Case No: B6/2016/4666

Neutral Citation Number: [2018] EWCA Civ 307
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Justice HADDON-CAVE
[2016] EWHC 3349 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2018

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE LEWISON
and
LADY JUSTICE KING

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Between :

	Anthony David Kerman	**Appellant**
	- and -	
	Tatiana Akhmedova	**Respondent**

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- -

Mr Phillip Shepherd QC and Miss Heather Murphy (instructed by Kerman & Co LLP) for the appellant
Mr Hodge Malek QC and Mr Dakis Hagen QC (instructed by Payne Hicks Beach) for the respondent

Hearing dates : 31 January-1 February 2018

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Judgment**Sir James Munby, President of the Family Division :**

1. This is an appeal, pursuant to permission granted by King LJ on 16 March 2017, brought by a solicitor, Mr Anthony David Kerman of Kerman & Co LLP, from an order made by Haddon-Cave J on 5 December 2016 requiring him to attend court to give evidence. The order was made on the application of Tatiana Akhmedova, the petitioner wife ("W") in financial remedy proceedings, FD13D05340, brought by her against three respondents (the second and third having been joined by an order made by Moor J on 25 October

2016): (1) her husband, Farkhad Akhmedov ("H"), (2) Woodblade Limited and (3) Cotor Investment SA. Haddon-Cave J's reasons for making the order against Mr Kerman, and for giving various subsequent rulings to which I shall refer in due course, were explained in a judgment handed down on 20 December 2016: *Z v Z and others (Legal Professional Privilege: Fraud Exemption)* [2016] EWHC 3349 (Fam), [2017] 4 WLR 84.

2. Before coming to Mr Kerman's appeal, I need to explain the financial remedy proceedings to the extent necessary to understand the order and rulings which are under challenge.

3. The final hearing before Haddon-Cave J lasted five days, starting on 29 November 2016 and finishing (judgment being reserved) on 5 December 2016. Haddon-Cave J handed down judgment on 15 December 2016: *AAZ v BBZ and Others (Financial Remedies: Sharing Principle: Special Contribution)* [2016] EWHC 3234 (Fam), [2018] 1 FLR 153. He gave a further judgment on 20 December 2016: *AAZ v BBZ and Ors* [2016] EWHC 3361 (Fam). His final order is dated 20 December 2016.

4. The bulk of the enormous wealth in this case, found by Haddon-Cave J (*AAZ v BBZ and Others (Financial Remedies: Sharing Principle: Special Contribution)* [2016] EWHC 3234 (Fam), [2018] 1 FLR 153, para 106) to amount to £1,092,334,626, was held by the third respondent, Cotor Investment SA ("Cotor"), a Panamanian company referred to by Haddon-Cave J in the published and reported judgments as P Ltd. Cotor received the sum of US$1.375 billion paid to the husband for his shares in a Russian energy company (paras 13, 77). Included amongst the assets of Cotor at the date of the trial were (a) a modern art collection (paras 110, 135) recently valued at US$112 million (£90,581,865) and (b) a portfolio of cash funds and investments at UBS in Switzerland. In the order he made on 25 October 2016, Moor J recorded the most recent disclosure as showing this standing at $890 million. Haddon-Cave J found (para 84) that "[Cotor] is H's nominee and that [Cotor] holds all its assets absolutely for H on a 'bare' trust."

5. Haddon-Cave J awarded the wife a total of £453,576,152 (para 134). He went on (para 135):

> "W already holds assets of £10,165,162 in value. I order the transfer to her of the contents of the English property (£2,479,125), the Aston Martin (£350,000) and the Modern Art Collection (estimated value £90,581,865). Accordingly, to meet the balance, I order H to pay to W the sum of £350m (three hundred and fifty million pounds sterling) and, for the reasons given in this judgment, [Cotor] shall be jointly and severally liable to pay this sum."

6. That judgment, as I have said was handed down on 15 December 2016. On 5 December 2016, the final day of the hearing, Haddon-Cave J had given the wife permission to issue a witness summons on 12 December 2016 to summons Mr Kerman to attend court on 15 December 2016. As permitted by FPR 24.4(2), the order provided that the witness

summons should be binding even if served less than 7 days prior to 15 December 2016. The order further provided that:

> "Except for the purpose of obtaining legal advice, until further order of the court, Anthony D Kerman must not directly or indirectly inform anyone – in particular, any of the above-named Respondents, their connected companies or their agents: (a) that he has been summoned to appear before the court to give evidence; (b) that he is to provide or has provided information to the Applicant and/or the court in connection with these proceedings; or (c) of the nature of the evidence that he is to give or has given as the case may be."

7. The Witness Summons, which was in the prescribed form, required Mr Kerman to attend court "to give evidence in respect of the above claim." That was identified as "Claim no. FD13D05340", Akhmedova v Akhmedov. The Witness Summons stated that it was issued on the application of "the applicant", ie, the wife. It was served on Mr Kerman on 12 December 2016 under cover of a letter of that date from the wife's solicitors.

8. Mr Kerman ("S") attended court in answer to the witness summons on 15 December 2016. We were directed to the transcript, but I can take what then happened from Haddon-Cave J's judgment, *Z v Z and others (Legal Professional Privilege: Fraud Exemption)* [2016] EWHC 3349 (Fam), [2017] 4 WLR 84, paras 4-8:

> "4 … He was accompanied by counsel, Mr Warshaw QC. S entered the witness box and was sworn. Mr Dyer QC, W's Counsel, then commenced asking S questions. He first asked S regarding his current position in relation to the respondents and whether he was retained by them. S explained that, whilst he did not have individual engagement letters from H, P Ltd and the second respondent, C Ltd, he was retained by them "in general terms" and had acted for H for many years. Mr Dyer QC then commenced asking S questions about S's role in arranging the insurance for the modern art collection. Mr Warshaw QC objected to further questioning on the grounds that it invaded legal professional privilege. I then heard legal argument from Mr Warshaw QC and Mr Dyer QC on the question of legal professional privilege and adjourned the matter at 4 pm until the next day. Overnight, Mr Warshaw QC also applied to set aside the witness summons against S under FPR r 2.3(4).
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> 5 On 16 December 2016, at 11 am, I ruled against Mr Warshaw QC's objection on the grounds of legal professional privilege and objection to the witness summons, with written reasons to follow. I also refused Mr Warshaw QC's subsequent application for permission to appeal and for a stay of my decision.

> 6 Mr Dyer QC then recommenced his questioning of S regarding the modern art collection. S answered Mr Dyer QC's questions on this topic. S revealed that H had moved the modern art collection from a repository in central Europe to a new repository in another European country in November, ie shortly before the trial.
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> 7 Mr Dyer QC then commenced asking S questions about P Ltd's assets in a portfolio of US$890,065,115. Mr Warshaw QC again objected to this line of questioning on the grounds of legal professional privilege. I heard further legal argument from Mr Warshaw QC and Mr Dyer QC. I ruled against Mr Warshaw QC on this further objection and refused his further application for permission to appeal and a stay. Mr Dyer QC then recommenced questioning S on P Ltd's assets and S answered his questions. S revealed that some US$600m in P Ltd's portfolio had been transferred in November from the central European country into a new trust vehicle in the other European country in another name.
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> 8 In the light of S's evidence, Mr Dyer QC applied for a further order requiring S to produce documents regarding the modern art collection and P Ltd's portfolio assets. He submitted that S's revelations demonstrated that H had taken further deliberate steps shortly before the trial to make enforcement of any monetary award by the court in favour of W even more difficult. This was a case, he submitted, of "iniquity on iniquity". I ruled in favour of Mr Dyer QC and granted the order duces tecum against S, returnable on 20 December 2016."

The order duces tecum was dated 16 December 2016. It contained an undertaking by the wife "to be responsible for the reasonable photocopying and administrative costs incurred by Kerman & Co in producing the documents set out below." It also contained a further order:

> "Mr A D Kerman and any personnel in Kerman & Co must treat the provisions of this order as confidential and nothing in this order may be disclosed pending further order of the court to any other person, including the main respondents listed in the title of these proceedings or any of their agents, and any personnel of [three named institutions], save (i) the applicant or (ii) a lawyer instructed by AD Kerman for the purposes of legal advice."

9. I pick up the story from Haddon-Cave J's third judgment, *AAZ v BBZ and Ors* [2016] EWHC 3361 (Fam), paras 4-7:

> "4 S, under cross-examination, revealed details of which entities in [Liechtenstein] now held the modern art collection and [Cotor]'s assets. He named an entity called 'O1, [an Anstalt in

> Liechtenstein], and a bank called 'L Bank' in [Liechtenstein] as now holding these assets …
>
> 5 Recent investigations have … revealed that there are two 'O' [establishments in Liechtenstein] called "O1" and "O2" … I infer, as I am invited to, that "O1" and "O2" are closely connected, and form part of the latest scheme by H to hide his assets.
>
> 6 There is no evidence that [Cotor] was paid any consideration for the transfer [of the modern art collection and Cotor's financial assets in Switzerland] to "O1" or "O2". It is quite apparent that this transfer was at an undervalue, or a nil value, and was simply the latest part of H's attempts to avoid his liabilities by purporting to transfer his assets to new entities in a new jurisdiction and thereby making enforcement more difficult.
>
> 7 For similar reasons given in my judgment dated 15 December 2016 … I find that "O1" and "O2" are no more than ciphers and the alter ego of H. For these reasons, I order that all dispositions of the modern art collection and [Cotor]'s financial assets to "O1" and/or "O2" in or around November 2016 are set aside, so that at all material times those assets vest in H and continue to do so. In those circumstances, those assets remain immediately available for the aforesaid enforcement of the judgment of this Court granting [the wife] ancillary financial relief in the sum set out in my order dated 20 December 2016."

10. So, in the event, the final order in the financial remedy proceedings dated 20 December 2016 contained provisions giving effect both to what Haddon-Cave J had said in his first judgment, *AAZ v BBZ and Others (Financial Remedies: Sharing Principle: Special Contribution)* [2016] EWHC 3234 (Fam), [2018] 1 FLR 153, and to what he said in his third judgment, *AAZ v BBZ and Ors* [2016] EWHC 3361 (Fam). For present purposes I need say no more, except to note that the order contained, in paragraph 21, the usual 'clean break' provision:

> "Upon full and complete compliance with this order, the Applicant's claims and the Respondent's claims for periodical payments orders, secured periodical payments orders, lump sum orders, property adjustment orders, pension sharing orders and pension attachment orders shall be dismissed, and neither party shall be entitled to make any further application in relation to the marriage for an order under the Matrimonial Causes Act 1973, section 23(1)(a) or (b), or be entitled on the other's death to apply for an order under the Inheritance (Provision for Family and Dependants) Act 1975, section 2."

11. To complete the story in relation to the financial remedy proceedings, on 20 December

2016 Haddon-Cave J also made a without notice worldwide freezing order.

12. To complete the story in relation to Mr Kerman, a further order made by Haddon-Cave J on 20 December 2016 prohibited Mr Kerman from disclosing the judgment in *Z v Z and others (Legal Professional Privilege: Fraud Exemption)* [2016] EWHC 3349 (Fam), [2017] 4 WLR 84, to anyone other than the wife and her legal advisers, Mr Kerman and his legal advisers.

13. Mr Kerman's revised grounds of appeal set out four grounds of appeal. Ground (1) relates to issues in relation to legal professional privilege, grounds (2), (3) and (4) relate to the process by which Mr Kerman was brought before the court and the propriety of the making of what are referred to as the "gagging orders." It is convenient first to deal with grounds (2), (3) and (4).

14. I need first, however, to emphasise what this appeal is about and, even more important, what it is *not* about. The *only* matter before us is Mr Kerman's appeal from the matters referred to in Haddon-Cave J's judgment in *Z v Z and others (Legal Professional Privilege: Fraud Exemption)* [2016] EWHC 3349 (Fam), [2017] 4 WLR 84. There is no appeal by the husband before us. Indeed, so far as I am aware, he has never sought permission to appeal and his time for doing so has long since expired. We are *not* hearing an appeal from the judge's award of £453,576,152 to the wife. We are *not* hearing an appeal from Haddon-Cave J's judgments in *AAZ v BBZ and Others (Financial Remedies: Sharing Principle: Special Contribution)* [2016] EWHC 3234 (Fam), [2018] 1 FLR 153, and *AAZ v BBZ and Ors* [2016] EWHC 3361 (Fam). The husband was *not* represented before us, he did *not* seek to be joined in Mr Kerman's appeal, he did *not* address us and, so far as I am aware, he was not even present in court during the hearing of Mr Kerman's appeal. Mr Kerman and his counsel, Mr Phillip Shepherd QC, were *not* acting for or representing the husband. They were in court pursuing, and pursuing only, Mr Kerman's own appeal.

15. If I seem to belabour these points it is only because there was a significant volume of very inaccurate reporting of the hearing before us, both in the print media and even on the legal blogosphere.

