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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2010

Before :

THE HON MR JUSTICE LEWISON

Between :

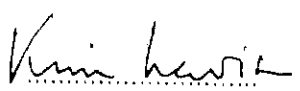
ABC Ltd	**Claimants**
- and -	
Y	**Defendant**

Desmond Browne QC and Jacob Dean (instructed by **Hogan Lovells International LLP**) for the **Applicant**
Mark Warby QC and Victoria Shore (instructed by **Bird and Bird**) for the **Claimants**
The Defendant in person

Hearing dates: 29th November 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



THE HON MR JUSTICE LEWISON

Mr Justice Lewison:

Introduction

1. [Redacted].

2. [Redacted].

3. Between November 2006 and June 2008 proceedings were on foot in the Chancery Division. [X] was not a party to those proceedings. They were proceedings between five companies [redacted] and Mr [Y], in which the five companies sought injunctions against Mr [Y] restraining him from disclosing or misusing confidential information. Those proceedings resulted in at least three orders of judges of this Division, including the Chancellor, following hearings in private. During the course of the proceedings on 27 September 2007, at another hearing in private, Master Bowles made an order that, subject to further order, non-parties might not obtain documents on the court file. The proceedings were eventually compromised in June 2008. Under the terms of the compromise Mr [Y] submitted to an injunction in broad terms; and withdrew allegations made against the five companies and/or their directors, officers, members etc and in particular withdrew all allegations of improper conduct made in the High Court proceedings. Part of the compromise was a comprehensive confidentiality agreement. Following the compromise a consent order was made by Chief Master Winegarten on 25 June 2008. A redacted version of that order is in evidence. The order does not state that it was made at a hearing in private; and the body of the order does not direct that the hearing be in private. The order includes an undertaking by Mr [Y] to be bound by a permanent injunction preventing the use or disclosure of confidential information, which is defined in very wide terms. It also included an undertaking by Mr [Y] that he had deleted copies of confidential information from all electronic or reusable media (including mobile phones and handheld computer devices). The order recited that the parties had "agreed to the terms set out in the Schedule hereto (which Schedule is confidential and therefore not to be filed at court)". The operative part of the order included an order that Master Bowles' order relating to the sealing of the court file be made permanent.

4. [X] has now applied for permission to have copies of documents on the court file. [Redacted]

5. The ground of the application, according to the application notice, is that:

> "… the documents are required in connection with other related ongoing proceedings [redacted]."

6. Despite the enormous range of documents mentioned in the application notice and the broad scope of the claims or potential claims mentioned in the grounds for the application, [X] has now severely curtailed his claim. [Redacted]

> "[Redacted]."

7. [Redacted]

Application for court documents

8. The application is made under CPR 5.4C. The relevant sub-rules are (1), (2), (4) and (6). They provide as follows:

> "(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
>
> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
>
> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing).
>
> (2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person
>
> (4) The court may, on the application of a party or of any person identified in a statement of case –
>
> (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
>
> (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
>
> (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
>
> (d) make such other order as it thinks fit.
>
> (6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission."

9. Under these rules the default position is therefore that [X] is entitled to a copy of a statement of case; but not any other document. Thus even if he wanted to see a copy of a witness statement, deployed in the course of a trial held in public, the default position is that he is not entitled to it. He is entitled to a copy of a judgment or order given or made in public, but not to a judgment or order given or made in private. However, the court may restrict access to documents. The court's power under CPR 5.4C (4) on the face of it deals only with statements of case. It does not apply to judgments or orders given or made in public. Mr Warby suggested that the court's power under 5.4C (4) (d) to make "such … order as the court thinks fit" might enable the court to restrict access to other parts of the court file. Whether or not this is so (and I do not think it is), it does not, in my judgment, enable the court to restrict

access to judgments or orders given or made in public. Quite apart from anything else anyone who pays the appropriate fee can obtain a transcript of a hearing in public (PD 39A para 6.3) or a transcript of a judgment given in public (PD 39A para 1.11). In addition paragraph 1.11 of PD 39A says in terms that a member of the public may obtain a copy of an order made at a hearing in public if he pays the appropriate fee. The reason why I do not think that the court's power under 5.4C (4) (d) extends to other parts of the file is that it is unnecessary. The default position as regards documents which are neither statements of case nor judgments or orders given or made in public is that a non-party must always obtain the court's permission to have a copy. As I have said, this would include witness statements. Thus a pre-emptive sealing of the whole file serves no useful purpose. CPR 5.4C does not deal expressly with judgments or orders given or made in private. Such a judgment or order is plainly not a document filed by a party. Arguably it is a "communication between the court and a party". That question might have arisen for decision in this case because of the wide terms of the application notice. But Mr Browne QC, appearing for [X], restricted his application to a much more limited number of documents; so that question can be decided in a case in which it matters.

10. [X] may also apply under CPR 5.4C (6) for the "unsealing" of a statement of case that has been previously sealed. In the present case Master Bowles' order of 27 September 2007 said that subject to further order "non parties may not obtain copies of documents on the court file". It does not seem to me that this form of order is appropriate. First, as I have said, I do not see what power is given to the court to order that a non-party may not obtain a judgment or order given or made in public. The power in sub-rule (4) to derogate from the general rule is confined to statements of case. Second, it is unnecessary to provide that non-parties may not obtain copies of other documents on the court file without further order. Under sub-rule (2) an order will always be necessary for a non-party to obtain anything other than a statement of case or a judgment or order made or given in public. If the effect of an order such as Master Bowles made goes further than the rule, it would give the appearance of pre-judging an application by a non-party that has not yet been made.

11. The documents on the court file of which [X] wishes to have copies are:

    i) The full version of the order made by Chief Master Winegarten following the settlement agreement;

    ii) Mr [Y's] defence and counterclaim; and

    iii) Any witness statement made by Mr Y.

12. In the course of his oral submissions Mr Browne explained that [X's] main goal in seeking these documents is to discover references to [redacted].

Open justice

Common law

13. Mr Browne majors on the principle of open justice. It is, I think, necessary to disentangle various strands of the argument. The principle of open justice is deeply embedded in the common law. The most authoritative expression of the principle is

the decision of the House of Lords in *Scott v Scott* [1913] AC 417, where their Lordships held that a suit for the annulment of a marriage on the grounds of the husband's impotence ought to have been held in public. Viscount Haldane LC said (p. 435):

> "...the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge."

14. As his Lordship said there are exceptions to the broad principle. He gave some examples (p. 437):

> "While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

15. He concluded (p. 438):

> "But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open Court. In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors."

16. The other Law Lords gave speeches to similar effect. Mr Browne also referred to the decision of the Court of Appeal in *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966 which contains a valuable statement of principle by Lord Woolf MR. Two quotations are apposite to the present case:

> "Sometimes the importance of not making an order, even where both sides agree that an inroad should be made on the general rule, if the case is not one where the interests of justice require an exception, has been overlooked. Here a comment in the judgment of Sir Christopher Staughton in *Ex parte P.*, The Times, 31 March 1998; Court of Appeal (Civil Division) Transcript No. 431 of 1998, is relevant. In his judgment, Sir Christopher Staughton states: "When both sides agreed that information should be kept from the public that was when the court had to be most vigilant." The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those

> situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve."
>
> "The nature of the proceedings is also relevant. If the application relates to an interlocutory application this is a less significant intrusion into the general rule than interfering with the public nature of the trial. Interlocutory hearings are normally of no interest to anyone other than the parties. The position can be the same in the case of financial and other family disputes. If proceedings are *ex parte* and involve serious allegations being made against another party who has no notice of those allegations, the interests of justice may require non-disclosure until such a time as a party against whom the allegations are made can be heard."

