Patel v Patel
Royal Court
30th August 2016
(Amended Approved Text)

JUDGMENT
36/2016

Applications relating to the Patel Discretionary Settlement

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between: **(1) KIRAJ GIRISH PATEL**
(2) VANISHA GIRISH PATEL
Applicants

and

(1) YASHWANT DAHYABHAI PATEL
(2) SURESH DAHYABHAI PATEL
Respondents

and

(1) GIRISH DAHYABHAI PATEL
(2) AMITA PATEL
Interested Parties

Judgment handed down: 16 August 2016

Before: Sir Richard Collas, Bailiff

Advocate for the Applicants: **Advocate B S Havard and Advocate C J Hay**

Advocate for the Respondents: **Advocate K Le Cras and Advocate M D P Jones**

Cases, legislation and references referred to:

The Trusts (Guernsey) Law, 2007
Somatra Ltd v Sinclair Roche and Temperley [2000] 1 WLR2453
Privilege by Passmore (3rd ed.) para 10-002
Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others [2011] AC 662
Lewin on Trusts (19th ed.)
Phipps v Boardman [1967] 2 A.C. 46
Schmidt v Rosewood Trust [2003] 2 AC 709
Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited [2003-04] GLR N [32]
In the Matter of the R and RA Trusts, Judgment 25/2014.
Re Londonderry's Settlement [1965] Ch 918
Disclosure by Matthews & Malek (4th ed.)
Buchanan-Michaelson v Rubinstein [1965] Ch. 258
Armitage v Nurse [1998] *Ch 241*
Stuart-Hutcheson v Spread Trustee Company Limited [2000-02] GLR 388
Countess Bathurst v Kleinwort Benson (Channel Islands) Limited [2003-04] GLR

Introduction

1. The background to the two preliminary applications before me may be explained briefly as a family dispute relating to the P. D. Patel Discretionary Settlement ("**the Settlement**") of which the Applicants are the only beneficiaries and the Respondents are the present trustees. The context in which the two preliminary applications are made is that in a written application dated 20 November 2015 the Applicants are seeking substantive orders that the Respondents be removed as trustees of the Settlement and the Interested Parties be appointed in their place. Before the application for removal of the trustees is heard the Applicants seek to identify all the assets that properly belong to the Settlement which, they claim, include certain specified assets that they believe have been added to the Settlement but the Respondents deny that is so. The Applicants are concerned that such assets would not be handed over to the new trustees if they were to be appointed.

2. In this judgment, the first of the two preliminary matters with which I am concerned is set out in paragraph 4 of the 20 November 2015 written application. The purpose of it is to enable the Applicants to obtain documents that they consider would assist them in establishing the extent and details of all the assets that properly belong to the Settlement. It seeks an order:

"That the Respondents disclose to the Applicants such of the information and documents set out in the First Schedule annexed hereto (sic)".

3. I will refer to it as the "**Disclosure Application**". In the face of conflicting evidence of ownership advanced by the two sides, the Applicants state that it is not the purpose of the Disclosure Application to determine the true ownership of the disputed assets. Their submission is that the Applicants have adduced evidence which should establish to the court that there is sufficient cause for concern over the Respondents' administration of the Settlement and their handling of the assets belonging to the Settlement in order to justify an order for disclosure under the court's inherent power to supervise a trust. The Respondents, on the other hand, contend that they have provided all the disclosure that can be required and that where assets are not held by the Settlement and in respect of which they, as trustees, have taken no action and have made no decisions, there is no jurisdiction, and no legal basis, for the court to order any further disclosure.

4. In the second preliminary matter, the Respondents applied for an order that the second affidavit filed by the Second Respondent in these proceedings be admitted into evidence in its entirety; its admissibility being opposed by the Applicants on the ground that some elements of it and certain pages of the exhibits thereto contain or relate to "without prejudice" correspondence between the parties. I will refer to it as the "**Admissibility Application**". Leave to admit the affidavit is required because it was lodged later than the date which was set in the agreed pre-hearing directions for the filing of evidence. At the oral hearing, I gave a decision that I would not admit the affidavit in its entirety and said that further reasons for the decision would be given in this judgment.

5. The pre-hearing procedural directions, agreed by consent and approved by the Deputy Bailiff, included an order dated 4th December 2015 whereby the Respondents were to file and serve any evidence in opposition to the Applicants' Disclosure Application on or before 5 February 2016. The Applicants were to file their skeleton argument and authorities by 19 February, the

Respondents were to do similar by 4 March and the Applicants were to file any response one week later. In fact, those filings were made on 30 March, 15 April and 19 April respectively. The Second Respondent swore a Second Affidavit on 12th April for which there was no provision in the agreed directions and which is the subject of the Admissibility Application. The Applicants did not object in principle to the late filing of the Affidavit but they objected to some of its content and to some of the exhibits on the grounds of privilege.

The Family

6. The Settlement was created by **Prabhavatiben** Patel, Mrs P D Patel, on 15 December 1997. She and her late husband were initially from India but relocated to Singapore where her husband, Dahhyabbai P Patel ("**D P Patel")** became involved in a commodities business operated by Prabhavatiben's father. Three of the four sons of Prabhavatiben and D P Patel, **Girish**, **Rajnikant** and **Suresh**, became involved in the business once they were of working age. A fourth son, **Yashwant**, trained as a doctor and later moved to New York. The commodities business grew into a multi-national enterprise with operations in a number of jurisdictions around the world and developed into the Patel Family Partnership ("the **Partnership**"). It was the wish of D P Patel that the Partnership be divided ultimately between his sons who, for that purpose, set up structures to hold their respective portions for passing down to their children. The Applicants, **Kiraj** and **Vanisha** are the children of Girish.

The Settlement

7. The Settlement was created by a written instrument made between Prabhavatiben as the settlor and Suresh and Yashwant as the trustees. Yashwant and Suresh are still the trustees and are the Respondents to these proceedings. The original discretionary beneficiaries were the Applicants, who were then aged 12 and 13, and their grand-mother, Prabhavatiben. The latter died in September 2011with the result that the two Applicants are now the only beneficiaries of the Settlement.

8. In the substantive proceedings, the Applicants are seeking to replace the trustees with their father, Girish, and another family member, Amita Patel, (together, the "**Interested Parties**") being appointed in their place. In a lengthy exchange of correspondence between the parties' respective Advocates, the Respondents have agreed in principle to their removal as trustees but the terms on which they would retire have not been agreed and, as I have said, it is the wish of the Applicants to determine the full details of the assets which properly belong to the Settlement before proceeding.

9. Clause 2 of the Settlement provides for the proper law to be Guernsey law and for the Guernsey Courts to be the forum for the administration thereof. At the time of execution of the Settlement, The Trusts (Guernsey) Law, (the "**1989 Law**") was in force. The 1989 Law has since been replaced by The Trusts (Guernsey) Law, 2007 ("the **2007 Law**").

10. Clause 24 of the Settlement declared that:

"Sections 19,22,25,34(1) and any order made under Section 57(1) of the [1989] Law shall not apply hereto and all or any of the liabilities or obligations imposed on the Trustees by all or any of such provisions or order are hereby negatived and excluded and shall have no application to the Trustees or hereto."

11. The exclusion of sections 19 and 22 are relevant to the present Application as they impose on a trustee the statutory duties to get in and preserve the property and the duty to give information, respectively. The effect of their exclusion is considered below.

The Family Dispute

12. Although Girish was for many years involved in the running of the family businesses along with others of his brothers and their children, the relationship between him and Suresh began to break down in 2003/4. As a result of the family disagreements, Suresh and Yashwant no longer speak to Girish.

13. For some years now, Girish has been locked in an acrimonious dispute with Suresh, Yashwant and a nephew of Girish, **Prashant**, who is the son of Rajnikant. The dispute relates to the family businesses and the treatment of various assets within the businesses. It has led to litigation in a number of jurisdictions including England, Australia, the Seychelles, the Cayman Islands and the British Virgin Islands.

14. In his First Affidavit, the Applicant Kiraj states that he is aware of allegations that Yashwant and Suresh may be using their positions as trustees of the Settlement to further their position in the dispute with his father to the detriment of the Applicants. He states that he is not in a position to form a definitive view but considers it inappropriate that the Respondents remain in control of the Settlement which, he says, his father estimates may have a value running to some £5 million.

Affidavits and Skeleton Arguments

15. I have before me nine affidavits. Four were sworn by the Applicant Kiraj, dated respectively 11 August, 2015 and 15 January, 21 March and 21 April, 2016 (the latter in reply to Suresh's second affidavit). The second Applicant, Vanisha, swore an affidavit dated 12 August 2015 confirming her agreement with the contents of Viraj's first affidavit. Yashwant swore an affidavit on 18 February 2016. Suresh has sworn two affidavits, on 19 February and 12 April 2016 respectively; the first affidavit was re-affirmed on 12 April and on that day he also swore his second affidavit which is the subject of the Admissibility Application. Ilesh Patel's affidavit of 19 February 2016 confirmed, inter alia, his agreement with the contents of Suresh's and Yashwant's first affidavits. **Ilesh** is a nephew of Suresh and Yashwant and is a director of AUM Commodities (UK) Limited, a company I describe later. Girish has not sworn any affidavit in these proceedings.

16. In connection with the Disclosure Application, the Applicants and the Respondents submitted skeleton arguments dated 30 March and 15 April respectively. The Applicants submitted a skeleton argument in reply on 19 April. In connection with the Admissibility Application, the Applicants submitted a skeleton argument on 21 April and the Respondents submitted their skeleton on 22 April 2016.

The Assets

17. The parties are agreed that the Settlement holds shares in a company known as Barrowfen Properties Limited ("**Barrowfen**"). The Settlement owns 60,000 of the issued shares; another 60,000 shares are held by another trust, created by D P Patel, known as the "**DP Patel Trust**", the beneficiaries of which are Suresh and his two sons; and a further 60,000 shares belong to a company that operates for the benefit of Prashant. Thus, it is agreed that the Settlement owns one-third of the issued share capital of the company which is the owner of a property on the Tooting Road, London. The two directors were Girish and Suresh, the former wanted to develop the property and the latter did not so the board was deadlocked. There exists a copy of a resolution purporting to add Prashant as a director, the appointment is described by Kiraj as being a particular concern to him and his sister because they fear that, in relation to the Tooting Road property, the Respondents are seeking to advance their own interests in the

ongoing dispute with Girish, rather than acting in the best interests of the Settlement. Their concerns were heightened by the purported appointment of Prashant as a director, which occurred after the Applicants had requested that the Respondents take no action in relation to the assets of the Settlement pending resolution of the present applications.

18. The Applicants allege that shareholdings in other companies are also held by the Respondents for the Settlement but that is disputed. I refer to those as the "**Contested Assets**".

19. In Kiraj's first affidavit, paragraph 11, he said:

"11. My father placed various assets into the Trust, and I understand that the Trust currently holds shares in the following private companies:

a) Anglo Dutch Investments Limited;

b) AUM Commodities (UK) Limited;

c) Barrowfen Properties Limited; and

d) Agromin Australia Pty Ltd".

20. In his second affidavit after referring back to paragraph 11 of the first affidavit, Kiraj added at paragraph 9:

"Since then, I have looked into the situation of the Trust's assets further with my father, and I believe that the following assets are also comprised (or ought to be comprised) in the Trust and on that basis have included them in the Information Requests; namely:

(a) shares in Pacific Rim Plantations Limited;

(b) shares in Invesco Corporation Limited;

(c) shares in Makita Corporation Limited; and

(d) 181 Cranley Gardens, London N10 3AG."

21. I do not consider it necessary in this judgment to set out the detailed allegations concerning the assets which are in dispute. I will merely attempt to summarise the material facts.

Agromin

22. Kiraj contends that the Settlement held shares in an Australian company called Agromin (Aust.) Pty Limited ("**Agromin**") and he has adduced evidence which he says demonstrates a strong arguable case to support his contention. Instead of shares being recorded in the books of the company as belonging to the trustees of the Settlement, he says they were recorded mistakenly as being held by "PD Patel as Trustee for Mrs PD Patel Discretionary Settlement". Mrs PD Patel (Prabhavatiben) was never a trustee of the Settlement although she was the nominal settlor and a beneficiary of it during her lifetime. After her death, Yashwant obtained a Grant of Probate in the English High Court in respect of a will allegedly made by Prabhavatiben. Acting as her executor, he arranged a company buy-back of the Settlement's shares in Agromin for approximately £600,000. The proceeds of sale were paid to Yashwant and have not been received by the Settlement. There has been litigation in New South Wales concerning the shares. The proceedings have been stayed to enable Girish to challenge the validity of the Grant of Probate in the English courts.

23. In reply, Suresh denies that the Agromin shares were ever held as assets of the Settlement. He says that they belonged to Prabhavatiben in her personal capacity and on her death passed

to Yashwant as her Executor. Furthermore, he alleges that a subsequent will produced by Girish has been described in forensic reports as a forgery. Yashwant agrees with Suresh that the Settlement had never held shares in Agromin.

AUM

24. AUM Commodities UK Ltd ("**AUM**") is a dormant company which was formerly engaged in trading commodities such as cocoa, rubber, tin, copper and vegetable oil. Kiraj claims that 60,000 shares in AUM are assets of the Settlement, as evidenced by the declarations made by AUM in the Annual Returns filed at Companies House since 25 March 2003.

25. On the other hand, the Respondents have stated in the context of proceedings before the English High Court concerning the DPP Trust that AUM is owned by Girish, Suresh and Rajnikant in the proportions 40/40/20 respectively. Ilesh who, as I have said, is a director of AUM claims that the Annual Returns are inaccurate and were completed and submitted by Girish without consultation or prior agreement with, or authority from, him.

Anglo-Dutch, Pacific Rim and Invesco

26. Anglo-Dutch Investments Limited ("**Anglo-Dutch**"), Pacific Rim Plantations Limited ("**Pacific Rim**") and Invesco Corporation Limited ("**Invesco**") were parties to a Memorandum of Agreement dated 10 February 2016 (the "**Memorandum**"). The other parties were Girish, Suresh, Yashwant and Rajnikant (defined in the Memorandum as "the **Partners**", I refer to them also as the **"Brothers"**). The Applicants were not parties although Kiraj was involved in the negotiations that led to its signing. The Memorandum includes a provision whereby each of the Partners agreed to use their best endeavours to procure that their children would not bring any claim relating to the Partnership accounts specifically identified in a schedule to the Memorandum.

27. In the instant proceedings, there is a dispute between the parties as to the scope and effect of the Memorandum. The Applicants assert that the Memorandum deals only with the distribution of funds held in the Partnership accounts but not with the ownership of the shareholdings in the three companies: Anglo-Dutch, Pacific Rim and Invesco. In reply, the Respondents contend that the Memorandum demonstrates that no shares in Anglo-Dutch, Pacific Rim or Invesco are, or were ever understood to be, assets of the Settlement.

28. The Memorandum is expressed to be governed by the laws of England and Wales whose courts are said to have exclusive jurisdiction over all disputes and claims arising out of or in connection with the Memorandum.

29. The Respondents acknowledge that shares in Anglo-Dutch were held in the name of the Settlement but state that the Settlement held them in a nominee capacity for the Brothers pursuant to an arrangement made at the insistence of Girish who was seeking to avoid the payment of UK taxes. A share certificate in respect of Pacific Rim was issued in the name of Mrs P D Patel but it should, the Applicants assert, have been in the name of the Settlement. They have adduced a document dated 14 November 2012 signed by their father declaring the Settlement to be the beneficial owner and they allege that Suresh would have been aware of the document as it had been forwarded to him. In respect of Invesco, a share certificate was issued in the name of Mrs P D Patel notwithstanding that Suresh had signed a resolution that it be issued in the name of the Settlement.

Makita

30. The Applicants claim that Makita Corporation Limited ("**Makita**") is owned in equal shares by the Settlement and the DPP Trust. One share was issued in the name of each of P D Patel

and D P Patel. Suresh asserts that each of them was the beneficial owner of their respective share. The Applicants describe that as a strange position for the Respondents to adopt when D P Patel had died many years before the transfer into his name. There are proceedings ongoing in the Cayman Islands regarding the shareholding.

181 Cranley Gardens

31. The Applicants rely upon the Official Copy of Title issued by the Land Registry in respect of 181 Cranley Gardens, Hornsey, London N10 3AG which declares the Title Absolute to be vested in Yashwant and Suresh as Trustees of the Settlement. In reply, the Respondents state that they were unaware they owned the property before receiving the Applicants' request for information. Suresh says that they signed a transfer form in blank and thought that the property belonged to Girish. At paragraph 180 of his affidavit, Suresh states that he does not believe the property to be an asset of the Settlement.

The Admissibility Application

32. The purpose of the Admissibility Application brought by the Respondents is to have the entirety of the Second Affidavit of Suresh sworn on 12 April 2016 admitted in evidence. Leave to admit the affidavit is required because there was no provision for it in the agreed directions, as I said earlier. The Applicants have adopted what they describe as a pragmatic approach; they agree to it being admitted in part whilst objecting to the inclusion of a number of passages in the affidavit and a number of the exhibits thereto which, they claim, are the subject of without prejudice privilege, specifically, paragraphs 15 – 23 and the associated exhibits.

33. Before examining the details of the objection, I refer to the broad legal principles about which there was no disagreement between the Respondents and the Applicants. The starting point is set out in the following quotation from paragraph 10-002 of *Privilege* (Passmore, 3rd ed):

"Communications made between the parties to a dispute that are written or made with the aim of genuinely attempting to settle that dispute cannot usually be admitted in evidence, nor made the subject of a disclosure order, whether in the proceedings (if any) to which the dispute gave rise, or in any other litigation in which similar or related issues arise. There is no privilege over the fact that such communications have occurred, rather the privilege is limited to the contents of such communications."

34. Furthermore, the privilege belongs to both parties and the scope of the without prejudice rule is very wide (paragraph 10-032):

"…the scope of the without prejudice protection is wide enough to exclude evidence of the entirety of the settlement negotiations in which the admissions are made, irrespective of whether everything said or communicated in such communications amounts to an admission against interest…"

35. Paragraph 10-033 of Passmore and the decision of the Court of Appeal in Somatra Ltd v Sinclair Roche and Temperley [2000] 1 WLR2453 establish that where the privilege has been waived, the whole of the correspondence becomes admissible. Para 10-033 provides:

"the wide view… prevents elements of without prejudice discussions or communications being dissected out and used in evidence where these are not confined to admissions."

36. In the present case, the issue relates to the negotiations that led up to the signing of the Memorandum in which the parties declared that in settlement and compromise of disputes between themselves, specified cash balances held by a number of companies were the personal funds of the Brothers and they agreed how the balances in the accounts were to be distributed between the Brothers. The negotiations were conducted in correspondence that was marked without prejudice.

37. The Respondents claim that the privilege attaching to the correspondence was waived by the Applicants in the third affidavit of Kiraj in which he said (at paragraphs 12 and 13):

"12. Following service of my second affidavit the agreement set out in the Memorandum was negotiated and signed as a means of settling the various competing claims that the family members claimed to have in relation to the funds in the accounts. The Memorandum was not negotiated between the Trustees and my father – I undertook all of the negotiations in relation to it with Yashwant's daughter, Payal, and we brokered the settlement between us."

"13. In earlier drafts of the Memorandum, my sister and I were signatories. The whole reason for our involvement was because the funds subject to the Memorandum were regarded as trust assets. My sister and I were ultimately not included as signatories to the Memorandum on the insistence of the Trustees. However this and the fact that the Memorandum includes a clause requiring the signatories to use reasonable endeavours to prevent the children (my sister and I) from bringing claims in relation to the funds is consistent with the fact that the parties regarded them as trust assets."

38. The Respondents' position is that the without prejudice correspondence they wish to adduce shows that the parties were aware that there were documents which established as an objective fact that the Applicants and all the parties to the Memorandum knew that the shares in Anglo-Dutch, Pacific Rim and Invesco were not assets of the Settlement. That fact is said to have a bearing on the interpretation to be given to the Memorandum, the true meaning of which supports the Respondents' contention that the shares are not assets of the Settlement.

39. The Respondents submit first that the reference made by Kiraj to the settlement negotiations that preceded the signing of the Memorandum is sufficient to amount to a waiver of privilege. Their second submission is that, to the extent that any without prejudice privilege remains, a relevant exemption applies, namely that there is a dispute between the parties as to the interpretation of the Memorandum, such that evidence of an objective fact can be adduced.

40. The Applicants contend that the reference by Kiraj to his participation in the negotiations is not sufficient to amount to a waiver of the contents of the without prejudice documents and discussions. They submit that the Memorandum does not settle all the claims relating to the three companies. It merely settles those claims relating to the funds held by them (described as the "Partnership Accounts") and thereby released monies that were available to be paid out amongst the parties as being their personal assets.

41. In relation to the first submission, it is necessary to look at what Kirraj said in paragraphs 12 and 13 of his third affidavit. He made two references to the settlement negotiations. In the first he said that he undertook the negotiations on behalf of his father. In the second he said that earlier drafts of the Memorandum envisaged that he and his sister would be signatories to the final document because, at the time, it was thought that the funds they were discussing were assets of the Settlement. In my judgment, a statement as to who participated in the negotiations does not amount to disclosure of the subject matter that was under discussion. The passage cited above from paragraph 10-002 of ***Privilege*** states that the fact that negotiations took place is not sufficient to waive the privilege. It follows that the identity of the negotiators is also insufficient as neither amounts to disclosure of the contents of the communications.

42. In support of the Respondents' second line of argument, they relied upon the principle stated by the Supreme Court in Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others

[2011] AC 662 and, in particular, the judgment of Lord Phillips of Worth Matravers PSC at paragraph 48, on page 683:

"The principle to be derived from this appeal can be shortly stated. When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted "without prejudice"."

43. The question raised by the appeal, as stated by Lord Clarke of Stone-Cum-Ebony JSC at paragraph 1 on page 670 was whether the facts communicated between the parties in the course of negotiations which were sought to be adduced *"would, but for the without prejudice rule, be admissible as part of the factual matrix or surrounding circumstances as an aid to construction of an agreement which results from the negotiations".*

44. I am not persuaded that the communications which the Respondents seek to admit in the present case would be admissible as part of the factual matrix if they were not "without prejudice". The Memorandum contains an agreement to distribute the monies held in the Partnership Accounts; it does not deal with the ownership of the companies. The contents of the documents that the Respondents seek to have admitted are not relevant to, and do not assist in, the interpretation of the Memorandum in the manner suggested by the Respondents. Hence they would not be admissible as part of the factual matrix if they were not contained in communication sent subject to without prejudice privilege.

45. Furthermore, even if parts of the communications were admissible, it would not be permissible for the Respondents to quote selectively from them as they were attempting to do.

46. For those reasons, I upheld the Applicants' objections to specified passages and exhibits in Suresh's second affidavit.

The Disclosure Application

47. The documents sought by the Disclosure Application are set out in the First Schedule appended to it. The Schedule is in two parts. The first part seeks disclosure of:

"a. Documents of title to the Trust property (e.g. share certificates);

b. Trust accounts and accounts of underlying entities;

c. Minutes of Trustees' meetings:

d. Copies of Trustees' resolutions; and

e. Copies of correspondence and emails between the Trustees in relation to the assets of the Trust, including for the avoidance of doubt any of the entities referred to below."

48. The second part of the schedule requests an order for specific information and disclosures in respect of each of the entities: Agromin; AUM; Makita; Anglo-Dutch; Pacific Rim; and Invesco.

49. In support of the Disclosure Application, the Applicants make a number of submissions. In the first, they rely upon the directions agreed by the parties for the purpose of progressing the substantive application for the removal of the Respondents as the present trustees and their replacement by the Interested Parties. The Respondents had agreed in correspondence that directions be set for an exchange of evidence regarding the ownership of the Contested Assets. Consequently, they submit that the Respondents are now precluded from claiming

that they are not obliged to give disclosure in respect of assets that they say do not belong to them in their capacity as trustees of the Settlement. The Applicants' position is summarised in paragraph 1.13 of their skeleton argument:

"it is submitted that the clear purpose of the agreed exchange of evidence was to provide the Court with evidence on which it could make some sort of preliminary finding as to the ownership of the Contested Assets so that it could then go on to determine the extent of any disclosure that should be provided by the Respondents pursuant to the Applicants' requests. If the Respondents were able to avoid any disclosure requirement and effectively defeat the application by simply maintaining (in the face of strong evidence to the contrary) that the Contested Assets do not fall within the Trust, there would have been no need for the parties to have gone to the considerable time and expense of preparing the voluminous evidence on the question of the ownership of the Contested Assets in accordance with the agreed directions."

50. The Applicants claim to be entitled to the documents sought in the first part of the Schedule on the grounds that, as they are the sole beneficiaries of the Settlement, they are entitled to the order (I quote):

    (a) for the protection of the interests of any beneficiary; or

    (b) for the proper administration or enforcement of the trust.

51. The Applicants' reasons for seeking the other documents, in the second part of the Schedule, are (I paraphrase):

(i) to enable them to investigate, and establish in more detail, the extent of the losses which they claim the Settlement has suffered in respect of the assets concerned; and

(ii) in respect of other assets, to enable the Applicants to establish how the Respondents have managed their conflicts of interest in arriving at the conclusion that the assets are not held on behalf of the Settlement.

52. Advocate Havard, for the Applicants, raised three matters which he described as preliminary issues:

    (i) the Respondents' conflict of interest between their role as trustee and their own personal interests;
    (ii) the legal test relevant to the provision of information by a trustee; and
    (iii) the test relevant to the acceptance of assets into a trust.

53. In relation to conflicts of interests, Advocate Havard relied upon the well-established principles that a trustee must not place himself in a position where his personal interests may conflict with his fiduciary interests. If he does so, he must prefer the interests of his beneficiaries to his own. Should he fail to do so, he must not retain any profit he may have gained. In support of his submissions, Advocate Havard quoted from Lewin on Trusts (19th ed.) at 20-033:

"A trustee must not, without authority place himself in a position where his personal interest, or interest in another fiduciary capacity, [Re Thompson's Settlement [1986] Ch.99 at 115] conflicts [Parker v McKenna (1874) 10 Ch.App.96 at 118, CA, per Lord Cairns L.C; Bray v Ford [1896] A.C. 44 at 51, HL] or possibly may conflict [Aberdeen Railway v Blaikie Bros (1854) 17 D.(H.L.) 20. As to what amounts to a possibility of conflict of interest and duty, see Phipps v Boardman [1967] 2 A.C. 46, HL] with his fiduciary duty to protect those whom he is bound by that duty to protect. If he does so, he is obliged by his trust to prefer the interests of his beneficiaries [Imperial Mercantile Credit Association v Coleman (1871) 6 Ch. App.558 at 563, per Malins V.-C; Swain v Law Society [1982] 1

W.L.R. 17 at 36G, CA, per Oliver L.J. If, in breach of this duty, he enters into a transaction or other engagement on his own account, thereby preferring his own interest to that of his beneficiaries, he is not permitted to retain the profit to the extent that it is made within the scope and ambit of the duty which conflicts or may conflict with his personal interest, or interest in another fiduciary capacity [see Phipps v Boardman, above].

It is not because he has made a profit from trust property or his fiduciary position that the trustee is liable under the conflict rule, but because, being in a fiduciary position, he has entered into a transaction inconsistent with his fiduciary duty of loyalty to the beneficiaries which has yielded the profit, and thereby misused his position."

54. The relevance of the issue to the present matter was said to be in relation to the shares in Agromin and Makita where there is a potential conflict as to whether the shares properly belong to the Settlement or to the estate of Prabhavatiben, of which Yashwant claims to be the executor and beneficiary. For my part, I do not consider there to be a conflict of interest in the manner described in Lewin where the typical situation is a trustee or other fiduciary who, having acquired knowledge in his trustee or fiduciary capacity, relies upon that knowledge when entering into a transaction or other engagement on his own account from which he is able to make a profit by preferring his own interest to that of his beneficiaries (see for example Phipps v Boardman [1967] 2 A.C. 46. Although, as is explained in Privilege at para 20-033:

"It is not because he has made a profit from trust property or his fiduciary position that the trustee is liable under the conflict rule, but because, being in a fiduciary position, he has entered into a transaction inconsistent with his fiduciary duty of loyalty to the beneficiaries which has yielded the profit, and thereby misused his position."

55. Whilst that principle is well-established as part of Guernsey law, I do not accept that it applies to the question of the ownership of the shares in Agromin and Makita. The conflict on which the Applicants seek to rely arises from the Grant of Probate issued to Yashwant. The dispute concerns whether the shares belong to the estate of Prabhavatiben or to the Settlement. The answer is to be found by looking at who was the beneficial owner when Prabhavatiben was alive. It does not appear to involve any knowledge the Respondents have acquired from their position as trustees. The question is whether the shares were gifted to, or settled upon, the Settlement during Prabhavatiben's lifetime. Any doubts as to the ownership of the shares should have been resolved in her lifetime. If the shares were gifted to the Settlement, they should have been accepted by the Respondents who should have taken all steps to ensure the shares were registered in the name of the trustees of the Settlement. If they were not settled into the Settlement, we need not be concerned with them.

56. In the Applicants' skeleton argument it was submitted (in para 4.5.9(b)) that the Court should consider:

"Whether the Respondents' action (or inaction) in relation to a particular asset is at best ambiguous (by allowing reference to the Trusts' ownership to remain), such that they should not now be permitted to take advantage of that doubt not as a trustee but in some other capacity, such as nominee (particularly where they stand to gain personally by doing so)."

57. I disagree. The issue is not whether the death of Prabhavatiben has caused some ambiguity such that the Respondents have a conflict in balancing competing interests. It is whether they did all that they should have done to gather-in the assets when they were transferred into the Settlement (if they were gifted to the Settlement) sometime in the past and at a time when Prabhavatiben was still alive. If the original intention was that the assets be given or

otherwise transferred into the Settlement and the Applicants failed to take them properly into their custody, they have failed in the duties they owe to the Settlement as its trustees. To answer that question, it will be necessary to investigate the origins of the assets in each case to ascertain the original intentions. If, as the Respondents assert, the shares in Agromin and Makita are not and never have been Settlement property, there is no conflict of interest.

58. If the Applicants are correct in their assertion that their father settled the Agromin shares into the Settlement at some time in 2002, and did everything in his power to transfer the shares, the Respondents had the power to accept the shares on behalf of the beneficiaries and they should have done so. The alleged conflict of interest would not have arisen at that time because they would not have known then that Yashwant was to become the executor and beneficiary of Prabhavatiben's will.

59. The position with Makita is similar. The Applicants' claim is that the issued share capital of Makita, comprising two shares, was held by Transglobal International Investments Limited of which their father was the sole director and shareholder and that Transglobal intended to effect the transfer of one share into the Settlement. In both cases there appears to be no reason why the Respondents should have declined to accept the transfer. If they subsequently failed to secure the shares by arranging for them to be properly registered in the names of the Respondents as trustees of the Settlement, they could be liable in breach of trust. In relation to both Agromin and Makita, it is necessary to establish whether the intention of the Applicants' father was to transfer the shares into the Settlement.

60. There is litigation ongoing in New South Wales and the Cayman Islands regarding Agromin and Makita respectively. I do not understand the Applicants to be alleging that they are concerned that the Respondents are not acting properly in the litigation. If they do, their concerns should be raised in the courts of those jurisdictions in order to ensure that the Settlement is properly represented.

61. If a conflict of interest exists (which I do not accept) it will be resolved by the retirement of the Respondents and the appointment of others in their place as trustees of the Settlement. It is not a justification for granting the disclosure requested.

62. The third preliminary issue raised by the Applicants is the legal test for disclosure. The leading decision is that of the Judicial Committee of the Privy Council on appeal from the Staff of Government Division of the High Court of Justice of the Isle of Man in Schmidt v Rosewood Trust [2003] 2 AC 709. The decision has been followed in Guernsey in a number of cases starting in the Royal Court with Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited [2003-04] GLR *N* [32]; Royal Court, Judgment 38/2004 and, more recently, in the Court of Appeal in In the Matter of the R and RA Trusts, Judgment 25/2014.

63. The Privy Council held that a beneficiary has a right to seek disclosure of trust documents; a right which is best approached as an aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts. Paragraph 54 on page 730 in the judgment of their Lordships delivered by Lord Walker of Gelsingthorpe, held that:

"In re Londonderry's Settlement and more recent cases have begun to work out in some detail the way in which the court should exercise its discretion in such cases. There are three such areas in which the court may have to form a discretionary judgment: whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional

inspection, or otherwise) to limit the use which may be used of documents or information disclosed under the order of the court."

64. Advocate Havard submitted, and I agree, that the Applicants have the jurisdiction to bring the Application. They do so, as beneficiaries, pursuant to Section 69 of the Trusts (Guernsey) Law, 2007 as amended and/or pursuant to the inherent jurisdiction of the Royal Court. The scope and effect of section 69 of the 2009 Law was considered by the Court of Appeal in In the Matter of the R and RA Trusts. In the judgment of Birt J.A., with which Nutting J.A. and Beloff JA both agreed, he held (at Para 73) that (i) Section 69 ensures that the court continues to have a supervisory jurisdiction in respect of trusts; (ii) the wording of the section is extremely wide; and (iii) it is not for the court to go further and impose a jurisdictional limit on the circumstances in which it may make an order in connection with the supervision of a trust that apparently falls within the wording of the statute.

65. The two Applicants are discretionary beneficiaries of the Settlement. Following the death of their grandmother, they are the only members of the class of beneficiaries, hence they collectively represent the entire class of discretionary beneficiaries. Having regard to the first of the three discretionary areas identified by the Privy Council in Schmidt, their interest is neither remote nor wholly defeasible and I am therefore satisfied that they are to be considered as being entitled to relief if the other areas for discretionary judgment can also be satisfied.

66. More contentious is the Applicants' claim to be entitled to disclosure of documents held by the Respondents other than in their capacity as trustees of the Settlement; such as documents relating to assets taken by one or both of the Respondents in their personal capacity but which the Applicants allege should be held as assets of the Settlement. In support thereof they relied upon a passage in Disclosure by Matthews & Malek (4th ed.) at paragraph 4.30:

"The court will not necessarily distinguish between documents held in an individual capacity and those held as trustee. Where a party is sued in a representative capacity and holds in an individual capacity documents which are relevant to the proceedings, the court may still order disclosure of such documents (Buchanan-Michaelson v Rubinstein [1965] Ch. 258)"

67. In Buchanan-Michaelson, discovery was sought under R. S. C. Ord. 6, r. 3, where the plaintiff was suing the executors of the estate of the deceased and obtained an order for discovery against one of the executors in respect of documents which formerly belonged to her in that capacity and which she had transferred to herself in her personal capacity.

68. On behalf of the Respondents, Advocate Le Cras drew attention to the decision of the Court of Appeal (reported at [1965] 1 WLR 390) overturning the first instance decision in Buchanan-Michaelson on the ground that the application was premature because the plaintiff had not yet succeeded in proving a contract which he claimed existed between him and the deceased. Without proof of such a contract, he had no entitlement to require the second defendant to disclose what she had done with the documents he sought to have disclosed to him.

69. It is clear that the Court's power to order disclosure of documents under the Royal Court Civil Rules, 2007 (or in England and Wales under the CPR) is a separate jurisdiction from the power to order disclosure on the application of a beneficiary under the court's supervisory jurisdiction in respect of trusts; see, for example, Re Londonderry's Settlement [1965] Ch 918 where the court order was made *"without prejudice to any right of the defendant to discovery in separate proceedings against the plaintiffs"*.

70. Looking at how the court's discretion is to be exercised, Advocate Havard sought support from paragraph 23-021 in Lewin:

"There is, however, a different kind of case where a beneficiary seeks disclosure against a background of hostility between him and the trustees, and it is obvious that the application for disclosure is being made in anticipation that disclosure, if made, will be followed by a breach of trust claim by the beneficiary against the trustees. Though beneficiaries rarely help themselves by adopting a rude or excessively aggressive attitude in seeking disclosure from trustees, we do not consider that the fact that the beneficiary's purpose in seeking disclosure is to assess the prospects of a breach of trust action is a reason why disclosure should not be ordered. That is because the jurisdiction is based on the accountability of trustees and beneficiaries have a legitimate interest in seeking disclosure so that they are in a position to assess whether the trustees have properly accounted for their conduct of the trusteeship, and if not to seek an appropriate remedy."

71. In summary, Advocate Havard's submission was that the Court has a wide jurisdiction under section 69 of the Trusts Law to make disclosure orders against the Respondents. In doing so, the Court must exercise its jurisdiction on a sensible and principled basis for the benefit of all the beneficiaries, having regard to the realities of the situation presented to the court and not being overcome by technicalities (see paragraphs 75 and 78 of R and R A).

72. The Respondents' position is that they have provided full disclosure of all the documents in their possession relating to the assets of the trust; as a matter of law, they cannot be required to give disclosure in respect of assets that they do not hold as trustees of the Settlement and that is particularly so on the facts of the present case where the Applicants are not seeking declaratory relief; and the Court has no jurisdiction, and is in no position, to make a preliminary finding as to the ownership of the contested assets which the Applicants are asking the Court to make.

73. In order to come to a decision, it is necessary to look at the details of the disclosure sought.

The Application – First Schedule

74. The First Schedule to the Application seeks:

"A full and complete suite of original documents relating to the Trust's assets and liabilities to include:

a. Documents of title to the Trust property (e.g. share certificates);

b. Trust accounts and accounts of underlying entities;

c. Minutes of Trustees' meetings;

d. Copies of Trustees' resolutions; and

e. Copies of correspondence and emails between the Trustees in relation to the assets of the Trust, including for the avoidance of doubt any of the entities referred to below."

75. The Respondents' Advocates replied to that request in a letter dated 11 March 2016:

"Only Trust asset is the Trust's 1/3 shareholding in Barrowfen. Due to the limited nature of the assets of the Trust, no specific Trust accounts, minutes, resolutions or correspondence (save for a Trustee resolution appointing Prashant Patel as a director of Barrowfen). The share certificates of Barrowfen are in the control and possession of Girish, who instructs Collas Crill alongside the Beneficiaries. Girish Patel was a former Trustee of the DP Patel Trust and (until February 2016) a director of Barrowfen. Accordingly, until very recently, Girish Patel was aware of all matters

concerning the Trust's sole asset of 60,000 shares in Barrowfen. There is therefore nothing further to disclose. Since the day the Barrowfen shares became an asset of the Trust, Barrowfen has never declared any dividends nor called for additional capital. The value of the shares held by the Trust is as per 1/3 the value of the audited financial position of Barrowfen Properties."

76. I will deal first with the assets and documents that the Respondents acknowledge as assets of the Settlement, starting with the shares in Barrowfen, looking at each paragraph of the request in turn.

77. **Paragraph (a) -** The Respondents say that the share certificates of Barrowfen are in the control of Girish. It is not necessary in this judgment to decide what control a trustee must exercise over the assets of a trust. Indeed, possession of a share certificate does not by itself confer control of the asset represented by the certificate. The Applicants are requesting that the original share certificates be delivered to them. Is it a sufficient answer for the Respondents to say they no longer have control and possession of them?

78. If the obligation imposed on a trustee by section 19(a) of the 1989 Law to hold or to have control over the trust property had not been excluded in the trust instrument, it would have been an insufficient answer to say that the share certificates are under the control of Girish. The Respondents could have been in breach of their duty if they had parted with control of the share certificates.

79. However, section 19(a) has been expressly excluded and the obligation has been negatived. Girish was until recently in effective control of Barrowfen and he remains a director of it. Prima facie, it does not seem unreasonable that the Respondents allowed him to have control of the certificates. However, that fact should not deny the Applicants any right they would have had to inspect or take a copy of the documents if they had been in the possession of the Respondents. If the certificates are in the possession of Girish, he holds them on behalf of the Settlement; there is no dispute that they belong to the Settlement.

80. The Applicants are the only discretionary beneficiaries of the Settlement and, as such, I consider they should have the right to inspect the share certificates. However, they are seeking more than the right to inspect them; they are asking in the Disclosure Application to be provided with the original documents. They have produced no legal authority and no evidence to justify any entitlement to the possession of the originals. Having regard to the hostility between the Applicants and the Respondents in the present litigation, it would not seem appropriate at this interlocutory stage to be ordering that the Applicants have a greater right to the documents than the Respondents. If they require the originals for a legitimate purpose such as, for example, forensic analysis they may make a specific application in that regard but they have not done so. In the absence of any such request, they are entitled only to inspect the share certificates and, if they wish, to take a copy on condition that they are responsible for any costs incurred.

81. Having regard to the legal tests set out above, I am persuaded it is appropriate to order that the Applicants may inspect the share certificates and, if they so wish, to take a copy at their own expense. Even though the Respondents do not have possession of the share certificates, I am minded to make an order against them. They may have to request that Girish make the share certificates available to the Applicants. If he were to be uncooperative, the Respondents will have to take steps to require him to grant the necessary access; steps which may or may not require the Respondents to seek a court order against Girish.

82. **Paragraph (b)** - Next, the Applicants seek the trust accounts and accounts of underlying entities. Section 21 of the 1989 Law imposes a duty on trustees to *"keep accurate accounts and records of his trusteeship"*. The duty has not been excluded. Indeed, the wording of the section suggests that it cannot be excluded, which is unsurprising. As Millett L.J explained in Armitage v Nurse [1998] Ch 241 at 253 H:

"there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts."

83. At page 261, he added:

Every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not".

84. In Stuart-Hutcheson v Spread Trustee Company Limited [2000-02] GLR 388, the Guernsey Court of Appeal put beyond doubt the duty owed by a trustee to maintain accounts under Guernsey law. Clarke J.A. said at paragraph 16, page 396:

"In essence, the duty of the trustee to provide information about the trust and its assets arises from the obligations of a trustee towards the beneficiaries of the trust that are inherent in the concept of trusteeship…. Any entitlement on [a discretionary beneficiary's] part to information arises because of the duty of a trustee to account to the beneficiaries, including discretionary beneficiaries, for what he has done in relation to the trust assets.

17….But a trustee may be bound to provide information regardless of whether it already exists in documentary form. The eccentric trustee who never kept written records could not, for that reason, resist accounting for what he has done with the trust property."

85. Here we are concerned not just with one discretionary beneficiary who may or may not ever receive a benefit from the trust, but with Applicants who together represent the entire class of discretionary beneficiaries. It is therefore wholly unacceptable for the Respondents to assert, as they have done, that they have not maintained specific accounts and that therefore the Applicants may not see them.

86. That is so notwithstanding that section 24 of the Settlement Deed seeks to negative and exclude the effect of section 22 of the 1989 Law. Section 22 (1) provides:

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

87. The trust instrument cannot deprive a beneficiary of the rights he has to require disclosure from the trustee of accounts and information relating to the administration of the trust which arise independently of section 22 of the 1989 Law or section 26 of the 2007 Law. Such rights derive from the court's inherent jurisdiction to supervise, and where appropriate to intervene in, the administration of the trust (as the Court of Appeal held in Stuart-Hutcheson and L-B Patrick Talbot QC sitting in the Royal Court held in Countess Bathurst v Kleinwort Benson (Channel Islands) Limited [2003-04] GLR Note32; Guernsey Judgment 38/2004).

88. In my judgment, the Applicants are entitled in the circumstances of the present matter to ask the Royal Court to invoke its inherent jurisdiction to supervise the administration of the Settlement and to order the Respondents to produce accounts, notwithstanding that written accounts may not presently exist. I order the disclosure to the Applicants of accounts of the Settlement recording the Respondents' administration of it.

89. As for the accounts of underlying entities, the Respondents are the shareholders in Barrowfen. It is described as a commercial property/investment company owning commercial property in London. I have not been told what rights the Respondents have as shareholders in Barrowfen to receive or request copies of the company's accounts. It seems most unlikely that the company does not produce accounts disclosable to its shareholders. The Respondents' answer appears unsatisfactory. The Respondents must investigate what rights they have as a shareholder and, subject to what they discover, they are to call for the directors of Barrowfen to disclose to them whatever accounting information they are entitled to receive as a shareholder. Any costs incurred in doing so are a matter for the Respondents as trustees of the Settlement in accordance with their responsibilities. Once the Respondents have obtained whatever they are entitled to receive, I order that they provide a copy to the Applicants, at the expense of the Applicants. They asked for a copy of the originals but have not shown any justification for receiving original documents

90. **Paragraphs (c) and (d)** Just as the court has the power to order production of the trust accounts, the Court also has the inherent power to order disclosure of trustee minutes and trustee resolutions. It may do so pursuant to its inherent jurisdiction to supervise the administration of a trust. The court also has a discretion to order that specific minutes or resolutions be excluded or redacted, for example where they may explain a decision to prefer one discretionary beneficiary over another especially where, for example, the minute may include information relating to one beneficiary which is confidential to him or her and would not and should not be known by another beneficiary. Here there is no evidence that there are any minutes or resolutions that should be excluded or redacted. The only resolution that is said to exist is one appointing Prashant as a director of Barrowfen. I order that that resolution, and any others that may exist but which have not to date been mentioned, are to be made available for inspection by the Applicants who may take a copy at their expense but are not entitled to possession of the original.

91. **Paragraph (e) -** Finally, in the First Schedule to the Disclosure Application, the Applicants seek disclosure of emails and correspondence relating to the assets of the Settlement, including its underlying entities and including the Contested Assets. I will come to the Contested Assets below. As far as the assets which the Respondents acknowledge are assets of the Settlement, I order that copies of emails and correspondence between the Respondents be provided to the Applicants at the Applicants' expense. Again, I do so under the inherent jurisdiction of the Court to supervise the administration of the Settlement. If there are few minutes and resolutions relating to the assets, it is important that emails and correspondence be disclosed as it may be that the Respondents have discussed their administration of the assets in correspondence rather than in formal, minuted, meetings of the trustees.

The Second Part of the First Schedule – the Contested Assets

92. The Second Part of the First Schedule to the Disclosure Application seeks orders for a wide range of specific disclosure of documents and information relating to each and every one of the Contested Assets. The Respondents have not disclosed any documents or information relating to any of the Contested Assets. They claim that they cannot be required to do so on the ground that none of those assets belong to the Settlement.

93. I am in no position to determine whether any of the Contested Assets do properly belong to the Settlement. Have they been transferred into the Settlement by a settlor and accepted by the Respondents in their capacity as trustees of the Settlement, either expressly or by implication? The legal position on the transfer of assets into trust is clear; so long as the trustee *"has under his control everything necessary to constitute his title completely without*

any assistance from the donee or settlor, the done or trustee needs no assistance from equity either, and the gift is complete, or the trust is properly constituted" Lewin 3-037. A trustee cannot be bound to accept a gift. Acceptance by the trustee may be either express or implied and where there is ambiguity, the doubt is resolved in favour of the trust.

94. I have considered carefully the evidence relied upon by the Applicants in support of their contentions that each of the Contested Assets belongs to the Settlement. The evidence before me of the alleged transfer of each of the Contested Assets into the Settlement is largely hearsay based, in large part, on what Girish has told Kiraj about his intentions and actions. In his affidavits, Kiraj explained what his father, Girish, had done or intended to do with each of the assets. In his first affidavit, paragraph 11, he said:

"11. My father placed various assets into the Trust, and I understand that the Trust currently holds shares in the following private companies:

a) Anglo Dutch Investments Limited;

b) AUM Commodities (UK) Limited;

c) Barrowfen Properties Limited; and

d) Agromin Australia Pty Ltd".

95. In his second affidavit after referring back to paragraph 11 of the first affidavit, Kiraj added at paragraph 9:

"Since then, I have looked into the situation of the Trust's assets further with my father, and I believe that the following assets are also comprised (or ought to be comprised) in the Trust and on that basis have included them in the Information Requests; namely:

(a) shares in Pacific Rim Plantations Limited;

(b) shares in Invesco Corporation Limited;

(c) shares in Makita Corporation Limited; and

(d) 181 Cranley Gardens, London N10 3AG."

96. He then set out his understanding of what had happened in respect of the ownership of the Contested Assets.

97. In paragraphs 26 to 28, he addressed the shares in AUM. At incorporation in 1987, 7,500 shares were held by his father personally and in 1988 his father received an allotment of a further 15,000 shares. On 22 December 1993, Girish transferred all of his 22,500 shares to Mr KK Yip as nominee for himself. Later, Mr Yip transferred them to Kiraj's grandmother, Prabhavatiben, to hold as nominee for Girish. As from the date of filing the annual return dated 25 March 2003, the shares have been recorded as held by the Trust.

98. Kiraj states that he is not aware of any stock transfer forms being signed to effect the above changes. He says that, in a statement sworn in connection with English High Court proceedings, Girish declared both that he was the beneficial owner of 40% of the shares in AUM and that the Settlement was the beneficial owner of his shares. I observe that Girish is not a beneficiary of the Settlement so those two statements appear contradictory and that Kiraj does not appear to explain the contradiction.

99. At paragraphs 31 onwards, Kiraj sets out his understanding of the position in relation to the Agromin shares. He says that upon incorporation of the company, in return for an investment in the company, Girish received a 15% shareholding which was initially held by Ilesh as nominee for Girish. Following a bonus issue, the shares were placed into the Settlement in December 2001 or early 2002, a fact of which he says Suresh, Rajnikant and Agromin were well aware, following correspondence with Girish regarding the shareholding.

100. In paragraph 35 Kiraj says that he understands from his father that he and Suresh decided to use Anglo-Dutch as an investment holding vehicle to hold some of their profits from the family businesses and that Suresh was well aware of Girish's intention to place his 50% holding in the company into the Settlement whilst Suresh transferred his own 50% holding into the DPP Trust.

101. At Paragraph 41 he makes a similar statement in respect of Pacific Rim:

"Suresh was well aware of my father's intention to place his 50% interest in Pacific Rim into the Trust. Indeed Suresh had a similar intention to place his 50% interest into the DPP Trust."

102. Invesco is dealt with at paragraphs 47 to 53. It was initially incorporated with bearer shares which were converted to registered shares in 2000. Paragraph 49 explains that:

"My father and Suresh are the directors of Invesco. When the bearer shares were converted to registered shares my father and Suresh passed a resolution setting out the details of the recipients of the shares. This included a request for the issue of a share certificate in favour of "Mrs P.D. Patel Discretionary Settlement."

103. Of Makita, he says at paragraph 55(a) that:

"My father was the sole shareholder and director of Transglobal and it was his intention to gift the 2 shares in Makita to the Trust and the DPP Trust."

104. A common factor in all the above is that Kiraj relies upon what he understands from, or has been told by, his father. Thus, in establishing whether any of the Contested Assets were gifted or settled into the Settlement, the evidence of Girish is crucial as he was the settlor or the economic settlor of the assets. The evidence presently before the Court of his intentions is second-hand, contained in the affidavits of Kiraj setting out what he has understands from his father. The evidence is corroborated by his sister who agrees with Kiraj but adds nothing more. There is no evidence from Girish who is the one person who would be best placed to state what he has done with the assets and what he intended.

105. 181 Cranley Gardens is different. Kiraj says that he has only recently become aware that the title to the property at HM Land Registry records the Respondents as the owners of the property in the name of the Settlement. Suresh says that it was only on reading Kiraj's second affidavit that he became aware that the property was registered in the Respondents' names. There is no evidence in the affidavits of any gift of the property to the Respondents or of any intention on behalf of the donor that it be transferred into the Settlement.

Decision

106. This is an acrimonious dispute involving family members who once worked together in family businesses which generated substantial wealth that they chose to hold and invest through corporate entities and trust structures in a number of jurisdictions around the world. Sadly Girish has fallen out with the remainder of the family, other than his own children. Allegations of improper conduct have been made on both sides and there are already judicial findings and comments condemning some of the actions that have been taken and the events which have occurred. The evidence produced in support of the present matter shows that the

Applicants have beliefs and concerns regarding the administration of the Settlement that require explanations. The evidence in the affidavits contains many competing allegations; inconsistencies and contradictions that I am unable to resolve without hearing oral evidence from the deponents.

107. I am unable to determine the extent of the assets that properly belong to the Settlement; more specifically, I am unable to say whether any of the Contested Assets had been transferred into the Settlement and should still belong to the Respondents in their capacity as trustees of the Settlement or if they have subsequently been misappropriated.

108. Fortunately, I am not being asked by any of the parties to make any such determination. The Respondents contend that in effect the Applicants are asking me to make some sort of preliminary finding of ownership. Advocate Havard denies that is what is sought; his submission is that the court should have sufficient concerns about the manner in which the Respondents have administered the Settlement to invoke the court's supervisory jurisdiction to make the disclosure orders sought.

109. Applying the principles in Schmidt, I am persuaded that the Applicants are entitled to apply to the court for disclosure of some information regarding the Settlement. I have indicated earlier in this judgment a number of orders I am satisfied it is appropriate to make, including in respect of assets which are accepted as belonging to the Settlement, such as the shareholding in Barrowfen.

110. The more contentious area is in relation to the Contested Assets and the disclosures sought in respect of them. The power I have to order disclosure is discretionary. I am not persuaded that the evidence is strong enough to justify an order for disclosure against the Respondents of assets that may not belong to the Settlement. My decision might be different if I had received first-hand evidence form Girish of the assets he transferred, or caused to be transferred, to the Settlement.

111. In the exercise of my discretion, notwithstanding that the parties agreed some procedural directions regarding disclosure, I cannot ignore the fact that the Disclosure Application is ancillary to a substantive application for the removal of the present trustees and the appointment of others in their place; a substantive application which is, in principle, unopposed and will result in the appointment of Girish as a trustee of the Settlement. Girish knows better than anyone else the identity of the assets that properly belong to the Settlement as he was the donor or settlor, either directly or indirectly through his nominees and agents, of the assets, including the Contested Assets.

112. On Girish's appointment he will be entitled to the documents and records held by the Respondents. He will know what, if anything, is missing including whether there are further assets that should have been transferred to the new trustees. He will be in a position to provide a full report to the Applicants who will then be able to decide what further action, if any, they wish to take or ask the new trustees to take on behalf of the Settlement.

113. The focus of the Applicants' submission has been the court's inherent supervisory jurisdiction to intervene in the administration of a trust. I accept that the evidence adduced in the affidavits before me justifies the court's intervention. However there are more ways than one in which the court may intervene. An order for disclosure of information is not the only remedy in the court's armoury. In the circumstances of the present matter, the appointment of alternative trustees is another way of approaching the matter. The fact that one of the

proposed replacement trustees is the person who knows best which assets have been transferred into the Settlement is a happy coincidence.

114. My decision is therefore to order that the Applicants may inspect the documents of title, trust accounts, accounts of underlying entities, minutes of trustees' meetings, trustees' resolutions and correspondence and emails between the Respondents relating to all of the assets which are acknowledged by the Respondents as being assets of the Settlement, such as Barrowfen, together with the right for the Applicants to receive copies thereof at their expense. Further than that, the sooner the Applicants proceed with the substantive application for the replacement of the Respondents by the Interested Parties as trustees of the Settlement, the quicker they will be able to establish whether there are assets that belong, or have belonged, or should belong to the Settlement that have been misappropriated or mismanaged by the Respondents.