

## TRUSTEES DISCLOSURE – TWO RECENT DECISIONS FROM THE COMMON LAW JURISDICTIONS



The thorny issue of what a trustee must disclose at the request of any beneficiary is a topic which has received much judicial guidance over recent years. The key decision for trustees is still that of *Schmidt v Rosewood* [2003] UKPC 26 which imposes judicial supervision over disclosure decisions in proper cases. Two recent cases, *Breakspear v Ackland* [2008] EWCH 220 and *Wingate v Butterfield Trust* [2008] WTLR 357 give further guidance to Jersey trustees in this most difficult area.

In *Breakspear v Ackland* the key question was whether a letter of wishes should be disclosed. In *Wingate v Butterfield*, the question was whether the documents of a wholly owned subsidiary company to a discretionary trust should be disclosed.

BREAKSPEAR V ACKLAND [2008] EWCH 220 (CH); [2008] 2 ALL ER (COMM) 62

In this English case, beneficiaries of a discretionary family trust sought disclosure of a Letter of Wishes and of oral statements of the de facto settlor's wishes which he had sent or communicated to trustees. The test as stated in *Schmidt v Rosewood* was relied upon by Briggs J in re-affirming that there is now virtual unanimity amongst the common law jurisdictions that a request for disclosure of a letter of wishes (or 'wish letter' as Briggs J referred to it) calls for an exercise of discretion by the trustee, rather than any examination of proprietary rights which the beneficiary may have.

When considering whether to disclose the letter of wishes (which was by its very nature inherently confidential) Briggs J disagreed with the view that there was a judicial trend towards disclosure of these types of documents. The question of whether to disclose such a document is entirely within the discretion of the trustee and they should not, Briggs J stated, approach the question of this discretion with a predisposition one way or the other.

Importantly, Briggs J identified that a letter of wishes which was by its very nature 'confidential' could still be disclosed if it was felt appropriate either by the trustees or in a proper case, by a court. Once the trustee had decided upon constituting the trust any decision in regards to the letter of wishes (or any other trust document) was purely one for the trustees or the court. It was not therefore appropriate to attempt to fetter this discretion by including terms within the letter of wishes or seeking to impose any such terms subsequently.

The court in this case was not prepared to conclude that the trustee's decision to refuse disclosure was wrong. However, the trustees were seeking the court's sanction for a scheme of distribution, meaning that the letter of wishes needed to be disclosed for a full review of the scheme and in asking for approval trustees would necessarily surrender confidentiality in a full examination of their reasoning.

WINGATE V BUTTERFIELD TRUST (BERMUDA) LTD [2008] WTLR 357

The Trust was a discretionary trust holding shares in a property holding company. The Plaintiff sought disclosure of five categories of documents including some concerning the activities of the property holding company.



The Bermudan Court ordered the production of documents including those of the underlying company. The Court importantly, did not draw any distinction between trust accounts or financial records and documents relating to trust management and business operations.

#### COMMENT

There is no doubting that trustees face a Herculean struggle in the difficult area of whether to disclose certain documents to any particular beneficiary (whatever their status). *Schmidt v Rosewood* put the emphasis upon the trustee but the question for the trustee became – “would a court if considering the issue order me to disclose this document?” That is a difficult question for a trustee to answer. It is also not a question that any trustee is used to asking themselves, although they are well versed in exercising their own discretion.

The decision of Briggs J in *Breakspear* attempts to put the emphasis back upon the decision being one for the trustee to consider in the exercise of their discretion. Given that trustees are well practised in this exercise, one would hope that this emphasis allows them to balance the competing considerations to come to their own conclusion. As long as the discretion is not exercised unreasonably or irrationally, the court is unlikely to come to a different conclusion than the trustees in any given disclosure question.

A further important point from the decision in *Breakspear* is that a trustee may not hide behind labels of ‘confidentiality’ or ‘privacy’. This is a principle already enshrined in Jersey trust law (see *In re Internine and the Azali Trusts* 2006 JLR 195). Any such labels are likely to be given short shrift by a court later seized of the matter and should also be ignored by trustees. That is not to say that a confidential document should or should not be disclosed only that such labels do not serve to fetter the discretion of the trustees.

The Bermudan decision of *Wingate v Butterfield* trust is illuminating because it answers a question which (on a practical level) many trustees must have encountered. The Bermudan Court defined documents relating to an underlying subsidiary company of the trust as being ‘trust accounts’ or ‘financial records’ of the trust. As such, they should all form part of the disclosure to the beneficiaries. The decision again emphasises the importance of the trustees’ duty to ensure that any wholly owned subsidiary company is being managed effectively, echoing the Jersey Royal Court’s recent judgment of *Freeman v Ansbacher*.

Although both decisions are not Jersey judgments they provide further practical guidance to Jersey trustees in any difficult disclosure decisions which are unfortunately, inevitable.

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