

## Trustees' Duties of Disclosure

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- Introduction. Scope of the talk.
  - Be careful to avoid confusion between the duty of disclosure in this context and what used to be called “discovery” in litigation.
- The old problem and the old solution
  - The underlying conflict – non-intervention by the court in discretionary acts of trustees vs. the beneficiary’s right to have the trust properly administered.
  - Old law derives primarily from cases concerned with private family trusts.
  - Reasons for non-intervention (*Gisborne v Gisborne*)
    - Discretion was given to the trustees by the settlor
    - Acrimony and ill-feeling
    - Difficulty in finding trustees
  - Solution in terms of property rights.
    - *O’Rourke v Darbishire*. Lord Wrenbury’s formulation – “The right to discovery is a right to see someone else’s documents. The proprietary right is a right to access documents which are your own.”
    - In re Londonderry. What did not have to be disclosed—
      - (a) the agenda of the trustees’ meetings,

- (b) correspondence between trustees or appointors under the settlement,
  - (c) correspondence between the trustees and appointors and the beneficiaries
  - (d) minutes of meetings and other documents disclosing the deliberations of the trustees as to the manner in which they should exercise their discretionary powers.
- They were, however, obliged to disclose any written advice they had received as to the manner in which they were in law entitled to exercise their discretionary powers.
  - Why it is unsatisfactory.
    - What are “trust documents”?
 

“It was suggested that trust documents included everything in the trustees’ hands as such. That will cover practically everything that reaches the trustees in their official capacity, from advertisements for pink pills to blackmailing letters from people who think they have a grudge against the trustees. That does not solve our problem in the least.” (per Danckwerts LJ)
  - Criticism in Ford and Lee, Principles of the Law of Trusts (quoted in Hartigan Nominees Pty Ltd v Rydge)—
 

“The legal title and rights to possession are in the trustees: all the beneficiary has are equitable rights against the trustees ... The

equation of the right to inspect trust documents with the beneficiary's equitable proprietary rights gives rise to unnecessary and undesirable consequences. It results in the drawing of virtually incomprehensible distinctions between documents which are trust documents and those which are not ... and it may give trustees too great a degree of protection in the case of documents artificially classified as not being trust documents, and beneficiaries too great a right to inspect the activities of trustees in the case of documents which are, equally artificially, classified as trust documents."

- Schmidt
  - The principle: right of beneficiary to have trust duly administered and the court's supervisory role in relation thereto
  - A potential discretionary object has no property interest and would be entitled to nothing under *re Londonderry*
  - No longer a question of identifying whether a particular class of documents falls within the meaning of "trust documents"
  - Possibility of safeguards—consider limited disclosure to professional advisers; consider redacting certain parts of sensitive documents
  - Ask yourself this question: "If the trustees cannot be compelled to disclose the document in issue, would it make it possible for the trustees to commit a breach of trust that could not be detected?" If the answer is "yes," then non-

disclosure would be inconsistent with “the beneficiary principle” and with the court’s power to supervise and enforce trusts.

- How much difference does Schmidt make?
  - Are pension trusts different from private trusts? *Wilson v Law Debenture Trust*
  - “Of course I accept that a pension scheme is different from a private trust in that, in particular, the members of a pension scheme have purchased their interests, but the question is what is the nature of the interest which they have purchased. That, in my judgement, depends upon the application to the relevant trust instrument and, in particular, to the trust deed in the present case on its proper construction, of well-established principles of trust law. That in general the principles applicable to private trusts as a matter of trust law apply equally to pension schemes was held by Megarry V-C in *Cowan v Scargill*.”
  - Contrast: “It is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts and the rationale of which has no application to trusts of quite a different kind.” Per Lord Browne-Wilkinson in *Target Holdings v Redferns* (cited by Lord Walker in “Some Trust principles in the Pensions Context”).
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- Cases since Schmidt [2003] 2 A.C. 709—
  - *Foreman v Kingstone* [2005] WTLR 823

- Family conflict
- Settlor's wishes
- Neither argument held sufficient to override beneficiaries' right to information
- *Lady Bathurst v Kleinwort Benson (CI) Trustees Ltd* (Unreported) 14 September 2004
- *Charman v Charman* [2005] EWCA Civ 1606
  - Claim for ancillary relief on divorce
  - H had made fortune in insurance market: he said £59m, W said £126m. The difference was represented by assets held by a trust ("Dragon") in Bermuda (Jersey law applying). Second Jersey trust was sole trustee of Dragon.
  - Legitimate for trustees to consult with settlor to ascertain his wishes
  - Brief reference to the principles in *Schmidt* in judgement of Lloyd LJ
- *Al-Abood v Tayeb* [2005] EWCH 1687 (Ch)
  - Wide-ranging fishing expedition in an attempt to gather evidence of fraud.
- *Re the Internine Trust* (2004) 7 ITELR 308

- Application for disclosure at a time when it was unclear whether or not the applicants were in fact beneficiaries of the trust (which was the very issue in dispute in the main action)
- In ordinary cases the court will defer the decision whether or not to order discretion until the issue of whether a party is a beneficiary is decided, but there may be exceptional cases
- *Broere v Mourant & Co* [2004] WTLR 1417
  - Application for disclosure against another beneficiary. The issue was therefore a matter of the ordinary rules of disclosure of document in litigation rather than the rights of a beneficiary under *Schmidt*, but the Jersey Court of Appeal referred to *Schmidt* and relied on it to suggest that the court could impose “safeguards” such as redacting documents.
- *Crowe v Stevedoring Employees Retirement Fund* [2003] PLR 343
- Ombudsman’s decisions—
  - Blaney
    - Mr Blaney applied for early retirement on the grounds of incapacity. The relevant rule of the scheme provided that “No pension under this Rule shall be payable before the age of 50 unless the person’s retirement was, in the opinion of the Trustee, due to incapacity.” Mr Blaney’s application was refused, the only reason given being that “his condition was considered not to meet the requirements of the rules.” The Ombudsman said that this was not a

discretionary power at all, and for that reason he rejected the trustee's argument that he was precluded from requiring reasons to be given for the decision. For the purposes of the present discussion, however, the more interesting part of the decision is the following observation—

“In any event, whatever the strict position as a matter of trust law, it does not follow that I am not entitled to consider whether the Trustee's failure to give reasons for its decisions in the past constituted maladministration in so far as this failure did not meet the standards of good administrative practice in fact applied by and expected of pension scheme trustees.”

- Allen
- Mr Allen belonged to a scheme under which a member who took early retirement would receive a reduced pension, subject to a discretionary power of augmentation, which could be used by the trustees to grant an unreduced pension. There existed an informal practice that a member who had completed 40 years' pensionable service would receive an unreduced pension. Mr Allen had been employed for 42 or 43 years, but because the company had been sold, only 38 years, 9 months and 11 days qualified for the “40 year rule”. One of Mr Allen's complaints was that he had not been provided with copies of the minutes of the trustees' minutes at which the decision was taken not to grant him an unreduced pension. The Ombudsman said—

“As Opas advised Mr Allen, there is no legal duty on the Trustee to make copies of their minutes available to him. Thus Mr Allen cannot as a matter of law seek some order from the courts to obtain these minutes. It would

be wrong however to conclude that the absence of a breach of law means there is no act of maladministration. Maladministration is in some ways a wider concept than a breach of law and Respondents to complaints may sometimes find themselves judged to have acted with maladministration in circumstances where they would not be regarded as acting lawfully.

As a matter of good administrative practice Trustees should provide reasons for their decision to those with a legitimate interest in the matter and, subject to the need to preserve rights to privacy of individual members, should also make the minutes of their meeting available to scheme members. I can see no good reason for the Trustee not to have done so in this case and the failure of the Trustee to do this for Mr Allen was also maladministration. Not knowing the basis on which an adverse decision is taken is itself an injustice.”

- Manship
  - Mr Manship applied to take early retirement on the grounds of “permanent incapacity”. He claimed that the depressive illness from which he suffered made it likely that he would never again be able to do the work for which he was qualified. The Group Accounts Department in which he had worked was clearly a depressing place, because Mr Manship asked the trustees to take into account the fact that a colleague in the same department had also succumbed to illness as a result of the stress. The trustee obtained reports from two doctors, one of whom advised that a possible explanation for the lack of

improvement in Mr Manship's condition was his failure to the medication prescribed for him. However, in turning down Mr Manship's application, the trustee refused to provide reasons for the decision or to allow him access to the medical advice on which it was based. The Ombudsman, whose word-processor should by now have a macro for dealing with such complaints, said—

“As a matter of law, Mr Manship is not likely to have been successful had he sued the Trustee because this information was denied to him. But maladministration is a wider concept than lawfulness and, in the absence of exceptional reasons, it is, in my view, maladministration not to provide reasons for the decision and not to provide the member with a copy of the medical evidence on which that decision is based. I see no such exceptional reasons here. Not knowing the basis on which an adverse decision is taken is itself an injustice.” He awarded Mr Manship the sum of £250 as compensation for this injustice.

- What about PSA 1993 s 150(3)? – “No person shall be compelled for the purposes of any such investigation to give any evidence or produce any document which he could not be compelled to give or produce in civil proceedings before the court.”
  
- Data Protection Act
  
- Other statutory provisions
  - PSA 1993 s 113

- PA 1995 s 41
- Regulations
- The trend towards openness.