Judgment on costs and collateral use of litigation materials in other proceedings, under RCCR r 79

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

CIVIL ACTION No. 1462

BETWEEN:

(1) INVESTEC TRUST (GUERNSEY) LIMITED

(2) BAYEUX TRUSTEES LIMITED

Plaintiffs

-AND-

(1) GLENALLA PROPERTIES LIMTIED

(2) THORSON INVESTMETNS LIMITED

(3) ELIZA LIMITED

(4) OSCATELLO INVESTMENTS LIMITED

(5) RAWLINSON & HUNTER TRUSTEES S.A.

Defendants

-AND-

(1) GLENALLA PROPERTIES LIMTIED

(2) THORSON INVESTMETNS LIMITED

(3) ELIZA LIMITED

(4) OSCATELLO INVESTMENTS LIMITED

Third parties

Judgment on Costs

Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff

21st November 2016, 8th February, 26th April, 6th June 2017

Judgment handed down: 29th August 2017

Counsel for the Plaintiffs (Respondents): **Advocate Robert Shepherd**
Counsel for the First to Fourth Defendants (Applicants): **Advocate Elaine Gray**
Counsel for the Fifth Defendant (Respondents): **Advocate Nicholas Robison**

Cases and legislation referred to

Royal Court Civil Rules 2007 rr. 79, 82 and 83

Guernsey cases:

Shaham v Lloyds TSB Offshore Treasury Ltd 2007-2008 GLR 297 and 323
Jefcoate vs Spread Trustee Company and others (2014) Judgment 44/2014
Broadhead vs Spread Trustees and others (2015) Judgment 10/2015
.
English Cases:

Lilly Icos v Pfizer Ltd (No 2) [2002] 1 WLR 2253
Tchenguiz v Serious Fraud Office [2014] EWHC 2597 (Comm).
Tchenguiz v Serious Fraud Office [2014] EWCA (Civ)1409
Tchenguiz and others v Grant Thornton and others [2017] EWHC 310 (Comm)

Lieutenant-Bailiff Marshall:

1. This is my judgment with regard to the costs of two applications made in the above proceedings under Rule 79 of the Royal Court Civil Rules 2007, which records not only my decision in costs but also some points of principle with regard to the application of that Rule.

2. The first has been labelled the "Collateral Use Application". It is an application originally dated 16th November 2016 made through their liquidators by the First to Fourth Defendants, which are four companies incorporated in the British Virgin Islands and currently in liquidation, but which formed part of the assets of the Tchenguiz Discretionary Trust ("the Trust"), the beneficiaries of which are Mr Robert Tchenguiz and his children or remoter issue. The application is made under RCCR rule 79 (implicitly sub-rule 79(1)(b)) against the Plaintiffs as the Former Trustees of the Trust and against the Fifth Defendants, Rawlinson & Hunter Trustees SA, as the Current Trustees of the Trust.

3. RCCR 79(1) provides that

> *"A party to whom a document has been disclosed* [sc. in the course of litigation] *may use the document only for the purpose of the proceedings in which it is disclosed…"*

except in certain circumstances which include, by sub-rule 79 (1) (b), where the Court gives leave. There are proceedings, conveniently known as "Action 599", currently being pursued by a third party in England against the First to Fourth Defendants (although by now I think only effectively against Oscatello Investments Limited). By this application, the liquidators originally sought (so far as here material) an order permitting the First to Fourth Defendants to make use in those proceedings of

> *"all disclosure documents, pleadings, witness statements and/or any other court documents issued to or served on the BVI companies by the other parties to these proceedings"*.

The application originally extended also to privately made transcripts of proceedings in the trial of the action, but this class of document was dropped, quite rightly, by amendment on 18th November 2016, and official transcripts were obtained.

4. Whilst the generality of this application may make it appear somewhat ambitious, the documents referred to under the description "all disclosure documents….(etc)" had already been identified in previous circumstances by being electronically copied on to a memory stick sent to the parties here, and in particular the Fifth Defendants, some 2½ years ago, in May 2014. Having said that, there were still some 4,720 documents on the original memory stick, even though, by the time of the first hearing the scope of the application had been reduced to 1,574.

5. The second application is conveniently labelled the "Restriction Application". It was made on 15th May 2017 by the Fifth Defendants against the First to Fourth Defendants and the Plaintiffs under RCCR 79(2). This rule gives power to the court to restore the restriction on use which attaches to materials disclosed under the compulsion of court process in an action by Rule 79 (1) (above) where the restriction has been lost through those materials having come into the public domain by being

> "*read to or by the Court, or referred to, at a hearing which has been held in public*" (see RCCR 79(1)(a)).

I will refer to this qualification as being "used at trial" for short. In this application, the Fifth Defendants seek an order that some 149 documents specifically identified in a table appended to the application, and all in fact within the subject matter of the Collateral Use Application, should be restricted from collateral use in other proceedings, and specifically in Action 599, it having been identified that they were to be treated as having been used at trial.

6. Following the working through of the two Applications and the processes necessary to resolve the matter between the parties at four effective hearings (on 21st November 2016 and 8th February, 26th April, and 6th June 2017) the position with regard to what collateral use of what documents within Action 599 was to be permitted was ultimately resolved. The issue of the costs of these applications remained outstanding and was adjourned for written submissions at the end of June. Having considered these, I now make the following determinations. To put these in context I must first set out the history of the matter.

