

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0001

BETWEEN:

EMMERSON INTERNATIONAL CORPORATION

Appellant/Applicant

and

RENOVA HOLDINGS LIMITED

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Paul Webster
The Hon. Mr. Eddy Ventose

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Robert Weekes, KC with him Mr. Iain Tucker and Mr. Daniel Burgess for the
Appellant/Applicant
Ms. Arabella di Iorio and Ms. Jodi-Ann Stephenson for the Respondent

2023: May 24;
July 7.

Application for conditional leave to appeal to the Privy Council – Worldwide freezing order – Confidentiality club – Section 3 of the Virgin Islands (Appeals to the Privy Council) Order 1967 – Whether the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council – Whether the Court of Appeal erred in law in holding that the decision whether to impose a confidentiality club is a discretionary case management decision – Whether the Court of Appeal erred in law in rejecting Emmerson’s submissions that three threshold conditions must be met before the court may order a confidentiality club be imposed – Whether the

Court of Appeal erred in law in not finding that even if the threshold conditions were met (and thus that the court were satisfied that the making of a confidentiality club order is necessary), considerable caution is nevertheless required where a confidentiality club is sought in respect of asset disclosure pursuant to a freezing order

Emmerson International Corporation (“Emmerson”) applied for and obtained before Wallbank J on 19th November 2018 an *ex parte* worldwide freezing order against Renova Holdings Limited (“Renova”) (the “WFO”). The WFO required Renova, among other things, to disclose certain documents and information within 21 days of service of the WFO. Renova subsequently applied to discharge or vary the WFO and for an extension of time to comply with the disclosure requirements of the WFO. The variation of the WFO was sought by Renova to prevent it from disclosing what Renova considered to be confidential and commercially sensitive documents and information until the determination of Renova’s application to discharge the WFO. Wallbank J in an order dated 12th December 2018 extended the time for Renova to comply with the disclosure requirements of the WFO and imposed a confidentiality club in relation to any documents and information disclosed pursuant to the WFO. The confidentiality club order requires that, pending the determination of the application by Renova to discharge the WFO, any documents and information provided by Renova pursuant to the WFO was to be given only to legal practitioners of Emmerson who were admitted in the British Virgin Islands (“BVI”). Those legal practitioners were granted liberty to apply on notice to Renova for permission to share documents and or information with Emmerson.

Emmerson appealed the decision of Wallbank J to make the confidentiality club order. The Court of Appeal gave its written decision in a judgment handed down on 7th February 2023 in which it dismissed all the grounds of appeal, including the main one that Wallbank J erred in concluding that it was appropriate to impose a confidentiality club in respect of the documents and information to be provided by Renova under the provisions of the WFO that could only be seen by Emmerson’s BVI legal practitioners. The Court of Appeal held that the decision of Wallbank J to make the confidentiality club order was a discretionary case management decision that could not be said to be plainly wrong, taking into account all the factors considered by Wallbank J in the balancing exercise he conducted to do justice between the parties.

Being dissatisfied, Emmerson applied under section 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 (the “1967 Order”) for conditional leave to appeal to His Majesty in Council against the decision of the Court of Appeal. The issues arising from Emmerson’s application are: (i) Whether the Court of Appeal erred in law in holding that the decision whether to impose a confidentiality club is a discretionary case management decision, and in rejecting Emmerson’s submissions that three threshold conditions must be met before the court may order a confidentiality club be imposed; (ii) Whether the Court of Appeal erred in law in not finding that even if the threshold conditions were met (and thus that the court were satisfied that the making of a confidentiality club order is necessary), considerable caution is nevertheless required where a confidentiality club is sought in respect of asset disclosure pursuant to a freezing order; and (iii) Whether the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council.

Held: dismissing the notice of motion for conditional leave to appeal to His Majesty in Council with costs to the respondent to be assessed if not agreed within 21 days, that:

1. The imposition of a confidentiality club and, if so, its terms, generally involves a balancing exercise and the following factors are relevant to the exercise of the court's discretion: (1) the court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club; (2) the inherent desirability of including at least one duly appointed representative of each party within a confidentiality club; (3) the importance of the confidential information to the issues in the case; (4) the nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge; and (5) practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information. A party seeking an order for a confidentiality club must provide reasons to the court to exercise its discretion in their favour; merely stating that the information is confidential or sensitive is insufficient.

The Libyan Investment Authority (incorporated under the laws of the State of Libya) v Societe Generale SA & Others [2015] EWHC 550 considered; **Porton Capital Technology Funds & 3 Ors v 3M UK Holdings Ltd (2010)** [2010] EWHC 114 (Comm) considered.

2. The decisions relating to confidentiality club orders do not establish any 'three threshold requirements' that must be satisfied before the court can exercise its discretion to make a confidentiality club order. What they show is that the basis for such orders is the court's inherent jurisdiction to regulate its own procedure in the interests of justice and that the court in granting a confidentiality club order will seek to do justice between the parties considering their rights and needs. That is the only overarching principle that can be distilled from these decisions. The matters which counsel for Emmerson has termed 'threshold requirements', namely that: (i) the applicant must establish the existence of information that is so sensitive that it cannot be satisfactorily protected in any other way; (ii) the applicant must show that the protections arising under the Civil Procedure Rules, 2000 or any express undertakings provide insufficient protection so that there is, despite these measures, a real risk of irreparable harm; and (iii) the applicant must also prove the strict necessity of each aspect of the additional and exceptional protection sought, are not prerequisites for the exercise by the court of its broad discretion to make a confidentiality club order. They are simply three (3) of the many factors or considerations that the court may have regard to in exercising that broad discretion.

The Libyan Investment Authority (incorporated under the laws of the State of Libya) v Societe Generale SA & Others [2015] EWHC 550 considered; **Porton Capital Technology Funds & 3 Ors v 3M UK Holdings Ltd (2010)** [2010] EWHC 114 (Comm) considered; **Bank of America N.A v. Pacific Andes Enterprises (BVI) Limited et al** BVIHC(COM) 2016/0132, BVIHC(COM) 2016/0133 & BVIHC(COM) 2016/0134 (delivered 1st December 2016, unreported) considered. **Roussel Uclaf v Imperial Chemical Industries plc** [1990] RPC 45 considered. **Infederation Ltd v Google Inc and other companies** [2020] EWHC 657 (Ch) considered; **One Plus Technology (Shenzhen) Co., Ltd and other companies v Mitsubishi Electric Corp and another company** [2020] EWCA Civ 1562 considered; **Al-Rawi and others v Security Service (JUSTICE and others intervening)** [2011] UKSC 34; [2011] 3 WLR 388 considered; **JSC Commercial Bank Privatbank v Kolomoisky and others** [2021] EWHC 1910 (Ch) considered.

3. The confidentiality club order under consideration is a quintessential case management decision of Wallbank J in managing the disclosure requirements made pursuant to the WFO to balance the interests of Emmerson in having the fullest possible access to relevant documents and information against the interests of Renova in preserving their confidential commercial information until the final determination of the application to discharge the WFO. Moreover, even if counsel for Emmerson was correct that the establishment of the confidentiality club was not discretionary case management decision of Wallbank J, what cannot be disputed was that it was a *discretionary decision* of Wallbank J. Consequently, the decision of Wallbank J to establish the confidentiality club was certainly of the type of which an appellate court will not interfere with unless Wallbank J took into account irrelevant considerations, or failed to take into account the relevant considerations or that he erred in principle or that he was plainly wrong.

Canary Riverside Estate Management Ltd and others v Coates (Circus Apartments Ltd intervening) [2021] EWHC 1505 (Ch) considered; **Dufour v Helenair Corporation Limited** (1996) 52 WIR 188 followed.

4. The decisions that considered the law relating to confidentiality clubs show that no difficult question of law is involved, and that the law relating to confidentiality clubs is not in dispute. Therefore, the application falls within the ambit of one of the bases on which this Court will not usually grant leave to appeal as no serious issue of great general or public importance arises in law or otherwise for which this Court requires guidance from His Majesty in Council.

Section 3 of the **Virgin Islands (Appeals to the Privy Council) Order 1967** S.I. No. 234 of 1967 applied; **Martinus Francois v The Attorney General Saint Lucia** Civil Appeal No. 37 of 2003 (delivered 7th June 2004, unreported) followed; **Renaissance Ventures Ltd et al v Comodo Holdings Ltd** BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed.

JUDGMENT

- [1] **VENTOSE JA [AG.]:** Before the Court is a notice of motion for conditional leave to appeal to His Majesty in Council against the decision of the Court of Appeal delivered on 7th February 2023 filed by the applicant, Emmerson International Corporation (“Emmerson”).

Background

- [2] Emmerson applied for and obtained before Wallbank J on 19th November 2018 an *ex parte* worldwide freezing order against Renova Holdings Limited (“Renova”) (the “WFO”). The WFO required Renova, among other things, to disclose certain documents and information within 21 days of service of the WFO. Renova subsequently applied to discharge or vary the WFO and for an extension of time to comply with the disclosure requirements of the WFO. The variation of the WFO was sought by Renova to prevent it from disclosing what Renova considered to be confidential and commercially sensitive documents and information until the determination of Renova’s application to discharge the WFO. Wallbank J in an order dated 12th December 2018 extended the time for Renova to comply with the disclosure requirements of the WFO and imposed a confidentiality club in relation to any documents and information disclosed pursuant to the WFO as follows:

- “3. **Pending the hearing of the Discharge Application**, documents and information required under paragraphs 7(1)-(3) and 8 of the Freezing Injunction shall solely be given to and retained by Emmerson’s legal practitioners (as defined in paragraph 4 below) who shall not be entitled without further order to share such documents and information in any way with any other person, including but not limited to other representatives of Emmerson.
4. For the purposes of this Order, Emmerson’s legal practitioners shall comprise those individuals listed in the Schedule hereto, each of whom on the date of this Order was a ‘legal practitioner’ as defined in the Legal Profession Act 2015 (‘Emmerson’s Legal Practitioners’). Emmerson and Renova Holding may agree that the Schedule should be varied, so as to include any other individual instructed by Emmerson who is such a legal practitioner. Emmerson shall have liberty to apply to apply (sic)

(including on short notice) to vary the Schedule in default of such agreement.

5. Liberty to Emmerson to apply (on notice to Renova Holding) for permission for Emmerson's Legal Practitioners to share documents and/or information provided under paragraphs 7(1)-(3) and 8 of the Freezing Injunction with Emmerson." (emphasis added)".

[3] The confidentiality club order is contained in paragraph three (3), requiring that, pending the determination of the application by Renova to discharge the WFO, any documents and information provided Renova pursuant to the WFO was to be given only to legal practitioners of Emmerson who were admitted in the British Virgin Islands ("BVI") as set out in a schedule (paragraph 4). Those legal practitioners were granted liberty under paragraph five (5) to apply on notice to Renova for permission to share documents and or information with Emmerson.

[4] Emmerson appealed the decision of Wallbank J to make the confidentiality club order and the hearing before the Court of Appeal took place on 29th July 2019. The Court of Appeal gave its written decision in a judgment handed down on 7th February 2023 in which it dismissed all the grounds of appeal, including the main one that Wallbank J erred in concluding that it was appropriate to impose a confidentiality club in respect of the documents and information to be provided by Renova under the provisions of the WFO that could only be seen by Emmerson's BVI legal practitioners. The Court of Appeal held that the decision of Wallbank J to make the confidentiality club order was a discretionary case management decision that could not be said to be plainly wrong, taking into account all the factors considered by Wallbank J in the balancing exercise he conducted to do justice between the parties.

