Neutral Citation Number: [2023] EWCA Civ 327

Case Nos: CA-2022-001544
and CA-2022-001553

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Jacobs
[2022] EWHC 1907 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2023

Before :

LORD JUSTICE MALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE DINGEMANS

- -

Between :

ALEXANDER GORBACHEV	**Claimant/ Respondent**
- and -	
ANDREY GRIGOREYVICH GURIEV	**Defendant Respondent**
-and-	
(1) FORSTERS LLP	**Respondent**
(2) T.U. REFLECTIONS LTD	
(3) FIRST LINK MANAGEMENT SERVICES LIMITED	**Appellants**

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- -

Richard Mott and **Harry Stratton** (instructed by **Enyo Law LLP**) for the **Appellants**
Mark Belshaw (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **First Respondent**

Hearing date: 21 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 28 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Popplewell :

Introduction

1. This is an appeal by T.U. Reflections Limited ('TU') and First Link Management Services Limited ('First Link'; together, 'the Trustees') against the costs order of Mr Justice Jacobs dated 22 July 2022, by which he ordered the Trustees to pay the costs of a failed jurisdiction challenge in respect of a third party disclosure application by the First Respondent, Mr Gorbachev. The Judge ordered the Trustees to pay the costs, applying the general rule in CPR 44.2(2)(a) that an unsuccessful party will be ordered to pay the costs of a successful party. The Trustees argue that he should have applied the general principle for third party disclosure applications, reflected in CPR 46.1, which is that a successful applicant should pay the third party's costs of the application unless the third party has behaved unreasonably.

2. CPR 46 is concerned with "Costs-Special Cases". Rule 46.1 governs pre-commencement disclosure and orders for disclosure against a person who is not a party. In relevant part it provides:

> *'(1) This paragraph applies where a person applies –*
> *(a) for an order under –*
> *[...]*
> *(b)(i) section 34 of the Senior Courts Act 1981; or*
> *[...]*
> *(which give the court power to make an order against a non-party for disclosure of documents, inspection of property etc.).*
> *(2) The general rule is that the court will award the person against whom the order is sought that person's costs –*
> *(a) of the application; and*
> *(b) of complying with any order made on the application.*
> *(3) The court may however make a different order, having regard to all the circumstances, including –*
> *(a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and*
> *(b) whether the parties to the application have complied with any relevant pre-action protocol.*

The proceedings

3. The First Respondent, Mr Gorbachev, and the Third Respondent, Mr Guriev, are in a dispute over an interest in a valuable Russian fertiliser business called PJSC PhosAgro. This dispute was originally listed for a six-week trial commencing in January 2023 but has now been relisted to commence in April 2024.

4. One of the issues at trial will be how and why Mr Gorbachev was financially supported between 2004 and 2012 through two Cyprus law trusts: the Gamini Trust, of which TU is the trustee, and the Goaliva Trust, of which First Link is the trustee (together, the 'Cyprus Trusts'). TU and First Link are Cypriot companies with Cypriot directors and advisers. Mr Gorbachev's case is that these have been operated by close associates of Mr Guriev.

The disclosure application

5. From 2006 onwards, the Trustees were advised by a partner at Lawrence Graham LLP, Mr Nick Jacob, who thereafter joined Forsters LLP. As a result, Forsters have possession in this jurisdiction of documents which Mr Gorbachev contended were likely to be relevant to issues in the action.

6. In 2021, Mr Gorbachev's solicitors wrote to Forsters seeking disclosure of documents. Forsters responded on 30 April 2021 saying that it was reviewing the documents it held, with the intention of seeing whether it would be possible to disclose some of the documents with the agreement of its clients, but that in any event the application against it was inappropriate because the documents belonged to its clients, and that the appropriate course would be to seek disclosure from the clients in Cyprus by an application there or letters rogatory procedure. There was some dispute about the precise identity of its clients which is not material to the current appeal, for which purposes they can be taken to be the Trustees.

