Neutral Citation Number: [2021] EWFC 108

Case No: LV16D01012

IN THE FAMILY COURT
SITTING IN THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 December 2021

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

LS — **Applicant**

- and -

Respondent

PS

- and -

Q COMPANY
(a Litigation Lender)

Intervener

- -
- -

Richard Todd QC and Edward Benson (instructed by **Paradigm Family Law**) for the Respondent
Jonathan Southgate QC and Simon Calhaem (instructed by **Keystone Law**) for the **Interveners**
The Applicant wife did not appear and/or take any part in the proceedings

Hearing dates: 29 November 2021

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APPROVED JUDGMENT

Mrs Justice Roberts :

1. This is an application by an intervener in financial remedy proceedings for disclosure of material and information which is currently subject to 'without prejudice' privilege. The intervener, Q, is a corporate entity which provides litigation funding to parties involved in family and probate proceedings. It has lent funds to LS, the applicant wife in these financial remedy proceedings. Her debt to Q with accrued interest currently stands at almost £1 million. For these purposes the precise figure matters not although it represents a significant debt in the context of the financial remedy case which was agreed to be informed by an assessment of the wife's needs as opposed to a full sharing claim.

2. Q is a party to these proceedings having been joined on 18 February 2021 by order of Newton J. It has issued an application to set aside a consent order which was sealed on 16 March 2021 having been approved by Mr Nicholas Cusworth QC, the Deputy High Court judge allocated to this case, on 3 March 2021. There is a four day hearing listed in March 2022 at which the court will determine whether or not to set aside that order. Q already has in its possession some of the privileged material (including without prejudice offers) which was generated in these proceedings and, in particular, for the purposes of a private FDR hearing which was conducted in February this year before a retired High Court judge. It was that hearing which provided the platform for the settlement which was reached by the husband and wife (as I propose to refer to them).

3. At the heart of this dispute is an allegation by Q that the settlement which resulted from those negotiations was deliberately structured by the parties so as to leave the wife with no assets or entitlement to property or liquid funds from which her debt to Q could be met. As a legitimate creditor, Q's case is that it was effectively "bypassed" and the wife, with the husband's encouragement and support, has been left without the means of satisfying her debt. Q already has access to some of the financial disclosure generated during the financial remedy proceedings. It wishes to use that material, together with the privileged material, in the set aside application pursuant to FPR 9.9A to prove its case in relation, inter alia, to claims for relief under ss 423 to 425 of the Insolvency Act 1986.

(i) The context of Q's claim in the extant set aside proceedings

4. Q's case, in essence, and the arguments which it will be advancing before the court in relation to the set aside application is that the agreement which the parties reached, and the order which reflected that agreement, are vitiated by the following:-

   (i) a fraud on Q as a creditor within the meaning of s 423 of the Insolvency Act 1986;

   (ii) fraudulent and material non-disclosure on the part of the parties by their failure to inform the judge who approved the order that Q had been joined to the proceedings for the purposes of its application to be heard on the question of whether or not the court should, in these circumstances, approve the order;

(iii) fraudulent and material non-disclosure of the husband's and wife's true financial circumstances and the wife's potential exposure to bankruptcy as a result of the agreement they had reached as a means to avoid the debt;

(iv) a breach of its article 6 rights. Q seeks to argue that the consent order should not have been approved without it first having been afforded an opportunity to be heard on these issues. It further argues that, without being informed of the true facts, the court was not in a position to consider whether this was a 'consent' order which, exercising its independent jurisdiction under s 25 of the Matrimonial Causes Act 1973, it should have made.

5. Section 423 of IA 1986 concerns *'Transactions defrauding creditors'*. It enables the court to set aside a transaction on the suit of a creditor where a person has entered into a transaction at an undervalue for the purpose of putting assets beyond the reach of creditors. For these purposes, Q relies on established principles of matrimonial law as explained in the well-known case of *Hill v Haines* [2008] 1 FLR 1192. Thorpe LJ held in that case that money and property received by a party under the terms of a financial remedy order is prima facie the measure of the value of the rights he or she has given up. However, this principle only applies in the absence of a vitiating factor such as fraud, collusion, mistake or misrepresentation: see paras 35, 46 and 47. At paras 46 and 60, his Lordship said this:

> "Plainly, if the ancillary relief order was the product of collusion between the spouses designed to adversely affect the creditors the trustee [in bankruptcy] would intervene in the ancillary relief proceedings and apply for the order to be set aside."
>
> …..
>
> "I believe it can be said that in the 21 years since the enactment of the Insolvency Act 1986, practitioners on either side of the boundary between insolvency and ancillary relief law have assumed that the principled approach taken by the courts in Re Pope and Re Abbott held true. Between the two systems of law there needs to be a fair balance which, on the one hand, protects the creditors against collusive orders in ancillary relief and, on the other, protects orders justly made at arms-length for the protection of the applicant and the children of the family."

6. More recently, Knowles J has considered the relevance of the "purpose" test in s. 423 of IA 1986 in *Akhmedova v Akhmedov & Others* [2021] EWHC 545 (Fam) at para 77. She held that there is no necessity or requirement that the sole or dominant purpose of the transaction should be to defraud the creditor. In order to establish the motive or "purpose" of the transaction under review, it is not enough for a creditor to show that its claim is likely to be defeated if the transaction is left to stand. However, the court can infer that a transaction was entered into for that specific purpose (i.e. to put assets beyond the reach of a creditor) if the evidence establishes that a party or parties to that

transaction foresaw that the result would achieve that purpose and that he or she desired to achieve that result: see para 83, and see the decision of the Court of Appeal in *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176.

7. Thus, applying these principles to this case, Q will seek to prove in the set aside proceedings in March next year that, for the purposes of its engagement of s. 423 of IA 1986, (i) the result of the transaction (*the agreement between the husband and the wife to conclude the financial remedy proceedings)* was to defeat its claims as a creditor of the wife; (ii) the husband and the wife foresaw that this would be the consequence; and (iii) they wished to achieve this result. In this way, Q will argue that the court may be placed in a position to infer that this was the 'purpose' of the transaction for the engagement of s. 423 and the relief available to Q as a creditor pursuant to s. 425.

8. It is for these purposes that Q now seeks the court's permission to admit as evidence in the set aside proceedings the without prejudice offers and the materials (including counsel's position statements) from the private FDR which it asserts will prove that the elements set out above in (i) to (iii) are established.

9. It is important to stress at the outset that I am not in this judgment considering the underlying merits of Q's claim under s. 423 of the 1986 Act or the likely outcome of the set aside application. These are matters which will be fully argued on the basis of a forensic scrutiny of the evidence by the judge at the full hearing in March next year. I am only concerned today with the disclosure application which Q now makes that, included within that evidence, should be the privileged material which informed the settlement negotiations at the private FDR which was held on 12 February 2021.

(ii) The litigation background which preceded the private FDR on 12 February 2021

10. The litigation funding provided by Q to the wife concerns a second round of financial remedy claims. Following the breakdown of the marriage in 2016, she had launched her initial claims which were finally adjudicated by Parker J in July 2018. She was represented in those proceedings by Mr Martin Pointer QC. Mr Todd QC represented the husband, as he does in these proceedings. By this stage the parties' marriage had been formally dissolved. The wife was living with the two children of the marriage at the former matrimonial home. The judge delivered her judgment at the conclusion of a four day contested trial during the course of which there were several allegations about the extent to which the husband had discharged his obligations to make full and frank disclosure of his financial circumstances. The court received oral evidence from both parties. In addition there was before the court expert evidence in relation to the value of the husband's company interests which included a portfolio of commercial property investments.

11. As a result of the award made by Parker J, the wife was to receive a lump sum of £3 million. That capital award was based upon an assessment of her future needs in the light of a finding by the judge that the husband's resources were c.£9 million. During the

course of her judgment, Parker J was critical of the husband's disclosure in a number of respects. As I understand it, there was no issue between Mr Pointer QC and Mr Todd QC for the purposes of that hearing that the basis of the assessment of the wife's award was anchored to her future needs as opposed to computation of a full sharing claim. The capital she was to receive pursuant to the judge's order was free capital and was clearly intended to meet her future housing and income needs, as well as any other accrued liabilities. It was no doubt assessed against the backdrop of the wife's case, which does not appear to have been disputed, that the parties and their children had enjoyed a high standard of living during the marriage with comfortable homes, regular international travel, expensive motor vehicles and the like. The picture will no doubt be familiar to practitioners in this field.

