Neutral Citation Number: **[2021] EWHC 2406 (Comm)**

Case No: CL-2019-000807

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **26 July 2021**

Before :

Master John Dagnall

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Between :

Adare Finance DAC	**Claimant**
- and -	
(1) Yellowstone Capital Management SA	**Defendants**
(2) Michel Ohayon	

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- -

Robert Weekes and Tom Lowenthal (instructed by **Allen & Overy LLP**) for the **Claimant**
Fraser Campbell (instructed by **Capita Law LLP**) for **Michel Ohayon**

Hearing dates: **26th July 2021**

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APPROVED JUDGMENT

Master John Dagnall **Monday, 26 July 2021**

(**2.17** pm)

Judgment by **MASTER JOHN DAGNALL**

1. This is my judgment in this matter as to whether or not the examination ought to be conducted generally in private. The context of the matter is that what has been ordered and directed to take place is an examination under Civil Procedural Rules part 71 in circumstances where the second defendant, Monsieur Michel Ohayon, is a judgment debtor in the amount of US $12 million and £475,000, together presumably with accruing interest, owing the money to the claimant judgment creditor, Adare Finance DAC; Adare being represented by Mr Weekes of counsel and Mr Ohayon by Mr Campbell of counsel.

2. Mr Ohayon has not satisfied the debt even though it is said that he is a businessman with very substantial resources; one statement of affairs, albeit some way out of date, in relation to the underlying lending transaction which eventually resulted in this judgment taking place, indicating that he may well be worth in the region of 1 billion euros. Monsieur Ohayon has in fact taken the approach that, at least with regards to assets in France, he is dissatisfied with the judgment of the Commercial Court which gave rise to the judgment debts and he is seeking to persuade the French courts, albeit so far unsuccessfully, that the judgment should not be enforced in that jurisdiction.

3. As I have said, this court has directed that there should be an examination of Monsieur Ohayon under the provisions of Civil Procedure Rules part 71. Such an examination is directed as stated in the CPR 71.2(1) that it relates to the judgment debtor's, that is to say Monsieur Ohayon's, means and any other matter about which information is needed to enforce the underlying monetary judgment or order. That is the purpose of CPR part 71 orders and examinations; the order here requiring Mr Ohayon both to produce documents, and he has produced various documents following various orders of this court, and also to be examined on oath or affirmation with regards to such matters.

4. As is made clear from the wording of the rule, the examination procedure exists in order to obtain information to aid enforcement, in particular to enable the creditor to decide as to what mechanisms of enforcement it might profitably engage in; and the purpose of part 71 and the orders made under it is so limited. As Mr Campbell for Mr Ohayon has submitted to me, it is not simply to enable pressure of one form or another to be brought upon the judgment debtor to induce them to pay the debt.

5. Nevertheless, as is made clear in various of the authorities, the provision of documents and provision of oral information process is intended to be a rigorous one to give the judgment creditor a full opportunity to find out what are the assets and what it might be worth enforcing against; and all in circumstances where the judgment debtor owes a judgment debt, in this case for a very substantial sum of money, and in principle ought to be discharging it if they have assets from which they can do so.

6. The question though before me at this point is as to whether or not the examination should be conducted in private, although there are some ancillary questions relating to the question as to the degree of privacy that should be afforded to the documents which have been provided and any more that are to be provided.

7. The question as to whether or not the examination should be in private it seems to me has involved three distinct sets of questions, although the first two are heavily interlinked. The first question is whether or not a part 71 examination is governed by the specific rules relating to whether or not hearings are heard in private contained in CPR 39.2, which depends very much on the question as to whether or not the examination is a "hearing" as defined by CPR 39.1(1)(a). The second question is: if (a) it is such a part 39 hearing or (b) if it is not, then what are the principles to be applied? The third question is as to the actual application of such principles on the facts of this particular case, this being a situation where Monsieur Ohayon,

through Mr Campbell of counsel, submits that the hearing/the examination should take place in private and Adare, through Mr Weekes of counsel, submits that it should not.

8. The question as to whether or not a part 71 application is normally to be held in private or in public was considered by Deputy Master Hill Queen's Counsel in her decision in Slade v Abbhi [2020] EWHC 2181. In that situation there had been an order made under part 71. I note from part 71.6 that it is provided firstly that the person ordered to attend court will be questioned on oath and, secondly, the questioning will be carried out by a court officer unless the court has ordered that "the hearing shall be before a judge". As sub-rule (3) provides, the judgment creditor may attend and ask questions where the questioning takes place before a court officer, but must attend and conduct the questioning if the hearing is before a judge.

9. I note that the word used there in the case of an examination conducted by "a judge" is "hearing" there, although "hearing" is not defined in part 71 by reference to the definition in part 39. "judge" is defined in CPR 2.3(1) to include various categories of judge, including a master or another person authorised to act as such, but which at first sight does not seem to extend to a court officer under part 71 (and CPR71.6 itself differentiates between "a court officer" and "a judge").

10. Returning to Slade v Abbhi; the direction there, as in this case, appears to have been that the examination should be before a master i.e. a judge. The matter came before the deputy master, who heard or conducted the examination and determined various matters relating to it but reserved other matters for judgment on 30 July 2020 and on the basis that the examination was going to resume following the judgment on 6 August 2020.

11. The actual question as such before the deputy master was as to what use might be made of the documents which had been provided by that judgment debtor in circumstances where, under CPR rule 31.22, those documents could only be used for specific purposes unless they had

been effectively deployed or read at “a hearing conducted in public”, but that exception itself being subject to any direction made by the court.

12. The consequence of those provisions was that the deputy master ended up having to consider (1) whether or not the part 71 examination was “a hearing” and then (2) whether or not what had taken place in front of her so far had been “a hearing conducted in public” and then (3) as to whether or not, if it was, she should make some direction restricting their use. In order to determine those various questions, she received and considered substantial submissions.

13. She then came to her various conclusions in paragraphs 34 to 50 of her judgment, which I read generally into this judgment for the purposes of saving of time. I should say in this judgment to the parties that I am delivering it here orally and eventually in fairly short form simply because it seems to me to be highly desirable in accordance with the overriding objective that at least some of the examination should commence and take place later this afternoon.

14. In her judgment she dealt first with the engagement of the exception in CPR rule 31.22, mentioning again the various issues as I have done, but in paragraph 37 stating that she regarded it as a complex question which might well have wide ramifications as to whether or not part 71 examinations are to be treated in general as public hearings or as private hearings. She went on at the end of that paragraph and the next paragraph to say that she regarded those questions as likely to be more suitable for determination by a High Court judge and therefore she limited her conclusions to the facts of that individual case. Thus, in effect, she was saying that her own conclusions were not to be treated as giving rise to any precedent. I bear that in mind although obviously what she says is potentially persuasive.

15. I note also that the matter has been referred to the Civil Procedure Rule Committee, which is conducting its own review of such matters. However, such review has not yet taken place and I am concerned with what the law is as opposed to what it might become.

16. In paragraph 39 of her judgment the deputy master came to the conclusion that there had been “a hearing” because what had taken place had involved the fundamental elements of “a hearing”, albeit that those elements were not specified in any relevant rule of court. This was because there had been prior disclosure of relevant material, the parties had been represented, the parties had made submissions as to their respective positions, a witness was subjected to questioning and it was the master's role to supervise the proceedings.

17. The deputy master did, however, note the particular provisions of CPR 39.1(1) which provides:

"In this part (a) 'hearing' means 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 prevent simultaneous communication; (b) 'judge' has the same meaning as in civil rule 2.3(1)."

18. The Deputy Master went on to accept that part 71 examinations do not necessarily require any interim or final decision by a judge, although she also went on to say that she had made some decisions at the hearing, including with regards to disclosure orders and what was to happen next both generally and with regards to a particular issue in relation to the law of contempt. She concluded that the event before her had been “a hearing” and then went on in the next paragraph to consider whether or not it had been heard in public. She concluded that on the particular facts of what happened, it had been heard in public.

19. At paragraph 41 she effectively disregarded the fact that no members of the public had chosen to attend.

20. In paragraph 42, she said that she had been fortified in her analysis by two particular matters: firstly, that part 71 itself does not refer to examinations being conducted in private and, secondly, observations of Mr Justice Hickinbottom in the decision in Watson v Sadiq [2015] EWHC 3803, where in one paragraph, albeit concerned with a particular issue as to why a

deputy district judge might or might not have been entitled to exclude a family member from the examination, the judge had said he was unsure about the relevant jurisdiction and had gone on to say, "Although oral examinations are conventionally held 'in private' in the sense of without attendance from the public ...” and then the judge had said that he could not see why the relevant person should have been excluded from the hearing, the deputy master plainly treating those words from the judge as implying that oral examinations are usually not attended by the general public but that they should be conducted according to the usual rules of a public hearing. It does not seem to me that the Watson judgment really carries matters very much further.

21. However, the deputy master did feel that it was a pointer to part 71 examinations being conducted in public, at least as a matter of law and at least unless the court otherwise orders for an appropriate reason. In paragraph 43 she said that she was not going to determine the general questions of principle with regards to this. Nonetheless, at paragraph 46, she did consider that she should not classify the resumed examination as being a private hearing. She said that this was "for similar reasons as were set out above", which would seem to suggest that she was taking into account what I have just covered.

22. She went on in paragraph 46 to say though:

"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."

23. The words which she used in that particular sentence come from Civil Procedure Rule 39.2(3), dealing with the circumstances in which the court must order a hearing to take place in private. Thus -- and to which I will return in due course -- what the deputy master seems to be saying there is that if a part 71 examination is a hearing, as she seems to have determined was the

case in relation to what had happened before her, then as a general rule it should be in public rather than in private, albeit since she was so much confining her judgment to the facts of her own particular case that the persuasive effect of this is limited.

24. She then went on to consider as to whether or not there should be an order which prohibited the use which could be made of the documents which had been read at the previous event, i.e. what she had determined to have been a public hearing. In paragraph 47 she referred to the fact that such orders were exceptional, which I will return to in due course. In paragraph 48 she said she had to weigh heavily the rights of the judgment debtor under Article 8 of the Human Rights Convention as to a respect for private life and bore in mind that the documents were likely to contain extensive personal and specific information about the debtor's bank accounts and very detailed information about their financial affairs, and that those documents also involved various members of the judgment debtor's family.

25. She went on at the end of that paragraph to say that that judgment debtor had, in her view, provided credible evidence of his concerns about the potential misuse of the documentation and the information within it.

26. At paragraph 49 she went on to balance Article 6/10 rights of the public and press and held that they weighed less heavily and particularly where she did not see what proper interest members of the public or press would have had in the information which had been provided in the case before her.

27. In paragraph 50 she concluded therefore that she was going to treat CPR 31.22 as being in point and, in the circumstances of that case, treat the relevant documents as having been read at a public hearing so that the prohibitions contained in CPR 31.22 would not apply without a court order, but she went on to say that she would therefore make such an order being to the effect that that claimant creditor might only use the documents for the purposes of subsequent

enforcement proceedings and must not otherwise share the existence or content of the documents with any other third party.

28. For the reasons which I have given when going through that judgment, it seems to me that the deputy master's analysis is valuable but should only be treated as being of limited persuasive effect, particularly where she was keen not to set out any statements of general principle with regards to part 71 applications generally and to confine what she was saying to the facts of that particular case.

29. I, however, it seems to me, am forced in my particular situation, where the examination has not taken place as yet and specific applications have been made, to consider, firstly as a matter of legal analysis, as to whether or not a part 71 examination of this nature before a master is a hearing within the meaning of CPR 39.1(1).

30. If it is, I will then have to turn to CPR 39.2 and its specific rules regarding whether the matter should be in public or private. If it is not, then it is common ground between counsel and, in my view, correct that whether to conduct the examination in private is a question of the court applying its inherent jurisdiction and what might be described as more common law principles, albeit both subject to and informed by the Human Rights Act, the Convention and human rights considerations.

31. I deal first with the question of whether a part 71 examination before a master is a "hearing" for the purposes of CPR part 39. CPR 39.1(1)(a) defines "hearing" for the purposes of CPR part 39. It does not seem to me that it defines "hearing" for the purposes of CPR part 71 and, equally well, where "hearing" is used in CPR part 71, it does not seem at first sight to import the CPR 39.1 definition of "hearing". However, I do bear in mind that under CPR 71.6, as framed at a time when CPR part 39 did not exist in its present form, the word "hearing" was used when referring to an examination taking place before a judge, which (see CPR 2.3(1)) includes a master, and appears to be used in contradistinction to any examination taking place

before a court officer. That is a pointer towards an examination before a master being a "hearing" for all purposes, albeit only one of limited weight since it may well be that the intention to be attributed to the then rule-makers was that matters which took place in person before a judge were termed "hearings" simply as a matter of ordinary English language rather than for the purposes of specific definitions existing for specific purposes as has subsequently come to be the case in the new CPR 39.1.

32. The second point which I note is that the way in which "hearing" is defined in 39.1(1)(a) is by effectively requiring two elements to be satisfied: firstly, that there is a making of an interim or final decision by a judge and, secondly, that it is a situation at which a person is or has a right to be heard by some means which permits simultaneous communications, thus in particular excluding matters which take place simply on paper since there is no communication between judge and any party in that particular situation (and, even if the judge seeks further information by email, that does not involve simultaneous communication).

33. The first part of the definition, though, is a requirement in its own right, namely the making of any interim or final decision by a judge. Mr Weekes submits to me that a part 71 application satisfies that requirement in a number of different ways. Firstly, he submits to me that the judge is actually taking an active role in terms of the conduct of the examination and requiring the party to take the oath or affirmation, saying when it is going to begin, when it is going to end and indeed as to what is going to happen next.

34. Secondly he submits to me that the judge is continually taking decisions throughout the application, including as to whether or not the examinee debtor is actually answering the questions, since if a question is not answered, that will in principle trigger the provisions CPR 71.8(1)(b) and require the judge to refer the matter to a High Court judge or, in the County Court, a circuit judge for consideration as to whether or not to impose a relevant contempt sanction.

35. Thirdly, that all sorts of questions may arise requiring decisions during the examination process, including as to whether or not particular questions are allowed to be asked and as to whether or not the debtor may, for example, refuse to respond on various grounds, such as legal professional privilege or privilege against self-incrimination, and therefore there is a constant judicial decision-making process. There is also the fact that at the end of the examination, when time runs out on the day, questions will arise, for example, as to whether or not there should be a further date fixed or provision made for disclosure of further documents or information.

36. Lastly, Mr Weekes submits to me that if I gave a restricted interpretation to the word "hearing" in this context, that it would have various unfortunate consequential effects, including causing questions as to whether or not a trial at which judgment was reserved itself was a hearing since a judge would not actually be taking a decision at it.

37. It seems to me that Mr Weekes' last point is a bad one. A trial where judgment is reserved continues as one continuous hearing, albeit adjourned, at least to the point of the handing-down of the judgment. Whether or not consequential matters which are dealt with at another time are being dealt with at a separate hearing is a difficult point which, as a matter of law, depends on what the judge actually does, being whether the judge specifically adjourns the extant hearing to a consequentials hearing or whether the judge directs a separate consequentials hearing (this latter possibility seems to be the default option under the various authorities). However, it does not seem to me that that sort of reasoning applies simply to a trial where judgment is reserved. If that happens, then the trial hearing is just adjourned to continue at the point that the judgment is handed down. However, Mr Weekes' other points have considerable weight and which I have considered carefully.

38. Mr Campbell submits to me that the examination process is not a decision-making process; effectively it is the judge presiding over an event which is taking place but which does not

necessarily involves the making of decisions at all. Any matter which comes up which requires a decision is effectively self-contained within it. It is not in any way the heart or core of the part 71 examination and its process.

39. It seems to me, having weighed up the matters together, and notwithstanding that I feel that Deputy Master Hill's feeling was in the other direction, that a part 71 examination is not per se a hearing within the meaning of CPR 39.1(1)(a) -- it seems to me that that sort of "hearing" is an event at which the judge is there to make a decision, whether interim or final. That is not the primary purpose of the judge in presiding over a part 71 application. In some ways it seems to me that this is really a matter of impression as to what is the core of what is happening since I do fully accept that, if the examination is being conducted before a judge, that may well be because it is thought by whoever made the original order that it may well be that decisions will have to be taken. However, that, it seems to me, is not enough to convert the examination into a hearing in itself.

40. When the judge actually comes to make a decision, then it is possible, I suppose, in theory, that a sort of miniature hearing then arises, just as if an examination was being conducted in front of a court officer, a particular point came up and the court officer referred under CPR 3.2 the particular question to the judge to rule upon, and where, the ruling having been obtained, the examination could continue. But even if, which seems to me may well be the case, the determination of such particular point(s) of decision could be regarded as a miniature self-contained hearing(s) in their own right, it does not seem to me that that reasoning can or should be applied to the part 71 examination generally. That is simply something which is going on between the parties which the judge is presiding over and where reference can be made to the judge during it. It is not, it seems to me, a matter which necessarily involves or is even really about the making of any interim or final decision and therefore, in my view, it does not fall within CPR 39.1(a), at least as the rules are generally drafted.

41. I should add that I have also borne in mind a further point made by Mr Weekes, being that under the former part 39 and its practice direction which existed before 2019, it was provided along the lines that part 71 examinations should be hearings to be conducted in principle in private. Mr Weekes submitted to me that the Rule Committee should not have been taken when creating a new part 39 and repealing and not re-introducing its practice direction to have been making some fundamental change to the question of whether or not part 71 examinations were either hearings or ought in principle to be conducted in public or private.

42. Under the recent case law, it is made quite clear that what was the actual intention of the rule-makers is not in point. The question is as to what has been done with the rules and their construction, albeit in the context of a factual matrix where there has been a previous version of the rule. In my view, however, the reconstruction of part 39 in its 2019 form and repeal and non-reintroduction of the practice direction to part 39 was such a major step that it is not, in my view, appropriate to seek to read the new part 39 in the context of the old. The court simply cannot proceed on the basis that objectively it was intended either to leave matters in place or for them no longer to be in place. The 2019 revisions were such as in my judgment to effectively create a new position which has to be construed and applied on its own terms.

43. Having decided that the examination itself is not a "hearing" within the meaning of CPR 39, I do not strictly have to apply a CPR 39.2 analysis but rather only general common-law and human rights principles. However, and in case I am wrong as to the application of CPR 39, I do nonetheless consider in this judgment as to whether or not it would make any difference to my eventual conclusion if I was to apply part 39 rather than general common law and human rights principles. I do, however, take first the question as to what the common law and human rights principles are.

44. Mr Weekes has taken me to effectively three sets of matters in relation to this. The first is the practice note or the practice direction on interim non-disclosure orders, [2012] 1 WLR 1003.

That document is of value although I bear in mind firstly that it is primarily, although in no way exclusively, concerned with interim non-disclosure orders, whereas the question as to whether or not a hearing should be conducted in public or in private is something of a different question. However, it is of value in terms of setting out various principles of human rights law and the general common law. Under paragraph 9 it is stated that:

45. "Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, [made] public ..."

46. At paragraph 10:

"Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice."

47. Paragraph 11, that it is a matter of discretion for the court rather than agreement of the parties.

48. In paragraph 12, that mere privacy or confidentiality is not sufficient. The court must be satisfied that "nothing short of the exclusion of the public" can enable justice to be done and: "Exclusions must be no more than the minimum strictly necessary to ensure [that] justice is done ... Matters which very much lead the court to consider as to whether or not something more restrictive than making the event a private one will do in the circumstances."

49. In paragraph 13:

"The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence ..."

50. It is of course Monsieur Ohayon who is seeking that this hearing be conducted in private. It seems to me at first sight that that sort of analysis applies to his application.

51. In paragraph 14, that:

"... the court will have regard to the [potential] ... competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the

Convention, where that is engaged, is not undermined by the way in which a court has processed an interim application."

52. There is then again a reference to limiting any derogation from open justice to the minimum required to comply with the Convention rights.

53. It does seem to me that Article 8 is relevant and engaged here since it does seem to me quite clearly that the information in question is information which is potentially private and personal to Monsieur Ohayon and that there are potential invasions of his private life by reason of his having provided the information, and all the more so if he has to provide it in a public situation. But I do take into account, as made clear in this paragraph, that the court has to consider the competing human rights considerations, which are in particular Article 10, with regards to court matters being in public and being capable of being accessed by the public. I also take into account that any interference with these rights should be the minimum which is required to achieve the proper balance.

54. Mr Weekes next took me to the decision in V v T [2014] EWHC 3432. That decision concerned the Variation of Trusts Act and an application for a hearing to be in private in view of a number of matters relating to the fact that the authorisation of the court was required because there were minor beneficiaries whose interests had to be considered, that trusts are usually private and that there might well be confidential or commercial information revealed.

55. There the judge was considering the old form of part 39, which is not that which is presently in the rules, albeit that it does seem to me that it provided for a greater readiness by the rule-makers to permit hearings to be in private than the present form of part 39 does. I read into this judgment generally paragraph 13 of the judgment in V v T.

"13. Rule 39.2 is to be applied against the background of long established common law rules as to the fundamental principle of open justice and against the background of Articles 6, 8 and 10 of the Convention, set out in schedule 1 to the Human Rights Act 1998 , coupled with section

12 of that Act dealing with freedom of expression. These rules have been the subject of a large number of highly relevant decisions over the decades. One can trace the authorities from the leading case of *Scott v Scott [1913] AC 417* through *R v Legal Aid Board ex parte Kaim Todner [1999] QB 966* (see, in particular, at 977) to a fairly recent discussion of the principles in *Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993* , a case which concerned proceedings in the Companies Court. The authorities establish the following general propositions:

(1) There are two dimensions to open justice. The first is that the public are entitled to attend court proceedings to see what is going on. The second dimension is the right of the media to report the court proceedings to the public. The media should not be discouraged from publishing fair and accurate reports of court proceedings. In reality, very few members of the public attend court hearings so that the scrutiny of court proceedings is performed by the media acting on behalf of the public.

(2) The hearing of cases in open court deters inappropriate behaviour by the court. It maintains public confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It makes uninformed or inaccurate comment about the proceedings less likely.

(3) Court hearings taking place in public enable information to become available to the public in a democracy. What goes on in the courts is inherently of legitimate interest, and real importance, to the public.

(4) The fact that a hearing in open court may be painful, humiliating and a deterrent either to a party or to a witness is not normally a proper basis for departing from the open justice principle. The interest protected by the open justice principle is the public interest in the administration of justice rather than the private welfare of those involved in court proceedings."

56. What that makes clear is that, by way of general propositions, there are a number of matters of great longstanding in the common law, as well as in the Human Rights Convention which favour open justice and for judicial proceedings to take place in public.

57. The first general propositions concern the fact that open justice involves not only the public being entitled to attend court proceedings to see what was going on but also the rights of the media to report court proceedings to the public. Of course, in reality, the public are much more likely to learn about what has happened in court proceedings through the media than themselves attending.

58. The second proposition is that:

"The hearing of cases in open court deters inappropriate behaviour by the court. It maintains public confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It [also] makes uninformed or inaccurate comment about the proceedings less likely."

59. It seems to me that this proposition is of great importance. The public is entitled in general to know and to be able to see what is going on in the courts. It is part of the system of administration of justice that it should, unless there is good reason to the contrary, be open and transparent and that the public should be able to see fully what is happening in any part of the justice procedure.

60. The third proposition is that:

"Court hearings taking place in public enable information to become available to the public in a democracy. What goes on in the courts is inherently of legitimate interest, and real importance, to the public."

61. It seems to me that that is a further iteration of the point which I have just made. There is a very great public interest in the public being able to see what the justice system is actually doing.

62. The fourth proposition is:

"The fact that a hearing in open court may be painful, humiliating and a deterrent either to a party or to a witness is not normally a proper basis for departing from the open justice principle."

63. In effect the public interest has primacy over the private interest of individuals and parties to avoid those particular matters.

64. It seems to me that those statements of principle (Mr Weekes describes them as "common law principles"), albeit of considerable antiquity and particularly arising from the decision of Scott v Scott in 1913, are still very relevant now; although, obviously, to be considered with the benefit and in the light of the Human Rights Act and the specific articles of the Human Rights Convention.

65. Mr Weekes also took me to paragraphs 20 and 21 of V v T which I have considered, but which, to my mind, seem to deal particularly with the question as to how applications under the Variation of Trusts Act should be dealt with and which would involve a consideration of those provisions themselves.

66. What paragraph 21 does, though, is to reiterate that, if there is to be a derogation from open justice, then it should be to the minimum extent required to achieve the objectives which the derogation is seeking to meet.

67. In the V v T judgment itself, the judge was able to fashion a solution based on reporting restrictions, but that is not available to me here where the parties are already known.

68. The other decision which Mr Weekes took me to was G v Wikimedia [2010] EMLR 14. That case related mainly to the question as to access to documents held by the court, but at

paragraphs 16 to 20 the judge considered the approach to hearings being in private under the old CPR part 39. It is effectively reiterated in those paragraphs that open justice is of the greatest importance and that any derogation from it should be limited to what is necessary and appropriate and proportionate.

69. It seems to me that, applying those principles, I have to ask myself first as to whether or not principles of open justice apply to a part 71 application if it is not a "hearing" within the meaning of CPR part 39. Secondly, if they do, then in asking myself whether the examination should be in private I should bear in mind that the general principle is in favour of open justice and, if there is to be a derogation from it, then that derogation has to be fully justified and should only be to the extent necessary and proportionate to enable that justification to be achieved and satisfied. Thirdly, that in considering those particular matters, I should bear in mind very much that Article 8 does provide that respect for private life is engaged in this particular case but has to be balanced against the Article 10 rights of the public and of the press to have justice in the open and capable of being seen and observed, and reported upon.

70. In those circumstances, it seems to me that the principles of open justice do apply and that the general rule should be that part 71 examinations before a master or other judge should be conducted in public, in particular for the following reasons. Firstly, the part 71 examination is part of the work of the courts. The fact that it is being carried out in front of a judge emphasises this, although at first sight it does not seem to me that it makes very much difference whether it is before a judge or a court officer, at least for these purposes. It is part of the work of the court. It is a coercive requirement upon the judgment debtor to provide information and it seems to me that, at first sight from the authorities which I have cited, it is an essential part of the public interest that the public should be able to see what the court is actually doing in terms of continuing the proceedings and dealing with matters between the parties and, moreover, doing so on a coercive basis. For such matters to be hidden from the

public seems to me to be contrary to the various authorities and principles which I have sought to review and outline.

71. Secondly, the fact that a matter is before a judge, if anything, re-emphasises the point. If the matter is before a judge, again, the public is entitled to see what a judge is actually dealing with and doing and to be able to consider the actual operation of the judicial function in this country. If the matter is simply before a court officer, it may be regarded as being less serious and of less interest, which, if anything, would point something in the other direction, although I am not for one moment saying that it points particularly far in another direction. But this examination is to be conducted before me as master i.e. a judge.

72. Thirdly, it seems to me that, insofar as Slade v Abbhi and the previous Watson decision go in any particular direction, they are supportive of that conclusion and favour part 71 applications being public. That appears to have been the approach of the judge in each of those particular cases.

73. That, however, being the general rule, it does seem to me that there is potential, in a proper case or to a proper extent, for a part 71 application to be conducted, at least partly, in private. Article 8 is engaged and that necessarily involves a balancing exercise with Article 10 and a consideration as to whether or not there are measures which can be put in place to achieve the Article 8 respect for private life without unduly infringing Article 10 and being measures which are necessary and proportionate.

74. Bearing in mind the need to conduct the balancing exercise between the Human Rights Convention articles and the general provisions of the common law and the authorities which I have cited, it seems to me that the burden is very much on Mr Ohayon to justify all or part of the examination being conducted in private and that it is therefore for him to produce the appropriate evidence to justify that particular outcome.

75. I do bear in mind that the press have not sought to attend this hearing. It can be said that Adare are being somewhat officious in taking the positive stance that the hearing should be conducted in public rather than private, but I lay little weight on that since, even if Adare had not taken that attitude itself, in order to ensure that the public interest was safeguarded, I would be likely to ask Mr Weekes to tell me as to what were the arguments in favour of the examination being conducted in public so that I heard in effect the public's side of the point.

76. That said as a matter of principle, I have considered what is said in Monsieur Ohayon's evidence as to why all or part of the examination should be conducted in private. That is set out in the fourth witness statement of Celine Jones, 5 July 2021, from paragraphs 25 to 40. Primarily it involves giving generalised evidence to the effect that Mr Ohayon is a businessman with very large and extensive interests and that any detailed questioning with regards to his financial affairs is likely to involve the consideration of financially confidential material. Also, that as far as his own very personal assets are concerned, including bank accounts and for that matter properties, that they are quite likely to be joint-owned with his wife, Madame Ohayon, whose interests ought to be respected, but otherwise there will necessarily be some potential involvement of both his family’s and his own private life even if not that of his wife.

77. It does seem to me, having looked at this evidence, that Mr Weekes is right to say that it is distinctly unparticularised. It does not identify particular corporate entities or particular financial matters which are said to be particularly commercially sensitive; because, for example, they may be intended to be put on the market and to be the subject matter of some sort of sale, in which case for Monsieur Ohayon to give evidence as to how much he thought they were worth would potentially be of the greatest interest to a prospective buyer. However, that is simply not said.

78. Mr Campbell says, "Well, that is hardly surprising because Adare have refused to say as to what particular assets they particularly wish to ask questions about". Mr Weekes responds that this can be dealt with on a case-by-case basis and that in any event he is going to take a responsible attitude of not seeking to ask questions about particular assets which give away too much about them, at least in ways which are particularly confidential, such as, for example, particular bank account numbers.

79. It seems to me that the practical solution to the problems which have been advanced by each side's counsel is as follows: the burden, as I have said, is on Mr Ohayon to justify derogation from open justice. If Mr Weekes proceeds in the responsible way in which he has said he is going to proceed in, that will nonetheless give rise to various problems or possible problems when it comes to dealing with specific assets, but on the material before me I am simply unable to tell as to what problem might or might not exist in relation to any particular asset.

80. Applying the approach that the burden is on Monsieur Ohayon to seek to derogate from open justice; it does not seem to me that it would be right in any way to order that the examination be private in these particular circumstances. However, the way to deal with envisaged problems are to consider them on any particular case-by-case basis if and when they arise, and perhaps by taking the proceedings private for a limited period of time or by some other means.

81. With regards to Madame Ohayon, Mr Campbell submits that this is a classic situation where, to protect the interests of an innocent third party, the hearing should be in private because it will inevitably verge on to matters where she has a very personal interest. Mr Weekes counters this by saying that, firstly, Madame Ohayon has not put forward any evidence, statement or contention of her own, and this is simply, he would say, something which Monsieur Ohayon is deploying in an effort to achieve his own objectives, and, secondly, that this is simply an occupational hazard and that, as set out in V v T, the mere fact that a court process is going to cause pain to someone, at least indirectly, is only of limited weight.

82. It seems to me that Mr Weekes is right in terms of what he says. If one joint-owns assets with someone else, then it is an occupational hazard that, if they do not pay their debts, there an examination of them and for that matter enforcement against them. In those circumstances, you as joint-owner are likely to be drawn in and deleteriously affected, which, as I say, is an occupational hazard of joint ownership.

83. The points about family might be stronger in some situations, but I have absolutely no evidence as to the existence of any relevant situation or relevant difficulty which might so engage Article 8 as to swing the balance in this case in favour of private rather than public. Again, it seems to me that this is a matter that should not give rise to any general direction, but if a particular point arises, Mr Campbell may seek to make some limited specific submission, but where he will in any event face the situation of, in my judgment, it being for Madame Ohayon to deploy points herself in principle rather than simply for Monsieur Ohayon to seek to take advantage of his wife's possible involvement and interest.

84. It seems to me, therefore, for all those reasons, that this hearing should be in public subject to specific and justified application being made as the matter proceeds. However, I am fortified in that by having considered paragraph 50 of the judgment in Slade v Abbhi with Mr Weekes and the orders made in that case to the effect that the documents which were disclosed could only be used for specific purposes, namely in effect for the purpose of enforcement. Mr Weekes has taken instructions and says that his clients are prepared to behave -- whether this should be via an order or undertaking I will come on to with counsel -- in a similar manner and to only use what is obtained in the part 71 process, for the purposes of enforcement. It seems to me that that is quite right. It is a valuable limitation and should go far to meet the various concerns which Mr Campbell has mentioned from his side.

85. I should say that Mr Campbell has dwelt in submissions on the assertion that his side believes that Adare is seeking to use the public nature of an examination as a further means of

pressurising Monsieur Ohayon to pay the debts. He submits to me that that is not a proper use of part 71. I am not sure that that is necessarily right since part of the examination process is intended to bring home to the judgment debtor the importance of complying with court orders, but I will put that to one side and assume that Mr Campbell is correct. Nevertheless, it seems to me that if such an order is made or undertaking given, then there is no evidence before me to come to the conclusion that it will not be complied with and that will afford Monsieur Ohayon the protection that he seeks and avoid this process being used in any way possibly improperly.

86. That then is my conclusion as far as the principles which I have concluded I ought to apply are concerned. However, in case I am wrong, and the examination is a hearing for part 39 purposes and so that CPR 39.2(3) applies, I do briefly consider the position on that basis.

87. CPR39.2(3) states that:

"A hearing or any part of it must be held in private if and only to the extent that the court is satisfied that of one or more of the matters set out in subparagraphs (a) to (g) and that is necessary to sit in private to secure the proper administration of justice…"

I am satisfied that the examination satisfies at least subparagraph (c). It involves confidential information, including information relating to personal financial matters and publicity would damage that confidentiality. Since at least one of the subparagraphs is satisfied; I need to consider the second (cumulative, not alternative) requirement for the hearing to be heard in private, being as to whether " it is necessary to sit in private to secure the proper administration of justice"

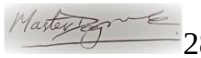
88. It seems to me that it was relatively common ground between counsel, and in any event correct, that for it to be necessary to sit in private to secure the proper administration of justice, the court is effectively engaged in considering the competing human rights provisions, Article 8 and Article 10 and the common law principles, and which I have effectively set out

and considered above. But the question is not whether it is “convenient”to sit in private to secure the proper administration of justice, but whether it is “necessary”.

89. In practice, it seems to me that that effectively brings in the same approach and considerations that I am already bearing in mind, although, if anything, it places a higher burden on Mr Ohayon.

90. Since I have already concluded that not applying part 39, I should direct that the examination is in public but with the limitations and protections which I have mentioned, it seems to me that I will come to exactly the same conclusion if I was applying CPR part 39. Therefore, in effect, that it makes no difference.

91. I add that Mr Campbell made submissions to me that examinations under the insolvency regime are often conducted in private. I have not placed any weight on that both because insolvency is a different regime and because the insolvency legislation also provides for public examinations.

Approved  28.8.2021