Neutral Citation Number: [2020] EWHC 131 (Ch) CR-2012-007914
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

The Rolls Building
The Royal Courts of Justice
7 Rolls Building, Fetter Lane
London EC4A 1NL
Dated: 28 January 2020

**BEFORE: DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE FRITH**

**SITTING IN PRIVATE**

**IN THE MATTER OF COMET GROUP LIMITED**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**BETWEEN:**

Geoffrey Lambert Carton-Kelly — Applicant

(as Additional Liquidator of CGL Realisations Limited)
(formerly Comet Group Limited) (in liquidation))

- and –

Nicholas Guy Edwards — Respondent

(as Liquidator of CGL Realisations Limited) (formerly
Comet Group Limited) (in liquidation))

**MR ANDREAS GLEDHILL QC (instructed by Jones Day) appeared on behalf of the Applicant**

**MR EMMANUEL SHEPPARD (instructed by the Government Legal Department) appeared on behalf of the Insolvency Service**

**The Respondent did not appear and was not represented**

**Hearing date: 7th January 2020**

**Deputy Insolvency and Companies Court Judge Frith**

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# APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic

**Deputy ICC Judge Frith:**

1 This is an application made by Mr Geoffrey Carton-Kelly, acting in his capacity as the additional liquidator of CGL Realisations Limited (formerly Comet Group Limited) (in liquidation) (the **"Company"**). By its terms, it seeks to lift certain confidentiality restrictions imposed by an order of Sir Nicholas Warren pursuant to an order that he made on 21 June 2018. Mr Andreas Gledhill QC appears on behalf of Mr Carton-Kelly. The Respondent to the application is Mr Nicholas Edwards in his capacity as liquidator of the Company. By a letter dated 9 December 2019 sent by his solicitors Freshfields Bruckhaus Deringer LLP, he indicated that he does not oppose the application neither did he intend to be represented at the hearing before me.

2 The only other party that appeared before me was the Insolvency Service (the **"IS"**) represented by Mr Emmanuel Sheppard. The IS has not made a formal application to appear as intervener under CPR 19.2 but seeks the exercise of the Court's discretion under CPR 19.2(2) for the purpose of making a limited submission on the matter on the grounds that first, the Applicant has had notice of the IS's resistance and the basis for it in correspondence and second, on the basis of the importance of the public policy relevant to the exercise of the court's discretion under CPR 5.4C. For the avoidance of doubt, I exercise the Court's discretion to add the IS as a new party to this application for the purpose of resolving the issue that remains in dispute between the Applicant and the IS pursuant to CPR 19.2(2)(a).

3 The Applicant sensibly gave notice of the application to the Institute of Chartered Accountants for England and Wales (the **"ICAEW"**), Darty Holding SAS (**"Darty"**) being a company involved as Respondent to proceedings issued under the Insolvency Act 1986 (the **"Act"**) by the Applicant and, finally to Messrs Bob Darke, Carl Cowling and John Clare, the directors of the Company (the "**Directors**"). Some of those parties attended the hearing, but were not legally represented and did not make submissions. The positions adopted by those parties will be set out later in this judgment. Since the central issue for determination by me involved the continuation or otherwise of a confidentiality regime, I ordered that the proceedings before me should be conducted in private.

**The factual background**

4 The Company went into administration on 2 November 2012. Three partners of Deloitte LLP, Messrs Nicholas Edwards, Neville Kahn and Christopher Farrington, were appointed as its joint administrator. It proceeded into creditors' voluntary liquidation on 3 October

2013 and the administrators were appointed liquidators for the purpose of the winding up (the **"Original Liquidators"**). However, over the course of time, two of them have since ceased to act, leaving the Respondent, Mr Edwards as the only Original Liquidator still in office.

5 A dispute arose between on the one part, Mr Edwards and Mr Kahn, who were at the relevant time appointed as liquidators to the Company (the **"Liquidators"**) and on the other, the ICAEW concerning the prosecution of certain potential causes of action against a number of parties that had been identified as a result of the investigations carried out by the Original Liquidators. The case attracted the attention of the ICAEW, because it is the regulatory professional body of the Original Liquidators (as defined in section 391 of the Act) and as such regulates their activities when performing their functions as insolvency practitioners under its provisions. As a result of the investigations that the ICAEW has carried out, disciplinary proceedings have been commenced against the Original Liquidators which are due to start in March of this year.

6 On 26 January 2018, the Liquidators issued an application for directions as to whether they should issue a claim form against the Directors. It was based upon certain concerns as to their conduct during the Company's entry into a facility and debenture with Hailey Acquisitions Limited ("**HAL**") in February 2012. At the time the application was issued, there were concerns on the part of the Liquidators as to the expiration of the limitation period. As a result, a claim form was issued on 30 January 2018 pursuant to the provisions of CPR Part 7 against both the Directors and HAL. The result of this was to protect the position on limitation pending the disposal of the application for directions that had, by then, been issued.

7 In due course, the Liquidators came to the view that the claims comprised in the proceedings should not be prosecuted. In consequence, they applied by an application notice issued on 20 February 2018, seeking the Court's directions endorsing the view that they had reached. It was at that stage that the ICAEW intervened on the grounds that they opposed the course of action that the Liquidators were proposing. The matter was dealt with on a contested basis before the Learned Judge which resulted in two judgments dated 7 and 21 June 2018. The first was the judgment which dealt with the substantive issues raised by the application. The second introduced the confidentiality regime with which I am concerned on this application.

8 By the judgment of 7 June 2018, an order was made (*inter alia*) appointing Mr Carton-Kelly as an additional liquidator. His remit was specifically to investigate and if so advised to prosecute the causes of action with regard to the sale of the shares in the Company to HAL, including an investigation as to the attendant financing and security arrangements that were entered into consequent thereon.

9 The confidentiality restrictions imposed by the order of Sir Nicholas Warren dated 21 June 2018 precluded first, the inspection of the applications made by the Liquidators; second, the inspection of supporting evidence and skeleton arguments for those applications; third the inspection of any transcripts of the hearings and finally, the inspection of the judgments of Sir Nicholas Warren dated 7 and 21 June 2018. The order remains in force. It is the continuation of those confidentiality restrictions that forms the basis of the current application before me.

10 By virtue of the Applicant's appointment as additional liquidator, the order of 21 June 2018 provides him with certain restricted rights to disclose copies of the judgments first, to his lawyers and experts; second, to any provider of litigation funding; and third, to any unsecured creditor if he considered that they should be disclosed to such parties for the purpose of carrying out his functions as an additional liquidator. Such disclosure was on terms but in each case, the recipient was obliged to provide a written undertaking to keep judgments confidential and not to disclose them to any other person.

11 Following his appointment, the Applicant set to work. He issued further claims under the Insolvency Act 1986 against a number of parties. These included the Directors, HAL and Darty. He also made an application under Rule 6.48 of the Insolvency (England and Wales) Rules 2016 (the **"Rules"**) against HAL, seeking the Court's authorisation for him to use monies that would otherwise be subject to HAL's floating charge for his litigation expenses.

12 Those proceedings were settled on a confidential basis on 8 November 2019. This also led to the final disposal of the application made under Rule 6.48 of the Rules. By a notice of discontinuance filed with the Court on 20 November 2019, all of the claims including those originally commenced by the original liquidators were discontinued, save for an application issued by the Applicant under Section 239 of the Act on 26 October 2018. This sought a declaration that certain arrangements made with Darty were a preference within the meaning of that section. The claim relates to certain arrangements that were made on 3 February 2012, whereby Kesa Holdings Limited sold the shares in the Company

to HAL for a nominal £1 consideration. On the same date, as part of what was described as a complex suite of transactions which accompanied that sale, the Company repaid an unsecured revolving credit facility of £115.4 million that was owing to Kesa International Limited ("**KIL**"). Darty is the successor to the rights and liabilities of KIL following a cross-border merger concluded on 1 April 2018. The Applicant submits in those proceedings that the Company was insolvent on the date when these arrangements were concluded which were made within the two year period referred to in Section 240(1)(a) of the Act. He seeks a declaration that transactions are revocable unless Darty, (as a connected party of the Company within the meaning of Section 249 of the Act) establishes that the appropriate desire to prefer was not present having regard to the presumption set out in Section 239(6) of the Act. Those proceedings continue. The matter was last before the Court on 13 December 2019 when ICC Judge Mullen approved an order for directions to which both parties consented. These proceedings have some relevance to this application. This is because of the constraints the Applicant asserts the confidentiality regime imposes upon his ability to consult with litigation funders. He also identifies certain consequential difficulties in the proceedings themselves. This arises from a perceived disparity in the access to information by virtue of one party being aware of the un-redacted information whilst the other is not.

