

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0048

BETWEEN:

FANG ANKONG

Appellant

and

GREEN ELITE LIMITED (in Liquidation)

Respondent

Before:

The Hon. Mde. Margaret Price-Findlay
The Hon. Mr. Sydney Bennett
The Hon. Mr. Godfrey Smith

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

Appearances:

Mr. John Carrington, KC with him Ms. Reisa Singh for the Appellant
Mr. John Machell, KC with him Mr. Peter Ferrer, Mr. Christopher Pease and Mr.
Zachary Van Horn for the Respondents

2022: September 23;
October 20.

Commercial appeal - Disclosure – Rules 28.17 and 29.12 of the Civil Procedure Rules 2000 – Discretion of trial judge - Whether the learned judge erred in ordering disclosure of information disclosed under compulsion of a freezing order to third party litigation funders - Costs - Whether the learned judge erred in principle in awarding costs to the respondent in that he should have considered the conduct of the respondent including the failure to send any pre-action correspondence to the appellant on the issue of the disclosure prior to making the application

The respondent is owned by two shareholders, namely HWH Holdings Limited (“HWH”) and Delco Participation BV (“Delco”). The appellant was one of four directors of the respondent which had as its only asset its shareholding in Chiho-Tiande Group Limited (“CT”). In April 2014, the respondent’s shares in CT were sold and the proceeds of the sale were transferred to the directors, excluding the appellant. On the application of Delco, joint liquidators were

appointed to the respondent who then issued a claim against the directors and HWH seeking the return of the sale proceeds of the shares. Delco funded the liquidators in bringing the claim, an arrangement which was sanctioned by court order dated 13th December 2018.

On 17th January 2022, the learned trial judge held that all four directors were jointly and severally liable to account for all the monies paid out of the respondent and that the respondent was entitled to trace the monies paid to the directors. The appellant and HWH appealed this judgment in March 2022.

On 20th January 2022, the respondent applied for post-judgment injunctive relief against HWH and the directors. On 23rd February 2022, the learned judge granted a Mareva injunction against the appellant and a proprietary injunction against the other three directors, along with asset disclosure orders. The appellant complied and provided a letter disclosing his assets; his Fourteenth Witness Statement confirming the contents of the letter; and an affirmation containing the same information as his Fourteenth Witness Statement. The respondent expressly undertook to not use any information obtained as a result of the order in any criminal or civil proceedings, other than the relevant claim.

By application filed 17th May 2022, the respondent sought an order from the learned judge that the respondent be authorized to share with Delco and their legal representatives, any documents received from the appellant in respect of disclosure of the assets pursuant to the injunction order of 23rd February 2022. The main ground on which the application was sought was to allow Delco to consider the proportionality and appropriateness of further litigation expenses in the proceedings in its capacity as funder. The learned judge ordered that the respondent was permitted to disclose to Delco in its capacity as funder and to its legal representatives on a confidential basis, any documents or information disclosed pursuant to the disclosure orders contained in the injunction order dated 23rd February 2022. The learned judge also ordered costs of the application to the respondent.

Being dissatisfied with the decision of the learned judge, the appellant appealed. The central issue for the Court's determination is whether the learned trial judge was right in making an order that the appellant's confidential information, disclosed to the respondent under compulsion of a freezing order, should subsequently be shared with the respondent's litigation funders.

Held: dismissing the appeal and awarding costs to the respondent to be assessed if not agreed:

1. It is the settled practice in the Eastern Caribbean that an appellate court will not interfere with the exercise of a lower court's discretion except if (a) the judge, in exercising his discretion, has erred in principle by either failing to take into account or giving too little or too much weight to relevant factors or considering or being influenced by irrelevant factors; and (b) as a result of the error, the trial judge's decision exceeds the generous ambit within which reasonable disagreement is possible and may be said to be clearly or blatantly wrong.

Dufour v Helenair Corporation Ltd (1996) 52 WIR 188 applied.

2. The codified CPR avoids concepts of implied or express undertakings, by legislating as to the terms on which disclosure documents are held and used. Under the Rules, a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, unless the document has been read to or by the court, or referred to, in open court; or the party disclosing the document and the person to whom the document belongs; or the court; gives permission. Similarly, a witness statement may be used only for the purpose of the proceedings in which it is served unless the court gives permission for some other use of it; the witness gives consent in writing to some other use of it; or the witness statement has been put in evidence. Ultimately, the question must be whether what is being done is for the purposes of the proceedings, or some other purpose. Whether one looks at the express undertaking given by the respondent in the order or CPR 28.17 or 29.12, the use of the information by the litigation funders is ultimately in or for the purposes of the proceedings. The disclosure letter and witness statement fall squarely within CPR 28.17 and 29.12, respectively.

Rule 28.17 of the **Civil Procedure Rules 2000** applied; Rule 29.12 of the **Civil Procedure Rules 2000** applied; **Caldero Trading Limited v Beppler & Jacobson Limited and Others [2012] EWHC 1609 (Ch)** applied; **Ansol Limited v Ellersay Management Limited & Hamer Investing Limited BVIHCV2007/0316 (delivered 15th and 26th February 2008, unreported)** considered.

