In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2018 No: 376

IN THE MATTER OF THE B TRUST

BETWEEN

MEDLANDS (PTC) LIMITED

Plaintiff

And

(1) THE ATTORNEY GENERAL

(2) RTB (in his personal capacity, his capacity as potential Protector of the B Trust and as representative of the other Beneficiaries, Descendants and Ultimate Distributees of the B Trust pursuant to RSC Order 15 rule 13)

~~**(3) BERMUDA TRUST COMPANY LIMITED**~~

(4) HSBC PRIVATE BANK (C.I.) LIMITED

(formerly Bank of Bermuda (Guernsey Limited)

(5) MARTIN LANG

(6) GROSVENOR TRUST COMPANY LIMITED

Defendants

RULING

(On the Papers)

Filing Dates of Submissions/Evidence:	Friday 24 April 2020 – Tuesday 5 May 2020
Date Draft Ruling Circulated:	Tuesday 9 June 2020
Post-Draft Ruling Submissions:	Thursday 11 June – Friday 3 July 2020
Decision:	Thursday 23 July 2020
Plaintiff:	Mr. Jeffrey Elkinson (Conyers Dill & Pearman Limited)
Joinder Applicant:	Mr. Mark Diel/Ms. Katie Tornari (Marshall Diel & Meyers Limited)

Beddoe Proceedings / Part IV Trustee Act 1975 and RSC O. 85 /Application for Disclosure of Trust Documents on Former Trustee / Displaced Trustee's Joinder Application

RULING of Shade Subair Williams J

Introduction

1. These proceedings were commenced in the Trust Administration and *Beddoe*'s jurisdiction of the Court by way of Originating Summons in respect of a trust established in 1981 as an irrevocable discretionary settlement under Bermuda law ("the B Trust"/ "the Trust"). It has been broadly stated that the B Trust holds substantial assets worth billions of dollars.

2. The present application is brought by the Plaintiff trustee, Medlands (PTC) Limited ("Medlands") whose current directors are Mr. James Gilbert, Ms. Kiernan Bell and Mr. Darren Stainrod. The application is made by way of a summons filed under a cover letter dated 2 April 2020. This is supported by the Ninth Affidavit of Mr. Gilbert which was sworn on 16 April 2020. One form of relief sought by Medlands is, *inter alia*, for an Order by this Court to issue directions in relation to disclosure of confidential and sealed Court documents on the former trustee, St. John's Trust Company (PVT) Limited ("SJTC").

3. SJTC (now represented by the attorneys of Marshall Diel & Meyers Limited ("MDM")) is wholly owned by Cabarita (PTC) Limited ("Cabarita") which is a company domiciled in Nevis and whose sole director is Mr. Evatt Tamine. The Board of Directors of SJTC ("the Board") is currently comprised of Mr. James Watlington and Mr. Glenn Ferguson whose appointments were made effective as of 25 October 2019. Mr. Gilbert, a Grand Cayman resident, was also a director of the Board up until 9 April 2020, having first been appointed on 23 June 2017. This means that between 25 October 2019 and 9 April 2020 Messrs. Gilbert, Watlington and Ferguson were all co-directors of the Board.

4. Prior to 25 October 2019, Mr. Gilbert was the sole director of the Board. This was the case from 28 September 2018 when Mr. Tamine, another previous director, resigned from the Board. Messrs. Gilbert and Tamine were, thus, co-directors of the Board between 23 June 2017 and 28 September 2018. Going behind 23 June 2017, Mr. Tamine was the sole director of SJTC since 2013 and during that period, from March 2017, Mr. Gilbert was employed as a Financial Controller providing his professional services to SJTC and to the B Trust.

5. While SJTC is no longer a party to these proceedings, the Originating Summons was filed on 2 November 2018 at the direction of Mr. Gilbert in his capacity as a sole director of SJTC. At that time SJTC was the trustee company for the B Trust. This is how Mr. Gilbert came to seek *Beddoe* relief of this Court as a Plaintiff under the SJTC name. However, on 19 December 2019 I ordered the discharge of SJTC as the trustee company for the B Trust and appointed Medlands in its place as the new trustee. Mr. Gilbert, therefore, continues to have the Plaintiff's microphone in these proceedings, having transitioned from the voice of Plaintiff SJTC-JG to that of Medlands, the current Plaintiff.

6. For the avoidance of confusion, where I refer to SJTC as the former Plaintiff in these proceedings, I will adopt the term "Plaintiff SJTC-JG". Otherwise, where I generically employ the word "Plaintiff" I do so by way of reference to Medlands.

7. Plaintiff SJTC-JG was represented by the attorneys of Conyers Dill & Pearman Limited ("CDP") for the entire span of these proceedings leading up to 19 December 2019. CDP now represent Medlands and continue to be the attorney of record in these proceedings. On behalf of SJTC, MDM seek, *inter alia*, to be joined to these proceedings, now as a Defendant, on a summons application filed on 23 April 2020 ("the MDM summons"). The MDM summons is being driven by the current SJTC directors, Mr. Watlington and Mr. Ferguson.

8. The background to the summons applications before this Court is overlapped by injunction proceedings which were ultimately decided by the Honourable Chief Justice, Mr. Narinder Hargun on 26 March 2020 in Case No. 447 of 2019 ("the injunction proceedings"). The injunction proceedings were commenced by Mr. Gilbert in the name of SJTC as a writ action in pursuit of an order to restrain Mr. Watlington and Mr. Ferguson from acting and holding themselves out to be directors of SJTC. In this sense, I shall refer to Mr. Gilbert, in his capacity as the SJTC Plaintiff in the injunction proceedings, as "Plaintiff-447".

9. During the course of those proceedings, Hargun CJ stated that Messrs. Watlington and Ferguson should be served with the materials which were submitted to this Court leading up to 19 December 2019, subject to the discretion of this Court. In this context, he directed Plaintiff SJTC-JG to make the present disclosure application before me, although in the event it was made by Medlands.

10. In the first instance, I encouraged Medlands and SJTC to take steps to agree on the substance of an Order. This proved unsuccessful as the parties came to a dispute on the disclosure of Medlands' 2 April summons and the underlying evidence. As such, this Court has been called upon to determine the full issue and scope of the disclosure applications and SJTC's joinder application.

11. In so doing, it was clearly necessary for me to carefully review the history of this matter through previous Court filings. This was done in prelude to my examination of the documents filed by MDM, namely its 23 April summons and the supporting unsworn affidavit from Mr. Watlington. Of course, I have also reviewed Mr. Gilbert's Ninth Affidavit in support of Medlands' 2 April summons. The affidavit evidence of Ms. Bell, as a director of Medlands, was also filed in support of Medlands' position and I have read her evidence thoroughly. Additionally, I reviewed Mr. Elkinson's written submissions outlining the grounds of Medlands' arguments and proposals for the service of redacted documents where legal professional privilege is asserted.

12. The Plaintiff's written submissions and its April 2020 summons and supporting affidavit evidence has not been served on MDM. I directed that it would be appropriate for me to

consider the legal professional privilege assertions therein on an *ex parte* basis. I have deliberated on those points and now state my decision on the subject of privilege in this Ruling.

13. In answer to the wider applications on disclosure as prayed in both parties' summonses, I deliver this Ruling on the papers *inter partes*. This Ruling is also an *inter partes* determination on the papers of the joinder application on the MDM Summons.

Procedural Background

The Commencement of these Proceedings

The Originating Summons

14. These proceedings commenced by an Originating Summons, dated 2 November 2018, for the Court's directions under RSC Order 85 on matters involving the execution of the B Trust. (Some six weeks prior, Mr. Tamine had resigned as director of SJTC leaving Mr. Gilbert as the sole director. Further, in Mr. Gilbert's First Affidavit, filed days after the filing of the Originating Summons, he pointed to clause 4(6) of the Bye-Laws of SJTC in support of his proposition that he had authority to act as a sole director for the purpose of preserving company assets.)

15. The only named Defendant on the Originating Summons (and in all other Court documents made in 2018 and up until 25 July 2019) was the Attorney General. This was explained in Mr. Gilbert's First Affidavit at paragraph 57:

    "*57. …the trust when created had certain named individuals as discretionary beneficiaries but to the best of my knowledge and belief, it has historically only made distributions to charitable organizations, and there is evidence that the beneficial class of the trust was narrowed and its name changed such that it appears to be a trust for charitable objects. For this reason, the Attorney General has been named as a Defendant to the application so that the interests of those charitable organizations may be represented in the context of this application. In circumstances where the other original "Beneficiaries" may be excluded persons and therefore not entitled to confidential information about the Trust, it is not proposed on this application that they be joined as parties (albeit that if, on analysis of any documents recovered, there are other beneficiaries, St John's can return to the court for further guidance on next steps).*"

16. Plaintiff SJTC-JG prayed on the Originating Summons for the Court's sanction, in exercise of its *Beddoe* powers, to pursue the proceedings described below on behalf of the B Trust:

a. *to issue and prosecute legal proceedings in Bermuda substantially in the form of the draft Generally Endorsed Writ of Summons which shall be provided to the Court;*

b. *to issue legal proceedings in England and Wales for an injunction in aid of the Bermuda proceedings, substantially in the form of the Claim From and Application Notice which shall be provided to the Court and to prosecute those proceedings and any appeals; and*

c. *to take all steps and to retain and employ such barristers, attorneys or solicitors and/or such other persons as may be necessary or expedient for the purposes of issuing and pursuing the legal proceedings set out in paragraphs a. and b. above*

17. The usual plea for an indemnification out of the Trust's funds in respect of any adverse costs order that might later be imposed was included in the Originating Summons. Further, confidentiality directions and a sealing order of the Court file were also sought.

<u>The Draft Generally Endorsed Writ of Summons</u>

18. The draft Generally Endorsed Writ of Summons referred to above is dated 6 November 2018. It is pleaded as an action brought by SJTC "*in its own right and as Trustee of the (B Trust)*" and the B Trust is described as a Charitable Trust in the title of the pleading. The named Defendant is Mr. Tamine and the causes of action pleaded are: (a) conversion; (b) breach of confidence; (c) misuse of confidential information and (d) equitable proprietary claim(s) in respect of property held on constructive trust. Plaintiff SJTC-JG also relied on the Court's equitable and supervisory jurisdiction over trusts in its claims for:

1. *An Inquiry and an Account of all assets of the Plaintiff, either in its own name or as Trustee of the… [B Trust], which the Defendant has secured for himself, his wife and/or family and/or any third party;*

2. *Declaratory relief in respect of any assets determined by the Inquiry and Account or otherwise to be held on constructive trust for the Plaintiff, either in its own name or as Trustee of the Trust;*

3. *Delivery to the Plaintiff of all assets of the Plaintiff, either in its own name or as Trustee of the Trust, as determined by the Inquiry and Account or otherwise, as may be in the custody, possession or control of the Defendant;*

4. *An Injunction compelling the Defendant to return all documents and related information in whatever medium it might be found relating to the operation of the Plaintiff and/or the Trust which came into his possession in his capacity as a director of the Plaintiff;*

5. *A Final Injunction compelling the Defendant, following delivery up to the Plaintiff pursuant to 5 above, to take all reasonable steps permanently and securely to delete and/or destroy and/or procure the deletion and/or destruction of all soft copy documents relating to the operation of the Plaintiff and/or the Trust which remain in his possession, custody or control;*

6. *An Injunction restraining the Defendant from disclosing to any person any confidential information relating to the Plaintiff and/or the Trust;*

7. *An Inquiry into any unauthorized disclosures by the Defendant of confidential information relating to the Plaintiff and/or the Trust following his resignation as director of the Plaintiff;*

8. *Equitable compensation to be assessed for: (a) breach of confidence; (b) misuse of confidential information; and (c) any trust monies and/or property dissipated by the Defendant, along with compound interest to be assessed on the trustee basis;*

…

Relief Granted in the Proceedings Prior to the start of the Injunction Proceedings

The Confidentiality Order

19. On 5 November 2018, I granted the terms prayed on Plaintiff SJTC-JG's *ex parte* summons for the Court file to be sealed and for these proceedings to be heard in camera. Additionally, I ordered that any judgment in this matter be anonymized to protect the identity of the parties. I shall refer to this as "the Confidentiality Order."

20. In making the Confidentiality Order, I had regard to the factual background narrated to the Court on the First Affidavit of Mr. Gilbert sworn on 1 November 2018. This was accompanied by a skeleton argument on behalf of Plaintiff SJTC-JG which, in part, provided:

"*1. St John's is a Bermuda exempted company which was incorporated (page 30 of the Exhibit) to be the trustee of the (B Trust)…The Trust is most likely today a trust with only charitable objects. The expression 'most likely' is used as the administration of the Trust and a full understanding of its present structure and operation are hampered by the breach of fiduciary duties of a former director of the corporate trustee, Mr. Evatt Tamine who has removed Trust records from the trustee…However, some reconstruction has taken place and the likelihood of the Trust being validly constituted and being only for charitable purposes is high…*

THE APPLICATION FOR A CONFIDENTIALITY ORDER

2. Guidance in relation to Bermuda Practice as regards the issue of Confidentiality Orders has been given in various decisions of the Bermuda Supreme Court over the years, and most recently in the case of <u>In the Matter of the E. Trust [2018] SC Bda 37 Civ</u> which cites the seminal judgment of Kawaley CJ <u>In the Matter of the G Trusts [2017] SC Bermuda 98 Civ</u>.

3. In that case, the Chief Justice referred to the making of what has become a standard "Confidentiality Order" for such applications and explained why such orders are appropriate, with reference to the prior decision In <u>Re BCD Trust (Confidentiality Order) [2015] Bda LR 108</u>. We would refer the court to the Chief Justice's Reasons at paragraphs 3 to 11 in the matter of the G Trust and to those of Mrs. Justice Subair Williams in the E Trust. The issue of confidentiality orders being made in this jurisdiction has a sound basis…

…

6. In the Bermuda instance, there is not only this judicial support for the Confidentiality Order in those instances where children are involved but the language of the Bermuda Constitution supports the Confidentiality Order for all beneficiaries where the court is of [the] opinion that it is necessary and expedient.

7. It is fully accepted that there is the public interest in open justice as regards cases that come before the courts, that the public should know how the coercive power of the state is being exercised in their name. However, trust applications are not appropriate to be put into that category. In trust applications there is no coercive power of the state being exercised, no question of civil rights being in jeopardy, no determination of rights. Trust applications, such as the present case of this intended application on Beddoe principles, are generally related to internal matters where the trustee seeks the guidance of the Court in furtherance of the administration of a trust.

8. This Court should guide itself by the approach recommended in G Trusts - whether the trust structure is genuine on its face and there is no evidence of it being operated in an artificial eye-brow raising manner. There it was said that it is quite appropriate that if the trustees, beneficiaries or any other persons linked with the Trust become subject to foreign criminal, tax, or other public investigations, the Confidentiality Order may be liable to be set aside. In the present instance, while there are allegations that have criminal elements associated and one could certainly raise an eye-brow as to what has occurred, a reading of the search warrant executed on the 29th August 2018 (page 52 of the Exhibit) demonstrates it was personal to Mr. Tamine, a director of the corporate trustee, who has since resigned and whose behavior not only raises an eyebrow but shocks given the context of his trusted role as a director and as a current member of the Bermuda Bar.

….

11. The jurisdiction advocates and promotes a general rule that civil courts sit in public while matters concerning trust administration, not only if children are involved but which

have to do with the internal management of a trust, are properly dealt with by the courts sitting in private.

12. This case warrants the confidentiality order being made as, at the end of the day, the present issues that beset the Trust are about internal management and it is appropriate in the present circumstances to make the Order as sought."

Court's Sanction for Commencement of Proceedings in Bermuda and England

21. In a separately drafted order also made on 5 November 2018, I authorized Plaintiff SJTC-JG to issue proceedings in Bermuda and England seeking the delivery of trust documents and the recovery of trust assets from Mr. Tamine and his company, Tangarra Consultants Limited ("Tangarra"). The Order also specified the Court's approval for Plaintiff SJTC-JG to retain Counsel for the proceedings in Bermuda and England and I directed that Plaintiff SJTC-JG was to be indemnified out of the B Trust fund in respect of costs of such proceedings and any liability resulting from an undertaking in damages.

22. This Order was made on the strength of Mr. Gilbert's First Affidavit. Exhibited to that evidence were, *inter alia*, various documents relevant to the constitution and operation of the B Trust. A copy of the search warrant against Mr. Tamine was also produced with Mr. Gilbert's outline of his efforts to access trust documents from Mr. Tamine. Mr. Gilbert also explained how he came to execute a money transfer out of the B Trust under Mr. Tamine's instructions.

23. On 13 December 2018, with the consent of Crown Counsel, Ms. Lauren Sadler-Best for the Attorney-General, I extended the 5 November Order to include authorization for Plaintiff SJTC-JG to secure legal representation for the purpose of pursuing legal action in respect of protecting the privileged documentation.

24. In an order made on 12 June 2019 and extended on 8 July 2019, Pettingill AJ sanctioned Court action to be co-prosecuted by Spanish Steps Holdings Limited ("Spanish Steps"), (a wholly owned subsidiary of Spanish Steps Holdings LLC which is in turn wholly owned by SJTC as an underlying asset of the B Trust. Mr. Gilbert explained in his Third Affidavit that he was the sole director of Spanish Steps). The Court permitted Spanish Steps to join the substantive Bermuda proceedings as a co-plaintiff (Case No. 390 of 2018) for the recovery of a $16,800,000.00 payment from Spanish Steps to Tangarra. Additionally, Spanish Steps was given leave to pursue its own application in England for a worldwide freezing order to be made by the English High Court. Pettingill AJ also granted Spanish Steps the same costs protection afforded under my earlier order of 5 November 2018.

25. Mr. Gilbert's Third and Fourth affidavits were made in support of the June and July 2019 summonses. Also underlying those Orders of the Court was the affidavit evidence of Ms. Susan Millar, a partner in the law firm Stephenson Harwood LLP in London England

("SH"). The principal purpose of this evidence was to provide an update on the English High Court proceedings.

26. The Court was made to understand on the evidence filed by Plaintiff SJTC-JG that the application before the High Court requiring Mr. Tamine to deliver up various B Trust documents and materials and for £5,000,000.00 of Trust assets to be frozen under a Mareva Injunction was successful ("the Delivery Up Order"). SJTC was also awarded its costs largely on an indemnity basis. Spanish Steps was also successful in its application to freeze Mr. Tamine's assets up to a value of $16,800,000 on the evidence that he had unlawfully transferred that sum out of the B Trust to Tangarra ("the Freezing Order").

27. The Court was further informed that Spanish Steps discovered a further unlawful transfer of $5,395,000.00 to Tangarra which resulted in an agreed payment to his English solicitors to be held subject to undertakings.

28. In the Bermuda proceedings, SJTC claimed for the recovery of $22,195,000 and £5,000,000.00 of Trust assets from Mr. Tamine and his company, Tangarra. At paragraph 9 of Mr. Gilbert's Seventh Affidavit, Mr. Gilbert states that it is pleaded in Mr. Tamine's filed Defence Statement that he will repay the B Trust in full, without any admission of wrongdoing.

<u>Joinder of Parties to these Proceedings and Further Directions on Confidentiality</u>

29. On Plaintiff SJTC-JG's 22 July 2019 summons, it sought directions on, *inter alia*, the joinder of potentially interested parties and consequential confidentiality directions and the declaratory relief set out in paragraph 59 below.

30. Earlier in the proceedings, Mr. Gilbert put it to this Court that a Deed of Exclusion which purported to exclude named beneficiaries, so to make the B Trust purely charitable, was invalid as a fraud on the power. This raised the question as to whether the beneficiaries of the B Trust ought to have been joined, after all. In his Third Affidavit at paragraphs 32-36:

"Parties to this Application

> 32. *Since the last hearing in these Beddoe proceedings and as noted already above, St. John's attorneys have been carrying out a review of the documents delivered up by Mr. Tamine. Those documents included a Deed of Exclusion dated 17 May 2007 which purports to remove the named beneficiaries of the Trust, leaving the Trust as purely charitable. It also provides that "in the event that it is determined by a Court of competent jurisdiction that the Trustee does not have the power to exclude the Named Beneficiaries", the Trustee shall not at any time in the future make a distribution to them. I exhibit a copy of the Deed at tab 1, page 70 of the Exhibit.*

33. I have taken advice on the effect of that Deed and I believe it to be invalid and of no effect for the following reasons. First, because there is no power on the part of a trustee under the Trust Indenture to exclude beneficiaries. Second, because I have received expert advice that the signatures on the Deed were added electronically years after the date it bears and, in the case of Gordon Howard, after he had died. This issue is addressed in the draft expert opinion at tab 7 of the Exhibit. I believe, therefore, that it is a forgery and invalid for that reason too.

34. Moreover, when asked about the Deed in correspondence (tab 1, pages 75 to 78), Mr. Tamine's lawyers have confirmed their client's belief that the document is ineffective to exclude the named beneficiaries. I exhibit a copy of that correspondence at tab 1, pages 61 to 66 of the Exhibit.

35. In due course and as part of a wider application to deal with the constitutional issues arising in respect of the Trust…, St John's will seek a declaration as to the invalidity of that Deed. However, I raise the issue in the context of this Summons because, it being my current belief that the beneficiaries named in the Trust Indenture are still beneficiaries of the Trust, the question of whether they should be joined as parties to this Summons arises.

36. Subject to the direction of the Court, I have not at present notified the named beneficiaries or joined them as parties to this Application because the nature of this Summons (seeking as it does directions as to whether to pursue a without notice freezing injunction application) demands directions on an urgent basis and a heightened degree of confidentiality, lest Mr. Tamine be tipped off. If, however, the Court believes that the named beneficiaries should be served before directions are given, I will of course do so expeditiously."

31. The 22 July 2019 joinder application successfully sought to have RTB joined as the Second Defendant as a potential beneficiary in his personal and representative capacity and also as a potential protector of the B Trust. This Court also allowed the joinder of the former Third Defendant who was determined to be the original trustee of the B Trust prior to its replacement by the Fourth Defendant, HSBC Private Bank (C.I.) Limited (formerly Bank of Bermuda (Guernsey) Limited). Such declaratory relief was granted by this Court at the close of a subsequent preliminary hearing on 1 November 2019 when this Court accepted the validity of the Deed of Retirement and Appointment and Change of Proper Law dated 10 August 1993 as effective in removing the Third Defendant and appointing the Fourth Defendant as the trustee of the B Trust. Grosvenor Trust Company Limited was also joined as the Sixth Defendant on 1 November 2019.

32. The Fifth Defendant, Mr. Martin Lang based in the Cayman Islands, was joined to these proceedings as an interested party in determining whether he had validly been appointed as the Protector of the B Trust under a Deed of Retirement and Appointment of Protector

made on 25 June 2019 which sought to retire Aquitaine Protectors Limited of St Kitts & Nevis.

33. Concerns regarding confidentiality and legal professional privilege were raised on Mr. Gilbert's Fifth Affidavit [paras 27-35]. Mr. Gilbert explained that in May 2019 SJTC sought legal advice to consider the constitutional documents of the B Trust which led Plaintiff SJTC-JG to make the applications granted by Pettingill AJ. The advice sought was crystallized into a written opinion exhibited under Mr. Gilbert's Fifth Affidavit. A summary of the conclusions made in the opinion is stated at paragraph 29 of Mr. Gilbert's Fifth Affidavit.

34. Plaintiff SJTC-JG sought this Court's approval of service of the summons and Fifth Affidavit (with exhibit of the legal opinion) on each of the proposed Defendants. However, an interim direction was also requested for the evidence previously filed to remain sealed from those proposed to be joined. (Further sealing orders in respect of subsequently filed legal opinions were later sought by Plaintiff SJTC-JG.)

Other Interim Relief Granted

35. On 25 July 2019 I granted Plaintiff SJTC-JG leave to proceed with various interim administrative steps on behalf of the B Trust. This included payment of operational and administrative expenses (eg. salaries, monthly rent and utilities, accounting and consulting expenses), management and maintenance of investments and charitable contributions.

36. Under the same 22 July summons, Plaintiff SJTC-JG sought directions in respect of the common shares of Point Investments Limited. As requested, I directed Plaintiff SJTC-JG to consider what, if any, steps should be taken in the best interest of the beneficiaries in respect of the ownership and control of those common shares. I further sanctioned that Plaintiff SJTC-JG could retain legal representation in achieving these steps.

The Injunction Proceedings (Case No. 447 of 2019)

37. Mr. Gilbert, again as a sole director of SJTC, commenced these proceedings against Mr. Watlington and Mr. Ferguson as the First and Second Defendants. Cabarita, in its personal capacity and as trustee of the Waterford Charitable Trust, was the Third Defendant and the Attorney General, without having to appear, was the Fourth Defendant. In referring to SJTC as the Plaintiff in these proceedings, I employ the term "Plaintiff-447".

38. Essentially, Plaintiff-447's case was that Mr. Tamine's 25 October 2019 appointment of Messrs. Watlington and Ferguson as directors of SJTC, following Mr. Tamine's own resignation as Director on 28 September 2018, was a calculated attempt to derail separate oncoming litigation by SJTC against him. Mr. Tamine was also accused of using these directorship appointments as a means of obstructing the litigation against him which entailed allegations of theft of over $20,000,000.00 worth of trust assets.

39. A detailed outline of these proceedings and the underlying factual evidence is provided in the 26 March 2020 Judgment of Hargun CJ. At the invitation of Counsel, I have reviewed extracts of the transcript of these proceedings.

The *Ex Parte* Interim Injunction

40. On 6 November 2019, Plaintiff-447 appeared before Hargun CJ on an *ex parte* application for interim injunctive relief, foreshadowing an equitable claim against Cabarita for fraud on a power and improper exercise of a fiduciary duty for an improper purpose.

41. Hargun CJ temporarily restrained Mr. Watlington and Mr. Ferguson from acting as directors of SJTC or representing themselves to be such on the prospect of an *inter partes* hearing being heard within one to two weeks thereafter. Mr. Gilbert was expressly permitted to conduct SJTC's affairs during this interim period as a sole director. (This is significant in understanding how Mr. Gilbert came to appear before me in these proceedings on 19 December 2019 as a sole director of SJTC.)

The *Inter Partes* Hearing and Final Decision

42. The subsequent three day hearing which started on 19 February 2020 comprised of two separate applications: (i) an application by Cabarita seeking an order that the Amended Generally Endorsed Writ of Summons be struck out on the grounds that the proceedings were commenced without the named Plaintiff's authority and (ii) an application by the First to Third Defendants, namely Mr. Watlington, Mr. Ferguson and Cabarita, to set aside the 6 November 2019 *ex parte* order of Hargun CJ.

43. The Court, by this point, had received substantial evidence. Of particular note, Cabarita produced the affidavit evidence of Mr. Michael Padula, its US attorney, who deposed that the investigations launched by the US Department of Justice ("the DOJ") and the US Internal Revenue Service ("the IRS") were concerned with SJTC and the B Trust and the tax affairs of the Second Defendant in these proceedings ("Mr. RTB"). On Mr. Padula's evidence, Mr. RTB is under suspicion for having evaded a sum exceeding US$2 billion of unreported gains made by entities within the B Trust structure. The Court further learned from Mr. Padula's evidence that the concerns of the investigating bodies are in respect of Mr. RTB's control over the B Trust and that a resulting trial would be one of the largest tax evasion cases by an individual in US history.

44. The Court received evidence of a warrant obtained by the Bermuda Police Service to search Mr. Tamine's home address in Bermuda and a subsequent grant of immunity to Mr. Tamine who gave evidence before a Grand Jury. During this period, Mr. Tamine signed a letter, dated 28 September 2018, fully resigning from all of his professional designations and duties for all companies, trusts and other entities, including SJTC. This is how Mr. Gilbert first came to be the sole director of SJTC, prior to the appointments of Mr. Watlington and Mr. Ferguson on 25 October 2019.

45. At the baseline of Cabarita's defence, all cause for suspicion and concern ought to have been directed against Mr. Gilbert's operation of SJTC and the administration of the B Trust, not him. Mr. Tamine also accused Mr. Gilbert of using the interim injunction as an opportunity to abscond with SJTC's legal possession over the B Trust assets in the confidential proceedings before me. Hargun CJ provided the following summary of the evidence at paragraphs 14-18 of his judgment:

"14. *Mr. Tamine has expressed the view that he has serious concerns that SJTC is conducting itself in a manner which is designed to improperly obstruct the Investigations, including by means of actions brought against him in England and in this jurisdiction. In paragraph 3 of Mr. Tamine's Defence in the Bermuda proceedings he asserts:*

> *"This Defence is served without prejudice to the Defendants' case that these proceedings constitute an abuse of process of the Court and ought to be struck out. The Defendants believe that these proceedings are brought for the purpose of putting pressure on the First Defendant to discourage him from co-operating with the United States Department of Justice ("the DOJ") in relation to its investigations into the Trust and the tax affairs of the principle beneficiary of the Trust. (RTB), and to either prevent the First Defendant from disclosing information to the DOJ, or to allow the Plaintiffs and (RTB) to understand what information the DOJ has obtained from the First Defendant".*

15. Mr. Gilbert, in his third affidavit dated 3 January 2020, revealed for the first time that on 19 December 2019 in separate proceedings before Subair Williams J ("the Beddoe Proceedings"), it had been determined that SJTC had never been properly appointed as trustee of the (B Trust) and Medlands (PTC) Limited ("Medlands") was appointed as the sole trustee of the (B Trust).

16. Medlands apparently had been incorporated on 15 July 2019 with the intention that it would be used in the corporate structure through which the (B Trust) is administered. The Beddoe Proceedings had been commenced, at Mr. Gilbert's instigation, in the name of SJTC with the particular application which led to the appointment of Medlands being made in the name of SJTC on 22 July 2019.

17. No attempt was made by Mr. Gilbert either prior or after the ex parte hearing to update the Court as to these potentially momentous developments before they occurred.

18. Cabarita, Mr. Watlington and Mr. Ferguson complain bitterly that SJTC persuaded the Court to grant an ex parte injunction based upon the representation that its sole purpose was "to hold the ring" and having obtained the ex parte injunction, proceeded to make an application in confidential proceedings which rendered SJTC an empty vessel."

46. Cabarita challenged the validity of Mr. Gilbert's appointment as a director of SJTC on procedural grounds which were rejected by the Chief Justice as wholly inequitable. In

accepting the validity of Mr. Watlington's and Mr. Ferguson's appointments, Hargun CJ applied the Duomatic principle (*Re Duomatic* [1969] 2 Ch 365) which in short recognizes an informal assent or ratification of a quorate voting majority. It permits the voting majority to carry out informally executed powers, where such powers are already within the range of powers formally vested in that majority.

47. Plaintiff-447 further contended that Messrs Watlington's and Ferguson's appointments were made with an underlying dishonest intention, notwithstanding their own unchallenged good characters as reputable, experienced and specialized attorneys. However, this fell short of a case for collusion, as pointed out by Hargun CJ at paragraphs 56 and 57 of his judgment. In the end the Chief Justice found that the appointments were *intra vires* and valid. At paragraph 82 of his judgment he consequently held:

"*It follows that from 25 October 2019 onward the Board of Directors of SJTC comprised Mr. Gilbert, Mr. Watlington and Mr. Ferguson. The commencement of the proceedings on 1 November 2019 required a resolution of the Board of Directors. Mr. Gilbert, acting alone, had no authority to institute these proceedings on behalf of SJTC. As no relevant board resolution authorizing these proceedings was passed, it follows that these proceedings were commenced without any proper authority from SJTC.*"

48. Hargun CJ further rejected the trust claims for equitable breaches. I need not restate the Court's reasoning on these grounds which are explained from paragraphs 83-112 of the judgment. At paragraph 113 he found that SJTC had no locus to pursue the claims and he struck out the Amended Writ of Summons on the statutory ground that it disclosed no reasonable cause of action. Consequently, the interim injunction was set aside restoring Messrs. Watlington and Ferguson to their full duties as directors of SJTC.

Joinder of Mr. Gilbert to the Injunction Proceedings for Consequential Relief

49. On the evidence of Ms. Bell, this Court has been made to understand that Mr. Gilbert has been joined to the injunction proceedings as a Defendant for consequential costs relief. Ms. Bell exhibited the skeleton arguments filed in the injunction proceedings by Walkers on behalf of Mr. Gilbert. At pages 8-37 of the exhibit, a summary of Mr. Gilbert's submissions on the joinder is stated.

The 19 December 2019 Order and the Underlying Evidence before the Court

50. By way of background, under the 13 December 2018 Consent Order between Plaintiff SJTC-JG and the Crown Counsel of the Attorney-General's Chambers, I further permitted Plaintiff SJTC-JG to investigate and rectify any deficiencies in the corporate or trust structure related to the B Trust. This Order was made having considered Mr. Gilbert's Second Affidavit in these proceedings.

51. Exactly one year later, Mr. Gilbert swore his Seventh Affidavit on 13 December 2019 repeating to this Court that the search warrant against Mr. Tamine had been executed and that Mr. Tamine had appointed him to manage all aspects of the pending investigations despite his access to a scarce level of documentation relevant to the operation of the B Trust (See Mr. Gilbert's First Affidavit. [para 27]).

52. On 19 December 2019 this Court had been made aware of the injunction proceedings and the interim order of injunction granted by Hargun CJ. Plaintiff SJTC-JG had retained US attorneys Miller & Chevalier ("M&C") and English solicitors Stephenson Harwood LLP ("SH") in addition to its Bermuda attorneys Conyers Dill & Pearman ("CDP"). This Court had also been updated on the status of the English High Court proceedings and the offer of repayment made by Mr. Tamine in the pleadings under the Bermuda proceedings. It was Mr. Gilbert's evidence that the prosecution of these claims were a means of ensuring "*that…* (he) *was doing everything…* (he) *could to maintain and protect the assets of the Trust*." [Paragraph 37 of Mr. Gilbert's Seventh Affidavit.]

53. At paragraphs 2-7 of his Seventh Affidavit, he stated:

"2. *I make this Affidavit on behalf of the Plaintiff company ("St. John's"), of which I believe I am the sole director (as I understand was explained to the Court at the last hearing on 1 November 2019 and as further explained in paragraphs 85-89 below, there is currently a dispute in respect of a recent attempt by St John's' shareholder to appoint two additional directors to the board of St. John's. As I also explain below, in the context of that dispute, a question has been raised about my own directorship of St. John's).*

3. I make this Affidavit in further support of St. John's' Summons dated 22 July 2019 (the "Summons") (which was issued at a time when no question had been raised as to my authority to act on behalf of St. John's and prior to the purported appointment of two additional directors). In particular, I address further the relief sought in the Summons which was not determined at the preliminary issue hearing on 1 November 2019.

4. I also make this Affidavit in support of St John's' application made by way of a separate summons dated 10 December 2019 (the "December Summons") for (primarily) the Court's authorization for the steps taken so far by St. John's to prevent two individuals, Mr. James Watlington and Mr. Glenn Ferguson (together the "Purported Directors"), from acting, or holding themselves out, as directors of St. John's and for St. John's to continue the application for an injunction that St. John's has made against the Purported Directors and related proceedings against the Purported Directors, the shareholder of St. John's (which, as I explain below, is ultimately controlled by Mr. Evatt Anthony Tamine) and the Attorney General in the Supreme Court of Bermuda.

5. I believe I am duly authorized by St. John's to make this Affidavit on its behalf (and, to the extent necessary, I rely in this regard on the Order of the Chief Justice dated 6 November 2019 referred to in paragraph 87 below). Nevertheless, given the unusual and

invidious situation in which I presently find myself, I propose to adopt as neutral a position as possible and simply provide the Court with all of the information which I believe it requires in order properly to consider what, if any, further directions and orders need to be made at this stage in order to secure the proper administration of… (the B Trust), which St. John's has recently been administering under the directions of this Court. It is my personal view that the relief sought in the Summons and the December Summons ought not to be delayed given its implications for the proper administration of the Trust but I of course defer to the Court and its views.

6. The facts and matters as set out in this Affidavit are within my own knowledge save as where the contrary appears. Where such facts and matters are not within my own personal knowledge, they are true to the best of my information and belief. In preparing this Affidavit, I have been assisted by St John's lawyers in Bermuda, Conyers Dill & Pearman ("CDP") in England, Stephenson Harwood LLP ("SH"), and in the US, Miller & Chevalier ("M&C"). Nothing in this Affidavit is intended to be or should be read as a waiver of privilege.

7. There is now produced and shown to me marked "JGSG-7" a paginated bundle of documents which is the Exhibit to this Affidavit. I have divided this into two sections. The first contains documents relating to the Injunction Application (as defined below), to which I refer in the following format… The second contains other documents and correspondence, to which I refer in the format… There is also a confidential Exhibit marked "JGSG-7C" which contains advice I have received on behalf of the Trust in respect of the proceedings concerning the Purported Directors. Pending further direction of the Court, the confidential exhibit will not be served on the Defendants (not least because: (i) their statuses in respect of the Trust are matters to be resolved at the hearing; and (ii) the Attorney General is also a party to the proceedings concerning the Purported Directors; and I believe it is in the best interests of the beneficiaries of the Trust that privilege is maintained in the relevant advice).

54. Mr. Gilbert also disclosed in his evidence that he appointed new advisors and consultants for the governance of the B Trust. These were steps taken by Mr. Gilbert in his purported capacity as the sole director of SJTC. At paragraph 84 of his Seventh Affidavit, Mr. Gilbert deposed:

"*84. Since becoming the sole director of St. John's(,) I have taken steps to ensure that I have the benefit of experience and independent advice to ensure that St. John(')s, and therefore the Trust, is properly governed. I describe these in further detail in paragraphs 10,11 and 12 of my Injunction Affidavit 2, but, in summary:*

84.1 St. John's has engaged the services of two consultants: Mr. Darren Stainrod and Mr. David Harris…Mr. Stainrod is a chartered accountant…Mr. Harris was previously Chief Executive of a large Isle of Man trust company…

> *84.2 St. John's has engaged two reputable Bermuda firms to support the administrative matters of the Trust: Zobec Services Limited ("Zobec") and Krypton Fund Services (Bermuda) Ltd ("Krypton"). Zobec now serves as the Registered Office for St. John's and performs other corporate administration services…*
>
> …"

55. Mr. Gilbert further deposed [para 12] that on 30 October 2019 he became aware of what he described as the appointment of the purported directors to the board of SJTC. In describing his subsequent steps to secure legal advice, Mr. Gilbert stated at paragraph 96 of his Seventh Affidavit:

    "*At my direction, St. John's has taken advice from Andrew Clutterbuck QC and Jonathan Fowles (one of the editors of Tudor on Charities (10th ed.)) on the merits of the Injunction Application. I refer to this advice in the confidential Exhibit (which I invite the Court to read). Given my concerns ..., I therefore believe that it is only right that the Injunction is continued to ensure that St. John's does not fall into the hands of Mr. Tamine. St. John's seeks retrospective authorization for commencing of the Injunction Application*."

56. Responding to the allegations against Mr. Gilbert that he was not a properly appointed director of SJTC, he explained that he sought legal advice and referred to the written opinion exhibited to his Seventh Affidavit.

57. Driven by his efforts to avoid the alleged interference of Mr. Tamine via his steps to appoint new directors, Mr. Gilbert outlined a need for the replacement of SJTC as trustee. Unsurprisingly, this move has come under scathing attack by Mr. Ferguson and Mr. Watlington who would forcefully contend that Mr. Gilbert had no lawful authority to represent himself as a sole director of SJTC while simultaneously making an application to the Court against the interests of SJTC.

58. At paragraphs 13 and 14 of Mr. Gilbert's Seventh Affidavit, he pleaded that it was agreed by all parties that it was necessary to replace SJTC as Trustee to protect the B Trust from further damage by Mr. Tamine:

    "*Notwithstanding the advice I have received as to the merits of the proceedings concerning the Purported Directors (which is in the confidential Exhibit), the fact that Cabarita, which is under Mr. Tamine's control, is the sole member of St. John's and has taken the steps I summarise above means that I have concerns about whether it is in the best interests of the beneficiaries and the due administration of the Trust that St. John's be appointed to act as trustee of the Trust. In my view, it is too great a risk to the Trust to have a trustee that may fall into the clutches of Mr. Tamine, who is accused of misappropriating Trust assets and who seems intent on delaying and stymying any accounting of his conduct that may be*

achieved in the litigation against him. My concerns regarding St. John's now being appointed as trustee is one which is shared by:
13.1 Martin Lang, who may not yet have validly been appointed as the Protector…

13.2 the beneficiaries of the Trust (…), who are represented in these proceedings by the Second Defendant ("RTB").

14. As I have stated above, I wish to remain as neutral as possible bearing in mind the circumstances and on that basis, I defer entirely to the Court on the issue of who should now be appointed as trustee of the Trust. I confirm, however, that I am director of a new entity that has been incorporated in Bermuda, Medlands (PTC) Limited ("Medlands"), which is willing and has consented to act as the trustee of the Trust. I believe, with the agreement of Martin Lang and RTB, that Medlands is a proper and appropriate candidate for appointment as trustee because it will enable me, along with Darren Stainrod who has agreed to join as a second director, to continue the administration of the Trust and avoid the disruption that would otherwise arise were the new trustee to be an entity with no prior knowledge and experience of the administration of the Trust.

59. The Court, having read the 22 July 2019 written opinion of Dakis Hagen QC, Emma Hargreaves of Serle Court, Lincoln's Inn and CDP (referred to as the "Joint Opinion" at paragraph 23 of Mr. Gilbert's 16 April affidavit and produced as an exhibit to his Fifth Affidavit at pages 143-178), found, *inter alia*, that: (i) the 1993 Deed of Retirement and Appointment and Change of Proper Law ("the 1993 Deed") was effective in making the Bank of Bermuda (Guernsey) Limited ("BBGL") (former name of the Fourth Defendant) the trustee of the B Trust; (ii) the 1993 Deed did not, however, change the law of the B Trust from Bermuda law to Guernsey law; (iii) neither the 1994 Deed of Removal, Appointment and Indemnity nor any of the successive deeds of the like validly removed BBGL as the trustee, thus making SJTC a trustee *de son tort* and (iv) that the Deed of Exclusion dated 17 May 2007 (which sought to remove the beneficiaries) was invalid.

60. Against this background, on 19 December 2019 I ordered the removal of SJTC as trustee *de son tort* of the B Trust and appointed Medlands as the new trustee and legal owner of all of the Trust property. The Order itself is extensive and contains a comprehensive series of directions giving effect to the appointment of Medlands as the new trustee. In the same Order, Mr. Martin Lang was appointed the Protector of the B Trust.

61. I also directed that the Court file be sealed from public access including access by SJTC, subject to any further Order of the Court. However, as may be seen from the Statement to my Order under Schedule 2, I directed Medlands to make it known to the parties in the injunction proceedings that Medlands had been appointed the new trustee.

Medlands' 2 April 2020 Summons and the MDM Summons of 23 April 2020

62. Hargun CJ's direction was made on 27 February and is the driving force behind Medlands' present disclosure application before me. The 2 April summons application states on its face that it is supported by the Ninth Affidavit of Mr. Gilbert which was sworn on 16 April 2020. In addition to the overview of the background to these proceedings and to the injunction proceedings, Mr. Gilbert provides the Court with factual updates relevant to Medlands' operation of the Trust as the newly Court-appointed trustee. Relevant for present purposes, the remainder portion of Mr. Gilbert's April 2020 affidavit proposes numerous redactions prior to any order for disclosure on Messrs. Watlington and Ferguson.

63. On Friday 17 April 2020 the 2 April summons and affidavit evidence were forwarded on to me for my consideration. On Tuesday 21 April 2020 I directed Mr. Elkinson to file a draft Order in relation to the proposed direction for service. (I determined that the balance of the terms prayed could be appropriately addressed after the re-opening of the Supreme Court for regular business.)

64. On 23 April 2020 MDM filed a summons application ("the MDM Summons") for an order that the Company be joined as a party to the proceedings "*(without prejudice to any future application that it may make in, or in relation to, the proceedings)*." The MDM Summons also sought directions on whom it should serve its application in addition to an order granting it access to the Court file.

65. An order is sought by the MDM Summons for provision within a 48 hour period of copies of all documents exchanged with other parties and/or filed with the Court "*relating to the Company's applications, including (for the avoidance of doubt) any applications which related to or resulted in (1) the purported determination on 1 November 2019 that the proper law of the…*(B Trust) *remained Bermuda law; (2) the purported determination in the order of Subair Williams J dated 19 December 2019 that the Company had never been validly appointed as trustee of the…* (B Trust)*; (3) the purported appointment in the order of Subair Williams J dated 19 December 2019 of Medlands (PTC) Limited as trustee of the …* (B Trust)*; and (4) all other provisions of the order of Subair Williams J dated 19 December 2019. For the avoidance of doubt, such documents shall include:*

    (i) *The originating process and any application notices;*
    (ii) *Evidence filed by any party in the proceedings;*
    (iii) *Skeleton arguments;*
    (iv) *The hearing bundle(s) for any hearing in the proceedings;*
    (v) *Transcripts of each hearing;*
    (vi) *Judgments of the Court;*
    (vii) *Unredacted orders of the Court;*
    (viii) *Correspondence between the parties (including through their legal representatives); and*
    (ix) *Any other materials filed or served in the proceedings.*

66. In an unsworn affidavit from Mr. Watlington in support of the MDM Summons, Mr. Watlington neatly summarizes SJTC's claim for access to all of these documents:

"*39. It cannot be right that the Company is unable to discover (i) what purported actions have been taken in its name, (ii) what evidence has been purportedly filed on its behalf, (iii) what allegations concerning the Company have purportedly been adjudicated upon as between the Company and the other parties (or purported parties) to these proceedings, (iv)the submissions and evidence on the basis of which any such determination was made, (v) the reasons for any such determination, (vi) the identity of other parties to an order, namely the Redacted Order, that has purportedly been made against it (being information which is necessary in order properly to understand the Redacted Order), or (vii) the full terms of an order purportedly made against it which have been redacted in the version of the Redacted Order presently provided by Mr. Gilbert, and (viii) the terms of any other order(s) purportedly made against the Company.*"

67. Medlands filed reply evidence from Ms. Bell who outlined, *inter alia*, a submission as to why it would not be in the interest of the beneficiaries to disclose any information to SJTC about the B Trust. In expounding the strongest points argued by Medlands, Ms. Bell contended at paragraphs 14-16:

"*14. Much else in Mr. Watlington's affidavit is premised on a refusal to accept that the December Order was or could have been properly made and St. John's clearly plans to apply to the Court to set aside the transfer of the trusteeship to Medlands.*

15. I do not believe that St. John's could have any proper grounds to seek any such set aside and, in light of the December Order, I do not believe it is appropriate for Mr. Watlington to claim to be acting in the best interests of the Trust.

16. Further, and for the avoidance of doubt, I do not believe that it is in the interests of the Trust to be administered by St John's and note that such a course has not been advocated or suggested by the protector, the Attorney General or any discretionary beneficiary. I attach [page 38], a recent letter from CHW on behalf of the representative of the class of discretionary beneficiaries confirming that they do not want St. John's to be appointed or Medlands to cease its trusteeship."

68. Ms. Bell also added her concern that any order entitling SJTC to disclosure of the pursued documents "*will invade the confidentiality of these proceedings and the Trust's privilege.*"

Issue of Delay in Bringing this Application

69. Attorney, Ms. Kate Tornari from Marshall Diel & Meyers Limited ("MDM") on behalf of SJTC, noted the appearance of delay between the 27 February direction and the 2 April

summons in email correspondence to the Court. A detailed complaint of delay also appears in the unsworn affidavit of Mr. Watlington filed in these proceedings.

70. However, it is explained in the Plaintiff's written submissions that the timing in bringing this application was contingent on the period which was needed for the preparation of a transcript of the 27 February hearing which did not become available until 16 March 2020. This was "*compounded by the coinciding of the COVID-19 pandemic and the shut-down of the various law offices and Chambers which have been involved in this matter*."

71. On Friday 17 April the 2 April summons and affidavit evidence were forwarded on to me for my consideration. On Tuesday 21 April I directed Mr. Elkinson to file a draft Order in relation to the proposed direction for service.

The Relevant Law

Legal Principles on Beddoe Proceedings Administration Actions and Joinder of Parties

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.

73. The Court is statutorily empowered to make an order for costs to be paid out of the trust where a trustee engages in action taken under Part IV of the Trustee Act 1975. Section 51 provides:

"*51 The court may order the costs and expenses of and incidental to any application for an order under this Act or for any order or declaration in respect of any property subject to a trust, or of and incidental to any such order or declaration, or any document executed or act performed in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made or performed, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just.*"

74. In England *Beddoe* applications are made to the Court under Part 64 of the Civil Procedure Rules. The *Beddoe*'s jurisdiction of the Court takes its name from the judgment delivered by the English Court of Appeal in *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (CA). There, the principle emerged that a trustee is not entitled to have the legal costs of any Court action paid out of the trust estate unless it can be shown (by the granting of leave

from a judge other than the trial judge) that it was reasonable for that trustee to have partaken in the action.

75. In *Re Beddoe*, the Appellant, Mr. Cottam, was one of others who were entitled to the proceeds of the sale of real property upon the decease of Mrs. Savage. The property had previously been devised by Ms. Sarah Beddoe on her will, dated 29 August 1876, to Mrs. Savage in the form of a trust for her lifetime enjoyment of the associated rents and profits.

76. Mr. Cottam, while an ultimate beneficiary of the *Beddoe* Trust, was also a solicitor and represented the elderly Mrs. Savage in the action which was triggered by her desire, as a life tenant, to sell the property under the Settled Land Act. Accordingly, Mr. Cottam contacted the Respondent Trustee, Mr. Downes, to obtain the property deeds. Mr. Downes was legally represented by Mr. Trow who advised him against the production of the deeds. Having followed his attorney's advice, Mr. Downes was served by Mr. Cottam with a writ *in detinue*.

77. In the leading judgment of the Court of Appeal, overturning Kekewich J at first instance, Lindley, L.J held:

"*… I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by cestuis que trust for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred." This view of a right of a trustee to indemnity is in conformity with the settled practice in Chancery and with Turner v. Hancock, the latest decision on the subject.*

But, considering the case and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of [the] opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to shew that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the Court in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs. This was decided in Stott v. Milne. In this case, I am compelled to say that Counsel made a mistake in advising that there was any doubt about Mrs. Savage's right to the deeds; and Trow made a mistake in acting on a doubtful opinion and in not applying by an originating summons for leave to defend the action, as he was advised that he had a doubtful case. Under these circumstances, it appears to me that the order of Mr. Justice Kekewich allowing the whole costs of that unsuccessfully defended action out of the estate ought to be discharged, and that an order ought to be made more in accordance with what is just to the parties on both sides. The order which we think it right to make is this: Vary that order. As to the costs of Savage v. Downes, Downes ought only have such costs as he

would have incurred had be (sic) applied for leave to defend at the expense of the estate, and as we do not intend to have a further taxation or to have any further costs incurred about this unfortunate matter, we shall fix them at £35. As to Downes' costs of his summons to get his costs out of the estate, he ought to be allowed a reasonable sum, say £20: but no more. As to Cottam's costs of this summons, he was right in appearing and in opposing the claim of Downes, and he has saved the estate thereby a considerable sum; but he has unnecessarily incurred expense. He ought to be allowed £20 for his costs of this summons out of the estate, and no more. As to the costs of the appeal, Cottam succeeds in part, and the estate has benefitted by this. On the other hand, he asked for too much, and we propose to give him £10 as the costs of this appeal out of the estate; and there will be no other order as to the costs of the appeal…"

78. In the concurring judgment of Bowen, L.J it is stated:

"*…The principle of law to be applied appears unmistakably clear. A trust can only be indemnified out of the pockets of his cestui que trust against costs, charges, and expenses properly incurred for the benefit of the trust- a proposition in which the word "properly" means reasonably as well as honestly incurred. While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is on the other hand essential to recollect that mere bona fides is not the test, and that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solicitor told him, if his solicitor has been wrong-headed and perverse. Costs, charges, and expenses which in fact have been unreasonably incurred, do not assume in the eye of the law the character of reasonableness simply because the solicitor is the person who was in fault. No more disastrous or delusive doctrine could be invented in a Court of Equity than the dangerous idea that a trustee himself might recover over from his cestui que trust costs which his own solicitor has unreasonably and perversely incurred merely because he had acted as his solicitor told him.*

If there be one consideration again more than another which ought to be present to the mind of a trustee, especially the trustee of a small and easily dissipated fund, it is that all litigation should be avoided, unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk should be incurred. If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people. With these preliminary observations, I proceed to narrate succinctly the story of this wasteful litigation..."

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*."

80. In the case of the B Trust, which has named discretionary beneficiaries but has a record of distributions made exclusively for charitable purposes, this Court's statutory jurisdiction under RSC Order 85 and Part IV of the Trustee Act 1975 ("the 1975 Act") together with its inherent jurisdiction have been engaged.

81. Procedurally governed by RSC Order 85, 'administration actions' are defined as follows under Rule 1:

"*In this Order 'administration action' means an action for the administration under the direction of the Court…for the execution under the direction of the Court of a trust*."

82. Without prejudice to the generality of Rule 1, an action may be brought for the determination of any of the following questions under O.85/2(2):

(a) any question arising in … the execution of a trust;
(b) any question as to the composition of any class of persons having a …beneficial interest in …any property subject to a trust;
(c) any question as to the rights or interests of a person claiming to be…beneficially entitled under a trust.

83. As a matter of sound case management and long established practice, a *Beddoe* judge may also decide the substantive issue where it is expedient and appropriate in all circumstances to do so. Lewin on Trusts (19th Edition) ("Lewin") [27-254]:

"*If there is no disputed issue of fact and all the interested parties are before the court in the Beddoe application, the court may decide on the Beddoe 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)…"

84. The Originating Summons in these proceedings pleaded for this Court to approve the bringing of an action for the form of relief available under RSC Order 85/2(3) and the judgments and orders made by this Court were done on the Court's opinion that it was necessary to do so in order to resolve the questions at issue (as required under RSC Order 85/5(1)).

85. The appointment of Medlands as the new trustee of the B Trust together with the consequential orders of this Court which followed, were all made in exercise of the Court's powers under sections 31 and 47 of the 1975 Act.

86. Section 31 confers on the Court a power to appoint a new trustee. It provides as follows:

"*31(1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.*

(2) In particular and without prejudice to the generality of subsection (1), the court may make an order appointing a new trustee in substitution for a trustee who is incapable, by reason of mental disorder…of exercising his functions as trustee, or is bankrupt, or is a corporation which is in liquidation or has been dissolved, or who for any other reason whatsoever appears to the court to be undesirable as a trustee.

(3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
…"

87. As seen by section 31, Part IV of the 1975 Act empowers the Court to appoint new trustees. Beyond section 31, Part IV also gives the Court the statutory authority to make vesting orders. The final tranche of statutory powers conferred on the Court in its supervisory role over trust administration matters is to be found at sections 47-54. Of particular relevance, the Court is entitled to authorize transactions relating to trust property under section 47:

"47 *(1) Where any transaction affecting or concerning any property vested in trustees is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by any provision of law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income*."

88. Under subsection (2) the Court "*may, from time to time, rescind or vary any order made under this section or may make any new or further order*." However subsection (3) limits the class of persons who may make an application under section 47, (i.e. whether it be to approve a transaction or whether it be to vary or discharge a transaction). Subsection (3) states:

"*(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.*"

89. Section 47A applies to the Court's jurisdiction to set aside a flawed exercise of fiduciary power, whether or not breach of trust or duty is alleged or proved.

90. Section 48 permits the Court to determine a trust variation or revocation application of any person who qualifies as having any of the various stated categories of interest in the relevant trust. Section 49 expressly restricts the class of persons entitled to apply for an order for the appointment of a new trustee or for an order concerning any trust assets:

"*49(1) An order under this Act for the appointment of a new trustee or concerning any estate or interest in land, stock, or thing in action subject to a trust, may be made on the application of any person beneficially interested…or on the application of any person duly appointed as trustee thereof.*"

91. The general procedural rule on joinder is contained in RSC Order 15. Rule 4(1)-(2) provides:

"*(1) …two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where-*

(a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and
(b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.

(2) Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any enactment and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant…"

92. The subject of joinder in a trust administration action is to be found under RSC Order 85/3(1) which requires every trustee to be joined as a party to a trust administration action, whether as a Plaintiff or a Defendant where the trustee does not consent to be joined.

93. RSC Order 85/3(2) provides:

"*Notwithstanding anything in Order 15, rule 4(2), and without prejudice to the powers of the Court under that Order, all the persons having a beneficial interest ... under the trust…to which such an action as is mentioned in paragraph (1) relates need not be parties*

to the action; but the plaintiff may make such of those persons, whether all or any one or more of them, parties as, having regard to the nature of the relief or remedy claimed in the action, he thinks fit."

94. In the context of a *Beddoe* proceeding concerning the enforcement of a purpose trust with both charitable purposes and discretionary beneficiaries, the Court of Appeal in *Trustees 1-4 v Attorney General and Respondents 2-3* [2014] Bda LR 86 considered the scope of persons entitled to enforce a trust as statutorily defined by section 12B(1)(d) of the Trusts (Special Provisions) Act 1989 and att paragraph 34 held:

   "*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 want 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 this case*."

95. The class of parties who may be properly joined in *Beddoe* proceedings is particularly narrow since the primary issue in such proceedings concerns the interests of the beneficiaries in reviewing the merits of a contemplated underlying action. Here it is relevant and helpful to consider the general character of *Beddoe* proceedings, as stated in Lewin [para 27-239]:

   "*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 in the main action, but from the viewpoint of the trust, not of the other party* (sic): *to the…not only should the Beddoe application and the main application be separate proceedings, but also the judge dealing with the Beddoe application should be different from the judge dealing with the main action* (citing *Alsop Wilkinson v Neary [1996] 1 W.L.R. 1220 at 1225H*)*"*

96. See also Lewin [para 27-250]:

   "*Parties* (*Beddoe* Applications)

   "*Though a beneficiary may make the application, in which case all the trustees must be made defendants, the application will normally be made by the trustees, since it is the trustees who need indemnity out of the trust fund in respect of their litigation costs. While*

it is normally necessary for beneficiaries (other than a claimant) to be made defendants, it is often unnecessary for all the beneficiaries to be joined. In some cases the trustees may know that beneficiaries need to be joined as defendants, or to be given notice of the application under Part 19, rule 19.8 of the Civil Procedure Rules, but may be in doubt as to which…."

97. Perhaps some synergy exists between an aggrieved former trustee and a scenario involving an allegation of breach of trust by one trustee against the other. However, even in those cases, the *Beddoe* proceedings would still be centered on "*whether it is in the interests of the trust fund for trust money to be spent on pursuing the proposed defendants*." (See Lewin [para 27-187]).

Legal Principles on Disclosure of Trust Documents

98. Usually, when the Court is called upon to consider a dispute on the subject of disclosure under trust law, the issue concerns the rights of the beneficiaries to view and access documents in the possession of a trustee. Questions on disclosure may also arise as between former and current trustees. However, in the context of past and present trustees, it is more common for the Courts to be engaged to resolve complaints by the new trustee in obtaining documents from its predecessor. Thus the present case appears to pull on strands of novelty in its call for the Court to determine the scope of disclosure, if any, to which an aggrieved former trustee is entitled in *Beddoe* trust proceedings.

99. As a starting point, the law commands an important demarcation between the concept of disclosure under trust law and disclosure under general rules of civil procedure. Unlike the RSC Order 24 entitlement to discovery conferred by civil procedure rules, disclosure under trust law is enforceable by classes of parties to the trust who have a right to seek disclosure based on long established trust principles. This is why the jurisprudential attention to disclosure in trust cases is so primarily focused on the disclosure rights of beneficiaries, settlors and protectors. (Additionally, there is a developing body of law on the subject of disclosure to public investigatory and regulatory bodies. See *In the Matter of the G Trusts [2017] SC Bermuda 98 Civ.*, per Kawaley CJ)

100. Unsurprisingly, I have struggled to no end in finding any commentary from the authors of Lewin in favour of the rights of a former trustee within *Beddoe* proceedings. This is, no doubt, because a former trustee is considered to be a stranger to the trust. However, the question as to whether the Court, in its supervisory role, ought to allow a stranger to the trust to obtain disclosure as a form of pre-action disclosure is specifically addressed in Lewin [23-021]:

"*23-021 Disclosure under the court's supervisory jurisdiction as a precursor to hostile litigation*

The court's jurisdiction to supervise and where necessary intervene in the administration of a trust by ordering disclosure of documents or information is limited to cases where disclosure is sought by a beneficiary (or other person interested under the trust) in his capacity as such an does not enable a stranger to the trust to obtain disclosure as a form of pre-action disclosure for the purpose of hostile proceedings against the trustees (citing Re C.A. Settlement 2002 J.L.R. 312, Jers RC; Re Internine Trust and Azali Trust [2006] JCA 093…) or indeed enable trustees to obtain disclosure against a person otherwise than in his capacity as a beneficiary (or other person interested under the trust) as a form of pre-action disclosure (citing Re A Settlement [2010] JCA 231 at [34(ii)]. In such a case, disclosure may be obtained only if a proper case is made for pre-action disclosure under a quite different jurisdiction from that now under consideration…"

101. The guideline principles on a beneficiary's right to seek disclosure is etched in the Privy Council's decision in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, a decision which the authors of Lewin [para 23-006] describe as a shift in favour of the exercise of judicial discretion over the application of hard and fast rules. Such judicial discretion, of course, is exercisable as an aspect of the Court's supervisory role over the administration of the trust in question. Of particular note, one of the important general principles formed in *Schmidt* is that a proprietary right is neither sufficient nor necessary to entitle a beneficiary to disclosure of trust documents. [See Lewin 23-018(3)].

Legal Principles on Legal Professional Privilege

102. The meaning of "*items subject to legal professional privilege*" is statutorily considered under section 10 of the Police and Criminal Evidence Act 2006 in the context of an exemption from material which may be seized by the police in the execution of a search warrant. The definition provided under section 10 is broadly applicable to the term:

"10(1) *Subject to subsection (2), in this Part "items subject to legal privilege" means-*

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and

(c) items enclosed with or referred to in such communications and made-
(i) In connection with the giving of legal advice; or
(ii) In connection with or in contemplation of legal proceedings and for the purposes of such proceedings,
when they are in the possession of a person who is entitled to possession of them.

(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.

103. The origins of the rule on legal professional privilege are deep-rooted in English common law. In B v Auckland District Law Society [2003] UKPC 38 the Judicial Board referred to Lord Taylor of Gosforth CJ's speech in R v Derby Magistrates' Court Ex p B [1996] 1AC 487 [para 37] as "*an authoritative exposition of the rational of legal professional privilege*". The Board cited the following passage from Taylor CJ [pp 507 and 508]:

"*The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests…[It] is not for the sake of the applicant alone that the privilege must be held. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors*."

104. While the right to assert privilege is not expressly protected under the Bermuda Constitution, the rule has acquired a sacred legal status having withstood nearly a century and a half of jurisprudential recognition throughout all corners of the Commonwealth.

105. Generally, in trust cases legal advice and opinions obtained by the trustees for guidance on the discharge of their trustee duties will be provided to a beneficiary who has demanded disclosure (See Lewin [23-048]). However, where disclosure of legal advice is sought by a beneficiary in another capacity which involves a dispute with the trustees, special considerations may apply. Lewin [23-050]:

"*Special considerations apply to legal advice obtained by trustees in relation to a dispute with a particular beneficiary otherwise than in his character as beneficiary, or a person connected with such a beneficiary. Where disclosure of advice to such a beneficiary would in the trustees' view be contrary to the interests of the beneficiaries as a whole, trustees may exercise a discretion to withhold disclosure from that beneficiary (even if confidentiality undertakings are offered,) though the court may (but is unlikely to) override the trustees' exercise of their discretion...*"

106. In *Trustees 1-4 v Attorney General* the Court of Appeal were called upon to consider a narrow issue as to whether Hellman J, the *Beddoe* judge, had erred in finding that it was "inappropriate" for the Appellant trustees to assert legal professional privilege against the Second Respondent. The underlying facts concern four purpose trusts established under the Trust (Special Provisions) Act 1989 ("the 1989 Act"). The assets of these trusts were derived from the settlors' expansive wealth and success in founding a group of companies.

The settlors were two brothers, each of whom had numerous heirs by multiple marriages. The Second Respondent is the eldest son of one of settlors by his second marriage.

107. In those proceedings the trustees sought an order appointing the Second Respondent to be the representative of both the estate and the other heirs of the settlors. On this basis, Hellman J accepted that he stood in the shoes of the settlors with standing to enforce the trusts under section 12B(1)(d) of the 1989 Act. At paragraph 74 of his judgment, Hellman J held:

"*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]…*to R2 so that he can establish whether it exists and has been represented fairly or accurately*."

108. Referring to this particular passage of Hellman J's ruling, Baker JA said this [para 27]:

"*The judge's finding that it was inappropriate for the trustees to assert legal professional 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*."

109. At paragraph 35 of the Court of Appeal's judgment, it is reported that Ms. Warnock-Smith QC argued in her written submissions for the Second Respondent:

"*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 the case) and the Attorney-General could have privilege asserted against him by a charitable trustee. In any event, it is clear for the La 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."

110. Baker JA crystallized the position as follows [para 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 the 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*."

Analysis and Decision

111. The legal principles applicable to disclosure in administration actions under the procedural governance of RSC Order 85 must not be blended with those which are uniquely reserved for discovery as part of the pre-action process in hostile litigation. In these *Beddoe* proceedings, the Court is concerned with the expedient and proper execution of the Trust.

112. Here, the former trustee, SJTC, is obviously seeking disclosure as a precursor to potential hostile litigation arising out of allegations that Mr. Gilbert breached his duty as a director of SJTC. Reported judicial commentary in favour of any rights of a former trustee within the *Beddoe* proceedings itself is scarce at best. This is, no doubt, because a former trustee is considered to be a stranger to the trust whose pursuit for disclosure can only be motivated by an intention to engage in future hostile litigation.

113. In the present case, this Court is concerned with a former trustee who does not seek to destroy or challenge the validity of the trust but is instead said to be in pursuit of an order for reinstatement as the trustee of the B Trust. However, there is no statutory pathway under Part IV which permits or seemingly contemplates an application by a displaced trustee for an order made under section 31 to be set aside or varied. While the Court may perhaps fall back on its general powers to hear such an application under its inherent jurisdiction; sections 48 and 49 narrowly authorize the Court to determine a trust variation or revocation

application where the applicant has standing by virtue of the applicant's status as a trustee or on account of a beneficial interest in the relevant trust.

114. The plain truth of the matter is that SJTC is now a stranger to the B Trust and has no standing to join these proceedings under Part IV of the 1975 Act. Even if that analysis were flawed, the reality is that the representative voice of the beneficiaries together with the Protector of the B Trust expressly supports Medlands as the trustee of the B Trust in substitution of SJTC. (Additionally, no objections were made by the Attorney General to the appointment under section 31.) All of this to say, that neither the beneficiaries, Medlands, the Protector nor the Attorney General will likely make an application to this Court for the reinstatement of SJTC under section, so the prospects of SJTC one day becoming a trustee of the B Trust is less than grim.

115. As the *Beddoe* judge, my role is to supervise the administration of the Trust with my primary focus on whether any proposal submitted to this Court is in the interests of the trust fund in protection of the general body of those who have an interest in the trust estate. These are not proceedings within which SJTC may properly air any complaint which would cause this Court of special Trust Administration and Beddoe jurisdiction to turn its back on the protection of the trust assets for the enjoyment of those who are beneficially interested in that property.

116. Where legal professional privilege arises, this Court is particularly duty bound to take all necessary steps to ensure the protection of the privileged material and information. After all, the privileged advice ultimately belongs to those who have a beneficial interest in the trust estate (whether it be any one or all of the beneficiaries who may one day receive a distribution or the charitable purposes for which the Trust has served). To do otherwise would be to proceed under a misguided notion that the Court has a power of discretion to direct a trustee to disclose privileged materials. It is on the application of the ordinary principles governing legal professional privilege that I refuse to direct for any legal advice obtained by SJTC in its former role as trustee to be disclosed to SJTC now in its current state as a stranger of the Trust.

117. Returning to the wider subject of disclosure, I do not accept that it would be a proper exercise of this Court's discretion to direct disclosure of trust documents to the applicant stranger of the Trust. SJTC has no *prima facie* prospects of being appointed as a trustee to the B Trust, whether or not Mr. Gilbert is later found in any possible separate action to have breached his fiduciary duties owed to SJTC. This is largely because the Court is most unlikely to impose a trustee appointment in this case where it is not expressly supported by the beneficiaries, the Attorney General or the Protector of the Trust.

118. (My refusal to direct disclosure to SJTC in these proceedings is, of course, without prejudice to any entitlement that SJTC might establish at the civil procedure discovery stage in any such separate litigation.)

119. As a matter of general legal principle, decisions on disclosure are within a trustee's original jurisdiction. This Court's role is merely supervisory. Thus, it would ordinarily be open to Medlands to determine in the first instance what, if any, documents should be disclosed to other interested parties. However, the Confidentiality Order effectively resulted in the Court's assumption of all of the decision-making powers on disclosure from 5 November 2018 through to present day. For this reason, it is important for me to be clear in stating my decision that both SJTC's disclosure application and Medlands' disclosure application containing proposals to disclose a large volume of redacted documents to SJTC are refused.

120. In refusing Medlands' disclosure application, I am mindful of the peculiar circumstances under which the application has been made. My reasons for rejecting the disclosure proposals are not to be read as a barrier to any future disclosure application that might be expressly and voluntarily supported by the beneficiaries, the Protector, and/or the Attorney General.

121. Although I have refused both disclosure applications, I have provided herein a detailed narrative on the case background as an information trail for SJTC's fuller understanding of the events culminating in its discharge as trustees. This is supportive of Hargun CJ's remarks and general disposition that SJTC should be made aware of the facts leading up to my ruling of 19 December 2019. However, anything further is a matter for a separate action and not these Trust Administration and *Beddoe* proceedings.

122. The same basis upon which I found that SJTC is not entitled to disclosure serves as my reasoning for which I would refuse SJTC's joinder application.

Decision on "Additional Written Submissions…Following Draft Judgment…"

123. On 9 June 2020 at 3:31pm, the Registry circulated the draft copy of this Ruling for editorial input by Counsel ("the Draft Ruling"). On 11 June 2020, Counsel for SJTC requested the unusual opportunity to make written and/or oral substantive submissions prior to the finalizing of the Draft Ruling. On 18 June 2020, I granted MDM leave to file written submissions. On 19 June 2020, I also granted leave to CDP, on behalf of Medlands, to file a written reply to MDM's post-Draft Ruling submissions. No further submissions or evidence beyond that point was permitted.

124. It should be noted that it was originally MDM who requested for these applications to be determined urgently on the papers without having requested leave to file written submissions or to be heard orally. Notwithstanding, I found that it was appropriate to grant leave to file the June submissions, given that I proposed to refuse the MDM summons upon considerable analysis of the legal principles stated in this Ruling. I also considered the final effect of this Ruling and the extent to which SJTC would perceive itself to be aggrieved by my Ruling. It is with these points in mind that I allowed, in the exercise of my discretion,

for the submissions to be filed. Against that background, it was my expressed expectation that the belated submissions would be "*narrow and concise in its narrative*."

125. That being the case, SJTC filed twenty-six pages of written submissions dated 26 June 2020 together with a bundle of thirty-one authorities. Medlands replied with sixteen pages of written submission and eight accompanying authorities. (I do not consider it necessary for me to cite or to specifically opine on any authorities beyond what I have already relied on in this Ruling.) However, having reviewed these filings and the underlying points of objection to the Draft Ruling, I make the below points, starting with the evidence of SJTC's purpose behind the disclosure application.

126. On MDM's written submissions, it is clear that the purpose behind the MDM Summons was to aid SJTC's mission in establishing that SJTC has a continuing proprietary right to the B Trust Assets [paras 30-31]:

> *"30. Its right of indemnity is enforceable by an equitable lien or charge over the assets of the (B Trust): see Investec at [59(v)]. SJTC's equitable lien or charge is a proprietary right: see Z Trusts [2019] JCA 106 at [145] and [147]; and Octavo Investments Pty v Knight (1979) 144 CLR 360, 369-3705.* ***SJTC's proprietary right ranks in priority ahead of the interest of the discretionary beneficiaries under the (B Trust)****: see Dodds v Tuke (1884) 25 ChD 617, 6196.*
>
> *31.* ***Thus, SJTC holds a proprietary right to the assets held under the (B Trust) which ranks first in priority****. That is of crucial importance here because of the investigations being conducted by the US Department of Justice and US Internal Revenue Service (the "****US Authorities****") in the context of alleged tax evasion and money laundering by Mr Brockman involving unreported gains of in excess of US$ 2 billion (the "****Investigations****")."*

127. Paragraph 34 of MDM's written submissions best summarizes SJTC's challenge to the relevant portion of the Draft Ruling:

> "34. *It is consequently of the utmost importance that SJTC is able to understand the scope of its potential liabilities, and the steps which have been taken purportedly in its name. Only then can it properly assess both whether any claim brought by the US Authorities is a good one; and the extent to which it will be able to rely on its indemnity from the assets of the (B Trust). That investigation is especially important where, as here, the US Authorities are making allegations of wrong-doing against SJTC (when it was controlled by Mr. Gilbert) which may mean that there is a question over whether any liability incurred while Mr. Gilbert was a director was incurred by SJTC acting properly and reasonably (so as to be covered by the indemnity). In order to assess and protect its own position, SJTC needs to understand what happened while Mr Gilbert was director – and this is a fundamentally different purpose from "seeking disclosure as a precursor to potential hostile litigation* ***arising out of allegations that Mr. Gilbert breached his duty as a director of SJTC***" *(which the learned Judge, respectfully,*

wrongly concluded was "obviously" the reason for which SJTC pursued the Summons; when it is not)".

128. As a reminder, the MDM Summons for disclosure was supported by the affidavit evidence of Mr. Watlington who deposed [para 41]:

"*As Independent Directors, Mr. Ferguson and I have a fiduciary duty to investigate the steps that Mr. Gilbert took purportedly in the name of the Company,* ***and to preserve its assets***, ***in whatever capacity they were held***. ***In order for us to do so***, *we require copies of the documents that we seek upon this application in order to understand what took place in these proceedings, how the Company was affected, and whether the Redacted Order (and other orders) were properly made*."

129. At the penultimate paragraph of the same affidavit Mr. Watlington said:

"*This relief is sought on an urgent basis as Mr. Ferguson and I are concerned –* ***as a result of Mr. Gilbert's previous improper conduct***, *identified above, and where he continues to be the sole shareholder of, and a director of, Medlands – that steps might be taken to dissipate assets of the (B Trust), and we are conscious of the Company's ongoing responsibility, and potential ongoing duties, in respect of the same*."

130. Mr. Watlington's evidence was suggestive of SJTC's continued legal ownership over the B Trust assets. What was not stated on Mr Watlington's evidence was that the proprietary right claimed is in the narrow form of an indemnity enforceable by an equitable lien or charge over the trust assets to cover part or the whole of the costs of any possible finding of liability against SJTC in another civil action. This new factual basis has been introduced to the Court on MDM's submissions without evidential support.

131. What may be deduced from Mr. Watlington's evidence is that SJTC considers that it still has legal title over the trust assets as the rightful trustee of the B Trust. This, undeniably, arises out of allegations of Mr. Gilbert's breaches of fiduciary duty as a director, in that he wrongly purported to act in the name of SJTC when he did not have the authority to do so from Messrs. Watlington and Ferguson. This is plainly SJTC's case on the evidence.

132. At paragraphs 17-18 of Mr. Watlington's affidavit he stated:

"*17. Thus, the Independent Directors were surprised to be informed in paragraph 25 of the Third Affidavit of Mr. Gilbert dated 3 January 2020 in the proceedings relating to the Interim Injunction [at pages 791- 792] that:*

"*By Order dated 19 December 2019, Subair Williams J appointed Medlands as trustee of the [B] Trust and has directed Medlands, in that capacity to pay [the Company's] reasonable costs and expenses of, and incidental to, and any other liabilities arising in,*

proceedings 2019: No. 447. The Order was made in confidential proceedings but her Ladyship has directed that this statement may be made available to the Court and to the parties to these proceedings. I confirm that I am a director of Medlands."

18. We, as the Independent Directors, were surprised to learn of this as it appeared that rather than "holding the ring" – as Mr. Gilbert had represented to the Court that he would – ***Mr. Gilbert had wrongly purported to take steps in the name of the Company*** *and otherwise (****in breach of his fiduciary duties to the Company****) that he now contends* ***have the effect of stripping the Company of significant appointments and substantial assets, including by procuring relief that is to the detriment of the Company*** *(and which the Company considers may be contrary to the interests of the (B Trust) in the proceedings in which this application is now made.*

133. At paragraph 37 of Mr. Watlington's evidence:

"37. …What also appears from the limited information that has been made available to us is that the Orders by Subair Williams J were made on the basis of the purported consent of the named parties, ***with the Company purportedly consenting through Mr. Gilbert (who was not authorized by the Company to provide such consent and, in any event, in a position of conflict as he was the sole shareholder and sole director of Medlands)****…."*

134. I shall consider for a moment, the new case put forth by SJTC (notwithstanding that it is unsupported by Mr. Watlington's evidence) that SJTC would have a right of indemnity out of the Trust assets in the event of a finding of liability against it in a separate action (for acts performed when it was previously acting as the trustee to the B Trust) brought by the US Authorities.

135. On this novel proposition, SJTC's proprietary claim would compete against the rights of those who are beneficially entitled to the assets of the B Trust assets. That is a glaring example of hostile litigation, as the question of '*hostility*' must surely be viewed from the standpoint of those persons and charitable purposes who want to preserve the trust assets for their own beneficial access and enjoyment. SJTC state, through MDM's written submissions, that its right of indemnity would rank in priority over the beneficiaries of the Trust. That is clearly a matter for separate proceedings as this Court's supervisory role and administrative duty to protect the trust assets for the eventual distribution to those who are truly beneficially entitled to them would be severely compromised in making a conflicting order in favour or furtherance of SJTC's proprietary claim.

136. In this Ruling I have not opined that SJTC has no route to access to the documents it seeks in order to discover what actions were rightly or wrongly taken in its own name. Instead, I have found that it may not obtain those documents as part of the disclosure process in these Beddoe and Trust Administration proceedings as a former trustee (*de son sort*) who is now a stranger to the trust. This brings me to SJTC's characterization of these proceedings and their submission that the disclosure relief sought is appropriately put before this Court [paras 40-50]:

"*40. It would be overly simplistic, and wrong, to characterise these proceedings in toto as "Beddoe proceedings", and then to approach the question of to what documents a person interested in the trust might be entitled based on that characterisation.*

41. These proceedings went very far beyond mere Beddoe proceedings and involved much more extensive relief than that which can properly be characterised as Beddoe relief.

42. Even based on the redacted copy of the December Order which SJTC has seen, it is plain that these proceedings covered, inter alia, (1) declarations as to the meaning and effect of deeds and orders of this and other courts (see the December Order at ¶¶1-17), (2) the removal of SJTC as trustee and replacement with Medlands (see the December Order at ¶18) and (3) variation of the Brockman Trust indenture (see the December Order at ¶¶27-28).

43. Indeed, there is little in the December Order, so far as can be seen from the redacted version available to SJTC, that deals with the Beddoe question of "whether an action should be brought or defended at the expense of the trust estate".

44. In truth these proceedings were, certainly in respect of the vast majority of the relief granted in the November and December Orders, trust administration proceedings (which engage none of the particular considerations as to whether advice, received by the trustee about the merits of litigation against somebody else interested in the trust, should be shared with that other person that arise when a trustee seeks Beddoe relief).

45. The point in this regard is well illustrated insofar as the December Order dealt with SJTC's substantive rights by, inter alia, removing it as trustee.

46. The removal of a trustee is typically undertaken in contested proceedings, pursuant to a specifically endorsed writ: see Lewin at ¶14-080, stating that "[p]roceedings for the removal of a trustee under the inherent jurisdiction should be commenced by claim form under Part 7 of the Civil Procedure Rules", which part is the equivalent of RSC Order 6.

47. That is of crucial importance in this case. The fact that the application for the removal of SJTC was brought in the context of ongoing Beddoe proceedings cannot disguise the fact that such a claim would usually be brought under Order 6. Accordingly, in the usual course of events there is no question as to whether the removed trustee should have access to the relevant documents, because it would have been an active party to the dispute, and would therefore have access to the court file without more.

48. The fact that that position has been muddied in this case by the form of those proceedings, and 48.the inappropriate involvement in them of Mr Gilbert, through the agency of Conyers, purporting (wrongly) to act in the name of SJTC, should not disguise the fact that, as here, a trustee that is removed in court proceedings has a legitimate interest in, and right to, the documents on the court file in those proceedings. Thus, for example, it would not usually be necessary for SJTC to seek an order permitting it access to the court file so as to understand its position and consider an appeal because it would have those documents following the service of an ordinary writ under Order 6 – but that is no reason to suppose that SJTC has no right, or ought not

to be able, to obtain those documents from the court file in the circumstances of this case.

49. This is not, therefore, a case where a "stranger to the Brockman Trust" is seeking access to the 49.court file to see what has happened in Beddoe proceedings (without prejudice to the true position as set out above that SJTC is not a stranger to the Brockman Trust). This is a case where an ex-trustee (assuming the November and December Orders are not set aside) is seeking to see the very information on which it was removed (among other things). The fact that there is no authority stipulating in terms that an ex-trustee has this particular right is because in no other case have there been the extraordinary efforts by other parties to keep those documents from the ex-trustee.

50. The same point applies in respect of the other non-Beddoe relief granted by the November Order 50.and the December Order. For example, SJTC is entitled to know why it is now said that it was (or is) a trustee de son tort. How can it sensibly investigate its position in that regard, and the basis on which the November and December Orders were made, if it cannot even see the court file?"

137. In the Draft Ruling it was explained in particular detail that this Court's statutory jurisdiction under RSC Order 85 and Part IV of the Trustee Act 1975 (which I have referred to in this Ruling as "the 1975 Act") together with its inherent jurisdiction has been engaged.

138. The dominant nature of these proceedings, as determined by the Originating Summons made under RSC Order 85 and the appended draft Generally Endorsed Writ of Summons, clearly relies on the longstanding marriage which exists between the Court's Trust Administration powers and its *Beddoe*'s jurisdiction. Therefore, in these proceedings, the Court is principally concerned with the exercise of its supervisory powers over the execution and continued administration of the B Trust. RSC Order 85 expressly extends the Court's powers to resolve any question as to the composition of any class of persons having a beneficial interest in trust property (as opposed to a mere legal interest vested in a trustee). The Court's supervisory powers under RSC Order 85 also expressly apply to any question as to the rights or interests of a person claiming to be beneficially entitled under a trust (again, as opposed to a trustee's legal interest).

139. The focal point of the Court's lenses are centered on the best interests of the stakeholders of the B Trust, ie. the discretionary beneficiaries who may one day receive a distribution or the charitable purposes for which the Trust has served. That is the very essence of Trust Administration and *Beddoe* proceedings.

140. It is clearly explained in the Draft Ruling that the appointment of Medlands as the new trustee of the B Trust together with the consequential orders of this Court which followed, were all made in exercise of the Court's powers under sections 31 and 47 of the 1975 Act. Part IV of the 1975 Act (to which sections 31 and 47 belong), has a supportive relationship with RSC Order 85 in that it designates a list of statutory powers vested in the Court for exercise in Trust Administration proceedings. In the Draft Ruling I examined section 47(2)

where the Court "*may, from time to time, rescind or vary any order made under this section or may make any new or further order*." I determined that subsection (3), however, limits the class of persons who may make an application under section 47, (i.e. whether it be to approve a transaction or whether it be to vary or discharge a transaction) to current trustees or persons beneficially interested under the trust. Equally, I considered section 48 which permits the Court to determine a trust variation or revocation application of any person who qualifies as having any of the various stated categories of interest in the relevant trust. I continued on to section 49 and found that it only permits current trustees or persons beneficially interested in the trust concerned to apply for an order for the appointment of a new trustee (in substitution of the former).

141. For these reasons I found and maintain that the Court's statutory, common law and inherent jurisdictional powers in Trust Administration and *Beddoe* proceedings do not open the door to an aggrieved former trustee or a trustee *de son tort* to raise its sword against those beneficially entitled to the trust assets. SJTC's claim to a right of indemnity is expressly stated on MDM's submissions to be a "*proprietary right*" which "*ranks in priority ahead of the interest of the discretionary beneficiaries under the (B Trust)*". This is the purest example, in my judgment, of intended hostile litigation which cannot be properly adjudicated in this jurisdiction of Court which is assigned to the special function of supervising the execution and administration of a trust with an ultimate focus of ensuring that those who are **beneficially** interested in the Trust may one day expect to receive their distributions. This is exactly why this Court will not, through the trust disclosure process, feed a stranger to the trust, which SJTC indeed now is. The proper avenue is for it to engage the civil procedure discovery process in aid of the obvious hostile litigation ahead.

142. For all of these reasons, I refuse SJTC's request for substantive changes to be made to the Draft Ruling.

Conclusion

143. The MDM Summons is refused.

144. The disclosure application in Medlands' Summons is refused.

145. Any costs applications arising out of this Ruling shall be determined on the papers upon the filing of a Form 31P within 21 days of the date of this Ruling.

Dated this 23 day of July 2020

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