THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0027

BETWEEN:

[1] IKANA HOLDINGS, S. DE R.L
[2] CONSORCIO ENERGETICO PUNTA-CANA MACAO, S.A

Appellants

and

[1] PUTNEY CAPITAL MANAGEMENT LTD.
[2] BASIC ENERGY (BVI) LTD. (NOW KNOWN AS HAINA ENERGY HOLDINGS II)
[3] SNAPPER INVESTMENTS, INC.

Respondents

Before

The. Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Ben Valentin, QC with him Mr. Simon Hall for the Appellants
Mr. David Mumford, QC with him Ms. Laurie-Astrid Wigglesworth for the Respondents

---

2021: November 24;
2022: January 24.

Interlocutory appeal – Application for specific disclosure of documents held by third party – Appellate interference with findings of fact – Civil Procedure Rules 2000 – CPR 28.1(4) – Document to be disclosed must be directly relevant to issues at trial – Whether the documents for which appellants seek disclosure are directly relevant to the issues in the case – Whether Court should exercise discretion to order respondents to search for documents in third party's possession and disclose them – Control – CPR 28.2 – Existence of an express agreement or an arrangement or understanding, for the disclosing party to

have free access to the documents of third party in possession of documents – Whether the Respondents have control of the documents held by a third party – Whether the judge erred in his overall approach to the application for specific disclosure – – Application to adduce fresh evidence – Ladd v Marshall principles - Whether fresh evidence should be admitted

The 1st appellant, Ikana Holdings, S. de R.L., and the 2nd appellant, Consorcio Energetico Punta Cana-Macao, SA ("The Appellants"), are companies within a group of companies controlled by InterEnergy Group Limited ("InterEnergy"). The 1st respondent, Putney Capital Management Ltd ("Putney"), the 2nd respondent, Basic Energy (BVI) Limited ("Basic"), and the 3rd respondent, Snapper Investments, Inc ("Snapper") ("The Respondents"), are companies controlled by the Vicini Group.

Before September 2014, InterEnergy and the Vicini Group owned interests in Haina Investment Company Limited ("HIC") which in turn owns 50% of the shares of Empressa Generadora Haina, SA ("EGE"). HIC also controls EGE. On 30th September 2014, InterEnergy, Putney, Snapper and Basic entered into a Master Transaction Agreement ("MTA") regarding the redistribution of their interests within the two groups of companies. The MTA made provision for the distribution of dividends to HIC's shareholders from profits generated by EGE before the closing of the MTA. HIC's pre-closing shareholders included the Appellants.

Before the closing of the MTA, EGE generated earnings and profits and following the closing of the MTA, EGE made a substantial distribution of dividends to its post-closing shareholders, which it classified as an advance against future profits. Further distributions were made in 2016 and 2017. However, the Appellants, through HIC, were not paid a *pro rata* or any share of these distributions. As a result, the Appellants filed a claim in the Commercial Court against the Respondents alleging that the Respondents breached the MTA by causing EGE to pay the distributions as advances against future profits, and not as dividends, to circumvent paying the Appellants' their *pro rata* share of the distributions as required by the MTA. To support their case, the Appellants requested documents in connection with the post-closing distributions. The Respondents voluntarily provided some documents, but the Appellants were not satisfied with the level of disclosure and the fact that the Respondents selected the documents that they disclosed. As such, the Appellants applied for specific disclosure of the documents relating to the decision-making process and the source of funds for the payment of the post-closing distributions.

The learned trial judge ("the Judge") found that the Respondents did not have the requisite control of the documents to order disclosure. He acknowledged the Respondents' majority control of HIC and by extension HIC's control of EGE, but held that the control of a subsidiary in the sense of corporate control is not the same as control of documents in the subsidiary.

The Appellants, being dissatisfied with the Judge's decision have appealed, relying on 5 grounds of appeal. The Appellants also applied for permission to rely on the fourth witness statement of Brian S. Herman as fresh evidence in the appeal.
The main issues that arise for the Court's determination are: (i) whether the documents for which the Appellants seek disclosure are directly relevant to the issues in the case; (ii) whether the Respondents have control of the documents held by EGE; (iii) whether the

Court should exercise discretion to order the Respondents to search for the documents in EGE's possession and disclose them; (iv) whether the Judge erred in his overall approach to the application; and (v) whether the fresh evidence should be admitted.
Held: granting the application to rely on fresh evidence; dismissing the appeal; affirming the Judge's order;; and ordering the Appellants to pay the assessed costs of the Respondents at the rate of two-thirds of the amount awarded in the lower court, that:

1. An appellate court is generally reluctant to interfere with the findings of fact, the evaluation of those facts and the inferences drawn from the facts made by a lower court, since the trial judge had the opportunity of seeing and hearing the witnesses give their evidence and to assess their demeanour and credibility. The appellate court will only interfere if the judge erred in principle in his findings or if his decision was clearly or blatantly wrong. In the case where the evidence before the judge was on affidavits and there was no cross examination of the deponents, an appellate court's degree of reluctance to interfere is less. In such cases, the appellate court will have due regard to the Judge's evaluation of the evidence and his findings of fact and will only interfere if the disagreement with the Judge's findings is so wide that the appellate court is satisfied that it can legitimately interfere.

   Watt (Or Thomas) v Thomas [1974] 1 All ER 582 applied; **Assicurazioni Generali SpA v Arab Insurance Group** [2003] 1 WLR 577 applied; **Datec Electronics Holdings Ltd and others v United Parcel Service Ltd** [2007] 1 WLR 1325 considered.

2. A document is liable to be disclosed if it is directly relevant to the issues that would arise for decision at trial. By virtue of rule 28.1(4) of the Civil Procedure Rules, a document is directly relevant if: the party with control of the document intends to rely on it; it tends to adversely affect that party's case; or it tends to support another party's case. In this case, at least some of the requested documents are or may be directly relevant to the issues between the parties and are liable to be disclosed.

   Rule 28.1(4) of the **Civil Procedure Rules 2000** applied; **Dr. The Honourable Timothy Harris v Dr. The Right Honourable Denzil Douglas** SKBHCVAP2019/0026 (delivered 9th December 2021, unreported) followed.

3. A party's duty to disclose is limited to those documents that are or have been in the control of that party within the meaning of CPR 28.2. In the context of a parent/subsidiary relationship, control must be demonstrated by sufficient evidence showing that there is an express agreement for the disclosing party to have free access to the documents of the subsidiary, or an arrangement or understanding for the disclosing party to have such access. The existence of an arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to the subsidiary's documents in the same proceedings is a highly relevant factor. In this case, the previous disclosures of documents by the Respondents relating to EGE were not sufficient to raise the inference of an arrangement or understanding for free access to EGE's documents by the Respondents. Therefore, the Judge's conclusion that the previous disclosures do

not amount to an arrangement or understanding for general access to EGE's documents cannot be impugned.

Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627 considered; **Ardila Investments NV v ENRC, NV and another** [2015] EWHC 3761 (Comm) applied; **North Shore Ventures Ltd v Anstead Holdings Inc** [2012] EWCA Civ 11 applied.

4. The Judge did not err in his overall approach and consideration of the issues and there is no basis for this Court to legitimately interfere with the Judge's finding.

5. In interlocutory appeals, the Court applies a more relaxed approach in its application of the **Ladd v Marshall** test. Notwithstanding this, the applicant must still satisfy the three limbs of the test. In this case, the Appellants satisfied all three limbs of the test and the new evidence was admitted as fresh evidence to be used in the determination of the appeal. However, the new evidence, when considered with all the evidence in the case, does not rise the case to the level of proving an understanding or arrangement that the Respondents have general access to EGE's documents.

Ladd v Marshall [1954] 3 All ER 745 applied; **Bilzerian & Others v Byron & Others** [2020] ECSCJ No. 249 (delivered 21st July 2020) followed.

JUDGMENT

[1] **WEBSTER JA [AG.]**: This is an appeal against the decision of Jack J [Ag.] ("the Judge") refusing an application by the appellants for specific disclosure of documents held by a third party, Empressa Generadora Haina, SA ("EGE"). The appellants, Ikana Holdings, S. de RL and Consorcio Energetico Punta Cana-Macao, SA (together "the Appellants") applied for an order that the respondents, Putney Capital Management Ltd., Basic Energy (BVI) Ltd. and Snapper Investments, Inc. (together "the Respondents"), conduct a search of the documents held by EGE and disclose the documents found as a result of the search.

Background and parties

[2] The 1st appellant, Ikana Holdings, S. de R.L. ("Ikana"), is a company registered in the Bahamas engaged in developing energy generation products in various countries. The 2nd appellant, Consorcio Energetico Punta Cana-Macao, SA ("CEPM"), is a wholly owned subsidiary of Ikana engaged in the business of generating, transmitting

and distributing electricity. Both companies are within a group of companies controlled by InterEnergy Group Limited ("InterEnergy"), an exempt company incorporated under the laws of the Cayman Islands.

[3] The 1st respondent, Putney Capital Management Ltd ("Putney"), is a BVI company engaged in asset management and manages the assets of the 3rd respondent, Snapper Investments, Inc ("Snapper"), a Bahamian company.

[4] The 2nd respondent, Basic Energy (BVI) Limited, now known as Haina Energy Holdings II ("Basic"), is a 100% subsidiary of Snapper.

[5] Putney, Basic and Snapper are within the group controlled by or affiliated with the Vinici Group which is sometimes referred to as the Putney Group. The names are used inter-changeably but in either case is used to refer to the group to which the Respondents belong.

[6] Before September 2014, InterEnergy and Vicini Group owned interests in Haina Investment Company Limited ("HIC") which in turn owns 50% of the shares of EGE and controls EGE. More than 49% of the shares are held by a fund associated with the Government of the Dominican Republic, and the remaining less than 1% is held by various individuals.

[7] EGE is a major distributor of electricity in the Dominican Republic.

[8] On 30th September 2014, InterEnergy, Putney, Snapper and Basic entered into a Master Transaction Agreement ("MTA") by which, among other things, InterEnergy would acquire Basic's interest in the Appellants and related companies and Basic would acquire InterEnergy's direct and indirect interests in HIC and EGE. Following the closing of the MTA, the Respondents' corporate control of HIC (through Snapper and Basic) moved from 50% to 75.6% and HIC continued to hold the majority controlling interest of 50% in EGE. This meant that HIC controlled the composition of

the board of directors of EGE. HIC also appointed the president, other senior officers, and the general manager of EGE.

[9] The negotiations leading up to MTA were protracted ending with the eventual closing on 31st October 2014. During this period EGE generated earnings and profits which, in the ordinary course, would have been distributed to HIC. HIC in turn would have distributed dividends to its shareholders who included the Appellants. However, EGE, which was controlled by HIC and the Respondents, did not distribute any earnings and dividends before the closing. To address this situation, section 2.06 of the MTA under the heading "Cash Distributions" provides that any dividends paid by EGE to HIC after closing that are attributable to the fiscal years 2013 and 2014 up to the date of the closing shall be distributed to the Appellants *pro rata* their interest in HIC as at the closing of the MTA. Section 5.02 further provides that the parties and their affiliates shall take all necessary steps to consummate the transactions contemplated by the MTA and section 8.02 provides that following the closing each party shall indemnify and hold the other parties harmless against any losses from or arising out of any breach of any representation or warranty contained in the MTA and two other related agreements between the parties.

[10] In 2015, following the closing of the MTA, EGE made a substantial distribution of US $56.6 million to its post-closing shareholders which it classified as an advance against future profits. Further distributions of US$146 million and $25 million were made in 2016 and 2017 respectively. The Appellants, through HIC, were not paid a pro rata or any share of these distributions. The Appellants claimed that the Respondents breached the MTA by causing EGE to pay the distributions as advances against future profits, and not as dividends, to circumvent paying the Appellants' their *pro rata* share of the distributions as required by section 2.06 of the MTA. The essence of the Appellants' claim is summarised in paragraph 24 of the statement of claim:

> "As detailed below, the Defendants have deliberately circumvented the contractual obligation to distribute distributions to the Claimants by disguising historic dividend payments as "advances" against future profits

> and using retained earnings accumulated prior to the Closing Date to pay distributions to the post-transactionowners of HIC to the exclusion of the Claimants. The characterization of these payments as "advances," to be paid "as cash flow allows," is reflected in the minutes from a meeting of Haina's board of directors."

[11[On 18th December 2019, the Appellants filed a claim in the Commercial Court against the Respondents for damages for breach of the MTA. The statement of claim alleges that the audited financial statements for years 2013 to 2016, and the unaudited financial statement for 2017, show that HIC, as a 50% shareholder of EGE, should have received distributions of US$103,474,364.00 attributable to the pre-closing period. Under section 2.06 of the MTA the Appellants' *pro rata* share of this amount would be $53,082,343.60. The Respondents failed to pay this amount in breach of section 2.06 of the MTA and/or failed to indemnify the Appellants for the non-payment in breach of section 8.02 of the MTA.

[12] The statement of claim also claims the disputed amount as unjust enrichment, and, under New York law which governs the MTA, breach of an implied covenant of good faith and fair dealing.

[13] In order to further its case, the Appellants requested documents in connection with the post-closing distributions. The Respondents voluntarily provided some documents, but the Appellants were not satisfied with the level of disclosure and the fact that the Respondents selected the documents that they disclosed. As a result, they applied for specific disclosure of the documents relating to the decision-making process and the source of funds for the payment of the post-closing distributions. The non-payment of dividends and the documents relating to the decision to distribute the retained earnings as advances on profits are at the heart of the dispute between the parties.

[14] The disclosure application states that the requested documents are in the possession of EGE and the Appellants require the Respondents to "… conduct a search of EGE's documents and give disclosure in respect of the documents obtained as a result of

the search within 21 days." It is apparent that the application seeks an order compelling the Respondents to conduct a search of documents held by third party (EGE) which is their indirect subsidiary, and disclose the documents obtained from the search.

Relevance

[15] The first step in the process is for the Appellants to prove that the documents for which they are seeking disclosure are directly relevant to the issues in the case. The test for relevance is in rule 28.1(4) of the **Civil Procedure Rules 2000** (the "CPR") which reads:

> "For the purposes of this Part a document is "**directly relevant**" if –
>
> (a) the party with control of the document intends to rely on it;
> (b) it tends to adversely affect that party's case; or
> (c) it tends to support another party's case; but the rule of law known as "the rule in Peruvian Guano" does not apply."

[16] The test of relevance was recently considered by this Court in **Dr. The Honourable Timothy Harris v Dr. The Right Honourable Denzil Douglas**.[1] The unanimous judgment of the Court was delivered by Baptiste JA who considered the position in the Eastern Caribbean since the enactment of the CPR in 2000 and concluded –

> "For the purpose of disclosure, the relevance of the documents is analysed by reference to the pleadings and the factual issues that would arise for decision at the trial. Disclosure must be limited to documents directly relevant to those issues. In seeking to identify the factual issues which would arise for decision at the trial, the judge is obliged to analyse the pleadings. The critical question is whether the documents are directly relevant, and if they are, the court is enjoined to consider whether the order is necessary to dispose of the case fairly."[2]

One must therefore have regard to the issues raised by the pleadings and decide if they are directly relevant. And if they are, whether they should be disclosed.

---

[1] SKBHCVAP2019/0026 (delivered 9th December 2021, unreported).
[2] Ibid at paragraph [15].

[17] The issues that arise on the pleadings revolve around the decision by the directors of EGE to distribute the retained earnings of EGE as advances on future profits and not as dividends, the reason for the decision and whether any part of the amounts distributed as advances on profits were paid out of the pre-closing earnings of EGE. The Appellants do not dispute that the Respondents and their directors and officers are not officers or the directors of EGE, but they assert that the Respondents, by virtue of their majority shareholding and overall control of EGE, have sufficient possession and/or control of EGE's documents to make them amenable to an order for disclosure under CPR 28.2.

[18] The Respondents dispute the Appellants' interpretation of the MTA and the obligations said to have been created by sections 2.06, 5.02 and 8.02 of the agreement, and deny that the payment of advances against future profits by EGE was improper or designed to circumvent section 2.06 or any other provisions of the MTA, and that the payments of the advances on profits are properly attributable to earnings for the fiscal years 2013/2014. The Respondents also denied the claims for unjust enrichment and breach of covenant of good faith. In short, the Respondents deny the claim entirely.

[19] The disputed issues in the claim are heavily contested and no attempt will be made in this judgment to make findings of fact on these issues.

[20] I am satisfied that at least some of the requested documents are or may be directly relevant to the issues between the parties. The fact that EGE distributed $55.6 million on 18th March 2015 and $171 million dollars during 2016 and 2017 raises the question whether any of those distributions, and in particular the March 2015 distribution, were from pre-closing earnings and could have been distributed to HIC as dividends attributable to the pre-closing period in accordance section 2.06 of the MTA and therefore be available for further distribution as dividends to the Appellants. If there were no such earnings that would be the end of the matter and the Appellants would have a more difficult time proving their claim. On the other hand, if any part of

the post-closing distributions were from pre-closing earnings it would be reasonable for the Appellants to know why they were not considered by the directors of EGE for distribution in accordance with section 2.06 of the MTA. The issues of the source of the funds for the payment of advance distributions of profits and the reason why the directors chose not to distribute any part of these funds to HIC as pre-closing earnings are directly relevant to the issues in the case. The documents in relation to these issues are therefore liable to be disclosed.

Control under CPR 28.2

[21] If the requested documents are directly relevant to the issues in the case the next step is for the Court to determine whether it should exercise discretion to order the Respondents to search for the documents in EGE's possession and disclose them. This involves a consideration of whether the documents are or have been in the control of the Respondents. The test for control is contained in rule 28.2 of the CPR which reads –

> **"Duty of disclosure limited to documents which are or have been in party's control**
>
> 28.2 (1) A party's duty to disclose documents is limited to documents which are or have been in the control of that party.
>
> (2) For this purpose a party has or has had control of a document if –
>
> (a) it is or was in the physical possession of the party;
>
> (b) the party has or has had a right to inspect or take copies of it; or
>
> (c) the party has or has had a right to possession of it."

For the purposes of this appeal sub-paragraph (a) is not disputed – the requested documents are not in the possession of the Respondents. They are held by a third party, EGE. It is apparent from the grounds of appeal and the Appellants' submission that they place heavy reliance on sub-paragraph (b) (the right to inspect or take copies of the documents), and to a lesser extent sub-paragraph (c) (the right to possession of the documents), to prove that the Respondents have control of the documents within the meaning of CPR 28.2.

The Judge's decision

[22] The learned Judge carried out a detailed examination of the law relating to a party's duty to disclose relevant documents that are or have been in the possession of a third party, applied the principles to the facts of this case, and concluded that the Respondents did not have the requisite control of the documents to order disclosure. He acknowledged the Respondents' majority control of HIC and by extension HIC's control of EGE, and made the distinction between "..control of a subsidiary in the sense of corporate control is not the same as control of documents [in the subsidiary]".[3] He found that the evidence did not reach to the threshold of showing that the Respondents had practical or factual control over the documents,[4] and that there was no express or implied arrangement or understanding that the Respondents had access to the documents. He dismissed the application with costs to the Respondents.

[23] The Appellants appealed on five grounds which I summarise as follows:

(a) The Judge should have found that the test of control under CPR 28.2 is met when there is an understanding or arrangement the effect of which is that the disclosing party (the Respondents) has, in practice, free access to the documents of the third party (EGE) (ground 5.1).

(b) The Judge should have found on the facts of this case that there was such an understanding or arrangement and that the Respondents had such access (and therefore control) of the documents (grounds 5.2).

(c) The Judge failed to have regard to the true nature of the relationship between the Respondents and EGE, which is a question of fact, and that in this case the Respondents exercised practical day-to-day control over EGE (grounds 5.3, 5.4 and 5.5)

[3] Page 84 lines 4-9 of the transcript of the judgment.
[4] Page 88 lines 4-7 of the transcript of the judgment.

(d) The Judge erred in permitting the Respondents to confine their disclosure to their own selection of documents of HIC and EGE and not ordering them to search for and produce all relevant documents of HIC and EGE, including documents that are adverse to their case, causing serious prejudice to the Appellants' right to a fair trial (ground 5.6). The Appellants described the Respondents form of disclosure as "cherry picking".

The Appeal

[24] In a nutshell, the Appellants contend that there was sufficient evidence for the Judge to have found as a fact that there was an understanding or arrangement between the Respondents on the one hand, and EGE and HIC on the other, that the Respondents had free access to the documents of EGE and HIC, and this was sufficient for the Judge to find that the Respondents had control of the documents within the meaning of CPR 28.2 making them amenable to an order to search for the documents of these companies and disclose all relevant documents.

Appellate approach to findings of fact

[25] The Appellants' grounds of appeal raise in large part challenges to the Judge's findings of primary facts and his evaluation of the facts. This brings into play the standard of review that this Court should apply in assessing his findings. As to the findings of primary fact, the approach of an appellate court is well-known and has been documented in several cases by this Court. In summary, an appellate court is generally reluctant to interfere with the findings of fact by a lower court since that court had the opportunity of seeing and hearing the witness give their evidence and to assess their demeanour and credibility. The appellate court will interfere only if the judge erred in principle in his findings or if his decision was clearly or blatantly wrong. If authority is needed for this trite point it can be found in the seminal judgment of Lord Thankerton in **Watt (Or Thomas) v Thomas**[5] which has been followed on many occasions by this Court.

[5] [1974] 1 All ER 582.

[26] The degree of reluctance to interfere is less in cases such as the present where the evidence before the Judge was on affidavits and there was no cross examination of the deponents. The judge evaluated the printed evidence and made findings of fact in coming to his decision. He did not have the benefit of seeing the witnesses give their evidence and observing their demeanour and in this respect this Court is in as good a position as he was to evaluate the evidence. But even in this situation the appellate court is reluctant to interfere with the judge's findings of fact. Learned counsel for the respondents, Mr. David Mumford, QC, relied on the judgment of Clark LJ in **Assicurazioni Generali SpA v Arab Insurance Group**[6] to support this position. He cited paragraph 16 of Clarke LJ's judgment that:

> "Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

Clarke LJ's approach to findings of fact based on an evaluation of the evidence was commended by Lord Mance in the House of Lords decision of **Datec Electronics Holdings Ltd and others v United Parcel Service Ltd**.[7] However, Lord Mance went on to warn against equating the test for reviewing findings of fact with the test for upsetting the exercise of discretion by a judge.

[27] In this case, where there was no oral evidence and the written evidence before the Judge is the same as the evidence that is before this Court. I am satisfied that this Court can interfere with the Judge's findings of fact based on his evaluation of the evidence for any of the well-known reasons in cases such as **Watt (Or Thomas) v Thomas** cited above, and also if this Court, having carried out its own evaluation of the evidence, can legitimately differ from the judge's conclusions. That said, this Court should still have regard to the findings of fact by the trial judge and not substitute its own findings simply because it disagrees with the Judge's findings. The

[6] [2003] 1 WLR 577.
[7] [2007] 1 WLR 1325 at paragraph 46.

disagreement must be so wide for the appellate court to find that it is legitimate to interfere. This is so for the further reasons that the judge is immersed in the proceedings in the lower court and is generally more familiar with the details of the case than the appellate court, and also because the court has an interest in the efficient use of its resources. In **FAGE UK Limited and another v Chobani UK Limited and another**[8] Lewison LJ stated at paragraph 114 –

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those factsand to inferences to be drawn from them… The reasons for this approach are many. They include
>
> i) The expertise of a trial judge is in determining what facts are relevant to the this legal issues to be decided, and what those facts are if they are disputed.
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case
>
> ."The position remains that even in an appeal such as this case where there was no oral evidence the appellate court will have due regard to the judge's evaluation of the evidence and his findings of fact and will not interfere simply because it would have come to a different conclusion on the facts. The disagreement must be so wide that the appellate court can feel satisfied that it can legitimately interfere, but the disagreement does not have to be so strong that the appellate court thinks that the judge of the lower court was blatantly wrong."

Guided by the principles outlined in the preceding paragraphs my approach is that the Judge's findings of fact, whether primary or by evaluation of the evidence, will be respected and I would only interfere if I find that he erred in principle in the **Watt (Or Thomas) v Thomas** sense, or if his conclusions from the evaluation of the evidence are so different from this Court's to make it legitimate to interfere.

Submissions and issues

[8] [2013] EWHC 630 (Ch).

[11] As stated above the application before the Judge was for specific disclosure under part 28 of the CPR of documents held by a third party. To succeed the Appellants must prove that the Respondents have control of the documents in the sense contemplated by the rule 28.2. The essence of the submissions of Mr. Ben Valentin, QC who appeared for the Appellants can be gleaned from the notice of appeal, and his written and oral submissions. His main points, which are the issues in the appeal, are:

(i) The Respondents had already voluntarily disclosed EGE's documents that were in their possession which supports his contention that there was an understanding or arrangement between EGE and the Respondents that gave the Respondents free access to EGE's documents

(ii) The Judge accepted that none of the points made by the Appellants was sufficient to find an understanding or arrangement, but he failed to consider the cumulative effect of the points and adopt a holistic approach to the issue of an understanding or agreement for free access.

(iii) (As a corollary of sub-paragraph (ii) above), the Judge erred in his evaluation of the evidence and should have found that the Respondents had control of EGE's documents in the sense of having free access to them within the meaning of CPR 28.2.

[12] Mr. Mumford, QC disputed these points and submitted that the Judge carried out a proper evaluation of the evidence and came to the correct conclusions.

[13] Counsels' submissions will be dealt with in greater detail in my analysis of the law.

The Law

[14] The Judge delivered an *ex-tempore* judgment immediately following the completion of submissions by counsel. He carried out a careful evaluation of the evidence,

analysed the law relating to applications for disclosure under CPR 28.2, and came to the conclusions set out in paragraph 22 above.

[15] At the outset I make the point that there is a distinction, which is not disputed, between control in the corporate sense of a parent company's control over its subsidiary, and control by a parent company of documents in the possession of its subsidiary. The former control is not decisive when considering an application for specific disclosure under part 28 of the CPR, but is one of the factors that the court can consider in determining whether there is an understanding or arrangement for free access to the documents in the subsidiary. Control in the latter sense of access to the documents in possession of the subsidiary can and often does amount to control within the meaning of CPR 28.2 and gives the court a discretion whether to order disclosure of the subsidiary's documents. The distinction was noted by the Judge at page 84 lines 4-9 of the transcript of his judgment.[9]

[16] I also agree with counsel on both sides that CPR 28.2 is substantially the same as the rule 31.8 of the English Civil Procedure Rules dealing with specific disclosure, and that the cases decided by the English courts are highly persuasive in interpreting CPR 28.2.

[17] The first case that dealt decisively with the issue of a parent company's control over documents in its subsidiary is of the House of Lords decision in **Lonrho Ltd v Shell Petroleum Co Ltd**.[10] The case was decided under the old RSC Order 24 which used the word "power" as opposed to "control" in the current rule 31.8 of the Civil Procedure Rules.[11] The case involved an application for disclosure by a parent company of documents in its subsidiary. Their Lordships decided that a parent company has a document in its power only if it had a presently enforceable legal right to obtain inspection of the document from whoever actually held it (the

[9] Supra note 3.
[10] [1980] 1 WLR 627.
[11] Counsel in Lonhro did not suggest that there was any difference between "power" in RSC Order 24 and "control" in rule 3.18 of the English CPR.

subsidiary) without the need to obtain the consent of anyone else. In the absence of such a legally enforceable right the application was refused. The case effectively ruled out the possibility of an implied or inferred understanding or arrangement for access to the subsidiary's documents by the parent.

[18] **Lonrho** also established that an expectation that a subsidiary will in practice comply with a request by the parent to provide documents is not enough to amount to control of the documents, and there is no obligation on the parent company to even make the request.[12]

[19] In the absence of a legally enforceable right of access the applicant must show that based on the relationship between the defendant and the third party there is evidence from which the court can infer an arrangement or understanding that the defendant has free access to the third party's documents.[13] The existence of such an arrangement or understanding often arises in the context of an application for a parent company to disclose documents in the possession of its subsidiary.

[20] The general position that the cases since **Lonhro** establish is that for a parent company to have access to documents held by its subsidiary the evidence must show that there is an arrangement or understanding between the parent company and the subsidiary which, in practice, has the effect of conferring free access to the subsidiary's documents. An example of how this principle operates is **Ardila Investments NV v ENRC, NV and another**.[14] The application was for ENRC, the parent of two 100% owned subsidiaries, to disclose documents held by the subsidiaries. ENRC had undertaken in a share purchase agreement with **Ardila Investments NV** that it would procure that its subsidiaries would co-operate and provide information relating to certain conditions of payment in the agreement. ENRC's position was that this did not give general access to all the documents of

[12] Supra note 10 at page 635 H.
[13] North Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11.
[14] [2015] EWHC 3761 (Comm).

the subsidiaries. Males J reviewed the authorities on what amounts to an understanding or arrangement for free access and found:

> "It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party, in that case [North Shore Ventures Ltd v Anstead Holdings Inc] the trustees. It appears that that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access."[15]

[21] In relation to ENRC's contractual obligation to procure that its subsidiaries co-operate and provide information, Males J said:

> "The fact that ENRC undertook these obligations certainly demonstrates, as it accepts, an expectation on its part that it would be able to ensure that Bamin and any other subsidiaries did what was necessary to enable ENRC to perform those obligations. It seems to me, however, that extensive as those obligations are, they fall well short of any understanding or arrangement which would enable ENRC to have free access to all of Bamin's or other subsidiaries' documents. It is one thing to undertake specific obligations of that nature, it is quite another to permit free range through the documents, including those held electronically, of the subsidiary company, potentially extending much more widely."[16]

[22] Males J refused the application, finding that ENRC's obligation under the share purchase agreement to procure the subsidiaries, to co-operate and provide information did not establish an arrangement that would allow ENRC free access to the subsidiaries' documents. The learned judge's judgment also shows that the arrangement or understanding must be between the parent and the subsidiary, and that an obligation or undertaking given by the parent to a third party is not sufficient for the purposes of control of the subsidiary's documents under CPR 28.2.

[23] The way that the law has developed since **Lonrho** is that the parent/subsidiary relationship is no longer a decisive factor one way or the other. What is required is sufficient evidence from which the court can find an express agreement or infer

[15] Ibid paragraph 10.
[16] Supra note 14 at paragraph 17.

an arrangement or understanding, in the context of a parent/subsidiary relationship, or otherwise, for the disclosing party to have free access to the documents of the subsidiary or other third party in possession of the documents. An express or legally enforceable right is not essential. In **Berkeley Square Holdings Limited & Others v Lancer Property Asset Management Ltd & Others**.[17] Robin Vos, sitting as a deputy judge, reviewed the authorities and set out a useful list of the types of conduct that can lead to a finding that there was an arrangement or understanding for free access to the documents:

> "Drawing all of these threads together, the following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents:
>
> i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;
>
> ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;
>
> iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;
>
> iv) <u>The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;</u>
>
> v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;

[17] [2021] EWHC 849 (Ch).

(vi) the arrangement or understanding must not be limited to a specific request but should be more general in its nature."[18] (Emphasis added)

This is a helpful summary of some, but not necessarily all the principles relating to disclosure of documents held by a third party.

Previous disclosure by the respondents

[24] The Appellants placed heavy reliance on principle (iv) in the deputy judge's judgment. Their case is that the Respondents had voluntarily provided documents in relation to EGE in these proceedings and that this by itself, or when considered with other factors which I will deal with below, was sufficient to show that there was an arrangement or understanding that the Respondents had free access to the documents and were therefore in control of the documents within the meaning of CPR 28.2. The Respondents did not deny that some of EGE's documents had been disclosed earlier in the proceedings, but say that these were documents that were already in their possession. These documents included reports that they would have received from Mr. Rafael Velez, the founder and chief executive officer of Putney who is also a director of EGE. The other documents came into the Respondents possession following a specific request to EGE by their local counsel. The issue of the extent of the Respondents' disclosure of EGE's documents is disputed and will have to be resolved in the trial.

[25] The Judge reviewed the evidence relating to the Respondents' prior disclosure of documents and other circumstances of the application and concluded at page 88 lines 16 to 20 of the transcript of the judgment that:

> "In my judgment, the factual points made by Mr Mumford QC are to be preferred that the ad hoc disclosure does not sufficiently demonstrate a general right of access to EGE Haina's documents."

[26] It is a question of fact in each case whether the previous voluntary disclosure or more than one such disclosure is sufficient to establish an arrangement or

[18] Ibid at paragraph 46.

understanding for free access to the documents in the third party's possession. The issue of the effect of previous disclosure by the party in possession of the documents has been considered in the decided cases. In **Berkeley Square Holdings Limited & Others**[19] the third parties holding the requested documents had provided voluntary disclosure of some of the documents during standard disclosure but refused further disclosure on the ground that they did not have control of the remaining documents. The deputy judge considered the leading authorities and found on the available evidence that based on the co-operation and previous voluntary disclosure there was an understanding or arrangement that the disclosing party had access to the third parties' documents connected to the claim and ordered disclosure.[20]

[27] The Court came to the opposite conclusion in the **Ardila Investments NV** case.[21] In coming to his decision to refuse the disclosure application Males J noted:

> "In my judgment, this material does not evidence any existing right or understanding or arrangement giving ENRC access to documents. It is merely the evidence of the normal relationship that one would expect between a parent and subsidiary without the particular features of the *Schlumberger* or *North Shore* cases. Such cooperation as there may have been in the past as to compliance with specific requests, for example production of certain of the licences in issue, does not, in my judgment, amount to evidence that ENRC has the necessary control in the sense which the cases show is necessary over Bamin's documents. It does not indicate that ENRC would be entitled to send its solicitors into Bamin's premises and to insist on searching Bamin's computers, applying the kind of word search terms and insisting on production of the computers of various individuals which would be necessary in order to enable that to be done. There is no evidence as far as I can see that that has happened so far, as distinct from specific documents being provided in response to a specific request." (Emphasis added)

[28] Applying the principles from the cases to the facts of this case I am satisfied that the disclosure of the documents relating to EGE that were already in the possession of the Respondents via Mr. Velez or otherwise, were properly disclosed

[19] Supra note 17 at para 42.
[20] Supra note 17 at paragraph 50.
[21] Supra note 14 at paragraph [21].

in the standard disclosure procedures and no inference of an arrangement or understanding for free access to EGE's documents should be inferred from these disclosures. Neither does the voluntary disclosure by EGE at the request of Respondents' local counsel for a specific purpose. Therefore, I agree with the Judge's conclusion set out above. Even if I did not agree with his conclusion, there is no basis on which I could legitimately disagree with his finding that the previous disclosures do not amount to an arrangement or understanding for general access to EGE's documents.

Control of EGE

[29] I outlined in paragraphs 2-9 above the corporate structure of the companies within the Vicini Group of which Respondents are a part. The Appellants contended that the Respondents have control of the day-to-day activities of EGE, including access to its documents, through the following:

(i) their direct and indirect majority shareholding in HIC, which in turn has the majority voting power in EGE and control the composition of the board of directors of EGE;

(ii) HIC has the right to appoint the president, general manager and other senior officers of EGE;

(iii) the assurances and undertakings given by the parties in section 5.02 of the MTA relating to the execution and consummation of the transactions in the MTA and the related agreements.

(iv) A management agreement between HIC and EGE dated 28th October 1999 ("the Management Agreement").

Items (i) and (ii) relate to the Respondents' corporate control of EGE and as I said in paragraph 34 above, this is only a factor to be considered in determining whether control within the meaning of CPR 28.2 exists. It is not decisive. Item (iii) covers the usual contractual obligations that flow from major commercial transactions as

contained in section 5.02 of the MTA. As with items (i) and (ii), these assurances and undertakings are relevant factors to be considered in the evaluation of whether control within the meaning of CPR 28.2 has been established. By themselves, they carry little, if any weight in the evaluation exercise. The Judge was equally dismissive of the reliance on the assurances and undertakings. At page 85 lines 10-19, he said that:

> "They indicate no more than that it was expected that the relevant companies would take the required steps at the request of the defendants, but that falls far short of demonstrating an ongoing agreement or arrangement, conferring rights required for the present purposes."

Males J came to the same conclusion regarding EMRC's contractual obligations in the **Ardila Investments NV** case.[22]

[30] Item (iv), the Management Agreement, provides in clause 3.5 that EGE shall make available to HIC at least every three months and as reasonably requested all the commercial and financial documents of EGE which may be needed in accordance with article 49 of EGE'S bylaws. Article 49 deals with the declaration and payment of dividends. This is a contractual right to EGE's documents for a limited purpose. It does not give a general access to all of EGE's documents.

The judge's overall approach

[31] Mr. Valentin, QC submitted that the Judge erred in his overall approach to the application by dealing with and dismissing each of the points made by the Appellants and did not adopt a holistic approach to the matter by considering the cumulative effect of the various points. Further, he did not dismiss the Appellants' points but found that they were insufficient to establish an arrangement or understanding for free access to EGE's documents. Mr. Mumford disagreed with this submission and pointed the Court to places in the transcript of the judgment where the Judge clearly stated that having examined the points individually, he

[22] See paragraphs 40-42 above.

stood back and took a holistic view of the matter. Passages to this effect can be found in the transcript of the judgment:

(a) Page 83 line 20 to page 84 line 3 – "It's right to say that there is a degree of corporate control exercised by the companies at the head and Mr Velez is a director of numerous of the companies, but that in itself in accordance with Lonrho does not show the necessary degree of control. I need to look at the overall picture because as the authorities to which I have referred make clear, it's a question of fact and whether there is sufficient control over the EGE documents."

(b) Page 85 lines 15 to 19 referring to the point about the assurances in the MTA – "I agree that standing on its own, those findings do not show sufficient practical control, nonetheless, it is necessary to have a look at the overall picture to see whether that is something which is indicium of practical control."

(c) Page 88 lines 13-15, having considered all the points – "However, the points which are made, in my judgment, are well-founded, although when I stand back from the matter and look at it in the round, I can see the attraction of Mr. Valentin's submissions that in practice, EGE Haina (sic) had access to the documents held by EGE Haina. When I stand back and take a holistic view of the matter, the evidence doesn't reach that point."

The first reference to "EGE Haina" in the passage on page 88 should probably have been "HIC", and the reference to "doesn't reach that point" at the end of the passage appears to be a reference to the point of showing that the relationship between the Respondents and EGE demonstrated a general right of access.

[32] I do not agree with Mr Valentin's submission that the Judge, having considered the points individually, did not go on to adopt a holistic approach and consider the

cumulative effect of the points on the overall finding of whether there was an arrangement or understanding for the Respondents to have free access to EGE's documents.

[33] Having considered the evidence, the judgment, the written and oral submissions of counsel, I am satisfied that the Judge did not err in his consideration of the issues that were before him, nor in his approach to the application. The Judge found that there was not sufficient evidence to establish that there was an arrangement or understanding that the Respondents had free access to the documents of EGE. There is no basis on which this Court should legitimately interfere with the Judge's finding.

The fresh evidence application

[34] The Court heard the appeal against the Judge's order dismissing the application for specific disclosure on 24th November 2021 and reserved its decision. On 23rd December 2021 the Appellants applied for permission to rely on the fourth witness statement of Brian S. Herman as fresh evidence in the appeal. The application is opposed by the Respondents.

[35] Mr. Herman's witness statement exhibits a report by the Respondents' expert, Mr. John Lvetske, senior managing director of Ankara Consulting Group Inc, giving his opinion on various accounting issues related to the on-going proceedings. The report starts with the statement:

> "Ankura Consulting Group, LLC ("Ankura") was retained by DLA Piper LLP US ("Counsel"), legal counsel to Haina Investment Co., Ltd. (collectively, with its subsidiaries and affiliates, the "Client"), pursuant to which Counsel, on behalf of Client, has retained Ankura to provide professional services in connection with the above-referenced matter."

[36] The statement, ex facie, is that DLA Piper LLP USA are counsel for HIC "…with its subsidiaries and affiliates". EGE is a subsidiary of HIC and it is arguable that the Respondents are affiliates of HIC. The Appellants contend that this statement confirms that the Respondents control HIC and EGE and that they are acting as a

team. Therefore, the Respondents control the documents in the possession of EGE. However, the statement is not supported by any other evidence in the case and it is inconsistent with the letter of instructions to the expert from Appleby dated 13th October 2021 that is attached to the expert's report. The Appleby letter states that they act for and are instructed by the Respondents, with no mention of HIC or EGE.

[37] The Respondents replied to the application by stating that the expert's report was commissioned by the Respondents (as shown in the Appleby letter). Further, that the expert's reference to being retained by DLA Piper was an error. This may very well be correct, but the statement was made by the Respondents' expert and I will attach to it such weight as is appropriate in the circumstances.

[38] The test for admitting fresh evidence on appeal is well-known and uncontroversial. The three limbs of the test as derived from the decision of **Ladd v Marshall**.[23]They are: (i) it must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial in the lower court; (ii) the evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive; and (iii) the evidence must be apparently credible although it need not be incontrovertible.

[39] This is an interlocutory appeal and it is accepted that the Court applies a more relaxed approach in appropriate cases to give effect to the overriding objective to do justice.[24] Notwithstanding the more relaxed approach in interlocutory appeals the applicant must still satisfy the three limbs of the test in **Ladd v Marshall**.

Applying the principles

[23] [1954] 3 All ER 745.
[24] Bilzerian & Others v Byron & Others [2020] ECSCJ No. 249, (delivered 21st July 2020), at paras. 26-31.

[40] Before applying the principles to the facts, I must deal with the Respondents' threshold submission that the application is exceedingly late, coming a month after the hearing of the appeal. This is not fatal. The new evidence came to the attention of the Appellants after it was produced by the Respondents on 13th December 2021, after the hearing of the appeal. It could not have been obtained any earlier and the application to rely on it was made promptly on 23rd December 2021. I will consider the application. This finding also satisfies the first limb of the **Ladd v Marshall** test.

[41] The third limb is also satisfied. The new evidence, coming as it does from the Respondents, is apparently credible, even if it was made in error.

[42] The second limb, that the new evidence would probably have an important influence on the result of the appeal, though it need not be decisive, is not straightforward. The central issue in the appeal is whether the Respondents have control of the documents in the possession of EGE, not whether the Respondents control HIC and EGE. Paragraph 7 of the witness statement of Mr. Herman in support of the application that the Respondents accepted that HIC controls EGE's documents is an overstatement. Mr. Herman relied on paragraph 36 of Mr. Harout J. Samra's first witness statement which, in fact, says what the Respondents have been saying all along – that they have access to the financial/accountancy and commercial documents of EGE pursuant to clause 3.5 of the Management Agreement and article 49 of EGE's bylaws, and the right to other documents under the MTA. These are contractual rights to EGE's documents and the case of **Ardila Investments NV** makes clear that a contractual right to specific documents does not translate into a general right of access to all the subsidiary's documents.[25] By itself, the statement by the expert does not show that the Respondents control the documents in the possession of EGE. However, I think it is relevant to the wider issue of the relationship between the Respondents, HIC and EGE, and whether it

[25] Supra see n. 14 and see paragraph 39 above.

assists the Court in determining whether there was an arrangement or understanding that the Respondents had general access to EGE's documents.

[43] I find that the expert's statement could probably have an important influence on the result of the appeal which satisfies the second limb of the test in **Ladd v Marshall**. All three limbs being satisfied, I would admit the new evidence in the appeal.

Consideration of the new evidence

[44] The new evidence goes to the control of EGE and HIC by the Respondents. This issue has never been seriously disputed by the Respondents, only the extent of the control. The key issue is general access to EGE's documents. I have already considered the evidence from which an inference of an arrangement or understanding of general access to EGE's documents could have been drawn. The evidence includes the parent/subsidiary relationship between the Respondents and EGE and the previous disclosures of documents by EGE, whether by contract or upon request by HIC. These factors, singularly or cumulatively, were found to be insufficient to establish a general right of access to EGE's documents. The alleged additional control of EGE and HIC because the Respondents may have been acting with them in instructing the law firm of DLA Piper LLP USA to retain the expert to produce the report for the BVI proceedings does not change that position. The statement by the expert, considered by itself or in conjunction with the other evidence in the case, does not rise to the level of proving an understanding or arrangement that the Respondents have general access to EGE's documents.

Disposal

[45] I would grant the application to rely on fresh evidence and dismiss the appeal, affirm the Judge's order and order the Appellants to pay the assessed costs of the Respondents at the rate of two-thirds of the amount awarded in the lower court.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar