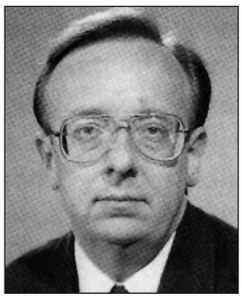
Confidentiality or disclosure?

Professor Mark Pawlowski asks whether a beneficiary is entitled to disclosure of the settlor's wishes under a family discretionary trust



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A wish letter provides the means by which a settlor may express their preferences to the trustees of a discretionary trust regarding the exercise of the latter's various discretionary powers relating to distribution, investment and administration of the trust. In the context of distribution, in particular, the settlor's non-binding wishes enable them to express freely their own desires, expectations and (even) prejudices about the beneficiaries in an informal document that does not form part of the trust deed and which, therefore, may be kept secret in order to avoid family disharmony and embarrassment.

This desire to maintain confidentiality, however, has the potential to conflict with the legitimate desires of the beneficiaries to have knowledge of the contents of a wish letter so as to enable them to have a better understanding of the terms of the family settlement and to assess their expectations of benefit in planning for their future. This inevitable tension between the respective advantages and disadvantages of confidentiality and disclosure in relation to wish letters formed the subject of the recent High Court ruling of Briggs J in *Breakspear v Ackland* [2008].

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No duty to give reasons

It is trite law that a beneficiary, as a matter of proprietary right, is entitled to see all the trust documents: *O'Rourke v Darbishire* [1920]. It is also well established, however, that trustees who exercise discretionary powers are not obliged to disclose why they have exercised their discretion in a particular way: *Re Beloved Wilke's Charity* [1851]. Indeed, they may refuse to allow a beneficiary to inspect documents, such as agendas and minutes of their meetings, which will reveal such information: *Re Londonderry's Settlement* [1965].

If, however, trustees volunteer reasons for their discretionary decisions, these may be the subject of judicial scrutiny if they do not justify the trustees' conclusions.

The rationale for protecting the trustees' deliberations on discretionary matters from disclosure is twofold. First, given their confidential role, trustees would find it impossible to exercise their discretion properly in the knowledge that their decisions may be open to investigation by the beneficiaries at any time. Secondly, it would not be in the best interests of the beneficiaries to make such enquiries, since such action could lead to embittered family feelings and damage the relationship between the trustees and members of the family. Moreover, in the absence of any confidentiality in such matters, individuals would be reluctant to act as trustees in family discretionary trusts. The principle of confidentiality, therefore, exists just as much for the benefit of beneficiaries as it does for the protection of the trustees. The rationale, however, has also been applied to the analogous situation of a trust of an employees' contributory pension scheme in the desire to minimise the potential for dispute and litigation between various groups of employees: *Wilson v Law Debenture Trust Corporation plc* [1995].

A different approach

The question of whether a wish letter falls within the scope of the confidentiality principle was considered in the Australian case of *Hartigan Nominees Property Ltd v Rydge* [1992]. The majority of the Court of Appeal of New South

Wales held that the settlor's letter should not be disclosed to the beneficiaries. According to Mahoney JA, although the claim to disclosure was based on a proprietary right vested in the beneficiaries, this could not prevail over the confidentiality that was inherent in a discretionary family trust. Sheller JA, on the other hand, preferred to base his decision on the more narrow ground that the settlor had (by implication) imposed on the trustees an obligation to keep his wishes confidential from the beneficiaries, by which the trustees were bound in the absence of any countervailing circumstances. In his view, wish letters did not fall within the *Londonderry* class of documents that would otherwise fall to be excluded from disclosure to the beneficiaries. According to Sheller JA, a wish letter was no different from the trust deed itself in so far as it did not, by itself (unlike the agenda and minutes of the trustees' meetings), reveal the trustees' motives and reasons for their decisions.

A similar conclusion was reached by Kirby P (in his dissent), when he concluded that a wish letter was simply a supplement to the trust deed and, hence, a 'trust document' to which the beneficiaries were entitled to have access. Such a letter was 'not created by the trustees' and provided no 'insight to the mind of the trustees' (as opposed to the settlor) when making their decisions. More generally, Kirby P felt that there should be a fundamental duty of trustees to be accountable to all beneficiaries. Moreover, that duty could not be overridden by the settlor's desire for confidentiality unless there were 'exceptional circumstances' that outweighed 'the right of the beneficiaries to be informed'.

Re Beloved Wilke's Charity
(1851) 3 Mac & G 440

Breakspear v Ackland
[2008] EWHC 220 (Ch) (To be published in the June issue of WTLR)

Foreman & ors v Kingston & ors
[2005] WTLR 823

Hartigan Nominees Property Ltd v Rydge
(1992) 29 NSWLR 405

Re Londonderry's Settlement
[1965] Ch 918

O'Rourke v Darbishire
[1920] AC 581

Re Rabaiotti's Settlement
[2000] WTLR 953

Schmidt v Rosewood Trust Ltd
[2003] WTLR 565

Wilson v Law Debenture Trust Corporation plc
[1995] 2 All ER 337

'greater level of accountability' by trustees in relation to the administration of a trust. This notion of greater trustee accountability has been endorsed in other Commonwealth jurisdictions, notably New Zealand. In *Foreman & ors v Kingston & ors* [2005] the High Court of New Zealand concluded that it was the discretionary jurisdiction to order disclosure in appropriate cases.

This conclusion was also reached in *Schmidt v Rosewood Trust Ltd* [2003], where the Privy Council held that the true basis of a beneficiary's claim to disclosure of material by trustees was not proprietary in nature but merely an aspect of the court's inherent jurisdiction to supervise and, if necessary, intervene in the administration of a trust. Thus, according to Lord Walker:

> ... no beneficiary (and least of all a discretionary object) 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 to different beneficiaries, trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place.

In the absence of any confidentiality in such matters, individuals would be reluctant to act as trustees in family discretionary trusts. The principle of confidentiality, therefore, exists just as much for the benefit of beneficiaries as it does for the protection of the trustees.

A discretionary jurisdiction

The accountability approach was considered by the Jersey Royal Court in *Re Rabaiotti's Settlement* [2000]. Interestingly, Kirby P's conclusion in *Hartigan* that a beneficiary should generally be entitled to know the reasons for the trustees' decisions was firmly rejected. In the words of the Deputy Bailiff:

> ... the fact that the views and reasoning of trustees on such sensitive matters could be made available to any disaffected beneficiary would, the Court believes, inhibit full and free discussion, and be likely to lead to ill-feeling and to fruitless litigation.

In relation to wish letters, in particular, the Jersey Royal Court concluded that these undoubtedly formed an integral part of the trustees' consideration of the exercise of their powers. As such, it was closely related to the decision-making process and to the reasons for the decisions, and was not merely a document which was ancillary to the trust deed. There was a 'strong presumption', therefore, that a letter of wishes did not have to be disclosed to a beneficiary against the wishes of the trustees unless there were good grounds for doing so. The upshot was that the court retained a

Disclosure, therefore, according to the Privy Council, was ultimately a discretionary function for the court and not a matter of proprietary right.

Ruling in *Breakspear*

Not surprisingly, Briggs J has endorsed the confidentiality principle enunciated in *Re Londonderry*. He held that it was in the interests of the beneficiaries and advantageous to the administration of family discretionary trusts that the exercise by trustees of their dispositive discretionary powers should be regarded as essentially a confidential process. Such confidentiality, however, was subject to the court's overriding discretionary jurisdiction to order disclosure whenever appropriate. In his words:

> 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.

The fact, therefore, that a wish letter formed a companion to the trust deed itself did not preclude it from having confidential status. The trust deed merely identified the trustees' powers and so, logically, no confidentiality attached to that document. A wish letter, on the other hand:

> ... operated... purely in furtherance of the trustees' confidential exercise of discretionary powers.

Such a letter, therefore, was immune from disclosure unless this was in the interests of the sound administration of the trust and the discharge of the trustees' powers and discretions. Moreover, since the settlor must be taken to have relinquished all their interest in the trust upon its constitution, the question of whether or not to relax or abandon confidentiality was a matter exclusively for the trustees themselves, or the court. Interestingly, Briggs J disagreed with the majority in *Hartigan* on this point and suggested that the express imposition of an obligation of confidence by the settlor was irrelevant to determining the issue of disclosure.

Practical guidance

Briggs J went to provide guidance to trustees when confronted with the question of disclosure at the request of a beneficiary under a family discretionary trust – this is set out in the box, right.

Decision

On the facts in *Breakspear* itself, Briggs J was mindful, in the exercise of his discretion, to order disclosure of the wish letter in favour of the beneficiary. In this connection, the trustees argued that disclosure would be divisive and lead to family discord. Against this, however, was the fact that the trustees had intended, in due course, to seek the court's approval for a future scheme of distribution of the trust assets. Inevitably, therefore, once the trustees applied for such approval, the contents of the settlor's wish letter would become relevant to the court's appraisal of the proposed scheme and, consequently, the risk of family discord occasioned by disclosure would be outweighed by the requirement to give the beneficiaries a proper opportunity to address the court on the merits of the scheme. The trustees would then necessarily have to surrender any form of confidence protection, assuming full disclosure and an examination of their reasoning prompted by seeking the court's approval.

A mere refusal to disclose a wish letter by the trustees, unaccompanied by any reasons or evidence of bad faith or unfairness, will not ordinarily attract court intervention. If the trustees do volunteer reasons, these will be the subject of scrutiny by the court.

Conclusion

It is apparent that the appropriate question (for both the trustees and the court) is one of discretion. As Briggs J was keen to emphasise, there are no fixed rules and trustees should not approach the question with any predisposition towards either disclosure or non-disclosure:

> All relevant circumstances must be taken into account, and in all cases other than those limited to strict review of the negative exercise of a discretion, both the trustees and the court have a range of alternative responses, not limited to the black and white question of disclosure or non-disclosure.

Such alternative responses may include the partial disclosure of relevant documents (subject to obtaining appropriate undertakings to the court) and limiting the use that may be made of such documents. He also alluded to the possibility of a private reading of a wish letter by the judge as part of the process of determining whether it should be disclosed. ■

A duty to disclose? The advice of Briggs J

- Trustees should regard a wish letter as being inherently confidential.
- Trustees have a discretion, regardless of any request for disclosure made by the beneficiaries, to maintain, relax or abandon confidentiality if they consider this best serves the interests of the beneficiaries and the due administration of the trust.
- Where a beneficiary makes a request for disclosure, the trustees will need to exercise their discretion giving such weight to the making of (and the reasons for) that request as they think fit.
- The trustees are not obliged to give reasons for their decision.
- In a difficult case, the trustees may seek the directions of the court on the question of whether to disclose, but must consider whether the difficulty of the question justifies the cost of any such application.
- If an application is made to the court, full disclosure of the wish letter must be made to the court. (The court will then consider whether, and to what extent, disclosure should be made to the beneficiary for the purpose of the hearing.)
- If a beneficiary seeks to invoke the court's jurisdiction, it will be necessary for them to show that an occasion has arisen that calls for the court's interference. (A mere refusal to disclose a wish letter by the trustees, unaccompanied by any reasons or evidence of bad faith or unfairness, will not ordinarily attract court intervention. If the trustees do volunteer reasons, these will be the subject of scrutiny by the court.)