13 There have been previous applications made by a number of parties relating to the confidentiality regime imposed by the order of 21 June 2018 and the lifting of those provisions. An application was made by the Applicant on 2 July 2019 for the provision of various documents sealed on the Court file and the lifting of the confidentiality restrictions more generally as an alternative to the hearing of the application made under Rule 6.48 of the Rules being heard in private. Other parties have also made their own applications for the seal to be lifted. These included an application made on 13 May 2019 by the Directors in which they sought certain documents which were currently sealed, an application made on 24 June 2019 by HAL seeking very much the same relief and finally an application dated 3 July 2019 where the Directors amended their original application to align with the documents which were being sought by HAL and the additional liquidator in his application which had by then been issued.

14 On 8 July 2019 the various applications came before ICC Judge Prentis. By an order that he made on that date, the Judge adjourned the additional liquidator's wider application for a general lifting of confidentiality restrictions in order to give sufficient time to take into account the objections that had by then been raised by the IS. The permission of the court

was given to the various applicants to obtain certain documents together with redacted copies of the judgment of the Learned Judge dated 7 June 2018. In due course, the matter was determined by consent on 6 September 2019 without a further hearing. The application made pursuant to rule 6.48 of the Rules was ultimately ordered to be heard in private. Some minor variations were made to the original order that ICC Judge Prentis made on 8 July 2019. However, there was no judicial consideration of the Applicant's wider application for a general lifting of the confidentiality restrictions. He did impose restrictions specifically indicating that first, every copy of the judgment of 7 June 2018 should have paragraphs 71 and 72 redacted and second, the witness statement of Mr David Hill dated 26 March 2018 should be redacted to exclude its paragraphs 14 to 16 inclusive.

**The Application**

15 Having recited the history of the proceedings I turn now to the application itself. It was issued on 4 December 2019. It is made pursuant to the provisions of Section 112 of the Act. This is on the basis that there is a question of law for the Court to decide under Rule 12.39 of the Rules and/or permitting the inspection of the Court file and/or Rule 5.4C(4) of CPR for an order lifting the confidentiality restrictions that were imposed by the order of 21 June 2018 in relation to the judgments and documents that have been sealed on the Court file since then.

16 As I have previously indicated, the application was served upon the Respondent and notice was provided to the Directors, the ICAEW, the IS and Darty. The position of the ICAEW is that it has no objection to the lifting of confidentiality, save to the extent that those parts of the Court file which the IS has indicated it wishes to remain confidential, are maintained. It expanded its position in a letter dated 2 December 2019. In this letter, it stated that it supported the application on the basis that the Respondent consents to the order. Recent developments and the fact that all parties mentioned in the judgments handed down by the Learned Judge are now aware of them meant that the time had now arisen when the Judge himself envisaged that the need for confidentiality would expire. The ICAEW further stated that there are concerns as to the effect the continuation of confidentiality will have upon the proper administration of the disciplinary proceedings which are due to take place against the Original Liquidators of the Company in March 2020. It does however state that any public disclosures should be subject to the redactions of the paragraphs in the Learned Judge's judgment that refer to the evidence of Mr David Hill of the IS because the evidence given by Mr Hill contained documents and information obtained using his statutory powers under Section 447 of the Companies Act

1985 (the **"1985 Act"**). In this regard, it supports the position adopted by the IS from which it received that information.

