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**Trust Quarterly Review**

**More about Schmidt**

The latest developments in disclosure to beneficiaries

## Abstract

- The principles governing applications for disclosure of trust information when made by beneficiaries against their trustees were examined by the Privy Council a decade ago in the Manx case of *Schmidt v Rosewood Trust*.[1](#)
- This article examines recent cases where these principles have been applied in novel situations and where the basis of the court's role when hearing applications relating to disclosure has been in issue.
- The decisions discussed in detail are:
  - *Re HHH Trust, B v C*,[2](#) a Jersey case where a beneficiary's application for disclosure from the settlor (who was in a position equivalent to that of a protector) was refused;
  - the Bermudan case reported as *Re an application for information about a trust*,[3](#) where a beneficiary's application was granted in the face of a protector's refusal to consent to disclosure being given by the trustee; and
  - *Re Y Trust*,[4](#) a Jersey case where the role of the court when considering applications for disclosure was considered, as it had been in *Re... a trust*. Consideration is also given to the different conceptions of the role of a protector, by reference to HHH and the Isle of Man case of *IFG International v French*.[5](#)

## Disclosure from a protector/settlor

*Re HHH Trust, B v C* concerned a Jersey law employee benefit trust.[6](#) The employer, JP Morgan, and its employee, Mr Des Pallières ('Mr D'), a senior banker, had made large contributions to the trust. It turned out that distributions from the trust to the employee and his family would incur substantial UK tax charges and, consequently, Mr D was unhappy with the position in which he found himself.

Mr D applied for *Schmidt* disclosure from the employer in its capacity as settlor and a holder of reserved powers. The wide scope of the request was justified on the basis that the employer was argued to be under a duty to shadow the trustee's every move and to keep fully abreast of the affairs of the trust.

The employer had reserved powers to appoint a protector and to appoint trustees. It was common ground that these were fiduciary powers.[7](#) The employer had also reserved a power to amend the trust instrument and the court found that this power was not fiduciary but was subject to the Imperial duty of good faith.[8](#)

The court determined that the employer was, like a protector, not within the definition of 'trustee' in the Jersey trusts law, as it did not hold trust assets, so article 29 of that statute dealing with disclosure by trustees had no application.[9](#) It was, however, a 'person having a connection with the trust' under

article 51(2) of the same statute, over whom the court had jurisdiction.[10](#)

The court also found that there was no distinction between a settlor and a protector as a holder of a fiduciary power, and that an application for disclosure against such a protector was governed by the principles derived from *Schmidt*.[11](#)

In applying those principles, the court found, importantly, that the employer did not have the wide active duty of supervision Mr D contended for and instead that a power holder's duty is the corollary of the powers held.[12](#) Hence, holding the particular fiduciary powers it did, the employer had no general or active duty of surveillance and, as a consequence, had no reason to have many of the categories of document sought from it.

The court refused the application on the basis that much of the material sought could have been obtained from the trustee and that seeking the same from the settlor, apparently to check what material it itself had rather than to obtain the information itself, was 'oppressive and wasteful of costs'. It was also held that the only relevant information which the beneficiary sought in connection with the exercise of the settlor's power to remove the trustee had already been disclosed.

Furthermore, the balance of the disclosure sought did not relate to the exercise of the settlor's fiduciary powers or indeed in some instances to the affairs of the trust at all. The court was concerned that documents were being sought that would amount to pre-action disclosure in a prospective non-trust claim against the settlor.[13](#)

The principles applied in *HHH* and the application of them to the facts seems hard to fault. It should be remembered, however, that, had *Schmidt* disclosure been sought in respect of an arguable prospective claim that the settlor's exercise of its powers had been invalid or involved a breach of fiduciary duty, the result may well have been different.[14](#)

## **How wide is the scope of a protector's duty?**

The scope of a protector's duty was discussed in *HHH* and also, in a different context, in the recent *Manx* decision in *IFG International v French*.[15](#) There the trustees of Isle of Man trusts sought directions in response to a former protector's demand that he be indemnified out of the trust fund. The indemnity was sought in respect of costs of proceedings brought against him and others in New York, and the protector relied upon express rights to indemnity found in the trust instruments.

While the court agreed with the trustees that they should wait and see what findings were made in the New York claim (which involved allegations of fraud) before providing any indemnity, it rejected an argument that the conduct in respect of which the protector sought to be indemnified was in any event outside the scope of his duties.[16](#)

It was held that a protector's role may extend beyond exercise of powers 'and will or may encompass a general supervisory or advisory role', and that, in principle, he was entitled under the terms of the

trust instruments to an indemnity on that basis.<sup>17</sup> If this is right, it would no doubt have an impact on the scope of the disclosure that might be ordered against a protector.

However, unless, very unusually, the trust instrument so provides or it is a necessary corollary of very wide fiduciary powers given to a protector, this would not seem to be correct as a general statement of a protector's position, and the view expressed in HHH on the point, noted above, is to be preferred.<sup>18</sup>

In IFG, the protector's powers were apparently limited to the removal and appointment of trustees, while his role in practice was a considerably more active one.<sup>19</sup> This illustrates the need for careful consideration by settlor and trust draftsman of both the powers to be given to a protector and the role that it is envisaged the protector will play in the affairs of the trust.

## **Disclosure where protector controls beneficiary's access to information**

In *Re... a trust*,<sup>20</sup> the applicant was contingently entitled to 35 per cent of the assets of a very large family settlement. The protector of the settlement was given wide powers, including a power to consent to the disclosure of information to beneficiaries by the trustee, and hence to refuse that consent. The principle beneficiary had been appointed as successor to the original protector and was refusing to consent to any disclosure.

There was 'open warfare' between the applicant and the protector. An application for disclosure was therefore made by that beneficiary to the court.

It was clear the draftsman of the settlement had gone to some pains to prevent beneficiaries obtaining disclosure without the protector's consent. The trust instrument declared that making any disclosure at all was a matter of discretion for the trustees (rather than of any right of the beneficiaries) but could be given only if the protector consented. The protector's powers were explicitly non-fiduciary and the protector was relieved of all liability to the beneficiaries in the absence of fraud.

As the court found, the application raised 'the apparently novel question of the impact of an information control clause or mechanism on this court's supervisory jurisdiction over a Bermudian trust.'<sup>21</sup>

Unsurprisingly, it was argued the information control provisions were invalid, as amounting to an attempt to oust the court's jurisdiction over the trust or as undermining the 'irreducible core' of the trustee's obligations.<sup>22</sup>

The court was not attracted to these arguments. As far as the non-fiduciary character of the protector's powers was concerned, the court found that the protector was 'implicitly required to have regard to the interests of the beneficiaries in their exercise'.<sup>23</sup> But, in any event, it found that the

trust instrument did not purport to exclude ‘the court’s supervisory jurisdiction over the trust generally or in respect of the specific matter of the ability of beneficiaries to enforce the due administration of the trust through obtaining appropriate financial information about the trust’. One might think that, if this was so, it was not for want of trying.

The court then heard argument as to the role of the court when considering ordering disclosure under Schmidt (discussed below).

It held that it should exercise its own discretion but was bound to take into account the terms of the trust instrument summarised above and so would only exercise its discretion where it was necessary ‘to guarantee minimum standards of trustee accountability’. It is questionable whether the Schmidt jurisdiction is ever in fact any wider than this and what impact, if any, the information control provisions of the trust instrument had on the result.

On the facts, the court gave a number of reasons for finding that disclosure should be given. There was ‘potential conflict’ between the protector’s role as such and their position as a beneficiary. This was a situation expressly contemplated by the trust and, seeing that the protector’s powers were not fiduciary, it is hard to see why this ‘potential conflict’ was relevant.[24](#)

The court also noted that the applicant might be prejudiced by distributions to the protector and that there was ‘open warfare’ between the two beneficiaries. It was critical of the protector’s conduct in refusing all requests for disclosure and in connection with the proceedings (in which they had filed no evidence themselves).

None of these matters would seem to add much to the essential issue, namely that the applicant was being refused all access to all trust information in circumstances where they had an obviously good claim to be informed. Whether in a less clear case similar information control provisions would be likely to lead a court to refuse disclosure that it might otherwise have been minded to order remains to be seen.

## **Role of the court hearing an application regarding disclosure**

One matter arguably left unclear by the Privy Council in Schmidt, or made so by some passages found in *Brakespear v Ackland*,[25](#) is whether the court should decide itself what disclosure should be made or whether (or when or to what extent) its role is limited to reviewing any previous or intended decision of the trustee.[26](#)

In *Re... a trust*, paragraphs 23–20 of Lewin, as published in the 18th edition, were cited to the court in support of the view that the court should exercise its own discretion, while the protector argued that the personal nature of the power to consent meant that the court was able to interfere only if it found there had been a fraud on the power.[27](#) The court held that, while the correct analysis was that it was exercising its own discretion and not merely reviewing the exercise of the protector’s power, it could not ignore relevant terms of the trust deed.

In *Re Y Trust*,<sup>28</sup> the trustee of a Jersey trust sought a 'blessing' of its decision to refuse to give disclosure to Mrs B, who for a time had been a beneficiary of the trust. In the event, this application was not opposed. The context of the request to the trustee for disclosure was threatened litigation against the settlor of the trust by Mr and Mrs B, to which the trustee had been warned it might be joined as a party.

The court agreed that disclosure ought not to be given, as it was 'clear that this information was being sought by Mrs B with a view to proceedings which might involve an attack upon the assets of the trust and it was not in the interests of the beneficiaries as a whole that such a process be facilitated'.<sup>29</sup>

The court held that this result would have been the same whether it was blessing a momentous decision taken by the trustee or exercising its own discretion as to what the trustee should disclose. The trustee had brought to the court's attention an apparent tension between the view derived from *Schmidt* that the task of the court was to decide for itself what disclosure ought to be given and a proposition said to be derived from *Brakespear v Ackland* and the current revised text of paragraphs 23-20 of *Lewin* that, at least on a trustee's application such as that before it, the court was limited to reviewing the exercise of the trustee's own decision.<sup>30</sup> The trustee argued that the court's function was limited to review, at least if that was the basis on which the trustee came to court.

The Jersey court reviewed the authorities,<sup>31</sup> and, while noting that it had not heard full argument, and although it was not adopting the submissions of the trustee on the point, issued what seems in effect to be a practice direction that, for the time being at least, the Jersey court would approach all applications relating to trust disclosure on the basis that its own primary *Schmidt* jurisdiction was invoked. It was held that, consequently, a decision of the trustee would not impede the court from reaching its own decision on the facts before it.<sup>32</sup>

Where, as in *Re... a trust*, a beneficiary does come before the court seeking *Schmidt* disclosure, the approach taken by the court in that Bermudan decision would seem to be clearly correct. The court must decide itself whether and what disclosure should be given.

Decisions made by trustees or protectors in relation to the issue, just as much as the terms of the trust instrument itself, are matters to be taken into consideration, but it is the court's own discretion that is to be exercised by virtue of its supervisory jurisdiction over the trust. In this respect, the position of a beneficiary is different than if challenging the exercise of other powers. A careful reading of the revised text of *Lewin* on this point does not seem to suggest the contrary.

It also seems clear that, when a beneficiary applies to a trustee for disclosure, the trustee will ordinarily make its own decision on whether to make that disclosure and will invariably exercise a discretion in so doing. How that discretion is to be exercised may be limited or otherwise constrained by the terms of the trust deed or applicable local statute.<sup>33</sup>

Unless that decision is challenged by application to the court under *Schmidt*, it will be the only decision. If that decision is challenged, one result may be that the court determines that, on the facts, the decision of the trustee should stand (as would normally be the result in the case of a decision not

to disclose a letter of wishes) and, in that sense, the court would have decided not to interfere with the exercise of the power holder's discretion.<sup>34</sup>

It seems less clear that a trustee or other power holder can approach the court for directions as to disclosure on a *Public Trustee v Cooper* basis, seeking the 'blessing' of a decision, without the application being converted into one determined by the exercise of the court's own jurisdiction under *Schmidt*, i.e. the equivalent of the surrender of discretion to the court.

Arguably, on such an application, as well as directing the trustee either to give or to refuse disclosure by reference to *Schmidt*, the court also has the option of 'blessing' a decision that it recognises falls squarely within the proper exercise of the trustee's own discretion.

## Conclusions

HHH has established that, when disclosure is sought by beneficiaries from protectors and other holders of fiduciary powers, rather than from trustees, the court will apply *Schmidt* principles, although not necessarily with the same result. How an application for disclosure against the holder of a personal power would be determined is still to be seen.

HHH and IFG show there is still an argument to be had on whether or when a trust instrument indicates a protector should be an active participant in the day-to-day affairs of a trust, with duties and rights to match. These cases also emphasise the need for settlors and their advisors to consider not just the powers a protector is to hold but also the practical scope of the protector's intended role in the administration of the trust.

From *Re... a trust* it is clear that attempts to subject beneficiaries' rights to information to control mechanisms in the trust deed are likely to be of limited effectiveness, although less likely to compromise the overall validity of the trust than many had thought.

Can a trustee or other power holder seek directions relating to disclosure without, in effect, surrendering discretion to the court? If *Re Y Trust* and *Re... a trust* are correct, the answer is apparently 'no', but at least in England and Wales the point cannot be regarded as settled.

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- ❖ <sup>1</sup> [2003] 2 AC 709 (*Isle of Man*), referred to below as '*Schmidt*'
  - ❖ <sup>2</sup> 16 ITEL 1, [2012] JRC 127B (*Jersey*), referred to below as '*HHH*'
  - ❖ <sup>3</sup> 16 ITEL 85, [2013] SC (Bda) 16 Civ (*Bermuda*), referred to below as '*Re... a trust*'
  - ❖ <sup>4</sup> [2014] JRC 027 (*Jersey*)
  - ❖ <sup>5</sup> [2013] WTLR 251 (*Isle of Man*), referred to below as '*IFG*'
  - ❖ <sup>6</sup> The parties' names were revealed, following an appeal on costs, to be *Des Pallières v JP Morgan Chase & Co*. The costs appeal is reported under that name at [2013] JCA 146 (*Jersey*) and is the leading authority on a protector's right to an indemnity from the assets of the trust, approving *Re HHH Trust, Costs* [2013] JRC 023 (*Jersey*)

- [7](#) Ultimately following *Re Skeats' Settlement* (1889) 42 Ch 522, as to which, doubting the conventional view, see *M Hubbard, Protectors of Trusts* (OUP, 2013), 6.06-6.15
- [8](#) This exists only as between employer and employee, *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589; *Prudential Staff Pensions Ltd v Prudential Assurance Co Ltd* [2011] Pens LR 239
- [9](#) *Trusts (Jersey) Law 1984 (as amended)*, article 29
- [10](#) HHH [30]
- [11](#) HHH [33]-[36]
- [12](#) HHH [40]
- [13](#) *Re A Settlement* [2010] JCA 231
- [14](#) See *J Mowbray et al, Lewin on Trusts*, 18th ed, online supplement (*Thompson Sweet & Maxwell*), 23-20A
- [15](#) Decided in December 2012, six months after HHH, which was not cited
- [16](#) IFG [42]-[43], [73]
- [17](#) IFG [63], [73]
- [18](#) See *Re X's Settlement* (1994) 1 BOC 600 (Jersey) and *Re A Trust* [2012] JRC 169A (Jersey)
- [19](#) IFG [42]
- [20](#) 16 ITELR 85, [2013] SC (Bda) 16 Civ (Bermuda)
- [21](#) *Re... a trust* [1]
- [22](#) *Re... a trust* [19], citing *Armitage v Nurse* [1998] Ch 241, 253
- [23](#) *Re... a trust* [27.3], [40]
- [24](#) *Re... a trust* [54]. Evidence of bad faith would perhaps have been a different thing
- [25](#) [2009] Ch 32
- [26](#) As on an application for directions under *Public Trustee v Cooper* [2001] WTLR 901
- [27](#) Citing *G Thomas, Thomas on Powers*, 2nd ed (OUP, 2012), 10.188
- [28](#) *Re Y Trust* [2014] JRC027
- [29](#) *Re Y Trust* [10]
- [30](#) *Re Y Trust* [9]-[10]
- [31](#) Although *Re... a trust*, which may have further supported the court's conclusion, was not cited
- [32](#) *Re Y Trust* [34]-[36]
- [33](#) See, for example, *Trustee Act 1998*, s83 (Bahamas)
- [34](#) *Brakespear v Ackland* [71]

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