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This judgment is linked to AP v BP and others (financial remedies - s37 application to set aside disposition) [2023] EWFC 170

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IN THE FAMILY COURT SITTING AT OXFORD

ON APPEAL FROM THE FAMILY COURT SITTING AT MILTON KEYNES

IN THE MATTER OF THE MATRIMONIAL CAUSES ACT 1973

Draft judgment sent: 31 January 2023
Approved judgment handed down: 9 March 2023

Before : HHJ Vincent

Between :

AP

Appellant husband

and

BP

Respondent wife

and

PN

GN

Second and third respondents (intervenors)

Joseph Switalski, instructed by Newton Kearns LLP for the Appellant husband
The respondent wife represented herself
Alexander Brown, instructed by CMS solicitors, for the intervenors

Date of hearing: 16 January 2023

APPROVED JUDGMENT

Introduction

1. I will refer to the parties as the husband, wife and intervenors.
2. The husband and wife were married on 24 August 2002 and have three children together.
3. They separated in May 2017. Financial remedy proceedings between them are ongoing.
4. The husband is a media personality. He is the founder and frontman of [Company A], a media channel, which posts content about sport.
5. Income from [Company A] was collected by another Company, [Company B], which was incorporated on 6 November 2012. The husband's colleague ML was the production assistant and held a 30% shareholding in [Company B] (30 shares). The remaining 70 shares were held by the wife. She says she was responsible for marketing, advertising and selling merchandise. The husband disputes the extent of her involvement. He says she held her shares wholly for his benefit, because his credit rating at the time precluded him from opening a business bank account.
6. On 10 January 2017 [Company X] was incorporated. Its directors and equal shareholders are the intervenors, PN and GN.
7. On 16 January 2017, the husband and ML entered into a shareholders' agreement on behalf of [Company B] with [Company X]. The intervenors were investing money into [Company A]/[Company B]. In return for their investment, they intended to gain a stake in those companies.
8. In a side letter (also signed by the wife) it was agreed that once [Company B] and [Company A] reached a value of £5million, the beneficial ownership would be transferred to [Company X].
9. On 2 February 2017 the husband was appointed a director of [Company X].
10. On 1 May 2017 the husband and wife separated.
11. The wife alleges that post separation, the husband set up a new group of companies, transferring ownership of [Company A] to that new group, cutting it loose from [Company B]. The husband says that [Company A] belongs solely to him. The shareholding in the new Company is owned 90% by the husband's accountant and 10% by the husband, but it is alleged by the wife that the accountant holds his shares on trust for the husband. She says [Company A] is a part of [Company B] and should not have been separated in this way. She alleges that these transactions represent an attempt by the husband to divert matrimonial property away from her.
12. On 29 October 2018 the husband's directorship of [Company X] was terminated.

13. On 31 October 2018 the wife commenced financial remedy proceedings against the husband.
14. On 3 October 2019 the intervenors and [Company X] commenced proceedings in the High Court against the husband, the wife and ML, asserting that there had been breaches of the shareholders' agreement. It was alleged that the value of the relevant companies had exceeded the agreed threshold of £5 million, yet the beneficial ownership of [Company A]/[Company B] had not been transferred to [Company X].
15. On 4 December 2020 this litigation was compromised by way of settlement agreement and Tomlin order. The husband and ML agreed to pay £250,000, plus £100,000 costs to the intervenors. The wife was not a party to the settlement, and did not participate in negotiations. She was subsequently discharged as a party to the litigation in May 2021.
16. Unbeknownst to the husband, on 30 October 2020, the wife had entered into an agreement (the agreement) with the intervenors. She agreed to assign 51 of the shares in [Company B] to the intervenors, for the sum of £51. This left her with 19 and ML with his original 30. The intervenors signed the agreement on 3 November 2020.
17. It is accepted that neither the husband nor ML were told about this agreement at the time, either by the wife or the intervenors.
18. In February 2021 the wife and the intervenors entered into another agreement, providing that if the wife obtained ML's 30% shareholding, she and the intervenors would split it between them.
19. Again, it is accepted that she did not tell ML or the husband about this agreement.
20. On 25 March 2021 the intervenors wrote to the Court to say that the [Company X] litigation had been settled 'in principle'. The wife was formerly discharged as a party to the [Company X] litigation on 20 May 2021.
21. On 7 July 2021 the wife procured the transfer of ML's 30% shareholding to her, in exchange for ML waiving £10,000 ML purportedly owed to [Company B].
22. The wife did not tell ML about her earlier agreement with the intervenors. Neither ML nor the husband knew at this time that the wife had already agreed to transfer 51% of the [Company B] shareholding to the intervenors.
23. On 30 July 2021, pursuant to the agreement she signed on 30 October 2020, the wife transferred 51 of her shares in [Company B] to the intervenors (25 to one and 26 to the other), thereby giving them a majority interest in [Company B].
24. The single joint expert in the financial remedy proceedings reported on 12 November 2021. He valued [Company B] at £177,000 if it does not own [Company A] and £592,000 if it does own [Company A]. This represents a significant proportion of the assets in the financial remedy proceedings, and [Company A] is the family's primary income stream. The husband asserts that even if these shares were not held on trust for him by the wife and she owned them outright, they should be regarded as

