



No. 317

# In the Court of Appeal of Guernsey

( Civil Division)

**The** 20th day of September, 2002 before The Hon. Michael Jacob Beloff, Q.C.,  
presiding, Miss Elizabeth Gloster, Q.C., and Jonathan Philip Chadwick Sumption,  
Q. C.

MARK KLABIN

Applicant  
(Second Respondent before  
the Royal Court)

v.

TECHNOCOM LIMITED

Respondent  
(Applicant before the  
Royal Court)

WHEREAS, on 9th August, 2002 the Bailiff  
as a Single Judge reserved to the Full Court of Appeal consideration of an application for  
leave to appeal from the decision of the Royal Court made on 26th June, 2002;

AND WHEREAS on 17th September, 2002  
THE COURT heard Advocates G.S.K. Dawes and J.P. Greenfield for the respective parties  
thereon;

THE COURT this day issued judgment in the  
terms attached hereto and

- i) DISMISSED the application for leave to appeal; and
- ii) AWARDED costs on this issue alone to the Respondent in this Court and in the Royal Court.

A handwritten signature in black ink, consisting of several overlapping horizontal strokes and a vertical stroke on the left side.

Deputy Registrar of the Court of Appeal.

FRIDAY 20TH SEPTEMBER 2002

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COURT OF APPEAL

Before

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The Hon. Michael Jacob Beloff, Esq., QC; presiding  
Miss Elizabeth Gloster, QC  
Jonathan Philip Chadwick Sumption, Esq., QC

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MARK KLABIN v. TECHNOCOM LIMITED  
(Civil Appeal No. 317)

Judgment delivered by Beloff, JA

E BELOFF, JA: By an interlocutory judgment dated 26th June this year, the Deputy Bailiff refused the Second Respondent's application dated 8th May this year, for specific discovery for the purpose of the inter partes determination of the Applicant's request for injunctive relief. This application is made by the Second Respondent for leave to appeal dated 1st July 2002. It is common ground that, without prejudice to that, we should have full argument and reach a final conclusion on the substantive issues raised.

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The background to this matter, which is gratefully taken from the Deputy Bailiff's judgment is as follows:

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The Applicant in the main proceedings, Technocom Limited, is a company incorporated in Eire. It is effectively owned by Metromedia International Telecommunications Inc. (MITI, a US corporation, through a Canadian company called PLD Telekom Inc. (PLD). MITI in turn is wholly owned by Metromedia International Group Inc. (MIG), a publicly quoted Delaware company which operates, as a holding company for over fifty joint venture companies in eastern Europe, the former Republic of the Soviet Union and other, so-called, "selected emerging markets."

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The Applicant is the holder of 66.67% of the shares of the First Respondent Roscomm Limited, a Guernsey registered company. The remaining 33.33% of the shares in the First Respondent are owned effectively, by the Second Respondent, Mark Klabin through the medium of two Guernsey registered companies, Commbel Limited and Anka Limited.

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One of the joint venture companies in the Russian Federation in which MITI, through the Applicant, has an interest is ZAO Teleport - TP ("Teleport"), which

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operates a telecommunications network, including a number of "earth-stations" containing satellite telecommunications equipment. 44% of the shares of Teleport are owned by Rostelcom ("Rostelcom") a partially state owned telecommunications company, also registered in the Russian Federation. 46% of the shares in Teleport are owned, through the Applicant, by MITI, either directly or, as to 7.5%, through another company registered in the Russian Federation, Technopark JV. The remaining 10% of the shares in Teleport are owned by the First Respondent. The First Respondent accordingly controls the balancing interest in Teleport.

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The Applicant initially identified the following issues as central to this dispute.

(i) During the course of 1999, PLD completed the process of acquiring the Second Respondent's shareholding in the Applicant, for which the Second Respondent was financially compensated.

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(ii) On 30th September 1999, MITI merged with PLD, acquired control over it, and thus acquired full ownership of the Applicant.

(iii) Prior to 30th September 1999, the Second Respondent was, inter alia, the sole director of the First Respondent, and, according to the company records, still is.

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(iv) However, the Applicant alleges that with effect from 30th September 1999, as part of the overall agreement between PLD/MITI and the Second Respondent, he resigned, and undertook to effect his resignations, from all directorships of the MITI Group, that is PLD, the Applicant, Teleport and the First Respondent. The last of those resignations, or undertakings, is disputed by the Second Respondent.

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(v) Since the beginning of October 1999, the Applicant has become increasingly concerned with, and distrustful of, the activities of the Second Respondent in respect, inter alia, of his control of the First Respondent, and therefore of the First Respondent interest in Teleport. (It alleges a conflict of interests and disregard for his fiduciary duties as a director).

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The concern and distrust relate to-

- An alleged Pledge of Roscomm's shares in Teleport on 15th April 1999, by Roscomm in favour of Helian International Corporation ("Helian"), a Panamanian corporation which the Applicant believes is owned or controlled by the Second Respondent.

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- Alleged Bills of Exchange of 15th January 1999, by Roscomm in favour of Helian.

Connected to both of which is-

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- A Services Agreement of 12th August 1995, between Teleport and Helian whereby various payments were, and may have been continued to be, made to Teleport to Helian.

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The Appellant alleges that that Services Agreement was effectively terminated in accordance with its controlling law, that of the Russian Federation, by the end of June 2001.

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In consequence the Applicant applied to the Royal Court for ex parte injunctive relief, both of a mandatory and a prohibitory nature, against the three Respondents, which on 19th April of this year the Deputy Bailiff granted. The relief was designed amongst other things to remove the Second Respondent as a director of the First Respondent and to substitute for him as director two representatives of the Applicants, as well as to prevent the First Respondent from dealing in any way with its shareholding in Teleport and from making or procuring to be made payments under certain Bills of Exchange.