12. The judge found that one of the family trusts established by the husband's father in the late 1990s for the benefit of the husband and his sister was a resource for the purposes of the section 25 exercise which the court was required to undertake in terms of the computation of the asset base. Family expenditure appears to have been funded, as the judge found, by a series of loans to the husband made by the trustee.

13. The husband indicated an intention to appeal the order made by Parker J. By that stage there were ongoing proceedings relating to the arrangements for the parties' two children. In separate Children Act proceedings outside London, a residence order was made in the husband's favour. In December 2018, the wife approached Q ahead of the husband's pending appeal in order to explore funding options. No doubt from the foot of the advice which she received, she agreed to concede the appeal. The matter returned to court in March 2020 when MacDonald J made various case management directions including a fresh round of Forms E and ongoing financial disclosure from both parties. By this stage in the proceedings, the wife had entered into the three separate loan agreements with Q. Her original Sears Tooth agreement with her solicitors had been superseded by these separate contractual arrangements with Q. By the time the second set of proceedings returned to MacDonald J in the early part of 2020, her principal debt as a result of the three loans stood at £630,000.

14. It was against this background that the parties found themselves attempting once again to conclude the financial remedy proceedings through the vehicle of the private FDR in February 2021.

(iii) Some initial observations on the 'fraud' or 'iniquity' exception to the principle of privilege

15. The disclosure application by Q which is currently before the court concerns three categories of privileged material: (i) documents not covered by FPR PD9A, para 6.2 (the parties' offers which were made *in advance* of the private FDR); (ii) material generated specifically for the private FDR hearing (including counsel's notes, asset schedules and a report of the course of the negotiations); and (iii) unredacted pages of various witness statements and the statement of claim prepared on behalf of Q for the purposes of related

civil claims which are pending in the Queen's Bench Division but currently stayed by agreement between the parties.

16. It is clear and established law that privileged material (including material protected by legal professional privilege) can, in appropriate circumstances, be overridden by evidence of facts which give rise to a claim under s. 423 of the IA 1986. Within the bundles of authorities which have been put before the court for the purposes of this application are several which relate to what has often been referred to as 'the fraud exception'. Amongst these are *Z v Z (Legal Professional Privilege: Fraud Exception)* [2018] EWCA Civ 307, [2018] 4 WLR 52, *Barclays Bank v Eustice and Others* [1995] 1 WLR 1238, *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, *R v Cox and Railton* (1884) 14 QBD 53. These relate, in part, to different forms of privilege.

17. In the context of financial remedy litigation in the Family Division, *Z v Z* (above) concerned a case where legal professional privilege as between a lawyer and his client was advanced as a defence to providing certain information in matrimonial enforcement proceedings. In that case, Haddon-Cave J (as he then was) at first instance had engaged the 'fraud exception' point in relation to a number of findings he had made in the judgment he delivered at the conclusion of financial remedy proceedings between former spouses. Finding the husband's conduct to have been "seriously iniquitous" in that he had "displayed a cavalier attitude to these proceedings and a naked determination to hinder or prevent the enforcement of W's claims", his Lordship ruled that legal professional privilege should not attach to communications with his solicitor in relation to those assets against which the wife was seeking to enforce her claim.

18. That, of course, is not this case. The husband's case here is that the agreement which he reached with his wife, as now embodied in the consent order approved by the court, should be upheld and he will comply with its terms. However, the 'fraud exception' has been held to apply as a justification for admitting privileged material in a case where an individual was seeking to enter into transactions at an undervalue, the purpose of which were to prejudice a creditor bank: see *Barclays Bank Plc v Eustice and Others* (cited above) in which Schiemann LJ said at p. 1252 that the potential prejudice to the bank was "sufficiently iniquitous for public policy to require that communications between [the individual debtor] and his solicitor in relation to the setting up of these transactions be discoverable". Whilst there remains an unresolved issue as to whether the test for these purposes is 'iniquity' (per Schiemann LJ) or 'dishonesty' (per Goff LJ in *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), the existence of the exception is not in doubt. In the context of the subsequent appeal against Haddon-Cave J's judgment in *Z v Z,* Sir James Munby P in *Z v Z* (above) said this at para 57:

> "….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."

19. *C v C* concerned an interim application by a wife for disclosure of the conveyancing files of an offshore Anstalt which the wife alleged to be the alter ego of her former husband. In the course of his judgment in that case Sir James Munby drew attention to the fact that in *Eustice* the Court of Appeal had held definitively that there was no privilege in the case of a transaction which was caught by s. 423 of the 1986 Act. At para 39 of his judgment, his Lordship explained that the section will invalidate a transaction by someone or some individuals 'at an undervalue' if the court is satisfied that it was entered into,

> "… for the purpose –
>
> (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."

20. In *C v C,* the transaction in question was potentially captured by s. 37 of the MCA 1973 and thus Munby J (as he then was) concluded, albeit obiter, that the transaction was not one to which legal professional privilege attached. In reaching that conclusion he held that the position in insolvency law was equivalent to that under s. 37(2) of the 1973 Act notwithstanding that the wife in that case failed in her interim application because she had not sufficiently pleaded her allegations.

21. The *Eustice* case related to a family farming operation whose members needed to raise further funds to buy land upon which they intended to raise further finance. The business was in financial difficulties in relation to unpaid tax and the Inland Revenue had already sought to enforce the outstanding liability by distraining on certain goods held at the farm premises. When family members sought to assign their interests in the farm for a nominal consideration and a rent which they agreed to pay annually in arrears, the bank sought to have the transaction set aside. For the purposes of the claim, it sought

disclosure of documents held by their solicitors. The issue before the court on the interim application was this:

> "Does legal professional privilege attach to documents containing or evidencing communications between the transferor and his legal advisers relating to transactions entered into by the transferor at an undervalue for the purpose of prejudicing the interest of persons making a claim against him ?"

22. Scheimann LJ considered that there was a strong prima facie case for an application under s.423 of the 1986 Act. Having considered the policy behind the public interest in maintaining legal professional privilege, his Lordship nevertheless concluded that 'fraud' in this context "was used in a relatively wide sense". Given that the dominant purpose of the transaction undertaken by the family was to prevent the bank from restricting the use of what family members regarded as "family assets", the bank was entitled to relief. Having considered the balance to be struck with consideration of aspects of public policy, Schiemann LJ said at p. 1252:

> "… we start here from a position in which, on a prima facie view, 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 those transactions to be discoverable."

23. Alongside the issue of legal professional privilege is the separate issue of 'without prejudice privilege' which attaches to settlement negotiations between parties. This protects the ability of parties engaged in private settlement negotiations to speak and negotiate freely without any concern arising that concessions made, or offers advanced, will not 'leak' into subsequent, or ongoing, litigation. In terms of the general law, there are established exceptions to this form of privilege. In *Unilever plc v The Proctor & Gamble Co* [1999] EWCA Civ 3027, [2000] 1 WLR 2436, Robert Walker LJ explained the basis of the rule in these terms:-

> "[35] … the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection for the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties … to speak freely about all issues in the litigation…
>
> [36] Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers … sitting at their shoulders as minders."

24. However, as *Unilever* makes clear, there are exceptions to the rule. The Court of Appeal set out in its judgment the most important instances where the privilege may be lost or be held not to apply. In cases which are captured by any one or more of the *Unilever* exceptions, relevant evidence which might have been immune from discovery and production will, or may, become admissible in proceedings because the privilege will have been lost.

25. In this context, it is only necessary to consider the three exceptions relied on in this case by Q.

    (i) Where the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible;

    (ii) Evidence of what transpired during negotiations is admissible to show that an agreement made in those negotiations 'should be set aside on the ground of misrepresentation, fraud or undue influence'.

    (iii) One party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'.

26. Robert Walker LJ considered this species of privilege as it arises in the context of 'matrimonial conciliation' which he described as "a hybrid species of privilege".

