

## Trustee disclosure: the A Settlement [2011] JRC 109

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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:

## **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:

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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:

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## **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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