IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

C.I.C.A NO 28 OF 2017

ON APPEAL FROM FSD 54 OF 2009

BETWEEN:

THE INTERNATIONAL BANKING CORPORATION BSC (IN ADMINISTRATION)

Appellant

- AND -

AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

Respondent

BEFORE **The Hon John Martin QC, Justice of Appeal**
The Hon Sir George Newman, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

CERTIFICATE OF ORDER OF THE COURT

This appeal coming on for hearing on 17 April 2018 in the presence of leading counsel for the Appellant and counsel for the Respondent.

I **HEREBY CERTIFY** that an order was made as follows:

1. appeal allowed to the following extent -
   a. disclosure in electronic form of the witness statements and affidavits without limit to the Appellant being mentioned therein.
   b. disclosure in electronic form of the transcripts of all the proceedings in court.

2. In relation to each order there should be agreement reached by the parties as to the costs to be borne and any division thereof. In default of agreement as to the costs of the transcripts, the Appellant should provide US$75,000 which shall include the cost of providing the transcripts to the Appellant in electronic form and any necessary licensing of the copyright in them.
3. The Respondent must pay the costs of the appeal and the costs on the summons below.

Given under my hand and the Seal of the Court this 30th day of July 2018

COURT OF APPEAL
11/17
CAYMAN ISLANDS

REGISTRAR OF THE COURT OF APPEAL

CAYMAN ISLANDS COURT OF APPEAL

CICA Civil 28 of 2017
(FSD 54 of 2009)

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BEFORE: **The Hon John Martin QC, Justice of Appeal**
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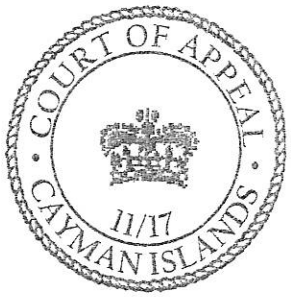
Appearances: **Mr. James Ramsden QC instructed by Mr. Ian Huskisson of Travers Thorp Alberga for Appellant**
Mr. Hector Robinson QC instructed by Mr. Christopher Levers of Mourant Ozannes for Respondent

Date of Hearing: **17 April 2018**

Date of Delivery: **30 July 2018**



JUDGMENT

NEWMAN JA:

1. The appellant, The International Banking Corporation BSC (in Administration), hereafter TIBC, not being a party to litigation proceeding in the Grand Court in the Cayman Islands, made an application, at the conclusion of the trial of the litigation, for leave to inspect and take copies of a number of categories of documents including witness statements, together with any documents attached to them that had been ordered to stand as evidence in chief. TIBC also applied for disclosure of documents read by the court in the course of the trial and in addition all transcripts made of the proceedings in open court and documents referred to on the transcripts of the witnesses cross examined in the

course of the trial. The application was made on the ground that the documents were to be treated as having entered the public domain and that the discretion of the court should be exercised in favour of disclosure unless it would prevent the court from doing justice in the proceedings continuing in the Grand Court.

2. The inherent jurisdiction of the Grand Court to order disclosure of documents which have been introduced into public proceedings has to an extent been the subject of specific provision in the ***Grand Court Rules*** (GCR and the Rules). As such the Rules clarify how the jurisdiction can be invoked but do not constitute limits on the scope of the jurisdiction. TIBC's application was framed in the summons it issued by reference to the documents specified in the GCR as being in the public domain, as well as by reference to the inherent jurisdiction and the general principle of open justice which treats documents put before the court for the purpose of being read in evidence as having entered the public domain. Its operation in this regard has been described as establishing a "*default position*".

3. The court was persuaded that TIBC's application should be treated as though its purpose and interest under the Rules was legitimate and should lead to limited disclosure, whereas the same purpose and interest was to be treated as illegitimate and outside the reach of the inherent jurisdiction and gave no right to any further disclosure. The steps in reasoning which led to this confused result must be followed in some detail.

