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Beneficiaries Rights to Trust Information

Confidentiality is often an integral part of the offshore trust relationship. Many clients want to ensure that only certain persons are entitled to obtain information on the trust. This is easily dealt with in relation to third parties, who have no rights to access trust information, with criminal penalties applying to trust company employees who disclose such information. In relation to beneficiaries however, two recent cases have reviewed the law relating to beneficiaries rights to trust information. The following article examines the legal basis for such access, the effect of provisions of Cook Islands law, and the situations where a trustee may refuse to provide information to the beneficiaries.

The Legal Basis for Access to Information

The starting point is that trustees have a duty to account for trust assets. They must monitor the performance of assets and ensure that full and correct accounting records are kept. The trustee must also always ensure that the trust is administered for the benefit of the beneficiaries and in accordance with the trust deed. In order to be able to enforce these duties and ensure that the trustee is administering the trust in line with the terms of the trust document, the beneficiaries must have access to trust information.

In the past the rights of beneficiaries to access trust information has been said to be based on a 'proprietary ownership', in other words because the beneficiary owns an interest in the trust property, they also own an interest in the trust documents and information¹. The documents are their own to view. This is a logical position where a beneficiary has a fixed and definable interest in the trust property, however it is not so clear in regards to discretionary beneficiaries, or objects of a power, which only have a definable interest when the trustee decides to allocate trust assets to them.

The decision of the Privy Council in *Schmidt v Rosewood*² confirmed that the court, as part of its inherent jurisdiction to supervise the administration of trusts, could order the trustees to disclose trust documents. *Schmidt* was recently endorsed by the New Zealand High Court in *Foreman v Kingstone*³. The Court in *Schmidt* made it clear that the basis for the rights to information arises directly from the trustees fiduciary duties to keep the beneficiaries informed and to provide accounts of trust activity. On this basis it could be said that all beneficiaries have a right to view trust accounts. Certainly a court would be reluctant to allow a trustee to refuse a reasonable request for information. However *Schmidt* and *Foreman* also make it clear that no beneficiary is entitled as of right to disclosure of all of the trust documents. If a beneficiary requests more comprehensive disclosure, then the extent of their rights will depend on a number of different factors including:

- The confidential nature of the documentation;
- The interest of the requesting beneficiary;
- The interests of all the beneficiaries as a whole;
- The reason for the request;
- The impact on other parties of disclosure;
- Whether limitations need be placed on disclosure; and
- All other circumstances surrounding the request.

What information should the trustee disclose?

Following is a list of the types of documents and information that a beneficiary will ordinarily be entitled to.

- All financial statements relating to the trust and trust property and the management of the trust and trust property;
- Full details of the assets and liabilities of the trust;
- Full details of all distributions of capital and/or income or settlements from the trust including the identity of the recipient beneficiary;
- Copies of legal opinions obtained where the opinions were for the purpose of advising as to beneficiary rights;
- Copies of correspondence between the trustees and their legal advisors where the correspondence is for the purpose of interpretation of trust provisions; and
- Copies of trust documents including the trust settlement deed, all deeds appointing or removing all previous and present trustees and all deeds amending the trust settlement.

It goes without saying that if beneficiaries have a right to view all of this information then the trustees have an obligation to maintain complete trust records and accounts so that all information is readily available.

While the level of disclosure required is reasonably high there are however certain documents that need not be disclosed and which a beneficiary is not ordinarily entitled to. These include the following:

- Trustee minutes setting out the reasons for the exercise of a trustee's discretion, for example deliberations over whether or not to proceed with a distribution;
- Legal opinions obtained by a trustee concerning the management or administration of trust property or to future conduct concerning trust property;
- Legal opinions obtained by a trustee relating to litigation brought by a beneficiary against the trustee;
- Letters of wishes which are specifically expressed as being confidential; and
- Any other documents which would disclose the trustees reasons for the decisions they have made.

When can a trustee refuse to provide information to beneficiaries?

There will be situations where a settlor does not want beneficiaries to be aware of their interest, or even if they are aware, that they should not receive information from the trustees. There will also be occasions where a trustee does not consider it to be in the best interests of the trust to comply with a request for information from a beneficiary.

Statutory Provisions and the Trust Agreement

Section 19A(3) of the Cook Islands International Trusts Act provides that all duties and obligations of a trustee shall apply only to the extent that a contrary intention is not expressed in the trust instrument, and shall have effect subject to the terms of the trust instrument.

A Cook Islands trust agreement will often include a provision limiting the trustee's duty to disclose information to any party, including discretionary beneficiaries. Such a trust provision, combined with the effect of Section 19A(3), effectively removes the trustee's positive duty to keep beneficiaries informed of their interest or potential interest in a trust. This allows a settlor to limit a trustee's requirement to disclose information to beneficiaries or to ensure that the trustee does not inform a beneficiary of their potential interest in the trust.

The decisions in *Schmidt* and *Foreman* may however have an impact on the effectiveness of such a provision where a beneficiary requests information from the trustees. The court confirmed that its inherent jurisdiction allows it to order disclosure. It may follow that where a beneficiary requests information, then despite the provisions of the trust document, the court may order disclosure. We are currently reviewing the impact of these decisions with US attorneys to determine whether an amendment to the Cook Islands legislation is required. This of course only has a limited application where a settlor specifically does not want beneficiaries to be able to access trust information. It must also be remembered that there are still a number of instances where the trustee may have a legitimate reason refuse to provide information to beneficiaries, and where such non-disclosure is in the best interests of the beneficiaries as a whole.

Reasons to refuse disclosure

As discussed above, both *Schmidt* and *Foreman* recognized that disclosure was not a matter of right, but rather a discretionary order based on an evaluative exercise that would consider a number of different factors.

A recent case in Jersey emphasized the importance of the interests of the beneficiaries as a whole⁴. The settlor of two Jersey trusts was involved in litigation with his ex-wife in the United States about child support. The ex-wife was a beneficiary of one of the trusts. As part of that litigation the ex-wife sought to invalidate both of the trusts on the grounds that they were operated by the settlor himself⁵. In regards to the trust of which she was a beneficiary she sought full information from the trustees as to assets contributed to the trust, and details of all distributions made. The court confirmed that while there was a strong presumption that a beneficiary was entitled to see trust accounting documents, that was subject to the discretion of the court to withhold them in the interests of the beneficiaries as a whole. If the wife's claim that the trusts were invalid was correct then the beneficiaries would receive nothing. She was seeking disclosure of documents in her capacity as beneficiary of one trust to try and invalidate both trusts. That could not be in the interests of the beneficiaries as a whole.

A similar argument could be raised where a settlor of a trust, who is also a beneficiary, is involved in litigation with a creditor. If that beneficiary requests full information and accounting records from the trustee then the trustee may be required to refuse. If disclosure of the information could lead to the endangerment of trust assets because of adverse results from the litigation, then that would clearly not be in the interests of the beneficiaries as a whole.

A trustee may owe duties of confidentiality that give rise to legitimate grounds for refusing to disclose information to beneficiaries. Where the confidential information belongs to a third party then the trustee would not be able to disclose it without the consent of that third party. However, where the information belongs to the trustee himself he will generally be obliged to provide the information which he holds for the benefit of the beneficiary. The Cayman Islands court has considered the issue of where the trustee holds detailed confidential information on the underlying assets of a trust⁶. It held that because the companies were trading companies involved in competitive business, the disclosure of all types of information could prove detrimental to the companies and to the trust.

Conclusion

The Common Law basis for beneficiaries' rights of access to trust information has recently been clarified. The courts have confirmed that they retain an inherent jurisdiction to order disclosure of trust documents and information to trust beneficiaries. However no beneficiary has an absolute right to all trust documentation, and the trustee must look at all of the surrounding circumstances before providing disclosure to the beneficiaries. That is particularly the case where there are discretionary beneficiaries with no definable interest.

Under Cook Islands law a trust agreement can remove the positive duty of trustees to keep beneficiaries informed. Often the trust will require that the settlor or protector be kept informed of trust activity, thereby providing a mechanism for enforcement of the trust. In most cases this is sufficient to allow confidentiality should this be settlor's wish.

The general position is that in the absence of special circumstances the trustees must respond to a request from the beneficiaries for information on the trust. There are legitimate reasons for a trustee to refuse to provide information. In particular, where it would not be in the interests of the trust as a whole, or of the other beneficiaries, for disclosure to be made. Such exceptions to disclosure can provide further comfort to settlors of asset protection trusts that the right of beneficiaries to access trust information cannot be abused to allow a creditor to obtain information to the detriment of the trust.

Endnotes

¹ *O'Rourke v Darbishire* [1920] AC 580.

² *Schmidt v Rosewood Trust Pty Ltd IOM* [2003] UKPC 26.

³ *Foreman v Kingstone* [2004] 1 NZLR 841

⁴ *Re The M & L Trusts, Nearco Trustee Company (Jersey) Limited v AM & Others* (2003) JRC002A.

⁵ For more information on challenging a trust by reference to the settlors control refer to the article entitled "The Sham Argument: Settors Secret Intention" in the November 2004 issue of Pacific Times.

⁶ *Re Ojeh's Trust* [1992-1993] CILR 348.