Judgment 38/2004 **Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited et al – Royal Court (Civil action file 780) – 14 September, 2004**

Trusts (Guernsey) Law, 1989 – administration and supervision of "Guernsey trusts" and "foreign trusts" – powers of the Royal Court to supervise and, where necessary, intervene – nature of a beneficiary's right or claim to disclosure of documents

IN THE ROYAL COURT OF GUERNSEY

The 14th day of September, 2004 before Patrick John Talbot QC, Lieutenant Bailiff;sitting alone

In the matter of:

GLORIA WESLEY COUNTESS BATHURST
(Applicant)

v.

KLEINWORT BENSON (CHANNEL ISLANDS) TRUSTEES LIMITED
(First Respondent)

and

CAREY OLSEN TRUST COMPANY (GUERNSEY) LIMITED
formerly
CAREY LANGLOIS TRUST COMPANY LIMITED
(Second Respondent)

and

RUSSELL CLARK
(Third Respondent)

Whereas on 5th, 16th and 19th day of July, 2004 the Lieutenant Bailiff considered an application by the Applicant under sections 22, 33 and 63 of the Trusts (Guernsey) Law 1989 for the delivery to her of trust instruments and other trust documents and for an order for disclosure and

Whereas on 19th July the Third respondent was joined as a party to these proceedings and

Whereas the Lt Bailiff heard thereon Advocates P Richardson, Counsel for the Applicant, and Advocate N Barnes, Counsel for the Second and Third Respondents, the First Respondent being represented by Advocate R Shepherd and

Whereas the Lieutenant Bailiff handed down a judgment on 9th August, 2004 and

Whereas, on 10th September 2004, the Lieutenant Bailiff considered submissions as to costs and also considered an application by counsel for the Second and Third Respondent to vary the said judgment handed down on the 9th August and heard thereon Advocate P Richardson for the Applicant, Advocate R I C E Harris, Counsel for the Second Respondent and Advocate J M Wessels Counsel for the Third Respondent, Advocate R Shepherd appearing for the First Respondent the Lieutenant Bailiff THIS DAY handed down an Amended Judgment as appended hereto together with an Addendum to the said Judgment also appended hereto and ORDERED as follows:-

1. The Second Respondent shall provide to the Applicant or to Collas Day as advocates for the Applicant as the case may be, good photocopies of the documents referred to in Clause 2.2 below within 56 days from the making of this Order.
2. The documents referred to are:
    2.1 In respect of the First Respondent:
        2.1.1 The Deed of Retirement and Appointment of Trustees of The Second Wheatland Trust dated 31st August 2001;
        2.1.2 The Deed of Indemnity dated 31st August 2001;

2.1.3 To Collas Day only as advocates for the Applicant, any Letters of Wishes or similar documents from Mr Clarry to it or to its predecessor as trustee of The First Wheatland Trust and to it both as prospective and as actual trustee of The Second Wheatland Trust, so long as such letters or similar documents remain in the possession or under the control of the First Respondent;

2.1.4 All trust accounts of The First Wheatland Trust for the calendar year 1999 including the entire period during which the First Respondent was a trustee of The First Wheatland Trust;

2.1.5 All trust accounts of The Second Wheatland Trust for the period between commencement on 1st October 1999 and the retirement of the First Respondent on 31st August 2001;

2.1.6 Minutes of the meetings of members and of directors of (a) Air Holdings Limited and (b) Moore Wilson & Blair Limited for the period between 20th May 1999 and 20th November 2001;

2.1.7 Such minutes of meetings of members and directors of (a) Atlantic & Caribbean Trust S.A. and (b) Boulevard Investments Limited and such resolutions relating to the affairs or either such company as may be or at any time between 20th May 1999 and 20th November 2001 may have been in the possession or control of the First Respondent;

2.1.8 All accounts of (a) Air Holdings Limited, (b) Moore Wilson & Blair Limited, (c) Atlantic and Caribbean Trust S.A. and (d) Boulevard Investment Limited as may be or at any time between 20th May 1999 and 20th November 2001 may have been in the possession or control of the First Respondent.

2.2 In respect of the Second Respondent:

2.2.1 The Deed of Retirement and Appointment of Trustees of The Second Wheatland Trust dated 31st August 2001;

2.2.2 The Deed of Indemnity dated 31st August 2001;

2.2.3 Any deed or other document dated on or about 20th November 2001 under which The Second Wheatland Trust came to an end by appointment of the entire trust assets to Wheatland Alliance Limited;

2.2.4 To Collas Day as advocates for the Applicant, any Letters of Wishes or similar documents from Mr Clarry;

2.2.5 All trust accounts of The Second Wheatland Trust between the appointment of the Second Respondent and the termination of the Second Wheatland Trust on or about 20th November 2001, such accounts to include a valuation at or about the date of the end of the period to which they relate of each of the shares then held as part of the trust assets and that if no such accounts exist they are to be produced and disclosed;

2.2.6 Minutes of the meetings of members and of directors of (a) Air Holdings Limited and (b) Moore Wilson & Blair Limited for the period between 20th May 1999 and 20th November 2001;

2.2.7 Such minutes of meetings of members and directors of (a) Atlantic & Caribbean Trust S.A. and (b) Boulevard Investments Limited and such resolutions relating to the affairs or either such company as may be or at any time between 20th May 1999 and 20th November 2001 may have been in the possession or control of the Second Respondent;

2.2.8 All accounts of (a) Air Holdings Limited, (b) Moore Wilson & Blair Limited, (c) Atlantic and Caribbean Trust S.A. and (d) Boulevard Investment Limited as may be or at any time between 20th May 1999 and 20th November 2001 may have been in the possession or control of the Second Respondent.

3. The Third Respondent to provide the Applicant with an affidavit in which the Third Respondent deposes:

3.1 To the fact, if it actually occurred, of his consultation with the Second Respondent and the obtaining of its consent to the decision made by him to exclude the Applicant as a beneficiary and the approximate timing of his consultation and the trustees' consent; and

3.2 The obtaining by the Second Respondent, if it actually occurred, of his consent pursuant to Clause 6(d)(i) of the 1999 deed to the appointing of the entire trust assets of The Second Wheatland Trust to Wheatland Alliance Limited on or about 20th November 2001.

4. As regards the Applicant and the Second Respondent the Second Respondent is to pay the Applicant 90% of her costs on the standard recoverable basis with written reasons for the said order to follow.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Text

No. 780

THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

B E T W E E N:

GLORIA WESLEY, COUNTESS BATHURST

Applicant

- and -

(1) KLEINWORT BENSON (CHANNEL ISLANDS) TRUSTEES LIMITED
(2) CAREY OLSEN TRUST COMPANY (GUERNSEY) LIMITED
(3) RUSSELL CLARK

Respondents

Advocate Paul Richardson for the Applicant
Advocate Robert Shepherd for the First Respondent
Advocate Iain Harris for the Second Respondent
Advocate Jeremy Wessels for the Third Respondents

ADDENDUM TO JUDGMENT

1. I delivered a Judgment in this matter on 9 August 2004.

2. After the Judgment the parties have liaised on the terms of the Order to be made as a result, but they have been unable to reach agreement on all parts of the Order or on the issue of costs. Accordingly, a further oral hearing took place on Friday 10 September 2004, when all four parties were represented by Counsel.

3. At the end of that hearing I granted the Second Respondent a stay of execution for a period of two months of those parts of my Judgment (paragraphs 141-142) in which I

ordered the Second Respondent to disclose company documentation. I decided that, in the light of the affidavit of Mrs Duchemin, a director of the Second Respondent, sworn on [9] September 2004, ("Mrs Duchemin's affidavit",) it was appropriate to give the company a further period in which to attempt full performance of what I had ordered it to do. I also gave the Second Respondent liberty to apply on 48 hours notice to the other parties in respect of these matters. I did not, however, decide that it was appropriate for me to make any changes to the substance of what I had ordered in paragraphs 141-142.

4. Mrs Duchemin's affidavit, (which I admitted to evidence, with some hesitation, in the interests of justice despite the fact that it was sworn very, very late in the day, *i.e.* after Judgment had been given but before the Order had been perfected,) also disclosed the fact that, far from the impression which I had gathered at the full hearing in mid-July 2004, the Second Respondent's then advocate, Advocate Barnes, *had* known that the Second Wheatland Trust had been brought to an end on about 20 November 2001 and had known of a deed of that date, which had such an effect. It must, therefore, I believe, follow that Advocate Barnes had forgotten these important facts and that, during the course of these proceedings, he had forgotten that he had been fully instructed by the Second Respondent on this aspect of the case. This is, of course, a very unfortunate circumstance and it has probably led to a high degree of unnecessary misunderstanding on the part of the Applicant, her Advocate and the Court.

5. But I confirm that Mr Barnes' mistake in no way affected either the conclusions of law which I reached in my Judgment or the way in which I exercised my discretion. Indeed, Advocate Harris on behalf of the Seconbd Respondent did not submit that I should revisit my decision on any such basis.

6. Nevertheless, the admission of Mrs Duchemin's affidavit means, in my view, that, as requested by Advocate Harris, I should reconsider my Judgment, and, in particular, paragraphs 46-51.

7. I have decided to issue this Addendum so that the version of the facts now relied upon by the Second Respondent regarding its failure to inform Lady Bathurst, the First Respondent and the Court of the termination of the Second Wheatland Trust is properly

taken into account. I must, however, stress that it has not been at all helpful to have the evidence on this important matter at such a late stage of the proceedings and that the reasons for the Second Respondent's failure to provide evidence on the lines of Mrs Duchemin's affidavit during the course of the main proceedings make unhappy reading and, in my judgment, do not really justify the Second Respondent's failure. Nevertheless, since I have the opportunity to correct the misunderstandings to which I have referred, I am sure that, in all the circumstances of the case, it is right for me to take it.

8. I have decided that it is necessary, in the interests of justice, for me to make the following changes to paragraphs 46 to 51 of my Judgment.

9. As to paragraph 46, I replace the words "It soon became apparent" at the start of the second sentence with "It seemed to me". In the light of the information now before the Court, I also add this sentence at the end of the paragraph: "It was only when Mrs Duchemin, a director of the Second Respondent, swore an affidavit on 9 September 2004 that it became clear to the Court that Advocate Barnes had been fully instructed by his client, it seems just before these proceedings were commenced, about the termination of the Second Wheatland Trust on about 20 November 2001, but had forgotten this fact and had, therefore, not informed the Court of it."

10. As to paragraph 47, I remove the words "and the Second Respondent" from the first sentence and I add the words "and Advocate Barnes" to the end of the second sentence. I do not propose to make any other changes to paragraph 47.

11. As to paragraph 48, I make no changes.

12. As to paragraph 49, I remove the words ", (and, indeed, Advocate Barnes,) have" and replace them with the word "has".

13. As to paragraph 50, I remove the whole of the last sentence.

14. As to paragraph 51, I replace the paragraph with the following paragraph:

"However odd it may, at first blush, appear, I consider that it is more likely than not that those representing the Second Respondent in these proceedings, and the officers of the Second Respondent responsible for instructing Advocate Barnes, must have thought that the termination of the Second Wheatland Trust was not something which either the Court or the other parties needed to know. If they had so thought, they were, in my judgment, clearly wrong. In any event, I have found it hard to understand the reasoning behind the position taken by the Second Respondent, but, in allowing, in effect, the Court and the other parties to remain in the dark on a highly material matter in the context of the Application before the Court, the Second Respondent and its advisers have allowed a material factual misunderstanding to occur. Fortunately, the misunderstanding was corrected in the course of the oral hearing in mid-Jul 2004. Mr Clark and Mr McAuliffe have deposed that neither they nor the Second Respondent intended to mislead either the Royal Court or Lady Bathurst and her Advocate. I accept their evidence. But the fact that this factor *did* so mislead both the Royal Court and Lady Bathurst and her Advocates, Collas Day, (including Advocates Collas and Richardson,) is, in my view, another matter altogether and a factor which may be relevant in the context of the Court's discretion in these proceedings whether or not to make an order for disclosure in Lady Bathurst's favour."

15. I do not consider it necessary to make any other changes to my Judgment. In particular, I stress that, despite Advocate Harris's submissions and Mrs Duchemin's affidavit, I make no changes to either paragraph 67 or paragraph 69 or paragraph 87 or paragraph 134.

16. I now turn to the question of costs. At the end of the oral hearing on 10 September 2004 I made the following orders as to costs:

- I made no order for costs in favour of the Applicant against either the First Respondent or Mr Clark.

- I made an order that the Second Respondent pay 90% of the Applicant's costs of the proceedings to be taxed on the recoverable basis. I declined to make an order for taxation of any of these costs on the indemnity basis.

- I declined to make an order that either the First Respondent or Mr Clark make a contribution to the Second Respondent towards any part of the Order for costs made by me in favour of the Applicant against the Second Respondent.

17. I ordered the great majority of the Applicant's costs to be paid by the Second Respondent primarily on the basis that the Applicant had "won" the proceedings against the Second Respondent, which had defended them on a fully contested basis in contrast with the First Respondent, which had largely left it to the Court to make a decision without contesting the arguments of the Applicant and without appearing by Counsel at the oral hearing. Whereas the Second Respondent, despite having no trust assets in its possession, took a full part in the proceedings and must have spent its own funds, or put its own funds at risk, in defending them. It is, therefore, I believe, just that the Second Respondent should meet most of the successful Applicant's costs.

18. The reason why I have awarded the Applicant 90% of her costs of the proceedings, and not 100%, is that, if the Applicant had decided to pursue the First Respondent for costs, I would have ordered it to pay 10% of her costs of the proceedings. It appears to me to be fair not to require the Second Respondent to pay that part of the Applicant's costs which I have decided were incurred in pursuing the First Respondent, a trust company against which I have made an order for disclosure of trust documents, and which I would have ordered the First Respondent to pay to the Applicant if the Applicant had not decided not to pursue it for costs.

19. In my judgment, there were no exceptional circumstances in this case, which would have justified an order for taxation of the Applicant's costs, or any part of them, on the indemnity basis. Although some issues raised in the proceedings are novel, and perhaps quite difficult, that factor alone does not, in my judgment, in this case invite an order for taxation of costs on the indemnity basis. Nor, in my view, is this a case where the Applicant can properly pray in aid the approach taken by the Guernsey Court of Appeal in ***Stuart-Hutcheson v Spread Trustee Co. Ltd*** (c. July 2002), when the Court ordered the costs of the successful beneficiary applicant to be taxed on the indemnity basis and paid out of the trust fund; for, there is no trust fund of the Second Wheatland Trust available to be used for such a purpose, since the trust came to an end on about 20 November 2001 and it seems that there were no liquid assets in the trust fund. In my discretion, the right answer, which meets the justice of the case, is for the costs of the Applicant to be taxed on the recoverable basis.

20. Finally, there is no reason, in my judgment, for either the First Respondent or Mr Clark to contribute towards the sum which the Second Respondent will pay to the Applicant

under the order for costs made by me. In my view, neither the First Respondent nor Mr Clark was responsible for the way in which the Second Respondent conducted its defence in these proceedings or for the way in which arguments were presented during the hearing. Accordingly, the Second Respondent must pay all these costs itself.

