In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019 No: 195

BETWEEN

JONATHAN INGHAM
NICHOLAS INGHAM
(as beneficiaries of the estate of Elfrida Chappell)

Plaintiffs

and

(1) Claudia Marie Ruth Radigan Wardman
(both as Executor of George Alfred Wardman's estate and in her own capacity)

First Defendant

and

(2) ALEC R. ANDERSON
(as Executor of George Alfred Wardman's estate)

Second Defendant

and

(3) BUTTERFIELD TRUST (BERMUDA) LIMITED
(as Executor and Trustee of the estate of Elfrida Chappell)

Third Defendant

(4) STEPHEN WHITAKER KEMPE
(as Executor and Trustee of the estate of Elfrida Chappell)

Fourth Defendant

RULING

Hearing Date	Thursday 22 July 2021
Supplemental Submissions:	Thursday 02 August 2021
Delivery of Ruling:	Thursday 16 September 2021
Plaintiffs:	Ms. Constance McDonnell QC of Counsel and Mr. Richard Horseman (Wakefield Quin Limited)
First and Second Defendants:	Ms. Fozeia Rana-Fahy (MJM Limited)
Third and Fourth Defendants:	Mr. Keith Robinson and Mr. Kyle Masters (Carey Olsen Bermuda Limited)

Application to set aside Ex Parte Privacy Order / RSC O. 32/6 - Objection to Interlocutory Order made by the Beddoes Judge in the Main Proceedings - Re Permission Application by Residual Beneficiaries to bring a Derivative Claim - Enforcement of Orders made in Foreign Proceedings and Confidentiality Orders – Constitutional Principles of Open Justice - Estate Proceedings

RULING of Shade Subair Williams J

Introduction

1. By a summons application dated 6 July 2021 the Third and Fourth Defendants seeks to set aside an Order that I made on 25 June 2021 (the "Privacy Order").

2. This is my Ruling on that application.

Factual Background

3. The Plaintiffs, Mr. Jonathan Ingham and Mr. Nicholas Ingham are two of the six grandchildren of the deceased, Ms. Elfrida Chappell (the "Deceased"), who at the age of 101 years died on 15 July 2015. The Plaintiffs are said to be the beneficiaries of 50% of the Deceased's residual estate in equal shares with one another.

4. The Deceased had two children, the late Ms. Mary Ingham who was the Plaintiffs' mother and the late Mr. George Wardman who fathered the other four grandchildren of the Deceased. The other 50% of the Deceased's residual estate was, according to a 2008 Will, gifted to Mr. Wardman absolutely provided that if he were to predecease his mother (which he did by precisely 3 months) his children surviving the Deceased upon the age of 21 years, would be entitled to the 50% of the residual estate.

5. Mr. Wardman's widow, Ms. Claudia Wardman, is the First Defendant in these proceedings in her personal capacity and as a co-executor of Mr. Wardman's estate. The other executor of Mr. Wardman's estate is the Second Defendant, Mr. Alec Anderson. The Third Defendant, Butterfield Trust (Bermuda) Limited ("Butterfield Trust Ltd.") together with the Fourth Defendant, Mr. Stephen Kempe, are said to be the executors and trustees of the Deceased's estate pursuant to the 2008 Will.

6. In their capacity as executors and trustees of the Deceased's estate, the Third and Fourth Defendants filed separate proceedings in the Court's Beddoes jurisdiction (Case No. 155 of 2019) (the "Beddoes proceedings") where I granted them permission to defend the Permission Application in an Order made on 8 January 2021. The Defendants named to the Beddoes proceedings are the Deceased, Mr. Brendan Ingham and his sons, Messrs. Nicholas and Jonathan Ingham, in addition to the various members of the Wardman family.

7. Subsequent to the commencement of the Beddoes proceedings, on 15 May 2019 the Plaintiffs filed a Generally Endorsed Writ of Summons (the "Main Proceedings"). In the Main Proceedings, the Plaintiffs filed a derivative claim (the "Derivative Claim") for relief arising out of a number of payments made between 2008 and 2015 out of the Deceased's account at Bank of N.T. Butterfield & Son Limited ("BNTB"). It is alleged by the Plaintiffs that the payments were made by Mr. Wardman or made pursuant to his instructions, if not made by Mrs. Wardman or under her own instructions. The Plaintiffs aver that the payments were procured by the undue influence of Mr. Wardman and or his wife.