16. Grounds (2), (3) and (4), as amplified in Mr Shepherd's skeleton arguments, raise the following matters of complaint:

    i) Proceeding by way of obtaining evidence from Mr Kerman rather than and without having first obtained freezing orders against the husband and Cotor.

    ii) Non-compliance with the requirements of section 31G of the Matrimonial and Family Proceedings Act 1984 and FPR Parts 21 and 24.

    iii) The inadequacy of the notice given to Mr Kerman of the witness summons and

the order dated 16 December 2016 and, in relation to the witness summons, the failure to give Mr Kerman notice of the issues on which he was to give evidence and to provide him with the evidence being relied on to justify the assertion that privilege would not apply because of the 'fraud exception' (see below). The consequence of this, it is said, is that, in effect if not intention, Mr Kerman was "ambushed" and he and his counsel were not able in the time to marshal a proper response to the arguments in relation to privilege.

iv) The fact that no notice of either the order dated 5 December 2016 or the order dated 16 December 2016 was given to the husband or Cotor, thus "depriving them of the opportunity to intervene."

v) The imposition of 'gagging orders' by the orders dated 5 December 2016 and 20 December 2016.

vi) The fact that the 'gagging orders' were expressed to be "until further order" rather than until a specified date. This was compounded by the fact (and we have been taken to the relevant correspondence) that, although the parties reached agreement on 5 January 2017 that the 'gagging orders' should be discharged, it was not until 21 February 2017 that Mr Kerman was told that the relevant order had been sealed on 7 February 2017.

vii) The fact that the order dated 5 December 2016, in contrast to what was included in the order dated 16 December 2016, contained no 'undertaking in damages' in favour of Mr Kerman.

viii) The refusal of Haddon-Cave J to give Mr Kerman permission to appeal and to stay the orders against him pending appeal.

17. With the exception of two matters, which although of important substance do not affect the outcome, there is, in my judgment, and with all respect to Mr Shepherd, nothing in any of these complaints.

18. Mr Shepherd opened his submissions very high. He suggested that Haddon-Cave J permitted procedures to be adopted that were "inappropriate and disproportionate and which should not be permitted to stand as a precedent." Of Haddon-Cave J's handling of the substantive financial remedy proceedings he went so far as to assert that "all proper judicial restraint seems to have been abandoned." There is nothing at all in any of these complaints. These attacks on Haddon-Cave J were utterly unwarranted and should never have been made.

19. Mr Shepherd also submitted that to dismiss Mr Kerman's appeal would be to "sanction the adopting of procedures in the Family Division that go far beyond anything that the High Court and public policy has considered permissible to date." As I shall proceed to

demonstrate, that is simply not so.

20. Mr Shepherd was, however, on much firmer ground when he asked rhetorically, "Whether the Family Court is to be permitted to adopt different trial and post trial procedures to those permitted by other divisions of the High Court." As a matter of generality, the answer to this is, and must be, an emphatic NO!

21. It is the best part of sixty years since Vaisey J explained in *In re Hastings (No 3)* [1959] Ch 368 that "there is now only one court – the High Court of Justice." It is now eleven years since I observed in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, paras 19, 21 (though, of course, at the time I was a mere *puisne*), that "the [Family Division cannot] simply ride roughshod over established principle" and that "the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions." In *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, para 53, we said that, "The Family Division is part of the High Court. It is not some legal Alsatia where the common law and equity do not apply." And in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415, para 37, Lord Sumption JSC observed that "Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different."

22. It is time to give this canard its final quietus. Let it be said and understood, once and for all: the legal principles – whether principles of the common law or principles of equity – which have to be applied in the Family Division (and, for that matter, also, of course, in the Family Court) are precisely the same as in the Chancery Division, the Queen's Bench Division and the County Court.

23. I return to the specifics of grounds (2), (3) and (4). I shall take them in turn.

24. Mr Shepherd characterises as "extraordinary" the wife's "failure" to apply for a preservation order before seeking to obtain evidence from Mr Kerman, and criticises the fact that no explanation for this has been offered. He submits that Mr Kerman should not have been brought in until all other means had been exhausted.

25. I can understand Mr Shepherd's concerns. The calling of a solicitor to give evidence in circumstances such as this, especially if coupled with the making of an 'anti-tipping-off' order, is pregnant with potential embarrassment for the solicitor and difficulties for the client: see the highly pertinent observations of Hughes J, as he then was, in *Re H (Abduction: Whereabouts Order to Solicitors)* [2000] 1 FLR 766, 769-770, 773. As Hughes J recognised, such orders may have the effect of inhibiting frank discussion between solicitor and client and, even worse, of destroying the confidence the client has in the solicitor's independence.

26. The point, I emphasise, extends beyond solicitors and cases involving legal professional privilege to other professionals – accountants, actuaries, bankers and doctors, for

example – whose relationship with a client, customer or patient is founded on mutual trust and confidence. Judges must be alert, in considering whether to make such orders in relation to a professional person, to the risk of potential damage to the professional relationship, just as they must be alert to identify whatever possibilities there may be for obtaining the necessary information from an alternative source.

27. In the present case, in my judgment, Haddon-Cave J was justified in proceeding as he did:

i) I can well understand why the wife's advisers wanted to obtain the information in the event supplied by Mr Kerman before they embarked upon attempts to obtain freezing orders, so that they had a better understanding of where – indeed, in which jurisdiction – the relevant assets were located, and so that the relief sought, whether in this or in foreign jurisdictions, could be more specifically focused and targeted.

ii) Mr Kerman was an obvious potential source of the needed information.

iii) Mr Kerman was no longer on record in the financial remedy proceedings.

28. So far as concerns section 31G of the 1984 Act and FPR Part 24, Mr Shepherd took two points. The first was that, by 5 December 2016, there were no longer any "proceedings" on foot, as that expression is used both in the statute and in the rules. With all respect to Mr Shepherd, this is a thoroughly bad point. In the first place, although the final hearing of the proceedings had concluded on 5 December 2016, judgment was still awaited. Secondly, and even more to the point, as my Lady observed during the course of argument, the final order in the financial remedy proceedings contained the usual 'clean break' provision, the effect of which was that the "proceedings" remained on foot until there was – and there never has been – "full and complete compliance" with that order. Mr Shepherd's other complaint was that the application for the witness summons was not "supported by evidence" as required by FPR 21.2(2)(b). There is nothing in this. By the time he came to make the orders under challenge, Haddon-Cave J was steeped in the evidence. There was no need for him require any further evidence, let alone further written evidence, in support of the application.

29. In relation to the various complaints relied upon in support of the allegation of "ambush", it suffices to make four points:

i) The shortness of the notice given to Mr Kerman of the order of 5 December 2016 had the proper effect of reducing the period of embarrassment to which he would be exposed were he to be contacted by his former clients: cf *Re H*.

ii) The witness summons was in the statutory form and identified that Mr Kerman was being called to give evidence "in respect of" what was identified as "Claim

no. FD13D05340", a claim with which he was, of course, very familiar, having at one time been, though no longer, acting in the proceedings for the husband.

iii) So long as the witness summons is in the relevant statutory form, it is not a requirement, nor has it ever been the practice, to give the recipient of a witness summons (whether in the criminal, civil or family courts) details of the issues on which he is to give evidence.

iv) If more time than had been allowed was required, whether by Mr Kerman or by his counsel, the remedy was to seek more time and, if sufficient time was not allowed, to make an immediate application to the Court of Appeal. That was not done.

30. The fact that no notice was given either to the husband or to Cotor is hardly surprising, for there was every reason to fear that, if alerted to what was going on, further attempts would be made by them to move or secrete assets. As Mr Hodge Malek QC, on behalf of the wife, put it to us, and who can possibly disagree,

> "There was every reason to suppose that had there been notice ... the entire purpose of the witness summons (and possibly the proceedings themselves) would have been defeated."

31. We were taken to Mostyn J's judgment in *L v K (Freezing Orders: Principles and Safeguards)* [2013] EWHC 1735 (Fam), [2014] Fam 35, where, at para 35, he quoted what Lord Hoffmann had said in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16, [2009] 1 WLR 1405, para 13:

> "… a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act … Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

32. We said precisely the same more recently in this court in *In re A (A Child)* [2016] EWCA Civ 572, [2016] 4 WLR 111, para 61:

> "The principle is very simple and is … of universal application. What requires to be shown, and this will usually require a proper evidential foundation, is a real risk that, if he is alerted to what is proposed, if he is "tipped off", the respondent will take steps in

> advance of the hearing to thwart the court's order or otherwise to defeat the ends of justice. That, after all, is the justification for the grant of freezing (*Mareva*) or search (*Anton Pillar*) orders without notice. It is the justification, in an appropriate case, for the grant of a non-molestation injunction without notice, lest the respondent, having been served with an application, further molests his (or her) victim or exerts pressure on her (him) to abandon the proceedings. It was the justification in [*X Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam), [2005] 1 FLR 341], where … an ex parte order was required in order to prevent the parents preventing or sabotaging the medical examinations of their children which had necessarily to be undertaken, if they were to be of any forensic benefit, without the parents having any prior warning of what was proposed. Exactly the same principle applies in the case of without notice applications for location or collection orders."

33. With all respect to Mr Shepherd this was a very plain and obvious case for proceeding without notice. I add, lest it be thought I have overlooked the point, that Mr Shepherd referred in this context to the decision of this court in *In re Creehouse Ltd* [1983] 1 WLR 77. The case is not authority for the proposition propounded by Mr Shepherd and does not stand in the way of the course adopted by Haddon-Cave J.

34. Nor, in my judgment, is there, except in one important respect, any more substance in relation to the complaints about the 'gagging orders'. 'Anti-tipping-off' orders are a well-recognised feature of practice in the family, as in the civil, courts: see, for example, *Re H (Abduction: Whereabouts Order to Solicitors)* [2000] 1 FLR 766, *Re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057, para 37, and *Re M (Children) (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433, [2016] 1 FLR 1055, paras 36, 39-49. The present was a case plainly calling for such an order. As Mr Malek submitted, had the husband been told that Mr Kerman had been summoned to give evidence, there was a risk that he (the husband) would have moved the assets again. Moreover, the order protected Mr Kerman from the embarrassment he might very well otherwise have found himself in, given his on-going duties to his former clients: see *Re H*, 770, 773.

35. I emphasise, however, and this is very important, that an 'anti-tipping-off' order is, of its nature, short-lived and temporary. It should be granted for a specified period – *not* expressed, as in the present case, as being "until further order" – and it must, in any event, be discharged as soon as it has served its purpose. In relation to the first point, which was raised by Mr Kerman's counsel before Haddon-Cave J, it follows that the order dated 5 December 2016 was defective, though in my judgment this does not entitle Mr Kerman to any relief. In relation to the second point, the delay after 5 January 2017 was most unfortunate, but there is no warrant, in my judgment, for any criticism of the wife's solicitors. Given the general practice in the office of the Clerk of the Rules, they were entitled to assume, as they said in their letter to Mr Kerman's solicitor of 21 February 2017, that the court would have provided him with a copy of the sealed order

when it was produced. And it is a fact that, although contacting Haddon-Cave J's clerk, neither Mr Kerman nor his solicitor made any direct enquiries of the Clerk of the Rules as to what was going on.

36. In relation to the complaint that the order dated 5 December 2016 contained no undertaking in damages, there are, in my judgment, two answers:

i) Insofar as the order authorised the issue of a witness summons, there could be no question of an undertaking in damages being required or even appropriate. A witness summons is not an equitable remedy, and the undertaking in damages is a creature of equity, invented by Knight Bruce VC in the 1840s (see *Re W (Ex Parte Orders)* [2000] 2 FLR 927, 946-7) as the appropriate *quid pro quo* for the grant of equitable injunctive type relief.

ii) Insofar as the order contained an 'anti-tipping-off' order, and this was the real gravamen of Mr Shepherd's complaint, we were taken to what Mostyn J said in *L v K (Freezing Orders: Principles and Safeguards)* [2013] EWHC 1735 (Fam), [2014] Fam 35, para 45. I respectfully agree with every word of that, but neither principle nor practice indicates any requirement for an undertaking in damages merely because the court is granting an 'anti-tipping-off' order.

37. In relation to the final complaint, the refusal of Haddon-Cave J to give Mr Kerman permission to appeal and to stay the orders against him pending appeal, I need say only this. If the matter was pressing, so as to admit of no delay, the remedy was to make an immediate application to the Court of Appeal. That was not done.

38. I return to the first ground of appeal, relating to legal professional privilege.

39. The law relating to legal professional privilege is well-settled by the authorities: see, in particular, *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610. The overarching principle is that confidential communications between client and solicitor for the purpose of obtaining legal advice – what the client tells the solicitor and what the solicitor advises his client – are privileged from discovery or disclosure. Legal professional privilege, once established, is absolute and permanent. It confers on the client, as the person entitled to the privilege, the right to decline to disclose or allow the disclosure of the confidential communications in question. It is long established that it is the duty of the solicitor to defend the client's privilege.

40. Legal professional privilege attaches to "legal advice" given by the solicitor to the client, so the question is whether the communication or document was made confidentially for the purpose of "legal advice". This is not confined to telling the client the law, but includes "advice as to what should prudently and sensibly done in the relevant legal context": see Lord Taylor CJ in *Balabel v Air India* [1988] Ch 317, 330. But where the

solicitor is acting not as the client's legal adviser but as the client's "man of business", there will be no legal professional privilege. As Lord Scott of Foscote said in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610, para 38:

> "If a solicitor becomes a client's "man of business" (and some do) advising the client on investment matters, finance policy and other business matters, the advice may lack a "relevant legal context"."

41. It is long established that there is an exception – what for shorthand I will label the 'fraud exception' – where legal professional privilege does not apply: see *The Queen v Cox and Railton* (1884) 14 QBD 153.

42. Before Haddon-Cave J the controversy centred on two issues. One was whether, in relation to the matters on which he was being questioned, Mr Kerman had been acting *qua* legal adviser or *qua* man of business. The other was whether the 'fraud exception' applied. Before us, Mr Shepherd challenged Haddon-Cave J's findings on both issues.

43. In relation to the first, Haddon-Cave J seems to have come to the conclusion, though without deciding, that in relation to both transactions Mr Kerman had been acting as a "man of business." He said (*Z v Z*, paras 16-18):

> "16 In my view, the arranging of insurance is something that a "man of business" would do for a client rather than qua solicitor. Arranging insurance is a fairly routine matter, involving instructing brokers. It would not generally involve giving legal advice … I am not persuaded by Mr Warshaw QC that the possibility that a client might have asked a lawyer "what to do" with a valuable asset necessarily cloaks the mere arranging of insurance with a "relevant legal context".
>
> 17 There was very little argument on whether there was a "relevant legal context" as to any communications between H and [Mr Kerman] as regards [Cotor]'s monetary asset. In my view, advice or assistance given by [Mr Kerman] to H in relation to [Cotor]'s bank accounts with [UBS] again is more redolent of something that he would do as a "man of business" rather than qua solicitor.
>
> 18 In any event, as set out below, I am satisfied that the "fraud" exception applies to both the modern art collection and to [Cotor]'s bank account and this is determinative of the matter (see below)."

44. In relation to the 'fraud exception' point, Haddon-Cave J set out (*Z v Z*, para 19) certain "facts" he had found in the financial remedies judgment. He went on (*Z v Z*, paras

20-21):

> "20 In the light of these findings, it is clear in my view, that the fraud or "iniquity" exception applies in this case. H's conduct has been seriously iniquitous. He has displayed a cavalier attitude to these proceedings and a naked determination to hinder or prevent the enforcement of W's claim. There was ample evidence of this prior to my first ruling on 16 December (see above). The picture was subsequently compounded by [Mr Kerman]'s subsequent revelations of the recent steps which H has taken to hide the modern art collection and [Cotor]'s portfolio in [Liechtenstein]. In my judgment, H's conduct is such that it is plain that legal professional privilege should not attach to his communications with [Mr Kerman] regarding the modern art collection and [Cotor]'s portfolio of financial assets.
>
> 21 The ratio and decision in [*Barclays Bank Plc and Others v Eustice and Others* [1995] 1 WLR 1238] is directly applicable and determinative of this case."

He then quoted what Schiemann LJ had said in *Eustice*, 1252:

> "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."

45. There is, in fact, another point, canvassed before Haddon-Cave J though not perhaps with the emphasis it deserved, which, in my judgment, is determinative of the issue in relation to privilege.

46. It is clear from the transcript that Mr Dyer's questioning of Mr Kerman was confined to two *factual* topics. The first was Mr Kerman's involvement in the insurance arrangements for the art collection. The second was Mr Kerman's knowledge of Cotor's banking arrangements and of the transfer of Cotor's funds from Switzerland to Liechtenstein. Importantly, Mr Kerman was *not* asked about his dealings with his clients, his instructions from them, or his communications with them, let alone about any advice he may have given them. Thus, as Mr Dyer put it to Haddon-Cave J in relation to the art collection, "We are not going to go into that sort of detail. Our questions are primarily going to be focused on: "Did you deal with arranging the insurance? Who were the insurance brokers? On the policy, where is the art said to be located, and where is the art now?""

47. As Mr Dyer pertinently pointed out to Haddon-Cave J, if these questions, or the questions about the Cotor portfolio, had been put to the husband, he would not have been able to rely on legal advice privilege as a reason for refusing to answer; he would have

been ordered to answer. Why then, he said, should Mr Kerman be able to rely on a privilege which would not available to his client – and, one might add, a privilege which, it is elementary, is the privilege of the client, *not* the solicitor.

48. Before us, Mr Malek made precisely the same point: "Mr Kerman was not asked to reveal any legal advice or even instructions which went to the provision of legal advice." He submitted that, "The documentation and information sought from Mr Kerman relate to communications with third parties. In the context of legal advice privilege (litigation privilege was not asserted), only communications with the client are privileged. Hence there is no conceivable privilege to protect here."

49. To this point, Mr Shepherd had, at the end of the day, no effective answer. Indeed, he had to concede, rightly in my judgment, that communications between a solicitor and a third party are not privileged.

50. The point is clearly established by *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474, [2003] QB 1556, para 21, Longmore LJ, giving the judgment of the court, said:

> "We, therefore, conclude that the 19th century authorities established that legal advice privilege was a well established category of legal professional privilege, but that such privilege could not be claimed for documents other than those passing between the client and his legal advisers and evidence of the contents of such communications."

He went on (para 26) to describe legal advice privilege as:

> "… a privilege possessed by the client in relation to no other adviser. Lord Brougham was exercised by the difficulty of discovering why the privilege has been refused in respect of other advisers, especially medical advisers. But the law is clear that it is so refused in respect of every profession other than that of the law. In these circumstances it is important that it be confined to its proper limits. The judges of the 19th century thought that it should only apply to communications between client and adviser. That is the proper compass of the privilege. It is not, in our judgment, open to this court to extend the privilege, even if we thought we should."

51. The most recent summary is to be found in *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd* [2017] EWHC 1017 (QB), [2017] 1 WLR 4205, paras 65, 69, 75, where Andrews J said this:

> "65 … Communications between clients and third parties, such as professional advisers who are not lawyers, are not subject

> to legal advice privilege. Interposing a lawyer in the chain of communication will not improve the client's chances of claiming legal advice privilege.
>
> 69 … only communications between solicitor and client for the purpose of seeking and obtaining legal advice, and evidence of the content of such communications [are] subject to legal advice privilege …
>
> 75 … legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice …"

I respectfully agree with that.

52. I add that in *C v C (Privilege)* [2006] EWHC 336 (Fam), [2008] 1 FLR 115, para 33, I said:

> "… 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."

53. It follows, in my judgment, that this is why the appeal on this point fails.

54. In relation to the 'fraud exception', Mr Shepherd's fundamental complaint is that Haddon-Cave J applied the wrong test. He submits that there is a conflict between the decisions of this court in *Barclays Bank Plc and Others v Eustice and Others* [1995] 1 WLR 1238, where, as we have seen, Schiemann LJ treated the relevant criterion as being "iniquity", and *Gamlen Chemical Co (UK) Ltd v Rochem Ltd and Others (No 2)* (1980) 124 Sol Jo 276, Court of Appeal (Civil Division) Transcript No 777 of 1979, where Goff LJ treated the test as being "dishonesty":

> "… 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 …"

Moreover, says Mr Shepherd, Haddon-Cave J did not (*Z v Z*, para 20) find the husband's conduct to have been fraudulent or dishonest, nor on his findings of fact (*Z v Z*, para 19) would he have been entitled to.

55. There is no need for us to decide any of these points, and it is better that we do not. I confine myself to two observations.

56. The first relates to the decision in *Gamlen*. It is clear reading the Transcript as a whole that the entire argument proceeded on the assumption that what had to be established was fraud or dishonesty, just as it is clear, having regard to the structure of the judgment, that the crucial passage in Goff LJ's judgment upon which Mr Shepherd relies was *obiter*.

57. The second observation relates to *Eustice*. Even if the test is correctly dishonesty and not merely iniquity, it does not follow that the actual decision in *Eustice* was wrong. In the course of an illuminating discussion, the authors of Thanki (ed), The Law of Privilege, ed 3, para 4.48, fn 116, say this:

> "In so far as the decision confirms that privilege is overridden in proceedings for declarations under section 423 [of the Insolvency Act 1986] there can be no objection. However, the dicta in the case go further in extending the scope of the fraud/ crime exception generally."

Given the decision in *Williams v Quebrada Railway, Land and Copper Company* [1895] 2 Ch 751, which, so far as I am aware, has never been questioned, it is not easy to see why the actual decisions in *Eustice* in relation to section 423 of the Insolvency Act 1986 and in *C v C (Privilege)* [2006] EWHC 336 (Fam), [2008] 1 FLR 115, in relation to section 37 of the Matrimonial Causes Act 1973, should be questioned, whatever criticisms there may be of some of the reasoning.

58. Accordingly, for all these reasons, Mr Kerman's appeal must, in my judgment, be dismissed.

Lord Justice Lewison :

59. I agree.

Lady Justice King :

60. I also agree.