Confidentiality and disclosure relating to International Trusts after International Trusts (Amendment) Law 2012

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Confidentiality and disclosure

- Under International Trusts Law 1992
- Amended Law 2012
- Fiduciaries Law 2012
Confidentiality and disclosure (cont.)

- Section 11 ITL “was largely inserted for psychological reasons, because it serves to remind settlors, trustees and beneficiaries that a trust relationship is a highly confidential one” (explanatory note)
- Section 11: "the trustee…shall not disclose to any person not legally entitled thereto any information or documents"
- "as a general proposition, trustees must keep the affairs of the trust confidential, as well as personal information relating to the beneficiaries, as part of the law relating to breach of confidence"
Confidentiality and disclosure (cont.)

- To whom is this duty owed and what happens if it is breached?
- Possibilities: the settlor or the beneficiaries
- Remedy for breach of duty?
Scope of the duty of confidence

a) the name of the settlor or any of the beneficiaries;
b) the trustee’s deliberations as to the manner in which a power or discretion was exercised or a duty conferred or imposed by law or by the terms of the international trust was performed;
c) the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason had been or might have been based;
d) the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty;
e) which relate to or form part of the accounts of the international trust.
Two exceptions

- Disclosure for the purpose of civil or criminal proceedings
- Disclosure to a beneficiary
Disclosure for purpose of civil or criminal proceedings

- Section 11(2) "a Court…. may by an order allow the disclosure of information or documents referred to in subsection (1)"
- Section 11(3) suggests that disclosure should only be given if the court is satisfied that it "is of paramount importance to the outcome of the case"
Disclosure to a beneficiary

Proviso to section 11(1) as follows:

"provided that where a request is submitted by a beneficiary for the disclosure of any document or information relating to or forming part of the accounts of the international trust, or in the case of a charitable trust, is submitted by a charity which is referred to by name in the instrument creating the trust as a beneficiary, the trustee shall be obliged to disclose the document or information requested".
What is the scope of the proviso to section 11(1)?

- "a beneficiary" (proviso)
- Section 11(1) - person who is "not legally entitled to disclosure"
- What do these terms mean?
- Relevance of English principles
- English law in 1992: the rights of a beneficiary to information were generally viewed in terms of property rights
- “the beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own" (O'Rourke v Darbishire)
- What about beneficiaries/objects of discretionary trusts who have no proprietary rights – only a mere spes or hope of benefitting?
Schmidt v Rosewood Trust [2003]

- The power to order disclosure derived from the court’s inherent supervisory jurisdiction to oversee the administration of trusts.
- This jurisdiction could be invoked by a discretionary beneficiary or object, as well as by someone with a proprietary right.
- An ability to obtain information is of such importance that it has been said to be part of the irreducible core – without which the court’s jurisdiction to supervise trustees is effectively ousted.
- The disclosure that is to be provided is a matter for the trustee to decide, weighing competing factors.
The Amended Law

Proviso to section 11(1) "the trustee shall have the power to disclose those accounts, documents or information to the beneficiary only if, in his opinion, such disclosure is necessary and secures the lawful interests of the trust. In deciding whether to make disclosure to the beneficiary, the trustee shall consider whether such disclosure is necessary and whether it is in the best interests of the trust be obliged to disclose the document or the information requested".

- Trustee now has a discretion
- Exercisable where considered necessary
- Refers to disclosure being given to a "beneficiary"
- "beneficiary" means "entitled to a beneficial interest in property subject to the trust" (section 2 of Amended Law)
Confidentiality and outsiders

- MOKAS concerned as to whether the confidentiality duty imposed by section 11 was consistent with disclosure obligations under anti-money laundering legislation
- Suggested that confidentiality imposed by section 11 is not absolute.
- *Tournier v National Provincial and Union Bank of England*
- A bank’s duty of confidence can be trumped in exceptional circumstances
- *S. 12(E). The Trustee should comply with and implement the relevant provisions of the Prevention and Suppression of Money Laundering Activities Law*
- Guernsey Court of Appeal has ruled that the *Tournier* principle extends to trustees: *Re B; B v T*
The Fiduciaries Law

- Law Regulating Companies Providing Administrative Services and Related Matters 2012
- Imposes an obligation to register the name of any trust, the name of the trustee, the date of establishment of the trust and the date it terminates
- None of this information falls within the five categories of information prescribed by section 11(1) of the basic law
- Therefore section 11 of the Amended Law not infringed
- Section 15 of the basic law
The Future

• Beneficial ownership registers
• Section 11(1)(a) seeks to prevent disclosure of names of the beneficiaries
• Shows how policy in this area has changed