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 1803 (Ch)

Royal Courts of Justice
Rolls Building
Fetter Lane
EC4A 1NL

Friday, 28 June 2024

BEFORE: **ICC JUDGE MULLEN**

BETWEEN:

SECRETARY OF STATE FOR BUSINESS AND TRADE

Claimant

- and -

ALEXANDER DAVID GREENSILL

Defendant

- and -

THE FINANCIAL TIMES

Applicant

MS C SANDBACH appeared on behalf of the Claimant
MR G MILLAR KC with MR WILLS appeared on behalf of the Defendant
MR S ROWE appeared on behalf of the Applicant

JUDGMENT
(Approved)

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

ICC JUDGE MULLEN:

1. This is my extempore judgment. On 7 March 2024, the Secretary of State for Business and Trade commenced proceedings under the Company Directors Disqualification Act 1986 against Mr Alexander Greensill, in connection with his role in Greensill Capital (UK) Limited, Greensill Limited, and Greensill Capital Pty Limited. The collapse of the Greensill companies has attracted a significant amount of press coverage over some time.

2. The disqualification proceedings were commenced by a Part 8 claim form, as required by the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987. They were supported by the affirmation of Mr William Wilson, a chief investigator in the Insolvent Investigations Directorate of the Insolvency Service, which runs to some 322 pages or 1053 paragraphs, plus some schedules. I am told, though I have not had the opportunity to count them, that the exhibits to Mr Wilson's affirmation run to more than 8,500 pages.

3. On 3 April 2024, I made an order with the consent of Mr Greensill and the Secretary of State that provided that the affirmation and its exhibits were not to be made available to a non-party to the proceedings unless ordered by the court. If an application was made for a copy of the document, the consent order provided that it was to be on seven days' notice to the parties, giving them the opportunity to make representations, whether in writing or orally, depending on whether the application was to be determined on the papers or at a hearing.

4. When that consent order was provided to the court in draft, signed by the parties, it was accompanied by a witness statement from Mr Ivan Pearce-Molland, the lawyer with the conduct of the case on behalf of Mr Greensill at Ellerman Limited, dated 20 March 2024. He explained the basis upon which the parties were seeking the order to be made. He acknowledged the significant press interest in the case and said that the order sought to:

> "Protect the status quo by ensuring that the Affirmation and exhibits are not provided to any third parties by the Court prior to the affected parties having a fair opportunity to be heard on that issue, and to allow the Court to make any decision on the basis of full information."

Mr Pearce-Molland explained that he and his client were still analysing the contents of the documents. He highlighted that the documents contained sensitive information against a background of ongoing criminal and civil proceedings, including information provided to the Insolvency Service by several directors of Greensill Capital (UK) Limited and Greensill Limited "under compulsion".

5. An application has now been made by the Financial Times to obtain sight of the affirmation under CPR 5.4C(2) or the court's inherent jurisdiction. CPR 5.4C is as follows:

> "(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

Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE
www.epiqglobal.com/en-gb/

> (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."

Moving to CPR 5.4D, this 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."

The upshot of all that 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. An application can be made without notice, but the court can direct that notice is to be given to persons who would be affected.

6. I approved the consent order having taken the view that, in a case such as this, in its early stages, it was inevitable that notice of such an application would need to be given to the parties at the least, in any event. The consent order merely formalised the process for doing that and provided a degree of certainty to the parties.

7. The Financial Times made its application on 18 April 2024. It seeks disclosure of the affirmation lodged with the claim form stating that, without sight of it, it will be unable to identify why the disqualification order is being sought "undermining substantively its function as public watchdog, and, thereby,

undermining the important principle of open justice". It also sought the disapplication of CPR 32.12(1), which 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 set out in CPR 32.12(2) as follows. Paragraph 1 of CPR 32.12 does not apply to a witness statement if:

> "(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."

CPR 32.12(3) provides that the rule applies to affidavits and, it follows, affirmations in the same way as it applies to witness statements.

8. The application is supported by the witness statement of Cynthia O'Murchu, a staff reporter at the Financial Times. She says in that statement that the Financial Times has been reporting on the Greensill matter since early 2021. She explains that she has seen the Part 8 claim form commencing the disqualification proceedings. A claim form is included with the definition of a "statement of case" in CPR 2.3(1) Civil Procedure Rules, which a non-party is entitled to see. The consent order does not provide otherwise. She goes on to explain some of the background that has led to the Financial Times's reporting of matters connected to Mr Greensill's companies.

9. The application is opposed by Mr Greensill. The Secretary of State, who appears by Ms Carly Sandbach of counsel, is neutral on the application.

10. Mr Samuel Rowe of counsel appears for the Financial Times. While in his skeleton argument he submitted that the consent order was "irregular", that argument is no longer pursued. He proceeds to argue that the affirmation is equivalent to a statement of case being in the nature of particulars of claim, which, again, fall within the definition of "statement of case" set out in CPR 2.3(1). If not, he says that the affirmation should, in any event, be made available pursuant to CPR 5.4C(2) on the principle of open justice.

Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE
www.epiqglobal.com/en-gb/

11. I have been referred to the judgment of the Supreme Court in *Dring v Cape Intermediate Holdings Ltd* UKSC 38. That case considered the principles of open justice in the context of the written material placed before the court in, as here, a civil action. 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 parte 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".

Lady Hale went on to say 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

Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE
www.epiqglobal.com/en-gb/

> 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."

12. The role of the press in informing the public understanding of the working of the justice system was considered by Park J in *Chan U Seek v Alvis Vehicles Ltd* [2004] EWHC 3092 (Ch). That was a case where the judge had begun to hear the matter and The Guardian newspaper sought access to certain documents after eight days of hearing. At paragraph 42 of the judgment Park J said as follows:

> "In this case why should it not be said that The Guardian has an entirely legitimate interest in inspecting the pleadings and witness statements in *Chan v. Alvis*? The nature of its interest is not related to other legal proceedings in which it is involved, but it is very much related to the core of its business and, as I am sure its editor and reporters would say, the purpose of its existence. The Guardian is a newspaper and a serious newspaper. It publishes stories which it believes to be of interest to its readers and which, in some cases, it believes could raise serious issues of public concern. Its reporters consider that, through Mr. Chan's skeleton, they have discovered such a story, and they wish to see whether there is more relevant material in documents which passed into the public domain through proceedings in open court. It is not for me to second-guess the reporters on whether the story really is interesting or whether it really does raise serious issues. If a litigant in current proceedings can see identified documents from an earlier court file because they may bear on his current litigation, then it appears to me that a serious newspaper should be able to see identified documents from an earlier court file because they may bear on a current story or article which it is interested in publishing."

13. In short, the position is that it is a fundamental principle of justice that cases should be heard in public, unless one of the exceptions to that principle applies. The public should have confidence in the justice system. They must be able to see how it works and it must be subject to scrutiny. That will often require sight of the documents before the court on which it is asked to base its decision.

14. It is, as recognised by the CPR, also permissible for non-parties to obtain the statements of case, usually still referred to as "the pleadings", in which the parties set out their respective positions before the case has reached a court hearing once, among other things, an acknowledgement of service has been

filed or the case has been listed for hearing. Understanding the nature of the question that the court is to be asked to decide is another aspect of open justice. I was referred to *Qadir v Associated Newspapers Ltd* [2012] EWHC 2606 (QB) in which Tugendhat J considered the operation of CPR 5.4C in relation to statements of case as follows:

> "It may be inferred that the purpose of the legislature in drafting r.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) that 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 service of a defence or acknowledgement of service), then the principle of open justice also becomes engaged. And it is for that reason that non-parties may become entitled to obtain the statements of case."

15. The cases to which I have been referred emphasise that, where once the nature of the case would have been set out and the evidence would have been given orally, with documents read out for everyone to hear, modern practice relies heavily on writing. In particular, a witness's evidence in chief is usually given in writing in the form of a witness statement, to the truth of which the witness attests when he or she gives evidence and is cross-examined. In company directors disqualification proceedings the Secretary of State's evidence is given in the form of an affidavit or affirmation. Very often, vast numbers of documents are put in evidence, exhibited to the affidavit at the outset. The process relies very heavily on the judge reading documents for him- or herself before the hearing, during the hearing and, indeed, after the hearing prior to giving judgment. That is the only efficient way for the evidence to be considered. It is in the ordinary case important that the material that was taken into consideration in coming to a decision is made available so that the reasons for the decision can be understood. What the court seeks to do is to make the proceedings at least as transparent as those conducted in the days when everything, or a great deal, was ventilated orally in court.

16. For completeness I should say that Mr Rowe also took me to *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003, promulgated by Lord Neuberger MR, where it is stated that:

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

That was guidance setting out recommended practice, rather than a practice direction, and is not of direct application in any event.

17. Mr Rowe has taken me through a number of the cases demonstrating the application of the principle of open justice, both in his skeleton argument and orally. None of that is really in issue but the cases that I have been taken to all relate in one way or another to whether proceedings should or should not be heard in open court or whether the documents used in open court should be available for inspection. The case that I am considering is a case where nothing has taken place in open court or, for that matter, at a private hearing, in relation to the substantive disqualification proceedings themselves. What the Financial Times seeks is access to a statement that has not yet been used in evidence in open court or received any substantive consideration by a judge. The other feature of this case is that director disqualification proceedings do not have formal statements of case in which the parties set out their respective contentions, apart from the Part 8 claim form itself, which is a standard form document. The parties set out their positions in their written evidence. There is, as I shall explain, therefore no summary of the parties' positions that non-parties are entitled to as of right.

18. Dealing with witness statements that have not yet been used in evidence in court, I was referred by Mr Millar KC, who appears for Mr Greensill, to the case of *Blue v Ashley* [2017] 1 WLR 3630, in which Leggatt J, as he then was, considered the provision of trial witness statements to Times Newspapers Ltd in advance of the trial. Leggatt J 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 pre-trial hearing."

He discussed this at paragraphs 12 to 16 as follows:

"12… 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.

The role of witness statements

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 at 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."

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."

19. Again, in *R (Yar) v Secretary of State for Defence* [2021] EWHC 3219 (Admin) Swift J considered provision of witness statements prepared for the substantive hearing of a judicial review. He said at paragraph 18:

> "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."

In that case he rejected the application of the BBC. He said:

> "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."

20. Mr Rowe however says that, here, he is not seeking advanced disclosure of a trial witness statement. What is being sought is something more analogous to a statement of case. In this regard, he relies upon the judgment of *Collins J in R (on the application of Corner House Research) v BAE Systems plc* [2008] EWHC 246 (Admin). In that case the judge adopted a purposive approach to the construction of CPR 2.3(1) 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:

> "It seems to me in those circumstances it does not do violence to the language of the rule to take the view that 'defence' includes the judicial review equivalent to a defence. In those circumstances, I am satisfied that the correct meaning of r.5.4C is that there is a right to have sight of not only a claim form, but also an acknowledgment of service and detailed grounds. It does not extend to any documents that are annexed to either the acknowledgment 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 r.5.4C. If more is sought, then an application will have to be made under r.5.4C(4)."

Mr Rowe says that is the position here. The affirmation takes the place of a statement of case and is therefore at the very least analogous to the statement of case that a non-party is entitled to see.

21. Turning now to the specific grounds of the application, although the question of the regularity of the consent order is no longer pursued, I should say that, while it was described as a derogation from the principle of open justice, I do not agree. What it does is formalise the process by which an application was to be made for the provision of documents from the court file. I do not accept, either, that it was otiose. As I have said, an application for copies of documents on the court file can be made without notice. What the order does is confirm that this is a case where it is appropriate for notice to be given and prescribes a short period of notice. It does not pre-judge the outcome of any such application and nor does it prevent the directions given in the consent order being varied in an appropriate case.

22. Turning next to the status of the Secretary of State's affirmation, it is reasonably clear to me that the affirmation in support of disqualification proceedings is not a statement of case within the definition provided at CPR 2.3(1). That states 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 defence; and
>
> (b) includes any further information given in relation to them voluntarily or by court order under rule 18.1".

That conclusion is fortified by the effect of CPR 32.12 which places restrictions on the use to which witness statements, but not statements of case, can be put.

23. An affidavit or affirmation is evidence in support of a statement of case, and filed with the Secretary of State's statement of case in the form of the claim form. It is not a statement of case itself. As was discussed during the course of the hearing however, in company directors disqualification proceedings an affirmation serves a dual purpose. It is both the evidence in support of the

Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE
www.epiqglobal.com/en-gb/

claim and it sets out the specific allegations of unfitness upon which the Secretary of State relies. The allegations relied upon are normally set out towards the start of the evidence under the heading "Statement of Matters Determining Unfitness". That statement is required by Rule 3 of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules, which, as amended, provides as follows:

> "**3 The case against the defendant**
>
> (1) There shall, at the time when the claim form is issued, be filed in court evidence in support of the application for a disqualification order; and copies of the evidence shall be served with the claim form on the defendant .
>
> (2) The evidence shall be by one or more affidavits, except where the claimant is the official receiver, in which case it may be in the form of a written report (with or without affidavits by other persons) which shall be treated as if it had been verified by affidavit by him and shall be prima facie evidence of any matter contained in it.
>
> (3) 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 defendant is alleged to be unfit to be concerned in the management of a company."

24. In this case the statement of matters determining unfitness required by rule 3(3) is set out at paragraphs 10 to 46 of the affirmation. The rule 3(3) statement is not quite a pleading but it is in the nature of a charge sheet on which the court is required to focus when considering a disqualification claim. The balance of the statement is the evidence in support by which the Secretary of State seeks to make good those allegations. The rule 3(3) statement is therefore analogous to a statement of case that a non-party would ordinarily be entitled to see now that the matter is opposed and the court may, as Tugendhat J put it, "be required to administer justice".

25. In my judgment, open justice in this case does point towards the statement of matters determining unfitness being made available for use by the Financial Times. There is a strong public interest in this case and a strong public interest in the nature of the case that the court is being asked to decide being understood. I think that Mr Rowe was right to observe that, until the nature of the allegations is known and understood, there is a risk of speculation as to what they might be. I am conscious that is not the relief that was requested by

Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE
www.epiqglobal.com/en-gb/

the Financial Times, in that it sought simply sought disclosure of the entirety of the affirmation. The nature of the Rule 3(3) statement does not seem to have been considered when the application was made.

26. In relation to the balance of the affirmation, it seems to me that it would be precipitous to make an order for its provision. The document has not been relied upon in open court. The defendant is faced with substantial information to process and address. There may be a number of objections that he may wish to take to the affirmation. I say this off the top of my head by way of example, not because there is any suggestion that such an application might be made, but it is not unknown for applications to be made to strike out parts of an affidavit or witness statement on the grounds that they are inadmissible. Again, some part of the evidence may simply not be relied upon in in due course.

27. I accept the submission of Mr Millar that the provision of the whole of the document at this stage, insofar as it goes beyond the Rule 3(3) statement, is strongly outweighed by the rights and interests of the parties, in particular ensuring that the parties can prepare for trial without their evidence being trailed in the media and protecting the defendant from the repetition of serious and potentially damaging allegations, which he has not yet had the opportunity to respond to and which are untested and unproven.

28. I do however bear in mind that some of the concerns raised by Leggatt J in relation to advanced provision of trial witness statements do not have the same force in the context of company directors disqualification proceedings. For example, the evidence is given on behalf of the Secretary of State and there is an obligation to prepare the evidence and present the case fairly and properly. The evidence contained in the affirmation is the evidence on which the Secretary of State will rely from the outset of the case to its resolution at trial, unless the matter is determined by agreement before trial, although it may of course in due course by supplemented by further evidence. The position is therefore rather different to a witness statement made for trial in proceedings brought by a private litigant, which may or may not be put before the court at all and which may or may not have been prepared with the care, diligence and focus on the public interest with which the Secretary of State is obliged to prepare her evidence.

29. This case has however plainly reached the stage where the allegations are contested and it is clear that the court will in due course be required to engage in the judicial determination of the dispute unless it is settled in the meantime. There is public interest in knowing what it is the court is being asked to decide. The Rule 3(3) statement is in the nature of a statement of case, which sets out the allegations that will fall to be determined be due course. Given that the CPR are clear that a statement of case, properly so called, is a document that is open to inspection by non-parties it seems to me that I should order provision of that part of the affirmation to the Financial Times under CPR 5.4C(2), or the court's inherent jurisdiction, allowing it to be reported. I do bear in mind however that this is not the way in which the Financial Times has sought to pursue the application up to today. Therefore, Mr Millar and Mr Greensill's team find themselves in the slightly difficult position of considering provision of the Rule 3(3) statement on the hoof in order to determine whether there are individual paragraphs in respect of which they would wish raise objection on particular grounds.

30. I have to say, having looked at those paragraphs, it is not immediately obvious why there should be any objection as they simply set out in general terms what the allegations are. I will however give Mr Greensill the opportunity to raise any objections to individual parts of those paragraphs within a reasonable time, and I will hear counsel as to what the mechanism should be in relation to that. Given my view on the public interest in the nature of the allegations being understood by general public I would not anticipate that any redaction would be permitted unless there is a very clear and serious reason to do so.

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

Lower Ground, 46 Chancery Lane, London WC2A 1JE
Email: civil@epiqglobal.co.uk