Rights of Trust Beneficiaries To Information – What Trustees Need To Know

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Walkers works in exclusive association with Taylors in Bermuda, a full service commercial law firm providing advice on all aspects of Bermuda law.
"The accountability of the trustees... is fundamental to the very existence of the trust"

Hayton, D, 'The Irreducible Core Content of Trusteeship'
General Principles

- Trustees must administer trust according to its governing documents
- Trustees accountable to beneficiaries
- Beneficiaries must be informed

...but what does this mean for our disgruntled beneficiary seeking to get his hands on information?
Enraged Beneficiary

"What the [bleep] has the trustee been playing at?!!"

• Information gathering essential to obtaining advice on possible grounds for challenging trustee's decision
• What information will assist with forming a case?
Rights of Trust Beneficiaries to Information

• How might disclosure occur?
• Disclosure by trustees voluntarily
• Disclosure on demand
  – By trustee voluntarily upon disclosure request from a beneficiary
  – Pursuant to an order of the court following application for disclosure by a beneficiary
  – Pursuant to an order of the court following application by the trustee
Position in Cayman

*In the matter of the Ojjeh Trust [1992-93 CILR 348]*

*Lemos & Ors v Coutts and Company (Cayman) Limited & Ors [1992-93 CILR 460] (Court of Appeal)*

- Beneficiaries not entitled as of right to disclosure of information and documentation concerning the trust. They can ask to inspect and take copies of essential trust documents on the basis of their proprietary right over the trust documents. A special case must be made out in respect of disclosure of detailed information concerning underlying companies or other affairs of the trust.
Privy Council

"... no beneficiary... has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place."

Lord Walker of Gestingthorpe
Schmidt v Rosewood Trust Ltd [2003] 2AC, at para 67
The Confidential Information Disclosure Law, 2016

- "confidential information" includes information, arising in or brought into the Islands, concerning any property of a principal, to whom a duty of confidence is owed by the recipient of that information.
- "principal" means a person to whom a duty of confidence is owed.
- "property" means every present, contingent and future interest or claim, direct or indirect, legal or equitable, positive or negative, in any money, moneys worth, realty or personalty, movable or immovable, rights and securities thereover and all documents and things evidencing or relating thereto.
Practical Application

• Trust deed?
• Supplemental deeds?
• Trustee fees?
• Transactional documents?
• Legal advice?
• Other professional advice?
• Internal communications?
Practical Application (Cont'd)

• Letters of Wishes

• General rule:

"It seems to me axiomatic that a document brought into existence for the sole or predominant purpose of being used in furtherance of an inherently confidential process is itself properly to be regarded as confidential, to substantially the same extent and effect as the process which it is intended to serve."

Mr Justice Briggs
Breakspear v Ackland [2008] EWHA 220 (Ch), at para 58
Practical Application (Cont'd)

• Trustee's reasons for its decisions

• General rule:
  – Trustees not obliged to disclose the reasons for their decisions
  
  _BUT_

  – No prohibition on disclosure by trustees voluntarily on request
  – Can be overridden by the court
  – What information falls within the scope of the rule?
What About Information Control Clauses?

• Does the trust deed contain express provisions on disclosure?
• Is disclosure subject to consent? E.g. protector consent?
• Does the clause seek to oust the supervisory jurisdiction of court?
Possible Modes of Disclosure

- Access to hard copies but no provision of originals
- Confidentiality undertaking from beneficiary
- Restrictions on use
- Redaction
Disclosure in Litigation

• Overview
  – Rules in litigation against trustees distinct from disclosure under court's supervisory jurisdiction
  – Beneficiary bringing a spurious / unparticularised claim in the hope of gaining ammunition during discovery at risk of having claim struck out prior to discovery
Thank you!

• Questions? Or wine?
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