IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. GC 20 OF 2021(IKJ)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF GCR O.53

BETWEEN:

(1) **MAPLES CORPORATE SERVICES LIMITED**

(2) **MAPLESFS LIMITED**

Plaintiffs

AND

CAYMAN ISLANDS MONETARY AUTHORITY

Defendant

IN CHAMBERS

Appearances:

Mr Paul Bowen QC instructed by Mr Adam Huckle of Maples and Calder (Cayman) LLP on behalf of the Plaintiffs

Mr Hector Robinson QC and Ms Laura Stone, Mourant Ozannes (Cayman) LLP, for the Defendant (the "Authority"/ "CIMA")

Before: The Hon. Justice Kawaley

Heard: 10 August 2022

Draft Judgment circulated: 18 August, 2022

Judgment Delivered: 24 August 2022

HEADNOTE

Judicial review-application by Plaintiffs to inspect documents contained in Defendant's List of Documents- whether documents admittedly relevant- whether Court should decline to order production on case management grounds-Court's duty to promote settlement and public law proceedings-Grand Court Rules, Preamble paragraph 4.2(d), Order 24 rule 10

RULING ON PLAINTIFFS' APPLICATION FOR PRODUCTION OF SPECIFIC DOCUMENTS

Background

1. On August 10, 2022, at the hearing of various Directions Summonses, the proceedings generally were adjourned on terms designed to encourage the parties to explore, through alternative dispute resolution ("ADR") mechanisms of their own choosing, ways of narrowing the disputed grounds in this case if not resolving them altogether. The ADR directions were proposed by the Plaintiffs and not eagerly embraced by the Authority, which is understandably keen to avoid any appearance that its duties of independence and its obligation to deal with various regulated entities in a consistent manner is not compromised in any way.

2. As I explained when granting those directions, I was unable to accept that the public law character of the present proceedings had the legal effect of exempting the parties from the general duty to attempt to settle cases or the Court to assist parties to do so. The Court's duty is found in the Preamble to the GCR (paragraph 4.2(d)); the parties' duty to seek to settle public law proceedings in particular is found in Practice Direction No. 4 of 2013 ("*Pre-Action Protocol for Judicial Review*"). Persuasive authority supportive of this conclusion may be found in *R (Cowl)-v- Plymouth City Council* [2002] 1 W.L.R. 803 (at paragraphs 1-3, 14), upon which the Plaintiffs relied.

3. I reserved judgment on one disputed issue. By their Summons dated July 18, 2022 (the "Inspection Summons"), the Plaintiffs sought the following relief in relation to what they described as the "Withheld Documents":

"*1. In the event that the Defendant fails to make an application to the Court to withhold disclosure on the grounds of Public Interest Immunity within 21 days, the Defendant shall disclose to the Plaintiffs the following documents referred to in the Defendant's List of Documents dated 26 November 2021 and exhibited at Exhibit RB-2 to the Second Affidavit of Rohan Bromfield dated 4 February 2022: Exhibits 5, 6, 8, 9, 10, 30, 36, 37, 38, 48 and 81.*"

4. In the draft Order appended to their Skeleton Argument, the relief sought was refined to replace the word "*disclose*" with "*produce for inspection*", consistent with the legal basis of the application being one for inspection of a document already disclosed under GCR Order 24 rule 10. It seemed clear that such a direction should in principle be made; but Mr Robinson QC for the Authority made a typically forceful submission to the effect that the Court should, for case management reasons, refuse an application which would not in any meaningful way advance the real issues in dispute in the present proceedings.

Findings: are the Plaintiffs prima facie entitled to inspect the Withheld Documents under GCR Order 24 rule 10?

Preliminary

5. The Withheld Documents appear at first blush to be listed as relevant documents in a List of Documents served as an exhibit to an Affidavit filed on behalf of the Authority. Somewhat surprisingly, the Authority sought to contend that no such admission had been made or, alternatively, that it had properly revised its original position on this topic. Public interest immunity is mentioned next to the documents, but irrelevance is not (as is the case with some other documents in relation to which public interest immunity appears to be claimed). It is common ground that if the documents are liable to be produced, the Authority must make an application to enforce its claim to public interest immunity.

