In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: 484

IN THE MATTER OF AN APPLICATION FOR INFORMATION ABOUT A TRUST

JUDGMENT

(in Court)

Date of hearing: February 18-20, 2013

Date of Judgment: March 12, 2013

Mr Narinder Hargun and Mr Paul Smith, Conyers Dill & Pearman, for the Plaintiff ("P")

Mr Robert Ham QC of counsel and Mr. Keith Robinson, Appleby (Bermuda) Ltd, for the 1st Defendant ("the Trustees")

Mr. David Alexander QC of counsel and Mr Andrew Martin, MJM Ltd, for the 2nd Defendant ("the Protector")

Introductory

1. By an Originating Summons issued on December 28, 2011, P seeks disclosure of what he characterises as basic information about the Trust of which he is a beneficiary with an interest that cannot be described as remote or speculative. The Trust Deed prohibits the Trustees from disclosing any information without the consent of the Protector, the principal beneficiary of the Trust. This application raises the apparently novel question of the impact of an information control clause or mechanism on this Court's supervisory jurisdiction over a Bermudian trust.

2. The present application raises two broad questions of principle. Firstly, is the information control mechanism in the Trust Deed valid on its face or are its terms incompatible with the irreducible core obligations inherent in a valid trust? These core obligations were said to include the requirement that the supervising court should always be able to enforce a beneficiary's right to obtain sufficient information to ensure the due administration of the trust. Secondly, assuming the relevant clause to be valid on its face, what principles delineate the scope of the Court's jurisdiction to grant relief in circumstances which arguably entailed a departure from the strict terms of the governing instrument?

3. The present Judgment, delivered in anonymised form, addresses these two broad issues, firstly concluding that the relevant clause is valid on its face and, secondly, outlining the circumstances in which this Court can supplement the disclosure mechanism prescribed by the Trust and direct disclosure by the Trustees in the exercise of the Court's supervisory jurisdiction over the Trust. Why I have decided to exercise the Court's discretion in favour of directing disclosure is then set out in general terms. More detailed factual findings are supplied to the parties in the form of a Confidential Appendix to this Judgment[1].

The information control mechanism in the Trust

4. The central clause for the purposes of the present application is the following:

> "*9.2 Subject to the provisions of clause 24 below and except to the extent that the Trustees (with the prior written consent of the Protector) in their discretion otherwise determine no person or persons shall be provided with or have any claim right or entitlement during the Trust period to or in respect of accounts (whether audited or otherwise) or any information of any nature in relation to the Trust Fund or the income thereof or otherwise in relation to the Trust or the trusts powers or provisions thereof (and whether from the Trustees or otherwise).*"

5. The Trustees are given the discretion to release information with the Protector's prior written consent. Clause 24 provides as follows:

> "*The Protector shall have power to request information and accounts from the Trustees (which information and accounts shall forthwith be supplied to the Protector.)*"

6. Related provisions which shed light on the wider role of the Protector under the Trust include the following:

[1] On February 9, 2012, Ground CJ ordered that the "*Court file in respect of these proceedings shall be sealed and not available for inspection by any person without further order of this Court.*"

"*12.1 In exercising all or any of the powers and discretions (whether fiduciary dispositive or administrative) conferred upon them by this Deed or by law or otherwise in relation to the Trust the Trustees shall be required to act in accordance with the written directions (if any) of the Protector given in the circumstances in which such directions are expressly provided for in and in accordance with the provisions of this Deed in so far is it lies within their power to do so (unless such directions conflict with any provisions of this Deed regarding the beneficial interests or entitlements with respect to assets forming part of the Trust Fund or the income thereof)…*

17. The Trustees shall keep proper books of account and other records and shall draw up periodic financial statements in respect of the Trust Fund and their trusteeship in accordance with acceptable accounting principles and shall at the expense of the Trust Fund or the income thereof have them audited annually or so often as the protector may otherwise direct by a firm of professionally qualified independent accountants of high standing and repute internationally (acting for this purpose as auditors) selected by the Trustees…

25.2 The Protector may give directions to the Trustees regarding any action or omission to take action with respect to any asset from time to time forming part of the Trust Fund or otherwise subject to the control of the Trustees…and the Trustees shall comply or procure compliance with directions given pursuant to this sub-clause in so far as it lies within their power to do so (unless such directions conflict with any provisions of this Deed regarding the beneficial interests or entitlements with respect to assets forming part of the Trust Fund or the income thereof)…

28. The Protector shall not owe any fiduciary duty towards and shall not be accountable to any person or persons from time to time interested hereunder or to the Trustees for any act of omission or commission in relation to the powers given to the Protector by this Deed to the intent that the Protector (in the absence of fraud or dishonesty) shall be free from any liability whatsoever in relation to such powers…"

7. It is also noteworthy that the Protector is currently the Principal Beneficiary under the Trust while the Plaintiff, as the result of an Irrevocable Deed of Appointment, potentially has an absolute interest in 35% of the Trust the assets of which are believed to be worth in the region of US$1 billion.

8. The key elements of the information control mechanism may be summarised as follows:

    8.1 The Trustees are required to keep books and records of account which must be independently audited;

    8.2 The Protector alone has an express right to receive financial information about the Trust from the Trustees;

    8.3 Any other requesting person, including a beneficiary, can only obtain information about the Trust's finances from the Trustees with the Protector's consent;

    8.4 The Protector's power to grant or withhold consent in respect of an information request is a non-fiduciary power and the acts or omissions on the part of the Protector in this regard cannot be legally impugned in the absence of fraud or dishonesty on the Protector's part.

