A beneficiary's right to see Trust documents – two recent cases

The common sense of Lord Walker's judgment in *Schmidt v Rosewood Trust* [2003] UK PC 26 has been remarkably successful in reducing disputes about the documents that beneficiaries are entitled to see.

The New Zealand case which followed it – *Foreman v Kingstone* [2004] 1 NZLR 841 - gave further clarification to this subject.

Disputes about access to Trust documentation usually arise when members of a family are at war with each other.

My article today is about two recent cases, one from New Zealand and one from Bermuda.

Because both families were at war with each other, the Trust Deeds had provisions which purported to limit access by beneficiaries to Trust information.

In both cases, the provisions were only partially upheld.

The New Zealand case was *Erceg v Erceg & Another* [2014] NZHC 155, a decision of Venning J.

The late Michael Erceg created Independent Liquor NZ Limited. With a PhD in mathematics he went improbably into the liquor industry where he was extraordinarily successful. Following his untimely death, the Company was sold for a reputed $1.25b.

His elderly mother benefitted under his Will but not under a Trust that he established. With the support of a son, she made a summary judgment application to access some Trust documents.

The Trust Deed had what I will call a barrier clause which was intended to stop her at the starting gate. It stipulated that *"the trustees shall not, unless required by law, be bound to disclose to any person any document or information relating to this Trust, the Trust fund or any Trust property, the beneficiaries or any document setting forth or recording any deliberations of the trustees as to the manner in which they have or should exercise any power of discretion"* etc.

The Bermuda Trust Deed was similar. The relevant clause in that document prevented the trustees from giving any accounts *"or any information of any nature in relation to the Trust Fund or income thereof"* to a beneficiary without the Protector's consent. This was followed by a provision which stated that *"The Protector shall not owe any fiduciary duty towards and shall not be accountable to any person or persons … for any act or omission"* for which he might be responsible.

In the New Zealand case, Venning J largely disregarded the clause but in acknowledgement of the family warfare, he refused to grant the degree of disclosure that was requested. To give one instance, the mother wanted a son to

see the requested documents. Documents before the Court showed that the son *"has … threatened to widely publish information concerning the family Trust(s) as well as details of Michael's Will if he [the son] did not receive a satisfactory response from the [trustees]."* [37] Understandably, Venning J did not allow such a person to have access to the documents that were ordered to be disclosed.

Justice Potter's decision in the *Foreman* case has been widely cited throughout the common law world. In general, it has been received positively but there has been some concern in places that she was too "liberal" in her approach to the entitlement to see documents. That approach was shared by Venning J who said, *"I consider Potter J overstated the position in suggesting the need for exceptional circumstances to exist to outweigh the beneficiary's 'right' to be informed. The point is, as the Privy Council made clear, that the beneficiary does not have a proprietary right to information; rather, the Court will require disclosure of information to ensure the trustees meet their obligations towards the beneficiaries."* [32]

In the event, the mother and junior counsel were authorised to inspect the Trust Deed, a share valuation, some financial accounts and redacted trustee resolutions. Senior Counsel could retain a hard copy of the Trust Deed and the redacted documents but he could not copy or reproduce information from the documents. The judgment records a form of undertaking that each of the people who were to see the documents had to sign. [54]

The Bermudan case was *Re A Trust* [2013] SC (Bda) 16 Civ (12 March 2013) and [2013] CA (Bda) 8 Civ. The protector was the principal beneficiary of the Trust, and had a 65% interest in it. He was in open warfare with the person who had the 35% interest.

The protector had refused to supply any documents – including the most basic of all materials, the Trust Deed - to the 35% beneficiary.

Kawaley CJ rejected the "*plain words of the Trust Deed*" which suggested that the Protector's powers were non-fiduciary. He said that the settlor presumably had an intention to create a valid Trust that *"does not oust the supervisory jurisdiction of the Court and/or the fundamental requirement that the trustees should be accountable to the beneficiaries for the due administration of the Trust."*

With their drive to attract lucrative Trust business, the legislatures of tax havens are continually expanding the parameters of permissible trust activity. Practitioners in these jurisdictions go further. In doing this, they run a serious risk that their laws will be internationally disregarded – if not derided. The Bermudan case shows a sensitivity to this reality. I suspect that Kawaley CJ realised that a decision to withhold Trust documentation, including the Trust Deed, would harm the reputation of Bermuda and its Trusts regime.

In my next article I will show how settlors who wish to prevent beneficiaries from gaining access to documents may be able to do so and how they may also be

able to prevent Courts from modifying nuptial settlements under s 182 of the Family Proceedings Act.

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