Neutral Citation Number: [2019] EWHC 3140 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2019

Before:

THE HONOURABLE MRS JUSTICE KNOWLES

- -

Between:

TATIANA AKHMEDOVA	**Applicant**
- and -	
FARKHAD TEIMUR AKHMEDOV	**Respondent**

- -

James Willan (instructed by **PCB Litigation LLP**) for the Applicant
The Respondent did not appear and was not represented

Hearing date: 4 November 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE GWYNNETH KNOWLES DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Knowles:

Introduction

1. This judgment is given following an application by Mrs Akhmedova pursuant to UL v BK (Freezing Orders: Safeguards) [2014] Fam 35 in respect of certain documents which have been, or may have been, illegitimately obtained. It forms part of the long-running matrimonial litigation between Mrs Akhmedova ["the Wife"] and her former husband, Mr Akhmedov ["the Husband"] which has been distinguished by (a) the largest financial order in favour of a wife within this jurisdiction and (b) the fact that the Husband has failed to pay a penny of that award. The Wife is presently seeking to enforce the December 2016 financial order made in her favour by Mr Justice Haddon-Cave (as he then was) and this application should be seen in that context.

2. I have read a bundle of documents and authorities provided by the Wife's legal team together with the helpful skeleton argument provided by Mr Willan. I am also grateful to Mr Willan for his succinct and realistic submissions. During the hearing I asked for a further statement to be provided in order to confirm what I was told by Mr Willan in submissions and this was provided to me within the time I allowed. I have considered that document and some short additional submissions by Mr Willan. Though important, that material was not crucial to my decision to grant the Wife's application. I indicated at the conclusion of the hearing on 4 November 2019 that I would allow her application and that I would also reserve my judgment for a short while.

3. This judgment reinforces the guidance given by Mostyn J in paragraph 56 of UL v BK in circumstances where one of the parties is not represented or fails to engage with the litigation.

Factual Background

4. What follows is a summary pertinent to my decision.

5. The documents with which I am concerned were provided to the Wife by Mr Ross Henderson, who was the sole director and an employee of Cotor Asset Management AG ["CAM"]. Mr Henderson met the Husband when the former was a banker at UBS in Switzerland and in August 2014 Mr Henderson accepted an offer from the Husband to set up and run the family office. Mr Henderson established CAM of which he was the shareholder and director. On 17 March 2015 the Husband [purportedly acting as a director of CAM] and Mr Henderson signed an employment contract by which Mr Henderson was appointed as "Lead Investment and Family Office Manager", with general responsibility for managing Cotor Investment SA's portfolio and the family office in the interest of the Husband. The employment contract was subject to Swiss law and the exclusive jurisdiction of the Swiss courts. A clause of the employment contract governed confidentiality, and provided as follows:

"The Executive [Mr Henderson] shall not use or disclose to any person either during or any time after his employment by the Company [CAM] any confidential information about the business or affairs of the Company or FTA [the Husband] (including without limitation his home life, finances, personal circumstances, and any information concerning FTA's family) or of any company or firm associated with the Company or FTA or of any of their respective business contracts, or about any other

confidential matters which may come to his knowledge in the course of his employment (whether directly or indirectly) other than for the benefit of the Company. For the purposes of this clause, "confidential information" means any information or matter which is not in the public domain and which relates to the affairs of the Company, FTA, FTA's family, friends and personal acquaintances and/or her/their business contacts."

6. In the course of his employment, Mr Henderson received information relating to the Husband and his companies, including (a) financial information (such as bank statements), (b) information about living costs and expenses, and (c) legal advice, principally from the Husband's English solicitors (Kerman and Co). The majority of this information was received by way of emails to Mr Henderson's CAM email address.

7. The relationship between Mr Henderson and the Husband broke down in around August 2015 and on 24 August 2015 the Husband dismissed Mr Henderson. Since Mr Henderson was the sole director (and shareholder) of CAM, he was required to wind down CAM's operations. He referred CAM to the Swiss insolvency department in November 2015; CAM entered liquidation in December 2015; and was formally struck off the register (and ceased to exist) on 17 January 2018. Mr Henderson retained (amongst other IT equipment) his office PC, on which his emails and documents were stored. He did not take any steps to download or copy documents which were not already on the office PC. In mid-2017 he copied emails/documents from the hard drive of the office PC onto a personal server. He retains copies of the CAM documents on the office PC and his server. I will refer to the documents held by Mr Henderson as the "**Henderson Documents**".