17 Darty initially indicated that they intended to appear at the hearing before me. However, following subsequent communications between the parties in which Jones Day, on behalf of the Applicant pointed out the potential difficulties their attendance may have caused if it had proved necessary for the Court to consider further material information that was still sealed on the Court file. Darty have in fact made their own application for permission to obtain copies of the judgments and other relevant documents but this stopped short of seeking a wider lifting of the sealing of the file. That application came before ICC Judge Burton on 18 December 2019 and following the determination of their application, Darty did not participate in the application hearing before me, presumably having obtained the relief they required on the disposal of their own application.

18 The Directors were given notice of the application on 4 December 2019 by the service of it upon Osborne Clarke LLP, their solicitors. Notwithstanding such service, no response was received and they were not represented in the hearing before me. It is therefore presumed that they have no objection to the relief sought.

19 The position of the IS was initially set out in an email that it sent on 13 December 2019 to Jones Day. They initially asserted that the matter had been disposed of by consent in the application conducted before ICC Judge Prentis. However, this was disputed by Jones Day on behalf of the Applicant. They stated that the consent order set out agreed directions that dealt only with a narrower issue of which parties would be entitled to certain documents and further directed that the Rule 6.48 application was to be heard in private. They asserted that there was no disposal either by consent or by judicial determination of the wider issue of the lifting the Court seal entirely. By the time the matter came in front of me, this appeared to have been accepted by the IS. They maintained the position that they had indicated initially. They submitted that the 7 June judgment should have paragraph 71 and 72 redacted and that paragraphs 14 to 16 of Mr Hill's statement of 26 March 2018 should be also redacted in its accessible form.

20 There is no dispute from the Applicant in relation to the redaction of the witness statement of Mr Hill. Therefore, the application boils down to the narrow question as to the redaction of the judgment at paragraphs 71 and 72. It is this issue that constitutes the dispute that I have to decide.

**The submissions**

21 On behalf of the additional liquidator, Mr Gledhill QC focused his attention on the fundamental nature of the open justice principle. He referred me to Rule 39.2 of the CPR, which prescribes that the general rule is that hearings should be held in public, the default position is open justice and the Court will be slow to derogate from principle. He drew my attention in his skeleton argument to the reasoning that the Learned Judge adopted for imposing the seal on the Court file. The judge himself described the application as unusual. He said that the 7 June judgment of Sir Nicholas Warren was made against the background of the investigation by the ICAEW of allegations concerning the Original liquidators at the time they intervened. There was also a risk of "tipping off" in relation to certain claims made against the Directors, who were not party to the application giving rise to the judgment but who were, at that time, the subject of a protective writ issued by the Liquidators and finally the position of the Applicant, who was at the time yet to be appointed with the task of investigating the reserved matters that the Learned Judge referred to in his judgment of 7 June 2018. These which were defined in the Order of that date as relating to the arrangements surrounding the sale of the shares of the Company to HAL and the repayment of the outstanding amounts to KIL pursuant to the KIL revolving credit facility and the advances by HAL of funds to the HAL revolving credit facility which was secured by a debenture entered into between HAL and the Company dated 3 February 2012.

22 He dealt with these risks that he identified in paragraphs 20 to 21 of his judgment.

> *"20. I consider, in all these circumstances, that it would be wrong to release publicly an unredacted version of the Judgment. Further, at this stage at least, I consider that it would be wrong to consider further the release of a redacted version. As Mr Mowschenson accepts, it is not for the parties to add words to the Judgment, if redaction does take place, in order to make better sense of passages which, with redaction, make little or no sense. I am not myself prepared to consider what might be significant rewrites of passages myself in order to bring about such sense. And whilst readers of a redacted document will know that the apparent sense of what they can see may not represent the actual sense and will see that some unredacted passages make no sense at all, the result of redaction (without addition of further words) in the present case runs the risk of giving an altogether misleading impression of the conduct of the Comet directors and the Administrators. I consider that it is not appropriate at this stage, to*

*release the Judgment, in either unredacted or redacted form, into the public domain. It is in the interests of justice that the Judgment remains private. In this way, any risk of tipping-off, however, slight, is avoided, privilege is maintained and third parties are not subject to what will inevitably be read as public criticism without having had any opportunity to defend themselves.*

*21. I say "at this stage" because it may be appropriate to release the Judgment at some time in the future. For instance, following completion of his investigations, the conflict liquidator may decide not to continue with the Protective Claim: the risk of tipping-off becomes irrelevant. Or it may be that in the course of carrying out his duties, the conflict liquidator informs the creditors (in a way which may result in the information becoming public) about what he considers that the directors did and did not discuss at their board meetings or about the enquiries which he has ascertained the Administrators did and did not make relevant to the validity of the HAL Debenture. It may then be unnecessary, in the interests of justice, for the Judgment to remain private. All of that is, of course, for another day."*

23 These two paragraphs identify succinctly the reasons for the implementation of the confidentiality regime. Significantly, they do not make reference to Sections 447 and 449 of the 1985 Act as playing any part in the reasons for its introduction. They set out in detail the background circumstances that prevailed at the relevant time. The Learned Judge specifically referred to the fact that it may be appropriate to release the judgment at some time in the future. In this regard he no doubt had in mind that there would come a time when these investigations were concluded one way or the other. This could be either by virtue of the issuing of applications for relief which included the various allegations referred to or their abandonment, in which case the perceived prejudice to those parties would disappear.

24 Mr Gledhill QC also submitted that in the case of the disciplinary proceedings against the former Original Liquidators, it is inevitable that the 7 June 2018 judgment will be referred to the Tribunal in any event. Consequently, the investigations into their conduct are no longer continuing. Therefore, there is no justification to withhold the judgment from the public and indeed, the Respondent, being the remaining liquidator, has indicated through his solicitors that he has no objection to the relief currently being sought. Finally, Mr Gledhill QC submitted that any claims against the Directors have also been discontinued. They have had the opportunity to present their side of the story and face the allegations

that were made against them head-on. There is no prejudice against them that could justify the withholding of the 7 June 2018 judgment and as a result they do not appear to oppose the relief sought.

25 The Applicant filed evidence from his solicitor Mr Adam Brown of Jones Day who deposed to the fact that the historic justifications for the introduction of the confidentiality regime had fallen away and therefore the time had arrived as foreshadowed by the Learned judge for the restrictions it imposed to be lifted. Mr Brown indicated that this is having a prejudicial effect upon the ability of the Applicant to obtain litigation funding by virtue of the continuing obligation to obtain undertakings by way of non-disclosure agreements that many funders have been unwilling to subscribe to. It also appears that the Applicant wished to convene a creditors' committee but the creditors who would be suitable candidates were similarly unwilling to sign up to the non-disclosure agreements such that it has not been possible to establish a formal liquidation committee in accordance with the Rules. The current regime is also interfering with the administration of the claims themselves. If it continues, it is believed that it may cause logistical difficulties by certain parties (including the Applicant) having un-redacted copies of the judgment, whilst others such as Darty do not. This would result in there being a disparity of information between the parties which, if the confidentiality regime were to continue would create difficulties in the conduct of any hearings and proceedings in the future. Specifically, this may affect the efficient conduct of the preference proceedings to which I have previously referred. Finally, the Applicant would suffer prejudice in putting his case if he wanted to refer to the redacted paragraphs in any evidence he wished to serve upon Darty in connection with the preference claim.

26 Mr Gledhill QC emphasised the Learned Judge's reference to the fact that in due course in may be appropriate to release the judgment. He referred to a subsequent hearing that took place in private before Mr Justice Nugee in relation to the Rule 6.48 Application on 11 October 2019. The judge on that occasion commented that it did not seem obvious to him why the proceedings should continue to be heard in private (though he did accede to the agreed request of the parties for this to take place), but he directed that his judgment should not be sealed.

27 The IS puts its case on two bases. Their primary position is that redactions refer to information obtained in relation to an investigation which had used powers conferred by the Secretary of State to acquire documents and information pursuant to the power to require the production of documents and information pursuant to the provisions of Section

447 of 1985 Act and the provisions for the security of any information or documents obtained as set out in Section 449 of the same Act.

28 Section 449 of the Act "***Provision for security of information obtained"*** provides as follows:

> *(1) This section applies to information (in whatever form) obtained–*
>
> *(a) in pursuance of a requirement imposed under section 447;*
>
> *...*
>
> *(2) Such information must not be disclosed unless the disclosure–*
>
> *(a) is made to a person specified in Schedule 15C, or*
>
> *(b) is of a description specified in Schedule 15D*
>
> *...*
>
> *(6A) A person guilty of an offence under this section is liable–...*
>
> *...*
>
> *(9) This section does not prohibit the disclosure of information if the information is or has been available to the public from any other source.*

29 Mr Sheppard on behalf of the IS referred me to certain gateways for disclosure set out in legislation. He referred me to Schedules 15C and 15D which he prayed in aid of his submission as to the strictness of the regime. They are as follows:

> *19 A disclosure with a view to the institution of, or otherwise for the purposes of, proceedings before the Competition Appeal Tribunal.*
>
> *33 A disclosure with a view to the institution of, or otherwise for the purposes of, civil proceedings arising under or by virtue of the Financial Services and Markets Act 2000.*
>
> *36 A disclosure for the purpose of enabling or assisting an official receiver (including the Accountant in Bankruptcy in Scotland and the Official Assignee in Northern Ireland) to exercise his functions under the enactments relating to insolvency.*
>
> *37 A disclosure for the purpose of enabling or assisting the Insolvency Practitioners Tribunal to exercise its functions under the Insolvency Act 1986.*
>
> *41 A disclosure with a view to the institution of, or otherwise for the purposes of, criminal proceedings.*

*42 A disclosure with a view to the institution of, or otherwise for the purposes of, proceedings on an application under section 6, 7 or 8 of the Company Directors Disqualification Act 1986.*

*43 A disclosure with a view to the institution of, or otherwise for the purposes of, proceedings before the Financial Services and Markets Tribunal.*

30 However, it was his position that the terms and effects of the legislation prohibited disclosure of that information unless it was through one of the gateways set out in Section 449. He asserted that this was wide enough to cover the power of the court application before me and that the language of the case law referred to disclosure and the grant of access to the Court file synonymously, such that the legislation would preclude the Court from exercising its discretion to permit the publication of the un-redacted judgment. The conundrum that arises is that it is common ground that the IS disclosed information it obtained as a result using the powers conferred upon it by Section 447 to the ICAEW. They in turn used it in connection with their intervention in the application made before the Learned Judge. As a result, it was referred to in the judgment.

31 Mr Sheppard also took me to the relevant provisions that deal with the disclosure of information that had found itself on to the court file and the basis upon which the Court will permit inspection of it. In this respect, there was no real dispute between the parties as to the test the Court has to deploy before exercising its discretion in the context of maintaining the principle of open justice. Specifically, he referred me to CPR Rule 5.4C which reads:

*(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), subject to paragraph (1B).*

*(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.*

32 That provision introduced a discretion that was considered by Lady Hale in *Cape Intermediate Holdings Limited - v - Dring* [2019] UKSC 38 in which she said at paragraph 10:

*"When exercising its discretion under CPR rule 5.4C(2) or the inherent jurisdiction, the court had to balance the non-party's reasons for seeking disclosure against the party's reasons for wanting to preserve confidentiality. The court would be likely to lean in favour of granting access if the principle of open justice is engaged and the applicant has a legitimate interest in inspecting the documents. If the principle of open justice is not engaged, then the court would be unlikely to grant access unless there were strong grounds for thinking it necessary in the interests of justice to do so."*

33 He went further to refer to paragraph 39 where Lady Hale cited with approval of the case of *R (Guardian News and Media Limited) – v – City of Westminster Magistrates Court (Article 19 intervening)* [2012] EWCA Civ 420 at [85]:

> *"Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson JSC observed in Kennedy v Information Comr (Secretary of State for Justice intervening) [2015] AC 455, para 113, the court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."*

34 He referred to the dual purpose of the principle of open justice so as to allow scrutiny of the Courts and inform the public as to how the judicial system works. At paragraph 38, he referred me to the statement of Lady Hale in which she said:

> *"In evaluating the grounds for opposing access, the court would have to carry out a fact-specific proportionality exercise".*
>
> This will involve balancing:
>
> "*the purpose of the open justice principle and the potential value of the information in question in advancing that purpose"* [45]
>
> and:
>
> "*any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others"* [46].

35 Finally, he referred to the provisions of the wording of Rule 12.39(6) of the Rules which requires the Court's permission for the publication of the matters on the Court file, but does not give the Court any additional powers beyond the discretion in CPR 45.4C which

reflected the common law provision and does not alter the necessary balancing exercise for that discretion as was described. As a consequence, the IS's primary position on this application was that the Court cannot grant access to documents and information acquired pursuant to a Section 447 request. He indicated that the effect of Section 449 is to prohibit the disclosure of information unless it falls within one of the gateways he identified. If it does not, the information is protected from any disclosure.

36 The alternative basis upon which he put his case is that there was a balancing exercise that had to be carried out in which the factors against granting access greatly outweighed the factors in favour of so doing. In this respect, he prayed in aid the risk of harm if access to the un-redacted judgment was granted on the basis that it was a core part of the process pursuant to a Section 447 request that those who are the subject of enquiries would have the assurance of confidentiality given to interviewees and any party cooperating with investigators. This he said was particularly important in the high-stakes circumstances in which enquiries are necessarily conducted and where interviewees may well be giving evidence against colleagues and their employer. If this was interfered with, this would have a significantly deleterious effect. He prayed in aid of this submission the particular importance in the current case where the Section 447 enquiry was unusually large and wide-ranging due in part to the size of the company in question, a fact which he asserted was well known and within judicial knowledge.

37 He sought to criticise the position adopted by the Applicant as set out in Mr Brown's evidence on the basis that there was no basis for the Court to assist him in relation to its funding agreements by making inroads into a policy of confidentiality behind the statutory regime of the Act. He indicated that it was for the funder and the additional liquidator to reach an alternative arrangement which took into account the relevant statutory and regulatory framework. This he said was also relevant in relation to the Applicant's attempts to form a liquidation committee under the Rules. The fact that the un-redacted judgment had already been provided to certain parties did not, he said, justify further disclosure and dismissed the complaints that the disparity of information did not fall under the particular types of gateway as provided for in Section 449. This in turn meant that in the exercise of discretion, when weighing the potential harm of terminating the confidentiality against the reasons prayed in aid of the relief sought in the application, this imposed an obligation upon the Court to consider that the prohibition on disclosure under Section 449 reflects the public policy of confidentiality crucial to the integrity of the documents and information obtained pursuant to the Section 447 request. If the un-

redacted judgment was made public, this would cause clear harm to that policy. Parliament had enacted specific gateways, none of which were engaged and if wrongful disclosure took place the imposition of criminal liability upon a perpetrator reflected the concern that existed. He finally invited me to find that the redaction of the two paragraphs would not necessarily impede the Applicant's ability to obtain funding and pursue its claim against Darty and further did not provide a compelling reason of open justice.

38 In reply to these submissions, Mr Gledhill QC indicated that the un-redacted judgment was generally available and had been disclosed pursuant to the permission granted by the court on applications issued by a number of interested parties. Once disclosure had taken place, he said the provisions of the 1985 Act cease to be relevant. The IS may have given the information it had obtained pursuant to a Section 447 request to the ICAEW with the intention and knowledge that it would be deployed at the hearing before the Learned Judge. However, the fact that the hearing was heard in private and the 7 June judgment was sealed may have provided the IS with the desired effect of keeping certain matters confidential, but that is not synonymous with the court having reached that determination through its consideration of the statutory gateways identified by the IS. There is no evidence of the Learned Judge having given any consideration to that issue at all.

39 I was referred by Mr Gledhill QC to the decision of Mr Justice Morgan in *V-v-T* [2014] EWHC 3432. His judgment makes it clear that derogations from the fundamental principle of open justice can only be justified in exceptional circumstances when they are strictly necessary to secure the proper administration of justice. The Applicant contends that there are no such exceptional circumstances in the present position. The proper administration of justice requires that the proceedings continue openly and with full transparency.

**Discussion**

40 The principle of open justice is fundamental to the integrity of the judicial system. As both parties indicated to me, it is vitally important for the administration of justice and the introduction of confidence in the judicial system in the context of holding it to account. The Court should be reluctant to derogate from this principle. There was no disagreement on that principle.

41 Plainly, during the course of any investigation, the confidence in maintaining the integrity of information gathered until the appropriate time for it to be properly deployed and disclosed is crucially important. This principle applies just as much to an enquiry conducted as a result of an office holder's statutory duties to investigate for the benefit of

the estate and its creditors as it does in relation to the enquiries conducted by a statutory body such as the IS in the performance of its statutory duties. However, as with most investigations, proceedings of some description will follow as is indicated in relation to the exceptions that the legislation provides for. It was not explained to me upon what basis the IS disclosed the information to the ICAEW, but the fact is that they did. In addition, it is clear that when introducing the confidentiality regime, the Learned Judge clearly anticipated that there may come a time for the judgment to be disclosed in an un-redacted form.

42 The issues consequent upon trying to ensure that any consequential redactions in crafting a judgment make sense were discussed before the judge as outlined in the extract from his judgment set out above. By virtue of the provisions of paragraphs 20 and 21 of his judgment, the Learned Judge was disinclined to follow this course. Instead, he clearly anticipated that once the historic justification for its introduction had fallen away then the confidentiality regime itself may also fall away. In the meantime, his order protected the position for certain specified purposes. It provided a mechanism for parties to apply for permission to obtain relevant documentation subject to fulfilling the conditions. A number of parties successfully availed themselves of this opportunity to make the appropriate application. In consequence, the Court remained in close control of the release of information.

43 I am not satisfied that the regime under Sections 447 and 449 has the effect of inhibiting the exercise of the discretion of the Court in the way advanced by Mr Sheppard in support of the primary case advanced by the IS. The purpose of the provisions is to maintain the integrity of an investigation such that disclosure can be controlled by the appropriate investigating body, in this case the IS. However where, as in this case, information is supplied by such a body for the purpose of a hearing conducted in a court of competent jurisdiction, it must thereafter rely on the supervision by the Court on the issue of the maintenance of confidentiality if it is appropriate for it to continue.

44 The IS was aware of the order that the Learned Judge had made and the reasons for it. It could have appeared before the court on the confidentiality hearing and made submissions based on its primary case before the Learned Judge on that occasion. However, it did not adopt that course and furthermore, neither did the ICAEW itself make submissions of a similar nature to the Court when the confidentiality regime was formulated. Instead, it is clear from the reasoning of the Learned Judge that it was to remain in place until such time as it was appropriate for it to be lifted. That is inconsistent with a regime advocated by

the IS on its primary case that would have the effect of placing the interests advanced by the IS unassailably above the interests in preserving the principle of open justice.

45 It is clear from his judgment that the Learned Judge had in mind the protection of the integrity of the investigations that the Liquidators had carried out and the effect that it may have on any claims that they may wish to bring. The use of the information that was received from the IS pursuant to their statutory powers and the manner in which they now seek to protect it, was never raised before him. That in my view is consistent with the view that once it has been lawfully disclosed and has been referred to in these proceedings, the relevance of Sections 447 and 449 falls away. As a result, I accept the submissions made by Mr Gledhill QC that those provisions fall away once an authorised disclosure has been made. It then becomes a matter for the exercise of the Court's discretion, having regard to the principles of open justice in relation to the lifting of any confidentiality regime.

46 In applying the test set out by Lady Hale in *Cape Intermediate Holdings Limited - v - Dring*, I accept the reasons identified in the evidence contained in the witness statement of Mr Brown filed in support of the application, where he explains the difficulties the Applicant will suffer should the regime continue. I also accept the submissions that have been made concerning the fact that the original justification for the introduction of the confidentiality regime has fallen away. It has now served its purpose.

**Conclusion**

47 Accordingly, having taken all matters raised in the evidence into account, it does seem to me appropriate that the time has now arrived for an order to be made that the confidentiality restrictions should no longer apply in the manner that is sought by the application. As a result, I will make an order in its terms. I invite the parties to submit to me an appropriate draft for approval. I will hear them on the terms of any other consequential relief that may be required.