

Trust Disclosure to Beneficiaries – the Cases Continue

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Jersey trustees typically spend a great deal of time complying with various international reporting requirements, including FATCA and CRS. However, two cases demonstrate that the long standing issue of disclosure of information to Beneficiaries of trusts can still cause difficulties and should not be overlooked.

Under Jersey trust law, there is a strong presumption that many categories of Beneficiaries should be provided with a copy of trust documents and accounts if these are requested, unless there is a good reason to refuse.

A question that arose in an English case is whether advice provided by lawyers to the trustee is privileged and therefore exempt from this requirement to disclose to Beneficiaries. In the case of Blades –v- Isaac and Alexander the Beneficiaries wished to see legal advice provided to the trustees. Although acknowledging there is no absolute right for Beneficiaries to see trust documents, if legal advice is a trust document then a trustee would normally need a positive reason to refuse disclosure to a Beneficiary. However, if the advice were not a trust document and privileged then the trustee could refuse disclosure. The court distinguished between advice sought personally, perhaps if the trustee was concerned about a personal attack, and advice obtained as trustee for the benefit of the trust. If the trustee was seeking personal advice than they would normally have personally to pay for this advice. The court made it clear that a trustee cannot expect to take legal advice at the expense of the trust fund and then expect this advice to be viewed as personal to it. This distinction can be easily overlooked, and when seeking legal advice trustees need to consider who should pay and whether they wish it to be privileged. Not all legal advice is privileged in any event, but a trustee does need to consider privilege and not assume that any legal advice is confidential from everyone. It may well be, for example, that legal advice would be privileged as against third parties seeking to attack the trust or its assets. However, if this advice is a trust document then the privilege is vested in the trust and the advice

likely available to the Beneficiaries. Although this was an English case, it is likely that this position would be reflected in the Jersey courts.

The question of disclosure to Beneficiaries can cause concern to Settlers, perhaps if Beneficiaries are young or otherwise vulnerable. It is quite common for Settlers to wish to restrict access in trust deeds. However, a Guernsey case emphasised the difficulty with achieving this and confirmed that such restrictions could not override trustees' fundamental duty to account to Beneficiaries. Therefore, even the inclusion of express provisions in the trust deed restricting disclosure to Beneficiaries in the trust deed are unlikely to prevent Beneficiaries gaining access to certain trust documents and accounts. Again, we consider this would be the position in the Jersey Courts.

These recent cases demonstrate that Beneficiaries' rights to access information about trusts still causes issues and Trustees must ensure they consider this when seeking legal advice and drafting trust deeds.

This article first appeared in the JEP Wealth Management Review.

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