Jersey Evening Post Ltd v His Excellency Sheikh Hamad Bin Jassim Bin Japer Al-Thani (and on behalf of the adult beneficiaries of the Y Trust, the H Trust and the Y No. 2 Trust)

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	02 December 2002
Neutral Citation:	[2002] JRC 227
Reported In:	[2002] JRC 227
Court:	Royal Court
Date:	02 December 2002

Text

[2002] JRC 227

ROYAL COURT

(Samedi)

Before:

Sir Philip Bailhache, Bailiff, **and** Jurats de Veulle **and** Allo

Between
Jersey Evening Post Limited
Representor
and
His Excellency Sheikh Hamad Bin Jassim Bin Japer Al-Thani (and on behalf of the adult

beneficiaries of the Y Trust, the H Trust and the Y No. 2 Trust)
First Respondent

and

David Fisher Le Quesne, Advocate (on behalf of the minor and unborn beneficiaries of the said Trusts)
Second Respondent

and

Standard Chartered Grindlays Trust Corporation (Jersey) Limited
Third Respondent

and

The State of Qatar
Fourth Respondent

and

Her Majesty's Attorney General
Fifth Respondent

Advocate N. M. Santos-Costa **for the Representor;**

Advocate F. B. Robertson **for First Respondent;**

Advocate M.J. Thompson **for the Third Respondent;**

Advocate J.D. Kelleher **for the Fourth Respondent;**

Advocate C.E. Whelan **for the Fifth Respondent**.

Authorities.

Re VGM Holdings Ltd. [1941] 3 All ER 417.

The Bank v A Ltd. and Others, (23rd June 2000) Chancery Division, unreported.

R v Legal Aid Board, ex p Kaim Todner [1999] QB 966.

Sir Jack Jacob's Hamlyn Lecture: The Fabric of English Civil Justice (1987): pp. 22–23.

Scott v Scott [1913] AC 417.

G v A (2000) JLR 56.

Barclays Private Bank & Trust Ltd v Bhander (15th July, 1998) Jersey Unreported;

[1998/152].

Hodgson v Imperial Tobacco Ltd (1998) 1 WLR 1056.

Royal Court Rules 1992: Rule 13/1.

Re Rabiotti 1989 Settlement (2000) JLR 173.

Re a Settlement (1994) JLR 139.

In re the Esteem Settlement (1995) JLR 266.

Re S Settlement (24th July, 2001) Jersey Unreported; [2001/154].

The Public Trustee v Cooper, (20th December 1999) Unreported Judgment of the High Court of England and Wales.

European Convention on Human Rights: Article 6(1); 10.

Gio Services Ltd. v Liverpool and London Ltd. [1999] 1 WLR 984.

AG v Leveller Magazine Ltd. [1997] AC 440.

Buttes Gas and Oil Co. and another v Hammer [1981] QB 223.

AG for the United Kingdom v Wellington Newspapers Ltd. [1988] 1 NZLR 129.

In re Rosedale Investments (1995) JLR 123 SC.

Kelly v BBC [2001] Fam 59 NMSC.

Derbyshire CC v Times Newspapers [1993] AC 534 NMSC.

R v Chief Registrar ex p New Cross Soc [1984] QB 227 NMSC.

Re Crook [1992] 2 All ER 687 NMSC.

Contempt of Court Act 1981 section 4 NMSC.

R v Horsham Justices ex p Farquharson [1982] QB 762 NMSC.

Practice Direction (Contempt) [1982] 1 WLR 1475 NMSC.

Re Central Television PLC [1991] 1 All ER 347 NMSC.

AG v Guardian Newspapers [1990] AC 109 JDK/NMSC.

SCP 1999, pages 1660–1 NMSC.

Young v AG (22nd January 1999) Jersey Unreported C of A. [1999/13]

Council of Civil Service Unions and ors v Minister for the Civil Service [HL] [1985] AC 374.

Glazebrook v Housing Committee [2000] JLR 301 FBR.

Abacus v Grupo Torras (15th January 2001) Jersey Unreported [2001/16A] FBR.

Yachia v Levi (26th March 1998) Jersey Unreported [1998/61] FBR.

Federal Trust v Macdonald-Smith and Bermuda Trust (6th April 2001) Guernsey Unreported FBR.

Bank of Scotland v A Ltd [2001] 1 WLR 751 FBR.

Contempt of Court Act 1981 Articles 4, 11.

Secretary of State for the Home Department v Rehman [2001] UKHL 47 NMSC/JDK.

Johnson v Walton [1990] 1 FLR 350 FBR.

AG v Times Newspapers [1974] AC 273 JDK.

Maister v Rind (14th June 1995) Jersey Unreported FBR.

Hodgson v UK Commission decision. App no 11553/85 MJT.

Diennet v France ECHR decision App no 24/1994/472/553 MJT.

Trusts (Jersey) Law, 1984 Articles 25, 47.

Attorney General v Newspaper Publishing PLC and others [1997] 1 WLR 926.

The Commonwealth of Australia v John Fairfax and Sons Limited and others [1980] H.C. of A 147 C.L.R.

Application by the Representor to discharge two orders of the Court: (1) an order of 10th October 2001 directing, inter alia, that the Court should sit in camera until further order to hear a representation of the First Respondent under the Trusts (Jersey) Law, 1984; and (2) an order of 21st November, 2001 that there be no publication in the media of any material or information or report relating to, or connected with, the in camera proceedings.

Bailiff

THE

Introduction

1 This representation raises important matters of principle in relation to the practice and

procedure of the Court when sitting to determine an application under Article 47 of the Trusts (Jersey) Law 1984 ("the Trusts Law"). Jersey Evening Post Limited ("the JEP") applies to discharge two orders of the Court. The first is an order of 10th October 2001 directing, *inter alia*, that the Court should sit in camera until further order to hear a representation of His Excellency Sheikh Hamad Bin Jassim Bin Jaber Al Thani ("Sheikh Hamad") under the Trusts Law. We shall refer to this as "the first order". The second is an order of 21st November 2001 in the following terms –

> *"that there be no publication in the media which, for the purpose of this order, shall mean in a programme, service or other communication in whatever form, which is addressed to the public at large or any section of the public, of any material or information or report relating to, or connected with, the present in camera proceedings*.
>
> *And the Court granted the parties liberty to apply"*.

We shall refer to this as "the second order".

2 The second order followed the publication in the Jersey Evening Post of an article headed "Court battle over Qatar millions" describing in broad terms the nature of the in camera proceedings and speculating on some of the arguments being advanced. That article led to a complaint of a possible contempt of court from counsel for the State of Qatar as a result of which the editor of the newspaper and the journalist were invited to attend before the Court. The allegation of contempt was referred to the Attorney General and it is right to add that the Attorney found no grounds for taking any further action. After hearing counsel for the parties and (to a limited extent because the principal submissions were made in camera) Mr. Costa for the JEP, the Court made the second order containing the reporting restrictions referred to above. Liberty to apply was given and, pursuant thereto, the JEP brought this representation on 11th January 2002. Advocate Le Quesne, the second respondent, sought and was granted leave to withdraw, and has played no part in these proceedings.

Procedural history

3 This hearing was held in open court although, without formal objection from counsel for the JEP, many of the submissions made during the course of it were made in camera in the absence of Mr. Costa and his client. At an earlier stage Mr. Costa had complained that the JEP was not aware of the identities of the parties and their respective advocates. Despite some submissions from counsel for some of the other parties that the Court should not confirm in its judgment speculative comment published in the Jersey Evening Post and some other newspapers, we think that the following brief synopsis of the procedural history can be stated without unfairness to anyone. Counsel for Sheikh Hamad consented to the identification of his client, as did counsel for Standard Chartered Grindlays Trust Corporation (Jersey) Limited ("the trustee"). Sheikh Hamad is a member of the ruling family of the State of Qatar and currently holds the office of Minister of Foreign Affairs. The involvement of the State of Qatar is already widely known. The trusts in question are known as the Yaheeb Trust, the Havana Trust and the Yaheeb No. 2 Trust. We refer to them

collectively as “the Trusts”.

4 In May 2001 an application was made to the Court by Sheikh Hamad pursuant to Article 47 of the Trusts Law. It was made in camera. The trustee, Advocate D.F. Le Quesne as guardian *ad litem* for the unborn and minor beneficiaries of the trusts, and the State of Qatar were convened to the hearing of that application. After hearing submissions the Court declared that the trustee held the assets of the trusts for the beneficiaries named therein respectively and for no other party or parties. That judgment was also given in camera.

5 On 6th July 2001, a second representation was made by Sheikh Hamad to which all the parties to the May 2001 representation but in addition the Attorney General were convened. Between Monday 19th November and Friday 23rd November argument took place on a preliminary application of the Attorney General. On 14th December 2001 judgment was delivered.

6 On 21st May 2002 counsel for Sheikh Hamad wrote to the Judicial Greffier pursuant to Rule 6/24 of the Royal Court Rules 1992 seeking to discontinue both the proceedings instituted by the second representation (“the substantive trust proceedings”) and appeals against the Court's order of 14th December 2001. A consent order was issued by the Greffier Substitute on 23rd May 2002. The original proceedings are now therefore at an end.

7 It is to be noted that the JEP was not informed of this discontinuance despite a direction of the Bailiff given on 28th March 2002 that “pending resolution of the issues raised in the representation, the Judicial Greffier will give the legal advisers for [the JEP] five clear days' written notice of the Court's next sitting on the substantive trust proceedings”. The discontinuance was however followed by a press release issued on behalf of the Attorney General on 28th May 2002 with the agreement of the legal advisers of Sheikh Hamad. That press release indicated that a criminal investigation into the conduct of Sheikh Hamad was at an end and that the Sheikh had voluntarily paid £6 million towards the costs of the investigation into the affairs of his three Jersey trusts.

Is the Court functus officio?

8 In the meantime preparations for the trial of this representation were afoot. The discontinuance of the substantive trust proceedings however led counsel for Sheikh Hamad to mount an argument that the Court was *functus officio* which was advanced at hearings on 30th September and 1st October. The argument was rejected and we now give our reasons for that rejection.

9 While many of the cases involving the doctrine of *functus officio* concern the powers of Magistrates' courts there is no doubt that the doctrine is applicable to civil proceedings too. In *Re VGM Holdings Ltd.* [1941] 3 All ER 417 the head-note to the report encapsulates the principle –

> ***"Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay.*** The only means of obtaining any variation is to appeal to a higher tribunal" .

A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even where a decision has been communicated to the parties. Proceedings are only fully concluded, and the Court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded the Court cannot review or alter its decision; any challenge to its rulings on adjudication must be taken to a higher court if that right is available.

10 Mr. Robertson argued that the discontinuance of the substantive trust proceedings had brought them to a close and that orders made in the context of those proceedings could no longer be reviewed. He continued that even if the Court was not *functus officio*, any discharge of those orders could only have prospective effect. In relation to the first order in particular the Court could not undo retrospectively what it had done on 10th October 2001.

11 We cannot accept those submissions for the following reasons —

We are satisfied that the Court is not *functus officio* in relation to the issues raised by this representation.

(i) In relation to the second order the prohibition of the reporting of the in camera proceedings is a continuing obligation. If circumstances have changed it must be open to the Court to review or to discharge its order. It cannot be right to require a litigant to go to the Court of Appeal where the appellate court would have no inkling of the views of this Court on the merits or demerits of discharging the order.

(ii) In relation to both the first and second orders the JEP intervened in the substantive trust proceedings before discontinuance by bringing this representation and the Court is still seized of the issues raised by the representation. There has been no determination of those issues. It would be quite unjust to allow the discontinuance of the substantive trust proceedings, in relation to which the JEP was not heard, to bring to an end the Court's jurisdiction to determine issues properly placed before it by the JEP.

(iii) Even if the first order is effectively dead the Court has an inherent jurisdiction to discharge it if it is just to do so. In *The Bank v A Ltd. and Others*, (23rd June 2000) Chancery Division, unreported, Laddie J was asked to discharge an Anton Piller order that was "more or less dead". He stated –

> ***"There is no general rule or set of practice in this area.*** The Court has a discretion whether it is to discharge even an expired order. In the

circumstances of this case, I have no doubt that I should discharge. That is not an empty gesture" .

Open justice.

12 In contending that both the first order and the second order should be discharged Mr. Costa rightly placed great emphasis on the principle of open and transparent justice. Many authorities were placed before us but it is necessary to cite only two. In *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966, Lord Woolf MR opined that it was important not to forget why proceedings should be subjected to the full glare of publicity:

> ***"It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court.*** It also maintains the public's confidence in the administration of justice. It enables the public to know that ***justice is being administered impartially.*** It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve" .

13 An earlier passage is to be found in Sir Jack Jacob's Hamlyn Lecture The Fabric of English Civil Justice (1987) at pages 22–23 –

> ***"The need for public justice, which has now been statutorily recognised, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of 'judging the judges:' by sitting in public, the judges are themselves accountable and on trial.*** This was powerfully expressed in the great aphorism that, 'It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.' The opposite of public justice is of course the administration of justice in private and in secret, behind closed doors, hidden from the view of the public and the press and sheltered from public accountability. There are, indeed, two prevailing exceptions to the open public system of conducting civil proceedings, namely, (1) the hearing of pre-trial proceedings 'in chambers,' at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded, and (2) the hearing of proceedings or the trial or part thereof 'in camera', where the court or the trial judge orders that the court should be closed or cleared and the public and press excluded. Both these exceptions may be necessary in matters which require protection from publicity, such as matters concerning national security, those relating to persons under disability, i.e. minors and mental patients, or those relating to secret processes and other special matters, such as hearings before the Commissioners of Inland

Revenue relating to tax affairs and such like matters. Subject to these exceptions, the principle of publicity should prevail throughout the whole range of civil proceedings" .

14 The principle of open justice has not yet found statutory expression in Jersey but we have no doubt that it forms part of our law. Indeed it has been given judicial expression in numerous judgments of the Court. Like most great principles however it is subject to qualifications. Viscount Haldane LC stated in *Scott v Scott* [1913] AC 417 –

> ***"While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred.*** But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity" .

15 The speeches of their Lordships in *Scott v Scott* were considered in a recent judgment of this Court in *G v A* (2000) JLR 56 where Page, Commissioner usefully summarized the general principles –

> ***"(a) The general principle, beyond doubt, is that all proceedings should take place in public in open court*** .
>
> ***(b) The constitutional, legal and practical importance of this principle is such that it should not be displaced except for compelling reasons*** .
>
> ***(c) Whether to order proceedings in camera is something that must be determined in accordance with principle, and not on the basis of what the judge happens to consider convenient or reasonable.*** Potential

embarrassment on the part of those who have to give evidence is not a sufficient reason, of itself, to justify a hearing in camera .

(d) The question (of principle) that has to be asked can be expressed in various ways but was put succinctly by the Lord Chancellor, Viscount Haldane, in *Scott (or Morgan) v Scott* ***(2) as follows*** ([1913] AC at 439). ***"I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made"***.

There are several classes of case in which it is well established that in camera hearings are often necessary. But they are no more than illustrations of this wider principle .

(e) The test is a strict one and I quote again from (*Viscount Haldane* [1913] A.C. at 438):

"But the burden lies on those seeking to displace … [the general rule as to openness] in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity" .

16 The aim therefore is to do justice to the parties before the Court. That aim must not be stultified by a rigid application of the principle that justice must be done in public. Yet the principle of open justice should not be displaced as a matter of convenience or expedience, or to avoid embarrassment to one or more of the parties, but only if it is necessary to do so in the interests of justice.

Linguistics.

17 Mr. Costa submitted that the courts in Jersey had used the terms " *in camera*" and " *in chambers*" interchangeably and on occasion confusingly. He referred to *Barclays Private Bank & Trust Ltd v Bhander* (15th July, 1998) Jersey Unreported; [1998/152], which was, as it happens, an application under the Trusts Law. Crill, Commissioner stated in that case –

"1. In matters of this sort, although the Court sits in camera it is acting as if the application were to a Master in Chambers in the English jurisdiction .

2. Neither the Judge who presides over the application nor the Jurats who sit with him should sit to hear the substantive action .

3. Because the Court will be addressed ex parte and, in the main, without the opposing party being present, it will expect that the weakness as well

as the strength of the applicant's case be disclosed .

4. Before the opposing party withdraws, the applicant should give a résumé of the facts, excluding the confidential matters that will be mentioned to the Court in camera, and the opponent should be allowed to comment on them .

5. It is desirable that the judgment following the hearing in camera should, as far as possible, be given in public. The confidential information disclosed in camera should not be mentioned except in a general way. It is not the court's duty to anticipate discovery" .

18 Counsel submitted that the Court in that case was not sitting *in camera*, where the proceedings were secret, but was sitting in chambers as a matter of convenience. He referred to another passage from the judgment of Lord Woolf MR in *Hodgson v Imperial Tobacco Ltd* (1998) 1 WLR 1056 –

"In accord with the usual practice in the Queen's Bench Division, interlocutory directions for the conduct of this litigation have been made in chambers. The defendants rely on this fact in support of the orders which have been made restricting communications between legal advisers and the media. Section 67 of the Supreme Court Act 1981 recognises the practice of the court of dealing with matters in chambers as opposed to in open court. As to section 67, the defendants rely upon the note in The Supreme Court Practice 1997, vol. 2, p. 1771, para. 5276:

'The expression 'in chambers' used in this section in contrast to 'in court' means in private, secret, secluded behind closed doors, in proceedings at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded unless invited to be present with the consent of the parties and the court."

This note is attributed to the editorship of Sir Jack Jacob Q.C. and therefore justifies great respect. However, in our judgment the note does not by the use of the word "secret" accurately reflect the significance of a hearing behind in chambers rather than in open court. The present position is more accurately reflected in the judgment of Jacob J. in *Forbes v. Smith* [1998] 1 All E.R. 973, 974:

"A chambers hearing is in private, in the sense that members of the public are not given admission as of right to the courtroom. Courts sit in chambers or in open court generally merely as a matter of administrative convenience. For example, in the Chancery Division the normal practice for urgent interlocutory cases is for the matters to be heard in open court, the application being made by way of motion. Corresponding applications in the Queen's Bench Division are normally made in chambers. There is no logic or reason as to why exactly the same sort of case in one Division should be in open court and, in another

Division, in chambers."

19 The difficulty with Mr. Costa's submission is that English practice has developed in part under the influence of statutory intervention. This becomes even clearer from a later passage from Lord Woolf's judgment in *Hodgson v Imperial Tobacco Ltd.* –

> ***"As section 12 of the Administration of Justice Act 1960 makes clear, the publication of information relating to proceedings held in private (i.e. chambers) is not in itself contempt except in the specific cases identified in section 12(1)(which do not apply here) unless the court makes an order prohibiting publication when it has "power to do so" (section 12(1)(e)).*** Nor is the publication of the whole or part of the order made by a court sitting in private a contempt (section 12(2)) .
>
> ***The general position is that any judgment including a judgment in chambers is normally a public document.*** This is the position notwithstanding that under R.S.C., Ord. 63, r.4(1) there is no right to inspect a judgment so given without leave .
>
> ***A distinction has to be clearly drawn between the normal situation where a court sits in chambers and when a court sits in camera in the exceptional situations recognised in*** *Scott v. Scott* [1913] A.C. 417 ***or the court sits in chambers and the case falls in the categories specified in section 12(1) of the Act of 1960 (which include issues involving children, national security, secret processes and the like).*** Section 12(1) also refers to the court having prohibited publication. Such proceedings are appropriately described as secret; proceedings in chambers otherwise are not appropriately so described .
>
> ***Proceedings in chambers however are always correctly described as being conducted in private.*** The word "chambers" is used because of its association with the judge's room so as to distinguish a hearing in chambers from a hearing in open court. While the public in general are normally free to come into and go from a court (as long as there is capacity for them to do so) during court hearings the same is not true of chambers hearings. Other than the parties and their representatives the public need the permission of the judge to attend .
>
> ***Hearings in private in chambers already make an important contribution to the administration of justice.*** They allow issues to be determined informally and expeditiously. They allow less strict rules as to representation to apply. They allow matters to be discussed which the parties might not wish to discuss in open court. They encourage openness. They are less intimidating to litigants which is particularly important in the case of the small claims jurisdiction. With the movement which is now taking place in relation to case management chambers hearings are likely in the future to make a greater contribution to the administration of justice than they do already" .

20 Nonetheless we agree with Mr. Costa that there has occasionally been a confusion of terminology employed by the Court. In our judgment the important distinction to be drawn is between cases heard in open court and cases heard in private. When the Court sits *in camera* it is in effect sitting in private, and we think that greater clarity would result if those Latin words were no longer used and courts declared that they were, in appropriate cases as described above, sitting in private. When the Court sits in private it follows that only the parties and their advisers are entitled to be present. The public and the media will be excluded unless the Court otherwise orders. So far as the place where the Court sits to conduct its business is concerned, this appears to us to be entirely a matter of convenience and not to affect the important principle as to whether the Court is sitting in public or in private. It may be convenient to conduct a public hearing in the judge's room or indeed anywhere else. Equally, it may be convenient, for example by reason of the number of the parties and their advisers, to conduct a private hearing in a court-room. We think that the employment of the term “sitting in chambers” can lead to confusion as to whether the Court is sitting in public or in private. We invite the appropriate authorities to consider whether the references to sitting “in chambers” in the Royal Court Rules 1992 should not be amended to avoid that possible confusion.

21 We emphasize that we do not intend to imply that hearings hitherto described as being held in chambers should not continue to be held in private as may be necessary. We respectfully agree with the comments of Lord Woolf MR that such hearings make an important contribution to the administration of justice. They allow more informality, openness and expedition. Directions hearings dealing with case-management issues preliminary to trial are already common in this jurisdiction and in the ordinary run of events it is perfectly proper and necessary in the interests of justice that they should be conducted in private. Generally they are of no interest in any event to the public or media. On the other hand the Court naturally retains a discretion in an appropriate case to admit a representative of the media or indeed to sit in public for such purposes. The Court should be as flexible as the circumstances admit. In all cases where the Court is sitting in private it should consider whether it is appropriate for a judgment to be given in open court announcing the order which is being made and giving some account of what has happened at the private hearing.

Nature of Article 47 proceedings.

22 We turn to consider the nature of proceedings under Article 47 of the Trusts Law. We observe in passing that Rule 13/1 of the Royal Court Rules 1992 provides that:

> ***“The following non-contentious business may be transacted in chambers before the Bailiff and two Jurats, namely, ….*** applications in pursuance of Article 47(1) and applications for leave in pursuance of Article 47(3) of the Trusts (Jersey) Law 1984” .

While this may be indicative that certain applications under Article 47 may be heard in private, we think that the rule is not particularly helpful in the context of this representation.

23 Mr. Thompson for the trustee contended that whenever the Court sat to hear an Article 47 application it was sitting in an administrative capacity. It was accordingly entitled to adopt a different approach on the question of whether or not it should sit in private from the ordinary run of civil cases. The trustee's duty of confidentiality was central to the trustee/client relationship and the Court had indicated that it would uphold the principle of confidentiality unless there was good reason why it should not do so. In *Re Rabiotti 1989 Settlement* (2000) JLR 173 the Court had endorsed the view that when a settlor expressed his wishes in writing privately to his trustees, there was a presumption that he intended the document to be confidential. Birt, Deputy Bailiff, had stated at page 190 that "the *Court should ordinarily respect that confidentiality"*. In *Re a Settlement* 1994 JLR 139 the Court expressed the duty of confidentiality at page 146 as follows –

> ***"In the context of discretionary trusts, it seems to us eminently sensible and reasonable that trustees should be able to weigh conflicting considerations as between different beneficiaries and to judge the merits and demerits of particular courses of action without being exposed to minute examination as to their motives and processes of reasoning at the instance of disaffected beneficiaries.*** Trustees of such a trust have been entrusted with a confidential role and should, in general, be permitted to exercise their functions away from the glare of publicity" .