The Application for Conditional Leave

- [5] Emmerson applied under section 3 of the **Virgin Islands (Appeals to the Privy Council) Order 1967**¹ (the “1967 Order”) for conditional leave to appeal to His Majesty in Council against the decision of the Court of Appeal. It is not disputed that the proposed appeal to His Majesty in Council is against an interlocutory decision of the Court of Appeal requiring leave under section 3(2). Section 3(2) of the 1967 Order provides:

“Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases –

- (a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
- (b) such other cases as may be prescribed by law for the time being in force in the Virgin Islands.”

- [6] Section 3(2)(a) of 1967 Order permits appeals to His Majesty in Council, with leave of this Court, ‘where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council’. This Court has considered the ambit of section 3(2)(a) on numerous occasions, including the decision of **Martinus Francois v The Attorney General**.² In considering the requirement under the Saint Lucian equivalent of section 3(2)(a), this Court stated that:

“[13] Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase ‘great general or public importance’, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.”

¹ S.I. No. 234 of 1967.

² Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7th June 2004, unreported).

[7] In explaining this passage, this Court in **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**³ summarised the applicable principles:

“[10] ... Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.

[11] It follows as well that the question of law which is said to be of great general or public importance must genuinely arise from the way the case was decided in the Court of Appeal. The question must be 'involved' in the appeal. Such a question cannot arise if it was not raised on the appeal, or if the principle of law which the applicant wishes to have settled by the highest court has not been put in doubt.

...

[13] But even where an applicant fails to establish that the question he or she wishes to pursue before the Privy Council is of great general or public importance, this Court may yet grant leave if it is satisfied that there are good grounds which would otherwise justify referral to Her Majesty in Council, as for example where there is some reasonable doubt as to the correctness of the decision of court.”

[8] This Court also provided useful guidance in **Pacific Wire & Cable Company Limited v Texan Management Limited et al**⁴ as follows:

³ BVIHCP2018/0005 and BVIHCP2018/0008 (delivered 8th October 2018, unreported).

⁴ British Virgin Islands HCVAP2006/019 (delivered 6th October 2008, unreported).

“[11] The above provisions are to be found in similar Orders or the Constitutions of all the Commonwealth Caribbean jurisdictions from which such appeals lie and have been considered by this and other courts of the region. It is generally accepted that the first consideration must be the question that is to be involved on the proposed appeal and so it is both useful and necessary that this should be stated with some precision in applications before this court. It is also generally accepted that an applicant may obtain leave, where the appeal does not lie as of right, on any of three grounds, namely: (i) that the question arising on the proposed appeal is of great general importance; (ii) that the question arising on the proposed appeal is of great public importance; or (iii) that there is good reason why the leave should otherwise be granted. The wording of these tests has been framed in wide terms so that this court has a broad discretion to deal with each application and to consider each question of a proposed appeal on its merits. However, this discretion must be exercised judicially and, in our view, this requires that this court should, as a general rule, strive to act consistently in applying the test to grant leave so that it is in accordance with its current practice and that of other courts of appeal whose discretion is exercised under the equivalent rules, bearing in mind that the jurisdiction of our highest court of appeal is being invoked. As far as possible, the court should also strive to be consistent with the practice adopted by the Privy Council itself in considering petitions for special leave to appeal, although the Board exercises a much wider discretion in relation to such petitions.”

- [9] To satisfy the requirements of section 3(2)(a) of the 1976 Order, Emmerson must show that the question involved in the proposed appeal is either of great general or public importance, or otherwise, that it should be submitted to His Majesty in Council. Emmerson can succeed on either limb of the subsection, and a single question may qualify under both limbs. Emmerson claims that the following errors of law of great general or public importance arise in the appeal:

- “(1) The Court of Appeal erred in law in holding that the decision whether to impose a confidentiality club is a ‘discretionary case management decision’, and in rejecting Emmerson’s submissions that three threshold conditions must be met before the court may order a confidentiality club be imposed (the “First Question”); and
- (2) The Court of Appeal erred in law in not finding that even if the threshold conditions were met (and thus that the court were satisfied that the making of a confidentiality club order is necessary), considerable caution is nevertheless required where a

confidentiality club is sought in respect of asset disclosure pursuant to a freezing order (the “Second Question”).

[10] In relation to the First Question, Emmerson submits that the Court of Appeal did not follow well-established English authorities on the threshold test of necessity that must be satisfied before a confidentiality club can be ordered. Consequently, the law of the BVI concerning the principles that apply to the imposition of confidentiality clubs and the proper scope of such orders have materially diverged from the settled principles that are applied under English law. In respect of the Second Question, Emmerson further submits that the Court of Appeal also erred as to the principles governing the imposition of confidentiality clubs specifically in the context of asset disclosure pursuant to freezing orders. In particular, the Court of Appeal was wrong to reject the submission of Emmerson that even if the test of necessity was satisfied, considerable caution is required in this context due to the importance of asset disclosure for policing the freezing order.

[11] Emmerson submits that these questions are of ‘great general or public importance’ within the meaning of section 3(2)(a) of the 1967 Order for the following reasons: (1) confidentiality clubs are exceptions to the rules of natural justice and open justice and amount to a serious interference with them so it is important to identify the principles regulating the jurisdiction to make such orders; (2) the efficacy of freezing orders would be undermined if applicants are prevented from considering and giving proper instructions on asset disclosure; (3) the delineation of the nature and limits of the court’s jurisdiction to impose confidentiality clubs (both generally and specifically in the context of freezing orders); (4) since the decision of the Court of Appeal deviates from the established English approach, the guidance of the Privy Council in this case would be appropriate; and (5) in this case, the freezing order was granted in respect of a very large sum (US\$893.47 million) in very substantial proceedings that have been ongoing in the BVI for over nine (9) years.

[12] This Court in **Francois** stated that leave under section 3(2)(a) of the 1967 Order is normally granted when: (1) there is a difficult question of law involved; (2) an area

of law in dispute; or (3) the resolution of the legal question poses dire consequences for the public. The third of these do not apply here, so the central issue is whether the legal questions raised by Emmerson are either difficult ones or whether the area of law is in dispute. Before examining that issue, it is important properly to understand the current state of the law relating to confidentiality clubs.

The Law Relating to Confidentiality Clubs

- [13] In **The Libyan Investment Authority (incorporated under the laws of the State of Libya) v Societe Generale SA & Others**,⁵ the court considered whether and on what terms a confidentiality club order should be continued. The purpose of the confidentiality club order was to keep confidential the identities of 20 individuals who were named in banking documents of one of the defendants. Hamblen J stated that in determining the issue the starting point was that each party should be allowed unrestricted access to inspect the other parties' disclosure subject to the implied undertaking that the disclosure will not be used for a collateral purpose.⁶ Hamblen J continued that it is for the person seeking the imposition of a confidentiality club to justify any departure from the norm; and that, to do so, the proponent of the confidentiality club must establish that there is a real risk, either deliberate or inadvertent, of a party using his right of inspection for a collateral purpose.⁷ Hamblen J accepted that the provision of protection using confidentiality rings or clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation, is well recognised;⁸ and that the basis for such orders is the court's inherent jurisdiction to regulate its own procedure in the interests of justice.⁹ Hamblen J stated that confidentiality clubs are most typically employed in antitrust or intellectual property litigation to protect commercial confidences.¹⁰

⁵ [2015] EWHC 550.

⁶ Ibid at paragraph 20.

⁷ Ibid at paragraph 21.

⁸ Ibid at paragraph 23.

⁹ Ibid at paragraph 24.

¹⁰ Ibid at paragraph 25.

[14] Hamblen J explained that the imposition of a confidentiality club and, if so, its terms, generally involves a balancing exercise and that the following factors are relevant to the exercise of the court's discretion: (1) the court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club; (2) the inherent desirability of including at least one duly appointed representative of each party within a confidentiality club; (3) the importance of the confidential information to the issues in the case; (4) the nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge; and (5) practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information.¹¹

[15] A party seeking an order for a confidentiality club must provide reasons to the court to exercise its discretion in their favour; merely stating that the information is confidential or sensitive is insufficient.¹² In **Porton Capital Technology Funds & 3 Ors v 3M UK Holdings Ltd (2010)**,¹³ the defendant made an application for the establishment of a confidentiality club. Christopher Clarke J stated that:

“20. A litigant is bound by the Rules to make disclosure of relevant non privileged documents which fall within the confines of standard disclosure, although the court may vary that obligation. Generally speaking, disclosure is required even if the documents are confidential. Such disclosure is not to be regarded as a waiver of confidentiality. The disclosing litigant loses his right to keep documents confidential because of the provisions of the Rules and subject to the protection that those Rules afford. A claimant may thus be able to see, by way of disclosure, documents which it would not otherwise be lawful for a servant or agent of the defendant to disclose to him. But under CPR 31.22 the claimant will be under an obligation not to use the documents otherwise than for the proper purposes of the action. except where:

‘(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

¹¹ Ibid at paragraph 34.

¹² See *Diamond Shamrock Technologies SA's Patent* [1987] RPC 91 at 93.

¹³ [2010] EWHC 114 (Comm).

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.”

[16] In this paragraph, Christopher Clarke J is merely reiterating that although a litigant is bound by the UK Civil Procedure Rules (“UK CPR”) to disclose certain documents, these documents do not thereby lose their confidentiality because the recipient of the information is under an obligation not to use the information otherwise than for the purposes of the claim unless the exceptions in UK CPR otherwise applies. Christopher Clarke J further stated that:

“43. Confidentiality club orders are the exception rather than the rule. Nevertheless the court will make such an order if the justice of the case demands. The party seeking the order needs to show that the legal restrictions on the use of documents obtained on disclosure are insufficient.

44. In *Roussel Uclaf v ICI* [1990] RPC 45, the Court of Appeal approved the following summary of the principles from the first instance judgment of Aldous J:

‘Each case has to be decided on its own facts and the broad principle must be that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with adequate protection of the secret. In so doing, the court will be careful not to expose a party to any unnecessary risk of its trade secrets leaking to or being used by competitors. What is necessary or unnecessary will depend upon the nature of the secret, the position of the parties and the extent of the disclosure ordered. However, it would be exceptional to prevent a party from access to information which would play a substantial part in the case as such would mean that the party would be unable to hear a substantial part of the case, would be unable to understand the reasons for the advice given to him and, in some cases, the reasons for the judgment. Thus what disclosure is necessary entails not only practical matters arising in the conduct of a case but also the general position that a party should know the case he has to meet, should hear matters given in evidence and understand the reasons for the judgment.’

...

Conclusion

65. I have come to the conclusion that I should make an order upon the lines proposed, and subject to the observations in paragraph 61 above, for reasons partly of principle and partly of pragmatism. As to the former, I am persuaded that there is likely to be a substantial body of confidential information of recent date within the documentation, whose existence justifies such an order. As to the latter, whilst pragmatism cannot override principle, I can see little benefit in requiring the defendants to go through the necessarily time consuming and, therefore, expensive exercise of producing a more focused analysis of specific documents to form the subject matter of the order. I strongly suspect that, but for the dispute about the two individuals, the parties would have been in substantial agreement about it.”

- [17] In **Bank of America N.A v. Pacific Andes Enterprises (BVI) Limited et al**,¹⁴ Davis-White QC J (Ag.) stated that:

“[21] The question of confidentiality clubs in the context of disclosure, being a compelled process, is a different, though doubtless related area, to the question of how the court should protect commercial confidences in circumstances where a party wishes, voluntarily, to deploy material at a trial but without the other parties having full access to that material. Doubtless many of the factors considered by Hamblen J may in practice intrude in that area, though the balancing exercise will be different.”

- [18] In insolvency proceedings, some companies sought to put before Davis-White QC J (Ag.) a written document that included confidential annexures which the companies did not want the other parties to see. The companies were prepared only to allow the other side’s BVI advocates to see the confidential annexures on the condition that the advocates could not share the information or take instructions on the annexures from their clients. Davis-White QC J (Ag.) found that the justification for the confidentiality club was a fabrication which meant that there was no overriding need for the confidentiality club previously made.

