IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2022] EWHC 1001 (Fam)

No. LV19D07193/
FA-2022-000009

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday 11 April 2022

Before:

SIR JONATHAN COHEN

B E T W E E N :

MARWAN BEDEA QASSEM SAID KOUKASH — Applicant

- and -

AMANDA ANNE KOUKASH — Respondent

MS S. HILLAS QC (who did not appear at the trial below) appeared on behalf of the Applicant.

THE RESPONDENT appeared in Person.

J U D G M E N T

SIR JONATHAN COHEN:

1 I am now going to give my judgment on the sole issue which is before me as a result of the order of Peel J who, on 17 January 2022, granted the husband Mr Marwan Koukash permission to appeal one part only of the order of HHJ Greensmith dated 30 November 2021, namely that part of the order which provided for payment of the lump sum of £510,000 save that the sum of £110,000, which was part of the £510,000, remained liable for payment by Mr Koukash and the stay that was granted applied only to the figure of £400,000.

2 The reason that the judge gave for the grant of a stay is set out in his written reasons, namely the fact, and it is agreed as a fact, that the trial judge had in his possession and had seen a without prejudice document from which the judge had deduced that the sum of £400,000 referred to in that letter was available to the husband to pay towards the wife and which, when allied with the figure of £110,000 which the husband's Form E said he had in the value of two motor vehicles, produces the sum total of £510,000. Accordingly, Peel J was of the view that it was arguable that the judge erred by taking into account privileged documentation.

3 All the other grounds of appeal were dismissed. Mr Koukash remained obliged to pay £110,000, and the sums ordered by way of periodical payments and costs. It is not at all to his credit that those sums have not been paid.

4 In order to assess the argument that was put before me it is necessary to set out in some detail the history of this case. I have great sympathy with Mrs Koukash when she says that this case has dragged on now for four years and that is causing great harm, not just to her, but also to the parties' three children. Divorce proceedings commenced in 2019 and the financial aspects of the breakdown of the marriage first came before the court in March 2020. For three hearings in 2020, both parties were represented by solicitors and counsel, the third of those hearings being the FDR. The FDR bundle was prepared in the usual way and as required by the Family Procedure Rules contained the parties' without prejudice proposals. The FDR took place and no settlement was reached. The matter was listed for a case management hearing before HHJ Greensmith and it was he who handled all the subsequent hearings.

5 On 8 March 2021, the husband filed a notice of acting in person. On 26 March, a case management hearing took place in front of Judge Greensmith. The wife was represented by solicitors and counsel. The wife's solicitors on behalf of the applicant prepared the bundle. No doubt entirely inadvertently, the bundle was the FDR bundle updated but without the removal of the without prejudice correspondence. This is something that should never happen but very regrettably does happen from time to time.

6 It appears to be common ground that the husband was not sent a copy of the bundle. I say that because there is a letter dated 31 March from the wife's solicitors to the husband containing the bundle of papers. It is therefore self-evident that Mr Koukash would not have been aware of the inclusion of this privileged correspondence. It is that bundle that has effectively been the trial bundle ever since, albeit supplemented by subsequent s.25 statements and no doubt by a few other documents as well including the orders that were made.

7 On 13 September, there was a directions hearing before the judge, as I understand it largely to do with the length of the hearing and both parties appeared unrepresented. The wife's solicitors had come off the record. I do not know why but it would not be hard to surmise

that she was not in a position to fund her costs. During the course of the hearing, it is recorded that the judge said that he was not going to ask for a new bundle. He was simply going to ask for the s.25 statements to be added to the trial bundle. There is no suggestion that, at that stage, the judge had the slightest clue that the bundle that he had before him contained without prejudice documents.

8 On 6 October, the case came before the judge again for what was a final case management hearing and at that stage, Mrs Koukash had instructed a direct access counsel. It is not clear to me exactly how much chance he had had to read into the case but there is a transcript of a discussion that counsel had with the judge and I have viewed, because it is a videotape, and listened to the discussion that took place. Counsel said as follows:

> "I can see your court clerk was good enough to forward to Mrs Koukash a copy of the bundle. I think at that stage both had solicitors on board."

I interpose to say that the reason why the wife needed the bundle was because she did not have one and she needed it so that she could pass it on to her direct access counsel. He then continued as follows:

> "You dealt with the hearing on that day. One thing that concerned me until I realised that you had dealt with the hearing is that there are offers in that bundle. Of course, if they can be considered as open offers then you have already seen them in any event and there is no difficulty there. In fact, it probably assists in terms of producing statements for at a final hearing given that they appear to have been dispensed with."

No one could interpret that as a clear exposition of the fact that the bundle contained without prejudice correspondence.

9 The husband filed his s.25 statement on 8 October and it is important that I read out what was said therein. Under the heading "Offer" he says this:

> "11.9 An offer of the home for the children and Mrs Koukash is one that my family would need to fund and having spoken to them, they are prepared to buy a four bedroomed house and place this in a trust for the children with my wife having living rights there. A suitable four-bedroomed home would cost approximately £300,000.
>
> 11.10 Upon the sale of the family home, my family would need to recover what they can from the loan. They will then buy two houses, as above a house for Mrs Koukash and the children and one for me. Both houses will be in trust for the children but, in my case, it will be in trust for all of my six children [that is because Mr Koukash had children from a previous relationship]."

So that was his open offer, a house to the value of £300,000 to be held in trust for the children of the family.

10 The wife's counsel prepared an opening document. At para.34 he says this:

> "Husband's offer as understood
>
> H's open proposal is contained within his s.25 statement. It is understood that his position involves no redistribution of capital, rather, the sale of the family matrimonial home to repay the family loan. The husband's family will then buy two modest [properties - it says 'parties'] and allow W to live in one of them having granted her 'living rights'."

In other words, the written position statement put into the judge before the hearing commenced referred only to the husband's open offer.

11 The hearing took place on 14 and 15 October. It appears to be common ground that during the hearing, there was no reference to the without prejudice offer which the husband had made. In fairness, Mrs Koukash says, "I have no recollection whether there was reference to it or not." Mr Koukash says there was no reference and it appears to me highly probable that there was none. In a sense, the lack of reference is not that surprising because Mrs Koukash was seeking the sum of £2 million by way of a lump sum clean break payment which she said reflected the high lifestyle which the parties had enjoyed and the monies that were available. The husband's case was that the wealth in this case all belonged to other members of his family and he was dependent on their generosity. So the parties were a million miles apart.

12 The evidence finished on 15 October and the case went off for written submissions. The husband's written submissions were of, I have to say, a rather opaque nature. Mr Koukash had instructed counsel to write written submissions. He dealt with his proposals at paragraphs 54 - 57 where he says this:

> "54. I believe a fair outcome to this case would be for Mrs Koukash to purchase a home for herself and the children...
>
> 55. She could buy a detached home for between £300,000-£350,000 mortgage-free... In terms of funding this, I am personally unable to pay for it... As such, the only way to fund this would be for me to yet again turn to my family for support by asking my father to loan me the money.
>
> 56. I submit that the court cannot compel my father to pay and should bear in mind when making its decision that it is beyond my power to force my family to pay any specific amount. I can only ask my father to help. I believe that he will help but only to the extent that he considers reasonable... My offer of £300,000 will not give Mrs Koukash enough to buy the house she seeks."

13 This was not a very helpful way of putting Mr Koukash's case. As a reader of it, I ask myself:

(a) Is the offer £300,000 or is it £350,000?

(b) Is it in trust or is it not?

(c) Has Mr Koukash's father actually agreed to a loan and, if so, in what sum?

14 Judgment was handed down on 30 November 2021. The relevant parts of the judgment are contained in paras.78, 79, and 81. At para.78, the judge says as follows:

> "The husband's open offer contained in his submission paper is based upon him receiving a one-off sum from his father to pay the wife. In an offer letter contained in the bundle, the husband offered £350,000. Without contravening the principles involved in including family money in a settlement, I can reasonably assume £350,000 is immediately available."

Then there is an asterisk down to a footnote which reads as follows:

> "The letter is dated 28 October 2020 one day before the FDR and is marked 'without prejudice' but as it is contained in the court bundle, I am making what I consider to be a reasonable presumption(sic) that any privilege (if it existed) has been waived."

At 79, the judge says:

> "It is reasonable to find, on the balance of probabilities, that a further £50,000 is available as contained within the letter dated 28 October 2020."

At 79, aggregating the figures, he says:

> "This gives scope to increase the lump sum payable by a further £50,000 to £400,000."

Then at 81:

> "Aggregating the £350,000 lump sum proposal with a £50,000 offer to set the wife up in business, and the £110,000 the husband is able to raise from the sale of his cars, this means there is a capital fund of £510,000 available within a short period of time, hence the judge's figure."

15 It is at this stage appropriate to turn to the full terms of that letter of 28 October. In it, his solicitors put forward the proposal which reads as follows:

> "1. That he borrows a further sum of £350,000 secured against the matrimonial home and pays this to the wife within ninety days from the date of any consent order.
>
> ...
>
> 4. That the husband will pay for a five-year lease on business premises for Mrs Koukash's proposed business with a maximum rental value of £10,000 per annum."

Then it continues with other matters. Thus, the offer of £400,000 was made up of £350,000, plus £10,000 a year for five years, without any reference to the money being held in trust.

16 The judge therefore was faced, as he saw it, with three offers: the without prejudice offer of £350,000 plus £50,000; the s.25 statement offering £300,000 in trust; and the closing

submissions offer apparently offering £300,000 or £350,000 if the husband's father would loan it. It is, I think, apparent from reading the judgment that the judge had not seen the without prejudice letter until he came to write his judgment. If he had seen it during the hearing, it is inconceivable that the matter would not have been raised during the hearing and nor would there have been the footnote revealing the discovery of this document. So it is in those circumstances that I have to consider what the effect is of the judge having seen and, as it seems to me and I will come back to, plainly relied upon a without prejudice letter.

17 It is necessary to touch on the law in relation to without prejudice documentation. Privilege is, of course, the privilege of the client and not of the solicitor or legal advisor. Privilege cannot be waived by solicitors on their own. The without prejudice rule governs the admissibility of evidence and is founded upon both the public policy of encouraging litigants to settle their differences rather than litigate them to a finish and the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence. That well-established principle has been approbated by the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280.

18 But, the privilege is not absolute and resort may be had to without prejudice material for a variety of reasons when the justice of the case requires it, always giving due weight to the purpose of the rule itself. That is made clear in *Rush & Tompkins* at p.1300. However, as is also made clear in the subsequent case of *Somatra Ltd v Sinclair Roche & Temperley (A Firm)* [2000] 1 Lloyd's Rep 311, where it was held that while it is clear that legal privilege could be waived unilaterally, without prejudice privilege was effectively a joint privilege and could not be waived by one party alone. On the appeal of that case, the Court of Appeal held, allowing the appeal in part, that a party to litigation was not entitled to rely upon the contents of without prejudice discussions with another party in order to advance the case at trial unless subsequent conduct by the other party entitled it so to do.

19 In this case the wife's solicitors had inadvertently put before the court a bundle containing the husband's without prejudice offer without any reference to him and without any discussion of it at any time.

20 On Mrs Koukash's behalf, counsel has provided written submissions for this appeal but has not appeared in order to save costs. He says the following and I will deal with them in turn. First, he says that the discussion that took place on 6 October showed that if there was a privilege, it had been waived and he expressly referred the judge to the offers without any objection being taken by Mr Koukash. As I have already mentioned, it does not seem to me that counsel's submissions get anywhere near close to being explicit enough in order to found that submission. There is no reference to the fact that the offer was without prejudice and there was minimal discussion about it before the judge.

21 Secondly, he says that the offers were in the bundle that had been before the judge on various occasions and thus it must be deemed that the husband had either agreed or acquiesced in them going before the judge. It does not seem to me that the precise contents of the bundle ever received the slightest attention before the trial started and it is not possible to draw from the fact that a letter was included in the bundle that this amounted to agreement to waiver of privilege or an acquiescence in such waiver.

22 Thirdly, says counsel, the judge could have reached the same conclusions as he did from the other material before him. I accept that it is arguable that the judge might have reached the same conclusion although it would have been, it seems to me, difficult to mount in the light of the findings of fact that he has made in the judgment, particularly in the paragraphs

between 61 and 68 and especially para.64. However, the fact is the judge made it clear in his judgment that he did rely on the without prejudice letter to reach the figure of £400,000 which was part of the £510,000. It would be wrong for me to go behind that and to say that the judge would have reached the same conclusion in any event. That is simply not a course that is open to me.

23 I have great sympathy with the judge. He was, in effect, handed a booby-trapped bundle containing a document that should not have been there. He was not given the help by the lawyers that he should have been given when he came to ascertain what the husband's offer actually was but it does seem to me that faced with the sudden discovery, as he was, when preparing his judgment of a without prejudice offer, it was not open to him simply to rely on that. He should have referred the matter back to the parties to discuss what course he should take, whether he should continue with the case himself, or how else he should proceed.

24 It is with a very heavy heart that I have to allow this appeal because this litigation has gone on far too long and as the wife has said, she and the children remain trapped in what is the husband's family estate. It is an eleven-bedroomed house, so I think I can use that term, and she is stuck there with the children because she has nowhere else to go. However, it does seem to me that in the circumstances, I have absolutely no alternative but to allow the appeal and remit the case.

25 I shall embargo publication of this judgment until after the rehearing of the case. I have asked the Family Division Liaison Judge to allocate a judge to take over its management and disposal. It would be too awful to contemplate a further hearing being compromised by the new trial judge reading this judgment.

26 I will now discuss with counsel and with Mrs Koukash how we take this matter forward so that it can be concluded sooner, I hope, rather than later.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.