



In the matter of the R and RA Trusts
Court of Appeal
11th April, 2014 & 20th May, 2014

JUDGMENT
25/2014

Application for leave to appeal against a decision of the Deputy Bailiff whereby he refused the application of the trustees of certain family trusts for orders requiring disclosure of specified information by some of the beneficiaries of those trusts.

Approved Judgment
20th May, 2014

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 470

20th May, 2014

Before: **The Hon Michael Beloff QC**
Sir John Nutting Bt QC
Sir Michael Birt

In the matter of the R and RA Trusts

Between: **L** **(Third Respondent/**
Appellant)
-and-
M **(Second Respondent)**
N **(Fourth Respondent)**
and
the Trustees **Applicants**

Advocate J M Wessels for the Third Respondent/Applicant for leave to appeal
Advocate I Swan for the Second Respondent
Advocates S H Davies and S Dingle for the Fourth Respondent
Advocate A Ozanne for the Applicants

BIRT, JA

1. This is an application for leave to appeal by the third respondent against a decision of the Deputy Bailiff whereby he refused the application of the trustees of certain family trusts for orders

requiring disclosure of specified information by some of the beneficiaries of those trusts, namely the first, second, third and fourth respondents. The third respondent had supported the trustees' application but had also submitted her own application for more far reaching disclosure orders against the first, second and fourth respondents. The Deputy Bailiff also dismissed that application.

2. The trustees (being the entities described as applicants in the title to these proceedings) have not appealed against the rejection of their application. However the third respondent has sought to do so and seeks an order from this Court ordering the disclosure requested by the trustees as supplemented by the third respondent in her own application.
3. The application requires the Court to consider, amongst other issues, whether the principles laid down in the decision of the Jersey Court of Appeal in Re B, C and D Settlements, RBC Trust Company (Jersey) Limited v E and others 2010 JLR 653 ("BCD") should be adopted as part of the law of Guernsey.
4. The Court announced its decision to grant leave to appeal and allow the appeal in part on 14th March. What follows constitutes my reasons for reaching that conclusion.

The general background

5. The parties before the Royal Court in connection with this application are all members of the J branch of a wider family. J was one of four brothers. He has died but the remaining three brothers are still alive. Together the four brothers established a substantial business empire trading in various parts of Africa. This is conducted by a number of different companies and there is a complex corporate structure which holds the African trading businesses. Ultimate ownership of these companies has over the years been placed in various trust structures. There is a complex history and at various times attempts have been made to separate some of the interests of the wider family. It is not necessary to describe these in detail save to say that, well before the events giving rise to these proceedings, the interests of one of the brothers were separated out.
6. The interests of J's family are held in four trusts. Various companies in a well-established financial services group provide the trustees of these trusts but, for the purposes of the particular matter which we have to consider, there is no need to differentiate between the various trustees. I shall refer to them simply as "the Trustees". I shall refer to two of the trusts as the R Trusts (where the beneficiaries comprise solely members of the J branch of the family) and two as the RA Trusts (where the beneficiaries comprise members of the three branches of the wider family and where, although the trusts are discretionary, the Trustees regard one third of the assets of each of these trusts as being held for the benefit of the J branch with the remaining two thirds being held equally for each of the remaining branches of the wider family). I shall refer to the four trusts as "the Trusts" unless it is necessary to refer to an individual trust.
7. The members of the J branch who are beneficiaries of the Trusts comprise the first respondent, who is the widow of J ('the mother'), her three children and J's remoter issue, both existing and prospective. The second, third and fourth respondents are the children of J and the mother. I shall refer to the second respondent as 'the elder son', the third respondent as 'the daughter' and the fourth respondent as 'the younger son' (together with the elder son 'the sons'). The remaining respondents include the minor and unborn beneficiaries of the J branch.
8. Some years ago, a decision was taken by the Trustees to set about separating the interests of the daughter and her immediate family from those of the mother and the sons and their respective families. To that end an appointment of £22m was made out of the Trusts in 2009 to a separate trust ("the W Trust") for the benefit of the daughter and her family. This was not, however, the end of the matter. The Trustees consider that to have been a payment on account and since that

time there have been further discussions between the Trustees and the beneficiaries, and indeed with other members of the wider family outside the J branch, about how to finalise the process which will eventually lead to the exclusion of the daughter and her family from the class of beneficiaries of the Trusts. These discussions turn largely on whether there should be any further appointment of assets to produce a just and equitable outcome for all the beneficiaries.

9. In order to reach a decision on this issue, the Trustees have instructed an international advisory firm (“the Advisory Firm”) to undertake an independent and up to date valuation of the assets of the Trusts. They consider that only once they have a satisfactory valuation will they be in a position to separate the interests of the daughter and her family in a manner which is fair and reasonable as between the beneficiaries. Once they have reached a decision, they intend to seek the blessing of the Court of what they consider will be a ‘momentous’ decision, thereby invoking category 2 of the well-established Public Trustee v Cooper [2001] WTLR 501 jurisdiction.
10. In very broad outline, the assets of the Trusts fall within four categories:-
 - (i) Investment portfolio
 - (ii) London property portfolio
 - (iii) Africa property portfolio
 - (iv) Business interests in Africa

These are held through a substantial number of companies, some of which are wholly owned by the Trusts but others of which are owned in part by separate trusts for the benefit of the wider family i.e. not the J branch.

11. The Royal Court received and we have read detailed affidavits from a number of witnesses setting out the protracted history of this matter, including the discussions about the provision of information. Whilst this has been useful, it is not necessary to describe this history in detail for the purposes of our decision. Suffice it to say that, following their appointment, the Advisory Firm in due course prepared a draft report dated February 2013. The respondents were given a presentation and as a result they were made aware of the gaps in the knowledge of both the Trustees and the Advisory Firm. There followed further enquiries to the sons and certain further information was forthcoming. Nevertheless, the Advisory Firm asserted that they required further information in certain areas in order to complete their task of valuing the assets of the Trusts.
12. It was in those circumstances that the Trustees instituted the present proceedings by way of application to the Royal Court dated 11th July 2013 seeking an order under Section 69 of the Trusts (Guernsey) Law 2007 (“the 2007 Law”). The application fell into two parts. First, the Trustees sought directions as to whether they should obtain an independent valuation of real estate in Africa held by various of the companies. That issue had fallen away by the time the matter came before the Deputy Bailiff and was not raised again before this Court. I therefore say nothing more about it.
13. Secondly, the Trustees sought an order that the mother and the sons should each provide information on oath in connection with three areas where the Advisory Firm required further information. I shall address these in more detail later in this judgment but in briefest outline, the information sought covered the following three areas:-

- (i) The first area relates to virtually all the liquid assets of the Trusts which have, on the advice of the younger son, been placed in a BVI company (“the Investment Company”). The Investment Company sustained a significant drop in value in late 2011. The Advisory Firm have been investigating the reasons for this drop in value and have been seeking assistance, principally from the younger son, in that respect. However, the Advisory Firm consider that they have not received

satisfactory information or explanations and accordingly the Trustees sought an order in that respect.

(ii) The second area relates to a large loan (“the F Loan”) made by a company to which I shall refer as F Limited to one of the Trusts as evidenced by two promissory notes executed in 2006. Although the loan has been shown as a liability in the accounts, there is a question as to whether in truth the loan is enforceable between the parties to it or whether it was in reality a way of contributing capital to the relevant Trust. It is said that F Limited is wholly owned by another trust (“the S Trust”) of which the mother and the sons are beneficiaries but the daughter and her family are not. The Advisory Firm require further information about this transaction and accordingly orders were sought against the mother, the sons and the daughter that they should provide information and explanations about F Limited, the S Trust and the F loan.

(iii) The third area relates to a Jersey company (to which I shall refer as “M Limited”) within the structure which is concerned with the African businesses and appears to have acted as some form of treasury company for those businesses. The Advisory Firm were at that stage seeking information about the cash balances held in M Limited.

The Deputy Bailiff’s decision

14. By the time the matter came before the Deputy Bailiff, the Advisory Firm had obtained more information from the elder son about the cash balances in M Limited and were no longer seeking further information. Although the Trustees continued to pursue that aspect, the Deputy Bailiff held (at para 46 of his judgment) that, even if he had had jurisdiction to make such an order, on the basis that it would be disproportionate having regard to the fact that the Advisory Firm were satisfied with the information which they had obtained, he would not have done so.
15. In relation to the Trustees’ application, the Deputy Bailiff was referred to BCD, the decision of the Jersey Court of Appeal referred to at para 3 above. It will be necessary to consider that decision in more detail shortly but, in essence, it held that, in order to fall within Article 51 of the Trusts (Jersey) Law 1984 – and all parties accept, as do I, that the wording of Section 69 of the 2007 Law is, although marginally different, to identical effect – any order against a beneficiary must be made against him in his capacity as such and the order must be made for the purpose of vindicating, or at least promoting, some right or interest arising directly out of the trust relationship. This aspect went to the scope of the relevant Article rather than being a limitation on the exercise of the jurisdiction under the Article. The Deputy Bailiff held that, although not binding, the decision was highly persuasive given the common membership of the two Courts of Appeal and he ought to follow it. This was a perfectly understandable and proper approach to take. He went on to find that the orders sought by the Trustees were not against the sons in their capacity as beneficiaries but rather as persons who were advisors to various companies within the trust structure. Making the orders sought would not promote or vindicate their positions or interests as required by BCD. He similarly held that there was no adequate evidence of a direct link founded on the trust relationship between the mother and the Trustees in relation to the information sought from her. He held therefore that he could not make any of the orders requested against the mother or the sons as they fell outside the scope of Section 69. Although he does not say so expressly, the implication from his judgment (paras 46, 48 and 51) is that he might well have made the orders had he felt that he had jurisdiction to do so.

Trustees’ decision not to appeal

16. The Trustees brought the application before the Royal Court because they considered that they needed the information sought in order to reach a fair decision as to how to separate the interests of the daughter and her family. They could not do that without being able to assess accurately the

value of the trust fund. It follows that they were disappointed with the Deputy Bailiff's decision to refuse them the required information.

17. However, the Trustees have not sought leave to appeal. The reason for this is that they have been advised not to appeal and to leave any appeal to the daughter. This is on the basis of an observation of Harman LJ in Re Londonderry Settlement [1965] Ch 918. In that case the trustees sought directions from the court as to whether they should disclose certain documents to beneficiaries. They then appealed the decision of the judge of the first instance and the Court of Appeal allowed the appeal in part on the basis that the judge's order went too far. However, in passing, Harman LJ said this at 930 about the appeal:-

"This appeal, as it seems to me, is an irregularity. Trustees seeking the protection of the court are protected by the court's order and it is not for them to appeal. That should be done by a beneficiary ..."

Danckwerts LJ gave a judgment in which he said that he agreed with Harman LJ but he did not deal with this aspect specifically. Salmon LJ on the other hand disagreed with Harman LJ and had this to say at 936:-

"I agree with what has fallen from my Lords. However, in my view the trustees were fully justified in bringing this appeal. Indeed it was their duty to bring it since they believe rightly that an appeal is essential for the protection of the general body of beneficiaries."

18. In my judgment, the view of Salmon LJ is to be preferred. Whilst I fully accept that in the majority of cases a trustee who has sought directions from the court should not appeal even if he is not convinced that the court reached the right decision, a trustee is perfectly entitled to appeal if convinced that the decision of the court is not in the best interests of the beneficiaries. Strictly speaking, a trustee who appeals may be at risk of an adverse costs order should the appeal fail; but such an adverse costs order will only be made in administrative proceedings where the appeal court concludes that the trustee has acted unreasonably in appealing, because it is only where a trustee has acted unreasonably that he is to be deprived of his indemnity as to costs (see Alhamrani v J P Morgan Trust Company (Jersey) Limited 2007 JLR 527 at para 69 per Vos JA).

19. Although not directly in point in relation to whether to appeal, some support for this view is to be found in BCD itself. In that case the trustee had initially sought the order for disclosure of information by beneficiaries, although it had surrendered its discretion to the court because of a perceived conflict of interest. Having obtained the order from the Royal Court, the trustee then considered it inappropriate to descend into the arena and deal with the correctness or otherwise of the order made by the Royal Court when it came before the Court of Appeal on appeal by the beneficiaries. Having referred to that stance and also the stance of the beneficiaries that they were not the protagonists in the litigation, the Court of Appeal said this at paragraph 30:-

"Each of these positions was influenced by a fear that unsuccessful opposition to the appeal might be categorised as hostile litigation and result in an adverse order for costs ... It nevertheless seems to us that it was in principle for RBC, as Trustee, to make to this court such arguments as could properly be made in opposition to the appeal. Although expressed in the context of an application for directions, we consider the principle is appropriately set out by Birt, Deputy Bailiff in In Re Esteem Settlement as follows:-

'The court is entitled to expect the fullest assistance from a trustee who should ensure that all relevant law is before the court and that all the arguments for and against the various possible courses of action are rehearsed. The court will usually be assisted by the trustee recommending a particular course of action and explaining the reasons for its recommendation. It will of course then be for the court to decide whether it agrees. It would not be in the public interest for trustees

to be discouraged from making recommendations for fear of being penalised in costs just because the court decides against the recommendation’.

We consider that that approach applies just as much on an appeal as it does at first instance.”

20. In my judgment, given that they clearly believed – and still believe – that the information sought on the application is important for them to reach a fair conclusion as to the division of the assets of the Trusts, the Trustees should have taken on the responsibility for appealing in this case. Even if, contrary to the above, the initial appeal was to be left to the daughter, they should (as envisaged in the passage in BCD quoted in the preceding paragraph) have actively supported it if they believed that the best interests of the beneficiaries as a whole would be served by the information being provided. It was always very unlikely that a court would conclude that such a stance on their part was so unreasonable that they should be denied their indemnity out of the trust fund.

The information sought on appeal

21. Following the Deputy Bailiff’s decision, there were further discussions between the Trustees and the sons and some further information was provided. Following this, the Advisory Firm produced a second draft of their report on 20th December 2013. That draft report lists the information they still require in relation to the Investment Company and the F loan. However, the information now required goes beyond that which was originally required. It follows that the information now sought by the daughter on this appeal falls into three categories:-

- (i) the information originally sought by the Trustees;
- (ii) the additional information now required by the Advisory Firm as listed in the second draft report; and
- (iii) the additional information requested before the Deputy Bailiff by the daughter.

22. As a matter of procedure, the Trustees have remained neutral in relation to this appeal. However, it is clear from the skeleton argument which they filed and Advocate Ozanne’s oral submissions that they would in reality welcome provision of the information which they were seeking before the Deputy Bailiff in relation to the Investment Company and the F loan. They would also welcome the additional information requested by the Advisory Firm (category (ii) above). Whilst not opposing the appeal, they remain strictly neutral in relation to the additional information sought by the daughter in her summons before the Deputy Bailiff (i.e. category (iii) above).

23. The importance of the information is shown by the fact that, according to Advocate Wessels, taking only the F loan and the Investment Company, the value of the Trusts is estimated by the Advisory Firm to vary between \$373m and \$159m (i.e. a difference of over \$200m) depending on the results of the further enquiries.

The relevant facts in more detail

24. Given the decision of the Deputy Bailiff that the information requested was not sought from the sons and the mother in their capacities as beneficiaries, it is necessary to describe the background in a little more detail. The daughter has not appealed the Deputy Bailiff’s decision in respect of the mother as it is generally accepted that she has little information to provide. Accordingly, orders are now only sought against the sons and I say nothing more about the mother’s position.

25. The information sought relates to three main areas and I shall take them in turn.

(a) The F Loan

26. In 2006 the Trustees of one of the R Trusts entered into a transaction whereby they borrowed assets to the value of some US\$132m from F Limited. The transaction was evidenced by two promissory notes, one issued in June 2006 and the other in December 2006.
27. The trust officers involved at the time are no longer in the employment of the Trustees and none of the present officers is familiar with the transaction. Nevertheless, investigations carried out by Clifford Chance on behalf of the Trustees have caused the Trustees to have real concerns as to whether the F Loan is in reality to be treated as a loan or whether it was intended to be a transfer of assets to the relevant Trust on the basis that the loan would not in fact ever be repaid. On the basis of the information with which they have been provided, the Advisory Firm are uncertain whether to treat the sum of \$132m as a liability of the Trusts. Clearly a decision on this point will have a substantial effect on the value of the Trusts for the purposes of calculating a fair allocation to the daughter and her family. If interest is added, the amount due under the F loan may be as high as \$171m.
28. It is not necessary for the purposes of this judgment to enter into great detail concerning the F loan but a short summary is necessary to see why the Trustees have concerns and why they are of the view that the sons, particularly the younger son, are likely to have information which would assist in establishing the position.
29. It appears from the affidavits and papers produced to us that in the 1990's, substantial funds were provided by companies within the then existing trust structures to enable the African trading companies to pay suppliers' invoices. The intention was that the funds would be repaid after the sales had been made. However, in 2000 an incident occurred ("the Incident"). It was therefore agreed that the funds would not be repaid at that time. They continued to accrue interest and in due course a total amount of approximately US\$360m was owed, with this being payable equally to each of the three branches of the wider family.
30. It is said that it was agreed in principle in 2003 that the sums would be repaid but that, almost on the day on which the transfers were to be made to clear the outstanding accounts, an event related to the Incident occurred. This apparently caused a further delay in the repayments.
31. On 12th April 2006, a meeting was held at the offices of Wedlake Bell in London; Jennet Eyre ("JE") of that firm apparently acted for the beneficiaries. The meeting was with MB, an official of the Trustees. The last paragraph of the file note of the meeting records as follows:-
- " [RA I and II]*
MB queried the position regarding the funds due to this structure (and thereafter ultimately to ...) by the African trading companies. MB confirmed that the Trustees were potentially exposed given the quantum of the amounts due (circa USD360m in total).
- JE confirmed that the funds were currently held in trust. Repayment has been delayed due to the [Incident]. JE confirmed that the Trustees were two "unknown" individuals. It was agreed that, even if funds are not to be paid immediately, a ... trust company [associated with the Trustees] (i.e. Bermuda) should be appointed in place of the current individuals. In that way, at least we would have transparency as to the location and quantum of the funds and have gone some way towards discharging our responsibilities."*
32. The F loan seems to have followed very shortly afterwards for a sum broadly equal to the J branch's one third share of the amounts due from the African companies. It is also clear that the younger son took the lead in securing the agreement of the Trustees to the F loan and in making the necessary arrangements to carry it into effect. Thus, in an e-mail dated 31st May 2006 MB of the Trustees e-mailed the younger son apologising for not returning his calls and enclosing some suggested wording for the promissory note for the younger son's review. He raised certain

questions such as the name of the entity providing the assets, the amount to be transferred, the term of the loan (indicating that the younger son might wish to recommend a limit) and the interest rate. It is clear that on all these aspects he was consulting the younger son. He went on to say:-

“As I suggested when we spoke in mid-April, the only concern that Jennet Davies has expressed is whether this loan has any ‘commercial’ rationale. In other words, what is the benefit to the Trust and the Trustees for entering into this arrangement? We have justified it on the basis of savings in terms of custody charges, transaction charges etc. One solution suggested is to charge interest on the loan. The alternative would appear to be to have one ‘global’ trustee of the assets which would remove the need for a loan. This, in her view, is not something which would prevent the issuing of a note, but it may be something you might like to consider at some stage.

My apologies once again if you have been inconvenienced. With the information outlined in points 1 – 4 above, we should be able to proceed without further delay.” [emphasis added]

Advocate Wessels submits that the emphasised wording suggests that the loan was really some form of device to return the assets to the Trusts without the African trading companies effecting direct repayment of the sums which they owed.

33. The younger son replied by e-mail the same day giving the required details and also asking MB to contact the younger son for the final list of assets to be transferred when all was in place. He also told MB that the person who would be acting for ‘the other side’ in relation to the legal documentation was Mr P, who appears to be an Israeli lawyer.

34. On 21st June, MB e-mailed the draft promissory note and details of the assets to be transferred to Mr P. Mr P replied on 27th June (copying his e-mail to both sons) saying:-

“I have received the beneficiary confirmation to go ahead. Please forward to me the document duly signed by the authorised signatories.

After receiving the documents signed, I will arrange for the transfer of the assets as was confirmed by the beneficiary.”

The younger son chased up that e-mail on 28th June seeking confirmation that it had been received and MB confirmed to him that it had been. In context, the reference to ‘the beneficiary’ in Mr P’s e-mail would appear to be a reference to the younger son.

35. Subsequently, in 2008 there were lengthy discussions about separating out the daughter’s interests. This resulted in the payment of £22m referred to earlier but also led to tensions within the family. According to instructions to counsel on behalf of the Trustees dated 30th January 2009 the two sons told the Trustees not to disclose the existence of the F loan to the daughter during those negotiations and said that they were content to treat it as a liability of their share of the trust fund. In this connection, they must have been speaking as beneficiaries. However, that proposal (that they would take it as part of their share) has not been maintained.

36. On 8th January 2009, notwithstanding that the promissory notes were not payable until 2016, Mr P wrote two letters to the Trustees with a request for (early) repayment of the F loan. By e-mail the same day, the Trustees sought a recommendation from the two sons as to how to proceed in relation to this demand. On 12th January the younger son replied with his recommendation as to which assets should be used to repay the F loan. The Trustees replied on 16th January querying why there should be early repayment. They also indicated that the younger son’s valuation was undervaluing a substantial asset which he had suggested should be used as part of the repayment. The younger son replied by e-mail dated 19th January saying:-

“The Creditor believes that given the current market conditions, and the [Trust’s] exposure to Mr Madoff, the asset coverage has diminished. From a restructuring point of view, it would be beneficial to have a structure that is free from such liabilities.”

Advocate Wessels submits that it is clear from this e-mail that the younger son was close to the Creditor (namely F Limited) and was able to pass on what F Limited believed and why that company felt it should ask for early repayment.

37. The Trustees replied to the younger son by e-mail dated 19th January which said the following:-

“Please bear in mind that the trustees’ actions are being scrutinised by three separate firms of London solicitors whose clients have competing and conflicting interests. The trustees have virtually no scope for flexibility in their actions and must do things entirely ‘by the book’ if they are not to risk being sued.

While the trustees sympathise with the position of [F Limited], we cannot see any legal obligation in the promissory note to repay the loan early. If [F Limited] wanted a facility to demand early repayment, then they should have drafted that into the loan note. The trustees cannot see that it is in their interest to hand over assets at their current very low market valuation when the loan itself is costing a relatively small amount. If all the beneficiaries are in agreement that there should be early repayment, then that would put the matter in a different light. I take it that you and [the elder son] want early repayment but we will have to write to Boodle Hatfield and Marcus Sinclair to obtain their agreement.” [emphasis added]

38. Boodle Hatfield acted for the mother and Marcus Sinclair for the daughter. These e-mails were copied to the elder son and Advocate Wessels makes the point that it is abundantly clear from these exchanges that the Trustees were corresponding with the sons in their capacity as beneficiaries.

39. The repayment of the F loan was not in fact pursued. It is of note, say the Trustees, that the sons were envisaging repayment of the F loan to an entity from which they could benefit but the daughter could not.

40. Finally, Advocate Wessels referred the Court to an internal Trustees’ memo dated 21st May 2010 in which it is stated that, at the time of calculating the sum of £22m for the daughter’s share, the Trustees deducted the F loan because they were told by the sons that the F loan was a liability to a third party stranger. The memo records that the Trustees asked the family about the owner of F Limited but they said they would only disclose this if the Trustees undertook not to reveal it to the daughter or her advisers, an assurance which the Trustees were not able to give. When asked specifically by the Trustees if it was a family trust, the sons denied this and asserted that it was a third party. However, following further investigations, the Trustees have established that F Limited is owned by the S Trust and that the sons and the mother are beneficiaries of the S Trust whereas the daughter is not. Indeed the sons accept this. The Trustees accordingly feel they were misled by the sons at the time of the negotiations leading to the initial payment to the W Trust for the benefit of the daughter and her family.

41. In summary, Advocate Wessels asserts that the evidence shows that the sons – and particularly the younger son – were at the heart of the establishment of the F loan and would therefore be entirely familiar with whether it was in truth a loan or whether it was a method of passing the amount owed by the African companies back to the Trusts via an alternative route. It was the younger son who persuaded the Trustees to enter into the F loan and the discussions with the sons were in their capacity as beneficiaries of the Trusts. Furthermore, they misled the Trustees as to whether they had any form of interest in F Limited and they sought to keep the F loan secret from the daughter.

42. It is against that background that the Trustees seek further information from the sons about the circumstances surrounding the F loan, having failed to obtain satisfactory answers from F Limited itself.

(b) The Investment Company

43. According to the mother's affidavit, when, by reason of a tragic and unexpected stroke, J's active involvement and significant contribution to the success of the businesses underlying the Trusts came to an abrupt end in 1997, his role was taken over by the sons who, together with J's two brothers who remained in the business, created and ran further trading and property holding companies. She goes on to say that about ten years ago the younger son ceased to be involved in the trading companies and has since concentrated on the investment of the other assets of the Trusts. That accords with the Trustees' experience which is that the elder son is involved in the African businesses whereas the younger son concentrates on property and portfolio investment. For example, an internal e-mail within the Trustees dated 25th November 2009 in connection with the proposal to invest in the Investment Company states "*You may recall that [the younger son] and [the elder son] are the main contacts on a day to day basis. [The younger son] is on the investment side and [the elder son] the property side. ...*"
44. The Trusts' portfolio of investments is for the most part held through a BVI company which is wholly owned by one of the Trusts and to which I will refer as RZ. Until 2009, the investments were held with an investment bank. However, in 2009, following the payment of £22m to the W Trust for the daughter's family, the younger son requested the Trustees to place the entire investment portfolio (worth approximately US\$185m at the time) in a new company which was to be incorporated in the BVI namely the Investment Company. The name of the Investment Company comprises the first letters of the first name of each of the mother, the elder son and the younger son. He explained that the funds would be managed by a Panamanian company, to which I shall refer as "ABC". Not surprisingly, the Trustees were a little reluctant to undertake such a change, particularly as they appear to have known nothing about the Investment Company. Thus on 10th November 2009, the Trustees e-mailed the younger son (copied to the elder son) thanking him for sending a copy of the proposed memorandum and articles of association of the new company and posing a number of questions. In particular they noted from the proposed articles of association that the Investment Company would be a closed ended fund so that the shares would not be redeemable. They asked the younger son to explain how the Trustees would be able to access liquidity in those circumstances. They also asked whether there were to be other investors in the Investment Company. They requested the younger son to explain how much he envisaged the Trustees/RZ subscribing and what percentage of the issued share capital of the Investment Company RZ would hold. They also asked him to confirm whether the investment adviser would be ABC or some new entity and what the remuneration arrangements for that adviser would be.
45. It is worth recording the younger son's response on 11th November, which was copied to the elder son.

"Thank you for your reply and questions below which I am very happy to see you haven (sic) a take a clear understanding of the structure. As the company is outside the BVI 1996 Mutual funds scope shares can be redeemed but with directors' discretions, which I am sure you know this is only necessary for the legal structure and share will be redeemable as needed.

With relation to your questions:

- 1. The purpose will be for [the Investment Company] to become a private or professional fund in the BVI in due time, but as mentioned above, it will not be an issue to redeem shares.*
- 2. Liquidity for the trust will not be an issue and will be dealt with upon request with urgency.*
- 3. [The Investment Company] will have other shareholders and I would envisage that [RZ] will be around 75% of share coming down to around 50% in the future.*

- 4.1 Please find attached a short presentation.
- 4.2 Quarterly reporting will be provided and if more frequent is needed this will also be possible.
5. The Investment Advisor will be [ABC] and their remuneration will be 1% per annum.

Please let me know any other question you have and how to go forward.”

46. Following these discussions, the Trustees agreed to make the investment but only on condition that the mother and both sons consented to the investment and agreed to indemnify the Trustees in respect of their decision to invest in the Investment Company. Each of the mother and the sons entered into an indemnity with the Trustees dated 15th December 2009. That entered into by the younger son (the other two were identical) was in the following terms:-

“Re Investment in [the Investment Company]

In consideration of [the Trustees] agreeing to invest in [the Investment Company][the younger son] hereby confirms that he has requested the Trustees to make such investments and covenants with the Trustees at all times to fully and effectually indemnify the Trustees and their respective successors in title and officers and employees and the personal representatives of such officers and employees in respect of all liabilities actions proceedings claims demands cost and expenses whatsoever and wheresoever for or in respect of which the Trustees or their respective successors in title and officers and employees and the personal representatives of such officers and employees may be or become (or may be alleged to be liable) by reason of its having agreed to invest in [Investment Company].”

The daughter was not asked to provide an indemnity nor does it appear that she was consulted; presumably as it was anticipated that her interest would be separated in due course.

47. When the Advisory Firm were instructed, they noted that the financial statements of the Investment Company for the period ended December 2011 had originally provided that the value of the portfolio at the end of that period was \$194m. Nine months later, restated financial statements were provided for the same period which showed a lower value of \$151m. No explanation was offered at the time as to the reason either for the substantial drop in value as compared with the original financial statements nor why it had taken nine months for the restatement to be made. It was subsequently asserted that there had been a drop of \$44m from November to December 2011. The Advisory Firm sought an explanation of the position from the younger son and held a number of meetings and telephone conversations with him to discuss the changes in value in 2011. At a meeting in March 2013, he brought various documents to a meeting with the Advisory Firm and allowed the Advisory Firm to read them during the course of the meeting; but he would not allow them to retain copies for further analysis.
48. The Trustees subsequently wrote on 24th April 2013 to the directors of the Investment Company, copying ABC and the younger son, expressing their disappointment at the lack of explanation for the 2011 drop in value and requesting a meeting to discuss performance of the portfolio. They subsequently received a response from BVI lawyers (Hempel and Boyd) stating that they had been instructed by the Investment Company to advise on its corporate structure and corporate governance and the company was not available to meet until such time as the lawyers had rendered their advice. Subsequently the lawyers informed the Trustees that the Investment Company had engaged accountants to prepare financial statements. On 10th July 2013, the lawyers indicated that the financial statements would be ready soon and asked what topics the Trustees would like to discuss with the younger son “prior to arranging a meeting [with the younger son]”.
49. On 28th August 2013, a director’s report and financial statements for the Investment Company for the year ended 31 December 2012 were provided by Hempel and Boyd together with an e-mail giving four brief explanations as to the loss in value of the investments. Upon Mr Kosky of Clifford Chance seeking further information he was told on 3rd September “It is not company

policy to elaborate further on positioning, due to possible adverse effects on the company's future performance. Measures have been taken to reduce any further losses of such magnitude. Please contact [the younger son] to arrange to meet with him. Please note that he is bound by certain rules of confidentiality." When Mr Kosky sought clarification as to who had prepared the financial statements the response was simply that they had been prepared by "a third party".

50. The second draft Report makes it clear that the Advisory Firm have not received any satisfactory explanation as to the underlying assets, their value etc. Furthermore, because of the changes in the stated value, they do not feel confident in the information that they have been given. For example, the Advisory Firm identified a material error relating to the net asset value for the year ending 31 December 2010. They discussed this error with the younger son who subsequently agreed that the net asset value for that date was incorrect and should have been recorded as US\$232.5m rather than US\$208.1m. The Investment Company forms a substantial part of the value of the Trusts and accordingly the Advisory Firm seek the detailed information set out at para 9.36 of their second draft report, namely a month by month schedule of the investments for the period 1 January 2010 to 31 December 2012, showing the value of each investment at the year end and the calculation of the asset value per share, details of trades and positions and any profits or losses on those trades and detailed descriptions of the basis on which the investments have been valued in the original account statements, the revised account statements and the director's report. According to the second draft report, the Advisory Firm estimate that there may be a difference in value of the Investment Company between \$168m and \$210m depending on the outcome of their enquiries.
51. At the appeal, the Court was shown correspondence concerning RZ's recent attempts to redeem some of its shares in the Investment Company. It appears that a request was first made on 22nd November 2013 to Hempel and Boyd to which that firm replied on 15th January 2014 by e-mail (copied to the younger son) stating that the shares were redeemable at the sole discretion of the directors and that at that time the director (apparently thereby indicating that there is only one director) elected not to redeem the shares. The e-mail indicated that this position would be reviewed at the end of the first quarter of 2014 when the 2013 financial accounts should be available. Clifford Chance, on behalf of RZ, responded on 21st January stating that this was unacceptable and repeating the request for immediate redemption of sufficient shares to raise the sum of \$20m. The letter referred in particular to the representations made by the younger son in the e-mail of 11th November 2009 (referred to at para 45 above) that '*shares will be redeemable as needed*', '*it will not be an issue to redeem shares*' and '*liquidity for the trust will not be an issue and will be dealt with on request with urgency*'. The firm of Carey Olsen replied on this occasion repeating that the director was not willing to redeem at this stage but would review the position once the 2013 financial statements had been approved by the director. Clifford Chance replied on 21st February asking for the name of the director of the Investment Company and her contact details but we have not been shown any further correspondence.
52. Advocate Wessels submits that this whole investment was made at the request of the younger son in his capacity as a beneficiary, supported by the mother and the elder son, also in their capacity as beneficiaries. It is clear that the younger son is closely involved with the management of the Investment Company and indeed the Trustees are of the view that he is the owner of ABC although he denies that this is so. The Trustees believe that the younger son is in a position to answer all the Advisory Firm's questions should he wish to do so and that it is necessary for these questions to be answered if a fair division of assets is to be reached having regard to the correct value of the assets of the trusts.

(c) M Limited

53. During the early part of their investigation, the Advisory Firm encountered some difficulty in ascertaining the exact level of cash balances in M Limited although the elder son did provide

various pieces of information. By the time the matter came before the Deputy Bailiff, the Advisory Firm had indicated that, following receipt of information from the elder son, they did not think it necessary to seek further information. Despite that, the Trustees persisted with their application that the sons should provide information about the net assets of M Limited as at 31 December 2012 and the daughter sought further information relating to the role of M Limited in relation to the business of the African trading companies, copies of financial statements and accounts and an explanation for a particular payment described in the daughter's application. Before us, the position remains that the Advisory Firm are not looking for any further information about M Limited at this stage but the daughter maintains her request for the further information described briefly above and set out in more detail in her application.

The response of the sons

54. Since the Advisory Firm began their work, both sons have had a number of discussions with the Advisory Firm and have provided a fair amount of information. In the case of the elder son, this has related primarily to the African businesses, including M Limited and in the case of the younger son, it has related primarily to the Investment Company. However, as described above, the Advisory Firm consider that they require further information in order to provide a reasonable valuation of the assets of the Trusts. As previously stated, at present the Advisory Firm have been forced to advise that the assets of the Trusts are worth somewhere between US\$373m and US\$159m, a difference of over \$200m.
55. Each of the sons filed an affidavit in response to the Trustees' application. The elder son devoted considerable attention to his contention that there should be a general separation of interests rather than just those of the daughter. As to the information sought by the Trustees, he said that the younger son had been principally involved with the running of the Investment Company and that it was the younger son, rather than he the elder son, who was therefore working with the Investment Company's solicitors to provide the information sought in relation to that company. As to the F loan, he stated that he was a beneficiary of the S Trust which was the beneficial owner of F Limited. He was not a director or shareholder of F Limited. He said that he was aware in 2006 of the proposal that F Limited should lend certain assets to one of the R Trusts in return for the promissory notes but commented that the Trustees were asking him to provide information as to F Limited's views on the enforceability of the F loan and what from their perspective (or that of the S Trustees) was the commercial purpose of the loan. He said that it was unclear why it was appropriate for the Trustees to seek information from him as to the views of a third party entity with whom they had entered into a commercial arrangement.
56. As to M Limited, he said that he did not know who its directors were although he knew it was owned as to one fifth by five African trading companies (which he named) and all of these were ultimately owned by the Trustees. He said that, together with the mother and his uncle F, he was a shareholder of a company I shall refer to as P Limited, which is an English company and not owned by the Trusts. He was also a director of that company. He said that that company provided services to M Limited. He accepted that he had provided information to the Advisory Firm in relation to the cash balances of M Limited and inferred that he had felt he had been fully cooperative in that respect.
57. The younger son filed an affidavit in which he was critical of the approach of the Trustees, both in relation to the separation of the daughter's interests and in relation to the application for information, saying that the Trustees were seeking disclosure from the sons to fill in gaps in the Trustees' own knowledge, which could only have been caused by their own failings in administering the Trusts. He did not address the substance of the Trustees' application in any respect but simply said that, so far as the Investment Company was concerned, he was not a director of it although he was a director of a company I shall refer to as D Limited, which provided services to the Investment Company (but not as investment advisor). He said that it was

in that capacity that the Investment Company had authorised him to talk to the Advisory Firm. He said nothing about ABC. As to the F loan, he said that he was a beneficiary of the S Trust but held no position in F Limited. He said nothing further about the F loan. As to M Limited, he said merely that he was not a director of it nor was he a director of P Limited. Having described his various capacities, he then said simply that he had been advised that he had duties of confidentiality to third parties in respect of information which he held in these various capacities.

The contentions in outline

58. The Trustees have decided in principle to separate out the interests of the daughter and her family. They have instructed the Advisory Firm to value the assets of the Trust for this purpose. Once they have the necessary information, they will reach a decision and will then seek the blessing of the Court on the basis that it will be a ‘momentous’ decision. They submit that it is clear that the sons, if they so choose, can provide the information requested and therefore assist the Advisory Firm in placing a fair value on the assets of the Trust. The Trustees submit that without that information, there is a substantial risk that they will divide the Trust assets on a false basis as to value. There is uncertainty over the value to the extent of over \$200m. It is therefore in the interests of the beneficiaries as a whole that the information be provided so that a fair decision can be reached. The Trustees submit that section 69 of the 2007 Law is in wide terms and that the Court has jurisdiction to make an order against the sons because they are beneficiaries of the Trusts. The Court should not adopt the principles laid down by the Jersey Court of Appeal in BCD as part of Guernsey law as it incorrectly restricted the wide language of the statute. They also further submitted that, even if the Court were to follow BCD, the facts of this case would allow for an order to be made because, contrary to the view of the Deputy Bailiff, the information was sought from the sons in their capacity as beneficiaries of the Trusts. Assuming that the Court had a discretion to make the order, it should do so because it was clearly in the interests of the beneficiaries as a whole.
59. The sons supported the decision of the Deputy Bailiff. In other words, they submitted that BCD should be followed and that the order sought against them fell outside the scope of Section 69. It was not sought against them in their capacity as beneficiaries or to vindicate their position as beneficiaries.
60. On appeal, they adduced a further point which was that a court did not have power to make an order for disclosure against a beneficiary. Disclosure by a trustee was part of its duty to account to the beneficiaries and there was therefore an enforceable duty on the part of trustees. There was no duty owed by a beneficiary to trustees and therefore no ability for the Court to make an order requiring disclosure in order to support or enforce such a duty.
61. It seems to me that the following points arise for decision:-
- (i) Should BCD be followed in this jurisdiction?
 - (ii) Does Section 69 permit the Court to order a beneficiary to provide information to a trustee in relation to a trust?
 - (iii) Assuming the Court has jurisdiction to make the order requested, should it do so on the facts of this case?
 - (iv) If the Court does not have jurisdiction under Section 69, may it order disclosure under Part X (Rule 71 in particular) of the Royal Court Civil Rules 2007 (RCCR).
62. I shall consider each of these in turn.

(i) Should BCD be followed in this jurisdiction?

63. Section 69 of the 2007 Law is in the following terms:-

“General Powers of Court

(1) On the application of any person mentioned in sub-section (2), the Royal 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 its functions, the removal of a trustee ..., the appointment, remuneration or conduct of a trustee, the keeping and submission of accounts, and the making of payments, whether into court or otherwise,

(iii) a beneficiary, or any person connected with a trust,

(iv) any trust property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof,

(v) an enforcer, in relation to any non-charitable purpose of a trust, including ...,

(b) make a declaration as to the validity or enforceability of a trust,

(c) rescind or vary an order or declaration under this Law or make a new or further order or declaration.

(2) An application under sub-section (1) may be made by:-

(a) Her Majesty’s Procureur,

(b) a trustee,

(c) a settlor,

(d) a beneficiary,

(e) a person described in Section 32(2),

(f) in relation to a non-charitable purpose, the enforcer’

(g) with the leave of the Royal Court, any other person.

(3) ...”

64. The wording relied upon by the daughter in this case is therefore:-

“(1) On the application of [a trustee] or [a beneficiary], the Royal Court may

(a) make an order in respect of:-

...

(iii) a beneficiary ...”

65. Although the wording of Article 51 of the Trusts (Jersey) 1984 Law is not identical, all the parties agreed before us that nothing turned on the minor differences of language. Thus the relevant provisions of Article 51 of the Jersey statute provide:-

“(2) The court may if it thinks fit:-

(a) make an order concerning:-

(iii) a beneficiary ...”

Paragraph 3 goes on to say that an application for an order under paragraph (2) may be made by a number of listed people including a trustee or a beneficiary.

66. As already mentioned, the sons submitted – and the Deputy Bailiff accepted – that the Court should follow the decision in BCD as representing the law of Guernsey and that this decision prevented the making of the order sought in this case. It is necessary therefore to consider that case in some detail.

67. In that case, the trustee sought disclosure against certain beneficiaries who were directors of Irish companies partially or totally owned by a company which was itself owned by the trust. The information related to potentially excessive remuneration paid to the directors and to other matters concerning the Irish companies and was sought in anticipation of a decision intended to achieve a proper division of the trust assets between different branches of the family. The Royal Court made the orders requested but that decision was reversed by the Court of Appeal on the ground that the making of such an order fell outside the scope of Article 51 of the 1984 Law.

68. In order fully to appreciate the Court of Appeal’s reasoning, it is necessary to set out the following passages from the judgment of the Court of Appeal delivered by Martin JA:-

“38 This provision is expressed in the widest possible terms. There is no apparent limit on the type of order that can be made, so long as it “concerns” a beneficiary or person connected with the trust; and there is no attempt to specify the degree of connection required in the latter case. Nevertheless, it is clear that some limit must be imposed on the width of the jurisdiction conferred by the article. Thus, it would not be permissible to regard the article as providing a source of jurisdiction to grant relief where no other cause of action existed merely because the defendant happened to be a beneficiary under some trust. Nor could the article be used, for example, to justify making a disclosure order against an attorney merely because the attorney had drafted a trust instrument in a wholly unrelated matter and so could be said to be connected to a trust. These examples are more than limitations on exercise of the jurisdiction: they go to the scope of the art. 51 power.

39 The necessity for some limitation was recognized by the Royal Court in S v. L. That case concerned a claim by S that she had provided part of the funds held on trust by the defendant trustees. While her claim was still unresolved, she applied to the trustees for an interim payment to enable her to meet legal fees. The trustees declined to make such a payment until her underlying claim had been established. She thereupon applied to the court for a direction that the trustees make the payment. The trustees argued that, since they had exercised their discretion against making the payment, their decision could be challenged only on conventional, limited grounds. S, however, argued that art. 51(2) gave the court a wholly unqualified power to make an order “relating to the exercise of any power”; with the consequence that the court could exercise its own discretion without regard to the reasonableness or otherwise of the trustees’ exercise of

discretion. In rejecting that submission, Birt, Deputy Bailiff said this ([2005] JRC 109, at para. 22):

“Although the wording of art. 51(2) is indeed wide and the court may have a theoretical jurisdiction to make an order as [S’s advocate] submits, the jurisdiction of the court must be exercised on a sensible and principled basis. A settlor does not choose the court as a trustee; he chooses his appointed trustee. It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. If [S’s advocate’s] argument were to be accepted, the effect would be to constitute the court as a trustee. That is not the court’s role. The court’s role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The court does not simply substitute its own discretion for that of the trustee . . .”

40 The question, therefore, is how the undoubted limitation on the power is to be identified. The starting point in answering that question is to ascertain the purpose for which the power exists. As the Royal Court stated in *In re C.A. Settlement (3)* (2002 JLR 312, at para. 16), the article “was clearly intended to give a general power to the court to give directions in administrative proceedings.” It is a statutory embodiment of what was described by Lord Walker of Gestingthorpe in *Schmidt v. Rosewood Trust Ltd.* ([2003] 2 A.C. 709, at para. 51) as “the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts,” together with its corollary, the entitlement of a trustee to seek directions from the court in case of difficulty. In *In re Internine Trust* (2006 JLR 195, at para. 24) this court recognized that applications brought under art. 47 (as art. 51 was previously numbered) were applications to the supervisory jurisdiction of the court; and the same recognition appears from the quotation set out above from *S v. L.*

41 This being the purpose of the article, it is clear that the power to make an order concerning a beneficiary is confined to cases where the order affects the beneficiary in his capacity as such—that is to say, in his capacity as beneficiary of the trust whose administration the court is supervising. The foundation of the jurisdiction lies in the nexus between trustee and beneficiary arising out of the trust relationship. The fact that a person is a beneficiary is not of itself sufficient to justify the making of an order: the order must be made for the purpose of vindicating, or at least promoting, some right or interest arising directly out of the trust relationship.

42 Similar considerations seem to us to apply to the question of who is a “person having a connection with the trust.” Like Gloster, J.A. in *In re Broere Trusts* (2003 JLR 509, at para. 26), we do not propose to attempt any exhaustive definition of those who might fall into that category; and we agree with her that whether a person has a connection with the trust must depend on the factual circumstances relevant to the particular case. It does, however, seem to us that the connection must be a direct connection with the relationship between trustee and beneficiary constituted by the trust instrument. The examples given by Gloster, J.A. in *Broere* of a settlor or protector or the potential object of a discretionary power who is not a beneficiary at the relevant time, all have the necessary direct and immediate connection with the trust relationship. So also, we think, did the creditor of the settlor who was convened at the outset of the *Esteem* litigation to advance any grounds on which it challenged the validity of or gifts to the settlement, since the issue was fundamental to the existence or otherwise of the trust relationship (see *In re Key Trust* (2003 JLR 437, at para. 7)). By contrast, in *Broere* itself, it was held that the mere fact that there happened to be an identity between persons who were the trustees of one trust and the trustees of a second trust could not result *per se* in there being a connection between the first trust and the trustees of the second trust or vice versa.

43 We consider that the requirement of a direct connection with the trust relationship provides a principled basis for exercising the jurisdiction conferred by art. 51 against a beneficiary or a person connected with the trust, whilst preserving the wide discretion to do whatever is necessary to further the administration of a trust that the article was clearly intended to confer on the court.

We do not consider that mere knowledge of the existence of the trust suffices, as Advocate Cadin suggested; nor do we think that the test can be satisfactorily framed in terms merely of proximity, as Advocate Young proposed, although proximity is clearly a relevant factor.” [emphasis added]

69. The Court of Appeal went on to hold that, on the facts of the case, the order of the Royal Court had gone “*beyond the proper limits of the jurisdiction*” conferred by Article 51 (para 44 of the judgment). This was in essence because the order ignored the fact that the appellants owed no duty of disclosure to the trustee or the other beneficiaries that arose directly out of the trust relationship. In their capacity as beneficiaries, they had no right to the documents of the companies. They only had the ability to procure the documents of the Irish companies in their capacity as directors. The Court considered that the existence of the company structure interposed a separate and distinct relationship between the trustee and the appellants, so that the relevant nexus between them was not the trust relationship. It was therefore not permissible to make an order against them either on the basis that they were beneficiaries or on the basis that they were persons having a connection with the trust.
70. The Court acknowledged the dilemma of the trustee and indicated that, had it not found that the orders fell outside the proper scope of Article 51 so that it became merely a question of the propriety of an exercise of discretion, the Court of Appeal would, subject to one possible exception, have upheld the Royal Court’s decision. As it was, the Court of Appeal felt that the trustee could pursue its remedy through the articles of association of the various companies or institute proceedings against the beneficiaries in Ireland to recover sums overpaid (with disclosure being obtained in the ordinary way during the course of the litigation). Alternatively, the trustee could draw inferences against the beneficiaries and order a distribution of assets on a basis that made assumptions about the benefits which the beneficiaries had obtained from the Irish companies.
71. The sons submit that BCD was correctly decided for the reasons given in the judgment of Martin JA and that this Court therefore has no ability to make the orders originally sought by the Trustees and now sought by the daughter.
72. It is not entirely clear whether, when it refers to the order in that case falling outside the ‘scope’ of Article 51(para 38) or ‘beyond the proper limits of the jurisdiction’ (para 44) or being concerned with ‘how the undoubted limitation on the power is to be identified’ (para 40) the Court of Appeal was referring to the jurisdiction (i.e. the power) to make the order in question or to the circumstances in which it would be proper for the Court to exercise a theoretical jurisdiction which it had. This difference may make no practical difference but I think it is nevertheless important to identify the issue with which one is concerned.
73. If the Court was intending to say that there was simply no jurisdiction (in the sense of power) to make the orders in that case, I would respectfully disagree for the following reasons:-
- (i) I accept that Section 69 was no doubt intended to ensure that the court continued to have an appropriate supervisory jurisdiction in respect of trusts. However, once something is given statutory form, it is the words of the statute which are decisive.
- (ii) The wording of Section 69 is extremely wide. It provides that, on the application of a beneficiary or trustee, the Royal Court may make an order in respect of a beneficiary or any person connected with a trust. I accept that the provision must be construed in the context of the statute in which it appears, which is a statute dealing entirely with the law of trusts. From this context, it is clear that the jurisdiction may only be exercised in connection with the supervisory jurisdiction of the Court in relation to trusts. So, for example, the fact that the applicant is a beneficiary of trust A and the respondent is a beneficiary of trust B, which is wholly unconnected, does not of itself confer jurisdiction on the Court to make an order requiring, for example, the

respondent to disclose details of his personal bank account in connection with an unrelated matter, just because the applicant and the respondent are each a ‘beneficiary’. Such an order would have nothing to do with the supervision of any trust.

(iii) However, I do not consider that it is for the Court to go further and impose a jurisdictional limit on the circumstances in which it may make an order which is in connection with the supervision of a trust and apparently falls within the wording of the statute. If the legislature has seen fit to confer a jurisdiction on the Court in those circumstances, it is not, in my judgment, for the Court to say that it does not have such a jurisdiction contrary to the wording of the statute.

(iv) An example of the court not cutting down an apparently wide statutory jurisdiction is to be found in the decision of the Privy Council in Gamlestaden Fastigheter v Baltic Partners 2007 JLR 393. That case involved an unfair prejudice petition (under the Jersey Companies legislation) brought by a member of a company (who was also a significant creditor) seeking that the directors pay damages to the company by reason of the alleged prejudicial conduct. Article 141(1) of the relevant Jersey legislation enabled a member of a company to apply to the Court for a remedial order under Article 143 on the ground that “the company’s affairs are being and have been conducted in a manner which is unfairly prejudicial to the interests of .. some part of its members (including at least the [applicant] member) ...”. Article 143(1) empowered the Court, if satisfied that an Article 141 application was well founded, to “make such order as it thinks fit in respect of the matters complained of.” Accordingly, the only person entitled to bring a petition was a ‘member’ of a company. At first instance, the petition was struck out on the basis that the petitioner was seeking relief in respect of loss suffered in its capacity as a creditor, not as a member of the company. This was because, even if the damages were recovered, the company would still be insolvent and there would accordingly be no distribution to members of the company. The petitioner would however have obtained financial benefit by way of partial repayment of its loan to the company.

(v) That decision was upheld by the Jersey Court of Appeal but overturned by the Privy Council. Although relief for unfair prejudice could only be sought by a member of a company, the Privy Council declined to construe the wide provision so as to rule out the grant of relief on the ground that the relief sought would not benefit the applicant in its capacity as a member of the company, albeit that in many cases, such a feature might as a matter of discretion justifiably lead to the refusal of relief.

(vi) Advocate Wessels argued that this was a clear example of a court refusing to cut down apparently wide wording as a matter of jurisdiction. Advocate Swan submitted that, even if the Privy Council did not impose a gloss on the wording of the statute by reference to whether the applicant would benefit as a creditor or a member, it did add a gloss at paragraph 36 of the judgment where it held that there must be some financial benefit to the applicant before relief could be granted. In my judgment, that point does not assist Advocate Swan. It is a trite statement that a court will not consider academic points which have no practical result. This would suggest that an applicant can only seek relief under Article 141 if he seeks to benefit from any relief sought. That seems to me to be a very different point. Accordingly, I agree that Advocate Wessels is entitled to submit that Gamlestaden offers some support for the proposition that apparently wide wording in a statute should not be cut down when a court is deciding whether it has jurisdiction to make an order which it is apparently entitled to do under the wording of the statute.

74. For these reasons, if the Court of Appeal in BCD was stating that there is only jurisdiction to make an order under Article 51 where the order affects the beneficiary in his capacity as such and is made for the purpose of vindicating, or at least promoting, some right or interest arising directly out of the trust relationship (para 41 of the judgment), I would respectfully differ.

75. However, I think it more likely that the Court was pronouncing that, notwithstanding the wide theoretical jurisdiction, the Court must exercise that jurisdiction on a sensible and principled basis (see paras 39 and 40). I entirely agree with that sentiment. The question then is how to try and articulate the principles upon which the Court should act. I understand why in BCD, given the unusual nature of the relief sought (in that it concerned the provision of information by beneficiaries entirely in relation to companies of which they were directors), the Court sought to set out some parameters for the making of such an order.
76. Nevertheless, in my respectful judgment, the Court in BCD articulated too rigid a test. It is always difficult to envisage future circumstances until they arise and how words in a judgment may apply to such circumstances. The danger is that a judgment is construed as a statute. Indeed that is what has occurred here. The argument before the Deputy Bailiff and his judgment turned entirely on consideration of whether the factual circumstances in this case did or did not fall within the exact wording used in BCD. The Deputy Bailiff held that they did not and therefore he could not make the order. In my judgment, it is preferable to proceed on a more incremental basis allowing the principles to be clarified and refined as future cases arise.
77. By way of analogy, it is of note that in Schmidt v Rosewood Trust Limited [2003] 2 AC 709 (which clarified authoritatively the basis for making orders for disclosure of information against trustees) the Privy Council did not seek to lay down guidelines as to exactly when a court should or should not order disclosure by a trustee. It contented itself with stating at para 67 of the judgment of Lord Walker of Gestingthorpe that a court had to undertake a balancing operation and pointing out some of the factors which might be relevant to that task.
78. In my judgment, in order to justify an order against a beneficiary, there must be a sufficiently close connection between the position of the beneficiary as a beneficiary of the trust whose affairs are being supervised and the relief being sought as to justify the exercise of the court's supervisory jurisdiction. The sort of considerations referred to in BCD may sometimes be helpful in ascertaining whether there is in fact a sufficiently close connection between the position as beneficiary and the relief sought; but the test that I have sought to articulate is more flexible and will enable the Court to achieve justice on behalf of the beneficiaries as a whole where appropriate. In deciding whether a matter is sufficiently closely connected with a person as a beneficiary, the Court should look at the realities of the situation and not be overcome by technicalities (see by analogy the decision of the English Court of Appeal in North Shore Ventures Limited v Anstead Holdings Inc [2012] EWCA Civ 11 in relation to the power under CPR 71.2(6) to order disclosure ('discovery' in Jersey terms) against a beneficiary of a trust).

(ii) Is there jurisdiction to make an order that a beneficiary should provide information?

79. Advocate Davies, supported by Advocate Swan, submitted that a beneficiary owes no fiduciary (or indeed other) duty to a trustee and that accordingly there is no ability for a court to order a beneficiary to produce information to a trustee, let alone to another beneficiary. All the cases about disclosure concerned the ability of a beneficiary to obtain information from a trustee. This was because a trustee owes fiduciary duties towards his beneficiaries and is therefore under a duty to account to them for his stewardship of the assets. A trustee can only be held to account if a beneficiary is able to obtain information as to what the trustee has done. It is therefore a necessary corollary of the duty to account that the court should have power to order a trustee to provide information to a beneficiary. He asserted that in the leading text books on trusts, such as Lewin on Trusts and Underhill and Hayton, Law of Trusts and Trustees, there was no example given of the court having made an order requiring a beneficiary to provide information to a trustee.
80. I accept without reservation that it is likely to be extremely rare for a court to order a beneficiary to provide information to a trustee, let alone another beneficiary. In general terms, a beneficiary does not owe any duty to a trustee, so that the considerations which lead a court to order a trustee

to disclose information to a beneficiary do not arise in the reverse situation. Nevertheless, I do not accept that the Court may not do so where it is satisfied that such an order is in the best interests of the beneficiaries.

81. First, as already stated, the jurisdiction conferred by Section 69 is in extremely wide terms and, on its face, permits the Court to order a beneficiary to provide information to a trustee or to another beneficiary.
82. Secondly, if Advocate Davies is correct in his submission, the Court of Appeal in BCD did not need to consider the limits of the jurisdiction to order the disclosure of information by a beneficiary and whether the facts of the case fell within that jurisdiction. The orders were sought against beneficiaries. The simple answer, if Advocate Davies is correct, was that the Court had no jurisdiction to make any order requiring the beneficiaries to disclose information. However, that point was not taken by any of the parties nor was it raised by the Court of its own volition despite the fact that the Court was clearly concerned with the scope of Article 51 and indeed itself raised the issue as to whether the orders made properly fell within article 51.
83. Thirdly, one must have regard to the underlying nature and purpose of the Court's jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. At its heart lies the protection of the beneficiaries – see Schmidt at para 51 per Lord Walker and the observation of Bailhache, Bailiff in Re Freiburg Trust [2004] JRC 056 at para 6:-

“A protector is in the position of a fiduciary and the Court must have power to police the activities of any fiduciary in relation to a trust whether he be called a protector or indeed by any other name. Such a jurisdiction is a necessary incident of the duty to protect the interests of beneficiaries, especially minor and unascertained beneficiaries ...” [emphasis added]

84. Whilst I have no doubt that in the vast majority of cases where the Court orders the provision of information, the order will be made against a trustee or other fiduciary who owes a duty towards the beneficiaries, I do not agree that the Court's jurisdiction should be confined in this way. If the Court concludes that, in order to protect the interests of the beneficiaries as a whole, it is necessary to make an order that a beneficiary provide information, I do not see why it should be precluded from doing so; the Court would be making the order for the very purpose for which the supervisory jurisdiction exists. Even if one accepts that Section 69 was intended to give statutory form to the Court's inherent jurisdiction to supervise trusts, the Court has not been referred to any case where it has been held that the inherent supervisory jurisdiction is not wide enough to make such an order and it seems to me desirable that it should be able to do so in the interests of the beneficiaries as a whole.
85. Advocate Davies and Advocate Swan placed some reliance on the Jersey case of Re HHH Employee Trust 2012 (2) JLR 64 in support of their contention that there is no jurisdiction to order a beneficiary to provide information to a trustee. In that case, a beneficiary sought disclosure against, *inter alia*, the settlor of the trust. The Court held (at para 45) that a beneficiary has a right to seek disclosure of information or access to documents held by a settlor in connection with the exercise by the settlor of any fiduciary powers retained by him under the trust. I accept that the implication from the Court's decision is that the right is limited to where the settlor retains fiduciary powers. Nevertheless, I do not consider that the Court was seeking to define the limits of its jurisdiction in this way; on the contrary it was indicating where it would be appropriate to make such an order. Thus in an earlier passage at paragraph 30, Commissioner Clyde-Smith said this:-

“We agree that the settlor is not a trustee for the purposes of the Trusts Law and that accordingly art. 29 dealing with disclosure by a trustee has no application to the settlor. Both parties submitted, however, and we accept that the court has jurisdiction over the settlor under art.

51(2)(a)(iii) as being a person “having a connection with the trust”. As Mr Mackereth pointed out, the question of whether the court has jurisdiction is only the first limb of the enquiry, as it must go on to decide what principles should govern the exercise of that jurisdiction. The mere fact that the settlor may have in its possession information in relation to the trust is not, without more, grounds for requiring it to be disclosed under the court’s supervisory jurisdiction to someone else interested in the trust, such as a beneficiary.” [emphasis added]

86. It seems to me that the emphasised sentence encapsulates the correct position. Whilst there may be jurisdiction to make an order against a settlor (as being a person having a connection with the trust) or a beneficiary, the Court has to decide the principles which should govern the exercise of any such jurisdiction. It seems to me that the remainder of the judgment in Re HHH was concerned with establishing the principles upon which the Court should act and I do not disagree in any way with the conclusions which the Court reached in that respect. It follows that I do not think Re HHH will bear the weight which Advocate Davies and Advocate Swan seek to place upon it.
87. In summary, whilst fully accepting that a beneficiary does not owe a fiduciary or other duty towards a trustee (so that the circumstances in which an order that he provide information is appropriate are likely to be exceedingly rare), nevertheless, if the Court concludes that the provision of information by a beneficiary is required in order to protect the interests of the beneficiaries as a whole, it is my opinion that the jurisdiction conferred by Section 69 and the inherent supervisory jurisdiction of the Court in relation to trusts are both wide enough to encompass such an order.

(iii) Should the Court exercise its jurisdiction in this case?

88. I turn therefore to consider whether the orders sought in this case against the sons have a sufficiently close connection with their position as beneficiaries of the Trusts to justify the exercise of the Court’s inherent jurisdiction and, if so, whether the orders should be made.
89. I accept that the theoretically very wide jurisdiction conferred under Section 69 must be exercised in a principled and sensible manner. In particular, if an order is to be made against a beneficiary requiring him to produce information to a trustee, there must be a close correlation between his position as beneficiary and the information in question. In that sense, the observations in BCD can still be of assistance whilst not regarding them as a straightjacket which limits the exercise of the jurisdiction.
90. Before undertaking that exercise, it is important to recall the circumstances in which it is now the daughter whose application the Court is considering. The original application was brought by the Trustees because they had reached a decision in principle to separate the interests of the daughter and her immediate family from the remaining members of the family. That required them to assess the value of the Trusts. Having received the first report from the Advisory Firm, they considered that they did not have sufficient information in certain areas and accordingly sought the assistance of the Court to obtain that information so that they could properly reach their decision in relation to the separation. Before the Royal Court, the daughter filed her own application asking for additional information which she said the Trustees should have before they reached their decision. The Trustees decided not to appeal for the reasons stated earlier. The matter is now technically before us as an appeal by the daughter, but the Trustees, whilst technically remaining neutral, are supportive of the application in so far as it relates to the information which they originally sought together with supplementary information which the Advisory Firm is advising should be disclosed. Their attitude in relation to these matters is different from their attitude in relation to the additional information which the daughter seeks. I propose therefore to consider first the three categories of information which the Trustees

originally sought, together with that which the Advisory Firm now advise is necessary before turning to the additional information sought by the daughter.

(a) F Loan

91. The Court can of course only go on the evidence which has been produced in the case so far. However, in my judgment, Advocate Wessels is correct in submitting that the Trustees have reasonable grounds for believing that the F loan may well have been intended as a method of transferring the accumulated funds in the African trading companies back to the Trusts other than by direct repayment of the various loans and accordingly it was not really intended that the F loan should ever be repaid. No other reason for the creation of the F loan has ever been suggested and the timing and the correspondence of the amount of the loan with the amount owed by the African trading companies lends support to the Trustees' concerns. The amount involved is substantial and will clearly make an enormous difference to the valuation of the Trusts' assets for the purposes of the proposed division. It seems to me therefore undoubtedly to be in the interests of the beneficiaries as a whole that the maximum amount of information should be obtained in order to establish the true position.
92. There is substantial evidence that the sons – and the younger son in particular – were at the heart of the creation of the F loan and would therefore be aware of what was intended and the reasons for the transaction. Thus, it was the younger son who suggested it to the Trustees in the first place; he was liaising with the Trustees over the terms of the loan and over the assets which would be comprised in the loan; it was he to whom Mr P, the lawyer acting for F Limited, looked for confirmation that he could proceed; and when F Limited sought early repayment in January 2009, the younger son was able to inform the Trustees as to why F Limited had sought early repayment and offered a view on which assets should be used to effect repayment.
93. The question then is as to whether the information sought is sufficiently closely connected with the younger son's position as a beneficiary of the Trusts. I must respectfully differ from the Deputy Bailiff when he placed weight on the fact that the younger son's e-mail address referred to D Limited (which, as mentioned earlier, is a company which provides unspecified services to the Investment Company) and concluded that, on balance, the evidence pointed towards the younger son's involvement either being on behalf of an advisor to a company several layers down from the Trust ownership within the Trust structure or, arguably, on behalf of F Limited or the S Trust. This was to give too much weight to form over substance and to have insufficient regard to the realities of the situation. In my judgment, the younger son's actions at the time of the creation of the F loan were clearly closely connected with his position as a beneficiary of the Trusts. This was a loan taken directly by the Trustees so there was no question of any corporate involvement. He was a beneficiary requesting the Trustees to enter into this transaction and the Trustees agreed to it because he was a beneficiary. Furthermore, the correspondence in January 2009 about possible early repayment is clear on its face (see para 37 above) that the Trustees are discussing the question of early repayment with the younger son in his capacity as a beneficiary, not as some form of investment advisor or advisor to companies elsewhere in the structure.
94. In summary, I have come to the firm conclusion that (i) this is information which the Trustees need in order to reach a decision which is fair to all beneficiaries in relation to the separation, (ii) there are grounds for the Trustees' concern that the transaction may not be as it seems, (iii) there are strong grounds for concluding that the younger son is in a position to shed light on the transaction and (iv) an order that he provide information is closely connected with his position as a beneficiary of the Trusts, which are the trusts whose administration is being supervised by the Court. I do not think it is in the interests of the beneficiaries as a whole that the younger son should be able to select the information he produces to the Trustees and when. One can foresee that, if the Trustees reach a decision on separation on the basis of their current knowledge, the sons could in future produce further selected information to support a challenge to the decision.

This would be highly unsatisfactory. The Trustees should have the best possible information now. I therefore conclude that an order that the younger son provide the information about the circumstances surrounding the F loan originally requested by the Trustees together with the information now required by the Advisory Firm is appropriate.

95. I accept that the elder son appears not to have been so heavily involved in the F loan but he was the one who had detailed knowledge as to the position of the African trading companies and the repayment of the loan and he appears to have been copied in to material correspondence. There are good grounds for thinking that he too was fully aware of the position and again it is closely connected to his position as beneficiary. Accordingly I conclude that the order should be made against him as well as the younger son.

(b) The Investment Company

96. Here too, it is necessary for the Trustees to ascertain the true value of the Investment Company in order that they can in due course make a decision on the separation which is fair to all beneficiaries. There are strong grounds for concluding that it is reasonable for them to wish to obtain this information. There are also strong grounds for concluding that the younger son has such information. It was his idea to place all the liquid assets in the Investment Company in the first place. The Trustees would not have done so otherwise and they clearly only agreed to it because he was a beneficiary of the Trusts. At the time of the investment, he appears to have held no official position in relation to the Investment Company because it did not yet exist. He can therefore only have been proffering the advice and making the request which he did in his capacity as a beneficiary. It is clear that the Trustees only agreed to the request because he was a beneficiary and of course they only did so provided that both sons and the mother provided indemnities. They clearly provided such indemnities because they were beneficiaries.

97. The younger son asserts that he is not a director of the Investment Company or of ABC, (although the Trustees believe that he is the owner of ABC). The only official capacity which he states that he holds is as a director of D Limited which offers unspecified services to the Investment Company. But before he held that official position in relation to the Investment Company, he felt able to speak for the Investment Company in assuring the Trustees that there would be no difficulty in redeeming their shareholding. Furthermore he has been able to answer numerous queries from the Advisory Firm about the Investment Company, albeit that he has not provided all the information which they seek. In his affidavit he merely asserts that he is advised that he has duties of confidentiality to third parties. Given the history of this matter, it seems highly probable that, if he wishes to provide information about the Investment Company, any necessary authority will be forthcoming.

98. In summary, on the evidence produced to date, I am satisfied that it is in the interests of the beneficiaries as a whole for the true value of the Investment Company to be ascertained, that there are strong grounds for believing that the younger son is in a position to provide such information should he so wish, and that there is also a close connection between his position as a beneficiary of the Trusts and the information in question such that it is appropriate to make the order sought. For the reasons given in relation to the F loan, I consider that it is in the interests of the beneficiaries that the information should be provided in full now rather than run the risk of it being produced piecemeal at a later stage. I would therefore make an order in the terms originally requested by the Trustees together with the additional information requested by the Advisory Firm.

(c) M Limited

99. I can deal with this aspect comparatively briefly. The Advisory Firm consider that, following receipt of various information from the elder son, they now have sufficient information for their

purposes. They do not seek any further information about M Limited or the African trading companies. The daughter, on the other hand, argues that, in order to reach a fair decision, the Trustees need to have more detailed information about M Limited. Thus, not only does she maintain the original request by the Trustees that the sons should swear affidavits dealing with their knowledge of the net assets of M Limited as at 31 December 2012, she contends that their affidavits should also (in summary) (i) provide a comprehensive explanation as to the role of M Limited in relation to the African trading companies and also in relation to two specifically named companies, (ii) provide copies, so far as they are in their respective possession or under their control, (to include in the case of the elder son any documents held by P Limited) of any audited or unaudited financial statements and accounts for M Limited together with all its bank statements from 2009 onwards, and (iii) provide a comprehensive explanation as to the payment of US\$13m to a named individual as described in the draft report of the Advisory Firm.

100. In my judgment, one must bear in mind the underlying purpose of this application. The Trustees intend to make a ‘momentous’ decision to separate out the interests of the daughter’s family and, for these purposes, consider that they need to have more accurate information about the value of the assets of the Trusts. In this respect, they are acting on the advice of the Advisory Firm.

101. Advocate Wessels argues that the additional information is necessary to reach a proper decision and that the information currently requested by the Trustees will be insufficient. He submits that the likely outcome of making no order at this stage is that, when the Trustees come to seek the blessing of the decision which they in due course will make, one or other of the beneficiaries will argue that the Court should not bless the decision because the Trustees did not have sufficient information. He argues that the Court should take steps at this stage to ensure that such a situation does not arise.

102. I cannot accept that argument. It is the Trustees who will take the decision in due course and it is up to them to decide what information they need before they can take that decision. Whilst a beneficiary can of course offer a view that further information is required, it is not for the Court to tell a trustee in advance what information it should obtain. This would be to go beyond the proper role of the Court which is to supervise the administration of a trust, not to manage the trust itself. In my judgment, it is hard to envisage circumstances in which it would be right for a court to order a beneficiary to provide information at the instance of another beneficiary in circumstances where the trustee was saying that it did not need that information for the purpose of fulfilling its role as trustee. I would accordingly entirely agree with the views of the Deputy Bailiff at paragraph 14 of his judgment where he said this:-

“As will become apparent, I take the view that the stage of the proceedings in which all the parties currently find themselves remains that of information-gathering on the part of the Trustees, where the fundamental question is what the Trustees consider they need in order to finalise the momentous decision they will then put to the Court for blessing. In such a situation, I do not consider that a beneficiary has a role to play in forcing the Trustees to expand their information-gathering exercise beyond the parameters that they have established for themselves. That does not mean that a beneficiary cannot usefully make suggestions about the approach that a trustee should follow. If such a suggestion were to be made, the Trustees are likely to understand that not following it could result in adverse comment from that beneficiary when the Court’s blessing is sought and will have to assess how it is most appropriate to explain their chosen approach. However ... there is a difference between active voluntary participation and compulsion, with the consequence that, if the Trustees are content with the information they have before forming a view, that will be an end of the matter, at least at this stage.”

103. It is of course always open to the Trustees to come back and seek further information (although I am not inferring one way or the other whether such an application would be successful). It will also of course be open to any beneficiary to argue, when the matter comes back to the Court after

the Trustees have reached their decision, that the Court should not bless the decision because the Trustees have taken it upon inadequate information. If the Court were to be persuaded of that view, it may refuse to bless the transaction. But that is a matter for the Trustees to consider, not the beneficiaries at this stage.

104. For these reasons, I decline to make the order requested by the daughter in relation to M Limited as it goes beyond that requested by the Trustees and the Advisory Firm.

105. For exactly the same reasons, I would also refuse the daughter's application for information in respect of the F loan and the Investment Company in so far as it goes beyond that of the Trustees/the Advisory Firm.

Criticism of the Trustees

106. I should at this stage address a point raised by the sons to the effect that this application has only become necessary because of failures on the part of the Trustees. It was the Trustees themselves who entered into the F loan. If they do not know the full story behind it, it is their fault for having entered the transaction without having ascertained the exact position and why it was appropriate to enter into the F loan. Similarly, it was up to the Trustees to ensure that, if they were willing to place virtually all the liquid assets of the Trusts in the Investment Company, appropriate procedures for them to monitor and be informed of the performance of the investments and a procedure for being able to realise the investments were established before they agreed to the proposal.

107. For my part, I would accept that it is, on the face of it, extremely surprising for a trustee to come before the Court and say that it does not know what lay behind a transaction which it (not some previous trustee) has entered into (whereby it borrowed \$132m) and furthermore that it has placed all the liquid assets of the Trust (some \$185m) in a vehicle of which it knows so little and over which it apparently has so little control. At some stage, there may clearly be scope for considerable criticism of the Trustees.

108. Nevertheless I do not consider that, in a case such as this, the supervisory jurisdiction of the Court should be exercised so as effectively to punish a trustee for its failures. The jurisdiction is there to protect the interests of the beneficiaries. That protection requires that, regardless of any previous failures by the Trustees, information is now obtained so as to enable a fair division to be made. The result of refusing to make an order would be that the assets of the Trusts would be partitioned when there is uncertainty (to the extent of over \$200m) as to the value of the assets. A decision made in such uncertain circumstances would clearly be vulnerable to challenge but it would be extremely difficult to conclude on any such challenge what the correct figure was without provision of the information in question. Partial further provision of information by some of the beneficiaries would not assist at that stage. Accordingly, everything points towards the desirability, in the interest of the beneficiaries as a whole, of the information being provided now so that the partition can proceed on adequate information. One alternative would be for the Trustees simply to draw adverse inferences against the sons and the mother in the absence of adequate information and that remains one possible course of action. Nevertheless, I consider that the better solution is for the Trustees to proceed on the basis of proper information.

(iv) May the Court order disclosure under Part X (Rule 71 in particular) RCCR 2007?

109. As an alternative to her application under the supervisory jurisdiction, the daughter submitted that the Court could order disclosure of the relevant information under Part X RCCR 2007.

110. There is abundant authority for the proposition that the Court's ability to order disclosure of documents and information pursuant to its supervisory jurisdiction in relation to trusts is quite

distinct from its power to order disclosure (or discovery) in ordinary litigation. Thus in Schmidt at para 65, Lord Walker said:-

“The Board does not find it surprising that Lord Wrenbury’s observations have been so often cited, since they are a vivid expression of the basic distinction between the right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property) and the right of a litigant to disclosure of his opponent’s documents (which is part of the law of procedure and evidence).”

111. So far as Guernsey authority is concerned, in Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited [2007] WTLR 999 at para 107, Talbot LB said:-

“107. 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.”

112. A helpful passage can also be found in the judgment of Commissioner Clyde-Smith in the Royal Court of Jersey in Re HHH Employee Trust [2011] JRC 235 at paras 21 – 22:-

“21. It is clear that there is a distinction between disclosure under trust law and under civil proceedings. Quoting from Underhill and Hayton, Law of Trusts and Trustees, 18th Ed, para 56.38:-

‘However, despite the change in the procedural rules, the broad distinction between on the one hand disclosure to a trust beneficiary as such beneficiary and on the other disclosure to a litigant in civil proceedings remains the same. Disclosure is a process only coming into play once civil proceedings have been commenced, and only in relation to matters in issue in those proceedings. The trust beneficiaries or objects have the right to seek to hold their trustees to account irrespective of litigation, and covering the whole range of their interests in the trust, not restricted to any matters which might be in dispute. But it should be noted that the scope of disclosure in civil procedure is more pervasive than the right to hold trustees to account, and covers, for example, documents withheld under the latter right because they might reveal the trustees’ private deliberations.’

*22. This distinction informed the court’s desire in April of this year to clarify the nature of the proceedings commenced by B, which although brought under Art 51 of the Trusts Law **combined** both hostile proceedings and an application for disclosure. There was nothing to prevent B from bringing hostile proceedings but if so, they would be better commenced by way of order of justice and disclosure in those proceedings will follow as a procedural matter ancillary to the enforcement of the hostile claim. B has now extracted the hostile claims from the representation so that it is clear that by that representation he is invoking the supervisory jurisdiction of the court pursuant to Art 51 of the Trusts Law in which he seeks disclosure as a beneficiary.”*

113. It is important to keep these two procedures separate as the considerations which will influence the Court as to whether to order disclosure are very different. In the case of an application under the trust supervisory jurisdiction, the question is what order should be made having regard to the interests of the beneficiaries, the duty of the trustee to account, matters of commercial confidentiality and many other aspects alluded to by Lord Walker in Schmidt (para 67). Conversely, in the case of ordinary litigation, the test for disclosure is whether the documents are relevant (or possibly relevant) to the matters in dispute between the parties.

114. In my judgment it is not possible for a beneficiary or trustee to bring a stand-alone application for disclosure in relation to a trust and then seek to argue that, because this is being opposed, there is

an issue between the parties and the Court can use its power under RCCR. Advocate Wessels argues that there is a ‘lis’ or ‘dispute’ between the parties because the Trustees’ application also refers to the fact that it will be seeking approval for its momentous decision to partition the assets. I do not accept that argument. Although it is true that there is a reference in the Trustees’ application to the fact that they will in due course be seeking the approval of the Court to the decision to partition, the fact remains that they have not yet taken that decision and can therefore hardly be seeking approval for it at this stage. There cannot be a dispute or lis between the parties in relation to that decision when no one knows what it is and whether anyone will disagree with it.

115. It follows that I agree with the decision of the Deputy Bailiff that this is not an application which brings Part X of RCCR into play and the matter falls to be considered solely under the supervisory trust jurisdiction.

Conclusion

116. For the reasons I have given, I consider that making the orders against the sons to the extent I have indicated is a proper exercise of the Court’s supervisory trust jurisdiction, whether considered under Section 69 or under the inherent jurisdiction. I would therefore give leave to appeal and allow the appeal to the extent described earlier.

117. I should add that, had I concluded that BCD should be followed in this jurisdiction, I would nevertheless have allowed this appeal. In my judgment, given the factual situation in relation to the F loan and the Investment Company described at paragraphs 26 – 52 above – and noting the importance of having regard to the realities of the situation as described at paragraph 78 – the proposed orders affect the sons in their capacity as beneficiaries of the Trusts given that their whole involvement in both these transactions was in such capacity. The proposed orders are also required for the purpose of vindicating or promoting a right or interest arising directly out of the Trust relationship, in that it is needed to achieve a fair division between the daughter and the sons in their capacity as beneficiaries of the Trusts.

118. I should also add that I entirely agree with the judgment of the President which follows.

Sir John Nutting:

119. I also agree with the judgment of Sir Michael Birt JA as above and with the judgment of the President which follows.

CIVIL DIVISION – APPEAL NO. 470

11th April 2014

Beloff, JA

1. I agree with Sir Michael Birt’s Judgment, and add only a few words because we are, to a limited extent, qualifying the Judgment of the Court of Appeal in Jersey in BCD in terms of its applicability to Guernsey.
2. As Sir Michael observes paras 72-73 the analysis in BCD of the reach of the equivalent provision to Section 69 of the Trusts (Guernsey) Law 2007 i.e. Article 51 of the Trusts (Jersey) 1984 Law is complicated by the use made of the word “*jurisdiction*” which notoriously has a chameleon quality. (See e.g. Anisminic v FCC 1969 2 AC 147 per Lord Reid at p.171 B-G.)
3. I prefer accordingly to eschew use of that word and to concentrate on two questions: First, what powers does the Court enjoy under Section 69? Second, in what circumstances is it appropriate for the Court to deploy such powers? Both involve an exercise in statutory construction.
4. In my view it is axiomatic that the point of departure in terms of construction of a provision in a statute must be the language of the provision. It is equally axiomatic that the literal meaning may be modified or limited by what can be discerned of the purpose of the provision itself.
5. In the matter before the Court, the applicant under Section 69 of the 2007 Law, the daughter, is “*a beneficiary*” whose ability to seek to make such an application is *prima facie* vouched for by Subsections (1) and (2)(d). The order sought is directed to “*a beneficiary*” i.e. each of the sons, identified as an object of a Section 69 order Subsection (1)(a)(iii). The order sought i.e. for disclosure of information is clearly in “*in respect of*” a beneficiary; whether the matter is looked at from the perspective of the daughter or the sons. The words ‘in respect of’ “*are difficult of definition but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer*” Lightman J Albon v Naza Motor Trading 2007 EWHC 9 (Ch) at (27) .
6. What reason then is there to limit the scope of the relevant words according to their literal interpretation? That must be found, as I have already suggested, in the perceptible purpose for which the Section 69 powers are conferred. I respectfully accept the conclusion in BCD at para 40 that the Jersey analogue of the provision (and therefore of the provision itself) is the statutory embodiment of what was described by Lord Walker of Gestingthorpe in Schmidt v Rosewood Trust Limited (2003) 2 AC 7 09 at para 51 as the Court’s “*inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts*”. That is, materially to ensure that the interests of beneficiaries under the Trust are protected and to assist, if need be, the proper performance of the Trustee’s fiduciary duties owed to the beneficiaries. (See further Re Freiburg Trust 2004 JRC 056 para 6 Bailhache, Bailiff.)
7. For that reason I would not for my part be disposed to qualify this broad and flexible power by attaching to the word “*beneficiary*” in the 2007 Law the confining words “*as such*”; (BCD para 41) or to require “*a direct connection with the trust relationship*” as a precondition for exercise of the Section 69 powers (BCD para 42). Those limiting concepts may better be utilized when the Court considers in any case whether it should exercise its discretion whether or not to make an order sought under Section 69; but not as barriers to prohibit such consideration in the first place. I accordingly associate myself with Sir Michael Birt’s conclusions at paragraph 78. In my view, the Court should, on a case by case basis consider whether the order sought by someone entitled to seek it promotes the purpose of the provision, and, if the Court considers that it does, whether there are any factors which should incline the Court nonetheless to refuse to make such order. On

the facts of this case I have no doubt, for the reasons set out in Sir Michael's judgment, that the making of the disclosure order within the limits he has described, fulfils the purpose of Section 69, and would be a proper means of ensuring that the rights and interests of the beneficiary daughter are protected.

8. On the ancillary issue as to the Trustees entitlement to appeal a decision of the kind before us (discussed in Sir Michael's judgment para 16-19) I am in the Salmon rather than the Harman camp.