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Case Nos: APPEAL NO: CH-2020-000212
APPEAL NO: CH-2020-000295
APPEAL NO: CH-2020-000299

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HIS HONOUR JUDGE HELLMAN

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 08/06/2021

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

(1) CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED
(2) YIANIS HOTELS LIMITED
(3) OCTAGON OVERSEAS LIMITED
(4) YFSCR LIMITED

Claimants

- and -

ALAN COATES

Defendant

- and -

CIRCUS APARTMENTS LIMITED

Intervenor

- -
- -

Charles Béar QC and Nik Yeo (instructed by **Freeths LLP**) for the **Claimants**
Guy Vassall-Adams QC and Jonathan McNae (instructed by **Kennedys Law LLP**) for the **Defendant**
Philip Rainey QC and Greg Callus (instructed by Norton Rose Fulbright LLP) for the Intervenor

Hearing dates: 20, 21 and 22 April 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MICHAEL GREEN

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10.30am on 8 June 2021

Mr Justice Michael Green :

A. INTRODUCTION

1. These are appeals from two Orders of His Honour Judge Hellman (the **Judge**) sitting in the Central London County Court. Those two Orders were case management orders concerning proposed amendments to the Defence and the establishment of a confidentiality club. While that may, on the face of it, look like a fairly straightforward set of issues, the context is a bitter and long-running feud between the owners/landlords, tenants and statutory manager of a large residential estate in Canary Wharf, Docklands, London E14, called Canary Riverside. This is but one small battle within a war that has been fought in many different proceedings. There is a long and complicated procedural history which I will try to disentangle. I say at the outset, however, that it is important not to lose sight of the fact that these appeals concern case management decisions and, even though much is at stake and the hearing took 3 days, a sense of proportion must prevail.

2. Canary Riverside is a mixed-use development comprising various blocks that contain some 325 residential flats (45 of which are short term serviced apartments), a hotel, health club, car park and various restaurants, commercial premises together with some shared communal spaces and grounds. The Claimant companies are the freeholders and long leaseholders of Canary Riverside. In accordance with the direction of Mann J on 2 February 2021, the Claimants will collectively be referred to as "**CREM**". Until October 2016, the estate was managed by Marathon Estates Limited (**Marathon**), a company incorporated by CREM for that purpose.

3. The Defendant, Mr Alan Coates was appointed on 1 October 2016 as statutory manager of the estate by the First-tier Tribunal (Property Chamber) (**FTT**) in exercise of its powers under s.24 of the Landlord and Tenant Act 1987 (the **1987 Act**). He remained as the statutory manager until his agreed discharge and retirement in September 2019.

4. The intervenor, Circus Apartments Limited (**Circus**), is the tenant from CREM (until 21 November 2018, and then from Riverside CREM 3 Limited) of the self-contained block of 45 serviced apartments on the estate. It shares certain services on the estate but CREM says that Circus is a commercial tenant, not a residential tenant, and that its apartments are not part of the estate that was within the control of the statutory manager.

5. The claim within which these appeals arise is concerned with disclosure. It is common ground that as part of a settlement in relation to a hearing before the FTT in July 2018, Mr Coates contractually agreed to provide disclosure of two categories of documents to CREM. Somewhat oddly this agreement was contained in a Recital to an Order of the FTT dated 18 July 2018. As it is central to all the issues in dispute on these appeals, I set out here the wording of the recitals:

"**AND UPON** the Applicant[1] agreeing to, by 21 September 2018, disclose copies of any communication between any two of the following categories of person

(i) him (including by any employee of the HML group[2], agent or solicitors);

(ii) Bruce Ritchie[3] (whether by himself or by agent or employee of Residential Land Ltd or Circus Apartments Ltd);

(iii) Norton Rose Fulbright LLP (including any officer, member or employee).

AND UPON the Applicant agreeing to, by 21 September 2018, disclose copies of any communication between any two of the following categories of person

(i) him (including by any employee of the HML group, agent or solicitors);

(ii) Angela Jezard[4];

(iii) any email account operated by or on behalf of the Residents Association;

insofar as it relates to any discussion of or plan to acquire the proprietary interests of either of the First or Second Respondents (whether by way of acquisition order under the Landlord and Tenant Act 1987 or by other means of enfranchisement) or any issue of funding (whether of litigation or of any such acquisition) or includes the name "Christodoulou".

This process must be at no cost to the leaseholders."

6. By these proceedings CREM is seeking to enforce the agreement contained within the recitals (the **Disclosure Agreement**). They are claiming specific performance of the Disclosure Agreement because they say that Mr Coates has not complied with his obligations within it.

7. Mr Coates has put in a Defence but he admits the Disclosure Agreement. For reasons explained below, in the run-up to a hearing before the Judge in December 2019, Mr Coates admitted that he was in breach of the Disclosure Agreement. By an order dated 9 December 2019, the Judge ordered Mr Coates to search for the documents within the two categories set out above. However he was not ordered to disclose any documents that he found on the search because by then it had been appreciated that non-parties to the Disclosure Agreement may be affected by any actual disclosure to CREM. In particular, Circus and the residential tenants may wish to object to disclosure on the

[1] This was Mr Coates.
[2] Mr Coates' employer at the time.
[3] Mr Ritchie is the owner of Residential Land Ltd and part owner of Circus. Residential Land Ltd manages the Circus apartments for Circus.
[4] Ms Jezard is the partner of one of the residential tenants in the estate and active within the Residents' Association.

basis that they have rights of confidentiality or privilege against such disclosure. Therefore a mechanism was set out in the order for Mr Coates to give notice to third parties "*with a potential interest in asserting rights in relation to the documents located by Search 1 and Search 2 that the Defendant is contractually required to produce copies of those documents to* [CREM]" and to give them the opportunity to object to disclosure.

8. Mr Coates found some 9000 documents. Circus objected to their disclosure. On 23 March 2020, the Judge permitted Circus to intervene in these proceedings. CREM applied to set aside that order but abandoned that application at the hearing on 7 August 2020.

9. The Judge made an order on 7 August 2020 that by paragraph 14 set up a "*confidentiality club*" whereby the documents in respect of which Circus is claiming a right of confidentiality would be provided to CREM's solicitors, Freeths LLP - not to those who are conducting this litigation on behalf of CREM but to other solicitors within the firm who would be bound to keep the contents of the documents confidential and undisclosed to anyone else. Circus appeals that order. On 9 November 2020, Mann J granted permission to appeal.

10. On 7 October 2020, the Judge heard an application by Mr Coates to amend his Defence. In his written reserved Judgment handed down on 30 October 2020, the Judge allowed some amendments and disallowed others. The two sets of proposed amendments that are subject to this appeal have been called the **"blue amendments**" and the **"purple amendments**".

    (1) The blue amendments sought to introduce some contractual defences based on what Mr Coates is now saying is the proper construction of the Disclosure Agreement. The Judge allowed these amendments.

    (2) The purple amendments concerned the attempted introduction of a "clean hands" defence. The Judge disallowed these amendments.

11. The Judge gave Mr Coates permission to appeal on the purple amendments and CREM on the blue amendments. CREM were arguing before the Judge and before me that both sets of amendments were an abuse of process.

12. On 2 February 2021 Mann J gave directions in relation to the hearing of these appeals. He ordered that the three appeals should be heard together, with a provisional direction that the amendments appeals be heard first with Circus' appeal following immediately thereafter. In the reasons for his order of 9 November 2020 whereby Circus was given permission to appeal on the confidentiality club order, Mann J said:

    "The concept of class confidence (if it exists) should be argued on the appeal."

13. Pursuant to that indication, Circus and CREM did argue as to the existence of the concept and Circus' claim to class confidence on Circus' appeal, even though it was not technically part of the appeal from the Judge's order as to the confidentiality club. Neither party objected to me deciding this issue. There may be a debate as to the status of my decision in that respect, in particular whether it is a first instance decision or an

appeal in part by way of rehearing, but I do propose to decide that issue in accordance with Mann J's suggestion that I do.

14. So to summarise the matters before me and the order in which I will consider them:

(1) The Amendments Appeals:

(i) Abuse of Process - CREM's appeals against the Judge's finding that both the blue and purple amendments were not an abuse of process;

(ii) Blue amendments – CREM's appeal against the Judge's grant of permission to amend;

(iii) Purple amendments – Mr Coates' appeal against the Judge's refusal of permission to amend;

(2) Circus' Appeal:

(i) Class confidentiality – whether Circus has a claim to class confidentiality in relation to the documents that Mr Coates agreed to disclose in the first category of the Disclosure Agreement;

(ii) Confidentiality club – whether the Judge was right to have made the confidentiality club order.

15. Before embarking on those issues, it is necessary to set out more detail as to the factual and procedural background.

B. FACTUAL AND PROCEDURAL BACKGROUND

(i) The s.24 Management Order

16. For some years, there had been serious dissatisfaction by the residential tenants with the management of the estate and in particular the service charges that they were obliged to pay. After the service of the requisite statutory notices under the 1987 Act, some of the tenants applied to the FTT under s.24 of the 1987 Act for a statutory manager to be appointed in place of Marathon. The application was led by Ms Jezard, not herself a residential tenant but living with her partner who is. They proposed Mr Coates as statutory manager. Mr Coates was then an employee and director of HML Andertons Limited, which, in September 2017, became HML PM Limited (**HML**). Mr Coates is an experienced property manager and this was his third appointment as a s.24 statutory manager.

17. By s.24 of the 1987 Act, the FTT can appoint a manager "*to carry out* [management functions] *in relation to any premises to which this Part applies*", if the FTT is satisfied:

> "(i) that any relevant person[5] either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them…, and
>
> …
>
> (iii) that it is just and convenient to make the order in all the circumstances of the case."

By s.24(4) of the 1987 Act, the management order may

> "make provision with respect to-
>
> (a) such matters relating to the exercise by the manager of his functions under the order, and
>
> (b) such incidental or ancillary matters,
>
> as the [FTT] thinks fit; and, on any subsequent application made for the purpose by the manager, the [FTT] may give him directions with respect to any such matters."

And ss.24(5) and (6) spell out in more detail the powers and functions that can be granted to the manager including that the "*rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager*".

18. It is also important context that Part III of the 1987 Act provides for the compulsory acquisition by qualifying tenants of their landlord's interest. An application to the court can only be made if two thirds of qualifying tenants join together to make such an application. One of the conditions for making such an acquisition order under s.29(3) of the 1987 Act is that a statutory manager had been appointed in respect of the premises for a period of at least 2 years.

19. CREM has been convinced that the appointment of Mr Coates is just the precursor to an application by the residential tenants to acquire their interest in the estate. Furthermore, CREM believes that Mr Coates has not been acting impartially as between CREM and the tenants, including Circus, and instead was siding with them in order to assist with their anticipated application to oust CREM and acquire the freehold. This is really what is behind all the various pieces of litigation between the parties before me and others, as I will come on to describe.

20. The FTT (Ms A. Hamilton-Farey and Mr L. Jarero) heard the tenants' application in May 2016 and handed down their decision on 5 August 2016. In the bundle, there is only a draft management order appointing Mr Coates as the statutory manager but it is common ground that the order was made in those terms. In its written decision the FTT

[5] Defined in s.24(2ZA) of the 1987 Act as including a person on whom a notice under s.22 of the 1987 Act has been served. CREM was such a person.

was highly critical of CREM, as it had to be in order to find that the statutory test for the appointment of a manager was met.

21. Mr Coates was appointed for a period of three years commencing on 1 October 2016. Before his appointment came into force, CREM sought to have the decision reviewed by the FTT. CREM also sought a stay of the management order and permission to appeal. The FTT did review and slightly amend its decision on 15 September 2016 but the draft management order came into force on 1 October 2016. CREM's applications for a stay and permission to appeal were refused by the FTT. Renewed applications before the Upper Tribunal also failed. I understand that CREM applied for judicial review of the FTT's and Upper Tribunal's decisions but Lavender J refused them permission.

(ii) Further litigation between the parties

22. Immediately after his appointment took effect, on 4 October 2016 Mr Coates began proceedings against CREM to secure their compliance with the management order. An order had been made *ex parte* restraining CREM from changing locks to the premises, removing any property and interfering with the manager's exercise of his functions under the management order. However on 18 April 2017, HHJ Walden-Smith, sitting as a deputy High Court Judge, allowed CREM's appeal, largely because the application had been made in the wrong court. Mr Coates should have applied to the FTT which retains a supervisory jurisdiction over the statutory manager.

23. A dispute had arisen at the same time in late 2016 concerning CREM's access to the estate as they had handed over effective control of access to Mr Coates and he had blocked CREM from entering the estate. CREM began proceedings against Mr Coates in the High Court but by 16 December 2016, the matter of access had been resolved by consent. The balance of those proceedings was transferred to the Central London County Court.

24. CREM applied to amend their claim to seek a declaration that Mr Coates was not acting fairly and impartially in his role as statutory manager. By an order of Mr Recorder Lawrence Cohen QC dated 22 September 2017, CREM was given permission to amend and Mr Coates was ordered to provide standard disclosure. Mr Coates did not give such disclosure. Instead he applied to strike out the amendments.

25. The matter came before HHJ Gerald on 22 January 2018 but by that time it appears that Mr Coates had conceded most of CREM's claims. Mr Coates was ordered to pay CREM's costs to date. HHJ Gerald was of the provisional view that the continuation of the claim for a declaration as to the independence and impartiality of Mr Coates was pointless and that, if CREM wished to pursue this, they should more properly do so by applying back to the FTT to seek to vary or discharge the management order. However, CREM were insisting that their claim for a declaration should proceed in the County Court, largely because they said that the FTT was an inferior court of record and it did not have the same procedural powers, in particular in relation to disclosure, that the County Court had. HHJ Gerald therefore adjourned his and the parties' consideration of that issue to a later date.

26. The matter was reconsidered in May 2018 and, by his order dated 9 May 2018, HHJ Gerald stayed the proceedings on the basis that the declaration that CREM were seeking

"*is of no use to anyone at all but will cost a small fortune to litigate and use an awful lot of court time for that purpose*". He also ordered CREM to pay Mr Coates' costs from the January 2018 hearing.

(iii) The Disclosure Agreement

27. Attention was then turned back to the FTT to which Mr Coates and CREM had applied to vary the management order. There was a hearing before the FTT (Judge Vance and Mr Jarero) over three days on 16 to 18 July 2018 which resulted in agreed variations to the management order. The Order dated 18 July 2018 contains in its recitals the Disclosure Agreement as set out above. The FTT gave certain directions concerning the future management of the various disputes between the parties. There is a transcript of this hearing which is relied upon for the purposes of the blue amendments and I will consider it when I deal with that part of the amendment appeal.

28. I should add that prior to the 18 July 2018 Order, on 20 March 2018, Mr Coates' laptop was stolen from his house. Nothing else was apparently stolen and it appears to have been a targeted theft. This was reported to the police. Mr Coates had stored documents on his laptop relating to his role as the manager of the estate. However, over a year later, certain documents derived from the laptop were sent to the parties' solicitors. These were said to be from a "Mr Smith" which was claimed to be a pseudonym for an employee (or employees) of HML and who was apparently disclosing this material as it showed that Mr Coates had been acting in breach of employment laws and abusing the court processes. The manner in which these documents came to light and the use that has been made of them forms the subject matter of the purple amendments and will be considered later. At this stage it should be noted that the laptop had been stolen prior to Mr Coates' agreement to the Disclosure Agreement and that the "Smith Documents", as they have been called, only emerged after CREM had begun these proceedings.

(iv) The commencement of these proceedings

29. Mr Coates disclosed only a small number of documents pursuant to the Disclosure Agreement. On 8 January 2019 CREM began these proceedings in the Birmingham County Court seeking specific performance of the Disclosure Agreement.

30. On 18 February 2019, Mr Coates filed a Defence which admitted the Disclosure Agreement but by way of defence asserted three main points:

    (1) A point on construction of the Disclosure Agreement, namely that the proviso to the second search category applied also to the first search category;

    (2) That there was an unresolved issue as to who was to pay the copying costs; and

    (3) Circus had claims to confidentiality and legal professional privilege in relation to certain of the documents.

31. On 29 May 2019, CREM issued an application for summary judgment.

(v) The Smith Documents

32. As referred to above, after the start of these proceedings, the Smith Documents were disclosed. They were disclosed in two tranches. On 30 April 2019, the person or persons

using the pseudonym "Mr Smith" emailed the FTT, copying Mr Coates' then solicitor and CREM's solicitor, Mr Marsden of Freeths, offering documents that were said to indicate wrongdoing by Mr Coates.

33. On 1 May 2019, Mr Marsden, on behalf of CREM asked "Mr Smith" to provide the documents. On 2 May 2019, Mr Coates' then solicitor (Mr Storar of Downs) objected to the disclosure of the documents.

34. On 11 June 2019, "Mr Smith" sent to both Mr Marsden and Mr Storar emails that attached the first batch of documents, called in these proceedings the "*Smith 1 documents*". On 14 June 2019, Mr Marsden, on behalf of CREM, forwarded a large part of the documents to the residential and commercial tenants on the estate, on the basis that they disclosed that Mr Coates had not been acting fairly and impartially. CREM has since claimed that the Smith 1 documents had ceased to be confidential because they had been sent to the residential leaseholders.

35. Mr Storar on behalf of Mr Coates emailed the FTT to say that the Smith 1 documents appeared to derive from Mr Coates' stolen laptop and claiming that some of the documents were subject to legal professional privilege. Mr Marsden agreed that two of the documents were privileged and that he had destroyed his copies of them. He said that the documents were relevant to the FTT's consideration of whether Mr Coates had been acting impartially or not. The FTT decided not to read the documents. The FTT, at that time, was considering a replacement manager for Mr Coates who was to be allowed to retire on 30 September 2019 (even though his original 3 year term had been extended to 5 years).

36. On 28 June 2019, Mr Storar wrote to Freeths claiming that the Smith 1 documents had actually come from Mr Coates' stolen laptop and asking for an undertaking that CREM would not make any use of the documents. No such undertaking was forthcoming. Instead, Freeths said that CREM intended to make use of the non-privileged documents before the FTT.

37. On 5 July 2019, HML applied *ex parte* to the High Court for an injunction against CREM to restrain the use of the Smith 1 documents. Mr Peter Marquand, sitting as a deputy High Court Judge, refused to grant the injunction. However a 3 day *inter partes* hearing for such an injunction in November 2019 was heard by Nicol J.

38. On 10 July 2019, HML's solicitors, Kennedys, wrote to Freeths asking for an undertaking not to use the Smith 1 documents and quoting an extract from *Hollander on Documentary Evidence* as to how solicitors should deal with the other side's privileged documents that come into their possession by mistake. On 2 August 2019, Kennedys (now acting on behalf of Mr Coates) served evidence demonstrating that the Smith 1 documents had been obtained from the stolen laptop because some of the documents were not on HML's server.

39. Despite knowing that the documents may have come from Mr Coates' stolen laptop and that they were likely to contain confidential and privileged material, on 15 August 2019, CREM emailed "Mr Smith" asking if there were any other non-privileged documents available. On 4 September 2019, "Mr Smith" provided a further batch of documents to Freeths (these have been called the "*Smith 2 documents*" and I will do likewise). The Smith 2 documents contained a larger number of confidential and privileged material

but Freeths maintained that Mr Marsden himself did not personally review the privileged documents but got a separate solicitor who was not involved in this litigation to review the Smith 2 documents for privilege. They gave a written assurance that the Smith 2 documents would not be disclosed to the residential tenants or any third party.

40. The hearing before Nicol J took place on 26, 27 and 28 November 2019 at which HML were seeking the injunction against CREM in relation to the Smith documents on the grounds of breach of confidence. However, after Nicol J was nearly prepared to hand down his written judgment, he was informed that the parties had reached an agreement as part of which HML had decided to withdraw its application. HML said it decided to do this when it had become clear that Nicol J would be likely to find that Mr Coates' appointment as statutory manager was personal to him and that therefore HML did not have standing to pursue the action for breach of confidence.

41. Nevertheless, and despite the settlement, Nicol J handed down his judgment on the basis that it dealt with a number of points of general interest, that it was almost complete and that neither party had objected to him doing so. The judgment is reported at [2019] EWHC 3496 (QB) and it provides a very useful summary of the litigation concerning the estate and makes some important findings relevant to these proceedings and appeals. Both sides rely on different parts of the judgment to advance their respective cases. Nicol J did indeed find that HML had no standing to pursue the claim.

(vi) The Order of 9 December 2019

42. CREM's application for summary judgment in this claim was listed to be heard by the Judge on 5 December 2019. However, in the run up to that hearing, the issue of the Smith documents had arisen and HML was pursuing its application for an injunction. In his fourth witness statement in the HML proceedings (and as recorded in [50] of Nicol J's judgment), Mr Coates referred to the Disclosure Agreement and these proceedings and said, in [105]:

> "105. …
>
> f. [CREM] have pointed out that certain documents that they now have seen should have been disclosed within my initial disclosure irrespective of the points at issue.
>
> g. I agree that these (limited) documents should have been disclosed…
>
> …
>
> 107. Therefore, I have concluded that the initial disclosure process was imperfect. I have made an open offer to re-do this disclosure process, and also to withdraw any argument about where costs should fall…"

43. Then in his witness statement in these proceedings dated 27 November 2019, Mr Coates said that there was very little substantively between the parties. Mr Coates had previously indicated that he would accept CREM's construction of the Disclosure Agreement – that was as to whether the proviso covered both limbs or just the second

– and he would pay the costs of the disclosure exercise. The only point outstanding between the parties was as to third party rights of confidentiality and privilege in respect of documents that Mr Coates had agreed to disclose.

44. As the Judge put it in [14] of his Judgment, "*the hearing on 5th December became an exercise in case management.*" The Order that was made after that hearing is dated 9 December 2019. In a recital it recorded that the Court recognised that non-parties to the Disclosure Agreement "*may have rights that they wish to assert*". The Order itself provided for Mr Coates to carry out two searches, "*Search 1*" and "*Search 2*". Search 1 corresponded exactly with the wording of the first limb of the Disclosure Agreement; Search 2 corresponded exactly with the second limb including the proviso. A timetable for the search process was then set out as follows:

> "4. By 4.00pm on 12 December 2019, [Mr Coates] shall notify [CREM] of the search mechanism to be applied.
>
> 5. Search 1 and Search 2 shall be completed by 17 January 2020.
>
> 6. Upon receipt of a sealed copy of this Order, [Mr Coates] shall provide a copy of this Order to third parties who are likely to be affected, and copying in [CREM's] solicitor to such notification.
>
> 7. By 4.00pm on 24 January 2020, [Mr Coates] shall notify any third parties with a potential interest in asserting rights in relation to the documents located by Search 1 and Search 2 that [Mr Coates] is contractually required to produce copies of those documents to [CREM]. [Mr Coates] shall invite the third parties to raise any objections to such provision of documentation within 28 days. [Mr Coates] shall provide a copy of this sealed Order to those third parties (if not previously provided), copying in [CREM's] solicitor to such notification.
>
> 8. The Application (as amended) shall be re-listed for a directions hearing before HHJ Hellman on 26 March 2020 at 10.00am, with a time estimate of 3 hours."

45. CREM rely on this hearing and order to found their argument on abuse of process. They say that Mr Coates conceded liability under the Disclosure Agreement and the only outstanding question was as to whether specific performance could be ordered in respect of disclosure that infringed third party rights. While third parties could seek to prove that they had rights in relation to documents that Mr Coates was obliged to provide, Mr Coates could not himself go back on his concession and try to argue that he had no such liability in the first place.

46. On or around 24 January 2020, in accordance with the order, Mr Coates provided Circus' solicitors, Norton Rose Fulbright LLP, with over 9000 documents in electronic form. These documents had been identified by Mr Coates as responding to Search 1 and he invited Circus to raise any objections to their disclosure to CREM. Norton Rose Fulbright objected to the disclosure of all the documents on the grounds of confidentiality and privilege. On 20 March 2020, Circus issued an application for permission to intervene in the proceedings and on 23 March 2020 the Judge granted it permission on the papers.

47. The directions hearing listed for 26 March 2020 (see the 9 December 2019 order) was adjourned because of the Covid-19 pandemic and the entry into the first lockdown. On 30 March 2020, CREM issued an application to set aside the Judge's order of 23 March 2020 permitting Circus to intervene in the proceedings.

48. On 29 May 2020, Mr Coates proposed making amendments to his defence. He issued an application for permission to amend on 17 June 2020.

(vii) The 7 August 2020 Order

49. By an order dated 30 July 2020, the Judge directed that on 7 August 2020 he would hear CREM's application dated 30 March 2020 to set aside the intervention order.

50. On 7 August 2020, there was a 4 hour hearing by telephone. CREM, Mr Coates and Circus were all present with leading counsel. CREM did not pursue their set aside application and this was dismissed. The Judge was however understandably keen to progress matters and this necessitated resolution of Circus' claim to confidentiality. I have seen a transcript of the hearing. Even though Circus' then leading counsel, Mr Hugh Tomlinson QC, had made clear that Circus was claiming class confidentiality over all the documents that Mr Coates had found in response to Search 1, the Judge was persuaded to establish a confidentiality club so that a segregated part of Freeths could examine the contents of the documents to check if there was a valid claim to confidentiality. The Judge gave no judgment on this issue. It was dealt with in the course of the hearing. Circus says that it came out of the blue and it had no idea that CREM would be asking the Judge to make such an order.

51. The Order following the 7 August 2020 hearing is dated 25 August 2020. It provided for CREM's set aside application to be dismissed. It also required Circus to prepare a document that set out the basis for its claim to confidentiality and privilege of the Search 1 documents and the areas upon which it would want to make submissions on if liability was established. That document was provided in accordance with the order. I will consider it later.

52. The order dealt with Mr Coates' amendment application by listing it before the Judge for a hearing on 7 October 2020 for one day and providing directions for evidence.

53. Then at paragraph 14 of the order there are the provisions in relation to the confidentiality club. It was in the following terms:

> "14 [CREM] shall establish a combined confidentiality club and information barrier (the Confidentiality Club) for the review of certain documents on the following terms:
>
> a. By 21 August 2020, [CREM] shall provide to the parties, in writing, the names of the members of the Confidentiality Club and nominate a central point of contact for the Confidentiality Club who shall be a partner of Freeths LLP. The central point of contact shall provide the names of any other partner or employee of Freeths LLP or any counsel who, it is intended, shall receive the documents referred to in sub-paragraph 14b before any of those documents are passed to them.

b. By 4 September 2020, [Circus] shall provide a hard copy of all of the Search Documents over which it claims [Circus] has a right of confidentiality but over which it does not claim that [Circus] has a right of privilege ("the Documents") to the central point of contact for the Confidentiality Club. The central point of contact shall only make copies of the Documents for the sole use of members of the Confidentiality Club.

c. The Documents shall be provided by the central point of contact only to other members of the Confidentiality Club who have been nominated in accordance with sub-paragraph 14a.

d. The central point of contact and each member of the Confidentiality Club shall keep the Documents confidential and shall not share them, or information arising from them, with [CREM], any other partner or employee of Freeths LLP or any third party without the permission of the Court (including for the avoidance of doubt Counsel who are presently instructed by [CREM] in these proceedings) save that they may, without the permission of the Court, seek instructions and funding from [CREM] and advise [CREM] as to whether [Circus'] claim for confidentiality is sustainable in respect of some or all of the Documents (without referring to any specific document or its contents) for the purpose of considering whether to make an application in respect of the Documents or in relation to [Circus'] compliance with this order or [Mr Coates'] compliance with the Directions (without sharing the Documents or information arising from them).

e. The members of the Confidentiality Club shall not be involved at any time after their receipt of the Documents in acting for [CREM] in these proceedings or in any other proceedings against [Circus] or [Mr Coates] save with the consent of [Circus] or [Mr Coates] (so far as relevant) or the permission of the Court.

f. A copy of this order shall be provided to each member of the Confidentiality Club prior to their being provided with any of the Documents."

54. Circus asked the Judge for permission to appeal in respect of the Confidentiality Club but this was refused on the basis that "*this is essentially a case management appeal.*" In his written reasons for refusing permission on the Form N460, the Judge said:

> "App/N for permission to appeal by IP against case mgmt. decision ordering D (sic) to supply copy of documents re which C claimed contractual right to disclosure, but re which IP asserted class confidentiality to C's solicitors (but protected by a Chinese wall), so they could properly assess whether to pursue disclosure of said documents in light of IP's objections".

55. On 2 September 2020, Falk J granted a stay of paragraph 14 of the 7 August 2020 order pending determination of Circus' application for permission to appeal. On 9 November 2020, Mann J granted Circus permission to appeal in relation to the confidentiality club order and he made no order on CREM's application to set aside the stay ordered by Falk J. It was in the Reasons attached to this order that Mann J indicated that "*the concept of class confidence (if it exists) should be argued on the appeal*".

(viii) The 7 October 2020 Hearing

56. The Judge heard Mr Coates' application for permission to amend on 7 October 2020 and handed down his written judgment on 30 October 2020. The order consequential on his judgment is dated 4 December 2020. Subject to one point, the Judge allowed some uncontested and minor amendments (these were also identified by colour – black, green, orange and red amendments). The Judge allowed the blue amendments but disallowed the purple amendments. He found against CREM on their abuse of process argument. He gave permission to CREM and Mr Coates to appeal his decision.

57. On 18 December 2020, Mr Coates' solicitors sought amplification from the Judge as to his reasons for refusing to allow the Purple Amendments. On 7 January 2021, the Judge provided a clarification of his reasons.

C. THE AMENDMENTS APPEALS

(i) Abuse of Process

(a) Introduction

58. CREM say that both sets of contentious amendments should have been disallowed because they would constitute an abuse of process. The argument is that Mr Coates had abandoned all defences to liability and this is reflected in the order made by the Judge on 9 December 2019. By the amendments, Mr Coates is performing a complete *volte face*, and seeking to introduce defences that were available to him in 2019 but which he chose not to pursue. The Judge was wrong in law and principle to reject the abuse of process argument on the basis that there was no judicial determination of Mr Coates' liability.

59. Mr Guy Vassall-Adams QC, appearing with Mr Jonathan McNae for Mr Coates, said that it was striking that CREM were not approaching the amendments by reference to the well-established principles relating to permission to amend. He accepted that Mr Coates was seeking to change his position from that which he adopted as at December 2019, but he said that, as there was no decision or ruling by the Judge, in particular on CREM's summary judgment application, it was in the interests of justice that Mr Coates should be permitted to advance his defence on all grounds that have a real prospect of success. This is not a re-litigation of points decided against Mr Coates and so, says Mr Vassall-Adams QC, the principles of *Henderson v Henderson* (1843) 3 Hare 100 are not engaged.

(b) The judgment below

60. The Judge dealt with the abuse of process argument in the following way:

(1) In [11] of his judgment, the Judge referred to CREM's application for summary judgment which was due to be heard on 5 December 2019. He said:

> "By that time, the dispute over disclosure appeared to have been largely resolved."

(2) Then in [14], the Judge said: "*the hearing on 5th December became an exercise in case management*" and he then described the directions that he made.

(3) In [15], the Judge said:

> "None of this was contentious. Subject to questions of privilege and third party rights, there was no suggestion that Mr Coates was not contractually required to produce copies of the documents identified in the Disclosure Agreement, and consequently the Court was not required to rule on the point. The hearing was largely concerned with establishing mechanisms for the production of documents and the protection of third party rights."

(4) In [30] to [36], under the heading "***Henderson abuse***" the Judge referred to some of the authorities in this area.

(5) In [61], the Judge determined the abuse of process argument thus:

> "The Amendment Application is not an abuse of process because the Court did not rule on the summary judgment application. The observation in the 5th December 2019 order "*that the Defendant is contractually required to produce copies of those documents to the Claimants*" was not a judicial determination but a record of what the parties had agreed."

61. CREM's Grounds of Appeal assert that the Judge appears to have considered that, because he had not decided a contested point and proceeded on the basis of concessions, there could not be an abuse of process. This was the main way in which Mr Charles Béar QC, appearing with Mr Nik Yeo on behalf of CREM, put their case on appeal: that Mr Coates had effectively conceded liability at a time when he was no longer the statutory manager and had accepted that the only outstanding issue was whether there were any third party rights of confidentiality that could be asserted to prevent disclosure. Mr Béar QC said that Mr Coates took advantage of the delay occasioned by the mechanism for determination of those third party rights (and because of the pandemic) and then performed a total U-turn by seeking to put forward, in particular, the blue amendments concerning the proper construction of the Disclosure Agreement. That, says Mr Béar QC, is an abuse of process and Mr Coates should be held to his concession of liability in order for some finality to be brought to this litigation.

62. Mr Vassall-Adams QC pointed out that the way that Mr Béar QC was now putting CREM's case on appeal, relying on Mr Coates' concession as grounding the abuse of process, was different to the way he put it below. He also suggested that the Judge's reasoning on abuse of process is reflective of the way Mr Béar QC put the case to the Judge which relied on the Judge having actually decided the contractual liability question in CREM's favour.

63. There was no recording of that hearing and so no transcript is available. I was taken to CREM's skeleton argument for the hearing on 7 October 2020 and it is clear from that that CREM was arguing both *Henderson v Henderson* abuse of process and cause of action / issue estoppel. Under the heading "Abuse" in paragraph 14, CREM stated (underlining added):

> "<u>The court made an order which partly implemented the contract</u> by requiring the promisor to perform the necessary precondition of disclosure, namely, a search for what had to be disclosed."

Under the heading "Estoppel" in paragraph 19 CREM said:

> "It can only, therefore, have been an order made in the court's equitable jurisdiction to order performance of the underlying contract."

And in paragraph 20, they concluded:

> "As these extracts show, the December Order was not an embodiment of a concession but a decision by the court to compel performance of the underlying contractual obligation. It therefore created an estoppel for the cause of action and/or the issue of the defendant's liability under the contract (viz. that there was a valid obligation, which he had yet to perform).

64. Mr Béar QC said that he was clearly running two alternative arguments: one of abuse; and one of estoppel, as the headings indicated. He was not arguing cause of action or issue estoppel on this appeal but he was running abuse of process which was not dependent on there having been a judicial determination on the point.

65. I can understand however why the Judge might have been under the impression that CREM's argument on abuse of process was based on the Judge having made a substantive determination as to Mr Coates' liability under the Disclosure Agreement (see in particular para 14 of the skeleton argument). The Judge thought that this was not right and that he had only made a case management decision in order that the parties and the court would be in the position of being able to determine the third party rights issue.

(c) The relevant legal principles on abuse of process

66. Within the past year, the Supreme Court has had occasion to consider abuse of process in seeking to re-litigate issues that were thought to have been resolved. In the competition case of *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and ors* [2020] Bus LR 1196 at [239] of the Judgment of the Court, the Supreme Court summarised the principle as follows:

> "239. One such principle which is well established is that there should be finality in litigation. This is a general principle of justice which finds expression in several ways, which tend to be grouped under the portmanteau term "res judicata": see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, paras 17-26 per Lord Sumption. When a legal claim has finally been determined in litigation, a cause of action estoppel arises and it cannot be reopened. A binding issue estoppel may arise in respect of a matter, other than a legal claim, which is directly the subject of determination in proceedings. Further, parties are generally required to bring forward their whole case in one action, and attempts to revisit matters that have already been the subject of a determination (even if not formally a matter of cause of action estoppel or the subject of an issue estoppel) are liable to be barred as an abuse of process: *Henderson v Henderson* (1843) 3 Hare 100, 114-116 per Wigram V-C; *Johnson v Gore-Wood & Co* [2002] 2 AC 1, 31 per Lord Bingham of Cornhill and 58-59 per Lord Millett; *Virgin Atlantic* (above). Under this rule, first explored in *Henderson v Henderson*, a party is precluded "from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones" (*Virgin Atlantic*, para 17). As Sir

Thomas Bingham MR (as he then was) explained in *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, 260:

> "The rule in *Henderson v Henderson* … requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided … once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

This is a rule based on what is required to do justice between the parties as well as on wider public policy considerations. It is a rule which is firmly underwritten by and inherent in the overriding objective."

67. In *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] 3 WLR 1369, the Supreme Court considered whether HMRC should be permitted to withdraw a concession that s.32(1)(c) of the Limitation Act 1980 applied to mistakes of law. The majority judgment given by Lord Reed PSC and Lord Hodge DPSC (with whom Lord Lloyd-Jones and Lord Hamblen JJSC agreed)[6] contained the following summary of abuse of process in relation to the withdrawal of a concession:

> "72. The claimants' alternative argument is that the Revenue, by seeking to extend Issue 28 into an argument that *Kleinwort Benson* and *Deutsche Morgan Grenfell* were wrongly decided, are guilty of an abuse of process. The principle of abuse of process was first formulated by Wigram V-C in *Henderson v Henderson* (above) and more recently was analysed by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. In that case Lord Bingham (at p 31B-E) stated:
>
> > "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. … It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests

[6] The dissenting Justices, Lord Briggs, Lord Sales and Lord Carnwath JJSC, did not dissent on this point.

> involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Lord Bingham then rejected the submission that the rule in *Henderson v Henderson* did not apply when an action had been settled by compromise. He stated, pp 32-33:

> "An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, that outcome would make a second action the more harassing."

Lord Goff of Chieveley, Lord Cooke of Thorndon and Lord Hutton agreed in terms with Lord Bingham's analysis. Lord Millett's speech is consistent with Lord Bingham's analysis. He described the doctrine of res judicata as a rule of substantive law and contrasted that with the *Henderson v Henderson* doctrine which he described as "a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression" ([2002] 2 AC 1, p 59D-E).

73. The abuse of process doctrine is not confined to the raising of subsequent proceedings after the completion of an action but can apply to separate stages within one litigation. See, for example, *Tannu v Moosajee* [2003] EWCA Civ 815.

74. In *Virgin Atlantic Airways Ltd* (above) Lord Sumption agreed with Lord Millett's analysis of the relationship between on the one hand the estoppels which come within the law of res judicata and on the other the abuse of process doctrine, stating ([2014] AC 160, para 25):

> "Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation."

75. While the concept of abuse of process informs the exercise of the court's procedural powers, it is not a question of the exercise by the court of a discretion: *Aldi Stores Ltd v WSP Group plc* [2017] EWCA Civ 1260; [2008] 1 WLR 748, para 16 per Thomas LJ, para 38 per Longmore LJ. If the court, on making the broad, merits-based judgment of which Lord Bingham spoke,

> concludes that a claim, a defence, or an amendment of a claim or of a defence involves an abuse of process or oppression of the opposing party, it must exclude that claim, defence or amendment. A finding of abuse of process operates as a bar. Thus, as Lord Wilberforce stated in delivering the judgment of the Judicial Committee of the Privy Council in *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425, the doctrine
>
> > "ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."
>
> 76. From these authorities it is clear that for the court to uphold a plea of abuse of process as a bar to a claim or a defence it must be satisfied that the party in question is misusing or abusing the process of the court by oppressing the other party by repeated challenges relating to the same subject matter. It is not sufficient to establish abuse of process for a party to show that a challenge could have been raised in a prior litigation or at an earlier stage in the same proceedings. It must be shown both that the challenge should have been raised on that earlier occasion and that the later raising of the challenge is abusive."

68. Abuse of process is a broad concept requiring a "*merits-based judgment*" as to whether the step that a party proposes to take, including an amendment to their pleadings, offends the finality rule and brings the administration of justice into disrepute. It is a strong finding to make and it is clear that the mere withdrawal of a concession is not, in itself, sufficient to conclude that it is an abuse of process. Indeed, the CPR allows for withdrawals of previous admissions and sets out the considerations for the court as to whether to allow a party to do so – see CPR 14.1(5) and CPR 14 PD 7.2. There must be something more than the withdrawal of a concession to render it abusive.

