The Court of Appeal for Bermuda

CIVIL APPEAL No 8 of 2013

In the matter of an Application for Information about a Trust

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Before: **Zacca, President**
Evans, J.A.
Ward, J.A.

Appearances: Mr. David Alexander QC and Mr. Andrew Martin, MJM Ltd, for the Appellant
Mr. Narinder Hargun and Mr. Paul Smith, Conyers Dill & Pearman, for the 1st Respondent
Mr. Robert Ham QC and Mr. Keith Robinson, Appleby (Bermuda) Ltd, for the 2nd Respondent

Date of Hearing: **12 - 14 November 2013**
Date of Decision: **18 November 2013**
Date of Reasons: **5 February 2014**

Reasons for Decision

Evans, J.A.

1. This Appeal is from a judgment of the Chief Justice dated 12 March 2013 and his subsequent Order made on 24 April 2013, on the Application of a beneficiary under a Trust established in Bermuda. The Order requires the Trustee to produce Trust Accounts and related documents to the Applicant, with safeguards intended to maintain their confidentiality and restricting the use that he may make of them. The Application was dated 28 December 2011 and initially was made against the Trustee alone, but on 2 February 2012 an Amended Originating Summons was issued adding the Protector of the Trust as Second Respondent.

2. The Protector, who is also the principal beneficiary of the Trust, brings the appeal, naming the Applicant as First Respondent and the Trustee as Second Respondent.

3. On 9 February 2012 the (former) Chief Justice ordered that the "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". For that reason, the judgment now under appeal was given in two parts: first, under the anonymised heading "In the matter of an Application for Information about a Trust", and secondly, a "Confidential Appendix to Judgment (Reasons for Ordering Disclosure)" in which the parties are named and the facts are discussed.

4. We should record that the appeal was heard in open court, with frequent references to the names of the parties and the circumstances of the Trust. We were not asked to make any further order with regard to the confidentiality of the proceedings. However, we are concerned mostly with issues arising from the first, non-confidential, part of the Judgment, and we will consider them anonymously as the Chief Justice did.

5. We shall refer to the Protector as "the Appellant" and to the Respondents as "the Applicant" and "the Trustee" respectively. The Applicant is "a beneficiary with an interest that cannot be described as remote or speculative" (judgment paragraph 1), because "as the result of an Irrevocable Deed of Appointment, [he] 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" (paragraph 7). The Appellant "is currently the Principal Beneficiary under the Trust" (judgment paragraph 7) which we understand refers to the current beneficial interest in the majority (65%) of the Trust assets.

6. We heard the Appeal on 12 - 14 November 2013 and gave judgment on 18 November 2013 holding that the Appeal was dismissed, for Reasons to be given in writing. On 22 November 2013 we gave leave to the Appellant to appeal to the Judicial Committee of the Privy Council. Both Respondents consented to that Application.

7. Our Reasons for dismissing the Appeal are substantially those given by the Chief Justice for granting the Application. We give them in our own words, as follows.

Legal Background

8. It is common ground that the Court exercises a supervisory jurisdiction in order to ensure that the affairs of a private trust are conducted lawfully and in accordance with the wishes of the settlor. This enables the Court to require the production of trust documents and information to a beneficiary of the trust. In *Schmidt-Rosewood Trust Ltd.* [2003] 2 AC 709 (JCPC) Lord Walker said this –

> "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 beneficiary's right, therefore, to demand trust documents and information is correlative to the Court`s willingness to order production in the circumstances of the particular case.

9. In *Armitage v. Nurse* [1998] Ch. 241 Millett LJ (as he then was) said –

> "…there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts."

10. The Applicant contends, and the Appellant and the Trustee do not dispute, that the beneficiaries` right to demand the production of trust documents is a "fundamental" right of that kind. But the Trust Deed contains express terms which, they say, have the effect of extinguishing the right, or which at least prevent the Applicant from exercising it in the present case. The Applicant`s response is that the express terms do not preclude the Court from exercising its supervisory jurisdiction, and that it should do so in the present situation of the Trust.

11. The Trust Deed provides for the appointment of a "Protector", and the Appellant was appointed to that office at the time of a re-arrangement of the Trust in 2002, as a result of which the Applicant obtained his 35% beneficial interest in the Trust. We understand that the role of Protector, also called a "Watchdog" or the "Enforcer" of a Trust is now recognised and accepted as a feature of Trusts where the Settlor does not wish to exercise personal oversight over the administration of the Trust, or where not being a local resident he cannot conveniently do so. An independent third party, either a personal friend or a professional adviser, residing in the locality, can often perform the role and be responsive to his wishes, without acting formally on his behalf.

