E Trust Company Ltd v Mrs B and C and D

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Fisher, Marett-Crosby
Judgment Date:	28 January 2014
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Text

[2014] JRC 27

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq, Commissioner, and** Jurats Fisher **and** Marett-Crosby.

Between
E Trust Company Limited
Representor
and
Mrs B
First Respondent

and

C

Second Respondent

and

D
Third Respondent

Advocate E. C. P. Mackereth **for the Representor**.

Authorities

In re S 2001/154.

U Limited v B and 6 others [2011] JLR 452.

Lewin on Trusts 18th Edition.

Schmidt v Rosewood Trust Limited [2003] 2 AC 709.

In re Rabaiotti (1989) Settlement [2000] JLR 173.

Breakspear v Ackland [2008] EWHC 220.

S and L and E v Bedell Cristin Trustees [2005] JRC 109.

Re M [2012] JRC 127.

Snell's Equity 30th edition.

Spellson v George [1987] NSWLR 300.

Rouse v 100F Australia Trustees Ltd [1999] 73S.A.S.R. 484.

Trusts (Jersey) Law 1984.

Public Trustee v Cooper Unreported 20th December, 1999.

Trust — refusal of disclosure by the representor to the first respondent.

THE COMMISSIONER:

1 On 9 th December, 2013, following a short hearing the Court blessed the decision of the representor ("the Trustee") in its capacity as trustee of the Y Trust ("the Trust") to refuse disclosure of information concerning the Trust to the first respondent ("Mrs B") in her capacity as former beneficiary of the Trust. The application raised the issue of the function of the Court, namely whether the Court was exercising its own discretion in supervising, and where necessary, intervening in the administration of a trust, or, on the facts of this

case, giving its blessing to the proposed exercise of the trustee's discretion.

2 The Trust is a discretionary trust, the assets of which were settled by the second respondent ("the Settlor"). The assets of the Trust comprise commercial property and residential property for trading and commercial investment purposes.

3 The Settlor was acquainted with the husband of Mrs B, namely Mr B ("Mr B") who, the Trustee understood, assisted the Settlor in the acquisition of real property held by the Trust. The Trustee is not aware of the precise scope of the arrangements between them, save that Mr B was to be remunerated for his advisory services. The Settlor requested that this remuneration be made through the Trust by way of distributions to Mrs B. The Trustee acceded to this request and accordingly, Mrs B was made a beneficiary on 17 th March, 2010, with the consent of the third respondent as protector of the Trust. Substantial distributions were made to her and at the Settlor's request she ceased to be a beneficiary on 6 th September, 2011, again with the protector's consent.

4 The catalyst for this application was a letter dated 29 th July, 2013, received by the Trustee from the English firm of solicitors Hogan Lovells, stating that they were acting for Mr and Mrs B and seeking information in relation to the Trust. The letter explained that if the Trustee did not assist there would inevitably be a dispute and Mr and Mrs B reserved their rights to join the Trustee as a party to any legal proceedings against the Settlor which might then ensue.

5 By letter dated 20 th August, 2013, Hogan Lovells sent the Trustee a copy of its letter before action on behalf of Mr B (and another) against the Settlor, reiterating that its clients may have a connected cause of action against the Trust.

6 By letter dated 30 th August, 2013, Ogier, on behalf of theTrustee, responded to Hogan Lovells confirming that there would be no disclosure of Trust information to Mr B, who had never been a beneficiary of the Trust. The letter acknowledged, however, that there was a rebuttable presumption that Mrs B, as a former beneficiary, would be entitled to certain Trust information for the period of time that she was a beneficiary. It was clear, however, that information was requested by her not for the purpose of holding the Trustee to account for the period that she was a beneficiary, but rather for the collateral purpose of assisting her husband's claim against the Settlor. The letter ended in this way:–

> *"Whilst my client is content that the decision it has reached is proper and correct, it acknowledges that its analysis may be questioned by your clients.* My client is prepared to take the prudent approach and seek the approval of the Royal Court of Jersey of its decision to refuse to provide Mrs B with any Trust information
>
> *or documentation. If your client does, however, accept our client's position from a Jersey trust law perspective, please confirm this to be the case by close of*

business on Thursday 5 th September, 2013. If we do not hear from you by that date we will presume that there is no consensus of opinion and we reserve our client's right to bring this matter before the Royal Court without further notice."

7 Not receiving that confirmation, the Trustee brought the matter before the Court by its representation dated 6 th September, 2013. The Court convened Mrs B, the Settlor and the protector. Hogan Lovells responded on 27 th September, 2013, to the date fix appointment in this way:–

> *"The representation was presented unilaterally by your client, for your client's own reasons.* We reserve our client's right to be represented at the substantive hearing, but (without meaning any offence to the Court) our client does not intend to incur the cost of making representations at the 30 th September, 2013, appointment.
>
> *For the avoidance of doubt, our client is not pursuing its request for disclosure any further at this juncture.* Nor are our clients requesting or insisting on judicial determination of your client's right to decline the disclosure request. We reserve our client's position entirely, but she accepts no responsibility whatsoever for your client's costs in connection with these proceedings."

8 At the hearing of the representation on 9 th December, 2013, Mrs B was not represented. The Settlor and the protector had written in supporting the Trustee's decision. Proceedings have now been commenced by Mr B (and another) against the Settlor but to date there has been no application to join the Trustee to those proceedings.

9 The Trustee's approach to the Court was made on the basis that it sought the Court's blessing to its *"momentous"* decision to refuse disclosure of information to Mrs B, applying the well-known principles set out in the case of *In re S* [2001] JRC 154, by which the Court has to address the following questions:–

> (i) Is the Court satisfied that the trustee has in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out the decision?
>
> (ii) Is the Court satisfied that the opinion which the trustee has formed is one at which a reasonable trustee properly instructed could have arrived?
>
> (iii) Is the Court satisfied that the opinion which the trustee has arrived at has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision?

10 The Court was satisfied in relation to each of those questions and indeed would have made the same decision as the Trustee if exercising its own discretion. It was clear that this

information was being sought by Mrs B with a view to proceedings which might involve an attack upon the assets of the Trust and it was not in the interests of the beneficiaries as a whole that such a process be facilitated.

11 As to the function of the Court in an application of this kind, Advocate Mackereth drew its attention to the case law, which he said was somewhat contradictory.

12 In *U Limited v B and 6 others* [2011] JLR 452, the trustee applied to the Court for directions as to whether information in relation to the accounts of the settlement (which was one of a number of family settlements) should be given to the settlor, who with his wife was excluded from benefit, and this in connection with their English divorce proceedings. The trustee did not seek the Court's blessing or on the face of it surrender its discretion but made the application on the basis that the Court would exercise its own discretion, relying on this passage from Lewin on Trusts 18th edition, at paragraph 23–20:–

> ***"The role of the court and the trustees***
>
> ***We consider that the court in determining whether, what and how disclosure should be made under the principles of*** *Schmidt v Rosewood Trust Ltd* ***to a beneficiary is exercising its own discretion in supervising, and where necessary intervening in, the administration of trusts.*** It is not, in our view, the case that the function of the court (in the absence of a surrender of discretion) is merely to review, on limited grounds, an exercise of discretion by trustees or give its blessing to a proposed exercise of discretion by the trustees, so that the court can and will intervene only if it is proved that the trustees' decision or proposed decision on disclosure is wrong or of a kind that no reasonable trustees could reach. But the fact remains that disclosure will, in the first place, be sought by beneficiaries from trustees. Normally
>
> ***applications for disclosure will be dealt with by the trustees and the court will not be involved.*** It cannot be the case that trustees have no power to decide whether, what and how disclosure should be made, and trustees need to have a discretion for exactly the same reason as the court needs to have a discretion. Indeed in a leading Australian case it was decided that the trustees did have a discretion to reach decisions on disclosure of confidential information. There may be cases , ***particularly where it is obvious that the application for disclosure is being made in anticipation that disclosure, if made, will be followed by a breach of trust claim against the trustees, in which trustees are in a position of conflict or possible conflict between their personal interest and their duty to consider the application for disclosure.*** But fear of a breach of trust claim could never, we think, be a good reason for not making disclosure and so if that was the only reason for declining or limiting disclosure, the duty of the trustees would be clear. It is only where other circumstances exist which militate against disclosure that fear of a breach of trust claim might disable the trustees from reaching a decision, so necessitating a determination by the court on the matter without any exercise of

