In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2013: No XXX

BETWEEN:-

TRUSTEE N AND OTHERS

Plaintiffs

-and-

THE ATTORNEY GENERAL AND OTHERS

Defendants

RULING

(In Chambers)

Date of hearing: 1st and 2nd June 2015
Date of ruling: 13th July 2015

Mr Alan Boyle QC, Mr Jonathan Adkin QC and Mr Narinder Hargun, Conyers Dill & Pearman, for the Plaintiffs

Mr Mark Cran QC, Ms Elspeth Talbot Rice QC, Mr James Brightwell and Mr Rod Attride-Stirling, ASW Law Limited, for the Second Defendant

The other Defendants did not appear and were not represented

Introduction

1. Should a party to Beddoe proceedings be able to use material disclosed in them to attack the trust or trustees in the action to which those proceedings relate? Or to bring fresh proceedings in relation to another trust? Or to investigate potential wrongdoing? If so, in what circumstances? Those interesting questions are raised in the application before me, which has been brought in these Beddoe proceedings by the Second Defendant, D2, to vary the confidentiality order made by this Court at their outset ("the Confidentiality Order" or simply "the Order").

Background

2. Applications for directions by a trustee, being of an essentially administrative character, are normally held in private, ie with the public excluded. As stated by Lord Neuberger MR (as he then was) in Howell v Lees-Millais [2011] EWCA Civ 786 at para 45, this practice is particularly appropriate for applications for directions in connection with projected litigation (ie Beddoe applications):

> "*… it would be unfair and potentially embarrassing if opinions given to the trustee, and indeed the Judge's views, were known by any potential adversary of the trustee in the litigation concerned, …*"

3. As it would if they were known by the judge hearing the main action. Further, there may be confidential information relevant to the Beddoe proceedings which the trustee wishes to communicate to the Beddoe Judge without placing it in the public domain. Moreover, I was satisfied on the evidence before me that there was a real risk that without the Confidentiality Order D2 would make use of material disclosed on the Beddoe application to appeal to the court of public opinion via the media. As D2 would have been perfectly entitled to do.

4. In Bermuda the fact that a hearing takes place in private does not in itself mean that the parties are prohibited from using material from the hearing in other proceedings or from disseminating it to the public. Thus, section 10(1) of the Administration of Justice (Contempt of Court) Act 1979 provides that the publication of information relating to proceedings held "*in camera*", which for present purposes is synonymous with "*in private*", shall not of itself be regarded as contempt of court, except in various specified circumstances, eg where the Court expressly prohibits such publication.

5. It was for these reasons that, at an *ex parte* hearing in the second half of 2013, I made the Confidentiality Order. The Court's power to do so has not been challenged. The Order provides that the file in these proceedings shall be sealed and that they shall be heard *in camera*. It further provides that all "*Confidential Information*" shall be kept confidential by each Defendant and shall not be used for any purpose other than these proceedings, but with liberty to any person to apply to vary or discharge the terms of the Order. However the Order provides that a Defendant may disclose confidential information if required to do so by law or to a "*Permitted Recipient*".

6. "*Confidential Information*" is defined in the Order as meaning all documents and information filed in or relating to these proceedings provided or made available to a party in connection with the proceedings save for (i) documents and information which are already in the possession of such party, and (ii) documents and information which are already in the public domain otherwise than by a breach of the Order.

7. "*Permitted Recipient*" is defined in the Order to mean a legal representative of a Defendant or a person holding a power of attorney which enables such person to represent a Defendant, provided that the representative is informed that the Confidential Information is confidential and is bound by professional obligations of confidentiality and non-disclosure to that Defendant, or has undertaken to the Plaintiffs ("the Trustees") to be bound by the terms of the Order as if the representative were a Defendant.

8. D2, who has scrupulously observed the terms of the Confidentiality Order, did not apply to vary or discharge it immediately. By an *ex parte* on notice

summons dated in early 2014 D2 applied to extend its ambit to cover the Trustees. An affidavit filed in support of the application by D2's solicitor, stated that D2 had instructed D2's lawyers to seek the variation or discharge of the Confidentiality Order and that it was proposed to issue such an application shortly.

9. The summons came before the Court shortly after its filing. I adjourned it so that it could be heard together with the broader application to vary or discharge the Confidentiality Order which, according to the affidavit of D2's solicitor, was to be filed shortly, and invited the parties to agree a sensible timetable for the filing of affidavits.

10. D2 did not in fact file a further application to vary the Confidentiality Order until early 2015. By that time, and indeed even before D2's summons in early 2014 was issued, the Trustees had filed a number of affidavits in these proceedings and provided very considerable disclosure.

11. In a further affidavit, D2's solicitor explained that D2 had waited for the filing of the Trustees' evidence in the Beddoe application to be completed, which did not take place until the end of 2014, so that D2 could assess the position "*in the round*" with D2's legal advisors. D2 then made an application to vary the Confidentiality Order which took into account the totality of the Confidential Information. It is upon that application that I am now required to rule.

12. D2 seeks to vary the Confidentiality Order so as to permit D2 to use for the purpose of other proceedings a number of specified documents ("the Permitted Material") falling within the Confidential Information. The Permitted Material includes documents which:

    (1) are relevant to causes of action already pleaded by D2 in the main action to which these proceedings relate ("the Main Action") in which D2 contends, *inter alia*, that the Trustees hold the entirety of the trust funds of the Trusts on trust for the heirs ("the Heirs") of D2's late father absolutely. Of the Heirs, D2 stands to inherit by far the largest share of the late father's estate;

(2) disclose new causes of action related to matters pleaded within the Main Action. These were pleaded in a draft re-amended statement of claim which was before the Court at the substantive hearing of the Beddoe application;

(3) disclose causes of action relating to another trust ("Trust J"). These were pleaded in a draft statement of claim which was also before the Court at the substantive hearing of the Beddoe application ("the Trust J Action"); and

(4) will enable D2 to pursue enquiries relating to a further trust ("Trust K"). These may result in a new action analogous to the Main Action but brought against the trustee of Trust K.

13. D2 asserts that the existence of Trust J and Trust K was revealed to D2 for the first time in affidavits sworn on behalf of the Trustees in these proceedings.

D2 also seeks to vary the Confidentiality Order in various other ways. I shall deal with them later in this ruling.

The law re disclosure of confidential material

14. When considering whether to vary the Confidentiality Order the obvious starting point is cases relating to applications by trustees for directions in general and Beddoe applications in particular.

15. It will be helpful to bear in mind that over the years the role of a party to the Beddoe proceedings who is also a claimant to the trust fund has changed. As Waite JA explained in STG Valmet v Brennan [1999 – 2000] Gib LR 211, a decision of the Gibraltar Court of Appeal:

"*39 The original view taken by the courts was that where the claimant to the fund was himself a beneficiary under the trust, he should be allowed a limited right to be heard on the Beddoe application but should be excluded from the hearing when the merits of his claim and the defence to it were discussed between the trustees and the judge: see In re*

Moritz ([1960] Ch. 251) and In re Eaton, Midland Bank Exor. & Trustee Co. Ltd. ([1964] 1 W.L.R. 1269). A claimant who was not himself a beneficiary had no such right to be heard, and might not even be aware that the application was being made at all: see In re Dallaway ([1982] 1 W.L.R. at 760, per Megarry, V.-C.). In In re Evans, Nourse, L.J. had this to say about the nature of a Beddoe application ([1986] 1.W.L.R. at 106):

> *'First and foremost, every application of this kind depends on its own facts and is essentially a matter for the discretion of the master or judge who hears it. The application is heard in Chambers and the claimant is excluded from any consideration of the merits of the action which are discussed before the court in much the same way as they would earlier have been discussed with counsel in his chambers. Being entirely domestic to the estate or trust concerned, the application is often conducted in a comparatively informal manner.'*

40 There are indications in more recent authority that the courts look with disfavour on the exclusion of the claimant from a Beddoe application; accepting that he should not be present when the strength of the case against him is discussed but insisting that in all other respects the rules of natural justice require him to be heard as fully as if he were a party to the proceeding. Thus in Weth v. Att.-Gen., ([2001] W.T.L.R. 155) Lawrence Collins, Q.C. [as he then was], as Deputy Judge of the High Court, said (... at 178):

> *'That such applications should be inter partes is now enshrined in O.15, r.12A. In McDonald v Horn ... it was held that applications of this kind in pension fund cases should also be inter partes, and it may be that today, when greater openness in litigation is being encouraged, the relaxation of the In re Moritz practice in Re Eaton should be liberally applied. Justice requires that a party has a right to be heard before an order is made that the party will bear, whether it wins or loses, the whole costs of what may be substantial litigation."*

16. Waite JA concluded at para 42, and I respectfully concur, that the authorities supported as a guiding principle that:

> "*Claimants to the trust fund, whether they be beneficiaries or strangers to the trust, should be allowed the maximum opportunity of being heard on the application consistent with the need to maintain confidentiality on matters which properly arise for consideration between the trustee and the court alone.*"

17. Turning to the Beddoe cases, both parties referred me in some detail to Midland Bank Trust Co v Green [1980] Ch 590, which concerned a family dispute about a farm. The father ("F") granted his son ("S1") an option to

buy the farm which S1 farmed as a tenant. F later changed his mind about the option, and, in order to defeat it, conveyed the farm to his wife ("W") at a considerable undervalue. W died. S1 commenced proceedings against *inter alia* W's estate. By the time the matter came on for trial, F and S1 had also died. What was before the Court was a claim by S1's executor – Midland Bank Trust Co – against S1's brother ("S2") as W's sole surviving personal representative, for specific performance of the option and for damages for conspiracy, and against F's executrix for damages, the latter claim being undefended.

18. At an earlier stage of the proceedings, W's executors had made a Beddoe application in which F swore an affidavit in which he appears to have admitted that the transfer was a sham or at any rate not a *bona fide* transaction. S1 was a party to the application as an executor and also a beneficiary of W's estate. F, by then feeling acutely unhappy about what had happened, had shown S1 a draft of his affidavit. S1 was thus able to comment on it in an affidavit which he filed in the Beddoe proceedings. Thereafter, S2, in his list of documents on behalf of W's executors in the main action, disclosed both affidavits in schedule 1, part 1 of the list. The executors claimed no privilege in respect of the affidavits and raised no objection to their production.

19. S1 delivered a reply in the main action in which he alleged that F, by reason of the admission in his affidavit, was estopped from contending that the transfer was a *bona fide* sale ("the issue estoppel"). W's executors issued a procedure summons to strike out the allegation as scandalous. Allowing the strike out application, Templeman J (as he then was) stated at 606 B – C and F – G:

> "*Over the whole of such an application [ie the Beddoe application] there is an aura of confidentiality, which is preserved by hearing everything in chambers … In my judgment, the same aura of confidentiality hangs over that affidavit as hangs over the whole of the proceedings in chambers and I am surprised that any attempt should be made to exploit it.*"

20. At trial, S1's executor gave notice of intention to rely upon the affidavits of F and S1 as evidence of the facts therein stated. S2 objected. His counsel argued *inter alia*: (i) that Templeman J's ruling gave rise to an estoppel *per rem judicatam* prohibiting the use of the affidavits in the main action to which the Beddoe proceedings related; and (ii) that no affidavit filed on a Beddoe summons could be used or referred to in any other proceedings (his original submission), or at any rate could not be used in the main action without the consent of its maker (his modified submission).

21. The trial judge was Oliver J (as he then was). He admitted the affidavits in evidence, noting in passing that Templeman J may not have been aware of how they came into the hands of S1 and his advisors. He held that the *ratio* of Templeman J's ruling was confined to the issue estoppel and that his remarks about the "*aura of confidentiality*" over the Beddoe proceedings and the affidavits filed in them were *obiter*. Thus there was no estoppel *per rem judicatam*.

22. Oliver J held further that in the absence of a direction from the Beddoe judge to the contrary the publication of matters in chambers was not a contempt. As stated above, this is the position in Bermuda (but not, as we shall see, in Jersey), although the supporting point made by the judge, namely that the affidavits would ultimately be available for inspection in the Public Records Office, does not apply in this jurisdiction.

23. Oliver J stated that there was no right to prevent a party to litigation from inspecting and making use of a filed document. However Order 63, rule 4 of the Rules of the Supreme Court for England and Wales ("RSC (EW)"), upon which he relied in support of this proposition, has no equivalent in Bermuda. The judge's point was that the practice for dealing with confidential written material, sanctioned by In re Moritz, decd, was to make such material an exhibit to an affidavit, as exhibits did not have to be filed and could be withheld from another party. As the judge stated at 609 C:

> "*The reasoning behind that is, of course, that the party would otherwise be entitled to use it as a weapon to the prejudice of the applicant.*"

24. Oliver J observed that if (as Templeman J appears to have thought) there were some general principle of confidentiality which protected the use of all material delivered to anyone in the course of a Beddoe application, there would seemingly have been no need for the practice of withholding non-privileged material to develop. However the judge found it unnecessary to decide any such general question as even if there was any such confidentiality in the admissions or statements in F's affidavit it had been waived. First by F when disclosing his draft affidavit to S1 and secondly by its inclusion without any claim to privilege in the list of documents served by S2.

25. The thrust of Oliver J's ruling on the admissibility issue was that if W's executors had not wanted S1 to make use in the main action of F's admission in the Beddoe proceedings then they should not have informed him of the admission.

26. The admissibility issue was but one aspect of Oliver J's judgment. He dismissed the claim brought by S1's executor but was reversed by the Court of Appeal. However the admissibility issue was not raised on appeal.

27. Midland Bank Trust Co v Green differs from the present case in two important respects. First, the material supplied by the Trustees to D2 has at all material times been protected by the Confidentiality Order. There was no such order in place in Midland Bank Trust Co v Green. Secondly, under the modern approach to Beddoe applications adumbrated by Waite JA in STG Valmet v Brennan, which aims to allow the claimant in the main action to participate in the Beddoe hearing as fully as reasonably practicable, the Trustees would have been expected to disclose the Permitted Material to D2 if they wished to rely upon it as it was not privileged and did not disclose their view of the strengths or weaknesses of D2's claim in the Main Action. Under the more traditional approach to Beddoe applications exemplified by Midland Bank Trust Co v Green the Trustees would have been under no such obligation.

28. These points are related. Had the Confidentiality Order not been in place, the risk that D2 might have sought to use the Permitted Material to attack the Trusts in the Main Action would arguably have been a good reason for the Trustees not to disclose it to D2.

29. Re 3 Trustees [2007] EWHC 1922 (Ch) provides a good example of the modern approach to Beddoe disclosure. The trustees of two trusts were shortly to bring a Beddoe application with respect to proposed proceedings in which they intended to seek significant relief against Mrs A, a beneficiary under one of the trusts and a former trustee of them both. She sought fuller disclosure of the material upon which the Beddoe Court was to be invited to act than had so far been made available to her. The Court agreed that she should have it.

30. Lindsay J noted at para 32 that the "*full disclosure of all relevant matters*" required by the Civil Procedure Rules ("CPR") PDB 64.7.1 would appear to be able to include not just a Beddoe judge but, eg, a beneficiary who was a prospective opponent in the main proceedings and who would have a concern to ensure that disclosure to the judge made by the trustee was fair and adequate.

31. "*Full disclosure of all relevant matters*" is to all intents and purposes the same as the "*full and frank disclosure*" required on a Beddoe application in some other jurisdictions, including Bermuda. By parity of reasoning, and applying the approach advocated by Waite JA in STG Valmet v Brennan, disclosure should also be able to include a stranger to the trust who is a party to the Beddoe proceedings. That is of course what has happened in the instant case, in which D2, although incapable of being a beneficiary of the Trusts, asserts in the Main Action a proprietary interest in the assets held by the Trustees. Or, as D2's counsel Ms Talbot Rice QC put it, D2 seeks to uphold (what is on D2's case) the true trust on which the assets are held.

32. Lindsay J accepted that the trustees would not necessarily disclose every document which they placed before the Beddoe judge to all or even any of the other parties to the application. Eg counsel's opinion on the merits of

hostile proceedings brought or defended by the trustees would be unlikely to be made available to a non-beneficiary or a beneficiary who was a hostile litigant. Another example, which arose on the particular facts of that case, was valuation evidence. The judge accepted that if the latest valuation evidence procured by the trustees might seriously affect or restrict their role in negotiating a compromise then they were properly able to withhold it from Mrs A at the Beddoe stage or alternatively to disclose a redacted copy. This was notwithstanding that the valuation would probably have to be disclosed in the main action.

33. The *leitmotif* running through Lindsay J's judgment was that, unless there was a good reason to withhold it, the trustees should incline towards disclosing to any beneficiary, or party to the Beddoe proceedings who had a proper interest in receiving it, the material that would be disclosed to the Beddoe judge. Eg with respect to one topic, possible future leasehold enfranchisement, which related only to the trust of which Mrs A was not a beneficiary, the judge stated at para 41:

> "*I find it difficult to contemplate that there may be matters in the Trustees' advices received or in their other papers which will put her, as against the Trustees, at some special unfair advantage or which will unfairly lead her to avoiding some disadvantage … unless the Trustees feel able to conclude that some material tactical or other disadvantage would be likely to be unfairly suffered by the Trustees from disclosure, material on this subject should be disclosed to any … beneficiary who presses for it*."

34. Those observations were directed at disclosure by the trustees within the Beddoe proceedings. But they are apposite when considering whether to vary the Confidentiality Order. It would be unreasonable to expect the Trustees to disclose material to D2 within the Beddoe proceedings if by doing so they ran the risk of conferring an unfair advantage upon D2, or putting themselves at an unfair disadvantage, in the Main Action.

35. The Trustees placed particular reliance on two more recent cases, both from Jersey. The first was Deery v Continental Trust Company Limited [2010] JRC001, Royal Court. I adopt the statement of facts from the note of the decision reported at 2010 JLR Note 8. Letters of request were issued by the

Family Division of the High Court of England and Wales ("the Family Division") seeking the assistance of the Royal Court in respect of matrimonial proceedings between the applicant and her husband. The husband was the settlor and principal beneficiary of certain Jersey trusts and the letters sought the production of affidavits sworn by the trustee on an application to the Royal Court for directions under article 51 of the Trusts (Jersey) Law 1984 ("the 1984 Law"). It is not clear from the judgment whether that application was analogous to a Beddoe application or was some other application for directions – article 51 is drafted in broad terms.

36. The Court (Bailhache DB and two jurats) started from the position that it should, where possible, give effect to letters of request. However in the present case it was not possible to do so. Bailhache DB stated:

"*6(d) ... it is clear from the material we have seen that it is absolutely necessary that a trustee should be able to come to Court under Article 51 to make a candid appraisal of its position and the problems which are to be addressed. If trustees thought that such Affidavits and applications might be provided to those with hostile eyes upon the trust or the trust fund, they would be less likely to be candid and the whole purpose underlying the Article 51 procedure would be liable to be frustrated.*

7 For this reason alone we regret that, applying our own law, we do not think it proper to give effect to the Letters of Request."

37. The Court also noted that the exhibits to the affidavits, which exhibits were not expressly mentioned in the letter of request, contained material which gave rise to claims of privilege and confidence which it would expect an English Court to uphold. It is not clear from the judgment whether that material had been disclosed by the trustee to the applicant or her husband.

38. The second case was A, B and C v Rozel Trustees (Channel Islands) Limited), Royal Court. A husband and wife were engaged in divorce proceedings before the Family Division. The husband's children by his first marriage were the adult beneficiaries of some Jersey trusts. They obtained leave to attend a financial dispute resolution hearing in the divorce proceedings. This was on condition that they gave an undertaking to the Family Division to produce if so required copies of documents that had been

supplied to them in an application to the Royal Court for directions under article 51 of the 1984 Law. The application was analogous to a Beddoe application in that the trustees sought *inter alia* approval of their decision not to submit to the jurisdiction of the Family Division in the divorce proceedings.

39. The adult beneficiaries, who all lived in England and were subject to the personal jurisdiction of the Family Division, had put themselves in an awkward position. If they produced the documents without leave of the Royal Court they might be in contempt of that Court because the article 51 proceedings were held in private. (Jersey law differs from English and Bermuda law in this respect.) But if they refused to produce them if so required they would be in contempt of the Family Division. They applied to the Royal Court for leave to disclose to the Family Division, so far as necessary, the papers served on them in the article 51 proceedings.

