

THE HIGH COURT

[2023] IEHC 493

Butler J.

Record No. 2018/206P

BETWEEN

MORTIMER JOHN WALTERS AND RONAN CAMPBELL

PLAINTIFFS

- AND -

LEXINGTON SERVICES LIMITED

DEFENDANT

- AND -

LEXINGTON SERVICES LIMITED

COUNTERCLAIM PLAINTIFF

- AND -

**ANTHOLOGY S.A., MORTIMER JOHN WALTERS, RONAN
CAMPBELL, FLORIAN KARRER AND BRIAN CONNELL**

COUNTERCLAIM DEFENDANTS

Judgment of Ms. Justice Butler delivered on 31st day of July 2023

Introduction

1. This is an application by Lexington, which is the defendant in the main proceedings and the plaintiff in the counterclaim, for orders relating to documents inadvertently disclosed by it in the course of inspection following the making of discovery pursuant to an agreement between the parties. The disputed material was included on a USB stick along with material which Lexington intended to provide pursuant to its affidavit of discovery.
2. The underlying dispute between the parties concerns ownership of a very valuable U.S. patent (“*the 807 patent*”) and has been ongoing for a considerable period of time. In fact, these proceedings arise out of a settlement reached between some of the parties in earlier proceedings, the interpretation of crucial terms of that settlement and of a related agreement and whether Lexington has defaulted in its obligations under the settlement such as to forfeit ownership of the 807 patent. For convenience, in this judgment I shall refer to the defendants to the counterclaim collectively as “*Anthology*” unless I am referring specifically to any one of them. Although the issues dealt with in this judgment have arisen primarily between Lexington and the first, fourth and fifth defendants to the counterclaim, the third defendant appeared at the hearing of the motion and submissions were made on his behalf in support of the stance taken by the first, fourth and fifth defendants.
3. The material inadvertently disclosed includes material listed in the First Schedule, Second Part of the affidavits of discovery sworn on behalf of Lexington in which legal professional privilege was claimed. It also includes additional material not listed in the affidavits of discovery, some of which Lexington claims is privileged and some of which is not privileged but all of which Lexington argues falls outside the agreed categories of discovery and thus is not relevant. Lexington seeks orders confirming the privileged status of the material in respect of which it claims privilege; restraining the defendants to the counterclaim from using the material and a declaration that two of the defendants to the counterclaim, namely Anthology and Mr. Connell, are in breach of an implied undertaking

to the court in respect of the discovered material in that they have passed it to third parties for use in litigation in other jurisdictions.

4. The counterclaim defendants (not all of whom are plaintiffs in the main proceedings) oppose the application on a number of grounds, although these grounds have shifted somewhat in the course of the hearing. Principally they contend that once the material was disclosed by Lexington, any privilege attaching to it was waived and thus lost and if Lexington wished to continue to rely on the privileged status of the material, the onus lay on Lexington to immediately re-assert that privilege, which it did not do either at all or in a timely manner. In making this argument, the counterclaim defendants rely on the contention that it was not obvious to them or their solicitors that the inclusion of additional and privileged material was a mistake on the part of Lexington. Further, Lexington have never explained how this mistake came to be made. In addition, these parties argue that insofar as privilege is claimed over some of the material, it is not properly claimed or the Court should, as an exception to the privilege claimed, allow the counterclaim defendants to use the material of which they have retained possession. Initially they seemed to argue that the Court should disallow the claim of privilege as the documents relate to the malicious prosecution of the counterclaim by Lexington as part of an abusive litigation strategy in this and other jurisdictions. Midway through the exchange of affidavits this changed and the ground advanced as the basis for disregarding the claim of privilege became the “*crime-fraud*” exception recognised in the jurisprudence of the Supreme Court most notably in *Murphy v. Kirwan* [1993] 3 IR 501. Much of the argument in the case concerned the scope of this exception and the test to be met in order for it to apply.

5. Finally, throughout the exchange of affidavits and in the written submissions the parties alleged to be in breach of the applied undertaking to the court regarding the use of the disclosed material, Anthology and Mr. Connell, maintained a detailed argument under a

number of different headings as to why no such breach had occurred. Some of the arguments made were unsustainable and seemed to proceed from the premise that once privilege was waived (itself a disputed issue) the parties were at liberty to use the discovered material as they thought appropriate. In normal course privileged material will not be disclosed at all and the implied undertaking regarding the use of discovered material necessarily refers to non-privileged material disclosed following discovery and not usually to privileged material. Waiver of privilege would allow an opposing party access to otherwise privileged documentation for the purposes of the trial. It would not allow that party to use the privileged material for purposes outside of the trial, or at least not without the express permission of the Court. Other arguments pointed to the purposes for which the disclosed material was to be used, e.g. in related proceedings between the same or related parties in other jurisdictions. Whilst in principle this may be permitted, it is only with the leave of the Court obtained prior to the use of such material, which was not the case here. It was also argued in respect of the additional non-privileged material that as it was not listed in the affidavits of discovery, it was not caught by the implied undertaking.

6. Notwithstanding the tenacity with which these arguments were maintained through three rounds of affidavits sworn by Mr. Connell, counsel on behalf of Mr. Connell and Anthology quite correctly indicated that he was not standing over this position; he accepted that Mr. Connell and Anthology were in breach of an implied undertaking to the court and apologised for that breach. There was some discussion as to the consequences of that acknowledgment, including the possibility of retrieving material from the third parties to whom it had been provided, but the main submission made by Anthology was that this was something which should sound in costs rather than having a bearing on the court's view of the substantive issues in this motion.

7. In light of this overview, I propose to look briefly at the circumstances in which the underlying proceedings came to be taken and the issues they raise and then look at the events surrounding the making of discovery – not least of which is the admission by Lexington that its first affidavit of discovery included amongst the documents to be discovered four e-mails which were either entirely false or modified. I then propose to identify the legal issues, consider the relevant legal principles and the jurisprudence supporting them and finally to consider how these principles should be applied to the facts of this case.

The Underlying Proceedings

8. The proceedings arise out the breakdown of the longstanding business relationship between the first plaintiff, Mr. Walters (who died on 22 March 2019) and Mr. J.P. Flannery, who although neither a shareholder nor a director is acknowledged, along with members of his family, as the principal behind Lexington, a Maltese registered investment company. The breakdown of that relationship culminated in the institution of proceedings before the Commercial Court in 2014 (“the 2014 proceedings”) and ultimately in a settlement agreement executed on 10 November 2015. Under the terms of the settlement agreement certain patents were assigned to Lexington and Lexington agreed to pay Mr. Walters or his nominee the sum of \$27m. from the revenues generated from the patents over a four-year period and, in any event, the entire sum by a fixed date in 2020. Mr. Walters was permitted to nominate an assignee of his rights under the terms of settlement and duly nominated Anthology, the first defendant to the counterclaim. Although the settlement covered a number of patents, the parties are agreed that the most valuable is US Patent 8,019,807 (referred to as the “807 patent” or “the secured asset”).

9. In order to give effect to the terms of settlement a further agreement was executed between Lexington and Anthology on 22 December 2015. Under Clause 3 of this Patent

Security Agreement (“PSA”), the sums due by Lexington (the debtor) to Anthology (the creditor) were secured by a first fixed charge on the 807 patent. Further, under Clause 8 that security became immediately enforceable on the occurrence of an event of default. The events of default were defined in the First Schedule to the Agreement and at para. 1.2 of the First Schedule one of the stipulated events of default is the failure of the debtor (Lexington) to deliver an Annual Revenue Report (“ARR”) to the creditor (Anthology) in accordance with Clause 2.2(a)(ii). One of the central issues to be determined in the underlying proceedings is the meaning and effect of the full text of para. 1.2 of the First Schedule. It provides as follows:-

“The debtor not delivering the Annual Revenue Reports to the creditor in accordance with Clause 2.2(a)(ii) and following the expiry of a further period of 14 days after the creditor serving a notice on the debtor of its intention to enforce the security created under the Agreement.”

Amongst other arguments, Lexington contends that under this clause it had a “cure period” running for 14 days from the service of a notice of default within which it could serve the ARR which would then preclude Anthology from enforcing the security. The correctness of this interpretation remains to be determined in the substantive proceedings.

10. Cause 2.2(a)(ii) requires an ARR for each year to be *“furnished to the creditor on or before 31st January of each subsequent year”*. In addition, under para. 1.4 of the First Schedule the insolvency of the debtor (Lexington) is an event of default.

11. Clause 20 sets out the permitted methods of delivery of any notice or other communication required to be given under the PSA. Specifically, all such communications are to be in writing and under Clause 20.1(b) to be *“delivered by hand, by pre-paid first-class post or other next working day delivery service or sent by fax.”* At sub-paragraph (c) the nominated contact person, address and fax number of each party is set out. In the case

of Anthology, the nominated contact person is Mr. Walters at an address and fax number in Andorra. The parties are permitted to notify other addresses or fax numbers from time to time, but it is not suggested that this was done by Anthology. Notably, delivery by e-mail is specifically not included in the list of permitted methods of delivery under Clause 20.1(b).

12. Finally, under Clause 10 of the PSA the creditor (Anthology) can appoint a receiver or a delegate of the secured property at any time after the security has become enforceable. Under Clause 11, a receiver or delegate may take possession of and sell the secured property.

13. These proceedings arise out of events which occurred on 31 January 2017 and over the following weeks. What actually occurred is a matter of serious dispute between the parties and cannot be resolved on this interlocutory application. Lexington claims that its principals, Mr. Flannery and his son, attempted to fax the Annual Revenue Report for 2016 to the fax number provided in the PSA but were unable to do so and received a number of “*error messages*” indicating that no answer had been received from the nominated fax machine. Lexington alleges that Mr. Walters and his co-conspirators deliberately disengaged the fax line to prevent delivery of the ARR and thereby manufactured an event of default in order to take control of the 807 patent. To rectify the situation Lexington’s solicitors e-mailed the ARR to Mr. Walters the following morning on 1 February 2017.

14. This account is strenuously disputed by Anthology who maintains that the fax line was working correctly throughout 31 January 2017 and that Lexington simply missed the deadline or misunderstood its obligations regarding delivery pursuant to the PSA. It takes issue with the assertion that any attempts were made to serve the ARR by fax. It is not disputed that Mr. Walters received the ARR by e-mail on 1 February 2017. Although nothing turns on it in the present application, the ARR showed a NIL return for 2016 and the correctness of this return is also disputed by Anthology.

15. Because the ARR was not received by Anthology on 31 January, it served a Notice of Default on Lexington on 1 February 2017. Lexington appears to have treated this as a misunderstanding as Mr. Walters would have received the ARR by e-mail by the time it received the Notice of Default. Anthology, on the other hand, regards Lexington as having failed to respond to the Notice of Default or to dispute its validity within 14 days. Both the service of the notice and the 14 day period derive from para. 1.2 of the First Schedule as set out above.

16. On 7 February 2017, Anthology served a second Notice of Default based on Lexington's alleged insolvency under para. 1.4 of the First Schedule to the PSA. This insolvency appears to derive primarily from the default on the part of Lexington in filing its accounts with the appropriate authorities in Malta. It seems that not having received a reply from Lexington to either notice, Anthology re-served both notices on 16 February 2017. It claims that as no further response was received it appointed Mr. Walters as receiver under Clause 10 of the PSA on 6 March 2017. Lexington claims it was not notified of this appointment until 15 March 2017. Almost simultaneously, on 6 March 2017 a company entitled "US Patent 8019807T Delegate LLC" ("Delegate") was formed in Delaware and on 7 March 2017 Mr. Walters, acting as receiver, assigned the 807 patent from Lexington to Delegate for the sum of \$100. Again, Lexington claims not to have been notified of this assignment of which it only became aware of a month or so later on the U.S. PTO website.

17. These steps prompted the institution of proceedings in the United States by Lexington in April 2017 and the making of complaints to the criminal and financial services regulatory authorities in Malta against Mr. Walters. Anthology characterises this as part of an abusive litigation strategy by Lexington particularly in circumstances where under Clause 21 of the settlement agreement the Irish courts have exclusive jurisdiction in respect of any dispute "*arising out of or in connection with*" the settlement agreement. Lexington contends that all

complaints/proceedings are serious and meritorious and that the parties it has sued in the U.S. and in Malta are not parties to this settlement agreement.

18. On 31 October 2017, Mr. Campbell was appointed as an additional receiver of the secured property. Lexington claims the actions of the counterclaim defendants had prevented it from monetising the 807 patent as intended under the 2015 settlement agreement. It is common case that the 2020 date for payment of the full amount due under the settlement agreement has passed and that the necessary payments have not been made.

19. Anthology complains that despite threatening litigation to challenge the appointment of the receivers, Lexington failed to bring any proceedings before the Irish Courts. Consequently, on 10 January 2018 the receivers (Mr. Walters and Mr. Campbell) instituted these proceedings in which they seek declarations as to the validity of their appointments as receivers and their entitlement to take possession of the secured asset. The Statement of Claim delivered in April 2018 seeks somewhat broader relief to include a declaration that Lexington's U.S. proceedings are brought in breach of the terms of settlement, a permanent injunction to restrain the defendants from litigating in breach of the terms of the settlement as well as exemplary damages.

20. The original defence and counterclaim filed in November 2018 named only the plaintiffs and Anthology as defendants to the counterclaim. The receivers' claim is denied both generally and specifically by reference to Lexington's alleged attempts to fax the ARR on 31 January 2017. Consequently, the alleged default, the validity of the appointment of the receivers and of Delegate and the assignment of the 807 patent are all disputed. In the counterclaim the same facts are rehearsed and allegations of conspiracy, breach of duty and misrepresentation made in support of the contention that the counterclaim defendants acted wrongfully to cause deliberate harm to Lexington. The counterclaim was subsequently amended in November 2020 when Twomey J. permitted the joinder of two additional co-

defendants, Mr. Connell (a director of Anthology) and Mr. Karrer (a business associate of Mr. Connell and Walters) (see judgment [2020] IEHC 595). An additional plea to the effect that the defendants to the counterclaim attempted to prevent Lexington from discharging the agreed sum under the settlement or from selling the 807 patent is now included.

21. A defence to the original counterclaim was filed on behalf of the second and third defendants jointly in May 2019 and a defence to the amended counterclaim was filed on behalf of the first, fourth and fifth defendants in March 2021. I don't propose going into the detail of these defences save to note that all defendants to the counterclaim strenuously resist both its legal and factual assertions. In the context of this motion, Lexington relies on the fact that no positive case of either fraud or abuse of process is made against it by any of the counterclaim defendants.

Discovery

22. On 16 May 2019, the judge in charge of the Chancery list directed a modular trial and provisionally listed the case for hearing on 26 November 2019. The issues to be tried on that date included whether there had been an event of default within the meaning of the PSA. She also gave directions regarding the bringing of motions for discovery. Ultimately, it was not necessary for such motions to be brought as the then-parties to the proceedings agreed the terms upon which discovery would be made by each of them. Although no order for discovery was made, the parties accept that under O.31, r.12(7) an agreement to make discovery in this manner has the same effect as if it were directed by court order. The terms upon which Lexington agreed to make discovery are not directly relevant to this application save to note three things. Firstly, the discovery was to be made under a number of discreet headings; secondly, the volume of discovery falling under these headings was not very large and, thirdly, the last category, category 14, was intended by the counterclaim defendants to

be a “*catch all*” category and covered all of the documents on which Lexington intended to rely at trial.

23. An affidavit of discovery was sworn by Mr. Flannery on behalf of Lexington on 10 September 2019. That affidavit listed a number of documents under various of the categories which had been agreed, although none, as I understand it, under category 14. Legal professional privilege was claimed in the second part of the schedule to this affidavit in respect of documents which reflected exchanges between Lexington and its lawyers and between its lawyers in different jurisdictions. It appears that copies of the non-privileged documents listed in the affidavit of discovery had already been provided to the receivers on 6 September 2019. Shortly after receipt of these documents, the receivers formed the view that four out of the twelve e-mails discovered exhibited “*unusual and suspicious characteristics*”. Consequently, they called for inspection of all original documents in their “*native format*”, which I understand to mean in the electronic form in which the documents were created and stored by the creating software or system. I also understand that an examination of documents in this form can reveal *inter alia* the date on which the document was actually created and whether changes were subsequently made to the original. Although inspection facilities were sought in correspondence as early as 4 October 2019, these were not granted voluntarily and the receivers brought a motion seeking inspection on 13 November 2019. This necessarily meant that the first part of the modular trial scheduled for hearing on 26 November could not proceed.

24. It is undisputed that four of the e-mails originally discovered by Lexington were either entirely false or modified to suggest that exchanges took place between persons associated with Lexington on or before 31 January 2017 in relation to the faxing of the ARR to Anthology on that date. This was ultimately conceded in an affidavit sworn by Mr. Flannery on 13 January 2020 in response to the motion for inspection. In fact, two affidavits were

sworn in response to this motion, the other being sworn by an employee of the Flannery family based in Spain and responsible for assisting in their Spanish and Andorran business interests. That employee stated that she was asked by Mr. Flannery to collect documents for discovery and while doing so she took it upon herself to falsify e-mails to create “*better records*” around the date the ARR was due to be sent. She states that she told Mr. Flannery what she had done on 16 September 2019. Mr. Flannery’s affidavit gives a similar account – i.e., that he was unaware that the e-mails had been falsified until after he had sworn his affidavit of discovery. He acknowledges that on becoming aware of the falsified e-mails he “*wrongly opted*” not to tell his family or his legal team and accepts that it was wrong of him not to bring the matter to the attention of the court immediately.

25. The counterclaim defendants, naturally enough, expressed grave reservations not just at the initial falsification of the e-mails but at the subsequent failure of Mr. Flannery to bring the matter to the attention of the court for nearly four months after he became aware of the issue and ultimately only doing so when faced with a court order for the inspection of the original documents. It would seem implicit in the approach the counterclaim defendants have adopted, that they do not necessarily accept the veracity of the account given by Mr. Flannery or his employee in these two affidavits - particularly as to Mr. Flannery’s lack of knowledge of or involvement in the falsification. This presents something of an evidential conundrum. The two affidavits in question have not been sworn in this motion but in the earlier motion to inspect which was ultimately conceded by Lexington and an order made on 20 January 2020. The deponents were not cross examined on the contents on their affidavits. It was not necessary to do so in the inspection motion which never ran and the individuals are not deponents on this motion since their earlier affidavits were merely exhibits in the grounding affidavit sworn by Mr. Corrieri on behalf of Lexington.

26. A corrective affidavit of discovery was sworn by Mr. Corrieri on behalf of Lexington on 30 January 2020 which, with the exception of the falsified e-mails, discovered the same documents as had been discovered by Mr. Flannery and made the same claims of privilege. Arrangements were then made for the entire of the discovered documents to be provided to the counterclaim defendants in native format. Lexington prepared a USB stick onto which native format copies of the documents were transferred and this was provided via Lexington's solicitor to the solicitor for the receivers on the understanding that the documents could be shared with the solicitor for Anthology. It appears implicit from the correspondence between the solicitors that Lexington's solicitor did not inspect the contents of the USB stick before arranging for it to be sent directly to the receivers' solicitor although somewhat surprisingly Lexington's solicitor has sworn an affidavit in this motion in which he does not aver to this directly.

27. The contents of the correspondence between the respective solicitors is of some significance in the context of this motion. Mr. Corrieri's affidavit of discovery (and a supplemental affidavit sworn on the same date) were sent to both defendant solicitors on 3 February 2020. On the same date, Lexington's solicitor wrote in identical terms to both the defendant solicitors referring to the inspection order made on 20 January 2020 and continuing:

"We confirm that our client has arranged for those documents (in their native format) to be uploaded onto a USB key which is been couriered to us. We expect to receive that USB key by today, however, it has still not arrived and TNT have advised our client that there was a shipment delay on Friday. In these circumstances, please rest assured that this USB key will be provided to you immediately upon receipt."

28. In light of this correspondence, the defendant solicitors were made aware of three things. Firstly, the fact that Lexington and not its solicitors had prepared the USB key (the

parties refer variously to a USB key or a USB stick and I have also used the terms interchangeably); secondly, the fact that the documents were in their native format and thirdly, the fact that the USB key would be forwarded “*immediately upon receipt*” suggesting that there would no intermediate examination of it by Lexington’s solicitors.

29. The USB key subsequently arrived in Dublin and was couriered by Lexington’s solicitors to the receivers’ solicitors under cover of a letter dated 6 February 2020. That letter stated:

“Please now find enclosed a USB containing the documents referenced in the affidavit of discovery sworn by Mr. Corrieri on 30 January 2020 in their native format (which replaced the affidavit of discovery of Mr Flannery.)

In the interests of the saving of costs, we are providing this USB to [the receivers’ solicitors] who issued the relevant motion. However we have no difficulty with [the receivers’ solicitors] sharing these documents with the solicitors for Anthology SA.”

30. In this motion Anthology places a lot of emphasis on the fact that this letter acknowledges that the documents on the USB key were to be shared by the receivers’ solicitor with its solicitor. Mr. Connell has averred that his solicitor contacted him, presumably having received the USB key from the receiver’s solicitor, as he was unable to access the files on it. The dates given by Mr. Connell in his affidavit for various events do not match the days of the week on which he states that those events occurred. Consequently, I will for the most part merely refer to the events themselves.

31. Mr. Connell indicates that the receivers’ solicitor also had difficulty with the USB key so he, Mr. Connell, took possession of it and transferred the contents of it onto his computer. He explains that he did this partly to speed up the analysis of the documents but also because he was concerned that there may have been malware on the USB key given the difficulties

experienced by both solicitors. He states that the files were copied and secured and that he performed a technical analysis of them over the weekend to confirm their validity in light of the earlier falsifications. As native format documents are not designed to be read directly, he imported the files into an e-mail application at which points he states (at para. 11 of his affidavit):

“It was obvious that there appeared to be an excessive number of documents (in comparison to those documents scheduled in the relevant Affidavit of Discovery), the majority of which were included in a folder labelled Category 14.”

32. It should be noted that the account given by Mr. Connell of the difficulties with the USB stick and the steps taken by him personally, including the copying of the documents onto his computer, was not one given to Lexington or its solicitors until he swore an affidavit in response to an earlier motion in October 2020. This is not to suggest that there was anything improper in Mr. Connell accessing and examining the documents when he did so, merely that Lexington had no means of knowing that this is what had occurred and did not in fact know this until many months later.

33. At this point there appears to have been a discussion between all of the counterclaim defendants and their respective solicitors regarding the contents of the USB key. It is clear from para. 12 of Mr. Connell’s affidavit that it was immediately appreciated by the parties to this discussion that (a) documents in respect of which privilege was claimed in Mr. Corrieri’s affidavit of discovery were included on the USB key and (b) there were approximately 117 documents on the USB key which were not listed in any of the schedules to the affidavit of discovery.

34. At para. 13 of its affidavit Mr. Connell states that two possibilities were considered, the first being that the documents were provided accidentally especially since privileged documents were included. The second possibility is described as follows:

“The documents were provided intentionally which was also a possibility as the vast majority of extra files were contained in folder named to represent documents captured by Category 14. We also considered that [Lexington’s solicitor] had apparently not assisted with the preparation of the USB stick having regard to the contents of the letter from the solicitors for Lexington dated the 3rd day of February 2020 which indicated that their client had arranged for the documents to be uploaded on to a USB stick and couriered directly to that firm. I say what was absolute clear is that the documents provided did not match up with the affidavit of discovery sworn by Mr. Correiri.”

35. Notably Mr. Connell does not aver that he or any of the parties or their solicitors actually believed the disclosure to have been intentional, merely that it was a possibility which was apparently considered.

36. On 11 February 2020 both of the defendant solicitors attempted to contact Lexington’s solicitor. In his affidavit Lexington solicitor’s states that a colleague of his received a phone call from Anthology’s solicitor indicating that there was “*an issue*” with the USB key but that the issue itself was not identified. On the same date the receivers’ solicitor sent an e-mail to Lexington’s solicitor in the following terms:

“Would you mind checking your copy of the USB that you sent me on Friday?”

I understand that it contains additional material that was not previously disclosed to us in your client’s affidavit of discovery and it may be the case that some of the documentation is of a nature that you may have sought to claim privilege over.

I would just like to clarify if it was intended to give us all of the documentation or not, as if it was, then your client will need to swear a supplemental affidavit”.

37. Throughout his affidavit Mr. O'Connell tends to mis-state the terms and effect of this e-mail. The e-mail does not in its terms identify the fact that material over which privilege was claimed by Lexington in its affidavit of discovery was included on the USB key nor invite Lexington to re-assert privilege over that material. It refers to the additional material not disclosed in the affidavit of discovery some of which is flagged as being potentially privileged. Further it seems clear that the receivers' solicitor was approaching the issue on the basis that if the additional material was to be disclosed, then it would be necessary for Lexington to properly list and schedule it in a supplemental affidavit of discovery.

38. In response Lexington's solicitors sent an e-mail on the same day stating:

"If you're available tomorrow morning we'll send someone to your office to collect the USB and take a look at it as our client only provided us with one version containing the natives for inspection. We'll return the USB and/ or replace it as soon possible."

It is evident from this exchange that although the receivers' solicitor initially assumed Lexington's solicitor had a copy of the USB key, that was not the case and the sole USB key containing the native format documents provided by Lexington had been passed by its solicitor to the receivers' solicitor. The USB key was collected the following day. Lexington's solicitor avers that on inspection it was apparent that the USB key contained *"a considerable number of additional documents which were clearly irrelevant to the categories of discovery and which had been mistakenly uploaded to the USB"*. He also asserts that a number of documents were *"manifestly privileged"* some of which were already the subject of a claim of privilege in the affidavit of discovery.

39. On 27 February 2020 a replacement USB key was provided to the receivers' solicitor which contained only the non-privileged documents referred to in the first part of the first schedule to the affidavit of discovery. Lexington maintains that it did not take further steps to re-assert privilege because it was unaware that the counterclaim defendants had retained

copies of the documents on the original USB key. It contends that the exercise of retrieving the original USB key and replacing it with one containing only the documents which matched its affidavit of discovery necessarily meant that it was maintaining the claims of privilege made in that affidavit (which were identical to those made in the original Flannery discovery affidavit) and that it was not voluntarily disclosing any additional material, whether privileged or not.

40. Anthology on the other hand relies on the fact that there was no discrete re-assertion of privilege by Lexington once it had been discovered that documents, including privileged documents, have been disclosed by it in error. Further, Mr. Connell claims that Lexington was on notice from the outset that he had retained copies of the documents on the original USB key because of the contents of an affidavit he swore on 28 February 2020 (i.e. 16 days after the original USB key was returned). This affidavit was sworn in the context of the motion to join two additional co-defendants to the counterclaim, including Mr. Connell himself. The relevant averment is as follows:

“I say furthermore although we have raised issues (which have yet to be adequately responded to) regarding Lexington’s discovery it might be noted that the discovery documents already supplied (by USB device on the 7th day of February 2020) by Lexington seriously undermines the credibility of the position adopted by Lexington to date and also raises concerning issues which will be explored at the modular trial.”

41. It is very far from clear to me that this averment put Lexington on notice that Mr. Connell and Anthology had retained copies of the documents on the original USB key. It certainly does not say this in terms. Further, although Anthology now seeks to argue that the additional material is not discovery material on the basis that it is not listed in the affidavit of discovery and thus is simply material which has been disclosed by Lexington to it – the averment refers solely to *“discovery documents already supplied”*. Thus, the averment, if

anything, is more naturally read as a reference to the documents discovered in Mr. Corrieri's affidavit of discovery which, of course, were also included on the USB key. The reference to the intention to explore "*concerning issues*" at trial is not particularly illuminative either, especially given that there was already a very serious issue with Lexington's discovery which will no doubt form part of any trial examining Lexington's allegation that the ARR was faxed on 31 January 2017.

42. The only matter which might potentially have acted as a flag to Lexington is the reference to the USB supplied on 7 February (this is presumably the date the receivers' solicitor provided it to Anthology as Lexington had provided it a day earlier). I don't think that a reference to the USB key of itself provides notification of the retention by Mr. Connell and Anthology of copies of the documents on it. During the course of this motion much has been made of the fact that once seen, documents cannot be unseen. Whilst that may well be so, the courts still have a jurisdiction to prevent the use of documents if they have been inadvertently disclosed even after they have been seen by the other side. Thus, contrary to the arguments made in Mr. Connell's affidavit, I do not accept that this averment demonstrated either that the material had been retained by him nor that he and Anthology proposed to rely on it.

43. There was a subsequent exchange of correspondence between the parties in May 2020 arising out of a reference in an earlier letter to Mr. Connell's "*understanding*" of certain privileged communications listed in the affidavit of discovery. In a letter dated 29 May 2020 Lexington's solicitor sought an explanation of the basis on which Mr. Connell could come to this understanding of confidential and privileged communications between Lexington and its lawyers. It seems that no direct response was received to this query and the matter was not pursued further.

44. However, on 24 July 2020 Mr. Connell swore an affidavit in the joinder motion in which he quoted directly from and exhibited what Lexington describes as “*two clearly privileged documents*” involving communications with Lexington’s solicitors which had been inadvertently included on the USB key. The documents were not listed in the affidavit of discovery as they were not within the agreed categories of discovery. On 7 August 2020, Lexington’s solicitor wrote to Anthology’s solicitor identifying that Anthology had kept copies of documents which had been provided in error and that this was deeply concerning to them. The letter requested that all copies of documents from the original USB key be deleted immediately and the affidavit in question be re-sworn without making reference to the privileged documents. On 18 August 2020, Anthology’s solicitors replied refusing this request on the basis that Lexington had been aware that Anthology was in possession of documents but made no assertion of privilege or confidentiality in respect of them and nor requested Mr. Connell to destroy any documents from the USB key. It was contended that any privilege attaching to the documents was waived when they were disclosed and thereafter when Lexington was informed of the disclosure of additional material but failed to re-assert privilege in relation to it. Subsequent correspondence disputed the contention that Lexington was aware that Anthology or Mr. Connell had retained copies of the documents on the original USB key.

45. The issue featured in the affidavits exchanged between the parties in the joinder motion – some of which are in almost identical terms to those sworn on this motion. Twomey J. did not find it necessary to pronounce on the issue or to refer to the privileged documents which had been exhibited in delivering his judgment.

46. It is acknowledged that documents discovered by Lexington were supplied by Mr. Connell to third parties in Malta and used by those parties in litigation involving Lexington in that jurisdiction. Lexington became aware of this in January 2021. As Mr. Connell is no

longer claiming an entitlement to have used the discovered documents in this manner, I do not propose to set out the chronology of that chain of events. The affidavits on this motion also set out other occasions on which confidential material belonging to Lexington, including material which would be covered by legal professional privilege under Irish law, was disclosed by a former consultant engaged by Lexington to the receivers and used by them in response to the complaints filed by Lexington with the police and regulatory authorities in Malta. Further, Mr. Connell has exhibited in this motion extracts of phone conversations with Mr. Flannery recorded by the former consultant without Mr. Flannery's knowledge or consent. Lexington relies on these events as demonstrating the willingness of Mr. Connell in particular to acquire and use Lexington's confidential information. I understand that the individual in question has since died. As this concerns both events in another jurisdiction and material separate to that contained on the USB key, I do not propose to deal with it further in this judgment.

The Motion Before the Court

47. This motion was brought by Lexington on 12 March 2021. The counterclaim defendants contend that in addition to Lexington's failure to re-assert privilege immediately on becoming aware that material had been inadvertently disclosed, the delay between July 2020 – when there could be doubt that Lexington was aware that Anthology had retained copies of the documents on the original USB key – and the bringing of a motion nearly eight months later is fatal to the application now made.

48. The motion seeks four substantive reliefs. The first is a declaration that certain listed documents (contained in "Schedule A" to the motion) are privileged; the second an order restraining the counterclaim defendants from using or making reference to the privileged documents in any proceedings; the third a declaration that Mr. Connell and Anthology are

in breach of an implied undertaking to the court that the discovered documents would not be used for any purpose other than the proceedings and, fourthly, an order restraining the counterclaim defendants from using the documents (including the non-privileged documents listed in Schedule B to the motion) for any purpose other than the proceedings.

49. There are three overlapping categories of documents involved. Firstly, documents in respect of which privilege was claimed in Mr Corrieri's affidavit of discovery; secondly, documents which are not listed in the affidavit of discovery because Lexington says they are not relevant to the agreed categories of discovery and thirdly documents coming within the second category (i.e. not relevant) but which, if they were relevant would be the subject of a claim of privilege. The only privilege in issue is legal professional privilege.

50. The three schedules to the motion do not coincide fully with these categories. Schedule A (Privilege Documents) includes all documents which Lexington claims to be privileged, both those in respect of which privilege has already been claimed in the affidavit of discovery and those among the additional material which Lexington claims are manifestly privileged as they comprise communications with or between its lawyers. Schedule B contains all of the non-privileged additional material which is not listed in the affidavit of discovery. Schedule A-1 contains privileged material already used by Mr. Connell in breach of his implied undertaking to the court.

Response to the Motion – Preliminary Observation

51. Mr. Connell has sworn three lengthy (in my view unnecessarily lengthy) affidavits in response to this motion. Some preliminary observations may be made regarding the approach taken by Mr. Connell in these affidavits. Firstly, as previously noted, Mr. Connell stood resolutely over the position that he was entitled to share material which had been discovered in the Irish proceedings with third parties in Malta and lawyers involved in

related litigation with Lexington in that jurisdiction. That contention was abandoned at the hearing but only at the point where his counsel commenced his reply and after counsel for Lexington had already made legal submissions which included submissions on this issue. As Mr. Connell and Anthology now acknowledge the deliberate breach of their implied undertaking to court regarding the use of discovered documents, it follows that Lexington is entitled to the third relief sought in its Notice of Motion. There will be costs consequences which will necessarily flow from this late concession.

52. However, that is not necessarily the end of the matter. In his affidavits Mr. Connell makes great play of the falsification of documents on behalf of Lexington in the original discovery and the delay on the part of Mr. Flannery in admitting to it. This is indisputably a very serious issue which will no doubt have adverse consequences for Lexington throughout the remainder of this litigation. It is relied on by Mr. Connell as an aspect (albeit not the only aspect) of the moral turpitude which the counterclaim defendants assert against Lexington in order to argue that the claim to legal professional privilege which otherwise applies should be lifted by the Court.

53. In my view, the very late admission by Mr. Connell and Anthology of a breach by them of an implied undertaking to court regarding the use of discovered documents is also a very serious matter and certainly something which warrants the court's opprobrium. As the implied undertaking is one given to court, technically Mr Connell and Anthology's behaviour amounts to contempt of court. Consequently, whatever about the conduct of their business relations, neither side can claim the moral high ground as regards their conduct in this phase of the litigation. The conduct of Mr. Connell and Anthology is something which I cannot ignore when I come to address the arguments made on their behalf in relation to Lexington's conduct.

54. Secondly, Lexington takes issue with the fact that Mr. Connell has exhibited a number of the documents in respect of which it claims privilege in his replying affidavits. Lexington contends that it was inappropriate for Mr. Connell to have exhibited documents the subject of a claim of privilege in affidavits responding to the motion in which the validity of the claim of privilege is to be determined. The use of documents in this manner created practical problems for the court as Lexington, naturally, objected to the documents being referred to in open court before their privileged status had been ruled upon. This resulted in an arrangement under which the parties were granted liberty to file additional written submissions to deal with any argument relating directly to those documents so as to obviate the need to open or refer to them in court. Notwithstanding this arrangement, I share Lexington's view that it is singularly inappropriate to make use of material in an affidavit sworn for the purposes of a motion to meet a claim that the material in question is privileged. Anthology did not make any application to court to be permitted to use the material in this manner nor did it ask the court to examine the material in advance of its use in order to rule on whether the claim of privilege should be upheld. Whilst Mr Connell and Anthology might not regard their high-handed approach to the use of potentially privileged material as being as serious as the deliberate falsification of documents, it is nonetheless another matter of serious concern to the court.

55. Thirdly, in his replying affidavit, Mr. Connell contended that the counterclaim defendant should be allowed to use the material in respect of which privilege has been claimed to establish factual issues concerning the timeline of events on 31 January 2017 and to rebut Lexington's version of those events which is alleged to be untruthful. In the written submissions filed on Anthology's behalf it is contended that Lexington has failed to establish that legal professional privilege attaches to the documents in Schedule A. A distinction is drawn between the privilege which attaches to documents prepared for the purpose of or in

contemplation of litigation and documents prepared for the purposes of requesting or receiving legal assistance. It was contended that Lexington has failed to provide the court with sufficient evidence to assert privilege over the documents in Schedule A and, instead, has baldly asserted privilege.

56. I am not prepared to deal with, much less to accept, this argument in the context and manner in which it is made. All of the documents in Schedule A are described in terms which make it clear that they comprise correspondence to, from and between Lexington's lawyers in various jurisdictions and between individuals associated with Lexington regarding the contents of the communications with its lawyers. As it happens all bar the first five items (out of more than 90) post-date 31 January 2017. Thus, they post-date service of notice of default by Anthology on the morning of 1 February 2017 and can therefore be seen as arising in a context where litigation between the parties was at least in contemplation. The privilege claimed by Lexington is described as legal advice privilege or, on occasion, as litigation privilege. In my view Lexington has not baldly asserted privilege in respect of the documents in Schedule A but has described each of the documents and the type of privilege claimed in a manner which, at least on a *prima facie* basis, warrants the claim of privilege made.

57. If Anthology wishes to dispute the claim of privilege which has been made, as it is entitled to do, there is a procedure for this set out in Order 31, Rule 20(2) of the Rules of the Superior Courts. This rule envisages the court inspecting documents on an application for an order for inspection to determine if the claim of privilege is validly made. This motion is not an application to inspect documents but rather it is Lexington's motion seeking various declarations and restraining orders. If Anthology wishes to dispute the validity of the claim of privilege made by Lexington in respect of any document in Schedule A, it may do so by bringing an application to court for that purpose. What it cannot do is baldly assert that

documents are not privileged and proceed to use them notwithstanding the claim of privilege made and the fact that no court has yet determined that claim to have been invalidly made.

58. I should note that these comments may be *obiter* in circumstances where the court was informed on the opening of the hearing that the respondents to the motion (i.e. the counterclaim defendants) were giving an undertaking not to challenge the privileged status of the documents elsewhere or for any other purpose if Lexington succeeded in its motion. However, counsel for Lexington appeared to be of the view that this was still unsatisfactory given that the material had already been disclosed to third parties in litigation with Lexington in other jurisdictions.

The Response of the Receivers

59. As noted earlier, the second and third defendants to the counterclaim, i.e. the receivers who are the sole plaintiffs in the main action, are represented separately to the first, fourth and fifth defendants. Most of the engagement with this motion has been by the first and fourth defendants. However, the third defendant, Mr. Campbell, swore an affidavit in June 2021 in which he agreed with and adopted the contents of Mr. Connell's first replying affidavit. I note, although this may not be intentional, that Mr. Campbell did not swear a subsequent affidavit adopting the contents of Mr. Connell's second or third replying affidavits. Therefore, he has not formally adopted the change of position evident between Mr. Connell's first and subsequent affidavits in which he latterly claimed an exception to legal professional privilege based on fraud, dishonesty, moral turpitude or the interference with the administration of justice by Lexington.

60. The balance of Mr. Campbell's affidavit is relatively succinct. He argues that in the absence of Lexington having explained how the files came to be on the USB key; identifying the person who created the USB key; detailing the processes by which the USB key was

reviewed by Lexington before being sent to their solicitor and the processes by which it was reviewed by Lexington's solicitor before being sent to the receivers' solicitor, it was not open to Lexington to claim privilege over material already disclosed by it. He explains that the files were not randomly uploaded to the USB key but rather documents were placed in folders reflecting the categories of discovery agreed between the parties, albeit that the majority of them are in Category 14. He says this suggests that the person who prepared the USB key was familiar with the discovery process. He points out errors made by Mr. Corrieri in listing documents in the schedule to his affidavit and the fact that some nineteen documents appear on the USB key which are not listed in any schedule to Mr. Corrieri's affidavit. Finally, he contends that the documents on the USB key are "*vital for the proper administration of justice in these proceedings*" because, it is alleged, they reveal the true version of events which, it is contended, is that Lexington only ever planned on e-mailing the ARR to Mr. Walters and not on faxing it.

61. One further issue arose in respect of the second and third defendants. The second defendant died at a relatively early stage in the proceedings on 22 March 2019. Notwithstanding this, the litigation progressed and contested applications were run in the High Court without the proceedings being re-constituted to take account of the fact that Mr. Walters' interests must now be represented by his estate. When I brought this to the attention of the parties at the outset of the hearing, I was informed by counsel for Lexington that his solicitors had raised the issue with the receivers' solicitor, but no action was taken in response to this correspondence. The attitude taken on behalf of Mr. Campbell, namely that the receivers were jointly and severally liable so that he could continue to progress matters in his own name, was unsatisfactory to say the least. The solicitor initially instructed by Mr. Walters and Mr. Campbell jointly remains on record on Mr. Walters' behalf.

62. Whilst the main proceedings were issued jointly by Mr. Walters and Mr. Campbell in their capacity as receivers, the counterclaim was not brought against Mr. Walters solely in that capacity. The counterclaim alleges a conspiracy to which Mr. Walters is central and Mr. Campbell is, at most, peripheral. It seeks damages including exemplary damages for breach of contract, interference with economic relations and conspiracy. As I read the counterclaim it is not alleged that Mr. Campbell was party to the conspiracy - certainly not prior to his appointment as receiver in October 2017 - and, as he was not party to either the terms of settlement or the PSA, the allegations of breach of contract do not concern him. Therefore, there are many aspects of this case, most particularly the counterclaim, for which Mr. Walters and Mr. Campbell do not share joint and several liability.

63. The court was informed that an application for grant of probate to Mr. Walters' estate had been made and that matters rested with the Probate Office. I appreciate that the extraction of a grant of probate may not be a straightforward matter particularly if the deceased's wealth is held through a number of corporate vehicles in a number of jurisdictions. However, there is a procedure under s.27(4) of the Succession Act 1965 under which an application can be made to court for the appointment of an administrator *ad litem* and for the extraction of an *ad litem* grant to enable the progression of legal proceedings to which the deceased was, or would have been, a party had he survived. This procedure is frequently invoked and in a case such as this ensures that the estate is properly represented in any ongoing litigation pending the extraction of the formal grant of probate.

64. It is highly inappropriate that litigation should have been actively pursued or defended on behalf of a deceased person without the requisite steps being taken to re-constitute the proceedings and to ensure that that person's estate was in a position to give instructions in respect of the litigation. In my view it is also inappropriate that litigation to which a deceased person is party be pursued, even if the interests of the deceased person are not directly

engaged, until steps have been taken to ensure that the deceased's estate is properly represented. At a minimum, significant costs may be incurred for which the estate may be liable to the detriment of its beneficiaries without it having had the opportunity to have any input into the steps which led to those costs being incurred. Some six months after the hearing of this application the court was informed that the proceedings had finally been re-constituted in December 2022, nearly four years after the death of Mr. Walters.

Overview of the Issues

65. On the basis of the facts and the evidence set out above I am satisfied that the inclusion of both privileged and additional material on the USB key was clearly a mistake on Lexington's part. Lexington did not intend to make discovery beyond those categories which had been agreed by it nor to disclose any document in addition to material set out in its affidavits of discovery. It also did not intend to waive privilege. Nonetheless, the material was provided to the counterclaim defendants in circumstances where Lexington intended that the USB key provided to the receivers would be shared with Anthology.

66. This gives rise to a number of issues. Firstly, was the disclosure of the material on the USB key, albeit unintentional, sufficient to amount to a waiver of any privilege that may have attached to it? If so, and perhaps in any event, were the actions of Lexington and its solicitors in February 2020 subsequent to being alerted to the potential error, sufficient to amount to a claim of privilege or a re-assertion of privilege already claimed? If not, did the delay between Lexington being notified of the potential error and the correspondence in which objection to the use of the material was first made in August 2020 and/or the issuing of this motion in March 2021 amount to a waiver of any privilege which might otherwise have applied? Alternatively, should that delay preclude the granting of the relief now sought on equitable grounds? A crucial matter central to the resolution of the second and third of

these issues is whether Lexington knew or ought to have known that the counterclaim defendants had retained copies of the documents on the USB after the original USB key had been returned to Lexington's solicitors.

67. Secondly, the counterclaim defendants argue that because of moral turpitude on Lexington's part, the entire of the transaction (i.e. the alleged faxing of the ARR on 31 January 2017) including the privileged material, should be exposed to the court. Mr. Connell's affidavit varied as regards the basis for this claim. Initially he seemed to suggest that Anthology was relying on an allegedly abusive litigation strategy on Lexington's part as an abuse of court processes which would justify an exception to legal professional privilege. In subsequent affidavits the claim to an exception was based on the assertion that the account given by Lexington regarding the faxing of the ARR could be demonstrated to be false using the privileged material and that this account constituted a fraud or other moral turpitude justifying an exception from the privilege. He also seemed to make the case that the falsification of emails constituted moral turpitude such that the entire of the transaction to which the false emails related (i.e., the faxing of the ARR), including the privileged material, should be examined by the Court. The interests of justice were relied on in respect of all of these arguments.

68. A considerable volume of case law on these issues was opened to the court and rather than examine the jurisprudence separately I will consider the relevant cases as I deal with each issue.

69. Finally, I noted at the offset that there were three types of documents in issue namely documents in respect of which privilege was claimed in the affidavit of discovery and then additional material not listed in the affidavit of discovery some of which is now subject to a claim of privilege and some of which is not. Lexington contend that the counterclaim defendants are not entitled to use the non-privileged additional material which was disclosed

in error as it is not relevant to any of the agreed categories of discovery and seek relief to that effect in para. 4 of their notice of motion. However, beyond this general statement of principle, no particular argument has been directed to the non-privileged material which is contained in Schedule B to the motion. The case law relied on also focusses on either the inadvertent disclosure of privileged material or an exception from privilege in certain circumstances and does not deal with inadvertent disclosure of non-privilege material.

Waiver of Privilege on Disclosure of Material

70. A claim of privilege properly made in an affidavit of discovery entitles the party making that claim to withhold the document, the subject of the claim from inspection by the opposing party to the litigation. Notwithstanding a claim of privilege, if the party making the claim deliberately discloses the material, the confidentiality otherwise attaching to it is lost and the claim of privilege is deemed to have been waived. Both sides accept these basic propositions. Where they differ is as to the application of law concerning the effect on a claim of privilege of the inadvertent disclosure of privileged material.

71. Lexington relies on the decision of the High Court (Smyth J.) in *Shell E & P Ireland Ltd v. McGrath (No. 2)* [2007] 2 IR 574 as authority for the proposition that there is an exception to the general principle that disclosure of privileged material operates as a waiver of privilege where the disclosure was inadvertent and that it was evident to the receiving parties' solicitor that this was the case. In fact, in more recent case law it has been accepted that the same principles may apply even where the disclosure is made to someone who is not a solicitor (see Hogan J. in *McGrath v. Athlone Institute of Technology* [2011] IEHC 254). However, it is not necessary to consider this potential extension of the principle because in this case the disclosure of the material in issue was made to the solicitors acting for the counterclaim defendants in the course of a discovery process.

72. The main passage from the judgment in *Shell & E & P Ireland Limited* relied on by Lexington is as follows:

“In summary, the Courts in England have taken the approach that privilege is not necessarily waived or lost by reason of inadvertent disclosure and that a party can restrain the use of a privilege documents provided he does so prior to trial and if the privileged document was obtained by improper means or it would have been obvious to the opposing party that it had been disclosed by reason of mistake. The courts in other jurisdiction, such as Canada and Australia take a more protective (and in my judgment, a more correct approach) whereby a court will restrain use of a privileged document that was disclosed by inadvertence ever if would not have been obvious to the opposing party that the mistake has been made. “

73. Leaving aside the use of documents by the third parties who received them from Anthology/Mr. Connell in breach of their implied undertaking to court and the more general allegations made by Lexington regarding the acquisition and use by Mr. Connell of its confidential material, this is not a case where the documents on the USB key were obtained by improper means. Thus, the court’s focus must be on the alternative possibility i.e., whether it was obvious to the opposing parties that the documents had been disclosed by mistake. In his judgment Smyth J. goes on to note that *“where it must have been apparent to the solicitors for the other party that the disclosure was as a result of an obvious mistake the court may grant an injunction restraining that party from making use of the document in the proceedings”*. At para. 36 of this judgment he approves the views expressed in *Pizzey v. Ford Motor Company Ltd.* [1994] PIQR 15 that:

“...whether, in the light of the evidence and the surrounding circumstances, it had been proved on the balance of probabilities that the disclosure of the document would be seen by the reasonable solicitor to have been disclosed by mistake.”

74. Smyth J.’s review of the English authority concludes with the judgment of Slade L.J. in *Guinness Peat Properties Ltd v. Fitzroy Robinson Partnership* [1987] 1 WLR 1027, on which central reliance is placed by Anthology. Slade L.J. concluded that the relevant principles could be stated as follows:

“(1) Where solicitors for one party to litigation have, on discovery, mistakenly included a document for which they could properly have claimed privilege in Part 1 of Schedule 1 of a lists of documents without claiming privilege, the court will ordinarily permit them to amend the list under RSC, Ord. 20, r. 8, at any time before inspection of the document has taken place:

*(2) However, once in such circumstances the other party has inspected the document in pursuance of the rights conferred on him by RSC, Ord. 24, r.9, the general rule is that it is too late for the party who seeks to claim privilege to attempt to correct the mistake by applying for injunctive relief. Subject to what is said in (3) below, the *Briamore* decision [1986 1 W.L.R. 1429 is good law.*

(3) If, however, in such a last mentioned case the other party or his solicitor either

(a) has procured inspection of the relevant document by fraud, or

*(b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene for the protection of the mistaken party by the grant of an injunction in exercise of the equitable jurisdiction illustrated by *Ashburton*, *Goddard* and *Herbert Smith* cases. Further, in my view, it should ordinarily intervene in such cases, unless the case is one where the injunction can*

properly be refused on the general principles affecting the grant of a discretionary remedy, for example, on the ground of inordinate delay: see Goddard's case [1986] 3 W.L.R. 734.

Possibly there may be other exceptions to the general rule set out in (2) above. However, in my judgment, the exception set out in (3) above suffices to cover the present cases. Save where it is too late to restore the previous status quo (e.g. on facts similar to those of the Great Atlantic case [1981] 1 WLR 529), I do not think the law should encourage parties to litigation or their solicitors to take advantage of obvious mistakes made in the course of the process of discovery."

75. I will deal in due course with Anthology's argument regarding delay, but at present would like to echo Slade L.J.'s observations that the law should not encourage parties to litigation to take advantage of obvious mistakes in the discovery process.

76. There is also a distinction of some potential significance between the type of cases under discussion in *Guinness Peat* and this case. This is evident in an earlier passage in the same judgment quoted by Anthology in its written submissions which is as follows:

"Care must be taken by parties to litigation in the preparation of their lists of documents and no less great care must be taken in offering inspection of the documents disclosed. Ordinarily, in my judgment, a party to litigation who sees a particular document referred to in the other side's list, without privilege being claimed, and is subsequently permitted inspection of that document, is fully entitled to assume that any privilege which might otherwise have been claimed for it has been waived. Let there be no doubt about that."

77. The discussion in this paragraph concerns the situation where a party is permitted inspection of a document listed in an affidavit of discovery without a claim of privilege. The normal assumption must be that if the document is expressly discovered without privilege

being claimed then it is not intended to claim privilege in respect of that document. If inspection is then provided of a document which has been discovered without a claim of privilege, the receiving party is entitled to assume that the disclosure of the document is deliberate. In such cases there is a consistency between the affidavit of discovery and the material provided on inspection. This is not the situation which arose in this case.

78. The USB key was intended to facilitate inspection of discovered documents. However, it included documents which were discovered but in respect of which privilege had been claimed and documents which were not listed at all in the affidavit of discovery. There was a manifest inconsistency between the documents which had been discovered (i.e. listed in the schedules to the affidavit of discovery) and the documents on the USB stick both as regards the disclosure of privileged material and the inclusion of additional material. The scale of the error in this case is possibly greater than that considered by Slade LJ, but in my view, if anything follows from this it is that it should have been even more obvious to the receiving solicitor that a mistake had occurred.

79. I note in any event that in the subsequent paragraph Slade LJ refutes the contention that after inspection has taken place, the Court is inevitably or invariably powerless to intervene by way of injunction if the particular circumstances warrant such intervention on equitable grounds. Whilst he instances fraud as a circumstance which would undoubtedly warrant such intervention, I do not read his understanding of the court's equitable jurisdiction to be limited to cases of fraud or analogous behaviour.

80. The principal identified by Smyth J. in *Shell E & P* was formulated into a test by Clarke J. (as he then was) in *Byrne v Shannon Foynes Port Company* [2008] 1 IR 814. Each of the parties in this case rely on different aspects of Clarke J.'s overall analysis. Lexington relies on his endorsement of the judgments in *Re Briamore Manufacturing Ltd* [1986] 1 WLR 1429 and *Guinness Peat Ltd.* (above) to the effect that the mistaken inclusion of a privileged

document in a non-privileged schedule to a discovery affidavit does not amount to a waiver of principle. Anthology relies on the endorsement by Clarke J. of observations in both of those judgments and in *Pizzey v. Ford Motor Company* (above) that once inspection has taken place, the general rule is that it is too late to assert privilege.

81. The test adopted by Clarke J. as to whether a court should refuse to permit an opposing party to use privilege documents of which it has had sight on inspection is in the following terms:

“The test is in two stage:

(1) Was it evident to the solicitor seeing privileged documents that a mistake had been made?

(2) If not, would it have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of a mistake?

If the answer to either question is yes then, [under the CPR], the court would normally restrain the solicitor if he did not give the documents back and might restrain him from acting further if he had read the documents and it was impossible for the advantage to be removed in any other way.”

82. Although described as a two-stage test, that description may not be entirely accurate as the two limbs of the test are alternative rather than cumulative requirements. If either limb is met, then the court has jurisdiction to restrain the opposing party from using the documents inadvertently disclosed. Further, the discussion in the immediately following paragraph of the judgment rejecting the argument that the test is subjective and based on what the receiving solicitor thought, is directed at the second limb of the test only. In my view, it does not provide a basis for contending that where the first limb of the test is met and the solicitor receiving the privileged documents appreciates that a mistake has been made, he will nonetheless be permitted to use the privileged material if a reasonable solicitor

in those circumstances would not have realised the documents were disclosed by mistake. Most of the jurisprudence concerns the second limb of the test, perhaps because in normal course where a solicitor appreciates that an error has been made it will not usually be necessary for the party who made the error to litigate in order to rely on the privilege.

83. In their written submissions Anthology also rely on an elaboration of the test as exemplified by the facts in *Pizzey v. Ford Motor Company Limited* (above). In that case, the plaintiff's solicitor had mistakenly sent the defendant solicitor a copy of an expert report which was privileged. The receiving solicitor appreciated that the report was privileged but thought her opponent was waiving that privilege. As a result, the court, in applying the reasonable solicitor test, looked not just at whether a reasonable solicitor would have appreciated that the document was privileged but also at whether a reasonable solicitor would have realised that the privilege had not been waived. I do not see this as a variation of the test but rather a breaking down into its component parts of the "*mistake*" which the reasonable solicitor must be shown to have understood was made in order for the court to intervene. Obviously, it is not a mistake to deliberately waive privilege in respect of a document which could otherwise be withheld from inspection. Therefore, in order for a reasonable solicitor to appreciate the error, they must understand both that the document was privileged and that their opponent did not intend to disclose it.

84. Counsel for Lexington relies on the fact that on examining the USB key the mistake was so obvious that both of solicitors, acting quite properly, immediately brought the potential error to its solicitor's attention. Matters went somewhat awry at this point because Lexington's solicitor had not retained a copy of the USB key and could not immediately confirm that an error had occurred. Instead, the USB key had to be returned before his office could examine it. I will consider the legal effect of the exchanges surrounding this transaction in the next section of this judgment. At this point, suffice to say that the test as

to whether a reasonable solicitor would have realised that a mistake had been made was clearly met in this case. Apart from the fact that the two solicitors actually appreciated that this was the case, the documents on the USB key manifestly did not match the affidavit of discovery both by reason of the inclusion of privilege material and the inclusion of the additional material.

85. There may well be situations in which a litigant will waive privilege, particularly over an expert report. This may be done, for example, if the litigant believes that the report is sufficiently supportive of their position to provide a basis for potentially fruitful negotiations. Apart from the fact of disclosure, no particular reason is advanced by the counterclaim defendants as to why their solicitors might have reasonably believed that Lexington intended to waive privilege and nothing is identified regarding the nature of the material in issue to suggest that this was likely. In my view, no reasonable solicitor could have thought that the disclosure was intentional.

86. I will briefly mention one further case relied on by Anthology under this heading, namely *Breeze v. John Stacey & Sons Ltd.* [1999] EWCA Civ. J 0621-5. That case looked at whether there was a duty on the receiving solicitor in cases just short of obvious mistake to make contact with the disclosing solicitor and enquire whether an error had occurred and found that such a duty did not exist. I do not think the comments in that judgment are of assistance here since I do not regard this as a case “*just short of obvious mistake*”. This is a case in which an obvious mistake was clearly made and in which both receiving solicitors appreciated that a mistake had most probably been made and proceeded to contact Lexington’s solicitor on that basis.

87. Although the written submissions on behalf of Anthology contend that it was not obvious that a mistake had been made, neither of the counterclaim defendants’ solicitors has sworn an affidavit to aver to this. The submissions also refer to the evidence of Mr. Connell

who is described as having believed that “*the documents could have been disclosed intentionally*”. I am unable to find any clear averment on Mr. Connell’s part to this effect. The high point of Anthology’s evidence in this regard is the description in Mr. Connell’s affidavit of discussions which took place between the defendant solicitors and representatives of both clients possibly on 11 or 12 February 2020 (as noted, the dates giving by Mr. Connell do not align with the days of the week on which he states certain events occurred). He stated that “*two possibilities*” were “*considered*”. These were that the documents were provided accidentally or alternatively that they were provided intentionally. The only basis advanced for suggesting that they might have been provided intentionally is that they were in a folder named to represent Category 14 of the agreed discovery. Given that no documents were discovered in the affidavit of discovery under Category 14, it is difficult to understand how this fact might have led to a belief that the documents were provided intentionally. In any event, Mr. Connell does not state that either he or his solicitor believed the documents were provided intentionally. Such a belief would be manifestly inconsistent with other factors identified in the same paragraph of Mr. Connell’s affidavit – i.e. the fact that they understood Lexington’s solicitor had not assisted with the preparation of the USB key and the fact that the documents did not match up with the affidavit of discovery.

88. In all of the circumstances, I am satisfied that Lexington has discharged the onus of proof on it to establish, on the balance of probabilities, both that it was evident to the solicitors acting for the counterclaim defendants that a mistake had been made and, if it were necessary, that it would have been obvious to a reasonable solicitor in these circumstances that a mistake had been made. Consequently, I do not regard the inclusion of privileged material on the USB key as a waiver of the privilege attaching to that material by Lexington.

89. It is important to bear in mind that the test falls to be applied in the circumstances of the particular case so that factual conclusions drawn in a different case are not necessarily of precedential value when looking at this. The counterclaim defendants rely on the conclusions of Clarke J. in *Byrne v. Shannon Foynes Port Company* that a hypothetical reasonable solicitor on receiving the disclosure of a large number of clearly privileged documents would not, partly because of the volume of documents, have concluded that the waiver of privilege was clearly a mistake. They contend that a similar conclusion should be drawn in this case because the volume of privileged and additional material included on the USB key far exceeds the number of documents of which discovery had been made.

90. I do not think that it necessarily follows from the fact that the inadvertently disclosed material vastly exceeds the properly disclosed material, that a reasonable solicitor would not have appreciated that an error was made. The surrounding circumstances are materially different. The discovery in *Byrne* had been prepared by a solicitor. Here, although the affidavit of discovery was most likely prepared or at least reviewed by Lexington's solicitor, because of the perceived need not to interfere with documents in their native format, the USB key had been prepared directly by Lexington. This fact was known to the opposing solicitors.

91. As I have explained above, there is also a difference between the failure to claim privilege in respect of a document and the disclosure of a document in respect of which privilege has been claimed. As Clarke J. points out, there are undoubtedly circumstances where a party who is entitled to claim privilege over a document might choose not to do so, it is far less likely that a party having chosen to claim privilege over a document will then voluntarily disclose that document in the course of the same discovery process and indeed will do so without notifying the other side of their change of position on that document. Clarke J. was also influenced by the fact that privilege had been claimed in respect of some

but not all of what appeared to be sequences of documents. It is not suggested that this is a feature of this case.

Did Lexington Assert Privilege over the Documents on the USB Key

92. There are a number of different issues to be considered under this heading, most of them factual rather than legal in nature. At its core, Anthology asserts that even if the disclosure of documents on the USB key was not a waiver of privilege, the subsequent failure of Lexington to provide an explanation for the error or to formally claim privilege after been notified thereof amounts to a waiver of any privilege that might apply. In looking at Lexington's conduct, it is necessary to consider whether, as claimed by Mr. Connell, Lexington was or should have been aware of the fact that the counterclaim defendants had retained copies of the documents on the USB key when the USB key itself was returned to Lexington.

93. Clarke J. commented in *Byrne v. Shannon Foynes Port Company* that an explanation as to how the mistake occurred can assist the court in answering the question as to whether a reasonable solicitor receiving the documents would have realised that an obvious mistake had been made. He goes on to state that "*if there is no satisfactory explanation for the mistake*" then the thinking of the hypothetical reasonable solicitor "*would necessarily have been influenced by that absence.*" Both Anthology and Mr. Campbell (on whose behalf oral submissions were made) rely on what is asserted to be Lexington's failure to provide an explanation for its mistake.

94. At the outset, it is important to bear in mind that Clarke J. did not hold that an explanation was essential before the court could accept that a mistake had been made nor essential for the court to reach the conclusion that it would have been obvious to a reasonable solicitor that a mistake had been made. An explanation can assist the court in reaching those

conclusions, but the absence of an explanation does not preclude them from being reached. Thus, if the evidence in the case supports the contention that it would have been obvious to a reasonable solicitor that an error had been made, the absence of a formal explanation for that error does not preclude the court from exercising its equitable jurisdiction to deal with the consequences of the error. Of course, because the jurisdiction is equitable, the absence of an explanation may still have a bearing on how the court exercises its discretion.

95. That said, I think there is some merit in the issue raised by counsel for Lexington in querying this aspect of Clarke J.'s judgment. Where material is disclosed in error, the court is tasked with forming a view as to whether the error would have been obvious to a reasonable solicitor on receiving the material. I think Lexington is correct in submitting that the point in time at which the "*obvious to the reasonable solicitor*" test is to be applied is when that solicitor receives the documents in respect of which the error has been made. There are almost no circumstances that I can think of where a person will inadvertently disclose documents and, at the same time, provide an explanation for that inadvertent disclosure. If the disclosing party could explain the mistake at the time they are making it they would, no doubt, act so as to prevent the occurrence of the mistake in the first place. Therefore, any explanation will necessarily be given subsequent to the inadvertent disclosure of the documents and, by extension, subsequent to the receipt of those documents by the opposing party. I have some misgivings as to how an explanation given for an error after the receipt of documents can have a bearing on the obviousness of the error to the recipient of the documents at the time that documents are received.

96. However, I do not think the resolution of this conundrum is necessary to resolve the issue as to whether a reasonable solicitor would have understood privilege to have been waived in this case. The test has to be applied in the context of the particular case and bearing in mind the circumstances in which the documents have been disclosed. I have

already looked at those circumstances in the preceding sections of this judgment and concluded not only that an error had been made but that it would have been obvious to a reasonable solicitor that such an error had been made. In fact, the error was obvious to the counterclaim defendants' solicitors. In all of these circumstances, I do not think that the absence of a formal explanation by Lexington as to how that error occurred – or at any rate the absence of an explanation going beyond the fact that the USB key was prepared directly by the client and not reviewed by the solicitor – requires the court to reach a different view on the “*obvious to the reasonable solicitor*” test.

97. A separate issue arises as to whether the actions of Lexington and its solicitors on being informed of the potential mistake were sufficient to amount to a claim of privilege or a re-assertion of privilege already claimed. Each side contends for a materially different construction of the relevant facts relevant to this issue.

98. Lexington argues that it requested the return of the USB key in order to examine its contents and on the basis that it would thereafter either return or replace the USB key as appropriate. The e-mail to which it was responding had identified that the USB key contained additional material some of which might be privileged and asked if Lexington intended to give the opposing solicitor “*all of the documentation or not*” in which case a supplemental affidavit of discovery would be required. Some two weeks later a replacement USB key was provided by Lexington's solicitors on which only the non-privileged documents listed in the original affidavit of discovery were included. No Supplemental affidavit was sworn. From this Lexington argues that it is clear, firstly, that it continued to rely on the claim of privilege made in its original affidavit of discovery and, secondly, that it did not intend to disclose any additional material whether privileged or not. A formal claim of privilege was not made in respect of the additional material as that material was withdrawn and this was evident from its non-inclusion in the replacement USB key.

99. The counterclaim defendants rely on the length of time it took Lexington's solicitors to provide the replacement USB key and the fact that no formal claim of privilege was made alongside its return.

100. It is clear that Lexington is relying on the actions taken by its solicitors on its behalf subsequent to being advised of the potential mistake rather than on any formal correspondence. I think it is unfortunate that no such correspondence was issued. This is very contentious litigation which has arisen because of the acrimonious breakdown of business relationships between the parties. There has already been previous litigation between the same parties, the breakdown of an earlier settlement agreement and a very serious incident involving falsification of documents in the discovery process in this litigation. In these circumstances, I would have thought it prudent, to say the least, for the parties' solicitors to be very clear with each other in the course of their written and electronic exchanges. A statement by Lexington's solicitor accompanying the replacement USB confirming the withdrawal of the additional material and the claims of privilege already made would have removed many of the difficulties the court now faces. Instead, the correspondence accompanying the replacement USB key is, at best, opaque. Indeed, the letter of 27 February 2020 from Lexington's solicitor refers to an administrative error in respect of Category 9 of the discovery but fails to say anything regarding the far more serious errors which had occurred on 6 February 2020 and which the replacement USB key was intended to rectify.

101. That said, the issue the court has to address is not how Lexington's solicitors might best have dealt with the situation but whether the way in which they did deal with the situation, however imperfect, was sufficient to make it clear that Lexington was not waiving privilege in respect of either the discovered or the additional material on the original USB key. With some hesitation I have concluded that it was. The e-mail to which Lexington's

solicitors were responding queried whether Lexington intended to give the opposing parties privileged and additional material. The replacement USB key contained neither and indeed, with some minor tweaking, the documents included on the replacement USB key matched the affidavit of discovery which had already been sworn. A claim of privilege in respect of some of the material no longer included on the USB key was clearly made in that affidavit. I do not think that the opposing solicitors could reasonably have interpreted these actions as a waiver of that privilege. Further, the receivers' solicitors had flagged in their e-mail that if Lexington intended to give them the additional documents, a supplemental affidavit of discovery would be required. No such affidavit was sworn on Lexington's behalf. Having requested a supplemental affidavit if the additional material was to be formally provided to it and not having been provided with such an affidavit, I do not think that the opposing solicitors can reasonably contend that they understood that Lexington intended to make disclosure of the additional material and did not intend to claim privilege in respect of those parts of it where privilege might legitimately be claimed.

102. I do not regard the delay of two weeks before the replacement USB key was provided as having any effect one way or the other. The documents on the original USB key were in native format which, as I understand it, means they could not be read directly and the solicitor opening the USB key would require some technical assistance in order to convert the documents into a legible format. They then had to be examined and assessed, instructions taken and, presumably, a replacement USB key had to be prepared and, one would hope, thoroughly checked before being provided to the opposing parties. It might have been possible to take all of these steps more quickly, but the time taken was not so excessive as to warrant a belief that privilege had been waived.

103. In summary, I agree with counsel for Mr. Campbell insofar as he submits that the response of Lexington's solicitor falls short of what a reasonable solicitor would expect in

light of the previous issues that had arisen in this discovery process. Indeed, counsel for Lexington accepts that there was a “*dearth of comment*” by its solicitors. Notwithstanding this, I do not accept that, on receipt of the replacement USB key, a hypothetical solicitor could reasonably have believed that the claim of privilege originally made had been waived or that Lexington intended to provide access to the additional material which had then been removed from the USB key.

104. Counsel for Anthology also puts the matter slightly differently and contends that Lexington’s solicitors did not do enough in the knowledge that copies of the documents have been made. Therefore, I will turn next to the issue of whether Lexington knew or ought to have known that copies of the documents had been made and retained by the opposing parties.

Knowledge of Retention of Documents

105. Anthology’s argument as to the adequacy of Lexington’s solicitor’s response is premised on the assumption that Lexington was aware that copies of the documents on the original USB key had been made and retained by the opposing parties. That knowledge is, in turn, premised on two factors. The first derives from Mr. Connell’s technical explanation that in order to open the documents which were on the USB key in native format, it was necessary to copy the contents of the USB key onto a computer and to convert individual documents into a legible format. Therefore, it is contended, it should have been obvious that copies of the documents were made, and no request was ever received for their return or their destruction. The second factor is his averment in an affidavit sworn on 28 February 2020 based on which he asserts it was clear that he, and by extension Anthology, were in possession of documents from the original USB key. I have set out that averment at para. 40 of this judgment.

106. Taking the latter point first, I struggle to read the averment in question as an indication, let alone a clear indication, that Anthology and Mr. Connell had copied and retained documents from the original USB key. The references to issues having been raised regarding Lexington's discovery and that "*concerning issues*" would be explored at trial is not illuminating particularly when regard is had to the fact that very serious issues concerning the falsification of documents in Lexington's discovery had already arisen. A reference to the fact that discovered documents had already been supplied on the USB key does not take the matter any further when regard is had to the fact that alongside the privileged and additional material, the USB key also included documents properly disclosed on foot of to Mr. Corrieri's affidavit of discovery. I have been critical of Lexington's solicitors for failing to clearly state Lexington's position in formal correspondence when replacing the USB key. If this averment was intended to alert Lexington to the fact that Mr. Connell had copied and retained documents from the original USB key, then I am equally critical of Anthology's lawyers for drafting an averment with that intended effect in a manifestly opaque and uninformative manner. I am not prepared to hold that Lexington was or should have been aware that copies of the material were made and retained on the basis of this averment.

107. The other factor is more nuanced. It is certainly arguable that Lexington should have appreciated that the material on the USB key would have to be downloaded and converted into a legible format before the issues of which it was informed on 11 February 2020 could have come apparent to the opposing parties. At the same time, the exercise of retrieving and replacing the USB key would be meaningless if Lexington is to be taken as having understood that the opposing parties were retaining copies of all of the original material. Put simply, why would Lexington replace the original USB key with one containing only a small fraction of the documents if it were aware that all of the documents on the original key had in any event been retained by the opposing parties? Therefore, taking the circumstances as

whole, I do not think that it has been established that Lexington was aware that copies of the documents had been made and retained by the opposing parties so as to place an onus on it either to seek the return of those documents or to make a claim of privilege in respect of their contents.

108. That this is so, is further evident by the exchange of correspondence in May 2020 when Lexington queried Mr. Connell's understanding of certain matters pertaining to its confidential and privileged material. Presumably that query would not have been raised if Lexington knew that Mr Connell had kept copies of the material. At that point, it was certainly open to Anthology and its legal advisors to confirm that copies of the documents had been retained but they chose not to do this.

109. The significance of all of this is that if Lexington had been aware that copies of the documents on the original USB key had been made and retained by the opposing parties then there would have been an onus on it to take some action to procure their return or destruction or, at a minimum, to claim privilege in respect of the material not already covered by the claim of privilege in the discovery affidavit. In the absence of that knowledge, no such obligation arose.

110. Even now, it is not clear whether the receivers and their solicitor made and retained copies of the documents on the original USB stick. Although Mr. Campbell in his affidavit makes a number of averments concerning the USB stick from which an inference might be drawn that he still has access to copies of the documents on that USB key, no direct averment is made in that regard.

Delay

111. The delay argument made by Anthology against Lexington is two-fold. They point to a delay in asserting privilege in response to the initial contact from their solicitors on 11

February 2020 and a delay between August 2020, when Lexington was undoubtedly on notice that Mr. Connell had retained copy documents from the USB key, and the bringing of this motion in March 2021.

112. For the reasons already set out, I do not accept that there was a delay on Lexington's part in asserting or re-asserting privilege in February 2020. The actions of Lexington in retrieving the original USB key and replacing it with a USB key containing only the non-privileged documents listed in the Affidavit of Discovery can only be understood as a continued reliance on the claim of privilege made in that affidavit (i.e. a re-assertion of privilege) and as a withdrawal of all additional material provided in error, both privileged and non-privileged. I do not accept that the averment of Mr. Connell in his affidavit of February 2020 put Lexington on notice that copies of documents on the USB key had been retained by him; Lexington's solicitor's correspondence in May 2020 did not receive a reply to the query which might have led to this information being disclosed by Anthology and privilege was asserted in August 2020 once it became clear from the July 2020 affidavit that material had, in fact, been retained by Mr. Connell and was now being used by him.

113. Therefore, the delay to be considered is that between August 2020 when Lexington's knowledge that documents had been retained can be said to have crystallised and the issuing of this motion which is a period of just over seven months. The affidavit which prompted this realisation was that of Mr. Connell sworn in the joinder motion on 24 July 2020 which quoted from and exhibited what Lexington characterises as two clearly privileged documents involving communications from its solicitors. A full account of the circumstances in which Mr. Connell made and retained a copy of the documents on the USB key was provided in a subsequent affidavit on 20 October 2020.

114. The July 2020 affidavit prompted an exchange of correspondence between the parties' respective solicitors. A letter from Lexington's solicitor dated 7 August 2020 clearly

asserted that the material was inadvertently included on the USB key provided to the receivers' solicitors and that it was "*clearly confidential and legally privileged*". It asked that all retained documents be deleted and that Mr. Connell's affidavit be re-sworn without reference to the privileged material. This request was refused by Anthology's solicitor in a letter dated 18 August 2020 on the basis that any privilege attaching to the documents had already been waived. Anthology's solicitors did confirm that their clients had retained copies of the documents on the original USB key. The refusal was in turn premised in part on the contention that Lexington were aware of the fact that the material had been retained due to the averments in Mr. Connell's affidavit of February 2020, a contention which I have rejected. That letter concluded by suggesting that if Lexington wished to assert privilege over the documents exhibited in the replying affidavit, it should raise this matter with the judge hearing the joinder motion then listed for hearing on 22 October 2020.

115. In dealing with the delay between August 2020 and March 2021 counsel for Anthology argued that the delay was unexplained and inordinate, and that Lexington should have re-asserted privilege in formal correspondence but did not do so. I have some difficulty understanding the latter element of these submissions as the letter of 7 August 2020 from Lexington's solicitor states, on five separate occasions, both that the particular documents exhibited in Mr. Connell's affidavit and the documents on the USB stick more generally were privileged. They are variously described as "*legally privileged*", "*clearly privileged*", "*confidential and privileged*" and "*obviously privileged*". That letter sought the deletion of all such documents and reserved Lexington's right to object to any reliance being placed on them. Therefore, in my view, on becoming aware that Anthology had retained confidential and privileged material from the USB key, Lexington claimed privilege in respect of that material in formal solicitor's correspondence within a short time thereafter.

116. This means that the issue which the court must decide is necessarily a narrower one. Does a delay of seven months in moving to seek relief in respect of the use of the material in respect of which privilege was asserted in August 2020, disentitle Lexington to that relief? In addressing this question, sight should not be lost of the weight which the law attaches to legal professional privilege and the purpose that it serves. The need for clients to be able to communicate freely with their legal advisers and for legal advice to be fully and frankly given is self-evident, particularly in an adversarial legal system. Consequently, the courts have long perceived it to be in the interest of justice to protect the confidentiality of these communications.

117. The arguments made by Anthology (that the delay is inordinate, and no excuse has been offered) are clearly drawn from the *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459 line of jurisprudence. That is directed at ascertaining whether proceedings should be struck out because of delay by a party in the taking of steps required to progress the litigation. Although the analogy may be useful in some respects, it is important to bear in mind that the court here is concerned with something materially different. The outcome of this appeal will not determine whether the litigation will be permitted to proceed. The assumption is that the litigation will proceed, and the application is to determine whether the counterclaim defendants should be permitted to use otherwise privileged material inadvertently disclosed by Lexington for the purposes of the litigation.

118. Although the court is not carrying out a *Primor* type analysis – i.e. it is not ascertaining whether there has been inordinate and inexcusable delay and, if so, determining where the balance of justice lies – it is nonetheless relevant to consider any excuse which is been proffered for the delay before deciding if the delay should operate to preclude the grant of the relief sought. Counsel for Lexington draws a distinction between the various reliefs sought in the Notice of Motion. He contends that the delay can have no effect on the claim

of privilege *per se* and it is only relevant as regards the grant of injunctive relief to restrain the use of the privileged material. I think, in principle, this distinction is correct although in practice it will benefit Lexington little to obtain a declaration that the documents listed in Schedule A are covered by legal professional privilege if it does not also obtain the restraining orders at paras. 2 and 4 of its Notice of Motion to prevent the material being used or referred to in the proceedings.

119. The delay the court is now examining – between August 2020 and March 2021 – is not addressed as clearly as it might have been in the exchange of affidavits. This is possibly because Anthology was asserting and Lexington refuting a longer delay running from the earlier date of February 2020. In his oral submissions, counsel for Lexington pointed to the fact that the privilege issue and Anthology’s use of privileged material was taken up in the affidavits filed in the joinder motion, some of which are in almost identical terms to those sworn on this application. It is, perhaps, unsurprising that Lexington took this approach since it had actually been invited to do so in Anthology’s solicitor’s letter of 18 August 2020. It appears that Twomey J. took the view that the determination of questions of privilege and the use of allegedly privilege material was not relevant to the issues he had to decide on the joinder motion. Although this approach might well have been anticipated by the parties, it was not finally evident until Twomey J. delivered his judgment in the joinder motion on 19 November 2020.

120. Meanwhile two other events were giving rise to further procedural applications. I understand (although no details are provided on affidavit) that a separate application was made by Lexington regarding the use of the transcripts of telephone conversations with Mr. Flannery recorded by its former consultant and that an undertaking was given by Anthology/Mr. Connell to the High Court not to use that material (with the exception of

documents already exhibited). I also understand there to be an ongoing issue concerning the legality of the manner in which Mr. Connell acquired those transcripts.

121. Separately, and more directly relevant to this application, in January 2021 Lexington became aware that Mr. Connell had passed discovery material to a third party in Malta when that third party used some of the material in pleadings filed in legal proceedings in that jurisdiction. This led to a further exchange of correspondence between the respective solicitors and the motion, when it issued, covered both the claim of privilege in respect of the material inadvertently disclosed on the USB key and Anthology's breach of the implied undertaking to court regarding the use of discovered material, a breach which is now acknowledged by Anthology.

122. A number of matters are apparent from these events. Firstly, in light of the invitation in Anthology's solicitor's letter to raise the issue concerning the use of the privileged material in the joinder motion and the fact that the issue was actually raised, I would not treat the period of alleged delay as having commenced until 19 November when Twomey J. gave his judgment in that motion without dealing with the privilege issue.

123. Secondly and most significantly, despite the lapse in time from the refusal by Anthology of Lexington's claim of privilege to the issuing of the motion, nothing in Lexington's conduct during that period could have led Anthology to believe that the claim of privilege made in the affidavit of discovery and in the letter of 7 August 2020 was not being actively maintained. On the contrary, Lexington took active steps in this and other jurisdictions to enforce the confidentiality of its material and to preclude the use of material it alleged had been improperly obtained.

124. Thirdly, in my view, it was reasonable for Lexington to have brought a single motion in respect of both its claim of privilege and Anthology's breach of the implied undertaking to court regarding the use of discovered material. It is very probable that the fact the second

issue arose in January 2021 and necessitated solicitor's correspondence before any court application could be brought, thus delaying the issuing of a motion regarding the privileged materials *simpliciter*.

125. In all of the circumstances, I am satisfied that some explanation has been offered by Lexington as to why the motion it brought in March 2021 was not issued earlier. I am also satisfied that the period of delay which the court should consider is one of just under four months (19 November 2020 – 12 March 2021) rather than one of seven to eight months. In all of the circumstances, I do not think that a delay of that magnitude would warrant the refusal to Lexington of equitable relief in this motion.

Exception to Privilege

126. In circumstances where I have held that Lexington did not waive privilege regarding its communications with its lawyers and it is not precluded by reason of delay from obtaining the relief sought in this motion, the last issue to address is Anthology's claim that the court should make an exception to the claim of privilege because of Lexington's conduct. As previously noted, the conduct complained of by Anthology has shifted from an abusive litigation strategy by Lexington (including the bringing of the counterclaim itself) to an assertion that Lexington's central claim is fraudulent (i.e. that it attempted to fax the ARR on 31 January 2017 but was unable to do so because Anthology deliberately disabled the fax line) with some intermittent reliance being placed on the falsification of documents in the discovery process. In his replying affidavit Mr. Connell has purported to use extracts from the material over which Lexington claims privilege to establish that the factual claim made by Lexington is, to Lexington's knowledge, false. Lexington objects to the use of that material without Anthology's having obtained the prior permission of the court to do so.

Lexington also argues that no claim of fraud or any analogous cause of action has been pleaded against it in these proceedings. As a matter of fact, that is correct.

127. The main authority relied on by both sides is the Supreme Court decision in *Murphy v. Kirwan* [1993] 3 IR 501 which established the principle that an exception to the general rule that privilege applies to communications between a client and their legal advisor may arise where it would be injurious to the interest of justice to allow such a claim to be maintained. The parties disagree as to the scope of that principle and of the circumstances which must exist before it can apply.

128. *Murphy v. Kirwan* concerned a claim for specific performance which the defendant had sought, unsuccessfully, to have struck out for failing to disclose a reasonable cause of action. At the hearing of the action the plaintiff's claim was dismissed without the defendant going into evidence and the defendant's counterclaim for damages was adjourned. The counterclaim denied the existence of any concluded agreement between the parties and alleged that the proceedings were brought to frustrate the sale of land by the defendant to a third party. Consequently, it was alleged that the plaintiff's claim was frivolous and vexatious and an abuse of the processes of the court. In the context of the counterclaim, the defendant then sought discovery of the plaintiff's legal advice up to the date of the trial. The plaintiff claimed privilege, but the High Court ordered production of the documents for inspection. The defendant appealed to the Supreme Court.

129. In the High Court Costello J. had allowed the application for inspection as an exception to the claim of legal professional privilege on the basis of what he termed the "*moral turpitude*" of the plaintiff. This phrase is used extensively by Anthology in making its arguments on this motion. Costello J. initially considered why there should be an exception to such a well-recognised privilege:

“Why, in cases of fraud and, speaking broadly, of commercial dishonesty, should the need to obtain all the facts take priority over the need to preserve the confidentiality of professional communications? It seems to me that the basis for the exception must be the conclusion that in exceptional cases which may involve a degree of moral turpitude which is much greater than that which arise in other causes of action it is in the public interest that no restriction be placed on the courts' capacity to ascertain the facts to ensure that a wrongdoer does not escape the consequences of his actions.”

He then considered the position of the plaintiff in the case before him:

“But if the moral turpitude of what the plaintiff is alleged to have done falls for consideration then it seems to me that the wrongdoing alleged is such as to justify the court in refusing the claim of privilege. For what is alleged is that the plaintiff has abused the court's procedures and has deliberately maintained a baseless claim not for the purpose of redressing a wrong done but to obtain a commercial advantage by forcing the defendant to concede an unjustified claim so as to avoid the consequences of having to defend a High Court action.”

130. The Supreme Court identified two issues arising on appeal. The first was whether the exception to the rule of legal professional privilege, which was well established in case of fraud and dishonest conduct, was properly extended to a claim of malicious prosecution. The second concerned the threshold the defendant had to reach in order for the exception to apply. It is implicit in the judgment of Finlay C.J. that simply pleading a case which, if proven, would allow the exception to apply could not be sufficient as if it were so, the privilege which is recognised as protecting a *bona fide* interest necessary for the proper administration of justice could be set at nought on the basis of no more than an assertion. At the same time, Finlay C.J. points out that the party seeking to rely on the exception cannot be required to prove as a matter of probability a claim of fraud or malicious prosecution etc.

To impose such a requirement would make the granting of an order for discovery as an exception to legal professional privilege impossible, since the party would effectively be required to establish their case in order to get the discovery necessary to establish their case.

131. In approaching the first issue Finlay C.J. looked at origin of the exception in *R v. Cox and Railton* (1884) 14 QBD 153 and the judgment of Stephen J. – and the reference to “the rule” is to the rule that confidential communications between lawyers and clients are privileged:

“The reason on which the rule is said to rest cannot include the case of communications criminal, in themselves or intended to further any criminal purpose, for the protection of such communications, cannot possibly be otherwise than injurious to the interests of justice and to those of the administration of justice.”

132. Finlay C.J. acknowledged that the exception had been extended beyond cases of criminal communications or communications to further a criminal purpose to include cases of fraud (*Williams v. Quebrada Railway Land & Copper Co. Ltd.* [1895] 2 CH 751) and more broadly “*all forms of fraud and dishonesty, such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances*” (per Goff J. in *Crescent Farm Sports v. Sterling Offices* [1972] Ch. 553). It is due to this emphasis on crime and causes of action analogous to fraud, that the exception to the rule of privilege that would otherwise apply is termed the “crime/fraud” exception. Finlay C.J. had little difficulty in concluding that cases of malicious prosecution fell within the logical and consistent extension of this principle:

“I am satisfied that these extensions to the application of the exemption flow logically and consistently from the principle laid down in R. v. Cox and Railton [1884] 14 QBD 153 as the real reason for the introduction of the exemption in the first place, and that

the essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct of moral turpitude or of dishonest conduct, even though it may not be fraud.

Nothing could be more injurious to the administration of justice nor to the interests of justice than that a person should falsely and maliciously bring an action, and should abuse for an ulterior or improper purpose the processes of the court.”

133. As regards the second issue, Finlay C.J. considered whether the defendant had provided “*sufficient evidence of a plausible or viable case to support his claim to warrant the making of the order for discovery at this stage.*” Lexington emphasises the “*plausible or viable case*” standard and contrasts it with an apparently lower standard referenced in the dissenting judgment of Egan J., namely the establishment of “*a prima facie case that the prosecution of the action was malicious*”. However, I am not entirely convinced that Egan J. intended his posited standard to be materially different or necessarily lower than that described by Finlay C.J. Egan J. notes that the exception would not apply merely because fraud was alleged and that “*there must be some prima facie evidence that the allegation has a foundation in fact*”. In fact, the reason for Egan J.’s dissent is that he would have allowed the plaintiff’s appeal on the basis that the defendant had not met this standard, thereby suggesting that in practice he applied a higher threshold to the defendant’s claim than did the majority.

134. In any event, Finlay C.J. speaking for the majority held that the defendant had met the necessary threshold through a combination of the fact that the plaintiff’s case was dismissed without the defendant being required to go into evidence (Egan J. felt that this did not necessarily provide evidence of the malice necessary for the tort of malicious prosecution)

and the fact that there had been a number of affidavits sworn by the defendant throughout the proceedings alleging that the plaintiff's claim was frivolous and vexatious and unsustainable and the plaintiff never disputed these serious allegations of a lack of *bona fides* on affidavit. These factors lent sufficient support to the defendant's claim to amount to evidence of a viable and plausible case.

135. Finlay C.J. revisited the exception to legal professional privilege in *Bula (In Receivership) v. Crowley (No. 2)* [1994] 2 IR 54 in which judgment was delivered just two and a half months after the judgment in *Murphy v. Kirwan*. In *Bula*, the plaintiffs made a claim of negligence against a receiver primarily on the basis that he had failed to follow legal advice which had been given to him as a result of which they had sustained greater losses than they would otherwise have done. The plaintiff sought discovery of the legal advice which was refused by both the High Court and Supreme Court. Notably, in rejecting the argument that the exception to privilege should be extended to cover any case in which the failure to follow legal advice is relevant to an issue in the proceedings, Finlay C.J. observed that the basic crime/fraud exception has "*to some extent expanded*" but, he noted "*always to include conduct which contained an element of fraud or dishonesty, and as I have said, moral turpitude.*" His detailed analysis of the issues in the case was as follows:

"The contention made in this case that such an exception should be extended to any case where it was proved that the nature of the legal advice obtained by a party was clearly relevant to an issue as to the commission of a tort would be inconsistent with the principles which I have set out. It would be a massive undermining, in my view, of the important confidence in relation to communications between lawyers and their clients which is a fundamental part of our system of justice and is considered in all the authorities to be a major contributor to the proper administration of justice.

With regard to the alternative suggestion that the court should look at the documents and if, as it were, it finds them highly relevant to the issue which appears to arise in the action, should, as a matter of discretion, order their production, this again seems to me to be unsound in principle. It shares with the contention for the extension of the exemption from charges of moral turpitude to cases where the existence and nature of legal advice is particularly relevant, what in my view is a fundamental error. Two conditions would exist before any question of a lifting of or exemption from this legal professional privilege could arise. The first is that the legal advice and the communications are probably relevant to one of the issues concerned, and the second is that the situation arising in the case comes within one of the special exemptions which have been identified so as to destroy the privilege. To contend, as is contended in this aspect of the case, as well as on the first general principle, that the more relevant or important the legal advice may be, the greater is the discretion of the court to lift the privilege, is to confuse two separate pre-conditions to the removal of the privilege.”

136. I have set this out in full because the case made by Anthology is based on the assertion that it has adduced *prima facie* evidence that Lexington is guilty of moral turpitude, that the material in issue is highly relevant and that it is in the interests of justice that the privilege should be lifted so that the transaction can be examined by the trial judge.

137. Apart from being somewhat old fashioned, I find the phrase “*moral turpitude*” to be unhelpfully imprecise. Nonetheless, as used by Finlay C.J. in *Murphy v. Kirwan* and *Bula v. Crowley (No. 2)*, it appears to be accepted as the descriptor of a category of conduct which might justify an exception to legal professional privilege. It is not, I think, intended to be a general synonym for unethical conduct but is linked by analogy to the type of conduct that the courts have expressly held justifies the exception to the privilege such as criminal

conduct, fraud, dishonesty and malicious prosecution. This is not to say that the category of conduct which might justify the exception is closed, but that any new heading has to be carefully scrutinised to ensure that it represents a logical and consistent development of the principle.

138. In particular, privilege is not lost merely as a punishment for conduct of which the court disapproves. The privilege will only be lost if access to the documents in respect of which the privilege is claimed is relevant and necessary for the party making the claim of fraud, dishonesty, malicious prosecution, moral turpitude etc. This in turn begs the question, raised by Lexington, as to whether it is necessary for there to be a formal claim made in the proceedings of fraud or dishonesty or similar conduct. The underlying rationale seems to be that privilege cannot be used to shield communications with lawyers which are part of that conduct whilst maintaining the distinction between communications that are part of the conduct complained of, which may fall within the exception, and communications which seek or give advice in relation to such conduct which must remain privileged in order to further the administration of justice.

139. I note that Anthology also relies on the decision of the Court of Appeal in *Barclays Bank v. Eustice* [1995] 1 WLR 1238 which suggests that a distinction should be drawn between legal advice given prior to the carrying out of an action alleged to be fraudulent and legal advice given subsequent to the carrying out of that action in order to explain the legal effect of what has already occurred. The essence of the distinction appears to be that a client is entitled to legal advice as to how to respond to a criminal charge but not to legal advice in order to carry out a criminal act. I am not entirely sure how that fits into the argument in this case since none of the privileged material used by Anthology in its affidavit suggests that Lexington's legal advisors were asked to or gave it legal advice on how to carry out any criminal, dishonest or fraudulent act.

140. When looked at in this manner, it is clear that some of the grounds upon which Anthology has argued that Lexington is guilty of moral turpitude could not, even if established, warrant an exception from the privilege. This is most obviously so as regards the falsification of e-mails included in Lexington's earlier affidavit of discovery. It is admitted by Lexington that falsification occurred and that Mr. Flannery delayed in bringing it to the attention of the court. These are very grave matters which will, no doubt, be revisited during the course of the litigation. They are not, however, matters the subject of these proceedings and, as Lexington points out, the falsification post-dates the creation of the privileged documents. Therefore, I do not accept that such moral turpitude (in the general sense) as Lexington may have been guilty of in the discovery process warrants the lifting of its claim of privilege.

141. The second ground relied on by Anthology is an abusive litigation strategy pursued by Lexington in this and other jurisdictions. However, there is a significant difference between the malicious prosecution which was alleged to have occurred in *Murphy v. Kirwan* and the allegation of an abusive legal strategy in this case. In *Murphy v. Kirwan* the plaintiff's claim was dismissed without the defendant being required to give evidence and allegations of abuse of the court's process made by the defendant on affidavit had not been answered by the plaintiff. It was specifically alleged that the litigation had been brought to frustrate the sale of the property to a third party. Here, except for the falsification of e-mails, none of the allegations of an abusive litigation strategy have been admitted by Lexington nor established before any a court. As I understand it one action in the USA has failed as it was issued in the wrong jurisdiction and proceedings were subsequently instituted in a different state. At the time this motion was heard, the other proceedings and investigations remained live save insofar as investigations into Mr Walters necessarily concluded on his death.

142. Anthology points to proceedings brought by Lexington in Malta and in the USA in circumstances where the settlement agreement included an exclusive jurisdiction clause in favour of the Irish courts. This complaint forms part of Anthology's pleaded case and may, or may not, ultimately succeed. However, at this stage, I note Lexington's response that the proceedings in the other jurisdictions involve parties who are not party to the settlement agreement (e.g Delegate in the USA) and issues which have to be determined pursuant to the regulatory law of foreign jurisdiction (the criminal and regulatory complaints made in Malta). Again, these arguments may or may not prove successful, but I do not think the position is so clear cut that it could be said at this stage that Anthology has provided sufficient evidence of a plausible and viable case of an abusive legal strategy such as to warrant the lifting of Lexington's claim of privilege.

143. This is even more so as regards complaints made concerning the counterclaim brought in these proceedings. Twomey J. concluded that Lexington had established a stateable case against Mr. Connell and Mr. Karrer to the effect that they were involved in an alleged fraud or conspiracy (along with the other counterclaim defendants) to unlawfully deprive Lexington of its economic interest in the 807 patent. Although that application was determined by reference to a different threshold than this (a *prima facie* stateable case *versus* sufficient evidence of a plausible or viable case) and the joinder application technically only involved the fourth and fifth it seems to me that it would be fundamentally inconsistent for me to hold that there is sufficient evidence that the counterclaim is abusive when Twomey J. has held that there is *prima facie* evidence that it is stateable. I am particularly conscious that the essence of the counterclaim is a conspiracy involving all of the counterclaim defendants (although Mr Campbell only to a limited degree). If the claim is stateable as against Mr Connell and Mr Karrer, it is difficult to see how it is not equally so against those persons they are alleged to have been conspiring with.

144. The third and final ground upon which Anthology appears to contend that Lexington is guilty of moral turpitude concerns its core case, i.e. that it faxed, or attempted to fax, the ARR on 31 January 2017. I have considerable difficulty in dealing with this aspect of the case because most of the argument made on behalf of Anthology is premised on the use of the privilege material in Mr. Connell's affidavits. This is purportedly done to demonstrate that the claim that the ARR was faxed on that date is false. None of the case law opened by Anthology deals with the situation where a party had, without leave of the court, used the privileged material in order to make a claim that the privilege should be lifted much less done so without seeking the leave of the court to use the material. I share the concern expressed by Lexington at the use of privileged information in this manner. It seems fundamentally wrong that a motion concerning whether Anthology should be permitted to use privileged material which was inadvertently disclosed to it, should be determined by the court on the basis of Anthology's use of that privilege material. A more proper approach would have been to have sought the leave of the court to use that material in the first place and only then made averments based on its contents or exhibited it.

145. IN seeking to justify its use of material over which privilege is claimed, Anthology also makes wide ranging assertions to the effect that some of the material in respect of which privilege is claimed is not properly the subject of legal professional privilege. I have held above that, on a *prima facie* basis, this privilege has been properly claimed and that if Anthology wished to assert otherwise then it was required to make an application to court, and the court could inspect the specific documents to which that application related. Again, this was not done.

146. All of this leaves the court in the invidious position of being asked to determine the application on the basis that the material, if Anthology is permitted to use it, will likely disprove the claim made by Lexington. Anthology characterises this as a claim of fraud or

moral turpitude, but I am not sure that this characterisation is legally correct. Firstly, no claim of fraud, dishonesty or of other conduct amounting to moral turpitude has been pleaded by Anthology or by any of the counterclaim defendants. Secondly, cases are frequently won or lost on the basis that parties assert matters which they ultimately cannot prove. It would, I think, be harsh to characterise litigants in this position as necessarily being guilty of fraud or moral turpitude. Of course, there may well be instances in which that characterisation is deserved but for the court to accept an unpleaded assertion to this effect at this early stage in the proceedings and before any evidence has been heard is something for which no authority has been proffered.

147. Because of the approach taken by the parties, I have had sight of some of the material in question and I have read the parties' supplemental submissions relating to it - although it might be observed that to a large extent the parties used these submissions to repeat their general arguments and there was surprisingly little focus on the privileged material which had not been opened in court. That said, on the face of it I do not see the privileged material to be as decisive as Anthology believes it to be. Whilst permission to use the material might well assist Anthology in advancing its case, the material of itself does not necessarily establish fraud or dishonest conduct on Lexington's part. The piece of evidence which appears to offer most support is the transcript of the telephone conversations between Mr Flannery and Lexington's agent in Malta. As it happens that evidence is not the subject of this motion (since the transcripts were not on the USB stick) although I understand a separate application has been brought in relation to it. Some of the exchanges may be open to a number of interpretations variously favouring either Anthology's or Lexington's version of events.

148. In the absence of oral evidence from the people involved explaining the communications in context they do not in my view reach the threshold required by *Murphy*

v. Kirwan of amounting to sufficient evidence of a plausible or viable case of fraud or dishonesty. I note particularly in this regard Finlay C.J.'s subsequent rejection of the notion that the more relevant and necessary a privileged communication is, the greater the ease with which the court should lift any claim of privilege. Therefore, in all of the circumstances I am not satisfied that the privilege claimed by Lexington should be refused to it on the basis of the crime/fraud exception or any broader exception derived from it which has been recognised to date.

Equitable Relief – Discretionary Factors

149. Finally, I have noted above that loss of privilege is not available to the court as a punishment for the undoubtedly serious misconduct in which Lexington has already engaged in the discovery process. I make no finding as to whether Lexington was directly involved in the falsification of documents but, at a minimum it is clear that the documents were falsified on its behalf and that Mr Flannery knew of this for a number of months before he brought what had occurred to the court's attention. Equally, the misconduct in which Anthology has engaged in the course of the discovery process is not necessarily a reason why, if it otherwise met the *Murphy v. Kirwan* standard, it might not succeed in its argument that the material of which it is currently in possession should be regarded as being subject to an exception from the claim of privilege made by Lexington.

150. Nonetheless, I am minded that the relief which is sought on this motion is primarily equitable and that the court must look at the conduct of both of the parties when considering the grant of relief which is discretionary in nature. Whilst in other circumstances Lexington's previous conduct in the discovery process might well have acted as an impediment to the grant of equitable relief to it, because Anthology and Mr. Connell had been involved in conduct which I regard as equally grave, I do not propose to withhold relief

from Lexington on equitable grounds. In other words, I regard Anthology's and Mr Connell's conduct as cancelling the negative weight that Lexington's conduct would otherwise carry.

151. I have already decided that the delay between Lexington becoming aware of the fact that Anthology and Mr Connell had retained copies of the material and intended to use them and the bringing of this motion was not such as to preclude Lexington from relying on the privilege claimed. It follows that I do not propose to refuse relief on equitable grounds for delay either.

Conclusion

152. In those circumstances, I propose to grant the relief sought by Lexington in its Notice of Motion and I will hear the parties further on what orders should be made.