6. Order 24 rule 10 provides as follows:

"**Inspection of documents referred to in pleadings and affidavits (O.24, r.10)**
10. (1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring that party to produce that document for the inspection of the party giving the notice and to permit the party to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as the party does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents the party objects to produce and on what grounds."

Factual background

7. A checklist referred to in paragraph 60 of the First Bromfield Affidavit was requested by Maples and Calder (Cayman) LLP ("Maples") in their Second Letter of September 17, 2021, *inter alia*, under GCR Order 62 rule 10. This put the Authority on express notice that inspection might be sought of any documents referred to in its Affidavits, had GCR Order 24 rule 10 not been at the forefront of its mind. Mourant responded on November 26, 2021 and explained that there were multiple checklists which were "*being withheld on the grounds of relevance and public interest immunity*". Their letter also stated:

> "*We confirm that the Authority is aware of its duty of candour in these proceedings. The Authority has carefully carried out searches for relevant documents in order to provide a full and accurate explanation for its decision-making process and underlying reasoning for the findings that are being challenged. As the Authority's attorneys, we have investigated and supervised this disclosure process from the start of the proceedings and continue to do so on an ongoing basis.*
>
> *The Authority has conducted searches in accordance with its duty of candour and encloses herewith its list of documents (**List of Documents**) which includes the Authority's position in respect of each document.*" [Emphasis added]

8. By letter dated March 22, 2022, Maples demanded an affidavit from the Authority explaining the "lack of relevance" and other grounds for not producing the Withheld Documents and a fresh review of the documents. The request for an affidavit at this stage was a somewhat aggressive one. In public law litigation, greater leeway is generally in my experience given to lawyers acting for public authorities to communicate their clients' instructions through correspondence, implicitly applying by analogy, perhaps, the presumption of regularity in relation to official acts. The letter also contained a fusillade of queries and challenges to the way the Authority had compiled its List of Documents. However, paragraph 3.2 listed the Withheld Documents and paragraph 9 of a 20 paragraph letter did crucially make the following point:

> "*9. The starting point in relation to those documents that are said to attract PII is that, to the extent that they fall within category 3.2 above, they are prima facie disclosable…*"

9. Mourant curtly invited Maples by letter dated March 25, 2022 to proceed with its judicial review application or make a specific discovery application without engaging with the points raised. The Second Bromfield Affidavit sworn on February 4, 2022 had by this juncture been sworn exhibiting the List of Documents (seemingly the same List of Documents served on November 26, 2021), but the List of Documents had not been formally filed in Court. The primary purpose of a list of documents in the discovery context is to disclose the existence of documents which have been determined to be relevant and to identify which documents the party objects to producing either because they are no longer in their possession or because privilege is asserted. The document exhibited to the Second Bromfield Affidavit is not presented in the standard format for lists of documents, but is nonetheless headed "*The Defendant's List of Documents*" and is referred to by the deponent as "*the Authority's List of Documents*". The Affidavit does not address the Withheld Documents controversy at all. However, the List of Documents is presented in tabular form with four columns: (1) "*Document No.*", (2) "*Description of Document*" (3) "*To be Disclosed? Y/N*", and (4) "*Reason for non-disclosure*".

10. In a standard list of documents, only relevant documents would be listed. This List includes several documents which are said to be "*not relevant*" and "*legally privileged*" or "*Not relevant and sensitive/PII*". The only stated grounds for not disclosing the 11 listed documents to which the Plaintiffs' Inspection Summons relates are "*PII/sensitive information*". The Authority's List of Documents apparently admits that all of these documents are relevant because irrelevance is not asserted as a ground for not disclosing them or, more properly, producing them for inspection having already disclosed their existence. Mr Robinson QC in oral argument referred to a footnote to Exhibit 5 of the List of Documents, the first document in relation to which "*Public Interest Immunity ('PII')/sensitive information*" was claimed, which reads as follows:

> "*Sensitive information is information that is sensitive, confidential or not relevant for the matter under consideration.*"

11. Does the footnote signify that the reader of the List of Documents is meant to understand that wherever production is objected to on "*sensitive information grounds*", the real objection is one of three possible objections or any combination of them ("*sensitive, confidential or not relevant*")? That would be a very curious, obtuse and unhelpful way of raising an objection to producing for inspection documents which a litigant has set out in a List of Documents the purpose of which is ordinarily to disclose all relevant documents in that party's "*possession custody or power relating to any matter in question in the cause or matter*"

(GCR Order 24 rule 3 (1)). In fact the drafter of the Authority's List of Documents does not adopt such an idiosyncratic approach because:

(a) 11 documents are claimed to be not liable to be produced on the grounds of containing "*sensitive information*" (the Withheld Documents);

(b) 18 documents are not produced on the grounds of being "*Not relevant & sensitive/PII*";

(c) 2 documents are not produced on the grounds of "*Not relevant/sensitive information*"; and

(d) of 31 documents, the production of which is objected to on sensitive information grounds, in 20 cases (64.5%) relevance is specified as an additional ground of objection, and in only 11 cases (34.5%) is relevance not specified as an additional ground.

12. The Authority's position at the hearing was that its position in relation to the Withheld Documents was as stated in Mourant's July 18, 2022 letter to Maples. Maples by letter dated June 22, 2022 relevantly stated that the Authority had to apply to Court to assert its public interest immunity privilege because:

> "…*In Exhibit RB2, CIMA has identified material in its possession that it agrees is relevant to the claims, but which CIMA considers to be too sensitive to disclose (namely exhibits 5, 8,9, 10, 30, 36, 37, 38, 48 and 81…*"

13. The Mourant response was to assert most broadly as follows:

> "…*For the avoidance of doubt, the Authority confirms that it has made full and frank disclosure of all relevant material and in doing so, the Authority has not interpreted your Client's grounds in a limited way…the Plaintiffs' Reply makes clear, and the Authority agrees, that all issues properly arising in this matter are issues of law relating to the proper interpretation and application of the AMLRs. In this context, the Plaintiffs' persistent pursuit of further extensive disclosure is clearly disproportionate to the requirements of the fair disposal of the case and prejudicial to the interests of good administration and the public interest generally.*"

14. The response to the Plaintiffs' assertion that the Authority "*has identified material in its possession that it agrees is relevant to the claims*" was to say, somewhat imperiously: "*The Authority does not deem the* [documents] *to be relevant to your client's case as per their Grounds. Therefore, the onus is on your client to demonstrate relevance.*" This was the comment in relation to Exhibits 5 and 8, which was repeated in abbreviated form in relation to the other documents. No explicit attempt was made in that letter, nor in any evidence filed in opposition to the Plaintiffs' Inspection Summons, to explain on what basis and in what circumstances the Authority had changed its views on relevance from that reflected in its own List of Documents to that asserted in its attorneys' July 18, 2022 letter.

15. Were the implications of the failure to allege the Withheld Documents were irrelevant as well as privileged in their List of Documents and the central complaint being made by the Plaintiffs in this regard simply not understood? This seems surprising, focusing on this narrow issue in isolation from other discovery points the Plaintiffs had raised, but is entirely possible as legal correspondence, rather than elucidating the issues covered, sometimes has the effect of making it difficult to see the wood for the trees. As Mourant when serving the List of Documents in November 2021 expressly stated, the List of Documents set out the Authority's position "*in respect of each document*". At the hearing the Authority, repeating the contention that the burden lay on the Plaintiffs to establish the documents were relevant, submitted in its counsel's Skeleton Argument:

> "*35. The Plaintiffs have not even asserted how the documents identified by them are, or might be relevant to the questions in issue, or how the Court might be assisted by what may be revealed in the documents if disclosure of the documents is to be ordered*…"

16. However, the Plaintiffs' Reply was served on June 22, 2022, and was referred to in the Mourant July 18, 2022 letter as clarifying that the issues in dispute were "*issues of law relating to the proper interpretation and application of the AMLRs*". So, looking fairly at the position in the round, the Authority may be viewed as having revised their position on relevance based on a narrowing of the issues after June 22, 2022. However, there is no clear and particularised articulation as to precisely how the Reply is said to have rendered irrelevant documents which were initially conceded to be relevant and would as a result be *prima facie* disclosable subject to any privilege claims.

Relevant legal principles

17. I tentatively explored with Mr Robinson QC whether there was any evidence which could be filed which would, in effect, provide a simple and straightforward answer, but it appeared that the most which could be said was that a further review had occurred and a different view taken. Mr Bowen QC objected to the Authority being given an opportunity to file further evidence, since issue had been joined on this topic as long ago as September 2021.

18. In Mourant's November 26, 2021 letter to Maples by way of response, it was confirmed that the disclosure process which the firm was supervising was an ongoing one. The main function of litigants under a continuing duty to disclose documents is that (a) they may have failed to disclose relevant documents and/or (b) new documents may come into existence or into their possession, custody or power after initial discovery has been given. It is unheard of in my experience for a civil litigant to disclose relevant documents in their initial discovery, and then subsequently seek to assert that, in fact, the listed documents are not relevant. It is not uncommon for relevant documents which are confidential or privileged to be accidentally disclosed. It is also easy to understand the scope of production obligations being obviously narrowed by the abandonment or striking-out of part of a judicial review applicant's claim.

19. In the present case, in my judgment, the burden clearly lies on the Authority to demonstrate why documents it had admitted were relevant in its List of Documents served on November 26, 2021 and further exhibited to the Second Bromfield Affidavit sworn on February 4, 2022 (triggering a right to inspect under GCR Order 24 rule 10) were not in fact relevant. Once documents have been referred to in pleadings or affidavits, the assumption is that they are relevant and the onus is on the party resisting an Order 24 rule 10 inspection application to establish "*good cause to the contrary*" (typically privilege): *Supreme Court Practice 1999* paragraph 24/10/2. Privilege was the ground for resisting disclosure in *Swaby-v-Attorney General et al* [2017] (2) CILR 899. Order 24 rule 10 is designed to provide a summary and cost-effective inspection remedy which is more simple and straightforward to deploy than specific discovery. This Court should be slow to undermine the reasonable expectations of litigants that referring to documents in affidavits will trigger an automatic prima facie right for their opponent to request the production for inspection of the referenced material.

20. Had the privilege claimed not been public interest immunity, which the Authority must apply to this Court to claim, I would have summarily rejected the submission that the Withheld Documents are not relevant. Applying ordinary procedural principles, litigants

who serve Lists of Documents containing relevant documents and exhibit them to Affidavits ought not to be permitted to resile from unqualified representations as to relevance when asked to produce the documents in question for inspection, absent clear and compelling reasons for adopting such an extraordinary position. Here, the question which requires evaluation is whether the Plaintiffs' application for inspection is so obviously substantively superfluous to the matters in dispute that, on broader case management grounds (taking into account the need for the Authority to incur the time and expense of a public interest immunity application), the Plaintiffs' application should be refused. Pivotal to the way this issue is evaluated is the question of what is the appropriate relevance test.

21. I have made no Order for discovery and the Authority has purported to be "*aware of its duty of candour in these proceedings*" (Mourant's letter dated November 26, 2021, page 1). One critical issue is whether that duty extends to documents relevant to unpleaded complaints, because the Authority contends that the documents sought are not relevant to the pleaded issues. That contention applied with greatest force in relation to Exhibits 5 and 8, but the legal principle clearly affects the entire relevance analysis. Mr Bowen QC submitted that the modern law on the scope of the duty of candour was best illustrated by the following observations of Lord Kerr in the UK Supreme Court decision in *R (Bancoult)-v-Foreign Secretary (No.4)* [2017] AC 301 at 362:

> "*183. A respondent's duty of candour in judicial review proceedings is summarised at p 125 of Fordham's Judicial Review Handbook (Sixth Edition 2012):*
>
> *'A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted. … A main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so.'*
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> *184. In R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 at para 50 Laws LJ said, 'There is a … very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue which the court must decide.' The duty extends to disclosure of 'materials which are reasonably required for the court to arrive at an accurate*

decision' - Graham v Police Service Commission [2011] UKPC 46 at para 18. The purpose of disclosure is to 'explain the full facts and reasoning underlying the decision challenged, and to disclose relevant documents, unless, in the particular circumstances of the case, other factors, including those which may fall short of public interest immunity, may exclude their disclosure' - R (AHK) v Secretary of State for Home Department (No 2) [2012] EWHC 1117 at para 22." [Emphasis added]

