IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION APPEAL No. 515

17 July 2018

Before:

Clare Montgomery QC, President
George Bompas, QC
Sir William Bailhache, Bailiff of Jersey

Between:

(1) Robert Tchenguiz
(2) Rawlinson & Hunter Trustees SA
(In its capacity as Trustee of the Tchenguiz Discretionary Trust)
Applicants/Appellants

-And-

Stephen John Akers **Respondent**

Advocate Paul Richardson for the Appellants
Advocate John P Greenfield for the Respondent

JUDGMENT

© Royal Court of Guernsey

BOMPAS JA, giving the judgment of the Court

Introduction

1 The present appeal is another chapter in the continuing saga of litigation involving Mr Robert Tchenguiz, the First Appellant, and various institutions arising from events precipitated by the turmoil in the financial markets at the time of the collapse of Lehman Brothers on 15 September 2008. This appeal is concerned with proceedings for contempt of court which have been on foot since 23 May 2014 and in one form or another have involved multiple applications to the Royal Court and to this Court; and these contempt proceedings are only a small part of what is involved.

2 A striking feature of the presentation of this appeal to us is the huge accretion of documents and arguments around what should be comparatively simple: on this appeal the facts relied upon for the alleged contempt are not complicated and hardly in dispute. Nevertheless, we have been provided with almost 3,000 pages of documents and over 900 pages of authorities. The approach has been cumbersome for the Court and the parties. Relevant judgments and orders have sometimes had to be found as exhibits to affidavits, and in the oral argument before us there has been reference only to some 35 documents in the entire bundle of 6 lever arch files. Recognising, as we do, that the scope of the argument in court cannot always be comprehensively anticipated, we nonetheless remind the Guernsey Bar that Rule 8(1) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 requires the appellant to lodge such affidavits and exhibits as are relevant to the appeal. Had this been complied with, the overall costs of this appeal would have been much reduced.

3 The vice of this volume of material is that it conceals the real issues. In essence, the question on this appeal is whether, given a few straightforward facts (almost all either admitted, established or to be assumed to be as stated by Mr Tchenguiz in his application notices) proceedings can viably be, and should be allowed to be, pursued by Mr Tchenguiz to have the Respondent, Mr Stephen Akers, committed to prison or otherwise punished for contempt of court when, so it is said, in about February or March 2011 he disclosed to the Serious Fraud Office in London certain information. Did the disclosure involve, arguably at the very least, a breach by Mr Akers of an order of the Royal Court?

4 In what follows we set out as briefly as possible the essential facts necessary to appreciate the issues on this appeal. There is rather greater detail given in a judgment of this Court (*Tchenguiz v Hamedani* [2015] GLR 154) on an appeal brought in the first iteration of these proceedings by a colleague of Mr Akers, a Mr Hossein Hamedani. He had been joined in the same contempt proceedings as Mr Akers. Mr Hamedani succeeded in setting aside the order made for service on him of the contempt proceedings out of jurisdiction.

5 Mr Tchenguiz is protector of a trust called the Tchenguiz Discretionary Trust ("the TDT"). Rawlinson & Hunter Trustees SA ("R&H") are, or at any rate at one time were, the trustees of the TDT. They are the Second Appellants; but for the reasons explained below the hearing before us has been argued by Advocate Paul Richardson for Mr Tchenguiz as though Mr Tchenguiz were the only appellant. Mr Akers is a joint liquidator of certain companies ("the

BVI Companies") which had been connected with the TDT, this appointment having been made in August 2009. In December 2009 the then director of the SFO authorised a formal investigation into dealings of Kaupthing Bank HF with Mr Tchenguiz, the TDT and interests of the TDT. In this investigation the SFO received information from Mr Akers and Grant Thornton UK LLP ("GTUK"), of which Mr Akers was a member.

6 On 12 March 2010 the then trustee of the TDT issued proceedings in the Royal Court. These (frequently referred to as "Guernsey 1") concerned historic dealings between the TDT and the BVI Companies.

7 Then, on 19 May 2010 an application was made to the Royal Court by the TDT trustees, when the trustees applied for directions concerning their trust. The 19 May 2010 application notice set out various specific questions asked of the Royal Court and sought directions as to specific matters. When the application (referred to as "Guernsey 2") came before the Royal Court on 21 June 2010 an order was made for it to be heard *in camera*, the court file being ordered to be sealed, with (among other directions for steps forward to assist with the determination of the various questions) a direction that the trustees could advise the Joint Liquidators of the BVI Companies of the existence and nature of the application.

8 There is some question as to whether the Order of 21 June 2010 was perfected. For present purposes this question does not need to be explored, as it is common ground between the parties before us that as regards the contempt of court alleged against Mr Akers any relevant effect which the order might have had, if perfected, would have anyway been duplicated by the Order of 28 June 2010 to which we refer below.

9 The Order of 21 June 2010 did not purport to require or direct all and any issues which might affect the TDT to be ventilated in Guernsey 2. Guernsey 2 was, in the Order, referred to as "*the application dated 19 May 2010*", which in our judgment was clearly the application started by and contained in the application notice we have just referred to. As we have mentioned, that was an application which was on its face concerned only with certain specific topics. Advocate Richardson on behalf of Mr Techenguiz submitted that Guernsey 2 was a trust administration application and as a consequence covered any matter concerning the TDT. We disagree. The application notice did not ask the Court to administer the TDT, or to give directions generally for the administration of the TDT. It was expressed in its preamble as an application for directions set out in the body of the application notice, these comprising directions in ten numbered paragraphs. The last, the only one of a general character, was that "*The Court shall make such order or orders as it may consider just and expedient*". This paragraph was not relied upon by Advocate Richardson; and in our judgment he was right not to rely on the paragraph, as it was simply consequential upon the matters sought in the nine preceding paragraphs.

10 On 28 June 2010 an order was made giving further procedural directions in Guernsey 2. After defining the expression "*the Second Application* " as meaning "*the application dated 19 May 2010*", this order provided in paragraph 1 that "*the Second Application should continue to be heard in camera and the court file in respect of the Second Application be sealed*". Paragraphs 2 to 4 then contained procedural directions as to three of the matters raised in the 19 May 2010 application notice, with paragraph 5 containing a permission to the TDT

trustees to notify a particular third party of the hearing of one of the matters, and paragraph 6 directing that costs should be reserved.

11 We refer to these two orders of 21 and 28 June 2010 as "the Private Hearing Orders". In each there is a reference to Advocate S Davies having appeared at the hearing for a Mr Richard Hillier, referred to as "the Protector", and Mr Tchenguiz, referred to as "the Beneficiary".

12 In late June and July 2010 there was correspondence between lawyers for the TDT trustees and for the Joint Liquidators of the BVI companies concerning Guernsey 1 and Guernsey 2. We have mentioned that pursuant to the 21 June 2010 Order certain information was allowed to be passed by the TDT Trustees to the Joint Liquidators; and on 14 July 2010 the lawyers for the TDT trustees sent to the Joint Liquidators' lawyers, as was said "*pursuant to the in camera order of Lieutenant Bailiff Finch dated 21 June 2010 as varied*", a copy of an affidavit which had been made by Mr Tchenguiz. There is no evidence that Mr Akers or his advisers were shown, much less served with, either of the Private Hearing Orders or the 19 May 2010 application notice.

13 On 20 July 2010 the Joint Liquidators of the BVI Companies made an application to the Royal Court to be joined to Guernsey 2. This application was stayed on agreed terms on 11 August 2010. At the same time a consent order, "the Protocol Order", was made. The detail of this order does not much matter for present purposes. It was signed by the Advocate representing Mr Akers as joint liquidator of the BVI Companies. It was also signed by, among other persons, an Advocate representing Mr Tchenguiz. It contained (at paragraph (1)) an undertaking by the TDT trustees to raise with the Royal Court, on any application for directions as to a proposed transaction involving TDT trust property, the question whether and if so what the Joint Liquidators should be told of the transaction; it contained (at paragraph (2)) a permission for the Joint Liquidators to make submissions and to offer evidence about the transactions as might be ordered by the Court; and it then contained (at paragraph (3)) a provision, expressed to be "*for the avoidance of doubt*", that information or documents provided to the Joint Liquidators "*pursuant to any application or order under Paragraph (1) above"* was to be confidential and used solely in relation to the paragraph (1) application, and that "*This restriction extends to any further information or documents provided to the [BVI] Companies under paragraph 2 above*".

14 The effect of the orders made on 11 August 2010 is that while the Joint Liquidators had not been joined to Guernsey 2, a mechanism had been put in place to ensure that the Court was to be informed of any proposal to dispose of TDT trust assets which might affect creditors, and to be placed so as to be able to consider whether and to what extent the Joint Liquidators were to be informed of the proposal and given the opportunity to make representations to the Court.

15 On 7 December 2010 Herbert Smith, solicitors advising R&H as trustees of a different Tchenguiz family trust wrote to R&H as trustees of the TDT. The letter concerned a property in London known as the Royal College of Organists (referred to as "the RCO"). The letter asserted that their clients had a claim against the TDT arising out of a contract made in 2009 for the TDT to transfer to their clients the share capital of Iver Resources Ltd (referred to in the letter as "Iver", but at other times as "IRL"), the sole asset of which was said to be the RCO. The letter explained that £6 million had been paid pursuant to the contract. It went on to offer a further £7.9 million, arrived at on the basis that the RCO was worth £22 million,

and that Iver had debts of £14.1 million (including an undocumented, unsecured and interest-free debt owed to the TDT). Claims under the sale contract were not to be waived.

16 By letter dated 13 December 2010 the Advocates (Ogier) then acting for R&H as trustees of the TDT sent a letter to the Advocates (Carey Olsen) representing the BVI Companies and their liquidators and forwarding a copy of the letter of 7 December 2010. Ogier's 13 December 2010 letter added that the trustees of the TDT had exercised their powers to permit the RCO to be occupied by Mr Tchenguiz as his family home, and explained what were said to be benefits of the 7 December 2010 proposal.

17 Ogier in their 13 December 2010 letter further explained that, given that R&H had a potentially conflicting interest as trustees of both the buying and the selling trusts, a named individual said to have no previous connection had been engaged to consider the proposal and a firm of London solicitors were to advise him. The letter then stated that the proposal, if the individual were minded to approve the proposal to be proceeded with, would "*require obtaining the blessing of the Royal Court of Guernsey*". It stated that, mindful of the Protocol Order, should an application to the Royal Court be necessary, R&H was providing to the Companies the letter of 7 December 2010 "*to afford you the opportunity to comment, and would ask that you do so as soon as is reasonably possible*", indicating that any application would be likely to be made "*during the course of this week*". The letter stated that on the application R&H would bring to the attention of the Court any comments the Companies might have; but it also stated that "*we do not accept that our client owes any duty to your clients"*, and that the provision of the letter of 7 December 2010 was without prejudice to that.