27. The position in relation to *Calderbank* offers was, and is, well known as a recognised species of privilege where it was possible for one party to make a privileged offer but to waive that privilege on any issue which subsequently arose in relation to costs. The position of 'without prejudice' correspondence and offers made on a wholly 'without prejudice' basis without the *Calderbank* reservation has always been considered to be immune from discovery: see *Walker v Wilsher* (1889) 23 QBD 335 and *Reed Executive plc and another v Reed Business Information Ltd and others* [2004] EWCA (Civ) 887, [2004] 1 WLR 3026.

28. The Financial Dispute Resolution appointment or hearing now forms an essential stage of all financial remedy proceedings. It was mandated as such by a Practice Direction introduced by Dame Elizabeth Butler-Sloss as the (then) President of the Family Division in 2000: see [2000] 3 All ER 379. That Practice Direction described such hearings or appointments as "meetings held for the purposes of discussion and negotiation". They were intended as a means of "reducing the tension which inevitably arises in matrimonial and family disputes and facilitating settlement of those disputes". Para 3.2 contains this direction:

> "In order for the FDR appointment to be effective, parties must approach the occasion openly and without reserve. Non-disclosure of the content of such meetings is accordingly vital and is an essential prerequisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR

appointment is an important part of the settlement process. As a consequence of *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] 2 All ER 693, [1993] Fam 231, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D*."

29. That paragraph of the 2000 Practice Direction is now reflected in PD9A para 6.2 of the Family Procedure Rules 2010. Its effect was considered by Sir James Munby in *V v W* [2020] EWFC 84. That case concerned a separate civil claim brought against a respondent husband (H) in financial remedy proceedings by a single joint expert who had prepared a company valuation report which was to be used in connection with those proceedings. An issue arose as to whether or not H should be permitted to rely on documents generated for the purposes of, or in connection with, the FDR hearing. The basis of his disclosure application in the Family Court was that H required the documents he sought to have disclosed in order properly to defend the civil proceedings and for the purposes of amending his defence and counterclaim. He had identified eight separate classes of documents, six of which related to the FDR hearing. They were these:-

    (i) each party's written submissions and asset schedules prepared for the FDR hearing (some 44 pages in all);

    (ii) the transcript of the submissions made by each counsel at the FDR hearing (60 pages);

    (iii) the transcript of the "indication" given by the FDR judge (4 pages);

    (iv) copies of his counsel's notes of the FDR hearing (54 pages);

    (v) copies of his counsel's notes of the FDR judge's oral indication (5 pages); and

    (vi) copies of notes by his legal representatives of the without prejudice discussions which took place after the FDR concluded (24 pages) and copies of the correspondence following the FDR which led to the consent order which both parties eventually signed and submitted to the court for approval (65 pages).

30. Sir James Munby read all the privileged material for the purposes of his decision but considered himself bound by para 6.2 of PD9A which he concluded was intended to operate as "an absolute bar" to any attempt by H to make use of anything said or done at the FDR in support of his defence and counterclaim in the civil proceedings. I shall need to return to *V v W* at a later stage of my judgment.

(iv) The circumstances in which the parties' agreement following the private FDR on 12 February 2021 was approved and converted into an order

31. In order to give context to the competing submissions of the parties, I propose to say something now about the terms of the consent order, the manner in which it was converted from an agreement into a formal order of the court, the background to the litigation, and the circumstances of the involvement of Q in these proceedings. I do so only to the extent necessary to inform my judgment on the discrete issue which is currently before the court. As the parties are aware, I have undertaken a significant amount of reading for the purposes of this hearing and an earlier hearing with which I dealt on 12 November 2021. That hearing concerned an application by Q for enhanced security for its debt and the return date of an earlier freezing injunction which prevented the disposal or diminution in the value of two properties owned by the husband, including the former matrimonial home.

32. The wife was still living in the former matrimonial home in Manchester (worth c. £1.8 million) at the time of the private FDR hearing on 12 February this year. The husband was living in rented accommodation in London with the parties' two children, residence orders having been made in his favour in separate Children Act proceedings on 7 December 2018. The former matrimonial home was subject to a mortgage which secured a loan from a trust of which the husband was a beneficiary. Under the terms of the agreement which was reached, the wife was to vacate the property which was to be transferred into the husband's name. At that point, the husband agreed to provide through his life interest trust a sum of £1 million which would be used to provide the wife with a home of her choice up to that value. She was to have the right to live in that property for the remainder of her life regardless of any remarriage or cohabitation. She was also to have the right to move to an alternative property through the inclusion of a substitution clause in the trust/licence deed. Responsibility for the upkeep and outgoings on the property were to be apportioned as they would be in a typical 1989 Act schedule 1 case: the trust would meet the costs of insuring the property during what was described as a "life tenancy" whilst the wife would meet the cost of basic utilities and keeping the property in reasonable 'tenantable repair'.

33. Aside from that, the wife's claims for capitalised maintenance and/or any other needs were to stand dismissed, the husband agreeing not to pursue any claim in the future in respect of child maintenance. At the time she had some income from an acting role but that appeared to be no more than about £30,000 per annum. She was then approaching her 50th birthday[1]. On this basis she was self-evidently not in a position to repay a debt of almost £1 million to Q. Shortly after the FDR, she spoke to Q and told them she would not be repaying the loan.

[1] It is right to record from the Defence filed by the husband in the civil proceedings that there was an issue between the parties as to whether the wife also had her own inheritance prospects (c.£1 million). She had also been the beneficiary of c.£140,000 from the sale of a Spanish property and a further £83,500 in respect of relief from costs she would otherwise have been expected to share.

34. Whilst the wife went into the private FDR hearing with legal representation, the husband having agreed to fund those costs after Q reached its maximum limits of lending, she became a litigant in person at some point during its course when a potential conflict of interest was recognised. Both her solicitor and leading counsel, Mr Justin Warshaw QC, withdrew from the FDR hearing. Whilst I do not propose to trespass into the territory of the without prejudice material, it is not difficult to understand why they felt themselves conflicted given the terms of their mandate from the wife in the context of the requirements of Q's loan agreements (see para 47 below).

35. On learning of the proposed settlement, Q sent an email to the court with a copy sent to the husband's matrimonial solicitors. It was dated 15 February 2021 and set out clearly its intention to apply for joinder in the financial remedy proceedings. Two days later Q sent a letter of claim to the wife putting her on notice that the proposed settlement with the husband put her in breach of the Loan Agreements.

36. On the same day, the husband's solicitor sent an email to the chambers of the allocated s.9 judge, Mr Cusworth QC, with a copy of the draft consent order together with the required financial information. Nothing was sent to the court through formal channels. The Family Office at the Royal Courts of Justice was not notified that the order had been submitted for the judge's approval. No formal application was issued and no fee paid. Q was not informed that this step had been taken and Mr Cusworth QC was not informed by the wife's solicitors that Q had made an application for joinder for the purposes of objecting to the making of a final order. The Form D81 *(statement of information for a consent order in relation to a financial remedy)* which was sent to the judge's chambers wrongly stated that the wife was earning £31,000 per month (as opposed to per annum). It omitted any reference to the husband's trust assets despite the obvious inference to be drawn from the terms of the draft consent order that he was in a position to procure a payment of £1 million from trust funds in order to provide a housing fund for the wife. It included reference to the wife's outstanding liability for the Q loan (put at £857,666) and some other legal costs owed to her former solicitors. The husband's corporate assets were valued at just under £625,000 but that value was offset by tax and other liabilities of c. £850,000. The financial landscape presented to the judge revealed net liquid assets of £412,635 and a total net asset base of £590,346.

37. On 18 February 2021 (some three weeks before the approved order was sealed), Q issued a formal application for joinder. It was made with the express purpose of being heard on the issue of whether or not an order should be made in the terms of the agreement. It alleged that the wife was in breach of her litigation funding agreements and that there were proper grounds for the joinder of Q given the issue which then existed as between the wife (and potentially the husband) which was connected to the resolution of the financial remedy proceedings.

38. On the same day, 18 February 2021, Newton J made the order for the joinder of Q. That order was subsequently amended on 19 February to provide a liberty to apply to either party to the financial remedy proceedings. That amendment appears to have been made

as a result of an email sent to the judge's clerk by the husband's solicitors and on the advice of his leading counsel, Mr Todd QC. It sought a stay of the order, although no reference was made to the fact that the draft consent order was then with the s.9 judge for approval. Whilst Newton J amended his order to include a liberty to apply, he did not grant the stay which was sought. The order for Q's joinder was thus effective at least from 19 February 2021 although it was, and is, the husband's contention that it should be discharged: see *Isaacs v Robertson* [1985] 1 AC 97 and *R (Majera)(formerly SM (Rwanda)) v SSHD* [2021] UKSC 46, [2021] 3 WLR 1075.

