Alpha Development Limited et al v
Barclays Wealth Trustees (Guernsey) Limited
Royal Court
4th March, 2015

JUDGMENT
11/2015

Plaintiff's applications for privacy orders.

Approved Text
04.03.2015

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

(1) ALPHA DEVELOPMENT LIMITED
(2) ALPHA DEVELOPMENT (CHELSEA) LIMITED

Plaintiffs

-and-

(1) BARCLAYS WEALTH TRUSTEES (GUERNSEY) LIMITED
(2)SHARON ANN PARR
(3) WARNER THOMAS KOLLER
(4) GAVIN ANTHONY ST PIER
(5) STEPHEN PERRY LE RAY
(6) BARCLAYS WEALTH DIRECTORS (GUERNSEY) LIMITED
(7) BARCLAYS WEALTH CORPORATE OFFICERS (GUERNSEY) LIMITED

Defendants

-and-

(1) LUBOV (ALSO KNOWN AS "LUBA") CHERNUKHIN
(2) CAPITAL CONSTRUCTION AND DEVELOPMENT LIMITED

Third Parties

Plaintiffs' Application for privacy orders

Date of hearing: 21st January 2015

Reasons handed down: 4th March 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiffs: Advocate G K Bell
Counsel for the Defendants: Advocate M G A Dunster
The Third Parties were not represented or present

Cases, Texts & Legislation referred to:

Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited (unreported, 11 June 2013)
The Royal Court Civil Rules, 2007
IFS Investments Ltd v Manor Park (Guernsey) Ltd [2003-04] GLR 77
Al Rawi v Security Service [2012] 1 AC 531
Scott v Scott [1913] AC 417
R v Legal Aid Board, ex parte Kaim Todner (a firm) [1999] QB 966
Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003
Re Delphi Trust Ltd (2014) 16 ITELR 885
In the matter of Timothy Edward Shuldham [2012] EWHC 1420 (Ch)
Ambrosiadou v Coward [2011] EWCA Civ 409
In the Estate of Platon Elenin (also known as Boris Berezovsky) [2014] EWHC 70 (Ch)
Science Research Council v Nasse [1980] AC 1028

Introduction

1. This action is listed for a seven-week trial this summer. The Plaintiffs claim £146½ million from the Defendants in respect of alleged lost profits in relation to a project to develop a prestigious property in London. The allegations are primarily that the losses stem from the Second to Seventh Defendants breaching duties owed as directors, with the First Defendant being vicariously liable or itself in breach of an administration agreement with the Plaintiffs. A more detailed exposition of the background to the action is contained in a judgment I delivered on 12 May 2014, which I do not propose to repeat here.

2. The Plaintiffs envisage calling three factual witnesses. They are Mrs Luba Chernukhin, who is the First Third Party, Mr Dennis Viskovich, of the Second Third Party, and Mr Olaf Kiener. The factual evidence of the Defendants is expected to be given by the Second to Fifth Defendants. In addition to the factual witnesses, permission has been given for a large number of expert witnesses to give evidence as well.

3. During the course of considering the content of the witness statements filed and served on behalf of the Defendants, the Plaintiffs have decided that they wish to be able to file and serve additional evidence from Mr Kiener in the form of a second witness statement. A draft of that statement has been prepared but it was not exchanged at the time envisaged last year because of concerns that Mr Kiener has about disclosing confidential information. Consequently, by an Application dated 20 October 2014, the Plaintiffs seek a suite of orders under the broad heading of "privacy orders". The evidence in support of that Application is contained in an Affidavit sworn on 18 July 2014 by Ms Inge Forster, who is the Plaintiffs' English solicitor. The Plaintiffs are represented by Advocate Bell, whose Skeleton Argument in relation to the Application is dated 20 October 2014.

4. The Defendants' position, set out in Advocate Dunster's Skeleton Argument dated 9 December 2014 and repeated at the hearing, is largely one of neutrality. Although I consider that Advocate Dunster's role necessarily needed to go further than that, he suggested his position was akin to that of an *amicus curiae*. The evidence filed on behalf of the Defendants consists of the Fifth Affidavit of Mr Simon Florance, sworn on 9 December 2014. The Defendants accept the legal test the Court must apply, as set out by Advocate Bell, but disagree as to its application to the position of Mr Kiener. They have invited the Court to take only those steps that are necessary to preserve any confidentiality found.

5. The Third Parties did not attend the hearing in any capacity. I infer from the position of the First Third Party as a central witness on behalf of the Plaintiffs that they would have been more likely than not to have aligned themselves to the position adopted by the Plaintiffs.

The Application

6. The most far-reaching element of the Application is in para. 7, seeking an order that "*Mr Kiener's evidence at the trial of these proceedings, if he is required to give any, shall be given in private*". Whilst the Plaintiffs are seeking very specific orders about how to disclose the proposed Second Witness Statement of Mr Kiener, including the establishing of a confidentiality ring, para. 4 of the Application also seeks an order that Mr Kiener's First Witness Statement should similarly be "*treated as confidential during and after these proceedings*" and basically subject to the same limitations on disclosure. The Application seeks orders consequential to the primary relief sought dealing with the sealing of the Court file and the prohibition on using any information derived from both Witness Statements for any collateral purpose.

7. Para. 8 of the Application seeks orders in respect of five documents that have been disclosed by the Defendants. I understand from what Advocate Bell explained that these documents form the proposed exhibit to Mr Kiener's draft Second Witness Statement. The Plaintiffs wish these documents to be treated as confidential during and after the proceedings and, in para. 9, seek an order that any reference to them or to the contents of them at the trial should be heard in private. Following the hearing, both Advocates confirmed that the first of these five documents had been referred to in para. 36 of the judgment I gave in *Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited* (unreported, 11 June 2013). Accordingly, Advocate Bell acknowledged that rule 79 of the Royal Court Civil Rules, 2007 operates and he no longer sought any order in respect of that document.

8. The basis for seeking these orders is set out in Ms Forster's Affidavit. She explains that Mr Kiener is a Swiss lawyer. Until 31 March 2014, he was a director of Aveva Trust SA. The clients of Aveva Trust SA included the First Third Party's husband, Mr Vladimir Chernukhin, and various companies and trusts with which Mr Chernukhin and his family were associated, to which she refers generally as "the Group". One of those companies is Navigator Finance Limited, which is primarily a funding entity. (These details, though not the date when Mr Kiener ceased to be a director, are already in the public domain, having been referred to in the *Emerald Bay* case (at para. 17).) Ms Forster further explains that Aveva Trust SA was, at the times relevant to the present proceedings, one of four directors of a company registered in Belize called Passatria Inc., which was the sole shareholder of Navigator Finance Limited. Until 30 January 2007, Passatria Inc. was also the sole shareholder of Sunny Gulch Village Limited, the parent company of Construction Alpha Limited, to which reference is made in para. 2 of the Plaintiffs' Re-Re-Re-Amended Cause dated 17 July 2014. As Ms Forster states, "*By reason of his involvement with the financial affairs of the Group, Mr Kiener is uniquely placed to provide evidence in relation to the Group's affairs during the time periods relevant to these proceedings*" (para. 9).

9. Mr Kiener's First Witness Statement is dated 31 October 2013. There has been no suggestion that, at the time of serving it, any question of some of its contents being confidential arose. Indeed, it appears to have been crafted in a very careful fashion so as to explain what Mr Kiener had been authorised to state and areas where his duties of confidentiality precluded him from saying any more. For example, at para. 7 of his First Witness Statement, Mr Kiener's states "*I am authorised to make this statement on behalf of [Navigator Finance Limited and Sunny Gulch Village Limited] by the shareholders and directors of both companies.*" Further, at para. 31, he adds "*I am authorised by the shareholders and directors of NFL and SGVL to confirm the extent to which those entities were in a position to make additional funds available to [the First Plaintiff], by way of further loans from NFL and SGVL or other entities within the Group*" before explaining in the following paragraph that "*For reasons of confidentiality I am not authorised to identify particular accounts from which such sums would have been available.*"