There was every reason therefore, counsel contended, for the Court to sit in private to hear applications under Article 47 of the Trusts Law.

24 Counsel drew support for that contention from *In re the Esteem Settlement* (1995) JLR 266 where Hamon, Deputy Bailiff stated –

> ***"It is trite law that civil and indeed criminal cases must be heard in open court.*** Unless exceptional circumstances such as public safety exist or where, for instance, there is to be evidence given by children or young persons in a case of an offence against morality or decency. But these are general rules and in my view have no application where the court is sitting in an administrative capacity .
>
> ***In the present case the applicants ask for funds to be dispensed out of trust funds.*** In order to do that candidly an enormous amount of information must be supplied. That must be so because the trustees surrender their discretion to the court and the court has to have the facts .
>
> ***It would be quite wrong, in my view, to penalize the applicants because they have candidly given the court sensitive financial information.*** The court was satisfied on June 16th, 1995 that the information given allowed it to make the orders that it did. I am satisfied that in exercising its administrative function the court is entirely able to have its hearings in camera and thereafter to suppress the disclosure of any information given to it in the course of the confidential hearing which, if it fell into the hands of the plaintiffs, might do great harm" .

Counsel also relied on the passage from the Court's judgment in *Barclays Private Bank & Trust Ltd. v Bhander*, cited above.

25 We accept that where a trustee surrenders his discretion to the Court, as happened in *Re the Esteem Settlement* and *Barclays Private Bank & Trust Ltd. v. Bhander*, and voluntarily discloses sensitive or confidential information relating to the affairs of the trust, the Court should sit in private to determine the application. The proposition that all applications under Article 47 of the Trusts Law fall into this category is however too wide and is misconceived.

26 In *Re S Settlement* (24th July, 2001) Jersey Unreported; [2001/154], Deputy Bailiff, cited with approval as representing the law of Jersey the following passage from a judgment of Robert Walker J in an unnamed case heard in chambers in 1995 setting out four categories of application by a trustee –

> ***(1) The first category is where the issue is whether some proposed action is within the trustees' powers.*** That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to .
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> ***(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.*** Obvious examples of that which are very familiar to the Chancery Division are a decision by the trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do, but they think it prudent and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries .
>
> ***(3) The third category is that of surrender of discretion properly so called.*** There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest. The cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in chambers in which

adversarial argument is not essential, although it sometimes occurs. It may be that ultimately all will agree on some particular course of action, or at any rate will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under Category (2)), approving the exercise of discretion by trustees or (under category (3)), exercising its own discretion .

(4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court" .

27 In *The Public Trustee v Cooper*, (20th December 1999) Unreported Judgment of the High Court of England and Wales, in which the above extract is cited, Hart J cautioned against assuming that there was always "a bright-line distinction" between these categories. It is clear that there will be cases falling into more than one category. Broadly speaking, however, in England, cases in categories one and four will be heard in open court, whereas cases in categories two and three will be heard in private.

28 We think it would be unwise to be too dogmatic as to when the Court should sit in public and when it should sit in private to hear Article 47 applications. As Hart J rightly emphasized, the categories adopted in *Re S* are not watertight, and some cases may even fall outside them. The jurisdiction conferred by Article 47 of the Trusts Law is a wide one. It has been employed to the great advantage of settlors, trustees and beneficiaries since the Trusts Law came into force. But we think it can be said that the courts in this jurisdiction have accorded a greater importance to the need to respect the confidentiality of private trusts than has been the case elsewhere. It has certainly been the practice in Jersey to sit in private to hear applications falling within categories two and three; but it has been the practice occasionally to sit in private to hear cases falling in category one. The underlying rationale is a desire not to undermine the confidence which lies at the root of the relationship between a trustee and the beneficiaries, particularly of a discretionary trust. In striking the balance between the principle of open justice and the rights of individuals to respect for the confidentiality of their private business arrangements, the Court must have regard to the purpose of the Article 47 jurisdiction. Its broad purpose is to assist those concerned with the administration of trusts to resolve their differences and to seek judicial guidance or direction in an orderly context but in a relatively informal and flexible manner. When hostile litigation is being conducted, it must naturally be conducted in public in the ordinary course of events. But where the Court is sitting administratively, or is exercising a quasi-parental jurisdiction to protect the interests of all the beneficiaries of a trust, the Court should generally sit in private. Although the Human Rights (Jersey) Law 2000 is not yet in force, we have considered whether this approach might be in conflict with a convention right under the European Convention on Human Rights. Article 6(1) of the Convention provides –

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within

> ***a reasonable time by an independent and impartial tribunal established by law.*** Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice" .

In our judgment the phrase "or the protection of the private life of the parties so require[s]" is sufficient justification, absent any compelling reason to the contrary, for resolving to sit in private to hear this kind of application under Article 47 of the Trusts Law.

The representations brought by Sheikh Hamad.

29 We turn to consider the representations brought by Sheikh Hamad. As we have stated above, two applications were made under Article 47 of the Trusts Law. The first application appears not to be within the knowledge of the JEP but it is necessary to refer to it briefly in order to consider the nature of the second application which led to the first order being made on 10th October 2001.

30 The application made by Sheikh Hamad, as a beneficiary of the Trusts, in May 2001 was designed to establish that the trustee did not hold the trust funds on constructive trusts for any other person, and that the trustee could accordingly make distributions to the beneficiaries. In our judgment this application fell on the borderline between the first and second categories in *Re S*, and was properly heard in private.

31 We turn next to consider the second application of Sheikh Hamad which, as we have stated, led to the first order which the JEP seeks to have set aside. The second application was, pursuant to the first order, heard *in camera* but we must, in order to explain the decision at which we have arrived, refer at this stage to the nature of the application and in consequence to some material which is not yet in the public domain. In our judgment it is necessary to do so, and what is set out below does not in all the circumstances cause unfair prejudice either to Sheikh Hamad or to any other party.

