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Case No: 2012 FOLIO 1356

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

SIMON GOODLEY	**Applicant**
- and -	
THE HUT GROUP LIMITED	**Respondent (Claimant)**
- and -	
(1) OLIVER NOBAHAR-COOKSON **(2) BARCLAYS PRIVATE BANK & TRUST LIMITED (acting as trustee of Oliver's Sebastian led Trust 2011, formerly the Oliver Nobahar-Cookson Trust)**	**Respondents (Defendants)**

Jude Bunting (instructed by Guardian News & Media) for the **Applicant**
Tim James-Matthews (instructed by **Harbottle & Lewis LLP)** for the **Respondent (Claimant)**

Hearing date: 30 April 2021

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11 May 2021 at 10:15am.

Mr Justice Calver:

Background

The Application

1. In November 2014 Mr. Justice Blair gave judgment in *The Hut Group Limited v Nobahar-Cookson and Barclays Private Bank and Trust Limited* [2014] EWHC 3842 ("the Blair judgment"). This is the hearing of an application dated 25 September 2020 by Simon Goodley, a journalistic reporter who works for The Guardian newspaper, for an order of the court that the Claimant to that action, The Hut Group Limited ("THG"), do provide him with a copy of the "Project Hydrogen" report which is referred to in paragraph 222 of the Blair judgment, pursuant to CPR 5.4C(2) and/or the court's inherent jurisdiction.

The dispute leading to the Blair judgment

2. The Blair judgment concerned a dispute arising out of a Share Purchase Agreement ("SPA") under which THG purchased a company trading as MyProtein from the Defendants for a combination of cash and shares in THG. THG contended that the financial position of MyProtein was not as warranted in the SPA and claimed damages for the loss caused as a result. For its part the Trustee of Mr. Cookson's family trust, Barclays Private Bank and Trust Limited, ("the Second Defendant") contended that the financial position of THG was not as warranted in the SPA, which THG admitted. However, there was a cap in the SPA on liability for breach of warranty not resulting from THG's fraud ("the cap") and the Second Defendant alleged that its losses exceeded the cap. It therefore alleged that THG's admitted breach resulted from the fraud of THG and also that it had been deceived into entering into the SPA.

3. In awarding THG damages, Blair J found that MyProtein's Management Accounts had not fairly presented its financial position in virtually all the respects alleged by THG and he rejected the Defendants' case that timely and adequate notice had not been given of THG's breach of warranty claim. As to the counterclaim, it was common ground that THG's admitted breach of warranty resulted from the fraud of a former employee of THG and the Judge held that his fraud was to be attributed to THG for the purposes of the relevant provision in the SPA – accordingly, the Second Defendant was entitled to recover more than the cap. However, the Judge rejected the allegation that a current employee and former director of THG had known of and/or participated in the fraud and dismissed the allegation of deceit.

4. In particular, Blair J stated as follows in his judgment:

> "The fraud uncovered
>
> 44. On 16 September 2011, in relation to work on the accounts to 30 June 2011, PwC uncovered fraud in THG's accounts department. An investigation by the company ensued, which was in part PwC led, with independent participation, and included formal interviews conducted with the people concerned.

45. It is common ground that the position is summarised in a draft report prepared for the company by PwC on 16 December 2011 (the "Project Hydrogen" report) under the heading "Falsification of documentation". The summary is set out below. In brief, PwC state that on 16 September 2011, it came to their attention that there had been a falsification of documentation provided to it in its capacity as the Group's auditors. The Financial Controller, Mr McCarthy, had been manipulating profitability, on a monthly basis, by overstating off-line stock and debtors, and understating liabilities. In addition, an initial review revealed a number of occasions where it was apparent that PwC had been misled by the finance team.

46. PwC records that it then switched its focus to the audit of the year ended 31 December 2010. This "resulted in a number of further issues being identified". Before adjustments, EBITDA (earnings) had been stated as £4.1m. Following adjustments, the figure was restated as an LBITDA (loss) of £1.5m. There was also an adjustment to the 2011 management accounts, though no definitive revised accounts for the quarter are in evidence.

47. PwC state, "The IPO process having been halted, we focused with management on the finalisation of the 31 December 2010 financial statements. This involved re -performance of those areas of our audit work were [sic] there was the risk of further document falsification, as well as adjusting for the areas of falsification of accounting records identified in the investigation …". The accounts were filed on 30 September 2011, right at the end of the permitted period.

48. PwC noted "that the people associated with the falsification of documentation and accounting records have now left the business". Mr McCarthy had been dismissed for gross misconduct on 18 October 2011. Another employee in the finance department, Mr Sajith Hevamanage, was dismissed for the same reason, and others were given final warnings.

49. In early October 2011, Mr Rajanah was placed on gardening leave, returning at the end of November. The circumstances are in dispute between the parties.

50. Mr Cookson said in his evidence, "I was in total shock and dismay. Whilst I thought I had got involved with a highly profitable and attractive business, this could not have been further from the truth. It was my worst nightmare and I felt robbed and cheated". I accept that this is how he did in fact feel.

51. It must also have been a severe blow to THG's top management, particularly Mr Moulding. He said in his evidence that he was shocked when Mr Whitehead told him on 16 September 2011 of the falsification that PwC had uncovered which raised concerns about THG's accounts generally. I accept that this is how he did in fact feel.

52. Though THG suggested at trial that market conditions may have played their part in the abandonment of the proposed IPO, I am satisfied that the reason that the IPO went off was the fraud and the discovery of the losses concealed by the fraud.

> 53. A further consequence of the discovery of the losses was that Barclays was asked to waive THG's compliance with its banking covenants, which it did following a report by Deloitte under the name "Project Napoli". I infer that THG secured PwC's agreement to sign off its 2010 accounts on the "going concern" basis by arranging an equity injection from its shareholders at a price of £17.46 per share on 30 September to 4 October 2011. This compared with a price of £57.71 per share in the share issue on 31 May 2011 which funded the purchase of Cend."

5. At paragraphs 222-223 of his Judgment, Blair J returned to this topic as follows:

> *"**The accounting fraud***
>
> 222. As stated above, it is common ground that the position is summarised in a draft report prepared for the company by PwC on 16 December 2011 (the "Project Hydrogen" report) under the heading "Falsification of documentation". The summary is as follows:
>
> > "*Falsification of documentation*
> >
> > On Friday, 16 September 2011, it came to our attention that there had been a falsification of documentation provided to us, in our capacity as the Group's auditors and Reporting Accountants. In the first instance, this led to the Group Financial Controller [Mr McCarthy] being suspended. In that same week, the remaining members of the finance function produced the management accounts for the month to 31 August 2011. The results that were produced were some £2.3m below the results that were anticipated based on the daily sales information. The explanation for this variance was that the Financial Controller had been manipulating profitability, on a monthly basis, by overstating off -line stock and debtors, and understating liabilities.
> >
> > Management, led by John Gallemore, performed an initial investigation and determined that there had been a series of documents that had been falsified during the audits of the year ended 31 December 2010 and the period ended 30 June 2011. We had also been misled as to the recoverability of certain assets and the extent of unrecorded liabilities. The three key areas of manipulation were:
> >
> > **Offline stock**: At 31 December 2010, an entry had been booked to recognise £1.6m of 'off –line' stock which was either double counted within the system stock balance, or which had been sold prior to 31 December. Senior members of the finance team verbally represented to us that this stock was held at the Warrington warehouse. We are also aware of a number of falsified goods despatched and goods receipts notes to support inappropriate sales and purchases cut-off;
> >
> > **Unrecorded liabilities**: We became aware of a number of unrecorded liabilities at 31 December 2010. Upon investigation, it became apparent that members of the finance function (including the wider purchase ledger team)

had falsified a number of supplier statements and withheld certain invoices and supplier statements from us. The Financial Controller had also released a significant number of smaller accruals which would be below the audit materiality threshold; and

Recoverability of debtors: At 31 December 2010, a number of debtors … were recognised on the balance sheet. These items were either recognised early or were not recoverable, despite formal representations from senior members of the finance team to the contrary. In particular, we were previously told by management that the [X] debtors could not be reconciled to specific bank receipts and that the typical length of time between credit card payments and receipt of cash by The Hut was 4 — 5 days. John Gallemore's work revealed that the debtor could be reconciled to specific bank receipts and that the typical length of time between credit card payments and receipt of cash by The Hut is only 2 - 3 days. We also believe that we were provided with a number of falsified documents to support the recoverability of these balances.

In addition, an initial email review, as part of the investigation, revealed a number of occasions where it was apparent that we had been misled by the finance team. For example, the Financial Controller had instructed a number of members of staff not to respond to our queries around new category investment costs which were to be treated as exceptional. The previous finance team had formally represented to us that these staff members were involved in the development of new websites or categories and that it was appropriate to treat their salary costs as exceptional."

223. On 18 October 2011, Mr McCarthy, who was Financial Controller, was dismissed for gross misconduct. The reason given for his dismissal was the fraudulent amendment of accountancy statements submitted to auditors. Another employee in the finance team, Mr Sajith Hevamanage was dismissed for gross misconduct for the same reason. Mr Fuad Jishi was given a final written warning, as were two other members of THG's finance team."

Flotation plans for THG

6. At the time that this accounting fraud was carried out, THG was being prepared for a future listing by way of Initial Public Offering ("IPO") on the main market of the London Stock Exchange (Blair judgment, paragraph 12). Blair J found that the reason that the IPO "*went off*" was the "*fraud and the discovery of the losses concealed by the fraud*" (Blair judgment, paragraphs 52 and 200).

7. In August 2020, it was revealed that THG was preparing, once again, for flotation on the London Stock Exchange. Its founder and executive chairman, Matthew Moulding, was THG's chief executive in 2011 at the time of the events discussed in the Blair judgment. The new flotation led to journalistic reporting around the time of the flotation and afterwards concerning THG's business practices, including reporting of alleged "*corporate governance concerns*" in relation to companies about to be floated

on the stock market such as Boo Hoo Group and THG[1] and new reporting by Mr. Goodley about those concerns in the context of the Blair judgment[2].

8. In particular, in The Guardian article of 4 September 2020, it was reported that a THG spokesperson said in relation to the findings in the Blair judgment:

> "This historic matter related to the actions of two junior individuals back in 2011. Contemporaneous independent reviews and the court found THG was not aware of their actions nor the systems issue causing the reporting inaccuracy and [THG] took immediate corrective action on discovery.
>
> "At the time, the company was considering the option to list or raise money privately and had not engaged any investors prior to identifying the accounting system error.
>
> "A private placement was then completed in September 2011, which the Myprotein founder participated in."

9. It is said by the Applicant that one of the public interest points arising out of the trial, therefore, was the corporate culture in a major company as it prepared for flotation on the stock exchange, and that this public interest has been reignited by the flotation in September 2020. In consequence, Mr. Goodley is keen to see the full terms of the Project Hydrogen report, presumably to understand, amongst other things, how that culture had changed at THG at the time of the second (successful) decision to float the company on the stock exchange, and whether the public statement of THG regarding the "independent reviews" and the findings in the Blair judgment were justified.

10. Unsurprisingly, the court no longer holds a copy of the Project Hydrogen report on the court file. However, on 13 November 2020, THG confirmed that after checking the documents in their archive, THG's external lawyers do hold a copy of the report. THG invited Mr. Goodley to provide it with a copy of his draft application and any supporting material so that it could consider the application for disclosure to him of the report. Mr. Goodley pointed out that he had already sent it to THG on 8 October, but he re-sent it to THG in any event on 18 November 2020.

11. THG responded on 19 November 2020 and it said as follows:

> "Having considered the application and the supporting materials, it is apparent that The Guardian's request for the document has not been made in pursuit of the principle of open justice … but rather for other journalistic purposes. The Guardian is required to demonstrate why the provision now of the document, which is historic and relates to legal proceedings concluded many years ago, would advance the open justice principle. It has not done so. Accordingly, THG's

[1] The Telegraph: "Boohoo and The Hut Group try to appease City governance fears", 17th November 2020: https://www.telegraph.co.uk/business/2020/11/17/boohoo-hut-group-try-appease-city-governance-fears/

[2] The Guardian, "Hut Group cancelled 2011 flotation after multimillion-pound fraud was uncovered", 4th September 2020: https://www.theguardian.com/technology/2020/sep/04/hut-group-cancelled-2011-flotation-after-multimillion-pound-was-uncovered

position is that it would not be appropriate for THG to consent to the application in such circumstances."

12. On 12 January 2021 Moulder J directed that the application should be listed for an oral hearing, which came before this court on 29 April 2021, at which THG was represented by Mr. Tim James-Matthews of counsel and the Applicant was represented by Mr. Jude Bunting of counsel. The First and Second Defendants have not engaged with this application, though Mr. Goodley did (unsuccessfully) attempt to correspond with the First Defendant through his former solicitors in these proceedings. The First and Second Defendants were therefore unrepresented at the hearing.

The law

13. CPR 5.4C provides 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."

14. This application does not concern a request for the provision of a document from the records of the court; rather it is an application to the court for it to exercise its inherent jurisdiction to order the provision of a document from a party to the original action in which the document was placed before the court.

15. In *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 at [34] and [41], Lady Hale explained that the open justice principle applied to all courts and tribunals, and that aside from CPR 5.4C and except in so far as limited by statute or rules, the court has an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court. At [32] she stated as follows:

> "developments since *FAI*[3] also meant that it was within the inherent jurisdiction to allow access to "documents read or treated as read in open court" (para 107). This should be limited to documents which are read out in open court; documents which the judge is invited to read in open court; documents which the judge is specifically invited to read outside court; and documents which it is clear or stated that the judge has read (para 108)."

16. Lady Hale then explained at [42]-[43]:

> "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

[3] [1999] 1 WLR 984

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

17. At paragraph [44], Lady Hale went on to conclude that the open justice principle does not just extend to the written submissions and arguments, but also extends to the underlying documents. She stated:

> "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…."

18. At paragraphs [45]-[46] Lady Hale also explained the approach that a court ought to follow when determining an access request. She said:

> "45. However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in both *Kennedy* [2015] AC 455, at para 113, and *A v BBC* [2015] AC 588, at para 41, the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle" and "the potential value of the information in question in advancing that purpose".
>
> 46. On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain

> confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case." (emphasis added)

19. That stated, Lady Hale also emphasised at [38], citing Toulson LJ in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618 at [85] that:

> "[i]n a case where documents have been placed before a judge and referred to in the course of proceedings … the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong". In evaluating the grounds for opposing access, the court would have to carry out a fact-specific proportionality exercise. "Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others" (para 85)." (emphasis added)

20. There are illustrations in the case law, pre-dating the decision in *Dring*, of where access has been granted to documents placed before a judge, or on the court file, when they were sought for proper journalistic purposes as part of the open justice principle. Thus, in *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2004] EWHC 3092 (Ch), the case between Chan and Alvis settled after 8 days of hearing. The Guardian newspaper took an interest in the case and applied to be supplied with certain documents (pleadings, witness statements and exhibits) from the court file under CPR 32.13, CPR 5.4(5)(b) or under the court's inherent jurisdiction. Whilst during the hearing The Guardian chose to rely only upon 5.4(5)(b), as the Judge, Park J, explained at [16]:

> "As regards the court's inherent jurisdiction, Mr. Hudson, if I understood correctly, said that it was hard to see the inherent jurisdiction taking the matter any further than Rule 5.4, so he was content to rely solely on Rule 5.4. I accept that the court has an inherent jurisdiction but I think that my feeling about it is similar to Mr. Hudson's. Where there are two specific provisions identifying circumstances in which the court can order disclosure of documents but neither applies in a particular case, I find it very hard to imagine myself nevertheless invoking an inherent jurisdiction (the limits of which are nowhere set out with precision) in order to direct disclosure after all. The application is therefore based solely on Rule 5.4, and in particular on sub-paragraph (5)(b) of Rule 5.4."

That rule provided that:

> "Any other person [i.e. any person other than a party to proceedings] may -
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> (a) unless the court orders otherwise, obtain from the records of the court a copy of –
>
> (i) a claim form …..
>
> (ii) a judgment or order ….;

> (b) 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."

21. Park J then referred at [34] to the fact that:

> "In the present case there is no evidence from Alvis that it will suffer any particular damage if The Guardian obtains the documents which it wants to see. I am sure that Alvis, which certainly did not want to be sued by Mr. Chan and which has now settled the case, would much prefer it if The Guardian was not taking the interest which it is. Imagining myself in the position of Alvis, I believe that I would be unhappy about this application. However, the proceedings between Alvis and Mr. Chan were not a private arbitration. They were proceedings in open court, and unwelcome publicity for a defendant, including a successful defendant, is not uncommonly a consequence of such proceedings."

22. It was specifically argued by Mr. Chan (at [36]), in resisting the application for disclosure, that the principle of open justice has been supported primarily on the ground that it serves a public interest in that it operates as a form of scrutiny of how the judicial system operates. Counsel for Mr. Chan (Mr. Ritchie) therefore contended (at [36]) that:

> "The Guardian does not want to see the documents which it requests in order to place the judicial system under scrutiny, or to keep it under scrutiny. Nor does The Guardian want to publish a fair and accurate report of the case between Mr. Chan and Alvis down to the time that it was settled. What it wants is to explore the newsworthy story which its reporters perceived from some of the contents of Mr. Chan's skeleton: a story which was of little or no relevance to Mr. Chan's claim or to Alvis's defence."

23. As to this, Park J stated:

> "38. Factually I agree with what Mr. Ritchie says in those respects. I also agree with him that The Guardian over-egged the pudding by saying in its application notice that it wished to inspect and copy the documents "because GNL wished to prepare a fair and accurate report of the proceedings". In my judgment that was not the real reason…
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> 39. Moore-Bick J in the *Dian AO* case at paragraph 31 has noted that doing justice in public can have consequences which go beyond its primary objects:
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> > "Although…one consequence of observing the principle of open justice is that those who are present at a hearing may obtain access to information that they may be able to use to their advantage in other contexts, that is simply a consequence of doing justice in public. It is not one of its primary objects."
>
> 40. The judge in that passage referred to "those who are present at a hearing". However, he plainly had in mind also those who were not present at the hearing but are able to obtain information about what happened at the hearing by taking advantage of the avenues which the law makes available. That is precisely what

happened in the *Dian AO* case itself. In that case Moore-Bick J made an order under the then Rule 5.4(2) – essentially the same as the present Rule 5.4(5)(b) – for a non-party to a case to be given access to certain of the documents in the court file. The case had been settled some years previously. The non-party did not want the documents out of a desire to scrutinise justice or in order to give a fair and accurate report of the earlier case. It wanted access to them because it was itself involved in current litigation and it thought it possible that the documents from the earlier case, in which it had not been involved, could be useful to it in the current case, in which it was involved. The judge was of the opinion that the applicant did have "a legitimate interest in obtaining access to documents on the court record in so far as they contain information that may have a direct bearing on issues that arise in the litigation in the Caribbean". I note that in expanding on what he says there he adds this:

> "Moreover, I think that in the case of documents that were read by the court as part of the decision-making process the court ought generally to lean in favour of allowing access in accordance with the principles of open justice as currently understood…"

…

42. 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.

…

44. If it becomes a matter of whether the discretion is to be exercised under the rule, I can see that, if an application was made by a newspaper to inspect the court file of an old and stale case, the court might be inclined to refuse. But this case is not like that."

24. In the present case, Mr. James-Matthews made clear that he was not suggesting that *Chan* was wrongly decided, but rather that in this case the Applicant wanted the documents not to further the purposes of the open justice principle, but rather for his own journalistic purposes in respect of an old and stale case.

25. More recently, in *NAB v Serco Limited* [2014] EWHC 1225 Bean J (as he then was) adopted a similar approach to Park J in ordering disclosure to The Guardian newspaper of a copy of a document (an internal investigation report) disclosed by Serco in its proceedings against NAB (that document having been referred to in open court). The Serco internal investigation report concerned the allegations made by an immigration detainee that a male nurse employed by Serco had sexually assaulted her. The Guardian was interested in a story concerning whether these allegations were properly investigated by Serco. The application was made pursuant to CPR 31.22(1)(b) and/or pursuant to the principles in the *Guardian News and Media* case.

26. Bean J applied the principles set out in the *Guardian News and Media* case, and referred in particular to paragraph 85 of Toulson LJ's judgment. He concluded by stating as follows at [43]:

> "The *Guardian* has a proper journalistic purpose in seeking to inspect a document which they believe may throw light on whether or not the allegation was properly investigated… the Guardian should be allowed access to the report and should be free to publish its contents."

Submissions of the parties

Applicant's submissions

27. In his Application Notice, Mr. Goodley states as follows:

> "I require sight of this document for journalistic reasons including:
>
> (a) to better understand the matters referred to in the trial.
> (b) to more fully understand how the company and its advisers viewed these accounting issues and internal controls ahead of a flotation and therefore fairly and accurately report on them. The judge referred to the document I am seeking in paragraph 222 of his judgment, in which the summary of that document is set out under a subheading of "Falsification of documentation".
> (c) for the journalistic purpose of reporting on how certain companies might deal with the discovery of fraud ahead of a planned flotation.
> (d) to obtain further information about this matter that may assist in further journalistic investigation."

28. In paragraph 20 of Mr. Bunting's skeleton argument on this application, he contends as follows:

> "…In fact, it is clear that Mr Goodley's aim is to further the open justice principle. In particular:
>
> a. Mr Goodley seeks to report about this trial; to further bring it to the attention of the public and to enable the public to assess whether justice was done. He has explained, in his application notice, the reasons why he needs access to the report to do so.

> b. Mr Goodley's aim is to enable the public to understand how the justice system works. This involves enabling the public to understand why decisions are taken. It cannot do so without access to the primary evidence about the fraud in issue in this trial.
>
> c. Mr Goodley seeks to report about the trial and to contextualise it in the Claimant's recent flotation on the London Stock Exchange. In such circumstances, there is a strong need for accurate reporting. This requires Mr Goodley to see and understand the primary basis for Blair J's findings about the nature and extent of the fraud on the last occasion when the Claimant was seeking flotation on the London Stock Exchange.
>
> d. Finally, he seeks to explore whether the contents of the report give rise to other grounds for journalistic inquiry. The Claimant is wrong to suggest that this purpose is not the purpose of the open justice principle.
>
> 21. It is clear that Mr Goodley is a serious journalist engaged in proper journalistic inquiry. The strong default position set out in the authorities applies.
>
> 22. In the circumstances, the second issue for the Court is whether there is any strong countervailing factor to outbalance this strong default position. None has been identified. Although the Court no longer holds a copy of the report, the Claimant's external solicitors do. They should therefore be able to quickly provide a copy of it to Mr Goodley if the Court should so order."

29. In oral submissions to the court, Mr. Bunting contended that this is a focussed application in which the Applicant seeks only one document. The court should order that it be provided as a matter of its inherent jurisdiction, as the court ordered disclosure in *Chan* and *NAB*. Both cases, he submits, demonstrate that proper journalistic interest in reporting a newsworthy aspect of proceedings even after those proceedings have finished has been treated by the courts as advancing the open justice principle. Toulson LJ's judgment in *Guardian News and Media* at [76]-[77] and [85] also confirms this fact. Mr. Bunting submits that as in that case, here too The Guardian has a proper journalistic purpose in seeking access to the documents. It wants to be able to refer to them for the purpose of stimulating informed debate about corporate governance issues. The public is more likely to be engaged by an article which focuses on the facts of a particular case than by a more general or abstract discussion. THG's stark submission that journalistic interests are not germane to the open justice principle is simply wrong.

30. Mr. Bunting submits that *Dian AO v Davis Frankel & Mead* [2005] 1 WLR 2951, relied upon by THG, is a different case altogether as it was not an application by a journalist, but rather by a third party for its own purposes for access to all of the court file. That did not engage the principle of open justice (at [31]). Even then, the court granted access to some of the documents on the court file (at [60]). *Dian* was specifically considered by the court in *Chan* at [40].

THG's submissions

31. In paragraph 2 of its written submissions to the court on this application, THG accepts that, if the open justice principle is engaged, there is jurisdiction to order THG to

provide a copy of the Project Hydrogen report to Mr. Goodley, despite the fact that the Blair judgment was given some 6 years ago and the document is now only in the hands of THG. It is right to do so. The *Guardian News and Media* case also confirms that even in the absence of a relevant statutory power, unless they are precluded by statute, the courts have power at common law to grant access to documents if the open justice principle requires this. As Lady Hale stated in Dring at [41], "*all courts … have an inherent jurisdiction to determine what [the open justice principle] requires in terms of access to documents or other information placed before the court … in question*."

32. However, THG opposes the application because, as Mr. James-Matthews contends on its behalf, Mr. Goodley does not require the Project Hydrogen report in order to give effect to the constitutional principle of open justice but, rather, for other different journalistic purposes, which is not sufficient. THG contends that this is apparent from his Application Notice. It says that all of the matters referred to in it may be the proper subject of journalistic investigation, but none of them advance the open justice principle. The document is not sought so as to enable scrutiny of the trial, the judgment or the justice system. The burden rests on the Applicant to show that the document sought will advance the open justice principle.

33. THG further submits that the reasoning of Blair J is set out in a long judgment in which the key findings of the Project Hydrogen report are extracted. The accuracy of those findings were common ground in the proceedings. The report is not a document of any significant controversy. It is not therefore necessary to test Blair J's conclusions against what is said in the report.

34. THG accepts that the purposes of the open justice principle are not limited to the two identified by Lady Hale in *Dring* (as Lady Hale refers to the "*principal"* purposes and states that "*there may be others*"), but it submits that any other purposes must relate to or concern the court proceedings in which disclosure is sought. The purpose of advancing public interest journalism, whilst an ancillary benefit of the open justice principle (see *Dian* at [30]-[31]), is not one of its core concerns. An appeal to the court's inherent jurisdiction will require particular justification, THG submits, where there is a significant passage of time between the conclusion of the court proceedings and the making of the application for disclosure, as the primary purpose of advancing the open justice principle is likely to diminish over time.

35. THG further contends that although Mr. Goodley says that he wishes to see the Project Hydrogen report to better understand the matters referred to in the trial, it is plain that this purpose is not related to the open justice principle. He is not seeking to understand or report on the Blair judgment in 2014 but rather to report on current matters relating to THG's flotation in September 2020. This may or may not be public interest journalism, but it does not advance the open justice principle.

36. THG seeks to distinguish *Chan* in that in that case the court was exercising its statutory jurisdiction under CPR 5.4 and so it did not need to consider the threshold question of whether the reasons as to why the documents were sought were related to the open justice principle. The application in Chan was made one week after the proceedings were compromised, whereas here the application is made 6 ½ years later.

37. THG finally contends that the court's jurisdiction to permit third parties, including journalists, to obtain copies of documents (where no express provision is made in the rules) is limited to situations where this would advance the purposes of open justice. It is not a general jurisdiction to provide access to court records for any other purpose. The court can only provide documents where either this is expressly permitted by the CPR or the provision of the documents falls within the common law open justice principle explained in *Dring*. Mr. Goodley's request does not fall under either head.

Discussion

38. Before turning to the substantive issues raised by this application, I must address one preliminary issue. That is to emphasise that whenever a contested application arises for a non-party to proceedings to be granted access to documents on the court file or which have been referred to in open court, the default position is that there will need to be an oral hearing of the application. The complexity of the balancing exercise that must be conducted by the court means that such an application will not be suitable to be determined on paper, as the parties had proposed in this case (which Moulder J rightly refused to sanction).

39. In my judgment, the starting point must be that, since the Project Hydrogen report was placed before Mr. Justice Blair and he specifically referred to it as a central finding in his judgment, the default position is that access should be permitted to it on the open justice principle; and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong.

40. However, it is important to appreciate that although the court has the power to allow access, the Applicant has no right to be granted it. It is for the Applicant seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In evaluating THG's grounds for opposing access, this court has to carry out a fact-specific proportionality exercise. In carrying out that exercise in the instant case, central to the court's evaluation will be (i) on the one hand the purpose of the open justice principle and the potential value of the material in advancing that purpose and (ii) on the other hand any risk of harm which access to the documents may cause to the legitimate interests of others.

41. As explained above, whilst the purposes of the open justice principle are at least twofold, as Lady Hale stated in *Dring*, there may be others. I do not consider, therefore, that every case has to be artificially fitted into the straightjacket of one of the two purposes of that principle identified by Lady Hale, namely (i) 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—and (ii) to enable the public to understand how the justice system works and why decisions are taken.

42. In the present case the Applicant seeks to report about the trial and contextualise it in the Claimant's recent flotation on the London Stock Exchange. He says that accurate reporting requires him to see and understand the primary basis for Blair J's findings about the nature and extent of the fraud on the last occasion when the Claimant was seeking flotation on the London Stock Exchange. On any view, this is a serious journalistic issue of public interest.

43. In my judgment, the direction of travel of cases such as *Chan*, *NAB* and *Guardian News and Media* leads to the conclusion that the court has the power, as part of the open justice principle, to allow a journalist access to a document which has been referred to in open court and which he/she requests for a proper journalistic purpose, unless affording access to the document is outweighed by the risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

44. Very often, a proper journalistic purpose will fall within one of Lady Hale's two principal purposes of the open justice principle. But even if it does not, in my judgment the open justice principle will nonetheless typically be advanced by disclosure to a journalist in pursuit of a serious journalistic story of a document referred to in open court which may be germane to that story. It will then be for the respondent to demonstrate that disclosure of the document may cause harm to the judicial process or the legitimate interests of others.

45. In fact, in my judgment part, at least, of Mr. Goodley's broad aim in seeking disclosure of the Project Hydrogen report is indeed to scrutinise and publicise the way in which Blair J reached his decision (in the context of the public interest topic with which he is presently concerned), and to understand more fully the background as to why he decided the case in the way that he did. In this way, therefore, I would find (if necessary) that Mr. Goodley's application broadly meets the requirements of both of Lady Hale's two *principal* purposes of the open justice principal. In short, Mr. Goodley wishes to gain a deeper understanding of the findings of Blair J so as to report accurately on issues of public interest arising out of the further recent flotation of THG, in particular how such companies deal with the discovery of fraud ahead of a planned flotation.

46. But regardless of whether the application can be said to fall neatly within one or both of Lady Hale's two principal purposes, I consider that to order disclosure of this report, which was specifically relied upon by Blair J in his public judgment, for this proper journalistic purpose, does indeed advance the open justice principle.

47. This conclusion is not undermined by the fact that the Blair judgment is now some 6 ½ years old, as its subject matter (the attempted flotation at that time of THG in the context of an accounting fraud) has become a matter of *current* public interest by reason of recent events (the current flotation of THG in the context of corporate governance concerns of such companies upon flotation). The underlying issues with which the judgment deals are not stale; they have once again become of contemporary interest.

48. My conclusion is fortified in this case by reason of the fact that THG does not suggest that there is any risk of harm which disclosure of this report may cause to the maintenance of an effective judicial process or to its own legitimate interests. It follows that there is nothing to weigh on the other side of the scales, by way of harm, to balance against the value of the report in advancing the open justice principle.

49. In all the circumstances, I grant the application in the terms of the draft order which is before me.