Neutral Citation Number: [2019] EWFC 25

Case No: ZC15D04127

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2019

Before :

MR JUSTICE MOSTYN

- -

Between :

CATIA MARION THUM	**Applicant**
- and -	
OLIVER THUM	**Respondent**

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- -

Rebecca Carew Pole (instructed by **Katz Partners LLP**) for the **Applicant**
Philip Marshall QC (instructed by **Farrer & Co)** for the **Respondent**

Hearing date: 10 April 2019

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Approved Judgment

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

....

MR JUSTICE MOSTYN

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

Mr Justice Mostyn:

1. I shall refer to the applicant as the wife and to the respondent as the husband.

2. This case is making glacial progress, entirely because of the obstacles placed in its way by the husband. The wife's petition was issued as long ago as 26 October 2015. The husband challenged the jurisdiction of this court to hear her petition. That challenge was rejected by me on 21 October 2016[1]. The husband appealed. It took until 15 March 2018 for the appeal to be heard. It was dismissed on 12 July 2018[2]. Only then could the wife's claim for financial remedies proceed. The first appointment came before me on 5 December 2018. I made certain orders for disclosure, as explained below, and adjourned the remainder of the claimed substantive interlocutory directions, including applications for the joinder of third parties and directions on a set-aside application, to 3 May 2019.

3. On that occasion a matter of controversy concerned certain documents stored on a flash drive which the wife found in the parties' joint safety deposit box in Zürich in January 2016. It was password protected. The wife says the stick was in an envelope on the front of which the password was written. In May 2016 the wife's German lawyers accessed the flash drive in her presence using the password provided by her. Those lawyers have provided a confirmatory statement.

4. Therefore, the wife says that these were not confidential "*Imerman*" documents as considered in *Tchenguiz & Ors v Imerman* [2010] EWCA Civ 908, [2011] 2 WLR 592. In that case at [88] Lord Neuberger MR said:

> "The question must, inevitably, depend on the facts of the particular case. Thus, if a husband leaves his bank statement lying around open in the matrimonial home, in the kitchen, living room or marital bedroom, it may well lose its confidential character as against his wife. The court may have to consider the nature of the relationship and the way the parties lived, and conducted their personal and business affairs. Thus, if the parties each had their own study, it would be less likely that the wife could copy the statement without infringing the husband's confidence if it had been left by him in his study rather than in the marital bedroom, and the wife's case would be weaker if the statement was kept in a drawer in his desk and weaker still if kept locked in his desk. But, as we have already said, confidentiality is not dependent upon locks and keys. Thus the wife might well be able to maintain, as against her husband, the confidentiality of her personal diary or journal, even though it was kept visible and unlocked on her dressing table."

5. The wife says that flash drive and its password were in a joint box to which she had free access. Therefore, she says that this was at the "lying around open in the kitchen" end of the spectrum.

[1] https://www.bailii.org/ew/cases/EWHC/Fam/2016/2634.html
[2] https://www.bailii.org/ew/cases/EWCA/Civ/2018/624.html

6. The husband says that the wife's evidence is quite untrue and that the flash drive was not in an envelope with the password written on it. He says the wife must have accessed the flash drive using a technology specialist. He says that the wife's German lawyers must be lying when they say that the wife provided them with the password.

7. However, in order to avoid what may well have been a very lengthy factual enquiry the wife agreed to deal with the flash drive and its contents as if they were *Imerman* documents in accordance with the guidance given in *UL v BK* [2013] EWHC 1735 (Fam) at [56(iii)] where I said:

> "If a wife supplies such documents to her solicitor then the solicitor must not read them but must immediately seek to obtain all of them from the wife and must return them, and all copies (both hard and soft), to the husband's solicitor (if he has one). The husband's solicitor, who owes a high duty to the court, will read them and disclose those of them that are both admissible and relevant to the wife's claim, pursuant to the husband's duty of full and frank disclosure."

8. The flash drive was given to the husband's solicitors in November 2016[3]. The husband's solicitors did not disclose the admissible and relevant documents on it at that time because the financial remedy case was stayed pending the outcome of his jurisdiction appeal. Even following the lifting of the stay the documents were not provided. Therefore, the wife made an application for specific disclosure of certain documents, or batches of documents, which she stated that she recalled (without having taken notes) as having seen when she accessed the flash drive. Such a recollection is admissible: see *Tchenguiz & Ors v Imerman* at [169] and *UL v BK* at [56(v)]. The wife must have a remarkable memory because she was able in her witness statement in support of her application at paragraph 10 to detail 18 separate documents, or classes of documents, on the flash drive ("the paragraph 10 documents"). No one has, yet, explicitly suggested that the wife has been cheating and has kept notes of the documents on the flash drive, although Mr Oliver came very close to doing so. In his note for the hearing on 5 December 2018 he sarcastically referred to the wife's "apparently near eidetic memory" and went on to say that "it stretches credulity beyond breaking point that W can recall at some considerable distance (in particular in relation to the memory stick information)". He later referred to the wife's "extraordinary and improbably unaided memory".

9. At the hearing Mr Oliver was highly critical of the wife's litigation approach. He wrote:

> "A little knowledge is a dangerous thing. Especially where that is gleaned from an improper purloining of documents and data, which is necessarily out of context, hurried, incomplete, subjective and prone to massive confirmation bias either by the selection and/or interpretation of information part recalled."

[3] Unbeknown to the wife her German lawyers retained a copy of the contents of the flash drive in compliance with professional rules about retention of client documents. When she handed over the flash drive she believed that no copy had been retained. She was mistaken.

He went on to cite Dante's Paradiso Canto XIII 118-20:

> "opinion – hasty - often can incline to the wrong side, and then affection for one's own opinion binds, confines the mind"

Yet, on behalf of his client he accepted that disclosure would be given. He wrote:

> "H is content to disclose those described by W in that statement, save only for the following (limited) objections and subject to consideration of which documents on the memory-stick may be commercially confidential or otherwise not his to provide."

He then took objection to only one of the paragraph 10 documents, and I upheld his objection. I therefore ordered that the rest of the paragraph 10 documents were to be disclosed by 4pm on 7 December 2018. Although Mr Oliver had stipulated a reservation in respect of the paragraph 10 documents which were "commercially confidential or otherwise not his to provide" no exception was made in the order in this regard. The only concession in that regard was that that part of the order was not expressed to be "by consent". But it was not opposed.

10. Even though the order was not opposed, the paragraph 10 documents still have not been produced. The court finds itself in the absurd situation where these documents are sitting on the flash drive which is in the possession of the husband's solicitors as well as on a copy of the flash drive held by the wife's German lawyers, but still they have not been produced either to the wife's English solicitors or to the court.

11. The reason that they have not been produced is because the husband flatly refuses to comply with my order without any good reason, as I will explain. He has deployed a variety of excuses, none of which, in my judgment, is tenable.

12. His first excuse was that he had mislaid the flash drive and that it took until 29 January 2019 to locate it in his parents' safe at their apartment. On that day his solicitor wrote to say that he had received the flash drive, but nonetheless did not give the ordered disclosure. Instead disbelief was expressed that the wife could have accessed the flash drive without the assistance of an IT specialist. If the wife had employed an IT specialist full details of the scope of their work was demanded.

13. It is not clear to me on what basis the husband's misgivings could have justified continued breach by him of an unopposed order made by me for disclosure of the paragraph 10 documents. Quite apart from the absolute nature of the obligation under the order is the fact that the husband had always maintained that the wife had accessed the documents unlawfully. I record that in paragraph 39 of his note for the hearing on 5 December 2018 Mr Oliver wrote:

> "…the allegations that W makes, and on which she bases her applications all ultimately originate in her unlawful (certainly) and criminal (most likely) accessing of H's confidential information."

14. On 8 February 2019 the wife's solicitors explained that she had not used IT specialists to access the flash drive but had rather used the password that was stored with it in the

safe in Zürich. That letter was not responded to. On 15 February 2019 the wife's solicitor stated that in the absence of a reply an application would be made for a penal notice to be attached to my order. (Of course, no order was necessary to attach a penal notice, but I understand the sense in which the threat was made.) On 22 February 2019 the wife's solicitors stated that an application for enforcement of my order would be made.

15. On 26 February 2019 the husband's solicitors wrote:

> "My client's position is therefore that your client must have engaged a specialist firm to access the documents unlawfully. In light of the above, it is not simply the case that your client took the flash drive, accessed it herself and viewed the documents. She went a good deal further than that. In light of this development, Mr Justice Mostyn should be asked to reconsider the position regarding disclosure at the hearing on 3 May 2019."

I do accept, of course, that solicitors have to act on their client's instructions, but even so this was a most unfortunate letter because it does not seem to acknowledge the absolute bounden duty of the husband to comply with my order. Moreover, the stance taken by the husband was quite untenable given that it was his strident case on 5 December 2018, when he did not oppose the disclosure order, that the wife had accessed the documents unlawfully and possibly criminally.

16. On 18 March 2019 the confirmatory letter from the wife's German lawyers referred to above was provided. This explained that they were given the flash drive in an envelope with the password written on it. Still, the husband did not comply with the order, and it must therefore follow that the husband is saying that the wife's German lawyers are blatantly lying to this court.

17. The wife issued her enforcement application on 21 March 2019 which was returnable on 3 April 2019. At 4:30 PM on 2 April 2019 the husband's solicitors served on the wife's solicitors an application seeking a stay of the order for disclosure pending further consideration at the adjourned first appointment on 3 May 2019. The application admitted non-compliance with the order for disclosure of the paragraph 10 documents but said, for the first time, that this would put the husband in breach of German civil and criminal law. On the basis of this new objection the husband sought a determination under FPR 21.3(5) in relation to his objection to disclosure of the paragraph 10 documents.

18. The application appended to it two letters from German lawyers instructed by Elvaston Capital Management GmBH. This is a small private equity firm founded and originally owned by the husband but which, following the breakdown of the marriage, seems to have found its way into the ownership of the husband's good friend Dr Thomas Keul. The first letter, dated 21 February 2019, states that the company did not grant the husband any release from the confidentiality and secrecy obligations concerning the company's affairs to which he was subject as managing director. It went on to assert that most of the listed documents were confidential documents of the company; that the company would not provide him with the documents for the requested purpose; and that it did not approve their submission to the Family Court in London. It argued that disclosure would be unlawful and even punishable under section 85 of the German

Limited Liability Companies Act and section 17 of the German Unfair Competition Act.

19. The second letter, dated 27 March 2019, repeats that consent to disclose the paragraph 10 documents was not granted and once again draws the attention of the husband to "the regulations for the protection of trade and business secrets". The letter went on to explain that the company had filed a lawsuit against the wife in the meantime with the aim of protecting the trade and business secrets contained on the flash drive from being used in the private divorce proceedings. Although the letter said that the law suit was appended, it was not disclosed with the husband's application.

20. These letters were not disclosed to the wife's solicitors until 4:30 PM on the day before the enforcement hearing.

21. At the hearing on 3 April 2016, which the husband in breach of the rules did not attend personally, a note was submitted by Mr Castle who on this occasion held the brief. In paragraph 7 of that note he wrote:

> "It has become apparent that there is a difficulty that makes it effectively impossible for H to comply with the order. H has been instructed by his employers, whose documents are contained on the USB stick, not to provide the documents. This was done initially through their lawyers in a letter dated 21 February 2019 sent in response to a request for information to enable H to complete his replies to questionnaire. They state that he will be guilty of a punishable offence in Germany (details are given) that would be aggravated by the fact that it would involve dissemination of confidential data belonging to the employer and third parties to a jurisdiction outside Germany"

And at para 14:

> "In any event it may be that the court requires further information before deciding whether to vary the terms of the 5 December 2019 order, and if so the matter can be considered at the hearing on 3 May 2019, without any material prejudice to W. The same submissions set out in relation to the attachment of penal notice apply here as well. Enforcement should be stayed until conclusion of that hearing."

22. As can be seen, it was the husband's stance that the material produced by him from the company's German lawyers was a sufficient evidential basis for me to refuse to enforce the order for disclosure of the paragraph 10 documents.

23. At the hearing Mrs Carew Pole made the valid complaint that she had been ambushed by this late development which had the obvious intent of seeking to derail the critical one-day hearing on 3 May 2019 when key directions will be given in relation to applications for joinder and set aside. The disclosure of the paragraph 10 documents was vitally necessary to enable that hearing properly to proceed. The husband was using every tactic to hand in order to prevent that disclosure being made so as to stymie orderly progress of this case.

24. I pointed out that the application was plainly made under the wrong rule. Rule 21.3 affords a third party against whom a disclosure order has been made the opportunity to make a claim to withhold inspection or disclosure of a document. It has nothing to do with disputes about disclosure between the principal parties. I indicated that the correct procedural route would have been for the husband to have applied under FPR rule 4.1(6) and/or section 31F(6) of the Matrimonial and Family Proceedings Act 1984 for an order varying or revoking the disclosure order made on 5 December 2018, and I deemed the husband's application to have been made under one or other (or both) of those provisions.

25. I also indicated my view that it was grossly unfair for the husband alone to be in a position of adducing expert evidence about German law, which is what the letters he relied on purport to do. I was not prepared to sacrifice the hearing on 3 May 2019 in the way proposed by the husband and I ruled that the matter would return before me on 10 April 2019. I allowed each party the opportunity to adduce expert evidence of German law as I took the view that there was not enough time before the hearing on 10 April 2019 for a single joint expert to be instructed.

26. I made an order which contained the following provisions:

> "5. The respondent shall by no later than 11am on Monday 8 April serve any evidence upon which he seeks to rely to address:
>
> a. why the evidence in support of his application dated 2 April 2019 could not, with reasonable due diligence, have been made available earlier; and
>
> b. expert evidence in relation to German law to support his assertion that he would be in breach of German civil law and/or at risk of criminal prosecution in Germany if he complies with the order of 5 December 2018 and produces the documents ordered pursuant to a non-consensual court order within confidential court proceedings.
>
> 6. The applicant has permission to serve any evidence upon which she seeks to rely in response by no later than 4pm on Tuesday 9 April 2019."

I draw particular attention to paragraph 5(b), which required the expert evidence to address the risks faced by the husband were he to produce the documents "pursuant to a non-consensual court order within confidential court proceedings."

27. On 5 April 2019 the husband's solicitors formally instructed as an expert Dr Omsels. I have to say that I am astonished by the terms of the instruction because they leave out, presumably by design, the critical part of paragraph 5(b) of my order, namely that the production would be pursuant to a non-consensual court order within <u>confidential</u> court proceedings. Again, I accept that solicitors have to act on their instructions, and I deduce that in this respect they were given very clear instructions by the husband that that particular aspect was not be drawn to the attention of the instructed expert.

28. The opinion of Dr Omsels stated that five documents, or classes of documents, within the paragraph 10 documents were not, in all probability, covered by corporate confidentiality. Yet even those documents have not been disclosed and the husband has produced an email from the company's German lawyers which states that in their opinion those documents are also commercially confidential and that consent to their disclosure was denied. This is patently absurd. The documents in question include an invoice made out personally to the husband for the purchase of a Porsche, and a bank statement showing that the parties personally held in their joint names at UBS €11.5 million. Obviously, these documents are not confidential, as Dr Omsels rightly says. The continued resistance on spurious grounds to their disclosure by the husband, in league with the company's German lawyers, demonstrates the extreme bad faith of all concerned.

29. Dr Omsels' opinion did not do much more than to reiterate what had been said by the company's German lawyers earlier. He stated:

    i) the husband would be in breach of his contract of employment by complying with the order;

    ii) the husband might be at risk of termination of his employment;

    iii) the husband might be exposed to claims for damages by Elvaston;

    iv) the husband faced a theoretical criminal sanction under section 17 of the German Unfair Competition Act; and

    v) the husband faced a possible criminal sanction under section 85 of the German Limited Liability Companies Act where it is an offence to disclose, without authority, a company secret disclosed to him in his capacity as managing director.

    Dr Omsels did not explain why in relation to section 85 my order would not constitute due authority. Nor did he address the confidential nature of the proceedings, because, as I have explained, he was not instructed to do so.

30. The wife's expert evidence was provided jointly by Dr Wilhelm and Dr Isenbart of the same German law firm that she had instructed to access the flash drive. Obviously, they are not completely independent but then neither is Dr Omsels as he had been instructed by Elvaston on two separate matters in 2012 and 2015. I do not regard any of the experts as guilty of bias.

31. In my judgment Dr Wilhelm and Dr Isenbart convincingly demolish the husband's case that he faces any realistic risk were the paragraph 10 documents to be disclosed. They demonstrate:

    i) there could be no valid claim against the husband for breach of contract, nor would he be at any risk of his employment being terminated, as his disclosure would be in conformity with the duty of legality imposed upon him as managing director. This duty extends to compliance with applicable foreign law;

ii) in any event a claim could only arise if Elvaston could show that it had suffered damage arising from the disclosure of the documents. Given that they would be disclosed within confidential proceedings it is impossible to conceive what loss Elvaston could possibly assert arising from disclosure of the documents;

iii) there is absolutely no risk of a prosecution under section 17 because the disclosure would not be for his personal benefit, nor would it be unauthorised; similarly there is no risk of a prosecution under section 85 because compliance with my order would supply the necessary authority;

iv) in the real world the idea that his good friend Dr Keul would either sack the husband, sue him or seek his prosecution is completely fanciful.

32. At the hearing on 10 April 2019 the husband, again personally absent in breach of the rules, was represented by Mr Marshall QC. The stance taken in his note was that in view of the dispute between the experts it was impossible for the court summarily to determine the question of what risks the husband faced. Instead the matter would have to be adjourned so that the experts could attend and be cross-examined.

33. In my judgment it is completely consistent with the overriding objective that I deal with this issue now. I am completely satisfied that the husband faces no risks whatever were disclosure of the documents to be made. I am completely satisfied that the conduct of the husband amounts an improper filibuster, mounted in bad faith, consistent with his attitude and conduct from the very dawn of this case.

34. In *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 at [63(iv)] Lord Justice Gross stated:

> "When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful "

For the reasons I have given I am satisfied, on the strong balance of probability, that there is no real, actual, risk of prosecution or civil sanction faced by the husband in Germany were he to comply with my order of 5 December 2018.

35. I propose to order, in order to cut through the nonsensical position in which the court finds itself, that the disclosure of the paragraph 10 documents should be from the copy of the flash drive adventitiously retained by the wife's German lawyers. I have no doubt that were I to go down the conventional route of ordering the disclosure from the flash drive in the possession of the husband's solicitors that other spurious objections and obstacles would be raised. Therefore, it is appropriate that I should authorise the disclosure from the documents held by the wife's German lawyers. This will give the husband the further assurance that he faces no risks, as he will not be making the actual

disclosure. I will hear counsel as to when the disclosure should be made but I have in mind that it should be very soon.

36. In order to succeed on an application under rule 4.1(6) or section 31F(6) the applicant must have acted promptly and must show either that there had been a material change of circumstances since the order was made; or that facts on which the original decision was made had been misstated; or that there had been a manifest mistake on the part of the judge in formulating the order (see *Tibbles v SIG Plc* [2012] EWCA Civ 518 at [39] and *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at [44]). In addition, save in a case where fraud is alleged, the applicant must show that the evidence in support could not have been made available with due diligence at the original hearing (see *GM v KZ (No 2)* [2018] EWFC 6, [2018] 2 FLR 469, and *Takhar v Gracefield Developments Ltd & Ors* [2019] UKSC 13).

37. In my judgment the husband fails on all limbs. He has not acted promptly. He has not demonstrated that there was a material change of circumstances since my order of 5 December 2018, or that the facts on which my decision was made had been misstated, or that I made a manifest mistake in formulating that order. Further, I am wholly satisfied that there was no good reason why the husband did not make his German law evidence available to the wife and to the court when I made the original order on 5 December 2018.

38. Finally, I refer to the lawsuit in Berlin commenced by Elvaston against the wife. I have now seen a translation of the claim. It seeks an order for delivery up of all the relevant documentation and for an order prohibiting the wife from using that material in any court proceedings including the financial remedy proceedings before me. Those proceedings will take their course. However, I give the wife permission to disclose this judgment, the position statements, and the court bundle into those proceedings.

39. That concludes this judgment.