8. In May 2017 Mr Henderson contacted the Wife to offer to help her with managing her interests and her litigation enforcement efforts. In his second statement, Mr Henderson recalled that there were no discussions relating to the Henderson Documents at that time though he realistically conceded that the Wife would undoubtedly have been aware that he held information about the Husband's financial affairs. Both Mr Henderson and his company, Sparten, continue to provide services to the Wife.

9. In November 2017 Mr Henderson provided a USB stick containing some of the Henderson Documents, which were relevant to a strategy deployed by the Husband of evading enforcement, to the Wife's Liechtenstein and (then) Swiss lawyers. I will refer to these documents as the "**Provided Documents**". Mr Henderson's second statement asserted that the provision of the documents did not represent a quid pro quo for being engaged by the Wife in that he had never offered to provide this material to her if she engaged him to work for her and the Wife had never asked him to agree to provide documents to her if he were engaged by her.

10. At the time the documents were provided, the Wife was instructing Withers to represent her in the English matrimonial proceedings. Mr Henderson informed Withers of the Provided Documents and Withers arranged for Mr Henderson to give the Provided Documents to an independent barrister, Ben Waistell of XXIV Old Buildings, so that he might review them for privileged material [the "**Waistell Review**"]. The Waistell Review concluded that the majority of the documents were

prima facie privileged. However it determined that the fraud/iniquity exception applied because *"there is a very strong prima facie case that (the Husband) instructed his lawyers to seek to effect transactions and asset holding structures which would defeat (the Wife's) ability to enforce an expected order against him"* and *"this [fraud/iniquity] exception will apply to documents which are unambiguously in furtherance of the plan/attempts to defeat enforcement of (the Wife's) anticipated order by secretly concealing or dissipating assets"*. On this basis, 244 documents were identified as reviewable and provided to Withers [the "**Reviewable Documents**"].

11. Following his review, Mr Waistell returned the Provided Documents to Mr Henderson. For reasons which are unclear, it appears that Withers also received a copy of the Provided Documents. A small number of the Reviewable Documents were also provided to the lawyers representing the Wife in the Marshall Islands. As a result of investigations conducted by the Wife's present legal team, PCB Litigation LLP ["PCB"], it appears that none of the Reviewable Documents have been deployed in any legal proceedings on behalf of the Wife. The Wife herself has never personally received any of the documentary material provided by Mr Henderson.

12. Although the Reviewable Documents were prima facie confidential and privileged to the Husband, Withers did not apply for directions from the court in accordance with the guidance in UL v BK before conducting the Waistell Review. PCB were instructed in late autumn 2018 and were provided by Withers with a copy of the Reviewable Documents on 20 December 2018.

13. PCB did not immediately appreciate that there might be issues about how the Reviewable Documents had been obtained. Mr Willan suggested that this was understandable in circumstances where the documents had been provided by Withers, a very experienced firm of family lawyers. Since its instruction, PCB has been heavily engaged with the Wife's worldwide enforcement efforts, including numerous applications in England as well as coordinating complex and often urgent matters in the Marshall Islands, Dubai, Liechtenstein and New York. Those matters did not require any of the Reviewable Documents to be deployed in evidence.

14. Concerns about the procedure followed in respect of the Provided Documents arose when the Wife's legal team was preparing the application for a freezing injunction which was heard by me in August 2019. It was initially intended to refer to some of the Reviewable Documents in the context of that application but, in preparing full and frank disclosure, the legal team came to appreciate the fact that the guidance in UL v BK had not been followed. It was therefore decided not to rely on the Reviewable Documents, but instead to inform the court of the position. I was told at the hearing in August 2019 that an application in respect of documents would be made. An application was duly issued on 30 September 2019 and on 2 October 2019 I gave directions on my own initiative to list a hearing at which I could consider the Wife's application.

15. For the purposes of preserving the position in advance of the hearing on 4 November 2019, PCB asked all the Wife's other lawyers to destroy any of the Reviewable Documents which they had received, subject to providing one electronic copy to PCB. PCB told me that it will not access these copies and has undertaken to hold these to

the order of the court so that there remains a record of what each firm had received. This process has been followed by Wife's Liechtenstein, Marshall Islands/New York and Swiss lawyers. PCB also offered the court an unreserved apology for not appreciating sooner that an application in respect of the documents was required.