History

7. The details of the substantive claims in this action, conveniently known as "Guernsey 1", because there are other broadly related proceedings in Guernsey, are not particularly important

and were complex. In brief, the First to Fourth Defendants (whom I will now call the "BVI Companies" for short) went into liquidation in 2009. Through their liquidators they claimed large sums of money from the Plaintiffs, (the Former Trustees) as repayment of monies said to be owing to them by the Trusts. The Former Trustees brought this action in 2010 for declarations as to the non-liability of the Trust/themselves to make such payments, and that in any event they themselves were not personally liable for any sums owed, but only liable to the extent of the assets of the Trust. They further claimed a right to indemnity from the Trust in respect of the sums claimed by the liquidators, and the usual trustees' lien over trust assets for any liability and their costs. The Plaintiffs were removed as Trustees of the Trusts shortly after, and replaced by the Fifth Defendants in July 2010, when the latter were brought into the action.

8. There was then, as often happens, a set of cross-claim skirmishes, including a counterclaim by the Current Trustees against the Former Trustees for an account on the footing of wilful default and challenges to the appropriateness, or the propriety, of transactions entered into by the Former Trustees. The whole action gave rise to a three week trial in mid-2012, but the judgment of Lt-Bailiff Chadwick was not delivered until December 2013. There were then appeals, which were dealt with in several separate hearings during 2014 and 2015.

9. Action 599, mainly comprising a claim brought in England by a third party against some one or more of the BVI Companies and itself involving significant sums of money, was already on the horizon in 2014. The liquidators were seeking to resist the claim. Following the original judgment in Guernsey 1, Carey Olsen, Advocates for the BVI Companies, sent a letter dated 13th May 2014 to the Court and to the other parties, recording the parties' agreement, subject to the permission of the Court, that the BVI Companies would provide electronic copies of all documents they had obtained in the Guernsey 1 proceedings to the respective solicitors acting for the Plaintiffs and the Fifth Defendants by 23rd May 2014, a date which was noted at the time as being two weeks before the disclosure deadline in Action 599. The liquidators would then be at liberty to disclose and make use of these documents in Action 599, provided that if, prior to the date when the BVI Companies were obliged to give inspection of these documents, either of the Plaintiffs or the Fifth Defendants objected to the inspection of such documents, then the BVI Companies would not permit inspection in Action 599 pending determination of such dispute by the English Court, in that action.

10. LB Chadwick indicated that he was prepared to make such an order on 29th May 2014, but no Act of Court was ever drawn up. Although a memory stick with the various documents on it (the 4,720 documents already mentioned above) was, I think, supplied by the liquidators' English Solicitors (Skaddens) to the English solicitors for the Former Trustees (Macfarlanes) and the Current Trustees (Herbert Smith Freehills), the procedure envisaged in Carey Olsen's letter never took place. This is apparently because Action 599 was stayed at that point for negotiations, before the trial process had reached the point of discovery of documents.

11. However, it was resuscitated in 2016 and Action 599 then moved to the disclosure phase. It was at this point that the fact that there had been no Act of Court drawn up in 2014 was discovered. On 14th September 2016, Skaddens notified Macfarlanes and Herbert Smith of Oscatello's obligation to give disclosure in Action 599 and its intention to disclose the previous Guernsey 1 documents (or possibly, I think, the 1,574 documents which they had identified as relevant in Action 599 - it is not perfectly clear which), and a further 34 documents not previously so identified, by the then disclosure deadline of 23rd September 2016. This deadline had in fact been fixed in an order in Action 599 some six months previously. Skaddens stated that they assumed that there would be no objection to this in the light of the fact that there had been none previously. I am told that electronic copies of the relevant documents were provided to the Former and Current Trustees' legal representatives on a secure website at this time.

12. The Former Trustees did not object to such disclosure in Action 599, although stating that this was subject to everyone else's views, including this court's. By a letter dated 22nd September 2016, the Solicitors acting for the Current Trustees did make objection, at any rate until their clients had had the opportunity to review all the various documents, citing changed circumstances in the interim. They also asked for an undertaking by the liquidators' solicitors to pay the Current Trustees' reasonable costs of reviewing the documents. No such undertaking was given, and disputatious correspondence then ensued over various matters such as whether circumstances had really changed, whether the Current Trustees were actually in litigation with the third party Claimant in Action 599, which jurisdiction ought to be deciding any dispute about collateral use of the material documents, etc, etc.

13. Eventually, this impasse provoked the Collateral Use Application, of which a few days' prior notice was given to the Current Trustees' Advocates, Babbé, to be made, - I infer hurriedly - on 16th November 2016, and amended on 18th November 2016. The application was brought on for a claimed urgent hearing on 21st November 2017. The urgency was once more said to be that the English Court was fixing time limits for compliance with disclosure obligations on the parties in Action 599.

14. By the 21st November hearing, the liquidators' representatives (Carey Olsen) had certainly (and fortunately) thought better of applying in respect of the whole 4,720 documents on the original memory stick referred to in their application, and had expressly whittled the number down to a mere 1,574 documents, presumably based on some standard of materiality/utility in Action 599. The documents were listed on a spread-sheet list which is pretty impenetrable to the uninitiated, by reference to identification codes used in the main action. There were also the 34 documents not on the memory stick as previously mentioned – I am not certain whether this is within or in addition to the 1,574 documents on the spread-sheet, but it does not matter. (I should mention at this point that where I refer below to particular numbers of documents, these figures may not be perfectly accurate, certainly as regards numbers over 20, as slightly different versions of such figures appear in different places, but any discrepancies are not material.) All these documents had, as mentioned, been supplied via a secure website to the Trustees' respective legal representatives in September 2016. The application was supported by an affidavit from Mr McCahill of the liquidators' London solicitors, which explained the background in general terms.

21st November 2016 hearing

15. At this first hearing, it seemed to me that, whatever the timetable in Action 599 might be, there was no getting away from the fact that, if the application was disputed, it was in principle going to be necessary in Guernsey to consider the subject documents individually in order to adjudicate on the liquidators' application, even if there were a large number of these. This is because the principles regarding permissible use (or not) of documents apply to the documents individually, and unless any large number of documents can be broken down into classes or groups, and dealt with as such by agreement, the process has to be gone through on an individual basis. At this early stage, it also appeared to me to be necessary to determine the status of individual documents in order to move the matter forward at all. There had as yet been no analysis or categorisation of the documents in respect of which the liquidators had applied, beyond their having been on the original memory stick (or not, in the case of the 34).

16. It was also appropriate, it seemed to me, and particularly in the light of the dispute as to which jurisdiction was appropriate to decide questions of collateral use, to consider the relationship of this application to the English proceedings, and whether the objections raised by the Current Trustees to collateral "use" in Action 599 would extend to listing the Guernsey 1 documents in

that Action at all, even with the caveat that their production was objected to on the grounds that they were subject to a restriction binding on the liquidators on their use outside the Guernsey 1 proceedings. This was a point which I considered to be rather important, because otherwise it would potentially present the liquidators with impossible difficulty in being able to confirm conscientiously to the English Court that they had disclosed, in the English proceedings, all material documents of which they had possession, custody or "control" as defined in Rule 31.8 of the English Civil Procedure Rules.

17. I have to say that it seemed to me that listing such documents in the qualified manner I have suggested would have been the appropriate way forward, as it does not seem to me that listing, for the purposes of disclosure procedure in Action B, material of which you have or have had possession through having been party to Action A and therefore hold under a restriction as to their use, but stating that you object to producing this material because of that restriction, can really be fairly described as "using" that material in any real sense for the purpose of Action B or at all.

18. I understand, however, that since that time, on 22nd February 2017, there has been a ruling to contrary effect by Knowles J in an application made in an action associated with the present proceedings in England (*Tchenguiz and others v Grant Thornton and others* [2017] EWHC 310 (Comm), in which he held that even looking at disclosed documents for the purpose of determining their relevance in other proceedings (let alone later listing them, permitting them to be inspected or relying on them) was itself "use" for a collateral purpose within the English CPR rule 31.22, and required a court order to permit it, although he readily in fact granted such an order whilst emphasising that this was in the light of the case management arrangements which had been made in that litigation. I am not sure at all that I would have followed that decision, which strikes me as imposing practical effects which verge on the unreal. What, for example, if the party in the second action does not need to review the documents but simply know from recollection that they are highly relevant? Also, how would the party to the second action fulfil his disclosure obligations in that action, possibly after a hearing in the first action in which the documents will have been examined, if the court in the first action refuses permission even to list them?

19. I do not, though, have to decide the point or consider such arguments in this case, because, in the event, the argument that the material documents could not even be listed in Action 599, even with qualifications, was not pursued by the Current Trustees, although this may well have been because the liquidators reached an agreement with the other parties to Action 599 which avoided the listing problem which I identified. Over the first and the following series of hearings I therefore gave directions and made decisions aimed at identifying the actual material documents, reducing these to a manageable number if possible, clarifying the issues, and hopefully narrowing these, before making final decisions on the documents remaining in dispute.

20. At this first hearing, to try to narrow the issues, I gave directions for the Current Trustees, to complete a schedule of the 1,574 or so documents in respect of which the liquidators were now seeking an order, and to allocate them to four classes, by reference to whether (i) they asserted that the document was subject to restriction on collateral use, and if so whether they then did, or did not, seek to uphold such restriction, or (ii) they accepted that the document was in the public domain for having been used at the trial in Guernsey 1 or otherwise, and if so whether they then would, or would not, seek to re-impose such restriction. This schedule was provided by the Current Trustees by 23rd December 2016, as ordered. The liquidators objected, however, that this schedule merely indicated the Current Trustees' objections to inspection of those documents on grounds of confidentiality, privilege, sensitivity or relevance, without adequate elaboration, those being, it was suggested insufficient reasons.

Aborted hearing of 13th January 2017

21. By the time of an anticipated telephone hearing on 13th January 2017, the Current Trustees had in fact provided two further Schedules. The first related to the documents in dispute and explained in greater detail the grounds of their objections to collateral use (a matter which I had found rather mysterious, given that the documents were by now very historic and the fact that the purpose of deploying them was to defend the assets of Oscatello, which thus amounted to defending the assets of the Trust). This Schedule thus gave more detail than previously supplied but was only supplied the day before the anticipated hearing. The liquidators objected that this was unreasonable, but the Fifth Defendants retorted that they were not obliged to provide such a schedule anyway, and had simply been trying to be helpful. The second Schedule listed 188 out of the 1,574 documents to which the Current Trustees did not object because they said that the BVI companies were themselves parties to those documents in the first place, such that no question of permission being required from either the Court or the Fifth Defendants for their use could arise, anyway.

22. The Current Trustees had also provided a skeleton argument in which Advocate Robison reviewed the principles relating to applications for collateral use under RCCR r. 79 (1) (b), emphasising that the burden was upon the applicant to make out a case for permitting such use (by disclosure), and pointing out the principles involved. He relied by analogy on the English case of *Tchenguiz v SFO* [2014] EWCA (Civ)1409, which had analysed the point in an English context. He stressed that the burden was on the applicant to justify the granting of such an order by demonstrating "cogent and persuasive reasons" which provided "special circumstances" in favour of permitting such collateral use, because the English courts had emphasised that the protection provided by the use restrictions imposed on documents disclosed under compulsion in court proceedings was not to be watered down: see per Eder J in *Tchenguiz v SFO* [2014] EWHC 2597 (Comm). Advocate Robison submitted that one crucial element of such "cogent and persuasive reasons" would be the demonstration of the document's significant relevance to the issues in the second action, as to which evidence was required, and that evidence of this relevance had not, so far, been provided by the liquidators because they had provided no analysis of the issues in Action 599 to illustrate this.