¹⁴ BVIHC(COM) 2016/0132, BVIHC(COM) 2016/0133 & BVIHC(COM) 2016/0134 (delivered 1st December 2016, unreported).

- [19] Counsel for Emmerson submits that the discretion to order a confidentiality club only arises where three threshold requirements (that can be distilled from the case law) are met, namely: (1) first, the applicant must establish the existence of information that is so sensitive that it cannot be satisfactorily protected in any other way. This test is therefore one of necessity (citing **Societe Generale SA**); (2) second (as follows logically from the first principle) the applicant must show that the protections arising under the **Civil Procedure Rules, 2000** (“CPR”) or any express undertakings provide insufficient protection so that there is, despite these measures, a real risk of irreparable harm (citing **3M Holdings Ltd**); and (3) third, the applicant must also prove the strict necessity of each aspect of the additional and exceptional protection sought (citing **Pacific Andes**). Counsel for Emmerson further submits that, first, only if those threshold conditions are met is the court then required to carry out a balancing exercise, so as to determine whether to impose a confidentiality club; and, second, the above conditions can be expressed as a single condition: that a confidentiality club shall not be imposed unless it is necessary and then only to the extent that it is necessary.
- [20] I must confess that having read the decisions relied on by counsel for Emmerson, I do not find that they lend any support for the view that the discretion of the court to make a confidentiality club order only arises where an applicant satisfies the court of any ‘three threshold requirements’. In **Societe Generale SA**, Hamblen J, as noted above, stated that the basis for such orders is the court’s inherent jurisdiction to regulate its own procedure ‘**in the interests of justice**’ (emphasis added). Hamblen J’s statement in the next paragraph that ‘the court will also depart from its usual procedural rules where it is necessary to do so in order to protect against a risk to life or limb’¹⁵ was made after he stated that ‘[c]onfidentiality clubs are most typically employed in antitrust or intellectual property litigation in order to protect commercial confidences’. When juxtaposed with the preceding paragraph where Hamblen J explained the basis of such confidentiality club orders, the latter

¹⁵ [2015] EWHC 550 at paragraph 25.

sentence can only be read as suggesting a typical case where the court will make an order for a confidentiality club 'in the interests of justice' is where it is necessary to protect against a risk to life or limb. I do not read paragraphs [20], [22] and [25] of the judgment of Hamblen J in **Societe Generale SA** as proposing any first threshold condition as submitted by counsel for Emmerson.

- [21] Counsel for Emmerson cites from the decision of Christopher Clarke J in **3M Holdings Ltd** that '[c]onfidentiality club orders are the exception rather than the rule... The party seeking the order needs to show that the legal restrictions on the use of documents obtained on disclosure are insufficient'. However, counsel omits the critical sentence which in my view provides the basis on which confidentiality club orders are granted: 'Confidentiality club orders are the exception rather than the rule. **Nevertheless the court will make such an order if the justice of the case demands**' (emphasis added). In the first sentence, Christopher Clarke J is merely stating the obvious. Since the CPR requires disclosure of relevant non-privileged documents, confidentiality club orders depart from this rule and the departure is justified '**if the justice of the case demands it**' (emphasis added). The third sentence, namely, that '[t]he party seeking the order needs to show that the legal restrictions on the use of documents obtained on disclosure are insufficient', is part of the court's assessment of whether the justice of the case demands the establishment of the confidentiality club order; it is not an independent criterion that must be satisfied in respect of all applications for the establishment or the continuation of a confidentiality club order. If the relevant protections afforded under the CPR are sufficient, the court may refuse to make a confidentiality club order. This is a matter that the court must consider having regard to all the relevant circumstances. Consequently, **3M Holdings Ltd** does not establish the existence of a second threshold condition for a confidentiality club order to be established or continued.

- [22] Having read paragraphs [22] to [23] of the decision of Davis-White QC J (Ag.) in **Pacific Andes**, I see nothing therein to support counsel for Emmerson's view that

they support the third of the ‘three threshold requirements’ that must be satisfied before the discretion to exercise a confidentiality club order can arise, namely, that the applicant must also prove the strict necessity of each aspect of the additional and exceptional protection sought by way of a confidentiality club order.

[23] It seems to me that the overriding principle is as stated by Aldous J, as quoted by the Court of Appeal of England and Wales in **Roussel Uclaf v Imperial Chemical Industries plc**¹⁶ and cited by Christopher Clarke J in **3M Holdings Ltd**, that: ‘[e]ach case has to be decided on its own facts and the broad principle must be that the court has the task of **deciding how justice can be achieved taking into account the rights and needs of the parties**’ (emphasis added). In deciding whether to make a confidentiality club order, the central task of the court is to do justice between the parties. This is reminiscent of the statement of Hamblen J in **Societe Generale SA** that the basis for such orders is the court’s inherent jurisdiction to regulate its own procedure **in the interests of justice**. The decision of whether to make a confidentiality club order is one for the first instance judge considering all the factors that bear on that decision, including those outlined by Hamblen J in **Societe Generale SA**.

[24] Contrary to the submission of counsel for Emmerson, the decisions of **Societe Generale SA**, **3M Holdings Ltd** and **Pacific Andes** do not establish any ‘three threshold requirements’ that must be satisfied before the court can exercise its discretion to make a confidentiality club order. What these decisions show is that the court in granting a confidentiality club order will seek to do justice between the parties considering their rights and needs. That is the only overarching principle that can be distilled from these decisions. The three matters that counsel for Emmerson claim to be ‘threshold requirements’ are not prerequisites for the exercise by the court of its broad discretion to make a confidentiality club order. The ‘threshold requirements’ identified by counsel for Emmerson are simply three (3) of

¹⁶ [1990] RPC 45.

the many factors or considerations that the court may have regard to in exercising that broad discretion.

- [25] Counsel for Emmerson also cites in support of the ‘three threshold requirements’ the following decisions: **Infederation Ltd v Google Inc and other companies**;¹⁷ and **One Plus Technology (Shenzhen) Co., Ltd and other companies v Mitsubishi Electric Corp and another company**.¹⁸ Before these two decisions are considered, it might be appropriate first to mention the decision of the United Kingdom Supreme Court in **Al-Rawi and others v Security Service (JUSTICE and others intervening)**¹⁹ which concerned whether absent statutory intervention a civil court could lawfully operate a ‘closed material procedure’ that was designed to exclude a party and the public altogether from certain materials in a civil trial. Lord Dyson JSC dealt briefly with confidentiality club orders, stating that:

“64 Similarly, where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. It is commonplace to deal with the issue of disclosure by establishing ‘confidentiality rings’ of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. Such claims by their very nature raise special problems which require exceptional solutions. I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party.”

- [26] In **Infederation**, the confidentiality club order made by the court was to give effect to an agreement between the parties and contained two further confidentiality rings. The first was an inner confidentiality ring (called “LEO” [legal eyes only] ring) and the second was and a more restricted inner confidentiality ring (called “RLEO” ring), which comprised, on the side of Infederation, ten (10) named external solicitors and counsel. Infederation’s application before the court was for the admission of an independent expert to the LEO and RLEO rings. The underlying dispute was the

¹⁷ [2020] EWHC 657 (Ch).

¹⁸ [2020] EWCA Civ 1562.

¹⁹ [2011] UKSC 34; [2011] 3 WLR 388.

allegation by the founding members of Infederation that the defendant, Google LLC, had abused a dominant position contrary to European Union and UK competition law. Infederation wanted their expert to be admitted to the inner rings not only to address evidence on Google's pending strike out/summary judgment application, but more generally for assistance in the assessment of the disclosures to be provided by Google and, eventually, in preparation for trial.

- [27] It will immediately be clear that the court in **Infederation** applied the principles which must guide the court in deciding whether to *establish* a confidentiality club order to the question of whether additional persons could be admitted to one of the confidentiality rings established by the confidentiality club order. Roth J examined the authorities and concluded that:

“42. Generally, the parties concur in these arrangements [for the establishment of a confidentiality club], although they still require the approval of the court, having regard to the principle of open justice. ... In my view, the important points to emerge from the authorities are that: (i) such arrangements are exceptional; (ii) they must be limited to the narrowest extent possible; and (iii) they require careful scrutiny by the court to ensure that there is no resulting unfairness. Any dispute over admission of an individual to the ring must be determined on the particular circumstances of the case.”

- [28] Roth J, after considering the evidence and various factors, held that ultimately the interests of the administration of justice and Infederation's right to a fair hearing of the case must prevail. Consequently, in light of Google's pending application to strike out, Roth J held that Infederation's independent expert should be entitled to inspect the LEO and RLEO documents, with an appropriate confidentiality undertaking to the court. Roth J noted that the alternative was for Google to renounce reliance on certain parts of its evidence in support of its application to strike out, in which case Roth J would not grant Infederation's application for the independent expert to be admitted to the LEO and RLEO rings.

- [29] Counsel for Emmerson submits that the three points noted by Roth J after examining the authorities (quoted at paragraph [27] above) meant that these were

‘the stringent conditions that apply where (as here) a confidentiality club is limited to external lawyers’. These observations can only be described as general principles that would guide the court when exercising its discretion in determining whether to establish or continue a confidentiality club order, or whether to admit new persons to a confidentiality club.

- [30] The last decision cited by counsel for Emmerson is the decision of the Court of Appeal of England and Wales in **One Plus** which was concerned with the treatment of commercially confidential materials in the context of litigation about standard essential patents. Floyd LJ commenced his judgment by stating at paragraph 1 that:

“1. Documents disclosed in the course of litigation under the CPR to an opposing party may only be used by that party for the purposes of that litigation unless they are read to or by the court, or referred to, at a hearing which has been held in public, the court gives permission or the party who disclosed the document and the person to whom the document belongs agree: CPR 31.22(1). In the vast majority of cases, this rule gives adequate protection against misuse of disclosure documents. It is not uncommon in intellectual property and other types of litigation, however, for highly confidential documents to be subject to more restrictive measures designed to prevent the documents from entering the public domain or being used for collateral purposes. These appeals are concerned with the treatment of commercially confidential materials in the context of litigation about standard essential patents (“SEPs”).”

- [31] The first instance judge had established a confidentiality regime for the disclosure under which the parties could designate documents into one of three (3) levels of confidentiality. Floyd LJ examined various decisions that have examined the law relating to confidentiality clubs including **Roussel**, **Al-Rawi** and **Infederation** and summarised the applicable principles as follows:

“39. Drawing all this together, I would identify the following non-exhaustive list of points of importance from the authorities:

- i) In managing the disclosure of highly confidential information in intellectual property litigation, the court must balance the interests of the receiving party in having the fullest possible access to relevant documents against the interests of the disclosing party, or third parties, in the preservation of their confidential commercial

and technical information: Warner Lambert at page 356; Roussel at page 49.

- ii) An arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all: Warner Lambert at page 360; Al Rawi at [64].
- iii) There is no universal form of order suitable for use in every case, or even at every stage of the same case: Warner Lambert at page 358; Al-Rawi at [64]; IPCOM 1 at [31(ii)].
- iv) The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional: Roussel at [49]; Infederation at [42].
- v) If an external eyes only tier is created for initial disclosure, the court should remember that the onus remains on the disclosing party throughout to justify that designation for the documents so designated: TQ Delta at [21] and [23];
- vi) Different types of information may require different degrees of protection, according to their value and potential for misuse. The protection to be afforded to a secret process may be greater than the protection to be afforded to commercial licences where the potential for misuse is less obvious: compare Warner Lambert and IPCOM 1; see IPCOM 2 at [47].
- vii) Difficulties of policing misuse are also relevant: Warner Lambert at 360; Roussel at pages 51-2.
- viii) The extent to which a party may be expected to contribute to the case based on a document is relevant: Warner Lambert at page 360.
- ix) The role which the documents will play in the action is also a material consideration: Roussel at page 49; IPCOM 1 at [31(ii)];
- x) The structure and organisation of the receiving party is a factor which feeds into the way the confidential information has to be handled: IPCOM 1 at [33].”

[32] Floyd LJ went on to add at paragraph 41 that:

“41. It is obvious from the above that the exercise of deciding what measure of restriction is justified involves the first instance judge in a judgment of the kind which an appellate court will not interfere with ‘unless the judge took into account anything which he ought not to have taken into account or that he left out of account anything which he ought to have taken into account, or that he erred in principle ... [or that he was] plainly wrong’: see Roussel in the Court of Appeal at page 56 lines 16-19, per Buckley LJ.”

[33] Males LJ agreed with the reasoning and conclusions of Floyd LJ and added that:

“117. Disclosure in FRAND litigation where a comparables approach is in issue will almost inevitably require disclosure of highly sensitive commercial information. Accordingly it will be particularly important for the parties and the court in such litigation to ensure (1) that disclosure takes place at an appropriate stage of the litigation, (2) that it is limited to that which is likely to be necessary for the just resolution of the case and does not include material of only peripheral relevance, and (3) that an appropriate regime is put in place to protect its confidentiality which strikes a fair balance between the interests of the parties (including third parties who are counterparties to documents which need to be disclosed).

118. The judge in this case was concerned only with the third of these points. For the reasons given by the judge and by Floyd LJ, the regime which he established was fair and appropriate. As he recognised, however, that regime may have to be adjusted as the litigation proceeds to trial and the issues become more focused.”

- [34] The decision of the Court of Appeal of England and Wales in **One Plus** does not support the ‘three threshold requirements’ put forward by counsel for Emmerson. While it is true that Floyd LJ stated that ‘[t]he court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional’, this was one of many ‘non-exhaustive list of points of importance from the authorities’, the first of which was the following:

“In managing the disclosure of highly confidential information in intellectual property litigation, **the court must balance the interests of the receiving party** in having the fullest possible access to relevant documents **against the interests of the disclosing party, or third parties**, in the preservation of their confidential commercial and technical information...” (emphasis added)

- [35] The decision in **One Plus** confirms that the court must undertake a balancing of the interests to do justice between the parties when deciding whether to establish a confidentiality club. More importantly, it is the overarching principle that the courts must first consider, with the other factors being matters that the court should have regard to when carrying out that balancing exercise. Emmerson submits that the reasoning in the decisions of **Infederation** and **One Plus** are: (1) ‘squarely supportive’ of Emmerson’s submissions; and (2) directly inconsistent with the reasoning and conclusion of the Court of Appeal. To the contrary, the decisions of

Infederation and **One Plus** and all the decisions considered above are inconsistent with the submissions of Emmerson and fully support the reasoning and conclusion of the Court of Appeal. Counsel for Renova submits that none of the authorities relied on by Emmerson supports the narrow formalistic approach of fulfilling three threshold requirements; and then separately directing the court to exercise additional caution in the context of a freezing order. I agree.

- [36] Subsequent decisions in the High Court of England and Wales have confirmed the correct approach when considering whether to make a confidentiality club order. The facts underlying the decision of **JSC Commercial Bank Privatbank v Kolomoisky and others**²⁰ are somewhat similar to this case. In **JSC**, the claimant obtained before Nugee J a worldwide freezing order against the defendants. The worldwide freezing order contained a provision for the disclosure by the defendants of all their assets worldwide exceeding £25,000.00 in value, giving the value, location, and details of all such assets. The claimant applied for and obtained a confidentiality club order that the first and second defendants' asset disclosure be limited to partners and employees at the claimant's English solicitors, Hogan Lovells, and would not be shared with their client. The effect of the confidentiality club order was to prevent the claimant (including its in-house lawyers and other instructing officers and employees) from seeing any documents or information relating to the Ukraine/Russia assets disclosed as part of the first and second defendants' compliance with the worldwide freezing order. Trower J stated that the expectation was that the confidentiality club order was to be of limited duration:

"10. It appears from the judgment that Nugee J gave at the time he made the confidentiality club order that he intended that the regime would 'last for a limited period, until the discharge application can be determined'. This reference to a discharge application was a reference to the first and second defendants' applications to set aside the WFO referred to in the opening lines of paragraph 1 of the confidentiality club order. He also said in the course of his judgment, albeit in relation to the different question of disclosure of assets worth less than £1 million, that 'Everything may change after the discharge application, because either the proceedings

²⁰ [2021] EWHC 1910 (Ch).

will come to a halt or the freezing order will be discharged or matters will proceed with a view to a trial, at which point matters can be revisited.”

- [37] The application to discharge the worldwide freezing order succeeded before Fancourt J but his decision was reversed by the Court of Appeal, with permission to appeal being refused by the United Kingdom Supreme Court. The claimant contended that the confidentiality club order was terminated by no later than the refusal by the Supreme Court of permission to appeal. The defendant argued for the continuation of the confidentiality club order. Trower J, after citing the non-exhaustive list of points of importance from the authorities outlined by Floyd LJ in **One Plus**, explained that:

“44. It seems to me that many of the same factors will apply in any other context in which a confidentiality club is sought to be introduced or maintained. In particular, it is clear that a restriction on disclosure to external eyes only at any stage of the litigation is exceptional and the burden remains on the disclosing party throughout to justify the continuation of any such restrictions for each document or class of documents so designated. Restrictions are capable of being an infringement of basic principles of fairness, including a level playing field, and **will therefore only be permitted where necessary in the interests of justice**. Any departure from the principle must be supported by clear and cogent evidence which will be subject to careful scrutiny by the court.” (emphasis added)

- [38] The important part of that statement is the continued recognition by the court that in determining whether to establish or continue a confidentiality club order, given the effect of such restrictions on the basic principles of fairness, the court must consider what is ‘necessary in the interest of justice’. This focus on what is ‘necessary in the interest of justice’ is the guiding thread running through the decisions relating to confidentiality club orders.

