COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2021/CLE/gen/01043

IN THE MATTER of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as the "X" Trust and of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The "Y" Trust.

AND IN THE MATTER OF an application under Section 3 of the Judicial Trustees Act and/or under the inherent jurisdiction of the Court.

BETWEEN

CHERYL HAMERSMITH-STEWART

Plaintiff

AND

CROMWELL TRUST COMPANY LIMITED

First Defendant

ADAM STEWART

(acting in his capacity as the Enforcer, a Member of the Advisory Board and personal capacity)

Second Defendant

JAIME McCONNELL

(acting in her capacity as a Member of the Advisory Board and personal capacity)

Third Defendant

BRIAN JARDIM

Fourth Defendant

GORDON STEWART

Fifth Defendant

KELLY STEWART

Sixth Defendant

SABRINA STEWART

Seventh Defendant

[NAMES REDACTED]

Eighth Defendant

AND

ROBERT STEWART

Ninth Defendant

Before:	The Honourable Madam Senior Justice Indra H. Charles
Appearances:	Mr. John Wilson QC with him Ms. D'Andra Johnson of McKinney Bancroft & Hughes for the Plaintiff
	Mr. Brian Simms QC with him Mr. Marco Turnquest and Mr. Wilfred P. Ferguson Jr. of Lennox Paton for the First Defendant
	Mr. Richard Wilson QC with him Mr. Sean McWeeney QC and Mr. John Minns of Graham Thompson for the Second, Third and Fourth Defendants
	Mr. Terry North with him Ms. Wynsome Carey and Mr. Darzhon Rolle of Alexiou Knowles for the Fifth, Sixth and Seventh Defendants
	Mr. John Delaney QC with him Mrs. Lena Bonaby of Delaney Partners for the Eighth Defendant
	Mrs. Courtney Pearce-Hanna and Ms. Raven Rolle of Callenders & Co. for the Ninth Defendant
Dates:	20 June, 27 June, 30 June 2022 (heard on written submissions)

Practice and procedure – Leave to appeal and stay pending appeal of Sealing Proceedings Ruling – Whether the Court wrongly exercised its discretion to refuse a sealing order – Whether there is a realistic prospect of success on appeal against such refusal – Whether the first instance judge is required to include every fact and consideration in written reasoning

By written Ruling delivered on 30 May 2022 ("the Ruling"), this Court refused the application of the First Defendant (which was supported by the Second to Fourth

Defendants and the Eighth Defendant to seal the file ("the sealing application"). The Second to Fourth Defendants ('the Applicants") then expressed their intention to appeal the Ruling and requested that the status quo be maintained. Accordingly, I published a redacted Ruling on 8 June 2022.

By unfiled Summons dated 13 June 2022, the Applicants formally sought leave to appeal to the Court of Appeal the Ruling on several grounds, most of which were assertions that the Court misunderstood facts and came to wrong factual findings. The grounds may be subsumed under the following broad heads:

1. Misstatements of fact;

2. Incorrect factual findings;

3. The Court misdirected itself on the law as to the effect of defending the proceedings as opposed to initiating them on the right to a privacy restrictions;

4. Failure to appreciate and/or properly consider alternative privacy restrictions;

5. Failure to consider authorities which set out the principles applicable to protection of [REDACTED] and;

6. Costs.

The Applicants also seek a stay pending the determination of the appeal. The Applicants' Summons for leave to appeal and a stay of these proceedings were supported by the Guardian.

HELD: Refusing the application for leave to appeal the Ruling and a stay pending appeal with costs awarded to the Plaintiff to be taxed if not agreed:

1. The acknowledgement that Defendants do not choose to have matters heard in public does not mean that they are any more entitled to request departure from the open justice principle by virtue of their positions as Defendants: **Hot Pancakes Limited et al v Amber Louise Murphy et al** SCCiv App. 95 of 2020 and **R v Legal Aid Board, ex parte Kaim Todner** [1999] QB 966 applied.

2. There is no reasonable prospect that the Court of Appeal would recognize the existence of [REDACTED], since to do so would open the floodgates: [CASE RELIED UPON REDACTED]

3. A confidentiality club is not a lesser form of privacy restriction. It is predicated on the conclusion that there is some information that should be kept private. As the Court determined that the evidence fell far short of that required to justify any document being private, a confidentiality club was not an option open to the Applicants because it is contingent first on a determination that some documents need to be kept private.

4. The Court did not fail to consider alternative measures of confidentiality. In fact, the Court expressly emphasised its continuing power to anonymise and/or redact confidential [REDACTED] documents if the need arose notwithstanding that the Applicants only suggested a confidentiality club. The Court concluded that it was not appropriate at that point since no documents or information had been disclosed warranting the making of such order.

5. It was made clear throughout the Ruling that the contentions of the Applicants along with the evidence in support were extremely unconvincing. It fell so far short of justifying a sealing order.

6. The fact that the Court's account was identical to that of the Plaintiff and contrary to that of the Applicants did not mean that the Court failed to consider the Applicants' evidence in support. As it is the Court's role to make factual findings, to the extent that facts are disputed between the parties, then what is expressed ought to be taken as positive findings of fact having considered the totality of the evidence including the documentary evidence: **Volpi and another v Volpi** [2022] EWCA Civ 464.

7. Further and, in any event, the misstatements alleged by the Applicants are nonconsequential and irrelevant to the determination of the sealing application. The determination of the sealing application was based on the Applicants' contention that the publicity of the trial and information disclosed therein [REDACTED]. The facts alleged to be misstated were not relevant to the sealing application.

RULING

Charles Sr J:

Introduction

[1] By an unfiled Summons dated 13 June 2022 ("the Application"), the Second to Fourth Defendants ("the Applicants") applied for leave to appeal this Court's Written Ruling made on 30 May 2022 ("the Ruling") refusing to grant a sealing

order or any alternative privacy restrictions and a stay of the proceedings pending the determination of the appeal. The Eighth Defendant supports the Applicants' application.

[2] The Plaintiff opposes the application. In a nutshell, the Plaintiff asserts that the Court correctly exercised its discretion to refuse the sealing application; that the complaints of misstatements of fact and factual findings are hopeless and there was no misdirection on the law.

Salient facts

[3] In the Ruling, the Court outlined some of the facts. However, some salient facts are necessary in order to put this application in its proper perspective.

[4] [REDACTED] The Deceased was a well-known entrepreneur [REDACTED]. He was the Founder of two (2) trusts governed by Bahamian law.

[5] He died leaving two (2) surviving branches of his family. The first branch is the "first Family" comprising his adult children, [REDACTED] (and their respective families). The second branch is the "Second family" comprising [REDACTED].

[6] Most of the Deceased's wealth was settled into three (3) trusts, two (2) of which are Bahamian and the subject of these proceedings. The Trustee is a Bahamian private trust company which is the trustee of both trusts.

[7] [REDACTED]

[8] By Summons filed on 12 November 2021, the First Defendant, Cromwell Trust Company Limited ("the Trustee") applied to have the file sealed. The application was supported by the First and Fourth Affidavits of [REDACTED], one of the Trustee's directors (and a director or employee of the holding company [REDACTED].

[9] [REDACTED]

[10] On 30 May 2022, this Court delivered its Ruling dismissing the application for a sealing order and also refusing a confidentiality club. The Applicants expressed an intention to appeal the Ruling and requested that it not be published on the Court's website so as to maintain the status quo. As a result, the Court published a redacted version of the Ruling on 8 June 2022.

Law on leave to appeal

[11] In **Maria Iglesias Rouco & Ors v Juan Sanchez Busnadiego (in his capacity as Judicial Administrator of the Spanish Estate of Jesus Iglesias Rouco) & Ors** [2017/CLE/gen/00937], this Court comprehensively set out the law on leave to appeal: see paras 28 to 30. The Court stated:

> **"[28] In Robert Adams (a beneficiary of the estate of Raymond Adams) v Gregory Cottis 2018/PRO/cpr/00035, this Court succinctly set out the law applicable to the question of whether leave to appeal should be granted. The Ruling was upheld by the Court of Appeal on 7 October 2021: see Court of Appeal Judgment SCCivApp & CAIS No. 23 of 2021.**
>
> **[29] The test is whether there is any realistic prospect of success. At paragraphs 14 and 15 of Cottis, this Court highlighted the importance of weeding out hopeless appeals and to deter parties from commencing frivolous appeals:**
>
> > **[14] As Mr. Jenkins correctly submits, the Court must consider whether the grounds put forward, or any of them have any realistic prospect of success. In this respect, part of the Court's function is to weed out unmeritorious claims and to deter parties from commencing frivolous appeals. As stated by the English Court of Appeal in Practice Note (Court of Appeal: procedure) [1999] 1 All ER 186, it is a part of the Court's function to weed out hopeless appeals. In this regard the Court of Appeal provided the following guidance:**
> >
> > > **"7. <u>The experience of the Court of Appeal is that many appeals and applications for leave to appeal are made which are quite hopeless. They demonstrate basic misconceptions as to the purpose of the civil appeal system and the different roles played by appellate courts and courts of</u>**

> **first instance. Courts of first instance have a crucial role in determining applications for leave to appeal."**

[15] The appeal systems and the requirement to obtain leave are imposed to avoid the expenditure of money and time on appeals which have no hope of success. The guiding principle in determining whether leave to appeal should be granted is set out in the Practice Note provided in the leading case of Smith v. Cosworth Casting Processes Ltd. (1997) 4 All ER 840 where Lord Woolf stated:

> **"The Court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why, however, this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient."** [Emphasis added]

[30] Relying upon submissions made by Mr. Jenkins, the Court stated that if there is any real doubt about whether leave ought to be granted, then leave should be refused:

> **"[17] If there is any doubt that leave ought to be granted, the safe course is to refuse leave to appeal, as set out at paragraph 8 of the 1999 Practice Note (Court of Appeal: procedure) where it was stated:**
>
> > **"[I]f the court of first instance is in doubt whether an appeal would have a real prospect of success or involves a point of general principle, the safe course is to refuse leave to appeal. It is always open to the Court of Appeal to grant leave."**

[31] The test for whether leave should be granted is whether there is a realistic prospect of succeeding on appeal or whether the intended applicant has an arguable case:

> **"[18] The principles set out in *Cosworth* were accepted and relied upon by Jon Isaacs J (as he then was) in**

Bethell v. Barnett and others [2011] 1 BHS J. No. 64. In Bethell, His Lordship stated, at paragraph 9:

> **"In Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840 Lord Woolf, MR provides guidelines for applications for leave to appeal. I mention the first two of them: "36 The guidance is as follows:**
>
> > **1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**
> >
> > **2. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying."**

[12] Not so long ago, on 4 July 2022, the Court of Appeal in **Maria Iglesias Rouco & Ors v Juan Sanchez Busnadiego (in his capacity as Judicial Administrator of the Spanish Estate of Jesus Iglesias Rouco) & Ors SCCIvApp Nos. 147 & 148 of 2021** reaffirmed this test on a leave to appeal application: paras. 55-57.

Law on stay pending appeal

[13] RSC Order 31A Rule 18 (2) (d) provides that the Court may stay the whole or any part of any proceedings generally or until a specified date or event.

[14] Also, Rule 12(1)(a) of the Court of Appeal Rules, 2005 provides:

> **"(1) Except so far as the court below or the court may otherwise direct: an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below."**

[15] Therefore, in order to obtain a stay pending appeal, the intended Appellant must obtain a stay from the court below.

[16] In **In the Matter of the Contempt of Donna Dorsett-Major on 3 June 2020** 2020/CLE/gen/0000, Ruling delivered on 8 December 2020, this Court dealt with the applicable principles on stay pending appeal. For present purposes, I merely reiterate them as set out fully in **Donna Dorsett-Major** at paras 23 to 28:

> **"[23] The starting point is that a judge has a wide discretion with regards to the grant of a stay. This is confirmed by the learned authors of *Odgers On Civil Court Actions* at page 460:**
>
> > **"Although the court will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection[…] [The] court has wide powers under the Rules of the Supreme Court."**
>
> **[24] As to how that discretion ought be exercised in these circumstances, the court's considerations have only broadened with the developing case law, beginning, most notably, with the decision of Brett, LJ in the case of *Wilson v Church No. 2* [1879] 12 Ch.D. 454 at 459 wherein he stated:**
>
> > **"This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory."[Emphasis added]**

[25] This was further developed in *Linotype-Hell Finance Ltd. v Baker* [1993] 1 WLR 321 wherein Staughton L.J. opined at page 323:

> **"It seems to me that, if the defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."[Emphasis added]**

[26] So, where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application if the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. This requires evidence and not bare assertions.

[27] Some additional principles that the Court should be guided by in considering an application for a stay pending an appeal is outlined in the case of *Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 at para 22 *(per Clarke JL and Wall J):*

> ***"*By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"**

[28] Guidance was also given by the English Court of Appeal in *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474. At para 13, Potter LJ said:

> **"The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."**

[17] See also **In Robert Adams (a beneficiary of the estate of Raymond Adams) v Gregory Cottis 2018/PRO/cpr/00035** at paras 22 to 24 as well as the Court of Appeal Judgment in **Gregory Cottis (SCCivApp & CAIS No. 23 of 2021** (Judgment delivered on 7 October 2021).

[18] It is on the basis of these well-established principles that the Court considers the present application.

Appeal on points of law

Ground 3: Whether the Judge was wrong to determine that the Applicants' position as Defendants was irrelevant to the question of whether they were entitled to confidentiality

[19] Learned Counsel Mr. Richard Wilson QC, who appeared on behalf of the Applicants, submitted that in determining whether the circumstances warranted a sealing order or some other confidentiality measure, the Judge was wrong to find that since the Defendants were forced to defend the claims and had not initiated them, was not probative toward their position that the proceedings should be confidential. According to him, both parties are not treated equally. He submitted that the Court was wrong to determine that "*parties to litigation ought to be prepared to have information disclosed whether they have commenced the proceedings or not*."

[20] Mr. Richard Wilson QC further submitted that **Standard Chartered Bank (Switzerland) S.A. v UBS (Bahamas) Ltd.** [2011] 2 BHS J No 24, which the Court relied on in its reasoning, did not support the Ruling because, in that case, the privacy of the defendant bank was not in issue. Further, says Counsel, the Court was bound by the decision of **Hot Pancakes Limited et al v Amber Louise Murphy et al** SCCiv App. 95 of 2020, which makes it clear that there is a distinction between plaintiff and defendant in the context of privacy. Learned Counsel referred to Sir Michael Barnett P's decision in **Hot Pancakes** at para 29 where Sir Michael approved the dictum of Lord Woolf MR in **R v Legal Aid Board, ex parte Kaim**

Todner (A firm) [1999] QB 966 who highlighted that the parties seeking anonymity were the Plaintiffs. At para 29, Sir Michael quoted:

> **"A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public."**

[21] The Applicants further stated that the Court's finding on that matter was contrary to **Hot Pancakes**. Had the Court correctly applied the principle emanating from **Hot Pancakes** and the English authority therein, the Court would have come to a different conclusion: that the Applicants' position of defending instead of prosecuting the proceedings is a consideration in their favour, as Defendants, being entitled to confidentiality.

[22] Learned Counsel Mr. John Wilson QC, who appeared on behalf of the Plaintiff, contended that the Applicants' understanding and application of the relevant dicta in **Hot Pancakes** and **ex parte Kaim Todner** is misconceived. He contended that the Court's conclusion that the Applicants' position as Defendants did not entitle them to confidentiality any more than the Plaintiff was not contrary to **Hot Pancakes** or to **ex parte Kaim Todner**. He further submitted that the principle is not more than the basic and common-sense observation that a person who seeks the court's relief as plaintiff is particularly poorly-placed to seek to shield the proceedings from public scrutiny. Absent exceptional circumstances, a person cannot invoke a process which is inherently public in nature, and at the same time seek to avoid the consequences of that decision.

[23] Mr. John Wilson QC next submitted that the principle in **Hot Pancakes** was not called into question by the Ruling and is actually consistent with it. Rather, the issue dealt with by the Court at paragraph [48] of the Ruling, is whether there is a *converse* principle: namely – as the Applicants contend – that defendants to

litigation have an *enhanced* right to have proceedings kept private because they have not themselves initiated the proceedings and, on the basis, that there would otherwise be "*scope for abuse*" by plaintiffs.

[24] Counsel for the Plaintiff next contended that the Court was correct to reject the contention that there is an enhanced right of the Defendant to confidentiality by virtue of not being the party who initiated the proceedings. He submitted that **ex parte Kaim Todner** supports his position – in particular the part of Lord Woolf's dictum that the Applicants failed to cite, which is in the same paragraph as that cited by the Applicants:

> **"In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. <u>Any other approach would result in wholly unacceptable inroads on the general rule</u>" (emphasis added).**

[25] In my judgment, the Applicants' application of the section of Lord Woolf's speech in **ex parte Kaim Todner** that was favourable to his position was incomplete and that the cumulative effect of the paragraph is for the general position to qualify the observation regarding the parties' positions. Although Lord Woolf's speech highlights the plaintiff as an especially unsuitable party to object to publicity, it does not confer any advantage on the defendant. Lord Woolf said that the general or ordinary position is for both parties to accept embarrassment and damage to their reputations and consequential loss of being involved in litigation. This is not qualified merely because he earlier observed that plaintiffs choose while defendants do not choose to have proceedings commenced. Lord Woolf went on, however, to admonish the approach suggested by the Applicants. He expressly stated that the only protection available to parties to litigation for the damage to their reputations is a public judgment refuting unfounded allegations and that any other approach would result in the general rule being undermined.

[26] The cumulative effect of both parts of Lord Woolf's speech with respect to the positions of parties and its effect on the right to object to the publicity of litigation is this: the acknowledgment that defendants did not choose to have matters heard in public does not necessarily mean that they are more entitled to confidentiality than plaintiffs. It was no more than an observation. In fact, Lord Woolf went on to make it clear that the positions do not affect the general rule of both parties having to accept the publicity.

[27] As such, the Court was correct not to consider the Applicants' position as Defendants as a factor in favour of confidentiality.

Grounds 4 and 5: Whether the Judge failed to apply the [REDACTED] exception to open justice and failed to consider alternative confidentiality measures

[28] The Applicants argued that the Judge did not consider (or properly consider) and apply the [REDACTED] exception to the open justice principle. According to the Applicants, had the Court properly considered that exception, it would have concluded that the [REDACTED]. The Applicants added that this erroneous understanding of the law was compounded by the incorrect factual finding that the publication of [REDACTED] was merely an inconvenience.

[29] The Applicants next argued that the [REDACTED] exception is broad; that the exception applies where [REDACTED]. According to the Applicants, those cases are such that [REDACTED]. Further, the Applicants urged the Court to find that the present case falls squarely within that description because [REDACTED]

[30] In response, the Plaintiff correctly stated that in dealing with the Applicants' contention that [REDACTED], the Court plainly applied the correct legal test, which is whether a privacy order is required in order to secure the administration of justice, the very test applied in the case of [REDACTED]. The Plaintiff also correctly stated that, at paragraphs 14 through 25 of the Ruling, the Court extensively set out the law on the relevant test and went on to apply those principles in "Discussion/Analysis".

[31] The Plaintiff further contended that there is no general "[REDACTED]" exception to the open justice principle [REDACTED]. The Plaintiff also argued that there is no reasonable prospect that the Court of Appeal would recognize the existence of a "[REDACTED]" exception since to do so would open the floodgates, as the Court stated at paragraph [REDACTED] of the Ruling that:

> **"[REDACTED]"**

[32] I agree with the Plaintiff's submissions. In determining whether the default position of open justice should be departed from, the correct test of whether it is necessary for the administration of justice was applied throughout. I stated that, in my opinion, the evidence fell very short of clear and cogent; far short of the heavy burden required to displace the default position of open justice. At paragraph 32 of the Ruling, I said:

> **"In my judgment, the effects on the trusts, asserted by the Trustee are no more than inconveniences. If the risk was sufficiently compelling to justify derogation from open justice, many parties to litigation would be entitled to sealing orders, which would undermine the effectiveness of the principle of open justice itself."**

[33] The Applicants argued that it did not appear from the Ruling that the Court adequately considered the [REDACTED] and itself supporting a free-standing basis for the exception.

[34] This argument is untenable. The Ruling reasoned that the [REDACTED] was a mere inconvenience and an ordinary incidence of litigation and, as such, could not be considered a factor favourable to departing from the open justice principle. If the Court considered that the [REDACTED] was not even a contributing factor probative to derogation from open justice, it is impossible that it would have been accepted as a free-standing basis for excepting open justice.

[35] The Applicants alleged that the Judge failed to adequately consider alternative confidentiality measures; that the sealing application failed to consider the possibility of imposing some lesser form of protection in order to address the

concerns of the [REDACTED]. They contended that the Judge erred in applying a test of necessity rather than applying the correct test of whether or not there was a "good reason" for imposing some form of restriction on the publication of information and documents. In support, the Applicants relied on the speech of Coulson J in **Bombardier Transportation Limited v Merseytravel** [2017] EWHC 575 (TCC) where the judge stated that the test for whether there should be some departure from open justice was whether there was "good reason" to depart, not whether it was strictly "necessary" to do so.

[36] Additionally, say the Applicants, the Court dismissed alternative protection against the publication of confidential information without any analysis at paragraph 45:

> **"[45] I am also not convinced that there is a need for a Confidentiality Club on any information, in particular, as requested by Mr. McWeeny QC."**

[37] In response to the Applicants' contention as to the failure to consider lesser confidentiality measures, the Plaintiff correctly postulated that, the only one form of alternative protection prayed for by Counsel for the Applicants, was a confidentiality club to protect the disclosure of sensitive information. In any event, the Plaintiff argued that the Applicants' suggestion that a confidentiality club constitutes a limited form of privacy order is fundamentally flawed.

[38] The Plaintiff submitted that a confidentiality club defines a limited class of persons with whom documents and information can be shared which the Court has concluded should *otherwise* be kept private. Accordingly, says Mr. John Wilson QC, the imposition of a confidentiality club presupposes that some form of more general privacy restriction is appropriate. Having already decided that a more general privacy order was unwarranted, the imposition of a confidentiality club was wholly inappropriate.

[39] I therefore agree with the Plaintiff that a confidentiality club is not a lesser form of privacy restriction as the Applicants suggest. It is predicated on the conclusion that there is some information that should be kept private. The Court determined that

the evidence fell far short of that required to justify any document being private so a confidentiality club was not an option open to the Applicants because it is contingent first on a determination that some documents need to be kept private.

[40] The Applicants' assertion that the Ruling dismissed alternative measures of privacy without due analysis is untenable. In fact, the Court expressly emphasised its continuing power to anonymise and/or redact confidential financial documents if the need arose notwithstanding that the Applicants only suggested a confidentiality club. The Court concluded that it was not appropriate at that point since no documents or information had been disclosed that warranted making that order. The Court asserted, at para. 46 of the Redacted Ruling and para. 63 of the Ruling, that:

> **"[46] As this matter progresses, the Court has the inherent power to anonymize the names of any parties and/or to redact confidential financial documents. At this stage, the necessity to do so does not arise."**

[41] I cannot fathom what further explanation is required. The Court acknowledged that it had the right to anonymize the names of parties and redact confidential information but that it was not necessary at this preliminary stage. As I have already stated, the confidentiality club is not a lesser method of privacy, as the Applicants have argued. Accordingly, the Applicants' contention that the wrong test was applied to determining its suitability as a lesser form of privacy falls away. In any event, it cannot be said that the test of whether there was good reason should have been applied as opposed to necessity on the basis that the necessity test was the proper test for small departures from the open justice principle. This is because as I stated, a confidentiality club is not a small departure because it is predicated on at least a finding that some documents should be kept private. As such, it was open to me to apply the same reasoning to the dismissal of the confidentiality club that was applied to the sealing more generally. It was made clear throughout the Ruling that the contentions of the Applicants along with the evidence in support were extremely unconvincing. It fell so far short of justifying a

sealing order that it was unnecessary for the Judge to have recanvassed how inadequate the evidence was at paragraph 46 when it refused the confidentiality club.

Grounds 1 and 2: Whether the Ruling was premised on factual errors

[42] The Applicants submitted that, in determining the sealing application, it was non-negotiable for the Court to consider what material would be disclosed in open court if a sealing order was not made. The extent of the material to be disclosed would be dictated by the disputed issues between the parties. According to the Applicants, the Judge failed to appreciate what the disputed issues were. [REDACTED]. According to the Applicants, the Judge adopted the factual account given by the Plaintiff, which is disputed by the Applicants. As a result, the evidence that was considered in relation to that factual dispute was significantly narrower in scope than that which actually exists.

[43] The second misstatement which the Applicants took issue with was a statement in the headnote of the unredacted Ruling: "*The Trustee applied for the file to be sealed* [REDACTED].

[44] The Applicants submitted that the Trustees' position that [REDACTED]. The basis for the sealing application was therefore not related [REDACTED].

[45] Perhaps, it is an opportune time to say something about a headnote. A headnote, as I understand it, is a summary appearing at the beginning of a full text normally in a law report (and not a judgment) encapsulating as precisely as possible the principle of law which the case establishes. Although the headnote adds value to the judgment, it is the judgment itself which sets out the precedent and binds subsequent decision makers, for example, the Court of Appeal.

[46] The fact that a party will appeal what it conceives to be a misstatement of fact in the headnote is, in my opinion, clutching at straws. In any event, the Court circulated a draft judgment on 27 May 2022, by which the parties had the

opportunity to make corrections so the Applicants cannot now complain of the factual misstatements that they could have corrected.

[47] [REDACTED], as the Plaintiff correctly stated, the fact that the Court's account was identical to that of the Plaintiff and contrary to that of the Applicants did not mean that the Court failed to consider the Applicants' evidence in support. As it is the role of the Court to make factual findings, to the extent that facts are disputed between the parties, then what is expressed ought to be taken as positive findings of fact made by me having considered the totality of the evidence including documentary evidence.

[48] Further, the practice of this Court circulating draft judgments and requesting Counsel to correct any inaccuracies, as in the present case, is not novel. In **Old Fort Bay Property Owners Association Ltd v Old Fort Bay Company Ltd et al** [2014 CLE/gen/ 773] consolidated with [2014/CLE/gen/0889] and [2017/CLE/gen/00014] (Ruling delivered on 8 February 2022), this Court circulated a draft judgment and in refusing leave to appeal on the ground that there were difference between the draft judgment and the final judgment, the Ruling set out the expected practice of Counsel at paragraphs 65 – 67:

> **"[65] I have previously mentioned quite a bit that it was a "draft" Judgment and not a "final" one so Counsel ought to have even assisted the Judge to clarify what appeared ambiguous in the Judgment but neither party did that.**
>
> **[66] In England, the purpose of sending a draft judgment to the parties is to enable them to draw the judge's attention to typographical, spelling or minor factual errors and also <u>to give the parties an early opportunity also to give the parties an early opportunity to consider and agree questions of costs and whether, and on what grounds, to apply for permission to appeal</u>**…. **Counsel has a duty to point out to the judge any omission in his judgment so that the matter can be dealt with there and then. It was not appropriate to rely on the alleged omission to seek leave to appeal: Re S (Omission from judgment: Duty of counsel (2007) Times 2 July. See also: The Caribbean Civil Court Practice: David diMambro and Louise diMambro at page 340 –Note 30.4: Review of Decision by Judge.**

[67] This practice seems 'far-off" to some attorneys in this jurisdiction but as the New Civil Procedure Rules are about to be promulgated (having been circulated widely to all stakeholders yesterday), many cultural changes will follow. That said, this is a long established and standard practice in my court …" [Emphasis Added]

[49] The Plaintiff referred to the speech of Lewison LJ in **Volpi and another v Volpi** [2022] EWCA Civ 464 where he made statements on appeal courts interfering with the decisions of trial judges on matters of fact at paragraph 2:

"2.The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or

> **construed as though it was a piece of legislation or a contract."**[Emphasis added]

[50] Time and again, appellate courts have reiterated that judges are not required to deal with every single consideration and account presented by Counsel. This Court dealt with similar misstatements of fact alleged by the intended appellants in **Maria Iglesias Rouco** and expressed that first instance judges are not required to include every fact and consideration in their written reasons. At para. 47, the Court of Appeal stated:

> **"[47] The Notice of Motion of Appeal otherwise alleges several misstatements of facts in the Stay of Proceedings Ruling and is littered with assertions of matters that the Plaintiffs say the Court failed to consider in making its determination that the Plaintiffs had not demonstrated circumstances adequately exceptional to justify refusing the stay. As all Defence Counsel pointed out, the mere fact that a matter is not mentioned in a Written Ruling does not mean that it was not taken into account. The House of Lords in Piglowska v Piglowska [1999] 3 All ER 632 emphasised that first instance judges are not required to include every single fact and consideration in their written reasons. At pages 643 and 644, Lord Hoffmann stated:**
>
> > **"In G v G [1985] 2 All ER 225 at 228, [1985] 1 WLR 647 at 651–652 this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 at 345, which concerned an order for maintenance for a divorced wife:**
> >
> > > **'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'**
> >
> > **This passage has been cited and approved many times but some of its implications need to be explained. First, the**

appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that.

It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc v Medeva plc (1996) 38 BMLR 149 at 165:

> **'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'**

The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in s 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself. The reason why I have taken some time to deal with the Court of Appeal's assertion that the judge did not realise that she was entitled to exercise her own discretion is that I think it illustrates the dangers of this approach. The same is true of the claim that the district judge 'wholly failed' to carry out the statutory exercise of ascertaining the husband's needs."

[51] Further and, in any event, the misstatements alleged by the Applicants are nonconsequential and irrelevant to the determination of the sealing application. The determination of the sealing application was based on the Applicants'

contention that the publicity of the trial and information disclosed therein would [REDACTED]. [REDACTED] and it was only canvassed in the facts of the Ruling to give context to what gave rise to the Plaintiff's instituting these proceedings. It was not relevant to the sealing application.

[52] With respect to the statement in the headnote, it seems to me that Counsel for the Applicants misunderstood the statement. [REDACTED] Rather, the statement was explaining what gave rise to the sealing application: [REDACTED].

Ground 5: Whether the Judge was wrong to conclude that disclosure was merely inconvenient

[53] The Applicants submitted that the Judge was wrong to conclude that the effect of disclosure of [REDACTED] would be merely inconvenient. [REDACTED] it was not open to the Judge to conclude that it would be merely inconvenient.

[54] I agree with the Plaintiff that the Applicants incorrectly stated the Plaintiff's position with respect to the effect of [REDACTED]

[55] Further and, in any event, the Court's conclusion was not that [REDACTED] as the Applicants seem to suggest. Rather, the Court's conclusion *proceeded* on the basis that there was a risk. In applying the law to the facts, however, the Court concluded that such a risk was insufficient to justify derogation from the open justice principle. The effect of the Ruling is that the fact that [REDCATED] when canvassed against the importance of open justice and the high standard required to displace it, [REDACTED].

Ground 1: Complaints about factual findings

[56] The Applicants take issue with two (2) factual findings namely: (i) [REDACTED]. Counsel for the Applicants submitted that the conclusion that the [REDACTED] was wrong because there was no evidence to that effect before the Court. According to him, the Plaintiff's evidence was that the [REDACTED]. Instead, says Counsel, [REDACTED] and consequently, the Court had no basis for concluding that the [REDACTED].

[57] First, it is important to clarify that the finding was that the [REDACTED] that would be publicized as a result of these proceedings.

[58] The Court reasoned that because it was likely that they knew of the *fact* [REDACTED], the Court was entitled to reject the evidence that [REDACTED]. Again, **Volpi and another v Volpi** is instructive on the factual findings of trial judges.

[59] The Applicants are also aggrieved with the finding on [REDACTED]. The Applicants argued that it was not open to the Court to make this finding having regard to the uncontroverted expert evidence of a specialist [REDACTED]. The Applicants also took issue with the Court's failure to "address or appreciate" the evidence of the expert in the Ruling.

[60] The Plaintiff objected to the validity of the expert evidence and stated that the Applicants never obtained leave of the Court to present expert evidence, which the Plaintiff argued, is contrary to the procedural requirements for expert evidence.

[61] I have reiterated that trial judges are not obligated to refer to every single piece of evidence in giving reasons for their decisions and that it ought to be assumed that they considered all of the evidence. Further and, in any event, the Court is entitled to reject any evidence including that of an expert witness. The fact that it is uncontroverted does not mean that the Court was obligated to accept it. This was clearly stated by Lewison LJ in **Volpi** at para. 4:

> **"Even where expert evidence is uncontroverted, a trial judge is not bound to accept it."**

Ground 6: Whether the Judge's ruling on costs was wrong

[62] The Applicants are also dissatisfied with the costs ruling. The cost ruling in the unredacted Ruling was as follows:

> **"Costs**
>
> **[REDACTED]**

[63] Counsel for the Applicants submitted that as the parties were not given the opportunity to make submissions on costs before the Court made the Ruling, the Applicants' constitutional right to a fair hearing under Article 20(8) was breached. He said that this was a serious procedural irregularity and breach of natural justice.

[64] Counsel for the Applicants further contended that the Applicants should not be made to bear the costs of the Plaintiff and the Fifth through Seventh Defendants because they did not make the sealing application. He submitted that the single sentence ruling was imprecise and that the Ruling failed to explain the meaning of "successful parties" or "these proceedings" and failed to specify whether the costs of the Plaintiff and the Fifth through Seventh Defendants were to be paid from the trusts or to be borne personally. In the event that the Court intended to order the latter, the Court misdirected itself on the law and fact by failing to consider and appreciate the following facts:

1. That the Trustee was acting in its capacity as trustee of the Trusts and made the Application because it considered that it was in the best interest of <u>all</u> the beneficiaries of the Trusts (including the Plaintiff) for the file to be sealed.

2. The Trustee's right of indemnity out of the Trusts to costs properly incurred as trustee of the Trusts (again, there being no ruling to the contrary).

3. The fact that the Applicants were all acting in their capacities as beneficiaries of the Trusts, the Second Defendant and the Third Defendants were acting in their capacities as [REDACTED] of the X Trust and the Second Defendant was also acting in his capacity as [REDACTED].

[65] The Applicants further submitted that the costs order was wrong because the Plaintiff was not the successful party. As Counsel for the Plaintiff correctly stated, most of the costs would have been exhausted on the sealing application and not the extension of time application. Therefore, it was clear that the "successful party" was the party successful in the sealing application, that is, the Plaintiff and the Fifth

through Seventh Defendants and "these proceedings" referred to the sealing application. Accordingly, the Court was not wrong to label the Plaintiff as the successful party.

[66] The Court did consider that the Plaintiff did not initially oppose the sealing application and noted it at paragraph 40 of the redacted Ruling:

> **"[40] Mr. McWeeny QC submitted that the fact that the Plaintiff resiled from her initial position of not opposing the sealing application is relevant. Mr. Wilson QC, however, offered an explanation for her change in position."**

[67] In the Ruling, the Court expressly stated that it did not accept that the Plaintiff's change in position was indicative of an ulterior motive. At para. 58, this is what the Court said:

> **"[REDACTED]. Ultimately, it is the Court that has to determine whether the matter should be sealed or not bearing in mind the constitutional principle of open justice…."**

[68] Further, it escapes me how the Plaintiff's change in position is relevant to the issue of costs.

[69] The Court made a usual cost order – costs follow the event. Although the Plaintiff and the Fifth through Seventh Defendants did not made the sealing application, [REDACTED].

[70] In any event, nothing precludes the Applicants from challenging the costs order in this Court as they said they would do: see Transcript on 30 May 2022 at pages 52-56. In addition, an order to that effect has not been perfected. Further, one of the purposes of circulating a draft Ruling before the final Ruling is to give the parties an early opportunity to consider and agree questions of costs. To my mind, this is another occasion where the Applicants are clutching at straws.

[71] For all of the reasons stated above, there is no realistic prospect that the intended appeal will succeed on appeal. In any event, if there is any doubt as to whether leave should be granted, the safe course is to refuse leave as it is always open to

the Court of Appeal to grant leave. The Applicants' application for leave to appeal is refused.

Stay pending appeal

[72] The Applicants and the Guardian urged the Court to grant a stay pending appeal because the nature of a ruling on a sealing application (or any application seeking to impose privacy restrictions) is that it is possible to render the appeal against that ruling nugatory by publishing the ruling which would publicise the very information seeking to be protected.

[73] The Applicants argued that the redactions made by the Court were ineffective for protecting confidentiality. [REDACTED]

[74] [REDACTED]

[75] Counsel for the Applicants submitted that another reason why the Court should grant the stay is because it is essential that the sealing application be determined before the [REDACTED] application, the hearing for which had been listed for 30 June 2022. He asserted that the Court appeared to have determined that it would dismiss the stay application before it even received the Applicant's submissions. After the filing of the application for leave to appeal together with the application for stay pending appeal on 13 June 2022, [REDACTED] John Delaney QC for the Eighth Defendant requested a deferral of the [REDACTED] hearing pending the disposal of the prospective appeal of the Ruling refusing the sealing application. The Judge replied by e-mail dated 15 June 2022 stating:

> **"I am on vacation and as such, I have no access to my notes… There will be no adjournment to any applications that were already fixed".**

[76] On the same day, lead counsel for the Applicants sought clarification of whether or not the Judge had in fact rejected the application for a stay of the proceedings (having not considered any submissions in relation to that issue). By an email sent on 16 June 2022, the Court stated as follows:

> **"I have no access to the court's file and my notes since I am on vacation. My recollection though, is that the application for leave to appeal will be heard by way of written submissions and the [REDACTED] will be heard on 30 June. I have not made any determination on the leave to appeal but I seem to recall that all Counsel had agreed to the directions which I gave. Unfortunately, I would not be able to assist any further".**

[77] Counsel for the Applicants submitted that, by those e-mails, the Court appeared to rule out the possibility of any adjournment of the [REDACTED] hearing, which suggests that she would not accede to the stay application notwithstanding that she had not received submissions on the stay application.

[78] The Plaintiff, in opposing the stay application, stated that the balance of prejudice weighs against any delay. Counsel for the Plaintiff submitted that the hearing of the [REDACTED] will not affect the viability of the sealing appeal [REDACTED]. As such, so long as the hearing of the [REDACTED] application [REDACTED] until determination of any appeal, there can be no possible prejudice to the Applicants in the [REDACTED] hearing [REDACTED]. Conversely, says Counsel for the Plaintiff, the prejudice to the Plaintiff of the [REDACTED] application being deferred is [REDACTED]. The Plaintiff's application [REDACTED]. Accordingly, and for so long as the Applicants are able defer the hearing of that application, [REDACTED] He intimated that the stay application is merely another delaying tactic of the Applicants [REDACTED].

[79] It seems to me that the Applicants [REDACTED] which, to my mind, would not affect the effectiveness of the Applicants' application to appeal the Ruling. The question is what (if any) additional ruin would the Applicants suffer [REDACTED] if the [REDACTED] application is heard before the determination of the sealing application. By the redacted sealing Ruling, as the Applicants' own evidence stated, detailed information about the case had already been in the public despite the redactions. This is a mitigating factor against the further publication of information, which is the basis of the Applicants' contention regarding their appeal being heard before the [REDACTED] application. [REDACTED], the Applicants do not have any prospect of success with their appeal refusing the sealing order. Their

reasons for appealing the Ruling are palpably weak. In fact, this is a most regrettable application and an example of the worst sort of satellite litigation geared at delaying applications which ought to be heard expeditiously.

[80] I agree with Counsel for the Plaintiff that the Plaintiff would suffer prejudice from a delay but that is not the key justification for refusing the stay. It is the fact that the Applicants' appeal against the Ruling is hopeless and is bound to fail. The circumstances of the case simply did not come close to justifying derogation from the open justice principle.

[81] With respect to the Applicants' allegation that the Court seemed to have determined that it would refuse the stay before hearing submissions on it, it is nothing more than an exaggeration of the language used in the e-mails. I simply stated that I could not assist, as I was on vacation at that time. [REDACTED]. In addition, on 30 May 2022, when the Written Ruling was delivered and directions were given, [REDACTED] Counsel for the Applicants agreed that the appeal of the sealing application [REDACTED]: see pages 70-71 and 74 of the Transcript of Proceedings dated 30 May 2022. To be succinct, Counsel has also misconstrued the contents of my two emails.

Costs

[82] As the Plaintiff is the successful party on the Summons seeking leave to appeal and a stay of these proceedings, the Applicants (Second, Third and Fourth Defendants and the Eighth Defendant) ought to pay her costs of these applications. If another costs order ought to be made for costs to be paid out of the trusts, Counsel may engage the Court.

Dated this 26th day of July 2022

Indra H. Charles
Senior Justice