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High Court of Justice (Family Division)
Mr Justice Munby

Neutral citation: [2006] EWHC 336 (Fam)

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Hearing: 21 February 2006
Judgment: 28 February 2006

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Legal professional privilege; solicitors' papers; registered conveyancing; matrimonial property; allegations of fraud or dishonest conduct on part of spouse; particularisation; injunction; ancillary relief proceedings; Anstalt; joinder of parties

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There were ongoing ancillary relief proceedings between the claimant wife (W) and respondent husband (H). W applied *ex parte* seeking a worldwide freezing injunction on the basis that H was about to make an improper disposition behind her back of two properties (including the matrimonial home) which were held by a Liechtenstein *Anstalt* and subject to a charge or mortgage in favour of Citibank. The order was granted, and contained a provision giving W permission to notify, *inter alia*, the *Anstalt*, Citibank and the purchaser's solicitors of the terms of the order.

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The *Anstalt* and Citibank opposed the order, complaining that it would prevent completion of the sale of the properties to which the *Anstalt* had agreed under pressure from Citibank, which had a possession order in relation to both properties that had been postponed to give the *Anstalt* a final opportunity to sell. The *Anstalt's* case was that it had taken steps to market the properties in order to avoid a forced sale at a much lower price. It asserted that the sale was an arm's-length transaction, where there had been rival bidders, and that it had obtained a price substantially in excess of that at which the properties had been valued 18 months earlier.

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The order was varied to permit immediate completion of the contract for sale of the properties on terms that the proceeds of sale, after payment of the monies owing to Citibank, were to be held in a joint account in the names of W and the *Anstalt's* solicitors. Completion subsequently took place. W then applied for an order that representatives of the *Anstalt's* conveyancing solicitors (X), and the purchaser's solicitors (Y), attend an inspection appointment to produce their respective conveyancing files. Orders were made that the *Anstalt* be joined as a respondent, and that a representative of X attend an inspection appointment. No order was made in relation to Y. The order was made without prejudice to any arguments that X and/or the *Anstalt* might wish to raise in respect of legal professional privilege, issues of Liechtenstein law or otherwise.

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In the event, the only point that was raised in opposition to the production of the files was that of legal professional privilege. X wrote to W's solicitors, making it clear that the *Anstalt*, was not waiving legal professional privilege. W's solicitors responded, disputing that 'the mechanical disposal of registered land' supplied a 'relevant legal context', ie disputing that there could be any privilege at all in a conveyancing file. They also referred to the principle that privilege may be forfeited if advice is given in pursuance of a fraudulent design, saying that:

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'At the relevant time [H] was acting secretly with the intention of defeating [W's] claims. We therefore make it clear that even if legal advice privilege is established in relation to any document we reserve the right to argue that it should be forfeited under these exceptions.'

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X then wrote W's solicitors formally claiming privilege.

Held (establishing the *Anstalt's* claim to privilege - para [69])

1. There was a relevant legal context in which to claim privilege. It was obvious that X were being retained to act, as lawyers, in a 'relevant legal context'. It followed that the *Anstalt* was, on the face of it, entitled to claim privilege in the relevant parts of the conveyancing file, ie those parts of it being or recording X's dealings with the *Anstalt* (their client) as opposed to those parts being or recording their dealings with Y or other third parties (paras [16], [33]).

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The system of registered conveyancing was in many respects much simpler than the traditional system, but the sale and purchase even of registered land was, of its very nature, infinitely more technical and complex, and more demanding of professional assistance than the sale and purchase of a tin of peas or the sale and purchase of a car. A solicitor was instructed in a conveyancing transaction because - whatever other reasons there may also be - the client required the technical skill and advice which comes from someone with legal expertise. Moreover, had X been negligent in the transaction, they could not even hope to defend the inevitable proceedings by denying that they owed the normal duty of care as a careful and competent solicitor.

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2. There were no circumstances to justify going behind the claim of privilege. W failed to make good her claim to go behind the *Anstalt's* privilege on the ground of 'fraud' (para [68]).

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The allegation that the circumstances were such as to open up the privilege had to be made in 'clear and definite terms'. There was no clear and definite allegation to be found anywhere on paper, apart from the bald and unparticularised statement in W's solicitors' letter. Indeed, it was not even clear whether W was making any (and, if so, what) allegation of 'fraud' against the *Anstalt* as opposed to H. That was not to suggest that elaborate pleadings were called for. The relevant allegations could perfectly properly (at least in the Family Division where there were no pleadings) be set out in an affidavit, witness statement or other suitable document. But where the allegation was of 'fraud', those against whom the allegation was mounted were

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A entitled to have the allegation set out clearly and definitely in writing. At a minimum, there had to be a succinct statement identifying clearly what the allegation was and the person or persons against whom it was being made with sufficient detail to enable them to identify the essential elements in the allegation and why it was being said that the 'fraud' exception applied (paras [61]-[62]).

B The court would not look at the documents before deciding whether they were privileged. The power the court had to examine the documents should be exercised very sparingly. Privilege was, in principle, absolute. Too ready a judicial willingness to exercise the power to inspect would put at risk the vitally important public policy on which the very principle of privilege was founded and would tend to water down the salutary protections against the too ready ousting of privilege which are afforded by the stringent requirements that:

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D '... the plaintiff must... go at any rate so far as to satisfy the Court that his allegations of fraud are not merely the bold assertions of a reckless pleader, but are such as to be regarded seriously as constituting *prima facie* a case of fraud resting on solid grounds.'

Those who could not meet that test should not be allowed to go on a fishing expedition - and it made no difference that it was the judge rather than the litigant who was casting the net and inspecting the catch (para [67]).

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Note

Unconditional leave to appeal this decision was granted by the Court of Appeal. However, the appeal was dismissed by consent as agreement had been reached between the parties by the time of the hearing. The approval of the order dismissing the appeal should not imply that the appeal would have been successful or unsuccessful (per Lord Phillips LC).

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Cases referred to

B v Auckland District Law Society [2003] 2 AC 736

Balabel v Air India [1988] Ch 317

G *Barclays Bank plc v Eustice* [1995] 1 WLR 1238

Bullivant v AG for Victoria [1901] AC 196

Buttes Gas & Oil Co v Hammer (No 3) [1981] QB 223

C v C [2005] EWHC 2741 (Fam)

Derby & Co Ltd v Weldon (No 7) [1990] 1 WLR 1156

Gamlen Chemical Co (UK) Ltd v Rochem Ltd (unreported, 7 December 1979)

H *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272

Kimber v Brookman Solicitors [2004] 2 FLR 221

O'Rourke v Darbishire [1920] AC 581

R v Cox (1884) 14 QBD 153

R v Derby Magistrates' Court, ex parte B [1996] AC 487

Three Rivers DC v Governor and Company of the Bank of England (No 6) [2004] QB 916 (CA); [2005] 1 AC 610 (HL)

Westminster Airways Ltd v Kuwait Oil Co Ltd [1951] 2 KB 134
Williams v Quebrada Railway Land & Copper Co [1895] 2 Ch 751

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Statutes referred to

Companies Act 1862, s164
Insolvency Act 1986, ss239, 423
Law of Property (Miscellaneous Provisions) Act 1989
Matrimonial Causes Act 1973, s37

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Statutory instruments referred to

Civil Procedure Rules 1998, SI 1998/3132
Family Proceedings Rules 1991, SI 1991/1247, r2.62
Rules of the Supreme Court 1965, SI 1965/1776

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Convention referred to

European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Art 8

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JUDGMENT

MR JUSTICE MUNBY:

[1] This is another preliminary skirmish in hotly contested ancillary relief proceedings in which I have already given one judgment – *C v C* [2005] EWHC 2741 (Fam).

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[2] Both applications relate to an expensive residential property in London which, according to the wife, was the former matrimonial home. There are in fact two properties, No 149 which was the matrimonial home and No 151, next door, which was being renovated. The registered proprietor of both properties – for both properties are registered at HM Land Registry – has at all material times been a Liechtenstein *Anstalt* which, according to the wife, is merely the husband's *alter ego*.

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[3] The wife issued her divorce petition on 21 November 2005. On the following day, she applied to me *ex parte* (without notice) seeking a worldwide freezing injunction. She claimed that the husband was about to make an improper disposition of the properties. She understood that the husband was on the point of completing a sale in relation to which contracts had already been exchanged. In the circumstances the wife's advisers took the view that there was no need to join the *Anstalt* as a party. They took the view that it would be sufficient if the injunction, although directed only against the husband, was served on the *Anstalt* and on the purchasers. It was known that the property was subject to a charge or mortgage in favour of Citibank. Accordingly, the freezing injunction I granted contained a provision giving the wife permission to notify certain persons, including the *Anstalt*, Citibank and the purchaser's solicitors, of the terms of the order by serving a copy of the order on them.

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[4] On 25 November 2005 both the *Anstalt* and Citibank appeared before me, complaining that the order I had made on 22 November 2005 would prevent the imminently due completion of the sale of the properties to which the *Anstalt* had agreed under pressure from Citibank.

A [5] The evidence filed on behalf of the *Anstalt*, and other evidence filed on behalf
of Citibank, revealed the following facts: that in March 1997 the properties had been
charged by the *Anstalt* to Citibank to secure certain sums advanced to the *Anstalt*;
that the wife had executed a letter waiving and postponing any interest she might
B have in the properties to Citibank's charge and agreeing forthwith to vacate the
properties on notice from Citibank should Citibank wish to realise its security; that
in September 2004 Citibank had served a final demand calling in the entire advance
(which by then stood at a little short of \$10m); that in October 2004 Citibank had
commenced proceedings in the County Court for possession of the properties; that
C after adjournments on 15 November 2004 and 7 June 2005 to enable the *Anstalt* to sell
No 151, Citibank had obtained a possession order in relation to both properties on
4 July 2005, possession being postponed until 3 October 2005 to give the *Anstalt* a
final opportunity to sell No 151; that on 15 August 2005 the *Anstalt's* conveyancing
solicitors, Messrs X, had informed Citibank that an offer had been accepted for the
purchase of both properties by Z and his wife in the sum of £30m; that on
D 29 September 2005 Citibank had agreed to extend its deadline for exchange of
contracts until 10 October 2005; that on 10 October 2005 that deadline had been
extended for a further day; that on 11 October 2005 contracts had been exchanged for
the sale of both properties to Z and his wife; and that completion had been due to
take place on 21 November 2005.

[6] The contract provided for:

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- (i) the sale of No 149 for £26.5m with completion of the sale on 21 November 2005
(completion had been held up, at first following a letter written by the wife's
solicitors to Z's solicitors, Messrs Y, on 21 November 2005 and then by the order
I had made on 22 November 2005);
 - F (ii) the grant by Z and his wife to the *Anstalt* of an assured shorthold tenancy of
No 149 for a term expiring on 1 August 2006 at a monthly rent of £21,667; and
 - G (iii) the grant of an option to Z and his wife to acquire No 151 on or before
31 December 2006 at a price of £5m.

H [7] As was pointed out to me during the hearing on 25 November 2005, in these
circumstances there would have been nothing to prevent Citibank at any time after
3 October 2005 taking actual possession of the properties and evicting the wife or
appointing a receiver to sell the properties. The *Anstalt's* case was that it had taken steps
to market the properties in order to avoid a forced sale by Citibank (or a receiver
appointed by Citibank) which would probably have achieved a much lower price. It
asserted that the sale was an arm's length transaction, where there had been a rival
bidder to Z and his wife, and that it had in the event obtained a price very substantially
in excess of the £16,725,000 at which the properties had been valued in March 2004.

[8] I varied the order made on 22 November 2005 so as to permit the immediate
completion of the contract for the sale of the properties. This was on terms that the

proceeds of sale, after payment of the monies owing to Citibank, were to be held in a joint account in the names of the wife's and the *Anstalt's* solicitors. I understand that completion has now taken place.