12. There are few reported judgments on this comparatively recent addition to trusts machinery, but there is a considerable amount of literature regarding it, which is based on practical experience as well as academic learning. It is recognised that a further development has taken place, namely, a beneficiary may be appointed Protector of the Trust, notwithstanding the apparent conflict of interest that may arise. The fact that the Appellant is both the Protector of the Trust and the Principal Beneficiary under it is a central feature of the present dispute, but it is not suggested that the appointment was improperly made.

The Trust Deed

13. Clause 9.2 reads –

> "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)."

The overriding provisions of clause 24 are –

> "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.)"

14. The "Protector" is defined in the Trust Deed as a named company (not a beneficiary) "or such other person or persons as may be or become the Protector hereof for the time being in accordance with the provisions hereinafter contained" (clause 1.8). No Trustee can become the Protector (clause 29.6), but there is no express provision regarding the position of a Protector who is a beneficiary also.

15. Numerous clauses in the Trust Deed give the Protector wide powers in the administration of the Trust and to control and direct the Trustees. Clauses 12.1,17, 25.2 and 28 are quoted in paragraph 6 of the Chief Justice`s judgment and they need not be set out *in extenso* here. In summary, clause 12.1 includes –

> "12.1 In exercising all or any of the powers and discretions (whether fiduciary, dispositive or administrative) conferred on 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….",

and clause 25.2 reads –

> "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……".

However, both clauses contain a proviso –

> "…(unless such directions conflict with any provisions of this Deed regarding the beneficial interest or entitlements with regard to assets forming part of the Trust Fund or the income thereof)…..".

16. Clause 17 requires the Trustees to keep proper books of account etc. and to "have them audited annually or so often as the Protector may otherwise direct by a firm of……..accountants of high standing and repute……".

17. The Protector`s role is further defined in clause 28 –

> "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……to the intent that the Protector (in the absence of fraud or dishonesty) shall be free from any liability whatsoever……".

The Judgment

18. The Chief Justice observed "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" (paragraph 1) and he defined two broad issues of principle -

> "Firstly, is the information control mechanism in the Trust Fund 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 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?" (paragraph 2).

(1) Clause 9.2 invalid?

19. The first issue arose from the Applicant`s submission that by restricting or denying the beneficiary access to Trust accounts, clause 9.2 "on its face" was inconsistent with that fundamental requirement of a valid trust. The Chief Justice accepted that "a settlor cannot validly oust the supervisory jurisdiction of the Court" (paragraph 20) but he also found "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" (paragraph 21). He quoted with approval from the written submission by counsel for the Trustees –

> "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 think fit in the settlements they make, within the limits of the law. The basic principle is freedom of trust…….[clause 9.2] [and 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…….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."

20. The Chief Justice held –

> "27……clause 9.2 (as read with clauses 24 and 28)…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 Trustee`s 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 buy 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."

(2) Second issue - the jurisdiction of the Court

21. The Chief Justice approached this second issue, therefore, on the basis that clause 9.2 is "valid", meaning that it forms part of the Trust Deed and should not be disregarded. The heading of the relevant part of his judgment (paragraphs 30 *et seq*) is "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" (paragraph 30). He considered submissions made on behalf of the Trustees and the Appellant on what he called the "threshold test" (paragraphs 29 and 35). The Appellant submitted that the 'information control mechanism' provided for in clause 9.2 represented the settlor`s intentions and that it gave the Protector a non-fiduciary

power to inform the Trustees what information the beneficiaries could receive; therefore, it was submitted, the exercise of that power could not be challenged unless it was shown to have been exercised "upon some capricious or utterly perverse foundation" or for some other reason which was not 'for the end designed' (per *Thomas on Powers* 2nd ed. paragraph 10-188) (judgment paragraph 34). For the Trustees, it was submitted that the Applicant must establish "some real cause for concern that cannot be resolved without an order for disclosure" (judgment paragraph 35).

22. The Chief Justice concluded as follows –

> "48. In my judgment [the Applicant] 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…….
> 49. The central question is whether [the Applicant] 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…….".

He further held that "the overarching fundamental principle…..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" (paragraph 51). In a case where disclosure is sought "by a beneficiary not entitled to information under the express terms of the trust instrument" (above, paragraph 20), he gave two reasons why the Court`s jurisdiction might nevertheless be invoked. First –

> "38……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."

Secondly –

"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 statutory 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."

23. Having considered certain agreed factors (paragraph 54) the Chief Justice concluded –

"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 consistent with the presumed intention of the settlor."

The factors referred to included –

"54.4 the Protector has manifested a blanket refusal to supply any documents whatsoever to [the Applicant] including documents as basic as the Trust Deed (which were only disclosed in the context of the present proceedings)……..".

24. The Chief Justice summed up his approach as follows =

"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….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 [the Applicant`s] access to trust documents is neutral on the facts of this case."

25. The Chief Justice then considered factors relevant to the exercise of the Court`s discretion in the present case (paragraph 59 and following). The principles appeared not to be in dispute (paragraph 60). They included the statement in *Lewin on Trusts* (paragraph 23-304) –

> "Nor do we think that fear of a breach of trust claim could ever be a good reason for trustees refusing disclosure." (judgment paragraph 59).

He concluded that an Order for disclosure, with suitable safeguards, should be made.

The Judge`s Order dated 24 April 2013

26. No submissions were made at the hearing of the Appeal as to the scope or wording of the Order. Its effect was to require disclosure of specified documents subject to the Applicant entering into a confidentiality agreement with the two Defendants.

The Appeal

27. The Protector appealed against the Chief Justice`s decision on the second issue, namely, that the Court should exercise its supervisory jurisdiction in favour of the Applicant notwithstanding the express terms of clause 9.2. The Applicant as First Respondent gave notice of his intention to contend alternatively *inter alia* that clause 9.2 is invalid "or alternatively does not prevent the Court from ordering disclosure even if the information control mechanism has been complied with by the Trustee and [the Appellant]".

28. In the event, little time was spent at the appeal hearing on the Applicant`s alternative contention that, contrary to the Chief Justice`s finding, clause 9.2 is invalid or without effect. The Appellant and the Trustees attacked his judgment

on the second issue on the assumption that clause 9.2 is valid, and we will consider the appeal on that basis.

29. For the Appellant, David Alexander QC submitted that the Chief Justice was wrong to order disclosure, on five grounds. These were –

    (1) "Where the mechanism is valid, it should be respected" – contending that "once a Court finds that an express disclosure mechanism is valid, the Court should respect that clause";

    (2) disclosure ought not to be ordered "absent mismanagement, impropriety etc." or unless there is "real cause for concern that the Trust may have been mismanaged" – the "threshold" argument;

    (3) the Appellant having assented to the Trust structure in 2002, with the benefit of legal advice, ought not to be permitted to challenge it now;

    (4) the Appellant is disqualified from seeking the Court`s assistance by reason of certain aspects of his conduct in relation to the Trust since 2009; and

    (5) the Chief Justice exercised the Court`s discretion to order disclosure "against the combined weight of the evidence".

30. Robert Ham QC appeared for the Trustees. He stated that the Trustees were "neutral" in regard to the outcome of the Appeal and that they were separately represented for three reasons: to defend themselves against any attacks made against them; to ensure that any disclosure ordered by the Court would be "workable"; and if the need were to arise, to protect "absent" i.e unrepresented beneficiaries of whom, he said, there are three. They are, we understand, members of the Applicant`s family who have future or contingent interests. We

are grateful to Mr. Ham for his careful and balanced submissions, though we note that they supported the Appellant`s contentions on the "threshold" issue and were critical of the Chief Justice`s reasoning as to the correct approach for the Court to adopt.

The First Ground of Appeal

31. The Appellant`s submission was that, clause 9.2 being valid, it should be applied in accordance with its terms – "where the mechanism is valid, it should be respected". The settlor enjoys "freedom of trust", and the Court`s fundamental duty in supervising the Trust is, so far as possible, to ensure that the settlor`s wishes as expressed are both respected and given effect to, as stated by the Chief Justice in the present case. In *Target Holdings v. Redfern* [1996] AC 421 Lord Browne-Wilkinson said –

> "The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law" (p.434A),

and in *Chapman v. Chapman* [1954] AC 429 the House of Lords rejected in strong terms a contention that the Court has power to rewrite the trust document or "to alter beneficial interests to any extent" (per Lord Morton of Henryton at p.461).

32. Here, clause 9.2 defines the Trustee`s duty to account in terms which, Mr. Alexander submitted, ensure a "minimum standard of accountability" for the beneficiaries, and the requirement for annual audits of trust accounts by independent accountants of international repute provides them with an additional safeguard. The beneficiaries` rights are not excluded altogether by clause 9.2, they are "conditioned on Protector consent", and by law the Protector is required to exercise its powers "for a proper purpose and not ….. irrationally" (citing *Lewin on Trusts* (18th ed.) paragraph 29.14). In the case of a family trust

like the present one there may be reasons, it was submitted, why the Protector is well-placed to decide what disclosure should be made to the beneficiaries and why the Settlor might intend that the Protector should have that power. The requirement for the Protector to consent therefore should be respected by the Court, and the Chief Justice was wrong to hold that the mechanism had "broken down".

33. Mr. Hargun, for the Applicant, submitted that a beneficiary has a fundamental right to hold the Trustee to account, which he cannot do without proper information as to the Trust`s affairs, and that the Court may exercise its supervisory jurisdiction in order to support that right. To say that a Protector has sole or primary responsibility for providing the information is inconsistent, he submitted, with supervision by the Court.

The Second Ground of Appeal

34. Mr. Alexander for the Appellant submitted that "at worst from the Protector`s point of view a valid exercise of the protector`s power to refuse consent should only be overridden where there is real cause for concern that the Trust may have been mismanaged", and that no ground for concern exists in the present case. Among his supporting arguments was the proposition that the Protector as 65% beneficiary "can be expected to supervise the Trustee in managing the Trust as a whole", so that the 35% interest of the Applicant will be protected also.

35. Mr. Ham submitted that 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 [the Applicant] has established some real cause for concern that cannot be resolved without an order for disclosure", and the Applicant has not done so. He accepted that there has been "a breakdown of trust" between the Applicant and the Appellant, but

he submitted "a mere lack of confidence or suspicion between beneficiaries does not justify a departure from the provisions of the Trust about information". He agreed that the Court`s supervisory jurisdiction "has not been, and could not be, ousted by the Provisions of the Trust. Nobody suggests otherwise.", and he submitted "…there is no need to interpret clause 9.2 other than in accordance with the ordinary meaning of the words used". He added "The Trustee would, nevertheless, accept that it is a function of the Protector to ensure due administration of the Trust on behalf of the Beneficiaries". It was the intention of the Settlor not to impose any fiduciary duty on the Protector, but "In practice, the Trustee would ……. expect to be held to account by the ……Protector [and successors]". Finally, the Trustee disputed the Chief Justice`s view that "the information control mechanism is not working".

36. Mr. Hargun submitted that "the imposition of such a threshold test [as was contended for by the other parties] is illogical and unjustified" and that there is no suggestion of it in any of the authorities where the Court`s supervisory jurisdiction has been exercised or defined. Further and in any event, any threshold test is satisfied in the present case where "the information control mechanism under the Trust Deed…..has clearly '*broken down*'." He submitted that in ordering the disclosure of information, the Court is exercising its own original discretion and not merely reviewing on limited grounds the exercise of discretion by a trustee (or protector).

The Authorities

37. There was little dispute between the parties as to the relevant principles of law. It is common ground that the Court in the exercise of its supervisory jurisdiction may order the disclosure of trust accounts and related documents to a beneficiary from whom they have been withheld by trustees, and that in considering whether to do so in a particular case the Court must have regard to

relevant provisions in the trust instrument. It is not contended that clause 9.2 has the effect of wholly excluding the beneficiaries` right to seek disclosure, and it is agreed that, if that were the case, the clause would be invalid, for that reason. The Appellant`s contention is that on its true construction the clause gives the beneficiaries a limited right which ensures at least a 'minimum standard of accountability' i.e. to the beneficiaries by the Trustees, and that the Court ought not to override the Protector`s refusal of consent in the present case.

38. The basis for the Court`s exercise of its supervisory jurisdiction has recently and authoritatively been defined in *Schmidt v. Rosewood Trust Ltd.* [2003] 2 AC 709 (JCPC) and in *Foreman v. Kingstone* [2004] 1 NZLR 841 (Potter J, NZ High Court) and in *Breakspear v. Ackland* [2008] EWHC 220 (Ch.) 32 by Briggs J. (as he then was) in relation to "wish-letters" by the settlor. The effect of express terms in the trust instrument and relevant statutory provisions was considered in two Channel Islands cases, *Re Rabaiotti 1989 Settlement* (2000) 2 ITELR 763 (Royal Court of Jersey) and *Countess Bathurst v. Kleinwort Benson (Channel Islands) Trustees* [2007] WTLR 959 (Royal Court of Guernsey), and in *Jones v. Shipping Federation of British Columbia* (1963) 37 DLR (2d) 273 (BC Supreme Court) (where a term that purported to exclude the trustee`s duty in the context of a pension fund agreement was held to be void and illegal, as ousting the jurisdiction of the Court: p.278).

39. Particular reference was made to two Australian judgments, *Tierney v. King* [1983] 2 Qd R 580 and *Hartigan Nominees P/L v. Rydge* (1992) 29 NSWLR 405 (CA). The former case involved the Trust Deed of a public employees` Superannuation Plan, clause 7.7 of which required the trustees to observe strict secrecy with regard to the affairs etc. of the Plan but which gave them permission to publish "financial [etc.] information to all Participants generally"

whenever they thought fit to do so. The trustees obtained a valuation of trust assets and liabilities, as required by the Trust Deed, which they refused to disclose to a beneficiary. The Full Court of Queensland held (1) the trustees were not bound to disclose reasons for their decisions, (2) the clause permitted publication to all participants but not to one participant alone, and (3) it was not a case for judicial interference in the trustees` decision. In *Hartigan* the majority of the Court held that trustees were not obliged to disclose to a beneficiary the settlor`s memorandum of wishes, Sheller JA referred with approval to the earlier decision, observing "there has, however, emerged another basis for requiring trustees not to disclose documents in their possession, namely, confidentiality." (page 445). The Appellant relied upon that statement of principle in support of its submission that the Court will uphold a settlor`s restriction on disclosure by trustees. However, the presiding member expressed serious doubts about the *Tierney* decision (per Kirby P. at p. 414) and his dissenting judgement was quoted with approval by Lord Walker in *Schmidt v. Roseland Trust* (paragraphs 52 et seq.), though on another issue. The precise weight of these two judgments therefore is not easy to assess.

40. *Underhill and Hayton* on the Law Relating to Trusts and Trustees (18th ed.) discusses the "Irreducible core of accountability to beneficiaries" (Article 56.2) citing the judgment of Millett LJ (as he then was) in *Armitage v. Nurse* (supra) and notes that "discretion aside, there are nevertheless limits" (Art. 56.8). These limits include "*Modification of trustees` duties and beneficiaries` correlative rights*" where the text begins –

> "56.14 There cannot be any obligation, and hence there cannot be any trust, if the trustee does not owe a duty to account to any beneficiary".

One exception, a 'blind trust' where the settlor deprives himself and his family of the right to see accounts, is noted in Art. 56.16, and in Art. 56.19 the view is expressed that in English law "..it does not seem open to the settlor definitively

to exclude the ability of a beneficiary….to invoke the jurisdiction of the court". Art. 56.21 is directly relevant for present purposes-

> "56.21 A settlor needs to be aware that when he creates a trust for persons……then those persons must have full rights to see the 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…….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 were in addition to the beneficiaries' rights."

41. *Lewin on Trusts* (18th ed.) states the general rule "Beneficiaries are entitled to seek inspection and copies of trust accounts" subject to the Court`s discretion as stated in *Schmidt v. Rosewood Trust* (Art. 23-23) and continues –

> "23-24 But that foes not mean that in any ordinary case there can be any doubt that the discretion should be exercised so as to allow disclosure of trust accounts on demand by a beneficiary."

42. We were also referred to *Waters` Law of Trusts in Canada* (3rd ed.) which states "As it is axiomatic that the trustee must account to the beneficiary, so it is fundamental that the beneficiary is entitled to the information that allows him to enforce the trust" and expresses the view that "instructing or authorising the trustees to deny beneficiary access to information is not part of the settlor autonomy that is usually associated with trust law" (paragraph 2 page 1077) and notes the exceptional position by statute in the Cayman Islands; and to three monographs – *The Irreducible Core Content of Trusteeship* (by David Hayton, now Justice Hayton, in *Trends in Contemporary Trust Law* (Oxford, 1996)); *The Trustees` Duty to Provide Information to Beneficiaries* by Lightman J. [2004] PCB 23; and *Trustee`s duties to provide information* by Lusina Ho in *Exploring Private Law* ed. Bant & Harding (Cambridge 2010).

43. The role of Protector was considered by the courts of the Isle of Man in *Rawcliffe v. Steele* (1993) 95 MLR (SGD*)* 426 where Acting Deemster Smith (as he then was) said this –

> "[counsel] described the Protector as being a vital part of the machinery of the trust. I agree with that analysis…….his role is clearly vital. Nevertheless, his role, in my opinion, is that of assisting in the administration of the trust…….The protector must *bona fide* consider the exercise of the powers from the point of view of the beneficiaries under the trust."(p.529).

44. It is also referred to in *Underhill v. Layton* (quoted above) and in the article by Justice Hayton (*The Irreducible Core Content of Trusteeship* – see *Use of Protector as Cut-off Device*, p.54), and it is dealt with extensively in *The International Trust* (3rd ed.) (ed. Justice Hayton) in a chapter contributed by Mr. Ham QC and others. Under the heading 'Control of the Protector' the view is expressed "there can be no doubt that the court`s power of control extends to ensuring that the protector complies with the terms of the settlement…….In our view, the court`s general jurisdiction to secure the good operation of trusts should, in principle, enable it to intervene even if, for example, the trust instrument lays down in terms that the protector is to owe no fiduciary duties" (paragraph 4.33). In answer to the question "Are there any powers that a settlor *cannot* validly confer on a protector?" and in relation to a power given to the protector to veto the beneficiaries` right to information, the view is expressed that "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 cause was void, merely that it had jurisdiction to order disclosure in the face of such a clause." (paragraph 4.45). A second question – "are there any circumstances in which a power conferred on a protector is of such importance to the trust that it will be held to

be a fiduciary power even if the settlor intends it to be a personal one? – is answered affirmatively-

> "4.46 .....Where it is necessary to ensure that those in control of the trust are made properly accountable, the courts have shown themselves willing to place limits on the settlor`s ability to decide what the obligations of the different parties to the trust should be."

Conclusions

45. In our judgment -

(a) The Chief Justice held, and it is common ground, that clause 9.2 does not purport "to oust the jurisdiction of the Court";

(b) however, the Court will not exercise its power to intervene without due regard to the terms of the Trust Deed; these, on their true construction, indicate what the Settlor`s intention was, and the Court`s primary concern is to give effect to that intention;

(c) the Court will assume that the Settlor intended to create a valid and lawful trust, to be enforced in accordance with its terms by or on behalf of the beneficiaries specified by him;

(d) clause 9.2 on its true construction provides that the Trustee shall not release information to the beneficiaries without the consent of the Protector;

(e) the Protector`s power under the clause must be exercised in the interests of the Trust and of its beneficiaries, notwithstanding that the Protector owes no fiduciary duties (clause 28) and notwithstanding that the Protector is one of the beneficiaries;

(f) the Protector who is a beneficiary therefore cannot withhold consent where a Protector who was not a beneficiary would not be justified in doing so;

(g) the Court has power to order disclosure to an individual beneficiary which it considers justified in the circumstances of the particular case, taking account of the terms of the Trust Deed;

(h) there is no defined "threshold" which the Applicant must cross before the Court`s power can be exercised: the beneficiary`s right is defined by reference to the Court`s willingness to make the order sought, and it follows from this that the burden on the Applicant is to show that the order should be made in the circumstances of the case; as the Chief Justice put it, he must establish a *prime facie* case that the order should be made;

(i) further to (g), the Court`s power is not limited to reviewing a decision made by the trustees or by the Protector; and

(j) the Court`s power may be exercised when the trustees or the Protector have discriminated between beneficiaries without authority from the settlor or other proper grounds for doing so.

46. It is immaterial in our view whether the legal analysis is that the power given by the Trust Deed is subject to the inherent powers of the Court, or that the express term is interpreted as being subject to the Settlor`s intention to create a valid trust; and we are content to endorse the Chief Justice`s approval of both views (paragraphs 38 and 52 of his judgment, see paragraph 21 above).

47. In the present case, the information has been made available to the Protector who is the principal beneficiary; the only reason advanced by the Trustees for not releasing it to the Applicant also is that the Protector has refused consent, without giving reasons for doing so.

48. As the Chief Justice concluded –

> "58. It is therefore ultimately obvious that [the Applicant] has made out a *prime facie* case for the exercise of the Court`s jurisdiction to order disclosure of trust documents by the Trustees."

49. If it were necessary to do so, we would find that the evidence establishes 'real cause for concern' sufficient to cross the suggested threshold as a pre-condition to the exercise of the Court`s power to order disclosure. We agree with the Chief Justice that the machinery envisaged by clause 9.2 has 'broken down' which justifies intervention by the Court.

50. The breakdown consists of the fact that the Protector has refused consent apparently for reasons not connected with the due administration of the Trust. Suggested reasons for the refusal do not justify withholding the information from the Applicant, subject to suitable safeguards as to confidentiality and the use he may make of it. There is no provision in the Trust Deed which excludes him from the beneficiaries` right to receive the information from the Trustees, other than the Protector`s suggested power to refuse consent.

51. Another analysis is that the Protector`s powers must be exercised within the limits imposed by the trust instrument and in the interests of the Trust, the same limits as those recognised by the Court. Put another way, the Protector is not entitled to depart from the Settlor`s intentions as expressed in the Trust Deed. Clause 9.2 "works" and can be supervised by the Court if it is interpreted in that way.

Third and Fourth Grounds of Appeal

52. There are two answers to the third ground of appeal, which is – "The Applicant having assented to the Trust structure in 2002, with the benefit of legal advice, ought not to be permitted to challenge it now". First, the Applicant does not challenge the Trust structure, as distinct from the Appellant`s submission as to what the structure is, a submission we reject; and secondly, on the evidence before us the Applicant and his (Swiss) legal advisors did not have a copy of the Trust Deed when the 2002 arrangements were made.

53. The fourth ground of appeal as summarised in paragraph 29 above is that the Applicant "is disqualified from seeking the Court`s assistance by reason of certain aspects of his conduct in relation to the Trust since 2009". We have considered the matters raised in the Appellant`s Skeleton Argument as well as the limited oral submissions made in their support. We agree with the Chief Justice`s view that they do not prevent the Applicant from invoking the inherent jurisdiction of the Court. However, they are relevant to the Court`s exercise of discretion, to which we now come.

The Court`s Discretion

54. The Appellant`s Skeleton Argument acknowledged (paragraph 130) that it is necessary to show that the discretion was "exercised against the combined weight of the evidence" for this ground of appeal to succeed. The paragraph listed 18 factors which, it was submitted, weighed against ordering disclosure in this case. These included assertions that there was no real cause for concern as to the administration of the Trust and that the mechanism has not broken down, which we have considered (and rejected) above.

55. We have no hesitation in dismissing this ground of appeal. In the circumstances and in this 'open' judgment we say merely that we see no ground for differing from the Chief Justice`s judgment, and we agree with it in any event.

56. The appeal therefore is dismissed.

Postscript

1. The appeal was argued and this judgment is given on the basis that the Protector`s refusal of consent made it inevitable that the Applicant`s request was refused by the Trustees, as it undoubtedly was. It is not entirely clear, however, what decision the Trustees made, and when. Although it makes no difference to the result of the appeal, we shall set out in greater detail what did occur, and add some observations of our own as to the operation of clause 9.2.

2. The initial request was made to the Trustees by letter to Appleby, their Bermuda solicitors, dated 15 October 2009. By letter dated 2 December 2009 the Trustees indicated that they had discussed the request and that they had a number of concerns about disclosing the information, which they invited the Applicant to address. He did so by letter dated 14 July 2010. Some correspondence followed about other matters, including a projected Confidentiality Agreement, but no substantive reply was received to the request. On 6 September 2011 Conyers Dill Pearman ("CDP") on behalf of the Applicant wrote formally requesting production of the documents within 21 days. Herbert Smith, London solicitors for the Trustees, replied on 28 September 2011 saying "the trustees are unable to provide any information of any nature in relation to the Trust to any person without the prior written consent of the Protector." Herbert Smith said that therefore CDP`s letter was being sent to the Protector.

3. CDP replied on 3 October 2011 pointing out that the Applicant had no copy of the Trust Deed, therefore they could not advise him regarding the need for the Protector`s consent, but they repeated the request because "out client`s entitlement to obtain basic information in relation to the affairs of the Trust under the general law, cannot be stymied or depend upon the wishes of the Protector".

4. The Protector then consulted London lawyers, Macfarlanes, who wrote to Herbert Smith on 20 October 2011 saying that after careful consideration and after taking legal advice, the Protector "was minded to consent" to the release of a copy of the Trust Deed, on certain conditions including a confidentiality undertaking, but that "For the avoidance of doubt, our client does not consent to the release.....of any of the other documentation requested." Herbert Smith, for the Trustees, forwarded the letter to CDP without any relevant comment.

5. CDP replied on 3 November 2011 and Herbert Smith sent a copy to Macfarlanes, who replied to them on 21 November 2011 stating *inter alia* "CDP and their client are therefore well aware why our client`s consent is required". Herbert Smith did not forward that letter to CDP but instead wrote in some detail on 22 November 2011. Their letter included "We repeat that the trustee is not permitted to release any information without having obtained the Protector`s consent. We would, however, have no objections to you corresponding directly with Macfarlane`s with regard to the Protector`s consent. We should add that if and when that consent is forthcoming [the Trustee] must of course consider for itself whether it is appropriate to accede to your client`s request for information, and whether to impose any terms in this regard."

6. CDP issued these proceedings on 28 December 2011.

7. Subsequently, on 29 October 2012 Appleby wrote to CDP an open letter saying that the Trustee wished to find a way of avoiding a contested hearing and that it had discussed with the Protector a proposal for limited disclosure which it regarded as "appropriate to offer at this stage". The Protector had not made final decision but the Trustee believed there was a reasonable chance that consent would be given. The disclosure included copies of the Trust accounts for 2010 and for 2011 when they were finalised. The letter proposed a without prejudice meeting.

8. Whether or not that meeting took place, no disclosure was made and the hearing before the Chief Justice began on 18 February 2013.

9. It appears, therefore, that the Trustees forwarded the Applicant`s request to the Protector and that they were advised that they could not release any documents without the Protector`s consent, which was refused. It is not clear whether the Trustees formed their own view as to whether the request should be granted, but Mr. Hargun submitted that their offer of "appropriate" disclosure after proceedings were brought indicates that that was their view and would have been their decision, had it not been "vetoed" (a word used in argument) by the Protector`s refusal of consent.

10. The proceedings have focussed on the validity or otherwise of the Protector`s refusal, rather than on the Trustees` decision. On the evidence, it is unclear whether they reached any decision, before proceedings were issued, as to whether the request should be granted, as distinct from seeking the Protector`s consent before making any decision of their own. It may be implied that they were minded to make some disclosure and sought the Protector`s consent to that course, but that does not seem likely from the contemporary correspondence.

11. In our view, clause 9.2 does not go so far as to release the Trustees from their duty to make their own decision, nor does it entitle them simply to pass on the request so that the Protector can decide. The clause reads “no person or persons shall be provided with” Trust accounts or information “except to the extent that the Trustees ……in their discretion otherwise determine”. The discretion is clearly, and understandably, given to the Trustees. The words in parenthesis “with the prior written consent of the Protector” can only mean, in our judgment, that the Trustees must obtain the Protector`s written consent before any release takes place; they do not have the effect of transferring the exercise of the Trustees` discretion to the Protector.

12. If that is correct, the Trustees are required to make their own decision, in the interests of the Trust and in accordance with the intentions of the Settlor as set out in the Trust Deed. If they are minded to release the information, they must seek the consent of the Protector before doing so. The question then arises, as it has done in the present case, on what grounds the Protector`s consent can properly be withheld, in a case where the Trustees are of the view that there should be a release.

13. It is not contended that the Protector`s refusal may be “capricious”, and it is recognised by the Appellant that it may not be “unlawful or irrational”. In our judgment, the Protector is bound by the same constraints as are the Trustees. The clause encompasses the release of information to beneficiaries as well as to strangers to the Trust. There is no indication that the Settlor intended that they should be deprived of information to which they are entitled as of right under the general law. Just as the Trustees were expected to exercise their discretion accordingly, so also in our judgment is the Protector in deciding whether to refuse consent to a proposed release. The Protector cannot lawfully refuse

consent in a case where the Settlor is taken to have approved the release, any more than the Protector can vary the terms of the Trust.

Signed

Evans, JA

Signed

Zacca, P

Signed

Ward, JA