16. The Husband received notice of the hearing on or shortly after 2 October 2019 by the various means described in the order of Haddon-Cave J dated 21 March 2018. The provisions of my directions order were set out in full in a letter accompanying the application documents sent at the same time. Unfortunately, once the sealed court order was received on 18 October 2019, PCB overlooked the need to serve it on the Husband until 31 October 2019. PCB apologised to the court for this oversight.

The Law

Directions

17. The modern principles governing illegitimately obtained documents (that is, documents which belong or are confidential to the Husband) are set out in the decision of the Court of Appeal in Tchenguiz v Imerman [2011] Fam. 116. In that case, the wife's brother had obtained confidential documents by accessing the husband's computer without permission and copying them. Tchenguiz establishes that:

    a. It would be a breach of confidence for X, without the authority of Y, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by X to be, confidential to Y. As a matter of principle, and in the absence of a defence, Y would be entitled to restrain any threat by X to look at, copy, distribute, communicate or utilise any such document, and would also be entitled to enforce the return of any such document or copy [paragraph 69];

    b. Y will ordinarily be entitled to obtain an injunction to stop X looking at the documents [paragraph 72] and to prevent X passing on or using the information, subject to any good reason to the contrary on the facts of the case; X could also be ordered to return or destroy the documents [paragraph 73];

    c. A claim based on confidentiality is an equitable claim subject to the normal equitable rules, including a discretion to refuse relief on familiar equitable principles [paragraph 74]. The Court of Appeal referred to Istil Group Inc v Zahoor [2003] 2 All ER 252 at [115], in which an injunction was refused to prevent use of privileged emails because of the public interest in the disclosure of wrongdoing and to achieve the proper administration of justice;

    d. A husband can claim confidentiality against his wife [paragraphs 84-89];

    e. There is no principle (previously referred to as the "Hildebrand Rules") by which a person can engage in self-help by obtaining information which might otherwise be concealed or destroyed [paragraphs 106-107 and 139];

    f. However, a claim for breach of confidentiality may be defeated by showing that the documents revealed unlawful conduct or intended unlawful conduct by Y

[paragraph 142]. Tchenguiz was not such a case because it was *"not suggested that the documents themselves disclose measures taken to defeat the wife's claim"*;

g. The court will wish to strike a fair balance between two competing concerns, being (a) that X should not obtain an improper benefit of being able to use Y's confidential documents which have been unlawfully obtained, and (b) that Y should not dispose of or hide documents which he is or may become obliged to produce, and that Y should find it more difficult to hide his assets [paragraph 149];

h. Although illegitimately obtained evidence is admissible, the court has a discretion to exclude it [paragraphs 170-177].

18. The principles in Tchenguiz are applied, in a practical sense, in UL v BK [see paragraph 56 at (3)-(4)]. The relevant part of the guidance contained therein requires solicitors who receive such documents: (a) to return the documents to the other party's solicitors, who (as officers of the court) can then ensure they are preserved and that proper disclosure is given, or (b) in the event that the other party does not have solicitors acting for him, to obtain directions from the court. In such circumstances the court is likely to direct that independent counsel be appointed to give proper disclosure.

Effect of Impropriety

19. As the Court of Appeal recognised in Tchenguiz, the principles may operate somewhat differently where the documents themselves disclose measures taken to defeat the wife's claim. There are two reasons for this.

20. First, it is a defence to what would otherwise be a breach of confidence to show that the material discloses iniquity or misconduct such that the relevant disclosure was in the public interest. The law in this regard is well summarised by Cockerill J in Saav v Angate Consulting Ltd [2019] EWHC 1558 (Comm) at paragraphs 126-136 as well as in Istil Group at paragraphs 90-94. Thus, if the Wife's receipt and use of the documents is justified on this basis, there is no breach of confidence at all and, therefore, no question of any relief being granted to restrain such use.

21. Second, even if the provision of documents to the Wife's lawyers involved a breach of confidence, the relief to be granted (if any) may be affected by the fact that the documents were part of an iniquitous scheme by the Husband.

22. Both Tchenguiz [paragraph 74] and Istil Group [paragraph 90] recognise that ordinary equitable principles governing the grant of relief will apply. So, for example, the *"clean hands"* principle may debar a person from obtaining relief in equity. Thus, in Istil Group, an injunction prohibiting reliance on privileged emails was refused in circumstances where a party had relied upon a document provided by an anonymous source whilst concealing the fact that the same source had provided a forged document apparently created for the litigation. In those circumstances, the public interest in the disclosure of wrongdoing and the proper administration of justice required that an injunction be refused.

23. Even where there has been a breach of confidence, the court might well refuse relief on equitable principles where the documents were created in furtherance of an unlawful scheme such that the Husband does not come with clean hands; and/or it would be contrary to the interests of justice to grant any relief to prevent use of those documents given that they formed part of a scheme to evade the court's orders.

Privilege

24. Privilege is a fundamental right which itself serves the interests of justice and it is absolute and not subject to any balancing exercise. There is however a recognised *"exception"* to privilege where the communications are, whether the lawyer knows it or not, conducted with the intention of pursuing a fraudulent purpose. In order to defeat the claim to privilege at an interlocutory stage, there must be a strong prima facie case of fraud.

25. The relevant principles and decisions are helpfully summarised in Accident Exchange Ltd v McLean [2018] 4 WLR 26 at paragraphs 15-18 and in Hotel Portfolio II UK Ltd v SMA Investment Holdings Ltd [2019] EWHC 1754 (Comm) at paragraphs 26-39.

26. The question of what sort of wrongdoing engages the exception is somewhat vexed. In the circumstances of this case, it is sufficient to observe that devising a scheme to dissipate assets so as to frustrate enforcement of an anticipated judgment of this Court will engage the exception. The following establishes that proposition clearly:

    a. In O'Rourke v Darbyshire [1920] AC 581 at 613, Lord Sumner held that no privilege applies to documents *"brought into existence in the course of or in furtherance of a fraud to which both solicitor and client are parties"*. He drew a distinction between obtaining advice on prior conduct and *"consulting [a lawyer] in order to learn how to plan, execute or stifle an actual fraud"*.

    b. Fraud here is not confined to *"civil fraud in the narrow sense"*. It has been applied to *"all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances"* and *"things which commercial men would say was fraud or which the law treats as contrary to public policy"*.

    c. In Barclays Bank v Eustice [1995] 1 WLR 1238, the Court of Appeal held that the purpose of *"enter[ing] into transactions at an undervalue the purpose of which was to prejudice the bank"* (which fell within the scope of s. 423 of the Insolvency Act 1986) was *"sufficiently iniquitous"* to engage the exception. The same logic was applied by Munby J (as he then was) to s.37 of the Matrimonial Causes Act 1973 in C v C (Privilege) [2008] 1 FLR 115 at paragraphs 34-35.

    d. In the present case, the Court of Appeal has previously considered the fraud exception in Z v Z (Legal Professional Privilege: Fraud Exception) [2018] 4 WLR 52. On that appeal, Mr Kerman argued that Haddon-Cave J (as he then was) had wrongly applied an *"iniquity"* test rather than a *"dishonesty"* test. The Court of Appeal decided not to resolve the question of the appropriate test, but observed at paragraph 57 that *"it is not easy to see why the actual decision in Eustice in relation to section 423 of the Insolvency Act 1986 and in C v C (Privilege) in*

relation to section 37 of the Matrimonial Causes Act 1973, should be questioned, whatever criticisms there may be of some of the reasoning".

e. Both Z v Z and C v C (Privilege) have referred to the long-standing decision in Williams v Quebrada Railway, Land & Copper Co [1895] 2 Ch 751. Williams was a case in which it was alleged that a company had given a charge in favour of its agents in order to defeat a prior floating charge. For arcane reasons, that charge did not fall within the scope of the avoidance legislation at the time. Kekewich J nevertheless held that privilege was not available because *"... it is difficult to say that this is not commercial dishonesty. It is, in my opinion, commercial dishonesty of the very worst type; and that is fraud"*.

f. For completeness, it should be noted that the Court of Appeal recently declined to decide whether Eustice remains good law in the light of the subsequent decision of the House of Lords in R (ex p. B) v Derby Magistrates Court [1996] 1 AC 487. It was argued that Eustice involves a retrospective evaluative judgment, contrary to Derby Magistrates. The Court of Appeal held that this was as *"an important argument which will no doubt have to be decided one day"* [see Curless v Shell International Ltd [2019] EWCA Civ 1710 at paragraphs 54-60]. Nevertheless, Eustice has consistently been applied at first instance and any reconsideration of that case should be left to the Court of Appeal. I observe that, as held in Z v Z, even if the *"sufficiently iniquitous"* test employed in Eustice might be open to question, the application of the exception to cases of fraud on creditors is difficult to criticise.

27. Mr Willan submitted that another way of analysing this class of case is that adopted by Popplewell J in BTA Bank v Ablyazov [2014] EWHC 2788 (Comm) at paragraph 76. The court should ask whether the communications fall within the ordinary course of a solicitor's professional engagement; if they do not, and are made in furtherance of an iniquitous purpose, they will not be privileged because they will not attract confidentiality. It seems unlikely in the extreme that obtaining advice from a solicitor as to how to evade and frustrate an anticipated judgment could be regarded as falling within the ordinary course of a solicitor's engagement. On the contrary, it is likely to involve the solicitor in serious misconduct.

Discussion

Service

28. It is regrettable that the Husband was not served in accordance with my order. However, he knew of the contents of that order and, particularly, of his right to apply in writing to vary the order or seek further directions. He has not engaged at all with the application or the documents which have been served upon him; for example, he has not opened the documents which were successfully served on him by WhatsApp. Taking account of all the circumstances, I was satisfied (a) that he has been served with the application and given notice of the hearing and (b) that I should proceed to hear the Wife's application.

Directions

29. The Wife, through her legal team, accepted that, in the light of paragraph 56(3)-(4) of UL v BK, directions ought to have been sought from the court when Mr Henderson gave her lawyers the Provided Documents and before the Waistell Review took place. She apologised to the court that this course had not been followed by her solicitors then instructed. I find it very surprising indeed that Withers failed to make the necessary application to the court required by UL v BK as soon as or shortly after the documents were in their possession. In circumstances where the Husband was without a solicitor and was not engaging in the matrimonial proceedings, the wording of the guidance in paragraph 56(4) of UL v BK leaves no room for doubt that an application to the court **must** be made. Whether Withers intended to make an application after the Waistell Review is unclear, but they did not do so.

30. This case raises some potentially awkward issues as to what would have been the proper course for the Wife's solicitors if (a) the Waistell Review had identified the need for the court to give some guidance on the Provided Documents or if (b) there was a dispute between the Wife's lawyers and Mr Waistell about the outcome of the Review. As presently formulated, the guidance in UL v BK is silent on such issues. I make some suggestions as to the way forward at the conclusion of this judgment.

31. Mr Willan submitted that, if that application pursuant to UL v BK had been made, it is almost certain that the court would have ordered that the documents be reviewed by an independent lawyer, and the outcome of that review would have been that documents which were relevant and not privileged should be provided to the Wife. However, he recognised that the fact that the court would most likely have given those directions did not mean that the Wife was necessarily entitled to retrospective approval of the steps she took without seeking directions from the court at that time. In the circumstances of this case, he invited me to approve the steps already taken since he submitted that it would be a disproportionate sanction to deprive the Wife of the use of those documents.

32. It is important in my view to bear in mind all the circumstances in exercising my discretion on this issue. At the relevant time the Husband was (a) in contempt of this court's orders, (b) had been found to have engaged in an *"elaborate and contumacious campaign to evade and frustrate enforcement of the judgment debt against him"* [see paragraph 21 of the judgment of Haddon-Cave J in Akhmedova v Akhmedov [2018] EWFC 23 (Fam)], and (c) had disengaged with the proceedings with the consequence that he could not be expected to give any or any proper disclosure himself. Those matters would have been reason enough to grant a UL v BK application made at the time in order to ensure that the Wife could obtain copies of relevant and nonprivileged documents relating to the Husband's campaign of evasion. This was also a case in which Haddon-Cave J had granted summonses to obtain confidential information from Mr Kerman who was the Husband's lawyer. Those orders were subsequently upheld by the Court of Appeal. I accept Mr Willan's submission that, in those circumstances, it was overwhelmingly likely the court would have allowed the Wife to receive and use relevant information about the Husband's campaign of evasion from another of his (former) advisers, that is Mr Henderson.

33. I have taken into account that the Wife did not deliberately omit to seek directions in the hope of obtaining some improper advantage. This was not a case where she unlawfully accessed her husband's confidential materials or procured another to do

so. Mr Henderson, who was already in possession of the documents, offered some of them to her and the Wife trusted her lawyers to take the appropriate steps to receive them. Her former lawyers instructed independent counsel who conducted a thorough and careful review to ensure that privileged documents were removed. To date the Wife has not deployed the documents and has sought directions before making use of them in any legal proceedings. I accept that, if I were to order that the Wife must not use and/or must destroy the Reviewable Documents, this would be a disproportionate response to the failure to obtain directions at the relevant time since it would potentially deprive her of evidence which might assist in unravelling her husband's schemes to evade compliance with this court's orders. Furthermore, requiring the Wife now to obtain the documents from Mr Henderson through a proper process (for example, by making an application for third-party disclosure against him) or to conduct a further review of the documents by independent counsel would simply increase costs and delay without achieving useful purpose.

34. Where the documents themselves form part of a fraudulent scheme, the documents may not attract the protection of confidentiality in the first place and/or the court might refuse in the exercise of its discretion the grant of any relief in respect of any breach of confidence. I accept there is a compelling argument that the court should not grant relief which is intended to protect the confidentiality of the Husband's documents because these documents are not entitled to receive such protection.

35. The Wife and PCB have offered undertakings that they will not request any of the Henderson Documents other than the Reviewable Documents from Mr Henderson and that they will use reasonable endeavours to ensure that they do not receive such documents. This will ensure that the Wife will not obtain access to documents to which she has no proper entitlement, for example because they are irrelevant or privileged.

36. In the light of the above, I direct that:

    a. The Wife and her lawyers are entitled to retain the Reviewable Documents, and to use them as if they had been disclosed by the Husband in the proceedings;

    b. The Wife is not required to cause a further independent review to be undertaken; and

    c. The Wife will provide a copy of the Reviewable Documents to the Husband by email if he so requests.

37. I am satisfied moreover that the Wife is entitled to retain the Reviewable Documents notwithstanding that the majority are prima facie privileged. Applying the law set out above, I have reached that conclusion for the following reasons.

38. First, I have read the Waistell Review very carefully indeed. It is, in my opinion, a thorough analysis which applied the correct legal principles and erred on the side of caution in that potentially privileged communications where there was an ambiguity as to their iniquitous nature were not included in the Reviewable Documents.

39. Second, Haddon-Cave J was satisfied in December 2016 that the fraud or iniquity exception applied in this case and that the Husband's conduct was such that it was

plain that legal professional privilege should not attach to his communications with Mr Kerman regarding the modern art collection and the portfolio of financial assets. He held that the exception applied not only to the specific transactions found to infringe s.423 of the Insolvency Act 1986 but also to communications generally in relation to the modern art collection and the monetary assets. Though the Court of Appeal ultimately did not need to consider whether Haddon-Cave J's judgment on this point was correct, I note that the Court of Appeal did not cast any doubt on it.

40. Third, based on the previous judgments in this matter, the court has already concluded that there has been a long history of improper dealings with the modern art collection, the vessel and the monetary assets which engages s. 423 of the Insolvency Act 1986 and/or s. 37 of the Matrimonial Causes Act 1973. This conduct began in March 2015 (when assets were settled into a Bermudan discretionary trust) through the months leading up to the trial in December 2016 (when all of the assets, including those previously held by the Bermudan trust, were transferred into Liechtenstein structures) and continuing after judgment was obtained (including the further transfer of the vessel to Straight). Relying on Eustice and C v C (Privilege), there would be no privilege in communications relating to this continuing campaign of evasion.

