

## In the matter of the HHH Employee Benefit Trust: scope of disclosure obligations owed by...

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### In the matter of the HHH Employee Benefit Trust: scope of disclosure obligations owed by settlors with reserved powers

On 28 June 2012, Jersey's Royal Court delivered an important judgment confirming the scope of a settlor's disclosure obligations under a reserved powers trust<sup>1</sup>. Faced with a wide-ranging information request from a beneficiary, the Court was required to determine whether it had jurisdiction to order a settlor to provide disclosure to a beneficiary and, if so, how that jurisdiction should be exercised. In doing so, the Court also reviewed the scope and exercise of a settlor's reserved powers.

#### Facts

The Settlor was a multi-national company and the settlor of employee benefit trust used to incentivise its employees (the Trust). The Trustee was an independent service provider. The Representor (B) had been an employee of the Settlor and was a beneficiary under the Trust. The Trustee also created a sub-trust, of which B and his family were beneficiaries (the Sub-Trust). The Settlor retained three powers under the Trust. It had powers to appoint a protector and to appoint or remove trustees, and also a power to amend administrative provisions in the Trust with the consent of the Trustee.

B's employment with the Settlor ended in 2005. In the years that followed, B's relationship with the Trustee deteriorated.

The parties were unable to agree on the way forward. B subsequently brought a representation against both the Trustee and the Settlor. The representation asserted that B needed to be provided with an extensive range of documents in order to obtain advice on his interest in the Sub-

Trust.

The Court was required to determine whether the Settlor was under any obligation to make any disclosure to B and, if so, the extent of that obligation.

## Decision

As a starting point, the Court reviewed the Settlor's reserved powers to determine whether their nature was beneficial, limited or fiduciary.

The Court accepted that powers to appoint a protector and to appoint or remove trustees were fiduciary. That left the Settlor's power to amend administrative provisions of the Trust with the consent of the Trustee.

Drawing on a line of authority including the Imperial Group Pension Trust and the Prudential Staff Pensions cases<sup>2</sup>, the Court held that (as is the case with pension trusts) in an employee benefit trust, the effect of the legal relationship of employer and employee is relevant, and meant that whilst the Settlor's power to amend administrative provisions was not fiduciary, neither was it wholly beneficial. In deciding whether to propose amendments, the Settlor was entitled to consider its own interests as employer, but could not do so without any regard to the reasonable expectations of the beneficiaries. Accordingly the power was categorised as a limited power.

With regards to the disclosure sought, the Court noted that the Settlor could not be regarded as a "trustee" for the purposes of Article 29 of the Trusts (Jersey) Law 1984 (Trusts Law), which imposes an obligation upon trustees to disclose trust documentation to beneficiaries. The Settlor did not hold any property, and applying the duties of a trustee to someone without stewardship of the trust property would have produced absurd results.

The Court consequently analysed whether there was any other basis for ordering disclosure against the Settlor. It noted that the Privy Council had previously characterised the Court's ability to order a trustee to disclose trust documents as an aspect of the Court's inherent and fundamental jurisdiction to supervise and intervene in the administration of a trust<sup>3</sup>. Guernsey's Royal Court had subsequently relied on this principle in deciding that a beneficiary could seek disclosure from a protector<sup>4</sup>. The Court agreed with this approach. It held that if the Court is to properly supervise and, if necessary, intervene in the administration of trusts, then its jurisdiction must extend not only to trustees, but also to any other person undertaking a fiduciary role within the trust. In Jersey this jurisdiction arises not only under the Court's inherent jurisdiction, but also under Article 51(2)(a)(iii) of the Trusts Law, which gives the Court jurisdiction to make an order concerning any person that has "a connection with the trust".

The Court then considered how it should exercise its jurisdiction. Even if the Settlor had information concerning the Trust in its possession, the fact that the Settlor had settled the Trust

would not, without more, provide grounds for requiring such information to be disclosed to B.

The Court held that where a person seeks disclosure of trust documents from someone with fiduciary functions under a trust, they must show that the information that is being sought relates to the exercise of those fiduciary functions. This is because the liability to account only arises as a "necessary corollary" of the obligations imposed by the fiduciary function<sup>5</sup>. In support of this approach, the Court said that it would be striking and undesirable if the reservation of powers by settlors exposed them to onerous and wholesale disclosure obligations, as if they were trustees. When settlors hand over trust property to trustees they are intending the stewardship of the trust property to pass to the trustees and for their own role in the trust to come to an end, save for any limited functions that they may retain. The Settlor was therefore only under a duty to account to B for its reserved fiduciary powers and B was not entitled to disclosure of any other documentation that did not relate to exercise of those powers.

B then argued that in order to be in a position to discharge its fiduciary obligations, the Settlor needed to be fully informed as to the administration of the Trust at all times and in all respects. According to B, this required the Settlor to, in effect, shadow the Trustee's role and have the complete suite of Trust documents to enable it to do so. The Court disagreed and cited with approval the following passage from Lewin on Trusts in respect of the power to appoint new trustees:

*"We do not think that a nominated person can be expected to have a detective role so that he is required to keep the trustees under surveillance... But if the nominated person has become aware of facts that required grounds for the appointment of a new trustee, and he has accepted his fiduciary function, for instance by making previous appointments, it does not seem to be harsh to impose upon him the duty of considering whether appointments should be made"*<sup>6</sup>.

Therefore, the Court found that a settlor with reserved fiduciary powers cannot be expected to shadow the central role that trustees have in relation to a trust and does not have to keep every step of the trustee under surveillance. However, a settlor with reserved powers does have a duty to consider exercising its power when it becomes aware of facts which require a change of trustee or (we would suggest) indicate that such a change may be appropriate.

Turning to the two fiduciary powers that the Settlor had retained (the powers to appoint a protector and to appoint or remove trustees), the Court noted that it had never been suggested that a protector should be appointed and there was nothing to police in that regard. Similarly, whilst there had been discussions about the possible removal of the Trustee by the Settlor and the appointment of a new trustee, B already knew the Settlor's position on removal and was not entitled to disclosure of the reasons why the Settlor had come to that position.

The Court found that the other wide-ranging documentation that B was seeking, and the purposes for which he sought them, were unrelated to the exercise of the Settlor's fiduciary powers.

In the main, the documents sought by B related to the Trust proper and B was already seeking the same documents from the Trustee. The Court rejected B's assertion that even if this information could be obtained from the Trustee, B required the information separately from the Settlor so that he could assess whether the Settlor had been keeping itself fully informed of the affairs of the Trust and thus properly discharging its fiduciary obligations. There was no reason to burden the Settlor with the provision of information that B could, and should, seek from the Trustee in the usual way. Such an approach was described by the Court as being oppressive and wasteful of costs.

The other documents that B sought concerned representations and explanations that were given to him before he entered into the employee benefit scheme. The Court found this request to be an attempt by B to obtain pre-action disclosure, which was outside the Court's supervisory jurisdiction under the Trusts Law and its inherent jurisdiction in relation to trusts (and is not generally permitted under Jersey law). Furthermore where, as here, it is clear that hostile proceedings are in contemplation and a wide-ranging demand for documents is made, the Court accepted the need for "close scrutiny" of the scope of disclosure, to ensure that beneficiaries' rights to disclosure are not used as a means of obtaining otherwise impermissible pre-action disclosure.

The Court consequently saw no reason to exercise its jurisdiction to order any disclosure against the Settlor, who was discharged from the case.

## Comment

The decision usefully clarifies the circumstances in which a settlor with reserved powers may be required to provide disclosure to a beneficiary. There is no general duty of disclosure on settlors. A settlor only needs to disclose the documents that it holds in connection with the exercise of its fiduciary powers under a trust.

The case also provides useful commentary on the nature of reserved powers in an employee benefit trust and when the holder of fiduciary powers needs to consider exercising them.

Ogier acted for the Settlor.

1. *In re HHH Employee Trust* (Royal Court, 28 June 2012, Commissioner J A Clyde-Smith)
2. *Imperial Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589; *Prudential Staff Pensions Ltd v Prudential Assurance Co Ltd* [2011] EW8C 960 (Ch)
3. *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709
4. *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* [2007] WTLR 959
5. *Spellson v George* [1987] 11 NSWLR 300
6. *Lewin on Trusts* (18th ed) 14-41

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