**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case references** | **:** | **LON/00BG/LVM/2021/0004,** |
| **Property** | **:** | **Canary Riverside Estate, Westferry Circus, London E14 (the "Estate")**<br><br>**Circus Apartments Limited ("CAL")** |
| **Applicants** | **:** | **(1) Canary Riverside Estate Management Limited("CREM")** |
| **Respondents** | **:** | **(2) Octagon Overseas Limited ("Octagon")**<br><br>**(3) Riverside CREM 3 Limited ("Riverside")**<br><br>**(4) Mr Sol Unsdorfer**<br><br>**(5) Leaseholders represented by the Residents Association of Canary Riverside ("RACR")** |
| **Represented by** | **:** | **Norton Rose Fulbright LLP for Circus Apartments Limited**<br><br>**Freeths LLP for Octagon, CREM, and Riverside**<br><br>**RACR for the leaseholders**<br><br>**Wallace LLP for Mr Unsdorfer** |

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| **Tribunal** | **:** | **(1) Judge Amran Vance**<br>**(2) Judge Nicola Rushton KC** |
| **Venue** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of Hearing** | **:** | **21 June 2023** |
| **Date of Decision** | **:** | **2 August 2023** |

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**DECISION**

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## Description of hearing

The hearing of this application took place, by way of video conferencing, on 21 June 2023. Parts of the hearing were held in private. The form of remote hearing was V: CVPREMOTE. The documents that we were referred to were in an electronic bundle prepared by the Applicant. References in square brackets in this decision are to page numbers of that bundle. The bundle comprised 2,340 pages.

## Order

**The tribunal makes an order in the terms set out in Annex Two to this decision.**

## Decisions

1. CAL's application to strike out/excise parts of the third witness statement of Mr Chris Christou dated 24 November 2021, and to exclude documents from the exhibit to that statement is refused. The four documents identified at numbers 2, 4, 5 and 6 in the Documents Schedule referred to below were read to, or by, the court, or referred to, at a hearing which has been held in public, and therefore fall within the exception in CPR 31.22(1)(a).

2. As to CREM's application for disclosure of the four categories of documents set out at para. 35 of the witness statement of Mr Marsden dated 7 February 2022:

    (a) an order for disclosure of the documents described at paras. 35.1 and 35.2 (categories 1 and 2) is refused;

(b) an order for disclosure of the documents described at para 35.3. (category three) is granted. Disclosure of all documents relating to CAL's inclusion in Annex 1 of the Management Order of the Canary Riverside Estate allegedly affecting the mortgageability, saleability and insurability of its premises must be provided within 21 days of the date of issue of this decision; and

(c) an order for disclosure of the documents described at para 35.4. (category four) is refused.

3. No order is made on CAL's cross-application for disclosure.

**Background**

4. This decision concerns three interim applications, all made within CAL's underlying application to vary the current Management Order ("MO") of the Canary Riverside Estate:

(a) the restored hearing of an application made by CAL on 21 January 2022 **[1241]** to strike out/excise parts of the third witness statement of Mr Chris Christou dated 24 November 2021 **[651],** and to exclude certain documents from the exhibit to that statement.

(b) an application for disclosure made by CREM dated 7 February 2022 **[1845]**; and

(c) CAL's cross- application for disclosure dated 18 April 2023 **[1986]**.

5. The three applications were heard on 21 June 2023, at a hearing that took place by remote video conferencing. Present were: Mr Rainey KC, counsel for CAL; and Mr Morshead KC and Mr Bates, both counsel for Octagon, CREM, and Riverside (which we will collectively refer to as "CREM"). We gave our decision in respect of CAL's strike out application verbally to the parties at the hearing, before turning to the disclosure applications. We indicated that our written reasons for our decision would follow, and they are set out below.

6. The background to CAL's strike out application is set out in the tribunal's decision of 9 March 2022 **[2132]** (which was issued on the basis that the decision was private to the parties). It is familiar to the parties, and there is no need for us to repeat it in detail here. The summary that follows is drawn, in part, from the helpful chronology set out in Mr Rainey's skeleton argument.

7. CAL's objections to the contents of Mr Christou's witness statement were that parts of it were irrelevant to the applications to vary the MO currently before the tribunal, and because he had referred to (and exhibited) documents ("the Contentious Documents") said to be private, or

confidential, or both. Some of those documents were said to be privileged documents circulated by an alleged anonymous "whistle-blower" known as Mr Smith (the "Smith Documents").

8. In a witness statement dated 11 February 2022 **[1303]** Mr Marsden, a solicitor at Freeths LLP with conduct of this matter on behalf of CREM, asserted that documents referred to, and exhibited to Mr Christou's' witness statement were not, in fact, Smith Documents, but were from various other sources. Mr Marsden identified those sources in a table included in his witness statement.

9. Mr Stevens, the solicitor at Norton Rose Fulbright LLP ("NRF"), who act for CAL, has provided a witness statement dated 16 February 2022 **[1549]**, in which he accepted that the Contentious Documents were not Smith Documents, but in which he contended that Mr Marsden's witness statement indicated that the documents in question were protected under CPR 31.22. He argued that CREM's deployment of the documents in Mr Christou's and Mr Marsden's witness statements amounted to a collateral use that breached CPR 31.22.

10. CAL's interim strike out application came up for hearing on 22 February 2022. The tribunal set out its decisions in paragraphs 1-4 of its 9 March 2022 decision. In summary:

    (a) CAL's application to strike out/excise parts of Mr Christou's witness statement, and its exhibit, on the grounds of relevance was refused;

    (b) CAL's application to strike out/excise parts of the said witness statement and its exhibit, on the grounds of confidentiality, privacy, and CPR 31.22 protection was postponed for further hearing. The tribunal was of the view that CAL had not properly set out its case on confidentiality and privacy, and that CREM had not had a proper opportunity to respond to the assertion that the documents were protected by CPR 31.22;

    (c) a text message referred to at para. 126 of Mr Christou's third witness statement attracted without prejudice privilege; and

    (d) we refused to strike out/excise paragraphs 21 and 24 of Mr Christou's third witness statement, and the emails referred to in those paragraphs as exhibited to his statement.

11. As there was insufficient time at the hearing on 22 February 2022 to deal with a disclosure application made by CREM, its application was adjourned for further hearing. This is the second of the three applications we are concerned with in this decision. The third application is a cross-application by CAL for disclosure of mirror categories of documents sought by CREM in its disclosure application. It only needs to be determined if, contrary to CAL's submissions, we are persuaded to order disclosure of the documents sought by CREM.

12. Both CREM and CAL sought permission to appeal the tribunal's decision of its 9 March 2022. As Mr Rainey refers to at paragraph 15 of his skeleton argument:

    (a) on 31 May 2022, the Upper Tribunal refused CREM permission to appeal against our decision to adjourn CAL's strike out application to a further hearing **[2158]**;

    (b) CAL's application for permission to appeal against the refusal to strike out based on relevance was refused by the Upper Tribunal on paper on 24 October 2022 **[2220]**; and

    (c) CREM was granted permission to appeal by this tribunal against the decision that the text message referred to at para.126 of Mr Christou's third witness statement was protected by "without prejudice" privilege, but its appeal was dismissed by the Upper Tribunal in a decision dated 17 November 2022 **[2223]**.

13. With the appeals to the Upper Tribunal disposed of, CAL's strike out application needed to be restored for further hearing alongside CREM's disclosure application. A further Case Management Hearing ("CMH") therefore took place on 28 March 2023, at which CAL indicated that provided that the confidentiality of documents in issue could be protected by the tribunal's procedural orders, it would not proceed with the application to exclude CREM's evidence on the basis of confidentiality. A confidentiality order was made, meaning that CAL's application was narrowed to just the CPR 31.22 collateral use issue.

14. Directions made at the CMH included a requirement for CAL to issue any cross-application for disclosure, together with any evidence in support, by 18 April 2023, which it duly did, and provided for it to be heard alongside CREM's disclosure application and the restored hearing of CAL's strike out application.

**CAL's Strike Out Application - CPR 31.22**

15. CPR 31.22 provides as follows:

    "31.22

    (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
        (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
        (b) the court gives permission; or
        (c) the party who disclosed the document and the person to whom the document belongs agree.

    (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has

been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made –
(a) by a party; or
(b) by any person to whom the document belongs.

(4) ....."

16. At para. 21 of his skeleton argument, Mr Rainey identifies the documents said to have been used by CREM in breach of CPR 31.22 (and the passages of witness statements which rely upon them) as falling into two broad and overlapping categories:

(a) documents disclosed in the exhibit to a witness statement dated 10 January 2018 made by Mr Coates ("Coates 2") in county court claim D10CL312 ("the Declaration Claim"). This claim was issued by CREM and Octagon against Mr Coates in 2017, in which, amongst other matters, it was alleged that Mr Coates had not acted fairly or independently in his management of the Estate. CREM considered that Mr Coates had failed to comply with his disclosure obligations and applied for an order that unless he did so his Defence and Counterclaim was to be struck out. In that application, CREM also sought specific disclosure of certain documents identified in a supporting witness statement of Mr Marsden, CREM's solicitor. In response to CREM's application, Mr Coates then served Coates 2 on 10 January 2018, to which was exhibited correspondence passing between him and Mr Stevens; and

(b) documents included in a list of 119 documents dated 3 October 2018 **[1808]**, which were produced on about 30 April 2019 during the course of Claim No.F00BM047 ("the Delivery Up Claim"). This is a claim issued by CREM on 8 January 2019, against Mr Coates, for specific performance of the terms of an agreement **[1795]** reached in proceedings before this tribunal (LON/00BG/LVM/2018/0005, 6 & 14), and which concerned proposed variations to the MO in place at the time. The terms in question were set out in a recital to a consent order made by the tribunal on 18 July 2018, and provided for the "disclosure" by Mr Coates of correspondence between him (or his agents acting on his behalf) and various third parties, including Ms Jezard of the residents association ("RACR"), and CAL (the "Disclosure Agreement"). By order dated 9 December 2019, HHJ Hellman ordered Mr Coates to carry out a search for documents meeting the criteria set out in the wording of the Disclosure Agreement, but allowed CAL the right to object to the provision of copies of those documents. Pursuant to those directions, Mr Coates provided CAL with over 9,000 documents and invited it to raise any objections to their disclosure to CREM. CAL objected to the provision of all of the 9,000 documents on grounds that the Disclosure Agreement was not an enforceable contract, and that the disclosure envisaged in the Disclosure Agreement was confined to those tribunal proceedings. CAL has claimed privacy and/or confidentiality in

respect of the 9,000 documents and the first of two trials, regarding liability between CREM and Mr Coates took place before HHJ Hellman in May 2023. We have been told that judgment is to be handed down on 2 August 2023.

17. In its Statement of Case dated 12 April 2023 **[1765],** CAL included a schedule (the "Document Schedule") which identified documents exhibited to Mr Christou's third witness statement, and further documents (and the information contained in them) referred to in his statement but exhibited to the witness statement of David Marsden dated 11 February 2022 **[1303]** CAL's case was that the use of these documents (13 in total) breached CPR 31.22.

18. When CREM served their Statement of Case in reply dated 5 May 2023, **[1773]** they added an item number for each document listed in the Document Schedule **[1780]**. They also asserted that each of the documents over which CAL was asserting CPR 31.22 protection were either: (a) documents to which CPR 31.22 did not apply because CREM had a right of possession apart from disclosure in any proceedings; and/or (b) documents excepted from the prohibition against collateral use because they had been read to or by the court, or referred to, at a hearing which has been held in public, therefore falling within the exception in CPR 31.22(1)(a).

19. By letter dated 6 June 2023 **[2320]**, CREM invited CAL to withdraw its case on CPR 31.22, in the light of evidence from Mr Christou, in his fourth witness statement dated 19 May 2023 **[1789]**. In that statement, Mr Christou said that:

    (a) the 119 documents had been provided voluntarily, rather than by way of disclosure, and therefore could not subject to any CPR 31.22 restriction;

    (b) Coates 2 had been included in a hearing bundle originally listed for hearing on 16 January 2028, but which was adjourned over to a hearing which took place in open court on 22 January 2018, where the original hearing bundle was used;

    (c) Mr Coates' skeleton argument dated 15 January 2018, filed for the hearing on 22 January 2018, had also referred to Coates 2;

    (d) at the 22 January 2018 hearing, a single issue was adjourned over to a further hearing which took place in open court on 9 May 2018, at which the bundle used for the 22 January 2018 hearing was re-used, alongside a supplemental bundle; and

    (e) a supplemental skeleton argument from Mr Coates dated 9 February 2018, prepared for the hearing that took place on 9 May, again referred to his 10 January 2018 witness statement, with specific reference made to documents exhibited to that statement.

20. In its Statement of Case in Reply dated 16 June 2023 (not included in the hearing bundle), CAL:

    (a) accepted that the documents in rows 1 and 7-11 of the Document Schedule (being documents from the 119 list) had been included in bundles deployed at public hearings. Although it did not accept that those documents were actually referred to or read, it accepted that, on the state of the authorities, there is a presumption that that CPR 31.22(1)(a) is satisfied where documents are included in a bundle, as there will be a presumption that the Judge read them in advance of the hearing. On that basis, CAL would not be pursuing its argument that these documents are used in breach of CPR r 31.22;

    (b) contended that in respect of the remaining three documents from the list of 119, (which had not been included in the relevant hearing bundles), CAL had taken the pragmatic decision not to argue that CPR 31.22 applied to those documents;

    (c) denied that Coates 2 and its exhibit had been including in the hearing bundle for a hearing on 15 January 2018;

    (d) admitted that the 15 January hearing was adjourned to a hearing that took place in open court on 22 January 2018;

    (e) admitted that Mr Coates' 10 January witness statement was in the bundle for the adjourned hearing on 22 January 2018, but denied that the Judge read any of the documents in the bundle ahead of the hearing;

    (f) admitted that the 22 January hearing was further adjourned over to a hearing that took place in open court on 9 May 2018; and

    (g) admitted that the 9 May 2018 hearing was preceded by skeleton arguments which were included in the hearing bundle, including on behalf of Mr Coates dated 9 February 2018 in which at para. 17 it was said that "Furthermore, the First Defendant provided some of the documents the Claimants are now asserting he has 'persistently refused' to disclose in the exhibit to his witness statement dated 10th January 2018"

21. The consequence of CAL's revised position is that CAL now: (a) no longer seeks to argue that CPR 31.22 prevents CREM from using any of the 119 documents; and (b) only contends that four remaining documents, all of which were disclosed in the exhibit to Mr Coates's witness statement, should be excluded from CREM's evidence by reason of CPR 31.22. These are the four documents identified at numbers 2, 4, 5 and 6 in the Documents Schedule (the "Four Documents"). As CREM accept that CPR 31.22 applies to those documents, the only issue dividing the parties is whether they fall within the exception in CPR 31.22(1)(a), namely whether they are documents that have been read to or by the court, or referred to, at a hearing which has been held in public.

22. At para. 33 of his skeleton argument Mr Rainey accepted that on the present state of authority, where documents have been included in bundles which are deployed for use at a hearing in public, and that hearing actually takes place in public, the onus is on the party contesting the position (in this case CAL) to show that the documents did not enter the public domain, and that the CPR 31.22(1)(a) exception is not made out. Both he and Mr Morshead agreed that the leading authority on this point was the Court of Appeal decision in *Barings Plc v Coopers & Lybrand* [2000] 1 WLR 2353, where Lord Woolf M.R said, at para. 53

> "53. When documents are put before the court for the purpose of being read in evidence as here the onus is no longer on the person contending they have entered the public domain to show this has happened. The onus is on the person contesting this is the position to show that they did not enter the public domain because, for example, the judge did not in fact read them or because of the need to protect the ability of the court to do justice in a particular case. This is the only practical solution. The judge cannot be cross-examined as to what he has or has not read."

23. In Mr Rainey's submission, before CAL is required to show that the Four Documents did not enter the public domain, the tribunal needs to first be satisfied that the documents were, in fact, before the court. The initial onus of establishing that, said Mr Rainey, rests with the party making the assertion, in this case CREM. His position is that it is only once that onus is discharged, that the onus shifts to CAL to show that the documents did not enter the public domain.

24. Following exchange of witness statements from Mr Stevens (fifth statement, dated 16 June 2023) and Mr Marsden (second, dated 19 June 2023), shortly before the hearing of these applications both parties agreed that Coates 2 was not included in the hearing bundle for the 15 January 2018 hearing. Mr Marsden explains, at para. 11 of his second statement, that Coates 2 had not been included in the original hearing bundle, but that when the bundle was finalised ahead of the hearing on 22 January 2018, it was noted that there were some documents missing from the bundle, so these were then added. He states that by the time the hearing took place on 22 January 2018, Coates 2 (including its exhibit) had been added to a section entitled "Additional Documents (since bundle prepared)". This, he said, was apparent from the bundle index for the 22 January hearing**[1832]**.

25. However, both parties now agree that Coates 2 and its exhibit were in the hearing bundles for both the 22 January hearing and the further hearing on 9 May 2018. Mr Rainey confirmed at the hearing before us that CAL now accepted this to be correct in light of Mr Marsden's evidence in his second witness statement. Despite this, Mr Rainey contended, at para 36. of his skeleton argument, that there is no actual reference to Coates 2 and its exhibit in the skeleton arguments **[DS7 pp.4-8, 9-20]**, reading lists,

or the transcripts of these hearings **[DS7 pp.48-62]**, and nor do they appear in the two ex tempore judgments given **[DS7 pp.64-69]**.

26. The question for us to determine in respect of CAL's strike out application is therefore whether the Four Documents entered into the public domain by virtue of being read to or by the court, or referred to, at either the hearing on 22 January 2018 and/or the hearing on 9 May 2018.

22 January 2018 hearing

27. In Mr Rainey's submission, it was clear that HHJ Gerald had not read anything other than the skeleton arguments in advance of the hearing on 22 January 2018, and that he had not looked at the bundles, apparently because he had not received them in time. This, he said was evident from the Judge's comments reproduced at lines 1/3, & 11-16, and 2/13-14 of the transcript of the 22 January hearing. Mr Marsden sets these out at para. 16 of his second witness statement as follows.

"Page 48 of Exhibit DS7, internal page 1 of the transcript, lines 2 – 3 and 11 - 16:

2 MR ISAAC: Your Honour, I think Your Honour's seen the skeletons-
3 JUDGE GERALD: I have. That is all I have seen.
11 MR ISAAC: You've seen what's said in the skeletons, but if you've not seen any of –
12 I take it you do have bundles?
13 JUDGE GERALD: I do.
14 MR ISAAC: Good
15 JUDGE GERALD: So miracles do-
16 MR ISAAC: Pristine I take lt. Very well.

Page 48 of Exhibit DS7, internal page 2 of the transcript, lines 13 and 14:

13 MR ISAAC: Yes. So I take it Your Honour's not read any of the-
14 JUDGE GERALD: I've read nothing apart from the skeletons because I - yes.

28. Mr Rainey also submitted that the Judge's comment at line 58/35 of the transcript tended to suggest that the bundles may have got lost in the Court's system, and were handed up only at the start of the hearing. That comment was as follows:

" JUDGE GERALD: My clerk will give you her email address and then you can just email the agreement order to her. If there are any bundles or anything which need to be done for the return day then I would get your clerk to actually bring them to the court rather than put them through the administration system."

29. Mr Morshead's submission, at para.22(6) of his skeleton argument, was that the fact that the transcript of the 22 January hearing records the Judge's acknowledgment that he had not read any of the documents before

him, other than the skeleton arguments, was not enough to rebut the presumption that the documents had entered into the public domain. This, he submitted, was for three reasons:

(a) as noted in *Barings* para 53, the judge cannot be cross examined. From this it follows that evidence (including the transcript recording the judge as saying positively "I didn't read them") is not admissible to demonstrate what he claims to have read, or not read, because neither party is in a position to challenge him.

(b) in the Supreme Court in *Dring v. Cape Intermediate Holdings Ltd* [2020] AC 629, the Court said, at para 44 of the lead judgment, "If access is limited to what the judge has actually read, then the less conscientious the judge, the less transparent is his or her decision."; and

(c) the rule under CPR 31.22 is explicit: it is sufficient for a document to have been "referred to" in open court, whether or not read.

30. *Dring* was not a case that concerned the operation of CPR 31.22. It concerned the question of public access to documents which had been placed before the court and referred to at a hearing. At para. 44 of her judgment, Baroness Hale said:

> "44. It was held in *Guardian News and Media* [2013] QB 618 that the default position is that the public should be allowed access, not only to the parties written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. It follows that it should not be limited to those which the judge has been asked to read or has said that he has read. One object of the exercise is to enable the observer to relate what the judge has done or decided to the material which was before him. It is not impossible, though it must be rare, that the judge has forgotten or ignored some important piece of information which was before him. If access is limited to what the judge has actually read, then the less conscientious the judge, the less transparent is his or her decision."

31. Mr Morshead referred us to *Hollander on Documentary Evidence* 14th edition, 28–50, where it was said that "in practical terms it will be extremely difficult to rebut the presumption [in Barings], so that anything in the trial bundles may lose its collateral undertaking and be treated as subsequently in the public domain". The author then suggests that it "is for consideration how far the test in *Barings* has been affected by the Supreme Court decision in *Dring*".

32. We do not agree with Mr Morshead's submissions regarding the Judge's comments as transcribed in the transcript of the 22 January hearing. HHJ Gerald's statement that he had not read anything other than the skeleton arguments in advance of that hearing is, in our view, an unambiguous and

conclusive statement of fact, that cannot be disregarded. In the absence of any evidence to the contrary, we find that although Coates 2 and its exhibit were in the bundles for the hearing, but that the Judge did not read them, despite being in possession of the hearing bundles at the hearing.

33. We agree with Mr Rainey that the reference in *Barings* to the inability to cross-examine the Judge on his statements simply means that we are limited to the evidence that is actually available to us, namely the transcript, and any other available evidence on the question of whether he read the documents (of which there is none). Nor is there any evidence to suggest that Coates 2 or its exhibit were "referred to" in open court, so the documents cannot be brought within scope of the exception in CPR 31.22(1)(a) on that basis.

34. Applying *Barings*, we determine that Coates 2 and its exhibit were put before the court for the purpose of being read in evidence as they were included in the hearing bundles before the Judge for the 22 January hearing. This means that onus then shifts to CAL to show that the documents did not enter the public domain. As we have found that the Judge did not read the documents, and that they were not referred to at the hearing, it follows that CAL has met the onus on it, and the Four Documents did not enter the public domain through their inclusion in the bundles for the 22 January hearing.

35. The suggestion in Hollander that *Barings* may need to be reconsidered in light of the Supreme Court decision in *Dring* is an interesting point but not material to this decision. *Barings* is binding Court of Appeal authority that is directly relevant to the question we have to determine, namely the operation of CPR 31.22 and whether documents have entered the public domain. *Dring* concerned public access to documents, not the application of CPR 31.22, and the test applied by the Supreme Court differed significantly from the test to be applied in respect of CPR 31.22 protection. Whilst both tests concern the purpose of the open justice principle, Baroness Hale, at para. 46, balanced that principle against "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.". The examples that she gave for potentially denying access, which include the protection of privacy interests, trade secrets and commercial confidentiality, suggest that the test in respect of access to documents is markedly different to the approach to CPR 31.22 followed in *Barings*.

36. For completeness, we are not persuaded that the Judge's suggestion at the end of the hearing that bundles for the restored hearing be brought to the court is evidence that he did not have the bundles before him before the start of the hearing. However, given that we have found that he did not read Coates 2 and its exhibit, nothing turns on the point.

<u>9 May 2018 hearing</u>

37. We are, however, satisfied that Coates 2 and its exhibit were read by the Judge for the hearing on 9 May 2018. Copies of the transcript for that

hearing appears at **[DS7 pp.71-131]** and the judgment is at **[DS7 pp.132-143]**. CREM's skeleton argument is at **[DS7 pp.21-24],** Mr Coates skeleton is at **[DS7 pp.25-30]**. A further CREM skeleton appears at **[DS7 pp.31-38]**, and a further skeleton from Mr Coates is at **[DS7 pp.39-47]**.

38. The issue before the Court on 9 May, was whether the claim for a declaration that Mr Coates was not acting in a fair and impartial manner should be stayed, as had been HHJ Gerald's provisional view at the hearing on 22 January 2018, or whether it should proceed to trial. His provisional view was that the declaration sought was of no practical use to CREM.

39. At para. 7 of CREM's first skeleton, counsel states that disclosure was at the heart of the case, with an order for specific disclosure sought against Mr Coates regarding correspondence between him and the residential leaseholders, and between him and Mr Ritchie of Residential Land (and a Director of CAL), which CREM consider are likely to say demonstrate a long-standing plan to get a manager appointed with a view to obtaining an acquisition order under s.29 Landlord and Tenant Act 1987 thereafter. CREM's position was that if the Claim was stayed pending litigation before this tribunal that they would be significantly prejudiced given the tribunal's limited rules regarding disclosure when compared to the CPR.

40. At paras. 15-16 of Mr Coates' first skeleton, his counsel disputed that this tribunal's powers are inferior to that of the County Court, as well as the contention that Mr Coates had "bitterly resisted" disclosure. At para. 17, counsel said as follows:

> " Furthermore, the First Defendant provided copies of some of the documents the Claimants are now asserting he has "persistently refused" to disclose in the exhibit to his witness statement dated 10th January 2018."

41. Paras. 4 - 6 of CREM's second skeleton sets out the matters before the Court at the hearing on 9 May. In the event that a stay was refused, the Court had before it: applications for standard and specific disclosure; permission to re-amend the Particulars of Claim; CREM's application to strike out the Counterclaim; and costs budgeting and directions to trial.

42. Mr Coates' counsel confirms in his second skeleton, para 3, that those are the matters the Court would need to address, with the addition of Mr Coates' application to strike out the Claimant's claim. At para. 6, reference is made to CREM having provided a supplementary bundle containing three witness statements served since the hearing on 22 January, addressing the issue of whether the claim should be stayed. Mr Coates argued that CREM had no permission to rely upon those further witness statements, and that the 22 January hearing was adjourned for the sole reason that its counsel wanted to put in a skeleton argument on the question of a stay.

43. At 1/C of the transcript for the hearing, CREM's counsel is recorded as saying that the Judge should have before him four bundles, three of which were from the previous hearing, and a fourth, supplemental bundle. The Judge confirmed he had read the first skeletons filed by counsel for the parties following the 22 January hearing (3/B-D). CREM's counsel referred to the applications for the court to determine if a stay was refused (4/A-C), following which the Judge said (at 4/D-E):

> " Just so that you know, I have not read any of the witness statements, because I cannot understand why it is necessary, and no permission has been ordered in relation to them." (our underlining)

44. The Judge dismissed all of CREM's arguments, and ordered a stay of the claim. Before doing so, he said, at para 44 of his judgment:

> " Since the skeleton argument has been filed and served pursuant to my 22nd January 2018 order, the claimant has put in three witness statements to try to explain why a stay should not be ordered. As things turned out, there was only one feature of those witness statements which was sought to be relied upon, and that was that, if there is a stay, the claimants' financial position will be put in jeopardy by reason of a letter of 19th February 2018 from its bankers, Santander, who have a mortgage over the property. So it has not been necessary, therefore, for me to read any of those witness statements because all is clear from that letter, and the only other matter is the application to amend to which I have referred." (our underlining)

45. Both Mr Rainey and Mr Morshead agree that the 22 January hearing bundle was before the Judge at the hearing on 9 May, and that the bundle contained Coates 2 and its exhibit. However, Mr Rainey submitted that there was no reason for the Judge to have read that witness statement because "disclosure was not an issue" for the hearing (skeleton, para 45), and the only matter the Judge was concerned with was whether the claim should be stayed.

46. In his submission, where a bundle is re-used from a previous hearing, and contains material that is not relevant to the issues being determined in a later hearing it cannot be assumed that the Judge has pre-read the irrelevant material. Therefore, for the *Barings* 'test', the onus on CAL to show that the Four Documents did not enter the public domain despite being included in the bundles for the 22 January hearing, had been met because those documents were irrelevant material for the hearing, and no reference was made to them in the pre-reading lists, skeletons, or during the hearing or in the judgment.

47. Mr Rainey also submits that the Judge's comment (at 4/D-E) that he had not read any of the witness statement amounts to specific confirmation that he had not read Coates 2.

48. We do not agree with Mr Rainey's submissions. Applying *Barings*, we are satisfied that Coates 2 and its exhibit were put before the court for the purpose of being read in evidence. They were included in the 22 January hearing bundles, which the Judge confirmed he had before him at the 9 May hearing. We disagree with his submission that all that the court was concerned with on 9 May was whether the claim should be stayed. That was the primary issue that the Judge had to deal with, but if he had been persuaded not to stay the claim then it is clear from the skeleton arguments of both counsel that he would then have had to address the other applications before him, which included applications for standard and specific disclosure. This is also clear from the transcript (p.4/A-B) where the following exchange took place between the Judge and CREM's counsel:

> "MR. HUTCHINGS: ..... So, your Honour, the matter comes back before you to deal, first of all, with the question of stay, and then, if that is unsuccessful, the effective application for a stay, then the other applications that are before you for strike-out of the counterclaim, specific disclosure, "unless" orders in relation to disclosure."
>
> JUDGE GERALD: They all just fall by the wayside, do they not, if a stay---
>
> MR. HUTCHINGS: If a stay is granted, all of that falls by the wayside, absolutely."

49. Coates 2 and its exhibit, which were in the bundles before the Judge, were relevant to the disclosure applications which were 'live' applications before him on 9 May. This was the case irrespective of the fact that the applications would fall by the wayside if a stay was ordered.

50. Mr Rainey also submitted that there is a distinction to be made between bundles prepared for interim hearings and those for trial bundles. Interim hearing bundles, he said, might contain documents that concern applications that are not before the court, and therefore it cannot be assumed that these were documents included in order to be read by the court. In contrast, it would usually be safe to assume that everything included in a trial bundle was relevant to the matters before the Court. We are not persuaded that there is a material distinction to be made between the two types of bundles. In any event, this is not a question that we need to address given our determination that Coates 2 and its exhibit were relevant to live applications before the Judge on 9 May.

51. Applying *Barings*, this means that onus then shifts to CAL to show that the documents did not enter the public domain. Here, Mr Rainey's submission was that the Judge expressly stated (transcript:4/D-E):that he had not read any of the witness statements, which must be taken to include Coates 2. We do not agree with that analysis. What the Judge is recorded as saying in that passage of the transcript is that he had not read any of the witness

statements because he did not understand why it was necessary to do so, and no permission had been ordered for their provision. We agree with Mr Morshead that the underlined words at para. 43 above strongly suggest that the Judge was not there referring to Coates 2, because Coates 2 long preceded the issue of the claim before him, and there was therefore no question of it having been lodged without permission. It is much more likely that the Judge was referring to the statements which had been filed, without permission, after the 22 January hearing, in addition to the skeleton arguments which he had ordered be provided.

52. In addition, at paragraph 44 of his judgment, the Judge said that as he had ordered a stay of the claim, it was unnecessary for him to read any of the new witness statements. This reinforces our view that his comments at 4/D/E were referring to the three new witness statements filed after the 22 January hearing, and not Coates 2.

53. What the Judge said at 4/DE is markedly different from the unambiguous statement he made on 22 January, when he said that he had read nothing at all apart from the skeleton arguments. In our determination, the Judge is much more likely than not to have read Coates 2 given that it concerned the live disclosure applications before him, and given that there was specific reference to Coates 2, and the documents exhibited to his statement, at para. 17 of Mr Coates' skeleton argument for the hearing. We agree with Mr Morshead that a conscientious judge would have read them, given the reference in the skeleton. CAL has therefore not met the onus on it to displace the presumption that the Judge read the documents.

54. We reject Mr Rainey's submission that what was said at para. 17 of the skeleton is irrelevant because the Judge did not have to deal with the disclosure applications. Where there are multiple applications before a court, the fact that one or more of them becomes redundant during the course of a hearing is irrelevant to the question of what the judge read in preparation for the hearing.

55. We determine that the CPR 31.22(1)(a) exception is made out. The Four Documents entered the public domain through their inclusion in the bundles for the 22 January hearing, which were read by the Judge at the public hearing on 9 May 2018.

56. In addition, we determine, as submitted by Mr Morshead, that the fact that Mr Coates' skeleton argument made specific reference to Coates 2 and its exhibited documents means that the documents were "referred to" in open court. They would therefore fall within the CPR 31.22(1)(a) exception whether or not they were actually read by the Judge. Support for that proposition is found in *Lilly Icos Ltd v Pfizer Ltd (2)* [2001] EWCA Civ 2, where reference was made to the decision in *Smithkline Beecham v Connaught* [1999] 4 All ER 498. In *Connaught*, the Court of Appeal pointed out that the intent of RSC O24 r14A (which was in broadly similar terms to CPR 31.22) would be substantially frustrated if the rule were literally restricted to what had physically happened in open court. At para. 9 Buxton LJ said:

"First, there are taken to fall under the rule certain categories of document, in particular those coming within the pre-reading of the judge. It does not have to be established that the judge has actually read the documents: once the category is established, it is for a party alleging that they have not in fact been read to establish that fact, something that has to be achieved without enquiry of the judge (*Barings v Coopers & Lybrands* [2000] 3 All ER 910[53]). Second, it therefore follows that not everything that is disclosed or copied in court bundles falls under this rule: the *Connaught* approach is restricted to documents to which the judge has been specifically alerted, whether by reference in a skeleton argument or by mention in the "reading guide" with which judges are now provided at least in patent cases. Third, since the *Connaught* approach is based upon the assumed orality of a trial, documents, however much pre-read by the judge, remain confidential if no trial takes place, but the application is, for instance, dismissed by consent, albeit by a decision announced in open court: Connaught at p509j."

**CREM's application for disclosure**

57. CREM seek disclosure in respect of four categories of documents as set out at para. 35 of a witness statement of Mr Marsden dated 7 February 2022 **[1854]** which we refer to below as the category one, two, three and four documents:

"35.1. the documents that Circus/Mr Ritchie/NRF/Mr Stevens received in relation to the May 2016 hearing, limited to any documents referring to arguments over whether Circus was residential or commercial and any documents referred to in paragraph 17 above, including any documents showing input from Mr Stevens/NRF/Circus/Mr Ritchie into Ms Gourlay' s submissions.

35.2 the documents that Circus/Mr Ritchie/NRF/Mr Stevens received in relation to the October 2016 application to vary, the 2017 hearings and the 2018 application, limited to any documents referring to arguments over whether Circus was residential or commercial, the Annex 1 Issue, and any documents referred to in paragraph 8 above, including any documents showing input from Mr Stevens/NRF/Circus/Mr Ritchie into Ms Gourlay's submissions and/or the residents' submissions

35.3. all documents relating to Circus' inclusion in Annex 1 allegedly affecting the mortgageability, saleability and insurability of the premises;

35.4. documents relating to the classification of Circus as residential or otherwise, such as Circus' declarations to its insurers and any other declarations as to the status of the property/lease (other than Council Tax).

58. Paragraph 17 of Marsden's statement concerned para. 39 of CAL's statement of case dated 19 March 2021, in which it said that so far as it was aware, it was not suggested at the May 2016 tribunal hearing that its lease was commercial, rather than residential. Mr Marsden's response is that the issue was addressed in para. 9 of CREM's counsel's skeleton argument for the May 2016 hearing **[719]**, and in his closing submissions and those of Ms Gourlay, Mr Coates' counsel.

59. Paragraph 8 of Mr Marsden's statement concerns the assertion that Mr Stevens' witness statement dated 4 June 2021 wrongly intimated that CAL had little knowledge of the Annex 1 issue before it was included within the Annex. The suggestion is that Mr Stevens had a copy of the Scott Schedule, and may have had a copy of the skeleton argument and closing submissions.

Category 1 and 2 documents

60. CREM contends that disclosure of documents in these two categories is required because CAL's pleaded case in these proceedings is that it is not a commercial tenant, and that it was procedurally irregular for the tribunal to have varied the MO to include it in the list of commercial tenants in Annex 1 (paras. 4(1)-(2), 43-52, and 68 of CAL's statement of case dated 19 March 2021 **[58]**). Its case, as set out in those paragraphs was, said Mr Morshead, that it did not know what was happening procedurally in respect of the application to appoint a manager over the Estate, and that it had no proper opportunity to make its position known to the tribunal in the subsequent applications to vary the MO which resulted in CAL being included in the list of commercial lessees. At para. 14 of his skeleton argument, he submitted that the tribunal hearing CAL's application for its removal from the list of commercial lessees would need to know whether those are good points or not. Disclosure of (non-privileged) material concerning those hearings was directly relevant. In summary, CREM needed disclosure to identify what CAL and its legal advisors knew about the circumstances that led to the tribunal including CAL in Annex 1.

61. It was Mr Morshead's primary submission that Judge Vance had already decided this issue in CREM's favour in his decision of 9 March 2022 (paras 47-48 **[2144]**). In that decision, Judge Vance decided that certain communications concerning the resident's application for a MO, and its variation (being communications passing between Mr Stevens, Ms Jezard of the Residents Association, Mr Coates and his solicitor, and Mr Coates' counsel, Ms Gourlay) were arguably relevant to CREM's pleaded case that CAL's application for a MO was an improper attempt to gain an advantage for a subsequent application for an acquisition order. Relevance, said Mr Morshead, had therefore already been determined, but if that was wrong, his secondary submission was that the documents in the two categories were clearly relevant to CREM's case of improper purpose, and disclosure should be ordered.

62. We do not agree with Mr Morshead's submissions. What Judge Vance decided at paras. 47-48 of his decision of 9 March 2022 was that certain

documents *already* in CREM's possession were arguably relevant to CREM's pleaded case on improper purpose, and that they should not, therefore be excluded from CREM's evidence. He did not make any decision on relevance for the purposes of disclosure that CREM was, or was not entitled to.

63. We do not, however, accept Mr Rainey's submission at para. 68 of his skeleton argument that at para. 49 of his 9 March 2022 decision, Judge Vance expressly rejected the relevance of the Annex 1 issue. What was rejected at that paragraph was Mr Morshead's alternative submission that the documents relied upon by CREM in its evidence should be excluded because CAL had delayed until March 2021 before making its application to be removed from Annex 1. He rejected that submission because the question of delay was irrelevant given that CAL was only seeking a prospective variation of the MO.

64. Returning to Mr Morshead's submissions, we do not agree that it is necessary to order disclosure of documents within in Categories One and Two in order to fairly determine CAL's substantive application to vary the MO to remove it from Annex 1.

65. Firstly, the problem with CREM's contention that disclosure is relevant to CAL's pleaded case of procedural irregularity arising from its inclusion in Annex 1, is that CAL no longer seeks to argue this point. On 7 June 2023, CAL applied to the tribunal to amend its Statement of Case in this application ("the Amendment Application"). Judge Vance refused to list the application for determination at the same time as the three applications listed for hearing on 21 June 2023, as, in his view, there was unlikely to be enough time available at the hearing to hear it, and there was insufficient time for directions to be issued and complied with. The application is therefore pending determination.

66. In its Amendment Application, CAL seeks to excise those paragraphs of its original Statement of Case that referred to procedural impropriety, and its assertion at para. 39 that the question of CAL's lease being commercial was not addressed at the May 2016 tribunal hearing. In an open letter dated 12 June 2023, from NRF (CAL's solicitors) to Freeths (CREM's solicitors) **[2334]** CAL:

    (a) expressly admitted that, as set out in para. 17 of Mr Marsden's witness statement dated 7 February 2022 **[1852]**, submissions were made at the May 2016 hearing on whether or not CAL's lease was commercial. CALs assertion to the contrary, at para. 39 of its original Statement of Case, was abandoned;

    (b) stated that it had never been part of CAL's case that the MO should be set aside, for irregularity or otherwise, or varied retrospectively. To the extent that paras. 4(2) and 68 of its Statement of Case raised issues of procedural irregularity, these were abandoned;

(c) gave assurances that it would proceed with its Amendment Application, and not withdraw it.

