EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2017/0026

IN THE MATTER OF A DEED OF SETTLEMENT KNOWN AS THE TCHENGUIZ **FAMILY TRUST**

AND IN THE MATTER OF SECTION 60 AND 82 OF THE TRUSTEE ORDINANCE (AS AMENDED)

BETWEEN:

MR. ROBERT TCHENGUIZ

Applicant

and

RAWLINSON & HUNTER TRUSTEE SA
(as trustee of the Tchenguiz Family Trust)

Respondent

Appearances:

Mr. Alain Choo- Choy QC, with him Mr. Stuart Cullen for the Applicant
Mr. Richard Wils.on QC, with him Mr. Paul Griffiths for the Respondent

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2018: February 8;
March 21.

-JUDGMENT

[1] **CHIVERS, J. [AG]:** The Tchenguiz Family Trust ("TFT") was declared under the law of the British Virgin Islands on 25th October 1988. In the events which have happened there are two named beneficiaries of this trust, Mr. Vincent Tchenguiz ("VT") and Mr. Robert Tchenguiz ("RT"). In the matter before me, RT is the applicant and the trustee., Rawlinson & Hunter Trustees SA ("the Trustee"); a Swiss company, is the respondent. VT is not a, respondent and has not taken part in the proceedings.

[2] By thi.s action RT seeks an order that the Trustee deliver up to him documentation relating to the Trustee's claims in the liquidations of 16 companies. The Court is asked to exercise its jurisdiction pursuant to section 82 or section 60 of the **Trustee Ordinance, 1961,** or fart 67, **Civil Procedure Rules, 2000** or the court's inherent jurisdiction.

[3] It was not in issue between the parties that I have jurisdiction to make the order sought. Nor were the principles upon which the Court should act, where a beneficiary seeks trust documents from the trustee, substantially in dispute. The issue between the parties is whether the facts disclosed in the evidence justify such a course.

The Legal Test

[4] I proceed on the basis that the law is as follows:

a. As. part of its inherent jurisdiction to supervise the administration of trusts, the Court has the power to order disclosure of documents to beneficiaries. **Schmidt v Rosewood Trust**[1] per Lord Walker at [51] and [66].

b. A beneficiary has a right to seek disclosure, but not right to disclosure.

[1] [2003] UKPC 26

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c. A beneficiary 'can seek disclosur only in their capacity as a beneficiary.

d. The beneficiary must demonstrate why it is appropriate for the court to exercise the discretion in its favour.

e. The power is to be exercised for enabling the beneficiary to hold the trustee to account for its stewardship of the trust.

.f. The court may have to balance competing interests of different beneficiaries, the trustees and third parties.

g. However, the fact that the documents may disclose a claim against the trustee cannot be a ground for their non-disclosure (because the very purpose of the disclosure is to hold the trustee to account).

h. The court will have to form a discretionary judgment on at least the following matters identified in **Schmidt** at [54]:

i. Whether a discretionary object or some other beneficiary with a remote or wholly defeasible interest should be granted relief at all;

ii. What classes of documents should be disclosed, either completely or in a redacted form;

iii. What safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order.

[5] The parties were not in agreement as to the extent of any presumption in favour of disclosure, as suggested by **Lewin on Trm ts** 19th Ed. At (20-018],

nor as to whether or not Lord Walker's reference to a "discretionary object" was intended to apply to a named beneficipry under a discretionary trust. But the parties were agreed that an interest under the trust engaged the court's jurisdiction and the nature of that interest was relevant to the exercise of the court's discretion.

The Interest of RT under the TFT and the letter of wishes

[6] VT and RT are the only two named beneficiaries of the Trust. But the trust is discretionary. In these circumstances, Mr. Wilson QC, for the Trustee, said that RT's interest was towards the far end of the scale of interests - taking the exemplar of a beneficiary for whom a trustee holds as bare nominee as being at the ear end.

[7] The Court must be realistic, indeed Mr. Wilson relied (for a different point) on the Court taking notice of the actual likelihood of a person benefiting under a trust.[2] The TFT was established,,according to Mr. Wilson's skeleton argument, "by Victor Tchenguiz [senior] ....for the benefit of a class consisting of his two sons [VT and RT]." The. prospect of a beneficiary of such a trust actually benefiting must be high, even if not as certain as for a beneficiary absolutely entitled.

[8] By a letter of wishes dated 20th March 2007, Victor Tchenguiz senior set out his wish that there be a division of the TFT into two new sub-funds, one for VT and one for RT. In the event a new trust was established for the benefit of RT and his family, the Tchenguiz Discretionary Trust ("TOT") and a substantial portion of the TFT assets were transferred to it thereby, as Mr. Wilson put it in his skeleton argument "effectively segregating ..and separating the family assets in two trusts, the TFT for VT and the TOT for [RT]."

[9] Mr. Nahal, for the Trustees, has given evidence that it was not possible simply to split the trust assets in two. The nature of those assets meant that for

[2] see Schmidt at [68.4]

commercial reasons it was necessary for RT to retain an interest in assets held by theTFT. He said3 ·

> "12. Following the establishment of the TOT, RT's share of the assets in the TFT was subsequently transferred to the TOT save for a small number of VT and RT joint assets and a very few RT only assets ("residual assets") that could not be transferred for commercial reasons. Those residual assets are primarily held through Sunnymist Limited.
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> 52. I am instructed that the TFT is divided into three main parts - only one of which.holds "joint" assets. The remaining two hold VT only assets:
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> a) Sunnymist holds the jointly designated commercial property assets... There are a few assets within Sunnymist which are solely designated to VT or RT, but these are in the distinct minority.
> b) The Euro Group (headed by Euro Investments Overseas, Inc· ["Euro"]) .... This is designated as a VT ooly.
> c) Amara (headed by Amara Investments Limited).... This is designated as VT only.
>
> 53. There are three further entities which are owned outside of Sunnymist (and directly by R&H in its capacity as TFT trustee) which are also held jointly for the benefit of VT and RT. These are Ashlake Limited, Challenger Investments Limited and Hillrose Limited...."

[10] No information was given as to either the relative or absolute value of the "residual assets". But in the context of an argument that the TFT is discretionary and that RT's interests are at the far end of the scale, the Court cannotignore the evidence given on behalf of the Trustee as regards "jointly" held assets and "RT only" assets. There is no suggestion that the Trustee

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3 Nahal 9th November 2017

proposes to re-designate these assets.as "VT only" so that RT will not benefit. Even if the designation is notional only, it has a clear reality. This reality was acknowledged - indeed advanced - by Mr. Wilson when he argued that RT could not conceivably suffer from costs allocated by the Trustee to "VT only" assets. The Trustee cann·ot argue that RT has:

a. No (realistic} economic interest in the "VT only" assets; *and*

b. Anything other than a (realistic} economic interest in the "jointly held" and "RT only" assets. .

[11] In the circumstances it seems to me ·that the first of the discretionary considerations raised by Lord Walker is answered by reference to the ,tacts. RT has a clear interest in the administration of the Trust at the least in regards to the "jointly held" and "RT only" assets. That interest may be discretionary in law, but the Trustee itself regards RT as having an actual economic interest in those assets and no economic interest in the "VT only" assets. RT's entitlement to ensure the proper administration of the trust is, on the Trustee's own evidence, a strong one.

Kaupthing

[12] During the course of 2007 various financing arrangements. were made between Kaupthing Bank hf, the TOT Trustee an various TDT companies. These arrangements were restructured as a joint venture through Oscatello Investments Limited ("Oscatello"}, a TOT company in late 2007. Oscatello is a BVI registered company.

[13] In about March 2008, _Oscatello .sought further support from Kaupthing. Arrangements were made whereby TFT compahies would. provide additional security to Kaupthing for Oscatellq, and Kaupthing would advance a three year loan of £100m to Pennyrock Limited, a TFT company. As is notorious; Kaupthing was putinto insolvency proceedings in Iceland in October 2008..-

[14] These events spawned a considerable number of legal proceedings. In about March 2009 the SFO in England arrested VT and RT and raided their homes and businesses on search warrants obtained in regard to the 2008 Oscatello and Pennyrock transactions mentioned above. The English Divisional Court subsequently quashed the search warrants. RT, VT (and the Trustee and er,tities associated with them) brought - separate - proceedings in England in consequence of those events. The defendants to the RT claim are of some interest in a different, but related, application made by RT ("the 3.14 application") which is the subject of a separate judgment.

[15] Proceedings were also brought, and claims made in the insolvency of Kaupthing by the Trustee and Euro in respect of the security given in support of Oscatello in 2008. Those matters have been resolved by a settlement of which the only relevant aspect is that the Trustee (or Euro) will be entitled to 5% of the recoveries made by Kaupthing in the insolvency of Oscatello. This, says Mr. Wilson, gives the TFT an interest adverse to RT, because RT and.the TOT themselves have an interest in claims against or through Oscatello.

The TFT Claims in the liquidations

[16] Prior to the settlement with Kaupthing the Trustee, VT, Euro and 17 other "VT asset" companies had submitted claims in the liquidations of Oscatello and 15 other BVI companies associated with Oscatello ("the BVI Companies"). Those clailli)s were initially made by letter in about August 2016 but were rejected and, following correspondence with the liquidators (who are the same liquidators for each company) applications were made pursuant to section 273 of the **Insolvency Act, 2003** for orders that the cJaims be admitted ("the 273 Claims").

[17] The 273 Claims were issued on 19th April 2017 as Ordinary Applications pursuant to rule 14 of the Insolvency Rules 2005. I will have to deal with those applications in more detail in my judgment on the 3.14 application, but it is

sufficient to say for the purpose of this judgment that they give no details of the grounds upon which they were made, other than "The grounds upon which the Applicants seek the order are set out in the affidavits of Mr. Vincent Tchenguiz dated 6 April 2017 and Mr. Rodney Hodges dated 13 April 2017." It is not possible for RT to see the grounds upon which the TFT parties sought to claim in the liquidations unless this court orders otherwise.

This Application

[18] The 273 Claims were issued following correspondence between the Trustee and the liquidators which had been continuing since about August 2016. RT has not seen this correspondence but his application arose out of information received by him concerning that correspondence. No challenge has been made to RT's evidence concerning the information received by RT, either as to its source, its content, or the accuracy of its content.

[19] RT's application was issued on 3rd April 2017, after the Trustee's claims had been made in the liquidation, but before the issue of the applications under section 273. By the application RT seeks against the Trustee delivery up of:

> "All and any documentation submitted by the Trustee to the Joint Liquidators, Mr. Stephen Akers and Mr. Mark McDonald of Grant Thornton, or to this Honourable Court, in relation to the Trustee's claims in the liquidations of [the relevant companies]."

[20] The grounds set out in the application include the following, the reference to "BVI Claims" being to the claims in the liquidation referred to above:

> [6] [RT] has learned from an email from Mr. Hillier, a director of the Trustee, that the Trustee is making allegations in the BVI Claims which may be premised on an incorrect or false factual basis and he understands that this concerns allegations as to the Claimant's conduct of a serious nature, namely an allegation that the Claimant may have made false statements.

[7] If the allegations are without foundation, then the Trustee will be pursuing baseless BVI Claims at the expense of the Trust and putting the Trust assets at risk of a significant adverse costs order.

[8] Despite having requested copies of the claims made in the Companies' liquidation, from the Trustee, the Trustee has refused to provide copies of the Claim Documentation to the Claimant, so that he can consider. whether or not the aliegations are baseless.

[9] The Claimant wishes· to ensure the due administration of the TFT in · light of the foregoing matters and is unable to do so without sight of the . Claim Documentation which the Trustee has refused to disclose.

[21] That is a condensed version of RT's complaint as regards apparent allegations of his wrongdoing made to the liquidators. In his affidavit dated 16th February . 2017 he says:·

> "On the limited information available to me I understand that the TFT has alleged that it has a right to the·assets of the BVI Companies ("the BVI Assets"). I also u_nderstand that the . alleged entitlement to the BVI assets is premised on false allegations made by the TFT against [me]... ·
>
> I have asked the TFT Trustee on several occasions for a copy · of·the BVI Claim and the Claim documentation ....but have been refused copies of even sight of them. As such, it is impossible for me to address those allegations that have been made against me and which, from the limited information available to me relate to my conduct andwhich I believe to be false ("the false allegatio.ns"). The falsity of t e allegations was confirmed by Rodney Hodges ("RH"), a director of R&H, and a director of the TFT Trustee, on several occasions, and specifically:
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> a,. In an open telephone conversation between RH and Nicole Martin ("NM"), my in-house Legal Counsel, where RH confirmed that (a) he and the TFT Trustee had been unaware of the false allegations being made when the BVI claim was made and (b) that he was upset by the fact that these allegations had been made and would have them removed as they were · not fundamental to the BVI Claim;
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> b. On an open conference call on Saturday 11 February 2017 with me, NM and Andrew Mccallum ("AMC"), also a director of R&H and a trustee of the TOT.

> Both RH and Richard Hillier ("RHI"), the managing director of R&H and trustee of the TFT and TDT confirmed that the false allegations ... would be dealt with."
>
> "At a meeting in my office with RHI on 8 December 2016, RHI agreed that R&H would do whatever was necessary to ensure that the false allegations against me in the BVI Claim were removed. RH has also given me similar assurances, over the telephone and in person. I have been told on many occasions by AMC that RH is "dealing with it."
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> It became apparent on the telephone call on Saturday 11 February that this was not the case however as RH made very clear that the allegations would not be removed unless and until I gave an undertaking not to discuss [the Pennyrock loan] with any third party. From my recollection of the call I confirm that RH stated:
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> a. Everyone knows he, RH, is unhappy with what has happened.
> b. While he was not happy with the process he is being told that a beneficiary is "making false allegations about R&H to third parties" concerning the Pennyrock loan and that I had to give an undertaking not to discuss the Pennyrock loan;
> c. If I gave the undertaking, then "both matters can get knocked on the head right now";
> d. He could "make the matter go away in one hour" If I g·ave the undertaking;
> e. I was to "give it up, once and for all"; I was not getting anything from Pennyrock;
> f. The false allegations would be removed only if there were no badmouthing.
>
> I gave RH the assurances and he said that he would send an email setting out in what was discussed by the following day. He did not do so....."

[22] I have set this material out in some detail because, none of it being contradicted by the Trustee or any witnesses on its behalf, I must take it to be true and it is material to the issue which I have to decide.[4] The only other passage from RT's witness statement I need refer to is where he says "I am

[4] Issue is taken with some of RT's reporting of conversations in the email from Mr. Hillier of 17th February 2017 (below) where Mr. Hillier says that Mr Hodges refutes the quotations as peing inaccurate. But ultimately the Trustee has chosen not to repeat this challenge in evidence. There is an issue raised about whether the particulars of claim served in the 273 Claims were known by Mr. Hodges to be false (Mr Nahal's second affidavit gives evidence that Mr Hodges was happy with the particulars of claim) but the particulars of claim post-date the events set out above and I note that Mr Nahal is careful not to join issue with Ms Martin as regards the contents of her conversation with Mr Hodges.

concerned that the TFT is not administering the Trust with integrity since they appears to be allowing representations which they know to be false to be presented to third parties, with whom th TDT is in litigation".

[23] By an email dated 17th February 2017 Mr. Hillier wrote, inter alia:

> "Re BVI Claims
> Rodney [Hodges] has re-read them.
> They contain no personal allegations whatsoever of fraud or dishonesty against yourself.
> They allege solely false representation in February 2008 by you (either in your personal capacity, as a director of R20, or as a representative of Oscatello Joint Venture (we are not in a position to know, but thatseems the most likely to us) with respect to inducing the creditors to provide the Additional Oscatello Security.
> This seems a reasonable position to protect the claims of the creditors and one that makes no personal claims versus you.
> This does not pertain to any trust asset in which you have an interest or expectation of interest, so it would be seen as improper to give you these document . We are taking advice"

[24] By an affidavit dated 7th March 2017 ("the Hodges affidavit"), Mr. Hodges sought to ensure that the Trustee could attend and observe RT and the TDT's own section 273 applications against the BVI Companies. He said "In su mary the TFT and the TFT ompanies aver, inter alia, t at they were induced by and relied upon misrepresentations made in early 2008 to enter into security arrangements with Kaupthing Bank hf:...".

RT's capacity and purpose

[25] The capacity in which RT has made his application, and his purpose in doing so, is of some importance, not least because the application was made by RT at a time when the TFT was pursuing claims in the liquidations of the BVI. Companies, and since about October 2017 those claims are no longer being pursued. Mr. Wilson pointed .out that RT had other capacities that that of beneficiary of the TFT. He and TDT were claimants in the liquidations of the BVI Companies and in proceedings against Kaupthing.

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[26] Mr. Nahal, on behalf of the Trustees said that "I believe that RT brought the present claim to de-rail the 273 Applications so as to damage the TFT's negotiating position with Kaupthing and, conversely, to improve his own negotiating position with Kaupthing".... In other word, I believe that this claim was not brought by RT to further his legitimate interests as a "beneficiary" of the TFT but for the collateral purpose of seeking to damage the TFT and to further his own interests and those of the TOT in his discussions with Kaupthing".

[27] While any such purpose must have fallen away following the October settlements between the TFT and Kaupthing, Mr. Wilson said that RT was still in a position of conflict with the TFT because of the 5% override on the Kaupthing claims against Oscatello. This is not a matter that was put forward in the Trustee's primary evidence - Mr. Nahal's reference to the October settlement was on the basis that the terms were confidential. Indeed it was a matter of complaint by the Trustee that RT had become aware of these terms, which suggests that the terms of settlement were not something that the Trustee intended to rely upon.[5] But in any case Mr. Wilson did not explain how information contained in the material sought by RT might, even possibly, assist him in damaging Kaupthing's claims against Oscatello or advancing his own or the TOT's claims.

[28] RT and the TOT made their own claims in the liquidations of the BVI Companies. Those claims are not themselves relevant to this application save that they were also the subject of section 273 applications before this court. By the Hodges affidavit, Mr. Hodges said:

> "It currently appears that RT is moving in the BVI court to stymie the TFT's claims in the Oscatello structure. For that reason it is important that the TFT Trustee has knowledge of what RT is doing elsewhere in relation to advancing claims against the Oscatello structure for his own benefit. For that reason I have instructed the TFT Trustee's BVI Legal Practitioners, who are Campbells, to attend and observe RT's

[5] The terms were contained in a document issued by Kaupthing to some shareholders or noteholders (it is not clear which from Mr. Nahal's second affidavit) but whether some such person breached any confidence in disclosing the terms to RT, there is no evidence that RT was aware of such a breach or is otherwise restricted from bringing this matter before the Court.

hearings in his claims against the Oscatello structure and report back to me".

Mr. Choo Choy QC, Counsel for RT, asked me to consider the irony of the Trustee seeking information about RT's claims against the BVI Companies while denying RT information about the Trustee's claims. I see that. But the Trustee was not seeking information in its capacity as trustee,· but in its capacity as litigant in parallel litigation. Some sort of "quid pro quo" might,have seen RT's lawyers attending at the TFT section 273 Claim hearings, but cannot assist RT in his capacity as beneficiary of the TFT.

[29] Since the settlement with Kaupthing, the 273 Claims have themselves been settled (i.e. withdrawn). Accordingly the landscape has changed since the application and evidence in support was filed. Each side took comfort from the withdrawal of the 273 Claims. RT, on the basis that it could not be said that giving him access to the documents could cause him to interfere in those claims, and the Trustee on the basis that since the claims were over and the costs of those claims were charged to the "VT assets" in the TFT, RT could have no claim to bring the Trustee to account in respect of any liability falling on the TFT associated with those claims.

[30] The latter aspect reflects the thrust of Mr. Wilson's objections to disclosure and echoes that advanced by Mr. Hillier in his email of 17th February 2017 that "this does not pertain to any trust asset in which you have any interest or expectation of interest".

[31] RT has argued that as a discretionary beneficiary of the TFT he is interested in all of its assets and entitled to hold the Trustee to account accordingly. In theory that is right. But in the first place the Court must be realistic and have regard both to the letter of wishes and its implementation.which has resulted in substantial assets leaving the TFT for the benefit of RT and his family exclusively. That cannot be undone and it is fanciful to suppose that RT is ever likely to benefit from "VT only" assets.

[32] In the second place RT is not seeking from the Trustees any account of the TFT assets - not even the joint or RT only assets. He wishes to have disclosure to "hold them to account", but not in any sense related to the holdings or values of assets, or in the Chancery sense of the Trustee being an accounting party. The Trustee has said that the VT only assets will bear the costs of the claims in the liquidation of the BVI companies, just as any upside would have enhanced those assets alone. RT does not seek to challenge that statement.

[33] To this extent there has undoubtedly been a shift in RT's application. As initially put the application focused in large part on the potential damage to the TFT caused by the pursuit of false claims in the liquidations of the BVI companies. Mr. Wilson's repost that RT would be insulated from any such damage has force in this context. But as advanced orally the application picked up the broader theme of proper administration of the trust, and whether the Trustee was acting with "manifest integrity".[6] As Mr. Choo-Choy put it in reply, if the Trustee misbehaves in respect of part of the trust, then the other sub-trust beneficiary is entitled to hold him to account in respect of his *conduct.*

[34] Mr. Wilson's answer to this was that if this was indeed RT's complaint then he had enough material for his purposes. If he wants to make a claim to bring the Trustee to account for advancing claims based upon what RT says are false allegations, then he can do that now. That RT persists in seeking tre documentation demonstrates that he has a collateral purpose, and that purpose may harm the TFT. As he put it, there is a balancing exercise and the court should weigh the potential harm to the trust against the importance of the documents in terms of the duty to account - see in this context **Schmidt** at [67].

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[6] A reference to the Judgement of Kirby P in the Court of Appeal of New South Wales in Hartigan Nominees Pty Ltd v Rydge .29 NSWLR 405 where he said that proprietary rights to trust documents were "sufficient; but they are not necessary to uphold the cestui qui trust's entitlement to a reasonable assurance of the manifest integrity of the administration of the trust by the trustees".

[35] If there is evidence that the disclosure of documents to a beneficiary may cause loss to the trust assets (i.e. harm to another beneficiary) that is certainly something which would be weighed in the balance. But the position here is as follows:

a. There is no evidence that loss will be caused. Mr. Wilson could do no more than speculate that RT might use information to advance his claims to Oscatello assets in competition with the TFT (through the 5% Kaupthing override). He said that the TFT and RT were in a position of conflict, but did not identify how RT could actually use the documents to cause loss to the TFF; and

b. RT has offered through counsel to undertake not to use the documents or information for any purpose outside the administration of the TFT. Mr. Wilson says that this will not stop him from having information contained in the documents. That is true, but such undertakings (express or implied) are the bread and butter of disclosure in this court and must be taken at face value when offered or given.

[36] In the circumstances I cannot be satisfied that RT has any collateral purpose in obtaining the documents, let alone a collateral purpose which might cause harm to the TFT. Nor can I be satisfied that there is a real risk of harm to the TFT if the documents are disclosed.

Exercise of discretion

[37] Before considering the discretionary factors set out by Lord Walker in **Schmidt** I need to decide whether RT has a sufficient purpose in seeking the

[7] Mr. Wilson said that it was not for the Trustees to come up with every sort of possibility as to how the TFT might be damaged by the use of the information. But the Trustee has not come up with any real possibility notwithstanding that the Trustee knows what is in the documents.

documents from the Trustee for the purpose of holding the Trustee to account. In my view he has. On the unchalleng d ·evidence of RT:

a. The Trustee was pursuing a claim in the liquidations of the BVI companies on a basis which· it (through the agency of at least one director) knew to be false[8] The Trustee acknowledged the falsity and said the allegations would be withdrawn, but they were not. That calls into question the conduct and potentially the integrity of the Trustee.

b. The Trustee agreed to withdraw the false allegation if RT gave a certain undertaking then refused to withdraw them upon the undertaking being given. Again that calls into question the conduct and potentially the integrity of the Trustee.

c. The Tr stee was pursuing that claim for the benefit of VT, in respect of which the Trustee holds assets jointly with RT. It may also be assumed that the allegations were brought to the Trustee's attention by VT. If the Trustee is prepared to advance a case on behalf of VT which it knows to be false, and which could cause harm to RT, then that potentially calls into question the suitability of the Trustee to be steward over those jointly held assets.[9]

[38] The fact that RT knows this much does not disentitle him from pursuing the documentary evidence further. He should not be obliged either to bring proceedings or decide not to bring proceedings to hold the trustee to account· based on such incomplete knowledge as he has, not least where the kernel of the allegedly false allegations remains unseen. In any event. the jurisdiction

[8] This refers to the position prior to the issue of the section 273 claims. There is hearsay evidence from Mr Nahal to the effect that Mr Hodges did believe the contents of the section 273 claim to be true. Of course, Mr Tchenguiz has not been able to compare the allegations made prior to the 273 claims with the claims themselves.

[9] A breakdown in relations and loss of confidence between a trustee and beneficiary over the stewardship of the trust may in certain circumstances justify the removal of a trustee. There is no doubt that the relationship between RT and the Trustee has broken down, at least to the point where the Trustee has been removed as trustee of the TOT and is in the process of being removed, or resigning, from other RT related trusts. Whether the circumstances of the breakdown justify removal must depend upon the conduct of the trustee and it is a legitimate purpose of a beneficiary to seek disclosure of trust · documents to look into those circumstances. This is not an area that was explored in argument.

outlined in **Schmidt** is no_t to be considered as equivalent to pre-action disclosure {where that is available). It is a different jurisdiction altogether:[10]

[39] To the extent that it is necessary to weigh RT's purpose against any potential harm to the TFT, the balance falls firmly in favour of disclosure. RT has a real purpose in seeing the documents in his capacity as beneficiary, but the TFT has not exhibited any real prospect of damage. Nor (although only peripheral to this point) has the Trustee availed itself of the mechanism suggested by RT for avoiding any damage.[11]

[40] Turning then to the three discretions:

Whether a discretionary object or some other beneficiary with a remote or wholly defeasible interest should be granted relief at all.

[41] I have answered this above, in the affirmative. The de facto designation of assets as joint or RT only within the TFT puts RT close to the *economic* position of a beneficiary absolutely entitled. That is the corollary of the Trustee's position that RT has no economic interest in the VT only assets and cannot be h·armed by their depletion.

What classes of documents should be disclosed, either completely or in a redacted form.

[42] I have considered whether it would be sensible to limit documents to those which specifically set out the allegations of misconduct made against RT. That, after all, is the core of what he wants to see. But I do not think that would be appropriate. The purpose of the application is to hold the Trustee to account,

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[10] See *Lewin* at 23-021 "... the jurisdiction is based on the accountability of trustees and beneficiaries have a legitimate interest in seeking disclosure so that they are in a position to assess whether the trustees have properly accounted for their conduct of the trusteeship, and if not to seek an appropriate _ remedy".

[11] Both sides agreed that I could see the material filed in Court, and RT asked that I see in addition a schedule of all the material sought. In the event I did not review it any material. Mr. Wilson did not ask me to look at the material with a view to identifying information that would damage the TFT nor did he ask me to look at any particular documents which would support his submission of potential harm.

and it is not sufficient simply to see the allegations made. It may be necessary to see how the Trustee sought to deploy those allegations in the context o,f the claims as a whole.

[43] Mr. Wilson did not suggest that the documents fell into different categories when it came to the exercise of my discretion. The original application was of far wider scope but was cut down at the ex parte stage through the process of RT seeking service of the proceedings out of the jurisdiction. It has not been argued by the Trustee that the request, if proper, is now excessive in scope.

[44] Nor did Mr. Wilson argue that it would be appropriate for any redaction process to be undertaken. In light of the lack of evidence concerning potential harm to the TFT and in light of the fact that this is material which was being shown to a party hostile to the TFT (so questions of privilege will not arise) I do not consider any redactions necessary.

What safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order?

[45] RT has offered through counsel to undertake not to use the documents or any information in them for any purpose other than seeking the due administration of the TFT. I consider that it is appropriate to hold RT to that offer. In light of that offer I do not consider professional inspection of the documents to be necessary. That would add a further layer of expense for no clear reason. These are not internal trust documents, but documents which were disclosed to a third party and the substance of which would likely, in material part, have come to the knowledge of RT had the 273 applications continued to contested hearings in court.

Conclusion

[46] For the reasons given above, I shall grant the relief sought in the application subject only to RT undertaking to this court in the terms set out above.

Postscript

[47] There is one further matter to mention. The Trustee is in Switzerland, but the TFT is a trust established under the law of the BVI. Further, it provides that:

> "This settlement shall be subject to the exclusive jurisdiction of the Courts of the British Virgin Islands which shall be the forum for administration hereof'.

Necessarily the Trustee has submitted to the jurisdiction of this Court by taking on the trusteeship.

[48] Submission to the jurisdiction is not the same as accepting service of process. RT sought th Trustee's consent to the application being served on the VI lawyers who were already acting for the Trustee on the section 273 Claims.[12] That consent was not forthcoming.

[49] This necessitated RT to seek permission from the Court to serve the proceedings out of the jurisdiction on the Trustee. The first attempt at obtaining permission failed on the grounds that, as mentioned above, the relief sought was too wide. But the second attempt succeeded on 29th March 2017. Even then, the Trustee did not instruct its lawyers to accept service of the proceedings. Those proceedings had to be served pursuant to Hague Convention Rules in Switzerland and it was not until 20th October 2017 that an acknowledgment of service was received.

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[12] The first request was made to the Trustee's BVI solicitors on 16 February 207 prior to issue of proceedings. Following permission to serve the proceedings out of the jurisdiction further requests were made on 3rd April and - direct to the Trustee - on 11th May. No response was received to either (or subsequent) requests, which hardly suggests proper conduct towards a beneficiary seeking due administration of a trust.

[50] The inevitable consequence was that RT incurred additional costs and there was a delay to the effective hearing of this matter. The delay was such that during the latency of the application the 273 Claims were compromised removing - so the Trustee alleged - the entire basis for the applications.

[51] Regardless of whether the Trustee obtained (or rather soughtto obtain) a tactical advantage in these proceedings by allowing the delay inherent in Hague Convention service to undermine the application itself, the Trustee's conduct raises a point of general concern.

[52] A trustee of a BVI trust is a person over whom the Court has supervisory jurisdiction both by statute and common law. If it is appropriate for the Court to exercise its powers over the trustee, then it is appropriate that such powers are exercised as soon as possible and as economically as possible. It cannot be in the interests of the proper administration of the trust for the determination of that issue to be delayed, or for there to be any delay in the Court giving directions or in those directions being carried out, or for unnecessary expense to be incurred. Accordingly it cannot, at least in general, be a proper exercise of discretion on the part of the trustee to seek to avoid or delay coming before the Court to answer for its administration of the trust.

[53] Mr. Wilson did not, when questioned by me, identify any reason why the Trustee should have required service upon it out of the jurisdiction in accordance with the Hague convention rules, at least once the threshold of obtaining permission had been passed. He simply said that those were the rules, there was no exception in the case of trustees of BVI trusts, and the Trustees were entitled to see the rules obeyed.

[54] I disagree. In my view the conduct of a trustee in delaying, or rather in allowing to be delayed the timely determination by the court of a question turning on the trustee's own conduct, is a matter of concern to the court and legitimate concern to the beneficiary seeking to hold the trustee to account.

[55] I have not taken the Trustee's conduct in refusing to accept service by BVI solicitors into account in exercising my discretion above. But it must be a factor which will weigh with any court when considering whether a trustee is administering the trust with dye regard to the interests of the beneficiary.

David Chivers, Q.C.
High Court Judge

By the Court