10. Ms Forster explains that "*Mr Kiener is concerned that his first and second witness statements disclose financial information that is highly personal and confidential to members of the Group, including Mr Chernukhin*" (para. 14). She notes that Mr Kiener's draft Second

Witness Statement "*will go into significantly more detail*" and that this level of detail "*has not been previously publicly disclosed or disseminated [and] is highly sensitive*". Ms Forster raises the possibility that, unless "*adequate measures are put in place to protect the Group's confidentiality*", so as to avoid Mr Kiener breaching his "*duties of confidence owed to his clients*", he will be unable to provide his proposed Second Witness Statement and unable to attend at the trial to speak to his First Witness Statement. Accordingly, the trial Court will be deprived of evidence that is clearly relevant to resolving the dispute between the parties. Although the genesis of the Application is the proposed Second Witness Statement, because of the inter-relationship between that evidence and what Mr Kiener is able to give by reference to his First Witness Statement, Ms Forster suggests it would be "*unworkable*" for part of his evidence to be in private and part in public, hence the application for all of it to be given in private. Advocate Bell acknowledged that, were such a course of action to be ordered, it is most likely that any questioning of other witnesses about matters dealt with by Mr Kiener would also have to be heard in private otherwise the underlying purpose of the order would be defeated.

The law

11. Both Advocates agreed about the applicable legal principles. The starting point is the judgment of Lieutenant Bailiff Day in *IFS Investments Ltd v Manor Park (Guernsey) Ltd* [2003-04] GLR 77, in which it was emphasised (at para. 21) that "*the principle of open justice … is and always has been a fundamental principle of our administration of justice*". That statement is as equally applicable today as it was then.

12. As an explanation of why this is such a fundamental principle, I can usefully refer to the passage in the judgment of Lord Dyson JSC in *Al Rawi v Security Service* [2012] 1 AC 531 (at page 572):

> "*10 There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of this open justice principle has been emphasised many times: see, for example, R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, 259, per Lord Hewart CJ, Attorney General v Leveller Magazine Ltd [1979] AC 440, 449H-450B, per Lord Diplock, and recently R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening) [2011] QB 218, paras 38-39, per Lord Judge CJ.*
>
> *11 The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In Scott v Scott [1913] AC 417, Lord Shaw of Dunfermerline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting "a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security". Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the central rule must treat the question "as one of principle, and as turning, not on convenience, but on necessity".*
>
> *12 Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. The Privy Council said in the civil case of Kanda v Government of Malaysia [1962] AC 322, 337:*

> *"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."*
>
> *13 Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said in the High Court of Australia in Lee v The Queen (1998) 195 CLR 594, para 32: "Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial".*"

13. As Advocate Dunster commented, a considerable number of the actions before the Court relate to financial matters. In my view, there are dangers inherent in being overly cautious about the wish parties and witnesses express that such matters be heard in private. One of the key foundations of Guernsey's success as an international finance centre is the quality of its administration of justice being dispensed openly. Transparency is an important facet because it operates as a disincentive to those who prefer to avoid public scrutiny of their affairs to place any unwelcome business here. It also means that members of the public are able to assess for themselves how decisions in commercial cases have been reached. If the Court accedes too readily to applications for evidence of financial details to be heard in private, it is likely to undermine the fundamental principle of open justice. I have, therefore, approached the Application with a degree of caution.

14. In the *IFS Investments* case (*supra*), the Court recognised that there are a number of well-founded and accepted exceptions to the general rule, eg, cases concerning children, incapables, matrimonial or trust matters and *ex parte* injunctions. In *Scott v Scott* [1913] AC 417, Viscount Haldane LC had similarly recognised established exceptions to the general broad principle of administering justice in public, which were themselves "*the outcome of a yet more fundamental principle that the chief objects of Courts of justice must be to secure that justice is done*". In relation to the principle of open justice, His Lordship said (at page 439):

> "*… 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. Reference was also made to the nine principles expounded by Lord Woolf MR in *R v Legal Aid Board, ex parte Kaim Todner (a firm)* [1999] QB 966. Advocate Bell highlighted the seventh and eighth points, but I will also refer to the sixth point because it demonstrates the importance of any order being a proportionate response to the concerns raised (at page 978):

> "*6. In deciding whether to accede to an application for protection from disclosure of the proceedings it is appropriate to take into account the extent of the interference with the general rule which is involved. If the interference is for a limited period that is less objectionable than a restriction on disclosure which is permanent. If the restriction relates only to the identity of a witness or a party this is less objectionable than a restriction which involves proceedings being conducted in whole or in part behind closed doors.*
>
> *7. 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.

8. A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest clam to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule."

16. Albeit given in the context of applications for interim injunctive relief in civil proceedings to restrain the publication of information, eg, in cases where celebrities seek to prevent newspapers from publishing stories about their sexual activities, which is quite different from the position in the present case, I regard the summary offered in the section in *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 given by Lord Neuberger of Abbotsbury MR (especially paras. 10 to 14) as being of general assistance as to how to approach applications for privacy orders:

"*10 Derogations from the general principle [of open justice] can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society [1984] QB 227, 235; Donald v Ntuli [2011] 1 WLR 294, paras 52-53. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.*

11 The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: M v W [2010] EWHC 2457 (QB) at [34].

12 There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be more than the minimum necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: Ambrosiadou v Coward [2011] EMLR 419, paras. 50-54. Anonymity will only be granted where it is strictly necessary, and then only to that extent.

13 The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: Scott v Scott [1913] AC 417, 438-439, 463, 477; Lord Browne of Madingley v Associated Newspapers Ltd [2008] QB 103, paras 2-3; Secretary of State for the Home Department v AP (No 2) [2010] 1 WLR 1652, para 7; Gray v W [2010] EWHC 2367 (QB) at [6]-[8]; and H v News Group Newspapers Ltd (Practice Note) [2011] 1 WLR 1645, para. 21.

> *14 When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled. The proper approach is set out in H's case [2011] 1 WLR 1645.* "

17. More recently, in *Re Delphi Trust Ltd* (2014) 16 ITELR 885, Deemster Doyle undertook an extensive comparative law exercise before concluding how the Isle of Man courts should deal with applications by trustees for directions. Deemster Doyle's comprehensive analysis of the approach taken across a broad spectrum of jurisdictions, including Guernsey and Jersey, led to his conclusion (at para. [150]) that "*The court should normally only sit in private where it is strictly necessary in order to secure the proper administration of justice and where privacy considerations legitimately override the important principle of open justice.*"

18. I am satisfied that this "*strictly necessary*" test applies generally as a matter of Guernsey law and so I have had it at the forefront of my consideration of the Application.

19. Some further guidance about the manner in which the issues raised in the present case could be addressed may be derived from some of the other cases to which Counsel referred me. For example, in *In the matter of Timothy Edward Shuldham* [2012] EWHC 1420 (Ch), Floyd J explained that (at para. 14):

> "*… the court will not automatically sit in private merely because private matters may be made public. The publication of private matters frequently occurs in litigation. The publicity in question must be shown to be sufficiently damaging that to require publication would amount to a significant denial of access to justice.*"

His Lordship proceeded (at para. 18) to clarify that:

> "*The court will have to form a view as to the nature of the confidential information, its importance to the party, and the damage he will suffer by its disclosure before deciding whether it is necessary to hold a hearing in private … The court has a wide armoury of measures it can take to protect truly confidential information, even in the context of a trial in open court …*".

The examples His Lordship then gave included making an order maintaining confidentiality notwithstanding that a document is one referred to in open court (see, eg, rule 79(2) of the 2007 Rules) and the making of orders restricting access to the court file by non-parties.

20. As noted in para. 51 of *Ambrosiadou v Coward* [2011] EWCA Civ 409, the Court can expect Counsel to be able to avoid revealing any private information when dealing with matters in public. Where it becomes necessary to do so, the Court can be requested to sit in private temporarily. Further, if Counsel accidentally reveal any private information orally, the Court can consider making appropriate orders preventing any reporting of that information. Accordingly, although parties may wish hearings to be held in private, or at least partly in private, because they are concerned that confidential information may otherwise be revealed, the Court can normally accommodate those concerns through less drastic means than the total exclusion of the public.

21. Finally, in *In the Estate of Platon Elenin (also known as Boris Berezovsky)* [2014] EWHC 70 (Ch), which involved a slightly different question about disclosure of otherwise confidential information utilising the test identified in *Science Research Council v Nasse* [1980] AC 1028,

Morgan J described the Court as needing to ask and answer the following questions (at para. 20):

> "*(1) is the disclosure of the information necessary for the purpose of disposing fairly of the proceedings;*
>
> *(2) can the information be provided to the court some other way not involving disclosure in breach of confidentiality;*
>
> *(3) is it open to the court to place restrictions on the use of the information;*
>
> *(4) if the answer to (3) is "yes", should those restrictions be imposed?*"

Those questions are not of direct relevance to the Plaintiffs' Application because they deal with a different situation. However, they demonstrate the importance of approaching the "*strictly necessary*" test in a principled fashion and emphasise that a proportionate response to questions of confidentiality is called for. This is clear from His Lordship's comment (at para. 53) that "*The court should not be unduly reluctant to impose restrictions which do no harm to anybody but preserve as far as possible the confidentiality of a third party caught up in litigation in which it has no direct involvement.*"

22. From this review of the more recent authorities from elsewhere, coupled with the approach in the ***IFS Investments*** case (*supra*), I consider that the following principles can be extracted:

    (a) There is a general presumption that all aspects of a case are to be held in public.

    (b) In exceptional circumstances, that presumption can be rebutted where it can be demonstrated that justice would be frustrated otherwise.

    (c) The test to apply is one of strict necessity.

    (d) The burden of establishing that the test applies lies on the applicant.

    (e) The Court expects the applicant to adduce clear and cogent evidence in support of such an application.

    (f) If that test applies, derogating from the general presumption follows as a matter of principle. Equally, if the test does not apply, the Application must be refused. There is no question of exercising a discretion.

    (g) Any limitations on the ordinary rule of open justice granted by the Court will, therefore, be the minimum required to preserve the confidentiality of the information involved so as to secure the proper administration of justice.

Discussion

23. Applying those principles to the present Application, it follows that para. 7 cannot be granted because it is not strictly necessary for the entirety of Mr Kiener's evidence to be given in private. From the ***Emerald Bay*** proceedings in 2012, in which Mr Kiener gave all his evidence in open court, and where reference to his evidence has been made in a publicly available judgment, the starting point, therefore has to be that his evidence should again be given in open court.

24. As I have indicated, no suggestion was made when Mr Kiener's First Witness Statement was filed and served that anything in it needed to be covered by a privacy order. Having reviewed it carefully, I am satisfied that it does not descend into the level of detail of any confidential

matters that would meet the strictly necessary test so as to justify it being treated during and after these proceedings as confidential. Accordingly, I will dismiss para. 4 of the Application.

25. Turning briefly to the five documents which are the subject of para. 8 of the Application, the correspondence submitted by the Advocates following the hearing confirmed that the first of these was indeed the e-mail of 19 February 2008 to which I referred at para. 36 of the *Emerald Bay* judgment. In those circumstances, Advocate Bell has conceded that rule 79 of the 2007 Rules operates so that the Plaintiffs' Application in respect of this document is no longer pursued. The other documents referred to are not, however, covered by the same principle because none of them has been placed in the public domain previously. Accordingly, the Plaintiffs have confirmed that they wish to proceed with para. 8(b) to (e) of the Application.

26. At the hearing, Advocate Bell made it clear that, even if the primary relief sought about Mr Kiener's evidence being heard in public were refused, the Plaintiffs sought an order relating to what he described as "*the bare minimum*" in respect of matters proposed to be included in Mr Kiener's Second Witness statement insofar as they dealt with confidential financial matters involving Mr Chernukhin and the structures associated with his family. I have, therefore, carefully considered the content of the proposed Witness Statement, the four documents already disclosed by the Defendants to which the Plaintiffs now propose that confidentiality should attach and the suggestion from Ms Forster that, without appropriate levels of protection being given to Mr Kiener's evidence, the Plaintiffs might not be able to call him as a witness.