23. In view of the quantity of documents, it had already appeared to me that there was likely to be insufficient time at the proposed hearing of 13th January 2017 to make this worthwhile. The parties concurred with this, in particular with the liquidators complaining that the further schedules served by the Current Trustees had only been received the day before the hearing. I therefore stood the matter off to 8th February 2017. The liquidators indicated that they proposed to see if the matter could be dealt with by a sampling exercise. I was quite happy for this to be attempted, if it could be agreed, because any means for reducing the necessary amount of work involved in an application relating to over 1000 documents would be welcome.

24. In the end, though, this proved to be impractical. Two attempts at working from a small, and then a larger, sample were demonstrated to be flawed and unhelpful in practice. The sampling which was attempted involved taking an arbitrary set of documents and searching to see if they could be located as having been referred to in the records of the trial, but the resulting argument amounted to little more than that if it could be shown from such a random sample of documents that only "x"% had been referred to in the Guernsey 1 trial, then if "x" were less than 50, the likelihood of any other document having been used was itself only x%, such that, on balance of probability it would not have been used. Not only did this result not appeal to the liquidators, but the logic of it is only superficial, and it obviously bears no satisfactory relationship to the reality for any given document.

8th February 2017 hearing

25. At the adjourned telephone hearing of 8th February, the liquidators proposed to argue (i) that the Current Trustees were not entitled to object to the collateral use of the documents in Action 599 because they had previously consented to such use in 2014, and failed to raise any objection then before November 2016, (ii) that all documents which had been in the trial bundles for the Guernsey 1 trial had been used at the trial and were all *ipso facto* in the public domain and therefore did not require permission for collateral use from the Court, and (iii) that this argument applied even if only the first page of the document had been included in the bundle. However, they had still not identified which of the documents actually had been included in the trial bundles.

26. Point (i) was effectively an estoppel argument. The Current Trustees refuted this, claiming that they had not actively consented to use of the documents in 2014 and had not lost the right to do so yet, either under the terms of what had been then agreed, as evidenced by the letter of 13th May 2014, or at all. As to the other points, they objected that the liquidators had not identified which documents had been included in the trial bundles and which had not, but they did not then take the point that mere inclusion in the trial bundle would still not amount to use in the trial, agreeing to proceed as if that was the case. They focused more on their objection that the liquidators had not identified the issues in Action 599 so as to discharge the burden of demonstrating the high degree of relevance and necessity for the documents' use in Action 599 to provide the "cogent and persuasive reasons" why the collateral use restriction should be lifted. They contested the argument that inclusion of the first page of a document in the trial bundle would automatically mean that the whole of the document was to be treated as being in the trial bundle or used in the action, averring that their use in Guernsey 1 would be confined to the first page unless anything beyond this could be affirmatively proved. (They also objected that the attempts to decide the issue by sampling were fundamentally flawed, but the liquidators did not, in the event, try to pursue this.)

27. At this hearing I held that on the correct interpretation of the Carey Olsen letter of 13th May 2014 the Current Trustees had not lost their right to object to collateral use of the Guernsey 1 documents in Action 599, as this had clearly been reserved to be operable before any requirement for inspection in that action, and this had not happened. Nor had they done so by any subsequent conduct in not making such objection, as there was therefore no apparent need for them to do so. I also rejected the liquidators' argument that inclusion of a single page of a document in the trial bundle would automatically bring the whole of the document into the public domain in principle; this would depend on the facts.

28. The upshot of this hearing was that it was agreed that the liquidators should have the opportunity now to prepare a table showing which of the 1574 documents they wished to contend were in the public domain through having been in the trial bundle in Guernsey 1, and the Current Trustees would then confirm whether or not they agreed this. The matter was therefore adjourned for several weeks for this exercise to be done and for further argument about such documents as either did, or arguably did, require permission for collateral use.

29. By 22nd March 2017, the liquidators had prepared a schedule listing the documents which they identified as having been included in the trial bundles, now reduced to 1,188. Although Advocate Gray repeatedly emphasised the amount of work which had had to be done by the liquidators' legal team to compile their various schedules, I am not particularly impressed by this, because that work was clearly the price which had to be paid if her clients were to be able to approach the matter of collateral use with the advantage of a presumption of availability for such use in their favour.

<u>26th April 2017 hearing</u>

30. By the next hearing on 26th April, the liquidators had also served a skeleton argument analysing the issues in Action 599 (not merely stating the nature of the claims, as previously) so as to enable an assessment of the relevance of the documents to that action. They had also provided a schedule of material documents, by now further reduced in number because the liquidators had narrowed their application in some respects and the Current Trustees had dropped their objections in other respects. This new Schedule was divided into three parts: Table A contained 553 documents which had been identified as having been in the trial bundles in Guernsey 1; Table B contained 43 documents "substantially similar" to documents contained in the trial bundles in Guernsey 1; and Table C contained, after revision and the culling of duplicates, 23 documents which had not been included in the trial bundles in Guernsey 1.

31. The liquidators subsequently withdrew their application in respect of the Table B documents, upon reflecting on the point that if they were substantially similar to documents in Table A (being duplicates, drafts and suchlike) they were unlikely to have any additional material relevance over those documents for the purposes of Action 599.

32. At the hearing on 26th April, the Current Trustees proposed to argue in respect of the Table A documents, that notwithstanding that they had now been identified as having been in the trial bundles for Guernsey 1, it was not demonstrated that they had actually been used in the trial. Various issues were also raised as to upon whom the burden of demonstrating that such documents had or had not been used at the trial would fall, and whether there still remained the possibility of the Current Trustees arguing that parts of any such documents which had been used at the trial but which they claimed were immaterial to the issues in Action 599, as now identified, should be subject to redaction before inspection in Action 599.

33. I gave my judgment on general principle broadly as follows. First, a simple rule of easy practical application is necessary for Guernsey procedure for identifying whether a document is to be treated as having been "used" at a trial for the purposes of RCCR r 79, and that in the interests of pragmatism that should be whether the document had been included in the trial bundles. Once that could be shown to have happened (which should be easy, as there would be an index) and also that the trial had actually taken place so as to project those materials potentially into the public domain, then the whole of the material in the trial bundles should be presumptively treated as having come into the public domain. (I pointed out that parties might wish to consider this point when preparing trial bundles, before simply putting into them everything which had been disclosed, which seemed to be a common but undesirable practice, and that they might also wish to consider making an application to the court at the time of the trial itself either to modify the above presumption, or to re-apply collateral use restrictions, if appropriate.)

34. I took this view because any further filtering exercise to establish any greater certainty as to whether documents had actually been read or referred to at a trial (for example, by reference to locating references to such documents in transcripts of proceedings, witness statements, submissions, or other trial materials) would, in my view, be a disproportionately onerous exercise in relation to what should be a relative short procedural application with regard to permission for collateral use, and it was neither justified nor required, in my judgment, by the objectives of the rules regarding use restriction or its release. In Guernsey 1 there had not in fact been a judge's reading list, which might have been suggested to provide an alternative starting point as to the set of documents should be taken to have been used at the trial but in any event I would not regard that as a satisfactory rule, or even starting point, at all. This is first because such lists are an entirely unreliable guide as to either the extent, or the limits, of what the judge might have read behind closed doors and therefore have taken into account in his/her decision, and the judge could not, of course, be examined about this, and second because it does not, in any event, provide a limit on identifying further or other documents referred to at the trial.

35. Given that the point of the lifting of any restriction on the use of documents is the public interest in open justice and understanding the result of a trial having regard to the material available as evidence, the trial bundles themselves therefore provided, in my view, the most sensible and pragmatic starting point, even though they might be likely in practice to err on the wide side. It would therefore be open to an objecting party to establish, in any particular case, that a particular document had not actually been used in the trial despite having been put into trial bundles if he could prove this to the reviewing court's satisfaction on usual evidential principles (compare the approach in *Lilly Icos v Pfizer Ltd (No 2)* [2002] 1 WLR 2253 at [8], although predicating a different starting point). In many cases, for example, the trial judge will require, at the end of the presentation of the parties' cases, that both Plaintiffs and Defendants identify expressly, out of voluminous trial bundles, the documents which they are in fact incorporating into or relying on for their respective cases, so that the judge knows exactly what documentary evidence is to be taken to have been adduced in the trial itself, and in such a case, that list would obviously provide an easily identified record of what documents had actually been "used" in the trial.

36. However, and as I made clear, I did not actually need to decide that point in this case, nor how far any objecting party would need to go in order to prove non-use of documents in trial bundles, because in this particular case Advocate Robison had, in my judgment, expressly conceded at the previous hearing in February, that all documents which had been placed in the trial bundles could be treated as thereby having come into the public domain, focusing his attack, instead, on their lack of demonstrated relevance to Action 599 and the burden as to demonstrating this being on the liquidators. Whether this concession had been made on the basis of benevolent pragmatism or because the further argument had not then been identified did not really matter; the liquidators' legal advisers had subsequently done a great deal of work on the basis that if they could identify documents as being in the Guernsey 1 trial bundles, it was accepted that they were in the public domain and could therefore be used by them in Action 599 in principle, and I took the view that it should not be open to the Current Trustees now to resile from that position. Therefore, insofar as the liquidators could demonstrate that the documents had been in the trial bundles, they were to be treated as being in the public domain for the purposes of this application.

37. However, as I had sympathy with the potential argument that documents which revealed aspects of the private affairs of the Trust or its beneficiaries might reasonably be expected to be accorded protection from the added publicity of being disclosed more widely in English court proceedings despite having lost their immediate protection in the Guernsey proceedings, I was prepared to adjourn the matter once more to allow the Current Trustees to make their own application to re-clothe any such documents with use restrictions and prohibit their use in Action 599 as provided in RCCR r. 79 (2), either as to the whole of any particular document, or on the basis of the redaction of any sensitive parts of it. I took this view despite the fact that no such application had been made at the time of the original trial or subsequently (as the liquidators argued should have been done) first because of the confused circumstances of this case, second, because the way in which the liquidators had initially made an application in respect of all these documents implied a basic acceptance that either agreement or the court's permission was positively required in respect of all of them, and third because the liquidators were, by this time, seeking to take an advantage from having now identified the status of the documents when they had not done so before, such that it would not be reasonable to deprive the Current Trustees of the opportunity to argue for re-imposition of use restrictions if appropriate. The fact that the burden of proof would now pass to the Former Trustees, to demonstrate that such re-imposition was justified, in my view dealt fairly with the situation.

38. The Table A documents, insofar as their fate had not yet been agreed between the parties, were therefore consigned to a further hearing on 6th June 2017 (to enable the matter to be decided in

advance of the next scheduled case management conference in England in Action 599), and I proceeded to hear individual arguments in the case of the 23 documents in Table C. In respect of these, as Advocate Gray accepted, the burden fell on her to establish special circumstance as to why the existing collateral use restriction should be lifted. I eventually granted permission to lift it in respect of 12 such documents (the majority of which the Current Trustees did not oppose), granted permission for use of redacted versions in the case of 7 such documents and refused permission entirely in respect of four.

39. In the interests of saving further costs, Advocate Shepherd, on behalf of the Former Trustees, who had really played no part in the hearings up to then, albeit his clients were plainly necessary parties to the liquidators' application, was excused further attendance on any application which the Current Trustees might later make.

17th May 2017 Application

40. The Current Trustees now made the Restriction Application, dated 15th May 2017 in respect of some 149 of the documents contained in Table A, primarily on the grounds that they were of no relevance to the issues identified or identifiable in Action 599, and also pointing out that they contained information which it was submitted was to do with the private affairs of beneficiaries of the Trust.

41. They also explained that circumstances had changed since the indication in May 2014 that they would be unlikely to object to collateral use of any documents disclosed in the Guernsey 1 proceedings, because they had subsequently instituted proceedings against the liquidators, or more precisely one of them, I think, for damages relating to improper use of information obtained in the Guernsey 1 proceedings and contempt of court, such that relations between the Trust and the liquidators had become litigiously hostile. This point was presented rather as refutation of the liquidators' persistent complaints that the Current Trustees were indulging in obstruction and gamesmanship than as being grounds in themselves for re-imposing collateral use restrictions on the relevant documents, and I have treated it as such.

42. On review of the application, and apparently as a result of reaching agreement with the other party in Action 599, the liquidators dropped their proposal to disclose and use about 124 of the 149 documents, in effect accepting the Current Trustees' application, before the hearing. They dropped their objections similarly to a further 8 documents after considering the Current Trustees' skeleton argument.

43. At the hearing on 6th June, with regard to the 17 documents remaining in issue, the Current Trustees abandoned their application in respect of three such documents, but I dismissed their application in respect of the remaining 14.

44. This is the background as to which I now have to decide the appropriate incidence of costs, based on the written submissions and responsive submissions filed by the parties in accordance with my directions.

The Law

45. I do not need to set out in detail the principles governing my jurisdiction to award costs under RCCR rr 82 and 83, as these are well known and I set them out previously in *Jefcoate v Spread*

Trustee Company and others (2014) Judgment 44/2014 at [2] to [8] and generally in *Broadhead vs Spread Trustees and others* (2015) Judgment 10/2015.

46. In essence, my discretion is broad but must be exercised judicially. The court will start from the principle that costs "follow the event" by which is meant that it will award costs to the "successful" party, but what is meant by "success" is a broad brush common sense assessment depending on the features of the case, and the court will readily depart from or modify that principle in appropriate cases, so as to produce a fair result in all the circumstances: *Shaham v Lloyds TSB Offshore Treasury Ltd*, [2007-2008] GLR 297 and 323. As regards the basis of costs, the usual award is of costs on the recoverable basis, but in exceptional cases the court can order costs on the more generous (to the receiving party) indemnity basis, see r. 83(2). This is a sanction which tends to mark some culpable or unreasonable conduct by the paying party, and the general principle is that the case should be "out of the norm" to justify such an award. Where the costs are being awarded in the context of trust cases or disputes, the court award needs to take account of that fact and its effect on the financial relationships between the parties, and possibly the incidence of a trustee's power to self-indemnify out of the trust fund. In addition, it may be appropriate, where a party has been compelled to incur costs for the benefit of another party that these costs should be awarded on the indemnity basis so that he is not out of pocket; whether or not that is regarded as a separate principle or as a case which is "out of the norm" does not really matter.

Submissions

The Plaintiffs

47. Advocate Shepherd, for the Former Trustees notes that the BVI Companies accept that they should pay his clients' costs of the Collateral Use Application up to 23rd December 2016 (the date when the Current Trustees filed their Schedule classifying the documents sought by the BVI Companies) on the recoverable basis.

48. As to the costs of the Collateral Use Application after that date, he submits that his clients should receive their costs on the recoverable basis from someone, and the only issue is the apportionment of those costs between the BVI Companies and the Current Trustees, as to which his clients make no submission.

49. As to the costs of the Restriction Application, he submits that the Current Trustees should pay his costs on the indemnity basis (agreeing with the BVI Companies who make a similar submission) or failing this the recoverable basis.

The First to Fourth Defendants

50. Advocate Gray for the BVI Companies accepts that her clients should be responsible for the costs of both the Former and Current Trustees up to 23rd December 2016 on the recoverable basis. This is on the grounds that the initial costs of the Collateral Use Application were incurred by those parties for the benefit of the BVI Companies and such reasonable costs ought to be borne by them. She puts this initial period as being up to 23rd December 2016, when the Former Trustees provided their initial classification of the 1,574 (or so) documents then the subject of her clients' application, in purported accordance with my order of 21st November 2016.

51. She submits that after that date, the Current Trustees should pay all of the costs of both her clients and (if awarded) of the Former Trustees in respect of both the Collateral Use Application and the Restriction Application, and, at least as respects her clients, on the

indemnity basis. She makes this latter submission on the grounds that the Current Trustees' conduct after 23rd December 2016 was unreasonable. She submits that they ought, at that date, to have provided more and proper grounds as to why the Current Trustees objected to collateral use, and as regards those documents identified as included in the trial bundles and therefore released from restriction, to have applied then for the re-imposition of such restriction if they were going to, and as they eventually and belatedly did. She complains that they served materials late, tried to rely on objections to collateral use such as alleged sensitivity and confidentiality of documents which were not proper grounds of objection at all, and she criticises the whole of their conduct, and even their taking objection to the materials at all, as being "playing games". In doing so she takes up my own early comment that I did find it difficult to see why the Trustees would be objecting to assisting the liquidators to resist a claim which it would presumptively be in the interests of the Trust itself to resist.

52. She further submits that the Former Trustees' costs should be limited after 23rd December 2016 to those of a mere watching brief, as they had satisfied themselves by then that they were neutral as to the outcome of the Applications.

The Fifth Defendants

53. Advocate Robison for the Current Trustees submits that they should be awarded all their costs of review of the documents originally included in the liquidators' Collateral Use Application on the indemnity basis and their further costs of the application on "at least" the recoverable basis. He submits this having regard to two main points.

54. The first was that the Collateral Use Application was made entirely for the liquidators' benefit in Action 599, an action to which the Current Trustees are not a party, but it caused costs to the Current Trustees, who were under a duty to review the documents – many of which were so old that their personnel were now seeing them for the first time – in the interests of both the Trusts and the beneficiaries. The liquidators ought to bear such costs, and ought to have recognised this (but did not) at the outset, in September 2016.

55. The second was that, throughout, the liquidators had never adequately got to grips with the implications of their application, the effect of it causing costs to others, the fact that it required identifying which documents had in fact been used at the trial if the liquidators were going to rely on that, and that insofar as they were not doing so, the fact that the burden lay on the liquidators to prove a good reason for removing collateral use restrictions, and not on the Current Trustees to prove a good reason why they should not be removed. The Current Trustees' reasons for taking the attitude which they did in that regard were in fact perfectly respectable, owing to a genuine change of circumstance - but they were also immaterial because it is the right of a party whose private documents have been compulsorily disclosed to insist that such infringement of its privacy is kept to the minimum consistent with legal principle and with justice being done, simply for that reason, and its motives in wishing to maintain privacy are nothing to the point.

56. As regards the Restriction Application, he submits that the Current Trustees should be awarded their costs of that application on (I understand) the recoverable basis, because the outcome has been that the Current Trustees had succeeded in protecting the vast majority (over 86%) of the documents which were the subject of that application from further publication, with the liquidators virtually conceding as much before the hearing. Despite the eventual outcome at the actual hearing, the Current Trustees had emerged, therefore, as the overall "successful party" on a common sense basis, and the application could obviously not be said to have been unreasonably made.

57. He further submits that any costs awarded in favour of the Former Trustees should on any basis be borne by the liquidators, as it was their application and wish to deploy documents for the BVI Companies' benefit which caused such costs to have to be incurred.

Discussion and conclusion

58. Having carefully retraced the history of the matter and reviewed the various submissions made by the parties, I shall make the following order as regards the costs of these applications

    (1) As to the Collateral Use Application:

    The First to Fourth Defendants shall pay the costs of the Fifth Defendants on the indemnity basis and shall pay the costs of the Plaintiffs on the recoverable basis.

    (2) As to the Restriction Application:

    There be no order save that the First to Fourth Defendants and the Fifth Defendant do each pay 50% of the costs of the Plaintiffs on the recoverable basis.

    (3) For the avoidance of doubt, the Plaintiffs shall not be entitled to recover from the assets of the Trust any shortfall between the costs awarded to them above and their actual costs without further application to the court.

59. I make this order for the following reasons.

60. First, applications under r. 79, but particularly r 79(1)(b), are unusual in that they are indeed made solely for the applicant's benefit but cause the respondent(s) to have to incur costs. The principle that the applicant should therefore indemnify the respondents must therefore influence and in most cases cause modification of, the principle that "costs follow the event" in more usual cases. Respondents should not be out of pocket unless this does not appear unfair in the particular circumstances. This will generally mean, unless there is something in their own conduct which justifies depriving them of such indemnification, or (but this would be even more severe) of ordering them to pay some part of the applicant's own costs.

61. Second, though, I agree with Advocate Robison's criticisms of the way in which this application was instituted and conducted by the liquidators. The form of the initial application was general to the point of being quite inappropriate, even when reduced from 4,720 to 1,574 documents. Approaching the matter in this way could be procedurally justifiable only on the basis that the liquidators had good reason to believe that the Current Trustees (in particular) either could not or would not object to the collateral use of such swathe of documents in Action 599. The only basis for this was what took place in May 2014. However, a properly careful reading of the Carey Olsen letter of 13th May 2014 shows quite clearly that neither of the Trustees had in fact consented outright to collateral use of the material on the memory stick but had preserved their rights in this regard, and by the time of the application itself, it was plain that the Current Trustees, certainly, were not giving the liquidators any grounds to believe that they would consent to such use without conducting a review of the documents themselves. I do not regard this as at all unreasonable after a lapse of over 2 years from what was only, even then an expression of expectation that objection was not likely to be taken, not a warranty.

62. The process, therefore, of examining the relevant status of any document which the liquidators wanted to deploy in Action 599, and considering whether the liquidators did or did not require permission for collateral use and if so what they needed to demonstrate in order to justify being granted permission, was going to have to be followed in relation to any document. That, though, was an obligation on the liquidators, and it seems to me that the liquidators simply did not turn their attention to the proper principles of this and what it required them to do until forced into doing so. They approached the matter on the basis that either such analysis was not necessary, or (and incorrectly) that the burden in respect of a s 79(1) application lay on the Current Trustees to justify why collateral use should not be allowed, rather than on themselves to justify why it should be. The result was that the proper analysis of the documents and their status and effects was done only piecemeal and inefficiently. In his reply skeleton argument on the costs issue, Advocate Robison submitted that

> *"Had the BVI companies properly, and prior to bringing their application, considered and identified he documents which were (a) actually required to be disclosed in Action 599, and of those documents, (b) identified which documents were in the trial bundles and therefore presumptively in the public domain and (c) provided document specific rationale as to why the remaining documents satisfied the high threshold for collateral use, the BVI Companies' Application would have been disposed of sooner and less expensively (for all parties)*

I think this is correct.

63. As to particular points I am satisfied that the Current Trustees did comply adequately with my order of 21st November as regards their first Schedule. The liquidators object that costs and delay were caused by the Current Trustees providing their second schedules late before the anticipated 13th January 2017 hearing, but I cannot see that any extra cost was in fact incurred, and in any event, these were materials which the Current Trustees were not obliged to prepare, and in fact both they and even the Schedule of 23rd December was analysis the bulk of which the liquidators ought to have done themselves, in the first place. Whilst I declined to allow Advocate Robison to resile from what I felt was reasonably understood as a concession that the trial bundles should be determinative of what material should be regarded as being in the public domain, little expense was incurred on this argument, and other small points, such as the effect of inclusion in the trial bundle of a front page only, were resolved in the Current Trustees' favour, such that overall such other individual points do not, to my mind affect the fundamentals of the position.

64. I should also deal with the accusations of "game playing". Whilst I remain somewhat surprised at the apparent lack of ready co-operation from the Current Trustees to enable the liquidators to resist the attack on Oscatello in Action 599, I can also accept the explanations given by Advocate Robison as to their position with regard to their responsibilities as Trustees towards the interests of their beneficiaries, very probably as the latter see them. It seems to me, therefore, that the question must come down to what the respective rights of the parties actually are, and it is not appropriate to criticise and still less to penalise a party for seeking to uphold those rights rather than consent to giving them up, especially where they are being upheld for the benefit of others (the beneficiaries). In practice, that seems to me to be all that the Current Trustees have been doing in this case, and whilst the result has been to require more work from the liquidators, in really turning their attention closely to the relevant probative value of documents they were seeking to use, the Current Trustees have not caused or required that to any excessive degree in all the circumstances such that that conduct should have any effect on what I would otherwise think it appropriate to order in terms of costs.

65. The combination, therefore, of the basic principle that the Current Trustees were being required to incur costs for the benefit of the liquidators, that the liquidators did not approach this application with the attention that they should have done, that much of the work which the Current Trustees in fact did ought to have been done by the liquidators in any event, and the eventual overall outcome of the Application, leads me conclude that it is fair and just to order the First to Fourth Defendants to pay the Current Trustees' costs of the entire Collateral Use application on the indemnity basis.

66. By the same token, they ought also to pay the costs of the Former Trustees, but I consider it appropriate to order that these be on the recoverable basis. Apart from the fact that that is all that Advocate Shepherd requested, this is because, whilst the Former Trustees were obviously properly convened as parties to the application, once its nature had been ascertained and considered, then it seems to me that the Former Trustees could have no valid or practical interest, *in that capacity,* in the issues, as indeed, their immediate reaction to the Application demonstrates. Insofar as they then did attend hearings, this will have been largely simply in their own interests to know what was going on. It was not suggested that they need not attend or that they should do so only at their own expense, but in those circumstances, it seems to me that it is fair that they receive their costs only on the recoverable basis.

67. As this will by definition limit those costs to reasonable costs reasonably incurred, it also seems to me that, in the circumstances, such costs will represent the maximum which it is reasonable for them to have incurred as merely Former Trustees and it would therefore not be reasonable that they should claim to recover any shortfall as against actual fees from the assets of the Trust. However, as I did not hear any argument on this point, I leave it open for reconsideration if the Former Trustees wish to make any application in this regard.

68. As to the Restriction Application, this seems to me to be in a slightly different position from the Collateral Use Application because, in the particular circumstances of this case, it has more of the flavour of ordinary hostile litigation. It is unreal to suggest that the Current Trustees' application caused the BVI Companies to have to incur costs in reviewing documents which they otherwise would not have had to do, because they had already just had to do this in some detail anyway, and had set out their position. In the end, the predominant result was that when faced with an application to restore use restrictions on 149 documents, the liquidators dropped their claim to use just under 90% of these, but the Current Trustees failed with regard to the last 17, which they presumably regarded as important. I agree with Advocate Robison's submission that there is no reason in this result to award indemnity costs against the Current Trustees, and it would be focusing too closely on the outcome of the application at the hearing itself to suggest that the liquidators were the successful party. It would be the case, though, that if I were to focus only on the hearing, the Current Trustees failed resoundingly in this narrow sphere.

69. The real question here is whether I should make any costs award in either direction, as the overall result seems to me to be very much more like the kind of result which would reasonably be reached in a compromise with no order as to costs. Honours were largely even. In those circumstances I think that no order as to costs between the Current Trustees and the First to Fourth Defendants is fair on a broad brush basis.

70. That leaves only the costs of the Former Trustees in regard to the Restriction Application. These ought to be minimal, as the Former Trustees were only convened for conformity and not because they had any actual interest to argue, and they ought to have behaved as such. I can see nothing in the conduct of either the BVI Companies or the Current Trustees to make it fairer that one of them bear the Former Trustees' costs rather than the other. Whilst it might be said that the Former Trustees' costs of the actual Restriction Application were caused by the Current Trustees ever making it, and this was entirely for their own benefit, it can also be

said that the whole situation only ever arose out of the BVI Companies' seeking leave to make extensive use of disclosed documents in Guernsey 1 in the first place and doing so in the clumsy way they did. In the circumstances I consider that the fair result is that the Current Trustees and the First and Fourth Defendants should bear equal responsibility for the small amount of costs of the Former Trustees, on the recoverable basis.

71. Lastly, there is the question of the costs of the costs applications themselves. It seems to me that the incidence of these costs ought broadly to reflect the substantive effect of the costs orders themselves. I think this is sufficiently achieved on a general basis by ordering the First to Fourth Defendants to pay the costs of the Current Trustees' costs submissions on the indemnity basis and those of the Former Trustees on the recoverable basis. I do not see that the Current Trustees ought to be liable for any of those costs.

72. For that purpose, therefore the final order which I will make is set out below.

As to the costs of these applications it is hereby ordered:

(1) As to the Collateral Use Application:

The First to Fourth Defendants shall pay the costs of the Fifth Defendants on the indemnity basis and shall pay the costs of the Plaintiffs on the recoverable basis, such costs to include those of their respective written submissions on costs.

(2) As to the Restriction Application:

There be no order save that the First to Fourth Defendants and the Fifth Defendant do each pay 50% of the costs of the Plaintiffs on the recoverable basis.

(3) For the avoidance of doubt, the Plaintiffs shall not be entitled to recover any shortfall between their costs awarded above and their actual costs from the assets of the Trust without further application to the court.

Her Honour Hazel Marshall QC
Lieutenant Bailiff

29th August 2017