

DISCLOSURE ROADSHOW

LIFE TENANT'S POSITION PAPER

1. The Life Tenant (LT) seeks disclosure of all material connected with the current investment and development plans of two of the companies controlled by the trustees. The trustees resist, fearing LT will share this information with a commercial competitor. (LT is also concerned about the cost of providing information to OH and the settlor.)
2. Note distinction between beneficiaries with fixed interests and mere discretionary beneficiaries or objects of a power (such as OH). LT is the former and OH the latter.
3. Nonetheless, both types share two issues in common: The forfeiture clause, which OH will address on behalf of both, and the disclosure of documents relating to underlying companies, which LT will address on behalf of both.
4. LT submits that the law on disclosure insofar as she is concerned is not radically changed by **Schmidt v. Rosewood** and that Schmidt merely reinforces long-standing principles that support disclosure of the company documents sought.
5. Prior to Schmidt, the common view of the law on disclosure was that a beneficiary with a proprietary interest was entitled as of right to certain categories of information, but no more – generally, trust deeds, accounts and documents relating to changes in trustee.

6. LT submits that documents relating to underlying companies at least since **Butt v Kelson** do not fall within a strict category and may be equated to disclosable “trust documents” where the trustees hold a controlling interest.

7. The court in *Butt v. Kelson* held that a trustee who was also the majority shareholder in an underlying company could be ordered to disclose all documents relating to the company. The beneficiaries were to be treated as though they were the majority shareholder and it was recognised that they could therefore compel the directors to use their votes – even to the extent of amending the company’s articles. If the beneficiaries had different interests or could not agree, the court could exercise this power on their behalf and in its discretion.

8. This is very much in line with *Schmidt*, which extends the court’s discretion into matters previously taken as strict categories, both of types of beneficiary and types of information the trustees may be required to disclose.

9. Several cases in other jurisdictions both before and after *Schmidt* follow a similar approach:

- a. **Rabaiotti [2000 Jersey]** An English divorce court ordered disclosure by husband/beneficiary – who in turn sought disclosure from trustees. He sought any letters of wishes, among other things. The Jersey court found that disclosure of letters of wishes was a matter of discretion and ordered disclosure. Although acknowledging that letters of wishes are not normally subject to disclosure, the court in effect reinterpreted the traditional categories

of disclosable and non-disclosable information as mere presumptions that the court could override in its discretion based on the circumstances.

- b. **Foreman v. Kingstone [2003 New Zealand]** The court followed Schmidt in finding disclosure and its extent matters of the court's discretion – although declined to order disclosure of information revealing the basis for the trustees' reasoning in exercising their discretion.
- c. **Bathurst v. Kleinwort Benson [2004 Guernsey]** Discretionary beneficiaries sought (and obtained) disclosure of information including shareholder and board minutes of controlled companies.
- d. **Hartigan v. Rydge [1992 New south Wales]** Kirby J cites Ford & Lee *Principles of the Law of Trusts* [in turn cited with approval in Rabaiotti and Bathurst] that the traditional rule, which gave beneficiaries with proprietary rights an entitlement to certain categories of information

“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 “

- 10. These cases mostly discuss letters of wishes, which will be discussed directly by OH and the Trustee, rather than company documents, and much of the courts' deliberations is taken up with finding reasons *not* to disclose, but the courts' rationale is nonetheless based on the court's supervisory discretion (which is consistent with Schmidt). This

rationale reinforces the approach in *Butt v Kelson* and militates for disclosure of company docs sought by LT.

11. In sum, although the right to disclosure of certain categories is no longer automatic, neither are the grounds for withholding.
12. One lingering vestige of the categorical approach is with respect to trustees' exercise of their discretion. Most of the cases cited are reluctant to disturb the traditional rule protecting the trustees from disclosing the basis of their discretionary decisions.
13. This is relevant to LT inasmuch as the Trustee argues that company business plans and board minutes would disclose trustees' protected reasoning. We disagree.
14. First, it is not necessarily the case that such company documents would disclose the Trustee's reasoning – in *Bathurst*, the court acknowledged the traditional protection of information revealing the trustee's reasoning, but nonetheless ordered disclosure of company documents of exactly the sort sought by LT – board minutes, etc.
15. Second, even if some of the Trustee's deliberations would be revealed by company business plans and board minutes, it is no longer clear that the traditional protection will long survive. It has been called into question by recent commentary. In fact, in *Rabaiotti*, where the court considered the issue in connection with letters of wishes, the court

ordered disclosure notwithstanding that this might reveal the trustees' reasoning. Lewin on Trusts (2000) observed that Rabaiotti went beyond existing English authorities, but it is no longer clear that this will this remain true in light of Schmidt.

16. In general, there is no sound reason for company documents to be treated as different from other trust documents where the companies in question are controlled by the trustees. As the court in Bathurst, where the companies were wholly owned by the trustees, observed, "so, in real terms, each company was, in all probability, a creature of the trusts. I can properly infer that the trustees ran the boards, and controlled the affairs of the companies"
17. In such a situation it is appropriate to look through the companies and treat them to the extent possible as any other trust asset. If this were not the case, it would be too easy for trustees to hide behind a company structure – giving them "too great a degree of protection in the case of documents artificially classified as not being trust documents"
18. Applying relevant factors for court to LT's case, we submit that the circumstances here weigh in favour of disclosure to LT of the companies' business plans, board minutes, etc. These factors are –
 - *personal or commercial confidentiality* – The only issue of substance, discussed below

- nature of the interests held by the beneficiary – Weighs in favour of LT
- impact on the trustees, other beneficiaries and third parties – No significant adverse impact is seen, other than commercial sensitivity issue discussed below
- whether some or all of the documents can be withheld in full or redacted form – This may be appropriate
- safeguards that can be imposed on the use of the trust documentation – again, this may be appropriate – and
- whether disclosure would be likely to embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole – Again, no significant adverse impact is seen

19. LT submits that on balance these factors weigh in favour of significant disclosure.

20. Commercial sensitivity is the only factor possibly weighing against LT, but we submit that it is outweighed by others on the following grounds:

- LT is not a competitor (noted as relevant in *Butt v. Kelson*)
- LT has no incentive to damage the companies – in fact, quite the opposite
- If the Trustees can establish legitimate commercial concerns, a number of safeguards are possible to mitigate their effect:
 - Limit disclosure to advisers – although LT acknowledges Trustee’s misgivings about the effectiveness of this
 - Undertaking not to divulge to third parties

- Redaction

21. For all these reasons, LT feels that disclosure of the further information sought should be made in this case.

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