matrimonial property. On the expert's valuations, 51% of the shareholding is either £90,000 or £301,000. The husband questions why the wife sold them for only £51.00. He asserts that this is an attempt by her to dispose of matrimonial assets.

25. Following the agreement signed by the wife on 30 October 2020, the intervenors supported the wife in opposing the husband's application to register the [Company A] trademark. Once they were shareholders in [Company B] themselves, the intervenors applied to acquire the [Company A] trademark, obtaining an order on 3 November 2021. There is ongoing litigation about this between the intervenors and the husband.
26. On 24 February 2022 the intervenors, as majority shareholders, served on the husband and ML a letter of claim asserting that [Company A] has been unlawfully misappropriated, seeking to set aside any transaction that separated it from [Company B], and claiming damages.

The application for disclosure

27. Following the transfer of the wife's shares in [Company B] to the intervenors on 30 July 2021, the husband's solicitors wrote to the wife's solicitors on 2 August 2021 seeking an explanation. In response, on 7 September 2021, the wife's solicitors referred to the agreement (this was the first time the husband knew of it), said they were awaiting a copy and would 'of course' disclose it once received.
28. The agreement never arrived, despite chasing letters. On 18 November 2021, the wife's solicitors said that in fact the agreement would not be provided because it was confidential and/or privileged.
29. On 9 December 2021 the husband applied to the Court for disclosure of the agreement, correspondence relating to it, and the stock transfer forms.
30. On 22 December 2021 the husband applied under section 37 of the Matrimonial Causes Act 1973 to set aside the transfer of [Company B] shares from the wife to the intervenors, on the basis that the transfer was carried out in order to defeat the husband's claims in the financial remedy proceedings.
31. The intervenors and the wife oppose disclosure of the agreement, on the grounds that it is a privileged document. They say it was prepared for the dominant purpose of pursuing legal proceedings which were either on foot or in reasonable contemplation as at the date of the agreement. It is asserted that the agreement provided the basis for enabling legal advice to be sought or given to [Company B] in respect of the pending trademark litigation, the dispute around ownership of [Company A], and for obtaining further information for use in the [Company X] proceedings.
32. The application was heard by DJ Lynch in Milton Keynes on 14 October 2022. He viewed the transfer agreement, and determined that it was privileged, and should not be disclosed into the financial remedy proceedings.
33. That decision is the subject of the appeal before me.

The law

34. An appeal will be allowed if the Appellant can show that the decision of the Court below was wrong, or the decision was unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
 35. Permission to appeal may only be given where (a) the Court considers the appeal would have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard (rule 30.3(7) Family Procedure Rules 2010.)
 36. The intervenors and the wife asserted that the documents are subject to litigation privilege.
 37. The factors the Court must have regard to when considering litigation privilege are set out by Hamblen J in Starbev GP Ltd v Interbrew Central European Holding BV [2013] EWGC 4038 (Comm) at paragraph 11:
11. *The legal requirements of a claim to litigation privilege may be summarised as follows:*
- (1) *The burden of proof is on the party claiming privilege to establish it – see, for example, West London Pipeline and Storage v Total UK [2008] 2 CLC 258 at [50].*
 - (2) *An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible – see, for example, Sumitomo Corporation v Credit Lyonnais Rouse Ltd (14 February 2001) at [30] and [39] (Andrew Smith J); West London Pipeline and Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm) at [52], [53], [86] (Beatson J); Tchenguiz v Director of the SFO [2013] EWHC 2297 (QB) at [52] (Eder J).*
 - (3) *The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation – see, for example, United States of America v Philip Morris Inc [2004] EWCA Civ 330 at [68]; Westminster International v Dornoch Ltd [2009] EWCA Civ 1323 at paras [19] – [20]. As Eder J stated in Tchenguiz at [48(iii)]: "Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility".*
 - (4) *It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent*

on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA [1992] BCLC 583, 589-590 (cited in Tchenguiz at [54]-[55]); West London Pipeline and Storage Ltd v Total UK Ltd at [52].

