

## **Secret trusts: must you keep a secret?**

James Brown and Mark Pawlowski consider whether a secret trustee is under an obligation not to disclose the terms of a secret trust

A fully secret trust is created where a testator (A) leaves property by will to B on the face of the will for his own benefit, but during the testator's lifetime he has informed B that the property is not, in fact, for him but for C, and B promises to carry out the testator's instructions. In these circumstances, equity will enforce the trust in order to prevent a notional fraud on the part of B (the secret trustee) in keeping the property for himself contrary to the wishes of the testator and the expectations of C, (the secret beneficiary): *McCormick v Grogan* (1869) LR 4 HL 82. The effect of such a trust is that the testator is able to bypass the formality requirements contained in the Wills Act 1837.

Now let us consider the following scenario. A is a wealthy married celebrity, who has had a long-term clandestine affair with C, leaves £100,000 in his will to B who agrees to hold the money on a fully secret trust for C after A's death. B decides, contrary to A's wishes, to reveal the terms of the trust and sell the details to a newspaper for a large sum of money. Does A have any remedy against B in these circumstances?

### **SECRET TRUSTEE'S EQUITABLE OBLIGATION**

The key requirements of a fully secret trust are: (1) communication of the testator's intention to the secret trustee; (2) the secret trustee's promise to carry out the testator's intention; and (3), on the faith of the promise, the testator either makes the disposition in favour of the secret trustee, or leaves an existing disposition unrevoked, or makes no disposition (i.e., allows the property to pass on an intestacy to the secret trustee). In most cases, as in our scenario, the secret trustee's obligation is to make some form of inter vivos transfer of the property to the secret beneficiary.

Significantly, it is not enough to communicate merely the fact of the trust to the secret trustee - the details of the trust must also be communicated and accepted by him during the testator's lifetime. If this is done, the secret trustee holds the property in question bound by an equitable obligation to comply with the terms of the trust.

### **BREACH OF CONFIDENCE**

As we have seen, the secret trustee is under an equitable obligation to comply with the terms of the trust including a duty to keep the testator's instructions confidential. This may be an

express term of the trust or implied by the very nature of the trust being a secret trust. If the trustee, therefore, discloses the trust, this will give rise to a breach of his obligation and a breach of confidence. Although the latter will usually arise in connection with the disclosure of information which has a commercial value, it can also include personal information about individuals. For the claim to be successful, however, it must be established that: (1) the information has the necessary degree of confidence about it; (2) the information was provided in circumstances importing an obligation of confidence; and (3) there was an unauthorised use or disclosure of that information: see, *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41. It should also be borne in mind that the duty that the confidence should be preserved may be outweighed by some other public interest factor which favours use or disclosure. Hence, the additional element that the court must balance the public interest in maintaining confidentiality against the public interest favouring use or disclosure see, *A-G v Observer Ltd* [1990] 1 AC 109.

Clearly, if B (in our scenario) had merely threatened, in breach of confidence, to reveal the terms of the trust, this would have triggered equity's intervention in the form of an injunction and (possibly) the appointment of a new trustee in place of B.

## **MISUSE OF CONFIDENTIAL INFORMATION**

The tort of misuse of private information is focused on "the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life": see, *Campbell v MGN Ltd* [2004] UKHL 22. A two-stage test is used to consider whether there is a valid claim for misuse of private information: see, *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.

- The threshold test means that the claimant must have a reasonable expectation to privacy in relation to the confidential information. The word "misuse" means simply the wrongful disclosure, or threatened disclosure, of personal information to the world at large. However, a misuse claim may be brought in respect of information disseminated less widely if that would unjustifiably interfere with the claimant's right to respect for privacy.
- There is also a balancing test where the right to a private life needs to be considered against others' rights, such as being in the public interest and the right to freedom of expression under Article 10 of the European Convention on Human Rights. Here again, the court needs to determine the correct balance in each case in relation to the right to a private and family life with the right to freedom of expression based on the circumstances of each case.

Undoubtedly, the testator, in our scenario, may have a successful claim against the secret trustee for disclosure of information relating to the secret trust which, in the circumstances, there was an reasonable expectation to privacy. However, the balancing exercise which the court is required to undertake may prove more problematic given that the revelation of the testator's affair with C may be in the public interest giving rise to the defence of freedom of expression.

## ESTABLISHING LOSS

### *The nature of the exercise*

In *Reid v Price* [2020] EWHC 594 (QB), Warby J suggested that the exercise of quantifying equitable compensation for breach of confidence was essentially the same for claims in tort involving misuse of confidential information. His Lordship also considered that the nature of the information disclosed and the degree of loss of control should bear on the court's assessment of damages - the more intimate the information and the more extensive the disclosure, the greater the award. In the earlier case of *Gulati v MGN Ltd* [2015] EWCA 1291, Mann J concluded that information about matters internal to a relationship would be treated as private, and disclosures which disrupted a relationship were likely to be treated as a serious infringement deserving substantial compensation. It seems, therefore, that the appropriate compensation will depend on the nature of the information, its significance as private information, and the effect on the victim of disclosure. It should be noted, however, that, unlike in claims for defamation, it is no defence to a claim for misuse of private information that the information in question is true. Moreover, whilst both breach of confidence in equity and the tortious action for misuse of private information may be pleaded in the alternative, the claimant will not be entitled to recover damages for the same loss twice.

### *The nature of the loss*

General damages for misuse of private information can be awarded for injury to feelings, loss of the right to control one's own information and damage to reputation. In our scenario, the testator will be able to claim under these heads given that disclosure will reveal his affair with C. In addition, given that B has used the confidential information in order to obtain a monetary gain, the court would, no doubt, order B to disgorge the money received by means of an account of profits.

In the normal case, however, where the secret trustee has not divulged the testator's instructions for monetary reward, it is difficult to see what loss the testator will have suffered (other than potentially injury to feelings and reputation). The only other conceivable basis for recovery would be the value of a notional reasonable agreement between the parties to buy a release from the testator's rights of confidentiality under the secret trust: see, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798. However, in *Marathon Asset Management LLP v Seddon* [2017] EWHC 300, the High Court rejected a claim for *Wrotham Park* damages where, although the defendants had breached their contractual and common law duties of confidence by taking the claimant's confidential documents, they had not actually used those documents and/or the confidential information contained therein. Accordingly, the misuse of the confidential information did not cause the claimant to suffer any loss, or conversely, result in the defendants making any financial gain. The court concluded that there was no reasonable party who would have negotiated a "licence fee" to permit the defendants to do what they had done. Similarly, it is doubtful whether a court would be minded to apply *Wrotham Park* damages to a straightforward case involving the

disclosure of a testator's instructions regarding a secret trust where there was no loss to the testator or gain to the secret trustee.

## **THE SECRET BENEFICIARY**

So far as the secret beneficiary is concerned, it is doubtful whether the secret trustee's disclosure extends to any actionable loss suffered by C in our scenario. If the testator changes his mind and revokes the trust as a result of the disclosure of the trust, the secret beneficiary, it is submitted, suffers no loss because his/her interest under the trust does not arise until after the trust is constituted (i.e., on the testator's death). Until then, the testator is free to revoke the trust and the secret beneficiary has no expectation of actual inheritance. (The controversial decision in *Re Gardner (No 2)* [1923] 2 Ch 230 to the contrary is generally considered to be wrongly decided).

## **POINTS FOR THE PRACTITIONER**

1. A secret trustee is under an equitable obligation to the testator to comply with the terms of the secret trust including a duty to keep the testator's instructions confidential. This may be an express term of the trust or implied by the very nature of the trust being a secret trust. If the trustee, therefore, discloses the trust, this will give rise to a breach of his obligation and a breach of confidence.
2. The testator may also have an actionable claim against the secret trustee for disclosure of confidential information relating to the secret trust which, in the circumstances, there was an reasonable expectation to privacy.
3. General damages for breach of confidence and misuse of private information can be awarded for injury to feelings, loss of the right to control one's own information and damage to reputation. In addition, if the secret trustee has used the confidential information in order to obtain a monetary gain, he will be obliged to disgorge the money received by means of an account of profits.
4. It is doubtful whether the secret trustee's disclosure extends to any actionable loss suffered by a secret beneficiary given that his/her interest under the trust does not arise until after the trust is constituted (i.e., on the testator's death).

*James Brown is a barrister and reader in law, School of Law, Aston University.*

*Mark Pawlowski is a barrister and professor emeritus of property law, School of Law, University of Greenwich.*