

Trustee disclosure: the A Settlement [2011] JRC 109

Insights - 12/06/2011

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The extent of a trustee's obligation to disclose documents (including correspondence between the trustee and its legal advisors) has been the subject of consideration in the A Settlement [2011] JRC 109. This is the latest judgment arising from an application for directions made by a corporate trustee (the "Trustee") in relation to three Settlements of which it is trustee: the B, C and D Settlements.

| Facts

Three brothers had, in the 1930s, set up a joint business in Ireland that was run through a series of companies (the "Irish Companies"). In due course each brother settled certain of their shares in the Irish Companies into separate discretionary trusts (the B, C and D Settlements) (the "Trusts"). The structure of the Trusts is complex and a detailed description is beyond the scope of this summary. In short, the Trustee holds some of the settled shares through a wholly-owned holding company (the "Holding Company"). The Holding Company holds: (i) directly, 100% of two of the Irish Companies; (ii) indirectly (through a further holding company), 100% of another of the Irish Companies; and (iii) directly, 50% of a further of the Irish Companies. The Trustee holds the shares of the Holding Company on trust equally between the B, C and D Settlements as to one-third each. There are other interests of the B and C Settlements which are not held through the Holding Company.

Importantly, the directors of the Irish Companies are primarily beneficiaries of the D Settlement (the "D Directors").

In 2001 the beneficiaries of the B and C Settlements raised concerns with the Trustee regarding the management of the Irish Companies by the D Directors. The Trustee took certain steps,

through the Holding Company, to procure the appointment of its own directors (the "Trustee Directors") in those Irish Companies which the Holding Company controlled as 100% shareholder. This was to obtain a majority at board level in order to investigate the complaints. It appointed a chartered accountant (the "Accountant") who produced a report. The report indicated, amongst other things, potential excessive director remuneration. This excessive remuneration had created potential tax liabilities. In the wake of this analysis, the Accountant and the Trustee Directors resigned. Beneficiaries of the D Settlement (including some or all of the D Directors), who are the "First Respondents" in this case, appointed their own tax and legal counsel, who purported to rebut the concerns of the Accountant. The matter is still live.

The Trustee has, since 2007, regularly sought directions from the Royal Court in relation to its investigations into the Irish Companies. It has surrendered its discretion to the Royal Court, on the basis that it faced actual or potential conflicts of interests. The matter has already been before both the Royal Court and the Court of Appeal, regarding the disclosure of information by the First Respondents about the affairs of the Irish Companies. In advance of a further directions hearing, to be held in September 2011, an application was brought by the First Respondents for the Trustee to disclose certain documents.

The documents being sought

There were five categories of documents in relation to which disclosure was sought:

1. certain redacted documents that had previously been before the Royal Court and the Court of Appeal, but which the First Respondents had not seen;
2. instructions and underlying documents sent to the Trustee's English barrister;
3. copies of the Trustee's correspondence regarding the reason why the Accountant resigned, the suggestion being that the Accountant did not resign because of the potential tax liabilities but because of an alleged breach of duties of confidentiality;
4. copies of the Trustee's correspondence regarding a change which occurred in the Irish lawyers acting for the Trustees; and
5. copies of all correspondence between the Trustee (and/or its advisors) and the Accountant (and/or his firm) concerning potential additional disclosure from the D Directors.

The Law

The Royal Court stated the general principles that it should have regard to when deciding whether to order disclosure of documents by a trustee. This was by reference to a helpful list submitted by the Advocate appearing for the Trustee. This should assist all trustees at the outset in deciding how to respond to requests for disclosure, and in deciding whether to apply to the

Royal Court for directions. The factors to be considered are:

- **Context:** this would include, for example, the state of the relationship between the trustee and beneficiaries, and the nature of any legal proceedings. Hostile proceedings may complicate matters.
- **Capacity:** is the beneficiary seeking documents simply as a beneficiary and in no other context, or has he/she been convened to legal proceedings in which he/she needs to make submissions? If it is the former, then there is a strong presumption that the beneficiary is entitled to see trust documents (although a strong presumption against disclosing the letter of wishes), applying the principles in *In Re Rabaiotti* (1989) Settlement 2000 JLR 173. If it is the latter then the principles in *Re A Settlement* 1994 JLR 139 apply - the appropriate test is for the beneficiaries to have sufficient information to make fully informed submissions.
- **Relevance:** this can often be a matter of opinion depending on whether one takes a narrow or broad approach to relevance, but it can act to include or exclude documents from disclosure.
- **Purpose** - a corollary of "context" and "capacity" perhaps, but clearly why the beneficiary seeks the documents should be considered. If, for example, a beneficiary seeks to attack the validity of the trust then it may warrant non-disclosure.
- **Floodgates:** is this a specific request or is it a general request more akin to a "fishing expedition"? Will it be the genesis of further extensive correspondence, and set an unwelcome precedent for further applications for disclosure, all at significant cost and to the detriment of other beneficiaries.
- **Third parties** - do the documents concern any third parties whose interests (for example, confidentiality) require protection.
- **Procedural appropriateness:** does the request amount to pre-action disclosure? The concept of obtaining discovery of an adversary's documents in advance of the commencement of formal legal proceedings does not, in general, find favour with the Royal Court. Trustee disclosure, and its underlying principles, should not be utilised as a mechanism to circumvent this procedural rule.

The Royal Court added that it is not in the interests of justice for trustees who are seeking directions from the Royal Court to be obliged to disclose communications with their advisors on the issue which is before the court. Trustees should not be inhibited from seeking advice in the context of difficult trust issues, by the fear that such advice would as a matter of course be required to be disclosed and would therefore find its way into the hands of the beneficiaries, although such disclosure would sometimes be appropriate (for example where the conduct of the trustee's behaviour itself is impugned). Trustees have to consider their position very carefully and professional advice will play a vital role in such considerations.

Finally, the Royal Court made clear that, in deciding whether or not to order disclosure in this instance, it would aim to prevent the parties and the Royal Court from being "side-tracked into a series of mini-investigations about the past". The Royal Court was sitting in an administrative capacity in proceedings that were not hostile. This was a consideration of the practical steps that the Trustee should adopt in its future conduct, and was not a trial of the underlying issues. Disclosing excessive information would potentially lead to time and money spent considering irrelevant points, and an unnecessary depletion of the Trust assets accordingly. This position was all the more so given the potential for hostile proceedings to develop in Ireland, and the prejudice that might be caused through extensive discovery at this stage.

The Royal Court's decision

Taking each category of document in turn:

- The redacted documents: they related to communications between the Trustee and beneficiaries or their advisers. Disclosure was not appropriate. A beneficiary is entitled to see correspondence between himself/herself and the trustee but not a trustee's correspondence with other beneficiaries, nor (absent good reason) working communications between the trustee and its lawyers.
- Instructions to counsel: adopting the "mini-investigations" point above, the Royal Court held that they were of no relevance to the practical issues of Trustee directions to be considered at the hearing in September 2011.
- The Trustee's correspondence regarding the resignation of the Accountant and the change in the Trustee's Irish legal team - again, it bore no particular relevance, and could side-track the matter. It may also be prejudicial should hostile proceedings be commenced.
- Correspondence between the Trustee and the Accountant regarding potential additional disclosure by the D Directors: this was not a permissible line of inquiry as the Court of Appeal had considered, and rejected, the reason why the First Representatives were seeking this information.

Conclusion

The scope of trustee disclosure to beneficiaries (or indeed to third parties) is a complex area requiring a careful examination of the pertinent considerations. The answer will often not be straightforward. Although every situation be different, this case has helped trustees and lawyers alike by clarifying the basis upon which the Royal Court will approach the issues. It should inform trustees from the outset and assist in deciding whether to apply to the Royal Court for directions. It also encourages trustees to seek advice and guidance in the event that difficult questions arise, safe in the knowledge that the Royal

Court will be slow to order disclosure of the details of that guidance or advice. Trustees should consider all of these issues closely before taking any decision in relation to a beneficiary's request for documents.

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