[9] On 1 December 2005 the wife applied for an order pursuant to *FPR 2.62* that representatives of the *Anstalt's* conveyancing solicitors, Messrs X, and of Z's solicitors, Messrs Y, attend an inspection appointment to produce in the case of Messrs X the conveyancing file in respect of the sale of the properties and in the case of Messrs Y the conveyancing file in respect of the purchase of the properties. That application came on for hearing before me on 18 January 2006 when, having made an order that the *Anstalt* be joined as a respondent to the proceedings, I made a further order that a representative of Messrs X attend an inspection appointment before me on 21 February 2006. I declined to make any such order in relation to Messrs Y. My order made explicitly clear that it was without prejudice to any arguments that Messrs X and/or the *Anstalt* might wish to raise in respect of legal professional privilege, issues of Liechtenstein law or otherwise.

[10] In the event the only point that has been raised in opposition to the production of the files is that of legal professional privilege.

[11] On 8 February 2006 Messrs X wrote to the wife's solicitors making it clear that their client, the *Anstalt*, was not waiving legal professional privilege. The wife's solicitors responded on 10 February 2006 disputing that what they called 'the mechanical disposal of registered land' supplies a 'relevant legal context' as that phrase was used by Lord Scott of Foscote in *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, at para [38] – in other words disputing that there could be any privilege at all in a conveyancing file. But they went further. Having referred to the principle that privilege may be forfeited if advice is given in pursuance of a fraudulent design, and referred also to the extension of that principle in *Kimber v Brookman Solicitors* [2004] 2 FLR 221, they said:

'At the relevant time Mr C was acting secretly with the intention of defeating our client's claims. We therefore make it clear that even if legal advice privilege is established in relation to any document we reserve the right to argue that it should be forfeited under these exceptions.'

[12] On 16 February 2006 the solicitors who have been acting for the *Anstalt* in connection with the matrimonial proceedings wrote to the wife's solicitors formally claiming privilege.

[13] The inspection appointment took place before me on 21 February 2006. The wife was represented as previously by Mrs Rebecca Carew Pole. The husband was represented by Mr Philip Rutter. The *Anstalt* was represented as previously by Mr Eason Rajah. Messrs X were represented by Mr Ian Cook. Mr Rutter and Mr Cook took no real part in the argument, Messrs X perfectly properly taking the view that since their client, the *Anstalt*, was separately represented their only role was to submit to act as the court might direct. Battle was accordingly joined between Mrs Carew Pole and Mr Rajah.

A [14] Mrs Carew Pole submitted that the claim of privilege had been formulated in imprecise and inadequate terms. She asserted that the claim should be rejected on that ground alone, alternatively that the *Anstalt* should be required to identify or particularise in greater detail the documents in relation to which privilege was being claimed. I reject both these submissions. The content and meaning of the claim

B for privilege was clear enough given the context, namely that what had to be produced was a conveyancing file. And in any event Mr Rajah told me on instructions that, if required, any defect in this respect could and would be cured by a claim of privilege formulated in indubitably sufficient terms. So far as concerned

C the claim for particularisation, Mr Rajah relied, and in my judgement correctly and appropriately relied, upon Vinelott J's rejection of a similar application in *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156 at 1176-1179.

[15] I turn therefore to the two main issues before me. Can privilege be claimed by the *Anstalt* in relation to the relevant parts of Messrs X's conveyancing file – that is, the parts relating to what has passed between the *Anstalt* and Messrs X? If so, can that privilege be set aside under the 'fraud' exception?

D [16] The first question is whether there was here a 'relevant legal context' in the sense in which that expression was used by Lord Scott of Foscote in *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, at para [38]. In my judgement there quite plainly was.

E [17] The convenient starting point is, I think, the judgment of Taylor LJ in *Balabel v Air India* [1988] Ch 317 at 330:

F '... the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as 'please advise me what I should do'. But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.'

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He added at 332:

‘... whether such documents are privileged or not must depend on whether they are part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate.’

[18] That approach was approved by the House of Lords in *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610. The point was put very clearly by Lord Carswell at para [111]:

‘... all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.’

[19] Lord Rodger of Earlsferry put the point even more succinctly at para [58]:

‘In relation to legal advice privilege what matters today remains the same as what mattered in the past: whether the lawyers are being asked *qua* lawyers to provide legal advice.’

[20] In *Balabel v Air India* [1988] Ch 317 at 331 Taylor LJ had added this important observation:

‘... to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide.’

[21] That also was endorsed by the House of Lords in *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610. As Lord Scott of Foscote said at para [38]:

‘This remark is, in my respectful opinion, plainly correct. If a solicitor becomes the client’s “man of business”, and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either

A under private law or under public law. If it does not, then, in my opinion,
legal advice privilege would not apply. If it does so relate then, in
my opinion, the judge should ask himself whether the communication
falls within the policy underlying the justification for legal advice privilege
in our law. Is the occasion on which the communication takes place and
B is the purpose for which it takes place such as to make it reasonable to
expect the privilege to apply? The criterion must, in my opinion, be an
objective one.'

[22] Earlier at para [34] Lord Scott of Foscote had described that policy as follows:

C '... it is necessary in our society, a society in which the restraining and
controlling framework is built upon a belief in the rule of law, that
communications between clients and lawyers, whereby the clients are
hoping for the assistance of the lawyers' legal skills in the management of
their (the clients') affairs, should be secure against the possibility of any
D scrutiny from others, whether the police, the executive, business
competitors, inquisitive busybodies or anyone else.'

[23] An earlier but equally authoritative statement of the policy underlying legal
professional privilege is to be found in the speech of Lord Taylor of Gosforth CJ in
E *R v Derby Magistrates' Court, ex parte B* [1996] AC 487 at 507-508:

F '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... it is not for the sake of the
applicant alone that the privilege must be upheld. It is in the wider interests
G of all those hereafter who might otherwise be deterred from telling the
whole truth to their solicitors.'

[24] In *B v Auckland District Law Society* [2003] 2 AC 736, Lord Millett twice
referred (at paras [47] and [54]) to the principle:

H '... that a lawyer must be able to give his client an absolute and unqualified
assurance that whatever the client tells him in confidence will never be
disclosed without his consent.'

[25] I should add that legal professional privilege is not merely a fundamental
principle of the English common law. It is also a principle of European Community

law and a right protected by Art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*: see *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272 at 288-291 for a discussion by Toulson J of the relevant authorities.

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[26] As a matter of first impression and, dare I say it, as a matter of common sense, it would seem obvious on this approach that privilege attaches to communications between a solicitor and his client (and vice versa) in the course of a conveyancing transaction in which the solicitor is retained by his client to act in that capacity. If authority is required, it is to be found, as Mr Rajah pointed out, in Taylor LJ's judgment in *Balabel v Air India* [1988] Ch 317 at 331:

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'... the "purpose of legal advice" test will result in most communications between solicitor and client in, for example, a conveyancing transaction being exempt from disclosure, either because they are privileged or because they are immaterial or irrelevant.'

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[27] Some doubt was thrown upon this by the observations of Lord Phillips of Worth Matravers MR in *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] QB 916 at para [39], questioning why privilege should attach to 'matters such as the conveyance of real property or the drawing up of a will' and saying 'It is not clear why it should'. But this view was repudiated in the House of Lords, in particular by Lord Rodger of Earlsferry at para [55]:

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'Despite its long pedigree the Court of Appeal in this case appear to have been less than enthusiastic about the very notion of legal advice privilege. In particular, they thought that it was not clear why it should attach to matters such as the conveyance of real property or the drawing up of a will: see [2004] QB 916, 935, para [39], per Lord Phillips of Worth Matravers MR. I do not share these doubts.'

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[28] Mrs Carew Pole sought to escape from this by submitting, as the wife's solicitors had earlier asserted in correspondence, that the disposal of registered land is a merely 'mechanical' process. She asserted that what she called the act of turning property into cash is no more a legal context than the selling of a second-hand car or a transaction in a shop. None of these examples, she says, involves giving or receiving advice as to 'rights, liabilities, obligations or remedies' whether under private law or under public law. I do not agree either with the proposition or with the implication.

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[29] No doubt, as its architects planned and hoped, the system of registered conveyancing is in many respects much simpler than the traditional system of conveyancing. But the sale and purchase even of registered land is, of its very nature, infinitely more technical and complex, and more demanding of professional assistance, than the sale and purchase of a tin of peas in a supermarket or even the sale and purchase of a motor car.

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A [30] Some early zealots opined that there was no need for a contract at all when disposing of registered land but this view did not prevail: see the illuminating account by Professor Farrand in *Contract and Conveyance* (4th ed) at pp147-148. A contract remains a characteristic part of the process of registered conveyancing: see Ruoff and Roper, *Registered Conveyancing* (2003 ed) at para 20.002 and *Barnsley's Conveyancing Law and Practice* (4th ed) at p140. Indeed, the significance of the contract has if anything increased as a result of the *Law of Property (Miscellaneous Provisions) Act 1989* with its invalidating of all informal contractual arrangements. Moreover, and as I pointed out to Mrs Carew Pole during the course of argument, although it is the responsibility of the purchaser's solicitor to draft the conveyance or transfer, it is the responsibility of the vendor's solicitor to draft the contract: see

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C *Barnsley's Conveyancing Law and Practice* (4th ed) at pp140 and 506. The reason for this is that it is in the vendor's interest to ensure that he is contracting to sell no more than he wishes to dispose of, whereas it is in the purchaser's interest to ensure that there will actually be conveyed to him everything he has contracted to acquire. So there is legal work to be done, and legal documents to be drafted, even by the

D vendor's solicitor and even if the land is registered.

[31] A solicitor is instructed in a conveyancing transaction because – whatever other reasons there may also be – the client requires the technical skill and advice which comes from someone with legal expertise. One does not, after all, employ a rude mechanical – a plumber or carpenter – to do one's conveyancing, any more than one would employ a solicitor to do one's plumbing or carpentry. The reason in each case is obvious – one retains the skilled expert whose expertise is relevant to the task in hand. Moreover, as I commented during the course of submissions, if, perish the thought, Messrs X had been negligent in the transaction in question, it is hardly to be imagined that they could have hoped to defend the inevitable proceedings by denying that they owed the normal duty of care of a careful and competent solicitor.

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[32] Mr Rajah submits that a solicitor acting in the conveyance of a client's property is plainly acting in a legal context. He is required, he says, to put on his 'legal spectacles' and steer a course for his client free of difficulties in relation to his client's private law 'rights, liabilities, obligations or remedies' in respect of the sale. I entirely agree. And I might add that it makes no difference that the solicitor has neither been asked to proffer nor has in fact tendered any explicit legal advice on anything. The solicitor retained to act in a conveyancing transaction who places a contract before his client and invites him to sign it is by implication advising that the contract is in the proper legal form to give effect to the client's instructions, just as he is by implication advising his client to sign it.

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[33] It is, in my judgement, perfectly obvious that Messrs X were here being retained to act, as lawyers, in a 'relevant legal context'. And it follows, equally obviously in my judgement, that the *Anstalt* is, on the face of it, entitled to claim privilege in the relevant parts of the conveyancing file – that is, those parts of the file being or recording Messrs X's dealings with the *Anstalt* (their client) as opposed to those parts being or recording their dealings with Messrs Y (the purchaser's solicitors) or other third parties.

[34] The second question is whether, assuming the privilege otherwise to exist, the wife can bring the case within the so-called 'fraud' exception. The modern law on this topic is usually treated as starting with *R v Cox* (1884) 14 QBD 153. A most illuminating survey of the authorities from then down to 1990 is to be found in the judgment of Vinelott J in *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156. More recently there has been the important decision of the Court of Appeal in *Barclays Bank plc v Eustice* [1995] 1 WLR 1238.

[35] It is clear that the 'fraud' exception is not confined to cases of criminal fraud or cases of civil fraud in the narrow sense. As Schiemann LJ said in *Barclays Bank plc v Eustice* [1995] 1 WLR 1238 at 1249:

'The case law refers to "crime or fraud" (*R v Cox* (1884) 14 QBD 153, 165), "criminal or unlawful" (*Bullivant v AG for Victoria* [1901] AC 196, 201), and "all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances" (*Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553, 565). The case law indicates that "fraud" is in this context used in a relatively wide sense.'

[36] In *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* (Court of Appeal (Civil Division) transcript No 777 of 1979 – the case is not reported but the relevant passages are conveniently set out in *Barclays Bank plc v Eustice* [1995] 1 WLR 1238 at 1249) Goff LJ said:

'... 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 is not lightly 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.'

[37] There are two cases involving situations not altogether different from that which I am here concerned with, in each of which it was held that the 'fraud' exception applied.

[38] In *Williams v Quebrada Railway Land & Copper Co* [1895] 2 Ch 751, Kekewich J had to consider a transaction involving (see the description by Vinelott J in *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156 at 1167) the execution by a failing company of a charge. The charge had been created when the cesser of business by the company was inevitable and in order to remove the assets from the scope of a pre-existing floating charge before it crystallised, in other words to defeat or delay the rights of the company's debenture holders under the floating charge. The claim, which for technical reasons could not be brought as a statutory claim under the fraudulent preference provisions then contained in s164 of the *Companies Act 1862* (compare now s239 of the *Insolvency Act 1986*), was, however, analogous to a claim to set aside a transaction for fraudulent preference. Kekewich J, expressing himself

A in trenchant terms, held that there was no legal professional privilege. His decision has often been cited and never been doubted.

[39] In *Barclays Bank plc v Eustice* [1995] 1 WLR 1238 the Court of Appeal held that there was no privilege in the case of a transaction caught by s423 of the *Insolvency Act 1986*. Section 423 invalidates a transaction by someone 'at an undervalue' (see s423(1)) if the court is satisfied (see s423(3)) that it was entered into by him:

'... for the purpose -

- C
- (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
 - (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.'

D [40] Schiemann LJ, with whom Aldous and Butler-Sloss LJ both agreed, said at 1250 that:

E '... it must have been obvious to the defendants that the bank might, once it learnt of the challenged transactions, start proceedings... The dominant purpose was to stop the bank from interfering with the defendants' use of what they regarded as family assets.'

He continued at 1252:

F '... the client was seeking to enter into transactions at an undervalue the purpose of which was to prejudice the bank. I regard this purpose as being sufficiently iniquitous for public policy to require that communications between him and his solicitor in relation to the setting up of these transactions be discoverable.'

G He added:

'If the strong *prima facie* case turns out to be correct then the defendants have deliberately indulged in something which I would categorise as sharp practice.'

H [41] Section 37 of the *Matrimonial Causes Act 1973* catches transactions where the court is satisfied (see s37(2)) that a spouse is about to make, or has made, a disposition:

'... with the intention of defeating the [other spouse's] claim for financial relief,... [that is (see s37(1)), with the intention of] preventing financial relief from being granted... or reducing the amount of any financial relief which

might be... granted, or frustrating or impeding the enforcement of any order which might be or has been made.'

A

[42] By parity of reasoning with both *Williams v Quebrada Railway Land & Copper Co* [1895] 2 Ch 751 and *Barclays Bank plc v Eustice* [1995] 1 WLR 1238, and consistently with the line of cases stretching from *R v Cox* (1884) 14 QBD 153 to *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156, a transaction within s37 is, in my judgement, one to which legal professional privilege does not attach.

B

[43] Thus far, therefore, on this question I agree with Mrs Carew Pole. But the main focus of Mr Rajah's defence to her attack was on a different point.

[44] The mere assertion of conduct which would bring the exception into play is not, of course, enough. In *Bullivant v AG for Victoria* [1901] AC 196 at 201, the Earl of Halsbury LC made it clear that 'mere surmise or conjecture' was not enough - there had to be 'some definite charge'. In *O'Rourke v Darbishire* [1920] AC 581 at 604 Lord Finlay said:

C

'The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact.'

D

Lord Wrenbury in the same case said at 632:

'... the plaintiff must... go at any rate so far as to satisfy the Court that his allegations of fraud are not merely the bold assertions of a reckless pleader, but are such as to be regarded seriously as constituting prima facie a case of fraud resting on solid grounds.'

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[45] In *Buttes Gas & Oil Co v Hammer (No 3)* [1981] QB 223 at 246, Lord Denning MR said:

F

'No privilege can be invoked so as to cover up fraud or iniquity. But this principle must not be carried too far. No person faced with an allegation of fraud could safely ask for legal advice. To do away with the privilege at the discovery stage there must be strong evidence of fraud such that the court can say: "This is such an obvious fraud that he should not be allowed to shelter behind the cloak of privilege."'

G

[46] In *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156 at 1173, Vinelott J said this:

H

'In any given case, the court must weigh, on the one hand, the important considerations of public policy on which legal professional privilege is founded... and, on the other, the gravity of the charge of fraud or dishonesty that is made. There are many contexts in which the court similarly has to strike a balance between the need to do justice to the plaintiff, on the one

A hand, and, on the other, the extent to which interlocutory relief may result in an unjustified interference with the defendant's property and his right to privacy. The point at which the balance is struck must depend on the extent to which the relief sought may unjustifiably invade the defendant's rights. So if a plaintiff can show that he has a fairly arguable case and if the defendant can be fully protected by a cross-undertaking in damages, the court in granting or refusing a purely negative injunction will be primarily concerned with a balance of convenience. More is required (in ascending order of importance) if the plaintiff seeks a mandatory injunction or... or if the plaintiff seeks *Mareva* relief or an *Anton Piller* order or the disclosure of confidential banking documents.

C There is a continuous spectrum and it is impossible to, as it were, calibrate or express in any simple formula the strength of the case that the plaintiff must show in each of these categories. An order to disclose documents for which legal professional privilege is claimed lies at the extreme end of the spectrum. Such an order will only be made in very exceptional circumstances but it is, I think, too restrictive to say that the plaintiff's case must always be founded on an admission or supported by affidavit evidence or that the court must carry out the preliminary exercise of deciding on the material before it whether the plaintiff's case will probably succeed, a task which may well present insurmountable difficulties in a case where fraud is alleged and the court has no more than affidavit evidence.

E ... no clear line can be drawn. All that can be said is that all the circumstances must be taken into account and that the court will be very slow to deprive a defendant of the important protection of legal professional privilege on an interlocutory application.'