7. In correspondence in June 2021 Forsters identified that there were about 4,500 electronic documents and 7 physical folders within the scope of the material sought, from 29 June 2006 to date. It repeated its view that an application against the firm was inappropriate. It also reiterated that it remained willing to take a pragmatic approach by exploring whether its clients would consent to disclosure of particular identified documents, but that it appeared that Mr Gorbachev's stance was an insistence on an order for disclosure of all the material which was widely defined. That was indeed Mr Gorbachev's position.

8. In August 2021, Mr Gorbachev issued an application seeking non-party disclosure from Forsters under CPR 31.17 and s 34 of the Senior Courts Act 1981. The scope of the documents sought was:

> "…the following classes of documents concerning the assets, liabilities, and operation of the Gamini Trust and the Goaliva Trust (the 'Cyprus Trusts'), including in relation to an option (the 'Option') (or multiple options) to acquire shares in PhosCo Industries Ltd ('PhosCo'):
>
> 1) all documents and information provided to Mr Nick Jacob, …., or others working on Mr Jacob's files, in respect of the Cyprus Trusts, PhosCo and the Option or multiple Options; and
> 2) all advice given by Mr Jacob or others in respect of the Cyprus Trusts, PhosCo and the Option or multiple Options
>
> insofar as those documents, information and advice pre-date 1 January 2014."

9. Following service of evidence, Mr Gorbachev's disclosure application came on before His Honour Judge Pelling QC on 11 April 2022. At the hearing, after being invited to do so by the judge, Mr Gorbachev applied orally and without notice for an order joining the Trustees to the application; and for permission to serve the application on them out of the jurisdiction and by alternative means. This application was granted, the judge holding that there was a serious issue to be tried, that the disclosure application fell within the gateway at CPR PD 6B para 3.1(20) ('the para 20 gateway'); and that service out and by an alternative means was appropriate because the documents in question were with Forsters.

10. On 12 April 2022, Mr Gorbachev served the disclosure application on the Trustees in accordance with HHJ Pelling QC's order by delivering them to Forsters' offices within the jurisdiction and emailing them to the specified email addresses.

The jurisdiction application

11. The Trustees applied to set aside the order of HHJ Pelling on the grounds that the Court had no jurisdiction to permit service outside the jurisdiction of a disclosure application against a foreign non-party, and/or should not exercise such jurisdiction. The application notice issued on 20 April 2022 challenged jurisdiction on the basis that the disclosure application did not fall within the para 20 gateway. By letter of 9 May 2022 the grounds were widened, without objection, to include an alternative argument that the court should not exercise jurisdiction because to do so would trespass on the letter of request regime set out in the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

12. The jurisdiction application was heard by Mr Justice Jacobs on 6 July 2022. He was concerned only with whether the jurisdiction application should succeed, not with the merits of the disclosure application. By an order dated 20 July 2022, the Judge dismissed the jurisdiction application for the reasons given in a reserved judgment ([2022] EWHC 1907 (Comm)). Following a hearing to deal with a number of consequential issues, he made an order on 22 July 2022 which included an order that the Trustees pay Mr Gorbachev's costs of and occasioned by the jurisdiction application.

13. Males LJ granted permission to appeal against the Judge's substantive decision on jurisdiction on three grounds. Permission on the fourth ground, relating to his costs order, was adjourned to be considered after the appeal. On 30 September 2022 the Court of Appeal (Nicola Davies, Males, Lewis LJJ) dismissed the Trustees' appeal ([2022] EWCA Civ 1270) and ordered that they pay Mr Gorbachev's costs of the appeal.

14. The disclosure application (against both Forsters and the Trustees) was heard by Robin Knowles J CBE on 3 November 2022. He determined that the applications did not comply with CPR 31.17 because they did not sufficiently identify the documents or classes of documents sought. He adjourned the applications with liberty to amend and restore them, which is what Mr Gorbachev has subsequently done. The applications are due to be heard on 2 May 2023.

15. In the meantime on 4 January 2023 the Supreme Court refused the Trustees' application for permission to appeal against the Court of Appeal decision on the jurisdiction application. The Trustees were ordered to pay Mr Gorbachev's costs of the unsuccessful application.

