

Trustee Duties

Sources of Trustees' Powers

- The trust deed
- Trustee Act 1956, s 2(3) & (4)
- See Law Commission report *The Duties, Office, and Powers of a Trustee* [here](#)
- Powers of management (sell, lease, etc), investment, and disposition (advancement, etc); appoint agents s 29; delegate if absent or incapacitated s 31; carry on testator's business s 32;
- Equity case law / precedent
- Trusts Bill 2017, part 3
- Duties (obligations) correlate to beneficiaries' rights
 - Constructive and resulting trusts have no trust deed, no obligations which the resulting or constructive trustee has to give effect to as in an express trust. Normally the trustee of a constructive or resulting trust has to recognise the trust and hand over the property.
 - Express trusts intend the trustee to hold the property and comply with many duties.
- Trusts Bill Part 3: Duties of a trustee
- Mandatory trustee duties cannot be excluded or modified s 20
- Duty to know the terms of the trust s 22
- Duty to act in accordance with the terms of trust s 23
- Duty to act honestly and in good faith. s 24
- Duty to act for the benefit of beneficiaries or for permitted purpose of the trust s 25
- Duty to act for proper purposes (not secret motives) s 26
- Default duties
- Can be excluded or modified by settlor s 20(2)
- If paid to advise on trust and if recommend settlor excludes or modifies the default duties, have to ensure settlor understands the consequences s 21
- Trustees must exercise care and skill which is reasonable – different between lawyers with special knowledge and layperson – tailored to the trustee. s 27
Duty can be modified if eg. trustee for the benefit of the family.
- Duty to invest prudently
- Duty not to exercise power for own benefit
- Duty to consider exercise of power eg. *McPhail v Dalton*
- Duty to not fetter discretion
- Duty to avoid COI
- Duty to not act for profit or reward
- Duty of impartiality between beneficiaries
- List of duties supposed to not codify but represent what already exists in equity. Allows courts to develop and interpret what the duties mean provided they are consistent with this list, giving settlor control and flexibility of the trust as not all duties are mandatory
- Trust places an equitable limitation on trustee's ability to control, use or manage property. Trustees need powers specified in the trust deed to legitimise certain actions
- Trustee Act imposes general powers and indemnities for trustees even if not specified in trust deed to use property for the benefit of the beneficiary

- s 2(4) ‘The powers conferred by or under this Act on a trustee are in addition to the powers conferred by any other Act or by the trust deed.’
- s 2(3) Powers conferred on trustees under this Act apply only if a contrary intention is not expressed in the instrument by the settlor
- General case law which imposes fiduciary duties is a source

Trustee duties – information

Rationale for disclosure duties

[5.46] No obligations and hence no trust if trustee does not owe a duty to any beneficiaries. Beneficiaries need to know that they are beneficiaries of the trust and need to be able to be provided with trust information on request to hold the trustee to account.

“While trust deeds can never dispense completely with the requirement to account to beneficiaries and the need to provide some information to some beneficiaries, what is required in each trust is dependent on the trust’s circumstances.”

- Law Commission R130 *Review of the Law of Trusts*

Proprietary approach? *Schmidt v Rosewood*

[43] Argument that “no object of a mere power could have any right or claim to disclosure, because he had no proprietary interest in the trust property”

- Only those with a fixed entitlement could ask for disclosure of trust information
- Trustees need to provide information to beneficiaries. Need certainty over trustee’s duties or obligations. Trust cannot be enforced unless beneficiaries have information with which they can determine what the trustees are doing with trust property.
- *Maurice v Bishop of Durham*: a trust which cannot be enforced does not exist. Beneficiaries are the only ones who can hold trustees to account need to hold info about the trust or else they cannot enforce the trust
- Giving some of the beneficiaries information about the trust is a mandatory duty
- In Trusts Bill, no mandatory duties that beneficiaries have info but there are obligations to generate certain info on trustees in relation to how trust is run
- Specific mandatory requirements for information given by trustees to beneficiaries s 45

Proprietary approach *Schmidt v Rosewood*

[51] the right to seek disclosure of trust documents is one aspect of the court’s jurisdiction over trusts. Court intervention does not depend on an 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...” Followed in *Erceg* [20]

[66] **There is therefore in their Lordships’ view no reason to draw any bright dividing-line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character).** The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in *McPhail v Doulton*) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction.

[67] Recent cases confirm no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. 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.

- Historical idea that beneficiary access to information is a proprietary right
- Problematic for certain beneficiaries i.e. discretionary beneficiaries without a fixed interest.
- Approach rejected in Schmidt – beneficiaries do not receive information as a proprietary right
- Lord Walker: the ability for beneficiaries to access information is not a matter of the beneficiaries holding fixed property rights. The correct approach is to consider the sort of information necessary for the beneficiaries to hold the trustees to account and to enforce the trust. Consequently, discretionary beneficiaries can ask for information about the trust as they have to be able to enforce the trust.
- LC: some beneficiaries have to be able to access information if beneficiaries are able to hold the trustees to account

Erceg v Erceg [2017] NZSC 28.

- Ivan Erceg was a discretionary and final beneficiary of trusts settled by his brother Michael
- Was not provided with any property from the trusts
- Asked for trust information: deed and any variation, trustee resolutions and minutes, financial dealings, debts. Said he would keep confidential to himself and advisors.

Facts:

- Michael owned lots of wealth, died in an accident
- Ivan seeking information from the trust about distributions made as discretionary beneficiary who received nothing from the trust.
- Ivan: needed information to ensure distributions made were legitimate and to hold trustees to account.
- Court has to consider what information is necessary for the proper administration of the trust to uphold the interest of the beneficiaries

Result:

- Court's role is not to review the trustee's discretionary decision (in a deferential way).
- It is an exercise of inherent jurisdiction
- [18] the Court must exercise its jurisdiction as a court of equity, exercising its own judgment as to whether disclosure ought to be made at all and, if so, to what extent and on what conditions.
- [20] not based on having a 'proprietary right' in trust property
- [51] We see the starting point as being the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries. A beneficiary who seeks such an account may seek access to documentation necessary to assess whether the trustee has acted in accordance with the trust deed.

- [55] trustees are not required to give reasons to discretionary beneficiaries for the manner in which they exercise their discretions. This means that trustees may decline to disclose to a beneficiary documents that set out their reasons or may redact documents
- Why? *Re Londonderry*. Family harmony | Protect trustees from onerous obligations
- [59] beneficiaries who can be expected to get distribution versus others. “close beneficiary”. Named or member of family.
- [60] Close beneficiaries will have the strongest case for disclosure where they seek the trust deed and trust accounts.
- [62] presumption of disclosure as above?
- Trust deed, financial statement, trustee minutes and resolutions “These are basic documents for which the strongest case for disclosure can be made.” Although the latter may contain reasons for decision that may be redacted.

- “the starting point as being the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries.”
- Consider kind of beneficiary i.e. fixed beneficiaries such as widow in Mulligan with a life interest are in a strong position.
- Nature of beneficiary’s interest is significant. A *named beneficiary or member of a class such as immediate family* of the settlor are strong candidates for receiving dispositions from the trust and have a strong case for receiving information, relative to a charity which does not have any association with the trust other than falling within the category of institutions which a disposition could have been made
- Balance between beneficiary’s need for information to enforce the trust against the need to protect confidential, private or commercial information.
- i.e. fact distribution made that is not publicly known is by default confidential information
- [60] “the strongest case for disclosure would be a case involving a request from a close beneficiary for disclosure of the trust deed and the trust accounts, which would be the minimum needed to scrutinise the trustees’ actions in order to hold them to account.”
- [62] “In the normal run of things, trustees will provide these to close beneficiaries on request or proactively, without the need for a request. If they refuse, a court will be likely to require disclosure unless there are *exceptional* circumstances”
- Expectation if the beneficiary asks for information that the trustees will provide it because the courts will compel the trustees to do so.
- Ivan does not receive trust information because there were exceptional circumstances – potential vexatious litigation or safety
- Court applies [56] factors – ensure beneficiary can enforce the trust even though need to maintain confidentiality and privacy
 - Context of the request
 - personal or commercial confidentiality
 - practical difficulty providing information sought
 - asking for trustee’s reasons for disclosure [cannot ask for]
 - likely impact on trustee and other beneficiaries if disclosure is made
 - impact on settlors and third parties
 - can disclosure be made while protecting confidentiality
 - can safeguards be imposed on use of trust documentation eg. redact information or give information only to Erceg’s lawyer and not the beneficiary

- Ivan wanted:
 - Trust deed – seems difficult for beneficiaries to enforce the trust if they do not have the trust deed which imposes obligations on trustees.
 - Financial statements – required if beneficiary intended to enforce the trust
 - Resolutions for trustee decisions and minutes – to find out who received property under the trust but it is private and confidential.
- Potential detriment to the trust, Court did not give information to Ivan
- Exceptional circumstances where Ivan has shown a lot of anger towards family [79] Ivan made a threat which counted against disclosure. In addition he was not a named beneficiary, only a class of discretionary beneficiaries. Ivan is not named as a close class of beneficiaries.
- Court could have given information to Ivan’s counsel to ensure if any distribution made was illegitimate and breached the trust deed.
- Court: too risky to give information to lawyer due to issues of confidentiality and concern over what Ivan may do to the other beneficiaries.
- Exceptional case where court does not pass information onto the beneficiary. Courts will generally order disclosure to beneficiaries who are likely to take an action to enforce the trust
- MB: unless have assurance some beneficiaries were given information about the trust how else is the trust being properly enforced. Ivan although excluded does seem someone reasonably expected to receive a distribution
- How do we know beneficiaries have been given enough info they can enforce the trust if trust obligations have been breached

- Factors [56]
- (a) what does sought?
- (b) context and objective of B – necessary for monitoring trustee compliance?
- (c) proximity and likelihood of settlor to trust/property
- (d) confidential matters
- (e) practical difficulties;
- (f) not disclose reasons;
- (g) effect on trustee and other Bs;
- (h) effect on settlor and 3Ps;
- (i) can disclosure be made with confidence?;
- (j) can safeguards be imposed?;

Reform: Trusts Bill 2017

S 45

trust information—

(a) means any information—

(i) regarding the terms of the trust, the administration of the trust, or the trust property; and
 (ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but

(b) does not include reasons for trustees’ decisions.

S 46 The purpose of **sections 47 to 51** is to ensure that beneficiaries have sufficient information to enable the terms of the trust and the trustees’ duties to be enforced against the trustees.

S 9

beneficiary means a person who has received, or who will or may receive, a benefit under a trust (other than a trust for a permitted purpose), and includes a discretionary beneficiary
discretionary beneficiary means a person who may benefit under a trust at the discretion of the trustee or under a power of appointment but who does not have a fixed, vested, or contingent interest in the trust property

- Trust bill – ensuring beneficiaries have enough info to enforce the trust, principle in Erceg, beneficiaries include discretionary beneficiaries without a fixed interest in trust property

S 47 Presumption that trustee must notify basic trust information

- (1) There is a presumption that a trustee must make available to every beneficiary or representative of a beneficiary the basic trust information set out in **subsection (3)**.
 - (3) The basic trust information is—
 - (a) the fact that a person is a beneficiary of the trust; and
 - (b) the name and contact details of the trustee; and
 - (c) the occurrence of, and details of, each appointment, removal, and retirement of a trustee as it occurs; and
 - (d) the right of the beneficiary to request a copy of the terms of the trust or trust information.
- s 47 – presumption – how similar to SC’s expectation that the trustee must make available to every beneficiary basic trust info
- Difference between Erceg and s 47 presumption is that the trustee must notify every beneficiary about basic trust info
- Expectation in Erceg does not extend that far – distinction in Erceg between close beneficiary i.e. named/nominated class who have an expectation of being given info and potential class of beneficiaries i.e. charities
- More onerous than status quo.

47 Presumption that trustee must notify basic trust information

- (2) However,—
 - (a) before giving the information, the trustee must consider the factors set out in **section 49**; and
 - (b) if the trustee reasonably considers (after taking into account those factors) that the information should not be made available to every beneficiary,—
 - (i) the presumption does not apply; and
 - (ii) the trustee may decide to withhold some or all of the basic trust information from 1 or more particular beneficiaries or classes of beneficiaries.
- (4) A trustee is required to consider at reasonable intervals whether the trustee should be making the basic trust information available under this section.
- Before given information, trustee has to think about other factors – consider whether should give basic trust information to all beneficiaries. Closer to Erceg,

49 Procedure for deciding whether presumption applies

The factors that the trustee must consider (for the purposes of **sections 47(2)(a) and 48(2)(a)**) are the following:

- (a) the nature of the interests in the trust held by the beneficiary and the other beneficiaries of the trust, including the degree and extent of the beneficiary’s interest in the trust and the likelihood of the beneficiary receiving trust property in the future;
- (b) whether the information is subject to personal or commercial confidentiality:

(c) the expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether the beneficiaries as a whole and the beneficiary in particular would be given information:

(d) the age and circumstances of the beneficiary:

(e) the age and circumstances of the other beneficiaries of the trust:

(f) the effect on the beneficiary of giving the information:

(g) the effect on the trustees, other beneficiaries of the trust, and third parties of giving the information:

(h) in the case of a family trust, the effect of giving the information on—

(i) relationships within the family:

(ii) the relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole:

(i) in a trust that has a large number of beneficiaries or unascertainable beneficiaries, the practicality of giving information to all beneficiaries or all members of a class of beneficiaries:

(j) the practicality of imposing restrictions and other safeguards on the use of the information (for example, by way of an undertaking, or restricting who may inspect the documents):

(k) the practicality of giving some or all of the information to the beneficiary in redacted form:

(l) if a beneficiary has requested information, the nature and context of the request:

(m) any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies.

- s 49 – factors close to what Erceg sets out [56] when try to figure out should trustees provide info to beneficiaries
- Trustee do not need to tell every charity that they are a possible beneficiary
- Initial burden of have to give every possible beneficiary info less onerous

48 Presumption that trustee must give information on request

(1) There is a presumption that a trustee must within a reasonable period of time give a beneficiary or the representative of a beneficiary the trust information that person has requested.

(2) However,—

(a) before giving the information, the trustee must consider the factors set out in section 49; and

(b) if the trustee reasonably considers (after taking into account those factors) that the information should not be given to the person,—

(i) the presumption does not apply; and

(ii) the trustee may decide to refuse the request for trust information.

- When there is a request, a presumption (is it the same as an expectation) that will give beneficiary who has made the request the info.
- However, trustee can reasonably consider factors that the presumption to give info does not apply

50 Procedure when trustee decides to give no information

(1) [Applies if trustee can find no beneficiary, withholds **all** trust information from **all** beneficiaries, or refuses a request for trust information]

(2) The trustee must apply to the court for directions in relation to—

(a) whether the trustee's determination that there is no beneficiary to whom information can be given, or to withhold information or refuse a request for information, is reasonable in the circumstances; and

(b) the alternative means by which the trustee can be accountable and the trust can be enforced.

...

(4) In giving directions under this section, the court must take into account the following principles:

(a) trust information may be withheld from all beneficiaries only in exceptional circumstances:

(b) alternative means of enforcing a trust pending disclosure of information to beneficiaries must be consistent with the objectives of the trust and not adversely affect its administration.

- If trustee can find no beneficiary or decide to withhold info from all beneficiaries so no beneficiary gets the info or if they refuse a request for trust info thereby give no info to any beneficiaries, problematic as beneficiaries have no info to enforce the trust
- Eg. the beneficiaries will cause problems or vexatious litigants or settlor stipulated to not give beneficiaries any info, situation where not going to give any info to any beneficiary as applied reasoning under ss 47 and 49
- s 50 - have to go to court to enforce trust obligation on trustees.
Court figures out some alternative means of enforcing trust
- If do not want to give certain beneficiaries info, add settlor as beneficiary and give them info, then complied and don't need to go to court to find another way of enforcing the trust - settlor control easily fixes the problem if the settlor did not want to inform certain beneficiaries.
- Erceg, before the trust bill, did not give an answer to the issue of trustees who act for one class of beneficiaries to the detriment of another class.