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Immediately upon notice having been received, the Second Respondent pursuant to liberty granted it to do so, applied to the Court to set aside the orders in their entirety. On 14th May of this year the injunctive orders of 9th April were duly amended until further order. The full inter partes hearing is scheduled to be heard on 7th October of this year. In it the Applicant will seek in effect to restore the position which obtained when the ex parte order was granted.

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The current position in the wake of the amendments is as follows:

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(i) A Mr. Carl Brazell and a Mark Hauf, representatives of the Applicant/MITI, have been appointed as Directors of the First Respondent, in addition to the Second Respondent.

(ii) The First Respondent is restrained from selling, etc., or otherwise dealing with its shareholding in Teleport.

(iii) The Second Respondent is restrained in his capacity as a Director of the First Respondent from exercising or purporting to exercise any rights attaching to the First Respondent's shares in Teleport, in particular those specified in Clause 2.3 of the Pledge Agreement.

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(iv) The First Respondent is restrained from making or procuring any payment under or in connection with the Bills of Exchange.

(v) The Second Respondent in his capacity as a Director of the First Respondent is restrained from negotiating, etc., or otherwise dealing with the Bills of Exchange.

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(vi) The Second Respondent is to cease and desist from holding himself out as having any authority to act for or on behalf of the First Respondent.

(vii) The Second Respondent was ordered by close of business on 20th May 2002 (which order has been complied with) to deliver up to Carl Brazell

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and Mark Hauf in their capacity of Directors of the First Respondent certified copies of the following documents:-

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- the original share certificate(s) recording the First Respondent's shareholding in Teleport;
- each and every original of the Bills of Exchange;
- all and any original documents, including agreements, in the Second Respondent's possession, custody or power purportedly issued, signed or otherwise executed on or after 30th September 1999, by the Second Respondent;
- all originals of the Pledge Agreement;

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and to file an affidavit stating the current whereabouts of all the original documents, to which I have referred, and verifying that the documents, certified copies of which were to be produced, represent each and every document that currently exists or has ever existed or been issued, signed or otherwise executed on or after 30th September 1999, by the Second Respondent for or on behalf of the First Respondent.

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- (viii) The Applicant is restrained from selling, or otherwise dealing with its shareholding in the First Respondent; and its application to be authorised to represent the First Respondent at Board Meetings of Teleport has been rejected.

The Deputy Bailiff summarised the status quo post the amendments thus-

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*"the general thrust of my conclusions with regard to the initial interim injunctive relief was that the activities of the Second Respondent should be restrained and controlled, and appropriate orders made, insofar as it was right to do so, in relation to the First Respondent, and that as far as Teleport was concerned, the "ring should be held", as far as possible ever to do so in such circumstances, between the alleged conflicting rights and interests of the Second Respondent and the Applicant (and its owners)".*

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The Applicant has now commenced substantive proceedings in the Royal Court, the Cause being lodged on 17th May of this year.

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Further areas of dispute between the parties have, as the Deputy Bailiff noted, become identified since the filing of affidavits in connection with the application for injunctive relief and the lodgement of the cause.

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- (a) Are those documents relied upon by the Second Respondent notably the Bills of Exchange and the share pledge (which the Applicant alleges to be deliberate fabrications) genuine?

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(b) What was known by PLD, MITI and the Applicant, or anyone acting on their behalf about any of the matters now complained of and when did they first come by that information?

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(c) Did either PLD, MITI, the Applicant or anyone acting on their behalf agree to and/or otherwise acquiesce in the matters now complained of, or any of them?

It is in connection with the evidence sworn on 11th April this year in support of the application for injunctive relief that the Second Respondent, on 8th May, applied for specific discovery prior to the inter partes hearing as follows:

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*“(a) Disclosure pursuant to RCCR 41(2) and 43 of the following documents.*

*(i) all documents referred to at paragraph 37 of the affidavit of Carl Brazell dated 11th April 2002;*

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*(b) The Applicant to provide forthwith facilities for the inspection of and the taking and/or provisions of copies of the said documents.”*

The relevant provisions of the Royal Court Civil Rules, 1989, state so far as material, as follows:

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*“39(1) The Court may, on the application of any party to the proceedings, order any other party-*

*(a) to furnish the Applicant with a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the proceedings;*

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*(b) to verify the list by affidavits.*

*(2) An order for discovery under paragraph (1) may be limited to such documents or classes thereof, or to such only of the matters in question, as may be specified or described in the order.*

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*(3) If it is desired to claim that any documents are privileged from production, that claim must be made in the list of documents with a sufficient statement of the grounds of privilege.*

40. *(Inspection of documents)*

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41(1) *Where a party who furnishes a list of documents under Rule 39(1)-*

*(a) fails to give written notice in accordance with Rule 40(b);*

*(b) claims that any of the listed documents are privileged from production; or*

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Judgment delivered by Beloff, JA

(c) *offers inspection at a time or place which in the opinion of the Court is unreasonable, the Court may, on the application of the party entitled to inspection, make an order for the inspection and copying of the documents in question at such time and place and in such manner as it thinks just.*

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(2) *Where a party to the proceedings makes reference to a document in his pleadings or affidavits, the Court may, on the application of any other party, make an order for the inspection and copying of the document at such time and place and in such manner as it thinks just.*

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42. *(Informal discovery and inspection).*

43. *The Court may by order give directions as to the hearing of any action or any question raised by the pleadings, including any exception, fin de non-recevoir or other preliminary point in issue, and may (without prejudice to the generality of the foregoing)-*

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(a) *order that any facts specified or described in the order shall be proved by affidavit;*

(b) *order that not more than a specified number of expert witnesses may be called;*

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(c) *order that the evidence of a particular witness shall be taken by commission; and*

(d) *order the manner in which such evidence is to be taken. ”*

It must be emphasised again that the Second Respondent’s requests for discovery relate solely to the inter partes injunction hearing, not to the substantive proceedings themselves.

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Under Rule 41(2), in our view, the Court has a discretion whether or not to make such an order as is described therein as long, of course, as the preconditions for such an order are satisfied. As with any discretion given to the Court, it must be exercised judicially. The Guernsey Rules do not give any direct assistance or provide any specific guidelines within which this particular discretion is to be exercised. There is no equivalent of the English RSC Order 24 R.13, which informed the exercise of discretion under RSC Order 24 R.10, the analogue of Guernsey Rule 41(2) and provided that no order should be made unless the Court was of the opinion that the order was necessary either for disposing fairly of the cause or matter or for saving costs. [I use the past tense because the English provision has undergone significant changes since the introduction of the CPR and RSC Order 24.1 does not survive CPR 31.14 which provides in lieu,

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“ *A party may inspect a document mentioned*

(a) ……

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(b) *a witness statement*

(c) .....

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(d) *an affidavit*]

However, Counsel were agreed, and the Deputy Bailiff held, that RSC Order 24 R.13 (while self evidently of no direct force in Guernsey) provides guidance as to appropriate, if not, exhaustive, considerations to be taken into account in reaching a fair and just disposal of the matter. I endorse that consensus.

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Two issues therefore arise-

(1) Whether there was a reference in Mr. Brazell’s affidavit paragraph 37 to the documents whose disclosure is sought within the meaning and for the purposes of Rule 41(2), (“the reference point”).

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(2) If so, whether the discretion should be exercised in favour of their disclosure (“the discretion point”).

In relation to the second, the discretion of the Royal Court should be respected unless flawed on well-known principles.

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I turn, first, to the reference point and consider paragraph 37 of Mr. Brazell’s affidavit, sworn on 11th April of this year, which is intrinsic to it. I am assisted in my review by the analysis of the Deputy Bailiff with which the Second Respondent takes no issue.

Mr. Brazell’s affidavit is divided into ten main sections. Sections I-IV relate to introductory and background matters, including the reasons for the alleged urgency of the application for injunctive relief.

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Section V relates to his knowledge of the matters deposed and encompasses paragraphs 36-39 inclusive. In paragraph 36 Mr. Brazell states that his knowledge comes principally from two sources: firstly the documents made at the time of the events relevant to the dispute, including the merger, whether internally or with the assistance of external advisors, and, secondly, from recent discussions with individuals from within the PLD and Metromedia Groups involved in the events relevant to this dispute to whom access has been possible.

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In paragraph 37 Mr. Brazell commences by stating:

*“I have caused to be undertaken a thorough review of documents from the following sources that we believe might be relevant to this application...”*

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He then proceeds to identify those five sources:

- The MITI operational files located in the Vienna office;
- Approximately 25 storage boxes of PLD documents from the former PLD London office which were recently shipped to the New York office for review;

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- The Applicant's and Teleport operational and corporate files in Moscow which were, so far as such files were available, reviewed by his in-house legal counsel and other relevant personnel based there;

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- The files in the New York corporate office of the former President, James Hatt, former General Counsel, Clive Anderson, and Chief Financial Officer, Simon Edwards, as well as general corporate files concerning the Applicant, Teleport and all related companies and subsidiaries;

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- (and a full review of) any and all E-mail correspondence and documentation that could be retrieved from the computer network server of MITI and its subsidiaries which in any way concerned any of the companies or individuals which were the subject of the Applicant's application.

In paragraph 38 Mr. Brazell identifies the further source of his knowledge, namely the discussions that he had been involved in, or the contents of which he was aware, conducted with various named individuals.

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Finally at paragraph 39 Mr. Brazell states that where he knows of a fact by reason of the investigations set out above, he has identified in the succeeding paragraphs the name of his sources in most cases, whilst in other he has stated that the fact is known by reason of investigation, by which he means a combination of sources, including documentary sources, listed in paragraphs 36-38. (He also refers to the documentary sources for the same purposes in paragraph 3(b).

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The next section of the affidavit, by far the largest, relates to the history of the dispute. Succeeding sections relate to the importance of controlling Teleport, the relief sought, service out of the jurisdiction and a summary. In paragraph 69 (which was not specifically referred to by the Deputy Bailiff) Mr. Brazell stated:

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*"My colleagues and I have undertaken a detailed investigation of the serious allegations made by Klabin, Helian and RoSH. From my review of the documents available to me and my discussions as described above, I am confident that the allegations are without foundation and I gravely doubt the authenticity and validity of the key documents on which Klabin relied."*

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On the reference point the leading English authority is that of Dubai Bank Limited v. Galadari (1990) 1 WLR 731 ("Dubai Bank") where Slade LJ giving the judgment of the Court said:

*The 'reference' point*

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*The 'reference' point, in our judgment, gives rise to greater difficulties. Rules of court substantially corresponding with Ord. 24, r.10 and the rules ancillary to it have been in force for over 100 years. Lindley LJ, in Quilter v. Heatly (1883) 23 Ch.D. 42, 50, drew a distinction between these rules and the general rules as to discovery of documents;*

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*'These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings.'*

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*While this statement explains the general purpose of the rules, it does not explain what test is to be applied in determining whether or not an assertion in a pleading or affidavit involves a 'reference ... to any document' within the meaning of RSC Ord. 24, r.10. Though the rule has existed for such a long time, there appears to be remarkably little authority on the point.*