F [47] Does Mrs Carew Pole meet that threshold? In my judgement, and essentially for the reasons given by Mr Rajah, she does not.

G [48] The wife's case on this point is to be found in a number of places. Formally, it is to be found in an affidavit which the wife swore on 22 November 2005 in support of her application for the freezing injunction, in an affidavit sworn by her solicitor on 1 December 2005 in support of the application which is at present before me, and in the statement of her case set out in the passage in her solicitor's letter of 10 February 2006 which I have quoted in para [11] above. Less formally, perhaps, it is to be found set out in Mrs Carew Pole's submissions – her written submissions prepared for the hearings on 22 November 2005 and 21 February 2006, her oral submissions before me on 22 November 2005, 25 November 2005 and 18 January 2006 (there are transcripts of all of these which I have read) and most recently, of course, her oral submissions during the hearing before me on 21 February 2006. I have had regard to all this material.

H [49] The wife's case before me at the hearing on 22 November 2005 was summarised by Mrs Carew Pole as being that the wife was seeking to prevent the

properties being sold 'underneath her feet' in circumstances where it was said to be 'inappropriate' for the husband to proceed with a sale of the matrimonial home whilst the proceedings were pending and the wife remained in occupation. It was submitted that the balance of convenience favoured preserving the status quo, particularly in circumstances where the wife was largely 'in the dark' about what was going on. It was not alleged, at least not in so many words, that the case fell within s37.

[50] Matters were little further advanced at the hearing on 25 November 2005. Indeed, the tenor of the wife's argument on that occasion is captured by the following interchange:

'MR JUSTICE MUNBY: Just remind me, I have rather lost track of what I have or have not had in all these various bundles. What is the evidence before me which is relied upon as showing a *prima facie* case that the *Anstalt* is the alter ego of the husband?

MISS CAREW POLE: My Lord, in the absence of any disclosure whatsoever from the husband, and on the basis that the *Anstalt* has owned the family home for the last 23 years - that was owned before the marriage - in respect of which the parties have had the exclusive occupation during the entirety of the marriage, we say on its face -

MR JUSTICE MUNBY: Yes, but the trustees of the Duke of Marlborough's settled estate no doubt have had Blenheim Palace vested in them for 250 years and the Duke of Marlborough, and the Duchess have always lived there and so has their heir. The fact that the Duke of Marlborough has always lived in Blenheim Palace does not mean that the trustees of his settled estate are simply his *alter ego*. Indeed, they almost certainly are not.

MISS CAREW POLE: My Lord, on the basis that since Tuesday of this week the *Anstalt* and the husband have been apprised of the wife's case in relation to the *Anstalt* and as at this moment nothing has been put forward which would rebut the wife's assumption that the *Anstalt* is the *alter ego* of the husband.

MR JUSTICE MUNBY: I am sorry, that is the world of Humpty Dumpty, and even this Division does not go that far. It is for plaintiffs to establish their case, or at least to put forward a *prima facie* case. We do not work on a system by and large where the plaintiff simply asserts and says, "well, unless and until the defendant produces evidence to disprove our bald assertion, our bald assertion holds the field".'

[51] The solicitor's affidavit of 1 December 2005 did not address the question of privilege. Production of the conveyancing files was sought because, so it was said:

A 'It is now material to her case to understand on a more informed basis not only when the negotiations and arrangements relating to the sale commenced but also what notice the purchasers were given as to her ongoing occupation, how for example the property information form was completed and what further enquiries were raised and also the discussions that took place in relation to the sale price. It is also important for her to understand who was conducting those negotiations on the sale. My client seeks this information from both the vendor's solicitors and also the purchaser's solicitors. To ensure she has a clear and informed view of both sides of that transaction, she seeks production in full of both files.'

C [52] The matter remained largely at this level of speculation and conjecture when the case came back before me on 18 January 2006. At one point Mrs Carew Pole said this:

D 'At this moment in time my client reserves her position on arguing that the husband's bad behaviour in terms of the sale of this property ought to be taken into account. That conduct argument may well fall away once we have sight of the file, but the issue has been raised at a very early stage in the litigation because of the circumstances of the sale and the sooner it is grappled with the better, either to identify the particular argument that is to be run or indeed to narrow the issues if there is nothing that is grist to that particular mill.'

A little later she said:

F 'It may well be the case, having seen the file, that the house has been sold at an undervalue. I can tell your Lordship on the basis of murmurs on the grapevine - and you will recall that it was murmurs on the grapevine that led in the first instance to my client's application that halted the sale and froze the monies - that well known personalities such as... were interested in the property at a sale price of 40 million. Now, my Lord, that may be nothing more than rumour on the grapevine but it may very well have some substance.'

And a little later again:

H 'It is far more serious than idle curiosity based on a feeling of resentment or anger. There may very well be serious and significant consequences to the way in which the husband has gone about the sale of this property... And of course your Lordship will appreciate that we have little confidence in a helpful response to a questionnaire, given the husband's and *Anstalt's* dogged refusal thus far to provide the file itself. My Lord, in circumstances where the sale took place while my client was in the dark, in my

submission, extra openness, if there can be such a thing, is required in order to allay any fears or suspicions that may be lurking. And they are more than lurking, my Lord will appreciate, in my submission. So, my Lord, that, in addition to the points I have made in writing, is the thrust of my application in relation to the conveyancing files.'

[53] I did not on that occasion give a formal judgment, but I indicated why I was making the order for disclosure:

'My view is that an order of this sort is not to be made if it is a mere fishing expedition or if it is designed simply to satisfy the curiosity of a wife as to what has been going on in the background. It has got to be justified by some proper forensic advantage and some proper issue in the case. It seems to me that, against the background of the events of that week in 2005 when I dealt with a succession of applications, this is a case where, on the face of it, it would seem that there were attempts by the husband and/or the *Anstalt* to sell the former matrimonial home (which appears to be, if not the only matrimonial asset of any substance, certainly the most valuable matrimonial asset) behind the wife's back and in circumstances where she can legitimately assert, at least on the face of it, that that was part of an attempt not merely to sell the property behind her back but also to dispose of the proceeds of sale in a way which would defeat her matrimonial claims...

There is a further point, although at present it is identified as no more than a possibility based upon rumours on the grapevine, that there were other bidders in the market who might have been prepared to pay a higher price than was in the event achieved. The wife, it seems to me, has a legitimate interest in exploring that because, after all, it goes to the question of the amount of the matrimonial assets available for the court's investigation.

On the back of all that, this being a case in which there appears to be at present at least a *prima facie* case of what the wife arguably could assert is litigation misconduct, she is entitled to explore that with a view to making good, if she can, a case of conduct which the court should take into account.

In substance, therefore, it seems to me that this is not a fishing expedition. It is an exploration of matters which fairly and properly require to be investigated for the purpose of the litigation. The argument that the application is premature or that the matter should be dealt with by questionnaire does not appeal to me at all. It seems to me that the sooner everybody knows whether there is substance to the wife's concerns, the sooner everybody knows whether there is or is not something of importance in this conveyancing file, the better. If there is no substance, the sooner that particular part of the case is put to bed, the better.'

[54] I went on to explain why I was not prepared to make an order against Messrs Y:

A 'That, I think, is an imposition which is not justified at this stage and would
not be a proportionate interference with their rights. [Messrs X] were acting
as solicitors for the *Anstalt*, which in fact is now a party. If, having examined
[Messrs X's] file, a proper case can be made for the need to examine the
B other file, then that case can be made and if it is accepted by the court no
doubt the appropriate order can be made. But I am not persuaded at present
that it is proportionate, let alone necessary, to require both files to be
obtained.'

[55] Thus the state of affairs on 18 January 2006. A number of things are striking.
The position of the wife and her advisers is all rather tentative. Essentially it is a
C wish to find out what has been going on, in a situation where everything is
speculation, assumption, rumour, suspicion and uncertainty. Production of
Messrs X's files was sought, as the wife's solicitor put it, so that the wife could
'understand on a more informed basis' what had been going on. Production was
D required, as Mrs Carew Pole put it, 'in order to allay any fears or suspicions that may
be lurking'. And although the wife and her advisers were suspicious, there was no
express allegation that s37 was implicated – indeed, so far as I can see, no express
allegation of any conduct of the kind that would be required to destroy legal
professional privilege.

[56] On 10 February 2006, as we have seen, the assertion was made in
E correspondence that any privilege should be forfeited under the 'fraud' exception.
But no further evidence was served. So the only evidence put before the court by
the wife consists of the two affidavits to which I have already referred. As articulated by
Mrs Carew Pole in her written submissions, the wife's case is that, at the relevant
time, the husband (via the *Anstalt*) was 'acting secretly to sell her home with the
intention of defeating her claims for ancillary relief'.

F [57] Mr Rajah pointed out that no fraudulent design by the *Anstalt*, as opposed
to the husband, is even alleged. And he submitted that in any event no evidence, or
at least no adequate evidence, had been adduced in support of any allegation of
relevantly wrongful conduct. He says it is quite plain that the sale of the properties
was not made in furtherance of any fraudulent design. The sale was entered into
G under pressure from Citibank, and in order to avoid a forced sale by a receiver,
following events which had been set in train long before the present proceedings
were commenced. And he points out that, in the event, the wife withdrew her
opposition to the sale and permitted it to proceed. (I do not think there is much
substance in this last point because the wife was, after all, enabled to secure the net
H proceeds of sale.)

[58] Mrs Carew Pole riposted by submitting that the gravamen of the wife's
complaint was not merely that the properties had been sold secretly and behind her
back. The sale had been so structured (with a sale and leaseback of No 149 and a
delayed sale of No 151) as to enable the transaction to be completed and the vast
bulk of the money handed over to the *Anstalt* – the husband's creature, as she would
have it – without the need to give vacant possession of the matrimonial home and

accordingly without the wife knowing anything about what was going on. In other words, she said, the transaction had been so structured as to enable the money to be squirreled away and hidden, no doubt somewhere offshore, before the wife even knew that the matrimonial home had been sold. Mrs Carew Pole asked rhetorically why the letter sent by the wife’s solicitors to Messrs Y on 21 November 2005 had seemingly stopped the transaction in its tracks if everything was so innocent. (I am not much impressed with this last point – after all, what solicitor acting, as Messrs Y were, for a purchaser would advise their client to buy a lawsuit?)

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[59] The wife has much reason to feel suspicious – indeed gravely suspicious. Even allowing full weight to Mr Rajah’s point that the *Anstalt* was under pressure to sell, there is, it might be thought, much force in Mrs Carew Pole’s point about the way in which the transaction was structured. But mere surmise and conjecture, mere speculation and suspicion, even grave suspicion, are not enough.

C

[60] The allegation that the circumstances are such as to open up the privilege must, as we have seen, be made in what Lord Finlay called ‘clear and definite terms’. I doubt that the wife’s case, as presently put, meets even that requirement. As my summary of the way in which she puts her case has shown, there is not, even now, any clear and definite allegation to be found anywhere on paper, apart, that is, from the bald and unparticularised statement to be found in her solicitors’ letter of 10 February 2006. Indeed, as Mr Rajah pointed out, it is not even clear whether the wife is making any (and if so what) allegation of ‘fraud’ against the *Anstalt* as opposed to the husband.

D

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[61] I am not of course suggesting that elaborate pleadings are called for. The relevant allegations can perfectly properly (at least in this Division where there are no pleadings) be set out in an affidavit, witness statement or other suitable document. But where the allegation is of ‘fraud’ – even ‘fraud’ of the kind with which we are here concerned – those against whom the allegation is mounted are entitled to have the allegation set out in writing, and set out, as Lord Finlay put it, clearly and definitely. At a minimum there must be a succinct statement – I emphasise that I am not calling for over-elaboration or prolixity – identifying clearly what the allegation is and the person or persons against whom it is being made. And the statement must have sufficient detail to enable one to identify the essential elements in the allegation and why it is being said that the ‘fraud’ exception applies.

F

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[62] Be that as it may, the wife, in my judgement, has in any event failed to make good the ‘*prima facie* case... resting on solid grounds’ to which Lord Wrenbury referred. There is suspicion and assumption. There is surmise and conjecture, some of it founded on mere rumour. But there is not, at least at present, the strong evidence for which Lord Denning MR called. There is not, in my judgement, sufficiently compelling evidence, either that the *Anstalt* is the husband’s *alter ego* or creature or that the transaction is one caught by s37, to justify going behind the *Anstalt*’s privilege on the ground of ‘fraud’. On the contrary, there is uncertainty. The wife, in my judgement, has failed to satisfy the heavy burden which rests upon anyone who in a case such as this seeks to go behind privilege on the ground of ‘fraud’.

H

A [63] Moreover, I cannot help thinking that this application is somewhat premature. The parts of Messrs X's file in relation to which privilege has not been claimed have not as yet been examined by the wife's solicitors, for the file, which I understand is voluminous, was produced only on the morning of the hearing. The wife's claim to go behind the privilege being asserted is surely much better considered – because it is likely to be easier to evaluate – after the non-privileged parts of the file have been properly examined.

B [64] Mrs Carew Pole submitted that I should myself examine the relevant documents before reaching a decision. I decline to do so.

C [65] I was referred in this connection to *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 2 KB 134. The principle – and I do not think it is in any way affected by the fact that the provisions of the old *Rules of the Supreme Court* have now been replaced by the somewhat different provisions of the new *Civil Procedure Rules* – was set out by Jenkins LJ at 146:

D 'But there is nothing in the rule, or in the authorities, to constrain the court to hold that, in every case where a claim to privilege is made and disputed, the party seeking production is entitled to come to the court and (as it were) demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances; but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, *prima facie*, the claim to privilege would appear to be properly made in respect of them, then, in my judgement, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents.'

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G [66] In that case, it may be noted, the submission that the court ought to look at the documents before deciding whether they were privileged was rejected (see at 140, 145 and 147) both by Parker J at first instance and by the Court of Appeal.

H [67] I think that the power the court undoubtedly has to examine the documents should be exercised very sparingly. I am prepared to assume that people may feel it less worrying if their solicitor's file is being examined by a judge rather than by a policeman, but if the papers are indeed privileged then the privilege will have been invaded just the same. Privilege is, in principle, absolute. Too ready a judicial willingness to exercise the power to inspect might well have a seriously chilling effect on people's confidence that what they say to their lawyers will not be disclosed and a seriously chilling effect, therefore, on their willingness to speak frankly and without reserve to their lawyers. In short, too ready a judicial willingness to exercise the power to inspect would put at risk the vitally important public policy on which the very principle of privilege is founded. Moreover, too ready a judicial willingness

to exercise the power to inspect would tend to water down the salutary protections against the too ready ousting of privilege which are afforded by the stringent requirements set out in *Bullivant v AG for Victoria* [1901] AC 196, *O'Rourke v Darbishire* [1920] AC 581 and *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156. Those who cannot meet that demanding test should not be allowed to go on a fishing expedition – and it makes no difference for this purpose that it is the judge rather than the litigant who is casting the net and inspecting the catch.

[68] In the present case there are no circumstances which justify my going behind the claim of privilege. The wife, for reasons I have already explained, has failed to make good, on the basis of the material she has put before me, her claim to go behind the *Anstalt's* privilege on the ground of 'fraud'. Having failed to gain entry through the front door, she should not, in my judgement, now be permitted to seek her objective by inviting the judge, as her surrogate, to make a surreptitious entry through the side door. Nothing Mrs Carew Pole has said begins to persuade me that I should adopt any course different from that which commended itself to all three judges in *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 2 KB 134.

[69] I conclude, therefore, that the *Anstalt* has established its claim to privilege and that the wife has, at least for the time being, failed in her attempt to go behind that privilege.

[70] There are two final observations I should make.

[71] There is no inconsistency between my acceptance of the wife's evidence as sufficient to justify the grant of the freezing order I made on 22 November 2005 and my assessment of her evidence as insufficient to justify invading the *Anstalt's* privilege. Of course the question is, in one sense, the same – has the wife sufficiently made out her assertion that the case falls within s37 of the *Matrimonial Causes Act 1973*? But I am assessing the matter today in the light of considerably more evidence than was available to me on 22 November 2005. Moreover, and for the reasons explained by Vinelott J in *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156 at 1173 in the passage I have already set out, the court's approach to the two issues is necessarily rather different.

[72] The other observation relates to Coleridge J's decision in *Kimber v Brookman Solicitors* [2004] 2 FLR 221. That was a case where the husband had been guilty of very serious litigation misconduct in his defence of the wife's claim to ancillary relief. As Coleridge J described it at para [10]:

'... the husband is "cocking a snook" at the court... the husband has no intention of assisting in the process or complying with court orders or taking any part in the proceedings at all. His whole attitude is, "You can whistle for it, you can have it if you can find me or it". It is reprehensible in the extreme and completely contrary to both the letter and spirit of this process.'

[73] In those circumstances Coleridge J held that any legal professional privilege was forfeited. He explained why at paras [16]-[18]:

A [16]... there is a clear duty in this type of proceedings, as set out in the rules, on both parties to make full, complete and frank disclosure to the court of their means. In this case the husband has failed to abide by the rules and also is in breach of orders of the court. He therefore forfeits, in my judgement, any entitlement in relation to retaining the usual cloak of legal privilege.

B [17]... he is, it is clear, taking every conceivable step he can to defeat his wife's legitimate claim. Whether or not she is claiming too much, I know not. All I know is that the actions which he has taken, on the face of it, appear to be designed to defeat her proper claim...

C [18] Accordingly, even if the husband is not in contempt of court, the public interest is fully engaged in this application and it is in the public interest to get to the bottom of where this man is and what he has done with the parties' resources.'

D [74] Now that case is far removed on its facts from the case with which I am concerned. The husband in this case is not accused of litigation misconduct of the type let alone on the scale of that which Coleridge J was considering. So neither his judgment nor his decision assists Mrs Carew Pole. In the circumstances I need say no more about it.

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