

DRAFT

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION

2020/CLE/GEN/01077

NICHOLAS JAMES RAU

Plaintiff

VS

(1) UBS TRUSTEES (BAHAMAS) LTD.

(in its capacity as Trustee)

(2) JEAN ROSEMARY RAU

(3) CLOVIS JAMES RAU

Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: ✓ John Wilson, Q.C. and Knyah Knowles for the
Plaintiff

Sean McWeeney, Q.C. and John Minns for first Defendant

No appearances by or on behalf of the second and third
named Defendants.

Date of Hearing: 26th July, 2021

DECISION

1. By a Summons for Directions filed 19th January 2021, the Plaintiff seeks the following:
 1. Directions as to:
 - (i) the service on/notice to any person of the Originating Summons dated and filed on 28th October, 2020 (the Originating Summons);
 - (ii) the filing of the respective parties' evidence, if any;
 - (ii) the exchange of Skeleton Arguments, if any;
 - (iii) any other directions which the Court deems just and/or necessary for the proper management of the matter; and
 2. An Order that the Affidavit of Nicholas James Rau sworn in support of the Originating Summons on 4th December, 2020 be placed in an envelope and sealed by the Registrar of the Supreme Court and retained by the Registrar in safe custody until further order.
3. The Plaintiff is the settlor of a trust (the Tern Trust), and by the Originating Summons seeks to have the establishment of that trust, and the transfer of property into that trust, declared voidable, and to have the trust set aside *ab initio* on the ground of mistake.

Service on Other Persons

4. Pursuant to Section 2(a) and (f) of the Deed of Trust dated 17th June 1995, "Beneficiaries" and "issue" are defined as follows:
 - 2(a) Beneficiaries means (i) the Settlor, the spouse of the Settlor, the issue of the Settlor (now living or hereafter born during the Trust Period), and the Settlor's parents and other issue of the Settlor's parents (now living or hereafter born during the Trust Period); and (ii) any persons or classes of persons (other than a person who is for the time being a Trustee) nominated by the Trustee by deed...;

2(b) issue means children or remoter issue whether legitimate illegitimate legitimated or adopted.

5. Procedurally, the Plaintiff has served notice of the Originating Summons on the office of the Attorney General, and has also served the three named defendants to the action. The issue of service on any other person arises because the Settlor had a half-sister, Lucy, now deceased, who left an adopted son, James Craig Ferguson. The question is whether Ferguson may be a beneficiary, and should also be served with notice of these proceedings.
6. The Plaintiff submits that Ferguson should not be served because 1. His mother was a half-sister, not a full sister, and is therefore not properly the "issue" of the Settlor's parents; and 2. Even if Ferguson is a potential beneficiary, his interest is remote, as, having regard to the Letters of Wishes, there was no intention that Ferguson should benefit. Mr. Wilson QC further submits that not serving a remote beneficiary would be in the best interests of the beneficiaries, as any potential benefit might be increased.
7. In support of his contentions, the Plaintiff cites the authority of **A and others and B and others (2016) EWHC 340(Ch)**, where the court noted as follows: **"It will be apparent from my description of the trusts under the Will and the Settlement that there are many people who are potential beneficiaries under those trusts other than the parties to the applications. The persons include living individuals, both adult and minor, as well as unborn and unascertained persons and charitable entities or purposes. Because of the nature of the trusts involved (a matter which it is unnecessary and inappropriate to describe in this judgment), it is highly unlikely that any non-party other than members of**

the specified class will ever benefit under those trusts. The entirety of the Arrangement Funds are in practice intended to be applied for the benefit of the parties and the specified class.

- 8. Ordinarily, that would not eliminate the need for a variation of the trusts affecting potential beneficiaries to be agreed to by adults and approved by the court on behalf of unborn and unascertained persons. However, in the light of the extremely remote interest which any non-party (other than members of the specified class) has, none of the parties, in particular the Trustees, has considered it sensible or proportionate to involve them in discussions about the future of the trusts let alone to join them as parties to the proceedings if there is some course which can properly be adopted to eliminate the need for such involvement. A method of eliminating the need for such involvement was identified. I was satisfied that the method was technically effective and that it could properly be adopted. It is to explain why I reached that conclusion that this judgment is written.**
- 9. The court went on at paragraph 31 to note as follows: "Ms Meadway submits that such questions do not arise here, or if they do, the answers are that the Trustees are exercising their powers in a perfectly proper manner and there is no fraud on a power. The powers being exercised are powers to restrict the interests of remote beneficiaries. Since such restrictions will necessarily enhance the interests of the core beneficiaries, they may properly be regarded as powers to benefit the core beneficiaries,**

and since the object of the variation is to benefit the core beneficiaries, it cannot be an objection that these powers are exercised so as to facilitate it. She refers by way of example to Re Lansdowne's Will Trusts [1967] Ch 603. In that case, Buckley J at p 608F-609B, 613B-F, 614G, held that the Court could authorise the barring of a minor's entail under the Trustee Act 1925 s. 53 as being for the benefit of the minor, where the barring, by removing a number of remoter interests, would facilitate a variation under the VTA which was for the benefit of that minor. I find that a helpful analogy."

10. The court then considered that approval of the arrangement was for the benefit of the wider class of beneficiaries, and concluded at paragraph 34 that: **"It is for these reasons that I did not see the method of dispensing with the need for representation of the wider class as other than fully effective, as well as being a sensible and practical approach to the application."**
11. On behalf of UBS, Mr. McWeeney QC indicated that UBS does not support or oppose the application, but is neutral. Mr. McWeeney QC further indicated that the trust is discretionary, and that in administering the trust the Trustees will have regard to the Letter of Wishes, under which there was no intention to benefit Ferguson. He also noted section 83(3) of the Trustee Act, pursuant to which trustees are not required to inform contingent beneficiaries.
12. In considering the issue, I note the submission of the Plaintiff that Ferguson might not be a potential beneficiary, as his mother was a half-sister of the settlor, and not a full sister, and is therefore not "issue" of the Settlor's parents. In reviewing the definition of "issue" in the Deed

of Trust, I note that it includes "children and remoter issue whether legitimate illegitimate legitimated or adopted." There is no specific requirement that issue of the Settlor's parents be the child of both parents, and illegitimate children are specifically included. I am therefore of the view that Ferguson is a potential beneficiary. However, that is not dispositive of the issue, as the Plaintiff's primary submissions are that Ferguson's potential interest is remote, and that there was no intention for him to benefit.

13. While the Deed of Trust defines beneficiaries, the Letter of Wishes is specific in detailing the disposition of the Trust Assets. In this case there were two such documents. They set out the wishes of the Settlor, but neither names Ferguson, or indeed his mother Lucy, as a beneficiary under the trust. I therefore accept that there was no intention on the part of the Settlor, as expressed in either of the Letter of Wishes, to benefit Ferguson.
14. I also accept that, as the trust is discretionary, the Trustees would have regard to the Letter of Wishes in administering the trust, and that the intention is usually to confine beneficiaries to those in the Letter of Wishes. I therefore conclude that Ferguson's potential interest is remote, and as there was no intention that he benefit under the trust, it is not reasonable or necessary that Ferguson be notified of these proceedings. I therefore accede to the request for a direction dispensing with the need to serve Ferguson with notice of the application commenced by the Originating Summons.

Sealing of File

15. The Plaintiff by the Originating Summons seeks an order that the Affidavit of Nicholas Rau be sealed and retained by the Registrar of the Supreme Court. However, the hearing of this application went further, in that the Plaintiff submitted that the file should be sealed, and the application held in camera. While acknowledging the constitutional imperative at Article 20(9) that all proceedings instituted in any court for the determination of the existence or the extent of any civil right or obligation be held in public, Mr. Wilson QC notes the exceptions to that imperative at Article 20(10), and submitted that the court is empowered to make an exception where required for the protection of the private lives of persons concerned in the proceedings.
16. Mr. Wilson QC further relies on Section 77(3) of the Banks and Trust Companies Regulation Act, 2020, which states as follows: **"In any civil proceedings where information is likely to be disclosed in relation to a customer's bank account, those proceedings may, if the court of its own motion or on the application of a party to the proceedings, so orders, be held in camera and the information shall be confidential as between the court and the parties thereto."**
17. Mr. Wilson QC submits that the evidence in this matter contains details of personal matters, including Mr. Rau's family, the establishment and operation of the trust and distributions made from the trust; the bank account of the company underlying the trust; the tax advice obtained by UBS and Mr. Rau; and the potential financial consequences of establishing the trust, including Mr. Rau's potential exposure to taxation in the United Kingdom.

18. The Plaintiff therefore submits that the court has a discretion to order that the proceedings be held in camera, and that certain information be held in confidence. In considering how to exercise that discretion, the authority of **Standard Chartered Bank (Switzerland) S.A. v UBS (Bahamas) Ltd (2011) 2 BHS J. No. 24** is cited.
19. In that case, the Defendant sought to have the proceedings heard in camera, and sought to have the record of the proceedings sealed. Similar orders are sought in the instant case. Barnett CJ, as he then was, quotes Section 19(3) of The Banks & Trust Companies Regulations Act Chapter 316, which is in the same terms as section 77(3) of the Act of 2020 cited above, as well as the provisions of Article 20 (9) and (10) of the Constitution, before going on to cite with approval the views of Sir John Donaldson MR in **R v Chief Registrar of Friendly Societies ex p New Cross Building Society (1984) QB 227 at 235**, where he stated that an applicant for privacy must satisfy the court **"that nothing short of total privacy will enable justice to be done. It is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice."** Barnett CJ goes on to consider the dicta of da Costa Ag. C.J. in **International Bank of Washington and Price Waterhouse v D. Cross and D.P. Hamilton, The Official Liquidators of Mercantile Bank and Trust Company Limited (No. 38 of 1980, Equity Side, Supreme Court, Bahamas, Unreported)**, where the learned Ag C.J. stated that "So where there is a conflict between preserving the privacy and protecting confidential information and disclosure in the interest of justice the competing interest must be weighed to determine which ultimately will prevail." The Ag C.J. goes on to say as follows: **"So in considering an**

application of the nature of that before me one must weigh the public interest which requires that a litigant should be able to lay before a court of justice all relevant evidence and the public interest which requires that confidentiality of information should be respected and to balance the one against the other. In exercising its discretion the court should be careful to impose conditions that will safeguard the confidentiality of information disclosed to prevent any abuse of such information.”

20. In conducting that balancing exercise, I note the concerns expressed by Mr. Wilson QC with respect to the Plaintiff's family, the establishment and operation of the Trust, the bank account of Temblador, the tax advice obtained by UBS and Mr. Rau, and the potential financial consequences of establishing the Trust, including potential tax exposure. However, in my view, while private information is involved, the same can be said for the vast majority of cases which come before the courts, and I fail to see how the possibility that the Plaintiff might be facing a tax liability should attract confidentiality. The position is different, though, with respect to the banking information, which might attract a measure of protection pursuant to Section 77(3) of the Banks & Trust Companies Regulation Act, 2020. That banking information, and the Plaintiff's banking affairs, in my view, are inextricably interwoven with the remainder of the evidence to be relied upon in this case. When I contrast that finding with the public interest, I do not find that there is any general public interest which weighs against protecting the confidentiality of the evidence in this case, particularly as the Plaintiff is the Settlor of the Trust, while the Defendants are the Trustee and Beneficiaries. There is therefore no

prevention of access to any evidence or information which might adversely impact the ends of justice in this matter. I therefore order that the affidavit of the Plaintiff be filed, but be placed in a sealed envelope and held by the Registrar of the Supreme Court until further order.

21. The same conclusion does not necessarily follow with respect to the application for the proceedings to be held in camera. As has already been stated above, the Plaintiff must satisfy the court that "**nothing short of total privacy will enable justice to be done;**" and "**It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice.**"
22. Applying that test to the facts of this case, it is my view that the concerns of the Plaintiff do not rise to the level of a potential denial of justice, which is necessary to outweigh the ordinary principles of open justice. I therefore decline to order that the proceedings be held in camera.
23. In conclusion therefore, I accede to the request to dispense with the need to serve James Craig Ferguson with notice of these proceedings; I order that the affidavit of the Plaintiff be filed, but be placed in a sealed envelope and held by the Registrar of the Supreme Court until further notice; and finally I decline to order that the proceedings be held in camera.

Dated this 19th day of August A.D., 2021



Neil Brathwaite

Justice