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Trusts in Divorce: Obtaining Disclosure in Jersey

The need for disclosure about an offshore trust is not uncommon in high value matrimonial proceedings. The aim of this article is to outline the legal framework applicable to a party seeking disclosure in relation to a trust governed by Jersey law¹ in the context of matrimonial proceedings outside Jersey.

The basic principles of trustee disclosure do not change in a matrimonial context. The key statutory provision is Art 29 of the Trusts Jersey Law 1984 (“TJL”) and the leading authorities are Schmidt v Rosewood² and Re Rabaiotti (1989) Settlement³. These principles can be usefully separated into four main areas.

First, a beneficiary has no unqualified right to any trust document. Disclosure is a matter of the trustee’s discretion which is, in turn, subject to an overriding judicial discretion prescribed by Art 29 TJL which supersedes any provision in the trust instrument that purports to restrict disclosure of information to beneficiaries⁴.

Secondly, certain categories of documents carry a presumption in favour of disclosure. A beneficiary will ordinarily be entitled to inspect trust documents which show the nature and value of the trust property, the trust income and how the trustees have been investing and distributing the trust property. The court retains a discretion to refuse disclosure if it is satisfied that it would not be in the best interests of the beneficiaries⁵. The position is reflected in Art 29(2) TJL which entitles a beneficiary to request disclosure of documents which relate to or form part of the accounts of the trust. That right is subject to the terms of the trust and any order of the court, the entitlement of the trustee to refuse if it is in the interests of one or more of the beneficiaries⁶ and the overriding power of the court⁷.

Trust accounts is a term that has been interpreted broadly and would ordinarily include⁸:

- The trust accounts.
- An inventory of the trust assets.
- A statement of liabilities attaching to the trust or any of the trust’s assets.
- A statement and current valuation of any share portfolios.
- Current bank account balances.
- Timesheets for work the trustee has charged to the trust.

¹ This article focusses on disclosure to beneficiaries, however a stranger to the trust can seek disclosure under Art 29(5)TJL with the leave of the court.

² [2003] 2 AC 709.

³ [2000] JLR 173.

⁴ Art 29(5) TJL.

⁵ M v W Limited [2017] JRC168A.

⁶ Art 29(3) TJL.

⁷ Art 29(5) TJL.

⁸ Depending on the factual circumstances, a request may need to be limited to a specific time period.

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- A statement of contributions to the trust.
- A statement of distributions, expenses, costs and outgoings from the trust.
- Correspondence relating to the trustee's administration of the trust fund.

Thirdly, certain categories of documents carry a presumption against disclosure. Art 29(4) TJL provides that a trustee shall not be required to disclose information or documents which reveal the trustee's deliberations as to how it has exercised a power or discretion or performed a duty, the reason for any particular exercise of a power or discretion or performance of a duty or the material upon which such reason was or might have been based, or relates to the exercise or proposed exercise of a power or discretion, or the performance or proposed performance of a duty. As with Arts 29(2) and (3), it is also subject to the terms of the trust and any order of the court, and the overriding power of the court⁹.

The class of documents that these categories cover is not closed but would ordinarily include:

- Letters of wishes.
- Internal trust correspondence, minutes of meetings and records.
- Legal advice and communications with lawyers on behalf of the trust.
- Correspondence between the trustee and other beneficiaries.

Fourthly, the general approach of the court. While all cases are fact sensitive, in M v W limited¹⁰ the Royal Court set out an inexhaustive set of factors to which it will have regard when considering disclosure of documents which do not form part of the trust accounts:

- The nature and immediacy of the beneficiary's interest.
- The extent to which disclosure might adversely affect the trust to the detriment of the beneficiaries as a whole.
- The likely effectiveness of any measures being put in place to meet any such detriment or risk of it.
- The documents which the beneficiary wishes to obtain.
- The extent to which non-disclosure of the documents would impede holding the trustee to account.
- The proportionality of the request having regard to the reasons expressed for it.

In most situations a trustee will be able to reach a decision on disclosure without going to court. If an application is necessary, the court will exercise its discretion afresh rather than approach it as a blessing of the trustee's decision¹¹. On a cautionary note, trustees must be conscious of the need to address requests for disclosure promptly. If a request is unreasonably refused, or the trustee is responsible for significant delay, and the beneficiary has to commence proceedings, the trustee may be deprived of its entitlement to have its costs paid from the trust fund and ordered to pay the beneficiary's costs personally¹².

⁹ Arts 29(4) and (5) TJL.

¹⁰ [2017] JRC168A.

¹¹ Re Y Trust [2014] (1) JLR 199, M v W Limited [2017] JRC168A and Representation of BOS Trustee Limited [2023] JRC 107.

¹² In the matter of the I Trust, the J Trust, the K Trust and the L Trust [2018] JRC214.

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Turning to the specific context of matrimonial proceedings, the position is illuminated by a number of authorities. In the matter of the H Trust¹³ was not an application for disclosure but involved spouses (both of whom were beneficiaries) involved in divorce proceedings in England. As to the availability of information, the court made the following observation:

“It seems to us important, in this case, that the husband and the wife should have the fullest information concerning the financial affairs of the Trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position. It is our understanding that the wife has received the necessary information, but if this understanding is incorrect and further information is requested, the Trustee should make the fullest information available to both parties and, through them, to the Family Division should this become necessary.”

The court also noted that, in exercising its supervisory jurisdiction over trusts, its function was different to that of a court conducting matrimonial proceedings:

“...it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this Court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the High Court. This Court’s primary consideration is to make or approve decisions in the interests of the beneficiaries”

This view reflected a similar approach taken in Re L & M Trusts¹⁴ in which the court refused disclosure to enable a spouse to attack the validity of the trust in US proceedings, but indicated that if the allegations of invalidity were abandoned (leaving a dispute over child maintenance) it would be sympathetic to an application for disclosure of the trust accounts.

In The Matter Of The Avalon Trust¹⁵ involved a husband beneficiary who had been ordered him to produce trust documents by the English Family Division. The court held that it was in the interests of justice for the English court to know the financial position of the trust and the extent to which the husband had benefited in the past. The trustee was ordered to disclose documentation which would give a picture of the financial position of the trust, the settlor’s letter of wishes¹⁶ and correspondence between the husband and the trustee. Disclosure of correspondence between the trustee and other beneficiaries was refused because the those beneficiaries had an expectation of confidentiality and there was no pressing need for the wife or the English court to see it.

¹³ [2006] JLR 280.

¹⁴ [2003] JRC 002A.

¹⁵ [2006] JRC105A.

¹⁶ This was unusual, however as the spouse was already in possession of earlier drafts disclosure was ordered so that the English Court did not make any incorrect assumptions.

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In In the Matter of the C Trust¹⁷ the court declined to comply with a letter of request from the English Family Division to disclose evidence that had been filed by the trustee in an application for directions under Art 51 TJL. While criticisms were made of the letter of request, the core reasoning was that applications under Art 51 TJL require trustees to be candid with the court and the potential for material to be disclosed to parties seeking to attack the trust could undermine the jurisdiction.

In The Matter Of The M and Other Trusts¹⁸ involved divorcing spouses who were not beneficiaries, but could have been added. The adult beneficiaries were three children of the husband from a previous marriage. In earlier proceedings the trustee had obtained the blessing of the court to disclose material about the assets of the trust to the grandfather (as a beneficiary) knowing that he was likely to disclose this information to the husband and it would then become available to the English court. The court also blessed the decision of the trustee not to submit to the jurisdiction of the English court. The adult beneficiaries subsequently sought leave to intervene in the English matrimonial proceedings to make submissions about the trusts. Leave was granted subject to an undertaking that they would disclose various categories of documents - including those disclosed in the previous Art 51 TJL proceedings.

The court endorsed the reasoning from the C Trust about disclosure of material obtained through Art 51 TJL proceedings, but sympathised with the predicament of the adult beneficiaries who could be held in contempt in Jersey if they disclosed the material without leave to do so, or held in contempt in England if they refused to produce the documents (all three were resident in England). The court divided the relevant material into three categories: privileged, sensitive and other. The privileged material could not be disclosed, and no party objected to disclosure of the other material.

As to the sensitive material, the court questioned whether the internal thinking of the trustee upon the best interests of the beneficiaries was relevant to the matrimonial proceedings. Permission was given to disclose but the English court was asked to reconsider its position. The court further observed that if the Family Division began routinely to make orders requiring disclosure of applications by trustees brought in private, it would have to consider amending its procedures to redact material served on English resident beneficiaries, or only allow inspection in Jersey. In the English proceedings Moylan J (as he then was)¹⁹ ordered disclosure of the sensitive material on the basis that the English court had to ascertain the likelihood of the husband benefitting from the trusts and the disclosure was likely to contain some useful information.

The above authorities were considered in Re Y Trust²⁰ in which the court restated the importance of a foreign matrimonial court having access to as much relevant material as possible, however it refused to order disclosure of affidavits sworn by the trustee for the same reasons of legal policy stated in C Trust and M and Other Trusts.

¹⁷ [2010] JRC001.

¹⁸ [2012] JRC127.

¹⁹ Tchenguiz-Imerman v. Imerman [2013] EWHC 3627 (Fam).

²⁰ [2014] JRC207.

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Drawing the threads together: The Royal Court has emphasised the importance of appropriate disclosure to parties involved in matrimonial proceedings. Certain categories of documents are likely to be disclosable and, in the majority of cases, that will include detailed information about the structure and assets of the trust. More extensive disclosure will depend on the circumstances. There will need to be compelling reasons and the potential impact on the wider beneficial class will carry significant weight. The general approach of the court will be guided by the framework laid down in M v W Limited. Trustees in receipt of a disclosure request should address it as promptly as possible including, if necessary, applying for directions. A lethargic response may lead to adverse costs orders.

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