INTERNATIONAL LAW

Go Offshore to Avoid Trust Transparency?

There's more wiggle room outside the United States for trusts to maintain confidentiality

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As more states adopt the Uniform Trust Code,[1] it is going to become increasingly difficult for trust settlors and trustees to maintain the levels of confidentiality that, until now, they've been able to take for granted.[2] Indeed, even in states that have not adopted the code, judicial attitudes appear to be moving in the same direction: toward transparency and disclosure[3] and away from privacy.

So, does the answer to keeping trust matters confidential lie offshore? Perhaps it does, even though, at first glance, governing law seems consistent with the growing U.S. penchant for disclosure.

The accepted position under English law (which generally applies in the major offshore jurisdictions unless there is some local statutory provision) is that the trustees of a new irrevocable inter vivos trust must tell the adult beneficiaries of the existence of the trust and their interest in it. There remains uncertainty, however, about whether those with contingent or defeasible interests must be told at the outset, or only when they become entitled to income or capital. It is also uncertain if the rule extends to beneficiaries of a discretionary trust,[4] although it is clear that the rule does not apply to objects of mere fiduciary powers.[5]

> Under the law of major offshore jurisdictions, it's unclear if all beneficiaries must be told of the trust at the outset.

In a recent Isle of Man case, *Vadim Schmidt v. Rosewood Trust Ltd*,[6] the Judicial Committee of the Privy Council[7] ruled that the object of a mere fiduciary power of appointment was entitled upon request to disclosure of the relevant trust instruments and to other information concerning the trusts. But the Privy Council did not need to consider whether the trustees had an

obligation to actually notify the plaintiff of his status, as he was aware of it.

While *Schmidt* clearly broadens the class of those who are entitled to information about trusts, it also reduces the right to information for all beneficiaries. This is because the rationale of the decision was that the entitlement of beneficiaries to information depended not, as had previously been accepted, on the proprietary interest of a beneficiary in the trust assets,[8] but rather on the need for beneficiaries to be able to hold trustees to account, which they clearly cannot do without knowledge, and without which there can be no trust.

Because a beneficiary's ability to force a trustee to account is at the court's discretion (as a necessary part of the court's jurisdiction to supervise trustees), it follows that the entitlement to information is likewise at the court's discretion and does not belong to a beneficiary as a matter of right. A beneficiary may have a legitimate expectation of disclosure, but it is neither absolute nor unlimited. Indeed, as Lord Walker said in *Schmidt*, "There are three...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."[9]

While such matters might well fall within the third area mentioned by Lord Walker, it already is settled that information should not be provided to a beneficiary who is seeking to attack the validity of a trust and seeks information for that purpose.[10]

Even so, there's a strong argument that, if none of the beneficiaries are told of a trust in the first instance, their ability to call trustees to account is illusory, and the trust must fail. This surely must be the case when that is the common intent of both settlor and trustee from the outset. Of course, if the settlor never considers the matter and the trustees reach this view by themselves, they may be in breach of trust.

But what if a trust instrument intentionally limits the disclosure of information? The court may have the power to supervise the trust, but surely it must supervise the trust as written and not some hypothetical trust that the court might have preferred the settlor to execute. Addressing the Association of Contentious Trust and Probate Specialists in London in January 2004, Christopher McCall QC, a leading member of the English Chancery Bar, said: "The Privy Council shows the choice for any settlor; restrict access to information needed to enforce the trust and you negate the existence of a trust. If there are no beneficiaries with any rights at all then there are no trusts."

So, there must always be at least one beneficiary entitled to information and able to call the trustees to account. But there is no reason why that should not be the settlor himself. In many cases, once the settlor is dead, the need for confidentiality falls away. In others cases, perhaps a trust might identify another beneficiary or beneficiaries who should then be given information. Indeed, we would advocate that any beneficiary entitled as of right to income, or with a power of appointment over trust property, should be given access to information. If, for whatever reason, they are not so trusted, question whether they should have the proposed interest or power under the trust in the first place.

And what of discretionary beneficiaries? If a settlor's true intent is that certain beneficiaries should benefit only in certain limited circumstances, the settlor should consider saying so in the trust instrument and add that such a beneficiary should be told of his interest when the trustees believe there is some realistic prospect of his benefiting, and not before.

As for those beneficiaries who are included just in case, that too should be made plain. Perhaps they should be left out, with someone being given power to add them as beneficiaries if need be. Surely even *Schmidt* does not give a right to those who may become beneficiaries at a later date?

Some may find this small degree of openness too much. For them, the answer may lie in jurisdictions that share their view of privacy. The Bahamas, for example, has a detailed statutory code regulating trustees' duties to provide information to beneficiaries.[11] Guernsey statutorily empowers settlors to deny beneficiaries information.[12] And in the Cook Islands, it is an offense to divulge information to anyone concerning an international trust.[13] None of these approaches is perfect, and there is always a risk that the matter will be litigated elsewhere and these provisions overridden on public policy grounds. But that, as they say, is another story. ▮

Endnotes

1. Effective Jan. 1, 2004, Arizona was supposed to become the fifth state to do so, joining Kansas, Nebraska, New Mexico and Wyoming. But the protest over a number of provisions—including the disclosure rules—derailed the process, and the Arizona legislature has delayed implementation for two years, while objections are studied.
2. Among others, the UTC requires trustees to inform adult beneficiaries, and (when a charity is named) the state attorney general of the existence of a trust for their benefit, the identity of the trustees and the nature and value of the trust assets. See Uniform Trust Code Sections 103(12), 110 and 813. These rules do not apply to beneficiaries with remote remainder interests, unless such beneficiaries file a specific request with the trustee. See Uniform Trust Code Sections 103(12) and 110(a).
3. See, for example, *McNeil v. Bennett* 792 A.2d 190, 2001 Del. Ch. LEXIS 91 (Del. Ch. 2001) and *Bishop v. McNeil*, 1999 Del. Ch. LEXIS 186 (Sept. 14, 1999) at *79 n.23 (faulting trustees for not informing beneficiaries of their rights). This right to information has been implied by the U.S. District Court for the District of Rhode Island in its interpretation of New York trust law as well; see *Hinrichs v. Gifford*, Civ. Action No. 99-209T (D.R.I. 2001), and is set forth as the general rule under Section 173 *Restatement (Second) Trusts* (1959) and Section 961 George G. Bogert, *The Law of Trusts and Trustees* (2nd ed. revised 1981).
4. For example, a trust for such of A, B and C as the trustees shall determine.
5. For example, a trust for such of A, B and C as are alive at the end of the trust period but with power in the meantime to pay income to D, E or F. See *McPhail v Doulton* [1971] AC 424, HL; *Re Manisty's Settlement Trusts* [1974] Ch. 17.
6. [2003] UKPC 26.
7. The Privy Council, sitting in London, acts as the final court of appeal from the major offshore jurisdictions and its judgments have strong persuasive authority in England.
8. *Clarke v Earl of Ormonde* (1821) JAC 108 37 ER 791; *O'Rourke v Darbyshire* [1920] AC 581.
9. [2003] UKPC 26 at paragraph 54.
10. See *Re the M and L Trusts, Nearco Trustee Company (Jersey) Ltd v AM* (2003) 5 ITELR 656.
11. See Trustee Act 1998, Section 83 (Bahamas).
12. See Trusts (Guernsey) Law 1989 (as amended), Sections 21 and 22.
13. See International Trusts Act 1984, Section 23 (Cook Islands).

Collectors' Spotlight

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