

## Beneficiaries' rights to trust information in the light of *Schmidt v Rosewood Trust Limited*

The decision of the Privy Council in *Schmidt v Rosewood Trust Limited* [2003] 2 A.C 709 ("*Schmidt v Rosewood*"), delivered in March 2003 on an appeal from the courts of the Isle of Man, has excited great interest among trust practitioners because it considers the approach to be taken to the question of disclosure of information by trustees to beneficiaries. The decision is likely to be regarded as authoritative under English law as under the laws of the Isle of Man, because Manx law in this area appears to follow English principles, there being no relevant statutory provisions. It is the intention of this briefing to consider the impact which this decision will have upon the existing law and practice in Jersey.

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At the risk of dangerous over-generalisation, the proponents of a proprietary right to documents which could be described as trust documents tended to derive support for their views from two English cases, the House of Lords decision in *O'Rourke v Darbishire* [1920] AC 581, and the Court of Appeal decision in *re Londonderry's Settlements* [1965] Ch 918. Those who advocated a more general right to enforce the terms of a trust, while able to point to some helpful references in earlier

English cases, have looked to more recent Commonwealth decisions, of which the leading case is perhaps the Australian case of *Hartigan Nominees Pty Ltd v Rydge* [1992] 29 NSWLR 405.

The judgment of the Privy Council in *Schmidt v Rosewood* has effectively concluded all these debates, but may well have left trustees with significant new issues to consider.

### Principal findings in *Schmidt v Rosewood*

First, in the view of the Privy Council, no beneficiary has a proprietary right (or any other form of absolute entitlement) to information concerning a trust. *O'Rourke v Darbishire* and *re Londonderry's Settlements* were considered, and found not to support such a view. Instead, the Privy Council (at paragraph 51 of the judgment): "*consider that the more principled and correct approach is to regard the right to seek disclosure of documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere*

*power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion".*

The Privy Council gave general approval to the reasoning found in the majority judgments in *Hartigan Nominees Pty Ltd v Rydge*.

Second, it is clear from the above passage that the nature of a beneficiary's interest will no longer be sufficient of itself to determine his right (if any) to information. Therefore, previous decisions (including the decision of the Isle of Man Court of Appeal in *Schmidt v Rosewood*) which tended to suggest that a mere object of a discretionary power, as opposed to a beneficiary of a trust, might not have a right to seek trust documents, must now be seen as incorrect. Instead, the nature of a beneficiary's interest will be just one factor for consideration in determining whether or not it is appropriate to provide information to a given individual. Indeed, it may not even be necessary for the person requesting the information to be within the current class of beneficiaries, or objects of a power, if he can show that it is reasonable to contemplate that at some time he will be so included, perhaps by exercise of a power of appointment or addition.

Third, and following on from the previous paragraph, the court, and therefore trustees who are faced with a request for information, will have to weigh up all relevant factors before deciding whether or not to accede to a request. At paragraph 54 of the Privy Council judgment, it is stated:

*"there are three such areas in which the court may have to form a discretionary judgment: whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court."*

Again, at paragraph 67 of the judgment, the following appears:

*"Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing*

*interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."*

*Schmidt v Rosewood* actually concerned claims brought by the son of one of the discretionary objects of two trusts, in his capacity as personal representative for his father, who had died. There were other bases for the son's claims as well, but these were not relied upon by the Privy Council in delivering its judgment. Two particular claims concerned distributions made during the father's lifetime, which his son did not accept had been fully accounted for. The Privy Council indicated that Mr Schmidt, as personal representative "seems to have a powerful case for the fullest disclosure in respect of these funds." Mr Schmidt also claimed that there may have been some breaches of fiduciary duty, such as over charging by the trustee, which, had they not occurred, might have led to more funds being available for distribution to his father. While expressing no view as to the merit of those claims, the Privy Council indicated that Mr Schmidt (again as personal representative) appeared to have "a strong claim" to disclosure of documents or information relevant to this issue. It can be seen that both these claims, by their nature, involved issues that might affect the scale of the benefit that should have been received by the deceased Mr Schmidt which, therefore, gave rise to a strong claim to information to enable his son as personal representative to enforce, if necessary, his father's rights against the trustee.

