Neutral Citation Number: [2020] EWHC 1847 (Fam)

Case No: FD19F00071

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2020

Before :

THE HON. MR JUSTICE COHEN

- -

Between :

AG	**Applicant**
- and -	
VD	**Respondent**

- -

Miss Deborah Bangay QC & Miss Lily Mottahedan (instructed by **Penningtons Manches Cooper**) for the **Applicant Wife**
Mr Justin Warshaw QC and Miss Kyra Cornwall (instructed by **Mishcon de Reya**) for the **Respondent Husband**

Hearing dates: 6 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cohen :

1. I have before me a summons issued in the context of proceedings brought by AG (the wife "W") for financial remedy orders in proceedings brought under Part III Matrimonial and Family Proceedings Act 1984 against VD (the husband "H"). By his summons, H seeks an order that W produces the files of her previous legal advisors. I will come to the precise terms of the application in due course.

2. The context of the application is that H and W co-habited from the middle of 2009 and married on 7 August 2010. W was born in Russia and has a number of different nationalities. H was born in Ukraine and likewise is a national of a number of different countries. The marriage took place in Russia. It appears to be common ground that in April 2014 there was a significant argument between the parties.

3. There is an issue within the proceedings as to when the marital partnership came to an end. Did it end following the argument in 2014 or did it continue until late 2017. The seamless cohabitation/marriage was only of some 5 years if it came to an end in 2014 but if 2017 the marriage would be deemed to be one of 8 years.

4. On 16 March 2017 W filed a divorce petition in England which stated that "*the petitioner and the respondent have been separated for the past two years in that they live separate and independent lives and do not have sexual relations".*

5. In November 2017 the parties had discussions and on 25 December 2017 H petitioned for divorce in Russia. His petition was promptly served on W. At this stage W had still not served H with her English divorce petition of which he was unaware. H's divorce petition was based on a pleaded separation date of April 2014.

6. After various interlocutory hearings a decree of divorce was pronounced in Russia on 22 March 2018. H had been served with W's English petition only the night before, namely on 21 March. As a result of the dissolution of the marriage in Russia, W withdrew her petition in England.

7. On 29 July 2019 W issued her application for permission under Part III and in due course I granted permission.

8. H says that it was only when he read W's Part III statement, signed on 26 July 2019, that he realised that, contrary to her petition, W was asserting that the marriage only broke down in late 2017.

9. W's case is as follows, as set out in her Part III statement:

> *58…In early 2017 I instructed Legal Case Management Ltd to issue divorce proceedings. LCM retained Sterling Lawyers Ltd on my behalf who issued a divorce petition on 16 March 2017 …*
>
> *59. I now know that LCM are a "para-law" firm, not qualified solicitors. They and the lawyers they initially instructed (Sterling Lawyers Ltd) were frankly incompetent (I believe possibly even negligent) as the petition was riddled with errors and inaccuracies … For example they did not include S as a child of the family although they referred to her as such in the narrative behavioural grounds, they incorrectly*

asserted that we had separated two years previously, and they failed to apply for financial relief within the petition. I accept that I signed the petition which was in English and just put in front of me, but at no time was it translated in Russian either on paper or orally so that I could check it. I understand spoken English, but I am not a confident speaker or reader.

10. It is H's case that on 3 separate occasions W waived the privilege that would normally attach to communications between a client and her legal advisors. The first occasion was as set out above in her Part III statement.

11. H says that the second waiver took place in March 2020 when W answered the question in a questionnaire:

"*Please confirm when the Applicant first instructed lawyers both in this jurisdiction and in Russia, in relation to the breakdown of her marriage to the Respondent".* Her reply was:

The Applicant confirms that she first instructed LCM … in early 2017, who instructed a solicitor and a barrister on her behalf to issue a divorce petition … although the Applicant did not receive detailed advice at that time.

12. This was followed by W's second statement, which says H amounts to her third waiver of privilege, which contains these passages:

[22] *In response to paragraph 49,* (H) *states that my English divorce petition issued on 16 March 2017 was on the basis of two years separation. In fact, page 4 of the petition states it was based on* (H's) *unreasonable behaviour, although I accept it mistakenly refers in the statement of case to a two year period of separation, and to a lack of marital relations. I have explained in my first statement that this petition was full of errors due to the way it was prepared. Until early 2018 I did not instruct lawyers directly, but via a "para law" firm, LCM Case Management. My contact was with AL, who was a Russian speaker, but not a qualified lawyer family or otherwise. I did not meet NG, the solicitor who AL found from Sterling Lawyers Limited, who prepared the petition, nor did I speak to her over the telephone. I was only involved at "one step removed" from the process via AL …*

[24] I dispute (H's) *claims that I am a confident English speaker. My statements in these proceedings have been prepared in parallel translation in Russian and English, which was not the case with the divorce petition …*

13. Thus it is, that W seeks to depart from the written terms of her petition for divorce and to argue that the petition:

"*Incorrectly asserted that we had separated two years previously*" and "*mistakenly refers in the statement of case to a two year period of separation and to a lack of marital relations*".

14. It is clear that these words are carefully chosen by the specialist legal team that W now has acting for her. Behind these emollient words it is clear that the way W's case is being put is as follows:

i) The petition did not reflect her instructions and that she did not tell her advisors that she had separated two years prior to March 2017 or that marital relations had then ceased;

ii) Whoever drafted the petition misunderstood W's instructions;

iii) W never saw the petition (as I was told during the hearing) or, alternatively, that it was "just put in front of her" but at no time was it translated into Russian either on paper or orally with the result that W did not understand its contents and/or was deprived of the opportunity of checking it;

iv) At no time did W ever speak to a qualified lawyer or anyone in any capacity at Sterling Law.

15. It is important that I have spelt out exactly what W's case now is so as to evaluate the inconsistencies between the position as pleaded in her divorce petition and now and in order to assess the extent of the substance of the inconsistency. Is she simply making a passing reference to an erroneous document or is she opening the door of the notional consulting room in which she and her advisors were meeting and explaining and relying upon what would otherwise be a privileged process?

The Law

16. The parties agree that I can take as my starting point the summary provided by Elias J (as he then was) sitting in the Employment Appeals Tribunal on Brennan and others v Sunderland City Council and others [2009] ICR 479. At paragraph 16 he summarised the principles as follows:

> "(I) As a matter of public policy, all communications between a legal adviser and/or his or her client are privileged from date of production so long as they are confidential, written by or to the legal adviser in his or her professional capacity, and for the purpose of giving or getting legal advice … The interest which it protects is to ensure that communications between a solicitor and client may be frank and free and should not emerge into the public domain if litigation is subsequently pursued.
>
> (2) A party may, however, waive that privilege. Classically, and uncontroversially, this would be so in instances where the party refers in detail to, and seeks to rely upon, part of a document setting out legal advice, but resists the other party's efforts to obtain disclosure of the whole of that advice.
>
> (3) Whether or not privilege has been waived is determined by the
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> application of the principle of fairness…
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> In *Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation,* Mustill J, as then he was, said this:
>
> "where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow

> an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood".
>
> This is frequently referred to as the "cherry picking" principle. A party
>
> cannot seek to gain an advantage in litigation by placing part of a document before the court and withholding the remainder.
>
> (4) The fact that waiver is accidental makes no difference; once waived, the whole document must be produced (or at least all parts of the document relating to that subject matter) …
>
> (5) A document may be redacted to remove immaterial matter or material of no relevance to the case, whether privileged or otherwise.

17. For these purposes the word "communication" can be substituted for "document", and "oral" for "written".

18. Later in the judgment Elias J said this:

> 62 We begin with the observation that the underlying principle here is fairness. We agree with Mr Engelman that it is also inconsistency -waiving where it suits and claiming privilege where it does not - but the test for determining whether there is such inconsistency as would warrant a finding of waiver is fairness.
>
> 63 … In our view the fundamental question is whether, in the light of what has been disclosed and the context in which disclosure has occurred, it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information because it would risk the court and the other party only having a partial and potentially misleading understanding of the material. The court must not allow cherry picking, but the question is: when has a cherry been relevantly placed before the court?
>
> 64 Typically, as we have seen, the cases attempt to determine the question whether waiver has occurred by focusing on two related matters. The first is the nature of what has been revealed; is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed; has it simply been referred to, used, deployed or relied upon in order to advance the party's case? …
>
> 66 Having said that, we do accept that the authorities hold fast to the principle that legal advice privilege is an extremely important protection and that waiver is not easily established in that context something more than the effect of the advice must be disclosed befree any question of waiver can arise.
>
> 67 However, in our view, the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities in England strongly support the view that a degree of reliance is required before waiver arises, but there may be issues as to the

> extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available. A court might, for example, find it difficult to say what side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question whether fairness requires full disclosure.
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> 79 … We agree that the law should be careful not too readily to find that relatively casual references to legal advice in collective bargaining negotiations constitute a waiver of privilege…In particular, if there is no reliance on these references then, even if they are relatively detailed, that will still not lead to waiver of privilege. If on the other hand there is reliance, it is only fair that the full advice (at least with respect to any relevant issue disclosed) should be produced.

H's case

19. Mr Warshaw QC and Miss Cornwall argue that in this case it is obvious that W relies on material that is privileged. She asserts that she did not tell her lawyers what they have attributed to her in the petition and further that they deprived her of the opportunity of checking the document so as to reveal their error. Thus, they say, W is relying on what she actually told her agents and that:

    i) It follows that she is relying not just on the effect of what has transpired but on the very content of what she told her advisors on what would be a privileged occasion.

    ii) It would be unfair to H if he was left unable to challenge W's statement without having sight of what one would anticipate to be contemporaneous notes taken by the advisors and/or correspondence or other communications between (a) W and LCM and (b) W or LCM with Sterling Law.

20. If further authority is needed, H relies on three cases, all from different jurisdictions. In Re D (Care Proceedings: Legal Privilege) [2011] 2 FLR 1183 the Court of Appeal dismissed an appeal from the judge who ruled that a mother had waived professional privilege by changing her case in her witness statements about circumstances in which her child had been injured. The Court of Appeal in deciding the "fundamental question" whether it would be unfair to allow her not to reveal the whole of the advice that she received, the undesirability of breaching confidentiality must be balanced against the unfairness to the father, if the cloak that ordinarily conceal the discussions with her lawyer were not lifted.

21. In the Australian case of Stamp v Stamp [2007] FamCA 420 a wife applied to set aside a property settlement order on the basis that a head injury had affected her capacity to give proper instructions to her solicitors advising her on the terms of the original consent order. The court held that the wife had waived privilege in respect of her solicitor's files. Because the wife had herself put in issue her capacity to give instructions to her solicitors, fairness demanded that the solicitors file be disclosed in order for her case to be tested.

22. A case almost identical to this was considered by the High Court of Hong Kong in Wing Fai Construction v Benefit Holdings, unreported from 16 September 2004, but cited in Daimler AG v Leiduck [2011] HKCFI 498. Reyes J was confronted with the defendants alleging that a letter written by their solicitor was written without their proper instructions and did not represent the truth of the situation. He held that by squarely raising the issue whether the letter truly reflected their instructions, the defendants were deemed to have waived privilege. The judge held that this could not be fairly explored at trial without access to relevant materials to examine the alleged mismatch between their instructions and the contents of the letter. The defendants could not both assert the solicitors did not act on instructions and refuse discovery of those instructions.

W's case

23. Miss Bangay QC and Miss Mottahedan argue:

    i) That legal professional privilege is to be jealously guarded; it will not be lightly lifted and the mere reference to a document, or piece of information does not lift the cloak of privilege.

    ii) W has been very careful about what she has said about the contents of the petition. She has not referred to individual occasions or any specific meeting. She has not mentioned what she said to those responsible for the drafting of the petition or to the detail of any conversations she had with LCM. All she has done is to say that they have made an incorrect assertion.

    iii) *Fairness is not the touchstone by which it is determined whether a client has or has not impliedly waived his privilege* - Paragon Finance Plc v Freshfields [1999] 1 WLR 1183. Thus, whilst fairness is a consideration in the exercise, it is not the paramount consideration that trumps all others. Or, as the authors of Passmore on Privilege 4th Edition say:

    "It is nonetheless clear that under English law the absolute nature of privilege will prevent the development of waiver rules of general application that are dominated by fairness considerations alone – inevitably while fairness has a major part to play, context is everything, …

    iv) Nowhere in her statements has W made reference to the advice that she was given or to any written document. There has to be actual detailed reference to privileged material and a simple statement of fact does not lead to waiver.

Discussion

24. Despite the skilful drafting of W's advisors, it is clear to me that W has invited H into the consultation room. She is plainly setting out that her instructions had been misconstrued or misquoted or not followed. Further she has been deprived of the opportunity of ever correcting the error. She is therefore expressly challenging what her lawyers had quoted her instructions to be. This is a radical change of direction in her case which goes to its substance.

25. It would not be fair for H to be put in the position where he could not challenge this statement by reference to what are likely to be contemporaneous notes, emails or other communications.

26. It is no answer to say that W has not specified the particular conversation which she would have had with her advisors and thus avoids "crossing the line". Likewise, the absence of reference to advice she was given is neither here nor there. What is relevant is that she has opened up the question of what she told her advisors. She puts it squarely in issue and is relying upon what she says she told her agents.

27. It makes no difference in principle whether the communications in question are from solicitors to client, whether in the nature of advice or otherwise, or from client to solicitors by way of instruction.

28. I see no inconsistency between the overseas authorities cited to me and Brennan v Sunderland.

29. In my judgment the following matters raised on behalf of W are not relevant:

    i) The fact that W claims to have evidence which proves that the parties continued cohabitating, at least on occasions in the period 2014-2017 and had an attempted reconciliation. This is simply another matter to put into the equation when the truth of the situation has to be assessed.

    ii) That if H is correct that as there was no post-marital accrual of assets, then the issue ceases to be relevant. This is a bad point because it is W's argument that there was indeed an accrual;

    iii) It is W's case that the petition contained other errors, such as the failure to describe W's daughter by a previous relationship as a child of the family. Again, this is a factor for me to consider in the round with all the other factors but no more than that.

30. I place no weight on H's assertion that W has indulged in "serial waiver". In particular, her replies to questionnaire add nothing. The real waiver is to be found in her first statement, repeated in her second statement. Nor can I at this stage evaluate his contention that W is in fact fluent in English.

31. In my judgment H's request to see the whole of the files goes too far. It may be that there is material contained in the files relating to financial affairs or the child of the family. That should not be the subject of waiver of privilege.

32. I will receive submissions as to the precise form of the order if it cannot be agreed but it appears to me that the disclosure that is required is the following:

    i) The material, whether attendance notes or communications, in which W's instructions are given or noted as to when the parties separated and when marital relations between them ceased;

    ii) Copies of all such communications and notes so as to identify those to whom W gave her instructions and the language in which those instructions were given as to the specific matters set out in i) above;

iii) Those documents identifying when the draft petition was sent to W or any communication with her about its contents, whether coming to W from her advisors or from W to them.

33. The files of LCM Case Management otherwise known as Legal Case Management Ltd and Sterling Lawyers shall be made available for this purpose to Queen's Counsel selected by the parties for him/her to sift the necessary material and if required to redact the documents to remove reference to other subject matter.

34. The parties have agreed that costs will follow the event. I therefore order that W pay the cost of H's summons on a standard basis. The assessment of costs and the time for payment will be considered at the next hearing before me which is due to take place on 21 August 2020.