12. *In relation to the Court's approach to the assessment of evidence in support of a claim for privilege, it has been stated that it is necessary to subject the evidence "to anxious scrutiny" in particular because of the difficulties in going behind that evidence – per Eder J in Tchenguiz at [52]. "The Court will look at 'purpose' from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose" – ibid. 48(iv). Further, as Beatson J pointed out in the West London Pipeline case at [53], it is desirable that the party claiming such privilege "should refer to such contemporary material as it is possible to do without making disclosure of the very matters that the claim for privilege is designed to protect".*

The hearing below

38. The hearing was listed for half a day, but unfortunately time was cut short as there were difficulties getting all parties and representatives joined up to the CVP hearing. It was a very busy morning in the Court. The judge had been sent a link to an electronic bundle before the hearing, but he could not open it. He said that all parties agreed that he did not need to be referred to the content of the bundle. He had before him skeleton arguments from all three counsel (for husband, wife and the intervenors), the witness statement from GN (one of the intervenors), and access to the Court file. The judge said in his judgment that he had carefully considered all the documents relied upon.
39. The judge requested to view the document about which privilege was claimed. I have also seen it.
40. After hearing submissions from each of the representatives, the judge gave an *ex tempore* judgment.

The agreement

41. The agreement sets out the names of the signatories to it.
42. In a series of recitals it sets out in brief terms the wife's dispute with the husband and ML around the ownership of [Company B] and [Company A]. The wife's intention to bring legal proceedings on behalf of [Company B] against the husband and ML is recorded.
43. The intention of the agreement is then noted:
- (1) the intervenors will fund the wife's litigation against her husband/ML in return for (i) the intervenors being appointed to the board of [Company B]; (ii) the transfer of 51% of shares in [Company B] to the intervenors; and (iii) her

obtaining legal advice that the claims she intends to bring have at least a 60% prospect of success.

(2) Once they are appointed to the board of [Company B], and the share transfer has taken place, the intervenors agree to settle the claims made against the wife in the [Company X] proceedings.

44. The purpose of the agreement is then stated to be, *'to record terms to implement the above'*.
45. It is then stated that, *'the agreement is entered into for the dominant purpose of pursuing legal proceedings against the husband and ML, and that such proceedings are in reasonable contemplation as at the date of the agreement.'*
46. The agreement then provides for the wife to transfer the two separate portions of shares totalling 51 ordinary shares, leaving her with 19 ordinary shares in the Company. The consideration is stated to be £51.00.

The judgment

47. Given that the history leading up to the making of the application is quite involved, it is impressive that the judge was able in an *ex tempore* judgment to set out that history and the parties' respective positions so clearly. After that, he set out at some length the law.
48. The judge then described the agreement. He noted that the agreement was headed *'confidential'* and *'subject to litigation privilege'*, and that it is stated to have been entered into *'for the dominant purpose of pursuing legal proceedings'*, which he said, *'were in reasonable contemplation as at the date of the agreement.'* He describes the agreement as *'commercial'* and concluded that he is satisfied that it is protected by litigation privilege. He then referred to the parts of GN's witness statement that he had in front of him, in which reference is made to the various pieces of litigation that the intervenors say they had in contemplation at or about the time the agreement was signed. This satisfied the judge that the document must therefore have been prepared for the dominant purpose of those proceedings, and that it provided the basis for enabling legal advice to be sought or given. The District Judge referred once again to the assertion within GN's statement that this is indeed what the purpose of the agreement was, and refused the application for disclosure.
49. This part of the judgment is very brief compared to the lengthy introduction setting out the facts and law.

Grounds of appeal

50. On behalf of the appellant husband, Mr Switalski invites the Court to find that the judge was wrong to conclude that the agreement attracted privilege, for the following reasons:

- a. The judge found the ‘dominant purpose’ of the agreement was to pursue litigation, but he only considered this from the perspective of the intervenors, and not from the wife’s perspective;
- b. He relied too heavily on GN’s statement, and did not give proper consideration to the wife’s witness statement, which stated that the dominant purpose of the agreement from her perspective was to settle the [Company X] litigation which by then had been underway for about a year;
- c. The judge failed to apply the correct legal test, and to identify in what way the document could be said to have been brought into existence for the dominant purpose of enabling legal advice to be sought or given and/or for seeking or obtaining evidence or information to be used in connection with such anticipated or contemplated proceedings;
- d. The judge did not consider the other classes of documents separately (correspondence and stock transfer forms) but having found that the agreement was privileged, came to the same conclusion about the other documents without further analysis or reasoning.

