

Rights of a beneficiary to information concerning a Jersey trust

What are the principles governing the scope of the information and documents to which a beneficiary of a Jersey trust is normally entitled? There are two bases on which a beneficiary might seek disclosure of documents in relation to a trust. The first is in his capacity as a beneficiary in order to compel the due administration of the trust by the trustee. The second is in his capacity as a litigant in the context of hostile litigation where the trustee is an adverse party, in relation to which the usual rules of discovery apply. In this briefing we are concerned with the first situation, where a beneficiary seeks information / documents in order to call the trustee to account for its administration of the trust. Before considering the key decisions (*Re Rabaiotti 1989 Settlement* (2000) JLR 173 in Jersey, and *Schmidt v Rosewood* [2003] 2 A.C 709 in the Privy Council, Isle of Man) we will firstly set out the law in relation to beneficiary information rights.

The Trusts Law

According to Article 1(1) of the Trusts Jersey Law 1984 as amended (“the Trusts Law”), a “beneficiary” means (unless the context otherwise requires) “a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised”. Article 2 of the Trusts Law provides that “a trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person’s own right) –

- (a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence;
- (b) for any purpose which is not for the benefit only of the trustee; or
- (c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b). ”

A trust has also been defined by the Jersey Law Commission Consultation Paper No. 1 of February 1998, as “a legal obligation, the legal enforceability of which is central to its viability and credibility”.

Further, as held in the English Court of Appeal “there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.” *Armitage v. Nurse* [1997] 2 All ER 705, 713, per Millett LJ. It would therefore seem to follow from the most basic principles of trust law, and applying the principle of enforceability, that a beneficiary is entitled to an account of dealings with the trust property by the trustees.

The Trusts Law makes express provision in this respect by virtue of Article 29, which reads:

“Trustee may refuse to make disclosure.

“Subject to the terms of the trust and subject to any order of the court, a trustee shall not be required to disclose to any person, any document which –

- (a) discloses the trustee’s deliberations as to the manner in which the trustee has exercised a power or discretion or performed a duty conferred or imposed upon him or her;

(b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based;

(c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or

(d) relates to or forms part of the accounts of the trust,

unless, in a case to which subCparagraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust or the enforcer in relation to any nonCcharitable purposes of the trust. ”

It is worth noting that Article 29 is couched in the negative: it is a provision which tells the trustees what documents they do not have to disclose. In effect, Article 29 is saying that a trustee does not have to disclose any documents falling within sub[paras (a) to (c) to any person, nor any documents which fall within sub[para (d), that is accounts and related documents, save in the latter respect to a beneficiary or to a charity which is a named beneficiary. However, the Article as a whole is expressed to be both subject to the terms of the trust and subject to any order of the Court. Therefore, the matter is expressly reserved by statute to the supervisory jurisdiction of the Royal Court in relation to Jersey trusts. As we shall see, the Royal Court has on occasion ordered disclosure of documents falling within categories (a) to (c) in Article 29; further, in at least one case the Royal Court has refused to order disclosure of documents falling within category (d), even where the applicant was a beneficiary.

The extent to which it may be permissible for the settlor and trustee to draft a trust instrument in such a manner as to exclude altogether a beneficiary’s right to information was considered by the Jersey Law Commission in its Consultation Paper No. 1 of February 1998. The Commission concluded that it would not be available to a settlor to exclude completely a beneficiary’s right to information concerning the trust, noting as follows:

“Whilst it may be possible by express provision in the trust instrument to confer on the beneficiaries completely unfettered access to all trust information in the hands of the trustees, it is necessary to be cautious at the other extreme. If a settlor attempted to deny beneficiaries any access to any information, there would be a considerable danger of an attack on the instrument on the basis that it had failed to create a viable trust. The duty of trustees to account to beneficiaries is an “essential ingredient of trusteeship” which “affords the beneficiaries a correlative right to have the court enforce the trustees’ fundamental obligation to account” (The irreducible core content of trusteeship, in Trends in Contemporary Trust Law, (1996) Journal of International Trust and Corporate Planning, Vol.5, No.1). Whether we term it “essential” or “fundamental”, the implication is that the trustees’ duty to account to beneficiaries on demand cannot be excluded.””

The above extract was cited with approval in the case of *Re Rabaiotti* (2000) JLR 173.

Rabaiotti

In the case of *Rabaiotti*, Mr Rabaiotti had been ordered by the High Court Family Division, in the context of ancillary relief proceedings, to disclose certain documents in relation to a number of discretionary trusts of which he was a beneficiary to his former wife. The documents which were ordered to be disclosed were split into two categories: accounting documents (consisting of documents such as the trust deed, the accounts, bank statements, portfolio valuations and generally documents showing how the assets of the trust had been dealt with) and a letter of wishes.

The Royal Court stated that there was a strong presumption in favour of the disclosure of accounting documents to a beneficiary, such that there would need to be good reason to refuse disclosure. As a matter of general equitable principle, the court nevertheless had an overriding discretion to

withhold documents if it were satisfied that it was in the best interests of the beneficiaries as a whole. The Court in Rabaiotti stated that the trustee has a balancing exercise to perform. It must balance its duty to disclose information, with its duty to act in the interests of all the beneficiaries. The Court held that the whole of Article 29 of the Trusts Law was therefore subject to any order of the Court and, where appropriate, the Court might exercise its discretion and make an order refusing disclosure even of trust accounts. In Rabaiotti, disclosure of standard trust documents was deemed appropriate so as to enable the Court exercising the ancillary relief jurisdiction to have knowledge of the total resources available to both spouses in order to do justice between them.

A good example of where disclosure of accounting documents has been refused, however, is the case of *Nearco Trust Company (Jersey) Limited v AM and others* [2003] JRC 002A, decided after Rabaiotti. Although the former wife in that case sought disclosure of what might be described as conventional trust documents such as accounts, the Court refused disclosure altogether on the basis that her agenda was to attack the validity of the trusts themselves. Therefore it would clearly not have been in the best interests of the trusts to order disclosure of the documents sought by her. Nevertheless, the then Deputy Bailiff (now Bailiff) did indicate that, if the wife was to drop her allegation of invalidity, the Royal Court would view with sympathy an application for disclosure of documentation revealing the extent of the assets in the trusts and the level of possible provision which might be made, or had been made, from the trusts for the benefit of the settlor.

Returning to Rabaiotti, in relation to letters of wishes the Royal Court adopted the reverse approach. Namely, it held that there was a strong presumption against the disclosure of a letter of wishes. There were two reasons for this: firstly, on the basis that the letter of wishes fell within the class of documents indicating how a discretion might be exercised (so that the principles enunciated in *Re Londonderry's Settlement* [1965] Ch. 918 applied to it); and secondly on the grounds of confidentiality. In the case of *Londonderry*, the Court of Appeal of England and Wales endorsed earlier authority to the effect that trustees exercising a discretionary power are not bound to disclose the reasons for their decision. The court reconciled that principle with the rule that a beneficiary is entitled to see documents concerning the administration of the trust by holding that the general entitlement to see trust documents did not apply to documents which would or might disclose the reasons for a discretionary decision. This included: the agenda for a trustees' meeting, correspondence between trustees, correspondence between trustees and individual beneficiaries and minutes of meetings of the trustees and other documents disclosing the deliberations of the trustees as to the manner in which they should exercise the discretionary power, or disclosing the reason for any particular exercise of such power or the material upon which such reasons were or might have been based.

The Royal Court held that a letter of wishes is covered by the principle which governed the decision in *Londonderry* and that it is a document which is closely related to the decision-making process and to the reasons for a decision. Accordingly, the Royal Court held: "*... in general we think it reasonable that such material should be covered by the protection given to the reasons themselves as they will often be so closely interlinked that the protection given to the reasons will not be achieved unless the material upon which those reasons were based is also protected.*"

The Court also held that a letter of wishes was confidential, as between the trustee and the settlor, and should ordinarily be protected from disclosure on that additional ground. The Royal Court considered in this context the authority of *Hartigan Nominees Pty. Ltd. v Rydge* (1992), 29 N.S.W.L.R. 405. In *Hartigan*, a majority (Mahoney and Sheller, JJ.A.) held that a trustee was not required to disclose a letter of wishes on the grounds of confidentiality. The Royal Court endorsed this approach and noted with approval the dicta of the Royal Court in *Re A Settlement* (1994) JLR 139: "*Trustees of such a trust have been entrusted with a confidential role and should, in general, be permitted to exercise their functions away from the glare of publicity. Of course, if they are not acting in good faith, that is an entirely different matter.*"

As it happens, disclosure of the letter of wishes was ordered in *Rabaiotti*, although the reason for this was very much fact specific. The Royal Court was concerned that the English court might, if disclosure was not made of the letter of wishes, proceed on the basis of an earlier superseded letter of wishes. The Royal Court wished to avoid its English counterpart seeking to do justice between the parties on the basis of a mistaken understanding as to the likely benefit Mr Rabaiotti would receive under the trust. As an exception to the general rule, therefore, an order for the disclosure of the letter of wishes was made in *Rabaiotti*.

Schmidt v Rosewood

What is the legal principle upon which a beneficiary (or in appropriate cases, such as in the context of a divorce, a non[beneficiary]) can seek information about a Jersey trust? Until the Privy Council decision in the Isle of Man case of *Schmidt v Rosewood*, there were two competing schools of thought. The first was the principle that documents belong to a trust in the proprietary sense, and beneficiaries (having an interest in the property of the trust) have a proprietary interest in its documents. The second school of thought was that the true principle on which the entitlement rests is the trustee's duty to account. The reasoning is that the legal title and rights to possession are in the hands of the trustees; all the beneficiary has are equitable rights against the trustee.

In *Schmidt*, the Privy Council rejected the contention that a beneficiary's right to disclosure of trust documents is based on any proprietary interest, holding (at paragraph 51 of the judgment) that it considered: *"that the more principled and correct approach is to regard the right to seek disclosure of documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts"*. In particular, Lord Walker asserted that no beneficiary (still less a discretionary object) has any entitlement as of right to disclosure of trust documents.

Lord Walker identified three areas where a Court might need to form a discretionary judgment. These were: *"whether a discretionary object .. 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."*

Again, at paragraph 67 of the judgment, Lord Walker stated as follows:

"Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."

The approach adopted by Lord Walker would appear to be closely consistent with the approach of the Royal Court in *Rabaiotti* where it was held as follows:

"But the need for an individual beneficiary to obtain trust documents has to be weighed against the interests of the beneficiaries as a whole. The trustee has a duty to the beneficiaries as a class. If, as in some of the cases referred to above, the trustee forms the view in good faith that disclosure of documents to which a beneficiary would normally be entitled would be prejudicial to the interests of the beneficiaries as a whole, it may refuse to make that disclosure and seek the directions of the court. Should the trustee fail to seek the directions of the court, it is open to any beneficiary to bring the matter before the court for resolution. To that extent, the court thinks the position is simpler than is suggested at the end of para. 100 of Doyle, C.J.'s judgment in Rouse. The remedy of a dissatisfied beneficiary

is not to seek to have the trustee removed but to seek the directions of the court as to whether the particular trust document should or should not be disclosed. The court will then have to balance the competing considerations and decide what is best for the beneficiaries as a whole."

Although *Schmidt* was concerned with the law of the Isle of Man, it is clearly of the highest persuasive authority for all courts which apply equitable principles derived substantially from English law. No doubt the Royal Court will in due course have to consider whether the principles established in *Rabaiotti* need any modification in the light of *Schmidt*. In this respect, the Bailiff in an article published in the February 2009 issue of the Jersey and Guernsey Law Review, entitled "Trusts and divorce courts – an offshore perspective" noted two aspects, namely that:

1. *Schmidt* emphasises the court's unfettered discretion as to whether to order disclosure in any particular case and therefore the guidance in *Rabaiotti* to the effect that one starts with a presumption that a beneficiary is entitled to see trust documents may have to be read in the light of that very wide discretion.
2. *Schmidt* did not specifically consider documents falling within the *Londonderry* principle, such as letters of wishes. On the face of it, there is nothing in *Schmidt* which suggests that the line taken in relation to letters of wishes in *Rabaiotti* is wrong.

Breakspear'v'Ackland'

In connection with letters of wishes, the recent decision of Briggs, J in *Breakspear v Ackland* [2008] 10 ITELR 852 is worthy of additional comment. It contains a very clear exposition of the cases and the law in this area. Briggs, J. held that the *Londonderry* principle applied to letters of wishes and that they were also to be regarded as attracting a degree of confidentiality. However he emphasized that it was open to the trustees to maintain or relax that confidentiality as they judged best in the interests of the beneficiaries and the good administration of the trust. His view that trustees need not approach the issue with any presumption against disclosure of a letter of wishes is slightly at odds with the Royal Court's findings in *Rabaiotti* but, subject to that, it would appear that on this topic English law and Jersey law are broadly similar.

For more information please contact:[

James Dickinson
Advocate
Email: james.dickinson@dgadvocates.com
Telephone No: +44 (0) 1534 737757

James Gleeson:
Advocate
Email: james.gleeson@dgadvocates.com
Telephone No: +44 (0) 1534 737757