

**EASTERN CARIBBEAN SUPREME COURT TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE COMMERCIAL DIVISION**

**CLAIM NO. BVIHC(COM) 2013/0162**

**IN THE MATTER OF CROWN TREASURE LIMITED**

**AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004 (AS AMENDED)**

**BETWEEN:**

**YAO JUAN**

**Claimant**

**AND**

**[1] KWOK KIN KWOK**

**1st Defendant**

**[2] CROWN TREASURE GROUP LIMITED**

**2 nd Defendant**

## **Appearances:**

For Claimant: George Bompas QC, David Fisher and Eleanor Morgan For First Defendant:  
Paul Chaisty QC, Richard Evans and Adam Hinks

2015: May 4 and 5

November 13

## **AMENDED JUDGMENT (AS OF 25 MAY 2016)**

*Judgment amended by consent (only as to form) to reflect changes as agreed between the Claimant and the First Defendant.*

*Applications by Claimant for information and specific disclosure - Wording of prior Court Order, prepared by the parties, unclear on provision of information - Extraordinary resort to transcript needed to clarify intent of Court - Tests under EC CPR Part 34 for information met for most requests - Information ordered to be provided - Tests under EC CPR Part 28 for specific disclosure met for most requests - Court has discretion under Rule 28.5 to limit specific disclosure to documents that are "directly relevant" but is not required to do so - Documents not "directly relevant" are not necessarily "train of enquiry" documents (which Rule 28.1 precludes by dis-applying "the rule in Peruvian Guano") - In any event documents should be specifically disclosed based on consideration of Rule 28.6 (1) matters and having regard to Rule 28.6 (2) matters - Specific disclosure to be provided -*

*Purposes of "sampling" discussed - Dealing among counsel to be guided and characterised by communication, cooperation, courtesy and common sense -- Disclosure a*

*"duty" under EC CPR - Good faith disclosure fundamental to overruling objective of enabling Court to deal with cases justly - System built on trust - Judgment calls about disclosure to be made in manner that fairly assesses whether other party would have arguable basis to assert disclosure - Party needs to view issues from other party's perspective to conclude if fairly and reasonably document either tends to adversely affect first party's case or support other party's case - If doubt, document should be disclosed or other party informed so judicial determination may be sought - Parties' legal practitioners directed to meet and confer to ascertain documents that will provide necessary disclosure (Purpose Specific Disclosure Process) - "General Guidelines for Proportionate Specific Disclosure of Business Documents" included as*

*Appendix to Judgment - Disclosure to be ongoing and orderly - List of documents may not be necessary*

Applications by the Claimant for information and specific disclosure from First Defendant were brought in an unfair prejudice claim. Prior Court Order required information. Dispute whether Order left it open to First Defendant to object to providing certain information.

Ordinarily resort should not have to be had to the words of a judge during a hearing to interpret the words of a formal order that the parties have had an opportunity to draft so as to reflect accurately, fully and clearly the Court's intent.

It is incumbent on legal practitioners and counsel to take the time to think through the wording of draft orders, whether consent orders or otherwise, including the consequences of wording on the subsequent progress of the case and on the positions, strategy and tactics of the party, so that the Court's determination, or the agreement of the parties, is reflected accurately, fully and clearly in carefully considered and consistent wording in the Order.

Transcript showed Court had left it open to First Defendant to object later on grounds of relevance or otherwise. Order amended to reflect intention of Court.

The tests for information under EC CPR Part 34 were met in respect of most of the requests. Accordingly, most of the information sought was ordered to be provided by First Defendant.

The tests for specific disclosure under EC CPR Part 28 were met in respect of most of the requests but scope of documents to be disclosed for most requests narrowed from the "all encompassing approach" often requested. Rule 28.5 gives the Court discretion to limit specific disclosure to documents that are "directly relevant" but it is not required to do so. Documents that are not "directly relevant" are not necessarily "train of enquiry" documents (which Rule 28.1 precludes when it dis-applies "the rule in Peruvian Guano"). Documents can be "directly relevant" (as defined in Rule 28.1 (4)) and yet not be "train of enquiry" documents. In any event, documents should be specifically disclosed by the First Defendant based on consideration of Rule 28.6 (1) matters and having regard to Rule 28.6

(2) matters.

Purposes of ordering "sampling" is so recipient may get a sense (a preview) of "what's out there"; know the nature of the types of records that were created and maintained; and be able to make specific disclosure requests in a more informed and focused manner.

Dealings among counsel throughout are expected to be guided and characterised by communication, cooperation, courtesy and common sense -- all of which are part of professionalism and business-like conduct; none of which will compromise the true substantive or procedural rights of parties; and all of which will facilitate achievement of the overriding objective of the EC CPR to deal with cases justly.

Each party has important good faith disclosure duty fundamental to the overriding objective of enabling the Court to deal with cases justly. System is built on trust. Neither opposite party nor the Court can supervise party's document review and decision-making on front line of disclosure. Judgment calls to be made in manner that fairly assesses whether other party would have arguable basis to assert disclosure is required.

Party needs to view issues from other party's perspective to conclude if fairly and reasonably document either tends to adversely affect first party's case or support other party's case. If doubt, document should be disclosed or other party informed so a judicial determination may be sought.

Parties' legal practitioners directed to meet and confer to ascertain documents that will provide disclosure needed to achieve purpose of Claimant having documents for each category or subcategory (Purpose Specific Disclosure Process). Process to be primary method to determine which "high level" and possibly other documents to be disclosed. As back-up, *"General Guidelines for Proportionate Specific Disclosure of Business Documents"* included as *Appendix to Judgment*. Disclosure to be ongoing and orderly. List of documents being disclosed may not be necessary.

**[1] LEON J. [AG]** There were a number of procedural applications before this Court in this case, most of which were resolved before and during the course of the two day hearing. The Claimant brought seven applications and the First Defendant brought two applications.

**[2]** The applications that remain to be determined are applications of the Claimant, being:

(a) an application regarding alleged non-compliance with a request for further information (set out in a letter dated 9 May 2014 from the Claimant's legal practitioners to the First Defendant's legal practitioners) which was the subject of an order of the Honourable Justice Bannister made at a case management conference on 20 October 2014 (**"Justice Bannister's Order"**); and

(b) two applications for specific disclosure.

## **WHAT THIS CASE IS ABOUT**

[3] The primary issue in this case is whether the affairs of the Second Defendant, Crown Treasure Group Limited ("**Crown**"), have been, are being or are likely to be conducted by the First Defendant, Kwok Kin Kwok, in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial to the Claimant, Yao Juan, in her capacity as a member of Crown.

[4] As is often the case in unfair prejudice cases, the sub-issues focus first on what the nature of the Claimant's involvement in Crown was to be - what participation rights the Claimant has and what information the Claimant is entitled to receive - and second, on whether she has been wrongfully deprived of any participation rights or information to which she is entitled. Then there are issues regarding the nature of various transactions, and whether those transactions were improper or

<sup>1</sup> Approved 11/11/2014 but apparently not sealed, or if sealed, not available in sealed form.

bona fide. The Claimant's skeleton for all the applications set out that there are at least 14 principal issues raised on the pleadings<sup>2</sup>.

#### **APPLICATION FOR PARTICULARS OF FIRST DEFENDANT'S DEFENCE/ REQUEST FOR FURTHER INFORMATION**

[5] The Claimant's Application for Particulars of the First Defendant's Defence / Request for Further Information (pursuant to Part 34, Civil Procedure Rules 2000) arose from paragraph 7 of Justice Bannister's Order. While the Claimant sought an "unless order", sensibly her "primary concern" was obtaining "proper responses to the outstanding requests for further information."

[6] Justice Bannister's Order, paragraph 7, required the First Defendant, by a time specified, to file and serve "the further and better particulars of the Defense of the 151 Defendant pursuant to the request for further information set out in the Claimant's letter of 9 May 2014".

[7] The First Defendant's position was that she responded (in what the Claimant calls "a partial answer") by a letter dated 10 October 2014 and despite the wording of Justice Bannister's Order, Justice Bannister did not order all of the information in the Claimant's letter of 9 May 2014 to be provided; rather, Justice Bannister left it open for the First Defendant to object to providing the particulars / information sought once she gathered and reviewed the documents and information.

[8] The Claimant disagreed, and submitted that the words of Justice Bannister's Order were clear and the First Defendant did not appeal the Order. She said that the failure to respond fully was a deliberate breach of Justice Bannister's Order and that Justice Bannister's Order did "not allow [the First Defendant] to put forward excuses for not providing the requested information: the Order is unequivocal and

requires the provision of the information, notwithstanding any excuses the First Defendant may have."

**[9]** The Claimant went on to submit that the information ought in any event to be provided because "the information is relevant to issues between the parties".

**[10]** Where substantive responses were not provided in the First Defendant's letter dated 10 October 2014, the First Defendant's responses included that:

- "the Claimant is not entitled to the information sought in this request" or "is not entitled to any information in respect of the financial affairs of the Company", or
- "the particulars sought are not relevant to the matters in issue" and the Claimant is attempting "to use the proceeding to obtain information to which she is not entitled", and
- in respect of one request, the First Defendant was not required to provide documents that contain privileged legal advice.

**[11]** The First Defendant submitted that Justice Bannister's intention to leave it open for the First Defendant to object to providing particulars / information once she gathered and reviewed the documents and information was evident from the transcript of the case management conference even if not on the face of the approved version of Justice Bannister's Order.

**[12]** Regrettably the parties appeared to have taken inadequate care in preparing the draft Order. A lack of care in preparing draft orders seems to occur too frequently so I do not intend to single out those who were involved in this case management conference for the reminder that follows.

**[13]** It is incumbent on legal practitioners and counsel to take the time to think through the wording of draft orders, whether consent orders or otherwise, so that the wording does not come back to "bite", and result in an unnecessary dispute about interpretation issues and an expenditure of time and money through subsequent applications to clarify or otherwise.

**[14]** The job of legal practitioners and counsel on an application is not done until the Court's determination, or the agreement of the parties, is reflected accurately, fully and clearly in carefully considered wording in an order that is then submitted for approval and entry (sealing). In particular, the problems seem to include not thinking through the consequences of wording on the subsequent progress of the case or on the positions, strategy and tactics of the party, and not using clear and consistent wording.

[15] Ordinarily resort should not have to be had to the words of a judge during a hearing to interpret the words of a formal order that the parties have had an opportunity to draft and consider.

[16] The First Defendant took the Court to the transcript of the 20 October 2014 case management conference hearing before Justice Bannister and submitted that Justice Bannister "left it open, therefore, for [the First Defendant] to object to any particular request and for the Claimant to then go back to the Court if she was not satisfied with such response." This must be right based on the transcript.

[17] It appeared clear from the transcript, as the First Defendant submitted to this Court, that Justice Bannister did not consider each of the requests or make any distinct decision in respect of each of the requests. Further, it appeared clear from page 421, lines 14 - 15, of the transcript that Justice Bannister did leave it open to the First Defendant to object later on the ground of relevance or on other grounds.

[18] Justice Bannister's words were as follows:

I want those questions answered, subject to objections as to relevance or whatever.

[19] As I determined during the hearing, paragraph 7 of Justice Bannister's Order should be so interpreted and should be corrected to have added to the end of it the words "... subject to objections as to relevance or otherwise."

[20] Turning to the specific requests and objections to them in the context of an application pursuant to EC CPR Part 34, and with reference to the First Defendant's "Replies to the Request for Further Information of the Defence dated 9 May"<sup>3</sup>, I make the determinations set out below having regard to subrules (2) and (3), namely that the information must be "necessary in order to dispose fairly of the claim or to save costs" having regard to the likely benefit of the information, the likely cost of giving it, and whether "financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order."

[21] The First Defendant submitted that the tests have been elaborated upon in court decisions so that the Claimant must show that each of the outstanding requests is necessary to dispose fairly of the case or save costs; proportionate; necessary prior to the consideration of witness statements; not simply "fishing"; and not going simply to credit.

[22] During the hearing the Claimant amended the scope of the requests made. The Claimant submitted that those tests have been met. I agree. Accordingly, the requests as set out in Schedule 1 to the Order consequent to this Judgment are ordered to be answered.

## **SPECIFIC DISCLOSURE APPLICATIONS- INTRODUCTION**

[23] The issues regarding the disputed transactions in the case gave rise to two specific disclosure applications by the Claimant {which I sometimes refer to as "requests" - that is how the Claimant has sometimes referred to them).

3 Attached to letter from Conyers Dill & Pearman to Hunte & Co. dated 10 October 2015 at Tab 5 of Application Bundle.

[24] To implement disclosure of what is sought, the Claimant seeks, in the usual manner, "a supplemental list of documents containing the said documents" and that the documents be made available for inspection. While those are the usual mechanics of carrying out disclosure, some modification should increase the speed and efficiency of the process, which I discuss below.

[25] The Claimant's requests for disclosure were set out in the following:

a) Schedule 1 (specific disclosure and inspection) to her Notice of Application dated 11 March 2015 ("**First Disclosure Application**"); and

b) Schedule to her Notice of Application dated 28 April 2015 ("**Second Disclosure Application**").

[26] Schedule 2 to the First Disclosure Application sought inspection of "the construction plan".

## **SPECIFIC DISCLOSURE GENERALLY**

[27] EC CPR 28.5 and 28.6 deal with specific disclosure and 28.16 deals with rights to inspect documents that have been disclosed. Specific disclosure can apply to "documents" or "classes of documents".

[28] Rule 28.5 provides that:

An order for specific disclosure may require disclosure only of documents "directly relevant" [as defined in 28.1 (4)] to one or more matters in issue in the proceedings.

[29] I note the use of the word "may". It appears to be significant.

[30] The use of the word "may" in Rule 28.5 is to be contrasted with the use of the word "must" in Rule 28.6 (1) and (2).

[31] Rule 28.6 (1) sets out what "the court must consider" when deciding on specific disclosure and Rule 28.6 (2) sets out three matters which "the court must have regard to" in deciding on specific disclosure.

[32] On its face this wording appears to leave it open for specific disclosure to include documents that go beyond documents that are "directly relevant" within the meaning of Rule 28.1 (4) so long as they do not include documents the production of which would be only because they are "train of enquiry" documents, which Rule

28.1 precludes when it dis-applies "the rule in Peruvian Guano".

**[33]** This makes sense given the role of the court in connection with the wide range of processes leading to trial.

**[34]** The court is permitted to develop a customized approach to fit the case. It is not hamstrung by any attempt by rule-drafters to micromanage the process. There is a significant element of "trust the court".

**[35]** In that regard, in connection with documents disclosure, EC CPR sets out broad tests that the court must apply and which are consistent with the overall approach of the EC CPR-

- First, "consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs." [Rule 28.6 (1)]
- Second, "have regard to (a) the likely benefit of specific disclosure; (b) the likely cost of specific disclosure; and (c) whether the producing party's financial resources are likely to be sufficient to comply and if not, to consider requiring the party seeking production to pay the costs of disclosure in any event. [Rule 28.6 (2)]

**[36]** Rule 28.1(4) states that

... 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 the 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.

**[37]** The "Peruvian Guano" reference in the Rule is to a judgment of the English Court of Appeal in *The Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company*<sup>4</sup> in which Brett, L.J. held at page 63:

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* - not *must* - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "directly or indirectly," because as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his

adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences:

**[38]** The First Defendant also cites<sup>5</sup> a restatement of the above "Rule" in *Thorpe v Chief Constable of Greater Manchester* at 668 6, as follows:

... documents must be disclosed which it is reasonable to suppose contain information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead him to a train of enquiry which may have either of these two consequences. Discovery is thus not necessarily limited to document which would be admitted in evidence.

**[39]** The parties made considerable submissions on "directly relevant" and whether a backdoor attempt was being made by the Claimant in effect to reintroduce the scope of relevance under *Peruvian Guano*.

4 (1882) 11 QBD 55

<sup>5</sup> Skeleton Argument of the First Defendant in respect of the Claimant's Specific Disclosure Application dated 11 March 2015 ("First Defendant's Disclosure Skeleton"), footnote 1 to paragraph 13, page 6.

6 (1989) 1 WLR 655

**[40]** Rule 28.1 precludes the "train of inquiry" rationale for the production of documents. That much is clear.

**[41]** But in my view, based both on logic and on my many years of experience dealing with document disclosure, conceptually there can be documents that are "directly relevant" within the definition in Rule 28.1 (4) and yet not only "train of enquiry" documents.

**[42]** The documents which I am ordering to be disclosed are such documents.

**[43]** Further, if I am wrong about that in any way but correct that the court is not restricted by Rule 28.5 (5) to ordering the disclosure of "directly relevant" documents that meet the criteria of Rule 28.6 (1) and (2), I find that the documents which I am ordering to be disclosed should be disclosed based on my consideration of the Rule 28.6 (1) matters, and my having had regard to the Rule

28.6 (2) matters.

**[44]** Most importantly, in summary, their disclosure is necessary in order to dispose fairly of the claim and the likely benefits of the specific disclosure significantly outweigh the likely cost of specific disclosure (and the financial resources of the First Defendant (Rule 28.6 (2)(c)) are likely to be sufficient to give the specific disclosure ordered).

**[45]** The First Defendant also objects to certain requests (regarding *Cheer Fancy* and *Xiamen Jianqi*) on the basis that the evidence does not directly support a finding of control within the meaning of Rule 28.2 (2), which provides that:

. . . 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.

However, given the nature of the order being made, it is necessary only that she provide specific disclosure of those documents over which she has control within a liberal meaning of Rule 28.2 (2). In other words, so long as she does not take some 'technical' position on why she does not have control of any particular document or documents, she cannot give what she does not have. Her duty cannot extend to what she genuinely does not control.

### **SPECIFIC DISCLOSURE APPLICATIONS- GENERAL DETERMINATION**

**[46]** Rule 28.6 (1) requires the Court, when deciding whether to make an order for specific disclosure, to "consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs." Further, the Court must have regard to (in Rule 28.6 (2)):

- a) the likely benefits of specific disclosure;
- b) the likely cost of specific disclosure; and
- c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with such order [subject to the exercise of its discretion in Rule 28.6 (3) to require the party seeking the order to pay the other party's costs of such disclosure in any event].

**[57]** As stated above, I have been mindful of the specific requirements as well as the overriding requirements in determining the applications for specific disclosure.

**[58]** The Claimant's main position of course is that it is necessary that the documents sought be disclosed to the Claimant so that her claim can be disposed of fairly. She also submits that the documents sought are "directly relevant" within the meaning of Rule 28.1 (4).

**[59]** The First Defendant's main position is that the specific disclosure sought is too broad (including documents of third parties) and constitutes a "fishing expedition" (my words). In that regard the First Defendant also raises the issue of proportionality.

**[60]** There is an issue as well about documents in respect of which Justice Bannister's Order provides (in paragraph 1) that:

[w]here there are numerous documents to similar effect, in the first instance the Parties (a) need only disclose samples; and (b) must indicate that they are only samples; and (c) confirm that there are other documents conveying transactions of a similar type of effect; and (d) the other Parties may request disclosure of same, and if such request is not met, may make an application for specific disclosure.

The sampling issue permeates the second specific disclosure application dated 28 April 2015 which is dealt with below, after the first application.

**[61]** The Claimant says this is such an application but the First Defendant says that instead of adopting "a layered approach", the Claimant "leaps to a 'full' approach". As will be seen, both parties are partly correct in my view.

**[62]** The basic reason for sampling, in my view, is so that the party seeking disclosure can get a sense (a preview) of "what's out there"; so that the party can see the nature of the various types of records that were created and maintained; and so that the party seeking disclosure can make specific disclosure requests in a more informed and focused manner. It enables the party seeking disclosure to say that some types of documents of which samples have been provided are not necessary, for example, because they are low level detailed documents that have been summarized in other documents which are sufficient for the particular matter in issue. For other issues, arguably the low level documents are necessary.

**[63]** In many instances, as specified below, it is necessary that the Claimant receive disclosure of documents concerning issues in the case to which those sampled documents relate. It is necessary for the Claimant to receive those documents in order for the Court to dispose fairly of this case. The benefit of the disclosure is that the Claimant will have documents of the First Defendant that are material to issues in this case and that will either tend to support the Claimant's case or tend to adversely affect the First Defendant's case. Also such disclosure will make for a more efficient trial.

**[64]** However, unfortunately the words that the Claimant has used in her requests call for a vast range of type of documents going to the various issues for which specific disclosure is sought. While the Claimant may ultimately need the "nitty gritty" documents {documents of original entry, for example} on one or more specific issues, it cannot be that they are needed on all the issues on which specific disclosure is sought now.

**[65]** Documents in many instances are at various levels of detail or generality. This is particularly so when they involve original entry documents that are then summarized or aggregated to produce a higher level of document for a short period or a portion of an operation, or both, and then are further aggregated to produce an even higher level of document, and so on, leading ultimately to documents at higher levels, perhaps the highest in some instances being documents such as annual financial statements, an annual report of operation for a business, or a presentation document to senior management or a board of directors.

**[66]** Communication documents may fall into a range of levels too although for the purposes of litigation the "original entry documents" may be as relevant as, or more relevant than, a summary of those documents. It is in these kinds of documents that "smoking guns" may exist (albeit rarely). But also they can show how people on the front lines viewed what was happening on a contemporaneous basis, or positions they took or information they provided or received, which was fundamental to how a project or relationship evolved, particularly where things have "gone off the rails" for one reason or another.

**[67]** So if specific disclosure should be provided on the various issues, how can a line be drawn to ensure, so far as if possible, that the Claimant gets what she needs and not what she does not need, at least not for all issues? As mentioned, perhaps as a follow up on certain issues, a lower level of documents may be needed.

## **SPECIFIC DISCLOSURE - GETTING THE NECESSARY DOCUMENTS**

**[68]** To set the context for the general approach to be taken to disclosure, and to specific disclosure in particular, it is important to stand back for a moment and remember how disputes are to be conducted in our system of adjudicative dispute resolution under the EC CPR (and many other modern adjudicative systems, albeit with some localized differences).

**[69]** Especially in Commercial Court cases, all dealings among counsel throughout a case, and certainly on procedural matters of all types and the conduct of hearings of applications and trials, are expected to be guided and characterised by communication, cooperation, courtesy and common sense -- all of which are part of professionalism and business-like conduct; none of which will compromise the true substantive or procedural rights of parties; and all of which will facilitate achievement of the overriding objective of the EC CPR to deal with cases justly (as discussed below).

**[70]** Parties engaged in a commercial dispute, despite being business people who one might expect would want to resolve their disputes in a business-like manner, sometimes become emotionally involved, personalise the dispute and are motivated by other things, whether pride, feelings of disappointment or even betrayal, saving face, getting revenge and so forth. This can be particularly so in "shareholder disputes".

**[71]** The Court cannot tell the parties how to feel. However when they engage in litigation in this Court, whether by choice at the time or as a result of choices made earlier that gives the Court jurisdiction over them and their dispute, and engage legal practitioners who are officers of this Court and who have duties in that capacity, some of which are set out in EC CPR, they agree to conduct their dispute within certain parameters, using certain principles, and subject to certain duties, some of which are set out in EC CPR.

**[72]** Sometimes legal practitioners and sometimes the Court need to remind the parties that they have expressly and/or implicitly agreed to conduct their dispute accordingly.

**[73]** The parties have bought into one of the best dispute resolution processes in the world, and in doing so, take both the benefits and the obligations. To some degree they have constrained themselves -- for example, they have the disclosure duties in the Rules, and sometimes they have forgone the ability to instruct their legal practitioners to adopt certain tactics that at least in some instances are unacceptable in this Court, such as to "just say no" or to "play" what they see as "disruptive or delaying procedural hardball".

**[74]** Focusing on disclosure in particular, significantly, EC CPR 28.2 (1) prescribes a party's duty (using the word "duty") with respect to disclosure (even though it does so in imposing a limit on the duty). It reads as follows:

A party's duty to disclose documents is limited to documents that are or have been in the control [as defined in Rule 28.2 (2), quoted above] of that party.

**[75]** EC CPR 28.9 emphasizes the importance of the duty by requiring the party giving disclosure to certify that the party "understands the duty of disclosure and that "the duty has been carried out" "to the best of the knowledge of the maker of the certificate".

**[76]** Failure by a party to comply with the disclosure duty in good faith is a serious matter as neither the opposite party nor the court is in a position to supervise the review and decision-making on the front line of disclosure.

**[77]** A party represented by a legal practitioner will have the benefit of the advice, guidance and direction of that legal practitioner who is an officer of the court. Indeed EC CPR 28.8 spells out the legal practitioner's duty to explain the "necessity of making full disclosure in accordance with the terms of the order for disclosure and these Rules, and possible consequences of failing to do so" and to certify that the explanation required has been given.

**[78]** Despite the role of the legal practitioner, at the end of the day the legal practitioner cannot assure compliance by a party who does not follow his, her or its legal practitioner's explanation, advice, guidance and direction.

**[79]** It is important to stand back from the specific procedural rules to keep in mind that unlike in some legal systems, in our system a party has a disclosure duty (as explained above), and that duty is fundamental to the overriding objective of the Rules, set out in Rule 1.1 (1) of enabling "the court to deal with cases justly". Indeed Rule 1.3 makes it "the duty of the parties to help the court to further the overriding objective." Further, Rule 1.2 requires the Court to:

... seek to give effect to the overriding objective when ii -

a) exercises any discretion given to it by the Rules, or

b) interprets any rule.

**[80]** Anyone who has been involved in dispute resolution in a system that is based on a party's duty to disclose documents knows that there are judgment calls to be made when it comes to disclosure.

**[81]** The disclosure is going to be tied to issues raised in the pleadings, and so at some point even if the party has gathered all potentially disclosable documents, in some instances difficult decisions need to be made, by or on the advice of, legal practitioners on which ones are required to be disclosed.

**[82]** It is easy - sometimes perhaps too easy - for a party or a party's legal practitioners to develop arguments on an "ex parte basis" as to why a document (or a group of documents) does not meet the applicable test. However, similar to the manner in which parties have to comply with a duty of full disclosure on ex parte court applications, in a disclosure situation the application of the applicable tests must be done by the disclosing party in a manner that fairly assesses whether the other party, if that other party would have sight of the document, would fairly and reasonably have an arguable basis to assert that the document is disclosable under the applicable test.

**[83]** Standing in the opposite party's shoes, viewing the issues from the other party's perspective and in light of the positions that party has pleaded or otherwise asserted, enables the party from whom disclosure is sought to say "yes, if I were trying to make out the other party's case, I would fairly and reasonably consider this to be a document that is "directly relevant" because it either "tends" (which does not in the vernacular mean it is "a slam dunk" or "the smoking gun) either to "adversely affect [my] case" or "to support [my opponent's] party's case".

**[84]** If in doubt, the document should be disclosed. Or at least the opposite party should be informed that there is a document (or group of documents) not being disclosed because it has been concluded that it/they are not disclosable but that it is possible a court could be convinced otherwise. Then a judicial determination could be sought by the opposite party if so advised.

**[85]** Our disclosure system is a system built fundamentally on trust, with only a limited ability of the opposite party or the court to ensure compliance with the critical disclosure duty.

**[86]** If that trust is breached, the court may deal firmly with the breach, at whatever stage of the litigation that matter comes to light, and thereafter.

## **SPECIFIC DISCLOSURE - APPROACH FOR THIS CASE**

**[87]** Having set the context, I turn to the general approach for this case.

**[88]** I proposed during the hearing of the applications an approach to having "high level documents" produced on issues that I was prepared to order specific disclosure, with the

Claimant then having the ability to apply for lower level documents if and when needed and if such lower level documents would meet the applicable disclosure tests.

**[89]** The Claimant suggested a one and one-half page "definition" of "high level documents"?. "Definition" may not be the best term - more correctly, I had in mind general guidelines. It is hard for the Court or a party in the position of the Claimant to be too specific in a definition, and indeed unless a party in the position of the First Defendant has done a sufficient amount of document review already, that party too may be unable to be too specific in a definition.

**[90]** General guidelines, applied by a disclosing party who is mindful of complying in good faith with her duty as mandated in the Rules (as discussed above), and who takes the approach (also discussed above) of trying in good faith to "stand in the opposite party's shoes" and view the issues from the other party's perspective and in light of the positions the other party has pleaded or otherwise asserted, should go a long way to ensuring the proportionate disclosure of directly relevant documents necessary for the Court to dispose fairly of the claim.

**[91]** The First Defendant declined the approach<sup>8</sup>, submitting that "it is not considered possible to provide a meaningful or workable definition of the term "high level document" which can fairly or adequately cover the whole of the two disclosure applications." The First Defendant went on to call for the Court to determine the requests based on the First Defendant's points in her detailed written and oral submissions. The First Defendant's alternative positions were that:

If the Court is minded, despite those submissions, to make some order for disclosure each category should be considered separately and consideration given for each category as to whether any disclosure at all should be ordered.

<sup>7</sup> In a post-hearing letter to the Court from her then legal practitioners, Mourant Ozannes, dated 13 May 2015.

<sup>8</sup> In a post-hearing letter to the Court from her legal practitioners, Conyers Dill & Pearman, dated 14 May 2015.

If an order is to be made, the reasoning behind the attempt to arrive at a catch all definition should be capable of being met by restricting any order to the minimum number of documents and types of documents.

By way of example only, in respect of categories 8, 9A, 11, 13 and 14 of the first application, the order, if made, should be limited to bank statements, deposit advices and/or passbooks, with permission to redact if necessary so only the specific relevant transaction is identified. A process of identifying only a small number of documents should be carried out but where possible in respect of other categories. Beyond this it is considered that no useful purpose can be served in attempting to provide a blanket definition as the long and complex attempt on the part of the Claimant demonstrates.

[92] While I appreciate the First Defendant's desire for more specific direction, the Court, at this stage not knowing the issues, the systems used to prepare and maintain documents, and the types of documents that exist or are likely to exist, as well as the parties and their legal practitioners and such other advisors, employees and agents as they may have, and certainly not as well as the First Defendant, is not in a better position than the parties to provide effective specific guidance.

[93] For the approach advocated on behalf of the First Defendant to work, using the First Defendant's legal practitioners' example above, I cannot know in respect of categories 8, 9A, 11, 13 and 14 of the first application, whether the high level documents that will give the Claimant what it needs are "bank statements, deposit advices and/or passbooks".

[94] Far better would it be for:

a) the Claimant to make clear to the First Defendant, if it is not clear already, what is trying to "get at" with each of those requests (in other words, help the First Defendant fulfill her duty of disclosure}, and

b) the First Defendant to come back to the Claimant and say - taking the good faith "stand in her shoes" approach - and having full regard to the First Defendant's duty of disclosure in the Rules - the records that will

give you the best picture, most efficiently, are the "X documents", the "X, Y and Z documents" or the "ABC group of documents", for the period and/or transaction in issue.

[95] If experts can be directed to meet and confer, surely legal practitioners should be doing that consistently to make pre-trial processes, and in this case the Specific Disclosure Process, function as smoothly and efficiently as possible - without compromising the substantive rights of the parties to have the court "deal justly" with their case [EC CPR 1.1 (1) and "dispose fairly of the claim [EC CPR 28.6 (1)].

[96] Accordingly, for all those categories for which I am ordering specific disclosure, the Court's order will require a meet and confer process to be undertaken between legal practitioners to ascertain the documents that will provide the disclosure needed to achieve the purpose of the Claimant having the documents for each category or subcategory. Below it will be referred to as a "**Purposive Specific Disclosure Process**".

[97] The Purposive Specific Disclosure Process will be the primary method for the parties and their legal practitioners to determine which "high level" and possibly other documents are to be disclosed.

[98] As a back-up, the Court will include as part of this Judgment an "**Appendix to Judgment**" (on pages 40 - 42) which is a modified version of the Claimant's definition of "high level documents", entitled "**General Guidelines for Proportionate Specific Disclosure of Business Documents**".

**[99]** The General Guidelines for Proportionate Specific Disclosure of Business Documents are to be reasonably liberally constructed with their objectives (as above) in mind. They are principles or guidance, not technical rules or formulas. The First Defendant should not parse words. On the other hand, the Claimant needs to get the documents to which she is entitled expeditiously so the Claimant also should not be unduly technical in her application of the General Guidelines.

The Claimant should consider what she really needs and whether foregoing some of what the order may require, but which will take time and cost money to digest if disclosed, would be in her interests of getting to trial. The legal practitioners, as officers of the Court, will be able to guide and assist their respective client.

### **SPECIFIC DISCLOSURE IMPLEMENTATION-AN EFFICIENT PROCESS**

**[100]** Implementation of the specific disclosure being ordered should be ongoing, albeit in an orderly manner. In other words, the First Defendant should not wait until everything is ready before providing it. She should balance the need for organization and efficiency in the disclosure process on her side, with the need for expedition in making the disclosed documents available to the Claimant. Rule

28.10 contemplates staged disclosure and inspection, and this seems to be a situation in which sensible staging is highly desirable.

**[101]** The legal practitioners for the parties should also confer on how they can innovate to reduce the time and cost of the process, to reduce clerical work that is of limited value, and so forth. A perfect process is not as important as getting the job done (that is, achieving the disclosure) expeditiously and cost-effectively.

**[102]** Specifically, the time and cost of preparing a list of documents being disclosed (EC CPR 28.7) in this case (and perhaps in many others) may be disproportionate to the value of having the list. Why is a list needed if copies of the actual documents are provided in an organized manner? If it is really necessary to have a method of knowing what has been turned over, running the disclosed documents through an automated scanner (for example) so that both sides have an electronic image of what was turned over seems that it would suffice. The parties' legal practitioners should discuss whether such a list will serve any meaningful and proportionate purpose - particularly at this stage - that is sufficient to justify the time and cost of preparing the list.

### **SPECIFIC DISCLOSURE APPLICATIONS - DETERMINATIONS OF INDIVIDUAL REQUESTS**

**[103]** Turning to the groups of specific disclosure requests, the Claimant grouped her requests into categories, and I will deal with them in that manner.

**A. FIRST DISCLOSURE APPLICATION - SCHEDULE 1, ITEMS 1 - 7 AND 16-18, AND SECOND APPLICATION-SCHEDULE, ITEMS 6 AND 8**

[104] These requests appear to arise from paragraphs 30 - 46 of the Statement of Claim and paragraphs 36, 57 and 66 of the Defence, as well as paragraph 132 of the First Defendant's affirmation. They are made for documents alleged to be relevant to an allegation of a misapplication or misappropriation of the funds of one of the relevant corporations, Xiamen RVH, and concern funds placed with other companies connected to the First Defendant.

[105] The First Defendant asserts an explanation for why those funds were so placed. The Claimant asserts that even accepting the explanation, the transactions were problematic and that the financial records show discrepancies which prima facie evidence a lack of monitoring and financial loss as a consequence of the transactions.

[106] While the First Defendant has asserted an explanation in her evidence, the Claimant says that the explanation is unsatisfactory and unsupported by documentary evidence, and does not enable the Claimant to ascertain if the companies properly accounted for the funds.

[107] The First Defendant says the accounts were audited and the disbursements closely supervised independently. But the Claimant says the evidence does not fully support that.

[108] The Claimant's "bottom line" (my term) on this part of the disclosure application is that the extraordinary nature of the transactions and the substantial discrepancies require that the Claimant have disclosure of financial records to be able to analyze the account between Xiamen RVH, on the one hand, and Cheer Fancy (Xiamen), RHM (Xiamen) and Xiamen Jianqi, on the other, and that only primary transactional documents have been disclosed as samples. The Claimant asserts that those documents do not enable her to undertake any evaluation of the First Defendant's case or the state of accounts between Xiamen RVH and the three companies.

[109] While conceptually there should be disclosure of these types of records for the reasons asserted by the Claimant, her requests in the first seven groups of questions for the First Application take an all-encompassing approach ("**All- Encompassing Approach**"), seeking "All accounting ledger entries, journals and vouchers with relevant supporting documents (including but not limited to exchanges of correspondence [defined to cover all types of communications] with the relevant parties pertaining to all accounting entries, fund flows and transactions ..."

- of ... in relation to the receivable "closing balance" of ... owing from ...
- of ... in relation to the receivable "closing balance" of ... booked under ... in the books of Cheer Fancy (Xiamen); RHM (Xiamen); Xiamen Jianqi
- of Xiamen RHV and RHM (Xiamen) in relation to discrepancies in ...

- of Xiamen RHV and Xiamen Jianqi in relation to discrepancies in .. .

**[110]** Her requests in three other groups of questions for the First Application (numbered 16 - 18) also take the All-Encompassing Approach, seeking:

- in the first request, "All documents, records and correspondence" between certain companies showing or evidencing certain advances"
- in the second request, "All invoices, receipts, ledgers, vouchers, bank statements and advices and the underlying contracts and the relevant correspondence between ..." and
- in the third request, "Payment advices, vouchers, tax returns and tax demand notes for remuneration of senior management of ... "

**[111]** Together those 10 requests appear to call for a considerable (perhaps vast) volume of documentation. They are huge jump from the meagre samples of documents provided by the First Defendant so far in relation to some of these items (which are far too meagre to be of sufficient use to the Claimant at trial) to what may be full disclosure of all records, which is not being ordered. They appear to cover documents ranging from high/top level summary documents to nitty- gritty original entry documents, and almost (it seems) everything in between.

**[112]** As a rational and stepped approach, the First Defendant should provide specific disclosure for each of the items in this group using the Purposive Specific Disclosure Process. The Process may lead to it being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

## **B. FIRST DISCLOSURE *APPL/CATION* - *SCHEDULE 1, ITEMS 8- 9A***

**[113]** These requests are made for documents alleged to be relevant to the issue of whether the "Cheer Fancy Transactions" were "unnecessarily and improperly" entered into by the First Defendant or were bona fide commercial transactions, and whether Cheer Fancy did in fact advance a certain sum or part of it pursuant to "the Cooperation Agreement as varied". They appear to arise from paragraphs 64, 73 and 75 of the Statement of Claim, paragraphs 92 and 102 of the Defence, and paragraphs 36 and 40 of the Reply.

**[114]** The Claimant referred to various documentary and affirmation evidence, and submits that the explanation/contention of the First Defendant cannot possibly be the case. She says that this shows that the First Defendant's disclosure in this regard is inadequate and misleading.

**[115]** The problem, as pointed out by the First Defendant, is that the Claimant's requests again take the All-Encompassing Approach - they are overly broad seeking, for example in the case of item 9A, "all remittance advices, deptsit slips, cheques, cashier's orders and

bank drafts showing ..." and "all bank statements, passbooks and deposit advices" of one company's bank account(s) and "all ledgers, journals and voucher pertaining to the underlying flow of funds and transactions in the books of' that company.

**[116]** The First Defendant also submits that (a) her legal practitioners addressed the matter in correspondence; (b) the financial statements of the two companies were audited; and (c) "there is a real concern that [the Claimant] is using this specific disclosure application for this category of documents as an opportunity to manufacture another claim against the First Defendant when she has no basis to do so."

**[117]** None of the three additional grounds of objection are a basis to deny specific disclosure.

**[118]** First, if there are documents that are responsive, within the parameters to be ordered, they simply should be provided.

**[119]** Second, that there are audited statements simply means there is some evidence in support of the First Defendant's position - audited financial statements are not necessarily conclusive.

**[120]** And third, the possibility of another claim by the Claimant against the First Defendant is not a basis to deny disclosure - the restrictions on the use of documents in the EC CPR are available to the First Defendant, if they are applicable, and otherwise, unless there is a specific basis, on evidence, to show that disclosed documents may be misused, they should be disclosed in the ordinary way. If there is evidence of such a specific basis, it could have been put forward and the Court could have considered whether there was a need to craft specific protection. However, apart from such a situation, if the Claimant were to bring a claim that lacks the merit necessary to withstand an early application to dispose of it, the First Defendant could bring such an application.

**[121]** Accordingly, as a rational and stepped approach, the First Defendant should provide specific disclosure for each of the items in this group using the Purposive Specific Disclosure Process. The Process may lead to ii being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

### **C. FIRST DISCLOSURE APPLICATION-SCHEDULE 1, ITEM 98**

**[122]** This request arises, according to the Claimant, "out of the curious circumstances" that the First Defendant disclosed contracts and an assignment but has not alluded to them in her Defence or evidence, these documents "have served only to increase the confusion as to what funds were provided by Strong Nation/Xiamen RVH, when, by whom and why". The pleading paragraphs appear to be some or all of paragraphs 64, 73 and 75 of the Statement of Claim, paragraphs 92 and 102 of the Defence, and paragraphs 36 and 40 of the Reply.

**[123]** The Claimant asserts that "unless disclosure is given of the documents requested, "the next and only opportunity to seek clarification ... will be during the cross examination of [the First Defendant] at trial, but without the benefit of the underlying documents which would cast light on the issues."

**[124]** However, once again the scope of the documents requested is unduly broad (taking the All-Encompassing Approach), and at least at first instance, goes well beyond what may be necessary to obtain clarification of the confusion asserted.

**[125]** The First Defendant's position is somewhat opaque but it seems to be that is because on this request the parties have been "two ships passing in the night".

The Claimant appears not to have previously made clear her rationale for the request (certainly she did not do so in the request 98 ilseID and so the First Defendant says that the request does not appear to arise from the pleaded case. Well that is the Claimant's point! So she wants to understand the documents before trial. That seems reasonable, and certainly in the interests of an efficient trial. (Communication to clarify, initialed by either party, would have got both parties on the same page, even if they would have ended up apart on whether clarification is needed, and on the scope of documents sought.)

**[126]** Accordingly, as a rational and stepped approach, the First Defendant should provide specific disclosure for each of the items in this group using the Purposive Specific Disclosure Process. The Process may lead to it being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

#### D. FIRST DISCLOSURE APPLICATION. SCHEDULE 1, ITEM 11

**[127]** There are issues raised in the case (apparently arising in the Statement of Claim, paragraphs 78 - 84; Defence paragraphs 107 - 114; and Reply, paragraph 45) regarding what are referred to as the "Edmund Eng Transactions" entered into at the direction of the First Defendant and whether they were unnecessary and improper, or bona fide commercial transactions. Related to that issue is an issue of whether Mr. Eng advanced a certain sum pursuant to a Mortgage Loan Contract between himself and Strong Nation. The Claimant asserts that she had made enquiries regarding these matters in early 2012 but did not receive a response.

**[128]** The Claimant submits that the First Defendant has not disclosed any primary documentary evidence supporting or demonstrating that the payment was for Strong Nation's benefit.

**[129]** The First Defendant submits that the Claimant's case on this issue is unclear, that there are audited accounts, and the Claimant has not shown any basis why audited accounts should not be relied on.

**[130]** If the Claimant's case was unclear on this issue, the First Defendant should have sought clarification earlier, and likely can obtain such clarification informally through a Purposive Specific Disclosure Process. And as I indicated in relation to items 8 and 9A above, that there are audited statements simply means there is some evidence in support of the First Defendant's position - audited financial statements are not necessarily conclusive. The Claimant need not show that the audited statements cannot be relied upon in order to obtain disclosure.

**[131]** While not specifically raised by the First Defendant, this request took the All Encompassing Approach too (with the exception of item 11 (3) which seeks the application papers and approvals of the Foreign Exchange Bureau of the PRC for the inward remittance of funds from Mr. Eng to Strong Nation or from Strong Nation to Xiamen RVH).

**[132]** Accordingly, the First Defendant should respond to item 11 (3) and with respect to the balance of the requests, as a rational and stepped approach, the First Defendant should provide specific disclosure for this item using the Purposive Specific Disclosure Process. The Process may lead to it being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

#### **E. FIRST DISCLOSURE APPLICATION - SCHEDULE 1, ITEMS 12 AND 19**

**[133]** These requests relate to the issues raised in the case about the "Cheer Fancy Transactions" and the "Edmond Eng Transactions" and apparently the issues raised in paragraphs 50 of the Statement of Claim and paragraphs 32, 58, 66 and

85 of the Defence). The Claimant asserts that there is a difficulty understanding the financial requirements of the subject hotel Project and that this is due to the absence of relevant records of Xiamen RVH and Strong Nation in the First Defendant's disclosure. She asserts that she needs disclosure of documents of Strong Nation and Xiamen RVH regarding the contention that the Cooperation Agreement between Xiamen RVH and Cheer Fancy was the result of financial necessity rather than some other motive.

**[134]** The requests include all budgets showing the construction costs for the project, minutes of the Board meeting of 18 October 2010, a Supplementary Agreement to Cooperation Agreement dated 19 October 2010, completion accounts of the Project, cash flow statements and projections of income and expense statements for the financial years 2010 to 2012, and management accounts (including monthly balance sheets and income and expenses statements) of Xiamen RVH for the financial years 2010 to 2012.

**[135]** The First Defendant's position is, first, that overall these requests are "extraordinarily wide and the amount of documentation relating to a Project of the size involved is vast" and second, that samples were provided to the Claimant and the Claimant should seek some further samples.

[136] With limited exceptions (minutes of the Board meeting of 18 October 2010 and the Supplementary Agreement to Cooperation Agreement dated 19 October 2010) the Claimant has again taken the All-Encompassing Approach to her requests.

[137] The minutes of the Board meeting of 18 October 2010 and the Supplementary Agreement to Cooperation Agreement dated 19 October 2010 should be disclosed.

[138] As I indicated above in the section "Specific Disclosure Application - General Determination", the basic reason for sampling is so that the party seeking disclosure can get a sense of "what's out there"; so that the party can see the nature of the various types of records that were created and maintained; and so that the party seeking disclosure can make specific disclosure requests in a more informed and focused manner. It enables the party seeking disclosure to say that some types of documents of which samples have been provided are not necessary, for example, because they are low level detailed documents that have been summarized in other documents which are sufficient for the particular matter in issue. For other issues, arguably the low level documents are necessary.

[139] While possibly the provision of samples would lead the receiving party to request further samples, requesting additional samples of the same documents is not the way in which the receiving party should have to proceed in order to get proper disclosure of all or a larger number of the relevant documents in the collection from which the samples were drawn. If that is the First Defendant's position on how specific disclosure should proceed, it is rejected.

[140] However, given the All-Encompassing Approach to most of these requests, as a rational and stepped approach, the First Defendant should provide specific disclosure for each of the items in this group using the Purposive Specific Disclosure Process. The Process may lead to it being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

[141] Accepting what the First Defendant submits about these requests encompassing a vast amount of documentation, it is particularly important that both parties apply the Purposive Specific Disclosure Process in the good faith and cooperative manner indicated above.

## **F. FIRST DISCLOSURE APPLICATION - SCHEDULE 1, ITEMS 10 AND 13-15**

[142] These requests arise from the allegations regarding the Edmund Eng Transactions and the issue as to whether Mr. Eng advanced funds pursuant to the Mortgage Loan Contract dated 10 January 2010 with Strong Nation. The relevant pleadings appear to include paragraphs 40 and 111 of the Defence and paragraph 13 of the Reply. As well, paragraph 139 of the First Defendant's Affirmation is said to be relevant.

**[143]** The Claimant seeks documents relating to payments in early 2010 caused to be made by the First Defendant to FM (Shanghai) (or Fuyao Mingyaohui) and Strong Nation and an alleged personal loan from the First Defendant to the Project.

**[144]** The First Defendant's position is that there is no issue between the parties that the FM (Shanghai) (or Fuyao Mingyaohui) payment was made and received, and that with respect to the other payment and the alleged loan, they are shown on the audited financial statements and there is no basis to dispute the audited accounts.

**[145]** As indicated above, that there are audited statements simply means there is some evidence in support of the First Defendant's position - audited financial statements are not necessarily conclusive. The Claimant need not show a basis to dispute the audited statements in order to obtain disclosure.

**[146]** Again the Claimant has taken an All-Encompassing Approach to her requests.

**[147]** Again, as a rational and stepped approach, the First Defendant should provide specific disclosure for each of the items in this group using the Purposive Specific Disclosure Process. The Process may lead to it being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

## **G. FIRST DISCLOSURE APPLICATION· SCHEDULE 2**

**[148]** Schedule 2 to the Claimant's Notice of Application dated 11 March 2015 seeks inspection of "the construction plan" that is referred to in the Defence, paragraph 75.

**[149]** The First Defendant's Disclosure Skeleton, paragraph 21, states:

[!]here was no one "construction plan" document. Rather the construction plan can be found across numerous documents already disclosed:

It goes on to list specific documents by name and with references to the First Defendant's List of Documents.

**[150]** If that is the First Defendant's answer, as it is stated to be, it could have been provided in her response, not left to be given in a skeleton on the application.

**[151]** However, the response has been provided and at this stage, in the interests of efficiency, if there is not already an agreement to this effect, nothing further need be provided by the First Defendant by way of a more elegant form of response.

## **H. SECOND DISCLOSURE APPLICATION**

**[152]** The Claimant's application for specific disclosure dated 28 April 2015 arises from the sampling disclosure undertaken by the First Defendant and relates to the issues of the "Cheer Fancy Transactions" and the "Edmond Eng Transactions". It initially encompassed eight type categories, the last two of which were withdrawn, thus leaving six categories.

**[153]** The Claimant submits as her first complaint about the approach to disclosure taken by the First Defendant that the sampling procedure was intended to apply only either to documents which are very similar in nature and effect, and numerous, or where there was a series of transactions of a similar nature. It was not and could not realistically have been intended to encompass documents which, although of the same type and numerous, were nevertheless "content diverse" and with particular content of immediate relevance (minutes of directors meetings dealing with relevant topics). The Claimant says that the First Defendant took the approach of (a) giving single documents, not documents evidencing or generated in the course of transactions, and (b) selecting more or less at random from among documents that are directly relevant and taking the position that all that is required by Justice Bannister's Order is samples of such documents.

**[154]** The Claimant submits as her second complaint about the approach to disclosure taken by the First Defendant that where samples were disclosed and the Claimant then asked for disclosure of some or all of the documents of which samples had been disclosed, the First Defendant refused to provide further disclosure.

**[155]** Earlier in this Judgment I explained what I consider the basic reason for sampling. It is so that the party seeking disclosure can get a sense of "what's out there"; so that the party can see the nature of the various types of records that were created and maintained; and so that the party seeking disclosure can make specific disclosure requests in a more informed and focused manner. It enables the party seeking disclosure to say that some types of documents of which samples have been provided are not necessary, for example, because they are low level detailed documents that have been summarized in other documents which are sufficient for the particular matter in issue. For other issues, arguably the low level documents are necessary.

**[156]** The Claimant is on solid ground in seeking to go beyond the samples and in her complaints about what she received. However again she took an All Encompassing Approach in her six remaining requests on the Second Disclosure Application. Some of her wide wording may be justified to avoid the First Defendant taking a strict approach to responding to the request.

**[157]** During the course of submission, the Claimant further narrowed and clarified certain of the six requests, and the First Defendant provided the response to one of the six requests.

**[158] Item 1** was narrowed from "All documents relating to the planning of the Hotel and decision making processes" to "All remaining documents relating to the planning of the Hotel and decision making processes not already disclosed for the period 2006

- 2013". However the First Defendant submits that it is not clear what "decision making processes" means.

**[159]** Accordingly, Item 1 can be dealt with efficiently using the Purposive Specific Disclosure Process. On that basis the First Defendant should provide specific disclosure. The Process may lead to it being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

**[160]** With respect to **Item 2**, during the course of submissions counsel for the First Defendant informed the Court that there are no written communications as requested. As a matter of good order, the Court's order should recite that such is the response.

**[161]** **Item 3** was narrowed (in *my* abbreviated summary) to all written communications between members of management of Xiamen RVH and Strong Nation and/or Crown Treasure and RHM Xiamen (including the First Defendant) relating to or touching upon the Cheer Fancy Transactions and the Edmond Eng Transactions and/or the financial needs of Xiamen RVH and/or Strong Nation and/or Crown Treasure and/or RHM (Xiamen) relevant to the two transactions.

**[162]** Accordingly, Item 3 can be dealt with efficiently using the Purposive Specific Disclosure Process. On that basis the First Defendant should provide specific disclosure. The Process may lead to it being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

**[163]** **Items 4 and 5** were similarly narrowed by adding the word "remaining" and "beyond those disclosed". Also the Claimant clarified in oral submissions that the phrase "i.e. additional to Items 61, 62 and 80" applies to Item 5 (1) and means "of the same nature as what the Claimant already has received". However the so called narrowing mostly merely precluded double-disclosure as opposed to reducing the scope of the request. And the First Defendant maintains that "decision making processes" is unclear. She submitted that there should be further sampling.

**[164]** I do not think further sampling at this stage makes sense. Items 4 and 5 can be dealt with efficiently using the Purposive Specific Disclosure Process. On that basis the First Defendant should provide specific disclosure. The Process may lead to it being clear to the legal practitioners when they confer, or after documents have been provided and reviewed, that more is needed. If so, it should be considered in the same open and cooperative manner, and appropriate further specific disclosure given under the auspices of this judgment and the order to follow.

**[165]** **Item 6** has six sub-items. The First Defendant submitted that the first sub-item is repetitious with Item 16 in the First Disclosure Application. If so, the First Defendant can respond to both together or cross-reference them.

**[166] Sub-items 6 (1) - (5)** are relevant and not unduly broad. However to guard against the possibility of there being any sub-items that in the result have more documents than would be required under the Purposive Specific Disclosure Process, it should be followed for these sub-items where the First Defendant considers that there may be room to reduce the number of documents necessary to fulfill the Claimant's needs.

**[167] Sub-item 6 (6)** was narrowed to sampling with three samples for each of 2011 and 2012, and by changing "documents" to "correspondence. That is a true narrowing. But the First Defendant maintained it was still too broad. The documents requested appear to be necessary. However, while the First Defendant should provide specific disclosure, it should be done using the Purposive Specific Disclosure Process.

*The "Appendix to Judgment" on pages 39 - 41 forms part of this Judgment.*

**Commercial Court Judge**

**13 November 2015**

## **Appendix to Judgment**

### **General Guidelines for Proportionate Specific Disclosure of Business Documents**

These Guidelines

1. These general guidelines are intended to assist parties and their legal practitioners in this case and others in identifying business documents (whether created or maintained in hard copy or electronically) that could be the subject of proportionate specific disclosure.
2. They are guidelines, not rules. They contain examples, not closed categories. They are intended to be construed flexibly and purposively, having regard to the nature of the business involved and the nature of the issues in respect of which specific disclosure is sought or to be given.

Hierarchy of Business Documents

3. It is important to note that business documents often involve a hierarchy of inter related documents with the level of summation and abstraction increasing as the level increases.
4. This is typically the case for financial records of most types, manufacturing and production records, and records from other comparable business situations that commence with a volume of individual transactions, steps or processes.

5. Typically for a business these levels range from documents of 'original entry' at the lowest level - vouchers such as invoices, receipts, bank paying-in slips, cheque stubs or cancelled cheques - to the annual financial statements at the highest level.

6. Between those two ends of the spectrum will be, typically:

a. at a higher level, those documents that may be ordinarily and periodically provided to the board of directors and/or senior management to assist business supervision and decision-making, and

b. at a lower level, those documents that are generated or held within a staff department or group, such as a finance department, as records from which to compile higher level documents.

7. Obviously the situations and documentation will vary depending of the nature, location, sophistication and size of the business, the manner in which records are generated, compiled and maintained (for example, manually or electronically) and so on.

8. Examples of financial documents between the two ends of the spectrum (in no particular hierarchy) may be:

a. quarterly management accounts,

b. monthly management accounts,

c. cash flow statements,

d. turnover and profit forecasts,

e. budgets, costing reports and variance analysis,

f. ledgers and journals,

g. bank statements, and

h. statements of account (from/to suppliers/customers).

The Course of a Business Issues v. Specific Event or Transaction Issues

9. In applications for specific disclosure, the appropriate and proportionate level of financial record or other documentation is context sensitive. In particular

a. where issue concerns 'the course of a business' - for instance solvency, the progress of construction of a project, or cash-flow requirements over time - the material financial or other documents *may* be confined to, or at least involve a high proportion of, higher level documents; and

b. where the issue concerns 'a specific event or transaction' - for instance a loan or a contract - the material documents *may* more commonly not simply be high level ones because material information may exist in documents at lower levels and/or in "one-off" documents such as non-routine communications.

10. To elaborate on 9 (b), where the issue concerns 'a specific event or transaction', the material documents for proportionate specific disclosure *typically may* comprise not only higher level financial and other documents but also (for example):

a. 'communications' (between the parties, with non-parties or within one of the parties) relating to what is in issue regarding the event or transaction - for example, documents in which the transaction is planned, implemented, recorded or reported; and

b. 'internal documents' of a party such as reports to the board of directors, senior management, shareholders or others; board of directors or management reports, minutes, memoranda of meetings, directions (from the board of directors or senior management), resolutions recording consideration given to or authorization of the transaction and document moving the transaction forward.

11. To elaborate on 9 (a), where the issue concerns 'the course of business', the material documents for proportionate specific disclosure *sometimes may* comprise not only higher level financial and other documents, but also some 'communications' and 'internal documents'.

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