EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2010/0006A & B, 0094A & B, 0097A & B, 0098A & B, 0099A & B, 0100A & B, 0101A & B, 0056-0059

IN THE MATTERS OF ELIZA LIMITED (IN LIQUIDATION), GLENALLA PROPERTIES LIMITED (IN LIQUIDATION), ROXINDA LIMITED (IN LIQUIDATION), THORSON INVESTMENTS LIMITED (IN LIQUIDATION), VIOLET CAPITAL GROUP LIMITED (IN LIQUIDATION), OSCATELLO INVESTMENTS LIMITED (IN LIQUIDATION), ALZAMA PROPERTIES LIMITED (IN LIQUIDATION), BRIGETTA INESTMENTS LIMITED (IN LIQUIDATION), TAZAMIA LIMITED (IN LIQUIDATION), SEACOURT LIMITED (IN LIQUIDATION), SAFINA LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF RULE 3.14(1)(d) OF THE CIVIL PROCEDURE RULES OF THE EASTERN CARIBBEAN SUPREME COURT 2000, (AS AMENDED)

BETWEEN:

MR. ROBERT TCHENGUIZ

Applicant

and

[1] MR MARK MCDONALD (IN HIS CAPACITY AS JOINT LIQUIDATORS)
[2] MR STEPHEN JOHN AKERS
[3] ELIZA LIMITED (IN LIQUIDATION)
[4] GLENALLA PROPERTIES LIMITED (IN LIQUIDATION)
[5] ROXINDA LIMITED (IN LIQUIDATION)
[6] THORSON INVESTMENTS LIMITED (IN LIQUIDATION)
[7] VIOLET CAPITAL GROUP LIMITED (IN LIQUIDATION)
[8] OSCATELLO INVES_TMENTS LIMITED (IN LIQUIDATION)
[9] ALZAMA PROPERTIES LIMITED (IN LIQUIDATION)
[10]BRIGETTA INESTMENTS LIMITED (IN LIQUIDATION)
[11]TAZAMIA LIMITED (IN LIQUIDATION)
[12]SEACOURT LIMITED (IN LIQUIDATION)
[13]SAFINA LIMITED (IN LIQUIDATION)
[14]VINCENT AZIZ TCHENGUIZ

[15]RAWLINSON. & HUNTER TRUSTEES S.A (IN ITS CAPACITY AS TRUSTEE OF THE TCHENGUI? FAMILY TRUST)
(16]WILLIAM PROCTER
[17]BPAR LIMITED
[18]EURO INVESTMENTS OVERSEAS INC
[19]ALTRACIA LIMITED
[20]BALVINO LIMITED
[21]BEAUCETTE INTERNATIONAL LIMITED
[22]BRIGADIER HOLDINGS LIMITED
(23]CHARLENA ENTERPRISES LIMITED
[24]CLEOBURY LIMITED
[25]DEGANO LIMITED
[26]FRANKELLA LIMITED
[27]GOLDEN MIST LIMITED
[28]GOLDWAY SERVICES LIMITED
[29]KALIO LIMITED
[30]OMATOLA INVESTMENTS LIMITED
(31]PIRATINE LIMITED
[32]PRAKARA LIMITED
(33]VALLEYMIST INVESTMENTS LIMITED

Respondents

Appearances:

Mr. Alain Choo- Choy QC, with him Mr. Stuart Cullen for the Applicant
Mr. Richard Wilson QC, with him Mr. Paul Griffiths for the 14th to 33rd Respondents
r. David Allison QC, with him Mr. Ben Mays for the 1st to 13th Respondents

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2018: February 8;
March 21.

JUDGMENT

[1] **CHIVERS, J. [AG]:** Mr. Robert Tchenguiz ("RT") is a iscretionary beneficiary of the Tchenguiz Family Trust ("TFT"). In other proceedings numbered BVIHC(COM) 2017/0026 he has sought an order that Rawlinson Hunter Trustees SA ("the Trustee") disclose to him certain documents ("the trust claim"). For the reasons given in my judgment in that case, I acceded to that application. This matter concerns a separate application brought by RT to

obtain a subset of the documents sought by him in the trust claim. The facts underlying this claim are as for the trust claim, and I do not repeat them here.

[2] Vincent Tchenguiz ("VT"}, the TFT and other related entities brought claims in the liquidations of 13 BVI companies under section 273 of the **Insolvency Act, 2003** ("the 273 Claims"). Those BVI companies have common joint liquidators, Mr. Mark McDonald and Mr. Stephen Akers. Mr. McDonald and Mr. Akers are also respondents to this application although they take a position of neutrality as to its merits. They appeared before me by Mr. Allison QC only to assist the Court and look after the interests of the insolvent estates.