41. Fourth, brief perusal of the Reviewable Documents shows that they form part of the fraudulent scheme to defeat the Wife's claims, including both by moving assets to jurisdictions in which enforcement would be impossible and by granting charges over those assets to frustrate enforcement. An email from Mr Kerman dated 9 June 2015 said that *"… we have been trying to put in place a structure in the UAE where it would be very difficult for your Mother to enforce an English judgment"*. On 10 June 2015 Mr Kerman stated that *"the priority right now is to secure everything as quickly as possible, and in the meantime to give Fiona/ your Mother the very clear signal that your Father is still prepared to consider an amicable settlement. This should buy your Father the time he needs to get the appropriate protections in place"*. The reference to *"Fiona"* is to the Wife's former solicitor. On 23 June 2015 Mr Kerman stated that *"…for as long as your Mother continues with the English divorce proceedings the very best way for your Father to protect his money and assets would be to move them to (and keep them in) a 'safe' jurisdiction, meaning a country where your Mother could not enforce an English court order - for example, Azerbaijan, Dubai, Qatar etc."*. He went on to propose a particular strategy involving charging assets to a friendly bank – *"…we were trying to arrange charges over Luna and the aircraft with CBQ [Commercial Bank of Qatar], and the paintings fall into the same category. The protection operates on the basis that once a charge is given to a bank that bank would object to any attempt to enforce a court order against the asset, because the bank is holding that asset as its security"*. Finally, in an email dated 14 July 2015, Mr Kerman explained that *"we have been attempting to safeguard all his assets by placing them in jurisdictions where it would be hard if not impossible for your Mother to enforce any English court order that she might obtain… As you know the best protection for these assets [the Vessel and the Artwork] that we have been able to come up with in all the circumstances is that they be charged to an offshore bank. However, quite apart from the risks and uncertainties which are always present in any litigation, the success of this operation is absolutely dependent on whether the bank your Father chooses co-operates with him and actively defends (at your Father's expense) its charges over the assets on the basis that the bank has a security interest in them. It is therefore essential that whatever bank is used understands that*

this is what it will have to do and will not get 'wobbly' at the last minute if an attack is made". I note that all these communications appear to have been made to one of the Husband's children who was involved with the Husband's financial affairs.

42. For the avoidance of doubt, I am satisfied that the Reviewable Documents are not confidential (or that no relief should be granted to protect any confidentiality) and that the *'fraud'* exception to privilege applies. There is no reason therefore to order that the Wife should return or make no use of the Reviewable Documents.

Guidance: UL v BK

43. I indicated in paragraph 30 above that I would give make some suggestions to resolve potential difficulties which might arise in circumstances where the owner of the documentary material in issue is not represented by a solicitor and/or is failing to engage with the proceedings. Most of what I have to say is not new and nothing I say is intended to invite unnecessary applications which ramp up costs and heighten the emotional temperature of matrimonial litigation. I will refer to the person who owns the documentary material in issue as Y and the person who has received/obtained it as X [this is the same nomenclature as used in paragraph 17 above when discussing the legal principles relating to illegitimately obtained documents].

44. I preface my suggestions with the observation that, in a criminal context, the proper function of independent counsel reviewing material in relation to matters of privilege has been held to be *"…not that of decision-maker, however valuable it may be in relation to legal professional privilege or indeed in relation to relevance in narrowing the differences and eliminating the need for all parties to examine before the judge the relevance of particular documents. The jurisdiction is a judicial jurisdiction to be exercised by the Crown Court judge. Independent counsel, as the judge said, could assist him – he or she could assist the parties – but the decision would be his"* [see paragraph 16 of R (o.a.o.Van Der Pijl) v Crown Court at Kingston upon Thames [2013] EWHC 3040 (Admin)]. Whilst the role of independent counsel in relation to illegitimately acquired documents in this Division might have been adapted so as to strike an appropriate balance between the parties' competing rights and duties to the court, there can be no doubt that, in a case of dispute, the judge remains the ultimate decision maker.

45. First, an application to the court for directions must be made in circumstances where Y is unrepresented. It should be made as soon as practicable after the documents come into X's possession. Delay, because it is thought by X unnecessary to deploy this material at that time in the litigation (whilst leaving open the question of deploying it in future), is not acceptable as this is information which does not belong to X.

46. If the court makes an order for a review of the documents by an independent lawyer, I suggest that it would usually be appropriate for the order to permit Y, if he/she wishes to do so, to make written representations to the independent lawyer that the material is subject to legal professional privilege. The reviewing lawyer should be directed to produce a report which should be provided to both X and Y in any event and to the court in the event of any disagreement. If there is disagreement about the outcome of

the Review by either Y or X, the matter should be referred to the court for determination by X's solicitors.

47. In circumstances where, unusually, the reviewing lawyer considers the assistance of the court is required, X's solicitors should restore the matter to the court for directions. The reviewing lawyer should provide a report explaining the basis of any referral to the court. I suggest that such an application can be avoided in almost all circumstances if reviewing lawyers adopt the approach taken by Mr Waistell in this case namely, to err on the side of caution by excluding Y's potentially privileged documents from disclosure to X where there is an ambiguity as to their (iniquitous) nature.

