In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2013: No 238

BETWEEN:-

(1) TRUSTEE 1
(2) TRUSTEE 2
(3) TRUSTEE 3
(4) TRUSTEE 4

Plaintiffs

-and-

(1) THE ATTORNEY GENERAL
(2) RESPONDENT 2
(3) RESPONDENT 3

Respondents

RULING (redacted version)

(In Chambers)

Date of hearing: 20th and 21st January 2014
Date of judgment: 26th February 2014

Mr Narinder Hargun and Mr Christian Luthi, Conyers Dill & Pearman, for the Plaintiffs

Mr Rod Attride-Stirling and Mr Shannon Dyer, ASW Law Ltd, for the Second Respondent

Mr David Kessaram and Ms Lilla Zuill, Cox Hallett Wilkinson, for the Third Respondent

The First Respondent did not appear and was not represented

Introduction

1. I am asked to rule on two applications for disclosure made by Respondent 2 ("R2") in the course of *Beddoe* proceedings commenced by the Plaintiffs ("The Trustees"). The background to the applications is as follows.

2. The Plaintiffs are the Trustees of four Bermuda purpose trusts ("the Trusts"). The First Plaintiff is Trustee of Trust 1; the Second Plaintiff is Trustee of Trust 2; the Third Plaintiff is Trustee of Trust 3; and the Fourth Plaintiff is Trustee of Trust 4.

3. R2 has issued a writ against the Trustees. He claimed on behalf of the estate of his late father, F, that all the assets presently held by the Trustees in their capacity as such were placed into trust without the proper consent of F, whose assets they are said to have been, and other relief. I shall refer to these proceedings as "the main action".

4. The Trustees issued an originating summons – a *Beddoe* application – in which they sought inter alia: (i) directions as to the stance which they should take in the main action – they invite the court to direct that they should resist R2's claims; (ii) directions as to the interim administration of the trust funds pending the outcome of the main action; and (iii) an indemnity with respect to any costs, liabilities and expenses incurred in complying with those directions.

5. The Trustees have also sought an order appointing R2 to represent in the *Beddoe* proceedings the estate of F and the heirs of F under the law of the jurisdiction where F was domiciled. I understand that this order, which has not yet been made, will be unopposed.

6. The parties have filed various affidavits in the *Beddoe* proceedings. The affidavits filed by the Trustees include the First and Third Affidavits of D1, who is one of the daughters of F and a director of each of the Plaintiffs. I shall refer to the affidavits as D/1 and D/2.

7. R2 has issued a summons ("the First Summons"), by which he sought a copy of a document ("the Document"), which is said to be referred to in D/1. He also sought production of a further document. The Trustees have since supplied him with a copy of that further document, although without conceding that they were under any obligation to do so.

8. By a summons dated 9th January 2013 ("the Second Summons"), R2 sought production of a number of documents said to be referred to in D/1 and D/2. Some of them have since been produced by the Trustees.

9. It is the applications contained in those two summonses which now fall to be determined. R2 relies on fact that the Trustees have a duty of full and frank disclosure in the *Beddoe* proceedings. Further or alternatively, he relies on the provisions of Order 24, rule 10 of the Rules of the Supreme Court 1985 ("RSC").

10. The Trustees resist the production of any documents which they have not already supplied to R2. They submit that they have already complied with their duty of full and frank disclosure. Further, they submit that Order 24, rule 10 is not applicable to *Beddoe* proceedings. Alternatively, they submit that if it is applicable to *Beddoe* proceedings, it is not engaged by R2's requests.

Full and frank disclosure

11. The Trustees' duty of full and frank disclosure falls to be considered within the particular context of a *Beddoe* application. It is helpful to recall the nature and purpose of such an application. This is helpfully summarised in the leading textbook Lewin on Trusts, Eighteenth Edition, at para 21-117:

> A *Beddoe* application is an application made to the court … for directions whether or not the trustee should bring or defend, or continue to bring or defend, proceedings in his capacity as trustee. An order made in a Beddoe application authorising the trustee to do that, and to be indemnified out of the trust fund in respect of the costs incurred in the proceedings to which the application relates, including any costs which he might be ordered to pay to another party in the proceedings, operates to indemnify and protect the trustee as between himself and the beneficiaries, provided that the trustee has made full and proper disclosure to the court in the Beddoe application, to the extent (subject to the effects of a subsequent unforeseen adverse developments [sic]) of the steps which are authorised to be taken, and to remove doubts which otherwise exist as to whether he is entitled to indemnity.

12. As to what should be disclosed, Lewin has this to say, albeit in the context of the English Civil Procedure Rules, at para 21-125:

> The application should be supported by evidence including instructions to, and the advice of, an appropriately qualified lawyer as to the prospects of success, and other matters relevant to be taken into account, including a cost estimate for the main action and any known facts concerning the means of the opposite party to the main action and a draft of any proposed statement of case (as well as any existing pleadings); the value of the trust assets, the significance of the main action to the trust, and why the court's directions are needed. The evidence should also state (i) whether any relevant Pre-Action Protocol has been followed and (ii) whether the trustees have proposed or undertaken, or propose to undertake, alternative dispute resolution, and (in each case) if not why not. The evidence must also explain what, if any, consultation there has been with beneficiaries, and with what result. The court must be made aware in the *Beddoe* application of the weaknesses as well as the strengths of the position of the

> trustees in relation to the substantive action, and indeed full disclosure is essential, otherwise an order made in the *Beddoe* application will not afford the trustees full and effective protection.

13. If the trustees are to enjoy the full protection of a *Beddoe* order, they must disclose not only the strengths and weaknesses of their position of which they are aware, but also any weaknesses of which they are unaware but of which, if they had made sufficient inquiry, they would have known. They must also avoid any material factual mistakes. If it transpires that the picture which the trustees painted before the judge in order to get *Beddoe* relief was materially inaccurate, and that the inaccuracy was their fault, then they may be vulnerable in costs. See the judgment of Lindsay J in Re Professional Trustees of 2 Trusts [2007] EWHC 1922 (Ch) at paras 22 – 25.

14. Where, as in the instant case, the trustees are seeking not merely the guidance of the court but its approval for a particular course of action, the duty of full and frank disclosure is of particular importance. This is because the trustees, in such a case, are surrendering their discretion to the court. The court must therefore have all the material necessary to enable that discretion to be exercised. See the judgment of the Privy Council, given by Lord Oliver, in Marley v Mutual Security Merchant Bank & Trust Co Ltd [1991] 3 All ER 198, PC, at 201. As the Royal Court of Jersey put it in In the matter of the A and B Trusts [2007] JLR 44, in the judgment of Clyde-Smith, Commr, at para 22:

> It must follow, as a matter of general principle, that if a trustee wishes the court to approve a decision it proposes to make, it must provide the court with all of the information that the trustee has or ought to have in relation to that decision.

15. That much is uncontroversial. The question arising here is whether the trustees' obligation to provide the court with all relevant information which they have or ought to have in relation to the decision to be made extends to providing the court with copies of the documents from which that information is derived.

16. Mr Attride-Stirling, counsel R2, submits that it does. He suggests that otherwise the court will not be in a position to satisfy itself that the information provided by the trustee is full and accurate. He submits that it is particularly important that the court is able to do this in a case such as the present, where the Trustees are not professional trust companies and are controlled by people who, at least on his client's case, have a personal interest in the outcome of the main action.

17. Mr Attride-Stirling referred me to In re Eaton [1964] 1 WLR 1269, Ch D. In that case the trustee sought directions as to whether proceedings should be taken against a beneficiary. In those days the beneficiary, although joined to the proceedings, was not generally permitted to be present in chambers when the matter was heard. That is no longer the case in England and Wales. See, for example, the suggested procedure for the hearing of the *Beddoe* application in Re Professional Trustees of 2 Trusts, as explained by Lindsay J at paras 49 – 51. Neither is it the case in Bermuda.

18. Be that as it may, in In re Eaton Wilberforce J (as he then was) invited counsel for the trustee to supply the beneficiary with such of the documents as were listed in the instructions to counsel to advise, and "*any other relevant document*" which it was not inappropriate for the beneficiary to see at that stage. Mr Attride-Stirling relies on that case as authority for the proposition that "*information*" includes "*documentation*". That, he submits, is in any case implicit in the broad nature of the duty of disclosure as set out in the various passages cited above.

19. However, in Re Eaton the question was not what information should the trustee provide to the court, but rather how much of that information should the trustee provide to the beneficiary. The court held that it should provide as much as it reasonably could: a proposition that is today uncontroversial. In so holding, the court was fashioning an appropriate remedy for the particular circumstances of that case: it was not purporting to lay down a general rule as what form such information should take.

20. To return to first principles, the courts originally intended that *Beddoe* relief should be relatively cheap and convenient. Thus, in In re Beddoe [1893] 1 Ch 547, EWCA, Lindley LJ spoke of:

> the ease 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.

21. Bowen LJ made the same point:

> 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.

22. Times change. As Briggs J (as he then was) stated in Breakspear v Ackland [2009] Ch 32, Ch D, at para 10:

> The assumption in In re Beddoe [1893] 1 Ch 547 that trustees can always obtain the directions of the court at modest expense is, I am afraid, simply wrong in modern times.

23. It is nevertheless important not to lose sight of the purpose of *Beddoe* proceedings. As Mr Hargun, counsel for the Trustees, submits, they are to give guidance to the trustees, not provide a mini trial of the main action nor give advance disclosure for its purposes. I agree with Clyde-Smith, Commr, giving the judgment of the Royal Court of Jersey in In re a Settlement [2011] JRC 109 at para 24 that the court should avoid being side-tracked into unhelpful mini-investigations.

24. Indeed, in Re Eaton, Wilberforce J at 1270 described the court in *Beddoe* proceedings as acting "*essentially in an administrative capacity*". As Nourse LJ noted in Re Evans [1986] 1 WLR 101, EWCA, at 107 A, the application is often conducted in a comparatively informal manner, and the court will frequently accept material on instructions and without formal proof. The extensive disclosure for which Mr Attride-Stirling contends is simply inconsistent with the way in which *Beddoe* applications have historically been conducted, both in England and Wales and in Bermuda.

25. I conclude that "*information*" and "*documentation*" are different words with different meanings. What is required on a *Beddoe* application is that the trustees present the court with all the relevant information which they have or ought to have in relation to the decisions which the court will be asked to make. This will typically be provided by way of affidavit.

26. As noted at para 21-125 of Lewin, the court will want to see a copy of the instructions to, and the advice of, an appropriately qualified lawyer on the matters in issue. Beyond that, there is no requirement that the trustees provide the court with the relevant information in any particular form, or with copies of the documents from which that information is derived.

27. The trustees may choose to provide the court with certain documents, as they have done in this case, but that is a matter for their judgment. These documents will typically include a copy of the trust instrument and – which I believe have not yet been provided in this case – up-to-date copies of the trust's accounts. They might also include copies of particular documents referred to in the trustees' affidavits or counsel's opinion. Depending on the particular facts of the case, the documents which the trustees put before the court might be sparse or alternatively quite voluminous.

28. Conversely, the court may express the view that copies of certain documents would be of assistance. Prudent trustees, and their professional advisors, would no doubt take careful note of any such indication.

29. In the premises, I find that the Trustees' duty to give (using the language of Lewin) full and proper disclosure does not require them to produce the documents sought by R2.

Order 24, rule 10

30. Order 24, rule 10 is headed "*Inspection of documents referred to in pleadings and affidavits*" and provides as follows:

> (1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.
>
> (2) The party on whom a notice is served under paragraph (1) must, within four days after service of the notice, serve on the party giving the notice a notice stating a time within seven days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

31. Order 24, rule 10 is to be read in conjunction with Order 24, rule 13. This is headed "*Production to be ordered only if necessary, etc.*" and provides as follows:

> (1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.
>
> (2) Where on an application under this Order for production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

Rationale

32. It will be helpful to have in mind the rationale for Order 24, rule 10. This was considered – with respect to a predecessor of the rule – in Quilter v Heatly (1883) 23 Ch D 42, EWCA. At first instance, Chitty J stated that its main object was to prevent fictitious deeds or documents being invented by the pleader and inserted in the statement of claim. In the Court of Appeal, Lindley LJ stated that the rules were intended to give the opposite party the

same advantage as if the documents referred to had been fully set out in the pleadings. Eg, as Jessel MR pointed out, a defendant might say:

> Your case depends partly on a set of documents which you may have set out incorrectly. I wish to see them.

33. Hobhouse J commented on the decision in Quilter v Heatly in Eagle Star Insurance Co Ltd v Arab Bank Plc, unreported, 25th February 1991, HC. He explained that a pleading should be taken to set out in full all the documents to which it referred. The opposite party was able to call for those documents so that it could understand the pleading and, in effect, have it fully particularised. The same applied to affidavits:

> If you choose to refer to a document in an affidavit, whether or not you exhibit it, you can be required, in order to enable the other side, so as to identify the full terms of the statement on oath of the other side, to see that document.

34. The practical reasons for this were stated by Keith JA in the Hong Kong decision of Shun Kai Finance Co Ltd v Japan Leasing (HK) Ltd (in liq) (No 2) [2001] 1 HKC 636, HKCA, at 653 B – C:

> The production of a document referred to in a pleading is required to enable the other party to the litigation to know what the whole of the document says. And why should he be entitled to that? The answer, I am sure, is to enable him to see whether there is anything else in the document (apart from that part of the document which is referred to in the pleading) upon which he can rely. It is to prevent the party who first referred to the document from concealing the fact that there may be other things in or about the document which might be of assistance to the other party to the litigation.

Cause or matter

35. I consider first whether a *Beddoe* application is a "*cause or matter*" within the meaning of Order 24, rule 10, and hence whether R2 has jurisdiction to apply to the court under this provision.

36. These terms are defined in section 1(1) of the Supreme Court Act 1905 ("the 1905 Act"). This provides that in the 1905 Act, and in any Rules of Court made thereunder, unless the context otherwise requires: "*Cause*" includes any action, suit or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown; "*action*" means a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court, but does not include a criminal proceeding by the Crown; and "*matter*" includes every proceeding in the Court or before any judge thereof, not in a cause.

37. The RSC were made under section 62 of the 1905 Act. The context of Order 24, rule 10 does not require that "*cause*" and "*matter*" are given different meanings to those in the 1905 Act. I therefore conclude that a *Beddoe* application is a cause or matter within the meaning of Order 24, rule 10.

38. RSC Order 85 is headed "*Administration and similar actions*". Order 85, rule 2(5) provides that an action may be brought for:

> an order directing any act to be done … in the execution of a trust which the Court could order to be done if the … trust were being … executed … under the direction of the Court.

That language is apt to describe a *Beddoe* application.

39. Confirmation that Order 85 covers *Beddoe* applications is to be found in the commentary to the 1999 Edition of the <u>White Book</u> at 85/2/2. This addressed the making of a *Beddoe* application under Order 85 of the Rules of the Supreme Court of England and Wales. Order 85 in those rules was in the same terms as Order 85 in the RSC.

40. This is relevant because in Bermuda (and in England and Wales) Order 85 does not provide that Order 24, rule 10 shall not apply to *Beddoe* applications. Had the legislature intended that Order 24, rule 10 should not apply, then either order 24 or Order 85 would no doubt have said so.

41. I am therefore satisfied that on R2's applications I have jurisdiction to make an order under Order 24, rule 10.

Reference is made

42. I consider next what is meant by "*reference is made*" to a document. The case law is clear. Reference is made to a document when there is a direct allusion to it. It is not sufficient that the existence of the document can be inferred. Thus in Dubai Bank v Galadari (No 2) [1990] 1 WLR 731, Slade LJ, giving the judgment of the Court of Appeal of England and Wales, stated at 738 H – 739 A and 739 H:

> We cannot accept the broad submission …. summarised above. It seems to us to involve reading the phrase "*reference is made to any documents*" as including *reference by inference*. This we do not regard as the natural and ordinary meaning of the phrase. To our minds, the phrase imports the making of a direct allusion to a document or documents.
>
> . . . . .
>
> In our judgment, a mere opinion that on the balance of probabilities, a transaction referred to in a pleading or affidavit must have been effected by a document, does not give the court jurisdiction to make an order under R.S.C., Ord. 24, r. 10, unless the pleading or affidavit makes direct allusion t the document or class of documents in question.

43. The direct allusion may be to a class of documents. Thus, earlier in his judgment, Slade LJ stated at 738 C:

> In our judgment, a compendious reference to a class of documents, as opposed to a reference to individual documents, is well capable of falling within the rule, provided that it is indeed a reference.

Affidavit

44. I must also consider whether, as R2 submits, "*affidavits*" includes "*exhibits to affidavits*", such that a party is entitled to call for the production of a document referred to in an exhibit. He relies on In re Hinchliffe (Deceased) [1895] 1 Ch 117, EWCA. The eponymous Miss Hinchliffe was a deceased lunatic. She had two sisters, both of whom were sane. The elder sister was the committee of the lunatic, which was a role analogous to that of guardian. The sisters were the beneficiaries of a trust fund.

45. The two sane sisters, having taken counsel's opinion, commenced proceedings against the trustee of the trust fund for breach of trust. They applied in the lunacy for leave to join the lunatic, who was then still living, as co-plaintiff. The committee filed an affidavit in support of that application to which she exhibited the case put to counsel and his opinion. Leave was granted, and the three sisters subsequently commenced an action against the trustee.

46. The lunatic later died. The surviving plaintiffs added as a defendant the executor of a will made by her while she was still sane. The committee supplied the executor with a copy of the affidavit, as the copy belonged to the lunatic, but refused to show him the exhibits on the ground that these were the property of the committee. The executor applied to the Master in Lunacy for an order permitting him to inspect and take copies of the case and opinion. As was the practice in Lunacy, the exhibits had not been filed with the affidavit.

47. The executor's application was refused by the Master, and subsequently by the Lord Chief Justice. But it was upheld by the Court of Appeal. The Court held that anyone who had the right to see an affidavit had the right to see the exhibits to the affidavit. That remains the position today.

48. All three judgments in In re Hinchliffe were quoted in full and with evident approval by Lord Woolf MR when giving the judgment of the Court of Appeal of England and Wales in the much more recent case of Barings v

Coopers & Lybrand [2000] 1 WLR 2353 at 2365 paras 44 – 46. This was in order to support the proposition at para 43 of his judgment that, as a matter of basic principle, the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings.

49. What is relevant for present purposes is the Court's reasoning in In re Hinchliffe. All three members held that the right of inspection derived from the fact that the exhibits to an affidavit form part of the affidavit. This is consistent with the decision in Quilter v Heatly, although in In re Hinchliffe the Court was not referred to that case.

50. Lord Herschell LC stated that the exhibits: "*form as much a part of the affidavit as if they had been actually annexed to and filed with it*". Lindley LJ (who also sat in Quilter v Heatly) mentioned: "*an exhibit referred to in the affidavit so as to be made part of it, just as if it were annexed to the affidavit.*" AL Smith LJ stated that where a document is referred to in an exhibit: "*the effect is just the same as if he had copied it out in the affidavit*".

51. Mr Attride-Stirling submits that if an exhibit is part of an affidavit, then a document that is referred to in the exhibit is by definition referred to in the affidavit. However that is not a question upon which the Court in In re Hinchliffe was asked to opine. I am therefore cautious about treating it as authority for that proposition.

52. The Court of Appeal of Hong Kong was also cautious. In Bank of India v B.K. Murjani and Others, unreported, 11th July 1989, the applicants sought specific discovery under Order 24, rule 10 of a document which had been referred to in a circular exhibited to the evidence in the court below. No such application had been made to that court, in which summary judgment had been awarded against them. The application was dismissed, and the Court expressed the view that there was no substance in the defence. Hunter J, giving the judgment of the Court, had this to say:

> Our attention was drawn to Re Hinchliffe [1895] 1 Ch 117, as authority for the proposition that affidavits include exhibits. That goes without saying under the modern practice. In this jurisdiction there could be no question about a party being entitled to a sight of the exhibits themselves. This is all Hinchliffe decided. Hinchliffe does not cover specifically, any more than I think the rule does, discovery of documents referred to in the exhibits themselves. I think in such circumstances it comes back to a matter of relevance, and that the applicant has to show at least a prima facie case of relevance, and in circumstances like these [ie the particular facts of the case] a powerfully persuasive case of relevance.

53. The 2014 edition of the Hong Kong White Book comments on the decision thus:

> In Bank of India v B.K. Murjani and Others … this provision was interpreted narrowly (arguably too narrowly) to exclude a document referred to in an exhibit attached to an affirmation. See para. 30 of Zida Technologies Ltd v Tiga Technologies Ltd and Others … where the court agreed with the view expressed in Hong Kong Civil Procedure 2001 that this was too narrow an interpretation of the provision.

54. Zida Technologies Ltd v Tiga Technologies Ltd and Others, unreported, 8th October 2001, was a decision of Deputy High Court Judge McCoy SC at first instance. He suggested that the thrust of a subsequent decision of the Hong Kong Court of Appeal, Dynamic Way International Ltd & Anor v Ho Kui Chee & Ors [2000] 4 HKC 138, was "*possibly in gentle antagonism*" with the Court's decision in the Bank of India case.

55. In Zida Technologies the court held that the opposite party had the right to inspect the contents of a sealed envelope which was exhibited to an affirmation. I do not understand that decision to be inconsistent with the decision in Bank of India, in which the court expressly stated that an opposite party had the right to inspect an exhibit.

56. The learned Deputy High Court Judge stated *obiter* that in Bank of India the court appears to have held that a document referred to in an exhibit attached to an affirmation was not itself a reference within the meaning of Order 24,

rule 10. He then approved the above-mentioned commentary in Hong Kong Civil Procedure 2001 on Bank of India. In my judgment the *obiter* comment of a Deputy High Court Judge at first instance, especially when apparently based on a misreading of one Court of Appeal decision, cannot be taken as undermining the *ratio* of another decision of the same Court of Appeal.

57. In re Hinchliffe was considered by Lander J, who was one of three judges, in Beneficial Finance Corporation Ltd and Ors v Price Waterhouse [1996] 68 SASR 19 in the Supreme Court of South Australia. He stated at para 167 that the case:

> … is not authority for the proposition that where a party exhibits a document to an affidavit any other documents referred to in that exhibit become subject to immediate and summary production.

58. This was in the context of the Supreme Court Rules, Rule 59.02, which is analogous to Order 24, rule 10. Lander J interpreted the Rule thus:

> The qualification for the production of the document is that the pleading refers directly to that document, or the document is exhibited to an affidavit, not that the document referred to in the pleading or exhibited in the affidavit in turn refers to another document making that last mentioned document subject to production.

59. Lander J was concerned that to interpret the Rule, or by parity of reasoning Order 24, rule 10, otherwise could result in significant hardship. It could certainly result in lengthy and burdensome requests for production. If Order 24, rule 10 is interpreted as Mr Attride-Stirling suggests, the court can order production of a document referred to in an exhibit because the exhibit is part of the affidavit. Thus the document referred to in the exhibit also becomes part of the affidavit. But if that document becomes part of the affidavit, so too does any document to which it refers. And so forth, through a potentially endless chain of references. The logic of Mr Attride-Stirling's position is that in a major piece of trust litigation, such as the present, the scope of requests for production under order 24, rule 10 is vast and

potentially without limit. I do not consider that the possibility of very extensive requests is merely fanciful.

60. On the other hand, if Order 24, rule 10 is interpreted so as to apply only to documents referred to in the body of an affidavit, a litigant could frustrate the Order by ensuring that any documents to which he wished to refer but did not want to produce were only referred to in a schedule exhibited to the affidavit and not in the body of the affidavit. It would be surprising if the correct construction of Order 24, rule 10 left the court unable to deal with such evasive tactics.

61. In order to resolve this conundrum I return to In re Hinchliffe. One way of looking at that case is to say that an affidavit consists of two parts: (i) a statement made by the deponent and verified on oath – which is how "*affidavit*" is habitually used – and (ii) any documents exhibited to the statement. This applies *mutatis mutandis* to affirmations.

62. However these parts are qualitatively different in that the deponent need not make the documents which he exhibits and does not verify their truthfulness on oath. An affidavit must include a sworn statement but need not include any exhibits. Thus a sworn statement is a necessary and sufficient component of an affidavit whereas an exhibit is not. The sworn statement is in that sense the more fundamental part of the affidavit.

63. This suggests that, in relation to Order 24, rule 10, the purpose of the court ordering the production of documents referred to in an affidavit is to enable the court and the requesting party to understand the meaning of the sworn statement – rather than the exhibits – and establish that any documents to which it refers exist and have been represented fairly and accurately. That is what is meant by their production being necessary either for disposing fairly of the cause or matter or for saving costs. The court will bear this purpose in mind when deciding whether to order their production.

64. In my judgment, therefore, Order 24, rule 10 does extend to documents mentioned in exhibits. However, before ordering the production of any such

documents the court would have to be satisfied that, as required by Order 24, rule 13, their production was necessary either for disposing fairly of the cause or matter or for saving costs. "*Necessary*" means "*necessary*": it does not mean merely "*helpful*" or "*convenient*". What is necessary will be construed in the light of the purpose of Order 24, rule 10, as outlined in the previous paragraph.

65. This analysis applies In Re Hinchliffe; is consistent with India Bank, in which the court stated that the production of documents referred to in the exhibits themselves was a question of "*relevance*"; and addresses the concerns of significant hardship raised by Lander J in Beneficial Finance Corporation Ltd.

First Summons

66. In the First Summons, R2 seeks production of a copy of the draft Document. This is mentioned (to use a neutral term) at a particular paragraph of D/1. Having considered the wording of that paragraph, I am satisfied that it makes reference in the sense of a direct allusion to a draft or drafts of the Document. But I accept Mr Hargun's submission that the draft Document is covered by legal advice privilege and that the privilege is that of the Trustees. This is because D1 was evidently working on the Document in her capacity as a director of the Trustees.

67. Where a privileged document is referred to in an affidavit, privilege will be waived where the maker of the affidavit is relying on the content of the document. See Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd [2003] EWCA Civ 901 at para 11. Mr Attride-Stirling submits that this is such a case. I disagree. D1 merely describes the draft Document so that the reader can understand how it fits in to her narrative. She does not disclose, let alone rely upon, its content. Therefore privilege has not been waived.

68. Mr Attride-Stirling submits in the alternative that the Trustees cannot assert privilege against R2 as he has been joined to these proceedings to represent

the estate and heirs of F. His argument runs thus. Generally speaking, the court in its inherent supervisory jurisdiction will upon request order that the trustees should disclose to the beneficiaries legal advice and communications between the trustees and their lawyers. As stated in Lewin at para 23-45:

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

69. There are exceptions to this principle, eg legal advice specifically directed at proposed reasons for the exercise of a power or discretion of trustees in a particular way (Lewin para 23-46) or legal advice obtained by trustees in relation to a dispute with a particular beneficiary otherwise than in his character as beneficiary (Lewin para 23-47). But none of these exceptions would cover circumstances analogous to the Trustees' communications with their lawyers about the Document.

70. One of the reasons why the court might order disclosure would be to assist the beneficiaries in holding the trustees to account and, if need be, taking proceedings to enforce the trust. In the context of a *Beddoe* application, disclosure to the beneficiaries will also help to ensure adequate disclosure to the court, with the beneficiaries acting as the court's watchdog. See Re Professional Trustees of 2 Trusts at para 22.

71. In the case of purpose trusts, such as the Trusts, there are no beneficiaries to enforce the trust. Enforcement is dealt with by section 12B(1) of the Trusts (Special Provisions) Act 1989 ('the 1989 Act"), as amended, which provides:

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

72. Mr Attride-Stirling submits that, in the context of a purpose trust, the persons identified in section 12B(1) of the 1989 Act are analogous to beneficiaries in that both have standing to enforce the trust with which they are concerned. It follows, he submits, that upon request the court should generally order the trustees of a purpose trust to disclose to the said persons legal advice and communications between the trustees and their lawyers. I find this submission persuasive.

73. Mr Attride-Stirling further submits that, as the Trustees have sought an order appointing R2 to represent the estate and heirs of F in these *Beddoe* proceedings, R2 prospectively stands in the shoes of the settlor and is a person with sufficient interest in the enforcement of the Trusts – although, as he disputes their validity, he will not seek to enforce them. I agree.

74. 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 draft 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 draft Document (whether it consists of one or several drafts) to R2 so that he can establish whether it exists and has been represented fairly and accurately.

Second Summons

75. I have, in the unredacted version of this ruling, ruled upon those requests which are still outstanding under Order 24, rule 10.

76. I shall hear the parties as to costs.

DATED this 26th day of February, 2014

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Hellman J