Case No: CR-2024-001426

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT (ChD)

Neutral Citation Number [2024] EWHC 2039 (Ch)

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

Thursday, 18 July 2024

BEFORE:

ICC JUDGE MULLEN

IN THE MATTERS OF GREENSILL CAPITAL (UK) LIMITED AND GREENSILL LIMITED

AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

BETWEEN:

(1) BCC TRADE CREDIT PTY LIMITED
(2) TOKIO MARINE MANAGEMENT AUSTRALASIA PTY LIMITED
(3) TOKIO MARINE & NICHIDO FIRE INSURANCE COMPANY LIMITED

Applicants

- and -

THE SECRETARY OF STATE FOR BUSINESS AND TRADE

First Respondent

MR ALEXANDER DAVID GREENSILL

Second Respondent

MR M GIBBON KC and MR O PHILLIPS (instructed by Kennedys Law LLP) appeared on behalf of the Applicants
MS C SANDBACH (instructed by Howes Percival LLP) appeared on behalf of the First Respondent
MR G MILLAR KC and MR A WILLS (instructed by Ellerman Limited) appeared on behalf of the Second Respondent

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JUDGMENT
(Approved)

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ICC JUDGE MULLEN:

1. This is my judgment on an application, dated 12 April 2024, made by BCC Trade Credit Pty Limited, Tokio Marine Management Australasia Pty Limited, and Tokio Marine & Nichido Fire Insurance Company Limited.

2. The application is made under CPR 5.4C(2), CPR 32.12(2) and/or the court's inherent jurisdiction to obtain a copy of an affirmation made by Mr Ian Wilson on 6 March 2024 in support of the Secretary of State's claim under the Company Directors Disqualification Act 1986 to disqualify Mr Alexander Greensill from being concerned in the management of a company. The applicants do not seek inspection of the exhibits to the affirmation. Having looked at the court electronic file, those exhibits do not seem to have been uploaded but they apparently run to about 8,500 pages. The affirmation itself runs to 322 pages, plus a few schedules, and comprises 1,053 paragraphs. The statement of the matters that the Secretary of State relies upon as demonstrating Mr Greensill's unfitness to be concerned in the management of a company are set out in paragraphs 10 to 46. That statement is required by the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, to which I shall turn in a moment. The applicants also seek permission to use the affirmation in proceedings currently before the Federal Court of Australia, to which the applicants are defendants.

3. The application now extends to a second affirmation of Mr Wilson, dated 24 June 2024, which makes amendments to the first. These are not amendments of any great significance in that the second affirmation corrects typographical and literal errors and exhibits documents that were intended to be exhibited to the first affirmation.

4. The application is supported by the evidence of Mr David Chadwick, the solicitor with conduct of the matter on the part of the applicants at Kennedys Law LLP. He has made two statements dated 12 April 2024, and 10 May 2024. The application is opposed by Mr Greensill, whose lawyer, Mr Ivan Pearce-Molland, made a statement dated 3 May 2024. The Secretary of State is neutral on the application though evidence has been put in by Ms Shevonne Keir, a senior lawyer at the Insolvency

Service, who sets out some of the pre-action correspondence between Mr Greensill and the representatives of the Insolvency Service, both prior to the notice served under section 16 of the 1986 Act and afterwards, including the extensions of time afforded to Mr Greensill make representations to persuade the Secretary of State not to commence proceedings. The statement also seeks to rebut certain contentions that there is information in the affirmation of Mr Wilson that is confidential.

5. Judge Baister, sitting as an ICC judge in retirement, directed that the application be expedited. The application was therefore listed before me on 8 July 2024. That was shortly after I heard and gave a judgment on 28 June 2024 in a similar application made by the Financial Times. The neutral citation of that judgment is [2024] EWHC 1803 (Ch). In that application, I directed that the Financial Times should be able to obtain a copy of paragraphs 10 to 46 of the affirmation, which set out the allegations which the Secretary of State is required to particularise under rule 3(3) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987. I regarded the rule 3.3 statement as akin to a statement of case, which a non-party to proceedings is usually entitled to see. I rejected the Financial Times's application insofar as it sought access to the affirmation more generally. That application was made on a different basis to the instant application. The Financial Times wished to report on the nature of the Secretary of State's claim generally, having reported on Mr Greensill's affairs for some years.

6. The application that I have to deal with now arises from the fact that there are some ten claims proceeding in the Federal Court of Australia in relation to trade credit insurance policies issued by BCC Trade Credit and others as representative of Insurance Australia Limited. The applicants are pursuing a number of cross claims, including claims against Greensill Capital (UK) Limited, which is now in administration. That administration has been recognised in Australia and the administrators have given consent to the Australian proceedings being brought against the company, notwithstanding the administration. They have done so on the basis that the company would be released from the obligation to file pleadings or give disclosure of documents, although they have stated that they would not oppose an order for a limited form of disclosure of documents by category.

7. The Australian proceedings are defended by BCC Trade Credit in part on the basis of a contention that the policies were not validly entered into as a result of fraudulent non-disclosure and/or misrepresentation by Greensill Capital (UK) Limited and by Mr Greensill himself, among others. Like defences are being run by the Tokio companies. The defences annex a document referred to as "Annexure A", which is common to each of the claims, particularises its fraud claims and leaves open the possibility of pleading further fraudulent disclosure or misrepresentation. It is to be noted that those claims seek recovery in the region of $7 billion AUD and there are other claims connected to Greensill Capital (UK) Limited in this jurisdiction and elsewhere.

8. The purpose for which the affirmation is sought is to frame the scope of disclosure in the Australian proceedings where that process continues to be referred to as "discovery". As part of that process, questions of the form and scope of discovery were referred by the order of Justice Lee on 21 December 2023 to a court-appointed referee, Mr Edward Cowpe, a barrister qualified in Australia. Following Mr Cowpe's report, Justice Lee gave directions for submissions at a hearing to consider the form and scope of discovery. Particular questions are whether there should be standard, non-standard or hybrid discovery, what the scope of discovery should be and whether there should be discovery on the basis of particularised frauds or, as it is called, "general fraud discovery". General fraud discovery is an order for disclosure of documents that tend to show fraud or dishonest conduct in relation to a commercial or financial transaction and would not be limited to the transactions particularised in Annexure A. More generally the applicants say the affirmation will indicate the extent of the material available to the administrators of the Greensill companies, who are taking a limited role in the Australian proceedings given the insolvency. The discovery hearing was initially listed in May of this year but has now been re-listed for 14 August 2024 as the result of the change of the docketed judge.

9. Both parties in this application have filed expert reports from barristers qualified in New South Wales who are familiar with the procedure of the Federal Court of Australia. Mr Greensill relied upon the report of Mr Phillip Sharp, while the applicants rely on that of Mr James Emmett SC. The experts are not wholly agreed

on the relevance of the affirmation to the Australian proceedings, but they have produced a joint report in which there is a measure of agreement.

10. Where the experts do not agree is as to whether the affirmation will be relevant to the question of whether there should be standard or non-standard discovery. It may be relevant in that it shows the sort of information available to the administrators of Greensill and provided to the Secretary of State. Without having seen the affirmation, however, the experts cannot say if it is likely to be relevant. Nor can they agree as to whether it is likely to assist the Federal Court in determining whether discovery will be of a broad or more confined scope, although it may be relevant to the question of the facilitation of wrongdoing for the purposes of the *Norwich Pharmacal* jurisdiction. They agree that if the affirmation contains allegations of fraudulent conduct which extend beyond the Annexure A allegations, it is likely to assist the court as to whether to order general fraud discovery or particularised fraud discovery. They take the view that the provision of the affirmation would not be regarded as being a fishing expedition by the Federal Court. If the affirmation merely covers the same ground as Annexure A, they disagree as to its likely assistance.

11. The second element of the joint expert report is the question of the extent to which any confidentiality restrictions imposed on the parties in this jurisdiction would be replicated in the Commonwealth of Australia. The experts state that until the affirmation is tendered in open court it is unlikely that a non-party would be granted access. Mr Greensill would have the right to seek leave to be heard on the making of a non-publication order in relation to the affirmation. The experts take the view that the Federal Court might well attach weight to any restrictions imposed by this court as to the way in which the affirmation could be used as a matter of judicial comity, but it might not. If it does not, it might be that the document is made available to the press and is reported more widely. Mr Greensill's concern in relation to this is that untested and, indeed, disputed allegations of a serious nature may make their way into the press without Mr Greensill being able to rebut them in any effective way and without the legal recourse that might be available to him had the allegation been made outside the court process.

12. At the hearing before me, the applicants were represented by Mr Michael Gibbon KC, while Mr Greensill was represented by Mr Gavin Millar KC and the Secretary of State by Ms Carly Sandbach. Mr Millar and Ms Sandbach also appeared at the hearing of the Financial Times application.

13. Mr Greensill does not now resist the provision to the applicants of the information set out in the rule 3.3 statement. In the Financial Times application, I gave him the opportunity to raise objection to particular paragraphs of that statement. I did so on the basis that the application had been brought on an all or nothing basis, and it seems that, until Ms Sandbach drew counsel's attention to the nature of the rule 3.3 statement, it did not receive much consideration, although it formed the basis of my decision. On the basis that the greater includes the lesser, however, it seemed to me to be proper to make an order for provision of the limited part of the affirmation to the Financial Times but to allow time to Mr Greensill to focus on the paragraphs concerned. In the event, I understand that no objections are raised to specific paragraphs.

14. More generally, I should observe that, of course, the applicants have not seen the affirmation and their application is brought on what they consider to be likely to be covered by it. By contrast, Mr Millar and Ms Sandbach, their clients and other members of their clients' legal teams do know what is in the affirmation. While Mr Greensill has some broad criticisms of the affirmation, which are not accepted by the Secretary of State, I have not been addressed on or asked to consider, on a confidential basis, any specific parts of the affirmation as raising particular cause for concern. The Secretary of State's position is that there is nothing in the affirmation that is confidential or which should not be referred to in open court in due course if the disqualification claim proceeds.

15. The nature of disqualification proceedings was discussed at some length during the hearing, and it is important to understand how such proceedings differ both in terms of their nature and in terms of their procedure from the majority of cases that come to the court though, as I shall explain, the procedure in these cases is not as different as the applicants seem to suggest.

16. First, I should set out the basis on which disqualification claims are made. Section 6 of the Company Directors Disqualification Act 1986 is headed "Duty of the court to disqualify unfit directors". It provides that the court "shall" on an application under that section make a disqualification order against a person who is or was a director of a company that has become insolvent, and that person's conduct makes him unfit to be concerned in the management of a company. If the court forms that view, it must make a disqualification order of between 2 and 15 years. Section 7 of the 1986 Act provides that an application may be made by the Secretary of State or by the official receiver on the Secretary of State's direction. Such an application may be made:

> "If it appears to the Secretary of State that it is expedient in the public interest that a disqualification order under Section 6 should be made".

Thus, the applicants submit, and I accept, the proceedings are based not on an ordinary civil cause of action but on a statutory provision that is focused on the protection of the public interest in relation to the conduct of directors. Directors are, in a sense, public figures. Their names and service addresses, for example, are maintained on a public register held by the Registrar of Companies. The director disqualification regime exists to protect the public and is part of the regulatory regime designed to hold directors to account and raise standards of corporate governance among those trading with the privilege of limited liability.

17. The procedure to be followed on making a disqualification claim is set out in the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987. As the date of that instrument indicates, it long predates the Civil Procedure Rules and has been amended over the years accordingly. It originally provided that proceedings would be brought by originating summons. It now provides, at rule 2, for the proceedings to be commenced by a Part 8 claim under the CPR, as modified by the 1987 rules. The CPR are to apply unless inconsistent with the 1987 rules.

18. The information prescribed to be included in the Part 8 claim form is very limited and says nothing about the detail of the Secretary of State's allegations. Rule 3, however, sets out that evidence must be filed with the claim form in the form of an affidavit,

which of course includes an affirmation, or an official receiver's report. Rule 3(3) provides:

> "There shall in the affidavit or affidavits, or as the case may be the official receiver's report, be included a statement of the matters by reference to which the respondent is alleged to be unfit to be concerned in the management of a company."

The nature of the evidence is, as Mr Gibbon submits, different from that in private litigation. For example, it is largely, if not entirely, evidence which the Insolvency Service has gathered. It is not first-hand testimony but puts the results of the Insolvency Service's investigations before the court.

19. There are also certain obligations on the Secretary of State in the preparation of that evidence in terms of fairness. In *Moonlight Foods UK Limited* [1996] BCC 678, 690, Judge Weeks QC, sitting as a judge of the High Court said:

> "At this stage, I want to say a little about the applicant's duties. It is accepted that these are not ordinary adversarial proceedings but have an element of public interest and may entail penal consequences. It follows that there is a duty on the applicant to present the case against each respondent fairly. Many of these applications go by default or are defended by litigants in person and the practices for an official in the Department of Trade and Industry to swear a short affidavit referring to charges specified in a detailed affidavit sworn by the receiver or liquidator.
>
> In my judgment that second affidavit should not omit significant evidence available in favour of any respondent. It should attempt to deal with any explanation already proffered by any of the respondents. It should endeavour to apportion responsibility as between the respondents and it should avoid sweeping statements for which there is no evidence."

It is fair to say that Judge Weeks felt that the evidence fell short in that case, but the principle is that the Secretary of State does not pursue disqualification at all costs and must put the evidence gathered fairly and in a balanced way.

20. The affidavit is also something of a hybrid between a statement of case and evidence. The case must be summarised in the rule 3.3 statement, but there is not a bright line between the element of the affidavit that is undoubtedly in the nature of a pleading and those parts of it that are undoubtedly in the nature of evidence in support. In *Re Finelist* [2023] EWHC 1780 (Ch), Mr Justice Laddie said at paragraph 14:

> "Thus, the affidavit must perform two functions. First, it must set out the facts and matters upon which the SoS intends to rely. The court must accept that as prima facie evidence. Secondly, it must contain a statement setting out why the SoS alleges the director is unfit as the latter which have been referred to by Mr Davies, as they have in a number of cases, as the charges. In view of Mr Green's objections to the use of this expression, I shall refer to them as the allegations. Nomenclature aside, I agree with the view expressed by His Honour Judge Micklam in *Circle Holidays International PLC* [1994] BCC 226, that the affidavit in support of an application has of necessity something of the character of a pleading. I do not understand Mr Green to dispute that."

21. The 1987 rules then provide for evidence in answer by the defendant and in reply by the claimant to be filed before the first hearing. Rule 7 provides for the first hearing to be in open court, and the claim may be determined at that hearing or adjourned for a further hearing, with directions. Rule 7 specifically restricts the power of the court to determine the matter at the first hearing if the judge considers provisionally that a disqualification order should be made and that the period should be for more than five years, or questions of law or fact arise that are not suitable for summary determination. Thus Mr Gibbon submits that the first hearing is in the nature of a trial on the written evidence filed by the parties. The court might direct further consideration and it might give directions for a trial with the makers of statements to attend for cross-examination.

22. For present purposes, I need simply note that, while a first hearing had been listed on 25 June 2024 in this case, and indeed Mr Greensill has filed an acknowledgement of service disputing the claim, that the first hearing was disposed of by consent. ICC Judge Burton approved a consent order on 21 June 2024. She did not hear from counsel, but it seems clear from the third recital of her order that she was treating her consideration of the matter as the first hearing of the case. There will be a further case management conference later this year.

23. The importance of that procedural background is that it must be borne in mind that disqualification proceedings, being a modified form of Part 8 proceedings, follow a different procedural track to Part 7 claims, which is the CPR equivalent of the old actions begun by writ. The former contemplate all evidence in the case being lodged at the outset of the claim, before that first hearing. The rule is more honoured in the breach than the observance in the case of defendants to disqualification proceedings, but the affidavit in support of the claim is not merely the opening salvo in hostile proceedings. It is the Secretary of State's full case, ready to be deployed, though it may be supplemented by later evidence in reply to that of the defendant. It is before the court from the outset, and it travels with it to trial, if a trial with oral evidence is directed. There may ultimately be no oral evidence from the claimant's witness, who simply puts the results of the investigation before the court, and he or she may not need to be cross-examined at all. There is usually little relevant first-hand evidence to give. Indeed, it is not unusual in these cases where, for example, the Secretary of State's witness retires or is no longer with the Insolvency Service, for the evidence in that first affidavit simply to be adopted in a short further affidavit made by another officer in the service.

24. In contrast, Part 7 proceedings are begun by a claim form supported by a formal statement of case. Further statements of case are put in and evidence in the form of witness statements is put in much later. Those written statements will as a matter of course have to be confirmed orally by the witness at trial unless they are expressly released from attending. Those witnesses, unless they are expert witnesses, will be giving first-hand testimony and are not generally subject to the obligations imposed on the Secretary of State.

25. Having set out that procedural background I will turn to the provisions of the CPR which deal with access to documents and the use of witness statements. First, CPR 5.4C provides:

> "(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it; (b) a judgment or order given or made in public (whether made at a hearing or without a hearing).
>
> …
>
> (2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.
>
> (3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if –
>
> (a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;
>
> (b) where there is more than one defendant, either –
>
> (i) all the defendants have filed an acknowledgment of service or a defence;
>
> (ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;
>
> (c) the claim has been listed for a hearing; or
>
> (d) judgment has been entered in the claim.

(4) The court may, on the application of a party or of any person identified in a statement of case

(a) order that a non-party may not obtain a copy of a statement of case under paragraph (1)

(b) restrict the persons or classes of persons who may obtain a copy of a statement of case;

(c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or

(d) make such other order as it thinks fit.

(5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23.

(6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission."

26. CPR 5.4D deals with the procedure to be followed:

(1) A person wishing to obtain a copy of a document under rule 5.4B or rule 5.4C must pay any prescribed fee and (a) if the court's permission is required, file an application notice in accordance with Part 23; or (b) if permission is not required, file a written request for the document.

(2) An application for an order under rule 5.4C(4) or for permission to obtain a copy of a document under rule 5.4B or rule 5.4C (except an application for permission under rule 5.4C(6))

> may be made without notice, but the court may direct notice to be given to any person who would be affected by its decision.
>
> (3) Rules 5.4, 5.4B and 5.4C do not apply in relation to any proceedings in respect of which a rule or practice direction makes different provision. (Rules 5.4, 5.4B and 5.4C are disapplied by rules 76.34, 79.30, 80.30, 82.18 and 88.33; and rule 5.4C is disapplied, and rule 5.4B applied subject to court order, by paragraph 23 of Practice Direction 49E)."

The effect of those provisions is that a statement of case can be provided to a non-party, together with judgments or orders made in public, without the permission of the court providing that one of the conditions in CPR 5.4C(3) is met. Other documents can only be provided if the court gives permission.

27. As to the use to which witness statements may be put, CPR 32.12(1) provides:

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

The exceptions are at CPR 32.12(2):

> "Paragraph (1) does not apply if and to the extent that –
>
> (a) the witness gives consent in writing to some other use of it;
>
> (b) the court gives permission for some other use; or
>
> (c) the witness statement has been put in evidence at a hearing held in public."

28. Here, the questions of whether the applicants should be permitted to see the affirmation and whether they should be permitted to use it are closely linked, if not standing and falling together. The applicants want to see the affirmation, but they want to do so in order to use it.

29. The application proceeds on the basis that the principle of open justice points in favour of granting permission for them to obtain a copy and to use it. In this regard, I was referred to the judgment of the Supreme Court in *Dring v Cape and Intermediate Holdings Ltd [*2019] UKSC 38. That case considered the principles of open justice in the context of written material placed before the court in, as here, a civil action.

30. Lady Hale of Richmond, giving the judgment of the court, began by quoting Lord Chief Justice Hewart's well-known statement in *R v Sussex Justices, Ex p. McCarthy* [1924] 1 KB 256, 259:

> "It is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

31. Lady Hale went on to discuss the principles as follows:

> "41. The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case.
>
> 42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In *A v British Broadcasting Corpn*, Lord Reed reminded us of the

comment of Lord Shaw of Dunfermline, in *Scott v Scott* [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard 'with open doors', 'bore testimony to a determination to secure civil liberties against the judges as well as against the Crown' (para 24).

43. But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material."

Lady Hale's judgment identifies that over the years the practice of the court has changed so that, where once documents would have been read out orally, much more is read by the court before and during the proceedings, and documents are not often read out publicly.

32. Another aspect of open justice is understanding the nature of the proceedings on which the court is asked to adjudicate. As I noted in my judgment in the Financial Times application, in *Qadir and Associated Newspapers Limited* [2012] EWHC 2606 (QB), Mr Justice Tugendhat had considered the operation of CPR 5.4C in relation to statements of case as follows:

"40. It may be inferred that the purposes of the legislature in drafting rule 5.4C was twofold. First, it was to protect the privacy of the parties to litigation up to the point at which, either (1) it becomes clear on service of a defence or acknowledgement of

> service, the claim is not admitted, or (2) the court makes an order. Until one or other of those stages is reached the functions of the court are essentially no more than administrative and do not involve any active intervention by the court, such as might be properly described as the administration of justice. Once it appears that the court may be required to administer justice, as it does become apparent on the service of a defence or acknowledgement of service, then the principle of open justice also becomes engaged, and it is for that reason that parties may become entitled to obtain the statements of case."

33. That is, of course, recognised in CPR 5.4C itself, which permits a non-party to obtain a statement of case. But a witness statement or affidavit is not a statement of case within CPR 2.3(1). That provides that the expression "statement of case":

> "(a) Means a claim form, particulars of claim where these are not included in a claim form, defence counterclaim or other additional claim or reply to a defence, and (b) includes any information given in relation to them voluntarily or by court order under rule 18.1."

34. In *R (on the application of Corner House Research) v BAE Systems plc* [2008] EWHC 246 Admin, however, Mr Justice Collins adopted a purposive approach to the construction of CPR 2.31 so as to include within the definition of a statement of case, an acknowledgement of service and the detailed grounds for contesting the claim filed under Part 54 of the CPR, which deals with the procedure in judicial review claims. He came to that conclusion saying:

> "27. It seems to me in those circumstances, it does not do violence to the language of the rule to take the view the defence includes the judicial review equivalent to a defence. In those circumstances, I am satisfied that the correct meaning of rule 5.4C is that there is a right to have sight of not only a claim form, but also an acknowledgement of service and detailed grounds. It does

> not extend to any documents that are annexed to either the acknowledgement of service or the detailed grounds. It merely includes the grounds themselves as set out in either document. That is in conformity with what is allowed by rule 5.4C. If more is sought than an application will have to be made under 5.4C(4)."

35. It is not, in my judgment, possible to say that the Secretary of State's evidence is, in its entirety, similarly in the nature of a statement of case. It serves a dual purpose, both setting out the Secretary of State's case and setting out the evidence on which the Secretary of State will rely to make good that case, and that is long established. In that regard, I respectfully disagree with the learned editors of Mithani on Directors' Disqualification where they say, albeit tentatively, at paragraph 251 that:

> "Where a witness statement was in the nature of a pleading — as it would be where a claim under CPR Pt 8 was made — it appeared that the non-party was entitled to obtain access to the witness statement without needing the permission of the court. It followed that where a witness statement was filed in connection with an application for a disqualification order (which can only be made under CPR Pt 8), it was available to the non-party without the need for him to make an application for permission. Thus, the non-party appeared to be entitled, without needing the permission of the court, to obtain access to the written evidence filed in support of, and in opposition to, the application and also to any written evidence filed in reply by the claimant to the written evidence served in opposition by the defendant."

Nonetheless, as I said in the Financial Times application, the rule 3.3 statement is closely analogous to a statement of case. Had the rule 3.3 statement been included in particulars of claim, there would be no question that a non-party will be entitled to see.

36. It seems to me that the open justice principle does require that part of the statement to be made available so that the nature of the case can be understood and its relevance to

other proceedings assessed. The court is being asked to "administer justice", as Mr Justice Tugendhat put it. The presumption should be that when it is clear that there is a dispute that must be resolved by the court, the nature of the allegation should be understood, subject to considering the countervailing factors. Here, there are none. The allegations which lead to the Secretary of State to consider that it is expedient in the public interest to bring the proceedings are set out in broad terms and it is to be understood that they are denied by Mr Greensill, but there is a public interest in the nature of the allegations that the court is being asked to adjudicate upon being publicly understood.

37. The question of whether the rest of the affirmation should be made available is more difficult. This is because it contains the evidence on which the Secretary of State relies to make good his allegations. I have been referred to a number of authorities in relation to the provision and use of documents which have not been placed before a judge in open court and in relation to witness statements which have not yet been either considered by a judge or deposed to by the witness under oath.

38. First, Mr Millar took me to *R (Guardian News and Media Limited) v Westminster Magistrates* [2012] EWCA Civ 120. That concerned evidence that had not been read out but had been considered by the court. Lord Justice Toulson said at paragraph 85:

> "In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact specific. Central to the court's evaluation will be the purpose of the open

justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

39. Again, in relation to a statement of overarching principle, I was taken to *Dring* when it returned to the High Court before Mr Justice Picken, reported at [2020] EWHC 1873 (QB). That was of course, again, a case where the material had been put before the judge but explains the approach to the exercise of the power to order access. The judge referred at paragraph 69 to Lady Hale's observation at:

> "It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle."

40. He then went on to say:

> "70. The position is underlined, Mr Webb submits, by Lady Hale's reference in the last sentence of [47] to non-parties not seeking access 'unless they can show a good reason why this would advance the open justice principle' – as well as 'that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impractical or disproportionate'.
>
> 71. It seems to me that Mr Webb must be right about this and so that a party making an application for access to documents should show that the documents will advance the open justice principle. This appears indeed to be what Lady Hale was saying in the passages to which I have referred. It is also consistent on a proper analysis with what was decided in *Guardian News and Media* since it is important to appreciate that in that case, as Toulson LJ made clear at [82], the applicant, The Guardian, had 'put forward credible evidence that it was hampered in its ability to report it as

full as it would have wished by not having access to the documents which it was seeking'."

41. He then said:

"78. I am quite clear, in the circumstances, that a third party should not merely show that access to documents would be in accordance with the open justice principle but also that such access would advance the open justice principle. If the position were otherwise, and an applicant could merely insist on production of documents on the basis that this would be in accordance with the open justice principle, there would be nothing to stop anybody making an application and doing so in overly wide terms. That clearly is not what the Supreme Court (whether in this case or in *Kennedy* or *A v BBC*) can have contemplated would justify an application under the inherent jurisdiction.

79. It does not follow, however, that Mr Webb QC was right when he submitted that there is, in effect, a prior hurdle to the exercise of the Court's discretion on an application such as this since nothing in the authorities, including Lady Hale's judgment in the present case, leads me to conclude that there is such a freestanding prerequisite. On the contrary, it seems to me that Mr Weir QC was probably right to describe there being something of a 'sliding scale'. Where a particular case appears on that 'sliding scale' will depend on a range of factors, including whether access to the documents will advance the open justice principle and, if so, consistent with the concept of a 'sliding scale', to what extent.

…

81. I agree with Mr Weir QC, therefore, that the proper approach is not to seek to impose 'limits' (as described by Lady Hale at [41]) or prior hurdles to the exercise of the Court's discretion.

> Rather, the Court should engage in the balancing exercise described by Lady Hale (as well as Lord Reed and Lord Toulson) and, in so doing, accord appropriate weight to the various different factors. The fact that a third party is seeking documents for collateral purposes which have only a limited connection with advancing the open justice principle will not, therefore, operate as a bar to the ordering of production but will be a factor which will weigh less heavily in the appropriate balancing exercise than if the position were otherwise and the documents sought would more significantly advance the open justice principle."

42. In relation to the disclosure of witness statements before trial specifically, I was taken to *Blue v Ashley* [2017] EWHC 1553 (Comm) in which Mr Justice Leggatt, as he then was, considered the provision of trial witness statements to Times Newspapers Limited in advance of the trial. Mr Justice Leggatt framed the question for the court as follows:

> "Whether a member of the public or the press should be given access in advance of the trial to witness statements which have been prepared for use of the trial in circumstances where the witness statements have already been referred to at a pretrial hearing."

43. He discussed the question as follows:

> "11. I also reject an argument made by counsel for Mr Ashley that it is implicit in CPR r 32.13 that a non-party cannot be allowed to inspect a witness statement until the statement stands as evidence-in-chief. CPR r 32.13 gives a non-party, unless the court otherwise directs, an automatic right to inspect a witness statement which stands as evidence-in-chief during the course of the trial, without the need to obtain the court's permission to do so. But there is nothing in CPR r 32.13 which prevents a non-party from applying for permission – or which prevents the court

from granting permission – to inspect a witness statement before the automatic right conferred by CPR r 32.13 has arisen. Even if CPR r 32.13 could reasonably be read as having that implication, which to my mind it cannot, the rules of court (which are contained in a statutory instrument) are not to be interpreted in the absence of language which makes such an intention plain beyond possible doubt as limiting or controlling the powers of the court in this context: see the *Guardian News and Media* case, para 73.

12. It is one thing to conclude, however, as I do, that the court has power to direct that a non-party should be given access to witness statements before a trial, and another to decide that the power ought to be exercised in a given case. There are, in my view, good reasons why the court should not generally make witness statements prepared for use at a trial publicly available before the witnesses give evidence. Those reasons follow from the role that witness statements play in the litigation process.

13. Historically in civil cases (as it still is today in criminal proceedings) the giving of evidence by witnesses at a trial was an entirely oral process. First, counsel for the party calling the witness would ask questions to elicit evidence from the witness 'in chief'. Then counsel for the opposing party would cross-examine the witness. Traditionally, the parties to the litigation and their counsel would have no notice of what witnesses of fact called by opposing parties were going to say in evidence until they said it. That began to change after provision for written witness statements was first introduced in certain parts of the High Court, including the Commercial Court, in 1986. Under the modern Civil Procedure Rules parties are required to serve witness statements in advance of a trial. A witness statement is defined in the rules as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally" (see CPR 32.4). The purpose of requiring such

statements to be served is twofold. First, it enables parties to prepare for trial with notice of the evidence which the other side may adduce. This avoids unfair surprise and enables rebuttal evidence to be obtained where necessary and cross-examination to be better prepared. It also allows each party to make a fuller assessment of the strength of the other party's case, which may facilitate settlement. The second purpose of witness statements is to make the trial process more efficient by saving the time that would otherwise be taken up by oral evidence given in chief. Instead of such oral evidence, the witness is simply asked to identify their statement and confirm their belief that its contents are true.

14. It is, however, important to notice that, it is only when a witness is called to give oral evidence in court that their statement becomes evidence in the case (see CPR 32.5). Until then, its status is merely that of a statement of the evidence which the witness may be asked to give. Thus, it quite often happens that a party serves a witness statement from a person who is not in the event called to give oral evidence at the trial. In that event the person's statement may be admissible as hearsay evidence and may then be admitted in written form; or the statement may not be put in evidence at all – in which case it never becomes part of the material on which the case is decided.

15. When a witness statement forms part of the evidence given at a trial, the principle of open justice requires that a member of the public or press who wishes to do so should be able to read the statement – in just the same way as they would have been entitled to hear the evidence if it had been given orally at a public hearing in court. That is the rationale for the right of a member of the public under CPR 32.13 to inspect a witness statement once it stands as evidence in chief during the trial, unless the court otherwise directs. But there is no corresponding right or reason

why a member of the public or press should be entitled to obtain copies of witness statements before they have become evidence in the case. Conducting cases openly and publicly does not require this. Nor is it necessary to enable the public to understand and scrutinise the justice system. The advance notice that a witness statement provides of what evidence its maker, if called as a witness, will give is provided for the benefit of opposing parties (for the reasons I have indicated), not the public. The trial is an event which must (save in exceptional circumstances) be conducted in public so that justice can be seen to be done. But preparations by the parties for the trial for the most part are not, and do not need to be, public.

16. I also accept the argument made by Mr Speker on behalf of Mr Ashley that there are positive reasons why it is generally undesirable for witness statements to be made public before such statements are put in evidence at a court hearing. A witness statement may contain assertions which are defamatory of another party and the truth of which is disputed. When such assertions are made by a witness in evidence given in court, the witness is protected by immunity from suit. As explained by Lord Wilberforce in *Roy v Prior* [1971] AC 470, 480:

'The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover, the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence.'

The safeguards referred to by Lord Wilberforce do not apply to statements made by a prospective witness which have not been

given in evidence. Yet if such statements were made public pursuant to an order of the court, a person who complained that a statement contained assertions that were untrue and defamatory of him would have no recourse against the author of the statement, who would not be responsible for its publication, nor against the publisher (who would be protected by qualified privilege unless the publication was malicious) and at the same time would also lack the opportunity for rebuttal and correction provided by the trial process. That does not strike a fair balance between the relevant interests. In addition, fair and accurate reporting of proceedings is promoted if a witness statement is put into the public domain only when it becomes evidence and its contents can also be tested and contested in a public trial."

44. He then referred to *R (Guardian News & Media Ltd) v Westminster Magistrates' Court* [2013] QB 618, and said:

> "21. This decision establishes that, once documents have been placed before a judge and referred to at a public hearing, access to the documents should be permitted other things being equal. But it does not remove the need for the court to consider the particular circumstances, including the nature of the documents in question, their role and relevance in the proceedings and, importantly, the purpose for which access to the documents is sought. Toulson LJ made it clear that the court has to make an evaluation which involves assessing the extent to which affording access to documents will serve the public interest in open justice and weighing this against any countervailing factors. He also emphasised that this exercise cannot be reduced to the application of a standard formula…
>
> 23. For the reasons already indicated, an interest in reporting what evidence witnesses will give at a trial before they give it does not engage the open justice principle and is not a good reason to be allowed access to witness statements before the statements are put

in evidence (if they are). Nor does it become a good reason just because of the adventitious fact that reference was made to the statements at a pre-trial hearing which it is not TNL's current purpose to report. In so far as the bare fact that such reference to the statements was made makes granting access to them the 'default position', that position is displaced by the general undesirability of the court supplying a witness statement to a non-party before the statement has been deployed in the proceedings to seek to prove the truth of its contents."

45. I was then taken to *ACL Netherlands BV and Lynch* [2019] EWHC 249 (Ch), in which Mr Justice Hildyard considered an application to provide disclosed documents and witness statements to the Federal Bureau of Investigation before trial. He referred to *Crest Homes Plc v Marks* [1987] AC 829 and said:

> "30. That case made clear that the Court will only release or modify the restrictions where (a) there are special circumstances which constitute 'cogent and persuasive reasons' for permitting collateral use and (b) the release or modification will not occasion injustice to the person giving disclosure: *ibid.* at 859G and 860, per Lord Oliver. Further, the burden is on an applicant to persuade the court to lift the restrictions (see 860, again per Lord Oliver). In a later case, *Bibby Bulk Carriers v Consulex Ltd* [1989] QB 155, Hirst J (at 163C-D) drew on another case in the House of Lords, namely *Home Office v Harman* [1983] 1 AC 280 at 326, in stating that the burden is a particularly heavy one where the permission is sought by or for the benefit of a person who is not a party to the action in which the documents were disclosed.
>
> 31. So far, I have treated the same principles as being applicable to both the collateral use of disclosed documents and the collateral use before trial of witness statements. However, certain differences should be noted also which suggest, in my view, that a more restrictive approach should be taken to the collateral use of witness

statements prior to trial, especially (as it seems to me) when the trial is imminent. These differences are the consequence of the peculiar status of witness statements prior to their deployment in evidence at trial. Thus:

(1) A witness statement is not, prior to the witness being called at trial, either (a) evidence but rather an indication of the evidence that the witness may give if the witness is called to give evidence, or (b) available as a public document, see Leggatt J (as he then was) in *Blue v Ashley* [2017] EWHC 1553 (Comm) at [14] and [15] …

(2) This echoed earlier observations by Colman J in *Hollywood Realisations Trust v Lexington Insurance Co* [2003] EWHC 996 (Comm), at [8]:

'Such documents having been provided to the opposite parties to the litigation in order to facilitate the smooth and efficient running of the trial and to encourage settlement before trial by providing information as to the content of a witness's evidence, it is an abuse of their function for them to be used for any other purpose or to be disclosed to anyone who is not a party to the trial or its representative. This limitation on use does not rest merely on the limited purpose for which the statement is disclosed, but upon the wider policy that such documents should not be exposed to any wider use until made public in the course of a trial because the document may be seriously harmful to any party whose witness has made the statement if it is relied on for other purposes than the trial in question. For example, it may be used to found a claim not previously made. It may be said to be defamatory. It may be used by a third party to intervene in the trial. Further, it may never be used at the trial and may therefore never enter the public domain, except, perhaps, as a basis for cross-examination of witnesses by those representing other parties.'

(3) As Hobhouse J said in *Prudential Assurance v Fountain Page* [1991] 1 WLR 756, at 775 (a case cited in Hollywood (above), albeit one that arose under a pre-CPR regime):

'Circumstances under which [the] relaxation [of the restriction on collateral use of a statement] would be allowed without the consent of the serving party are hard to visualise, particularly where there was any risk that the statement might be used directly or indirectly to the prejudice of the serving party.'

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."

46. There, the judge was not satisfied that there were significantly cogent and persuasive reasons to provide the information. In relation to witness statements he added, at paragraph 88:

"To be added to it is the basic point, lying behind the restrictions against collateral use. Those providing witness statements for use only at trial must be taken to do so on the basis they will not be released for use for any other purpose in the meantime. That is the premise and purpose of the restriction. It requires no evidence to establish it. The same applies to documents, though, unless

> especially confidential, which is not suggested here, the factor carries less weight."

47. In *R (on the application of Yar) v Secretary of State for Defence* [2021] EWHC 3219 Admin, Mr Justice Swift considered provision of witness statements prepared for the substantive hearing of a judicial review, which are normally determined on the papers, without oral evidence. This was a decision that took place after the decision of the Supreme Court in *Dring*. He said at paragraph 4:

> "4. So far as concerns the high-level principles applicable to this application it is not necessary to look further than the decision of the Court of Appeal in *R (Guardian News and Media Ltd) v City of Westminster Magistrate's Court* [2013] QB 618, and the decision of the Supreme Court in *Dring v Cape Intermediate Holdings Ltd* [2020] AC 629. The court's power to require documents used for the purposes of litigation to be provided to non-parties, whether by virtue of an inherent jurisdiction (i.e., at common law) or as regulated by provisions in the CPR, is an expression of what is commonly referred to as the open justice principle. Open justice is the means by which public confidence in the integrity of the judicial process is maintained."

48. At paragraph 18 he went on:

> "Although at a final hearing statements are not formally adopted in the way required under CPR 32.5, it is still the case that it is only from the beginning of the relevant hearing that the statement is considered and used by the court for the purposes of any determination. Thus, whether, formally, the effect of CPR 54.15 is that statements become evidence in the case at the point of filing is a moot point, and the answer to it does not bear upon the objective of the open justice principle. That objective, as explained in the case law, is not engaged until the court is called on to consider the evidence for the purpose of deciding issues in the case. Practical considerations also support the conclusion that

> the open justice principle does not require disclosure of witness statements simply because they have been filed at court. Even though a witness statement may have been filed there can be no certainty that it will be used for the purposes of any decision taken by a court: for example, the statement might be withdrawn before any hearing, or the claim itself may be withdrawn or compromised."

49. In that case he rejected the application of the BBC. He said at paragraph 22:

> "When [the substantive] hearing takes place, the open justice principle may require that statements relied on be provided to non-parties so they may follow and understand the proceedings. But the principle that gives rise to that need does not either require or justify advance disclosure of evidence in anticipation of a final hearing. Absent the final hearing there is no principle of public policy that requires early disclosure to non-parties of documents prepared for the purpose of that hearing, even if the non-party is a journalist. The parties to proceedings gather documents and prepare witness statements in aid of the court's resolution of the legal dispute between them, not as a resource for journalistic endeavour. Prior to any relevant hearing, the relevant public interest is one which permits the parties the space to identify and prepare documents relevant to the issues the court is called on to decide and file them at court. There is no strong generic public interest that at this stage, such documents should be provided to non-parties in aid of permitting scrutiny or public commentary. At this stage, the open justice principle should not provide the means for journalistic preview of what is yet to happen in court."

Mr Millar highlights this case as an example of a procedure which is analogous to that in director disqualification proceedings. Judicial review proceedings are also brought by Part 8 claim, and it is contemplated that witness statements will be considered on the papers at the final hearing. Until they are tendered for that purpose, he says, *Yar*

establishes that the open justice principle does not require the disclosure in advance of the hearing.

50. For completeness, I should say that Mr Gibbon also referred me to a number of documents on increasing transparency in the court process, not for the purposes of seeking to persuade me to decide the case on the basis of the law as it might become, but as an illustration of the "direction of travel" towards increased transparency and openness. I am not sure that they take matters much further, but if anything, they emphasise the distinction to be drawn between a witness statement which has been deployed, and a witness statement which has not. The proposed redrafting of CPR 5.4C offered for consideration in the Civil Procedure Rules Committee consultation still envisages a restriction on provision of witness statements to non-parties. While such persons would be entitled to witness statements, without the permission of the court, that is still limited to the statements of witnesses who are called to give evidence. The draft rule includes at paragraph 9:

> "A non-party who has at or in advance of the hearing requested a copy of a witness statement shall be entitled to it, but not any exhibit or annexure to it, when the relevant witness is called and the witness statement stands as their evidence-in-chief, subject to any order or pending application under paragraph (4), any direction that the witness statement should not be open to inspection, or any directions restricting access to the hearing."

51. Bearing all that in mind, I am not persuaded by the applicants' arguments that the 1987 Rules provide a *sui generis* procedural code, or at least something fundamentally different from ordinary Part 8 claims. They do indeed envisage that evidence will be completed by the first hearing, at which the court may determine the matter, subject to the restrictions of Rule 7 of the 1987 Rules. It is true, as Mr Gibbon submits that, in the days before the CPR when there was a distinction between hearings in chambers and in open court, the fact that the first hearing was heard in open court reflected that the hearing was, potentially, a trial albeit on written evidence. The Secretary of State's evidence is thus a statement that is deployed, or may be deployed, at the very first hearing. While disputes of fact are common, it is

not impossible for those to be resolved without the need for cross-examination. I do not accept however that it means that the evidence in disqualification proceedings falls to be treated, by virtue of the procedural framework alone, differently from other Part 8 proceedings. 1986 Act proceedings are simply a modified form of Part 8 proceedings. Part 8 itself in its unmodified form similarly provides for evidence to be complete by the time of the first hearing. The claimant's evidence must be served with the claim form and the defendant's evidence with the acknowledgement of service, in default of which he or she may not be allowed to rely on evidence without permission to the court. An ordinary Part 8 claim may also be determined at its first hearing, although the court might give directions for a further hearing. Evidence there, too, will be received in writing unless there is an order that the witness attend for cross-examination.

52. By the same token, I do not think that that judicial review proceedings offer the clear analogue suggested by Mr Millar. Under Order 53 of the old Rules of the Supreme Court, an application for permission to bring judicial review proceedings was made in form 86A and, if permission was granted, the application was made by originating motion to a judge in open court in the case of a non-criminal matter, unless it was ordered to be made by originating summons to a judge in chambers or by motion to the Divisional Court. The procedure is simplified in CPR Part 54 and a Part 8 claim form is now used to begin the proceedings and the rules provide for the grant of permission as a preliminary step. The CPR is of course, a new procedural code, but the history informs an understanding of the procedure. Judicial review proceedings are a two-stage process, and it is at the second stage that the evidence falls for substantive consideration and may then fall to be made available to non-parties as of course. In disqualification proceedings, as in Part 8 proceedings generally, the rules do contemplate that an effective disposal of the case on its merits may take place at the first hearing. That may however not happen, and the affidavit may not fall to be considered at all.

53. Plainly understanding the nature of the allegations on which the court is being asked to adjudicate when, in Mr Justice Tugendhat's words, it is asked to "administer justice", engages the open justice principle, but it is argued by Mr Millar that the principle is not engaged at all in relation to the remainder of the affirmation. The

principle is directed to understanding the court's decision-making process. If the bulk of the affidavit has not been used in court in order to make a decision nor proffered by a party in seeking to persuade the court to make a decision, sight of the document is not necessary to understand the decision or to scrutinise the decision-making process.

54. As noted in *Blue v Ashley,* and accepted by the parties here, there is, however, undoubtedly a power to allow a non-party to see a statement before trial. That is not in issue. As Mr Justice Picken noted in *Dring*, the fact that it is sought for a collateral purpose not clearly connected with open justice is not an absolute bar. There is a "sliding scale" and ultimately the court, in any case, has to consider the particular circumstances, including the nature of the document in question, its role and relevance in the proceedings, and, importantly, the purpose for which access to the documents is sought. There is a heavy burden on the applicant and the risk of harm to the defendant must be considered.

55. In my judgment, it cannot be said that the open justice principle is entirely absent in relation to the balance of the affirmation. It is a hybrid document. While the rule 3.3 statement is the part which most obviously has the character of a statement of case, the document as a whole represents the Secretary of State's case, as noted by Mr Justice Laddie in *Re Finelist*. It is a compilation of the results of the Insolvency Service's investigations. It is compiled and deployed only where the Secretary of State considers it in the public interest to seek a disqualification order. It is not a statement in support of a statement of case from an individual who may or may not give evidence in due course. The document as a whole represents the case that the defendant must meet, and on which the court will be asked to adjudicate, where, as here, the claim is opposed and the court process to "administer justice" is in motion. In this regard, the nature of the document and its role in the proceedings is different from witness statements produced purely for trial or in private litigation. It is second-hand, either largely or entirely. It is not first-hand testimony from an individual who may or may not attend to give evidence, or may be wholly unreliable, although the evidence falls to be weighed like any other. There is also a duty of fair presentation. The Secretary of State's evidence must be balanced rather than partial or tendentious.

56. Mr Greensill has had the opportunity to consider the Secretary of State's case and raise arguments to persuade him not to proceed. The Secretary of State must give advance notice of the intention to proceed under section 16 of the 1986 Act, and, here, notice was given on 15 November 2023 in advance of the giving of the formal statutory notice. There was correspondence over that time, which did not alter the Secretary of State's view, and the section 16 letter was issued on 23 February 2024. Mr Greensill was given the usual opportunity to offer a disqualification undertaking. He did not do so, as is his right. The issued proceedings were served on 8 March 2024, and, again, Mr Greensill was offered time to consider whether he would contest the allegation. He disputes the allegations and directions were given at the first hearing to a further case management conference. Mr Greensill has, in all that time, not raised specific points which he alleges are unfairly expressed beyond his general consideration of the Secretary of State's case as being unbalanced and unfounded. The Secretary of State raises no objections to the document, which is his evidence, being provided, although he does not consent.

57. The affirmation is the foundational document of the Secretary of State's case, which Mr Greensill has had ample opportunity to consider. It may be supplemented by further evidence, but it is the basis of the Secretary of State's case from the first hearing to any trial. It is ready to be deployed in full at the first hearing, and the first hearing here has come and gone, although disposed of by consent, and it may be adopted by another officer if the original deponent is not available. Its function is not merely to give advance notice of the evidence that Mr Wilson may or may not give when the big day of trial arrives. It is the Secretary of State's case for all purposes from issue to disposal. It is therefore, in my judgment different in nature from trial witness statement or a witness statement prepared for the purposes of judicial review, which may or may not be given by a public officer subject to similar obligations as those imposed on the Secretary of State. The only circumstances in which it will not ultimately be relied upon before the court is if parts of it are struck out, of which there is no suggestion at present, or if the proceedings are discontinued. Mr Greensill, as I have explained, has had the opportunity to seek to persuade the Secretary of State not to bring the proceedings and has not done so. It is similarly possible that Mr Greensill will offer an undertaking in due course, and the proceedings will be discontinued without trial. That will invariably require a schedule of agreed conduct to be made

public but will not delve into the detail of the affidavit. At present, there are certainly no signs of a willingness to do so, and all the signs are that the proceedings will be robustly defended to trial.

58. Absent those events, however, the affirmation will be used, and it might be asked why the accident of the extent to which the evidence has been referred to in open court at an interim hearing or whether the application to see the affirmation takes place the day before or the day after trial should be determinative of a non-party's application to see it. Had this hearing happened the moment after Mr Wilson had confirmed his affirmation in the witness box, none of this debate would be taking place.

59. That deals with the nature of the document and its role in proceedings. The third significant factor is the purpose for which disclosure is sought and this is possibly the most significant factor. It is said by the experts as to the Federal Court procedure that it is likely to be of assistance to the court on the general fraud discovery question. The administrators of Greensill Capital are understandably concerned to limit the extent to which they have to expend monies on disclosure or to permit the applicants' unfettered access to the entirety of the records. This is vast litigation, a behemoth as Mr Gibbon called it. Some of the scale of it is summarised in Mr Cowpe's report. He notes:

> "55 In summary, GCUK holds the following repository of documents:
>
> (a) some 168 million Microsoft files;
>
> (b) 300TB of operational system data and files;
>
> (c) data stored on multiple back up applications, some of which have been decommissioned;
>
> (d) approximately 77 boxes of documents in hard copy; and
>
> (e) 836 laptops and 99 mobile phones.

> 56 Some repositories are still in operation, and the number of documents/files within those repositories changes over time
>
> ....
>
> 82 The administrators have informed the regulators that some of the data provided is likely to be privileged, but the administrators have not undertaken any privilege review themselves. Accordingly, the administrator say that no documents have been withheld from the regulators on the basis of privilege.
>
> 83 Further, the administrators say that the documents which have been produced to the regulators have not been siloed so as to be readily accessible by reference to the categories of documents sought by the regulators."

There are various allegations of very serious fraud already before the court in Australia, of which the applicants claim to be victim. Annexure A runs to some 53 pages.

60. The applicants do appear to me to have a legitimate interest in understanding the nature of the application that the Secretary of State is making and the basis of it in circumstances where they claim that there has been a serious fraud worked upon them and others. That appears to me to give rise to a genuine public interest in the document being made available so that the case can be understood and its relevance to the Australian proceedings assessed. Discovery of some sort will inevitably be given by Greensill Capital in Australia. As against that, no specific issues are taken with elements of the affirmation. The nature of these proceedings will in due course be known. I accept Mr Gibbon's submission that Mr Greensill can have no long-term expectation of avoiding some level of publicity in relation to either set of proceedings. Indeed, it is very likely, although one cannot be certain, that the affirmation will be substantively deployed in this jurisdiction in due course, and possibly sooner rather than later.

61. While I cannot be sure of the approach that the Federal Court will take to maintaining confidentiality, to the extent that this court imposes any restrictions both experts suggest that the court may well, as a matter of comity, seek to mirror any restrictions that I place on the affirmation's use, insofar as that is consistent with that court's own jurisprudence. Parties in Australia are, as here, as a general rule under an obligation to use disclosed documents only for the purposes of the proceedings. It does appear to me that there are measures that can be put in place to mitigate the risk of wider dissemination.

62. In my judgment, bearing in mind the matters I have mentioned, being: (i) the nature of the affirmation as the Secretary of State's considered case and its function as both evidence and a quasi-statement of case; (ii) the absence of an objection from the Secretary of State or Mr Wilson; (iii) the importance to the applicants as persons who claim to be victims of a very substantial fraud and directly affected by the conduct which is likely to be covered by the investigation detailed in the report; and (iv) the limited risk of harm to Mr Greensill over and above the disclosure of the rule 3.3 statement and the publicity of the Australian proceedings generally, which is a risk that can be managed satisfactory, I should permit the applicants to have a copy of the affirmation and to use it for the limited purpose of the discovery application.

63. It seems to me that it would be appropriate to direct that a copy be provided to the applicants subject to conditions. Those conditions that I propose are that:

    a. the affirmations, that is to say the substantive affirmation and Mr Wilson's second affirmation, should be provided to the applicants and their legal representatives and used solely for the purpose of the resolution of the question of the scope of discovery, unless otherwise ordered;

    b. only those parts of the affirmations which are reasonably necessary to the determination of the nature and scope of discovery, shall be provided to the other parties and their legal representatives and placed before the Federal Court of Australia;

c. names of individuals other than the name of Mr Greensill and Mr Wilson shall be redacted from any parts of the affirmations provided to the other parties and their legal representatives or placed before the court, unless reasonably necessary for the determination of that discovery question;

d. the applicants should as soon as practicable apply to the Federal Court for an order that the parts of the affirmations which they propose to rely upon should not be open for inspection and use reasonable endeavours to obtain such an order.

64. I shall also direct that Mr Greensill shall be informed within 14 days of the provision of the affirmations to the applicants which of parts of the affirmations the applicants propose to rely upon in the Australian proceedings. That is to enable him, as contemplated by the authors of the joint expert report, to seek to intervene in the Australian proceedings to apply for a non-disclosure order on his own behalf should he wish to do so.

65. That concludes my judgment.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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