



Neutral Citation Number: [2016] EWHC 3349 (Fam)

Case No: FD13D05340

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2016

Before:

MR JUSTICE HADDON-CAVE

Between:

AAZ
- and -
BBZ
C LTD
P LTD

Applicant
Respondent
2nd Respondent
3rd Respondent

Mr Nigel Dyer QC, Mr Dakis Hagen and Mr Henry Clayton of Counsel (instructed by
Payne Hicks Beach) for the **Applicant**
Mr Justin Warshaw QC (instructed by Solicitors) for **S**
The Respondents were not present or represented

Hearing dates: 29 and 30 November 2016, 2, 5 and 15 December 2016

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.

.....
MR JUSTICE HADDON-CAVE

This judgment was delivered in private. The judge directs that this anonymised version of the judgment may be published. No report may identify the parties.

Mr Justice Haddon-Cave:

1. On 29th November 2016, a trial commenced before me in Court 36 of the Queen's Building at the Royal Courts of Justice of the application for ancillary financial relief sought by the Applicant, AAZ ("W") against the Respondent, BBZ ("H"). H did not appear at the trial and was not represented.
2. W gave evidence *inter alia* regarding the role played by H's long-standing London solicitor, S, in arranging the insurance for the Modern Art Collection. There was also evidence of the role that S had played in other aspects of H's financial affairs. On 2nd December 2016, I granted W's application for a witness summons against S to appear to give evidence on 15th December 2016. I included in the order a 'non-tipping off' provision, prohibiting S from notifying the Respondents that he had been summonsed.
3. On 15th December 2016, following the trial, I handed down judgment granting W ancillary financial relief against H in the sum of £453,576,152, comprising 41.5% of the total marital assets (see [2016] EWHC 3234 (Fam)). As part of the ancillary financial relief, I ordered H to transfer to W *inter alia* the Modern Art Collection (estimated value £90,581,865) and to pay W the sum of £350,000,000 and that the 3rd Respondent, P Ltd, was jointly and severally liable to pay this sum.
4. On 15th December 2016, S attended in Court 36 pursuant to the witness summons. He was accompanied by Counsel, Mr Warshaw QC. S entered the witness box and was sworn. Mr Dyer QC, W's Counsel, then commenced asking S questions. He first asked S regarding his current position in relation to the Respondents and whether he was retained by them. S explained that, whilst he did not have individual engagement letters from H, P Ltd and the 2nd Respondent, C Ltd, he was retained by them "*in general terms*" and had acted for H for many years. Mr Dyer QC then commenced asking S questions about S's role in arranging the insurance for the Modern Art Collection. Mr Warshaw QC objected to further questioning on the grounds that it invaded legal professional privilege. I then heard legal argument from Mr Warshaw QC and Mr Dyer QC on the question of legal professional privilege and adjourned the matter at 4 pm until the next day. Overnight, Mr Warshaw QC also applied to set aside the witness summons against S under FPR 2.3(4).
5. On 16th December 2016, at 11 am, I ruled against Mr Warshaw QC's objection on the grounds of legal professional privilege and objection to the witness summons, with written reasons to follow. I also refused Mr Warshaw QC's subsequent application for permission to appeal and for a stay of my decision.
6. Mr Dyer QC then recommenced his questioning of S regarding the Modern Art Collection. S answered Mr Dyer QC's questions on this topic. S revealed that H had moved the Modern Art Collection from a repository in central Europe to a new repository in another European country in November, *i.e.* shortly before the trial.

7. Mr Dyer QC then commenced asking S questions about P Ltd's assets in a portfolio of US\$890,065,115. Mr Warshaw QC again objected to this line of questioning on the grounds of legal professional privilege. I heard further legal argument from Mr Warshaw QC and Mr Dyer QC. I ruled against Mr Warshaw QC on this further objection and refused his further application for permission to appeal and a stay. Mr Dyer QC then recommenced questioning S on P Ltd's assets and S answered his questions. S revealed that some US\$600 million in P Ltd's portfolio had been transferred in November from the central European country into a new trust vehicle in the other European country in another name.
8. In the light of S's evidence, Mr Dyer QC applied for a further order requiring S to produce documents regarding the Modern Art Collection and P Ltd's portfolio assets. He submitted that S's revelations demonstrated that H had taken further deliberate steps shortly before the trial to make enforcement of any monetary award by the court in favour of W even more difficult. This was a case, he submitted, of 'iniquity on iniquity'. I ruled in favour of Mr Dyer QC and granted the order *dues tecum* against S, returnable on 20th December 2016.
9. These are my written reasons for my various rulings.