16. Neither the costs order made by the Court of Appeal nor that of the Supreme Court are challenged by the Trustees. The only issue now on appeal is whether the Judge was correct to order the Trustees to pay Mr Gorbachev's costs of the jurisdiction application at first instance. That is the subject matter of the fourth ground, for which permission to appeal was granted by the Court of Appeal on 30 September 2022 in the same order in which the substantive jurisdiction appeal was dismissed.

The Judgment

17. The Judge, who was dealing with costs as one of a number of issues falling for resolution consequential upon his substantive judgment, expressed the reasons for his costs order commendably briefly. He said that the jurisdiction challenge was a self-standing application, to whose costs CPR 46.1 did not apply, and that costs should therefore follow the event.

Submissions

18. Mr Mott's arguments on behalf of the Trustees, which were attractively advanced, can be summarised as follows.
    (1) The Judge should have applied the principle that a third party resisting a third party disclosure application will be entitled to their costs, even if they challenge the application and the application is unsuccessful, unless they have behaved unreasonably. Unreasonable behaviour connotes more than just actively opposing the application. The principle is established in *Totalise Plc v The Motley Fool Ltd* [2001] EWCA Civ 1897, [2002] 1 WLR 1233; *Miller Brewing Co v Mersey Docks and Harbour Company* [2003] EWHC 1606 (Ch), [2004] FSR 5, each approved by the Supreme Court in *Cartier International AG v British Telecommunications Plc* [2008] UKSC 28, [2018] 1 WLR 3259; *SES Contracting v UK Coal Plc* [2007] EWCA Civ 791, [2007] 5 Costs LR 578; and *Jofa Ltd v Benherst Finance Ltd* [2019] EWCA Civ 899.
    (2) That principle forms the rationale for CPR 46.1. The costs in this case fell within CPR 46.1, but Mr Mott described his primary case as being that the principle should have been applied irrespective of whether CPR 46.1 was applicable on its terms.
    (3) To treat the jurisdiction application as "self-standing" was to promote form over substance. The challenge to jurisdiction and to the merits of the application were simply two grounds for resisting the disclosure application.
    (4) It was reasonable for the Trustees to advance the jurisdiction challenge in circumstances where at the lowest there was doubt as to whether the Court had jurisdiction to order disclosure. The only decision in point (that of Cockerill J in *Nix v Emerdata Ltd* [2022] EWHC 7180 (Comm)) held that no such jurisdiction existed; and that position was supported by, or consistent with, the leading textbooks.
    (5) Alternatively, if the Court were persuaded that the challenge was not wholly reasonable, the appropriate order would be no order for costs.

19. Mr Belshaw's argument on behalf of Mr Gorbachev, which was equally attractively presented, may be summarised as follows:
    (1) The Judge was correct to treat CPR 46.1 as inapplicable to the jurisdiction challenge, and to apply the general rule in CPR 44 that costs follow the event.
    (2) There is a distinction of substance, not just form, between an application concerned with the substantive merits, and an application concerned with the court's jurisdiction to make such an order. The latter is separate from the former and must be decided prior to the former as a preliminary question, because in the absence of jurisdiction the court will not embark on an inquiry into the merits. CPR 46.1 is only concerned with costs incurred in relation to the substantive merits of the third party disclosure application.

(3) None of the authorities relied on by the Trustees address the position where there is a jurisdiction challenge.
(4) In any event the rationale expressed in the *Norwich Pharmacal* cases, that a costs order against the applicant will allow the costs to be laid at the door of the wrongdoer, is not applicable: in this case it is far from clear that the costs of the application against the Trustees would be recoverable in the proceedings from Mr Guriev were they to be payable by Mr Gorbachev to the Trustees.
(5) Alternatively, if CPR 46.1 applies, the general rule can be displaced "having regard to all the circumstances" (CPR 46.1(3)) and there are two aspects of the circumstances which justified the Judge's order:
    (a) the costs were incurred in the context of disputing jurisdiction, without any argument on the merits, and in challenging a procedural order permitting service by alternative means; and/or
    (b) the Trustees had identified no legal obligation on their part not to reveal the information, and there was no suggestion that disclosure would or might infringe any legitimate interest of anyone; the only relevant legal obligations to which the Trustees are subject are the obligations of trust and confidence owed to Mr Gorbachev and his family as the beneficiaries under the trusts; yet it is from Mr Gorbachev that they seek to withhold disclosure. There was no suggestion that the Trustees would suffer damage or be subjected to legal proceedings if they gave disclosure voluntarily.

20. It is apparent from this summary that the rival submissions potentially raise an issue whether the Trustees owed duties of confidentiality to others which would be breached if they gave disclosure of the documents sought by Mr Gorbachev voluntarily. This was not an issue raised by either side before the Judge. Having seen the skeleton arguments for the appeal in which this issue was raised for the first time, we asked for the evidential material on which each side based their submissions, confining it to that in existence at the time of the Judge's costs order, and any brief further submissions they wished to make on that material. This produced a further bundle of over 250 pages with further substantial submissions on each side. I shall return to the question of how that material should be approached.

The Authorities

21. In *SES Contracting*, this Court was concerned with an application by SES for pre-action disclosure under CPR 31.16 on the grounds that it had a prospective claim against UK Coal for participating in a dishonest conspiracy to steal SES's business. UK Coal actively and unsuccessfully opposed the application, putting in evidence and advancing arguments as to why the factual basis for the application could not be supported. This Court set aside the judge's order requiring UK Coal to pay the costs of the application, holding that it had not been unreasonable for it to oppose SES's application, although the unreasonable manner in which it had done so justified departure from the general rule to the extent of making no order for costs. Moore-Bick LJ, giving the leading judgment, said this in relation to the predecessor of CPR 46.1 at [17]:

> "Although a respondent to an application may incur some costs merely in considering what response to make to an application of this kind, in most cases he will only incur substantial costs if he opposes it. By laying down a general rule that the respondent will be awarded his costs, therefore, I think that the Rules

implicitly recognise that it will not usually be unreasonable for him to require the applicant to satisfy the court that he ought to be granted the relief which he seeks. The reason for that (if it be necessary to find one) lies, I think, in a recognition that a private person who is not a party to existing litigation which brings with it an obligation of disclosure is entitled to maintain the privacy of his papers unless sufficient grounds can be shown for overriding it and that it is for the person seeking to invade that privacy to justify doing so. At all events, the rule is clear in its terms and provides the point of departure for a judge dealing with the costs of an application of this kind."

22. He went on to say at [21]:

> "……If it was reasonable for UK Coal to oppose the application at all, it was surely entitled to decide on what basis and with what evidence it wished to do so, provided only that it did not take a wholly unreasonable course which unnecessarily increased the costs. If the respondent to an application of this kind decides to contest the allegations against him on the basis of witness statements unsupported by any contemporaneous documents, he runs the risk that the court will place less weight on that evidence than it might otherwise have done, but in my view that does not of itself make his behaviour unreasonable….."

23. *Totalise v Motley Fool* concerned a *Norwich Pharmacal* application against an innocent third party, Interactive, as operator of a website on which statements which were defamatory of the claimant had been posted by someone under the pseudonym 'Zeddust'. The order sought the identity and registration details of Zeddust, as well as removal of the content. Interactive appeared at the hearing of the application and took a neutral stance. The judge ordered Interactive to pay the claimant's costs. This court allowed the appeal and ordered the claimant to pay Interactive's costs. At [18] Aldous LJ, giving the leading judgment, rejected the submission of counsel for the claimant that the applicable rule was CPR 44 providing for the general rule that costs follow the event. He said that a closer analogy was with applications for pre-action disclosure, to which CPR 48.3, the predecessor to CPR 46.1, applied. At [29]-[30] he said:

> [29] … *Norwich Pharmacal* applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party. They are akin to proceedings for pre-action disclosure where costs are governed by Part 48.3 CPR. That rule, we believe, reflects the just outcome and is consistent with the views of Lord Reid and Lord Cross in the *Norwich Pharmacal* case. In general, the costs incurred should be recovered from the wrongdoer rather than from an innocent party. That should be the result, even if such a party writes a letter to the applicant asking him to draw to the court's attention to matters which might influence a court to refuse the application. Of course such a letter would need to be drawn to the attention of the court. Each case will depend on its facts and in some cases it may be appropriate for the party from whom disclosure is sought to appear in court to assist. In such a case he should not be prejudiced by being ordered to pay costs.
>
> [30] The Court when considering its order as to costs, after a successful *Norwich Pharmacal* application, should consider all the circumstances. In a normal case the applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure. There may be cases where the

circumstances require a different order, but we do not believe they include cases where:
(a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it;
(b) the party was under an appropriate legal obligation not to reveal the information, or where the legal position was not clear, or the party had a reasonable doubt as to the obligations; or
(c) the party could be subject to proceedings if disclosure was voluntary; or
(d) the party would or might suffer damage by voluntarily giving the disclosure; or
(e) the disclosure would or might infringe a legitimate interest of another."

24. Paragraph [29] of *Totalise v Motley Fool* was cited with approval by Lord Sumption JSC in *Cartier* at [12]. It was also referred to by Leggatt LJ in *Jofa v Benherst* where he said at [35]:

> "The Court of Appeal also made the point (at para 29 of the judgment) that *Norwich Pharmacal* applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party, and that in general it is just that the applicant should recover its costs of obtaining the information that it needs from the wrongdoer rather than from an innocent party. It is relevant in that regard that, if the party from whom disclosure is sought is ordered to bear its own costs, or even to pay costs incurred by the applicant, it has no means (unlike the applicant) of recovering those costs from the wrongdoer."

25. *Miller Brewing* was concerned with an order for delivery up of beer which infringed the claimants' trademarks, pursuant to s. 16 of the Trade Marks Act 1994, from Mersey Docks, who were innocent third parties in possession of the beer. Mersey Docks sought and were granted their costs of the application, relying on the position in *Norwich Pharmacal* cases by analogy. Neuberger J said at [30]:

> "The logic behind that general rule [in *Norwich Pharmacal* cases] is that, where an innocent third party has reasonably incurred legal costs to enable a claimant to obtain relief, then, as between the innocent third party and the innocent claimant, it is more unjust if the innocent third party has to bear his own legal cost than it is for the innocent claimant to pay them. After all, it is the claimant who is invoking the legal process to obtain a benefit, and the fact that the benefit is one to which he is legally entitled is not enough to justify an innocent third party having to be out of pocket."

26. This passage was cited with approval by Lord Sumption JSC in *Cartier* at [14].

27. These authorities suggest that the same costs principles should apply to applications for disclosure under CPR 46.1 as to *Norwich Pharmacal* applications and other applications against innocent third parties. The principles are that:

    (1) it is reasonable for an innocent third party to seek to protect private information by resisting a court order;
    (2) as between an innocent claimant and an innocent third party it is more unjust for the third party to bear the costs than the claimant, because it is the claimant who is invoking the legal process to obtain a benefit, and the fact that the benefit is one to

which he is legally entitled is not enough to justify an innocent third party having to be out of pocket;

(3) in general the costs should be recovered from the wrongdoer, not the innocent third party, which the third party has no means to achieve;

(4) the principle does not treat a third party as entitled to do no more than adopt a neutral position before it is at risk of having to bear or pay the costs of resisting the application; active opposition, albeit unsuccessful, is not of itself unreasonable behaviour or sufficient to deprive the third party of the benefit of the general principle that the applicant should pay its costs;

(5) if it is reasonable for the third party to resist disclosure, it is entitled to decide on what basis to do so, and with what evidence, without losing its costs protection, provided that it does take an unreasonable course which unnecessarily increases the costs;

(6) there may be cases which require a different order but that will not usually be the case (a) where the third party had a genuine doubt whether the applicant was entitled to disclosure; or (b) where the third party was under a legal obligation not to disclose; or (c) where the legal position was not clear; or (d) where the third party could be subject to legal proceedings or might suffer damage if it gave voluntary disclosure; or (e) where disclosure would or might infringe a legitimate interest of another.

28. It is these principles which are reflected in the general rule in CPR 46.1(2) and the displacement rule, rule 46.1(3).

29. I would accept Mr Belshaw's submission in relation to (6) that these were not intended by Aldous LJ in [30] of *Totalise v Motley Fool* to be an exhaustive list, or a rigid straight jacket, as to the circumstances in which the general principle may be departed from. CPR 46.1(3) allows the general principle to be displaced where the circumstances justify it, and the circumstances of individual cases are infinitely variable. However, they are listed as alternatives, and give guidance that each will usually be sufficient to prevent the general rule being displaced. It is significant that a number of them cater for the position where the relevant criterion is unclear or "might" exist. Where these matters are not clear, it may often be disproportionate for the parties to seek to have them resolved, or address detailed evidence to them, if they are relevant only to costs.

30. I would not, however, accept Mr Belshaw's subsidiary argument that the *Norwich Pharmacal* cases are to be distinguished on the basis that there is doubt whether in the present case the costs, if ordered to be paid by Mr Gorbachev as between him and the Trustees, could be recovered as part of the costs of the action by Mr Gorbachev from Mr Guriev. I see no reason why, if the costs of a *Norwich Pharmacal* application can be treated as costs of the action against the wrongdoer, as the authorities state they can, the same is not true of the costs of a disclosure application under CPR 31.17. Mr Belshaw was unable to identify any reason. Section 51 of the Senior Courts Act 1981 empowers the court to award costs of and incidental to all proceedings. CPR 44.2(6)(e) permits orders for costs relating to particular steps in the proceedings. These are sufficient to give the Court the necessary powers. Foxton J reached a similar conclusion in respect of a liquidator's costs of seeking third party disclosure pursuant to s. 236 Insolvency Act 1986, drawing an analogy with third party disclosure applications under CPR 31.17, in *Hotel Portfolio II UK Ltd v Ruhan & others* [2022] EWHC 1695 (Comm) at [54]. (Of course, this is not to say that Mr Gorbachev should recover the costs of the jurisdiction application if he is successful in his action against Mr Guriev: the present position is that

his application for third party disclosure has been refused as being too wide; I say nothing about what order for the costs of the third party disclosure application should be made in the underlying action if the claim succeeds, which will be a matter for the trial judge).

Analysis

31. The first question is whether CPR 46.1 is applicable to the costs of the jurisdiction application. The general rule in CPR 46.1(2) applies to the "costs of the application". The "application" is that referred to in CPR 46.1(1), which is, in this case, the disclosure application under CPR 31.17 and s. 34 Senior Courts Act 1981. The question is therefore one of construction of the rule: do the costs incurred in relation to the jurisdiction application come within the description "costs of the [disclosure] application"?

32. In my view the answer is yes, both as a matter of the letter and the spirit of the rule.

33. Disclosure was the substantive relief sought by the amendment of the application notice issued against Forsters to add the Trustees, which HHJ Pelling KC granted. Thereafter the Trustees wished to resist disclosure on two cumulative bases, first that there was no jurisdiction to make the order sought; and secondly that, if there were, disclosure should not be granted. The costs of both aspects were incurred in order to defeat the disclosure sought by the disclosure application, albeit that as a matter of form they fell to be heard sequentially, and that one did so on a jurisdictional basis and one on a merits basis. It is apt to describe the costs of the jurisdiction application as part of the costs of the disclosure application against the Trustees because the jurisdiction challenge was one of two bases on which the Trustees resisted giving disclosure.

34. Mr Belshaw's argument, that jurisdiction disputes are separate from merits disputes, as a matter of substance as well as form, and arise as a separate and prior inquiry, is not an answer to the point. A third party may legitimately seek to protect the privacy of its information by challenging jurisdiction as well as, or instead of, challenging the merits of the application. The jurisdiction challenge, if successful will have that effect. The disclosure application will thereby be dismissed. I do not see any reason as a matter of language or logic why costs incurred in such an endeavour are not within the rubric of costs of the disclosure application.

35. To hold otherwise would favour form over substance. If it is not unreasonable for an innocent third party to resist disclosure, I can see no justification for having a different costs rule where the resistance is on the grounds that the Court has no power to make the order from that where there is resistance on any other grounds. Both are legitimate means by which the third party may seek to protect the privacy of its information. Indeed it may be that in a particular case its only grounds for protecting that privacy involve objecting to the court's jurisdiction because it is clear that if the English court assumes jurisdiction, it will grant the relief sought, although no such relief would be available in another forum.

36. This gives effect to the rationale for the general rule in CPR 46.1(2), which applies in this case. Mr Gorbachev is seeking disclosure against innocent third parties, and the general rule is that he should bear and pay the costs of establishing his entitlement to the documents sought. Establishing that the Trustees are amenable jurisdictionally to an order for production is part of the process of establishing that entitlement.

37. Moreover as between the innocent Trustees and the innocent Mr Gorbachev (assuming him to be so), it is right that the costs should if appropriate be recoverable by Mr Gorbachev from Mr Guriev as costs of the action, rather than costs which the Trustees must bear and which are irrecoverable by them from Mr Guriev.

38. I would add, although it is not essential to my reasoning, that it is not inevitable that in third party disclosure applications the hearing of a jurisdiction challenge will be separate from, and determined prior to, the merits hearing, although that will usually be the case. One can imagine circumstances in which an imminent trial date would dictate a single hearing date, and a jurisdictional challenge which included an argument that there was no serious issue to be tried on the merits which would involve consideration of evidence and argument going to the merits for both purposes at the hearing. That is not this case, but the possibility undermines Mr Belshaw's argument that the two are always substantively and logically distinct, such that costs incurred in respect of a jurisdiction challenge are always separate from costs incurred in respect of the merits of a disclosure application. Indeed preparatory legal costs may be referable to both, even where there are sequential and distinct hearings, given the place played in a jurisdiction dispute of the merits threshold of a serious issue to be tried.

39. For these reasons I am of the view that the Judge fell into error in treating the jurisdiction application as a "self-standing" application which took the costs outside the scope of CPR 46.1.

40. The remaining question, then, is whether the general rule was displaced by circumstances falling within rule 46.1(3).

41. Subject to the confidentiality issue, I can see no basis for the general rule in CPR 46.1(2) being displaced. It was reasonable for the Trustees to take and argue the jurisdiction point which, as Mr Mott correctly submits, appeared to be supported by the only first instance decision directly on point and by leading textbooks. It was clearly arguable, as is apparent from the jurisdiction application judgments of Jacobs J and the Court of Appeal, and as Males LJ recognised in granting leave to appeal, albeit that the appeal was ultimately unsuccessful.

42. It is not sufficient to displace the general rule that the jurisdiction application was determined in a separate hearing. That did not prevent it being part and parcel of resistance to the disclosure application or its costs falling within rule 46.1(2) such that the general rule applied to them.

The confidentiality issue

43. There are a number of reasons why it would be inappropriate for this Court to embark upon an inquiry on the confidentiality issue. First, it is obviously unsatisfactory for an appellate court to be invited to uphold or overturn a discretionary costs decision on a basis to which neither evidence or argument was directed before the Judge, and especially so when the point emerges elliptically in the skeleton arguments, without being addressed in grounds of appeal or a Respondent's Notice. Secondly, we have heard only limited argument and not been taken to the underlying materials. The issue raises questions of whether English law should be applied as the default law notwithstanding that the trust

deeds are governed by Cypriot law; and if so, whether under English law, duties of confidentiality are owed in respect of the documents sought to a Protector, a Settlor, and to discretionary beneficiaries in circumstances where Mr Gorbachev and three other family members were the beneficiaries and it was Mr Gorbachev seeking disclosure. It would have been necessary to consider authorities such as *Breakspear v Ackland* [2008] EWHC 220 (Ch). Thirdly, these are issues which may well have to be addressed with the benefit of full evidence and argument on the substantive hearing of the disclosure application, and it would be inappropriate for us to express views on an ill-informed basis. Fourthly, and importantly, although the substantial material now assembled on the issue was in the bundles which were available to the Judge, there would have been no cause for him to have looked at them for the purposes of determining the jurisdiction application because the issue of confidentiality was irrelevant to that application, in the absence of any dispute that the serious issue to be tried threshold was reached. It would be disproportionate for such material to be produced and become the subject of substantial argument on a consequential costs application.

44. Once the Trustees have brought themselves within the general rule in CPR 46.1(2), as I would hold they have, the burden would be on Mr Gorbachev to raise an assertion of the absence of confidentiality if relied on as justifying displacement of the general rule, as one of the circumstances fulfilling rule 46.1(3). He did not seek to do so because, as is apparent from the skeleton argument for the consequentials hearing, he took his stand on the argument that rule 46.1 was irrelevant because this was a stand-alone jurisdiction challenge. Nor was there any Respondent's Notice seeking to uphold the Judge's costs judgment, which was not made on this basis. It is not therefore open to Mr Gorbachev to raise the point in this Court.

Conclusion

45. For these reasons I would allow the appeal and substitute an order that Mr Gorbachev should pay the Trustees' costs of the jurisdiction application. I agree with the additional observations in the judgment of Lord Justice Males.

Lord Justice Dingemans :

46. I agree with Lord Justice Popplewell that the appeal should be allowed and with the order that he proposes. As to paragraph 32 of Lord Justice Popplewell's judgment, I agree that the Trustees were within "the spirit of the rule" set out in CPR 46.1(2). This is for the reasons that Lord Justice Popplewell has given, namely that they were third parties from whom disclosure of documents was sought who should, as a general rule, have their costs.

47. I do not, however, agree that the costs were within "the letter" of CPR 46.1(2). This is because "that person's costs- (a) of the application" as set out in CPR 46.1(2) must refer to the Trustees' costs (as "that person's costs") of the disclosure application (as "the application") made under CPR 31.17 and section 34 of the Senior Courts Act 1981, as set out in paragraph 8 of the judgment above. The costs of the application to dispute jurisdiction, as set out in paragraph 20 of the judgment above, were not costs of "the application" because they were a separate application intended to show that the Court had no jurisdiction. The principles set out in CPR 46.1(2), which were developed from the common law's protection of third parties against whom disclosure was sought as set out in paragraph 27 of the judgment above, apply, but only by analogy.

48. As to paragraph 35 of the judgment of Lord Justice Popplewell I do not regard this conclusion (namely that the "costs of the application" in CPR 46.1 means the costs of the disclosure application and not the costs of the jurisdiction application) as a triumph of form over substance. This is because it is appropriate to apply the principle that third parties from whom disclosure is sought should, as a general rule, have their costs. Such an order can be made under CPR 44.2(b) even where CPR 46.1 does not apply, as recognised by the notes in the White Book at 44.2.15 and some of the authorities referred to in paragraph 27 of the judgment above.

49. I agree with the judgment of Lord Justice Males that persons against whom disclosure is sought who contest the jurisdiction of the English court do not have, in general, a free ride to do so at the expense of the applicant. The jurisdiction point taken by the Trustees in this case was, as Lord Justice Popplewell has identified in paragraph 41 of the judgment, supported by one reading of a first instance decision and passages in a number of textbooks.

Lord Justice Males :

50. I agree with the judgment of Lord Justice Popplewell and would add two comments.

51. First, it should not be thought that our decision necessarily gives an overseas third party who seeks to challenge the jurisdiction of the English court a "free ride" to do so at the expense of an applicant. CPR 46.1(3) enables the court to depart from the general rule in CPR 46.1(2) when it is appropriate to do so having regard to all the circumstances, including in particular whether the third party has acted reasonably. That said, I would draw attention to what I said at [89] and [90] of my judgment on the issue of jurisdiction, pointing out that even if there is jurisdiction to make an order for third party disclosure against an overseas third party when there are no documents here, a point which it was unnecessary to decide, cases in which it would be appropriate to exercise that jurisdiction are likely to be rare.

52. Second, as Lord Justice Popplewell has pointed out at [13] of his judgment, this court ordered the Trustees to pay Mr Gorbachev's costs of the jurisdiction appeal to this court. We did so, as I recall, without hearing argument (and certainly without detailed submissions) whether the general rule in CPR 46.1(2) should apply to the costs of an appeal. As to that, I can see arguments both ways and, as it does not arise for decision in this case, would wish to leave the point open.