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HSBC Trustee (CI) Ltd v Siu Hing Kwong

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Grime, Sparrow
Judgment Date:	06 March 2018
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Text

[2018] JRC 51A

Royal Court

(Samedi)

Before:

Sir Michael Birt, Commissioner, and Jurats Grime and Sparrow.

In the Matter of the KSH no. 4 Trust, the KSH no. 5 Trust, the KSH No. 6 Trust and the GK and JK Trust

Between
HSBC Trustee (CI) Limited
Representor
and
(1) Siu Hing Kwong
(2) Walter Ping Sheung Kwok (on his own behalf and as representative of his unborn issue)
(3) Thomas Ping Kwong Kwok (on his own behalf and as representative of his unborn

issue)
(4) Adam Kai Fai Kwok
(5) Kimberly Hew Chee Kwok
(6) Dominic Kai Kuan Kwok
(7) Raymond Ping Luen Kwok (on his own behalf and as representative of his unborn issue)
(8) Edward Ho Lai Kwok
(9) Joyce Kwok
(10) Christopher Kai Wang Kwok
(11) Geoffrey Kai Chun Kwok (on his own behalf and as representative of his unborn issue)
(12) Jonathan Kai Ho Kwok (on his own behalf and as representative of his unborn issue)
(13) Lesley Wai San Kwok (on her own behalf and as representative of her unborn issue)
Respondents

Advocate N. A. K. Williams **for the Representor**.

Advocate J. D. Kelleher **for the First Respondent**.

Advocate N-L. M. Langlois **for the Second Respondent**.

Advocate J. M. P. Gleeson **for the Third to Sixth Respondents**.

Advocate S. J. Alexander **for the Seventh to Tenth Respondents**.

The Eleventh, Twelfth and Thirteenth Respondents did not appear and were not represented.

Authorities

HSBC Trustee CI v Kwong [2017] JRC 214A .

R v Legal Aid Board ex p Kaim Todner (a firm) [1999] QB 966 at 977.

The Fabric of English Civil Justice.

Jersey Evening Post Limited v Al Thani [2002] JLR 542 .

Scott v Scott [1913] AC 417 .

L v L [2016] 1 WLR 1259 .

Trusts (Jersey) Law 1984.

In the matter of M and Other Trusts [2012] JRC 127 .

The C Trust [2010] JRC 001 .

H v News Group Newspapers Limited [2011] 1 WLR 1645 .

Re S Settlement 2001/154 .

Civil Procedure Rules.

Re Delphi Trust Limited 16 ITELR 885 .

Re The G Trusts [2017/371] .

Re Trusts of X Charity [2003] 1 WLR 2751 .

3 Individual Present Professional Trustees of 2 Trusts v An Infant Prospective Beneficiary [2007] EWHC 1922 (Ch) .

V v T [2014] EWHC 3432 (Ch)

MN v OP [2 March 2017 unreported].

Re Esteem [1995] JLR 266 .

Re Bhandher [1998/152] .

Civil Procedure 2017 Vol. 1.

PJS v News Group Newspapers Limited [2016] UKSC 26 .

Blunkett v Quinn [2004] EWHC 2816 (Fam) .

Appleton v Gallagher [2015] EWHC 2689 (Fam)

Trust — reasons for the publication of 15th December 2017 judgment

THE COMMISSIONER:

1 On 15 th December, 2017, the Court issued a judgment *HSBC Trustee CI v Kwong* [2017] JRC 214A ("the Judgment") giving its blessing to a decision which the Representor ("the Trustee") proposed to take in respect of four trusts governed by Jersey law ("the Trusts"). We were informed that the Second Respondent ("Walter") is appealing against the Judgment and the matter is due to come before the Court of Appeal in May.

2 An issue has arisen as to whether the Judgment should be published. In the ordinary way, although the hearing was in private, it would be published in anonymised form. However, as described below, the parties agree that it is not possible in this particular case effectively to anonymise the Judgment. Accordingly, the choice is between not publishing the Judgment at all or publishing it as delivered including identification of the parties.

3 It is that matter which we consider in this judgment. Words and expressions defined in the

Judgment have the same meaning in this judgment.

Background

4 The background is fully described in the Judgment. In short, the family has considerable wealth. Some is reflected in shares in a Hong Kong company referred to in the Judgment as “the Main Company” or “SHKP”. The family also has interests in other assets and the Judgment is concerned only with such other assets.

5 The Trusts were established in 2009 by the First Respondent (“the settlor”). She and her late husband had three sons, namely Walter, the Third Respondent (“Thomas”) and the Seventh Respondent (“Raymond”). Each of the sons also has children.

6 The general approach to distribution of the family wealth has been that 55% should be held for the settlor and 15% for each of the families of Walter, Thomas and Raymond. The settlor has indicated that upon her death, she would wish the 55% to be distributed equally between the three branches of the family. Much of the family wealth is held in trusts.

7 Difficulties have arisen between Walter and his two brothers. An agreement was reached in a document known as the Heads of Agreement (and defined at paragraph 12(v) below) dated 27th January, 2014 whereby it was agreed that 15% of what was described as the “Family Assets” should be paid to a trust which would be for the benefit of Walter and his family and certain properties were specified for allocation to that trust as part of that 15%. There was provision for a top up if the specified properties came to less than 15% of the Family Assets.

8 In the circumstances described in the Judgment, it has not so far proved possible to give effect to this part of the HOA. Accordingly the settlor has requested the Trustee to make various distributions. Her request refers to the assets of the Trusts and certain Canadian assets (together “the Relevant Assets”) and has requested the Trustee to distribute 15% of the Relevant Assets to trusts for the benefit of Walter, Thomas and Raymond (and their families) respectively. The request also specified certain assets to be allocated for the benefit of each of Walter, Thomas and Raymond. Those to be allocated for Walter comprised the assets allocated to him in the HOA.

9 Having considered the matter and instructed its own financial experts, the Trustee has decided that it will accede to the settlor's request. Thus it will distribute the specified assets to trusts for the benefit of Walter, Thomas and Raymond (and their families) respectively and there will be top up payments so that each branch receives 15% of the Relevant Assets.

10 Because Walter did not agree to its proposal, the Trustee sought the Court's blessing on

the basis that the decision to make the proposed distributions amounted to a momentous decision. The Court heard the matter over three days. The settlor, Thomas and Raymond all supported the Trustee's decision whereas Walter opposed it on various grounds which are set out in the Judgment.

11 Ultimately, for the reasons set out in the Judgment, the Court gave its blessing to the proposed distributions.

12 The family has a high profile in Hong Kong. There is regular media coverage of their activities. In particular, despite the fact that the present proceedings were held in private, the Hong Kong media are already aware of many details in connection with the Trustee's application and have published information about the application. We have been shown extracts from newspaper reports in Hong Kong. We do not propose to repeat all that is contained in that coverage but it includes the following matters:-

(i) details of the creation of the Trusts by the settlor and the beneficiaries of those four trusts;

(ii) the 55/15/15/15% division of assets following the death of the Father;

(iii) the fact that the Trusts are concerned only with private assets, not with shares in SHKP;

(iv) that there are four holding companies (which are named) and that the underlying assets comprise some 300 companies, with the current percentage holding of each of the Trusts in the holding companies being described;

(v) that in 2013 Walter issued a draft writ of summons against the principal members of his family and that agreement was then reached in the Heads of Agreement ("HOA") dated 27 th January 2014;

(vi) that under the HOA Walter agreed to accept a one-off distribution of 15% of the Family Assets and that he had chosen certain US assets (some of which were named) and the Holiday Inn Express in Hong Kong, all of which were to be held in a new private assets trust;

(vii) because conflicts between the principal members of the family had not been resolved, the Trustee (which was named) had sought directions from this Court, that the hearing lasted for three days commencing 9 th August 2017 and that various lawyers had been instructed (their names being specified). The report also contained a picture of the Royal Court building and of the Commissioner;

(viii) details of the properties to be allocated to Thomas and Raymond, although it was erroneously suggested that this had occurred already;

(ix) details of the grounds upon which Walter was opposing what was proposed, including the fact that property prices in Hong Kong had risen by nearly 30% which

would result in unfairness to him (because he had taken US properties), that the 15% distribution should be based on a current valuation, that he did not accept the accuracy of the reports of the property valuer and accountants selected by the settlor, that his consent was needed before properties could be allocated to Thomas or Raymond, his suggestion that, at her advanced age, the settlor would not know how to distribute the trust funds and that accordingly was acting under the influence of someone behind the scenes; and that the total value of the Family Assets had to be re-assessed; and

(x) that litigation in Hong Kong could not be ruled out if Walter's demands were rejected by the Court.

13 There are a number of inaccuracies in the reports. These include:-

(i) It is suggested that Walter is seeking to overturn the HOA whereas in fact his complaint is that the Trustee is not fulfilling the HOA and that the principal family members have not complied with their obligations under the HOA.

(ii) It is said erroneously that Walter is claiming a difference initially estimated at approximately HK$7 billion.

(iii) There is an implication in one of the reports that it was Walter who initiated the current proceedings whereas in fact it was the Trustee.

14 As already stated, it is accepted by all parties that, given the high profile of the family and given the details of these proceedings which are already in the public domain, it would be impossible to anonymise the Judgment effectively. The Hong Kong media and others in Hong Kong would immediately recognise any anonymised judgment as referring to the Kwok family and anonymisation would therefore be pointless.

15 It is in those circumstances that the choice in this case rests between non-publication or publication of the Judgment essentially as it has been issued.

Public justice

16 It is well established that open justice is a principle of fundamental importance to the rule of law. This is because it enables the public (usually through the media) to see what the courts are doing. It is a protection against injustice on the part of the courts. As Lord Woolf MR said in *R v Legal Aid Board ex p Kaim Todner (a firm)* [1999] QB 966 at 977:-

" ***It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court.*** It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially."

17 To like effect is a passage from Jacob, The Fabric of English Civil Justice at 22–23 (1987):-

> " ***The need for public justice, which has now been statutorily recognised, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of 'judging the judges'; by sitting in public, the judges are themselves accountable and on trial***."

18 Both of these passages were cited by Bailhache, Bailiff, in the leading case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 where the Court held in clear terms that the principle of open justice also forms part of the law of Jersey. Having so held, the Court went on to say at paragraph 16:-

> " ***The aim therefore is to do justice to the parties before the court.*** That aim must not be stultified by a rigid application of the principle that justice must be done in public. Yet the principle of open justice should not be displaced as a matter of convenience or expedience, or to avoid***embarrassment to one or more of the parties, but only if it is necessary to do so in the interests of justice***."

19 However, the principle of open justice is not absolute. It is subject to qualification. The court in *Al Thani* quoted at paragraph 14 the following well-known passage from the judgment of Viscount Haldane LC in *Scott v Scott* [1913] AC 417 at 437–438:-

> " ***While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred.*** But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and

as turning, not on convenience, but on necessity".

20 As matters have developed, in addition to procedural hearings as described at para 21 of the judgment in *Al Thani*, there appear to us to be at least three categories where public justice may yield to some other factor. These are (i) cases concerning minors or other persons under a disability; (ii) where sitting in public or issuing a public judgment would defeat the very objective of proceedings so that the court could not do justice; and (iii) where the right to privacy outweighs the interests of public justice.

21 Examples of (i) are public law cases concerning children e.g. whether they should be removed from their parents. An example of (ii) is where an injunction is sought to restrain disposal of monies pending trial or the provision of information to enable stolen assets to be traced on the basis that sitting in public would defeat the objective by enabling the proposed defendant to hide the monies in question; and examples of (iii) are proceedings for ancillary relief in matrimonial cases (see *L v L* [2016] 1 WLR 1259 where it was held that anonymisation of judgments in such cases should normally be made in order to preserve the privacy of the parties).

Application to matters of trust administration

22 In *Al Thani*, the Court, having referred at paragraphs 26 and 27 to the fact that, in England and Wales, applications for the blessing of a momentous decision by trustees ("blessing applications") or where the trustees were surrendering their discretion to the Court ("surrender applications"), were normally held in private, went on to say at para 28:-

> " ***We think it would be unwise to be too dogmatic as to when the court should sit in public and when it should sit in private to hear Article 47 applications.*** As Hart J rightly emphasized, the categories adopted in*Re S***are not watertight, and some cases may even fall outside them.** The jurisdiction conferred by Article 47 of the Trusts Law is a wide one. It has been employed to the great advantage of settlors, trustees and beneficiaries since the Trusts Law came into force. But we think it can be said that the courts in this jurisdiction have accorded a greater importance to the need to respect the confidentiality of private trusts than has been the case elsewhere. It has certainly been the practice in Jersey to sit in private to hear applications falling within categories (b) and (c); but it has been the practice occasionally to sit in private to hear cases falling in category one. The underlying rationale is a desire not to undermine the confidence which lies at the root of the relationship between a trustee and the beneficiaries, particularly of a discretionary trust. In striking the balance between the principle of open justice and the rights of individuals to respect for the confidentiality of their private business arrangements, the Court must have regard to the purpose of the Article 47 jurisdiction. Its broad purpose is to assist those concerned with the administration of trusts to resolve their differences and to seek judicial guidance or direction in an orderly context but in a relatively informal and flexible manner. When hostile litigation is being

conducted, it must naturally be conducted in public in the ordinary course of events. But where the Court is sitting administratively, or is exercising a quasi-parental jurisdiction to protect the interests of all the beneficiaries of a trust, the Court should generally sit in private. Although the Human Rights (Jersey) Law 2000 is not yet in force, we have considered whether this approach might be in conflict***with a convention right under the European Convention on Human Rights.*** Article 6(1) of the Convention provides –

" ***In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*** Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

In our judgment the phrase "or the protection of the private life of the parties so require[s]" is sufficient justification, absent any compelling reason to the contrary, for resolving to sit in private to hear this kind of application under Article 47 of the Trusts Law ."

We would add that Article 47 is now Article 51 of the Trusts (Jersey) Law 1984 as amended. References in the quotation to categories (b) and (c) are to blessing applications and surrender applications respectively. We shall hereafter refer to these two categories of application as 'direction applications'.

23 In practice, the Court proceeds as envisaged in paragraph 28 of *Al Thani*. In other words, it sits in private to hear direction applications. We are not concerned for the purposes of this case with any other instances (whether related to trusts or not) where the Court may sit in private and we say nothing further about such cases.

24 Some of the reasons why this is so were stated in *In the matter of M and Other Trusts* [2012] JRC 127, where the Court said this:-

" ***13. It is common for trustees in Jersey to seek the directions of the Court in relation to matters concerning the administration of trusts. These are brought under Article 51 of the 1984 Law. Usually the trustee will have reached a decision itself but will seek the court's blessing on the grounds that the decision is of a 'momentous' nature… In other cases the trustee will surrender its discretion to the court. Some applications are Beddoe applications properly so called, in the sense that they seek directions as to whether the trustee should institute or defend legal proceedings. Others concerndecisions in relation to a variety of matters relating to the administration of a trust e.g. whether to sell a major asset…***

14. Such applications are an important part of the supervisory jurisdiction of this Court in relation to trusts. They are invariably held in private. This is because the application will often concern legally or commercially sensitive matters and they are of course administrative rather than adversarial proceedings. They do not usually determine civil rights for the purposes of Article 6 of the ECHR .

15. It is of vital importance that, if such applications are to serve the purposes to which they are intended, information and documents received by those who are convened as parties to such proceedings should be held in confidence. The trustee is under a duty and must feel able to make full and frank disclosure in relation to the application. It must be able to summarise the arguments for and against the proposed course of action, including any weaknesses or possible risks in relation to what is proposed ."

25 In the same vein, William Bailhache, Deputy Bailiff, at paragraph 6(d) of the judgment in *The C Trust* [2010] JRC 001 said as follows:-

" ***(d) Fourthly it is clear from material we have seen that it is absolutely necessary that a trustee should be able to come to court under Article 51 to make a candid appraisal of its position and the problems which are to be addressed.*** If trustees thought that such affidavits and applications might be provided to those with hostile eyes upon the trust or the trust fund, they would be less likely to be candid and the whole purpose underlying the Article 51 procedure would be liable to be frustrated."

26 It is also to be noted that direction applications are usually brought at the instance of a trustee for its guidance and protection. Thus, if the application were to be heard in public or an unanonymised judgment were to be published, the beneficiaries would find their privacy invaded as a result of a decision taken by another party (i.e. the trustee).

The Court's practice

27 However, the Court is conscious of the importance of public justice and accordingly its practice is that, if a written judgment is produced, it will normally arrange for the judgment to be published but in anonymised form. The judgment will, so far as possible, contain the full reasoning and factual description contained in the judgment but will simply omit names and any other matters which would permit identification. Publication of an anonymised judgment serves two important purposes:-

(i) Whilst such a procedure does not fulfil the objectives of public justice (as described above) to the same full extent as would be served by a hearing in public, it is the next best thing. It enables the public to see what the Court is doing and why. For example, in public law children's cases, publication of the judgment enables the public to see

the sort of circumstances in which the Court will remove children from the care of their parents. This enables the public to assess whether the Court is being too proactive or not proactive enough in such cases. Publication of an anonymised judgment therefore serves an important purpose. As Lord Neuberger MR said in *H v News Group Newspapers Limited* [2011] 1 WLR 1645 at para 35:-

> " ***35. ….More particularly, there is much in the point that the media will be generally better able to discover, and report on, what the courts are doing if they can publish (a) details of the type of case (for instance, as in this case, a sexual liaison between an unidentified well-known sportsman, in an apparently monogamous relationship, and a third party) rather than (b) the name of the individual who is seeking to protect an unspecified aspect of his or her alleged private life by means of an injunction. As Mr Tomlinson puts it, the former information would normally enable the public to have a much better idea of why the court acted as it did than the latter information***."

In other words, full information about a case without names is more helpful than publication of names but with no detail.

(ii) Publication of full reasons, even in anonymised form, enables the legal profession to be aware of any developments in the law. Even in cases which do not involve new law but merely application of settled principles to the facts of a particular case, it is often helpful to the profession to see how the Court applies established law to particular facts. This enables them to advise their clients with greater precision in future cases.

28 The procedure which this Court follows appears to be broadly consistent with the practice in a number of jurisdictions.

29 . As appears from the extract of the judgment of Robert Walker J quoted in *Re S Settlement 2001/154*, the procedure in England and Wales has also traditionally been that direction applications are heard in private. Indeed, Rule 39.2(3) of the Civil Procedure Rules in that jurisdiction provides that a hearing may be in private if ".. *it involves uncontentious matters arising in the administration of trusts…*".

30 In his illuminating judgment in *Re Delphi Trust Limited* 16 ITELR 885, Deemster Doyle considered the practice concerning applications by trustees for directions in a number of different jurisdictions. It would appear from his judgment that Guernsey follows a similar practice to that of Jersey in terms of hearing such applications in private but publishing anonymised judgments. The position in Bermuda appears to be similar although it may be that they publish judgments less often than we do. The position appears to be similar in the Cayman Islands. So far as the Isle of Man is concerned, the First Deemster approved the general proposition contained at paragraph 28 in *Al Thani*, namely that direction applications would normally be heard in private, but he made it clear that this must be judged on a case by case basis. On the facts of the case before him, he held that the

hearing should be in public but that the judgment should be anonymised.

31 The position in Bermuda has recently been re-emphasised in the matter of *Re The G Trusts [2017/371]* where Kawaley CJ considered whether proceedings by trustees for directions should be subject to confidentiality orders with the judgment being anonymised. Having referred to previous authority, he said this at paragraph 11:-

> " ***For the above reasons I have no reticence about tacitly confirming the Confidentiality Order I made at the beginning of the present case when the proceedings reached their conclusion.*** The present proceedings concern the internal administration of a private trust into which the general public have no right to pry. Persons administering, interested in or settling Bermuda trusts should rest assured that this Court's firmly established practice of making confidentiality orders in appropriate cases, which is merely designed to enable law-abiding citizens to peaceably enjoy their actual and contingent property rights, has a venerable legal basis. The existing practice will continue to be applied in appropriate cases such as the present."

32 In some cases, publication of even an anonymised judgment is not possible if the interests of justice are to be served. For example, in a Beddoe application, the trustee must tell the Court about all the strengths and weaknesses of its position in the proposed litigation. Publication of even an anonymised judgment would inform the other side in the proposed litigation of the weaknesses in the trustee's case. That would clearly be extremely prejudicial to the trust and would not be in the interests of justice. Another example might be where a trustee seeks directions as to the price for which the main asset of the trust should be sold. Even an anonymised judgment might, depending on the facts, disclose to potential purchasers information about what price the trustee might be willing to sell for. Again, in such circumstances, the Court is likely not to publish any judgment at all.

33 However, subject to exceptions such as these, this Court's policy is clear, namely that although direction applications will normally be heard in private, any reasoned judgment should be published subject to anonymisation so as to protect the privacy of those involved and to ensure that full disclosure to the Court is given by the parties as described in the passages cited above from *In the matter of M and Other Trusts* and *The C Trust*.

34 In our judgment, this policy strikes the appropriate balance between, on the one hand, the privacy rights of the beneficiaries under Article 8 European Convention of Human Rights ("ECHR") (respect for private life) and the interests of justice as summarised at paras 24 and 25 above and, on the other, the importance of public justice and the Article 10 ECHR rights in respect of freedom of expression.

35 The policy is also consistent with Article 6 ECHR (right to a fair trial) for two reasons. First, such applications are administrative in nature and do not usually constitute " *the determination of … civil rights …*" as required by Article 6 – see para 14 of *In the matter of M*

and Other Trusts (supra); para 12 of *Re Trusts of X Charity* [2003] 1 WLR 2751 " ***an application to the court by trustees for directions may well affect but does not normally determine the civil rights of anyone";*** and paras 19 – 27 of the judgment of Lindsay J in *3 Individual Present Professional Trustees of 2 Trusts v An Infant Prospective Beneficiary* [2007] EWHC 1922 (Ch). Secondly, even if an application does amount to the determination of civil rights so that Article 6 applies, the anonymisation of the judgment is necessary and proportionate both to protect the private life of the beneficiaries and to prevent (as set out at paras 24 and 25 above) the prejudice which publicity would cause to the interests of justice if an unanonymised judgment were published.

36 It was suggested to us that recent cases in England and Wales indicate a shift in approach on the part of the English courts, with greater emphasis being placed on the importance of public justice. In this connection, we were referred to the judgment of Morgan J in *V v T* [2014] EWHC 3432 (Ch) and to a note of the decision of Rose J in *MN v OP* [2 March 2017 unreported].

37 It is certainly the case that these two judgments have emphasised in strong terms the importance of open justice. In *V v T*, Morgan J held that the hearing should be in public but that, in the interests of the minor beneficiaries of the trust, the judgment should be anonymised. In *MN v OP*, the hearing appears to have been in public and Rose J refused to anonymise the judgment although reporting restrictions have been imposed pending an appeal against that part of her decision.

38 However, we have not found these two decisions to be of assistance. They were concerned with applications to vary a trust pursuant to the Variation of Trusts Act 1958 of the United Kingdom. It appears from para 16 of the judgment of Morgan J and the note of the judgment of Rose J that such applications have traditionally been held in public in England and Wales. That is quite different from the traditional practice in relation to direction applications in that jurisdiction. Neither judgment has anything to say about the practice in respect of direction applications and we have not been referred to any authority which suggests any change of approach in England and Wales to the effect that the court should no longer sit in private or should not anonymise judgments in such applications.

39 If, contrary to our understanding, there has been a change of approach in England and Wales in relation to direction applications so that these are no longer held in private or judgments are not normally anonymised, we would respectfully disagree with such change. We remain firmly of the view that, whilst ultimately each case must be considered on its own facts, the various interests and factors referred to earlier in this judgment are normally best balanced and accommodated by continuing the policy of sitting in private to hear such applications, but then issuing an anonymised judgment giving as much information as possible without negating the purpose of anonymisation.

When anonymisation is not possible

40 The question then arises as to what the Court should do where, as in this case, it would be pointless to issue an anonymised judgment because it would be wholly ineffective in preventing the identification of the beneficiaries. The choice is therefore between not publishing a judgment at all or publishing the judgment without anonymisation.

41 Advocate Langlois argued that, in such circumstances, the Court should in general not publish its judgment. She made the very fair point that anonymisation of the Court's judgment means that the outcome in the ordinary case is that the privacy of the beneficiaries is not invaded to any degree. Because of anonymisation, no one knows that the trust referred to in the judgment relates to particular individuals. Their privacy is secure.

42 She argued that the outcome should be the same even where the beneficiaries have a high profile such that anonymisation would not achieve its purpose. They should not end up in a worse position than other beneficiaries simply because of their high profile. They too should be left in the position at the end of the proceedings that the public is not aware of the details of their interests under the trust or of the circumstances surrounding the trust. The only way in which that can be achieved (anonymisation not being effective) is for the judgment not to be published at all.

43 She submitted that that was particularly so where, as in this case, the Judgment did not contain any point of law but was merely an application of well-established principles to particular facts.

44 She referred to two Jersey cases, namely *Re Esteem* [1995] JLR 266 and *Re Bhandher [1998/152]*. In the former case the Court held that the judgment would not be published at all. However, both these cases were Beddoe applications where the considerations mentioned at para 32 above come into play. We do not think therefore that they assist when considering how to proceed in other direction applications.

45 She also referred to Civil Procedure 2017 Vol. 1 page 1204 at para 39.2.10 where, in relation to the position in England and Wales, it is stated:-

> " ***Where a court has heard a case in private it is not prevented, for that reason alone, from giving judgment in public … Obviously, the reasons that may persuade a court that it should sit in private to hear a case are likely to be the same reasons that cause the court to consider whether, as an exception to the principle of open justice, its judgment should be made public only in an anonymised or abridged form or (if that is not possible) should not be made public at all.…***"

46 The authority given for the last 13 words of the above extract is *Re Trusts of X Charity* (supra). In that case the trustees of a charity applied for directions of the court in relation to legal proceedings to which the charity was a party. It appears therefore to have been a

Beddoe application although this is not specifically stated in the judgment. Having heard the matter in private, Morritt V-C considered whether he was obliged to give his judgment in public because of the terms of Article 6 ECHR. The Vice Chancellor held that Article 6 did not require this to occur and at paragraph 11 said this:-

> " ***As I have already indicated I was satisfied that the hearing should be held in private because the interests of justice so required.*** I was also satisfied that it was not a practicable possibility to produce an anonymised or abridged version……"

47 It is not clear from the judgment why it was not a practicable possibility to produce an anonymised or abridged version but, having regard to the fact that it was an application for directions in relation to pending litigation, it seems likely that it was the sort of consideration referred to in paragraph 32 above which led the Vice-Chancellor to this conclusion. In any event, we cannot draw from that decision a general rule that, where an anonymised version is not possible, the solution is then not to publish at all.

48 In our judgment, any decision must be fact specific. Whilst we can accept that in some cases, for the reasons set out at para 42 above, the right course will be not to publish at all where anonymisation is not possible, that will not necessarily be the case. The Court must have regard to all the circumstances of the particular case. With that in mind, we turn to consider the arguments which are specific to the facts of the present case.

Application to this case

49 Walter objects to publication of the Judgment. He has produced a fourth affirmation containing his reasons for doing so.

50 We would summarise those reasons as follows:-

(i) He states that, because of their high profile, the Hong Kong press displays great interest in the affairs of the family. The intrusive nature of press attention which he and members of the family have suffered is shown by the fact that press photographers can regularly be found outside the homes of family members and photographers regularly follow members of the family around Hong Kong as they are going about their day to day business. At times this is intrusive and distressing.

(ii) Publication of the Judgment would only increase the intensity and regularity of this intrusive press attention, which often borders on harassment.

(iii) The press has already published information about the present proceedings. In Walter's opinion these are sensational and misleading reports about the proceedings which are slanted against him. In his view they paint a significantly distorted picture of the proceedings and unfairly portray him as the protagonist in a private family dispute. He has not been in any way responsible for any leakage of information to the press in

Hong Kong.

(iv) He is concerned that a failure to provide an accurate and full picture may have the effect of discrediting him if litigation were subsequently to be commenced in Hong Kong.

(v) Furthermore, the press reports might also weaken his position in any future settlement negotiations with the remaining members of the family.

51 In her submissions, Advocate Langlois emphasised the above points and made the following further submissions:-

(i) Publication would increase interest in the Eleventh Respondent ("Geoffrey") and the Twelfth Respondent ("Jonathan") because it would disclose their substantial interest in the family wealth. Furthermore, this might raise security concerns in respect of them bearing in mind the fact that, as disclosed in the evidence produced for the hearing, Walter had some years ago been kidnapped.

(ii) The Judgment contained information and details which went beyond that already in the public domain as a result of the publicity. Furthermore, publication of the Judgment would act as a source of oxygen and lead to another spate of publicity about the family's private affairs.

(iii) It would be wrong to allow the fact of the existing publicity to influence the Court's decision. Walter had not been responsible for this publicity and it would be unfair that he should be prejudiced as a result of other parties wrongly leaking material concerning the proceedings to the press.

(iv) The Judgment did not contain any new point of law or practice. It was simply the application of established principles to the particular facts of this case. There was therefore no public interest for the profession in publishing the Judgment.

(v) Even if the Court considered that the family's privacy had already been invaded as a result of the previous press reports about the case, there would still be an extra invasion by reason of further or repeated publication – see the observation of Lord Mance in *PJS v News Group Newspapers Limited* [2016] UKSC 26 at paragraph 32.

(vi) There was a safeguard in existence to protect the interests of public justice. Even if the Court at this stage refused publication, there would be nothing to prevent the media from applying to the Court at a later stage to vary that decision. The balance of interest between public justice and privacy could be carried out at that stage having regard to any submissions put forward on behalf of the media.

52 On behalf of the settlor, Advocate Kelleher submitted that the Judgment should be published in full without any anonymisation. He submitted that the existing press reporting already contained very considerable detail and little more would be disclosed if the Judgment were published. Furthermore if, as Walter submitted, the existing reports were

inaccurate or misleading, publication of the Judgment would provide an authoritative and factual statement of the real position. It would therefore correct the misreporting and enable the true facts to be published. In this respect, Advocate Kelleher submitted that the reporting was misleading in respect of the settlor. It reported Walter's allegation that she was not fully aware of the consequences and implications of her request to the Trustee whereas the Judgment dealt with this point and found that the request did indeed represent her genuine wishes and that she had not been unduly influenced by other members of the family. He further submitted that if, as seemed possible, Walter were to institute proceedings in Hong Kong concerning the HOA, the parties would need to be able to show the Judgment to the Hong Kong court. All these factors, he said, pointed strongly in favour of publication.

53 On behalf of Thomas and Raymond and their respective families, Advocates Gleeson and Alexander supported the stance taken on behalf of the settlor and supported release of the Judgment.

54 We were informed that the three adult children of Walter had been informed of this hearing but none of them has expressed any view to the Court as to whether the Judgment should be published or not.

55 Having considered the various submissions made to us, our decision is that the Judgment should be published.

56 The most significant factor in our decision relates to the information which is already in the public domain. As can be seen from the summary at paragraph 12 above, press reports have already published the main details of the background to the application and the application itself. We have carefully re-read the Judgment and compared it with the information contained in the existing press reports. In our judgment there is little that is new in the Judgment. There is of course more detail in some respects (e.g. the exact terms of the relevant clauses of the HOA, the names of certain US properties allocated to Walter under the HOA and the fact that Walter is not currently a beneficiary of the Trusts). But the essential features are already in the public domain. In the circumstances, there will in our judgment be little further invasion of the privacy of the beneficiaries.

57 It is argued on behalf of Walter that the family is already subject to intrusive press attention and that, upon publication of the Judgment, this will be re-invigorated and the family will be subject to a greater degree of intrusion. As Advocate Langlois put it, publication would act as a source of oxygen for further publicity. We accept that upon publication the media are likely to report the outcome in some detail and may well seek comment from members of the family. However, given that there is so little that is new information, we do not see this lasting for long. The Judgment will not add materially to what has already been published about the private affairs of the family and in the circumstances, apart from the initial flurry upon publication, it is hard to see why publication of the Judgment should increase the intensity and regularity of press attention in the future, as is suggested by Walter.

58 A point strongly made by Walter is that the existing press reports are inaccurate in certain respects and are slanted against him. In our judgment, publication of the Judgment will address those concerns and assist in meeting the concern described at para 50(iv) above. The media will no longer be able to rely on undisclosed sources about the application. They will have the Judgment which will set the matter out factually and objectively. Putting the accurate facts into the public domain is the best way of correcting inaccurate reports. In this respect, we would refer to the observation of Ryder J in *Blunkett v Quinn* [2004] EWHC 2816 (Fam), at para 22 which was quoted at paragraph 16 of the judgment of Mostyn J in *Appleton v Gallagher* [2015] EWHC 2689 (Fam) as follows:-

> " ***In considering the competing rights [under Articles 6, 8 and 10], I have come to the clear conclusion that having regard to the quantity of material that is in the public domain, some of it even in the most responsible commentaries wholly inaccurate, it is right to give this judgment in public.*** The ability to correct false impressions and misconceived facts will go further to help secure the Art 6 and Art 8 rights of all involved than would the court's silence which in this case will only promote further speculation and adverse comment that will damage both the interests of those involved and the family justice system itself."

We agree entirely with those sentiments, substituting a reference to the Island's justice system for the reference to the family justice system of England and Wales in the last line of the quotation.

59 We do not see that publication of the Judgment could in any way weaken Walter's position in any settlement negotiations with his brothers and/or the settlor as he fears. They are of course already aware of the contents of the Judgment and will therefore be able to take these into account if it assists their negotiating position. We do not think that the fact that members of the public will now be aware of the Judgment rather than simply the existing media reports of the position can be relevant to the position in relation to any settlement discussions.

60 As to the position concerning Geoffrey and Jonathan, there is no evidence about this; it was only mentioned in Advocate Langlois' submissions. They are both adult beneficiaries and could have made submissions to this Court had they so wished. It is already in the public domain that they are members of a wealthy family and we do not see that publication of the Judgment will make the position any worse.

61 We have not forgotten Advocate Langlois' point that Walter has asserted in his affirmation that he was not responsible for the leakage of information giving rise to the existing press reports and that it would be wrong therefore to penalise him for something which is not his responsibility. We accept that no evidence has been put in by any other party and we therefore proceed on the basis of Walter's affirmation that he was not responsible for the publicity. Any person who does disclose information about a hearing in private is likely to have committed a contempt of court. Any person who commits a contempt of court is liable

to be punished (up to and including imprisonment) and/or to be the subject of measures limiting that person's ability to participate further in the proceedings in question.

62 Nevertheless, one cannot undo the fact that the information is in the public domain. The existence of the application and the factual background to it is already available in considerable detail. No matter who may be responsible for it, that is the position. In those circumstances the Court must take that into account in deciding how it should proceed.

63 We accept Advocate Langlois' submission that the Judgment does not contain any new point of law or practice. However, as indicated at para 27(ii), there is a strong public interest in publishing even those judgments which do not develop the law. Much guidance about the Court's approach to its role in administrative decisions concerning trusts can be derived from looking at how it has approached matters in practice.

64 As to the point made by Advocate Langlois that further repetition can amount to a further intrusion on privacy, that has to be balanced against the factors pointing in favour of publication. As we have already stated, the further intrusion will be minimal because of the level of detail which has already been published.

65 As to her point concerning the ability of the media to apply for publication of the Judgment at a later stage, we see no advantage in this. The Court has come to the clear conclusion that, in the particular circumstances of this case, the Judgment should be published. We see no reason for delaying publication and putting the media and the beneficiaries to the trouble and expense of a further hearing which would simply rehearse the same sort of arguments as we have heard already.

66 A further factor relates to the attitude of the other members of the family. While the fact that all parties consent to a hearing in private and to publication only of an anonymised judgment does not mean that the Court will necessarily follow that course (because of the importance of open justice), the fact that the settlor, Thomas and Raymond (with their respective families) are in favour of publication of the Judgment is a factor to be taken into account, particularly when considering Walter's objections based upon press intrusion and the likely effect of publication of the Judgment on the family's privacy.

67 The Court has to bear in mind that there must be a good reason to depart from public justice. Some of the grounds upon which this is done are set out at paragraph 20. It is hard to see that, on the particular facts of this case, the matter falls within any of the three categories there mentioned. As to the first category, it is not a case concerned with the welfare of minors. As to the second category, we do not consider the publication of the Judgment would defeat the very objective of the proceedings. Finally, as to the third category, for the reasons already mentioned in relation to the information already in the public domain, we do not consider this is a case where the right to privacy outweighs the interests of public justice.

68 Ultimately, this is a case where the application is known about by the media and details of the application and of the factual background have been widely reported. At some stage questions will undoubtedly be asked as to whether the Court has given a decision and if so what that decision was. It would in our judgment be unsatisfactory at that stage for the media to be told that the decision and the reasons for it are private. It is likely to lead to further speculative (and possibly inaccurate) reporting coupled with the risk of unofficial leakage of the decision. Given the level of detail already in the public domain and the attitude of the other members of the family, we consider that, in the particular circumstances of this case, the balance comes down firmly in favour of publication of the Judgment rather than non-publication.

69 We have however revisited the Judgment and the published version will omit one or two minor and unimportant details which we do not think it is necessary to place in the public domain.