

## Guide to trustees' disclosure obligations in Guernsey: Requests from beneficiaries

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### Introduction

All trustees will have had some experience of dealing with requests for trust information from beneficiaries. While more often than not these will be routine in nature, they can be the precursor to complaints by beneficiaries which in some cases can lead to litigation. Given the stakes, it is important that trustees properly understand their disclosure obligations so they can determine when and if it should provide the information sought.

We have put together a straightforward step-by-step guide of the issues to consider when approaching an information request from beneficiaries of a Guernsey discretionary trust.

### Starting point

The starting point when considering whether a trustee is required to hand over information or documents to a beneficiary is to be mindful of a trustee's overarching equitable duty to account to the beneficiaries which forms part of the irreducible core of a trustee's obligations. A beneficiary needs to be provided with certain information about the trust which enables it to enforce that duty.<sup>[1]</sup>

In Guernsey this irreducible common law duty is considered alongside statutory provisions in the Trusts (Guernsey) Law, 2007 (**Trusts Law**) in relation to the provision of information.

Those statutory rights are principally contained in sections 26 and 38 of the Trusts Law.

Section 26(1) **requires** a trustee, subject to the terms of the trust and at the written request of any beneficiary (amongst others), to provide full and accurate information as to the state and amount of the trust property (for example, trust accounts).

By contrast, Section 38(1) provides that a trustee is **not**, subject to the terms of the trust or any order of the Royal Court, **obliged** to disclose documents which reveal: a trustee's deliberations as to how he should exercise his functions as trustee, the reasons for any decision made in exercise of those functions, any material upon which such a decision was or might have been based; and any letters of wishes.

Therefore, a trustee's first port of call should always be to consider what the terms of the trust say: do they prohibit providing a document otherwise disclosable under Section 26(1) or do they permit providing a document otherwise not disclosable under Section 38(1)?

## What do the terms of the trust say?

Firstly, the trust instrument may include specific restrictions or permissions on the information which the trustee is able to provide to beneficiaries.

For example, the terms of the trust may provide that:

1. Certain documents are or are not disclosable to beneficiaries;
2. A beneficiary is only entitled to information about the trust once they are adults or have reached a certain age where they are deemed mature enough to handle knowing about their family's wealth; or
3. The rights contained in Section 26(1) shall not apply to the trust.

Where the terms of the trust do contain a restriction on a trustee's ability to disclose information or documents the trustee should be wary of taking the terms of the trust at face value.

For example, in the case of a restriction in relation to providing copies of the trust accounts or trust instruments, a trustee must be careful to consider whether such a restriction cuts across its overriding equitable duty to account to the beneficiaries. In the case of trust instruments and trust accounts, that core duty may 'trump' any restriction in the trust instrument, such documents being sufficiently fundamental to a beneficiary's ability to hold the trustee to account.

If no restriction exists, the trustee should next consider who is requesting the information and what documents are being requested.

## Who is requesting the information and for what purpose?

A trustee should also consider the nature of the interest of the beneficiary who is making the request for information.

In *Schmidt v Rosewood*, the Privy Council in its concluding remarks stated:

*'...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.**'*<sup>[2]</sup> (Emphasis Added)

Where a trustee receives a request from a beneficiary who, for example, is the brother of the settlor who is only likely to benefit if the settlor, his spouse, children and their children all die, it may be less appropriate for this beneficiary to have information about the trust where his likelihood of benefitting is very remote.

A trustee also needs to be mindful of its duty of confidentiality to all beneficiaries when considering a request for information from one or a group of beneficiaries, particularly if circumstances amplify those concerns. For example, where you have warring beneficiary families, it may be inappropriate to disclose trust information that relates to one side of the family to the other.

Another consideration is in what context the information is being requested. For example, it may be that the beneficiary requesting the information is the soon-to-be ex-husband of the settlor who is trying to obtain information about the wife's financial means. That beneficiary's entitlement may ultimately be predicated on their relationship to the settlor and therefore on that relationship ceasing, it may be particularly harmful to provide information on the size and amount of the trust fund to the husband. Indeed, to do so may cut across a trustee's fiduciary duty to preserve and enhance the trust fund.

## What documents or information are being requested?

We have already seen above that the terms of the trust instrument may seek to prevent a beneficiary from being able to obtain certain documents or information from the trustee and the risk of blindly following such a prohibition in relation to, for example, trust accounts. However, the trustee's decision whether to disclose a document is not simply whether a document has or has not been expressly excluded under the trust instrument but whether the document or information being requested falls into a category of documents which a beneficiary is ordinarily entitled to.

## Trust accounts

Trust accounts by definition provide details of the financial state and amount of the trust fund. Generally speaking trust accounts should be disclosed to beneficiaries, but consideration does need to be given to who is requesting the information. As mentioned above if the beneficiary's entitlement is more likely theoretical then it may not be appropriate to provide copies of the trust accounts.

## Trust instruments

Trust instruments are often one of the first set of documents to which a beneficiary may seek access. Trust instruments include the declaration/settlement of trust and any supplemental instruments. As with trust accounts, it is generally accepted that these should be provided to beneficiaries but again, consideration should be given to who the requesting beneficiary is and their likely interest.

## Company documents

When approaching any request for company documents a trustee needs to consider the nature of the requesting beneficiary's interest in the relevant company.

If the company in question is a wholly-owned special purpose vehicle set up to hold the assets of the trust and the directors of that company are provided by the trustee, the balance may tip in favour of disclosure. In effect there is no substantial economic difference between assets held by the trustee and those held by the company.<sup>[3]</sup>

Where the company in question is not merely a holding company for the underlying trust assets the beneficiary should make out a proper case for why the documents are being requested.<sup>[4]</sup> In the case of the company's profit and loss and balance sheet these should usually be disclosed if they are not already publicly available.

## Letter of wishes

The general rule against disclosure of letters of wishes is largely based on the principles in *Re Londonderry's Settlement*<sup>[5]</sup> that a trustee of a discretionary trust is not obliged to disclose documents or information which set out their reasons for exercising a power or discretion in a particular way.

As Salmon LJ observed in *Re Londonderry*: 'Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them.'

The Trusts Law makes express reference to disclosure of letters of wishes. As mentioned above, Section 38(1) provides that, subject to the terms of the trust and to any order to the Royal Court, a trustee is not obliged to disclose copies of letters of wishes.

The default position in statute is therefore that these are not disclosable unless the settlor has made express provision for the same in the trust instrument.

## Trustee deliberations

Trustee deliberations i.e. trustee minutes, are *ordinarily* not disclosable in accordance with the principle set out in *Re Londonderry* and the provisions of Section 38(1) of the Trusts Law.

However, care should be taken where those deliberations relate to decisions affecting administrative functions as opposed to dispositive functions (i.e. decisions relating to distributions to beneficiaries).

The English High Court recently indicated in *Lewis v Tamplin*<sup>[6]</sup> that the principle set out in *Re Londonderry* does not apply to a trustee's administrative functions. In that case the beneficiaries sought disclosure of, among other things, documents relating to option agreements entered into by the trustee for the development of trust owned real property, i.e. they did not concern decisions relating to distributions to beneficiaries.

While not a Guernsey case, the reasoning is based on fundamental principles that may well be persuasive to the Guernsey Courts.

## Legal advice

In relation to any legal advice obtained by the trustee, where it has been paid for from the assets of the trust and has been taken by the trustee in the course of it administering the trust, this will usually not be privileged as against the beneficiaries.

However, the trustee will still have to consider whether it is appropriate to disclose it. For example, where legal advice has been specifically directed at proposed reasons for the exercise of a power or discretion of the trustee in a particular way or where advice has been obtained in the context of warring families the detail of which may reveal matters confidential to a particular family.

Where the trustee has paid for advice itself (i.e. not from the assets of the trust) and for its own personal benefit, the advice is likely to be privileged against the beneficiaries.

## What can a beneficiary do if its request is refused?

As set out above there are a number of reasons why a request for trust information made by a beneficiary may be refused by a trustee (perhaps because the trust instrument prohibits its provision).

If a beneficiary is dissatisfied with the refusal it is possible for them to make an application to Court to try and obtain the requested trust information.

Under Section 26(2) of the Trusts Law, a beneficiary may apply to the Royal Court for an order authorising or requiring the provision of information relating to the state and amount of the trust fund.

The Royal Court will only make such an order where the provision of the information is **necessary** or **expedient** for one or other of the following:

- For the proper disposal of any matter before the court;
- For the protection of the interests of any beneficiary; or
- For the proper administration or enforcement of the trust.

A beneficiary also has the power to apply to the Royal Court for the disclosure of a letter of wishes or trustee deliberations pursuant to section 38(3) of the Trusts Law. The Royal Court will apply the same considerations as those set out above.

## The interaction between trustees' disclosure obligations and data protection

No summary of trustees' disclosure obligations would be complete without acknowledging the interaction these obligations have with trustees' data protection obligations.

Guernsey has adopted the regime instituted by the EU General Data Protection Regulation (**GDPR**) brought into force of law by the Data Protection (Bailiwick of Guernsey) Law, 2017 (**Data Protection Law**).

Pursuant to section 15 of Data Protection Law, individuals are able to make subject access requests for personal information held about them.

On its face this would appear to provide a 'back door' whereby beneficiaries could make requests for trust information and documentation it would not ordinarily be entitled to, such as trustee deliberations or letters or wishes which make reference to that beneficiary's personal data.

Guernsey legislation has expressly exempted (and did so long before the enactment of GDPR) from the scope of a subject access request any data consisting of information in respect of a Guernsey trust which can be withheld pursuant to section 38 of the Trusts Law (i.e. trustee deliberations and letters of wishes) or where disclosure would be contrary to a prohibition or restriction under any rule of law of Guernsey.<sup>[7]</sup>

In other words, beneficiaries of a Guernsey trust will face difficulties in relying on a subject access request to obtain information that they would not otherwise be entitled to as a matter of trust law.

## Conclusion

The above hopefully provides a clear step-by-step list of the issues that trustees should consider when dealing with an information request from a discretionary beneficiary. Whether information should be disclosed requires careful consideration of the terms of the trust, the beneficiary's interest and the type of document/information being requested, and the context (for example whether there is a dispute).

It is important that all requests for trust information are carefully considered and where there is any doubt on whether a document should be disclosed, legal advice should be obtained.

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[1] See for example in *Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited and Others* Guernsey Judgment 38/2004 following the Privy Council in *Schmidt v Rosewood Trust Limited* [2003] UKPC 26.

[2] [2003] UKPC 26, para [67].

[3] As was the case in *Bathurst v Kleinwort Benson (Channel Islands) Trustees Limited et al* (Guernsey Judgment 38/2004) where Lieutenant Bailiff Talbot QC ordered disclosure of minutes of shareholder and board meetings and company accounts for three companies which the trust wholly-owned.

[4] See the English Court of Appeal in *Butt v Kelson* [1952] Ch. 197 CA.

[5] [1965] Ch. 918, CA

[6] [2018] EWHC 777

[7] Schedule 8, Paragraph 16B of the Data Protection (Bailiwick of Guernsey) Law, 2017.

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