IN THE EASTERN CARIBBEAN SUPREME COURT

THE TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 118 of 2017

BETWEEN:

[1] TETIANA IEREMEIEVA
[2] ROMAN YEREMEIEV

Claimants/Applicants

and

[1] ESTERA CORPORATE SERVICES (BVI) LIMITED
[2] SERGII LAGUR
[3] STEPAN IVAKHIV
[4] SOFIIA YEREMEIEVA (a minor)

Defendants/Respondents

and

[5] PAUL PRETLOVE (as Receiver over the Receivership Trust Assets)

Respondent

Appearances:

Mr Timothy Collingwood, with him Mr Matthew Brown and Dr Alecia Johns of Conyers Dill & Pearman for the Applicants/Claimants
Mr David Mumford QC, with him Mr David Welford and Ms Akesha Adonis of Maples and Calder for the Second and Third Defendants
Ms Claire Goldstein and Mr Mark Rowlands of Harneys for the First Defendant
Mr Robert Nader of Forbes Hare for the Fourth Defendant
Mr Grant Carroll and Mr Oliver Green of Ogier for the Receiver

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2019: February 13
2019: April 4

JUDGMENT

Court appointed Receiver over Trust Assets – nature of this unusual Receivership – disclosure of documents obtained by Receiver from one party to another party – applicability of principles of natural justice – upholding of confidentiality – relevance of documents provided under compulsion – the test for sealing of the Court file

[1] GREEN J. [Ag.]: This is an application by the Claimants for the provision to them of unredacted copies of certain documents that have been filed with the Court by an interim receiver appointed by the Court on 19 July 2017 ("the Receiver"). The Claimants are also applying for the unsealing of the Court file in relation to an application made by the Receiver. The application is opposed by the Second and Third Defendants ("D2&3") who are the persons against whom the Receiver brought his application on 20 August 2018 ("**Receiver's August** Application") and who claim that the redacted passages include confidential information that was provided by them to the Receiver under compulsion.

[2] The application raises a number of important and seemingly unresolved questions as to the nature of a court appointed receiver over trust assets (a very rare event) and the rights of a party to the litigation to have access to documents obtained by the receiver from another party under some compulsion in order to carry out his designated functions.

[3] More specifically the Claimants are seeking unredacted copies of the following:

(1) The Receiver's Interim Report to the Court dated 30 April 2018 ("First Interim Report");

(2) The documents filed in support of the Receiver's August Application, namely (i) the Receiver's affidavits dated 20 and 29 August 2018; (ii) the Notice of Application and draft Order.

Even though the seal on the Court File for these proceedings has now been lifted by consent (as embodied in the Order of Adderley J dated 19 December 2018), the seal remains on the Receiver's August Application and the Claimants are asking for that to be removed.

[4] In addition, the Claimants are seeking an order that the Receiver should not be entitled to refuse to provide to the Claimants any document or information or to redact any document or information on certain specified grounds. This was not pressed at the hearing by Mr Collingwood for the Claimants and I think he was right not to. This Court would be most unlikely to fetter in advance the exercise of the Receiver's discretion in relation to such a sensitive exercise.

[5] The day before the hearing, the Receiver served and filed his Second Interim Report dated 12 February 2019 ("Second Interim Report"). This was rather curious timing and I am not sure why it was served then. A redacted version was served on the Claimants and, although they had very little time to digest the Report, Mr Collingwood took me through a number of passages that he relied upon in support of the Claimants' application. There appeared to be some inconsistencies between what was stated in the Second Interim Report and the Receiver's affidavit and skeleton argument on this application. I will address those matters later in this judgment.

Factual Background

[6] The claim concerns the control and breaches of duty in relation to the assets of Igor Ieremeiev ("Igor") who, following a riding accident, died on 13 August 2015 at the age of 47. Igor was a successful businessman and politician in Ukraine. The First Claimant ("Mrs Ieremeieva") is Igor's widow, although they had been separated since 2011. The Second Claimant ("Roman") who is 24 and the Fourth Defendant ("Sofiia") who is 11 are the children of Igor and Mrs Ieremeieva. (No claims are made against Sofiia but as she is a minor she is separately represented by Forbes Hare who, as her Litigation Friend, take decisions in the litigation that they consider are in her best interests.)

[7] Roman and Sofiia are the only beneficiaries under a trust called the R & S Trust that was purportedly established in the British Virgin Islands ("BVI") by Igor through a Trust Deed dated 21 August 2014 ("the Trust"). The Trust settled the majority of Igor's assets on discretionary trusts and he was the first trustee. I say purportedly established because the Claimants assert that the Trust is a fabrication of D2&3 (after Igor suffered his riding accident on 26 July 2015) and was not validly constituted. The Claimants are the personal representatives of Igor's estate

and, if the Trust is found to be invalidly constituted, the Claimants, Sofiia and Igor's mother are the only persons interested in the estate.

[8] That is why the claim is really about the control of Igor's assets not their beneficial ownership. D2&3 were former business partners of Igor, together with a Mr Dyminsky, in the Continuum Group of trading companies based in Ukraine. This is a very diverse Group including businesses engaged in wholesale trading in oil and petroleum products, petrol stations with cafes, general retailing, construction, property development and the production of dairy products. The interests of the four partners in the Continuum Group were broadly equal. The most significant business is called WOG Holding Ltd ("WOG Holding") and Igor's 25% interest in that is held by a BVI company called Yudelle Asset Holdings Ltd ("Yudelle"). The Trust owns 100% of Yudelle. There is a WOG Holding Shareholders' Agreement dated 20 December 2013 which, through his control of Yudelle, the Receiver now has the right to enforce.

[9] D2&3 maintain that the Trust was entered into by Igor for the benefit of his children. The Second Defendant ("Mr Lagur") was appointed as trustee of the Trust on the death or incapacity of Igor. On 31 May 2016, Mr Lagur was replaced as trustee by the First Defendant ("Estera"), a professional BVI trustee company and it remains the trustee. The Third Defendant ("Mr Ivakhiv") is the protector of the Trust. On the same day as Estera was appointed, it converted the Trust into a VISTA Trust with Mr Ivakhiv as protector and Mr Lagur as successor protector. That conversion into a VISTA Trust was set aside by this Court on 2 May 2018 at which point Estera also agreed to retire as trustee (this was at a hearing of Estera's Beddoes application whereby Estera was seeking the direction of the Court concerning these proceedings and the conduct of the Trust's affairs in the light of the Receivership).

[10] The Claimants say that D2&3 have used their positions in relation to the Trust to prevent Igor's heirs from receiving their rightful share in the Continuum Group and they are exploiting their control of Igor's interest for their own benefit and have diverted assets and businesses away from the Continuum Group for their own personal benefit and to the detriment of the Claimants and Sofiia. D2&3 vehemently deny that. The Claimants claim declarations that the Trust was not validly constituted and that its assets are held on implied, resulting or constructive trust for Igor's estate and/or heirs; they also claim that D2&3 are liable to account as constructive trustees on the grounds of dishonest assistance and damages and/or equitable compensation are sought from all the Defendants.

Procedural Chronology

(a) Injunction and Receivership Order

[11] On the commencement of these proceedings the Claimants applied *ex parte* for a proprietary injunction over the "*Trust Assets*" as defined and also for the appointment of an interim receiver. Carrington J made the Order on 20 July 2017 and this was continued by Wallbank J on 26 July 2017 ("Injunction and Receivership Order"). The Injunction and Receivership Order was made against Estera and D2&3. The "*Trust Assets*" were all the assets of the Trust and specifically included the shares in a number of BVI companies that were identified in Schedule C to the Injunction and Receivership Order ("BVI Companies") and which were the holding companies at the top of the corporate structure, including Yudelle, through which Igor held his interests in the Continuum Group.

