IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009 (ASCJ)

BETWEEN	**AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY ("AHAB")**	**PLAINTIFF**
AND	**SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) ("SICL")**	
	MAAN AL SANEA AND OTHERS	**DEFENDANTS**

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 7TH AND 19TH SEPTEMBER 2017 AND 28TH NOVEMBER 2017

APPEARANCES: **Mr. James Ramsden QC instructed by Mr. Ian Huskisson of Travers Thorp Alberga for the Administrator of the International Banking Corporation BSC**

Mr. Hector Robinson QC and Ms. Delia McMahon of Mourant Ozannes for AHAB.

JUDGMENT

In respect of Summons (on behalf of the External Administrator of the International Banking Corporation BSC) ("TIBC") as Intervenor for Inspection of Documents

Applicability of the Grand Court Rules for regulating access to the court file – applicability of the open justice principle for access to the court file and other discovery generally in the action – whether third party has right of access for use in hostile litigation abroad – whether parties to the action may be imposed upon to provide access not available from the court file to third party – whether appropriate to lift the implied undertaking to allow a party to do so – whether in the absence of reciprocal rules for disclosure in foreign court it would be appropriate to require the applicant to give undertakings to reciprocate or to limit use of documents disclosed to him – the proper ambit of access under the open justice principle.

1. This is an application by summons filed on behalf of the External Administrator of the

International Banking Corporation BSC (in Administration) (the "**Administrator**" and "**TIBC**", respectively). It is brought in this action where the Plaintiff AHAB sues the Defendants (members of the Saad Group of companies in liquidation) for the recovery of the proceeds of an alleged massive fraud committed against AHAB's Money Exchange branch by Mr. Maan Al Sanea, in Al Khobar in the Kingdom of Saudi Arabia (the "**KSA**"). Mr. Al Sanea is the principal of the Saad Group, many of which he established in this jurisdiction and along with himself, are the Defendants in this action.

2. The Administrator's summons is brought in this action seeking inspection of broad categories of documents disclosed to or filed in this court and which the Administrator claims are amenable to access by him either under the Grand Court Rules ("**GCR**") or in keeping with the principle of open justice.

3. The terms of the Administrator's summons are as set out below.

4. The application is opposed by AHAB while the Defendants remain neutral, although they propose that certain undertakings be provided by the Administrator in respect of the disclosure of any information to be obtained in this action. AHAB also argues for undertakings from the Administrator.

The Summons

5. TIBC is making the following applications:

   a) *An application under Order 63 Rule 3 of the Grand Court Rules and Practice Direction 1 of 2015 to inspect and take copies of documents that either appear or should appear on the Court file.*

b) *An application under Order 38, rule 2A(12) of the Grand Court Rules for leave to inspect and take copies of any witness statements, together with any documents attached to them, that have been directed to stand as evidence in chief.*

c) *An application under the principle of open justice for disclosure of all other documents read by the Hon. Judge during the course of the trail of this action, including copies of:*

i) *All written submissions (skeletons, openings or closings) and any documents attached to them.*

ii) *All pleadings and witness statements (together with any documents attached to them) that have been directed to stand as evidence in chief.*

iii) *Those parts of the trial bundles containing discovery given by the Plaintiff [AHAB].*

iv) *All transcripts made of proceedings in open Court."*

6. The factual context of the application is explained from TIBC's and AHAB's points of view in the affidavits of Alexander Scoresby Burton and Andrew John Ford, filed respectively on behalf of the Administrator and AHAB. The facts as addressed in them are largely uncontroversial but require of being set out in some detail in order properly to understand the factual matrix which will be very important to the balancing enquiry advised for the application of the relevant legal principles.

7. Mr. Burton is a solicitor of the London firm of Trowers & Hamlins LLP. The Administrator is a representative of that firm which itself holds the appointment as Administrator. Mr. Ford is a senior member of the AHAB litigation team.

8. Mr. Burton and Mr. Ford describe in their affidavits the circumstances in which actions and counter-actions have been filed by TIBC and AHAB in the Kingdom of Bahrain

("**Bahrain**") and in the KSA, in the context of allegations and counter-allegations of fraud in which TIBC claims to be an affiliate or "division" of AHAB, a relationship which AHAB denies.

9. By way of setting the context, it is also relevant to note that while the trial in this action has been concluded, the judgment has been reserved and so the proceedings here are not yet concluded. TIBC's involvement was an important issue in the trial and will have to be addressed in the judgment.

10. The background to TIBC's claims and actions taken or to be taken, is also explained in the affidavit of Mr. Burton. It is however, important here to emphasize the potential size and scope of the disclosure sought by the Administrator, particularly as it depends upon the Administrator's asserted right, as a member of the public, to all the wide categories of information described in his summons.

TIBC

11. TIBC is a wholesale bank established in Bahrain in 2003. On 30 July 2009, TIBC was placed in administration by the Central Bank of Bahrain ("**CBB**") pursuant to the Central Bank of Bahrain and Financial Institutions Law of 2006. The Administrator was appointed as external administrator of TIBC on 6 August 2009.

12. The Administrator is actively involved in trying to identify and recover the assets of TIBC. It is said to be intended that such recoveries will, in due course, contribute to the distribution to be made to creditors of TIBC.

13. Having obtained judgment against AHAB in Bahrain, TIBC is a significant creditor of AHAB, and as AHAB is a partnership registered in the KSA, TIBC seeks to enforce its judgment against AHAB in the KSA.

14. There is a brief summary below of each of the legal proceedings that are ongoing. In each of the proceedings, the nature of the relationship between AHAB, TIBC and The Money Exchange is in issue. Mr. Burton avers that there is substantial common ground between the questions for determination in those proceedings and the issues that have been addressed in detail in this action.

Disputes between TIBC and AHAB

15. In June 2010, TIBC commenced a claim against AHAB before the Saudi Arabian Monetary Authority Committee for Banking Disputes ("**SAMA Committee**") in the KSA ("**SAMA Proceedings**"). The claim related to a series of foreign exchange transactions, pursuant to which TIBC had allegedly paid US$722,256,782 and Euro 6,500,000 to AHAB and was to receive Saudi Riyals from AHAB. AHAB failed to make the payments due and TIBC seeks payment of the sums due from AHAB. In its defence AHAB has pleaded, inter alia, that:

a) That AHAB was the victim of a fraud perpetrated by Mr. Al Sanea.

b) That Mr. Al Sanea had managed The Money Exchange "*with strict controls*" and that in doing so he had "*misled the shareholders, auditors, local and international bankers with his operations*".

c) That Mr. Al Sanea had "*borrowed billions in the name of Ahmed Hamad Algosaibi & Brothers Company from over 118 banks around the world using documents (including Board of Directors' Resolutions) all bearing forged signatures...*".

d) That Mr. Al Sanea had "*transferred such amounts to false accounts he opened at banks using forged documents in the name of Algosaibi company*".

e) In respect of TIBC that "*The Plaintiff company is a result of the aforesaid forged transactions which were discovered recently. It was incorporated in Bahrain as a closed joint stock company owned by Algosaibi family members who were not aware of its incorporation or registration in their name as Ma'an Al-Sanea has incorporated this company in Bahrain using false documentation in order to use such false documents for his money transfers and illegal operations*".

16. The SAMA Proceedings are ongoing. The SAMA Committee has appointed an expert to consider the evidence in the case. TIBC is currently engaged in preparing replies to a number of questions that the expert has raised. Mr. Burton explains that this is happening now, albeit that the claim was commenced in 2010, because for some time the SAMA Proceedings were not progressed by TIBC as a consequence of a shortage of funds in the administration. The funding situation has now improved and therefore the claim has been reactivated and will be pursued by TIBC to judgment.

17. On 7 May 2014, TIBC commenced proceedings against AHAB and the individual partners of AHAB in the Bahrain Chamber for Dispute Resolution (BCDR) under Case Number 11/2014 (BCDR Proceedings). In the BCDR Proceedings, TIBC sought damages from AHAB arising from a series of loan payments purportedly made to AHAB to pay to borrowers that AHAB had introduced to TIBC. In defending the claim AHAB has advanced similar arguments to those that are summarized in paragraph 15 above. On 27 April 2016 the BCDR delivered its judgment, in which it ordered AHAB to pay to TIBC the sum of US$1,575,202,002.35 together with interest. AHAB filed an appeal against that judgment in the Bahrain Court of Cassation. At a hearing on 25 April 2017, the Court of Cassation advised the parties of its intention to deliver its appeal judgment on 6 June 2017, which it did in favour of TIBC.

18. In connection with the BCDR Proceedings, on 22 September 2015 TIBC made an Application to the High Court in London. By that application, TIBC sought an Order that it be entitled to take copies of documents that had been referred to in Court during the trial, in London in 2011, of a number of proceedings that had been brought against AHAB by HSBC, Arab Banking Corporation and three other banks ("AHAB London Trial"). The proceedings had all been commenced by the plaintiff banks in 2009. The documents that were the subject of TIBC's application had been disclosed by AHAB very shortly before the trial. The basis of the application was that it was apparent that the documents which had been disclosed by AHAB were relevant to factual allegations that AHAB had sought to raise in its defence of the BCDR proceedings. Those allegations concerned, inter alia:

a) AHAB's knowledge of the business that was taking place within The Money Exchange.

b) AHAB's knowledge of a US$ bank account in its name with Bank of America in New York.

c) AHAB's knowledge of the establishment and the business of TIBC.

19. The Order TIBC sought by its application was granted by Mr. Justice Flaux (on the papers and without a hearing) on 24 September 2015 and thereafter TIBC was able to obtain copies of the documents that had been disclosed by AHAB. AHAB's London solicitors were on notice of this.

20. Justice Flaux's Order, while made administratively and without opposition from AHAB, also required disclosure of but a finite number of documents (less than 200) which were specified in the Order, readily identifiable and amenable to production. The scope of the

administrative application before Justice Flaux was therefore very different from that now presented to this Court.

21. As a consequence of Justice Flaux's Order, TIBC was in a position says Mr. Burton, to submit documents to the BCDR that were directly relevant to the allegations of fact that AHAB had sought to make in the BCDR Proceedings. The documents in question are said to have been of real significance because they had originally been disclosed by AHAB. Mr. Burton attests to his belief that without the documents from the AHAB London Trial it would have been difficult for TIBC to challenge the truthfulness of the version of events that was contended by AHAB.

22. He understands that the disclosure that AHAB gave in the AHAB London Trial forms part of AHAB's disclosure, and part of the trial bundles, in this trial.

23. The AHAB London Trial culminated in AHAB abandoning its defence and consenting to judgment against it in favour of the plaintiff banks.

24. On 25 September 2016, AHAB commenced proceedings against TIBC in the General Court in AL Khobar, KSA ("**Khobar Proceedings**"). In the Khobar Proceedings, AHAB seeks to recover US$1,107,513,509 together with other sums (not yet particularised) from TIBC. In the statement of claim AHAB makes, inter alia, the following allegations:

    a) That Mr. Al Sanea owned 25% of The Money Exchange.

    b) That The Money Exchange was managed under Mr. Al Sanea's "absolute administration and control until its collapse".

    c) That Mr. Al Sanea had abused his position to conspire with TIBC.

    d) That Mr. Al Sanea had established TIBC.

    e) That AHAB did not approve the establishment of TIBC and was not aware of its daily operations with The Money Exchange.

f) That both TIBC and Mr. Al Sanea deliberately concealed these daily operations from AHAB.

g) Mr. Al Sanea and his "Saad Group" companies benefitted from the fraud without the knowledge of AHAB.

h) That TIBC transferred the proceeds of the fraud, directly or indirectly, to the accounts of Mr. AL Sanea, Saad Group and Saad Trading and Contracting.

25. The Khobar Proceedings are ongoing. TIBC has challenged the jurisdiction of the Court. The next hearing in the case was at the time of the hearing of this application, scheduled to take place on 22 August 2017.

26. TIBC says Mr. Burton, has further potential claims against AHAB. Those claims are being considered. It is assumed that any such claims would need to be litigated, in Bahrain or in the KSA.

The Evidence in this Trial

27. Mr. Burton submits that it can be seen from the brief summaries above that in each dispute between TIBC and AHAB, there are live questions as to the knowledge and involvement of AHAB in the business conducted by TIBC, The Money Exchange, Mr. Al Sanea and various entities within the Saad Group, and as to the large-scale fraud that is alleged to have been carried out by Mr. Al Sanea, in conspiracy with other parties (including TIBC).

28. He avers that TIBC's Cayman attorneys, Travers Thorp Alberga ("**TTA**"), attended Court during a large part of the trial of the action, including during the majority of the days when the witnesses of fact that were called by AHAB were giving their evidence. During that cross examination, which took place over many days, the witnesses were asked many

questions about issues that are directly relevant to the matters that are in dispute between TIBC and AHAB. Further, numerous documents were put to the witnesses which would be relevant to the issues in dispute between TIBC and AHAB.

29. Mr. Burton avers finally on the background circumstances, that the TTA attorneys who attended the trial here were able to take notes of the evidence being given. However, in many respects that it was difficult to properly understand what was being asked of the witness without being able also to see the document that the witness was being asked to consider. This exercise would be assisted by now having the professional transcript of the evidence.

Rationale for Granting TIBC's Applications

30. Mr. Burton summarises as set out below, the basis for the applications in support of which he makes his Affidavit. Those applications were described to the parties to this action in TTA's letter dated 9 May 2017. The parties were invited to consent, but have said that they do not, by letters from Mourant Ozannes dated 23 May 2017 on behalf of AHAB, and from Walkers dated 25 May 2017, on behalf of the Defendants. The Walkers letter followed a further letter from TTA dated 24 May 2017. In TTA's letter it was asserted to the parties that in respect of the trial bundles, TIBC would be content in the first instance to be provided with the bundles containing the disclosure given only by AHAB.

31. Mr. Burton requests that the Court grants the Orders that TIBC seeks. He asserts that TIBC seeks to access the contemporaneous documents and other evidence that are relevant to TIBC's efforts to establish the truth in respect of arguments that AHAB has

raised in both its prosecution and defence of significant and high value claims that have been made.

32. He asserts that there is a very real prospect of TIBC suffering serious prejudice and injustice if it is not able to see and understand:

a) the cases that have been pleaded and presented by the parties to this action by way of skeleton arguments or other opening or closing submissions;

b) the evidence that has been given by AHAB's witnesses both by way of evidence in chief and during cross-examination;

c) the documentary evidence that is relevant to issues that are currently subject to litigation between TIBC and AHAB.

33. Further, the applications should be granted in the interest of comity between Courts in different jurisdictions who have before them a party in common (AHAB) and are asked to deal with actions that raise the same issues of fact. It is important, Mr. Burton asserts, that each Court should be properly informed as to those facts through sight of relevant contemporaneous evidence, and moreover that each Court should be in a position to identify any inconsistency of position taken, on the same issues, before different Courts.

34. Further still, there is the real possibility says Mr. Burton, that the granting of the applications will allow for a saving of time and costs in the actions between TIBC and AHAB.

TIBC's application seen from AHAB's point of view

35. Mr. Ford's affidavit picks up the narrative from AHAB's point of view and explains AHAB's response to the Administrator's Application. His narrative is set out following.

36. First he adopts Mr. Burton's explanations and definition of the three disputes in the KSA and Bahrain between AHAB and TIBC; defined as the SAMA Proceedings, BCDR Proceedings and the Khobar Proceedings. He confirms that in the SAMA Proceedings and the BCDR Proceedings, TIBC is the claimant. In the Khobar Proceedings, AHAB is the claimant.

37. He notes that TIBC in a letter dated 5 July 2017 from TTA has stated that it intends to enforce the judgment obtained in the BCDR Proceedings in the KSA. He understands that enforcement will be attempted in the Joint Directorate of Enforcement at the General Court in Al Khobar (the "JDEK") in the KSA and refers to the enforcement proceedings in the JDEK and any other potential enforcement proceedings as "Enforcement Proceedings" in his Affidavit.

38. He notes that following the issue of the Administrator's Summons, this Court sent an email through the Registrar in the following terms on 6 June 2017 to TTA, the Defendants and Mourant Ozannes:

> "*Please (contact) the respondents to this summons and invite them to consider what aspects of the evidence presented in the case should properly be disclosed to the Administrator of TIBC, bearing in mind the important role of TIBC in the trial and the potentially legitimate interest that the Administrator might have in getting access to the evidence although he is not a party to this action*".

39. Mr. Ford describes the Defendants as remaining neutral in respect of TIBC's application. This was explained in HSM Chambers' letter to TTA dated 7 June 2017 sent on behalf of the different Saad Group defendants – the GT Defendants, the AWALCos and SIFCO5. In

that letter, the Defendants requested that TIBC provide an undertaking that the documents disclosed:

> *"1. Shall not be used for any other purpose than the claims specified in the First Affidavit of Alexander Burton;*
>
> *2. Shall not be shared with any other party than the Applicant, the Applicant's Administrator/External Administrator, and their respective legal advisors; and*
>
> *3. Shall not be used in the course of any proprietary trading by the Applicant".*

40. Mr. Ford states that AHAB, for its part, is seeking different forms of undertaking relating to TIBC's applications, which he explains below in the context of his response to the different aspects of the Administrator's summons

Application to inspect and take copies of documents on the Court File (referred to by Mr. Ford as "TIBC's application 1")

41. TIBC's Application 1 is made under Order 63 Rule 3 of the Grand Court Rules and Practice Direction 1 of 2015, to inspect and take copies of documents "*that either appear or should appear on the Court file*".

42. Mourant Ozannes replied on behalf of AHAB to the email referred to at paragraph 38 above from the Court (copied to the other parties) by email dated 30 June 2017 stating:

> *"We should be obliged if you would please notify the Hon. Chief Justice that, having considered his direction to the parties, AHAB is agreeable to TTA's client being permitted access to inspect and take copies of the non-sealed documents on Court files, subject to receipt of a prior written undertaking from TTA's client in the following terms:*

(1) *That the documents shall not be used for <u>any purpose other than</u> in the context of the ongoing SAMA Proceedings (as defined at paragraph 10 of the Affidavit of Alexander Burton)... given that the appeal judgment has been determined in respect of the BCDR Proceedings (as) defined at paragraph 12 of Mr. Burton's Affidavit.*

(2) *That the documents shall not be shared with any party other than to TTA's client, it's Administrator/External Administrator, and their respective legal advisors; and*

(3) *Shall not be used in the course of any proprietary trading by TTA's client".*

43. TTA wrote to Mourant Ozannes on 5 July 2017 requesting an explanation for the reasons why documents on the court file were sealed.

44. In response, Mourant Ozannes explained by further letter dated 17 July 2017 that:

*"In addition to an historical order made by the court to preserve confidentiality of evidence filed by the Receivers, in 2010, since the trial commenced in July 2016 three further Orders have been made by the Court to seal and keep confidential the Nineteenth, Twentieth and Twenty-First Affidavits of Simon Charlton (**Charlton 19, 20 and 21**) pursuant to Grand Court Rules, O.63 r.3(4). These Affidavits are not open to inspection by any party (save for the GT Defendants, the AwalCos and SIFCO5 in these proceedings), due to their containing information regarding ongoing matters in Saudi Arabia and information the subject of non-disclosure agreements disclosed in the proceedings conditional upon*

such information remaining under seal. A recent application has also been made, on similar terms, requesting that the Thirtieth Affidavit of Andrew John Ford, be sealed which has yet to be determined by the Court."

45. Mr. Ford notes that this Court is aware, and is very familiar with the precise reasons underlying the granting of the orders sealing certain documents on the Court file to preserve confidentiality, and is also aware that there has been no change in circumstances to warrant any such documents being unsealed.

46. AHAB consequently objects to the inspection and taking of copies of any sealed documents contained on the Court file by TIBC in such circumstances.

47. I break from the narrative of Mr. Ford's affidavit to state here that that is a proposition which I accept. In particular, I have seen no change of circumstances to justify taking a different view of the confidentiality and sensitivity of the information contained in the sealed documents and affidavits identified in the letter from Mourant Ozannes at paragraph 44 above. These include affidavits and their exhibits filed on behalf of AHAB for the purposes of portions of the trial proceedings which were ordered to be and were conducted in camera. I remain satisfied that the documents disclosed in that context and the earlier context of the aforementioned application by the Receivers, should remain sealed and I so ordered at the hearing of the application.

48. Mr. Ford goes on to confirm that AHAB has agreed that TIBC may inspect and take copies of any non-sealed documents on the Court file, subject to a written (revised) undertaking similar to that set out at paragraph 42 above but expanded to allow the use of those documents mentioned in the SAMA Proceedings, Khobar and JDEK proceedings or otherwise.

49. Subject to the question of the scope of the disclosure, I note here in passing, that the

terms of the undertakings sought by the Defendants as set out at paragraph 39 above and by AHAB at paragraph 42 would not be unusual. They reasonably acknowledge that TIBC would be able to disclose those categories of documents viz: non-sealed documents from the Court file; in the specified litigation. The further requirement they include that TIBC not use the information disclosed *"in the course of any proprietary trading"* appears from the correspondence to have been accepted at least in principle by TIBC and this too is in keeping with the principles. I will come below to consider the case law that supports the appropriateness of such a requirement.

Application for copies of Witness Statements and attached documents directed to stand as evidence-in-chief (Referred to by Mr. Ford As " TIBC's Application 2")

50. Mr. Ford notes that TIBC's Application 2 is made under Order 38, rule 2A(12) of the Grand Court Rules for leave to inspect and take copies of any witness statements, together with any documents attached to them, that have been directed to stand as evidence in chief.

51. He points to the fact that Mourant Ozannes' email to the Court on 30 June 2017 confirmed AHAB's conditional agreement to providing the Application 2 documents to TIBC. But that conditional agreement is to be subject to a prior more restrictive undertaking being provided by TIBC (as per Mourant Ozannes' letter of 17 July 2017 at paragraphs 4 and 12 thereof in these terms:

> *"The International Banking Corporation B.S.C in Administration ("TIBC") undertakes that any documents disclosed to it pursuant to its summons application dated 5 July 2017 (Record No. FSD 54 of 2009) (other than non-sealed documents from the Court file which are subject to a separate undertaking):*
>
> *1. Shall not be used in the SAMA Proceedings, the Khobar Proceedings (adopting the definition used in Mr. Burton's*

Affidavit) and any proceedings for the enforcement of the judgment in the BCDR proceedings (as defined in Mr. Burton's Affidavit) and upheld by the Bahrain Court of Cassation.

2. *Shall not be shared by TIBC with any party other than the Administrator/External Administrator of TIBC, their respective legal advisors, and Alix Partners, as advisors to the external administrator of TIBC.*

3. *Shall not be used in the course of any proprietary trading by TIBC.*

52. As justification for this restrictive wording, it is implicitly proposed by AHAB that, as any documents to be disclosed to TIBC (other than non-sealed documents from the court file) must come from AHAB itself or from another party who would be bound by the implied undertaking, AHAB can require restrictions upon its use in other proceedings. This proposition, from the Court's point of view, gives rise to a number of questions to be addressed: (i) the appropriateness of such restrictions as well as questions of the practical enforceability of any undertaking that this Court might require of TIBC; (ii) questions of the appropriateness, in the first place, of ordering disclosure to TIBC of documents not filed or not required to be filed in Court; (iii) the further question – if the disclosure were to be given by a party to the action without an order of the Court – whether that party would be in breach of the implied undertaking which requires that documents disclosed in an action may be used only for the purposes of the action unless they have been read out or referred to in open court[1]. These questions will be considered in practical context below. I note here though, that the proposition invites recourse to the inherent jurisdiction of the Court to impose precautions against the possibility that discovery may

[1] See GCR , Ord 24, r. 22 and ***Home Office v Harman*** [[1983] A.C. 280 and ***Smithkline Beecham v Connaught*** [1999] 4 All. E.R. 498, applying the well-known dictum of Sir Nicolas Browne-Wilkinson, V-C from ***Derby v Weldon*** *(No. 2) 132 SJ 1755 on the nature and purpose of discovery.*

be abused or may cause unjustifiable hardship. As the case law explains[2], the court may to that end, impose suitable restrictions upon inspection or permit it subject to undertakings, including restrictions against the abuse of documents for commercial purposes. Whether or not it would be appropriate to do so in this case will be considered below.

Application under the Principle of Open Justice (TIBC's Application 3)

53. Mr. Ford next discusses what he describes as TIBC's Application 3 which is made under the principle of *open justice* for "*disclosure of all other documents read by the Honourable Judge during the course of the trial of this action*" including copies of:

(i) All written submissions (skeletons, openings or closings) and any documents attached to them (Application 3(i));

(ii) All pleadings and witness statements (together with any documents attached to them) that have been directed to stand as evidence in chief (Application 3(ii));

(iii) Those parts of the trial bundles containing discovery given by the Plaintiff (Application 3(iii)); and

(iv) All transcripts made of proceedings in open Court (Application 3 (iv)).

54. He affirms that AHAB has agreed to conditionally provide the documents requested in TIBC's Application 1 and Application 2, but that AHAB does not consent to TIBC's Application 3(iii) and Application 3(iv) He says that AHAB would ask the Court, in

[2] **Church of Scientology** v **D.H.S.S.** [1979] 1 W.L.R. 723; [1979] 3 ALL. E.R. 97 and **Grupo Interpres SA V Spain** [1997] ECHR 196 approved by the English Court of Appeal in **Regina(Guardian News and Media) v City of Westminster Magistrates' Court and another (Article 19 intervening) Guardian News and Media Ltd v Government of the United States of America and another** [2013] QB 618 (***R(Guardian News and Media)***), at page 639 [46]. In ***Grupo Interpres***, the applicant sold information about people's assets to third parties. He complained that the refusal of the Spanish Courts to allow him access to the Courts' archives in order to obtain such information violated his right under article 10 of the ECHR. It was held that his application was inadmissible, that article 10 *"is intended basically to prohibit a Government from restricting a person from receiving information that others may wish tor may be willing impart to him"*. The court also observed *that "the sale of commercial information, which was the applicant company's object, was not concerned with informing the public opinion, which is the purpose of the provision in question.*

considering whether it would be just in the circumstances to refuse TIBC's Application 3(iii) and Application 3(iv), to be mindful of the facts and matters below. But first, he explains AHAB's position in relation to Application 3(i) and Application 3(ii).

Application 3(i) - Written Submissions (Skeletons, openings or closings)

55. Mr. Ford avers that AHAB confirmed its agreement to providing TIBC with all written submissions (skeletons, openings or closings) and any documents attached to them on condition that TIBC agrees to an undertaking in terms similar to those of the undertaking in relation to TIBC's Application 2 and set out at paragraph 51 above.

56. I note in passing that here too, AHAB seems to proceed on the basis that it (or another party) will be required to provide this documentation; viz: the written submissions of the parties.

57. *As to* Application 3(ii) – "*Pleadings and Witness Statements directed to stand as evidence in chief*"; Mr. Ford avers that AHAB confirmed its conditional agreement to providing TIBC with (a) access to the Court file which will contain the pleadings in this action (which do appear on the court file) and (b) witness statements and exhibits which do not. That agreement is subject to what Mr. Ford describes as the "reasonable undertakings" which AHAB requires.

58. Mr. Ford then turns to Application 3 (iii) – "*AHAB's Discovery Trial Bundle*" a request which he describes as "*an unreasonable burden on AHAB.*"

59. He states in this regard and in relation to Application 3(iv) for the Transcripts, in terms most conveniently quoted in full as follows that:

> *"Application 3(iii) requires the parties, including AHAB, to make disclosure of the trial bundles containing the discovery given by AHAB.*

In considering whether to make an order, and the scope thereof, the Court ought to be mindful of the fact that, given the complexity and long running nature of this trial, the trial bundle in these proceedings is extremely large. It comprises over 21,600 documents and 236,000 pages. There are 10,818 documents in the chronological G bundle alone. The vast majority of the documents that make up the trial bundle come from AHAB's discovery.

There is no automatic process which can be carried out in order to enable Magnum Opus[3] to extract all of the documents that derive from AHAB's discovery. A time consuming manual process will have to be undertaken in order to identify which documents can be provided. The following are examples of the type of review that I believe would need to be undertaken before a list of documents can be provided to Magnum Opus to produce for disclosure.

(a) The largest manual process will be in reviewing the index of the chronological G Bundle to identify documents that can be provided. This will involve identifying which documents derive from AHAB's discovery, and which derive from the Defendants. That is not easy in itself because there are some documents that have missing or incomplete metadata.

[3] The document management firm engaged for this trial.

(b) *It is unclear in many instances from which party particular documents derive. It will therefore be a time consuming task to establish whether the document should be provided to TIBC.*

(c) *A number of the documents in the trial bundle are confidential and sealed. AHAB will need to highlight those documents and withhold them from its disclosure to TIBC.*

Once the documents, which can be provided have been identified Magnum Opus would then need to produce the documents. Through informal conversations between my colleagues at Lipman Karas and Magnum Opus, I understand that due to the number of documents, this process could take around 10 days to complete. The process will require AHAB's lawyers having to conduct a review of the trial bundle to ascertain which documents should be provided.

60. [I interpose here to note that the AWALCO Defendants later offered to undertake this exercise if the Administrator paid their costs. Whether it would be appropriate to require the AWALCOs to do so will be discussed below having regard to the implied undertaking and the effect of Ord 24 r. 22.

AHAB notified TTA (at paragraphs 10 and 13 of Mourant Ozannes letter dated 17 July 2017) that "AHAB shall request that, in the event that the Court makes an order for disclosure under the principle of open justice in favour TIBC, any such documents disclosed to your client shall also be made conditional upon them also being the subject of the undertaking referred to at paragraph 12 (thereof) [i.e. in the same terms as the undertaking referred at paragraph 51 above in respect of Application 2]."

Application 3(iv) - All Transcripts made of proceedings in open Court.