4. The trial had continued for a year, presided over by the Honourable Anthony Smellie QC, Chief Justice (CJ). It was common ground that TIBC, although not a party to the action, had a legitimate interest and purpose in obtaining access to the evidence in the case. Its purpose included being able to use the evidence in foreign proceedings in which it was involved against one of the parties to the proceedings in the Grand Court. When TIBC issued its summons seeking disclosure the Chief Justice invited the respondent to the summons, Ahmad Hamad Algosaibi and Brothers Company ("AHAB") "*to consider what aspects of the evidence presented in the case should properly be disclosed to the administrator of TIBC, bearing in mind the important role of TIBC in the trial and the*

potentially legitimate interest the Administrator might have in getting access to the evidence in the trial although he is not a party to this action". The parties were encouraged by the Court to reach agreement on the limits which should be imposed on the breadth of the disclosure but an agreement could not be reached. As a result TIBC issued its application. The Court offered a further opportunity to the parties and adjourned the application to enable them to try again to reach an agreement. The attempt failed because "*as matters transpired, the extremes between the Administrator's sense of his entitlement to access under the rules of court and the open justice principle and AHAB's sense of their entitlement to exact undertakings, meant that no agreement was reached*" (Judgment paragraph 213). The reference to undertakings reflects an important aspect of the contest. One proposed undertaking permitted use in the foreign proceedings of the material disclosed on the court file but the second was designed to prevent all other material ordered to be disclosed being used for the same purpose.

5. When account is taken of the results below and election by TIBC to accept some of the conclusions reached by the judge the application has fallen for consideration in this court as follows.

   a. An application under Order 63 Rule 3 of the GCR and Practice Direction 1 of 2015 to inspect and take copies of documents that either appear or should appear on the Court file and an application under Order 38, rule 2(A) 12 of the GCR for leave to inspect and take copies of any witness statements, together with any documents attached to them, which had been directed to stand as evidence in chief. Disclosure was ordered of all non-sealed statements and affidavits on the court file which were directed to stand as evidence in chief at the trial limited to those in which reference is made to TIBC, but not including exhibits, annexes or schedules attached to or documents identified in, such witness statements and affidavits. Affidavits and witness statements which were deployed in interlocutory stages of the proceedings were excluded but that aspect of the order is not appealed.

   b. An application under the open justice principle for disclosure of all transcripts of the evidence of witnesses cross examined in the course of the trial not heard in

camera and documents referred to in the transcripts of the evidence of such witnesses.

c. In short the contest in this court has focused upon: (i) the limit imposed by the judge that only witness statements and affidavits in which reference is made to TIBC should be disclosed and that attachments or documents merely referred to should not be disclosed because the rules did not require them to be filed; and (ii) the refusal for disclosure of all transcripts of the cross examination of witnesses in the course of the trial and documents referred to in the transcripts.

6. AHAB's action was brought against a number of defendants, including Saad Investments Company Limited and Mr. Maan Al Sanea. It was based upon allegations of a massive fraud by the defendants, giving rise to claims for huge sums of money. In simple terms, TIBC's involvement was based upon allegations and counter allegations in connection with foreign exchange transactions conducted through The Money Exchange (a Saudi Arabian entity). AHAB have alleged that Mr. Al Sanea manipulated the Money Exchange so as to deceive, borrowed billions in the name of AHAB by the use of false signatures and opened false accounts in the name of AHAB by forging documents. TIBC's role in the events also included an allegation that it was incorporated by the use of false documents as a joint stock company owned by AHAB, whereas, in truth, it was a vehicle for Mr Al Sanea's fraud. Although not a party to the action in the Cayman Islands, TIBC is a claimant in proceedings it has brought in Saudi Arabia and Bahrain in connection with the same events. Having obtained judgment in Bahrain it is a significant creditor of AHAB but it has been unable to enforce the award. It is also being proceeded against by AHAB in a separate set of proceedings in Saudi Arabia. Interlocking actions involving claims and counterclaims arising out of the same or similar facts are commonly seen in the global pursuit of international commercial litigation and frequently arise in cases in which fraud is alleged. Such connected litigation between the same parties and others based on the same facts, in a number of foreign jurisdictions taking place at the same time, under different rules, offers opportunities for procedural advantages to be exploited but more particularly it can lead to inconsistent findings of facts being made by the different courts involved.

It is against this background that the purpose of TIBC's application under the Rules and the principle of open justice fell for consideration. Although the CJ has now delivered judgment dismissing AHAB's claims, this judgment considers the issues on the same basis as they were considered below, namely that the outcome of the proceedings was still at large.