3. In any event, the disclosure letter, witness statement and affirmation would pass the implied undertaking test at common law. In construing this test, the question which ought to be asked is whether the use to which Delco intends to put the disclosed documents – “to consider the proportionality and appropriateness of further litigation expenses in these proceedings” – can be properly construed as ancillary to that for which the disclosure order was made, namely, to police or ensure the efficacy of the freezing order, or is it for an ulterior purpose? As the applications and interlocutory appeals proliferate within these same proceedings, the funder will naturally wish to assess the extent to which it should commit further resources. That assessment naturally involves considering the value of the assets disclosed by the appellant that could be available to offset litigation expenses should the respondent be ultimately successful. It is therefore difficult to see how this could not be viewed as ancillary to the policing of the Mareva injunction. Further, once this exercise has been carried out and concluded, the details of the funding agreement is of doubtful relevance, especially in circumstances where it is common ground that Delco is the litigation funder.

Caldero Trading Limited v Beppler & Jacobson Limited and Others [2012] EWHC 1609 (Ch) applied.

4. The learned judge refused to grant a general stay of execution or enforcement of the trial order, except for a limited stay in relation to selling the assets of the appellant. The order did not prevent the respondent taking further steps in aid of execution or enforcement of the binding judgment in its favour (that remains unsatisfied) short of selling the appellant's assets, which must await determination of the substantive appeal. There was therefore nothing wrong in the judge taking the view that the respondent was entitled to take steps in a strategy of enforcement pending determination of the substantive appeal.
5. The judge could and did take into consideration that the undertaking was sufficiently broad and prevented Delco from relying on the disclosed information in the Hong Kong proceedings which was, in any event, completed and judgment pending. The appellant did not present the court with any other scenario in which there was a real risk that the information could be used in order for the court to consider in its deliberations and balancing exercise. Absent any such indications of real risk, the learned judge was right in characterizing the appellant's concerns as speculative. All such disclosure orders are open to speculation that they can somehow be used for some unauthorized purpose not yet known. However, that is the reason why the undertaking is given and for which there is a sanction if breached.
6. While it is true that no pre-action letter was sent to the appellant, the judge noted in his oral judgment that the application had been issued in May 2022 which provided the appellant with ample opportunity to take proper advice on it, who instead chose to contest it and lost. In these circumstances, there is no reason to interfere with the learned judge's order that the successful party be awarded its costs of the application.

JUDGMENT

- [1] **SMITH JA [AG]:** This is an interlocutory appeal against the order of the learned trial judge permitting the respondent to disclose the appellant's financial information to Delco Participation BV ("Delco"), the third-party funder of the respondent's litigation expenses. The appellant contends that the learned trial judge blatantly erred in exercising his discretion to permit the disclosure and exceeded the generous ambit within which reasonable disagreement is possible. The respondent counters that the judge made no relevant error in permitting disclosure and that the appeal is misconceived. The central issue at the heart of this appeal is therefore whether the learned trial judge was right in making an order that the appellant's

confidential information, disclosed to the respondent under compulsion of a freezing order, should subsequently be shared with the respondent's litigation funders.

Background

- [2] A brief background suffices to provide the necessary context to the appeal. The respondent is equally owned by two shareholders, namely, HWH Holdings Limited ("HWH"), a company incorporated in the BVI, and Delco, a company incorporated in the Netherlands. The appellant was one of four directors of the respondent which had as its only asset its shareholding in Chiho-Tiande Group Limited ("CT"). The other three directors were Mr. Gu Liyong, Mr. Fang Anlin and Ms. Ding Li.
- [3] The respondent's shares in CT were sold in April 2014 for approximately HK\$150 million and the proceeds ultimately transferred to the three directors, not including the appellant, which the respondent contends was done without its approval or that of its shareholders. On the application of Delco, joint liquidators were appointed to the respondent who then issued a claim against the directors and HWH on 14th December 2018 seeking the return of the sale proceeds of the shares. Delco funded the liquidators in bringing the claim, an arrangement sanctioned by the court in an order dated 13th December 2018.
- [4] The claim was tried in October and November 2021 and on 17th January 2022, the learned trial judge held that all four directors were jointly and severally liable to account for all the monies paid out of the respondent and that the respondent was entitled to trace the monies paid to the directors. That judgment, to date, remains outstanding. On 2nd March 2022, the appellant and HWH filed an appeal against that judgment to the Court of Appeal, which was heard during the week of 3rd October 2022 and judgment reserved.
- [5] On 20th January 2022, the respondent applied for post-judgment injunctive relief against HWH and the directors, which was opposed. The appellant filed his Twelfth

Witness Statement in opposition to the injunction application which included a table of his and HWH's assets as at 14th February 2022.

The Mareva Injunction & Disclosure Order

[6] On 23rd February 2022, the learned judge granted a Mareva injunction against the appellant and a proprietary injunction against the other three directors, along with asset disclosure orders. Paragraphs 1, 14 and 15 of the Mareva injunction, which are directly relevant to the issues arising on this appeal, provided as follows:

. There shall be no stay of execution or enforcement of the Trial Order save that (save with the written consent of the First Defendant) there shall be a stay (pending final determination of any appeal of the Trial Order by the First and Fifth Defendants ("the Appeal") or further order of the Court in the meantime) of any attempt by the Claimant by or pursuant to court order or otherwise in any jurisdiction to sell any asset of the First Defendant.

5. Within 5 working days of being served with this Order, the First Defendant must disclose to the Claimant's BVI legal practitioners, by way of letter, details of all of his assets worldwide (save that the First Defendant is only obliged to disclose assets outside of the PRC and only those assets in value over US\$50,000) whether held in his own name or not, whether solely or jointly owned and whether the First Defendant is interested in them legally, beneficially or otherwise. The details should specify: (i) the value, location and details of the assets, (ii) whether the assets are in the First Defendant's own name; (iii) whether they are solely or jointly owned; and (iv) whether the interest is legal, beneficial or otherwise, or if they are controlled by the First Defendant directly or indirectly.

