Neutral Citation Number: [2022] EWHC 2880 (Ch)

Case Nos: **E00YE350, F00YE085, BL-2019-BRS-000028, 166 and 167 of 2015, and 21 of 2019**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)
INSOLVENCY AND COMPANIES LIST (ChD

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 15 November 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

In the Possession Proceedings

CHEDINGTON EVENTS LIMITED
(formerly AXNOLLER EVENTS LIMITED)

Claimant

and

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE

Defendants

In the Eviction Proceedings

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

In the Documents proceedings

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE

Claimants

-and-

(1) GEOFFREY WILLIAM GUY
(2) THE CHEDINGTON COURT ESTATE LIMITED
(3) CHEDINGTON EVENTS LIMITED
(formerly AXNOLLER EVENTS LIMITED)

Defendants

In the Insolvency Application

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(as trustees of the Brake Family Settlement)
AND OTHERS

Applicants/Respondents

and

(1) SIMON LOWES
(2) RICHARD TOONE
(as joint liquidators of the Stay in Style Partnership (in liquidation))
(3) DUNCAN KENRIC SWIFT
(as former trustee in bankruptcy of Nihal Brake and Andrew Brake)
(4) THE CHEDINGTON COURT ESTATE LIMITED

Respondents/Applicants

- -
- -

William Day (instructed by **Stewarts Law LLP**) for Chedington Events Ltd and The Chedington Court Estate Ltd
Mrs Nihal Brake for herself and Mr Andrew Brake

Application dealt with on paper

- -

Approved Judgment

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

.....

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Tuesday 15 November 2022.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application by notice dated 14 October 2022. It is brought by The Chedington Court Estate Limited and Chedington Events Limited (formerly called Axnoller Events Limited) ("the Guy Parties") against Mrs Nihal Brake and her husband Mr Andrew Brake ("the Brakes") in four separate sets of legal proceedings between them. The application relates to a single document disclosed by the Brakes in compliance with a worldwide freezing order granted by me on 28 February 2022, but in only two of the four sets of proceedings.

2. The application is for an order permitting that document (a redacted bank statement addressed to Mrs Brake) to be adduced in evidence in support of a further application also made by the applicants in all four sets of proceedings. That further application is also dated 14 October 2022. It seeks an order cancelling a mental health crisis moratorium entered into by Mrs Brake in late August 2022, pursuant to the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 ("the 2020 Regulations"). That application will be listed for hearing in due course. I am presently considering what directions need to be given in respect of it.

3. The worldwide freezing order in compliance with which the document was disclosed was made on 28 February 2022 in two sets of proceedings between the parties which have become known as the "Possession Proceedings" and the "Eviction Proceedings". The undertakings given by the Guy Parties as part of the order included one in the usual form concerning the use to which any information obtained could be put. It read:

> "The Guy Parties 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 England and Wales or in any other jurisdiction, other than in the Possession and the Eviction Proceedings."

4. The redacted bank statement which is the subject of the present application shows that a sum of money was paid into Mrs Brake's bank account in September 2022 by a third party (who is named). The entry contains the word "retainer", on the basis of which the Guy Parties submit that this demonstrates that Mrs Brake is being remunerated for work. Moreover, on the basis of the identity of the third party, they submit that the work concerned is in the financial services industry, in which Mrs Brake was previously employed. They say that this document is therefore relevant to the question which arises in the moratorium cancellation application, of whether Mrs Brake is suffering from a mental disorder of a serious nature for which mental health crisis treatment is required.

Background

5. I set out some of the background to this complex and interlocking litigation in a recent judgment, given on an application dated 12 September 2022, substantially between the same parties, and also concerned with the same moratorium, though on a quite different point: see my judgment of 4 November 2022, at [2022] EWHC 2797 (Ch), [2]-[11]. The brief summary that follows here is based on that, though omitting unnecessary details, and including some others. The starting point is that the parties have been locked in large-scale litigation ever since the breakdown of the former employment relationship between them in November 2018. I have so far tried four full-scale actions between them. There are also employment proceedings, with which I am not concerned.

6. I have mentioned the Possession and Eviction Proceedings. In the Possession Proceedings, the Brakes were refused permission to appeal against my decision in principle in favour of the Guy Parties ([2022] EWHC 365 (Ch)). But there will be a further trial next year, this time of the quantum of damages due to the Guy Parties by way of mesne profits. In relation to Eviction, my decision at trial against the Brakes ([2022] EWHC 366 (Ch)) was recently reversed by the Court of Appeal ([2022] EWCA Civ 1302), but the question whether the Brakes are entitled to any (and if so what) remedy is subject to further written submissions, and a decision has yet to be taken by the Court of Appeal.