discretion by trustees. Obtaining information with a view to a breach of trust claim is not the only reason for seeking disclosure, and in other cases there may be no real possibility of conflict of personal interest and duty at all. In such cases, the trustees do, in our view, have a discretion in deciding whether, what and how disclosure should be made. But if the matter is taken to the court, whether by a beneficiary whose application for disclosure has not been met to his satisfaction, or by the trustees who may be well advised themselves to take the initiative in seeking directions in some circumstances, the court will exercise its own discretion. And the function of the trustees will be to persuade the court not to intervene against their decision or to assist the court in reaching a decision where the trustees make the application, the views of the trustees being no more than a factor taken into account by the court in determining the application." (our emphasis)

13 Lewin cited *Schmidt v Rosewood Trust Limited* [2003] 2 AC 709 and *In re Rabaiotti (1989) Settlement* [2000] JLR 173 as authority for the highlighted proposition that on applications for disclosure to beneficiaries the court will exercise its own discretion. The Court in *U Limited v B* accepted this role (there being no argument on the issue) even though the settlor was not a beneficiary. Whether it was right to do so may be open to question because it was not concerned with disclosure to a beneficiary, but this passage from Lewin was subsequently revised in the third supplement to the 18th edition to express the view that if the issue of

disclosure to a beneficiary was taken to the Court, it would not exercise its own discretion (unless there was a surrender):–

"23–20

The court does have an original jurisdiction to intervene in the administration of the trust, but if a trustee's refusal to make disclosure to a beneficiary cannot be successfully challenged on those limited grounds, the court may not be persuaded, merely because of the trustee's refusal to make disclosure, to intervene at all in the administration of the trust under its supervisory jurisdiction, so leaving the trustees' refusal to stand. The trustees therefore have a central role in the decision making process on disclosure. Disclosure will, in the first place, be sought by beneficiaries from trustees. Normally applications for disclosure will be dealt with by trustees and the court will not be involved. In many circumstances, for example in relation to disclosure of trust instruments and accounts to principal beneficiaries with vested interests, trustees have no real choice to refuse disclosure save in special circumstances. But trustees need to have a discretion for the same reasons as the court needs to have a discretion. And so in the context of disclosure of confidential information the trustees have a discretion to determine whether, what and how disclosure should be made and, unless they make an application to the court seeking to surrender their discretion, the decision will be that of the trustees and the decision will stand in the absence of a successful challenge to the decision or successful invocation of the supervisory

jurisdiction."

14 The authority cited by Lewin for this revised approach was the judgment of Briggs J in *Breakspear v Ackland* [2008] EWHC 220. That case concerned disclosure of a letter of wishes. After a very thorough review of the English and relevant common law case law (including Rabaiotti), he concluded that trustees are not bound to disclose a settlor's letter of wishes and may keep it confidential unless, in their view, disclosure is in the interests of the sound administration of the trust and the discharge of their powers and discretions. Materially in relation to the function of the court in an application by a beneficiary for disclosure, he then went on to say this:–

> ***"66. Before applying those principles to the facts of the present case, I shall briefly summarise what I consider to be their practical effect in relation to family discretionary trusts, separately in relation to each of the three stages in which the issue may typically arise.*** First, trustees should in general regard a wish letter (that is a document from the settlor the sole or predominant purpose of which is or appears to be to assist them in the exercise of their discretionary powers) as invested with a confidentiality designed to be maintained, relaxed, or if necessary abandoned, as they judge best serves the interests of the beneficiaries and the due administration of the trust. This discretion to maintain, relax or abandon confidence arises regardless of a request for disclosure by a beneficiary, and persists regardless of the incapacity, death or change of heart on the part of the settlor.
>
> ***67. Where a beneficiary makes a request for disclosure, that in my judgment merely triggers an occasion upon which the trustees need to exercise (or reconsider the exercise) of that discretion, giving such weight to the making of and reasons for that request as they think fit. Having made their decision the trustees are not obliged to give reasons for it, any more than in relation to any other exercise of their discretionary powers. In a difficult case the trustees may, as always, seek the directions of the court on the question whether to disclose but, bearing in mind the inevitable cost associated with doing so, the trustees will need to think twice before concluding that the difficulty of the question justifies the expenditure. It is by no means a matter for criticism (of the type levelled against the trustees in this case) that trustees do not either give reasons or apply to the court for directions, if minded not to accede to a beneficiary's request for disclosure.***
>
> ***68. If application is made to the court by trustees for directions whether to disclose a wish letter, then it is a fundamental principle that full disclosure must be made to the court. It will almost always be necessary to include the wish letter itself in that disclosure to the court. Furthermore the court is unlikely to determine the question of disclosure without joinder of at least the requesting beneficiary, and the court would have to give anxious consideration to the question whether, and if so to what extent, to restrict***

disclosure of the relevant materials to that beneficiary or his legal advisers, for the purposes of enabling submission to be made on his behalf, in the same way as occurs in the context of *Re Beddoe* ***applications, where the opposite party to the proposed or threatened litigation is a beneficiary of the trust.***

69. At the second stage (i.e. determination of the disclosure issue by the court in proceedings brought solely for that purpose), the matter may be presented, at least in theory, in four different ways. In its simplest form the trustees may seek to surrender their discretion to the court, in which case (if it permits the surrender, which it is not obliged to do), the court is exercising its own discretion afresh, rather than reviewing any negative exercise of discretion by the trustees. Alternatively, the trustees may, without surrendering their discretion, invite the court in effect to bless their refusal. Thirdly, the case may be brought by the disappointed beneficiary by way of a challenge to the trustees' negative exercise of their discretion to disclose. Finally, the beneficiary may seek simply to invoke an original discretion in the court, as part of its jurisdiction in the administration of trusts.

70. The second and third of those types of application involve a review of the trustees' negative exercise of their discretion to disclose. If the trustees themselves apply, then it is in practice inevitable that they will have to disclose their reasons. If the disappointed beneficiary applies, then it seems to me that the Londonderry principle will entitle the trustees, if they choose to do so, to decline to give reasons, and to defend the challenge upon the basis that , if it be the case, the disappointed beneficiary has disclosed no grounds for impugning either the fairness or the honesty of their decision, their reasoning being off-limits for that purpose.

71. Finally, if the disappointed beneficiary seeks to invoke the court's administrative jurisdiction, then it will be incumbent upon him to demonstrate, by reference to whatever facts may be available to him, that an occasion has arisen which calls for the interference of the court. A mere refusal to disclose a wish letter, unaccompanied by reasons or evidence of mala fides or unfairness, would not ordinarily justify such intervention. Of course, if the trustees volunteer reasons for their refusal, the court may investigate those reasons, and call for such factual material or further explanation from the trustees as may be thought fit.

72. The third stage, (where disclosure is sought from the court to facilitate the determination of an issue to which the wish letter is alleged to be relevant), gives rise to different considerations, governed by the law and practice as to disclosure in civil proceedings. For those purposes, the relevance of the foregoing detailed analysis of the status of a wish letter is that identified by Danckwerts LJ in *Re Londonderry* ***at page 936G, namely that if the document in question does no more than illuminate the trustees'***

> ***reasons for the making of a discretionary decision, it may be simply irrelevant, unless the trustees by a partial disclosure of their reasons have put into play the issue as to their rationality. Since the present case is not an example of this third category, I say no more about how the questions of that kind may in due course be decided."***

15 Thus, Breakspear envisages that where there is no surrender of discretion, and where the beneficiary is unable to invoke the ***"original jurisdiction of the court"*** by demonstrating that ***"an occasion has arisen which calls for the interference of the court"*** then the Court will proceed on the basis of a blessing, involving a review of the trustees' decision, as opposed to exercising its own discretion. Briggs J held that a refusal to disclose the letter of wishes without evidence of ***"mala fides or unfairness"*** will not ordinarily justify intervention. This, Advocate Mackereth said, was the same test as is usually applied in approval hearings: has the power been properly exercised?

16 Advocate Mackereth submitted that the approach in *U Limited v B*, namely for the Court to exercise its own discretion, gives rise to difficulties and is inconsistent with the approach in *Re S*, where in the absence of something having clearly gone wrong, the Court will not interpose its own decision for that of the trustee (described in Lewin as ***"the principle of non-intervention").***Should such an approach be followed in every case in which the trustee brought a disclosure decision to Court, the Court would, he said, be usurping the trustee's role, which the settlor bestowed on the trustee, not the Court. The principle of non-intervention has been recognised in this jurisdiction in *S and L and E v Bedell Cristin Trustees* [2005] JRC 109, where at paragraph 22, Birt, then Deputy Bailiff, said this:–

> ***"A settlor does not choose the court as a trustee; he chooses his appointed trustee.*** It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. If Mr Sinel's argument were to be accepted, the effect would be to constitute the Court as a trustee. That is not the Court's role. The Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court does not simply substitute its own discretion for that of the trustee unless the trustee surrenders its discretion to the Court and the Court agrees to accept such surrender (which it is not obliged to do)."

17 There is some support for the suggestion that the Court in Jersey has approached applications in relation to disclosure under the principles set out in *Re S*, namely in the case of *Re M* [2012] JRC 127, where Sir Michael Birt, Bailiff, referred at paragraph 13 to the trustees having previously obtained approval to two ***"momentous"*** decisions, one of which related to disclosing information to a beneficiary in the knowledge that he was likely to pass it on to a non-beneficiary.

18 Advocate Mackereth submitted that the approach in Re M should be preferred to that in *U Limited v B* because:–

(i) In *U Limited v B* a trustee appears to have been seeking guidance as to how to exercise its discretion rather than seeking approval of the exercise of its discretion;

(ii) The scenario of a trustee seeking directions as to how to exercise its discretion should be properly categorised as a type of surrender of discretion by the trustee consistent with the *Re S* approach; and

(iii) The effect of transfers of responsibility to the Court of trustees' decisions regarding disclosure runs counter to the fundamental proposition of Trust Law, that the discretion of a trustee is conferred upon the trustee and not on the Court.

19 Advocate Mackereth further submitted that if disclosure to beneficiaries is so fundamental as to require a recalibration of the *Re S* principles in any way, the preferable approach would be to hold that applications for a blessing of a disclosure decision can still be advanced on *Re S* principles, but on the basis that the Court should treat the band of reasonableness within which the trustees' decision has to fall as being as narrow as the Court feels it needs to be. Such an approach he said may avoid the need for the Court to make its own decision in every case concerning disclosure to beneficiaries whilst preserving the Court's ability to ensure that beneficiaries have access to the requisite information needed in order to hold the trustees to account.

20 As we said above, in the case before us the Court was content to bless the Trustee's decision as requested because it would have reached the same decision if exercising its own discretion. On the face of it the unopposed submissions on behalf of the Trustee as to the function of the Court were attractive but having reflected on them we think that there are substantive contrary arguments that could be put on behalf of beneficiaries and we wish to leave expressly open the question of whether this jurisdiction should follow the decision in Breakspear to a future case where full argument can be heard.

21 The starting point as stated in Rabaiotti at page 177 (in relation to disclosure of trust documents) is the duty of trustees to account to their beneficiaries in accordance with the general principles set out in Snell's Equity 30th edition at 264:–

> ***"Another duty of a trustee is to keep accounts and produce them to any beneficiary when required.*** Trustees must also when required give any beneficiary all reasonable information as to the manner in which the trust estate has been dealt with and as to the investments representing it… Further, in the absence of special circumstances, they must allow a beneficiary to inspect all title deeds and other documents relating to the trust estate. In this context a beneficiary includes a contingent beneficiary or an object of a discretionary trust, save that trustees who exercise discretionary powers (e.g. under a discretionary trust) need not disclose why they have exercised their discretion in a particular way, and so they may refuse to allow a beneficiary to inspect documents which will reveal such information, such as minutes of their meetings."

22 This duty was emphasised in *Schmidt v Rosewood*, which was of course decided after *Rabaiotti*, where the Privy Council approved the judgment of Powell J in *Spellson v George* [1987] NSWLR 300 at pages 315–316, the whole of which it said merited study. The Privy Council quoted this passage:–

> ***"At the risk of being regarded as overly simplistic, it is as well to start with the fundamental proposition that one of the essential elements of a private trust, be it a discretionary trust or some other form of trust, is that the Trustee is subject to a personal obligation to hold, and to deal with, the trust property for the benefit of some identified, or identifiable, person or groups of persons."***

The judgment of Powell J goes on to say:–

> ***"It is, so it seems to me, a necessary corollary of the existence of that obligation that the Trustee is liable to account to the person, or group of persons for whose benefit he holds the trust property … and, that being so, the Trustee is obliged not only to keep proper accounts and allow a cestui que trust to inspect them, but he must also, on demand, give a cestui que trust information and explanations as to the investment of, and dealings with, the trust property."***

23 This obligation on the part of trustees has been described as an essential ingredient of trusteeship, which affords the beneficiaries a correlative right to have the Court enforce the trustees' fundamental obligations to account.

24 Returning to *Rabaiotti*, from that starting point Birt, Deputy Bailiff, posed this question at page 178:–

> ***"The question which does arise is whether the right of a beneficiary to see trust documents is an absolute right or whether the court has a discretion to refuse a beneficiary permission to inspect trust documents in some circumstances."***

25 It is noteworthy that here and indeed throughout the judgment in Rabaiotti, the Deputy Bailiff, talks in terms of the Court, not the trustee, having a discretion to refuse disclosure. Having considered the relevant case law, the Deputy Bailiff at page 181 approved this extract from the judgment of Doyle C.J. in *Rouse v 100F Australia Trustees Ltd* [1999] 73S.A.S.R. 484 a decision of the Supreme Court of South Australia:–

> ***"100. There must be various situations in which a trustee, particularly a trustee conducting a business, would be put in an impossible position if the beneficiary of the trust could, as a matter of right, claim to inspect documents in the possession of the trustee and relevant to the conduct of the business. It is readily conceivable that there will be situations in which***

an undertaking of confidentiality is not sufficient protection. The fact that the trust is one in which numerous beneficiaries have an interest, and the further fact that those beneficiaries may have differing views about the wisdom of the course of action being pursued by the trustee, only serve to emphasize, in my opinion, the need for the law to recognize some scope for a trustee to refuse to disclose information on the grounds that it is confidential and on the further ground that the disclosure is not in the interests of the beneficiaries as a whole. I make that observation on the basis and on the assumption that the ultimate right of the beneficiaries will be to have the trustee removed if they are dissatisfied with the approach of the trustee.

101. Ultimately, I would rest the existence of the relevant discretion upon the need to reconcile the undoubted duty of a trustee to make disclosure to beneficiaries of information about the trust, and the undoubted duty to permit the inspection of trust accounts and trust documents, with the equally fundamental obligation of a trustee to conduct the affairs of a trust, and particularly a trust which involves the conduct or management of a business, in the interests of the beneficiaries as a whole. I consider that on occasions the reconciliation of these interests may entitle a trustee to decline to provide information to particular beneficiaries, when the trustee has reasonable grounds for considering that to do so will not be in the interests of the beneficiaries as a whole, and will be prejudicial to the ability of the trustee to discharge of its obligations under the trust. It may be that the ultimate foundation of the discretion is the obligation of the trustee to discharge its duties to manage the affairs of the trust in the interests of the beneficiaries.

102. I wish to make it clear that the discretion that I envisage is a limited one, and must always be limited by the general duty of disclosure by a trustee to which I have referred. The existence of the discretion cannot be used as an excuse for paternalism or to disregard the interests of beneficiaries. Its existence depends upon the need to protect the trustee's ability to discharge its obligations. The availability of the discretion will depend very much upon the circumstances of the particular case."

26 Doyle CJ does refer to the trustee having a discretion to decline disclosure to beneficiaries but having quoted this passage with approval, the Deputy Bailiff in *Rabaiotti* went on to say this:–

"In our judgment, <u>the court</u> does have a discretion to refuse to order disclosure of trust documents that a beneficiary is normally entitled to see. Clearly, the general principle is that a beneficiary is entitled to see trust ***documents which show the financial position of the trust, what assets are in the trust, how the trustee has dealt with those assets etc.*** This is an essential part of the mechanism whereby the trustee can be held accountable for his trusteeship to a beneficiary.

But the need for an individual beneficiary to obtain trust documents has to be weighed against the interests of the beneficiaries as a whole. The trustee has a duty to the beneficiaries as a class. If, as in some of the cases referred to above, the trustee forms the view in good faith that disclosure of documents to which a beneficiary would normally be entitled would be prejudicial to the interests of the beneficiaries as a whole, it may refuse to make that disclosure and seek the directions of the court. Should the trustee fail to seek the directions of the court it is open to any beneficiary to bring the matter before the court for resolution. To that extent, the court thinks the position is simpler than is suggested at the end of para. 100 of Doyle, C.J.'s judgment in Rouse. The remedy of a dissatisfied beneficiary is not to seek to have the trustee removed but to seek the directions of the court as to whether the particular trust document should or should not be disclosed. The court will then have to balance the competing considerations and decide what is best for the beneficiaries as a whole. In short, the court agreed with the way in which Doyle, C.J. puts the matter at para. 101 of the judgment in *Rouse*.

The court does not wish to encourage trustees to refuse disclosure on weak grounds. One starts with a strong presumption that a beneficiary is entitled to see trust documents of the nature described. There would have to be good reason to refuse disclosure of such documents. But the court is satisfied that, as a matter of general equitable principle, the court has an overriding discretion to withhold documents where it is satisfied that this is in the best interests of the beneficiaries as a whole." (our emphasis)

27 Two observations arise from this extract. Firstly, that although the Court contemplated trustees being able to refuse to make disclosure, this appeared to be combined with an application to the Court for directions, which the beneficiary may bring if the trustees fail to do so and secondly, the function of the Court, whether the application is brought by the trustees or the beneficiary, is not to review the decision of the trustees but to exercise its own discretion.

28 The Deputy Bailiff in *Rabaiotti* then went on from the general equitable principles to consider what is now Article 29 of the Trusts (Jersey) Law 1984 which has no equivalent under English law and may well distinguish Jersey law from English law in this respect. Article 29 is in the following terms:–

"29 Trustee may refuse to make disclosure

Subject to the terms of the trust and subject to any order of the court, a trustee shall not be required to disclose to any person, any document which –

(a) discloses the trustee's deliberations as to the manner in which the trustee has exercised a power or discretion or performed a duty conferred or imposed upon him or her;

(b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based;

(c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or

(d) relates to or forms part of the accounts of the trust,

unless, in a case to which sub-paragraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust or the enforcer in relation to any non-charitable purposes of the trust."

29 The Deputy Bailiff interpreted this Article in this way:–

> ***"As the Jersey Law Commission states in its helpful and thought-provoking Consultation Paper No. 1 entitled The rights of beneficiaries to information regarding a trust, the provision is not as easy to interpret as it might be because of the use of the double negative.*** In our judgment, the relevant wording in effect confers a positive right on a beneficiary to see documents which relate to the accounts of the trust. Thus, "… a trustee shall not be required to disclose to any person any document which relates to or forms part of the accounts of the trust unless that person is a beneficiary" means that, where that person is a beneficiary, the trustee is required to disclose such documents. However, that right is expressed to be "subject to any order of the court." In our judgment, therefore, the position under art. [29] is that, just as we have found that under general equitable principles a beneficiary's right to inspect trust documents is subject to the discretion of the court, the right conferred by art. [29] is also subject to any order of the court, which may, in an appropriate case, exercise a discretion to refuse to order disclosure."

Again, the emphasis is on the discretion of the Court to refuse disclosure, not that of the trustee.

30 It seems to us that the Privy Council in *Schmidt v Rosewood* contemplated the Court exercising its own discretion on such an application. Finding that a beneficiary's right to seek disclosure of trust documents was best approached as one aspect of the Court's inherent and fundamental jurisdiction to supervise and if appropriate intervene in the administration of a trust, Lord Walker said this at paragraph 67:–

> ***"67. However, the recent cases also confirm (as had been stated as long ago as In re Cowin 33 Ch 179 in 1886) that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document.***

> ***Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."***

Again it is the Court exercising its own discretion not reviewing a decision of the trustees.

31 It would be very costly and administratively burdensome to hold that in every case where trustees decide that it is not in the interests of the beneficiaries as a whole to make disclosure of trust documents to a particular beneficiary, they must seek the directions of the Court and we do not think that is what *Rabaiotti* intended, but what does seem clear from both *Rabaiotti* and *Schmidt v Rosewood* is that once the issue of disclosure of trust documents to a beneficiary is before the Court (whoever brings it), it will exercise its own discretion. Neither Briggs J in *Breakspear* nor Lewin in the revised paragraph 23–20 make any reference to this aspect of the decisions in *Rabaiotti* and *Schmidt v Rosewood*.

32 It may be open to question whether it is appropriate to equate a decision to refuse disclosure to a beneficiary with the exercise of powers vested in the trustees under the trust deed or by law of the kind contemplated in *Re S*. Powers are described in general terms in *Lewin* at paragraph 29–01 in this way:–

> ***"A power is a legal authority conferred on a person to dispose of property which is not his own.*** In connection with trusts, powers are ordinarily either powers of appointment and other dispositive powers, which enable the creation of beneficial interests in property, or administrative powers, such as a trustee's powers of investment and sale…… There are other powers often held by trustees which are not readily categorised as dispositive or administrative, for example a power of appropriation and a power to appoint new trustees."

33 In *Re S* the Court was being asked to bless the trustee's decision to enter into various deeds by which it can be assumed certain powers of appointment were being exercised. *Public Trustee v Cooper*, an unreported decision of Hart J dated 20 th December, 1999, upon which *Re S* is based, was concerned with the sale by the trustees of shares in a brewery.

34 We are concerned here not with the exercise of such powers but with the discharge of the trustees' obligations. Whilst it is well established that the Court should not usurp the role of trustees (as per *S and L and E v Bedell Cristin Trustees*), its function may arguably be quite different when it comes to the enforcement of the trustees' fundamental obligation to

account to beneficiaries, where the Court might be expected to be astute to ensure that trustees discharge those obligations and not to distance itself from that task. Intuitively it does not seem right that as per Lewin in the revised paragraph 23–20 trustees can have ***"a central role in the decision making process"*** as to how they discharge their own core obligations.

35 If *Breakspear* were to be followed in this jurisdiction, then in an application by trustees to bless their decision to refuse disclosure, the Court's role would be limited to one of review as per *Re S*. If it were to withhold its blessing, then, unless the circumstances were such as to call for the Court's intervention, the trustees' decision to refuse disclosure would still stand. If the disaffected beneficiary seeking to hold the trustees to account applied to the Court, then *Breakspear* contemplates the trustees being able, on *Londonderry* principles, to withhold the reasons for their refusal from the beneficiaries and indeed the Court, unless the beneficiaries can impugn the fairness or honesty of the trustees' decision. This approach could arguably represent a material dilution of the rights of beneficiaries to have the Court enforce the trustees' fundamental obligation to account.

36 It may therefore be argued on behalf of beneficiaries that in relation to the discharge by trustees of such a core obligation (as opposed to the exercise of powers vested in the trustees by the trust deed or by law) the Court should in any application for disclosure before it, for the proper protection of beneficiaries, reserve to itself the exercise of its own discretion. These observations have been made without the benefit of full argument but we would anticipate that until the matter is the subject of full argument, the Court will wish to do so.