



Royal Court
In re a Guernsey Trust (“the BCD Trust”)
13 July 2012 judgment handed down
20 July 2016 anonymised version handed down

JUDGMENT
32/2016

Application for relief by the former trustees (delivery up of documents issue) from the Court under the so-called Beddoe’s jurisdiction.

Approved Text
20.07.2016

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

IN re a GUERNSEY TRUST (“the BCD Trust”)
DELIVERY UP OF DOCUMENTS ISSUE

Extracts from J U D G M E N T in approved, anonymised form

13 July 2012
20 July 2016 (date of approved, anonymised form)

Oral hearing *in private*: 14 to 16 September 2011
Judgment handed down: 13 July 2012
Anonymised version of the Judgment handed down: 20 July 2016

J U D G M E N T

of

Lieutenant Bailiff Patrick John Talbot QC

Advocate Jeremy Wessels of Mourant Ozannes for the former trustees of the BCD Trust (“the former trustees”)

Advocate Simon Davies of Ogier for the present trustee of the BCD Trust (“the present trustee”)

Advocate Ian Swan of Babbé for the protector under the BCD Trust (“the protector”)

Advocate Gareth Bell of Collas Crill for the minor, unborn and unascertained beneficiaries under the BCD Trust appearing on behalf of Advocate Christian Hay

Advocate John Greenfield of Carey Olsen for [Mr D] of ... [UK LLP] and [Mr E] of ... [BVI Limited], (“the liquidators”), the joint liquidators of four companies, (“the companies”)

Introduction

1. This is an application in proceedings, which have been before the Royal Court since about late May 2010, in which the former trustees seek relief from the Court under the so-called *Beddoe’s* jurisdiction (see *Re Beddoe* [1893] 1 Ch. 547), [which proceedings will be referred to as “XYZ”]. Some of the issues in XYZ relate to the value of the assets which are subject to the trusts of the BCD Trust. ...

2. On 1 September 2011 the present application was lodged in XYZ on behalf of the former trustees, for whom Advocate Wessels appears. By the application, the former trustees claim an Order for the recovery of a file of papers, including correspondence and emails, (which I shall call “the papers”), which was sent electronically by the former trustees’ Advocates, Mourant Ozannes, (the firm in which Advocate Wessels is a partner,) to Carey Olsen, the Advocates for the liquidators, by an email sent ... on [date], together with all paper copies made by the respondents to the application, the liquidators, The application is supported by the present trustee, for whom Advocate Davies appears, and by the protector, for whom Advocate Swan appears. Advocate Bell appeared on the oral hearing in place of Advocate Hay, who represents in XYZ the minor, unborn and unascertained beneficiaries under the BCD Trust, and also made submissions in support of the application.
3. The form of relief sought by the former trustees was refined and expanded during the oral hearing and a draft Order was lodged by Advocate Swan on [date].
4. The liquidators, for whom Advocate Greenfield appears, oppose the application and contend that they and their Guernsey Advocates, Carey Olsen, their English solicitors Weil, Gotshal & Manges LLP, and their own firms, respectively [UK LLP] and [BVI Limited], are entitled to retain the papers and use them for their own purposes, subject to the terms of [a] consent Order made by me in XYZ ..., including, it must logically follow, using them for the purposes of proceedings in this Court brought by the liquidators against the former trustees on 3 March 2010 for a very substantial sum, that is to say, over £170 million, [which proceedings will be referred to as “ABC”]. I am the Judge hearing XYZ, which, as is customarily the case with applications by trustees for directions under the *Beddoe*’s procedure, is being heard solely in [private], whilst Lieutenant Bailiff the Rt Hon. Sir John Chadwick PC is the presiding Judge in ABC, which is being conducted in open court.
5. ...
6. ...
7. It would be useful, in my view, if I were to set the scene a little before dealing with the application itself. In XYZ the former trustees primarily seek the approval of the Royal Court to possible steps to be taken by them in relation to the defence of ABC. But there has been a series of Orders made so as to ensure that the net value of the assets subject to the trusts of the BCD Trust is not to be materially reduced without prior notice being given to the liquidators of any proposal which would have, or be likely to have, such an effect. Advocate Tim Corfield of Carey Olsen has appeared before me on behalf of the liquidators on several occasions when such an event has been discussed in hearings conducted in [private] during the course of XYZ.
8. It is no surprise to me that the former trustees seek such approval under the *Beddoe*’s procedure since the very size of the claim in ABC would be likely, in my view, to lead to any Guernsey-based trustees in the position of the former trustees seeking directions from the Royal Court since there is a very real probability that the claim would exhaust the trust fund under the BCD Trust – see, generally, the decision of Mr Justice Hart in the High Court in England in *The Public Trustee v Cooper* [2001] WTLR 901, at pp. 922G to 924G, quoting extracts from a judgment of Mr Justice Robert Walker, (as he then was,) delivered in another matter in chambers. An application like XYZ, in my view, clearly comes within the second category of case listed in *The Public Trustee v Cooper* – see further (i) *Lewin on Trusts*, 18th edition (2008), at paragraphs 21-117/118, 21-125 to 21-128, (ii) the judgment of Mr Justice Oliver, (as he then was,) in *Midland Bank Trust Company Limited v Green* [1980] Ch. 590, at pp. 604-609, and (iii) the judgment of Justice Young in *re Permanent Trustee Australia Limited* (1994) 33 NSWLR 547, a decision on an application for judicial advice on a commercial trust pursuant to a statute, for the principles and practice to be applied in a *Beddoe*’s application.
9. I have considered the judgment of Mr Justice Oliver in *Midland Bank Trust Company Limited v Green* [1980] Ch. 590 at pp. 604-609, which was cited to me by Mr Swan for the protector.

The issue before the Court in that case was described by the learned Judge as “...*the very much broader question of whether, when a party has put on affidavit evidence of facts and that affidavit has been filed by or on behalf of the party to a Beddoe application, after the deponent's death that affidavit can be tendered as evidence of the same facts either by or against the party or his representatives and whether in the same or some other proceedings.*” At p. 608E and ff. the learned Judge said: “...*Mr Hoffmann, however, has submitted that even if there is no issue estoppel here, nevertheless there is some general principle that protects evidence of facts given on a Beddoe application from being used or referred to. He was, I think, inclined at first to put it as generally as that - that no affidavit filed on a Beddoe summons could be used or referred to in any other proceedings than that summons. Such a proposition clearly does not in my judgment bear examination. In the absence of a direction by the judge that there should be no publication - and there was no such direction here - the publication of matters in chambers is not per se a contempt of court any longer. The affidavits are filed and formerly could be inspected by anybody on payment of the appropriate fee, which was why, as I understand it, the practice grew up of giving confidential evidence by way of an exhibited statement which was not filed. Although the affidavits are not now open to immediate public inspection, they are open to inspection once they get into the Public Record Office. That, no doubt, is a fairly lengthy process, but at the time when the practice in relation to Beddoe applications grew up, they could be inspected by anybody on payment of the appropriate fee and it is difficult to see how any general confidentiality could be claimed for documents which then were - and still are, ultimately - open to public inspection. ...*”