THE LAW

10. The law relating to legal professional privilege is well-settled by the authorities, notably, *Three Rivers District Council v. Governor of the Bank of England (No.6)* [2004] UKHL 48, *Ventouris v. Mountain* [1991] 1 WLR 607 *USA v. Philip Morris* [2004] EWCA Civ 300, *Balabel v. Air India* [1988] Ch. 317 (CA), and *Barclays Bank Plc v. Eustice* [1995] 1238 (CA); and in the specific context of ancillary relief in divorce proceedings, see *C v. C (Privilege)* [2006] EWHC 336 (Fam).
11. The overarching principle is that communications between clients and their lawyers for the purpose of obtaining legal advice are generally privileged from discovery or disclosure. This is for sound reasons of public policy, as Bingham LJ explained in *Ventouris v. Mountain* at p. 611:

“The doctrine of legal professional privilege is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as is possible discouraged, and civil disputes so far as possible settled without resort to judicial decision. To this end, it is necessary that actual and potential litigants... should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied upon by an opposing party if the dispute comes before the court for decision. It is the protection of confidential communication between client and the legal adviser which lies at the heart of legal professional privilege... Without the consent of the client, and in the absence of iniquity or dispute between the client and solicitors, no inquiry may be made into or disclosure made of any instructions which the

client gave the solicitor or any advice the solicitor gave the client, whether in writing or orally.”

12. Legal professional privilege arises out of a relationship of confidence between lawyer and client and, once established, is absolute and permanent. It confers on the person entitled to it the right to decline to disclose or allow the disclosure of the confidential communications in question (*Cordery on Legal Services* 9th Revised Edition, para. [3801]).

‘Relevant legal context’

13. Legal professional privilege attaches to “*legal advice*” given by a lawyer to his or her client. The following statements of principle are pertinent:
- (1) The test is whether the communication or document was made confidentially for the purpose of “*legal advice*”. “*Legal advice*” may involve a “*continuum of communication*”. It is not confined to telling the client the law, but includes “*advice as to what should prudently and sensibly be done in a relevant legal context*” (*per* Taylor CJ in *Balabel* at p.330).
 - (2) A useful test as to whether a “*relevant legal context*” exists is to ask whether the client has, expressly or impliedly, asked his lawyer “*to put on legal spectacles*” when giving the advice sought (*per* Lord Rodger in *Three Rivers* at [60]),
 - (3) If a solicitor becomes a client’s “*man of business*” (and some do) advising the client on investment matters, finance policy and other business matters, the advice may lack a “*relevant legal context*” (*per* Lord Scott in *Three Rivers* at [38]).
 - (4) In cases of doubt, the judge should ask whether the advice relates to the “*rights, liabilities, obligations or remedies of the client either under private law or under public law*” and whether the “*occasion*” on which and “*purpose*” for which the advice takes place makes it (objectively) reasonable to expect the privilege to apply (*per* Lord Scott in *Three Rivers* at [38]).
 - (5) It makes no difference that the solicitor has neither been asked to proffer, nor has in fact tendered, any specific legal advice on anything so long as there is a “*relevant legal context*” (*per* Munby J in *C v. C* *passim*).

The fraud or ‘iniquity’ exception

14. There is, however, a “*fraud*” exception. The following statements of principle are pertinent:
- (1) Where legal advice is sought or given for the purpose of effecting fraud or “*iniquity*”, it is not privileged (*per* Schiemann LJ in *Barclays Bank* at p.1249, who noted that the use of the word “*iniquity*” in this context stemmed from Bingham LJ in *Ventouris* (*supra*)).

- (2) The “*fraud*” exception is not confined to cases of criminal fraud or cases of civil fraud in the narrow sense, but is used in a relatively wide sense (*per* Munby J in *C v. C* at para. [35] citing Schiemann LJ in *Barclays Bank* at p.1249).
- (3) The court must be satisfied in every case that what is *prima facie* proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards. Each case depends on its own facts (*per* Goff LJ in *Gamlen Chemicals Co (UK) Ltd v. Rochem Ltd* (unreported 7 December 1979 – cited by Schiemann LJ in *Barclays Bank* at p. 1249).
- (4) In any given case, the court must weigh the important considerations of public policy on which legal professional privilege is founded and the gravity of the charge of fraud on the other. The court must be slow to deprive a defendant of the important protection of legal professional privilege on an interlocutory application (*per* Vinelott J in *Derby & Co v. Weldon (No.7)* [1990] WLR 1156 at 1173).
- (5) Each case depends on its own facts (*per* Goff LJ in *Gamlen* (*supra*)).

ANALYSIS

(1) Was there a “relevant legal context”?