8. The Plaintiffs intend to seek the permission of a judge of concurrent jurisdiction (the "Permission Application") to bring the Derivative Claim as residuary beneficiaries so to enable them to stand in the shoes which would ordinarily be worn by the trustees and executors of the Deceased's estate (the "Executors"). It is averred by the Plaintiffs that they will be able to establish special circumstances to warrant such an unusual approach on the basis that the Third and Fourth Defendants, Butterfield Trust Ltd. and Mr. Kempe, respectively, are barred from prosecuting the claim due to conflicts of interest. The Executors, however, dispute that any such conflicts of interest arise and oppose the Permission Application which will be heard as part of the Main Proceedings. Crucially, the Executors' position is that the Derivative Claim, no matter who prosecutes it, is not in the best interest of the estate.

The Guernsey Proceedings

9. Proceedings in the Royal Court of Guernsey (the "RCG") were commenced in 2019 (the "Guernsey Proceedings") by Butterfield Trust (Guernsey) Limited as a trustee of the Wardman 1980 Trust. On 5 July 2021 the RCG ordered that the Guernsey proceedings would be heard privately and that the Court file in those proceedings would be sealed in addition to directing that any judgment of the RCG would be redacted and/or anonymised so to conceal the identity of the parties.

The *Ex Parte* Application to this Court for a Privacy Order

10. On 26 May 2021 Counsel for the Plaintiffs filed a summons application for the granting of the Privacy Order. The relief sought under that summons was for, *inter alia*, the granting of privacy orders (a) prohibiting any further disclosure and/or use of the Permission Documents by the Bermudian parties other than for the purposes of the Permission Hearing; (b) sealing the Court file in respect of the Permission Documents (the "Permission Documents") and (c) directing for the Permission Application to be heard in private. The Registrar signed and dated that summons 25 June 2021 and also made it returnable for 25 June 2021.

11. A narrative on the background to the application for a Privacy Order from this Court is provided in the affidavit evidence of Mr. Richard Horseman sworn on 12 July 2021 [7-8 and 10-11]:

"…
7. As the proceedings progressed, it became apparent to the Inghams that a number of the documents disclosed by the Trustee in the Guernsey Proceedings would be directly relevant to the derivative proceedings before the Supreme Court of Bermuda: Civil Jurisdiction 2019: no 195 (the ***Bermuda Proceedings****).*

8. On 22 December 2020 the Inghams applied to the Royal Court to be granted permission to use evidence produced in the Guernsey Proceedings in the Bermuda Proceedings.

…

10. On 24 May 2021 the Royal Court of Guernsey granted an Order, agreed by consent between the parties (the ***Guernsey Order [Exhibit "DOH 1"]*** *(one party being Claudia Wardman a defendant in the Bermuda Proceedings and another being Butterfield Trust (Guernsey) Limited) that, subject to certain restrictions, the Inghams be permitted to provide as evidence a defined schedule of documents produced by the Trustee in the Guernsey Proceedings (the* ***Relevant Guernsey Documents****). Pursuant to the Guernsey Order, the*

Relevant Guernsey Documents can be shown to the parties' legal representatives in Bermuda, the other parties in the Bermuda Proceedings, their legal representatives and the Supreme Court of Bermuda.

11. On 26 May 2021 the Inghams made an urgent application to the Supreme Court of Bermuda seeking a privacy order in relation to the Permission Application, in order to comply with the Guernsey Order and that would allow the Permission Documents to be used in the Bermuda Proceedings."

12. Two important observations immediately follow: (i) the Permission Documents are a sub-category of the Relevant Guernsey Documents (the "Relevant Documents") and (ii) I granted the application urgently made on the papers without having been made aware that the Executors confirmed their intention to be heard in opposition to the application. I shall address these two points below.

The Relevant Guernsey Documents vs the Permission Documents

13. Under the 24 May 2021 RCG Order (the "RCG Order") the parties to the Guernsey Proceedings agreed that the Relevant Documents, which is the broader class of documents, could be reviewed and used by the parties to these proceedings. However, the terms of the RCG Order in respect of the Permission Documents is more restrictive as it permits usage on the condition that this Court grants privacy orders sealing the Permission Documents and prohibiting the use of the Permission Documents outside of the Permission Application.

14. The RCG Order, in its relevant portions, provides:

"…
AND FURTHER UPON *the application dated 22 December 2020 of the Sixth and Seventh Respondents (hereafter* ***the Use Application****) Inter alia for an order granting them permission to use the evidence produced by the Applicant and/or the First to Fifth Respondents in the Guernsey Proceedings (the* ***Guernsey Documents****) for the purpose of derivative proceedings they have issued in the Supreme Court of Bermuda (the* ***Bermudian Supreme Court****) (civil jurisdiction 2019 No. 195) (the* ***Bermudian Proceedings****)*

AND UPON *the Court's Order on 30 April 2021 that the undertaking, arising out of the Privacy Order, not to use the Guernsey Documents for any collateral use shall be varied to permit certain Guernsey Documents to be reviewed by the Inghams' Advisers (as defined in that order) in order to assess the relevance of each such document against the claims made in the Bermudian Proceedings.*

AND FURTHER UPON *the Inghams' Advisers having provided a list of Guernsey Documents which they consider to be relevant for the purpose of the Bermudian proceedings as shown in Schedule 1 hereto (the* ***Relevant Guernsey Documents****), which includes documents referred to as the* ***Permission Documents*** *identified as being relevant to the hearing of the Sixth and Seventh Respondents' application for permission to pursue the Bermudian Proceedings on a derivative basis (the* ***Permission Hearing****). The Relevant Guernsey Documents (including any such redacted documents) are shown in Schedule 2 hereto.*

AND UPON *the Sixth and Seventh Respondents' undertaking not to summon or otherwise make an application for BDO LLP to provide evidence in the Bermudian Proceedings.*

IT IS ORDERED BY CONSENT THAT:

1. *The Implied undertaking not to use the Guernsey Documents for any collateral use shall be further varied to permit the Sixth and Seventh Respondents to use the Relevant Guernsey Documents in accordance with paragraphs 2 and 3 herein.*

2. *Subject to the order made at paragraph 3 below, the Relevant Guernsey Documents may be used by the Sixth and Seventh Respondents in the Bermudian Proceedings and only for the purpose of the Bermudian Proceedings, such use to include:*

    a. *the Sixth and Seventh Respondents providing to, and reviewing with, their legal representatives the Relevant Guernsey Documents for the purpose of the Bermudian Proceedings;*

    b. *the Sixth and Seventh Respondents and/or their legal representatives providing the Relevant Guernsey Documents to the parties to the Bermudian Proceedings and/or their respective legal representatives (the* ***Bermudian Parties****) and the Bermudian Supreme Court for the purpose of the Bermudian Proceedings; and*

    c. *any other use sanctioned by the Court following an application made to the Court.*

3. *The Permission Documents may be used by the Sixth and Seventh Respondents for the Permission Hearing and only for the purpose of the Permission Hearing, such use to include:*

    a. *the Sixth and Seventh Respondents providing to, and reviewing with, their legal representatives the Permission Documents for the purpose of the Permission Hearing;*

b. the Sixth and Seventh Respondents and/or their legal representatives providing the Permission Documents to the parties to the Bermudian Parties and the Bermudian Supreme Court for the purpose of the Permission Hearing PROVIDED THAT prior to any such use, the Sixth and Seventh Respondents shall confirm to the Applicant and the First to Fifth Respondents in writing that the Bermudian Supreme Court has granted privacy orders (a) prohibiting any further disclosure and/or use of the Permission Documents by the Bermudian parties other than for the purposes of the Permission Hearing and (b) sealing the Bermudian Supreme Court's files in respect of the Permission Documents; and

4. The Sixth and Seventh Respondents may provide a copy of this Order to the Bermudian Supreme Court for the purpose of the Permission Hearing and/or any application for the aforementioned privacy orders.

5. Any party who believes that there has been a breach of the implied undertaking may bring an application before the Court to determine if the implied undertaking has been breached and, if so, for the Court to determine the appropriate sanction, including terminating the variation of the implied undertaking permitted under this Order.

6. *Costs are reserved, without prejudice to the Applicant's right of indemnity for its costs.*

Schedule 1: Relevant Guernsey Documents including Permission Documents (highlighted)…"

My Consideration of the Ex Parte Application on the Papers

15. Notice to the Executors of that Plaintiff's application for a Privacy Order is said to have been made on 31 May 2021. Prior to my granting of the Privacy Order, on 2 June 2021, pursuant to my direction, a Court administrator emailed the parties stating:

"*Dear Mr. Horseman,*
Your letter dated 26 May 2021 refers. The Court has reviewed your application and asks that you file a draft order granting the privacy terms prayed. This may be sent as a consent order and/or contain a "liberty to apply" provision…"

16. On 16 June 2021 Counsel for the Executors wrote to the Registrar stating that they do not consent to the terms of the proposed order and submitting that such an order would be wrong in principle. In that letter a request was made to the Registrar for the matter to be listed before the Court for a hearing.

17. Regrettably, the Privacy Order (containing a 'liberty to apply' provision) was made on 25 June 2021 before I was made aware of the Carey Olsen's 16 June letter. No doubt, the delay in my attention being drawn to this correspondence was due to the exorbitant level of pressure on the Supreme Court Registry having re-opened after an extended period of Court closures related to the COVID-19 Pandemic.

The Privacy Order

18. The Privacy Order of 25 June 2021 was made by this Court in the following terms:

> "…
> 1. *The Court file in respect of the Permission Documents, as defined in the Consent Order of the Royal Court of Guernsey dated 24 May 2021 (the Guernsey Order), exhibited to the First Affidavit of David John O'Hanlon, be sealed, with the exception that, in accordance with section 3(b) [of] the Guernsey Order, the Plaintiffs be permitted to provide written confirmation to the First Defendant, George Steward Wardman, Tiffany Ann Wardman, John Blackburn Wardman and Christopher Smith Wardman, that the Supreme Court of Bermuda has granted a privacy order;*
>
> 2. *The parties and their legal representatives are prohibited from any further disclosure and/or use of the Permission Documents other than for the purposes of the Permission Hearing;*
>
> 3. *The permission application scheduled to be heard on the 22nd July 2021 shall be heard in private.*
> …"

The Application to Set Aside the Privacy Order

19. I am presently concerned with the Executors' application to set aside the Privacy Order I made on 25 June 2021. The Executors say that the Court had no legal or evidential basis for having made the Order.

20. The Executors' primary argument as to why the Privacy Order ought to be set aside is that I, having been the Beddoes Judge who sanctioned the Executors' decision to defend and oppose the Permission Application, ought not to have made a Privacy Order in respect of the same Permission Application in the Main Proceedings.

21. It is further submitted by the Executors that the Privacy Order was made only to accommodate the Plaintiffs' desire to enforce the Guernsey Order and that in doing so the Court acquiesced in recognising an unenforceable foreign judgment, contrary to established legal principle. On this argument, Mr. Robinson pointed out that the Executors are not parties to the Guernsey Proceedings and that the Deceased's estate is Bermuda property, not property in Guernsey, and is to be administered in accordance with a Bermuda Will. On this basis, the Executors contend that they are not and ought not to be made subject to the jurisdiction of the RCG.

22. In their written submissions, the Executors termed the Privacy Order a 'perpetual prohibitory injunction' and stated [41-42]:

"*41. The Privacy Order prevents the Executors from exercising what would otherwise be their right to use the documents as they see fit. Without seeing the documents, it is impossible to know what those purposes might be. Athene Holding Limited v Imran Siddiqui and Others [2019] SC (Bda) 20 Com confirms that, save in circumstances where documents and evidence are disclosed by compulsion (i.e. by Court Order or by means of discovery in a writ action), there is no implied undertaking given by the party receiving those documents not to use them for a collateral purpose (AB-1/Tab 8).*

42. The Plaintiffs do not assert a private law right as to confidentiality in their application for the Privacy Order. Instead they seek to enforce the terms of a consent order made in the Guernsey Proceedings, which the Executors are not bound by, in Bermuda. There is no basis, therefore, for the portion of the Privacy Order prohibiting the Executors from making use of the Secret Documents outside of the Permission Application on a perpetual basis."

23. Another reason for pursuing the discharge of the Privacy Order, says the Executors, is that the Plaintiffs failed to prove any of the grounds on which a Confidentiality Order would ordinarily be made as a matter of Bermuda law. In the written submissions for the Executors, it is submitted [13]: "…*The evidence filed by the Plaintiffs in support of the Privacy Order provide no indication (not even in general terms) of what the Secret Documents contain, how they are relevant to the Permission Application and why they must be kept secret*." In advancing this argument, the Executors relied on the constitutional principles of open justice.

Analysis and Findings

Complaint that the Beddoes Judge ought not to have made the Privacy Orders

24. Mr. Robinson pointed to an extract from Lewin on Trusts in support of his submission that a Beddoes Judge ought not to be the Judge who deals with the main action. In the written submissions for the Executors [22-24] it states:

"*22. Mrs Justice Subair Williams granted the Privacy Order notwithstanding that Mrs Justice Subair Williams was also the Judge who granted the Beddoes Order. With respect, it is well established that the Beddoes Judge ought not also to deal with the "Main Action" in respect of which the Beddoes order has been granted. The application for the Privacy Order, which was made by summons in the Permission Application (i.e. the Main Action) should not have been considered by the Beddoes Judge and it is submitted that it was incumbent upon the Plaintiffs to draw this to the Court's attention. The Plaintiffs appear not to have done so.*

23. This important principle is succinctly explained in the following extract from Lewin on Trusts at 48-133 (emphasis added) (relying on Alsop Wilkinson v Neary [1996] 1 W.L.R. 1220 at 1225H) …:

> *The Beddoe application must be made in separate proceedings. That is not a matter of form but of substance. The Beddoe application is concerned with a question that directly affects the beneficiaries, namely whether trust money should be spent or placed at risk in the main action. Accordingly, beneficiaries are necessary parties to the Beddoe application since they are entitled to be heard on that issue. That question involves a review of the merits of the main action, but from the viewpoint of the trust, not of the other party and not only should the Beddoes application and the main action be separate proceedings, <u>but also the judge dealing with the Beddoes application should be different from the Judge dealing with the main action</u>.*

24. It is therefore submitted that on this ground alone, the Executors are entitled to have the Privacy Order set aside so that it can be considered afresh by a Judge other than the Beddoes Judge."

25. The overarching purpose of Beddoes proceedings is to ascertain whether it is ultimately in the best interests of the beneficiaries for the trustees to prosecute or defend the Court action. Where a Beddoes Judge finds that it is in the best interests of the beneficially interested for the trustees to proceed, the Court will usually direct, as a protective measure, for the trustees' costs to be paid out of the trust assets. In my earlier ruling in *Re the B Trust; Medlands (PTC) Ltd v Attorney General and Ors* [2020] Bda LR 42 [72] and [79]:

"*72. Beddoe proceedings are proceedings within which a trustee seeks the Court's sanction to commence, defend or otherwise continue a Court action in the role of trustee. This is ultimately a costs protective measure to safeguard the trustee from being personally liable for the costs of the contemplated action. Where a Beddoe judge pre-approves the trustee(s) involvement in the underlying Court action, that Beddoe judge will ordinarily direct that any such consequential legal costs incurred by the trustee (including an adverse costs order against the trustee) be indemnified by the trust.*

…

79. Beddoe applications are now commonplace and expected, irrespective of the extent to which the trust estate may be considered prosperous. The Bermuda Court of Appeal in Trustees 1-4 v Attorney General and Respondents 2-3 [2014] Bda LR 86, per Baker JA (as he then was) summarized Beddoe proceedings [para 3]: "…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."

26. So, the rationale behind the assignment of separate judges is in part to avoid the possible embarrassment of the same judge making:

    (i) a protective costs order in favour of the trustees on the strength of the judge's pre-acceptance of the merits of the trustees' case in the claim and

    (ii) a costs order against the same trustees after the trial of the main action where a final determination is made rejecting the merits of the trustees' case in the claim

27. Another obvious danger is that the assignment of a Beddoes Judge to the main action runs the risk of complaints of apparent bias on the grounds that the Beddoes Judge has prejudged the case in favour of the trustees.

28. However, the principle supporting the assignment of separate judges is not absolute. Inevitably, there will be instances where it is more cost effective and efficient from a case management viewpoint for the Beddoes Judge to deal with an application in the main action, if not the main action itself. That is to say that it will sometimes be the case that it is in the best interests of the beneficially interested (and of no prejudice to any other party) that the Beddoes Judge determines a portion or the whole of the main action.

29. Such a prospect was observed in my earlier judgment in *Re the B Trust* [83] where I relied on another passage from Lewin on Trusts:

"*As a matter of sound case management and long established practice, a Beddoe*[s] *judge may also decide the substantive issue where it is expedient and appropriate in all circumstances to do so. Lewin on Trusts (19th ed) ("Lewin") [27-254]: "If there is no disputed issue of fact and all the interested parties are before the court in the Beddoe*[s] *application, the court may decide on the Beddoe*[s] *application itself the issue which has arisen in the main action so as to avoid the need for the main action at all (citing Re Kay's Settlement [1939] Ch 329)...*"

30. In this case, the impugned Privacy Order does not engage the merits of the substantive action. It merely touches on any interlocutory issue of discovery and the use of Court documents. No matter how I decide this issue, it will not mismatch the Beddoes Order made approving of the trustees' decision to defend the Permission Application.

31. For this reason, I reject this basis for setting aside the Privacy Order and will go on to consider the merits of the remaining arguments.

Complaint that the Privacy Order Recognised an Unenforceable Foreign Judgment

32. Under the Judgments (Reciprocal Enforcement) Act 1958 final money judgments obtained in a Superior Court of the United Kingdom (or in a Court of a jurisdiction specified in the Judgments Extension Order 1956) may be enforced in the Supreme Court of Bermuda. Otherwise, the governance over the enforcement of a foreign judgment falls to the rules of common law.

33. Mr. Robinson pointed this Court to the relevant extract from Dicey, Morris & Collins on the Conflicts of Law (15th Edition) [14R-054] which provides (footnotes not quoted):

"*Rule 43 – Subject to Rules 44 to 46, a court of a foreign country outside the United Kingdom has jurisdiction to give judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:*

First Case – If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

Second Case – If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case – If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case – If the…person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

34. The Plaintiffs in this case do not suggest that any one of these four cases applies to them. Further, it is plain that the statutory position entitling the registration of a final money judgment does not apply.

35. However, in the Plaintiffs' Skeleton Rebuttal Points, it is submitted [9-12]:

"…
9. This is not a case of enforcing a foreign order against the Executors as suggested by their counsel. The Plaintiffs' privacy application was not predicated on any mandatory order in Guernsey, but instead was simply to fulfil a condition for use of certain relevant documents.

10. The Plaintiffs sought permission from the Guernsey Court to deploy certain confidential documents in the Permission Application in Bermuda. The Plaintiffs were granted leave to use the requested documents in the permission application on condition that the confidentiality of those documents be preserved, namely by seeking an order of the Bermuda Court that protects the confidentiality of the documents. [Footnote 1: It is noted that the majority of the documents, should permission be granted by the Bermuda Court to continue with the litigation, may subsequently be used by the parties in the litigation. As to the remaining documents, the Bermuda Court should derive comfort from the fact that both the Plaintiffs and the First Defendant have received these documents and will be subject to ongoing obligations of disclosure in the substantive litigation.]

11. As the former Chief Justice of Bermuda Ian Kawaley wrote in Cross-border Judicial Cooperation on Offshore Litigation: The British Offshore World:-

"It has long been recognized that the courts of one jurisdiction will be unable to deal effectively with civil and commercial litigation with an international dimension without assistance in some respects from the courts of other jurisdictions"

12. The Guernsey Court, with the consent of the Trustee and the beneficiaries of the Guernsey Trust (who are also the principal beneficiaries of the estate represented by the Executors), has acceded to the Plaintiff's request but has requested the Bermuda Court's assistance in maintaining the confidentiality of the trust documents. The request is not an Order being made against the Executors."

36. As argued on the supplemental written submissions for the Executors, Order 39/2 of the Rules of the Supreme Court ("RSC") (Letters Rogatory) is the appropriate mechanism through which

an application may be made to this Court for the issuance of a Letter of Request for evidence to be procured from RCG for the purpose of these Bermuda proceedings.

37. RSC Order 39/1-5 provides:

39/1 Power to order depositions to be taken

1 (1) The Court may in any cause or matter where it appears necessary for the purposes of justice, make an order (in Form No. 32 in Appendix A) for the examination on oath before a judge, an officer or examiner of the Court or some other person, at any place, of any person.

(2) An order under paragraph (1) may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit.

39/2 Where person to be examined is out of the jurisdiction

2 (1) Where the person in relation to whom an order under rule 1 is required is out of the jurisdiction, an application may be made—

(a) for an order (in Form No. 34 in Appendix A) under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person, or

(b) if the government of that country allows a person in that country to be examined before a person appointed by the Court, for an order (in Form No. 37 in Appendix A) under that rule appointing a special examiner to take the evidence of that person in that country.

(2) An application may be made for the appointment as special examiner of a British consul in the country in which the evidence is to be taken or his deputy—

(a) if there subsists with respect to that country a Civil Procedure Convention providing for the taking of the evidence of any person in that country for the assistance of proceedings in the Court, or

(b) with the consent of the Deputy Governor.

39/3 Order for issue of letter of request

3 *(1) Where an order is made under rule 1 for the issue of a letter of request to the judicial authorities of a country to take, or cause to be taken, the evidence of any person in that country the following provisions of this rule shall apply.*

(2) The party obtaining the order must prepare the letter of request and lodge it in the Registry, and the letter must be in Form No. 35 in Appendix A, with such variations as the order may require.

(3) If the evidence of the person to be examined is to be obtained by means of written questions, there must be lodged with the letter of request a copy of the interrogatories and cross-interrogatories to be put to him on examination,

(4)-(6)…

39/4 Enforcing attendance of witness at examination

4 *Where an order has been made under rule 1—*

(a) for the examination of any person before an officer of the Court or some other person (in this rule and rules 5 to 14 referred to as "the examiner"), or

(b) for the cross-examination before the examiner of any person who has made an affidavit which is to be used in any cause or matter,

the attendance of that person before the examiner and the production by him of any document at the examination may be enforced by writ of subpoena in like manner as the attendance of a witness and the production by a witness of a document at a trial may be offered.

39/5 Refusal of witness to attend, be sworn, etc.

5 *(1) If any person, having been duly summoned by writ of subpoena to attend before the examiner, refuses or fails to attend or refuses to be sworn for the purpose of the examination or to answer any lawful question or produce any document therein, a certificate of his refusal or failure, signed by the examiner, must be filed in the Registry, and upon the filing of the certificate the party by whom the attendance of that person was required may apply to the Court for an order requiring that person to attend, or to be sworn or, to answer any question or produce any document, as the case may be.*

(2) An application for an order under this rule may be made ex parte.

(3) If the Court makes an order under this rule it may order the person against whom the order is made to pay any costs occasioned by his refusal or failure.

(4) A person who willfully disobeys any order made against him under paragraph (1) is guilty of contempt of court."

38. I accept the Executors' objection that the Privacy Order was wrongly used as a method for seeking and providing assistance to the RCG. Privacy Orders are ultimately governed by constitutional principles and the Bermuda law position on open justice and Confidentiality Orders is clear and ought not to be conflated with the available statutory schemes in place for providing or seeking assistance from a Court of another jurisdiction.

Complaint that the Privacy Order offends the Constitutional Principles of Open Justice

39. The constitutional principles of open justice are guaranteed under section 6(9) of the Bermuda Constitution Order 1968 (the "Constitution"). Under section 6(9) a Court's adjudication of any civil right or obligation must be done publicly and transparently. This is to be balanced against section 6(10) which requires the Court to ensure that its duty to provide open justice does not prejudice the overall interests of justice.

40. Sections 6(9) and 6(10) provide:
"*(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.*

(10) Nothing in subsection (9) of this section shall prevent the court from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court-

(a) May be empowered by law so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, …or the private lives of persons concerned in the proceedings;
(b) …"

41. The Court of Appeal in *Director of Public Prosecutions v Cindy Clarke* [2019] Bda LR 46 considered the requirement for open justice to be a fundamental principle of the judicial process and subject only to limited derogations [4-13]:

"***Anonymity and Privacy***

4. The hearings in the Supreme Court took place under conditions of anonymity and privacy, the judge having acceded to an application for such protection by the Deputy.

5. Open justice is a fundamental principal of the judicial process. It is required, subject to limited derogations, by sections 6(9) and 6(10) of the Bermuda Constitution Order 1968,…

6. These provisions reflect the approach of the common law, namely, that open justice is the rule, but there must be exceptions in circumstances where publicity would itself be productive of injustice.

7. In the Supreme Court the judge explained his decision to depart from open justice in this brief passage. At paragraph 28 of the judgment he says:

"[28] Public service disciplinary proceedings are conducted in private. If this matter were to be referred to the Chief of the Civil Service that adjudication would be conducted in private. I do not believe it appropriate to interfere with this privacy regime by making these proceedings or this judgment public. I therefore continue the Anonymity Order made on 18 April 2019."

8. Perhaps surprisingly, the judge made no reference to R (on the application on Willford) v Financial Services Authority [2013] EWCA Civ 674, upon which he had received submissions. In Willford , which was also concerned with an application for Judicial Review in the context of disciplinary proceedings, that were taking place in private, Moore-Bick LJ said at para 9:

"[9] The question, then, is whether in those circumstances it is strictly necessary in the interests of justice to anonymise and redact our judgments in order to protect the Respondent's identity. In my view it is not. The redactions proposed by counsel for Mr Willford are extensive and go to the heart of the judgments. The anonymisation is, of course, complete. The principle of open justice requires that the court's judgment should be published in full unless there are overriding grounds for not doing so. Although the FSA disciplinary proceedings were private, once the Respondent stepped outside those proceedings, whether by referring the matter to the Upper Tribunal or by making a claim for judicial review, he brought the matter into the public forum where the principle of open justice applies. That may happen in other contexts. Parties to arbitration proceedings, for example, are entitled to have the confidentiality of those proceedings maintained, but if one party invokes the assistance of the court, perhaps by appeal or by an application to set aside the award, the court will not normally take steps to preserve the confidentiality of the proceedings or their subject matter."

9. How then does Mr Pettingill seek to distinguish the present case from the general principle as applied in Willford? First, he submits that special considerations arise in a small jurisdiction such as Bermuda. For my part, I do not accept that the size of the country requires the public interest in open justice to be modified. The constitutional provision does not suggest that it does.

10. Secondly, he points to the difference in language between sections 6, 9 and 10 of the Bermuda Constitution, and the corresponding provision in the United Kingdom Human Rights Act 1998. The former permits exclusion where it is "necessary or expedient in circumstances where publicity would prejudice the interests of justice". The Human Rights Act 1998, on the

other hand, refers to "the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". I accept that "necessary or expedient" are words more permissive that "strictly necessary". However, both formulations are aimed at exceptionality "where publicity would prejudice the interests of justice". In the present case, the interests of justice will not be prejudiced by open proceedings, even though at least one of the parties will be disadvantaged by them.

11. Thirdly (and he places great emphasis on this), Mr Pettingill submits that the interests of justice in general, will be adversely affected by publicity of a dispute between the Director, who is shortly to take up a position as a Supreme Court Justice, and the Deputy. It is suggested that public confidence in the justice system would be undermined if the public were to learn of this dispute. I reject this submission. It effectively seeks an indulgence for legal practitioners and judges which is not extended to other professions or spheres of operation. This cannot be justified. The Director and the Deputy are both senior wielders of state power, and where a dispute about its exercise is litigated between them, the public have a right to know. The Director accepts this, even though his personal interests would be served by privacy.

12. Fourthly, Mr Pettingill submits that if this Court upholds the finding of apparent bias, this could lead to further bias in the course of the resumed disciplinary proceedings. I see no reason to fear this.

13. This fifth and final submissions is effectively a rerun of the contention that was roundly rejected in Willford, namely that the confidentiality of the internal disciplinary proceedings should be preserved when they are subjected to judicial review. In my judgment, we should follow Willford for the reasons stated in the judgment of Moore-Bick LJ. It is for these reasons that we rejected the Deputy's application for privacy in this court."

42. As a starting point, it is exceptional for any civil proceeding to be heard and determined *in camera*. Special reasons giving rise to a privacy and/or anonymity direction might likely apply to cases involving vulnerable litigants or witnesses such as children or persons with mental disability, particularly where the Court is exercising its inherent and statutory powers under the Mental Health Act 1968.

43. In commercial proceedings, confidentiality orders are often granted in private trust matters related to the internal administration of a trust pursuant to RSC Order 85 and section 47 of the Trustee Act 1975. In such cases, the Court is satisfied that there is no general public right or interest to pry into the internal administration and assets of a trust operated by and for the benefit of law-abiding citizens who seek to peacefully enjoy their actual and contingent property rights. These Confidentiality Orders are also informed by the right to privacy provisions under section 6(10) (a) and section 7 of the Constitution. (See *Re BCD Trust (Confidentiality Order)* [2015] Bda LR 108, per Kawaley CJ; *the G Trusts* [2017] Bda LR 124, per Kawaley CJ and *Re the E Trust* [2018] Bda LR 48, per Subair Williams J)

44. Sealing orders are also often granted to protect the confidentiality of reports authored by Joint Provisional Liquidator in company winding-up proceedings governed by Part XIII of the Companies Act 1981. Sealing orders in this kind of litigation are usually purposed to protect against the commercial vulnerability of a company or group of companies which may be restructured pursuant to a scheme of arrangement under Part VII. Here the private commercial interests of the other individuals and/or corporate bodies are most often a relevant factor.

45. In this case, the evidence before the Court does not point to any reason for a privacy order other than to give effect to or enforce the RCG Order. In making the Privacy Order I was not made privy to the documents nor was I made aware of the particular character of the Permission Documents. The only basis upon which it might reasonably be said that the Privacy Order was granted was because of the conditional terms ordered by the RCG. As a matter of Bermuda law, that is insufficient to warrant a departure from the section 6(9) starting point of open justice.

46. For these reasons, I must accept the Executors' complaint that the Privacy Order was unlawful and ought to be set aside.

Conclusion

47. The summons application dated 6 July 2021 filed by the Third and Fourth Defendants for an Order setting aside the Privacy Order is granted.

48. Unless any party seeks to be heard on the issue of costs, the Plaintiffs shall pay the costs of the Third and Fourth Defendants, to be taxed if not agreed.

Dated this 16th day of September 2021

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT