IN THE HIGH COURT OF JUSTICE - FAMILY DIVISION

Case No: FD13D04387

Neutral Citation Number [2018] EWHC 3879 (Fam)

Courtroom No. 33

Royal Courts of Justice
Strand
London
WC2A 2LL

3.15pm – 4.45pm
Wednesday, 19th December 2018

Before:
SIR ANDREW MCFARLANE
THE PRESIDENT

B E T W E E N:

TIMOTHY LEWIS SAXTON

and

JOANNE CLAIRE BRUZAS

MR P MARSHALL QC appeared on behalf of the Applicant
THE RESPONDENT appeared In Person

JUDGMENT
(Approved)

This judgment was delivered in private. The judge has not given leave for this version of the judgment to be published.

THE PRESIDENT:

1. This is an application issued on 27 June 2018 by a wife in long-contested financial remedy proceedings following a divorce. The application is to set aside a decision made by Parker J on 11 December 2017, which in turn dismissed the wife's application to set aside the substantive financial remedy order which had been made as long ago as 27 March 2014 by Deputy District Judge Berry sitting in the Principal Registry of the Family Division. The basis of the application made in June 2018 is said to be that the decision of Parker J was achieved on the basis of perjury and perverting the course of justice by the husband and his legal team.

2. The case has a very substantive procedural history. It is not necessary for me now to go into any detail as to the substance of the dispute. The couple were married in 2001; they have one child who is now nearly an adult, divorce proceedings commenced in September 2013 with decree nisi being pronounced in November 2013. It is plain that there were substantial negotiations between the parties as to the resolution of the finances on separation and divorce. The husband is an accountant working in a company with one colleague, and the wife had in the past run a business but had not the benefit of good health throughout that time and was no longer working at the time of separation. There were properties involved as well as the need to value the husband's business assets.

3. A consent order was drawn up and submitted. At certain stages the wife had had the benefit of legal representation; the husband was represented by solicitors, and at times counsel, throughout. At the time that the consent order was made it does not appear that the wife had the benefit of legal representation. The consent order, having been submitted to the court, was placed as "box work" before Deputy District Judge Berry. On 28 January 2014, the court wrote to the husband's solicitors a letter saying that the judge had asked them to record the following:

> "The draft minutes of consent was referred to Deputy District Judge Berry for consideration. The judge has not approved the order and had made the following comments, 'It is far from clear what the net effect will be of this proposed order, nor is it clear that it is reasonable to dismiss the respondent's claim for periodical payments in view of the large disparity between the parties' incomes. What is the rationale behind the terms of the order?'"

4. It now seems established, and indeed accepted, that that letter was sent by the Court Service to the husband's legal team, but was not sent by the Court Service to the wife. It also is now

clear that the husband's solicitors did not send a copy of the letter to the wife. The husband's solicitors responded to the court on 31 January setting out the net effect of the order and what they claimed was the rationale behind it. Again, it seems established and clear that that letter from the husband's solicitors to the court was not copied, either by the court or by those solicitors, to the wife. A further letter was then sent by the husband's solicitors to the court in similar terms, and this was copied to the wife. In short, the letter explained that notwithstanding the absence of formal periodical payments in the consent order, the husband was making additional financial payments to support the wife, and in particular the mortgage debt which were in part equivalent to periodical payments. The matter progressed in that the terms of the consent order were discussed further between the husband and wife and a final version of it, or final at that stage at least, was signed on 17 February 2014. The wife also signed a document setting out waivers in terms of explaining the legal advice that she had had and the basis upon which she intended the case to proceed. Part of that document reads as follows:

> "Although there is a discrepancy in the parties' incomes, the petitioner has committed himself to a long term payment plan to enable the parties to achieve their objectives. He is currently paying the mortgage on the respondent's property. The increased mortgage on the former matrimonial home, which was re-mortgaged to release equity for the respondent, plus monthly instalments of £2,500 per month. Although the respondent has no income now, she does anticipate being able to generate an income through her company, Bruzas & Co, which will enable her to support herself financially. In the past she has been able to pay herself an income of £1,000 per annum. The respondent acknowledges that as a result of the monthly instalments being paid to her by the petitioner, together with the monthly mortgage payments being paid upon the former matrimonial home and the property held in trust for her, the petitioner is unable to make any further payments to the respondent in the form of maintenance or otherwise".

5. On the basis of that document and the letters that had been sent to Deputy District Judge Berry by the husband's solicitors, the second of which, dated 24 February 2014, had been copied to the wife by email, the judge was prepared to approve the consent order without a hearing, and that was the order that was made on 27 March 2014. In the subsequent proceedings which were conducted before Parker J, the wife challenged the authenticity of the signed consent order and waiver. She claimed that the signature purporting to be hers on those documents was not made by her. Parker J, having heard evidence, found as a fact, as I shall set out in

more detail in due course, that the wife had, contrary to her case, willingly signed those two documents.

6. Further discussions took place between the parties as to the working out of the order during the ensuing year or so. However, on 20 February 2016 the wife made an application to set aside the order on the basis of an alleged failure by the husband to make proper disclosure of his financial circumstances. That application was met by one from the husband two months later applying to strike out the wife's application. Both applications came on for a preliminary directions hearing before District Judge Gibbons on 28 April 2016, that hearing is unremarkable in terms of the outcome, which was to make directions. However, Mr Philip Marshall QC for the husband before this court points to it as providing evidence through the transcript of the hearing as to the fact that the letter from Deputy District Judge Berry, sent on 28 January 2014, was referred to during the hearing and a copy was handed to direct access counsel then acting for the wife. Be that as it may, the matter proceeded and there was a substantive hearing on three days in early February 2017 before Parker J. Judgment was given on 9 March 2017, in which the judge refused the husband's application to strike the wife's application out, but adjourned the wife's application to be heard in due course, albeit on a limited and focused basis.

7. On 8 March 2017, that is the eve of the day on which judgment was in fact handed down by the judge, Parker J received an unsolicited email sent anonymously to the court. The email was itself not a full transcription, but it purported to be an exchange between the solicitor then acting for the husband and counsel then instructed for the husband on the early evening following the first day of the hearing before Parker J. The unredacted content of the email from the solicitor is in these terms:

> "The only relevant points really were… (B) the letter from DJ Berry. …I do not think Jo [the wife] ever saw the letter from DJ Berry – I did not want to discuss it in front of Tim (the husband), given that he is still sworn in, but I distinctly recall at the time that he did not want Jo to see it".

Counsel then replies a short time later by email to the solicitor:

> "I agree with everything you say, although I do not think I can mislead the court if directly asked whether she saw the letter… However, it must be that she knew about the letter, otherwise why would she sign that waiver in February? I just fear if it is does come to light that he withheld it, then the judge might take a bit of a dim view".

8. Parker J informed the parties, quite rightly and sensibly, of the unsolicited and anonymous

transmission of these redacted emails, and they obviously formed part of the evidence at the substantive hearing which was conducted before her on three days in early December 2017. The issues at that hearing were twofold, partly concerning the disclosure of assets by the husband, which I do not need to turn to, and partly determining the impact, if anything, of the fact, as it was established, that the wife did not know that Deputy District Judge Berry had caused a letter to be written at all at the time it was written, and secondly, the impact of the email correspondence. It is necessary to make sense of the current application to set out some of Parker J's judgment which was given on 11 December 2017.

9. Having established the background with respect to the letter, the judge at paragraph 20 onwards turns to the detail. Part of the evidence before the judge involved oral evidence from both the husband and his then solicitor as to what they did or did not do or say three years earlier at the time that the consent order was made. Paragraph 20 reads as follows:

> "Mr Saxton told me that at some point he saw Ms Bruzas, and again they renegotiated the terms. This involved a significant benefit by way of a payment to be made directly to the wife, as opposed to a payment intended to reduce the mortgage secured against (the property) not to paid until the consent order had been approved, but that does not strike me as a matter of materiality. Therefore, the wife would have received an additional sum of £60,000 directly to her. Mr Saxton's recollection is not clear either as to what was said. He told me that he had informed Ms Bruzas of the contents of the letter emanating from Deputy District Judge Berry. He was unable to make it clear to me whether or not he had shown her the letter – at one moment he thought that he probably had, at the next he was not so clear – nor that he had specifically said to her that the court had expressed its concern about the termination of periodical payments. The wife's case at the time, as expressed in at least one letter to the court, was that although she had been unable to operate the business, a recruitment consultancy, Bruzas & Co, which was presently in abends, she was expecting, since her health had now recovered, to be able to rejuvenate this business and shortly to generate an income for herself of £100,000 per annum. The wife says (and it is not contended otherwise) that during the marriage she had been rather successful and had generated a significant income, certainly at one stage, being at that point the major contributor to the marriage. The important point about this aspect of the evidence is that she was confident that she would be able to maintain or to reinstate this income.
>
> 21. I accept that there is nothing frankly inconsistent with what the husband told me on the last occasion, and told me on Friday, as to what had happened in respect of the District Judge Berry letter. He

> told me (and this does not strike me as unremarkable) that he has reflected and tried to recollect in more detail what happened since this letter first became the focus of attention at the February/March hearing, and that his recollection is now somewhat better. I am left, however, with some unclarity as to precisely what it was that the wife knew about this letter. The issue, of course, also arises as to whether it would have made any difference had she been shown it".

10. The judge then refers to the redacted emails which I have already quoted, and deals with the question of whether or not these might be covered by legal professional privilege, and the judge records as follows, paragraph 25:

> "By the morning of the second day Mr Marshall told me that there were interesting and complex arguments with regard to privilege, but nonetheless he and his team had taken the view that the pragmatic way to deal with this was for me to formally admit this document".

11. Pausing there, in the course of the present application, the applicant wife has submitted that the legal professional privilege covering the redacted email correspondence was dealt with in a different way. She asserts that Parker J dismissed the claim for legal professional privilege and the document came into the court proceedings in the full and ordinary way. However, having been given a chance to do so, she was unable to take me to any ruling by Parker J to that effect. My reading of the judgment of the judge is that the only reference to the possibility of legal professional privilege attaching to these internal email messages, which on their face must attract legal professional privilege, is that given at paragraph 25 in recording Mr Marshall's 'pragmatic' approach. Indeed, Mr Marshall in response has taken the court to the two occasions which he says are the only two occasions in the transcript of the hearing before Parker J where that topic is mentioned, and on neither occasion is anything said that takes the matter any further than the judge's summary of it at paragraph 25. I must therefore proceed on the basis that legal professional privilege for those emails was not waived or set aside during the hearing before Parker J.

12. Paragraph 25 continues:

> "Mr Webb (the husband's solicitor) explained to me as follows, the email was written from his handheld device, or perhaps a tablet on the train at the end of a busy day. The passage which is recorded, as to the husband not wanting the wife to see the letter, is his recollection at the time, and that what he said at the time, that he was able to 'distinctly recall' he thought now was incorrect. He had looked at his records and he was certain that they[?] had not given Mr Saxton advice that the wife should not be shown this

> letter. I am not helped in this aspect of the case by not knowing in what circumstances a 'whistle-blower', assuming this to be in Mr Webb's firm, as I think it must be, came to pass on this information to me and for the wife. However, on what I have been told, it would be a very strong thing for me to find that I have been misled by a solicitor of the Supreme Court with a significant number of years of experience under his belt. Although the explanation is not a very comfortable one, I do not feel able to reject it. I also have to ask myself the question, would the husband have known at the time that the query with regard to periodical payments was something which might or ought to cause her some concern before she entered into this agreement? I have already referred to the fact that the wife was referred to having received legal advice from several firms of solicitors over the year that this litigation has been continuing, although she told me that at the time in question she had only had one hour's free consultation with a firm with whom she had no previous relationship and no subsequent relationship either".

Therefore, in terms of a key passage in the redacted emails, to the effect that the solicitor stated in the email, 'I distinctly recall at the time that he (the husband) did not want Jo (the wife) to see it (the DDJ Berry letter),' Parker J's finding was that she accepted that that was not a correct statement of the position.

13. The judgment moves on, refers to the waiver document and to the wife's case about that. At paragraph 28 the judgment continues:

> "The precursor to this was that in response to District Judge Berry's letter of 28 January, the husband's solicitors had written to the Principal Registry, without copying the documents in to the wife, in which a similar presentation was set out. Notwithstanding that that letter was not copied in to the wife, Mr Marshall submits that it is highly material that the second letter, dated 24 February 2014, to the court, which contained exactly the same information, was copied in to her by email. She therefore would have had every opportunity to write to the Principal Registry to disavow what was said, in particular in relation to periodical payments.
>
> 29. I remind myself that the question asked by District Judge Berry in 28 January letter was the rationale behind the terms of the order, and whether it was reasonable to dismiss the wife's claims in the light of the disparity between the parties' incomes, and that in all the documentation to which I have referred the wife had agreed with the husband that her intention was to revitalise her business with the expectation of a substantial income. It is the wife's case that had she seen that letter she might have taken a different view as to whether or not she should sign up to the order. That is a point which has troubled me greatly during the course of this case, but I need to set that also in the context of the other evidence and submissions which the wife has given to me as to why she says this

> order should be set aside, particularly with a view to providing income/a pension for her".

Before moving on, it is right to record that the wife's case, as stated by Parker J in the middle of paragraph 29, is precisely the case that she puts before this court today. In a nutshell she says,

> "I was not given the opportunity to consider the position on periodical payments in the light of the fact that a judge had asked for the rationale to support the absence of a periodical payments provision in the order, notwithstanding the apparent disparity of income between the parties".

14. Returning to the judgment of Parker J, with two further short extracts, the judge at paragraph 31 turned to the question of whether the wife did indeed sign the waiver.

> "Certainly, the wife says she did not sign a waiver. I have referred to the one of 28 February, she denied that was her signature or that she had ever described herself as Joanne Saxton, as opposed to Joanne Bruzas. The wife's evidence as to when she had first seen this document and realised that it was not her document was not clear nor consistent, and she could not explain why she had not made it clear to me at the previous hearing that she disavowed this document. I have referred to the statement of information for a consent order that is signed with what looks like, even in the photocopy, an identical signature, and it is Joanne Saxton, not Bruzas. She again disavows that document, she takes the point also that the date was filled in in the husband's hand, not in hers, that latter point seems to me of no materiality whatsoever if the parties were together, as the husband says, and this is not suggested to be untrue, when they signed this document".

Omitting paragraph 32, paragraph 33:

> "Those misunderstandings and misrepresentations caused me to have some doubt as to the accuracy of the wife's recollection as to what happened at the time when these agreements were negotiated. I said in my earlier judgment that I had no reason to disbelieve the wife when she said that she had not seen the District Judge Berry letter; I do not think she did, it was certainly not sent to her by the court. Having heard the husband's evidence and having seen how that resulted in the change of the provision made by the order, I have come to the conclusion that something must have happened to cause there to be further movement on the husband's side. On the one hand, £60,000 is not much compensation for the lack of periodical payments. On the other, against the wife's confident representation and belief at the time, which I am satisfied she had, she had an income capacity of £100,000 per year, £60,000 is perhaps not so nugatory, but furthermore, I need to remind myself again that District Judge Berry's did not say that these terms were

> unconscionable in any event. The letter simply asked for an explanation and a rationale as to why the wife would be prepared to give up her claims, and the documents, which I am satisfied that the wife signed, and signed willingly at the time, were sufficient to satisfy him, as indeed he was satisfied".

15. Therefore, Parker J's primary conclusion about the underlying soundness of the process leading to the consent order was favourable to the husband's case and against that of the wife. The judge, having dealt with the other aspects of the case which do not concern this application today, returned to the matters in conclusion at paragraphs 40 and 42:

> "40. As I have said, I have considerable sympathy for the wife, who plainly struggles with her current difficulties. However, I need to adopt a principled and clear approach, rather than allowing my sympathies to dictate the results in this case. I have come to the conclusion, notwithstanding my concerns, particularly about the letter from the court, that the wife has not satisfied me that had she been aware of this letter this would have caused her to think twice about the provision that was to be made. As I have already said more than once, the effect of the letter from the court was not to say that this order should not be made, only that the court needed the information upon which it would be".

Then 42:

> "In those circumstances, I have come to the conclusion that this is a case very familiar in this area of litigation where the wife has, for understandable reasons, come to the conclusion that she has had a bad deal from the financial remedy order made. That she has thought better of it and has in her own mind reworked the events so as to justify her application. Furthermore, as I am satisfied that there was no intention deliberately to mislead this court, I have to bear in mind as well that the husband has made provision for the wife to a not insignificant extent over the years. I am satisfied that the husband's agreement to make further provision for her has not been out of a guilty conscious, but out of a wish to avoid this type of litigation. I have come to the conclusions accordingly that I must dismiss the application to set aside the consent order".

16. That was where matters lay as at 11 December. However, as the judge recorded herself in a subsequent judgment, the whistle-blower who had delivered the first tranche of documentation, namely the redacted emails, once again sent documentation to the court. On this occasion it was in the form of a letter to which was attached a statement, purportedly dated 11 December 2017, running to some 16 pages and giving an account of substantial concerns as to the conduct of not only the husband and his solicitor in relation to this case, but also another member of the same solicitors' firm in relation to a wholly different piece of

litigation. The author of the document is identified. I am not going to name her; she was a junior employee in the litigation department of the firm of solicitors acting for the husband at the time of the February 2017 hearings before Parker J. The judge, having received that material, of her own motion and without a hearing sent it to each of the two parties. Pausing there, criticism is made of the judge's decision to take that step by Mr Marshall, he submits that it would be appropriate for a judge in circumstances such as this to alert the parties to the fact that the court had received a communication of this sort, and then set up an inter parties hearing at which both sides could make submissions to the court as to what, if anything, should be done in the light of that development, before disclosing material to one or other party that did not otherwise have that material. Mr Marshall's caution is well placed. It would be much more prudent for judges to approach an issue of this sort in a careful staged manner, rather than simply sending the material to the two parties without allowing for submissions from each side.

17. In the event, as we established at the first inter parties hearing before me of this application in early October, there is common ground that that step having been taken, it now is necessary for this court to engage in assessing the new material to decide, first of all, whether it is material to which legal professional privilege attaches. If so, whether there is any exception from the ordinary course of events which would mean that that was not disclosable within the proceedings or to the other party. Thirdly, whether, in any event, it justifies granting the wife's application to reopen the proceedings that had been closed down by Parker J's order. In my view, expressed at the October hearing and I think accepted by both sides, if there has been any damage done by the judge's decision to send this controversial material to the wife, that can be addressed either with the decision which decides that it should not have been withheld in any event and that it was disclosable, and in which case it can be used. Or, if it is not disclosable, by orders requiring it to be returned, if necessary supported by an injunction. Also, as the wife is plain before this court, it is only the basis of this new material that gives her the ground for the application to reopen the decision of Parker J. If the material does not justify the application to reopen, there is no other basis upon which it could proceed, and no proceedings therefore within which this disclosed material could be used.

18. On 22 February 2018, the inter parties hearing before Parker J took place. At that hearing the father's application was for the judge to recuse herself from any further involvement in the proceedings. Having heard submissions, that was an outcome with which the judge agreed. Therefore, the case was removed from her list, it came before Holman J on 21 June 2018 on

the basis that he, at that hearing, was to give directions but not to see the controversial material. Holman J considered that the case potentially raised important matters relating to legal professional privilege and that those were apt to be determined by the President of the Family Division, and thus it was that the case came into my list. The issue before me therefore relates to this material and its place in the application that is made by the wife to set aside Parker J's order. If the wife is successful before me today, and it is my conclusion that in the light of the material there are grounds for her application to proceed, then it is accepted that the application would proceed before another judge. My understanding also is that it is agreed that if the disclosure application is unsuccessful, there being no other grounds for setting aside Parker J's order, the application to set aside would fall to be dismissed.

19. What is the new material? It is a narrative account given by the junior employee in the litigation department of the firm then acting for the husband. The early part of the account fleshes out that person's knowledge of the circumstances around the time that the two redacted emails were drawn. I am not going to quote from the whole document, in particular the statement records that at the end of the first day of hearing, after the husband and the solicitor had departed, the author was in the company of the husband's counsel alone, during which time counsel said this, 'Bloody D (solicitor) just told me that he did not send Jo (the wife) the DJ letter and now he is off skiing and leaving me to deal with it. Thanks D!' The statement goes on to explain how that junior employee gained access to the emails and came to send them to the court. She quotes the terms of the emails, she quotes certain parts of the hearing before Parker J, in particular part of the hearing where the judge asks counsel for the husband, 'Was the wife told that DJ Berry had questioned spousal maintenance? Was she given the letter?' To which counsel for the husband replied, 'I will have to take instructions'. The statement from the whistle-blower continues and explains that the case then moved on and counsel for the husband was never required to respond to the judge's question at a later stage.

20. The statement says, and this is the narrative of the whistle-blower herself, 'Ms J (counsel), Mr W (solicitor), and the husband knew full well that Mr W, on the instructions of the husband, had not sent the wife the letter'. A commentary by the whistle-blower is that counsel 'fudged her answer' to the judge, thereby denying the judge a clear account at that time of whether or not the wife had had a copy of DDJ Berry's letter. The statement goes on to explain that, at a subsequent hearing during the same stage, namely February 2017, the whistle-blower covertly tape-recorded conversations between the husband, his solicitor, and

counsel. She explains that she no longer has the transcript, but she says this in her statement, 'If you see a copy of the transcript of this recording you will appreciate that it is damning for as far as Mr W and Ms J are concerned. They make reference to the fact that High Court Judge Parker was concerned about the letter and Ms J said, "I think I dealt with it, I think I covered it, did I not, without saying, because what I cannot say is she had seen the letter"'. About a week later, on 13 September, the author of the statement explains that she was attending court on another matter with the husband's solicitor. Whilst travelling on the bus she reports the following conversation:

> "(The solicitor) brought up the District Judge Berry letter, he explained that a letter had been sent from District Judge Berry which raised concerns that the wife may be due spousal maintenance. He said he had intentionally not sent the letter on to her. He said he was now worried about this because it may jeopardise the case and he would be in trouble. He said that (the wife) had realised the importance of the letter and she had been emailing him about it, but that he was ignoring her".

21. The statement, as I have indicated, then goes on to deal with a second and completely unrelated matter which concerned the author. The statement, as I understand it, was compiled by its author for proceedings before the Solicitors' Complaints Board, or some other similar internal regulatory process, and that in part accounts for the wider range focus of that document.

22. The hearing today, which was set up following the earlier hearing before me in October, has been to consider the following headline questions, firstly, whether the content of this new statement from the 'whistle-blower' is covered by legal professional privilege. Secondly, if it is, do the circumstances and the content of that statement amount to grounds for setting aside any legal professional privilege, or holding that this material does not in fact attract legal professional privilege because, on either basis, it is evidence of fraud or more widely based 'iniquity'. Thirdly, if, as a result of considering the first two questions, the material is potentially disclosable, what, if anything, in it is new, and is there a basis for granting the wife's application which is for the full hearing of her application to set aside to proceed?

23. Taking matters in turn, I have been assisted by Mr Marshall on behalf of the husband who has provided an account of the underlying law relating to legal professional privilege, but I wish to record I have also been greatly assisted by the submissions that the wife has been able to make as a litigant in person. She is, as Parker J found, having being exposed to her as a litigant over the course of, in total, some six or more days, an intelligent individual who,

despite her lack of legal qualification, has some understanding of the legal issues in this case. She therefore accepts, as I think is the position, that if other things were equal everything in the whistle-blower's statement, which is an account by that person of conversations and documents that she has seen as a member of the husband's legal team, would normally attract legal professional privilege. Indeed, really the document speaks for itself in that regard. She however submits that legal professional privilege cannot be claimed when what is being described within the particular material amounts to iniquity or underhand activity, or fraudulent conduct. Equally, she says there must come a time when what is described provides evidence of a situation which is so unfair and unjust that it would be wrong for legal professional privilege to be asserted and thereby the deny the opportunity of another litigant, her in this case, to rely upon that material. She, if I may say so, in her own lay terms encapsulates what is recognised as an exception to the otherwise blanket application of legal professional privilege, and I will turn to the law in that respect in a bit more detail in a moment.

24. I pause simply to refer to one further legally based submission that the wife made, which was to refer to the Public Interest Disclosure Act 1998, which introduced a new part, part 4A, into the Employment Rights Act 1996, designed to protect certain disclosures. In lay terms it is designed to protect whistle-blowers in the context of employment law. Having looked at that statute in very short terms, one can understand the public policy behind it in the context in which it operates. However, in my view it adds nothing to the issues that I have to determine in this application today. Certainly, my approach to the material is not coloured in any way by the fact that it comes from a 'whistle-blower'. The professional position of that individual, her courage or otherwise in acting as she did, are not matters for me. I have focused entirely on what she says, not why she says it or how she comes to say it. The focus for me is these proceedings between this husband and this wife, and whether there is evidence of fraudulent or iniquitous behaviour by the husband and his legal team which justifies, (A), releasing this material into the Family Court to be used as part of the wife's application and, (B), in round terms, whether it actually adds anything new to the material that was before Parker J.

25. Having made that reference, it is right to observe that this application is not straightforward in the sense that I am not the first judge dealing with these issues for the first time. The ground that the wife now wishes to re-till was thoroughly covered in the hearings before Parker J, fuelled in part by the two redacted emails and the evidence that was given about the DDJ Berry letter and what the wife did or did not know about it at the time. The judge has

made findings which I have already set out about that, and those findings, whilst based on evidence that she heard, stand as the baseline from which I must now operate. There has not been an abandonment of the legal professional privilege that would attach to the emails that came before the judge, those emails have nevertheless been thoroughly considered by a High Court Judge. The question for me at the end of the day in this case may be to look in real terms as to what, if anything, the new whistle-blower's material actually adds to the evidential picture as it came to be settled before Parker J.

26. I turn therefore, briefly, to the fraud/iniquity exception and to the case law as to legal professional privilege. I say briefly because there is no debate between the two sides as to its existence, or to the importance of it. The skeleton of Mr Marshall accepts that there is an exception and he also accepts a point made by the wife in her note relying upon the Victorian case of *R v Cox and Railton* [1884] 14 QBD 153, to the effect that this 'exception' is not strictly an exception. It is authority for the proposition that fraud cuts through legal professional privilege, and legal professional privilege simply does not apply to material which is evidence of fraud and iniquity. In the context of family proceedings, Munby J, as he then was, in the case of *C v C (Privilege)* [2005] EWHC 336 (Fam) reviewed the law as to what he called the 'fraud' exception. He held, as other judges have before him and since, that it is not narrowly defined within what would normally be cast as either criminal or civil 'fraud'. However, it encompasses, again I quote from an earlier case, 'All forms of fraud and dishonesty, such as fraudulent breach of trust, fraudulent conspiracy, trickery, and sham contrivances'. It is to be construed in a wide context. A further quote relied upon by Munby J comes from the decision of *Barclays Bank Plc v Eustice* [1995] 1 WLR 1238, where Goff LJ said at page 1249:

> "The court must in every case, of course, be satisfied that what is prima facie proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards, and must bear in mind that legal professional privilege is a very necessary thing and it is not likely to be overthrown, but on the other hand, the interests of victims of fraud must not be overlooked. Each case depends on its own facts".

27. Mr Marshall draws particular attention to that extract, endorsed expressly as it was by Munby J, in response to the wife's criticisms of the husband's counsel in keeping her answers to Parker J's questions as to the DDJ Berry letter opaque, namely that she would 'take instructions' and then not returning to the matter in express terms. Although, as the emails and the recent statement from the whistle-blower evidence demonstrate, counsel had been

told that the wife had not been given a copy of the letter. Mr Marshall submits that that might be thought to be careful advocacy designed to keep private that which was not in her client's interest to disclose. He submits that that falls on the side of the line drawn by Goff LJ, which would not justify breaching what would otherwise be legal professional privilege.

28. A more recent case is a decision in another context, *BBGP Managing General Partner Ltd v Babcock and Brown Global Partners* [2011] Chancery 296, where Morris J once again summarised the various authorities and said this in the latter part of paragraph 62:

> "In each of these cases the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature, where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy".

29. What is needed, as these authorities indicate, is a strong prima facie case established by the wife that has some foundation in fact that there are solid grounds for holding that there has been fraud (in the wide context that I have described) in the conduct of the husband and his legal team with respect to this letter from District Judge Berry. In her submissions the wife is plain that, looked at together with the material that was before Parker J, including in particular she would say the oral testimony, the picture is clear. She points to a number of aspects of that material, she points to various stages in the witness statements and the transcripts where the husband, and separately the solicitor, gave differing accounts as to what they understood the position to be in terms of the wife's knowledge of Deputy District Judge Berry's letter. She points to the actions of the husband's counsel during the hearing, which I have already dealt with. She points to the statement from the whistle-blower with the account given there to the effect, in the whistle-blower's view, that all three, counsel, solicitor, and husband, 'Knew full well that (the solicitor), on the instructions of the husband, had not sent the wife the letter'.

30. Pausing there, all of the material that I have just summarised was before Parker J, that is what the hearing before Parker J on this point was all about. The question of whether or not the solicitor had acted 'on the instructions of the husband' arises entirely from the content of the redacted email. The whistle-blower does not point to any further or new occasion when the whistle-blower heard or read an account given by the husband, the solicitor, or the barrister, which indicated that there had been instructions from the husband as to the letter and that it should not be sent to the wife. As I have indicated already, Parker J grappled with that issue

head on and concluded that the solicitor's account should be accepted and that the email, insofar as it asserted the contrary, was not correct. The case that the wife has to mount before this court is to point to additional material which shows that, when added to what Parker J had, the balance is tipped or might be tipped in favour of a more adverse finding against the husband and his legal team.

31. Having been through the whistle-blower's statement, the only two elements of this narrative which are 'new' in that respect are as follows, firstly, the account in the transcription of the covert recording of counsel saying, 'I think I dealt with it, I think I covered it, did I not, without saying, because what I cannot say is that she had seen the letter'. During the course of this hearing, unexpectedly, Mr Marshall volunteered not only a transcript of this section of covert recording, but also the opportunity for the court and the wife to listen to the digital recording, which sits either on a memory stick and/or on a mobile phone. He expressly did not waive legal professional privilege with respect to that material, but it was received into court on the basis that the both the wife and I would read and listen to the recording. Unfortunately, it has not been possible for me to listen to the recording, but I have read the transcript; the wife has done both. The wife's case is that in addition to what the whistle-blower records in the statement, which I have reread, the transcript as a whole is one which establishes a context of conspiracy where the three, and the three present were the husband, the solicitor, and the barrister, are engaged in a cover up in order to prevent the judge understanding that the letter was deliberately kept from the wife.

32. I am afraid I have read the transcript a number of times during the luncheon adjournment and the further recent short adjournment, earlier on this afternoon, and I just do not read the transcript in this way. This is no more than an ordinary conversation about litigation between the lawyers and their client, in which they postulate about what was going on with the other side and what might or might not be in the judge's mind. It falls a long way, it falls a very long way, short of establishing the context that the wife now argues for, or a context which would lift this case into the realms of iniquity and fraud. Similarly, the precise quotation made by the whistle-blower of what the barrister said is no more than the barrister explaining that in the forensic context of adversarial litigation she responded to the judge without having to say that the wife had seen the letter.

33. Pausing there, and raising one's view higher than the words in the transcript and the words in the whistle-blower's statement, Parker J found that the wife had not seen the letter. The judge concluded that it was not proved that that was as a result of a deliberate cynical and

manipulative tactic by the solicitor. It is a finding of that level that the wife would really need to be able to indicate was available before this 'exception' to legal professional privilege would be established. It is one thing to say that she did not get a letter, which she plainly did not get, it is another to say that she, in some way, was put in that position as a result of a conspiracy in order to keep her in the dark. The evidence that I have now seen, in addition to what was before Parker J, on that point in terms of this covert transcript does not take the matter any further.

34. The only other 'new' material is towards the end of the statement where the conversation on the bus takes place, and the solicitor is recorded as saying, 'He said he had intentionally not sent the letter on to her'. It goes on to say he is now worried that this may have an impact on the case. Parker J knew that the solicitor had not sent the letter, and the solicitor gave an account of deliberately not doing that because he understood the court was sending the letter on. In my view, put very simply and I do not think it is any more complicated than that, this new insight from a conversation on the bus or on the bus really does not take the case any further than the other material to which I have referred. It is also a long way short of establishing that this is a malevolent, fraudulent, iniquitous step taken by the solicitor to cut the wife out of this material. This was, as I have already said, the ground over which Parker J ranged very thoroughly and clearly. In her response to Mr Marshall's submissions, the wife, in my view, rightly said that Mr Marshall had been wrong to focus on the redacted email because the redacted email is not, as she put it, what we are here to discuss. She stressed that her case was based on the new evidence. Whilst it is understandable that Mr Marshall and, indeed, I have gone back to Parker J's findings because, as I have indicated, those provide the baseline for me to determine this application, it is right that the wife's case before this court today must rest upon the new material.

35. Having summarised matters as I have, I make two plain conclusions. The first is that this new material falls well short of being capable of establishing fraud or iniquity that would justify overriding or ignoring the legal professional privilege which otherwise would attach to all that the whistle-blower's statement describes. Secondly, and in any event, even if it did, this material does not take the wife's case any further than it could have been taken before Parker J. These matters have been litigated to the full already, this new material, coming in a different format, arriving in a somewhat sensational manner to the judge, in reality does not change the picture significantly, certainly sufficiently significantly to justify reopening these matters.

36. I therefore refuse the application for the whistle-blower's statement to be admitted as evidence into these proceedings. As a result, there is no new evidence upon which the wife now relies in support of her application. Secondly, as I have indicated, the application itself, is in reality no more than an attempt to reargue the same material as it was before Parker J. I therefore now summarily refuse the application to set aside and reopen the order of Parker J. I remind myself that the application issued on 27 June, which is the application I am determining, was pitched at a very high level. It asserted 'perjury and perverting the course of justice' by the husband and his legal team. For the reasons I have given that application must fail, I therefore the refuse the wife's applications on that basis.

End of Judgment

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