



## A NEED TO KNOW? DISCLOSURE OF INFORMATION BY TRUSTEES

by David Pytches

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It is not uncommon for a settlor to impress upon a trustee the wish that under no circumstances should his family be told anything about the trust he has just settled for their benefit. He may have very good reasons for wanting this: the knowledge may pose a risk to his own personal security or that of his family; it may serve as a disincentive to younger members of the family and discourage them from making their own way in life; there may be other threats to general family harmony.

This can present a problem for a professional trustee. On the one hand the relationship manager wants to keep the settlor happy; on the other, the directors are mindful that the trustee's duties are owed to the beneficiaries, not the settlor, and those beneficiaries will only be in a position to enforce their rights if they know about them. Also, there may be other practical reasons why the beneficiaries need the information - to complete their tax returns or comply with other reporting obligations.

Trustees have a general duty to keep the affairs of the trust confidential. Equally, a trustee must be ready with his accounts and make them available to beneficiaries so that they can identify any impropriety and protect their interests: this is fundamental to the "irreducible core of obligations owed by trustees to beneficiaries"<sup>1</sup>. What follows is a brief look at the principles of disclosure by trustees in relation to (a) informing the beneficiaries about the existence of the trust and (b) making available documents and information to beneficiaries upon demand.

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<sup>1</sup> *Armitage v Nurse* [1998] Ch 241

### ARE THEY INTERESTED? DISCLOSING THE EXISTENCE OF THE TRUST.

Circumstances always have a part to play but, as a general proposition, beneficiaries should know where they stand. It goes without saying that an adult beneficiary with a fixed interest in trust property must be told about it so that they may be paid. Less straightforward perhaps is the position of those beneficiaries with future or contingent interests or that of discretionary beneficiaries. It seems difficult to argue that an adult beneficiary with a future or contingent interest should not know about it. Present breaches of trust may be detrimental to the future value of the trust fund and so those potential beneficiaries should be in a position where they can intervene and protect their interests. An exception might be made if that interest is so remote that there is very little prospect of the beneficiary ever receiving anything; for example, there may be no immediate need to inform a beneficiary of last resort (included only to avoid the risk of a resulting trust) of their status as the default beneficiary.

Equally, it seems reasonable that a beneficiary of a discretionary trust, or an object of a discretionary power, should know about and understand their position in order that they may make representations to the trustee and ask to be considered for distributions. Again, remoteness may influence the trustee's decision but, generally, any adult beneficiary with a realistic prospect of benefitting from the trust ought to know that it exists. As a rule of thumb, a trustee might consider whether or not a beneficiary's interest is sufficient such that, if they were to apply to the Court requesting an order for disclosure of information about the trust, the court would accede to that request. If it is likely that the Court would order disclosure to that beneficiary, then the trustee should think very carefully before deciding not to tell the beneficiary about their interest. In short, no knowledge means no accountability which could mean no trust.

### WE WANT INFORMATION. DISCLOSURE ON DEMAND

Once the beneficiary knows about the trust, he presents the trustee with a list of the documents he wishes to see: he would like all trust and company constitutional documents, trust and company accounts, bank and investment portfolio statements, all the trustee minutes and the settlor's letter of wishes. What is he actually entitled to see?

The Privy Council clarified the law on disclosure by trustees to beneficiaries upon demand in the Isle of Man case of *Schmidt v Rosewood*, still the leading decision on the subject<sup>2</sup>. Before *Schmidt*, beneficiaries were regarded as having rights to inspect certain trust documents which, it was thought, stemmed from their beneficial ownership of the trust property. In *Schmidt*, the Privy Council held that this analysis was incorrect. Instead, beneficiaries have rights to seek disclosure of trust documents and the Court has a *discretion* to decide what, if anything, they should be allowed to see. This is a facet of the Court's supervisory jurisdiction over the administration of trusts.

This is not to say that every request for disclosure by a beneficiary will be determined by the Court - far from it. In practice, the trustee also has discretion to deal with disclosure requests. It is unlikely to refuse a request by a beneficiary to see the trust accounts or a copy of the trust deeds - there could be little justification for doing so and the court would almost certainly uphold such a request on the grounds that the trustee should be accountable to beneficiaries. On the other hand, the party seeking information may have an interest which is theoretical at best, or the information being sought may be commercially sensitive, or the applicant may want to use the information to attack the trust<sup>3</sup>; in such cases the proper course of action for the trustee is not so clear and there may be grounds for limiting disclosure by redacting the information or restricting who is to have access to it.

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<sup>2</sup> *Schmidt v Rosewood Trust Limited* [2003] UKPC 26

<sup>3</sup> *In the matter of the M Trust* [2003] JRC 002A, a Jersey case, in which the Royal Court held that it would not be in the best interests of the beneficiaries as a whole for documents to be supplied for use in proceedings in another jurisdiction to attack the validity of the trust.

## WHAT SHOULD BE DISCLOSED?

When faced with a disclosure request, trustees might ask themselves two questions:

1. Does the beneficiary need this in order to determine whether or not the trust has been properly administered? Or put another way:
2. Would non-disclosure assist the trustee in covering up a breach of trust?

If the answer to either question is yes, then the likelihood is that a court would grant disclosure and trustees may have difficulty justifying withholding the information. In most instances, the following documents are likely to be disclosable without much scope for debate:

- the trust deed and any supplemental deeds;
- trust accounts and investment statements;
- minutes of trustee meetings<sup>4</sup>; and
- legal advice funded from the trust fund.

Generally, the settlor's letter of wishes is not disclosable unless the trustee considers that there are compelling reasons why it would be in the interests of the trust as a whole to do so. The rationale seems to be that a letter of wishes exists principally to assist a trustee in the exercise of its discretions; a trustee is not bound to disclose its deliberations or reasons for exercising its discretions and so the letter may properly be regarded as confidential<sup>5</sup>.

As regards corporate documents and financial information, if the company is merely a passive vehicle through which the trustee holds the substantive trust assets, then the beneficiary will be entitled to information in the same way as if the trustee held those assets directly. If, however, the company is a commercial enterprise, then the beneficiary will have to make out more of a case for wanting access to anything other than the most high-level information, particularly if that information may be commercially sensitive<sup>6</sup>.

Finally, a point often missed by beneficiaries – if they ask for documents and information, they will be responsible for paying the costs incurred by the trustee in providing them.

## CONSULTATION AND VOLUNTEERING INFORMATION

A word on voluntary disclosure: whilst a trustee may not be obliged to consult with the beneficiaries in relation to the exercise of its functions, it will often do so in order to take soundings and seek guidance. This helps the trustee to make informed decisions and demonstrates a proper and active exercise of its discretion. In the course of consultation, the trustee may decide to volunteer confidential information about the trust, trust property, transactions or other beneficiaries. The disclosure is made for a proper purpose and with the best of intentions, but the trustee still needs to be mindful of its duty to protect confidential information held on behalf of the trust. No matter how hard it impresses upon the beneficiary the need for discretion, there may be little it can do to prevent the beneficiary from broadcasting the information to the world at large.

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<sup>4</sup> Although possibly not if those minutes reveal the trustee's deliberations or the reasons why it has exercised its discretion in a particular manner, see *Re Londonderry's Settlement* [1965] Ch 918.

<sup>5</sup> *Breakspear v Ackland* [2009] Ch. 32

<sup>6</sup> *Butt v Kelson* [1952] Ch. 197, CA.

**CONCLUSION**

*Schmidt* helped to clarify the principles but, in practice, it may not have made a trustee's life much easier. Any disclosure request must be considered very carefully and on its own facts. What is more certain, however, is that a blanket direction from the settlor to keep the existence of the trust secret at all costs is unlikely to be a good reason for a trustee to render itself unaccountable to some or all of the beneficiaries and complying with that direction may prove very costly.

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