IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION
IN THE MATTER OF THE ESTATE OF ISRAEL IGO PERRY DECEASED

CAUSE NO. FSD 205 of 2017

BETWEEN:

(1) LEA LILLY PERRY
(2) TAMAR PERRY

Plaintiffs

and

(1) LOPAG TRUST REG.
(2) PRIVATE EQUITY SERVICES (CURACAO) NV
(3) FIDUCIANA VERWALTUNGSANSTALT
(4) GAL GREENSPOON
(5) YAEL PERRY
(6) DAN GREENSPOON (7) RON GREENSPOON (8) MIA GREENSPOON
(CHILDREN, by Hagai Greenspoon, THEIR GUARDIAN AD LITUM)
(9) ADMINTRUST VERWALTUNGSANSTALT

Defendants

AND
(1) ANDREW CHILDE
(2) CHRISTOPHER ROWLAND

On the papers

RULING ON THE TRUSTEES' APPLICATION FOR AN ORDER THAT THE JUDGMENT FOLLOWING THE HEARING ON 1-2 DECEMEBER NOT BE PUBLISHED AND ON THE FIFTH DEFENDANT'S APPLICATION FOR PERMISSION TO DISCLOSE AND RELY ON THE JUDGMENT IN SUPERVISORY PROCEEDINGS BEING CONDUCTED BY THE LIECHTENSTEIN COURT

Introduction

1. On 1-2 December 2022 a hearing (the ***Hearing***) was held in relation to the Fifth Defendant's Notice of Motion issued on 23 March 2022 (the ***NOM***). The Hearing followed previous hearings (and judgments delivered) in the NOM. It dealt with the Fifth Defendant's application in the NOM for a declaration that the Trustees had acted in breach of the injunction previously granted by me. At the hearing, Ms Tracey Angus KC appeared for the Fifth Defendant and Mr Graeme McPherson KC appeared for the Trustees.

2. On 12 January 2023, my Personal Assistant (Ms. David) circulated to the attorneys for the Trustees and the Fifth Defendant a draft of my judgment (the ***Judgment***). The covering email invited comments from the parties by no later than 19 January 2023. Following receipt on 19 January 2023 of the typographical corrections proposed by the parties, on 20 January 2023 I indicated that I would accept these corrections and was ready to hand down the Judgment subject to dealing with an issue which had been raised by the Trustees in a letter sent to the Court on 17 January 2023 by their Cayman attorneys (Campbells).

3. In that letter Campbells explained that they were corresponding with the attorneys for the Fifth Defendant (Priestleys):

> *"… in relation to steps which are required to preserve the confidentiality of the judgment when it is formally handed down to ensure that paragraph 4 of the Order dated 8 July 2022 is given effect. We hope that agreement can be reached … If that proves not to be the case, we anticipate that short written submissions from each party may be required before Judgment is handed down to enable [the Court] to consider and determine the effect of handing down the Judgment and what restrictions, if any, should be placed on the use to which the Judgment may be put after handing down…. In those circumstances we would ask that [the Court] delay handing down Judgment for a short period…"*

4. It transpired that the hoped-for agreement could not be reached and accordingly written submissions were filed by the Fifth Defendant on 24 January 2023 and by the Trustees on 25 January 2023.

   The Trustees seek an order that prevents publication of the Judgment while the Fifth Defendant seeks permission to disclose and rely on the Judgment (if necessary subject to some redactions) in the supervisory proceedings currently being conducted by the Liechtenstein court.

5. I have reviewed these submissions and concluded that the Trustees' application should be dismissed and that the Fifth Defendant's application should be granted. The Trustees have, in my view, failed to establish a proper basis on which an order precluding publication of the Judgment, and the overriding of the principle of publicity and open justice, can be justified. While the order I made preventing the collateral use of the documents ordered to be discovered pursuant to the order dated 8 July 2022 (the ***July Order***) is to be treated as continuing after the Hearing and publication of the Judgment, for the reasons set out in [51] of this judgment, upon handing down of the judgment the Fifth Defendant is at liberty to refer to the Relevant Terms (as defined in [5] of the Judgment) set out in the Judgment in its revised form, including references to clause 27.3 and schedules 3 and 4 (once produced by the Trustees) of the LFA and freely to quote from and refer to any other parts of the Judgment (as well as the August Judgment and previous judgments) in the current or any other proceedings in Liechtenstein or elsewhere once the Judgment has been handed down.

The orders dated 8 July 2022 and 7 September 2022

6. Redacted versions (the ***Redacted Documents***) of the financing (litigation funding) agreement dated 22 June 2018 (the ***LFA***) and the deed of variation thereof dated 26 March 2021 (the ***DOV***), which were entered into between the Trustees and the funder (the ***Funder***), were disclosed in the proceedings commenced by the NOM on terms, as regards the Fifth Defendant, set out in the July Order and, as regards the Plaintiffs, set out in the order dated 7 September 2022 (the ***September***

Order). The Redacted Documents were disclosed as an exhibit to the 12th Affidavit of Natasha Partos (***Partos 12***).

7. Partos 12 was provided in accordance with [4] of the July Order which stated (underlining added):

> *"For the avoidance of doubt, insofar as the [Redacted Documents] are disclosed to the Fifth Defendant pursuant to paragraph 2 hereof she may not, without the permission of the court, rely upon them in any other proceedings (in any jurisdiction) nor provide them to any other person save for the purpose of the proper conduct of these proceedings. For the further avoidance of doubt, this paragraph is not intended to prevent the Fifth Defendant from relying upon the Relevant Terms or the LFA in any other proceedings (in any jurisdiction) or from providing the same to any other person, in all cases where and to the extent that they have been or are in future disclosed to the Fifth Defendant other than pursuant to paragraph 2 hereof. "*

8. The Trustees subsequently agreed that the Redacted Documents would be provided to the Plaintiffs on the same terms. This agreement was recorded in [2] of the September Order, which was made by consent:

> *"For the avoidance of doubt, insofar as the Redacted LFA is disclosed to the Plaintiff pursuant to paragraph 1 hereof, the Plaintiffs may not, without the permission of the court, rely upon them in any other proceedings (in any jurisdiction) nor provide the Redacted LFA to any other person save to the Plaintiffs' legal team, consisting of Walkers and the Plaintiffs' counsel, for the purpose of the proper conduct of these proceedings."*

The previous judgments

9. As I have noted, I have previously handed down a number of judgments dealing with applications and issues arising in relation to the NOM. These include my judgments dated 31 May 2022, 8 July 2022, and 12 August 2022. I refer to these judgments as the ***May Judgment***, the ***July Judgment,*** and the ***August Judgment*** respectively. All these judgments were uploaded to the Court's public Register of Judgments.

10. In the August Judgment I dealt with the Fifth Defendant's challenge to the redactions made by the Trustees. I explained the background and the issues arising as follows:

> *"2. Following a judgment of 31 May 2022 (the Judgment) and ruling of 8 July 2022 (the Ruling), the Court made an order dated 8 July 2022 (the Order). By paragraph 2 of the Order the Trustees were ordered to produce those parts (together the Relevant Terms) of the LFA and any deed of variation thereof (the Deed): (a). that required or permitted the Trustees to have (or give the funder) recourse to (or which gave the Trustees or the funder rights over) assets of the Ypresto Trust for the payment of sums due under the LFA (and the terms which condition and regulate those rights of recourse or rights over the Ypresto Trust assets) including not only the main operative provisions but related and relevant definitions and terms. (b). on which the Trustees rely in support of their case that the Trustees and the funders do not have and cannot exercise rights of recourse to those assets until after the Injunction has been discharged.*
>
> *3. Paragraph 3 of the Order permitted the Trustees to redact any clauses or provisions within the LFA that (a) were irrelevant to and unconnected with the Relevant Terms, (b) were subject to privilege or (c) contained commercially sensitive information (the Redaction Criteria), subject to a proviso that the redactions made should not affect the ability of the Court and the Fifth Defendant to understand and interpret the nature and extent of the rights of recourse to and rights over the Ypresto Trust assets (the Redaction Proviso).*
>
> *4. Paragraph 5 of the Order directed the Trustees to provide by 11 July 2022 an affidavit explaining why they contended that their proposed redactions were justified being as specific as possible without making disclosure of matters that the claim for privilege or commercial sensitivity was designed to protect (the Specificity Requirement).*
>
> *5. On 11 July 2022 the Trustees served on the Fifth Defendant and the Plaintiffs an affidavit made by Ms Natasha Partos of Campbells, the Trustees' attorneys (Partos 12). The exhibit to Partos 12 contained a redacted copy of the LFA (the Redacted LFA) and a redacted copy of the Deed (the Redacted Deed). The Trustees provided explanations for their redactions at [6] of Partos 12 ("Redactions for commercial sensitivity are as the clause is commercially sensitive in the context of this litigation") and in a table at Annex A to Partos 12 (Annex A).*

> 6. *On 15 July 2022 the Fifth Defendant's attorneys, Priestleys, notified the Trustees' attorneys (pursuant to paragraph 6 of the Order) that she challenged some of the Trustees' redactions. Priestleys' letter enclosed a list (the List) of the redactions challenged by the Fifth Defendant (the Challenged Redactions).*
>
> 7. *On 22 July 2022 the Trustees provided, by way of a letter from Campbells to Priestleys of that date (the Campbells Letter) "additional information in respect of each of the Challenged Redactions" (Additional Information).”*

11. In the August Judgment I dismissed the Fifth Defendant’s challenge and explained why I considered that the Redacted Documents, together with the confirmations given on oath by the Trustees, provided the Court and the Fifth Defendant with the details needed for a fair hearing and adjudication of the NOM. The August Judgment discussed the terms of the Redacted Documents and set them out *in extenso* in Appendix 1 (the LFA) and Appendix 2 (the DOV) of the August Judgment. This was necessary so that my decision and reasoning could be understood.

12. No application was made by the Trustees to prevent the publication of the August Judgment, which was, as I have noted, posted on the Court’s Judgments Register which is accessible by the public (as had been my judgment dated 26 July 2018 in FSD 98 of 2018 (the ***Champerty Ruling***)).

The Hearing

13. At the beginning of the Hearing, Mr McPherson KC raised a concern regarding the impact of the Redacted Documents being referred to in open court and the effect of doing so on the restrictions established by [4] of the July Order and [2] of the September Order (Mr McPherson KC referred to the “*implied undertaking to use documents only in these proceedings*”). I indicated that my provisional view was that the restrictions on use set out in those paragraphs were intended to apply irrespective of the Redacted Documents being referred to in open court (or for that matter in the evidence filed in the NOM) since they had been granted as a *quid quo pro* to the order requiring the Trustees to disclose the Redacted Documents and to deal with the Trustees’ specific concern that the

NOM had been filed for an ulterior motive, namely that the Fifth Defendant had commenced the NOM in order to obtain the documents and details relating to the Trustee's litigation funding with a view to gaining negotiating leverage or to using them in other proceedings.