7. The other two of the four cases with which I have dealt are known for convenience as the Documents Proceedings. and the Insolvency Proceedings. The Documents Proceedings are effectively at an end, the Court of Appeal ([2022] EWCA Civ 235) having affirmed my decision at first instance ([2021] EWHC 671 (Ch)). In relation to the Insolvency Proceedings, I struck out most of the claims at an early stage ([2020] EWHC 537 (Ch), [2020] EWHC 538 (Ch)), and the only part of it which actually went to trial was thereafter known as the Section 283A Claim, in which I found for the Guy Parties ([2020] 4 WLR 113). Permission to appeal that decision was refused. The Court of Appeal subsequently ([2021] BPIR 1) reversed part of my strike out decision, so that I might have to try that part in future. However, the Supreme Court has recently heard an appeal by the Guy Parties against that part of the decision of the Court of Appeal which went against them, so the position on that part of the Insolvency Proceedings remains uncertain.

8. In the meantime, costs orders, constituting judgment debts, have been made in these proceedings against the Brakes and in favour of the Guy Parties, and given the fluidity of the situation in the various claims, there may conceivably be more in future, and perhaps even damages too. It is important to notice that these debts are (and if ordered in future will be) owed by the Brakes jointly rather than individually. Some of the past costs orders were paid, but a considerable amount owed under them remains unpaid. The Guy Parties have sought to take various steps by way of enforcement.

9. However, on 6 May 2021 Mr Brake entered into a mental health crisis moratorium under the 2020 Regulations, of the same kind that his wife has recently entered into. (So far as I am aware, he is still in it.) So, all enforcement action had to cease against him at that time: see regulation 7(2), (6)(c). But, as I noted at [21] of my judgment of 17 August 2021, the further effect of

regulation 7(7)(n) of the 2020 Regulations is that, without more, the already existing joint judgment debts could not be further enforced against *Mrs* Brake either.

10. After Mr Brake entered his moratorium, the Guy Parties made two applications. One was for that moratorium to be discharged; the other was for certain "unless orders". I heard the applications on 12 August 2021. I dismissed the application to discharge the moratorium, but granted the application for "unless" orders, giving my reasons in a written judgment delivered on 17 August 2021: [2021] EWHC 2308 (Ch), [2021] 1 WLR 6218. That written judgment dealt with the structure and provisions of the 2020 Regulations, and some of what I said there will be relevant for the purposes of the present judgment. One point which I decided on that occasion was that a moratorium under the regulations did not apply to *future* debts, *ie* debts incurred after the moratorium came into effect: see at [44], [51], [70].

11. Accordingly, although the Brakes were now protected against enforcement action in relation to *past* joint debts (which at the time was all of them), they were exposed in relation to *future* such debts. It was not long before a further joint debt arose. Following an unsuccessful appeal in one of the cases by the Brakes to the Court of Appeal ([2022] EWCA Civ 235), that court ordered that the Brakes pay the costs of the Guy Parties, and ordered an interim payment on account of £70,000. That sum was not paid. The Guy Parties applied for and obtained a TPDO, on an interim basis, on 4 April 2022, in relation to a third party pension policy owned by Mr Brake. On 30 May 2022, I decided that the TPDO should be made final: see [2022] EWHC 1746 (Ch). But my order involved the grant of an injunction requiring Mr Brake to exercise his right to draw down his remaining pension entitlement from the third party.

12. My decision requiring Mr Brake to take steps to draw down his pension was made on 20 July 2022. It set out the steps to be taken by the parties, beginning with Mr Brake. A draft order was sent to me on 29 July, agreed between the defendants and the third party, with no objection in principle from the claimants. On the same day Mrs Brake confirmed that Mr Brake had taken the first step required of him, namely, asking HMRC for confirmation of his tax code. However, it appears that he has not further complied. In fact, the Brakes applied for various postponements of steps under the order, all of which were refused.

13. On 30 August 2022, Mrs Brake wrote to the Guy Parties' solicitors to inform them that she had entered into what she called a "Mental Health Crisis Breathing Space" on 26 August 2022. (Strictly speaking, a "mental health crisis moratorium" under the regulations is to be distinguished from a "breathing space moratorium", as amongst other things the provisions for termination are different. But for present purposes the differences do not matter.) In fact, the official Insolvency Service notifications say that Mrs Brake's entry into the moratorium happened very slightly later than she says it did. But nothing turns on this.

14. As I said in my judgment of 17 August 2021 (at [18]), the main point of the 2020 regulations is to provide sufficient protection for indebted individuals to help them to enter into sustainable debt solutions, and to encourage them to seek

appropriate debt advice. But there is a second and separate route into the scheme for those receiving mental health crisis treatment. This reflects the fear that this group might face challenges in meeting the requirement to engage with debt advice in order to meet the eligibility criteria: see my judgment of 17 August 2021, at [19]. Both Mr Brake and now Mrs Brake have separately been entered under this alternative route, on the basis of their separate mental health states.

15. As I have said, when the Brakes were ordered to pay the Guy Parties' costs of their unsuccessful appeal in March this year, that was a (joint) debt which was outside Mr Brake's moratorium, and could be enforced against the Brakes. It enabled the Guy Parties to apply for and obtain a TPDO against Mr Brake and his pension provider. But the entry of *Mrs* Brake into *her own* moratorium has changed all that for the future, and no future enforcement action can take place in relation to any joint debt incurred before such entry without the court's consent.

16. The Guy Parties thereafter made the earlier application referred to in paragraph [5] above, which resulted in my judgment of 4 November 2022, consenting to the continued enforcement of the TPDO. But the Guy Parties have now also made the application of 14 October 2022, for an order *cancelling* Mrs Brake's moratorium altogether. That application is made in all four sets of proceedings between the parties, presumably because there are unsatisfied judgment debts in all of them. And it is in *that* context that the present application, for permission to use a document disclosed only by virtue of the freezing injunction, comes to be made.

The parties' submissions

17. As I have already said, the redacted bank statement shows that money was paid into Mrs Brake's bank account in September 2022 by a named third party, using the word "retainer", The Guy Parties in written submissions ask the court to infer that this shows that Mrs Brake is being remunerated for work in the field of business of the third party, which they say is financial services.

18. They further submit that the redacted bank statement

> "is relevant to a key issue in the application which is whether Mrs Brake is suffering from a mental disorder of a serious nature for which mental health crisis treatment is required. It will be relevant for the Court (and any experts should permission for such evidence been given in the Moratorium Application) to consider what professional work Mrs Brake is undertaking in circumstances where she purports to be suffering from a mental disorder of a serious nature for which mental health crisis treatment is required".

19. Mrs Brake submits in answer that the test which the court must apply in deciding whether to give permission to use documents obtained under the freezing injunction for the purposes of some other litigation is the same as that which the court must apply in deciding whether to give permission under CPR rule 31.22 to use documents disclosed as part of the disclosure process in litigation for collateral purposes, including in other litigation. She says the sole purpose of requiring the disclosure of information as part of the freezing injunction is to

protect the applicants' financial position by enabling them to monitor the financial position of the respondent.

20. She relies on the decision of the House of Lords in *Crest Homes plc v Marks* [1987] AC 829, and two more recent decisions, namely *Glaxo Wellcome UK Ltd v Sandoz Ltd* [2019] EWHC 2545 (Ch), and *ACL Netherlands BV v Lynch* [2019] EWHC 249 (Ch). (In fact, in relation to the former of the two recent cases I think she must mean the interlocutory decision of Chief Master Marsh at [2019] EWHC 3229 (Ch), rather than the judgment of Arnold LJ at trial at [2019] EWHC 2545 (Ch). In relation to the latter case, there appear to be two quite different decisions using the same neutral citation number, [2019] EWHC 249, one in the Commercial Court and one in the Chancery Division. But it is clear from the name which one is meant.)

21. Mrs Brake says that these cases show that the court will grant permission only if the applicant demonstrates "special circumstances" amounting to "cogent and persuasive reasons". She further says that the Guy Parties have not demonstrated any such "special circumstances", and that it is not enough that they say that they think it will enhance their case. She further submits that the bank statement is in any event irrelevant, because the real question is whether the health professionals' opinions can be displaced at all.

22. In reply, the Guy Parties say that the bank statement is

> "obviously relevant to the question of whether (or to what extent) Mrs Brake is suffering from a mental health crisis, and therefore unable to engage with debt advice, which is one of the bases upon which the Moratorium Application is advanced".

They further say it is not only probative in itself, but also material for cross examination of relevant medical experts (if any give evidence). They also say that any argument about Mrs Brake's mental health based on evidence that she is working must be had at the final hearing, and not shut out at this stage by preventing collateral use of the bank statement.

23. The Guy Parties go on in their reply to refer for the first time to the decision in *Manek v Wirecard AG* [2020] EWHC 406 (Comm), [26], [34], where the court permitted collateral use. They say that the present case is a stronger one than that. They submit that the statement could be taken into account in the Moratorium Application, in relation to the Possession Proceedings and the Eviction Proceedings. What they seek is

> "to regularise the position across all four sets of proceedings".

24. Mrs Brake quite properly so to respond to the submissions in reply, so far as they related to new material, and I permitted this. She submits that the *Manek* decision is distinguishable from the present case, because there the judge was satisfied that some of the evidence was relevant to the decision under appeal, whereas in the present case the statement had no evidential value in the context of the application, and would simply invade the third party's privacy. She also submits that the exception to the undertaking contained in the words "other than

in the Possession and the Eviction Proceedings" should be restricted to use for the purpose of policing the injunction, and not any wider use in those proceedings, such as in evidence in other applications that the Guy Parties might wish to make.

The law

25. In *Crest Homes plc v Marks* [1987] AC 829, there were two separate copyright infringement claims brought by the plaintiffs against the same defendants, one in 1984 and one in 1985. In each case the plaintiffs obtained an *Anton Piller* order (now called a search and seizure order). In the first action, the plaintiffs considered that there was evidence of two infringements only. In the second action, the plaintiffs by means of the second order obtained documents tending to show that the defendants had not complied with the 1984 order and that there were other infringements which should have been, but were not in fact, discovered. They sought permission to rely on these documents in the earlier proceedings for the purposes of possible contempt of court proceedings.

26. The House of Lords, affirming the decision of the Court of Appeal (which had reversed the decision at first instance), held that they should have permission to do so. In the course of his speech, Lord Oliver of Aylmerton, with whom the whole House agreed, said (at 859G):

> "it is not for [the respondent to the application for permission] to advance reasons why the implied undertaking should not be released but rather for the [applicants for such permission] to demonstrate cogent and persuasive reasons why it should be released."

27. And, after referring to several authorities, Lord Oliver went on to say (at 860B-C):

> "I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse LJ observed in the course of his judgment in the instant case (ante, p.840G), each case must turn on its own individual facts. In the instant case, the determinative point to my mind is that it is purely adventitious that there happened to be two actions."

28. *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409 was not directly referred to before me. But it was the foundation of the principles applied by the judge in *Manek v Wirecard AG* [2020] EWHC 406 (Comm), which was very much relied on before me, and it was also discussed in the other two cases referred to me. So, I think I should mention one paragraph of the judgment here. In *Tchenguiz*, Jackson LJ (with whom Sharp and Vos LJJ agreed), having reviewed the authorities, said:

> "66. The general principles which emerge are clear:

> i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22 (1) (b) if there are special circumstances which constitute a cogent reason for permitting collateral use.
>
> ii) The collateral purpose rule contained in section 9 (2) of the 2003 Act is an absolute prohibition. Parliament has thereby signified the high degree of importance which it attaches to maintaining the co-operation of foreign states in the investigation of offences with an overseas dimension.
>
> iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination. There are decisions going both ways in the authorities cited above.
>
> iv) There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of that information, other than in the resultant prosecution.
>
> v) It is for the first instance judge to weigh up the conflicting public interests. The Court of Appeal will only intervene if the judge erred in law (as in *Gohil*) or failed to take proper account of the conflicting interests in play (as in *IG Index*)."

29. In *Glaxo Wellcome UK Ltd v Sandoz Ltd* [2019] EWHC 3229 (Ch), the claimants sought an order permitting the second claimant to use certain documents disclosed in this claim by the Sandoz Defendants in a claim in Belgium between the second claimant and Sandoz NV. The two claims were part of then global litigation between members of the GlaxoSmithKline and Sandoz groups of companies. Chief Master Marsh referred to *Crest Homes v Marks* [1987] AC 829, to *Cobra Gold Inc v Rata* [1996] FSR 819, and to *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1409, [66]. The court allowed the application, relying on (i) the equal resources of substantial businesses, (ii) the similarities of the issues in the litigation, (iii) the relevance of the documents concerned, (iv) the usefulness for deciding whether to launch other proceedings, (v) the minimal disruption caused by additional documents, (vi) the small number of documents concerned, (vii) the lack of abuse of process, (viii) the documents concerned had in effect already been deployed, and (ix) the lack of prejudice to the Sandoz Defendants.

30. In *ACL Netherlands BV v Lynch* [2019] EWHC 249 (Ch), the claimants sought permission to provide to the United States FBI copies of the documents disclosed by the defendants and the witness statements served in these proceedings, in order (they said) to comply with a subpoena issued by a US Grand Jury. The judge, Hildyard J, emphasised

> "26. … the substantial importance attached to the prohibition against collateral use, and the public interest in its observance. The rules, in other words, may be procedural in form: but they give effect to important public

policy, and in exercising its discretion to give permission for collateral use, the Court must be circumspect and protective of that policy.

31. He relied on what was said in *Crest Homes*, which he referred to as "still" the leading case. He said that

> "33. In my view, the burden is such that, in reality, it will usually be difficult, if not impossible, to obtain permission for collateral use (especially in the case of witness statements) except where the Court is persuaded of some public interest in favour of, or even apparently mandating, such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect.
>
> 34. The most common public policy interest relied on as overriding the public interest in preserving confidentiality and privacy expressed by the rules is the public interest in the investigation and/or prosecution of serious fraud or criminal offences."

32. The judge summarised his view of the caselaw as follows:

> "53. The message of the cases, echoing down from *Crest Homes* and even before then, is that the discretion is to be exercised by reference to all the circumstances as they appear to the court whose permission is sought, and on the basis that it is for the applicant to show that the public interest in making the documents available outweighs the public interest in honouring the promise of privacy which the rules reflect. Careful observance of the restrictions against collateral use, and circumspection accordingly in permitting any departure from them, is important in encouraging compliance with fundamental obligations in contested English proceedings of full and proper disclosure (including of confidential material, save in exceptional circumstances) and the exchange of witness statements which to a greater or lesser extent provide a glimpse behind the curtain into the other side's brief."

33. Having considered the application of these principles to the facts, the judge refused permission. He was not satisfied that the disclosure of the documents and witness statements was necessary for the purpose of the US process, and neither was he persuaded that the recipients of the subpoena could be regarded as under "compulsion" to obey. As he put it,

> "92. … it appears from the evidence that the US Subpoena has received no material judicial input; and there has simply not been demonstrated any sufficient necessity or urgency to outweigh this jurisdiction's public policy and interest which the restrictions against collateral use are intended to promote, nor even any clear compulsion on the parties before this court to even the balance."

34. In *Manek v Wirecard AG* [2020] EWHC 406 (Comm), [26], [34], the claimants were involved in two sets of proceedings. First, they had sued a UK company ("IIFL") and three individuals for fraudulent misrepresentation in relation to the sale of their shares in a company called Hermes. Second, they sued Wirecard,

as the ultimate purchaser of Hermes, on the basis that it was part of a conspiracy to defraud the claimants and procure the sale of their shares at an undervalue. It appeared there were two sets of proceedings, rather than one, for reasons of speed, and in order to avoid possible jurisdictional disputes being brought into play Wirecard applied to strike out the second claim, and served three witness statements with exhibits in support of that application. The claimants sought permission to rely on those exhibits in relation to the first proceedings, against IIFL and the individuals.

35. In an extempore judgment, Moulder J said:

> "25. I apply the general principles identified by Jackson LJ in his judgment in *Tchenguiz* [*v Serious Fraud Office* [2014] EWCA Civ 1409, [66]]. I accept that the collateral purpose rule exists for sound and long-established policy reasons. I accept that the court will only grant permission if there are special circumstances which constitute a cogent reason for permitting collateral use, and that whether the public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case and those circumstances require careful examination."

36. The judge then pointed out that these two sets of proceedings were "very closely related", and "could have been consolidated as a single set of proceedings". However, she then went on to say that

> "26. … it seems to me that the fact that a single set of proceedings could have been brought does not affect the question of whether this court should grant permission for collateral use."

As I read her decision, therefore, for the purposes of deciding whether to give permission for collateral use of the documents, the judge was putting on one side the fact that the two sets of proceedings were closely related, and could have been consolidated. This may be contrasted with the view taken by Lord Oliver in *Crest Homes*, that in that case "the determinative point to my mind is that it is purely adventitious that there happened to be two actions".