8. The CJ reviewed and analysed the line of cases in which the entitlement of a third party to the disclosure of court documents has been considered. He identified principles which he considered should be applied to TIBC's application. He dealt first with the disclosure of the trial transcripts. It was noted that in the Cayman Islands there is no rule of court which requires a recording of the evidence or judgment to be made. The CJ regarded the absence of a provision, such as RSC Order 68 r.1 (1) in England and Wales (which made provision for an official shorthand note of evidence and the availability on request of transcripts of that note), as having a significant bearing on the correct outcome of the application under the open justice principle. He concluded that the terms of Practice Direction No.3 of 2017, which stipulates for the position in the Cayman Islands, presented a formidable barrier to intervention by the court because the parties were required in civil cases to make their own arrangements, at their expense, for the provision of these services. Unless the parties make an application by agreement to the court for the record to become the official record, the judge's notes are deemed to be the official record. In this instance the private arrangements for the transcript, which had been made, had not been the subject of an agreed application to the court that they should stand as the official record. An attempt by TIBC to have a direction made retrospectively failed because AHAB refused to give its consent and, in that event, the judge's notes were the official record. The notes comprised some 1700 pages, were in manuscript and were not a verbatim record. It is the case that in the Cayman Islands there is no rule which suggests that transcripts could be made available to third parties, whereas in England and Wales the rule provides that "*nothing in the rule requiring transcripts to be provided to the parties upon payment of a fee, should be construed as prohibiting the supply of transcripts to non-parties*". The CJ regarded the difference as critical and could see no

sufficient basis existed in the Cayman Islands, "*assuming the court had power to do so, to provide disclosure where the Administrator could have made his own arrangements*" and where, if an order was made, it would cut across the parties' contractual arrangements. It can be noted that apart from AHAB the parties were neutral on the issue.

9. As to the disclosure of documents other than the transcripts, prior to any application being made by TIBC, the CJ had recognised that, although TIBC was a non-party, it was likely that it had a legitimate right to obtain disclosure of a significant number of trial documents. It is clear from his judgment that he had in mind an entitlement under the Rules but could see little or no legitimacy for disclosure to be made under the principle of open justice. He expressed his conclusion as a general conclusion on the law as follows: "*...it will be in the rarest of private interest cases that it can be truly said that central to third party disclosure will be the purpose of the open justice principle*". Although the CJ stopped short of excluding all "*private interest cases*" from the reach of the open justice principle his settled view was that its application is normally confined to public interest cases. It seems that he accepted that the rules of court were but an expression of the open justice principle in operation but interpreted them as determinative of the reach of the principle in the specific area covered by the Rules and subject to principles borrowed from the rules which apply on discovery between parties to an action. It led him to conclude that the open justice principle "*is not meant to be an unruly charter for fishing expeditions in aid of possible third party proceedings*". He stated that TIBC's application was "*poised*" to become just that if disclosure was granted in the wide terms of the summons.

10. It is firmly established that the administration of justice in Cayman must comply with the principle of open justice. Since the decision of the Court of Appeal in England in ***R Guardian News and Media Ltd v City of Westminster Magistrates Court and another*** [2012] 3 WLR 1343 it has been clear that the starting point when applying the principle is that disclosure should prevail unless there are sufficiently powerful countervailing factors to prevent or limit its application (the so called default position). The principle of the default position exemplifies a fundamental distinction between the rules which apply to

parties seeking discovery in an action and the right of any member of the public to understand and scrutinize how a court is dealing with or has dealt with issues raised by an action. Whilst it is clear that in the ***Guardian*** case the ground for disclosure was framed by reference to the journalistic purpose "*...in stimulating informed debate about the way in which the justice system deals with suspected corruption and the system for extradition of British subjects to the USA"* and that Toulson LJ, who delivered the leading judgment, unhesitatingly concluded that the purpose should be assisted rather than impeded, the Court of Appeal was not suggesting that the principle was reserved for the scrutiny and understanding of cases involving public interest issues.

11. TIBC formulated its purpose for obtaining disclosure on the ground which the Chief Justice had recognised when the summons was issued, namely TIBC's close connection with the case and the "*important role*" of TIBC in the trial, as well as its interest derived from its current engagement in foreign proceedings against AHAB. It is obvious that the CJ was aware that TIBC wished to obtain the documents in order to assist it in the foreign litigation. The CJ characterised this as the interest of a private litigant, which did not merit the assistance of the court to the same degree as the pursuit of a journalistic purpose. This perception that TIBC deserved less by way of disclosure, because it was out to further its own commercial interests in the foreign litigation, dominated his approach. It led him to conclude that the exercise of power by the court was substantially defined and exclusively within the reach of the Grand Court Rules, because the circumstances lacked a public interest content which would have placed the claim within the reach of the open justice principle. Although he must have realised that disclosure would assist TIBC in the foreign proceedings, he saw it as capable of giving rise to *"... an unfair juridical advantage in the foreign proceedings*". The CJ was very concerned that since normally no disclosure was ordered in the foreign proceedings the extent of the disclosure being sought would generate unfairness. He concluded that the way to restrict the extent of the disclosure was to apply principles governing discovery applications in trial proceedings. For example the requirement for specificity and a prohibition on "*fishing applications*". I can see little room for the applicability of the rule that a lack of specificity and the undue breadth of a request justify refusal on the ground that it is "*a*

fishing expedition". It is clearly inconsistent with the default position. The origins of the default position include the acceptance that the court need not engage in painstakingly identifying documents which have come into the public domain. The concept of fishing does not appear to be in place where the material which is being sought has already been deployed in public proceedings and where the motive for obtaining the material has been expressly declared. It could more accurately be described as the gathering of documents already disclosed and in the public domain. Yet further, when it is obvious that the applicant could have arranged for a record to be taken of the entire court proceedings an applicant should not be penalized by the imposition of restrictions because steps could have been taken to gather the material earlier.

12. The CJ's reasons for concluding that the orders sought could redound "*to an unfair advantage*" in the foreign courts can be traced to the parties' arguments on the availability of disclosure in the foreign proceedings. Leading counsel for TIBC submitted that the grant of the request for disclosure could be seen as analogous to the grant of freezing and ancillary disclosure orders in aid of foreign proceedings, where relief could be granted even where equivalent relief might not be available from the foreign court, and factors such as comity and the need to stop international fraud were relevant. The CJ firmly dismissed the arguments as "*overplayed*", accepting instead AHAB's contention, which the CJ described as "*well founded in notions of fairness and reciprocity*", that the disclosure sought would impose an unfair juridical advantage on AHAB which would not be able to obtain similar disclosure orders against TIBC in the foreign courts. He remarked that because the relative merits or demerits of TIBC's actions could not be determined there was no basis upon which he could determine whether the grant of the application could be seen as "*helpful or obstructive*" in the foreign proceedings. For example, he observed, there had been no request from the foreign courts for assistance (paragraph 205). Surprisingly, the CJ nevertheless concluded in paragraph 207 as follows: "*...this court could hardly expect the foreign courts to have wished to see such wide-ranging orders for disclosure made as those sought here by the Administrator in aid of their proceedings, while knowing that they could not make orders themselves and so could neither avail AHAB of similar orders nor reciprocate in event of a request for*

assistance for disclosure emanating from this court". It is not clear to me in what circumstances it was being envisaged that the lack of reciprocity and the suggested consequent unfair juridical advantage gained by TIBC would be seen as such and with displeasure by the foreign courts. It is not clear to me how disclosure ordered in the Cayman Islands could interfere with the foreign proceedings as opposed to affecting the balance of interest between TIBC and AHAB in the resolution of their disputes, wherever that may take place. The powers of the Grand Court must be exercised against parties to litigation in the Cayman Islands in furtherance of justice in proceedings in the Cayman Islands. The impact of the order for disclosure will fall upon AHAB, not the foreign court, and the Grand Court's obligation to apply the principle of open justice should not be curtailed in an attempt to protect AHAB from any possible consequences which might affect it in foreign proceedings or elsewhere. AHAB submitted itself to the jurisdiction of the Grand Court where the public, including non-parties to litigation in which they have a direct interest, are entitled to be informed of the content of the proceedings and of the manner in which the court addresses the participation of litigants in multiple suits in foreign litigation arising out of the same facts.

13. The corollary of the default position places the burden on the party resisting disclosure to establish why it should not take place. The process for the court is fact sensitive and involves weighing of all the factors. It is likely to start with an examination of the threshold ground which has been advanced for disclosure. It is clear that a "*serious journalistic purpose*" will provide a sure threshold and fulfillment of the purpose could well require full and complete disclosure. However I can see no basis for a purpose, not being a "*serious journalistic purpose*", which has been advanced by a member of the public and has been recognised as legitimate, being treated by reason of the character of the purpose, as having a lesser entitlement to the harvest from the disclosure than the harvest to which the pursuit of a journalistic purpose may give rise. The right of the public to open justice can be expressed from any public quarter or person. A purpose must be identified because the court must reasonably and proportionately respond to the application and the purpose will point to the character and the weight of any countervailing factors.

14. This case illustrates some of the difficulties which can arise. The volume of disclosure from a trial which has proceeded for one year, involving a number of parties and counsel and where the same evidence is likely to appear in numerous parts of the record, will require particular attention. The court must be able to see and understand the connection between the interest and purpose of the non-party and the rationale for the disclosure being sought. Proportionality will be in play. Matters of weight are likely to include consideration as to how clearly an interest has been demonstrated. An application may be driven by a number of mixed motives and purposes. The presence of a personal and private interest in the issue may be relevant and care will need to be taken in assessing the strength of each element. For example the principle of public access to the courts in a democracy means that the public are entitled to see how the system grapples with issues of a public interest, as well as how it dispenses justice generally. The press will regularly wish to exercise the right but there is no reason why a case advanced for the press should be categorised as one being taken exclusively in the public interest without other interests being served. The interests of the press acting as "*the eyes and ears of the general public*" (see Sir John Donaldson MR in ***Attorney General v Guardian Newspapers (No2)*** [1990] 1 AC109, 183) can be deployed for mixed motives, which frequently involve examining a matter of general public interest as well as promoting the commercial and political ends and purposes of the organ itself.

15. In the present case the appellant was categorised as a "*private litigant*" and was treated as probably outside the reach of the inherent jurisdiction whose application for disclosure was weaker than might have been the case had the application come from the press. The CJ put the matter thus:

> "*Whilst the court may have the authority in the absence of rules to so direct, no basis is shown for such an approach by the application of the open justice principle in aid of third party discovery. Without meaning to be definitive, such a basis could be shown to exist, for example, if there was a*

clear need to assist the press in the fulfillment of its duty and responsibility to inform the public". (Paragraph 194)

THE WITNESS STATEMENTS ISSUE

16. TIBC's application for the witness statements and any documents attached to them that had been directed to stand as evidence in chief was made under the GCR (Rule 38). It succeeded in part. The CJ restricted the order to witness statements in which TIBC was mentioned. He refused the application for the attachments principally by reference to the case of ***GIO Personal Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd and others*** [1999] 1 WLR 983. I agree with the submission that the judge placed too much reliance on this case and allowed it to influence his general conclusion on the restrictions which should be placed on disclosure. The case formed the basis for his refusal to order disclosure of the attachments. It will be necessary to consider whether the witness statements, when read with other disclosed material, can be regarded as sufficient for a full and adequate understanding of the content of the proceedings. I can see no reason why the statements which do not mention TIBC should not be disclosed. If there was an underlying concern about the volume of documents which would be involved it is likely to be outweighed by the potential value of the statements and their relevance to TIBC notwithstanding the absence of a reference to it. The production of the witness statements will not involve an onerous task because all the documents in the case were uploaded onto a database that can be searched for the witness statements relatively easily and quickly and result in the statements being made available in electronic form.

THE TRANSCRIPTS

17. As to the transcripts which had been prepared pursuant to a contract between the parties, the CJ observed: "*They have not been certified or ordered to be the official record of the proceedings and so do not physically form part of the record of the proceedings. In the circumstances, in the absence of any good public interest reason for the court to cut across the contractual arrangements without the consent of the parties (which in AHAB's*

case is not forthcoming) in order to provide the transcripts to a private non-party, I consider it would be inappropriate to do so". The practice of parties in substantial litigation agreeing to pay for the costs of a transcript is not uncommon. It is regularly adopted so that the best possible record is created and can be available throughout the trial to assist the judge and the parties. It would be unfortunate if the adoption of this practice alone prevented or hindered the ability of the public or any other legitimate applicant from learning what happened in litigation. Lord Woolf suggested that a broad principled approach was as follows: "*As a matter of basic principle the starting point should be that practice adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings.*" (***Barings Plc v Coopers & Lybrand*** [2000] 3All E R 910 at [43]). The practice of producing a transcript is a good example of what Lord Woolf had in mind. But it is to be noted that TIBC's request also extended to documents referred on the transcripts of the evidence of witnesses cross examined. Even if disclosure of the transcripts should have been ordered it will be necessary to consider whether the request for documents referred to in the transcripts is reasonable and proportionate to the purpose of granting TIBC with an adequate understanding of the proceedings.

THE PRINCIPAL CASES

18. The Chief Justice reviewed the cases with great care. He highlighted the important trilogy of ***GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd and others*** [1999] 1WLR 983, ***Barings Plc (in liquidation) v Coopers & Lybrand and others*** [2000] 3All E R 910 and ***Guardian News***. In ***Guardian News*** Lord Justice Toulson (as he then was) rejected the contention that *"... the open justice principle is satisfied if the proceedings are held in public and reporting of the proceedings is permitted"* because it was *"...based upon too narrow a view of the purpose of the open justice principle*". It should be noted that for much of the trial TIBC took the opportunity provided by the trial being in public and had a person present in court to listen and take notes. Toulson LJ explained the rationale:

"The purpose is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinize the justice system of which the courts are the administrators".

19. This observation can be seen to have been prompted by a statement by Viscount Haldane in ***Scott v Scott*** [1913] AC 417 to the effect that there are exceptions to the principle of open justice but they had to be justified by some even more important principle. Toulson LJ echoed Viscount Haldane stating that *"...the most common example occurs when the circumstances are such that openness would put at risk the achievement of justice which is the very purpose of the proceedings"*. (***Guardian News*** paragraph 4.) In the next paragraph the Lord Justice observed: "*While the broad principle and its objective are unquestionable, its practical application may need reconsideration from time to time to take account of the way that society and the courts work. Unsurprisingly there may be differences of view about such matters.*" (Paragraph 5).

20. It is a truism that the strength of the common law system is that it is flexible and can take account of changes in the way society works. There is continuing requirement for an examination to be made of the way in which the court works and handles the changing conditions and demands to which litigation gives rise. Recognising and meeting challenges to the administration of justice as they evolve is critical to the quality of justice which can be delivered. Previous case law can provide guidance but there are hazards in regarding the approach taken in a previous case as a strong determining influence in the conclusion to be reached in a later case. The facts in one case are rarely on all fours with those present in another and where the law calls for an intensive, fact sensitive inquiry into any evolving circumstances which may have created a need for change, it is the principle which can be extracted from the earlier cases which is of value.

21. The CJ interpreted Toulson LJ's citation of principle and comment given in connection with the case of ***GIO*** as being approval of the case *"...as a leading example of the open justice principle being applied to suit the changing needs of society"*. (Paragraph 166). To a certain degree it did illuminate the operation of the principle but as more recently

observed since ***Guardian News*** in ***NAB v Serco Ltd and another*** [2014] EWHC 1225 the law has moved on since ***GIO***. The CJ summarised the facts in ***GIO***: *"...an insurance company sought access to documents in a case which did not directly concern it, because it was facing a claim giving rise to similar issues...The applicants wanted sight of the evidence filed in the first action in the hope that it would strengthen their position in the second action. Issues about informing the public regarding matters of general public importance did not arise."*

22. At first instance the judge had stated: " *In my judgment this application has nothing whatever to do with the public interest: it is to do with the commercial interests of FAI and references to the confessed desire to understand the nature of the case being put forward are mere window dressing.*" There is an obvious similarity between the approach of the CJ and the first instance judge in ***GIO***. The argument condemned as "*window dressing*" had been that "*any member of the public*" was entitled to be assisted by the disclosure so as to follow and understand the nature of the case. As such the argument encapsulated the purpose of the open justice principle. But FAI did not present itself as any member of the public and no more. It advanced its claim as a member of the public, having a particular interest as a party to a reinsurance contract which had been negotiated by the same broker, alleged in the ***GIO*** action to have been guilty of misrepresentation and non-disclosure. The value in obtaining the evidence was put no higher by FAI than being "*...likely to be highly material regarding the course of conduct...* " on the part of the broker who had negotiated the FAI contract. As the CJ had already recognised TIBC were not looking at a likelihood of evidence being available from a case involving a separate commercial transaction but could point with certainty that evidence was available which directly affected it. Further the evidence had been taken in proceedings in the Grand Court where its role in the affairs of the parties to the litigation had been directly under consideration, where evidence had been given to the Court about TIBC's role by AHAB and others and where its role and its relationship would be under consideration in three separate contentious actions involving the same parties. FAI had no role in the proceedings before Timothy Walker J. and a speculative hope that evidence about the broker's conduct might assist its action. That said it seems

likely that under the current law, which has developed since the date of ***GIO***, FAI's application would be regarded as legitimate.

23. In the Court of Appeal, Potter LJ concluded that the written opening speech supplied to and read by the judge under the then new rules should be supplied, if requested, to a member of the press or the public but he refused FAI sight of the evidence because the reason for the request was an attempt to strengthen FAI's position in the second action.

24. In ***GIO*** the request for documents forming part of the evidence, including witness statements (and documents referred to in the witness statements) which had been referred to in open court but not read out, was made pursuant to RSC Ord.38 R.2A. (12) on the basis that the witness statements had been ordered to stand as evidence in chief. Potter LJ considered that the issue raised by the application fell to be answered as a matter of construction of Order 38 and his conclusion was that "*...historically there had been no right, and that currently there was no provision which enabled a member of the public to see, examine or copy a document on the basis that it had been referred to in court or read by the judge.*"

25. Potter LJ did add that if the statements had documents annexed or attached to them then it "*might well be successfully argued that such documents form part of the witness statement*". Although the case of ***In re Hinchcliffe*** [1895] 1 Ch.17 had not been cited to him his observation was consistent with the rationale in that case.

26. In ***Hinchcliffe*** documents (including an opinion of counsel) had been referred to in an affidavit and given an exhibit reference but in accordance with the "*convenience*" followed at the time, the exhibit was not lodged in the Master's office. The court saw the refusal to disclose the exhibit as unmeritorious because the maker of the affidavit had chosen, by reference to the document, "*...to induce the court to act in manner which might affect and may prejudice the lunatic's rights*". The result reflected the need for fairness, which could only be achieved by full disclosure to the interested party. It did not require a procedural rule to found the principle that irrespective of any question as to

discovery, property or privilege, if a document is made an exhibit to an affidavit, any person who has the right to inspect and take copies of the affidavit has a similar right as to documents referred to in it. Documents referred to in witness statements should be regarded as part of the statements and subject to countervailing considerations, disclosed so as to further the ability of the public and a person with a legitimate interest to know *"...what is happening in the course of the proceedings"* (See Lord Woolf in ***Barings v Coopers & Lybrand*** [2000] 3 All E R 910 at [43]). It may be arguable that in certain circumstances a proper understanding of the transcripts in a case might require documents which have been the subject of cross examination to be disclosed. Lord Woolf was not confining himself to changes embodied in new rules passed to reduce cost and increase efficiency: it included steps adopted by the parties. Steps adopted by the parties have an equal capability to conceal facts from persons entitled to be informed of all the facts and thus can lead to error and unfairness. A clear example of a practice, adopted by parties to litigation, which operates to provide a true record and is designed to avoid error and uncertainty, is the use of a privately commissioned transcript of the evidence. I can see no reason why Lord Woolf's basic principle should not apply to transcripts, subject to practical questions and the issue of cost being resolved. Clearly the cost of the provision of a transcript must be taken into account but I can see little or no justification for refusal on the ground that the applicant could have made his own arrangements and having failed to do so cannot seek an order from the court.

SUMMARY

27. Thus far it seems to me that TIBC did have a legitimate entitlement to have access to all the witness statements directed to stand as evidence in chief, without the limitation imposed by the judge that TIBC had to be mentioned in the witness statement.

28. Thus far it seems to me that TIBC did have a legitimate entitlement to have access to the record made of the evidence given in open court proceedings.