#### **Implications under Jersey law**

There seems little doubt that the principles enunciated in the Privy Council judgment in *Schmidt v Rosewood* will be followed by the Jersey courts. Indeed, it is reasonable to state that, since the judgment of the Deputy Bailiff in *In re Rabaiotti 1989 Settlement 2000 JLR 173*, the law of Jersey as to disclosure of trust documents to beneficiaries has already been governed by many of the principles which found favour with the Privy Council in *Schmidt v Rosewood*. In particular, the Deputy Bailiff

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**"In *Nearco Trust Company (Jersey) Limited v AM and others* [2003] JRC002A, the court had to consider an application for disclosure of documents made by the former wife of the settlor of two Jersey trusts, both in her own capacity and as guardian for her daughter."**

considered his decision in *Rabaiotti* not as proceeding upon the existence of proprietary rights (which, as he observed at paragraphs 32 and 33 of his judgment, had already been questioned, in particular in cases such as *Hartigan Nominees Pty Ltd v Rydge*) but as being "an essential part of the mechanism whereby the trustee can be held accountable for his trusteeship to a beneficiary" (see paragraph 26 of the judgment).

The Deputy Bailiff continued (at paragraph 27), in terms which appear to be closely consistent with the approach of the Privy Council in *Schmidt v Rosewood*:

*"But the need for an individual beneficiary to obtain trust documents has to be weighed against the interests of the beneficiaries as a whole. The trustee has a duty to the beneficiaries as a class. If, the trustee forms the view in good faith that disclosure of documents to which a beneficiary would normally be entitled, would be prejudicial to the interests of the beneficiaries as a whole, it may refuse to make that disclosure and seek the directions of the court. Should the trustee fail to seek the directions of the court, it is open to any beneficiary to bring the matter before the court for resolution. The court will then have to balance the competing considerations and decide what is best for the beneficiaries as a whole."*

The Deputy Bailiff approved the approach adopted by the Supreme Court of South Australia in *Rouse v IOOF Australia Trustees Limited* (1999) 2 ITEL 289, at paragraph 101 of that judgment, delivered by Doyle CJ:

*"Ultimately, I would rest the existence of the relevant discretion upon the need to reconcile the undoubted duty of the trustee to make disclosure to beneficiaries of information about the trust, and the undoubted duty to permit the inspection of trust accounts and trust documents, with the equally fundamental obligation of a trustee to conduct the affairs of a trust, and particularly a trust which involves the conduct or management of a business, in the interests of the beneficiaries as a whole. I consider that on occasions the reconciliation of these interests may entitle a trustee to decline to provide information to particular beneficiaries, when the trustee has reasonable grounds for considering that to do so will not be in the interests of the beneficiaries as a whole, and will be prejudicial to the ability of the trustee to discharge its obligations under the trust. It may be that the ultimate foundation of the discretion is the obligation of the trustee to*

*discharge its duties to manage the affairs of the trust in the interests of the beneficiaries."*

Therefore, although the judgment of the Deputy Bailiff in *Rabaiotti* does also speak in terms of a general right of a beneficiary to see certain categories of trust documents, which can be overridden by a court in exceptional circumstances, it is not difficult to reconcile the approach taken in *Rabaiotti* with that taken by the Privy Council in *Schmidt v Rosewood*. This is particularly so when it is recognised that the categories of documents at issue in the *Rabaiotti* case were core documents such as the trust deed and supplemental deeds, and documents relating to the trust accounts and tax returns. In short, by their very nature, these were documents of a type which might be expected under the *Schmidt v Rosewood* principles to give rise to a strong presumption that a beneficiary with any reasonable expectation of benefit from the trust should be entitled to inspection.

Indeed, another decision of the Deputy Bailiff has already had to consider the interests of the beneficiaries of a trust as a whole, against the interests of particular beneficiaries, in the context of an application for disclosure. In *Nearco Trust Company (Jersey) Limited v AM and others* [2003] JRC002A, the court had to consider an application for disclosure of documents made by the former wife of the settlor of two Jersey trusts, both in her own capacity and as guardian for her daughter. The wife was a beneficiary of one trust, and the daughter a beneficiary of both trusts. The wife was alleging in proceedings in the State of Illinois that both trusts were shams and, therefore, invalid. In his judgment, the Deputy Bailiff found it impossible to regard an application for disclosure made in these circumstances as being in the interests of the beneficiaries of the trust as a whole. If released, the information would be used in proceedings intended to produce an order that the trusts were shams. This could not possibly be in the interests of the wider beneficial class of the trusts. Nevertheless, the Deputy Bailiff did indicate that, if the former wife was to drop her allegation of invalidity, the Royal Court would view with sympathy an application for disclosure of documentation revealing the extent of the assets in the trusts and the level of possible provision which might be made, or had been made, from the trusts for the benefit of the settlor. This was in the context of proceedings in Illinois concerning the level of maintenance

appropriate to be paid for the daughter for whom the former wife acted as guardian. The Deputy Bailiff did, however, note that the documentation, which it might be appropriate to disclose for these purposes, would be considerably less than the categories of documents contained in an order for disclosure already made against the trustee in the Illinois proceedings.

Nor, it would appear, does article 25 of the Trusts (Jersey) Law 1984 cut across the *Schmidt v Rosewood* principles. In *Rabaiotti*, the Deputy Bailiff noted that the general principles set out in article 25 are expressly made subject to any order of the court. He also noted (at paragraph 31 of his judgment) that article 25 also makes the provisions of that article subject to the terms of any given trust, but indicated that he felt that there were arguments which could be raised against or used to limit a contention that this provision could allow the terms of a trust to limit or prohibit disclosure of information to beneficiaries. What can be said as regards article 25 is that the ability of trustees to withhold disclosure in relation to documents evidencing the deliberations of a trustee in reaching a decision, or relevant to the reasons for exercising any discretion or touching upon the reasons for reaching a particular decision, will remain valid as a general principle, subject always to the overriding discretion of the court to order disclosure of such documents if it feels this is justified in the particular circumstances of a case. It should be remembered that, in the context of letters of wishes, the Deputy Bailiff concluded that these were documents which fell into these categories but nevertheless ordered that in the circumstances of *Rabaiotti*, a letter of wishes in relation to that trust should be disclosed.

Therefore, to the extent that *Schmidt v Rosewood*, and recent Jersey cases, require a change in the approach adopted by trustees of Jersey trusts faced with a request for disclosure of information or documents from a beneficiary, it is suggested that this might be more as regards the manner in which such a request should be considered than as a fundamental change of the principles to be applied. In particular, trustees might feel that they should have regard to the following points among others:

- Each such request will need to be considered individually in the light of the underlying principle that any right to disclosure is based upon the fundamental

obligation of trustees to act in the interest of the beneficiaries as a whole, and the overriding jurisdiction of the court to ensure that the terms of any trust can be enforced.

- Trustees may need to consider whether there are any factors which might weigh against the provision of disclosure to a particular beneficiary, in particular the interests of other beneficiaries.
- The nature of the interest of the beneficiary in the trust, and the realistic expectation of benefit being conferred upon that beneficiary may also be relevant.
- Arguments based upon what may or may not constitute trust documents, or form part of the "accounts" of the trust, will no longer be material as to the right of any given beneficiary to disclosure. Rather, the nature of any given document will be one factor to be weighed in the balance in determining whether or not it is appropriate for particular information to be given to a particular beneficiary.

Trustees will need to consider whether to require that limitations should be imposed upon the manner in which information is disclosed, or upon the uses to which information disclosed can be put, if these could protect trust property or the interests of other beneficiaries.

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