# International trust and succession digest - spring: Disclosure of trust documents to beneficiaries

23 APRIL 2008

**CATEGORY:**
ARTICLE

**CLIENT TYPES:**
BENEFICIARIES AND HEIRS

TRUSTEES, EXECUTORS AND FIDUCIARIES

## Re Internine Trust, Alhamrani v. Russa Management Ltd & Others [2006]WTLR 1551

### Facts of the case

The Jersey proceedings arose out of a dispute between nine brothers and sisters who were all beneficiaries of two Jersey trusts. In September 2000, the parties had entered into an agreement (the 'Disengagement Agreement') whereby one group (the 'First Party') would take assets in Saudi Arabia and the other group (the 'Second Party') would take other assets including the Jersey trust.

A Saudi court of first instance held in January 2004 that the Disengagement Agreement was null and void and this decision was upheld by the Saudi Court of Appeal. One issue in the Jersey proceedings was whether as a result of the Disengagement Agreement, the First Party had disclaimed their interest in the Jersey trust. The issue was relevant as to whether the Jersey Royal Court could order the disclosure of information relating to the Jersey trust to the First Party since they were no longer a beneficiary.

The Jersey Royal Court ordered that the trustees should not disclose any trust information to the First Party until further order but subsequently ordered that the trustees were to disclose such information to the First Party, only up to the date of the Disengagement Agreement.

On appeal, the representor (the sole remaining member of the Second Party) submitted that the Jersey Court could do nothing in favour of the First Party until the issue of whether or not they were beneficiaries had been conclusively resolved in all jurisdictions.

### The decision

The Jersey Court of Appeal found that although it was usual to defer decisions on directions until the issue of whether a party was a beneficiary had been decided, there might be exceptional cases where this would not be appropriate. The Jersey Court found that this was an exceptional case and decided in favor of the First Party on the following grounds:

- The First Party were beneficiaries of the trust, at least until the date of the Disengagement Agreement;
- On the basis that the Disengagement Agreement was at present null and void, the First Party were still beneficiaries of the trust;
- It would be unsatisfactory to postpone making directions until the issue of the identity of the beneficiaries was determined as during this time the court might not order disclosure to those who claimed to be beneficiaries and might not take their interests into account;
- The Royal Court's objective of securing disclosure to facilitate settlement of disputes could never be achieved until all matters relating to the identity of the beneficiaries were resolved;
- Disclosure to all parties might facilitate settlement of the family dispute; and
- The former members of the Second Party and the trustees did not oppose disclosure. Only the representor (the sole remaining member of the Second Party) opposed disclosure and in fact had indicated that he would agree to disclosure after the Saudi Court of Appeal decision which had now been given.

### Points of interest

In making its decision, the Jersey Court of Appeal referred to the 2004 Withers lecture given by Lightman J, published in the newsletter for contentious trust and probate specialists on 'The trustees duty to present information to beneficiaries'.

Lightman J's view is that if the existence of the interest in a trust is uncertain, the court should in ordinary circumstances defer any decision whether to give any direction to the trustees to make disclosure, in accordance with the principle in Schmidt v Rosewood Trust Ltd, until the issue of construction has been decided.

The Jersey Court of Appeal acknowledged that on this reasoning it followed that Lightman J accepts that there may be exceptional circumstances where it would be appropriate for the court to make a decision on disclosure before the issue of construction is resolved and that on the present facts, this was an exceptional case.

## Buffrey v. Buffrey and Another [2006] 9 ITELR 455

### Facts of the case

Mr and Mrs Buffrey had been married for 36 years. In 1993, Mr Buffrey suffered an accident at work for which he received a significant sum in compensation and damages. In 1998 he used the money to buy a property (the 'Property') to provide for his future. Approximately 75% of the Property was paid for from the compensation money. The rest was provided by way of mortgage in the joint names of Mr Buffrey and his wife, as Mr Buffrey was unemployed at the time and therefore the mortgagee required that Mrs Buffrey appeared as co-mortgagor. The Property was registered in Mr and Mrs Buffrey's joint names. Rental income from the Property was paid into an account in the joint names of Mr and Mrs Buffrey and the mortgage payments were deducted from the joint account. Mr and Mrs Buffrey's tax returns showed each having an equal share of rental income from the Property.

In 2004, Mrs Buffey was accused of defrauding her employer, ORIX Australia Corporation Ltd ('ORIX') of a large sum of money. ORIX obtained an asset freezing order which affected the Property. Mr Buffrey was advised to protect his interest and commenced proceedings against Mrs Buffrey for a declaration that Mrs Buffrey held her interest in the Property on resulting trust for Mr Buffrey and an order that she convey her interest accordingly.

### The decision

The Judge found that Mr and Mrs Buffrey were co-contributors to the purchase price of the Property, Mrs Buffrey's contribution being half of the principle borrowed under the mortgage. By reason of the unequal contributions of Mr and Mrs Buffrey to the acquisition cost of the Property, a presumption of resulting trust arose. ORIX was not able to rebut the presumption on the basis that the tax returns of Mr and Mrs Buffrey showed each as having an equal share of rental income or that the rent was placed in a joint account. The evidence of common intention was equivocal at best and not enough to displace the presumption of a resulting trust. Mr Buffrey successfully rebutted the presumption of advancement. The judge found that he intended the Property to represent his own superannuation fund and that the Property had only been in joint names at the insistence of the mortgagee, as Mr Buffrey had been unemployed when the loan was made. Mr Buffrey had educational difficulties such that he was found to be incapable of sustained dissembling and would not have understood the significance of the tax returns and the joint account as indicating an intention to make a gift to Mrs Buffrey of a half interest in the Property.

### Points of interest

The Australian case provides a useful restatement of the principles on which a court proceeds where the presumptions of resulting trust and advancement are at issue where property is held in joint names following unequal contributions to acquisition cost.

## ATC (Cayman) Ltd v. Rothschild Trust Cayman Ltd [2006] 9ITELR 36

### Facts of the case

ATC succeeded Rothschild as trustees of two trusts governed by the laws of the Cayman Islands.

Rothschild sought an indemnity from ATC in respect of any future liabilities as trustee. The trust instrument contained a provision expressly giving the trustees power to indemnify. ATC offered to ensure the funds stayed in the trust for a specified period to cover any likely liability that Rothschild faced.

Rothschild refused to accept any formal undertaking from ATC on the basis that for ATC to do so would be fettering its discretion as trustee. In support of its position, Rothschild relied primarily on Re Gibson's Settlement Trust where an under taking given by the trustees to appoint absolutely trust assets to the settler's two children was set aside as fettering the trustees' discretion. ATC sought the ruling of the court whether it could enter into the proposed undertaking.

### The decision

The question before Smellie CJ was whether the express clause overrode the settled principle from case law that a trustee should not fetter their discretion. Smellie CJ confirmed that whether ATC could give the undertaking was a matter of construction, which was distinct from seeking to surrender the exercise of ATC's discretion to the court.

After reviewing the key texts on trustees' powers Smellie CJ confirmed that a trustees' discretion could be fettered by an express clause in the trust instrument.

In light of the fact that it was clear that in the present case the impasse was impacting on the proper management of the trust assets and an outgoing trustee is entitled to an indemnity, Smellie CJ found that the express clause within the trust was "prudent drafting".

Smellie CJ rejected the argument that trustees should not fetter their discretion as this was overridden by an express clause allowing ATC to offer Rothschild an indemnity. The provision of an indemnity was not an improper or impermissible fetter upon the exercise in the future by ATC of its discretionary dispositive powers.

### Points of interest

The case reiterates the need to carefully consider the trustees' express powers set out in the trust instrument. The express provision authorizing the trustees to give an indemnity made it difficult for Rothschild to argue that ATC were fettering their discretion.

In delivering his judgment Smellie CJ noted that " … it can seldom, if ever, be appropriate for a trustee to exert pressure to secure its own entitlements, to the detriment of its beneficiaries, by withholding the entire or a very large proportion of the trust fund".

Bonham, Michael & ors v. Blake Lapthorn Linell & anr [2006] EWHC2513 (Ch).

## Facts of the case

The claimant owned a substantial number of shares in a private company and borrowed money against those shares in order to discharge his debts and acquire further shares in the private company. The lender was to acquire an entitlement to a share in the proceeds of sale of the shares in the private company. However, the claimant had previously established a trust into which all of his shares in the private company were to be transferred. When the claimant did not transfer his shares into the trust the trustee, without first obtaining a Beddoe Order, started proceedings against the claimant seeking to enforce the transfer of shares in the private company to the trust. The claim was settled by consent but a substantial costs liability remained for the trustees. The claimant therefore issued proceedings against both the trustees and the solicitors advising them, on the grounds that the trustees had acted in breach of trust by pursuing litigation relating to the transfer of shares and that the trustees' solicitors had been negligent in failing to advise the trustee that the litigation had no real prospect of success. It was common ground that the trustees were entitled to recover their costs from the trust fund in so far as they fell within the statutory indemnity provided by s30(2) Trustee Act 1925 (superseded by s31(1) of the Trustee Act 2000) and for expenditure to be within the scope of the statutory indemnity it was necessary for a trustee to show that the expenditure in question was properly and reasonably incurred.

#### The decision

The judge dismissed the claim and found for the defendants that it had been proper and reasonable for the trustees to commence and pursue the litigation against the claimant. It was found that because the trustees had a good arguable case the claimant had been obliged to transfer his shares in the private company into the trust, therefore the claim had a reasonable prospect of success. In reaching that decision the judge concluded that there was considerable doubt about the value of the shares in question and that there was therefore a substantial risk that the creditor to whom the claimant had borrowed money would be forced to call in the loan made.

There was accordingly a very real risk that the trust did not hold sufficient assets to meet the liabilities of the trustees, to meet the money owed to the creditor and the creditor's lenders. The value of the shares not transferred to the trust was a loss to the trust and if the trustees had simply allowed the claimant to retain the shares, they might rightly have been criticised by the remaining beneficiaries of that trust.

Furthermore, if the trustees did not enforce the transfer of the shares they would potentially be missing out on an opportunity to add further value to the trust by increasing its already large shareholding in the private company, which would make it more attractive to a purchaser. It was also held that the trustees did not act in breach of trust in pursuing the litigation and deciding not to obtain a Beddoe Order. The trustees therefore had not acted in breach of trust in paying trust moneys in settlement of legal costs incurred.

## Interesting point

It is not necessary for trustees to obtain a Beddoe Order where it is proper and reasonable for the trustees to commence and pursue litigation.

## Re The Avalon Trust [2006] JRC 105a

#### Facts of the case

The trustees of a discretionary trust established in Jersey sought directions of the Jersey Court in response to a request for disclosure of documents made by one of the beneficiaries who was involved in divorce proceedings, in England. In the course of the divorce proceedings the Family Division had ordered the beneficiary to produce certain documents relating to the trust. The beneficiary requested that the trustee provide:

- Documents such as the trust accounts, the trust deed and any supplemental deed of appointment and details of any distributions.
- Letters of wishes and any earlier drafts of letters of wishes.
- Copies of all correspondence between the beneficiary and other beneficiaries from the trustee relating to the trust and any correspondence relating to investment strategies between the beneficiary, his brothers and sisters and other members of the family and the trustee.

#### The decision

The court held that the trustees should disclose the documents in the first two categories. It was in the interest of the beneficiary and the trust generally that the English Family Division should be made aware of the financial position of the trust and the extent to which the beneficiary had benefited from the trust in the past.

In respect of the category 2 documents, the court referred to Re the Rabaiotti 1989 Settlement and other settlements [2000] 2 ITELR 763 and started from the position that letters of wishes were confidential between the settlor and the trustee and that there needed to be a very good reason why it would be appropriate to disclose the letter of wishes to a beneficiary. On the particular facts of this case there was a good reason to depart from the position that a letter of wishes is confidential because the beneficiary was already in possession of a draft letter of wishes. It was better for the Family Division to see the final version of the letter of wishes so that it did not draw assumptions that were incorrect on the basis of a draft letter of wishes.

In respect of the third category of documents, the court held that it was entirely reasonable for the trustee to provide the beneficiary with any correspondence between him and the trustee, it did not agree that the trustee should disclose copies of correspondence between it and other beneficiaries. This was because this went beyond what was required to give a full and fair picture of the trust assets to the English High Court.

#### Points of interest

This case is a further example of the exception to the starting position as set out in Rabaiotti that letters of wishes are confidential between the trustee and settler.

## AN v. Barclays Private Bank & Trust (Cayman)

#### Facts of the case

The claimant, the primary discretionary beneficiary of two trusts, made complaints about certain decisions and actions of the trustees and the protection committee and took action to challenge a restructuring of the shareholdings held by the trustees on the basis that it would impact on the balance between immediate and remoter beneficiaries. In response, concerns were raised by the trustees that a forfeiture or 'no compete' clause appearing in both trusts had operated on the beneficiaries' complaint to exclude her from benefit under the trusts so that her complaints could therefore not be considered.

The clause in question stated that "whosoever contests the validity of this deed and the trust created under it, of the provisions of any conveyance of any property by any person or persons to the trustee to form and be held as part of the trust fund and of the decisions of the trustee and/or the protection committee shall cease to be a beneficiary in any of these trusts and shall be excluded from any benefits, direct or indirect, deriving from the trust fund." The trustees therefore sought directions from the court and it was ordered that the validity of the forfeiture clause be examined as a preliminary issue.

## The decision

Applying Clavering v Ellison (1859) 7 H L Cas 707 and considering Sifton v Sifton [1938] 656, the judge held that; firstly, when deciding whether a beneficiary under a discretionary trust had forfeited their entitlement under a condition, the court must be able to anticipate from reading the clause, precisely and distinctly, the event that might cause forfeiture. It was a question of whether or not one would be able to predict from reading the trust document what the forfeiting event would be. Therefore, although there was certainty in the forfeiture clause's prohibition against contesting the validity of the trust, the judge held that the phrase "decisions of the trustees" was not sufficiently certain. Secondly, the judge held that public policy did not prevent enforcement of a forfeiture clause where a challenge was made by a beneficiary without good cause and unsuccessfully.

However, forfeiture clauses should not be used as a method to protect an illegal or invalid disposition or prevent challenges that were based on probable cause or good faith. The forfeiture clause would therefore operate against vexatious challenges without good reason but not legitimate ones.

Simply, trustees cannot be exonerated from their core obligations and it would be contrary to public policy to hold that beneficiaries cannot justifiably enforce trusts. The case of Evanturel v Evanturel [1874] LR6 PC1 applied.

#### Points of interest

This is a useful case for revisiting the principles surrounding forfeiture clauses and also, perhaps most notably, because it shows that the same principles apply whether a forfeiture clause is written into an inter vivos trust or a will.

## Barnes & Others v. Tomlinson & Others [2007] WTLR 377 Chancery Division, Kitchin J

#### Facts of the case

The claimants sued the defendants who had been trustees of a family settlement ("the Trust") established by the first claimant in 1973. The defendants were also directors of a private company engaged in property development whose shares formed the principal asset of the Trust. The first claimant had procured substantial bank loans taken out in the name of the Trust and this, coupled with the collapse of the property market in the mid 1970s, led the defendants to believe the Trust was insolvent. However, the defendants spent considerable time and effort restoring the fortunes of the development company by paying off loans and developing a residential site in which the company had an interest. As the company's financial condition improved, the defendants paid themselves emoluments. The second defendant resigned as a director of the company in 1997 because of other business commitments and eventually all three defendants retired as trustees in 2000. The claimants at that stage issued proceedings against the first defendant and another director of the company, K, against both of whom the court awarded substantial damages for misfeasance. In these proceedings, the claimants argued that the second and third defendants (against whom there had been no findings of misfeasance in the earlier proceedings) had received excessive emoluments as directors and had failed to take any steps as trustees to remove the first defendant and K from their directorships and that these omissions had caused significant losses to the Trust.

#### The decision

Mr Justice Kitchin dismissing the claim, said it was accepted that under the exoneration clause contained in the trust deed, the second and third defendants were exempted from liability except for wilful and individual fraud or wrongdoing. This meant that to succeed against the second and third defendants (d1 had died shortly before the issue of proceedings) the claimants had to prove dishonesty. It was for the court to determine what was the normally acceptable standard of honest conduct. Following the Privy Council decision in Barlow Clowes International Limited v. Eurotrust International Limited [2006] 1 WLR 1476, it was irrelevant that a defendant genuinely believed he had not fallen below that standard. The test of honesty in this context was whether the trustees were conscious that they were committing a breach of duty or were recklessly indifferent as to whether they were. Upon examining the amount of work the trustees had undertaken in an honest effort to restore the trust fortunes, all of which was evidenced by voluminous documentation, the level of emoluments taken was not unreasonable and did not exhibit dishonesty. The second and third defendants could not be held responsible for the activities of the tirst defendant and K. The accounts did not reveal any evidence of mismanagement and the trustees under the terms of the trust deed were entitled to leave the conduct of the company's affairs to the board of directors. The judge ruled the second and third defendants had acted in good faith and honestly at all material times. The court accordingly awarded both the second and third defendant's their costs on the indemnity basis. The second defendant was represented by Withers LLP.

#### Points of interest

The Judge applied the test of dishonesty laid down in the Barlow Clowes case (which concerned an offshore investment scheme) in the context of an express family trust. The judge also made it clear that in seeking to make trustees liable for misfeasance in a company whose shares were held as part of the trust assets, provided that the trust deed had the usual provision relieving the trustees of the obligation to concern themselves in the day to day management of that company, then the clearest possible notice of that misfeasance would be required to make the trustees liable.