

**DISCLOSURE ROADSHOW**  
**TRUSTEES' POSITION PAPER**

The Letter of Wishes

1. *Schmidt* can be taken as confirming or establishing the principle that a beneficiary's prospects of obtaining disclosure from trustees depends not upon a proprietary right but upon the court's exercise of its discretionary supervisory powers. However, *Schmidt* barely touched on the interaction between this principle and the time-honoured rule that trustees will not be required to disclose the reasons for the exercise of their discretions. It was accepted (see para. 54) that considerations of confidentiality would be one of the important factors that the court would have to bear in mind when exercising its supervisory discretion. Reading between the lines, either the trustees' decision making process continues to enjoy total immunity from disclosure, or it enjoys an immunity that will only be overridden in exceptional circumstances.

2. *Rabaiotti* (which in many ways foreshadowed *Schmidt*) accepted that trustees would not be obliged to disclose the reasons for their decisions and went on (in para. 46) to conclude that in general "the protection given to the reasons will not be achieved unless the material upon which those reasons were based is also protected." This seems to suggest that the reasons themselves are absolutely immune from disclosure, whereas the material upon which the reasons are based enjoys a qualified immunity to be overridden only in exceptional circumstances (such as existed in that case).

3. In *Rabaiotti* at para. 45 it was observed that the trustees could not

simply slavishly follow a letter of wishes from the settlor but still had to exercise their own discretion. Save in exceptional cases, they would not be ordered to disclose the letter of wishes for the reason already stated, that disclosure of material like that would tend to disclose their decision making processes.

4. That approach is to be preferred to that of Kirby P in *Hartigan* (in the minority on this point) that a letter of wishes is generally disclosable on the basis that it in effect puts a gloss on the trust deed and is therefore to be considered an essential component or companion of it. Although *Schmidt* endorsed much of what Kirby P had to say on the principles governing disclosure to beneficiaries by trustees, it did not refer to this particular point, still less accept it.

5. It also appears unduly restrictive to take the view offered by Patrick Talbot in *Bathurst* that disclosure of the material upon which a discretion is exercised does not amount to disclosure of the reasoning adopted by the trustees. If the trustees can be compelled to disclose all of the material upon which they based their decision, they will in many cases have revealed the decision making process itself.

6. Apart from that, both in *Rabaiotti* and in *Schmidt* (at para 67) it was accepted that respect would generally need to be shown for communications between settlor and trustees that were clearly intended to be confidential. Even Kirby in *Hartigan* was prepared to accept that a letter of wishes might be kept undisclosed if it was clearly expressed to be confidential.

7. In short, there are no exceptional circumstances here such as would warrant disclosure of the letter of wishes.

8. Disclosure limited to OH's professional advisers would achieve nothing for him: what proper use could they make of the information divulged to them under confidence? Such limited disclosure could do nothing other than foment further trouble.

#### Trust Management Documents

9. The trustees are prepared to disclose trust accounts to OH and may be open to persuasion as to disclosure of the companies' accounts. Beyond that, they are not prepared to go.

10. In *Foreman v. Kingstone* the court was not prepared to order disclosure of material concerning the reasons for the exercise of the trustees' discretionary powers of management of the trust fund (which included shares in corporate entities. That approach has much to recommend it.

11. In any event, *Schmidt* indicates that disclosure will be confined to that which is in all the circumstances proportionate and appropriate. In the case of OH's request, it is relevant that he has no immediate interest in the fund nor any certain prospect of ever obtaining one. Furthermore, compliance with his request would place an undue burden on the trust income and be to the disadvantage of the life tenant without achieving any real benefit for OH.

12. The minutes of board meetings stand in a special position. Only the directors, the secretary and the auditors are entitled to see them (*Gore-Browne on Companies*, para. 11-24). If even the shareholders are not entitled to access to them, why should the beneficiaries be?

13. *Butt v. Kelson* requires particular attention. The trust fund had a majority holding in a company and the trustee defendants had appointed

themselves as directors. At first instance the life tenant had obtained an order for disclosure by the trustees of documents in their possession or power as directors. That order was overturned by the Court of Appeal. It was observed that the claimant had to “get out of his head the idea that he is entitled to call upon these directors to use their powers as directors as though they held those powers on trust” for him. In refusing to order any disclosure the Court of Appeal noted that the life tenant might call upon the trustees to use their voting powers to procure what he wanted, and that if they refused to comply he might seek an order requiring them to exercise their voting power as he wished, but that whether or not he would obtain that order would depend upon whether there were valid objections from other beneficiaries or from the directors from the point of view of the company. In effect this is an early indication of the line later taken in *Schmidt*: disclosure is not a matter of right but of the court’s discretion in the supervision of the trust.

14. So far as concerns the life tenant’s request (and in addition to the points above), considerations of commercial confidentiality require that disclosure be withheld (as it was accepted might be the case in *Schmidt* at para. 67). Furthermore, although there is no objection to the life tenant having accounts and minutes of general meetings, anything more than that both infringes the privacy of the companies’ management deliberations and looks like a fishing expedition designed to furnish her with further material upon which to base an attack upon the trustees’ management of the trust fund. Company and trust accounts and general meeting minutes are quite sufficient for the purpose of showing her how the trustees have discharged their stewardship.

15. Again, the trustees have considered whether they would be prepared to offer wider disclosure limited to the beneficiaries' professional advisers, but they have rejected that possibility. Any such disclosure, even to professionals, would infringe the privacy of the trustees' and the companies' decision making processes. Furthermore, it would achieve nothing for the beneficiaries if their advisers were (as they ought to be) bound not to share with them the fruits of the disclosure. That is not to say that limited professional disclosure will never be appropriate, but it is not appropriate here.

#### The Termination of Benefit Clause

16. If a clause forfeiting all beneficiaries' interests in the event of one of them mounting a challenge to the will or trust instrument can be valid and is not void for repugnance or as offending public policy, (as *Nathan v. Leonard* held it could be, provided that it was expressed with sufficient clarity and certainty), then it is difficult to see how a clause restricting the beneficiaries' rights to information and documentation can be faulted.

17. In particular, the clause does not prevent beneficiaries from obtaining core trust documents. It does not negate the core requirements for the existence of a trust. *Nathan v. Leonard* specifically rejected the notion that there was any public policy interest in fettering testamentary freedom. The same can be said of freedom to create inter vivo trusts: provided that the core requirements for a trust exist, there is no public policy interest in limiting the trustees' disclosure obligations.

18. It may perhaps be conceded that the clause would not work a forfeiture in the case of court ordered disclosure in the context of legitimate

proceedings brought bona fide to protect the beneficiary's interest. Thus in *Adams v. Adams* and in *Re Williams*, forfeiture clauses were construed so as to limit their operation to frivolous or vexatious or failed claims, on the basis that it would be repugnant to grant an interest and then deny the means of enforcing it. But that is not the position here.

#### Liaison with the Settlor

19. *Charman v. Charman* at para. 12 accepts that it is perfectly proper for trustees to liaise with the settlor and to consult his wishes and intentions. That is of course a very different thing from acting as a mere puppet for him. Moreover, it is in the distinct interests of the beneficiaries as a whole that the trustees should continue to co-operate with the settlor to obtain the benefit of his wisdom and experience and to enhance the prospect of further funds being injected into the settlement.

Andrew Cosedge  
3 Stone Buildings  
Lincoln's Inn

8<sup>th</sup> May, 2006

#### Cases Cited

Re Rabaiotti [2000] WTLR 953  
Hartigan Nominees Pty Ltd v. Rydge (1992) 29 NSWLR 405  
Bathurst v. Kleinwort Benson (Guernsey, 9.8.2004)  
Schmidt v. Rosewood [2003] UKPC 26; [2003] 2 AC 709  
Foreman v. Kingstone [2005] WTLR 823  
Butt v. Kelson [1952] 1 Ch 197  
Nathan v. Leonard [2002] EWHC 1701 (Ch); [2003] 1 WLR 827  
Adams v. Adams [1892] 1 Ch 369  
Re Williams [1912] 1 Ch 399  
Charman v. Charman [2005] EWCA Civ 1606