39. Correspondence between Q's solicitors and H's solicitors continued throughout the rest of February and into March of this year. Despite repeated requests for the same, Q was not provided with copies of correspondence which those solicitors had with the court. On 26 February 2021, Q's solicitors made a formal complaint about the lack of any information relating to the status of the proceedings. They remained unaware that an informal request had been sent to the s.9 judge seeking approval of the draft consent order despite securing party status (albeit that that status was challenged in principle by the husband's solicitors).

40. On 2 March 2021, Mr Cusworth QC's clerk sent him an internal email saying that he had received from the husband's solicitors "a very polite enquiry/chaser" enquiring as to progress. On the same morning, the judge responded with an email stating that the documents submitted were "approved as signed and can be lodged". The consent order was then sent on the same day by his clerk to the Family Office in the Royal Courts of Justice.

41. On behalf of Q, Mr Southgate QC maintains that the failure to inform the judge of Q's intervention and joinder to the financial remedy proceedings and, specifically, its objection to the finalising of the draft consent order, was both deliberate and a failure of the ongoing duty of disclosure owed by both the husband and wife to Q as an existing party to the financial remedy proceedings.

42. On 5 March 2021 Q made a further application to the court on the express basis that no order should be made before it had been afforded an opportunity to make representations. Whilst it appears that Holman J offered to accommodate the parties at an attended hearing on an urgent basis, Mr Todd QC was said to be unavailable.

43. Q became aware for the first time that an order reflecting the terms of the FDR agreement had been approved on 15 March 2021 when the husband's solicitors issued an application for the joinder to be set aside. The consent order appears to have been sealed by the court the following day on 16 March 2021. At an urgent hearing on 17 March 2021 Holman J ordered a temporary stay of the consent order and listed the matter for a hearing two days later on 19 March 2021. It was at the hearing on 17 March that Q's legal team was provided through Holman J's clerk with copies of the email correspondence which the husband's solicitors had had with Mr Cusworth QC's chambers.

(v) The hearing before Holman J on 19 March 2021

44. At the hearing on 19 March, Holman J listed the set aside application for final hearing and made various case management directions in relation to the filing of evidence. He also made freezing injunctions directed to the husband and wife which prevented further dealings with the former matrimonial home and another property owned by the husband in Israel. Q gave undertakings that it would not, without the permission of the court, use any information obtained as a result of the court's order for the purpose of any civil or criminal proceedings other than its claim in the financial remedy proceedings. As a condition of granting the freezing injunctions, Holman J directed that Q must plead its civil claims against the husband and/or the wife by 16 April 2021. The injunctions would be discharged on payment into court by either of the parties to the financial remedy proceedings of a sum of £950,000. The judge subsequently clarified in an email that he was not prepared to require Q to particularise precisely what orders it would be seeking in the set aside proceedings. His Lordship's email to the parties concluded in this way: *"In general the answer to that is obvious: that the wife receives a sufficient sum to at least equal the amount that she owes the interveners. Above that, they have no interest."*.

45. I have seen in the material provided to the court detailed transcripts of what transpired in court on 19 March 2021. Q made it plain through Mr Southgate QC that it had no wish to bring collateral civil proceedings and that it sought a remedy within the financial remedy proceedings through its set aside application. As a party to those proceedings, Q would have locus to make representations to a judge charged with reconsidering the wife's claims so as to caution against approving any order which gave her less than that to which she was entitled in circumstances where such an order had the effect of neutralising what was in effect Q's charge over those assets recovered as a result of the matrimonial litigation. Holman J described that recovery during the hearing as *"a charge over the fruits of the case effectively"*.

46. In my judgment, that was an entirely apt description. I have been provided with a copy of the original litigation loan agreements between Q and the wife. There were three separate loans. The first, for £500,000, was dated 14 December 2018. That appears to have been intended to discharge the existing costs liability which the wife had incurred under the original *Sears Tooth* arrangement which she had with her first set of solicitors. The second agreement was for a further £100,000 and is dated 20 June 2019. The third, and final, loan agreement is dated 27 September 2019 and was intended to finance an advertised application for a legal services provision order which the wife intended to launch. Thus, when Holman J described Q's rights as *"a charge over the fruits of the recovery"*, that must have been the effect of the Deed of Assignment into which the wife entered with Q on 12 December 2018 when the first Loan Agreement was executed under which she assigned her rights, interests and any benefit in "the assets" (defined as the capital sum and costs orders which the court would make" in the financial remedy proceedings) to Q on terms that it would pay to W all remaining sums realised once its

debt had been discharged. As required by the terms of the Loan Agreements, the husband was served with notice of the existence of this formal assignment of the wife's rights. In respect of each separate Loan Agreement, he was formally served in writing with notice that his wife's "Assets", as defined, had been formally assigned to Q.

47. On 20 September 2019, the wife provided her solicitors with formal and irrevocable written instructions which were to remain current throughout the duration of the three loan agreements. By that formal written mandate, her solicitors were instructed, inter alia, to do the following:-

> "1. Provide the Lender with any information it reasonably requests in relation to my legal proceedings and my financial situation, including assets that I may hold and the settlement that I may receive;"
>
> ….
>
> "4. Use all reasonable endeavours to ensure that repayment of all sums due under the loan agreement(s) with the Lender are provided for within the terms of any court order made in respect of my legal proceedings;
>
> 5. Notify any relevant third party … who will be making payments using the proceeds of the proceedings and/or disposal proceeds that I am entitled to in relation to any properties, to ensure payment is made into your client account. I waive my right to confidentiality in this regard.
>
> 6. Subject to your own compliance with applicable anti money laundering regulations, receive the proceeds of the Proceedings (and the disposal proceeds that I am entitled to in relation to my properties (if any)) into your client account and use such proceeds to settle all outstanding sums under the Loan Agreement(s) as the first priority before being used for any other purpose".

48. The instruction concludes with this specific confirmation:

> "I irrevocably waive, in favour of the Lender, any right of privilege and/or confidentiality I may have in relation to the Proceedings throughout the duration of the Loan Agreement(s)."

49. Those were amongst the terms of their retainer both in the run up to the private FDR on 12 February 2021 and throughout until her solicitors ended their retainer during that hearing as a result of a perceived conflict of interest with the wife. As I have said, it is not difficult to understand why they took that step.

50. By its disclosure application issued on 24 November 2021, Q seeks copies of the following privileged material:-

> (i) all without prejudice correspondence since 19 July 2018;
>
> (ii) all offers to settle the proceedings since 19 July 2018; and

(iii) a copy of the Zoom recording of the FDR on 12 February 2021;

51. The 'without prejudice' bundle of material which has been put before the court for the purposes of this application which I decided to read notwithstanding Mr Todd QC's opposition[2] contains three separate categories of material, all of which are acknowledged to be privileged. First, there are two without prejudice offers from H (one of which is a *Calderbank* offer from June 2019, the other being a 'without prejudice' offer written two days before the private FDR in February this year). Secondly, there are the notes and asset schedules prepared by the parties' leading counsel for the private FDR and an email from the wife's solicitors written to the CEO of Q to explain what had transpired at the FDR and the potential conflict of interest which had arisen as a result. Thirdly, there are copies of unredacted pages extracted from Q's particulars of claim (as directed by Holman J) together with unredacted pages from two witness statements sworn by the CEO of Q in support of its claim against the husband and wife.

52. I have also been provided with an extract of an opinion written by counsel (whom I assume to be Mr Warshaw QC) which was prepared to inform her solicitors (and presumably Q) about the merits and quantum of her claims in the context of the rehearing of the financial remedy proceedings after the set aside of Parker J's original order awarding her £3 million.

The Legal Arguments in relation to the Disclosure Application

(a) Q's submissions as advanced by Mr Southgate QC and Mr Calhaem

53. In relation to the joinder order and its status as an intervener in the financial remedy proceedings, Mr Southgate QC, with Mr Calhaem, submits that the joinder order was properly made pursuant to FPR 9.26B. At the time of joinder Q was owed c. £866,000 by the wife. The contractual agreements between them include the formal assignment to Q of the benefit of the financial provision which was to be the subject of a formal court award. It was thus "directly affected" by the prospective final order in the sense that it was "capable of materially and adversely affecting its legal interest": see *Abdelmamoud v The Egyptian Association in Great Britain* [2015] EWHC 1013 at para 59. The wife's agreement with H left her with no assets of her own and put her in what Q contends was deliberate breach of the loan agreements. On Q's case, it amounted to an act of bankruptcy and a statutory fraud within the meaning of s. 423 of the 1980 Act.

54. Mr Southgate QC further argues that the approval of the final order reflecting the terms of the agreement was obtained from Mr Cusworth QC by subterfuge. At no time prior to his consideration of the papers was the Deputy High Court Judge informed that Q had been formally joined as an intervener in order to make specific representations about whether the agreement should be approved and made into an order. It is submitted on Q's behalf that there is no issue but that the husband's solicitors had notice of the joinder

[2] for reasons which I set out in a short preliminary ruling

order. It is equally clear that, because of the informal approach to the judge in his chambers, the court office was unaware that he had been asked to approve the consent order despite the existence of Newton J's order. (Mr Southgate QC has referred to this strategy as "procedural bifurcation" and he maintains it was quite deliberate.) Q was not told that this step had been taken and, in circumstances where its solicitor's requests for information were being ignored, it was unaware that the papers were with the judge with a view to securing judicial endorsement of the FDR agreement. Mr Southgate QC submits that, in these circumstances, the court is entitled to look at what happened in the days and weeks after the conclusion of the FDR as a course of conduct on the part of the husband and his solicitors which was designed to "push the order through without [Q's] interest being addressed".

55. It is submitted on behalf of Q that the privileged material in respect of which it seeks disclosure is relevant to the question of whether or not the husband and wife colluded in reaching an agreement that she would leave the marriage with no assets of her own with a view to avoiding payment of her debt to Q. By ensuring that she received nothing in her own right (a) she thereby avoided repayment of all monies advanced to her for the specific purposes of allowing her to participate in the litigation; and (b) the agreement was likely to result in her personal insolvency and exposure to bankruptcy leaving Q without the means to enforce any summary judgment it secured were it to sue for recovery of the debt. Five days after the private FDR and almost a month before the consent order was sealed, Q had sent the wife a formal letter of claim putting her on notice that the settlement she had reached with the husband put her in breach of the Loan Agreements. In these circumstances, Mr Southgate QC submits that there can be no doubt that she was aware of the position yet neither she nor the husband did anything to impede the process of securing formal judicial approval of the agreement and its conversion into a formal court order.

56. Mr Southgate QC further submits that the procedural route of Q's application to set aside the consent order in the financial remedy proceedings was the correct and appropriate manner in which to bring these issues before the court. It was the course approved by Moylan LJ when he refused Q permission to appeal the order. In holding that application to be misconceived, his Lordship explicitly endorsed a set aside application as the appropriate route for determination of these issues, including whether the court should set aside the order which had been approved by Mr Cusworth QC given his state of knowledge about the circumstances at the relevant time.

57. In terms of the legal approach, it is submitted on behalf of Q that *Hill v Haines* (supra) is reliable authority for the proposition that the court can and will step in to right a wrong in the presence of a vitiating factor such as fraud, collusion or misrepresentation. The much more recent authority of *Akhmedova* has confirmed that, where a party foresees that the result of his actions will be to put assets out of reach of a creditor and that he or she desired to achieve that result, the court can infer that the transaction was entered into for that purpose, albeit that it does not have to be the dominant purpose. Mr Southgate QC

submits that the chronology in this case, taken together with the without prejudice material on which it seeks to rely, will establish its case that s. 423 is engaged and that this was a transaction which was intended to defeat Q's interests as a creditor. He relies on the decision in *Z v Z (Legal Professional Privilege: Fraud Exception)* (supra) as an appellate authority which confirms that legal professional privilege can be overridden by evidence of facts giving rise to a claim under s. 423 under the "fraud exception", as happened in *Eustice*.

58. In relation to the "implied undertaking" not to use material from financial remedy proceedings for a collateral purpose without the court's permission, Mr Southgate QC submits that Q only issued its civil claim as a result of the order made by Holman J as the 'condition' for proceeding with the application for the freezing injunction which it obtained. Having obtained that order, he submits that it is not now open to the husband to argue that Q is seeking to use documents for a collateral purpose when it has done so under compulsion of that court order. Since issuing its civil claim, Mr Southgate QC maintains that Q has taken all steps to ensure that the civil proceedings remain private and it has a pending application before this court for consolidation of those proceedings with the set aside application which is due to be heard in March 2022.

(b) The husband's submissions as advanced by Mr Todd QC with Mr Benson

59. Mr Todd QC's overarching submission is that this is essentially a civil debt action by a non-party to the marriage. As such it is a collateral action and one which is not, and was not, necessary in order for the court to determine the financial remedy application as between the husband and the wife. It is on this basis that he submits the joinder order made by Newton J was flawed and should never have been made. Mr Todd QC further submits that Q has used its status as an intervener to further an attempt to secure production of confidential papers in a financial remedy case which it intends to use for the collateral purpose of pursuing its civil debt against the wife. He maintains on behalf of the husband that it is not necessary to determine whether the debt is valid within the financial remedy proceedings because those proceedings were concluded by an agreement concluded on 12 February 2021 and there is now in place a final order approved by the allocated trial judge, Mr Cusworth QC. As far as the husband and wife are concerned, that is an end to the matter.

60. In circumstances where the case has effectively ended, Mr Todd QC submits that, irrespective of whether the debt action is founded in fraud or criminality (which the husband denies), the order for joinder does not provide Q with a right "to go rummaging through the papers in order to pursue the debt action".

61. As to the circumstances in which the order came to be sealed following the conclusion of the private FDR on 12 February 2021, Mr Todd QC submits that Mr Southgate QC's arguments are no more than "a red herring". Because the case effectively ended with a

Rose order[3] on that date, the sealing of the order was no more than the "formality in respect of a done-deal". In relation to that deal, he makes the following points on behalf of the husband:-

(i) It is not dishonest for a husband to put forward proposals which a third party unsecured creditor does not like, far less does it propel that party into the category of fraud. The wife accepted that proposal but that acceptance does not establish fraud on her part.

(ii) Q has not properly pleaded its case against either the husband or the wife in relation to dishonesty or, against the husband, in relation to conspiracy.

(iii) Q had a debt action at the time of the parties' settlement. They still have one. Whilst they were entitled to *hope* that the wife would recover sufficient capital to meet her debt in respect of the litigation loans, they were not a secured creditor. In the event that the husband had died or become bankrupt before the resolution of the financial remedy claims, they would have been exposed.

(iv) Simply put, there are now no proceedings to join: this case is over.

62. Mr Todd QC relies on the without prejudice privilege which attaches to all Financial Dispute Resolution hearings as set out in para 6.2 of PD9A FPR 2010. In the absence of a *Re D* exception or evidence of the commission of a criminal offence having been committed during the private hearing, he relies on *V v W* and the "absolute bar" (per Sir James Munby) to any attempt by Mr V in that case to make use of anything said or done at the FDR in support of a defence and counterclaim in separate civil proceedings. In these circumstances, the disclosure application made by Q, and its claim in general, ends with PD9A. Even absent PD9A, Mr Todd QC submits that there is clear authority that third parties in multi-party litigation are not entitled to the other parties' without prejudice correspondence: see *Rush & Tompkins Ltd v Greater London Council* [1989] AC 128, (HL). Whatever interest Q may have had as a creditor of the wife, it cannot override the public interest in preserving the confidentiality of privileged correspondence and/or invade the rights of these former spouses to private communication.

63. On behalf of the husband, Mr Todd QC submits that, even if it is thought that there might be a parallel public interest in privileged documents being disclosed in circumstances where allegations of iniquity or dishonesty have been raised by a third party (and that is not this case), the embargo will still apply: see *HM Revenue and Customs Commissioners v Charman and Charman* [2012] 3 FCR 380. In that case the Revenue was not permitted to use information disclosed in the financial remedy proceedings between the husband and the wife despite the fact that Coleridge J had accepted in those proceedings that there was a public interest in the documents being produced.