48. Finally, and this is by way of an aside, I was struck during exchanges with Mr Willan by the differences between civil search orders and such orders in the Family Division, particularly about how issues relating to privilege were handled. With the assistance of Mr Willan's submissions, I offer these observations as to the format of Family Division search orders which I suggest may need expanding to correctly deal with issues of privilege.

49. The form of search order contained in Practice Direction 25A of the Civil Procedure Rules 1998 ["the CPR"] contains provisions in paragraph 11, requiring the independent lawyer to exclude documents from the search, and to retain them in his or her possession pending further order of the court, in the event that (a) he/she believes that the respondent *"may be entitled*" to withhold production on the grounds of privilege, or (b) the respondent claims to be entitled to withhold production (whether or not the supervising solicitor agrees). The equivalent order in the Family Division is "Order 3.2". This closely follows the wording in the standard PD25A order. However, it differs from the PD25A standard order significantly as regards claims to privilege against self-incrimination and legal professional privilege.

50. It is clear that, in both forms of order, the supervising solicitor undertakes to provide *"an explanation that the Respondent may be entitled to avail himself of the privilege against self-incrimination and legal professional privilege"*. However, the Family Division order has no equivalent of paragraph 11 of the PD25A order in that it has no regime for handling claims to privilege. That struck me as a surprising omission given that privilege is a fundamental right and that, without any such provision, there is a real risk of the applicant's solicitor (who is entitled to participate in the search under paragraph 25.b) seeing privileged material. The format of Order 3.2 seems to me to be wrong in principle. It would be desirable for Order 3.2 to contain a paragraph in the same terms as paragraph 11 in the PD 25A order, namely:

11(1) Before permitting entry to the premises by any person other than the Supervising Solicitor, the Respondent, may for a short time (not to exceed two hours, unless the Supervising Solicitor agrees to a longer period) –

a. Gather together any documents he believes may be incriminating or privileged; and

b. Hand them to the Supervising Solicitor for him to assess whether they are incriminating or privileged as claimed;

(2) If the Supervising Solicitor decides that the Respondent is entitled to withhold production of any of the documents on the ground that they are privileged or incriminating, he will exclude them from the search, record them in a list for inclusion in his report and return them to the Respondent.

(3) If the Supervising Solicitor believes that the Respondent may be entitled to withhold production of the whole or any part of a document on the ground that it may be privileged or incriminating, or if the Respondent claims to be entitled to withhold production on those grounds, the Supervising Solicitor will exclude it from the search and retain it in his possession pending further order of the court.

As with the PD25A order, Order 3.2 provides for a written report on the carrying out of the order to be sent by the supervising solicitor to the judge who made the order for the purposes of the court file. That report would address any issue of privilege which has arisen if paragraph 11 is incorporated into Order 3.2.

51. I have also noted that Order 3.2 omits in its entirety the section headed *"Restrictions on Search"* contained in the PD25A order. This also strikes me as surprising since that omission means that:

a. There is no prohibition on the search being carried out at the same time as a police search warrant. That practice has been criticised by the Court of Appeal and the European Court of Human Rights in ITC Films Distributors Ltd V Video Exchange (No 2) (1982) 126 S.J. 672;

b. The respondent is not expressly entitled to refuse access until he has received an explanation of the order;

c. The respondent has no right to delay the search briefly to obtain legal advice. This was described as *"an important safeguard"* in Universal Thermosensors v Hibben [1992] 1 WLR 840 at 860;

d. There is no requirement not to remove items until a list has been prepared. In Universal Thermosensors (see above) it was held that this should be ordered *"unless this was seriously impractical*"; and

e. There is no prohibition on searching or removing items unless the Respondent is present.

52. I agree with Mr Willan that the omission of such provisions in Order 3.2 was probably inadvertent not least because the undertakings in paragraph 22 of Order 3.2 envisage the possibility of the Supervising Solicitor retaining items but the paragraph of the order which actually provides for the Supervising Solicitor to retain disputed items is omitted. Thus, I suggest that the "*Restrictions on Search*" provisions in PD25A should be incorporated into Order 3.2 to remedy any inadvertent omission.

Conclusion

53. That is my decision.