Neutral Citation Number: [2022] CA (Bda) 7 Civ

Case No: Civ/2021/22

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2019: No. 195

Sessions House
Hamilton, Bermuda HM 12

Date: 25/03/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

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Between:

(1) JONATHAN INGHAM
(2) NICHOLAS INGHAM
(as executors and trustees of the estate of Elfrida Louise Chappell)

Appellants

- and -

(1) CLAUDIA MARIE RUTH RADIGAN WARDMAN
(both as Executor of George Alfred Wardman's estate and in her own capacity)
(2) ALEC R. ANDERSON
(as Executor of George Alfred Wardman's estate)
(3) BUTTERFIELD TRUST (BERMUDA) LIMITED
(as Executor and Trustee of the estate of Elfrida Chappell)
(4) STEPHEN WHITAKER KEMPE
(as Executor and Trustee of the estate of Elfrida Chappell)

Respondents

Ms Constance McDonnell, QC, instructed by Mr. Richard Horseman, Wakefield Quin Ltd. for the Applicant
Mr. Keith Robinson, Carey Olsen Bermuda Ltd., for the Respondent

Hearing date: 14 March 2022

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APPROVED JUDGMENT

BELL JA:

Introduction

1. This appeal arises from a ruling made by Subair Williams J dated 16 September 2021, in which she set aside a privacy order ("the Privacy Order") which she had previously made on an ex parte basis. The judge had made the ex parte order without having been informed that the third and fourth defendants to these proceedings ("the Executors") had confirmed their intention to be heard in opposition to the application for the Privacy Order. The judge had also been the *Beddoe* judge in previous applications relating to the main proceedings[1]. The judge decided that she should set aside the Privacy Order on two bases argued before her on behalf of the Executors; first, that the Privacy Order recognised an unenforceable foreign judgment, and secondly, that the Privacy Order offended the Constitutional principles of open justice. The judge decided further that the fact of her having been the *Beddoe* judge did not preclude her from dealing with an interlocutory application in the main action.

Background

2. The proceedings relate to the estate of the late Elfrida Chappell, who died on 15 July 2015 at the age of 101. She was the mother of two children, both of whom predeceased her. These were her daughter Mary Ingham, who died on 9 June 1991, leaving two sons, Jonathan and Nicholas, who are the two plaintiffs ("the Inghams"), and her son George Wardman, who died on 15 April 2015, leaving four children, Tiffany, George, John and Christopher. George's widow Claudia is the first defendant both in her own capacity and as an executor of George's estate. Alec Anderson, the second defendant, is the other executor of George's estate.

3. During her life Mrs Chappell had settled two trusts, of which she and various family members were beneficiaries. The Chappell Trust was a Bermuda trust, settled on 17 August 1979, of which Stephen Kempe, the fourth defendant, was one trustee and Richard Spurling was the other. The Wardman 1980 Trust was originally a Bermuda trust but subsequently became a Guernsey trust. The original trustee was the Bank of Butterfield Executor & Trustee Company Limited, and the present trustee is Butterfield Trust (Guernsey) Limited. At times Butterfield Trust (Bermuda) Limited has acted as agent for the Guernsey trustee.

4. Mrs Chappell's last will is dated 28 July 2008, and in it she appointed the Executors to be her executors. The validity of this will was at one stage challenged by the Inghams in separate proceedings in the Supreme Court (proceedings #288 of 2018), but as I understand it, that is no longer the position. That 2008 will had made more generous provision for George, his wife and children than had a previous will of 2007. The dispositive provisions of both wills included a devise of Mrs Chappell's home, Mount Pleasant, to George, and had then divided the residuary estate equally between the Ingham and Wardman branches of the family.

5. In very broad terms, the Inghams make complaint that from 2008 onwards, George had begun to take control of Mrs Chappell's financial affairs, and from August 2010 at the latest, he and Claudia were exclusively in control of them. The claim is that a substantial number of payments (defined as "the

[1] Following the principles laid down in *In re Beddoe, Downes v Cottam* [1893] 1 Ch 547

Payments") were made out of Mrs Chappell's account at Butterfield Bank by George and/or Claudia or on their instructions. The Payments as defined also include payments on Mrs Chappell's credit cards, the removal of a number of valuable chattels from Mount Pleasant, the transfer of shares in Bermuda Properties Limited, and payments to third parties by the third defendant as agent for the trustee of the Wardman 1980 Trust. The claim is made that the Payments were procured by the undue influence of George and/or Claudia, alternatively that they were made without Mrs Chappell's capacity or consent. The Inghams accordingly seek to pursue a derivative claim against the first and second defendants in their capacity as George's executors and the first defendant in her personal capacity. They say that there are special circumstances such that the Executors are unable to bring a claim themselves due to conflicts of interest, which are particularised.

6. In addition to the Bermuda proceedings, proceedings were taken in the Royal Court of Guernsey. During the course of those proceedings, certain documents were provided to the Inghams. From these the Inghams identified a narrower number of documents ("the Permission Documents") which they believed had relevance for the purposes of the Bermuda proceedings which they had initiated. The Guernsey court made an order ("the RCG Order") permitting the Inghams to use both categories of documents in the Bermuda proceedings despite the usual implied undertaking not to use such documents for any collateral purpose. However, the Permission Documents were made subject to privacy orders by the Guernsey court, which required that prior to any such use, the Inghams should confirm to the Guernsey trustee (whose documents it were that had been disclosed in the Guernsey proceedings) that the Bermuda court had granted privacy orders prohibiting any further disclosure and/or use of the Permission Documents, other than for the purpose of the application ("the Permission Application") needed to continue with the derivative action filed in proceedings #155 of 2019. The Inghams' Guernsey lawyer, David O'Hanlon, swore an affidavit dated 25 May 2021 in which he averred that until the Bermuda court made a privacy order, he was unable to provide the documents to their Bermuda counsel, and neither could the Inghams provide the documents to the parties to the Bermuda proceedings, to their Bermudian legal advisors or to the Supreme Court. Nevertheless, he was able to say that during the course of the Guernsey proceedings it had become apparent that the documents which had been provided to them had relevance to proceedings #155 of 2019. There were said to be 14 such Permission Documents, comprising 45 pages. The date originally set for the hearing of the Permission Application was 22 July 2021, but that date was instead used for argument on the Privacy Order, and the Permission Application remains to be argued. So it was against this background that the Inghams made their application to the Supreme Court for the Privacy Order, granted ex parte in the first instance, and then set aside on the application of the Executors in Subair Williams J's ruling of 16 September 2021, to which I will now turn.

The ruling of 16 September 2021

7. The judge began by setting out the history, and the Inghams' wish to pursue a derivative action against the Executors pursuant to the Permission Application, if granted. She referred to the Inghams' claim that the Executors were unable to bring that claim because of the conflicts of interest which the Inghams maintained they had. She referred to the fact that she had already given the Executors permission to defend the Permission Application in *Beddoe* proceedings. The judge then moved on to describe the proceedings in Guernsey which had culminated in the RCG Order, permitting the use of the Permission Documents, subject to the restrictions imposed by the Guernsey court. As appears from the narrative relating to events in Guernsey, there was a wider class of documents, which could be

used by the parties to the Bermuda proceedings, and a narrower class of documents which could be used in relation to the Permission Application only if the Bermuda court were to grant privacy orders sealing the Permission Documents and prohibiting their use outside the Permission Application.

8. The judge then moved to the application to set aside the Privacy Order, dealing firstly with the Executors' complaint that since she had been the *Beddoe* judge who sanctioned the Executors' decision to defend the Permission Application, she should not rule on that application. The judge rejected that argument, and, there being no appeal against that finding, it does not fall for further consideration.

9. The second argument made for the Executors was that the Privacy Order was made only to accommodate the Inghams' desire to enforce the RCG Order, and that in so doing the court was recognising an unenforceable foreign judgment, contrary to established legal principle. The judge set out the competing arguments of counsel. Counsel for the Executors relied on standard conflicts of laws principles relating to the enforcement of a foreign judgment. Counsel for the Inghams' primary submission was that this was not a case of enforcing a foreign order against the Executors, but rather simply an application to fulfil a condition imposed by the Guernsey court so as to permit the use of the documents in question. The judge referred to the letters rogatory provisions of the Rules of the Supreme Court, which counsel for the Executors argued was the appropriate mechanism for evidence to be procured from the Guernsey court for the purpose of the Bermuda proceedings. She concluded that the Privacy Order was wrongly used as a method for seeking and providing assistance to the Guernsey court.

10. The judge then turned to the complaint that the Privacy Order offended the principle of open justice pursuant to section 6 (9) of the Bermuda Constitution Order 1968. While the judge recognised that confidentiality orders were often granted in private trust matters or to protect the confidentiality of reports made by liquidators, she concluded that the evidence before the court did not point to any reason for a privacy order other than to give effect to or enforce the RCG Order. Accordingly, she set aside the Privacy Order.

This appeal

11. The Inghams sought leave to appeal on three grounds. The first of these was that the judge had been wrong to regard the Privacy Order as an instrument of enforcement of a foreign judgment. The second ground was that the judge had been wrong to conclude that the Privacy Order offended the Constitutional principles of open justice, and this ground was broken down into sub-grounds; ground 2.3 (ii) was that the judge had failed to address the Inghams' submission that there existed "special circumstances" as a result of the fact that the documents emanated from the Guernsey trust proceedings which were subject to a privacy order, which fact justified the maintenance of the confidentiality of the documents. The third ground was that the judge had been wrong not to query the reasons for the Executors' opposition to the Privacy Order. This ground maintained that at no point in her reasoning had the judge appeared to consider the propriety of and reasons for the Executors' opposition, in circumstances where all of the main beneficiaries of the estate had consented to the use of the Permission Documents in the Bermuda proceedings, arguing that the judge should have taken into account that the Executors' application was likely to have been made for entirely self-serving reasons.

12. The judge granted leave to appeal only in respect of ground 2.3 (ii), and the Inghams renewed their application for leave to appeal to this court. The court dealt with the applications for leave together with the merits of the appeal in a rolled-up hearing.

13. There has been one further development in the *Beddoe* proceedings, which has led to a further application, seeking leave to appeal an order made by the judge on 25 February 2022, when she had declined to grant a variation of an order relating to costs which she had made in the *Beddoe* proceedings on 10 February 2022. That order was to the effect that the Executors were entitled to be indemnified against the costs of the appeal made to this Court out of the assets of the estate, up to the conclusion of the appeal. The variation sought was to leave it expressly open to the Court of Appeal to make an order against the Executors requiring them to pay the costs of the appeal and the Privacy Order application personally, as a result of what is said to have been their unreasonable conduct in not consenting to the Privacy Order, and adopting a hostile position in the Privacy Order application as well as in the appeal. The application for leave to appeal from the 25 February 2022 order contends that the judge was wrong to place any express restriction on the *Beddoe* relief granted ex parte on 10 February 2022. That application was left on the basis that it could better be addressed once this Court's judgment on this appeal was to hand.

The argument on the appeal

14. While counsel on both sides provided helpful skeleton arguments, it is unnecessary to rehearse these at length. The issues are relatively straightforward, and indeed Ms McDonnell QC for the Inghams said early on in her submissions that the Executors had complicated a simple issue in circumstances where all the main beneficiaries had consented to the making of the RCG Order. But for what she described as the Executors' egregious actions, the Permission Application would have been heard last July. She emphasised that all that the Inghams were seeking to do was to put documents before the Bermuda court, that it was for the Bermuda court to make its own decision in this regard, and that the Executors' position had been marked by hostility throughout.

15. Ms McDonnell referred to the evidence filed on behalf of the Executors, in the form of an affidavit sworn by Mr Kempe dated 12 March 2021. She referred particularly to paragraph 14, in which Mr Kempe had averred that the Executors had taken advice from three sources, including two Bermuda law firms on the merits of bringing a claim against George's estate, before positively deciding not to pursue such a claim. I will come in due course to the matters which ought to govern the making of such a decision on the part of trustees where there is a dispute between beneficiaries. Ms McDonnell also drew the Court's attention to paragraphs 25 and 26 of the affidavit, where Mr Kempe reiterated that the Executors did not consider that there was merit in pursuing the claims raised in the derivative proceedings. In fact, he also described them as "not sustainable" (paragraph 13), and "unmeritorious" (paragraph 18). Mr Kempe does not seem to have considered, either properly or at all, the role of a trustee in relation to a dispute between beneficiaries, and in paragraph 26 referred to the fact that claims of undue influence, lack of capacity and breach of fiduciary duty were complex, difficult and expensive to litigate, matters to which the Inghams have no doubt had regard. He then made the statement "The Executors are not of the view that the pursuit of such litigation against either George's estate and/or Claudia would be in the interests of the beneficiaries of the Deceased's estate". One can readily see how the Wardman branch of the family might take that view, but how that can be said so

far as the Ingham branch of the family is concerned is quite beyond me. Mr Kempe closed that paragraph by saying that it was quite wrong to suggest that the Executors had not or could not form a view as to whether or not to litigate. Again, that is not looking at the issue from the correct perspective, and as Ms McDonnell stressed, there is no downside to the Executors in permitting the derivative claim to proceed, when they could receive the fruits of any judgment for the benefit of the estate.

16. Ms McDonnell stressed that the judge had before her sworn evidence from a Guernsey lawyer that the Permission Documents were relevant for the purposes of the Permission Application, whereas the Executors, who have not seen the documents, can only say that they do not know that the documents are relevant, as they did in their skeleton. She continued that if the judge accepted relevance, the issue of open justice could be kept to a minimum, and could be dealt with as it was in the case of *Ace Bermuda Insurance Ltd v Ford Motor Company* [2016] Bda LR 1, where Hellman J had held that the part of the hearing dealing with confidential documents should be held in camera, but the rest of the hearing held in open court. And Ms McDonnell maintained that the overriding objective was best served by making the privacy order, something which she said that the Bermuda court would likely have done if seised of the same issue.

17. Turning to the Letter of Request argument, Ms McDonnell said that it was not suggested that the RCG Order has any effect in Bermuda. Simply put, what the Guernsey court had done was to provide a mechanism whereby the Bermuda court could have access to the Permission Documents. It has not compelled the Bermuda court to do anything. While Ms McDonnell understandably went through the position in relation to outgoing and incoming requests, I do not think that any useful purpose is served by spending time on that issue, for reasons which I will come to. But Ms McDonnell maintained that the bottom line for the Inghams is that in relation to this aspect of matters the judge was led down the wrong path by the Executors, and that the Executors' arguments rested upon a mischaracterisation of the Privacy Order and the RCG Order. And the statutory schemes for providing assistance to or seeking assistance from a court of another jurisdiction are of no relevance to this case, quite apart from requiring two further sets of proceedings in two jurisdictions.

18. In relation to the open justice argument, Ms McDonnell stressed that the relevant provisions of the Constitution, and particularly section 10, provide for an exception when the court considers that that is necessary or expedient in circumstances where publicity would prejudice the interests of justice or in the case of an interlocutory proceeding, as the Permission Application hearing is. What is important, she said, is to discover the truth, in circumstances where the judge had before her sworn evidence as to their relevance.

19. The third ground of appeal relates to the reason for the Executors' opposition to the Inghams' application, something which Ms McDonnell argued that the judge was wrong not to query. In this regard, it is important not to look at the Executors' opposition to the Privacy Order application without also considering the consequent Permission Application, required so that the Inghams' derivative action can be pursued. And when one looks at the Executors' position in that light, it becomes clear that their approach, if successful, will have the effect of closing down a claim made by one group of beneficiaries against another such group. In due course, I will examine the reasons given by the Executors in Mr Kempe's affidavit for their opposition to the applications made by the Inghams. But it is to be noted that the written submissions for the Inghams referred to an affidavit sworn by Kyle Masters, counsel for the Executors, on 5 July 2021, in support of the Executors' application to set

aside the Privacy Order, and suggest that there was some prejudice to the Executors which should have been weighed in the balance, something which it is said for the Inghams demonstrated that the Executors were acting in their own self-interest rather than in their interest as personal representatives. But the final submission was that the Executors' stance did not make sense if they were acting, as they should, in a truly neutral manner.

20. Mr Robinson for the Executors started by referring to the terms of paragraph 45 of the Ruling, which is in the following terms:

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

21. In response to questioning from the bench, Mr Robinson did not accept that there was any relevance to the fact that all the main beneficiaries had consented to the making of the RCG Order. He nevertheless maintained that the Bermuda court had been right to refuse to make a privacy order. When it was suggested to him that the route by which the Inghams were seeking to have the Permission Documents placed before the Bermuda Court was both obvious and sensible, Mr Robinson suggested that there were alternative procedures including seeking a less restrictive order from the Guernsey court, or seeking to obtain the documents directly from the Guernsey trustee. Why the Guernsey trustee should release its documents without some confidentiality safeguard in place, such as that contained in the order of the Guernsey Court, was not answered satisfactorily.

22. Mr Robinson referred to paragraph 14 of Mr Kempe's affidavit, referenced in paragraph 15 above, as well as the following two paragraphs of the affidavit, which detail the role of what is described as a reputable international asset recovery firm, whose advice led the Executors to write to the Inghams' lawyers advising that they did not think a claim against George's estate had "reasonable prospects of success". But Mr Robinson also referred to and relied upon the assertion made by Mr Kempe in paragraph 47 of his affidavit, where he queried whether the Inghams proposed to pay any adverse costs orders which might be ordered against the estate. Mr Robinson equated this concern to being that the estate was at risk in costs.

23. And while Mr Robinson repeated his reliance on paragraphs 38 and 45 of the judge's ruling, he accepted that in the former paragraph, the judge had been in error in describing the Privacy Order as being a method of seeking and providing assistance to the Guernsey court. But Mr Robinson could not explain how the ruling could stand when the judge had not given reasons for the finding at paragraph 45 set out above.

Findings – the Executors' motives in acting as they have

24. It seems to me that the starting point is to consider the nature of the Executors' duties when there is an underlying dispute between beneficiaries, and in this regard I would propose to start with the

judgment of Lightman J in the case of *Alsop Wilkinson (a firm) v Neary and others* [1995] 1 All ER 431. In this case, a firm of solicitors had taken proceedings against a former partner of the firm, alleging dishonesty, and had secured judgment against him in an amount in excess of £1 million. The former partner had made two settlements during the period when the misappropriations had taken place, of which he and his family were the beneficiaries. The firm brought proceedings against the trustees, seeking declarations that those transfers were void as against the firm. The trustees applied for directions as to whether to defend the firm's action, and for a pre-emptive costs order.

25. Refusing both applications, Lightman J described the three types of dispute in which trustees might find themselves. These he defined as a trust dispute, a beneficiaries dispute and a third party dispute. He was concerned in that case, as we are in this, with a beneficiaries dispute. In those circumstances, he said, the trustee's duty is to remain neutral and to offer to submit to the court's directions, leaving it to the rivals to fight their battles. It is worth setting out the relevant passage in full, as follows:

> *"In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as happened in Merry's case [1898] 1 Ch. 306) offer to submit to the court's directions leaving it to the rivals to fight their battles. If this stance is adopted, in respect of the costs necessarily and properly incurred e.g. in serving a defence agreeing to submit to the courts direction and in making discovery, the trustees will be entitled to an idemnity and lien. If the trustees do actively defend the trust and succeed, e.g. in challenging a claim by the settlor to set aside for undue influence, they may be entitled to their costs out of the trust, for they have preserved the interests of the beneficiaries under the trust: consider In re Holden, Ex parte Official Receiver (1887) 20 Q.B.D. 43. But if they fail, then in particular in the case of hostile litigation although in an exceptional case the court may consider that the trustees should have their costs (see Bullock v. Lloyds Bank Ltd. [1955] 1 Ch. 317) ordinarily the trustees will not be entitled to any indemnity, for they have incurred expenditure and liabilities in an unsuccessful effort to prefer one class of beneficiaries e.g. the express beneficiaries specified in the trust instrument, over another e.g. the trustees in bankruptcy or creditors, and so have acted unreasonably and otherwise than for the benefit of the trust estate"*

26. It does seem to me that, regrettably, the Executors have indeed sought to prefer one class of beneficiaries to another, by taking the view (after spending trust assets on taking advice which was effectively as to which side they should prefer) that the derivative claims which the Inghams seek to pursue against other beneficiaries do not have merit. That is not their function; they are not the arbiter of that dispute. Rather, they should remain neutral, and follow the directions of the court. I cannot imagine their being ordered to pay costs in those circumstances; the battle, so described, will be between the Ingham and the Wardman branches of the family. And in regard to the position they should take, of neutrality, the judge indicated at paragraph 6 of her ruling, that she had granted permission to the Executors to defend the Permission Application. This was presumably on the Executors' application, and will no doubt have to be examined in due course.

27. I have started with the Appellants' third ground of appeal because it does seem to me that the role which the Executors have chosen to play, (described by Ms McDonnell as hostile, acting out of self-interest, with their conduct described as being egregious), has coloured their entire approach to what,

as Ms McDonnell said at the outset, should have been a relatively straightforward application. One might have expected that, if the Inghams had come to the Bermuda court and said:

(i) we have certain documents, which came into our possession in the Guernsey proceedings,

(ii) we believe these documents to be relevant for the purposes of the Permission Application,

(iii) the Guernsey court has allowed us to use these documents for that purpose, provided we secure equivalent confidentiality safeguards to those in existence in Guernsey, which means

(iv) that we must ask the Bermuda court to put in place a similar privacy order to that ordered by the RCG,

the Executors would have adopted a neutral stance, and, the remaining beneficiaries having already consented to the RCG Order, the Bermuda court would give such a proposal its blessing without demur, not least on the basis that the documents, which the Inghams' Guernsey lawyer has said are relevant, will be of assistance to the court in ruling on the Permission Application.

28. Instead, there has been contentious litigation in dealing with what is only the first step in the process, and no doubt a very significant expenditure on legal fees to boot. If the judge (whether in her capacity as the *Beddoe* judge or on hearing the application for the Privacy Order) had been advised by the Executors that they were taking a neutral position because that was the correct approach in the case of a beneficiaries dispute, the Permission Application would have been argued last July.

29. It follows from all that I have said above that in my view the judge was wrong not to query the reasons for the Executors' opposition to the Privacy Order, and wrong not to have found that the Executors' stance should have been in accordance with the principles set out in *Alsop Wilkinson v Neary* to apply in the case of a beneficiaries dispute.

The Privacy Order as an instrument of enforcement of a foreign judgment

30. I will deal with the arguments raised by the Executors relatively briefly, because I do not think that they merit extensive consideration. First, the notion that the Privacy Order should be regarded as an instrument of the enforcement of a foreign judgment seems to me quite absurd. It was, as Ms McDonnell rightly pointed out, no more than the mechanism by which the Inghams sought, and were entitled to seek, to have relevant documents which had come into their possession in the Guernsey proceedings, put before the Bermuda court for use in connection with the Permission Application, as being relevant for that purpose. To describe the RCG Order, as counsel for the Executors did in their written submissions before the judge, as being "in substance a prohibitory injunction granted (inter alia) against the Executors which enforces in Bermuda the order of the Guernsey Court" is a complete misrepresentation of the nature and purpose of the Guernsey order. It is no more and no less as Ms McDonnell described it above.

31. In dealing with this argument, the judge set out the relevant statutory provisions by which foreign judgments are enforced, and excerpts from the skeleton arguments, but dealt with her reasons for accepting the Executors' position only in paragraph 38 of her ruling, and then relatively briefly. She

accepted that the Privacy Order was wrongly used, but relied upon principles of open justice (to which I will come) in saying that the Bermuda law position on open justice and confidentiality orders "ought not to be conflated with the available statutory schemes in place for providing or seeking assistance from a Court of another jurisdiction". Insofar as the judge understood this to be the nature of the application for the Privacy Order, I find that she was in error. I have referred any number of times to what is the true nature of the application.

32. I would therefore hold the first ground of appeal is made out.

Open justice

33. The judge acknowledged that confidentiality orders are often granted in private trust matters, in paragraph 43 of her ruling. And so far as the provisions of the Constitution are concerned, while the judge set out section 6 (10) of the Constitution at paragraph 40 of her ruling, she in fact omitted the reference to interlocutory proceedings contained within that subsection. The Permission Application and the application for a privacy order which preceded it are of course interlocutory proceedings, whereas the case on which the Executors relied, *DPP v Clarke* [2019] Bda LR 46 was a case of an entirely different nature, where at the Supreme Court level the entire proceedings had taken place under conditions of anonymity. The Court of Appeal held that the interests of justice would not be prejudiced by open proceedings. Two members of this court sat on the bench for that case, and for my part I regard the underlying circumstances of that case to be of a completely different nature to those of this case.

34. As submitted on behalf of the Inghams, the judge's reasons were expressed very briefly at paragraph 45 of the ruling. She said that the evidence before the court did not point to any reason for a privacy order "other than to give effect to … the RCG Order". She had the evidence of Mr O'Hanlon that the Permission Documents were relevant for the purposes of the Permission Application. The Executors' skeleton argument below referred to the documents pejoratively as "the Secret Documents". They were, as already stated, simply documents which had come into the Inghams' hands in the Guernsey proceedings. But the real point is that it was clearly in the interests of justice that the judge hearing the Permission Application should have before her all relevant documents. The judge did not address this despite it being the Inghams' case in their skeleton argument below. In this case the interests of justice require the court to inform itself of the true facts, as submitted for the Inghams. Simply put, the judge did not explain her reasons for rejecting the submissions, and why the documents should not be regarded as coming within the interlocutory proceedings exception, the application of which in the present case seems to me entirely apposite.

35. The skeleton argument before us sets out the position much more fully than I have above, but suffice to say that the circumstances of this case seem to me to make it quite clear that the judge should have appreciated the need for her to be informed on the true and full facts for the purpose of considering the Permission Application. I would therefore hold that this ground, too, is made out. It follows that I would allow the appeal, set aside the judge's ruling, and restore the Privacy Order which had been made by the judge on an ex parte basis.

Costs

36. I have already indicated that in my view the Executors should have followed the course set out in *Alsop Wilkinson v Neary*, as appears above. Interestingly, the Executors relied on this case below, when addressing the subject of *Beddoe* proceedings. In the normal course I would have had no hesitation in ordering that the Executors should be responsible for the Inghams' costs in relation both to this appeal and below. I regard their conduct in relation to these proceedings exactly as Ms McDonnell described them; improper and unjustifiable, as well as hostile and potentially governed by self-interest. One might have thought that where issues of conflict of interest had been raised against them, the Executors, and those advising them, would be anxious to maintain a position of neutrality. Instead they took it upon themselves to make their own judgment on the prospects of success of the claims made by the Inghams, all at the expense of the estate.

37. But I am concerned that there is apparently in place a *Beddoe* order which purports to protect the Executors, and would wish to know how the judge was persuaded to ignore the authority of *Alsop Wilkinson v Neary*, and regard it as right for the Executors to take on the role that they did, in the manner which they did. This aspect of matters is no doubt covered by the appeal against the judge's order of 25 February 2022. In the circumstances, I would invite counsel to agree the appropriate way forward on the issue of costs, both here and below, and particularly to agree what material should be before us to enable us to deal with costs appropriately. It may well be that the questions at issue could be determined on paper.

SMELLIE JA:

38. I have read the judgment of my Lord in draft, and I agree.

CLARKE P:

39. I, also, agree and accordingly the appeal is allowed.