18 At the time when the 13 December 2010 letter was sent there had not been any application to the Royal Court for directions as to the subject matter of the letter (that is, the proposal put forward in the 7 December 2010 letter from Herbert Smith). Indeed, the tenor of the letter was that an application might not be required and therefore might not be made: the letter was directed at a proposed application which R&H were yet to make but which they might not make.

19 On 15 December 2010 Carey Olsen responded protesting on behalf of the Joint Liquidators of the BVI companies.

20 On 17 December 2010 R&H as trustees of the TDT provided to the Royal Court a form of application. The application, which was supported by an affidavit sworn the same day, asked the Court to sanction the entering into of the transaction proposed by the 7 December 2010 letter. It did not seek any directions as to the providing of information to the Joint Liquidators of the BVI companies or as to confidentiality. We were told by Advocate Richardson on behalf Mr Tchenguiz that the application was not made pursuant to the Protocol Order.

21 The form of application of 17 December 2010 was signed on behalf the TDT trustees but otherwise does not appear to have been issued or served. It carried, however, the same court file number as was set out on the Private Hearing Orders, the number given to Guernsey 2.

22 On the same day, 17 December 2010, Ogier for the TDT Trustees wrote to Carey Olsen for the Joint Liquidators saying that no application to the Court about the proposal was envisaged

for hearing in that week, but that they had filed an application and were enclosing for courtesy, and without accepting that the liquidators had any standing, a copy of the application and a proposed draft order. In the same letter there was an indication that the proposal "*is private and confidential*" and that the application "*will be heard in camera*", and asked for confirmation that Carey Olsen and their clients had not disclosed any information relating to the proposal to Kaupthing or its advisers and that they would refrain from doing so.

23 It appears that the first hearing of the 17 December 2010 application was scheduled to come on for hearing on about 21 January 2011; and we were told that there was a hearing in early March 2011 which ended with the application being adjourned and never thereafter being pursued. In connection with this application there was also an application made by the Joint Liquidators of the BVI companies to the Royal Court for the provision of information from the TDT trustees, as well as for permission to participate in the directions application and also to use information obtained "*pursuant to the Protocol Order*" (and, we observe here, none had been, although the Joint Liquidators may have believed that the 13 December 2010 letter had come pursuant to that order) and other information which they might receive from various sources. The Liquidators' application was refused.

24 On 4 March 2011 the SFO and City of London Police delivered an Information to the Central Criminal Court supporting an application for search warrants under section 2(4) of the Criminal Justice Act 1987 and to arrest Mr Tchenguiz, his brother and others. His Honour Judge Paul Worsley QC heard, and granted, the application on 7 March 2011. The Information and supporting evidence relied heavily upon information provided by GTUK.

25 At 6.55am on 9 March 2011 the search warrants obtained by the SFO were executed by officers of the City of London Police, with representatives of the SFO in attendance, at Mr Tchenguiz's home; and he was arrested on suspicion of conspiracy to defraud and steal from Kaupthing and its creditors.

26 No charges were ever brought as a result of the SFO investigation, which was discontinued on 15 October 2012.

27 Mr Tchenguiz sought judicial review of the lawfulness of the grant of the search warrants and of the arrests. On 31 July 2012 the Divisional Court quashed the warrants, granted declarations that the warrants, and consequent searches and seizures, were unlawful and transferred the civil claim for damages to the Queen's Bench Division. In delivering the judgment of the court *(R (Rawlinson & Hunter Trustees and Ors) v Central Criminal Court* [2013] 1 WLR 1634, Sir John Thomas P (as he then was) was critical of the SFO's conduct of the warrant application, holding that the SFO had presented the application in an inaccurate and misleading manner, including as to the manner in which it had presented the involvement of GTUK.

28 Since there has been continuing litigation arising out of the collapse of Kaupthing and the BVI Companies and the SFO's proceedings against Mr Tchenguiz. GTUK and Mr Akers have been involved in this, the propriety of their conduct in relation to the assistance given to the SFO being under challenge.

29 We have mentioned already that on 23 May 2014 Mr Tchenguiz launched an application to have Mr Akers and Mr Hamedani committed to prison for contempt of court, and sought permission to have the application ("the First Committal Application") served out of the jurisdiction. At this time the contempt alleged by Mr Tchenguiz against Mr Akers and Mr Hamedani was breach of the Protocol Order by disclosing to the SFO at a meeting in March 2011 the proposal for the transfer of the IRL shares and thus of the RCO. The application notice itself made no reference to the Private Hearing Orders, although the supporting affidavit did.

30 Mr Hamedani responded to the First Committal Application, when served upon him, by seeking to have the order giving permission set aside. His application was rejected by the Royal Court but, on appeal to this Court, his application succeeded. The basis for this was explained in the judgment to which we have already referred (that is *Tchenguiz v Hamedani* [2015] GLR 154), given on 24 July 2015: essentially the First Committal Application failed to raise a seriously arguable case of contempt of court, for the reason that the alleged contempt was put forward as involving a breach of a prohibition imposed by the Protocol Order, while on its face the Protocol Order did not prohibit what had been done.