Modern Art Collection

15. Mr Dyer QC submitted that advice or assistance given by S to H in arranging the insurance for the Modern Art Collection did not amount to “*legal advice*” or a “*relevant legal context*” and did not attract legal professional privilege. Mr Warshaw QC submitted that the request by H to S to arrange the insurance was privileged because it was likely to be part of a wider “*continuum of communication*” between them involving legal questions concerning, *e.g.*, the fiscal and other consequences of storage of the Modern Art Collection in a particular EU or non-EU country.
16. In my view, the arranging of insurance is something that a “*man of business*” would do for a client rather than *qua* solicitor. Arranging insurance is a fairly routine matter, involving instructing brokers. It would not generally involve giving legal advice. In this regard, it is more akin to the prosaic matters referred to Brooke LJ in *USA v. Philip Morris* (*supra*) at para. [80] (*e.g.* advice or assistance in collecting and collating, listing, spring-cleaning, storing, transporting and warehousing documents), or the buying of air tickets for a client (see *Hollander on Documentary Evidence*, 12th Edition, p. 262). I am not persuaded by Mr Warshaw QC that the possibility that a client might have asked a lawyer ‘what to do’ with a valuable asset necessarily cloaks the mere arranging of insurance with a “*relevant legal context*”.

P Ltd's bank accounts

17. There was very little argument on whether there was a “*relevant legal context*” as to any communications between H and S as regards P Ltd’s monetary asset. In my view, advice or assistance given by S to H in relation to P Ltd’s bank accounts with the portfolio holders again is more redolent of something that he would do as a “*man of business*” rather than *qua* solicitor.
18. In any event, as set out below, I am satisfied that the ‘*fraud*’ exception applies to both the Modern Art Collection and to P Ltd’s bank account and this is determinative of the matter (see below).

(2) Was there fraud or “iniquity” such as to justify lifting legal professional privilege?

19. I found the following facts in my Judgment of ancillary financial relief dated 15th December 2016:
 - (1) H had withdrawn from the trial process at a late stage: H’s solicitors, Sears Tooth, came off the record two weeks before the trial; H then failed to appear at the trial in person in breach of orders by the Court dated on 27th November 2015, 11th April 2015 and 25th October 2016 (*Judgment*, para. [5]).
 - (2) C Ltd and P Ltd had also failed to appear at the trial or respond in any way to the proceedings (*Judgment*, para. [5]).
 - (3) H was in breach of numerous other Court orders, in particular, regarding disclosure, valuation and settlement offers: see the orders of Holman J dated 18th May 2016 and Moor J dated on 25th October 2016) (*Judgment*, para. [8]).
 - (4) C Ltd was a transparent ‘Dear me’ trust designed simply to pay out to H (*Judgment*, para. [72]).
 - (5) P Ltd was a bare trust and nominee for H (*Judgment*, para. [84]) and had paid out to H in excess of US\$110m between June 2014 and February 2016, *i.e.* after the issue of W’s divorce petition (*Judgment*, para. [73]).
 - (6) The March 2015 disposition to C Ltd was intended to defeat or impede W’s claim (*Judgment*, para. [98]) and this was a paradigm case for the application of s.37 of the Matrimonial Causes Act 1973 (*Judgment*, para. [99]).
 - (7) The March 2015 disposition was at an undervalue and entered into for the purpose of putting assets beyond the reach of W and/or otherwise prejudicing W’s interests (*Judgment*, para. [103]) and should also be set aside under s.423 of the Insolvency Act 1986 (*Judgment*, para. [105]).
 - (8) The March 2015 disposition appeared to be part of a wider pattern of conduct by H designed to put his assets out of the reach of W (*Judgment*, para. [98]).

20. In the light of these findings, it is clear in my view, that the fraud or “*iniquity*” exception applies in this case. H’s conduct has been seriously iniquitous. He has displayed a cavalier attitude to these proceedings and a naked determination to hinder or prevent the enforcement of W’s claim. There was ample evidence of this prior to my first ruling on 16th December (see above). The picture was subsequently compounded by S’s subsequent revelations of the recent steps which H has taken to hide the Modern Art Collection and P Ltd’s portfolio in a second European country. In my judgment, H’s conduct is such that it is plain that legal professional privilege should not attach to his communications with S regarding the Modern Art Collection and P Ltd’s portfolio of financial assets.
21. The *ratio* and decision in *Barclays Bank Plc v. Eustice* (*supra*) is directly applicable and determinative of this case. In *Barclays Bank Plc v. Eustice*, the Court of Appeal held that there was no privilege in the case of a transaction caught by s.423 of the Insolvency Act 1986. Schiemann LJ said (at p.1252):

“...[T]he client was seeking to enter into a transaction at an undervalue the purpose of which was to prejudice the bank. I regard this purpose as being sufficiently iniquitous for public policy to require the communications between him and his solicitor in relation to the setting up of these transactions be discoverable.”

