Huw Lewis, Rhys Lewis, Sadie Lougher v Charles Tamplin, Jane Wayne, Mark Edward Wyde Tamplin

Positive/Neutral Judicial Consideration

Court
Chancery Division

Judgment Date
16 April 2018

Case No: D31BS734

D31BS468

High Court of Justice Business and Property Courts in Bristol Property Trusts and Probate List (ChD)

[2018] EWHC 777 (Ch), 2018 WL 01831386

Before: HHJ Paul Matthews (sitting as a Judge of the High Court)

Date: 16/04/2018

Hearing dates: 9 February, 26 March 2018

Representation

William Moffett (instructed by Stone King LLP) for the Claimants.
Guy Adams (instructed by RDP Solicitors) for the Defendants.

Approved Judgment

HHJ Paul Matthews:

Introduction

1. This is my judgment on two proceedings listed for hearing before the court. The first is an application for pre-action disclosure ("the Application"). It was begun by notice issued on 22 February 2017 at the County Court in Bath. It was supported by a witness statement of Sarah Eden dated the same day. A witness statement was made on behalf of the defendants, opposing it, by Michael Feakes on 16 May 2017. The Application was transferred to the High Court, Chancery Division, Bristol District Registry, by order of DJ Goddard of 23 May 2017. It now has the reference number D31BS468.

2. The second proceeding is a claim under Part 8 of the CPR ("the Claim"). The claimants, who are now accepted to be beneficiaries under a trust of land known as the Tamplin Trust, seek disclosure of documents and other information from

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the defendants, the trustees of the trust, on the basis of the obligation owed by trustees to beneficiaries to account to them for their stewardship. It was commenced by claim form issued on 22 November 2017 in the Bristol District Registry of the High Court, under reference number D31BS734. It was supported by a witness statement made by Simon Stone dated the same day and subsequently opposed by another witness statement of Michael Feakes, dated 15 December 2017. On 19 January 2018, Sarah Eden made a witness statement responding to this. In order to avoid constant repetition, I will use the terms claimant and defendant to include applicant and respondent, so as to cover both proceedings, unless otherwise stated.

3. At the two hearings before me William Moffett of counsel appeared for the claimants, and Guy Adams of counsel appeared for the defendants. The time estimate for the hearing of four hours (itself an increase on the time originally sought) proved at the original hearing on 9 February 2018 to be inadequate, and the matter was adjourned part-heard to 26 March 2018, when it was completed. I should say that Mr Adams had the lion's share of the time available. I am very grateful to counsel for their interesting and helpful submissions, on a matter of some practical importance, on which (in certain respects) there appears to be no existing authority.

The Tamplin Family and the Trust

4. Before going further, I should set out the necessary details of the Tamplin family in order to make this judgment intelligible. Ernest Tamplin and his wife Gladys had six children. They were Kathleen Bennett (who died in 1996), Charles Edward Tamplin (the first defendant in the Claim and first respondent to the Application), Robert Tamplin (who died in 2013), Maisie Tamplin (who died in 2009), Jane Wayne (the second defendant and second respondent) and Lorna Lewis (who died in 2008). Kathleen Bennett's husband Clifford had a sister called Bertha Standage, who has survived him. Charles Edward (known as Edward) Tamplin has two sons, Mark (the third defendant in the Claim) and Nicholas. Robert Tamplin had one daughter, Sadie Lougher (the third claimant in the Claim and third applicant in the Application). Jane Wayne has a daughter, Pippa Pountney. Lorna Lewis had two sons, Hugh (the first claimant and first applicant) and Rhys (the second claimant and second applicant).

5. The Tamplin Trust came into existence in the following way. Ernest and Gladys Tamplin bought Panteg Farm, Lisvane, Glamorgan, as beneficial joint tenants in 1951. When Ernest Tamplin died in 1985 his widow Gladys became the absolute beneficial owner of the land by right of survivorship. In February 1986 Gladys entered into a deed of variation and a deed of family arrangement with certain of her children as trustees. The effect of these instruments was that a half share in equity in the land was retained by Gladys and the other half was split between her six children. The terms of the deed of family arrangement provided that the beneficiaries under the trust (*ie* Gladys and her children) should hold their shares

> "for their own use and benefit absolutely and for them to devise bequeath or appoint during their lifetime or in their will as they individually shall decide".

6. When Gladys died in August 1988, her beneficial half share passed to her 6 children equally by will. Accordingly, after her death, the trustees held the land on trust for all six children in equal shares. Subsequently, four of those children have died, leaving only Edward and Jane still alive. They are both trustees and beneficiaries. The interests of the deceased children passed by inheritance to those entitled on their deaths. (Any rights that Kathleen had in relation to the trust appear now to be vested in Bertha, though she has sadly lost capacity and is represented by Heather Mayo by lasting power of attorney.) An important feature of this case is that for a long time the trustees, advised by their solicitors, did not accept

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that the beneficial interests under the trust of the children of Gladys and Ernest could or should pass on their death by *intestate* succession. Instead, they persisted in the (unfortunately mistaken) view that the critical words of the deed of family arrangement (set out in paragraph 5 above) meant that the interests of the deceased children could not pass on intestacy, but only by will or deed of appointment. Accordingly, not having been willed to particular persons, those interests (they said) simply fell back into the trust fund and so increased the shares of the surviving siblings.

7. The three trustees of the Tamplin Trust are Edward Tamplin, his sister Jane Wayne, and his son Mark Tamplin. A procedural oddity is that Mark Tamplin appears as third defendant in the Claim, yet not as a party to the Application. He was appointed as a trustee on 28 November 2016, but it appears that the claimants were not aware of his appointment at the time that they issued the Application in February 2017. However, by the time that they came to issue the Claim, they had become aware (probably by way of a letter in May 2017) that he had become a trustee, and so they joined him too. Why it took so long for the existing trustees to communicate the fact of the appointment of a new trustee to the beneficiaries is not disclosed. But nothing appears to turn on this point, and I will not consider it further.

8. I should say that the disputes which have arisen in this case between the parties are not purely academic. As I have said, the land the subject of the trust amounts to some 12.3 acres at Panteg Farm in Glamorgan. It is potentially developable, and I have been told that as such it may have a value in excess of £10 million. Options have twice been granted by the trustees to potential developers, and may be granted a third time in the near future. But the evidence is that progress is slow: see Mr Feakes' first witness statement, [7]-[10], largely replicated in his second witness statement at the same paragraph numbers.

The claimants' status as beneficiaries

9. The claimants were foremost in propounding the view that the interests under the trust of children of Mr and Mrs Tamplin dying intestate were assets capable of devolution as part of the estates of those children. They made numerous requests to the trustees for information about the trust. The trustees refused such information, on the basis that the claimants were not beneficiaries. According to the witness statement of Simon Stone for the claimants dated 22 November 2017, [31]-[32], at the first hearing of the Application in the County Court at Bath in May 2017, DJ Goddard invited clarification of the trustees' position as to whether the claimants were beneficiaries. Following that judicial intervention, the trustees were persuaded to agree in writing that the claimants were indeed beneficiaries under the trust. Although, in his witness statement dated 15 December 2017, Michael Feakes for the defendants says that the claimants had not been "willing to accept the Trustees' assurances that they were beneficiaries", he does not challenge the version of events set out in Mr Stone's witness statement, and indeed accepts that a deed was subsequently signed recording the status of the beneficiaries. Having considered the relevant documents, and for what it is worth, I respectfully agree with the interpretation placed upon the trust documents by the claimants.

10. What that means is that the trustees now hold the trust fund on trust for a total of nine beneficiaries in fixed but different shares. The defendant trustees between them hold some 44% (the first two defendants having 20% each, and the third 4%). The claimants having thus established their position as beneficiaries, the defendants had to decide what to do about the claimants' outstanding requests for information about the trust and its management. On 19 January 2018 the defendant's solicitors sent the claimants a letter enclosing a document of 12 pages, stated to be the "trust accounts". Although the inception of the trust was in 1986, the document begins only in 1998. It sets out distributions to various beneficiaries and also payments of various fees charged by professional advisers. This document has come some ten months after the Application was launched and some two months after the Claim was issued. However, the claimants say this is still inadequate. They persist in both the Application and the Claim.

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Further developments

11. A draft order put before me on 9 February 2018 set out the categories of documentation sought. But in fact the claimants produced a revised form of order for the hearing on 26 March 2018, taking into account submissions and comments made at the first hearing. I will come back to this later. Also at the second hearing on 26 March 2018, two further witness statements were adduced on behalf of the claimants. These were from Nicholas Tamplin (son of the First Defendant and brother of the Third) and from Heather Mayo on behalf of Bertha Standage. They together have fixed interests amounting to about 7% in total of the trust capital. They both support the claimants' stance in this litigation. Since the claimants by themselves have about 45% of the trust capital, that means that more than 50% by value of the trust capital is held by persons in favour of disclosure by the defendant trustees. This is not a case which will be decided by majority vote, of course. But forensically, at least, this demonstrates that it is not just a small minority, or indeed any minority, of the beneficiaries by value that seeks disclosure.

The arguments

The original hearing

12. At the original hearing Mr Moffett for the claimants opened the matter to me, but after hearing him for a while I decided it would be better if I heard in substance first from Mr Adams, to explain the trustees' opposition to the disclosure sought. Once I saw what the opposition was based on, I could decide how best to resolve the dispute as to the various categories of documents. Both counsel were content for me to take that course. I should say that, although the Application was for pre-action disclosure, and the skeleton argument for the claimants addressed that jurisdiction, the matter has been argued orally in effect as the Claim for trustee disclosure to beneficiaries. I will return to the Application after I have dealt with the Claim.

13. Mr Adams said there were two main points. The first was that the beneficiaries had already had sufficient information about the trustees' stewardship of the trust. The second was that the disclosure sought might reveal to the beneficiaries the reasons why the trustees had made the decisions that they had in the management of the trust, and therefore the so-called *Londonderry* principle (from *Re Londonderry's Settlement [1965] Ch 918*) applied to entitle the trustees to withhold it from the beneficiaries. A third point made by Mr Adams was to distinguish the case where one only of several beneficiaries sought disclosure from the case where they all did. In the first case the beneficiary would not be entitled to disclosure. In the second case they would be so entitled, collectively, as an aspect of the well-known rule in *Saunders v Vautier* .

14. As to the first point, Mr Adams told me that the only dealings with the main asset of the trust fund, the land with development potential, had been for the trustees to enter into option agreements with the developer Redrow. Under the option agreements small initial payments have been made by the developer to the trustees. If the developer exercises the option there is a mechanism for determining the price, which in this case is the open market value less 14%. The current option was the second, and it expires this year. The trustees anticipate that they may have to enter into a third option. Copies of the option agreements have been supplied to the claimants, as have the trust accounts produced in January 2018. They have therefore had an account of the dealings with the trust assets in the relevant period. According to the second witness statement of Ms Eden, filed on behalf of the claimants, at [48], as at the date of that statement they had received a total of 87 pages of documents from the defendants. These include the first option agreement (32 pages), a letter to one of the advisers (3 pages), a deed of appointment (2 pages), a copy of their solicitors' ledger (2 pages), one statement of account (1 page), and documents exhibited to Mr Feakes' first witness statement in these proceedings (9 pages). So far as I am aware, this evidence was not challenged, although it was pointed out to me that the total of 87 pages referred to above also included a further 8 pages of accounts. To that must now be added the further "trust accounts" document of 12 pages, sent to the claimants on 19 January 2018 (see at [10] above).

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15. Mr Adams further said that the information sought and the documents requested by the claimants went beyond an account and would require the court as the supervisor of the trust to enquire further into why the option agreements were entered into and why the professionals were employed on a contingency basis. The rule in *Saunders v Vautier* meant that the body of beneficiaries acting together had ultimate control and could remove the trustees and put in their own nominees who would give them whatever they wanted, in this case disclosure. Mr Adams admitted that he did not know of any judicial decision to that effect. From this position he inferred that individual beneficiaries were not entitled to see the advice given to the trustees, whether legal, accountancy or planning matters. The trustees were entitled to decide not to disclose it to an individual beneficiary. The decision of the Privy Council in *Rosewood Trust v Schmidt [2003] 2 AC 709* meant that the decision of the trustees could be reviewed by a court only on the basis that no reasonable trustee could come to that conclusion.

16. Mr Adams submitted that the so-called *Londonderry* exception was to be treated simply as an example of the principle that the trustees were entitled to withhold documents in the exercise of their discretion. It was the trustees that were entrusted with the discretion to make decisions. It was they that have the management of the trust assets, not the beneficiaries. The beneficiaries had to show grounds for real suspicion based on substantial grounds that the trustees may have got the decision wrong before the court could interfere.

17. He referred me to the decision of the New Zealand Supreme Court in *Erceg v Erceg [2017] NZSC 28* , in particular at [56](f), where the court said:

> ”56. Drawing these threads together, we consider the matters that need to be evaluated in relation to an application for disclosure of trust documents include the following:
>
> […]
>
> (f) *Whether the documents sought disclose the trustee’s reasons for decisions made by the trustees* . It would not normally be appropriate to require disclosure of the trustees’ reasons for particular decisions.”

Mr Adams said that the principle that it was not normally appropriate to require the disclosure of trustees’ reasons for particular decisions applied to *administrative* decisions as well as to *dispositive* ones: see also Mr Feakes’ first witness statement, [12], making the same point.

18. He also referred me to the decision of North J in *Re Cowin (1886) 33 Ch D 179* . That was a case in which a beneficiary, one of eight entitled to a reversionary interest under a will, wished to mortgage his interest, and for that purpose to inspect the title deeds of the trust property. The trustees refused to allow him to do so. The beneficiary brought the matter before the court. North J said (at 185):

> ”In my opinion the plaintiff has a *prima facie* right to inspect the deeds, and for this reason, that *cestuis que trust* are the beneficial owners of the trust property.”

19. Then, after discussing a number of authorities, the judge said (at 186-87):

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> ”It has been suggested that in the present case the other persons beneficially interested should be before the court. I do not think it is necessary that they should. The only person suggested are persons who stand in precisely the same position as the Plaintiff, and, in my opinion, they have no right to prevent him from inspecting the deeds, to which he has quite as much right as they have…It seems to me, therefore, that the Plaintiff is entitled to see the deeds, subject to this, that there might be circumstances which would justify the trustees in withholding them from him. But nothing has been shown which can justify them in doing so…In my opinion no case has been established for withholding the deeds from the Plaintiff, and I think he is entitled to the production of them for the inspection of himself or his solicitor. I do not say that he is entitled as of right, but only that he is entitled under the circumstances, because there might be a state of circumstances under which the right to production would not exist.”

Mr Adams relied on this authority for the reference to “circumstances which would justify the trustees in withholding [the deeds] from him”.

20. He also relied on the decision of the Court of Appeal in *Butt v Kelson [1952] 1 Ch 197* . That was a case where the defendants were trustees of a will trust, holding the vast majority of the ordinary shares in a limited company. The defendants had relied on their shareholding to appoint themselves sole directors of the company. The plaintiff was entitled to a life interest in a part of the trust fund. He sought a declaration that he was entitled to inspect all documents which came into the possession or power of the trustees by virtue of their position as directors of the company. At first instance the judge made that declaration. The Court of Appeal reversed his decision, holding that the beneficiaries were not entitled to call upon trustees who happen to be directors to use their powers as directors as though those powers were held on trust for the beneficiaries. Beneficiaries under a trust of shares were entitled to be treated as though they were the registered shareholders, and they could compel the trustees if necessary to use their votes as the beneficiaries thought proper.

21. Accordingly, as Romer LJ put it (at 207), if the plaintiff

> ”firstly, specifies the documents of the company which he wishes to see; secondly, makes out a proper case for seeing them, and thirdly, is not met by any valid objection by other beneficiaries or by the directors from the point of view of the company, then the directors should give inspection, not because they can be compelled to do so as directors but as a short-circuit … to an order compelling them to use their voting powers so as to bring about what the plaintiff desires to achieve.”

Mr Adams emphasised the last part of the quotation, which he said showed how the rule in *Saunders v Vautier* applied to this case. Mr Adams also referred to *Rosewood v Schmidt, [2003] 2 AC 709* , [48], where Lord Walker endorsed *Re Cowin* , saying that

> ”North J clearly considered that the particular interest of an individual beneficiary might in some circumstances run counter to the collective interest of the beneficiaries as a body.”

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22. Applying these authorities to the present case, Mr Adams said that the interests of the claimants in these proceedings ran counter to the interests of the trust generally. It was for the trustees however themselves to decide that that was so, and not for the court. The court was entitled to review the trustee's decision on *Wednesbury* grounds, but was not entitled to say that the decision was wrong. It is of the essence of the trust that the trustees make the decisions about the collective interests of beneficiaries as beneficiaries. He also referred to passages from *Lewin* at 29-009, dealing with the distinction between administrative and dispositive powers, and at 29-333, dealing with the grounds of challenge to trustees' decision-making. He submitted that the court should not substitute its own judgment for that of the trustees unless the power concerned was being surrendered to the court. The court's role was to consider whether there were substantial grounds for considering whether something might have gone wrong with the process which warrants further enquiry.

23. On the other side, Mr Moffett responded to Mr Adams's submissions as a series of some six points. Firstly, he said that the attempt to import public law principles was not helpful in the context of the court's supervision of the trust. In his submission there was no such fetter on the court's powers. But in any event where (as here) there was a refusal to disclose documents to which the claimants were prima facie entitled it was unreasonable in the absence of any explanation, and none was given here. Moreover, the court's supervisory role was not merely procedural, but substantive. It would be absurd if the court could not correct substantive errors in a decision that had followed the correct procedure.

24. Second, the idea that a body of beneficiaries must act together in order to obtain documents was unsupported by authority.

25. Third, there was no authority for a test of having to excite the suspicion of the court or to raise suspicion on substantial grounds of something having gone wrong before the court could intervene. However, in any event there were such grounds in this case.

26. Fourth, Mr Moffett accepted that in para 2 of the draft order there would have to be a qualification to the request for the solicitors' files that they should be trust documents rather than the solicitors' own papers. He distinguished *Erceg* on the basis that there was no suggestion here that the beneficiaries would seek to damage the interests of the trust in which they were interested.

27. Fifthly, he submitted that it was paradoxical that a beneficiary might need to show that there was a case to answer before the trustee had to disclose any documents, because it was only with the documents that the beneficiary could show that there was something to be explained.

28. Sixthly, he said that the claimants were not troublemakers. They had sent letters before action as long ago as April 2015. They were not recognised as beneficiaries until recently. And they had not been given the reports and updates which had been given to other beneficiaries.

29. Mr Moffett set out under some ten heads in his skeleton argument the concerns and potential claims which he said the claimants had and for the investigation of which they required the documents and information sought. He expanded on these in oral submissions. For present purposes I can summarise them as follows:

1. Legal costs and expenses in establishing their status as beneficiaries;
2. Distributions of income to other beneficiaries but not to the claimants;
3. Breach of trust in entering into unenforceable and unreasonable contingency fee arrangements with professional advisers;
4. Whether the option agreements were prudently entered into;
5. Whether the compulsory purchase arrangement was prudently entered into;
6. Whether the trustees have committed a breach of trust in failing to generate income from the land in the meantime, and whether any of the trustees has benefited from personal use of the land without paying for the benefit;
7. Failure to take tax advice in order to mitigate a potentially large tax liability on the sale of the land for

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development;
8. Failing to provide trust accounts and excluding the claimants from reports and updates;
9. Failing to act impartially and fairly between the beneficiaries;
10. Whether the trustees should be replaced.

As to no 9, Mr Moffett however accepted that failing to act impartially and fairly between the beneficiaries was a facet of no 2 and no 8.

The second hearing

30. At the second hearing, Mr Adams replied to the various matters put forward by Mr Moffett in his address to me. He also expanded on his argument based on *Rosewood v Schmidt [2003] 2 AC 709* . He said that it was a matter of discretion for the trustees whether to give information to beneficiaries and not a matter of right. Accordingly the court should not interfere with the trustees' decision to refuse disclosure unless at least the court's suspicion had been excited. He compared the situation to that in which a court might order an account on the footing of wilful default. The court should not order the trustees to give wide ranging disclosure to the beneficiaries unless it was satisfied that there had been or would be a breach of trust, or at least if there were prima facie grounds for thinking that something may have gone wrong. Disclosure should not go any wider than that which would be necessary for an account. Here an account had already been given. He criticised the requests for disclosure as nothing more than a fishing expedition aimed at finding ammunition if possible for a claim of breach of trust against the trustees.

31. For the claimants, Mr Moffett accepted that there was normally a threshold to be got over before the court would interfere with the exercise of discretion by trustees. He referred me to paragraph 29 – 336 of *Lewin on Trusts* . This reads:

> "Where power is given to trustees to do or not to do a particular thing at their absolute discretion, the court will not restrain or compel the trustees in the exercise of that power, provided that their conduct is informed, bone fide and uninfluenced by improper motives: 'it is settled law that when a testator has given a pure discretion to trustees as to the exercise of the power, the court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly.' The principle is both that the court will not interfere before the trustees have acted to compel a particular exercise of the power and, except as stated, but after they have acted it will not overturn their exercise of the power. The mere fact that the court would not have acted as the trustees have done is no ground for interference. The settlor has chosen to entrust the power to the trustees, not to the court."

32. But he pointed out that *Lewin* allowed for certain exceptions to the threshold principle, *ie* where it was not necessary for the court to be satisfied that something had gone wrong before it would interfere. One of these was disclosure to beneficiaries, and he referred me to paragraph 29 – 346 of *Lewin* . This reads:

> "A second exception to the general principle is to be found in the court's jurisdiction to order the disclosure of information about the trust to beneficiaries. That jurisdiction has been held to be part of its jurisdiction to supervise trustees and not to be based on a proprietary right of the beneficiaries in trust documents. The trustees' decision to withhold disclosure may no doubt be impugned on one of the conventional grounds for challenging their decisions; such a decision may not be the exercise of power in the ordinary sense but the trustees cannot be under a duty to give disclosure in response to every request and hence, except in circumstances where they have no real choice, they must have a discretion to withhold disclosure. The court, however, may also

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> intervene in the exercise of its supervisory jurisdiction, though if not persuaded to do so only the conventional grounds of challenge will be available."

33. He also referred me to the recent decision of the Supreme Court of New Zealand in *Erceg v Erceg [2017] NZSC 28* . That was a case concerning two trusts whose settlor was dead. The claimant (a brother of the deceased) was not a named beneficiary, but was a member of a class of beneficiaries who were objects of discretion of both trusts and also were entitled to the capital in default of appointment at the end of the trust. He sought disclosure of a number of trust documents. The trustees refused. When their decision was challenged, they argued that the exercise of their discretion to refuse him disclosure could not be overcome without first getting over the threshold. The Court of Appeal had agreed with this. The Supreme Court on appeal, however, rejected this approach.

34. That court said as follows (omitting footnotes):

> "14. Before turning to the issue of how the Court should exercise its jurisdiction in cases such as the present, we first deal with a preliminary point as to the nature of the Court's task. The Court of Appeal said that the evaluation of the factors that need to be considered in determining whether disclosure of trust information should be made and, if so, the extent of the disclosure, was a matter of discretion for trustees. It added:
>
> > It follows that the Court, if it becomes involved in disclosure, will be reviewing the exercise of a discretion by the trustee. It should therefore apply the well-established principles governing review by a Court of a discretionary decision. The Court should not intervene unless satisfied the trustee erred in law or principle, overlooked a relevant point, factored in an irrelevant point or made a decision that is plainly wrong. The words "plainly wrong" refer to a decision that was simply outside the permissible ambit of the trustee's discretion.
>
> 15. Mr Carruthers argued that the Court of Appeal had wrongly confined the Court's power by defining it as the review of a discretionary decision. He pointed out that the jurisdiction of the Court to supervise and if necessary intervene in the administration of a trust is part of the Court's inherent jurisdiction, and is not reliant on there being a challenge to a particular decision made by trustees.
>
> 16. Mr Carruthers accepted that an application could be brought as a challenge to a previous discretionary refusal by the trustees to disclose trust documents, but said that it was wrong to describe that as the only jurisdictional basis for the Court to intervene. In a case where the Court is asked to exercise its inherent jurisdiction to supervise, and if necessary intervene, it was not reviewing a decision of a trustee and was not, therefore, limited in its power of intervention to determining whether the trustee had erred in law or principle, overlooked a relevant point, factored in an irrelevant point or made a decision that was plainly wrong. Rather, the Court was making its own determination as to whether it needed to invoke its inherent jurisdiction to

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supervise and, if necessary, intervene in the administration of the trust concerned.

17. Ms Coumbe QC accepted that where an application seeks the exercise of the Court's inherent jurisdiction, the Court's decision is not to be regarded as the review of a discretionary decision by a trustee, limited in the manner described above. She argued that the Court of Appeal's reference to the limited basis of intervention was intended to refer to the limited basis on which the Court of Appeal could intervene in relation to the exercise of the discretion by Courtney J in the High Court. We do not read the Court of Appeal decision in that way. Nor, for reasons we will come to, do we consider the Court of Appeal's ability to intervene in relation to the High Court decision has such a limited basis.

18. We consider the correct position is that the Court's jurisdiction on an application for the exercise of the supervisory jurisdiction is not limited to the grounds of review of a discretionary decision by the trustees. Rather, the Court must exercise its jurisdiction as a court of equity, exercising its own judgment as to whether disclosure ought to be made at all and, if so, to what extent and on what conditions."

35. Mr Moffett submitted that similarly in this jurisdiction, since the disclosure was sought under the court's supervisory role, it was unnecessary for the claimants to pass any threshold. The documents being sought here were obvious, and did not fall into any categories which might prove troublesome, for example where the information sought was commercially sensitive and might assist a beneficiary who was carrying on a competing business. Nor was there any question of legal professional privilege being applicable. As for the *Londonderry* principle, Mr Moffett submitted that only applied to dispositive powers.

Discussion

36. In *Rosewood Trust v Schmidt [2003] 2 AC 709* , Lord Walker of Gestingthorpe gave the advice of the Board of the Judicial Committee of the Privy Council, in an appeal from the courts of the Isle of Man, where one of the objects of discretionary powers under two Isle of Man trusts had been refused disclosure of trust documents and information by the trustees. The trustees argued that only a beneficiary with a proprietary interest in the trust assets was entitled to disclosure about the trust and its assets, and relied in particular on the dicta of Lord Wrenbury in *O'Rourke v Darbishire [1920] AC 581* .

37. There Lord Wrenbury had said (at 626-27):

"If the plaintiff is right in saying that he is a beneficiary and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own."

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The other judges in that case also referred to the beneficiary's 'proprietary right'.

38. The Privy Council in *Rosewood Trust* considered that that case did not decide that only a beneficiary with a proprietary interest *in the trust assets* was entitled to disclosure about the trust and its assets. Lord Walker said:

> "50. … The Board does not find it surprising that Lord Wrenbury's observations have been so often cited, since they are a vivid expression of the basic distinction between the right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property) and the right of a litigant to disclosure of his opponent's documents (which is part of the law of procedure and evidence). But the Board cannot regard it as a reasoned or binding decision that a beneficiary's right or claim to disclosure of trust documents or information must always have the proprietary basis of a transmissible interest in trust property. That was not an issue in *O'Rourke v Darbishire* ."

39. It may also be (though this was not argued in *Rosewood Trust v Schmidt*) that the reference to "proprietary right" in the earlier cases has been misunderstood. A beneficiary or object may have rights in relation to the trust fund which are good, not only against the trustees, but also against third parties, which thus may properly be called property rights, without necessarily having a vested interest in possession or in remainder in a particular income stream or capital asset. If the trustee of a discretionary trust in breach of trust gave away a trust asset to a third party, no-one can doubt that even a discretionary object of the trust in whose favour an appointment could still be made would have standing to sue the third party for the return of the asset to the trust fund. Similarly, where land is burdened by a restrictive covenant for the benefit of that of a neighbour, the neighbour has an equitable property right without having any present or future right to possess or use the land so burdened. A negative right of one person over the asset of another person, good against at least some third parties, is by definition a proprietary right. Judged in this way, a discretionary object *does* have a proprietary right. Indeed, Lord Walker earlier in his advice had made clear that the rule in *Saunders v Vautier* , giving trust beneficiaries the right collectively to decide what to do with the trust assets, applied to a discretionary trust so that the consent of every object of discretion had to be obtained before the trustees could be required to hand over the trust property: see at [41]. That is an additional indication of the proprietary nature of the object's right.

40. However that may be, in *Rosewood Trust v Schmidt* Lord Walker preferred to explain the basis of trustee disclosure to beneficiaries as an aspect of the court's role in supervising trustees:

> "51. Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion: see Lord Wilberforce in *Gartside v Inland Revenue Commissioners [1968] AC 553* , 617-8 and in *McPhail v Doulton [1971] AC 424* , 456-7; Templeman J in *In re Manisty's Settlement [1974] Ch 17* , 27-8; and Warner J in *Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587* , 1617-8. Mr

> Brownbill's submission to the contrary effect tends to prove too much, since he would regard the object of a discretionary trust as having a proprietary interest even though it is not transmissible (except in the special case of collective action taken unanimously by all the members of a closed class)."

41. It is notable that Lord Walker, having referred to a person being entitled "to a fixed and transmissible beneficial interest", immediately went on to add that "[t]he object of a discretion (including a mere power) may *also* be entitled to protection from a court of equity" (emphasis supplied). He then considered the kinds of circumstances in which a discretionary object would, or would not, be likely to have disclosure ordered in his or her favour. The whole direction of travel is in equating the position of the discretionary object to that of the fixed interest beneficiary, and not the other way around. The implication is that the beneficiary of a fixed, transmissible interest would normally obtain the assistance of the court.

42. It is true that Lord Walker had by then pointed out that there were authorities making clear that even a fixed interest beneficiary would not always obtain disclosure, because there might be special circumstances in which that beneficiary's interests conflicted with the general interest of the trust: see at [48]. But it is clear that, in his opinion, absent such special circumstances, the beneficiary could normally expect the assistance of the court. In my judgment, that applies in the present case, where the claimants' interests are as fixed interest beneficiaries entitled in possession to a share in the capital of the trust fund.

43. It was not suggested in argument that the claimants were in cahoots with the potential developers of the land, and anxious to see confidential advice to the trustees so that it could be passed to such developers (*cf Rouse v IOOF Australia Trustees [1989] SASC 181*), or that they were carrying on some kind of business in competition with the trustees, so that sensitive commercial information might be used for their personal gain (*Morris v Morris (1993) 9 WAR 150*), or that there might have been dealings by other beneficiaries with their shares which the claimants were not entitled to know about (*Re Tillott [1892] 1 Ch 82* , 89), or that the beneficiary's conduct gave "genuine reason for concern as to what he would do with the information if he received it" (*Erceg v Erceg* , [96], [99]). On the material before me, no special circumstances pointing against giving such assistance have been shown. On the contrary, the evidence is that the claimants want the information for precisely the right reasons, namely, to hold the trustees to account, and thus to vindicate their own beneficial interests, by way of an action for breach of trust if need be.

44. I turn now to the defendant trustees' other objections to giving beneficiary disclosure. First of all, I do not accept the argument for the trustees that the court should not order disclosure of particular categories of documents merely because in the opinion of the trustees the beneficiaries already have had sufficient information. The beneficiaries have the right to hold trustees to account for their stewardship of the trust fund and the performance of the trust obligations which they accepted. If the beneficiaries ask for information from the trustees and the trustees refuse, the beneficiaries may ask the court to order the disclosure of the information in the exercise of the court's jurisdiction to supervise the activities of trustees. The court will not be satisfied with the "say-so" of the trustees that they have had sufficient information already, but will make its own mind up as to whether the information sought should be disclosed. I will return to the question of the particular categories of information sought later.

45. Secondly, I reject the submission that if beneficiaries are to require information from the trustees it must be done

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collectively, under the rule in *Saunders v Vautier* . The sentence in the judgment of Romer LJ in *Butt v Kelson* relied on by Mr Adams does not support his argument. It refers to voting within a company, and not to the exercise of the *Saunders v Vautier* principle. If it were necessary for all the beneficiaries to join together in order to obtain disclosure from unwilling trustees, then the number of successful requests would be very small indeed. In any case where there were unborn or minor beneficiaries who could not properly join in a *Saunders v Vautier* application (a very common phenomenon where family trusts are concerned), no disclosure could ever be successfully sought. That would be an absurd situation. It would also mean that for decades now trustees and beneficiaries had been proceeding on a false basis.

46. Moreover, in my judgment that principle is simply a red herring in the present context. Even if all the beneficiaries combined to demand that the trustees should disclose certain documents to them, it is trite law that the beneficiaries cannot even collectively control the exercise of the trustees' powers, at least in the absence of legislative sanction (*cf* the Trusts of Land and Appointment of Trustees Act 1996, s 19). The only power that beneficiaries collectively have under this principle is to put an end to the trust itself. But, so long as the trust subsists, it is for the trustees to decide how to exercise their powers: see *Re Brockbank [1948] Ch 206* ; *Pettigrew v Edwards [2017] EWHC 8 (Ch)* , [45].

47. Thirdly, I reject the submission that the so-called *Londonderry* principle applies to the exercise of *administrative* powers of trustees. Mr Adams could cite no authority for this proposition, and I am not aware of any. Moreover, if it were correct, it would mean in practice that trustees were never obliged to disclose professional advice or even other information about (for example) dealings with the trust assets, because the relevant documents might well disclose reasons why the trustees had decided to sell this asset and buy that one. That cannot be right. In addition to that, I find that, in the case of *Re Londonderry's Settlement [1965] Ch 918* itself, the members of the court made it clear that their decision was one in relation to *dispositive* powers of trustees.

48. So for example Harman LJ said (at 929):

> "The trustees have from time to time exercised their powers over both income and capital and, in particular, at the end of 1962 and early in 1964 determined to distribute the remaining capital in various shares among members of the class. The defendant was dissatisfied with the amount proposed to be distributed to her and made representations to the trustees through their solicitors for an increment, which was declined after the defendant's representations had been considered, but she was not willing to let the matter rest and employed a solicitor who, in November, 1963, demanded the disclosure of five classes of documents with the object of scrutinising the trustees' reasons and motives and in order presumably to organise some kind of attack upon them."

49. And then he concludes (at 933):

> "I would hold that even if documents of this type ought properly to be described as trust documents, they are protected for the special reason which protects the trustees' deliberations on a discretionary matter from disclosure."

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50. Danckwerts LJ agreed with Harman LJ, but went on to say (at 935-36):

> ”It seems to me that where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner.”

51. Finally, Salmon LJ said (at 936-37):

> ”The defendant beneficiary undoubtedly believes that she has been harshly treated by the plaintiff trustees. She considers that they should have appointed larger sums to her under the settlement than they have in fact appointed. It is not unusual for a disappointed beneficiary to persuade herself that she has a real grievance. Whether or not there is any justification for the present defendant’s view, I do not know and have no means of knowing. Whether or not the court, if it knew all the facts known to the trustees, would have acted as they did, again I do not know - nor is it material. The settlement gave the absolute discretion to appoint to the trustees and not to the courts. So long as the trustees exercise this power with the consent of persons called appointors under the settlement and exercise it bona fide with no improper motive, their exercise of the power cannot be challenged in the courts - and their reasons for acting as they did are, accordingly, immaterial. This is one of the grounds for the rule that trustees are not obliged to disclose to beneficiaries their reasons for exercising a discretionary power. Another ground for this rule is that it would not be for the good of the beneficiaries as a whole, and yet another that it might make the lives of trustees intolerable should such an obligation rest upon them…”

52. The point is that the decision made by the trustees in the exercise of a dispositive power produces, or at least may produce, different treatment for different beneficiaries. One beneficiary may receive more benefit from the trust than another. Hence the trustees are justified by practical considerations in withholding their reasons for that exercise. Plainly, that does not apply to a request to trustees for information about the trust. No decision of the trustees on such a request will change the entitlement of the beneficiaries among themselves to benefits under the trust. The proposition in *Erceg* at [56](f) (cited by Mr Adams) that “[i]t would not normally be appropriate to require disclosure of the trustees’ reasons for particular decisions” is consistent with this. In context the New Zealand Supreme Court was clearly referring to decisions in the exercise of dispositive powers (see *eg* at [54]).

53. Lastly, I reject the submission on behalf of the trustees based on *Rosewood v Schmidt* to the effect that the court must get over a threshold before being entitled to interfere with the exercise of discretion of trustees to refuse disclosure. Once again the trustees could cite no authority to support their position. I accept the submission of Mr Moffett, based on *Lewin* ,

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[29 – 346], and on *Erceg v Erceg* , [14]-[18], that the supervisory jurisdiction of the court rests on a different footing, and that in the exercise of that jurisdiction the court is entitled to interfere with a disclosure decision whenever it thinks proper to do so in order that the beneficiaries may be able to hold the trustees to account.

54. I add only that, if it were necessary for the court to find grounds for suspicion before overturning the trustees' refusal and ordering disclosure, in my judgment there are ample such grounds in this case. In their original skeleton argument, the claimants set out some 8 different concerns (plus 2 additional points). Of those, numbers 1, 2, 6 and 8 seemed to me to be matters which at first sight should excite the suspicion of the court. I summarised them in paragraph [29] above. They are supported by the second witness statement of Ms Eden. The first is an allegation that the defendant trustees failed to identify correctly who their beneficiaries were, wrongly excluding the claimants, to the financial advantage of the defendants themselves as beneficiaries (Ms Eden, at [5]-[12]). The second is a claim for breach of trust in distributing trust income to some beneficiaries but not others (including the claimants), and an unexplained anomaly in the amounts distributed to some beneficiaries (the amounts being the same although the size of the beneficial interests differed) (Ms Eden, at [43]-[45]). The sixth is an allegation that the land has not been used to generate income in the waiting period before it can be realised for its development value, but also that the first defendant as one of the trustees has exploited the land without payment (Ms Eden, at [39]-[42]). The eighth is a failure to render any trust accounts until recently, but also excluding the claimants from informal updates and more formal reports to the beneficiaries (Ms Eden, at [13]-[20]).

55. I am aware that these allegations are not accepted by the defendants, at least not completely. But they are all matters which, in my judgment, must excite the suspicion of the court. Of course, there may be perfectly proper and innocent explanations for all of them. Conversely, I am not excluding the possibility that the other complaints made are also justified, in whole or in part. But that is not the test which I am applying. I am not now in possession of all the evidence and am not making any *decision* . I am only looking to see whether, on an initial consideration, there can be said to be something *suspicious* . If I had held that it was necessary for the suspicion of the court to be excited before it could intervene in relation to the refusal to give disclosure, I should have held that that suspicion was indeed excited, and that accordingly the court could intervene, to grant at least some of the disclosure sought. But, given my decision stated earlier, all this is by the way.

56. I add one other point. There is some suggestion in the evidence that the beneficiaries in this case have, through their solicitors, been attempting to gain what might be described as "parity" with the trustees. For example, it is put in one of their solicitors' letters that they wished "to work collaboratively with the trustees". If this were so then, in my judgment, there would be a danger of mistaking the nature of the relationship. The settlor of a trust gives the management of it, and of its assets, to the trustees, and not to the beneficiaries. This is deliberate. Despite not being given a role in the management of the trust, the beneficiaries are entitled in principle to know what the trustees have done. But they are not entitled to make the trustees' decisions for them, or (subject to the terms of the trust or to statute) even to be consulted upon proposed decisions, nor to be present when such matters are discussed and decisions made. The evidence here suggests that the beneficiaries may have been encouraged to think that they had greater rights than they in fact have. My decision in this case is founded simply on the assessment that they were not given sufficient information about dealings with trust assets and so on. The beneficiaries' advisers would do well to bear this in mind for the future.

The documents sought

57. I turn now to consider the categories of document which are sought in the revised draft order by the claimants. They are as follows:

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(a) Information and documents relating to entry by the first and second defendant trustees into the option agreements of 21st of January 1999 and 10 October 2011 and performance of the same, including but not limited to professional advice given to the trustees from time to time (”the trustees”) of the trust which is the subject of these proceedings (”the trust”) in relation to the same, including but not limited to:

(i) the advice obtained from Tom Beverley Jones in relation to the earlier of the option agreements referred to above;

(ii) the advice obtained from Derek Prosser in relation to the earlier of the option agreements referred to above;

(iii) correspondence passing to/from solicitors for the trustees RDP law limited and/or its predecessors and successors, as appropriate (”RDP solicitors”) and each of the advisers to the trustees namely Derek Prosser, Leslie Blohm and Tom Beverley Jones;

(iv) advice provided by RDP solicitors to the trustees in relation to preparing, entering into and exercising the said option agreements;

(v) documentation enclosed with instructions to Leslie Blohm, namely the draft option agreement, fax from Watkin Williams (Cardiff) Ltd to RDP solicitors dated 27 January 1995

(vi) letter of instruction to Tom Beverley Jones in relation to advising on the later of the 2 option agreements referred to above and the exercise of such option agreement.

(vii) documents and information as to whether any other experts were considered to advise the trustees in relation to the said option agreements.

(b) Correspondence passing between RDP solicitors, Derek Prosser, Tom Beverley Jones and others acting for the trustees and Redrow Homes (SW) Ltd to date;

(c) Information and documents relating to the Conditional Fee Agreements into which the Trustees have entered into with RDP solicitors, Derek Prosser, Tom Beverley Jones (and any others) and any advice given to the trustees concerning entry into the same and documents including but not limited to:

(i) an explanation of the Trustees position as to the enforceability and suitability of such conditional fee agreements;

(ii) an explanation as to why professional fees have been met on an ongoing basis if such conditional fee agreements were in place;

(iii) an explanation as to why professional fees were not met out of income;

(iv) the letters referred to in the ‘letter of instruction’ to Derek Prosser, namely a letter from RDP solicitors dated 1 June 1995 and a letter from the consultant dated 7 October 1994;

(v) any conditional fee agreements entered into by the Trustees;

(vi) any documents relating to the assignment to RDP solicitors of any conditional fee agreements from their predecessor firm; and

(vii) any advice given to the trustees concerning the conditional fee agreements (and a report of

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any such advice if given orally).

(d) Information and documents relating to the compulsory purchase of an easement over part of the land That for motorway widening, and any advice given to the trustees concerning entry into the same including but not limited to the compulsory purchase agreement, any valuations of the land, correspondence with the relevant authority or authorities and negotiations with them;

(e) Information and documents relating to the use and occupation of the Land and any advice given to the trustees concerning the same, any efforts to generate income from it, and including information as to the First Defendant's occupation of the land, the terms of that occupation and any payment therefor, and including but not limited to information and any documents concerning:

(i) who occupies (or has occupied) the Land since the inception of the Trust in 1986 and for what periods;

(ii) what income was received therefrom;

(iii) the alleged trespassing (and damage caused) to the Land;

(iv) what enquiries were made to verify the insurance and/or professional fees that would have been involved in letting or licensing the Land;

(v) The Trustees' alleged installation of gates and padlocks; and

(vi) any offers to occupy/use the land That and the basis for refusal of the same;

(vii) details of the period and use and occupation of the property by the First Defendant and any income received by the trust therefrom (and if none an explanation of the same).

(f) Instructions given and advice received by the trustees as to the status of the claimants as beneficiaries, and an explanation of the trustees' denial of the same and details of the costs of that advice and the source of payment of the same;

(g) Information and documents relating to the basis on which distributions have been made to some of the beneficiaries, but not all including any instructions given and advice received by the trustees as to the same, and what is proposed to be done about distributions made that do not accord with the beneficiaries' respective entitlements;

(h) Copies of tax advice received by the trustees in relation to the trust, and information as whether further tax advice has been sought, and if not the basis upon which it has not and whether tax returns have been filed (and copies of the same);

(i) Copies (and reports of the same where advice was not given in writing) of trust updates and information from time to time that are said by the Trustees to have been given to the Trustees and beneficiaries by the trust's professional advisers, and information and documents relating to the same.

(j) Full trust accounts dating from the inception of the trust, including work in progress and any conditional fee agreement liabilities, narrative explanation of distributions to beneficiaries and payments of fees in light of any conditional [fee] agreements and including:

(i) a full copy of RDP Solicitor's ledger and/or client account since the firm (and its predecessors) was instructed by Trustees,

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(ii) any further invoices raised/paid by RDP solicitors (or its predecessors in relation to the trust to confirm the payments made and received into the trust since inception.

(iii) a breakdown of RDP solicitors work in progress, such as has not been raised or billed since the last invoice.

2. The Defendants shall provide copies of the 9 files of trust correspondence and 2 files of trust documents referred to in the letter of RDP solicitors dated 7 October 2016, the claimants by their solicitors having undertaken to pay the reasonable photocopy charges of £150, and insofar as the documents are trust documents. It shall be an adequate answer to an order for disclosure under paragraph 1 above that the defendants shall identify the document or documents (among many others) in the files so disclosed that meet the categories and descriptions of documents to be disclosed in paragraph 1 above.

3. The defendants shall specify when providing disclosure of the documents described in paragraph 1 above which documents are no longer in their control and what has happened to such documents. Legal professional privilege does not apply to the documents of which disclosure is ordered above."

58. Both Mr Adams and Mr Moffett took me through this draft order. Before turning to the detailed terms, there are some general points to make. First, whether the court proceeds under the Application or the Claim, the categories of document sought must be read as restricted to documents concerning the beneficiaries of the trust. They must be trust documents, and not, for example, working papers belonging to professional advisers. For example, para 1(j)(i) of the draft order refers to "a full copy of RDP Solicitor's ledger and/or client account since the firm (and its predecessors) was instructed by Trustees". This cannot be read as referring to the solicitors' ledger other than in relation to these trustees as trustees of the Tamplin Trust. And even in relation to the Tamplin Trust, it is to the *information* in the ledger rather than the ledger itself that the beneficiaries are entitled.

59. Secondly, and similarly, the claimants are not entitled to production to them of any documents protected by legal professional privilege of the trustees in any capacity other than as trustees of the Tamplin Trust. Originally, the trustees sought to claim legal professional privilege for all the communications with their lawyers: see Mr Feakes' second witness statement at [24]. This untenable position has wisely been abandoned. There is a clear distinction to make. 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. The last sentence of paragraph 3 of the draft order gives the unfortunate impression that none of the earlier categories of document set out could include documents covered by legal professional privilege. But they are drawn widely, and some could.

60. Subject to that, professional advice obtained by the trustees for the benefit of the trust and at the cost of the trust (and associated letters of instruction and other related correspondence) is not protected from production to the beneficiaries. In my judgment there is no good reason why information and documents (including advice and correspondence) relating to the entry by the trustees into the option agreements of 1999 and 2011 should not be produced to the beneficiaries. That

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covers category 1(a). Similarly with correspondence between the trustees and the potential developers of the trust land. That covers category 1(b).

61. Turning to category 1(c), in principle I see no reason why the trustees should not disclose information and documents relating to the entry into Conditional Fee Agreements with the professional advisers. A general point to bear in mind is, however, that these information requests must not become old fashioned interrogatories. This jurisdiction is simply about providing to trust beneficiaries information about the trust, its assets and the trustees' stewardship of it and them. It is not about compelling trustees to convict themselves out of their own mouths of breach of trust (*cf Bishopsgate Investment Management Ltd v Maxwell [1993] Ch 1* , CA). Where a document is called for, and falls within the scope of any of the categories I am prepared to allow, then, subject to questions of privilege, it should be produced. But information which is *not* in documentary form is more difficult. For one thing, it is clear that beneficiaries are not entitled to throw the costs of assembling information not already in documentary form on the trust generally. They must pay for it themselves: *Re Bosworth (1889) 58 LJCh 432* . For another, whilst the beneficiaries may properly ask the trustees to tell them *if* they did this or that with a trust asset, in general I do not consider that the beneficiaries are entitled to ask *why* they did or did not do it, or for a general "explanation of their position" on a particular point (although I accept that, if any of this is revealed by a document otherwise produceable, it cannot be withheld on that ground alone). So I would not uphold categories 1(c)(i)-(iii) *as such* , though documents giving at least some of the explanations sought may fall within the general category at the head of 1(c) (which I do uphold).

62. On similar grounds to category 1(a), I uphold category 1(d).

63. As to category 1(e), the beneficiaries are entitled to know what the trustees have done with the land. That includes information as to the installation of gates and padlocks (if any), who has offered to exploit it, who has actually exploited it, and (if for consideration) what that consideration was, or (if not) that there was no consideration. By 'exploit' here I mean any kind of use for which a fee or rent might reasonably be charged in a commercial setting. They are also entitled to know if such exploitation as there was has damaged the land, and if so to what extent. But, if the answer is that it has not been exploited, they are not entitled to know (at least at this stage) what would have happened if it *had* been exploited.

64. As to category 1(f), if the trustees obtained professional advice for the benefit of the Tamplin Trust and at the cost of the trust they must produce it (and associated letters of instruction and other related correspondence). If they obtained it in their personal capacity (or as trustees of another trust), and paid for it out of their own pockets (or the funds of the other trust), then not. But in any event they are not obliged to create documents explaining *why* they took the view they did as to the claimants' status. (As before, if other produceable documents reveal this, that is not a ground for refusing to produce them.)

65. Category 1(g) is similar. Advice (and associated documents) belonging to the trust must be produced. But there is no obligation to create new documents explaining reasoning or making proposals for the future. That is a matter for the trustees.

66. Similarly to earlier categories, I uphold category 1(h), except in relation to the "basis on which [further tax advice] has not [been sought]". There is no obligation as such to explain why such advice has not been sought (if that be the case), though it is not an objection to the production of any document otherwise produceable that it gives such an explanation.

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67. Again in line with earlier categories, I uphold categories 1(i) and (j), though subject to the comment made earlier about category 1(j)(i) (see [57] above).

68. As to category 2, this consists of documents the subject of an offer to produce to the claimants by way of photocopies, at a cost of £150. I uphold this category, whether or not it consists entirely of documents produceable under the foregoing categories. The defendants' solicitors had (at least ostensible) authority to make the offer that they did to make this disclosure, which was accepted by the claimants. The defendants' solicitors' attempt to make this offer retrospectively subject to their clients' consent fails. However, documents produced under this category need not also be produced under category 1 above, if and to the extent that they are identified as falling under a particular sub-category of that category 1 above.

69. Paragraph 3 of the draft order refers to documents otherwise falling under category 1 but which are no longer in the control of the defendants. The defendants obviously cannot produce such documents to the claimants. But they can and must provide the substance of the information in them to the claimants to the extent that they are aware of it. This may be by reference to copies or summaries, or in some other way. I have already dealt with the question of legal professional privilege.

70. I held earlier that the fact that the trustees considered that the beneficiaries had already had sufficient disclosure was irrelevant. What mattered was the court's own assessment. Here I record formally what has no doubt become apparent during the course of this judgment. This is that, in my judgment, when the circumstances and history of this trust is considered, what has so far been given to the beneficiaries has been given very late, only under threat of legal proceedings or indeed after they have been started, and remains inadequate. The beneficiaries are entitled to much more than what they have so far received. However, the order will provide that the defendants shall not be required to supply a second time any document already supplied to the beneficiaries, as long as they so identify something otherwise required under the order with a particular document already supplied.

Conclusion on the Claim

71. In my judgment, the Claim in general terms succeeds. The defendants have taken an extreme and in my judgment indefensible approach to disclosure in this case, first by denying (on a very weak basis) that the claimants were beneficiaries at all, and then by putting forward a series of hopeless arguments against giving information to the beneficiaries. It may well be that, if the trustees had taken a less confrontational and more co-operative approach at the outset, all this litigation could have been avoided, and fewer documents (perhaps none at all) would now need to be disclosed. Unfortunately they did not. It does not matter whether the defendants were correctly advised but refused to accept the advice given, or were simply badly advised and followed that advice. Either way, they have brought it upon themselves, and must take the consequences.

The Application

72. In the light of my conclusion on the Claim, it is perhaps not necessary to deal in any detail with the Application. But I will deal with it shortly nonetheless. This part of the case has nothing to do with the disclosure given by trustees to beneficiaries in the context of their relationship, even without the need for any dispute between them. Instead, it has its origins in the jurisdiction of the court to order disclosure to be given in the context of actual litigation between two parties, whatever their relationship, but only to the extent relevant to the issues arising between the parties. The distinction between

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this kind of disclosure and that given to trust beneficiaries was well described by Lord Wrenbury in *O'Rourke v Darbishire* , and by Lord Walker in *Rosewood Trust v Schmidt* , in passages that I have already cited ([37]-[38] above).

73. Originally, this kind of disclosure was given only once litigation had been started, and the issues between the parties were clear. That is still the norm in most cases. However, an important procedural reform in 1970 made it possible for disclosure (then called discovery) to be obtained even before litigation had been started, although only from a person who was likely to be a party to that litigation, and only where certain conditions were satisfied. As first enacted, this jurisdiction was confined to claims in respect of personal injuries or death, but since 1999 it has operated more generally. The procedure is currently governed by CPR r 31.16 .

74. That rule provides as follows:

> "(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where –
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6 , would extend to the documents or classes of documents of which the applicant seeks disclosure; and
>
> (d) disclosure before proceedings have started is desirable in order to –
>
> (i) dispose fairly of the anticipated proceedings;
>
> (ii) assist the dispute to be resolved without proceedings; or
>
> (iii) save costs.
>
> (4) An order under this rule must –
>
> (a) specify the documents or the classes of documents which the respondent must disclose; and
>
> (b) require him, when making disclosure, to specify any of those documents –
>
> (i) which are no longer in his control; or
>
> (ii) in respect of which he claims a right or duty to withhold inspection.
>
> (5) Such an order may –
>
> (a) require the respondent to indicate what has happened to any documents which are no longer

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in his control; and

(b) specify the time and place for disclosure and inspection."

75. It is clear from the terms of the rule itself that, unlike disclosure given by trustees to beneficiaries, this rule applies only to *documents* , and only to documents which would form the subject of standard disclosure if there were litigation between the parties. In this respect it is rather narrower than trustee and beneficiary disclosure. On the other hand, the case law shows that it is not necessary to demonstrate that any proceedings are indeed likely to follow the application, and that the court should be hesitant to try to assess the merits of the potential claim. But the applicant must show at least a prima facie case.

76. In the circumstances, I consider that, for the reasons already given, sufficient has been shown to excite the suspicion of the court in a number of areas, and in my judgment a prima facie case has been established in those areas. Accordingly, in principle, I would be prepared, if it mattered, to make an order for pre-action disclosure of documents which would be subject to standard disclosure if substantive proceedings were started against the defendants, and which would not be produceable under the order to be made on the Claim. At this stage I cannot tell whether there are any such documents. What I will therefore do is adjourn the Application generally, for further consideration once the effect of the order on the Claim is clear. It may be restored on notice to the Defendants.

Conclusion

77. For the reasons given above, I give judgment for the claimants on the Claim, and adjourn further consideration of the Application.

Postscript: 27 April 2018

78. After I had handed down the judgment as set out above, without attendance, adjourning consideration of the terms of the order to another day, my attention was drawn to the decision of Rattee J in *Wilson v Law Debenture Trust Corporation [1995] 2 All ER 337* , which had unfortunately not been cited to me during the argument.

79. In that case, trustees of a pension trust covering the employees of a group of companies exercised a power to appropriate certain assets to answer the pension entitlements of the employees of a particular company in the group which was being sold out of it, and transfer those assets to another pension trust. Some of the employees of the company being sold challenged the exercise of the power as not transferring sufficient value to the new trust, and sought disclosure of the trustees' reasons for their decision. Rattee J held that the trustees were not obliged to disclose their reasons, relying on the *Londonderry* principle.

80. Neither the argument by counsel nor the decision of the judge distinguished between administrative and dispositive powers, however. Instead, both focused on whether there was a relevant difference between pension trusts and voluntary

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settlements. Subsequently, *Lewin on Trusts* (at [29-234] of the current, 19th edition, 2015) has treated it as an example of the *Londonderry* principle *apparently* applying to the exercise of an *administrative* power.

81. Accordingly, I invited counsel (if they wished) to make written submissions on this point in advance of the adjourned hearing to deal with the order, listed for 27 April 2018. Both counsel responded with helpful submissions, for which I am grateful. Mr Adams invited me to reconsider the decision I had handed down, on the basis that the order had not yet been drawn up (see *Re Barrell Enterprises Ltd [1973] 1 WLR 19* , CA), and the important thing was to get the decision right first time round (a sentiment which I endorse). Mr Moffett however submitted that *Wilson* , far from being inconsistent with my decision as handed down, was actually both consistent with and indeed supported it.

82. I have carefully considered the further submissions, and in addition both counsel addressed me at the adjourned hearing. My conclusion is that Mr Moffett is right. Accordingly, I am not going to modify my judgment, except by adding this short postscript to make the position clear. In my judgment, *Wilson* is a case of the exercise of a dispositive power, and not of an administrative one. The exercise of the power in that case produced, or could produce, a material difference to the respective interests of two different classes of beneficiaries, *ie* (1) those that were being transferred to the new scheme, and (2) those that were staying with the old one. So it is dispositive, and within both the spirit and the mischief of the *Londonderry* principle.

83. Were I wrong about that, however, I would be prepared to modify the principle stated at [47] and [52] above, so that it referred, not to the distinction between administrative and dispositive powers, but to a distinction between powers which affect or may affect the respective interests of beneficiaries as between themselves, and those that do not or may not do so. This is supported by the fact that in *Wilson* itself Rattee J noted (at p 348g-h) that the decision in that case was likely to prove highly divisive. But the present case would still be decided the same way. The provision of information in this case will change no beneficiary's entitlement.

84. Mr Adams says that here the decision of the trustees to grant an option directly affected the beneficiaries' entitlement as it might mean that future generations of beneficiaries would benefit, and to a greater extent, than if the land were sold immediately for the benefit of the present generation. I cannot accept this submission. The interests of the beneficiaries here are fixed. If future generations benefit, it will be by way of succession to earlier ones. In *Wilson* the trustees in effect had a discretion as to how much of the trust fund to appropriate to the departing beneficiaries' new trust fund.

85. Lastly, so that it is not overlooked, I mention that my own view, that the correct distinction lies between dispositive and administrative powers is also supported by a dictum of Briggs J (as he then was) in *Brakespear v Ackland [2009] Ch 32* , [24], where he referred to the *Londonderry* principle as applying in the context of "discretionary dispositive powers". (I am grateful to Mr Adams' written submission for this reference.)

86. Accordingly, I see no reason to alter my decision as stated above, and I will make an order reflecting that decision.

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