27. Taking the final point first, although Mr Kiener resides outside the jurisdiction and so is not compellable as a witness, I imagine that his previous involvement with the Chernukhin family's affairs means that he is more likely than not to attend and give evidence in support of the Plaintiffs' case. Accordingly, I assess the risk of the Plaintiffs being deprived of his evidence as low, although it is certainly still a possibility. The importance of the Court being presented with as much material as is available in support of all parties' contentions is, however, important. I assess the prospects of Mr Kiener attending and giving evidence as increasing if certain aspects of what he now wishes to say, and which he explained in his First Witness Statement he was not authorised to say, can be kept confidential. Further, I consider that that outcome will result in Mr Kiener being generally more forthcoming in his willingness to give evidence that will assist in the resolution of the disputes between the parties.

28. Looking at the draft Second Witness Statement, I am satisfied that a lot of it does not contain or touch on material that can properly be said to deal with confidential financial matters. However, I am satisfied that there are some paragraphs in that Statement that could be extracted and placed into a confidential annex. In Advocate Dunster's submission, the only paragraphs he believed contained detailed information extracted by Mr Kiener were paragraphs 20 to 22. Advocate Bell argued that, in addition, a number of the paragraphs following those three paragraphs should also be afforded the same degree of protection. In my judgment, the strictly necessary test has been shown by the Plaintiffs to apply to the following paragraphs only: 20, 21, 22, 27 (last sentence only) and 28 (but not the final sentence).

29. In reaching that conclusion, I am satisfied that most of the material set out in Mr Kiener's draft Second Witness Statement is of a similar nature to the content of his First Witness Statement. It has been carefully constructed to state what he has been authorised to state and the paragraphs other than the four I have just identified do not contain confidential financial information. However, because of the order I am making permitting material in those five paragraphs to be extracted into a confidential annex, there may need to be some re-writing of certain other paragraphs, eg, paragraphs 4, 12, 23 and possibly also 18. There may also be scope to re-word what is left in the open statement from paragraphs 27 and 28.

30. In his reply, Advocate Bell did not advance arguments in support of extracting paragraphs 23 and 24 and acknowledged that paragraphs 25 and 29 are satisfactory as they stand for inclusion in an open witness statement. I have rejected Advocate Bell's submissions in relation to para. 26 because, although it touches on the decision-making processes within the Group, it does not explain anything that I regard as confidential. Indeed, the reference to matters proceeding again in the way they had previously indicates that this paragraph is simply descriptive and in no way confidential. I have similarly rejected Advocate Bell's submissions relating to the bulk of para. 27 because it too is descriptive without actually explaining the precise role undertaken by any entity. For the same reasoning, the final sentence of para. 28 offers Mr Kiener's views on what would have happened had the situation arisen and that is not something that that contains anything confidential.

31. In his post-hearing letter, Advocate Bell repeated his submissions that para. 30 of the draft Second Witness Statement should also be covered in the same way by being extracted into a confidential annex by explaining what details proposed for inclusion in that Statement have been given in the evidence of other witnesses, in particular the First Third Party. I have reached the conclusion that the references to the way in which the Sunny World Trust would have been operated set out in that paragraph do not satisfy the strictly necessary test because it is inevitable that evidence will be adduced about that Trust. Indeed, Mr Kiener's evidence contains references to the ultimate beneficiary and it is not a secret that that is a reference to Mr Chernukhin and/or his wife. Indeed, that is set out at para. 7A of the Defendant's pleading. Accordingly, I can find nothing in para. 30 which requires any level of protection by ordering that it form part of a confidential annex. It serves to explain further what is contained in para. 26.

32. The four documents remaining in para. 8 of the Application all form part of the same exchange between Mr Kiener and the Second Defendant. The first two documents were attachments to the e-mail of 19 February 2008 to which reference has already been made. Upon reviewing the content of both of them, I am satisfied that they contain private financial information and so should be referred to only in the confidential annex to any Second Witness Statement of Mr Kiener and so not treated in the same way as the other documents disclosed by the Defendants in that they must not be publicly accessible. The other two documents are further messages in the same chain of e-mails. The first was written by Mr Kiener to the Second Defendant on 20 February 2008. It refers to a company that is not a party to these proceedings and so not of direct interest to the matters in issue. Because it describes matters that can, in my view, be regarded as private financial matters, on balance, I am satisfied that this message meets the test of strict necessity. It should also feature as part of a confidential annex and is subject to the same qualification relating to public accessibility.

33. The final document, however, contains nothing private, save for the fact that when it is printed out it contains a copy of the message from Mr Kiener on 20 February 2008. This message arose when the Second Defendant forwarded to the Fifth Defendant on the same day what Mr Kiener had sent her, together with a query and a short comment. In my judgment, the confidentiality attaching to the message from Mr Kiener to the Second Defendant can properly be preserved by redacting some, but not all, of that message from the print-out of the last message in that sequence. In order to put the forwarded message into context, the greeting, the first and last sentences and the sign off should be left in place, but the three paragraphs in between should be redacted.

34. What this all means is that there will be a limited privacy order in respect of the paragraphs listed above in Mr Kiener's draft Second Witness statement and the three documents I have described (ie, those referred to in para. 8(b), (c) and (e) of the Application). The document referred to at para. 8(d) of the Application to be dealt with by redacting the three paragraphs to which reference has previously been made but will otherwise be treated as a public document subject to what happens to it at trial. To distinguish between matters that will, if evidence is given, be in the public domain and those matters which will remain private, assuming that Mr Kiener is willing to give evidence on this basis, there should be an ordinarily prepared Second Witness Statement. I consider that it should be filed and served

within 14 days of the date of this judgment. At the same time, there will be a confidential annex to that Witness Statement prepared, filed and served within the same timeframe, to which will be appended the three documents in respect of which I have indicated the privacy order applies with the consequence that none of the three documents is to be included in any general trial bundle. That confidential annex will be made subject to the tightly circumscribed confidentiality ring as set out in para. 1 of the Application in paras. 1.1 to 1.4. As a means of identifying the various copies of the confidential annex, I will further grant para. 3 of the Application relating to numbered watermarks being used. In relation to paragraphs 5 and 6 of the Application, it is only the confidential annex to Mr Kiener's Second Witness statement and the documents exhibited thereto which will benefit from an order that the copy on the Court file be sealed and that no copy thereof shall be provided to any third party.

35. At the trial, all the witnesses will, subject to any further applications and orders as the need arises, give their evidence in public. Because I have ruled that there will be no order for any of the proceedings to be heard in private, I will also dismiss para. 9 of the Application. The Advocates and the witnesses should be able to deal with everything arising satisfactorily without needing to refer expressly to anything in the confidential annex to Mr Kiener's Second Witness Statement. In that regard, I echo what was said in *Ambrosiadou v Coward* (*supra*). If this proves to be unduly cumbersome, it is obvious that the trial judge can consider on the day how best to manage the situation. Equally, if anyone inadvertently refers at the trial to something covered by the privacy order I am making, the trial judge can consider making an appropriate order relating to publication of that information or even its use following the trial.

Conclusion

36. The Application is granted to that limited extent because I have not been persuaded that any greater derogation from the ordinary rule of open justice is strictly necessary. The order provides the level of privacy that preserves the confidentiality of the financial information Mr Kiener wishes to be able to put before the Court, but in a manner that should mean that any observer will have the opportunity to see and hear the entirety of the proceedings. This serves to ensure not only that justice will be done, but also that it will be seen to be done.

37. I invite Advocate Bell to prepare a draft Act of Court reflecting the orders made and propose to reserve the costs of the Application unless either Advocate wishes to apply for a different order at this stage, in which case such an application should be listed for determination at a forthcoming Interlocutory Court.