40. The Court (Birt B and two jurats) referred with approval to the passages cited above from Deery v Continental Trust Company Limited and the judgment of Templeman J mentioned in Midland Bank Trust Co v Green. Speaking of article 51 applications generally, the Court stated:

> "*15 It is of vital importance that, if such applications are to serve the purposes for which they are intended, information and documents received by those who are convened as parties to such proceedings should be held in confidence. The trustee is under a duty and must feel able to make full and frank disclosure in relation to the application. It must be able to summarise the arguments for and against the proposed course of action, including any weaknesses or possible risks in relation to what is proposed.*
>
> . . . . .
>
> *21 As just explained, the Court considers that it is in the interests of justice that trustees should be able to come before this Court in private, confident in the knowledge that they may speak frankly to the Court and that what is said or produced to the Court and to the other parties to the private proceedings will not be released to third parties or used for purposes other than the private proceedings.*"

41. The Court analysed the material which the beneficiaries sought leave to disclose as falling into three categories: (i) privileged material, ie the legal advice obtained by the trustee for the article 51 hearing; (ii) sensitive

material, ie material showing the reasoning or decision making process of the trustee or other parties to the article 51 hearing; and (iii) other material.

42. The Court refused leave to disclose the privileged material, and ordered that prior to disclosure various documents which referred to it should be redacted. The Court gave leave to disclose all the sensitive and other material. It stated that for the reasons set out above it would normally refuse permission to do so. However its disclosure was permitted on this occasion because of the undertaking to the Family Division and the fact that the "sensitive" material was not in fact particularly sensitive.

43. Mr Adkin QC, who appeared for the Trustees, submitted on the strength of these authorities that the Court should only permit a party to Beddoe proceedings to use material disclosed to them in those proceedings in exceptional circumstances. The Rozel Trustees case, he submitted, presented a good example of just such an exceptional circumstance. Mr Cran QC, who appeared for D2, did not agree with this proposed test, which, he submitted, was not supported by anything which the courts had actually said.

44. As to the "*full and frank disclosure*" point, Mr Cran drew a distinction between what he termed "*Category A*" material, which corresponded broadly with privileged and sensitive material as defined by the Court in the Rozel Trustees case, and "*Category B*" material, which corresponded broadly with other material as defined by the Court in the Rozel Trustees case. He accepted that trustees might legitimately be concerned about the use of Category A material in other proceedings, but submitted that they need not be inhibited about disclosing it to the Court as they were entitled to withhold it from the other parties to the application. Whereas an issue might arise as to whether they could withhold it from a beneficiary outside of a hostile litigation context, that was not the issue here. The Trustees could, Mr Cran submitted, have no reasonable objection to a party to the Beddoe proceedings using Category B material outside of those proceedings as it was neither privileged nor sensitive. Indeed, much of the material which D2 sought to use in the instant case would be discoverable in any event.

45. Mr Cran invited the Court to consider the analogous topic of discovery. Under Order 24, rule 1 of the Rules of the Supreme Court 1985 ("RSC") the parties to the action are required to provide discovery of documents which are or have been in their possession, custody or power relating to matters in question in the action, including documents adverse to their interests. Put another way, they are required to give full and frank disclosure. The documents thus produced are subject to an implied undertaking not to use them for any purpose other than the proper conduct of the action ("the collateral purpose rule"). See eg the leading speech of Lord Oliver in Crest Homes Plc v Marks [1987] 1 AC 829 at 853 G.

46. It was common ground that the Permitted Material was not covered by such an implied undertaking as the documents of which it consists were not disclosed by compulsion. See the judgment of Sir Nicholas Browne-Wilkinson V-C (as he then was) in Marcel v Commissioner of Police [1992] Ch 225 at 237 B – C, which on appeal was reversed in part but not on this point. Mr Cran submitted that the principles governing the variation or release of an implied undertaking nonetheless suggest a helpful approach to the variation of the Confidentiality Order.

47. The applicable principles were analysed by Jackson LJ, giving the judgment of the Court, in Tchenguiz v SFO [2014] EWCA Civ 1409. It is immaterial that the case was decided under the CPR rather than the RSC (EW). This was an unsuccessful appeal against an order of the Commercial Court refusing permission for documents disclosed in litigation in England to be used in litigation in Guernsey. The principal issue was whether the judge had correctly weighed up the conflicting public interests in play:

> "*56 The courts have stated the rationale of the collateral purpose rule on a number of occasions. First, a party receiving documents on discovery impliedly undertakes not to use them for a collateral purpose. Secondly, the obligation to give discovery is an invasion of the litigant's right to privacy and confidentiality. This is justified only because there is a public interest in ensuring that all relevant evidence is provided to the court in the current litigation. Therefore the use of those documents should be confined to that litigation. Thirdly the rule against using disclosed documents for a collateral purpose will promote compliance with the disclosure obligation.*

57 In Crest Homes Plc v Marks & Others [1987] 1 AC 829 the plaintiffs brought two successive actions against the same defendants (Mr Marks and Wiseoak Homes Ltd) for breach of copyright. They obtained Anton Piller orders in both actions. The documents which the plaintiffs obtained from the defendants in the second action showed that the defendants had not complied with the Anton Piller order in the first action. Both the Court of Appeal and the House of Lords permitted the plaintiffs to use the documents obtained from the defendants in the second action for the purpose of bringing contempt proceedings in respect of the defendants' breach of the Anton Piller order in the first action. In the House of Lords Lord Oliver gave the leading speech, with which Lords Keith, Templeman, Griffiths and Mackay agreed. Lord Oliver stated that it was for the party seeking release from the collateral purpose rule to 'demonstrate cogent and persuasive reasons'. The court would not permit the use of disclosed documents for a collateral purpose 'save in special circumstances and where the release or modification would not occasion injustice to the person giving discovery.' In the Crest Homes case 'special circumstances' existed.

. . . . .

65 Upon reviewing the authorities it seems to me that the decisions reached are highly fact sensitive. The court is weighing up conflicting public interests in a variety of different circumstances. There is sometimes a tendency in the judgments to slant the language used, or at least the emphasis, somewhat in favour of the public interest which prevails in that particular case.

66 The general principles which emerge are clear:

i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22 (1) (b) if there are special circumstances which constitute a cogent reason for permitting collateral use.

. . . . .

iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination. There are decisions going both ways in the authorities cited above."

48. In Springfield v Bridgelands [1992] 110 ALR 685, Federal Court of Australia – General Division, the Court provided a helpful gloss on the meaning of "*special circumstances*" in Crest Homes Plc v Marks. Drawing on a line of Australian cases, Wilcox J held at 693 lines 27 – 41:

"*For 'special circumstances' to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the Court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it came into existence, the attitude of the author of the document and any prejudice the author may sustain, whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain, the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information), the circumstances in which the document came into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding.*"

49. The importance of achieving justice in the second proceedings, which he referred to as "*satellite*" proceedings as opposed to the "*hub*" proceedings in which the documents were disclosed, was emphasised by Laddie J in Cobra Golf Inc and Anr v Rata and Ors [1996] FSR 819, Ch D at 830:

"*In the end the interests of justice must prevail and that will sometimes mean that the documents must be released for collateral use. In deciding how to exercise the discretion the court must also bear in mind, as Denning M.R. said in [Riddick v Thames Board Mills Ltd [1977] QB 881], that*

> *'the reason for compelling discovery of documents lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure.'*

That principle operates in favour of releasing relevant documents from hub into satellite proceedings as long as no significant injustice is done to the disclosing party."

50. At para 11 of his judgment Laddie J, like Wilcox J, set out a list of factors which may be relevant to the exercise of the Court's discretion:

"*(a) The extent to which relaxation of the undertaking will cause injustice to the party which provided the discovery.*

(b) Whether the proposed collateral use is in court proceedings or outside litigation (e.g. for disclosure to the press …). Prima facie if it is for use outside litigation, it is not the court's function to release for that purpose.

(c) Whether, if the collateral use is in aid of criminal or civil proceedings, those proceedings are in this country or abroad.

(d) In so far as the satellite proceedings are in this country:

. . . . .

(ii) If the collateral use is for civil proceedings, the court should take into account:

(a) whether the hub proceedings and the satellite proceedings are similar in character.

(b) whether the parties in the two sets of proceedings are the same;

(c) the extent to which the party seeking relaxation of the undertaking would be able to obtain discovery by another route and, if so, which route is likely to be cheaper or quicker;

(d) whether the effect of the relaxation of the undertaking will have the effect of generating new proceedings or whether it will merely help in pursuing a claim or defence which already exists or could be run anyway;

(e) prima facie it is not in the interests of justice to hinder a party from advancing a good claim or defence in other proceedings;

(f) prima facie it is not in the interests of justice to allow discovery in the hub action to be released for the purpose of supporting the initiation of contempt proceedings in the satellite action, at least if the two proceedings are 'unrelated'."

51. Similar principles apply to the law relating to breach of confidence. Disclosure of allegedly confidential material relating to the commission of a crime or civil wrong will be justified if the disclosure is in the public interest. Reasonable suspicion that the confidence relates to wrongdoing will suffice for the defence to be raised. See Gurry on Breach of Confidence, Second Edition 2012, at para 16.08. The Court will have to

balance the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material. See AG v Guardian Newspapers (No 2) [1990] 1 AC 109 *per* Lord Griffiths at 268 H – 269 A. This might include what Scott Baker LJ described in Frankson v Home Office [2003] 1 WLR 1952 at para 13 as:

"*... the public interest of ensuring that as far as possible the courts try civil claims on the basis of all the relevant material and thus have the best prospect of reaching a fair and just result*".

52. Mr Cran suggested that the law relating to breach of confidence provides a helpful analogy with D2's position and submitted that there was a public interest in permitting D2 to investigate the Trustees' alleged breaches of fiduciary duty.

53. The case upon which Mr Cran placed most reliance was another decision from Jersey: Trilogy Management Ltd v YT Charitable Foundation International Ltd and Ors [2014] JRC 182. The plaintiff sought permission to use in an English action against a firm of solicitors documents which had been disclosed in private proceedings relating to funds held on charitable trusts ("the trustee directions proceedings"). I infer that the private proceedings were brought under article 51 of the 1984 Law or were analogous to such proceedings.

54. The documents were confidential because they had been disclosed in proceedings held in private. Some of them were also confidential because they had been produced subject to an order of the Court which carried an implied undertaking not to use them in other proceedings without the Court's permission.

55. Commissioner Herbert QC held at para 4 that the test for deciding whether to authorise the use of all or part of the documents in the English proceedings was the same irrespective of the reason why they were confidential: namely a version of the test for documents covered by an implied undertaking:

"*In short, the task of the Court can be summarised in this way: to consider the criteria identified in the Springfield case, namely the nature and provenance of the document in question, its forensic value in the proposed litigation, and the importance of the privacy imposed by the court; to avoid disclosing the nature and result of private proceedings; and to avoid harm to the trust in question and its assets.*"

56. The Commissioner did not advert to the need for special circumstances identified by Lord Oliver in Crest Homes Plc v Marks and accepted by the Court in Springfield v Bridgelands. The criteria which he identified overlapped with the factors mentioned in Springfield but were not identical with them. Although the Commissioner stated that one of the decisions on which his judgment was based was the Rozel Trustees case, in which the Court did not apply the implied undertaking test, he did not explain how he reconciled the reasoning in Rozel Trustees with his own reasoning or alternatively why he declined to follow it. Nevertheless I accept that the analogy with implied undertakings may be helpful when considering whether to give leave to use confidential material disclosed on an application by trustees for directions.

57. The plaintiff had originally sought permission to use documents filling an estimated 100 lever arch files. The Commissioner had adjourned that application. The plaintiff renewed its application, but limited to those documents or parts of documents, filling (a still substantial) five lever arch files, which it would immediately need in the early stages of the English proceedings. These included at least one affidavit prepared specifically for the trustee directions proceedings.

58. The renewed application was successful, save for the pleadings in the trustee directions proceedings, which did not satisfy the criteria for disclosure identified by the Court, and any documents sought to be relied on by the plaintiff that were covered by legal professional privilege. The Commissioner held that as none of the parties had satisfied him that public disclosure would cause particular harm to the charitable trusts, the forensic value of the documents in the English proceedings justified the Court in granting permission to use them for that purpose.

Decision on disclosure of confidential material

59. The purpose of a Beddoe application is, as Mr Adkin submitted, to allow the trustees to obtain guidance from the Court and not to provide a hostile litigant with ammunition. Unlike mainstream civil litigation, in Beddoe proceedings there is no discovery, in which a litigant is required to disclose documents which will or may assist an opponent and which can then be used against him. Nonetheless, the interests of justice require that claimants to a trust fund, whether beneficiaries or strangers to the trust, should have the maximum opportunity to participate in a Beddoe application consistent with its purpose.

60. That is the philosophy that underpins the Confidentiality Order. D2 got to see material that D2 would not otherwise have seen prior to discovery in the Main Action or in some instances at all. But that was on condition that D2 could not use this material for any purposes other than that of the Beddoe proceedings in which it was disclosed to D2. This restriction does not apply to any such material which D2 obtains independently of these proceedings, eg through discovery in the Main Action, or which is already in the public domain otherwise than by a breach of the Confidentiality Order.

61. The Trustees have disclosed material to D2 in reliance on the Confidentiality Order. Indeed they sought and obtained the Order before making any disclosure to D2. Had no such Order been in place they could fairly have withheld such material from D2 while disclosing it to the Court. When D2 applied for its disclosure they would have had at the very least a good arguable case that D2 should not have it. True it is that the Confidentiality Order provides in express terms for an application for its variation or discharge. But D2 did not make any such application until after D2 had been provided with all the Permitted Material.

62. The confidentiality of Beddoe proceedings is not absolute. Rozel Trustees was a paradigm case where the Court permitted parties to use material disclosed to them in Beddoe type proceedings in other proceedings. What principles, then, should govern such permitted disclosure? Mr Adkin

submitted that the use of disclosed material in other proceedings should only be permitted in exceptional circumstances. Mr Cran submitted that the Court should conduct a balancing exercise, weighing the importance of preserving the integrity and confidentiality of the Beddoe proceedings on the one hand against the interests of justice and in particular the proper exploration of potential wrongs on the other.

63. In my judgment the right approach is best expressed by Lord Oliver's test in Crest Homes v Marks for the disclosure of material subject to an implied undertaking, namely: (i) whether there are special circumstances, which I take to mean cogent reasons for disclosure particular to the facts of the case which would not normally be present in other cases, as opposed to particular examples of generic reasons which might apply to many cases; and (ii) whether the release or modification would cause injustice to the party giving disclosure, in this case the Trustees. Whether in this context "*special*" has the same meaning as "*exceptional*" is not a discussion into which I need enter.

64. I bear in mind that although implied undertaking cases are analogous to the present case they are not the same: the strong policy reasons militating against disclosure in Beddoe cases means that an applicant will likely have a more onerous task than if he were merely dealing with an application for the release of an implied undertaking. Specifically, subsequent to Crest Homes v Marks the case law in relation to implied undertakings has tended to invite the Court to look at the justice of disclosure "*in the round*": in the present application, as in other applications where Beddoe disclosure is confidential to the Beddoe proceedings, the focus where the Court has found that there are special circumstances should be firmly on whether disclosure would cause any injustice to the Trustees.

65. It is to be hoped that this approach will discourage aggressive, well-resourced litigants from conducting Beddoe applications with an eye to the collateral use that might be made of any disclosure obtained in them. This in turn should help to prevent the Beddoe Court from becoming embroiled in satellite litigation on this issue.

66. As to the present case, D2 seeks to use the Permitted Material to augment the pleading of existing causes of action in the Main Action; plead a new cause of action in the Main Action; plead new causes of action in future proceedings; and follow a chain of enquiry which may lead to yet further proceedings. Through D2's counsel, D2 has explained why D2 seeks permission to use the Permitted Material in precise, concrete terms. In my judgment, however, D2's reasons are particular examples of generic reasons which might apply to many cases. They do not amount to special circumstances.

67. As to whether disclosure would cause any injustice to the Trustees, I draw a distinction between documents in the Permitted Material which will be discoverable in any event even if the Confidentiality Order is not varied ("Category 1 material"), and documents in the Permitted Material which will not, eg affidavits which were created specifically for the purposes of the Beddoe proceedings, ("Category 2 material").

68. Mr Adkin submitted that permitting D2 to use Category 1 material for the purposes of the Main Action would be unjust to the Trustees as it would in effect provide D2 with partial early action discovery, which under the RSC is not available in Bermuda. This, it was submitted, would give D2 an unfair tactical advantage. However Mr Adkin did not identify any specific prejudice which the Trustees would suffer as a result of such early disclosure. Neither did he ask the Court to hear him on the issue in the absence of D2's lawyers, which he could have done had there been any specific prejudice about which he did not wish to alert D2. I suppose, as with any action, it is always possible that for whatever reason the Main Action will not reach the discovery stage, but that is mere speculation.

69. In my judgment, on the material before me on this application, there would be no injustice to the Trustees in permitting D2 to use Category 1 material for the purposes of the Main Action. This would permit D2 to apply to amend D2's statement of claim now, rather than waiting to apply until after discovery has taken place. That would appear to me to be a sensible and cost-effective way to proceed consistent with the overriding objective of

dealing with cases justly. However it would be wrong in principle for me to waive or dilute the requirement of special circumstances for the sake of good case management.

70. I accept Mr Adkin's submission that permitting D2 to use Category 2 material in the Main Action and the proposed Trust J Action would be unjust to the Trustees. D2 should not have the litigation advantage of using in those proceedings material to which D2 would never have had access but for D2's participation in the Beddoe proceedings. However I am not satisfied that it would be unjust to the Trustees to permit D2 to use Category 2 material for the purpose of making enquiries regarding Trust K: on the material before me it does not appear likely that in any resulting action relief would be sought in relation to the assets of the Trusts.

71. In summary, D2's application for leave to use the Permitted Material for purposes outside of the Beddoe proceedings is dismissed as D2 has failed to establish the existence of any special circumstances and, in respect of Category 2 material relating to the Main Action and the proposed Trust J Action, because its use would be unjust to the Trustees.

72. However, and bearing in mind the overriding objective, I invite the Trustees to give serious consideration as to whether to consent to the use by D2 of Category 1 material in the Main Action so that D2 can apply to amend D2's statement of claim in early course. It appears to me that most (though not all) of the amendments sought could probably be made without reference to the Category 2 material. Although the point was contentious, I accept Mr Cran's judgment, embodied in the slimmed down list of documents which he has supplied to the Court, as to which documents within the Permitted Material would be strictly necessary for this purpose.

Other variations sought to the Confidentiality Order

73. D2 also seeks to vary the Confidentiality Order so as to:

(1) enable D2 to discuss Confidential Information with the Heirs, on whose behalf D2 states that D2 has brought the Main Action, and the beneficiaries of Trust J, whom D2 wishes to represent in the proposed action in relation to that trust;

(2) clarify the wording of the Confidentiality Order "*so as to make it clear beyond doubt*" that D2 can reveal Confidential Information to all persons providing professional assistance to D2, not just qualified lawyers; and

(3) ensure that the Confidentiality Order applies in the same way (ie symmetrically) to the Trustees as it does to the Defendants.

74. I shall deal briefly with each of these points in turn.

(1) If the Heirs wish to have access to the material disclosed in these Beddoe proceedings then, even at this late stage, they can apply to be joined to the proceedings for that purpose. Otherwise, D2 is not to discuss the Confidential Information with them. D2 has no business discussing it with the beneficiaries of Trust J, who have no interest in these proceedings.

(2) In the Confidentiality Order, the reference under "*Permitted Recipient*" to "*a legal representative of a defendant*" was intended to include a servant or agent of a legal representative, eg a paralegal or secretary. Although it is in my view unnecessary, I have no objection to varying the wording of the Order to say so in express terms.

(3) The Confidentiality Order is asymmetric because the obligation to make disclosure under the Order was asymmetric. I am satisfied that the asymmetric restrictions on disclosure have worked well and at this late stage in these proceedings I do not propose to vary them.

75. I shall hear the parties as to costs.

DATED this 13th day of July, 2015

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Hellman J