22. The same reasoning applies to transactions caught by s.37 of the Matrimonial Causes Act 1973, as Munby J observed in *C v. C* (*supra*) at para. [34]:

“By parity of reasoning with both *Williams v. Quebrada Railway Land and Copper Co* [1894] 2 Ch 751 and *Barclays Bank Plc v. Eustice* [1995] 1 WLR 1238, and consistently with the line of cases stretching from *R v. Cox and Railton* (1884) 14 QBD 153 to *Derby & Co v. Weldon (No.7)* [1990] WLR 1156, a transaction within s 37 of the 1973 Act is, in my judgment, one to which legal professional privilege does not attach.”

Mr Warshaw QC’s arguments

23. Mr Warshaw QC raised a number of specific arguments. First, he argued that the reasoning in *Barclays Bank Plc v. Eustice* (*supra*) was ‘transaction specific’ and that only the specific transaction(s) impugned by s.423 was vulnerable to the lifting of legal professional privilege; and that *ergo* its reasoning only applied to the March 2015 disposition. I disagree. It is right to say that *Barclays Bank Plc v. Eustice* concerned the application of s.423 to a sale agreement and tenancy assignment at an undervalue intended to prejudice the bank. However, the reasoning of Schiemann LJ is of general application. To paraphrase the words of Schiemann LJ, in the present case H’s conduct as a whole has been “*sufficiently iniquitous*” for public policy to require the communications between him and his solicitor in relation to Modern Art Collection and P Ltd’s monetary assets to be discoverable.
24. Second, Mr Warshaw QC argued that the fact that an order was made under s. 37 in the present case was irrelevant because s. 37 relied upon a presumption. However, this does not help him, first, because of the far-reaching findings of fact in my

judgment, *e.g.* that the March 2015 disposition was part of a wider pattern of behaviour designed to prejudice W (*Judgment*, para. [98]) and, second, because of my conclusion that s.423 applied because the March 2015 disposition amounted to a sale at an undervalue entered into to put H's assets beyond W's reach (*Judgment*, para. [103]).

25. Third, Mr Warshaw QC argued that the decision in *C v. C* supported him, not Mr Dyer QC, because in that case the Court held that legal professional privilege should not be lifted. I disagree. It is clear from Munby J's judgment that the reason he concluded that legal professional privilege should not be lifted was simply that the wife had failed to prove a case on s.37 on this evidence. As Munby J said at para. [62]:

“There is not, in my judgment, sufficiently compelling evidence, either that the Anstalt is the husband's alter ego or creature or that the transaction is one caught by s.37 of the 1973 Act, to justify going behind the Anstalt's privilege on the grounds of 'fraud'.”

26. Fourth, Mr Warshaw QC sought to rely on passages in the judgment of Henderson J in *JSC BTA Bank v. Solodchenko (No.3)* [2011] EWHC 21763 (Ch) in which Henderson J observed that that despite the Fourteenth Defendant's 'deplorable' conduct, it would not be right to “whittle away or inhibit [his] ability...to exercise his right to seek legal advice from the lawyer of his choice” (see para. [18] and also see paras [45] and [46]). In my view, none of these passages nor the decision in *JSC BTA Bank v. Solodchenko (No.3)*, advance Mr Warshaw QC's case. Henderson J determined the matter on the basis of s.37(1) of the Supreme Court Act 1981. He did not consider the 'fraud' exception to legal professional privilege (and whilst *Barclays Bank v Eustice* was cited in argument, he did not refer to it or *Three Rivers* or any of the standard legal and professional privilege authorities). The decision was, in any event, fact specific and made at an interlocutory stage (*c.f.* Vinelott J in *Derby & Co v. Weldon (No.7)*, *supra*, at 1173).

Conclusion

27. For the above reasons, I reject Mr Warshaw QC's arguments, and find that there was iniquity such as to justify the lifting of legal professional privilege in this case.

PTA and stay

28. I rejected Mr Warshaw QC's applications for permission to appeal and for a stay. I did so because, in my view, this case is covered by existing Court of Appeal authority (*Barclays Bank v Eustice (supra)*) and the facts are pellucid (see above).
29. Mr Warshaw QC sought to argue that a temporary stay of my decision to order S to produce documents would not prejudice W unduly because the assets had been moved to what, *selon* Mr Dyer QC, was a more challenging enforcement environment. I do not accept Mr Warshaw QC's submission. The contumacious steps which H is revealed recently to have taken to hide his assets now in the other European country, compound the case against him. His iniquity makes it inequitable for the court to grant the indulgence of a stay. Moreover, it would be wrong to delay W pursuing these assets for a moment longer. Time is of the essence.