32 The Court's order of 17th May 2001 did not resolve the problem faced by Sheikh Hamad in relation to the Trusts. The underlying difficulty was that the trustee had felt obliged in July 2000 to make a suspicious transaction report pursuant to the Proceeds of Crime (Jersey) Law 1999. The trustee was then caught on the horns of a dilemma. If it distributed funds from the Trusts it might commit an offence under the Proceeds of Crime Law. If it refused to distribute, it might render itself liable to action for breach of trust. Under the Proceeds of Crime Law the trustee would have been afforded a defence to a charge of assisting another to retain the benefit of criminal conduct if the police had consented to any distribution. That consent was not however forthcoming. Sheikh Hamad's application accordingly sought directions from the Court "that will enable the trustee to resume the administration of [the

Trusts] in accordance with their terms within such a time and to such an extent as may be reasonable in all the circumstances of the case". This "rather elliptical application" (to use the Court's phraseology in its interlocutory judgment of 14th December 2001) was in reality designed to overcome the refusal on the part of the police to consent to the distribution of funds from the Trusts.

33 The Attorney General objected that this was tantamount to directing the trustee to do something which might amount to the commission of a criminal offence. Although the Attorney General declined to be specific as to what offences were under investigation, it emerged that the inquiries were concerned with the payment of commissions to Sheikh Hamad. Those commissions were paid by foreign companies in relation to certain arms contracts with Qatar. The commissions had been paid into the Trusts. The police were unwilling to consent to any withdrawal of funds from the Trusts at what was said to be an early stage of a complex inquiry. On the other hand, the effect of the police refusal to grant consent was to paralyse the administration of the Trusts in circumstances where it had not been established that the trust funds were in fact the proceeds of crime. We should add that the allegation that they were the proceeds of crime is no longer being pursued.

34 We think that we have said enough to indicate that the second application by Sheikh Hamad under the Trusts Law could not in any sense be described as a straightforward administrative matter. It was in fact a controversial and hotly contested application. It does not fall neatly within any of the four categories in *Re S*, but we have no doubt that it was not the kind of trust application under Article 47 which might ordinarily have been heard in private. It was adversarial litigation.

35 That is not to say however that the Court was wrong to sit in private. There appears unfortunately to be no record of the submissions made by counsel on 10th October 2001 as to why the Court should sit in private. Furthermore, the Court did not give any reasons for its decision to accede to those submissions. What can be said is that counsel for Sheikh Hamad advanced two grounds for sitting in private. The first was that the representation was an administrative application under the Trusts Law. We have now found that that ground is without substance. The second was that the issue of alleged criminality made a hearing in private necessary to avoid prejudice to the process of criminal justice. That submission was not opposed by the Attorney General. That ground (of possible prejudice to the process of criminal justice) is no longer relevant because the Attorney General has announced that the investigation into alleged criminality on the part of Sheikh Hamad is now at an end.

The first order.

36 Should the first order accordingly be discharged? In one sense the order is spent in that the proceedings were in fact conducted in private. However, as Laddie J stated in relation to the Anton Piller order in *The Bank v A Ltd. and others*, the discharge of the first order in this case would not be an empty gesture. Mr. Costa at one stage appeared to be seeking

access to all the documents of the Trusts, affidavits and other written material placed before the Court at the hearing. He is clearly not entitled to such documents. As Potter LJ stated in *Gio Services Ltd. v Liverpool and London Ltd.* [1999] 1 WLR 984 at page 995 –

> ***"So far as concerns documents which form part of the evidence or court bundles, there has historically been no right, and there is currently no provision, which enables a member of the public present in court to see, examine or copy a document simply on the basis that it has been referred to in court or read by the judge.*** If and in so far as it may be read out, it will "enter the public domain" in the sense already referred to, and a member of the press or public may quote what is read out, but the right of access to it for purposes of further use or information depends upon that person's ability to obtain a copy of the document from one of the parties or by other lawful means. There is no provision by which the court may, regardless of the wishes of the parties to the litigation, make such a document available to a member of the public. Nor, so far as such documents are concerned, do I consider that any recent development in court procedures justifies the court contemplating such an exercise under its inherent jurisdiction" .

We consider that this statement also represents the law in this jurisdiction.

37 Generally speaking the submissions of counsel would have been lost upon the air; but in this case they have been recorded. At the request of the Attorney General and eventually by consent of all the parties, on 10th October 2001 the Court –

> *"directed that all evidence and submissions in the proceedings be recorded on audio tape and not released to any other person without leave of the Court, and that adequate notice be served on all parties upon such application for leave being made; if a transcript is to be obtained it must be with the knowledge of the other parties;"*

There is now a transcript of the submissions made by counsel, and counsel for the JEP seeks access to those transcripts.

38 Counsel for Sheikh Hamad argued that the Court could not discharge the first order with retrospective effect. The order could not be re-visited and set aside *ab initio*. Whatever the merits of that argument it does not seem to us to be in issue here. The Court has a discretion, as we have found, to discharge the first order. Whether, and if so to what extent, we should exercise that discretion is considered below. If the first order is discharged the Court will need to consider whether, and if so to what extent, to exercise the power reserved on 10th October 2001 to grant leave for the release of the transcripts to the JEP. Whether or not the first order is discharged we must consider whether changed circumstances justify the release in whole or in part of the Court's judgment delivered on 14th December 2001. The exercise of these discretions are of course inter-related. To discharge the first order while at the same time refusing to allow the JEP access to the transcripts or part of them would indeed be an empty gesture.

39 Counsel for all the respondents were in varying degrees opposed to the unqualified release of the transcripts to the JEP.

40 Mr. Kelleher stated that Qatar accepted the presumption that justice should be done in public. The presumption was however rebuttable, and the national security of Qatar was a factor which could rebut the presumption. Counsel accepted that, if the national security of Qatar was to rebut the presumption of openness, it would have to pass a threshold where "the Court reasonably believes it to be necessary in order to serve the ends of justice" as Lord Diplock put it in *AG v Leveller Magazine Ltd.* [1997] AC 440; or it "appears to endanger the due administration of justice" (per Lord Scarman in the same case). This is a high threshold but counsel submitted that proper respect for the legitimate security concerns of another state was a factor that could, as a matter of comity and in the public interest, overcome that threshold.

41 He drew support for this contention from passages in the judgments delivered in the English Court of Appeal in *Buttes Gas and Oil Co. and another v Hammer* [1981] QB 223. Donaldson LJ stated at page 256 –

> ***"The public interest in the maintenance of international comity – a standard of international behaviour which can be epitomised as "do as you would be done by," – is very great.*** The courts are wholly independent of the executive, but they are an emanation of the Crown and they act in the name of the Crown. Giving the fullest weight to the public interest in the achievement of justice between litigants, I have no doubt that this is more than counterbalanced in this case by the public interest in refraining, in the name of the Crown, from ordering the disclosure for inspection of the documents, the subject matter of this application" .

Brightman LJ also stated at page 265 –

> ***"In my view it is in the public interest of the United Kingdom that the contents of confidential documents addressed to, or emanating from sovereign states, or concerning the interests of sovereign states, arising in connection with an international territorial dispute between sovereign states, shall not be ordered by the courts of this country to be disclosed by a private litigant without the consent of the sovereign states concerned.*** I think that such an immunity is a public interest of the United Kingdom and I think that it outweighs the public interest that justice shall be administered on the basis of full disclosure of all relevant unprivileged documents" .

42 Counsel drew further support from *AG for the United Kingdom v Wellington Newspapers Ltd.* [1988] 1 NZLR 129, which was a New Zealand case involving an attempt by the United Kingdom Governemnt to seek an injunction and damages in respect of the publication of the book "Spycatcher" in New Zealand. Cooke P stated –

> ***"The world is shrinking, with nuclear hazards, terrorism, ideologies and the power of the media transcending national boundaries and at times making them almost irrelevant.*** It would seem anachronistic for the Courts to deny themselves any power to do what they can to safeguard the security of a friendly foreign State. Spycatcher can be seen as a rather dated book, written ***in a rather hackneyed style: not fit, it might be said, to be linked with global considerations.*** But the Court has to work out a principle capable of covering much more than Spycatcher. The international imperatives of security cannot be foreseen. The rule expounded by Lord Watson and Lord Denning was not designed to meet this sort of problem. To extend the rule to it is logically possible, but so is the approach of treating State secrets as a special subject and part of the law as to confidentiality. In principle I think that the British Government have been on sound ground in claiming that Courts outside the United Kingdom should be ready in a proper case to protect their security secrets."

43 We have had the benefit of further submissions made in private based upon an affidavit of General Hamad Bin Ali-Attiyah, Chief of Staff of the Qatari Armed Forces. We have not found this aspect of the matter easy, but we have on balance concluded that we ought to accept the submissions of counsel for Qatar for three reasons.

Counsel for Qatar helpfully supplied us with a list of references in the transcripts to the disclosure of which objection was taken.

> (i) We take judicial notice of the fact that Qatar is a friendly foreign state. While we might have thought that some of the material to which objection to disclosure is taken was already in the public domain, there is no evidence before us to that effect. We accept that we do not know how valuable even apparently insignificant pieces of information might be to the enemies of Qatar. When the State of Qatar asserts through the Chief of Staff of its Armed Forces that disclosure of certain documents could be damaging to the national security of Qatar, we think that we should, absent compelling considerations to the contrary, accept that assertion.
>
> (ii) At this moment in world affairs, when storm clouds are gathering over the Middle East, we agree with Mr. Kelleher that the Court should be particularly cautious. We agree with the prescient observations of the New Zealand Court of Appeal in *AG for the United Kingdom v Wellington Newspapers Ltd.*
>
> (iii) It is the case, as asserted by Mr. Kelleher and other counsel, that submissions were made on the basis that the Court was sitting in private. If the Court is to change the rules of the game after the final whistle has blown, the Court should be careful not to cause unfair prejudice to any party.

44 Mr. Robertson for Sheikh Hamad was opposed to the release of the transcripts on two principal grounds. First, he submitted that there was an issue of confidentiality. Confidential information was given to the Court on the basis that the Court was sitting in private.

Secondly, he submitted that the release of the transcripts would cause unfair and disproportionate prejudice to Sheikh Hamad. The two points are in a sense interrelated. There is no doubt that certain passages in the transcripts would, if released, cause prejudice to the interests of Sheikh Hamad. They would open the door, as counsel suggested, to further articles alleging improper if not illegal conduct. In general, as counsel rightly submitted, the details of a police investigation not resulting in a criminal charge are not publicly released. Would it thus be unfair to release the transcripts? The contrary argument put to us by counsel for the Attorney General is that the prejudicial material in the transcripts results in the main from the Attorney General's response to the argument that the refusal of the police to consent to the payment out of trust funds should be overridden. The Attorney General was driven to explain why the police had not granted their consent under the Proceeds of Crime Law. Inevitably that explanation involved the disclosure of documentary material which, in the Attorney General's view, gave rise to suspicions. If Sheikh Hamad had not brought his representation under the Trusts Law none of this would have emerged.

45 It is the case that all this prejudicial material constituted valid grounds for sitting in private to receive it. If the Court had not sat in private, the publication of the material might well have caused prejudice to the process of criminal justice. It is also the case that the material assembled during the police investigation has not, and now never will be tested in a court of law. What appears on the face of it and from one perspective suspicious might in fact have turned out on closer analysis to be entirely innocent. We have reached the conclusion that it would be unfair to authorize the release of material assembled during a police investigation which has now come to an end. It would be equally unfair to authorize the release of confidential material put forward by Sheikh Hamad to rebut the police allegations on the basis that the hearing was being conducted in private. The proper place to conduct a trial of alleged criminality is in a court of law subject to all the usual safeguards and not in the media.

46 Mr. Thompson for the trustee reminded the Court that the investigation into alleged regulatory offences by the trustee was not concluded. In so far as the transcripts contained material alleging improper or unlawful conduct, it could be prejudicial to the process of justice. This submission is difficult to evaluate in that the Court has not been told what alleged regulatory offences or misconduct are under investigation. Nonetheless the submission is clearly correct. It would be wrong to order the release of material in the transcripts which could prejudice future proceedings against the trustee or its officers.

47 Mr. Whelan for the Attorney General was opposed to the release of the transcripts only in one respect. The Attorney General had referred to a document during the course of submissions to which he would not have been authorized to refer had the Court been sitting in public. In counsel's view the references in the transcripts to this document could be excised if the Court were minded to grant leave for the transcripts to be released to the JEP.

48 The Court has read the transcripts of the hearings that took place between 19th and 29th November 2001. While it is possible that some parts of the transcripts might be released to

the JEP without transgressing the bounds of counsels' objections, it seems to us that the process of editing and excision would be inordinately time-consuming and ultimately futile. The reason is simple. The underlying purpose of the Attorney General was to show that there were grounds for suspecting that the conduct of Sheikh Hamad might have involved the commission of criminal offences and that the withholding of consent under the Proceeds of Crime Law by the police was justified. Part of the evidence assembled during the police investigation was accordingly placed before the Court and adverse inferences drawn from that evidence. Submissions on behalf of Sheikh Hamad were designed to show that the inferences drawn were misconceived, and that the evidence was capable of bearing different interpretations. The bulk of the transcripts are therefore concerned, directly or indirectly, with allegations of criminal misconduct by Sheikh Hamad. Even when legal submissions were made, they are generally comprehensible only by reference to the documents obtained during the police investigation. In addition there are materials placed before the Court by counsel for Qatar in relation to defence policy and arms procurement which, as we have held, ought not to be disclosed in the interests of the national security of Qatar. The transcripts contain an intertwined mass of material the bulk of which ought not, for the different reasons set out above, to be placed in the public domain. We think that there is a more satisfactory way of satisfying the need for public justice than by ordering the disclosure of disjointed sections of the transcripts. We refer to that in paragraph 50 below.

49 The application to discharge the first order is accordingly refused, as is the application by the JEP for access to the transcripts.

The December 2001 judgment

50 We turn to the next question raised with counsel during the hearing which is whether the interlocutory judgment delivered by the Court on 14th December 2001 but not released, ought now to be placed in the public domain. The draft judgment was circulated to counsel on 13th December 2001 with a note from the Bailiff's Judicial Secretary indicating that the Bailiff was minded, subject to any submissions which might be made by counsel, to order that the judgment be placed in the public domain. In the event the Court was persuaded by counsel's submissions that the course of criminal justice might be prejudiced by the release of the judgment at that stage, and the Court directed it be withheld until further order. So far as Sheikh Hamad is concerned, the prejudice to the process of criminal justice is no longer relevant, the Attorney General having announced that the police investigation is at an end.

51 Counsel for Sheikh Hamad helpfully summarized his position in a written note. He objected to the release of the judgment on the basis that, in the generality, no publicity is given in relation to the discontinuance of a police investigation other than an announcement that the criminal process is at an end. The judgment of 14th December 2001 does not however refer to any of the evidence placed before the Court during the hearing. What it does make clear is that the Attorney General was seeking to cross-examine Sheikh Hamad on his affidavits. Counsel submitted that adverse inferences might be drawn from the disclosure of the nature of the application. We do not know, and we decline to

speculate, on what inferences might or might not be drawn. In our judgment this objection falls squarely within the principle that open justice should not be displaced in order to avoid embarrassment to one of the parties. The fact that the Attorney General wished to cross-examine Sheikh Hamad and was granted leave to do so is essential to an understanding of the hearing that took place in November, 2001. In our judgment, no unfair prejudice can be cause to Sheikh Hamad by this disclosure.

52 Counsel for the trustee reminded us that a police investigation was continuing in relation to alleged regulatory infractions by his client. We have examined the judgment of 14th December 2001 in the light of that submission but we cannot find anything which is likely to cause unfair prejudice to the trustee. It is true that the judgment is critical of the trustee in some respects, but that criticism falls short, in our judgment, of creating any prejudice likely to affect the process of criminal justice. Counsel also objected that publication of the judgment would reveal that the Attorney General wished to cross-examine the managing director of the trustee. That is true, and might cause the trustee some embarrassment, but this seems to us insufficient to displace the principle of open justice upon which counsel for the JEP rightly placed reliance. Counsel further objected that paragraph 28 of the judgment refers to the names of certain persons who were not involved in the proceedings and not represented in Court. We agree that the publication of those names would be unfair and we advert to that below.

53 Viewing the matter in the round, we can see no reason why, given the change of circumstances since it was delivered, the Court's judgment of 14th December 2001 should not now be placed in the public domain. So to order would acknowledge the important principle of open justice on which this representation of the JEP is founded, and the general practice of this Court in disclosing, where possible, the nature of proceedings that have taken place in private. We will order that the names of persons referred to in paragraph 28 of the judgment be excised and replaced by the phrase “certain other persons”. Subject to that redaction we direct the Judicial Greffier to publish the Court's judgment of 14th December 2001.

The second order.

54 We turn finally to the reporting restrictions contained in the second order which the JEP seeks to have discharged. Counsel for the JEP was critical about the breadth and unlimited duration of the order. We do not accept that criticism. The second order is certainly framed in wide terms but it was designed to protect the course of criminal justice which might have been adversely affected if the reporting of the proceedings had continued. Liberty to apply was given, and indeed the JEP has taken advantage of that liberty by making this representation.

55 Counsel for the JEP rightly emphasized however that circumstances had changed. It is clear to us that the second order cannot stand in its current form. It would indeed prevent the JEP from reporting the contents of this judgment. The Court has made it clear however

that the original proceedings were rightly held in private and that the interests of justice require that the transcripts of those proceedings should not be placed in the public domain. Any publication of those transcripts would place the publisher at risk of proceedings for contempt of court.

56 We have considered whether we ought to discharge the second order and substitute reporting restrictions on a more limited scale so as to reinforce the obligation not to publish the transcripts or parts of them. Reporting restrictions are not generally imposed *ex post facto* in circumstances such as these. On balance we think it is sufficient to warn that any such publication would be at the risk of proceedings for contempt of court. Subject to that cautionary note we accept the submission of counsel for the JEP that the second order may now, given that the police investigation into the alleged conduct of Sheikh Hamad has been discontinued, be discharged. We so order.