> *The Transcripts do not form part of the Court File and continue to remain the property of the parties to the proceedings pursuant to a contractual arrangement entered into between them. AHAB notified TTA (at paragraphs 10 and 13 of Mourant Ozannes letter dated 17 July 2017) that "if the Court is minded to grant any order for the transcripts to be disclosed to TIBC, AHAB shall request that any such order be made conditional upon such documents also being the subject of the undertaking referred to at paragraph 12 [thereof] (i.e. in the same terms as the undertaking referred to at paragraph 51 above in respect of Application 2)".*

61. Apart from the undertaking that AHAB seeks of TIBC in respect of the Transcripts, a different question raised here by Mr. Ford and to be considered, is whether it would be appropriate in the circumstances of this case to the Transcript as forming part of the court record and so as amenable to disclosure by the Court, given the circumstances under which they were contracted for by the parties. I also note here that the Transcripts for the trial alone which ran over 129 days of sitting in Court, comprise some 20,000 pages. If ordered to be disclosed this would be feasible only in electronic form to be provided by Opus Magnum, the providers engaged contractually by the parties, with the leave of the Court, to provide the services.

62. Mr. Ford continues that in addition, AHAB opposes Application 3(iii) and Application 3(iv) for the additional reasons quoted below:

"Application in aid of foreign proceedings and likely prejudice to AHAB

It is *clear from Mr. Burton's affidavit that TIBC's application is for disclosure in aid of, and for use in, foreign proceedings against AHAB.*

I should note that I do not pretend to be an expert on the governing law and process in Saudi Arabia. However, I have been able to gain some knowledge from AHAB's lawyers in Saudi Arabia, including Dr. Eyad Reda (Eyad Reda Law Firm, Jeddah/ Riyadh) and Looaye Al Akkas (Vinson & Elkins – Riyadh). My evidence on this subject is, therefore, limited, but I produce it in an effort to assist the Court.

Based on conversations that I have had with AHAB's legal advisers in Saudi Arabia, I understand that there is no ordinary requirement of disclosure in proceedings in Saudi Arabia (or indeed in Bahrain) in the same way as there is in the Cayman Islands or other common law jurisdictions. Granting TIBC's wide ranging application will result in access to documents that TIBC would not be entitled to in the ordinary course of events.

63. [I interpose here that while this is not expert evidence on the law of Saudi Arabia or Bahrain, no contrary assertion has been made by the Administrator. I therefore do not regard this evidence as controversial and it is consistent with the expert evidence on this subject given in the proceedings in the action.]

64. Mr. Ford continues:

"There has been no reciprocal offer by TIBC's Cayman attorneys that AHAB will have access to TIBC's documents in any proceedings in Saudi Arabia or Bahrain between AHAB and TIBC. I have also asked AHAB's lawyers whether TIBC has provided any disclosure so far in the SAMA

Proceedings, the Khobar Proceedings, and in the BCDR Proceedings. I am told that no disclosure has been provided. Any disclosure now provided is likely to be too late to deploy in either of those proceedings or in the BCDR proceedings.

I also wish to highlight that so far the Central Bank of Bahrain the ***(CBB)*** *[the authority who appointed the Administrator] has refused AHAB's various requests for access to documents as contained in letters from Lipman Karas to Mr. Ahmed Abdulaziz Al Bassam, Director-Licensing & Policy Directorate at the CBB dated 2 February 2016, 10 February 2016 and follow up email dated 26 February 2016 to which no responses have been received to date (copies of which are provided at pages 14 to 18 of my affidavit). As a result, AHAB or the Defendants' experts in these proceedings have not had access to the documents requested of the CBB. AHAB also has not had access to such documents in the BCDR Proceedings.*

No serious prejudice or injustice will be suffered by TIBC if the Third Application for disclosure is not granted, in full.

Mr. *Burton's affidavit says (at paragraph 25 of his Affidavit) that "TIBC seeks to access the contemporaneous documents and other evidence that are relevant to TIBC's efforts to establish the truth in respect of arguments raised in both its prosecution and defence of the significant and high value claims that have been made."*

Given no reciprocal disclosure has been offered by TIBC to AHAB, or is likely to be given in the SAMA Proceedings, the Khobar Proceedings, the

BCDR Proceedings or in the JDEK, it is AHAB that will suffer real prejudice and injustice as a result of TIBC's application being granted, in full. In fact, the efforts to establish the truth in respect of arguments raised in these proceedings have been actively hampered by the CBB failing to provide documents through

....

Lipman Karas' requests set out above;

[The CBB has also failed] to authorise Awal Bank[4] *to provide specific documents requested by Lipman Karas in these proceedings (see for example Mourant Ozannes' letter dated 6 December 2016, Charles Russell Speechlys' letter dated 3 January 2017 and Mourant Ozannes' letter dated and 12 January 2017 to the External Administrators of Awal Bank, at pages 19 to 22 of my affidavit).*"

65. [I note in passing that, as the Trial Judge, I am also aware of the non-responsiveness of the CBB].

66. Mr. Ford continues:

"AHAB has already agreed to provide significant, informing and wide ranging voluntary disclosure in the form of agreeing to TIBC's First and Second Applications.

Applications 1 and 2 which AHAB has agreed to provide, subject to the requested undertaking, comprises a significant amount of information which would afford TIBC sufficient details to facilitate its efforts to

[4] A Saad Group bank established by Mr. Al Sanea in Bahrain, affiliated to the AWALCO Defendants and which was shown in the trial in this action to have engaged in billions of dollars of transactions and counter-transactions involving directly or indirectly, AHAB's Money Exchange Division.

establish the truth in respect of arguments raised in both its prosecution and defence of the significant and high value claims that have been made. There is no evidence that the jurisdictions in which this disclosure would be deployed would show the same judicial comity.

Mr. Burton suggests that TIBC's applications should be granted in the "interest of comity between Courts in different jurisdictions who have before them a party in common and are asked to deal with actions that raise the same issues of fact."

The Court will be aware that the JOLs of SICL the 2nd Defendant to this action] have attempted, without success, to retrieve its books and records from Mr. Al Sanea through litigation in Saudi Arabia. Those books and records belong to SICL and could have made a material impact in these proceedings. Those books and records are however, still not available to the JOLs of SICL, to AHAB or to the Court. There is therefore no evidence of any attempt to apply the principle of judicial comity by the Saudi courts on this issue.

There are other possible claims that TIBC is considering.

Mr. Burton says at paragraph 20 of his Affidavit that TIBC has further potential claims against AHAB, which are being considered. No details have been provided about such potential claims and AHAB ought not to be obliged to provide documents which could ultimately be used in unspecified and un-particularized actions."

67. With the factual context of this application set fully by the affidavits of Mr. Burton and Mr. Ford above, I may now turn to consider the applicable legal principles.

The Applicable Legal Principles

68. As shown above, TIBC's application is based upon the GCR, Order 38, rule 2A(12) and Order 63 rule 3 (read with Practice Direction 1 of 2015); as well as upon the common law principle of open justice.

69. Order 41, rule 9, which deals with the status of affidavits filed with the court, also comes into play.

70. In support of its argument for comity, TIBC also relies in the submissions of Counsel, albeit only by analogy, upon the powers vested in this Court by section 11A of The Grand Court Law, the terms of which will also be discussed below.

71. I begin the discussion with the GCR provisions, the most relevant aspects of which are set out following.

72. First, those relevant provisions from Order 38 Rule 2A which explain the status of witness statements filed with the Court:

Order 38 Rule 2A (2), 4(b), (7)(a), (12) and (13)

> **2A(2).** *At the summons for directions in an action commenced by writ the Court may direct every party to serve on the other parties, within 14 weeks (or such other period as the Court may specify) of the hearing of the summons and on such terms as the Court may specify, written statements of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial.*
>
> ...
>
> *(4) Statements served under this rule shall-*

...

(b) *sufficiently identify any documents referred to therein;*

...

(7) ... where the party serving the statement does call such a witness at the trial-

(a) *except where the trial is with a jury, the Court may, on such terms as it thinks fit, direct that the statement served, or part of it, shall stand as the evidence in chief of the witness or part of such evidence;" [*emphasis added*].*

(12) *Subject to paragraph **(13)**, the judge shall, if any person so requests during the course of the trial, direct that any witness statement which was ordered to stand as evidence in chief under paragraph (7)(a) shall be open to public inspection.*

A request under this paragraph shall be made orally or in writing.

(13) *The judge may refuse to give a direction under paragraph (12) in relation to a witness statement, or may exclude from such a direction any words or passages in a statement, if he considers that inspection should not be available-*

(a) *in the interests of justice or national security;*

(b) *because of the nature of any expert medical evidence in the statement; or*

(c) *for any other sufficient reason."*

73. The status of **affidavits** filed in the Court is the subject of **Order 41**, the relevant provisions of which for present purposes, are as follows:

Order 41, rule 9(1) and (2):

> ***9 (1)*** *Every affidavit used in a cause or matter proceeding in the court must be filed.*
>
> ***(2)*** *The exhibits to an affidavit shall not be filed and it shall be the duty of the party on whose behalf an affidavit is filed to preserve the exhibits for use by the Court."* [emphasis added].

74. Order **63** mandates the creation of the Court files and explains the basis upon which access to them may be obtained. The aspects of Ord. 63 which are relevant to the present application are set out following.

Rules 2 (1) and 3(1)

> *2(1) The Clerk of the Court shall create a court file in respect of every proceeding immediately prior to issuing the writ, originating summons, originating motion or petition by which such proceeding is commenced.*
>
> *3(1) Every document required to be filed in any proceeding must be placed on the Court file relating to such proceeding and sealed with a seal showing the date upon which the document was filed* [emphasis added].

Rules 3(3), (4) and (5)

> *3(3) Subject to paragraphs (4) and (5), the Court file relating to any proceeding shall be open to inspection only by the parties to that proceeding.*

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.

(4) *The Court may grant leave in special circumstances on application to any person not a party to the proceedings to inspect the Court file or to take a copy of any document on the Court file relating to those proceedings.* [*emphasis added*].

Rules 7(1), (2) and (3).

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

(2) *The Register of Judgments shall be open to public inspection upon payment of the prescribed fee.*

(3) *Any person shall be entitled, upon payment of the prescribed fee, to obtain from the Clerk of the Court a certified copy of any judgment or order contained in the Register of Judgments.*

Rules 8(1),(2) and (3).

(1) *The Clerk of the Court shall create a file containing, in chronological order, an office copy of every writ, originating summons, originating motion or petition issued by the Court, which shall be referred to as "the Register of Writs and other Originating Process".*

(2) *The Register of Writs and other Originating Process shall be open to*

public inspection upon payment of the prescribed fee.

(3) Any person shall be entitled, upon payment of the prescribed fee, to obtain from the Clerk of the Court a certified copy of any writ, originating summons, originating motion or petition contained in the Register of Writs and other Originating Process."

75. When read together the foregoing rules are to be taken as defining the nature and extent of the public right to search for, inspect and take copies of documents filed in the Grand Court. The rules seek to strike a crucial balance between the interests of parties seeking access to justice (and so are required to disclose what will often be private and sensitive information); and those of interested third parties and the wider public interest, in having access to any information placed before the Court. In striking the balance, the rules make an important distinction between the right of search and inspection enjoyed by a party to a cause or matter which is unrestricted (save only for specific sealing orders made under Ord. 63 rule 3(4) (above)) and the right of search and inspection enjoyed by a member of the public, which is restricted to those documents particularly specified as comprised within the Register of Judgments and the Register of Writs and other Originating Process (together the "Public Registers"), as provided under Ord. 63, rules 7(3) and 8(3).

76. Thus, the effect of the rules is to exclude from the public right of search and inspection without the leave of the Court, other documents which may be routinely filed with the Court in the context of an action, such as affidavits, depositions and witness statements and the written (skeleton) arguments of the parties[5].

77. The notes to the former Rules of the Supreme Court[6] suggest that the principle upon

[5] As explained by the Court of Appeal in ***Sasken v Spreadtrum*** 2016 CILR 1, per Rix J.A. at [1]-[3].

[6] 1999 Edition at RSC 63/4/2.,The GCR are based primarily upon the RSC as they were before the reforms introduced on 26 April 1999 in England and Wales by way of the Civil Procedure Rules.

which these other documents[7] are excluded from the right of the public to search and inspect "*would appear to be that they are all interlocutory in character and may or may not be used or affect the justice of the case when the cause or matter comes to be heard in open court.*"

78. A more compendious and compelling explanation of the purpose and effect of these rules, was given by Vice-Chancellor Sir Donald Nicholls (as he then was) in *Dobson v Hastings*[8], and one which is worthy of being cited in full in the context of this application. The question before the Vice-Chancellor was whether the allegedly clandestine inspection (and subsequent publication of excerpts) of an official receiver's report which had been filed with the court, without the required leave of the Court, was a contempt of court. Although not so found to be on the facts of the case, in concluding that such a breach would in principle be contemptuous - one which *"(knowingly sets) at naught one of the court's procedures devised to strike a balance between the various factors which pull in different directions in all court processes"*[9] - he expanded upon the purpose of the rules which he noted to be a form of delegated legislation[10], in the following terms:

> "*The Rules of the Supreme Court do not expressly prohibit inspection and taking copies of documents otherwise than in accordance with the rules. What the rules do is require parties to proceedings to file certain documents in the court office. Ord. 63, r 4 provides that of the documents*

[7] Which under the RSC also excluded judgments and orders made in chambers as distinct from those made in open court. Under the GCR O.63 R.7, read with O. 42 R. 5(8), all judgments are to be placed upon the Register of Judgments.
[8] ***Dobson & An. v Hastings & Others*** [1992] Ch 394 at 401-402
[9] At page 404.
[10] Then in the form of the RSC, made in the exercise of the power contained in section 84(1) of the Supreme Court Act 1981 by Supreme Court Rules Committee established for the purpose by section 85 – see page 403 of the judgment. The equivalent provisions are in section 19 of the Grand Court Law which establishes the Grand Court Rules Committee and delegates to it the rule making power.

which must be filed, some are to be open to inspection. Other documents may be inspected with the leave of the court. Rule 4 provides further that this requirement is not to prevent parties to proceedings from inspecting or obtaining copies of documents on the file. In my view these provisions do not make sense unless they are read as indicating that, save when permitted under the rules, documents on the court file are not intended to be inspected or copied. That is the necessary corollary of the rules granting only a limited right to inspect and take copies. In other words, a court file is not a publicly available register. It is a file maintained by the court for the proper conduct of proceedings. Access to that file is restricted. Non-parties have a right of access to the extent, but only to the extent, provided in the rules. The scheme of the rules is that, by being filed, documents do not become available for inspection or copying save to the extent that access to specified documents or classes of documents is granted either generally under the rules or by leave of the court in a particular case.

The purpose underlying this restriction presumably is that if and when affidavits and other documents are used in open court, their contents will become generally available, but until then the filing of documents in court, as required by the court rules for the purposes of litigation, shall not of itself render generally available what otherwise would not be. Many documents filed in court never see the light of day in open court. For example, when proceedings are disposed of by agreement before trial. In that event, speaking generally, the parties are permitted to keep from the

public gaze documents such as affidavits produced in preparation for a hearing which did not take place. Likewise with affidavits produced for interlocutory applications which are disposed of in chambers. Again, there are certain, very limited, classes of proceedings, such as those relating to minors, which are normally not heard in open court. Much of the object sought to be achieved by a hearing in camera in these cases would be at serious risk of prejudice if full affidavits were openly available once filed.

In all cases however, the court retains an overriding discretion to permit a person to inspect if he has good reason to do so." [emphasis added].

79. It is in keeping with that frame work but adapted to suit local circumstances, that the GCR treat the Court files as generally not being open to the public, even while Order 63 rule 3(5) allows a member of the public to apply to the Court for leave "*in special circumstances*" to "*inspect the Court file*" or to "*take a copy of any document on the Court file*". In so doing, the rule recognizes that whether the documents were filed at the interlocutory or at the final stages, there may be special circumstances where a member of the public will need such broader access beyond that afforded by the Public Registers

80. As I understand this application in respect of the Court files, it is therefore upon Order 63 rule 3(5) that the Administrator relies primarily for access, according to paragraph 1(a) of his summons "*to inspect and take copies of documents that either appear or should appear on the Court file*".

81. But based as it is - under paragraph 1(c) of the summons- also upon the principle of open justice, the Administrator's application is not confined to rule 3(5). For those documents which were referenced by the court –whether or not they are on or required to be on the

Court files – he relies upon the open justice principle, on the basis of the "*default position*" – which is that all documents referenced by the Court must be regarded as having come into the public domain[11].

82. It must however, be noted here that the words in paragraph 1.a. of the Administrator's summons - "*appear or should appear on the Court file*"- imply that there may still be some documents which should be on the Court file which have not yet been filed in keeping with O. 63 r.3(1).

83. I do not approach this matter on the basis of any such implication. No reason has been given in support of it. Rather, I note the significance especially of Order 41 rule 9[12] which, while requiring by sub-rule 9(1) that every affidavit used in a cause or matter must be filed, also provides by sub-rule 9(2), that the exhibits to an affidavit shall not be filed and it shall be the duty of the party on whose behalf an affidavit is filed, to preserve the exhibits for use by the Court.

84. The practical effect in this case is that many exhibits to affidavits, perhaps totaling many thousands of pages, have not been filed and so are not available from the Court file pursuant to the rules. Very many of these have however, been made available the Court by the respective parties (mainly in electronic form) and have been referenced by the Court during the proceedings, including in open court at the trial stage.

85. I therefore proceed on the basis that the Administrator seeks access to affidavits and their exhibits under clause 1.c. of his summons pursuant also to the open justice principle, on the basis that although exhibits are not required to be and have not been placed upon the

[11] To be discussed further below by reference to the case law. The principle appears to have been first recognized by the English Court of Appeal in **Re Hinchcliffe** [1875] 1 Ch 117 and more recently affirmed in **Dobson v Hastings** by Vice-Chancellor Nicholls (see the passage in emphasis above at paragraph 78); and developed by the English Court of Appeal in a trilogy of cases, including ***R(Guardian News and Media)*** (above), to be discussed below.

[12] See above at paragraph 53.

Court file, they were referenced by the Court during the course of the trial of the action.

86. And although the Administrator by clause 1.b. of his summons, seeks access to witness statements on a different basis -that pursuant to Order 38 rule 2A (12)[13] - I take a similar view of his application for attachments to witness statements, which statements have been directed under O. 38 rule 2A (2)[14] to be filed and served and under rule 2A (7)(a)[15], to stand as evidence in chief at the trial.

87. According to 0.38 R2A (4) (b), witness statements served under the rule must sufficiently identify any documents referred to therein but this provision does not go so far as to require that documents identified must also be filed with the witness statements. The result is that in practice generally (and certainly in this action), attachments to witness statements, although made available to the Court by the respective parties (again mainly in electronic form), have not been filed.

88. Accordingly, the Administrator's application for access to the attachments to witness statements, must also be considered pursuant to the open justice principle, rather than pursuant to Order 63 rule 3(5). In addition to clause 1.b. of his summons, this is how he also applies, it seems for good measure in relation to witness statements, by clause 1.c.(ii) of his summons.

89. This is clearly the premise proposed also for the rest of his application – under clauses 1.c.(iii) and (iv) of his summons - respectively for access to the trial bundles containing discovery given by AHAB and for all transcripts made of the proceedings in open Court.

90. But it must be noted here that not only are these last two classes of documents not required by the GCR to be filed with the Court (or even in the case of the Transcripts to

[13] See above at paragraph 72.
[14] ibid.
[15] Ibid..

be treated as the official transcripts of the proceedings), they are extremely voluminous and would be - in the case of the AHAB discovery as Mr. Ford explains above in his affidavit - time consuming and expensive to identify and produce. The exercise to be undertaken would be significant not only because of its scope given the massive extent of the AHAB discovery in this case but also because, the purported right of access in the public interest is premised on the documents in question having come into the public domain by being referenced by the judge during the course of the trial - again, the so-called "default position"[16]. Those documents from among the AHAB discovery which were not so referenced by the Court either in chambers or in open court - of which there are indeterminate numbers running perhaps to the tens of thousands of pages- would therefore have to be identified and excluded from the ambit of the application. So too, as Mr. Ford explains, would the extensive discovery given by the Defendants have to be identified and separated, either because it is not the subject of the Administrator's application or to the extent it has not been referenced by the Court and so not having come into the public domain.

91. These are all factors to be addressed when considering in this case, the import, scope and proper application of the principle of open justice. Indeed, it is correct to note that this case has raised for consideration a question not yet fully settled by the courts: which is what are the appropriate limits to the ambit of disclosure available under the right of access pursuant to the open justice principle? It is a question that arises acutely in a case like the present where access is sought, not for the well-recognized public interest in monitoring or understanding the functions of the Court but for the very different purpose

[16] Citing Toulson LJ from his judgment on behalf of the Court of Appeal in **R(Guardian News and Media).** *On the "default position" this is what Toulson LJ stated (at page 650 [85]): In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position shoufd be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong"*

of third party discovery for use in other litigation. More particularly, the question is whether appropriate limits may be set on grounds of proportionality or the nature of the consequential impact upon a party to be affected by the grant of access - consequences such as the juridical disadvantages to AHAB, cited by Mr. Ford above. Or, indeed other concerns also arising in this case, on account of the fact that the Court will be unable to provide the extensive disclosure sought without imposing upon the assistance of the parties (or a party) to the action.

Open justice

92. The common law imperative to open justice is now well understood. It recognizes the great importance of access to the proceedings and records of the court for public scrutiny of the justice system, to ensure public confidence in its integrity. The principle is well recognized by this court. For instance, in a different context in these very proceedings[17], this Court declared upon an *inter partes* application that:

> "*Generally,* parties to *litigation (including civil and interlocutory proceedings) would be entitled to know reasons for the court's decisions, following from the principle of open justice. They would ordinarily be entitled to access all aspects of the case file. However, the court could restrict such access, if necessary for the more fundamental principle of the proper administration of justice.*"

93. As the principle of open justice has developed at common law and as will be discussed below, it is now settled that while members of the public - non-parties - will not ordinarily be entitled to inspect the Court files beyond the Public Registers, they may be granted such access upon application by leave of the Court. This is indeed, as reflected in

[17] ***AHAB v Saad Investments Co. Ltd and Forty Three Others*** 2011 (1) CILR 326, where one group of defendants in this action sought access to sensitive financial information filed by the plaintiff AHAB in response to applications by other defendants for security for their costs and which information was ordered to be kept sealed on the file. Access was denied notwithstanding that the application was that of a party to the action who relied not only upon its purported right of access qua party but also upon the open justice principle. This decision was approved by the Court of Appeal in Sasken v Spreadtrum (above).

O.63 rule 3(5) itself, as set out above at paragraph 74

94. In keeping also with the principle as developed, it is now also settled that public access to documents which are on the Court file but would otherwise be unavailable but for an application to the Court, will also be available in keeping with the default position, once the documents (or their contents) enter into the public domain by being referenced by the Court during the proceedings in which they are filed.

95. It is this aspect of the open justice principle that I see as presenting a particular challenge for its application in this case.

96. In this massive case, literally hundreds of affidavits and witness statements but not their exhibits or other attachments, have been filed. Many but not all of them have been referenced by the Court, depending on whether or not the different issues which they addressed had to be resolved by the Court instead of by agreement between the parties at the different interlocutory stages. As Mr. Ford explains, tens of thousands of documents, running to hundreds of thousands of pages, have been provided by AHAB alone by way of discovery. In keeping with the rules of court, the discovery given by the parties is not filed with the Court.

97. In a different category under paragraph I.c (iv) of the Administrator's summons as already mentioned, some 20,000 pages of Transcripts have been generated during the course of the trial which spanned 129 days in Court. While sought under the open justice principle, these too are not available from the records of the Court and so can only become available by the Court imposing upon the parties to provide them.

98. With those introductory observations, I proceed by first recognizing the rationale and purpose of the open justice principle. It has been explained in different ways by erudite judges. A recent and highly persuasive exposition by Toulson LJ (as he then was) comes

from his lead judgment on behalf of the English Court of Appeal in R(Guardian News and Media)[18]. In the case journalists from the Guardian newspaper sought disclosure of skeleton arguments of counsel, affidavits and witness statements submitted to the Court but only some of which were referenced in open Court, in the extradition proceedings against two British subjects brought at the instance of the United States of America:

> *"1. Open Justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodies – who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinize the workings of the law, for better or for worse. Jeremy Bentham said in a well-known passage quoted by Lord Shaw of Dunfermline in Scott v Scott[1913]AC 417, 477:*
>
> > *"Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."*
>
> *2. This is a constitutional principle which has been recognized by the common law since the fall of the Stuart dynasty, as Lord Shaw explained. It is not only the individual judge who is open to scrutiny but the process of justice. In a valuable report by the Law Commission of New Zealand on Access to Court Records (2006) (Report 93), the*

[18] ***R(Guardian News and Media)*** (above) at page 630.

commission summarized the principle at paragraph 2.2:

> *"Open justice is a fundamental tenet of New Zealand's justice system. It requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties. It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done'."*

3. *The commission quoted, at paragraph 2.11, in the following passage from the judgment of the President of the Court of appeal, Woodhouse P, in Broadcasting Corporation of New Zealand v Attorney General [1982] 1 NZ LR 120, 122:*

> *"...the principle of public access to the courts is an essential element in our system. Nor are the reasons in the slightest degree difficult to find. The judges speak and act on behalf of the community. They necessarily exercise great power in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens names that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with*

human understanding it may be hoped, but certainly by and fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process may be regarded as fulfilling its purposes."

4. *There are exceptions to the principle of open justice, but, as Viscount Haldane LC explained in Scott v Scott [1913] AC 417, they have to be justified by some even more important principle. The most common example occurs where the circumstances are such that openness would put at risk the achievement of justice which is the very purpose of the proceedings.*
5. *While the broad principle and its objectives are unquestionable, its practical application may need reconsideration from time to time to take account of changes in the way that society and the courts work. Unsurprisingly there may be differences of view about such matters."*

[emphasis added]

99. Indeed, as the cases have developed, we see in the practical application of the principle, the right of access for third parties being recognized in circumstances which, in reality, have nothing to do with understanding or scrutinizing how the Courts fulfill their

responsibilities but quite openly instead for getting information for other purposes, such as for use in other litigation. This is of course, not meant merely as a criticism. As Potter LJ recognized in ***GIO***[19] and I accept:

> "*Yet, quite apart from the interest of the press (who are members of the public for this purpose) most persons who attend a trial when they are not parties to it or directly interested in the outcome do so in furtherance of some special interest, whether for purposes of education, critique or research, or by reason of membership of a pressure group, or for some other ulterior but legitimate motive.*"

100. This application is of that kind. It is brought by the Administrator acting as intervener in this action[20]. He enters the realm seeking the protection of its laws as a member of the public in the widest sense, coming before the Court as a member of the public international community having an interest in these proceedings, not for ensuring the due administration of justice in them but for the purpose of advancing TIBC's claims against AHAB in Bahrain and in the KSA.

101. While the Administrator's standing as so defined has not be challenged, his purpose is clearly beyond the scope of the settled purpose of the open justice principle which, as we have seen, is the imperative to public scrutiny of the administration of justice. As the cases show, this imperative is epitomized in the unique role of the media as the public's "eyes and ears", having the professional responsibility for the accurate and fair reporting of court proceedings. Not being of that tried and proven mold, the practical implications and ramifications of the Administrator's application must be recognized and considered

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[19] Below, at page 996.

[20] The fact that he applies by summons and not originating summons as formality might require of a non-party to this action, has not been raised as a concern by any party. I see no point in making an issue of the procedure either, taking a similar view to that taken by Potter LJ in **GIO**,(below ,at page 997).

not just for the enforcement of the rights invoked but also for the difficulties they present. These were difficulties which may not be overlooked because the application is cloaked in the veil of public scrutiny it could be unfair harm to any party or future detriment to the administration of the justice system itself.

102. A fair starting point is to recognize that, at the most authoritative level, there do not appear to have been many cases in which the open justice principle has been invoked simply in aid of third party discovery for other litigation, let alone other litigation abroad.

103. More specifically, so far as research for this application has availed, only two of the cases at the appellate level appear to deal with discovery of that kind. But none deals with an application for what is in effect, third party disclosure of a scope and scale comparable to what is sought by the Administrator's application here.

104. The two cases come from the trilogy of English Court of Appeal cases[21] which I regard as guiding, most persuasively, the outcome of this application.

105. In the earliest of the three ***GIO***, the appellant FAI General Insurance Co. Ltd ("FAI") intervened as a third party in the trial at first instance, applying for sight of and/or copies of (a) the skeleton arguments lodged by counsel, (b) the trial bundles, and (c) daily transcripts as they became available; all against FAI's undertaking to pay the reasonable charges.

106. The context was that FAI had been sued in a different action, having been a counter-party to certain contracts of re-insurance under which FAI's liability could have depended upon the outcome of the trial in the ***GIO*** action. This was because the FAI contracts involved allegations of misrepresentation and non-disclosure similar to those involved with the

[21] **GIO Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Ass. Ltd. and Others 9FAI General insurance Co. Ltd intervening) [1999] 1 WLR 984 ("GIO").. Barings PLc (in liq) and Another v Coopers &Lybrand (a firm) and Others; Barings Futures (Singapore) PTE Ltd. (in liq) v Mattar and Others [2000]** 3 All E.R 910 **("Barings v Coopers")**; and ***R(Guardian News and Media)*** (above).

GIO contracts. FAI did not conceal the underlying purpose motivating their application when intervening in the ***GIO*** trial. Even while their grounds of application were stated to be: "*That the trial is taking place in open court and the applicant and any member of the public, is entitled to access to the said categories of documents*", FAI's solicitors had also written frankly explaining that:

> "*Evidence regarding the course of conduct on which [defendants to the first instance trial] engaged in relation to the Liverpool& London Reinsurances is likely to be highly material regarding the course of conduct on which they engaged on the contemporaneous placements for the Ocean Marine/FAI Reinsurance... In the circumstances, my firm has been seeking access to documentation which has been brought into the public domain as part of the trial which is underway.*"

107. Upon the appeal, FAI no longer pursued their application for copies of the entirety of the trial bundles lodged with the court, but limited their application more specifically for an order for copies of the following documents[22]: (i) documents referred to in the witness statements provided to FAI under R.S.C Ord.38, r.2(a)[23]; (ii) any written opening skeleton argument or skeleton submissions to which reference was made by the judge, together with any document referred to in such an opening, argument or submission; and (iii) access to any document which Timothy Walker J. (the judge in the ***GIO*** trial) was either specifically requested to read, or which was included in any reading list, or which was read or referred to during the trial.

108. FAI's application was opposed by both plaintiffs to the action in which FAI had been

[22] ***GIO***, page 989, per Potter LJ.
[23] The equivalent of GCR O.38, r. 2A above

sued ("O.M.M." and "G.M.R" for convenience). They argued that FAI's application was a blatant attempt by a third party to sidestep the effect of the rules relating to discovery whereby the interests of one party in respect of documents which it discloses in the course of litigation are protected by the implied undertaking binding upon the opposing party not to use them for a collateral or ulterior purpose, subject to the provisions of R.S.C. Ord. 24, r.14A.[24]

109. This argument was premised on the assumption that the practical effect of an order in favour of FAI, would be to require the parties to the ***GIO*** trial to comply at least in large part, and so to that extent, not the Court Registry itself.

110. O.M.M. also argued in the alternative that, if an order was made in favour of FAI, it was only just that O.M.M should be given access to the same documents.

111. Lord Justice Potter, in his lead judgment with which the other Justices of Appeal agreed, addressed the different heads of FAI's application separately.

112. As regards "*Access to Documents referred to in the witness statements*", he concluded that having regard to the plain terms of Ord. 38 r. 2A, that aspect was "*doomed to failure... for at least two good reasons*". The first was that the plain words of the rule "*impose upon the court a power in respect of witness statements only and do not extend to cover documents referred to in those statements*". Moreover he declared, the rule plainly requires only that "*Statements served under this rule shall... (b) sufficiently identify any documents referred to therein*" [emphasis added].

113. Thus, as under the equivalent GCR O. 38 R. 2A here, no power was vested to require that

[24] Which is in terms almost identical to GCR O. 24, r. 22, save for the last phrase of r, 22, which states: "*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 the person to whom the document belongs or by whom the oral evidence was given*".

the documents "*referred to therein*" in witness statements, also be filed with the Court.

114. The second reason expressed by Potter LJ was that "*nothing in the history or context of the introduction of the rule leads one to suppose that the Rules Committee intended thereby to introduce a provision which would enable a third party to the litigation to obtain access to inter partes documents which had previously (unless by agreement between the parties) been unavailable to any member of the public whether or not he or she attended court to hear the oral evidence of the witness in question.*"

115. However, after elaborating upon the purpose of Ord.38 rule 2A as being to increase the efficiency of the *inter partes* procedural process, he recognized the effect of paragraph 11(a), which like the Cayman equivalent[25], governs access to witness statements which are directed by the court to stand as evidence in chief, and stated[26]: "*Once it is put in evidence, the confidentiality is lost and in principle, the witness statement is available to the public for inspection and copying, subject only to the procedures laid down [in the rules] and the discretion of the judge to exclude words or passages.*"

116. He then further noted that the purpose of the rule (and the form of witness statement adopted in practice) is to ensure that the statement embodies the oral evidence of the witness as if he or she were in the witness box, even while making only brief reference to as distinct from actually attaching any of the documents in the case upon which the witness relies; leading him to conclude that[27]: "*There is no warrant for reading the provisions of rule 2A as entitling a member of the public to inspect the documents referred to by the witness, as opposed to the witness statement itself. Thus, I consider that, so far as rule 2A is concerned, the judge was right, when ordering inspection of the*

[25] GCR Ord. 38 R. 2A (7)(a) above at paragraph 52.
[26] Op cit , at page 991.
[27] Ibid.

witness statements, to refuse to extend his order to include the documents referred to therein."

117. Potter LJ concluded on this point[28] by noting that where, as more and more frequently is the case, documents are actually scheduled by way of attachments to the statements, "*it might well be successfully argued that such documents form part of the witness statement for the purposes of the procedures for public disclosure set out* (in r 2A)". Thus, he drew a clear line of demarcation between the availability under the rules of documents which are actually attached to witness statements and those which are merely identified or referenced in witness statements. The former but not the latter would be available by way of application under the rules. As set out above, he also recognized however, that once the statement is put in evidence (i.e. referenced by the Court); it is in the public domain, loses its confidentiality and becomes available under the open justice principle, including any documents attached or identified which have actually been referenced by the Court.

118. The earlier longstanding decision of the Court of Appeal in ***Re Hinchcliffe***[29] does not appear to have been cited in ***GIO*** and this became the subject of comment by Lord Woolf MR in his later judgment given on behalf of the Court of Appeal in ***Barings v Coopers***. I will come below to look more closely at ***Barings v Coopers*** and more fully as well at ***R(Guardian News and Media)***[30] where Potter LJ's further dicta from ***GIO*** on the subject of disclosure of written opening and closing submissions were also considered.

119. On that subject of "*written openings, skeleton arguments and the documents referred to therein (trial bundles)*" Potter LJ made extensive comments in ***GIO***. His comments also became the subject of searching analysis by the Court of Appeal in the subsequent cases

[28] ibid
[29] [1895] 1 Ch 117
[30] At [35]

and so must be quoted here in full.

120. I begin with that passage in his judgment at page 993 where he cited and applied the dicta, inter alia, of Sir Donald Nicholls V-C. from *Dobson v Hastings* (above in emphasis at para. 78) and concluded[31]:

> *"I do not regard the words of Sir Donald Nicholls V-C. as extending beyond the context in which they were spoken, i.e. as reflecting the likelihood that leave to inspect a document lodged upon the court file will readily be granted if the document has been read out in open court. They are not in my view to be taken as extending to skeleton arguments or trial bundles which are not documents required to be filed, let alone are simply lodged with the court so that the court can communicate them to the judge dealing with the case as a matter of administrative convenience and, after the end of the case, are returned to the custody of the parties: see generally R.S.C. Ord.34, r 10[32]."*

121. He continued at pages 995-999:

> *"However, so far as the opening (or other) speeches of counsel are concerned, while a member of the public attending court will have the benefit of hearing them and be free to report them (including references to or extracts from any documents read out), there is no provision or requirement for the taking of a shorthand note or for other form of record for the benefit of the public. No doubt this is because, for the purposes of*

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[31] Page 993

[32] [Equivalent of GCR Ord. 34 r.10] and ***Practice Direction (Civil Litigation: Case Management)*** [1995] I. W.L.R. 508 and the Commercial Court and Chancery Guides. See also the Supreme Court Practices 1999, Vol.1.p. 664 para. 34/*10/12"*

any subsequent appeal (which again takes place in public), it is the evidence before the judge and his stated reasons which are essential to the validity of his decision.

So far as concerns documents which form part of the evidence or court bundles, there has historically been no right, and there is currently no provision, which enables a member of the public present in court to see, examine or copy a document simply on the basis that it has been referred to in court or read by the judge. If and in so far as it may be read out, it will "enter the public domain" in the sense already referred to, and a member of the press or public may quote what is read out, but the right of access to it for purposes of further use or information depends upon that person's ability to obtain a copy of the document from one of the parties or by other lawful means. There is no provision by which the court may, regardless of the wishes of the parties to the litigation, make such a document available to a member of the public. Nor, so far as such documents are concerned, do I consider that any recent development in court procedures justifies the court contemplating such an exercise under its inherent jurisdiction.

On the other hand, the arguments for such an exercise in respect of the written submissions of counsel, or of skeleton arguments which are used as a substitute for oral submissions, seem to me to be a good deal stronger. As *Lord Scarman observed in Home Office v. Harman [1983] 1 A.C. 280, 316:*

"When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition: and, if the price of expedition is to be the silent reading by the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done."

This is particularly so in a case of great complication where careful preliminary exposition is necessary to enable even the judge to understand the case. Until recently at least, the opportunity for public understanding has been afforded by a trial process which has assumed, and made provision for, an opening speech by counsel. If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or skeleton argument treated as such) which is not read out, or even summarised, in open court before the calling of the evidence, it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case, has in fact taken place in the privacy of his room and not in open court. In such a case, I have no doubt that, on application from a member of the press or public in the course of the trial, it is within the inherent jurisdiction of the court to require that there be made available to such applicant a copy of the written opening of skeleton argument submitted to the judge.

...

In my view, the appropriate judicial approach to an application of this kind in a complicated case is to regard any member of the public who for legitimate reasons applies for a copy of counsel's written opening or skeleton argument, when it has been accepted by the judge in lieu of an oral opening, as prima facie entitled to it. I therefore consider that the judge erred in the exercise of his discretion in this case. For reasons already stated, however, those observations do not extend to documents referred to in such written opening or skeleton.

That said, the issues canvassed upon this appeal plainly raise matters appropriate for consideration in the course of the revision of the rules of court currently being conducted in relation to the proposed introduction of various civil justice reforms in the wake of Lord Woolf's report, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (July 1996), whether by way of some specific provision in the rules, or as the subject of a practice direction. It is of great importance that the beneficial saving in time and money which it is hoped to bring about by such new procedures should not erode the principle of open justice.

Documents on the Judge's reading list

Whether or not the documents which the judge was requested to read extended beyond those referred to in the written submissions, it will be apparent from what is said above that I do not consider that any grounds have been established for FAI to be given access to them" [emphases added].

122. The foregoing analysis led the Court in ***GIO*** to conclude, notwithstanding the breath of FIA's application for access[33], that its appeal should be allowed but only to the extent of allowing inspection and photocopy of written opening submissions or skeleton arguments to which the judge referred at the trial.

123. As regards attachment to witness statements, in ***GIO*** it was also decided that even where skeleton arguments are to be available to the public, documents identified in them or which form part of the evidence or trial bundle, will be available only in so far as they have entered the public domain by being read out in open court. Otherwise, as they do not form part of the Court files, the Court itself has no basis for ordering their disclosure to non-parties and no means for making them available without imposing upon a party.

124. The written openings and skeleton arguments themselves were held to be available on account of the important part they played in the education of the judge, even when read in the privacy of his chambers in lieu of oral submissions in open court.

125. Before turning to look at the next in the trilogy of Court of Appeal cases, it is important here to emphasize that ***GIO*** was the only one in which the Court had to grapple with a claim of right of public access to documents which were not available from the Court file itself and so, if granted, would require imposing upon the parties in order to meet the claim of a non-party for access. The question of access therefore involved different considerations and concerns in ***GIO*** than in the other cases but similar to the concerns which arise on here on the Administrator's application.

126. In ***Barings v Coopers***, the application was for disclosure of specific transcripts of interviews conducted by the Bank of England during its enquiry into the infamous collapse of the Barings banking group. The transcripts were sought by Deloitte & Touche

[33] Even after it was narrowed by the withdrawal of the request for the trial bundles.

(D&T) who had been the former auditors of Barings and sued by Barings for professional negligence, allegedly leading to the collapse of the group. D&T applied on the basis that the transcripts had come into the public domain when put before the Court to be read in evidence as exhibited to an affidavit, in the course of earlier "disqualification proceedings" against certain directors of Barings but to which D&T had not been a party.

127. The dicta of the Court of Appeal in ***Barings v Coopers*** is also highly relevant to the appropriate treatment of the Administrator's application here, especially under paragraph 1c of his summons, on the open justice ground.

128. Lord Woolf MR in delivering the judgment on behalf of the Court of Appeal, cited with approval the longstanding dicta from ***Re Hinchcliffe*** (above) and which had been relied upon by D&T in support of their application for access to the interviews exhibited to the affidavit filed in the earlier disqualification proceedings.

129. In ***Re Hinchcliffe,*** their Lordships decided upon an application by the executor of a deceased mental patient's estate, for access to documents referred to as "attachments" in an affidavit (a statement of the case and a legal opinion) which affidavit had been filed, without the attachments, in court by the guardian of the patient (referred to in the language of the era as "the committee of the lunatic"). The committee provided a copy of the affidavit but refused to provide the attachments, asserting a proprietary right to them. The executor applied for access to the attachments and this was resisted by the committee.

130. Their Lordships declared, firstly per Lord Herschell LC (at 119 -120):

> "*I think that questions of property and of privilege have in reality nothing to do with this application. The documents may be the property of the committee, prepared and taken for her own satisfaction. It may be that,*

being her property, production of them could not have been ordered in the action. But she chooses to bring them before the court herself, as part of her affidavit, in order to induce the Court to act in a manner which may affect and may prejudice the lunatic's rights. I cannot, in the absence of authority, see any ground on which the lunatic, if she became sane, or her executor if she were dead, could be refused inspection of these documents. They form as much part of the affidavit as if they had been actually annexed to and filed with it. For these reasons I think it is impossible to hold that the committee is entitled to refuse to the executor inspection of these documents."

131. Further, per Lindley LJ (at 120):

"I think that the application for inspection of the case and opinion of counsel, said to be annexed to the affidavit, does not turn upon questions of property or privilege. It is only a matter of convenience that exhibits are not lodged in the Master's office with the affidavit. In my opinion, anyone who has a right to see an affidavit has also a right to see an exhibit referred to in the affidavit so as to be made a part of it, just as it if were annexed to the affidavit. That is all I need say on the question."

132. And, finally, A. L Smith LJ (at 120):

"When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense. Therefore any person who is entitled to see the affidavit is equally entitled to see the document referred to therein."

133. Having cited with approval the foregoing dicta from ***Re Hinchcliffe***, and turning to the subject of the interviews sought by D&T, this is what Lord Woolf said in ***Barings v Coopers***[34] about the decision in ***GIO***:

> *"47. This issue was also helpfully considered by a judgment of this Court of Potter LJ in [**GIO**].... Unfortunately it does not appear that **Re Hinchcliffe** was cited to the Court in that case. The case concerned an application by a non-party to inspect documents. An application was made under Ord 38, r. 2A to obtain copies of documents referred to in witness statements. There was also an application to obtain copies of skeleton submissions and any documents referred to in those submissions; and any documents the judge was requested to read or referred to during the trial.*
>
> *48. The application under Ord 38, r. 2A failed as a matter of interpretation of the language of that order. Potter LJ.. did, however, recognize that if the statements had documents annexed or scheduled to the witness statement it "might well be successfully argued that such documents form part of the witness statement".*

134. Thus, there was no disagreement with Potter LJ's conclusions on the language of Order 38 r, 2A ,in its application to documents which are merely identified in as distinct from annexed or scheduled to witness statements. Right of access under the rule by leave of the Court extends to the latter but not to the former. There appears to be positive agreement, however, that where the documents are annexed or scheduled, they will be regarded as forming part of any statement read by the Court and so as themselves having

[34] At 921 [47], [48].

also come into the public domain (***Re Hinchcliffe***). Accordingly, as I read these pronouncements, it was "unfortunate" that ***Re Hinchcliffe*** was not cited in ***GIO***, only because Lord Justice Potter's statement on this point would likely have been more definitive than as last quoted above by Lord Woolf MR.

135. With regard to the more general application that was before the Court in ***GIO*** relating to the evidence, trial bundles and written submissions, Lord Woolf reviewed the dicta from Lord Justice Potter's judgment (quoted above at pp50 – 53)[35] and stated[36]:

> "*50. The **GIO** Services case involved an application to obtain copies of the documents. Here D&T [the applicants] do not require the court's assistance for this purpose. D&T only need to establish that the absence of any evidence that Jonathan Parker J [the trial judge in the disqualification proceedings] actually read the documents is not fatal to their case; that even without such evidence the documents, because of their use in the proceedings, were available to the public for inspection.[37] This is not without significance because Potter LJ thought that the comment which he cited of Nicholls V-C in Dobson v Hastings[38] when he said "if and when affidavits and other documents are used in open court their contents will become generally available" should be read restrictively. In our judgment the contrast which Nicholls V-C*

[35] From p995 –996 of the Court of Appeal's judgment.
[36] At p 992 [50] et seq
[37] This, presumably because D&T would then be able to get copies of them directly from the court or from the Bank of England interviewers.
[38] As set out above in paragraph 78.

drew between that position and documents on the court file is accurate."

136. I break here from the citation of this dicta of Lord Woolf's judgment to make the observation that he must be taken in that passage to be disagreeing with Potter LJ's "restrictive" reading of *Dobson v Hastings* - to the effect that only the contents of affidavits and other documents as read in open court become generally available but not the documents themselves or copies of them for further inspection and use[39]. This becomes clearer from the rest of Lord Woolf's dicta:

> "51. *The tension between the need for a public hearing of court proceedings and what happens in practice in the courts will be increased when the Human Rights Act 1998 comes into force and the courts will be under an obligation to comply with art.6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). Already, this court has recognized the need to give "appropriate weight to both efficiency and openness of justice" in the judgment of the court given by Lord Bingham of Cornhill CJ in* ***SmithKline Beecham Biologicals SA v Connaught Laboratories Inc.***[40]*. As Lord Bingham (at 498) recognized, it "may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain." Since the CPR came into force it is important to reduce the gap*

[39] See above herein at paragraph 121 (frost in emphasis).

[40] [1999] 4 All ER 498 at 512 in which it was decided that, in keeping with the language of Ord. 24 r 14A [GCR Ord. 24 r 22] and the open justice principle, the implied undertaking binding upon a party in receipt of discovery is released once the documents disclosed have been read to or referred to by the Court, in open Court.

since judges will be increasingly performing their role out of court as well as in court.

52. *Here the transcripts were put forward by the department as part of the evidence relied upon to obtain orders of disqualification. If the transcripts had been read in open court they would have been in the public domain. If they were read by the judge, in or out of court, as part of his responsibility for determining what order should be made, they should be regarded as being in the public domain. This is subject to any circumstances of the particular case making it not in the public interests of justice that this should be the position.*

53. *When documents are put before the court for the purpose of being read in evidence as here, the onus is no longer on the person contending they have entered the public domain to show this has happened. The onus is on the person contesting this is the position to show that they did not enter the public domain because, for example, the judge did not in fact read them or because of the need to protect the ability of the court to do justice in a particular case. This is the only practical solution. The judge cannot be cross-examined as to what he has or has not read.*

54. *The question of inspecting and copying the documents raises difficulties which do not arise in this case. The court can bear in mind CPR1.3 which*

requires the parties to help the court to further the Overriding Objectives set out in Pt. 1.[41]"

137. A number of important principles are recognized by Lord Woolf in these passages, leading to the dismissal of the appeal in ***Barings v Coopers*** against the order for disclosure of the transcripts of interview in question.

138. In particular, it is clear that practices – such as judicial pre-reading of written submissions and witness statements out of court, adopted for the sake of procedural convenience to ensure the efficient resolution of litigation, should not be allowed adversely to affect the ability of the public to know what has happened in the course of the proceedings. Accordingly, where documents were put before the court for the purpose of being read in private by the judge or read as evidence in the case, such documents are deemed to have been read and so to have come into the public domain and the onus is upon the party contending otherwise to show that they have not in fact been read by the judge. This is the only practical solution as the judge cannot be questioned about what he or she did or did not read.

139. Here the Court appears to be partially in disagreement with ***GIO***, where Potter LJ said that the written skeleton submissions of counsel but not also witness statements and affidavits read by the court, should be available

140. But of some importance to this application, and as I read the judgment in ***Barings v Coopers***, Lord Woolf did not decide upon the question of whether there is also a general

[41] Adopted and adapted as the Preamble to the GCR since 2003. In particular, in addition to that rule cited by Lord Woolf MR which requires the parties to help the court to give effect to the overriding objectives (ie. dealing with every cause or matter in a just, expeditious and economical way); rule2.2 states that "**These rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits**". Taken together, the over-riding objectives therefore require the court to have regard to matters such as the practical and financial impact of its orders upon the parties when requiring them to help the court. Such considerations will a fortiori arise where the help required is for the resolution of a claim of a third party which has nothing to do with advancing the interests of any party or may even be adverse to such interests, as AHAB contends is the interest of TiBC in bringing this application.

right in the public to inspect and copy documents (evidence) which, although not available from the court file, have come into the public domain by having been provided by the parties to be read by the judge.

141. This was one of the vexed questions confronting Potter LJ in ***GIO*** who, from the passages quoted in emphasis above[42] and cited by Lord Woolf, expressed the firm view that (the written skeleton submissions apart), "*if and in so far as it may be read out , the evidence bundles will "enter the public domain" .. and a member of the press or public may quote what is read but the right of access to it for purposes of further use or information depends upon that person's ability to obtain a copy of the document from one of the parties or other lawful means. There is no provision by which the court may, regardless of the wishes of the parties to the litigation, make such a document available to a member of the public. Nor...(should the court contemplate) such an exercise under its inherent jurisdiction.*"

142. On this question, there is no basis for thinking that the Court in ***Barings v Coopers*** disagreed with the reasoning in ***GIO***.

143. Rather, Lord Woolf clearly recognized this distinguishing element between the two cases where at paragraph 50[43] he said:

144. "*The GIO Services case involved an application to obtain copies of the documents. Here D&T do not require the court's assistance for this purpose*"

145. And in his conclusive exhortation[44], that :

> "*The question of inspecting and copying the documents raises difficulties which do not arise in this case. The court can for the future bear in mind*

[42] See again paragraph 121.
[43] As quoted above at paragraph 135 herein.
[44] From paragraph 54; also as quoted above herein at para. 136

CPR 1.3 which requires the parties to help the court to *further the overriding objectives*."

146. In the application of its fuller terms as earlier described above at paragraph 136, it is seen that the Overriding Objectives may not however, be invoked in a one-sided fashion to suit the interest of any party, let alone an intervening third party. It follows then, that in requiring any party (especially an objecting party like AHAB here) to assist the Court for the purpose of accommodating a third party's asserted right of access to documents which are not within the court files but in keeping with the open justice principle, the Court must take a balanced, fair and proportionate approach. The third party's right (or that of a member of the public) of access is not automatically, in such circumstances, to be regarded as paramount. And "*suitable safeguards*[45]" must also be observed to protect the general integrity of the court practices.

147. I now turn next to consider in more detail the judgment of Toulson LJ given on behalf of the Court of Appeal in ***R(Guardian News and Media)***. It reaffirms the principles enunciated in ***Barings v Coopers*** and further, in recognizing the practical difficulties for access to documents which confronted the Court in **GIO** but which did not arise in ***Barings v Cooper***, does not depart from ***GIO***, regarding it instead as decided upon its own facts and pronounces for the resolution of the kind of difficulties arising in that case, that the court should "*carry out a fact-specific proportionality exercise*."

148. As mentioned above, the case involved an application by the Guardian journalists for judicial review of the District Judge's decision in which she refused access to the documents sought – documents which had been filed in the extradition proceedings of two British citizens to the United States for alleged bribery offences and holding that she

[45] Per Lord Bingham, from **SmithKline Beecham**, also above.

had no power to allow the application for access. The Divisional Court upheld her decision and so the Guardian appealed. The Court of Appeal allowed Article 19, a not for profit organization which campaigns globally for free expression, to intervene in support of the Guardian's appeal by way of written submissions.

149. Access had been sought by the Guardian writing to the District Judge for inspection and copy of affidavits or witness statements, written arguments and correspondence, which were supplied to the Judge for the purposes of the extradition proceedings. They were not read out in open court but they had been referred to her attention during the course of the extradition hearings.

150. The Guardian relied upon strong public interest arguments, premised in its application to the Judge on the basis that the District Court had the inherent power at common law to regulate its own procedure, citing ***Attorney General v Leveller Magazine Ltd***[46].

151. It submitted further, that the general common law principle of open justice was now bolstered by the introduction of article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") through the Human Rights Act 1998[47], enshrining the right of access to public information for the exercise of the right to freedom of expression.

152. On the facts of the case, the Guardian submitted that it was wrong for it to be denied the documentation sought. In particular, (a) it had a serious journalistic purpose in seeking production of the documents, because the case raised issues of public interest; (b) allowing it to see the documents would not frustrate or render impracticable the administration of justice; and (c) allowing it to see the documents would not interfere

[46] [1979] AC 440.

[47] The equivalent of article 10 has since been adopted also in the Cayman Islands Constitution Order 2009, Part 1 Bill of Rights, Freedoms and Responsibilities, section 11.

with any rights of the parties to the case or of third parties.

153. Citing its longstanding interest in investigating stories of bribery and corruption of public officials, the Guardian argued that the public interest issues in the case included the questions (a) what were the two British citizens alleged to have done when participating in the scheme to bribe foreign officials/politicians in Nigeria? (b) was the scheme run through London because the United Kingdom then had weak laws against foreign corruption (c) why was the US Government , rather than the Serious Fraud Office (UK) ("SFO"), seeking to prosecute the two British citizens? Had the SFO taken a back seat so as to allow the US Government to extradite and prosecute them? (d) Has the UK, by the 2003 Bilateral Extradition Treaty with the USA, made it too easy for the US Government to extradite British citizens, even when the offences alleged were mostly committed in countries other than the USA?

154. In its evidence in support of its application for judicial review, the Guardian referred to the pivotal fact that for reasons of efficiency, and in order to save time and costs, judges increasingly receive and read written material which in previous years would have been given orally in open court[48]. This makes it more difficult for journalists to follow the details unless one of the parties chooses to provide the press with copies of the documents. Rob Evans, one of the Guardian journalists, also averred in his witness statement that he had not been able to attend throughout all five days of the extradition proceedings because of other pressing professional engagements and given that in any event counsel did not refer in detail to the contents of documents already read by the judge, without access to the documents, his understanding of the proceedings would be

[48] Recognized as an important factor as we have seen both in ***GIO*** and in ***Barings v Coopers*** (both above) and in the earlier cases discussed in them.

seriously hampered.

155. In his lead judgment on behalf of the Court of Appeal, Toulson LJ undertook an extensive review of the previous cases including ***GIO*** and ***Barings v Coopers***, as well as cases from other common law jurisdictions[49] dealing with the open justice principle and from the European Court of Human Rights, dealing more specifically with article 10 of the Convention.

156. A number of his conclusions are highly persuasive and I record them here as to be adopted and applied[50] along with and consistent with the dicta applied above from the earlier cases.

157. First, reflecting upon the District Judge's misapprehension of lack of power in her Court he stated that:

> *"The open justice principle is a constitutional principle to be found not in the written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied."*

158. Next, in clearly approbatory terms, he refers to ***GIO***[51] , as a case in which the Court of Appeal had allowed an appeal in respect of access to the written submissions but not the evidence for the reasons stated by Potter LJ (referring as well to the authoritative and seminal decision of the House of Lords in ***Scott*** **v Scott**[52] and of the Court of Appeal in **R v Howell)**[53]:

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[49] New Zealand, South Africa, Canada and the United States
[50] Beginning at [69] to [91] of his judgment.
[51] Which he had earlier discussed at page 637, [35]
[52] [1913] AC 417 and above
[53] [2003] EWCA Crim 486 in which Judge LJ (as he then was) declared on behalf of the Court of Appeal:

> *"The decisions of the courts in* ***Scott v. Scott*** *and* ***(GIO)*** *and* ***R v Howell*** *are illustrations of the jurisdiction of the courts to determine what open justice requires. For this purpose it is irrelevant how broadly or narrowly the last two cases should be interpreted. The significant point is that the decisions of the court in those cases, about disclosure of skeleton arguments to non-parties, were an exercise of the courts' power to determine whether such disclosure was required by the open justice principle."*

159. Next[54] he addressed an argument which had found favour with the Administrative Court below, to the effect that as Parliament had excluded court documents from the reach of the Freedom of Information Act, there was no good reason why the Court in exercise of its common law powers should seek to override the checks and balances created by that Act. While no such argument was raised on this application, it is worth noting here in passing, that Toulson LJ regarded that objection as misconceived:

> *"The question, rather, was whether the Act demonstrated unequivocally an intention [by Parliament] to preclude the courts from determining in a particular case how the open justice principle should be applied".*

160. As the Act neither expressly nor implied showed any such intention, then it raised no obstacle to the exercise of the Courts' inherent common law powers which, for these purposes, were reposed in the courts at all levels.

161. In turning to the critical question of the merits of the Guardian's application before the

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"Subject to questions arising in connection with written submissions on[public interest immunity] applications, or any other express justification for non-disclosure on the basis that the written submissions would not properly have been deployed in open court, we have concluded that the principle of open justice leads inexorably to the conclusion that written skeleton arguments, or those parts of the skeleton arguments adopted by counsel and treated by the court as forming part of his oral submissions, should be disclosed if and when a request to do so is received."

[54] At [73] –[74].

Court, he accepted that the Guardian had a serious journalistic purpose in seeking access to the documents and so, "*unless some strong contrary argument can be made out, the courts should assist rather than impede such an exercise.*" The reasons he noted[55] "*are not difficult to state. The way in which the justice system addresses international corruption and the operation of the Extradition Act 2003 are matters of public interest about which it is right that the public should be informed.*"

162. He then turned[56] to address the "*countervailing arguments*" raised on behalf of the United States. There were four: 1. that the open justice principle is satisfied if the proceedings are held in public and reporting of the proceedings is permitted; 2. that to allow the Guardian's application would be to go further than the courts have considered it necessary in the past; 3. that in the present case the issues raised in the extradition proceedings were ventilated very fully in open court, and there was no need for the press to have access to the documents which they seek for the purpose of reporting the proceedings; and 4. that to allow the application would create a precedent which would give rise to serious practical problems.

163. Given the strong public interest arguments raised by the Guardian, and the role of the press as the "*watchdogs*[57]" of the public interest in the justice system, it was not surprising that none of these objections prevailed with their Lordships.

164. As to the first, Lord Justice Toulson declared: "*The first objection is based on too narrow a view of the purpose of the open justice principle. The purpose is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinize the justice system of which the courts are the*

[55] At [77].
[56] At [78] et seq.
[57] Approving the term as used by Strasbourg Court in ***Tarsasag Szabadsagjogokert v Hungary*** 53 EHRR 130 dismissed at [48] of the judgment.

administrators".

165. Accepting that the breath of the Guardian's application was unusually wide, he described the second objection as "*correct but not of itself decisive*". The practice of the court is not frozen, he declared, thus acknowledging that the size or scope of the access sought would not be in and of itself determinative.

166. And here again he cites ***GIO*** approvingly, as a leading example of the open justice principle being applied to suit the changing needs of society and pointed out that in that case: "*The applicants wanted sight of the evidence filed in the first action in the hope that it would strengthen their position in the second action. Issues about informing the public regarding matters of general public interest did not arise.*"

167. This is of course, a passage on which Mr. Ramsden QC heavily relies here, as it supports the proposition that access to documents for use in other proceedings will be available on the basis of the open justice principle.

168. As to the third objection that the Guardian's attendance at the open court proceedings did not afford complete access: "*I do not regard the third objection as a strong objection on the facts of this case. The Guardian put forward credible evidence that it was hampered in its ability to report as fully as it would have wished by not having access to the documents which it was seeking. That being so, the court should be cautious about making what would really be an editorial judgment about the adequacy of the material already available to the paper for its journalistic purpose.*"

169. He then went on to recognize, as did the Courts in ***GIO*** and R(***Baring v Coopers***) that "*the practice of receiving evidence without it being read in open court potentially had the side effect of making the proceedings less intelligible to the press and public. This calls*

for counter measures[58] *... In my view the time has come for the courts to acknowledge that in some cases (access to documents referred to in open court) is indeed necessary.*"

170. Then turning to the fourth objection, Lord Justice Toulson said he was not impressed by this objection based on the "*practical problems which it is said would arise if the Guardian's application were to succeed*". In that case there was an easy practical solution provided by Rule 5.8 of the Criminal Procedure Rules 2011: namely , that "*The applicant may be required to pay an appropriate fee; it must specify what it wants; and it must explain for what purpose the information is required.*"

171. However, recognizing that that there could be valid countervailing reasons for refusing access, he reaffirms the importance of the "*default position*" and gives important guidance in the following terms[59] which is emphasized by Mr. Robinson QC here and which I regard as very apposite to the present case:

> "*In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit*[60]*, and the Constitutional Court of South Africa*[61]*, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to*

[58] Citing Lord Bingham's dictum, from *SmithKline Beecham* (above).
[59] At [85]
[60] In ***United States v Amodeo*** (1995) 71 F 3d 1044 (discussed by Lord Toulson at [65]-[66].
[61] ***In Independent Newspapers (Pty) Ltd v Minister for Intelligence Services*** 2008 (5) SA 31 , considered by Lord Toulson at [62]-[64.

outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

172. As reinforcement for these very helpful words of guidance and their obvious applicability in this case, I consider the passage approved by Lord JusticeToulson from the Constitutional Court of South Africa well worth setting out in full here as well. It comes from the dissenting judgment of Sachs J. but here agreeing with the majority that technical concepts, such as onus of proof, should not loom large in the balancing enquiry for access on the basis of the open justice principle:

"On the contrary, in fact-specific matters such as these, undue technicism, whether on questions of procedure or evidence, would be more likely to distort the achievement of constitutional justice than to enhance it. Similarly, it seems clear that, whereas in most cases involving proportionality, the courts will act as an outside eye in assessing the constitutionality of the way in which power has been exercised, in cases such as the present the courts have to do the balancing themselves. Check lists will not be helpful. As in all proportionality exercises, the factual matrix will be all-important, and the court concerned will itself have to make an order based on its enquiry into the specific way in which constitutionally-protected interests interact with each other, and particularly with the intensity of their engagement."

173. Adopting that dictum on behalf of the Court of Appeal, Lord Justice Toulson therefore went on to pronounce the decision granting access to the Guardian, while recognizing as well that in other cases there could be the further countervailing factor of too great a burden being placed upon the court for grant of access[62]: "*In this [Guardian's] case... there has been no suggestion that this would give rise to any risk of harm to any other party, nor would it place any great burden on the court*".

174. As I will come to explain, these last mentioned by Lord Justice Toulson are indeed two, among a number of other countervailing factors, arising for consideration in this case.

175. In summary, this important trilogy of cases of equal standing from the English Court of Appeal, have taken the open justice principle forward, in a uniform and coherent way. First, they recognize and accept that under the Rules of Court access can be granted only to the extent that documents are required to be placed upon the Court file and so are available to be accessed from it. Of equal significance though, they are in agreement that the rules are but a statutory expression of the inherent jurisdiction of the court and so, unless they expressly prohibit access such as for established reasons relating to particular classes of cases, the rules will be no bar to the application of the open justice principle which is itself a manifestation of the inherent jurisdiction of the court.

176. That being so, the cases emphasize the importance of the default position as a pivotal aspect of the open justice principle; i.e.: whether or not they are required to be filed on the court files and so are amenable to the rules; witness statements, affidavits, written submissions and their attachments read by the judge in private for the sake of expedition or convenience or referred to the judge in open court; are deemed to have come into the public domain and so may be available under the open justice principle. There is no onus

[62] At {87].

on the applicant to prove what documents of those put before him were actually read by the judge. In the absence of proof to the contrary, all such documents must be deemed to have been read and so to have come into the public domain.

177. On this score there may however, be perceived to have been disagreement in ***Barings v Coopers*** with ***GIO***, in so far as Lord Justice Potter did not but Lord Justice Woolf did, regard the attachments to such witness statements and affidavits as themselves becoming automatically available under the open justice principle. As discussed above, Lord Justice Potter declared more restrictively, that the attachments (as well as more generally the documents comprising evidence) come into the public domain only to the extent that their contents could be gleaned from having been read out in open court. That there was no further right of access to the documents themselves.

178. However, in the latter two cases, ***GIO*** was generally cited with approval and in ***R(Guardian News and Media)*** it was specifically cited[63] as an "*illustration of the jurisdiction of the courts to determine what open justice requires*".

179. This view I think must be regarded as reinforced by the fact that of the three cases, only in **GIO** were there "*difficulties of inspecting and copying the documents*" not available from the Court file and such as to require of the court's assistance by way of imposing upon a party or which would place "*an undue burden upon the court*".

180. And so, even if regarded in the subsequent cases as not to be followed on the question of access to attachments to witness statements and affidavits and their attachments which have entered the public domain, ***GIO*** nonetheless stands as an illustration of how the court might exercise the jurisdiction, and in particular how it might carry out the enquiry for the purposes of the "*proportionality exercise*", which is itself now also to be regarded

[63] At [71] and see above..

as a settled basis emerging from the cases for resolving applications under the open justice principle.

181. Accordingly, the framework set by the cases as I understand it, is that even with regard to the default position, it will be a matter for the court, on the basis of the fact specific enquiry to be taken in the particular factual matrix of the case and in exercise of the inherent jurisdiction, to determine what open justice requires by way of access to case records, whether filed in court or maintained by the parties.

182. In carrying out this exercise, it is also clear that the court must always to bear in mind the rationale of the open justice principle itself . The rationale of the principle "*at the heart of our justice system*", as Toulson LJ explained, is the assurance of public accountability in the administration of justice.

183. Accordingly, the open justice principle is not meant to be an unruly charter for fishing expeditions in aid of possible third party proceedings. In agreement with Mr. Robinson QC, this is what I see the Administrator's application as poised to become if granted in the widely frame terms of his summons.

184. Such potential abuse of the principle was no doubt recognized by Lord Toulson when he advised that, in carrying out the proportionality exercise, "*Central to the court's evaluation will be the purpose of the open justice principle....*[64]"

185. Such potential abuse appears also to have been recognized by the Bermudian Supreme Court in ***Bermuda Press (Holdings) Ltd v Registrar of the Supreme Court***[65] when granting an application by the press for access to affidavits filed in court in earlier proceedings and which had entered the public domain in parliamentary discussions of

[64] At [85] and as extracted above.
[65] In ***Bermuda Press (Holdings) Ltd v Registrar of Supreme Court*** [2015] SC (Bda) 49 Civ (24 July 2015).

their contents relating to allegations of official corruption raised against Government Ministers. In granting the application under the open justice principle, Kawaley CJ reflected upon the relevant inter-play between the rules of court and the common law inherent jurisdiction in the following terms, and ending with salutary and precautionary advice[66]:

> "*In the course of argument Mr. Howard submitted that the Bermudian statutory framework was entirely different from the English position where the discretion to afford access to such documents [as the affidavit in question] existed under Rules of Court. Properly analysed there is in substance no material distinction. Section 3(2) of the 1955 (Bermudian) Supreme Court (Records) Act opens the door to common law, statutory and constitutional provisions of law which permit access to, inter alia, Court records in pending cases. The Appellant's counsel explicitly relied upon highly persuasive English case law on the open justice principle*[67] *as applied to facts almost indistinguishable from the facts of the present case. Those principles need to be viewed in conjunction with the provisions of Order 63 rule 9, which confers an overarching statutory discretion on the Court to regulate access to Court records.*
>
> *Accordingly, I find that the Registrar has a discretionary power under section 3(2)(a) of the Act and read with the common law rules on open justice and/or Order 63 rule 9 of this Court's Rules, in an appropriate case, to provide a member of the public with copies of written evidence*

[66] At [31] –[32]
[67] ***R(Guardian News and Media)*** but as reported at [2012] EWCA Civ 420

filed in court and referred to by either the parties or the Court in the course of public hearing. This discretionary power is engaged par excellence in relation to constitutional proceedings involving significant public contracts where the conduct of senior Government figures has been called into question. It will rarely if ever be engaged in relation to in camera hearings and/or the vast majority of civil and commercial cases where predominantly private interests are in play" [emphases added].

186. I agree, as it will only be in the rarest of private interest cases that it can truly be said that central to an application for third party disclosure will be the purpose of the open justice principle itself.

187. With the foregoing summary of the guiding principles in mind and before finally turning to express my findings and conclusions upon the application, I need to deal briefly with the issue of access to the Transcript of the trial and with the argument for the application of section 11A of the Grand Court Law by analogy with the principles of comity.

Transcripts of the trial proceedings

188. Unlike in England and Wales[68] in this jurisdiction there is no rule of court requiring the recording of the evidence or judgment in civil proceedings[69], either by way of an official shorthand note or by electronic means. Nor are there rules here, again unlike the position in England and Wales[70] where it is expressly provided that nothing in the rule which requires transcripts to be provided to the parties upon payment of the prescribed fee, shall be construed as prohibiting the supply of transcripts to non-parties.

[68] RSC Order 68 rules 1 and 2 now reflected in Practice Direction 39A, paragraph 6 , pursuant to Civil Procedure Rules Part 39, and discussed by Potter LJ in **GIO at p. 995, B and C**

[69] There are however, statutory provisions for stenographic records in criminal proceedings.

[70] RSC Ord. 68 r.1(1) and (2), and in Practice Oirection 39A at .

189. Here, where there are no such official provisions for civil cases, Practice Direction No.3 of 2017[71] explains at paragraph 4 that:

> *"...it therefore remains the obligation of the parties, with the approval of the judge, to make their private arrangements for these services in civil cases.*
>
> *By the agreement of the parties and with the approval of the judge, the private stenographer's notes and transcriptions may be deemed the official record of the proceedings. Failing such agreement and approval, the judge's notes of the proceedings will be the official record."*

190. The Transcripts in issue here are the product of an arrangement between the parties with the approval of the Court, in keeping with those practice directions. While they have been made available to the Court for all purposes of the trial, including for the writing of the judgment which has been reserved, no order has been made, (or has been regarded as necessary), for deeming the transcripts to be the official record of the proceedings. The Transcripts have simply been accepted and relied upon by the Court and the parties as an accurate record especially of the evidence given at the trial, without the need for such an order. The judge's notes of the proceedings therefore remain the official record.

191. These were made throughout the trial in manuscript and though comprising 4.5 volumes of note books running to some 1700 pages, they are by no means a verbatim record of the evidence given from the witness box. They would, however, be time consuming and expensive to transcribe and certify.

192. That no doubt at least in part, explains why no application is made by the Administrator for the judge's notes although, as the official record of the proceedings, those would ordinarily be the accessible records in keeping with the open justice principle.

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[71] Published on 4 August 2017

193. Instead, it is proposed by Mr. Ramsden QC that I should now order retrospectively, that the stenographer's notes be certified by the court and deemed the official record of the proceedings so that AHAB or another party, could be directed to provide it in satisfaction of this aspect of the Administrator's summons.

194. While the court may have the authority in the absence of rules to so direct, no basis is shown for such an approach by the application of the open justice principle in aid of third party discovery. Without meaning to be definitive, such a basis could be shown to exist, for example, if there is a clear need to assist the press in fulfillment of its duty and responsibility to inform the public.

195. In the present case, the Transcripts have been prepared pursuant to contractual arrangements with Magnum Opus at considerable cost to the parties. They have not been certified or ordered to be the official record of the proceedings and so do not physically form part of the court records of the proceedings. In the circumstances, in the absence of any good public interest reason for the court to cut across the contractual arrangements without the consent of the parties (which in AHAB's case is not forthcoming) in order to provide the transcripts to a private non-party, I consider that it would be inappropriate to do so.

196. As Mr. Burton acknowledges, in this case, the Administrator was (or could have been) represented throughout the trial proceedings in open court by TTA. Nothing prevented TTA from making a full note of the evidence given from the witness box or even, had they applied as an interested member of the public and obtained permission from the court, taking an electronic recording of the evidence. The Administrator therefore chose not to avail himself of that access and it would now be unreasonable, in my view, to impose upon the parties enhance his private interest position, by the provision of the

Transcripts obtained at the expense of the parties for the specific purposes explained above.

Comity

197. Mr. Ramsden QC also sought to rely on what he describes as the analogy between the principle of open justice and the grant of relief under section 11A of the Grand Court Law, the rationale of which is grounded in the doctrine of comity. It is an analogy which I consider to be heavily overplayed here, for reasons which I now explain.

198. Section 11A vests a statutory jurisdiction for the making of freezing and ancillary disclosure orders in aid of foreign proceedings, where it is shown that there is a good arguable case and that there is a risk of dissipation of assets. "*Factors such as comity and the need to stop international fraud mean that the court should not be timid about granting an injunction*" in the exercise of this jurisdiction, said Lord Justice Millett in ***Credit Suisse v Coughi***[72], This was the case in which he examined and explained the jurisdiction as vested in the courts in England and Wales by the equivalent section 25 of the Civil Jurisdictions and Judgments Act.

199. The like jurisdiction exercised in the Cayman Islands by this court has been examined and explained also in the local cases: ***Classroom Investments Inc v China Hospitals***[73] and ***Meridian Trust Co v Eike Furkhen Batista.***[74] In them this court adopted and applied the analysis from ***Coughi***, among other cases, to the effect that relief may be granted in aid of proceedings in a foreign court even where such relief may not be available from that court or has been applied for in the foreign court and refused.

[72] [1998] QB 818
[73] [2015] (1) CILR 451
[74] Cause FSD No: 172 of 2016(IMJ)., written ruling delivered on 11 November 2016.

200. Placing heavy emphasis on this principle as explaining the wide breadth of the discretion to be exercised by this court in granting disclosure in aid of foreign proceedings, Mr. Ramsden responds to an objection raised by Mr. Robinson (as adumbrated by Mr. Ford in his affidavit above) that, as the kind of disclosure sought by the Administrator here would not be available from the courts of Bahrain or the KSA, the grant of his application for what would be in effect, wide-ranging third party discovery, would be to impose an unfair juridical disadvantage upon AHAB who would not be able to get any orders, let alone similar orders, for disclosure from TIBC.

201. In my view, reliance on the section 11A jurisdiction and the case law in support, misplaced here and is no answer to the objection raised by Mr. Robinson which is well founded in notions of fairness and reciprocity which themselves crucially inform the exercise of that jurisdiction.

202. In this regard I think I need only note the following further specific points.

203. First, there has not been undertaken before me any kind of enquiry into the relative merits or demerits of TIBC's actions proposed to be taken against AHAB or vice versa. There is therefore, simply no basis upon which I could determine that the discretion vested by the inherent jurisdiction for application of the open justice principle should by analogy with the section 11A power, properly be exercised in aid of any of TIBC's proposed actions abroad.

204. Second, as some such actions are as yet only proposed, there would be no basis for the exercise of discretion, again by analogy, for determining whether or not the foreign court would regard the grant of access here as being helpful or as obstructive – factors which should be considered when exercising the section 11A jurisdiction purportedly in aid of foreign proceedings. Although addressing the potential mischief that a freezing order

rather than a disclosure order could cause for the foreign court, to the unknown extent that the latter could also cause mischief, Lord Justice Millett's advice from ***Coughi***[75] is pertinent:

> *"Particular caution is appropriate where a freezing order is sought under section 25. The fact that the primary forum for the litigation is abroad means that this court is likely to be even less fully appraised of all the facts than in a case where it is exercising primary jurisdiction...."*

205. I regard that caution to be applicable here particularly as I have no request for assistance or other indication from either the Bahraini or Saudi courts as to how either would regard the making of orders here. This concern is heightened where the orders sought might be regarded as redounding to an unfair advantage in proceedings engaged before those courts.

206. In ***Motorola Credit Corp v Azan***[76], among the five particular considerations identified by the English Court of Appeal as those which should be borne in mind when exercising the jurisdiction to make orders purportedly in aid of foreign proceedings, four are apropos the application of the Administrator's argument by analogy here and the fifth also, again by analogy, as to why the exacting of undertakings, in this case from the Administrator, would be inappropriate for lack of their enforceability:

> *"As the authorities show, there are five particular considerations which the court should bear in mind, when considering the question whether it is inexpedient to make an order. First, whether the making of an order will interfere with the management of the case in the primary court, e.g.:*

[75] At 825 – 6 and considered and applied in **Classrooms** (above) at [18] –[24].
[76] [2003] EWCA Civ 752 at [115], cited and applied in ***Classrooms***(above).

where the order is inconsistent with an order in the primary court or overlaps with it. .. Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce."

207. It is having regard to such "*particular considerations*", that I find that Mr. Robinson's objections carry weight: this court could hardly expect the foreign courts to have wished to see such wide-ranging orders for disclosure made as those sought here by the Administrator in aid of their proceedings, while knowing that they could not make such orders themselves and so could neither avail AHAB of similar orders nor reciprocate in the event of a request for assistance for disclosure emanating from this court.

208. And while it is true as Mr. Ramsden submits on the basis of the case law cited, that comity requires that questions of fairness within their own proceedings must be left for the foreign courts to decide, that does not assist this court in deciding on an application for the exercise of its jurisdiction, in a way expected to result in an unfair juridical

advantage being obtained against a party before it. Especially, moreover, when such concerns about unfairness could result – as AHAB asserts here – from the unmeasured divulgence of documentation put before this court by AHAB for the purposes of access to justice and which could not have been expected to be divulged on the basis of any ordinary or usual application of the open justice principle.

209. When viewed in that light, Mr. Ramsden's resort to notions of comity seems far-fetched. And they certainly do not answer AHAB's complaint that the provision to the Administrator of its discovery made in this trial only for the purposes of this trial, would result in an unfair juridical advantage to TIBC in proceedings under the laws of the KSA or Bahrain.

Analysis and conclusions

210. As shown above, where an application for access is made pursuant to the rules of court or the open justice principle in furtherance of a proper purpose, the court should be inclined to grant it. It is equally settled however, that "*central to the evaluation will be the purpose of the open justice principle*". It follows that applications may not be granted simply because they may be helpful for third party discovery. There must be shown at least, a legitimate need for information for the better understanding of the court proceedings in question. Where the situation is complicated like here, with potential harm to the interests of others and issues of proportionality arising, this will involve a fact specific enquiry to be taken in the particular factual matrix of the case. Where other interests may be harmed or undue burdens placed upon either a party or upon the court in order to enable access, a balancing exercise guided by the discipline of proportionality will be required.

211. As appears from its email sent to the parties[77], this Court recognized that TIBC has a legitimate interest in seeking access to the information disclosed in the context of the trial of this action. As the email also indicated however, there were to be reasonable limits and so the parties were encouraged to agree what those should be and so upon an order for access.

212. In furtherance of that objective, the application was adjourned on 7th September 23017 part-heard, to allow instructions to be taken from the Administrator as to what undertakings he would give to reciprocate by way of TIBC disclosure to AHAB and by way of accepting the undertakings sought by the parties (especially by AHAB). AHAB for its part, was invited to say what reasonable disclosure it sought from TIBC.

213. As matters transpired, the extremes between the Administrator's sense of his entitlement to access under the rules of court and the open justice principle and AHAB's sense of their entitlement to exact undertakings, meant that no agreement was reached.

214. Yet, it is plain that there must be reasonable limits and so these must now be set by the Court.

215. In ***Dian AO v Davis Frankel & Mead and another***[78]. an application under the CPR R5.4(2)(C) – the equivalent of Ord. 63, r3[79]- was made for the disclosure of the entire court file to take copies which might be of assistance to the applicants in subsequent litigation. The court file comprised documents from an earlier case involving the defendants. Moore-Bick J (as he then was) decided that the rules did not entitle an applicant to seek permission to search the whole court file to see what it contained and to copy anything he considered to be of interest; that the applicant must identify with

[77] Mentioned by Mr. Ford in his affidavit as set out at paragraph 38 above.
[78] [2005] 1 WLR 2951, following Dobson v Hastings, GIO and Barings v Coopers (all above)
[79] Above at paragraph 74.

reasonable precision the documents in respect of which he sought permission and lay before the court the grounds upon which he sought it; that in the case of documents read by the court as part of the decision-making process, the court ought generally to lean in favour of allowing access in keeping with the principle of open justice, but it should not be as ready to permit the search for, inspection or copy of affidavits or statements that were not so read and should only do so if there were strong grounds for thinking that it was necessary in the interests of justice.

216. These are principles which I hold to be applicable here whether the application is considered under the rules of court or under the open justice principle.

217. As Mr. Robinson submits and I accept, the scope of the Administrator's application is much too wide to be justified either under the rules or under the open justice principle. It certainly bears no relationship to what a reasonable member of the public might expect by way of disclosure to inform the public interest for a proper understanding of the administration of justice in this case. Nor does it attempt to condescend upon any particularity even as to what documents could be relevant to TIBC's claims against AHAB. Frankly, the application, in its total lack of specificity, is indeed, a bold attempt at a fishing exercise in the hopes of netting information that could be used against AHAB in TIBC's proposed actions in the KSA and Bahrain. This is by no means an inference too lightly drawn when it is also recalled that during the hearing, with detailed knowledge of the circumstances surrounding the relationship between AHAB and TIBC derived from my knowledge of the case, I invited the Administrator to focus his application upon relevant specifics such as the financial records of the AHAB Money Exchange – its General Ledger and Deal Management System – in which is likely to be recorded its transactions with TIBC. And, in order to allay AHAB's concerns about unfairness, the

Administrator was also invited in return, to disclose TIBC's financial records in which the counter-entries to the transactions would likely be recorded.

218. This was not meant to be restrictive "*editorial judgment*" of the kind discountenanced in R*(**Guardian News and Media**)*[80] in relation to the grant of access to the press but a pointer to a practical solution to enable access upon an otherwise ill-defined application. Common sense also dictated that, given the existence of the electronic data-base into which the discovery for the trial had been converted and which is amenable to key word searches, the request could have been reasonably narrowed such as to identify and disclose all documents in the data-base in which any reference to TIBC is made. But none of that advice was to be of avail.

219. In the midst of the massive filings and disclosure made in this case, references in the Administrator's summons to "*...all...documents read by the Court during the course of the trial*" and to "*... those parts of the trial bundles containing discovery given by the Plaintiff*" obviously give rise to concerns about practical enforceability. That is, unless it is to be assumed that the Court will impose either upon the Registry staff or upon a party, to conduct the burdensome exercises of identifying such documents and separating them from the rest for the Administrator's inspection and then ultimately photocopying them as he might require.

220. It would be unacceptable to impose such a burden upon the Registry staff in the circumstances presented by this application and I do not consider, even upon the most generous interpretation of the Overriding Objectives[81], that I have the power to direct any

[80] Above, at paragraph 168 from [82] of the Judgment
[81] See as extracted above at F.N. 41.

of the parties to assume the responsibility for such an exercise, the feasibility of which, in the circumstances of this action, I also doubt.

221. I note here in this regard that I was told that the attorneys for the AWALCOs had offered to undertake the exercise, at least to the extent of its scope as identified in Mr. Ford's affidavit above, provided that their incidental fees and costs are paid by the Administrator. While the AWALCOs' estimate of the time required for the work is less than Mr. Ford's, they certainly anticipate significant costs which must be paid. And costs would not be the most significant issue. The AWALCos would also first require an order from the Court such as would serve to confirm their release under GCR Ord. 24 r 22 from the implied undertaking – that which is accepted as binding on all the parties in respect of the use of discovery provided in the action, except to the extent the discovery has been used in open court[82]. This would be required to cover the unintended but probable disclosure of material from the vast AHAB discovery not yet in the public domain.

222. The need for such recourses only serves to my mind, to emphasize the egregiously broad terms in which the application is framed. For instance, among other concerns, this would mean leaving it up to the judgment of one party only (the AWALCOs as proposed) to decide which documents comprise not only the AHAB discovery but also which from among the AHAB discovery have actually come into the public domain (for having been referenced by the Court) and which have not; as only the former and not the latter would have been released from the implied undertaking and so also available to the Administrator under the open justice principle. Without an order releasing the implied undertaking to suit the AWALCOs' proposal, I would therefore have to require AHAB to

[82] See reference to GCR Ord. 24 r 22; ***Home Office v Harman*** and ***Smithkline Beesham v Connaught*** (all above).

undertake the expense of monitoring the process, in order to protect their own interests by ensuring compliance with the legal principles for disclosure.

223. Here it is unquestionably the case that very many documents in the AHAB discovery have not come into the public domain for not having been referenced by the Court and there can be no issue of AHAB having to establish that fact. Nor is this a case where, like in ***Smithkline Beecham v Connaught***[83], it can properly be said that public access should be given to documents "*to avoid too wide a gap between what has in theory , and what has in practice, passed into the public domain.*"

224. Nothing I have seen in the development of the case law on the open justice principle comes anywhere near suggesting that it would be appropriate to grant the kind of invasive orders proposed here for the sake of affording the Administrator access to the AHAB discovery for the purpose of his potential use in other litigation hostile to the interests of AHAB. This conclusion is to my mind only reinforced by the fact that the Administrator's intended objective bears no relationship to the true purpose or the rationale of the open justice principle itself.

225. Especially in a case like this one, where the objective is wholly unconnected to that purpose or rationale, there is an obligation on the court to examine more closely and give due regard to the countervailing factors against access, as Toulson LJ advised in ***R(Guardian News and Media)***, and as discussed above.

226. This is even while recognizing that the principle does admit of reasonable access for use for potential third party proceedings. In this regard, I am especially guided by the approach in ***GIO*** which, from my reading of the case law, represents the high water mark

[83] Per Lord Bingham, as cited before above at paragraph 136.d

for access where sought for a purpose not closely connected to the monitoring of the court's decision-making process.

227. With due regard to all the circumstances, my approach will seek to strike an appropriate balance to allow such access as comports with the purpose of the rules and the purpose of the open justice principle while not imposing an undue burden either on the court Registry staff or on any party.

228. I conclude that the Administrator should be afforded for inspection and photocopy (at the rates charged by the Registry) access to witness statements and affidavits on the Court file and which were directed to stand as evidence in the trial but confined to those in which reference is made to TIBC. This does not include their attachments or documents merely identified in them, neither of which will be available on the Court file because the rules require them not to be filed. This is as distinct also, from those witness statements and affidavits filed in Court for use at the interlocutory stages, as distinct from at the trial; the former not to be disclosed.

229. The Administrator will also be provided with the skeleton opening and closing submissions of AHAB and the Defendants, in electronic form, to be respectively provided by the parties, on payment of such reasonable related costs as they might require. Documents identified in or attached to the skeleton submissions will not be provided as I consider such a measure (as in the case of attachments to witness statements and affidavits) to be burdensome and wholly disproportionate to what could be reasonably required for the due observance of the open justice principle in this case. Also for that reason and because of the unfair use to which it could be put in proceedings abroad, I refuse the application for the disclosure of the AHAB discovery.

230. I invite the parties to submit an agreed list of the witness statements and affidavits as allowed by this judgment for disclosure. This list will be for use by the Registry staff to identify those witness statements and affidavits allowed for disclosure and which are expected to be available from the Court files. If the parties can readily provide copies of these for use and certification by the Registry for release to the Administrator, so much the better.

231. I will not require any undertaking from the Administrator in respect of the use to which he might put the information to be obtained by way of this judgment. This is because I consider that it simply reflects the level of access that a third party, with a proper interest such as the Administrator's, might reasonably expect to obtain with the assistance of the Court for the purpose of a proper understanding of the administration of justice in the case. This is as it might affect his interests pending the judgment of the Court being delivered, upon which event as a member of the public he might expect to attain an even clearer understanding. In that regard, the access given bears no relationship to AHAB's concerns and is not intended to address those concerns. In other words, the access given simply reflects what this court considers to be fair, reasonable and proportionate having regard to the circumstances of the case and the proper application of the legal principles.

232. Implicitly also, it follows that I make no assessment of whether it would have been appropriate to delimit the use of the information to be provided – whether it would be appropriate to require undertakings in that regard in keeping with the Court's inherent jurisdiction to protect its process from abuse.[84]

233. In this regard, I note that a reason for delimiting the information disclosure, in particular the AHAB discovery, is to protect it (and by implication the Court's process) from the

[84] See ***Church of Scientology (above).***

potential abuse of that information being passed on for commercial purposes; for instance, along with any assignment of a cause of action or to any other interested third party. This concern was among those sought to be addressed by way of the undertakings which, for the reasons explained above, were not forthcoming; and even if they were, would likely have not been enforceable by this Court.

234. As touched upon above, I recognize however, and the case law clearly shows, that these are proper concerns for the Court in an appropriate case, in determining what access should be given to information entrusted to the Court for the purposes of access to justice, especially in private partisan proceedings.[85]

235. The costs will follow the event and so, as I consider that AHAB has been largely successful in its resistance to the scope of the Administrator's application, AHAB will have its costs of the application to be taxed, if not agreed.

236. I invite AHAB and the Administrator to submit an agreed draft form of order in keeping with this judgment.

Hon Anthony Smellie
Chief Justice

28 November 2017.

[85] See again, cited by Toulson LJ with approval above especially, ***Grupo Interpres SA v Spain*** [1997] ECHR 196.