[12] By the Injunction and Receivership Order, Mr Stuart MacKellar[1] of Kalo Group was "*appointed as receiver of Trust Assets*". The definition of the "*Receivership Trust Assets*" was a subset of the Trust Assets limited to the BVI Companies in the Schedule and any other assets located in the BVI. "*The Subsidiaries*" was also a defined term meaning all companies below the BVI Companies in the corporate structure wherever registered. The Receiver was not appointed over the Subsidiaries as so defined but still was able to exercise the rights that the parent BVI Companies had over them.

[13] The material terms of the Injunction and Receivership Order are as follows:

(1) Paragraph 12contained the Receiver's broad powers:

> The Receiver shall have the power to take all such steps as may seem expedient to take possession of, recover, preserve, and get in the Receivership Trust Assets and preserve their value, including without limitation the power to do the following:
> a.…
> b.…
> c. Request from the Trustee any information that relates to the Receivership Trust Assets as the Receiver may require for the purpose of carrying out his function as a receiver.
> d. Register himself as the holder of any shares forming part of the Receivership Trust Assets, including the shares set out in Schedule II to this Order.
> e. Exercise the rights and entitlements of the legal or registered owner or holder of any shares forming part of the Receivership Trust Assets including any right to appoint or

[1] Mr MacKellar was replaced by Mr Pretlove also of Kalo Group on 9 March 2018

remove directors, any rights under statute or any rights under the Relevant Articles of Association.
f. Exercise any rights or entitlements in respect of the Subsidiaries or any of them, including any right to appoint or remove directors, any rights under the statute or any rights under relevant Articles of Association.
g.Give instructions to, remove or appoint nominees, agents or corporate agents with respect to the BVI Companies or the Subsidiaries.
h.…
i.Carry out such investigations and enquiries of the Respondent[2] or any other persons as may be reasonably required to give effect to the receivership, whether in this jurisdiction or any other.
j. Do all such things as may be necessary to give effect to the receivership.
k. Do all things incidental to the exercise of the foregoing powers."

(2) By paragraphs 15 and 16, both Estera and D2&3 were obliged to disclose to the Receiver:

"such information as the Receiver shall reasonably require regarding the Receivership Trust Assets and/or Subsidiaries and must if requested to do so by the Receiver swear an affidavit confirming same."

[14] The clear intent of the Receivership was to put the Trust Assets into the hands of an independent officer of the Court so that they could be protected and their value preserved for the benefit of Roman and Sofiia who are the beneficiaries whatever the outcome of this litigation. The Receiver has become registered as the holder of the shares in the BVI Companies which together hold essentially all the assets of the Trust. The requirement for D2&3 to disclose information to the Receiver is so that the Receiver can be satisfied that the underlying assets, the trading companies of the Continuum Group, are being managed properly and their value protected.

[15] There is no dispute between the parties that the Receiver is an officer of the Court and is not an agent for any of the parties, including the party upon whose application the Receiver was appointed. While there may have been suggestions in the Claimants' evidence that the Receiver was appointed for their "*benefit*", I think that the Claimants were merely saying that, as Roman and Sofiia were unquestionably entitled to the Trust Assets, the Receiver was safeguarding them for their benefit during the course of the litigation.

[2] Respondent included Estera and D2&3.

(b) The Beddoes Order

[16] Estera applied by Fixed Date Claim Form dated 10 January 2018 for the Court's directions concerning these proceedings, its prospective retirement as Trustee and the conduct of the Trust's affairs during the pendency of the Receivership. Adderley J gave comprehensive directions to Estera as contained in the Beddoes Order dated 2 May 2018. The Receiver's appointment was endorsed by the Court. The Court further directed that Estera should "*take no steps to seek, or support an application for, the discharge of the Receiver or to limit his powers*." Estera was also directed to "*continue to comply with the obligations imposed on it by paragraph 17 of the Receivership Order*" (I think this should be a reference to paragraph 15 of the Injunction and Receivership Order – the duty to disclose information). As noted above, the Beddoes Order set aside the Deed of Amendment that purported to convert the Trust into a VISTA trust.

[17] As this was such an unusual situation with two persons legally responsible for the Trust Assets, the Court was keen to encourage cooperation between Estera and the Receiver and for there to be an agreed division of responsibility. Paragraph (12) of the Beddoes Order provided as follows:

> "The Receiver may agree with Estera such arrangements as they think fit for the division of administrative responsibilities between them provided that written notice of every arrangement so agreed is given within 7 days to the lawyers on the record for Roman and Sofiia."

[18] The division of responsibility was only finally agreed between Estera and the Receiver on 22 January 2019. Although it was recognised that Estera remains in office as Trustee, all the Trust Assets are under the control of the Receiver. So they agreed that:

> "The general approach [….] should therefore be to recognise that whilst [Estera] remains formally in office as such, [Estera] has no continuing ability to manage the Trust assets or to intervene in relation to them.
> It must therefore be the responsibility of the Receiver to supervise the affairs of the companies within the Trust and to investigate their affairs. Such is not the responsibility of [Estera] although [Estera] will continue (as it has before) to cooperate with the Receiver and to seek to bring to the Receiver's attention any relevant matters which come to its attention.
> For its part the Receiver will seek to ensure that [Estera] is kept informed of all significant decisions or events which relate to the trust where possible.
> The ultimate decision maker in all matters will be the Receiver."

In relation to administrative tasks, the document included the following:

> "Business Decisions of the Underlying Companies – where the Receiver or [Estera] becomes aware of, or is asked to approve, any business decisions of the underlying companies, the Receiver and [Estera] may discuss the matter, but the ultimate decision will be made by the Receiver.
>
> Important Information – where [Estera] receives information that could significantly impact the Trust or the Trust assets, [Estera] will discuss and agree an approach in terms of validating the information and next steps with the Receiver. As stated above, the Receiver, in the first instance, will undertake the majority of the work with respect to any investigative enquiries required and [Estera] will provide assistance upon the request of the Receiver, in terms of information gathering or facilitating communications with third parties."

(c) D2&3's applications

[19] On 26 April 2018, D2&3 made a number of applications including the following:

(1) security for costs;

(2) disclosure of a third-party funding agreement in relation to the Claimants' costs pursuant to CPR 28.16(1)(a); the Claimants had admitted that they had received funding for the litigation from a company controlled by Mr Palytsia who D2&3 say is well known to be closely associated with a Mr Igor Kolomoyski, said to be an arch rival of both Igor and D2&3 in Ukrainian political and business spheres ("the funder");

(3) discharge of paragraphs 4 to 6 and 9 of the Injunction and Receivership Order because of the Claimants' alleged failure to comply with their duties of full and frank disclosure and because of there being no proper basis to grant such an injunction;

(4) a stay of the proceedings on the grounds that it is an abuse of process because the funding agreement referred to above is said to be champertous and unenforceable; D2&3 are also seeking to prevent disclosure of documents by the Claimants to the funder.

[20] The Applications referred to in (1) and (2) above were heard by Wallbank J on 15 October 2018 and the learned Judge ruled on those two applications on 5 December 2018. The security for costs application was dismissed with costs. The application for disclosure of the funding agreement was allowed with costs payable by the Claimants. The other two applications ((3) and (4) above) have, as at the date of this judgment, been listed to be heard on 29 and 30 July 2019. The concerns of D2&3 as to disclosure to the Claimants' funder persist.

(d) Receiver's First Interim Report dated 30 April 2018

[21] A redacted version of the Receiver's First Interim Report was provided to the Claimants on 22 June 2018. I have seen an unredacted version but for obvious reasons I will not refer to any of the redactions and, even though we could have looked at the unredacted version at the hearing but without the presence of the Claimants, it was not considered necessary for the purposes of me deciding this application. I did however state in the presence of the Claimants that there were one or two things that concerned me about the redactions but I received assurances from the Receiver and D2&3 that the redactions would be revisited to check whether they did actually need to be withheld from the Claimants.

[22] The Claimants say that the First Interim Report shows that there is a history of non-compliance by D2&3 with the Injunction and Receivership Order. In the Introduction to the First Interim Report (para. 1.2) it says:

> "The Report has been prepared on the basis of the information made available to the Receiver by the Respondents[3] and other relevant parties. Since the Date of Appointment, however, the Receiver has encountered a number of problems with obtaining timely, accurate and complete information from certain of the Respondents. This Report, therefore, details these problems and provides an update to the Court on the progress of the receivership since the Date of Appointment."

[23] In the Executive Summary, the First Interim Report made clear the frustration of the Receiver in the cooperation of D2&3. In particular the Receiver was most concerned that he was required to make important decisions about for instance major transactions that were proposed to be entered into by the trading subsidiaries when inadequate information and time was afforded to him in order to make such decisions on a fully and properly informed basis. In paras. 3.11 to 3.17 it said as follows:

> "3.11 For each of these issues the Receiver has encountered resistance in obtaining full and detailed answers to his questions from the parties contacted about these matters…
>
> 3.12 Detailed within this Report are the Receiver's requests for information from the Continuum Group, and specifically from Mr Lagur and Ivakhiv, which remain outstanding and have been for several months. Responses have either not been provided at all to certain requests or superficial responses only have been received and after delays or after requiring numerous chasers.

[3] That is Estera and D2&3

3.13 What also raises concern is the fact that matters are only brought to the attention of the Receiver at a late stage, with short deadlines for decisions to be made. The risk being that insufficient time is provided to sufficiently review the information provided, or no time is available to raise queries or request additional documents and therefore the Receiver would not be in a position to make an informed opinion.

…

3.16 The Receiver has also contacted Mr Lagur and Mr Ivakhiv to obtain full information about the Receivership Trust Assets. Due to their involvement in the business they were the natural people to provide further information about the current position and the history of the Trust and its assets. Maples who act on behalf of Mr Lagur and Mr Ivakhiv, have repeatedly questioned the Receiver's authority and power to seek information requested, such as detailed information about indirect subsidiaries and historic information; their position is that some of the Receiver's queries are outside the scope of the Order. It is the Receiver's view that this is a means to delay the provision of the information or not provide the information at all. Typically, concerns regarding confidentiality have been cited, and despite the Receiver giving additional assurance that the information will only be used for the Receivership purpose, the information is rarely provided as requested.

3.17 A conference call took place on 31 January 2018, prior to which a detailed agenda was circulated with the parties, as to questions that were to be posed and information required. The information shared on the conference call had limited practical benefit to the Receiver as it was high-level and detailed information wasn't forthcoming. Furthermore, the resistance mentioned above from Maples meant that many questions were not answered. The Receiver has followed up with Maples via written communication over the recent months."

[24] The criticisms made by the Receiver in the Executive Summary were expanded upon in the body of the First Interim Report and it is fair to say that the Receiver was not too impressed by the lack of cooperation he was receiving from D2&3 and their legal practitioners, Maples and Calder ("Maples"). In response, D2&3 maintain through Maples, (see para. 17 of Mr Adrian Francis' Third Affidavit sworn on 23 January 2019) that some of the Receiver's requests for information were outside of the scope of the Injunction and Receivership Order. In particular they assert that information in relation to indirect subsidiaries would not be information concerning the Receivership Trust Assets to which the Receiver would be entitled. They were also concerned throughout about whether the information and documents that they might supply might be passed to the Claimants and their funder but they received an undertaking from the Receiver that he would not disclose any of the information or documents provided to any third parties, including the Claimants and their funder and that such documents and information would only be used by him to enable him to discharge his duties as Receiver (see

para. 6.13 of the First Interim Report). D2&3 have however accepted that the information took longer to provide than was expected.

[25] In para. 17 of the Receiver's Third Affidavit sworn on 29 January 2019[4] he confirms that after the First Interim Report was filed with the Court, there was a "*substantial amount of information*" produced on behalf of D2&3. He went on to say:

> "I do, however, agree with the Applicants' general comments about the historical insufficiency of cooperation of [D2&3] and inadequacy of information provided on their behalf."

(e) Receiver's August Application

[26] Despite what was said by the Receiver in his affidavit, there clearly remained insufficient cooperation from D2&3 after the filing of the First Interim Report because this led to the Receiver's August Application which was made on 20 August 2018. By the application notice, a redacted version of which was provided to the Claimants, the Receiver sought orders against D2&3 that they do the following:

(a) Comply with their obligations under paragraph 16 of the Injunction and Receivership Order;
(b) Obtain and deliver up the documents and information listed in Schedule A to the draft Order;
(c) Produce an affidavit addressing the information sought in Schedule B to the draft Order.

The Receiver was also asking for the Application and evidence in support to be sealed on the Court file.

[27] The draft Order (the Claimants have an unredacted copy of this) set out in Schedules A and B the documents and information that the Receiver wanted. The documentation in Schedule A sought a structure chart of all Trust Assets, accounts for the last 5 years of all subsidiaries defined in the Injunction and Receivership Order and a substantial amount of financial

[4] I was told at the hearing that this affidavit was actually prepared in October 2018 but for some reason it was not sworn until 29 January 2019. This is potentially significant as it gives a rather different take on D2&3 cooperation than the Second Interim Report filed less than 2 weeks after the affidavit was sworn.

information concerning WOG Holding and the Group as a whole. The Schedule B information to be dealt with in an affidavit sought details of all entities in which the Trust held an interest and all operating entities. It also sought information as to significant and related party transactions, repayments of debt and dividends paid during the Receivership and general financial information.

[28] The application was served on D2&3 on 27 August and three days later on 31 August 2018 it was resolved by consent, as embodied in an Order of Wallbank J. By that Order, D2&3 agreed to provide all the documents and information that had been specified in Schedules A and B of the draft Order. In addition the following sealing Order was made:

> "4. The certificates of urgency, application notices, affidavits and exhibits filed on 20 and 29 August respectively on behalf of Paul Pretlove shall be sealed on the court file against all parties other than the Receiver and [D2&3] save for the redacted application notice and draft order filed on 20 August 2018 as already supplied to the Claimants' counsel.
>
> 5. The affidavits and exhibits ordered by paragraph 2 above shall be sealed on the court file against all parties other than the Receiver and D2&3."[5]

[29] In para. 19 of the Receiver's Third Affidavit, he said that he subsequently received a large amount of documentation from D2&3. This was repeated in para. 15 of the Receiver's skeleton argument for this application which is dated 11 February 2019. Importantly, in para.21 of the Receiver's Third Affidavit, he says this (underlining added):

> "…as at the date of this Affidavit, I am not in possession of any evidence of dissipation of Trust Assets and I do not currently believe that any such dissipation has occurred."