9. As a matter of superficial and preliminary analysis, the information control mechanism does <u>not</u> appear to seek to oust the jurisdiction of the Court to entertain an application by a beneficiary to obtain information from the Trustees about the Trust. Rather, it appears designed to ensure that:

    (a) the Protector has a right to control what information beneficiaries or strangers to the Trust are given by the Trustees;

    (b) the Protector is not required to explain or justify the exercise or non-exercise of his powers; and

    (c) the Protector is not liable for any loss flowing from a decision to accede to or refuse an information request unless his conduct was dishonest or fraudulent.

10. The position posited in (b) and (c) is not solely applicable to the information request context; it applies to all of the Protector's powers under the Trust.

Legal Findings: the validity of the information control mechanism in the Trust

<u>The arguments of counsel</u>

11. Mr Hargun made the following submissions in his Skeleton Argument:

"9. *It follows that a trustee's accountability and the Court's supervisory jurisdiction to ensure that it can be upheld cannot be excluded by the trust instrument. If the trust instrument, on its own terms, does not provide a beneficiary with the ability to hold a trustee to account, then the Court should intervene.*

10. Thus, in the present case, the restriction in the Trust Deed which precludes a beneficiary's access to trust documents without the consent of the protector and the Trustee:

10.1 does not on its own provide sufficient means by which the Trustee may be held accountable; and

10.2 far from restricting, necessitates the Court's intervention to ensure that the Trustee's accountability can be made good."

12. P's counsel conceded in oral argument that there was a very fine line between analysing the validity of the information control mechanism on its face and determining whether the application of those provisions to P on the facts of this case justified the intervention of the Court. The line between these two questions was blurred almost to the point of extinction by the way in which the validity argument was advanced. Mr Hargun's written submissions in my view confused the distinct questions of:

(a) whether the Trust Deed impermissibly restricted the beneficiary's right to hold the Trustees accountable; and

(b) whether P's access to trust documents was being restricted to an impermissible extent on the facts of the present case so that the Court was required to intervene.

13. Only the first question is properly relevant to the question of the validity of the provisions in the Deed regulating access to information on their face. Whether the Court's intervention is required is essentially a fact-specific line of inquiry, albeit an inquiry the course of which is delineated by guiding principles of law. No authority, judicial or academic, was cited which clearly supported the proposition that a trust instrument which enabled a protector to decide what information a beneficiary received from the trustees was incompatible with fundamental notions of a trust. The authorities which were relied upon will be briefly considered below.

14. In *Bathurst-v- Kleinwort Benson (Channel Islands) Trustees Ltd* [2007] WTLR 959, the Guernsey Lieutenant Bailiff Patrick Talbot QC stated (at 1002) that the Court's inherent jurisdiction was "*wide enough to allow the Court, in a proper case, to make an order requiring trustees to give full and accurate information about the 'state and amount of the trust property', despite the existence of a term in the trust which purports to negative the obligations and liabilities of the trustees to do so.*" It appears from the report of this case that the relevant clause (permissibly[2]) excluded a general statutory duty to supply information without substituting any alternative information control mechanism. The Royal Court did not view a clause excluding a positive duty to supply information as being void on its face. The *dicta* relied upon by P's counsel left open the possibility that, depending on the applicable facts, such a clause might be effective to exclude a beneficiary's right to demand financial information about the trust.

15. Mr Hargun did refer the Court to the opinions of distinguished jurists who cast doubt on the ability of the settlor to exclude altogether the trustees' duty to account to the beneficiary in relation to the trust property. The following passages in '*Lewin on Trusts*', 18th edition[3], at paragraphs 23-83 to 23-84 were cited:

> "*Limitations on the information to be disclosed, as distinct from any general exclusion of accountability, may be valid….*
>
> *Another way to restrict, suspend or even exclude rights to seek disclosure of some beneficiaries who would otherwise be entitled to seek disclosure. This would be effective, in our view, in the case of a settlor or other beneficiary who was a party to the trust instrument, or otherwise effected a release, but is of doubtful efficacy in the case of other beneficiaries, since prima facie the trustees must be accountable to all beneficiaries.*"

16. Mr David Alexander QC for the Protector argued that P had consented and was bound by the information control mechanism in the Trust Deed even if this statement of the law was correct.

[2] The Guernsey Trust Law permitted settlors to contract out of the statutory obligations.
[3] Sweet & Maxwell: London, 2012.

17. One of the most unequivocal statements to the effect that clauses purporting to deprive beneficiaries of access to information about the trust will be held to be invalid which P's counsel referred to in argument was the following passage from '*Waters' Law of Trusts in Canada*', Third Edition[4], at page 1077:

> "*As it is axiomatic that the trustee must account to the beneficiary, so it is fundamental that the beneficiary is entitled to information that allows him to enforce the trust. Beneficiaries must be able to satisfy themselves that the trust is being properly administered. As we have seen, the rule is disclosure subject to exceptions. It follows that instructing or authorizing the trustee to deny a beneficiary access to information is not part of the settlor autonomy that is usually associated with trust law…mainland jurisdictions, including those of Canada, will place first in importance the ability of the beneficiary to compel the trustees to act within their authority, in good faith and with attentiveness to their duties. Such clauses are therefore declared invalid. By way of contrast, in several instances offshore jurisdictions have amended their trust legislation to permit the settlor to achieve a significant level of secrecy from beneficiaries…*"

18. Clause 9.2 as read with clause 24 facilitates access to information by the Protector, empowering -without requiring- the Protector to veto any request for information made to the Trustees. The quoted passage from Waters does not in my judgment support the invalidity of an information control clause as nuanced as the one under consideration in the present case.

19. Mr Hargun submitted without dissent that there was no statutory modification of beneficiaries' right to enforce the due administration of the trust under Bermudian law. Further, he argued that there was an international consensus across the common law world of the role played by beneficiaries' information rights as part of the "irreducible core functions" in the trust concept. The notion of irreducible core trust concepts generally, beyond the narrow parameters of information control clauses, has eminent judicial support. In *Armitage v Nurse* [1998] Ch 241 at 253, to which counsel also referred, Millett LJ (as he then was) stated that:

> "*…there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the*

[4] Thomson/Carswell: Toronto, 2005.

