

The Trustee v Principal Beneficiary

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	10 August 2020
Neutral Citation:	[2020] JRC 161
Reported In:	2020 (2) JLR 119
Court:	Royal Court
Date:	10 August 2020

vLex Document Id: VLEX-850641761

Link: <https://justis.vlex.com/vid/the-trustee-v-principal-850641761>

Text

[2020] JRC 161

ROYAL COURT

(Samedi)

Before:

R. J. MacRae **Esq**, Deputy Bailiff, **and** Jurats Christensen **and** Hughes

In the Matter of the Arpettaz Settlement

And in the Matter of Articles 51 & 53 of the Trusts (Jersey) Law 1984 (As Amended)

Between
The Trustee
Representor
and
Principal Beneficiary
First Respondent

and

[the claimants to English High Court proceedings]
Second to Fifth Respondents

Advocate N F Journeaux for the Representor.

Advocate A Kistler for the First Respondent.

The Second to Fifth Respondents were not represented

Authorities

Trust (Jersey) Law 1984.

Public Trustee v Cooper [\[2001\] WTLR 901](#).

Re S Settlement [2001] JLR Note 37.

The F Charitable Trust [\[2017\]\(2\) JLR 26](#).

M & L Trust [\[2003\] JRC 002A](#).

In the matter of the H Trust [\[2006\] JLR 280](#).

HSBC International Trustee Limited v Poon [\[2011\] JRC 167](#).

Conflict of Laws (15th Edition).

Alsop v Wilkinson [\[1996\] 1 WLR 1220](#).

E Trust Company Limited v B [\[2014\] JRC 027](#).

U Limited v B and 6 others [\[2011\] JLR 452](#).

Lewin on Trusts, 18th Edition.

The Law of Privilege (Third Edition).

Lewin on Trusts (20th Edition).

Lewis v Tamplin [\[2018\] EWHC 777 \(Ch\)](#).

Dawson Damer v Taylor Wessing LLP [\[2020\] EWCA Civ 352](#).

Winterthur Swiss Insurance Company and Another v AG (Manchester) Limited and Others
[\[2006\] EWHC 839 \(Comm\)](#).

M and Other Trusts [\[2012\]\(2\) JLR 51](#).

Trust — directions in relation to participation in foreign proceedings.

Deputy Bailiff

THE

- 1 By representation dated 17th March 2020 the Representor, (“the Trustee”), Trustee of the Arpettaz Settlement (“the Trust”) seeks the directions of the Court in respect of how it should conduct itself in the context of litigation extant before the English High Court.
- 2 We heard submissions in this matter on 8th April 2020. We then directed the parties to file additional arguments and authorities which were received from the First Respondent's advocate on 24th April 2020 and the Representor's advocate on 29th April 2020.
- 3 Subsequently the members of the Court met to consider the additional documentation filed and our decision in this matter. We gave our decision on 29th June 2020 and now give our reasons for that decision.

Background

- 4 The Trust was established by deed of settlement dated 18th July 2011 made between the settlor and the original trustee as trustees. The Trust is governed by Jersey law and is irrevocable. The Trust is a discretionary trust. The settlor was the former chairman of an oil exploration company incorporated in the Isle of Man. He ceased to occupy this role in March 2014. The original settled total funds from the settlor were limited to £35,000. From the outset the beneficiaries under the Trust, as listed in Schedule 3, comprised the First Respondent (“the principal beneficiary”) and immediate members of his family – his parents, sister and brother. Clause 23 of the Trust, dealing with “*Disclosure*”, prohibits the trustee during the trust period from making disclosure to any person of any information relating to the Trust, except with the authority of all adult beneficiaries or unless ordered to do so by a court of competent jurisdiction.
- 5 On the same day that the Trust was established the settlor, the original trustee and the principal beneficiary entered into a deed of undertaking which provided that in consideration for the principal beneficiary working as Chief Executive Officer of the oil company and his efforts to increase the price of their shares, of which 48,723,953 were held by companies beneficially owned by the settlor and his family, the settlor would provide the original trustee in its capacity as trustee of the Trust a sum with the anticipated value of \$15m within three years from the date of the deed of undertaking.

- 6 This sum was duly paid into the Trust on 12th February 2012 by the settlor's wife. This is the only significant settlement that was made into the Trust and it is this payment which is the subject of litigation before the English High Court.
- 7 The settlor signed a letter of wishes on 18th July 2011 expressing the wish that the principal beneficiary should be regarded as the principal beneficiary of the Trust and that the trustees should have regard to the principal beneficiary's wishes with regard to adding or removing beneficiaries and to the future administration of the Trust when exercising its powers. The principal beneficiary produced his own letter of wishes dated 20th August 2011 expressing various wishes including that:
- (i) the trustee should have regard to his wishes during his lifetime;
 - (ii) on his death the trustee should have regard for the wishes of the remaining beneficiaries; and in particular named godchildren, each in respect of the 10% share of the Trust; and
 - (iii) the remainder of the Trust should not be used for the benefit of the principal beneficiary's family and godchildren but should instead be used to support charities formed to assist British Armed Forces personnel and ex-personnel.

The English Proceedings

- 8 . The Second to Fifth Respondents ("the English Claimants") issued proceedings against the settlor in 2013. A worldwide freezing order was made against the settlor in those proceedings. In those proceedings, it is alleged that the settlor defrauded the claimants whilst he was Chief Executive Officer of the Second Respondent. The English Proceedings were resolved in favour of the English Claimants in 2017. During the trial the settlor gave evidence and was cross-examined over the course of four days. The English judge described the settlor as "evasive" and "thoroughly dishonest".
- 9 The English High Court ordered that the settlor pay the English Claimants the sum \$299 million together with costs. The worldwide freezing order against the settlor was thereafter increased to \$315 million.
- 10 The English Claimants now seek to enforce that judgment against various assets, including the assets of the Trust which they claim are the proceeds of the settlor's fraud. The English Claimants say that they have a proprietary interest in the assets of the Trust. The principal beneficiary was put on notice by the English Claimants in December 2017 that action may be taken against him because he had had dealings with assets originating from the settlor. In December 2019 the Trustee gave an undertaking to the English Claimants to notify them at least fifteen working days in advance of any intention to make a payment out of the Trust to which the English Claimants had not given their prior written consent, save in respect of the Trustee's routine administration fees.

- 11 The English Claimants have applied to join the principal beneficiary and the Trustee to the English Proceedings pursuant to amended particulars of claim. Those particulars of claim have since been re-amended. Allegations of dishonesty or bad faith on the part of the Trustee and any consequential personal claims made by the English Claimants against the Trustee, which featured in the amended particulars of claim have been abandoned in the re-amended particulars of claim.
- 12 The re-amended particulars of claim say that the \$15 million legally owned by the Trustee as Trustee of a Trust in which the principal beneficiary has an interest represent the traceable proceeds of funds stolen from the English Claimants and misappropriated in breach of fiduciary duty by the settlor and another. The prayers for relief seek orders, *inter alia*, that the defendants to the English Proceedings do all acts necessary to transfer to the English Claimants the legal title of any assets which they hold on resulting and / or constructive trusts for the English Claimants, and that the said assets be used to satisfy the judgment in favour of the English Claimants. The claims in relation to the Trust are particularised at schedule V to the re-amended particulars of claim. It is said that the deed of undertaking referred to at paragraph 5 above was “a secret agreement” designed to hide and disguise the principal beneficiary's remuneration from his fellow directors and the company's auditors and that, *inter alia*, the principal beneficiary was not a *bona fide* purchaser for value without notice in respect of the assets transferred to or payments received from the Trust and that the Trust assets accordingly represent traceable proceeds of sums of which the English Claimants have been defrauded by the settlor. The Trustee is, it is said, a “mere volunteer” which did not give value for its receipt of the payment to the Trust and accordingly the Trustee holds any Trust assets for the English Claimants beneficially.
- 13 The Trustee, in the affidavit sworn on its behalf, says that until it was notified of the English Proceedings it had understood that the Trust assets were held subject to the terms of the Trust. The Trustee accepts that in the event that the English Claimants succeed in their proprietary claim against the Trust assets, the assets would be held by the Trustee as constructive trustee for the English Claimants. The Trustee says, accordingly that it is “presently unable properly to determine for whom it holds the Trust assets”.
- 14 The Trustee anticipates that the principal beneficiary, as the principal beneficiary, will defend the legitimacy of the sum settled into Trust in the English Proceedings. The principal beneficiary's advocate confirmed this to us. Indeed the principal beneficiary has made a reverse summary judgment application in the English High Court with the intention of seeking the dismissal of the proceedings issued against him.

The relief sought by the Trustee

- 15 The Trustee wishes to disclose three pieces of legal advice received by its predecessors in title which are privileged in the hands of the Trustee. Such disclosure will be made with the

consent of the principal beneficiary but without consultation with the other beneficiaries. In any event an order from the Court is sought in regard to these three pieces of advice. They can be summarised as follows. The first piece of advice to the Trustee dated June 2011 dealt with the terms of the deed of undertaking, which was drafted by London lawyers assisting the Trustee. The second piece of advice, from January 2014, was from the same London law firm and considered, *inter alia*, the propriety of the Trustee receiving the payment of \$15 million from the settlor, in the context of claims (at that stage unresolved) made in the English High Court against the settlor. The third piece of advice, dated February 2015, was given by Jersey advocates advising whether the Trustee should consider itself on notice of a proprietary claim in respect of the funds settled into trust such that it should not make any payments or loans out of the Trust. Disclosure of this advice will, it appears, reinforce the Trustee's assertion (which appears to be unchallenged in any event) that it has acted properly throughout and may, to some extent, assist the principal beneficiary in his defence to the proceedings.

- 16 The principal relief sought by the Trustee is in respect of its wish to submit to the jurisdiction of the English court and to adopt a neutral position in the English Proceedings, thus allowing the English High Court to determine the ownership of the Trust assets, and related matters, and to assist the English court in so doing by making disclosure and generally complying with any directions given by the English High Court. In this regard the Trustee has sought the advice of English Leading Counsel as to the proper role that the Trustee should play in the English Proceedings.
- 17 In February and March 2020 the Trustee informed both the English Claimants and the principal beneficiary, through their respective lawyers, of its intention to issue these proceedings by way of representation and explained in the letter that the Trustee proposed to take a neutral role in the English Proceedings, with the principal beneficiary advancing such arguments in defence of the claims as he thinks appropriate.
- 18 The English Claimants have responded to the effect that they regard the matter of the issue of the Representation as one for the Trustee. They have asserted that any costs incurred by reason of the Trustee's Representation should not be taken out of the Trust assets. Although the English Claimants have instructed Jersey advocates, they elected not to participate in the hearing of the Representation. The principal beneficiary was generally supportive of the Trustee's position in that he was content for the Trustee to participate in the English Proceedings and take a neutral stance therein, although it was submitted on his behalf that the Court should direct that the Trustee should generally consult with the principal beneficiary's lawyers in connection with such steps that it might take in the English Proceedings.
- 19 The English Claimants have asked whether or not the Trustee is in receipt of any indemnity in respect of the Trust or the Trustee's participation in the English Proceedings provided to it by either the principal beneficiary or any other person. The Trustee seeks an order from the Court in relation to disclosure of the existence or absence of such an indemnity, as the case may be.

20 The stance taken by the Trustee in respect of the advice that it has received from English counsel in relation to the English Proceedings is that it is privileged in the Trustee's hands and that it should not be disclosed to third parties. The advice has been paid for by the Trustee personally but the Trustee's advocate indicated that it would be quite proper to discharge the costs of seeking that advice out of the assets of the Trust, that the advice was taken to benefit the Trust and its beneficiaries and not the Trustee personally. Further the Trustee sought an order, which the Court made on 29th June 2020, to the effect that the costs of and incidental to the Representation should be paid out of the Trust assets (described as the "*disputed assets*") which would, *prima facie*, include the cost of instructing counsel. The principal beneficiary argued that he should be entitled to see the advice given by counsel in order to understand the stance taken by the Trustee and on the footing that, on usual principles, a beneficiary in this context should be able to see such advice. The Trustee responded to this argument by saying that if the advice from counsel is disclosed to the principal beneficiary then it should also be disclosed to the English Claimants as the Trustee had no reason to believe, at this stage, that the principal beneficiary had a better ultimate beneficial claim to the Trust assets than the English Claimants as that matter had not yet been determined by the English High Court.

21 At the end of the hearing of the Representation on 8th April 2020 the Court wished to receive further material and information in relation to three issues and gave consequential directions. These issues were as follows:-

(i) Costs. It seemed to the Court that the estimate of the costs of participation in the English Proceedings were high. The Court directed the Trustee to provide further material in relation to costings, particularly in order to ascertain whether or not it would be significantly less expensive for the Trustee to provide the documents that were relevant to the English Proceedings without submitting to the jurisdiction of the High Court and to provide a full estimate of the costs of full participation in the English Proceedings by way of a comparison.

(ii) The Court directed the parties to file further authorities in respect of the Court's general approach to submission to the jurisdiction on the part of Jersey trustees to foreign proceedings; and

(iii) The Court ordered the parties to provide further additional authorities relevant to the contention that the beneficiaries have a joint privilege in the advice from counsel with the Trustee and the extent to which common interest privilege in respect of the English Proceedings could apply to the advice from counsel if disclosed to the principal beneficiary.

22 Having now received this material it is appropriate to set out the general principles applicable to the various forms of relief sought in this case before applying them to the facts before. We will consider the Court's practice in relation to ordering the Trustees to participate in foreign proceedings and the consequential costs of the same, then the Court's

supervisory jurisdiction to make orders in respect of disclosure and then, finally, the appropriate approach to the disclosure of advice taken by the Trustee which is *prima facie* covered by legal privilege.

Jersey trustees submitting to the jurisdiction of foreign courts: proper approach

- 23 Under Article 51 of the Trust (Jersey) Law 1984 ("the Law") the Trustee is seeking an order concerning the manner in which the Trustee should act namely, in this case, for the Court to give a blessing to a decision made by the Trustee. The decision to participate in foreign proceedings is, in this context, plainly a "*momentous*" one as described in *Public Trustee v Cooper* [2001] WTLR 901, as approved in Jersey in *Re S Settlement* [2001] JLR Note 37. This application falls within the second category referred to in *Public Trustee v Cooper* namely:-

"(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' power where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that which are very familiar in the Chancery Division are a decision by the trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do, but they think it prudent and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision, in a case like that there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

- 24 The well understood approach for the Court to apply considering whether to approve a momentous decision was set out by Birt DB in *Re S Settlement* as follows:-

"we need to consider three issues when fulfilling our role under the second category:

(1) Are we satisfied that the Trustee has in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out each of the steps we have described earlier in this judgment?

(2) Are we satisfied that the opinion which the Trustee has formed is one at which a reasonable Trustee properly instructed could have arrived?

(3) Are we satisfied that the opinion at which the Trustee has arrived has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision?"

25 We agree with the decision of the Royal Court in the matter of *The F Charitable Trust* [2017](2) JLR 26 where the court observed at paragraph 12 of the judgment that on Beddoe applications (such as this) the general approach derived from in *Re S Settlement* is "slightly more nuanced" in that the court should have regard to the nature of the decision which the trustee seeks to have blessed. There are certain decisions, as the court observed in that case, where a trustee is in a better position than the court in terms of expertise – for example, the decision to realise a majority interest in a family company or to make an appointment of a particular member of the class of beneficiaries. In *F Charitable Trust* the court said:-

"In those circumstances, there is every reason for thinking that as the settlor had conferred the relevant power or discretion on the trustee, he was satisfied that the trustee was the right person to exercise it, and it is unsurprising in those cases that the court exercises on a supervisory power in blessing a momentous decision, restricting itself to a review, as has been said in the cases, based on honesty (lack of conflict) and rationality."

26 However the court went on to observe:-

"Where the substratum of the decision is the question of litigation, however, it appears to us that the court is not in quite the same position. One thing that can firmly be said about litigation is that it is something with which the court is familiar, probably in most cases more familiar than the trustee. Where the trustee therefore seeks to have a decision to litigate blessed by the court, it should expect the court to exercise a more direct, inquisitorial role, and be ready to form its own judgment as to whether it is sensible for the trust estate to be put at risk by the litigation in question."

27 As to approval of a trustee's in principle decision to participate in foreign proceedings it should be firmly kept in mind that the starting point is that questions of validity of a Jersey trust (which in essence the English Proceedings are, in this context) should be determined by the Jersey court and it will only be in exceptional circumstances that the court will direct a trustee to participate in foreign proceedings where the outcome may be that most or all of the trust fund is recovered by a third party. As the Royal Court said in *M & L Trust* [2003] JRC 002A:-

"18. These are trusts governed exclusively by Jersey law and administered in Jersey by a Jersey based trustee. On the face of it, this Court is the most appropriate forum to adjudicate upon whether the trusts are valid or whether, for the reasons put forward by the mother, they

should be regarded as shams so that the assets belong in law to the settlor. Nevertheless the issue having been raised in the Illinois proceedings, we must consider whether the interests of the beneficial class as a whole would best be served by the Trustee participating in those proceedings or whether it would be more in their interests for the Trustee to take no further part.”

28 . In the matter of the H Trust [\[2006\] JLR 280](#) the Royal Court said, in the context of foreign divorce proceedings where the husband and wife were beneficiaries under a Jersey trust:-

“12. Significant consequences may flow from a decision by a trustee of a Jersey trust to submit to the jurisdiction of the Family Division of the High Court (“the Family Division”) or indeed any other court considering the matrimonial affairs of beneficiaries of a trust. Any order subsequently made by the Family Division would be made in proceedings to which the trustee had voluntarily submitted and in which therefore it had full opportunity to put forward submissions on the order which the court should make. It follows that the trustee would be in some difficulty in arguing subsequently before this Court against the proposition that any order of the Family Division relating to the Trust should be enforced without re-consideration of the merits of such order .

13. Conversely, if the trustee has not submitted to the jurisdiction of the Family Division, any order of that court will not be enforceable in Jersey under the rules of private international law. On any subsequent application to this Court to vary the trust so as to achieve the effect of any variation or other order made by the Family Division, this Court would have complete discretion as to the course it should take .

14. In this respect it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this Court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This Court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has therefore a very different focus from the Family Division .

15. It follows that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment of the beneficiaries of a trust when the primary focus of that court is the interests of the two spouses before it. It is more likely to be in

the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this Court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases – e.g. where all the trust assets are in England – it may well be in the interests of a trustee to appear before the English court in order to put forward its point of view because the English court will be able to enforce its order without regard to the trustee or this Court by reason of the location of the assets.”

- 29 Although the *H Trust* involved a matrimonial case, in the view of the Court the principles are of general application – in most circumstances it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court.
- 30 The amendment of the Law by the introduction of Article 9(4), subsequent to the decision in *H Trust*, does not, in the Court's view affect this general approach. The Court agrees with the submission made by the advocate for the principal beneficiary to the effect that notwithstanding the amendments to Article 9, if a Trustee submitted to the jurisdiction of a foreign court and subsequently applied to the Royal Court to bless a decision which had the indirect effect of securing the implementation of the foreign order on the footing that was in the interests of the beneficiaries of the Trust, and not by way of enforcement or approval by the Royal Court of a foreign order, then the Royal Court would be more likely to pay attention to the foreign order for a decision than if the Trustee had not submitted to the foreign court's jurisdiction in the first place.
- 31 However there will be cases where it is in the interests of the beneficiaries for the Trustees to submit to the jurisdiction of a foreign court. Such a case was *HSBC International Trustee Limited v Poon* [\[2011\] JRC 167](#). In that case the Royal Court cited the relevant paragraphs (above) from the decision in *H Trust* and observed:-

“The position has of course changed since then because of the introduction of the new Article 9 of the Trusts (Jersey) Law 1984. Even if the trustee submits, an order of an overseas matrimonial court varying a trust cannot be enforced in Jersey because that overseas court will be applying its local law to vary the trust rather than Jersey law, and any enforcement of such a variation is prohibited by Article 9(4) of the 1984 Law (see *IMK Family Trust* [\[2008\] JLR 250](#)).”

- 32 The court approved the trustee submitting to the jurisdiction of a foreign court in *Poon* because, *inter alia*, if the trustee did not submit and refused to comply with any order of a Hong Kong court, that court would still have the necessary power to enforce its order against the assets situated in Hong Kong, which were principally held in underlying companies holding 70% of the trust assets. The trustee would be unable to prevent such enforcement. Furthermore the trust was administered in Hong Kong.

- 33 In this case the principal beneficiary, lives in the United Kingdom. He now holds the majority of the Trust assets, which have been advanced by way of a loan to him, and accordingly, one way or another, the Trust assets and their principal recipient is within the jurisdiction of the English High Court. As set out in the [Conflict of Laws \(15th Edition\)](#) at paragraph 22–026 a debt is situate in the country where the debtor resides.
- 34 The Court was informed that about £7 million of the £10.9 million of assets consisted of a debt owed to the Trustee by the principal beneficiary. Accordingly a significant portion of the Trust assets, being unsecured interest free loans to the principal beneficiary which although governed by Jersey law are situated in England. The remainder of the Trust assets are held with Quilter Cheviot which is an English company and the assets are not likely to be Jersey sited. If the English Claimants obtain a judgment against the Trustee then the Claimants would be able to obtain a third party debt order against the principal beneficiary in respect of the debt owed by him to the Trustee.
- 35 For this reason we regard this as in a case where the Court would be prepared to approve the decision of the Trustee to participate in foreign proceedings.
- 36 As to the appropriate stance to be adopted by the Trustee in such proceedings, this case falls within the third of Lightman J's three categories of disputes described in *Alsop v Wilkinson* [1996] 1 WLR 1220, namely:-

“In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of a trustee is to remain neutral and in the absence of any court direction to the contrary and substantially as happened in Merry’s case [1989] 1 Ch 306) to offer to submit to the court’s directions leaving it to the rivals to fight their battles. If this stance is adopted, in respect of the costs necessarily and properly incurred e.g. in serving a defence agreeing to submit to the courts direction and in making discovery, the trustees will be entitled to an indemnity and lien.”

- 37 There are, as noted by the Royal Court in the representation of VV [2012] JRC 207, instances where the trustee cannot adopt the principle of neutrality because no one else is available to defend the case. As the Royal Court said in the final paragraph of its judgment in that case:-

“None of the beneficiaries were prepared or were in a position to ‘take up the cudgels’ on behalf of the trusts and in the light of this advice it would not be appropriate to allow these claims to go by default. Whilst ordinarily, we would expect VV to take a neutral stance, in these special circumstances we concluded that it was the only person in a position to defend the trusts and it was directed to do so. We also gave VV its costs for doing so out of the trust funds.”

- 38 This is not such a case as the principal beneficiary will be and is defending the claims on their merits. Accordingly it is appropriate for the Trustee to adopt a neutral stance and we direct it to do so.
- 39 We were troubled about the extent of legal costs of the Trustee participating in the proceedings as they seem to us to be high. This concern was almost sufficient for the Court to decline to bless the Trustee's in principle decision to participate in the English Proceedings.
- 40 The total cost to the Trustee if it submits to the jurisdiction, including the cost of participating in a three day trial and preparation for the same, will amount to some £793,000. However we were informed that even if the Trustee was not to submit to the jurisdiction of the English High Court, the principal beneficiary and the English Claimants may wish to obtain and serve witness statements from individuals at the Trustee; the Trustee would need to monitor the content of expert evidence that was served by the other parties in order to ensure that it was properly scrutinised to protect its interests and those of the beneficiaries; the Trustee would need to monitor and be advised on developments that take place at the case management conference, particularly in relation to disclosure; the same would apply to the pre-trial review and in any event the Trustee would need to monitor and be advised on developments that took place in the trial. On this footing the costs to the Trustee even in the absence of submission to the jurisdiction were estimated at £410,000. The Court did receive some reassurance from the understanding that the Trustee would investigate ways in which the costs might be reduced and noted that they would be subject to scrutiny by the High Court following service of a proposed budget. It did seem to the members of the Court, including the estimated costs of non-participation, were high. However on balance the members of the Court were satisfied:-
- (i) that the Trustee had formed the opinion that it ought to involve itself in the proceedings in good faith and that it was desirable to do so, particularly having regard to the advice from counsel, which we do not set out as this is a judgment that will be available to all parties;
 - (ii) that the Trustee's decision to participate in the English Proceedings is a reasonable one;
 - (iii) that the Trustee is not disabled from reaching this conclusion by any actual or potential conflict of interest. This is particularly so having regard to the fact that any personal claims against the Trustee have now been withdrawn by the English Claimants.
- 41 As to the nature of the participation in the English Proceedings, the Court rejected the assertion that it was appropriate for the Trustee only to take certain steps in those proceedings having consulted with the principal beneficiary's legal representatives. To make such an order would not be appropriate and would be inconsistent with the neutral stance that we have directed the Trustee to adopt.

- 42 However that is not to say, and this is a point that we will return to when dealing with disclosure of the advice of counsel below, that the Trustee should proceed on the footing that the status of the principal beneficiary and the English Claimants are currently identical as both claim to be beneficially interested in the trust fund. The Trustee should not lose sight of the fact that they are currently holding this trust fund on trust for the beneficiaries, the principal beneficiary being the principal beneficiary.
- 43 We agreed that the Trustee would need to take the standard procedural steps required by a party to English law proceedings and directed it accordingly. As to costs, the Trustee has an indemnity out of the Trust assets in respect of its costs if the principal beneficiary is successful. It also has a right of indemnity under Section 31 of the English [Trustee Act 2000](#) if the English Claimants are successful. There was also a similar provision to this effect in the English Civil Procedure Rules and pursuant to a practice direction. The Court was assured that the English High Court, having taken into account the Trustee's neutral stance, was likely to order that the unsuccessful party in the case ought to pay the Trustee's costs of and incidental to the English Proceedings.
- 44 We note that a copy of the Trust has already been provided to the English Claimants by the principal beneficiary by witness statement dated 20th February 2020. We agreed that the Trustee should make disclosure to the English Claimants of the existence and location of the disputed assets. Accordingly we directed the Trustee as follows:-
- “(b) consent to being added as a party to the English Proceedings;*
 - (c) adopt a neutral stance in relation to the allegations made in the English Claimants' draft Re-Amended Particulars of Claim (save insofar as, and to the extent that, the English Claimants might seek any order that the Representor should pay any sum from its own funds or that they may require the Representor to incur any liability for its own account);*
 - (d) provide such evidence as it can to assist the English Court in relation to the factual position alleged in the Re-Amended Particulars of Claim;*
 - (e) otherwise participate and take steps in the English Proceedings as required by the English Civil Procedure Rules or any order of the English High Court, to the extent advised by English counsel, including, for the avoidance of doubt by filing and serving a Defence, providing further information and disclosure to other parties;*
 - (f) seek, pursuant to Rule 46.3 of the English Civil Procedure Rules (hereinafter “the CPR”), an order in the English Proceedings that it may recover its costs of an incidental to its participation in the same (to the extent that they are not paid by another party to said proceedings, and to be assessed on the indemnity basis) from the assets that it holds, or to which it is entitled, and in respect of which the English Claimants assert a claim (hereinafter “the Disputed Assets”);*

(g) file and serve, together with its Defence, a notice of its intention to claim its costs from the Disputed Assets on an indemnity basis, together with a budget of likely costs, as contemplated by paragraph 5.4 of CPR Practice Direction 3F;

(h) identify the Disputed Assets, and their whereabouts, to the English Claimants; and

(i) discharge its ongoing expenses of administering the Disputed Assets, pending the final determination of the English Proceedings insofar as they concern the Representor, from the Disputed Assets.”

Documentary disclosure to the English Claimants of privileged advice and other material

45 Frequently it is not necessary for a trustee to seek an order from the Court before making disclosure of trust documents to a beneficiary. However, “ **once the issue of disclosure of Trust documents to a beneficiary is before the Court (whoever brings it) it will exercise its own discretion**” – see paragraph 31 of the judgment of the Royal Court in *E Trust Company Limited v B* [2014] JRC 027. In that case the Royal Court cited its previous decision in *U Limited v B and 6 others* [2011] JLR 452 where the trustee applied to the court for directions as to whether information in relation to the accounts of the settlement should be given to the settlor and his wife, both of whom were excluded from benefit, and thus were third parties to the trust. The court determined that the correct approach was set out in *Lewin on Trusts*, 18th Edition at paragraph 23 – 20, particularly the following passage:-

“But if the matter is taken to the court, whether by a beneficiary whose application for disclosure has not been met to his satisfaction, or by the trustees who may be well advised themselves to take the initiative in seeking directions in some circumstances, the court will exercise its own discretion. And the function of the trustees will be to persuade the court not to intervene against their decision or to assist the court in reaching a decision where the trustees make the application, the views of the trustees being no more than a factor taken into account by the court in determining the application.”

46 In *E Trust Company* the Royal Court noted at paragraph 13:-

“Lewin cited *Schmidt v Rosewood Trust Limited* [2003] 2 AC 709 and *In re Rabaïotti (1989) Settlement* [2000] JLR 173 as authority for the highlighted proposition that on applications for disclosure to beneficiaries the court will exercise its own discretion. The Court in *U Limited v B* accepted this role (there being no argument on the issue) even though the settlor was not a beneficiary. Whether it was right to do so may be open to question because it was not concerned with disclosure to a beneficiary...”

47 We were not addressed on whether or not, in respect of disclosure of trust information to third parties the Court is, on applications such as this, approving the decision of the Trustee or exercising its own discretion. We think that the latter approach may well be correct but have not heard argument upon the issue. In any event the application of either test would not make a difference to our decision in respect of disclosure to the claimants of the documentation in this case. We have summarised at paragraph 15 above the three privileged documents which the Trustee wishes to disclose to the English Claimants. The Trustee seeks this direction because there is uncertainty as to whether, as a matter of law, a trustee has the power to waive privilege in legal advice that it has obtained on behalf of the Trust without obtaining the consent of all the beneficiaries. There is no clear Jersey or English case law on the point. However The Law of Privilege (Third Edition) Thanki states:-

“it is probably the case, albeit not yet confirmed by any case law, that the trustees would be entitled to waive privilege over legal advice obtained by the trust before its disclosure to a beneficiary without seeking that beneficiary’s consent. It would probably be argued that so long as the trustee was waiving privilege for a legitimate trust purpose, then to seek the beneficiary’s consent to that purpose would be unnecessarily cumbersome.”

48 The Trustee’s predecessor has shared the privileged material with the principal beneficiary only but not any other beneficiaries who, in any event, are not aware of their beneficial interest under the Trust. It was not necessary for the Court to determine whether as a matter of law a trustee is required to have to secure the consent of all beneficiaries in order to waive privilege to legal advice received for the benefit of the Trust by the trustee. Without having heard argument on the issue we express the provisional view that it is probably not necessary for the Trustee to have the consent of all beneficiaries. Having said that it may often be appropriate to seek the Court’s direction prior to waiving privilege if the matter is of sufficient significance. In this context — legal advice going to the matters relating to the whole corpus of the Trust fund — it is appropriate to obtain the Court’s directions.

49 Accordingly whether as an exercise of its own discretion or pursuant to considering the three stage test in the *S Settlement* the Court authorises the Trustee to waive privilege in the three pieces of legal advice referred to above to the extent that is appropriate to do so.

50 With the same principles in mind the Court authorised the Trustee to disclose to the English Claimants the existence and terms of any indemnity that the principal beneficiary or any other persons have provided to it in respect of either the Trust or the English Proceedings.

Disclosure — the advice from English Leading Counsel

51 This advice was provided to the Court only and not those convened to the hearing of the Representation. The Court received brief submissions from counsel for the Trustee with regard to the content of this opinion in the absence of counsel for the principal beneficiary,

in accordance with standard Beddoe hearing practice.

- 52 The advice focusses upon the approach the Trustee should adopt in relation to the English Proceedings, the approach that the English court might adopt in respect of costs that the Trustee might incur and requests made by the English Claimants of the Trustee for information in respect of the Trust and its assets. The contents of the advice remained privileged but, bearing in mind the Trustee's assertion that it is acting in accordance with advice received, it is appropriate to record that counsel has advised that it is reasonable and sensible for the Trustee to take a neutral stance in relation to the English Proceedings in order to assist both the English Claimants and the principal beneficiary in resolving the dispute as to ownership, and also reasonable for the Trustee to have determined that it is appropriate to submit to the jurisdiction of the English court.
- 53 As indicated above, the principal beneficiary wished to see the advice from counsel for reasons that the Court can readily understand, particularly having seen the advice itself. The principal beneficiary argues that as a beneficiary of the Trust he enjoys joint privilege with a Trustee in respect of advice taken by the Trustee and for the benefit of the Trust and that he wished to see the advice to understand the approach proposed by the Trustee, the directions sought and would wish to know, for example, to what extent counsel has considered the effect of Article 9 of the Law which limits the recognition and enforcement of the judgments of a foreign court where the judgment has not been made in accordance with Jersey law. Counsel for the principal beneficiary also argues that there are various remedies available to the English Claimants under English law which would not apply to proceedings in Jersey and he would wish to see an analysis of the same.
- 54 The English Claimants have not requested the advice and did not wish to participate in the proceedings.
- 55 Conversely the Trustee argued that the advice was privileged and was equally privileged against both the principal beneficiary and the English Claimants and that if produced at all it ought to be produced to both.
- 56 The Trustee says that currently it has funded the advice received from counsel personally. The Trustee goes on to say "this position is not changed by the fact that [the Trustee] reserves the right to rely in the future – when it knows for whom it holds the disputed assets – on any indemnity on which it might then be appropriate for it to rely to recover the costs of seeking this advice". The Court noted, as referred to above, that the Trustee sought an order, which the Court granted, to the effect that costs of and incidental to the Representation should be paid out of the Trust / disputed assets. This includes the costs of the advice from counsel. The Trustee has said that this is advice taken by the Trustee for the benefit of the Trust and not itself personally. It is clear from the contents of the advice, which the Court has considered with care, that this was indeed advice that has not been taken in order to consider the Trustee's personal position. It is advice taken for the benefit of the trust and the beneficiaries as a whole. The very fact that the Trustee reserved the right

to indemnify itself in future in respect of the costs of the advice from the Trust itself is further proof of the fact that this was advice taken for the Trust and not the Trustee personally.

57 As Lewin on Trusts (20th Edition) says at paragraph 21–059:-

“Normally the court’s discretion under the supervisory jurisdiction will be exercised to order disclosure of cases submitted to, and opinions of, counsel taken by the trustees, and other instructions to and legal advice obtained from the trustees’ lawyers, for the guidance of the trustees in the discharge of their functions as trustees, and paid for from the trust fund.

Even though such advice is privileged, the privilege is held for the benefit of the beneficiaries, not for the personal benefit of the trustees, and so privilege is no answer to the beneficiary’s demand for disclosure.”

58 We were also assisted by the decision of the English High Court in *Lewis v Tamplin* [2018] EWHC 777 (Ch) where His Honour Judge Paul Matthews, sitting as a judge of the High Court, said at paragraph 59 of the judgment:-

“In general, where trustees seek legal advice for the benefit of themselves personally, eg in relation to possible breach of trust liability, or of another trust of which they are trustees, and pay for it themselves, or out of the funds of that other trust, without recourse to the funds of the Tamplin Trust, that advice may well be privileged in favour of those trustees as against these beneficiaries. But, where the advice is sought for the benefit of the Tamplin Trust as a whole, and the trustees pay for that advice out of Tamplin Trust funds, then such advice, even though it may be privileged as against third parties, is not privileged as against the beneficiaries, and is liable to be ordered to be produced.”

59 Accordingly the Court ordered that the advice be disclosed to the principal beneficiary if he continued to request it from the Trustee. As to the status of the advice in his hands the Court agreed that *prima facie* the advice is subject to joint interest privilege. We note that in *Dawson Damer v Taylor Wessing LLP* [2020] EWCA Civ 352 the English Court of Appeal held that although joint privilege is a matter of general procedural law, not trust law, there is no reason to doubt that joint privilege applies as between trustee and beneficiary and that the joint privilege contended for in that case by the beneficiary was of a type that would mean that the Trustee could assert privilege against third parties but not against the beneficiary.

60 The Court of Appeal in *Dawson Damer v Taylor Wessing* [2020] EWCA Civ 352 drew a distinction (at paragraph 44 of the judgment) between the beneficiaries’ rights under trust law and the right of litigant to disclosure of his opponent’s documents, which is part of the law of procedure and evidence. The Court of Appeal noted (in paragraph 45) that “*joint privilege*” had been recognised in context other than trusts, for example as between a shareholder and company.

- 61 The joint privilege arises from the fact that the parties have a joint interest in the subject matter of the communication at the time it comes into existence. As to the consequences of joint privilege we note from The Law of Privilege (Third Edition) Thanki that:-

“If a joint interest exists then the same principles as those set out above in relation to joint retainers will generally apply. Accordingly, neither party can assert privilege as against the other in respect of communications coming into existence at the time the joint interest subsisted; hence, each party to the relationship can obtain disclosure of the other's (otherwise privileged) documents so far as they concern the joint purpose or interest. However, both parties are entitled to maintain privilege as against the rest of the world. As with a joint retainer, the privilege is not lost simply because the parties subsequently fall out. Given the extent to which the existence of a joint interest might fetter the actual client's rights in relation to privileged advice, a joint interest ought not to be lightly inferred. Nor have the courts worked through all the consequences of the existence of a joint interest. The concept is less well developed or defined in the case law than joint retainer. It is ***questionable, for example, whether a client is necessarily precluded from waiving privilege in advice he has obtained simply because someone else (or necessity a stranger to the relevant lawyer-client relationship) can assert a joint interest in the advice.*** For instance, while companies and shareholders might have a joint interest in legal advice, it is doubtful whether the courts would say privilege in legal advice obtained by the company could not be waived by the company unless all its shareholders consented.”

- 62 In view of the Court's findings on joint privilege it is perhaps unnecessary to make any observations in respect of common interest privilege. It is argued on behalf of the Trustee that there cannot be a common interest between the Trustee and the principal beneficiary because the Trustee will be adopting a neutral stance before the English High Court and the principal beneficiary will not be. That is true. However the Trustee and the principal beneficiary are co-defendants of the same claim.

- 63 In *Winterthur Swiss Insurance Company and Another v AG (Manchester) Limited and Others* [2006] EWHC 839 (Comm) Aikens J, sitting in the Commercial Court of the Queen's Bench Division held that:-

“....where a communication is produced by or at the instance of one party for the purposes of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this “common interest privilege” must be the common interest in the confidentiality of the communication.”

64 Further in the *M and Other Trusts* [2012](2) JLR 51 the Royal Court considered an application by beneficiaries for leave to disclose to the Family Division of the English High Court documents which they had received in connection with “in private” trust proceedings in Jersey. The court made the following observations:-

“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 art. 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 Macedonian Orthodox Church of Australia and New Zealand (2)*, 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, and disclosure of it without the leave of this court would constitute a contempt of court.”

65 In the Court's opinion the Trustee viewed the advice of counsel as being a proper expense of the Trust, and took it for the benefit of the Trust and not the Trustee personally. The Court

ordered, at the Trustee's request, that the Trustee's costs of and incidental to the application be paid out of the disputed assets on the Trustee basis. This necessarily *prima facie* includes the advice of counsel. Although the Trustee rightly says that it does not know ultimately whether or not it will hold the Trust assets on trust for the English Claimants or on trust for the principal beneficiary and the other beneficiaries, currently the assets are held on trust under the Trust Deed for the benefit of the beneficiaries and the principal beneficiary is the principal beneficiary. The advice is covered by joint privilege owing to the circumstances in which it came into existence and that privilege is effective as against third parties. To the extent necessary the advice is also likely to be covered by common interest privilege notwithstanding the different roles that the two parties will play in the proceedings before the English court.

66 The Trustee is not obliged to make disclosure of this advice to the English Claimants and indeed we would anticipate the Trustee making a further application to this Court if it wished to do so.

67 We would also hope that the English High Court, if asked to deal with an application for specific disclosure designed to require the principal beneficiary to produce this advice, would give due weight to the decision made by this Court in relation to this matter and recognise the importance of trustees being able to share legal advice with the Royal Court pursuant to proceedings under Article 51 and, in appropriate circumstances, for such advice to be shared with the beneficiaries under the Trust.

Costs

68 We also order that the Trustee's costs of and incidental to these proceedings be paid out of the disputed assets on the trustee basis in accordance with Article 53 of the Law. This is the appropriate order to make in accordance with authority, notwithstanding the claims in the English Proceedings. Lewin on Trusts observes at paragraph 19–038 (20th Edition):-

“Persons who have not been properly appointed as trustees, if they have acted in good faith, believing themselves to have been duly appointed, are entitled to indemnity in the same way as other trustees (Travis v Illingworth [1868] W N 206; Provident Capital Ltd v Agusta Pty Ltd [2011] NSWSC 258 at [47], citing this passage). And, if a fiduciary becomes a constructive trustee of property under the rule in Keech v Sandford, or by reason of making use of the trust property or his fiduciary position, and the beneficiaries seek to recover the property subject to the constructive trust, the trustee will be allowed the costs and expenses incurred by him in obtaining the property or in effecting improvements which benefit the property, for he who seeks equity must do equity” (Emphasis added)

We agree with this proposition.