[3] I mentioned in passing in the trust claim judgment that RT and RT related entities had brought proceedings in England consequent upon RT's arrest and the execution of search warrants by the SFO relating to the Oscatello and Pennyrock transactions. Those proceedings ("the English proceedings") are of somewhat greater moment in this application. The claimants in those proceedings seek very substantial damages against Grant Thornton UK LLP, Mr. Akers and others including four of the BVI companies which are respondents to this application. The proceedings have various heads of claim, including the torts of conspiracy by unlawful means and malicious prosecution. Needless to say, liability is vigorously disputed.

The Applications

[4] CPR 3.14 provides that:

> "On payment of the prescribed fee, any person is entitled, during office hours, to search for, inspect and take a copy of the following documents filed in the court office, namely:
>
> (a) a claim form;
> (b) a notice of appeal;
> (c) a judgment or order given or made in court; and

(d) with the leave of the court, which may be granted on an application made without notice, any other document."

The rule does not prevent parties from having access to such documents, but RT is not a party to the 273 Claims.

[5] This application was made under CPR 3.14(d) and the liquidators and 13 companies affected were joined as parties. The Trustee was also given notice and on its own application was, by consent, joined as an additional party along with the various TFT companies which had made the section 273 Claims. As will be apparent from the trust claim judgment, those companies are on the "VT onlt' side of the TFT.

[6] The relief sought by RT is an order that he be permitted to inspect and take copies of:

> "any documents ... filed by Ordinary Applications in the claims herein .on 19th April 2017 (the VT Claims) ... and in particular but not limited to permission to inspect and take a copy of:
>
> a. The ordinary applications dated 19th April 2017 in the VT Claims;
> b. Any draft order filed in the VT Claims;
> c. The affidavits of Rodney Hodges dated 13th April 2017 and of Vincent Tchen uiz dated 6th April 2017 and the exhibits thereto filed in the VT Claims."

The application also seeks inspection of documents filed in an application to limit access to the Court file in several of the VT Claims, or as I refer to them, the 273 Claims, but that application did not appear to be moved before me. Argument was limited to the 273 Claims files themselves.

[7] The 3.14 application was issued on 26th October 2017, just prior to the settlement between VT, the TFT and related parties and Kaupthing which led to the withdrawal of the 273 Claims. To that extent the ground relied upon in

the body of the application that RT was interested as a co-claimant in the liquidations of the BVI companies has fallen away. That left the following grounds advanced in the application:

(1) To the extent that the filed affidavits contain imputations as to RT's conduct he is a person interested in knowing what has been said, so that he can take steps to defend the allegations;

(2) RT is interested as a beneficiary of the TFT with a prima facie right to disclosure of claims brought by the TFT, to hold the Trustee to account.

(3) RT is a member of the public with a right to take copies of (so far as is relevant) claim forms.

[8] The third ground raises some questions as to the interpretation of the Insolvency Rules and prescribed forms, and it is necessary to understand how the section 273 Claims were lodged.

The 273 Claims

[9] From my enquiries of counsel for the liquidators and TFT parties (Mr. Wilson QC) it appeared that the documents filed in each 273 Claim were in materially identical form.[1] Having searched the file as he was entitled to do, RT has on payment of the prescribed fee obtained a copy of an originating application in the liquidations of 4 companies, one of which was Brigetta Investments Limited, the 10th Respondent.

[10] The Btigetta claim is not brought under the CPR. Section 273 is an Insolvency Act provision subject to the **Jnsolvency Rules, 2005.** Insolvency rule 4 provides that:

[1] Save for some documents filed for CMCs in some, but not all, of the applications.

(1) Subject to paragraph (2)[2], except so far as inconsistent with the Act or the Rules or a practice direction issued under Rule 8, the CPR, practice directions issued under CPR Part 4 and practice guidance issued under CPR 4.6 apply to insolvency proceedings, with any necessary modifications.

Insolvency Rule 13 provides:

Types of application.

(1) An application to the Court which is not an application made in insolvency proceedings already before the Court shall be made as an "originating application".

(2) An application to the Court made in insolvency proceedings already before the Court shall be made by way of an "ordinary application".

(3) For the purposes of applying the CPR, an application made in insolvency proceedings, whether originating or ordinary, shall be regarded as a fixed date claim.

Insolvency Rule 14 provides:

Form and content of application.

(1) An application, whether originating or ordinary, shall be in writing and in the prescribed form, with such modifications as are appropriate.

(2) In particular, an application shall state:

(a) the name of the applicant and the names of any espondents;

[2] not relevant for these purposes.

(b) the nature of the relief or the order applied for or the directions sought from the Court;

(c) the names and addresses of the persons, if any, on whom it is intended to serve the application or that no person is intended to be served;

(d) where the Actor the rules require that notice of the application is to be given to specified persons, the names and addresses of those persons so far as known to the applicant;

(e) the applicant's name and his address for service within the Virgin Islands; and

(n the applicant's contact details.

(3)

(4) An originating application shall set out the grounds on which the applicant claims to be entitled to the relief or order sought.

(5)

·(6) An application may; and .where the Rules so ·provide shall, be supported by an affidavit.

Form R14A is the prescribed form for an originating application. It reads so far as relevant, taking the marginal notes into the text where indicated:

I/We

[on behalf of applicant] intend to apply for an order under Section (dl *[insert details of order]* of the Insolvency Act 2003 that{dJ *[insert details. of order]*

.A draft of the order sought is attached.

The grounds upon which I/ we seek the order are (set out in an affidavit attached] [as follows] [*delete as applicable*].

[11] The 273 Claim for Brigetta was an originating application. So far as relevant Form R14Awas filled out as follows:

"The Applicants intend to apply for an order and directions under s 273 of the Insolvency Act 2003 that:

(1). The decision of the [liquidators] made on 16 January 2017 to reject the claims of the applicants, as unsecured creditors, made in the liquidation of the Company be set aside.

(2) The [liquidators] admit the applicants claims in an amount to be assessed by the court upon enquiry....

The costs and expenses of and in relation to this application be costs in the liquidation.

A draft of the order sought is attached.

The grounds upon which the Applicants seek the order are set out in the affidavits of Mr Vincent Tchenguiz dated 6 April 2017 and Mr Rodney Hodges dated 13 April 2017."

[12] As is clear, the applicants chose to take the option which, on the face of Form R14A entitled them to set out the grounds of the application in affidavits (which the form requires to be attached to the form) rather than in the form itself.

[13] RuleA4(4) requires an originating application to "set out the grounds" on which the application is made. No such requirement is made for an ordinary application. Yet both Form R14A and R14B (the prescribed form for an ordinary application) appear on their face to give the applicant the option of setting out the grounds in the application itself, or setting them out in an affidavit to be attached to the application.

[14] There is no necessary conflict between rule 14(4) and Form 14A because it is possible in every case to comply both with the rule and with the prescribed

form made under the rule. An applicant can comply with both rule and form by setting out the grounds in the form. Setting out the grounds in an attached affidavit is compliant with the form, but not the ule.

[15] It might be said that rule 14(4) can be read together with the terms of the "prescribed form" to mean that the grounds are set out in the form when they are said to be contained in an affidavit which is attached. But Form 148, the prescribed form for an ordinary application, contains exactly the same language. Yet rule 14(4) does not apply to an ordinary application. In other words:

(i) An ordinary application must by the terms of Form 148 have the grounds set out on the face of the form or in an attached affidavit.

(ii) An originating application must by the terms of Forr:n 14A have the grounds set out on the face of the form or in an attached affidavit.

(iii) But only an originating application must, by the terms of rule 14(4) set out the grounds of the application.

[16] This is not an application for sanction for failure to comply with Rule 14(4) and for the reasons given below I do not think the answer is necessarily material to my decision. But Mr Choo-Choy QC for RT argued that the public right to inspect the claim form under CPR 3.14(a) extended to filed documents which contain information that should have appeared on the face of the claim form, or which if it did not so appear was attached to the claim form. In other words he did not need an order under CPR 3.14(d), he merely needed a judgment from me, to take to the registry, confirming that he could see the affidavits attached to the claim form as of right.

[17] In my view the claim form which may be inspected under CPR 3.14 is the document itself which is, in the case of an insolvency application Form 14A or Form 148. If there are errors or omissions in the document that does not extend a right of inspection to documents necessary to correct those errors or

omissions. Such a doctrine cguld not work in practice. The right of inspection is effected administratively through the Registry on,payment of-a fee. It is not possible for the Registry to conduct a qualitative exerci e of the sort that would be required if Mr Choo Choy were right.

[18] Nor do I think that documents attached to the claim form are part of the claim form. The right under CPR 3.14(a) to inspect the claim form cannot have been intended to extend to attached documents; In the first place the claim form is a prescribed form. Attachments are not "the form". In the second the argument fails as a matter of language. Attachment is not the same as incorporation. And in the third, there is a general policy consideration inherent in CPR 3.14 which draws a distinction between an application and its grounds on the one hand, and evidence which has been filed on the other.

[19] This distinction appears from the English case of **Dobson v Hastings.**[3] That case was also one in which the court held that the relevant insolvency rules applied the civil procedure rules as regards the inspection of documents pn the court file. The relevant rules of court provided that any person on payment of the prescribed fee was entitl_ed to inspect a copy of any originating process and, with the leave of the court, any other document. Sir Donald Nicholls *V-C* said (at 402B-C):

> "The scheme of the rules is that, by being filed, documents do not become available for inspection or copying save to the extent.that access to specified documents or classes of documents is granted either generally under the rules or by leave of the court in a particular case.
>
> The purpose underlying this restriction presumably is that if and when affidavits and other documents are used in open court, their contents will become generally available, but until then the filing of documents in court, as required by the court rules for the purposes of litigation, shall not of itself render generally available what otherwise

[3] [1992] Ch 394

would not be. Many documents filed in court never see the light of day in open court. For example, when proceedings are disposed of by agreement before trial. In that event, speaking generally, the parties are permitted to keep from the public gaze documents such as affidavits produced in preparation for a hearing which did not take place. Likewise with affidavits produced for interlocutory applications which are disposed of in chambers. Again, there are certain, very limited, classes of proceedings, such as those relating to minors, which are normally not heard in open court. Much of the object sought to be achieved by a hearing in camera in these cases would be at serious risk of prejudice if full affidavits were openly available once filed.

In all cases, however, the court retains an overriding discretion to permit a person t inspect if he has good reason for doing so."

[20] Accordingly I am satisfied that documents attached to a claim form are not part of the claim form for the purpose of inspection under CPR 3.14(a). In any case it is not necessary to construe CPR 3.14 in that manner. The court's power to give- permission under CPR 3.14(d) is broad enough to cover cases where there has been no compliance with the rules as well as cases where there has been full or even partial compliance.

[21] The relevance ofthe discussion above is to the question of the threshold which will trigger an order under CPR 3.14(d). If a claim form fails to include information to which a non-party is (on the face of the rules) entitled, then it will be relatively easy for a non-party to persuade the court that documents which do contain such information should be inspected. Mr. Choo-Choy would say, I think, that in such a case the position is one of absolute entitlement, so the Court would always make the order. For my part I can see that the non-party would be in a strong position to ask for the information, but the court still has a discretion to exercise.

Applications under CPR 3.14(d)

[22] As set out above, in **Dobson v Hastings** the Vice Chancellor said that the court retains an overriding discretion to permit a person to inspect if he has *good reason* for doing so. That is a broad test. In **Dian AO v Davis Frankel** & **Mead**[4] the court considered a different formulation of the rule (UK CPR 5.5(2)) as follows

> "[a non-party] may ... if the court gives permission, obtain from the records of the court a copy of any other document filed by a party...."

A practice direction accompanied. the rule and provided that the application notice under UK CPR 5.5(2):

> "must identify the document or class of document in respect of which permission is sought..."

Moore-Bick J took the view at [32] that, even without the practice direction:

> "the documents which the applicant wishes to be allowed to look for must be identified with reasonable precision. The rule clearly does not contemplate permission to *inspect* the file as a whole."

I note that the language of CPR 3.14 ("any other document") is sufficiently similar for the same conclusion to be drawn. There is no provision for a general permission to inspect and copy the whole file. In this context Mr. Choo-Choy accepted the criticism made by Mr. Wilson QC, for the, TFT / Respondents, that RT's application was drawn too widely.

[23] Moore-Bick J added little to the *good reason* test of the Vice-Chancellor when he said at [55] that the court's discretion is to be exercised "after taking into account all the circumstances of a case". But he did distinguish between documents which had been deployed in the judicial process, as opposed to documents which were simply on the file awaiting such deployment (or which

[4] [2005] 1 WLR 2951

had never been deployed and, presumably, never would). In respect of the latter he said at [57]:

> "I do not think the court should be willing to give access to documents of this kind as a routine matter, but should only do so if there are strong grounds for thinking that it is necessary in the interests of justice to do so".[5]

[24] That is a high threshold. Moore-Bick J was having regard to the principle of open justice which did not require access by non-parties to material which had never been determinative of any issue before the court, but was simply filed "for administrative reasons" in anticipation of such determination. For convenience in this judgment I shall call the policy which calls for that high threshold the "non-disclosure policy".

[25] The judgment of Moore-Bick J was considered in this jurisdiction by Joseph-Olivetti J in **Alfa Telecom Turkey limited v Cukurova Finance International Limited.**[6] Joseph-Olivetti J considered at [19] that CPR 3.14 had to be construed first in the light of CPR 1.2 to give effect to CPR 1.1. I agree as a matter of principle, but in the current circumstances of seeking inspection of documents from a "dead" action those considerations are not straightforward. Ultimately at [29] Joseph-Olivetti J considered that the applicant had to show

> "a good or legitimate reason for inspecting the file and this must include being able to identify the document or classes of documents in which he or she is interested."

The grounds of RT's application

[26] Mr. Choo-Choy limited his application to the specific documents mentioned in RT's application form, that is to say the ordinary applications dated 19th April

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[5] Followed by Lewison J in ABC Ltd v Y [2010] EWHC 3176 (Ch} and Floyd J in Pfizer Health AB v Schwarz Pharma Ltd [2010] EWHC 3236 (Pat}.
[6] BVIHCV 2007/0072 and BVIHCV 2007/0073, (delivered 12th July 2007)

2017 in the VT Claims; any draft orde'r filed in the VT Claims and the affidavits of Rodney Hodges dated 13th April 2017 and of Vincent Tchenguiz-dated 6th April 2017 and the exhibits thereto filed in the VT Claims.

[27] So far as the first is concerned, I do not think there is any eed to see the "ordinary applications" dated 29th April. RT has seen four of the originating applications filed on that date and it is not suggested that he will learn anything from further applications in materially identical form.

[28] Nor is it clear to me what purpose RT has in obtaining the draft orders lodged with the originating applications. The applications themselves set out the relief sought and Mr. Choo-Choy did not explain why the draft orders would be of any use to RT.

[29] The real fight is over the affidavits of RH and VT which are referenced in the originating applications as containing the grounds but which RT has not seen on his inspection of the Brigetta file. As to these, RT says that he has a legitimate reason for seeing them for the three reasons set out in the claim form. I shall take each in turn.

To the extent that the filed affidavits contain imputations as to RT's conduct he is a person interested in knowing what has been said, so that he can take steps to defend the allegations.

[30] RT was not ever a party to the 273 Claims and no person has actually brought proceedings against him based upon the imputations he is concerned about. So "defending the allegations" is a somewhat abstract notion. RT has not identified any forum in which he can defend the allegations. Indeed, since the allegations have been made·privately (the very substance of RT's complaint is that he cannot see the details of them) there is no person to whom he has any particular need to justify himself. This may change if he is cross examined about the allegations in the English proceedings and I consider that possibility further below.

[31] That said, it seems to me that in general a person who is traduced in evidence filed in proceedings to which they are not a party does have a *good reason* or *legitimate interest* in seeing what has been said about them for at least the following reasons:

(i) The details of the allegations may be repeated to some other person, whether in the context of legal proceedings or otherwise (and in this case not necessarily by the Trustee, but by VT or some VT entity who appears to be the sourc of the allegations);

(ii) The details of the allegations may be discovered by some other person who makes application in the proceedings either now or at some unspecified time in the future. (in this case it was not clear for example whether Kaupthing was aware of the material or not, and Kaupthing was defending itself against claims by RT covering the same subject matter);

(iii) The details of the allegations will be known to the other parties to the litigation. So in this case the details are known to the liquidators and the BVI companies that are defending themselves against RT in the English proceedings.

(iv) The fact of a statement of truth, or oath, means that the allegations are not some transient statement to which no weight can be given. The record will show that some person was sufficiently satisfied as to the truth of the allegations to swear to their veracity.

[32] Whether these considerations make it "necessary in the interests of justice" for RT to see evidential material which has not been deployed in judicial determination will be addressed below.

RT is interested as a beneficiary of the TFT with a prima facie right to disclosur of claims brought by the TT, to hold the Trustee to acc!)unt.

[33] The potential use of documents to assist in holding a trustee to account would clearly give a good reason, or legitimate interest in a beneficiary seeking to inspect those documents on the court file. The fact that the claim had been brought by the trustee is not relevant in this context. If proceedings between two wholly unconnected persons had thrown up information which might potentially cause a beneficiary to doubt the stewardship of a trust, then that might well be a good reason, or give a legitimate interest, for disclosure of that material to the beneficiary.

[34] Mr. Wilson argued that if I were to find in the trustee action that RT was not entitled to the documentation then RT could not rely upon the same attempted justification in this application. I am not sure that follows as a matter of law, because the tests are different. But if I had found that RT was not entitled to the documents as against the TFT for the purpose of holding the Trustee to account, it would be difficult to see why I should consider that it was *necessary in the interests of justice* for RT to have the documents for the purpose of holding the·Trustee to account.

[35) In fact I have found that RT is entitled (in the exercise of my discretion) to the documents as against the Trustee in the trust action. Necessarily it seems to me that he would be a person with a legitimate interest in obtaining those documents for the purpose of CPR 3.14 for the purpose of holding the Trustee to account. Again, I address the *necessary in the interests of justice* question below.

RT is a member of the public with a right to take copies of (so far as is relevant) claims forms

[36) It is this ground which raises starkly the effect of Rule 14(4) and the requirement for grounds to be stated in the originating application. Can it be said that Rule 14(4) provides that a member of the public has the right to know

(on payment of the prescribed fee) the grounds of an originating application? In my view, yes. The distinction drawn in the authorities above between those documents which a non-party is entitled to see by operation of the rules, and those which the non-party is entitled to see as a matter of discretion, cannot be limited to the paper which bears the name "claim form" or, in this case "originating application". The policy behind the distinction set out in **Dobson v Hastings** was expressed in negative terms as regards the availability of material which might or might not "see the light of day". But the positive corollary is that - as a matter of policy - the claim form is already in daylight and can be inspected.

[37] I shall call this policy in respect of the claim form the "open justice policy" but that is only for convenience of identification in this judgment. The open justice policy must necessarily extend to those parts of the claim form which are mandatory. A litigant cannot avoid filling in a claim form in accordance with the rules because it wishes to keep the content from the public eye. Applications can, and often are, made to this Court for an order that the file be sealed so that even the claim form is hidden from public scrutiny. Butthere must be good reason to make such an order and it is not open to a party to decide for itself that it will not include material which it would rather keep from public scrutiny.

[38] So there can be no policy ground *not* to allow a non-party to see the grounds of a claim. Does the policy of open justice reflected in CPR 3.14(a) expressly require a non-party to see the grounds of the claim? Where the grounds of claim are required to be set out in the claim form itself it seem to me that the answer must be yes.

[39] Does it make any difference that the prescribed form gives a party the choice to set out the grounds in the form itself or in an attached affidavit? Where the Rule provides for the grounds to be set out in the form, the *policy* must be that the grounds are open to inspection by a non-party. Any *permission* in the form for the grounds to be included in an affidavit attached cannot impact upon that policy. A person inspecting the file under CPR 3.14(a) is entitled to see a

document which sets out the relief sought. In my opinion they are also prima facie entitled to see the grounds upon which that relief is sought.

[40] Put another way, a litigant who is bound to set out the grounds of its application in a claim form cannot prevent a non-party inspecting the document which *actually* sets out the grounds. The grounds of a claim are not the evidence by which the claim will be proved. Going back to the distinction drawn in **Dobson v Hasting,** it is that evidence which may or may not be deployed in a judicial determination. The *grounds* have been "deployed" upon filing the claim form because that is a mandatory part of filing the claim form.

[41] Accordingly the choice which a litigant filing Form 14A has is either:

(i) To file a claim form which sets out the grounds on its face so as to limit the right of inspection to the claim form only. That claim may be supported by an affidavit which is not easily vulnerable to inspection; or

(ii) To file a claim form which says that the grounds are included in an affidavit attached. This makes the affidavit vulnerable to an application for inspection and separately runs the risk of non-compliance with Rule 14(4)).

In this case the Trustee chose route b.

[42] But there is a further basis upon which the court may proceed. The distinction between the grounds of the application and the evidence in support of the application is a real one. The policy considerations which led Moore-Bick J to consider that un-deployed evidence should not be open to public scrutiny unless it was necessary in the interests of justice simply do not apply to the *grounds* of the application.

[43] This is apparent from the operation of CPR 3.14 in ordinary (i.e. non-insolvency) proceedings, where the claim form requires the grounds to be stated on its face and where putting the grounds in affidavit evidence is

contrary to the rules.[7] The scheme of the CPR is that the grounds of an application are something to which the non-party has, on payment of the fee, an absolute right to see. Does it make any difference that this application is in respect of the Insolvency Rules, where (on this basis) the party has the right to put the grounds on the face of the form or in the evidence in support?

[44] Mr. Wilson suggested that there might be a distinction, because proofs of debt may be something which should be kept private. He did not advance an explanation of why, in particular, proofs of debt should attract privacy once they are sought to be justified by legal proceedings. Section 273 Claims in respect of proofs of debt are just one example of applications which may be made under that section. And in any case issues of true confidentiality can be dealt with in insolvency proceedings just as in ordinary civil proceedings by asking the court to make specific provision to protect documents from the scrutiny allowed under CPR 3.14(a).

[45] Further, as appears from the face of Forms 14A and 148 the grounds of the application remain something which is integral to the form itself - this is not a section of the form which can be ignored. Even if the litigant has a genuine choice whether to put the grounds on the face of the form or in an affidavit attached to it, that cannot give the *litigant* the right to decide whether, in that particular case, the open justice policy considerations favouring disclosure are outweighed by the need for secrecy.

[46] Accordingly regardless of whether the application is originating (so as to attract the provision of 14(4)) or ordinary, the distinction between the grounds of an application and the evidence in support of an application is one which leads me to the following conclusions:

(i) Non-parties are entitled to see the grounds of an application when they are stated on the face of the application.

[7] And an abuse of process - BEACH PROPERTIES BARBUDA LIMITED v LAURUS MASTER FUND LTD ANTIGUA AND BARBUDA, COURT OF APPEAL CIVIL APPEAL NO.2 OF 2007

(ii) The entitlement (if it be one) in the Insolvency Rules Forms 14A and 14B to include the grounds in an attached affidavit does not affectthe open justice policy identified at point (i).

(iii) Any applicant under 3.14(d) has to show a good reason or legitimate interest to inspect a document.

(iv) This is the case even if it is apparent from the face of the claim form that there has been a failure to fill in the form in accordance with the rules.

{v) Where there has been a failure then a non-party will have a low burden to persuade the court that they have a good reason to see "a document that would set rightthat failure.

(vi) Where the document consists of evidence that has not been deployed in the judicial process an applicant will - on non-disclosure policy grounds - have to show that inspection is necessary in the interests of justice.

(vii) This is over and above the requirement to show a good reason or legitimate interest, but that may be another way of saying that the good reason or legitimate interest has to be such as to outweigh the non-disclosure policy.

(viii) However, the policy denying general access to non-deployed evidence is substantially weakened when:

(i) That evidence contains the grounds of the application; and

(ii) The rules (or relevant form) gave the litigant the option to separate out the grounds ffom the evidence, so as to protect the evidence from the open justice policy, and take advantage ofthe non-disclosure policy.

(ix) It follows that a litigant cannot rely upon their choice of including the grounds in an affidavit as a reason for the court to deny a non-party access to a document, but

(x) The litigant may be able to demonstrate to the court that the evidential material is such that the open justice policy ought in that particular case to give way, or (if practicable) that the document should only be disclosed subject to suitable redactions or upon the provision of undertakings.

[47] In this case Mr. Wilson did not suggest that the evidence was of such a nature as to require the open justice policy to give way. What he did argue was, that the non-disclosure policy was important because the court had an interest in encouraging settlement of disputes, and the policy supported a process whereby the parties could settle proceedings without having to be concerned that evidence filed in those proceedings (but not deployed) would not become generally available.

[48] I agree. There is no doubt in my mind that this is one of the considerations which does underlie the non-disclosure policy. But as stated above the TFT parties had (at best) a choice whether to set the grounds out in Form 14A or to include them in the affidavit. By choosing the latter course they opened the affidavits up to an application on the basis of the lower threshold identified above.

[49] If the grounds were themselves sensitive then the TFT parties could have applied to the court for an order that the files be sealed. Some form of application was indeed made to the court in respect of a number of the files of the BVI companies. For reasons which are not clear to me the effect of the application (without any court order being made) was to prevent RT from inspecting all but four of those files. In the events that have happened nothing turns upon that, but Mr. Wilson's opposition to this application was based upon

the ordinary principles applicable to applications under 3.14(d), not upon any shadow application for the file to be sealed.

[50] I should mention a further point raised by Mr. Wilson. CPR 29 governs the making and use of witness statements. CPR 29.12 provides that:

(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that the -

a. court gives permission for some other use of it;

b. witness gives consent in writing to some other use of it; or

c. witness statement has been put in evidence.

Relying upon a comment of Joseph-Olivetti J at paragraph 21 of **Alfa,** Mr. Wilson said .that the same rule would apply to affidavits. With respect to Joseph-Olivetti J (if that is what she.meant) I disagree. CPR 30 governs the making and use of affidavits and there is no such restriction. That is because an affidavit is a sworn document and stands alone as evidence given by the deponent. A witness statement is a lesser document. It is, by CPR 29.4 "a statement of the evidence of any witness upon which the ...party intends to rely in relation to any issue of fact to be decided at the trial".

[51] A witness statement is not sworn testimony, but a statement of the testimony which the witness intends to give. CPR 29.2 provides the general rule for proving facts:

(1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at -

a. Tri.al - by their oral evidence given in public; and

b. Any other hearing - by affidavit.

The fact that a judge may (and often will) direct that a witness statement shall. stand as evidence in chief makes no difference to the principle, and even then

the witness statement does not stand as evidence until it has been sworn to by the deponent in the witness box.

[52] Accordingly I cannot agree that CPR 29.2 is a consideration in this case. The general rule as regards affidavits on the file which have not yet been deployed is that they will not be subject to inspection. But there is no further consideration arising by analogy with CPR 29.2 that they cannot be used for any other purpose than the litigation itself. In the exercise of its discretion under CPR 3.14(d) the Court has jurisdiction to limit the use to which a non.l party might make of any documents inspected in accordance with its order. Were inspection to be sought of a witness statement a condition equivalent to CPR 29.2 might be in order; or it may be appropriate to deny inspection of the witness statement altogether. But in the case of an affidavit the general discretion is sufficient without regard to CPR 29.2.

The Applicable Test 1 Good Reason and Legitimate Interest

[53] For the reasons given above the higher threshold of "necessity in the interests of justice" which is applicable to disclosure of evidence which has not been deployed in a judicial determination does not apply to an application intended to discover the grounds upon which an originating application has been made.

[54] For that purpose the basic threshold applies - namely that the applicant has a good reason, or legitimate interest to see the document setting out the grounds. An application might properly be made by any non-party who would, upon payment of the fee, have a legitimate interest to see the grounds because of the open justice policy referred to above.

[55] In this case Rrs position is not just as member of the public. In my opinion his interest in gathering information ab6ut the content of serious allegations of wrongdoing made against him and relating to matters in respect of which he is involved in ongoing litigation give him both a good reason and a legitimate

interest to see the grounds, regardless of whether a "mere" member of the public would be so interested.

[56] Because the grounds are contained in affidavits, RT has a good reason and a legitimate interest in inspecting those affidavits. That is not outweighed by any non-disclosure policy in circumstances where either:

(i) the TFT parties were obliged by Rule 14(4) to set out the grounds in the application form, and failed to do so; or

(ii)' the TFT parties were entitled to choose to follow the alternative given by Form 14A, but in failing to separate the grounds from the evidence substantially weakened the non-disclosure policy consideration in relation to that evidence; and in any event

(iii) The TFT parties have failed to identi.fy (beyond the bare policy consideration) why the non-disclosure policy should be given any particular weight on the facts of the case.

The Applicable Test 2- Necessary in the interests of justice

[57] I shall also consider this application from the perspective of an applicant who seeks the affidavits regardless of whether or not the grounds have been set out in the body of the originating application. Does RT satisfy the higher threshold test, namely that it is necessary in the interests of justice for him to have disclosure of material which has not been deployed in any judicial determination? How, in the Circumstances of this case is the test applicable?

(58] This test can only be applied by weighing the applicant's good reason or legitimate interest for inspection against the non-disclosure policy to which the documents are generally subject. Mr Choo-Choy's submission at its highest was that RT was a claimant in the English proceedings where the defence

wo,uld turn on the apparent propriety of his actions in relation to the very transactions in respect of which he appeared to be criticised in the 273 Claims. Although the defendants had not pleaded that conduct by way of defence, RT might be cross examined in respect of allegations made against him by his own brother.

[59] I see the force in that. RT has a legitimate reason to know what might be put to him in the English proceedings. If the defendants to those proceedings know something that RT. does not know then they are -potentially at least - at a forensic advantage over him: Does this interest outweigh the non-d.isclosure policy in relation to material which has been filed but not deployed?

[60] In light of my judgment in the trust proceedings it cannot be said that it is necessary in the interests of justice for an 9rder to be made under CPR 3.14(d) because RT will obtain the affidavits in any event. But treating this application a a stand-alone attempt by RT to obtain the documents would that be necessary in the interests of justice? I th k the answer to this turns upon the English proceedings.

[61] I have considered ,whether it is necessary for RT to have the affidavits because he is in litigation with the liquidators and BVI companies which have the material themselves, and might therefore have some unfair advantage over him in the English proceedings to which they are all parties. After all, the information might be used by the liquidators in cross examination as to credit. Whether RT would be unfairly prejudiced by this material being sprung on him in the witness box would be a matter for the trial judge. Indeed the liquidator (or any other party) might have difficulty deploying the material effectively for any purpose in circumstances where they hav refused to deliver it in advance. I can see that this gives RT both a good reason and a legitimate interest in seeing the material, but I cannot say that it amounts to an injustice for him not to have it. .

[62] I have also considered whether the wish to have this material to hold the Trustee to account makes it necessary in the interests of justice to make an

order. But as intimated above, if this is the applicable test it must run far stronger in the trust action. So inspection is either not *necessary* because it will be available in the trust action, or it is not *in the interests of justice* because if that were the case, the trust action would succeed. In light of my judgment in the trust action inspection here is not necessary.

[63] Accordingly I do not think that RT can show that it is necessary in the interests of justice for him to obtain the affidavits. That is a very high test. I do not think as a general proposition it is unjust that parties should be able to deploy evidence in anticipation of a hearing without that evidence being subject to subsequent scrutiny by persons identified within it. or is it unjust for the evidence to be withheld simply because such persons claim that it shows them in a bad, or even very bad, light.

Conclusion

[64] I have to exercise a broad discretion under CPR 3.14(d). There is some first instance authority both in England and in this jurisdiction which I have set out above and which (in the. case of **Alfa)** I should follow unless I consider it to be wrong. I do not consider it to be wrong.

[65] For the reasons given above I consider that R.T has a good reason and a legitimate interest (if different) in seeking inspection of the affidavits referred to on the face of the originating applications in the 273 Claims.

[66] To the extent that the affidavits amount to evidence which has not been deployed in judicial decision making I consider that the test of "necessary in the interests of justice" gives way to the open justice policy as regards the *grounds* of the 273 Claims. This is particularly the case where the TFT parties could have avoided that consequence, had they so wished, by separating out the grounds from the evidence at the time of filing.

[67] Because the documents sought are sworn affidavits I do not consider it necessary as a matter of-principle to make an order subject to any undertaking limiting the use that may be made of them. There is no evidence that inspection by RT will cause harm to any of the litigants in the 273 Claims or to the makers of the affidavits.

J

[68] I am conscious that in the trustee claim I have determined that RT should be limited in his use of the material disclosed. But that is because the disclosure in that application arose under a particular jurisdiction which, in my view, made it appropriate to accept RT's undertaking. Because I consider this application should succeed in large part because of the open justice policy incorporated in CPR 3.14(a) there is no justification to limit the use which a non-party may make of inspection of the grounds of an application. It was not suggested at the hearing that it was eithe.r practicable or desirable to attempt to divide the affidavit evidence into "grounds" which would not be subject to any restriction, and "other evidence" which would. "

[69] I shall therefore make an order under CPR 3.14(a) giving, RT liberty to inspect the affidavits of Mr. Vincent Tchenguiz dated 6 April 2017 and Mr. Rodney Hodges dated 13 April 2017.

David Chivers, Q.C.
High Court Judge

By the Court