67. Mr Morshead argued that CREM's disclosure application had to be determined on CAL's pleaded case as it currently stands, ignoring the Amendment Application because: (a) CAL's application amounts to an application to withdraw part of its case for which the tribunal's consent under Rule 22 of the tribunal's 2013 Rules is required; and (b) such consent, and any permission for CAL to amend its case, should only be granted on condition that CREM admit it was aware of what was happening in respect of the tribunal proceedings. He suggested that the Amendment Application was an attempt by CAL to dodge the consequences of CREM's disclosure application.

68. We do not agree that the Amendment Application should be ignored. CAL has made express admissions in open correspondence, and it would need the permission of this tribunal to resile from those admissions. As such, the issues that are the subject of those admissions are no longer live issues before this tribunal, and cannot be ignored by us when considering the disclosure applications.

69. We do not agree with Mr Morshead that Rule 22 is relevant to the Amendment Application. This a straightforward application to amend a statement of case, rather than a request to withdraw part of a case. In any event, the end result is the same, the tribunal will need to consent to the application, but it is inconceivable that we would refuse to do so, or that we would make consent conditional, in light of the admissions made by CAL. Of course, if CREM considers CAL has acted unreasonably in pursuing these points for as long as it has, before abandoning them, then it is open to it to pursue a Rule 13 costs application.

70. There can be no question, therefore, of the tribunal ordering disclosure of the Category One and Two documents on the issue of procedural irregularity because the point has been abandoned by CAL. Nor are documents that might have passed between CAL, its lawyers, and other parties, between 2016 – 2018 regarding CAL's inclusion in Annex 1 as a commercial lessee relevant to CAL's extant application to remove it from Annex 1. That is because CAL is only seeking an order with prospective effect, and not that the original MO, or its various subsequent iterations, should be retrospectively amended. What matters, therefore, is whether CAL is *currently* a commercial or residential lessee, not what it and it lawyers might have thought was the case several years ago.

71. We reject Mr Morshead's submission that disclosure should be ordered because the documents that would fall to be disclosed would be relevant to CREM's pleaded case that CAL's engagement with the residents' application for a MO was to further an improper purpose of obtaining an acquisition order. Such a request has the hallmarks of a fishing exercise. The disclosure sought is far too broad and speculative to warrant the making of an order on such grounds.

Category 3 documents

72. At para. 4(4) of its Statement of Case **[59]** CAL asserts that its inclusion in the list of commercial tenants in Annex 1 "is causing and/or is likely to cause CAL significant practical issues when dealing with its interest in the Premises". That subparagraph remains intact in CAL's draft amended Statement of Case, and Mr Rainey confirmed to us that it remains part of CAL's pleaded case.

73. At para. 11 of his witness statement **[617]**, Jonathan Smith, an in-house solicitor employed by Residential Land, states that wrongly characterising CAL's premises as commercial is likely to affect its mortgageability by making it less attractive collateral, and that it may potentially affect CAL's availability to obtain mortgage finance, as well as the terms of such finance. As to saleability, Mr Smith said that the characterisation of the premises as commercial paints a confusing picture of its character, particularly given that the 45 flats in the premises are registered for council tax. Mr Smith also suggests that the incorrect characterisation is likely to affect its insurability, including the ability to obtain loss of rent cover, contents cover and employers' liability insurance.

74. In light of CAL's pleaded case, CREM seeks disclosure of all documents relating to CAL's inclusion in Annex 1, allegedly affecting the mortgageability, saleability and insurability of its premises. This is resisted by Mr Rainey, who points out at para. 96 of his skeleton argument that this part of CAL's case is not based on an actual attempt to mortgage or sell, but on what Mr Smith, as an experienced property solicitor believes to be the case, and what CAL considers to be obvious. Mr Rainey told us that Mr Smith's evidence is all prospective, and that there are no documents to disclose in these categories. A nil return, he said, would be of no benefit to CREM.

75. CAL's pleaded case is that its inclusion in Annex 1 "is causing/and or is likely to cause it significant practical issues", so its pleaded case is not wholly prospective. Part of its case is that its inclusion in Annex 1 is currently causing problems. In light of that, we determine that it is appropriate to order disclosure of documents in category 3, going back to CAL's inclusion in Annex 1 in 2017. Any documents falling within that category are clearly relevant to CAL's pleaded case, and would either support its case, or adversely affect it, or adversely affect CREM's case. A search for documents in this category would be proportionate, and if, as Mr Rainey suggested, it will result in a nil return, then that, contrary to his submission, that may benefit CREM's case as it may suggest that contrary to its pleaded case, CAL has not suffered any ill effects to date.

Category 4 documents

76. CREM seeks disclosure of documents relating to how CAL has described itself in declarations to its insurers and other third parties, i.e. whether it has described itself as commercial or residential. Mr Morshead contended

that knowing how CAL describes itself to third parties goes to the issue of how it should be described in the MO.

77. We agree with Mr Rainey that the parties' subjective assessment as to CAL's status is not relevant to the question that the tribunal has to determine in CAL's application to be removed from Annex 1. Whether CAL should be described as commercial or residential is a question for the tribunal to determine by way of an objective assessment of the factual and legal position at the time we determine the application. Subjective assertions by either side are irrelevant to that exercise.

CAL's cross-application

78. CREM's cross-application for disclosure was made on the basis that if the tribunal were to grant CREM's request for disclosure of category 4 documents, then disclosure should also be provided by CREM for mirror categories of documents in its possession. As we have refused CREM's application for documents in that category, CAL's cross-application does not to be determined. If we had been required to do so, we would have refused it for the same reasons as we refused CREM's category 4 request.

Judge Amran Vance
25 July 2023

## ANNEX 1 - RIGHTS OF APPEAL

*Appealing against the tribunal's decisions*

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.