Conclusions

51. Despite time pressures and difficulties with accessing the bundle, the judge was urged on by the parties’ representatives to deal with the application. No doubt he had in mind that it was being heard some ten months after it had been issued, and that the financial remedies proceedings had been going on for two years with little progress. In some ways it is to his credit that he pressed on, and in a short time got to grips with the history of the litigation, the issues between the parties and the law. However, the judge’s conclusion was not underpinned by the level of analysis and ‘anxious scrutiny’ that the application required of him.
52. The application required some delicacy because he could not reveal the content of a document that was asserted to be privileged.
53. However, the judgment does not give sufficient reasons for why he had concluded that the document was prepared ‘*for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings.*’
54. The labels that were applied to the document made it clear that the signatories to it intended it to be regarded as confidential and not for disclosure to other parties. However, attaching a label that a document is ‘*subject to litigation privilege*’ does not make it so.
55. A conclusion that it was privileged could only be reached with analysis of the document itself, the statements of evidence and any other relevant evidence.
56. The judge only had two documents directly in front of him; the witness statement and the agreement. The judge said he had considered other evidence, including the wife’s statement, but he did not refer to the wife’s statement in his judgment. He referred

only to the agreement itself and GN's statement. He said he had read GN's statement 'multiple times'. It would seem that he placed too much focus upon the perspective of the intervenors.

57. The judge noted once in the judgment that the transfer agreement was subject to legal professional privilege on behalf of the wife, but did not explain anywhere how he had reached that conclusion, other than noting she was a party to the agreement.
58. In her own statements, the wife states on a number of occasions that from her perspective, the dominant purpose of the transfer agreement was settling the [Company X] litigation:
 - *'the agreement was made in order to settle the [intervenors'] claims against me personally and was part of the consideration for settlement;*
 - *'I had to make my own agreement with the [intervenors]. Without the resources to defend myself, the settlement offer of transfer of shares was my only out and I had no alternative but to make this agreement with them';*
 - *'I transferred the shares in [Company B] in good faith to the [intervenors] to settle the [Company X] proceedings'*
59. The wife did not say in either of her witness statements that the purpose of the agreement was seeking or giving legal advice or obtaining information to be used in contemplated litigation – either on her behalf or by the intervenors.
60. The intervenors had devised a plan of action to take control of [Company A]/[Company B] by a means which involved embarking on litigation in the future. However, merely stating an intention to seek advice with a view to pursuing litigation in the future is not sufficient to attract litigation privilege.
61. Mr Switalski has referred me to the case of (1) WH Holding Ltd (2) West Ham United Football Club Ltd v E20 Stadium LLP [2018] EWCA Civ 2652, *'[l]itigation privilege relates to documents brought into existence for the purpose of the conduct of litigation and passing between client, lawyer, agent or third party'*. However, litigation privilege does not cover all documents brought into existence for the purpose of actual or contemplated litigation. In that case, *'[d]iscussing a commercial settlement'* was found not sufficient to attract privilege.
62. Was litigation in train or contemplated at the time the agreement was signed?
63. At the time the agreement was entered into, the intervenors did not have any shares in [Company B]. Only once the wife had transferred her shares to them in July 2021 were they in a position to even contemplate the litigation that they then embarked upon by sending the letter of claim in February 2022. The effect of the agreement was that it would give the intervenors the shareholding they had originally sought to obtain by the agreements entered into in 2012. Once they were shareholders [Company B] they had standing to bring litigation against the husband and his partner ML.

64. The agreement described the intention to obtain legal advice at some point in the future, and depending on the outcome of that advice and the successful transfer of the shares to the intervenors, obliged the intervenors to fund that litigation. Litigation could not have been contemplated by the intervenors at that stage as they had no standing to bring it. Litigation was not realistically in contemplation by the wife, merely her wish to enter into it, desire to have financial backing for it, and intention to obtain legal advice about it. Other than that, there is no request either for advice or further evidence or information to be provided for the purposes of the [Company B] litigation.
65. GN says in his statement that following the agreement, the intervenors supported the wife to register her objection to the husband's and ML's application. The intervenors themselves were not involved in this dispute until after they became stakeholders in [Company B], and obtained a trademark order in November 2021.
66. So far as this litigation was concerned, again the agreement described the intervenors' intention to financially support the wife in this dispute. However, other than stating that there is a dispute around trademarks, there is no request for legal advice in respect of it, nor is further evidence or information sought to be provided for the purposes of the trademark litigation.
67. The [Company X] litigation was ongoing at the time this agreement was entered into. It was settled just over a month later, the intervenors accepting a cash settlement in lieu of the share transfer. Unbeknownst to the husband and ML, by that stage the intervenors had contracted with the wife to obtain fifty-one of her shares, which would give them the shareholding they originally to have.
68. So far as the [Company X] litigation is concerned, the agreement is clearly intended to bring about settlement of that litigation, and creates significant leverage for GN and PN. There is no request for legal advice, nor for further evidence or information to be provided in respect of the [Company X] litigation.
69. The dominant purpose of the agreement was, as is in fact stated, the implementation of the steps identified to bring about changes in the parties' legal relationships, which shifted the tactical positions so far as the ongoing and future litigation was concerned. As such this litigation provided a context for the agreement, but having regard to the contents of the document itself and the evidence from the witness statements, it does not attract legal privilege.
70. On this occasion the judge was not afforded the time that would have been necessary to scrutinise the agreement in the light of all the evidence, not just the intervenor's statement. He was not able to carry out a more detailed analysis of the agreement. I find that instead he took the assertions printed on the face of the document, and the intervenor's witness statement at face value. In doing so, he was wrong.
71. The agreement is plainly a commercial agreement, intended to (i) put the wife in funds so that she may bring litigation against the husband and ML, (ii) to relieve the wife of any liability towards the intervenors from the [Company X] litigation, and (iii) to put in train measures that would eventually lead the intervenors to have a controlling interest in [Company B].

72. I do not accept Mr Brown's submission that the district judge's conclusion about privilege should be treated as a finding of fact that could only be set aside on the basis that it was a finding that no reasonable judge could have reached. This was not a conclusion reached after hearing live evidence from witnesses of fact.
73. Despite the labels given, and the references to planned litigation in the future, on straightforward analysis, no part of this agreement could be said to have been for the purpose of either seeking or giving legal advice, nor obtaining evidence or information to be used in or in connection with anticipated or contemplated proceedings. A recorded intention to obtain legal advice in the future does not cloak this document with legal privilege.
74. The application for permission to appeal is granted and the appeal is allowed.
75. Pursuant to rule 30.11 of the Family Procedure Rules 2010 I consider it proportionate to set aside the order of the lower court and to replace it with the decision of the appellate Court that the agreement does not attract legal professional privilege. It must be disclosed into the financial remedies proceedings.
76. The next issue is whether the judge failed to consider classes of documents other than the transfer agreement. It is perhaps understandable that having found the transfer agreement to be privileged, he would not have gone on to consider the related correspondence and stock transfer documents separately.
77. In his witness statement the intervenor says that he does not understand the basis of the request for the stock transfer forms, they are '*just administrative documents that record that the shares were formally transferred for their nominal value (£1 per share).*' There does not seem to be any claim that these documents are privileged, this share transaction is plainly relevant to the issues in the case, and I find that they should be disclosed into the financial remedies proceedings.
78. On the face of it, correspondence which relates to the commercial agreement to transfer shares in return for (i) settlement of an existing claim and (ii) an agreement to fund future litigation, does not attract litigation privilege. The starting point is that they should be disclosed, contrary to what is asserted by GN in his witness statement. They are not a protected class of document per se. However, I have not heard arguments in respect of any particular items of correspondence, so I cannot be definitive about this.

Appeal in respect of costs

79. The judge noted that the presumption that each party would bear their own costs did not apply where intervenors were involved.
80. Having dismissed the husband's applications for disclosure, his starting point was that the husband should pay the costs of the winning parties.
81. However, the judge was critical of the wife, '*[she] was not open and frank about the transaction. She could have set out much earlier what happened and provided a*

detailed narrative of the circumstances. She did not. In the circumstances, the judge did not award the wife her costs.

82. The order provided that the husband alone should pay the costs of the intervenors. He carried out a summary assessment of those costs.
83. The husband appeals the order.
84. Given that the husband has been successful on the appeal the normal order would be that his costs of the appeal would be paid by each of the respondents.
85. In addition I find that the husband's costs of the hearing below should have been paid by each of the respondents to the application.
86. If not agreed, I will consider arguments in respect of the apportionment of those costs and assessment of their amount when judgment is handed down.

HHJ Joanna Vincent
Family Court, Oxford

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