6. Within 14 days of being served with this Order, the First Defendant must swear and serve on the Claimant's legal practitioner an affidavit repeating and confirming the information that is required to be provided pursuant to paragraph 5 above.

[7] There was compliance with the disclosure order. On 28th March 2022, the appellant's attorneys, Kendall Law, provided a letter disclosing certain details of his assets. On 14th April 2022, the appellant filed his Fourteenth Witness Statement which repeated and confirmed the information set out in the letter of 28th March 2022. Then on 22nd April 2022, the appellant filed a sworn affirmation containing the same information as in his Fourteenth Witness Statement and confirming that the details

disclosed in his Twelfth Witness Statement (i.e. the voluntary asset disclosure) were still accurate.

The Express Undertaking

- [8] In a schedule to the Mareva injunction, the respondent (claimant in the court below) provided certain undertakings including that set out at paragraph 5 which is directly relevant to the issues arising on this appeal:

“(5) The Claimant will not without the permission of the Court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in BVI or in any jurisdiction, other than this claim.” (Underlining added)

The Application & Order to Share Information with Delco.

- [9] By application filed 17th May 2022, the respondent sought an order from the learned judge that it,

“...be authorised to share with Delco Participation BV and their legal representatives, any documents received from the First Defendant in respect of disclosure of the First and Fifth Defendant’s assets pursuant to the injunction order dated 23 February 2022...”

- [10] The respondent’s ground for the application was set out at paragraph 9 of its application. For completeness, paragraphs 8 through 12 of the application are set out below.

“8. Pursuant to the asset disclosure orders in paragraphs 14 and 15 of the Freezing Injunction, Fang has disclosed certain details of his worldwide assets (Fang’s Asset Disclosure).

9. Delco funded the Joint Liquidators in bringing the Claim and continues to do so with respect to matters consequential to the Judgment. Green Elite seeks permission to disclose Fang’s Asset Disclosure to Delco in order that Delco may properly consider the proportionality and appropriateness of further litigation expenses in these proceedings in accordance with the terms of the Funding Agreement and in its capacity as Funder.

10. At paragraph 5 of the Schedule to the Freezing Injunction Green Elite undertook not to, save with the Court’s permission, use any information obtained as a result of the Freezing Order for the purpose of any civil or

criminal proceedings, either in the BVI or any other jurisdiction, other than for this Claim.

11. To this end, Delco has provided an undertaking that (i) it will not disclose any information contained in Fang's Asset Disclosure to anyone (save for its legal counsel), and (ii) it will not use the documents or information contained therein for any purpose other than to consider the funding of any steps to be taken post-Judgment by Green Elite.

12. Based on the foregoing, the Claimant respectfully asks the Court to grant the draft order filed with this Application." (Underlining added)

[11] The learned judge ordered¹ that:

"1. The Claimant is permitted to disclose to Delco Participation BV (in its capacity as funder) and to its legal representatives on a confidential basis, any documents or information disclosed by the First Defendant in relation to his assets pursuant to the disclosure orders contained in paragraphs 14 and 15 of the injunction order dated 23 February 2022.

2. The First Defendant pay the Claimant's costs of the application which costs are to be assessed in the absence of agreement between the parties within 14 days from the date of this Order (i.e. by 4pm on Thursday 4 August 2022)

3. There be a limited stay on paragraphs 1 and 2 above for a period of 7 days."

[12] It is to be noted that, according to paragraph 1 of the learned judge's order set out above, the capacity in which Delco was permitted to receive disclosure of the information was in its capacity as funder. This is of some significance since, in his oral judgment on the application, the learned judge had stated that Delco, as a shareholder in the respondent, could be permitted to receive disclosure, which the appellant, in this appeal, contends was an error of law. It should also be noted that the order permitted disclosure of any of the documents subject to the Mareva injunction order of 23rd February 2022, namely, the letter, witness statement and affirmation of assets.

¹ Order dated 19th July 2022 and entered 27th July 2022.

Issues

[13] In his Notice of Appeal, the appellant enumerated seven grounds of appeal which, after hearing the arguments, can be distilled into the following issues:

- (i) Whether the learned trial judge, in exercising his discretion, misdirected himself and failed to apply the correct principles relating to disclosure to third parties.
- (ii) Whether the learned trial judge failed to consider adequately or at all the grounds on which the respondent sought permission to disclose the asset information and whether he erred by granting the information sharing order despite the respondent's refusal to disclose the funding agreement.
- (iii) Whether the learned trial judge took irrelevant matters into account in exercising his discretion to order disclosure of the appellant's confidential information to Delco, namely, by considering Delco's interest as a shareholder in the respondent, its previous liability for costs to the appellant and its need to know how effective the security provided by the Mareva injunction would be.
- (iv) Whether the learned trial judge erred in failing to take into account the proper timing of any disclosure in light of the stay previously granted and by holding that it was important for Delco to have disclosure before the substantive Court of Appeal hearing in October 2022.
- (v) Whether the learned trial judge erred by failing to properly consider or at all the allegedly inadequate nature of Delco's undertaking in circumstances where there was no evidence of how the undertaking was to operate in practice so as to afford adequate protection to the appellant.
- (vi) Whether the learned trial judge erred in awarding costs in circumstances where the respondent failed to have sent any pre-action correspondence to the appellant, refused to disclose the terms of the Funding Agreement and where there was no stated urgency to the Application.

Principles for reviewing exercise of High Court's discretion

- [14] The decision being appealed involves the exercise of discretion by a High Court judge. Both counsel for the appellant and the respondent cited **Dufour v Helenair Corporation Ltd**² as authority for the proposition that an appellate court will not interfere with the exercise of a lower court's discretion except if (a) the judge, in exercising his discretion, has erred in principle by either failing to take into account or giving too little or too much weight to relevant factors or considering or being influenced by irrelevant factors; and (b) as a result of the error, the trial judge's decision exceeds the generous ambit within which reasonable disagreement is possible and may be said to be clearly or blatantly wrong. This is the settled standard in the Eastern Caribbean for reviewing a judge's exercise of discretion and will be applied in evaluating the exercise of the learned judge's discretion in the case at bar.

Whether judge misdirected himself in law

- [15] Mr. Carrington, KC's fundamental contention, in his own words, is that:
- "The learned judge erred in law and in principle by considering irrelevant matters and failing to consider or give proper weight to relevant matters in conducting the required balancing exercise between the right of the Appellant to privacy of his confidential financial information disclosed by him under compulsion of an Order of the court and any interests of the third-party funder in the disclosure of such information."
- [16] He also contends that an order for disclosure should only have been granted if the court was satisfied that there were special circumstances requiring it, based on cogent and persuasive reasons presented by the respondent.
- [17] The starting point is therefore an appreciation of the rules and principles applicable in determining whether confidential information disclosed to one party under compulsion of a court order can be shared by that party with a third-party funder.

² (1996) 52 WIR 188.

[18] The **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (“CPR”) make provision for the subsequent use of disclosed documents:

“Subsequent use of disclosed documents

28.17 (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, unless –

(a) the document has been read to or by the court, or referred to, in open court; or

(b)(i) the party disclosing the document and the person to whom the document belongs; or

(ii) the court;

gives permission

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to in open court.

(3) An application for such an order may be made by any –

(a) party; or

(b) person to whom the document belongs. (Underlining added)

[19] The CPR further provides:

“Use of witness statement for other purposes

29.12 (1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that the –

(a) court gives permission for some other use of it;

(b) witness gives consent in writing to some other use of it; or

(c) witness statement has been put in evidence.” (Underlining added)

[20] There is no corresponding provision for affidavits.

[21] Mr. Carrington, KC, appears to have nailed his colors to the mast of **Ansol Limited v Ellersay Management Limited & Hamer Investing Limited**,³ a judgment of the BVI High Court. He relies on the following quote from paragraph 20 of **Ansol** (citing

³ BVIHCV2007/0316 (delivered 15th and 26th February 2008, unreported).

Disclosure, Matthew & Malek, 2nd Ed, para 13.01) as being the applicable law on disclosure in the circumstances of this case:⁴

“It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery. So it has been said that the implied undertaking is more a matter of justice and fairness, to ensure that a person’s privacy and confidentiality are not invaded more than is absolutely necessary for the purposes of justice. A further rationale is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery.”

[22] **Ansol**, however, involved an application for an order that the applicants be permitted to disclose certain confidential documents in collateral proceedings in London. In **Ansol**, Joseph-Olivetti J, at paragraph 16 of that judgment, identified the issue as being whether Ansol has “made out a proper case for leave to use these admittedly confidential documents for a collateral purpose...” She then went on to consider the applicable legal principles for granting permission to use confidential documents for a collateral purpose.

[23] It was in that context – an application to use confidential documents in collateral proceedings – that Joseph-Olivetti J stated at paragraph 25 that, “[t]he general principle for granting leave is that the court will not do so save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery.”

[24] The reference to the existence of “special circumstances”, which Mr. Carrington, KC, places great reliance, is also in the context of an application for permission to use confidential information for a collateral purpose.

⁴ See para 12 of Appellant’s written submissions dated August 2022.

[25] As in the case at bar, in **Caldero Trading Limited v Beppler & Jacobson Limited and Others**,⁵ the claimant had been provided with information, in the form of witness statements and an affidavit, as to a defendant's assets pursuant to the terms of a freezing order and had shared that information with litigation funders. The issue before the court was whether the claimant should be enjoined to prevent further disclosure and ordered to recover documents disclosed to the funders. In considering whether to grant relief, the High Court of England and Wales analyzed the English CPR 31.22 and 32.12 (the equivalent of CPR 28.17 and 29.12), the relevant undertakings and the applicable principles in circumstances similar to the case at bar.

[26] The following passages of **Caldero**, reproduced at some length below and underlined for emphasis, are of considerable assistance to this Court in resolving this issue:

"56. CPR 31.22 replaces the common law rule based on an implied undertaking not to use documents disclosed on "discovery" otherwise than for the purposes for which they were disclosed. As the notes in the White Book indicate, it avoids concepts of implied or express undertakings, by legislating as to the terms on which disclosure documents are held and used. The same is true for witness statements. CPR 31.22 has been held to be a 'complete code' for disclosure documents, see SmithKlineBeecham v Generics [2004] 1 WLR 1479 at 1490. The code is neutral as to whether the disclosure documents or witness statements are obtained by compulsion, or are produced voluntarily as part of a party's case.

