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

Toby Graham

STEP Cyprus: 12 June 2015

Introduction

Attitudes have changed since 24 July 1992 when the International Trusts Law entered into force. Possibly one of the biggest changes is in the area of confidentiality and the linked area of disclosure. We start by looking at the position in relation to these matters under the International Trusts Law 1992, then consider the position reached under the Amended Law, and then the position following changes introduced by the so called Fiduciaries Law that entered into force on 5 September 2013.

The duty of confidence under the basic law

I refer to the International Trusts Law 1992 as the basic law, as this is how it is described in the Amended Law. The Explanatory Note to this basic Law stated that its section 11, dealing with disclosure, “was largely inserted for psychological reasons, because it serves to remind settlors, trustees and beneficiaries that a trust relationship is a highly confidential one”. The section itself provided that "the trustee...shall not disclose to any person not legally entitled thereto any information or documents". The word "shall" meant that it imposed an obligation on trustees not to disclose and thus the position roughly approximated to the position under English law¹. This begs the question to whom is this duty owed and what happens if it is breached? The basic law is silent on both. As to who the duty is owed, the only possibilities are the settlor or the beneficiaries. Any confidentiality attaching to a letter of wishes is thought to be owed to the settlor. But, on the other hand, he may have died and in any event (unless powers have been reserved) will have become no more than a matter of historical record and those with an economic interest in upholding confidentiality are the beneficiaries. This may be why the Guernsey Court of Appeal considered in a case that I come onto to consider shortly that the duty of confidence under Guernsey law at least was owed to the beneficiaries. The basic law did not specify the remedy available to the beneficiary (or possibly settlor) in the event that the duty is breached. The basic law did not go as far as Cayman or the Cook Islands which makes disclosure a criminal offence, something that has

¹ Underhill & Hayton, Law of Trusts & Trustees (18th edn) at 56.31: “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”. The authority cited in support is Hereema v Hereema 1985–86 JLR 293. See also 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”. See also CoCo v A.N. Clarke (Engineers) Ltd [1969] R.P.C. 41 Megarry J noted that: “The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of the trust”
attracted concern from OECD FATF and others. Presumably the remedy would injunctive relief to prevent breach of confidence.  

This general prohibition on disclosure is directed at five categories of information relating to an international trust specified in section 11(1) set out below. Information outside these five categories falls outside the general duty of confidence created by section 11. It is possible that general principles of confidence (outlined in footnote 1) might apply to other information (but this possibility seems remote given the width of the five categories). These five categories are as follows:

(a) which disclose the name of the settlor or any of the beneficiaries;

(b) which disclose 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) which disclose 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) which relate to 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:

Documents and information within (b) (c) and (d) are linked to the principle established by the English Court of Appeal decision in Re Londonderry’s Settlement which establishes that trustees reasons are generally not disclosable. Otherwise it would be difficult for trustees to do their job—the need to keep these confidential trumps the factors militating in favour of disclosure. This principle has been followed in most if not all other trust jurisdictions. The final category, in section

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2 First recognised in Prince Albert v Strange [1849] 1 H&T 1.
3 [1965] Ch 918.
4 In Hartigan Nominees Pty v Rydge (1992) 29 NSWLR 405, the New South Wales Court of Appeal refused to order disclosure of the letter of wishes. Mahoney, JA said—

“I would, for myself, see the matter of confidentiality as being of particular significance in discretionary trusts of the present kind. In deciding questions of disclosure, it is important in my opinion to have regard to the essential nature of such discretionary trust. Such a trust is not a mere commercial document in which the public may have an interest. It is a private transaction, a disposition by the settlor of his own property, ordinarily voluntarily, in the manner in which he is entitled to choose. Special cases apart, it is proper that his wishes and his privacy are respected. In a discretionary trust of this kind, the settlor has placed confidence in his trustee and has on that basis transferred property to him. It has, I think, been the purpose of the law to respect that trust. It depends upon confidence and confidentiality. The settlor seeks to have the trustee resolve, without unnecessary abrasion, the conflicting claims of persons in an area, the family, where disputes are apt to be bruising. In cases of this kind, if a settlor’s wishes cannot be dealt with in confidence, the purpose of the trust may be defeated.”

Sheller, JA said—

“That (the instigator of the trust) did not disclose his wishes in, or in a document attached to, the deed of settlement, but delivered a separate memorandum of wishes to the trustees, leads to the conclusion that it was his, and thus the settlor’s, intention that his wishes should remain confidential, and consequently that the contents of the memorandum were obtained by the trustees in circumstances of confidence,
11(1)(e), namely accounts of an international trust, might appear to conflict with the trustees fundamental duty to account to the beneficiaries. This is not the case, by reason of two exceptions to this general duty, which also applies to the other categories in section 11(1).

First exception: disclosure for the purpose of civil or criminal proceedings

The first of these exceptions is where the court orders disclosure under section 11(2). This simply says that it is open to parties to civil or criminal proceedings to approach the court for an order that disclosure be provided. When they do so, "a Court.... may by an order allow the disclosure of information or documents referred to in subsection (1)". However, 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". This suggests that disclosure given under this first exception will only be for the purpose of parties to civil or criminal proceedings, where disclosure is necessary for the purpose of their suit. Presumably such disclosure would be subject to the implied undertaking not to use it for a collateral purpose. This exception does not seem to extend to disclosure for the purpose of holding the trustee to account, which is the focus of this article.

The second exception: disclosure to a beneficiary

The second exception is found in the 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".

If the person seeking disclosure falls within the scope of the proviso, then the proviso states that the trustee shall give disclosure. The word "shall" suggests that the trustees have an obligation to disclose, irrespective of issues of confidentiality or the purpose for which disclosure is sought. The question becomes what is the scope of the proviso to section 11(1)? The proviso refers to someone who is a beneficiary. Linked to this is the general prohibition on disclosure in subsection (1), which refers to a person who is "not legally entitled to disclosure". What do these terms mean? The basic law does not provide an answer. The answer can probably be found by looking at English principles at the time the basic law was enacted. They are relevant as the courts of the Republic are required to apply "the common law and the doctrines of equity save in so far as other provision has been or shall be made by any Law [of Cyprus]" and English case law, whilst not strictly binding, is "of the highest persuasive authority". At that time, the rights of a beneficiary to information were generally viewed in terms of property rights. A beneficiary with a property interest had a right to disclosure, no matter how remote the interest or the reason for seeking disclosure. This was

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5 by section 29(1)(c) of the Courts of Justice Laws 1960-2010.
6 For example the Cypriot courts have followed English authorities on constructive and implied trusts: see Akis Gregoriou v Christina Stavrou Christophorou (1995) 1 CLR 248, and Pentaukas v Pentaukas (1991) CLR 547.
described as follows by the House of Lords in a leading authority in this subject; “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”.  Of course if the person seeking disclosure did not have a property right, then though, he was not entitled to anything. This was a particularly problem given the vogue for discretionary trusts. The objects of such a trust are said to have a mere spes or hope that is not a property right capable of assignment. This property rights analysis was firmly rejected by the Privy Council in Schmidt v Rosewood. 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. The key was to assess the beneficiaries' expectation. Disclosure might be refused if the expectation was remote. Beneficiaries with a stronger claim would need information, to police the trustees effectively. For this reason, 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. Once this threshold requirement is met, the disclosure that is to be provided is a matter for the trustee to decide, rather than something based on ownership of the trust documents. The Privy Council suggested that confidentiality was a factor that should be weighted in the scales in determining how the trustees should properly exercise this discretion.

The Privy Council’s decision was handed down on 27 March 2003. Because the second exemption to the basic law, described earlier, was linked to proprietary rights of beneficiaries, giving them an absolute right to disclosure which admitted no room for the trustee's discretion, the Cypriot law fell out of step with accepted norms established following the Schmidt decision. This was part of the reason for saying the basic law needed amendment.

The Amended Law

The main change was to the second exception. The proviso to section 11(1) now provides that "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".

This gives the trustees the power to disclose if it considers this to be necessary. Although the Privy Council in Schmidt did not articulate a test based on the trustees' perception of what is necessary, it is clear that the proviso is intended to work in a similar way to the test propounded in Schmidt v Rosewood Trist Ltd. A possible difficulty is that the proviso refers to disclosure being given to a beneficiary. This term is now defined in section 2 of the Amended Law as someone "entitled to a beneficial interest in property subject to the trust". This definition suggests the proviso is confined to those with property rights. This is reinforced by the fact that the Amended Law defines

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7 O'Rourke v Darbishire [1920] AC 581
8 Jones v Shipping Federation of British Colombia [1963] 37 DLR (2d) 273, where a term that purported to exclude the trustee’s duty in the context of a pension fund arrangement was held to be void and illegal as ousting the jurisdiction of the court. In AN v Barclays Private Bank & Trust (Cayman) Ltd [2007] WTLR 565, at 597, Smellie, CJ held 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.”
"objects", but they are not mentioned in the proviso to section 11(1). It seems very unlikely that the Cypriot parliament would have intended to perpetuate the pre-Schmidt distinction between those with property rights and those without, as that distinction was comprehensively swept away by the Schmidt decision. The more likely result is that the absolute duty to disclose to a narrow class of persons with proprietary interests has been replaced by a discretion exercisable by the trustee in favour of those with an interest under the trust, whether or not the interest qualifies as a property law right.

Confidentiality and outsiders

I want to pass onto the question of disclosure to outsiders. This might seem an anathema to settlors at least. This question arose during the public consultation stage on the proposed amendment to the basic law. The national anti-money laundering authority (MOKAS), which comprises representatives from the Attorney General’s Office, expressed concern as to whether the confidentiality duty imposed by section 11 was consistent with disclosure obligations arising under Cyprus’s anti-money laundering legislation. It was explained that the duty of confidentiality imposed by section 11 is largely reflective of the common law. It has long been established that the confidentiality obligations arising under the common law are not absolute. The leading authority on this is the Tournier v National Provincial and Union Bank of England. This suggested that a bank’s duty of confidence to its customer can be trumped in exceptional circumstances which allow the bank to disclose. However, MOKAS worried that this might be confined to a bank customer relationship which is obviously governed by contract. It might be said that the trustees’ relationship with beneficiaries is rather different. In any event, section 11 contains no exemption that might permit disclosure in the circumstances considered in Tournier. MOKAS were not satisfied so a new provision was included in the Amended Law which provides as follows:

S. 12(E). The Trustee should comply with and implement the relevant provisions of the Prevention and Suppression of Money Laundering Activities Law.

Since then, the Guernsey Court of Appeal has ruled that the Tournier principle extends to trustees. The case is known as Re B; B v T and arose because the trustee wished to give disclosure to the French revenue authority for the purpose of an investigation against the trustee into money laundering and assisting in evasion of French tax. A beneficiary objected contending that disclosure would place the trustees in breach of its obligation of confidence. The Guernsey Court of Appeal considered that there was a general duty of confidence. The judgment states—

“We accept that, in general terms, a trustee is under a duty to keep the affairs of the trust confidential. In many respects, this duty is akin to the duty of confidence owed by a bank in relation to the affairs of its customer. However, the duty of a trustee is not identical to that of a bank. In the first place, it does not arise as a matter of contract. Furthermore, there will be many cases where a trustee has to disclose information concerning the trust and/or its beneficiaries for the very purpose of administering the trust e.g. in order to open a bank account or obtain a loan. However, in relation

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9 [1924] 1 KB 461
10 It is respectfully submitted that this addition was superfluous
to the issue with which we are concerned in this case, we consider that the principles applicable in
the case of a bank are equally applicable to a trustee.”

The Guernsey court weighed up competing interests of the beneficiaries (in withholding disclosure)
and the trustees (in giving it). They came down on the side of the trustees. Their reasons were as
follows—

“on the facts of this case, the potential injustice to the [Trustee] here ‘trumps other considerations’
such that the balance falls firmly on the side of dismissing the appeal and granting the application by
the [the Trustee].”

And—

“In the last analysis, on the facts of this case and bearing in mind the jurisdictions involved, the result
of a decision to reject the judgment of the Royal Court would be to deny the Trustee and X (as its
representative) [X was a director of the trustee] the opportunity, which they wish to make use of, to
defend themselves against serious criminal allegations. To prevent them from availing themselves of
that opportunity might result in charges being preferred against them and convictions being
recorded in their absence. It is not for this Court to make any assessment of their chances of success
in persuading the French Judge of the falsity of the allegations made against them. But, granted X’s
wish to take the opportunity on her own behalf and that of the Trustee, it would be plainly wrong
for this Court to inhibit it. In weighing the principle of confidentiality to which the beneficiaries are
entitled and the principle that no court should connive at possible injustice, it is plain where the
balance lies. This appeal must be dismissed.”

This boiled down to saying the trustees should not be exposed to the risk of criminal charges in
connection with unpaid tax. This risk would (or might) have been avoided if it were able to disclose
what it had done.

This was an application by trustees for directions. There was no tradition in Cyprus of trustees
applying to court for directions in relation to disclosure or other matters; indeed there was a
question as to whether the court had jurisdiction to give directions to trustees. This has been
addressed by section 11A of the Amended Law which permits trustees to approach the district court
for directions in relation to questions of disclosure and any other matter concerning an international
trust.

The Fiduciaries Law

Once again events moved on faster than those responsible for the Amended Law might have
envisaged. On 5 September 2013 the Law Regulating Companies Providing Administrative Services
and Related Matters 2012 entered into force. The followed financial difficulties stemming largely

11 Ibid, at para 70.
13 S. 11A (1) A trustee may file an application to the court for directions concerning the manner in which the
trustee should act in connection with any matter concerning an international trust and the court may issue any
such order as it thinks fit, as foreseen in subsection (2)”. Section 11(2) provides that The court may make an
order concerning “the exercise of any power, discretion or duty of the trustee...”
from the country’s exposure to Greek banks, making it necessary to seek a bailout from the troika of international lenders. They insisted on changes designed to increase transparency. Consequently the Fiduciaries Law 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. As mentioned, information falling outside these five categories is not confidential. The information that the Fiduciaries Law requires to be recorded in the register therefore does not seem to infringe section 11 of the Amended Law. The same cannot be said for section 15 of the basic law which exempted international trusts from registration requirements. This was not changed by the Amended Law but was deleted by the Fiduciaries Law.

The future

On 31 October 2013 Rt Hon David Cameron committed the United Kingdom to the establishment of a central register of beneficial ownership. It remains to be seen whether this example will be followed by Overseas Territories and Crown Dependencies and more significantly whether it will be taken up and promoted by multi lateral agencies such as OECD and FATF. If so, then since section 11(1)(a) seeks to prevent trustees disclosing the names of the beneficiaries, then such a register would result in a breach of confidence. It would be necessary for the duty in section 11 to be relaxed, or the scope of the duty to be narrowed. It remains to be seen how this might develop.