69. Mr Béar QC referred me to *Khan v Golecha International Ltd* [1980] 1 WLR 1482 but in that case there was a concession by the plaintiff that led to an appeal in the first action being dismissed by consent. The plaintiff was debarred from going back on that concession in later proceedings between the same parties. There are clear distinctions between that case and this, in that the Court of Appeal found there to be an issue estoppel by virtue of the judgment being entered on the appeal in the first action. There was no consideration of abuse of process or *Henderson v Henderson*, which was not even cited.

70. Mr Béar QC also relied on what Lord Bingham had said in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 32H, in particular the second quote in [72] of the *FII Group Litigation* case (supra) set out above. Lord Bingham said that there should be no distinction in terms of effect between a compromise of proceedings and a judgment.

71. There is no doubt that an abuse of process can arise within the same set of proceedings. The Supreme Court endorsed that point in [73] of the *FII Group Litigation* case and the Judge referred to the earlier cases that established that point: *Seele Austria GMBH v Tokio Marine Europe Insurance Ltd* [2009] BLR 261, Coulson J (as he then was) at [21] – [27]; and *Kensell v Khoury* [2020] EWHC 567 (Ch), Zacaroli J, at [47].

72. The Judge also quoted, rightly in my view, from *Gruber v AIG Management France SA* [2019] EWHC 1676 (Comm) a decision of Andrew Baker J on an application to limit the scope of an assessment of damages following a trial on liability where certain findings were made. At [11], Andrew Baker J said as follows (underlining added):

> g. The doctrine is not restricted to cases where the alleged abuse comes in a separate, later action. It is possible to conclude that a claim or defence not initially raised ought properly, if it was to be raised at all, to have formed part of an earlier stage within a single action at which at least some matters were finally determined.
>
> h. <u>It is a strong thing to shut out pursuit of a point not actually decided previously against the party raising it; and it may be an even stronger thing to do so in relation only to different stages within a single action</u>. I would though add, as to the latter, that much may depend on the nature of the stages involved. Here, the parties had their final trial of all issues, not merely, for example, a decision on preliminary issues or a summary judgment decision on some particular claim or defence or a final determination of an individual point as part of dealing with some other interlocutory application. If the doctrine be available, as indeed it is, in the context of a single set of proceedings, the potential for it to apply on the facts where those are the circumstances plainly may arise more readily than during the interlocutory life of the process.

73. In all the authorities that I have seen where abuse of process has been found, there has been a form of judicial determination in the previous proceedings or earlier in the same set of proceedings, either following a fully contested hearing or pursuant to a concession by one side. I accept that in *Khan v Golecha International*, the judgment was by consent, but that was an issue estoppel case. Also in *Johnson v Gore Wood* there was a settlement of the earlier proceedings and in any event the House of Lords held that the new proceedings were not an abuse of process.

74. Where there has been a concession by one party at an earlier stage of the proceedings, the attempted withdrawal of that concession is not *per se* an abuse. The Court needs to look at all relevant circumstances around the making of that concession, the reasons why the concession is sought to be withdrawn, the prejudice caused to the other side if the concession is withdrawn, the prospects of success if the concession is withdrawn and whether it would bring the administration of justice into disrepute.

(d) Was the Judge wrong to decide that this was not an abuse of process

75. The Judge held, as he was entitled to, that the hearing before him on 5 December 2019 was a case management hearing and that this was the way to characterise his order of 9 December 2019. Furthermore, the reference in paragraph 7 of the order to Mr Coates being "*contractually required to produce copies of those documents to* [CREM]" was clearly an embodiment of Mr Coates' concession, not a ruling or determination as to Mr Coates' liability. The fact that it was the Judge's own order is significant in relation to his interpretation of it.

76. Furthermore, CREM's summary judgment application was adjourned on 9 December 2019 and I understand it was later dismissed by consent. The Judge never considered,

and certainly never made a determination on that application. Because that application was being adjourned and CREM had wanted to file an amended application, it is perfectly understandable why the Judge considered that he was only concerned with case management directions, principally a mechanism for drawing out the third parties with objections on confidentiality grounds to the disclosure that Mr Coates had apparently agreed to provide.

77. The Judge also went on to consider the reasons why Mr Coates wished to withdraw his concession. Two reasons were put forward by Mr Coates. The first related to the involvement of Circus which was challenging all aspects of the disclosure obligation and which Mr Coates argued changed the landscape of the case. The Judge did not find this reason persuasive (see [62] to [65]).

78. The other reason the Judge did find persuasive. This was that after the 5 December 2019 hearing, CREM had stepped up the pressure significantly on Mr Coates and it was clear that they intended to pursue him for damages for his "*participation in a conspiracy to use unlawful means to cause [CREM] loss*". This was contained in a document preservation notice dated 20 December 2019 sent to him by Freeths. Furthermore, as recorded in [69] of the judgment, Freeths wrote on 2 March 2020 to say that they were "*finalising an application for the committal of [Mr Coates] to prison*".

79. The Judge concluded in [70] as follows:

> "I draw the reasonable inference that if, prior to the 5th December 2019 hearing, Mr Coates had known of the intentions subsequently expressed in the document preservation notice and the 2nd March 2020 letter, he might very well have taken a position in relation to the application for summary judgment which foreshadowed that taken on the Amendment Application".

In other words, the Judge considered that the concessions were only made by Mr Coates to try to bring the proceedings to a close but after receiving those communications from Freeths it was apparent that CREM were intent on pursuing him even to the extent of trying to get him sent to prison. If he had known of that intention prior to 5 December 2019, the Judge thought that the concessions would not have been made.

80. CREM does not challenge that finding. They do say that the Judge ignored the long and acrimonious history of the litigation but that does not, in my view, undermine his finding as to Mr Coates' knowledge. It seems to me to be significant in relation to the Judge's conclusion on abuse of process, even if the Judge did not directly relate it to that argument.

81. It must be in the interests of justice for a defendant to be able to advance all possible defences when the stakes are so high and there is a threat of committal proceedings against him. It cannot be an abuse of process to seek to put forward all available defences so long as they have at least a real prospect of success. That should be tested in the usual way by the balancing exercise that is carried out in considering whether to allow amendments to pleadings. It is not helpful for this to be overlain with allegations of abuse of process.

82. CREM's case on abuse of process really comes down to the single fact that Mr Coates is seeking to withdraw a concession that he was contractually liable to provide the two

categories of documents under the Disclosure Agreement. Apart from thinking that that issue had been resolved and that, subject to permission being granted, these issues will have to be fought, necessarily extending the timetable for this part of the litigation between the parties, CREM cannot point to any real prejudice that they will suffer. That prejudice will have to be balanced against the prejudice to Mr Coates in not being able to run his defences on liability when the Court considers whether to allow the amendments (or more properly on these appeals, whether the Judge correctly allowed or disallowed the amendments). But that level of prejudice is quite insufficient, in my view, to assert (and the burden is on CREM) that the withdrawal of the concession amounts to an abuse of process or that it in some way brings the administration of justice into disrepute.

83. Even though there is somewhat abbreviated reasoning in the Judge's judgment in relation to abuse of process, I think he came to the correct conclusion. I therefore reject CREM's appeal on the dismissal of their abuse of process argument.

(ii) The blue amendments

84. CREM appeals the Judge's permission granted to Mr Coates to make the blue amendments. Mr Yeo made submissions on behalf of CREM on this aspect and his main point was that the contractual defences to liability in the blue amendments do not, on analysis, have any real prospect of success. He helpfully divided the blue amendments into two main categories:

(1) Whether the documents to be disclosed under the Disclosure Agreement were subject to the usual rules of disclosure in Court proceedings under CPR 31 or their equivalent in the FTT (the **CPR argument**); if so, were privileged documents excluded and was the disclosure subject to the usual implied undertaking (now CPR 31.22) that they were only to be used for the purposes of the proceedings in which they were disclosed; and

(2) Whether the obligations on Mr Coates in the Disclosure Agreement were personal to him or whether they were in his capacity as the statutory manager; if the latter, did he cease to be bound by the Disclosure Agreement when he retired as statutory manager (the **capacity argument**).

85. In [20] to [29] of the Judgment, the Judge accurately set out the principles applicable to the exercise of the court's discretion to permit amendments to be made. I do not understand there to be any challenge to those principles as explained by the Judge. In particular the Judge quoted twice from the judgment of Sir Geoffrey Vos C (as he then was) in *Nesbit Law Group LLP v Acasta European Insurance Company Ltd* [2018] EWCA Civ 268 as to the balancing of injustices and the "*heavy burden on the party seeking a late amendment*".

86. As to the question whether these were late amendments, I have to say that the Judge took a slightly odd view, although I do not think it affected his overall analysis. The Judge considered effectively that the amendments in relation to the CPR argument were not late because they were consistent with the position adopted by Mr Coates at the 5

December 2019 hearing; whereas the amendments to bring in the capacity argument were late, because they were not consistent.

87. In [75] the Judge seems to have applied the same test to both sets of amendments, whether late or not, and so his classification of lateness had no impact on his decision. He found that the blue amendments have a real prospect of success and that the injustice to Mr Coates in refusing them outweighs any prejudice to CREM in having to deal with them at a trial. I do not understand CREM to be appealing in relation to the injustice/prejudice issue. They confined their appeal to whether the amendments have a real prospect of success.

88. I remind myself that this is an appeal, not a re-hearing, on a case management decision in which the Judge has a fairly wide discretion. Having said that, if I were to conclude that he was wrong about the prospects of success, then his decision must be overturned.

89. The proposed amendments plead a mixture of both the proper interpretation of the Disclosure Agreement and also its express and/or implied terms. Thus in proposed paragraph 27f. Mr Coates wishes to plead his construction of the express terms of the Disclosure Agreement:

> "The meanings of certain terms within the Disclosure Agreement are and were intended and understood by [Mr Coates] and by all parties to the Disclosure Agreement to be as follows…"

90. As for further express or implied terms of the Disclosure Agreement, proposed paragraph 27C states as follows:

> "Further the Disclosure Agreement is subject to the following terms, which are express oral terms agreed between the parties' respective Counsel during the course of the negotiations that took place at Alfred Place prior to reaching agreement on 18 July 2018, alternatively, implied terms…"

91. Mr Yeo attacked these on two main bases:

(1) That Mr Coates could not establish that it was necessary, rather than reasonable, to imply those terms; and

(2) That Mr Coates' reliance on the negotiations leading up to the Disclosure Agreement breached the *parol* evidence rule and he could not bring his case within any of the exceptions to that rule.

92. In relation to the first point as to the test for implication of terms, Mr Yeo took me to certain extracts from *Chitty on Contracts* (33rd Ed.) and to *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 for the now uncontroversial proposition that for a term to be implied into a contract, it is not enough that it would be fair or reasonable to imply such a term. It must be necessary to do so.

93. Mr Vassall-Adams QC accepted that that is the appropriate test for the implication of terms but said that Mr Coates has a real prospect of satisfying that test. He also pointed out that, as is clear from paragraph 27C of the proposed amended defence, Mr Coates relies both on oral express terms as well as implied terms.

94. Mr Coates places particular reliance on the transcript of the hearing on 16 to 18 July 2018 that he says shows that the parties actually wanted the FTT to put their agreement on disclosure in the body of the order in which case it would have been akin to an order for standard disclosure and so subject to the usual rules around disclosure in proceedings. However the FTT did not wish to make it part of its order as it considered that it was not necessary for the resolution of the issues currently before it. Throughout the transcript there are multiple references to standard disclosure and CREM's counsel at the time said that the provision of documentation pursuant to the proposed order would be on the basis of standard disclosure, so with an opportunity to object on the grounds of privilege. Mr Coates contends that the movement of the Disclosure Agreement into the recitals to the order did not affect the agreement that this was to be on standard disclosure terms.

95. In order to determine the express terms of a contract, if not wholly contained in written form, extrinsic evidence is admissible. The Judge was alive to this point in [79] and [80] where he quoted from *Chitty on Contracts* and concluded that Mr Coates, even though he might have difficulty ultimately doing so, had a real prospect of persuading the court that there were further express oral terms of the Disclosure Agreement evidenced by the discussions between counsel and the statements made to the FTT in relation to it. Mr Yeo accepted that this is an established exception to the *parol* evidence rule.

96. As to the proper construction of its terms and the admissibility of the transcript, the Judge also addressed this in [74] and [81], recognising that the transcript could not be used to establish the subjective intentions of the parties as to what the Disclosure Agreement meant. Nevertheless, the interpretation of the Disclosure Agreement will require the court to examine the surrounding circumstances that were known or reasonably available to the parties. The fact that the parties wanted their agreement to be in the form of a court order is in my view material to its interpretation when it was subsequently moved to the recitals to the order. I do not see that the Judge approached this question wrongly or made any error of law.

97. Mr Yeo submitted that the CPR argument is too vague to constitute a term of the Disclosure Agreement, whether expressly or by implication. There would certainly be some difficulty in establishing exactly how such a term would work and the mechanism by which the CPR rules on disclosure may be superimposed in the contractual disclosure obligations. But I do not think that these are insuperable difficulties.

98. In relation to the capacity argument, that seems to me to be simply a question of construction of the Disclosure Agreement and the consequences of finding that Mr Coates contracted either in his personal capacity or as the statutory manager. Having rejected CREM's abuse of process argument, I do not see that there can be any proper objection to Mr Coates being able to argue these points of construction at trial.

99. Accordingly I reject CREM's appeal on the blue amendments.

(iii) The purple amendments

100. Mr Coates appeals against the Judge's disallowance of the purple amendments which principally contain a plea that CREM should not be entitled to equitable relief because they have "*unclean hands*" (as Aikens LJ preferred to term the doctrine in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328). The Judge held that Mr Coates had no real prospect of succeeding on this defence. He also held that allowing the amendments would substantially lengthen the trial.

(a) The proposed amendments

101. At the heart of the proposed amendments is the episode of the Smith documents and the way CREM and their solicitors have handled those documents. This all arose from April 2019, that is after these proceedings had commenced and after Mr Coates' original defence had been filed. That means that the alleged misconduct in relation to the receipt and use of the Smith documents has happened in the course of these proceedings which are themselves solely concerned with disclosure of documents. CREM make no secret of the fact that they want disclosure of documents from Mr Coates in order to gather evidence in support of their alleged conspiracy claim against him, the tenants and Circus. Indeed they pray in aid the fact that the Smith documents allegedly show such impropriety by Mr Coates as establishing that they cannot be subject to any obligations of confidence such as would restrict disclosure – the "no confidence in iniquity" principle.

102. The proposed amendments put forward Mr Coates' case on "unclean hands" in the following way:

(1) In paragraph 39Ba. Mr Coates refers to the prior litigation between the parties, including Circus, and the consistently failed attempts by CREM to obtain disclosure of communications between Mr Coates, the residents and Circus; the point being made is that CREM has been trying by whatever means possible to get hold of such documents;

(2) In paragraph 39Bb. Mr Coates deals with the Smith documents; he goes through the chronology that I have set out above and then pleads as follows:

> "vii. The Smith documents were documents unlawfully obtained from [Mr Coates'] laptop, which had been stolen the previous year. [CREM] were notified of this possibility in a letter from Downs solicitors on behalf of [Mr Coates] on 14 June 2019; and served with evidence confirming the theft as the most likely source of the Smith 1 Documents on 2 August 2019"

(3) In relation to the Smith 2 documents, Mr Coates says in paragraph 39Bc.:

> "On 4 September 2019, Mr Smith, ostensibly acting in breach of confidence, provided Mr Marsden with a further set of documents (the "**Smith 2 Documents**"). Some or all of the Claimants gave Freeths instructions to review those documents, and Freeths accepted those instructions and did so. Those documents were, in part, confidential, alternatively privileged. The Smith 2 documents had been unlawfully obtained from the Defendant's laptop."

(4) And in paragraphs 39Be. Mr Coates avers that CREM's ulterior purpose in all the proceedings and the obtaining of the Smith documents was to gather evidence to bring further claims against Mr Coates:

> "The ulterior purpose of the proceedings; applications; actions soliciting a breach of confidence; and sharing documents between all of the Claimants (despite assurances to the contrary) was to provide some or all of the Claimants with sufficient information to bring further claims against [Mr Coates]"

(5) Mr Coates then summarises his position that CREM is pursuing a personal vendetta against him and that CREM's "*conduct is oppressive, abusive, and improper*".

103. The averments as to the Smith documents being from Mr Coates' stolen laptop were based on evidence that they all: pre-dated the theft; were all in Mr Coates' Hotmail account which he accessed from his laptop; and crucially that many of the documents were not on HML's server. This was one of the reasons why Nicol J held that HML did not have standing to obtain an injunction against CREM in relation to the Smith documents. Nicol J said that this was because of the strength of HML's primary case that the documents had come from Mr Coates' stolen laptop (see [60vii] of Nicol J's judgment). Both the Judge and I have to assume that Mr Coates can make good on his plea that that is the origin of the Smith documents.

104. That being so, Mr Coates makes serious allegations as to the way that the Smith documents were handled by Freeths, on the instructions of CREM. Despite being told that the likely source of the documents was Mr Coates' laptop, CREM decided to accept and read those documents and, in relation to the Smith 1 documents, to disseminate them to the residents on the estate. In relation to the Smith 2 documents, they sought them after seeing HML's IT evidence proving their provenance. Mr Coates has alleged that CREM and Freeths improperly procured a breach of confidence in relation to Mr Coates' confidential and privileged documents from his stolen laptop.

105. Mr Marsden's fourth witness statement dated 28 August 2020 filed in opposition to Mr Coates' application to amend and in answer to Mr Adam Blanchard's witness statement dated 17 June 2020 is 37 pages long and has 157 paragraphs. However he does not deal with the allegations that are specifically directed at him and Freeths in paragraph 39B of the proposed amendments. He says that they will be subject to legal submission. Because of his silence on the factual matters, it must be assumed that Mr Coates is able to make good his allegations in paragraph 39B as to the improper way that the Smith documents were handled.

106. The question then is whether in law or equity that can constitute the requisite elements for the "unclean hands" defence to the claim for specific performance.

(c) The Judge's judgment

107. In [43] to [49] the Judge summarised the purple amendments. He then dealt with his conclusions as to the purple amendments in very abbreviated form in [82] to [89].

108. In [83] and [84] the Judge dealt with the "clean hands" doctrine:

> "83. As to the "clean hands" doctrine, Snell's Equity, 34th Edition, states at paragraph 5-010:
>
> "*…the question is not whether any general moral culpability can be attributed to B, the party seeking relief, but is rather whether relief should be denied because there is a sufficiently close connection between B's alleged misconduct and the relief sought. It is accepted therefore that 'the scope of the application of the "unclean hands" doctrine is limited' and the maxim is applicable only in relation to conduct of B which has 'an immediate and necessary relation to the equity sued for', so that B is 'seeking to derive advantage from his dishonest conduct in so direct a manner that it is considered unjust to grant him relief'*".
>
> 84. The case pleaded in the draft amended defence is that [CREM] should be denied specific performance of the Disclosure Agreement because [CREM] have obtained documents improperly from Mr Smith. However, I am not persuaded that Mr Coates has any real prospect of establishing the necessary causal connection between [CREM's] alleged misconduct and specific performance of the Disclosure Agreement." (underlining added)

109. Mr Vassall-Adams QC submitted that the Judge was clearly applying a "*causal connection*" test when even the quote from *Snell's Equity* in the previous paragraph referred to a "*sufficiently close connection*" test. After the judgment was delivered, Mr Coates' solicitors sought clarification from the Judge as to his determination that there was no "causal connection". On 7 January 2021, the Judge gave "Additional Reasons" on this aspect. After repeating [83] and [84] of his judgment, the Judge said this:

> "The purple amendments allege that some or all of [CREM] have sought documents by alternative and improper routes. But the present claim to enforce their contractual rights to obtain documents is not in any way dependent upon [CREM] having done so and is not in itself improper. On the face of the purple amendments, therefore, there is no real prospect of[Mr Coates] establishing that there is a sufficiently close connection between [CREM's] alleged misconduct and the relief sought, ie that [CREM] are seeking by this claim to derive advantage from their allegedly improper conduct, still less that they are seeking to do so in so direct a manner that it would be unjust to grant them relief." (underlining added)

110. Mr Vassall-Adams QC said that the clarification shows that the Judge was still applying a causation test rather than a connection test. Mr Béar QC said that the Judge accurately set out and applied the test explained in *Snell's Equity*.

(d) The correct test for the "unclean hands" defence

111. In *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40; [2002] 1 WLR 3024, Lord Scott said at [90]:

> "…it is long established practice that an equitable remedy should not be granted to an applicant who does not come before the court with "clean hands". The grime on the hands must, of course, be sufficiently closely connected with the equitable remedy that is sought in order for an applicant to be denied a remedy to which he

> ordinarily would be entitled. And whether there is or is not a sufficiently close connection must depend on the facts of each case."

112. In *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328, the Court of Appeal upheld Burton J's refusal to grant the claimant an anti-suit injunction on the grounds of their "unclean hands". At [159] Aikens LJ explained the scope of the doctrine and the task for the Judge:

> 159. It was common ground that the scope of the application of the 'unclean hands' doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in *Dering v Earl of Winchelsea* (1787) 1 Cos 318 at 319 the misconduct or impropriety of the claimant must have 'an immediate and necessary relation to the equity sued for'. That limitation has been expressed in different ways over the years in cases and textbooks. Recently in *Fiona Trust & Holding Corp v Privalov* [2008] EWHC 1748 (Comm) Andrew Smith J noted that there are some authorities in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief. *Spry: Principles of Equitable Remedies* (8th Ed.) suggests that it must be shown that the claimant is seeking 'to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief'. Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought." (underlining added)

113. Aikens LJ clearly thought that the court had to perform a multi-factorial assessment in order to determine if the defence was available. In that case, the claimant was relying on a contractual exclusive jurisdiction clause in favour of the English courts in order to seek an anti-suit injunction against the defendants in relation to proceedings in Texas, USA. The "unclean hands" defence was based on the misconduct of "SG" on behalf of the claimant in an earlier trial by giving false evidence and wrongly not accepting the findings of the judge in an even earlier trial. There seems to me to have been no causative link between the claim and the misconduct but Burton J and the Court of Appeal found the "*necessary immediate and close relationship*" to the equity sued for because the claimant had relied on the "*false evidence in the course of the English proceedings whose very object is to stop the Texas action.*"

114. That the "unclean hands" doctrine involves a multi-factorial assessment by the trial judge was endorsed by the Court of Appeal in *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 at [170] (Lord Briggs and Hamblen LJ, as he then was; Gloster LJ dissented). This was also referred to in *Snell's Equity* (34th Ed.) in the sentence following the passage quoted by the Judge in [83] of his judgment.

115. The inability of the court at a preliminary stage of proceedings to make that assessment is confirmed by the judgment of Popplewell J (as he then was) in *Orb a.r.l. v Ruhan* [2016] EWHC 850 (Comm). After quoting from the *RBS* case, Popplewell J said as follows:

> "102. …I decline to embark on the exercise of making a final determination of whether such an argument would succeed on assumed facts. As Lord Scott observed, the inquiry in every case is fact sensitive, and resolution of this argument should await resolution of the undecided factual issues upon which it depends."
>
> …
>
> 106. As Andrew Smith J observed in the *Fiona Trust* case at paragraph 19, elements of misconduct must be looked at cumulatively, not just individually, to determine whether they are sufficiently serious and connected with the equity invoked to bring the doctrine into play…
>
> 107 For these reasons I cannot determine the clean hands argument summarily in Mr Ruhan's favour on the written evidence before me."

116. This case is only at the stage of considering amendments to the pleadings and a trial is some way off. Therefore the court is not in a position of being able to assess summarily all the factors involved and conclude that the misconduct sought to be pleaded could not establish enough of a connection to amount to an "unclean hands" defence.

117. None of the authorities referred to above suggest that there has to be a "*causal connection*" or that there is any sort of necessary causation. If there is a causal connection then that would presumably be a sufficient connection to be able to invoke the defence. But if there is something less, it is clear that a court of equity will look at a number of factors to determine if there is a "*sufficiently close connection*" between the misconduct and the relief sought such that the relief should be denied.

118. As *Snell's Equity* also points out, the equitable "unclean hands" defence is closely related to the common law defence of *ex turpi causa non oritur actio* which now involves a multi-factorial assessment following the Supreme Court decision in *Patel v Mirza* [2017] AC 467. Paragraph 5-010 of Snell's Equity continues after the passage quoted by the Judge:

> "When considering that common law maxim in *Patel v Mirza* the majority of the Supreme Court warned against its mechanical application, emphasising instead the need to consider a "range of factors", looking at the specific policies behind the relevant prohibition and the particular conduct of B, and to consider whether it would be disproportionate to deny relief to B."

If it is relevant to ask whether the denial of relief is a proportionate response to the misconduct alleged, then that is pre-eminently a matter for a trial judge to assess in the light of all the evidence.

119. In summary therefore the legal test for the "unclean hands" doctrine is not limited to where there is a causal connection between the alleged misconduct and the equitable relief being claimed. The test is one of "*sufficient connection*" and the trial judge has to balance a number of different factors in assessing whether the correct response is to deny the equitable relief claimed.

(e) Did the Judge apply the wrong test?

120. Mr Béar QC accepted that the Judge was applying a causal test but said that he was right to do so. As the Judge clarified after the judgment, CREM were not seeking to "*derive advantage*" from the Smith documents in these proceedings. They are simply seeking to enforce their contractual rights under the Disclosure Agreement and no reliance is placed on the Smith documents for that purpose.

121. I have held that it is not necessary to apply a causation test for an "unclean hands" defence to succeed. The Judge was clearly applying such a test – he said so in terms by using the words "*necessary causal connection*" in [84] of his judgment – and Mr Béar QC did not suggest otherwise. As there is no further analysis in the Judgment as to the reason why there is not a "*sufficiently close connection*" between the alleged misconduct and the relief sought, the Judge's conclusion in this respect cannot be upheld.

122. These proceedings are simply about disclosure of documents. Mr Coates would say that it is a further attempt by CREM to obtain his confidential and privileged documents so as to pursue their personal vendetta against him in the form of conspiracy and committal proceedings. Mr Coates' case is that the Smith documents and the manner in which they have been received and acted upon by CREM and their lawyers are all part of the same effort to obtain those confidential and privileged documents to further their cause. If Mr Coates is able to establish the facts that he proposes to plead in relation to the improper handling of the Smith documents, then it seems to me to be relevant to the court's consideration as to whether to afford the equitable relief of specific performance of a disclosure obligation of the same or similar confidential documents that CREM would have been found to have obtained improperly. They are both intimately bound up in the same process of obtaining disclosure to found a claim.

123. Mr Béar QC said that there is no such connection for the simple reason that CREM's proceedings to enforce the Disclosure Agreement began well before the Smith documents emerged in 2019. Nevertheless, CREM has included a large number of the Smith documents in its disclosure in these proceedings and even though Mr Béar QC said that CREM did not need to rely on the Smith documents, they clearly have done so, if only to prove that Mr Coates has not so far complied with his obligations.

124. But I think that the error that the Judge made was to look for an actual causal connection between the pursuit of this claim and any reliance by CREM on the Smith documents in this claim. As the *RBS* case demonstrates, misconduct during the course of proceedings, or even in earlier proceedings, can be a sufficient connection for the purposes of the "unclean hands" defence. The Judge appears to have looked at the issue too narrowly and did not take account of the fact that an "unclean hands" defence requires the trial judge to undertake a multi-factorial assessment of the extent of the relationship between the alleged misconduct and the relief being sought.

125. Therefore, at the stage of considering whether the purple amendments should be allowed, the Judge should have considered whether there was a real prospect of Mr Coates succeeding in establishing the requisite connection for the purposes of his "unclean hands" defence. The Judge's approach was too focused on trying to find a causal link and he did not explain why any of the other connecting factors should not be taken into account. In my view, if the Judge had taken all those other factors into account, he would have been bound to conclude that Mr Coates had a real prospect of succeeding in establishing a "*sufficiently close connection*" at the trial.

(f) Other discretionary factors

126. As stated above, the Judge also considered that if the purple amendments were allowed it would greatly extend the length of the trial which would be detrimental to both CREM and other court users. Mr Béar QC claimed that the purple amendments effectively enable Mr Coates to throw the "*kitchen sink*" at CREM and will require a wide-ranging examination of the whole relationship between the parties and CREM would want to pursue their claim that the Smith documents cannot be subject to any duties of confidence or privilege because of the "*iniquities*" by Mr Coates and others that the documents disclose. The Judge also found that these amendments were late and so there was a heavy burden on Mr Coates to justify them.

127. Mr Vassall-Adams QC says that it would not substantially increase the trial length where such matters would have to be explored anyway. But in any event, he submitted that, given the stage of the proceedings, if the court concludes that the amendments have a real prospect of success and that the Judge applied the wrong test, it does not matter if the trial is consequentially extended. No trial date is being lost, as there is no trial date yet. Furthermore, Mr Vassall-Adams QC said that Circus would be seeking to run an "unclean hands" defence in any event and so the trial would have had to accommodate that. Circus confirmed that it would be seeking to raise that defence. In fact it will seek to run the contractual defences as well, even though it was not a party to the Disclosure Agreement.

128. In my view, any extension to the length of the trial by reason of allowing the purple amendments is an insufficient reason for denying Mr Coates the opportunity to run a defence that he has a real prospect of succeeding on. If the application to amend had come very late in the day, shortly before a trial that had been fixed for some time, then this factor may be material for disallowing the amendments despite having a real prospect of success. But at this stage of the proceedings, it would be unfair and unjust to Mr Coates to disallow the amendments on that basis. I also take into account that Circus is likely to want to pursue similar points and so the court will, in all likelihood, be seized of such matters in any event.

129. In all the circumstances and for the reasons set out above, I allow Mr Coates' appeal in relation to the purple amendments.

D. CIRCUS' APPEAL IN RELATION TO THE CONFIDENTIALITY CLUB

(i) Class Confidentiality

(a) Some preliminary procedural issues

130. As noted above, on 9 November 2020, Mann J gave Circus permission to appeal and indicated that "*the concept of class confidence (if it exists) should be argued on the appeal*". Because the Judge did not consider the "*class claim*" to confidence (indeed his confidentiality club order assumes that Circus was making a "*contents claim*" to confidence) this was not directly included in Circus' Grounds of Appeal. To a certain extent, it is raised in the context of Ground 3 which asserts that the Judge should not have set up the confidentiality club because it was not necessary to determine Circus'

"*class claim*" to confidentiality. But without any judgment on this issue and without any formulated issue on the pleadings, I will have to define exactly what I am deciding.

131. Mann J also decided to adjourn consideration of Circus' application dated 23 September 2020 to amend its Grounds of Appeal to the hearing of this appeal. Circus had made that application because of a change in Counsel from the hearing on 7 August 2020 and the fact that they were asserting that Circus was "*ambushed*" at that hearing on this issue and there was no time to research and develop any arguments against the imposition of a confidentiality club. At the hearing before me, I did not understand that Mr Béar QC was objecting to the amendments and it is appropriate for me to record therefore that I grant permission to amend the Grounds of Appeal.

132. Following Mann J's indication, CREM put in a Respondent's Notice dated 23 November 2020. In that CREM asserted that Circus "*has no (and no arguable) class-based rights to confidentiality or public interest immunity in all of the documents which are the subject of that part of the Order under appeal (the "Relevant Documents")*."

133. Because of the way that this issue has arisen, there are no factual findings from the Judge on it. A factual issue has since emerged as to the scope of the Management Order and in particular whether the Circus Apartments are within it and therefore whether Mr Coates was the Manager of the Circus Apartments. In the parties' skeleton arguments, each side sought to suggest that this issue had been raised by the other and that there needed to be an application by CREM to raise this issue and an application by Circus to adduce new evidence to deal with the point.

134. Again, when we got to the hearing, I did not understand that there was any objection to me considering this issue or allowing Circus to rely on its new evidence. Clearly it would be inappropriate to insist on Circus satisfying *Ladd v Marshall* grounds for such new evidence as this is the first opportunity that it has had to adduce evidence relevant to the court's first consideration of the merits of its claim to class confidence. Accordingly I will allow that new evidence in and will make findings as necessary and insofar as it impacts on the claim to class confidence.

(b) Circus' claim to class confidence

135. As I have described above in [49] to [54], the hearing on 7 August 2020, although originally directed to be about CREM's application to set aside the 23 March 2020 order allowing Circus to intervene, was not about that at all and turned out to be a 4-hour long telephone hearing at which the future direction of the case was discussed. At paragraph 14 of the Judge's Order dated 25 August 2020, the confidentiality club was set up. By paragraph 2 of the Order, Circus was obliged to serve a document, called the "**Note**", by 4 September 2020, setting out its basis for asserting confidentiality and/or privilege in relation to the documents gathered by Mr Coates in response to Search 1 in the 9 December 2019 order. More specifically the order provided as follows:

> "2 [Circus] shall, by 4 September 2020, lodge and serve a document setting out:
>
> a. Each area of dispute between [CREM] and [Mr Coates] in relation to which it wishes to make submissions in this action.

b. A general description of the documents, or class of documents, in relation to which it claims that it has rights of confidentiality and the basis on which it claims such rights of confidentiality, provided that such description shall be in terms that allow a person with access to the documents to understand whether confidentiality is, or is not, asserted in a particular document.

c. A general description of the documents, or class of documents, in relation to which it claims that it has rights of privilege and the basis on which it claims such privilege, provided that such description shall be in terms that allow a person with access to the documents to understand whether privilege is, or is not, asserted in a particular document.

d. A general description of those documents, or class of documents, in relation to which it makes no claim of privilege or confidentiality."

136. It is clear that this was required by the Judge so that the persons receiving the documents within the confidentiality club at Freeths would know over which documents Circus was claiming a right of confidentiality. By paragraph 14b. of the Order, Circus only had to provide documents "*over which [it] has a right of confidentiality*"; documents over which it claims privilege were not to be provided. So the terms of paragraph 2b. were designed to enable the person looking at any particular document to determine whether there was, and if so the basis for, a claim to confidentiality. It does not look like it was envisaged that there would be a class claim to confidentiality over all the Search 1 documents (even though the Judge had been told that that was the claim that Circus was making).

137. Circus' Note in response to this Order is dated 7 September 2020. It defined "*the Documents*" as all of the "*9,000 documents supplied by [Mr Coates] to [Circus] as the results of "Search 1" carried out pursuant to paragraph 2 of the Order of 9 December 2019*". In response to paragraph 2a., the areas of dispute, Circus essentially raised Mr Coates' defences, in the following terms:

"1. Whether the Disclosure Agreement was made for good consideration and is enforceable as a contractual agreement against [Mr Coates].

2. The true construction of the Disclosure Agreement and, in particular, whether there are any documents which fall within the First Limb.

3. Whether [CREM] are entitled to an order for Specific Performance of the Disclosure Agreement.

4. [Circus] reserves the right to add to this list of areas of dispute in the event that [Mr Coates] is given permission to amend his Defence."

138. As to the claim to confidentiality, Circus made it clear that it was making a claim to confidentiality over all the documents. In response to paragraph 2b. of the Order, it stated as follows (underlining added):

"**B. (i) A general description of the documents, or class of documents, in relation to which it claims that it has rights of confidentiality and**

> 5. [Circus] claims rights of confidentiality in all communications between itself (by itself, or by its agents, Residential Land Limited or Norton Rose Fulbright LLP, acting by their officers, employees or members) and [Mr Coates] in his capacity as the statutory manager of the Canary Riverside Estate ("the Estate"). For the avoidance of doubt all of the Documents fall into this class.
>
> **(ii) The basis on which it claims such rights of confidentiality**
>
> 6. All these communications were confidential business communications which the parties did not intend should be disclosed to any third party and, in particular, not to the landlord, without their joint agreement. [Circus] reasonably expected that [Mr Coates] would preserve the confidentiality of all these communications, unless compelled to disclose them pursuant to some legal obligation imposed upon him.
>
> 7. Given the statutory status of [Mr Coates] as the Tribunal-appointed Manager of the Estate, and the reasons for [Mr Coates'] appointment there are very strong policy reasons for keeping such communications confidential. The appointment of a Manager requires fault on the part of the landlord and the operation of the Manager's functions inevitably requires investigation of the landlord's past conduct. If residents cannot communicate freely and frankly with the Manager about such matters for fear that such correspondence may be handed over to the landlord whose misconduct has led to the Manager's appointment, this would have a serious chilling effect on the statutory Manager jurisdiction."

139. The class claim to confidence therefore seems to be based on the relationship between Mr Coates as the "*Tribunal-appointed Manager*" and the "*residents*" of the estate. It is perhaps because of the reference to "*residents*", that the whole issue as to whether Circus is to be regarded as such has arisen. CREM insists that Circus is a commercial tenant and so not covered by the Management Order.

140. It is important to be clear as to what I am being asked to decide in relation to class confidentiality. CREM has accepted in their skeleton argument, and confirmed by Mr Béar QC at the hearing, that if Circus (or any other third party) can establish that the documents are "*ones over which it has a legal right of confidence…and if such right of confidence…can be enforced against CREM, then (and to that extent) the Court will not order specific performance of Mr Coates' obligation to produce such documents*."

141. It is common ground that the context for consideration of Circus' right of confidence is whether such right will defeat CREM's claim to specific performance. To a certain extent, this is putting the cart before the horse, as Mr Philip Rainey QC, appearing with Mr Greg Callus for Circus, put it because CREM's right to specific performance of the Disclosure Agreement has not yet been established and I have allowed Mr Coates to amend his Defence to include further contractual defences as well as the "unclean hands" defence which is directly related to specific performance. Mr Rainey QC referred to *Sterling v Rand* [2019] EWHC 2560 at [80] where Ms Clare Ambrose, sitting as a deputy High Court Judge said:

> "Specific performance is an equitable remedy and will not be granted by an English court if it interferes with the rights of third parties or a party has not come to court with clean hands (see Snell's Equity, 33rd Ed at 17-039 & 044)."

142. At this stage, when the claim to specific performance has not been established, it is difficult to know how strong the right to confidence would have to be in order to defeat specific performance. As I will come on to describe, Circus' submissions on the law in relation to class confidence, which were made on its behalf by Mr Callus, were firmly based on the fact that class confidence was being used in this case as a shield, not a sword, and it was not necessary for Circus to show that the alleged right could have been used as a sword and thereby enforced against CREM, for example, by way of an injunction if CREM already had the documents.

143. It is as a result of the odd way that this has come about that there is no clear basis upon which I am to decide the issue of class confidence. Implicit in Mann J's indication is the possibility that class confidence as a concept does not exist at all. If it does, then I have to decide if it exists in this case because of the relationship that Circus relies upon. But a right of confidence implies that such right is enforceable and it does not make much sense to me to say that I only have to consider whether it is capable of defeating a claim to specific performance when I am in no position to judge (and the proceedings are a long way off this stage) the other balancing factors that may have to be considered before the court will order specific performance. I think that all I can safely decide is whether Circus has a right to class confidence over all the Search 1 documents that it could enforce against CREM.

(iii) The scope of the Management Order

144. CREM says that if Circus is not a tenant over whom Mr Coates was appointed as Manager, then its entire argument as to class confidentiality falls away. They maintain that Circus' claim is entirely dependent on showing that Circus is in an identical position to the individual residential tenants in respect of whose flats Mr Coates was appointed Manager.

145. Circus says that the Circus Apartments were within the Management Order. But it also says that, even if Mr Coates was not the Manager of the Circus Apartments, it does not affect its class confidentiality claim because the Circus Apartments were physically a part of the estate over which Mr Coates had been appointed and Circus was therefore bound to deal with Mr Coates, at least in relation to shared services and the like. So Circus' communications with Mr Coates were necessarily in his capacity as the Tribunal-appointed Manager and they were subject to the same expectation of confidence as if the Circus Apartments were within the Management Order.

146. Given that position it is a little hard to understand why I am being invited to decide this legal and factual question. The evidence in relation to this has blossomed into three witness statements of Mr David Stevens, a partner in Circus' solicitors, Norton Rose Fulbright LLP; and two witness statements of Mr Marsden; in each case exhibiting many documents. I am reluctant to make a definitive finding on this question, when it is more properly a matter for the FTT to determine the exact scope of its Management Order and because of the manner by which the issue has arisen.

147. The 45 Circus Apartments are within a self-contained block to the rear of Eaton House on the estate. Circus has a 999 year underlease dated 26 July 2000 of the block. The block has a ground floor reception area, 45 serviced apartments on the floors above and 20 parking spaces below. The other part of Eaton House is unquestionably within the Management Order.

148. Mr Rainey QC took me to some of the provisions of Circus' underlease and he emphasised that the definition of "*Building*" was "*several blocks of flats within the Estate intended primarily for residential use from time to time completed*". The permitted user was "*for serviced residential lettings of each of the Flats*". Furthermore the premises demised were interior areas only and the landlord is responsible for the repair of the structure and the exterior.

149. Mr Rainey QC then submitted that the Circus Apartments were "*flats*" within the meaning of the 1987 Act. He said that whether it is a "*flat*" or not depends on its physical layout rather than its actual use. He took me to *Q Studios (Stoke) RTM Co Ltd v Premier Grounds Rent No.6 Ltd* [2021] L&TR 9 (UT) which held that studios used as student accommodation were "*flats*" within the Commonhold and Leasehold Reform Act 2002 even though they might not be "dwellings". (See also *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch).)

150. More importantly, in my view, was his point that under s.24 of the 1987 Act, a Manager is not appointed over premises; rather the appointment is to carry out functions in connection with the management of premises to which that part of the 1987 Act applies. It is accepted by CREM that Mr Coates exercised management functions in relation to shared services with Circus. There is therefore no bright line between Circus and the other residential tenants in relation to their dealings and communications with Mr Coates.

151. Mr Béar QC really hangs CREM's case on the inclusion of Circus in the list of "*Commercial Tenants*" annexed to the Management Order. It only came onto that list in the varied Management Order of 29 September 2017, after a 6-day hearing in the FTT between April to June 2017. Mr Marsden says this issue was debated at length with CREM wanting it included and Mr Coates arguing against. Circus itself has never been involved in the FTT hearings.

152. In the original Management Order dated 15 September 2016, the definition of "*Leases*" included the Circus underlease. The "*Premises*" was defined as the whole of the estate and by paragraph 1 Mr Coates was appointed as Manager "*of the Premises…and is given for the duration of his appointment all such powers and rights as may be necessary and convenient and in accordance with the Leases to carry out the management functions of the Landlord under the Leases*" and then there were set out particular powers. "*Commercial Tenants*" were separately defined by reference to the list annexed; that list included a number of restaurants and gyms and the Four Seasons Hotel. The fourth recital to that Management Order excluded the "*Commercial Units*", that is the units of which the Commercial Tenants are leaseholders, from the "*ambit of the Manager's appointment…save where those Units share services with the Lessees*".

153. As I have said, when that Management Order was varied on 29 September 2017, somehow or other, Circus was then included on the list of "*Commercial Tenants*".

However it remained within the definition of "*Leases*" and the fourth recital was removed. Paragraph 1 was varied to read as follows:

> "1. [Mr Coates] …is appointed as Manager…of (a) the residential leasehold properties at Berkeley Tower, Hanover House, Belgrave Court and Eaton House (b) the residential common parts comprised in those buildings (c) the Common Part of the Premises; (d) any Car Park spaces, demised to a residential leaseholder (whether as part of a residential lease or by way of separate agreement); and (e) any Shared Services including those provided or capable of benefiting any Residential Leaseholder, Commercial Leaseholders, Licensee, or Other occupier including the Leaseholder under the Circus Apartment lease."

154. There seems to have been a continuing battle in relation to this issue with Mr Coates applying in 2018 to have Circus removed from the list and Circus itself applying in 2020. The FTT itself recognised that it did not give reasons for Circus' inclusion but it has remained on the list ever since.

155. Mr Stevens in his witness statement refers to the fact that Circus has paid over £1.5 million to Mr Coates and his successor as Manager in respect of residential service charges. That requires interaction and communication between Circus and Mr Coates in his capacity as statutory Manager of the estate. The fact that he does not manage the Circus Apartments as such is, in my view, neither here nor there because he does not manage any of the other individual residential flats in the same way as the landlord does not. The Manager stands in the shoes of the landlord of the estate and manages the premises which contain flats.

156. A major problem with CREM's thesis as to the relevance of this issue is timing. The documents over which class confidentiality is claimed range over the period from the appointment of the Manager in 2016 to the Disclosure Agreement of 18 July 2018. Until September 2017, CREM has to accept that Circus was not on the list of "*Commercial Tenants*". I do not see that the question of class confidentiality can sensibly change as a result of its inclusion on the list from September 2017. The relationship between Mr Coates and Circus did not fundamentally change at all by the varied Management Order. Mr Coates clearly carried out the same functions in relation to the Circus Apartments throughout the relevant period in terms of Shared Services, collection of service charge and maintenance of the exterior of the block.

157. I am therefore not persuaded that I have to come to any conclusion as to the precise scope of the Management Order; nor that I am in a position to do so. There was a relationship between Mr Coates and Circus as a result of the Management Order. Circus says that because of the circumstances under which Mr Coates was appointed to supplant CREM as the landlord of the estate, this is a paradigm example of a relationship of trust and confidence such that any correspondence between them necessarily is protected by the law of confidence. That is the issue I have to decide.

158. I therefore turn now to consider whether in law Circus has a claim to class confidence over all its communications with Mr Coates.

(iv) The law on class confidence

159. The short answer to this question is that there is no authority in which a right of class-based confidentiality has been recognised, let alone enforced. While there is an established body of authority dealing with class-based public interest immunity claims, there is nothing in relation to mere confidentiality claims.

160. Mr Callus took me on a fascinating tour of the law of confidence and privacy (derived from Article 8 of the European Convention of Human Rights), as well as related areas such as data protection and intellectual property and reputational rights. In relation to confidential correspondence, he referred me to cases such as *Pope v Curl (1741) 2 Atk. 342*, concerning an injunction obtained by the poet Alexander Pope in relation to the publication of his private correspondence; and to the very recent decision of Warby LJ in *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch) concerning the publication of a letter sent by the Duchess of Sussex to her father who had provided it to the Mail on Sunday. The latter was however a privacy case (based on Article 8, as well as data protection and copyright) and it concerned one letter. Mr Callus submitted that the tort of misuse of private information developed from the equitable action for breach of confidence as well as the court's obligation to exercise its powers compatibly with Convention rights, such as Article 8.

161. The classic definition of the elements of an actionable breach of confidence remains that of Megarry J in *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419:

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed.
>
> First, the information itself, in the words of Lord Greene, M.R. in the Saltman case[7] on page 215, must "have the necessary quality of confidence about it".
>
> Secondly, that information must have been imparted in circumstances importing an obligation of confidence.
>
> Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

162. The third element is not relevant to the claim to confidence in this case which is covered by the first two elements. As Mr Callus would prefer to put it, when rights of confidentiality are being used as a shield, as Circus seeks to do in this case, Megarry J's third element is not relevant.

163. Mr Callus submitted that companies are entitled to rely on the "*correspondence*" element of Article 8: "*everyone has the right to respect for his private and family life, his home and his correspondence*." Two decisions of the European Court of Human Rights establish that companies can have private correspondence: *Wieser v Austria* (2008) 46 EHRR 54; and *Bernh Larsen Holding AS v Norway* (2014) 58 EHRR 8.

164. In *Imerman v Tchenguiz* [2011] Fam 116, Lord Neuberger MR (as he then was) explained the relationship between privacy and confidentiality:

> 65. The domestic law of confidence was extended again by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457, effectively to incorporate the right

[7] *Saltman Engineering Co. Ltd v Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203

> to respect for private life in article 8 of the Convention, although its extension from the commercial sector to the private sector had already been presaged by decisions such as *Argyll v Argyll* [1967] Ch 302 and *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804. In the latter case, Laws J suggested at p 807 that the law recognised "a right of privacy, although the name accorded to the cause of action would be breach of confidence". It goes a little further than nomenclature in that, in *Wainwright v Home Office* [2004] 2 AC 406, the House of Lords held that there was no tort of invasion of privacy, even now that the Human Rights Act 1998 is in force. None the less, following its later decision in *Campbell's case* [2004] 2 AC 457, there is now a tort of misuse of private information: as Lord Phillips of Worth Matravers MR put it in *Douglas v Hello! Ltd (No 3*) [2006] QB 125, para 96, a claim based on misuse of private information has been "shoehorned" into the law of confidence.
>
> 66. As Lord Phillips MR's observation suggests, there are dangers in conflating the developing law of privacy under article 8 and the traditional law of confidence. However, the touchstone suggested by Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Campbell's case* [2004] 2 AC 457, paras 21, 85, namely whether the claimant had a "reasonable expectation of privacy" in respect of the information in issue, is, as it seems to us, a good test to apply when considering whether a claim for confidence is well founded. (It chimes well with the test suggested in classic commercial confidence cases by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 , 47, namely whether the information had the "necessary quality of confidence" and had been "imparted in circumstances importing an obligation of confidence".)

At [74] Lord Neuberger continued:

> "74. A claim based on confidentiality is an equitable claim. Accordingly, the normal equitable rules apply. Thus, while one would normally expect a court to grant the types of relief we have been discussing, it would have a discretion whether to refuse some or all such relief on familiar equitable principles. Equally, the precise nature of the relief which would be granted must depend on all aspects of the particular case: equity fashions the appropriate relief to fit the rights of the parties, the facts of the case, and, at least sometimes, the wider merits. But, as we have noted, where the confidential information has been passed by the defendant to a third party, the claimant's rights will prevail as against the third party, unless he was a *bona fide* purchaser of the information without notice of its confidential nature."

165. Mr Callus relied on that passage to submit that the claim to confidentiality is made against Mr Coates, not CREM. He submitted that Circus does not have to establish a claim against CREM; merely that Mr Coates is obliged not to pass on the confidential correspondence between Circus and him. The establishment of that right to confidence is good enough, Mr Callus submitted, to prevent disclosure to CREM by way of an order for specific performance of the Disclosure Agreement. Essentially Circus' rights to confidence outweigh any obligation that Mr Coates might have agreed to in the Disclosure Agreement.

166. *Imerman v Tchenguiz* concerned the obtaining of confidential information from a husband's computer by his wife's brother so as to assist the wife in the divorce proceedings. As to the particular claim for confidence in that case Lord Neuberger MR said as follows:

> "76. Communications which are concerned with an individual's private life, including his personal finances, personal business dealings, and (possibly) his other business dealings are the stuff of personal confidentiality, and are specifically covered by article 8 of the Convention, which confers the right to respect for privacy and expressly mentions correspondence.
>
> 77. …It seems clear that much of the information contained in the documents was, at least in the absence of a good reason to the contrary, confidential to Mr Imerman. Many emails sent to and by and on behalf of Mr Imerman, whether connected with his family or private life, his personal and family assets, or his business dealings must be of a private and confidential nature.
>
> 78. However, at least in the written submissions made on behalf of the defendants in the Queen's Bench Division appeal, it was contended that, until Mr Imerman had specifically identified the documents which contained confidential information, and the grounds for claiming confidentiality, his claim in confidence should be rejected. No authority has been cited to support the proposition that, in every case where it is said that breach of confidence has occurred, or is threatened, in relation to a number of documents, the claimant must, as a matter of law, identify each and every document for which he claims confidence, and why. In some cases, that may be an appropriate requirement, for instance where a claimant is seeking to enjoin a former employee from using some, but not all, of the information the latter obtained when in the claimant's employment … However, in the present case, the imposition of such a requirement is unnecessary (as it is obvious that many, probably most, of the documents are confidential or contain confidential information), disproportionate (because of the sheer quantity of documents copied), and unfair on Mr Imerman (in the light of the number of documents copied, and the fact that the copying was done without his knowledge, let alone his consent). It is oppressive and verging on the absurd to suggest that, before he can obtain any equitable relief, Mr Imerman must identify which out of 250,000 (let alone which out of 2.5 million) documents is or is not confidential or does or does not contain confidential information."

167. That last passage seems to me to be the closest one comes in the authorities to a form of class-based confidentiality claim. However it clearly is not holding that such a concept exists. What Lord Neuberger MR was saying was that, given the number of documents that had been unlawfully obtained, it would be "*oppressive and verging on the absurd*" to have to separately identify which ones were confidential and which were not. It did not render all the documents confidential based on class; it was a pragmatic approach to the situation where a large number of the documents would clearly be confidential.

168. In *Candy v Hollyoake* [2017] EWHC 373 (QB), Warby J (as he then was) seemed to reject the notion of a claim to class confidentiality or privacy based purely on the circumstances of the communication. At [47], he said this:

> "There are several problems with this. Most significant of these is the fact that neither privacy rights nor confidentiality rights are imposed in respect of information purely by virtue of the fact that it is disclosed and comes to a person's attention on an occasion which is private, rather than public. Nor does information attract the protection of the law of confidence purely by reason of being confided. The nature of the information is unquestionably an element of a claim in traditional breach of confidence, and one of the factors that go into the mix when applying the circumstantial test for whether information is private in nature."

169. In the end, Mr Callus's submissions effectively came down to the following: that because of the relationship between Mr Coates and Circus, every single piece of correspondence between them was expected to be and was confidential. Both parties were obliged not to disclose such correspondence to third parties without the consent of the other, save under compulsion of law, for example a requirement to disclose in legal proceedings.

170. Mr Callus accepted that in such a blanket claim to confidence there may be included correspondence that is anodyne and dealing with mundane matters to do with the day to day management of the estate. Such correspondence has, he said, a low level of confidentiality but it is still confidential and it can be used as a shield, particularly against specific performance of a contract to which Circus was not a party and which amounted to an agreement by Mr Coates to breach Circus' right of confidence. This is why the difference between a sword and shield became such a large part of Mr Callus' submissions. He said that Circus would probably not be able to rely on such a low level of confidence to enforce its rights against CREM should such documents have come into CREM's hands; but it can rely on it by way of defence to a claim for specific performance.

171. Attractively as these submissions were put, I cannot accept them. There is no authority that supports the way Mr Callus was putting it and it is based on looking at the issue in a vacuum and in a very generalised way. It seems to me that it effectively amounts to saying that all correspondence, at least that which is not published, is inherently private and confidential. If it is not very confidential, there may be no right that can be enforced against a third party who has that correspondence, but there may still be a right to prevent a third party acquiring it pursuant to a contract or some other obligation. Mr Callus was therefore advocating that there are different grades of rights of confidence: some can be used as a sword; and others may only be able to defeat a weak claim to specific performance.

172. The paradox of this argument, in my view, is that it undermines a class confidentiality claim. One would have thought that such a class, if it existed, would mean that all the documents within the class had the same right to confidentiality. Yet it appears that some may have stronger rights and could be used as a sword; whereas others have weaker rights and may only be used as a shield, and only against low level claims. In those circumstances, it surely is necessary to look at the contents of the documents to determine the strength of the right and whether it is capable of defeating the claim to specific performance. As a matter of law, I do not think there is any basis for cloaking all the documents in a blanket of confidentiality.

173. As I said above, and at this stage of the proceedings, all I can decide is whether Circus has a sustainable claim to class confidentiality that it could enforce as such against CREM. I have decided that it does not.

(v) Application to the facts

174. Having so decided, it is not necessary to examine the facts in any great detail. The basis for Circus' claim was set out in paragraph 7 of the Note. It amounts to saying that because of the circumstances around Mr Coates' appointment as Manager, in particular that CREM had defaulted on their obligations as landlord, Mr Coates had to investigate CREM's past conduct. In investigating such past conduct, there are strong policy reasons for allowing "*residents*" to be able to communicate with the Manager "*freely and frankly*" about such matters and without any fear that such might be handed over to CREM at some point. Otherwise, this "*would have a chilling effect on the statutory Manager jurisdiction.*"

175. Even treating Circus as a "*resident*", I think this exaggerates the situation. As Mr Béar QC submitted, the Note expressly limits the confidential communications to the subject of the landlord's past conduct about which the residents must be able to communicate freely. There is clearly a large amount of communication that is not within that category and is nothing to do with the landlord's past conduct. There can be no policy reason for this correspondence to be part of the class claim to confidence. In any event, it is questionable whether Mr Coates was inevitably required to investigate such past conduct as part of his statutory or Management Order functions.

176. Furthermore, as Mr Béar QC also submitted, the landlord remained liable on an indemnity if Mr Coates was obliged to remedy breaches by the landlord of their obligations to tenants. The landlord also remained responsible for insuring the estate. Communications therefore between Mr Coates and the residents, including Circus, could not have reasonably been expected to be kept confidential from the landlord as they may directly affect the landlord's liabilities.

177. As Circus recognises, the correspondence may become disclosable in proceedings, including in particular as part of the FTT's supervisory role over its statutorily appointed Manager. Of course it would only be disclosable if it were relevant to live issues before the FTT or other court and Circus rightly referred to the fact that CREM's efforts to obtain these documents by an order for disclosure were refused by the FTT on the basis that it was just a "*fishing expedition*". Nevertheless, Mr Coates did agree to provide these documents without seemingly being concerned at the time as to any issues of confidentiality. As Mr Béar QC put it, there is a public interest in parties being held to the contracts they have entered into.

178. In the circumstances, and on the facts, I do not think that Circus can establish that it has a right of class confidence over all the 9000 documents that are the product of Search 1. There are clearly amongst such documents, which were not subject to a contents qualification (unlike Search 2), communications over which there is no enforceable right to confidence. If Circus wishes to assert a right of confidence so as to defeat CREM's claim to specific performance, it will have to be based on the contents of the document and not merely that it is part of the class of communications between Circus and Mr Coates.

179. Accordingly I dismiss Circus' claim to class confidentiality.

(ii) The Confidentiality Club

180. The above issues as to class confidentiality have only arisen as a result of Circus' appeal against the confidentiality club order made by the Judge following the telephone hearing on 7 August 2020. The irony of this is that the only logical basis for the confidentiality club would be a contents-based claim to confidentiality that needed to be tested. Even more peculiar is the fact that it was made very clear to the Judge that Circus was putting forward a class-based claim to all of the documents. In the light of that, it seems fairly obvious that that claim would need to be adjudicated on first, before any sort of mechanism, such as a confidentiality club, would need to be set up to adjudicate on a contents-based claim.

181. The very great difficulty with this order is that the Judge gave no reasons for it. That, in itself, could be said to be an adequate ground of appeal. Mr Béar QC submitted that this was a case management decision, as the Judge clearly thought in his written reasons for refusing permission to appeal (see [54] above), and it can therefore only be set aside if it is "*so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge*" – see *Royal & Sun Alliance Insurance PLC v T&N Limited* [2002] EWCA Civ 1964. Without any reasons, it is impossible to know whether the Judge applied the correct principles and whether he took into account all relevant matters.

182. I am afraid to say that I do not think that this order can stand.

183. It was, in my view, at least premature for the Judge to have made the order when he did. At the time, there had been no consideration of Circus' class-based claim to a right of confidence in all the documents. During the course of the hearing on 7 August 2020, Mr Hugh Tomlinson QC, who was then appearing for Circus, explained the broad nature of Circus' claim to confidence:

> "MR TOMLINSON:…We have made it clear for several months what our position in this case is. We are not claiming a document by document confidentiality. We are not saying: "This document is confidential for these reasons". We are claiming class confidentiality. …
>
> JUDGE HELLMAN: So you say that all communications between Mr Coates and Circus are, by definition confidential.
>
> MR TOMLINSON: Yes
>
> JUDGE HELLMAN: Irrespective of their precise content.
>
> MR TOMLINSON: Exactly…
>
> JUDGE HELLMAN: That sounds as if it might be quite a short point to deal with in argument.

> MR TOMLINSON: Exactly, and we have said that from the outset. The suggestion that somehow we are running a document by document confidentiality claim which needs to be the subject of a confidentiality club is, with respect to Mr Aldridge, ludicrous…"

184. Despite that clear statement of Circus' position, repeated later in the transcript, the Judge simply decided to order the confidentiality club that required all the documents over which Circus was claiming a right of confidentiality to be disclosed to partners at Freeths that were behind a Chinese wall. Given the lack of trust between the parties and the allegations that have specifically been made against Freeths in relation to the Smith Documents, it is not surprising that Circus was displeased with an order that required disclosure of documents which it said were confidential.

185. Mr Béar QC submitted that the order could be justified on the basis that there had to be a mechanism to test whether the documents fell within the class of documents over which class confidentiality was being claimed. However, that did not require a confidentiality club or the contents to be looked at; Circus was claiming that all 9000 documents fell into the class.

186. I suppose it could be said that I have now decided the issue of class confidentiality and, if Circus wishes to proceed with a contents-based claim it would make sense to leave the confidentiality club in place so that that claim can be tested. However, I do not think it is appropriate to leave in place an order that should not have been made, particularly as it is only through the appeal from that order that the class-based confidentiality issue has been decided by me. In any event, there could well be an appeal against my decision on that.

187. Circus relies on three Grounds of Appeal, as amended, against the confidentiality club:

> "Ground 1: The Judge did not have the jurisdiction to order a closed material procedure by way of confidentiality [sic], involving the supply of documents to [CREM's] solicitors on the basis that the documents be kept from their clients, without having first determined [Circus'] class-based claim to the confidentiality (and/or privilege and/or public interest immunity) of those documents, and as such his decision was an *ultra vires* derogation from open justice
>
> Ground 2: The Judge was wrong in principle to make an order which provided the documents which were the subject of the action (and potentially many documents which, on proper construction of any contract, were not the subject of the action) to [CREM's] solicitors in circumstances in which there was a dispute as to whether [CREM] had any entitlement to receive the documents under a contract with [Mr Coates] or otherwise, and where such documents were not relevant disclosure for the determination of the contractual claim against [Mr Coates]
>
> …
>
> Ground 4: In making the order, the Judge failed to take into account the background to the dispute, which involved a campaign of litigation by a defaulting landlord against its tenants and a Court apportioned [sic]

> manager where it was alleged in previous proceedings that [CREM] had used stolen confidential documents. Having taken this background, and the inherent problems of information barriers between solicitors and their clients explained in reported cases, into account the Judge should have considered that there was a significant risk of information leakage."

188. I was not particularly taken with Circus' arguments in relation to jurisdiction in Ground 1. Mr Callus' submissions ranged over the authorities dealing with derogations from open justice and the inherent problems with erecting information barriers between lawyers and their clients in a form of closed material procedure: see in particular *Al Rawi v Security Services* [2012] 1 AC 531; *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 1158 (Ch); and *R (Mohammed) v Secretary of State for Defence* [2014] 1 WLR 1071.

189. The trouble with that argument in this case is that CREM were happy for the confidentiality club to be imposed on them. Indeed they were asking for it. So any problem with the lawyers at Freeths not being able to disclose information to their clients is something that they have voluntarily accepted.

190. Ground 2 is however more pertinent. It goes to the issue of prematurity or "*putting the cart before the horse*". This case is about whether the Search 1 and Search 2 documents should be disclosed to CREM. Whether they should or not will only be decided after a trial at which liability is being contested on various contractual grounds, including as to the scope of the obligation, and at which there are defences to an order for specific performance. Confidentiality may provide a further defence to the claim for specific performance. By the order, the Judge has ordered disclosure of all the documents that are the subject matter of the case itself, albeit to people within CREM's solicitors who are subject to the confidentiality club restrictions.

191. Circus has queried the jurisdiction that the Judge was purporting to exercise in making such an order. In particular, whether the Judge was so ordering under CPR Part 31 (which would be consistent with his view that it was a case management decision) or whether it was a form of interim specific performance, both of which Circus submitted would be wholly inappropriate. It is impossible to know, because the Judge did not explain. Mr Béar QC submitted that the purpose of disclosure into the confidentiality club was to enable determination of Circus' claim to confidentiality. However, as I have said above, it is difficult to see why that was necessary to resolve the only issue on that at the time, namely class confidentiality.

192. In my view, whatever the basis for the order, it was a plainly inappropriate order to make at that time. While it must be assumed that any solicitor subject to the obligations set out in paragraph 14 of the 25 August 2020 order would comply with it, I can foresee practical difficulties as to how it would actually work. Under paragraph 14d. of the order, the partner who has seen the contents of the documents may "*advise [CREM] as to whether [Circus'] claim for confidentiality is sustainable in respect of some or all of the Documents (without referring to any specific document or its contents) for the purpose of considering whether to make an application in respect of the Documents*…"

193. I do not understand how CREM can possibly consider making an application in respect of some or all of the documents when they do not know anything about their contents.

Furthermore, the relevance of confidentiality is only as to whether specific performance of the Disclosure Agreement should be ordered. At the stage when that is being considered, if there is still an issue as to whether there is a right of confidentiality that might defeat a claim to specific performance, it would clearly be far more appropriate to appoint an independent solicitor or counsel to argue the point. With the level of mistrust between the parties, including their solicitors, an order such as this, requiring disclosure of hotly disputed documents to the other side's solicitors is bound to engender suspicion and concern that there will be some leakage as to the contents of the documents. (This is Ground 4.)

194. I will therefore allow Circus' appeal and set aside the confidentiality club order. In due course there may have to be a mechanism devised to deal with a contents-based confidentiality claim but that can only sensibly be considered in the context of the trial of this matter and should not require disclosure of documents that are the subject matter of the action to CREM's solicitors before liability has at least been established.

E. CONCLUSION

195. I will summarise my conclusions and disposition on all matters before me:

(1) I dismiss CREM's appeal on the blue amendments;

(2) I allow Mr Coates' appeal on the purple amendments and give permission to make those amendments;

(3) I reject Circus' claims to class confidentiality;

(4) I allow Circus' appeal against the confidentiality club order.

196. I am grateful to all counsel and their teams for their clear and helpful submissions on all aspects I have dealt with. I would hope that the parties could agree a form of order but if a consequentials hearing is necessary that can be arranged through the usual channels.