IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Civil No. 1505/2010

IN RE THE TCHENGUIZ DISCRETIONARY TRUST ("the TDT")

Before Patrick John Talbot, Esq., QC, Lieutenant Bailiff – sitting alone

Oral hearing 29 June 2017

Advocate Jessica E Roland for the Former Trustees of the TDT
Advocate Nicholas J Robison for the Current Trustee of the TDT
Advocate Elaine R Gray for the Joint Liquidators of four BVI Companies, creditors of the Former Trustees of the TDT
Advocate Paul Richardson for the Protector, Robert Tchenguiz, who is also joined as a party as an adult member of the class of Beneficiaries under the TDT
(Advocate Christian Hay is the appointed representative of the minor, unascertained and unborn Beneficiaries under the TDT, including the two minor children of Robert Tchenguiz

J U D G M E N T

LIEUTENANT BAILIFF TALBOT QC:

1. This is the judgment in civil proceedings 1505/2010, commonly known to the parties as "**Guernsey 2**," on an application dated 17 May 2017 under rule 79 of the Royal Court Civil Rules, 2007 for leave to use in English proceedings defined below documents disclosed to the Applicant, Mr Stephen Akers (**Mr Akers**) and his co-joint liquidator, Mr Mark McDonald (**Mr McDonald**), during the course of Guernsey 2, (**the application**).

2. I am giving judgment *ex tempore* because of the urgency of the matter which relates to disclosure of documents in English proceedings, to which I shall refer later. Otherwise, because of the complexity and novelty, at least in Guernsey, of the matter to which the judgment relates, I would have preferred to have given judgment after having had more time for preparing a reserved written judgment.

3. The application is one of a set of four applications brought by Mr Akers under rule 79. This judgment relates to Guernsey 2 only. Guernsey 2 are trustee directions hearings between about May 2010 and, effectively, early in 2014 and there have

thereafter been cross-applications and applications for remuneration and a few other hearings; but there has been much less activity within Guernsey 2 since the appointment in about December 2013 of joint receivers over the majority of the assets of the TDT, the Jersey trust to which Guernsey 2 relates.

4. The jurisdiction of the Royal Court of Guernsey over the TDT arises under section 4 of The Trusts (Guernsey) Law, 2008. The other three proceedings are, shortly, these: 1780/2013, a related trustee directions hearing, and two applications for committal brought by Mr Robert Tchenguiz (**Mr Tchenguiz**) against Mr Akers. One committal application has been concluded as against Mr Akers, (1849/2015), and the other, (1984/2016), where Rawlinson & Hunter Trustees SA (**R&H**), is also a co-applicant with Mr Tchenguiz, which is still proceeding; Mr Akers has applied to strike out 1984/2016 as against him. Hearings on the rule 79 application in the other three matters will proceed next week on Wednesday 5 July 2017, if necessary.

Jurisdiction

5. Rule 79(1) of The Royal Court Civil Rules, 2007 forms the jurisdictional ground upon which Mr Akers applies for relief. Under rule 79(1):

> *"A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –*
>
> *(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public,*
>
> *(b) the court gives leave, or*
>
> *(c) the party who disclosed the document and the person to whom the document belongs agree."*

For reasons which will appear later, it has not been possible for Mr Akers to identify the document or documents for which leave to use is now sought by him under rule 79(1)(b), but he still seeks the leave of the court in the manner described below. This rule, so far as is material, is identical to CPR 31.22, which applies in England and Wales.

6. It is to be noted, first, that only a party is entitled to apply for relief under rule 79. Here, Mr Akers is a party in Guernsey 2 in his capacity as one of the two joint liquidators of four insolvent BVI companies. Although the position is a little more complicated, it is enough to say for present purposes that he and his fellow joint liquidator, Mr McDonald, have been parties in Guernsey 2 since about August 2011.

7. The joint liquidators took part in most of the hearings in Guernsey 2 after their joinder as parties in their capacity as prospective unsecured creditors of the former trustees, who had been the trustees of the TDT between about 2008 and the time of their removal as trustees on or about 2 July 2010. In December 2013, the joint liquidators obtained a very large judgment in their favour in this court in the proceedings known to the parties as Guernsey 1 from Lieutenant Bailiff The Right Hon. Sir John Chadwick. This judgment has led to several appeals and many issues from those

appeals are to be decided on appeals to the Judicial Committee of the Privy Council, the final Court of Appeal from Guernsey, in a hearing fixed for 27 November 2017.

8. By the application, Mr Akers seeks relief in Guernsey 2 under rule 79 in his capacity as one of the joint liquidators of the four insolvent BVI companies, which are named in the application. As I have said, the application is made under rule 79(1)(b) and also under the Court's inherent jurisdiction, although, in the circumstances of the application at least, I think that the praying in aid of the inherent jurisdiction adds nothing. Mr Akers seeks orders and relief as set out in paragraphs 2 to 4. (Paragraph 4 seeks costs, but costs are not dealt with in this judgment). The material parts of the rest of the application are in the following form:

> *(1) "The applicant, Grant Thornton UK LLP (GT UK) and Mr Hossein Hamedani, together with GT defendants, may hold certain pleadings, witness statements, submissions, orders, transcripts, correspondence, and other such documents or communications served, issued or otherwise received or generated by the parties to these proceedings, defined as 'the disclosed materials'.*
>
> *(2) Subject to paragraph 3, the GT defendants be permitted to:*
>
> *(i) review the disclosed materials;*
>
> *(ii) prepare a draft list of the documents identified within the disclosed materials for which further permission may be required; and*
>
> *(iii) take all ancillary, preparatory steps to enable the applicant to return to this court in order to seek such further permissions or relief as may be sought by him in connection with the GT defendants' standard disclosure obligations in the English proceedings, if so advised.*
>
> *(3) The permission granted in paragraph 1 of this order extends to the GT defendants' legal representatives and agents, provided they enter into a confidentiality undertaking in equivalent terms to that annexed as schedule 1 to this application defined as 'The Confidentiality Undertaking.'"*

9. A draft confidentiality undertaking, to which I shall return at the end of this judgment, is set out at schedule 1 to the application. It is to be noted that under the terms of paragraphs 2 and 3 of the application, Mr Akers seeks relief involving both of his fellow GT defendants, *i.e.* Mr Hamedani, and GT UK plc, (**the GT firm**), and also what are called the GT defendants' legal representatives and agents. The legal representatives of the joint liquidators, for the purposes of the proceedings in England to which I shall refer in a moment, are Messrs Simmons & Simmons, as solicitors, and, as is to be expected in such large-scale commercial litigation, there is a team of Counsel as well. However, it is to be noted that Simmons & Simmons were not instructed by the joint liquidators in Guernsey 2 as their English solicitors during those parts of Guernsey 2 when the joint liquidators required the advice of English solicitors. Messrs Weil, Gotshal & Manges were their solicitors for that purpose.

10. The parties to the application under rule 79, who are parties in Guernsey 2, are as follows: Mr Akers, one of the two joint liquidators, is a party in Guernsey 2 and he is

represented by Advocate Gray; the Former Trustees, the Applicants in Guernsey 1, are represented by Advocate Roland; the Current Trustee of the TDT (R&H) is represented by Advocate Robison; and Mr Robert Tchenguiz, who is joined in Guernsey 2 both in his capacity as an adult beneficiary and as the present protector under the trust deed governing the TDT, is represented by Advocate Paul Richardson. The four Advocates have provided helpful written submissions and also addressed me orally yesterday. I am most grateful to all Counsel for their assistance, and also for complying with the tight procedural timetable, which has enabled the application to be heard and decided in as short a time as possible.

11. As will appear, the position of Mr Akers has changed during the application and there is now, it seems, a large degree of agreement, or at least of co-operation and non-opposition, between the parties. It is to be noted that Advocate Hay, who throughout Guernsey 2 has been the representative of unborn beneficiaries, unascertained beneficiaries and the two minor children of Mr Tchenguiz who are beneficiaries under the TDT trust deed, did not appear on the application, and there was no need for him to have done so.

12. The leave of the Royal Court is requested, and Mr Akers contends it is required, so as to allow Mr Akers and his fellow GT defendants, Mr Hamedani and the GT firm, to comply with their disclosure obligations in substantial proceedings brought against them in the Commercial Court in England for damages for conspiracy and I think other torts, CL-2015-000610, (**the English proceedings**).

13. The nature of the claims and the live issues in the English proceedings have been set out helpfully in (i) a Case Memorandum, (ii) the GT defendants' disclosure report, prepared for the Commercial Court, (for Mr Justice Knowles, the presiding judge,) by Mr Dan Stevens, a senior in-house solicitor at the GT firm, and dated 20 September 2016, and (iii) two affidavits sworn by Mr Ian Burrell Hammond, a partner and the lead solicitor at Simmons & Simmons, the solicitors for the GT defendants, who include Mr Akers, sworn on 16 May 2017 and 16 June 2017 respectively. The Case Memorandum and the disclosure report form part of exhibit IBH2 to Mr Hammond's second affidavit. It is not necessary for me to refer further to the details of either the claims or the issues in the English proceedings at this stage.

14. The unusual facts or circumstances in which it has proved necessary for Mr Akers to apply for relief under section 79 are set out in considerable detail in Mr Hammond's first and second affidavits.

15. The difficulty with which the court is faced on the application results from the circumstances in which the GT defendants, including Mr Akers, have stored electronic documents in the GT firm's central servers and other storage systems in the UK. The material details do not need to be set out by me in any detail. It is enough for me to say, as appears from Mr Hammond's evidence, that the problem faced by Mr Akers as a party in Guernsey 2 is a practical one, which, in my view, may prove to be a problem faced by other litigants in other trust administration and other commercial cases in Guernsey in the future, and seems likely to prove an unavoidable one.

16. The problem amounts to this: how to store electronic documents disclosed to a party concerned in trust administration proceedings to which either privacy/confidentiality

or confidentiality orders of the court apply or where there are restrictions on use under either implied undertakings or similar restrictions which apply to the use of such documents in such proceedings.

17. Trust administration proceedings might well include, as was the case in Guernsey 2, applications which have been brought by a trustee or former trustees for directions from the Royal Court under its supervisory jurisdiction over either Guernsey trusts or trusts subject to the jurisdiction of the court due to the fact that their assets are managed by Guernsey resident trustees. Such applications are nearly always heard in private, sometimes described as "*in camera*" or "in chambers", but perhaps, in my view, most helpfully described as being heard "in private." Such applications, which are administrative proceedings customarily heard in private, often include directions being sought by a trustee under the *Beddoe's* jurisdiction relating to adversarial proceedings where the trustee seeks directions whether to prosecute or to defend the 'hostile' action, but they are not so limited.

18. Guernsey 2 did not, in fact, include a *Beddoe's* application strictly so-called, but comprised applications brought by the former trustees, or, from time to time, by the current trustee, relating to the administration of the TDT and the maintenance and preservation of the TDT assets and their net value. But whatever may be the nature of the non-contentious trust proceedings brought before the Royal Court, a large amount of the documentation disclosed by one party to another will have been disclosed, - as was, I understand, the case in the TDT and in Guernsey 2 - electronically, and then kept in circumstances of as much security as is deemed by the disclosing and the recipient parties to be practicable so as to comply either with orders of the court or with the obligations of privacy and confidentiality which might be understood to apply in such cases, in secure folders or sub-folders which are only accessible by a limited number of persons by whom the privacy and confidentiality and the need for secure protection of such documents are both known and accepted. It is necessary for me to deal in a little detail with the parties to the English proceedings and then with Mr Stevens' disclosure report, which I have found particularly helpful.

The Parties

19. Some parties are common to both the English proceedings and Guernsey 2. The claimants in the English proceedings are R&H and Mr Tchenguiz. They are respectively the Current Trustee of the TDT, appointed on about 2 July 2010, and the present Protector, appointed on about 28 June 2010. I repeat that Mr Tchenguiz is also joined as a party in Guernsey 2 in his capacity as an adult beneficiary of the TDT. R&H also sues in the English proceedings in its capacity as trustee of another trust, which is not relevant to the application. Both R&H and Mr Tchenguiz are parties to Guernsey 2. Mr Tchenguiz has been a party, as I have said, as one of the class of adult beneficiaries since the commencement of Guernsey 2 earlier in 2010 and his joinder as a party became, as it were, expanded very soon after his appointment as protector of the TDT; the nature and extent of his obligations as protector are not material to the application.

20. Mr Akers is one of what are now the four defendants in the English proceedings. He is sued both personally and in his capacity as a joint liquidator of the four BVI companies. It is to be noted that Mr McDonald is not sued as a defendant in the English proceedings. Mr Hossein Hamedani (**Mr Hamedani**), who was, like Mr

Akers, at all material times a partner in the GT firm, (which is an English limited partnership,) is sued personally. The GT firm is also sued as a defendant. Mr Akers, Mr Hamedani and the GT firm are defined together as "the GT defendants", and are sued jointly and severally. But neither Mr Hamedani nor the GT firm are parties in Guernsey 2. Where necessary, I shall use the term "**the GT defendants**" in the rest of this judgment to describe Mr Akers, Mr Hamedani and the GT firm when considered together. A fifth defendant, Mr J R Johannsson, is also sued. It is to be noted that the Former Trustees of the TDT, who are parties as the Applicants in Guernsey 2 and who made several applications for directions within Guernsey 2, are not sued as defendants in the English proceedings; their stance on the application is one of neutrality, although Advocate Roland has made helpful written and oral submissions to assist the court.

Discussion

21. It is not practicable for Mr Akers, at least at this stage of the application, to identify or list specific documents or categories or classes of documents for which he seeks the court's leave under rule 79 to use in the English proceedings by way of giving standard disclosure. So he asks the court to make what would amount to a 'preliminary steps order' so as to allow him and his Guernsey and English lawyers to review the documents disclosed to Mr Akers, as one of the joint liquidators, in Guernsey 2 by other parties, including the Former Trustees, the Current Trustee (R&H) and the protector (Mr Tchenguiz) and to adjourn the remainder of the application pending the taking of those steps.

22. The nature of the relief sought by Mr Akers changed materially during the oral hearing yesterday. This change occurred after the parties' Counsel had met, with my encouragement, over an extended lunch adjournment to discuss the application and to see whether there was some room for agreement or at least for limiting the extent of any difference between them. This seems to have proved helpful and the joint liquidators' Advocate, Miss Gray, sent an email to other counsel at 13:41pm yesterday setting out her client's proposal for dealing with the preliminary parts of the current application. By the email, Advocate Gray wrote to Advocate Robison for R&H and Advocate Paul Richardson for Mr Tchenguiz, responding to a letter from them dated 16 June 2017 in relation to the proposal made by her clients, (by which I think she must mean the GT defendants), to isolate Guernsey 2 materials and what are called sub-set materials, which would result in those materials being reviewed for the purposes of disclosure in the English proceedings. After referring to their discussions at court and correspondence, Mr Akers proposed a protocol regime in the following terms:

> (1) *"Such terms to be agreed between us later today, the proposed search terms, are applied to the data set.* [That is a term defined in Mr Hammond's evidence.]
>
> *(2) Responsive documents to the proposed search terms be stored on a separate workspace on our clients' respective e-disclosure platforms.*
>
> *(3) To address the concerns of commonality, Carey Olsen (and the equivalent Guernsey firm for your respective clients) review these response documents to confirm if they are indeed Guernsey 2 or subset proceedings.*

(4) Documents identified as Guernsey 2 or subset are then tagged as 'G2 restricted document', and not reviewed further."

23. There is not now, it seems, much difference between Mr Akers and the other parties to the application on the relief which I am asked to grant to Mr Akers as a party to Guernsey 2. In general terms, the limited preliminary relief now claimed by Mr Akers at this stage is not opposed, although Counsel for all parties have, as I have just mentioned, addressed the applicable issues on the applications both in writing, (as is so often the case, with Mr Tchenguiz supporting the submissions of R&H,) and orally. Counsel were, admirably, able to deal effectively with the changed position of Mr Akers, as set out in Advocate Gray's email of 13:41pm yesterday, in their oral submissions and all such submissions were concluded by about 5.25pm. I have found these submissions of particular help. I had earlier asked for submissions on several cases in Jersey, Australia and Bermuda, to which reference is made both in the current 19th edition of *"Lewin on Trusts"* and the second supplement (2017) to it, and in the recently published Jersey textbook *"Litigating Trust Disputes in Jersey"* by Advocate James Sheedy of the Jersey Bar (2017).

24. Counsel have been of much assistance to the court in preparing such submissions. Without their oral and written submissions and, in particular, the evidence of Mr Hammond in his second affidavit, I am doubtful whether I would have found it possible to make any order on the application at this stage. However, I am satisfied, as will appear later, that it is now right for me to give Mr Akers limited leave to use the documents disclosed to him and Mr McDonald, as joint liquidators, in Guernsey 2 for the preliminary parts of complying with his and the other GT defendants' disclosure obligations under the orders made by Mr Justice Knowles in the English proceedings. In light of the changed position explained in Advocate Gray's email of 13:41pm yesterday, some of the cases to which I referred have not, in the event, proved to be of assistance at the present stage of the application, but they might be relevant at a later stage in the application, if, that is, leave is then sought by Mr Akers to use any particular document or class or category of documents in giving disclosure of documents in the English proceedings.

25. The use of specific documents in such proceedings has been the subject of helpful decisions, which are relevant at the present stage of the application. Some are cases on the court rules applicable to them and some on the implied undertaking or the special circumstances of *Beddoe's*, and other, trustee directions hearings. Examples include the decision of the Federal Court of Australia in *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd [1992] 110 ALR 685*, *per* Justice Wilcox at p. 693; *Trustee N v Attorney General for Bermuda [2015] SC (Bda) 50 Comm*, a decision of Mr Justice Hellman in the Supreme Court of Bermuda, delivered on 13th July 2015; and, most recently in Jersey, the decision of Mr Commissioner Mark Herbert QC, sitting alone in the Royal Court of Jersey, in *Trilogy Management Limited v YT and Others* [2014] JRC 182.

26. It is helpful, I think, for me to refer to two cases in which applications for permission or leave to use documents, which have been disclosed to the applicant party in trust administration proceedings as part of disclosure obligations in other proceedings, have been dealt with in the Royal Court of Jersey. In the decision of *In The Matter of M and Other Trusts* [2012] 2 JLR 51, the judgment of the Royal Court was delivered

by Sir Michael Birt, Bailiff, which is a helpful starting point for applications of the nature now before the court:

> *"The Nature of Applications by Trustee for Directions*
>
> *13. It is common for trustees in Jersey* [I add, also in Guernsey,] *to seek the directions of the court in relation to matters concerning the administration of trusts... Usually, the trustee will have reached a decision itself but would seek the court's blessing on the grounds that a decision is of a 'momentous nature'... Some applications are Beddoe applications, properly so-called in the sense that they seek directions as to whether the trustee should institute or defend legal proceedings. Others concern decisions in relation to a variety of matters relating to the administration of the trust, e.g., whether to sell a major trust asset. ...*
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> *14. Such applications are an important part of a supervisory jurisdiction of this court in relation to trusts. They are invariably held in private. This is because the applications will often concern legally or commercially sensitive matters and they are of course administrative rather than adversarial proceedings. They do not usually determine civil rights for the purposes of Article 6 of the European Convention on Human Rights.*
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> *15. It is of vital importance that if such applications are to serve the purposes for which they are intended, information and documents received by those who are convened as parties to such proceedings should be held in confidence. The trustee is under a duty and must feel able to make full and frank disclosure in relation to the application. It must be able to summarise the arguments for and against the proposed course of action, including any weaknesses or possible risks in relation to what is proposed.*
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> *16. In Deery v Continental Trust Co Ltd the court refused to give assistance to a letter of request from the Family Division which had sought disclosure of material provided to this court in an application made by a trustee under Article 51. Bailhache, Deputy Bailiff, said this [2010] JRC 0001 at paragraphs 6 to 7—*
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> > *'6(d)... fourthly, it is clear from material we have seen that it is absolutely necessary that a trustee should be able to come to court under Article 51 to make a candid appraisal of his position and the problems which are to be addressed. If trustees thought that such affidavits and applications might be provided to those with hostile eyes upon the trust or the trust fund, they would be less likely to be candid and the whole purpose underlying the Article 51 procedure would be liable to be frustrated.'*
> >
> > *7. 'For this reason alone we regret that applying our own law we do not think it is proper to give effect to the letters of request... The exhibits contain material which is legally privileged and also contain material which is confidential. These are claims to privilege and confidence which we would expect an English court to uphold.'*
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> *This court entirely agrees...*
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> *20. Applying that to the facts of this case, it would in our judgment be a contempt of court for the adult beneficiaries to disclose without leave of the court any*

document which they received in the July proceedings (such as affidavits, exhibits, skeleton arguments, notes of the content of the hearing and the judgment itself) save to the extent that they were in possession of such documents independently of the proceedings. They have therefore very properly brought this application seeking leave.

General Observations

21. As just explained, the court considers that it is in the interests of justice that trustees should be able to come before this court in private, confident in the knowledge that they may speak frankly to the court and that what is said or produced to the court and to the other parties to the private proceedings will not be released to third parties or used for purposes other than the private proceedings..."

In *Trilogy Management*, in part of a wide-ranging series of applications in the Royal Court of Jersey, Mr Commissioner Mark Herbert, QC, who was sitting alone, gave judgment after a third hearing of an application by the plaintiff company, Trilogy Management Limited, for permission to use in other proceedings documents which were revealed and made available to it only in proceedings heard in private (see paragraph 1 of the judgment). The learned Commissioner had given an earlier written judgment on 29 May 2014, but the judgment to which I am referring now is the one delivered by him on 29 September 2014, reported at [2014] JRC 182. At paragraphs 3 and 4, the Commissioner said:

"3. ... basing myself principally on three decisions of the Royal Court, namely Enhőrning v Nordic Link Limited and Ors (unreported 24th January 1997), in which the court cited an important passage from the Australian case, Springfield Nominees Pty Ltd v Bridgelands Securities Ltd (1992) 110 ALR 685, 693; Westbond International Bank Ltd v Cantrust (C.I.) Ltd [2004] JRC 111 and [the decision of Sir Michael Birt and the jurats in *In Re. M*].

The main conclusions [in his judgment of 29th May 2014] *were summarised in paragraph 32:—*

(i) It is accepted that the application is made in good faith and that there are likely to be documents capable of assisting Trilogy to achieve justice in the new proceedings.

(ii) It is for Trilogy to identify which particular documents or possibly specific descriptions of documents it needs in order to plead and make good its case in the English proceedings and to demonstrate that need to the court.

(iii) If the court's order is to give permission by reference to categories of documents as opposed to specific documents, it will expressly limit its permission to documents relevant to the issues in the new proceedings...

(iv) In short, the task of the court can be summarised in this way: to consider the criteria identified in the Springfield case, namely the nature and provenance of the document in question, its forensic value in the proposed litigation and the importance of the privacy imposed by the court to avoid disclosing the nature and result of private proceedings and to avoid harm to the trust in question or its assets."

27. On 22nd February 2017, Mr Justice Knowles gave judgment in the English proceedings, on a similar application to the application, brought there, I think, by the GT defendants. After a general introduction, (paragraphs 4 to 7), the learned Judge turned to deal, in a passage with which I respectfully agree, with what he described as collateral use protections (paragraphs 8 to 11). The practical difficulties facing the parties in the English proceedings, who include, of course, the GT defendants, after what was described as "*conscientious testing*" were then explained by Mr Justice Knowles in depth (paragraphs 12 to 15). Step (a) and part of step (b), as there described, are relevant, in my view, to the application. Mr Akers is seeking the leave of the Royal Court to the use of the documents disclosed to him by other parties in Guernsey 2, by carrying out (i) step (a), that is to say, reviewing documents and witness statements and affidavits for relevance, and (ii) part of step (b), that is to say, preparing a *draft* list of any such relevant documents, referred to as responsive documents, so as to give disclosure to the claimants, R & H and Mr Tchenguiz, in the English proceedings. The time for disclosure has recently been extended by Mr Justice Knowles by three months to a date in late September 2017. As appears from Mr Stevens' disclosure report prepared for the GT defendants, much of the disclosure will take the form of electronic searches with search terms agreed between the parties being used to find responsive documents for review.

28. The judgment of Mr Justice Knowles, at paragraphs 12 and following, gives further detail of the disclosure problem faced by the parties with regard to electronically disclosed documents, as do the first and second affidavits of Mr Hammond in these proceedings and the disclosure report in the English proceedings.

29. I repeat that the application relates specifically to documents disclosed within Guernsey 2 to the joint liquidators, who of course include Mr Akers. There is no judgment in Guernsey, so far as any researches by Counsel have managed to discover, about the operation of the part of rule 79(1)(b) which is relied upon here. Lieutenant Bailiff Her Honour Hazel Marshall QC recently gave judgment *ex tempore* on a collateral use of documents application in Guernsey 1, but that judgment is not relevant to these applications as it seems to have related to documents which had been specifically identified.

30. Accordingly, since the wording of CPR 31.22 and in rule 79 of the Royal Court Civil Rules is to the same effect, I am asked on behalf of Mr Akers to follow the approach taken by Mr Justice Knowles, especially in paragraphs 16 to 24 and 31 in the English proceedings. I have found the reasoning used by Mr Justice Knowles persuasive. In those circumstances, I shall follow the approach taken by him, which I do gratefully. Doing so may not produce, I understand and appreciate, a convenient result, but it is necessary and right, in my judgment, for me to follow both the reasoning and the decision of Mr Justice Knowles.

31. It is to be noted as well, for completeness' sake, that the arguments which led to Mr Justice Knowles' judgment have not, it seems, been previously raised elsewhere and it is perhaps the case that all the earlier decisions to which I have referred above proceeded on the basis either of listed, identified documents or of listed, identified categories of documents, and without the benefit of detailed arguments of the nature presented to the court in the English proceedings.

32. In my judgment, it is essential that the most stringent controls practicable are put in place, so as to ensure that sealed files in Guernsey 2 remain sealed files, so far as is practicable, and that, secondly, information and documents received by Mr Akers and Mr McDonald under the embargo of privacy which applies in the protected trustee administration proceedings which are Guernsey 2 remain so protected. In my judgment, the proposals now largely agreed between the parties should ensure that, so far as is practicable, this happens.

33. The urgent question for me to consider and decide is this: Is it possible for me to make an order which would enable Mr Akers, one of the GT defendants, to take his first steps towards complying with his discovery obligations under the disclosure orders made by Mr Justice Knowles, without in any material way loosening or destroying the protection of the information and documents either in the sealed files or behind the protection embargoes which are in place in Guernsey 2?

34. Mr Hammond's second affidavit has, in my view, gone some part of the way towards doing so and the proposals made in Advocate Gray's email of 13:41pm yesterday have gone considerably further towards achieving this objective. These proposals are for (a) uploading Guernsey 2 electronic documents disclosed to the joint liquidators to what I understand will be an isolated electronic document platform, (b) applying agreed search terms to the uploaded documents so as to identify responsive documents, and then (c) tagging, and further isolating, the responsive documents further, and (d) preventing them from being listed in Mr Akers' or the GT defendants' list or lists of documents in the English proceedings at all. As Advocate Gray said in oral submissions yesterday relying on what Mr Hammond had said in paragraph 46 of his second affidavit, and I agree:

> *"The agreed system, or what I understand to be the agreed system, may not be perfect and some Guernsey 2 documents may have slipped through the net by not having been found by the agreed search terms but that is in my view an acceptable risk to take."*

35. A few other matters were raised in the oral hearing and in Advocate Gray's written submissions, with which I should deal before deciding the application. First, the question was raised whether it might also be necessary for either R&H or Mr Tchenguiz to make similar applications to the Royal Court for permission to use documents disclosed to them in Guernsey 2. At the present time, only Mr Akers has made an application for leave to use Guernsey 2 documents in the English proceedings. In such circumstances, it is not appropriate for me to say anything more about such a possibility unless and until any such application is made by either R&H or Mr Tchenguiz.

36. Secondly, this court is being asked for its assistance in what I believe, on the evidence, to be unavoidable circumstances and, in my judgment, it is not right, in my judgment, for the court to penalise Mr Akers for what may have been a past act of a paralegal employee of the joint liquidators' then English solicitors, who were not Simmons & Simmons, about the disclosure of protected documents disclosed to the joint liquidators in Guernsey 2. The current trustee has understandable concerns about this issue, as I think Mr Tchenguiz has as well, and they both seek a preliminary order limiting the access to Guernsey 2 documents to Mr Akers and Carey Olsen, his Guernsey advocates, alone. In his oral submissions, with which Advocate Robison

for R&H agreed, Advocate Richardson contended on behalf of Mr Tchenguiz that, since only Mr Akers of the GT defendants is a party to Guernsey 2, in his capacity as one of the joint liquidators, he alone can make an application for leave to use documents under rule 79, and that it follows that only he and his Guernsey lawyers should take part in the review process, and not Simmons & Simmons, the solicitors for all the GT defendants. Mr Richardson was right to remind me that only a party can apply for relief under rule 79(1)(b), but I am not persuaded such a limitation of access is required. Any leave granted to Mr Akers to use documents, once it has been shown that leave is justified as being capable of achieving the desired aim of identifying any Guernsey 2 documents disclosed to the joint liquidators and excluding them from being listed in the GT defendants' list of documents in the English proceedings, should, in my judgment, not be so limited. On the evidence before the court in Mr Hammond's first and second affidavits and the proposals made at 13:41pm yesterday in Miss Gray's email, it is, in my view, likely, perhaps very likely, that Messrs Carey Olsen, the Guernsey advocates for the joint liquidators and whose partner Advocate Gray appears on the application for Mr Akers, will need assistance in carrying out the review process, in particular, as Miss Gray has suggested, in technical IT ways in carrying out the review proposed in her email.

37. Despite Advocate Richardson's powerful submissions to the contrary, delivered orally yesterday afternoon, which had some force, I do not consider it would be appropriate for me to limit the review to Carey Olsen alone and to exclude any members of the Simmons & Simmons permanent case team. A carefully drafted confidentiality undertaking is proposed to be signed by all those who will be involved in the proposed review, including Messrs Simmons & Simmons and their relevant partners and employees, *i.e.* partners and employees of a reputable City of London firm of solicitors of international experience, and is to be attached to the order following on from this judgment.

Decision

38. In conclusion, in my judgment, it is appropriate for me to make the order now sought by Mr Akers permitting him to use the documents disclosed to him and Mr McDonald as joint liquidators of the four BVI companies by any of the other parties in Guernsey 2 in the manner proposed in Miss Gray's email of 13:41pm yesterday. I am satisfied that I should make an order giving such leave in a form to be agreed by Counsel, if possible, but otherwise settled by me, so as to allow the procedures set out in that email to be carried out. I specifically allow the use of Messrs Simmons & Simmons' partners and employees during each part of the review stage so long as Messrs Carey Olsen consider that it is necessary for them to have such assistance. If the parties are unable to agree the form of such a confidentiality undertaking, (and they may perhaps wish to use the draft attached to the application as a starting point,) it would be necessary for me to settle it. So I ask the parties to try to agree how the tasks under the proposed preliminary steps orders here will operate and especially, if they think it necessary to do so, to agree which person or persons are to carry out the tasks and review the results.

PATRICK TALBOT QC
Lieutenant Bailiff
29 June 2017 (approved version 5 July 2017, as further corrected on 18 January 2018)