Neutral Citation Number: **[2026] EWHC 1747 (Ch)**

Case No: **BL-2020-001050**

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 July 2026

Before :

MR JUSTICE RICHARDS

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Between :

(1) LOUDMILA BOURLAKOVA **(4) VERONICA BOURLAKOVA**	**Claimants/ Respondents**
- and –	
Others	
- and –	
(6) SEMEN ANUFRIEV **(7) NIKOLAI KAZAKOV** **(8) VERA KAZAKOVA**	**Defendants/ Applicants**
- and –	
Others	

- -
- -

Neil Kitchener KC, Patricia Burns and Matthew Hoyle (instructed by **Mishcon de Reya LLP**) for the **Claimants**
Andrew Scott KC and Ajay Ratan (instructed by **Asserson Law Offices**) for **Semen Anufriev**
Andrew Scott KC, Joshua Crow and John-Patrick Asimakis (instructed by **Covington & Burling LLP**) for **Nikolai Kazakov and Vera Kazakova**

Hearing dates: 18th - 19th May 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Richards :

1. D6 (**Mr Anufriev**) and D7-8 (**Nikolai** and **Vera** respectively and together the **Kazakovs**) apply (the **Application**) for declarations, disclosure and information on affidavit that relate to communications with private investigators that C1 and C4 (**Loudmila** and **Veronica** individually and together the **Bourlakovas**) have instructed in connection with this dispute. Since Mr Anufriev and the Kazakovs make common cause in their pursuit of the Application, I will tend to refer to them together as the "**Applicants**".

2. The Applicants assert that the "iniquity exception" prevents legal professional privilege (**LPP**) attaching to relevant communications. In essence the Applicants say that over five years the Bourlakovas obtained access to their confidential and privileged information "on an industrial scale". They did so by instructing enquiry agents (principally **CT Group**, but also **Marengo** in one specific instance) to obtain confidential and privileged information knowing that the Applicants had not consented to its provision. The Applicants argue that the Bourlakovas were assisted by their solicitors, Mishcon de Reya (**MDR**). The Bourlakovas do not accept those assertions.

3. The Application arises in connection with a long-running and bitter dispute as to who is entitled to assets worth in excess of US$3bn generated from businesses in which Mr Oleg Bourlakov (**Oleg**), a wealthy Russian businessman, had an interest. Oleg died in 2021 and his estate (the **Estate**) has been joined as party to the underlying claim.

4. It will be seen from the above that I follow a familiar convention by referring to members of the same family by their first names. I assure the parties that I mean no disrespect or lack of formality in doing so.

Overview of the underlying dispute

5. The trial of the underlying claims is listed to commence in October 2027. It is scheduled to continue well into 2028. The length of the trial demonstrates the complexity of the matter and the detailed factual enquiry that it will involve. It is simply not possible to provide a concise summary of all the matters in issue. I will not attempt to do so. However, the following high-level summary is sufficient for the purposes of my determination of the Application.

6. Loudmila is Oleg's widow. Veronica is the daughter of Oleg and Loudmila.

7. Vera is Oleg's sister. Nikolai is Vera's husband.

8. Mr Anufriev helped to manage Oleg's family office during his lifetime and is said to have worked with the Kazakovs after Oleg's death.

9. In 2017, Loudmila discovered that Oleg was having an affair with a woman more than 40 years younger than him with whom he was planning to have a child. This led to a breakdown in their marriage.

10. In 2018, Oleg asserted that he was not, as Loudmila says she had previously believed, the sole owner (through various corporate and other structures that included D12 (**Edelweiss**)) of his business interests but that rather since 1988, he had been in a business

partnership with Nikolai. The Bourlakovas' position is that there was no partnership with Nikolai and that Oleg and the Kazakovs confected the assertion of a partnership to reduce the body of assets that would have been available to Loudmila on a divorce.

11. Earlier, in 2014, Oleg had transferred a number of assets to Loudmila. Loudmila's position is that this was an outright transfer. The Kazakovs' position, and that of the Estate, is that it was a transfer of assets for "safekeeping" so that Loudmila held the assets as, effectively, a nominee and acquired no beneficial interest in them.

12. The present proceedings were commenced in 2020. They involve all principal parties alleging fraud, dishonesty and interference with property rights against others. For example:

    i) The Bourlakovas assert that the Kazakovs and Mr Anufriev fraudulently confected the assertion of the partnership.

    ii) The Kazakovs say that the Bourlakovas have perpetrated a fraud (by, for example, misappropriating assets of the partnership that Loudmila was given for safekeeping in 2014).

    iii) There is a further dispute about transactions involving Edelweiss in 2018. The Bourlakovas say that Oleg, the Kazakovs and Mr Anufriev wrongly "seized control" of Edelweiss and other companies. They allege that Mr Anufriev forged documents to facilitate an extraction of assets from Edelweiss.

    iv) The Estate asserts that, even if there was a partnership between Oleg and Nikolai, that partnership was legally invalid so that all of the assets that Nikolai asserts to have been partnership property were owned by the Estate.

13. Most recently, the Kazakovs (but not Mr Anufriev) have amended their pleadings to bring a counterclaim against the Bourlakovas relating to breach of confidence, misuse of private information and breach of data protection legislation in respect of their investigations into the Kazakovs. The Bourlakovas defend that counterclaim asserting, among other matters, that documents and information that they obtained in their investigations were not confidential because they revealed iniquity on the Kazakovs' part.

14. All parties agree that I should not and cannot determine the rights and wrongs of the underlying dispute. That will be a matter for trial. It follows that the summary above is necessarily partial and should be read as neutral rather than as supporting the case of any party.

PART A – THE LAW AND FACTUAL FINDINGS

The law on the iniquity exception

<u>Scope of litigation privilege</u>

15. The iniquity exception denies privilege in documents or communications that might otherwise benefit from LPP. Although it can deny both litigation privilege and legal advice privilege (the two constituents of LPP), it is litigation privilege that is most relevant in the context of the Application. That is because the Bourlakovas instructed

both CT Group and Marengo after the present litigation was reasonably contemplated and anticipated. Moreover, both CT Group and Marengo were evidently instructed to seek or obtain evidence in connection with the present proceedings. Therefore, absent the iniquity exception, documents passing between the Bourlakovas, CT Group/Marengo and MDR in relation to the investigations would appear to benefit from litigation privilege.

16. Neither side made any detailed submissions on the scope of litigation privilege, taking it as self-evident that communications of the kind I have discussed in paragraph 15 would benefit from it. I gratefully adopt the summary of the scope of litigation privilege that is set out at [185] of the judgment of Popplewell LJ in *Al Sadeq v Dechert LLP* [2024] KB 1038 (CA).

The iniquity exception - overview

17. Where it applies, the iniquity exception does not "remove" LPP from documents that would otherwise benefit from LPP. Rather, it prevents LPP from being available in the first place. There is a principled reason for that approach that Lewison LJ explained at [29] of his judgment in *Addlesee v Dentons Europe LLP* [2020] Ch 243, [2019] EWCA Civ 1600. A client needs to be sure at the time a communication is made whether or not privilege attaches to that communication so that there are no circumstances (absent the client's consent) in which that communication can be disclosed.

18. For the iniquity exception to apply, all of the following ingredients must be present:

    i) documents or communications that would otherwise benefit from LPP;

    ii) an "iniquity" which can be established to the requisite standard; and

    iii) the requisite connection between the iniquity and documents or communications.

Whose iniquity?

19. It was common ground between the parties that the court is concerned with iniquity of the Bourlakovas only as distinct from iniquity of others such as CT Group, Marengo or MDR. That follows clearly from [56] of *Al Sadeq*, there being no suggestion in this case that the Bourlakovas are being used as a tool for the iniquity of others.

20. That said, it is not irrelevant to consider whether CT Group, Marengo or MDR may have behaved iniquitously. Such an enquiry may shed some light on whether the Bourlakovas have also done so. For example, the Bourlakovas may have instructed CT Group, Marengo or others to act as they did. By way of example, MDR could have been aware that CT Group was behaving iniquitously and told the Bourlakovas, in which case conceptually the Bourlakovas could have adopted the iniquity. A further possibility is that any iniquity of MDR is automatically attributed to the Bourlakovas under agency principles so as to become the iniquity of the Bourlakovas. All sorts of factual and legal propositions may make the iniquity of others relevant, but ultimately the iniquity exception is concerned with iniquity of the Bourlakovas.

The meaning of "iniquity"

21. There was a significant dispute between the parties as to the nature of the iniquity that must be present. Throughout his oral submissions on behalf of the Bourlakovas, Mr Kitchener KC referred to the necessary iniquity as "fraud". The Applicants deny that fraud is a necessary ingredient of iniquity.

22. In my judgment, the iniquity exception does not require the presence of fraud or dishonesty. Popplewell LJ said so expressly at [55] of *Al Sadeq*:

> The principle is not confined to fraudulent or criminal purposes, but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice…Whilst formerly often referred to as the fraud exception, it is now most commonly referred to as the iniquity exception.

23. In reaching that conclusion, Popplewell LJ referred to the earlier judgment of the Court of Appeal in *Barclays Bank Plc v Eustice* [1995] 1 WLR 1238 (CA). In that case, Mr Eustice effected transactions at an undervalue. Barclays Bank Plc brought a claim seeking to have the transactions declared void under s423 of the Insolvency Act 1986 on the basis that they were entered into for the purpose of prejudicing its interests as creditor. Schiemann LJ agreed with the judge at first instance that there was a strong prima facie case that the transactions were entered into for that purpose (see 1247A of the report). As is well-known, s423 can apply even in the absence of dishonesty as that term is generally understood in law. Accordingly, at 1249C, Schiemann LJ introduced the first issue before him, namely whether Mr Eustice's purpose of prejudicing the interests of a creditor was enough to engage the iniquity exception even if he was not dishonest.

24. At 1250G, Schiemann LJ rejected the argument based on the absence of dishonesty saying:

> … [a]s I have indicated, various words other than "dishonest" have been used in the course of the cases in which privilege has been in issue. However, to me the most important consideration is that we are here engaged not in some semantic exercise to see what adjective most appropriately covers the debtor's course of conduct but in deciding whether public policy requires that the documents in question are left uninspected. I do not think it does.

25. I agree with the Bourlakovas that, in this passage, Schiemann LJ was not formulating a new test, that reduces entirely to a consideration of whether public policy requires any particular document to be immune from inspection or not. Rather, read in context, Schiemann LJ is noting that something other than criminal acts or pure dishonesty can be enough to engage the iniquity exception. Considerations of public policy will determine how far removed from criminality or dishonesty conduct which engages the iniquity exception can be. That conclusion prefaced Popplewell LJ's similar conclusion at [55] of *Al Sadeq* to the effect that the conduct had to be "fraud or other <u>equivalent</u> underhand conduct" (my emphasis).

26. It follows that there will be some conduct of which society disapproves, but which is not sufficiently iniquitous to engage the iniquity exception. One example can be seen in the judgment of Goff J (as he then was) in *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553. In that judgment, quoted with approval in *Al Sadeq*, Goff J held that the tort of inducing a breach of contract was not enough to engage the iniquity exception. In *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 WLR 1964, Rix J held that perpetrating the tort of trespass to chattels would not amount to iniquity.

<u>The need for the iniquity to take the relationship with MDR outside the "ordinary run"</u>

27. The communications with which the Application is concerned predominantly involve MDR. In practice MDR instructed both CT Group and Marengo. CT Group and Marengo provided their reports to MDR. MDR in turn communicated the conclusions from those reports to the Bourlakovas. There were some direct communications between the Bourlakovas and CT Group. In principle, those communications could attract LPP, even though no lawyer is party to them, if the dominant purpose of them was seeking or obtaining evidence or information to be used in connection with these proceedings. However, very little, if any, of the parties' submissions were directed at this category of communication. Accordingly, the comments that I make in this section are directed at communications that involve MDR, being the central communications at issue.

28. At [58] of *Al Sadeq*, Popplewell LJ said this:

> Communications between a lawyer and client, or with third parties, are confidential if they take place in the usual course of the professional engagement of such a lawyer, notwithstanding that the engagement may concern an iniquity. This is why the iniquity exception does not apply to what Glidewell LJ referred to as the "ordinary run of cases" in *R v Snaresbrook Crown Court Ex pte DPP* [1988] QB 532 at pp. 537-8. Such privilege is not prevented from attaching merely because the solicitor is engaged to conduct litigation by putting forward an account of events which the client knows to be untrue, and which therefore involves a deliberate strategy to mislead the other party and the court, and to commit perjury, as is clear from that case and *Ex p Francis & Francis*. Accordingly the touchstone in distinguishing such cases from those where the exception applies is whether the iniquity puts the conduct outside the normal scope of such professional engagement or is an abuse of the relationship which falls within the ordinary course of such engagement. This was the conclusion reached from the analysis of the authorities at [93] in *Ablyazov*, cited with approval and applied by this court in *Candey Ltd v Bosheh* [2022] EWCA Civ 1103; [2022] 4 WLR 84 at [70]-[71], [82]-[83]. This was common ground on the current appeal.

29. It is clearly "iniquitous" (in a general sense) for a client to instruct a lawyer to put forward a case that the client knows to be untrue. However, that is not enough to engage the iniquity exception. I therefore agree with the Bourlakovas that iniquity on its own is not enough. To defeat a claim to LPP in connection with communications with lawyers, the iniquity must either (i) put the relationship between lawyer and client outside the normal

scope of a professional engagement or (ii) involve an abuse of a relationship which falls within the ordinary course of a professional engagement.

The relevance or otherwise of beliefs as to lawfulness

30. There was a further aspect to *Eustice*. Mr Eustice was positively asserting that he had not been dishonest. He gave evidence that the transactions were effected so that he and his family could continue to operate the farming business without interference from the bank so that the bank could be paid the money it was owed (see 1247A to F of the report which included a quote from Mr Eustice's affidavit). In those circumstances, Mr Eustice submitted that:

    i) The cloak of privilege should be lifted only if either Mr Eustice's solicitors were party to the "crime" or Mr Eustice had been using his solicitor's advice or assistance for a criminal or fraudulent purpose not contemplated by the solicitors.

    ii) The solicitors and Mr Eustice had "jointly and openly engaged in a purpose that was both overt and lawful, namely seeking and giving advice as to how to remove Mr Eustice's assets out of the temporary reach of the bank without rendering the transactions liable to be set aside under section 423". (see 1251A to 1252A of the report). That was not iniquitous.

31. At 1252B, Schiemann LJ rejected those submissions. He reiterated his conclusion that there was a strong prima facie case that Mr Eustice was seeking to enter into transactions at an undervalue the purpose of which was to prejudice the bank. Schiemann LJ considered that purpose to be "sufficiently iniquitous for public policy to require that communications between him and his solicitor in relation to the setting up of these transactions should be discoverable". He then continued:

> 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 s.423 either because they thought that the transactions were not at an undervalue or because they thought that 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.

32. The Applicants submit that this is authority, binding on me, to the effect that it is simply irrelevant to consider the extent to which the Bourlakovas believed that the enquiries that CT Group and Marengo were conducting were lawful. I do not agree.

33. In the passage above, Schiemann LJ had moved on from his consideration of whether there was a sufficient prima facie case that Mr Eustice's purpose was iniquitous. Although he did not put it this way, because his judgment preceded *Al Sadeq*, he was turning to consider the question summarised in paragraph 29 above as to whether the relationship between Mr Eustice and his solicitors was taken outside the "ordinary run" by the iniquity.

34. Schiemann LJ made no finding as to whether Mr Eustice and/or his solicitors believed that the planning "worked" so that s423 did not apply. Even if they thought that the planning worked, Mr Eustice's purpose remained iniquitous because there was a strong prima facie case that he was seeking to prejudice the interests of the bank. Certainly Schiemann LJ was not prepared to hold, in the circumstances of Mr Eustice's case, that a genuine belief in the efficacy of the planning (if there was one) would be enough to keep the relationship with the solicitors within the "ordinary run" (using the language of *Al Sadeq*). However, I do not accept that Schiemann LJ was saying that a client's beliefs as to the legitimacy of actions being taken are in all cases irrelevant to an analysis of the iniquity exception.

35. Rather, in my judgment, the Bourlakovas' beliefs as to the legality of CT Group's or Marengo's actions are relevant in two respects:

    i) They may shed light on whether there is iniquity at all. After all, iniquity includes "fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice". That concept invites consideration of the Bourlakovas' mental state.

    ii) They may shed light on whether the relationship between the Bourlakovas and MDR was in the "ordinary run". I accept that, as was the case in *Eustice* itself, if the Bourlakovas were engaged in iniquity, it might well be more difficult for them to argue that considerations of their subjective beliefs mean that the relationship with MDR was nevertheless in the ordinary run. That said, if the Bourlakovas asked MDR to arrange for CT Group and Marengo to engage in investigations that either the Bourlakovas or MDR knew or suspected to be unlawful, that would clearly be relevant to the question whether the relationship was in the ordinary run. I see no reason why *Eustice* compels the conclusion that the mirror image situation (if the Bourlakovas believed the enquiries to be lawful) should be ignored simply because Mr Eustice's similar arguments did not succeed in *Eustice* itself.

<u>Establishing the iniquity to the requisite standard</u>

36. A variety of persons may have to make decisions on whether a particular document or communication attracts LPP. For example, a lawyer engaged in a disclosure exercise may need to decide whether to withhold a document on the grounds that it benefits from LPP. In cases of dispute, a judge may have to make a determination. For the iniquity exception to apply, on the assessment of the material available to such a decision maker, it must be more likely than not on a balance of probabilities that the iniquity exists.

37. On the face of matters, that is the threshold I must apply at the present interlocutory stage even though (i) I have a conflicting account of the facts set out in multiple witness statements and affidavits, (ii) none of the evidence that I have will be tested in cross-examination and (iii) the existence or otherwise of the iniquity is a matter that will only finally be determined at the trial of the Kazakovs' counterclaim ([108] of *Al Sadeq*).

38. Popplewell LJ's judgment in *Al Sadeq* recognises that there may be "exceptional circumstances" in which a court might not apply the approach set out in paragraph 37 above. The presence of such exceptional circumstances might justify a court in considering the "balance of harm" by weighing up the potentially irrevocable consequences of "wrongly" ordering disclosure of privileged material at an interlocutory

stage against the consequences that would flow if it wrongly declined to order disclosure, thereby depriving a litigant of the necessary means of establishing the iniquity at trial. (I use the word "wrongly" to capture the point that a court's determination of the issue at the interlocutory stage might be shown to have been mistaken following a more searching factual examination, and cross-examination of witnesses, at trial.)

39. In their skeleton argument, the Bourlakovas stressed the difficulty of the task before the court. They pointed out the difficulty of making factual findings on the state of mind of the Bourlakovas in circumstances where the court is being invited to disbelieve evidence and no witness is being cross-examined. However, ultimately, I believe all parties accepted that the court's task is to do the best it can on the available material. While they stressed the conflict in the evidence, the sheer difficulty that the court faces in determining issues of disputed fact and the irrecoverable consequences of them having to deliver privileged material to the Applicants, ultimately I did not understand the Bourlakovas to suggest that this was an "exceptional case" in which the task should not even be attempted.

40. I will follow the approach set out in paragraphs 37 and 38 above. In the remainder of this judgment, I will express conclusions on disputed factual issues. I will do so on a balance of probabilities by reference to the available material that I have, recognising all the difficulties with the exercise that the Bourlakovas point out. The quantity of the factual material available is immense: much more than can be assimilated in a two-day hearing, even allowing for the two days of judicial pre-reading that was allocated to the case.

41. It is simply not realistic to expect the court to follow through every single footnote and cross-reference in the parties' written skeleton arguments. That would result in this case benefiting from many more than the four days allocated to it, at the expense of other court users. For that reason, I asked the parties during the hearing to identify the central findings of fact that they were seeking and to cross-reference their respective lists to their skeleton arguments and the hearing bundle. The parties helpfully provided a list of the factual findings which they sought.

<u>The necessary relationship between the iniquity and the documents/communications</u>

42. At [166] of *Al Sadeq*, Popplewell LJ held that:

> [w]here there is a prima facie case of iniquity which engages the exception, there is no privilege in documents and communications brought into existence as part of or in furtherance of the iniquity.

43. Documents that are "part of" the iniquity include documents which report on or reveal the iniquitous conduct. That category also includes documents brought into existence in preparation for the iniquity. Documents are not, however, "part of" the iniquity simply on the basis that they would not exist but for the iniquity ([166] of *Al Sadeq*).

44. No further analysis on this issue is necessary for present purposes. I took both parties to agree that in this judgment I should decide on whether all or any of the alleged iniquities are established and, if so, what form they took. The precise form of any relief can then be determined in the light of my findings on the iniquities.

Overview of the nature of the investigations

45. In this section, I set out a summary of the nature of the investigations that the Bourlakovas pursued, whether through CT Group, Marengo or otherwise. The Bourlakovas dispute the relevance of some of these matters, particularly in relation to the covert recordings and the Marengo investigation described below.

Covert Recordings

46. The Bourlakovas object to the Application being based on any allegations relating to the Covert Recordings described in this section (see paragraph 49 below) on the basis that the Applicants have not pleaded any claim against them based on the Covert Recordings. I will, however, make some findings on this issue given that the Applicants ask me to and the findings have some relevance to the Bourlakovas' state of mind when conducting this litigation which could have some bearing on the question of iniquity.

47. In March/April 2018, and before the present litigation commenced, Veronica (perhaps assisted by her sister Elena) planted covert recording devices at the family home of Loudmila and Oleg in Monaco (**La Reserve**). They placed those devices in a room that Oleg used as an office and in Oleg's bedroom.

48. Over a period of about a year until March 2019, those devices captured both an audio and visual record of conversations that Oleg had with others, including the Kazakovs and Mr Anufriev (the **Covert Recordings**). The Covert Recordings captured at least some information that would have been confidential to those recorded (including the Applicants) under English law, assuming that an "iniquity exception" did not apply (**Confidential Information**). I adopt this formulation to capture the point that the Bourlakovas assert that a good part of the information that their investigations yielded is not actually confidential under English law because it reveals iniquity. Conversely the Applicants assert that the information is confidential and no iniquity is present. Only trial will reveal who is correct on issues such as this, hence the equivocal definition of the term "Confidential Information".

49. I also accept that the Covert Recordings would have captured at least some communications that would have been privileged to the Applicants, assuming that the iniquity exception did not apply (**Privileged Communications**). The equivocal definition of Privileged Communications captures a similar point to that set out in paragraph 48 above. It will be noted that Privileged Communications are, strictly, a subset of Confidential Information. However, I will tend to draw a distinction between material on the one hand that is, or is asserted to be confidential, and material that is, or is asserted to be, both confidential and privileged. Therefore, the terms "Privileged Communications" and "Confidential Information" as used in this judgment will tend to refer to distinct categories.

50. The finding in paragraph 49 is controversial. I make it in part because, in 2023, Veronica provided some of the Covert Recordings to CT Group. CT Group has now provided the Applicants with disclosure on *Norwich Pharmacal* principles pursuant to an order of Richard Smith J of 28 March 2025. That disclosure has revealed that some of the material so provided consists of a transcript of a conversation between Oleg, Mr Anufriev and a lawyer (the **CT Transcript**). The CT Transcript has been reviewed by Independent Review Counsel, described in paragraph 83 below, who have expressed the view that it

contains privileged material. The processes described in paragraph 73 below mean that neither the Bourlakovas nor MDR has seen the CT Transcript to date. As a result, the Bourlakovas submit that it would be procedurally unfair for me to reach any conclusion as to the privileged nature of the document.

51. I recognise, of course, that it is unusual, to say the least, to express any conclusion on the status of a document that neither I nor the Bourlakovas have seen. However, I regard that as a corollary of the process that I am required, by *Al Sadeq*, to apply which is itself unusual. If I declined to make any findings at all on the status of the CT Transcript, then the Applicants could be prejudiced as they could only assert that it was privileged by giving away that privilege. *Al Sadeq* does not oblige me to take that course. Rather, it requires me to do the best that I can with the available evidence. A conclusion of Independent Review Counsel that the document is privileged strikes me as sufficient to underpin a conclusion that, for present purposes, it should indeed be taken to be privileged.

52. Veronica knew how, and where, her father conducted business. She knew that her father had business dealings with both Mr Anufriev and Nikolai. She would have realised that, by installing covert recording devices in Oleg's bedroom and office, those devices were likely to capture Confidential Information and Privileged Communications. She would have perceived the most likely outcome as being that the covert recording devices would capture information that was confidential to, and privileged to, Oleg specifically. However, given the breadth of Oleg's business dealings and so the likely topics that he would be discussing in any conversations with Mr Anufriev or Nikolai, she must have realised the risk that the covert devices would capture material that was privileged, or confidential, to Mr Anufriev and/or Nikolai as well.

53. When she installed the covert recording devices, Veronica must have realised that those being recorded would not have consented to her thereby accessing their Confidential Information or Privileged Communications.

54. The Applicants suggest that Veronica was using an app on her phone to listen to conversations that were being recorded in real time. I do not consider that I have sufficient evidence to make that finding on a balance of probabilities. However, I am prepared to infer that Veronica listened to the recordings. The Bourlakovas' position is that the Covert Recordings were made because they were concerned about Oleg's violent and erratic behaviour. Given those concerns, it would have been natural for Veronica to highlight significant material from the Covert Recordings to Loudmila and other of the Bourlakovas. I infer that she did so and that Loudmila (at least) listened to some of the Covert Recordings as well.

55. MDR wrote in a letter of 1 May 2025 that some of its members "have reviewed a limited number of the [Covert Recordings] in connection with the global proceedings but no comprehensive review has been conducted". Given the care that MDR took to ensure that they did not see Privileged Material of the Applicants (see paragraphs 72 to 76 below), I accept MDR's assurance in that letter that no member of the firm listened to any conversations considered to be privileged.

56. There was a dispute as to whether, when Veronica provided a selection of the Covert Recordings to CT Group in 2023, she did so for the purposes of enabling CT Group to

conduct investigations for the purpose of this litigation or for some other purpose. In this regard, Ms Pigott said in her Twenty-Third Witness Statement:

> (c) without any waiver of privilege, it was and is the clear understanding of my firm that the recordings were not provided for the purpose of assisting CT Group in any way in their investigation - and Veronica has confirmed that this is the case - but rather in the course of a separate exercise;
>
> (d) the exercise was billed as a discrete matter in 2024.

57. The Applicants characterise this as an uninteresting statement as to how CT Group billed for work that they did in connection with the Covert Recordings. I do not agree. I read it as a statement of a solicitor, accompanied by a statement of truth, that the Covert Recordings were not provided to CT Group for the purposes of investigations undertaken in connection with the present litigation. I accept that evidence.

<u>The initial instruction of CT Group</u>

58. In February 2020, MDR engaged CT Group to conduct covert investigations into the Applicants for the purpose of obtaining evidence in connection with this litigation. MDR instructed CT Group for that purpose because the Bourlakovas believed (i) that they were the victims of a fraud perpetrated by the Applicants and (ii) to guard against the risk of (as the Bourlakovas saw it) the Applicants perpetrating further frauds. I recognise that the Applicants assert that any dishonesty is being perpetrated by the Bourlakovas. Trial may indeed show that the Bourlakovas were dishonest. If that is the outcome at trial, it may follow that, in fact, the Bourlakovas have no genuine belief in the Applicants' turpitude. However, I must approach this question now, and before the outcome of the trial is known. The sheer amount of effort (and cost) being deployed in this litigation is consistent with all sides having a belief in the rectitude of their own position.

59. CT Group had standard terms of business. Clause 4 of those standard terms included a promise that CT Group would not undertake any work that is prohibited by government regulation or the laws of any jurisdiction in which it operated or in which its clients reside. CT Group also promised not to pay anyone to obtain improper information or secure any improper advantage for its clients. By Clause 5 of its standard terms, CT Group said that they would take legal advice on laws outside England and Wales so that they could adhere to the local laws of the country in which they were working.

60. There may have been a "battle of the forms" in relation to CT Group's engagements. On 26 October 2023 MDR engaged CT Group to undertake some work and MDR sought to impose its own terms dealing with the legality of CT Group's activities that were expressed in somewhat different terms to those set out in CT Group's standard terms. MDR's wording was to the effect that:

> At all times you will comply - in respect of all work carried out on our behalf - with the provisions of English law and, if applicable, the civil and criminal law of any other jurisdiction. You will not carry out any work or take any steps that in any way breach English civil or criminal law (or the law of any other applicable jurisdiction). In particular, you must comply with the

> requirements set out in the Court of Appeal's judgment in the case of *Imerman* [2010] EWCA Civ 908.

61. Whatever the outcome of any "battle of the forms", I consider that CT Group was at all material times precluded by contract from conducting its investigation in breach of civil or criminal law of England, Monaco or Russia.

62. There was some dispute as to how closely involved the Bourlakovas were in directing the manner of CT Group's investigations. In paragraph 35 of her First Witness Statement of 22 October 2024, Ms James, the Global Head of Intelligence at CT Group said that:

> CT did not at any time throughout the course of the Investigations seek out intelligence that it had not been instructed to seek out, and CT shared all intelligence obtained in execution of those instructions with MdR, the Bourlakovas and/or Gerrit Straub of Klein Law…

63. I will not, however, conclude that Ms James was saying that the Bourlakovas were directing the course of CT Group's investigations. CT Group were the intelligence-gathering experts and, at most, the Bourlakovas could suggest fruitful general areas of enquiry. In the passage quoted above, Ms James was dealing with an assertion by the Kazakovs that CT Group was acting as the Bourlakovas' agent when conducting its investigations. The Kazakovs said that analysis was supported by a passage in a retainer letter that referred to CT Group carrying on work "on our behalf". Ms James's point, read in context, is not that the Bourlakovas were directing CT Group's enquiries. Rather, she is explaining the reference to work "carried out on our behalf" was to work done for the benefit of the Bourlakovas and under their general instructions, rather than for CT Group's own benefit and at its own instigation.

64. CT Group were experts in investigations. They were not, however, themselves lawyers. Therefore they could not themselves have determined conclusively whether a particular document was privileged or not. However, CT Group had access to English lawyers who could provide advice on such matters.

<u>The manner in which CT Group operated</u>

65. CT Group operated by instructing a "**Field Team**" consisting of operatives, including former intelligence officers, resident outside the UK. The Field Team in turn liaised with "**Underlying Sources**" who provided information to the Field Team.

66. CT Group was concerned with confidentiality. When communicating with the Field Team, CT Group often used messages that automatically deleted after a period. CT Group did not know the identities of the Underlying Sources.

67. I have not been told how much CT Group charged the Bourlakovas. I infer that their fee was substantial. One member of the Field Team invoiced CT Group EUR 1 million for their work. CT Group must have passed this cost on to the Bourlakovas and charged more besides in return for their own contribution and that of other members of the Field Team.

68. CT Group presented periodic "project reports" that were made available to both MDR and the Bourlakovas.

When did the Bourlakovas/MDR first actually receive Privileged Communications from CT Group?

69. There was some dispute as to when project reports that CT Group delivered to the Bourlakovas/MDR showed that CT Group was obtaining access to Privileged Communications of the Applicants. The Applicants argue that the Bourlakovas and MDR would have realised this from September 2021. Against that, the Bourlakovas argue that they would only have realised this in August 2023.

70. The Applicants supported their case for the earlier date by showing me extracts of what were said to be project reports that CT Group sent to the Bourlakovas/MDR in 2021. Those documents were identified by the last three numbers of an identifier in the footer. In his oral submissions, Mr Scott KC showed me a few of these documents and I assume that he showed me the ones that were most supportive of a discovery in 2021. As regards these:

    i) The 904 document references an "Exhibit 10_1". It is not clear what that exhibit was. The 904 document also purports to summarise aspects of that Exhibit. In her Confidential Annex to her 23rd Witness Statement, Ms Pigott says that MDR never saw the Exhibit, and to the best of her knowledge the Bourlakovas did not do so either. I accept that evidence. However, Ms Pigott does not deny seeing the summary of the Exhibit that appears in the 904 document and I therefore infer that both MDR and the Bourlakovas did see that summary. On a balance of probabilities I am not satisfied that the summary of the exhibit would have demonstrated that CT Group was obtaining Privileged Communications. The summary could be of something that was said by a lawyer or a non-lawyer. (The Bourlakovas also say that it is possible that the summary was referring to iniquity. I agree that this possibility exists. However, I regard the possibility as not adding much to the analysis. If the summary were clearly privileged, but for iniquity, it would have revealed to the Bourlakovas/MDR that CT Group was obtaining (potentially) privileged communications with the result that they should have acted earlier to address that issue even if no privilege attached to the 904 document itself.)

    ii) The 445 document also refers to, and summarises, another document. I accept Ms Pigott's evidence that MDR have not seen that underlying document and that, to the best of her knowledge, the Bourlakovas have not seen it either. However, Ms Pigott does not deny that MDR saw the summary and I infer that both MDR and the Bourlakovas did so. However, I accept the Bourlakovas' case that document 445 is, on a balance of probabilities, not referencing legal advice. The events to which document 445 refers were public knowledge at the time. It is more likely than not that document 445 is referring to press articles or similar public commentary.

    iii) I accept Ms Pigott's evidence that, to the best of her knowledge, and having searched MDR's systems, neither she nor the Bourlakovas received the 699 document in 2021.

iv) I was also shown a copy of an engagement letter from early 2021 between one of the Kazakovs and their former English solicitors. The Kazakovs did not invite me to disbelieve Ms Pigott's evidence that neither she nor the Bourlakovas saw this in 2021. Rather, they show me the document as part of their arguments as to the kind of documents that CT Group were tasked to hunt out. I consider that issue in paragraph 105 below.

71. I conclude that neither the Bourlakovas nor MDR saw any Privileged Communications that CT Group's investigations yielded before August 2023. They did not realise until August 2023 that CT Group was obtaining Privileged Communications.

August 2023 and the appointment of the Bourlakovas' Review Counsel

72. On 4 August 2023, MDR became aware that CT Group had come into possession of a tranche of documents that contained material over which the Applicants could potentially assert privilege.

73. I accept Ms Pigott's evidence that MDR decided that they did not wish to receive Privileged Communications from CT Group. MDR therefore instigated a process under which CT Group would pass any potentially Privileged Communications that came into their possession to counsel (**Bourlakovas' Review Counsel**) who were not instructed to act (and would never be instructed to act) for the Bourlakovas in relation to this dispute. CT Group would not send such material to MDR or the Bourlakovas until the review of the Bourlakovas' Review Counsel was complete. If the Bourlakovas' Review Counsel concluded that the document was potentially privileged, the document in question would never be sent to MDR or the Bourlakovas. If the Bourlakovas' Review Counsel concluded that there was no potential for the document to be privileged, the document could be sent to MDR and the Bourlakovas.

74. Initially, the Bourlakovas' Review Counsel was James Shaw. From January 2024, MDR instructed Tamara Oppenheimer KC, a silk with a particular expertise in privilege matters, to act as the Bourlakovas' Review Counsel.

75. Occasionally, but by no means frequently, the arrangement failed. On one such occasion, CT Group sent four potentially privileged documents to MDR without warning that they might be privileged. A member of MDR, Ms Simpson, opened three of these documents. One of them was in Russian which Ms Simpson could not read. Ms Simpson skim-read two further documents but only in sufficient detail for her to appreciate that they were likely to be privileged documents. Ms Simpson read the fourth document in more detail. She reached the view, which Ms Pigott shared, that although the document was capable of benefiting from LPP, it did not do so because the iniquity exception applied.

76. I have rejected the assertion that MDR was reviewing privileged material in 2021 (see paragraph 71 above). Apart from the four documents referred to in paragraph 75 above, I have concluded that MDR and the Bourlakovas between them have received no more than two or three Privileged Communications as a result of CT Group's investigations. Doing the best I can with the evidence, I have concluded that those two or three documents simply lay dormant in MDR's document management system as no-one realised that they were or may be privileged. I conclude that neither MDR nor the Bourlakovas have made any active use of those two or three documents.

77. Between August 2023 and the end of February 2024, the Bourlakovas were working with MDR on an application for a worldwide freezing order against the Applicants. That application (the **WFO Application**) was ultimately issued on 18 January 2024. Exceptionally for a WFO Application, it was made on notice to the Applicants. The Bourlakovas served the WFO Application and supporting evidence on the Applicants on 12 February 2024, less than a week before the date fixed for hearing of that application. The first occasion on which the Bourlakovas made the Applicants aware either (i) that the Bourlakovas' Review Counsel procedure was in place or (ii) that CT Group had come into possession of the Applicants' Privileged Communications was in evidence served in connection with the WFO Application.

78. I accept Ms Pigott's evidence that MDR realised, from August 2023, that, to the extent that CT Group had obtained material that was genuinely privileged to the Applicants, ultimately that material would have to be returned. I also accept her evidence that the reason why the Bourlakovas did not immediately notify the Applicants that they had access to Privileged Communications was to avoid prejudicing the WFO Application. The Bourlakovas were concerned that, if CT Group's possession of Privileged Communications was revealed, the Applicants might realise that the WFO Application was being considered and that this would act as an inducement to the Applicants to engage in unjustified dissipation of assets. I make no finding as to whether this concern was justified, but it was genuinely held.

The output of CT Group's investigation and its repercussions

79. During the course of their investigation, CT Group came into possession of a substantial quantity of Privileged Communications and Confidential Information.

80. CT Group does not normally provide its reports in a format that it expects will be used in legal proceedings. However, this case was different. A good part of CT Group's investigations into the Applicants was distilled into a report (the **CT Report**) that was tendered as evidence in the WFO Application.

81. When the CT Report was served with the Bourlakovas' other evidence, the Applicants pointed out almost immediately that much of the documentary evidence underpinning the conclusions in the CT Report was forged. There are signs that CT Group does not accept that conclusion. However, the Bourlakovas have not mounted any strong defence of the CT Report. They have withdrawn the WFO Application and have agreed to pay the Applicants their costs of it on an indemnity basis. For present purposes, I will proceed on the basis that a high proportion of the documentation underpinning the CT Report was indeed forged.

82. The debacle with the CT Report alerted the Applicants to the existence and scope of CT Group's investigations and opened a new front in this litigation (the Applicants' **Confidentiality Applications** of which the present applications form part). The Applicants have, to date, obtained orders restraining the Bourlakovas from further misuse (as the Applicants characterise it) of their Confidential Information and Privileged Communications. They have also obtained disclosure from CT Group under *Norwich Pharmacal* principles. The Bourlakovas have delivered up most, if not all, of the Confidential Information and Privileged Communications that they have. The Bourlakovas and MDR have given evidence on affidavit about the circumstances in

which they came into possession of that material. CT Group has provided an affidavit containing information on their investigations and has given disclosure.

83. The process of complying with the orders summarised in paragraph 82 has been complicated by the need to review documents for both confidentiality and privilege. That is a complicated exercise: a communication from MDR commenting on information obtained from CT Group's investigations could engage both the Applicants' confidentiality, and potentially the Applicants' legal privilege, as well as the Bourlakovas' privilege. For that reason further review counsel, independent of all parties and different from the Bourlakovas' Review Counsel described in paragraph 73 (**Independent Review Counsel**) have been instructed to review a large number of relevant documents.

84. A consequence of this approach is that when CT Group provided its *Norwich Pharmacal* disclosure, a good amount of material was held back from disclosure on the basis that Independent Review Counsel considered it to be privileged. The Applicants say that one of the reasons why they pursue the present applications concerns the extent of documents that are withheld on the grounds of privilege. CT Group's *Norwich Pharmacal* disclosure exercise has revealed 2,039 potentially relevant documents. However, only 178 have been disclosed because others (principally the Bourlakovas) assert privilege over the remaining 1,861 documents. Those figures relate only to the *Norwich Pharmacal* disclosure by CT Group. The Applicants believe that, if the iniquity exception applies to communications between MDR and the Bourlakovas, still further documentation will be available to them.

85. I am prepared to infer, given my knowledge of CT Group's investigations and the material that it uncovered that, among the documents in relation to which the Bourlakovas assert privilege are references to the Applicants' Confidential Information. I am also prepared to conclude that the material will contain some references to the Applicants' Privileged Communications.

86. However, I expect references to Privileged Communications to be relatively small in number, and certainly much smaller in number than references to Confidential Information. That is because, as I have noted in paragraphs 75 to 76, the Bourlakovas and MDR have actually come into possession of a relatively small amount of the Applicants' Privileged Communications. I acknowledge, of course, the possibility that CT Group have come into a much greater quantity of Privileged Communications. It is therefore possible that CT Group and the Bourlakovas/MDR have discussed Privileged Communications even though the Privileged Communications themselves have not been made available to MDR. However, on balance, I consider that there are likely to be relatively few instances of this because:

   i) On my findings, MDR only realised that CT Group were accessing Privileged Communications in August 2023. There cannot have been much discussion of Privileged Communications between MDR, the Bourlakovas and CT Group of Privileged Communications before then because otherwise MDR would have realised sooner that CT Group had access to such material.

   ii) Even if it did not always work perfectly (see paragraph 75 above), the process with the Bourlakovas' Review Counsel sent CT Group a clear signal that Privileged Communications had to be handled with care. I conclude from Ms James's witness statements that CT Group took seriously the restrictions on the use of Privileged Communications and that, in cases of doubt, after August 2023 CT Group provided documents to the Bourlakovas' Review Counsel for review. That process necessarily resulted in CT Group realising that they should not be referring to Privileged Communications in communications, for the very same reason that they had to submit potentially privileged documents to the Bourlakovas' Review Counsel for review.

iii) I am prepared to accept that there would have been the occasional slip. No system is perfect and, since some Privileged Communications were sent to MDR (see paragraph 75 above) there may well be the occasional reference to Privileged Communications in communications between the Bourlakovas/MDR and CT Group. However, on balance, I conclude that there will be comparatively little of this.

iv) I am not prepared to conclude that there was a substantial "back channel" of communication between the Bourlakovas and CT Group that would have enabled the rigours of the process imposed by MDR to be circumvented (see paragraphs 128 to 130 below).

<u>The Marengo investigation</u>

87. The Bourlakovas object to the Kazakovs founding the Application on the Marengo investigation arguing that there is no pleaded claim in relation to that investigation. I will make the findings below on the Marengo investigation without prejudging that argument.

88. In January 2024, the Bourlakovas became aware that the Kazakovs were in London. The Kazakovs have previously asserted that the Bourlakovas must have found out about their visit to London by engaging someone to hack their email accounts. However, while the Kazakovs do continue to assert that the Bourlakovas have instructed third parties to engage in hacking, they no longer argue that information about the London visit came from hacking. I accept Ms Pigott's evidence that the awareness came about by chance: one of the Bourlakovas' advisers was staying at the Prince Akatoki Hotel in London on 16 January 2024 and happened to see the Kazakovs in the dining room there.

89. I accept Ms Pigott's evidence that MDR, and the Bourlakovas, wanted to know whether the Kazakovs would be meeting with anyone from the Russian litigation funder, AI LLC, partly because AI LLC has been listed as a sanctioned entity by the US Department of the Treasury. MDR and the Bourlakovas instructed a firm of enquiry agents (**Marengo**) to follow the Kazakovs on their trip round London.

90. On 18 January 2024, Marengo told MDR that the Kazakovs and their daughter Svetlana, who is not party to this litigation, were meeting with a Ms Inga Ludewig and two English-speaking men, later identified as Mr Andrew Wordsworth and Mr Tobias Vollmer from Raedas, a firm of investigators at Zetter Townhouse, a bar/restaurant in Marylebone. MDR were aware that Ms Ludewig was a lawyer who acted for the Kazakovs.

91. MDR asked Marengo to eavesdrop on the conversation (the **Conversation**) which Marengo did by sitting at a table adjacent to that of the Kazakovs. On a messaging thread, Marengo started relaying the contents of the Conversation to MDR over an instant messaging application. However, MDR asked Marengo to be careful not to divulge the

substance of the Conversation as it may be privileged. Marengo did not entirely adhere to this stricture as they sent two further snippets of the Conversation to a member of the MDR team. However, that member did not share the snippets with anyone else on the MDR team.

92. MDR asked Marengo to make a note of the Conversation. In fact, Marengo went further and took an audio recording of it. I accept Ms Pigott's evidence, which the Applicants have not invited me to disbelieve, that MDR was not aware at the time that Marengo were making this recording.

93. MDR asked Marengo to provide "brief headline information" about the topics discussed in the Conversation (without revealing their substance) so that MDR could form a view on whether the Conversation was privileged. From the summary provided, MDR believed that Marengo's summary suggested that much of what was discussed during the Conversation had no obvious meaning and the Conversation might not even have been confidential. MDR shared some of the headline information about the Conversation with the Bourlakovas.

94. The audio recording of the Conversation was of poor quality, not least because it took place in a bar/restaurant with other background noise. Marengo sent the audio recording to a business called "Audio Forensic Services" to enhance the recording so that Marengo could prepare a transcript (the **Conversation Transcript**).

95. MDR asked Marengo not to send a copy of the Conversation Transcript to them, because MDR had residual concerns that it might contain Privileged Information. Instead, Marengo were asked to send the Conversation Transcript to the Bourlakovas' Review Counsel. Marengo overlooked this request and sent two individuals at MDR a copy of their final surveillance report that was accompanied by the Conversation Transcript. The first MDR recipient of this material scanned the material quickly to ensure that the Conversation Transcript had not been provided. On seeing that it had, they immediately deleted the email in question (including from their "deleted items" folder) and warned the other recipient not to open the email and to delete it (which they did).

96. I have not myself seen a copy of the Conversation Transcript. All parties at the hearing proceeded on the assumption that it included at least some Privileged Communications. I will do the same.

Findings as to the states of mind of the Bourlakovas and MDR

The Covert Recordings

97. I have made findings as to the information that Veronica expected to capture, and did capture, from the Covert Recordings in paragraphs 48 to 57 above. I have, however, rejected the Applicants' request that I conclude that Veronica provided a selection of the Covert Recordings to CT Group for the purposes of their investigations into the Applicants conducted in connection with this litigation (see paragraphs 56 and 57 above).

Targeting Confidential Information – The investigations of CT Group and Marengo

98. I agree with the Applicants that both the Bourlakovas and MDR intended, when instructing both CT Group and Marengo, that CT Group and Marengo would seek to

access Confidential Information of the Applicants. The Bourlakovas and MDR realised that the Applicants had not authorised either CT Group or Marengo to access their Confidential Information.

99. The Bourlakovas and MDR instructed CT Group and Marengo to seek out the Applicants' Confidential Information because they believed that the Applicants had perpetrated a fraud against them. They also hoped that information that CT Group and Marengo obtained would help to prevent future frauds against them. Thus the Bourlakovas and MDR hoped that some information that Marengo and CT Group discovered would not actually be confidential as a matter of English law because it revealed iniquity. However, they would have realised that there was a risk that much of the material that the investigations of CT Group and Marengo produced might not positively reveal iniquity so as to engage an "iniquity defence" or "public interest defence" of the kind described at [5-135] to [5-145] of *Toulson & Phipps on Confidentiality* (5th Edition). The Bourlakovas and MDR were content to set in train a process that could involve the acquisition of a good amount of confidential information in the hope that it would turn up some material that revealed the Applicants' iniquity and so might not actually be confidential.

"Privilege hunting" – CT Group's investigations

100. The Applicants invite me to conclude that, from the time that CT Group was instructed, both the Bourlakovas and MDR intended (including because they knew and were reckless to the risk) that CT Group would be accessing Privileged Communications of the Applicants.

101. CT Group had a broad remit. The Bourlakovas cannot point to a communication, or contractual stipulation, in which either they or MDR expressly forbade CT Group from targeting Privileged Communications of the Applicants. While CT Group were under a contractual obligation to conduct their investigations lawfully, that would not, of itself, have precluded them from seeking to obtain Privileged Communications. Those are certainly factors that might support a finding of the kind summarised in paragraph 100.

102. The Applicants place some emphasis on paragraph 39 of the First Witness Statement of Ms James of CT Group in which she says, after noting that personnel at CT Group were not capable of assessing for themselves whether documents were privileged:

> No personnel at CT Solutions were legally trained and, as such, a process was put in place by MdR to regulate the flow of information provided by CT Solutions to MdR in order to protect against the risk of disclosing privileged material to MdR during the course of the Investigations. The specific process adopted for CT Solutions to provide its reports and intelligence to MdR changed in around September 2023, when CT Solutions was informed by MdR that it had concerns regarding privileged material and wanted to ensure that it did not receive any privileged material.

103. The Applicants suggest that this demonstrates that MDR was aware from the outset that CT Group might be obtaining privileged material and that therefore, right from the beginning there was a process in place to "regulate the flow of information" to guard

against the risk of MDR obtaining privileged material. I agree that the statement can be read in that way. However, it can also be read as describing the "process [that] was put in place" after September 2023.

104. Without hearing Ms James cross-examined, I cannot tell conclusively what she meant by the above extract from her witness statement. However, in my judgment, MDR's actions throughout are inconsistent with a wish, or expectation, that CT Group would access Privileged Communications. It would make no sense for either the Bourlakovas or MDR to set CT Group to work hoping, or expecting, that CT Group would obtain Privileged Information when MDR was taking positive steps to ensure that, if Privileged Information were obtained, neither they nor the Bourlakovas would see it. It would make no sense to commission CT Group to deliver a work product that neither MDR nor the Bourlakovas could use.

105. It is true that, in 2021, CT Group's investigations were actually accessing a privileged document such as the engagement letter described in paragraph 70.iv) above (even though neither the Bourlakovas nor MDR saw that engagement letter at the time). The Applicants suggest that, because CT Group was obtaining Privileged Communications such as this, they must have been directed to hunt out privileged material. I am not prepared to make that finding. I regard it as more likely that CT Group had a means of obtaining documents generally and could not know until a particular cache of documents was obtained whether they would contain privileged documents or not. Therefore, CT Group's actual receipt of privileged documents is just as consistent with those documents being delivered as part of a cache over which the Bourlakovas had no control as it is with a positive direction from the Bourlakovas that CT Group hunt out Privileged Communications. Accordingly, I do not consider that CT Group's actual receipt of some Privileged Communications displaces the indication set out in paragraph 104.

106. The Applicants counter that, even if MDR did put in place steps designed to ensure that neither they nor the Bourlakovas would see Privileged Communications, CT Group at least would see that material and could so use it to further their investigations. The Bourlakovas object to that argument being advanced, saying that it was new and, if they had known it was to be raised, they might have asked CT Group to provide evidence as to how, if at all, their own knowledge of Privileged Communications advanced their enquiries.

107. I will consider the Applicants' argument summarised in paragraph 106, but will bear in mind the Bourlakovas' point that CT Group have not had an opportunity to address it in evidence. I acknowledge, of course, the possibility that CT Group's sight of Privileged Communications gave them an advantage in their enquiries. However, I do not accept that MDR or the Bourlakovas intended CT Group to have that advantage. From the perspective of MDR and the Bourlakovas, it was for CT Group to conduct their enquiries as they saw fit, subject to the constraint that they had to act lawfully in every relevant jurisdiction.

108. Moreover, there is a clear indication that CT Group did not consider that they were building their investigations on a foundation of privileged material that they had seen but the Bourlakovas/MDR had not. That indication can be seen in the decision that the CT Report should be used as evidence in the WFO Application. The Bourlakovas must have expected that well-resourced opponents such as the Applicants would scrutinise that report carefully. If the conclusions in the report were indeed based on Privileged

Communications, the Bourlakovas would have anticipated real difficulties with it and CT Group could be expected not to allow the report to be used in that way. I will not make the finding summarised in paragraph 106.

109. I have rejected the Applicants' case that the Bourlakovas realised in 2021 that CT Group were accessing Privileged Communications (see paragraph 71 above). I will not therefore find that from 2021, MDR or the Bourlakovas had the intention summarised in paragraph 100.

110. That then leaves the question of whether the Bourlakovas and/or MDR formed the intention summarised in paragraph 100 in August 2023 when it became clear that CT Group had accessed Privileged Communications. That is the most difficult part of the analysis. At that point, MDR and the Bourlakovas decided that (i) CT Group's investigations would continue, subject to the additional procedural steps involving the instruction of the Bourlakovas' Review Counsel but that (ii) the Applicants would not be told immediately that CT Group was able to access certain of their Privileged Communications. It is of course possible that the Bourlakovas took that approach hoping that CT Group's investigations would be furthered by access to Privileged Communications even if MDR and the Bourlakovas did not themselves see that material.

111. However, on balance, I conclude that the Bourlakovas and MDR did not form the intention summarised in paragraph 100 even in August 2023. It is significant that Ms Pigott appreciated, from August 2023 that, once the evidence had been served in the WFO Application the Applicants would have to be told (i) that CT Group had received the Applicants' Privileged Communications and (ii) what those Privileged Communications were. That is inconsistent with an intention that, until that time came, CT Group should derive advantage from using those materials since any such advantage might well be discovered when the Applicants were told that their Privileged Communications had been accessed. Moreover, the reason that Ms Pigott gave for wishing to defer telling the Applicants about the position with their Privileged Communications was understandable: she did not want to tip off the Applicants about the WFO Application. I am not prepared to conclude that MDR's reasons for deferring notification to the Applicants was a smokescreen to conceal the use of Privileged Communications in the interim.

112. I will not make any findings as to whether CT Group expected at any point in their investigations to derive an advantage from the use of Privileged Communications, recognising the Bourlakovas' point that I have no evidence from CT Group on this issue. However, even if CT Group did have such an expectation, for the reasons set out above, this was not an expectation or intention that the Bourlakovas or MDR urged on CT Group.

"Privilege hunting" – Marengo's investigation

113. In relation to the Marengo investigation, I will make variants of the findings that the Applicants seek which I have summarised in paragraphs 100 and 106 above.

114. MDR knew that the Conversation involved the Kazakovs' lawyer. They could not have known in advance whether that Conversation would be privileged, as not every conversation involving a lawyer is privileged. However, MDR would have appreciated a

real risk that the Conversation would include privileged material. They instructed Marengo to eavesdrop on the Conversation appreciating that risk.

115. However, neither MDR nor the Bourlakovas wanted themselves to access any privileged component of the Conversation. That is why they put in place the safeguards described in paragraphs 91 to 95. The reason why MDR and the Bourlakovas wanted to know what was said in non-privileged parts of the Conversation was to discover whether the Kazakovs had any contact with AI LLC.

116. MDR and the Bourlakovas would have realised that eavesdropping on the Conversation might result in Marengo hearing Privileged Communications. They would not, at the time of the Conversation, have realised that any such Privileged Communications would be recorded and passed to Audio Forensic Services because they did not realise at that time that Marengo would be recording the Conversation.

117. Neither MDR nor the Bourlakovas was positively seeking to ensure that Marengo or any other person obtained access to the Kazakovs' Privileged Communications. Marengo had been engaged for a single project and so MDR and the Bourlakovas did not believe that any privileged information that Marengo obtained would assist with any ongoing investigation that Marengo was conducting.

<u>Purpose of instruction of the Bourlakovas' Review Counsel</u>

118. The Applicants invite me to find that the dominant purpose of the Bourlakovas' instruction of the Bourlakovas' Review Counsel was not to obtain evidence or advice in connection with this litigation. Rather, the Applicants argue that the purpose of the instruction was to prevent the Bourlakovas and MDR from reviewing the Applicants' Privileged Communications. The Applicants seek this finding so that they can establish, whatever my conclusion on the iniquity exception, that instructions to the Bourlakovas' Review Counsel are not privileged.

119. In my judgment, the basis of the Applicants' request is flawed. If the iniquity exception does not apply, legal advice privilege will attach to any instructions to the Bourlakovas' Review Counsel seeking legal advice on whether particular documents are privileged or not.

120. For completeness, I would not make the finding summarised in paragraph 118 in any event. The distinction between "obtaining evidence" and "preventing the Bourlakovas and MDR from reviewing privileged material" that the Kazakovs posit is an artificial one. The Bourlakovas and MDR wished to obtain evidence that could be deployed in this litigation. They realised that Privileged Communications could not be deployed as evidence. The Bourlakovas' Review Counsel were instructed to advise on which materials were privileged and which were not. The purpose of that was to enable the Bourlakovas to have access to, and deploy if they saw fit, a body of evidence in connection with this litigation. Understood in those terms, the Bourlakovas were indeed instructing the Bourlakovas' Review Counsel for the dominant purpose of obtaining evidence or advice in connection with this litigation.

The Bourlakovas' beliefs as to lawfulness of CT Group's investigations

121. It is important to keep separate the question of whether CT Group's investigations were actually lawful and the question of whether the Bourlakovas believed those investigations to be lawful. This section deals with the latter question.

122. The Bourlakovas invite me to find that:

i) they and MDR believed that CT Group's investigations were conducted lawfully;

ii) they and MDR believed that, to the extent CT Group acquired Privileged Communications, it obtained those from a "whistleblower" rather than by hacking email accounts operated by the Applicants; and

iii) they and MDR acted throughout in good faith.

123. I will make the finding requested in paragraph 122.i).

124. The Bourlakovas instructed a reputable law firm in MDR. MDR instructed CT Group, a reputable firm of investigators. CT Group gave contractual assurances that they would conduct investigations lawfully (see paragraph 59 above). The combination of those factors itself points in favour of the proposition that the Bourlakovas expected CT Group's enquiries to be conducted lawfully.

125. The Applicants point out that contractual assurance was only that CT Group would act lawfully and that this says nothing about how the Field Team or the Underlying Sources would act. That is true, but CT Group also promised that it would not "directly or indirectly pay or promise to pay … any person or entity … to obtain any improper advantage for you in the course of carrying out the work". If CT Group was to use the Field Team or Underlying Sources to obtain information unlawfully, it is not unreasonable to expect that they would expect payment for doing so. Fairly read, CT Group's contractual terms precluded it from making a payment in order to further an unlawful investigation.

126. The Applicants suggest that the Bourlakovas should not have assumed that CT Group were reputable because of criticisms made of them in the judgment of Charles Hollander KC, sitting as a judge of the High Court in *Green v CT Group Holdings Limited* [2023] EWHC 3168 (Comm). I consider that to go too far. In the first place, Mr Hollander KC's judgment was not given until 11 December 2023, by which time CT Group had been appointed for a long time and their enquiries were nearly complete. Moreover, in that case, while Mr Hollander KC did not accept all of CT Group's submissions resisting an application for *Norwich Pharmacal* disclosure, he did find that Ms Green had no good arguable case of wrongdoing against CT Group.

127. Ms Pigott has given sworn evidence that she (and others at MDR involved in the litigation) believed that CT Group would act lawfully. Ms Pigott did not form that belief simply because of blind trust in CT Group. She reached her conclusion in the light of the documents and information that CT Group were actually producing. That of course is not determinative of the Bourlakovas' beliefs as Ms Pigott can only speak to her beliefs. However, Ms Pigott's evidence is of force because MDR were primarily dealing with CT Group and, being legal professionals, were better placed than the Bourlakovas to form a

view on whether CT Group were acting lawfully or not. If Ms Pigott had believed that CT Group were, or were likely to have been acting unlawfully then I consider it likely she would have told the Bourlakovas.

128. The Applicants suggest that the involvement of a reputable law firm such as MDR is of little weight since CT Group's investigation "was from start to end the Bourlakovas' own". I do not accept that. Ms James said, at paragraph 23 of her first affidavit:

> On occasion, I would meet with Veronica Bourlakova and her husband, Greg Gliner, to receive instructions, information and/or documents in connection with the Investigations. I do not recall every meeting that I had with the Clients, nor did I keep any records of those meetings, but I estimate that I had around a dozen such meetings, the vast majority of which were in person. These meetings were always arranged by MdR or Klein Law, who were always in attendance as well.

129. The Applicants suggest that the above paragraph of Ms James's affidavit was suggesting that there were a number of meetings between CT Group and the Bourlakovas at which neither MDR nor Klein Law were present. I agree that there is some ambiguity in the passage above. It is not clear whether the meeting with Veronica and Greg Gliner were meetings with "Clients" (at which MDR or Klein Law were said to be "always in attendance") or some other meetings. Ms James used the defined term "Clients" in her affidavit to refer to MDR's clients. At [38] of her affidavit she said that it appeared to her that MDR were treating Greg Gliner as one of its clients. Of course, I cannot hear from Ms James, but I consider the most natural interpretation of her evidence is that there were few, if any, meetings at which MDR or Klein Law were not in attendance. If there was a substantial "back channel" of communication at which CT Group received instructions from the Bourlakovas, I do not see how Ms James could have said, in paragraph 22 of her affidavit, that the majority of CT Group's instructions came from MDR with some other instructions coming from Klein Law.

130. The Applicants referred also to paragraph 36 of Ms James' affidavit, in which she confirms informing James Tamblin (who was employed by Veronica) about details of the case and showing him some reports in CT Group's offices. However, that suggests that James Tamblin was being kept informed, not that he was giving instructions. I acknowledge the possibility that the Bourlakovas and CT Group had an understanding that CT Group would use unlawful methods, such as hacking, to obtain information but that MDR were kept in the dark about that understanding so that "plausible deniability" could be maintained. However, doing the best I can with evidence that has not been tested in cross-examination, I do not consider that was the case as there was an insufficiently substantial back channel of communication between the Bourlakovas and CT Group to make such an approach workable.

131. Nor do I accept the Applicants' point that the Bourlakovas and MDR could not have believed that CT Group would act lawfully when they did not know how CT Group would actually conduct its investigations. People frequently take at face value assurances given by an expert about processes they do not understand. A patient can truly believe a surgeon's assurance that an operation will be straightforward without any knowledge of anatomy, for example.

132. In a similar vein, the Applicants are correct to assert that neither the Bourlakovas nor MDR took any steps to monitor or "police" CT Group's promise to act lawfully. However, they simply lacked the expertise to do so, not least since they did not know how CT Group would conduct its investigations. People frequently believe assurances are true without verifying or policing them for themselves. For example, someone might believe a financial adviser's assurance that he or she is constantly thinking about the composition of an investment portfolio without requiring that financial adviser to provide timesheets.

133. I will also make the finding that the Bourlakovas request in paragraph 122.ii). That is a finding as to the beliefs of the Bourlakovas, rather than as to the sources from which CT Group actually obtained their information.

134. By "whistleblower" the Bourlakovas mean someone who (i) has access to Confidential Information and/or Privileged Communications, (ii) considers those documents to reveal iniquity, and (iii) chooses to reveal those documents to the Bourlakovas to help them to uncover the iniquity and/or protect against further iniquity.

135. The Bourlakovas draw a contrast between obtaining material from such a whistleblower and obtaining material from hacking. The Applicants deny the validity of that contrast, asserting that both are equally iniquitous, and I will address that issue later in the judgment when I address the Applicants' arguments on "*per se* iniquity". However, I accept that the Bourlakovas had a genuine belief that CT Group was not engaged in hacking, but rather was obtaining sensitive information from a whistleblower.

136. I reach that conclusion partly because of my conclusions earlier in this section. The Bourlakovas believed that CT Group were using lawful means to obtain information. Hacking is unlawful in the UK. On a balance of probabilities, I conclude that neither MDR nor the Bourlakovas believed that CT Group were engaged in, or commissioning, hacking.

137. Ms Pigott says expressly in paragraph 77 of her Twenty-Third Witness Statement that she believed that information was coming from a whistleblower. She states expressly that she was unaware of any hacking. I will accept that evidence. Ms Pigott provides some reasoning in support of her conclusion: she did not consider that the quantity of documents that CT Group was generating was consistent with them having wholesale access to hacked email accounts. I recognise, of course, that there were contra-indications. For example, CT Group were being paid a large sum of money: one of the Field Team invoiced for some EUR 1 million. If CT Group were engaged in hacking, or commissioning hacking by others, they might be expected to charge a high price. However, I am not persuaded that I should disbelieve the evidence that Ms Pigott has given as to her beliefs.

138. For reasons that are essentially the same as those set out in paragraphs 127 to 130 above, I conclude that the Bourlakovas had the same belief as Ms Pigott and MDR.

139. That also deals with the Applicants' assertion that the Bourlakovas and MDR simply could not have believed that CT Group were acting lawfully since they necessarily had to be using unlawful methods to obtain information. As explained in the next section, I do not accept that CT Group's methods necessarily had to be unlawful. Moreover, the Bourlakovas and MDR had formed the view that CT Group was obtaining information

from a whistleblower. A whistleblower might be expected to be providing documents that showed the Applicants' iniquity. To the extent that documents showed iniquity, their contents would be neither confidential nor privileged. In my judgment, the belief of the Bourlakovas and MDR that information was coming from a whistleblower is entirely consistent with, and supportive of, a belief that information was being obtained lawfully.

140. Finally, the Applicants make the general point that the Bourlakovas' conduct in relation to the Covert Recordings shows their willingness to act unlawfully and so gives the lie to any suggestion that they believed that CT Group would act lawfully. I do not accept that reasoning. Certainly Veronica, and perhaps Loudmila as well, showed that they were prepared to act unlawfully when they had control of an investigation. However, as I have explained, the Bourlakovas were not in control of CT Group's investigations and they were told and assured that CT Group's investigations were being conducted lawfully. I am not prepared to accept that they disbelieved that assurance simply because Veronica and Loudmila had behaved differently before the present litigation commenced.

141. That leaves the question of "good faith". I am not prepared to make the finding requested in paragraph 122.iii). Such a finding would be extremely broad in its nature and would require a detailed examination of material going beyond that I have considered above in relation to the Bourlakovas' beliefs as to lawfulness. I have heard little argument in support of such a general finding. In saying this, I am not making any finding that the Bourlakovas were acting in bad faith.

<u>The Bourlakovas' belief in the genuineness of documents that CT Group produced</u>

142. As I have noted, much of the documentation on which CT Group based their report is said to be forged, although CT Group does not accept that the forgeries are as extensive as the Applicants alleged. I am not prepared to conclude, however, that either the Bourlakovas or MDR knew that CT Group's report was based on forged documents. Proceeding on the basis of such a belief would make no sense particularly given that the Bourlakovas had decided to put CT Group's report in evidence in the WFO Application. Well-resourced opponents such as the Kazakovs would inevitably discover any forgeries.

Whether CT Group engaged in, or commissioned, hacking

143. As will be seen, the Applicants' position is that the iniquity exception is engaged in relation to CT Group's investigations whether or not CT Group actually engaged in, or commissioned, hacking. However, in case that proposition is not accepted, they do ask me to find that CT Group did obtain documentation, primarily at least, from hacking the Kazakovs' email accounts rather than from a whistleblower.

144. Against that, the Bourlakovas invite me to conclude that (i) CT Group used no criminal means to obtain information and (ii) CT Group believed its investigations were conducted lawfully.

145. I will not make either finding summarised in paragraphs 143 or 144. I do not see how any determination of either issue could fairly be made on the papers without hearing live evidence that is tested in cross-examination.

146. In support of their position on hacking, the Applicants point to a number of circumstantial factors. For example, they note the large sums that CT Group's Field Team were charging. They point out that someone was evidently providing CT Group with forged documents and people prepared to do that could be expected to be prepared to hack. They suggest that the member of the Field Team who invoiced for EUR 1 million was particularly busy at crucial junctures in the litigation when important applications were being made to this court. They suggest that this suggests that hacking was taking place to obtain evidence for those applications.

147. Against that, I have CT Group's assurances that their investigations were conducted lawfully and that no hacking was involved. That is not a bare denial and is supported by other evidence. If the Bourlakovas are correct to say that the Kazakovs were perpetrating a fraud against them by extracting assets and relying on forged documents in the process, it is reasonable to suppose that a lot of individuals such as lawyers and corporate service providers would have to be involved. Of course some of those involved might not be aware of the fraud if there was one, but others would have to be. It is not implausible that some individuals involved could become whistleblowers so that no hacking was necessary.

148. I simply cannot decide on the papers between either of those two competing theories. I consider that it would be procedurally unfair to attempt such an ambitious task. If I concluded on the basis of the huge quantity of written material that I have that CT Group had indeed engaged in hacking, that would be an extremely serious finding which could have significant commercial and legal repercussions for CT Group following a hearing in which they have not been involved and have not made submissions. I acknowledge that *Al Sadeq* requires me to make the best of the available evidence. However, since I regard one possible conclusion of the exercise as procedurally unfair, I conclude that making the best of the evidence on hacking involves simply declining to decide the issue one way or the other.

149. That deals with the question of hacking which is a criminal offence in the UK. The Applicants also argue that CT Group's investigations must have been unlawful simply because those investigations resulted in CT Group obtaining Confidential Information and Privileged Communications. I do not consider I can make that finding at this stage. If the Applicants have indeed been practising the fraud that the Bourlakovas assert then any documents that CT Group obtained that either comment on or reveal that fraud are likely to be neither privileged nor confidential. If the Applicants have not been practising the fraud, then the Applicants' counterclaims against the Bourlakovas for breach of confidence and misuse of private information may well succeed. Those claims may also succeed to the extent that CT Group has obtained Confidential Information and Privileged Communications which do not comment on or reveal iniquity. It is simply not possible at this stage to tell whether CT Group's investigations did, or did not, involve the commission of the torts alleged in the Applicants' counterclaims.

150. There was a debate between the parties as to whether iniquity could be present if the Bourlakovas or CT Group were engaged in conduct which, while criminal under English law, would be lawful in the country where that conduct took place. That led to a debate as to whether only principles of English law were relevant or whether the court could have regard to overseas law as well when considering the presence or absence of iniquity. I do not consider it necessary to address that legal debate. I have had no evidence as to the law of any country outside England. In those circumstances, the difficulties that I

have in making a finding that CT Group engaged in or commissioned hacking (which would be an offence in the UK) make it even less possible for me to consider whether they were engaged in activity that is, or is not, criminal in any other jurisdiction.

PART B – THE INIQUITIES CONSIDERED

Overview of the alleged iniquities

151. The Applicants argue that four separate iniquities are present:

  i) The Bourlakovas' instructions to CT Group to carry on covert investigations lasting over four years (the **CT Group Iniquity**);

  ii) Veronica's provision of information gleaned from the Covert Recordings to CT Group for the purpose of their enquiries (the **Covert Recordings Iniquity**). (In his oral submissions, Mr Scott KC initially positioned the Covert Recordings Iniquity as involving the installation of the covert recording devices. However, there is no pleaded allegation against the Bourlakovas involving the Covert Recordings. Mr Scott KC therefore explained that the Applicants pursue the Covert Recordings Iniquity so that they could obtain disclosure relating to the provision of Covert Recordings to CT Group as part of their investigation, since there is a pleaded allegation that it was wrong for the Bourlakovas to instruct CT Group to pursue that investigation. Therefore, Mr Scott KC accepted that the Covert Recordings Iniquity is concerned with the provision of covert recordings to CT Group rather than with the original making of those covert recordings);

  iii) instructing the Bourlakovas' Review Counsel to review Privileged Communications (the **Review Counsel Iniquity**); and

  iv) instructing Marengo to follow the Kazakovs around London and ultimately eavesdrop on the Conversation (the **Marengo Iniquity**).

The CT Group Iniquity

<u>Iniquity *per se* – Confidential Information</u>

152. The Applicants argue that it is "inherently iniquitous" for the Bourlakovas intentionally to take steps to obtain unauthorised access to either (i) the Applicants' Confidential Information or (ii) their Privileged Communications. I will refer to this as an allegation of "*per se* iniquity" because the Applicants' position is that it is established whatever the Bourlakovas' beliefs as to the lawfulness or propriety of their actions. I start with the argument in relation to Confidential Information.

153. In support of that argument, the Applicants rely heavily on the judgment of the Court of Appeal in *Imerman v Tchenguiz* [2011] Fam 116. I do not, however, consider that this authority bears the weight that the Applicants seek to put on it.

154. *Imerman* was not dealing with the iniquity exception at all. In that case, a wife's brother accessed her husband's computer without authorisation and copied a vast quantity of information stored on that computer. He did so because he was concerned that the husband would unjustifiably dissipate or conceal assets to the wife's disadvantage in anticipated divorce proceedings. The court strongly deprecated the brother's actions

holding that communications concerning the husband's personal finances, personal business dealings and private life were necessarily confidential ([76] to [77] of the judgment of Lord Neuberger MR) and that the brother should not be accessing such material whether or not he intended to reveal it to a third party ([72] of the judgment). When a party has taken confidential documents, "there can almost always be no question but that he must return them; they are the claimant's property" ([73] of the judgment).

155. At [144] of his judgment, Lord Neuberger MR characterised the brother's behaviour as involving an invasion of privacy in an underhand way and on an indiscriminate scale. It was no answer that the brother (or the wife) accessed the information to forestall the husband's feared dissipation or concealment of assets since the court was able to order relief, in the form of a search and seize order on an *ex parte* basis if necessary ([135] and [136] of the judgment).

156. Therefore, *Imerman* is an authority dealing with confidentiality. The essence of the court's conclusion was that the court would intervene to order, among other remedies, the return of the confidential information accessed. The court was not prepared to accept that there was a corpus of special rules (the so-called "*Hildebrand* Rules") that permitted the brother to act as he did simply because divorce proceedings were pending.

157. *Imerman* does not, however, change the law to the effect that the law will not protect confidentiality in documents that actually reveal unlawful conduct or intended unlawful conduct (see [142] of Lord Neuberger MR's judgment). In *Brake v Guy* [2021] EWHC 670 (Ch), HHJ Paul Matthews, sitting as a judge of the High Court, conducted a comprehensive review of authorities including *Imerman* and concluded that there was an "iniquity defence" to both the tort of misuse of private information and the tort of breach of confidence. He also concluded that this defence can be available even if the material in question was obtained unlawfully.

158. Overall, I conclude from *Imerman* and *Brake* that (i) information that CT Group obtained from the Applicants may well be confidential even though (ii) the Bourlakovas sought that information because of concerns that they had been, or would be, defrauded except to the extent that (iii) the information actually reveals unlawful conduct or intended unlawful conduct. However, I do not consider that *Imerman* is authority for the proposition that the iniquity exception applies simply because, as the Applicants put it, the Bourlakovas set in train a process which culminated in CT Group obtaining the Applicants' Confidential Information. The judgment in *Imerman* means that the Kazakovs' counterclaim might succeed. However, that in itself is not enough to engage the iniquity exception.

159. The Applicants also rely on the judgment of Rix J in *Dubai Aluminium* in support of their argument that it was iniquitous *per se* for the Bourlakovas to instruct CT Group to seek out the Applicants' Confidential Information without their consent. In that case, the claimant company had obtained a freezing order against the defendant, Mr Al Alawi. Mr Al Alawi sought to discharge that freezing order on the basis that the claimant company had instructed enquiry agents (Page Associates) who in turn had instructed sub-agents with those sub-agents obtaining information about Mr Al Alawi's bank, credit card and telephone accounts by making "pretext calls" to his bank. Those pretext calls involved false representation and impersonation (presumably on the basis that the caller pretended to be Mr Al Alawi himself) and constituted an offence both in the UK under the Data Protection Act 1984 and in Switzerland (where Mr Al Alawi's bank was established).

160. The claimant company put forward no case as to its involvement in, or instruction of, the pretext calls. It took a "stand on principle" (as Rix J put it) to the effect that (i) the authorities as they then stood were limited to situations where solicitors had become involved, whether innocently or not, with the planning or carrying out of iniquitous acts such as a fraud or a crime which have themselves been the subject matter of litigation (and the pretext calls were not themselves the subject of litigation), (ii) the evidence obtained from the pretext calls was admissible no matter how it was come by and (iii) the ramifications of what was submitted to be an extension of the iniquity exception were "dangerously uncertain".

161. The Applicants rely on the following passage of Rix J's judgment at 1969E:

> It seems to me that if investigative agents employed by solicitors for the purpose of litigation were permitted to breach the provisions of such statutes [e.g. the Data Protection Act] or to indulge in fraud or impersonation without any consequence at all for the conduct of the litigation, then the courts would be going far to sanction such conduct... But it seems to me that criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege.

162. The Bourlakovas suggest that, in this passage, Rix J was canvassing the possibility that the documents that lost privilege because of the iniquity exception were the fruits of the pretext calls such as the banking information that those calls yielded. There is something in that. At 1969G to H, Rix J commented that:

> … [t]he material being investigated is usually material which falls within the other party's possession or control, and which in all probability he will in due course be obliged to disclose himself. In such circumstances, it does not seem to me to be too great an intrusion on legal professional privilege to require that documentation such as is in question in this case should be disclosed.

163. However, the significant aspect of Rix J's judgment is that he found that the iniquity exception was engaged, rather than the documents that he envisaged would become disclosable. In that regard, I consider that the Applicants are reading the passage at 1969E out of context.

164. Significantly, at 1968D to E Rix J commented on the claimant company's "stand on principle". That position meant that Rix J, by contrast with this case, was not being invited to conclude that the claimant company or its solicitors had no knowledge of any iniquity perpetrated by the enquiry sub-agents. That prompted Rix J to say:

> In the circumstances, while I do not think that [counsel for the claimant company] accepts the strictures made, and I am certainly in no position to find exactly what has been done or whether [the claimant company's solicitors] or Page Associates

> themselves had foreknowledge of such matters, nevertheless, I believe that I can find there to be a strong prima case of criminal or fraudulent contact in the obtaining of such information concerning Mr Al Alawi's accounts, and indeed in the light of [counsel for the claimant company's] approach to his submissions I think I can proceed for present purposes on the assumption that such conduct has occurred. In my judgment, such conduct constitutes crime, fraud or iniquity within the scope of the doctrine discussed above.

165. In this passage, Rix J is not holding that the claimant company's knowledge of, or involvement in, the iniquity is irrelevant. Indeed, if he were, that would be contrary to the judgment of the Court of Appeal in *Al Sadeq* that makes it clear that the relevant iniquity is that of the litigant itself. Rix J's point was that, since the claimant company had chosen not to put forward a case exonerating it of iniquity, he would proceed on the basis that the necessary prima facie case was established. I do not, therefore, agree with the Applicants that *Dubai Aluminium* supports their position that the Bourlakovas are guilty of *per se* iniquity in this case.

166. The Applicants also rely on the judgment of Stephen Houseman KC, sitting as a deputy judge of the High Court, in *Pliego and another v Astor Asset Management 3 Ltd and others* [2025] 4 WLR 130, 2025 EWHC 2968 (Comm) in support of their arguments on *per se* iniquity. In my judgment, that reliance is misplaced. I acknowledge that there are some statements in *Pliego* to the effect that it can be an abuse of process contrary to the interests of justice and public policy for a litigant to take unethical steps to obtain information from an adversary even if that information is not privileged (see [48(iii)] of the judgment, for example). However, *Pliego* was concerned with a situation where the litigant itself was closely involved in a "sting" operation that involved seeking to induce an opponent's solicitor to reveal confidential and possibly privileged information. Paragraph [25] of *Pliego* makes it clear that the claimants had themselves engaged in unethical behaviour with a view to obtaining an unfair litigation advantage. That is not a finding of *per se* iniquity and I do not, therefore, accept that *Pliego* sets out any principle to the effect that the Bourlakovas' actions in setting in train a process that was expected to obtain Confidential Information without the Applicants' consent was iniquitous *per se*.

167. I do not, therefore, consider that authority does establish a rule that it was *per se* iniquitous for the Bourlakovas to put in train a process that could be expected to result in the obtaining of Confidential Information without the Applicants' consent. Nor am I prepared to establish such a rule. The Applicants emphasise that they gave no consent to the Bourlakovas accessing their Confidential Information. However, I do not accept that this of itself makes the Bourlakovas' conduct iniquitous. As Mr Kitchener KC pointed out in his oral submissions there are many situations in which the Bourlakovas could, without any iniquity at all, access Confidential Information without consent: for example if they obtained it pursuant to a Russian court order to which the Applicants had objected.

168. There is a further reason not to establish the kind of rule for which the Applicants contend. As I have explained, the law will not protect confidentiality in documents that comment on, or reveal, iniquity. A claimant will very seldom be able to show the iniquity is present until trial and will need to obtain documentary evidence to succeed at trial in circumstances where, if the claimant's allegation is true, the defendant might be expected

not to volunteer information and indeed positively to hide it. The Applicants' formulation of the rule would risk having a chilling effect on the ability of claimants to obtain evidence in cases of suspected fraud. I accept the Applicants' point that claimants cannot be given free rein to pursue all manner of unlawful and underhand enquiries simply because they say they suspect fraud. However, the kind of *per se* iniquity for which the Applicants argue would be a disproportionate means of addressing that concern. In my judgment, the appropriate method of addressing the Applicants' concerns is to enquire more deeply into the Bourlakovas' actions, beliefs and motivations to establish whether iniquity on their part is established.

Per se iniquity – Privileged Communications

169. For similar reasons, I also reject the argument that it was iniquitous *per se* for the Bourlakovas to access the Applicants' privileged information without authority.

170. Indeed, I consider the premise of this asserted *per se* iniquity to be absent. The Bourlakovas did not seek to access the Applicants' privileged information themselves. On the contrary, they put in place a mechanism designed to ensure that they would not see such information. I have also rejected, in paragraph 108, the assertion that the Bourlakovas wanted CT Group to have access to Privileged Communications, even if the Bourlakovas and MDR themselves would not see those communications.

171. The Applicants suggest that, as soon as the Bourlakovas realised that CT Group had obtained some of their Privileged Communications, they became subject to an absolute duty to ensure that the Applicants were notified, the Privileged Communications returned and CT Group's engagement terminated. Since the Bourlakovas did not do that, they submit that *per se* iniquity was established from late 2023 when the Bourlakovas realised that CT Group had obtained Privileged Communications.

172. I do not accept that submission, based on an asserted absolute duty. I recognise that, in different circumstances, professionals who have themselves wrongly come into the possession of their opponents' privileged material have been criticised for not returning it immediately. The case of *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm), on which the Applicants rely, is an example. However, that does not establish the immutable and absolute duty for which the Applicants argue. Again, a more detailed enquiry as to Bourlakovas' actions, beliefs and motivations is needed.

"Motive-based" iniquity – Confidential Information

173. For want of any better expression, I use the expression "motive-based" iniquity to capture a detailed analysis of the Bourlakovas' beliefs and motives that I consider necessary.

174. I first apply the definition of "iniquity" that I have considered in paragraphs 21 to 26 above. Since I will not conclude that CT Group or the Bourlakovas were engaged in any criminal activities (see paragraphs 148 to 150 above), the first question is whether the Bourlakovas were themselves party to fraud or other equivalent underhand conduct which is a breach of a duty of good faith or contrary to public policy or the interests of justice (see paragraph 22 above). As I have explained, I agree with the Applicants that this does not require fraud or dishonesty on the part of the Bourlakovas.

175. I do not accept the Bourlakovas' argument that, because the Confidential Information they obtained was, on the face of matters, admissible evidence there could be no iniquity. I respectfully agree with the conclusion of Rix J to similar effect in *Dubai Aluminium*.

176. The Bourlakovas and MDR believed that CT Group's investigations were conducted lawfully (see paragraphs 123 and 133 above). If CT Group did engage in criminal acts to secure that information, neither the Bourlakovas nor MDR were aware of that or procured it. The Bourlakovas and MDR believed that Confidential Information was being provided by a whistleblower, rather than as a result of criminal activity. That belief was consistent with CT Group obtaining information without committing the tort of breach of confidence or misuse of private information (see paragraphs 139 and 157 above).

177. In my judgment, those beliefs demonstrate that the Bourlakovas were not acting iniquitously in instructing CT Group. Moreover, it was within the normal course of a solicitor/client relationship for the Bourlakovas to request MDR to instruct CT Group to obtain Confidential Information by lawful means.

<u>Motive-based iniquity – Privileged Communications</u>

178. Much of what I have said in the section above applies to Privileged Communications as well. It is, however, also necessary to examine the way in which MDR dealt with Privileged Communications.

179. I have concluded (see paragraphs 108 to 112 above) that the Bourlakovas did not actively solicit, seek, desire or authorise the obtaining of Privileged Communications for themselves or MDR. I have rejected the assertion that they were "privilege hunting" from the outset in relation to CT Group's investigations. I have concluded that they only became aware in August 2023 that CT Group were in fact obtaining Privileged Communications (see paragraph 71 above).

180. When they became aware that CT Group was obtaining Privileged Communications, the Bourlakovas instructed the Bourlakovas' Review Counsel to ensure that neither they nor MDR came into possession of Privileged Communications. There was a dispute in the witness evidence as to whether this was a "normal" method of dealing with the issue. Mr Pollack gave evidence that, having consulted with his colleagues who had worked at a variety of leading law firms, he was not aware of a single instance in which a litigant had considered it proper to instruct counsel to review privileged material of their opponent.

181. Mr Pollack is not, of course, tendering independent expert evidence on this matter, but I will have regard to that evidence. I do not consider, however, that it was iniquitous for the Bourlakovas to act as they did. Paragraph 25-22 of the 15th Edition of *Hollander on Documentary Evidence* suggests that, if a litigant comes into possession of apparently privileged material of their opponent, and wishes to ascertain whether the iniquity exception applies to that material, the "prudent course may be to instruct different lawyers to review the disputed material".

182. Perhaps the Applicants are right that they should have been told sooner that CT Group had come into possession of apparently privileged material. I express no view on that issue. However, MDR had defensible, if not unassailable, reasons for taking the course they did (see paragraph 111 above). They were not obviously obliged to terminate CT Group's engagement in August 2023. Even if the Applicants should have been told earlier

than they were about the position with Privileged Communications, I do not consider that to establish that, applying the kind of public policy considerations that are set out in *Eustice*, the case tips over into iniquity.

183. Overall, I do not consider that the CT Group Iniquity is engaged in relation to Privileged Communications.

Conclusion on the CT Group Iniquity

184. I do not consider that the CT Group Iniquity has been established.

The Covert Recordings Iniquity

185. I have made findings in paragraphs 47 to 54 above about Veronica's acts and state of mind in relation to the Covert Recordings because I was asked to do so. Her behaviour was underhand and, as I have found in paragraphs 52 and 53 above, was undertaken in the full knowledge that the covert devices were likely to record Privileged Communications and Confidential Information. The Bourlakovas have not invited me, in their list of factual findings, to determine that Veronica had any belief, whether reasonable or otherwise, that she was acting lawfully. (The Bourlakovas have explained that they did not request such a finding because their understanding of the case being made on the Covert Recordings Iniquity summarised in paragraph 151.ii) above made such a finding unnecessary since what mattered was whether covert recordings had been provided to CT Group not what Veronica had believed when making those recordings. I am not, therefore, finding that the Bourlakovas accept that Veronica knew, or suspected, that her actions were unlawful).

186. I have explained the precise nature of the Covert Recordings Iniquity that is alleged in paragraph 151.ii) above. Mr Scott KC also explained that the Covert Recordings Iniquity, if established, will enable the Kazakovs to obtain disclosure for the purposes of their counterclaim against the Bourlakovas that relates to the CT Group investigations conducted for the purposes of this litigation.

187. Given that I have found that the Covert Recordings were not provided to CT Group in connection with investigations that form the subject matter of this litigation (see paragraphs 56 and 57 above), I will not conclude that the Covert Recordings Iniquity is established. I do not, therefore, need to express a concluded view as to whether Veronica's placing of the covert recording devices was "iniquitous" and I will not do so. Instead I have limited myself to factual findings on Veronica's actions and beliefs on the basis of the evidence I was shown, and in the light of the findings I was asked to make.

The Review Counsel Iniquity

188. My conclusion in paragraphs 118 to 120 above means that LPP ostensibly attaches to communications between the Bourlakovas/MDR and the Bourlakovas' Review Counsel.

189. The purpose of instructing the Bourlakovas' Review Counsel was to ensure that neither the Bourlakovas nor MDR saw Privileged Communications of the Applicants. That was not an iniquitous purpose. I have rejected the allegation that the Bourlakovas wanted CT

Group to benefit from sight of Privileged Communications. The considerations explained in paragraphs 180 and 181 also point against the presence of iniquity.

190. It was within the ordinary course of a solicitor/client relationship for MDR to be asked to put in place a process that ensured that neither the Bourlakovas nor MDR saw the Applicants' Privileged Communications.

191. The Review Counsel Iniquity is not established.

The Marengo Iniquity

192. It is certainly unattractive to eavesdrop on a private, and potentially privileged, conversation in a public place. However, I am not satisfied that the Bourlakovas, MDR or Marengo were committing any criminal offence in connection with their eavesdropping on the Conversation.

193. Instructing Marengo to eavesdrop on the Conversation, when they knew that the Kazakovs' lawyer was party to it, reflects no credit on either the Bourlakovas or on MDR. However, I have rejected the Applicants' argument that Marengo were instructed as part of a process of "privilege hunting" (see paragraphs 113 to 117 above).

194. In *Eustice*, Schiemann LJ referred with approval to the judgment of Goff LJ in the case of *Gamlen Chemical Co. (U.K.) Ltd v Rochem Ltd*, (unreported) 7 December 1979 that iniquity involves conduct that is "not merely disreputable or a failure to maintain good ethical standards". I find the case to be towards the margin, but on balance do not consider the asserted Marengo Iniquity to move beyond that kind of conduct and into iniquity.

195. The Marengo Iniquity is not established.

Conclusion

196. None of the iniquities alleged has been established. I do not, therefore, propose to deal with other objections that the Bourlakovas raised to the Application, for example that (i) there is no pleaded counterclaim in relation to either the Covert Recordings Iniquity or the Marengo Iniquity and (ii) that Mr Anufriev should obtain no disclosure at all because he (unlike the Kazakovs) has not brought any counterclaim. I would invite the parties to agree an order giving effect to this judgment. If they cannot do so, there will need to be a further hearing on consequential matters.