

In re B; B v T (Court of Appeal, 11 July 2012)

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A trustee's duty of confidentiality has recently been discussed and to some extent clarified in the recent Guernsey Court of Appeal decision of *In re B; B v T* (Court of Appeal, 11 July 2012). This summary has been prepared to provide you with a summary of the case as well as the general issues raised, but is not intended to cover all matters or to provide commentary. This summary does not constitute legal advice.

| Background

This case involved a Guernsey professional trustee (the details of which, together with all other parties have been anonymised in the judgment to preserve privacy) (which in itself is somewhat ironic one could say) which was trustee of two Guernsey law trusts established by a settlor (who had passed away in 2001) for the benefit of his children and grandchildren and to hold a number of French assets of substantial value. A protector and family advisory committee had been appointed to protect the interests of the beneficiaries.

As many will be aware, the French authorities have, over the past couple of years, become increasingly interested in trusts set up by or for French individuals or containing French situs assets and have commenced a number of investigations into certain structures. These investigations have included civil, criminal and tax investigations and certain disclosure obligations have now been imposed.

In this case, the French tax authorities were carrying out extensive investigations and were contemplating placing the trustee under judicial investigation for criminal offences (translated as "*possession of stolen goods and complicity in tax evasion*" and "*aggravated laundering*") and issued a summons requiring the trustee to appear before the District Court of Paris for examination (not as a witness but as a potential defendant). The possible consequences of these proceedings were extremely serious including imprisonment for substantial periods of time and very large fines.

There was also a possible action against one of the directors of the trustee personally. These allegations would obviously have had very serious consequences for the director and the company as a whole.

Expert opinions were obtained which held that there was no basis for criminal liability on the part of the trustee.

Between a rock and a hard place

On becoming aware of the French summons, a beneficiary of the trusts brought proceedings in the Royal Court of Guernsey for an order to be made to prevent the trustee from disclosing information relating to the trusts without leave of the Court. The trustee was faced with the unenviable position of having to balance their duties of confidentiality, owed to the beneficiaries, with their own interests. The trustee therefore applied for an order allowing it to disclose trust information in response to the summons. The Court at first instance directed that the trustee could disclose ***"any information of whatever nature...the Respondent reasonably considers necessary or desirable to protect the interests of the beneficiaries...to secure the preservation of the trust property or to protect the interests of the Respondent personally in the context of on-going criminal investigation"*** [emphasis added].

Unsurprisingly, the beneficiary appealed against this decision on the basis that the trustee owed a duty of confidentiality to the beneficiaries and the trust and that such a duty overrides a trustee's right to disclose information in order to defend itself, even in criminal proceedings. Further, the beneficiary was concerned that the information that would be provided to the authorities would be used by the authorities in existing criminal investigations or to bring new civil claims initiated by the settlor's widow (and joined by one of the settlor's sons) who is said to have waived her entitlement to the settlor's estate years previously. Further, there was said to be a real risk that trust assets would be seized and/or frozen. Expert evidence was submitted which supported these fears.

In July last year, the Court of Appeal heard the case as a *de novo* (new) hearing (as extensive additional evidence had been provided between the first instance hearing and the appeal) and dismissed the appeal, finding that in certain cases, the balance of duties lies in favour of the trustee to the extent that disclosure was required to defend the trustee. The only change made to the directions at first instance were that the trustee could disclose information ***"necessary or prudent to protect the interests of the beneficiaries"*** [emphasis added].

General duty of confidentiality but dependant on the circumstances

In considering the duty of confidentiality owed by a trustee, the Court of Appeal looked to both

English law and Jersey cases. Considering a recent Jersey decision on this topic, the Guernsey Court concluded that the Jersey case did not deal with the question of duty of confidence generally, but purely in the context of hostile proceedings, but that the Guernsey Court needed to look at the issue generally, making this decision a very interesting decision indeed.

The Court of Appeal held that the duty of confidentiality did not apply differently to different types of documents (as has been held in Jersey case law), but that it applies generally, subject to qualifications based on the circumstances.

| Like banker like trustee

In analysing when disclosure would be appropriate, the Court, confirming what some have already considered to be the correct analogy, held that the duty of confidentiality owed by a trustee to a beneficiary is *akin* to that owed by a bank to a customer. Citing the well known English case of *Tournier v National Provincial and Union Bank of England* [1924] 1 K.B. 461, the Court held that trustees have a general duty of confidentiality, but that such duty was not absolute but can be qualified as follows:

- (a) where disclosure is under compulsion by law;
- (b) where there is a duty to the public to disclose;
- (c) where the interests of the [bank] require disclosure;
- (d) where the disclosure is made by the express or implied consent of the [customer].

In line with *Tournier* therefore, the Court of Appeal held that a trustee has a right to disclose such information reasonably necessary for the protection of the trustee's interests.

Whilst some have already argued that the application of principles developed in a banking relationship might be difficult to apply in a trust setting, the Court of Appeal did clearly point out that the duties owed by trustees and by banks are not identical.

| A balancing act

The Court of Appeal held that in deciding, in each circumstance, whether disclosure is appropriate, a balancing act is also required between the interests of the beneficiaries and the trustees against the "*nature, scope, quality and effect of the foreign order*" that may be ordered. In addition, this balancing act must be considered in light of the general public interest of the disclosure. In this particular case, the Court held that "*the potential injustice to the Respondent here 'trumps other considerations' such that the balance falls firmly on the side of dismissing the appeal and granting the application by the Respondent.*"

Conclusion

This case provides a welcome consideration of this important yet uncertain area of trust law and will be of particular interest to trustees and perhaps to other fiduciaries. Whilst the facts of this case are particular, the issues raised in this case should be borne in mind when drafting trust documentation and when considering the future of a trust, its beneficiaries and potential fiscal issues.

Ultimately there are limits to the duty of confidentiality, particularly in light of potential injustice.

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