Judgments

CHANCERY DIVISION

Neutral Citation Number: [2014] EWHC 4564 (Ch)

Case No: HC14E01253

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

The Rolls Building

7 Rolls Buildings

Fetter Lane

London

EC4A 1NL

Tuesday, 4th November 2014

BEFORE:

MR S MONTY Q.C. SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

BETWEEN:

LONDON BOROUGH OF BRENT

Claimant

- and -

(1) ESTATE OF MR OWEN KANE

(2) MR MICHAEL KANE

(3) MR ROBERT KANE

Defendants

MISS CHRISTINE COOPER (instructed by **London Borough of Brent Legal Services**) appeared on behalf of the Claimant

MISS ALANA GRAHAM appeared on behalf of the Defendant

Approved Judgment

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(Official Shorthand Writers to the Court)

MR MONTY QC:

1. By an application notice of 28th May 2014, the claimant seeks an order for disclosure of documents.

2. On 15th July 2014, Master Teverson ordered that the application be listed before a judge as it raises issues of principle, namely whether the documents sought are privileged or whether there is evidence of in-iquity and thus there is no privilege attaching to them.

3. The trial is due to take place in April 2015. I am told that there are other applications which have been made by the claimant for disclosure which are shortly to come on for hearing before the Master.

4. The claimant's pleaded case is as follows.

5. The claimant is a local authority which provided residential care to Mr Owen Kane from October 2007 until his death in November 2013. The claimant paid for that care pursuant to the provisions of the National Assistance Act, 1948 -- which I will refer to as "the Act" -- section 21.

6. The defendants are respectively Mr Kane's estate and his two sons, Robert Kane and Michael Kane.

7. The claimant is obliged to charge for that care under section 22 of the Act. Some sums were paid to the claimant towards that care but the claimant says that nothing was paid since July 2009 and that £162,650.30 is now owing.

8. Mr Kane had suffered from dementia in his latter years. The claimant says that the second and third defendants completed a financial assessment form on Mr Kane's behalf in October 2007. They stated that Mr Kane owned a 50 per cent share in premises at 4 Alder Grove, London NW2, which I will refer to as "the Property".

9. By transfer of 5th April 2007 Mr Kane had transferred a 25 per cent share in the Property to each of the second and third defendants. The claimant says it sought further details in respect of the ownership of the Property and the reasons for the transfer.

10. The defendants deny that it did so -- and in due course, in accordance with the Act, the claimant disregarded the value of the Property for 12 weeks following which it assessed Mr Kane's liability to pay charges in the sum of £563.20 per week, the full costs of the care because Mr Kane's capital assets exceeded the prescribed amount of £21,500.

11. In June 2012 the claimant informed the defendants that they considered Mr Kane to have deliberately deprived himself of the 50 per cent share in the Property.

12. In November 2012 the claimant says it became aware that the Property had been sold on 15th April 2008 for £340,000. The defendants say that the claimant was aware of the sale on 28th July 2008 and from a letter from Davis Arnold Cooper LLP of that date, that indeed seems to be the case.

13. The completion statement shows that £64,880.95 was paid from Mr Kane's share in the proceeds to each of the second and third defendants, said to have been payments to redeem mortgages granted on 3rd April 2007, two days before the transfer of the 50 per cent share and a day after the registration of an enduring power of attorney by which Mr Kane appointed the second and third defendants as his attorneys.

14. The claimant alleges in terms at paragraph 13 of the amended particulars of claim that the payments to redeem the mortgages were in fact disguised gifts or transactions at an undervalue, made knowingly with the intention of avoiding charges for Mr Kane's residential care.

15. At paragraph 14 of the amended particulars of claim the claimant refers to section 21.1 of the Health and Social Services and Social Security Adjudications Act, 1983, which provides as follows:

"Subject to the following provisions of this section where--

(a) a person avails himself of Part III accommodation; and

(b) that person knowingly and with the intention of avoiding charges for the accommodation--

(i) has transferred any asset to which this section applies to some other person or persons not more than six months before the date on which he begins to reside in such accommodation; or

(ii) transfers any such asset to some other person or persons while residing in the accommodation; and

(c) either--

(i) the consideration for the transfer is less than the value of the asset; or

(ii) there is no consideration for the transfer, the person or persons to whom the asset is transferred by the person availing himself of the accommodation shall be liable to pay to the local authority providing the accommodation or arranging for its provision the difference between the amount assessed as due to be paid for the accommodation by the person availing himself of it and the amount which the local authority receive from him for it."

16. The claimant therefore claims that the second and third defendants are liable to pay the sums which Mr Kane was liable to pay for the residential care.

17. The claimant further asserts at paragraph 16 and 17 of the Amended Particulars of Claim that the transfer of the property and the purported redemption of the mortgages were transactions at an undervalue within the meaning of section 423 of the Insolvency Act, 1986 for the purpose of either putting assets beyond the reach of the claimant or otherwise prejudicing the claimant's interests in its claim for payment and that it is just and equitable that the second and third defendants should restore the position to what it would have been had the transactions not taken place.

18. Section 423 of the Insolvency Act provides as follows:

"(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if--

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b) he enters into a transaction with the other in consideration of marriage [F1or the formation of a civil partnership]; or

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for--

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose--

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."

19. The defendants say that Mr Kane and his wife, Julia, had severed the joint tenancy of a Property by a notice dated 5th November 2005 and that the second and third defendants inherited their mother's share of the Property pursuant to the provisions of her Will dated 29th August 1999 when she died on 11th February 2006.

20. The claimant in its Reply questions the validity and provenance of the Will and the documents severing the joint tenancy and I note that by the Master's Order of 1st May 2014 permission has been given for expert forensic document and handwriting evidence to be given in relation to those documents.

21. The Defence in the main consists of denials without any particulars being given.

22. The application notice seeks "disclosure of information held by Kirkwood Solicitors, including legal advice, and any other legal firm who assisted the defendants in a number of transactions that are relevant to this dispute".

23. In a witness statement made in support of this application Mr Shackleton, a senior solicitor employed by the claimant, says at paragraph 7 as follows:

"The property was sold on 20th February 2008 for £340,000. There is a dispute between the parties as to when the Council was informed of the sale. It has no record of that Information being provided, despite an annual request for updated information about his Income and assets, until November 2012. It was said that Owen Kane's share of the proceeds of sale amounted to only £37,861.21. The completion statement dated 20th February 2008 was finally provided in July 2013 and there is a copy at page 11 of WS1. It showed payments of £64,880.95 each to Robert and Michael purportedly to redeem mortgages. These sums allegedly included 321 days interest, meaning interest was running from about the date of the transfer of the property into joint names. Despite requests for evidence that Owen Kane had been loaned monies by his sons, no explanation or evidence was provided. In the amended defence dated 22nd April 2014, it is now said that these sums were to reimburse Michael and Robert for works done, carer's fees and school fees. This explanation is vague and unparticularised and is inconsistent with the earlier claims that Owen Kane had borrowed money from his sons. Again, there is a prima facie case that these payments to Michael and Robert were transactions at an undervalue intended to prejudice the interests of a creditor."

24. Mr Shackleton goes on to say at paragraph 9:

"Kirkwoods Solicitors acted in all of these transactions at a time when there were debts owed but no proceedings. Based on the aforementioned, the Claimant strongly suspects that the purpose of any advice was to structure the various transactions in a way that shifted the burden of Owen Kane's care onto the public purse whilst enabling Michael and Robert to acquire almost all of their parents' assets. The Claimant contends that this purpose was sufficiently iniquitous for public policy to require the disclosure of the documents held by Kirkwoods prior to 27th February 2013, that being the date of the letter before action in these proceedings. I therefore ask that the court makes the requested order."

25. The draft Order seeks disclosure as follows:

That the defendant shall by no later than 4.00 p.m. 28 days from the date of the Order disclose and provide to the claimant a copy of all information and / or documents to which each or all of the defendants have a right to inspect, including legal advice held by Kirkwood Solicitors or any other who assisted the defence that pertain to or are material to:

(a) the drawing and execution of the enduring power of attorney granted by Owen Kane to the second and third defendants;

(b) the estate of Julia Kane;

(c) the alleged mortgages granted by Owen Kane to the second and third defendants;

(d) the transfer of the property at 4 Alder Grove into the names of Owen Kane and the second and third respondents, and

(e) the sale of that property save that the defendants are not required to disclose any document created after 27th February 2013.

26. The defendants have served a Reply in response to the application and the evidence served by the claimant which was signed by both the second and third defendants.

27. The general and well-known rule is that legal advice privilege protects confidential communications between lawyers and their clients for the purposes of giving or obtaining legal advice and such communications are not disclosable. One of the exceptions to the general rule is what has become known as the iniquity principle or the iniquity exception.

28. In **Barclays Bank in v. Eustice** [1995] 1 WLR 1238 it was held as follows, as per the Judgment of Schiemann LJ at 1248:

"(1) Discovery of every relevant document is desirable to help the Court to decide what happened and why. The right answer is more likely to be arrived at by the Court if it is in possession of all relevant material. (2)It is desirable that persons should be able to go to their legal advisors knowing that they can talk frankly and receive professional advice knowing that what each party has said to the other will not be revealed to third parties. This second desideratum has recently been expressed thus by Bingham LJ in **Ventouris v. Mountain** [1991] 1 WLR 607, 611 and I gratefully adopt his words:

'The doctrine of legal professional privilege is rooted in the public interest which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged and civil disputes so far as possible settled without resort to judicial decisions. To this end it is necessary that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisors and their legal advisors be free to give honest and candid advice on a sound, factual basis without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision. It is the protection of confidential communications between client and legal advisor which lies at the heart of legal professional privilege. Without the consent of the client and in the absence of iniquity or dispute between the client and solicitor, no enquiry may be made into or disclosure made of any instructions which the client gave to the solicitor or any advice the solicitor gave the client, whether in writing or orally.'

It will be noted that in the last sentence cited Bingham LJ referred to the 'absence of iniquity'. In so doing he was recognising the effect of a line of cases which have established that advice sought or given for the purpose of effecting iniquity is not privileged. The present appeal is concerned essentially with the question whether the effecting of transactions at an undervalue for the purpose of prejudicing the interests of a creditor can be regarded as iniquity in this context."

29. Schiemann LJ went on to say at 1249:

"One of the factors which the Court will often find relevant and which may be decisive in a particular case is the purpose for which the advice is sought. Is it sought to explain the legal effect of what has already been done and is now the subject of existing litigation or is it sought in order to structure a transaction which is yet to be carried out? In the former class of case the Court will be more hesitant to lift the cloak of privilege than in the latter."

30. And later in his Judgment Schiemann LJ said this:

"For reasons given earlier in this Judgment we start here from a position in which on a prima facie view the client was seeking to enter into transactions in undervalue, the purpose of which was to prejudice the bank. I regard this purpose as being sufficiently iniquitous for public policy to require the communications between him and his solicitor in relation to the setting up of these transactions to be discoverable. If that view be correct then it matters not whether either the client or the solicitor shared that view. They may well have thought that the transactions would not fall to be set aside under section 423 either because they thought that the transactions were not at an undervalue or because they thought the court would not find that the purpose of the transactions was to prejudice the bank. But if this is what they thought then there is a strong prima facie case that they were wrong. Public policy does not require the communications of those who misapprehend the law to be privileged in circumstances where no privilege attaches to those who correctly understand the situation. These cases can indeed throw up difficult problems of policy. One sees frequent references in the case law to the desirability of deciding each case on its facts.... If the strong prima facie case turns out to be correct then the defendants have deliberately indulged in something which I would categorise as sharp practice."

31. In **BBGP Managing General Partner Ltd & v Babcock & Brown Partners** [2011] Ch 296, Mr Justice Norris said as follows:

"Having summarised the position arising on the first two lines of argument I can turn to the third line of argument. This is that the partners in Global cannot claim that any material seen by General is subject to claims to legal professional privilege by them so that General is not free to use and to disseminate such material as it wishes because of 'the iniquity principle'. This principle may be shortly stated: advice sought or given for

the purpose of effecting iniquity is not privileged (see **Barclays Bank v. Eustice**). The principle is founded upon public policy. We are here engaged in deciding whether public policy requires that the documents in question are left uninspected. The rationale was said by Parker LJ in **Banque Keyser Ullman v Skandia** [1986] 1 Lloyds Rep 336 at 338 to be

'first that a fraudulent party who communicates with his solicitor for the purpose of the furtherance of fraud or crime is both communication with his solicitor otherwise than in the ordinary course of professional communications, and secondly, that in any event it would be monstrous for the Court to afford protection from production in respect of communications which are made for the purposes of fraud or crime.'"

32. Although the case law refers to crime or fraud or dishonesty, such as fraudulent breach of trust, fraudulent trickery or sham contrivances, it is plain that the term "fraud" is used in a relatively wide sense, see **Eustice** at 1249D. So a scheme to effect transactions at an undervalue was sufficient (**Eustice**), as was deliberate misrepresentation for the purpose of securing a mortgage advance (**Nationwide Building Society v Various Solicitors** (No. 1) [1999] PNLR 52 at 72), or making a disposition with the intention of defeating a spouse's claim for financial relief (**C v. C** [2008] 1 FLR 115), or the establishment by employees in breach of a duty of fidelity to their employer over a rival business (**Gammon v. Roach** [1983] RPC 1 and **Walsh Automation (Europe) Ltd v. Bridgeman** [2002] EWHC 1344 QB).

33. The enumeration of examples is useful only insofar as it enables some underlying theme or connectedness to be identified. In each of these cases the wrongdoer has gone beyond conduct which merely amounts to a civil wrong, he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy. In **JSC BTA Bank v. Mukhtar Ablyazov and others** [2014] EWHC 2788 (Comm), Mr Justice Popplewell analysed all the cases relating to the iniquity exception and at paragraph 76 drew the distinction between the ordinary run of cases and those exceptional cases in which the iniquity exception applies. He held that the answer lay in an analysis of three matters.

1) That communications between solicitor and client which are privileged are confidential, the quality of confidence being the bedrock of the rationale for the privilege is essential to the administration of justice.

2) That communications between solicitor and client for an iniquitous purpose negates the necessary condition of confidentiality.

3) That the reason why such communications are not confidential is that only communications made in the ordinary course of the professional engagement of a solicitor are confidential.

34. Mr Justice Popplewell concluded as follows, at paragraph 93:

"I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question. In the 'ordinary run' of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence. But where in civil proceedings there is deception of the solicitors in order to

use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege."

35. Based on those authorities the claimant says that the transactions fall squarely within the words used by Mr Justice Norris, sharp practice or something of an underhand nature, because Kirkwoods were, on the face of the evidence, instructed to advise and structure the various transactions in a manner plainly intended to prevent the claimant from obtaining property payment under the Act.

36. For the defendants, Miss Graham says that the documents are clearly privileged and cites the House of Lords decision in **R v. Derby Magistrates' Court ex parte B** [1996] AC 487 in which their Lordships stressed the importance of upholding the principle of legal professional privilege; see in particular the speech of Lord Taylor at paragraph 58:

"The principle which runs through all these cases and many other cases which were cited is that a man must be able to consult his lawyer in confidence since otherwise he might hold back half of the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.'

And later on at paragraph 65:

"I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege once established."

37. Lord Lloyd said in his speech at paragraph 69:

"But the principle remains the same and that principle is that the client must be free to consult his legal advisors without fear of his communications being revealed: **R v. Cox and Railton** [1884] 14 QBD 153 provides a well-recognised exception, otherwise the rule is absolute; once the privilege is established the lawyer's mouth is shut forever."

38. Ms Graham's first submission, as I had understood it from her skeleton argument, appeared to be that there should be no disclosure because the rule is absolute. It is clear that there are exceptions to the general rule, one of which is the exception to which Lord Lloyd referred, the case of **R v. Cox and Railton**, where the communication amounts to a crime or is intended to further a criminal purpose. The communication is, in the words of Mr Justice Steven, giving judgment in that case, injurious to the interests of justice and does not fall within the rule protecting legal professional privilege from disclosure.

39. Another exception is clearly the iniquity principle as developed from the **Cox and Railton** case, as shown in **Eustice** and **BBGP**, and the **Ablyazov** case.

40. It is clear from the decision in **Derby** that such an exception applies, see the speech of Lord Taylor in which he expressly refers to it and **Cox and Railton**, before noting that the argument in **Derby** that the exception applied was abandoned, and as I have noted, Lord Lloyd also referred to the **Cox and Railton** exception.

41. In oral submissions Ms Graham accepted that the general rule was indeed subject to the iniquity exception. Insofar as it may have been persisted in I therefore reject the first submission made by the defendant.

42. I also reject Ms Graham's submission that **Eustice** is not good law; it is clear from **BBGP** and **Ablyazov**, in both of which **Eustice** was cited with approval, and indeed from **Derby** itself, that the iniquity principle is a well-recognised exception to the general rule.

43. Ms Graham's second submission is that the claimant has not produced any prima facie evidence to confirm what are merely suspicions. In **O'Rourke v Darbishire** [1920] AC 581, Viscount Finley stated at 604 that it is not enough to allege fraud in order to get rid of privilege, there must be more than a mere assertion.

"There must be something to give colour to the charge. The statement must be made in clear and definite terms and there must be some prima facie evidence that it has some foundation in fact. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion not merely as to the terms in which the allegation is made but also as to the surrounding circumstances for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications."

44. In **C v. C** [2008] 1 FLR 115 Mr Justice Munby referred to Viscount Finlay's speech and said this:

"At a minimum there must be a succinct statement -- I emphasise that I am not calling for over-elaboration or prolixity -- identifying clearly what the allegation is and the person or persons against whom it is made and the statement must have sufficient detail to enable one to identify the essential elements in the allegation of why it is being said that the fraud exception applies."

45. Mr Justice Munby also said that suspicion and assumption, surmise and conjecture were insufficient.

46. Ms Graham says that the claimant's case amounts to no more than that. For her part, Ms Cooper accepts that the evidence put forward by the claimant must be more than mere speculation or assertion.

47. Ms Graham says that in any event the defendants have answered all the claimant's concerns in relation to the transactions and at paragraph 15 of her skeleton argument she summarises the explanations that the defendants have given in relation to the drawing up and execution of the enduring power of attorney, the mortgages granted by Mr Kane to the second and third defendants, the transfer of the property to Mr Kane and the second and third defendants and the sale of that property.

48. Ms Graham says therefore that there is no evidence, let alone prima facie evidence, of any iniquity.

49. I do not agree. In my view, the evidence turns the claimant's suspicions from mere speculation into a clear assertion backed up by prima facie evidence that there may have been transactions at an undervalue, and, or alternatively, an attempt to put Mr Kane's assets beyond the reach of the claimant.

50. It seems to me that Ms Cooper is right when she says that I can look not only at the transfer of the property and the mortgages but at the whole chronology of events when considering whether there is evidence of iniquity.

51. I adopt with some further comments what Ms Cooper says in her skeleton argument.

1) All of these transactions were made at a time when Mr Kane lacked the capacity to make decisions for himself, as evidenced by the registration of the enduring power of attorney in late March or early April 2007. Ms Graham observed if there was indeed a plan to set aside assets which might otherwise have been available to the claimant, it could and would have been done at any time after the EPA was signed, but it seems to me that this is a point which goes nowhere. It seems to me that the registration of the EPA is the important date; none of the transactions took place before the EPA was registered at which time Mr Kane was no longer capable of managing his own affairs.

2) The transactions were entered into at a time when the second and third defendants knew that it was likely that Mr Kane might need to be admitted to residential case in the near future.

3) The second and third defendants, as is accepted by Ms Graham, were aware from their mother's stay in residential case that the amount that Mr Kane would be charged for his care depended on his financial circumstances.

4) The letter from Kirkwood Solicitors dated 17th June 2014, exhibited to the reply to this application, signed by both the second and third defendants, describes an extraordinary method of dealing with Mrs Kane's Will, bypassing the probate process, the payment of debts and the requirements of the Revenue and Customs.

After the severance of the joint tenancy Mrs Kane's interest in the property would have vested in the executor named in her will upon her death, a Mrs Mary Butler. If the Will dated 29th August 1999 is indeed the genuine valid last Will of Mrs Kane -- and that is an issue in this case -- then Mr Kane, acting by his attorneys, could not have unilaterally appointed trustees to sell the property. This suggests, as Ms Cooper submits, that Kirkwoods had not been given full instructions at the time as it is difficult to believe that they would have carried out this transaction had they known that Mrs Kane's estate had unpaid debts. There is or may be an issue between the parties as to whether Mrs Kane's estate owed money to the claimant or to Hammersmith Council for her residential care at the date of her death. But in any event, it is clear that monies were owed, that the second and third defendants knew that, and by what happened as described in the Kirkwoods letter the proper mechanism for dealing with those debts was bypassed.

I agree with Ms Cooper that it is clear that contrary to the third defendant's assertions, the proper legal processes were not followed in respect of Mrs Kane's estate.

5) The second defendant told Deputy District Judge McCormick at a hearing on 5th March 2014 that probate in Mrs Kane's estate had been obtained, but that was not a correct statement. Ms Graham told me on instructions that the second defendant had been confused between the technical terms 'probate' and 'letters of administration' but it appears from the Kirkwoods letter that neither were obtained in this case.

6) The transfer TR1 form exhibited by the third defendant is not the same as the TR1 lodged at the Land Registry.

An explanation was given by Ms Graham again on instructions that the first version was to make the second and third defendants the trustees and the second version was to effect the transfer itself. Not only does this seem to me to be inherently implausible, it does not accord with the explanation given in the Kirkwoods letter.

As Ms Cooper says, it does appear that multiple transfer documents were prepared, which cries out for an explanation in the circumstances.

7) There is no proper evidence of the second and third defendants making large loans to Mr Kane as alleged by the second defendants in paragraph 6 of his witness statement of 5th March 2014 or of any agreement that these would be secured against the property.

When asked for an explanation for the purported mortgages none was offered other than that loans had been made. In the amended defence dated 23rd April 2014 it was alleged for the first time that Mr Kane was liable to both his sons for school fees, carer's fees and works done, but I agree with Ms Cooper that this allegation lacks credibility and is not corroborated by any evidence. The manner in which the purported mortgage was operated in respect of the second defendant has never been explained.

8) The limited bank statements disclosed by the second and third defendants show that the little remaining proceeds that Mr Kane did receive from the sale of his property were withdrawn from his bank accounts, at times in large amounts, whilst he was in the care home and incapacitated. Ms Graham told me again on instructions that the bulk of these sums were cheques to the claimant but there is no evidence before me in relation to that and I cannot draw any conclusion other than yet again it is a matter which needs to be explained.

52. It seems to me that on the documents I have seen there is prima facie evidence to support the claimant's case that there may have been sharp practice or something underhand going on, to borrow the words used by Mr Justice Norris, and that I should make the order sought. Taken as a whole, the various transactions have, to my mind, the hallmarks of at the least something underhand.

53. What seems to me is crucial is not the explanations which have now been given by Kirkwoods and which were summarised at paragraph 15 of Ms Graham's skeleton argument, which are themselves rather unsatisfactory as a matter of proper practice, but what instructions Kirkwoods had at the various stages from Mr Kane, Mrs Kane and the second and third defendants.

54. For that reason I do not accept Ms Graham's submission that now an explanation has been given there is nothing more which the claimant needs to see.

55. As Ms Cooper observes, this is not the trial of the issue as to whether there was a fraud or whether there was a transaction at an undervalue and I make no conclusions or I draw no conclusions as to whether there was indeed any sharp practice or whether indeed something underhand was going on. That is not the issue. The question is whether the claimant has made out a prima facie case on the evidence that there was iniquitous conduct and in my judgment it has.

56. I do not think it necessary to carry out any sort of balancing exercise between the interests of the defendants not disclosing the communication against the public interest in seeing that justice is done. First, Lord Nicholls in the **Derby** case at paragraph 79 to 81 referred to the impossibility of carrying out such an exercise, but secondly I am satisfied on the evidence before me that there is sufficient prima facie evidence of iniquity in its widest sense as explained by Mr Justice Norris and as explained elsewhere in the authorities to which I have referred to invoke the exception, so the need to carry out such an exercise does not arise.

57. Where the exception applies, legal professional privilege does not apply or attach and the communications must be disclosed.

58. In my view therefore the claimant is entitled to the order sought.

(End of judgment)