

M and Other Trusts

Jurisdiction:	Jersey
Judge:	The Bailiff:
Judgment Date:	28 June 2012
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Text

[2012] JRC 127

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Kt.**, Bailiff, **and** Jurats Le Cornu **and** Marett-Crosby.

IN THE MATTER OF THE M AND OTHER TRUSTS

Between
A, B and C
Representors
and

Rozel Trustees (Channel Islands) Limited
First Respondent

Advocate Damien James, Guardian of the minor and unborn beneficiaries
Second Respondent

Advocate A. D. Robinson for the Representors.

Advocate R. J. MacRae for the First Respondent.

The Second Respondent appeared in person.

Authorities

Trusts (Jersey) Law 1984.

Re S Settlement [2001] JLR N 37 .

Deery -v- Continental Trust Company Limited [\[2010\] JRC 001](#) .

Midland Bank Trust Co Limited -v- Green [\[1980\] Ch 590](#) .

Westbond International Bank Limited -v- Cantrust (CI) Limited [\[2004\] JRC 111](#) .

Macedonian Orthodox Community Church St Petka Inc -v- Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand [\[2006\] NSWCA 160](#) .

Trust — application by the representor seeking leave of the court to disclose certain documentation to the family division in London.

The Bailiff:

- 1 On 15th July, 2011, following a hearing held in private, the Court gave certain directions to the First Respondent (“the trustee”) as trustee of the M, R, T and O Trusts (“the Trusts”) in connection with matrimonial proceedings taking place before the Family Division of the High Court in London (“the Family Division”). The Representors (“the adult beneficiaries”) were joined to those proceedings and received the various papers filed in support of those proceedings. They now seek the leave of the Court to disclose to the Family Division, so far as is necessary, the documents served on them in the course of those proceedings as well as the decision of this Court in those proceedings.

Background

- 2 The background to the matter is set out in the Court's judgment dated 19th August, 2011, which gave reasons for the decision reached on 15th July. For today's purposes we can summarise the position briefly as follows.
- 3 D (“the husband”) and E (“the wife”) are engaged in divorce proceedings before the Family Division. The adult beneficiaries are the three adult children of the husband by his first

marriage. The husband also has one child, who is a minor, by the wife. One of the adult beneficiaries also has a child, who is a minor.

- 4 The trustee is the trustee of the Trusts. Each of them is a discretionary trust in conventional form. The class of beneficiaries in each case comprises the husband's father ("the grandfather"), the husband's mother ("the grandmother"), the children and remoter issue of the husband, the Red Cross Geneva and such other persons as may be added as beneficiaries by the trustee with the consent of the protector. The husband and the wife are not beneficiaries, although it would be open to the trustee, with the consent of the protector, to add them. The living beneficiaries of the Trusts therefore comprise the grandfather, the grandmother, the adult beneficiaries and the two minors referred to earlier.
- 5 The Trusts are governed by the law of the British Virgin Islands but the trustee is a Jersey company resident in Jersey and the administration of the Trusts is carried on in Jersey; hence the Court has jurisdiction under Article 5(b) and (d) of the Trusts (Jersey) Law 1984 ("the 1984 Law").
- 6 In the course of the English matrimonial proceedings, the wife applied to join the trustee to those proceedings. In the light of that application, the trustee applied to this Court for approval of two decisions which it had reached:-
 - (i) It had disclosed and wished to continue to disclose information about the assets of the Trusts to the grandfather as a beneficiary in the knowledge that he was likely to disclose this information to the husband (despite the fact that the husband was not a beneficiary), from which the information would of course become available to the Family Division and the wife.
 - (ii) It sought the Court's approval of its decision not to submit to the jurisdiction of the Family Division and therefore not to take part in the divorce proceedings.
- 7 In each case, for the reasons set out in the judgment dated 19th August, the Court approved the decision of the trustee.

This application

- 8 During the earlier proceedings the adult beneficiaries indicated that they might themselves seek leave to intervene in the divorce proceedings in the Family Division. This they have now done. They have done so in order to be able to make submissions concerning the Trusts. Their application to intervene has not yet been fully dealt with by the Family Division but, by an order dated 2nd December, 2011, they were given leave to attend a Financial Dispute Resolution hearing ("FDR") before Baron J which was to commence in February 2012. As a condition for obtaining that leave, they were required to give an undertaking to the Family Division in the following terms:-

“D. AND UPON the above-named “Applicants to Intervene” [the adult beneficiaries] each undertaking to the Court and agreeing with the petitioner [the wife] that:-

(i) They will not, until further order destroy or dispose of (or permit any other person to destroy or dispose of) any of the documents in their possession, custody or power as have been served upon them, or which they (or any person acting on their behalf) may have received other than by way of service, in relation to any and all applications in connection with the proceedings herein that have been made by the Trustees in overseas courts in their capacity as trustees of the trusts listed in the schedule at annex 8 of this order including all pleadings (including the Jersey ‘Representation’ document), orders (including Jersey ‘Acts of Court’), transcripts of hearings, skeleton arguments and other advocates documents, statements of position and evidence filed (including any affidavits sworn by Philippe de Salis) or served in the BVI and Jersey proceedings and all correspondence connected with those proceedings;

(ii) They will use their best endeavours to obtain personal possession of any of the documents referred to in the previous subparagraph that are not already personally possessed by them; and

(iii) They will have available, to bring to court on 24 hours notice at the hearing that is to take place pursuant to paragraph 2(i) below, [i.e. the FDR] copies of all such documents.”

9 As can be seen, the above undertaking (“the Undertaking”) requires the adult beneficiaries to have all the relevant documents and be ready to disclose them on 24 hours notice. Although they have not yet been called upon to honour the Undertaking, the FDR was not concluded in February and was adjourned to a later date. The adult beneficiaries are concerned that, either at the adjourned FDR or prior to the subsequent hearing of the wife's application for financial relief in the divorce proceedings, they may to be ordered to produce the documents in question.

10 The difficulty is that the previous proceedings in this Court were held in private. The adult beneficiaries therefore see themselves as being on the horns of a dilemma. If they produce the documents in question without the leave of this Court, they may in contempt of this Court; if, on the other hand, they refuse to produce them to the Family Division if and when required, they would be in contempt of the Family Division. The adult beneficiaries all reside in England and accordingly are subject to the personal jurisdiction of the Family Division.

11 It is in those circumstances that they apply at this stage to this Court seeking leave to disclose the documents referred to in the Undertaking should they be ordered to do so by

the Family Division. They confirm that they would raise all proper arguments against disclosure before the Family Division but they wish to be in a position to comply with any order which, despite such objections, the Family Division may make.

- 12 The trustee understands the position in which the adult beneficiaries find themselves. Accordingly, whilst wishing to maintain the confidentiality of directions hearings before this Court, it accepts that in this particular case, it should not object to disclosure of much of the material which was placed before this Court in July should the Family Division insist on its production. However, it believes that two categories of material should not be disclosed. First, there is legally privileged material and secondly there is material which discloses the purpose of the July hearing or sets out the trustee's thinking in relation to the application which was before the Court on that occasion. We shall refer to the former as "the privileged material" and the latter as "the sensitive material".

The nature of applications by trustees for directions

- 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 (see *Re S Settlement* [2001] JLR N 37, Jersey Unreported 2001/154). 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 concern decisions in relation to a variety of matters relating to the administration of the trust e.g. whether to sell a major trust asset. In this case, as already mentioned, the trustee's application sought approval of two "momentous" decisions, namely a decision to disclose information about the Trusts to the grandfather in the knowledge that he was likely to pass this on to a non-beneficiary, the husband and through him the information would become available to the wife and the Family Division; and secondly a decision not to submit to the jurisdiction of the Family Division in relation to the divorce proceedings between the husband and the wife.
- 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 for 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.

- 16 In *Deery -v- Continental Trust Company Limited* [\[2010\] JRC 001](#), the Court refused to give assistance to a letter of request from the Family Division which had sought disclosure of material provided to this Court in an application made by a trustee under Article 51. At paragraphs 6 and 7 of the judgment William Bailhache DB said this:-

This Court entirely agrees.

“6(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.

7. For this reason alone we regret that, applying our own laws, we do not think it is proper to give effect to the Letter of Request. We would also like to add that we have seen that the affidavits contain a number of exhibits; we assume that the Letter of Request extends to the exhibits as well as to the affidavits themselves although it does not in terms say so. The exhibits contain material which is legally privileged and also contain material which is confidential. These are claims to privilege and confidence which we would expect an English court to uphold. ...”

- 17 These observations are consistent with the approach to similar applications in England. Thus in *Midland Bank Trust Co Limited -v- Green* [\[1980\] Ch 590](#) at 606 Templeman J said this:-

“... of course, it is necessary for defendants [i.e. the applicants for Beddoe relief] to open their hearts to the judge and tell him exactly what the action looks like. The judge is acting in some respects as though he were the adviser and trustee giving guidance. The application is invariably heard in chambers, and nothing is published because of the jurisdiction of the judge to look after the estate, and because any information made public would be available to the plaintiff in the action, and might well be prejudicial to the defence and the estate which the judge is there to protect. Over the whole of such an application there is an aura of confidentiality, which is preserved by hearing everything in chambers.”

- 18 In our judgment, given the clear public interest reasons for hearing such applications in private, it is a contempt of court for a party to publish information which he only receives as part of such an application. We would endorse what the Court said in *Westbond International Bank Limited -v- Cantrust (CI) Limited* [\[2004\] JRC 111](#) at para 6:-

“6. We are wary of attempting to issue any such guidance. The matter has

not been fully argued – because the court indicated at a fairly early stage that it did not believe that this was a case of contempt – and in any event it is difficult to foresee all the various circumstances which may arise. At one end of the scale, the fact that X chooses to use evidence already in his possession for the purposes of a private hearing surely cannot prevent him from using that same material in other public proceedings providing that he does not state in the public proceedings that the material has been used in the private hearing so as, in effect, to disclose the content of that private hearing. Thus the mere fact that material has been used by a party in a private hearing cannot of itself be sufficient to prevent that party deploying that material in public proceedings. Conversely, if information is disclosed to X during the course of a private hearing and he subsequently uses that material publically in such a way as to refer to the material and thereby in effect to disclose the content of the private proceedings, that is clearly capable of amounting to a contempt of court as it will interfere with the intention of the court sitting in private that the interests of justice required the hearing to be in private.”

- 19 The distinction drawn by the Court in the foregoing passage can be simply illustrated. It may well be that a party to Article 51 proceedings is already in possession of a trust deed or trust accounts. The fact that such deed and accounts are produced and referred to by another party in the Article 51 proceedings held in private cannot possibly prohibit the first party from using those documents in other proceedings or, indeed, publicly. But, if he was not hitherto in possession of those documents and has only received them as a result of the Article 51 proceedings, then it would be a contempt for him to disclose them to any other party; hence the use of the word “only” in the first sentence of paragraph 18 above.
- 20 Applying that to the facts of this case, it would in our judgment be a contempt of court for the adult beneficiaries to disclose without leave of the Court any document which they received in the July proceedings (such as affidavits, exhibits, skeleton arguments, notes of the content of the hearing and the judgment itself) save to the extent that they were in possession of such documents independently of the proceedings. They have therefore very properly brought this application seeking leave.

General observations

- 21 As just explained, the Court considers that it is in the interests of justice that trustees should be able to come before this Court in private, confident in the knowledge that they may speak frankly to the Court and that what is said or produced to the Court and to the other parties to the private proceedings will not be released to third parties or used for purposes other than the private proceedings.
- 22 We would hope that the Family Division would, in the interests of comity, take note of those concerns. We accept, of course, that the Family Division will wish to establish the financial position of the Trusts and the likelihood of the husband benefitting thereunder as part of its

role of resolving the financial dispute between the husband and the wife. However, by ordering the disclosure which it did in July, the Court has done all it can to ensure that the Family Division is made fully aware of the financial position of the Trusts and the likelihood of the husband benefitting.

- 23 We accept that we cannot view the matter from the perspective of the Family Division but it does seem to us highly unlikely that the material disclosed for the July proceedings will add to the relevant knowledge about the Trusts on the part of the Family Division or will be relevant to the issue which the Family Division has to resolve. The only issues raised in the July proceedings were whether the trustee should provide information to the grandfather and whether it should submit to the jurisdiction of the Family Division. Following the Court's ruling, the information has been provided to the grandfather (and onwards) and the trustee has not submitted to the jurisdiction. The reasons for the trustee and the Court reaching that view do not, with respect, seem relevant to the issue of how much, if anything, the husband should be ordered to pay the wife or whether there should be a variation order in relation to any of the Trusts. The internal thinking of the trustee as to what it considers to be in the best interests of the beneficiaries and the decision of the Court in relation to that matter seems very different from the issue of what order should be made by the Family Division in relation to the financial position of the husband and the wife.
- 24 We would therefore respectfully invite the Family Division to consider very carefully whether it needs to make any order that the adult beneficiaries disclose material relating to the July proceedings. If this Court were to find that the Family Division began routinely to make orders requiring disclosure of applications by trustees brought in private, the Court would have to consider amending its procedures either so as to heavily redact any material served on English resident beneficiaries or to preclude material from being sent out of the jurisdiction and allowing only inspection within the jurisdiction. This would seem to be in no-one's interests. If, despite this, the Family Division considers that some disclosure should be made, we hope that it will have regard to the remarks of this Court in relation to the different categories of material referred to in the remainder of this judgment.

Should the Court grant leave to disclose?

- 25 We agree with the trustee that the material sought to be disclosed falls conveniently into three categories:-

We will consider each of these in turn.

Privileged material

- (i) Privileged material
- (ii) Sensitive material
- (iii) Other material

- 26 As part of its duty to assist the Court and to give full and frank disclosure, the trustee obtained legal advice prior to the application in July 2011. It obtained this from Mr Le Poidevin QC and from BVI and Jersey lawyers and its associated company in Switzerland also obtained advice from English solicitors. Some of the advice was exhibited to the affidavits sworn on behalf of the trustee. Furthermore, parts of the advice were referred to in the skeleton arguments and in the judgment of the Court.
- 27 In Jersey, as in England and Wales and other common law jurisdictions, there is absolute privilege for legal advice. A party cannot be compelled to disclose legal advice in subsequent litigation. This is regarded as a principle of major importance in that it ensures that communications between a lawyer and his client can be full and frank without fear of production in subsequent Court proceedings.
- 28 In our judgment, in an application of this nature, there is clearly a common interest between trustees and beneficiaries. Privilege is not lost by disclosure to persons sharing a common interest. Similarly, given the role of the Court as a form of adviser (as described by Templeman J in the passage referred to at para 17 above) we consider that privilege is not lost by disclosure to the Court as part of an Article 51 application. Although we were not referred to any English authority which supports this proposition, the point was raised recently in Australia in *Macedonian Orthodox Community Church St Petka Inc -v- Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* [2006] NSWCA 160 when it was held that privilege in a legal opinion placed before the Court on an application similar to a Beddoe application was not lost.
- 29 In our judgment, privilege in the legal advice placed by the trustee before this Court in the proceedings in July 2011 was not lost by disclosing it to the Court and to the other parties to those proceedings. We would hope very much that the Family Division would recognise the protection necessary for legally privileged material and would not order its disclosure. In view of the importance which this Court attaches to legal privilege, we are not willing to grant consent to the disclosure of such material, whether in the form of the original advice or in the form of documents which quote from or otherwise identify the content of that advice. Such material is listed in Schedule A to this judgment and disclosure of it without the leave of this Court would constitute a contempt of court.

Sensitive material

- 30 Given the situation in which the adult beneficiaries find themselves, the trustee has not objected to this Court permitting disclosure of most of the material which is the subject of the Undertaking should the adult beneficiaries be ordered to do so by the Family Division. However, it considers that certain material ('the sensitive material') should be redacted on the grounds first, that it shows the purpose of the July hearing and secondly, it shows the reasoning and decision making process of the trustee or other parties such as the Guardian of the minor and unborn beneficiaries.

- 31 The trustee has produced a schedule setting out all the material which it considers sensitive and whether it does so for the first or second of the two reasons mentioned above. We have concluded that, in the circumstances of this case, we see no particular harm in disclosing simply the purpose of the July hearing. We cannot see any prejudice to the Trusts in it being known that the trustee was seeking directions as to the disclosure of information and as to whether it should submit to the jurisdiction of the Family Division. We consider therefore that all of these entries should not be treated as “sensitive” and should be considered along with “other material” below.
- 32 In relation to those matters which disclose the trustee's reasoning or decision-making process (other of course than that which refers to legal advice which is privileged) or those of the Guardian, we would normally refuse permission to disclose such material for the reasons set out above. However, the situation in this case is different. For better or worse, the adult beneficiaries have given an undertaking to the Family Division. They reside in England and are subject to the personal jurisdiction of the Family Division. The Undertaking obliges them to produce material within 24 hours if required to do so, so that there may not be time to seek the leave of this Court at that stage.
- 33 In the very unusual circumstance of this case and taking into account the nature of the material in question (which we do not think is particularly sensitive), we consider that, if required to do so by the Family Division even after it has heard arguments to the contrary, the adult beneficiaries should be given leave to disclose the sensitive material. This material is listed in part B of the Schedule to this judgment. However, we hope very much that the Family Division will respect the nature of the July proceedings and not order disclosure of the sensitive material.

Other material

- 34 Given the existence of the Undertaking, none of the parties before us opposed the adult beneficiaries' application for leave to disclose this material. Again, we would not normally give leave because of the overriding public interest referred to earlier. Nevertheless, in the particular circumstances of this case, we do give leave to the adult beneficiaries to disclose such material for the purposes of the matrimonial proceedings if ordered to do so by the Family Division despite argument to the contrary.

Conclusion

- 35 In summary, we refuse leave to disclose the material listed in Schedule A to this judgment on the grounds of legal privilege but we grant leave to disclose all other material should the Family Division make an order requiring disclosure despite the expressed wishes of this Court. As to the material supplied for this hearing, only redacted copies have been served on the adult beneficiaries and they are given leave, if ordered to do so, to disclose such redacted material to the Family Division. Leave is also given to disclose this judgment to the Family Division without any order of the Family Division should the adult beneficiaries think it appropriate in the context of a hearing before that Court as to whether the adult

beneficiaries should be ordered to disclose any material in relation to the July proceedings or these present proceedings.

Schedule A

Schedule B

Index	Document	Paragraphs to redact
Vol 1, tab 3	Exhibit IC2	Pages 361 – 370, 386 – 389 & 421—423
Vol 2, tab 4	Second affidavit of Ian Crosby	Paras 27 – 30
Vol 2, tab 4	Exhibit IC3	Pages 604 – 627 & 629 – 630
Vol 3, tab 24	Skeleton argument of the Trustee	Paras 11(d) (second sentence) & 11(e), paras 22 – 25
Vol 3, tab 25	Skeleton argument of the adult beneficiaries	Para 5
	Judgment of the Royal Court dated 19th August 2011	Paras 22 —23

Index	Document	Paragraphs to redact
Vol 3, tab 24	Skeleton argument of the Trustee	Paras 11(b), (c) and (f), 12 & 36
Vol 3, tab 25	Skeleton argument of the adult beneficiaries	Paras 3 & 4
Vol 3, tab 26	Skeleton argument of the Guardian	Paras 9 – 15, 18 – 19 and 21