

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 February 2017

Before :

MR JUSTICE ARNOLD

Between :

TWIN BENEFITS LIMITED

Applicant

- and -

(1) IAIN PAUL BARKER

Defendants

(2) CONFIANCE LIMITED

- and -

ALISON MEEK

Respondent

Jonathan Seitler QC and Stephen Hackett (instructed by **Mishcon de Reya LLP**) for the
Applicant

Simon Taube QC (instructed by **Harcus Sinclair LLP**) for the **Respondent**

Hearing date: 2 February 2017

Judgment Approved

MR JUSTICE ARNOLD :

Introduction

1. This is an application by the Claimant (“Twin Benefits”) for an order for disclosure against a person who is not party to the proceedings pursuant to CPR rule 31.17 and for inspection of the documents disclosed. The Respondent (“Ms Meek”) is a solicitor and a member of Harcus Sinclair LLP (“Harcus”). Ms Meek has the documents in her possession because in a separate action in 2014 (“the Confiance Proceedings”) she acted as litigation friend to Euan Barker (“Euan”) and Harcus acted as Euan’s solicitors. As explained in more detail below, Euan was then and remains a minor. By an order dated 25 July 2014 (“the 2014 Order”) Asplin J appointed Euan to represent a class of beneficiaries of a trust which included Euan’s half-siblings Tom Barker (“Tom”) and Freya Barker (“Freya”), who also were and remain minors, and approved terms of compromise set out in the 2014 Order as being for the benefit of those beneficiaries. In these proceedings Twin Benefits, which claims as assignee from Tom and Freya, alleges that (a) neither Tom nor Freya nor their mother nor any other adult acting on their behalf was consulted about the compromise and (b) the compromise did not properly take account of Tom and Freya’s interests. By this application Twin Benefits seeks disclosure and inspection of six classes of documents

which it contends will reveal the background to the compromise. For reasons that I will explain, the key issue concerns a class of documents which it is common ground are subject to legal professional privilege (“LPP”).

Procedural history

2. The application has had an unfortunate procedural history, which is of some relevance to the merits of application for reasons that will appear.
3. The application was made on 11 July 2016. It was listed for determination at a half-hour hearing on 11 August 2016 before Master Bowles. After Ms Meek instructed leading counsel and made it clear that the application would be opposed, Master Bowles took the hearing out of the list and re-listed it for hearing on 15 December 2016 with a time estimate of two hours. In the meantime, the Defendants both made applications seeking the summary disposal of Twin Benefits’ claim. Those applications have been listed for a two-day hearing in a window commencing on 22 March 2017.
4. Prior to the hearing of the present application on 15 December 2016, Master Bowles once again removed the hearing from the list on the basis that it would be sensible for this application to be determined by the same judge who determined the summary disposal applications, and at the same time. Since Twin Benefits wished to be able to use any documents disclosed pursuant to the present application in resisting the summary disposal applications, it applied for this application to be re-listed for hearing sufficiently far ahead of the hearing in March to enable that to happen. At a hearing on 17 January 2017, Norris J acceded to Twin Benefits’ application and directed that the matter should be heard by a Judge.

Factual background

5. The First Defendant (“Mr Barker”) is a wealthy man who achieved considerable business success at an early age. In the late 1990s he established a tax efficient arrangement called an Employee Benefit Trust (“the EBT”).
6. The purpose of the EBT was to shelter the proceeds of the highly profitable sale of Mr Barker’s business from capital gains tax and (in due course) inheritance tax. Mr Barker’s shares were gifted to the EBT prior to their sale. The shares, and later their proceeds, were held by the EBT off-shore on a discretionary trust of which Mr Barker was settlor and protector and a corporate entity was trustee. The Second Defendant (“Confiance”) was the final such trustee.
7. Mr Barker was excluded from being a beneficiary of the EBT (this was essential for the tax efficacy of the scheme), but his family could benefit after his death. As well as his family, within the class of discretionary beneficiaries of the EBT were the employees of Mr Barker’s business.
8. Although Mr Barker could not himself benefit from the EBT, it was understood to be part of the scheme that he was able to avail himself of funds from the EBT by way of discounted loans (and he did so on occasion).

9. The EBT was devised by Paul Baxendale-Walker, a specialist tax lawyer. Through his firm Baxendale Walker, Mr Baxendale-Walker advised Mr Barker on the EBT and its implementation. The tax efficiency of the EBT depended upon the interpretation of section 28(4) of the Inheritance Tax Act 1984.
10. In or around October 1998 Mr Baxendale-Walker introduced Mr Barker to Susan Glover, who was a colleague and friend of Mr Baxendale-Walker's. At that time, Mr Barker was married to his second wife Alison, from whom he was divorced in or around 1999. Mr Barker and Ms Glover formed a personal relationship and twin children, Tom and Freya, were born in 2001.
11. Mr Barker and Ms Glover's relationship subsequently broke down. In 2004 Mr Barker had two further children: Euan, by Deborah Siddoway, and Lauren Barker by Julie Chadwick. Mr Barker and Ms Siddoway married and subsequently had another son Rowan Barker in 2006.
12. In 2005 HMRC began to investigate the EBT. In 2010 HMRC levied assessments on Mr Barker. In 2011 Mr Barker appealed against those assessments to the First-Tier Tribunal (Tax). In 2012 Mr Barker received advice that HMRC's case as to the correct interpretation of section 28(4) of the 1984 Act was a strong one, and the effect of that interpretation was that the EBT did not work as intended. In the light of that advice, Mr Barker entered into a settlement with HMRC on terms that Mr Barker would pay £11.3 million to HMRC. That settlement was concluded in April 2013.
13. Mr Barker subsequently decided that he wished to dissolve the EBT to recover the proceeds of the sale of the shares that he had gifted to it. He therefore commenced the Confiance Proceedings against Confiance and five other defendants alleging that the EBT was void for breach of a condition precedent alternatively mistake. The other defendants were Euan, Stuart Brown (an employee) and Mr Barker's mother and two sisters. As noted above, Ms Meek was appointed as Euan's litigation friend since he was a minor.
14. Settlement negotiations were conducted by the parties to the Confiance Proceedings and a compromise was agreed ("the Confiance Settlement"). Twin Benefits' case is that neither Tom and Freya nor Ms Glover were notified of the Confiance Proceedings, or involved in the settlement negotiations in any way.
15. Ms Meek instructed Francis Barlow QC and Richard Dew to prepare an opinion as to whether the Confiance Settlement was for the benefit of Euan and the other members of the class defined as the "Principal Beneficiaries" of the EBT, in essence Mr Barker's issue. It may be inferred that they opined that it was for the benefit of those persons.
16. The Confiance Settlement was put before Asplin J for approval on 25 July 2014. By the 2014 Order Asplin J appointed Euan to represent the Principal Beneficiaries pursuant to CPR rule 19.7 and, being satisfied that the Confiance Settlement was for the benefit of Euan and the other Principal Beneficiaries, approved the Confiance Settlement on behalf of Euan and the other Principal Beneficiaries and directed that it should be binding upon them.

17. Twin Benefits contends that the Confiance Settlement was deeply disadvantageous to Tom and Freya. Instead of a discretionary share of £30 million or more with a letter of wishes asking for them to receive £2 million each, under the Confiance Settlement they are now entitled to a discretionary entitlement to a share of £1 million with three siblings and various members of the older generation. Twin Benefits further contends that this raises a *prima facie* case that their interests were not properly taken into account.
18. In consequence Twin Benefits alleges that the Defendants acted in breach of fiduciary duties owed to Tom and Freya. It is not necessary for the purposes of this judgment to set out the details of those allegations. Part of the relief sought by Twin Benefits is the setting aside of the 2014 Order.

CPR rule 31.17(3)

19. CPR rule 31.17(3) provides:

“The Court may make an order under this rule only where

- (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
 - (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.”
20. Documents are “likely to support the case of the applicant” if they “may well” do so, and it is not necessary to show that this is more probable than not: see *Three Rivers DC v Bank of England (No 4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210 at [32]. Chadwick LJ, who gave the judgment of the Court of Appeal, added at [33] that “it is no bar to an order for disclosure that the court is of the view that the document to be disclosed is as likely - or more likely - to support the case of one of the other parties to the proceedings, as it is to support the case of the applicant”.
 21. As to paragraph (b), as the editors of the White Book comment at 31.17.4, this test is unlikely to be satisfied where the documents are available from another source. Ordering disclosure against non-parties is the exception rather than the rule (*Frankson v Home Office* [2003] EWCA Civ 655, [2003] 1 WLR 1952 at [10]) and the jurisdiction should be exercised with caution (*Re Howglen Ltd* [2001] 1 All ER 376 at 382).

The classes of documents

22. By this application Twin Benefits seeks an order that Ms Meek disclose and permit inspection of the following classes of documents from her case file in the Confiance Proceedings:
 - a) open *inter partes* correspondence;
 - b) without prejudice *inter partes* correspondence;

- c) documents disclosed to Ms Meek in relation to the proceedings;
- d) court documents in relation to the proceedings;
- e) communications between Ms Meek, Harcus and counsel; and
- f) the deed of trust approved by Asplin J.

Ms Meek's grounds of opposition

23. Although Ms Meek had argued in the run-up to the hearing of the application, including in counsel's skeleton argument, that the application should be refused on the ground that rule 31.17(3)(a) was not satisfied because Twin Benefits' substantive claim was bound to fail, counsel for Ms Meek sensibly did not press this contention at the hearing having regard to Norris J's order. Accordingly, for the purposes of this application, I shall proceed on the assumption that Twin Benefits has a real prospect of success. That is without prejudice to the Defendants' applications which are due to be heard in March.
24. The grounds on which counsel for Ms Meek opposed the application can be summarised as follows:
- i) Rule 31.17(3)(a) was not satisfied because Twin Benefits had failed to show that the documents were likely to support its case or adversely affect the Defendants' case. In essence, the application was a fishing expedition in the hope that disclosure might turn up something to support Twin Benefits' case.
 - ii) Furthermore, in the case of class e, rule 31.17(3)(a) was not satisfied because, even if the documents supported Twin Benefits' case, Twin Benefits would not be able to use them because they were the subject of LPP.
 - iii) In the case of classes a to d and f, rule 31.17(b) was not satisfied because Twin Benefits could obtain disclosure of them, to the extent that they were relevant, from the Defendants in the ordinary course of the proceedings, assuming that the Defendants were unsuccessful in their applications.
25. For reasons that will appear, it is convenient to deal with these contentions in reverse order.

Classes a to d and f

26. Ms Meek has stated, via a witness statement made by Jon Beresford of Harcus on the basis of information provided by Ms Meek, that Mr Barker and/or Confiance are likely to have copies of the documents in classes a to d and f from the Confiance Proceedings. I agree that this is inherently probable. It follows that Twin Benefits will be able to obtain disclosure of these documents, to the extent that they are relevant, from the Defendants in due course, assuming that the Defendants' applications are unsuccessful. (Ms Meek has also stated that she does not have the document in class f anyway.)
27. Counsel for Twin Benefits frankly admitted that, as the procedural history suggests, Twin Benefits had made the present application because it wanted to obtain the

documents prior to the hearing of the Defendants' applications in order to use them to resist those applications and because it had perceived that it would be easier to obtain them by this route than by an application for early disclosure by the Defendants. In my judgment that is not a proper use of the procedure under rule 31.17. I consider that rule 31.17(3)(b) is not satisfied in those circumstances. Even if it is, I shall exercise my discretion to refuse the application in respect of classes a to d and f. This is subject to the following point.

28. Counsel for Twin Benefits submitted that there was one category of documents within class b that it could not obtain disclosure of from the Defendants, namely without prejudice correspondence between Ms Meek and the third to sixth defendants in the Confidence Proceedings, because such documents would not be in the control of the Defendants within CPR rule 31.8. Mr Beresford's evidence is that "[Ms Meek's] non-privileged correspondence was with [the Defendants'] solicitors". Counsel for Ms Meek submitted that this showed that Ms Meek did not have any without prejudice correspondence with the third to sixth defendants, and therefore there was nothing to disclose. It is not clear to me, however, that, in giving this evidence through Mr Beresford, Ms Meek was addressing that question. If it is confirmed by Ms Meek that she did not have any without prejudice correspondence with the third to sixth defendants in a witness statement when this judgment is circulated to the parties in draft, I will refuse the application. If Ms Meek is unable to give that confirmation, I will hear further argument on this category.

Class e

29. As indicated above, it is common ground that this class of documents is covered by LPP.
30. Twin Benefits contends that Euan on the one hand and the other members of the class of beneficiaries whom he represented, and in particular Tom and Freya, on the other hand are jointly entitled to LPP in respect of this class of documents either on the basis of a joint retainer or on the basis of a common interest. Counsel for Ms Meek disputed that there was a joint retainer, but conceded for the purposes of this application only that there was a common interest between Euan on the one hand and the other members of the class, and in particular Tom and Freya, on the other hand such that they were jointly entitled to LPP.
31. Given that concession, it is common ground that (a) Euan cannot rely upon LPP to deny Tom and Freya (or Twin Benefits as their successor in title) inspection of the documents, but (b) Tom and Freya (and Twin Benefits) cannot waive LPP so as to permit inspection of the documents by the Defendants without Euan's consent. Ms Meek has consulted Euan's mother, who does not consider that it would be in Euan's best interests to waive LPP. Although it would be open to Ms Meek, as Euan's litigation friend, to take a different view as to Euan's best interests, she does not. At this stage, Twin Benefits does not challenge Ms Meek's view.
32. It follows that LPP would not prevent Twin Benefits from inspecting these documents, but *prima facie* it would prevent Twin Benefits from deploying the documents as part of its case in these proceedings. In those circumstances, counsel for Ms Meek submitted that rule 31.17(3)(a) was not satisfied. Counsel for Twin Benefits submitted that it was not necessary in order for rule 31.17(3)(a) to be satisfied for the

applicant to show that the documents themselves could be deployed as part of its case. Once Twin Benefits had seen the documents, it could attempt to prove their contents in other ways. In the alternative, counsel for Twin Benefits submitted that it would be open to Twin Benefits to seek to challenge the claim to LPP on the basis of the improper purpose rule.

33. I accept the submission that it is not necessary in order for rule 31.17(3)(a) to be satisfied for the applicant to show that the documents themselves could be deployed as part of its case. It seems to me that this is implicit in the structure of rule 31.17, since it envisages that an order may be made for disclosure of documents on the basis that that they are likely to support the applicant's case or adversely affect another party's case (rule 31.17(3)(a)) even though the respondent may have a right or duty to withhold inspection of the documents (rule 31.17(4)(b)(ii)). The position is *a fortiori* where the respondent does not have a right or duty to withhold inspection of the documents by *the applicant*, even if the applicant has a duty to withhold inspection of the documents by the *other parties* to the proceedings without the consent of the respondent. As submitted by counsel for Twin Benefits, once the applicant has inspected the documents, it may be able to prove their contents in other ways, and hence the documents may support its case even though they cannot themselves be deployed as part of that case.
34. As for counsel for Twin Benefits' alternative submission, this raises the question of whether one beneficiary of LPP can rely upon the improper purpose of another beneficiary to negate LPP to which they are jointly entitled. Normally, of course, the improper purpose rule is relied upon by a party other than one entitled to LPP. Neither counsel was properly prepared to debate this question, and therefore it was not argued. In those circumstances, and given that it is not necessary for me to do so, I shall refrain from expressing any concluded view on the question. My starting point, however, would be that I cannot at the moment see why it would not be open for one joint beneficiary of LPP to rely upon the improper purpose rule to defeat another joint beneficiary's claim to enforce LPP.
35. I turn therefore to consider whether disclosure (and inspection) of this class of documents would be likely to support Twin Benefits' case. Counsel for Twin Benefits submitted that it would, because the documents would show the extent to which Tom and Freya's interests were taken into account. Either they would show that they were not properly taken into account, as Twin Benefits believed, in which case they would support its case, or they would show the opposite. Counsel for Ms Meek submitted that this demonstrated that the application was a fishing expedition and that rule 31.17(3)(a) was not satisfied. In my judgment, however, Twin Benefits' submission is supported by the passage from Chadwick LJ's judgment in *Three Rivers* at [33] cited in paragraph 20 above. The documents may well support Twin Benefits' case, and it is immaterial that it may turn out that they do the opposite.
36. Turning to rule 31.17(3)(b) and the exercise of my discretion, I consider that disclosure and inspection of this class of documents by Twin Benefits is necessary fairly to dispose of the claim or to save costs. The documents are likely to give a strong indication as to the extent to which Tom and Freya's interests were properly taken into account. They may support Twin Benefits' beliefs or they may contradict those beliefs. Either way, I consider that early disclosure and inspection by Twin

Benefits is likely to promote the speedy, just and efficient resolution of the dispute, and may avoid the need for a trial.

37. Since the documents are confidential and subject to LPP, I will direct that they be inspected on terms which preserve the confidentiality of the documents. The parties should agree a confidentiality club in respect of these documents. If there is a dispute as to the terms of the confidentiality club, I will hear further argument on that point.

Conclusion

38. I will make an order as requested by Twin Benefits in respect of class e subject to the qualification stated in paragraph 37 above. Otherwise, the application is dismissed.