14. The following exchanges took place at the beginning of the hearing on 1 December (underlining added):

> *"**MR MCPHERSON:*** *My Lord, yes. You may recall that as part of your order earlier this year on 8 July, you directed that insofar as the relevant terms are disclosed to Yael pursuant to the paragraph of the order, she may not, without permission of court, rely upon them in any other proceedings in any jurisdiction. Then you made a similar order. You may recall that there was a debate as to whether or not Tamar should receive copies.*
>
> *The issue that I simply wish to raise was this. We are now in open court. We are about to refer to those as a document. It might be thought that by doing so, the implied undertaking to use documents only in these proceedings is no longer extant and is at an end. So people can take the redacted LFA and DOV and wave it wherever they want to round the world. My understanding or my interpretation of your order was that was not what was intended.*
>
> ***MR JUSTICE SEGAL:*** *Indeed. Yes.*
>
> ***MR MCPHERSON:*** *So the only reason that I raise it is therefore to seek clarity and confirmation at the start that merely by referring to this document in open court does not in any way alter paragraph 4 of that order or the relevant order that affects Tamar.*
>
> ***MR JUSTICE SEGAL:*** *No. Is that something, Ms Angus, that you disagree with?*
>
> ***MS ANGUS:*** *My Lord, in a sense, I have not had a chance to take instructions from my client at this point. The point that occurs to me is whether or not it really is a matter for to be agreed because I think the open justice principle is engaged, is it not? If a document is referred to and it operates or it leads to a judicial decision, then the open justice*

principle would be that that document is no longer protected by an undertaking, and it really goes beyond what the parties want actually and engages that principle. I have not come along armed with the relevant authorities, but I think it is a matter that the court will need to consider before reaching a decision on this point.

MR JUSTICE SEGAL: *Well, I must say, as far as I am concerned, the orders that were made were intended to apply throughout the proceedings. As regards the use to which the documents are to be put, the limitation on the use to which the documents can be put by the parties seems to me to continue and to apply irrespective of the open justice principle. That is my provisional view. If it is something Ms Angus that you think requires further deliberation, I am prepared to give that some further thought but as matters currently stand, as I say, it seems to me the orders that were made limited the use to which you can put the documents. I do not see why the fact that the documents are going to be deployed in a hearing to which the orders relate should undermine the effect of the orders.*

MS ANGUS: *I think, my Lord, it would come down, in my respectful submission, to what the court intended when it made the order in, I think, it was July, the July order. Because ordinarily if that order was merely intended to encapsulate what the implied undertaking is, then the implied undertaking would fall away when a document is referred to in open court.*

If the order was intended to add to the implied undertaking then that would be a different matter. And I do not think that is a question that we clarified with your Lordship at the time the order was made. I think that your Lordship's ruling in relation to the order was that it was wording that my client suggested was appropriate because it reflected the implied undertaking.

So I think I can only leave it there at that point in time. But perhaps if one could take instructions and come back to you on that and just make a point about this some more.

MR JUSTICE SEGAL: *Why do you not do that and then I think you have heard my immediate reaction and provisional view, but I think you ought to have the opportunity to take instructions? If you wish to make further*

submissions, you can do so. Clearly the sooner we deal with that ... perhaps we can deal with that after the lunch adjournment if there are points that you wish to raise."

15. The following further exchanges took place on this subject at the beginning of the hearing on 2 December (underlining added):

> ***"MR MCPHERSON:*** *What we have discussed between ourselves, and what we would like to present to you as an agreed position, is that paragraph 4 effectively is confirmed as being the position, namely that Yael, and anyone who through Yael has received a copy of the redacted funding agreements in these proceedings, is prohibited from using them or from relying on them in any other proceedings in any jurisdiction -- as per paragraph 4 -- although there is liberty to apply.*
>
> ***MR JUSTICE SEGAL:*** *Yes.*
>
> ***MR MCPHERSON:*** *I say straightaway, Ms Angus has said to me that she anticipates that Yael will apply and is happy to do that on paper if you are happy to have it on paper, for use or to use the document in Liechtenstein. That is something for another day.*
>
> ***MS ANGUS:*** *Actually, I would like to clarify to Mr McPherson, I would like to deal with the Liechtenstein point with you today, not on another day, but in relation to other proceedings, I have suggested to Mr McPherson that an application could be made and we would invite your Lordship to deal with the permission or any (Inaudible) order on paper, if your Lord is happy about that.*
>
> ***MR JUSTICE SEGAL:*** *Yes.*
>
> ***MS ANGUS:*** *Just to be clear, as I understand it, the order itself only applies to the redacted LFA.*
>
> ***MR JUSTICE SEGAL:*** *That is what it says.*
>
> ***MS ANGUS:*** *Yes.*

MR JUSTICE SEGAL: *Yes.*

MS ANGUS: *But one of the things I wanted to draw your attention to is of course there will be submissions made in open court about the redacted LFA, and how one deals with that is something that we have to give consideration to.*

My clients' position, my Lord, is this. Your Lordship will be aware, there are supervisory proceedings ongoing in Liechtenstein. Effectively, as far as I can tell, they are bit like CPR Part 64 proceedings, so they are internal. In those proceedings -- just by analogy with Part 64 proceedings -- it would be unusual if my client could not refer to material in litigation in Cayman there. So, in that respect, that is the one exception; that I would like my client to be able to refer to not just the submissions on the LFA, but the redacted LFA in those internal proceedings involving her and the Trustees in Liechtenstein. In relation to other applications, if she wants to use them in other proceedings, or for anything else, then I suggest, as Mr McPherson said, it is done by application on paper to your Lordship explaining why.

MR JUSTICE SEGAL: *Yes.*

MS ANGUS: *I think what has happened in the past, and your Lordship may recall the 2 July 2018 submission, submissions have been made in Liechtenstein that do not actually reflect what has happened here. I am also told by my client that the Trustees have referred to, quite happily, material in the Cayman proceedings in Liechtenstein, and she would like to be in the same position.*

MR JUSTICE SEGAL: *But presumably not material to which paragraph 4 or its equivalent apply? Paragraph 4 stands, does it not? Paragraph 4 is unqualified. I regard paragraph 4 as effectively an order made pursuant to order 24, rule 22, that there are special reasons why it is appropriate that the prohibition in paragraph 4 applies without limitation, and even after the relevant documents are read out in court. In terms of Liechtenstein, what are the Trustees' ...?*

MR MCPHERSON: *I am very surprised my learned friend even raised it, because I made it clear to her that because she had raised this so late in the day, I have had no opportunity to take instructions.*

MR JUSTICE SEGAL: *Indeed.*

MR MCPHERSON: *That is why I thought it was going to be dealt with on paper, so I cannot tell you what their position is, because I do not know it. Sorry.*

MR JUSTICE SEGAL: *Yes.*

MR MCPHERSON: *There is no urgency in respect of Liechtenstein. It does not matter if it is Monday. Whereas the urgency comes because of what is happening in Delaware. I am reminded that, as well as paragraph 4, there is a consent order in like terms with Tamar and I think with Lily? 7 September. Mr Dunne confirms with Lily as well, so it is effectively simply reinforcing that not only paragraph 4 remains applicable, but paragraph whatever it is of that.*

MR JUSTICE SEGAL: *Sorry. The other provision that you are talking about refers to the same subject matter?*

MR MCPHERSON: *I understand it is in materially the same terms.*

MR JUSTICE SEGAL: *Yes.*

MR MCPHERSON: *Yes. To be clear, those paragraphs refer to "the relevant terms", which are referenced in the document. So my learned friend's concerns about being able to refer to what is going on in Cayman is a different matter. That is not an issue.*

MR JUSTICE SEGAL: *Yes. Ms Angus.*

MS ANGUS: *It is not just what is going on in Cayman. It is about submissions about a document that have been made in open court.*

MR JUSTICE SEGAL: *I understand.*

MS ANGUS: *Your Lordship (Inaudible)if they are not covered by paragraph 4, I do not have any problem. I am a little concerned that paragraph 4*

only prevents my client to referring to the redacted LFA in the Liechtenstein proceedings. It is obviously unfair if the Trustees can and she cannot. If the Trustees make mention of the LFA in Liechtenstein, surely my client can also make submissions.

MR JUSTICE SEGAL: *I think that kind of refinement as to whether it would be appropriate to amend paragraph 4, and the equivalent provision -- so that the prohibition does not apply if and to the extent that the Trustees themselves refer to that material in the other proceedings -- where I am at the moment is I think paragraph 4 and the other order are clear and remain in full force and effect. That they were granted -- paragraph 4 was an order that I made -- as part of the overall orders that were made on your clients' application to see the LFA and the associated documents. Paragraph 4 was a protection for the Trustees that was included in order to justify and to ensure that I was prepared to make the order permitting the redacted parts of the LFA and the relevant terms to be made available. The circumstances of the case and the relevant circumstances that caused me to decide that those special protections were needed constitute special reasons for the purpose of order 24, rule 22. As things currently stand, paragraph 4 is effective, applies irrespective of whether the relevant terms are referred to in open court, or read to, or read by me. If you want to make a modification, or want to apply for one, then you should do so, and you can do so. I am not prepared at the moment to modify the terms with respect to Liechtenstein without seeing an application and without understanding precisely what is involved.*

MS ANGUS: *Can I just make sure I have understood your Lordship?*

MR JUSTICE SEGAL: *Yes.*

MS ANGUS: *Your Lordship is indicating that paragraph 4 applies to the redacted LFA terms, and you are also saying it applies to submissions made about those in open court?*

MR JUSTICE SEGAL: *As far as I am concerned, it applies to the relevant terms. Is it not? That is what it says in terms.*

MS ANGUS: *Yes.*

MR JUSTICE SEGAL: *It applies to the relevant terms even if, and to the extent that, those are read out in court or read by the court. It should apply, should it not, to any other documents which refer to the relevant terms? Otherwise, that would wholly undermine the protections that paragraph 4 provides. So, if there are submissions which describe or deal with so as to enable a reader to ascertain what the relevant terms are, then paragraph 4 should apply to that, surely?*

MS ANGUS: *My Lord, can I clarify one other matter arising from what your Lordship has just said?*

MR JUSTICE SEGAL: *Yes.*

MS ANGUS: *Prior to the order of July, material was put in evidence by the Trustees with the permission of the Funder about various aspects of the LFA. In my respectful submissions, those aspects of the LFA cannot possibly be confidential anymore and the evidence has been relied upon. Part of the reason we wanted a proviso in that order was that so my client could not be prevented in relying on that particular material. I would like to clarify with your Lordship if that is your (Overspeaking)*

MR JUSTICE SEGAL: *I think what you need to do, do you not -- we can have a discussion but I think those kind of matters, if you want clarification of the scope of paragraph 4 -- if you want to apply or to seek a confirmation that certain things are not covered by paragraph 4, then can you make an application, file submissions, and I can read the submissions and understand precisely what the scope is of the clarification or the qualification or the amendment, and understand the reasons why you are seeking it? Then I can hear what the Trustees say and I can decide.*

MS ANGUS: *Yes. In fact, if I look at the terms of the order, it is pretty clear in terms of (Inaudible) disclosed (Inaudible) pursuant to paragraph 2 of the July order that we wish(?) to rely on.*

MR JUSTICE SEGAL: *Yes.*

MS ANGUS: *I think that answers the question. Thank you.*

MR MCPHERSON: *Thank you, my Lord. That deals with that matter, and I am grateful for the clarification.*

MR JUSTICE SEGAL: *If you want a minute of (Inaudible) -- if you want a piece of paper which sets out what I have said or confirmed -- you can draft one and let me have it, but if you do not need that (Inaudible).*

MR MCPHERSON: *I suspect that those that are watching remotely will communicate the relevant opinion to. In so far as something more than an oral communication is needed*

MR JUSTICE SEGAL: *Then you will let me know.*

MR MCPHERSON: *-- then we can deal with that.*

MR JUSTICE SEGAL: *Yes."*

16. As will be apparent, the discussion at the hearing dealt exclusively with the use to which the Fifth Defendant could put the Redacted Documents. The Trustees did not suggest that the Judgment to be delivered following the hearing needed to or should be delivered in private and should not be made public (unsurprisingly to me since the previous judgments had been, as I have explained, placed on the public register and the Trustees had never suggested that this should not be done or sought to prevent that).

The Trustees' position

17. The Trustees now submit, as their primary position, that the Judgment should remain private and should not be published. They argue that this is necessary to maintain the confidentiality of the Redacted Documents. They claim that the intention and purpose of [4] of the July Order and [2] of the September Order was to prevent the terms and operation of the LFA and the DOV from being made public. The Trustees say that while the terms of the LFA and the DOV are not confidential as between the parties before the Court they are as between the parties to the LFA and the DOV, not all

of whom are before the Court, and there was no reason why the terms of the LFA and the DOV should not remain confidential.

18. The Trustees accept that the default position is that judgments are public, in accordance with the open justice principle, but rely on the Court's power pursuant to GCR O.63 r.3(4) and GCR O.63, r.7(1) to make orders ensuring that judgments are kept confidential. The Trustees submit that the Court exercises the discretion conferred by GCR O.63 where it is satisfied that the open justice principle should give way to the objective of achieving justice in the case (citing *Sasken Communication Technologies Limited v Spectrum Communication Incorporated* [2016] 1 CILR 1 in which the decision in *Ahmad Hamad Algosaibi & Bros. Co. v Saad Invs. Co. Ltd* [2011 (1) CILR 326] was cited with approval). The Trustees accept that there is a balance to be struck between the principle of open justice and the confidentiality of the contractual terms (and that there are matters discussed in the draft judgment that do not touch upon the Redacted Terms) and argue that in this case the Court should make an order that prevents the Redacted Documents coming into the public domain. In Campbells' letter dated 13 January to the Fifth Defendant's attorneys, the Fifth Defendant was invited to agree to an order (the ***Confidentiality Order***) that the judgment "*shall not be made public but will be confidential to the parties, and that its use will be restricted in the same terms as provided for in the order of 8 July 2022...so as to protect the confidentiality of the information disclosed by the Trustees relating to the LFA and DOV*.".

19. The Trustees have considered whether the Judgment could be redacted or amended to be in a form that preserved the effect of [4] of the July Order and [2] of the September Order but consider this to be impracticable since it isnot easy to see how the Judgment could be redacted in any meaningful way that would both preserve the confidentiality of the Redacted Documents and allow the decision to be understood. They consider that a workable alternative would be for the Court to prepare either a revised judgment which omitted any reference to the Redacted Documents and which set out the terms of the Redacted Documents in a confidential annex to the judgment or a separate summary of

its decision which avoided disclosing and referring to the Redacted Documents, but appreciate that this would impose a burden, and probably a substantial burden, on the Court.

The Fifth Defendant's position

20. The Fifth Defendant's primary position was that, since all the terms of the LFA and DOV which were disclosed to the Fifth Defendant pursuant to [2] of the July Order were already in the public domain (and the Trustees had taken no step to avoid publication of the August Judgment), the interests of justice did not require any part of the Judgment to be kept confidential to the parties.

21. The Fifth Defendant submitted that the authorities established three core propositions: the Judgment should be published save to the extent that the interests of justice require it be kept confidential; the restrictions on publication should go no further than are required in the interests of justice; and it was for the party seeking to prevent publication to satisfy the Court that the interests of justice require its non-publication. The Fifth Defendant submitted that the Trustees had failed to satisfy this requirement.

22. In the alternative, the Fifth Defendant submitted that if the interests of justice required some restriction to the publication of the Judgment so as to give effect to [4] of the July Order, the proposed Confidentiality Order would be an impermissibly wide inroad into the open justice principle. This objective could instead be achieved by redacting parts of the Judgment.

23. The Fifth Defendant submitted that by its terms [4] of the July Order was not intended to restrict the Fifth Defendant from publishing terms of the Redacted Documents insofar as those terms had already been disclosed to her prior to the July Order, nor was it intended to prevent her from publishing the terms of the LFA and DOV that were disclosed to her after the date of the July Order other than in documents provided to her pursuant to [2] of the July Order. She referred to the terms of the LFA and DOV disclosed to the Fifth Defendant in a manner not captured by [4] of the July Order as the

Non- Embargoed Terms. She argued that effect could be given to [4] of the July Order by redacting from the Judgment references to the Non-Embargoed Terms.

24. The Fifth Defendant also applied, as contemplated by the discussions during the Hearing referred to above, for an order authorising her to refer to and disclose the unredacted Judgment to the Princely Court of Liechtenstein in and for the purpose of the supervisory proceedings currently being conducted by the Liechtenstein court (***the Fifth Defendant's Application***). She argued that there was no risk of a release of confidential material into the public domain if this was done since, as had been confirmed at the Hearing, the Liechtenstein proceedings were internal and are not open to the public and the unredacted versions of the LFA and DOV were already on the Court file in the Liechtenstein proceedings.

25. The Fifth Defendant in her written submissions referred to [8 – 11] of the Fifth Affidavit of Florian Zechberger which confirmed that the Liechtenstein court is, *inter alia*, considering the behaviour and actions of the Trustees and their legal advisors in the context of an application by the Fifth Defendant, following [67] of the May Judgment. In these submissions the Fifth Defendant said that the Liechtenstein court had informed her of these proceedings by a letter dated 9 September 2022. The Liechtenstein court had also, she said, provided the Fifth Defendant with the parties' responses to those proceedings from which the Fifth Defendant had learned that it was the case of the trustee of the Ypresto Trust (Global) appointed by the Liechtenstein court that the Trustees had not provided to it information relating to the Ypresto Trust. The Liechtenstein court has, the Fifth Defendant says in those submissions, allowed a further submission to be made (presumably by the Fifth Defendant although this is not stated) that the Trustees should be removed as trustees of Ypresto Trust on the ground of their conflict of interest and breach of trust. The Fifth Defendant further says in these submissions that in an email dated 24 January 2023, Global had informed her that the unredacted LFA and DOV had been filed in the Liechtenstein proceedings. Copies of the relevant

correspondence were attached to the written submissions (but have not been adduced into evidence by affidavit).

The relevant law

26. The parties referred me to and relied on the provisions in the Constitution (the Cayman Islands Constitution Order 2009, Schedule 2) (the ***Constitution***), in the GCR and the common law jurisprudence relating to the open justice principle and its exceptions. The provisions and jurisprudence referred to can be summarised as follows:

27. Section 7 of the Constitution reads as follows:

> "(9) *all proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public."*

28. GCR O.63, r.3(4) provides that:

> *"3(4) The Court may order that the Court file relating to any proceeding or any specific document therein be closed and not open to inspection by any party or other person except with the prior leave of the Court."*

29. GCR O.63, r.7(1) provides that:

> *"7(1) The Clerk of the Court shall create a file upon which shall be placed an office copy of every final judgment given or made by the Court of the kind referred to in Order 42, rule 5(8) [refers to form of Judgment etc.], unless otherwise directed by the Court, which shall be referred to as "the Register of Judgments."*

30. The principles applicable to the exercise of the discretion conferred in O.63 were considered by Smellie CJ in *Ahmad Hamad Algosaibi & Bros. Co. V. Saad Invs. Co. Ltd*. [2011 (1) CILR 326] (***Saad***) in which it was held that the *"... tenor of the more recent decisions lead to the conclusion that the principles of open justice apply fully also in the context of interlocutory proceedings*".

31. In *Saad*, Smellie CJ (at [13]) cited with approval the judgment of Lewison J in *ABC Ltd v Y* [2012] 1 W.L.R. 532, at [33]:

> *"As the history shows, such limitation as could be placed upon the general principle of open justice derive from the inherent power of the court to determine that its deliberations may be conducted in private but only if the interests of justice so require".*

32. Smellie CJ said (at [14] and [15]) that (following Lewison J) he relied on the following passages from the judgment of Viscount Haldane L.C. in *Scott v Scott* [1913] A.C. at 435 (underlining added):

> *"The power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge...*
>
> *... the exceptions are themselves the outcome of a yet more fundamental principle that the chief objects of Courts of Justice must be to secure that justice is done... As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity". I do not understand the law and practice in our jurisdiction to have departed from those fundamental principles described by Viscount Haldane, L.C.".*

33. Smellie CJ again considered the application of GCR O.63 in *In the Matter of the Sphinx Group of Companies (In Official Liquidation)* [2017] (1) CILR 176. There he concluded that (underlining added):

> *"It is recognised, however, that the principle of open justice is not unlimited. Rather, open justice forms part of the overriding principle that justice must be done. As such, at common law, the general rule as to publicity must yield to this overriding principle and limitations can*

> *be placed upon the access to information by the public. But these limitations are not left to the individual discretion of the judge based simply on what is convenient or desirable in the circumstances. Limitations can only be placed on the principle where the interests of justice so require. The Court is therefore required to balance the general rule as to publicity against any requirements for confidentiality or privacy in the interests of justice that may arise in a particular case*".

34. The law and procedural rules governing the use of material disclosed in proceedings is also relevant. It is necessary to consider the proper construction and effect of the Orders and the impact of the Redacted Documents having been read to or by the Court, or referred to, at the Hearing (which was held in public).

35. The use of documents disclosed for the purpose of legal proceedings is under the control of the Court. In the absence of an order of the Court, the obligation not to use such documents for any other purpose arises from an implied undertaking that every party who receives disclosed documents is treated as giving to the Court. It is an undertaking only to use the documents for purposes connected with the proper conduct of the action and not to use them for any collateral or ulterior purpose (see *Home Office v Harman* [1983] 1 AC 280).The Court may release a party from the undertaking and allow collateral use but the Court always retains control in order to prevent its process from being abused.

36. The impact on the implied undertaking of reference being made to the disclosed documents in open Court is dealt with in the GCR. GCR O.24, r.22 states that (underlining added):

> *"Any undertaking, whether expressed or implied, not to use a document or transcript for any purposes other than the proceedings in which it is disclosed or made shall cease to apply to such document or transcript after it has been read to or by the Court, or referred to in open Court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs or by whom the oral evidence was given."*

37. The freedom to use disclosed material that has been brought out in open court is dictated by the basic principle of publicity of legal proceedings and by the right to freedom of expression. Given that what has passed at a public hearing may generally be publicised and disseminated by parties, or by anyone else, there is no justification for prohibiting reliance on such materials in other legal proceedings (or indeed, using them for any other purpose).

38. However, under GCR O.24, r.22 the Court has the power to order that the implied undertaking continues in force despite the disclosed documents being read out or referred to in open Court. For an example of a case in which the undertaking was waived, see the decision of Smellie J in *Hoyes v Gas Monitoring Inc Cayman [1994-95 CILR 504]*. After having referred to the decision of the House of Lords in *Crest Homes PLC v Marks, [1987] A.C. 829* he noted that the Court could release or modify the undertaking in special circumstances if to do so would not cause injustice to the person giving discovery.

The basis on which [4] of the July Order and [2] of the September Order were made

39. It is clear from [11-21] of the July Judgment that [4] of the July Order (and the order to be made relating to the Plaintiffs, as eventually set out in the September Order) was intended to reflect but also reinforce (by Court order) the terms of the usual implied undertaking so as to deal with the risk of collateral use of the Redacted Documents, which the Trustees in their evidence had identified as a real risk and were concerned about.

40. The following extracts from the July Judgment make that plain (underlining added):

"13. The Trustees said that they were concerned to ensure that the Fifth Defendant did not misuse the [Redacted Documents] once they had been provided to her. They were content that she should not be prevented from making reference to information relating to the Litigation Funding Agreement (or any variation thereof) which she already possessed, or which legitimately came into her possession in the future, otherwise than pursuant to the Notice of Motion and the Summons. However, the Trustees argued, the Fifth Defendant should not be entitled to disclose the [Redacted Documents] to the Plaintiffs and other Defendants. They were not parties to the Notice of Motion or the Summons, had not made an application for production of the Litigation Funding Agreement and there was no good reason why the Fifth Defendant might need to provide the [Redacted Documents]to them. Furthermore, were the Fifth Defendant to do so, there would be no express prohibition preventing the Plaintiffs or the other Defendants from using, relying on, or providing to third parties copies of the Relevant Terms for their own purposes.

14. The Fifth Defendant argued that the order should not be expanded beyond the normal rule which applied by reason of the implied undertaking which is deemed to be given by a party when documents are disclosed under compulsion. The Fifth Defendant referred to Braga v Equity Trust Company (Cayman) Limited and Four Others [2011] (1) CILR 402, which she said confined that the leading authority was the decision of the House of Lords in Home Office v Harman [1983] 1AC280. The implied undertaking was not to use the documents disclosed, nor to allow them to be used, for any purpose other than the proper conduct of the relevant action. The Fifth Defendant argued that she should not be prevented from disclosing the Relevant Terms to other parties to the proceedings where that was permitted by the implied undertaking (so that the Fifth Defendant should not be prevented from making use of those documents for the proper conduct of the litigation in which they were disclosed).

15. I agree with the Fifth Defendant. The Trustees did not make at the hearing (and have not, even assuming that it would have been appropriate to do so, subsequently made) an application for an order restricting the use which the Fifth Defendant can make of the [Redacted Documents]. In those circumstances the usual position and the restrictions imposed by the implied undertaking must apply. It is inappropriate for the Trustees to seek to add restrictions at this stage by adding wording to the form of order whose purpose is to give effect to the determination of the matters dealt with at the hearing as set out in the judgment. In circumstances where the point was not raised (let alone the subject of argument and the citation of authority) at the hearing, the only proper course is to apply the normal default rule.

16. *The Fifth Defendant seeks an order that "she may not, without the permission of the court, ... provide the [Redacted Documents] to any third party save for the purpose of the proper conduct of these proceedings." The implied undertaking, as I have already mentioned, is usually expressed as an undertaking not to use the documents disclosed, nor to allow them to be used, for any purpose other than the proper conduct of the relevant action. But use includes showing the document to someone else. As Robin Knowles J (referring to and interpreting CPR 31.22(1) which incorporated the implied undertaking into the English rules of court) held in Tchenguiz and another v Grant Thornton UK LLP and others [2017] 1 WLR 2809 at [21]""Use" is a wide word. It extends to (a) use of the document itself e.g. by reading it, copying it, showing it to somebody else (such as the judge)." And as Browne-Wilkinson V-C (as he then was) said in Derby & Co Ltd v Weldon (1988) Times, 20 October (quoted in SmithKline Beecham v Connaught [1999] 4 All ER 498 at 505-506) (underlining added):*

> *"But such invasion of privacy being only for the purpose of enabling a proper trial of the action in which the discovery is given, the court is astute to prevent documents so obtained from being used for any other purpose. As a result the law is well established that the recipient of documents disclosed under compulsion of court proceedings holds those documents subject to an implied undertaking not, without the consent of the court. to disclose such documents to any third party or use the documents hr any purpose other than the action in which they were disclosed".*

17. *So the Fifth Defendant's formulation is in accordance with the implied undertaking. I take "third party" in this context, both as used by the Fifth Defendant and Browne-Wilkinson V-C, to refer to any other person, as opposed to any person who is not a party to the proceedings. So the undertaking is not without the consent of the court to disclose the documents to any person for any purpose other than the action in which they were disclosed. In the present context, this must be taken to mean for the purpose of enforcing and policing the Injunction, which was made pursuant to an order in the main proceedings. The proceedings for contempt, as constituted by the Notice of Motion and the Summons, are part of the main, underlying, proceedings pursuant to which the Injunction was granted."*

Discussion and decision

The Trustees' application for the Confidentiality Order

41. At the Hearing I expressed my "*provisional view*" that [4] of the July Order and [2] of the September Order (the ***Orders***) were intended to apply throughout the proceedings and that the limitations on the use to which the Redacted Documents could be put continued to apply despite their disclosure in open Court. I indicated that this was because the Orders were intended to provide specific protection to the Trustees in response to a particular identified risk (in particular the concern that the NOM was being prosecuted at least in part to obtain documents for use in Liechtenstein where proceedings against the Trustees had been and may continue to be taken). I had made a particular order for discovery of the Redacted Documents to ensure that the NOM could be fairly adjudicated and it was important in this context that they only be used for the purpose of the NOM unless the Court permitted otherwise (after the Trustees were given an opportunity to make submissions). I mentioned the jurisdiction under GCR O.24, r.22 to order (where there were special circumstances) that the restrictions on the use of discovered documents continued after their disclosure in open Court. It also seemed to me to be important to preserve the effect of the Orders until their scope and effect could be properly considered (the issue of their scope and effect not having been raised before the commencement of the Hearing) and avoid delaying and disrupting the Hearing by pausing to do so.

42. My comments in the July Judgment (in particular at [15]) were directed primarily at the scope of the restrictions to be imposed by the proposed orders rather than as their status and duration. It does seem to me that there were special reasons justifying the prohibition on collateral use continuing despite the disclosure of the Redacted Documents at a public hearing. When discovery of the Redacted Documents was ordered it was clear that they would be referred to at the Hearing – that was the whole purpose of the Fifth Defendant's application for their disclosure. The Redacted Documents are central to the issues raised on the NOM. This is not a case of a wide range of documents being

discovered pursuant to compliance with ordinary discovery obligations, many of which may not be referred to at an interlocutory or final hearing. I do not consider that the continuation in force of the restrictions in the Orders will cause injustice to the Fifth Defendant (or the Plaintiffs, for that matter, who have not sought to make submissions on this issue).

43. Having said that, the Trustees did not apply and have not applied for an order under GCR O.24, r.22. I have considered whether it is right for me nonetheless to treat the Orders as being unaffected by the disclosure of the Redacted Documents at the Hearing. In the circumstances it seems to me that there is no need, in the interests of justice, to require the Trustees to apply for such an order. The impact of the disclosure of the Redacted Documents at the Hearing was discussed at the Hearing, at which I referred to GCR O.24, r.22 and the existence of special reasons, and the Fifth Defendant has had an opportunity subsequently to make written submissions following the Hearing. Accordingly, I consider that the prohibition, without the Court's permission, on reliance in other proceedings on, or the provision to others of ,the Redacted Documents continues after the Hearing.

44. But [4] of the July Order (and [2] of the September Order) do not prohibit the publication of any judgment handed down by the Court in connection with the NOM nor have the Trustees sought to prevent publication of any of the other judgments handed down to date, including the August Judgment. Nor did the Trustees raise the issue at the Hearing. The full Redacted Documents were published in the August Judgment and are therefore in the public domain. This fact combined with the weight to be given to the publicity or open justice principle establishes a strong presumption that the Judgment should be published without the need to redact the Redacted Documents. I do not accept the Trustees' submission that the Judgment only deals with a private dispute of relevance to the parties with "*limited wider relevance*." In my view, a case involving allegations of contempt of court against professional trustees for breaches of a proprietary injunction raises issues of wider significance and public importance.

45. The Trustees' focus has been and remains on the improper use of the Redacted Documents by the Fifth Defendant. The Trustees have not argued that the Redacted Terms include confidential information which if disclosed to the public at large would be prejudicial to them. The fact that the Trustees have obtained litigation funding and the existence of the LFA, and its main terms and effect, have been in the public domain since the Champerty Ruling. The Redacted Documents were, as I have noted, set out in the August Judgment. The Trustees' argument in support of and justification for keeping the whole judgment private is based on the assertion that this is needed to give effect to and preserve the effectiveness of the Orders. It is said, as I understand it, that if the Judgment is made public the Fifth Defendant can make whatever use of it she wishes - if the Judgment is made public without at least the extensive redactions the Trustees seek, the Fifth Defendant will then be able to rely on it and deploy it in support of applications made by her in the Liechtenstein court and possibly elsewhere (this is a dispute involving litigation in multiple jurisdictions).

46. However, I do not consider that the Trustees have made out a case or justified the need to prevent publication of the whole of the Judgment. The restrictions imposed on the Fifth Defendant by the Orders can remain effective after such publication, provided it is clear that they remain in force despite and after the Hearing and publication. It seems to me that, for the reasons I have given above, there are special reasons in this case why the use of the Redacted Documents obtained by the Fifth Defendant in these proceedings should continue to be limited to these proceedings save where the Fifth Defendant can persuade the Court, on evidence, that their use in other proceedings is justified.

47. The action restrained is that of the Fifth Defendant and in particular her use of the Redacted Documents in other proceedings or their disclosure by her to others. Publication does not mean that these restrictions cannot continue or be enforced. Of course, once the Judgment is made public others can refer to the Judgment (and the Redacted Documents) in other proceedings and freely distribute the Judgment. But the mischief that the Orders were designed to deal with was improper use by the Fifth Defendant and this remains prohibited despite publication. I appreciate that this creates a risk

that the Fifth Defendant might seek the assistance of or use others to achieve what she is prohibited from doing, but were she to do so this would almost certainly involve conduct in breach of the Orders with the consequent serious risk of contempt sanctions, this time against her.

48. The question then arises whether, if the parts of the Judgment that set out or refer to the Redacted Documents are not to be redacted, any other parts of the Judgment should be redacted or removed. I cannot see that there is any justification for doing so. The other documents reference to which the Trustees complain of (for example to the Byrne Memorandum and the Withers Letter – see [24] and [25] of the Judgment) were not discovered by them (pursuant to [2] of the July Order) but by the Fifth Defendant and as I explained in the Judgment the Trustees have never applied to exclude these documents from the evidence. I would also note that, as I stated in [25] of the Judgment, I omitted references to financial information which might have been regarded as commercially sensitive.

The Fifth Defendant's Application

49. As I have noted, the Fifth Defendant's Application has been made by way of her written submissions and she refers only to evidence filed for the purpose of the hearing, namely [8 – 11] of the Fifth Affidavit of Florian Zechberger.

50. The Fifth Defendant has not issued an application and filed new evidence. I am prepared to treat the request for permission set out in her written submissions as her application made by reference to the evidence contained in Mr Zechberger's Fifth Affidavit.

51. It is clear that the Trustees have accepted that if I dismissed their application for the Confidentiality Order and decided that the Judgment should be handed down and made public without any restrictions, then it followed that the Fifth Defendant would be able to refer to and rely on the Judgment and the references therein to the Relevant Terms. The Trustees have accepted that once the Judgment is publicly available, after it has been handed down, it can be referred to and quoted

from without restriction. This can be in the current supervisory proceedings in Liechtenstein, in subsequent supervisory proceedings or in any other proceedings. Accordingly, there is no substantive opposition to the Fifth Defendant's Application, and I therefore propose to order that the Fifth Defendant has permission to and may refer to and quote the Relevant Terms set out in the Judgment (in its revised form including references to clause 27.3 and schedules 3 and 4, once produced by the Trustees, of the LFA) and freely quote from and refer to any other parts of the Judgment (as well as the August Judgment and previous judgments) in the current or any other proceedings in Liechtenstein or elsewhere once the Judgment has been handed down.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
23 February 2023