21. Mr Clark was joined as a Respondent on 19 July 2004 upon the Court's own motion in order that, in his capacity of Protector of the Second Wheatland Trust between 25 October 2001 and 20 November 2001, he would be bound by my Judgment. I do not consider that it would be just for him to pay any part of the Applicant's costs and I shall, therefore, make no such order.

Patrick Talbot QC
Lieutenant Bailiff
14 September 2004

Approved Text

No. 780

THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

B E T W E E N:

GLORIA WESLEY, COUNTESS BATHURST

Applicant

- and -

(4) KLEINWORT BENSON (CHANNEL ISLANDS) TRUSTEES LIMITED
(5) CAREY OLSEN TRUST COMPANY (GUERNSEY) LIMITED
(6) RUSSELL CLARK

Respondents

Advocate Paul Richardson for the Applicant
Advocate Robert Shepherd for the First Respondent (who, with the consent of the Court, did not appear at the hearing)
Advocate Nicholas Barnes for the Second and Third Respondents

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J U D G M E N T

of Lieutenant Bailiff Patrick John Talbot QC dated 9 August 2004
as amended on 14 September 2004

Introduction

1. The legal issues at the centre of this application are interesting and may be of some general importance to practitioners in the area of Guernsey trusts and foreign trusts with

Guernsey-based administration or assets. The issues relate to the administration and supervision of Guernsey trusts, including discretionary trusts, and, in particular, the role of the Royal Court in such matters.

2. These proceedings raise, in particular, questions about the Royal Court's powers to supervise, and, where necessary, intervene in, the administration of both Guernsey trusts and foreign trusts whose trustees are Guernsey resident or the assets of which include shares in Guernsey companies.

3. Both the trusts with which the Court is concerned in these proceedings were trusts established by the late Mr Gordon Wilson Clarry ("Mr Clarry"), who was a Guernsey resident at the time of his death on 27 April 2002. Even though Mr Clarry was not *strictly* the settlor under either trust, he was treated by the trustees, and by the Protector of the second trust, as though he actually was the settlor. Accordingly, the references in the correspondence between Advocates and in the affidavit evidence to Mr Clarry as "settlor", or as "the Settlor", were, in my view, quite understandably made, even though they might not have been accurate in terms of strict legal analysis. In any event, it was accepted that Mr Clarry was the settlor within the meaning of the term as defined, and used, in The Trusts (Guernsey) Law 1989, ("the Trusts Law").

4. Mr Clarry's only sibling, his sister, Gloria Wesley, Countess Bathurst, ("Lady Bathurst"), applied to the Royal Court by an Application dated 26 September 2003 under Sections 22, 33 and 63 of the Trusts Law, and under the inherent jurisdiction of the Court, for the delivery to her of trust instruments and other trust *documents*, including so-called "letters of wishes", relating to two trusts, namely, the Wheatland Trust (formerly

known as the Clarry Trust) first established probably on 11 March 1970, but for present purposes established on about 27 October 1983, (to which I shall refer as "the First Wheatland Trust"), and another trust, also known as the Wheatland Trust, established on about 1 October 1999, (to which I shall refer as "the Second Wheatland Trust"). An Order was also sought by Lady Bathurst for disclosure of minutes of companies or other entities in which the trustees of the two trusts either had, or had had, an interest, - there were three such companies, which were, in due course, specifically named in the Re-Amended Application - and of trust accounts in relation to each of the two trusts. Lady Bathurst also sought an Order for disclosure of trust *information* relating to the affairs of the two trusts. The Application was supported by an affidavit from Lady Bathurst sworn on 1 July 2003.

5. I was appointed by the Bailiff to hear the Application and the oral hearing took place on 15, 16 and 19 July 2004.

6. At the start of the oral hearing on 15 July 2004 Advocate Paul Richardson, who appears for Lady Bathurst, presented the Application to the Court on the basis, as he then understood it, that the First Respondent, **(**which was originally known as Orbis Trustees (Guernsey) Limited and is sued under its present name of Kleinwort Benson (Channel Islands) Trustees Limited,) was the last trustee of the First Wheatland Trust, a Bermudian trust which had come to an end on about 4 October 1999, and that the Second Respondent, (which was originally known as Carey Langlois Trust Company Limited and is sued under its present company name of Carey Olsen Trust Company (Guernsey) Limited,) was the current trustee of the Second Wheatland Trust, a subsisting Guernsey trust.

7. Between the issue of the Application and the start of the oral hearing, the Second Respondent did not seek to correct any factual misunderstanding which there might have been on the part of Lady Bathurst or her Advocate about its position as current trustee of the Second Wheatland Trust. In particular, the Second Respondent did not inform either the Applicant or her Advocate or the Royal Court that the Second Wheatland Trust was not, in fact, a current subsisting Guernsey trust, but had actually come to an end on about 20 November 2001, when all its trust assets had, so the Second and Third Respondents now assert, been appointed irrevocably in favour of a beneficiary.

8. The Royal Court has jurisdiction under Section 4 of the Trusts Law in respect of a Guernsey trust, (meaning a trust, the proper law of which is the law of Guernsey,) and in respect of a foreign trust (meaning a trust, the proper law of which not is the law of Guernsey) – see the definitions of "Guernsey trust" and "foreign trust" in Section 73(1) of the Trusts Law. For the purposes of this Application it is important to remember that Part II of the Trusts Law (Sections 5 to 57) applies only to a Guernsey trust and that Part III (Sections 58 and 59) applies only to a foreign trust. Accordingly, since the First Wheatland Trust was at all times a Bermudian trust, much of the argument in the parties' written skeleton arguments and in the oral submissions of the Advocates during the hearing, including argument based on the application, if any, of Sections 22, 28 and 33 of the Trusts Law, relates only to the Second Wheatland Trust.

9. The Royal Court's jurisdiction over Guernsey trusts, and the history of trusts in Guernsey in general, were explained by the Court of Appeal of Guernsey in ***Stuart-Hutcheson v Spread Trustee Company Limited*** [2002] WTLR 1213, (to which I shall

refer as ***Stuart-Hutcheson***), and I shall discuss the trusts jurisdiction of the Royal Court later in this Judgment.

10. Whilst, at all times between its commencement on 1 October 1999 and its apparent termination on 20 November 2001, the Second Wheatland Trust was a Guernsey trust, the Royal Court's jurisdiction over the First Wheatland Trust, perhaps, only existed during the short period between 20 May 1999, (when the First Respondent, a Guernsey trust corporation, was appointed sole trustee,) and 4 October 1999, (when the First Wheatland Trust came to an end by the appointment of all of its assets in favour of the First Respondent in its capacity as the first trustee of the Second Wheatland Trust). For only during that short period did the First Wheatland Trust have a Guernsey corporate trustee, namely, the First Respondent.

11. The evidence before the Court does not, however, establish whether, and, if so, to what extent, the trust assets of the First Wheatland Trust included Guernsey-based assets before 20 May 1999, which would, of course, have founded jurisdiction in the Royal Court under the terms of Section 4 of the Trusts Law. I, therefore, consider that I should proceed on the basis that, whereas it seems clear that from that date onwards the trust assets of the First Wheatland Trust both included shares in two Guernsey companies called Air Holdings Limited and Moore Wilson & Blair Limited – see the schedule to the Deed of Retirement and Appointment dated 20 May 1999 and paragraph 4 of the affidavit of Mr Philip Charles Retz ("Mr Retz") sworn on 16 July 2004 on behalf of the Second Respondent – and a Guernsey resident trustee, the state of the trust assets up to 20 May 1999 has not been proved to the Court; in particular, it is has not been established by admissible evidence in these proceedings that the trust assets included or

comprised the same shares before that date as they did after it, and it is not open to me to speculate on such a question. This point *may* be relevant in relation to Lady Bathurst's application for trust accounts, but is not, I think, likely to prove important in the context of the remainder of the Application.

The First Wheatland Trust

12. It is, I think, obvious that the express terms of the two trusts are likely to prove of central relevance to the application. I, therefore, turn to the two deeds under which the two trusts were established and I start with the First Wheatland Trust.

13. By a Declaration of Trust dated 27 October 1983, ("the 1983 Deed"), the Bermudian trust, which I have defined as the First Wheatland Trust, was set up. It seems that there had been an earlier trust established by Mr Clarry in Bermuda on about 11 March 1970 and that this trust was itself superseded by the First Wheatland Trust; but, for present purposes, nothing seems to turn on this and I do not need to refer to the earlier trust again in this Judgment.

14. By the 1983 Deed, which was made by Harrington Limited, a Bermuda company, as Original Trustee, a new trust, which first became known as The Clarry Trust, and thereafter as the Wheatland Trust, *i.e.* the First Wheatland Trust, was established. It was a discretionary settlement. The discretionary class of beneficiaries was defined as "The Specified Class" and included, at that time, Mr Clarry's then wife Cynthia, her children and remoter issue, three charities and "Such other person persons or class or persons or body corporate or unincorporated or otherwise as the Trustees shall declare to be

members of the Specified Class pursuant to the power contained in clause 8(a) …". Lady Bathurst was not named as a member of the Specified Class and only became a member of the Specified Class for a very short period, *i.e.* between 1 and 4 October 1999.

15. Clause 8 of the original Trust Deed gave express powers to the Trustees exercisable at their absolute discretion by deed to declare that named persons or classes or descriptions of persons be included or excluded as a member or members of the Specified Class in respect of the whole, or part only, of the Trust Fund subject to the Trust Deed.

16. Clause 9 was a clause which, in the events which happened, permitted the First Respondent, as trustee of the First Wheatland Trust, to transfer the entire trust assets to itself, as the then trustee of the Second Wheatland Trust, since at the time of the appointment, 4 October 1999, Lady Bathurst had been added as a member of the Specified Class and since the provisions of the Second Wheatland Trust were considered by the First Respondent to be for her benefit as the only named member of the class of beneficiaries under the Second Wheatland Trust at the time of the appointment.

17. Clause 16 of the 1983 Deed provided as follows:

> "Every discretion or power hereby conferred on the Trustees shall be an absolute and unfettered discretion or power and the Trustees shall not be obliged to give to any person beneficially interested hereunder any reason or justification for the exercise of any such discretion or power …"

18. By clause 19 it was provided that the 1983 Deed was to be irrevocable.

19. By clause 20 the original Trust was declared to have been established under the laws of Bermuda and it was provided that

> "… the rights of all persons hereunder and the construction and effect of each and every provision hereof shall be subject to the jurisdiction of and construed according to the laws of Bermuda which shall be the forum for the administration thereof."

28. As I have said, the First Wheatland Trust came to an end on 4 October 1999 when, by Deed of Appointment, the then Trustee of the First Wheatland Trust, namely, the First Respondent, pursuant to clause 9(a) of the 1983 Deed, transferred all the assets of the First Wheatland Trust, (which were stated to be shares or stock in three companies mentioned in the Re-Amended Application,) to itself as sole trustee of the Second Wheatland Trust. Recital (B) of the Deed of Appointment was in these terms:

> "(B) Gloria Wesley Bathurst who is a member of the Specified Class of Beneficiaries is beneficially interested under a trust known as "The Wheatland Trust" dated 1 October 1999 ("the Second Trust") specified in Part 2 of the First Schedule".

29. Accordingly, on about the 4 October 1999 the assets then held subject to the trusts of the First Wheatland Trust were appointed irrevocably by its Trustee, the First Respondent, to itself as trustee of a Declaration of Trust dated 1 October 1999 ("the 1999 Deed") under

which the Second Wheatland Trust was established. It, therefore, appears to be common ground that as at the 4 October 1999 Lady Bathurst was "beneficially interested under" the Second Wheatland Trust, although the nature and extent of her beneficial interest under that trust was not further described in the Deed of Appointment dated 4 October 1999.

30. It was only very recently, on about 6 July 2004, (when Advocate Richardson received a letter dated 5 July 2004 from Advocate Nicholas Barnes, who represents the Second Respondent in these proceedings), that the Second Respondent disclosed the 1999 Deed, and some other deeds relating to the administration of that trust, including an Instrument of Exclusion of Lady Bathurst dated 25 October 2001. It is to be noted that Advocate Barnes did not disclose either the Instrument of Addition of a Beneficiary apparently also dated 25 October 2001 or any trust instrument dealing with the coming to an end of the Second Wheatland Trust on 20 November 2001, which I believe would be likely to have been a deed of appointment in favour of a beneficiary or beneficiaries.

31. The reason for producing the disclosed deeds was explained in paragraph 5 of an affidavit from the Second Respondent's managing director, Mr Kevin Michael McAuliffe, ("Mr McAuliffe"), sworn on 15 July 2004. Mr McAuliffe deposed that Mr Nicholas Le Poidevin, a member of the English Bar, "… did latterly suggest that we might usefully disclose the Instrument of Exclusion (a redacted copy of which Advocate Eades had offered to Collas Day shortly after the Settlor's death) together with the Instrument of Appointment of New Protector in order to enable [Lady Bathurst] to satisfy herself that she had been properly excluded. However, Counsel advised that we were not obliged to do so."

The Second Wheatland Trust

32. The Second Wheatland Trust is a discretionary trust made under, and governed by, the law of Guernsey. The 1999 Deed was made by the First Respondent, and the Second Wheatland Trust was set up under it. It is a long, detailed document and provides, as one would expect, for many aspects relating to the administration of the trust. For present purposes, it is, I believe, enough for me to refer to relatively few provisions of the 1999 Deed.

33. By recital (B) the trust thereby created was stated to be known as "The Wheatland Trust" and the term 'The Beneficiaries' was defined in clause 1(c) as meaning Lady Bathurst and such other objects (including charitable objects) or persons as are added under clause 3.

34. The first Protector was defined in clause 1(d) as meaning Belmont Trust Limited, a BVI company, ("Belmont"), and by clause 2 the Trust Fund was declared to be held on trust for sale, with power to postpone the sale.

35. By clause 3 (a) it was provided as follows:

> "The Protector may at any time or times during the Trust Period add to the Beneficiaries such one or more objects (including charitable objects) or persons as the Protector with the written consent of the Trustees shall determine."

By clause 3(c)(iii) it was provided that the power in clause 3(a) should not be exercised so as to add to the Beneficiaries any person resident in Guernsey for income tax purposes, which, doubtless, was the reason why on 25 October 2001 Mr Clark added Wheatland Alliance, Limited, ("WAL"), a BVI company, to the Beneficiaries rather than the lady who was soon to become Mr Clarry's wife, (whom I shall call "Christina Clarry"), who was, it seems, a Guernsey resident. Clause 3(d) was in the following terms;

> "The Protector (if any) with the written consent of the Trustees and if there is no Protector the Trustees may at any time or times … by deed declare that any Beneficiary shall cease to be a Beneficiary (and the Beneficiary shall thereupon be excluded from benefit hereunder) and such declaration may be revocable of irrevocable but shall not affect any application of capital or income of the Trust Fund made prior to such declaration."

36. Clause 5(a) contained a power of appointment vested in the Trustees in favour of one or more of the Beneficiaries exclusive of the other or others of them and clause 5(b) was to the effect that the Trustees might release or restrict this power without the written consent of the Protector (if any).

37. Clause 6 contained trusts in default of appointment in favour of such one or more of the Beneficiaries exclusive of the others as the Trustees should in their absolute discretion from time to time think fit.

38. Clause 8 (and the First Schedule) provided the Trustees with the wide powers and immunities set out in the schedule provided that the Trustees should not exercise any of their powers so as to conflict with "…the beneficial provisions of this trust".

39. Clause 9 was, so far as is material, in the following terms:

> "
> (a) The Trustees may exercise (or refrain from exercising) any power or discretion for the benefit of any one or more of the Beneficiaries actually or prospectively interested under this Trust without being obliged to consider the interests of the others or other of them
>
> (b) Every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion and the Trustees shall have the same discretion in deciding whether or not to exercise any such power
>
> (c) The Trustees in exercising any of the powers hereby conferred in favour of any Beneficiary are expressly authorised to ignore entirely the interests of any other Beneficiary who is or may become interested under this Trust and in particular (but without prejudice to the generality of the foregoing) no appointment or advancement made in exercise of any power herein contained shall be invalid on the grounds that:
>
> …

(bb) any object of such power is thereby altogether excluded…"

40. By clause 11 the Protector was given the power of appointing and removing trustees of the Second Wheatland Trust.

41. By clause 14(a) the proper law of the Second Wheatland Trust was declared to be the law of Guernsey "… and all rights under this Trust and its construction and effect shall be subject to the jurisdiction of and construed according to the laws of the Island of Guernsey". Further, clause 14(b) declared that the courts of the Island of Guernsey should be the forum for the administration of the trusts declared in the 1999 Deed.

42. Clause 15 related expressly to the Trusts Law and was in the following terms:

> " SECTIONS 19(b) and 34(1)(b) and any order made under Section 57 (1) of the [Trusts] Law (as amended or re-enacted) shall not apply hereto and all or any of the liabilities or obligations imposed on the Trustees by all or any of such provisions or order or by Section 22(1) or 25(1) of such Law are hereby negatived and excluded and shall have no application to the Trustees or hereto".

43. By clause 16, the power of appointing a new Protector was vested in the Trustees.

44. Clause 17 provided indemnities to the Protector against any claims by a Beneficiary "… or any other person interested in any manner in this Trust" and obliged the Trustees, in wide terms, to keep the Protector indemnified.

45. Paragraph 29 of the First Schedule was a trustee charging clause and paragraph 41 authorised the Trustees or the Protector to take Counsel's opinion about the Second Wheatland Trust and their respective "… duties in connection with the trusts hereof and in all matters to act in accordance with the opinion of such counsel".

The (apparent) termination of the Second Wheatland Trust

46. It was only at the end of the sitting of the Court on 15 July 2004, (the first day of the oral hearing,) that Advocate Barnes, who at that time was only representing the Second Respondent, informed the Court that the Second Wheatland Trust had been brought to an end on about 20 November 2001, when all the trust assets had been appointed to a beneficiary. It seemed to me that neither Advocate Barnes nor Advocate Richardson had had any idea at all until that moment late on 15 July 2004 that the Second Wheatland Trust was not a subsisting Guernsey trust. At that time Advocate Barnes received oral instructions to that effect from Advocate Russell Clark, a partner in the firm of Carey Olsen, ("Mr Clark"), who had been the Protector under the Second Wheatland Trust between 25 October 2001 and its apparent termination on 20 November 2001, and who was sitting behind Advocate Barnes in the Court Ordinaire. It was only when Mrs Duchemin, a director of the Second Respondent, swore an affidavit on 9 September 2004 that it became clear to the Court that Advocate Barnes had been fully instructed by his client, it seems just before these proceedings were commenced, about the termination of the Second Wheatland Trust on about 20 November 2001, but had forgotten this fact and had, therefore, not informed the Court of it.

47. If I were to describe Mr Clark's instructions to Advocate Barnes as having caused great surprise to the Advocate for Lady Bathurst, (and, indeed, to me as well,) I would be profoundly understating the position. The news came as a factual bombshell to everyone in Court, except, of course, to Mr Clark and Advocate Barnes. There had been no indication of the bringing to an end of the Second Wheatland Trust, either within the affidavit evidence in these proceedings or, as I interpret it, in the correspondence between the Advocates for Lady Bathurst and the Second Respondent which preceded the issue of the proceedings, until Mr Clark gave Advocate Barnes the oral instructions to which I have referred in the preceding paragraph late on 15 July 2004.

48. During the overnight adjournment the Second Respondent decided to provide, for the first time, some evidence in these proceedings in the form of Mr McAuliffe's affidavit; the Second Respondent had earlier refused the Court's invitation to put in affidavit evidence. Mr McAuliffe deposed that his affidavit was sworn ".. to explain why disclosure was not made at an early stage of the fact that the [Second] Wheatland Trust … was terminated on the 20th day of November 2001 by an appointment out of all the Trust assets." Mr McAuliffe's evidence was that the Second Respondent had been advised by Carey Langlois, (the predecessor firm of Guernsey Advocates to Carey Olsen, which is, I find, very closely connected indeed with the Second Respondent,) and by Mr Nicholas Le Poidevin that "… that an excluded beneficiary was not, as of right, entitled to be provided with any information regarding a trust from which they had been excluded. *We were also advised that we retained a duty of confidentiality to those in whose favour we owed fiduciary duties even after the termination of the [Second] Wheatland Trust*. … Given that this was our advice we declined to provide [Lady Bathurst] with information regarding the [Second] Wheatland Trust. We did not disclose

that the [Second] Wheatland Trust had been terminated as we did not believe that [Lady Bathurst] was entitled to any information relating to the administration of the Wheatland Trust, particularly post her exclusion. … *We had not … appreciated that the Court would consider that the [Second] Wheatland Trust had been terminated to be a factor in determining whether, as a question of law, [Lady Bathurst] is entitled to be provided with the information which she is seeking. Nor had we appreciated that the non-disclosure of the fact of termination would be a complicating factor. … We had not anticipated, as Lady Bathurst never explained that this might be her argument, that [Lady Bathurt] might have an expectation that she might be readmitted to the class of beneficiaries.* Given the breakdown in the relationship between [Lady Bathurst] and the real economic Settlor of the [Second] Wheatland Trust we had not expected that [Lady Bathurst] would have any such expectation. … There was absolutely no intention to mislead either [Lady Bathurst], her advisers or the Court but until the Court determines that [Lady Bathurst] is entitled to this information our advice had been that the affairs of the [Second] Wheatland Trust should remain confidential." (The emphasis is mine.) The reference to "the real economic Settlor" was obviously, in the context, a reference to Mr Clarry.

49. Whereas I understand why Lady Bathurst may have some concerns about the way in which the Second Respondent has conducted its trusteeship of the Second Wheatland Trust in the period between about early October 2001 and 20 November 2001, and may also have further concerns about the way in which the Court has, in effect, been kept in the dark about a highly important fact, *i.e.* the termination of the Second Wheatland Trust on 20 November 2001, I do not believe that either the Second Respondent or its

directors or the partners in Carey Langlois and Carey Olsen intended to mislead the Royal Court, and I so find.

50. I lean to the view that Advocate Michael Eades, formerly a partner in Carey Langlois, and now a partner in Carey Olsen, ("Mr Eades"), did not really recognise how difficult it was for him to represent both Christina Clarry and the Second Respondent at the same time and that Mr Clark failed fully or properly to understand the independent role of the Protector of the Second Wheatland Trust, and, in particular, the distinct and separate roles of the Protector, on the one hand, and the Trustees, on the other hand.

51. However odd it may, at first blush, appear, I consider that it is more likely than not that those representing the Second Respondent in these proceedings, and the officers of the Second Respondent responsible for instructing Advocate Barnes, must have thought that the termination of the Second Wheatland Trust was not something which either the Court or the other parties needed to know. If they had so thought, they were, in my judgment, clearly wrong. In any event, I have found it hard to understand the reasoning behind the position taken by the Second Respondent, but, in allowing, in effect, the Court and the other parties to remain in the dark on a highly material matter in the context of the Application before the Court, the Second Respondent and its advisers have allowed a material factual misunderstanding to occur. Fortunately, the misunderstanding was corrected in the course of the oral hearing in mid-Jul 2004. Mr Clark and Mr McAuliffe have deposed that neither they nor the Second Respondent intended to mislead either the Royal Court or Lady Bathurst and her Advocate. I accept their evidence. But the fact that this factor *did* so mislead both the Royal Court and Lady Bathurst and her Advocates, Collas Day, (including Advocates Collas and Richardson,) is, in my view,

another matter altogether and a factor which may be relevant in the context of the Court's discretion in these proceedings whether or not to make an order for disclosure in Lady Bathurst's favour.

52. The name of the beneficiary in whose favour the entire assets of the Second Wheatland Trust had apparently been appointed on 20 November 2001, namely, WAL, was not disclosed until first thing on 16 July 2004 when, without opposition from Advocate Richardson, the Second Respondent lodged Mr Retz's affidavit. Mr Retz, who is one of the directors of the Second Respondent, sought to "…explain the function of [WAL]." He deposed that the place of incorporation of WAL was the British Virgin Islands and that WAL was incorporated there "… as a means to enable the Second Respondent in the exercise of the discretions afforded to them by the [Second Wheatland] Trust and in accordance with the express wishes of the Settlor to ensure that the financial and housing needs of the Settlor's wife could be provided for after the Settlor's death, which, at the time of its appointment, was imminent." The references to "the Settlor" were clearly references to Mr Clarry.

53. Advocate Richardson also announced that Lady Bathurst had decided to continue with the Application on the basis of a draft Amended Application and the proceedings continued thereafter on that basis.

Amendment of the Application

54. The Application was amended with the leave of the Court on two occasions during the hearing, once early on 16 July 2004, (see the preceding paragraph,) to expand the relief

sought by Lady Bathurst, and again on 19 July 2004 to add Mr Clark as a party. Despite submissions from Advocate Barnes to the effect that I might not need to do so, I acceded to the application of Advocate Richardson, (which was itself made with some reticence,) for leave to re-amend the Application by adding Mr Clark as a respondent. I decided that his joinder was required in order that Mr Clark, in his capacity as Protector under the Second Wheatland Trust, would be bound by any decision of the Royal Court in this matter. The joinder of Mr Clark caused no real difficulty, and also no delay, since Advocate Barnes had received instructions before the start of the Court's sitting on 19 July 2004 to represent Mr Clark as well as the Second Respondent; and the hearing was able to proceed on that day until the end of the oral hearing that afternoon.

Mr Clark's evidence

55. Mr Clark swore an affidavit on 19 July 2004. He deposed that he was a shareholder, but not an office holder, in the Second Respondent and that he "… became involved in the affairs of the [Second Wheatland] Trust at a fairly late stage. My fellow partner [Mr Eades] had been instructed by [Mr Clarry], the settlor of the Trust to advise on how the financial and housing needs of the Settlor's partner (whom he subsequently married) could be satisfied after his death. … The previous Protector of the Trust was a company based in the BVI. Mr Clarry requested that I might be appointed as the Protector in place of the previous Protector … I was not formally appointed until 25 October 2001. … In exercise of the powers conferred upon me by the Trust, after meeting the Settlor and discussing matters with him and considering the material circumstances including Mr Clarry's declining health and his relationship with, the soon to be, Mrs Clarry and his serious concerns for her welfare after his death I resolved to add [WAL], a BVI

company, to the beneficial class and subsequently remove [Lady Bathurst]. … On 20 November 2001 the Second Respondent appointed the assets of the [Second Wheatland] Trust to [WAL] and my formal role as Protector was brought to a close. …" Mr Clark also deposed to his part in the correspondence between Advocates, and especially to his letters dated 15 November 2002 and 10 December 2002. Whereas I do not accept the reasoning behind the way in which some parts of the latter letter were drafted by Mr Clark, and I reject without hesitation the contentions made in the fourth, fifth and sixth sentences of paragraph 12 of Mr Clark's affidavit as inappropriate *ex post facto* reasoning by Mr Clark to seek to "explain away" Advocate Barnes' written submissions, (which Advocate Barnes himself, quite properly, did *not* try to do,) I do not consider that Mr Clark has *intended to* mislead either Collas Day or the Royal Court in any aspect of the case. The errors of judgment on his part, to which I have referred in this Judgment, do not, in my view, amount to a breach of Mr Clark's duties to the Royal Court, which are, of course, paramount and which would, where necessary, require him to have complied with them whether or not they conflicted, or appeared to conflict, with his duties to his fellow partners in the firms of Carey Langlois and Carey Olsen or his duties to his client, (who during October and November 2001 may apparently have been Mr Clarry,) or his duties as Protector of the Second Wheatland Trust.

Material Facts

56. I shall now consider further the material facts upon which the Application may, in part, turn.

57. Mr Clarry died on 27 April 2002. At the time of his death he was a Guernsey resident. Mr Clarry was Lady Bathurst's elder brother, and her only sibling.

58. It seems that during their lives the relationship between Lady Bathurst and Mr Clarry was generally a close one, although it is possible that the relationship became a little strained during the last few months of Mr Clarry's life.

59. Earlier in his life Mr Clarry had served in the Royal Navy and then studied Estate Management. He had worked in the Colonial Service of the UK Government in Singapore, Vancouver and the Bahamas. Between the 1950s and the mid 1970s Mr Clarry often stayed with Lady Bathurst and her first husband at their homes in England and after her first husband's death Mr Clarry also lived with Lady Bathurst until in 1978 she married Earl Bathurst of Cirencester. Thereafter, Mr Clarry continued to live with Lady Bathurst until he himself married for the second time.

60. In fact, Mr Clarry married four times. His last marriage took place in about November 2001, when he married Christina Clarry, who survived him.

61. Other facts have appeared, gradually, from the affidavit evidence filed respectively on behalf of (i) Lady Bathurst, (which only comprises her affidavit sworn on 1 July 2003), (ii) the Second Respondent, (which comprises Mr McAuliffe's affidavit and Mr Retz's affidavit sworn respectively on 15 and 16 July 2004,) and (iii) Mr Clark, (which comprises his affidavit sworn on 19 July 2004,) as the proceedings continued. As I have already mentioned, the position of the Second Respondent, (for most of the proceedings at least,) was that it did not wish to file affidavit evidence; but that position changed

during the oral hearings on 15/16 July 2004; and in due course two affidavits were filed on its behalf. Mr Clark swore his affidavit on the day on which he was joined as Third Respondent to the proceedings in his capacity as the so-called Protector of the Second Wheatland Trust.

62. The relevant chronology for the purposes of this Application is set out, in part, in paragraph 16 of Lady Bathurst's affidavit, which I quote:

> "16.1 The original Clarry Trust subsequently renamed the Wheatland Trust was established on 11 March 1970. The original Trustees were Harrington Trust Limited in Bermuda.
>
> 16.2 On 20 May 1999 Orbis Trustees (Guernsey) Ltd were appointed Trustees.
>
> 16.3 On 1 October 1999 Orbis established a new Trust also called the Wheatland Trust by way of declaration of trust.
>
> 16.4 On 4 October 1999 by Deed of Appointment the assets of the original Wheatland Trust were transferred to the new Wheatland Trust.
>
> 16.5 On 26 October 2001 Orbis retired as Trustees in favour of Carey Langlois Trust Company Ltd.
>
> 16.6 On 26 October 2001 I was excluded as a beneficiary under the new Trust."

It now appears that the relevant date for the purpose of paragraphs 16.5 and 16.6 of Lady Bathurst's affidavit was, in fact, 25 October 2001.

63. In paragraphs 18 and 19 of Lady Bathurst's affidavit she summarised the basis of her application in these words:

> "18. I find it very difficult to accept that after many many years of close relationship with my brother he would change position so drastically over the last few months of his life to exclude his only surviving family member from benefit under the Trust.
>
> 19. In the first instance I wish to establish definitively the following:-
>
> 19.1 The date of cancellation of the old Trust.
>
> 19.2 The date of making of the new Trust.
>
> 19.3 Who instructed whom to make the new Trust and who were the beneficiaries.
>
> 19.4 Who the new trustees were and who appointed them.
>
> 19.5 Who gave instructions to the Trustees to take me out of the old Trust made by Mr Clarry." [This must, I believe, mean the Second Wheatland Trust.]

> "19.6 The terms of the new Trust and the beneficiaries.
>
> 19.7 The nature of the property held, transferred and held in the new Trust." [This must, I believe, mean transferred to, and held in, the Second Wheatland Trust]

64. After the Application had been issued, *some* information was provided to Lady Bathurst in the form of a letter from Ozannes dated 30 September 2003 and the enclosures to the letter. By this letter Ozannes, who act for the First Respondent, (whose position on this application is said by its Advocate, Advocate Robert Shepherd, to be neutral, in the sense that it is content to be bound by any Order which I might make,) supplied Lady Bathurst's Advocates, Collas Day, with documents relating to the First Wheatland Trust. These documents were

- the 1983 Deed, under which trusts of the First Wheatland Trust were declared;
- a Deed of Retirement and Appointment of trustees dated 20 May 1999, under which the First Respondent was appointed sole corporate trustee;
- a Deed of Nomination dated 1 October 1999, under which Lady Bathurst was added to the class of beneficiaries; and

- a Deed of Appointment in favour of itself as trustee of the Second Wheatland Trust of the whole of the trust fund, then said to have comprised shares in three named companies, dated 4 October 1999.

In their letter Ozannes said:

> "…
>
> The position that will be taken by our clients is one which distinguishes between the First and Second Wheatland Trust. In respect of the Second Wheatland Trust it would be quite wrong for our clients, as former Trustees of the Trust, to intermeddle in decisions made *by the existing Trustees*, Carey Langlois Trust Company Ltd. Accordingly, our clients would take a neutral position in respect of any documents held by them concerning the Second Wheatland Trust. To the extent that you are successful in procuring your application against *the existing Trustees*, our clients will observe the terms of any order obtained.
>
> In relation to the First Wheatland Trust which was wound up on [*sic*] 1 October 1999, different considerations apply. Your client was a Beneficiary of the Trust at the date of its termination albeit only for four days. As such, she has rights to certain information on the First Wheatland Trust in accordance with the Trusts (Guernsey) Law 1996 (as amended),"

the last quoted words meaning, I think, the Trusts Law, as amended by The Trusts Amendment (Guernsey) Law 1990. (The emphasis is mine.)

Ozannes also informed Collas Day as follows:

> "Other documents which our clients hold concerning the first Wheatland Trust fall within Section 33 of the Law."

I note that Ozannes did not disclose either of the deeds referred to in Recital (A)(ii) and (iii) of the Instrument of Exclusion dated 25 October 2001, namely, a Deed of Appointment and Retirement of Trustees dated 31 August 2001, under which the First Respondent appears to have retired as trustee of the Second Wheatland Trust in favour of the Second Respondent and a Deed of Indemnity made on the same day between the same parties. Neither of these deeds is in the evidence before the Court and I assume, I believe correctly, that neither has been disclosed to Lady Bathurst or her Advocates. I shall proceed on the basis that on 31 August 2001 the First Respondent did, in fact, retire as sole trustee of the Second Wheatland Trust in favour of the Second Respondent.

65. During the afternoon of 25 October 2001 three significant events occurred in relation to the Second Wheatland Trust and the details of what happened when on the afternoon of that day were set out in a letter from Advocate Barnes to Advocate Richardson dated 14 July 2004, *i.e.* the day before the oral hearing began, in answer to a letter from Advocate Richardson dated 7 July 2004. First, it appears that at about 3.30pm on 25 October 2001 by an Instrument of Appointment of Protector, (which *was* supplied to Collas Day with Advocate Barnes' letter dated 5 July 2004,) Mr Clark was appointed as Protector in place of Belmont, which had resigned from office by letter dated 5 October 2001 with effect from the date of that letter. Secondly, it seems that, at about 4.35pm, WAL was - so the Second Respondent and Mr Clark contend - added as a Beneficiary by an Instrument of Addition of Beneficiary, (which deed is *not* in evidence and was not supplied to Collas Day with Advocate Barnes' letter dated 5 July 2004). And thirdly, it seems that, at about

4.37pm, Lady Bathurst was excluded as a Beneficiary of the Second Wheatland Trust by the Instrument of Exclusion of Beneficiary made between (1) the Second Respondent as Trustee and (2) Mr Clark, as the Protector of the Trust, (which *was* also disclosed to Collas Day with Advocate Barnes' letter dated 5 July 2004).

66. The material terms of the Instrument of Exclusion of Beneficiary were these:

- by Recital (A)(v) it was stated that the Deed was supplemental to an Instrument of Addition of Beneficiary dated the same day whereunder WAL was added as a Beneficiary of the Trust

- by Recital (E) it was stated that the Protector was desirous of excluding the Beneficiary named in the Schedule, namely, Lady Bathurst, from future benefit under the Trust

- by Recital (F) it was stated that the Second Respondent, the Trustee, wished to consent to the removal of Lady Bathurst as a Beneficiary of the Trust

- by clause 2 the Protector pursuant to his powers (the express power under clause 3(d) of the 1999 Deed was expressly mentioned in recital (C)) duly excluded Lady Bathurst "from future benefit under the Trust"

- by clause 3 it was provided that nothing in the Deed should derogate from any interest to which Lady Bathurst had previously become indefeasibly entitled whether in possession or in reversion or otherwise

- by clause 4 the Second Respondent, as Trustee, consented to the exercise of the power by the Protector in the manner aforesaid

- by clause 5 it was provided that the Deed should be governed by and construed in accordance with the law of Guernsey and the parties submitted to the non-exclusive jurisdiction of the Courts of the Island of Guernsey.

Correspondence between the parties and their Advocates

67. Although Lady Bathurst did not give much detail in her affidavit sworn on 1 July 2003 of the reasoning behind her application to the Royal Court, I think that a better understanding of her position can be seen in exhibit "GWCB2" to her affidavit, which largely comprises correspondence passing between Collas Day for Lady Bathurst herself and Carey Langlois for the Second Respondent, and also for Christina Clarry, between 14 May 2002 and 25 March 2003. It is necessary for me to refer to several parts of that correspondence.

68. In their letter dated 14 May 2002 Collas Day informed Carey Langlois that Lady Bathurst had a copy of a Will made by Mr Clarry in April 1996 naming her as the sole beneficiary but that she understood that Carey Langlois were holding a later Will, about which they had declined to inform her when she contacted them, as a result of which Collas Day had been instructed to lodge a caveat with the Ecclesiastical Court. Collas Day asked for a copy of Mr Clarry's Will and for information

> "… concerning the Wheatland Trust, including the Trust Instrument and all and any subsequent Instruments relating to the Trusts including full details of any distributions that have not been made or of the winding up of the Trust if it has been wound up. If the Trust has not been wound up, please provide full and accurate information as to the state and amount of the trust property".

69. Carey Langlois replied by letter dated 20 May 2002, confirming their instructions to act for Christina Clarry. The letter included this passage:

> "Great distress was caused to Mr Clarry during his final months by your client's complete lack of communication and total disinterest in his health and welfare during months of distress and pain. Needless to say your letter of 14 May 2002 has caused a further distress, now to Mrs Clarry.
>
> I am instructed to inform you that your client is not a beneficiary under Mr Clarry's Will of Personal Estate nor is there any applicable Will of Real Estate. In the circumstances your client has no right to see a copy.
>
> *In respect of the Wheatland Trust all I am instructed to inform you is that this* ***was*** *a discretionary trust with entirely normal terms as to appointment and exclusion of beneficiaries at the Trustees' discretion. Your client was at one stage within the class of beneficiaries however the Trustees, mindful of Mr Clarry's specific wishes in this regard, later excluded her. In the circumstances your client has no right to see any copy documentation or receive further information.*
>
> Given the above please confirm that your client will now release her Caveat."

(The emphasis is mine.)

I note that Mr Eades, (who wrote this letter and who has at all material times acted for Christina Clarry and was also, at all material times until 8 July 2004, a director of the Second Respondent, a Guernsey trust administration company closely connected with his firm,) did not give Advocate Collas any information about "the winding up of the trust", despite having been asked a direct question on the subject in Advocate Collas' letter dated 14 May 2002, and made no mention of the role of his partner, Mr Clark, as Protector of the Second Wheatland Trust. At best, Advocate Eades, (who has chosen, (as, of course, he is entitled to do,) not to swear an affidavit on behalf of the Second Respondent,) appears to have given a small hint, by the use of the words "… In respect of the Wheatland Trust all I am instructed to inform you is that this *was* a discretionary trust …", (the emphasis is mine,) that the Second Wheatland Trust might have been wound up. The instructions referred to must, I conclude, have come from either WAL, a BVI company, in whose favour all the trust assets had apparently been appointed on 20 November 2001, or the Second Respondent, as the last trustee of the Second Wheatland Trust. Mr Eades could not, in my judgment, properly have accepted instructions to refuse to provide trust documents and information to Lady Bathurst from any other person, including Christina Clarry. I conclude, in the light of the terms of the letter itself and the absence of affidavit evidence on this point from the Second Respondent, that the instructions were more likely than not to have come from the Second Respondent, a company of which Mr Eades was then a director.

70. This is the only part of the correspondence between Advocates which is capable, in my view, of bearing a construction that Carey Langlois had informed Collas Day of the coming to an end of the Second Wheatland Trust and I lean strongly to the view that,

when read together, the whole of the correspondence can only properly be read on the basis that the affairs of a *subsisting* Guernsey trust were being addressed. All other letters from Mr Eades and Mr Clark appear to me to bear only one proper construction, namely, that the affairs of a subsisting Guernsey trust *were*, in fact, being addressed. This, in my judgment, was extremely unfortunate. For, if Carey Langlois had told Collas Day of the true position relating to the Second Wheatland Trust, and had provided them with trust documentation to establish the true facts about the terms of the trust and the trust's administration by itself as trustee, it might have resulted in Lady Bathurst deciding not to bring these proceedings or perhaps to have taken a different approach to them.

71. By a letter dated 5 June 2002 Collas Day replied to Carey Langlois' letter dated 20 May 2002, having in the meantime taken Lady Bathurst's instructions. They said that Lady Bathurst did not accept that she had no right to see a copy of Mr Clarry's Will and did not accept that she had no right to see any documentation or receive information concerning the Second Wheatland Trust. The letter also contained this passage:

> "Over a period of more than 70 years Lady Bathurst enjoyed a very close and harmonious relationship with her brother. Their relationship was evidenced in many ways and the following is by no means an exhaustive summary:
>
> - Lady Bathurst had been the principal beneficiary under her brother's Will of Personal Estate, including the Will made for him by Advocate Fooks in April 1996.
> - When Mr Clarry created the Wheatland Trust, Lady Bathurst was the principal beneficiary.

- Gordon Clarry made Powers of Attorney in favour of Lady Bathurst and she, in turn, made an enduring Power of Attorney nominating her brother as her Attorney.
- Lady Bathurst assisted her brother financially with advances that have not been repaid because her brother promised her that she would inherit on his death.
- By agreement between the two of them, monies due to Lady Bathurst on the estate of their parents [were] not paid to her but were taken by her brother, again, on the basis that she would inherit from his estate on his death.
- Some of the contents of Le Foulon House belonged to Lady Bathurst.

As the result of her brother's promises representations and conduct Lady Bathurst had every expectation that she would be the principal beneficiary under his Will. Furthermore, as I have said, the Wheatland Trust was created principally for her benefit."

Collas Day asked for disclosure of a copy of Mr Clarry's last Will and a copy of the Deed excluding Lady Bathurst from benefiting from the Wheatland Trust,

"… together with full and accurate information as to the state and amount of the trust property at the date of her exclusion"

there using words contained in Section 22(1) of the Trusts Law. Collas Day informed Carey Langlois that Lady Bathurst was also extremely distressed at the manner in which she had been treated and asked them to note that any lack of communication between Lady Bathurst and Mr Clarry during his last months

> "… was not of her choosing, but as a result of your client" (meaning Christina Clarry) "discouraging such communication."

72. Carey Langlois took instructions from Christina Clarry and replied by a long letter dated 27 June 2002. In the circumstances of this application, I have decided that I should quote the letter almost in full:

> "… your client may state that she enjoyed a very close and harmonious relationship with her brother, however, this was certainly not the case after September 2000 for the following reasons:
>
> > Mr Clarry had befriended … Christina Clarry in early 1998 and they showed their intention to remain together after Christina moved to Guernsey in March 2000 to live with Mr Clarry. In September 2000, after a scare regarding Mr Clarry's health (incompatible drugs had been prescribed) your client and her husband visited Mr Clarry to regain control of their Swiss bank accounts from Mr Clarry. In the same month Mr Clarry made it clear that he wished to provide for Christina in the future but your client reacted entirely negatively to this, apparently hoping to have all Mr Clarry's assets for herself. This was the cause for the major disagreement between Mr Clarry and your client. After eight months your client's husband, Lord Bathurst contacted Mr Clarry and tentative communication with your client began again, also mainly routed through Lord Bathurst which ended a few months later in November 2001 when Mr Clarry and my client announced their wedding plans to your client and Lord Bathurst together with the news that Mr

Clarry had been undergoing chemotherapy for cancer since 2001. Your client then broke off communications, much to the distress of Mr Clarry.

……..

My client also has documentation which shows that there was a difference of opinion some years ago whilst their mother was still alive between Mr Clarry and your client concerning the fact that he had purchased, from his own funds, a home for their mother (as he had done for their father) yet Mr Clarry had to insist to your client that the proceeds from the sale of the house should go towards the future care of his mother and should not be given under a Will or any other arrangement to your client. Your client was the sole beneficiary of their mother's last Will.

……..

It is noted that you state that Lady Bathurst had been the principal Beneficiary under her brother's Will of Personal Estate in April 1996 (prior to him meeting my client). The fact remains however that that Will was revoked by the Will Mr Clarry made prior to his marriage to Christina which will was subsequently revoked by his marriage and a new will was executed post his marriage to Christina. If someone has no children it is not unusual to make a Will in favour of their wife rather than their sister. *It should be noted that Gloria Bathurst was not always the principal Beneficiary of Mr Clarry's Will.* His former wife Cynthia has been and so have his parents. Only when there was no more … immediate to Mr Clarry has he nominated his sister as a beneficiary.

You stated that when Mr Clarry created the Wheatland Trust Lady Bathurst was the principal Beneficiary. The history of the matter goes back to 1970. The original trust was established on 11th March 1970 and was then known as the Clarry Trust. *The sole Beneficiary was Harold Clarry. The Trust was subsequently renamed the Wheatland Trust. From time to time the discretionary class of beneficiaries of that Trust has included Mr Clarry's parents, your client and Mr Clarry's wife Cynthia. There is a history in the Trust of Mr Clarry adding and excluding a beneficiary, namely his former wife Cynthia and her children.* In no Trust document was your client ever described as "the principal Beneficiary". *The old Wheatland Trust distributed its assets to the new Wheatland Trust in 1999.*

….

In respect of the Wheatland Trust if it had really been created principally for her benefit why was not a fixed interest Trust in favour of Lady Bathurst created? Instead Mr Clarry chose a discretionary Trust specifically including a power to add and exclude beneficiaries. It was always Mr Clarry's intention that at his request the Trustees would so oblige and there is a history of them having done so. In respect of the will Lady Bathurst's "every expectation" is entirely irrelevant. You will have advised your client that, in any event, her expectation that she be the principal beneficiary under Mr Clarry's Will was impossible given the provision of Section 3 of the Loi Relative à la Portion Disponible des Biens Meubles des Père et Mère, 1930.

….

Please would you provide evidence that Lady Bathurst assisted her brother financially? This seems somewhat strange in that whilst it is acknowledged that your client is independently wealthy, so was Mr Clarry... With regard to your statement that monies due to Lady Bathurst from the estate of their parents were not paid to her but were taken by Mr Clarry on the basis that she would inherit from his Estate on his death we have correspondence that runs entirely contrary to this statement. Mr Clarry kept meticulous records. If monies had been owed by Mr Clarry to Lady Bathurst it seems very strange that she did not claim these monies after their disagreement in September/October 2000.

From the documentation which we have seen it is totally incorrect to say the monies to Lady Bathurst from the Estate of their parents were not paid to her. In fact she was the sole beneficiary of the mother's Will dated 29th April 1981. Mr Clarry did not benefit under that Will. In respect of her father's Estate we have a copy of a release dated 4th August 1986 stating that your client received from the executors of his Estate the sum of $50,596.93 "in full satisfaction and payment of all monies due to me… as my distributed share of the Estate of Harold Clarry"… Regarding your comment that some of the contents of Le Foulon House belonged to Lady Bathurst could the executor designate have a list of the items? ... As for your comment that the reason of lack of communication between Lady Bathurst and her brother during his final months was not of her choosing but as a result of Christina Clarry discouraging communication, such an assertion is ridiculous. Anyone

who new Mr Clarry will know that he was an extremely independently minded and strong willed individual who would not be influenced by anyone. The fact is the communication from your client ceased when Mr Clarry wrote to her informing her of his cancer and his wish to marry Christina. *Apart from the telephone call to me in which your client appeared to be solely concerned about her supposed entitlement under the Wheatland Trust* and made no mention of her brother's health, there was no further communication.

Given Mr Clarry was such an independent and charismatic man, given the medical evidence that can be called as to his capacity and *given the large amount of evidence he left behind to record his wishes to benefit Christina* there can be absolutely no doubt that he was entirely competent at all times (even to his very last hours) and subject to no undue influence**.** *He wished to benefit the person for whom he had great and palpable fondness, whom he asked to be his wife and who was his undoubted solace and comfort in the very trying and stressing last two years of his life.*

I confirm that by instrument of exclusion dated 25th October 2001 Lady Bathurst was excluded as a beneficiary of the Wheatland Trust. As that instrument also referred to other matters I do not believe that your client is entitled to a copy of it. I would however be prepared to allow you to personally inspect the relevant part of it.

> Please confirm by return that your client will now release the Caveat she has caused to be lodged at the Ecclesiastical Court." (The emphasis is mine.)

73. It is, again, to be noted that, whereas Mr Eades specifically offered Advocate Collas sight of "… the relevant part …" of the Instrument of Exclusion dated 25 October 2001 under which Lady Bathurst was excluded as a member of the class of beneficiaries under the Second Wheatland Trust, no mention was made by him of the fact that the trust itself had come to an end just over seven months previously. It is, in my view, likely that the parts of the Instrument of Exclusion which Carey Langlois would *not* have shown Collas Day would have included the part of the deed which referred to WAL being added as a Beneficiary, *i.e.* Recital (A)(v), even though the addition of WAL appears to have taken place earlier during the afternoon of 25 October 2001 than Lady Bathurst's exclusion as a Beneficiary, with the result that at the time of her exclusion there were two named Beneficiaries, *i.e.* herself and WAL. It is also possible, in my judgment, that Advocate Collas might not have been shown the part of the Instrument relating to Mr Clark's appointment as Protector, since no mention of Mr Clark's position as Protector had been made by either Mr Eades or Mr Clark himself to a Protector at this stage. Furthermore, whilst Mr Eades *did* give Advocate Collas the relevant details of the coming to an end of the *First* Wheatland Trust on 4 October 1999, he did not give Advocate Collas the same details in relation to the Second Wheatland Trust, which had apparently occurred on 20 November 2001. It is also, I believe, noteworthy that the effect of Mr Eades' letter was that the Second Respondent was not, at that time, prepared to disclose to Lady Bathurst either the 1999 Deed, under which the Second Wheatland Trust had been set up and under which Lady Bathurst was the only natural person named as a Beneficiary at the

commencement of the trust, or the Deed of Appointment and Retirement of Trustees dated 31 August 2001 or the Instrument of Appointment of Mr Clark as new Protector of the Second Wheatland Trust.

74. On 3 July 2002 Collas Day sought from the First Respondent much the same information as they had sought from Carey Langlois, and the First Respondent replied by letter dated 26 July 2002. Its then managing director, Mr Gavin St Pier, gave the following further information, much of which is set out in Lady Bathurst's affidavit:

> " Orbis Trustees Guernsey Limited became the Trustee of the Wheatland Trust (formerly the Clarry Trust) on 20 May 1999. The former Trustee was Harrington Trust Limited of Cedar House of 41 Cedar Avenue, Hamilton, Bermuda. On 1 October 1999 Orbis settled a new trust also known as [the] Wheatland Trust, by way of Declaration of Trust. On 4 October 1999, by way of a Deed of Appointment, the assets of the old Wheatland Trust where transferred to the new Wheatland Trust. On 29 [*sic*] August 2001, Orbis retired as Trustee in favour of [the Second Respondent].
>
> Any exclusion of Lady Bathurst by way of the Instrument of Exclusion dated 25 October 2001, to which you refer in your letter, obviously therefore took place after we had retired as Trustee. I understand that you will therefore be pursuing matters relating to this Instrument of Exclusion with Carey Langlois.
>
> …
>
> I note from your letter that this matter appears to have extended back to 1970. However, clearly I am unable to provide any information in relation to matters

> which preceded our brief involvement with this Trust in the beginning of 1999. You may therefore wish to raise some enquiries of Harrington Trust Limited…"

75. By two letters dated 23 July and 10 September 2002 Carey Langlois requested Collas Day once again to arrange for the caveat lodged on behalf of the Applicant to be released.

76. Collas Day did not reply to the First Respondent's letter dated 26 July 2002 until 12 November 2002. In their letter Collas Day claimed that Lady Bathurst was entitled to information from the First Respondent as Trustee, on the lines set out in paragraph 1 of the prayer in the Application to the Royal Court. By further letter dated 12 November 2002 Collas Day wrote to Carey Langlois in response to their letter dated 27 June 2002. In this letter they sought from the Second Respondent information of the nature set out in paragraph 1 of the prayer in the Application. By further letter dated 12 November 2002 Collas Day put Carey Langlois on notice that they had written to the Registrar of the Ecclesiastical Court for a further extension of six months for the caveat lodged by the Applicant.

77. By letter dated the 15 November 2002 Carey Langlois, by Mr Clark on this occasion, asked Collas Day for

> " the authority upon which you rely in making your bold assertion that a former beneficiary is entitled to the information set out in your letter of 12 November 2002. I am sure that Advocate Eades would be particularly interested in your

> authority that a beneficiary, let alone a former beneficiary, is entitled to see any Letter of Wishes."

By letter dated 22 November 2002 Collas Day cited the then recent judgment of the Court of Appeal in Guernsey in "the Acatos Case", (*i.e.* ***Stuart-Hutcheson***,) as what they called a "general authority" for their request for information.

78. The legal debate continued between the firms of Advocates for the Applicant and Second Respondent and by letter dated 10 December 2002 Mr Clark, on behalf of the Second Respondent, argued that the Court of Appeal in ***Stuart-Hutcheson***

> "*.. was not asked to even consider the issue of whether letters of wishes were disclosable documents… you are doubtless familiar with the learning on the disclosability of Letters of Wishes which documents are prima facie confidential… The application made by Mr Stuart-Hutcheson in relation to the Peter Acatos Number 3 Settlement of which Mr Stuart-Hutcheson had been previously excluded as a beneficiary was adjourned sine die.* If you have any authority to suggest that that a non-beneficiary is entitled to be supplied with the information you have demanded it would be of enormous assistance to all concerned for you to disclose it. If you are unable to provide authority for your contention that you are entitled, as representing a non-beneficiary to the information you have requested, I would draw your attention to the provisions of Rule 59 of our Rules of Professional Conduct. Unless you have any such authority I regret that I am unable to provide you with the information you have demanded. Mr Clarry established a settlement which conferred power to remove

> and appoint beneficiaries. Section 8 (2) of the [Trusts Law] expressly confirms that trusts may provide for the exclusion from benefit of a beneficiary. *The powers conferred by the Trust Instrument to remove your client from benefit were exercised following consultation with the Settlor.*
>
> *I would be perfectly happy for you to see an extract of the Instrument by which your client was excluded from benefit in order for you to satisfy yourself that your client* ***is not a beneficiary of the Trust****.*" (Once again, the emphasis is mine.)

Mr Clark accepted in paragraph 9 of his affidavit that the reference to the Rules of Professional Conduct was "immoderate".

78. By letter dated 20 December 2002 the First Respondent made similar points to those made by Carey Langlois in their letter dated 10 December 2002, and refused to provide Collas Day with the information which they had sought. The First Respondent claimed that it owed a continuing duty of confidentiality, presumably meaning a duty to the Beneficiaries, who, of course, had included Lady Bathurst between 1 and 4 October 2001, and so would not provide the requested information. The First Respondent also directed all questions to the Second Respondent, which it described as "the current trustee", raising, I think, the possibility that the First Respondent did not know at that time of the termination of the Second Wheatland Trust on 20 November 2001.

79. By letter dated 17 March 2003, Collas Day replied to the First Respondent and claimed information in relation to the First Wheatland Trust on the basis that Lady Bathurst had been a beneficiary under that trust, and sought, in relation to the Second Wheatland

Trust, information for the period, (if any), during which the First Respondent had been the Trustee of that trust.

80. By letter dated 17 March 2003 from Collas Day to Carey Langlois, Lady Bathurst's Advocates said:

> " Our interpretation differs from yours in relation to the Stuart-Hutcheson case. The decision of the Court of Appeal was based on the issue of Trustee accountability. Whilst the beneficiary's representative did not request disclosure of a Letter of Wishes and so the issue of such a document did not form part of the decision, given the rationale of the decision at its widest interpretation it is certainly arguable that such a document is disclosable.
>
> Having said that, our client's understanding of the Trust's history is imperfect because of the lack of information. We understand that the position is as follows:
>
> > " The Clarry Trust, subsequently named the Wheatland Trust was established on 11 March 1970. That Trust distributed all its assets into the new Wheatland Trust in or about 1999. Our client was a beneficiary of the Clarry/Wheatland Trust until its termination in or about 1999.
> >
> > Our client was named as a beneficiary in the 'new' Wheatland Trust but was subsequently purportedly excluded on 25 October 2001.

> Our client is therefore entitled as a beneficiary to the requested information in relation to the original Clarry/Wheatland Trust. In so far as your clients have such information, will they now please provide same.
>
> In so far as the 'new' Wheatland Trust, our client, it seems to us, is certainly entitled to information up to the point that she was excluded as a beneficiary. Thereafter, as you point out in your letter is a matter of argument based upon the nature and impact of the Stuart-Hutcheson decision. Again, will your clients provide information in relation to the 'new' Wheatland Trust, at least up to 25 October 2001".

81. After these lengthy exchanges between Advocates for the parties, by Application dated 26 September 2003 Lady Bathurst, acting by Advocate Richardson of Collas Day, started these proceedings. As I have said already, Ozannes, the Advocates for the First Respondent, supplied trust documentation to Collas Day under cover of their letter to Collas Day dated 30 September 2003, including copies of the 1983 Deed, the Deed of Nomination of Lady Bathurst as a beneficiary dated 1 October 1999 and the Deed of Appointment dated 4 October 1999 under which the assets of the First Wheatland Trust were paid irrevocably by the First Respondent to itself as the first trustee of the Second Wheatland Trust.

82. But no documents were forthcoming from the *Second* Respondent or its Advocates in response to the Application. Indeed, as I have already mentioned, no documents were produced by them until very recently. It was only when the oral hearing date was fast approaching that some documentation was supplied to Collas Day by Advocate Barnes,

the Advocate for the Second Respondent; this took place, as I have already mentioned, on the instructions of the Second Respondent and the documents reached Collas Day on about 6 July 2004. With his letter (dated 5 July 2004,) Advocate Barnes supplied Collas Day with copies of the 1999 Deed, the Instrument of Appointment of Mr Clark as the new Protector of the Second Wheatland Trust, dated 25 October 2001, and the Instrument of Exclusion of Beneficiary between the Second Respondent as the Trustee of the Second Wheatland Trust and Mr Clark as the Protector dated 25 October 2001, under which Lady Bathurst was excluded as a member of the class of Beneficiaries under the Second Wheatland Trust. Advocate Barnes' letter included these words:

> "In anticipation of the hearing next week my clients do not want there to be any doubt about the formal validity of your client's exclusion from the trust and I am therefore enclosing copies …"

83. Accordingly, whilst the 1999 Deed, the Instrument of Nomination of Mr Clark as new Protector, and the Instrument of Exclusion of Lady Bathurst as a Beneficiary, have now been provided by the Second Respondent, as trustee of the Second Wheatland Trust, no other documents relating to the trust and its administration, including any Letters of Wishes of Mr Clarry, have been disclosed by it.

84. Three documents, probably deeds, in particular, have not been disclosed, namely, a Deed dated 31 August 2001 under which the Second Respondent itself was appointed sole trustee of the Second Wheatland Trust, a Deed of Indemnity of the same date arising out of the change of trusteeship, and a Deed of Appointment, apparently in favour of WAL, dated 20 November 2001.

85. Further, no trust accounts and no documents relating to any of the three companies, in whose shares the trustees of both trusts may from time to time have invested, have been disclosed to Lady Bathurst or her Advocates by either the First Respondent or the Second Respondent.

86. Furthermore, no trust documents have been disclosed by Mr Clark, as Protector of the Second Wheatland Trust, and, until the Instrument of his nomination was disclosed by Advocate Barnes' letter dated 5 July 2004 and until he swore his affidavit on 19 July 2004, he had given no information about his appointment and role as Protector either to Lady Bathurst or her Advocates or to the Court. Indeed, until 6 July 2004 Lady Bathurst can have had no clue at all that there had been a Protector.

87. In case it were to be suggested on behalf of Mr Clark, (which I stress it was not,) that no request by or on behalf of Lady Bathurst for the disclosure of trust documents and information had been made to him in his capacity as Protector until the oral hearing, such a suggestion would not, I think, be fairly made. Not only did Mr Clark, on behalf of the Second Respondent, personally write material letters to Collas Day, from which I have already quoted, in late 2002, in which no mention was made of his appointment as Protector, but also Lady Bathurst and her Advocates had no way of knowing of the existence of *any* Protector of the Second Wheatland Trust until 6 July 2004, nine days before the hearing date, when they received from Advocate Barnes a copy of the 1999 Deed, (which provided for the appointment of a Protector and also for the powers and duties of the Protector,) and a copy of the Instrument of Nomination of Mr Clark as the Protector in place of Belmont, the original Protector.

The remaining live issues in the proceedings

88. Since some trust documents and, in the affidavits of Mr McAuliffe, Mr Retz and Mr Clark, some trust information have now been disclosed by the Respondents, the live issues in these proceedings, therefore, now relate primarily to Lady Bathurst's request for disclosure of (a) further information relating to each trust and (b) of documents, namely, (i) a Deed dated 31 August 2001 under which the Second Respondent was appointed sole trustee of the Second Wheatland Trust in place of the First Respondent, (ii) a Deed of Indemnity of the same date, (iii) a Deed of Appointment dated 20 November 2001 under which the trust assets of the Second Wheatland Trust appear to have been appointed irrevocably in favour of WAL, (iv) any Letters or Memoranda of Wishes written by Mr Clarry to the trustee(s) of either of the two Wheatland trusts or to Mr Clark as Protector of the Second Wheatland Trust, (v) trust accounts relating to both trusts and (vi) company documents, including minutes and company accounts, relating to each of five companies mentioned in paragraph 1.2 of the Re-Amended Application, the first three of which, namely, (a) Air Holdings Limited, a Guernsey company, (b) Atlantic and Caribbean Trust SA, a Panamanian company and (c) Moore Wilson & Blair Limited, a Guernsey company, were, it seems, investments of the First and Second Wheatland Trusts, the fourth of which is a Bermudian company in which Atlantic and Caribbean Trust SA itself invested and the fifth of which is WAL. Details of these investments were given in paragraph 4 of Mr Retz's affidavit, where he said:

> "The entire assets of the Trust were appointed to [WAL] namely:

4.1 all of the issued shares in Air Holdings Limited, a company incorporated in Guernsey, the principal asset of which was the Settlor and his wife's home in Guernsey.

4.2 300 shares of US$1 each in Atlantic and Caribbean Trust SA, a company incorporated in Panama, which in turn owned shares in a Bermudian company, Boulevard Investments Limited, which in turn owned a commercial property in Nassau.

4.3 Moore Wilson & Blair Limited, a Guernsey registered company which had sold agricultural land in England. The land had potential if planning permission was granted and the sale of the land included an uplift provision which the company retains for thirty years post-sale.

All three companies maintained bank accounts."

Guernsey as a trusts jurisdiction

89. The use of Guernsey, and other so-called offshore jurisdictions, trusts by wealthy individuals is well-established, and has been for many years. In this case, of course, Mr. Clarry was a Guernsey resident, but, in my view, the general comments made in paragraphs 1-2 and 34-35 of the judgment of the Privy Council (delivered by Lord Walker of Gestingthorpe) in ***Schmidt v Rosewood Trust Ltd*** [2003] 2 A.C. 709, (to which I shall refer as ***Schmidt*** ,) (reversing the decision of the Staff of Government

Division of the Isle of Man on appeal from the Deputy Deemster,) apply as well to Guernsey trusts, and to Guernsey resident beneficiaries and trustees, as to trusts of other jurisdictions.

90. Settlors, who may directly set up trusts or use a corporate cloak to set up trusts, often expect both security and a high degree of confidentiality. What I know of the facts, (which is not very much in the light of the somewhat limited affidavit evidence lodged by the parties,) suggests that Mr. Clarry desired both security for his corporate assets and a degree of confidentiality. Whilst I accept that he wanted some confidentiality in respect of his dealings with the Respondents, I am not able to say whether he wanted a high degree of confidentiality or was satisfied with a little less. For the evidence does not, for instance, say whether any Letters of Wishes sent by him to the trustees of the two trusts, and perhaps to Mr Clark as the Protector of the Second Wheatland Trust, were expressed to be confidential. Indeed, the trustees have chosen to put in no evidence on this aspect of the case and so I can only judge their position, on a factual basis, from what they or their Advocates might have said in the correspondence passing between the parties in 2002-2003. There is, therefore, no evidence from any of the Respondents, which touches on the privacy or confidentiality of other beneficiaries of the Second Wheatland Trust whilst it continued as a subsisting trust between, say, 25 October 2001 and 20 November 2001, save for what is said, in general terms, in paragraph 3 of Mr McAuliffe's affidavit and in more detail in the letters to Collas Day from the First Respondent and Carey Langlois, as Advocates for the Second Respondent. From which I have quoted above.

91. I turn once again to the jurisdiction of the Royal Court in trusts matters. The Trusts Law covers much, but not all, of the jurisdiction of the court and, in the circumstances of this case, several provisions of the Trusts Law need to be considered.

92. First, I refer to certain definitions used in the Trusts Law. There are two, separate definitions of a "beneficiary". Section 1 deals with the requirements for the existence of a trust and, so far as is material, defines the term "beneficiary" as meaning a person, whether or not yet ascertained or in existence, for whose benefit another, *i.e.* a trustee, holds personalty, whilst the term is also defined by Section 73(1), unless the context otherwise requires, as meaning "a person entitled to benefit under a trust, or in whose favour a power to distribute trust property may be exercised". Section 73(1) also defines a "trust" in somewhat unusual, and perhaps, circular, terms as meaning

> " (a) the trust property; and
> (b) the functions, interests and relationships under a trust".

A "trustee" is there defined as having the meaning given by Section 1, and as including a corporate trustee. Finally, a "settlor" is defined in Section 73(1) as meaning "… a person who provides trust property … to a trust".

93. Part V of the Trusts Law contains several important supplemental provisions. Section 72(1) provides that:

> "Subject to Section 74, and except where provision to the contrary is made, this Law applies to trusts created before or after the commencement of this Law."

Section 74(2) provides that:

> "Nothing in this Law derogates from the powers of the court which exist independently of this Law –
> …
> (b) in respect of trusts, trustees or trust property; …"

94. In Part III of the Trusts Law Section 59(1) provides that:

"… a foreign trust is governed by, and shall be interpreted in accordance with, its proper law."

Neither Lady Bathurst nor the First Respondent adduced expert evidence of Bermudian law relating to the First Wheatland Trust and, in these circumstances, in accordance with usual practice, I shall, where necessary, treat Bermudian law as being to the same effect as the law of Guernsey.

95. Part IV of the Trusts Law contains provisions of general application, which, where the context admits, apply both to Guernsey trusts and to foreign trusts (Section 60). Section 62 gives trustees an express power to apply to the court, (which is defined in Section 73(1) as meaning the Royal Court sitting as an Ordinary Court,) for directions.

96. Of some importance to this application is Section 63, which provides, *inter alia*, as follows:

> "(1) On the application of any person mentioned in subsection (2), the court may –
>
> (a) make an order in respect of –
>
> (i) the execution, administration or enforcement of a trust;
>
> (ii) a trustee, including an order as to the exercise by a trustee of his functions, … or conduct of a trustee, the keeping and submission of accounts …;
>
> (iii) a beneficiary, or any person connected with a trust;
>
> (iv) any trust property, …;
>
> …

(2) An application under subsection (1) may be made by [HM Procureur], a trustee, a settlor, a beneficiary, a person described in Section 28(2), or, with the leave of the court, any other person."

97. There are several provisions in Part II of the Trusts Law, (which is applicable only to Guernsey trusts,) which are of importance to this Application.

Section 8(2) provides that:

"The terms of a trust may provide for the addition of a person or beneficiary, or for the exclusion from benefit of a beneficiary."

Section 18(2) provides that:

"A trustee shall execute and administer the trust, and shall exercise his functions thereunder, in accordance with the provisions of this Law and subject thereto –

(a) in accordance with the terms of the trust;

(b) …"

Section 21 provides that:

"A trustee shall keep accurate accounts and records of his trusteeship."

Section 22 deals expressly with the provision of information by trustees in these terms:

"(1) Subject to the terms of the trust, a trustee shall, at all reasonable times, at the written request of any beneficiary … or of the settlor, provide full and accurate information as to the state and amount of the trust property.

(2) In its application to a trust arising from a document or disposition executed or taking effect before the commencement of this Law, subsection (1) shall only operate for the benefit of a beneficiary whose interest in the trust property becomes vested before the commencement

of this Law, but this subsection shall not prejudice any rights that the beneficiary may have under the terms of the trust."

Section 26 provides that:

"Subject to the provisions of this Law and to the terms of the trust, a trustee has, in relation to the trust property, all the powers of a beneficial owner."

Section 28 provides that:

" (1) A trustee may consult professional persons in relation to the affairs of the trust.

(2) The terms of a trust may require a trustee to consult or obtain the consent of another person before exercising any function.

(3) A person shall not, by virtue of being so consulted or giving such consent, be deemed to be a trustee."

Section 33 provides that:

"A trustee is not (subject to the terms of the trust and to any order of the court) obliged to disclose documents which reveal –

(a) his deliberations as to how he should exercise his functions as trustee;

(b) the reasons for any decision made in the exercise of those functions;

(c) any material upon which such a decision was or might have been based."

98. I am bound by the decision of the Guernsey Court of Appeal in ***Stuart-Hutcheson***, where the main judgment was delivered by Judge of Appeal Christopher Clarke QC. The case concerned pre-1989 Guernsey discretionary trusts; the applicant was both an existing, and a revocably excluded, beneficiary of two existing Guernsey discretionary settlements, and he sought an order for copies of trust documents, and other trust information, relating to the trust where he remained a beneficiary, and related company documents, to be disclosed to him. The company concerned was owned 50/50 by the two trusts. It seems that the application in relation to the trust, from benefit under which he had been excluded, as adjourned *sine* die. The Deputy Bailiff declined to make an order for disclosure on the basis that he had considered that he had no jurisdiction to do so in the light of Section 22 of the Trusts Law. His decision was reversed by the Court of Appeal.

99. At paragraphs 13-25 of his Judgment Clarke J.A. dealt with the rights of beneficiaries of Guernsey discretionary trusts before the Trusts Law. At paragraphs 14 & ff. he considered, in the absence of Guernsey authority, the position under English law. At paragraph 14 he said:

> "Under English law beneficiaries, including discretionary beneficiaries, have a right, within limits, to receive information from the trustee in relation to the affairs of the trust. The basis of that right has been said to arise either because the beneficiary has some form of proprietary right in respect of trust documents or because the trustee has a duty to account to the beneficiaries in respect of his stewardship of the assets of the trust."

The learned Judge of Appeal reviewed the arguably contrasting views expressed by Lord Parmoor and Lord Wrenbury in ***O'Rourke v Darbyshire*** [1920] AC 581 and ***Rouse v IOOF Australia Trustees Ltd*** (1999) 2 ITELR 289, Doyle CJ at 308, and, at paragraph 16, said:

> "There is, to my mind, no antithesis between these two approaches. In essence the duty of the trustee to provide information about the trust and its assets arises from the obligations of a trustee towards the beneficiaries of the trust that are inherent in the concept of trusteeship. These include an obligation to hold and dispose of assets for the benefit of the beneficiaries in accordance with the terms of the trust and to account to the beneficiaries for his stewardship of them. Even the so-called proprietary right in respect of trust documents arises, as Lord Wrenbury said 'because they are trust documents and because he is a beneficiary'. They are only 'in a sense' his own. In the case of discretionary beneficiaries without any vested interest in the trust property it is difficult to see how documents or information belonging to the trust are in any sense his own. Any entitlement on their part to information arises because of the duty of a trustee to account to the beneficiaries, including discretionary beneficiaries, for what he has done in relation to the trust assets."

Then, at paragraph 18, the learned Judge of Appeal said:

> "I have no doubt that, as a matter of principle, a beneficiary of a trust has a right to information from the trustees as to the assets of the trust and their dealing with them. … That that should be so is in accordance with the principle upon which

> the right to information rests. A discretionary beneficiary, at any rate if he belongs to a limited class, as in most family trusts, has an interest in having the trusts observed by virtue of being a permissible object of the trustee's discretion. This gives him a similar interest in receiving an account of the unappointed assets as any other kind of beneficiary. It may be highly material for a discretionary beneficiary to know what has happened to the trust fund, not least because the size and nature of the assets of the trust may be relevant to whether any share in them should be appointed to him."

At paragraph 25 the learned Judge of Appeal concluded as follows:

> "… in my judgment, prior to the enactment of [the Trusts Law], non-vested discretionary beneficiaries of a Guernsey trust had, under Guernsey customary law, a right to see documents of the trust and to receive information about the trust and the assets commensurate with that enjoyed by such beneficiaries under English law."

100. At the heart of ***Stuart-Hutcheson*** were the rights of beneficiaries under pre-1989 trusts, both under Guernsey's customary law and generally, to information and documents and, more generally, the effect of Section 22 of the Trusts Law. The Judgment of the Clarke JA explained the genesis of Guernsey trusts before the coming into force of the Trusts Law and, after doing so, considered the effect on that case of Section 22(1) and (2) of the Law. It was suggested to me in argument that it might not have been strictly correct for the Court of Appeal to have referred to Guernsey's *customary* law as having provided non-vested discretionary beneficiaries with rights to seek information and documents, and reference was made to the Policy Letter dated 12 February 1988 which led to the passing of the Trusts Law, which is commented on in Clarke JA's Judgment. But what is abundantly clear is that the decision in ***Stuart-Hutcheson*** is directly relevant to the First and the Second Wheatland Trusts, and binds me on this Application in relation to each trust.

101. The question of general importance addressed by the Court of Appeal in ***Stuart-Hutcheson***, (which I believe relates to all trusts within the jurisdiction of the Royal Court, whenever they may have been established,) was described in paragraph 20 of the Judgment of Clarke JA in these terms:

> "That, prior to the [Trusts Law], trusts had become part of Guernsey law is not in dispute; what is in issue is the extent to which the general law of trusts in England had become part of the law of Guernsey. To that question the answer is, in my judgment, to be found by a consideration of the process by which trusts came to be part of Guernsey law. They did do because settlors established trusts, whether *inter vivos* or by will, the validity of which was recognized and, where necessary, enforced by the Royal Court. In addition the legislature in a number of laws recognized and adopted the notion of trusteeship. In thus importing, as it were, the English concept of a trust and trustees those concerned must be regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable. The trustee's obligation to account for his execution of the trust is a characteristic of a trust…"

102. In connection with a beneficiary's right to claim disclosure of documents and information from trustees the Court of Appeal (Clarke JA at paragraph 22) centred on what "… is inherent in the adoption and recognition of trusts in Guernsey." Like Lord Walker in ***Schmidt***, the learned Judge of Appeal cited, in support of his conclusions, what Kenny J. had said in Ireland in ***Chaine-Nickson v The Bank of Ireland*** [1976] IR 393. The learned Judge there, *inter alia*, said:

> "This seems to me to be contrary to the basic concept of a trustee being accountable for his management of the trust fund. In a case where the investment powers of the trustee under a discretionary trust are limited, the beneficiaries have a clear interest in getting information as to how the trust fund had been invested … and a potential beneficiary under a discretionary trust is entitled to copies of the trust accounts and to information as to the investments

which represent the trust fund. The obligation of the trustees is not satisfied by giving particulars of the payments made by them."

103. The Trusts Law was carefully considered by the Court of Appeal in ***Stuart-Hutcheson***, where, unlike in the present case, the applicant did not seek to obtain any documents which revealed any of the matters referred to in Section 33 (a)-(b). In paragraphs 32 and 35 of Clarke JA's judgment, he dealt with the nature of the Trusts Law, and with the ambit of Section 22(1), as follows:

> "The Trusts Law is not expressed to be, and, in my view, is not, a statute codifying the whole law of trusts or even the whole law on disclosure of information. *There are a number of documents (such as the trust deed and supplements thereto, documents excluding or adding beneficiaries and documents relating to the appointment or retirement of trustees) which a beneficiary may be entitled to see whether or not they contain information as to the state and amount of the trust assets.* In my judgment the purpose of the Trusts Law was to declare and delineate certain basic principles. That that is so appears both from a study of its contents and from the report to the States that led to the Projet de Loi. … To the extent that the Trusts Law modifies the principles of English trust law, those principles must, of course, take effect as modified. But there is nothing in the Trusts Law that purports to take away any existing rights of non-vested discretionary beneficiaries to information. On ordinary principles it should be presumed not to do so in the absence of clear provision to that effect. There is no such provision. On the contrary s22(2) makes clear that that it shall not prejudice any rights that a non-vested beneficiary may have under the terms of the trust. Section 73(1) provides that:
>
> > 'In this Law, unless the context otherwise requires –
> >
> > "terms of a trust" means the written or oral terms of a trust, and any other terms applicable under its proper law.'
>
> The proper law of the present trust is that of Guernsey under whose customary law, prior to 1989, non-vested discretionary beneficiaries had, as I hold, rights to information. Section 22(2) preserves those rights. …

> I am … in respectful agreement with the Deputy Bailiff that the reference in s22(1) to information embraces information in documentary form, including information in
>
> existence in written form prior to the making of any request. *In enacting s22(1) the legislature was, to my mind, seeking to set out a principle of disclosure in terms which broadly reflected existing English law.* I can see no reason why the legislature should have intended to distinguish between 'information', which s22(1) requires the trustee to provide, and trust documents which it does not. *In my opinion s22(1) should receive a construction consistent with the general English law on the question of disclosure by trustees* and not one that artificially distinguishes existing documents from 'information'. *Compliance with the duty to provide full and accurate information on the state and amount of the trust property may require the production of existing documents, or fresh, information, or both. Nor is information as to the state and amount of the trust property to be limited to the state and amount of the trust property at the time of the request*." (I have added the emphasis.)

104. The present application may, I believe, be the first occasion on which the Royal Court has been asked to consider its trusts jurisdiction relating to requests for so-called "trust" documents and information about a Guernsey trust and a foreign trust after the decision of the Privy Council in ***Schmidt***. In the judgment of the Board in that case, which was given by Lord Walker, the inherent jurisdiction of a Court seised with trusts or equity jurisdiction to supervise, and where appropriate intervene in, trusts was relied upon as founding the right of named beneficiaries of trusts, and objects of a discretionary power to add beneficiaries, under established principles of English law to apply to the Court for disclosure of trust information and documents.

105. The Privy Council decided that this inherent jurisdiction did not depend upon any distinction or "bright line" between what were called transmissible and non-transmissible (*i.e.* discretionary) interests or between the rights of an object of a discretionary trust and those of an object of a mere power of a fiduciary nature. I refer, in particular, to paragraph 36 of Lord Walker's judgment where he said:

> "It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust. As Holland J said in the Australian case of *Randall v Lupano* (unreported) 31 October 1975, cited by Kirby P in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 416:
>
> "No matter how wide the trustee's discretion in the administration and application of a discretionary trust fund and even if in all or some respects the discretions are expressed in the deed as equivalent to those of an absolute owner of the trust fund, the trustee is still a trustee."
>
> "

The point most addressed in argument in the Privy Council was whether a beneficiary's right or claim to disclosure of documents was a proprietary right. Lord Walker discussed the decision of the House of Lords in ***O'Rourke v Darbishire***, and especially the words of Lord Wrenbury at pages 626-7, which had been interpreted in later cases in England, (but not in ***Stuart-Hutcheson***, which was not cited,) as a binding decision of the House of Lords to the effect that "…a beneficiary's right or claim to disclosure of trust documents or information must always have the proprietary basis of a transmissible interest in trust property" (Lord Walker, at paragraph 49). Lord Walker examined the context in which Lord Wrenbury had been speaking and, whilst, I think, not necessarily moving away from the approach of the Court of Appeal in the landmark case of ***In re Londonderry's Settlement*** [1965] Ch. 918, (where the Court recognised as a limitation on the right to disclosure of trust document what was described in these terms:

> "…the need to protect confidentiality in communications between trustees as to the exercise of their dispositive discretions, and in communications made to the trustees by other beneficiaries. That issue can alternatively be seen as an inquiry whether such confidential communications are indeed trust documents. …",)

he went back to "first principles" of English trust law to found the decision of the Board.

106. At paragraphs 51-52 of the Judgment in ***Schmidt*** Lord Walker summarised the views of the Board, and expressed the Board as being in general agreement with the views of the Court of Appeal of New South Wales in ***Hartigan***, using these words:

> "… Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion…"

107. ***Hartigan*** was a case where disclosure was sought, *inter alia*, of a memorandum of wishes. As Lord Walker said in paragraph 61 of the judgment in ***Schmidt***, there

> "… were two main issues, whether the letter of wishes should be disclosed, despite its confidential nature; and how much weight trustees, in exercising their discretions, should give to a letter of wishes. Much of the discussion of the authorities was in the context of the second question. For present purposes the case is of most interest for the division of opinion in the Court of Appeal of New South Wales on whether a beneficiary's right or claim to disclosure of documents is proprietary in nature …"

The majority of Kirby P and Sheller JA in ***Hartigan*** had found the "proprietary right" approach unsatisfactory. Kirby P said:

> "I do not consider that it is imperative to determine whether that document is a 'trust document' (as I think it is) or whether the respondent, as a beneficiary, has a proprietary interest in it (as I am also inclined to think he does). … Access should not be limited to documents in which a proprietary right may be established. Such rights may be *sufficient*; but they are not *necessary* to a right of access which the courts will enforce to uphold the cestui que trust's entitlement to a reasonable assurance of the manifest integrity of the administration of the trust by the trustees. … The equation of the right to inspect trust documents with the beneficiary's equitable proprietary rights gives rise to unnecessary and undesirable consequences. It results in the drawing of virtually incomprehensible distinctions between documents which are trust documents and those which are not; it casts doubt upon the rights of beneficiaries who cannot claim to have a right to have an equitable proprietary interest in the trust assets, such as the beneficiaries of discretionary trusts; and it

> may give trustees too great a degree of protection in the case of documents, artificially classified as not being trust documents, and beneficiaries too great a right to inspect the activities of trustees in the case of documents which are, equally artificially, classified as trust documents.' "

108. In ***Schmidt*** the Board decided that it was neither sufficient nor necessary for an applicant to have a proprietary right to disclosure (paragraph 54). In the same paragraph Lord Walker also said:

> "Since *In re Cowin* 33 Ch D 179 well over a century ago the court has made clear that there may be circumstances (especially of confidentiality) in which even a vested or transmissible beneficial interest is not a sufficient basis for requiring disclosure of trust documents; and *In re Londonderry's Settlement* and more recent cases have begun to work out in some detail the way in which the court should exercise its discretion in such cases. There are three such areas in which the court may have to form a discretionary judgment: whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court.**"**

109. Although the decision in ***Schmidt*** is not binding on the English Courts, it has already received strong approval from academic writers, Commonwealth judges and trust

practitioners and I believe that it is very likely that it would, at the first opportunity, be adopted as part of English law by any English Court. I have also reached the respectful conclusion that the approach of the Board represents the current state of English trust law and that there is no distinction to be drawn between this approach and the approach taken by the Court of Appeal in ***Stuart-Hutcheson***. For the sake of completeness, I also record that, amongst the writings which I have considered both during the hearing and in writing this Judgment, are:

- Christopher McCall QC, *Case Note on Schmidt*, [2003] PCB 358
- Lightman J. *The Trustees' Duty to Provide Information to Beneficiaries*, [2004] PCB 23
- Simon Taube QC *Discovering the Reasons for Trustees' Decisions*, 18 May 2004, Chancery Bar Association (England) paper
- Advocate St John Robilliard, *The Rights of Beneficiaries to Information on Trusts*, Autumn 2003, Rothschild Trust Review, Issue 8
- J.D. Davies, *Integrity of Trusteeship*, (2004) 120 LQR 1

110. Under the Guernsey law of precedent ***Schmidt*** is not binding on either the Royal Court or the Guernsey Court of Appeal, since it was not an appeal from the Court of Appeal of Guernsey, - see ***Morton v Point*** (1996) 21 GLJ 61, per Southwell JA at page 55E & ff. But I have found the reasoning and approach of the Board, and their review of English and Commonwealth authorities, highly persuasive; I respectfully consider it be both correct in principle and consistent with the general pattern of Guernsey trusts. I propose, therefore, to follow, in relation to Guernsey and foreign trusts, in respect of which the Royal Court has a supervisory jurisdiction, the approach taken in both ***Stuart-***

Hutcheson and ***Schmidt***. I add that it was not suggested to me by either Advocate Richardson, for Lady Bathurst, or Advocate Barnes, for the Second Respondent and Mr Clark, that ***Schmidt*** was inconsistent with ***Stuart-Hutcheson*** or that I should not follow it.

111. I, therefore, conclude that under the law of Guernsey no beneficiary of a trust, whether or not he has a vested interest under the trust, and no object of a discretionary power, has "any entitlement as of right to disclosure of anything which can plausibly be described as a trust document" or to disclosure of trust information – see Lord Walker in ***Schmidt*** at paragraph 67. The real test is, in my judgment, whether or not it is appropriate, in all the circumstances of the case in question, for the Royal Court, under its inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts, to exercise its discretion by ordering the disclosure by a trustee of trusts documents or information.

112. Furthermore, it appears to me that the approach to be taken in relation to the First and Second Respondents, as trustees respectively of the First and Second Wheatland Trusts, should equally be taken in relation to Mr Clark as Protector under the Second Wheatland Trust; and the Advocates for the parties did not, (I believe, rightly,) seek to distinguish between trustees and a protector with regard to Lady Bathurst's application for disclosure of documents and information.

113. The position of protectors, which, with the possible exception of Section 28(2), is not expressly provided for in the Trusts Law, has been helpfully considered in *Underhill and Hayton's Law Relating to Trusts and Trustees* 16th ed. (2003) at pp. 29-33

and in *An Analysis of the Guernsey Law of Trusts*, Dr Raymond Ashton (1998) at pp. 83-91. In the light of the agreement between Counsel that, on the facts of this case, in relation to Lady Bathurst's application for disclosure of trust documents and information, there is no difference between the position of the First and Second Respondent, as former trustees, and the position of Mr Clark, as former protector of the Second Wheatland Trust, it is not necessary for me to decide the difficult question whether, on the terms of the 1999 Deed, Mr Clark owed Lady Bathurst personal duties or fiduciary duties – see, *e.g.*, on this question the Jersey case of ***Sofimeca SA v Klienwort Benson (Jersey) Trustees Ltd*** (unreported) 13 July 1993, and the Bermuda case of ***In re Star Trusts*** (1994) 13 July 1994. But I agree with what Dr Ashton said, at p. 84:

> "The protector can be a useful liaison between the trustees and beneficiaries, particularly where he has special knowledge of the family, the reasons behind the creation of the trust, or of particular assets in the trust, such as private company shareholdings. *The protector may and can, in certain circumstances, give considerable weight to a Letter of Wishes. Obviously, having someone with independent powers outside the jurisdiction of the trustees and/or settlor is a good idea as it provides a check on the use of the trustees' powers. …*"
>
> (The emphasis is mine.)

114. For the sake of completeness, I add that the function of the Royal Court to supervise, and where necessary intervene in, the administration of trusts is quite distinct from its procedural rules and practice governing discovery and inspection of documents in the context of trust litigation, *e.g.* proceedings for damages for breach of trust.

The position of an "excluded" beneficiary of a trust which has been terminated after the exclusion

115. It was argued on behalf of the Second Respondent and Mr Clark, as their primary argument and consistently with the approach taken by them in the corrspondence between Advocates, that Lady Bathurst's application failed at the outset since the Royal Court had no jurisdiction to order disclosure, in relation to the Second Wheatland Trust, in the case of an excluded beneficiary like her. I disagree. There is, in my judgment, no principle which leads, or indeed should lead, to such a conclusion. Nor does any authority require me so to hold. To my mind, the jurisdiction of the Royal Court to supervise, and where appropriate intervene in, the administration of trusts either under Section 4 of the Trusts Law or under the inherent jurisdiction of the court in trusts matters extends to trusts which have come to an end and includes jurisdiction to decide applications for disclosure brought by ex-beneficiaries, including former beneficiaries who had been excluded from a specified class of beneficiaries under a discretionary trust before the termination of the trust – see, on the question of an application by ex-beneficiaries of a *subsisting* discretionary trust, the Australian case of ***Millar and Butterworth v Hornsby*** (2000) Supreme Court of Victoria 28 June 2000.

116. In my judgment, there is no principle which operates so as to prevent the Royal Court exercising this jurisdiction in relation to trusts which have already come to an end either before proceedings have been commenced, as in this case, or during the course of the proceedings; nor, in my view, does nay provision in the Trusts Law have such an effect. In this context, I refer in passing to Section 48 of the Trusts Law, under which express powers are conferred on the Royal Court to make certain orders on the termination of trusts.

117. The right of a beneficiary, who has been excluded from a class of beneficiaries under a trust, to seek trust information and documents has, it seems, only rarely been addressed by Courts within the Commonwealth. I consider that, as a matter of first principle, an excluded beneficiary, like Lady Bathurst, is entitled to apply to the Court for relief relating to the period both when she was a named beneficiary of the trust in question and when she was a potential object of the discretionary powers, including the short period, now known to be the period between 25 October and 20 November 2001, after she had been excluded as a member of the class of beneficiaries under the 1999 Deed.

118. Whether or not such an excluded beneficiary would succeed in obtaining an order for disclosure would be a different question, to be addressed as a matter of judicial discretion in accordance, *inter alia*, with the approach described by Lord Walker in ***Schmidt*** at paragraphs 66 and 67 of the Judgment and in accordance with the guidance of the Court of Appeal of Guernsey in ***Stuart-Hutcheson***, at paragraphs 36-41 of the Judgment of Clarke JA, where it is made clear that the jurisdiction of the Royal Court is discretionary. Perhaps one way to put it is that cases of this nature are fact-specific or that they must always be governed by their facts.

Letters of Wishes

119. This case raises, probably for the first time in the Royal Court, the question whether the Royal Court should order disclosure by trustees of a Guernsey trust of Letters or Memoranda of Wishes written by Mr Clarry to "his" trustees or to Mr Clark, as the Protector of the Second Wheatland Trust.

120. In this case it seems likely from what was said by Carey Langlois in the correspondence that Mr Clarry had provided a Letter of Wishes relating to the Second Wheatland Trust, or some other document of a similar nature, and that such a document relating to the Second Wheatland Trust, and Mr Clarry's express instructions to Mr Clark, were specifically taken into account by the Second Respondent in deciding whether to give its consent to the request of Mr Clark, as the Protector, to exclude Lady Bathurst from the class of Beneficiaries under the trust, pursuant to clause 3(d) of the

1999 Deed, a few weeks only before the termination of the trust – see Carey Langlois' letters to Collas Day dated 27 June and 10 December 2002.

121. Requests for copies of Letters of Wishes formed part of the requests for disclosure of trust documents and information dealt with in two Commonwealth cases, namely, the decision of the Court of Appeal of New South Wales in ***Hartigan Nominees Pty Ltd v Rydge*** (1992) 29 NSWLR 405 and the decision of the Royal Court of Jersey (Deputy Bailiff Byrt presiding) in ***Re Rabaiotti's 1989 Settlement*** [2000] WTLR 953.

122. After reviewing these cases in the light of both ***Schmidt*** and ***Stuart-Hutcheson***, I have reached the conclusion that the jurisdiction of the Royal Court to order disclosure of trust documents could, in a proper case, embrace letters or memoranda of wishes. I gratefully adopt the description of such documents of the Royal Court of Jersey in ***Rabaiotti***, at pp. 964/5:

> "In referring to a letter of wishes, we mean a document addressed by a settlor to trustees which is not binding upon the trustees, but which indicates the settlor's thoughts and wishes as to how the trustees might exercise their discretionary powers."

I have also carefully considered the reasoning of all three members of the Court in ***Hartigan***, where one majority (Mahoney and Shellar JA) held that a letter of wishes did not need to be disclosed on the ground that that it had been written privately to trustees and it was properly to be inferred that it was intended by the settlor to remain confidential, whilst another majority held (Kirby P and Shellar JA) held that a letter of wishes was not a document which might disclose the reasoning for the exercise of a discretionary power.

123. I accept the reasoning of Kirby P and Shellar JA. I find that a letter or memorandum of wishes is not a document which might disclose the deliberations relating to, and the reasoning for, the exercise of a discretionary power. It follows that, in my judgment, such a document does not generally come within the scope of Section 33 (a) and (b) of the Trusts Law.

124. I am also of the view that, in such circumstances, (subject to the individual facts of a case,) Section 33 (c) of the Trusts Law would not apply so as to permit trustees to refuse disclosure of a letter of wishes as a document which reveals "any material upon which a decision was or might have been based"; a letter of wishes may or may not have formed the basis, or part of the basis, on which a decision was made, but the letter itself would not, as I see it, reveal that fact. I, therefore, do not propose to follow the approach of the Royal Court of Jersey in ***Rabaiotti***, at pp. 966-969, which I consider to be unduly restrictive. In my judgment, there is no limit on the jurisdiction of the Royal Court to make orders for disclosure of a letter of wishes in a proper case.

125. I conclude that the jurisdiction of the Royal Court to supervise, and where appropriate, intervene in the administration of trusts would enable it, in a proper case, to decide whether or not to order disclosure of a letter of wishes. I consider that the discretion of the Royal Court in this area is sufficiently broad to enable it to decide each case on its own facts, without there being any need for the imposition of any fetter on the nature or type of document of which it might be asked to order disclosure.

The effect of clause 15 of the 1999 Deed in relation to the Second Wheatland Trust

126. The Second Respondent and Mr Clark also raised a further argument against disclosure based on clause 15 of the 1999 Deed. What, then, is the effect, in terms of the law of Guernsey, of the apparent exclusion of the operation in relation to the Second Wheatland Trust of Section 22(1) of the Trusts Law? I refer first to paragraph 35 of the Judgment of Clarke JA in ***Stuart-Hutcheson***, - it seems that no such clause existed in either settlement in that case - where the learned Judge of Appeal interpreted the subsection as covering trust information of all types, including documents.

127. It is, in my view, clear from the first words of the Section 22(1), which read "Subject to the terms of the trust", that it was the intention of the States to permit a settlor to seek to exclude, by express terms, the operation of the subsection and thereby to negative the obligations of the trustees to provide for a beneficiary, (which is, in my

view, defined so widely as to include a person in Lady Bathurst's position,) "full and accurate information as to the state and amount of the trust property".

128. The question, therefore, arises whether Mr. Clarry, or more accurately the First Respondent, successfully made express provision to stop all or part of Lady Bathurst's application in its tracks in relation to the Second Wheatland Trust by the express exclusion of Section 22(1) of the Trusts Law. This raises difficult questions, which may, I believe, require careful balancing of, on the one hand, the wishes of Mr Clarry, as, in all probability, they appear from the express terms of clause 15 of the Second Wheatland Trust Deed, and, on the other hand, the jurisdiction of the Royal Court to supervise Guernsey trusts, in the context of the clear words of Sections 63(1)(a)(i) and 74(2)(b) of the Trusts Law. This exercise was, to some extent, foreseen in *The Laws of Guernsey*, Dawes (2003), at pages 143-146.

129. It is to be noted that, in contrast with Section 33, Section 22(1) does not include the words "subject … to any order of the court" and this might suggest that no order of the Royal Court could override a provision like clause 15 of the 1999 Deed. But I consider that the powers of the court to supervise, and where appropriate intervene in, the administration of trusts exist independently of the Trusts Law under its inherent jurisdiction and that the jurisdiction is wide enough to allow the court, in a proper case, to make an order requiring trustees to give full and accurate information about the "state and amount of the trust property", despite the existence of a term in the trust which purports to negative the obligations and liabilities of the trustees to do so. If it were considered necessary for the court, in the exercise of its discretion, to make an order for disclosure of trust information and documents, the court would, in deciding to make such an order, be exercising powers independently of Section 22(1) of the Trusts Law, as Section 74(2) expressly permits it to do. I also note that there is no limitation at all on the absolute obligation imposed on a trustee of a Guernsey trust by Section 21 to "keep accurate accounts and records of his trusteeship", which suggests to me, (although the point was not argued before me,) that the conclusion I have reached may well be the correct one. Again, I consider that the discretion of the Royal Court in this area is sufficiently broad to enable it to decide each case on its own facts, taking into account here that the 1999 Deed did include clause 15 as an express term.

Conclusion on Jurisdiction

130. In my judgment, both under its inherent jurisdiction and under Section 4 of the Trusts Law, the Royal Court has jurisdiction in respect of both trusts in relation to any events which may have occurred during the period relevant to these proceedings, which I find, (i) in relation to the First Wheatland Trust to have been the period between the appointment of the First Respondent as trustee of the First Wheatland Trust on about 20 May 1999 and the end of the trust on about 4 October 1999, and (ii) in relation to the Second Wheatland Trust to have been the period between the commencement of the trust on about 1 October 1999 and the (apparent) coming to an end of the Second Wheatland Trust on 20 November 2001.

130. I, therefore, find that all of the arguments of the Second Respondent and Mr Clark which sought to persuade me to dismiss the Application without me needing to exercise my discretion fail.

Exercise of the Court's Discretion in relation to the First and Second Respondents and Mr Clark

131. Lady Bathurst has concerns about the transfer of the assets of the First Wheatland Trust by the First Respondent on about 4 October 1999 to itself as trustee of the Second Wheatland Trust and about the change of corporate trustee of the Second Wheatland Trust on about 31 August 2001. She also has concerns, probably more serious concerns, about the events of 25 October 2001 and the termination of the Second Wheatland Trust on about 20 November 2001.

132. On 30 September 2003 the First Respondent disclosed some trust documents, including the 1983 Deed, as a result of being served with these proceedings. The first question for me is whether the circumstances make appropriate the disclosure by the First

Respondent of any more "trust documents" and information relating to either the First Wheatland Trust or the Second Wheatland Trust.

133. In the exercise of my discretion, I consider it is appropriate, as a matter of discretion, to order the disclosure to Lady Bathurst and her Advocates by the First Respondent of two deeds dated 31 August 2001, *i.e.* the Deed of Appointment and Retirment of trustees of the Second Wheatland Trust and the Deed of Indemnity. Amongst other things, I bear in mind what Clarke JA said in the second sentence of paragraph 32 of his Judgment in ***Stuart-Hutcheson*** and also that Lady Bathurst was a named member of the class of beneficiaries under the 1999 Deed at that time.

134. In my view, it is also appropriate for me to order the disclosure to Lady Bathurst and her Advocates of the same two deeds by the Second Respondent. In its case I consider that it is also appropriate, and perhaps necessary, as a matter of discretion, for it to disclose to Lady Bathurst and her Advocates any deed or other document dated about 20 November 2001 under which, so the Second Respondent claims, the Second Wheatland Trust came to an end by appointment of the entire trust assets in favour of WAL. There appears to me to have been a positive decision on the part of both the Second Respondent and Mr Clark not to disclose any such deed until ordered to do so by the Royal Court. I shall, therefore, make such an order against the Second Respondent.

135. I also consider it is appropriate for me to order disclosure by the First Respondent, to Lady Bathurst's Advocates only, of any letters of wishes, or similar documents, from Mr Clarry (i) to it or to its predecessor as trustee of the First Wheatland Trust, Harrington Trust Limited, and (ii) to it both as prospective, and as actual, trustee of the Second Wheatland Trust, so long as such letters remain in the possession or under the control of the First Respondent.

136. Furthermore, I consider it right, as a matter of discretion, to order the Second Respondent as well to disclose to Lady Bathurst's Advocates only any letters of wishes, or similar documents, from Mr Clarry to it, so long as such letters remain in the possession or under the control of the Second Respondent.

137. I limit the disclosure under the last two paragraphs to disclosure to Collas Day, the Advocates for Lady Bathurst, so as to preserve, so far as I consider necessary, some degree of confidentiality for what Mr Clarry may have written, and I direct that Collas Day do not show Lady Bathurst or anyone else any documents so disclosed. I believe that Collas Day should be able to advise Lady Bathurst properly without her having to see any such documents. I also direct that if any such documents have been, but no longer remain, in the possession and control, of the First or Second Respondent a director is to swear an affidavit explaining the circumstances in which they left their possession and control and stating, if known to the relevant trust company, where the documents are now likely to be found.

138. In the case of Lady Bathurst, she was the only person actually named as a beneficiary of the Second Wheatland Trust when it was created and she would, in my view, also have been a candidate after her exclusion on 25 October 2001for any possible addition to the class of beneficiaries in the future up to the termination of the trust, bearing in mind her close relationship with her only sibling, Mr. Clarry, and the history over the years of him naming her as a beneficiary in his will and including her as a member of classes of beneficiary within his trusts. This factor has led me to exercise my discretion in relation to letters of wishes and similar documents in her favour.

139. I have also carefully considered the position of WAL, and also that of Christina Clarry, and have decided that, since the Second Wheatland Trust was terminated less than a month after WAL was added as a beneficiary, their confidentiality would be sufficiently protected by the order which I propose.

140. Next, I do not think that there is any reason why, as a matter of discretion, I should not order disclosure by the First Respondent to Lady Bathurst and her Advocates of all trust accounts of the First Wheatland Trust for the calendar year 1999, including the entire period during which it was the trustee of the trust, and of all trust accounts of the Second Wheatland Trust for the period between its commencement on1 October 1999 and its retirement apparently on 31 August 2001. I, therefore, make such an order.

141. Further, I make a similar order against the Second Respondent for disclosure by it to Lady Bathurst and her Advocates of all trust accounts of the First Wheatland Trust for the period between its appointment and its apparent termination on about 20 November 2001. Nothing in the evidence before the Royal Court provides any reason why I should not, as a matter of discretion, make such an order; and, in the case of the Second Wheatland Trust, which was at all material times a Guernsey trust, Section 21 of the Trusts Law required the Second Respondent to keep accurate accounts and records of its trusteeship. I further direct, as a further exercise of my discretion, that all such accounts shall include a valuation, at or about the date of the end of the period to which they relate, of each of the shares then held as part of the trust assets and that if no such accounts exist, they are to be produced now and then disclosed.

142. No documents have been disclosed by any of the Respondents relating to the three companies, the shares in which appear to have comprised the entire trust assets of each trust between 20 May 1999 and 20 November 2001. I consider, as a matter of discretion, that it is appropriate for me to order disclosure of some such documents, but to a limited degree only. In the exercise of my discretion, I shall order that each of the First and Second Respondents disclose to Lady Bathurst and her Advocates copies of the following documents:

- Minutes of the meetings of members and of directors of (a) Air Holdings Limited and (b) Moore Wilson & Blair Limited, both of which are, it seems, Guernsey companies for the period between 20 May 1999 and 20 November 2001. Mr Retz's affidavit shows that Air Holdings Limited was wholly-owned by the trusts and it is possible that Moore Wilson & Blair Limited was also, in substance, so owned and so, in real terms, each company was, in all probability, a creature of the trusts. I can, in my view, properly infer that the trustees ran the boards, and controlled the affairs of the companies.
- Such minutes of meetings of members and directors of (a) Atlantic and Caribbean Trust SA, and (b) Boulevard Investments Limited, and such resolutions relating to the affairs of either such company, as may be, or at any time between 20 May 1999 and 20 November 2001 may have been, in the

possession or control of the trustees for the time being of the First and Second Wheatland Trusts

- All accounts of (a) Air Holdings Limited, (b) Moore Wilson & Blair Limited, (c) Atlantic and Caribbean Trust SA, and (d) Boulevard Investments Limited as may be, or at any time between 20 May 1999 and 20 November 2001 may have been, in the possession or control of the trustees for the time being of the First and Second Wheatland Trusts.

143. In the light of Mr Clark's affidavit, I consider, as a matter of discretion, that it is not appropriate for me to order disclosure of any further documents by any of the three Respondents relating to the *deliberations* of the Second Respondent as trustee and Mr Clark as Protector of the Second Wheatland Trust which led, it appears, to the addition of WAL as a beneficiary and the exclusion of Lady Bathurst as a beneficiary on the afternoon of 25 October 2001. In this regard I have taken into account the provisions of Section 33(a) and (b) of the Trusts Law and do not consider it would be appropriate to make such an order.

144. But I do consider it appropriate to order Mr Clark to provide Lady Bathurst and her Advocates with information by further affidavit about two matters relating to the events of 25 October 2001, which were not dealt with by him in his affidavit sworn on 19 July 2004. He should depose to (a) the fact, if it actually occurred, of his consultation with the Second Respondent and the obtaining of its consent to the decision made by him to exclude Lady Bathurst as a beneficiary, and the approximate timing of his consultation and the trustee's consent, and (b) the obtaining by the Second Respondent, if it actually occurred, of his consent pursuant to clause 6(d)(i) of the 1999 Deed to the appointing of the entire trust assets of the Second Wheatland Trust to WAL on about 20 November 2001.

145. I make no other order for disclosure.

Terms of the Order and Costs

146. I propose, therefore, to make an order to the effect described above and I ask Counsel to liaise and to produce an agreed draft Order to HM Greffier within 21 days. If the parties are unable to agree the terms of the draft Order or if the incidence of costs cannot be agreed, I shall hear further submissions on a date to be fixed as a matter of urgency.

Patrick John Talbot QC
Lieutenant Bailiff
4 August 2004

Amended in accordance with the Addendum to the Judgment dated 14 September 2004.

Patrick John Talbot QC
Lieutenant Bailiff
14 September 2004