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*In Smith v. Harris (1883) 48 LT 869 the plaintiff had stated in his statement of claim that during a certain period he and his father had used the word 'Glenlivet' on their letters and bill heads. In resisting an application by the defendant for production of these documents, the plaintiff argued that this was only a general reference to documents. Chitty J., however, held at p.870:*

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*'that is both a general reference and also a special reference to each and every bill head and each and every letter; because the plaintiff, instead of setting out each document separately, refers to them compendiously, that is no reason why inspection should not be allowed.'*

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*That decision is not binding on this court, but we see no reason to doubt its correctness. In our judgment, a compendious reference to a class of documents, as opposed to a reference to individual documents, is well capable of falling within the rule, provided that it is indeed a reference.*

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*Mr. Purle, on behalf of the plaintiff, submitted that the words of Ord. 24, r.10 should be construed with the purpose of the rule as explained by Lindley LJ, in mind and should be given their natural and ordinary meaning. From those propositions we would not dissent. The problem arises in applying them in a case where, though the assertion made in the affidavit or pleading does not specifically mention a document or class of documents, it gives the reader strong grounds, perhaps even sure grounds, for supposing that a document must exist. A simple example was canvassed in the course of argument. Let it be supposed that a deponent to an affidavit asserts that on a specified date 'the property Blackacre was conveyed by A to B.' If the assertion is true, one can be more or less certain that a document effecting the conveyance exists. But would the affidavit contain a 'reference to' a document within the meaning of the rule?*

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*Mr. Purle submitted that it would. He accepted that the mere fact that a particular transaction, referred to in an affidavit or pleading, would be likely to be evidenced by a document would not ipso facto involve a 'reference' to such a document. However, he made the broad submission that, if an affidavit refers to a transaction which on the balance of probabilities will have been effected by a document, that must involve a reference to such document for the purpose of the rule. Any other construction of the rule, he suggested, would be likely to lead to 'canny' drafting of affidavits; the draftsmen might simply state the effect of a document without specifically mentioning the document itself. A pleader or deponent who relies on a document as source of information ought, it was said, to be prepared to verify it by specific reference to his source of information.*

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*We did not find the last point compelling. If the respondent to a pleading can infer that the allegation in question is based on a document, it is open to him to ask for further and better particulars. If a deponent has failed adequately to identify his sources of information, the other side may be able to object to the affidavit in question, or the relevant parts of it, being read. The contention does not, in our judgment, by itself justify giving an extended meaning to the phrase 'referred to.'*

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*We revert to the example of the assertion 'Blackacre was conveyed by A to B.' We cannot accept the broad submission of Mr. Purle summarised above. It seems to us to involve reading the phrase 'reference is made to any document' as including reference by inference. This we do not regard as the natural and ordinary meaning of the phrase. To our minds, the phrase imports the making of a direct allusion to a document or documents. If the plaintiff were correct in its broad submission, this would oblige the court to enter into a process of inference and conjuncture in order to determine whether the document or class of documents in question even existed; and indeed, the judge did so in the present case. We cannot think that this was what the makers of the rule had in mind. As Mr. Reid pointed out, if the contents of an affidavit or pleading give good grounds for an inference that a particular document or class of documents exists, it is always open to the other party to apply for an order for discovery of a specific document or class of documents under RSC Ord. 24, r.7. The absence of a direct allusion to the document in the affidavit or pleading will merely mean that the other side will not have a right to seek production and inspection under Ord. 24, r.10 itself.*

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*In our construction of RSC Ord. 24, r.10 we are fortified by the judgment of Lawton LJ, in Marubeni Corporation v. Alafouzou (unreported) 6 November 1986; Court of Appeal (Civil Division) Transport No. 996 of 1986. In that case a deponent to an affidavit sworn on behalf of the plaintiffs had stated:*

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*'The plaintiffs have obtained outside Japanese legal advice which categorically states that this agreement does not render performance of the sale contract illegal in any way whatsoever.'*

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The issues were whether the references to 'legal advice' constituted reference to a document and, if so, whether privilege had been waived. The defendants' counsel, on an application for production pursuant to RSC Ord. 24, r.10, submitted that the use of the word 'which', followed by the words 'categorically states', was only consistent with a reference to a document. The plaintiffs' counsel, for his part, conceded in argument before this court that the Japanese legal advice referred to was almost certainly contained in a document. The judge in the court below had accepted the defendants' argument. Lawton LJ, however, held: 'In my judgment there was not a reference to any document in the affidavit.' He went on to hold that there was, in any event, no waiver of privilege on such document as existed. Since Lloyd LJ, the only other member of the court, agreed with Lawton LJ's conclusion on the question of privilege, he did not find it necessary to express any conclusion on the reference point, merely saying:

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*'I will assume that there was here a reference to the document in question within the meaning of RSC Ord. 24, r.10, though I have some doubt on the matter.'*

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*In the context of the privilege issue, both Lawton and Lloyd LJJ, drew attention to the real difference between a reference to the effect of a document and the contents of a document.*

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*In our judgment, a mere opinion that on the balance of probabilities, a transaction referred to in a pleading or affidavit must have been effected by a document, does not give the court jurisdiction to make an order under RSC Ord. 24, r.10, unless the pleading or affidavit makes direct allusion to the document or class of documents in question. The tenth defendant in its amended notice of objection, in our judgment, quite rightly accepted that items (1), (n), (o), (p) and (q) constituted references to documents. The judge, in our judgment, no less correctly decided that items (b) and (f) did not constitute such references. In our judgment, however, with respect, he applied the wrong test in approaching the remaining items, save for two."*

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The issues which were addressed in Dubai Bank were therefore twofold-

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- (1) Did documents to qualify as "referred to" have to be individually referred to, or could they be referred to more generally? The Court of Appeal concluded that *"a compendious reference to a class of documents is sufficient."*
- (2) Did the documents to qualify as "referred to" have to be expressly mentioned, or could the reference be a matter of inference. The Court of Appeal concluded that *"the phrase imports the making of a direct allusion to a document or documents; reference by inference is insufficient."*

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In my view, in application of these tests, the documents were "referred to" in Mr. Brazell's affidavit paragraph 37. Indeed given that he expressly refers to documents reviewed, and identifies them either by character (e.g. E-mail correspondence) or by location (e.g. files or storage boxes of documents) in a manner which incontrovertibly distinguishes the documentary from the other material relied on by him (see further paragraph 39) the contrary seems unarguable, unless there are limitations to be implied from the purpose and context of the rule itself. To put it another way, there is no reference by inference to these documents; there is reference by direct allusion. There is, in my view, a measure of artificiality, even arbitrariness as to whether a party renders himself vulnerable to accelerated discovery by the drafting of a pleading or affidavit to refer to a document rather than to a transaction which may (or even, as in the case of a transfer of land, necessarily will) be effected by a document. But the Court of Appeal in Dubai Bank both recognised and to an extent justified the distinction.

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The fact that the documents are not individually but compendiously referred to, cannot then avail the Applicant in the light of Dubai Bank.

The Deputy Bailiff concluded on this point:

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*"I am not persuaded there was any such reference by Mr. Brazell in his introductory comments to paragraph 37.*

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*In my view paragraph 37 of Mr. Brazell's affidavit has to be placed in its proper context, namely that he identified the whole range of sources which were investigated, as potentially they might contain information which would be relevant to the matters to which he was to depose. In the subsequent sections, and indeed in earlier sections of the affidavit, Mr. Brazell identifies the specific documents, extracted from those sources, upon which he has relied to support his company's application that injunctive relief should be ordered.*

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*In my view, the documents which fall within Rule 41(2) are those specifically referred to by Mr. Brazell - for example CB3 or CB11, there are many others; the whole range of sources from which the specific documents have been extracted do not so fall. On the facts in this case, those sources are not documents "referred to" for the purposes of Rule 41(2)."*

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In my respectful view the Deputy Bailiff ignores as a matter of fact that it is not only sources, but documents from sources (themselves documentary) to which Mr. Brazell alluded: and, as a matter of law that it is not necessary for a document under this rule to be specifically referred to in order to be discloseable (see also Supreme Court Practice (1999) Vol. 1 24/10/2).

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Nor, for my part, do I derive a limitation from "*the general purpose of the rules*" as described by Lindley LJ in Quilter v. Heatly (1883) 23 Ch.D. 42 at p.50, i.e. to give the opposition purely the same advantage as if the documents referred to had been fully set out in the pleadings - which was accepted as a valid explanation for the rule in Dubai Bank. If a document is fully set out whether in pleading or affidavit, the opposition party will, ex hypothesi see it. The rule, in Guernsey 41(2), will subject to the discretion of the Court, give him the same opportunity or advantage to see the documents referred to.

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Nor can I see any way in which, once the documents are directly alluded to even generally, there can be any limitation other than by the exercise of discretion, to deny the opposition party access to them. Neither the vocabulary or the rule nor the reasoning in Dubai Bank supports such limitations [a general reference is the antithesis of a limited reference]. True it is that the examples given of documents discloseable as a class (or generally) by virtue of this rule in such earlier cases as have been drawn to our attention are not on all fours with those listed in paragraph 37 of Mr. Brazell's affidavit: but the documents there listed are documents and even if defined wholly or in partly by location, still seem to me to be, in common parlance, a class of documents as so defined. It is to essential principle not exact precedent that the Court must look for guidance.

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I note that the learned authors of Style and Hollander Documentary Evidence (6th Edition) recognised at p.15 that a deponent on ex parte application (as in the present case) who discharged his duty of full disclosure to the Court may by reason of the equivalent RSC Rule "*allow the defendant immediate access to documents the intended*

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*plaintiff identifies*". To the extent that the Rule allows the ordinary timetable for and (if it is the case, which I doubt) the ordinary principles limiting discovery to be bypassed, that is the consequence of the engagement by the Plaintiff (or Applicant) of the Court processes: he cannot take the benefit without the burden. I note too that the learned authors of Mathews and Malek Discovery (2nd Edition) p.146 contemplate (if exhibits are treated as part of an affidavit for this purpose) prima facie "*a very wide potential production*" without suggesting other than that such is the conclusion compelled by the RSC Rule.

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I fully recognise the concerns which impel the contrary and forceful reasoning of Mr. Sumption JA (which I have read in draft), but arguments as to consequence cannot justify departure from what would otherwise be the natural interpretation of the rule or associated jurisprudence.

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The key, in my judgment, to preventing the expeditious conduct of proceedings from impediment by excessive and premature disclosure lies in the exercise of a wise discretion by the Court, and (under the repealed English rule expressly, under the Guernsey rule by voluntary implication) taking into account considerations of necessity and fairness (including avoidance of oppression). Establishing that a document is "referred to" only opens the door but does not guarantee that a litigant can pass through it. It is, therefore, to the discretion point that I now turn.

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It is necessary to bear in mind the nature of the exercise to be carried out by the Judge on 7th October of this year. He will have to decide essentially two matters (1) whether the Applicant has established an arguable case for the relief sought on American Cyanamid principles; (2) whether the balance of convenience favours the grant of such relief. Mr. Dawes for the Second Respondent accepts that the documents whose disclosure he seeks relate to the first matter only.

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I do not consider that, unless the documents sought contain a smoking gun, or more accurately a bomb which could destroy the entire foundation of the Applicant's case, the Second Respondent would gain any advantage from the disclosure at this juncture. On orthodox principle the Court will not be forming a final view on the merits to which the documents alone may go. The Applicant has done no more than state, at the different junctures referred to, that the documents listed in paragraph 37 (among other material) support his case and do not support the Second Respondent's. The Second Respondent wishes to double check the validity of that assertion of the Applicant's. In due time - and on the basis that they satisfy the test of relevance - he will have (subject to established exceptions such as legal professional privilege) the opportunity to do so. But he has not come within measurable distance of seeking to persuade me, let alone successfully, that he will even probably, let alone necessarily, find something which will show the Court at an interlocutory stage that the Applicant's case is entirely devoid of merit.

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Mr. Dawes says that it is unfair that the Applicant should seek to rely, as he undoubtedly does, upon documents which he declines to disclose for the purposes indicated. But Mr. Greenfield for the Applicants was constrained to accept that the Court is likely to pay little attention to mere assertion when the documents upon which it is based are neither produced to the Court, nor disclosed to the other side, in

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Judgment delivered by Beloff, JA

particular where such disclosure has been resisted, and I repeat will only marginally be concerned with the merits of each side's case at this stage in any event.

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I turn in light of these general considerations, to those passages in the judgment of the Deputy Bailiff which may relate to discretion.

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*"I also agree with Mr. Greenfield that it would be wrong, as a matter of general principle, that a party who had, with proper frankness and honesty, referred to all the sources which he had investigated, and from which he had obtained documents upon which he was seeking to rely, be therefore 'penalised' (his word) by being required, by order of the Court, to make all those sources available for inspection by another party. That process could well be unacceptable 'fishing'. The general principle would of course be subject to the requirements of justice, depending upon the particular facts of the case.*

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*Nor am I persuaded that any useful analogy can be drawn, as Mr. Dawes sought to do, from the nature of the documents which were held to be discloseable in Dubai Bank Ltd to the facts in this case.*

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*I further accept Mr. Greenfield's argument, despite Mr. Dawes' protestations that the cost ought to be minimal, that the work entailed, if the Second Respondent's application was granted on this matter, would be disproportionate, both in time and cost, to the matters which have essential relevance, as previously identified, to the exercise of my discretion under Rule 41(2), for the immediate purpose of the inter partes hearing.*

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*Moreover the whole host of specific documents which have already been identified, and produced, are exactly those which in my view would have been rightly produced in the normal course of events, under Rule 39 and Rule 40, at this stage, and for the purposes of the present proceedings."*

Mr. Dawes makes two preliminary observations.

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First he says that the Deputy Bailiff did not decide the matter on the grounds of discretion at all. As to that, in my view, it is clear from the passage cited that, even had he been in favour of the Second Respondent on the reference point, he would have ruled against him on discretion. Indeed in the context of his earlier discussion of the principles which should govern the exercise of discretion, it would be odd if he had declined to apply them - at any rate without making his abstinence clear.

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Secondly and alternatively, Mr. Dawes says that the Deputy Bailiff did not approach the discretion point with an open mind, given his firm ruling, adverse the Second Respondent, on the reference point. As to that I assume that the Deputy Bailiff approached the discretion issue judicially; and there is, as one would expect, not a scintilla of evidence that he did not do so.

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On the assumption that his initial arguments did not find favour with this Court, Mr. Dawes says that the Deputy Bailiff misdirected himself, essentially by his failure to recognise the unfairness of the state of inequality between the parties which resulted in his rejection of the application, one able to refer to and rely on documents, the other

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not. (I note in passing that if the application had succeeded, there might have been a mirrored inequality since the Second Respondent would not (unless voluntarily) have disclosed his documentation to the scrutiny of the Applicant). As to this, in my view, the Deputy Bailiff struck the right notes. If I may paraphrase the matters he took into account, they were the following:

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(i) A fishing expedition would be unacceptable where, as here, any catch could not be guaranteed.

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(ii) Given what would be essentially in issue in the inter partes interlocutory hearing (as to which see above), the work entailed in implementing an order for discovery would be disproportionate in time and cost.

(iii) It was useful to consider the substantial number of documents already produced relevant to the issues at the interlocutory stage of the proceedings (what might be relevant for the trial would be on a different scale).

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These seem to me to be highly material considerations, given due weight by the Judge who had, by reason of being seized of the matter from the start, a fine feel for the issues: nor can I detect any such consideration which he ignored. The Deputy Bailiff's view was reasonable - in my judgment - a right one to take.

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Mr. Dawes urged on us the importance of the interlocutory application to the Second Respondent: if deposed from the Directorship of the First Respondent, he would have lost not only the battle but the war. This, however, is an argument, it may be a persuasive one, on the balance of convenience. It does not require, for its support, the disclosures sought.

For those reasons I would dismiss this application for leave to appeal.

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GLOSTER, JA: I agree with Beloff, JA, both in relation to the reference point and the discretion point, and for the reasons which he gives I would also dismiss this application for leave to appeal.

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SUMPTION, JA: I agree that Mr. Klabin's application for leave to appeal should be dismissed, and if there was a discretion, I agree that the Deputy Bailiff and the President have given compelling reasons for exercising it against Mr. Klabin. However, like the Deputy Bailiff I do not think that there was a discretion, because in my judgment paragraph 37 of Mr. Brazell's affidavit did not refer to the documents in the sense which is meant by Rule 41(2). I propose to explain why I take this view as I think it is important to prevent the abuse of Rule 41(2), such as appears to have happened in this case.