37. The judge then reviewed various submissions that had been made by the parties. She said there was no suggestion that the second claim was brought merely so that the claimants could access material not otherwise available to them. She was satisfied that at least some of the evidence concerned was capable of being relevant to the other proceedings, even if not essential. She put the matter in this way:

> "32. … The proceedings in issue are not just related, but unusually, the evidence in the two proceedings goes to one central narrative, the sale of the shares, which happened in the same period for both proceedings. The overlap or potential overlap and relevance of the evidence could not be clearer or closer."

38. Ultimately, she concluded (at [34]) that there was

> "a cogent reason for permitting the collateral use of the witness statements and the other documents".

She also said that

> "no clear reasons have been advanced as to any prejudice which will result, other than a general desire to have avoid having details of the negotiations on this deal in the public domain".

39. More recently, in *Vardy v Rooney* [2022] EWHC 304 (QB), a libel case, Steyn J also discussed the question of the collateral use of documents. In particular, she referred to the earlier decision of Cockerill J in *Lakatamia Shipping Co Ltd v Morimoto* [2020] EWHC 3201, and set out the applicable principles drawn from that case in summary form. But neither of those cases was referred to before me, and in any event I respectfully consider that the principles set out by those judges are entirely in accordance with the authorities to which I have already referred, including *Crest Homes* and *Tchenguiz*. As a result, I have not sought the parties' comments on them, and need not lengthen this judgment by referring further to them here.

Discussion

Disclosure and freezing orders

40. First of all, I am satisfied that, in principle, even though this case arises in the context of an undertaking contained in a freezing order, rather than the ordinary process of disclosure under CPR Part 31, the *policy* of the law is in principle the same. The judge and the parties in *BDW Trading Ltd v Fitzpatrick* [2015] EWHC 2490 (Ch) certainly assumed so. Where a party is compelled by law to supply information to another party as part of the legal process, this information may only be used by the recipient for the purposes for which it was compelled to be supplied, and not for any wider purpose: *Marcel v Metropolitan Police Commissioner* [1992] Ch 234G, 235E, 237D, 262C-D. (In *Smithkline Beecham plc v Generics (UK) Ltd* [2004] 1 WLR 1479, the Court of Appeal held that the prohibition in CPR rule 31.22, unlike the position under the earlier RSC, applied more widely than the case of compulsion, to some cases of *voluntary* disclosure, but that is a later – and indeed somewhat contentious – development, and does not matter for present purposes.)

41. In the case of an undertaking contained in a freezing order, however, the scope and extent of the prohibition are obviously subject to the express terms of that order. Here those terms are clear. They are based on the standard form of freezing injunction to be found in Annex A to CPR Part 25. The undertaking is not without permission to use the information obtained for the purposes of any proceedings *except the proceedings in which the order was obtained*. Where the disclosure obligation is imposed on the respondent by the order simply for the purpose of "policing" the order, those words of exception are strictly speaking too wide. It may be that, in future, judges granting such relief should consider whether to make the exception narrower.

42. But I must construe this order as I find it. In my judgment, use of the information in this case is not limited to policing the order, but may be for *any* of the purposes of the proceedings in which it was obtained. That means that the Guy Parties do not need the court's permission to use the document in the cancellation application so far as relates to the Possession and Eviction proceedings.

Generally

43. I now turn to the position in relation to the Documents and Insolvency Proceedings. Here, in contrast, it is clear that permission of the court is needed before use can lawfully be made of the bank statement. The test to be applied is that laid down by Lord Oliver in *Crest Homes*:

> "the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery,"

and it is for

> "the [applicants for such permission] to demonstrate cogent and persuasive reasons why it should be released".

Moreover,

> "each case must turn on its own individual facts".

It is therefore a fact-sensitive enquiry. Of course, none of these judicial statements is to be construed as if they were in a statute: see for example *Sullivan v Bury Street Capital Ltd* [2021] EWCA Civ 1694, [75].

44. So, I start with from the position that there is a strong public interest in preserving the confidentiality of documents and information extorted by compulsion for certain purposes during litigation, and that a heavy burden lies on the party seeking permission to rely on that document or information for other purposes. In this connection I respectfully agree with the comment of Hildyard J in *ACL Netherlands BV* that

> "34. The most common public policy interest relied on as overriding the public interest in preserving confidentiality and privacy expressed by the rules is the public interest in the investigation and/or prosecution of serious fraud or criminal offences."

To that I would only add that, for myself, I would include in "criminal offences" the investigation and prosecution of contempts of court occasioned by breaches of court orders even in civil cases. Many of the cases where permission has been given are indeed of this kind, as, indeed, was *Crest Homes* itself.

Factors

45. In the present case, there are a number of factors to be taken into account. The first is the purpose of seeking permission to use the bank statement. As Hildyard

J pointed out, the most commonly relied on public policy interest to justify permission is that in the investigation and/or prosecution of serious fraud or criminal offences, in which I include contempt of court by the deliberate breach of court orders. That is not, however, this case. This is a case where the Guy Parties seek permission to adduce the bank statement as evidence that Mrs Brake is engaged in an activity which is inconsistent with a mental health crisis, so as to support their application to cancel the moratorium. This is seeking to overturn the public interest in preserving confidentiality and privacy by reference to the Guy Parties' private interest in enforcing their rights against Mrs Brake. As such, I do not think it is of any significant weight against that public interest.

46. This brings me to the next point, which is the probative value of the document in question. All that this document shows is that Mrs Brake received a modest sum of money into her bank account from an identified third party, accompanied by the word "retainer". The Guy Parties will ask the court to infer from the identity of the third party concerned that the payment was for work, and that the work was in the financial services sector. As it happens, Mrs Brake in her written submissions has been happy to accept that she has been paid a sum of money as a retainer for work (she says it is "all I have earned in 4 years"), but says it is irrelevant to the issue in the application. I am not now dealing with the main application itself, but (albeit in the absence of submissions) have to say that at this early stage the probative value of this document seems small to me. It is hardly a "knockout blow", or even a "smoking gun".

47. The critical question is whether earning money for work done tends to show that the person concerned is not in a mental health crisis. But Mrs Brake accepts that she has earned this money, so the statement adds only the amount and the identity of the third party. (If she were cross-examined and denied the admission, the court might well accede to a further application, at least to put the statement to her in cross-examination.) In any event, the question whether Mrs Brake is or is not in a mental health crisis will be one dominated by the medical evidence, and as I see the matter at this stage it would take significant high-grade non-medical evidence to overturn cogent medical evidence of the existence of such a crisis. I do not think that the probative value of the document is of any real weight in considering the balance.

48. The next point is that the bank statement is a single (redacted) document, and there will not be wholesale disclosure of confidential information, such as was sought in *ACL Netherlands*, for example. So, in terms of size, the permission sought is for a comparatively modest infringement of privacy, not a large one. Overall, I do not think that this weighs one way or the other in the balance. The fact that it is a single document tells us nothing about the merits of the application. And, from the applicant's point of view, it is hardly a plus point to say, "Well, I could have asked for more, but I was reasonable and didn't."

49. Next, I bear in mind that permission will involve not only a (significant) injury to the public interest in preserving the confidentiality and privacy of documents disclosed by compulsion, but, even in the redacted form presented to me, also an injury to the private interests of Mrs Brake and the third party, by potentially putting into the public arena information about their affairs which is private to

them. Unlike in commercial cases, it is usually harder in domestic cases to quantify the prejudice or damage wrought by disclosure of private and personal information, but the damage is nonetheless real for all that, and must be taken into account. Given, as I have said, the relatively small scale of the permission sought in the present case, this private injury is not of huge weight in itself, but, so far as it goes, it tends against permission being given.

50. The Guy Parties point out that the bank statement was obtained by means of the freezing order granted in Possession and Eviction, and can therefore be used on the main application in those proceedings (as I have indeed held, on the construction of the order). They say it would be odd if it could not be used in the application in the other two proceedings. However, I do not agree. What evidence is available in an application in given legal proceeding depends on the processes followed in that proceeding, and in particular disclosure. I see nothing in itself odd in making an application in four proceedings, and being able to deploy the statement in two of the applications but not in the other two.

51. One factor that Moulder J in *Manek* said was *not* relevant was the fact that a single set of proceedings could have been brought. But I respectfully prefer the view of Lord Oliver in *Crest Homes*, that it *was* relevant that it was "adventitious" that two proceedings rather than one was brought. (Indeed, on the facts of that particular case, it tipped the balance.) The question is how far that applies here. The parties in three of the four proceedings are in substance the same. But the causes of action are quite different: Possession and Eviction both concern rights to properties, but different rights in different properties, whereas Documents concerns rights to confidential information. Insolvency concerns the affairs of the Brakes' bankruptcy, which is different again, but also therefore includes their trustee in bankruptcy as well as the parties themselves. The issues in all of these cases arose at different times. It would not have been sensible to include them all in a single omnibus claim, or even to consolidate the several claims, and, indeed, so far as I know nobody ever suggested it.

52. Moreover, although there is only one application notice, the same application is being made in each set of proceedings where debts have been generated. So, there are in substance and reality *four* applications, albeit for the same relief, so that costs judgments in different cases may be enforced. The significance of the application is thus different in each case. Further, because the cases were commenced and fought at different times, and the documents disclosed by the parties to each other in each case depended on the particular issues in each case, it follows that the evidence available to them in each case will have been different. It follows therefore that the evidence which can be adduced by the Guy Parties on each of the four applications may well be different too (as indeed I have already said).

53. Accordingly, I accept that these four cases, as originally framed and tried, are not closely related, *except* that they happen to concern most of the same parties. That would not point in favour of giving permission. Even so, the application to cancel the moratorium *is* the same in all four cases. So, on this view the relevant "issue" is the same, namely whether the moratorium should be cancelled. If that is right, the cases *are* to be treated as closely related for this purpose. I must therefore assess the weight of this factor for the purposes of the present

application. In my judgment it would have some weight, but not such as to outweigh the other factors, including the damage done to the public interest in preserving privacy and to the private interests of Mrs Brake and the third party, the limited probative value of the document, and the fact that this is an application in support of private interests rather than for contempt of court or other public purposes. On the basis of the factors I have examined, at this stage I would hold that the balance came down in favour of refusing the application.

54. The question then is whether the cases which have been cited to me make any difference to that view. I have already referred to the notion that these applications are fact-sensitive. So citation of other first instance decisions where the facts are not exactly the same is likely to prove (at the least) inconclusive. Nevertheless, and in deference to the submissions made to me, I will say something about the cases to which I was referred.

55. In relation to the *Glaxo Wellcome* case, where the application was to use the documents abroad, most of the features which appealed to the Chief Master to persuade him to give permission are not present here. I can certainly see why he made the decision that he did. In the *ACL Netherlands* case, another case of application to use the documents abroad, the judge this time refused permission. But the assessment was that the disclosure of the documents was not necessary for the purpose of the foreign process, and neither were the recipients of the subpoena under "compulsion" to obey. The case was very different from the present, even though I consider the judge's statements of principle to be of great assistance to me.

56. Lastly there is the *Manek* case. I do find this case more difficult. But the judge there found that the documents sought were in fact relevant ("even if not essential") to at least part of the proceedings, and that the "overlap or potential overlap and relevance of the evidence could not be clearer or closer". She also found – and it was after all a *commercial* case – that the disclosing party could not show any prejudice if the order were made. But, as I have said, prejudice in domestic cases (unlike commercial cases) is not normally demonstrable in financial terms. It is above all emotional. I respect the decision in *Manek*, as one reached on its particular facts, but it does nevertheless seem to me to be an outlier in the jurisprudence in this area. I respectfully consider that it does not assist me in reaching my decision on the facts of this case.

Use

57. Lastly, I should add that I have not been addressed on the meaning of "use" in the context of permission to use the document for the purposes of other proceedings. I therefore make no ruling on this question. But, I observe that, in *Lakatamia Shipping Co Ltd v Morimoto* [2020] EWHC 3201 (Comm), [54]-[59], Cockerill J reviewed the relevant authorities, and concluded that:

> "60. On the basis of these authorities it seems that:
>
> i) Absent some provision in the relevant order, doing anything other than realising, in the course of review for the purposes of the proceedings in which documents are disclosed, that a document or documents would be

relevant to other proceedings actual or contemplated, may constitute a collateral use.

ii) The best course is therefore to seek permission for collateral use to review as soon as the issue is identified.

iii) It would then be necessary to apply for permission for collateral use to deploy the documents if a (permitted) review concluded that it was desirable to use them."

58. On the face of it, this suggests that using the document as the basis for cross-examining a witness, without seeking to admit it in evidence, would nonetheless amount to such "use" as may be prohibited by the undertaking in the freezing order. But, as I say, I do not need to and do not decide that point at this stage.

Conclusion

59. Overall, on the facts of this case, I am in no doubt that the Guy Parties have failed to show that the strong public interest in preserving the confidentiality and privacy of documents disclosed by compulsion has been overcome. What they seek is sought in their private interests, to enable them to enforce their costs orders against the Brakes, and against Mr Brake's pension policy in particular. It is not even very strong in the proof of the case which they will have to make on the main application. Accordingly, I dismiss the application.