57. Mr Morgan drew my attention to a transcript of a decision of the Court of Appeal in *Savings & Investment Bank v Gray* and another (No 1) dated 10th August 1990... Lloyd LJ said that the true test was not whether the documents are being used for the purposes of the action, but

'whether the documents obtained on discovery are being used for the purpose for which the discovery was ordered, or whether they are being used for a collateral purpose. Normally the purpose will not be collateral if the document is to be used in the same action. But I can imagine cases

⁵ [2012] EWHC 1609 (Ch).

where that would be not so, just as I can imagine the converse case where the purpose would not be collateral even though the documents are to be used in a separate action.'

58. So Lloyd LJ went on to say that the question to be decided was whether the plaintiffs were proposing to put the documents to some 'collateral or ulterior purpose to the purpose for which they were obtained on discovery.' The Court answered that question in the affirmative.

...

60. Mr. Morgan submits that in the present case there can be no sense in which the court's order compelling Leibson and Mr Telser to disclose information was to enable the petitioner to provide that information to a third party funder. The information was ordered for a specific and limited purpose, namely as ancillary to and in aid of injunctive relief granted by it. He submits that such use is not "for the purpose of the proceedings" as that phrase is properly understood.

61. Mr Hollington submits that showing and supplying the documents to a third party funder for that third party to determine whether to fund the proceedings and whether to give and whether to continue to give the cross-undertaking in damages is use 'for the purpose of the proceedings'. That is permitted use whether one looks at the express undertaking in the order or CPR 31.22.

62. I consider first the application in so far as it relates to material other than the affirmation of Mr Telser. All this material seems to me to fall squarely within CPR 31.22 as disclosure or as a witness statement within CPR 32.12. The delineation of the limits of the use to which this material may be put turns on the meaning of 'for the purpose of the proceedings in which it is disclosed'. I cannot accept Mr. Morgan's submission that this phrase carries with it the limitations on use of disclosure which the old implied undertaking would have imposed. I accept that, as Savings & Investments v Gray makes clear, it was not enough to ask, prior to the CPR, whether the documents were being used in the same action. It was necessary to examine more closely whether the documents were being used for the purpose for which they were disclosed, or for some ulterior or collateral purpose. However, the draughtsman of the CPR chose not to go down that route in codifying the restrictions on use of disclosure documents. He or she chose to define the permitted scope as being "for the purpose of the proceedings". Had it been the intention to define the permitted

scope of use by reference to the precise purpose for which the documents were disclosed it would have been a simple matter to do so.

63. By laying down a test that documents may only be used for the purposes of the proceedings in which they are disclosed, it seems to me that those who framed the CPR were providing a different test. Thus any use within the purpose of the proceedings is permitted use, whilst any use for a purpose outwith the purpose of the proceedings can only be made with the leave of the court. If use for the purpose of the proceedings is to be restricted, it is necessary to apply for a restriction to be imposed.
64. Is showing or supplying the witness statements and attached documents to a third party funder so that the funder can determine whether to continue to fund the proceedings and whether to give and whether to continue to give the cross undertaking in damages use “for the purpose of the proceedings”? Mr. Morgan submitted that such use was to be distinguished from showing or supplying documents to a witness, as such use was within the proceedings. Showing the documents to a third party funder was use outside the proceedings. He said that if I were to hold that it was legitimate to supply documents to a third party funder in these circumstances, funders would be able to buy information to which they would not otherwise have access.
65. In my judgment, at least in the present circumstances, the use to which the petitioner has put the documents other than the affirmation is use for the purpose of the proceedings. I do not think that the distinction which Mr. Morgan seeks to draw between witnesses and funders is a workable one. Ultimately the question must be whether what is being done is for the purposes of the proceedings, or some other purpose. Although Mr. Morgan did not accept on behalf of his clients that what had been done was necessary for the purposes of making the decisions referred to, there was really no evidence that it was done for any other purpose.
66. I conclude therefore that in relation to the material other than the affirmation of Mr Telser there has been no breach of the conditions on which the materials are held. Subject to an undertaking proffered by TNK which I mention below, I see no reason for the court to intervene to prevent the documents from continuing to be used for the purpose they were shown and supplied to TNK.”

[27] The key principles that emerge from **Caldero** are that:

- (i) Rules 31.22 and 32.12 are a complete code for disclosure of documents which is neutral as to whether the disclosure documents or witness statements are obtained by compulsion, or are produced voluntarily as part of a party's case;
- (ii) The test under the codified CPR for undertakings differs from that of the implied undertaking at common law. Under the common law test (pre-CPR), it was necessary to examine whether the documents were being used for the purpose for which they were disclosed, or for some ulterior or collateral purpose. Now, under the codified CPR, the test is whether the use is "for the purpose of the proceedings";
- (iii) The codified CPR avoids concepts of implied or express undertakings, by legislating as to the terms on which disclosure documents are held and used;
- (iv) The limits of the use to which this material may be put turns on the meaning of the phrase "for the purpose of the proceedings in which it is disclosed", which does not carry with it the limitations on use of disclosure which the implied undertaking would have imposed.
- (v) The phrase "for the purpose of the proceedings in which it is disclosed" means that any use within the purpose of the proceedings is permitted use, whilst any use for a purpose outwith the purpose of the proceedings can only be made with the leave of the court. Ultimately, the question must be whether what is being done is for the purposes of the proceedings, or some other purpose.
- (vi) The regimes of CPR 31.22 and 32.12 apply only to disclosed documents and to witness statements.

[28] Whether one looks at the express undertaking given by the respondent in the order (set out at paragraph 8 above) or CPR 28.17 or 29.12, the use of the information by the litigation funders is ultimately in or for the purposes of the proceedings. The disclosure letter and witness statement fall squarely within CPR 28.17 and 29.12, respectively. But if I am wrong on this, all three – the disclosure letter, witness statement and affirmation – would, in any event, pass the implied undertaking test at common law.

