The Court of Appeal for Bermuda

CIVIL APPEAL No 3 of 2014

Between:

(1) TRUSTEE 1

(2) TRUSTEE 2

(3) TRUSTEE 3

(4) TRUSTEE 4

Appellants

-v-

(1) THE ATTORNEY-GENERAL

(2) RESPONDENT 2

(3) RESPONDENT 3

Respondents

Before: **Zacca, P.**
Auld, J.A.
Baker, J.A.

Appearances: Mr. Alan Boyle, QC, Mr. Narinder Hargun, and Mr. Scott Pearman, Conyers Dill & Pearman, for the Appellants
Ms. Shan Warnock-Smith, QC, Mr. Rod Attride-Stirling, and Ms. Cratonia Smith, ASW Law, for the 2nd Respondent
Ms. Lila Zuill, Cox Hallett Wilkinson, for the 3rd Respondent

Date of Hearing: **5 & 6 June 2014**
Date of Decision: **12 June 2014**
Date of Reasons: **15 August 2014**

REASONS

Baker, J.A.

Introduction

1. Having heard submissions over two days on 5 and 6 June 2014, on 12 June 2014 we unanimously allowed the appeal, announced our conclusions as repeated at the end of these reasons and granted the declaration therein

referred to. We said that our detailed reasons would be given as soon as possible. These are my detailed reasons.

2. The point under appeal is in reality a short one and arises from Hellman J's ruling on 26 February 2014 that it was "inappropriate" for the Appellants to assert that a document ("the Document") was legally privileged. The appeal is brought with the leave of the judge.

3. The proceedings in which the ruling was given were brought in accordance with the procedure in *Re Beddoe* [1893] 1 Ch 547 ("Beddoe Proceedings"). These in short are separate proceedings in which trustees are permitted to seek advice and direction from the court as to the position they should take in an action concerning the trust, including whether they should defend an action brought against a trust at the expense of the trust fund. Beddoe Proceedings are heard by a judge who will not be in charge of the main action and are heard in camera.

Background

4. The Appellants are the trustees of four Bermuda purpose trusts established between 2001 and 2005 under the Trusts (Special Provisions) Act 1989 ("the 1989 Act"). Their aggregate value is said to exceed US$10 billion and derives from wealth created by F and G ("the Brothers") who founded an international business (the "Group"). More specifically the trusts are as follows:

    1. Trust 1. The trustee is Trustee 1 and the trust was established on 10 May 2001. It holds shares in offshore companies that in turn hold shares in the Group.
    2. Trust 2. The trustee is Trustee 2 and the trust was established on 24 June 2002. It holds shares in offshore companies.
    3. Trust 3. The trustee is Trustee 3 and the trust was established on 9 May 2005. It holds shares in an offshore company which in turn holds shares in Group companies.

4. Trust 4. This trust too was established on 9 May 2005 and holds shares in an offshore company which in turn holds shares in Group companies.

5. Underlying the Beddoe Proceedings is an action ("the underlying action") brought by the Second Respondent ("R2"). R2 is the only Respondent who has participated actively in the current appellate proceedings. The other Respondents are The Attorney-General who is the First Respondent and G, the Third Respondent. G is in poor health and is unable to manage his affairs. He is said to have no interest in the assets of the trusts. His son has power of attorney and a guardian ad litem has been appointed. G was joined in the proceedings in order to be bound by the Beddoe judgment.

6. R2 is one of twelve heirs of F and is his eldest son by his second marriage (or relationship – there is some dispute as to whether there was a marriage). R2 worked for the Group for many years; there is conflicting evidence as to the circumstances surrounding the end of his employment.

7. It is necessary to look at the nature of the underlying action brought by R2 in order to understand the flavour of this bitter dispute. F died in 2008. He was domiciled in a country in Asia and did not, apparently, leave a will. In this action the trustees of the four trusts are the first four defendants and D5 is joined as the fifth defendant. D5's involvement arises in this way. Prior to establishment of the trusts, what became the trust assets were held by D5, a long standing associate and trusted adviser to the Brothers. The assets were in offshore companies prior to the shares in those companies being assigned to the trusts. D5 was, if not formally the settlor of the four trusts, at the very least the agent of F and undertook the necessary arrangements on his behalf. I shall return to this later.

8. The relief sought in the underlying action is as follows:

   - Declarations that all four trusts are void for uncertainty of object.

- Declarations that the trustees hold the entirety of the trust funds on trusts for the heirs of F i.e. on resulting trusts.
- Various consequential orders including removal of the trustees.
- Compensation against D5 for breach of trust or breach of fiduciary duty.

9. There are two main threads to R2's case. First, that the purposes of the trusts are not sufficiently certain for the trusts to qualify as purpose trusts and second that the trusts were improperly constituted because F never gave his full and informed consent to their creation or alternatively there was undue influence or breach of fiduciary duty. R2's case is that he did not know of the existence of the trusts until a meeting with D5 in 2009 and that it was as a result of what R2 learned at that meeting that it was necessary for him to commence the underlying action.

10. When F died intestate in 2008 he left considerable assets outside the purpose trusts. So this is not a case where his heirs have received little or nothing. An explicit part of the vision of the Brothers was that the family would control and manage the assets that eventually went into the trusts rather than own them. The Brothers had built up vast wealth through the Group since the 1950s and the Group has made a significant positive impact on the economic welfare of the country in which the Group is primarily active.

11. The court's attention was drawn to passages of Trust 1 as broadly representative of all four trusts.

12. In the definitions section of the trust document the settlor is defined as "any person who at any time contributes property to the trust fund." An enforcer is defined as "a committee consisting of such individuals as shall be appointed by or pursuant to Clause 11 for the purposes of section 12B(1) of the 1989 Act."

13. We were also shown the Bye-laws of the same trust, again on the basis that they are representative of all the trusts.

14. By Bye-law 13 there are restrictions on a person serving as a director including (3) which provides:

> "such individuals shall agree, in writing, with the [...] Family spirit, vision and principles set forth in paragraph (1) of Bye-law one of these Bye-laws and Recital (C) of Trust 1 and be willing to fully implement such spirit, vision and principles."

In other words a person cannot be appointed a director unless he signs up in writing to the spirit, principles and vision of the trust.

15. It is the trustees' case that they fulfil the vision statement and intend to continue to do so. One puzzling feature of the case is that in the spring of 2009 R2 put himself forward as a director of the trusts and indeed signed a nomination form to that effect. He said he did so in order to get inside the trusts and learn about them as they had been kept secret from him, and to uncover the true story of their creation, funding and formation. Had he been appointed a director, which in the event did not happen, he would have had to sign up to the vision statement and committed himself to personal ownership of the assets.

16. T is the half sister of R2. Her evidence is that from 2000, with the knowledge and guidance of the Brothers, she played an active role in restructuring the offshore holdings so that the founders' vision and life's work would continue after their deaths. She says the shares in these holding companies were entrusted principally to D5 who was to apply the assets for the public purposes identified by the founders.

17. Having read in particular the voluminous affidavits of T, on behalf of the Appellants, and R2, it is apparent that there are very significant underlying factual disputes between the two sides going to the fundamental issue in the underlying action whether the trusts were properly constituted or whether the funds are held on a resulting trust for the heirs of F. These factual issues will fall to be resolved in that action. I express no view as to the likely outcome which is irrelevant for the purposes of this appeal. I should add that the issue

of whether the purpose of the trusts are sufficiently certain is a pure question of law.

The Appeal

18. The judge dealt with a number of issues in the Beddoe Proceedings only one of which, relating to the Document, is the subject of appeal. The issue about the Document arises in this way. In early 2008 T prepared a memorandum setting out a proposal for modification of the trusts' structure. The idea was to widen membership of the boards of the trusts and provide for representation of future generations of the family on those boards. Initially, G did not agree the time was right to do so but in April 2008 F sought advice on proposed changes to the Bye-laws of the trusts. The plan was to produce a new document, being the Document, which would explain the possible new structure. T worked on it with the lawyers but it was not finalised when F died. The judge decided it was privileged and that privilege had not been waived, but that for reasons that we shall come to later in this judgment it would be *inappropriate* for the trustees to assert legal privilege against R2.

19. We were shown correspondence dated February and March of this year ventilating whether it was necessary for this appeal to proceed as the Appellants are prepared to disclose the contents of the Document. Agreement, however, could not be reached that the decision would not serve as a precedent for other possible applications and the appeal has therefore proceeded.

The Legislation

20. The four trusts are purpose trusts which are permitted in Bermuda under the 1989 Act. There is broadly comparable legislation in other jurisdictions such as the Cayman Islands but such trusts are not permitted in England and Wales. The relevant provisions of the Act are as follows. Section 12A provides that a trust may be created for a non-charitable purpose or purposes provided it is sufficiently certain to allow the purposes of the trust to be carried out and that it is lawful and not contrary to public policy.

21. The outcome of the present appeal turns on the meaning of section 12B(1) which provides:

> "The Supreme Court may make such order as it considers expedient for the enforcement of a purpose trust on the application of any of the following persons –
> (a) any person appointed by or under the trust for the purposes of this subsection;
> (b) the settlor, unless the trust instrument provides otherwise;
> (c) a trustee of the trust;
> (d) any other person whom the court considers has sufficient interest in the enforcement of the trust;
> and where the Attorney-General satisfies the court that there is no such person who is able and willing to make an application under this subsection, the Attorney-General may make an application for enforcement of the trust."

By section 12C, subject to a saving for trusts created under any other law, trusts that do not comply with section 12A are invalid.

22. Both sides relied on the Law Reform Sub-Committee's Report on Purpose Trusts leading to the 1998 amending legislation to the 1989 Act that permitted Bermuda purpose trusts. However, in my view the meaning of section 12B is sufficiently clear on its face to resolve the issues on this appeal without resort to the Sub-Committee's Report.

The Judge's Judgment

23. In his judgment the judge dealt at paragraph 71 with Mr. Attride-Stirling's argument on behalf of R2 that the trustees could not assert privilege against him because he had been joined in the proceedings to represent the heirs of F. Generally speaking, he argued, the court in its inherent supervisory jurisdiction will, upon request, order that the trustees should disclose to the beneficiaries legal advice and communications between the trustees and their lawyers. He cited Lewin on Trusts 18th Edition at paragraph 23-45:

> "Normally disclosure will be ordered of cases submitted to, and opinions of, counsel taken by the trustees, and other instructions to and legal advice obtained from trustees' lawyers, for the guidance of the trustees in the discharge of their functions as trustees, and paid for from the trust fund. Even though such advice is privileged the privilege is held for the benefit of the beneficiaries, not for the personal benefit of the trustees, and so privilege is no answer to the beneficiaries demand for disclosure."

24. The judge said there were exceptions to the principle but none of the exceptions could apply to the present case. He went on at paragraph 73 to explain that one of the reasons why the court might order disclosure would be to assist the beneficiaries in holding the trustees to account and, if need be, taking proceedings to enforce the trust. He added that in the context of a Beddoe application, disclosure to the beneficiaries will also help to ensure adequate disclosure to the court with the beneficiaries acting as the court's watchdog. The judge then recited section 12B(1) of the 1989 Act and said he found Mr. Attride-Stirling's submission persuasive that the persons identified in the subsection were analogous to beneficiaries in that both have standing to enforce the trust with which they are concerned and that it followed that upon request the court should generally order the trustees of a purpose trust to disclose to these persons legal advice between the trustees and their lawyers.

25. The judge then went on at paragraph 76 to accept Mr. Attride-Stirling's further submissions that as the trustees had sought an order appointing R2 to represent the estate and heirs of F in the Beddoe proceedings, R2 stood in the shoes of the settlor and was a person with sufficient interest i.e. under section 12B(1)(d) in the enforcement of the trusts – although he disputes their validity and will not seek to enforce them.

26. He then reached his decision in paragraph 74 in these terms:

> "As, for the purposes of this *Beddoe* application, R2 has standing to enforce the Trusts, I accept Mr. Attride-Stirling's submission that it is inappropriate for the Trustees to assert legal advice privilege against him with respect to [the Document]. I am satisfied that its production is necessary for disposing fairly of these *Beddoe* proceedings, and I therefore order the trustees to produce [the Document] (whether it consists of one or several drafts) to R2 so that he can establish whether it exists and has been represented fairly and accurately."

27. The judge's finding that it was inappropriate for the trustees to assert legal privilege and that the Document's production was necessary for disposing fairly of the Beddoe proceedings suggests the judge may have thought he was exercising some form of discretion (which he does not identify) and that he was

concerned with a discovery process. In my judgment, if privilege exists it is a right that can be asserted. Whether it exists is to be established by the ordinary principles of the law of privilege and if it exists it cannot be "inappropriate" to assert it. We were told that, although not subject to appeal, the trustees dispute that the production of the Document was necessary for the fair disposal of the Beddoe proceedings. Mr. Alan Boyle, Q.C, for the trustees, said they did not wish to succeed on an appeal on this point and leave the privilege issue unresolved. This appeal is about privilege, not about obtaining information.

28. Ms. Shan Warnock-Smith Q.C, who appeared for R2, sought to build on the judge's conclusions and helpfully, during the course of her submissions, supplied two flow charts with a number of propositions that she developed in argument. Equally helpfully, Mr. Alan Boyle Q.C, produced in his reply a response to the flow charts.

29. Ms. Warnock-Smith's first two propositions are that with all types of trust there is a community of persons who have the right to enforce the trusts but may not from time to time be enforcing them. In beneficiary trusts, these persons are the beneficiaries, in charitable trusts the Attorney-General and in purpose trusts the enforcers. I accept these propositions as they stand but am not persuaded that they lead anywhere. A central plank in Ms. Warnock-Smith's argument is the contention that a purpose trust is still a trust and that the ordinary rules about trustees' powers and duties apply. So, she argues, the position of an enforcer under a purpose trust is analogous to that of a beneficiary under a beneficiary trust. The assets of purpose trusts (which may be for commercial as well as philanthropic purposes) are held for purposes not people. Accordingly, there are no people to enforce the trust, hence the need for enforcers which is the reason behind section 12B(1) of the 1989 Act. What enforcement means, in my judgment, is holding the trustees to account, to their proper duties under the trust. As a matter of law the trusts did not need to specify an enforcer although in fact they did. To characterise an enforcer as a watchdog or whistleblower is to put a gloss on the ordinary meaning of the

word. Enforcers are creatures of statute and their functions, rights and powers are defined exclusively by the 1989 Act. One does not have to, indeed cannot, look further. Ms. Warnock-Smith is keen to equate enforcers to beneficiaries because, as the judge pointed out, beneficiaries can generally obtain disclosure of legal advice from the trustees' lawyers since the advice is held for the benefit of the beneficiaries. But, so it seems to me, an enforcer of a purpose trust is an entirely different animal from a beneficiary of a beneficiary trust. There are no beneficiaries as such of a purpose trust.

30. Ms. Warnock-Smith's third proposition is as follows:

> "Those persons' ('enforcers') status is not dependent on how they are acting towards the trusts at any given time. An entitlement to enforce is a statutory right: section 12(B)(1) presupposes that the identity of someone with enforcer status is determined prior to their bringing an action to enforce the trusts. In most cases it will be obvious because the person is a settlor or a named enforcer. However the court can identify other persons who would be able to enforce if they saw fit."

31. The answer to this seems to me to be clear. An entitlement to enforce is a statutory right. Three specific persons are so defined namely (a) a person appointed under the trust for that purpose, (b) the settlor, absent a statement to the contrary in the trust instrument and (c) a trustee. Subsection (d) then gives the court residuary power to allow any other person to apply for the enforcement of a purpose trust "whom the court considers has sufficient interest in the enforcement of the trust." Finally there is a safety valve giving the Attorney-General a right to apply if no one else is able and willing to make an application.

32. It seems to me that the purpose of section 12B(1)(d) is to leave open the opportunity for someone who has a sufficient interest in enforcing the trust but is not one of the three defined persons in (a)(b) or (c) to make an application to the court but leaving the court with a discretion to decide whether their interest is, in the circumstances, sufficient. Examples suggested were a trustee in bankruptcy or a liquidator. The court was referred to paragraph 3.19 of the Law Reform Sub-Committee's Report which records that such people could

apply under the section as having a "sufficient interest" and that the court would interpret the words to mean a person who was affected in some way by the lack of enforcement of the trust. Ms. Warnock-Smith relied on this paragraph to support her argument that enforcement covers setting aside the trust because, so she submitted, trustees in bankruptcy and liquidators would be interested in recovering money that they contended had been wrongly placed into trust. But they have other powers see e.g section 29(1) of the Bankruptcy Act 1989 and section 195 of the Companies Act 1981. Accordingly I do not consider paragraph 3.19 assists Ms. Warnock-Smith. What the authors of the report had in mind was getting the trustees to do what the terms of the trust required them to do. Whether someone has a sufficient interest, submits Mr. Boyle, is a question that only arises when they are actually making an application to enforce the trust. I accept that submission.

33. Now the opening words of section 12B(1) refer to the court making an order for the "enforcement of a purpose trust" and subsection (1)(d) identifies the person who has "sufficient interest in the enforcement of the trust." The word *enforcement* is a simple English word and is in my judgment directed to compliance with the objects or purpose of the trust. It manifestly does not include the destruction or setting aside of these trusts. It is here that one turns to the relief sought by R2 in the underlying action. In the first place he argues that the trusts are void for uncertainty. Ms. Warnock-Smith submitted in argument that it was overwhelmingly likely that this is so, although she accepts the issue cannot be resolved until the point is argued in the underlying action. As Mr. Boyle observed, a purpose trust does not qualify to be enforced under section 12B(1) unless it meets the conditions including certainty specified in section 12A(2), in other words if it is not a valid trust (see section 12C). In the second place R2 seeks to strike down the trusts on the ground that they were improperly constituted because they were set up by improper means; they are not purpose trusts at all but resulting trusts for the heirs of F. It is to be observed that the Court's power to make "such order as it considers expedient" given by the opening words of the section is qualified by "for the enforcement of a purpose trust". The power would not be engaged if either of

R2's propositions is correct as there would be no purpose trust to enforce. The Court is concerned with giving effect to the objects of the trust, not setting the trust aside, which would require separate litigation.

34. In my judgment the short answer resolving the present appeal is that R2 is not someone who is enforcing the trusts. The 1989 Act is designed to protect purpose trusts and make sure that the trustees are properly performing their duties. Section 12B of the 1989 Act is not the vehicle for attacking the very existence of a purpose trust. That, under present legislation, can only be done in the underlying action and not in Beddoe proceedings. A person who wants to attack the validity of a purpose trust does not need, and indeed has no locus, to use section 12B(1) of the 1989 Act. One cannot sensibly in my judgment construe 'enforcement' so as to include destruction or striking down. R2 is not an enforcer but a destroyer and that, at the end of the day, is in my judgment the death knell to his case.

35. Ms. Warnock-Smith's fourth and fifth propositions are as follows:

> "4. In the law of trusts those with standing to enforce a trust cannot have privilege asserted against them by the trustees. There is no privilege against The Attorney-General susceptible to being asserted by a charitable trustee; there is no privilege susceptible to being asserted by a trustee against its beneficiaries. The source of this lack of privilege is not solely derived from a proprietary interest in the trust fund. If that were so, a beneficiary of a discretionary trust could have privilege asserted against him by his trustee (which is not this case) and the Attorney-General could have privilege asserted against him by a charitable trustee. In any event, it is clear from the Law Reform Report that the intention of the legislature prior to the 1998 Amendment which introduced section 12B(1) of the 1989 Act was that those in the character of enforcers of a Bermuda purpose trust have the same information rights as beneficiaries.
>
> 5. A person who has standing to enforce a trust, joined as a respondent to a trustee directions application, will not be actively or putatively enforcing the trust in question, but privilege is not capable of being asserted against a beneficiary joined to such an application or against the Attorney-General in a charitable situation. Likewise no such privilege is capable of being asserted against an enforcer in a purpose trust."

36. As I have already stated, I gain no assistance from the role of other persons in different types of trusts. Secondly, there is no general principle that those with

standing to enforce a trust cannot have privilege asserted against them by trustees. Whether or not privilege can be asserted depends on the application of the relevant principles of the law of privilege. The reason why privilege cannot generally be asserted by trustees against beneficiaries is that either (a) the advice belongs to the beneficiaries (see *O'Rourke v Darbyshire* [1920] AC 581) or (b) the beneficiaries are jointly entitled to the privilege with the trustees because they have an interest in the trust assets (see *Schreuder v Murray* (No. 2) [2009] WASCA 145, para. 94). Furthermore, submits Mr. Boyle, there is no authority for a general proposition that trustees of a charitable trust may not assert privilege against the Attorney-General. Each case will fall to be determined on its own facts according to the relevant privilege principles.

37. I do not accept the submission that paragraph 3.16 of the Law Reform Sub-Committee's Report assists R2. The opening words of this paragraph specifically refer to the enforcer's duty being to enforce the trust, whereas R2's averred intention is to achieve the opposite.

38. Ms. Warnock-Smith's sixth proposition is:

> "The court below in the exercise of its discretion found that [R2] has sufficient interest "in" the enforcement of the trust, thus bringing him within the statutory list of those who can enforce. There is nothing in the statute that says such a person must be actively or putatively enforcing the trust in question and the trustees' counsel accepted that he could foresee circumstances where [R2] could enforce the trusts."

39. Mr. Boyle's response is that the judge had no discretion to find that R2 had a sufficient interest because (a) enforcement relates to enforcement of a purpose trust (b) on R2's case there was no trust to enforce and (c) the question of whether he had a sufficient interest only arises in the context of an application under section 12B(1). The whole purpose of section 12B(1) is to enable purpose trusts to be enforced. In my judgment, in order to reach the point where the court has to exercise a discretion or judgment whether R2 has a sufficient interest, the court would have to be satisfied that R2's objective was enforcement rather than the opposite.

40. Ms. Warnock-Smith's seventh proposition is:

> "[R2]'s challenge to the Trusts does not override the fact that objectively he is someone with an interest in enforcing the Trusts. This is reflected in his alternative pleaded case where he pleads that if and to the extent that the Defendants establish that any of the Bermuda trusts was validly funded by the transfer of the Trust assets to the Trustees, the Trustees should be removed and replaced with independent Trustees. [R2]'s locus standi to bring that claim can only arise under section 12B(1)(d) of the 1989 Act. In that context [R2] is enforcing the trusts.

41. Mr. Boyle submits that this was not a point relied upon by the judge; nor is it taken in R2's notice. There is force in both these points. Nevertheless, it seems to me that the proposition is within the broad ambit of the subject matter of the appeal and that the Court should deal with it. Paragraphs 42 and 43 of the amended statement of claim are very much premised on the failure of R2's main allegations in the underlying action. Although these paragraphs allege a conflict of interest on the part of the board's directors and seek replacement of the trustees, thus leaving the trusts themselves intact, this allegation is very much an alternative to R2's main allegation and is only relevant should they fail. If this contention stood alone R2 would have a stronger argument that he falls within the section but in my judgment the court has to look at the overall picture both in deciding whether what R2 is seeking to do is to enforce the trusts and whether he has a sufficient interest in that enforcement. In my judgment he fails on both counts.

42. Ms. Warnock-Smith's eighth proposition is:

> "On the contrary [R2]'s challenge to the validity of the Trusts does not undermine his claim that privilege should not be asserted against him. It strengthens his position since if the trusts are invalid the property including the Trusts' documents result to the heirs, of whom he is one. The Document would be his. If not then there is no privilege against him for the reasons set out in propositions 1-7 inclusive above."

43. Mr. Boyle submits that this is another new point but again I shall deal with it. R2's main problem is that he does not fall within section 12B(1) for the reasons I have already adumbrated. He cannot ask the court to proceed on the basis that his claim in the underlying action will succeed and that the trusts are

invalid. The court's attention was drawn to Lewin on Trusts 18th Edition 23-79 where it is stated that:

> "Generally a person seeking disclosure under the trust supervisory jurisdiction must establish that he is entitled to the interest or rights under the trust which he claims. Where his interest or rights are yet to be established, the claimant may, in the litigation or prospective litigation seeking to establish the interest or rights, obtain disclosure of documents or information relevant to his claim to the extent permitted to rules of court."

The authors cite Sir John Romilly MR in *Wynne v Humbertson* (1858) 27 Beav. 421 for the proposition that a mere claimant to an estate is not entitled to the production of cases and opinions taken by a trustee. In any event, submits Mr. Boyle, it is not open to R2 to argue that privilege cannot be asserted against him because if the trusts are invalid he has a proprietary interest in the Document. His case is that the reason why privilege cannot be asserted by trustees against beneficiaries does not depend on any proprietary interest in the document concerned. I am unpersuaded that there is any substance in Ms. Warnock-Smith's eighth proposition.

44. Ms. Warnock-Smith's second flowchart deals with what has come to be called the settlor point. In summary her submission on the settlor point runs thus. F was the settlor or at the very least the joint settlor with D5. F is dead but the trustees have selected R2 to represent him and therefore he stands in the shoes of the settlor and is accordingly the statutory enforcer under section 12B(1)(b).

45. Ms. Warnock-Smith's first proposition is:

> "It is common ground that [F] had the power or joint power, to direct the transfer of the assets held by [D5] onto the terms of the Trusts. The Trustees' case is that the assets were transferred to the trusts at the direction of [F]."

The circumstances in which trusts were created is the fundamental issue in the underlying action and will be determined at the trial.

46. Ms. Warnock-Smith's second and third propositions are:

> "2. A settlor means any person who at any time contributes property to the trust fund of the Trusts. Property includes the beneficial interest in the property. No evidence of a pre-existing purpose trust held by [D5] has been produced and under Bermuda law an oral purpose trust is void.
>
> 3. Hellman J. was entitled to find [F] was the settlor, or at least a settlor (under the Interpretation Act the singular also means the plural in a statute so the reference to "the settlor" in section 12B(1)(b) means the "settlors")."

47. Mr. Boyle refers to the 18th Edition of Lewin on Trusts 2.02 where the authors state that:

> "in general any person who is competent to deal with a legal estate or equitable interest in property can constitute an express trust."

Accordingly, he submits, there is no reason why D5 could not have been the settlor if he was competent to deal with a legal and equitable estate in the trust assets. In my judgment who the settlor was (and whether there was more than one) raises issues of fact and very probably law that fall to be determined in the underlying action. We do not think it was open to the Judge to find that F was the settlor on the material before him and I prefer to express no view on this issue.

48. Ms. Warnock-Smith's fourth proposition is that, for the reasons set out in the first flowchart, privilege could not be asserted against F if he were alive and joined in the proceedings to represent himself.

49. The answer to this proposition depends in the first place upon whether F was the settlor. Even if he was, I cannot accept, for the reasons we have already given, the bold proposition that privilege could not be asserted against him. In any event F is no longer alive and this proposition on its face leads nowhere.

50. Ms. Warnock-Smith's fifth proposition is that F is deceased and therefore the trustees have selected R2 to represent him. It is necessary to look and see what actually occurred and why. By their originating summons in the Beddoe Proceedings dated 25 July 2013 the trustees sought, inter alia,

> "An order (if and in so far as is necessary) appointing [R2] or such other person as the court directs to represent:

(a) The estate of [F] and
(b) The heirs of [F] under the laws of [the jurisdiction in which F died]

for the purposes of these proceedings only."

51. Mr. Boyle explained the reasons for seeking this order. There was an issue whether R2 had locus to bring the claims. The trustees wanted to make sure that he represented the estate/all the heirs of F rather than join all the heirs individually. Apparently the estate of a deceased person is not an entity known to the law of the jurisdiction in which F died. The full Beddoe Proceedings have yet to be heard and no order has yet been made. All the other heirs have been alerted by the trustees but none has made any representations. Mr. Boyle's fall-back position is that were the trustees to lose the present appeal they would not apply to the court for the order sought in the originating summons. However, he submits, even were the order made it does not have the effect Ms. Warnock-Smith's submits. It would not place R2 in the shoes of the settlor for the purposes of section 12B(1) of the 1989 Act. If R2 wishes to represent the estate he should, submits Mr. Boyle, apply for a grant in Bermuda which the trustees told him they would not oppose.

52. Mr. Boyle pointed out that the order sought in the originating summons sought to invoke three rules of court dealing with representation orders. These are:

i. RSC Order 15 rule 12 which applies where numerous persons have the same interest in any proceedings.

ii. RSC Order 15 rule 13 which applies to proceedings concerning property subject to a trust where a person or class of persons and one or more of the specified conditions is satisfied.

iii. RSC Order 15 rule 15 which applies where a deceased person may be interested in the matter in question and has no personal representative. This is the rule of specific relevance to the present case.

53. These are rules of administrative convenience. They are procedural and do not confer substantive rights. There is, however, another reason why Ms. Warnock-

Smith's argument on this point fails. First, section 12B(1)(b) refers only to the settlor himself and no one else. R2 was not, on any view the settlor and the subsection cannot be read as including the settlor's personal representative or anyone else standing in the settlor's shoes. One reason for concluding that settlor in section 12B(1)(b) means settlor and no one else is that section 12B(1)(d) is designed to cater for relevant "other persons." The prospective or actual appointment of R2 to represent the estate and/or heirs of F in the Beddoe Proceedings does not bring R2 within section 12B(1)(b) of the 1989 Act.

54. Ms. Warnock-Smith's sixth proposition is that regardless of what R2 is doing personally, so far as he represents the deceased in the proceedings, privilege that cannot be asserted against the deceased cannot be asserted against R2. This is clear, she submits, from the authorities cited and arguments raised in paragraphs 75-85 of R2's primary skeleton argument. In the R2's notice the claim is that the trustees are estopped from denying that the judge was right to treat R2 as a prospective representative of F's estate under RSC Order 15 rule 15 so that they cannot now contend that the fact that the appointment of R2 has not yet been formally made is a relevant factor for this court. Ms. Warnock-Smith relies on the fact that until the application for leave to appeal, both sides relied on the assumption that such order would be made and that it would be unconscionable to allow the trustees to resile from the position that there was no objection to an order under Order 15 rule 15 being made. It is submitted that this gives rise to a procedural estoppel or alternatively an estoppel by convention or in the further alternative an estoppel by representation. The point, although not abandoned by Ms. Warnock-Smith was not pursued with any great vigour. In my judgment the events that occurred cannot be characterised as giving rise to an estoppel under any of the three heads. The order under Order 15 rule 15 was sought in the originating summons for procedural convenience as both sides were well aware; it had nothing to do with elevating R2 to the status of settlor within the meaning of section 12B(1) of the 1989 Act.

55. Having re-read paragraphs 75-85 of R2's primary skeleton argument and considered the authorities I remain unpersuaded that either an order under Order 15 rule 15 or a firm indication that the trustees would apply for one (assuming for present purposes the events that occurred can be interpreted in that way) create a substantive right under section 12B(1) to see documents that would otherwise be privileged. The bottom line is that R2 is not seeking to enforce the trusts and accordingly the section is not engaged.

Waiver

56. The final point taken in the R2's Notice is that any privilege in the Document has been waived. The judge set out his finding on waiver at paragraph 67 of his judgment, he said:

> "Where a privileged document is referred to in an affidavit, privilege will be waived where the maker of the affidavit is relying on the content of the document. See *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901 at para 11. Mr. Attride-Stirling submits that this is such a case. I disagree. [T] merely describes [the Document] so that the reader can understand how it fits into her narrative. She does not disclose, let alone rely upon, its content Eg she does not set out any possible new structure contained in the draft(s). Therefore privilege has not been waived."

57. In her affidavit, T says she did not intend to waive privilege but that of course is not determinative of whether she did. I see the position in law to be as follows, where a person is deploying in court material that would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. (Mustill J in *New Kateria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corporation* [1981] Com LR 138, 139). Waller LJ in the *Dunlop Slazenger* case, having cited this passage went on to point out that the key word is "deploying". A mere reference to a privileged document in an affidavit does not in itself amount to a waiver of privilege, and this is so even if the document is being relied on for some purpose, for reliance in itself is said not to be the test. Instead the test is whether the contents of the document are being relied on, rather than its effect.

58. Ms. Warnock-Smith sought to rely on *MAC Hotels Limited v Rider Levett Bucknall UK Ltd* [2010] EWCA Civ 767 (TCC) in which Judge Havelock-Allan QC said that deployment involves two elements, first a clear reference to the existence of the privileged documentation and second reliance on that documentation for the purpose of making a particular point. But he went on to say that the test is whether the contents of the document rather than its effect are being made use of. She submits T is making the point that she is following F's instructions with regard to family involvement. She included the document to give the message that all she has done was with the approval of F and that that goes to the veracity of the trustees' case.

59. I do not think *MAC Hotels* assists Ms. Warnock-Smith. Its facts are far removed from those of the present case. I agree with the judge. The relevant test is that described by Waller LJ in the *Dunlop Slazenger* case and T did not disclose, let alone rely on, the content of the Document. The facts fall some way short of any waiver of privilege.

Conclusion

Grounds of Appeal

1. The judge erred in holding at paragraph 75 of his ruling that the persons identified in section 12B(1) of the 1989 Act in relation to a purpose trust are analogous to beneficiaries and as a consequence that upon request the court should generally order the trustees of a purpose trust to disclose legal advice and communication that would otherwise be privileged.

2. The jurisdiction to order disclosure of privileged documents to enforcers only applies when application is made under section 12B(1) of the 1989 Act for the bona fide purpose of enforcement of the trust and the judge should have so held.

3. R2 does not fall within section 12B(1)(b) of the 1989 Act because he was not the settlor of the trusts. The judge was wrong to hold that he did on the basis that he stood in the settlor's shoes.

4. R2 does not fall within section 12B(1)(d) of the 1989 Act because he did not have a sufficient interest in the enforcements of the trusts.

5. The proceedings were not enforcement proceedings and accordingly section 12B(1) did not apply.

R2's Notice

1. Neither an order nor an application for an order under RSC Order 15 rule 15 estops the trustees from denying that R2 could be treated as a prospective representative of F's estate or that he stands in the shoes of the settlor for the purposes of section 12B(1)(b) of the 1989 Act.

2. The privilege in the Document was not that of F jointly with the trustees.

3. The trustees did not waive privilege in the Document.

We accordingly allowed the appeal and granted a declaration that legal advice taken by the trustees in connection with the administration of the trusts is, in the absence of waiver, protected from production to R2.

Signed

Baker, JA

PRESIDENT

1. This appeal was heard over two days on the 5th and 6th June 2014 and judgment of the Court was reserved.

2. On 12th June 2014, after consultation with Scott Baker, JA, Robin Auld, JA and the President, a unanimous decision of the Court allowing the appeal was handed down.

3. I agree with the decision of Scott Baker, JA in allowing the appeal and the reasons for coming to his decision.

Signed

Zacca, P

Auld, J.A.

1. On 12th June 2014, Baker JA, announcing the Order of the Court, allowed the Trustees' Appeal with Reasons to follow, and granted the Declaration sought by the Trustees. Following my receipt and reading of Baker JA's Reasons for the Order, I regret that I cannot agree with them. On the contrary, they have driven me to conclude that there are compelling reasons for dismissal of the Trustees' Appeal:

    1) as a matter of statutory construction of section 12(B)(1) and (d) of the *Trusts (Special Provisions) Act 1989*; and
    2) given the issues in the underlying action, whether R2 has "sufficient interest in the enforcement of the [T]rusts".

2. My Dissent as to Reasons does not affect the Order of the Court allowing the Appeal or the grant of the Declaration, since the Reasons of the Majority, Baker JA and the President, support it. I apologise to them and to the Parties and all others concerned for my lack of vigilance at the time of Baker JA's announcement of the Order, but I cannot now subscribe to the Majority's Reasons, or properly remain silent as to my Dissent and Reasons for it, which I set out below.

3. I adopt with gratitude the account of Baker JA in his Reasons of the nature and progress to date of the underlying action. In it R2 seeks:

    1) declarations that each of the Trusts is void for uncertainty of purpose;
    2) declarations that the Trustees hold all the trust funds on resulting trust for the heirs of the Settlor, one of whom is R2;

    alternatively

    3) removal of the Trustees for breach of trust in failing to ensure compliance with the proper purpose of each

Trust (see Bye-Law (1) of each of them, set out in paragraph 13 of Baker JA's Judgment), and their replacement by independent Trustees; and/or

4) compensation from an agent of the putative Settlor of the Trusts for breach of trust or breach of fiduciary duty.

4. R2 is thus a person who:

1) under all four of his headings of claim, maintains that he would, or could, benefit from or be adversely affected by the outcome of the underlying action, namely, as provided by section 12(B)(1)(d) of the *1989 Act,* that he is a person who, whether or not seeking enforcement of the Trusts, is a person whom the court can and should consider has *sufficient interest in enforcement of the Trust[s]*; alternatively and in any event

2) under the third and fourth claims, he is a person with *sufficient interest in the enforcement of the Trusts* because he is seeking *to enforce* them against the Trustees for their breach of trust in failing to comply with the purpose of each Trust and/or for breach of fiduciary duty.

5. The matter came before this Court as an appeal by the Trustees from a decision against them by Hellman J in *Beddoe* proceedings, concerning their claim of legal advice privilege from giving disclosure of a document potentially material to R2's claims in the underlying action. The contents of the document are immaterial to the real concern of the Trustees in the underlying action. They are prepared to disclose it informally, but are concerned to prevent R2 relying upon such a concession as a precedent against them in possible further applications by him for disclosure in the underlying proceedings.

6. R2, as the son and one of the heirs of the deceased putative settlor of the trusts, F, had a clear and substantial interest in the potential outcome of the proceedings under all four heads of his claim, his father having, before his death, passed vast personal assets to the Trusts. *Sufficiency of interest in the enforcement of the Trusts*, if found by the court, would, empower the court to make on his application "such order as it considers expedient for the enforcement" of the trusts.

7. In my view, and with respect, Baker JA has put the issues before the Court too narrowly, when stating, in paragraph 17 of his Reasons, that "the fundamental issue" in the underlying action is "whether the Trusts were properly constituted or whether funds are held on a resulting trust for the heirs", including R2, of the Settlor. The potentially important issues as to R2's "sufficiency of interest" in the enforcement of the Trusts are wider, as Hellman J clearly recognised in his judgment, regardless of the legal principle under which he based his order in favour of R2's standing to have recourse to section 12(B)(1)(d).

8. Hellman J's concern was not so much about "sufficiency of interest", but about the legal label for, or nature of, the "interest in enforcement of the" purpose Trusts under section 12(B)(1)(d) of which there has to be a "sufficiency". He eventually lighted upon R2's legal interest for the purpose by analogy with that of a beneficiary seeking to enforce a trust against trustees and/or also by virtue of his role as a representative in the proceedings as one of the heirs of the putative Settlor, F. The Judge held that in both respects R2 had "sufficient interest" for seeking to enforce the Trusts, that it was therefore, "inappropriate for the Trustees to assert legal advice privilege against him with respect to" the document in question, and that, therefore, they should produce it to him.

9. I agree with Baker JA, for the reasons he gives, that the Judge erred in reliance on such comparisons as to the nature of the legal interest, and also with his view that the Judge seemingly applied a discretion more apt to a discovery process than a claim of legal advice privilege. However, I respectfully disagree

with the main thrust of Baker JA's judgment in which he equates the section 12(B)(1)(d) of test of *sufficiency of interest in enforcement* of a purpose trust with *seeking to enforce* or *enforcement* of it.

10. Baker JA, in paragraph 32 of his Reasons summarised his understanding of section 12(B)(1)(d) in the following words:

> "... the purpose of section 12B(1)(d) is to leave open the opportunity for someone who has sufficient interest in enforcing the trust but is not one of the three defined persons in (a) (b) or (c) to make an application to the court, but leaving the court with a *discretion* whether their interest is, in the circumstances sufficient...." [my italics for emphasis]

With respect, that summary is incomplete and, in my view, wrong in its equation of determination of *sufficient interest* with an exercise of discretion.

11. The question for the Court under section 12(B)(1)(d) is not what is meant by the word "enforcement" of a purpose trust or whether in Baker JA's words, in paragraph 31 of his Reasons, "the short answer for resolving the ... appeal is that R2 is not someone who is enforcing the trusts". The question is whether a judge may make "such order as it considers expedient" on an application of any person who it considers has "sufficient interest *in*" the enforcement of a purpose trust. A person may have a sufficient interest in the enforcement of such a trust, whether he is for it or against it, or, possibly, as an intervener on the issue. If there is, as here, an issue between two or more parties as to enforcement, where one side, the Trustees, seek to uphold and enforce it, and the other, R2, seeks to challenge or enforce it, the draftsman of the provision cannot have sensibly intended that the court, in determining on "such order as it considers expedient" under section 12(B)(1) "for the enforcement of a purpose trust", should not hear and consider argument on both sides of the argument.

12. If the draftsman had not so intended, he would have drafted the opening clause of section 12(B)(1) and sub-paragraph (d) so as to restrict the latter to persons "seeking enforcement" or as "enforcers". Compare and contrast section 1(2)(a)

& (b) of the Isle of Man's *Purpose Trusts Act 1996.*[1] The Bermudian provision's wording is in sharp contrast to that and to Baker JA's interpretation of it in his repeated adumbration of what he regards as the appropriate formula, rather than the elastic formulation in the provision itself, namely, "on the application of the following persons - ...(d) any other person whom the court considers has sufficient interest in the enforcement of a trust".

13. In my view, on a correct reading of section 12(B)(1) and, in particular, sub-paragraph (d), Hellman J need not have embarked on a search for labels or analogies to justify his view as to sufficiency of R2's interest in the underlying action. The statutory interest in question is not "to enforce" or of "enforcement", but sufficiency of interest in enforcement. It follows, in my view, that Baker JA, in his Reasons, has made a similar error in misconstruing section 12(B)(1)(d) as if it only gives standing to person who is seeking "to enforce" a trust. He does so in various propositions to that effect in paragraphs 29 to 32 and 38 of his Reasons and paragraphs 2, 4 and 5 of his Conclusions, emphasising that it means enforcement of a purpose trust - not its destruction.

14. Even if Baker JA's narrow interpretation of section 12(B)(1) - ... and (d) were correct, it would not justify dismissal of his application for standing under the provision. As can be seen from the summary in paragraph 2 above of R2's four claims in the underlying action, the first two are for a declaration that each of the four Trusts is void for uncertainty and/or improperly constituted, which Baker JA characterises as "destruction". But the third and the fourth, as Baker JA appears to recognise in paragraph 38 of his Reasons, are claims for breach of trust, namely to uphold and enforce the Trusts. They are clearly well within its terms. His response to this difficulty is to treat the first two of his claims for standing under section 12(B)(1)(d) as the "main allegations in the underlying action" and to disregard the third and (implicitly) the fourth as

[1] "The High Court may on the application of the enforcer of a trust make such orders as it considers necessary or expedient to enable or assist an enforcer – (a) to enforce a trust or the administration of a trust," or (b) to gain access to any information or document which relates to a trust or to the administration of a trust." See also section 1(2)(d) & (e) as to an "enforcer".

alternatives - only relevant should the first two claims fail. This is how he has put it in paragraph 41 of his Reasons:

> "... if this [*sic*] contention stood alone [R2] would have a stronger argument that he falls within the section but in my judgment the court has to look at the overall picture both in deciding whether what [R2] is seeking to is to enforce the trusts and whether he has a sufficient interest in that enforcement. In my judgment he fails on both counts."

15. Baker JA does not go on to explain why R2 "fails on both counts". Is it simply because, on his narrow interpretation of section 12(B)(1) - ...(d) as to standing, his third and fourth potentially highly important claims are alternatives and/or because looking at the four claims as a whole, the primary or main thrust of his claim is to be found in the first two claims? If so, I do not understand why on either approach the third and fourth claims should not amount to an "interest" – indeed a "sufficient interest" - in the enforcement of the Trusts. There is nothing in the provision to limit standing under section 12(B)(1)(d) to "primary" or main applications or to exclude alternative claims.

16. As to "sufficiency" of interest, that is all that section 12(B)(1)(d) requires to give standing at the stage of considering an application under its provision when no-one knows how the matter will proceed in the underlying action or its outcome. It is not and cannot sensibly amount to a preliminary evaluation as to relative strengths of a number of overlapping or alternative claims for enforcement. Moreover, "sufficiency of interest" is not, as Hellman J and Baker JA, on differing approaches, have put it, a matter of discretion. The statutory formula is for a finding of mixed law and fact, or a value-judgement on the facts, as to *sufficiency of interest* for the purpose of the provision. That is all that is required.

17. In my view, as Ms Warnock-Smith emphasised in argument, R2's alternative third and fourth challenges in the underlying action, namely removal of the Trustees for breach of trust and their replacement by independent Trustees and the claim for compensation from the putative Settlor's agent, give him a

clearly "sufficient", albeit contingent, interest in their enforcement. Baker JA, in the passage I have cited above from paragraph 41 of his Reasons has not set out any identifiable reasons or formula for putting them aside.

18. It follows from what I have said that, in my view, the Court should have dismissed the appeal of the Trustees. There is no need to deal with the arguments on behalf of R2 on the "shoes of the settlor point" or with his claim as to waiver, though I agree with Baker JA's closely reasoned conclusions against him on both issues in paragraphs 39 – 54 and 55 - 57 of his Reasons.

19. Accordingly and for the above reasons, I would and should have dismissed the appeal against Hellman J's order, but would have upheld it on different grounds.

Signed

Auld, JA