17. On the other hand, only a few months earlier Lord Woolf MR had said in *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056, 1073:

> "The best way of avoiding ill-informed comments in the media in a case of this nature when the interest of the public is high, is for the court to be as open as is possible and practicable, not only in relation to the trial *but also in relation to the interlocutory proceedings* which have to take place prior to that trial." (Emphasis added)

18. The two statements exhibit some degree of tension between them as regards the application of the principle of open justice to interlocutory hearings. But in *Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Ltd* [2005] EWHC 2101 (TCC) HH Judge Wilcox said (§ 23):

> "There can be no legitimate distinction drawn between decisions made in interlocutory proceedings and those at final trial when the requirement for open justice is considered. Interlocutory decisions may often be decisive as to the whole or a significant part of a complex case."

19. I do not need to decide whether HH Judge Wilcox was right or not, and I do not do so. I am content to assume that he was. The tenor of more recent decisions follows this trend. In *G & G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB) (an application for a *Norwich Pharmacal* order heard in private) Tugendhat J said:

> "Hearings in private under CPR 39.2 (3) and orders under CPR 5.4C (4) are derogations from the principle of open justice. They must be ordered only when it is necessary and proportionate to do so, with a view to protecting the rights which claimants (and others) are entitled to have protected by such means. When such orders are made, they must be limited

> in scope to what is required in the particular circumstances of the case."

20. Tugendhat J repeated these sentiments in *Gray v UVW* [2010] EWHC 2367 (QB) and *JIH v News Group Newspapers Ltd* [2010] 2818 (QB) (both applications for interim injunctions).

21. It did, at one stage, appear that Mr Browne was attacking the decision to hear the interim hearings in the underlying case in private. However, it is clear that the Chancellor expressly considered the question whether the hearing should be in private in the light of Mr [Y's] opposition to that course of action; and delivered a judgment in which he said that the case for a private hearing was "overwhelming". In a case which concerns the restraint of use of confidential information, the Chancellor's decision is unsurprising. In *Scott v Scott* itself the House of Lords recognised the need to conduct *trials* relating to secret processes in private. The application before the Chancellor was not only concerned with confidential information, it was an interim hearing only. Moreover, since the application for a private hearing was opposed, this is not a case in which the court now needs to be specially vigilant. Likewise Master Bowles was referred to the relevant principles before making his order; and there is no reason to suppose that he failed to take them into account. There is no material upon which I could conclude that the decision of the Chancellor to hold the hearing in private and to deliver judgment in private was susceptible to any criticism. Likewise the decision of Master Bowles. This, then, is a case in which the court has already reached the conclusion that a derogation from open justice was necessary.

22. In addition the principle of open justice is primarily concerned with what happens in court and the ability of the public (and especially the press) to observe what happens contemporaneously. It is less concerned with historical investigations into litigation that has come to an end. That is not to say that an Iron Curtain descends once litigation has concluded, even if it has concluded by settlement. Thus in *Chan U Seek v Alvis Vehicles Ltd* [2005] 1 WLR 2965 Park J allowed an application by a newspaper for copies of certain pleadings and witness statements that had been placed before the court at a hearing in public, even though the application was made after the case had settled. The general principle that the judge applied was that (§ 31):

> "... the courts favour disclosure rather than the withholding of materials if the materials have featured in proceedings in open court."

23. In deciding what counted as materials featuring in proceedings in open court the judge said (§ 32) that:

> "The reference to documents which have been read in open court must, in my view, be regarded as covering the pleadings, and also witness statements which were confirmed in general terms by their makers and which stood as evidence in chief."

24. In *Dian AO v Davis Frankel & Mead* [2005] 1 WLR 2951 Moore-Bick J discussed the principle of open justice. He pointed out (§ 28) that the highest importance was to be attached to the principle and that it was for that reason that in "all but exceptional

cases" hearings are conducted in public, judgment is delivered in public and proceedings can be freely reported. He continued (§ 30):

> "It could be argued that the principle of open justice demands that the court records be open to all and sundry as a right in order to enable anyone who wishes to do so to satisfy himself that justice was done in any given case. But that has never been the law and it is not what r 5.4 says. I accept that the line of authority on the principle of open justice was not specifically drawn to the attention of Nicholls V-C in *Dobson v Hastings*, but I am unable to accept that he was not well aware of it. It clearly did not strike him as odd, however, that the court's permission should be required in order to obtain access to the record. The principle of open justice is primarily concerned with monitoring the decision-making process as it takes place, not with reviewing the process long after the event."

25. In the following paragraph he said that if a non-party simply seeks permission to use the court file as a source of potentially useful information, the principle of open justice is not engaged. This may be putting the point a little too high. In *R oao Taranissi v Human Fertilisation and Embryology Authority* [2009] EWHC 130 (Admin) the BBC sought permission to inspect a class of documents on the court file in judicial review proceedings. The reason for the application was that the documents were likely to contain information relevant to a libel action in which Mr Taranissi was suing the BBC and in which the BBC wished to advance a plea of justification. Saunders J said (§ 6):

> "In their application, the BBC have identified the general class of document that they wish to see. I am satisfied that this is not an exercise to look through the whole of the court file to see if there is anything in it which might possibly assist which could probably be described as a fishing expedition. The reason for the application is not directly concerned with obtaining publication in the public interest or in pursuit of the principle of open justice; it is clearly to assist the BBC in their libel action. Indirectly it is concerned with the public interest because that public interest is the basis of the plea of justification in the libel action. In any event, I am satisfied on the authorities to which I have been referred that an application for disclosure for the purposes of collateral litigation does not mean in any sense that the order cannot be made."

26. I entirely accept that an application for disclosure for the purposes of collateral litigation does not mean that the order cannot be made. Indeed, such an order was made in the *Dian* case itself. An order can also be made where there is no litigation in prospect: for example for the purposes of investigative journalism: *Chan U Seek v Alvis Vehicles Ltd.* What is not clear from the judgment in *Taranissi* is why the BBC would not have been entitled to the documents it sought on an application for disclosure in the libel action itself. Moreover as Saunders J pointed out the documents that the BBC sought were all put before the judge in a public hearing. To that, extent,

therefore, the principle of open justice may well have been engaged. I do not, however, regard *Taranissi* as otherwise detracting from what Moore-Bick J said.

27. Mr Browne said that *Dian* should be distinguished (or at least watered down) because the rules in force at that time have since been changed. The rules that Moore-Bick J considered allowed a non-party to obtain a copy of the claim form only, whereas the current rules allow him to obtain not only the claim form but other statements of case as well. However, I accept Mr Warby's submission that although the general rule applies to a wider class of document than hitherto, that does not herald any change in the court's approach either to documents for which the court's permission is always required, or to statements of case to which the court has restricted access by express order under CPR 5.4C (4). In my judgment Moore-Bick J's judgment remains good law.

Article 6

28. Article 6 of the European Convention on Human Rights and Fundamental Freedoms says:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

29. According to the traditional jurisprudence of the Strasbourg court, a "determination" engaging article 6 is a final determination. Applications for interim relief, such as an application for an interim injunction, are not generally within its scope. This general principle was recognised domestically by the House of Lords in *R (Wright and others) v Secretary of State for Health* [2009] AC 739 in which Baroness Hale said:

> "But it is a general principle, frequently reiterated by the European Court of Human Rights, that
>
> "article 6 does not apply to proceedings relating to interim orders or other provisional measures adopted prior to the proceedings on the merits, as such measures cannot, as a general rule, be regarded as involving the determination of civil rights and obligations". (See, for example, *Dogmoch v Germany* (Application No 26315/03) (unreported) given 18 September 2006.)"

30. However, more recently, the Strasbourg court has reconsidered this question. In *Micallef v Malta* (15 October 2009) the Grand Chamber said (omitting references to previous caselaw) (§ 75):

> "Preliminary proceedings, like those concerned with the grant of an interim measure such as an injunction, are not normally considered to determine civil rights and obligations and do not therefore normally fall within the protection of Article 6 .... It follows that in length-of-proceedings cases, the Court has applied Article 6 only from the initiation of the case on the merits and not from the preliminary request for such measures ... Nevertheless, in certain cases, the Court has applied Article 6 to interim proceedings, notably by reason of their being decisive for the civil rights of the applicant .... Moreover, it has held that an exception is to be made to the principle that Article 6 will not apply when the character of the interim decision exceptionally requires otherwise because the measure requested was drastic, disposed of the main action to a considerable degree, and unless reversed on appeal would have affected the legal rights of the parties for a substantial period of time...."

31. It concluded:

> "79. The exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same "civil rights or obligations" and have the same resulting long lasting or permanent effects.
>
> 80. Against this background the Court no longer finds it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor is it convinced that a defect in such proceedings would necessarily be remedied at a later stage, namely, in proceedings on the merits governed by Article 6 since any prejudice suffered in the meantime may by then have become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation.
>
> 81. The Court thus considers that, for the above reasons, a change in the case-law is necessary. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.... It must be remembered that the Convention is designed to "guarantee not

> rights that are theoretical or illusory but rights that are practical and effective"....
>
> 82. In this light, the fact that interim decisions which also determine civil rights or obligations are not protected by Article 6 under the Convention calls for a new approach."

32. It proceeded to describe the "new approach":

> "83. As previously noted, Article 6 in its civil "limb" applies only to proceedings determining civil rights or obligations. Not all interim measures determine such rights and obligations and the applicability of Article 6 will depend on whether certain conditions are fulfilled.
>
> 84. First, the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under Article 6 of the Convention....
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> 85. Second, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.
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> 86. However, the Court accepts that in exceptional cases - where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process - it may not be possible immediately to comply with all of the requirements of Article 6. Thus, in such specific cases, while the independence and impartiality of the tribunal or the judge concerned is an indispensable and inalienable safeguard in such proceedings, other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue. In any subsequent proceedings before the Court, it will fall to the Government to establish that, in view of the purpose of the proceedings at issue in a given case, one or more specific procedural safeguards could not be applied without unduly prejudicing the attainment of the objectives sought by the interim measure in question."

33. As I have said the modern cases in this jurisdiction have taken the view that there is no difference between an interlocutory application and a trial, so far as the principle of open justice is concerned. To that extent our courts may have gone further than the Strasbourg court. In some cases this has been decided with express reference to article 6. The most recent pertinent example is *Donald v Ntuli* [2010] EWCA Civ 1276. In that case Maurice Kay LJ, having referred to *Scott v Scott* and other cases, said (§ 50):

> "This line of authority (which includes numerous other examples) requires open justice to apply because it furthers the

> interests of justice unless a countervailing consideration overrides it in the interests of justice. There are well-known circumstances in which to insist upon open justice would itself create a greater injustice."

34. He rejected an argument that the test of necessity should be watered down in the light of the Human Rights Act 1998 and continued (§ 52):

> "In my judgment, there is no need for a new approach. Indeed, it is significant that Article 6 of the ECHR itself prescribes a test of strict necessity in the context of publicity being permitted to be restricted in the interests of justice. However, as part of its consideration of all the circumstances of a case, a court will have regard to the respective and sometimes competing Convention rights of the parties."

What are [X]'s Convention rights?

35. I pose this question because of Mr Browne's reliance on a number of cases (including *Donald v Ntuli*) which concerned the grant of an injunction restraining publication of information. In such a case the court has to balance the claimant's right to privacy under article 8, the defendant's right to freedom of expression under article 10 and the defendant's right to a public hearing under article 6 (and the public interest in open justice).

36. In a case like *Donald v Ntuli* the injunction is designed to prevent further dissemination of information that the defendant already knows. It is that dissemination which constitutes the exercise of the defendant's right to freedom of expression. In the present case, however, [X] does not have the information that he wants to deploy [redacted]. The purpose of his application is not to disseminate information that he already has, but to seek to obtain it from the court records. That, in my judgment, is an essential difference between cases like *Donald v Ntuli* and this one.

37. [Redacted].

38. [Redacted].

39. [Redacted].

The correct basis of the application

40. In *Dian* Moore-Bick J said (§ 56):

> "In the present case, although Alfa is not interested in whether justice was properly administered in the Dian case, I think it does have a legitimate interest in obtaining access to documents on the court record in so far as they contain information that may have a direct bearing on issues that arise in the litigation in the Caribbean. I did not accept the submission that the link is too tenuous to make it appropriate to allow any access to the

> records at all. Moreover, I think that in the case of documents that were read by the court as part of the decision-making process, the court ought generally to lean in favour of allowing access in accordance with the principle of open justice as currently understood, notwithstanding the view that may have been taken in the past about the status of hearings in chambers."

41. In the following paragraph (§ 57) he said:

> "On the other hand, I do not consider that the court should be as ready to give permission to search for, inspect or copy affidavits or statements that were not read by the court as part of the decision-making process, such as those filed in support of, or in opposition to, the application for summary judgment in this case. These were filed pursuant to the requirements of the rules but only for the purposes of administration. The principle of open justice does not come into play at all in relation to these documents. I do not think that the court should be willing to give access to documents of that kind as a routine matter, but should only do so if there are strong grounds for thinking that it is necessary in the interests of justice to do so."

42. In the first of the quoted passages Moore-Bick J is dealing with documents that have formed part of the decision-making process in a public hearing. It is for that reason that the principle of open justice has a part to play. That this is the right interpretation of Moore-Bick J's observations is, I think, borne out by the remarks of Park J that I have already quoted in which he referred specifically to proceedings in "open court". In such a case, if the applicant can show "a legitimate interest" in having access to the documents, the court should lean in favour of allowing access. In the second of the quoted passages, Moore-Bick J is dealing with documents that have not been read by the court as part of the decision making process. In such a case the court should only permit access if there are "strong grounds for thinking that it is necessary in the interests of justice to do so."

43. In a case where the court has considered the question of access to documents on the court file and has restricted access; or where the applicant is seeking documents filed for the purposes of a hearing that after due consideration the court has decided should take place in private, I consider that the test that should be applied is the second of these tests. I must therefore consider whether there are strong grounds for thinking that it is necessary in the interests of justice that [X] should have access to the documents he seeks in so far as they were deployed at hearings held in private.

The documents

Chief Master Winegarten's Order

44. Paragraph 1.13 of PD 39A says that:

> "A judgment or order given or made in private, when drawn up, must have clearly marked in the title:

'Before [*title and name of judge*] sitting in Private'"

45. As I have said, there is no indication on the face of Chief Master Winegarten's order that it was made at a hearing in private. Nor is there any evidence to that effect. Consequently, in accordance with paragraph 1.11 of PD 39A [X] is entitled to a copy of that order on payment of the appropriate fee. I cannot see any power in the rules for the redaction of an order made at a hearing in public. The copy order will therefore be supplied in its unredacted form. I should make it clear, however, that what [X] is entitled to is a copy of the order as it exists on the court file. The order states that the Schedule to the order was not filed at court. Consequently [X] will not be entitled to a copy of the Schedule under CPR 5.4C.

46. [Redacted]

Mr Y's statement of case and witness statement

47. [Redacted]

48. [Redacted]

49. [Redacted]

50. [Redacted].

51. [Redacted].

52. [Redacted]

53. [Redacted]

Result

54. With the exception of Chief Master Winegarten's order I refuse the application.

55. My provisional view was that this judgment should be given in public. Having had written submissions on that question I now propose to give judgment in private; but to make publicly available a redacted version of the judgment. I would be grateful for the assistance of counsel on the extent of the necessary redactions.