

**Judgment 35/2012**

**In Re B  
Court of Appeal  
Civil Division  
11th July 2012**

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**Disclosure of information on a Guernsey trust to the French authorities in connection with a criminal investigation.**

Anonymised Final Judgment  
31 July 2012

**IN THE COURT OF APPEAL OF GUERNSEY  
(CIVIL DIVISION)  
APPEAL NO. 420**

**ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT**

**Before:**

**Sir John Nutting Bt QC, President  
Nigel Fleming QC  
Sir Michael Birt, Bailiff of Jersey**

**And in the matter of:**

**“RE B”**

**Hearing dates 9<sup>th</sup> and 10<sup>th</sup> July 2012**

**Date of decision 11<sup>th</sup> July 2012**

**Advocate Andrew Laws for the Appellant  
Advocate Russell Clark for the Respondent  
Crown Advocate Frederic Raffray for HM Procureur**

**Cases and texts referred to in the judgment: -**

European Convention on Mutual Assistance in Criminal Matters 1959
Criminal Justice (International Co-operation) (Bailiwick of Guernsey) Law, 2001 as amended
Trusts (Guernsey) Law, 2007 as amended
Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991
Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999
Underhill and Hayton Law of Trusts and Trustees 17 <sup>th</sup> Ed
<i>Irish Permanent Building Society -v- Farrell, Montoire Limited Intervening</i> (Judgement 1993/41)
<i>Viscount -v- The Attorney-General</i> [2002] JLR 268
<i>In Re The Intermine and the Azalia Trusts</i> [2006] JLR 195
<i>Attorney General -v- Guardian Newspapers Limited (2)</i> [1990] 1 AC 109
<i>Tournier -v- National Provincial and Union Bank of England</i> [1925] 1 KB 46
<i>Re a New York Bank</i> [1983] E.C.C. 342

**Additional cases and texts referred to by the parties: -**

<i>Attorney-General v Observer Ltd (No.2)</i> [1990] 1 AC 109
<i>British Steel Corporation v Granada Television Limited</i> [1981] AC 1096
<i>Morgan Stanley International -v- Consentino AP, Banque Belge (Guernsey) Limited Intervening</i> [1992/40]
<i>In the Matter of the Representations of McMahon and Probets</i> [1924] 1 KB 46
<i>Barclays Bank plc -v- Taylor</i> [1989] 1 WLR 1066
<i>Canadian Imperial Bank of Commerce -v- Sayani</i> [1991] CanLII 671.
<i>Royal Bank of Canada -v- Vincenzi</i> [1994] CanLII 1823
<i>Sunderland -v- Barclays Bank Limited</i> [1938] 5 L.D.A.B. 163
<i>Emmott -v- Mitchell Wilson and Partners Limited</i> [2008] EWCA Civ 184
<i>Pharaon and Others -v- Bank of Credit and Commerce International S.A. (in liquidation)</i> [1998] 4 A11 ER 455
<i>R -v- Grossman</i> [1981] 73 Cr AP R.
<i>Commissioner of the Police -v- Times Newspapers</i> [2011] EWHC 2705
<i>X -v- A</i> [2000] 1 A11 ER 490
<i>Re Lord Cable</i> [1977] 1 W.L.R. 7.
<i>Re Reid</i> (1970) 17 D.L.R (3d) (199)

Pleming, J.A., delivering the judgment of the Court

### **Introduction**

1. This is an appeal, with the leave of Sir de Vic Carey JA, from the decision of Judge J R Finch on 15<sup>th</sup> March 2012, when he made the following order:

*“The Respondent and/or its employees, representatives, agents, officers or directors be at liberty to disclose any information of whatever nature, whether orally, or in written form, or any document, relating to the Trusts to the law enforcement authorities of the Republic of France, as the Respondent reasonably considers necessary or desirable to protect the interests of the beneficiaries of the Trust, to secure the preservation of the trust property or to protect the interests of the Respondent personally in the context of an on-going criminal investigation in that country apparently commenced pursuant to charges brought by a French Prosecutor [on specified dates] and including but not limited to a summons issued to the Respondent by [a named investigating magistrate (“the French Judge”)] which requires the Respondent to appear in the District Court of Paris [on a specified date] for an oral examination.”*

2. The appeal is supported by a Notice of Appeal dated 4<sup>th</sup> May 2012. As noted by the learned judge in his judgment he was placed under considerable time pressures because the court hearing in Paris was due to take place two days after the conclusion of oral submissions. Notwithstanding the time pressures the judge produced a very helpful judgment explaining the basis upon which he concluded that the application should be dismissed, and the cross-application allowed.
3. Since the case was before the judge there have been some factual developments and on 8<sup>th</sup> June 2012 Sir de Vic Carey, sitting as a single judge of the Court of Appeal, allowed the parties to rely on four affidavits of expert evidence and on a second, lengthy, affidavit from a director of T (“X”). We have therefore had the opportunity to consider not only the material placed before the judge, but also extensive additional evidence such that the proceedings have in effect been conducted as a *de novo* hearing.

### **Factual background and chronology**

4. Although we have been provided with several hundred pages of evidence and exhibits, the broad factual background does not appear to be in dispute, and is here briefly summarised from the skeleton arguments and from the affidavit evidence.
5. The Respondent, a subsidiary of an international banking group, is trustee of two trusts created in February 1989 for the benefit of the sons and grandchildren of the Settlor (“S”). The First Trust (set up principally for the benefit of the children of S) was created by settlement made between S as settlor and S and a Caribbean corporate trustee as trustee. The

Second Trust (set up principally for the benefit of the grandchildren) was created by settlement between the same parties on the same date. The Settlor died in 2001.

6. The terms of the Trusts are described in some detail in the second affidavit of X, and the assets listed. The only real estate asset of which we are aware specifically identified as being in France is a half interest in an agricultural property, owned indirectly by the First Trust through company shareholding. There is also an interest in [other non-real estate assets] in France. It is not necessary here to list the other assets, but it is to be noted that they are substantial in value. The Trusts are administered by the trustee, but the interests of the beneficiaries are also protected by a Protector (now "P") and the Family Advisory Committee.
7. A Guernsey based corporate trustee was appointed co-trustee in place of the original Caribbean corporate trustee in 1990. At the same time the proper law of the Trusts was changed to the law of Guernsey. The original Guernsey trustee was replaced by the Respondent in 1999. The Respondent has been trustee of the Trusts since 1999.
8. The Appellant is a granddaughter of the Settlor and a beneficiary of both of the Trusts. She has never benefited from either trust. She explains in her affidavit that she is “concerned that should a representative of [the Respondent] attend the hearing... information regarding the Trusts may be disclosed. It is my position that the duty of confidentiality that [the Respondent], as the Trustee, owes to the Beneficiaries, including myself, overrides any right that the trustee may have to disclose such information in order to defend itself, even in criminal proceedings.”
9. As noted above, the Settlor died in 2001. Shortly after his death his widow is said to have waived her entitlement to any interest in the Settlor’s estate. The widow later sought to challenge the waiver and civil proceedings were commenced. In 2005 a French court in these, or related, proceedings ordered the initiation of procedures to account for, liquidate and divide up the joint marital assets existing between the Settlor and his widow, and also the estate of the Settlor, commissioned a notary with the task of drawing up a draft division of the personal property and real property, and appointed an expert with the task of appraising the value of all tangible assets. This description is taken from paragraph 61 of the second affidavit of X.
10. Civil proceedings continued in France over the following years and in April 2010 criminal investigations in the French courts concerning the Trusts were initiated by the Settlor's widow and, in 2010, the French Judge was appointed as an investigating magistrate, or “*Juge d’Instruction*” – his formal title is “Deputy Chief Judge in charge of the investigation”

11. The Settlor's widow died later in 2010 and we are informed that her civil claims were extinguished on her death but her criminal complaint continued. It would appear that the widow of one of the Settlor's sons joined the criminal proceedings as a complainant.
12. In addition to the criminal proceedings referred to above X also discloses that there have been tax investigations in France and, following an amendment to the French tax code pursuant to changes in tax law in July 2011, disclosure obligations are now imposed on trustees. These provisions came into force in January 2012 and are the subject of some dispute in the expert evidence but it seems to us reasonably clear that a trustee is under a duty to make disclosure of the market value of any real estate interests held by the trust in France (referred to as Wealth Tax French Assets) with failure to report leading to financial penalties.
13. In 2011 P, the Protector of the Trusts, was summonsed to appear as a witness in France in relation to the criminal proceedings and had been asked to provide the French Judge with copies of the trust deeds and trust accounts. Apparently P was questioned by the French Judge in early 2011 but he did not take documents with him and refused to answer questions which would have been in conflict with his obligation of professional secrecy as a Swiss lawyer.
14. On 19<sup>th</sup> January 2012, as a “bolt out of the blue” according to X, the Respondent received a summons from the French Judge requiring the appearance of the Respondent at a pre-indictment hearing on 16<sup>th</sup> March 2012. Although the summons was received in January it was not served in accordance with Guernsey law until 7<sup>th</sup> March 2012 - see below. The effect of the Summons was to inform the Respondent that the French Judge was contemplating placing the Respondent under judicial investigation concerning criminal offences which have been translated as "possession of stolen goods and complicity in tax evasion", and “aggravated laundering”. The relevant substantive parts of the Summons (translated) are as follows:

“possession of stolen goods and complicity in tax evasion”

*“For having aided and abetted and concealed, in Guernsey beginning in 2007, the tax evasion committed in Paris by the heirs of [S], consisting in deliberately concealing a portion of the sums subject to French estate tax, [the Summons then specified certain assets] held by [the First Trust and the Second Trust], of which [the Respondent] is the trustee.*

*Deeds governed by and punishable under Articles 121-2, 121-6, 121-7, 321-1, 321-3, 321-12 of the Criminal Code and Articles 1741 and 1745 of the General Tax Code,”*

and

“aggravated laundering”

*“For having aided and abetted, in Guernsey beginning in 2007, the operation of concealing and converting the direct proceeds of an offence which procured a direct profit for [S’s] heirs, by having accepted to falsely qualify as loans distributions of income or capital to the [...]heirs, Laundering committed by using the opportunities resulting from the carrying out of a professional activity, in this instance that of a trustee.*

*Deeds governed by and punishable under Articles 121-2, 324-1, 324-2, 324-3, 324-9 of the Criminal Code”.*

15. The introductory words of the Summons are also relevant and important:

“Pursuant to Article 80-2 of the Code of Criminal Procedure, I hereby inform you that I am convening you for the purpose of conducting your oral examination at the time of your first appearance, in an investigation initiated pursuant to the French Prosecutor’s charges of [specified dates were given].”

16. The following is a translation of Article 80.2 agreed by the parties:

“The investigating magistrate may inform a person by registered letter that such person is summoned to appear within a timeframe which may not be less than 10 days nor more than two months so that such person may be heard for the first time (“*première comparution*”) in the conditions set forth by article 116. Such letter shall mention the date and time of the hearing. It shall inform the person about the facts on which the magistrate has been designated to investigate and for which an indictment (“*mise en examen*”) is contemplated, while mentioning their legal qualification. It shall inform the person that he/she/it is entitled to appoint an “*avocat*” or to request that such an *avocat* is designated “*d’office*” (by the Bar), such choice or request having to be mentioned to the investigating magistrate’s greffier. It shall provide that the indictment may only take place at the end of the first hearing of the person before the investigating magistrate. The investigating magistrate may also have the summons served by a police officer. Such summons shall stipulate the details mentioned in the preceding paragraph; such summons shall be acknowledged by way of a formal acknowledgement of receipt (“*process-verbal*”) signed by the person who receives a copy of the summons. The *avocat* who is appointed or designated is summoned in the conditions provided by article 114; he/she is given access to the criminal file within the conditions set forth by such article”

17. It is common ground that the Summons makes it clear that the Respondent is under investigation for serious criminal offences including the first charge "*recel*" which is concealing, keeping or transferring a thing or acting as an intermediary in order to transfer a thing knowing that this thing results from a felony or an offence. If convicted the Respondent could be punished with up to five years imprisonment and a fine of €375,000 or half the value of the goods held by "*recel*". In relation to second charge, the accusation of money laundering under French law ("investing, concealing or converting the direct or indirect product of a felony or an offence"), the potential punishment is again up to five years imprisonment and a fine of €375,000. Where money laundering is committed using the facilities offered by the exercise of a professional activity the penalty is increased to 10 years imprisonment and a fine of €750,000 or half the value of the monies said to be laundered. The alleged crimes require a criminal intent or (in relation to *recel*) bad faith. It is apparent that

the French Judge may be intending to invoke the enhanced penalty in relation to the Respondent.

18. On any view these are serious allegations, carrying a risk of severe penalties. As set out in the first affidavit of X the Respondent “denies absolutely that it has had any involvement in aiding or concealing any person’s tax evasion nor has the Respondent sought to conceal or convert the direct proceeds of an offence committed by the heirs of the Settlor. It has done nothing other than discharge its enforceable duties as trustees.” The experts on French criminal law instructed by the parties agree, on the basis of the facts presented to them, that there is no basis for criminal liability to attach to the Respondent. However, there is no evidence before this Court to suggest that the French Judge shares this view. Indeed, we are informed (and this does not appear to be disputed by the Appellant) not only that the criminal investigation in France is continuing, but that in April 2012, as a result of the Respondent failing to provide information, the French Judge said that he proposed to issue an arrest warrant against X as legal representative of the Respondent. This accords with the views of the French law experts that there is a possibility that regardless of what is actually provided to the Judge he may still place the Respondent “*mise en examen*” in any event. The French legal expert for the Respondent summarises the position as follows:

“17. As long as the Respondent is prevented by order of this Court from answering the questions that [the French Judge] wishes to pose in connection with the offences mentioned in the Summons, in a transparent and open manner, including if necessary disclosing the assets of and activities undertaken with the Trusts, we confirm our advice is that there is a very strong risk that the Respondent will be charged (*mise en examen*) with the offences referenced in the Summons.

18. In my opinion, this risk exists whether or not the Respondent appears before [the French Judge].”

19. In an email dated 1<sup>st</sup> March 2012 to the Respondent’s Guernsey advocates, the French Judge said:

“If your client appears, I will hear him and at the end of the hearing I will decide whether I notify him charges or not (‘*mise en examen*’, sort of pre indictment).

If your client does not appear, I shall issue an application to the President of the Tribunal de Grande Instance de Paris (District Court), who can appoint a (French) judicial agent to represent your client for his appearance (article 706-43 in fine of Code procédure pénale). I would then summon this judicial agent and proceed as explained above.”

20. As far as we are aware an arrest warrant has not yet been issued, which (we are told) would require the consent of the Procureur in France, nor has a European Arrest Warrant been

issued. But it appears to be common ground that there remains a real risk this may happen, and happen soon.

21. When she became aware of the Summons, the Appellant commenced these proceedings seeking an order under section 69 of the Trusts (Guernsey) Law 2007, in summary, to prevent the Respondent disclosing any information relating to the Trusts without the leave of the Court. The Respondent, in turn, applied for an order (again in summary) that the Respondent be at liberty to disclose Trust information in response to the Summons from the French Court.
22. As already stated the matter came before Judge Finch at extremely short notice and he made the order described in paragraph 1 permitting the Respondent to attend before the French Judge.

### **International mutual assistance in criminal matters**

23. In 1959 the European Convention on Mutual Assistance in Criminal Matters was signed in Strasbourg, (the “1959 Treaty”). It provides for the use of letters rogatory for the purpose of procuring evidence and obtaining articles (Chapter II, Articles 3 to 6), and the service of writs and records of judicial verdicts in relation to the appearance of witnesses, experts and “prosecuted persons” (Chapter III, Article 7 to 12). France is a signatory.
24. The 1959 Treaty was extended to the Bailiwick of Guernsey by declaration of the United Kingdom government dated 27<sup>th</sup> September 2002 with effect from 20<sup>th</sup> January 2003.
25. In Guernsey neither the First Protocol (in 1978) nor the Second Protocol (in 2000) to the 1959 Treaty have been extended to the Bailiwick and there are no requests that either be extended here. In this regard the position in Jersey is different where the First Protocol has apparently applied since October 2008.
26. Local implementation of the 1959 Treaty took place in 2001 with the enactment of the Criminal Justice (International Co-operation) (Bailiwick of Guernsey) Law (“the 2001 Law”). Section 1(1)(a) provides for the service of overseas process where Her Majesty’s Procureur receives from the government of, or other authority in, a country or territory outside the Bailiwick “a summons or other process requiring a person to appear as defendant or attend as witness in criminal proceedings in that country or territory”.
27. Section 4 of the 2001 Law addresses “Bailiwick evidence for use overseas”, where there is a request from a court or tribunal, or prosecuting authority, in a country or territory outside the

Bailiwick for assistance in obtaining evidence in the Bailiwick “in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, in that country or territory”.

28. As this appeal raised consideration of the Bailiwick’s approach to international cooperation and, thereby, the public interest in Guernsey we invited the Procureur to make submissions to the Court. We were provided with an unsworn affidavit from the Procureur which confirms that the Summons was duly received by his office on 5<sup>th</sup> March 2012 and acknowledged the following day by a Notice of Service of Overseas Process under the 2001 Law. As a result of representations from Advocate Clark on behalf of the Respondent, the Procureur and Crown Advocate Raffray acting on his behalf were in contact with the French Judge inviting him, if necessary, to avail himself of Guernsey’s international cooperation powers. We are informed that no formal request for mutual legal assistance has been received from the French Judge, other than the original request to serve the Summons.
29. Crown Advocate Raffray made brief oral submissions to us on behalf of the Procureur to the effect that, in this case, it was a matter for the French Judge as to how he pursued his investigation, as long as local substantive and procedural law was followed. There was no evidence put before the Procureur to show or support an argument that the French Judge had failed to comply with French law, or that there had been any absence of good faith. In those circumstances it was a decision for the investigating magistrate as to whether or not a Summons was issued.

### **The law of confidentiality**

30. Neither the terms of the Trusts nor the applicable statute law (the Trusts (Guernsey) Law, 2007) contain restrictions or permissions in relation to the disclosure of trust information. The Trusts do not give the Protector of the Trusts or the Family Advisory Committee, or any beneficiary, any veto over disclosure.
31. However, it is common ground that the position of trustee carries with it a duty to keep the affairs of the trust confidential. Both parties refer to *Underhill and Hayton, Law of Trusts and Trustees* (at Paragraph 60.31);

*"As a general proposition, trustees must keep the affairs of the trust confidential, such as personal information relating to the beneficiaries, as part of the law relating to breach of confidence."*

32. We have not been referred to any Guernsey authority which specifically holds that a trustee is under a duty of confidentiality in respect of the affairs of the trust. In *Irish Permanent Building Society v Farrell* (Judgment 1993/41), Carey, Deputy Bailiff, stated:

*“There are a great many companies in Guernsey engaged in fiduciary business and I think one can properly infer that generally such companies will owe a duty of confidentiality to their clients, just as an advocate or accountant does”.*

That case was concerned with a company used as a vehicle for pooling deposits; it did not involve the trustee of a trust. Nevertheless, the observations of Carey, DB are of some assistance by way of analogy.

33. The position has been touched upon by the Jersey courts. In *Viscount v Attorney General* 2002 JLR 268, Birt DB said at para 21:-

*“A trust company owes a duty of confidentiality to its clients in respect of their affairs. Thus a settlor or beneficiary of a trust or a beneficial owner of a company who communicates with the trust company which administers his structure is entitled to expect that the trust company will not disclose such communications voluntarily. The duty is akin to the duty of confidentiality owed by a banker”.*

34. In *Re The Internine and the Azalia Trusts* 2006 JLR 195, there was a common trustee of the two trusts in question. The Jersey Court of Appeal had to consider whether, in the context of what it categorised as hostile litigation in respect of the Internine Trust, the trustee should be ordered to disclose certain documents which it held as trustee of the Azalia Trust, but which were said to be relevant to the dispute concerning the Internine Trust. The issue which we are considering did not arise directly in the case, but at paragraph 30 and 31 of the judgment the Court said that it inclined to the view that there was no irrefutable presumption that all documents held by trustees for the purposes of the trust were confidential. It considered that many would be but others would not. The Court’s judgment gives the example of ordinary contractual documents entered into by a trustee as documents which would not prima facie be confidential. On the other hand it accepted that the circumstances in which a stranger to a trust could call for documents such as the trust deed, a letter of wishes etc. were likely to be very restricted. It concluded that, in the context of discovery in hostile proceedings, each document had to be considered on its merits.

35. The Jersey Court of Appeal was considering matters in a very specific context. We are considering the matter more generally. It seems to us that one cannot express a trustee’s duty of confidentiality by reference to a particular document, so that some documents are defined as confidential and others are not. Take the example of a contract for the provision of a carer for one of the beneficiaries. In our judgment it is not possible to say in the abstract that that document is not confidential. The legitimacy of any disclosure would depend upon the

circumstances. It would in our judgment be a breach of the trustee's duty to disclose such a document to, for example, the media, so that they could run a story about the beneficiary who is being cared for. On the other hand, disclosure of a copy of the contract to the contractor providing the carer, because the contractor had mislaid his own copy of the contract, would be entirely permissible as it would be disclosed for the purposes of administering the trust.

36. We therefore prefer the view that there is a general duty of confidentiality upon a trustee in relation to the affairs of the trust, but that one of the qualifications to that duty is where disclosure is necessary in connection with the proper administration of the trust. We return to this topic below.

37. The law relating to the duty to keep confidential information received in confidence is reasonably clear. Advocate Clark, for the Respondent, referred to *Attorney General –v- Guardian Newspapers Limited (No. 2)* [1990] 1 AC 109, at 281 where Lord Goff summarised the broad general principle of the duty of confidentiality as follows:

*"A duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others ...*

*In the vast majority of cases ... the duty of confidence will arise from a transaction or relationship between the parties ... But it is well settled that a duty of confidence may arise in equity independently of such cases..."*

38. It is clear that the duty of confidentiality does not impose an absolute duty to stay secret and silent. As Lord Goff noted in the same case, at page 282C-F, there are three limiting principles:

- 1) that the principle of confidentiality does not apply to information that is generally accessible;
- 2) that the duty of confidence does not apply to information that is useless or trivial; and
- 3) ("of far greater importance") in certain circumstances the public interest in maintaining confidence can be outweighed by the public interest in the information being disclosed.

39. We accept that, in general terms, a trustee is under a duty to keep the affairs of the trust confidential. In many respects, this duty is akin to the duty of confidence owed by a bank in

relation to the affairs of its customer. However, the duty of a trustee is not identical to that of a bank. In the first place, it does not arise as a matter of contract. Furthermore, there will be many cases where a trustee has to disclose information concerning the trust and/or its beneficiaries for the very purpose of administering the trust e.g. in order to open a bank account or obtain a loan. However, in relation to the issue with which we are concerned in this case, we consider that the principles applicable in the case of a bank are equally applicable to a trustee. The duty, and its limits, of a bank are the same in Guernsey as in England and Wales and are set out in *Tournier –v- National Provincial and Union Bank of England* [1924] 1 KB 46, by Bankes LJ at 471:

*"At the present day I think it may be asserted with confidence that the duty [of confidentiality] is a legal one arising out of contract, that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualifications, and to indicate its limit ...*

*"On principle I think that the qualifications can be classified under four heads;*

- (a) where disclosure is under compulsion by law;*
- (b) where there is a duty to the public to disclose;*
- (c) where the interests of the bank require disclosure;*
- (d) where the disclosure is made by the express or implied consent of the customer".*

See, from the same decision, Scrutton LJ at page 480/481:

*"The Court will only imply terms which must necessarily have been in the contemplation of the parties in making the contract. Applying this principle to such knowledge of life as a judge is allowed to have, I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances. This duty equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient. The circumstances in which disclosure is allowed are sometimes difficult to state, especially in the case of a medical man; and I do not propose to do more than indicate the exceptions material to the present case. I think it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft; or to an extent reasonable and proper for carrying on the business of the account, as in giving a reason for declining to honour cheques drawn or bills accepted by the customer, when there are insufficient assets; or when ordered to answer questions in the law Courts; or to prevent frauds or crimes.*

And Atkin LJ at page 486:

*"It is difficult to hit upon a formula which will define the maximum of the obligation [not to divulge information] which must necessarily be implied. But I think it safe to say that the obligation not to disclose information such as I have*

*mentioned is subject to the qualification that the bank has the right to disclose such information when, and to the extent to which it is reasonably necessary, for the protection of the bank's interests, either as against their customer or as against third parties in respect of transactions of the bank or with their customer, or for protecting the bank, or persons interested, or the public, against fraud or crime".*

40. We therefore accept that the duty of confidentiality implied into the relationship of trustee and beneficiary is subject to the qualification that *"the [trustee] has the right to disclose such information when, and to the extent to which it is reasonably necessary, for the protection of the [trustee's] interest"*.

### **The test to be applied in the appeal**

41. Before Judge Finch, and (after some hesitation) before us, the parties accepted that the test to be applied was as set out by Leggatt J in *Re a New York Bank* [1983] E.C.C. 342. The relevant passages from the judgment are as follows:

*"[15] There is no dispute that the bank is subject to a duty of confidentiality. Apparently the nature of the duty is no different in New York from the duty to which it is regarded as subject in London. For convenience, I would describe the duty as arising from an implied term of the contract governing the relationship of banker and customer and as being that, subject to certain qualifications which it may be material to consider, a banker shall not without the consent of the customer disclose to any other person any document or other information obtained by the banker in the course of that relationship.*

*[16] There is no dispute that disclosure of the documents to the Grand Jury would constitute or create a breach of that duty. It would be so, as it appears from the evidence, not merely in the technical sense of the Grand Jury itself constituting a third person to whom disclosure of confidential documents would constitute a breach of that confidentiality, but also in the far wider and more material sense that, as it would appear, there is in practice no secrecy in relation to matters entrusted to Grand Juries.*

*..*  
*[51] It seems to me that even if it be right to regard the exercise which has to be undertaken here ultimately as being a balancing exercise, it must involve an evaluation of the relevant order of the foreign court. It would be necessary for this court in particular to consider the nature, scope, quality and effect of the foreign order and to analyse it with some care, because the fact is that to allow that order to take effect upon a bank conducting its business in the City of London would be, as it would appear, to allow a fairly large cuckoo in the domestic nest. But I say 'would be necessary' because the balance with which I am immediately concerned in this interlocutory matter is the balance of convenience and not the performance of that balancing act which Mr. Longmore has in mind."*

42. In summary, therefore, we are invited to proceed on the agreed basis that the confidentiality obligation is not absolute, and there is a balancing exercise to be carried out involving *"an evaluation of .... the nature, scope, quality and effect of the foreign order"*, but with regard to and in the context of the interests of the Respondent Trustee and the beneficiaries of the

Trusts, including the Appellant. We accept, as we believe the learned judge must also have accepted, that the balancing exercise to be performed by the Court is not merely a crude balancing of the particular interests of the parties appearing before it, but there must be some consideration of the order compelling disclosure and regard had for the broader public interest.

### **Grounds of Appeal**

43. The Notice of Appeal identifies 4 Grounds of Appeal, but they can conveniently be divided into 2 broad headings:
- 1) The learned judge failed to carry out the balancing act required in accordance with the judgment of Leggatt J in *Re A New York Bank* [1983] E.C.C. 342, and thereby misdirected himself;
  - 2) In so far as the learned judge did carry out that balancing exercise he arrived at a conclusion which was plainly wrong.

### **The competing arguments**

44. Advocate Laws for the Appellant submits, under the first ground of appeal, that Judge Finch erred in law by failing to give due regard to the public interest in maintaining the preservation of banking (or in this case, trust) confidence, he failed to consider the content and effect of the French Court's order, and he should have considered the actual harm likely to be suffered by the Respondent.
45. If Judge Finch had taken that, correct, approach the Appellant submits that he would have concluded:
- 1) The French Judge could, and should, have sought to obtain the information he required through the mutual assistance route in Guernsey, including applications under Section 4 of the 2001 Law to obtain evidence in connection with an overseas criminal investigation, Section 1 of the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 to investigate a person's affairs where there are reasonable grounds to suspect an offence involving serious or complex fraud, wherever committed; or Section 45 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 to obtain an order requiring the production of particular material or material of a particular description.
  - 2) The French Judge deliberately circumvented the protections in the 1959 Treaty and the statutes, which would all require evidence of reasonable grounds for the suspicion

of an offence (and here there is no evidence at all of any criminal conduct by the Respondent, and both experts are firmly of the view that on the information in the Summons, and on the further information available to them, there is absolutely no basis to believe that the Respondent has committed the serious offences it is alleged to have committed).

- 3) The French Judge issued the Summons with “the real intention ... to obtain information and documents in relation to the Trusts to pursue other persons that he is presently in the process of investigating (namely, certain members of the Settlor's family)”.
- 4) If and in so far as there is a risk of harm to the Respondent (and particularly to X) “(a) by permitting the Respondent to attend before [the French Judge], the Court would implicitly be encouraging the disregard of the relevant mutual assistance treaties and legislation in favour of the use of bullying tactics to obtain information without the operation of the ordinary safeguards” and (b) any harm is unlikely to be ameliorated by attending.
- 5) Disclosure by the Respondent to the examining magistrate would cause real harm to the Appellant, and other beneficiaries, including but not limited to the risk of seizure of trust assets, and risk of access to the information and consequential attack by the heirs of Settlor's widow or Settlor's son's widow.

46. Advocate Clark for the Respondent defends the decision of Judge Finch, and submits:

- 1) The French Judge was well aware of the Mutual Assistance route, but is not seeking to examine the Respondent as witness, but as a person under suspicion of serious crime.
- 2) There is no evidence that the French Judge is exercising his powers in bad faith or for an improper purpose.
- 3) It is the Respondent's case that if it is able to demonstrate what it has done and what it has not done the French Judge must appreciate that the Respondent should not, properly, be charged with the offences identified in the Summons. Absent being able to demonstrate that fact, the Respondent risks being charged and subsequently prosecuted and potentially convicted of serious offences that it does not believe that it

has committed and which it believes it can demonstrate relatively easily that it has not committed.

- 4) It is manifestly in the interests of the Trust that the allegations raised by the French Judge are clarified.
- 5) The offences for which the Respondent is under investigation go to the very heart of its integrity as a financial institution and will seriously prejudice the Respondent's reputation and that of its parent company which has been hard won over a great many years.
- 6) The Appellant has still produced scant information regarding the prejudice that would be occasioned to her and her fellow beneficiaries if the Respondent was able to defend itself as it saw fit despite having had plenty of time in which to do so. In contrast, there is clear evidence before the Court that there is a real risk of prejudice and harm to the Respondent, and to X in particular.
- 7) There is no evidence before the Court to demonstrate that the order of the French Court is abusive.
- 8) The reputation of Guernsey as a well regulated and cooperative jurisdiction is at risk for as long as there is an Order preventing the Respondent from cooperating with the law enforcement authorities in France in their investigation as to whether or not the Respondent has committed serious criminal acts. The Respondent has nothing to hide regarding its own conduct but can only demonstrate that by disclosing information regarding the Trusts.

### **Discussion**

47. We are informed that neither Guernsey nor English counsel for the Respondent, nor Guernsey counsel for the Appellant, are aware of any authority in which there is specific discussion of the use which a trustee may make of trust documents and information to protect itself against criminal charges.
48. As already noted we accept that a trustee, such as the Respondent, is under a duty of confidentiality to the beneficiaries of the trust. This is a "general proposition" to which there are exceptions. We are also satisfied, and this appears to be common ground, that such an exception would arise where a trustee demonstrates that it is at risk of real harm, or substantial prejudice, if it does not make disclosure, and thereby breach its duty of confidentiality. This conclusion is supported by various decisions to which we have been

referred, in particular *Tournier* and the fourth qualification to the contractual duty of secrecy implied in the relation of banker and customer, namely "where the interests of the bank require disclosure".

49. The essential issues in this case, picking up the various grounds of appeal, and the arguments listed above, are:

(1) Has the Respondent shown that its interests require disclosure in the circumstances of this case? ("Prejudice to the Respondent")

(2) Has the Appellant shown that there will be prejudice to her, and to the other beneficiaries of the Trusts, if the Respondent attends court in Paris and answers questions, thereby disclosing information about the Trusts and, in particular, information disclosing the existence of assets in France, and elsewhere? ("Prejudice to the Appellant")

(3) Is there evidence upon which we can reasonably conclude that the French Judge has acted in such a way as to cause this Court not to give due respect to his order/summons? ("The Summons")

(4) When carrying out the balancing exercise described by Leggatt J in *In re a New York Bank* do we agree or disagree with Judge Finch that the application to restrain the Respondent should be dismissed? ("The Balancing Exercise")

50. We now turn to address these issues, using the abbreviated headings.

*Prejudice to the Respondent*

51. It is common ground that, on the basis of the facts available to each of them, the Appellant's and the Respondent's experts are of the opinion that there can be no basis for criminal liability attaching to the Respondent. The Appellant's expert says this:

*"20. Based on this information, and in light of the constitutive elements pertaining to the various crimes described above... it is my opinion that no criminal liability can attach to [the Respondent]. Further, based on the information provided to me (i.e. the assumptions set forth above and in the Letter of Instruction), it is my opinion that there are insufficient grounds for liability to attach to any other person."*

The Respondent's expert says:

*"32. I have been provided with a draft of the as yet unsworn second affidavit of [X] and have also discussed with the Respondent its activity as Trustee of the Trust since 2007.*

*33. I am advised that since 2007 there have only been loans made from the [First Trust] to meet the liabilities of the [Second Trust]— principally the Trustee's own costs – due to insufficient liquidity within the [Second Trust]. I am advised that the Respondent regards these as fully enforceable loans.*

*34. Based on this information, I share the opinion expressed by [the Appellant's expert] that no criminal liability can attach to the Respondent which is why it is so important that the Respondent is able to give a full account of all that it has done and not done as a trustee of the Trusts.*

*42. According to the factual information I was provided by Carey Olsen and by the Respondent, I have absolutely no reason to believe that the Respondent has committed any of the very serious offences mentioned in the Summons. This is precisely why I maintain that it is essential that the Respondent should be given the opportunity to defend itself as soon as possible by providing [the French Judge] with any information to demonstrate that his concerns are ill-founded. Until the Respondent is permitted to do so the Respondent (and possibly some of its officers and employees at a later stage) run the risk of being charged and subsequently prosecuted before French criminal courts. ”*

52. There is no agreement between the two experts as to the risk that the Respondent will be charged with the criminal offences referred to in the Summons. The Appellant’s expert does not address this issue, but the Respondent’s expert expresses the following firm views, in addition to those set out above:

*“22. ... If the Respondent is no longer prohibited from disclosing information relating to the Trusts in defending itself from the allegations made by the Judge in connection with the charges and the offences mentioned in the Summons, it is manifestly the case that the Respondent is less likely to be charged. I accept that the Respondent may be charged regardless of what it does but its best chance of not being charged is to give a very full account of all that it has done and not done as trustees of the Trusts.*

*“35. If the Respondent is prevented from disclosing such information to the investigating magistrate and more generally to answer his questions, as indicated above, the Respondent runs the very clear risk of being charged with criminal offences mentioned in the Summons.”*

We put these paragraphs to Advocate Laws, for the Appellant, and his response was to accept that he was not in a position to challenge these statements but, he emphasised, attending before the investigating magistrate could not guarantee that the Respondent would not be charged.

53. Whether, in the opinion of the two experts and on the basis of information they have received, criminal liability can attach to the Respondent is not of particular significance. What is of importance is that the investigating magistrate in Paris (who may, or may not, have access to the same information) appears to have formed the view (and there is no material before the Court to suggest that this is anything other than an honest view) that suspicion of serious criminal offences requires the Respondent to appear before him to answer questions. In paragraphs 108 to 126 of her Second Affidavit X describes the events since the hearing in Paris on 16<sup>th</sup> March 2012, and her account has not been contradicted by the Appellant. These paragraphs clearly show that the French Judge continues to have "suspicion of wrongdoing on the part of the Respondent", and on 6<sup>th</sup> April 2012 the French Judge is reported as saying that as a result of the Respondent failing to provide information he proposed "to issue an arrest warrant against [X] personally as legal representative of the Respondent". On 15<sup>th</sup> May 2012 the Respondent received information that in April 2012 an order had been made in Paris designating a *mandataire ad hoc* "in order to represent the Respondent in the course of the

investigation conducted by [the French Judge]". In an earlier paragraph of her Affidavit X notes the advice the Respondent has received that "the appointment of such a Mandataire would expose the Respondent to a strong possibility of being charged and thereby denied of its right to defend itself adequately or at all". Finally, on 25<sup>th</sup> April 2012, X learned that the French Judge had arrested one of the lawyers previously engaged by a member of the Settlor's family who had been charged ("mis en examen") with money laundering ("blanchiment aggravé de fraude fiscale"). He was said to be contesting a €750,000 bail set as a condition of his release.

54. We are satisfied that, notwithstanding the views of the eminent experts in French law as to liability, it is likely that the investigating magistrate continues to suspect the Respondent of involvement in criminal activity.
55. In her second affidavit, X describes in some detail the personal prejudice she has been suffering as a result of the risk of arrest including the need to cancel family holidays and also suffer a more general restriction on travel necessary in order to discharge her responsibilities as a director of the Respondent. X also addresses the prejudice being suffered on a continuing basis by the Respondent:

*"The Respondent is part of a global banking and wealth management business that has been in business for [many] years. ... "Integrity" is not just a cliché within our business. It is taken very seriously. We risk being prosecuted for serious criminal offences which go to the heart of the Respondent's standing and reputation. ... If the Respondent is charged with serious crimes which by their very nature involve dishonesty and criminal intent the reputation of the Respondent and its parent companies, which it holds in very high esteem, will be grievously damaged. Client confidence, which is essential to any business which has, at its core, a relationship of trust will, inevitably, be shaken."*

56. On the basis of the uncontradicted factual evidence presented to this court by the Respondent, and the expert evidence of the Respondent's expert, we have no hesitation in concluding that there has been, and continues to be, serious prejudice to the Respondent if it is unable to attend before the French Judge and seek to allay his suspicions of criminal wrongdoing.

*"Prejudice to the Appellant"*

57. We also accept that there is a risk to the Appellant, and therefore to the other Beneficiaries of the Trusts, that if the Respondent were to appear before the French Judge and answer his questions, information would be disclosed which would otherwise remain confidential. We accept that the mere disclosure of confidential information can be detrimental. The particular claimed prejudice falls into the following categories:

- 57.1 *Dissemination of information* - according to the Respondent's expert it is likely that the criminal investigation in France was instigated as a result of the complaint by the Settlor's widow (referred to above) and also by the French Revenue. It is therefore possible, perhaps

likely, that information disclosed to the Investigating Magistrate (whether or not such information can lawfully be disclosed) will find its way into the hands of the heirs of the Settlor's widow and/or the French Revenue. The Appellant is concerned therefore that a mass of information, which would otherwise remain confidential, could be released if the Respondent answered questions and/or provided documents.

57.2 *Risk of seizure of Trust assets* – based on the risk of information being passed on to the French tax authorities, as accepted above, there is a consequential risk that action will be taken in relation to the trust property. The Appellant's expert in French tax law, informed the Court in his affidavit sworn on 10<sup>th</sup> May 2012:

*“42. In this context, should any information on the Trusts be provided to the FTA – where even the beneficiaries do not have such information – the FTA are likely to use various means (e.g. seizures of immovable assets, seizures of bank accounts, etc) to preserve what they assume to be their rights, which would be very difficult for the taxpayers or the beneficiaries of the Trusts to oppose, and notwithstanding our view that the 2011 Tax Reassessment Notice is not enforceable...*

*43. More generally, since the FTA seem to consider that the assets held by the Trusts 'belong' to [the Settlor's] estate, they could try to implement protective measures on the assets held by the Trusts, which would hamper their profitability and reduce their market value.*

*44. This could prove harmful to all the beneficiaries of the Trusts, among whom those that are not targeted by the FTA in the context of the 2011 Tax Proceedings, like the Applicant.”*

The Respondent's expert on French tax law, does not appear to disagree with this view.

57.3 *Risk of further civil proceedings* - also arising from the risk of dissemination of information is the concern that the heirs of the Settlor's widow, or his son's widow, will pursue new civil claims against the Trusts and the beneficiaries (even if without merit) which will lead to further expenses being incurred in defending such claims.

*“The Summons”*

58. The Appellant submits that the French Judge should have used alternative, proper, means in order to seek to obtain the information he required - see paragraph 45 above for details of this complaint.

59. In summary, the Appellant submits that the investigating magistrate deliberately circumvented the safeguards contained in the mutual assistance provisions "because he would not have been able to satisfy the Guernsey authorities that reasonable grounds exist for the suspicion of an offence". The Appellant invites us to infer that the real intention behind the issuing of the Summons was to obtain information and documents in relation to the Trusts in order to pursue, not the Respondent, but other persons who are presently in the process of being investigated, namely various members of the Settlor's family. The Appellant's French expert provides some support for this submission, relying on Article 3-6, 7-12 and 14 of the 1959

Treaty. His conclusion is "that the French Judge has here misused the procedures available to him to obtain evidence in connection with his ongoing investigation. In so doing, he has disrespected International Cooperation channels that are likely well known to him."

He continues:

*"26. As a criminal lawyer practising for a long time, I am very surprised by the French Judge's lack of respect for the international treaties and laws relating to Mutual Assistance in Criminal Matters, unless he did so to avoid revealing facts about the case that he would have had to provide to the Guernsey authorities had he respected the laws governing international cooperation.*

*34. It is clear to me that the French Judge has not respected laws governing international cooperation. This course is so surprising to me that it is my opinion that he may be using the Summons to circumvent the requirement to establish, to the satisfaction of the Guernsey authorities, that he had reasonable grounds to suspect [the Respondent] of the commission of an offence (as would have been required by the 1959 treaty).*

*35. It is my belief that the French Judge is seeking to obtain documents relating to the Trust but that he has used the Summons to improperly obtain evidence from [the Respondent] by naming them as a target and then issuing a Summons for them to appear before him."*

60. Based on this evidence, the Appellant invites this court to conclude that the Summons was an attempt by the investigating magistrate to circumvent the proper safeguards and extort information from the Respondent with the threat of criminal proceedings.

61. The difficulty we have with this submission is that the main provisions of the 1959 Treaty, upon which reliance is placed, are confined to requests from one State to another where the requesting party requires witnesses or experts to give evidence (whether or not producing records or documents) and "a witness or expert, whatever his nationality, appearing on a summons before the judicial authority of the requesting Party shall not be prosecuted or detained or subjected to any other restriction on his personal liberty in the territory of that Party in respect of facts or convictions anterior to his departure from the territory of the requested Party." (see Article 12(1)). From the text of the Summons it is clear that the French Judge is treating the Respondent, not as a witness, but as a "prosecuted person" (for the purposes of the 1959 Treaty), in which case it is Article 7(1) that applies:

*"The requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party. Service may be effected by simple transmission of the rateable record to the person to be served. If the requesting Party expressly so request, service shall be effected by the requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law."*

62. This provision was drawn to the attention of the French Judge's office by letter dated 24<sup>th</sup> February 2012 and, as noted above, the Summons was duly served in March 2012 in accordance with the requirements of the 1959 Treaty and the 2001 Law.

63. It is noteworthy that the highest the Appellant’s French expert puts his case is that, because of his strong opinion that the French Judge should have used the mutual assistance provisions to obtain the evidence, he considers that the Judge may be using the summons to circumvent the requirement to establish, to the satisfaction of the Guernsey authorities, that there are reasonable grounds to suspect the Respondent of the offences in question.
64. For the reasons we have given, it seems to us that it was open to the Judge to proceed by the alternative route of issuing a summons and arranging for that summons to be validly served in Guernsey. In our judgment, there is no evidence before us which would enable us to find that the Judge was acting other than in good faith. On the basis of the evidence before us, he appears to have been exercising a jurisdiction available to him under French law and has not acted contrary to the 1959 Treaty. In the circumstances we are unable to accept the Appellant’s contention that the Judge acted so as deliberately to circumvent the protections in 1959 Treaty, or with any intention which is different from that expressed on the face of the Summons.
65. We are fortified in these conclusions by the acknowledgment by Advocate Raffray summarised above. In light of the service of the Summons on the Respondent by the French Judge, the Procureur entered into lengthy correspondence with the Judge. Mr Raffray emphasised that at no stage during the process did the Procureur have any cause to fear that the method of securing the presence of the Respondent (or X) adopted by the French Judge was in any way untoward, still less that he was seeking to manipulate the processes of the Guernsey court for some discreditable or ulterior purpose to secure the attendance of the Trustee in the person of X before his court.

*“The Balancing Exercise”*

66. We are prepared to proceed on the basis that the balancing exercise to be undertaken “must involve an evaluation of the *nature, scope, quality and effect* of the relevant order of the foreign court” (taken from paragraph 51 of the judgment of Leggatt J in *Re A New York Bank*), but we also accept that it will require a balancing of the individual interests of the two parties.
67. We have considered the French Judge’s summons (the “relevant order of the foreign court”) with care, and in particular the submission that the investigating magistrate has used his powers for the improper purpose and in order to avoid complying with the requirements of the 1959 Treaty. For the reasons given, we do not find this to be the case. If there were to be evidence that a foreign criminal investigation was being carried on in bad faith the court might well take a different approach.

68. We turn now to the balancing of the individual interests of the Respondent and the Appellant, including the interests of the unrepresented beneficiaries of the Trusts. We accept that there is likely to be some detriment if otherwise confidential trust information is disclosed in the course of the French proceedings. We reach this view notwithstanding that what may or may not happen in the court in Paris cannot accurately be predicted, and the Respondent's application is broadly framed to allow it to disclose information "as the Respondent reasonably considers necessary or desirable to protect the interests of the beneficiaries of the Trust, to secure the preservation of the trust property or to protect the interests of the Respondent personally".
69. We are satisfied, as noted above, that the Respondent is at real risk of identifiable harm if it fails to attend before the investigating magistrate and provide at least some information to try and remove the suspicion that it is guilty of the serious offences referred to in the Summons.
70. Notwithstanding the fact that we have been provided with a great deal more evidence than that placed before Judge Finch we reach essentially the same conclusion on this aspect of the appeal namely that, on the facts of this case, the potential injustice to the Respondent "here trumps other considerations" such that the balance falls firmly on the side of dismissing the appeal and granting the application by the Respondent dated 13<sup>th</sup> March 2012 – see paragraph 12 of Judge Finch's judgment:

"The more general question is considering the various beneficiaries' rights to privacy in relation to their financial affairs, which is a serious consideration and the rights of the Respondent. The Respondent has, brusquely and at short notice, been summoned as a prospective criminal defendant on serious charges. In response it is intended, as I understand it, to demonstrate that they have acted simply in accordance with the normal rules and duties pertaining to trustees. I consider that attending and then refusing to provide the information sought is, on the expert evidence I have accepted, likely to lead to potentially deleterious criminal consequences for the Respondent. The effects of even a charge against such an institution would be, at least, unfortunate. Justice requires on these facts that the application fails. The potential injustice to the Respondent here trumps other considerations."

### **Conclusion**

71. The facts of this case serve to remind trustees and beneficiaries that there are limits to the obligation on trustees to keep the affairs of the trust confidential. One of those limits is the ability of the trustee to protect its own interests in circumstances where silence in response to a court order, or summons (whether issued in this jurisdiction or abroad), would be likely to expose the trustee to a real risk of serious harm. A trustee in such circumstances cannot be expected to refuse to answer questions in a court of law, and simply suffer the consequences.
72. In the last analysis, on the facts of this case and bearing in mind the jurisdictions involved, the result of a decision to reject the judgment of the Royal Court would be to deny the Trustee and X (as its representative) the opportunity, which they wish to make use of, to defend

themselves against serious criminal allegations. To prevent them from availing themselves of that opportunity might result in charges being preferred against them and convictions being recorded in their absence. It is not for this Court to make any assessment of their chances of success in persuading the French Judge of the falsity of the allegations made against them. But, granted X's wish to take the opportunity on her own behalf and that of the Trustee, it would be plainly wrong for this Court to inhibit it. In weighing the principle of confidentiality to which the beneficiaries are entitled and the principle that no court should connive at possible injustice, it is plain where the balance lies. This appeal must be dismissed.

73. It follows that the Order made by Judge Finch, on the cross-application, remains, but by the agreement of the parties there is a small amendment replacing the word “desirable” with “prudent” so that it reads:

*“The Respondent and/or its employees, representatives, agents, officers or directors be at liberty to disclose any information of whatever nature, whether orally, or in written form, or any document, relating to the Trusts to the law enforcement authorities of the Republic of France, as the Respondent reasonably considers necessary or prudent to protect the interests of the beneficiaries of the Trust, to secure the preservation of the trust property or to protect the interests of the Respondent personally in the context of an on-going criminal investigation in that country apparently commenced pursuant to charges brought by a French Prosecutor dated [...] and including but not limited to a summons dated 5 January 2012 issued to the Respondent by [the French Judge] which requires the Respondent to appear in the District Court of Paris on 16 March 2012 for an oral examination.”*

74. Notwithstanding that these proceedings have been heard *in camera*, we grant permission at the request of the Respondent for a copy of the Order set out above to be provided to the French Judge.