10. I am satisfied that Mr Justice Oliver was not suggesting that, if evidence before the Court on a *Beddoe's* application on the approach to be taken by trustees in contentious proceedings brought against them by a third party was accidentally supplied to the clients who were suing the trustees of the trust in question or to their legal advisers, any confidentiality attaching to the information contained in the evidence which invited the Court to give the trustees directions relating to the contentious proceedings would be, as it were, lost for ever. On the contrary, the learned Judge did not seem to me to be disagreeing in any way with the manner in which the nature of the *Beddoe's* procedure had been addressed in the same case by Mr Justice Templeman, (as he then was,) in an earlier chambers application in the same case, (when another point had arisen for decision,) where Mr Justice Templeman had said this: “...*of course, it is necessary for defendants to open their hearts to the judge and tell him exactly what the action looks like. The judge is acting in some respects as though he were the adviser and trustee giving guidance. The application is invariably heard in chambers, and nothing is published because of the jurisdiction of the judge to look after the estate, and because any information made public would be available to the plaintiff in the action, and might well be prejudicial to the defence and the estate which the judge is there to protect. Over the whole of such an application there is an aura of confidentiality, which is preserved by hearing everything in chambers.*”
11. It is standard practice on a *Beddoe's* application that there will be “...*a review of the merits in the main action, but from the viewpoint of the trust, not of the other party to the main action. So as to enable the judge to adjudicate upon the question with which the Beddoe's application is concerned, he will need to have access to privileged information which would not be available to the judge dealing with the main action, particularly legal advice on the merits.*” (Lewin at paragraph 21-118)
12. The sensitive, confidential and often privileged nature of the evidence put before the court on a *Beddoe's* application is described in Lewin in this way at paragraph 21-125: “*The application should be supported by evidence including instructions to, and the advice of, an appropriately qualified lawyer as to the prospects of success, and other matters relevant to be taken into account, including ... the value of the trust assets, the significance of the main action to the trust, and why the court's directions are needed. ... The court must be made aware in the Beddoe application of the weaknesses as well as the strengths of the position of the trustees in relation to the substantive action, and indeed full disclosure is essential, otherwise an order made in the Beddoe application will not afford the trustees full and effective protection.*”

13. At paragraph 21-126 of *Lewin* the learned editors deal with the procedure to be adopted when the other party to the main action is a beneficiary. This paragraph is equally applicable in XYZ to the position of the liquidators in their capacity as parties to XYZ for the limited purposes only of, as it were, ‘keeping an eye’, on the net value of the assets of the TDT. It is clear beyond argument, in my judgment, that the liquidators have not been joined as ‘full’ parties to XYZ and that they and their legal and other professional advisers have at all times material to this application been aware of such a limitation on their interest as respondents in XYZ. As it is put in *Lewin*, relying upon the well-known cases of *In re Eaton* [1964] 1 WLR 1269 and *In re Moritz* [1960] Ch. 251: “*Special care must be taken in a case where the beneficiary is a party to the main action, with an interest opposed to that of the trustees. ... Any material which would be privileged as regards that beneficiary in the main action should be put in evidence by way of being exhibited to the trustees’ witness statement and should not be served on the beneficiary, except that if the trustees’ representatives consider that no harm would be done by the disclosure of all or some of the material it should be served on that beneficiary. ... Neither the beneficiary ... nor those representing him will normally be allowed to be present when the merits of the main action are discussed between the trustees’ counsel and the judge ..., since they might hear something that they should not about the strength or (more dangerously) the weakness, of the trustees’ case. ...*”
14. The effect of the undertakings given by both the former trustees and the present trustee to the Court and the liquidators in the Order made in ABC ... [in] 2011 was to enable the liquidators to have sufficient documentary materials so as to be able to address me as fully as they wished on the aspects of XYZ relating to both the [family home of the protector] ... and commercial properties in [England], ... at a hearing in XYZ ... and the reference to the so-called ‘Tab x’ materials in that Order made it clear that parts of the evidence before the Court in XYZ would definitely not be provided to the liquidators.
15. Trustees may, of course, sue or be sued like anyone else: any such litigation would be a “*third party dispute*” in the classification adopted by Mr Justice Lightman in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220. A *Beddoe’s* application is a “*friendly .. trust dispute*” in the same classification. In short, the duties of trustees with respect to third party litigation like ABC are to preserve the trust estate, *i.e.* to defend the trust against adverse claims where such defence is in the best interests of the trust. The trustees owe these duties to the beneficiaries of the trust and, whilst the duties are not absolute duties, they do require the trustees to exercise reasonable care and prudence when deciding how to act.
16. *Beddoe’s* proceedings offer the trustees a means of protecting themselves against the risks, especially the risks on costs, involved in contesting adverse proceedings brought against them, which affect the value or composition of the trust estate.
17. The circumstances in which the liquidators appear in these proceedings are summarised in the [affidavits mentioned]. The factual background to the application appears from the correspondence and emails exchanged between the Advocates for the liquidators, Carey Olsen, the Advocates for the present trustee, Ogier, and the Advocates for the former trustees, Mourant Ozannes, ...
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30. ...
31. *[There appears to have been no paragraph numbered 31.]*
32. ...
33...
34. I now turn in some detail to the evidence filed on behalf of the parties. *[There then followed a consideration of the evidence.]*
35. ...
36. ..
37. ..
38. ..
39. ...

40. Counsel presented interesting and challenging arguments on the law, which covered the nature of a *Beddoe's* hearing, the law of confidence or confidentiality of documents and the law of both legal professional privilege and common interest privilege from production of documents.
41. The legal principles which relate to applications by a party to litigation for delivery up of documents which have been obtained by an opposing party either by illegal or illicit means or by accidental mistake have been the subject of plenty of attention in the English Courts over the last 30 years or so. But, so far as the researches of Counsel have been able to discover, there is no Guernsey case which touches on the points in issue on this application.
42. Accordingly, as appeared to be agreed by Counsel, particularly since it is standard practice for Guernsey Advocates to look to English law for guidance on the topic of disclosure and inspection of documents, the Royal Court, in my judgment, should look for guidance first to the approach taken by judges in the English Courts and also in the Royal Court of Jersey. In the light of the remainder of what I shall say on the law, it has not proved necessary for me, or indeed Counsel, to go beyond English and Jersey authorities for aid and guidance.
43. I shall first deal with a point raised on the terms of rule 77 of the *Royal Court Civil Rules, 2007*. The rule provides:

“Restriction on the use of a privileged document inspection of which has been inadvertently allowed.

77. Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the leave of the Court.”

Upon the facts relevant to the application, this rule seems to me to relate, at most, only to [a letter], which was written ... expressly on a common interest privilege basis. Whether it also relates to any of the remainder of the papers is, in any event, not material in the light of the decision which I have reached on this application and I shall, therefore, leave undecided the further question whether any, and, I so, which other parts of the papers are entitled to be protected by either form of claimed privilege for another day. I doubt whether rule 77 has any part to play on this application since the issues do not arise for decision in the context of an accidental disclosure during disclosure and inspection of documents in contentious proceedings before the Royal Court, but only in the context of separate *Beddoe's* proceedings being heard in [private] on affidavit evidence only and without any Order having been made between the parties to XYZ for any *inter partes* disclosure and inspection. The only Order made relating to the supply of documents from one or more parties to the other material to this application is the Order made in ABC [in] 2011, which, in a loose sense, was affirmed by the consent Order made by me in XYZ ... under which the liquidators became respondents to XYZ.

44. Nevertheless, in my judgment, if the [letter] had been disclosed during a process of disclosure and inspection in contested proceedings, the clear effect of rule 77 in relation thereto would have been that, so long as I were satisfied that the ... letter remained a privileged document

when it was enclosed within the papers and sent to Carey Olsen on [date], no use whatsoever could be made of it or its contents without the leave of the Royal Court when the former trustees, by their lawyers, Mourant Ozannes, had inadvertently allowed it to be read, (which I consider comes within the scope of the word “inspected”,) by Carey Olsen, their clients the liquidators and Weil, Gotshal & Manges, their English solicitors. Speaking strictly *obiter*, I would have been so satisfied. For it has been proved by the former trustees to my satisfaction that the ... letter was, and at all times remained, a privileged document. In my judgment, the privilege was quite possibly that of both the former trustees and the present trustee, and, perhaps, of the protector as well, and I am also satisfied on the evidence ... that there was no waiver of the common privilege attaching to the ... letter when it was sent to Carey Olsen within the papers on [date]. But, since no application was made to me on behalf of the liquidators for leave to use the ... letter or its contents, it is not necessary for me to decide whether I would have given leave to the liquidators to use it. However, in the light of the decision which I make later in this Judgment with regard to the remainder of the papers, ... it is doubtful that I would, in such an event, have granted the liquidators leave to do so if I had been asked to give such leave.

45. I shall now turn to the relevant English cases for guidance so as to decide the correct approach to be taken on applications before the Royal Court like the present application.
46. One of the leading English cases summarising the principles relating to inadvertent disclosure is the Court of Appeal decision of *Al Fayed v Commissioner of Police for the Metropolis* [2002] EWCA Civ 780, which was much relied upon by Advocate Greenfield for the liquidators. Although the papers were disclosed to Carey Olsen by Mourant Ozannes apparently under the terms of the undertakings contained in the Order made in ABC by consent [in] 2011, and not as part of the procedure of disclosure and inspection of documents in XYZ, (which are *Beddoe’s* proceedings to which the rules relating to disclosure and inspection do not often apply, if at all,) it seems to me that some helpful points of principle relating to legal professional privilege and waiver of privilege do arise for consideration from the judgment of the Court, which was given by Lord Justice Clarke, (as he then was,) which it might well be helpful to bear in mind. The following guidance was given by the learned Lord Justice:-

- “15. *We were referred to a number of cases including Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027, Derby & Co Ltd v Weldon (No 8) [1991] 1 WLR 73, Pizzey v Ford Motor Co., The Times 8 March 1993 and International Business Machines Corporation v Phoenix International (Computers) Ltd [1995] 1 All ER 413 under the RSC and Breeze v John Stacey and Sons Ltd, unreported, 21 June 1999 under the CPR. All the cases were concerned with [legal professional privilege] and not [public interest immunity].*
16. *In our judgment the following principles can be derived from those cases: i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not. ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents. iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived. iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief. v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud. vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake. vii) A mistake is likely to be held to be obvious and*

an injunction granted where the documents are received by a solicitor and: a) the solicitor appreciates that a mistake has been made before making some use of the documents; or b) it would be obvious to a reasonable solicitor in his position that a mistake has been made; and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief. viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court. ix) In both the cases identified in vii) a) and b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances. x) Since the court is exercising an equitable jurisdiction, there are no rigid rules. ...

17. *Finally, it seems to us that the same approach should be adopted to the exercise of the discretion conferred on the court by rule 31.20 of the CPR. Whether the question is whether to grant an injunction or to make an order under that rule, the court should do what is just and equitable in all the circumstances of the case.”*

47. In reaching their decision on the guiding principles applicable in a case where a document has been mistakenly disclosed during the disclosure process the Court of Appeal specifically mentioned *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 and *Pizzey v Ford Motor Company* [1994] PIQR 15, two earlier decisions of the English Court of Appeal, which were also cited to me. These cases helpfully developed the English law on what remedies, if any, were available to a party whose lawyers had inadvertently disclosed a privileged document during disclosure where the mistake is an obvious one. The judgment of Lord Justice Mann (at pp. 20/1) in *Pizzey* makes it clear, in my judgment, that different principles may well apply in cases where discovery or disclosure and inspection of documents is taking place and a privileged document or documents is or are mistakenly disclosed by a party’s lawyers. The learned Lord Justice carefully distinguished between discovery cases, like *Guinness Peat*, and cases which do not relate to discovery. In the latter class of case the Court of Appeal seemed to me to confirm the longstanding position under English law that an injunction was available under the Court’s equitable jurisdiction flowing from the decision in *Lord Ashburton v Pape* [1913] 2 Ch. 469 to restrain the use of a confidential communication like a document subject to legal professional privilege outside the disclosure and inspection process. Lord Justice Mann said:

*“Cases of discovery apart, an injunction will usually be granted to restrain the use of communications that are both confidential and privileged unless they have already been adduced in evidence or otherwise relied on at trial. This is established by *Goddard v Nationwide BS* [1987] QB 670 where Nourse L.J. said at page 685E: “...once it is established that a case is governed by *Lord Ashburton v Pape* ... there is no discretion in the court to refuse to exercise the equitable jurisdiction according to its view of the materiality of the communication, the justice of admitting it or the like. The injunction is granted in aid of privilege which, unless and until it is waived, is absolute. In saying this, I do not intend to suggest that there may not be cases where an injunction can properly be refused on general principles affecting the grant of a discretionary remedy, for example on the ground of inordinate delay.”*

48. Lord Justice Mann (at pp. 21/2) also made it clear that, where a mistake has been made, but the recipient lawyer does not know that a mistake has been made by the sending lawyer, in assessing whether or not the mistake ought to have been, or would have been, obvious to a person in the position of the recipient lawyer, “*the law ought not to give an advantage to obtusity*”. Nevertheless, it is important to remember that the onus is on the sending party to satisfy the Court that a reasonable person in the position and with the qualities of the recipient lawyer ought to have realised that there had been a mistake – *ibid*. As Lord Justice Mann concluded in relation to the recipient lawyer in *Pizzey*, I am satisfied that the relevant quality of Advocate [LMN] is that either that she is a Guernsey Advocate, of thirteen years’

experience largely in other jurisdictions than Guernsey, or that she is a Guernsey Advocate. With some hesitation, I lean to the view that her relevant quality is not merely that she is a Guernsey Advocate, but that she is a Guernsey Advocate with appropriate professional skills in both commercial matters, including international trusts, and commercial litigation. However, I rather doubt that the distinction matters much on the facts of this application.

49. After the oral hearing on this application had finished on 16 September 2011, Mr Justice Supperstone delivered judgment in the High Court in England in October 2011 on an application for summary judgment in the case of *London Borough of Redbridge v Johnson* [2011] EWHC (QB) 2861, where a former employee had taken with him some of his employer's emails, which were privileged and confidential, and refused to return them, claiming that he was entitled to use them in proceedings since they were, he claimed, in the public domain. The learned judge followed the approach taken in *Ashburton v Pape* and *Goddard v Nationwide Building Society* and decided that the documents were not in the public domain and that the privilege had not been waived by the employer, and accordingly ordered the Defendant to restrain from using the documents in any way. I asked Counsel through HM Deputy Greffiers if they wished to address any further written argument to me resulting from this very recent decision, but, rightly, in my view, Counsel did not wish to do so; in my judgment, the case does not raise any new point of general principle with which I need to deal in this already lengthy Judgment.
50. There are also cases where the English Courts have granted an injunction where one party to litigation has innocently obtained privileged or confidential documents of another party outside the scope of disclosure and inspection of documents. I shall mention two such cases. First, in *English & American Insurance Co. Ltd. v Herbert Smith* [1988] F.S.R. 232 some papers of counsel acting for the Plaintiffs in an action were mistakenly sent to the solicitors for the Defendants. Whereas the Defendants' solicitors realised what had happened, they did not at first read the documents supplied to them. Nevertheless, they considered it their duty to tell their clients, which they did, and the Defendants instructed them to read those documents. It was held by Sir Nicolas Browne-Wilkinson V.-C., in the words of Advocate Wessels' written submissions, that "*if the documents in question had not yet been tendered in evidence by the party who had come into possession of them, the person entitled to the privilege was entitled to an injunction to restrain any disclosure or use by that other party of any information contained in them, including use of them in pending proceedings, and that it makes no difference that the person who has come into possession of the confidential information has done so innocently.*" In the context of an argument by Counsel that his client's innocent receipt of documents mistakenly provided to its solicitors by the other side meant that no remedy was available to the client whose solicitors had mistakenly sent the documents and that an injunction would only be available if the recipient "*had been in some way wrongfully implicated in obtaining that information*", the learned Vice-Chancellor said, at pp. 237/8: "*...They were asked to collect the documents, they collected the documents and they received them in good faith. It is then submitted that the equitable right of the owner of the confidential information to restrain the use of that confidential information does not apply as against a third party (as opposed to the party who has himself undertaken the duty of confidentiality) where there has been what was called an accidental escape of the information to the third party. I reject that submission, I can see no ground for distinguishing the earlier Court of Appeal decisions on that ground. The judgment of May L.J. in Goddard v Nationwide Building Society in no way suggests that the right to restrain the use of confidential information by a third party depends on the third party being improperly implicated in the leakage of the information. Nourse L.J. on page 745 at C. in fact deals expressly with the point. He says this: "Third, the right of the party who desires the protection to invoke the equitable jurisdiction does not in any way depend on the conduct of the third party into whose possession the record of the confidential communication has come. Thus, several eminent judges have been of the opinion that an injunction can be granted against a stranger who has come innocently into the possession of confidential information to which he is not entitled.... This view seems to give effect to the general rule that equity gives relief against the world, including the innocent, save only a bona fide purchaser for value without notice. It is directly in point in the present case and our decision necessarily affirms*

it.” It seems to me, therefore, that it is impossible for me to distinguish this case from Goddard v Nationwide Building Society....”

51. Further, in *Ablitt v Mills & Reeve* (1995) 24 October, Mr Justice Blackburne was faced with a similar situation. Some litigation papers were mistakenly sent by Junior Counsel instructed by a firm to the solicitors for the other side. Like “the papers” in this case, a very substantial amount of papers were despatched, i.e. seven lever arch files, and a large number of them were prima facie protected by legal professional privilege. On any view, it seems, these documents were highly confidential to the Plaintiff. Mr Justice Blackburne granted an injunction restraining the solicitors, who had relied on a version of the then Law Society Rules as entitling them to retain the documents and had asked their client for instructions as to whether to read the documents provided to them, from acting further. As Mr Wessels noted, in both *Herbert Smith* and *Ablitt* the inadvertently disclosed documents in issue had been returned by the recipient party’s solicitors to the sending party’s solicitors before the hearing.
52. I was referred to one case in the Royal Court of Jersey, which proved to be of some assistance. In *Café de Lecq Limited v R. A. Rossborough (Insurers Brokers) Limited* [2011] JRC 067 the Royal Court of Jersey, Bailiff Birt presiding, had to deal with an application for an injunction to require the return of one email which was claimed by the Defendant to be privileged and which the Defendant claimed had been inadvertently disclosed during the discovery process in a case relating to breach of warranty and negligence which had arisen after a café had burned down due to overheating of deep fat frying oil. After deciding that the email was indeed the subject of litigation privilege, the Court then decided on the facts that the Defendant had not intended to waive that privilege and that the email had been inadvertently disclosed as part of the discovery process. But the Court concluded that the mistake would not have been obvious to a reasonable lawyer in the position of the recipient lawyers and so no relief was granted requiring the return or destruction of the email. What was helpful, I thought, was that the learned Bailiff of Jersey relied upon the English cases of *Guinness Peat*, *Pizzey* and *Al Fayed* to which I have made reference above to decide the principles which were to govern applications in Jersey in the disclosure and inspection of documents context. I note, however, in any event, that the case of *Imerman v Tchenguiz* [2011] Fam. 116, to which I refer below, was not, it seems, cited to the Royal Court of Jersey in support of any argument that the email in question was a confidential document.
53. Before turning to the issue of the law relating to confidentiality of documents, I mention one other point raised by Mr Wessels on behalf of the former trustees. He contended that the approach taken by Carey Olsen in their letter of [date] was wrong in law since “*a third party is not entitled to act so as to frustrate the purpose of an order of the Court with impunity based on the premise that the third party was not a party to the order*” and seemed to be suggesting that the liquidators were, or might be, acting in contempt of Court in XYZ in retaining the papers and refusing to return them to the former trustees. He cited cases in England in which non-parties had been held liable for contempt in respect of orders made against parties to civil litigation which were not even intended to be served on such parties nor, in form, to be binding upon them.
54. In my judgment, there is no question of the liquidators being in contempt of any Order made in XYZ, or, indeed, of any Order in ABC of which I am aware, whether in retaining the papers or otherwise, despite the argument presented to me by Mr Wessels on this point. I have looked at the conduct of the liquidators in retaining the papers and I am quite unable to conclude that they have acted in contempt of court in the sense analysed by Lord Phillips MR in the Court of Appeal, and by Lord Nicholls in the House of Lords in *Attorney General v Punch Limited* [2003] 1 AC 1046 where he said:-

“Contempt of court is the established, if unfortunate, name given to the species of wrongful conduct which consists of interference with the administration of justice. It is an essential adjunct of the rule of law. Interference with the administration of justice can take many forms. In civil proceedings one obvious form is a wilful failure by a party to the proceedings to comply with a court order made against him. By such

a breach a party may frustrate, to greater or lesser extent, the purpose the court sought to achieve in making the order against him. That is not the form of contempt in question in this case. In 1997 the court made an order against Mr Shayler, restraining him from disclosing information about the Security Service. But neither Punch Ltd nor Mr Steen was a party to those proceedings. No order was made against either of them. ... Aiding and abetting a breach of the order by the person specifically restrained by the order is not always an essential ingredient of "third party" contempt. The purpose of a court in making an order may be deliberately frustrated by a third party even though he is acting independently of the party against whom the order was made. An interlocutory order for the non-disclosure of information is the paradigm example of the type of order where this principle is in point. The Spycatcher litigation is the best known recent instance of this, It is a contempt of court by a third party, with the intention of impeding or prejudicing the administration of justice by the court in an action between two other parties, himself to do the acts which the injunction restrains the defendant in that action from committing if the acts done have some significant and adverse effect on the administration of justice in that action: see Lord Brandon of Oakbrook in Attorney General v Times Newspapers Ltd [1992] 1 AC 191, 203d, 206g-h, and, for the latter part, Lord Bingham of Cornhill CJ in Attorney General v Newspaper Publishing plc [1997] 1 WLR 926, 936. Lord Phillips MR [2001] QB 1028, 1055, para 87 neatly identified the rationale of this form of contempt: "The contempt is committed not because the third party is in breach of the order—the order does not bind the third party. The contempt is committed because the purpose of the judge in making the order is intentionally frustrated with the consequence that the conduct of the trial is disrupted."

55. I now turn to deal with what I have concluded is the most important, and, as I have found, determinative argument presented to me in support of the application, *i.e.* the claim that under the law of confidence the papers were confidential to all other parties than the liquidators, or at least confidential to the former trustees, before they were sent to the liquidators' Advocates and that they remained so confidential even after they had been sent to Mr [X] and Ms [Z] as an electronic attachment to the central email on [date] and, in turn, sent on by Ms [Z] on [dates] to employees of the liquidators' UK firm and the liquidators' English solicitors, Weil, Gotshal & Manges.

56. During the oral hearing I drew the attention of Counsel to the recent judgment of the Court of Appeal in England in *Imerman v Tchenguiz* [2011] Fam. 116, which, in my judgment, contains a formidable analysis of the approach to be taken in England to cases of the nature of the present application and other applications where an issue of confidentiality of documents arises. I consider that the approach there taken by the learned Judges, Lord Neuberger MR and Lords Justice Moses and Munby, should be taken in Guernsey in cases like the present application. I have specifically adopted this same approach in reaching my decision on this application; indeed, I can see no reason why I should not do so. In my judgment, the answer to the application lies in the law of confidence. In order to describe the relevant principles, I can do no better, I believe, than to include within this judgment the lengthy exegesis at paragraphs 52 to 75 of the judgment of the Court, which was handed down by Lord Neuberger MR, ... :

“52. *The time has come to consider whether there is any legal justification for permitting a wife to retain copies of documents which she has unlawfully obtained on the grounds that to do so will assist in preventing or curing a less than frank disclosure by her husband of his assets. Wilson LJ described himself as a family lawyer of practical disposition, but does that entail permitting a party to obtain an advantage by self-help in breach of the law?*

53. *Although we shall in due course consider the issues of criminal and tortious liability, the answer to the question we have posed must lie primarily in analysis of the law of confidence and of the remedies designed to protect confidential information and documents.*

The nature of a claim in confidence

54. *The law of confidence was developed by the Courts of Chancery over the eighteenth and nineteenth centuries. Typically, a claim for breach of confidence arose in the commercial context, and in circumstances where there was no question but that the defendant was entitled to have obtained the information concerned initially. Thus, in perhaps the most familiar and frequent category of case, involving trade secrets and the like, the claimant himself will have provided the defendant with the information, as, at the relevant time, the defendant will have been an employee or agent of the claimant. In such cases, the claimant cannot allege that the defendant is not entitled to have the information, let alone complain that he did anything legally wrong or morally culpable to obtain the information in the first place. What the claimant could do was to complain if the defendant made illicit copies of confidential papers or misused the information for his own, rather than his principal's, purposes.*
55. *The earliest cases on the topic pre-date even the days of Lord Eldon LC. However, the jurisprudence really starts with a number of his decisions and then continues throughout the nineteenth century. There are many reported cases but it is convenient to start with the celebrated case of Prince Albert v Strange (1849) 1 Mac & G 25, the facts of which are too well known to require repetition. It suffices to say that the claim was brought against various defendants who were involved in the copying and proposed publication of etchings of the Royal family made by Prince Albert which, as Lord Cottenham LC put it (page 41), had been "surreptitiously and improperly obtained."*
56. *Lord Cottenham LC stated the general principle as follows (page 44): "a breach of trust, confidence, or contract, would of itself entitle the Plaintiff to an injunction. The Plaintiff's affidavits state the private character of the work or composition, and negative any licence or authority for publication ... To this case no answer is made, the Defendant saying only that, he did not, at the time, believe that the etchings had been improperly obtained, but not suggesting any mode by which they could have been properly obtained ... If, then, these compositions were kept private, ... the possession of the Defendant, or of his intended partner ..., must have originated in a breach of trust, confidence or contract ... ; and ... in the absence of any explanation on the part of the Defendant, I am bound to assume that the possession of the etchings by the Defendant and Judge has its foundation in a breach of trust, confidence or contract ... ; and upon this ground ... I think the Plaintiff's title to the injunction sought to be discharged, fully established."*
57. *He added (page 46):*
"The cases referred to ... have no application to cases in which the Court exercises an original and independent jurisdiction, not for the protection of a merely legal right, but to prevent what this Court considers and treats as a wrong ... arising from a ... breach of ... confidence, as in the present case and the case of Mr Abernethy's lectures; ... In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend upon any legal right, and to be effectual, it must be immediate."
58. *The relief sought against the defendants included the delivery up of all copies of the plaintiff's etchings. At trial this part of the order was resisted. Knight Bruce VC made the order sought. He said this ((1849) 2 De G & Sm 652, page 716):*
"It is ... said that neither the copies of the catalogue, nor the impressions that have been taken, can be delivered, or be directed to be delivered up, inasmuch as the Defendant contends that he is entitled to the property in the materials on which they are printed. With regard to catalogues, no such question, I think, arises. They must be either cancelled or destroyed; and without destruction they can hardly be cancelled. With regard to the impressions, it might possibly be right to attend to the Defendant's claim, had the impressions been upon a material of intrinsic value – upon a material not substantially worthless, except for the impressions which, by the wrongful act of the Defendants, had been placed there. That case,

however, does not arise. The material here is substantially worthless, except for that in which the Defendant has no property. There can consequently be no reason why the effectual destruction of subject should not be directed by the court."

59. It is convenient to go next to *Morison v Moat* (1851) 9 Hare 241, a decision of Sir George Turner VC, affirmed on appeal to the Lords Justices, which has been frequently cited with approval. It concerned a servant, Moat, who had sought to use a secret formula of his employer's. The relief sought was an injunction to restrain use of the formula. In a much quoted passage (page 255) which there is no need for us to set out, the Vice Chancellor reiterated the principles, as to which he said there was "no doubt." He added (page 263):

"The Defendant admits that the secret was communicated to him by Thomas Moat ... The question then is whether there was an equity against him; and I am of opinion that there was. It was clearly a breach of faith and of contract on the part of Thomas Moat to communicate the secret. The Defendant derives under that breach of faith and of contract, and I think he can gain no title by it ... the cases of *Tipping v Clarke* and *Prince Albert v Strange* shew that the equity prevails against parties deriving under the breach of contract or duty. It might indeed be different if the Defendant was a purchaser for value of the secret without notice of any obligation affecting it; and the Defendant's case was attempted to be put upon this ground ... but I do not think that this view of the case can avail him ... So far as the secret is concerned he is a mere volunteer deriving under a breach of trust or of contract."

60. *Prince Albert v Strange* (1849) 1 Mac & G 25 and *Morison v Moat* (1851) 9 Hare 241 were cited with approval by Kay LJ in *Lamb v Evans* [1893] 1 Ch 218. Referring (page 235) to cases where an employee has "surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence", Kay LJ said that the employee "has been restrained from communicating that secret to anybody else, and anybody who has obtained that secret from him has also been restrained from using it." In *Robb v Green* [1895] 2 QB 1 (another employee case) the relief granted included an order for delivery up to the plaintiff of all copies or extracts from the plaintiff's papers in the defendant's possession or under his control. The judgment and order were upheld by the Court of Appeal: *Robb v Green* [1895] 2 QB 315, per Kay LJ (page 319):

"On whatever ground it is put, it is clear in this case that an injunction ought to be granted ... The other items of relief granted are the delivery up of the list made and the damages. With regard to the first, it seems to me clear that such a document surreptitiously made in breach of the trust reposed in the servant clearly ought to be given up to be destroyed."

61. Many of the cases on the use of confidential information are confused by the fact that the documents concerned not only contain confidential information but were privileged. That was the position in one of the best known cases on the topic, *Lord Ashburton v Pape* [1913] 2 Ch 469. In that case a third party who had received the confidential and privileged document from the plaintiff's clerk was restrained from using it and required to hand it back to the plaintiff. The court approached the claim on the basis that it was based on confidence, presumably on the somewhat archaic basis that privilege had been lost: see *Calcraft v Guest* [1898] 1 QB 759. Although there appears to have been no claim for return of copies, *Swinfen Eady* LJ plainly thought (page 477) that an order could be made for delivery up of both originals and copies, a conclusion entirely consistent with the earlier authorities to which we have referred.

62. In *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, *Ungoed-Thomas* J granted the plaintiff an injunction to restrain the defendant, her former husband, from publishing "secrets of the plaintiff relating to her private life, personal affairs or private conduct, communicated to the first defendant in confidence during the subsistence of his marriage to the plaintiff and not hitherto made public property." He said (page 322) that:

"the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law."

Later (page 333) he added:

"an injunction may be granted to restrain the publication of confidential information not only by the person who was a party to the confidence but by other persons into whose possession that information has improperly come."

63. *ITC Film Distributors Ltd v Video Exchange Ltd [1982] Ch 431* was a case where a defendant had got possession of his opponent's papers, including certain privileged material, by a trick. Having referred to *Lord Ashburton v Pape [1913] 2 Ch. 469*, Warner J (page 438) said this:

"that was not an isolated decision but is illustrative of a general rule that, where A has improperly obtained possession of a document belonging to B, the court will, at the suit of B, order A to return the document to B and to deliver up any copies of it that A has made, and will restrain A from making any use of any such copies or of the information contained in the document."

He added (page 440) that, had the plaintiff applied in time for relief against the defendant on the lines of that granted in *Lord Ashburton v Pape [1913] 2 Ch. 469*, "I have little doubt that ... they would have been held entitled to it."

64. It was only some twenty years ago that the law of confidence was authoritatively extended to apply to cases where the defendant had come by the information without the consent of the claimant. That extension, which had been discussed in academic articles, was established in the speech of Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109*. He said (page 281) that confidence could be invoked "where an obviously confidential document is wafted by an electric fan out of a window ... or ... is dropped in a public place, and is picked up by a passerby."

65. The domestic law of confidence was extended again by the House of Lords in *Campbell v MGN Ltd [2004] UKHL 21, [2004] 2 AC 457*, effectively to incorporate the right to respect for private life in article 8 of the Convention, although its extension from the commercial sector to the private sector had already been presaged by decisions such as *Argyll v Argyll* and *Hellewell v Chief Constable of Derbyshire [1995] 1 WLR 804*. In the latter case, Laws J suggested (page 807) that the law recognised "a right to privacy, although the name accorded to the cause of action would be breach of confidence". It goes a little further than nomenclature in that, in *Wainwright v Home Office [2003] UKHL 53, [2004] 2 AC 406*, the House of Lords held that there was no tort of invasion of privacy, even now that the Human Rights of Act 1998 is in force. Nonetheless, following its later decision in *Campbell*, there is now a tort of misuse of private information: as Lord Phillips of Worth Matravers MR put it in *Douglas v Hello! Ltd (No 3) [2005] EWCA Civ 595, [2006] QB 125*, a claim based on misuse of private information has been "shoehorned" into the law of confidence.

66. As Lord Phillips's observation suggests, there are dangers in conflating the developing law of privacy under article 8 and the traditional law of confidence. However, the touchstone suggested by Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Campbell*, paragraphs [21], [85], namely whether the claimant had a "reasonable expectation of privacy" in respect of the information in issue, is, as it seems to us, a good test to apply when considering whether a claim for confidence is well founded. (It chimes well with the test suggested in classic commercial confidence cases by Megarry J in *Coco v A N Clark (Engineers) Ltd [1969] RPC 41*, page 47, namely whether the information had the "necessary quality of confidence" and had been "imparted in circumstances importing an obligation of confidence".)

67. As stated in Stanley on *The Law of Confidentiality: A Restatement* (2008), page 4, "Cases asserting an 'old fashioned breach of confidence' may well be addressed by considering established authority [whereas c]ases raising issues of personal privacy which might engage article 8 ... will require specific focus on the case law

of the European Court of Human Rights". However, given that the domestic law on confidentiality had already started to encompass privacy well before the 1998 Act came into force, and that, with the 1998 Act now in force, privacy is still classified as part of the confidentiality genus, the law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases, even if they sometimes may have different features. Consistency and coherence are all the more important given the substantially increased focus on the right to privacy and confidentiality, and the corresponding legal developments in this area, over the past twenty years.

68. *If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence. The notion that looking at documents which one knows to be confidential is itself capable of constituting an actionable wrong (albeit perhaps only in equity) is also consistent with the decision of the Strasbourg court that monitoring private telephone calls can infringe the article 8 rights of the caller: see Copland v United Kingdom (2007) 25 BHRC 216, (2007) 45 EHRR 37.*
69. *In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy. Without the court having the power to grant such relief, the information will, through the unauthorised act of the defendant, either lose its confidential character, or will at least be at risk of doing so. The claimant should not be at risk, through the unauthorised act of the defendant, of having the confidentiality of the information lost, or even potentially lost.*
70. *In this connection, we were taken to the observation of Eady J in White v Withers LLP [2008] EWHC 2821 (QB), para [8], that "the mere receipt of documents by the solicitors from their client and their continued retention in connection with the matrimonial proceedings simply cannot give rise to a cause of action". In our view, that observation (which may in any event have been limited to a cause of action in damages) should be taken as applying only to the receipt of documents by solicitors from their client; further, it should not be taken as suggesting that the claimant could not recover the documents from the solicitors.*
71. *The fact that the law of confidentiality was extended in Campbell for the purpose of giving effect to article 8 in English law, cannot, as we see it, mean that the law of confidentiality has somehow been circumscribed in other respects. The fact that misuse of private information has, as Eady J said in White v Withers, "become recognised over the last few years as a wrong actionable in English law" does not mean that there has to be such misuse before a claim for breach of confidentiality can succeed, unless that was the position before the Human Rights Act 1998 came into force, which it was not. (It is only fair to mention, that in White v Withers the appeal against Eady J's decision was not pursued on the issue of confidentiality: [2010] EWCA Civ 1122, [2010] 1 FLR 859, para [40]. Ward LJ's obiter approval (para [23]) of what Eady J said related to the suggestion of misuse by the solicitors.)*

The relief to be granted where there is a breach of confidence

72. *If a defendant looks at a document to which he has no right of access and which contains information which is confidential to the claimant, it would be surprising if the claimant could not obtain an injunction to stop the defendant repeating his action, if he threatened to do so. The fact that the defendant did not intend to reveal the contents to any third party would not meet the claimant's concern: first, given that the information is confidential, the defendant should not be seeing it; secondly, whatever the defendant's intentions, there would be a risk of the information getting out, for the defendant may change his mind or may inadvertently reveal the information.*
73. *An injunction to restrain passing on, or using, the information, would seem to be self-evidently appropriate – always subject to any good reason to the contrary on the facts of the case. If the defendant has taken the documents, there can almost always be no question but that he must return them: they are the claimant's property. If the defendant makes paper or electronic copies, the copies should be ordered to be returned or destroyed (again in the absence of good reason otherwise). Without such an order, the information would still be "out there" in the possession of someone who should not have it. The value of the actual paper on which any copying has been made will be tiny, and, where the copy is electronic, the value of the device on which the material is stored will often also be tiny, or, where it is not, the information (and any associated metadata) can be deleted and the device returned.*
74. *A claim based on confidentiality is an equitable claim. Accordingly, the normal equitable rules apply. Thus, while one would normally expect a court to grant the types of relief we have been discussing, it would have a discretion whether to refuse some or all such relief on familiar equitable principles. Equally, the precise nature of the relief which would be granted must depend on all aspects of the particular case: equity fashions the appropriate relief to fit the rights of the parties, the facts of the case, and, at least sometimes, the wider merits. But, as we have noted, where the confidential information has been passed by the defendant to a third party, the claimant's rights will prevail as against the third party, unless he was a bona fide purchaser of the information without notice of its confidential nature.*
75. *In ISTIL Group Inc v Zahoor [2003] EWHC 165 (Ch); [2003] 2 All ER 252, after a full and illuminating survey of the authorities, Lawrence Collins J held (para [74]) that, where a privileged document had been seen by an opposing party through fraud or mistake, the court has power to exercise its equitable confidentiality jurisdiction, and "should ordinarily intervene, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy ...", a view which he discussed in the ensuing paragraphs. On the facts of that case, he concluded (para [115]) that an injunction should be refused "on the ground of the public interest in the disclosure of wrongdoing and the proper administration of justice".*

57. I now turn to the application of those principles to the facts of this case.

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72. When Advocate Swan addressed me further on behalf of the protector, he presented a most interesting and concise submission relating to the issue of the law of confidence and the consequential confidentiality of the papers. After submitting that it was beyond doubt that some at least of the documents which the former trustees are seeking to have returned were obviously privileged or confidential, he addressed the question of which parties in XYZ were entitled to claim that the confidentiality was theirs, and answered the question by submitting that the confidentiality was that of the present trustee, the protector and the minor beneficiaries who were all entitled to the protection of such confidentiality against the rest of the world. So, Mr Swan continued, neither Mourant Ozannes nor their clients, the former trustees, could waive any privilege or abandon any confidentiality in those documents within the papers which were either privileged or confidential since the privilege and the right to maintain the confidentiality of all such documents was not a right belonging to the former trustees alone; the privilege and the right belonged to all of those who support the application, *i.e.* the present trustee, the protector and the minor beneficiaries. Mr Swan contended, relying especially upon the approach taken in paragraphs 68 and 69 of the judgment in *Imerman*, that, although the application had, in fact, been made by the former trustees, under the law of confidence it could just as well have been made by either the present trustee or the protector and, even if Carey Olsen and their clients, the liquidators, were entirely innocent in receiving the papers, (which I find they were,) a remedy was still available to each of the former trustees, the present trustee, the protector and the minor beneficiaries to have the papers, and all copies of them made by or for the liquidators, returned to the former trustees since, on that evidential basis, Carey Olsen had received the papers adventitiously and neither Mourant Ozannes nor their clients nor the present trustee nor the protector had authorised Mourant Ozannes to supply Carey Olsen or their clients with those of the papers which were privileged or confidential. In conclusion, Advocate Swan submitted that, whilst the [email] suggested ... that documents were being supplied, it ought to have been obvious to any reasonable Advocate at Carey Olsen in the position of Advocate [Z] on beginning to read the papers that a mistake had occurred in sending all the papers to her and Mr [X] and accordingly the relief claimed in the application, as modified in the form of the draft Order submitted by Mr Swan ... should be granted to the former trustees. He also submitted, in reply to the submissions of Mr Greenfield, that each of the parties to the *Beddoe's* proceedings, *i.e.* XYZ, owed duties of confidence to each other to maintain the confidential nature of the materials submitted to the Court where an order had been made for the supply of such materials to be restricted, *e.g.* to maintain confidential all material within the papers relating to the merits of ABC. He also argued that, because the documents listed ... were before the Court in XYZ, all the parties to those proceedings, with the exception of the liquidators, (who were, as it were, on the other side of the curtain,) shared a common interest privilege in those documents which could only be waived as a matter of law by all of them, and not by any one of them, *e.g.* by the former trustees.

73. ...

74. ...

75. I have been persuaded by the former trustees' argument that the papers were sent to Carey Olsen by mistake, (which I have already found as a fact was what happened on [date]), and without the instructions of the former trustees, and that the papers were confidential to the former trustees, and that, in order to preserve their confidentiality, it is necessary under the law of confidence in Guernsey for the papers to be returned by the liquidators, by Carey Olsen, by Weil, Gotshal & Manges and by anyone else at the offices of each of the liquidators to whom the papers were sent by any of them, and also for all electronic records to be removed from all electronic file systems at Carey Olsen, Weil, Gotshal & Manges and each of the liquidators' firms, including any records on their central servers, laptops, personal computers or other electronic devices, and any other records otherwise represented by metadata within the electronic systems of each of those firms. In reaching this conclusion, I have had in mind, in particular, the reasoning of the English Court of Appeal in paragraphs 68 and 72/73 of their judgment in *Imerman*.

76. Despite Advocate Greenfield's submissions to the contrary, I agree with Advocate Swan's oral submission that viewed through the lens of confidentiality the question whether and, if so, to what extent part or parts of the papers were privileged does not arise on the facts relevant to the application.
77. What is, however, clear to me is that, when the papers were sent to Carey Olsen ... they were confidential to the former trustees, and also quite possibly as between the former trustees, the present trustees and the protector and perhaps also, as Mr Swan suggested with some delicacy, although this may, I think, be stretching the point too far, as between the Judge hearing XYZ, that is to say myself, and the former trustees, the present trustees and the protector, since the papers were, and were known to the liquidators to be, documents, including affidavits, submitted to the Court in XYZ under the all-covering umbrella of a *Beddoe's* application for the purpose of seeking and obtaining appropriate relief relating to the defence of the former trustees to the claim made against them by the liquidators in ABC. I also conclude, upon the basis of the *Imerman* analysis, that the papers remained confidential to the former trustees, and also quite possibly as between the former trustees, the present trustees and the protector, after they had been received by each of Carey Olsen, Weil, Gotshal & Manges and their clients, the liquidators and their UK firm.
78. I also agree with the submission of Advocate Davies for the present trustee that what has happened is, from the viewpoint of the BCD Trust, very serious and that the BCD Trust requires protection from the Royal Court within XYZ in the form of both mandatory and restraining injunctions. Mr Davies also pressed on me that from the first moment XYZ had been heard in chambers, *i.e.* in private, and that Advocate Tim Corfield of Carey Olsen had appeared in chambers on a few occasions, with my permission, to address argument to me on behalf of the liquidators, especially argument relating to the value of the BCD Trust assets within the context of the Order made by me in XYZ on this topic [in] 2010, and also submitted that all the Advocates instructed on behalf of the liquidators within Carey Olsen, and their legal support staff, must have known that XYZ were confidential proceedings being heard in private. I agree with Mr Davies' submissions.
79. On the facts of the present application, I consider it is appropriate to grant the former trustees both mandatory and restraining injunctions against the liquidators. I have considered carefully what remedy would be the minimum necessary to meet the equities of the case and have decided that it is necessary for me to order the return and, where appropriate, the destruction of all the papers ... even though the former trustees accept that the liquidators are entitled to copies of those documents under the Order in ABC made [in] 2011; I suggest that Mourant Ozannes should re-supply the documents listed ... to Carey Olsen in hard copy form only, and not by electronic means.
80. I have, in particular, taken into account paragraphs 72-73 of the judgment of the Court of Appeal in *Imerman*. I respectfully agree with the Court's reasoning in those paragraphs and have decided that it is necessary to grant an injunction against the liquidators in mandatory form requiring the return or destruction of all copies of the papers, including the Herbert Smith letter, in both hard copy, paper form and in all varieties of electronic storage, including email folders and central servers, and also a restraining injunction preventing further use of any of the papers. It would be useful, I think, if I were to set out paragraphs 72 and 73 here again:

“72. *If a defendant looks at a document to which he has no right of access and which contains information which is confidential to the claimant, it would be surprising if the claimant could not obtain an injunction to stop the defendant repeating his action, if he threatened to do so. The fact that the defendant did not intend to reveal the contents to any third party would not meet the claimant's concern: first, given that the information is confidential, the defendant should not be seeing it; secondly, whatever the defendant's intentions, there would be a risk of the information getting out, for the defendant may change his mind or may inadvertently reveal the information.*

73. *An injunction to restrain passing on, or using, the information, would seem to be self-evidently appropriate – always subject to any good reason to the contrary on the facts of the case. If the defendant has taken the documents, there can almost always be no question but that he must return them: they are the claimant's property. If the defendant makes paper or electronic copies, the copies should be ordered to be returned or destroyed (again in the absence of good reason otherwise). Without such an order, the information would still be "out there" in the possession of someone who should not have it. The value of the actual paper on which any copying has been made will be tiny, and, where the copy is electronic, the value of the device on which the material is stored will often also be tiny, or, where it is not, the information (and any associated metadata) can be deleted and the device returned."*

81. I propose to make an order which, in my view, meets the equities of the case. Accordingly, I shall make an Order largely in the form of paragraphs ... and ... of the draft submitted to me by Advocate Swan on [date], but, for the sake of safety, I shall add ...[BVI] Limited to those who are to be subject to the injunctions to be granted in paragraphs ... and ... of the Order. I shall also make an Order under paragraph ... against [Mr E], requiring him to swear an affidavit as well as the other persons there mentioned, and shall alter the wording in paragraph ... so as to read "all necessary steps have been taken to identify all hard copy and electronic copies of the Documents". I shall require the period under paragraphs ... of the Order to be a period of 28 days after the date of this Judgment, *i.e.* a period ending on [date], and the period under paragraph ... of the Order to end on [date]. I shall also give each party liberty to apply to me on 24 hours written notice for any variation of the Order or for any further relief which they might consider necessary so as to ensure that the Order can be complied with; I appreciate, of course, that we are now in the summer holiday period. Counsel should submit a draft Order to me, if possible in agreed form, in Word format via Senior Deputy Greffier Ross by 4pm on Friday 20 July 2012.

82. I invite the parties to the application to attempt to agree the issue of costs, failing which I direct a hearing in [private] as soon as possible. I regret that it has taken me an undue amount of time to deliver this Judgment.

Patrick Talbot QC
Lieutenant Bailiff
13 July 2012

Anonymised version of the Judgment approved
Patrick Talbot QC
Lieutenant Bailiff
20 July 2016