This was repeated in para.17 of the Receiver's skeleton argument:

> "The Receiver has not uncovered any evidence of dissipation of Trust Assets."

[5] I was shown a transcript of the hearing on 31 August 2018 before Wallbank J and it is clear that no positive decision was made after full argument as to sealing – the Court put in place the sealing order as a temporary provision pending full consideration of the Court. It was not right therefore for D2&3 to have suggested in their skeleton argument that this had already been decided by the Court. I should record that Mr Mumford QC for D2&3 accepted this at the hearing.

(f) First CMC

[30] The first Case Management Conference ("CMC") in these proceedings took place before Adderley J on 18 December 2018. There were a number of issues in dispute but of relevance to this application there was a concern in relation to the standard disclosure obligations that might soon arise. As D2&3's application in relation to the Claimants' funder was still outstanding, D2&3 were concerned that if they were required to provide their disclosure before that application was heard, that any such disclosure should not be provided to that funder. This is similar to D2&3's concerns in this application. According to a draft Order that I have seen (and the Claimants accept that this was agreed), the Claimants agreed that they would not provide any of the D2&3 disclosure to their funder until after the D2&3 application had been determined.

[31] The Claimants have made a similar offer not to disclose the unredacted documents (if they are ordered) to their funder on the same basis as the CMC Order. The Claimants say that this resolves any concerns that D2&3 might legitimately have in relation to the documents being provided to the funder. D2&3 do not think it does.

(g) The Receiver's Second Interim Report

[32] As indicated above, the Receiver served and filed his Second Interim Report dated 12 February 2019 ("Second Interim Report") the day before this hearing. Mr Collingwood complained that it was unsatisfactory that the Claimants had had to wait so long for these Reports from the Receiver. Nevertheless he made considerable use of the material in the Second Interim Report, a redacted copy of which was served on the Claimants. There is no doubt that the Second Interim Report gives a very different flavour to the Receiver's Third Affidavit and skeleton argument in that it suggests that there has been continued non-cooperation by D2&3 and that things have got so bad that the Receiver may be contemplating a further application to the Court. The Second Interim Report refers to this hearing and the Third Affidavit and skeleton argument dated 11 February 2019 but does not explain why the Receiver appears to have radically changed his mind the day after filing that skeleton argument.

[33] In the Introduction section, the Receiver states:

> "1.3 Since the Claimants' application was made in September 2018 [ie this application], I have continued to receive a large volume of information from [D2&3]. I still however have concerns over their engagement with the process. Key issues are that delays are being experienced in the receipt of information, inadequate documentation is provided where my decision is required – for example, when asset realisations are being proposed or operational changes to be made – and there has been an unsatisfactory level of engagement with my Ukraine lawyers. These concerns have most recently been addressed within correspondence between myself and [D2&3]. If the issues are not rectified immediately and a working protocol agreed, a further application will be forthcoming to seek directions or specific remedies from the Court."

And in the last paragraph of the Second Interim Report, (para.5.23), the Receiver goes quite a long way to suggesting that D2&3 are in contempt:

> "5.23 It is my view that the various acts and omissions referred to in this Report clearly constitute failure to comply with the spirit of the Receivership Order. Although each failure taken in isolation, at present, is unlikely to give rise to [D2&3's] liability for contempt of Court (or some other possible sanction), taken together these failures do seem to represent a pattern of conduct which I am concerned about and bringing to the attention of the Court."

[34] This is a far cry from the position portrayed in the Receiver's Third Affidavit and skeleton argument. While I understand that the Receiver is in a difficult position, caught as he is between the litigating parties and wanting to take a neutral stance on contentious issues between those parties such as this application, it is a little unsatisfactory to be presented with such conflicting views as to D2&3's cooperation with the Receiver.

[35] Mr Collingwood took me to a number of paragraphs in the Second Interim Report that dealt with particular proposed transactions and which showed the difficulties the Receiver had in responding to such proposals because of inadequate information provided by or on behalf of D2&3. I can understand his concerns when he saw references to solvency issues – "*This is a critical issue that underpins the solvency of the entire group*" (para. 5.5); and "*I have developed concerns regarding the solvency of the Group as well as the inadequate corporate governance*…" (para. 5.7) – and the inability of the Receiver properly to assess transactions because of inadequate information being provided. The difficulty that I have with the Second Interim Report is that it does indeed refer to such problems that the Receiver was having but on

closer analysis these were problems largely faced by the Receiver in the lead up to the Receiver's August Application and therefore presumably to be solved by the consent Order that was made on 31 August 2018. Compliance with their obligations under that Order was then confirmed by the Receiver's Third Affidavit and skeleton argument. In other words, the timings are a bit confused in the Second Interim Report which means I have to treat it with a little caution in terms of its relevance to the issues that I must resolve on this application.

[36] The Receiver continued to ask for the Court file seal to be applied to the Second Interim Report and all appendices, pending the decision on this application, "*given the confidential nature of the information discussed herein.*" (para. 1.4). It is clear that any information that was provided by D2&3 was given and accepted by the Receiver on the same basis as set out above, namely that it was treated as confidential and would not be provided to third parties including the Claimants and their funder. Mr Carroll on behalf of the Receiver told me that every document that came in from D2&3 was stamped by the Receiver as "*Private and Confidential*".

[37] A further point can be made in relation to the Second Interim Report. It indicates that the Receiver is prepared to take action, perhaps by another application to the Court, in order to enforce compliance with the Injunction and Receivership Order and to ensure that he is provided with the information he needs in order to discharge his responsibilities in relation to the Trust Assets.

[38] I now turn to the parties' submissions in relation to this application.

The Claimants' submissions

[39] Mr Collingwood on behalf of the Claimants submitted that there are a number of legal principles at play here. He referred to and relied on:

(1) The principles of natural and/or open justice;
(2) The balancing exercise when access is sought to confidential information;
(3) The nature of a court-appointed receivership; and
(4) The disclosure rights of a beneficiary as against his/her trustee.

[40] Mr Collingwood said that the burden was on D2&3 to justify the withholding of documentation that has been provided to the Receiver. In particular, he said that there was no justification to maintain the sealing of the Court file as against the Claimants and the principles of natural justice require that the Claimants should have full access to all documents that have been placed on the Court file. Furthermore, the test for sealing the Court file is whether it is in the interests of justice to do so and that cannot be the case in this situation. D2&3 can have no real concerns about the onward disclosure of these documents as the Claimants have agreed not to pass them on to their funder at least pending the resolution of D2&3's application concerning the funding arrangements.

[41] The Claimants submit that there is no real confidentiality in the redacted documents; nor in the documents and information in the Receiver's affidavit and exhibit. For the following reasons they say they should have unredacted copies provided to them:

(1) As a matter of natural justice, fairness and transparency, because the documents have been filed with the Court, the Claimants as a party should have the same rights as the other parties;
(2) So that they can understand the progress of the Receivership – the Claimants maintain that they have an interest in seeing if the Injunction and Receivership Order is being complied with by D2&3 and if necessary to seek to enforce it;
(3) So as to benefit the Receivership – the Claimants insist that Roman has "*intimate knowledge of the Continuum Group and its operation*" and he speaks Ukrainian, so he would be in a position to assist the Receiver in the discharge of his functions;
(4) In recognition of Roman's position as a beneficiary – as the Receiver is standing in the shoes of the Trustee, the Claimants argue that Roman should be in no worse position and should have his entitlement to disclosure of trust documentation as a beneficiary recognised.

[42] Finally Mr Collingwood submits that the Claimants are not seeking any form of illegitimate litigation advantage and that D2&3 should not be allowed to dictate to the Receiver which documents should or should not be disclosed to the Claimants.

D2&3's Submissions

[43] Mr David Mumford QC, appearing for D2&3, relied particularly on the fact that the documents and information were provided to the Receiver under compulsion and on the express basis that they were confidential and would not be disclosed save if it was necessary to do so for the purposes of the Receivership. He submits that the Court should not abrogate the restraints accepted by the Receiver on the use of the documents.

[44] Mr Mumford QC also submits that the Claimants have mischaracterised the role of the Receiver who does not act for any one party but is an officer of the Court appointed to "*hold the ring*" pending the determination of the substantive dispute between the parties. Furthermore, it is for the Receiver to decide whether it is necessary for the purposes of the Receivership to disclose documents to the Claimants and the Court should not interfere in the decisions of the Receiver in such respect.

[45] The Claimants' alleged purposes of disclosure, Mr Mumford QC says, are wholly inadequate: insofar as the Claimants want to see if they need to take steps to enforce the Injunction and Receivership Order, the Receiver has already shown that he is quite prepared to do so himself; and insofar as Roman might be useful in assisting the Receiver, that too is a matter for the Receiver to decide.

[46] In relation to the unsealing of the Court file for the Receiver's August Application, Mr Mumford QC submits that it is clearly in the interests of justice not to do so because that would then give the Claimants access to many documents, at the pre-disclosure stage of the proceedings, that they would not otherwise be entitled to. He says that, even on disclosure, many of the documents would not be disclosable under a standard disclosure order. The arguments as to "*open justice*" or "*natural justice*" are misconceived in this context.

[47] As to the Claimants' suggestion that Roman is entitled to the documents and information because of his position as an undisputed beneficiary, Mr Mumford QC says that the Receiver is not the trustee and does not owe any fiduciary duties to Roman or Sofiia. Furthermore, the Receiver's rights to obtain documents from third parties are different to the Trustee's and where, as in this case, the Receiver has agreed to treat such documents as confidential, it would be unfair to force the Receiver to disclose them in breach of that agreement. In any

event, it is unclear that a beneficiary would be entitled to such documents anyway under the principles of Schmidt v Rosewood Trust Ltd.[6]

Submissions on behalf of Sofiia

[48] Mr Nader appeared on behalf of Sofiia and as her appointed Litigation Friend. Although no similar application to the Claimants' has been made on behalf of Sofiia, Mr Nader submitted that there was no good reason why unredacted copies should not be provided to them, nor why the Court seal should not be lifted as against them. He said that there were none of the problems associated with the Claimants, such as preservation of confidentiality particularly in relation to their funder and Sofiia would not be getting any litigation advantage from this disclosure. There is no ancillary purpose in the documents being provided to Sofiia and as a party with a substantial interest in the litigation, it cannot be justified to keep documents on the Court file from her.

The **Receiver's submissions**

[49] Mr Grant Carroll made some brief submissions on behalf of the Receiver. I have dealt above with the contents of the Receiver's skeleton argument and the inconsistencies with what is said in the Second Interim Report. Mr Carroll explained that the Receiver's Third Affidavit had been prepared in October 2018 but for some reason was not actually sworn until 29 January 2018. The contents of that affidavit were basically repeated in the skeleton argument. This goes some way to explaining the apparent contradictory positions in these documents but still leaves it difficult to discern the actual position. In any event, the Receiver has made clear that he will be taking steps to ensure that the Injunction and Receivership Order is complied with. Mr Carroll did however confirm on behalf of the Receiver that he remained of the view that he had not seen any evidence of the dissipation of assets.

[50] Mr Carroll stated that all documents that were provided to the Receiver by D2&3 were stamped "*private and confidential*" and that the Receiver agreed to accept them on that basis. The Receiver gave that assurance to D2&3 because he wanted the documents in order to be able to discharge properly his duties. He did not want to be just a "*conduit*" for the provision of documentation to the parties.

[6] [2003] 2 AC 209.

[51] Finally, Mr Carroll said that the Receiver did regret that his Reports had been somewhat delayed, the explanation for which is the lack of cooperation, the sheer complexity of the Trust Assets and its structure and also to a certain extent the disruption caused by Hurricanes Irma and Maria.

Discussion

[52] I propose to deal with this in the following order:

(1) The distinction between the documents filed in Court and those in the hands of the Receiver;
(2) The nature and purpose of the Receivership;
(3) The basis upon which documents are in the hands of the Receiver;
(4) The reasons why the Claimants want to see the documents;
(5) Roman's rights to disclosure as a beneficiary under the Trust;
(6) The appeals to open justice and natural justice;
(7) The appropriate test to apply for unsealing the Court file;
(8) The interests of justice.

(1) The distinction between the documents filed in Court and those in the hands of the Receiver

[53] I was told by Mr Mumford QC that there were about 1000 pages exhibited to the Receiver's affidavit filed in support of the Receiver's August Application. These were the documents that had by then been provided by or on behalf of D2&3 and which had been disclosed pursuant to the confidentiality agreement of the Receiver. In Mr Francis' Fourth Affidavit (para. 9), he says that following the consent Order made on the Receiver's August Application, the Receiver was provided with access to over 3000 documents. This appears to have been confirmed in paras. 2.44 and 2.45 of the Second Interim Report. Mr Collingwood made clear that the Claimants are not seeking disclosure of those latter documents. He says that there is a distinction between documents filed in Court, which as a party the Claimants should be entitled to see, and those held by the Receiver but which have not been filed in Court. The Claimants are therefore asking for the Court seal to be lifted which would have the effect of the Receiver having to disclose his own affidavits (which the Claimants have not seen) together with the 1000 confidential pages that formed his exhibit in the Receiver's August Application.

[54] To my mind that reveals a serious problem with the Claimants' application. Their submissions concentrated far more on the redacted documents and I do not think they were distinguishing the applicable principles for that part of their application and those relevant to the unsealing application. Mr Mumford QC, by contrast, did treat them quite separately and although his written submissions proceeded erroneously on the basis that the Court had already decided to make a sealing order[7], it seemed to me that D2&3 were particularly concerned to protect the disclosure of the actual documents that they had disclosed (ie those exhibited to the Receiver's affidavit).

[55] These proceedings are some way from the ordinary disclosure process. If by the unsealing application the Claimants are saying that they should have access now to the 1000 pages disclosed by D2&3, then logically they are saying that they should be entitled to disclosure of all documents provided to the Receiver. Their arguments as to confidentiality, natural justice and a beneficiary's rights would all be equally applicable to those other documents. It seems to me that there should be little distinction in principle between one set of documents that has been placed on the Court file in an application to which the Claimants were not a party and another set that is merely in the hands of the Receiver, when all such documents were provided to the Receiver by the same party and on the same basis. Therefore, if the Claimants are right that they should have access to the whole Court file, they should also be entitled to all documents provided by D2&3 to the Receiver. (In fairness, this may be implicit in the Claimants' application for future guidance, but as I have said in para. 4 above, this part of the application was not pursued before me.) However, if they are not seeking that, then it is difficult to see why, as a matter of principle, they should succeed in removing the Court seal.

[56] The argument on the unsealing of the Court file to a certain extent proceeded on the basis that it was about the burden of proof: the Claimants saying that it was on D2&3 to establish that the interests of justice required the seal to be imposed to deny another party access to this part of the Court file; whereas D2&3 were saying that it was on the Claimants to show why the seal should be lifted, because it had already been imposed.[8] While I consider that the burden is always on a party seeking to justify the Court seal, in particular when it is directed at another party, I find the distinction that the Claimants seek to draw between documents on the Court file

[7] see footnote in para. 28 above

[8] As stated above Mr Mumford QC properly withdrew that point after he had seen the transcript of the hearing before Wallbank J on 31 August 2018. However he was still maintaining that the burden was on the Claimants.

and those just in the Receiver's hands difficult to apply in determining whether the seal ought to remain.

(2) The Nature and Purpose of Interim Receivership

[57] In Capewell v Revenue and Customs Commissioners [2007] 1 WLR 386, Lord Walker of Gestingthorpe referred to the nature of a receivership ordered by the Court as part of its equitable jurisdiction in situations where there was a need for the interim protection of property. He said:

> "19. …The receiver, being appointed by the court, was an officer of the court. His duty was to act impartially, and in accordance with the directions of the court, in administering the property to which the receivership extended.
>
> 20. In short, the appointment of a receiver was in many cases the most effective way of "holding the ring" between warring litigants until the disputed issues could be finally determined…"

This was adopted in this jurisdiction by Hariprashad-Charles J in Michael Wilson & Partners Ltd v Temujin International[9]

[58] In Milsom v Ablyazov[10], Briggs J (as he then was) was being asked to restrain the receiver's ability to communicate information obtained from Mr Ablyazov to third parties. In refusing to do so, he said at para. 38:

> "The Receivers are no doubt well aware of the longstanding principle, dating back at least to 1823 in Comyn v Smith, that receivers appointed by the court over the subject matter of litigation must not take sides or make common cause with any of the parties. Nothing has happened to lead the court to conclude that information disclosure by the Receivers to the bank will occur, other than when expedient for the purposes of the receivership, or that the receivers will not bear in mind the need to tailor any such disclosure to minimise the risk of giving the bank any advantage, let alone any unfair advantage, in the main litigation."

[59] D2&3 fear that disclosure will be giving the Claimants an unfair litigation advantage which they describe as a fishing expedition to try to find further as yet unpleaded causes of action against D2&3. The Claimants say that this is not why they want the documents. They say they want to

[9] (BVIHCV2006/0307) see para. 93.
[10] [2011] EWHC 955.

see if the Injunction and Receivership Order was being complied with and they are entitled to them. They seem to accept therefore, and rightly so, that disclosure from the Receiver should not lead to them being given a litigation advantage.

[60] This Receivership is an unusual one as the beneficial ownership of the Trust Assets is not really the subject matter of the litigation. Whatever happens in the litigation, the Trust Assets are held for at least Roman and Sofiia, so the Receiver is not there so as to protect assets for whoever is found to be the beneficiaries. D2&3 are arguing that the Trust is validly constituted and that Estera is the Trustee. They are not seeking to establish that they have a beneficial interest in the Trust Assets. In that sense it differs from the normal case where the parties are fighting over those assets. While that may mean that there is a stronger connection between the Claimants (or Roman and Sofiia) and the Trust Assets under the control of the Receiver, I do not think it fundamentally changes the role and purpose of the Receiver.

[61] I fully understand the desire of Roman to find out exactly what is going on with the Trust Assets to which he is ultimately entitled. But what is paramount is the purpose and interests of the Receivership, not the interests of one of the parties to the litigation. The Receiver was appointed to take the Trust Assets out of the control of Estera and D2&3 and to put them into the hands of the Receiver who would be an independent officer of the Court and would be purely interested in ensuring that those Trust Assets are managed and protected properly.

(3) <u>The basis upon which documents are in the hands of the Receiver</u>

[62] By para. 16 of the Injunction and Receivership Order, D2&3 were obliged to disclose to the Receiver "*such information as the Receiver shall reasonably require regarding the Receivership Trust Assets and/or the Subsidiaries*". If they did not comply with any such reasonable requests, they were at risk of being in contempt of Court. Although there were a number of disputes between the Receiver and D2&3 through Maples as to whether certain requests were properly within the scope of para. 16, it is clear that any documents that were provided by D2&3 were disclosed under compulsion.

[63] A consequence of that is that the Receiver can only use the documents and information provided to him under compulsion for the purposes and in the interests of the Receivership. The analogy with a liquidator's compulsory powers of extracting information is close and it is

clear that such information can only be used for the purposes for which the power was conferred. As Lord Browne-Wilkinson said in Hamilton v Naviede; Re Arrows Ltd.[11]:

> "The extraction of private and confidential information under compulsion from a witness otherwise than in the course of inter partes litigation is an exorbitant power. It is right that such information should not be generally available but should be used for the purposes for which the power was conferred."

[64] Both the Receiver and D2&3 are agreed that the terms upon which the documents and information were provided to and accepted by the Receiver were that they were confidential and would not be disclosed to anyone including the Claimants save where it was necessary to do so in order for the Receiver to discharge his duties as Receiver. The Receiver decided that it was not so necessary for that purpose for the documents and unredacted Interim Reports and other documents in the Receiver's August Application to be provided to the Claimants. Mr Mumford QC submits that there is no justification for overriding the Receiver's duty of confidentiality or indeed his decision not to disclose the documents to the Claimants. I agree. It is for the Receiver to judge what would further the interests of the Receivership and unless the Receiver had come to a perverse or wholly unreasonable conclusion, I do not think the Court should interfere. Furthermore, the fact that the documents were provided under compulsion seems to me to require the Receiver and the Court to respect so far as possible the basis upon which the documents were provided.

[65] Mr Collingwood has said a number of things about the claim to confidentiality, including that D2&3 and the Receiver should have no concerns about preserving confidentiality because of their agreement not to disclose the documents to their funder. I do not think that that is an answer to the prior issue which is the duty of confidentiality agreed to by the Receiver upon accepting the documents. The fact that the Claimants will not pass the documents on to their funder does not mean that there should be disclosure to the Claimants in breach of that confidentiality agreement and I consider that there has to be a good reason in the interests of the Receivership and justice to override that agreed basis of disclosure.

[66] Mr Collingwood also relies on some evidence that the Claimants have as to whether some of the redactions that have been made were truly of confidential or sensitive information. The examples he cites include a redacted affidavit and email attached at Appendix B to the First

[11] [1995] 2 AC 75, 104C-E.

Interim Report, unredacted versions of which the Claimants have obtained from other sources, and which show that the redactions related to matters of which the Claimants were already fully aware and so could not be confidential. While I can see that there is some force in what Mr Collingwood is saying and I myself (as I have said above) have had some concerns about whether some of the redactions should remain, I do not consider that this is sufficient to ignore the agreed basis upon which documents were provided by D2&3 under compulsion and which the Receiver has decided not to disclose to the Claimants.

[67] Finally in relation to confidentiality, Mr Collingwood referred to a number of authorities that support the proposition that confidentiality is not a ground for withholding inspection of documents as part of the standard disclosure exercise. However disclosure in the course of proceedings is completely different to the disclosure that is sought in this application. There will come a point in these proceedings when disclosure will have to be given by all parties but they are not there yet. D2&3 will have difficulty in resisting inspection of relevant documents on the grounds of confidentiality. But at this preliminary stage of the proceedings when disclosure is sought from the Receiver appointed to hold the ring until the substantive dispute is resolved, the confidentiality of documents provided to the Receiver under compulsion should be respected so long as that is in the best interests of the Receivership and the carrying out of the Receiver's functions.

(4) <u>The Reasons why the Claimants want to see the documents</u>

[68] Apart from questions of natural justice and the rights of beneficiaries to trust documents, (both of which I deal with below), Mr Collingwood relied upon two reasons as to why the Claimants should be entitled to see the documents:

(1) In order to understand the progress of the Receivership and if necessary to enforce the Injunction and Receivership Order;
(2) In order to assist the Receiver in the discharge of his functions.

[69] As to (1) above, the Claimants say that as the Receiver was appointed at the instigation of the Claimants and that he is ultimately acting for Roman's and Sofiia's benefit in preserving the Trust Assets, so it is right that the Claimants should know what progress is being made by the Receiver and should be provided with sufficient information to understand whether D2&3 are

complying with their duties under the Injunction and Receivership Order. Their fears in this respect can only have been exacerbated by the Receiver's shift in position in the Second Interim Report.

[70] Nevertheless, the Receiver has sought to enforce the Injunction and Receivership Order through the Receiver's August Application and considered, according to his Third Affidavit and skeleton argument that D2&3 had largely complied with the consent Order. The Second Interim Report makes clear that the Receiver will, if necessary, use the same process to enforce compliance if he concludes that D2&3 are not cooperating. Thus the Receiver has shown that he is fully prepared to seek the assistance of the Court when he deems it necessary.

[71] Furthermore the Receiver has stated quite correctly in his Third Affidavit that he owes his "*primary duties to the Court, and not to any party to the underlying litigation*" and that as a neutral party he has not "*and will not show bias to any one party to the claim*". He goes on to say that:

> "I am cognisant of the need to ensure that the Receivership is not used as a means for the Claimants to obtain information they are not entitled to and/or which is not available to them from public sources and/or which would only otherwise be available to them pursuant to a disclosure order made by the Court."

[72] The Receiver has taken a decision that it is not necessary in the interests of the Receivership to provide to the Claimants unredacted copies of certain documents and to withhold from them generally the disclosure received from D2&3. That decision appears to be a reasonable one and consistent with his duties, as he expressed it, to ensure that the Receivership is not being used by a party to obtain information that they are not otherwise entitled to. While in theory the Claimants could attempt to enforce the Receivership parts of the Injunction and Receivership Order, that responsibility primarily falls on the Receiver who knows whether that needs to be done and what is in the interests of the Receivership. And it is not as though the Receiver has declined to take such steps.

[73] As to reason (2), this is very weak and I am sure that if the Receiver felt he needed the assistance of Roman in order to carry out his functions more effectively, he would ask for such assistance. He would have to bear in mind his overarching duty not to favour any one party to the litigation and this may be reflected in a reluctance to seek assistance from Roman. I do not consider that this reason carries any significance to the issues I have to decide.

(5) Roman's rights to disclosure as a beneficiary under the Trust

[74] Mr Collingwood recognised that this was not an application by a beneficiary (Roman) against his trustee for disclosure. However he did submit that Roman (and Sofiia) should not be in a worse position by reason of the appointment of the Receiver who had now assumed the responsibilities of the trustee. He relied on the well-known Privy Council decision of Schmidt v Rosewood Trust Ltd[12], in which Lord Walker of Gestingthorpe delivered the judgment of the Board and held that the jurisdiction to order disclosure against a trustee on a beneficiary's application is one aspect of the Court's inherent supervisory jurisdiction that can lead to an intervention in the administration of a trust, including a discretionary trust. Mr Collingwood also identified some authorities which supported the proposition that if a trustee had acquired company documents by virtue of the fact that the trust owned a majority shareholding in a corporate structure, then these documents could also be ordered to be disclosed to a beneficiary see eg In the Matter of the L Trust[13] a decision of the Jersey Royal Court at paras. 52-53 and 89-90; and Lewin on Trusts (19ed) at para 23-068. It may be however that a beneficiary's rights to see day to day documents in relation to the trading operations of underlying subsidiaries requires a special case to be made out – see In Re The Ojjeh Trust [14] a decision of Smellie, Ag. J. (as he then was) in the Grand Court of the Cayman Islands.

[75] I do not see that this is a helpful analogy or appropriate basis for ordering disclosure against the Receiver. Estera remains as Trustee and it owes fiduciary duties to Roman and Sofiia. The Receiver does not owe similar duties to them. Furthermore, as Mr Mumford QC submitted, the Receiver's rights to obtain documents derive from the Injunction and Receivership Order that required compliance by D2&3 and he agreed to keep them confidential save where necessary for the proper discharge of his functions. The Trustee would not have been able to require production of such a quantity of documents, under threat of contempt of Court. The documents in the hands of the Receiver as opposed to the hands of the Trustee are held on quite different bases and whatever entitlement Roman may have as against the Trustee I do not consider it is transferable to a similar entitlement as against the Receiver.

[12] [2003] 2 AC 709.
[13] [2017] JRC 168A.
[14] [1992-93] CILR 348.

(6) The appeals to open justice and natural justice

[76] The Claimants invoke "*natural justice and transparency*" and say that as the documents have been filed in Court in proceedings to which they are a party, they should be disclosed to them. The principle of natural justice that is relied upon by the Claimants is "*the right to a fair hearing; to know the case against them; to know the evidence on which it is based; and to have the right to respond to such evidence*." (para. 70 of their skeleton argument). In support of this, they rely on Al Rawi v Security Service[15] in which Lord Neuberger of Abbotsbury MR (as he then was) in the Court of Appeal said at p.542:

> "14. Under the common law a trial is conducted on the basis that each party and his lawyer sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or audi alterem partem, the other rule being the rule against bias or nemo iudex in causa sua)."

In the Supreme Court at p.572, Lord Dyson JSC said:

> "12. Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. The Privy Council said in the civil case of *Kanda v Government of Malaya* [1962] AC 322, 337:
>
> > "If the right to be heard is a real right which is worth anything, it must carry with it a right in the accused to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."
>
> 13. Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594, para.32: "Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial."

[77] These lofty statements of principle apply most obviously where there is a substantive issue between the parties that is being resolved. Of course, in that situation, save in the most exceptional circumstances of national security (see eg the closed material procedure described

[15] [2012] 1 AC 531.

in Bank Mellat v HM Treasury (No 2)[16]) the principles of natural justice require full disclosure to the other side so that they can know the case against them and can challenge that case fully. However, where, as here, the documents were acquired by the Receiver, not a party to the underlying litigation, and then used by the Receiver in an application to which the Claimants were not a party, I do not consider that the natural justice principles are engaged so far as the Claimants are concerned. The Receiver's August Application was not deciding any issues that involved the Claimants and did not affect any rights or entitlements that the Claimants have in relation to their substantive dispute with D2&3.

[78] Support for this departure from the Al Rawi principles can be found in R (BskyB) v Central Criminal Court[17] and Evans v Wolverhampton Hospitals NHS Foundation Trust[18]. In the R (BskyB) case, Lord Toulson JSC, delivering the Judgment of the Supreme Court, said at p.894:

> "28. As a general proposition, I would agree with the Commissioner's argument that the court should not apply the *Al Rawi* principle to an application made by a party to litigation (or prospective litigation) to use the procedural powers of the court to obtain evidence for the purposes of the litigation from somebody who is not a party or intended party to the litigation. This is because such an application will not ordinarily involve the court deciding any question of substantive legal rights as between the applicant and the respondent. Rather it is an ancillary procedure designed to facilitate the attempt of one or other party to see that relevant evidence is made available to the court in determining the substantive dispute."

After referring to the R (BskyB) case, Leggatt J (as he then was) in the Evans case said at p. 4667:

> "29. …The second point is that, although the *Al Rawi* case [2012] 1 AC 531 concerned the trial of a civil claim for damages, the reasoning which underpins that decision is not confined to trials and is of broader application. The broader principle which I derive from these authorities is that the logic of the *Al Rawi* case applies whenever a court is deciding a question of substantive legal right as between the parties to the litigation. This is consistent also with article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which establishes the right of everyone to a fair and public hearing in "the determination of his civil rights and obligations" and provides only for balancing the requirement of publicity and not that of fairness against other interests."

[79] Accordingly, I do not consider that the application of the seal on the Court file in respect of the Receiver's August Application infringes any natural justice rights that the Claimants have. That

[16] [2014] AC 700.
[17] [2014] AC 885.
[18] [2015] 1 WLR 4659.

is not to say that the seal should be continued which depends on the appropriate test to which I now turn.

(7) The appropriate test to apply for unsealing the Court file

[80] It is fairly clear that the seal should only be imposed and continued if it is in the "*interests of justice*" to do so. In Jersey Evening Post Limited v Al Thani[19], a decision of the Jersey Royal Court, Bailhache, Bailiff said on p.554:

> "16. The aim therefore is to do justice to the parties before the court. That aim must not be stultified by a rigid application of the principle that justice must be done in public. Yet the principle of open justice should not be displaced as a matter of convenience or expedience, or to avoid embarrassment to one or more of the parties, but only if it is necessary to do so in the interests of justice."

[81] There is no authority in this jurisdiction as to the test to be applied by the court in sealing the Court file so as to restrict access by a party to documents on the Court file. It has however been considered in two cases decided by Smellie CJ in the Cayman Islands Grand Court. In AHAB v SAAD Investments Company Ltd[20], Smellie CJ was dealing with an application by the "Maples Defendants" to see a confidential document filed in a security for costs application to which the Maples Defendants were not a party. The learned Chief Justice said as follows:

> "26. These strictures do not, however, in ordinary circumstances apply to parties to the action who are not normally precluded by rules of court from access to any aspect of the case file, but rather are ordinarily, by virtue of the principle of open justice, entitled to access to all aspects of the file. For due cause shown, the court can, however, restrict access, even for parties to the action, to specific aspects of the case file and can by so doing impose a requirement that access be only by way of leave of the court. This the court can do if necessary for the proper administration of justice.
>
> 27. This is precisely what has happened in this case, upon the hearing of the summons for security which was a summons brought by the defendants in liquidation against the plaintiff, who were together *the parties to the order*. And so the question becomes one, fairly and squarely, whether or not leave should now be given to the Maples Defendants to inspect the security schedule, which was ordered in the interests of the administration of justice to be kept confidential and on the basis that they were *parties to the action,* though not to the application for security for costs." (italics in original)

[19] [2002] JLR 542.
[20] [2011] (1) CILR 326.

[82] In Re Sphinx Group (In Liq) (Smellie CJ, 20 January 2017), Smellie CJ distinguished "*typical partisan litigation*" from the sanction of a Settlement Agreement in the context of a Scheme of Arrangement because the latter does not involve the determination of "*rights and obligations of the parties in adversarial legal proceedings.*" [para. 8] The learned Chief Justice decided to make the sealing order in the "*interests of justice*" and pursuant to the specific winding up rules in the Cayman Islands giving the Court jurisdiction to make such an order. At para. 30.2 he said as follows:

> "A sanction application is not a proceeding where civil rights and obligations are decided. Rather it is a hearing where the liquidators (or in this case the Scheme Supervisors) are obliged to obtain the sanction of the court to exercise a power. It will then be for the liquidators (the Scheme Supervisors) to decide whether to exercise that power or not. In such a case there is not the same public interest in the subject matter of the proceedings being made public, as there would be in relation to the typical partisan action."

[83] The Receiver's August Application was not a sanction application but it was an application by an officer of the Court to seek the Court's help in enforcing compliance by D2&3 with the Injunction and Receivership Order. As an officer of the Court, the Receiver should be able to approach the Court on a confidential basis. Although it may have been determining civil rights and obligations as between the Receiver and D2&3, it did not in any way affect the civil rights and obligations of the Claimants. In the circumstances, I consider that D2&3 must establish that it is in the interests of justice for the seal to be maintained but that there is no higher threshold of "*necessity*" that has to be shown.

(8) <u>The interests of justice</u>

[84] Mr Mumford QC made a number of submissions on this:

(1) The Claimants do not have a right to inspect the documents obtained by the Receiver in order to carry out his functions;
(2) Merely because the Receiver has to place some documents on the Court file for the purposes of an application does not give the Claimants rights to see those documents; it is somewhat ironic that the Claimants' alleged entitlement to see such documents depends on the Receiver having taken action to enforce the Injunction and Receivership Order, the very issue that the Claimants say they need the documents for;

(3) The seal protects the impartiality of the Receiver and ensures that he is not being used as a vehicle for the Claimants to gain access to material that they would otherwise not be entitled to;

(4) The seal preserves the agreed basis upon which D2&3 provided the documents, namely their confidentiality; D2&3 go further to say that they have in fact provided more than was strictly necessary and procured others, such as the management of the underlying Ukrainian subsidiaries, to disclose voluntarily a much wider variety of documents than the Receiver had a legal right of access to;

(5) Therefore the seal has made the Receivership more effective as it has enabled far more cooperation than the Receiver might have got if there was thought to be a risk that the documents would not remain confidential.

[85] I find these compelling reasons. In particular I feel that the express confidential basis upon which documents were provided to the Receiver is important to uphold and it would be unfair to override. I also go back to what I said about the difficulty of seeing the distinction between the documents put on the Court file for the purposes of the Receiver's August Application and the documents in the hands of the Receiver that have not yet found their way on to the Court file. As I have said above, the Claimants' countervailing reasons as to why they want to inspect all the documents on the Court file are rather weak and do not shift where the interests of justice lie on this matter. Accordingly, in my judgment, D2&3 have shown that the interests of justice are best served by retaining the seal on the Court file in respect of the Receiver's August Application.

Conclusion

[86] For the reasons set out in this judgment, I will not make any of the Orders that the Claimants have sought in this application. The application is therefore dismissed.

[87] I should add that although Mr Nader on behalf of Sofiia effectively applied during the course of the hearing for the documents to be disclosed (and unredacted) to him, I do not think this would be appropriate. He did not issue an application for that relief on behalf of Sofiia and I have not based my judgment on D2&3's fear that the documents would be disclosed to the Claimants' funder. All the reasons in my judgment are equally applicable to Mr Nader's oral application.

[88] I am very grateful to all Counsel for their helpful submissions. If there is to be a disagreement about the incidence of costs, a hearing will have to be arranged to deal with that, but I would hope that that would not be necessary.

Hon Mr Justice Michael Green QC
Commercial Court Judge [Ag]

By the Court

Registrar