> *concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.*"

20. There is also eminent judicial support for the proposition that a settlor cannot validly oust the supervisory jurisdiction of the Court. In *AN v Barclays Private Bank & Trust (Cayman) Ltd* [2007] WTLR 565 at 597, Smellie CJ, on behalf of the Grand Court of the Cayman Islands, opined that:

> "*Such a complete prohibition would be repugnant to the trusts themselves, to the beneficial interest of the beneficiaries and to their right to seek vindication of their position before the court in an appropriate case when such vindication may be necessary.*"

21. In my judgment there is no clear consensus amongst even academic writers that a clause purporting to restrict (or stem altogether) the flow of information from trustees to beneficiaries would be invalid on its face. In '*Underhill and Hayton: Law Relating to Trusts and Trustees*', 18th edition[5], the following statement is made about a clause analogous to that under present consideration (at paragraph 56.21):

> "*A settlor needs to be aware that when he creates a trust for persons (whether beneficiaries or objects of fiduciary powers of appointment) then those persons must have full rights to see trust accounts and bring the trustees to account. Suppose for instance that the settlor stipulated that 'The Protector [or 'Enforcer'] alone shall have rights to see trust accounts and documents and to bring an action against the trustees'. The court, rather than strike down the clause, or even hold that this caused the whole trust to fail and meant the property was held on resulting trust for the settlor, would more likely hold that the Protector held these rights as a fiduciary for the benefit of the beneficiaries as part of the Protector's irreducible core function, but that these rights of the Protector were in addition to the beneficiaries' rights.*"

22. The General Editor of that text is now a Justice of the Caribbean Court of Justice. Justice Hayton is also General Editor of '*The International Trust*', 3rd edition[6]. Counsel referred to Chapter 4 ("PROTECTORS') of that text, authored by Emily Campbell, Robert Ham QC, Jonathan Hilliard and Michael Tennet QC, in which the

[5] Lexis Nexis: London, 2010.
[6] Jordans: Bristol, 2011.

following passage appears. After asserting that it is clear that a settlor cannot validly oust the jurisdiction of the court, the learned authors opine as follows:

> "4.45… *More difficult is the power to veto the beneficiaries' rights to information. It is suggested that by analogy with other types of clauses that seek to limit (but not remove entirely) beneficiaries' rights to information…a court would probably take the view that such a clause was a relevant factor in deciding whether to exercise its inherent jurisdiction to order disclosure but far from a decisive one. Therefore, it might not find that the clause was void, merely that it had jurisdiction to order disclosure even in the face of such clause.*"

23. Finally, Justice Gavin Lightman, writing extra-judicially[7], has also suggested that a clause restricting access to trust information will neither be struck down nor wholly disregarded by the courts:

> "*In the circumstances (as it seems to me) a provision in the settlement excluding enforcement or accounting rights and indeed the express exclusion of any right of access to trust documents or information may not (indeed perhaps should not) preclude the object from inviting the court to exercise its jurisdiction to direct disclosure, though no doubt the settlor's wishes may be a relevant factor in the exercise of the court's discretion.*"

24. However, in a chapter upon which P's counsel also relied, Justice Hayton (writing as Professor David Hayton in 1996), has also opined that a clause purportedly making a protector's power to veto information being given to beneficiaries as non-fiduciary and/or limiting the beneficiary's right to receive information to circumstances where they could establish bad faith on the protector's part "*would surely be ignored as repugnant to the nature of his irreducible core function*": David Hayton, '*The Irreducible Core Content of Trusteeship*' in AJ Oakley (ed.), '*Trends in Contemporary Trust Law*'[8]. Thus the authority which most directly addresses a clause analogous to clause 9.2 falls well short of contending that such a clause would be wholly invalid on its face.

25. In their 'Skeleton Argument of the 1st Defendant', Mr Robert Ham QC and Mr Keith Robinson advanced the following concise response to the contention that the information control provisions in the Trust deed might be invalid on their face:

> "6. *Provisions like clause 9(2) are relatively unusual but there is no reason to doubt their validity. Settlors are free to include whatever provisions they*

[7] '*The Trustees' Duty to Provide Information to Beneficiaries*' [2004] PCB 23-40 at page 29.
[8] Oxford University Press: Oxford, 1996) at page 54.

think fit in the settlements they make, within the limits of the law. The basic principle is freedom of trust. A clause that attempted to exclude all access to information might be open to challenge on the ground that it was repugnant to the nature of a trust – what Professor (now Justice) Hayton calls the irreducible core obligations – because it would prevent the trust being enforceable by the court. But clause 9(2) does not purport to do that. Indeed, by giving the Protector a right to information and accounts clause 24, coupled with the power conferred on the Protector by clause 22 to appoint and remove trustees, created an effective mechanism to supervise the administration of the Trust without having to resort to the court. As we shall show, the right to information and accounts conferred by clause 24 goes beyond the rights of beneficiaries under the general law. A clause restricting the right to information might also be open to challenge on the ground that it attempts to oust or restrict the jurisdiction of the court. But clause 9(2) does not purport to do this.

7. We may add that it would be surprising if there were any doubt as to the validity of clause 9(2) given the number of eminent lawyers (including (a) Conyers Dill & Pearman, the attorneys for the trustee of the ... Trust, (b) the international legal and tax advisory firm, Maitland, (c) Macfarlanes and (d) Timothy Lloyd, QC (now Lloyd LJ)) who were involved in the creation of the. . . . Trust and the other sub-Trusts..."

26. Mr David Alexander QC for the 2nd Defendant fully endorsed this submission. He also pointed out that the Trust mechanism provided a somewhat atypical safeguard for beneficiaries in requiring that the Trustee's accounts be independently audited. Mr Alexander further relied upon the following *dictum* of Sheller JA of the New South Wales Court of Appeal in *Hartigan Nominees-v-Rydge*(1992) 29 NSWLR 405 at 406:

> "*However, the importance of the Queensland case* [Tierney-v-King [1983] 2 Qd R 580] *is that it acknowledges, in my opinion correctly, that a settlor can effectively impose conditions of confidentiality on trustees.*"

Findings on validity of the Trust's information control mechanism

27. In light of the above authorities and the submissions of counsel, I find that clause 9.2 (as read with clauses 24 and 28) of the Trust Deed is not invalid on its face for violating the irreducible core content requirements for a valid trust. The information control mechanism of the Trust neither eliminates the Trustees' duty to account

altogether nor purports to oust the jurisdiction of this Court to order appropriate disclosure. The essential elements are as follows:

27.1 The Trustees are required not merely to prepare their own accounts but to have those accounts independently audited by an internationally recognised firm of accountants;

27.2 The Protector is expressly empowered by the Deed to obtain financial information from the Trustees;

27.3 The Protector is implicitly required to have regard to the interests of the beneficiaries in exercising his admittedly non-fiduciary powers of supervising the Trust's administration;

27.4 It is true that the Protector is not expressly accountable to the beneficiaries in respect of the exercise or non-exercise of his powers and is given an indemnification for all liability save for that occasioned by his fraud or dishonesty. However, the instrument does not purport to exclude this Court's supervisory jurisdiction over the Trust generally or in respect of the specific matter of the ability of beneficiaries to enforce the due administration of the trust through obtaining appropriate financial information about the Trust.

28. In light of these findings, I see no need to consider for present purposes the additional argument advanced by Mr Alexander to the effect that P could not challenge the validity of the Trust arrangements because he had expressly approved them as part of a wider family settlement.

29. Although it was common ground that the Court possessed the jurisdictional competence to order disclosure, the jurisdictional grounds upon which such competence could properly be exercised was hotly disputed. This controversy had two elements to it. Firstly, whether this Court had an unfettered discretion to consider the application for information afresh or whether the application could only be acceded to, having regard to the terms of the Trust Deed, if exceptional grounds were made out for 'overriding' the information control mechanism prescribed by the settlor. The second element of this dispute was somewhat less controversial: assuming the appropriate threshold test for invoking the Court's supervisory jurisdiction was met, what factors were relevant to the factual assessment of whether or not and on what terms an Order should be made? The first limb of this jurisdictional issue will next be addressed below.

Legal findings: grounds upon which the Court's supervisory jurisdiction over a trust can be invoked by a beneficiary not entitled to information under the express terms of a trust instrument

The submissions of counsel

30. Mr Hargun rightly submitted that the Judicial Committee of the Privy Council has authoritatively decided that the jurisdiction to order trustees to furnish information to beneficiaries is not a proprietary right but rather derives from the Court's inherent jurisdiction. In *Schmidt-v-Rosewood Trust Ltd* [2003] 2 AC 709, Lord Walker opined as follows:

> "*51.Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion…*"

31. More controversially, however, P's counsel proceeded to contend that this Court's discretion (despite clause 9.2) should be exercised on the basis of the following statement in *Lewin on Trusts*, 18th ed, at 23-20:

> "*We consider that the court in determining whether, what and how disclosure should be made under the principles of Schmidt v Rosewood Trust Ltd to a beneficiary is exercising its own discretion in supervising, and where necessary intervening in, the administration of trusts. It is not, in our view, the case that the function of the court (in the absence of a surrender of discretion) is merely to review, on limited grounds, an exercise of discretion by trustees or give its blessing to a proposed exercise of discretion by the trustees, so that the court can and will intervene only if it is proved that the trustees' decision or proposed decision on disclosure is wrong or of a kind that no reasonable trustees could reach.*"

32. This seemed to me to represent an accurate statement as to the approach of a Court construing an instrument which does not contain express provisions restricting the beneficiaries' information access rights. What is the impact of such a restrictive clause?

33. Mr Alexander submitted, partly in reliance on *Tierney-v- King* (1983) 2 Qd. R. 580, that the Court should not supplement the prescribed disclosure regime unless

something had clearly gone wrong. In that case the complaint that the confidentiality provisions ousted the jurisdiction of the court was rejected and it was held that the court retained the ability to assess whether the discretion to withhold information had been properly exercised. This case was, as Mr Hargun pointed out, a statutory review of the decision made by a trustee. I do not find the reasoning to directly bear upon what threshold test an applicant must meet to justify the Court considering the exercise of its discretion to make a disclosure order. Section 8(1) of the Trusts Act 1973 under which the application being considered by the Queensland court had been made provided as follows:

> "*Any person who has, directly or indirectly, an interest…in any trust property , or has a right of due administration of any trust and who is aggrieved by any act, omission or decision of a trustee…may apply to the court to review the act, omission or decision*…"

34. However, the Protector's counsel more fundamentally invited the Court to approach the question of whether to intervene by seeking primarily to give effect to the settlor's intentions as expressed in the Trust Deed. The prescribed machinery empowered the Protector on a non-fiduciary basis to inform the Trustees what information beneficiaries could receive. The misuse of those powers should only be challenged by the Court in circumstances where non-fiduciary powers were open to challenge. In this regard he referred the Court to '*Thomas on Powers*', Second Edition[9], at paragraph 10-188:

> "*If the exercise is based upon some capricious or utterly perverse foundation, it is difficult to see how the power could be said to have been exercised 'for the end designed'…Here, the issue is essentially whether such a requirement can properly be implied; and there is no obvious reason why a similar implication can not be made in the case of a non-fiduciary power found in a trusts context.*"

35. In paragraph 17 (1) of their Skeleton Argument, the Trustees' counsel made the following submission on what I describe as the threshold test P has to meet for seeking information not available under the Trust Deed's express terms:

> "*The court should so far as possible respect the provisions of the Trust about providing information and accounts. It should not, therefore, order disclosure except to the extent that [P] has established some real cause for concern that cannot be resolved without an order for disclosure*…" [emphasis added]

[9] Oxford University Press: Oxford, 2012.

36. The latter submission was not supported by reference to any specific authority; however, it appeared to represent something of a middle position between the contrastingly liberal and restrictive approaches contended for by P and the Protector respectively.

Findings: impact of information control mechanism in Trust on Court's jurisdiction to order disclosure

37. The impact of provisions of a trust instrument which restrict a beneficiary's right to obtain information from the trustees about a trust on the scope of this Court's jurisdiction to exercise its discretion to order disclosure turns on the following principal considerations:

    37.1 bearing in mind that the function of the Court's supervisory jurisdiction in respect of the discretionary power to order disclosure is to enable the applicant beneficiary to hold the trustees accountable with a view to ensuring the due administration of the trust;

    37.2 assessing how and to what extent the relevant information control mechanism is expressly and/or impliedly designed to ensure the due administration of the trust; and

    37.3 determining whether, in all the circumstances of any particular disclosure application, declining relief on the bare ground that the beneficiary is not entitled to disclosure under the mechanism prescribed by the trust instrument would substantially impair the fundamental requirements of trustee accountability.

38. In my judgment the above approach is supported broadly by principles governing the scope and purpose of the Court's jurisdiction to supervise trusts which have been judicially recognised across a range of common law jurisdictions. This approach is supported more specifically by the somewhat tentative but essentially coherent opinions articulated in leading practitioners' texts on the validity of such clauses, a topic which has seemingly not previously received any published judicial consideration. The breadth of the Court's jurisdiction to intervene cannot in my judgment be as broad as it would be in the context of a disclosure application made in relation to an instrument which was silent on the topic of access to information. The Court must be required to take into account the machinery expressly prescribed by the instrument, assuming it is not so offensive as to be invalid on its face, and assess the extent to which mechanism either theoretically and/or practically gives rise to a need for judicial intervention to guarantee minimum standards of trustee accountability.

39. It bears repeating that the crucial provisions of the Trust deed in the present case are as follows:

> "*9.2 Subject to the provisions of clause 24 below and except to the extent that the Trustees (with the prior written consent of the Protector) in their discretion otherwise determine no person or persons shall be provided with or have any claim right or entitlement during the Trust period to or in respect of accounts (whether audited or otherwise) or any information of any nature in relation to the Trust Fund or the income thereof or otherwise in relation to the Trust or the trusts powers or provisions thereof (and whether from the Trustees or otherwise)…*
>
> *24. The Protector shall have power to request information and accounts from the Trustees (which information and accounts shall forthwith be supplied to the Protector.)…*
>
> *28. The Protector shall not owe any fiduciary duty towards and shall not be accountable to any person or persons from time to time interested hereunder or to the Trustees for any act of omission or commission in relation to the powers given to the Protector by this Deed to the intent that the Protector (in the absence of fraud or dishonesty) shall be free from any liability whatsoever in relation to such powers…* "

40. As I have already found above, there is nothing repugnant about the concept of the Protector receiving information from the Trustees about the Trust and being conferred a power to veto the supply of information to other persons including beneficiaries. But this assumes that this power is, by necessary implication, intended to be used for the benefit of the beneficiaries. It also assumes that clause 28 is construed as an indemnity clause rather than as a clause designed to ensure that the Protector's use of the veto power can only be challenged on grounds of capriciousness or perversity which can only be made out if the information withheld is in fact supplied. This would potentially lead to an ousting of the supervisory jurisdiction of the Court altogether. A construction with these consequences would require plain words to justify adopting.

41. As Professor David Hayton (as he then was) put it in '*The Irreducible Core Content of Trusteeship*' in AJ Oakley (ed.), '*Trends in Contemporary Trust Law*'[10]:

> "*Use of a 'protector' (or 'committee' or 'board') with lesser or greater powers of direction or veto is becoming increasingly popular. Can a*

[10] Oxford University Press: Oxford, 1996) at page 54.

settlor therefore use a protector as the accountable person so as to avoid the inconvenience of the trustees being troubled by 'irritating' beneficiaries? Since the settlor intends the benefit of his trust to be not for the protector but for the beneficiaries the core right to obtain information about the trustees' stewardship must be held by the protector as a fiduciary: any attempt expressly to state that his rights and powers are purely personal to him for his own benefit would surely be ignored as repugnant to his irreducible core function. Thus the beneficiaries would have a right to obtain information from the trustees joining the protector as co-defendant if need be.

Would it help the settlor and beneficiaries if the trustees and beneficiaries were expressly accountable to the protector alone, unless the beneficiaries could establish on the balance of probabilities (or a prima facie case) that the protector was acting in bad faith, whereupon the trustees would become accountable to the beneficiaries? It is thought not. After all, how can the beneficiaries realistically hope to establish …bad faith if they have no means of finding out what is going on?"

42. I also cannot ignore the fact that as a matter of Bermuda statute law as well, the accountability of trustees for the due administration of a trust is considered to be an essential ingredient of the trust concept. Section 2 of the Trusts (Special Provisions) Act 1989 provides as follows:

> "***Trust described***
> *2 (1) For the purpose of this part, the term "trust" refers to the legal relationship created, either inter vivos or on death, by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.*
>
> *(2) A trust has the following characteristics:*
>
> *(a) the assets constitute a separate fund and are not a part of the trustee's own estate;*
>
> *(b) title to the trust stands in the name of the trustee or in the name of another person on behalf of the trustee;*
>
> *(c)the trustee has the power and the duty in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law…*" [emphasis added]

43. While clause 28 of the Trust Deed does not go so far as to specify that the Protector's powers are personal powers, I do not construe them as in any way limiting the circumstances in which a beneficiary under the Trust can invoke this Court's

supervisory jurisdiction in circumstances where the Protector has vetoed an information request made by the beneficiary to the Trustees. P in the present case must simply make out a *prima facie* case that the Court's intervention is required to meet the minimum requirements for trustee accountability in objective terms. And this entails assessing how the Trust information control mechanism operated in all the circumstances of the relevant information request. Putting aside for present purposes the potential impact of any breakdown in the information control mechanism, one neither starts off with a presumption in favour of disclosure, as Mr Hargun contended, nor does P have to show a capricious or perverse use of the Protector's veto powers as Mr Alexander contended, partly in reliance upon *Tierney-v- King* (1983) 2 Qd R 580. That was a case where the Queensland court was "*concerned with, in effect, an appeal from a decision made by trustees*" and Matthews J opined that "*although the right to review a decision…..should not be unduly confined the object of the section is not the substitution of a Judge's opinion for that of a trustee*" (page 582-583).

44. Rather, as Mr Ham effectively submitted in distilled form, the Court must show due deference for the terms of the Trust Deed and only order disclosure if this is shown to be necessary in the proper exercise of this Court's supervisory jurisdiction over the Trust. The present application invokes the inherent jurisdiction of the Court, not a statutory review power. In Bermuda, as in England and Wales, this requires the Court to adopt the following approach commended in *Lewin on Trusts*, 18th edition, paragraph 23-20 upon which Mr Hargun heavily relied:

> "*We consider that the court in determining whether, what and how disclosure should be made under the principles of Schmidt v Rosewood Trust Ltd to a beneficiary is exercising its own discretion in supervising, and where necessary intervening in, the administration of trusts. It is not, in our view, the case that the function of the court (in the absence of a surrender of discretion) is merely to review, on limited grounds, an exercise of discretion by trustees or give its blessing to a proposed exercise of discretion by the trustees, so that the court can and will intervene only if it is proved that the trustees' decision or proposed decision on disclosure is wrong or of a kind that no reasonable trustees could reach.*" [emphasis added]

Findings: has the Plaintiff established prima facie grounds for this Court considering whether or not to exercise its discretion to order disclosure?

Submissions of counsel

45. Mr Hargun submitted that even if it was necessary for P to show that "something had gone wrong" or that the Protector's veto power was being exercised capriciously, the case for this Court to order disclosure had been made out. He relied on, *inter alia*, the following factors:

    45.1 the blanket refusal of the Protector to consent to the disclosure of any documents, including the Trust Deed, until the commencement of the present proceedings;

    45.2 the fact that P's interest as a beneficiary was far from remote or speculative;

    45.3 the fact that that P was related to the present Protector and the two were engaged in a longstanding dispute (Mr Smith at an earlier hearing before Ground CJ described it as " *a humungous family row*");

    45.4 the fact that in all the circumstances of the present case, disclosure to the Protector was insufficient to make the Trustees accountable to P for the due administration of the Trust having regard to the distinct interests of P as a beneficiary.

46. The main reasons advanced by Mr Alexander in opposition to the proposition that the Court should consider exercising its discretion to order disclosure included the following:

    46.1 bearing in mind the non-fiduciary nature of the Protector's powers, the overlapping interests of the Protector as Principal Beneficiary and P together with the fact that the accounts were independently audited, there was no basis in the absence of oral evidence and cross-examination for a finding that the veto power was being deployed in a capricious manner;

    46.2 P had previously consented to the Trust arrangements as part of a Court approved settlement and it was not open to him to challenge the settlor's prescribed information control mechanism. This argument was also relied upon in opposition to the attack on the formal validity of clause 9.2.

47. Messrs Ham and Robinson advanced the following reasons why relief should not be granted at all in paragraph 17 of their Skeleton:

> "(1) *The court should so far as possible respect the provisions of the Trust about providing information and accounts. It should not, therefore, order disclosure except to the extent that [P] has established some real cause for concern that cannot be resolved without an order for disclosure.*

(2) [P] has not established any real cause for concern. A mere loss of confidence on his part (whether in [the Trustees] or [the] Protector) is not enough for this purpose. Nor is suspicion on [P]'s part, unless there are substantial grounds for that suspicion. On the evidence before the court, [P] has not made good his claim for disclosure.

Findings: has P made out prima facie grounds for the Court's intervention?

48. In my judgment P has made out a *prima facie* case for this Court's intervention applying the threshold test of whether or not such intervention is required in order to hold the Trustees accountable for the due administration of the Trust. For the reasons indicated above, I find that the appropriate test is not whether P can show that something has gone wrong (e.g. a capricious use of the Protector's veto power) or whether P can show a cause for substantive concern about the due administration of the trust.

49. The central question is whether P has made out a *prima facie* case for disclosure, taking into account both the information control mechanisms created by the settlor and how they have operated in practice in relation to the current information request. This requires the Court to construe the relevant provisions of the Trust instrument and assess how they were intended to operate in practice, bearing in mind that a core requirement of a valid trust is that the beneficiaries must be in a position to hold trustees accountable in respect the trustee's fundamental duty to duly administer a trust.

50. Mr Hargun in the course of argument described the beneficiary's right to hold the Trustees accountable as akin to a fundamental right. To my mind that is an apt analogy, recalling the interpretative rule that statutes must be construed so far as possible in a way which does not interfere with fundamental human rights. The equivalent rule applicable to the interpretation of private instruments, be they contracts, trusts or wills, is described by Lewison LJ, writing extra-judicially[11], as follows:

> "*If a contract admits of two interpretations, one of which is legal and the other illegal, the courts prefer that which leads to a legal result. Likewise, if a contract admits of two interpretations, one of which makes the contract valid, and the other makes it invalid, the courts prefer that which makes it valid.*"

[11] Lewison, '*The Interpretation of Contracts*', 5th edition Sweet & Maxwell: London, 2011, at page 184.

51. In my judgment the overarching fundamental principle which is engaged by the present application is the rule that the jurisdiction of the Court to supervise a trust (to, *inter alia*, hold trustees accountable for the due administration of the trust) cannot be ousted by a trust settlor. This is why Lord Walker opined in *Schmidt-v-Rosewood Trust Ltd* [2003] 2 AC 709 at 734D:

> "*65... Mr Brownbill made some brief submissions based on the Protector's powers to obtain documents and information. These points may conceivably bear on the exercise of the court's discretion but they cannot in the Board's view go to the issue of jurisdiction.*"

52. So rather than reading the plain words of the Trust Deed as if they were rigidly cast in stone, they must be read in a more pliable purposive manner with a view to giving effect not just to the settlor's manifested intention but also his implied (or presumed) intention to create a valid trust which does not oust the supervisory jurisdiction of the Court and/or the fundamental requirement that the trustees should be accountable to the beneficiaries for the due administration of the Trust. Following this analysis, the fact that P positively agreed to the Trust mechanism cannot constitute grounds for depriving him of the ability to enforce the terms of the Trust properly construed. Such agreement would be far more relevant to an attack by P on the validity of the Trust as a whole and/or its most important provisions.

53. These principles were no doubt very much in mind when clauses 9.2 and 24 were drafted, because they created the following access to information regime:

    53.1 the Protector was given an express right to obtain information from the Trustees;

    53.2 the Protector was given the express power to supply or veto the supply of information to beneficiaries;

    53.3 by necessary implication, having regard to the extensive (and purportedly non-fiduciary) powers conferred on him under the Trust, the Protector was required to ensure the due administration of the Trust on behalf of beneficiaries.

54. The initial Protector was not a beneficiary. At the time of the present application and the information requests which preceded it, the following circumstances appertained by common accord:

54.1 The current Protector is also the Principal Beneficiary creating a potential conflict between the distinct roles of protector and beneficiary, a dual role expressly permitted by the Trust;

54.2 while P is beneficially interested in the same fund as the Principal Beneficiary, it is theoretically possible that P's interest could be eroded by distributions made to the Principal Beneficiary;

54.3 although the Protector might be presumed to have natural affection for P, the parties have been engaged in open warfare for approximately 5 years;

54.4 the Protector has manifested a blanket refusal to supply any documents whatsoever to P including documents as basic as the Trust Deed (which were only disclosed in the context of the present proceedings). Moreover the Protector has elected to file no evidence personally thus sidestepping any possibility of oral evidence and cross-examination. Rather, reliance has been placed on the indirect evidence of a legal adviser to explain the Protector's reasons for exercising the veto power contained in clause 9.2.

55. In my judgment it is self-evident and clear beyond sensible argument on this highly unusual alignment of facts that the information control mechanism in the Trust is not currently working in a manner which is substantially consistent with the presumed intention of the settlor. The jurisdiction of the Court to intervene to ensure the due accountability of the trustees cannot be ousted merely because P assented in 2002 to the arrangements permitting the Protector/Principal Beneficiary roles to be performed by the same person.

56. The Judicial Committee of the Privy Council has held that no beneficiary is entitled to information "*as of right*" without considering whether the Court's discretion ought to be exercised on the facts of the particular case: *Schmidt-v-Rosewood Trust Ltd* [2003] 2 AC 709 at 734H. However, in considering whether an applicant has made out a *prima facie* case for invoking the Court's jurisdiction at all, the practical approach adopted by the Court should properly be the approach suggested by Deputy Bailiff Michael Birt (as he then was) of the Jersey Royal Court in *Re Rabaiotti's Settlement* [2000] 2 ITELR 763 at 773-774:

> "*Clearly, the general principle is that a beneficiary is entitled to see trust documents which show the financial position of the trust, what assets are in the trust, how the trustee has dealt with those assets etc. This is an essential part of the mechanism whereby the trustee can be held accountable for his trusteeship to a beneficiary…One starts with a strong presumption that a beneficiary is entitled to see trust documents of the nature described. There would have to be good reason to refuse disclosure of such documents.*"

57. Having regard to the information control mechanism of the Trust and simply analysing the relevant provisions of the instrument, the usual presumption in favour of access to information might well have been displaced. I am bound to find that the usual presumption in favour of information access is brought back into play in the present case because the prescribed machinery for the beneficiaries to hold the Trustees accountable has effectively broken down. The impact of the clauses which might otherwise restrict P's access to trust documents is neutral on the facts of this case.

58. It is therefore ultimately obvious that P has made out a *prima facie* case for the exercise of this Court's jurisdiction to order disclosure of trust documents by the Trustees.

Findings: should the Court's discretion be exercised in favour of or against ordering disclosure and, if so, what safeguards (if any) should be imposed?

<u>Submissions of counsel</u>

59. There was broad agreement on the principal factors which were relevant to the exercise of the Court's discretion to order disclosure. The Skeleton Argument of Mr Hargun and Mr Smith drew the following principles to the attention of the Court:

> "*70.As well as explaining the correct jurisdictional basis for a beneficiary's claim to receive trust documents, in Schmidt, Lord Walker expanded upon the nature of the discretionary exercise which the Court should undertake in determining whether or not disclosure was appropriate in a given case. Lord Walker explained (at [54]) that:*

'There are three such areas in which the court may have to form 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.'

71. Shortly after the decision in Schmidt, Potter J in the New Zealand High Court, in the case of Foreman v Kingstone [2004] 1 NZLR 841 at [90], drew out the principal relevant factors which may be taken into account by the Court:

'The following may be derived from the judgment of the Board in Schmidt as matters that may be taken into account by the Court in the exercise of its supervisory jurisdiction:

(a)Whether there are issues of personal or commercial confidentiality;

(b)The nature of the interests held by the beneficiaries seeking access;

(c)The impact on the trustees, other beneficiaries and third parties;

(d)Whether some or all of the documents can be withheld in full or redacted form;

(e)Whether safeguards can be imposed on the use of the trust documentation (for example, undertakings, professional inspection etc.) to limit any use of the documentation beyond that which is legitimate; and

(f)Whether (in the case of a family trust) disclosure would be likely to embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole.'

72. Whilst a beneficiary's motive in seeking the disclosure of trust documents may be relevant to the Court's exercise of discretion, fear on the part of the trustees (or someone else) that a breach of trust claim may be brought by the beneficiary is not a valid ground for preventing disclosure. As stated in Lewin on Trusts (at paragraph 23-20A):

> *'There is, however, a different kind of case where a beneficiary seeks disclosure against a background of hostility between him and the trustees, and it is obvious that the application for disclosure is being made in anticipation that disclosure, if made, will be followed by a breach of trust claim by the beneficiary against the trustees. Though beneficiaries rarely help themselves by adopting a rude or excessively aggressive attitude in seeking disclosure from trustees, we do not consider that the fact that the beneficiary's purpose in seeking disclosure is to assess the prospects of a breach of trust action is a reason why disclosure should not be ordered. That is because the jurisdiction is based on the accountability of trustees and beneficiaries have a legitimate interest in seeking disclosure so that they are in a position to assess whether the trustees have properly accounted for their conduct of the trusteeship, and if not to seek an appropriate remedy. Nor do we think that fear of a breach of trust claim could ever be a good reason for trustees refusing disclosure, and so if that was the only reason for declining or limiting disclosure, the duty of the trustees in making disclosure would be clear. There may, of course, be other circumstances which militate against disclosure, and so the fact that the trustees fear a breach of trust action does not mean that disclosure must be made. Nevertheless, in a case where the beneficiary does appear to have a real grievance or potential grievance, and is not merely a time-wasting troublemaker intent on disrupting the sound administration of the trust to the detriment of other beneficiaries, it may be easier than otherwise would be the case for the beneficiary to persuade the court to intervene under the supervisory jurisdiction, having regard to the conflict between the trustee's duty to give proper consideration to an application for disclosure and his personal interest in not being sued for breach of trust."'*

60. These general principles did not appear to be challenged as such by counsel for the Protector or the Trustees. Rather it was contended that on an analysis of the relevant facts no sufficient grounds for exercising the discretion had been made out and, if this submission was rejected, safeguards to meet confidentiality concerns ought to be put in place. Mr Ham made the important submission that the long-term stability of the Trust required good relations between the two protagonists and encouraged the Court to do what it could to encourage peace.

Findings: should the Court's discretion be exercised in favour of or against ordering disclosure?

61. Neither of the parties to the family dispute which lies at the heart of the present application has covered themselves with glory in the period leading up to the hearing of the present application. P's highly impetuous conduct has raised not irrational fears that he is seeking information in part with a view to launching some form of legal attack on the current Trust arrangements, designed to accelerate distributions which are currently designed to take place in the future. Having regard to the confidentiality concerns raised in opposition to the disclosure application, the Court cannot ignore the fact that the Protector has not been a model of discretion and restraint.

62. As regards the risk of attacks on the arrangements P has previously assented to, which appeared to me to be the most significant concern genuinely harboured by the Protector, it was significant that counsel could identify no significant action which P could obviously take in any overseas court. The Trust assets are held by companies incorporated in a friendly offshore jurisdiction with broadly similar approaches to the law of trusts. This Court is quite capable of preventing its own processes from being abused and can dispose summarily of any plainly frivolous attacks that might be launched on the Trust by P in the future. In short, it appears to me that the risks attendant upon disclosure may more appropriately be dealt with by imposing conditions upon disclosure rather than refusing disclosure altogether.

63. On balance, for the reasons set out in more detail in the Confidential Appendix to this Judgment, I find that there should be disclosure of historical basic financial information about the Trust assets subject to appropriate safeguards to meet the Defendants' legitimate concerns about the use to which the relevant information might be put. In balancing the countervailing interests of confidentiality and accountability and in determining the scope of disclosure which it is appropriate to order the trustees to make, I have been assisted by the following analysis upon which P's counsel relied:

> "*But the question is, of course, one of degree; what is a proper degree of confidentiality? It is clear that the answer lies in the concept of enforceability – a beneficiary must be entitled to such information as he needs to be able to hold the trustee to account, but cannot expect information to be made available to him if it is not necessary to serve that aim, and disclosure would damage the interests of other beneficiaries…So, on the one hand, the arguments in favour of confidentiality are not to be devalued but, on the other, the enforceability of the trust must dominate above all else. If a trust is*

not enforceable, if a trustee cannot be held to account, how then can there be a trust?"[12]

Conclusion

64. P is entitled for the above reasons to an Order directing the Trustees to disclose financial information about the Trust assets. The documents to be disclosed are described with greater particularity in the Confidential Appendix to the present Judgment. I will hear counsel, if required, on the precise terms of the Order to be drawn up to give effect to this Judgment (in particular with respect to safeguards) and on costs.

Dated this 12th day of March, 2013 _____
IAN RC KAWALEY CJ

[12] Christopher McCall QC, '*Schmidt v Rosewood Trust Ltd: the End of the Trust as a Disappearing Trick*'(2003) PCB 358 at 361.