Neutral Citation Number: [2022] EWHC 2879 (Ch)

Claim No: BR-2014-001699

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

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

Date: 22 November 2022

Before:

ICC Judge Greenwood

- -

Between:

(1) JONATHAN PAUL THIELMANN **(2) NICHOLAS STEWART WOOD** **(3) KEVIN JOHN HELLARD** **(As the Joint Trustees of the deceased insolvent estate of Platon Elenin, formerly known as Boris Berezovsky)**	**Applicants**

- and –

GALINA BESHAROVA

Respondent

- -
- -

Mr Tony Beswetherick KC (instructed by Holman Fenwick Willan LLP) for the Applicants
Mr Lloyd Tamlyn (instructed by Spencer West LLP) for the Respondent

Hearing date: 20 October 2022

- -

Remote hand-down: This Judgment was handed down remotely at 10.30am on 22 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

ICC Judge Greenwood:

Introduction

1. This is an application made by Ms Galina Besharova, the former wife of the late Mr Boris Berezovsky, to strike out under the inherent jurisdiction of the court, an application ("**the Preference Claim**") made against her under s.340 of the Insolvency Act 1986 (as modified by the Administration of Insolvent Estates of Deceased Persons Order 1986) ("**the IA 1986**") by the Respondents ("**the Trustees**") acting as the Joint Trustees of Mr Berezovsky's insolvent estate.

2. In essence, Ms Besharova, represented by Mr Lloyd Tamlyn of Counsel, says that because the Trustees refuse to disclose various relevant but (admittedly) privileged documents, "*no fair trial*" of the Preference Claim is or will be possible, and that it therefore comprises an abuse of the court's process. In response, the Trustees, represented by Mr Tony Beswetherick KC of Counsel, say that the application is misconceived, and that the Trustees' proper reliance on privilege, a fundamental and substantive right, does not (indeed cannot) render the process "*unfair*".

3. Mr Berezovsky died on 23 March 2013, and on 29 April 2013, two of the Trustees, Mr Nicholas Wood and Mr Kevin Hellard (both of whom are partners in Grant Thornton LLP) were appointed as Joint Receivers over his Estate by Order of Mr Justice Morgan. On 10 April 2014, by further Order of Mr Justice Morgan, they were appointed as General Administrators of the Estate, and one of Mr Berezovsky's daughters, Ekaterina, was appointed as Special Administrator. On 30 October 2014, the General Administrators presented a debtor's petition for an Insolvency Administration Order, having concluded that the Estate was insolvent, and that Order was made on 26 January 2015.

4. The Preference Claim was issued on 28 April 2021, in respect of a payment of £2.5 million ("**the Payment**") made by Mr Berezovsky to Ms Besharova on 24 July 2012, some 8 months before Mr Berezovsky died. It was supported by the First Witness Statement of Mr Jonathan Thielmann made on 28 April 2021. Mr Thielmann has day to day conduct of the administration of Mr Berezovsky's insolvent estate; he is an employee of Grant Thornton LLP. In short, the Trustees' case in respect of the Payment is that it was a preference within the meaning of s.340(3) of the IA 1986; they seek appropriate relief (but essentially, repayment) to restore the position to what it would have been had the Payment not been made.

5. The Preference Claim is defended (Ms Besharova has served a Statement made on 22 October 2021) and has been set down for a 4-day trial in January 2023, but in respect of its substance, I understood it to be common ground that:

   i) Ms Besharova received the Payment on 24 July 2012 ("**the Payment Date**") in partial discharge of a debt owed to her by Mr Berezovsky, of £5 million; that she was therefore at that time one of Mr Berezovsky's creditors;

   ii) the effect of the Payment was to put Ms Besharova into a position which, on the Insolvency Administration Order being made in respect of Mr Berezovsky, was better than the position in which she would otherwise have been; that she was therefore "*given a preference*" within the meaning of s.340(3) of the IA 1986;

   iii) because Ms Besharova was an associate of Mr Berezovsky (by virtue of s.435 of the IA 1986) it is presumed that he was influenced by the desire to produce that effect; in other words, that it is for Ms Besharova to rebut the statutory presumption; and,

iv) the Payment was made within 2 years of Mr Berezovsky's death and so within the relevant time period specified in s.341(1)(b) of the IA 1986.

6. Accordingly, at least two issues arise on the Preference Claim:

i) "**the Desire Issue**" - whether Ms Besharova is able to rebut the statutory presumption that Mr Berezovsky was influenced by the relevant desire in making the Payment; and,

ii) "**the Insolvency Issue**" - whether Mr Berezovsky was insolvent as at the Payment Date or became insolvent in consequence of it.

7. As at the Payment Date, Mr Berezovsky was pursuing, as Claimant, a number of extremely substantial claims, described by Mr Thielmann at paragraph 27 of his First Statement:

> "*(a) The Deceased had commenced a claim against Mr Roman Abramovich in the Commercial Court on 1 June 2007 (2007 Folio 942) claiming a sum in excess of US$5.6 billion (**the Abramovich Proceedings**). The trial took place over 43 days between October 2011 and January 2012. At the date of the Payment, judgment was awaited. Judgment was given on 31 August 2012, shortly after the Payment, dismissing the Deceased's claims in full. A summary of the judgment was delivered in open court, with copies of the full judgment (in draft) being provided to the parties. The Deceased was liable for his own and for Mr Abramovich's very substantial legal costs (ultimately agreed at £35 million as recorded in a consent order dated 12 October 2012 ...). At the time of the Payment, the Deceased would have been well aware of the risk of failure in the claim and his exposure.*

*(b) On 12 December 2008, the Deceased had commenced a claim in the Chancery Division (HC08C03549) against the joint interim administrators of the estate of Mr Patarkatsishvili and numerous others, claiming damages/equitable compensation for alleged breaches of fiduciary duty and other related matters in connection with a joint venture agreement (**the Main Action**). The Deceased commenced a further claim in the Chancery Division against many of the same defendants and Vasily Anisimov, a Russian businessman, together with several entities controlled by him on 18 February 2009 (HC09C00494) claiming approximately US$585 million in connection with the Deceased's alleged ownership interest in a valuable Russian ore and mining company called Metalloinvest (**the Metalloinvest Action**).*

*(c) On 9 March 2009, the Deceased had commenced a claim against Mr Patarkatsishvili's estate and others (including a company called Salford Capital Partners Inc), again in the Chancery Division (HC09C00711) for circa US$10 million (**the Salford Action** and, together with the Main Action and the Metalloinvest Action, **the Chancery Actions**).*

(d) There was a common factual background and overlapping factual issues relevant to the Abramovich Proceedings and all of the Chancery Actions. At a joint case management hearing, it was decided that these overlapping issues would be dealt with first in the Abramovich Proceedings, with any findings of fact determined as preliminary issues. The parties to the Chancery Actions would then be bound by the findings of the overlapping issues as determined in the Abramovich Proceedings.

(e) As at the date of the Payment, I understand that the Chancery Actions were stayed pending determination of the overlapping issues in the Abramovich Proceedings. Following the judgment in the Abramovich Proceedings, the Chancery Actions were swiftly settled by the Deceased, although some of the actions did still continue between the other parties without the Deceased's involvement."

8. Ms Besharova contends that that "*the value of the Claims at the Payment Date*" - in other words, the "*value*" of Mr Berezovsky's claims against Mr Abramovich and of those which he was pursuing in what were described by Mr Thielmann as the "**Chancery Actions**" is of "*obvious*" relevance both to the Insolvency Issue, and to his perception of his solvency and prospects as at that date, and thus to the Desire Issue. Amongst other things, in correspondence, she has therefore requested disclosure by the Trustees of documents in respect of those Claims, including privileged documents relating, for example, to any settlement offers made by the various defendants at about the time of the Payment Date, or any advice on their merits.

9. In consequence of her requests, by letter dated 26 November 2021, the Trustees disclosed six relevant, privileged documents ("**the Documents**") and in respect of those documents, privilege was waived. However, that waiver of privilege was expressly limited to those documents only. Ultimately, it is because and on the basis of the Trustees' refusal to disclose any further, additional privileged documents, that Ms Besharova's application is made.

10. Thus, in his Skeleton Argument at [24], Mr Tamlyn said that "*in short*":

"*a. Documentation relating to the Claims is,* [Ms Besharova] *contends, of obvious relevance to the issues in the* [Preference Claim] *(solvency, and desire);*

b. The Trustees appear to be in control of that documentation;

c. The Trustees (court officers) have refused to waive privilege in those documents;

d. Therefore [Ms Besharova] *contends that no fair trial of the* [Preference Claim] *is possible, or will prove to be possible*."

and at paragraph [26], that:

"*the legal basis for the strike out ... is ... clear.* [Ms Besharova] *submits that where X claims relief against Y, and there is a risk that Y will not receive a fair trial by reason of (inter alia) X's choosing not to disclose documents relevant to the trial, the court will exercise its inherent jurisdiction to strike out or stay the proceedings.*"

The Detailed Background

11. To explain the provenance, grounds and scope of Ms Besharova's strike out application, I need to set out the background in some further detail.

12. In his First Witness Statement in support of the Preference Claim, at paragraphs 33 to 37, Mr Thielmann dealt with the Insolvency Issue. Amongst other things, he exhibited a "*Statement of Affairs and accompanying notes produced by the Trustees and their staff based on the information we have obtained through our investigations, and which seeks to identify in approximate terms the position of the Deceased as at 24 July 2012 (the date of the Payment) and 11 July 2013 (the latter date being the date of the Joint Receivers' report to Court that first assessed the solvency of the Estate). As at the date of the Payment, on a "best case" analysis, the Trustees would estimate that the Deceased's assets were of the order of £23.8 million, but those were substantially*

outweighed by his liabilities (resulting in a balance sheet deficit of in excess of £78 million)".

13. The Statement of Affairs refers, implicitly at any rate, to Mr Berezovsky's various claims, and so to their value, whether positive or negative, as follows.

14. First, it refers to the "*AP Settlement*". That is a reference to the settlement by Mr Berezovsky on 9 September 2012 of one of the Chancery Actions, his claim against Mr Patarkatsishvili. The settlement sum (that is, the amount paid to settle Mr Berezovsky's claim) was nearly £97 million. In the Statement of Affairs the Trustees ascribe to the "*AP Settlement*" a nil value as at the Payment Date, on the basis that the funds were "*not in sight*" at that time; no separate value is ascribed to the underlying claim itself.

15. Second, it refers to the Abramovich Claim and to the "*Anisimov Defendants*" and in each case, as at the Payment Date, ascribes a substantial liability (on a "worst case" basis – thus on the basis of what happened subsequently and in fact) or a nil value (on a "best case" basis). Again, no value is ascribed to either claim, or indeed to any of the claims in the Chancery Actions generally.

16. In the Notes to the Statement of Affairs, some further explanation is provided:

> "*20. As at the date of the preference transaction, the Deceased was involved in a substantial legal dispute (as claimant) against Mr Abramovich. At the time of the preference transaction the outcome was not known, therefore no value has been ascribed to this asset under the 'Potential best case' scenario as this is a contingent asset. The 'Potential worst case' scenario assumes the Deceased's claim was unsuccessful and therefore no value is attributable to this asset.*

21. As per note 20, the 'Potential best case' does not value any potential asset which may result from the Deceased succeeding in this legal claim. The 'Potential best case' scenario does not assume failure of the claim, and therefore there are no adverse costs consequences for this scenario. The 'Potential worst case' scenario assumes that the Deceased lost the claim and was therefore responsible for the adverse costs of his opponent. These adverse costs have been included in the amount which the Deceased was ultimately obliged to pay the defendant.

22. The Deceased was also involved in a legal claim in which the Anisimov family were defendants. Judgment had not been received by the date of the preference transaction. The 'Potential best case' scenario does not assume failure of the claim, and therefore there are no adverse costs consequences for this scenario. The 'Potential worst case' scenario assumes that the Deceased lost the claim and was therefore responsible for the adverse costs of his opponent. These adverse costs have been included in the amount which the Deceased was ultimately obliged to pay the Anisimov family pursuant to a settlement agreement."

17. I should make clear that whether or not the Trustees' approach to valuation, and to the assessment of Mr Berezovsky's solvency or otherwise, is in substance correct, is not a matter before me, and nothing that I say should be understood as commenting on it, favourably or otherwise.

18. In light of that evidence, on 8 June 2021, Ms Besharova's solicitors (Spencer West LLP ("**SW**")) wrote to the Trustees' solicitors (Holman Fenwick Willan LLP ("**HFW**")), asking, amongst other things, for their confirmation that disclosure would be given of the documents on the basis of which the Statement of Affairs (and accompanying

Notes) had been prepared, and on 16 June 2021, a Consent Order was made, including for disclosure in relation to two issues:

i) that of Mr Berezovsky's financial position as at and immediately after 24 July 2012, in respect of which the Trustees were to give disclosure in accordance with Model D of PD 51U (without Narrative Documents) and Ms Besharova was to give disclosure in accordance with Model A;

ii) that of Mr Berezovsky's "*motivation*" for making the Payment to Ms Besharova on 24 July 2012, in respect of which the parties were both to give disclosure in accordance with Model D of PD 51U (again, without Narrative Documents).

19. On 21 July 2021, before the date fixed for disclosure, SW wrote to HFW stating that the Trustees would need to produce documentation in respect of Mr Berezovsky's Claims, including privileged documents, for example:

i) in respect of the AP Settlement and the associated underlying claim, it was said that "*it is plain that disclosure must be made of documents relating to the value of the claim (which may indeed, for all we know, have been settled at an undervalue following the loss of the action against Abramovich) and that the searches must extend beyond the dates you have suggested, in both directions, so that all documentation relating to the value of the asset (including any advice on merits and settlement offers and negotiations) is disclosed*" (emphasis added); and,

ii) in respect of the Abramovich Claim, it was said that "*We understand that judgment in the Abramovich proceedings was handed down at the end of August 2012. The deceased's (and thus his solicitors') perception of and thus advice on*

merits of the claim, and any settlement offers by either side or mediation attempts, are clearly relevant, including any advice which post-dated trial and the handing down of judgment" (again, emphasis added).

20. HFW replied on 3 August 2021, saying that privileged documents would not be made available for inspection.

21. On 5 and 6 August 2021, the Trustees and Ms Besharova respectively (by their solicitors) signed their disclosure certificates. Both identified that documents were withheld on grounds of privilege, Ms Besharova's Certificate stating that on grounds of legal professional privilege, production was being withheld of, "*Correspondence passing between my then solicitors, WGS Solicitors, and me*" and "*Correspondence passing between my then solicitors, WGS Solicitors, and counsel instructed by them on my behalf*."

22. It is an arresting fact, to which I shall return, that Ms Besharova seeks to strike out the Preference Claim on the basis of the Trustees' decision to assert privilege in respect of relevant documents, whilst doing precisely that herself. I agree with Mr Beswetherick, that those documents, lawfully (and without challenge) withheld, would be quite capable of being critically probative.

23. The following month, on 12 November 2021, SW wrote again, making various criticisms of the Trustees' disclosure. In that letter, it was said, amongst other things, that the "*documents in respect of which the Trustees are, it appears, asserting privilege are potentially of considerable relevance to the claim …. Were it the case, for example, that the AP Family had prior to the Payment made offers of settlement above the US$ 150m eventually achieved, this is relevant both to the value of the AP claim at the date of the Payment and to the deceased's desire. … We do not consider that there can be*

any fair trial of the Trustees' claim without full disclosure of such matters as advices, settlement offers and mediation attempts. … We invite the Trustees to confirm whether or not they continue to claim privilege in such documentation; and if they do, to explain how a fair trial can be possible. The Trustees are at liberty to allow our client to inspect the documentation. We invite the Trustees (who are officers of the Court) to reconsider their position." (Emphasis added.)

24. It was this letter that resulted in the limited waiver of privilege referred to above - on 26 November 2021, HFW wrote and provided Ms Besharova with copies of the Documents relating to advice given to Mr Berezovsky in respect of the Abramovich litigation. It is said by the Trustees, that those documents show that prior to the Payment, Mr Berezovsky had received negative advice (which was later proved to be correct) regarding his prospects in that litigation. The letter of 26 November 2021 also stated that the Trustees had run key-word searches "*of a variety of settlement terms and the term 'Abramovich' which has come back with 19,738 responses. We do not believe it is proportionate and reasonable for our client to review all of these documents, especially when the majority are likely to be privileged*".

25. In response, on 7 December 2021, albeit without any prior warning of their intention to do so, SW wrote to HFW, serving the application now (in part) before me (albeit not yet formally issued), and relying on the grounds "*set out in the witness statement of John Andrew Gilbert dated 6 December 2021*".

26. Mr Gilbert is a solicitor and partner at SW, and in his witness statement, at paragraph 9, he said that "*the Respondent considers that no fair trial of the Main Application is possible, or will prove to be possible, based on the Applicants' failure to disclose documentation to the Respondent. I refer to a letter from my firm to HFW dated 7*

December 2021, in particular to paragraphs 2-5 .... The Respondent's intention is not that this issue should be determined at the 15 December Hearing, or otherwise prior to trial of the Main Application. The purpose of this aspect of the Respondent's application notice is fairly to raise this issue before the trial judge. I believe that all other matters relating to this aspect of the Respondent's application notice can be left for submission, should submissions be necessary." The reference to the hearing on 15 December 2021, was to the CCMC fixed pursuant to the Order of 16 June 2021.

27. The relevant paragraphs of SW's letter stated:

"*2. We note that the Trustees purport to have waived privilege in respect of 6 documents containing or referring to legal advice given to the Deceased between 28 October 2011 and 15 August 2012.*

3. We note that the only document disclosed which relates directly to the Deceased's perception of the Abramovich (or any other) claim is the file note dated 30 October 2011 in which the Deceased is recorded as stating (despite the negative advice he had received on prospects of succeeding in the Abramovich claim) that "he was convinced that he would win." That is, of course, consistent with our client's evidence.

4. We note that your letter expressly states that the Trustees have given only limited disclosure of privileged material. Indeed, it is obvious from what has been disclosed that material documentation has not been included. Nothing has been disclosed relating to the merits or offers of settlement of the "Chancery Actions" (as defined at paragraph 27(c) of the Thielmann Statement), save in so far as counsels' note dated 15 August 2012 refers in various places to a "recent mediation" and to "settlement offers" having been tabled recently by "VA" in (it

appears) one of the actions (the Metalloinvest action, it appears); whilst the covering letter refers to further discussions with VA's representative (the content of which does not appear). No material disclosure has been made of any documentation relating to or generated by the Chancery Actions (despite the Thiemann [sic] *Statement at paragraph 27(b) - (e) and the SoA recognising the relevance of those proceedings), so that our client and her advisers are wholly unable to understand the documentation which you have disclosed. Further, the disclosure the Trustees have made is expressly acknowledged to be limited, but our client is not given access to documentation (or information) sufficient to allow her to know whether disclosure has been fairly made.*

5. This is obviously deeply unsatisfactory. Our letter dated 12 November 2021 asked the Trustees to explain how, absent disclosure of all privileged documentation, there could be a fair trial of the preference claim against our client. Your letter provides no explanation. Our client continues to contend that no fair trial is or will prove to be possible."

28. I note that the letter of 12 November 2021 (referred to in paragraph 5 of the letter of 7 December 2021) pre-dated the limited disclosure of privileged documents by the Trustees on 26 November 2021, and sought "*disclosure of all privileged documentation*". In other words, the allegation of unfairness was made before the Documents were disclosed, and independently of it.

29. As to the Documents themselves, they include a Note prepared by counsel, and Mr Berezovsky's solicitors' covering letter, dated 15 August 2012, a few weeks after the Payment Date. The Note, at paragraph 6, refers to the risk that if Mr Berezovsky were to lose against Mr Abramovich, he would be ordered to pay costs, and that if he did not

meet those costs "…*we have no doubt that all settlement offers* [i.e. made by the Chancery Action Defendants] *will be withdrawn*…"; the point was repeated at paragraph 8, which also made reference to "*previous settlement offers*". What these settlement offers comprised (including their quantum) is not said, and has not been disclosed.

30. Furthermore, paragraphs 11, 13 and 15 of the Note relate to the claims against Mr Anisimov, and refer to "*offers tabled recently*" by him. What they comprised is also not disclosed, although it appears from paragraph 15 that it may have been in the region of US$ 200 million. Mr Berezovsky's solicitors' covering letter also refers to "… *further discussions with* [Mr Anisimov's] *representative*" – but again, what these comprised has not been disclosed.

31. In short, submitted Mr Tamlyn, it is evident from the Documents that other relevant documents must exist.

32. At the CCMC on 15 December 2021, before ICCJ Prentis, it was argued by Mr Tamlyn, in accordance with paragraph 7(d) of the Application Notice itself, that the strike out application was not one that "*can, or should, be determined prior to trial. This aspect of the … Application simply gives notice to the Trustees that the issue is live and the point will be taken at trial. The appropriate order is therefore simply to adjourn this aspect of the … Application to trial*." In the event, having heard argument, Judge Prentis refused to adjourn the application to trial, and instead fixed this hearing. He also gave the Trustees permission to serve further evidence, which they did, comprised in the 2nd Witness Statement of Mr Thielmann made on 11 February 2021.

The Basis of the Application

33. Prior to the hearing before me, I had understood the basis of Ms Besharova's application to be that without disclosure of all (or at least perhaps certain categories of) relevant albeit privileged documents, a "*fair trial*" would not be possible, and that the problem had not been met or solved by virtue of the Trustees' limited waiver. Be that as it may, at the hearing, the argument advanced was not merely that the limited disclosure had failed to solve the pre-existing problem of unfairness, but more than that, was itself a further, independent cause of unfairness, sufficient to justify the relief sought, because it would be unfair, in the absence of further disclosure, to allow the Trustees to rely on their limited disclosure.

34. There were therefore two discrete but related bases:

i) first, that without disclosure of all (or perhaps, at least certain categories of) relevant albeit privileged documents, a "*fair trial*" will not be possible (or is "*likely*" not to be possible, or there is a "*risk*" of unfairness) - and that the unfairness problem had not been solved by virtue of the Trustees' limited waiver ("**the First Argument**"); and,

ii) second, that <u>because</u> of the limited disclosure, in the absence of further disclosure of all (or perhaps, again, at least certain categories of) relevant albeit privileged documents, a "*fair trial*" will not be possible (or again, is "*likely*" not to be possible, or there is a "*risk*" of unfairness) – "**the Second Argument**".

35. Mr Beswetherick submitted that Ms Besharova must be confined to the terms of her Application (albeit describing its basis as "*elusive*"). He did however deal in his Skeleton, and in oral argument, with the Second Argument (which was canvassed to some extent in correspondence) and in those circumstances, whilst distinguishing between them, I shall consider both.

36. It is also useful to clarify what the Application and hearing were not about, and what was not in issue.

i) It was not said on behalf of Ms Besharova, that the Trustees have acted in breach of an order for disclosure or any rule or practice direction, and nor was it said that the Trustees have in some way incorrectly (or improperly or for some wrongful reason) asserted privilege.

ii) Thus, despite the terms of the Second Argument, this was not an Application for further specific disclosure of privileged documents on the basis of a collateral waiver.

iii) In correspondence, it was at one point said on behalf of Ms Besharova that the Trustees could not assert privilege on the basis that she had some common interest in the relevant litigation with Mr Berezovsky. That argument, whatever its merits, and whether or not abandoned, was not raised before me.

iv) It was common ground that although ordinarily, a bankrupt's privilege does not pass to his trustee in bankruptcy (see Avonwick Holdings Ltd v Schlosberg [2016] EWCA Civ 1138) in this case, because the Trustees are also the General Administrators of the Estate (and hence Mr Berezovsky's personal representatives), they are, as it happens, in a position in that capacity to waive privilege (and of course, have to some extent lawfully done so). Whether or not the existence of those two separate capacities raises any additional issues (about which I make no comment) none was argued, and I therefore proceed on the footing that the Trustees could, if they chose to do so, waive privilege in additional documents.

v) Finally, whilst Mr Beswetherick said that it would have been abusive (in any event unjustified) to have sought (without more) a simple adjournment of the Application to the trial, it was nevertheless not in dispute that having heard argument, I could in principle determine that the Application should not be finally determined until the trial. Mr Tamlyn described this as his secondary position. Mr Beswetherick of course, said that I should not make that direction, but having heard argument, should simply dismiss the Application now, as unfounded, or indeed, "*misconceived*". I shall deal with this issue below.

The Relevant Legal Principles & Issues of Law

37. I heard submissions in respect of various matters of law, regarding which there was some measure of agreement.

i) What are the principles governing an application to strike out a claim under the inherent jurisdiction, as an abuse of the court's process, on grounds that a "*fair trial*" is or might not be possible? What degree of impairment or disadvantage in the conduct of a defence is it necessary to establish before concluding that an application or claim is abusively "*unfair*"?

ii) More particularly, how is "*unfairness*" assessed: does it require all relevant material to be before a court?

iii) What is the relevance to "*fairness*" of:

a) The fact of privilege, lawfully asserted (albeit as a "*choice*"), being the basis upon which relevant documents have not been disclosed by a claimant (which has "*chosen*" to advance its claim), and being the reason for their exclusion from the trial;

b) the possibility (if it is a possibility) of drawing adverse inferences at trial against a litigant who has waived privilege in some, but not all, privileged documents;

c) the possibility of applying for specific disclosure of further privileged documents (against a litigant who has waived privilege in some but not all privileged documents) based on a collateral waiver – and indeed, the relevance of any failure to do so;

d) any other related means by which a defendant can oppose the claim (and so mitigate any alleged "*unfairness*"), as for example, by arguing at trial that the claimant has (in the absence of other materials) simply failed to prove its claim, or, as in the present case, by arguing that the court should exercise its discretion under s.340 of the IA 1986, to grant no relief?

iv) What in any event would be appropriate relief: would it be appropriate to strike out the claim altogether? What is the relevance of the possibility that a litigant which has voluntarily waived privilege in some but not all privileged documents, might simply disavow reliance on them?

Abuse of Process

38. In Hunter v Chief Constable of the West Midlands Police [1982] AC 529 HL at 536C, Lord Diplock referred to:

> "*.. the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into*

disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

39. The power is thus said to arise out of the court's inherent jurisdiction to safeguard its authority and processes from being undermined by disruptive, oppressive or otherwise inappropriate use of its procedures. A number of points emerge from that short, well known passage.

40. First, the circumstances in which abuse of process can arise are "*very varied*"; there are no "*fixed categories*". It therefore seems to me that while previous decisions will of course provide useful illustrations of how the jurisdiction might properly be invoked, it is incumbent on the court, in each case, to consider all the circumstances of that particular case in light of current judicial policies regarding the conduct of litigation (including by reference to the overriding objective). Those policies will likely change over time.

41. Second, the question turns not on the interpretation of the rules (their "*literal application*") but on the (mis)use being made of them; the court must assess the ("*manifestly unfair*") effect of a particular process on other parties and/or on the system more generally (such as to "*bring the administration of justice into disrepute*"). It follows that proceedings can be struck down as an abuse of process where there has been no unlawful conduct or breach of relevant procedural rules – indeed, the power exists precisely to prevent the court's process being misused by a lawful and literal application of the rules, or being used for a purpose or in a way significantly different

from its ordinary and proper use; it would very likely not be needed where a party was acting unlawfully or in breach of procedural rules, because in those cases, there would ordinarily be a procedural sanction which would be enough to protect the process. The jurisdiction to prevent misuse of the court's procedure thus transcends the rules.

42. Third, the court must consider all factors and circumstances and consider them in combination with one another – a point illustrated by the decision of Marcus Smith J in High Commissioner for Pakistan in the UK v Prince Muffakham Jah and Others [2020] Ch 421, which I consider below at paragraph 45.

43. Fourth, determining whether proceedings are an abuse of process is not an exercise of discretion; it is an exercise of judgment. However, deciding upon the appropriate remedy, if any, does involve an exercise of discretion.

44. In respect of abuse, I was referred to three cases by Mr Tamlyn, said to provide or illustrate the basis of Ms Besharova's application.

45. The first was High Commissioner for Pakistan in the UK v Prince Muffakham Jah and Others [2020] Ch 421. The relevant facts can be taken from the headnote: "*Immediately following India's annexation of Hyderabad in 1948, the former finance minister of the Government of Hyderabad transferred a sum slightly in excess of £1m to an account at a United Kingdom bank in the name of the High Commissioner of Pakistan in the United Kingdom, who received it on the instructions of the Foreign Minister of Pakistan. The transfer was ostensibly made on behalf of the ruler of Hyderabad, the seventh Nizam. Shortly thereafter, the Nizam instructed the bank to reverse the transfer on the ground that it had been made without his authority, but in the absence of the account holder's agreement, the bank refused to comply with the instruction. Proceedings were brought in 1954 by the Nizam against the High Commissioner and the bank, but were stayed*

following Pakistan's assertion of sovereign immunity. In 2013 Pakistan waived that immunity when it commenced proceedings against the bank, through its High Commissioner, asserting that it was absolutely entitled to the fund. The Union of India, the eighth Nizam and the eighth Nizam's brother, all of whom claimed to be the seventh Nizam's successor in title, were joined to the proceedings as interpleader claimants. They contended, inter alia, that the fund was held on trust for the seventh Nizam and his successors in title by the High Commissioner; alternatively, that the transfer had been unauthorised, which provided the basis for a claim against Pakistan in restitution. Pakistan contended that the restitution claim was time-barred; and that the act of state doctrine made the proceedings non-justiciable except in so far as they related to the banker/customer relationship between Pakistan and the bank, since the transfer had been of a governmental nature engaged in by two sovereign states in a political context."

46. In those circumstances, it was held to be an abuse of process for Pakistan, having prevented proceedings from being pursued against it within the relevant limitation period by its original assertion of sovereign immunity, to waive that immunity and assert a defence of limitation in order to defeat the restitution claim. Accordingly, Pakistan's statements of case asserting limitation defences were struck out.

47. At [284] of his Judgment, and having cited the decision in Hunter referred to above, the Judge explained his conclusions as follows:

> "*(1) …. That said, there can plainly be nothing wrong in a party relying upon a defence conferred upon it by statute, and to describe such a course as an abuse of process must require, in my judgment, fairly extreme or unusual circumstances. None of the parties was able to point me to any authority that might assist on the*

point, save that in Chagos Islanders v Attorney General [2003] EWHC 2222 (QB) at [599], Ouseley J expressed the view that there was no basis upon which a court could decide that a statute could be removed from the arena to which its language made it apply, simply because a court thought that it would be unconscionable to allow a party to rely upon the rights which Parliament had given him.

(2) Clearly, there can be nothing wrong in a sovereign state successfully asserting a right to sovereign immunity. Equally clearly, there can be nothing wrong in a sovereign state successfully asserting a defence of limitation. Ordinarily, the combination of these two procedural bars does not arise: that is because sovereign immunity - once successfully asserted - is very rarely waived. I am not surprised that this situation is without precedent, and that none of the parties was able to identify any relevant law to assist me.

(3) The question … is whether, having raised one procedural bar, and then waived it, Pakistan is now entitled to raise a second, different, procedural bar, that only exists because of the raising of the first bar or whether Pakistan's raising of the limitation defence in this context constitutes an abuse of process. I find that this conduct does amount to an abuse of process. The point about the assertion of sovereign immunity is that it operates as a complete bar to the litigation of certain proceedings. It is not open to the state asserting sovereign immunity to pick and choose which points to proceed with and which points to block by asserting sovereign immunity.

(4) In a very different context, the Court of Appeal recognised that an ability to pick and choose in this way would be profoundly unjust. In Law Debenture Trust [2019] QB 1121, the claimant trustee ("Law Debenture") entered into a trust deed

with a sovereign state, Ukraine. The deed was governed by English law. Ukraine defaulted under the notes. The Russian Federation was the sole holder of the notes and - on Russia's direction - Law Debenture brought a claim against Ukraine for payment of the final repayment amount under the notes, and in due course applied for summary judgment on its claim. Ukraine resisted that application on various grounds, one of which was that the issue of the notes had been procured by unlawful threats made, and pressure exerted, by Russia, so as to render the notes voidable on grounds of duress. Of course, a contract made as a result of illegitimate pressure is unenforceable as a matter of English law: the issue, in this case, was that the acts by Russia which Ukraine relied upon as constituting duress or illegitimate pressure involved acts of high policy by Russia in the sphere of international relations in the exercise of sovereign authority which Law Debenture contended was non-justiciable under the doctrine of foreign act of state. ... For present purposes, what is of interest is the Court of Appeal's statement of what it would have held, had Law Debenture's contention as to non-justiciability succeeded (at para 183):

> *"The basic point is that Russia, through Law Debenture, is positively seeking to enforce contractual rights in private law against Ukraine. In our view, it can only fairly seek to do so if Ukraine is afforded a fair opportunity to defend itself . . . It would be unjust to permit Law Debenture and Russia to proceed to make good the contract claim without Ukraine being able to defend itself by raising its defence of duress at trial . . ."*

Accordingly, had Law Debenture's contention as to non-justiciability succeeded, the Court of Appeal would have stayed the entire proceedings (at para 184).

(5) The situation is very similar in the present case: Pakistan's assertion of sovereign immunity in the 1954 Proceedings prevented <u>everyone</u>, including Pakistan, from asserting a claim to the Fund in this jurisdiction - the only jurisdiction that matters, given the location of both the Fund and the Bank. Whilst Pakistan is perfectly entitled to waive its sovereign immunity, and has done so, the effect of that waiver must not be to provide one party (Pakistan) with an advantage in the litigation which only exists by reason of the assertion of the immunity. The waiver in this case has enabled Pakistan to deploy a defence that she could not have deployed had she never asserted sovereign immunity and this, I find, is an abuse of process because it is obstructing the just disposal of these proceedings."

48. This decision and reasoning illustrate a number of the points that I set out above:

i) that an abuse can arise notwithstanding that a party has not acted outside or in breach of the rules – Pakistan was otherwise lawfully entitled to assert sovereign immunity and rely on a limitation defence;

ii) however, to describe such a course of action as abusive therefore requires something very serious, or "*fairly extreme or unusual*", or "*profoundly unjust*" (because it derogates from a litigant's usual freedom to conduct litigation according to the rules, as it sees fit);

iii) the court will consider all the circumstances of the case, and in combination with one another: it was Pakistan's own choice to raise one bar - and then waive it - that had created the second, different bar – it was "*picking and choosing*" (albeit not deliberately – it was not said to have been "*gaming the system*": see the Judgment at [283]).

49. The second case cited was the Law Debenture case explained by Marcus Smith J in the Pakistan case. As to that, I observe that the injustice to Ukraine was (or would have been) very serious – it would have been deprived entirely of the freedom to defend itself by raising the defence of duress (in the same way that in the Pakistan case, the claimants would have been deprived entirely of the freedom to assert their claim).

50. The third case cited was Hamilton v Al Fayed [2001] 1 AC 395 (HL), in which Neil Hamilton, a Member of Parliament, brought proceedings for defamation against Mohamed Al Fayed, and it was said that had the principle of parliamentary privilege been applicable to the claimant's action it would have made a fair trial impossible by preventing any challenge to the veracity of evidence previously given to a parliamentary committee, and so would have necessitated a stay of the action. In the event, because Mr Hamilton had chosen to rely on section 13 of the Defamation Act 1996, and to waive the protection of parliamentary privilege so far as it concerned him, the trial of the action could proceed and it was permissible to question the parliamentary proceedings without that being regarded as infringing the autonomous jurisdiction of Parliament.

51. Explaining those conclusions, Lord Browne-Wilkinson said, at 404C-E:

> "*In the field of defamation parliamentary privilege has its main impact in precluding the courts from entertaining a case alleging that a Member of Parliament or other participant in parliamentary proceedings is liable for defamatory statements made in the course of parliamentary proceedings. However, recent experience has shown that the impact of parliamentary privilege is not all favourable to an individual MP. Say, as in the present case, that an MP wishes to sue for defamatory remarks made by a third party outside Parliament, such*

defamatory remarks alleging breaches by the D MP of his parliamentary duties. If the defendant wishes to justify his defamatory remarks he will be precluded from leading evidence or cross-examining as to matters which form part of the MP's parliamentary functions. As a result in some such cases it might be grossly unfair to let the action proceed in circumstances which would preclude the defendant from putting forward his defence. It was to deal with such a case that the court developed a procedure ("the fair trial stay") under which, unless the plaintiff could in some way waive the privilege which produced exceptional unfairness, the action by the MP would be stayed."

And at 407F-408B:

"*I have said above that, in the normal case involving parliamentary privilege, the court is not asked to make an order staying the whole action: the relief claimed in an action does not normally itself conflict with the authority of the decision reached by Parliament. The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings. Thus, it is not permissible to challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee. If that approach had been adopted in the present case, there can be no doubt that, apart from section 13, the trial of the action would from the outset have proved completely impossible. All evidence by Mr Hamilton that he had not received money for questions would have conflicted directly with the evidence of Mr Al Fayed which was accepted by the parliamentary committees. Any attempt to cross-examine Mr Al Fayed to the effect that he was lying to the parliamentary*

committees when he said that he had paid money for questions would have been stopped forthwith as an infringement of parliamentary privilege.

Presumably because of the way the case was presented to them, the Court of Appeal never considered the relevant question (viz whether there should be a fair trial stay) .... The only way in which Mr Al Fayed could justify his defamatory statements was by detailed challenge to Mr Hamilton's conduct in Parliament, which challenge would be precluded by parliamentary privilege. That being so it would in my judgment have been impossible for Mr Al Fayed to have had a fair trial in this action if he had been precluded from challenging the evidence produced to the parliamentary committees on behalf of Mr Hamilton."

52. Again, this is consistent with the principles set out above. In particular, as to the high degree of unfairness or procedural disruption required: the effect of parliamentary privilege would have been to render a fair trial "*from the outset*", "*completely impossible*", precluding Mr Al Fayed from challenging evidence produced to the committees on behalf of Mr Hamilton, and preventing any attempt to cross-examine Mr Al Fayed to the effect that he was lying to the committees.

53. This deals with one aspect of Mr Tamlyn's submissions. Variously, he argued that a "*fair trial*" will not be possible, or is "*likely*" not to be possible, or there is a "*risk*" of unfairness. In my judgment, in order to establish abuse, he would have to establish unfairness to a high degree – a mere risk of unfairness would not be enough.

Fair Trial

54. In order to describe a trial or litigation process as "*unfair*" - as Ms Besharova contends in the present case - it is necessary of course to understand what are the requirements of "*fairness*".

55. This point was little developed before me, and I shall therefore say little about it. However, it is uncontroversial that English law protects the right to a fair trial by a variety of means, including statute, rules of court and common law principles that uphold fundamental constitutional rights. The statutory and common law safeguards of procedural fairness are now overlaid with the rights established by Article 6 of the European Convention of Human Rights.

56. Amongst the various components of the right, is a requirement that litigants be treated on an equal footing, and that they have a "*right to be heard*" – including a defendant's right to know the case made against him, to know what evidence has been given and what statements have been made affecting him, and to have a fair opportunity to correct or contradict them, and present his side of the story.

57. It is equally uncontroversial that certain components of the right to a fair trial involve a balancing of competing considerations; rights may be restricted proportionately for a legitimate purpose, but the process rendered no less "*fair*" in consequence.

58. One such competing consideration is the right to assert legal professional privilege, which almost necessarily, but in any event very frequently, results in relevant evidence being withheld from an opponent and from the court. It is a right which according to its nature prevails over the conflicting public interest in the disclosure of all relevant material, and so might in that sense be said to detract from the "*fairness*" of the process, but it does not thereby render the whole process "*unfair*".

Legal Professional Privilege

59. Privilege is a right to resist the compulsory disclosure of information, and in particular, documents which contain legal advice or were created for the dominant purpose of obtaining information or advice in connection with actual or contemplated litigation. Its history and effect was authoritatively examined by the House of Lords in R v Derby Magistrates' Court, Ex p B [1996] AC 487.

60. In that case, a person (B) was charged with murder after admitting to the police that he had strangled a girl. He changed his story before trial, alleging instead that his stepfather had killed the girl. He was acquitted but, together with his stepfather, was later found liable in a civil action brought by the victim's mother, for assault and battery. When the stepfather was then charged with murder, B gave evidence at his committal proceedings. In cross-examination, he declined to answer questions about instructions he had given to his solicitors in 1978 before he changed his story. The defence thereupon obtained a witness summons under s.97 Magistrates' Courts Act 1980 addressed to B's former solicitors, seeking the production of privileged documentation detailing instructions given by B in defending his murder charge.

61. One of B's grounds of appeal was that the witness summons sought materials protected by legal professional privilege. The issuing magistrate had performed a balancing exercise, weighing the public interest in the protection of confidential communications between a solicitor and his client against the public interest in ensuring that all relevant, admissible evidence is made available to the defence. The House of Lords held that he was wrong to have done so: the nature of privilege is "*absolute*".

62. Lord Taylor CJ gave the leading speech, and having reviewed the history and origin of the rule, said, at [1996] AC 487, 507D:

"*The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests*."

And at 507G:

"… [Counsel for the stepfather] *submitted that in other related areas of the law, privilege is less sacrosanct than it was. He points to the restrictions recently imposed on the right to silence, and the statutory exceptions to the privilege against self-incrimination in the fields of revenue and bankruptcy. But these examples only serve to illustrate the flaw in* [his] *thesis. Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), as to which we did not hear any argument.* [His] *difficulty is this: whatever inroads may have been made by Parliament in other areas, legal professional privilege is a field which Parliament has so far left untouched*."

63. In his speech, Lord Nicholls of Birkenhead explained, at 510D-G, that legal professional privilege "*is concerned with the interaction between two aspects of the public interest in the administration of justice*", being the public interest in enabling people to obtain legal advice, and the public interest that "*all relevant material should*

be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome." But as he said, "*All this is familiar ground, well traversed in many authorities over several centuries. The law has been established for at least 150 years …. subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence.*"

64. A number of points can be made.

65. Privilege is a fundamental constitutional right; a fundamental condition on which the administration of justice as a whole rests. It is protected by the ECHR, and is a component of the right to a fair trial, affording litigants a reasonable opportunity to prepare for litigation: without the assurance of privacy, parties to legal proceedings would be denied an adequate opportunity to prepare.

66. It is a substantive right, and "absolute" in nature; no balancing or weighing of factors is required or appropriate to establish it; a litigant does not have to explain or justify his decision to rely on it. Ms Besharova herself asserts it in the present case, and is (I was not told otherwise) perfectly entitled to do so.

67. Its effect is or may be that highly probative evidence will be withheld from other litigants and the court, even in the most serious cases (such as Derby Magistrates itself); it does not give way to competing interests.

68. The principle is "*once privileged always privileged*"; the lawyer's mouth is "*shut for ever*" (Wilson v. Rastall (1792) 4 Durn. & E. 753, 759, *per* Buller J., cited by Lord Lloyd of Berwick in Derby Magistrates at 509G). Privilege is not lost by the death of the client, as in the case of Mr Berezovsky, and will apply even in subsequent proceedings having no similarity of subject matter with the first.

69. It is not possible to argue, without more, that any of this renders the litigation process "*unfair*"; on the contrary, it is an integral element of that which makes it "*fair*".

70. As I said above at paragraph 41, it is not an answer to an allegation of abuse merely to establish that a particular course of conduct is undertaken in accordance with the rules. Accordingly, and given the breadth of the court's inherent jurisdiction, I would hesitate to agree with Mr Beswetherick that reliance on privilege - regardless of its effect in combination with other circumstances or facts - could never, by definition, and as a matter of principle, be abusive, or render a process abusively unfair. However, given the nature and fundamentality of the right, I do agree that for it to do so would require extremely unusual circumstances (for which there appears to be no precedent in the authorities). It is most certainly not enough simply to complain about the absence from the litigation process of relevant documents – to do so would be to make the very complaint raised in the Derby Magistrates case, but rejected.

Waiver of Privilege & Adverse Inferences

71. As I have said, privilege is a rule of immunity from compulsory disclosure, and broadly therefore, the client is entitled to waive it. Once privilege has been waived and a document has been disclosed to others or the court, privilege is lost permanently and cannot be reasserted.

72. When waiver is expressly stated, there is no doubt about its effect. But waiver may also be "*implied*" or "*collateral*" – inferred for example, from the fact that privileged documents have been used in litigation or from a reference to, or partial disclosure of privileged materials, where fuller disclosure is necessary to ensure that the reference or partial disclosure does not result in misleading the court or the other parties.

73. In that regard, Mr Tamlyn cited the decision of the Court of Appeal in R v Secretary of State for Transport *ex parte* Factortame and Others [1997] 9 Admin. L.R. 591, and Magnesium Elektron Ltd v Neo Chemicals & Oxides (Europe) Ltd (No.2) [2018] F.S.R. 11, a decision of Mr Daniel Alexander QC, sitting as a Deputy Judge of the High Court. In the latter case, at [57]-[58], the Judge said:

> "*… the approach to implied or consequential waiver is not necessarily a "once and for all" position where the court is required to determine, as a matter of quasi-historical fact, what the scope of waiver was. To the contrary, the law operates an element of consequential procedural control following deployment of a document where the scope of waiver is a function of the contents of the document and the nature of its deployment:*
>
> *"if you are going to rely on privileged document A to contend that it shows X, the scope of waiver is S(A,X); if you are going to rely on A to contend that it shows Y, the scope of waiver is S(A,Y) – which may not be the same".*
>
> *That is one reason why I have preferred to use the term "implied or consequential" waiver in this judgment.*
>
> *58. The authorities subsequent to Nea Karteria [1981] Com. L.R. 138 are therefore consistent with this somewhat more sophisticated approach to implied waiver*

which does not depend on mere deployment alone but takes account of (a) the material of which the deployed document forms part and (b) the representations express and implied made by the act of deploying the document. Moreover, they recognize that the potential unfairness of selective disclosure can be mitigated in the possibility that adverse inferences in certain cases may (and I emphasise, may) be drawn if privileged material is not disclosed. Moreover, some of the authorities are consistent with an approach that says that the scope of waiver will depend on what use is ultimately sought to be made of the material deployed which may not be self-evident before trial …"

74. In Factortame, the issue was whether the Secretary of State could waive legal professional privilege in respect of the advice which he received in connection with the formulation of policy before the introduction into Parliament of the Bill which became the Merchant Shipping Act 1988, without making himself liable also to disclose subsequent advice which he received in the context of litigation concerning the legality and implementation of that Act.

75. The test was said to be one of fairness – whether partial disclosure would cause "*unfairness*". Despite having disclosed the earlier privileged opinion, the Secretary of State was able to avoid disclosure of later privileged opinions by disavowing reliance on the earlier opinion as governing the later position. At 600A-B, Auld LJ said:

"*If the Secretary of State keeps to* [his Counsel's] *word I can see no unfairness to the applicants. The applicants and the court know his stance, that of a party prepared to reveal the legal advice that he received as to his conduct over one period but not over another, with all the suspicion and adverse inference that that may engender. If the Secretary of State does seek to take an unfair advantage of*

his partial discovery at the trial, whether as a matter of evidence or argument, the applicants would be entitled to invite the trial Judge to reopen the matter and determine whether there should be further disclosure."

76. As to this:

i) First, it is of course possible to argue - it was not in dispute - that a partial or "*limited*" disclosure has had the (unintended) effect of waiving privilege in other documents - that it would be unfair to deploy and rely on A, without also disclosing B. However, as I have said, that is not an application that has been made by Ms Besharova.

ii) Second, it was also common ground that where privilege has not been waived, no adverse inferences can be drawn as a result, because to do so would be inconsistent with the privilege existing as a fundamental right, as explained above: see Wentworth v Lloyd 11 E.R. 115 (a decision of the House of Lords) and see also Hollander on Documentary Evidence, 14th ed., at 13-06.

iii) However, third, Mr Tamlyn submitted that where there has been a partial or limited waiver of privilege, as for example in Factortame, it is or might be possible to draw adverse inferences. As to that, there is at least some doubt - it is for example said in Phipson on Evidence, 20th ed., 26-17, footnote 100, commenting on the Judgment in Magnesium Elektron Ltd, that the "*Deputy Judge rather spoiled his analysis by stating that unfairness can in some cases be mitigated by the possibility of drawing adverse inferences if privileged material is not disclosed. No doubt this is possible if an order for disclosure of privileged material consequential on a collateral waiver is simply not complied with, but the statement is at best confusing because it is well established that so*

long as documents remain privileged, no adverse inference can be drawn from a refusal to waive privilege: Wentworth v Lloyd…". It is difficult, I agree, to see why a litigant who has waived privilege in certain documents but not others (including impliedly, consequently or collaterally) should be in any worse position than one who has not waived privilege at all.

iv) But fourth, be that as it may, even assuming Mr Tamlyn to be correct in respect of adverse inferences, I do not discern any support to be drawn from either (1) a possible right to seek further disclosure on the basis of collateral waiver, or (2) a possible right to ask the court to draw adverse inferences from the fact of partial waiver, for (3) the asserted allegation of abuse of process.

v) To the contrary, in my judgment, those possible arguments (either or both of which Ms Besharova could at some point rely on, whether before or at trial) make the allegation of abusive "*unfairness*" even <u>less</u> persuasive, because they diminish, or even extinguish, the possibility of any unfairness arising out of a partial waiver. Even if that is not so, the "*unfairness*" that enables a litigant to rely on either of those arguments, is not, so it seems to me, the same as the "*unfairness*" which would justify holding an application or case to be abusive. For example, it was not suggested in <u>Factortame</u> that a right to argue for adverse inferences would be co-extensive with a right to have the defence struck out entirely, and although it might be "*unfair*" to disclose A, not B, that cannot be to say that the entire process is thereby rendered "*unfair*", and should be struck out. Were it otherwise, applications to strike out on those grounds would be commonplace.

<u>The Application of the Principles to the Case</u>

77. In my judgment, the principles having been stated, it is plain that Ms Besharova's application to strike out the Preference Claim must fail, whether based on the First or the Second Argument. The reasons for its failure are essentially simple.

78. However framed, the basis of the application is, as stated in the penultimate paragraph of Mr Tamlyn's Skeleton Argument, that "*The position remains* [which is to say, that it remains, despite the Trustees' disclosure of the Documents] *that the key privileged documentation which would tell* [Ms Besharova] *what the various claims were worth at the Payment Date has not been produced.*"

79. In other words, Ms Besharova's complaint is that highly relevant material has been withheld, which makes it more difficult to evidence her defence, which makes the litigation process "*unfair*", and thus abusive.

80. There is however a fundamental flaw in that argument. The only alleged "unfairness" is, as explained above, an inevitable consequence of the Trustees' assertion of the right to privilege, nothing more. It cannot conceivably be said that this consequence, "*whilst not inconsistent with the literal application of .. the rules,* [is] *nevertheless manifestly unfair to* [Ms Besharova]" or that it brings "*the administration of justice into disrepute*", such as to render the Preference Claim (or the assertion of privilege) abusive.

81. On the contrary, it is no more or less than one acknowledged, almost inevitable feature of the "*ordinary and proper use*" of the rules, as for example in Derby Magistrates itself, where the ultimate issue was an allegation of murder, of the utmost seriousness, and yet highly probative material was nonetheless lawfully withheld. There is no additional or further feature or combination of circumstances to distinguish this case from any other. As I have explained above, the right to privilege is itself fundamental to the fair operation of the litigation process.

82. Mr Tamlyn urged the point that the Trustees have "*chosen*" to assert privilege (inviting comparison with the Pakistan case discussed above). But that case was different and is distinguishable – the Trustees did not, by their own acts or choices, bring about their ability to rely on privilege (as Pakistan brought about its ability to rely on limitation) - the privilege existed in any event (indeed, it is a matter of chance that the Trustees are in a position to waive it at all).

83. Although therefore, as explained above at paragraph 70, I would hesitate to say that reliance on privilege, regardless of its effect in combination with other circumstances or facts, could never, by definition, and as a matter of principle, be abusive, or render a process abusively unfair, this is not such a case.

84. Nor does it make any difference (the Second Argument) that the Trustees have waived privilege in the Documents, but in no others.

85. As to that, any relevant, consequential unfairness would be met by (a) an application for further disclosure on the basis of collateral waiver (an application that has not been made) or (b) possibly, if it is open to the court to do so, by drawing adverse inferences against the Trustees at trial, or (c) in any event, by the court refusing to accept their claim as insufficiently evidenced; it is difficult for a litigant to complain of procedural unfairness in a case where she is given process rights to meet that unfairness, but has chosen not to rely on them.

86. Those rights, set out in the preceding paragraph, represent the limits of what is relevant and available to Ms Besharova; they are the means by which, within the process, any "*unfairness*" born of a limited waiver is to be met; they do not however lend any support to the quite distinct allegation of abuse, as explained above at paragraph 76(iv) and (v). In any event, I agree with Mr Beswetherick that the Trustees could simply disavow

reliance on the Documents, in which case, although they would remain available for use by Ms Besharova, it would become impossible to say against the Trustees that they are taking unfair advantage of their own partial waiver.

87. Those conclusions are sufficient to deal with the application. But in any event, there is nothing in the wider circumstances which lends it any support.

i) First, Ms Besharova has adduced evidence in opposition to the Preference Claim, and is defending it. A 4 day trial has been listed. By comparison, in the Pakistan case, the Law Debenture case, and the Hamilton case, in each of which the court identified an abuse or possible abuse of process, the effect on the complaining party or on the litigation process, was or would have been profound, comprising an absolute inability even to raise a case, or the "*absolute impossibility*" of trying it. Whilst I am willing to assume that the withheld materials are relevant and would therefore add to the information available to Ms Besharova and her advisors (albeit they might of course not support her case) the degree of prejudice caused to her by their unavailability (or the disruption of the process) is far from that which was found in the three cited cases.

ii) This was perhaps reflected in Mr Tamlyn's submissions, referred to above, that the court "*will exercise its inherent jurisdiction to strike out or stay the proceedings*", where there is a (mere) "*risk that Y will not receive a fair trial by reason of (inter alia) X's choosing not to disclose documents relevant to the trial*" (a submission which in any event I have rejected). Furthermore, it is to some extent implicit in Ms Besharova's argument that the court should stand over this application to trial (stated in the Application Notice itself) that it is not

currently possible to establish a high degree of difficulty in advancing her defence.

iii) Second, although to some extent Ms Besharova has identified the documents which would need (on her case) to be disclosed in order to meet her complaint (for example, Mr Tamlyn referred me to SW's letters of 21 July 2021), they have not been clearly specified, even as classes of document, despite the draconian nature of the remedy sought. It would be wrong to hold that the Trustees are acting abusively without at the same time specifying exactly what they would need to do in order meet the complaint raised. Moreover, as stated above, I must take into account the overriding objective, and the principles of proportionality in the conduct of litigation – it is not clear to me that the Trustees are not being asked to conduct disproportionate searches (and I note, from the Consent Order referred to above, that it was previously agreed that in respect of the Insolvency Issue and the Desire Issue, there were - as ever - limits on the disclosure to be given by the Trustees).

iv) Third, although she seeks to strike out the Trustees' claim on the footing that they have asserted privilege, thus depriving her of relevant materials, Ms Besharova does so herself, as is her right. As I have said, the material withheld by Ms Besharova is quite capable of being critically probative. In substance, to accede to her application would be to afford her greater process rights than those available to the Trustees.

88. Finally, given those conclusions, and my reasons, I decline to adjourn the application to trial. For exactly the reasons that I dismiss it now, it would in my judgment be dismissed at trial.

Dated 22 November 2022