Conclusions

- [39] In **Canary Riverside Estate Management Ltd and others v Coates (Circus Apartments Ltd intervening)**,²¹ Green J had to consider an appeal from a

²¹ [2021] EWHC 1505 (Ch).

decision of a county court judge to establish a confidentiality club in ongoing litigation between the parties. The intervenor had asked the county court judge for permission to appeal the confidentiality club order, but the judge refused on the basis that 'this is essentially a case management appeal'. Green J, after examining the law relating to breach of confidence and the facts, explained that:

"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."

- [40] Counsel for Emmerson submits that the Court of Appeal wrongly held that the imposition of a confidentiality club is a 'discretionary case management decision' and that the making of an order which interferes with the fundamental principles of natural justice and open justice is therefore not (and cannot be) a pure matter of case management discretion. No authority was cited for this proposition, however, Green J in **Coates** commenced his judgment with the following statement:

"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.**" (emphasis added)

- [41] Counsel for Emmerson also submits, using language borrowed from Roth J in **Infederation** (at paragraph 42 of that judgment), that if a confidentiality club (or at least such an order limited to external lawyers only) is: (1) exceptional; (2) must be limited to the narrowest extent possible; and (3) requires careful scrutiny by the court, then it is not a discretionary case management decision but rather requires a determination that an order in those terms is necessary.

[42] The Court of Appeal, after observing that the main ground of appeal was essentially an attempt by Emmerson to impugn a discretionary case management decision of the judge, stated that:

“[5] ... It is well established that case management decisions are discretionary decisions. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the discretion of the first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors, or has come to a decision that is plainly wrong in the sense of being outside the ambit where reasonable decision makers may disagree. The question is not whether the appeal court would have made the same decision as the judge; the question is whether the decision was wrong in the sense explained per Lewison LJ in *Broughton v Kop Football Limited* at paragraph 51.” (citation omitted)

[43] None of the decisions cited by counsel for Emmerson answer the question of whether a confidentiality club order is a case management decision of a trial judge. I suspect that the question never arose because the answer was so plain. It seems to me that the confidentiality club order under consideration is a quintessential case management decision of Wallbank J in managing the disclosure requirements made pursuant to the WFO to balance the interests of Emmerson in having the fullest possible access to relevant documents and information against the interests of Renova in preserving their confidential commercial information until the final determination of the application to discharge the WFO. If there was a need for this clear point, the decision in **Coates** provides it when Green J refers to the establishment of a confidentiality club as a case management order. Moreover, even if counsel for Emmerson was correct that the establishment of the confidentiality club was not discretionary case management decision of Wallbank J, what cannot be disputed was that it was a *discretionary decision* of Wallbank J. Consequently, the decision of Wallbank J to establish the confidentiality club was certainly of the type which an appellate court will not interfere with unless Wallbank

J took into account irrelevant considerations, or failed to take into account the relevant considerations or that he erred in principle or that he was plainly wrong.²²

- [44] The Court of Appeal examined each of Emmerson's grounds of appeal with care particularly Emmerson's submissions that, first, it is only if the three threshold conditions are met is the judge then required to carry out a balancing exercise to determine whether to impose a confidentiality club; and, second, even if the threshold conditions had been met, considerable caution is required where a confidentiality club is sought in respect of asset disclosure provided in support of worldwide freezing injunctions. After examining the submissions of Emmerson and Renova, the Court of Appeal concluded that:

"[26] Renova submitted and I agree, that in imposing a confidentiality club, the learned judge was exercising a case management decision which this Court ought only to interfere with if it was plainly wrong, and it was not. Renova contended that in circumstances where it raised serious concerns as to confidentiality, and where Emmerson maintained that it needed the information to police the Freezing Order, the learned judge conducted the balancing exercise required by the authorities and struck a compromise in the exercise of his discretion. It was a sensible case management decision by an experienced judge seeking to balance the interests of both parties. The appellate court should not interfere with the decision.

...

[33] The imposition and terms of a confidentiality club depends on all the circumstances of the case and generally involves a balancing exercise, which was essentially a matter for Wallbank J's discretion. The confidentiality club appeal essentially concerns a challenge to the discretionary case management decision of Wallbank J. The decision fell within the generous ambit of discretion available to Wallbank J. It cannot be said that the decision was plainly wrong. The confidentiality club was a sensible and pragmatic temporary measure which was put in place fairly to balance the parties' competing interests pending Renova's discharge application. Wallbank J exercised his discretion appropriately, after conducting a careful balancing of all circumstances of the case. The decision fell within the range of reasonable decision making. It is not a decision to which no reasonable judge could reasonably have come. The high threshold for appellate interference of discretionary case management discretion of the judge has not been met."

²² See *Dufour v Helenair Corporation Limited* (1996) 52 WIR 188.

[45] To return to the guidance provided by the decision of this Court in **Francois**, leave under section 3(2)(a) of the 1967 Order is normally granted when: (1) there is a difficult question of law involved; and (2) an area of law in dispute. The decisions that considered the law relating to confidentiality clubs show that no difficult question of law is involved, and that the law relating to confidentiality clubs is not in dispute. The law relating to the establishment or continuation of confidentiality clubs requires the court to balance the interests of the receiving party against the interests of the disclosing party to achieve justice between the parties. In carrying out that balancing exercise, the court will consider many factors including the need for caution in making such orders.

[46] Therefore, the application falls within the ambit of one of the bases on which this Court will not usually grant leave as explained by this Court in **Renaissance** at paragraph [10] as follows:

“Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.”

Disposal

[47] For the reasons given above, I am of the view that no serious issue of great general or public importance arises in law or otherwise for which this Court requires guidance from His Majesty in Council. Consequently, I would dismiss the notice of motion for conditional leave to appeal to His Majesty in Council with costs to the respondent to be assessed if not agreed within 21 days.

[48] I am grateful for the assistance provided by all counsel for the parties.

I concur.

Vicki Ann Ellis
Justice of Appeal

I concur.

Paul Webster
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar