

Trust documents – The rights of beneficiaries and obligations of trustees

Whether advising beneficiaries or trustees about their respective positions, the question of **WHO** may be entitled to documentation relating to a trust and **WHAT** documentation should be provided, is not straightforward.

Beneficiaries consider such requests reasonable whereas trustees may take the opposite view refusing the request or offering only limited disclosure, inevitably leading to disputes.

Recently there have been some cases which have shed some light on changing views whilst giving some insight into how to deal with requests for trust documents, whether as a beneficiary, or as a trustee.

Trustees' obligations

Trustees are obliged to administer a trust in accordance with the provisions of the trust document and the law and trust beneficiaries have a right to expect that. Trustees are obliged to keep trust accounts and should be ready to provide those to beneficiaries, or to the court upon reasonable request.

Who can request disclosure?

Trustees should firstly consider whether the person requesting information is **entitled** to the information or documentation. Trustees should inform **adult beneficiaries** who have an **interest in possession**, that is, **the right to income from the trust assets or a right to use trust assets** about the existence of the trust and the nature of their interest in the trust (*Brittlebank v Goodwin [1868]*).

Even where a beneficiary only has a **potential future interest** under the trust (eg a discretionary trust), trustees should consider notifying these beneficiaries of the existence of the trust and their prospective interest. This includes beneficiaries who are likely to benefit under a discretionary trust (per *Chaine-Nickson v Bank of Ireland [1976]*).

In *Re Londonderry's Settlement [1964]* a case regarding a discretionary trust and the right to disclosure of trust documents the court considered what were and were not trust documents and identified documents that a beneficiary was or was not entitled to disclosure of. It was held that **the right to disclosure** covered only documents relating to **the ownership, management or administration of any property vested in the trustees**.

What should trustees do when they receive requests for information or documentation from a beneficiary?

As a beneficiary has **no specific right to disclosure**, trustees should in exercising their discretion, consider all information relevant to the beneficiary's request. In doing so, trustees should consider the following:

- what is the **purpose** of the disclosure request?
- the **type** of documents requested and the **contents** of those
- whether or not disclosure would be in the best interests of **all of the beneficiaries**

For example, where a beneficiary requests **disclosure of trust accounts** but the trustees reasonably consider that request is made with a **view to attack the trust or trust property**, then the trustees ought to be cautious where giving disclosure may not be in the best interests of **all** the beneficiaries.

If the trustees are unsure of the beneficiary's purpose in requesting disclosure, then the trustees should **ask the beneficiary to explain the reason for their request**. It may even be prudent for trustees to provide limited or redacted information, or documentation.

The usual types of documents that beneficiaries request disclosure of:

- **The trust document** – being central to the trust, trustees should not object to disclosure without good reason.
- **Supplemental trust documents** – for example documents relating to the appointment and retirement of trustees, or documents relating to the variation of the trust. These would usually be disclosed.
- **Trust accounts** – because a trustee is obliged to keep and give accounts trustees should provide these. If they do not, the beneficiary can ask the court to order the trustees to provide accounts. Trustees can expect that the courts will order accounts in addition to ordering trustees to pay costs.
- **Letter/s of wishes** – it is quite common for settlors to make a letter of wishes and state that it should remain confidential to the trustees. It is well known that these are not binding on trustees although trustees ought to consider those wishes when deciding how to deal with the trust.

In general, trustees are not obliged to disclose a letter of wishes. However, in *Breakspear v Ackland [2008]* the court considered whether **a letter of wishes should be disclosed**. The court held that trustees should generally treat a letter of wishes to be confidential and that the trustees have a discretion whether to maintain, relax or abandon confidentiality.

The court also went on to say:

- after the trustees have made their decision, they are **not obliged to give reasons for it**, any more than in relation to any other exercise of their discretionary powers. If trustees give reasons for their refusal, then the court can consider whether those reasons were appropriate.

- in difficult cases, the **trustees may seek the court's direction**, which would require full disclosure to be given to the court.
- If a **beneficiary applies to court for disclosure**, requesting that the court invoke its administrative jurisdiction, then the **onus is on the beneficiary to show why the court should intervene**. A mere refusal to disclose a letter of wishes without giving reasons for this would not ordinarily justify intervention by the courts unless the beneficiary can evidence unfairness.
- **Documents regarding the exercise of trustees' powers and discretions** – generally trustees have a discretion to disclose or not, although it is likely that trustees may lean towards withholding those documents.
- **Legal advice documents** – trustees are entitled to take legal advice where they consider it necessary. Where **trustees obtain legal advice and pay for that from the trust fund** then even though the advice may be privileged as against third parties, it may not be privileged as against the beneficiaries, and therefore **could be disclosable**.

In *Lewis v Tamplin [2018]* the court confirmed that even where trustees had provided information, the **trustees could not rely on legal professional privilege as the basis to refuse disclosure of legal advice where the advice was obtained for the benefit of the trust, as a whole** (and not for the trustees personally in relation to potential liability for breach of trust). In that case the court held that the beneficiaries did not have to show suspicious circumstances before the court could exercise its supervisory discretion to order disclosure (although the court was satisfied that there were suspicious circumstances).

So, can trustees refuse disclosure or not?

As a general guide, **unless there is a valid reason not to give disclosure** then trustees should lean in favour of giving disclosure (or perhaps only limited disclosure if that is apt in the circumstances).

If trustees refuse to disclose, and as a result a beneficiary then commences proceedings then the trustees risk the court ordering them to pay costs although every case will turn on its specific facts.

What should beneficiaries do?

In the first instance, beneficiaries should request disclosure from trustees giving reasons for the request.

If the trustees refuse (and cannot be persuaded), **the beneficiary could consider seeking a court order** on the basis that the court should invoke its discretion regarding the administration of the trust.

Alternatively, beneficiaries can **consider making an application for pre-action disclosure** upon taking legal advice.