Applications under s 69 of the Trusts (Guernsey) Law 2007 for disclosure of trust documents/information made by non-beneficiaries (or other specified party). Basis and extent of Court's jurisdiction. Principles discussed. Applications dismissed. Observations regarding the operation of PD 1/2012 as to suggested amendments to a judgment circulated in draft.

[2024]GRC036

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION
Civil Matters 2514 and 2525

Before: **HER HONOUR HAZEL ELEANOR MARSHALL KC**
LIEUTENANT BAILIFF
(Sitting alone)

Civil 2514
Between: **BX** **Applicant**

-and-

(1) T LIMITED
(2) AX
(3) JX
(4) CX
(5) OX
(6) PX
(7) QX

Respondents

Advocate for the Applicant: **ADVOCATE A C LYNE**
Advocate for the First Respondent: **ADVOCATE C H EDWARDS**
Advocate for the Second and Third Respondents: **ADVOCATE A B COLE**
Advocate for the Fourth, Fifth, Sixth and Seventh Respondents: **ADVOCATE B S HAVARD**

Civil 2525
Between: **(1) CX** **Applicants**
(2) PX
(3) OX
(4) QX

-and-

(1) T LIMITED
(2) AX
(3) JX **Respondents**

Advocate for the Applicants: **ADVOCATE B S HAVARD**
Advocate for the First Respondent: **ADVOCATE C H EDWARDS**
Advocate for the Second and Third Respondents: **ADVOCATE A B COLE**

Dates of hearing: 20th – 21st February 2024
Judgment delivered: 21st February 2024
Approved anonymised judgment handed down: 21st May 2024

Legislation and cases referred to:

Guernsey

Legislation
Trusts (Guernsey) Law 1989 s.22
Trusts (Guernsey) Law 2007 ss 26, 69, 84

Cases
Stuart-Hutcheson v Spread Trustee Co Ltd [2002] WTLR 1213
Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited et al [2003–04] GLR N [32]
Patel v Patel [2016] GLR 36
Kazzaz v Standard Chartered Bank [2023] GRC 049

England and Wales

Cases
Re Manisty's Settlement [1974] 1 Ch 17
American Cyanamid v Ethicon Ltd 1975 AC 396
Schmidt v Rosewood Trust Ltd [2003] UKPC 26
Grand View Private Trust Company and Another v Wen-Young Wong and Others (Bermuda) [2022] UKPC 47

J U D G M E N T (approved and anonymised)

Introduction

1. There are two Applications before the court seeking similar relief. One is brought by CX ("**C**"**)** and her three adult children, OX, PX and QX ("**O**", "**P**", and "**Q**") against T Limited, ("**T**" or "**the Trustee**") as Trustee of the W Trust, which is a Guernsey trust. Also joined into that Application as Respondents are AX ("**A**") and JX ("**J**") who are the beneficiaries of that trust. The second Application is made by BX ("**B**") in respect of the same trust, also against the Trustee, T Limited. The other parties to the first Application are joined in that Application as Respondents. The parties apart from the Trustee are all related to each other through the deceased patriarch of the X family, Mr X ("**Mr X")**.

2. These two applications were originally brought within a few days of each other, and steps have been taken, procedurally, to make sure that they can proceed together because they raise a common issue and they proceed very much along the same lines. Advocate Edwards has appeared on behalf of T, the Trustee itself. Advocate Havard has appeared on behalf of Applicants in the first Application ("**C**" and "**the US Family**"). Advocate Lyne has appeared on behalf of the Applicant in the Second Application ("B"), and Advocate Cole has appeared on behalf of the two other respondents to each Application ("A" and "J"), the beneficiaries of the W Trust.

3. The relief sought in each Application is the disclosure to the Applicants by the Trustee of documents which are trust documents. Each of the Applicants applies to the court for an order to such effect. The documents sought are matters such as trust accounts and documents relating to the way in which the trust itself is structured and has been administered, and so forth, matters in the background to its immediately obvious superficial features and matters which are essentially information belonging to the Trustee, (although subject to its obligations to account to its beneficiaries).

4. The Applications were brought with a degree of urgency as they concern materials which the Applicants say it is vital that they should have, in order to decide how best to proceed in the light of dealing with the situation created by the death of Mr X, and possible fiscal consequences and effects upon certain of them, as I will explain in due course. This hearing has therefore been brought on as expeditiously as possible, as the court accepted that it was important that the parties should have a decision quickly, as they are all, I think, inclined to want.

5. This judgment is therefore the approved version of an *ex tempore* judgment which I delivered on the third and final day of the hearing, which took place from 19th-21st February 2024. I said then that, on the basis that a decision was needed, I would deliver an *ex tempore* judgment, but I made it clear that, as and when a fully written reasoned judgment might be requested, as I had little doubt it would be, it would take some time to produce this because of my own imminent absence from the island during most of March. I also indicated that when such written judgment was produced, whilst its reasons and result would not change, details might well be added and reasons elaborated on, because my *ex tempore* judgment had been hastily prepared so that the parties could have a decision. However, as I had reached my conclusion firmly at the time of the hearing, it seemed to me to be right that I actually deliver that conclusion straight away, not least because of the nature of the urgency for their application asserted on the part of the US Family.

6. That was therefore the basis on which I gave my oral judgment, and this judgment is the product of further preparation to produce a fully approved version. However, in the light of some subsequent events, I draw attention, here, to the fact (as I confirmed expressly in response to a request from Advocate Cole at the conclusion of the hearing) that my account of the background to the matter is not a statement of final binding conclusions of fact being made by the court, but is merely an account of the background, largely (and naturally) drawn from the Applications being advanced, and necessary to enable the context and basis for my decision to be understood. It is thus an account of matters of which there is evidence. Aspects of that account, are, I understand, disputed by Advocate Cole's clients, but not in any respect which is a fundamental factor in my decision. I therefore record that position, again, here, but I also draw attention to my further comments, in the "Postscript" to this judgment, with regard to the proper scope of Advocates' suggested corrections to a judgment circulated in draft.

7. I should lastly also say that this application hearing has been held *in camera* as a matter of principle, because it is all to do with trust matters which are essentially private. The public has therefore not been admitted. However, insofar as it is a record of my decision on a point of the application of law, it is a matter of some public interest and for the benefit of the profession, and I consider that it should be reported as such. I will prepare a suitably anonymised version of the judgment for publication.

Background

8. The W Trust, the trust with which I am concerned, is associated with the business empire that was created and built up by Mr X. He was the founder of a well-known group of hospitality businesses which traded under the name of 'F'. This was phenomenally successful and became a multi-million dollar empire. Mr X was a native of Country H and was based there. He had several business undertakings, although these proceedings primarily focus on the F empire. I understand that he took care not to become tax resident in the United States although he also carried on much of his business there. He had seven surviving children all told, by two marriages and two other relationships, one of which was long term.

9. One child from an earlier relationship, ZZ has played no part in this matter. B is the child of Mr X and his first wife in Country H, and is the Applicant in the Second Application. Mr X's two children by his second wife are A and J. They are the beneficiaries of the W Trust and are two of the Respondents in each case. I gained the impression that A, in particular, may have worked in the F business, although I believe that at times B did as well, and it is possible that ZZ did, but that is not particularly material for present purposes. These persons were what I will call Mr X's "Offshore Family", but also, after what I believe was his divorce from his second wife, he effectively had a United States Family, and they have been known as such in the hearing. C was Mr X's long-time domestic partner. She had previously been in charge of providing certain consultancy services to the F Group, which is no doubt how she and Mr X met. They did not marry but they had three children (O, P and Q, all now adult) and effectively they were man and wife together for the last years of Mr X's life. C and these three children are the Applicants in the First Application.

10. The F business empire itself grew and grew, but, as is very commonplace with these multi-million dollar empires, the assets were put into trusts. Eventually, maybe not initially but eventually, the business empire was divided into three groups of companies, of which the "S Group", as it was known, was the group that operated the hospitality establishments, and the "V Group" was the group that provided services to these, thus making profits at a second level from what would be supply functions otherwise contracted outside the business activities of the hospitality businesses. The third group was the "U Group", which organised and provided the booking services for customers. Those three groups of enterprises were structured separately but operated to their mutual benefit.

11. In 2001, Mr X settled certain business assets into two Trusts in M Land, known as the Y Trust and the Z Trust (together, "**the M Trusts**"). The trustee of those trusts is a trustee company in M Land, which has been known as "CW" in these proceedings. All, or some, of the related persons I have referred to, but I think principally C and her children, are the beneficiaries of those trusts, and I am told that the class of beneficiaries extends to their issue. Especially materially, as will appear, A and J are also within the class of beneficiaries of those trusts; it may be that I have got the impression that C and her children are the principal beneficiaries because of being informed of litigation which has taken place in M Land in relation to those trusts in which C seems to have had a prominent part. But again, that point is not particularly material. On any basis, those M Land trusts were in the nature, simply, of family trusts.

12. The assets of the M Trusts, at least by the material time in this case, included the S and the V companies. The M Trusts were actually revocable trusts. Expressly, they could be revoked by the settlor, ie Mr X himself There was a power of appointment in relation to each of them that was in effect reserved to Mr X. In one instance it was reserved to the "Enforcer" but that was Mr X himself, anyway. In the other, it was reserved to Mr X as settlor. So Mr X was able to decide, apparently as he wished, who were and were not to be beneficiaries of those trusts.

13. However, the Trust which is the subject of these proceedings is the W Trust. That Trust was settled by Mr X in Guernsey in May 2005, so some four years after the M Trusts were set up, in 2001. It is not suggested that the W Trust had any actual connection with Guernsey at all, as far as I can see. I have certainly not noticed any, but it was no doubt regarded as being convenient, for some purposes, to set it up here.

14. Mr X was the settlor and the Trustee was and is T Limited, a Guernsey trustee company. The sole named beneficiaries of the W Trust are A and J, i.e. Mr X's children by his second wife. The Trust owns, indirectly, the U Group of companies which is the one that controls the booking function for the F establishments. However, it owns those assets indirectly through an insurance policy which has been described as an insurance "wrapper". This is something that is quite difficult to understand for those who are not intimately engaged in the finance industry, as I certainly am not, but at any rate it appears that the actual asset of the Trust is an insurance policy. In this case, it is an insurance policy on the life of A. The funds that are put into the trust are used to pay the premium to purchase the insurance policy, but under the terms of the arrangements, those funds can then be used for the

purpose of investment in whatever way an investment manager decides is appropriate. Consequently, the situation is created where, in a sense, the insurance policy "owns" the underlying investments. It is understood, and I think it is common ground, that this structure can be beneficial for tax purposes and it was adopted here in relation to the W Trust.

15. There was no Letter of Wishes written by the settlor to the Trustee in relation to the W Trust. (I do not know for certain if there were letters of wishes in relation to the M Trusts.) However, the W Trust itself, unlike the M Trusts, is irrevocable. There is a power to add beneficiaries included in Clause 11 of the Trust Deed, and this is a totally general power. Literally, it is drafted as a power to add anybody from the whole world; it is that general. Clause 11 simply reads:

> *"The trustees may at any time (a) add to the class of beneficiaries such persons not being an excluded person"* [I am not sure if there are any] *"as the trustee shall determine, and any such addition should be made by deed…*".

The clause then goes on to specify the details that are needed for the making of such an appointment.

16. I have already referred to the W Trust holding the insurance policy as its asset. The terms, under clause 5 are basically that the Trustee shall hold the trust assets

> *"upon trust to pay appropriately or apply the whole or such part of the trust fund as it may from time to time think fit, to or for the maintenance or otherwise to the benefit of all or such one or more of the beneficiaries"* [that is J and A] *"in such shares and in such proportions if more than one and generally in such manner as the trustee shall think fit, and subject thereto to accumulate the income of the trust fund".*

There is then a reference to distributions, and a default provision which is that, subject to the foregoing, the trust assets will, if necessary, be held for charity - but obviously nobody is envisaging that that is ever going to actually occur.

17. The only other term of the W Trust which I need mention is that, specifically, s. 26 of the Trusts (Guernsey) Law 2007 ("**the Trusts Law**") is excluded, so that the Trustee is not obliged to provide information to the beneficiaries as provided in that section, as would be the case if that section were not excluded. (It was s. 22 of the Trusts Law (Guernsey) Law 1989 at the time of the settlement, but the effect is the same.) Clause 26 of the Trust Deed itself, provides, quite permissibly, for the exclusion of certain provisions of the Trusts Law, and it excludes the obligations of s. 22(1) (and also s 25 (1)) of the then Trusts Law 1989. So that means that the Trustee is not obliged to provide information to the beneficiaries, and they can insist on it only through making an application to the Court. Indeed the Trust also, I understand, contains what is called an "anti-Bartlett" clause which basically absolves the Trustee from getting involved, at all, in the actual financial or commercial activity of the Trust, that might be required of it as a holder of trust assets. All the Trustee is really obliged to do is keep the Trust in good standing and to monitor what is going on at a very high general level; there is an investment manager who actually conducts the business activities of the Trust itself.

18. So that describes the provisions of the actual Trust which was settled in 2005. The business of the F empire continued for ten or more years after this, with the assets held in these trust structures of the two M Land and one Guernsey trusts. There is some evidence which suggests that during this time, Mr X was rather accustomed to regard the assets in the business empire as being really his own, even though he had actually settled them on trust, and almost to do what he liked with. He was the founder, and it does not appear that he was particularly challenged by anyone else, as far as this might happen. I should say at this point, that I have been provided with a good deal of evidence about the background of how these trusts came to be established and operated from the perspective of various people, but whilst I have obviously looked at this, I do not think I need to refer to much of it for present purposes because it is of no real significance to my decision, and I do not propose to do so.

19. In about 2017, Mr X began to form some ideas about how he wanted his estate to be divided between his various relatives, in the event in particular (obviously) of his demise. He devised a scheme, it would appear, in conjunction with a Mr Y, who was his local attorney, and who had been involved in helping him set up various schemes and achieve the results that he wished to achieve in the past. I will come back to Mr Y later. Broadly, the scheme that was then devised - and it was fairly detailed in some documents that have been produced to the court - involved all the trading companies in what I have called the F business empire being combined into one group company, and the shares and assets of that company then being divided between five trusts that were going to be set up, to divide what Mr X perceived as his estate between C and Mr X's children in the percentages which he thought appropriate. This intention did not appear fully all in one document because Mr X was secretive about the intended percentages and therefore he may have intended to put them, ultimately only in a will which would not be revealed until after he died. Nevertheless the written document then recorded and explained the general structure that he was trying to set up. What he wanted to achieve was that the shares would "drop down" into these new trusts automatically on what he called a "trigger event". Fairly obviously this was principally the event of his passing on.

20. His idea ultimately, it has been submitted, was that his US Family would have 42% of the shares in the overarching company by value, A and J and B, (three of his Offshore children), would have 16.67% each, and ZZ, the fourth, would have 8%. However, to even out control of the assets - because he had concerns about giving a majority to the Offshore Family who could therefore outvote the US Family - he intended to give the US Family a further 8% share for voting purposes.

21. That, it is suggested, was the idea. As I pointed out at the hearing, I am not quite sure if that actually worked in the great scheme of things because it appeared only to give the US Family 50% as against 58% that was still left in the Offshore Family, because their entitlement did not appear to be reduced, but this question did not have to be considered because this scheme was not ultimately implemented. Whatever the position, though, there is evidence suggesting that it was Mr X's intention at that stage (2017), to divide the wealth of his estate in that manner.

22. Mr X executed what has been described as a "holding will" in 2018. This was also before the court, explaining some of the scheme already mentioned, and also devising or purporting to devise other properties which Mr X owned or with which he was associated. There was also a more considered Will dating from 2020 in which Mr X did actually acknowledge that he did not have the power to dispose of a lot of the assets he was purporting to dispose of by the Will, but was strongly asserting his preferred outcome, saying, in effect, that if by chance there was a resulting trust or if in fact events worked out such that his wishes could have effect or influence, then this was the way in which he wanted his assets to devolve. It also seems that he was setting up documentation to try to achieve his preferred outcome - I think probably by persuading trustees that it would be the right thing to do to implement his wishes - when unfortunately he was taken ill and died, more suddenly than had perhaps been anticipated.

23. Mr Y therefore wrote out a general memorandum of what he (Mr Y) understood to be the intended scheme - I have called it the "great scheme of things" - and Mr X signed this on the day before he died. It seems clear that this was intended, and was viewed by at least him and Mr Y, as being equivalent to a letter of wishes by him.

24. Mr X unfortunately died in 2021. He did so whilst documentation was apparently being prepared to remove a member of the Board of the M Land trustee who was – presumably - regarded as being unco-operative. This was a Mr Z, who had also had quite a lot to do with setting up the original trust arrangements, including those of the W Trust, in 2005. It appears that practical arrangements were being made by which Mr X would have signed this document in a window two or three days after the date of his death, but of course that would have been too late. Again, Mr Z has not featured at all in these Applications and I do not know what information Mr Z would have had about various disputed facts or what light he might have shed on them. On any basis, though, it does

seem clear that it was part of Mr X's intention at that stage to try and organise his affairs so that what he wished to have happen after he died would happen pretty well automatically.

25. There was, however, or rather I should say there is - and I do not know when it started but I suspect it has been quite long-going - considerable friction between the US Family and at least certain members of the Offshore Family. Certainly it would appear that C and A, who both seem to be quite forceful personalities, do not appear to have been getting on very well. There has been a lot of litigation elsewhere in the background.

26. In M Land, C has taken steps with litigation to seek to get CW removed as trustee of the M Trusts. I do not know exactly how far that litigation has progressed, but at any rate that indicates that all is not well in relation to the M Trusts. I understand this is because C considers that CW has been partisan, and ill-disposed to her, in relation to its dealings in the M Trusts, but I know nothing about the merits (or otherwise) of any such application.

27. I understand that there has also been litigation in the United States, between the company which was C's own company at one stage (or in which she had a controlling interest) which was providing consultancy services to the F Group and has continued to contract with it. C says in her evidence that she no longer takes any part in the actual operation of this company, though I believe she accepts that she still has a 50% share interest in it, although I am told that is actually being reduced. Nevertheless, the relevant point for now is that there has been hostility between one faction, which is effectively C's interests in that company, and the F Group in which others have interests.

28. C and her children, and presumably also B (ZZ has not taken any part in these proceedings), appear undoubtedly to be keen that Mr X's apparent or assumed last wishes as outlined above should be implemented. It seems possible and even probable that CW is also amenable to this, although I have no actual evidence as to their attitude. It is also plain, though, that T does not take the same attitude, and A and J, the beneficiaries of the W Trust, also have a more reserved position. This is the background which leads to the present applications.

The Applications

29. The Application of B was made on 20th September. By that Application he sought from the trustees of the W Trust:

- copies of the trust instrument constituting the trust and any supplemental instruments;
- copies of the latest accounts of the trust including accounts for any underlying companies, in particular the group of companies known as U, for all years since the constitution of the trust;
- copies of all documents relating to or dealing with any distributions made since the later of the death of Mr X and the last set of accounts;
- a copy of the life insurance policy which had been referred to in a letter between Guernsey advocates and advocates in London in 2022, together with any financial statements and reports relating thereto;
- a sworn affidavit setting out the assets of the policy which, for the avoidance of doubt should include the two companies within the policy as referred to in the above letter, as well as their corporate structures and all underlying companies, subsidiaries and assets;
- all relevant registers of members and directors, memoranda and articles of association for the companies described above; and

- details of the independent investment advisor (as referred to in a letter) under the policy, together with all documents relating to the management and direction of the assets for the policy by the independent investment advisor.

It can thus be seen that what B wants is the entirety, as far as one can see, of the financial information relating to the goings-on of the W Trust pretty well since its inception.

29. The Application of the US Family was made on 13th October 2023. That Application is not phrased quite so widely, but it is in fairly similar terms. It is an Application for the Trustee as first Respondent to disclose to the Applicants such of the following documents and information relating to the Trust, which are:

- A copy of the policy referred to and held by or for the benefit of the respondent as trustee, together with any statements or reports relating to the assets of the policy immediately prior to and immediately following the settlor's death, and the most recent statements and reports,

- any supplemental instruments relating to the trust;

- a structure chart of the U Group and all the statutory documents relating to the companies within the U Group, and the financial statements of each of those companies for the accounting periods immediately prior to and immediately following the settlor's death, and the most recent financial statements or accounts and details of any changes in the period since the settlor's death; and

- trust accounts for the accounting period immediately prior to and immediately following the settlor's death and the most recent trust accounts.

So that is aimed at rather more recent documentation relating in particular to the time at or about the death of Mr X.

30. Those two Applications, when they were brought, required some manipulation of directions as to Respondents, to make sure that everybody who had a potential interest in the matter was actually a party before the Court. Initially there were also contests about the extent to which any of the Applications should be heard *in camera* or not, largely because these are not "internal" trust proceedings and there were also complications arising from the effects of orders as to privacy which had been made in the M Land proceedings. However, this had all been sorted out for the purpose of this hearing, which came on before me on 19th February.

The issues

31. I turn now, therefore, to the issues to which these applications give rise. The important point is that neither B nor the US Family are named beneficiaries, nor are within any descriptive class of beneficiaries, of this Guernsey trust. It is therefore apparent that neither of them has any right to receive the information they have sought. In fact, they do not even have a statutory right to apply to the court in respect of the Trust at all; they need the Court's leave.

32. They make their applications under s. 69 of the Trusts Law, which is a general provision that states that:

> "*On the application of any person mentioned in subsection (2), the Royal Court may*
>
> *(a) make an order in respect of -*
>
> *(i) the execution, administration or enforcement of a trust…".*

33. This covers the relief for which they apply. The other sub-sections enable orders to be made in respect of a trustee or a beneficiary or any trust property, or an enforcer in relation to any non-charitable trust and so forth, and declarations as to the validity or enforceability of a trust, so none of those is applicable. It is the first and primary sub-section which I have noted above which has to form the basis for these Applications.

34. However, such s 69 applications are also authorised to be made only by a specified list of persons under s 69 (2), and these do not include non-beneficiaries, except that at (2)(g), with the leave of the Royal Court "*any other person*" may make an application. The position therefore is that these Applicants are obliged to rely on that particular subsection, but by agreement the necessary applications for leave have not been separated out from the main applications, because looking at the substance of the main applications to see whether there are justifiable grounds for it being granted would certainly be determinative of the question whether leave ought to be given under s 69 (2) (g) for any application to be brought at all. So on that basis I am invited to treat this as a "rolled up" hearing at which I will decide the actual application itself. In theory, if my final decision were negative, I could dispose of the matter on the basis of either refusing leave to bring the application, or refusing the application as a matter of substance, but in practice the effect is to treat the matter, by agreement as if leave had been granted. So I move straight to the merits of the Applications rather than any two stage consideration, that being the practical course.

Nature of the Applicants' cases

35. I therefore indicate at this point the basic nature of B's and the US Family's cases. Broadly they say this: Whilst they are not actual beneficiaries of the W Trust, they really only have to show that they have got serious prospects of benefiting under the Trust, and that is sufficient to found jurisdiction and to merit an order in their favour. I will examine this proposition as a matter of law in a minute, but it can be seen that it rests on the Applicant's prospects of becoming beneficiaries of the W Trust, given that at present, they are not.

36. The US Family claims to have an exceptionally strong chance of benefiting. They say that effectively they can rely on overwhelmingly persuasive evidence of the settlor's intention that they should benefit from the W Trust, and in that context they rely particularly, as they have all along, on the evidence from Mr Y. Mr Y has made a statutory declaration, which he did shortly after Mr X's death, in which he set out what he understood to be the position with regard to Mr X's intentions and what had gone on as regards formulating and implementing these, and so on and so forth. Mr Y has also made an affidavit in these proceedings in which he exhibited his statutory declaration, or at any rate he reinforced it and gave some further detail, effectively supporting the applications of both B and, in particular, the US Family, that they ought to be regarded in this matter as overwhelmingly likely potential beneficiaries of the Trust, really on the basis that this was to implement the wishes which Mr Y was quite convinced were the true wishes of Mr X, and therefore which ought to be implemented.

37. There has been a dispute about the admissibility of Mr Y's evidence, affidavit or otherwise. A and J dispute a lot of what Mr Y says as a matter of fact and also, I think, the provenance of some of his documents and his interpretation of many matters, and indeed they are certainly not kindly disposed to Mr Y. From some time past there have been complaints made by them about allegedly over-partisan conduct which has led him into suggested conflicts of interest, that they say should not have been permitted, in relation to the way he has dealt with other aspects of the situation. I am not involved in those disputes and I am not going to go into the merits of such allegations in any way; I simply note them as part of the background of the proceedings.

38. Well in advance of this hearing, A and J informed the lawyers for the US Family that if Mr Y's evidence was going to be relied on, then they required him to present himself for cross-examination on the contents of his affidavit. Mr Y has not attended to be cross-examined. There was correspondence that invited Mr Y to agree to attend but the last round of such correspondence, as far as I can see, showed that Mr Y claimed that he did not really know what was going on in the Guernsey

proceedings and that before he would indicate whether he was willing to come and be cross-examined or not he wanted more information. That round of correspondence took the matter beyond the time when the hearing was to be held, and therefore meant that he has not attended.

39. Advocate Cole, on behalf of A and J, therefore submitted that Mr Y's evidence should not be admitted at all. Those who wished to rely on Mr Y's evidence had been given notice that he was required to attend. He had not attended and on that basis his evidence was just not admissible. If that was not accepted, then Advocate Cole's submission was that I should place absolutely no weight whatsoever on Mr Y's evidence, because of the impossibility of cross-examining him.

40. The other interested parties (T was neutral) submitted that Mr Y's evidence was there, they did seek to rely on it and they should be able to do so, because, they urged, Mr Y was quite plainly a person who had a very close acquaintance with Mr X's intentions and had (I could therefore infer) a very sound degree of knowledge of them, because of his position as Mr X's Offshore attorney and long-time advisor and confidant of many years.

41. In the end I simply declined to decide whether or not the evidence was technically admissible or not in the circumstances. I said I would look at Mr Y's evidence, as it were, *de bene esse* and I would decide what weight if any I was able to place upon it in relation to the issues that were actually before me. I have looked at it, and I have taken it into account for what it is worth. However, I have done so plainly on the basis that A and J would have wished to cross-examine Mr Y but were not enabled to have the opportunity of doing so. Rather than either adjourn the matter or decide the point on the crude basis of whether to exclude the evidence, I took the view that it was the better course to consider the evidence for what it might be worth in all the circumstances.

Applicants' cases

42. Both of the Applicants' cases are that the documentary evidence which is put before the court - which is not just Mr Y's own affidavit but also documents that he exhibits - show that Mr X intended the US Family and B, as well as the other children (A and J), to benefit from the W Trust as well as the M Trusts on a global basis. That is the first point on which they rest. Therefore, if they were intended to benefit as clearly (it is urged) as the circumstances show, their submission is that they are effectively "as good as" beneficiaries, and they therefore can and should be treated as such. I will deal with that more when I come on to the law.

(i) The US Family

43. In addition, as regards C, they say that the position is particularly complex, and the need for the information is particularly acute, because she requires this for tax reporting purposes in the United States The reasons for this are complicated, but the US Family claim that, as a result of the position of A and J and the W Trust, the situation is costing them approximately $30Mn a year because C is incurring tax on the income of a certain company or companies – non -US companies – held in the M Trusts as if it were her own income, when in fact this is "phantom" income which she has never received. This is because of income attribution rules which apply under the United States tax system,

44. I am not going to pretend to describe accurately, below, the US tax regime which gives rise to this issue, and what I am about to say is, no doubt, at best a great over-simplification of the position, and very possibly inaccurate or at least incomplete in some respects. However, it is not necessary to understand the detail for present purposes, but only, in my judgment, the general principles, so as to evaluate the effect, the weight, and the importance of this situation as it is invoked in support of C's Application. (I refer only to C for simplicity.)

45. The non-US F companies which are held in the M Trusts are "foreign" entities as regards the United States but are potentially what are known as "CFCs" ("Controlled Foreign Corporations") in US tax law. The question of "control" describes the degree to which US taxpayers hold any interest in them,

as laid down by US tax law. Such entities are subject to tax rules which involve taxing those who are potentially entitled to a share in the income of such companies as if they had in fact received it, even when no such distribution has been made.

46. (I understand this principle, as it has similarities with a principle of UK tax legislation with which I am more familiar, relating to "Close Companies". There, it is designed to make sure that small companies cannot just accumulate income within the company itself, enabling those who would be entitled to income from the company in the form of dividends to avoid (at least *pro tem*) being taxed upon this by simply leaving it in the company. In certain circumstances the legislation dictates that those who own shares in the company are treated as if they had received the relevant share of the company's income themselves, even though they never have.)

47. US tax evidence in the matter has been advanced, in particular by DB a qualified US lawyer and C's US tax adviser, on her behalf, by two US law firms instructed by the Trustee to provide specialist evidence on its behalf and by DS, also a qualified US tax lawyer, engaged by A and J. They appear largely to agree on the basic principles. From their evidence I derive that the relevant points here are three-fold. The first is that the "anti-deferral" principle noted above operates in respect of foreign corporations in which US taxpayers have a specified quantum of control; those taxpayers then become taxed on their notional share of the income of such a corporation, even if they did not receive it. The potential triggering factors are that, first, there is at least one US taxpayer shareholder with an interest by vote or value of at least 10% in the foreign entity, and, second, that the aggregate interests of all US taxpayers in that entity, by vote or value, exceed 50%. The second relevant principle is of more general application, and is that when assessing the amount of a tax-payer's interest in the relevant entity, if that interest arises under a trust, then it is calculated according to the tax-payer's apparent beneficial interest. If that interest arises under a discretionary trust, then its quantum is assessed and attributed according to the person's expected interest, assessed on the basis of the facts and circumstances of the trust, including historical distributions and any pertinent expression of settlor's wishes. I believe that this is part of the principle of "upward attribution" which attributes ownership of an underlying asset upwards to the superior individual ultimate owner.

48. C is thereby deemed to have a percentage interest in certain non-US companies, held under the M Trusts. A and J also have an interest in those companies, but as they are non-US taxpayers, they are not themselves affected, and their interests on a personal level do not raise - or have not in the past raised - the quantum of US taxpayer interests in the relevant companies above the 50% threshold. The trusts apparently operated on this basis for many years, and there was no US tax concern.

49. However, there were changes to the US tax rules in 2017 which, as I understand it, extended the scope of the attribution rules, in particular with regard to "downward attribution" a principle which is applied to the assessment of the requisite quantum of deemed US taxpayer investment control, and the 50% threshold above. (I derive what follows, centrally, from paragraphs 14 and 18 of DB's first affidavit and paragraphs 24, 28 and 31 of DS's first affidavit, although the evidence gives much further detail.) This doctrine of US taxation appears to involve that where a non-US taxpayer owns interests in both a US corporate entity, and a non-US corporate entity, the US-owned entity is treated as if it owned, also, the whole of its interested owner's interest in the non-US entity, for the purpose of assessing whether the 50% US taxpayer threshold in that non-US entity is exceeded. This "downward attribution" does not affect the tax liability of the actual non-US superior owner, but it can affect the tax liability of any other US taxpayer with an interest in the non-US entity, (apparently even if entirely unconnected) who may find that, when these further actual and notional interests in the non-US corporate entity are aggregated with his own, the entity becomes a CFC, and that other US tax-payer becomes taxable on his/its proportionate interest on the income of the non-US entity, despite not having received it.

50. It appears to be the effects of the application of this principle which is of concern to C and the US Family, in this case. I am not going to attempt to describe with precision how this is said to be brought about in the present case, but what I understand to be said, in simple terms is this.

51. A and J have interests in the companies in the M Trusts, as do C and other persons. Because A and J, have interests in the M Trusts, even though they are non-US citizens, their interests in the F companies that are held in the M Trusts could get "attributed down" to a company which I think was UM, which is a United States company. If that happens, then when you add up the shareholdings of the F Companies in the M Trusts as attributed to the various persons who hold, or are deemed to hold them (of which C is one), those companies would potentially qualify as CFCs and those US tax-payers with an interest in them will be treated as being taxable on the income attributable to their own shareholdings as if they had received a distribution even though they never did. Once a foreign company gets tipped over, by these rules, into the "excessive" US-control bracket which actually triggers this operation, US taxpayers have to pay tax on the current income of the relevant underlying company. I believe that that is the $30Mn that was paid by C in the United States previously. It was eventually slightly reduced on the calculation of the actual income in the relevant M Land company or companies.

52. I have been told that when a similar point arose in relation to companies held only in the M Trusts, the position was remedied by a (perfectly legitimate) restructuring of the companies in the M Trusts which meant that the qualification for being a CFC was not triggered. I understand that this can be done by (for instance) making other persons interested in the income of the relevant company, which therefore dilutes the shareholdings so that there is no 10% holding by a single shareholder and the CFC quantification is therefore not the met. Exactly what happened, or needs to happen, does not really matter. The important point is that something like this has previously happened in relation to the M Land trust companies, but steps could be taken to mitigate the problem in respect of those companies. The problem as now advanced by C is that unfortunately, owing to the fact that both A and J and she are interested in some relevant M Land companies, if the attribution of A and J's interests become "attributed down" to a US company, those interests (A's and J's) will be aggregated with hers (and possibly others) and will trigger this US tax liability for her, likely to be in the order of the $30Mn (dramatically pointed out to be some $80,000 per day) which she has previously been obliged to pay, unnecessarily.

53. With the assistance of her tax advisor DB, who has sworn some very comprehensive evidence here, C's submission on this Application is that she therefore needs to know about the structure of the W Trust, and in particular details of the operation of the insurance policy. Again, venturing into this rather abstruse area, the insurance policy itself, this insurance "wrapper" can be (I am told, and all experts agree in principle) a "blocker" on this "attribution down" process, and would prevent any interests in the companies held with the insurance policy funds being sucked into these notional attribution rules. However, this is only provided it qualifies as "insurance" within the meaning of the United States tax laws. That may not be simple. The particular definition of "insurance" for the purpose of US tax legislation may well be quite esoteric. However, provided the insurance policy is an effective blocker, then the attribution down does not take effect and the penalty of increased tax does not happen.

54. C states, though, that at the moment, because of the information which she has come to possess (about the structure of the companies, about what was happening when Mr X was alive and the way he dealt with the assets in the F group which I have already alluded to, and which I understand imports arguments about "investor control" for tax purposes) she is concerned that she feels currently obliged to accept that the relevant M Land corporations are indeed CFCs and therefore she must report her accepted tax liabilities on that basis. She would (unsurprisingly) like to avoid doing this if she can, but she says that at the moment she cannot because she does not know enough about the structure and operation of the W Trust and its insurance policy to be able to assure herself that the CFC provisions do not apply and that therefore she does not have to report this income as her income.

55. So the first thing C appears to be seeking is some kind of method of assuring herself - more accurately assuring her tax advisor, who is the person upon whose advice she would no doubt act in relation to her tax reporting - that in fact all is well, and the way in which the W Trust is structured and operated, with the insurance policy and the companies below it, does not give rise to a situation in which the

relevant non-US companies in the M Trusts become CFCs and a proportion of their income therefore becomes taxable as if in her hands.

56. But she also says, as I understand it, that just as there has already been some perfectly lawful restructuring in relation to the M Trusts/their assets which has enabled this consequence to be avoided in another instance, it is perfectly possible that there are options within the W Trust that would do the same. If that was the case, then she would want and expect and hope that that would be done in the W Trust too, so as to relieve her of this unnecessary tax bill. I observe that that, however, is a second stage. The first and current stage is that C asserts that she needs all the information requested because her tax advisor needs it to be able to deal properly with her affairs for her. As mentioned, her tax attorney has sworn evidence to this effect.

57. There has, though, been other tax advice as mentioned, obtained on behalf of the Trustee, and on behalf of A and J, and there is dispute about some of the assumptions made, and the validity of propositions derived from this and advanced on C's behalf. It is submitted by Advocate Cole, for example, that if C already knows, from her own knowledge or investigations, that companies within the W Trust are to be treated as triggering the CFC position, and/or that any income is to be treated as that of a CFC in her hands (as I think more accurately expressed) then she has already "crossed the Rubicon" as regards having knowledge obliging her to make such a tax reporting and nothing that she now learns from the W Trust is actually going to make any difference to that. Her second stage, ie invoking the proposition that once she really knows this is the case, she can actually ask, require, demand, or plead with the Trustee of the W Trust, to get it to change the trust structure, or whatever, is really nothing to do with the Application that is being made. It is the information, which C is now demanding. The purpose, whatever it may be, to which she may then wish or be able to put that information, is actually nothing to do with this Application, or the justifiable grounds of it.

58. The position there again, though, is that the Trustee has taken or seen tax advice which suggests that this tax argument is not simple or clear-cut, and there may be other reasons whereby the situation does not impose this tax liability upon C through these M Land companies. There is what is called the "safe harbour" resort. This is the principle that (not unreasonably) there is a limited extent to which the American tax authorities require taxpayers to investigate proactively whether a company in which they have in interest might be a CFC and hence bring this tax charge upon themselves, and that the taxpayer is fixed only with his actual knowledge. Thus, it is only if the taxpayer has <u>actual</u> knowledge that a company is a CFC that he becomes obliged to report as if it is. The taxpayer is given the benefit that she is not expected either to report income on the basis of mere suspicion, or to make further enquiries (save perhaps as to a limited extent) to elicit further information about the position. Quite how far this principle would be of protection, though, may be a matter of debate.

59. There are lots of points made in relation to this aspect, on the advice which has been obtained on behalf of the Trustee and/or A and J, and thus on what might be called A and J's side. The Trustee's advisors dispute that the "attributing down" provisions could be thought to apply to prejudice C on the basis of facts already known, but DB's riposte is that, bearing in mind his duties to his client, unless he actually sees and can consider the information sought (in particular the terms of the Insurance Policy) at first hand, so as to assure himself as to what the position is, he cannot conscientiously advise C that she can submit her tax returns lawfully on the basis that there is no CFC problem. That, therefore, is a reason, and it is urged very forcefully, as to why the US Family press the reasonableness of their claim that the Trustee be ordered to give them disclosure of the documents and information sought.

60. The Trustee has so far refused to provide the information because at the end of the day, it is a Trustee, and it is Trustee of this Trust, and it is conscious of its duty to act in the best interests of its beneficiaries (who are A and J), and it does not consider it within its trustee powers or duties to accede to this application, on any basis. I accept that the Trustee is in a difficult position, because on the one hand it has its beneficiaries wanting it to take (or rather not to take) a course of action, but on the other it has these Applicants who are pressing it to disclose information and (although this is a separate point,

at the moment) pressing that the Trustee ought to use its power to add B and the US Family as beneficiaries of the Trust.

61. As mentioned, the US Family have said that there is a real urgency about this, because they are potentially incurring tax at the rate of about $80,000 per day unless they can satisfy themselves as to the CFC position, or steps are taken to relieve them from this tax liability Because of this stressed urgency Advocate Havard submitted that in deciding this Application, the urgency which he submitted was required entitled me to adopt "*American Cyanamid*" principles in approaching my decision whether or not to grant the relief sought. The American Cyanamid principles were formulated as the approach for dealing with applications for urgent interlocutory injunctions. Put very broadly, they lay down that, assuming that there is a serious issue to be tried at all, the court should decide the matter on the balance of convenience, which, in the first place involves considering whether or not it can be expected that the party against whom the interlocutory decision might go could be adequately compensated for this by an award of damages, if the ultimate decision went the other way.

62. It is submitted that the US Family will potentially suffer irremediable prejudice in taxation and penalties if this matter is not dealt with quickly, and that there is no comparable prejudice that the W Trust, or A and J as its beneficiaries, might suffer, if the order for disclosure is made. Consequently, the US Family submits that the court should both grant them leave to bring the application for disclosure and decide it in their favour. On the basis of Mr Y's evidence, in particular, the court should find that there is an extremely strong case that the US Family should be added as beneficiaries of the W Trust, and that they are therefore able to invoke the court's general supervisory jurisdiction over the administration of a trust, with the consequent implementation of this being an order for the disclosure of the information which is sought, and on the balance of convenience in the current circumstances, that order should be made effective immediately.

(ii) BX

63. B's case is put forward on a similar basis. I do not think he says he has got an "exceptionally" strong case, but he says he has a "very" strong case to be granted the order sought, because of the likelihood that he should be added as a beneficiary of the W Trust, and thus with an interest in the Trust, and (even at this stage, therefore) its administration. Advocate Lyne deprecates the criticism of Mr Ymade in the evidence of A and J and says that the court should not get involved in any such issue. To avoid delay and bring about a swift resolution the court should simply get on with deciding this Application on the merits of the case, and the sole question is therefore, she submits, how the court should exercise its supervisory jurisdiction.

64. She submits that the situation favours making orders in B's favour forthwith, on the basis of the present evidence. However, if the Court is not inclined to do so, she indicated that B might require, and would seek, time to put in further evidence. She informed the Court that B has been somewhat pressed just lately, owing to suffering an unfortunate bereavement, which has naturally taken a lot of his time; if necessary, and if further evidence would assist, then B should be given the opportunity to submit it.

65. In essence Advocate Lyne submitted that B makes his Application because, despite the Trustee having been furnished with a detailed record of Mr X's wishes, clearly conveyed to it, it has been slow to implement those wishes despite initially indicating that it would do so. This latter was a reference to a letter whereby, with Mr X's suggested wishes having been forwarded the Trustee, the Trustee's response was that this was interesting, and to agree that it looked as if there were a strong case in favour of B's becoming a beneficiary of the Trust. However, and particularly I think in the light of objections from A and J, the Trustee has drawn back from this initial, and apparently encouraging, approach and has said that it can only be neutral and put the facts before the Court.

66. In my judgment, this was not an unreasonable approach for the Trustee to have adopted, and an initial superficial reaction cannot be held against it or subsequently used against it. It cannot be said that to make such an initial courteous and perhaps encouraging comment, even if possibly unwise, created

anything in the nature of an estoppel or an admission or anything like that. The Trustee needed time to review the position fully, in all the circumstances, to make any considered decision. Later, upon becoming aware of all the disputes between sections of Mr X's family, the Trustee invited the parties to engage in a process to enable it to consider, and make an actual decision, as to whether it was right for it to exercise its discretion to add B and the US Family as beneficiaries of the W Trust. It in fact set out a procedure under which this might be appropriately pursued, with representations being made. Neither B nor the US Family have chosen to engage with this suggested process.

67. That point is emphasised to me, because in this hearing I am not, of course, obliged, nor, indeed entitled, to make a decision about whether B or the US Family should be joined as beneficiaries of the W Trust. That is a matter for the Trustee. The only question actually before me is whether the US Family, and/or B, should be entitled to the information which they seek by their Applications, on the basis of the evidence and the situation as it stands at the moment - and it is accepted that at this moment they are not beneficiaries.

68. B's claim is obviously based on his relationship with his deceased father. The clear wishes which B emphasises are set out in the affidavit and information that is provided by Mr Y. It was suggested by Advocate Lyne at one stage that the first important point was whether the Court could take the view here and now that the circumstances demonstrated that it had never been intended that B should become a beneficiary of the W Trust, ie (she submitted) that he was implicitly excluded. She submitted that it could not; the evidence went nowhere near that, and indeed showed that Mr X's wishes expressed latterly in life were to the contrary. Since B was clearly not excluded, he could pursue his claim to be added, and the basis of his claim for information was, primarily, that he needed the relevant information in order to be able fairly to advance his case to the Trustee to be added as a beneficiary of the W Trust. He also needed this information so as not to be at a disadvantage vis-à-vis A and J, who of course would have such knowledge.

69. I do not think it is right to say that A and J do "know" the relevant information. The position is that they have more of a right to it, being actual beneficiaries - and certainly they will have more information as to what is actually going on with the Trust than B might have. However, the Trustee is not actually obliged to provide them with information (as I have already observed) even though they of course have a statutory right to apply to the Court to be provided with such information, if a situation arose in which they felt they needed it. B's case, though, is that unless and until he obtains all the information that he has sought in his Application, he is at a disadvantage vis-à-vis his half-siblings, A and J, and that that is not fair and reasonable. Consequently, the Court ought to intervene to direct that he too should receive such relevant information.

70. B has also expressed concern at what he perceives A might be doing, in relation to the companies, presumably those falling under the W Trust. A works in the F business and (although A denies this) B perceives that A appears to have a great deal of influence and even control over what is going on in the U companies. I have observed that this area of business is that of taking the bookings. The taking of the bookings creates a lot of income and there is a suggestion that monies going into the U Group are not being transferred on to the rest of the F Group companies as they were, previously, when Mr X was in charge. I have received some evidence about this. It was said that Mr X had the takings reported to him regularly, and he would then actually decide himself how funds were going to be distributed. It is said that the pattern has changed since Mr X died, and there is a suggestion that A is engaged in choking off income, which might be as much as even half a million dollars, from the other parts of the F businesses, and this is not fair and should not be simply allowed to happen. Those concerns have been cited as one reason why B's Application for information should be seen as a reasonable one that the Court should accede to.

71. I must make it clear at this point that all this, and most certainly the insinuations of wrongdoing behind it, is disputed by A. It is suggested to be an unfounded rumour, and is, in any event mere assertion unsupported by any actual evidence. But the particularly important point, Advocate Cole submits on behalf of A, is that A cannot refute what is being insinuated by B without having to disclose what he

regards as confidential trust information, which he should not be obliged to disclose. It is therefore not possible for A to respond in an open and a reasonable way without "selling the pass" and effectively giving up his rights to privacy in respect of the very information sought, thus giving B much of what he seeks by a backdoor. It is submitted that this is unreasonable, and that the Court should not place any weight on those criticisms in deciding whether to order disclosure of the Trust information sought by these non-beneficiaries, at all.

Beneficiaries' case

72. A and J, represented by Advocate Cole, object to both Applications on the following grounds. Their primary point is that B and the US Family are not beneficiaries; they are merely possible objects of the power to add. They point out that the statutory right to be given trust information which is conferred by s. 26(2) of the Guernsey Trust Law does not include either of the Applicants. They thus have no standing to apply under the Law itself, as to which the purposes are limited by s. 26(3), the terms of which are important.

73. The statutorily conferred right to receive information is given currently by s. 26 of the Trusts Law (although there was a previous manifestation in the 1989 Law, albeit possibly with less detail). S. 26 (1) of the 2007 Law says:

> *"A trustee shall, at all reasonable times, at the written request of*
>
> *(a) any enforcer, or*
>
> *(b) subject to the terms of the trust*
>
> *(i) any beneficiary*
> *(ii) the settlor, or*
> *(iii) any trust official,*
>
> *provide full and accurate information as to the state and amount of the trust property."*

That, it will be noted, does not even in fact cover A and J, because of the terms of the Trust.

74. Section 26(2) then says:

> *"Where the terms of the trust prohibit or restrict the provision of any information described in subsection (1), a trustee, beneficiary, trust official or settlor may apply to the Royal Court for an order authorising or requiring the provision of the information."*

So, in effect the Court has power to overrule the prohibition contained in Clause 26 of the Trust Deed.

75. Subsection 26(3) provides that:

> "*The person applying to the Royal Court for an order under subsection (2)…*" [thus a general approach to all who are entitled to apply for an order]*"…must show that the provision of the information is necessary or expedient*
>
> *(a) for the proper disposal of any matter before the court"* [not this case as there is no other matter before the court]
>
> *"(b) for the protection of the interests of any beneficiary",* [again, not this case] *"or*
>
> (c) *for the proper administration or enforcement of the trust".*

I do not need to read subsection (4).

76. So those are the grounds upon which someone who is not entitled to information as a beneficiary under the terms of the trust may apply to the Royal Court to order that they should have it nonetheless, and Advocate Cole relies on the point that, in this case, the only available basis to justify the application is s.26(3)(c), and that requires that it must be either *"necessary or expedient… for the proper administration of the trust*".

77. That, Advocate Cole submits, is not only a limitation, but it is an inevitable and necessary limitation in context even in respect of a beneficiary, or similar protagonist, because the Trusts Law is concerned with the due administration of trusts which have been settled under its aegis. The only course for a non-beneficiary must be the invocation of the Court's inherent jurisdiction. However, he submits that that too must be constrained by the same limitation, because it would be extraordinary if a non-beneficiary, being compelled to have resort to the Court's inherent jurisdiction in support of an application for disclosure of information, should thereby gain a more extensive right to information than would an actual beneficiary, whose right is constrained by s 26(3). Put at its lowest, the principles on which it is laid down that the Court could allow a beneficiary to obtain information despite not being entitled under the trust deed, must be a strong guide as to the principles which must be applied to someone who is not even a beneficiary.

78. Advocate Havard for the US Family does not appear really to accept this proposition, in terms. He does not submit that I should or can disregard s. 26 entirely, but he submits, in effect, that the inherent supervisory jurisdiction of the court is not constrained by the terms of s.26, not least because, insofar as it existed independently of the Trusts Law in the first place, that inherent jurisdiction has been specifically preserved by section 84(2)(b) of the Trusts Law itself, which says

> "*Nothing in this Law derogates from the powers of the Royal Court which exist independently of this Law in respect of trusts, trustees or trust property*".

He submits that, since the inherent powers of the Royal Court exist (*ex hypothesi)* independently from the Trusts Law, that inherent jurisdiction, whatever its ambit, has been saved.

79. There is thus a dispute here, but I prefer and accept Advocate Cole's argument. I find that it would be extraordinary if, in applying the Court's inherent jurisdiction to an outsider to the Trust, I were to be expected to disregard the principles that were set down as defining the parameters for the compulsory provision of information to persons who have some interest in and connection with the Trust. Indeed, from the context of other cases it seems that the courts have actually regarded this as the proper test to apply when asked to order a trustee to provide information which a trustee is not otherwise actually obliged to provide. (I will be referring more to this later, when considering law, and to the case of *Schmidt v Rosewood Trust Ltd [2003] UKPC 26* which is the case that actually seems to me to provide the exemplar of the basis for invoking the inherent jurisdiction which the Applicants rely on.)

80. To sum up, Advocate Cole submits, on behalf of A and J, that the Court's jurisdiction is not exercisable just because it would be a nice thing to do, or it might help, or it might be gentlemanly, but only where it is actually necessary, or at least expedient, to order whatever is sought for the "*proper"* administration of the Trust, and he emphasises that this is the actual Trust itself. In deciding the point he submits that one must therefore have regard to what has been called the "proper purpose" of the relevant trust. This is, in effect, identifying the intention of the settlor, at the time when the trust was settled, as to its general objective and purpose which thus defines the scope of any power that is authorised to be exercised. Importantly, it is accepted by all parties here that the power to add a beneficiary is a fiduciary power, and if it is a fiduciary power it has to be exercised in the furtherance of the proper purpose (that is: the intention) of the trust.

81. Advocate Cole then submits that when you examine the features of the W Trust, you find that the proper purpose of this trust is the benefit of J and A as the designated beneficiaries. He points out that there was no letter of wishes at the time of the settlement of the W Trust, so that its purpose cannot

be regarded as expanded beyond the express or necessary implications of its terms. He points out that even Mr Y says (for what it is worth) that he was not involved in the setting up of the W Trust, and he does not purport to give any evidence or express any knowledge as to what was then going on. T, as the Trustee, has itself confirmed that it did not receive a letter of wishes or anything like that at the time of the Trust's inception. There is therefore nothing to indicate that any divergence from the actual wording of the Trust Deed can have been intended and so one can and must infer what the proper purpose of the W Trust is, simply from the true construction of the Deed, ie interpretation of its wording in the light of the known material circumstances.

82. Advocate Cole points out that, in contrast to the M Trusts, the W Trust was and is, irrevocable. The Trustee has said that this was for tax purposes, and Advocate Cole submits that there is therefore no evidence of any intention to benefit anyone else within the scope of the Trust. On the face of it, it was only intended to benefit J and A, who were one section of Mr X's family at that stage, and indeed the policy is a policy on A's life. Whilst there is a wide power to add beneficiaries, that in itself is not relevant, and is certainly explicable on the basis that it might subsequently be beneficial to add A and J's children (fairly obviously), or perhaps other dependants, but that (he points out) would be an operation for the benefit of A and J, and thus within the ambit of the proper exercise of a fiduciary power for the current beneficiaries. It could not be said to be the case that just because you could add "anyone in the world" on the literal wording of the power, that indicated an intention on the part of the settlor to bring anyone in the world within the scope of potential intended benefit. Still less does it mean that the fiduciary power can be exercised in a manner not otherwise authorised within the fiduciary nature of the power.

83. As to the Applicants' claimed and emphasised reliance on Mr X's wishes as purportedly expressed subsequently, Advocate Cole points out that that is not contemporaneous with the establishment of the trust and there is clear authority that the "proper purpose" of the trust is to be ascertained at the time it takes effect, ie upon its establishment. All the wishes that are referred to in Mr Y's evidence as evidence of what Mr X wanted to happen, and the wills he made, and so on and so forth, date from no earlier than 2017, but the trust had been established, and operated according to its stipulated structure, since 2005, some 12 years earlier. Consequently, while the wishes apparently expressed later by Mr X are certainly very wide, they are simply not relevant. They cannot alter or extend the pre-existing "proper purpose" of the Trust as it falls to be ascertained and taken into account as a factor relevant to a decision by the Trustee as to whether it could and properly should exercise any power to add a further beneficiary or beneficiaries to the Trust.

84. For present purposes, those wishes are simply inadmissible as evidence, and even if they were at all relevant to an exercise of the power to add, (which I am not sure that Advocate Cole even accepted), that would only be at the second stage of actually making a decision upon exercise of that power; it could not affect this prior stage, as to whether information should be disclosed to the Applicants even though they are not beneficiaries. Advocate Cole submits that the decision for the Court at this stage is not a matter of a discretion which can be exercised taking into account the subsequent events which appear to have produced Mr X's efforts to express his later wishes. If the position is that adding B and the US Family as beneficiaries of the W Trust could not take place because the proper purpose of the irrevocable W Trust was the benefit of A and J, and such addition could not be seen to be for their benefit in any way (as he submitted was the case), then the Applicants attempts to base their claim to receive disclosure of information on the grounds of being as good as beneficiaries, or strongly likely future beneficiaries, must inevitably fail. The proper purpose of the W Trust according to its terms, cannot be said to be other than to benefit that branch of the X family constituted by J and A.

85. Thus A and J submit that both Applications far from being "strong" are irremediably weak because the Applicants simply do not come within the ambit of the proper purpose of the W Trust. But in any event, they cannot show, either, that any order for disclosure of information which they claim they "need" is either necessary, or even expedient, for the proper administration *of the W Trust*. Advocate Cole stresses his point, because he submits that whenever "the administration of the trust" is talked about in this case, there is an inclination to slide into the view that such administration really includes

the administration of all three trusts and the general F business empire in particular, because of an impression that you cannot separate them out; they are all part of one enterprise. However, that, he submits is not accurate, and is not good enough. Administration of the F Group empire is not the same thing as administration of the subject Trust. This is because the Guernsey Trustees and the Guernsey Court are obliged to look at this Trust, the W Trust, which is an autonomous Guernsey trust, and it is not permissible to say that the order sought might be good for the administration of some other trust or for some other greater purpose, and that the order sought is necessary or expedient for that. The test is, on any basis, what is necessary or expedient for the proper administration of this Trust?

86. The Applicants proceed as if it were somehow vital to implement Mr X's overall wishes as subsequently said to have been expressed, but that also is not good enough. Very importantly those were not wishes that were expressed as being of any influence on the purposes of the W Trust when it was established. Put (by me) in a slightly different way, there is an implicit assertion that implementing Mr X's later expressed global wishes will be for the overall benefit of everyone – it might be suggested that implementing Mr X's wishes by bringing the whole of the F Group empire together and dividing it out as he envisaged might result in everybody benefitting more than if the component parts remained separate – and so on that hypothesis it would be necessary for everyone to have equality of access to information. However, Advocate Cole submits that, apart from begging the question of benefit, that is simply an irrelevant consideration. A and J, as the sole beneficiaries of the W Trust can decide what they regard as being in their own interests, and this must, on any basis, influence their Trustee's decisions, and they cannot, in effect, be dictated to as to what they ought to decide is in their interests by anybody else.

87. Advocate Cole also submits that the fact that B and the US Family have declined to apply for consideration to be added as beneficiaries at this stage, makes their application somewhat hollow, because they are actually declining to apply for a decision as to the very matter which would make clear their status to require the information. Whilst the excuse for this is that they say they need the information sought in order to make those very applications, Advocate Cole submits that this is disingenuous, and what is really happening is that they have decided that they will be in a better position by trying to by-pass any such qualification and attempt to gain advantage by invoking this supposed inherent jurisdiction. He submits that this simply should not be permitted, and the Court should keep its attention firmly focused on what is the apparent purpose of the W Trust and thus what the scope of its jurisdiction in relation to the W Trust might be.

88. Advocate Cole submits that other, separate, issues relied on do not assist in strengthening either Applicants' cases. B has asserted that he was only originally excluded from the W Trust on a temporary basis because he was getting a divorce; he was excluded from the M Trusts in March 2003 by an order that was made and a direction that was enacted in 2004, thus before and by the time of the actual establishment of the W Trust, in 2005. He points out that he was subsequently reinstated in relation to the M Trusts. However, he was only reinstated in 2018. It is submitted by Advocate Cole that this casts considerable doubt on the assertion that this was intentionally a "temporary" measure, as regards establishing the W Trust more than 10 years earlier. If it had really been intended to be a temporary status, then the position would have been kept under review and the restoration would surely have been implemented earlier. Therefore, Advocate Cole submits, there is no evidence of any intention to exclude B being only temporary.

89. As far as the US Family's tax problem is concerned, Advocate Cole submits in effect that it cannot just be accepted, on the basis of the mere assertions in the evidence of DB, that there really is a problem. I think he is also inclined to say that any problem is actually self-inflicted, in that, if you actually go and make enquiries and find out things that you are not obliged to find out, but that put you in a more difficult position, that is neither the problem nor the fault of other persons such as the W Trust Trustee and its beneficiaries, and cannot oblige them to assist. (This point is countered by a submission that C has not really had any choice in this matter, but has been obliged, so far as she has it, to obtain the concerning information for other purposes.) Advocate Cole submits that this is quite irrelevant to the affairs of the W Trust and its beneficiaries; the Trustee could not take sympathy for

C - even if merited - into account in making any decision, and therefore the Court should not be doing so either.

90. In effect, the submission on the part of A and J, at the end of the day is that any problem as to the amount of US tax which C and the US Family are or feel obliged to pay is not A and J's problem; there is no principle requiring them to assist and their Trustee should not be obliged to assist if its beneficiaries are not prepared to do so voluntarily. It is rhetorically asked; on what basis does this factor gives grounds to compel the Trustee? because the Trustee accepts and asserts that it owes no duty to anybody other than the beneficiaries of the Trust. Thus, the only indirect duty which might be prayed in aid comes back to the question whether B and/or the US Family have any grounds to say that they have such an exceptionally strong case to be added as beneficiaries of the W Trust, that it is plain, at this stage, that they really must be added, and they can therefore be treated as being "as good as" beneficiaries, in the present situation. If that could fairly be said at this stage, it might possibly justify granting the order for disclosure in their favour, but Advocate Cole submits that, in practice, they do not get anywhere near that point.

Trustee's position

91. The Trustee's position is that it takes a neutral stance in this hearing, and simply seeks to enable the court to understand what it perceives to be the position under the law, and the position in which the Trustee finds itself. It points to the fact that this is actually a very simple trust. Its set up just is not complicated. Its sole asset is the life policy on A's life A and J have always been the sole beneficiaries. There have been no distributions ever made. The Trustee has no access to the full value of the policy at all during A's lifetime, but only after his death. The trust instrument contains the clause I have already mentioned which absolves the Trustee from having any involvement in any business activities carried out within the indirect assets of the Trust, and indeed I think says effectively it cannot be so involved. The Trustee's function is limited to appointing the Investment Manager required and receiving monthly results. The Trustee is not obliged under the trust instrument to provide information to anyone.

92. The power of addition is broadly drafted; that is accepted. As to its own position the Trustee says that it is not in a position to decide whether it should or will exercise its power to add, or not. It accepts that it must make such a decision, considering all relevant circumstances, and that it should be doing so dispassionately (as it were), but with a view to the proper purpose of the Trust and in the interests of the beneficiaries of the Trust. It points out that it has offered a procedure for it to make a decision, but that has not been taken up and indeed has been rejected. It states that that during Mr X's life it was never suggested to the Trustee that the power to add should be exercised in favour of either B or the US Family. Instead, the Trustee says that it was under the impression that it was only likely that it would be the children of A and J who would ever be added. It observes that documents now relied on as showing Mr X's wishes were never conveyed to it during Mr X's life, at all – even though some of the recording of such matters took place well before his death. There was no letter of wishes at any time. There was an occasion in September 2019 when adding Mr X himself as a beneficiary of the W Trust was suggested and requested to the Trustee, by Mr Z; the Trustee was asked to (and did) take steps to enable this to be pursued, but in the event, it heard nothing more and this change was not proceeded with. (When delivering my *ex tempore* judgment, I had the wrong impression that the Trustee had not been aware of this proposal at the time, but the evidence of Ms AM of the Trustee shows that it was so aware, as described above. My mistaken recollection did not have any effect on my actual decision.)

93. The Trustee also notes that its own beneficiaries, (A and J), appear to dispute the provenance of some of the documents that are relied on in support of the Application.

94. It reminds the court of the "non-intervention principle" which is that the court will not intervene to substitute its own decision for that of a trustee where a decision within the parameters of reasonable decision-making has been made or is open to the trustee to be made. It makes clear that, albeit in a

difficult position, it is not attempting to invite the court to make any decision on its behalf. It accepts its responsibilities and wishes to make its own decisions in the matter and it is willing to do so. It therefore invites the Court to be cautious about trespassing on the area of the Trustee's discretion, reminding the Court of that particular principle. It respectfully submits that where a decision involves a discretion, e.g. as to whether or not to disclose information, or to add a beneficiary, then the trustee's decision would seem to be an end of the matter unless the trustee is behaving perversely. But it points out, as I have said, that at the moment there is no question of a decision to add a beneficiary being taken because the Court is not being asked to do that, and the Trustee has offered to do it but has not been asked to proceed. The only matter before the Court at present is whether information as sought should be disclosed to the Applicants in the current circumstances.

95. The Trustee has also given evidence that it has taken its own tax advice. Having done so, it is of the view that the US Family's tax concerns are not, in fact, related to the activities of the Trust and its operation, but arise because C seems to want to press that something needs and ought to be done to ameliorate her position, as has (apparently) been done in M Land. That, though, is a different point. It is submitted that the US tax situation of C and her family is neither obvious nor simple, nor, is it in fact, any concern of the Trustee and beneficiaries of this independent Guernsey trust. It is respectfully submitted that it is not really appropriate for the Court and the Trustee to get embroiled in any investigation of such tax position, and they really should not have to.

96. As to B's Application, the Trustee notes B's level of concerns about, (as it is put) the "level playing field" and his ignorance of what is going on elsewhere, as facts that surround the present application. However, B, as a non-beneficiary, is outside the scope of the Trustee's duties. The Trustee is in a difficult position. It is willing to consider exercising such powers as it actually has, but it takes an entirely neutral stance as to whether the application for disclosure of information should be granted; that is a matter for the Court, but bearing in mind the Trustee's cautionary note about the principle of non-intervention, and the fact that the decision as to whether B or the US Family should be added as beneficiaries is not a decision being taken at present. Indeed, I think that the Trustee itself submits that the question what is the proper purpose of the trust? is not one that the Court ought to opine on definitively at this time, because that is a matter that would need to be considered in the context of any actual application to which it is relevant. At present, therefore, the court should simply deal narrowly with the question of whether the applications for information can and should succeed or not, with the apparent purpose of the trust being background to that.

The law and authorities

97. So, I turn now to the law. I have already drawn attention to the statutory provisions. I am not exercising the statutory jurisdiction in the Trusts Law, because, as is agreed, the Applicants are not beneficiaries of this trust and nor do they qualify to seek this relief under any other statutory category. So, the only entrée for the Applicants to seek to get the Court to exercise its jurisdiction in their favour is the inherent jurisdiction, a discussion of which is to be found in a case called *Schmidt v Rosewood Trust Ltd [2003] UKPC 26*. However, before coming to that I must look at the development of the law in Guernsey.

98. The first Guernsey case that dealt really with the obligation of a trustee to produce information or where it could be sought by beneficiaries was *Stuart-Hutcheson v Spread Trustee Co Ltd [2002] WTLR 1213* in 2002. It is a decision of very general application. What it decided was that the Guernsey Court would apply analogous rules to those that had been imported from England in relation to matters such as a trustee's obligation to provide information, as with other similar aspects of the operation of trusts. This is because the question whether such an obligation arose was a question of what are normal incidents of a trust, a concept which had been imported into Guernsey law from English law. The case specifically decided that somebody who was merely a discretionary beneficiary of a trust would have a right and would therefore be allowed to apply for information as to the operation of the trust, because they had an equal interest to an actual, express or direct beneficiary of the trust in holding the trustee to account for its/his administration of the trust assets.

By common consent, the rules relating to the provision of information to a beneficiary have their origins in the fact that a beneficiary has a right to require a trustee to provide an account and to perform its obligations properly. That entitlement was held to apply to a discretionary beneficiary just as much as to a direct beneficiary. It is apparent from that, that the Applicants in this case just do not qualify on that general ground. They are not beneficiaries and have no right to hold the trustee to account, in their present position and status.

99. The next case in Guernsey was *Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited et al [2003–04] GLR N [32]*, which took place in 2004 and was a decision of Lt-Bailiff Talbot QC. That was decided after *Schmidt v Rosewood* to which I refer later, but its materiality is that it did decide that when Guernsey law imported the rules and statutes relating to trusts from English law, that importation did not oust the inherent jurisdiction of the court with regard to applications related to trusts; however, in order to invoke such inherent jurisdiction one would need to convince the court that what it was being asked to do was to vindicate a normal and natural incident of trust law, no doubt on the basis that such power would then have been imported into Guernsey law as part of such general inherent jurisdiction. So, the upshot seems to be that the inherent jurisdiction of the Court can be invoked, but it is necessary to find that it is part of an inherent jurisdiction in relation to trust law as a general matter.

100. *Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited et al [2003–04] GL N [32]* was an application of these principles to a beneficiary, (a former beneficiary, but nevertheless an actual beneficiary) who wanted to see what letters of wishes had influenced the acts of the trustees in making distributions at a time when she had been a beneficiary. She succeeded. However, once again this case does not deal with the present situation of an application by a non-beneficiary. There has been no case in Guernsey in which a non-beneficiary has made any such application.

101. I will just mention the case of *Patel v Patel [2016] GLR 36* in 2016, to which Advocate Cole invited me to have regard, because he wanted to point out that that was a case in which, whilst it was beneficiaries who had applied, they had purported to apply under the inherent jurisdiction of the court - but the case nonetheless still referred to the principles laid down in s. 26 of the Trusts Law, to which I have already referred. I am not sure how much further that takes the matter because, once again, it is beneficiaries who were applying to the court, even if they chose to claim to invoke the inherent jurisdiction, but it does suggest that in considering the inherent jurisdiction it was not thought appropriate simply to ignore the terms of s. 26 but was tacitly accepted that they would have some influence. So, it is some little, if rather oblique, support for Advocate Cole's proposition that the approach of s.26 would still be appropriately applied to any invocation of the court's inherent jurisdiction.

102. I now come to *Schmidt v Rosewood Trust Ltd [2003] UKPC 26*. This was actually a decision of the Judicial Committee of the Privy Council on an appeal from the Isle of Man, so it is not directly binding upon this Court, but it is obviously very highly persuasive. In that case the applicant was the son of a person who had been both co-settlor and a major beneficiary of a trust established in connection with his work, who was Russian and had died in suspicious circumstances. The son was held to be entitled to apply to obtain information from the trustees of the trust despite the fact that he was not a named beneficiary. He had, though, two separate capacities. One was that he was the personal representative of his father and was therefore able to succeed to any rights his father might have had, in the name of his estate, although that was only in relation to matters that would have applied to his father's entitlement as a beneficiary whilst alive. However, in relation to one only of the two relevant trusts he was also the object of a power of the trustees, namely a power to add beneficiaries. This trust had a very general power (at its clause 3.3) to add beneficiaries to the trust and this power could have been exercised in his favour. The question was whether that might give him a *locus standi* to invoke the court's jurisdiction to obtain the order for disclosure which he sought.

103. Clearly there is some similarity in this latter situation with the situation here, and Advocates Lyne and Havard rely strongly on this case as showing, by parity of reasoning, that they have sufficient *locus standi* both to make and to succeed in their present applications.

104. Whilst he obviously has to accept that the Privy Council concluded that an application by a non-beneficiary in the circumstances of the *Schmidt* case was maintainable, Advocate Cole points out that the case does not show that such an application necessarily succeeded even on the facts of that case, which he submits were overwhelmingly strong and far stronger than the facts of either Application made here. The Court observed, in that case, that there was really a kind of "void" in the trust caused by the father's demise. It was a trust for distributions to be made to executives of a Russian oil company although obviously there were a number of these, but there was also a letter of wishes from the father (who it will be remembered was a co-settlor of the trust) stating that he would wish that his son should benefit in his place when he died. In that situation it was said that the son had a very strong claim to be added as a beneficiary and insofar as it was therefore necessary for the court's inherent jurisdiction to be exercised to enable him to obtain necessary information, that jurisdiction could be exercised in his favour. The strength and sympathies of the case in the particular circumstances of the father's death are obvious.

105. But it is important to note what happened in the Isle of Man. Initially, the Manx court did order disclosure of the trust information. The Manx Court of Appeal (the Staff of Government Division) reversed that decision. The Privy Council reinstated the decision of the High Court, but not to the effect that the information was ordered to be disclosed, but only to the effect that there was jurisdiction to grant such an order. The matter was remitted to the High Court to reconsider with guidance given by the Judicial Committee as to what it was appropriate to take into account when faced with such an application.

106. Several paragraphs of this judgment have been cited in this case and I refer first to [51] where the Board, having referred to authority suggesting that the crucial distinction was the bright line divide between the status of being a beneficiary of a trust and not having such status, with the court having jurisdiction in favour of the former but not the latter, and that the court's jurisdiction to order disclosure of trust documents, being part of its inherent jurisdiction to supervise trusts, *could* extend to be exercised in favour of persons who were not beneficiaries of the trust in appropriate circumstances. The jurisdiction was not to be treated as determined by the applicant's being able to assert some "interest" akin to a proprietary interest, in the trust documents, by virtue of his relationship with the trust.

> *"[51] Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts."*

So, in other words it is bringing it entirely under the inherent jurisdiction. It continues:

> *"The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest,* [which had been previously asserted to be the kind of right that was necessary to bring entitlement to require disclosure of documents]. *The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion."*

107. Then there are various authorities cited, in relation to the Board's conclusion above, that there is not a black and white division between beneficiaries, actual or discretionary, of the trust, on the principle that they are its actual objects and other persons simply are not, thus leading to the conclusion that the inherent jurisdiction can extend to such persons in appropriate circumstances. The judgment ends from [66] with conclusions:

"66. Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts. There is therefore in their Lordships' view no reason to draw any bright dividing-line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in Re Baden's Deed Trusts (No 1) [1971] AC 424) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction.

67. However, the recent cases also confirm (as had been stated as long ago as In re Cowin 33 Ch 179 in 1886) that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

"68. It would be inappropriate for the Board to go much further in attempting to give the High Court of the Isle of Man guidance as to the future conduct of this troublesome matter. But their Lordships can, without trespassing on the High Court's discretion, summarise their views on the different components of the appellant's claims.

> *"(1) It seems to be common ground that during Mr Schmidt's lifetime substantial distributions were made for his benefit, all or most by allocation of funds to the two companies (Gingernut and Petragonis) which were regarded as being (in some sense) Mr Schmidt's. The appellant as Mr Schmidt's personal representative does not accept that these funds have been fully accounted for. His contention is that in respect of allocated funds Mr Schmidt ceased to be a mere discretionary object, and became absolute owner. On the face of it the appellant (as personal representative) seems to have a powerful case for the fullest disclosure in respect of these funds.*
>
> *(2) The appellant as personal representative would also, on the face of it, have a strong claim to disclosure of documents or information relevant to the issue whether, but for breaches of fiduciary duty (such as for instance overcharging) more funds would have been available for distribution to Mr Schmidt, and would or might have been allocated to him in practice. The Board express no view whatever as to whether the appellant has a case for overcharging or any other breach of fiduciary duty. But claims of that sort have been put forward in the 1998 proceedings, and the possibility must be noted in order to make the position clear."*

[This case was in 2003].

> *"(3) As regards the appellant's personal claims under the Angora Trust since his father's death, his status as beneficiary of any sort depends on the issue of construction discussed at paras 28–32 above."*

[That was, I think, in relation to a "proper purpose" argument because the applicant was not specifically named in the power, but I do not think this matters for present purposes]

> ***"(4) As regards the Everest Trust, the appellant is a possible object of the very wide power in clause 3.3, (see paragraph 33 above) but an object who may be regarded (especially in view of the Everest letter* [the letter of wishes]) *as having exceptionally strong claims to be considered.***

> *"69. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed, the order of Deemster Cain restored and the matter remitted to the High Court of the Isle of Man for further consideration in the light of the Board's judgment."*

I have emphasised, in the citation above, what seems to me to be the particularly pertinent passage.

108. There are various aspects there that seem to me to be pertinent here. Firstly, this seems to me to be very much a case where the Board is extending a recognised jurisdiction (the established jurisdiction of the court to order the disclosure of trust documents as part of its fundamental supervisory powers over trusts) incrementally, rather on the basis that one should, as it were, never say "never" to there being jurisdiction as a matter of a rigid principle, but rather retain flexibility to enable the jurisdiction to be applied (or not) on a more nuanced fact-specific basis if appropriate. The Court was therefore pointing out that whilst the applicant, as the son of the deceased might be unable to claim at the moment to be a beneficiary, he appeared to have a very, very strong claim ("*exceptionally*" so), with various matters taken together, to suggest that he ought to be added as a beneficiary, and he could argue that he ought therefore to be favourably considered as a party in whose favour the jurisdiction ought to be capable of being exercised. The Board was not deciding that the jurisdiction to order disclosure of trust documents should or must be exercised in favour of the applicant, but only that there was jurisdiction to do so (despite his not being an actual beneficiary) and the fact that he appeared to have an exceptionally strong claim to be added as such a beneficiary was a factor which the decision-making tribunal could take into account in deciding whether to exercise that jurisdiction in his favour, when it considered all the circumstances of the case. I note in particular that the Board was not saying either that Mr Schmidt should be added (it was very careful not to do this), or that the Manx High Court should order disclosure of the trust information to him. The Board was simply saying that his potential claim to be added as a beneficiary was a matter which it would be appropriate to consider.

109. Advocate Cole stresses the point that the Board appears to regard it as an insufficient reason for the court to exercise this jurisdiction, that one only had a theoretical possibility of benefiting. Advocate Cole submits that, therefore, it is not good enough for it to be submitted, for example, on B's behalf, that there is always the possibility that at some time in the future it could be seen as appropriate for him to benefit, because it might be that, in the context of a "family" trust, providing for B might even be suggested to be in the interests of A and J. That would be only the kind of remote, theoretical possibility that should not be given any credence as a basis for ordering the production of such extensive information as is currently sought to be disclosed.

110. Before leaving the authorities, I should mention *Grand View Private Trust Company v Wen-Young Wong and Others (Bermuda) [2022] UKPC 47*, which I have not mentioned yet, and which illustrates the point about the "proper purpose" of a trust. At the one extreme you may have a very narrow family trust which says that the beneficiaries are A and B and the extent to which a power of adding might therefore be exercised to add beneficiaries would have to be exercised in the context of that

being the intention of the trust – it is a particular branch of the family that is supposed to be benefiting, and that defines the proper purpose of the trust.

111. But in contrast there is this *Grand View* case itself, showing the other extreme, yet another Privy Council case, but very recent, and from Bermuda. There, the settlor set up a family trust which was expressed to be for the benefit of family members, and their issue and so forth, quite plainly with the flavour of having the intention to provide for family members, generally. However, it had a very widely worded power for the trustees to add persons as beneficiaries. At the same time the settlor set up a purpose trust to implement philanthropic and suchlike purposes which he wished to benefit. A long time afterwards, the trustees of the family trust decided to alter the family trust by adding the purpose trust as a beneficiary and excluding family members. They had literal power to do so under the family trust instrument. They thus effectively transferred all the assets of the family trust for the benefit of the purpose trust. This action was challenged, and indeed in the end not merely the dispositions, but the actual power to add the purpose trust as an object of the family trust, was held to be void, because it was outside the scope of the fiduciary power that was given to the trustee to add beneficiaries to the family trust. This was because it was outside the proper purpose of that trust, it being plainly intended to operate as a family trust.

112. It was very easy to see that point in that case because the two trusts were set up together, with the obvious implication that the settlor had intended to divide assets out, ie the assets to benefit his family and the assets to benefit his philanthropic concerns, and they were to be separate and were to be conducted separately. Consequently, it was quite outside the power of the trustees to add the purpose trust to the family trust. It was not so much, even, the question of excluding the family members; it was actually the question of adding the purpose trust in the first place, that was even regarded as being void.

113. That is an extreme situation. I am not sure that it says anything of direct application as far as this case is concerned, but it is a striking example of the application of the proper purpose principle, and the limits which it may impose on what trustees can do. What it does show is that the proper purpose of a trust is not driven by the inclusion of a very wide power to add beneficiaries (as here) but, rather, that the scope of a very widely drawn power to add beneficiaries will be limited and cut down by consideration of the otherwise apparent proper purpose of the trust.

114. Advocate Cole would no doubt argue that this case illustrates that if one concludes that the W Trust was set up with the intention of benefitting A and J, then changing it to benefit others not sufficiently connected with A or J is impermissible, but we are not yet at that point. All this case does, therefore, is to illustrate Advocate Cole's argument as to the proper purpose of the W Trust potentially having limitations which would preclude B or the US Family from arguing that their claims to be added as beneficiaries of the W Trust could have any validity.

115. Lastly, on the law, I simply record that I was also referred to the case of *Re Manisty's Settlement [1974] 1 Ch 17*, but I did not find it to be of any assistance.

Discussion and conclusion

116. The authority of most relevance is plainly the *Schmidt* case. However, what *Schmidt* decides is merely that the court has an inherent jurisdiction which may be invoked to make orders in favour of parties who are not current or former beneficiaries or objects of a trust. It does not assist very much, if at all, as to when and whether it is appropriate to make such an order except to indicate, by inference, that it requires exceptional circumstances. Since Mr Schmidt also had a claim to information as personal representative of his father, and the relative weights of such statuses did not have to be considered and simply were not considered in *Schmidt*, no more guidance than that can be gleaned as regards the narrower facts of this present case.

Schmidt

117. On the jurisdiction point, *Schmidt* shows that it is not the case that the dividing line between having, or not having, *locus standi* to obtain an order for disclosure of trust documents is drawn between persons who are actual beneficiaries or objects of trust powers, and persons who are not - it can be exercised in favour of the latter – but the decision whether to do so or not is heavily dependent on the facts of the individual case, and all the balancing factors which the Board says must be applied (see [67] of the judgment). It also certainly seems to me that the Board is not actually encouraging the notion that these sorts of applications are reasonable. Rather, the Board is looking at the case before it and saying, (I have read between the lines here) that this is an extreme case (the circumstances are fairly clearly well-described as "*exceptional*") and therefore it might be reasonable to grant the relief sought; however, making that decision must be done on the basis of the considerations which the Board has set out as guidance. As the Board did not feel able to make the actual decision, but remitted it to the High Court for redetermination, the Board must have regarded the information and arguments before it on this score as having been incomplete.

118. Thus, I approach this case on the basis that I do have possible jurisdiction to make the orders sought in favour of the Applicants, but that I must consider all the relevant circumstances and competing considerations in favour or against doing so, and the exercise of the jurisdiction is exceptional.

119. I must also bear in mind, in my judgment, the actual basis of, and reason for, the existence of the inherent jurisdiction, at all. The jurisdiction which I am asked to exercise by the Applicants is extension of a more recognisable and readily exercised jurisdiction, to order information to be given to beneficiaries. The jurisdiction is held available in order to enable relief to be granted in sufficiently compelling circumstances but is not a free-standing jurisdiction. It is noted in *Schmidt* as being part of the court's inherent jurisdiction for the purpose of "*supervising, (and if necessary intervening in) the administration <u>of the trust</u>."* I emphasise this because, in my judgment, this justification for the basic existence of the jurisdiction must not be lost sight of**.** This is an administrative jurisdiction; it is not a dispute resolution jurisdiction. It is also assumed for the purpose of facilitating the administration of the particular trust to which any application relates.

120. This makes the hurdle which faces the Applicants, as outsiders to the W Trust, a high one because to grant the relief which the Applicants seek cuts right across the principles of autonomy of trusts, and, moreover, the *Schmidt* case itself, seems to me to be a very, very different case from the present.

121. I have been provided with evidence about what happened when this trust was set up in the first place. What defines a trust at all is that it is administered for the purposes defined when the trust was established (although those purposes may, of course build in some flexibility). The trustees must keep on the "straight and narrow" as regards the way they exercise their powers and so forth, and whilst they make their own decisions, the do so in the context of the intentions of the settlor at the time he settled the trust and thus put the control of the relevant assets out of his own power and into the trusted hands of others. People may, of course, change their minds, but just because 15 or 16 years later the settlor may change his mind and would then wish to promote something different from what he set up years previously, even though he (obviously) thought it was the right thing to do then, does not change the direction and purpose of the original trust, certainly in the absence of any mechanism built into the terms of the trust itself to enable this. The background to this whole case seems to me to be that the settlor is said to have changed his mind latterly about what he would like the structure of the trusts concerning his family members to be, but this imports a scheme which is at odds with what he originally did, with some members of his family and entourage believing that this scheme should be implemented (with the original scheme being overridden) and some not necessarily accepting this, (they say, because they do not accept the scheme relied on as having represented Mr X's true and complete wishes). This background itself emphasises the very different situation here from that in the *Schmidt* case.

Scope of the jurisdiction

122. Returning to general points, relevant to the exercise of any such jurisdiction, Advocate Edwards has reminded me of the "non-intervention principle" and in my judgment this is not something which the *Schmidt* decision disturbs at all. Whilst the jurisdiction is described in *Schmidt* as *"better viewed as being an aspect of the court's inherent jurisdiction to supervise, and if necessary intervene, in the administration of trusts*", this does not, in my judgment, extend the basic concept that the court's powers are exercised for the purpose of facilitating due and effective trust administration. The non-intervention principle still subsists as part of the basic approach.

123. Examining the jurisdiction under which these orders are sought, the first point is that the court has jurisdiction to *supervise*. The court may therefore lend its powers to advise a trustee, or to assist with something a trustee wants to do in administration, or if there are problems because of deadlock or some other problem. The court will not let a trust fail for any difficulty in the practical details of doing things at the coal face (as it were). The court's jurisdiction can support, or remedy gaps, if necessary. The jurisdiction extends to a power of *necessary intervention*, if, for example, the court is of the view that all is not happening as it should do in the trust, or if its attention is drawn to possible claims of breach of trust or excess of powers or some other mis-step occurring within the workings of the trust. Thus the court will intervene if necessary, but the object is always to achieve the proper administration of the particular trust with which it is concerned, and it operates in the context of the principle of non-intervention which says that it is the trustee who has been charged with the duty to administer the trust, and the court should not intervene unless the trustee's powers are inadequate, or are being operated improperly or (improperly) not at all.

124. The third general point is that, in my judgment, I cannot and should not ignore the terms, of s. 26. I am satisfied that although I may be being asked (because the Applicants have to) to exercise the inherent jurisdiction of the court, the terms of s. 26 are indicative of what the objectives of an exercise of disclosing trust information would be, and this ought to be kept in mind. The basic principles of s.26 are, again, all focused on the proper administration of the subject trust, ie the W Trust. They are not focused on the proper administration of the M Trusts, or the proper administration of the F Group affairs, or of all the family assets which may be the subject of a possible war between factions of the X family, but of the W Trust. Therefore the court would look at the W Trust and see what is necessary or expedient for its proper administration, and in my judgment the same objectives must be applied, by parity of reasoning, to the operation of any power justified as being exercised under the inherent jurisdiction.

125. I would accept that the concept of the proper administration of a trust can be extended, if it is established, or as good as established that a third party does indeed have a sufficiently strong moral claim to be added as a beneficiary because, by that stage the due administration of the trust would have come to include taking that fact into account. It would be better still if they actually are added, but if they come that close to it (as actually was found in *Schmidt)* then an order which takes account of this circumstance can be justifiably made. However, as already mentioned, *Schmidt* does not say that an order will or must be made, but only that there is jurisdiction to do so.

126. Against that background, it does seem to me that the Applicants face a high hurdle in convincing me that the present situation justifies the court intervening, in the way which is requested, not least because I need to be satisfied that the orders requested are necessary or expedient for the proper administration of the W Trust, because the inherent jurisdiction, under which these Applications are necessarily made, is there for the purpose of furthering and/or facilitating this.

The Applications themselves

127. I start from the position that neither B nor the US Family are beneficiaries of, nor indeed have any legal connection with, the W Trust or its operation. I realise that the US Family and B bristle at being called "strangers" to the W Trust, but in legal terms it seems to me that is what they are. Each of them claims to have a "strong", or even an "exceptionally strong", claims to be added as beneficiaries. Whilst the Privy Council in the *Schmidt* case was prepared to describe the claim of the applicant there,

to be considered (but I note that it was only that) for appointment as an additional beneficiary of the Everest Trust in that case as being "*exceptionally strong*", it did not suggest that this strength should be determinative of any such application. It indicated no more than that a claim of such apparent strength could possibly be a factor which might persuade a court to exercise its discretion in favour of the relevant applicant. Even in making this comparison of the cases on the facts, I agree with Advocate Cole that neither of the claims which are advanced by the Applicants here, taken at their highest, has even the strength of Mr Schmidt's claim to be considered for addition as a beneficiary of the Everest Trust in that case.

128. Both Applications are based on the proposition that the evidence of Mr X's wishes during the few years before his death (dating from around 2017) provide material which must reasonably convince the Trustee of the W Trust to add their respective names as beneficiaries of the W Trust. Much if not all of this evidence comes from Mr Y.

129. I have not found it necessary to make a decision on the disputed issue of whether Mr Y's evidence should be ruled admissible, because, even taken at face value, I find that it does not provide grounds for considering that the claims of B and the US Family to be added as beneficiaries of the W Trust have anything like the overwhelming strength which is argued for, and which in my judgment would be a necessary minimum for justifying the making of an order that trust documents be disclosed to them, at this juncture.

130. These events occurred more than 10 years after the establishment of the W Trust, and benefitting either B or the US Family does not immediately appear at all to have been within the purpose and intention of Mr X in establishing the W Trust at that time. I have taken into account the fact that there is some evidence that the settlor does not seem to have paid a great deal of attention to the legal effects of where he had actually placed properties into trusts or other structures, or who should be entitled to what money, etc, during his life, but I emphasise that all the Court can do is to look at the structures which he actually set up, and consider the true effects of these. I bear in mind the terms of the W Trust, and in particular that it is irrevocable, and that there were no provisions included for taking account of any subsequent wishes of the settlor.

131. The material upon which it is now sought to place such substantial reliance is therefore, put at its highest, evidence of the wishes of a settlor (now deceased) with no call or right to influence the trust. I am not, of course, saying that these wishes, if substantiated, are a circumstance with the Trustee would be obliged to ignore totally upon any consideration of any application by B or the US Family to be favourably considered for addition to the class of beneficiaries of the Trust, insofar as they are a fact. The actual decision on this will be that of the Trustee and not this Court. I am not to be taken as expressing any views upon what any such decision ought to be, and the Trustee would properly have regard to all potentially relevant material. On any basis, though, this would have to be considered in the context of the terms of the Trust.

132. That is not a point which I am called on to decide here. All I need to decide (and I do decide) is that any impact which the Mr Y evidence may have, even ignoring that it is untested hearsay, is not sufficient to show, or even suggest, that any application by B or the United States Family to be added as beneficiaries of the W Trust has overwhelming *prima facie* strength, such that the Court could fairly assume that it is bound to succeed on any rational basis, or that these Applications can fairly be determined as if the Applicants were "as good as" beneficiaries.

133. For all the reasons advanced by Advocate Cole, this simply cannot, in my judgment, be assumed or accepted. It has just not been established, and in my judgment the Court cannot and should not even form any view as to the likelihood that it would be established, in either case, let alone make orders based on the assumption, likelihood, or even possibility that it ever would be. In this situation, I do not consider that this Court can possibly treat any of the Applicants as having a claim to be added as a beneficiary of the W Trust which is so exceptionally strong that they ought to be treated as having

an equal (or, in practical terms, greater) right than the actual beneficiaries to disclosure of information which is confidential to the Trustee and actual beneficiaries.

134. My findings, therefore, as to the negligible weight which should be accorded to the matters set out in Mr Y's evidence upon these Applications, even if they are all accepted to be true, means that it is unnecessary to consider whether that evidence should even be admitted, owing to its content being disputed in at least some respects by A and J, and Mr Y's having been less than enthusiastically co-operative about attending for potential cross-examination. It is not necessary either for me to form a view as to whether this was deliberate evasion.

B's Application

135. B's Application is based, further on his dual assertions, first, that it should be inferred that he was only omitted as a beneficiary of the W Trust in the first place because of his then current circumstances, going through a divorce, and this was only meant to be a temporary limitation and, second, that he needs the information which he is seeking in order better and even fairly to be able to make his (meritorious) application to the Trustees to be added as a beneficiary of the Trust.

136. As to the former, I do not find the evidence of this proposition very convincing, and certainly insufficient to confer extraordinary strength upon his Application.

137. As to the second, he invokes the application of a "level playing field" for his intended application to the Trustee. Quite apart from the fact that I do not see such an application as being a matter of levelness of playing fields at all, it also seems to me that this proposition is very much putting the cart before the horse. It is not necessary or even appropriate for the Court to intervene at this early stage, at the outset of any such application being made.

138. In the first place I have difficulty in seeing, and I can recall no convincing example being given to me, that any of the information sought could have any material bearing on the general issue of whether B had/has a sufficiently strong equitable claim to be added as a beneficiary of the W Trust, in all its circumstances. B claims that he needs all this information in order to make his application to the Trustee. But the merits of his case must, it seems to me, be based on circumstances entirely extraneous to the Trust itself and its operations, and the nature of the information sought. I do not see how his gaining information as to what assets are in the Trust, or how it is being or has been operated, can provide anything material <u>for B,</u> to the question whether there is any case for the Trustee to add him as a beneficiary of the W Trust, or would enable him to make a better case to do so. If it could, there would even appear to be a conflict of interest between B and the existing beneficiaries, as to whether such (helpful) information ought to be disclosed to assist him, on any basis. I am therefore entirely unconvinced that there is any case of which the court can properly take account that trust information is either relevant to B's professed position or should be ordered to be disclosed to assist him.

139. Second, if there were any such possible problem as regards the need for further relevant information in order to give proper consideration to any application by B to the Trustee, the way in which it would be appropriately dealt with would seem to me to be by the Trustee entertaining such an application made without access to such allegedly relevant information, and if the applicant raises a convincing case as to the materiality of such information and that a more useful or helpful case could only be made by him after access to it, then <u>the Trustee</u> would decide the matter then (it might or might not accept the proposition) in that particular context. Such an assertion at this early stage does not, in my judgment, justify the court intervening, now, to override the general principle that the trust information is confidential to the trustee and (possibly) the actual beneficiaries. I do not think that it would be a proper exercise of the inherent jurisdiction for the court to jump ahead and pre-empt the position.

The US Family's Application

140. The US Family's Application rests firmly on the alleged strength of the evidence of Mr X's last wishes and the proposition that the Trustee should inevitably be seeking to implement these, a proposition which I have rejected above. It has, however, been supplemented by propositions as to the great necessity of obtaining the relevant information, from C's point of view, owing to its possible impact on her US tax position and the assertion that ignorance of this information may be costing her many $Millions.

141. As far as these taxation concerns were raised, they have been mainly raised as grounds for the determination of this issue to be pursued (and determined in C's favour) as a matter of urgency. On examination, however, it seems to me that, once again there are assumptions underlying these propositions as to supposed obligations upon the Trustee of the W Trust to which they can justifiably give rise, and in practice, those calls are really limited to the procedural point about time. I find them of little, if any, further relevance to the substance of the Applications.

142. As regards the evidence as to the workings of the US tax system, I have to say that I prefer Advocate Cole's submissions on the subject, as against those of Advocate Havard, although I express my great gratitude to the latter for the clarity with which his submissions as to how the system worked were advanced. However, I hold that the position of C and the US Family in the US under the US tax system is just not something which is the concern of the W Trust, nor indeed of this Court.

143. I recognise that the inherent jurisdiction of the court has been described (see *Schmidt* at [51] above) as being to give "protection*"* (see: "*The object of the discretion including a mere power may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion")* and that it could be said that a person who is a potential object of a power to be added as a beneficiary could be said to be "the object of a discretion". But not only (a) is this a highly discretion-dependent "right", but (b) I am asking myself: protection from what? It seems to me that the answer is: protection from being disadvantaged in the relevant capacity, in the way a trust is being run. That is the kind of situation in which it is envisaged that the court's ability to confer "protection" may be invoked. I do not see this as being intended to extend to totally extraneous matters, and certainly not as far as protection from possible adverse tax consequences in another jurisdiction which the W Trust itself has got no control over.

144. Neither the concept of the W Trust, nor its Trustee, owes any duty to the US Family, to try to assist them to mitigate their potential or apparent tax liabilities under the rules of another jurisdiction, and certainly in the absence of any wish to do so. It might be the position, in some circumstances and if it were not seen as being adverse to them, that the beneficiaries of a trust might be prepared to assist, or authorise their trustee to assist, in such a regard, but I cannot see how they could be compelled to assist, in the absence of any case that this attitude was a breach of some other duty owed to the relevant third party. I cannot conceive of one, and none has been suggested. Whilst, therefore, it might be said not to be very "nice" not to assist, and it might be that it is purely self-interest of A and J to say, "no, we are not prepared to help, and we are not prepared to authorise our Trustee to help", that is a decision which it seems to me the Court cannot overrule in the absence of some hugely influential factor which I do not find to be apparent and indeed, cannot at the moment conceive of. I certainly do not see that the incidence or otherwise of the possible tax liabilities, to the extent, and arising from the circumstances, that I have actually been shown in this case, comes anywhere nearing justifying overruling the principles of autonomy of a trust structure, and the privacy of trust information, for the potential benefit of a stranger to the Trust.

145. This is particularly so when, it seems to me, the potential benefit to C lies not necessarily just in getting the information and therefore possibly being able to produce this to the tax authorities to show she is not liable for tax, but, on the evidence, rather so that she can then press for changes to be made to the structure of the W Trust, (as to which she is not even a beneficiary) in order to ensure that her tax liability in the United States is mitigated. This all just seems to me to be a step far too far away distant

from the "*proper administration of the W Trust*" let alone its being necessary or expedient for such administration.

146. So for all the above reasons I do not consider that the US Family's possible tax problems add any factor of weight to the question whether or not the Court should exercise its discretion to order the disclosure of trust documents to her.

147. To sum up, insofar as it might be material for the Court to take account of the Applicants' cases to be added as beneficiaries, I consider that I must exercise my jurisdiction in the context of the purpose for which that jurisdiction exists, namely (here) to effect or facilitate the proper administration of the W Trust. Unless, therefore, there are clear grounds upon which I can say that the proper administration of the W Trust requires, or will benefit from, the granting of these Applications, I should not do so. The only basis on which I could come to the conclusion that the proper administration of the Trust required these orders to be made would, it seems to me, be if I considered that the claims of B and/or the US Family (as the case may be) to be added as beneficiaries of the W Trust were so overwhelmingly strong that they could safely be treated as if they had succeeded. However, on the basis of the evidence before me, and even taking the evidence of the absent Mr Y at face value, I do not get anywhere near seeing this condition as fulfilled.

148. I cannot simply look at the situation as if, yes, there are three separate trusts (the two M Trusts and the Guernsey Trust) but since they were all dealing with Mr X's family assets, they were all intended to have the same sort of interlinked overall effect. There is a very large question mark about whether that assumption is even the case. I am struck by the fact that the W Trust was an entirely different scheme, and on very different terms, from the M Trusts, which quite obviously were "family" trusts, in the sense of trusts which were being used as vehicles for benefitting a family in general terms. Any argument about the proper purpose of the W Trust impliedly encompassing the purpose of adding, even, other members of the family who had not been named or might even not have been born, seems to me, therefore, to encounter very different inferences from those that might be drawn in the case of the M Trusts. One cannot take the same approach to both.

149. Even assuming that I took Mr Y's evidence at face value, despite the objections that are made to it, the fact that he was not prepared to turn up to be cross-examined about it I cannot find any sufficiently strong support from this that the proper purpose of the W Trust should be taken to have been to include other members of the wider X family, and therefore that there is a good case for arguing that it would now be proper to bring B or the US Family within its benefit. (I emphasise that this comment is not a decision on whether or not B and the US Family could be added as beneficiaries of the W Trust, but simply that the evidence at present does not suggest that they would be able to mount such a sufficiently strong case for this that it should influence my only decision here, as to whether they ought to be given the benefit of the Court's inherent jurisdiction to order the disclosure of the documents sought. I emphasise this point for the benefit of the Trustee, because the effective consideration of any such claim is a decision for the Trustee.)

150. Even if it were appropriate for me to assume that these Applicants possibly could be added as beneficiaries of the W Trust as they wish to claim, the question would then be whether I should order the disclosure which they seek in advance or anticipation of such possible, actual, addition. I would not think it right or appropriate to make any such order. Firstly, their status is still only theoretical until then. Secondly, I reject the notion that B, or even C needs this information for any purpose legitimately connected with the Trust.

151. I should add here that a further factor which inclines me to be extremely cautious about ordering the disclosure of such information is the context of hostility which there plainly is, between the factions of the family. I can neither adjudicate upon the rights or wrongs of this at this stage, nor has it any real relevance to the narrow question before me. It would be entirely disproportionate for me to consider the merits of any accusations of bad behaviour or suchlike which have been made, or to consider who is in the wrong, or more in the wrong. But what I can and should do is to take account

of this context, and in such a context the court must, in my judgment be cautious about ordering the disclosure of documents on any but the most substantially justifiable grounds, when such disclosure could have an extremely sensitive effect, and sway any natural balance of advantage between hostile parties.

152. The documents in question are trust documents and are, by definition, private. I am prepared to accept, although I have not viewed them, that they are likely to contain or disclose material which is commercially sensitive to entities within the Trust, as to corporate strategy and commercial activity and suchlike. In addition, I am aware that there have been and probably still are legal proceedings on foot between factional interests. There is therefore the prospect that ordering disclosure of information may have the consequence of altering the balance of advantage and disadvantage in these family relationships. In such a situation the Court should, in my judgment be very careful that its orders do not have unintended or "knock-on" consequences, and the safer course is not to interfere unless the Court is absolutely sure that there are very strong grounds for doing so, and to alter the basic legal "bottom line" position.

153. This is that the W Trust is being administered, as far as I can see, without any difficulty at the moment for the benefit of the beneficiaries who are its express and established beneficiaries, and whose interests are therefore the immediate and proper priority of the Trustee. Any positive order which I might now make could certainly have the effect of tipping or altering that balance, and I consider that that would be a dangerous thing to do. So this is another reason why, on balance of relevant considerations, I will not exercise my discretion to make any order as sought. It seems to me that in the context of these family relations, I should, on any basis, require a particularly strong case as to any justification for overriding the privacy of the W Trust, whether at the behest of B or at the behest of C. I consider that no such sufficient case has been put before me, on the present evidence, to justify doing so. But on any basis, balancing the cases put forward by each of the Applicants against the case for upholding the autonomy of the W Trust, I find that the latter is not displaced, and I will dismiss these Applications.

154. For completeness, I should say that I have considered whether, if I were to order any such disclosure, I could do so subject to appropriate safeguards, but I have concluded that this would not be possible, even if it were a matter which could tip my discretion into being inclined to make an order in favour of the Applicants, which it is not. Not only could I not devise any satisfactory safeguards, but they would also involve taking undertakings from persons who were not within the jurisdiction, and they would therefore be difficult or impossible to police or enforce. I think that is probably all I need to say about that.

155. I should also add, although it will have become apparent, that I do not consider that *American Cyanamid* principles have any place in considering the appropriate disposition of these Applications.

156. These Applications are therefore both dismissed.

Postscript

157. This judgment was originally delivered *ex tempore* at the end of a three-day hearing, on 21st February 2024. I was asked, at the time, by Advocate Cole to confirm that I was not making any material findings of fact as to two matters, namely Mr X's wishes and A's working in, or for, the U Group. I did so, specifically. My findings were merely as to the existence of evidence.

158. This should have been plain. There were two issues in the applications, namely

    (i) did I have jurisdiction to make the disclosure orders sought by the Applicants at all? (Answer: Yes. This was a point of law), and

(ii) in all the circumstances, should I make the orders sought? (Answer: No – even taking the evidence adduced by the Applicants at its highest. This was an exercise of discretion).

No binding findings of fact on issues which were in dispute were necessary for this exercise, nor could they have been made, as a matter of jurisprudence. There was no way any such apparent "finding" by me, could give rise to any issue estoppel *per rem judicatam* (none being a decision on an issue which was fundamental to the ultimate decision made), and otherwise, any "finding" apparently expressed by me is simply a matter of an opinion expressed by a third party on the evidence then before such third party, and as such is *prima facie* of no evidential weight, or relevance, on any collateral issue: see what I said in *Kazzaz v Standard Chartered Bank* [2023] GRC049 at [136] and [145].

159. I stated, as was the case, that my subsequent perfected written judgment would not differ in the conclusions or reasons which I had given *ex tempore*, but might well add to, explain, or elaborate on my reasons, and would obviously clarify or correct any mistakes as appropriate.

160. Before completing my approved judgment (I was off-island from 3rd – 26th March 2024), I received, through the Greffe, a letter dated 26th March 2024 from Advocate Cole, asking (in effect) that I specifically incorporate into my written judgment certain observations as to matters relating to the first point above (Mr X's wishes). This was quite inappropriate. My judgment had already been delivered in substance, and its ultimate perfected form was a matter for the court (me) only. Unsurprisingly it elicited immediate objections from the two Advocates for the Applicants.

161. None of this correspondence should have happened. Whilst it would no doubt be permissible for the parties to approach the court jointly, if it appeared that some matter of real importance might be unresolved or recorded in a mistaken or misleading way in a perfected version of an *ex tempore* judgment, such an application is tantamount to re-opening the hearing. This can, of course, be done if necessary, before a judgment is handed down in final form, but only by observing proper procedures, and that is emphatically not by one party approaching the court unilaterally, even whilst copying other parties into the correspondence. If there is no agreement, and the matter or issue is regarded as sufficiently important (bearing in mind possible costs consequences), a formal application must be made.

162. I therefore prepared the written judgment, which would become the authoritative record of the decision which I had made and delivered previously, without reference to that correspondence. I explained this, and my view that the subsequent sequence of correspondence should not have happened, in a private accompanying note to the parties.

163. Since I had already delivered the decision, I did not regard the "approved" version of the judgment, which I sent out on 22nd April 2024, as being a draft judgment circulated for comment under Practice Direction No 1 of 2012, at all, but rather as a "final" version, albeit it would not become public because the matter had been heard *in camera*. (I did send out an accompanying, anonymised, version as a "draft" because this <u>was</u> intended for publication, and I wished to ensure that all parties were reasonably satisfied with the anonymisation which I there proposed.) However, I received a message back from Advocate Cole's office asking me not to "hand down" the final version of my judgment pending submission of suggested "points of correction" which had been identified, and which were being canvassed for comment and agreement by the other parties, in view of my own previous note.

164. I assumed that this was an intended implementation of the liberty to suggest amendments or corrections to a judgment circulated in draft, as authorised by PD 1/2012. Since it was always possible that there were still textual errors in the judgment which I had overlooked, I was content to let the "approved" version be reviewed in this way, even though it had not, strictly, been a draft.

165. The liberty to suggest amendments to a draft judgment accorded to advocates by PD 1/2012, so far as material, reads as follows;

> *"4……. to enable the advocates to submit suggestions to the Court about typing errors, factual errors, wrong references and other minor corrections of that kind… so that the necessary corrections to the text may be considered and incorporated, if appropriate, before* [final handing down]. *This facility is confined to the correction of textual mistakes and is not to be used as the occasion for attempting to persuade the judge to change the decision on matters of substance."*

166. I was subsequently informed that the Advocates were unable to agree on potential amendments to the text of the judgment. From Advocates Lyne, Edwards and Harvard (and agreed by Advocate Cole) I received a set of mostly typing, punctuation, spelling or other perceived clerical errors, and one or two minor factual inaccuracies, together with a few more significant errors (such as, my misdescription of the effects of the US tax system - which I had actually qualified as possibly being inaccurate - and my mistaken recollection of the Trustee's evidence as to the extent of their awareness of a proposal to vary the beneficiaries of the trust in 2019), which were indeed helpful and valid corrections, albeit not in any way affecting the substance of my decision. I was informed, however, that these three Advocates had not been able to agree further amendments and corrections being put forward by Advocate Cole, and that objection was taken to these on the grounds that they strayed well outside the appropriate scope of comments on a draft judgment, and effectively asked the court to make further or other findings of fact outside those within the scope of the proceedings and indeed, re-cast much of my judgment in such a way as to alter its tenor.

167. Advocate Cole therefore submitted his further suggested corrections separately, identified by colouring. They contained a raft of further extensive and significant amendments to the text of my judgment. These included, at various places: changing the language which I had chosen to describe facts or express my general impressions, making unnecessary and pedantic corrections of totally immaterial facts (and doing so even in places where I had specifically stated that perfect accuracy did not matter for present purposes) inserting repeated express statements that I was "*not making any finding of fact*" in a particular regard and/or that I had "*not heard any argument*" on a matter, suggesting repeated, laborious and unnecessary references to the fact that it was "B and the US Family" making a submission when, in context, this was perfectly obvious, and so on, and so forth. Over all, I considered that the other parties' objections were indeed justified, as to, at least, changing the general tenor of my judgment, and in places, also that the proposals amounted to inviting me to make additional "findings" which I simply had not made. They were also of no significance for the issues with which I was actually concerned, and did not affect my decision.

168. The extent and content of these further "corrections" was quite inappropriate, and all the more so having regard to the previous history. It was way beyond the ambit of the "textual mistakes only" corrections envisaged by PD 1/2012, which is all that could properly be proposed in the circumstances.

169. I was initially of the view that these proposals were virtually an abuse of process, such that I should simply decline to have any regard to the whole of Advocate Coles' individually suggested further "corrections", at all. On reflection, I decided that this was probably not appropriate, and that since I had effectively agreed to treat the "approved" text as being a draft, I ought to review those further corrections, and make any amendment which I would have thought fit to make if any particular one had been submitted under PD 1/2012 in the normal way, although always bearing in mind that this was to be a perfected version of an original *ex tempore* judgment, This is what I have done. Such amendments are minor, minimal, and broadly confined to places where (i) I am satisfied that my own intended meaning might be made more clear or (ii) where I might have inadvertently misrepresented Advocate Cole's own submissions.

170. The purpose of this postscript is, in the light of the above, to draw attention to the terms and, importantly, the limitations of PD 1/2012, as set out above. The PD does not require that any suggested amendments to judgments circulated in draft of this minor type must be agreed between the parties, but it is still the duty of the individual Guernsey advocate making such submissions to confine suggestions to the kind of points there mentioned. If suggestions come from other sources (such as support lawyers in other jurisdictions) then it is equally the duty of the Guernsey advocate to review these to ensure that only those which comply with the Practice Direction are submitted. This is both correct practice and avoids incurring excessive judicial time. It is also to be emphasised that it is entirely within the judge's decision, whether or not to accept, or to act in any way, upon any such suggested amendments.

Hazel Marshall KC
Lt Bailiff

21 May 2024