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Paragraph 37 of Mr. Brazell's affidavit was not designed to identify any specific document or specific group of documents as constituting the authority for statements of fact made elsewhere in the affidavit. It is a list of broad categories of documentation, classified mainly by location, but also to some extent by type such as "E-mail correspondence" or "operational files". The categories of documents thus described clearly contain large volumes of paper, and it is not being suggested by Mr. Brazell that everything in them is relevant or supplies authority for his statements. The paragraph

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is simply designed to identify the sources which have been reviewed for the purpose of enabling Mr. Brazell to inform himself about the facts in order to give the evidence as he does. Some of this evidence is negative evidence, for example that no evidence has been found to support some point: see for example paragraph 66. Mr. Dawes accepted that if he were right in his submission about the effect of Rule 41(2), it would follow that subject to the discretion of the Court all documents in these categories were discloseable under that rule irrespective of relevance. Indeed it would follow that, subject again to the discretion of the Court, a statement in an affidavit that there were no relevant documents in some broadly defined category, or that the deponent had not read documents in that category, would make everything in the category in question discloseable under the rule. I cannot accept this.

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Rule 41(2) substantially corresponds to RSC Ord. 24 r.10 of the Rules of the Supreme Court in England as they stood when they were replaced by the Civil Procedure Rules. That rule had stood in more or less the same form since 1876 and it co-existed with a more elaborately defined power to obtain discovery of documents, normally after the close of pleadings. The reason for including the right to the disclosure of documents referred to in the affidavits and pleadings in addition to a right of discovery was said by Lord Lindley in a case about references to documents in pleadings to be “*to give the opposite party the same advantages as if the documents referred to had been fully set out in the proceedings*”: Quilter v. Heatly (1883) 23 Ch. D. 42, 50 (Lindley LJ). In the same vein, speaking of references to categories of documents (“letters and bill-heads”), Chitty J. observed in Smith v. Harris (1883) 48 LT. 869, 870 that all of them might be discloseable under RSC Order 25 r.10 if the pleading was in terms that constituted “*both a general reference to each and every bill-head and each and every letter, because the Plaintiff instead of setting out each document separately refers to them compendiously.*” Both of these observations were cited with approval by the Court of Appeal in England in Dubai Bank v. Galadari (No. 2) [1990] 1 WLR 731, 737-8. In my judgment they state the true purpose of the rule. It is not designed to advance the stage of the proceedings at which discovery or partial discovery must be given, but to enable a party on whom a pleading or affidavit is served to understand more fully what the pleader or deponent is saying about the document to which he refers. A pleading or affidavit “makes reference” to a document if it cites a specific document or group of specific documents as the authority for some statement, in a context in which the pleader or deponent might have set out the terms of the document or group of documents verbatim in order to make his point. The rule simply means that the fact that the draftsman has chosen to make the point by reference rather than by verbatim quotation is not to deprive the reader of the right to read the text side by side with the pleading or affidavit which deals with it. It follows that a pleading or affidavit which simply identifies the categories of documentation which the author has reviewed for the purpose of informing himself about the dispute does not “make reference” to all the documents in those categories. It is not a short-hand alternative to setting out everything in those documents. Some more specific “reference” must be made to the documents or some of them elsewhere.

It is of course correct, as the authorities which I have cited show, that a pleading or affidavit may “make reference” compendiously (as the Court of Appeal put it in Galadari) to a group of documents. But that only means that where a pleading or affidavit specifically refers to more than one document as authority for some statement under a collective description (e.g. “the correspondence between A and B”) as an

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alternative to setting out or exhibiting every one of those documents, every one of them may be discloseable. Paragraph 37 of Mr. Brazell's affidavit does not by identifying broad categories of documents directly refer to each document within those categories.

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I would support this view of the authorities by making two points.

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First, it is well established, and accepted by both parties to this application that it is not enough to justify disclosure under Rule 41(2) that the pleader or deponent has inferentially referred to a document because he has made some statement that must have been derived from one. That was the main point decided in Dubai Bank Limited v. Galadari (No. 2) [1990] 1 WLR 731. For example, by law a conveyance must be in writing but, as Slade LJ observed at pages 738-9 of that case, a statement in an affidavit that "Blackacre was conveyed by A to B" would not warrant disclosure under the rule, whereas a statement that "by a conveyance executed by A, B became the owner of Blackacre" would warrant disclosure of the conveyance. If the object of the rule is to advance the time of discovery at least on part of the issues, so that the statements in the pleadings or affidavits can be tested earlier, this distinction is completely absurd. It only makes sense on the footing that the rule is designed to enable the reader to follow and more fully understand the pleading or affidavit.

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Secondly, the same object is implicit in the scheme of the Rules, both in England before the CPR and in Guernsey today. In Guernsey documents may be discloseable under Rules 39-40 and/or under Rule 41(2). Rule 39 empowers the Court to order the disclosure of documents by list which the adverse party may then inspect under Rule 40, subject to privilege. Such an order may be made at any stage of the proceedings, but it is subject to a number of limitations and ancillary provisions. The documents are discloseable under Rule 39 only if they "relate to any matter in question" between the parties. The documents must be in the possession, custody or power of the party against whom the order is made. The list of documents may be ordered to be verified by affidavit. And discovery may be limited to some only of the matters in question. If the mere reference to the classes of documents which have been consulted to enable a deponent to inform himself is enough, subject to the Court's discretion, to make all documents in the class discloseable, then they are in principle discloseable without reference to any of the limitations or ancillary provisions contained in Rule 39. Thus, subject to discretion, irrelevant documents may be discloseable under Rule 41(2), simply because a deponent has said that there is nothing relevant in a particular class. That would enable the assertion to be tested, even if it appeared in an affidavit of documents under Rule 39 in a case where that statement would be conclusive. And a reference to documents which had been consulted and related to the whole of the dispute would in principle make all of them discloseable under Rule 41(2) long before the time when it would be appropriate to order discovery under Rule 39.

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Mr. Dawes submits that he ought to be entitled to the paragraph 37 documents under Rule 41(2) because it is unfair that Mr. Brazell should be able to fortify his evidence on an interlocutory application before discovery by boasting of the exhaustive researches he had made, when his client is not able to do the same because he does not yet have access to most of the documents which Mr. Brazell has consulted. However appealing this point may be at first sight, it does not withstand much examination. In the first place, Mr. Dawes accepts that his client would have to put up with this injustice, if it is one, had Mr. Brazell phrased his affidavit differently, for example by referring to

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“material” instead of documents, or by leaving it to be irresistibly inferred that he had consulted documents without saying so in terms. Secondly, it is not actually an injustice at all, because any unfairness which might arise from the inequality of arms can be addressed by making the application under Rule 39 for discovery relating to the issues which will arise on the interlocutory application.

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I do not accept that the “wise exercise of discretion” is an answer to the problems to which the procedure adopted in this case gives rise. The main reason is that the Court’s discretion can enable it to cut down the scope of an application, if necessary to nothing, but not to enlarge it. Thus if disclosure is made under Rule 41(2) instead of Rule 39, its maximum extent will depend on the accidents of phraseology instead of an intelligent appreciation of the issues on which disclosure is required, which may call for greater disclosure in some areas and reduced or no disclosure in others. Secondly, disclosure under Rule 41(2) is not mutual. I am not attracted by a principle which would enable Mr. Klabin to obtain discovery from Technocom under Rule 41(2) without having to give it himself, provided that he had managed to avoid swearing an affidavit at all or did so in more cautious terms. Far from producing equality of arms, Rule 41(2) if used in the way it has been here is calculated to produce precisely the opposite if it produces anything at all.

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To my mind, Rule 41 was intended to confer a very limited right to inspect certain documents and not an alternative method of obtaining partial or total discovery. It should not be allowed to exceed the proper bounds of its purpose or to get out of hand, as would I fear happen if applications such as this one were to become common.

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ADVOCATE GREENFIELD: Sir, in those circumstances my friend’s application having been dismissed I would ask for costs in relation to that application. I would also ask you for costs in relation to the hearing in the Court below; two points to make on that. Firstly submissions on costs were never heard before the Deputy Bailiff in the Court below because this appeal application intervened and therefore it never transpired. Secondly, I would make the comment that not only was this particular application before the Court below but two other applications were rejected by the Deputy Bailiff which have not even been pursued for appeal.

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BELOFF, JA: But in relation to the matter with which we are seized, they were implicitly reserved were they, in other words, no order was made in relation to them?

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ADVOCATE GREENFIELD: No order was made but the Deputy Bailiff indicated that he was prepared to hear submissions but that never transpired- that- and the order-

BELOFF, JA: Was overtaken by events, yes.

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ADVOCATE GREENFIELD: I’m sorry?

BELOFF, JA: Was overtaken by events?

ADVOCATE GREENFIELD: ... (Inaudible) ... I would have made submissions if it hadn’t been overtaken by the events for costs.

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BELOFF, JA: But were the costs actually reserved to this Court; can we in fact deal with costs of an argument before the Deputy Bailiff in circumstances where he has not made any order as to costs even by way of reserving them to us?

B ADVOCATE GREENFIELD: Well what he- it's slightly odd, the way he has phrased it, I've not come across it before; what he has done, he's said, at the end of his judgment "*I'm minded to reserve the costs but await to hear submissions.*" Sir, if your direction is that I need to go back to him to say "*Well I want to make those submissions*" then I'm happy to do so. It did seem however that you'd be guided by your own views.

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(Judges confer briefly)

BELOFF, JA: Mr. Dawes, what do you say?

D ADVOCATE DAWES: Sir, the Deputy Bailiff ... (inaudible) "*I am minded to order that costs should be reserved but I'm naturally willing to hear any submissions in this regard.*" Sir, my submission is it is for the Deputy Bailiff to adjudicate upon the issue of costs before him. Sir as to the costs of the appeal itself, sir in my submission the costs should be in the application sir, the Appellant has had some success in the law by two to one. Sir there is also a question of what view the Deputy Bailiff ultimately takes of the application within which this appeal is made, and the refusal of the Respondent to give disclosure of these documents that we seek. So sir I don't think I can develop it much further than that.

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BELOFF, JA: Is the Deputy Bailiff going to be the Judge who hears the resumed inter partes hearing on 7th October?

ADVOCATE DAWES: I understand yes, sir.

F BELOFF, JA: So that if we were to make an order only related to the costs of this appeal, nonetheless it would be open to him, would it, to at that juncture, deal with the costs that he had reserved?

G ADVOCATE DAWES: It would be sir, although I merely note that he said he was minded to order that costs should be reserved and no submissions were subsequently made.

BELOFF, JA: They weren't made and we know why they weren't made.

ADVOCATE DAWES: I take that point sir.

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(Judges confer again)

BELOFF, JA: We do not need to hear you reply. We will order the costs in favour of your client Mr. Greenfield, both here and below on this issue. We are not making any other orders about applications that may not have been pursued before the Deputy Bailiff- that be sufficiently clear.

I ADVOCATE GREENFIELD: Thank you sir.

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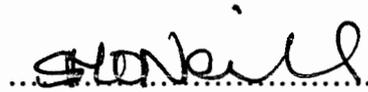
BELOFF, JA: Thank you both very much for most interesting arguments.

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C I, Suzanne Margaret O'Neill, hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

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..... Suzanne M. O'Neill  
Tuesday 5th November 2002

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