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Case No: CR-2021-000179

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**  
**INSOLVENCY AND COMPANIES LIST**

Rolls Building,  
Fetter Lane  
London  
EC4A 1NL

Date: 1 March 2021

**Before :**

**MR JUSTICE SNOWDEN**

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**IN THE MATTER OF PORT FINANCE INVESTMENT LIMITED**  
**AND IN THE MATTER OF PART 26 OF THE COMPANIES ACT 2006**

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Application by **Reorg Research Inc** pursuant to CPR 5.4C  
**Baker McKenzie LLP** for the **Company**  
The application was determined without a hearing

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**Judgment**

COVID-19: This judgment will be circulated to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 2 p.m. on 1 March 2021.

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**MR JUSTICE SNOWDEN**

**MR JUSTICE SNOWDEN :**

1. This is my ruling on an application by a Reorg Research Inc (“Reorg”) pursuant to CPR 5.4C(2) to be provided with copies of four witness statements filed on behalf of Port Finance Investment Limited (the “Scheme Company”). The application is opposed by the Scheme Company.
2. Reorg describes itself as a business intelligence and media organisation that focuses on financial restructurings. It regularly observes and reports on proceedings concerning schemes of arrangement and restructuring plans. It provides a paid-for subscription service to the restructuring community: its subscriber base consists of over 20,000 lawyers, financial advisers and investment professionals around the world.
3. The witness statements in question were used and referred to at the convening hearing in relation to a scheme of arrangement to be proposed by the Scheme Company. That hearing took place on 4, 11 and 17 February 2021 and was attended by a representative from Reorg together with a number of other media representatives and professional observers. I referred to and paraphrased some parts of the witness statements in my judgment delivered on 23 February 2021 convening the scheme meeting: see [2021] EWHC 378 (Ch). I refer to that convening judgment for the background and shall use the same abbreviations herein as in that judgment.
4. Reorg’s application was originally made by letter dated 24 February 2021. It cited CPR 5.4C(2) and the judgment of the Supreme Court in Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38 (“Dring”) explaining the applicable principles of open justice. Upon receipt, I requested that Reorg should issue a formal application as required by CPR 5.4D(1) and exercised my power under CPR 5.4D(2) to give notice to the Scheme Company by forwarding a copy of the letter. I received a response by letter dated 26 February 2021 from the solicitors to the Scheme Company which, after making the point that a formal application should be made, opposed the application. Reorg responded briefly by email later that same day.
5. What has sparked the interest of Reorg is the unusual fee arrangement which the Group intends to enter into with the Financial Adviser to the AHG. As I described in my convening judgment, that will apparently comprise two elements – a fixed monthly retainer and a Success Fee of \$1 million payable if the members of the AHG vote in favour of the Scheme and the Scheme is sanctioned. In paragraphs [105]-[106] of my judgment I summarised the evidence and my understanding of the proposed arrangement in this way,

“105. The evidence is less clear as to the basis upon which the Financial Adviser has been acting to date and whether the proposed payment of the Financial Adviser’s Fees are designed to relieve the members of the AHG of liabilities (including for the Success Fee) which they would otherwise have. It would appear that the Financial Adviser has been acting on the basis of an informal agreement or understanding with the members of the AHG, but that no final or binding agreement has been reached. In particular, the evidence is that the precise circumstances in which the Success Fee will be payable remain

to be finally negotiated and agreed between the Group, the Financial Adviser and the AHG. What I take from that, however, is that the proposal for payment of the Success Fee is not intended to relieve the members of the AHG from any actual liability to pay such a fee to the Financial Adviser contingent upon the Scheme being sanctioned, and it is not designed to provide any element of additional benefit or disguised consideration to the members of the AHG to induce them to vote in favour of the Scheme.

106. The possibility that the Financial Adviser to the AHG will be given a financial incentive by the Group by way of the Success Fee to advise the members of the AHG to vote in favour of the Scheme is an unusual arrangement. In my experience it is certainly not “market standard” as the Scheme Company’s evidence sought to suggest. However, I accept Mr. Smith QC’s point that since the members of the AHG are fully aware of the proposal and consent to it, it is a matter for them to take into account in their deliberation on the merits of the Scheme, and does not give rise to any class question. The other Noteholders will also be aware of the possibility of payment of such a Success Fee from the Explanatory Statement. They will therefore be able to take that matter into account in deciding what, if any, weight they might choose to place on any support that might be expressed by the members of the AHG in favour of the Scheme (in its current or any amended form).”

### The arguments

6. Reorg’s request for access to the underlying evidence cites the substantial amount of the Success Fee and my indication that, contrary to the evidence of the Scheme Company, the arrangement for a scheme company to pay such a fee to an adviser to some scheme creditors is not, so far as I am aware, market standard. Reorg suggests that it will advance the open justice principle for it to have access to the evidence, which it believes is likely to contain more detail than my judgment, not only so that it can make Scheme Creditors aware of the genesis and reasons for the proposal, but also to make other trade creditors and lenders to the Group aware of such matters because the payment of the fee will reduce the funds that the Group has available to service other debt. Reorg also submits that access to greater detail in the evidence about the proposed arrangements will provide guidance to other proponents of schemes (and Part 26A plans) in the future “as to the type of fee arrangement which is now acceptable”.
7. In opposition, the Scheme Company essentially takes two points. The first is that the witness statements contain little (if any) information concerning the structure of the Success Fee that has not already been captured in the convening judgment and the explanatory statement (which is published on the Group’s website and is available to the public). Secondly, it contends that Reorg’s purpose in obtaining the witness statements is not to advance the purposes of open justice in the interests of Scheme Creditors or other creditors of the Group, but is to promote Reorg’s own commercial

activities by which it makes information available to a limited group of clients who pay for its services.

The law

8. CPR 5.4 provides, so far as material,

“(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of— (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it; (b) a judgment or order given or made in public (whether made at a hearing or without a hearing) ...

(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.”

9. In Dring, at [41], Lady Hale explained that the open justice principle applied to all courts and tribunals, and that except in so far as limited by statute or rules, the court has an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court.

10. Lady Hale then explained, at [42]-[43],

“42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases—to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly....

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

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

“44. It was held in Guardian News and Media [2013] QB 618 that the default position is that the public should be allowed access, not only to the parties’ written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. It follows that it should not be limited to those which the judge has been asked to read or has said that he has read. One object of the exercise is to enable the observer to relate what the judge has done or decided to the material which was before him....”

12. At paragraphs [45]-[46], Lady Hale also gave some indication of the approach that a court ought to follow when determining an access request. She said,

“45. However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in both Kennedy [2015] AC 455, at para 113, and A v BBC [2015] AC 588, at para 41, the court has to carry out a fact-specific balancing exercise. On the one hand will be “the purpose of the open justice principle” and “the potential value of the information in question in advancing that purpose”.

46. On the other hand will be “any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others”. There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case.”

### Analysis

13. Performing the “fact-specific balancing exercise” referred to by Lady Hale in Dring, I consider, first, that the primary purpose of the open justice principle, namely to allow public scrutiny of the decisions of the judges and therefore to enhance confidence that judges are making their decisions properly, is especially important in scheme cases.

Such cases do not merely involve a determination or declaration of rights, but involve a compulsory alteration of the rights of non-assenting creditors against their will or without their consent. That is pre-eminently a process that should be open to close scrutiny.

14. In this regard I do not place any weight upon the argument made by the Scheme Company that Reorg is a subscription service provided to a limited number of organisations. It is inherent in the concept of open justice that public scrutiny should be capable of being conducted by persons other than the parties directly affected by the decision in question. Given the highly technical and specialist nature of schemes, it is inevitable that such scrutiny of decisions in scheme cases will be more effectively conducted by specialists and professionals in the restructuring industry rather than by the man in the street.
15. In that respect, Reorg's subscriber base of over 20,000 is not insignificant in number, it must include a high proportion of the specialist advisers in the restructuring industry, and Reorg's commentary is likely to be picked up by other interested media organisations. Further, and in any event, if Scheme Creditors do seek advice about the Scheme, it is quite possible that they will do so from someone with access to the Reorg service.
16. Moreover, in the case of an international scheme such as the present, the parties affected are not confined to the UK, and so when one speaks of facilitating public scrutiny and enhancing public confidence in judicial decision-making, it is not simply the public in the UK that needs to be considered. Rather, in order to ensure recognition abroad, it is essential to ensure that there is confidence internationally that the English court is conducting a rigorous, fair and transparent restructuring process. Making the process fully accessible to media organisations with an international reach such as Reorg can perform an important role in that regard.
17. I also reject the argument by the Scheme Company that it is relevant that Reorg charges a subscription fee and is seeking to enhance the commercial value of its service by using the information in the witness statements. Very few media organisations operate on a not-for-profit basis: most seek to make a profit and charge in some way for their services, whether that be the price for a newspaper or periodic journal, or a subscription payment for a television channel or online service.
18. Such organisations doubtless hope that the information that they obtain and their analysis of it will enhance the value of their publications or programming, thereby justifying their charges and increasing their subscriber base and profitability. But I do not see why any of that should lead to a conclusion that such organisations are not performing a legitimate journalistic function, or that they cannot serve the principles of open justice. There is also no suggestion in Dring of the restricted approach for which the Scheme Company contends.
19. Lady Hale's explanation of the second purpose of the open justice principle – making the case comprehensible and allowing the public to understand why the judge reached his decision - is also entirely applicable in the instant case.
20. The documentation for a modern scheme case can be extensive. The evidence often runs to many hundreds, if not thousands of pages. In the instant case, the bundle for

the convening hearing ran to just short of 2,000 pages. To make such evidence digestible, counsel usually (and helpfully) provide detailed written arguments summarising the case and the judge has the opportunity to pre-read. The result is that oral hearings can be conducted very efficiently by way of an abbreviated dialogue between the court and counsel, and the contents of the witness statements will not be read out in open court. The inevitable consequence, however, is that even where (as was the case at the convening hearing) a copy of the skeleton argument is made available to persons attending the hearing, it can be impossible for an observer to discover the detail of the evidence or argument. That can certainly be the case where (as occurred in the debate over the Success Fee) the court asks questions which go beyond the information provided in the skeleton argument, and supplemental evidence is filed.

21. I give some weight to the fact that, as the Scheme Company submits, the witness statements contain little (if any) detail about the structure of the Success Fee that was not captured in the convening judgment. But although the structure of the proposal may have been captured in the judgment, there is additional evidence in the witness statements as to the genesis, terms and rationale of entering into such an arrangement from the Group's point of view that I did not think it essential to replicate in the convening judgment. In that respect, as Lady Hale pointed out in paragraph [44] of *Dring*, one object of the open justice exercise is to enable the observer to relate what the judge has done or decided to the full range of the material which was before him. The observer should be able to assess the approach taken by the judge for itself. In the instant case, it is, of course, possible that with its background knowledge of the restructuring industry, Reorg may be able to pick up nuances in the evidence that did not occur to me.
22. I place less weight on Reorg's argument that it may be important to make the proposal to pay a Success Fee to the Financial Adviser known to other creditors of the Group, who might effectively be paying for that fee by a reduction in funds available to them in the wider restructuring. There may well be a wider interest in that point, but the propriety or wisdom of the Group's intentions in this respect was not an issue before me at the convening hearing. Whether it might otherwise be desirable, I therefore do not see how it would directly serve the principles of open justice in promoting an understanding of my decision for Reorg to be able to publicise such information to non-Scheme creditors of the Group who might have their own and different interests to serve.
23. There is one aspect of Reorg's argument with which I definitely do not agree. As indicated above, Reorg sought to justify its application on the basis that access to the evidence about the proposed arrangements between the Group and the Financial Adviser will provide guidance to other proponents of schemes in the future "as to the type of fee arrangement which is now acceptable".
24. Providing guidance to future proponents of schemes and plans is an important aspect of judgments in scheme cases, but Reorg's submission entirely misunderstands the nature and scope of the decision that I made at the convening hearing in the instant case.
25. The court can refuse to convene a scheme meeting if it thinks that there is an obvious defect in a scheme, or some other reason why it would inevitably refuse to sanction

the scheme, or some manifest deficiency in the explanatory statement: see e.g. Re T&N (No.4) [2006] EWHC 1447 at [19]-[20]; Re Indah Kiat International Finance Co BV [2016] EWHC 246 (Ch) at [39]-[42]; and Re Noble Group Limited [2019] BCC 349 at [74]-[76]. But apart from such cases, the main issues to be determined at the convening hearing are the class question and any other questions going to the existence of jurisdiction. The convening hearing is “emphatically not” the occasion upon which the court passes any judgment on the merits or otherwise of a scheme proposal: see Re Telewest Communications plc [2004] BCC 342 at [14].

26. As such, in the instant case, the propriety or otherwise of the Group’s proposal to enter into an arrangement with the Financial Adviser which might involve payment of the Success Fee was not an issue which I had to decide. Nor did I have the necessary evidence to do so. My concerns over the proposals as regards the role and involvement of the Financial Adviser related to the equality of provision of information to Scheme Creditors and to the question of class composition. I was eventually satisfied on those two issues, but contrary to Reorg’s contention, I have in no way endorsed or approved the proposed fee arrangements between the Group and the Financial Adviser.
27. Rather, as I made clear, any dissenting Scheme Creditor could seek to reopen the class question and the question of the adequacy and equality of the provision of information at sanction. Scheme Creditors would also be able to take other points going to the exercise of discretion at sanction. They might, for example, be able to contend that I should place less weight upon the votes of any members of the AHG advised by the Financial Adviser given its incentive to recommend the Scheme.
28. In the balancing exercise on the other side of the scales, according to Lady Hale’s judgment in Dring, is the question of “any risk of harm which ... disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others”. In that regard, however, it is significant that the Group does not actually contend that any of the information in the witness statements is confidential, or that disclosure of it would be harmful to the Group, to the court process as regards the Scheme, or to any other person. Of itself, that lack of any adverse consequences is a weighty factor supporting the conclusion that access should be permitted.

### Conclusion

29. Weighing the various factors to which I have referred in the balance, for the reasons that I have given, I am entirely convinced that this case falls squarely within the approach taken by Toulson LJ in the Guardian News and Media case [2013] QB 618 which was referred to with evident approval by Lady Hale in Dring. Toulson LJ concluded, at [85],

“85. In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong.”



30. I therefore conclude that it is an appropriate case to grant Reorg access to the witness statements in order to serve the principles of open justice. I shall make an order to that effect.