31 Mr Hamedani's success prompted Mr Akers, who had submitted to the jurisdiction of the Royal Court and had not challenged service on him, to apply to strike out the First Committal Application. His application was issued on 26 August 2015.

32 Mr Tchenguiz, for his part applied by notice dated 29 September 2015 to amend the First Committal Application; but the application notice did not describe the proposed amendments: these were provided on about 2 October 2015, were exhibited to an affidavit sworn on 20 October 2015 by Nicole Ann Martin on behalf of Mr Tchenguiz, and were revised during the hearing of the application before Lieutenant Bailiff Talbot QC on 5 November 2015. According to Ms Martin, the disclosure to the SFO now alleged against Mr Akers as amounting to contempt of court took place "*in February and/or March 2011*", and "*probably on or around 4 February 2011*". Also, and most importantly, the proposed amendment as put forward on 5 November 2015 sought to found the contempt on the Private Hearing Orders, while also relying on the Protocol Order. As appears from paragraph 20 of the Judgment of Lieutenant Bailiff Talbot given on the strike out and amendment applications ("the First Judgment"), it was to be contended by Mr Tchenguiz in the amended committal application that "*the purpose of the in camera Orders was to 'keep private and confidential … the existence of [Guernsey 2] and/or the Proceedings [(being "the proceedings commenced by" Guernsey 2 "with Court File No.1505/2010 in which this committal application was originally made")], including any further application in the Proceedings and in each case their nature and content; information disclosed in the Proceedings; and information disclosed for the purpose of [the Proceedings, including, for the avoidance of doubt, any information disclosed in advance of any application in the Proceedings and for the purposes of such an application.'.*"

33 It is convenient to point out here that this Court, at paragraphs 71 to 87 of *Tchenguiz v Hamedani*, discussed the law of contempt in Guernsey, and in particular the characterisation of contempts as either civil or criminal. The Committal Application based on the Protocol Order was alleging a breach of a specific order against disclosure of certain information. The Private Hearing Orders contain no such specific order. Their stated object is simply for

Guernsey 2 to be heard in private (described as being "*in camera*"). As it seems to us, any contempt in relation to the Private Hearing Orders which might be committed by the improper disclosure of information is contempt, not in that there is breach of a specific prohibition, but rather in that there is in a more general sense an interference with the administration of justice by bringing about something which the Private Hearing Orders were designed to prevent: see paragraph 83 of the judgment in *Tchenguiz v Hamedani*.

34 In the previous paragraph we have referred to "improper" disclosure of information, because a fundamental question on the present appeal is whether what is alleged to have been done by Mr Akers (that is, providing to the SFO information imparted chiefly by Ogier's letter of 13 December 2010) was in fact improper and capable of qualifying as a contempt of court. But the point is that such a contempt, if contempt there was, has the character of a criminal contempt. In turn, that has an implication for the way in which the issues on this appeal are to be approached.

35 In this regard we drew to the parties' attention the English case of *Attorney-General v Leveller Magazine Ltd* [1979] AC 440. In that case a witness had been allowed to give evidence anonymously. Following the hearing publicity was given in Leveller Magazine to the identity of the witness. Contempt proceedings were brought. The proceedings failed only because the House of Lords concluded that, in giving his evidence, the witness had sufficiently identified himself that publication of his name did not interfere with the due administration of justice. But for this, the publication of the witness' name would have been contempt, not because there was breach of an order but because it interfered with the due administration of justice.

36 The point in the previous paragraph appears from the following passage in the speech of Lord Diplock at page 451G-452C:

> *'My Lords, in the argument before this House little attempt was made to analyse the juristic basis on which a court can make a 'ruling,' 'order' or 'direction' - call it what you will - relating to proceedings taking place before it which has the effect in law of restricting what may be done outside the courtroom by members of the public who are not engaged in those proceedings as parties or their legal representatives or as witnesses. The Court of Appeal of New Zealand in Taylor v. Attorney-General [1975] 2 N.Z.L.R. 675 was clearly of opinion that a court had power to make an explicit order directed to and binding on the public ipso jure as to what might lawfully be published outside the courtroom in relation to proceedings held before it. For my part I am prepared to leave this as an open question in the instant case. It may be that a 'ruling' by the court as to the conduct of proceedings can have binding effect as such within the courtroom only, so that breach of it is not ipso facto a contempt of court unless it is committed there. Nevertheless where (1) the reason for a ruling which involves departing in some measure from the general principle of open justice within the courtroom is that the departure is necessary in the interests of the due administration of justice and (2) it would be apparent to anyone who was aware of the ruling that the result which the ruling is designed to achieve would be frustrated by a particular kind of act done outside the courtroom, the doing of such an act with knowledge of the ruling and of its purpose may constitute a contempt of court, not*

because it is a breach of the ruling but because it interferes with the due administration of justice.

37 What appears from the speeches in the *Leveller Magazine* case is that, where what is alleged as the contempt does not involve a direct contravention of a stated prohibition in a court order, the decision whether or not there has been a contempt requires consideration of the question whether there has been interference with the due administration of justice; whether, the alleged contemnor has, to borrow words of Viscount Dilhorne at page 458C, sought to frustrate what the court has done.

38 Yet further, when considering the question of the approach which properly should be taken when considering Mr Tchenguiz's application to amend the First Committal Application, it is notable that in his speech in the *Leveller Magazine* case Lord Edmund-Davies highlighted two points.

