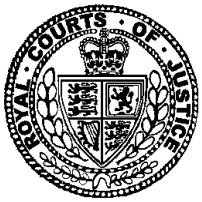

Neutral Citation Number: [2020] EWHC 2181 (Comm)

Case No: LM-2017-000132

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th August 2020

Before:

DEPUTY MASTER HILL QC

- -

Between:

RICHARD JOHN SLADE

Claimant

-and-

DEEPAK ABBHI

Defendant

- -
- -

Sebastian Kokelaar (instructed by Richard Slade and Company) for the **Claimant**
William Willson (instructed by Birketts LLP) for the **Defendant**

Hearing date: 30th July 2020

- -

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.

DEPUTY MASTER HILL QC:

Introduction

1. These proceedings involve the CPR Part 71 examination of the Defendant as a judgment debtor. By an application dated 24th July 2020 the Defendant seeks one or a combination of orders which will have the effect of limiting the further use that can be made of the financial documentation he has provided during the examination process. The application engages CPR r 31.22 but raises wider issues about the status of Part 71 examinations, and in particular whether they are to be treated as "hearings" under the CPR, and hearings held "in public".

The factual and procedural background

2. The Claimant is a solicitor who at all material times was the sole principal in his firm of Richard Slade and Company. The Defendant is the son-in-law of a former client of the Claimant. The Claimant alleged that the Defendant had undertaken to pay his father-in-law's legal fees. These had gone unpaid and the Claimant brought proceedings to recover them.

3. The matter went to trial before HH Judge Russen QC (sitting as a judge of the High Court). By a judgment dated 24th September 2018, he found in the Claimant's favour. A quantum hearing followed, leading to an order that the Defendant pay the Claimant a total of £430,000 by 15th March 2019. The monies were not paid.

4. Shortly thereafter the Claimant applied for and was granted an order for examination of the Defendant as to his means under the CPR 71. The examination was originally listed for 27th June 2019.

5. This hearing was vacated because on 13th June 2019 Lord Justice Longmore had granted the Defendant permission to appeal and stayed the order for examination as to his means. On 6th December 2019 the Defendant's appeal was dismissed and the stay was lifted.

6. The examination was listed before me on 25th February 2020. The examination did not proceed on that day due to issues around the manner in which the documentation relating to the examination had been served upon the Defendant. Those issues were addressed in my judgment dated 20th April 2020. The examination took place on 8th July 2020. At the end of that hearing I directed that the Defendant produce further documents and that the examination resume on the afternoon of 30th July 2020.

7. The Defendant has disclosed over 1,000 pages of documents in the Part 71 process. These include bank statements, joint investment account statements, insurance policies, utility bills, documentation relating to a series of trusts and an agreement/plan of merger document from June 2019 to which the Defendant was a party.

8. The Defendant holds one of his bank accounts and all of the investment accounts jointly with his wife. The trust deeds relate to his wife and children. The Defendant has provided witness evidence indicating his concerns about privacy and security,

should the private information relating to his financial affairs and those of his family become public or fall into the hands of unconnected third parties as a result of it having been produced during the Part 71 process. Some of the material produced relates to unrelated third parties including ArisGlobal and Nordic Capital. The Defendant has additional commercial confidentiality concerns about this material.

9. On 21st July 2020, the Defendant's solicitor, Mr Matthews, wrote to the Claimant setting out the Defendant's concerns about confidentiality. He asked him either (i) to consent to an order that the Part 71 proceedings were private (not public) hearings or (ii) to provide an express undertaking that he would not use the documents produced in the Part 71 proceedings for any other purpose than "*enforcing the Court's orders for damages and costs in these proceedings*" and that he would not "*pass to any third party any copy of any of the Part 71 Documents*". Mr Matthews explained that in the alternative he would apply to Court for a declaration that the Part 71 proceedings were not public hearings, alternatively for an order under CPR r 31.22(2) (seeking to restrict the use of the documents produced to subsequent enforcement proceedings).

10. Later that day the Claimant replied in perfunctory terms indicating that he was not prepared to co-operate in the making of such a request and made adverse comments about the Defendant's conduct.

11. On 24th July 2020 the Defendant issued this application. Skeleton arguments were provided by both counsel. I heard detailed submissions on the application during the 30th July 2020 hearing. It was considered necessary for me to determine the application before the Defendant answered further questions in the examination. It is intended that the examination will resume on the afternoon of 6th August 2020.

The legal framework

12. CPR r 31.22 provides in material part as follows:

> "**Subsequent use of disclosed documents….**
>
> **31.22**
>
> (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, except where –
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (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, at a hearing which has been held in public.

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

(a) by a party; or

(b) by any person to whom the document belongs".

13. Accordingly the basic rule in CPR r 31.22(1) is that a party to whom a document has been disclosed (here, the Claimant) may use the document only for the purpose of the proceedings in which it is disclosed (here, a Part 71 examination).

14. There are three exceptions to that rule:

(i) Where the document has been read to or by the court, or referred to, at a hearing which has been held in public (CPR r 31.22(1)(a));

(ii) Where the court gives permission (CPR r 31.22(1)(b)); or

(iii) Where the party who disclosed the document and the person to whom the document belongs agree (CPR r 31.22(1)(c)).

15. In this case the Claimant does not seek any permission for wider use of the documents under CPR r 31.22(1)(b) and the Defendant does not agree to any additional use of the documentation by the Claimant under CPR r 31.22(1)(c). Therefore the only exception relevant to this application is that set out in CPR r 31.22(1)(a). If that exception has been triggered, the Defendant seeks an order under CPR r 31.22(2) to restrict or prohibit the use of documents which have been disclosed (to essentially restore the "status quo" of the basic rule in CPR r 31.22(1)).

16. It is agreed that determining an application under CPR r 31.22(2) requires an assessment of the competing weight to be given to privacy rights under Article 8 of the European Convention on Human Rights ("the ECHR"), fair/public hearing rights under Article 6 and the right of access to information by the press and public derived from Article 10. The court must conduct what Lord Steyn at paragraph 17 of *Re S (A child)* [2005] 1 AC 593 called the "*ultimate balancing test"*, involving first, "*an intense focus on the comparative importance of the specific rights being claimed in the individual case*", secondly, a consideration of "*the justification for interfering with or restricting each right*", and, thirdly, the test of proportionality. These principles were set out by David Richards J in *Re Coroin* [2012] EWHC 1158 (Ch), at paragraphs 92-95 (albeit in the context of a wider application that a trial should take place in private due to the nature of the financial information involved). This balancing exercise also, to varying degrees, informs the Court's approach to the other issues raised in this application.

The Defendant's submissions

17. The Defendant advances three grounds which alone or in combination would provide him with the protection which he seeks. These are as follows: **(1)** the exception to the

implied undertaking expressed at CPR r 31.22(1)(a) is not engaged; **(2)** the Court should make an order for a private hearing; and **(3)** the Court should make an order under CPR r 31.22(2) that the Claimant (i) may only use the documents for the purpose of subsequent enforcement proceedings; and (ii) may not otherwise share the existence of the content of the documents with any other third party.

18. As the backdrop for all his arguments the Defendant (i) relies on the general principle that "*private information obtained under compulsory powers cannot be used for purposes other than those for which the powers were conferred*" (Malek and Matthews, Disclosure, paragraph 19.01); and (ii) highlights the unique nature and purpose of Part 71 proceedings, as being a "*bridgehead*" to the enforcement process, which is intended to give the judgment creditor information to decide whether to enforce and what assets to enforce against.

(1) The exception to the implied undertaking expressed at CPR r 31.22(1)(a) is not engaged

19. The Defendant argues that the documents are not ones that have or will be "read to or by the court, or referred to, at a hearing which has been held in public" because:

(i) A Part 71 examination is not a hearing. A "hearing" is defined by CPR r 39.1(a) as "the making of any interim or final decision by a judge at which a person is, or has a right to be, heard in person, by telephone, by video or by any other means which permits simultaneous communication". On that basis a Part 71 examination is not a "hearing": no interim or final decisions are made by a judge at such an examination (rather s/he simply supervises questioning carried out by the judgment creditor); and some Part 71 examinations are not conducted by judges at all but by court officers;

(ii) Even if a Part 71 examination is properly regard as a "hearing" it is not clear that it is in "public". As a matter of generality, Hickinbottom J said in *Watson v Sadiq & Sadiq* [2015] EWHC 3403 (QB) that "*oral examinations [under Part 71] are conventionally heard "in private" in the sense of without attendance of the public*". In this particular case, due to the restrictions on conventional court proceedings imposed by the Covid-19 pandemic, the examination on 8th July 2020 took place by video. Although it is understood that members of the public and press could have sought access to the video proceedings, no-one actually did. Thus it is said that this particular Part 71 examination took place in private. Further it is argued that under CPR PD 51Y it would be open to me to direct that the examination on 8th July 2020 took place in private on the grounds that "*it is necessary to do so to secure proper administration of justice*"; and to make a similar direction with respect to the resumed examination due to take place on 6th August 2020; and

(iii) Not all the Part 71 documents in this case were "*read to or by the court or referred to*" in open court. Reliance is placed on Matthews and Malek, Disclosure, paragraph 19.33 for the proposition that where a document, although included in a bundle lodged at court, has not been referred to in open court, whether orally or in a skeleton argument, it should not be assumed that the document falls within CPR r 31.22(1)(a) simply because the court may have read the document in private. In this case, the Part 71 documents were

not put before the court for the purpose of being read in evidence; or available to the public in the sense of being exhibited to a witness statement or affidavit (*NAB v Serco Limited* [2014] EWHC 1225 (QB), at [25]; and, in the case of very many of the documents, were not even referred to at the 8th July 2020 hearing.

(2) The Court should make an order for a private hearing

20. Second, the Defendant submits that, even if Part 71 examinations are properly regarded as public hearings, in this case the Court should make an order that the Part 71 proceedings are being conducted in private. He relies on CPR r 39.1(3)(c), which provides that any hearing may be in private "*if it involves confidential information (including information relating to personal financial matters) and publicity would damage confidentiality*".

21. The Defendant argues that the documents plainly involve confidential information relating to personal financial matters relating to the Defendant, but also to various non-parties including his family members, ArisGlobal and Nordic Capital; and that this is information in relation to which there is a reasonable expectation of privacy which attracts the protection of Article 8.

22. The Defendant submits that the need for open justice and 'publicity' under Article 10 is less persuasive in the context of Part 71 examinations for two reasons: (i) there is no or limited judicial decision-making in such examinations and so public scrutiny for that purpose is less important (cf the observations of Leggatt J (as he then was) in *Chodiev v Stein* [2016] EWHC 1210 (Comm) quoted below); and (ii) the efficacy of Part 71 proceedings is achieved by the penal notices attached to the orders and the threat of committal for contempt, not the element of public scrutiny *per se*.

23. The Defendant points out that family court proceedings (in which parties are compelled to make disclosure of their personal financial information) and examinations under the Insolvency Act 1986, sections 236 and 366 (by which trustees in bankruptcy/liquidators can summon bankrupts/company directors to be examined before a judge about the business and affairs of the bankrupt/the company) are generally conducted in private. These, it is said, provide a much closer analogy to Part 71 examinations than applications for restrictions on reporting in the context of super-injunctions involving well-known public figures and similar proceedings.

24. For all these reasons the Defendant submits that the fair human rights balance is struck by an order that the examinations in this case be conducted in private.

(3) The Court should make an order under CPR r 31.22(2)

25. While the Defendant recognises that generally the Court will exercise the discretion to make an order under CPR r 31.22(2) cautiously because "*publicity is the very soul of justice*" (*Lilly Icos Ltd v Pfizer Ltd (No. 2)* [2002] EWCA Civ 2, at paragraph 25, per Buxton LJ) an order should be made here for similar reasons as are set out under **(2)** above: the documents contain personal financial information; the Defendant has provided clear evidence in support of restrictions on their use; and key factor is that this application is made in the specific context of a Part 71 examination to which the principle of open justice is not integral.

26. Finally the Defendant argues that if I am not persuaded to make an order under any of the distinct grounds above, I could make a "mixed" order, ie. that the use of the Part 71 documents in the bundle for the 8th July 2020 hearing is restricted, but that the adjourned hearing is confidential and is thus heard in private for the purposes of CPR r 39.2.

The Claimant's submissions

27. In response to all of the Defendant's arguments, the Claimant focuses on the principle of open justice. He relies on the words of Leggatt J in *Chodiev*, at paragraph 19 to the effect that the principle of open justice "*includes, in principle, access not only to what is said and read out in open court, but also to evidence which is referred to in open court or read by the judge outside court as part of that process. In principle, all the material which has or may have affected the decision-making process should be open to public scrutiny*". Further, Leggatt J made clear at *Chodiev*, paragraph 34 that the principle of open justice does not exist for the benefit of the parties to litigation but exists in the public interest.

28. As to the "threshold" questions (the first two issues inherent in the Defendant's ground **(1)**), the Claimant contends that Part 71 examinations before a judge plainly are hearings (as they can and do involve judicial decision-making, and potentially about serious issues relating to alleged contempt); by default of any contrary indication in CPR 71, they are held in public (even if the public or press rarely attend); and there is no recognised concept of a *de facto* private hearing.

29. The Claimant submits that the insolvency proceedings relied on by the Defendant are not an appropriate comparator: they are entirely inquisitorial, whereas Part 71 examinations take place after a trial. It is said that it cannot be right that the open justice principle simply does not apply at this point in the proceedings: rather, it must be engaged by the whole of the court process.

30. On the facts of this case, the Claimant argues that it is for the Defendant to satisfy the court that it is appropriate to derogate from this; that clear and cogent evidence justifying such a derogation is required; and that derogations from this principle are wholly exceptional and are only to be ordered where strictly necessary to secure the proper administration of justice (*JIH News Group Newspapers Ltd* [2011] 1 WLR 1645 (Practice Note) and *Practice Direction (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003, at paragraphs 9-13). Moreover, as Leggatt J said at *Chodiev*, paragraph 22 (quoting *Lilly Icos*, at paragraph 25), "*simple assertions of confidentiality and of the damage that will be done by publication…should not prevail. The court will require specific reasons why the party would be damaged by the publication of the document*".

31. The Claimant submits that the Defendant's evidence falls short of these stringent evidential requirements: it does nothing more than pray in aid general observations about confidentiality which are insufficient; the broad assertions the Defendant has made about the "*scourge of identity theft, internet and bank fraud*" do not provide sufficiently specific evidence of damage of harm to himself or third parties; and no details of the source and scope of the alleged duties of confidence owed to third parties have been provided (even though it was recognised at the 8th July 2020 hearing that some further documents which the Defendant was directed to provide might be

withheld on grounds of commercial duties of confidence, in fact they were provided ahead of the 30th July 2020 hearing).

32. The Claimant cites *Republic of Costa Rica v Stronsberg* (1880) 16 Ch D 8 for the proposition that a CPR 71 examination is "*not only intended to be an examination, but a cross-examination of the severest kind*". It is argued that by refusing (rather than being unable) to pay a very substantial debt, the Defendant has effectively brought scrutiny of his financial affairs on himself.

33. The Claimant therefore contends that the open justice principle is paramount and that the evidence does not merit derogations from it by making orders for a private hearing and/or restricting the use of documents read to or by the court, or referred to, at a hearing which has been held in public. He would not object, however, to a limited order protecting the details of specific bank accounts and matters of that nature.

Discussion and conclusion

34. I address the grounds advanced by the Defendant in turn.

(1) Engagement of the exception in CPR r 31.22(1)(a)

35. The exception to the implied undertaking expressed at CPR r 31.22(1)(a) is engaged if (i) documents have been "read to or by the court, or referred to"; (ii) this has occurred at a hearing; and (iii) the hearing has been held in public.

36. I consider that I can take issue (i) relatively shortly: on any view there are documents which were read to the court, by the court, or referred to explicitly during the 8th July 2020 examination. It is not necessary for the purposes of this part of the application to determine which documents they were.

37. Issues (ii) and (iii) are more complex. The question of whether Part 71 examinations of the sort that occurred on 8th July 2020 constitute "public hearings" in general is a point of principle that could have wider ramifications beyond this case. It seems to me that the press would need to have the opportunity to make submissions on that issue (as they did in *Re Coroin*, and that related to the facts of a particular case, not whether Part 71 examinations *in toto* should be held in private). It is also likely to be more suitable for determination by a High Court judge.

38. I therefore limit my conclusions to the facts of this case.

39. In my view the examination that occurred on 8th July 2020 was a "hearing". It involved the fundamental elements of a "hearing" (albeit that these are not specified in CPR r 39.1(a)): there had been prior disclosure of relevant material, the parties were represented and advanced their respective positions, a witness was subjected to questioning, and it was the Master's role to supervise the proceedings. Although Part 71 examinations do not necessarily require any interim or final decision by a judge (to quote the phrasing used in CPR r 39.1(a)), the hearing on 8th July 2020 did so, as I had to determine whether there had been material compliance by the Defendant with the disclosure orders, whether there was a basis for resuming the examination on another date and how to manage the potential contempt issue.

40. I also consider that the examination on 8th July 2020 was a hearing held "in public". It had been listed on the cause list in the usual way. As the examination was listed to be conducted by video, it is understood that arrangements were in place for access to be provided to any member of the public or press who sought to attend. The ability to secure such access made the 8th July 2020 hearing a public one under PD 51Y, paragraph 3, even, in my view, though no member of the public or press chose to secure such access.

41. I am not persuaded by the Defendant's argument that, even if the examination was *de jure* public, it became *de facto* private by the fact that no-one other than the parties chose to attend. Many hearings in courts of all kinds are conducted in circumstances where no-one other than the parties choose to attend, but they do not and cannot become private hearings on that basis, especially given the fundamental nature of the open justice principle and the need for exceptional reasons to underpin a derogation from it.

42. I am fortified in my analysis of the position in this case by (i) the absence of any reference in Part 71 to the examinations being conducted in private (which, in my view, would have been expected if that had been the intention, given the very high premium placed on open justice); and (ii) the observations of Hickinbottom J in *Watson*: read in context, his observations were to the effect that he doubted that the judge below had a power to exclude someone from a Part 71 examination, and expressed the view that the person in question should not have been excluded. This suggests to me that he considered that although *de facto* Part 71 examinations are often held in private, they are *de jure* public.

43. However, I stress that the wider point of principle set out at paragraph 37 above is not one I consider I should or need to determine.

44. For present purposes I consider that the exception in CPR r 31.22(1)(a) has been engaged.

(2) An order for a private hearing

45. I consider that it is not possible to retrospectively classify the 8th July 2020 hearing as a private one. It was listed as a public one; people could have sought access to it; the fact that they chose not do is irrelevant; and the other reasons of principle set out above mean, in my view, that it should remain a public hearing.

46. I am also not persuaded that I should classify the examination to be resumed on 6th August 2020 hearing as a private hearing, for similar reasons as are set out under **(1)** above. Moreover, all Part 71 hearings are likely to "*involve confidential information (including information relating to personal financial matters*" and circumstances in which "*publicity would damage confidentiality*" and so to make such an order in this case would be tantamount to saying that all Part 71 hearings should be private.

(3) An order under CPR r 31.22(2)

47. The principles of open justice mean that an order under CPR r 31.22(2) should be made cautiously (*Lilly Icos Ltd v Pfizer Ltd (No. 2)*): derogations from the principle are wholly exceptional and are only to be ordered where strictly necessary to secure

the proper administration of justice (*JIH News Group Newspapers Ltd* [2011] 1 WLR 1645 (Practice Note) and *Practice Direction (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003, at paragraphs 9-13). It is necessary to balance the competing rights under Articles 6, 8 and 10 of the ECHR (*Re S (A child)*).

48. Here, I consider that the Article 8 rights of the Defendant in the information in question weigh heavily in the balance. *Re Coroin*, at paragraph 96, makes clear that counsel for the press had accepted that "*clearly personal financial affairs*" attracted protections at the stronger end of the Article 8 "spectrum" than the bulk of the documents in issue in that case. That principle applies here: the documents involved contain extensive personal and specific information about the Defendant's bank accounts and very detailed information about his financial affairs. They involve various members of his family. They also involve his dealings with unrelated commercial third parties. I also note that "*bank details*" were ultimately kept confidential by Leggatt J in *Chodiev* in the context of a CPR 31.22(2) application that otherwise failed (see paragraph 41 of the judgment). The Defendant has, in my view, provided credible evidence of his concerns about potential misuse of the documentation and the information within it.

49. On these facts, I consider that the Article 6/10 rights of the public and the press weigh less heavily. I accept the force of the argument by the Defendant that Part 71 examinations generally merit less public interest (not least as there is no judicial decision-making required in such examinations; and given their specific purpose). It is also hard to see what proper interest members of the public or press would have in access to the detail of the information in this case; and as a matter of fact no member of the public or press did choose to attend the hearing.

Conclusion

50. For all these reasons I dismiss the applications under grounds **(1)** and **(2)** but propose to make the order sought by the Defendant under his ground **(3)**. This is an order to the effect that (i) the Claimant may only use the Part 71 documents for the purpose of subsequent enforcement proceedings; and (ii) the Claimant will not otherwise share the existence or the content of the Part 71 documents with any other third party.