22. This suggests that the disclosure obligation on public authorities which arises under the duty of candour is wider than under the normal rules of discovery. But Lord Kerr also noted that "*in the particular circumstances of the case, other factors, including those which may fall short of public interest immunity, may exclude…disclosure*" of relevant documents. These passages have been cited with approval by the Carter J (Acting) in *Douglas and Ramoon-v-The Governor et al*, Cause Nos. 155 and 164 of 2017, Judgment dated October 19, 2020 (unreported). The Judge went on to cite *dicta* (from the House of Lords case of *Tweed-v-Parades Commission for Northern Ireland* [2006] UKHL 53) suggesting that general discovery ought to be avoided in public law cases. Mr Robinson QC commended to the Court the following observations of Lord Bingham in the *Tweed* case:

> "*2. The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.*
>
> *3. In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions, as my noble and learned friends explain, for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency, since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.*"

23. The Authority's counsel also relied upon the following passages in the speech of Lord Carswell:

> "*28. Applications for judicial review in Northern Ireland are not subject to the requirement contained in RSC (NI) Order 24, rule 2(1) that the parties exchange lists of documents, which applies only to actions in which pleadings are served. They are governed instead by the provisions of rule 3(1), whereby the court may order any party to make disclosure by a list of documents, and rule 7(1), empowering the court to require a party to make disclosure by affidavit in relation to any specified document or class of documents. These rules are in turn subject to rule 9, which provides that on applications for orders under rule 3 or 7 the court shall refuse to make an order for disclosure "if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs." Until the Civil Procedure Rules came into force in England and Wales identical provisions applied under RSC Orders 24 and 53. Under CPR Practice Direction CPD 54.12, however, it is specifically provided that disclosure is not required unless the court orders otherwise.*
>
> *29. The courts in both jurisdictions developed over a series of decisions an approach to disclosure in judicial review which is more narrowly confined than in actions commenced by writ. The basis of this approach is that disclosure should be limited to documents relevant to the issues emerging from the affidavits: see R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 654, per Lord Scarman, and cf Lewis, Judicial Remedies in Public Law, 3rd ed (2004), para 9.086 and a valuable article by Oliver Sanders, Disclosure of Documents in Claims for Judicial Review [2006] JR 194. In building upon this foundation the courts developed a restrictive rule, whereby they held that unless there is some prima facie case for suggesting that the evidence relied upon by the deciding authority is in some respects incorrect or inadequate it is improper to allow disclosure of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence: see the line of authority represented in England by R v Secretary of State for the Environment, Ex p Islington London Borough Council and the London Lesbian and Gay Centre [1997] JR 121 and in Northern Ireland by Re McGuigan's Application [1994] NI 143 and Re Rooney's Application [1995] NI 398…*
>
> *32. Mr Hanna QC for the appellant invited your Lordships to reconsider these principles limiting the extent of disclosure in judicial review applications, as they have not been explored in an appeal before the House. He placed this argument before the House, without developing it very far, as he concentrated on the question of the effect of the proportionality issue. I do consider, however, that it*

would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure."

24. I accept that the duty of candour is generally as broad as the Plaintiffs contended, but also accept that there must be some connection between what must be disclosed in any particular case and the matters which fall for determination as the Authority argued. There is a duty to disclose material which is potentially relevant to unpleaded grounds, but the Court can control the discovery process to prevent a disproportionate amount of time and costs being expended by public authorities on giving discovery in relation to documents which are of peripheral concern. I accordingly accept the Authority's counsel's submission this Court should also adopt considerable restraint when deciding to make specific discovery orders; and that general discovery ought not generally to be ordered in public law cases (general discovery was not ordered in this case). As Sir John Laws observed in *Graham-v-Police Service Commission and Attorney General of Trinidad and Tobago* [2011] UKPC 46, in a passage upon which Mr Robinson QC relied:

"*18. It is well established that a public authority, impleaded as a respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision.*"

25. Accordingly, when this Court is invited to make a discovery order against a public authority in a public law case, it is not enough for the applicant to demonstrate that certain documents are relevant and ought to be disclosed applying the most generous possible relevance test by way of extrapolation from the duty of candour. The Court should be astute to ensure that the discovery sought is genuinely needed to assist the Court to adjudicate the case before the Court, having regard to the need for a nuanced application of the Overriding Objective in the public law arena in which the requirements of expedition are an obvious public policy concern. How this case management power

should be exercised depends on the circumstances of each case, but there can be no doubt that its principles must be considered in the context of an application under Order 24 rule 10. Paragraph 2 of the Preamble to the GCR provides:

> "***Application by the Court of the overriding objective***
>
> *2.1 The Court must seek to give effect to the overriding objective when it*
> *(a) applies, or exercises any discretion given to it by these Rules; or*
> *(b) interprets the meaning of any Rule.*
>
> *2.2 These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.*" [Emphasis added]

Findings: disposition of the Plaintiffs' Inspection Summons

26. In the present case, where no general discovery has been ordered and the Plaintiffs are merely seeking to inspect a small number of documents which the Authority itself initially admitted were relevant, there is limited room for concluding that the requests for inspection are disproportionate unless the grounds for refusing the Plaintiffs' application are obvious. It is difficult for the Court to confidently determine, without sight of the relevant documents and in the context of an application which will traverse unfamiliar legal terrain, that the significance of the documents is so obviously peripheral that the right to inspect should be refused to avoid a clearly wasteful public interest immunity application.

27. I find that the Plaintiffs' application for inspection should be granted substantially in the terms prayed-i.e. unless the Authority applies to claim public interest immunity privilege. The Authority has not demonstrated with sufficient clarity that the inspection requests are so far removed from the merits of the issues the Court is presently charged with adjudicating that the application should be refused, despite their admitted relevance when the List of Documents was served in late November 2021 and exhibited to the Second Bromfield Affidavit in early February 2022.

28. It was (in the first instance at least) entirely proportionate for the Plaintiffs to seek to inspect 11 documents listed as relevant in the Authority's own List of Documents, which was not only served but also exhibited to an Affidavit. The Authority failed to explain with any clarity why the position on relevance was being changed as regards the

Withheld Documents, and having only ever coherently advanced an objection grounded on privilege. It was also argued that it is self-evident that the legal character of the grounds the Plaintiffs rely on make the underlying factual material obviously irrelevant. The force of that argument is greatly diminished by the fact that the Authority itself only belatedly contended that the Withheld Documents are irrelevant as well as privileged and has been unable to clearly explain its change of position. In these circumstances, no case has been made out for departing from the usual principles according to which GCR Order 24 rule 10 is applied. The documents sought are not so obviously disconnected to a proper adjudication of the Plaintiffs' complaints that inspection can properly be refused on wider case management grounds.

29. This judgment is necessarily an imperfect one at this stage. It is impossible to fairly determine that the costs of dealing with a public interest immunity challenge would be disproportionate to the benefit of ordering inspection, but I accept that it is possible that subsequent events may show this to be the true position. The Court's case management powers are sufficiently flexible to address these concerns. The costs of any such privilege application (however it may be resolved) can always be reserved until the conclusion of the present proceedings so that the Authority can be compensated in costs if the Plaintiffs turn out to have led it and the Court on what amounts in substance to a wild goose chase.

30. Similar concerns potential arise in relation to the costs of the present application. The Plaintiffs would ordinarily expect to be awarded their costs of the present application in any event. But this is not the typical case where the substantive merits of the present application can be confidently assessed, because the documents to which the application relates are not before the Court. And a successful litigant is not prima facie entitled to recover all of their costs; the overriding objective of Order 62 is that "a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by the successful party in conducting that proceeding in an economical, expeditious and proper manner" (GCR Order 65 rule 4 (2) [emphasis added]).

31. Accordingly, my strong provisional view is that because it might emerge at the end of the day that the present application was only meritorious in wholly abstract and technical terms, a risk which I am unable to dismiss out of hand, the costs of the present application should be reserved until the conclusion of the proceedings as a whole.

Summary

32. The Plaintiffs are granted the relief sought on their Inspection Summons in relation to the Withheld Documents. I will hear counsel if required as to the terms of the Order and/or costs.

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THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT