

## CHAPTER 23

**DISCLOSURE TO PERSONS INTERESTED UNDER THE TRUST****1. INTRODUCTION****Potentially controversial nature of issues concerning disclosure to beneficiaries on demand**

**23–05** NOTE 1. AFTER THE THIRD SENTENCE ADD: For a case where a trustee failed to apply for directions and suffered an adverse costs order in proceedings commenced by a beneficiary, see *Wingate v Butterfield Trust (Bermuda) Ltd (Costs)* [2008] SC (Bda) 6; [2008] W.T.L.R. 593.

**Sources of law about disclosure under trust law**

**23–06** NOTE 2. FOR THE REFERENCE TO Cayman Islands Trust Law, SEE NOW (2011 Revision), s.102. Trusts (Guernsey) Law 1989, ss.21, 22 and 33 HAVE BEEN REPLACED WITH AMENDMENTS BY Trusts (Guernsey) Law 2007, ss.25, 26 and 38 with effect from March 17, 2008.

**2. TRUSTEES' DUTY TO NOTIFY BENEFICIARIES OF THEIR INTERESTS****Adult beneficiaries of lifetime settlement with future interests**

**23–08** NOTE 8. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 50.2 and 56.9–56.10.

NOTE 10. ADD: In *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 the omission of trustees to notify adult beneficiaries with defeasible reversionary vested interests of the existence of the settlement until ten years after its creation was relied upon by them as demonstrating a wrong-headed and unfair tight-fistedness with regard to disclosure of information, but the court declined to consider whether the trustees had good reason for their past attitude to disclosure of information, see at [81] and [89].

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**Modification of the duty of disclosure by the terms of the trust**

- 23–14** AT THE END OF THE TEXT ADD: A clause in a discretionary trust that the trustees are not bound to disclose the existence of the trust to any beneficiary who has not taken an absolute and indefeasible interest under the trust does not render the trust as a whole invalid, though it remains unclear whether such a clause is in itself invalid.<sup>41a</sup>

**3. DISCLOSURE BY TRUSTEES TO BENEFICIARIES ON DEMAND*****Schmidt v Rosewood Trust Ltd*—the general principles**

- 23–18** AT THE END ADD: Following *Schmidt v Rosewood Trust Ltd*<sup>79a</sup> it is now settled in English law that the court should approach a request by a beneficiary for disclosure of a document in the possession of the trustees in their capacity as such as one calling for the exercise of discretion rather than the adjudication upon a proprietary right.<sup>79b</sup>

*The role of the court and the trustees*

- 23–20** DELETE THE TEXT FROM THE THIRD SENTENCE TO THE END AND REPLACE BY: The court does have an original jurisdiction to intervene in the administration of the trust, but if a trustee’s refusal to make disclosure to a beneficiary cannot be successfully challenged on those limited grounds, the court may not be persuaded, merely because of the trustee’s refusal to make disclosure, to intervene at all in the administration of the trust under its supervisory jurisdiction, so leaving the trustees’ refusal to stand.<sup>86a</sup> The trustees therefore have a central role in the decision making process on disclosure. Disclosure will, in the first place, be sought by beneficiaries from trustees. Normally applications for disclosure will be dealt with by trustees and the court will not be involved. In many circumstances, for example in relation to disclosure of trust instruments and accounts to principal beneficiaries with vested interests,

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<sup>41a</sup> *Tam Mei Kam v HSBC International Trustee Ltd* [2011] HKCFA 34 at [41]–[47]; affirming *sub nom. Re Estate of Mui Yim Fong* [2010] HKCA 197; [2010] 4 H.K.L.R.D. 69. The HK CA decided in favour of the validity of the clause, see [2010] HKCA 197 at [62], but the HK CFA did not decide the point though acknowledged that “it may be void”, see [2011] HKCFA 34 at [45].

<sup>79a</sup> [2003] UKPC 26; [2003] 2 A.C. 709.

<sup>79b</sup> *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [52] (though note that *Schmidt v Rosewood Trust Ltd*, above, has not received universal acclaim abroad, see *McDonald v Ellis* [2007] NSWSC 1068; (2008–09) 72 N.S.W.L.R. 605 for a critical view).

<sup>86a</sup> *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [69]–[71].

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trustees have no real choice to refuse disclosure save in special circumstances.<sup>86b</sup> But trustees need to have a discretion for the same reasons as the court needs to have a discretion. And so in the context of disclosure of confidential information the trustees have a discretion to determine whether, what and how disclosure should be made and, unless they make an application to the court seeking to surrender their discretion, the decision will be that of the trustees and the decision will stand in the absence of a successful challenge to the decision or successful invocation of the supervisory jurisdiction.<sup>86c</sup>

AFTER § 23–20 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Disclosure under the court’s supervisory jurisdiction as a precursor to hostile litigation*

**23–20A** The court’s jurisdiction to supervise and where necessary intervene in the administration of a trust by ordering disclosure of documents or information is limited to cases where disclosure is sought by a beneficiary (or other person interested under the trust) in his capacity as such and does not enable a stranger to the trust to obtain disclosure as a form of pre-action disclosure for the purpose of hostile proceedings against the trustees<sup>87</sup> or indeed enable trustees to obtain to obtain disclosure against a person otherwise than in his capacity as a beneficiary (or other person interested under the trust) as a form of pre-action disclosure.<sup>88</sup> In such a case disclosure may be obtained only if a proper case is made for pre-action disclosure under a quite different jurisdiction from that now under consideration.<sup>89</sup> There is, however, a different kind of case where a beneficiary seeks disclosure against a background of hostility between him and the trustees, and it is obvious that the application for disclosure is being made in anticipation that disclosure, if made, will be followed by a breach of trust claim by the beneficiary against the trustees. Though beneficiaries rarely help themselves by adopting a rude or excessively aggressive attitude in seeking disclosure from trustees, we do not consider that the fact that the beneficiary’s purpose in seeking disclosure is to assess the prospects of a breach of trust action is a reason why disclosure should not be ordered. That is

<sup>86b</sup> See § 23–24.

<sup>86c</sup> *Breakspear v Ackland*, above, at [67] and [73]; and on the trustees’ discretion see too *Rouse v IOOF Australia Trustees Ltd* [1999] SASC 181; [2000] W.T.L.R. 111 at [105].

<sup>87</sup> *Re C.A. Settlement* 2002 J.L.R. 312, Jersey RC; *Re Internine Trust and Azali Trust* [2006] JCA 093; 2006 J.L.R. 195 at [25].

<sup>88</sup> *Re A Settlement* [2010] JCA 231 at [34(ii)].

<sup>89</sup> See §§ 23–93 to 23–94.

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because the jurisdiction is based on the accountability of trustees<sup>89a</sup> and beneficiaries have a legitimate interest in seeking disclosure so that they are in a position to assess whether the trustees have properly accounted for their conduct of the trusteeship, and if not to seek an appropriate remedy. Nor do we think that fear a breach of trust claim could ever be a good reason for trustees refusing disclosure, and so if that was the only reason for declining or limiting disclosure, the duty of the trustees in making disclosure would be clear. There may, of course, be other circumstances which militate against disclosure, and so the fact that the trustees fear a breach of trust action does not mean that disclosure must be made. Nevertheless, in a case where the beneficiary does appear to have a real grievance or potential grievance, and is not merely a time-wasting troublemaker intent on disrupting the sound administration of the trust to the detriment of other beneficiaries, it may be easier than otherwise would be the case for the beneficiary to persuade the court to intervene under the supervisory jurisdiction, having regard to the conflict between the trustee's duty to give proper consideration to an application for disclosure and his personal interest in not being sued for breach of trust.<sup>89b</sup>

AFTER § 23–21 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Trusts and estates in administration*

**23–21A** We consider that generally similar principles apply in relation to disclosure to beneficiaries by personal representatives of an unadministered estate as apply to disclosure by trustees to beneficiaries of a trust. Beneficiaries of an unadministered estate do not have a proprietary interest in particular assets of the estate,<sup>96a</sup> but since the right to seek disclosure is not founded on the existence of a proprietary interest, the focus on the absence of such an interest is liable to lead one astray.<sup>96b</sup> Personal representatives of an unadministered estate are trustees for many purposes,<sup>96c</sup> are accountable to their beneficiaries,<sup>96d</sup> and have a duty to their

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<sup>89a</sup> See § 23–16.

<sup>89b</sup> Compare *Re A Settlement* [2011] JRC 109 at [7]–[15].

<sup>96a</sup> *Commissioner of Stamp Duties v Livingston* [1965] A.C. 694, PC.

<sup>96b</sup> *Att.-Gen. of Ontario v Stavro* (1994) 119 D.L.R. (4th) 750 at 756, Ontario.

<sup>96c</sup> *Bernstein v Jacobson* [2008] EWHC 3454; [2010] W.T.L.R. 559.

<sup>96d</sup> See generally Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (19th edn), § 61–23.

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beneficiaries of due administration.<sup>96e</sup> The court has jurisdiction, in administration proceedings, to supervise and where appropriate intervene in the administration of an estate.<sup>96f</sup> These matters are a sufficient basis, in our view, for the application of the *Schmidt* principles to an unadministered estate. Rights for beneficiaries of unadministered estate to seek disclosure of information in relation to the estate have been accepted in Canada,<sup>96g</sup> though not in New Zealand.<sup>96h</sup> In our view, in English law, beneficiaries of an unadministered estate have a right to seek disclosure in relation to matters concerning the estate, such as what assets are comprised in the estate and whether or not assets have in which the deceased was interested were subject to a beneficial joint tenancy and so passed by survivorship, but not (save in the context of a probate action) disclosure of previous wills of the deceased since that does not relate to the will proved by the personal representatives under which the rights of the beneficiaries seeking disclosure arise.<sup>96i</sup>

**Accounts and information about the state of the trust***Duty to keep accounts*

**23–22** NOTE 99. ADD: *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) at [216].

*Disclosure of trust accounts to beneficiaries*

**23–23** NOTE 4. AT THE END ADD: In *McDonald v Ellis* [2007] NSWSC 1068; (2008–09) 72 N.S.W.L.R. 605 a beneficiary with a fixed interest was considered to have an entitlement to inspect trusts accounts on the basis of a proprietary right, that being preferred as the basis for the rights of a beneficiary with a fixed interest to inspection over the principles of *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 A.C. 709. Contrast the earlier case *Avanes v*

<sup>96e</sup> See e.g. *Re Leigh's Will Trusts* [1970] Ch. 277 at 281, cited with approval in *Marshall v Kerr* [1995] 1 A.C. 148 at 157, HL.

<sup>96f</sup> On administration proceedings concerning estates, see generally Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (19th edn), Chap.60.

<sup>96g</sup> *Att.-Gen. of Ontario v Stavro*, above, considered in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2002] 2 A.C. 709 at [62].

<sup>96h</sup> *Re Maguire* (2010–11) 13 I.T.E.L.R. 139, NZ HC. *Att.-Gen. of Ontario v Stavro*, above, was not cited in this case, though *Schmidt v Rosewood Trust Ltd*, above, which did discuss the *Stavro* case as a case about unadministered estate, was cited.

<sup>96i</sup> In *Re Maguire*, above, the court rejected claims for disclosure of (i) documents relating to a property in which the deceased was interested and which was said to have passed by survivorship and (ii) claims for disclosure of former wills of the deceased. We consider that, so far as English law is concerned, the decision is incorrect as to (i) but correct as to (ii).

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*Marshall* [2007] NSWSC 191; (2007) 68 N.S.W.L.R. 595 where the *Schmidt* principles were accepted as applicable to a beneficiary with a fixed interest.

*Remedies for default*

- 23–27** AT THE END OF THE TEXT ADD: The court may decline to order an account where an order for disclosure of documents and information by the trustee to the beneficiary is an adequate and more cost-efficient remedy.<sup>25a</sup>

*Information about the state of the trust*

- 23–28** AFTER THE TEXT TO N.31 ADD: Ordinarily a beneficiary may seek reasonable information and supporting documents about transactions concerning the trust property and property owned by companies owned by the trust entered into by or with the authority of the trustees.<sup>31a</sup>

**After § 23–28 insert the following new sub-heading and paragraph***Information about trustee charges*

- 23–28A** Ordinarily a beneficiary may seek reasonable breakdowns and supporting documents in relation to fees and expenses of the trustees, including fees and expenses charged to companies owned by the trust.<sup>32a</sup>

*Information about discretionary distributions to or for the benefit of beneficiaries*

- 23–29** NOTE 33. AT THE END ADD: *Wingate v Butterfield Trust (Bermuda) Ltd* [2007] SC (Bda) 67; [2008] W.T.L.R. 357 at [37]. Contrast *Re A Settlement* [2011] JRC 109 at [32]–[35] where the court directed disclosure of a schedule of distributions specifying the dates and amounts of distributions but with redaction of the identity of the beneficiaries receiving the distributions, though the circumstances of that case were unusual in that a number of settlements were involved, and what was important in the context of that case was what distributions had been

<sup>25a</sup> *Wingate v Butterfield Trust (Bermuda) Ltd* [2007] SC (Bda) 67; [2008] W.T.L.R. 357 at [42].

<sup>31a</sup> *Wingate v Butterfield Trust (Bermuda) Ltd* [2007] SC (Bda) 67; [2008] W.T.L.R. 357 at [38]–[41]. As to disclosure in relation to companies, see §§ 23–62 to 23–64.

<sup>32a</sup> *Walker v Cherry*, July 15, 1994, Ch D (Judge Rich), unreported; *Wingate v Butterfield Trust (Bermuda) Ltd* [2007] SC (Bda) 67; [2008] W.T.L.R. 357 at [10], [11] and [36]. As to disclosure in relation to companies, see §§ 23–62 to 23–64. As to questioning trustee charges, see § 20–163.

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made from the various settlements involved rather than which particular beneficiaries had received the distributions.

**Documents relating to reasons for the exercise of powers or discretions by trustees**

**23–37** NOTE 61. REPLACE THE REFERENCES TO n.57 and n.61 BY REFERENCES TO n.58 and n.62.

NOTE 64. ADD: *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [53]–[57].

*Judicial discretion as to disclosure of documents relating to trustees' reasons*

**23–40** AT THE END ADD: In *Breakspear v Ackland*,<sup>81a</sup> concerned with disclosure of a settlor's letter of wishes which was determined<sup>81b</sup> to fall within the principle of *Re Londonderry's Settlement*,<sup>81c</sup> the principle was based, not on an absolute right, but rather on a discretion conferred on the trustees in the interests of the beneficiaries and the sound administration of the trust, and it was recognised that the court had a discretion to override the trustees' confidentiality.<sup>81d</sup>

**23–41** NOTE 83. Trusts (Guernsey) Law 1989, s.33 HAS BEEN REPLACED WITH AMENDMENTS BY Trusts (Guernsey) Law 2007, s.38 with effect from March 17, 2008.

**Internal trust correspondence and records, etc. during administration***Protection of confidentiality of other beneficiaries*

**23–43** NOTE 98. ADD: See too *Representation of Y* [2010] JRC 154; *Re A Settlement* [2011] JRC 109 at [20].

**Legal advice and communications with lawyers**

**23–45** NOTE 6. ADD: *Schreuder v Murray (No.2)* [2009] WASCA 145; (2009) 260 A.L.R. 139.

AT THE END OF THE TEXT ADD: A beneficiary should, of course, seek disclosure from the trustee, or if necessary in proceedings to which the trustee is a party, and not directly from the

<sup>81a</sup> [2008] EWHC 220 (Ch); [2009] Ch. 32.

<sup>81b</sup> See § 23–53A.

<sup>81c</sup> [1965] Ch. 918, CA.

<sup>81d</sup> *Breakspear v Ackland*, above, at [54], [56] and [62]–[63].

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lawyer who gave the advice since the lawyer is bound by privilege and is in no position to waive it at the instance of a beneficiary.<sup>6a</sup>

*Legal advice relating to exercise of powers*

**23–46** IN THE SECOND SENTENCE AFTER trustees’ INSERT reasons.

*Communications between the trustees and their lawyers*

**23–48** AFTER THE FIRST SENTENCE OF THE TEXT ADD: Where, however, in the context of an application by the trustees for directions, extensive disclosure is sought of communications between the trustees and their lawyers in relation to those proceedings, the court may limit disclosure both so as to ensure that the trustees are not inhibited in their communications with their lawyers by the fear that all will have to be disclosed to beneficiaries involved in the application, and to ensure that the application does not become sidetracked into a mini investigation which will not assist the substantive hearing of the application.<sup>16a</sup>

*Legal advice and communications with lawyers in breach of trust actions*

**23–49** NOTE 18. AT THE END ADD: See too *Thommesen v Butterfield Trust (Guernsey) Ltd* 2009–10 G.L.R. 102 (hostile action by settlor for removal of trustee).

### **The settlor’s letter of wishes**

*The case for disclosure*

**23–53** NOTE 31. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 56.51. AT THE END ADD: criticised in *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [46]–[47] and see [60].

<sup>6a</sup> *Cunningham v Cunningham* [2010] JRC 074.

<sup>16a</sup> *Re A Settlement* [2011] JRC 109 at [15] and [22]–[24].

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DELETE THE THIRD SENTENCE, THE WORD “But” IN THE FOURTH SENTENCE, AND THE LAST THREE SENTENCES.

AFTER § 23–53 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*General rule in England—no compulsory disclosure*

**23–53A** The case for disclosure of a settlor’s letter of wishes was rejected in *Breakspear v Ackland*,<sup>37a</sup> in the context of a family discretionary trust. The basis for the rejection was this. The defining characteristic of a settlor’s letter of wishes is that it contains material which the settlor desires that the trustees should take into account in exercising their powers. Having been brought into existence for the purpose of serving and facilitating an inherently confidential process, the settlor’s letter of wishes is properly to be regarded as confidential, to substantially the same extent and effect as the process which it is intended to serve. The settlor’s letter of wishes is different in character from the trust instrument. The trust instrument confers and identifies the trustees’ powers. By contrast the settlor’s letter of wishes operates exclusively within the boundaries set by the trust instrument and purely in furtherance of the trustees’ exercise of discretionary powers, and so may properly be afforded a status of confidentiality which the trust instrument itself entirely lacks. Consequently, the trustees are in general not bound to disclose the settlor’s letter of wishes and may keep it confidential from the beneficiaries, unless, in their view, disclosure is in the interests of the sound administration of the trust and the discharge of their powers and discretions.

*Objections to disclosure based on the Londonderry case*

**23–54** NOTE 42. AT THE END ADD: *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* [2007] W.T.L.R. 959 was effectively reversed by Trusts (Guernsey) Law 2007, s.38(1)(b) and (2), which expressly bring letters of wishes within the categories of documents generally excluded from disclosure.

AT THE END OF THE TEXT ADD: In England, what is crucial is not whether letters of wishes come within any particular excluded category in *Re Londonderry’s Settlement*.<sup>42a</sup> The categories do not appear to have been formulated with letters of wishes in mind. What is

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<sup>37a</sup> [2008] EWHC 220 (Ch); [2009] Ch. 32, see especially at [5]–[14] and [58]–[62].

<sup>42a</sup> [1965] Ch. 918, CA.

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crucial is that letters of wishes come within the *Londonderry* principle that documents forming part of the decision making process on the exercise of discretionary powers are protected by confidentiality. If asked, the Court of Appeal might have put letters of wishes into a separate category of documents protected by confidentiality.<sup>42b</sup>

**23–55** DELETE THE FIRST NINE SENTENCES AND REPLACE BY: The confidentiality afforded to letters of wishes and the question whether disclosure should be refused by the trustees or the court does not in general turn on the context in which the beneficiary’s demand for disclosure arises or the subjective purpose for which disclosure is sought, but rather on the objective consequences of disclosure. Even if disclosure is not sought in the context of dissatisfaction with a particular decision of the trustees, but for the purpose of evaluating a beneficiary’s prospective entitlement under the trust, the disclosure sought may too easily, once obtained, be used for the purposes of challenging the subsequent exercise by the trustees of their dispositive discretion on grounds of rationality.<sup>43</sup> Nevertheless, despite that criticism, it is striking that the purpose for which disclosure of a letter of wishes is sought is a matter apparently to be generally disregarded as irrelevant. For instance, a beneficiary, having inherited the estate of the settlor or another relative, may wish to consider re-directing the inheritance in whole or in part to his children within two years of the death, something that is likely to have tax advantages for him and his family, and for that purpose wish to know whether the trust fund in the family discretionary trust is earmarked under the settlor’s letter of wishes for him or for them. But it seems that this is a matter to be disregarded by the trustees (and the court) in deciding whether or not to make disclosure, a restrictive approach which does not fit easily with what is said in § 23–56 which was broadly accepted in *Breakspear v Ackland*<sup>44</sup> subject to a qualification about the role of the settlor in asserting confidentiality.<sup>45</sup> The only circumstances in which the purpose for which disclosure is sought for an evaluation of a beneficiary’s future prospects is relevant is where disclosure of a letter of wishes is sought for the purpose of an evaluation of the beneficiary’s prospects in the context of divorce proceedings. And so trustees (and the court), though they apparently cannot assist an harmonious family which wishes to regulate its financial affairs for sound tax

<sup>42b</sup> *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [24] and [65].

<sup>43</sup> *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [50]–[51], taking a critical approach to observations made in the deleted text of § 23–55.

<sup>44</sup> Above.

<sup>45</sup> *Breakspear v Ackland*, above, at [62] and see § 23–58.

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planning reasons, can assist a divided family where the disclosure is sought in the context of divorce proceedings.

**23–56** THIS PARAGRAPH, WHICH WAS FOR THE MOST PART ENDORSED IN *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [62] SHOULD BE READ SUBJECT TO WHAT IS SAID IN THE REPLACEMENT TEXT OF § 23–55.

**23–57** DELETE THIS PARAGRAPH (NOT CONSIDERED IN *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32) AND REPLACE BY: Where the confidentiality is of the limited character referred to in § 23–56, trustees may in a proper case make disclosure (and the court may in its discretion order disclosure if the trustees do not), but disclosure should not be made on slight grounds. For instance, an application for disclosure by a young adult beneficiary is likely to be refused if the beneficiary wants access to the settlor’s letter of wishes so that he can tell whether there is no need for him to pursue his studies or training since he can expect to be able, in view of the letters of wishes, to lead a life of idleness and live off the trust. Different considerations might be thought to apply where disclosure was sought in a tax planning context<sup>50a</sup> or, for example, if the beneficiary was thinking of buying a house and wished to ascertain his expectations, having regard to the letter of wishes, of obtaining money for a deposit from the trust, or of obtaining support under an income discretionary trust to help pay mortgage instalments or interest. Nevertheless, it seems that such a purpose falls to be disregarded in deciding whether or not disclosure should be made.<sup>50b</sup> The only circumstance in which the purpose for seeking disclosure has been recognised as material is when disclosure is sought in the context of divorce proceedings.<sup>50c</sup>

**23–58** DELETE THE THIRD SENTENCE AND REPLACE BY: It is doubtful whether it is appropriate for the trustees to be greatly influenced by the subsequent giving or withholding of consent to disclosure by the settlor. In the absence of special terms, the confidentiality in which a letter of wishes is enfolded is something given to the trustees for them to use, in accordance with their best judgment as to the interests of the beneficiaries and the sound administration of the trust. Once the settlor has completely constituted the trust, and sent his letter of wishes, the preservation, judicious relaxation or abandonment of that confidence is a matter for the

<sup>50a</sup> See replacement text of § 23–55.

<sup>50b</sup> See *Breakspear v Ackland*, above, at [50]–[51] and the replacement text of § 23–55.

<sup>50c</sup> See § 23–55.

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trustees or, in an appropriate case, the court.<sup>52a</sup> It follows that the settlor is bound by the confidentiality and so may be unable to disclose the letter of wishes to beneficiaries without the trustees' consent. Further, it is doubtful whether it is either appropriate or legitimate for a settlor to fetter the trustees' discretion in that respect, either by the inclusion of special terms as to confidentiality in the letter of wishes itself or, still less, on any subsequent occasion.<sup>52b</sup>

NOTE 55. AT THE END OF THE SECOND SENTENCE ADD: (not repeated in 18th edn).

**23–60** NOTE 58. ADD: See *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [68].

AFTER THE TEXT TO N.58 ADD: Further, if the trustees seek directions from the court blessing a refusal to disclose a letter of wishes, they will, under their duty of disclosure in such applications,<sup>58a</sup> need to disclose their reasons for the proposed refusal.<sup>58b</sup> And where the trustees make no such application, but in an application by beneficiaries for disclosure of the settlor's letter of wishes, indicate that they intend to make an application to the court for approval of a decision on the exercise of their dispositive powers which will involve a disclosure of that letter, the court may, despite opposition from the trustees, decide to exercise its supervisory jurisdiction by ordering disclosure of the settlor's letter of wishes. And so, despite the general theme of protection of the confidentiality of a settlor's letter of wishes pervading *Breakspear v Ackland*, above, disclosure of the settlor's letter of wishes was ordered in that case, as sought by the beneficiaries, because it would be disclosed anyway in the trustees' intended application, and there were in the circumstances sound reasons for disclosure sooner rather than later.<sup>58c</sup>

DELETE THE LAST TWO SENTENCES AND NN.59 AND 60 AND REPLACE BY: And so in *Breakspear v Ackland*<sup>59</sup> the judge did read the settlor's letter of wishes before reaching his decision.<sup>60</sup>

<sup>52a</sup> *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [62].

<sup>52b</sup> *Breakspear v Ackland*, above, at [63]–[64].

<sup>58a</sup> See § 29–299.

<sup>58b</sup> *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [70].

<sup>58c</sup> *Breakspear v Ackland*, above, at [90]–[101].

<sup>59</sup> Above.

<sup>60</sup> See at [95]–[97]. An order for such disclosure was refused in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 409, NSW CA, but largely because there was no ground for introducing new evidence in the CA. In

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**Company documents**

AFTER § 23–64 INSERT THE FOLLOWING NEW PARAGRAPH:

**23–64A** Where none of the trustees is a director of the company concerned, a beneficiary seeking disclosure under the court’s supervisory jurisdiction should seek an order requiring the trustees to assert such rights as they have under company law to obtain disclosure from the directors, if necessary by separate company law proceedings. It is not a permissible exercise of the court’s powers under the supervisory jurisdiction to make disclosure orders in the trust proceedings directly against the directors, even if they are also beneficiaries and before the court in their capacity as beneficiaries.<sup>75a</sup>

**Particular beneficiaries**

*Objects and donees of particular powers*

**23–72** NOTE 89. FOR THE REFERENCE TO Thomas and Hudson, *The Law of Trusts*, SEE NOW (2nd edn), §§ 19.07 to 19.11.

**5. DISCLOSURE IN TRUST LITIGATION****Disclosure after commencement of proceedings**

**23–91** NOTE 50. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 31.3.5 to 31.3.30, SUBSTITUTE *Civil Procedure* (2011), Vol.1, 31.3.5 to 31.3.30.1.

*Confidentiality and reasons for exercise of powers or discretions*

**23–92** NOTE 55. AT THE END OF THE FIRST SENTENCE ADD: *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32 at [17].

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that case, the first instance judge felt able to decide the issue of disclosure without examining the letter of wishes **Error! Main Document Only**, which remained in a sealed envelope throughout the trial, see *ibid*. Note that this procedure cannot be utilised in an application for pre-action disclosure under rules of court, compare *BSW Ltd v Balltec Ltd* [2006] EWHC 822 (Ch); [2006] All E.R. (D) 142 (Apr) at [84]–[86] (which rejects a procedure based on use of a court appointed expert), but that is a quite different kind of application, see §§ 23–90 *et seq.*, see *ibid*.

<sup>75a</sup> *Re A Settlement* [2010] JCA 231.

## DISCLOSURE TO PERSONS INTERESTED UNDER THE TRUST

**Pre-action disclosure**

- 23–93** NOTE 61. Supreme Court Act 1981 is renamed Senior Courts Act 1981 from October 1, 2009, see Constitutional Reform Act 2005, Sch.11, para.1 and Constitutional Reform Act 2005 (Commencement No.11) Order 2009 (SI 2009/1604).

AFTER § 23–96 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

**Disclosure by beneficiary of trust documents held by non-party trustees**

- 23–96A** Disclosure by a party to litigation is limited to documents which are or have been in the control of the party to the litigation, and for this purpose the party has or has had a document in his control if he is or was in physical possession of it, or has or has had a right to possession of it, or has or has had a right to inspect or take copies of it.<sup>77a</sup> Under the principles of *Schmidt v Rosewood Trust Ltd*<sup>77b</sup> a beneficiary does not have an automatic right to disclosure of trust documents.<sup>77c</sup> Accordingly,<sup>77d</sup> in many, perhaps most cases, a disclosure order against a beneficiary of a document held by the trustee of the trust concerned would not be proper, since production by the beneficiary would depend upon the exercise of consent by a party over whom the beneficiary had no control or the exercise of discretion by the court.<sup>77e</sup> But it would go too far to say that an order might never be made against a beneficiary in respect of a trust document not in his physical possession, as in circumstances in which the trustee would have no ground upon which to oppose production of a document at the instance of the beneficiary.<sup>77f</sup> In special circumstances, a beneficiary (or settlor) may be taken as being in control of trust documents under principles unrelated to those of *Schmidt v Rosewood Trust Ltd*, as where the beneficiary settled his assets into an offshore trust at the time when he received notice of a claim against him and the evidence indicates that the true nature of the relationship between the beneficiary and the trustee is that the beneficiary (or settlor) is the puppet master in the handling of money entrusted to the trustee for the purpose of defeating

<sup>77a</sup> CPR, Pt.31, r.31.8.

<sup>77b</sup> [2003] UKPC 26; [2003] 2 A.C. 709.

<sup>77c</sup> *Schmidt v Rosewood Trust Ltd*, above, at [67]. See §§ 23–18 to 23–21.

<sup>77d</sup> *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 at [43]–[45].

<sup>77e</sup> *North Shore Ventures Ltd v Anstead Holdings Inc*, above, at [45].

<sup>77f</sup> *ibid.* For a case where that may be so, see § 23–24.

## DISCLOSURE TO PERSONS INTERESTED UNDER THE TRUST

the creditor's claim.<sup>77g</sup> Questions of disclosure by a beneficiary of trust documents not in his possession may sometimes be circumvented by a third party disclosure order<sup>77h</sup> against the trustees, but there are limitations on the availability of a third party disclosure order<sup>77i</sup> and such an order may be of no practical use in the case of offshore trusts and trustees.

## 6. DISCLOSURE BY OUTGOING TRUSTEES TO THEIR SUCCESSORS

### Transfer of trust papers on change of trusteeship

**23–97** NOTE 78. AT THE END ADD: The statement of the law in this and the next two paragraphs was approved in *Equity Trust (Bahamas) Ltd v Basel Trust Corp. (Channel Islands) Ltd* [2012] JRC 006 at [26].

## 7. DISCLOSURE BY AND TO SETTLORS AND PROTECTORS

### Disclosure by trustees to settlor

**23–103** NOTE 83. Trusts (Guernsey) Law 1989, s.22(1) has in relation to a settlor been replaced with amendments by Trusts (Guernsey) Law 2007, s.26(1)(b)(iii) and (2) with effect from March 17, 2008.

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<sup>77g</sup> *North Shore Ventures Ltd v Anstead Holdings Inc*, above, at [24]–[41]. Note that there was no requirement, for the purpose of obtaining a disclosure order, for the creditor either to obtain an order under Insolvency Act 1986, s.423 setting aside dispositions into the trust or to establish that the trust was a sham.

<sup>77h</sup> CPR, Pt.31, r.31.17.

<sup>77i</sup> See § 23–95.