DISCLOSURE OF INFORMATION TO BENEFICIARIES

Introduction

1. For beneficiaries the possession of information often represents power. To trustees often charged by the settlor with keeping the affairs of the trust as confidential as possible, requests for documents and information can be extremely troublesome. This paper looks at the present law in relation to a beneficiary's right to documents and information relating to a trust and the frequently connected question of privilege attaching to documents in trust litigation.

2. The starting point for any discussion of this topic must be the decision of ***Schmidt v Rosewood***[1] but there are specific points I would like to explore in relation to letters of wishes, who can invoke the jurisdiction and against whom and the role of privilege in this area. Finally I deal with the slightly different position of the incoming trustee.

Schmidt v Rosewood and its impact

3. Until the decision of ***Schmidt v Rosewood***[2] in the Privy Council there was a lack of clarity about the way in which the Court should approach an application by a beneficiary for disclosure of information and documents. There was certainly authority to support the right

[1] [2003] 2 AC 709

[2] [2003] 2 AC 709

being a proprietary right of the beneficiary[3]. However, that analysis caused difficulties in the context of modern discretionary trusts or where the applicant was an object of a power.

4. The Privy Council held that it is a matter for the discretion of the Court exercising its jurisdiction supervising trusts to decide what information should be provided to a beneficiary rather than it being a proprietary right of a beneficiary. This was in line with Commonwealth authority and in particular ***Hartigan Nominees Pty Ltd v Rydge***[4] and circumvents neatly the difficulty of dealing with applications by discretionary beneficiaries or the objects of powers Lord Walker stated the principle as follows[5]:-

> *It will be observed that Kirby P said that for an applicant to have a proprietary right might be sufficient, but was not necessary. In the Board's view it is neither sufficient nor necessary. Since In re Cowin 33 Ch D 179 well over a century ago the court has made clear that there may be circumstances (especially of confidentiality) in which even a vested and transmissible beneficial interest is not a sufficient basis for requiring disclosure of trust documents; and In re Londonderry's Settlement and more recent cases have begun to work out in some detail the way in which the court should exercise its discretion in such cases. There are three such areas in which the court may have to form*

[3] O'Rourke v Darbyshire

[4] (1992) 29 N.S.W.L.R. 405; 01 January 1992

[5] At para 54

> *a discretionary judgment: whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and 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 of the court.*

5. Therefore what the Court is looking at is not entitlement but what is in the interests of the trust as a whole. This of course chimes with other areas when the Court is exercising its inherent jurisdiction to supervise trusts. The guiding principle is always what is in the best interests of the beneficiaries as a whole whether that is granting Beddoe relief or blessing a momentous decision.

6. While the decision is right in principle and imparts a degree of flexibility into the jurisdiction, flexibility does not always assist practitioners in advising their clients as to whether they will be successful in an application to obtain documents or trustees in resisting such an application. Certainly, trustees ought to disclose accounts (although the entitlement of beneficiaries to see accounts may well be dependent on the type of beneficiary they are: income or

capital for example[6]) and other basic trust documents, there can be more difficult questions which arise.

Letters of Wishes

7. The exercise of this jurisdiction in the context of letters of wishes has caused particular problems. Letters of wishes are of course written by the settlor with a view to their being confidential. Further they are a guide to the way in which the trustees should consider exercising their discretion although trustees ought not to follow them slavishly any more than they should ignore them. ***Re Londonderry's Settlement***[7] (decided of course before ***Schmidt***) has generally been regarded as authority for the proposition that the trustees ought not to be obliged to disclose the reasons for their decision making and that the process should remain confidential.

8. That decision in turn has been seen to justify as a matter of course the refusal of the courts to order disclosure of letters of wishes unless a case can be made out to the contrary. In ***re Rabaiotti's Settlements***[8] the Royal Court considered that a letter of wishes was too bound up with the decision making process of the trustees to justify its disclosure unless a case was made to the contrary. Notwithstanding that, disclosure was ordered to be made to the

---

6 ***Royal National Lifeboat Institution (RNLI) v Headley*** [2016] EWHC 1948 (Ch); [2016] W.T.L.R. 1433

7 [1965] Ch. 918

8 [2000] WTLR 953

applicant beneficiary who was embroiled in matrimonial proceedings in England. That in turn triggered his obligation to disclose to the English court because the Jersey court feared that, otherwise, the English court might conclude that his interest in the four settlements was greater than it was in fact. The case raises the other interesting point as to the extent to which a beneficiary under a trust has access to trust documents for the purpose of disclosure or discovery in hostile litigation. If the ***Schmidt*** principles are applied, the documents are not in the possession power or control of the beneficiary until a court order is made.

9. Interestingly the reasoning in that case was rejected by the Lieutenant Bailiff in Guernsey in ***Countess Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd***[9] who thought that letters of wishes did not fall within the ***Londonderry*** exception and that while they might provide the reasoning behind trustees' decisions were not part of their decision making process. In that case, he ordered disclosure only to the applicant's legal advisers. The case is also of note in that it held that an excluded beneficiary had locus to apply for information from trustees not just relating to the period when they were a beneficiary but also relating to the period after they had been excluded.

[9][2007] WTLR 959

10. In ***Breakspear v Ackland***[10] Briggs J (as he then was) conducted a masterly survey of the authorities in the context of an application for disclosure of a letter of wishes. While acknowledging that there seemed to be universal acceptance of the fact that applications for disclosure were a matter for the supervisory jurisdiction of the Court, he considered that the law as established in ***Re Londonderry's Settlement***[11] was still good law in regarding as confidential the decision making process of the trustees in exercising their discretion. He considered the letter of wishes which was the subject of the application before him was part of that confidential process and refused disclosure of it. However in doing so he acknowledged that he was not imposing a blanket rule but exercising the supervisory jurisdiction of the Court to decide whether a document should be disclosed to a beneficiary.

Who can apply and against whom

11. As set out above, the Guernsey Court has held that an excluded beneficiary could apply for information relating to a period during which she had been excluded from the trust. Similarly in ***Alhamrani v Russa Management Ltd***[12] beneficiaries who had disclaimed their interests but where the disclaimer had been set aside by a tribunal in Saudi Arabia were regarded as beneficiaries for the purpose of a disclosure application.

---

[10] [2009] Ch. 32

[11] [1965] Ch. 918

[12] [2006] W.T.L.R. 1551; (2004-05) 7 I.T.E.L.R. 308

12. There have been extensions of the principle in other ways. In the Bermudian Court of Appeal case of ***Re Application for Information about a Trust*** [13] the trust contained a clause purporting to control the information available to the beneficiaries so that they were not entitled to accounts and other trust information unless the trustees decided to exercise their discretion in favour of providing them and then with the prior written consent of the protector. The Court of Appeal held that such a clause was valid as it did not oust the supervisory jurisdiction of the Court but that the protector had to exercise his powers (even though the trust deed said they were not fiduciary) in the interests of the trust as whole. The Court affirmed the Chief Justice's order requiring disclosure of the financial information sought.

13. The jurisdiction has been extended to settlors where they have fiduciary duties to the beneficiaries[14]. Essentially this seems right. The Court is ensuring that the right thing is done in the administration of the trust, and to ensure that it is run for the benefit of the beneficiaries.

Privilege

14. There is often some confusion between the disclosure which can be sought by beneficiaries as part of the inherent jurisdiction of the Court to supervise trusts and disclosure within the context of proceedings which have been brought against the trustees. The former situation has been explored above. The latter is the subject of

[13] [2015] W.T.L.R. 559.

[14] ***Re HHH Employee Trust*** 16 I.T.E.L.R. 1

the relevant rules of disclosure of the particular civil jurisdiction in question and will usually require the disclosure of documents relevant to the proceedings in question.

15. This important distinction was drawn recently by Master Matthews in ***Mackley Blades v Isaac***[15] between disclosure by the trustees in the course of the administration of the trust and disclosure in proceedings where privilege might be claimed. The case raised the issue of the disclosure of an opinion obtained by the trustees from Counsel as to whether they should disclose trust documents to a beneficiary. Master Matthews found that the Opinion had been taken by the Trustees for the benefit of the trust, and paid for out of the trust funds and therefore there could be no question of privilege between the trustee and beneficiary. Therefore if the Court decided, exercising its discretion under the ***Schmidt v Rosewood*** jurisdiction, that the Opinion should be disclosed, privilege was simply irrelevant.

16. The position is of course different when the advice is sought by trustees in relation to an attack by a beneficiary but in those circumstances the advice is not sought for the purpose of furthering the administration of the estate, nor ought it be obtained at the expense of the trust. In those circumstances there is no reason why privilege cannot be maintained against a beneficiary.

17. The question of privilege between trustees and beneficiaries also arose in the case of ***Birdseye v Roythorne & co.***[16]***.*** That case concerned a claim on behalf of the estate of someone who had been

[15] [2016] EWHC 601 (Ch)

[16] [2015] EWHC 1003 (Ch); [2015] W.T.L.R. 961

named as a beneficiary under a codicil of a farm when it later transpired that the farm was in the name of a family company rather than the testator. There was an argument over whether certain documents were privileged and whether therefore certain passages in the Particulars of Claim should be struck out. One of the arguments was that there was no privilege as between the executor/trustees on the one hand and the named beneficiary on the other because (at least prima facie) she was a beneficiary. The Court rejected that argument on the basis that privilege can be maintained against a person who has no more than an arguable claim to be a beneficiary[17]. However, the Court held that privilege had been waived in any event.

The Incoming Trustee

18. It seems trite that an incoming trustee is entitled to the delivery up of trust papers as part of the trust property itself. However, it is clear that there is an element of discretion as part of the Court's jurisdiction to supervise trusts as to whether the outgoing trustee has to hand over everything[18]. The onus of course is on the outgoing trustee to establish why a document ought not to be handed over to its successor and different considerations apply to the reasons for withholding information or documents from a beneficiary. Letters of wishes and the reasons why the outgoing trustees have exercised their

[17] ***Wynne v Humberston*** (1861) 27 Beav 421; ***O'Rourke v Darbishire*** [1920] AC 581,

[18] ***Tiger v Barclays Bank Ltd*** [1952] 1 All ER 85 and ***Equity Trust (Bahamas) Ltd v Basel Trust Corp (Channel Islands)*** [2012] JRC 006

discretion in the past will of course be of vital relevance to the incoming trustees.

Summary

19. The inherent jurisdiction of the Court to supervise trusts provides a very flexible way in which to control information flow to beneficiaries and incoming trustees but its very flexibility leads to difficulties in advising trustees when to resist disclosure and beneficiaries when to push for it.

4 November, 2016

Penelope Reed QC, 5 Stone Buildings, Lincoln's Inn, preed@5sblaw.com