[3] Because this was a private FDR, I do not accept that this was in fact a *Rose* order: see para 80 of my judgment.

64. Mr Todd QC invites the court to look at the practical realities which are engaged here. He submits that if Q succeeds in its application to set aside the order in March of next year, there will need to be a fresh hearing absent some form of compromise. In any rehearing, Q will not stand in the wife's shoes as claimant. The court does not have jurisdiction to make an order in Q's favour. If the wife renews her agreement with the husband or simply does nothing, then Q will get nothing. If, in the alternative, Q pursues its civil claim, it has absolutely no evidence of any conspiracy as between husband and wife. He contends that neither of these former spouses has to prove the reasonableness of an award which was approved by the allocated trial judge.

65. Further, Q will not be able to bankrupt the wife because she has not breached her contract with Q. Whilst it is accepted that she was not allowed to dismiss her solicitors during the currency of the litigation as a term of the loan agreements, that is not what happened. He maintains that her solicitors declined to continue to act for her in circumstances where they felt they had to withdraw because of a professional conflict.

Discussion and analysis

66. This application engages a number of competing policy considerations. I have referred already to the policy considerations which inform the privileged nature of the FDR hearing as an essential stage of the financial remedy process. If divorcing parties are to settle the financial issues flowing from the breakdown of their marriage at minimum cost (both emotional and financial), it is essential that they can conduct those negotiations with input from their lawyers under the protective veil of privileged discussions which they know will not then be exposed to the full glare of judicial scrutiny at a later stage if those negotiations break down. In this context, it pays to revisit what Sir James Munby said as the headline principle in *V v W* (supra).

> "26. It is important to remember that the FDR is entirely a creature of statute, being part of the statutory process for dealing with proceedings – financial remedy proceedings brought under the Matrimonial Causes Act 1973 – which are themselves entirely a creature of statute. So far as concerns the FDR, the relevant provisions are in FPR 9.15(4), 9.17 and PD9A, para 6. For present purposes, two aspects of the FDR process are significant. The first is that the FDR is compulsory and both parties must personally attend: the parties cannot themselves contract out of it, though they can pre-empt the FDR by embarking upon a 'private' FDR: see *President's Circular: Financial Remedies Court Pilot Phase 2*, 27 July 2018, paras 7 to 11. The other is the obligation of the parties to hold nothing back at the FDR and, indeed, to put forward their best offers. Moreover, it is fundamental that the FDR is a confidential process, differing from other types of family hearings in two significant respects: first, journalists are not permitted to attend the FDR: FPR 27.11(1)(a); secondly, the judge hearing the FDR must have no further involvement with the case: FPR 9.17(2).
>
> 27. This explains the language of PD9A, para 6.2, which is at the heart of this case:

> "In order for the FDR to be effective, parties must approach the occasion openly and without reserve. Non-disclosure of the content of such meetings is vital and is an essential pre-requisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR appointment is an important part of the settlement process. As a consequence of *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231, evidence of anything said or of any admission made in the corse of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D*."

Re D, to repeat, is concerned with child protection and is therefore not relevant here."

67. Sir James Munby recognised the potential problems which this prohibition might bring in terms of affording a remedy to an aggrieved litigant about some aspect of the FDR process. It prevents such a litigant (or indeed the judge) from relying on anything said or done by his own counsel during that hearing to support a formal complaint to the Bar Standards Board or as evidence to support a professional negligence claim. It would appear to prevent a formal complaint by either party or their respective advocates about any inappropriate conduct by the judge during the course of such an FDR hearing. In rejecting these considerations as being sufficient to displace the provisions of PD9A, para 6.2, Sir James Munby directed himself in clear terms that "[a] Practice Direction cannot bind the court if it is wrong in law": see para 32. He continued:

> "33. But, not least given its wholly statutory context, how can it be said that para 6.2 is wrong in law ? It is, as it seems to me, entirely consistent with the remainder of the statutory provisions providing for and regulating the FDR. And I cannot identify any respect in which it might otherwise be said to be wrong in law. If the law regulating the FDR is thought to be unsatisfactory, then the remedy lies with the relevant lawmakers: in the case of the FPR the Family Procedure Rule Committee and, in the case of a Practice Direction, the President of the Family Division. They, after all, are in a much better position than a judge to decide if change is needed and, in particular, if it is, to decide what form that change should take. Indeed, were a judge to embark upon the latter task, the judge would no longer be acting as a judge but arrogating to himself the function of a legislator."

68. In response to the article 6 point raised by Mr V in support of his entitlement to the privileged material which he alleged to be required for the purposes of fair trial, a point advanced in this case by Mr Southgate QC on behalf of Q, Sir James Munby dispatched the argument on the basis of two earlier decisions: *R v Derby Magistrates Court ex parte B* [1996] AC 487 and *General Mediterranean Holdings SA v Patel and Another* [2000] 1 WLR 272 at 295-296. Thus, his Lordship was in no doubt that established principles of legal privilege and client confidentiality must take precedence over the inability of lawyers defending their conduct of proceedings to raise matters which occurred during the course of confidential discussions in relation to what advice and warnings they gave

and/or what instructions they received. That principle applies even when it inhibits a lawyer from being able to put before the court 'the whole story': see, for example, *Ridehalgh v Horsefield & Another* [1994] Ch 205 at 237 per Sir Thomas Bingham MR.

69. A consideration which weighed heavily in the balancing exercise conducted by Sir James Munby in *V v W* was the fact that the parties in that case, as litigants in financial remedy proceedings, were under compulsion to make full, frank, complete and up to date disclosure of their financial affairs. That obligation flows from the requirements of the Matrimonial Causes Act 1973 and the FPR 2010 which mandate that disclosure. In this respect he considered that they were a species of litigation which is different from other civil proceedings: see *S v S (Inland Revenue: Tax Evasion)* [1997] 2 FLR 774 at 777 per Wilson J (as he then was); *Clibbery v Allen* [2002] EWCA Civ 45, [2002] Fam 261 at paras 99 to 105 per Thorpe LJ; and *HMRC v Charman and Charman* (supra) per Coleridge J at para 22 *("The fact that the evidence may be relevant or useful is not by itself a good enough reason to undermine the rule")*.

70. Can the facts of *V v W* be distinguished in this case so as to provide Q with the relief which it seeks ? Mr V, the respondent husband in financial remedy proceedings, had been directed by the court to meet the costs in the first instance of a SJE who was instructed to prepare a valuation report in relation to a company which was agreed to be an asset of his for the purposes of the computation exercise. Following an FDR hearing in June 2018, the litigation was resolved in December that year by the making of a final order which concluded all outstanding issues as between husband and wife. The costs of the SJE remained outstanding at the end of that litigation and the valuer sued the husband in separate civil proceedings for the recovery of his fees. Mr V filed a defence and counterclaim in those proceedings denying liability and contending that the SJE had been negligent in his preparation of the valuation and that it was not one which any reasonably competent professional could have produced. He further argued that the SJE's failure to adhere to the court's timetable had resulted in the late delivery of the valuation report, some 48 hours before the FDR before a Judge of the Family Division. Because he had not had an opportunity to challenge the conclusions of that report, Mr V sought to launch a counterclaim based upon the FDR judge's access to that valuation and his apparent reliance upon it. In terms of the quantum of the counterclaim, he argued that he should be entitled to recover damages equal to the difference between any sums which he was required by the court at final hearing to pay to his wife and what he might have had to pay if the value of shares in the company had been assessed correctly. The FDR judge refused Mr V's application for disclosure of a transcript of the FDR relying on the provisions of para 6.2 of FPR PD9A.

71. In the present case, I accept Mr Southgate QC's submission that Q does not stand in the same position as a third party unsecured creditor, albeit one connected tangentially with the litigation giving rise to the privilege which is under attack.

During the course of legal argument, Mr Todd QC invited me to consider Q's position as analogous to that of any external commercial lender or provider of credit. What, he asked, would be the position if the wife in this case had used a Barclaycard to discharge her legal costs ? Surely it would not be open to that creditor to intervene in financial remedy proceedings to secure some form of priority in relation to its debt ?