29. In paragraph 4 of its written submissions to the CJ, AHAB submitted that TIBC's application was: *"...in effect an application for third party disclosure in aid of foreign*

proceedings in circumstances where there was no reciprocal or automatic duty of disclosure in those foreign proceedings". This submission found favour with the CJ and probably drove his conclusion that any order for disclosure which he made had to be significantly restricted. Equally it can be seen that there was an express invitation to the CJ "*to follow and apply the reasoning in the case of* ***GIO***" and to refuse access to documents in the court bundles and the parties' discovery (see paragraph 24 of the written submissions for the Chief Justice). In this regard the submissions to a large degree failed. The judge did exclude interlocutory stages of the proceedings from the disclosure and TIBC has not appealed that order. Underlying AHAB's approach was its objection to the prospect that the disclosed documents could be used in the three sets of foreign proceedings. The attempts at agreement failed because AHAB demanded an undertaking that the documents would not be used in the foreign proceedings. The intention of TIBC to use the documents for the purpose of the foreign proceedings could not have been in doubt. This intention seems to have been the driving influence which affected the judge's whole approach to the application. The level of access which was ordered, described by the CJ as *"... the level of access that a third party, with a proper interest such as the Administrator's, might reasonably expect to obtain with the assistance of the court for a proper understanding of the administration of justice in the case*", meant that the CJ did not see the need for an undertaking restricting use in the foreign proceedings. His conclusion that use of the documents in the foreign proceedings could create unfairness underpinned his restriction in connection with documents identified in or attached to the skeleton submissions and attachments to witness statements and affidavits. The CJ endeavoured to encourage reciprocity but as he graphically recited in paragraph 213 of his judgment: "*As matters transpired, the extremes between the Administrator's sense of his entitlement to access under the rules of court and the open justice principle and AHAB's sense of their entitlement to exact undertakings, meant that no agreement was reached.*" For completeness and in fairness to the CJ's obvious desire to find a balanced solution, he invited the Administrator to give consideration to making specific requests rather than carrying out a "*fishing*" exercise and to give specific disclosure to AHAB. His efforts failed and he therefore concluded that what was requested would *"...be burdensome and wholly disproportionate to what could be reasonably required for the*

due observance of the open justice principle in this case. Also for that reason and because of the unfair use to which it could be put in proceedings abroad, I refuse the application for the disclosure of the AHAB discovery." (Judgment paragraph 229).

30. I accept the submission of the appellant that the correct approach is to regard the nature of the interest advanced by an applicant, whether it is to be seen as a purely private interest or a public interest or a mixed purpose interest, as merely a factor to be weighed in the exercise of the court's discretion. That said, if the court fails to properly identify the interest, it is likely that it will fall into error when carrying out the weighing exercise. In my judgment the CJ was wrong to conclude that TIBC's status should be equated to that of any person, not a party to the litigation, who had asserted an interest in the litigation. He erred in his approach to the application of the open justice principle and precluded from its reach applications by members of the public who had a personal interest in the subject matter of proceedings, save in the "*rarest of cases*".

31. TIBC are entitled to have an understanding of the case which has been advanced in the trial and to understand the allegations which have been advanced in connection with its role in the events. As I have indicated in paragraphs 27 and 28 above, TIBC has a legitimate entitlement to the witness statements and to the transcripts of the proceedings. It will be able to consider the judgment of the CJ with the assistance of a complete account of the evidence recorded on the transcripts and in witness statements and in addition with the assistance of access to the court bundle of documents. However, it seems to me that to grant access to attachments and documents referred to in witness statements and to documents referred to on the transcripts of witnesses cross examined will be likely to give rise to a large measure of duplication and repetition; and I am satisfied that without them TIBC will have an adequate understanding of what is relevant to the foreign proceedings. I would accordingly decline to order production of documents referred to in the witness statements or transcripts.

CONCLUSION

32. For the reasons given above I am satisfied that this court should exercise its discretion and should allow the appeal to the following extent.

33. I would order:

a. disclosure in electronic form of the witness statements and affidavits without limit to TIBC being mentioned therein.

b. disclosure in electronic form of the transcripts of all the proceedings in court.

34. In relation to each order there should be agreement reached by the parties as to the costs to be borne and any division thereof. The court understands that the copyright in the text of the transcripts is owned by the parties and that each contributed US$500,000. In default of agreement as to the costs of the transcripts, TIBC should provide US $75,000 which shall include the cost of providing the transcripts to TIBC in electronic form and any necessary licensing of the copyright in them. As to the documents at (a) above and documents on the court file disclosure shall follow the CJ's Order dated 7 September 2017 at paragraphs 2, 3, 4 and 5.

35. AHAB must pay the costs of the appeal and the costs on the summons below. For the avoidance of doubt TIBC shall pay the costs of disclosure and compliance with paragraphs 2, 3, 4 and 5 of the Order dated 7 September 2017.

MARTIN JA: I agree

FIELD JA: I agree