



## **Introduction**

1. This is the court's ruling in respect of an application made by certain of the defendants to these proceedings for an order against the plaintiffs for disclosure of documents relating to an application that was made in November 2022 in relation to a certain trust structure. That relief included two principal elements: (i) the court's grant of the power to the Trustees of certain trusts ("the Trustees") to amend the trust instruments to add a power of exclusion to the trusts ("the Trusts") under section 47 of the Trustee Act 1974 and (ii) the blessing of the Trustees' decision to implement a plan ("the Steps Plan") by which one branch of the family of the Settlers' descendants were to be excluded as beneficiaries under the Trusts ("the Excluded Branch") and who were to receive the payment of sums which represented a proportion of the fair value of the assets owned or controlled by the Trusts.
2. Hargun CJ made the order in the terms that were sought ("the Order") and gave his reasons for doing so in a Ruling dated 9 December 2022<sup>1</sup>. The relevant background facts were set out in that Ruling and so it is not necessary to repeat the background here. The Trustees subsequently proceeded to amend the Trusts by adding the power of exclusion, excluded the members of the branch of the family as beneficiaries in accordance with the powers newly conferred, the exercise of which had been blessed by Hargun CJ as being a 'momentous' decision in the life of the Trusts which was (then) within the powers of the Trustees. This blessing was given under the jurisdiction of the court explained in **Public Trustee v Cooper** as a 'category 2' type of case<sup>2</sup>.
3. The effect of Hargun CJ's Order and the Trustees' implementation of the Steps Plan was to enable the Excluded Branch to receive its proportionate share of the value of the assets of the Trusts (in respect of which they had an entitlement to be considered for benefit as members of a discretionary class of objects), and to allow the Excluded Branch to chart their own course without being tied to the financial fortunes of the other branches of the family who remained members of the discretionary beneficial classes under the Trusts.

## **The timing of the hearing before Hargun CJ**

4. In planning the separation of the Excluded Branch from the Trust structure, the Trustees and the beneficiaries needed to take into account the tax implications, and this had an impact on timing. It was decided that it would be preferable to achieve the exclusion as soon as possible. Thus, at the time the application came on before Hargun CJ, the structure of the Steps Plan was largely agreed by the time the application came on before Hargun CJ, but there were some details that had not been finalised.
5. Hargun CJ made the Order giving the Trustees the power to vary the Trusts and gave the court's blessing to the Trustees' decision to proceed with the Steps Plan knowing that some of the details remained to be finalised. Hargun CJ added a 'liberty to apply' provision to the

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<sup>1</sup> [2022] SC (Bda) 93 Civ.

<sup>2</sup> [2001] WTLR 901.

Order at the request of the Excluded Branch's counsel in case any 'insurmountable hurdles' as to the final terms of the proposed transaction could not be overcome.

6. The instruments excluding the Excluded Branch were executed by the Trustees after the finalisation of the documentation that was necessary to complete the Steps Plan, but before all payments under that documentation had been made because of the desire to minimise the potential exposure to additional tax liability that delaying the exclusion would have given rise to.
7. After the Order, but before the exclusion, further negotiations over the terms continued and eventually the terms were finalised and implemented. The original structure was by way of a contractual obligation to make payments under an Additional Payments Agreement ("the APA"). Subsequent to Hargun CJ's Order, the APA was replaced by a Promissory Note structure containing the same payments and on the same terms, but the payments were payable by the holding company instead of the Trustees.
8. At one point in the negotiations the representatives of the Excluded Branch proposed the addition of a long stop date for all payments to be made, but this was rejected by the Trustees. There was also some debate about the definition of 'net profit after tax' ("NPAT") in the APA and Promissory Note, which had not been settled by the time the matter came on before Hargun CJ for hearing. The relevant documents were executed in final form without any application being made by the Excluded Branch to review or reconsider the terms of the Steps Plan.

### **The Steps Plan**

9. It is necessary to explain a few of the details of the how the final version of the Steps Plan was structured in order to understand the nature of the present application and how it arises from the implementation of those steps.
10. The first step of the Steps Plan was a lump sum payment for the benefit of the Excluded Branch in respect of the surrender of certain rights. This payment was made in full. The second Step was the payment of an amount that was calculated as representing the current fair value of a proportion of the underlying assets attributable to what the Trustees had assessed as being the Excluded Branch's equal proportionate share of the total value of the assets of the Trusts. The value attributed to the assets was based on independent valuation advice, which put the value of the underlying assets within a range of values, and the parties agreed on a figure above the midpoint of that range. The formula for the calculation of the payments in the Promissory Note was based on this figure, and it is the application of this formula that is at the centre of the present dispute. The reasons for this dispute are explained below. The payment was divided into three instalment payments, each to be made on 31 May in each of the three next successive years in 2023, 2024 and 2025. The sums involved in the initial payment and the subsequent instalment payments are of substantial value, but the precise details do not matter for the purposes of the court's analysis.
11. The first instalment payment was expressed to be unconditional in nature. This amount was paid in full in accordance with the terms of the Steps Plan. The second instalment payment

was also made in full, but only after some delays. The final Step involved the third instalment payment. This payment was not made on the due date in May 2025.

### **The present application**

12. A dispute has arisen as to how the payment mechanism under the Promissory Note was intended to work. Certain members of the Excluded Branch say that the three equal instalments were due to be paid so as to be equal to the total estimated fair value of their proportionate share of the underlying assets that were to be attributed to their branch of the family. In effect the Excluded Branch say that they expected to receive the full sum of the estimated fair value provided for in the Promissory Note in the three equal instalment payments.
13. The Trustees say the instalment payments were to be paid under the detailed provisions of the Promissory Note structure that was adopted for the implementation of the Steps Plan. The Trustees say these terms make it clear that the calculation of each of the second and third instalments were subject to conditions. The principal feature was that the payment obligation included a calculation of the performance of the underlying assets' operational performance, based upon the NPAT of the underlying business owned by the Trusts measured against the estimated fair value. The Trustees say that the terms of the Promissory Note provide that the Excluded Branch are to receive the *lower* of the value of the estimated fair value figure and the relevant NPAT calculation for the business in the second and third instalments. The Trustees say that the financial performance of the underlying business has resulted in a negative NPAT for the relevant financial year.
14. The Trustees' position is that the payment of the estimated fair value figure was always subject to adjustment according to the actual net profit after tax performance of the underlying assets. The Trustees say that the third payment is not yet due and, according to the application of the formula, will only become due when the performance of the underlying business improves to the point where NPAT allows for a payment against the third instalment payment of the estimated fair value.
15. The Excluded Branch's position is that something has gone seriously wrong, because that is not how they understood the mechanism to work. They have asked the Trustees to disclose information relating to the following categories of document to elucidate the position. These categories of document are as follows:
  - (i) *The Trustees' knowledge and understanding ....of the payment terms under the Promissory Note, including the calculation of ...NPAT, the likely timescale for payment in full, and the likelihood of such payment being made at all;*
  - (ii) *All advice sought by and given to the Trustees in relation to the matters in (i) above;*
  - (iii) *The Trustees' knowledge and involvement ...to date in the calculation of...NPAT and the (non) payment of the second and third instalments due under the Promissory Note.*
16. The Trustees have responded explaining the basis on which the Steps Plan operates and referred to the terms which they say make it clear that the second and third payments were

always subject to the conditions as to performance of the underlying business. The Trustees have also explained that there are in fact no additional documents which fall into the categories requested that have not already been disclosed.

17. In reply, the Excluded Branch have expressed their surprise at this reaction and have stated their disbelief that there are no such documents. The Excluded Branch point to several other matters.
18. First, they say that although the second instalment provided for under the Promissory Note was not initially paid on the due date, it was eventually paid in full, even though there should not have been a full payment of that instalment if the NPAT formula had been applied. The Excluded Branch say that this shows that it was always understood that the NPAT calculation was never intended to result in a nonpayment of the instalments, and therefore the payment of the second instalment supports their view that the third instalment is also due in full.
19. Second, they say that although the Trustees have stated that there are no additional documents that fall within the categories requested, the Trustees have in the meantime produced some additional documents. They say there must be more documents and have pointed to the likelihood of notes and legal advice having been generated in relation to the matters about which they have requested further information.
20. Third, the Excluded Branch complains that the proposal that they put forward for a longstop payment for the three instalments was rejected, and that the Excluded Branch was pressed into an unreasonably short time to agree to the final form of the transaction. This resulted in the longstop provision being omitted from the terms of the final arrangement. The Excluded Branch say that the documents surrounding the longstop proposal will be relevant to what the Trustees knew at the time about the likelihood of payment.

#### **The legal basis of the application for an order for disclosure by the Excluded Branch**

21. As a result of the impasse, the Excluded Branch have applied to this court for relief. The Excluded Branch have made three applications in their summons. The first of these applications is for disclosure of information. That is the application presently before the court. The Excluded Branch have also sought additional relief in their summons. In brief, the Excluded Branch say they wish to set aside the Order made by Hargun CJ and set aside the instruments by which the Excluded Branch were excluded from the Trusts. Those applications are not presently before the court. The Excluded Branch say that they need the disclosure of the information sought on this application in order to assist them in presenting their remaining applications.
22. It is right to note that the Excluded Branch have supported the present application, and the non-excluded branches are taking a watching brief and neither support nor oppose the application.
23. In making all three applications for relief in their summons, the Excluded Branch rely on the terms of Hargun CJ's Order which gives 'liberty to apply' to the parties to come back to the court in order to work out the mechanics of the implementation of the Steps Plan that was blessed by Hargun CJ. The Excluded Branch also point to the submissions made by their

counsel at the hearing (different counsel to those appearing on this application) which explained the concerns that gave rise to the need for a ‘liberty to apply’ provision<sup>3</sup>. The Excluded Branch say that this type of application is included in the ‘liberty to apply’ provision so that the Excluded Branch can better understand the basis on which the Trustees are taking their present position.

24. The Excluded Branch say that if the Trustees are correct in their analysis of the Promissory Note and its meaning, then there has been a material change in circumstances, namely that the financial under performance of the assets has resulted in the position that the third instalment has not been paid, and may never be paid, which cannot have been what Hargun CJ understood when he blessed the Trustees’ decision to implement the Steps Plan. Or, if it was always understood by the Trustees that the second and third instalments due under the Promissory Note (originally under the APA) might never be paid, then this was never explained to Hargun CJ and the court has therefore given its blessing when all the relevant facts had not been fully explained to the court.
25. The Excluded Branch rely upon the general principles that apply to the court’s exercise of its jurisdiction to vary or set aside earlier orders, or to give relief in relation to those orders, to give them proper effect. The authorities summarised in **Tibbles v SIG plc**<sup>4</sup> show that the English court’s jurisdiction under the CPR 2000 are unlimited in this respect but are generally only exercised where the court is satisfied that (i) there has been a material change of circumstances or (ii) where all the facts were not fairly presented to the court when it made its order. The Excluded Branch say that applying these principles on either basis the court should exercise its powers in this case to order the Trustees to disclose the documents in the categories set out above.
26. Alternatively, the Excluded Branch say that they are entitled to apply to the court for disclosure of trust documents and information about the trust under the general principles explained by the Privy Council in **Schmidt v Rosewood**<sup>5</sup>. The Excluded Branch say that application of these principles should enable them to get any additional documents that shed light on the way in which the Trustees understood the structure and thereby enable the Excluded Branch to properly formulate their likely subsequent request for relief from the court.

### **The Trustees’ position**

27. The Trustees say that the application is an abuse of process and should be struck out because the court does not have power to order disclosure of documents under a ‘liberty to apply’ provision, and the basis on which the application is made is fundamentally misconceived because all the documents are clear and there is (and was) no room for any misunderstanding

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<sup>3</sup> See transcript at pages 324-5: Ms Van Overdijk: “*We’re not objecting to the blessing. It’s a question of how it’s going to protect my client’s interests in terms of understanding should there be any hurdles that are insurmountable to what happens then...that’s why we ask for the court to have some element of review...in the event that the insurmountable issues can’t be resolved by any agreement....it’s quite clear ...the trustees are saying that their decision may change dependent on the conclusion of these various agreements....vis a vis the rights of my clients in terms of affordability of these commercial agreements and particularly as to how they receive the second tranche of distributions...*”

<sup>4</sup> [2012] 1 WLR 2591.

<sup>5</sup> [2003] 2 AC 709.

on the part of (i) the Excluded Branch (ii) the lawyers involved in drafting the documents (iii) the counsel who appeared at the hearing before Hargun CJ or (iv) Hargun CJ that the terms of the payments of the second and third instalments under the Steps Plan were conditional on the performance of the underlying operating companies.

28. Further, the Trustees say that if the Excluded Branch wish to allege that there was a non-disclosure of relevant facts to Hargun CJ, they must do so in the proper way and issue the relevant application to set aside the Order and set out the basis of their claims and seek relief in a formal proceeding begun by originating process. The Trustees say that the court does not have jurisdiction to make the orders sought, or if it does, it should decline to exercise them in this case. They say there has been no material change of circumstances because the conditionality of the payments was always known and provided for and the terms were the subject of negotiation, and that the documents which explain the conditionality were known to the parties and Hargun CJ read and understood them at the time he was invited to make the orders he did.
29. The Trustees also take the position that this is not a case in which it would be appropriate for the court to exercise its powers of supervision over trustees to require the Trustees to disclose trust information under **Schmidt v Rosewood** principles. In any event, the Trustees have put in evidence to confirm that as a matter of fact, there are no documents in the categories sought by the Excluded Branch.

#### **The court's assessment of the application**

30. Although the Excluded Branch have included in their summons prayers for orders setting aside Hargun CJ's Order and setting aside the exclusion of the Excluded Branch, those applications are not being pursued on this application but are being preserved for a later hearing, after the disclosure sought on this present application has been given. Accordingly, the court is not today deciding which interpretation of the documents contended for by either side is correct, nor determining whether there are any proper grounds for setting aside the Order of Hargun CJ. No evaluation of the underlying merits of the claims being contemplated by the Excluded Branch has been made by the court on this application, even though the parties have each set out their respective positions on the main issues in some detail.
31. However, in order to put the present application into context it is necessary to summarise the claims being advanced and the responses made in the court's analysis of the application of the correct approach to the disclosure application.
32. The possible grounds so far advertised by the Excluded Branch are (i) that there has been a change of circumstances as a result of the deteriorating financial performance of the underlying business which makes the terms of the Promissory Note materially different in effect that the Excluded Branch expected and understood (ii) the grounds of the application to Hargun CJ for the exclusion and blessing were materially misrepresented (iii) the Trustees wrongly rejected a proposal for the inclusion of a longstop provision and put undue pressure on the Excluded Branch to execute the documents in a form which did not reflect the true understanding of the parties concerning the terms of the exclusion.

33. It is obvious that the relief sought is substantive not procedural and the relief is not aimed at *giving effect* to Hargun CJ's Order: the Excluded Branch seek orders *setting aside* the Order made by Hargun CJ and setting aside or rescinding the instruments of exclusion executed by the Trustees under the authority of that Order.
34. The present application is for an order for disclosure of various categories of documents so that the Excluded Branch can support one or more of these allegations by evidence they suspect the Trustee may have in its possession custody or power. The present application is therefore in the nature of a 'pre-action' disclosure to enable the Excluded Branch to formulate their other claims for relief<sup>6</sup>. However, the Excluded Branch do not have any direct evidence that there are any documents which are responsive to their requests, but they believe that some documents of the type described are likely to exist.

*Liberty to apply*

35. The ordinary application of the liberty to apply jurisdiction only allows for the party to apply to the court to work out the mechanics of the orders that have been made by the court and does not give the court a roving or unlimited power to re-visit the orders that have been made<sup>7</sup>. The court's jurisdiction described in **Tibbles** is intended to provide a method of addressing or revisiting something in an ongoing situation when it is foreseen that further applications are likely in the course of implementing the decision, or where there has been a material change of circumstances since the making of the order, or the facts on which the original decision was based were (innocently or otherwise) misstated.<sup>8</sup>
36. It is necessary for the court to keep in mind that the applications in this case were for two things: the first was to grant the Trustees a new power to exclude beneficiaries from the class of potential beneficial objects so that the Trustees could exclude the Excluded Branch, and the second was to give the court's blessing to the Trustees' decision to exclude the Excluded Branch and to implement the Steps Plan.
37. It is obvious that the basis of the claims being made by the Excluded Branch are put on the footing that Hargun CJ's Order should be set aside because of an alleged change of circumstances or alleged misrepresentation of the facts or some alleged misconduct on the part of the Trustee. There is no allegation that there is or was any confusion or difficulty in implementing Hargun CJ's Order. Therefore, no issue arises under the 'liberty to apply' provision in relation to the mechanics of giving effect to the exclusion which was carried into effect. The Excluded Branch wish to reverse it.
38. It is also obvious that there is no dispute about the principles on which Hargun CJ acted in blessing the decision of the Trustee's decision to implement the Steps Plan or in applying the principles in **Public Trustee v Cooper**. The blessing was given on the basis that the decision that the Trustees had taken was (i) momentous (ii) the exclusion was lawfully within their powers (after the power to exclude had been added) and the Trustee genuinely considered it to be in the interests of the Trust, and that it was a decision which a reasonable trustee could reach and (iii) the decision was not tainted by any conflict of interest.

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<sup>6</sup> The Bermuda RSC do not yet include RSC Order 24 Rule 7A of the equivalent English Rules.

<sup>7</sup> **Cristel v Cristel** [1951] 2 KB 725.

<sup>8</sup> At paragraphs 39- 40 Per Rix LJ.

39. The dispute is that the Excluded Branch considered that they were to be entitled to the full payment of the instalments without adjustment, whereas the Trustees' position is that it was always clearly understood that the payments of the second and third instalments were contingent on the performance of the underlying businesses. This is in the nature of a straightforward contractual dispute as to the meaning of the documents that gave effect to the transaction, and the claim does not involve a reconsideration of the mechanics of the implementation of Hargun CJ's Order.
40. The Excluded Branch have not (yet) advanced their main claims for relief on their summons, so for present purposes I have had to assume (not without some scepticism) that the court *could* in theory allow a trial of the issues being raised by the Excluded Branch to be determined by way of an application for directions for the trial of an issue under a 'liberty to apply' provision. But, even if the court decided that such a course was appropriate, in my view, at the very least, the court would direct that all the issues in dispute (both legal and factual) that underpin the application must be properly identified in a formal pleading *before* ordering disclosure of documents in relation to those claims<sup>9</sup>.
41. This is because the court is required to apply procedural safeguards that ensure a just and procedurally fair determination of disputed issues of fact and law. These include specific procedural protocols that regulate the giving of disclosure that meet the requirements of the particular type of case being advanced. In the present circumstances the court is disinclined to grant orders for disclosure before directions have been given for the trial of the issues the Excluded Branch wish to raise, either in some form of special procedure that is tailored for this case, or by directions for the trial of the issues in a more conventional proceeding.
42. No authority has been advanced to support the proposition that the court can order disclosure on a 'liberty to apply' provision. However, on the basis that the court has an inherent jurisdiction to make orders necessary to regulate and control its own process, I am not prepared to say that it has no power to make the orders sought by the Excluded Branch. That said, I am not persuaded that this is a case in which the court *should* exercise its powers in the manner sought under the principles summarised in **Tibbles** because the issues the Excluded Branch wish to argue do not in reality arise out of Hargun CJ's Order; instead, those issues arise out of the parties' conflicting interpretations of the meaning of the commercial documents that gave effect to the decision that was blessed by Hargun CJ.

#### *The documentary requests*

43. The court also has serious concerns about the scope of the applications that have been made and is far from persuaded that the court would give the relief sought even if the **Tibbles** principles are applied. There are several reasons for this conclusion.
44. The Excluded Branch wish to obtain disclosure of documents to find out what the Trustees' knowledge and understanding of the payment terms of the Promissory Note were. This is a problematic request because it is a general principle of contractual interpretation that parol

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<sup>9</sup> See the commentary to the Notes to the 1999 Supreme Court Practice RSC Order 24 rule7 at page 471: "*The court has jurisdiction to order specific discovery under this rule even before service of the statement of claim, but the making of such an order generally calls for the definition of the issues and should not normally be made.*" (Emphasis added)

evidence is inadmissible as an aid to the interpretation of the objective meaning of contractual documents. Such a request would not be granted unless it arises in the context of an application to rectify a document which does not reflect the true intention of the parties. This relief would need to be sought in a formal application, and no such proceedings have been brought.

45. The Excluded Branch also seek all advice sought and given to the Trustees in relation to their understanding of the terms of the Promissory Note and the timescale for repayment. This request is also problematic. It appears to be directed at legal advice, but it may also include financial advice.
46. In the first category of legal advice, this is privileged from production, and the court would not order such disclosure even under conventional disclosure proceedings. If it related to financial advice in relation to the timescale for repayment, the Promissory Note expressly provides for the carriage of interest on any unpaid amounts until performance allows for repayment. For the reasons already stated, it would be unusual for the court to order disclosure of precontractual documents that explain the reasons for the terms agreed unless the document was the subject of an application to set it aside or rescind it or to rectify it.
47. The Excluded Branch also seek disclosure of documents which relate to the Trustees' knowledge and involvement of the calculation of the NPAT and the payment or nonpayment of the second and third instalments. This request is also problematic in that it seeks disclosure of post contractual documents in aid of interpretation of the meaning and effect of the Promissory Note. For the same reasons, the court will not generally take the parties' post contractual subjective knowledge or intentions into account.
48. Therefore, for these reasons the court would not have been persuaded to order the disclosure of the documents referred to in the categories sought by the Excluded Branch.

#### *Existence of documents*

49. Even if the court were to assume that an application for disclosure of documents were possible or appropriate in the present circumstances, the general principle on an application for specific disclosure is that the applicant must show by evidence that the documents requested exist or are likely to exist. The Excluded Branch say that it seems unlikely<sup>10</sup> that there are no documents in those categories but produce no evidence of their existence and rely on circumstantial inference that some documents must exist but have not been disclosed<sup>11</sup>.
50. Against that the Trustees have put in sworn evidence to explain that in fact there are no such materials in their possession, custody or power<sup>12</sup>. Normally that is conclusive, at least until the Excluded Branch can adduce direct evidence as to the existence of documents which have not been produced in an application for specific discovery<sup>13</sup>.

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<sup>10</sup> Excluded Branch's written submissions paragraphs 62-4.

<sup>11</sup> The deponent uses the verbs 'assume' and 'infer' and suggests that it is 'implausible' that documents do not exist to describe the factual basis of the application at paragraphs 41-7 of the affidavit in support.

<sup>12</sup> Trustee's 3rd affidavit at paragraph 9.3.

<sup>13</sup> Applying conventional principles for disclosure described in the notes to RSC Order 24 rule 7.

51. As a result, the present application falls into the category of a ‘fishing expedition’ to see if some material that will assist the Excluded Branch in formulating a claim for relief can be uncovered. It is well settled that Micawberistic disclosure applications are not permitted.

### **Allegations of inadequate presentation of the facts to the court**

52. The premise that lies behind the application is that Hargun CJ was led to understand by counsel that in all circumstances the effect of the Steps Plan would be that the Excluded Branch would receive the full amount of the three instalments provided for in the Promissory Note (previously contained in the APA). It is suggested that the nature of the conditionality provided for in the Promissory Note was not properly explained to Hargun CJ and that had Hargun CJ been told of the nature of that conditionality he would not have given the court’s blessing to the Trustees’ decision.

53. It is a serious matter to allege that the court has not been given a fair presentation of the facts by counsel. If such an allegation is made, it is well established that the basis for such an allegation must be clearly set out in materials that support that allegation. It is relevant to record that the Excluded Branch was represented by eminent counsel at the hearing before Hargun CJ and there was no suggestion by her at the time that the effect of the instalment payments (then in the APA) had not been properly or fully explained to Hargun CJ.

54. Indeed, the Excluded Branch accept there was clearly an element of conditionality in the terms of the Promissory Note. It is not clear to the court what it is said that Hargun CJ may not have understood about the conditionality of the second and third instalment payments. If this allegation is to be pleaded, it needs to be properly supported by some *prima facie* evidence that justifies it.

### **Schmidt v Rosewood**

55. The alternative ground advanced on support of the application for disclosure is that the court can order a trustee to disclose to beneficiaries of a trust documents which beneficiaries reasonable request to aid their understanding of their entitlements or potential entitlements under the trust, including legal advice and other relevant information. This can extend to the interest of former beneficiaries<sup>14</sup>. These principles are set out in a well-known decision of **Schmidt v Rosewood Trust Ltd**<sup>15</sup> and arise in the context of the court’s power to supervise the conduct of trustees and to allow persons who have an actual or potential interest under the trust to have access to confidential information relating to the trust to ensure transparency and to uphold the performance of the trustee’s fiduciary duties.

56. It is said that the documents requested are documents which are likely to exist and relate to the conduct of the Trusts’ affairs at a time when the Excluded Branch were still beneficiaries of the Trusts.

57. It is undoubtedly true the court has a discretion to order specific documents or classes of documents to be disclosed to the beneficiaries of a trust or former beneficiaries in relation to matters which relate to a period when they were beneficiaries. This is usually on the basis that

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<sup>14</sup> **Countess Bathurst v Kleinwort Benson (Channel Islands)** [2007] WTLR 959.

<sup>15</sup> [2003] 2 AC 709.

the documents may be relevant to an understanding of their actual or potential interests or rights under the Trusts. It is also true that an order under this aspect of the court's supervisory jurisdiction is wider than an ordinary application for disclosure and the applicant need not comply with the requirements that must be satisfied in an application for an order for disclosure of documents under RSC Order 24 in ordinary litigation.

58. However, it is a discretion which is to be exercised with care and due regard to the appropriate scope for relief in each case. While the court has jurisdiction to entertain an application for relief, there is no absolute right to obtain the information requested by a beneficiary or former beneficiary.
59. In this case the documents sought do not relate to any actual or potential rights or interests of the beneficiaries (or former beneficiaries) under the Trust. The documents requested relate to the performance of an obligation owed to the Excluded Branch by the holding company through which certain assets of the Trusts are held. The claim relates to an alleged failure to perform the obligation, and the background history to the negotiation and drafting of the document that sets out the legal formalities of that obligation.
60. This is not a case where the court is being asked to balance the interests of the beneficiaries to obtain information about the management of the trust's affairs against the duties of confidentiality of the trust documents.
61. In balancing the respective rights and interests in this situation, in my view it would not be an appropriate exercise of the court's supervisory powers to require the Trustees to disclose documents which relate to the drafting of the documents that were prepared to implement the Trustees' decision to exclude the Excluded Branch.
62. First, the Excluded Branch were on the opposite side of the transaction and were represented by counsel and a team of lawyers who dealt with the lawyers instructed by the Trustees on the negotiation and preparation of the documents. It would require an extraordinary situation to justify the court ordering one side of a transaction to disclose to the other side their own lawyers' privileged documents relating to the drafting of the agreement.
63. Secondly, for all the reasons I have already given about the absence of relevance and the inadmissibility of evidence of subjective intention, the information requested would not be admissible to assist the court in determining the objective meaning of the contractual terms.
64. Third, if the Excluded Branch issue proceedings in respect of any of the claims they have referred to or which underlie an application to set aside Hargun CJ's Order, the Excluded Branch will be entitled to disclosure in those proceedings in the ordinary way.
65. Fourth, the Promissory Note contains terms which require any dispute over the meaning of the terms and the performance of the obligations thereunder to be resolved by arbitration proceedings, and the Trustees are not parties to the Promissory Note. The benefit of the Promissory Note has been assigned in part to a trustee of new trusts. If the Excluded Branch wish to raise a dispute over the meaning of the terms of the Promissory Note, the appropriate course is for the Excluded Branch to seek to enforce their rights through the trustees of the

new trusts to whom the benefit of the Promissory Note has been assigned. It would not, in my view, be appropriate to bypass the commercial agreements which contain the rights of the parties and allow the Excluded Branch to obtain information under the court's **Schmidt v Rosewood** jurisdiction.

66. In reaching these conclusions, the court has also taken into account that the Trustees have confirmed on affidavit that there is no non-privileged material which is in their possession custody or power that is responsive to the requests. Until there is some evidential basis to justify the court in rejecting the Trustees' uncontradicted evidence on this, the premise upon which the present application is made is speculative.
67. In addition, the court is also not persuaded that it would be appropriate to order disclosure of trust documents or information or in the exercise of the court's supervisory jurisdiction under **Schmidt v Rosewood** because the arguments raised by the Excluded Branch are in the nature of hostile trust litigation, and the court would not normally order disclosure against the adverse party before the claim is formulated.
68. Accordingly, the court is not satisfied that the application for relief against the Trustees for the disclosure of information is properly justified under the **Schmidt v Rosewood** principles, and the court hereby refuses the Excluded Branch's application under this alternative ground.

#### **Conclusion**

69. It follows from the court's analysis and reasoning set out above that the applications made by the Excluded Class are hereby refused.
70. The normal rule is that the party who succeeds in the application 'in real life terms' is entitled to recover the costs. I can see no good reason not to award costs to the Trustees on the standard scale, to be taxed if not agreed. The court so orders.

Dated this 26 March 2026



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**THE HON. MR. JUSTICE ANDREW MARTIN**  
**PUISNE JUDGE OF THE SUPREME COURT**