72. It seems to me that different policy considerations are engaged in the case, as here, of a professional corporate lender which offers bespoke services designed for the specific purposes of enabling a litigant to participate fully and effectively in litigation flowing from matrimonial breakdown. The role of such lenders has been considered by the courts in several authorities to date.

73. Outside the field of matrimonial law, the principle of access to litigation funding has been recognised for many years. In *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292, Lord Phillips MR said this:-

> "54. …. Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."

74. In the field of matrimonial law and family proceedings arising out of divorce and family breakdown, the courts are frequently confronted with situations where one party has direct access to funds, including cash and other liquid resources which will be required to meet often very significant legal costs, in circumstances where the other party's access to such funds may be limited, if they exist at all. In these circumstances the disadvantaged party, usually the wife, cannot seek assistance from conventional commercial lenders because there are usually restrictions on the extent to which she can provide sufficient security for the lending. In its quest to ensure equality of arms and a level playing field, the court has always been astute to ensure that both parties should have access to resources from which they can meet legal fees. Sometimes there will be agreement that one party should provide the other with a litigation fund at the outset. This avoids the additional costs of applications to court and/or the often significantly higher rates of interest charged by specialist litigation funders. Once the litigation is progressing, the court can control future expenditure on costs in a number of different ways but the principle is enshrined that fairness and justice require that both parties have access to litigation funding.

75. In the field of financial remedy litigation, judges in the Family Division have often recognised and endorsed the valuable function which litigation funders such as Q can provide in appropriate circumstances: see, for example, Moor J in *Young v Young* [2014] 2 FLR 789, Francis J in *Weisz v Weisz* [2020] 2 FLR 95, and Gwynneth Knowles J in *Akhmedova v Akhmedov* (above). Mr Southgate QC

reminds me that a similar view was expressed by Holman J when this matter came before him on 19 March this year. The availability of this form of finance is now recognised specifically by the court in the context of the provisions of s.22ZA of the 1973 Act. For the purposes of any application made to a court for a legal services provision order against the other party, a litigant generally has to show that he or she has been refused lending by "two commercial lenders of repute": see *Rubin v Rubin* [2014] 2 FLR 1018 at para 13(vi) per Mostyn J. In this context Mr Southgate QC makes the obvious point that litigation lending and its interrelationship with s.22ZA would break down if applicants and lenders perceived a real risk that a court could, or would, sanction an outcome which left an applicant without any resources to repay the loan at the end of the litigation.

76. There is no doubt in this case that the husband is aggrieved at the level of costs incurred by the wife. He is particularly concerned that a significant element of the debt due to Q has accrued as a result of costs which he perceives to have been run up unreasonably in the context of the defended Children Act proceedings. He has made it quite plain through Mr Todd QC that he does not consider that Q is entitled to any protection or preferential status within these proceedings. It does not need an invasion of the privileged FDR material to reach a tentative conclusion that this *may* (not must) have been one of the drivers for structuring the settlement proposals in terms of the offer accepted by the wife.

77. Q's status in this litigation derives from the fact that the wife entered into a direct contractual arrangement with it in order to enable her to continue to participate in complex and highly contentious litigation where there was every prospect of an appeal, a rehearing of the financial remedy proceedings, or both. Those contractual arrangements were informed, no doubt, by findings made in 2018 that the assets in this case amounted to c. £9 million. Whilst those findings may have been the subject of a pending appeal, Q had the benefit of an opinion from counsel as to the range of possible outcomes in the event of a successful appeal. Both factors were likely, I suspect, to have been part of the risk assessment which Q would have carried out in terms of its appetite for the level of risk it was prepared to carry as a litigation provider. In order to inform its ongoing assessment of risk, the wife entered into a number of contractual obligations with her litigation funder including a direct waiver of privilege in respect of future negotiations and offers, and a promise not to dispense with the services of the specialist solicitors who were then representing her. Those contractual arrangements recognised that her professional advisers were to be the conduit for the provision of information in relation to any negotiations or other steps in the litigation which affected Q's position and its exposure to recovery in the proceedings. That was why the wife waived her privilege in terms of the legal advice she herself was receiving. I accept that the privilege attaching to the FDR hearing afforded by para 6.2 of PD9A belonged to both the husband and the wife: that is a different issue.

78. In my judgment, on the basis of the facts in this particular case, Q was entitled to seek, and secure, party status as an intervener in the financial remedy proceedings when it became aware of the steps which had been taken to conclude a settlement which, on its face at least, had the appearance of defeating it ability to recover its debt, on whole or in part, from the wife. When her solicitors ended their professional retainer midway through the FDR hearing as a result of the perceived conflict of interest, Q was left professionally exposed. That is not to imply that there was any contractual nexus between Q and those solicitors for there was none. Q's contract was with the wife. Pursuant to her contractual obligations to Q, she had delivered to her solicitors a series of mandates or instructions. I accept that, in this context, there may well be issues as to the extent to which she was in a position to waive aspects of an FDR privilege which belonged not only to her but also to the husband. Q applied for joinder pursuant to FPR 9.26B for the specific and limited purpose of enabling it to be heard on the question of whether or not the court should confirm the agreement which the husband and wife between them had made. Newton J considered that application and granted the relief which was sought albeit without hearing full argument and on a without notice basis. In my judgment, and with respect, he was entirely right to do so although nothing which I say in this judgment is intended to, or can, bind the court if it decides that the issue of joinder should be fully argued at the forthcoming hearing next March.

79. The matter is now listed before another judge of the Division (currently Lieven J). Four days of court time have been allocated to the application which Q now makes to set aside the financial remedy order. I need say no more in this judgment about the circumstances in which Mr Cusworth QC came to approve the draft consent order. It is common ground that he was not made aware of either Q's joinder or the fact that it had made an application to be heard prior to that final approval being given.

80. Where, then, does this leave the court in terms of the current disclosure application and Q's wish to adduce in evidence at that hearing the privileged material which I have now read. Does Q's status as a litigation funder in the particular circumstances of this case lead to a conclusion that this court should depart from the reasoning in *V v W* so as to let in as discoverable documents the three categories of privileged material which Mr Southgate QC submits should be placed before the judge in March next year ? Does the material which is currently before the court (discoverable and/or privileged) lead to a conclusion that there is sufficient evidence of fraud and/or iniquity to engage one of the three *Unilever* exceptions relied on by Q as an exception to the 'without prejudice privilege' attaching to settlement negotiations as now enshrined in para 6.2 of PD9A ? To put it another way, for the purposes of Q's case in relation to s.423 of IA 1986, would the exclusion of the privileged material in this case act as a cloak for perjury, blackmail or other 'unambiguous impropriety' ?

81. In my judgment the privilege is clearly engaged in this case notwithstanding that this was a private FDR arranged by the parties outside the context of a court-listed FDR appointment. Such are the demands on the court system that timely settlements would not be achieved if every case had to take its place in the queue to secure oversight by a full-time judge of the Division or a s.9 deputy authorised to sit in financial remedy disputes. The same observation applies to cases proceedings at all levels of the Family Court. Private dispute resolution has been encouraged by successive Presidents of the Family Division for some time. It has the considerable advantage of enabling parties to choose their tribunal and to do so within timelines which maximise the prospects of avoiding unacceptable delay and extra cost. There will inevitably be limits on what a private FDR judge can do in terms of giving parties the security of a final or *Rose* order at the conclusion of those private negotiations. Even where settlement is achieved in principle at a private FDR, finality will always depend upon a judicial overview since a private FDR judge will inevitably lack jurisdiction to convert the agreement into a formal court order. That is not in any way to underestimate the very important function which the private FDR judge performs in providing an early neutral evaluation of the claim and bringing the parties together to a concluded settlement.

82. In this context, it is important to note that, notwithstanding my reading of the without prejudice material which has been put before the court, I have no knowledge of what, if any, observations were made by the FDR judge during the private hearing about the agreement or the position of the wife's litigation lender. For obvious reasons I do not, and cannot, speculate about these matters.

83. Mr Todd QC's overarching submission is that this court has no discretion here (see para 54 of his written submissions). He submits that Q's application for disclosure of any documentation from the FDR must be dismissed. In taking that position he relies, no doubt, on the conclusion reached by Sir James Munby in *V v W* that he was "bound" by PD9A, para 6.2 in that it operated as "an absolute bar" on the use by a party or person of anything said or done at the FDR in support of any separate action in civil proceedings (see para 34). Whilst I accept that submission as it stands in relation to the facts of that case, it seems to me to ignore the distinction between the exercise of a 'discretion' vested in the court and the existence of a recognised 'exception' to the rules governing the admissibility of without prejudice material. As was recognised as long ago as the decision in *Hill v Haines* (above), the Family Division has always acknowledged the exception of vitiating factors such as fraud or collusion in the context of financial litigation flowing from divorce. These exceptions operate in parallel with the jurisdiction of the *Unilever* exceptions to the general and overarching principle of privileged communications being immune from discovery. As the Supreme Court made clear in *Prest v Petrodel Resources Limited & Others* [2013] [UKSC] 34, [2013] 2 AC 415 the Family Division exercises its jurisdiction in terms of established legal principles in accordance with established

law across the jurisdictions. The problem here arises because of the particular superimposition on these principles of very specific rules which capture the confidentiality of the FDR hearing. Those rules are in place for good reason.

84. For my part, I can see no good reason for drawing a distinction between the application of para 6.2 of PD9A to a FDR hearing which takes place in court before a judge and one which takes place outside court with the agreement and engagement of the parties. The *President's Circular* issued in July 2018 to which I have already referred makes it plain that parties can pre-empt the formal court attendance mandated by the rules provided that they engage in a similar process of negotiation guided and led by a suitably qualified individual whom they trust to provide them with the clear steer towards overall resolution. Whilst that individual lacks the ability to formalise matters on that occasion in the context of a private FDR, exactly the same principles of confidentiality apply to those negotiations as to any formal court dispute resolution process. The language of para 6.2 itself speaks of privileged "meetings" between the parties for the purposes of "fruitful discussion directed to the settlement of the dispute" between them. It seems to me artificial in these circumstances to draw a distinction between the privilege which attaches under para 6.2 of PD9A to a formal 'in house' court-led FDR and one which is convened outside court for exactly the same purposes.

85. I am not adjudicating the merits of the claim advanced by Q pursuant to s. 423 IA 1986, nor any of the alternative grounds advanced by Mr Southgate QC. These decisions will be made at the substantive hearing in March next year when the court will determine, amongst other matters, whether the parties' agreement embodied in the consent order approved by Mr Cusworth QC was an arm's length agreement which was uncontaminated by collusion, fraud or some other 'unambiguous impropriety'. This phrase is captured in the *Unilever* list of exceptions in these terms at page 2444:

> "Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in *Forster v Friedland* (unreported), 10 November 1992; Court of Appeal (Civil Division) Transcript No. 1052 of 1992."

86. For reasons which will be clear, I do not intend in this judgment to descend into the detail of the privileged material upon which Q seeks to rely. Mr Todd QC maintains on behalf of his client that the privileged material falls short of the high bar required to establish fraud for the purposes of the s.423 claim. Standing back, as I do, to review the evidence which is, and will be, available to the court in March next year, there can be no argument but that the agreement of the husband

and wife to settle her outstanding claims as they did has deprived this lender of any immediate or foreseeable prospects of recovering its debt. There is also no dispute from the terms of the agreement but that the provision which the husband intended to make for his former wife's housing was to be carved out of trust resources. However, there are other assets in the case which would have been available as 'resources' to meet needs had the case proceeded to trial. Indeed, Q now has the benefit of orders which preserve assets pending the final resolution of the substantive application in this case.

87. In this instance the court is engaged in an exercise which requires the balancing of different aspects of public policy considerations. The importance of the policy underpinning para 6.2 of PD9A needs no further elaboration over and above the issues which I have already highlighted in this judgment. The entire system of FDR-resolution would cease to run as efficiently as it does if negotiations and discussions, often taking place over several days in a complex case, were at risk of being opened up to wider scrutiny as teams of lawyers picked over which aspects of those discussions and/or the written material generated for the FDR might be admissible for purposes unconnected with those negotiations. In this case, and quite properly in my judgment, Q has secured a substantive hearing when the court will have an opportunity to determine whether the order sealed on 16 March this year can stand in circumstances where Q's claims appear, on their face at least, to have been overridden by the agreement reached by the parties. The court will have the benefit of hearing from the parties directly. It will reach its own conclusions as to whether or not there is merit in the application which Q makes pursuant to the remedies available if its claim pursuant to section 423 is made out. I accept that Q's path to that conclusion might well be facilitated in part by the release into those proceedings of the privileged material which I have read. Mr Southgate QC seeks to spread the forensic net of his current application even more widely than that. However, there is already a wealth of material open to the court on that occasion (including the specific terms of settlement reached) which is either a matter of record or which is available as part of the evidence which has already been collected for the purposes of disclosure in the financial remedy proceedings. In this context I include the circumstances in which the draft consent order was put before the Deputy High Court judge for approval and the apparent failure to inform him prior to securing that approval that Q had applied for joinder, and been joined to the proceedings, for the specific purpose of making representations as to whether the court should make the order in the terms proposed.

88. I accept that there is a distinction to be drawn between this case and *V v W*: there was no suggestion in that case that Mr V had perpetrated a fraud on the court or anyone else, including the wife. He was simply objecting to paying the costs of the SJE's report and was seeking by his counterclaim damages on his own account. I have asked myself whether the potential "contamination" factor in this

case is sufficiently established on the without prejudice material to outweigh the very significant policy considerations which are undoubtedly engaged by para 6.2 of PD9A. It is a difficult balance given the importance which I attach to Q's status as a litigation funder.

89. At the end of the day, and without in any way seeking to predetermine the outcome of that set aside application, I have concluded that the court in March next year will have ample evidence available to it in the absence of the privileged material to form a view as to whether or not this order should be set aside. In the circumstances, I am not prepared to grant the application for the disclosure of the privileged material which Q seeks to adduce for the purposes of the forthcoming set aside application.

90. In relation to the separate question as to whether or not Q was entitled to have this material in the first place, I agree in part with the submission made by Mr Southgate QC. Q has been joined as a party to these proceedings in order to pursue a set aside application. That application has been case managed and is now listed as a fixture. Whilst it is clear that Q was provided with some information about the disclosure which had been made during the course of the financial remedy litigation prior to becoming a party, it is difficult to see how it could have taken any decisions about the risk profile of the wife's application for funding without an understanding of the issues involved. That is not to say that a litigation provider is automatically entitled to disclosure of all the papers generated during the context of proceedings. However, it is commonplace in the field of matrimonial litigation for a commercial litigation funder to require a written opinion from a party's legal adviser in relation to the respective merits of a financial claim. How is that to be done if it is not to be informed by knowledge of the disclosure and the likely parameters of a claim ? In this case the wife had specifically contracted to keep Q informed and to retain her solicitors for this express purpose.

91. I do not propose for the purposes of this judgment to descend into wider issues of the scope of the circumstances in which a party can disclose to a third party without the consent of the other documents generated during the course of litigation. There is no need for me to do so. Q has access to information about these proceedings. As a party, it holds that information subject to the implied undertaking in relation to confidentiality. Absent a resolution of the set aside application, the matter will proceed to a full determination in March of next year. Lieven J (or whichever judge is assigned to deal with the case) will make her determination based upon the evidence which is already before the court supplemented, no doubt, by the oral evidence of the parties and the submissions advanced by counsel. I have determined that the disputed, or privileged, material will remain subject to the FDR privilege mandated by para 6.2 of PD9A. However, as I have indicated, I do not regard that limitation on the scope of the

evidence available to the court on that occasion to prevent or inhibit a full and proper consideration of Q's claims in the context of the settlement which was reached by this husband and wife.

Footnote

92. I take the view that, given the importance of litigation funding to the system, the Family Procedure Rules Committee may well wish to consider in due course whether the potential issues raised by this case require some reconsideration of the 'absolute bar' which Sir James Munby identified in his interpretation of para 6.2 of PD9A. It is an interpretation with which I respectfully agree for the reasons set out in this judgment, although I hope that the different underlying factual matrix of this case (and, no doubt, others) might provide a basis for revisiting when, and in what circumstances, that bar might be lifted where a case can be established for justifying the introduction into proceedings of material covered by the FDR privilege.

Order accordingly