[29] On the implied undertaking test, the question is: can the use to which Delco intends to put the disclosed documents – “to consider the proportionality and appropriateness of further litigation expenses in these proceedings” – can be properly construed as ancillary to that for which the disclosure order was made, namely, to police or ensure the efficacy of the freezing order, or is it for an ulterior purpose?

[30] In **Caldero**, Floyd J also considered the applicable test for disclosed documents not covered by the codified CPR:

“67. I turn therefore to the affirmation of Mr Telser. The regimes of CPR 31.22 and 32.12 apply only to disclosure and to witness statements. A first question is whether either provision applies also to information and documents provided pursuant to a Mareva order. In *Marlwood Commercial v Kozeny* [2004] EWHC 189 (Comm) Moore-Bick J thought that it did not. He said at [32] that 31.22 does not ‘extend to documents or information provided under any other form of compulsion, for example ... an affidavit of assets ordered in support of a freezing injunction.’ I agree.

68. ...However, information produced pursuant to a freezing order is not in my judgment ‘disclosed’. Thus the contents of the affirmation of Mr Telser are not disclosure within the meaning of Part 31.

69. What rules now govern what may be done with information and documents produced pursuant to the Mareva jurisdiction? If the implied undertaking continues to apply in relation to the affirmation ordered to be produced by Leibson and Mr. Telser pursuant to the order, it would, as Mr. Morgan submits, limit the use to which the documents were to be put to purposes ancillary to the Mareva relief...

70. Mr. Hollington submits that there is no room for the implication of an implied undertaking in the face of the express undertaking in the order. The express undertaking permits the use to which the petitioner has put the documents.
71. ... I agree with Mr. Morgan that in cases not subject to the codification in CPR Part 31 and 32, the implied undertaking continues to apply. In the present case it is possible to read both the express and the implied undertakings together, the former regulating use in relation to fresh proceedings, the latter imposing obligations as to the purpose for which the material may be used. Thus I reject Mr. Hollington's submission that there is no room for the implied undertaking in the face of the express undertaking in the order.
72. Accordingly, in my judgment, the affirmation and its exhibits should not have been shown or supplied to TNK-BP. However the material has been supplied. The question is therefore whether I should grant an injunction prohibiting further use or a mandatory injunction requiring its return.

[31] Mr. Carrington, KC contended, here and in the court below, that the purpose for which Delco intends to use the disclosed document (to assist Delco in properly considering the proportionality and appropriateness of further litigation expenses) is a purpose collateral to that of policing the Mareva injunction.

[32] I am not persuaded that it is. It is not in dispute that Delco is funding the respondent's litigation. Apart from the substantive trial, the proceedings gave rise to a number of applications and an appeal against the substantive judgment which remains unsatisfied. There is no guarantee that the respondent will be able to trace the proceeds paid to the three directors.

[33] As the applications and interlocutory appeals proliferate within these same proceedings, the funder will naturally wish to assess the extent to which it should commit further resources. That assessment naturally involves considering the value of the assets disclosed by the appellant that could be available to offset litigation expenses should the respondent be ultimately successful.

- [34] As the English Court of Appeal stated at paragraph 31 of its judgment in **Excalibur Ventures LLC v Texas Keystone Inc.**⁶

“Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest. What the judge characterised as ‘rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals’ is what is to be expected of a responsible funder...”

- [35] Against that backdrop, it is difficult to see how the respondent’s stated purpose of using the appellant’s disclosed information to properly consider the proportionality and appropriateness of further litigation expenses in these proceedings could not be viewed as being ancillary to the policing of the Mareva injunction.

- [36] This is how the learned trial judge considered and resolved this issue:

“Fourthly, I don’t accept that funding is merely collateral to policing the Mareva. It’s artificial in my judgment to divide up the purpose of disclosure. The purpose of disclosure is certainly to allow policing of the Mareva, but it’s also to ensure that a rational strategy of enforcement of the judgment can be put in place, and that again requires discussion between the Liquidator and the funder. Accordingly, as a discretionary matter, it is, in my judgment, right to make disclosure to Delco in its capacity as funder.

The position is, in my judgment, even stronger in relation to Delco’s position as shareholder. Green Elite was not wound up as an insolvent company. It was wound up on the just and equitable ground. Delco therefore has a very material interest in the steps being taken by the Liquidators to realise the assets for the benefit of the shareholders.

For this reason, two [sic], it’s important in my judgment that Delco should be able to discuss freely and frankly with the Liquidators what steps the Liquidators are taking to obtain the best recovery of the assets of Green Elite.

For those reasons, two [sic], as a matter of discretion, the implied undertaking should in my judgment be relaxed.”

- [37] If the compulsory disclosure order is for the purpose of policing the Mareva injunction so as to not frustrate a potential judgment in favour of the respondent,

⁶ [2016] EWCA Civ 1144.

then that is ancillary to Delco, as funder, developing, as the learned trial judge put it, a “rational strategy” for enforcement of the judgment in discussion with the liquidators about the appellant’s available assets.

[38] The learned judge considered **Caldero**, the provisions of the CPR and the implied undertaking at common law and correctly concluded that the disclosed information could properly be shared with Delco as third-party funders.

[39] Before leaving this ground, there is another aspect of the appellant’s submission that needs to be addressed. The appellant, relying on paragraphs 20 and 25 of **Ansol**, contends that the learned trial judge, in making the information sharing order, failed to conduct the required balancing exercise between the right of the appellant to privacy in relation to the information disclosed under the court order against any irremediable injustice to Delco not having access to such information, and never directed his mind to any possible injustice to the appellant by way of the information sharing order.

[40] As previously explained at paragraphs 22, 23 and 24 above, **Ansol** is of limited assistance since it was a case involving an application to use disclosed confidential information for a collateral purpose. In any event, the learned judge did consider any possible injustice to the appellant when he stated in his oral judgment:

“Secondly, the trial in Hong Kong has been completed. Judgment is reserved. The affidavit of assets cannot be used at that trial because it’s too late.

Mr. Carrington puts the matter on the basis of the strategic importance of Delco knowing what assets Mr. Fang has. In my judgment that’s speculative. Mr. Fang is adequately protected by Delco’s undertaking not to use the materials disclosed.

Third, Mr. Carrington, in my judgment, is putting the cart before the horse. What the funders need to know is how effective the security or quasi security given by the Mareva might be. They need to discuss the strategy which can best be adopted to execute the judgment with the Liquidators in order to have those discussions about the strategy of execution. They need

to have knowledge of the assets disclosed by Mr. Fang. Thus, there is a genuine need for Delco to know what assets Mr. Fang has disclosed.

- [41] By considering the Hong Kong proceedings, the learned judge was clearly weighing the possibility of the information being used in those proceedings if he made the information sharing order, and concluded that, since those proceedings were concluded, there was no risk. He also addressed his mind to Delco knowing what assets the appellant had and concluded that this was adequately protected by the undertaking. This was effectively a balancing exercise, and I am unable to conclude that in weighing the matter as he did, the learned judge exceeded the generous ambit within which reasonable disagreement is possible.

Whether learned judge erred in granting disclosure despite the respondent's refusal to disclose the funding agreement

- [42] In relation to this second ground of appeal, the appellant submits that the learned judge erred in "bizarrely" concluding that details of the funding agreement between Delco and the respondent were irrelevant to the application for information sharing. Mr. Carrington, KC submitted that the learned judge could not be satisfied of the need for information sharing, based on the only substantial ground on which the application was made, in the absence of the funding agreement and that the respondent was required to at least disclose the relevant clauses in the funding agreement.
- [43] This is how Mr. Carrington, KC developed the argument: it has always been Delco's decision to finance the proceedings against the appellant and there is no general right of a claimant to get the financial information of the defendant. This is normal litigation risk. The parties have been involved in considerable litigation in the past for which the absolute necessity of the appellant's disclosure was not required and the current position is that the respondent's costs to date (funded by Delco) are fully covered by the disclosed assets. It therefore begs the questions what has changed and what is the irremediable injustice to Delco if the sharing of information is not permitted? These questions were not answered by the respondent. Furthermore,

contended Mr. Carrington, KC, if the respondent and Delco wished to maintain the stance that they will not disclose the funding agreement, which is the only means by which a third party such as the appellant or the Court can determine whether the ground of the application has been made out, then they should not expect the Court to exercise a discretion in their favour, adversely to the appellant.

[44] The essence of the learned judge's reasoning on this point is set out below:

"Looking at those points in turn, as to one, it's common ground that the Funding Agreement is a privileged document. So there's no power on the Court's part to order disclosure. It's true that it will be possible to make disclosure a condition of any order. However, Delco have already been made liable for the costs of earlier proceedings which have been made in Mr. Fang's favour. Because they are funders, the exact terms of the Funding Agreement in my judgment are immaterial to this. It's clear that they are funding the litigation, therefore have potential liabilities to Mr. Fang and the other Defendants."

[45] I do not think there is merit in this ground of appeal. As previously explained, the test to be considered and applied in determining whether information disclosed under a Mareva injunction may be shared to a third-party litigation funder involves a consideration of whether the purpose for which the information is to be put can be considered ancillary to the purpose for which the disclosure order was made. Once that exercise has been carried out and concluded, the details of the funding agreement is of doubtful relevance, especially in circumstances where it is common ground that Delco is the litigation funder. Consideration of the funding agreement forms no part of the deliberative exercise that the judge is required to embark upon.

Irrelevant considerations & procedural injustice

[46] Under this ground of appeal, the appellant asserts that the learned judge erred by taking into account irrelevant matters, namely, that Delco was a shareholder of the respondent and by conflating the interest of a shareholder in a judgment debt owed to the company with that of the company itself. By so doing, he disregarded an elementary principle of company law, namely, that the company is a separate entity from its shareholder.

- 47] Having correctly applied the relevant principles and concluded that the information would be shared with Delco in its capacity as funder it was not necessary for the judge to go on to consider whether Delco, as shareholder, had an interest in the judgment debt and therefore in the information. Indeed, the learned judge's order stated that Delco was entitled to receive the information in its capacity as funder. In this regard, I agree with Mr. Machell, KC that even if the learned judge erred in taking Delco's status as shareholder into account, that conclusion was not material to the decision.
- [48] The appellant also contends that the learned judge wrongly took into consideration matters that were not raised in the disclosure application or in evidence before him, namely, that Delco had been found liable to pay costs previously by the High Court and that Delco needed the information to discuss a rational strategy with the liquidators, thereby breaching elementary provisions of procedural justice by not permitting the appellant to address these matters.
- [49] In its application for information sharing, the respondent sought permission to disclose the appellant's asset disclosure to Delco in order that Delco may properly consider the proportionality and appropriateness of further litigation expenses in these proceedings in accordance with the terms of the funding agreement and in its capacity as funder. This is sufficiently broad and is part and parcel of policing the Mareva injunction to ultimately ensure the judgment can be satisfied if upheld on appeal. Stripped to its essence, the purpose was for Delco to assess the effectiveness of the freezing injunction for enforcement purposes before committing more funds to the litigation which would obviously require a discussion of strategy with the liquidators. This was not explicitly spelt out in the application but was set out in the respondent's skeleton argument filed in the court below and therefore there was ample opportunity for the point to be addressed before the learned judge. In these circumstances, the appellant can hardly be said to be prejudiced.

Timing of disclosure

[50] On this ground, the appellant's contention, as I understand it, is that the learned judge erred in principle when he concluded that no issue arose concerning the timing of any disclosure to Delco because an appeal does not operate as a stay. In so doing, the appellant says that the learned judge failed to consider that he had, on 23rd February 2022, actually granted a stay of realization of the appellant's assets to satisfy the judgment pending appeal so that no issue of completion of execution by realization of assets could arise before (an unfavourable) decision was rendered by the Court of Appeal.

[51] There is not much force in this ground of appeal. The learned judge in fact refused to grant a general stay of execution or enforcement of the trial order, except for a limited stay in relation to selling the assets of the appellant. The order did not prevent the respondent from taking further steps in aid of execution or enforcement of the binding judgment in its favour (that remains unsatisfied) short of selling the appellant's assets, which must await determination of the substantive appeal. There was therefore nothing wrong in the judge taking the view that the respondent was entitled to take steps in a strategy of enforcement pending determination of the substantive appeal.

Adequacy of undertaking

[52] As regards the fifth ground of appeal, the appellant submitted that the learned judge erred by not directing his mind to how the undertaking offered on behalf of Delco by the respondent would operate in practice in order to determine whether it would afford adequate protection to the appellant from the perils of having his confidential information used for some collateral purpose. The appellant submits that the "overarching feature" is that this matter involves the confidential financial information of the appellant disclosed under compulsion of the 23rd February 2022 disclosure order to a third party. The appellant therefore faces the "real peril" of his confidential information being disclosed to a third party not contemplated under the compulsion order. It is further submitted that this risk was in no way minimized by the inadequate

blanket undertaking proffered on behalf of Delco. Furthermore, the statement made by the learned judge that the Hong Kong proceedings are over, is not a sufficient answer to the bare undertaking given by the respondent and ultimately the appellant's confidentiality was not given proper consideration or weighed proportionately against the third-party's interest.

[53] Delco's undertaking was given in writing by a director of Delco and exhibited to the affidavit of Mr. Crumpler, one of the joint liquidators, which stated:

"28. Delco has provided an undertaking that:

28.1 It will not, without permission of the Court, disclose the Fang Asset Disclosure or information contained therein to any third party (save for its legal counsel, Clifford Chance); and

28.2 It will not, without the permission of the Court, use the Fang Asset Disclosure or any information contained therein for any purpose (including in Delco's proceedings before the Hong Kong Court against Mr Fang Ankong and other defendants in cases, HCA 3040 of 2015, HCA 2943 of 2015 and HCA 2939 of 2016 (and any subsequent proceedings issued)) other than in considering the proportionality and appropriateness of further litigation expenses in the Proceedings in accordance with the terms of the Funding Agreement and in its capacity as Funder.

This undertaking is exhibited at pages [19] to [20].

29. I draw the Court's attention to the fact that Delco itself also brought proceedings against HWH before the Hong Kong courts (the Hong Kong Proceedings). I am informed by Delco that the trial in the Hong Kong Proceedings has taken place and the parties are awaiting judgment."

54] The judge could and did take into consideration that the undertaking was sufficiently broad and prevented Delco from relying on the disclosed information in the Hong Kong proceedings which was, in any event, completed and judgment pending. The appellant did not present the court with any other scenario in which there was a real risk that the information could be used in order for the court to consider in its deliberations and balancing exercise. Absent any such indications of real risk, the learned judge was right in characterizing the appellant's concerns as speculative.

All such disclosure orders are open to speculation that they can somehow be used for some unauthorized purpose not yet known. However, that is the reason why the undertaking is given and for which there is a sanction if breached.

Award of costs

- [55] The appellant's sixth ground of appeal is that the learned judge erred in principle in awarding costs to the respondent where no pre-action correspondence was sent to the appellant who was therefore placed in a situation where he could not be advised on the merits of the application in the absence of disclosure of the funding agreement.
- [56] While it is true that no pre-action letter was sent to the appellant, the judge noted in his oral judgment that the application had been issued in May 2022 which provided the appellant with ample opportunity to take proper advice on it, who instead chose to contest it and lost.⁷ In these circumstances, there is no reason to interfere with the learned judge's order that the successful party be awarded its costs of the application.
- [57] For the reasons stated above, I am of the view that on the issues that arose for his consideration, the learned trial judge reached conclusions which were within the ambit of reasonable decision-making and was just, correct and appropriate. There is therefore no proper basis for this Court to interfere with the decision of the learned trial judge and, accordingly, this court makes the following orders:

- (1) The appeal is dismissed.

⁷ See Transcript of oral judgment at pg. 39.

- (2) Costs are awarded to the respondent to be assessed if not agreed.

I concur.
Margaret Price-Findlay
Justice of Appeal

I concur.
Sydney Bennett
Justice of Appeal [Ag.]

By the Court

Chief Registrar