38.1 The first is that contempt of court consisting of interference with the due administration of justice is a criminal contempt and of a different order from a contempt which lies in the breach of an express prohibition in a court order. This point is also crystal clear from the observation of Lord Scarman at page 471H-472B: "*It is a misconception of the nature of the criminal offence of contempt to regard it as being an offence because it is the breach of a binding order. The offence is interference, with knowledge of the court's proceedings, with the administration of justice*".

38.2 The second point is the need for clarity and certainty when a charge is made of contempt consisting of interference with the due administration of justice.

39 Thus, at the outset of his speech, at page 459B, having alluded to confusion in the law of contempt of court described in a case in the House of Lords in 1974, Lord Edmund Davies explained that as to this:

> *"... there has been comparatively little judicial comment on the topic meanwhile.*
>
> > *'The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice.... It is not the dignity of the court which is offended - a petty and misleading view of the issues involved - it is the fundamental supremacy of the law which is challenged.' (Johnson v. Grant, 1923 S.C. 789 , 790, per Lord President Clyde.)"*

40 Later in his speech, at page 465B-D, Lord Edmund Davies explained further the elements of a contempt consisting of interference with the due administration of justice:

> *"... what appears certain is that at common law the fact that a court sat wholly or partly in camera (and even where in such circumstances the court gave a direction prohibiting publication of information relating to what had been said*

or done behind closed doors) did not of itself and in every case necessarily mean that publication thereafter constituted contempt of court.

For that to arise something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future. So the liability to be committed for contempt in relation to publication of the kind with which this House is presently concerned must depend upon all the circumstances in which the publication complained of took place."

41 Related to this is the requirement for clarity. This appears also from the speech of Lord Edmund Davies at 461H-462F:

"*Nor, my Lords, would it be acceptable were the Attorney-General to urge, in effect, that no injustice has here been done, since the wishes of the court were clear and the determination of the appellants to flout or disregard those wishes equally clear. Mr. Sedley rightly observed that, if no direction was in fact given, thinking cannot have made it so, and the appellants were correct in thinking that by publishing they were breaching no ruling of the court. I have to say respectfully that I am uneasy about the view expressed by Lord Widgery C.J. that 'the deliberate flouting of the court's intention ' is sufficient to constitute criminal contempt, for as O'Connor J. said in P. A. Thomas & Co. v. Mould [1968] 2 Q.B. 913 , 923:*

> *'... where parties seek to invoke the power of the court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it.'*

In the absence of any such ruling as that deposed to by Miss Butler, but denied by the clerk of the court, was it the unmistakable intention of the magistrates in the present case that no one should behave as these appellants later did, particularly when those magistrates were specifically advised by their clerk that they had no power to make any order restricting the publication outside their court of 'Colonel B's' identity? In such circumstances 'intention' and 'preference' seem indistinguishable. The latter would have been manifested by the expression of a mere request that no such publication should take place, and when the magistrates elected to discontinue sitting in camera and thereafter did no more than rule that in their court the name of the witness should be written down, their 'intention' regarding what must or must not be done outside court was, in my judgment, indeterminable. Indeed, it was ex hypothesi non-existent, since they had been advised that they could in no way control such conduct. They might well have preferred that no publication of 'Colonel B's' name should take place anywhere or at any time, but it is going too far to say that they had manifested an intention to do all they could to guard against it by ruling as they did. 'No man should be condemned by an implication,' observed my noble and learned friend. Lord Diplock, in the course of counsel's submissions. Condemnation is even more

> *objectionable when the implication underlying the court's conduct is simply a matter of conjecture, and I have already indicated why I consider that such omission was fatal in the circumstances and should lead to these appeals being allowed.*"

42 It follows from this that in our judgment it would not be correct to find a person who is not party to proceedings guilty of contempt of court where the act alleged did not involve any breach of any express prohibition, did not self-evidently jeopardise a purpose obviously and objectively to be found in a proper direction made or procedure adopted by a court, and where the act could only be said to have contravened some more or less elaborate restriction to be found by a process of implication when construing a direction made by a court.

43 Yet further, in his speech Lord Edmund Davies drew attention to the fact that there are limits to the changing of a case. As he said at page 461G:

> "*Persons charged with criminal misconduct are entitled to know with reasonable precision the basis of the charge. If proceedings such as the present were tried on indictment and the statement of the charge 'Criminal Contempt', it would be impermissible to present a case wholly different from that outlined in the particulars of charge and then to urge that the departure was immaterial, since the new misconduct relied upon was, like the old, simply another variety of criminal contempt."*

44 The First Judgment was given by Lieutenant Bailiff Talbot on 11 March 2016. The Lieutenant Bailiff refused the amendment application and allowed the strike-out application on the basis that no reasonable grounds for bringing the application were disclosed within Rule 52(2)(a) of the Royal Court Civil Rules 2007, thereby putting an end to Mr Tchenguiz's First Committal Application. When reaching these conclusions the Lieutenant Bailiff pointed out that, rather than seeking to amend the First Committal Application, Mr Tchenguiz might have issued a fresh committal application based on the proposed amended case.

45 As we have mentioned, the proposed amendment of the First Committal Application had sought to keep alive a case of contempt of court by reference to breach of the Protocol Order. However this proposed amendment was rejected by the Lieutenant Bailiff as unsustainable: he said, at paragraph [21] of the First Judgment, that what was to be put forward was not of a materially different nature from the case originally relied upon and, in the light of the judgment given by this Court on Mr Hamedani's application, could not survive as existing claims against Mr Akers.

46 On 29 March 2016 Mr Tchenguiz issued a second application to have Mr Akers committed for contempt. This application ("the Second Committal Application") was, in effect, the proposed amended application which had been put forward the previous year but now without any reliance on the Protocol Order. However, R&H was also added as an applicant. The position of R&H is mentioned further below.

47 In the notice of the Second Committal Application the particulars of the contempt alleged against Mr Akers explained that the Private Hearing Orders had, as their purpose, keeping certain information confidential. This information the application labelled "Restricted

Information"; and the application further explained what was the alleged to be effect of the Private Hearing orders. For this purpose the expressions "*Application*" and "*Proceedings*" were to mean, respectively, "*an application for directions in the Royal Court in respect of the TDT*" filed on 19 May 2010, and "*the proceedings with Court File No:1505/2010*" commenced by the filing of the application for directions.

47.1 The Restricted Information was defined as: "*[1] the existence of the Application and/or Proceedings, including any further applications in the Proceedings and in each case their nature and content; [2] information disclosed in the Proceedings; and [3] information disclosed for the purpose of the Proceedings, including for the avoidance of doubt: (1) any information disclosed in advance of any application in the Proceedings and for the purposes of such an application; and (2) any information which would not ordinarily be disclosed but for the existence of the Proceedings (including, but not limited to, for the purpose of seeking the consent of interested parties to deal with the trust assets, providing information in relation to any dealings with the trust assets and/or to ascertain whether an application needed to be made in the Proceedings*".

47.2 The effect alleged for the Private Hearing Orders was: "*[1] to prohibit any party to the Proceedings from disclosing any Restricted Information to any third party for any purpose other than for the purpose of the Proceedings, without the leave of the court; [2] to prohibit any person aware of the [Private Hearing Orders] from disclosing any Restricted Information to any third party for any purpose other than for the purpose of the Proceedings, without leave of the court; and [3] to oblige any person disclosing Restricted Information to any third party to inform that third party of the existence and effect of the [Private Hearing] Order(s).*"

48 The purpose and effect alleged for the Private Hearing Orders had necessarily to be extremely wide in scope in order to cause Mr Akers to have been made subject to any possible duty of confidentiality when Ogier sent him the letter of 13 December 2010 and when later, as a matter of courtesy (as it was put in Ogier's letter of 17 December 2010), he was told that an application was being made to the Royal Court for directions. This must be the reason for the elaborate formulation in the application notice. Most obviously Mr Akers was not a party to Guernsey 2, having attempted unsuccessfully to be joined; there is no suggestion that he has divulged anything that he heard or seen in any hearing of Guernsey 2; and there is no evidence that he had by February or March 2011 seen the Private Hearing Orders or the Second Application as referred to in those orders.

49 The 13 December 2010 letter, on which Mr Tchenguiz principally founds his complaints about wrongful disclosure by Mr Akers, was a letter from the lawyers for the TDT, written of their own volition, telling Mr Akers of a proposed transaction and explaining that there might (not that there would) be an application to the court for directions about the transaction. In particular, the letter did not explain, and it was not self-evident, that the proposed transaction was already under consideration in Guernsey 2 as a matter for which the TDT trustees had sought directions.

50 In the Second Committal Application a further refinement was made in relation to the allegation of breach of the Private Hearing Orders contended for by Mr Tchenguiz. It is said

on behalf of Mr Tchenguiz that the restriction imposed by those orders precluded Mr Akers from revealing to any third party the fact that an application had in fact been made to the Royal Court as contemplated by the 13 December 2010 letter. Accordingly, so it is said, it would have been contempt of court for Mr Akers to tell the SFO that fact.

51 On 7 November 2016 Mr Akers filed an application to have the Second Committal Application struck out under Rule 52(2) of the Royal Court Civil Rules 2007. This application was heard by Lieutenant Bailiff Talbot in late 2016 and early 2017. On 19 July 2017 the Lieutenant Bailiff made an order allowing Mr Akers' application, insofar as based on Rule 52(2)(b), and striking out the Second Committal Application as an abuse of the Court's process.

52 With leave of the Court of Appeal Mr Tchenguiz now appeals (a) out of time in respect of the order made by the Lieutenant Bailiff on 11 March 2016 on the First Committal Application and (b) in respect of his order made on 19 July 2017 on the Second Committal Application. R&H were in the notice of appeal and applications for leave to appeal also named as parties appealing jointly with Mr Tchenguiz, although one of the applications for leave filed by an advocate for Mr Tchenguiz and R&H sought an order (never pursued, so we were told by Advocate Richardson, for no plausible reason) for substitution or joinder of Fort Trustees Ltd and Balchan Management Ltd with an order for R&H to cease to be parties. We were told by Advocate Richardson in the course of the hearing, that he and is firm no longer act for, and have no instructions from, R&H. He told us that this has been the position since 2 June 2018, but that the present appeals had until that time been properly progressed on instructions from R&H to his firm,

53 On these appeals it is accepted that, unless amended, the First Committal Application did not disclose reasonable grounds for the application. The following questions then arise on these appeals, these being as to the two committal applications:

53.1 [The First Committal Application] Could amendment have resulted in the First Committal Application disclosing reasonable grounds? If so, should leave have been given to Mr Tchenguiz to amend the First Committal Application?

53.2 [The Second Committal Application] Did the Second Committal Application disclose reasonable grounds for the application? Even if the application did disclose reasonable grounds, was it nevertheless to be struck out as an abuse of process?

54 On behalf of Mr Akers the point has been taken, by a Respondent's Notice under Rule 5 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964, that the Private Hearing Orders did not have the operation or effect contended for by Mr Tchenguiz, and cannot reasonably found a case that Mr Akers was in contempt of court by disclosing information in the 13 December 2010 letter or by revealing that the contemplated application had been made. His argument is that no viable grounds have been put forward by Mr Tchenguiz to show any contempt of court on the part of Mr Akers. If this argument is correct, and in our judgment it is unanswerable, then it is unnecessary to consider the detailed arguments put forward to the Royal Court and to this Court concerning the principles applicable to amendment and to the question whether, in the present case, fresh proceedings are abusive: there would be no basis for allowing the proposed amendment of the First Committal Application, and the Second

Committal Application would be correctly struck out under rule 52(2)(a) of the Royal Court Civil Rules 2007 as disclosing no reasonable grounds for bringing the application.

55 The reason why the Private Hearing Orders do not have the operation or effect contended for is that such a detailed and blanket prohibition cannot properly be derived from an order that a matter is to be heard in private. It is convenient here to refer to a couple of cases from Jersey which, as it seems to us, describe well the principles applying in this Island. The purpose of privacy in directions hearings in trust matters is to "*assist those concerned with the administration of trusts to resolve their differences and to seek judicial guidance in an orderly context but in a relatively informal and flexible manner*" (see *Jersey Evening Post v Al Thani* [2002] JLR 542 at para 28, cited by Sir Michael Birt in *HSBC Trustees (CI) v Kwong* [2018] JRC 051A at para 22). Again, Sir Michael Birt, Bailiff, in *A v Rozel Trustees (Channel Islands) Ltd* [2012] JRC 127 explained at paragraphs [14] and [15]:

> *"14. Such applications are an important part of the supervisory jurisdiction of this Court in relation to trusts. They are invariably held in private. This is because the application 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 ECHR.*
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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."*

56 In short, the applicable privacy purpose is achieved for directions hearings, when an order is made for such proceedings to be *in camera* (or in private, in other words), by according privacy to information discussed or presented at such hearings before the court; and this information will normally include the judgment given on the directions application, subject to something else being ordered by the Court. And it will normally include materials received "as part of" or "in" the directions application. Again, this is explained by Sir Michael Birt in the *Rozel* case, supra, at paragraphs [18] to [20].

> *"18. In our judgment, given the clear public interest reasons for hearing such applications in private, it is a contempt of court for a party to publish information which he only receives as part of such an application. We would endorse what the Court said in Westbond International Bank Limited-v-Cantrust (CI) Limited [2004] JRC 111 at para 6:-*
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> > *'6. We are wary of attempting to issue any such guidance. The matter has not been fully argued – because the court indicated at a fairly early stage that it did not believe that this was a case of contempt – and in any event it is difficult to foresee all the various circumstances*

which may arise. At one end of the scale, the fact that X chooses to use evidence already in his possession for the purposes of a private hearing surely cannot prevent him from using that same material in other public proceedings providing that he does not state in the public proceedings that the material has been used in the private hearing so as, in effect, to disclose the content of that private hearing. Thus the mere fact that material has been used by a party in a private hearing cannot of itself be sufficient to prevent that party deploying that material in public proceedings. Conversely, if information is disclosed to X during the course of a private hearing and he subsequently uses that material publically in such a way as to refer to the material and thereby in effect to disclose the content of the private proceedings, that is clearly capable of amounting to a contempt of court as it will interfere with the intention of the court sitting in private that the interests of justice required the hearing to be in private.'

19. The distinction drawn by the Court in the foregoing passage can be simply illustrated. It may well be that a party to Article 51 proceedings is already in possession of a trust deed or trust accounts. The fact that such deed and accounts are produced and referred to by another party in the Article 51 proceedings held in private cannot possibly prohibit the first party from using those documents in other proceedings or, indeed, publicly. But, if he was not hitherto in possession of those documents and has only received them as a result of the Article 51 proceedings, then it would be a contempt for him to disclose them to any other party; hence the use of the word "only" in the first sentence of paragraph 18 above.

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 the 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 …"

57 Notable about these descriptions of the purpose and effect of holding directions applications in private is the language used: confidentiality attaches to materials in the hands of parties to the applications received by them "as part of" or "in" the applications. This language is comparatively cautious. It does not follow at all from any of these descriptions that a communication by a trustee to a third party about the affairs of a trust will be required, on pain of committal to prison for contempt, to be treated by the third party as secret merely because the trustee has also applied for directions from the Court in some matter concerning the trust and the Court has directed the application to be heard in private. If the trustee believes that the communication should be secret, the trustee's course would be to apply to the Court for directions as to what should be said to the third party; and the Court may if necessary give directions and make an order expressly imposing on the third party secrecy obligations if the third party wishes to receive the communication.

58 We have not been referred to any authority to support an argument for such wide-ranging confidentiality restrictions as contended for by Mr Tchenguiz in the present case. In our view it could not possibly be said that the due administration of justice would be in any way undermined or frustrated if a third party, provided by a trustee with information which comes under no court ordered embargo, makes disclosure of the information. Such disclosure cannot frustrate, undermine or otherwise prejudice the ability of parties to have directions applications heard in private and to be reasonably sure that their information produced in the applications would remain private.

59 It will also be noted that in our judgment the Private Hearing Orders fall to be construed by reference to the application which was before the Court when they were made and which was referred to in the orders as "*the Second Application*". That was the application contained in the 19 May 2010 application notice, and it was to that application, the application in that form, that the Private Hearing Orders were directed.

60 It was submitted by Advocate Richardson that Guernsey 2 comprised trust administration proceedings, and that once an order had been made for "*the Second Application*" to "*continue to be heard in camera*" there was a secrecy cloak cast over all matters relating to the TDT, or at the least all matters proposed to be brought to the attention of the Court by way further application to be made in those same proceedings; or alternatively that all steps taken in relation to those same proceedings or the fact of an application being made in those same proceedings, was to be kept secret by anyone who might come to know of the matters. This submission had at its heart the contention that the Private Hearing Orders were in relation to proceedings of a much broader character than might be gleaned from a review of the 19 May 2010 application notice, so that Guernsey 2, or in other words "the Second Application" was those proceedings.

61 We do not accept this submission. The Private Hearing Orders required the hearing of certain matters to be in private; and the matters to be heard in private were those set out in the 19 May 2010 application notice. The Private Hearing Orders cannot be construed, by any reasonable process, as requiring any and all applications for other matters to be heard in private, even if they were later asked to be added as directions sought in the same proceedings as started by that application notice.

62 In support of his submission Advocate Richardson referred us to various judgments made at different times in the litigation surrounding the TDT and the committal applications, where it has been assumed that there might be some broad privacy applicable to any application made at any time in the proceedings started in May 2010. This material did not, in our judgment, assist. We were not shown any judgment which had been given following argument on the scope or effect of the Private Hearing Orders.

63 Our conclusion about the effect of the Private Hearing Orders, means that we are satisfied that the application to amend the First Committal Application was bound to fail. The Appellant accepts that this Court should follow the decision of the Bailiff in *Jefcoate v Spread Trustee Company Ltd* (2013) Judgment 11/1013, at paragraph 52(l), that an amendment will not be allowed if the case introduced by the amendment has no realistic prospect of success. It also follows that the Second Committal Application must fail and should be struck out on Mr Akers' application as disclosing no reasonable grounds for bringing the application.

Amendment of the First Committal Application

64 In refusing the application for leave to amend the Lieutenant Bailiff observed that the character of the proceedings sought to be amended, namely proceedings seeking to commit a person to prison for contempt, was a relevant consideration pointing against allowing any amendment. At paragraph [22] of the First Judgment he explained that he thought that exercise of the Court's power to allow amendment of a contempt application should be approached with considerable caution, and that cases in which the power would be exercised would be relatively rare.

65 We agree that the nature of contempt proceedings may require a court to consider additional discretionary factors, including; (i) the personal, professional and financial impact of any amendment of the case on the alleged contemnor; (ii) the interests of justice in the pursuit of the amended allegation of contempt, particularly if the contempt process is not required to give effect to orders of the court but rather to vindicate the public interest in the system of justice in Guernsey; (iii) any private interest that the Applicant may have in the outcome of the contempt proceedings including any collateral purpose served by the contempt proceedings; and (iv) the explanation for the need to make the application for an amendment, including whether an earlier deliberate choice had been made not to pursue the amended case.

66 We also consider that it is not sufficient for the party seeking to amend to assert that the alleged contemnor can be compensated in costs: the test is more nuanced, as appears from the speech of Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220D-F. In his speech he made, among other points, the point that "*justice cannot always be measured in money*". The case was one where a late amendment was being sought; but nevertheless the substance of Lord Griffith's remark is of more general application and has particular resonance in the context of a contempt application.

67 However we are not satisfied that leave to amend contempt applications will necessarily be rare. We are also inclined to doubt whether, if there was a viable case of contempt based on the Private Hearing Orders, the new case was so fundamentally different from the original case so as to militate against amendment. We consider there is force in the submission that the Lieutenant Bailiff set himself an excessively high threshold.

68 If, therefore, there had been in the present case a viable allegation of contempt we consider that it would have been a finely balanced decision as to whether or not the application to amend should have been granted. The nature of the contempt alleged would have carried considerable weight in the balance between the various interests engaged (including the interests of justice). We do not however propose to perform a hypothetical exercise in giving weight to the various factors in order to arrive at a theoretical conclusion.

Striking out

69 The Appellant accepts that, absent any amendment, the First Committal Application was bound to be struck out.

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70 Our conclusion on the legal effect of the Private Hearing Orders means that the Second Committal Application should also have been struck out on the ground that it disclosed no reasonable ground for bringing the application.

Abuse

71 The fact that, as we have found, there is no viable case of contempt on the Second Contempt Application, renders it unnecessary for us to consider whether the Second Contempt Application was an abuse of the process of the Court. On the premise (contrary to our main conclusion) that there was a viable case of contempt, it appears to us that it would not have been appropriate to characterise the Second Committal Application as an abuse if the case could and should have been the subject of a successful application for leave to amend in the First Committal Application. The principles identified by this Court in *Rawlinson & Hunter Trustees S.A. v Investec Trust (Guernsey) Ltd* [2016] GLR 332 would have to be assessed having regard to counterfactual weighing of the factors we have identified in relation to the application to amend above.

Disposition

72 In the result we dismiss Mr Tchenguiz's appeals.