

Disclosure of certain documents to the respondents, also beneficiaries under the trusts, pursuant to section 69 of the Trusts (Guernsey) Law 2007. Cross-appeal, that the appellants have waived privilege in the documents concerned.

[2023]GCA084

Court of Appeal 576

IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE ROYAL COURT SITTING AS AN
ORDINARY COURT

IN THE MATTER OF

THE [WF TRUST], THE [E] TRUST, THE [L] TRUST AND THE [I] TRUST (hereafter the "[M] TRUSTS")

-and-

THE TRUSTS (GUERNSEY) LAW, 2007 AND/OR THE INHERENT JURISDICTION OF THE ROYAL COURT OF
GUERNSEY

BETWEEN

[B] AND [C] (COLLAS CRILL)

Appellants

-and-

(1) [G] (MOURANT OZANNES)

(2) [H] (MOURANT OZANNES)

(3) [K] (MOURANT OZANNES)

Respondents

MATTHEWS JA:

INTRODUCTION

1. On 12 October 2023, I gave leave to appeal against the interlocutory decision of Sir Richard McMahon, Bailiff, on 26 September 2023 that the appellants, beneficiaries under the captioned trusts should disclose certain documents to the respondents, also beneficiaries under those trusts, pursuant to section 69 of the Trusts (Guernsey) Law 2007. That decision was made in an application by the respondents against the appellants dated 16 August 2023. Although that application was made inside an application for directions made by the trustee of the trusts, the trustee was not a party to the respondents' application which led to the decision under appeal.
2. This is the judgment of the Court on the appeal itself. This appeal was heard remotely, and as a matter of urgency, because it appears that there are proceedings on foot in Jersey, in relation to which the documents sought are said to be potentially relevant, and in which a

hearing is currently fixed for 27 and 28 November 2023. The point is that, if this court were to uphold the order below, then the date for making such a decision should be sufficiently before that date as to enable compliance with the order, in time for the Jersey court to consider those documents.

BACKGROUND

3. The main part of the litigation is concerned with restructuring family trusts created by the settlor (who is now deceased) both in Guernsey and in Jersey. Although there are separate Guernsey and Jersey trusts, the intention is to restructure these “holistically”. The trustees in both jurisdictions will ultimately ask their respective courts to bless their proposals, but the trustees in each case do not intend to surrender their discretion.
4. The appellants are the settlor’s children by his first marriage. The respondents are the settlor’s second wife and their children. It appears that there is no love lost between them. One aspect of the proposed restructuring would be the needs of the beneficiaries. This in turn depends on their individual financial positions. The appellants say that the first respondent is much richer than she gives out, and that the trustee has not done enough to obtain relevant information. The appellants have therefore sought to find evidence to establish her resources.
5. First of all, they made an application for disclosure from the trustee and the first respondent of documents relating to her needs and resources. However, on 4 May 2023 the Bailiff refused this in part, on the basis that the trustee said that it no longer sought the information in question. The Bailiff took the view that this was a complete answer, relying on paragraph 102 of the decision of this court in *Re R and RA Trusts*, 470/2014. That was a decision on section 69 of the Trusts (Guernsey) Law 2007. We shall return to it later.
6. However, in addition to this, the appellants by their English solicitors ([English solicitors]) instructed a firm of private investigators ([Investigation Company]) to investigate the financial affairs of the first respondent. The appellants’ case is that the instructions were to use only lawful means of doing so. The investigators obtained certain documents, which appeared to show considerable funds in accounts belonging to the first respondent. The respondents have since labelled these documents as forgeries, an allegation which is contested by the appellants, who continue to rely on them.
7. Against that background, the respondents brought an application before the Bailiff, seeking an order for disclosure of documents evidencing communications between the appellants, the [English solicitors] and the [Investigation Company]. The Bailiff granted this application. It is this decision which the appellants now appeal to this Court.

PROCEDURE

8. In May 2023, [the Investigation Company] informed [the English solicitors] by way of a short report that they believed they had identified personal bank accounts in the name of the first respondent holding considerable sums of money. [The English solicitors] asked the investigators to confirm, and they did confirm, that the information in the report been obtained, and was being provided to the solicitors, lawfully. The solicitors asked the investigators to try lawfully to obtain documents to evidence the information in the report.
9. The investigators thereafter obtained or provided to the appellants various documents appearing to show transfers of funds from offshore entities to personal bank accounts connected to the first respondent. The appellants' solicitors provided copies of these documents to the trustee and to the first respondent on 7 June 2023. The first respondent denied knowing about the transactions which appeared from the documents to have taken place. From an early stage, she has asserted that the documents are forgeries.
10. The appellants sought leave to adduce these documents ("the June documents") in evidence at a hearing before the Royal Court of Jersey. The application was supported by an affidavit from [a Partner] of [the English solicitors], dated 13 June 2023. That affidavit at paragraph 3 contains the sentence "Unless expressly stated to the contrary, nothing in this affidavit constitutes a waiver of legal professional privilege."
11. It also contains the following:
 - "10. Meetings with the Investigation Company took place on 27 and 30 March 2023 at which background information was provided.
 11. On 12 April 2023, the Investigation Company confirmed that they were willing to be engaged by [B and C], and specifically confirmed, amongst other things, that:
 - 11.1 They would approach all contacts legally and appropriately;
 - 11.2 They would not undertake any work that was prohibited by government regulation or unlawful under the laws of any jurisdiction in which the work was conducted;
 - 11.3 They adhered to the laws of England and Wales, as well as to the laws of the jurisdictions in which they worked;
 - 11.4 They would not directly or indirectly pay or promise to pay, or authorise the giving of anything of value to obtain improper information or secure any improper advantage;
 - 11.5 They were aware of their obligations under US and UK bribery legislation; and
 - 11.6 They were an independent contractor and not an employee or agent of my firm or of [B and C].
 12. On 14 April 2023, and on the basis of both the above assurances from the Investigation Company and instructions from my clients, my firm instructed the

Investigation Company to proceed. In so doing, my firm specifically warned the Investigation Company that:

12.1 They were required to comply – in respect of all work undertaken in relation to this matter – with the provisions of English law and as well the civil and criminal law of any other applicable jurisdiction;

12.2 They were required, in particular, to comply with the requirements detailed by the English Court of Appeal in the case of *Imerman v Tchenguiz* [2010] EWCA Civ 908;

12.3 They were required at all times to comply with the standards referred to in the Security Industry Authority's Booklet entitled Enforcement: What to Expect from the SIA; and

12.4 They must not delegate or sub-contract any part of the engagement without prior written consent, and only where any third parties appointed by them complied with the special terms set by my firm.

[...]

15. On 12 May 2023, my firm asked the Investigation Company to confirm that: the Initial Information had been obtained and provided to my firm lawfully, under both English law and any applicable local law and regulation, including any applicable criminal law; and that they were not aware of any legal or other condition or restriction on use of the Initial Information, whether in the UK or elsewhere. The Investigation Company confirmed this to my firm the following day (Friday).

16. On (Wednesday) 17 May 2023, my firm instructed the Investigation Company to try to obtain documents to evidence the Initial Information.

17. On (Monday) 26 May 2023, the Investigation Company informed my firm that they had obtained documents that evidenced the Initial Information. ...

[...]

21. On review of the investigation findings the firm's compliance team and Compliance Officer for Legal Practice were requested to consider the obligations that might be attendant upon my firm.

22 On 27 May 2023, my firm requested that the Investigation Company clarify if the Copy Transaction Records (i) had been provided by human sources, (ii) had been redacted to remove reference to the identity of those sources, and (iii) had been sourced (and not hacked) from the ECB. The Investigation Company confirmed that the Copy Transaction Records (i) had been provided by human sources, (ii) had been redacted to remove reference to the identity of those sources, and (iii) had been sourced (and not hacked) from the ECB later that day, and on 28 May 2023 clarified further that the redacted information identified when and where the Copy Transaction Records were obtained.

23. On 22 May 2023, and as advised by my firm's compliance officer, I contacted English Leading Counsel (who had not previously been engaged on this matter) and requested that he undertake a conflict check regarding the [Appellants' and Respondents'] family. English Leading Counsel cleared that conflict check that same

day and, on 29 May 2023, my firm therefore provided English Leading Counsel with a non-disclosure agreement which he signed and returned that same day.

24. On 1 June 2023, my firm instructed English Leading Counsel to advise on the issue of admissibility into evidence of the findings of the investigation.

25. On 7 June 2023, and again without intending any waiver of privilege, English Leading Counsel provided his opinion.

26. The Investigation Company was instructed on the basis that it operated within the relevant legal frameworks and had assured my firm that they had complied with their legal obligations in obtaining the Copy Transaction Records. My understanding is that this is an important distinguishing feature from the scenario in, for example, the leading English case of *Imerman* (that I mention above), where it was common ground that the confidential information had in effect been stolen.”

12. On 16 June 2023, the Jersey court indicated that it would refuse leave to adduce the June documents.

13. In July 2023 the appellants’ solicitors received further material from the investigators (“the July documents”) which they provided to the parties on the same day as they received it. The respondents sought an order from the Jersey court that the appellants explain the circumstances in which the investigations took place. At a hearing on 28 July 2023 the Royal Court of Jersey ordered that the appellants provide an affidavit giving certain explanations regarding the investigations and both the June and July documents. This affidavit was made in the Jersey proceedings by [the Partner] of [the English solicitors] on 11 August 2023.

14. That affidavit contained the following statements:

“18. Both my firm's and [B's] and [C's] position is that all of the matters that I address below are protected by litigation privilege and/or legal advice privilege. Accordingly, [B] and [C] cannot properly be compelled to provide that information or related documents to the other parties or to the Court.

19. As indicated prior to and at the hearing on 28 July 2023, [B] and [C] are, however, keen to assist the Court in evaluating the Records and are themselves keen to understand the correct position regarding the information that appears on the face of the Records.

20. I am accordingly instructed to address what would otherwise be privileged matters in this affidavit. Importantly, however, I do so only on a strictly limited basis. [B] and [C] do not intend to waive privilege and have instructed me to provide the information in this Affidavit only in order to comply with their obligations under the July Act of Court and intend no wider waiver of privilege.

21. In so doing I seek to give, and consider that I am giving, a proper picture of the relevant underlying matters, whilst seeking to protect the legitimate wider litigation

privilege and legal advice privilege, as well as confidence, that [B] and [C] are entitled to – just as the other parties to these proceedings are entitled to.”

15. The affidavit makes clear that the appellants were aware of their rights to claim privilege, and that they could not be compelled to deal with matters covered by such privilege. It also makes clear that they wished to deal with such matters in order to assist the court, but that they wished to do so “on a strictly limited basis”, including that they “do not intend to waive privilege”.
16. On 28 July 2023 the Jersey trustees indicated to the Jersey court that they would not have regard to the June and July documents for the purposes of the restructuring, unless the Jersey court admitted them in evidence. The Guernsey trustee subsequently gave a similar indication by a letter dated 5 September 2023.
17. In the meantime, on 16 August 2023, the respondents issued an application in Guernsey, in which they sought an order that the appellants produce certain documents to the respondents. This is the application that was before the Bailiff and in relation to which he gave judgment on 26 September 2023, which is the subject of this appeal.
18. On 29 August 2023 the respondents made a further application in Jersey, for an order requiring the appellants to identify who within the [Investigation Company] had been involved in obtaining the June and July documents, and for permission to use material from the Jersey proceedings for collateral purposes, including an application for a *Norwich Pharmacal* order in England. The Jersey court in substance granted this relief on 8 September 2023, and listed the matter for a hearing in November 2023, to decide whether to admit the June and July documents into evidence in Jersey.
19. At the hearing of this appeal, the court asked why the parties were concerned with whether the court (whether in Guernsey or in Jersey) considered that the documents were admissible or not when it is for the trustee of a trust to decide what documents to place before the court on a “blessing” application, and not for the court. Advocate Wessels was unable to assist as to why this was being done.
20. On 18 September 2023 the application of 16 August 2023 was argued before the Bailiff, who reserved his decision. On 26 September 2023 the Bailiff delivered his decision *extempore* from his notes. In substance he acceded to the application. The order made dated that day by the Bailiff required the production of the following documents:

“The Third and Fourth Respondents do provide disclosure of all records of communications between the Third and Fourth Respondents and/or [the English solicitors] with [the Investigation Company] between 12 May 2023 and the date of this Order, and any reports or other documents provided to them by [the Investigation Company], by 4pm on 3 October 2023 by sworn affidavit, exhibiting all documents ... ”

21. On 29 September 2023 the appellants applied for leave to appeal and for a stay. The application was heard on 2 October 2023. Leave to appeal was refused but a stay of execution of the disclosure orders was granted, although any application for leave to appeal to the Court of Appeal had to be lodged by 4 October 2023.
22. An application to this court for leave was duly made on 4 October 2023. The three main grounds of appeal were that (1) section 69 does not confer power to make the order appealed, alternatively (2) the power granted to the court by section 69 should not have been exercised on the facts of this case, and (3) the documents concerned were subject to legal privilege to which the so-called ‘iniquity’ exception did not apply. There was also a fourth, ‘sweep-up’ ground that the Bailiff was wrong in all the circumstances to make the order that he did. On 12 October 2023, I gave permission to appeal on the first three grounds. I also granted a stay of the Bailiff’s orders until either the abandonment or the final determination of the appeal.
23. The respondents filed a respondent’s notice on 19 October 2023. That notice sought a variation of the disclosure order by extending it in time backwards from 12 May 2023 to 14 March 2023. The start date of 12 May 2023 was identified in the disclosure order because the Bailiff considered (at [45]) that the actions of the appellants “after receipt of the initial report [*ie* on 12 May 2023] amount to a form of iniquity”, so that privilege in the documents was lost from that date. However, the respondents contended that the order should cover the entire period during which the investigators were engaged.
24. The respondents’ notice also contended that there was an additional ground for affirming the order – namely, that the appellants have waived privilege in the documents concerned. This amounts to a cross-appeal.
25. In the meantime, the first respondent issued proceedings on 13 October 2023, the day after I gave leave to appeal, under CPR Part 8, in the Commercial Court in the High Court in London, seeking a *Norwich Pharmacal* order against [the Investigation Company]. On the same day an application notice was issued for the claim to be heard on an expedited basis. We were not told that a date had been fixed for the hearing of the claim or whether it would be dealt with on paper. We were however told that, in addition to defending the *Norwich Pharmacal* proceedings, [the Investigation Company] was taking other proceedings with a view to establishing the authenticity of the June and July documents (the [Investigation Company] documents), presumably to protect its reputation.

THE BAILIFF’S DECISION

26. The first question with which the Bailiff dealt was the source of the power conferred upon the court to make the order sought. The application itself was silent as to this matter. But the Bailiff regarded it (at [16] of his judgment) as “apparent” that the applicants were relying on the terms of section 69 of the Trusts (Guernsey) Law 2007. So far as material, that section provides as follows:

“69. (1) 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,

[...]

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

[...]

(2) An application under subsection (1) may be made by –

[...]

(d) a beneficiary,

[...]

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

[...]”

27. The next question with which the Bailiff dealt was whether the applicants (the respondents to this appeal) had standing to make the application. The Bailiff referred again to section 69 of the 2007 Law, and said:

“17. I am satisfied by virtue of Section 69(2)(d) that all three have standing to bring an application for relief under Section 69(1). That is because they are beneficiaries, and the provision on which they rely is that under Section 69(1), on the application of any person mentioned in subsection 2, the Royal Court may, (a), make an order in respect of, (iii), a beneficiary, it is added, ‘or any person connected with a trust.’”

28. The third question was the scope of section 69, and in particular whether it conferred power on the court to make the order sought by one beneficiary against another. The Bailiff referred to, and indeed relied on, the decision of this court in *Re R and RA Trusts* (470/2014), where the judgment of the court was delivered on 20 May 2014 by Birt JA. We return to this decision later. For present purposes, we note that that case was one where the application was made by the trustees of certain trusts for an order that some of the beneficiaries of those trusts provide information to the trustees. In the Royal Court, the Deputy Bailiff (now the Bailiff) refused the application. In line with comments of Harman LJ in *Re Londonderry’s Settlement* [1965] Ch 918, 930G-931C, one of the other beneficiaries, rather than the trustees, appealed the decision. This court allowed the appeal in part.

29. In the present case, the Bailiff held that section 69 extended to the case where one beneficiary of the trust sought disclosure from another beneficiary in order to protect the interest of the beneficiaries as a whole. He said:

“18. ... Whilst I have no doubt that in the vast majority of cases where the court orders the provision of information the order will be made against the trustee or other fiduciary who owes a duty towards the beneficiaries, I do not agree that the court’s jurisdiction should be confined in this way. If the court concludes that in order to protect the interest of the beneficiaries as a whole it is necessary to make an order that a beneficiary provide information, I do not see why it should be precluded from doing so. The court would be making the order for the very purpose for which the supervisory jurisdiction exists. Even if one accepts that Section 69 was intended to give statutory form to the court’s inherent jurisdiction to supervise trusts, the court has not been referred to any case where it has been held that the inherent supervisory jurisdiction is not wide enough to make such an order, and it seems to me desirable that it should be able to do so in the interests of the beneficiaries as a whole.

19. ... I accept that the provision must be construed in the context of the statute in which it appears, which is a statute dealing entirely with the law of trusts. From this context it is clear that the jurisdiction may only be exercised in connection with the supervisory jurisdiction of the court in relation to trusts. So, for example, the fact that the applicant is a beneficiary of Trust A and the respondent is a beneficiary of Trust B, which is wholly unconnected, does not of itself confer jurisdiction on the court to make an order requiring, for example, the respondent to disclose details of his personal bank account in connection with an unrelated matter just because the applicant and the respondent are each a beneficiary. Such an order would have nothing to do with the supervision of any trust.

[...]

24. Accordingly, I accept, on the basis that I am bound by this decision of the Court of Appeal, that Section 69 of the 2007 Law confers a broad jurisdiction on this court, but I acknowledge that there must be an appropriate connection to trust proceedings. But I am satisfied that in this application there is such a connection. In particular this is not a free-standing application, it has been brought in the context of the trustees’ application for restructuring of the four trusts that are being dealt with by this court, and the other trusts, the [Jersey Trusts], as before the Royal Court of Jersey. In that context I draw attention to the fact that [the appellants] have made previous applications to this court for disclosure from [the respondents] in exactly the same way that this application is now being brought the other way round for disclosure from the appellants.

25. In short, I am satisfied that there is a sufficient nexus to say that this is part of the supervisory jurisdiction that this court is exercising in relation to these four trusts ...

26. I reject Advocate Adkins’ submission that this is tantamount to being an application to require private citizens to disclose private documents. As I have said, the legal team acting for [C] and [B] chose to go down this route, and they then sent the materials to [the Trustee] outside of what can or cannot be admitted as evidence in the Jersey proceedings. ...

27. I am satisfied that all of what has happened, the letters from [the English solicitors], are clearly being done within the context of the restructuring proceedings and therefore rather than having nothing to do with the supervision of trusts, I am persuaded that this is deploying the information in the manner that it has been seeking to influence how the trustees are to exercise their powers under the trusts. I will add that on the narrow question of whether Section 69 of the Trusts Law can be invoked here, I do not regard *R and RA Trusts* as being the final answer. It is not to be construed as a statute, as it is explained therein. It is not to be hidebound by technicalities. But, taking a step back, this court has been involved in supervising these four trusts for a while now and I am satisfied that the deployment of this material by [the English solicitors] on behalf of [C] and [B] falls within the overall supervisory jurisdiction of the trusts as between these beneficiaries. Accordingly, I find that there is no legal barrier to entertaining this amended application.”

30. The Bailiff then said (at [31]) he would “now turn to the substance of” the application. He did not address, whether, aside from any legal objections or defences that might be put forward, it was otherwise appropriate to make the order sought. Instead, he went straight on to consider the question whether the documents sought were covered by legal privilege, and if so, whether the privilege had been waived. The first question was whether the documents were excluded from privilege by the so-called “iniquity” exception. As to this, the Bailiff said:

“32. I am told that there are no Guernsey cases dealing with the iniquity exception, which is why both advocates referred me to decisions from elsewhere. I am satisfied, having reviewed them carefully, that I can have regard to those decisions in order to assist in determining what the law of Guernsey in this area is.”

31. Having examined (as it happens, exclusively English) cases, the Bailiff continued:

“41. Having cantered through the English authorities relating to the iniquity principle, I am satisfied that as a matter of Guernsey law, the iniquity exception operates here. I am further satisfied that those principles that I have just described from the English cases are suitable principles to guide the approach that this court should take. In particular, I have noted that any decision is fact specific.”

32. He then considered the contents of the investigators’ report, which he considered “significant”, and the affidavit made by the first respondent, challenging those contents. He said:

“43. ... I emphasise that I do not today have to decide if the documents that were supplied under cover of the July letter are forgeries or not. All I need to be satisfied of is that there is a strong prima facie case doubting the veracity of those materials. Balancing what [G] says against what [the Partner of the English solicitors] on behalf of [C] and [B] has said, I am persuaded that that demonstrates that there is such strong prima facie evidence going to whether or not they might be forgeries. Further, I do not have to decide whether there is any wrongdoing on the part of [C] and [B], nor do I have to decide whether there is any wrongdoing on the part of [the English solicitors] acting on their behalf. But the view I do take is that [the English solicitors] and/or [C] and [B] and indeed the advocates acting on their behalf in this jurisdiction

should have recognised that accessing the information as now set out on the disclosed report from [the Investigation Company], which appears to be confidential to [G], raises serious questions ...

[...]

45. ... I have reached the conclusion that [G], [H] and [K] have demonstrated to my satisfaction that those steps after receipt of the initial report amount to a form of iniquity, questioning how this information could have been obtained, and in particular by asking for documents which I am satisfied there is strong prima facie evidence doubt in their veracity. This runs from receipt of the report on the 12th May 2023... ”

33. The Bailiff then went on to consider the question of waiver of privilege. Here the respondents said that statements made in affidavits made by [the Partner] of [the English solicitors] amounted to a waiver of privilege. Two of the affidavits (including the second) were made under compulsion, and so the Bailiff put them on one side. He focused instead on the first affidavit, which had been voluntarily made on 13 June 2023 in the Jersey proceedings. Some of its terms are set out above. Some of the terms of the second affidavit, not specifically considered by the Bailiff, have also been set out above
34. Having considered Guernsey authority, the Bailiff held (at [46]) that privilege could be waived for limited purposes only, “so as to preserve both the principles of privilege and to do justice and fairness in a particular context”. The Bailiff referred to both Jersey and English authorities, and (on the basis that there was no privilege in the post-12 May documents) held (at [51]) that there had been no waiver of the pre-12 May documents. He said:

“53. My principal reason for deciding that I am not persuaded there is a waiver of the privilege in what preceded receipt of the 12th May report is that I am satisfied that there has been an attempt in [the Partner's] first affidavit to avoid any and certainly any full waiver of the privilege that would otherwise attach to what he refers to. I will even go as far as to say because he is a lawyer, albeit not supervised by this court, I think that gives credence to his efforts to avoid unwittingly waving [sic] privilege ... ”

JURISDICTION

35. The first ground of appeal asserts that the court had no jurisdiction to make the order it did. We note that both the application for disclosure and the order under appeal were made under section 69 of the 2007 Law. Although, in the Notice of Appeal reference is also made to the inherent jurisdiction of the court, both parties have proceeded on the basis that the only relevant power is that contained in section 69. This case does not concern disclosure to trust beneficiaries under section 26 of the Trusts (Guernsey) Law 2007, or to other parties to litigation under the usual rules of litigation disclosure contained in the Royal Court Civil Rules, 2007, Part X.
36. A feature of this case is that there is a textual difference between the trusts laws of Guernsey and Jersey. Article 51 of the Trust (Jersey) Law 1984 (as amended) and section 69 of the Trusts (Guernsey) Law 2007 (as amended) both confer powers upon the relevant court to

make orders in the administration of trusts. The two provisions are similarly worded but not identical.

37. The leading case on section 69 of the 2007 Law is the decision of this court in *Re R and RA Trusts*. The judgment of the court (Beloff P, Nutting JA and Birt JA) was given by Birt JA. In his judgment, Birt JA discussed an earlier decision of the Court of Appeal of Jersey in *Re the B, C and D Settlements* 2010 JLR 653. That case dealt with the scope of article 51 of the Trusts (Jersey) Law 1984 (as amended).

38. Article 51 of the Jersey law, so far as relevant, is in the following terms:

“51. (1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit.

(2) The court may, if it thinks fit –

(a) make an order concerning –

[...]

(iii) a beneficiary or any person having a connection with the trust ...

[...]

(3) An application to the court for an order or declaration under paragraph (2) may be made by ... a beneficiary or, with leave of the court, by any other person.

[...]”

39. The opening words of the Jersey article 51, referring to a “direction concerning the manner in which *the trustee* may or should act in connection with any matter concerning the trust” (emphasis supplied) do not appear in the Guernsey section 69. It might have been thought that this operated as some kind of limitation on what the rest of the article empowered the Jersey court to do. However, in *Re R and RA Trusts*, Birt JA said:

“65. Although the wording of Article 51 of the Trusts (Jersey) 1984 Law is not identical, all the parties agreed before us that nothing turned on the minor differences of language.”

So this court considered that the statutory language to be construed was effectively the same in both Bailiwicks.

40. In *Re the B, C and D Settlements*, the Court of Appeal of Jersey held that article 51 did not generally permit the court to order a *beneficiary* to disclose documents to the *trustee*. That article could only be exercised in relation to a beneficiary if the issue at stake involved a direct connection with the trustee-beneficiary relationship. Martin JA, delivering the judgment of the Jersey court, said this:

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

[...]”

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

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

41. In *Re R and RA Trusts*, Birt JA, giving the leading judgment in this court (with which Beloff P and Nutting JA agreed), appear to have taken a different view (on section 69) for this jurisdiction. In that case the trustee was considering a decision intended to achieve a proper division of the trust assets between different branches of the class of beneficiaries. The trustee sought disclosure against some of the beneficiaries who were directors of companies indirectly owned by the trustee. The disclosure would go to issues of potentially excessive remuneration paid to those directors. One of the other beneficiaries, the third respondent, also sought disclosure against those beneficiaries, going further than the trustee sought. The Royal Court refused all the orders requested. The trustee did not appeal, but the third respondent successfully appealed the dismissal of the trustee’s application to this court.

42. In commenting on *Re the B, C and D Settlements* this court observed (at [72]) that it was not clear whether, when it referred to the scope or limits of art 51, the Jersey court was referring to *the jurisdiction or power* to make the order in question or to the *circumstances in which it would be proper* for the Court to exercise a jurisdiction which it had. This court (at [75]) took the view that it could not be the former, and considered that it was more likely that, although there might be theoretical jurisdiction, “the Court must exercise that jurisdiction on a sensible and principled basis ...”.

43. The court said further that

“73. ... (ii) ... the provision must be construed in the context of the statute in which it appears, which is a statute dealing entirely with the law of trusts. From this context, it is clear that the jurisdiction may only be exercised in connection with the supervisory jurisdiction of the Court in relation to trusts. ...”

44. This court went on (at [76]) to express the view that in *Re the B, C and D Settlements*, the Jersey court had “articulated too rigid a test”, and sought itself to identify the principles involved. It concluded thus:

“78. ... in order to justify an order against a beneficiary, there must be a sufficiently close connection between the position of the beneficiary as a beneficiary of the trust whose affairs are being supervised and the relief being sought as to justify the exercise of the court’s supervisory jurisdiction. The sort of considerations referred to in *BCD* may sometimes be helpful in ascertaining whether there is in fact a sufficiently close connection between the position as beneficiary and the relief sought; but the test that I have sought to articulate is more flexible and will enable the Court to achieve justice on behalf of the beneficiaries as a whole where appropriate. In deciding whether a matter is sufficiently closely connected with a person as a beneficiary, the Court should look at the realities of the situation and not be overcome by technicalities ...”

45. The view that section 69 was concerned with the supervisory jurisdiction of the Court in relation to trusts was not controversial. But the view that the Jersey court had articulated too rigid a test of that supervisory jurisdiction in relation to beneficiaries was not universally shared at the time. It would not be appropriate for this Court to express a view on the meaning and application of Article 59 of the Jersey law, a question which will be for the Court of Appeal of Jersey. Nor is it necessary on the facts of the present case for this court to reconsider whether the approach taken in *Re the B, C and D Settlements* was indeed “too rigid”.

46. It was argued in *R and RA Trusts* that the Guernsey court had no power under section 69 to order a beneficiary to provide information, because a beneficiary owed no fiduciary or other duty to the trustee. As to this, this court said (at [80]) that it was:

“80. ...likely to be extremely rare for a court to order a beneficiary to provide information to a trustee, let alone another beneficiary. In general terms, a beneficiary does not owe any duty to a trustee, so that the considerations which lead a court to order a trustee to disclose information to a beneficiary do not arise in

the reverse situation. Nevertheless, I do not accept that the Court may not do so where it is satisfied that such an order is in the best interests of the beneficiaries.”

47. After giving reasons for that view, this court went on:

“84. Whilst I have no doubt that in the vast majority of cases where the Court orders the provision of information, the order will be made against a trustee or other fiduciary who owes a duty towards the beneficiaries, I do not agree that the Court’s jurisdiction should be confined in this way. If the Court concludes that, in order to protect the interests of the beneficiaries as a whole, it is necessary to make an order that a beneficiary provide information, I do not see why it should be precluded from doing so; the Court would be making the order for the very purpose for which the supervisory jurisdiction exists. Even if one accepts that Section 69 was intended to give statutory form to the Court’s inherent jurisdiction to supervise trusts, the Court has not been referred to any case where it has been held that the inherent supervisory jurisdiction is not wide enough to make such an order and it seems to me desirable that it should be able to do so in the interests of the beneficiaries as a whole.”

48. This court then considered whether it would be appropriate on the facts of that case to make an order in the terms sought by the trustee against the beneficiaries who were also directors of the relevant companies. It concluded (at [94] and [98]) that it would. However, it is important to notice that the court at the same time rejected the appeal against the dismissal of the third respondent’s own application for more extensive disclosure. It was argued on her behalf that the trustee required certain additional information in order to reach a proper decision on one aspect of the exercise which the trustee was undertaking. However, the trustee’s own view expressed to the court was that it now had sufficient information on that aspect, and therefore sought no further disclosure in relation to it.

49. Against that background, this court said:

“102. ... It is the Trustees who will take the decision in due course and it is up to them to decide what information they need before they can take that decision. Whilst a beneficiary can of course offer a view that further information is required, it is not for the Court to tell a trustee in advance what information it should obtain. This would be to go beyond the proper role of the Court which is to supervise the administration of a trust, not to manage the trust itself. In my judgment, it is hard to envisage circumstances in which it would be right for a court to order a beneficiary to provide information at the instance of another beneficiary in circumstances where the trustee was saying that it did not need that information for the purpose of fulfilling its role as trustee ...”

50. In addition, this court expressly approved the statement of the Deputy Bailiff (now the Bailiff) sitting in the court below, where he explained the analytical basis for the position articulated by Birt JA in the following way:

“14. As will become apparent, I take the view that the stage of the proceedings in which all the parties currently find themselves remains that of information-gathering on the part of the Trustees, where the fundamental question is what the Trustees

consider they need in order to finalise the momentous decision they will then put to the Court for blessing. In such a situation, I do not consider that a beneficiary has a role to play in forcing the Trustees to expand their information-gathering exercise beyond the parameters that they have established for themselves.”

51. We were also referred to the advice of Lord Neuberger on behalf of the Judicial Committee of the Privy Council in *Crociani v Crociani* 2014 (2) JLR 508, where he said:

“36. ... In the case of a trust, unlike a contract, the court has an inherent jurisdiction to supervise the administration of the trust ... This is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which of inability to function represents a clear and, for present purposes, significant distinction between trusts and contracts.”

52. Section 69 gives the Court a very wide power to make orders in fulfilment of its responsibilities for the supervision of trusts. In our judgment, the necessary (but not always sufficient) basis for making an order under section 69 is that there is something which ought to happen for the well-being or benefit of the trust, or (to put it another way) for the benefit of the beneficiaries as a whole. The most obvious case for the exercise of the power under section 69 is where there is an obligation put on a trustee, protector or other power holder, or even a beneficiary, which is not being performed. Examples include the fiduciary obligations attached to powers and the obligations which rest on beneficiaries permitted to occupy trust property to insure it or pay rates or taxes on it, or not to damage it. But there may be other cases too, for example the removal of the trustee or protector because of inability to function.

53. One important difference between this case and *Re R and RA Trusts* is that *Re R and RA Trusts* was a case of a trustee seeking an order against a beneficiary, whereas this is the case of an application for an order at the suit of one beneficiary against another beneficiary. Although the appeal in that case was brought by a beneficiary, that was, as we have explained, because of the comments of Harman LJ in *Re Londonderry's Settlement* [1965] Ch 918. To put it another way, the decision of the Bailiff in this case appears to involve an extension of the law as understood in *Re R and RA Trusts*. By contrast with the position in that case, in the present case the trustee does not seek the documents concerned. It has stated that it does not intend to rely on them at this time (although its position would probably change if the Jersey court were to hold that the documents are admissible). The appellants say that the Bailiff did not sufficiently consider this point, if at all, and for this purpose refer to paragraph 102 of *Re R and RA Trusts*, which was set out earlier in this judgment.

54. The appellants argue that the purpose of the disclosure sought by the respondents against the appellants was to further their private law interests, rather than to further the administration of the trusts. They say that the documents sought would not be of any substantial assistance in that administration, and that there was no sufficient connection between the two.

55. In this connection, the respondent's skeleton in the court below says this:

“4. There is therefore an urgent need for an order that [B and C] provide further information and documents now; [G] needs to be able promptly to get to the bottom of what has been taking place and to take such further steps as may be required to protect her reputation and financial standing, including by preventing the production and circulation of any further forgeries. She wishes to put a stop to any suggestion that she has misled the Court in the restructuring, to prevent further false information being put before the Courts and to ensure that the parties responsible for doing so are prevented from doing so again.

[...]

35. Disclosure of these communications is now both urgent and necessary:

- (1) to ensure [G], the Trustees and this Court and the Jersey Court have a full picture of the source, provenance and authenticity of the [English solicitors] Documents;
- (2) for as long as [B and C] maintain that the authenticity of the [English solicitors documents] remains a live issue there is a real risk of disruption to the progress of the restructuring, where the timetable to the production of the Trustees' proposals is already very tight; and
- (3) so as to facilitate the taking of any necessary action against [the Investigation Company] for disclosure with a view to preventing the production and circulation of yet further forgeries, and addressing what has occurred. The provision of this information will likely assist in the bringing of a properly focused application to compel the provision of information from [the Investigation Company] with a view to addressing the wrongdoing that has occurred.

36. [The respondents] make this application now to this Court because the balance of the Application is scheduled to be heard on 18 August 2023, and it is plainly necessary, convenient and in the interests of all parties for these issues to be determined on the first available occasion when the parties are before a relevant Court so as to ensure they can be resolved at the earliest opportunity. The issues that are engaged are identical in both the Jersey and the Guernsey Court, going to the matters to which the Trustees should have regard in the context of the restructuring.”

56. The respondents say that the appellants are attempting to use the documents produced by the investigators to influence the decision of the trustee as to how to divide up the trust funds between the different branches of the family. But the appellants have not produced any documents from the investigators themselves. Therefore, say the respondents, the appellants should disclose their communications with the investigators.
57. A beneficiary has standing to make an application for an order under section 69 and under that section the Court has power to make an order against a beneficiary. But that does not mean that a beneficiary can bring proceedings under this section directed against another beneficiary other than proceedings which properly involve the Court’s supervisory jurisdiction in relation to trusts. It follows that in order to ascertain whether the order made is one which was within the jurisdiction granted to the Court under section 69, it is necessary to consider whether the application properly invoked that jurisdiction.
58. The starting point must be to identify the fact that the exercise which is currently on foot is a proposal by trustees to restructure the trusts, which they anticipate bringing before the Court in due course for blessing. They have not surrendered their discretion to the Court. As

the Deputy Bailiff explained, in the passage from his judgment in *R and RA Trusts* which this court approved in paragraph 102 of its judgment, it is for the trustees to consider and decide what information to take into account. That feature of the exercise is not altered by the fact that, if the trustees fail to take into account relevant information, the Court may withhold its blessing. As the Deputy Bailiff (as he then was) observed (in language expressly approved by this court), “I do not consider that a beneficiary has a role to play in forcing the Trustees to expand their information-gathering exercise beyond the parameters that they have established for themselves”.

59. The problem for the respondents is that the trustee has never sought the documents of which disclosure is now sought. The trustee has said in correspondence that it does not intend to take into account the [Investigation Company documents] (although that might change if the Jersey court were to hold that they were “admissible”). That being so, the trustees would have no reason now to seek the documents which are the subject of this application. The trustee was expressly neutral on the respondents’ application. It seems to us that, in these circumstances, the first two reasons given by the respondents in paragraph 35 of their skeleton fall away as a proper basis for inviting the Guernsey court to exercise its powers under section 69.

60. That leaves only the third reason, which is framed in the following terms:

“so as to facilitate the taking of any necessary action against [the Investigation Company] for disclosure with a view to preventing the production and circulation of yet further forgeries, and addressing what has occurred. The provision of this information will likely assist in the bringing of a properly focused application to compel the provision of information from [the Investigation Company] with a view to addressing the wrongdoing that has occurred.”

This is a concern with a possible invasion of, and for the protection of, the private rights and confidentiality of the first respondent. That possible invasion may well have legal consequences elsewhere, whether in the Guernsey legal system or some other. The current *Norwich Pharmacal* proceedings in England against [the Investigation Company] show what can be done in this regard. Those private rights and interests are not a proper object of the court’s supervisory jurisdiction in relation to trusts.

61. We recognise that there are currently proceedings before the Royal Court of Jersey, specifically directed to considering whether the [Investigation Company documents] are “admissible”. We also recognise that the decision of the Royal Court of Jersey in that regard could well have implications for the Guernsey trusts, not least because in those circumstances, the trustee would probably reconsider its position in relation to the [Investigation Company] documents. In the context of that process, it will be for the Royal Court of Jersey to consider whether or not further orders for disclosure should or should not be made. But it does not seem to us that the existence of that process, and its potential significance for the Guernsey trust, supports a freestanding application to the Royal Court of Guernsey in reliance on section 69 of the 2007 Law in the circumstances currently pertaining.

DISCRETION

62. That would be enough to justify allowing the appeal. But, in case we are wrong, we go on to consider the second ground of appeal. This arises only if the court were to hold that there

was jurisdiction under section 69 to make the order. The question here is whether, as a matter of discretion, the court should have made the order at all.

63. So far as one can tell from the transcript of his extempore judgment, the Bailiff did not address this question. If he reached a decision on this point, he did not express it, and neither did he give any reasons for it. Advocate Wessels, for the respondents, referred us to paragraphs 35 and 36 of the respondents' skeleton argument (set out above at [55]), which was before the Bailiff at the hearing. He invited us to infer that the Bailiff's reasons must have been those set out in those paragraphs. We are unwilling to draw any such inference. We do not think it is obvious that the Bailiff must have decided to exercise his discretion because of what is stated there. So far as we can see, the Bailiff does not refer at all in his judgment to the skeleton argument, and certainly not to paragraphs 35 or 36.
64. In Guernsey law the duty of a judge to give reasons is axiomatic. For example, in *Henry v Veloso*, 14 October 2004, judgment 44/2004 (Royal Court), Hancox LB said:
- “15. It is clear from the authorities in recent years that there is a general duty on a Judge or Magistrate to give reasons for his decision. ...
- [...]
20. No great elaboration is necessary in the reasons which a Court gives for arriving at its decision ... nor does it have to mention every scrap of evidence given ... The extent of the duty to give reasons depends very much on the subject matter of the case ... ”
65. We respectfully agree. In our view this is the law in this jurisdiction, even without recourse to the Strasbourg jurisprudence on ECHR article 6. In the present case, the Bailiff appears to have moved directly from a consideration of whether there was jurisdiction to make the order sought, to a consideration of whether the appellants had a defence of privilege to the application, without considering whether, assuming jurisdiction, it was otherwise appropriate to make the order on the facts of the case.
66. If the Bailiff did not address this critical question, that would suffice for this court to allow the appeal. On the other hand, if he did address the question, but has simply omitted to set out his reasoning, that too would suffice for this court to allow the appeal in this case. Although the absence of reasons does not automatically invalidate a decision, losing parties are generally entitled to know why they have lost. Otherwise they cannot be properly advised whether to seek to appeal. Moreover, appeal courts cannot easily decide whether the court below has gone wrong. It is generally not in the public interest to keep losing parties in the dark.
67. In our judgment, in the absence of any decision on the part of the Bailiff addressing whether or not he should exercise the power under section 69 (assuming that the application fell within the scope of that power), we would ourselves be entitled to exercise the discretion under section 69 for ourselves. In considering the exercise of that discretion, we bear in mind what this court said in *R and RA Trusts*, it is “likely to be extremely rare for a court to order a beneficiary to provide information to a trustee, let alone another beneficiary.” Here there are a number of factors pointing against making any such order.

68. The first is that the Jersey court is already seized of the question whether the [Investigation Company] documents should be taken into account, and a hearing has been listed to deal with that. By contrast, the Guernsey trustee and the beneficiaries of the Guernsey trusts have taken no steps to raise that matter before the Guernsey court. The Royal Courts of Guernsey and of Jersey are not two branches of the same legal system; rather, they are the courts of two separate jurisdictions. Orders made in the one court are not automatically enforced as if they were orders of the other. As things stand, the question of what disclosure should properly be ordered to support the Royal Court of Jersey's decision-making is a matter for that court to decide.
69. The second factor is that the trustee does not currently propose to take the [Investigation Company] documents into account. Whether it will change its position depends, it would appear, on the Jersey proceedings (and, as we have observed, it is for the Jersey Court to decide what disclosure orders to make). As we have already explained, it is not generally for beneficiaries to seek to compel trustees to expand their investigations (even if a failure by trustees to do so might affect the Court's ultimate decision whether or not to bless their decision).
70. The third factor is that, on the respondents' own case, as set out in paragraphs 4 and 35(3) of their skeleton argument before the Bailiff, the first respondent seeks the documents the subject of the order for a collateral purpose, namely, to pursue her own private law interests.
71. The fourth factor is that the first respondent has now brought proceedings against [the Investigation Company] in the Commercial Court in London, for a *Norwich Pharmacal* order. These proceedings will determine if the upstream documents from [the Investigation Company] to their informants will be disclosable. The existence of these proceedings also confirms the collateral purpose point just made. It is also, on the face of it, more likely to disclose information bearing on the source of the [Investigation Company] documents than the present application which is concerned with downstream communications between appellants, their solicitors and [the Investigation Company].
72. The fifth factor is that there is no dispute as to what the appellants and their solicitors did. They instructed [the Investigation Company], which produced a report and some documents. [The Investigation Company] has since refused to explain how it acquired them, citing commercial sensitivity. The documents sought from *the applicants or their solicitors* are unlikely to be of any assistance in relation to the provenance of the [Investigation Company] documents.
73. As against that, the only factor of any weight is that, if more disclosure were provided, the Jersey court would get a fuller picture. We, however, are sitting in Guernsey. In our judgment, weighing these factors in the balance, even if there were jurisdiction to make the order sought there would be no sufficient case for doing so as a matter of discretion. For this reason too we would dismiss this appeal.

PRIVILEGE

74. The third ground of appeal relates to the status of the documents sought, and in particular whether they were subject to legal privilege. Given our decision on the first two grounds, this

does not arise, either in relation to the so-called “iniquity” or “fraud” exception, or in relation to the cross-appeal on waiver. We do not propose to take up time considering the application of the law to the facts of this case. However, the law was argued before us and, given the absence of Guernsey case law on the “iniquity” or “fraud” exception, we will make a few (necessarily *obiter*) observations, intended to assist practitioners in the future.

75. In his judgment (at [31]) the Bailiff pointed out that the respondents in making their application:

“acknowledged that the materials that were generated through [the solicitors] instructing investigation company ... potentially attracts privilege to those materials”.

However the respondents argued that these were subject to the so-called “iniquity” exception established in English law.

76. There are no Guernsey cases dealing with the so called “iniquity” exception. The authorities cited to the Bailiff were all from England & Wales. The parties agree that the law of Guernsey is materially identical to the law of England & Wales on the subject. We consider that they are right to do so. This permits us to identify the governing principles as they apply in Guernsey.

- a. Legal professional privilege is not merely a procedural right but an important substantive right, indeed a fundamental right which exists both to protect other rights and in support of the sound administration of justice and the rule of law: see Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commr of Income Tax* [2003] 1 AC 563.
- b. The iniquity exception is not a true exception to legal professional privilege but rather a rule that lawyer/client communications or communications in contemplation of litigation that are for an unlawful or iniquitous purpose are not confidential and cannot therefore be privileged: see the judgment of Stephen J in *R v Cox and Railton* (1884) 14 QBD 153 at 167-168 discussed by Lord Carswell in *McE v Prison Service of Northern Ireland and another (Northern Ireland Human Rights Commission and others intervening)* [2009] 1 AC 908.

77. We shall nevertheless use the term “iniquity exception” for ease of reference in discussing the principle. An alternative description of the “fraud” or “crime fraud exception” may provide a more accurate indication as to the nature of the “iniquity” that must be proved in order to invoke the exception, although the decision in *Barclays Bank v Eustice* [1995] 1 WLR 1238 suggests that something less than crime may suffice. For present purposes it is unnecessary to say more about that.

78. Any party asserting that the “iniquity” exception applies must establish a strong *prima facie* case of sufficiently serious iniquity; where the iniquity is inextricably entwined with the issues in the case, the standard of proof may be higher: see *Kuwait Airways Corporation v Iraqi Airways Company (No 6) (CA)* [2005] 1 WLR 2734, [37]-[38], per Longmore LJ:

“If all one has is disputed versions of events, it will be difficult to say that there is even a prima facie case of fraud. This will be particularly so if the disputed version of events is the very same issue that is to be tried in the proceedings”.

79. The relevant iniquity may be the conduct or purpose of a person other than the lawyer or the client: see the speeches of the majority in the House of Lords in *R v Central Criminal Court, ex p Francis & Francis (a firm)* [1989] AC 346. Lord Goff explained the approach of the majority in the following terms (at 396D-G):

“[W]hen I have regard both to the purpose which has long been understood to underline the principle of legal professional privilege, and to the reason why communications passing between a client with a criminal purpose and a solicitor who is innocent of any such purpose are held not to be protected by such privilege, it appears to me to be immaterial to that exception whether it is the client himself, or a third party who is using the client as his innocent tool, who has the criminal intention ... I would hold that the criminal intention of the third party will, in the circumstances under consideration, exclude the application of the principle of legal professional privilege at common law, even though the privilege, if it attached, would be the privilege of the client and not of the third party.”

80. In our judgment this represents the law of Guernsey. However, in practice we find it hard to imagine that third party iniquity could be such as to limit or qualify privilege other than in circumstances where the third party is using the privileged relationship between solicitor and client as a mechanism to further their iniquitous purpose. This because, as Lord Goff explained it, the third party’s purpose must be the use of the privileged relationship as “a tool” to achieve a criminal purpose aimed at persons other than the client and the lawyers. Otherwise, the existence of some fraudulent or dishonest purpose or activity on the part of a third party might adventitiously create a significant and unpredictable inroad into the right to claim privilege.
81. The question of privilege would only arise, in the context of a case such as the present, if there were otherwise a proper basis for ordering disclosure. Such a basis does not exist in the present case, for the reasons which we have explained. In these circumstances, it is unnecessary to express any view about the application of these principles to the facts of the present case, or to address the question of waiver.

CONCLUSION

82. Accordingly, we would allow the appeal and dismiss the cross-appeal.