

# The Rabaiotti 1989 Settlement and other settlements; Representation of Latour Trust Company Ltd and Latour Trustees (Jersey) Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	30 May 2000
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## Text

[2000] JRC 90

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, Esq., Deputy Bailiff and Jurats Myles and Georgelin

In the matter of the Rabaiotti 1989 Settlement and other settlements  
Representation of Latour Trust Company Limited and Latour Trustees (Jersey) Limited

**Advocate D.J. Benest for Latour Trust Company Limited and Latour Trustees (Jersey) Limited**

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**Advocate J.D. Kelleher for John Rabaiotti****Authorities**

Trusts (Jersey) Law 1984: Articles 25 & 47.

Snell's Equity (30<sup>th</sup> Ed'n): p.264.

*Chaine-Nixon -v- Bank of Ireland* ([1976](#)) IR 393 .

[Murphy -v- Murphy](#) (1999) 1 WLR 282 .

*Re Londonderry's Settlement* ([1965](#)) 2 WLR 229 .

*West -v- Lazard Brothers* (1987–88) JLR 414 .

*Butt -v- Kelson* (1952) Ch. 1977 .

*O'Rourke -v- Darbishire* ([1920](#)) AC 581 .

*Re Cowin* (1886) 33 Ch. 179 .

*In re Lemos Trust Settlement* ([1992–93](#)) CILR 26 .

*In re Ojeh Trust* (1992–93) CILR .

*In re a Settlement* ([1994](#)) JLR 139 .

*Rouse -v- 100F Australia Trustees Limited* (1999) 2 ITEL 289 .

*Hartigan Nominees Pty Ltd -v- Rydge* 29 NSWLR 405 .

*Bhandar -v- Barclays Private Bank and Trust Co Ltd* (7<sup>th</sup> April, 1997) Jersey Unreported.

*T -v- T & Ors* ([1996](#)) 2 FLR 357 .

Hochberg & Norris: "The Rights of Beneficiaries to Information concerning a Trust"  
(February, 1999) The Jersey Law Review.

Willoughby: "Misplaced Trust" [1999] (1<sup>st</sup> Ed'n): pp.83–94.

Underhill & Hayton: "Law relating to Trusts and Trustees (15<sup>th</sup> Ed'n: 1995): pp.657–60.

Moore & Allport: "Disposals, Discretion and Deception" Vol. 3 Jersey Law Review 306.

Bailiff

**THE DEPUTY**

- 1 This application raises interesting issues as to the duties and powers of trustees in relation to disclosure to beneficiaries of (i) trust documents, such as trust deeds, accounts etc. and (ii) a letter of wishes given by the settlor to trustees in connection with a discretionary settlement. We announced our decision at the time of the hearing and now give the reasons for that decision.

### **The factual background**

- 2 The Court is concerned with four settlements.

#### (i) The 1989 Settlement

This is a discretionary settlement, established on 13th July 1989 by Guiseppe Rabaiotti (the settlor). The trustee is Latour Trust Company Limited. The settlement is governed by the law of the British Virgin Islands. However, it is administered in Jersey by Latour Trust Limited on behalf of the trustee, and is therefore, pursuant to Article 5 of the Trusts (Jersey) Law 1984, subject to the jurisdiction of this Court. The beneficiaries of the 1989 Settlement are John Rabaiotti (son of the settlor), Louisa Punturieri (daughter of the settlor) and the grandchildren and remoter issue of the settlor.

#### (ii) The Grezzo Settlement

This is a discretionary settlement established on 22nd July 1994 by the settlor. The trustee is Latour Trustees (Jersey) Limited. The settlement is governed by Jersey law. The beneficiaries are the same as in the 1989 Settlement.

#### (iii) The Catikina Trust

This is a discretionary settlement established on 19th January 1998 by the settlor. The trustee is Latour Trust Company Limited. The settlement is governed by Jersey law. The beneficiaries are the same as in the 1989 Settlement.

#### (iv) The Luisa Punturieri Trust

This is a discretionary settlement established on 13th October 1989 by Louisa Punturieri. The trustee is Latour Trust Company Limited. The settlement is governed by the law of the British Virgin Islands. However, as in the case of the 1989 Settlement, it is administered in Jersey by Latour Trust Limited on behalf of the trustee and is therefore subject to the jurisdiction of this Court. The beneficiaries are the same as in the 1989 Settlement.

- 3 In summary, two of the settlements are governed by Jersey law, whereas two are governed by the law of the British Virgin Islands, but are administered in Jersey. The class of beneficiaries is broadly similar, although adopted descendants of the settlor are included in

the Louisa Punturieri Trust but are excluded from the other three settlements. There is, however, a power to add beneficiaries in all four settlements. The living beneficiaries of the 1989 Settlement, the Grezzo Settlement and the Catikina Trust comprise John Rabaiotti, Louisa Punturieri and the four children of John Rabaiotti. The living beneficiaries of the Louisa Punturieri Trust include the foregoing, together with the two adopted children of Louisa Punturieri.

4 John Rabaiotti and his wife have separated and divorce proceedings are taking place before the High Court in England. There is a dispute as to the extent of the financial provision which John Rabaiotti should make for his wife. The High Court has made an order that John Rabaiotti should disclose copies of the following documents in relation to any trusts of which he is a beneficiary:—

- (i) the trust deed, together with all deeds of variation and appointment;
- (ii) the accounts of the trust for the last three years;
- (iii) insofar as the assets include equities, a current share portfolio printout and valuation;
- (iv) insofar as the assets include land, a current valuation of the land, unless the trustees confirm that the accounts provide actual values;
- (v) a copy of the last three years tax returns (including all schedules thereto) filed in any jurisdiction, together with all tax assessments made in any jurisdiction;
- (vi) a schedule of distributions made in each of the last three account years to John Rabaiotti, his wife, or any of his children;
- (vii) all letters of wishes, current and past.

5 For ease of reference, we will refer to the documents in the first six categories above as “Accounting Documents”.

6 The High Court has also made an order giving leave for the trustees of the 1989 Settlement, the Grezzo Settlement and the Catikina Trust to intervene in the matrimonial proceedings. That order has been served on the trustees.

7 John Rabaiotti has asked the trustees of the various settlements for the documents referred to above. The trustees are not convinced that this is in the interests of the beneficiaries as a whole. Latour Trust Company Limited and Latour Trustees (Jersey) Limited (“the trustees”) have accordingly sought the directions of the Court under Article 47 of the Trusts (Jersey) Law 1984 (“the 1984 Law”) as to whether they should disclose all or any of the requested documents to John Rabaiotti. In addition, they have sought directions as to whether they should intervene in the English matrimonial proceedings.

## The issues

- 8 In relation to the Accounting Documents, the question arises as to whether John Rabaiotti, as a beneficiary of the trusts, is entitled to see these documents as a matter of right, or whether there is a discretion to withhold them. In relation to the letter of wishes, the question arises as to the right of a beneficiary to see such a letter. Is it to be regarded in the same light as ordinary trust documents? Alternatively, is it something which a beneficiary is not generally entitled to see? If so, does the Court have a discretion to order that it be disclosed?
- 9 It is important to recall that only the Grezzo Settlement and the Catikina Trust are governed by Jersey law. The Court therefore feels considerable diffidence in giving directions in relation to the other two settlements, which are governed by the law of the British Virgin Islands. Nevertheless, in view of the time scale involved, and the fact that they are administered in Jersey, we concluded that it was appropriate for the Court to give directions in relation to those settlements as well. The Court has been shown advice from Messrs. Harvey, Westwood & Riegels, BVI lawyers, to the effect that the right to information of a beneficiary of a trust governed by BVI law will be the same as under English law. We propose to examine each of the issues as a matter of general principle first. Having done so, we will turn to the relevant Jersey statutory provision, as that clearly can affect only the two settlements governed by Jersey law.

## Accounting Documents

- 10 One starts with the proposition that a beneficiary of a trust is entitled to inspect trust documents. The general principle is well set out in Snell's Equity (30th edition) at page 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.”**

- 11 The principle is applicable to a beneficiary of a discretionary trust (see *Chaine-Nixon v. Bank of Ireland* (1976) IR 393 and *Murphy v. Murphy* (1999) 1 WLR 282 where Neuburger J

said at 290:—

**“Further, Mr. McDonnell said that, as a discretionary object of the defendant's 1965 settlement, the plaintiff is entitled to ask the trustees for information as to the nature and value of the trust property, the trust income, and as to how the trustees have been investing and distributing it.**

Although there is no English authority on this point, this submission appears to be supported by the Irish case *Chaine-Nixon v. Bank of Ireland* **and it is treated as being the law of England in the two leading text books on the topic, namely *Snell's Equity* 29th edition (1990) pp 231–232 and *Underhill and Hayton's Law of Trusts and Trustees* 15th ed. (1995), p.657.** On behalf of the defendant, Mr. Blackett-Ord, quite rightly in my view, accepts that the plaintiff does, as a matter of principle, have these rights in relation to the defendant's 1965 settlement.”

- 12 Although Neuburger J may have been technically correct in saying that there was no binding English authority, the leading case of *Re Londonderry's Settlement* (1965) 2 WLR 229 concerned a settlement with discretionary powers. The decision itself was concerned with documents relating to the reasons for the exercise of a discretionary power, but all the judges of the Court of Appeal accepted the general principle that a beneficiary has a right to see trust documents and did not suggest that a beneficiary of a discretionary trust was in any lesser position.
- 13 This principle has been accepted as a matter of Jersey law. See, for example, *West v. Lazard Brothers & Co. (Jersey) Limited* (1987–88) JLR 414.
- 14 There has been some discussion over the years as to what is included within trust documents which a beneficiary is entitled to see (excluding the question of documents relating to reasons for a trustee's exercise of a discretionary power). In *West v. Lazard* (*supra*) a very wide view was taken, although the point appears not to have been argued. Conversely, in *Re Londonderry* itself, Danckwerts LJ said at 239 that a suggestion that trust documents included everything in the trustees' hands as such, was not helpful. An issue may arise some day as to the extent to which documents in relation to underlying companies are to be regarded as trust documents. ( *See Butt v. Kelson* (1952) Ch. 1977, which does not appear to have been referred to in *West v. Lazard*.)
- 15 Fortunately, these issues do not arise in this case. All the documents defined above as Accounting Documents are clearly trust documents which a beneficiary is normally entitled to see in accordance with the principles described above.
- 16 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.

- 17 The dicta of Lord Wrenbury in *O'Rourke v. Darbishire* ([1920](#)) AC 581 might be said to suggest an absolute right on the part of the beneficiary. Lord Wrenbury said at 627:–

***“If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors, as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right.*** The beneficiary is entitled to see all the trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. A proprietary right is a right to access to documents which are your own.”

- 18 However, there have been a number of cases which suggest that this right is not absolute. In *Re Cowin* (1886) 33 Ch 179, North J said at 186:–

***“It seems to me, therefore, that the plaintiff is entitled to see the deeds, subject to this, that there might be circumstances which would justify the trustees in withholding them from him.”***

and at 187:–

***“I do not say that he is entitled as of right, but only that he is entitled under the circumstances, because there might be a state of circumstances under which the right to production would not exist.”***

- 19 Although *Londonderry* was concerned with documents relating to the reasons for the exercise of discretionary powers, Danckwerts LJ spoke in general terms at 240 when he said:–

***“For these reasons, therefore, it seems to me that there must be a very restricted application of the observation that beneficiaries are entitled to see all trust documents.*** The matter must be one which is subject to special circumstances and the right to disclosure cannot apply to all trust documents.”

- 20 In *In re Lemos Trust Settlement* ([1992–93](#)) CILR 26, the beneficiaries had instituted an action before the Greek courts to set aside a Cayman Island trust. The beneficiaries applied to the court in the Cayman Islands for an order that the trustees of the trust should disclose documents concerning the accounts of the trust to the beneficiaries. The trustees contended that to do so might assist the beneficiaries in their action in Greece and would therefore not be in the interests of the trust and of the beneficiaries of the trust as a whole. The Cayman Court of Appeal, founding itself on *Re Cowin* and *Re Londonderry* held that there were circumstances in which a trustee could withhold trust documents such as accounting documents from a beneficiary and that this was such a case.



- 21 In *In re Ojeh Trust* (1992–93) CILR, a beneficiary sought detailed financial information concerning the underlying companies of a trust. The Grand Court of the Cayman Islands held that Cayman law was the same as English law in this respect. The Court's finding was summarized in the headnote as follows:–

***“The principles governing the disclosure of information to beneficiaries (including a parent or guardian or guardian ad litem of a minor beneficiary) were in summary (a) a beneficiary would normally be permitted to inspect and take copies of essential trust documents, on the basis of the proprietary right he held over them; this was not the same as having a right to discovery, which was the right to see someone else's documents; (b) that normal right did not extend to detailed information about the affairs of the companies owned by the trust and to obtain information of that kind the beneficiary must make out a special case; (c) in so doing, he must specify the document that he wished to see; (d) there must be no valid objection by the trustees or directors or (in special circumstances) the beneficiaries whom the trustees considered should properly be consulted upon the matter; and (e) the beneficiary seeking disclosure must give proper assurances that he would not disclose the documents to anybody but his own legal or other advisers and would not make copies save as might properly be advised by them.”***

- 22 Although the documents related to the business of underlying companies rather than the trust itself — and it is clear that under English law a beneficiary does not have an absolute right to some types of information about an underlying company even if wholly owned by the trustees ( *See Butt v. Kelson* ( *supra*)), — the decision supports the existence of a discretion on the part of the court to determine whether, in a particular case, such information should be supplied.
- 23 On the facts, the Court held that the demand for information was unreasonable as it would require the disclosure of just about every type of information on the affairs of the trust companies, some of which, if indiscriminately disclosed or used, could prove detrimental to those companies given the highly competitive nature of some of their enterprises.
- 24 In *In re a Settlement* (1994) JLR 139, in the context of an application for directions under Article 47 of the 1984 Law, this Court rejected a submission that beneficiaries had a right to see all trust documents. Although the Court was concerned principally with documents of the type considered in *Londonderry*, (referring to reasons for the exercise of a discretionary power), the Court suggests that, in the context of an application for directions, the Court has a discretion as to which documents should be disclosed to beneficiaries.
- 25 Finally, in *Rouse v. IOOF Australia Trustees Limited* (1999) 2 ITELR 289, the Supreme Court of South Australia had to consider whether a beneficiary's right to inspect trust documents was unrestricted. In that case, the trust was part of a managed investment scheme which involved 20,000 investors, who became beneficiaries of a trust as part of the



scheme. The scheme also involved a forest company and a milling company. The trustee became involved in a management dispute against the forest company and the milling company. Certain beneficiaries sought an order that they be permitted to inspect and copy documents in the possession of the trustee, including witness statements, expert reports and legal advice forming part of the trustee's brief to counsel in the management dispute. Doyle CJ, in a judgment agreed with by the other members of the Court had this to say at paragraphs 100–102.

***“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 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 In our judgment, the Court 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.
- 27 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 paragraph 100 of the 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 agrees with the way in which Doyle CJ puts the matter at paragraph 101 of the judgment in *Rouse*.
- 28 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.
- 29 For those trusts governed by Jersey law, the Court must also consider Article 25 of the 1984 Law. This reads:–
- “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 .....(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 ...”***
- 30 As the Jersey Law Commission states, in its helpful and thought-provoking Consultation Paper No. 1 entitled “The rights of beneficiaries to information regarding trusts”, 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 Article 25 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 Article 25 is also subject to any order of the Court, which may, in an appropriate case, exercise a discretion to refuse to order disclosure.

- 31 We appreciate that, by construing Article 25 in this manner, we are opening up the argument that the words “**subject to any terms of the trust**” also govern the right of a beneficiary to documents relating to trust accounts, so that the contention can be made that the settlor, by the terms of the trust, may restrict the right of a beneficiary to inspect documents relating to the accounts. However, for the reasons set out in paragraphs 4.2.19 to 4.2.24 of the Jersey Law Commission Consultation Paper, we think that there are a number of arguments which could be raised against or used to limit such a contention. That matter is not before the Court. All we need say is that our interpretation of Article 25 in relation to the power of the Court to restrict the provision of documents relating to trust accounts to a beneficiary, does not necessarily mean that the settlor can do likewise or the Court could not intervene where a settlor purported to do so.
- 32 An additional issue raised in the Consultation Paper of the Jersey Law Commission, (see paragraphs 4.2.24–4.2.26) is whether the right of a beneficiary to inspect trust documents is a proprietary right. There is no doubt that *O'Rourke v. Darbishire* asserts a proprietary right on the part of a beneficiary (see the dictum of Lord Wrenbury at paragraph 17 above). This was followed in *Londonderry*. Conversely, a majority of judges in the Court of Appeal of New South Wales in *Hartigan Nominees Pty Ltd. v. Rydge* 29 NSWLR 405 appeared to be of the view that a better basis was the trustee's fiduciary duty to account to the beneficiary. In particular, at 422, Kirby P cited with approval an extract from Ford & Lee, Principles of the Law of Trusts, which was as follows:–

**“..... The legal title and rights to possession are in the trustees: all the beneficiary has are equitable rights against the trustees ..... The beneficiary's rights to inspect trust documents are founded therefore not upon any equitable proprietary right which he or she may have in respect of those documents but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts. It is the extent of that duty that is in issue. The equation of the right to inspect trust documents with the beneficiary's equitable proprietary rights gives rise to unnecessary and undesirable consequences. It results in the drawing of virtually incomprehensible distinctions between documents which are trust documents and those which are not; it casts doubts upon the rights of beneficiaries who cannot claim to have an equitable proprietary interest in**

***the trust assets, such as the beneficiaries of discretionary trusts; and it may give trustees too great a degree of protection in the case of documents, artificially classified as not being trust documents, and beneficiaries too great a right to inspect the activities of trustees in the case of documents which are, equally artificially, classified as trust documents”.***

- 33 In *In re a Settlement* ( *supra*) the Royal Court did not find it necessary to determine whether the beneficiaries of a trust have a proprietary interest in trust documents. It is similarly not necessary for us to resolve the issue definitively for the purposes of this case, but, as at present advised, the Court is of the view that the opinions in *Hartigan* referred to above are persuasive and the Court would concur with the view of the Jersey Law Commission at 4.2.26 of the Consultation Paper when it said:—

***“In principle, whilst it can be seen that beneficiaries can assert proprietary rights to the trust property (thus being able to join together and demand an outright transfer to themselves if they are all absolutely entitled), it is less clear why such rights should extend over the trust documents, which are in the trustees’ hands so that effective management can be carried out. In short, we would agree with Professor Hayton when he says: ‘The beneficiaries’ rights to inspect trust documents are now seen to be better based not on equitable proprietary rights but on the beneficiaries’ rights to make the trustees account for their trusteeship.’”***

### **The letter of wishes**

- 34 We turn now to consider whether a letter of wishes is a document which a beneficiary is entitled to see. In referring to a letter of wishes, we mean a document addressed by a settlor to trustees which is not binding upon the trustees, but which indicates the settlor's thoughts and wishes as to how the trustees might exercise their discretionary powers.
- 35 In *Londonderry* the Court of Appeal endorsed earlier authority to the effect that trustees exercising a discretionary power are not bound to disclose the reasons for their decision. The Court then had to reconcile that principle with the rule that a beneficiary is entitled to see documents concerning the administration of the trust. The Court resolved this conflict by holding that the general entitlement to see trust documents did not apply to documents which would or might disclose the reasons for a discretionary decision. This included the agenda for a trustees' meeting, correspondence between trustees, correspondence between trustees and individual beneficiaries and, most importantly, minutes of meetings of the trustees and other documents disclosing the deliberations of the trustees as to the manner in which they should exercise the discretionary power, or disclosing the reason for any particular exercise of such power or the material upon which such reasons were or might have been based. However, the position of a letter of wishes did not arise for consideration in that case.

36 *Londonderry* was quoted with approval by this Court in *Re a Settlement* ( *supra*), when, at page 148, it was said that the propositions contained in *Londonderry* offered general guidance as to the documents which need not be disclosed. The principles underlying the decision in *Londonderry* were also supported by the Court at page 146 where it said:–

**“ Those paragraphs make it clear that, subject to the terms of the trust and to any order of the Court, trustees are entitled to refuse to disclose matters touching upon the exercise of a power or discretion or the performance of a duty imposed on them.** In the context of discretionary trusts, it seems to us eminently sensible and reasonable that trustees should be able to weigh conflicting considerations as between different beneficiaries and to judge the merits and de-merits of particular courses of action without being exposed to minute examination as to their motives and processes of reasoning at the instance of disaffected beneficiaries. Trustees of such a trust have been entrusted with a confidential rôle and should, in general, be permitted to exercise their functions away from the glare of publicity. Of course, if they are not acting in good faith, that is an entirely different matter.”

37 In *Bhander v. Barclays Private Bank and Trust Company Limited*, (7th April 1997, Jersey unreported) a letter of wishes was disclosed voluntarily by the trustees and the court did not therefore address the issue. Counsel's researches have unearthed only one case where the position of a letter of wishes has been considered. That case is *Hartigan Nominees Pty Ltd. v. Rydge* ( *supra*), a decision of the court of appeal of New South Wales, Australia. The court of appeal subjected *Londonderry* to detailed scrutiny. The court held by a majority that the letter of wishes in that case did not have to be disclosed to a beneficiary. However, the reasoning differed on a number of issues.

38 Kirby P believed that *Londonderry* was based on old-fashioned principles which were no longer appropriate. A beneficiary should be entitled to know the reasons for the exercise of a discretionary power. The rule that documents disclosing reasons for the exercise of a discretionary power by trustees need not be disclosed was therefore wrong. Even if, contrary to his views, *Londonderry* was still good law, he held that, because trustees were likely to have regard to a letter of wishes when considering their powers under a trust deed, the letter of wishes should be regarded as a document which was ancillary to the trust deed and therefore a “trust document”, so that it was disclosable on *Londonderry* principles. Whilst reserving his position in a case where a settlor imposed an express provision of confidentiality in a letter of wishes, he declined to imply any duty of confidentiality in relation to letters of wishes generally and he would therefore have ordered that the letter be disclosed to the beneficiary.

39 Maloney JA approved *Londonderry*. He declined to order disclosure of the letter of wishes on three grounds. First, he held that a letter of wishes was not a trust document, in the sense that it was not part of the property of the trust. Secondly, he drew the inference that a letter of wishes was given by a settlor on a confidential basis to the trustees and it would be wrong to breach that confidentiality. Thirdly, he held that a letter of wishes was a document



which related to the reasons for the exercise of a trustee's discretionary power, disclosure of which would be likely to lead to family difficulties, and was therefore a document which fell within the category of documents which *Londonderry* said need not be disclosed.

- 40 Sheller JA also supported the principle laid down by *Londonderry*. Documents which disclosed the reasons for the exercise of a trustee's discretion need not be disclosed to a beneficiary. However, he was of the view that *Londonderry* went too far in including in that category material upon which reasons were or might have been based, unless that material would reveal the reasons themselves or the reasoning process. Furthermore, he held that a letter of wishes was not a document which would disclose the reasons for a trustee's decision and therefore did not fall within the category of documents which *Londonderry* held need not be disclosed. However, he agreed with Mahoney JA that it was to be inferred that a letter of wishes written privately to trustees was intended to remain confidential and that, for that reason, it should not be disclosed to beneficiaries.
- 41 In short, a majority, (Mahoney and Sheller JA) held that a trustee was not required to disclose a letter of wishes on the grounds of confidentiality. A different majority (Kirby P and Sheller JA) held that a letter of wishes was not a document which fell within the category of documents which *Londonderry* held need not be disclosed because they might disclose the reasons for the exercise of a discretionary power.
- 42 Mr. Kelleher argued that the Court should follow the approach of Kirby P to the effect that the reasoning in *Londonderry* is out of date. A beneficiary should be entitled to know the reasons for a trustee's decision. We do not agree. We think that the arguments for confidentiality in relation to the reasons for trustees' decisions given in *Londonderry* remain as valid today as they were then. Salmon LJ summarized these at 240 as follows:—

***“The settlement gave the absolute discretion to appoint to the trustees and not to the courts.*** So long as the trustees exercise this power ..... bona fide with no improper motive, their exercise of the power cannot be challenged in the courts — and their reasons for acting as they did are, accordingly, immaterial. This is one of the grounds for the rule that trustees are not obliged to disclose to beneficiaries their reasons for exercising a discretionary power. Another ground for this rule is that it would not be for the good of the beneficiaries as a whole, and yet another that it might make the lives of trustees intolerable should such an obligation rest upon them..... Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them. It might indeed well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might ensue, added to their present not inconsiderable burdens.”

- 43 It seems to us important that discussion should be uninhibited by fear of publication. In order to fulfil their duties properly, the trustees may need to consider weaknesses of

character of a beneficiary, the relationship between different beneficiaries, and many other sensitive matters. One can readily understand that, should such personal information about beneficiaries be freely available to any individual beneficiary who asks for it, it may lead to difficulty. Furthermore, the fact that the views and reasoning of trustees on such sensitive matters could be made available to any disaffected beneficiary would, the Court believes, inhibit full and free discussion, and be likely to lead to ill feeling and to fruitless litigation. The Court cannot improve on the language of Bailhache, Bailiff, in *Re a Settlement* set out at paragraph 36 above and fully endorses it.

- 44 Mr. Benest, on behalf of the trustees, argued that Mahoney JA was correct to hold that a letter of wishes is a document which falls within the category of documents which *Londonderry* held need not be disclosed, because it was a document which might disclose the deliberation of the trustees or the reasons for any particular exercise of the discretionary power or constitute material upon which such reasons were or might have been based.
- 45 Although the exact wording used in the order drawn up in *Londonderry* did not have a letter of wishes in mind, we are satisfied that such a letter is covered by the principle which governed the decision in *Londonderry*. A letter of wishes will usually set out in some detail how the settlor would like the trustees to exercise their discretionary powers of distribution and, perhaps, of management of the trust fund. When trustees come to consider the exercise of a discretionary power, they will normally have the letter of wishes before them. The letter is of course not binding. If trustees slavishly follow a letter of wishes, their decision can be quashed, on the grounds that it is not, in truth, the decision of the trustees. The trustees must make up their own minds as to how they should exercise their discretion in the best interests of one or more of the beneficiaries. However, discussion is almost certain to involve references to the contents of the letter of wishes, such as whether the settlor's wishes remain appropriate; whether there are reasons to depart from his wishes; if so, what those reasons are and how they might impact on the wishes expressed by the settlor. Circumstances will, of course, vary and the weight given to the letter of wishes will vary from case to case. Nevertheless, in general terms, the contents of the letter of wishes will undoubtedly form an important part of the trustees' consideration of the exercise of their powers. We are quite satisfied that a letter of wishes is a document which is closely related to the decision-making process and to the reasons for a decision, even where the trustees decide to depart from the letter. However, we disagree with Kirby P in *Hartigan* that it is therefore a document which is to be treated as being ancillary to the trust deed. It is an informal document which the trustees are free to ignore. It is merely an expression of the settlor's wishes.
- 46 Nevertheless, it may, in many cases, be a document which discloses the reasons for a decision and is, in almost all cases, likely to be material upon which such reasons were or might have been based, even in cases where the trustee chooses to depart from it. We note the criticism of this last category of documents referred to in *Londonderry*, by Sheller JA in *Hartigan* and we can envisage a case in which material upon which reasons were or might have been based, should nevertheless be disclosed. However, in general, we think it reasonable that such material should be covered by the protection given to the reasons



themselves as they will often be so closely inter-linked that the protection given to the reasons will not be achieved unless the material upon which those reasons were based is also protected.

- 47 We are conscious that the wording used to describe the relevant categories of documents in *Londonderry* should not be construed as a statute. The wording is simply taken from an order made in a particular case. Although we hold that the letter of wishes is covered by the wording in *Londonderry*, that is not necessary to our decision. We would rest our decision additionally upon the general principle that a trustee does not have to disclose the reasons for the exercise of a discretion and upon the justification for that principle as given in *Londonderry* and in *In re a Settlement*. We hold that to require disclosure of a letter of wishes would be likely in practice to undermine the immunity from the provision of reasons and to lead to just the sort of problems which the immunity was designed to avoid.
- 48 We would also endorse, as an additional ground, the decision of the majority in *Hartigan*, that the letter of wishes need not be disclosed on the ground of confidentiality. We agree that the fact that the settlor writes a separate letter addressed privately to trustees raises a strong implication that he intended the document to be confidential. In some cases, he may have stated expressly that it is confidential. We agree with the majority in *Hartigan* that the Court should ordinarily respect that confidentiality. The settlor will often wish to communicate to the trustees thoughts about individual beneficiaries which would cause upset, distress, and possibly family strife if they became generally known. The settlor is always able to make these thoughts known to his family if he wishes. But should he prefer to keep them confidential, he should be entitled to do so. It will often be in the interests of the family as a whole that such thoughts should remain confidential. Where information is provided in confidence, the law will respect that confidence unless there are good grounds for it not do so. For the reasons which we have set out above, we believe that, far from there being good reason not to respect the confidentiality of the settlor's wishes in such cases, there are good grounds for saying that it should be respected and that it would be damaging to ignore it.
- 49 As on the first issue, we have considered the matter first by reference to general equitable principles, so as to be able to give a decision in respect of the two trusts not governed by Jersey law. However, the position in Jersey is also covered by Article 25 of the 1984 Law, the relevant parts of which read:—

***“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 his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or***

***(b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such***

***reasons shall or might have been based; or***

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

- 50 For similar reasons to those which we have set out above, we hold that a letter of wishes falls within paragraphs (b) and (c) of Article 25 so that, subject to the terms of the trust or to any order of the Court, the trustee is not required to disclose a letter of wishes to an individual beneficiary.

### **Discretion of the Court**

- 51 Given our decision that a beneficiary is not entitled as of right to see a letter of wishes, does the Court have power to order disclosure in some cases? Although the issue did not arise in *Hartigan*, there are dicta to suggest that the majority contemplated the existence of such a power. Thus, at 436, Mahoney JA said:—

***“I would, for myself, see the matter of confidentiality as being of particular significance in discretionary trusts of the present kind.*** In deciding questions of disclosure, it is important in my opinion to have regard to the essential nature of such discretionary trusts. Such a trust is not a mere commercial document in which the public may have an interest. It is a private transaction, a disposition by the settlor of his own property, ordinarily voluntarily, in the manner in which he is entitled to choose. Special cases apart, it is proper that his wishes and his privacy be respected.” (emphasis added).

At 447, Sheller JA said:—

***“The question is whether there is in this case some countervailing circumstance which calls for the disclosure of a document given to the trustees in confidence.*** Such a circumstance may spring from the nature of the document itself, as, for example, the documents of title of the trust, from want of good faith on the part of the trustees, or, perhaps, from some overriding public interest; compare *Castrol Australia Pty Ltd. v. EmTech Associates Pty Ltd.* (1980) 51 FLR 184 **at 209–216**. There is no allegation of bad faith. The document is itself not of a nature that requires disclosure. Nor do I see any specific or amorphous public interest which requires, in the circumstances of this case, the revelation of the wishes of Sir Norman Rydge expressed privately and, I am satisfied, confidentially to his trustees.”

- 52 The existence of a power to override the confidential nature of the letter of wishes in particular circumstances would be consistent with the general law of confidence which allows for disclosure in various circumstances.

- 53 Supported by those dicta, we would return to first principles. A court of equity has a general supervisory jurisdiction over trusts. It is there, amongst other reasons, to ensure that the trustees are accountable to the beneficiaries on whose behalf they hold the assets. Indeed, trustees may surrender their discretion to the court. In our judgment, it would be inconsistent with the general position of the Court if it did not have the power to order disclosure of a letter of wishes or other document, which did not have to be disclosed on *Londonderry* principles, where it was satisfied that it was essential to do so. The position is similar to that concerning trust documents, save that it is the reverse situation. One starts with a strong presumption that a letter of wishes or other document falling within the *Londonderry* exceptions, does not have to be disclosed to a beneficiary. The burden lies on a beneficiary who requests the court to order the disclosure of such a document against the wishes of the trustees. Nevertheless, there is power in the Court to do so if the Court is satisfied that there are good grounds for ordering disclosure in a particular case.
- 54 Under Jersey law, the position is even clearer, because Article 25 (quoted at paragraph 49 above) provides that the rule that a trustee is not required to disclose documents falling within paragraphs (a) to (c) is “ **subject to any order of the court ...**”. It is clear, therefore, that the Court has power to order disclosure of documents which would otherwise not be disclosable.
- 55 For the avoidance of doubt, nothing in this judgment touches upon the rules of discovery in adversarial litigation. In those circumstances, the ordinary rules of discovery will apply and a letter of wishes or other document which does not have to be disclosed to a beneficiary on *Londonderry* principles, will fall to be discovered in exactly the same way as any other document.

### **Application to the facts**

#### **(a) Accounting Documents**

- 56 As we have said at paragraph 28, there is a strong presumption that a beneficiary is entitled to see trust documents of this nature. There must be good reason to refuse disclosure of such documents. What reasons are relied upon in this case? Mr. Benest argues that it is not a request from a beneficiary made of his own free will. John Rabaiotti has only made the request because he has been ordered to do so by the English court and he is worried that it will be taken against him if he cannot produce the documents to that court. The trustees are concerned that provision of the documents to Mr. Rabaiotti's wife or to the English court would make it more likely that the English assets of the settlement might be attacked in some way, or that the English court would exercise the jurisdiction, which it apparently may have, to vary the terms of the various trusts.
- 57 In our judgment, these arguments do not justify withholding the Accounting Documents from Mr. Rabaiotti. On the contrary, the Court can well understand the desire of the English matrimonial court to have full knowledge of any assets to which Mr. Rabaiotti may be or

become entitled. The fact that one party to a marriage has an interest or expectation under a trust may well be a material consideration when deciding how the parties' matrimonial assets are to be divided following divorce. As a matter of comity, this Court would not wish to place impediments in the way of the English High Court undertaking its proper rôle. Mr. Rabaiotti has called for the Accounting Documents. They are documents to which any beneficiary is normally entitled and we see no reason on the facts of this case to deny Mr. Rabaiotti that entitlement. Accordingly, we ordered that the Accounting Documents should be disclosed to Mr. Rabaiotti by the trustees. On a point of detail, we said that there was no obligation upon the trustees to obtain a market valuation of any real property (they are apparently at cost in the trustees' books), but that, if Mr. Rabaiotti were willing to pay the costs of obtaining a market valuation, the trustees could, at their discretion, obtain such a valuation. Should they do so, these too should be disclosed to Mr. Rabaiotti.

### **(b) Letter of wishes**

- 58 So far as the letter of wishes is concerned, the Court starts in the opposite position to that for the Accounting Documents. There is a strong presumption against its disclosure. The Court will not order inspection of a letter of wishes unless a clear case is made for its disclosure.
- 59 Mr. Kelleher argues that there are strong reasons to order disclosure in this case. He says that the evidence shows that Mr. Rabaiotti's spouse and the English court are likely to draw the conclusion that Mr. Rabaiotti has easy access to both the capital and income of the various settlements on the grounds that the trustees are likely to have regard to Mr. Rabaiotti's wishes. In fact, because of what his father made known to both children before he died, and because of the fact that he has seen earlier letters of wishes as referred to below, Mr. Rabaiotti believes that the letter of wishes makes it clear that the settlor wished the trust fund to be preserved for subsequent generations and has requested the trustees only to pay part of the income of the various settlements to Mr. Rabaiotti. The scope for misunderstanding of the true position on the part of the English court is said to have been increased in this particular case, because, following the recent death of his father, Mr. Rabaiotti went through his father's papers and found earlier letters of wishes signed by his father, as settlor, in relation to two of the settlements. These have been disclosed to his wife pursuant to the order of the English court. He is concerned, therefore, that the English court will proceed on an erroneous basis, in that it will have regard to letters of wishes which have been replaced. The trustees, on the other hand, repeat the arguments against disclosure which they raised in respect of the Accounting Documents.
- 60 Mr. Rabaiotti is supported by his sister Louisa Punturieri. She has written to the Court to say that she does not oppose her brother's application. More significantly, she emphasizes that she wishes the Court to ensure that the English court obtains the fullest picture of the settlements; in particular that, if the trustees act in accordance with the letter of wishes, John Rabaiotti will only receive part of the income of the settlements and will not receive any capital. She is concerned that a failure to disclose the full position will result in

prejudice to her side of the family because the English court may conclude that John Rabaiotti has a greater interest in the settlements than he is likely to have in practice.

- 61 The Court has had particular regard in this case to the fact that earlier letters of wishes in respect of two of the settlements are already available to John Rabaiotti's wife and the English court. It would clearly not be in the interests of John Rabaiotti as a beneficiary or any of the other beneficiaries if the English court were to proceed on a basis which assumed that John Rabaiotti's interest in the settlements was much greater than it was. We note that the only other child of the settlor supports full disclosure and, in the particular circumstances of this case, we think that the risk of the English court drawing an erroneous inference as to the likely position of John Rabaiotti as a beneficiary is such that we ought to order disclosure of the letter of wishes to John Rabaiotti. We conclude that, on the facts of this case, it is in the interests of the beneficiaries as a whole as well as being in the interests of John Rabaiotti.

### **Intervention by the trustees in the English proceedings**

- 62 The English court has made an order giving leave for the trustees to intervene in the English matrimonial proceedings. That order has been served on the trustees and they seek directions as to whether they should intervene.
- 63 The Court has been provided with an opinion of English counsel experienced in matrimonial law who has set out the principles which will be applied by the English court and the powers of the English court in relation to ante-nuptial or post-nuptial settlements. The Court has also been referred to an article by Moore & Allport: "Disposals, Discretion and Deception" Volume 3 Jersey Law Review 306. From these it is clear that the English court has power, under English statute, to vary nuptial settlements. The latter phrase has been interpreted very widely, although it is not entirely clear whether it would be wide enough to cover the settlements in this case.
- 64 The main concern of the trustees is that, if they were to submit to the jurisdiction of the English court, and if that court were to purport to vary any of the settlements under its statutory power, the trustees would find it more difficult to contest any subsequent proceedings in Jersey brought to enforce the order of the English court for variation. Conversely, if the trustees had not submitted to the jurisdiction, they would be able to argue strongly that this Court should not enforce an order of an English court in respect of a settlement governed by Jersey law or BVI law and administered in Jersey. The trustees argue that it is in the best interests of the beneficiaries as a whole that they should preserve their freedom of action in this respect.
- 65 The Court regards it as unlikely that an English court would so exceed the normal bounds of comity as to purport to vary a settlement governed by Jersey or BVI law, administered in Jersey by Jersey trustees and which had no connection with England save that some of the

beneficiaries resided there. However, they accept that the trustees are right to take a cautious approach. Furthermore, it is hard to see any specific advantage for the settlements in the trustees' submitting to the jurisdiction. By reason of the orders we have made in respect of disclosure, the English court will be aware of the position in relation to the settlements without the need for the trustees to appear. In any event, as a matter of general principle, it seems inappropriate for trustees to become involved in litigation between a particular beneficiary and a third party to the settlement (in this case, the spouse of a beneficiary).

66 Accordingly, the Court was of the clear view that the trustees should not intervene in the English matrimonial proceedings between Mr. Rabaiotti and his wife.

### **Summary of Conclusions**

67 A beneficiary is normally entitled to inspect trust documents such as the trust deed and 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. However, there is a discretion in the Court to refuse disclosure to a beneficiary where it is satisfied that this would not be in the best interests of the beneficiaries as a whole.

68 A beneficiary is not normally entitled to see a letter of wishes both because it is covered by the principles laid down in *Londonderry* and because it is a document which is confidential to the trustees. However, there is a discretion in the Court to allow disclosure where it is satisfied that there is good reason to do so in any particular case.

69 On the facts of this case, the Court is satisfied that there are no good grounds for holding that the trust documents falling within paragraph 67 above should not be disclosed to John Rabaiotti. However, it is satisfied that there are good grounds for holding that, on the particular facts of this case, the letter of wishes in relation to each settlement should be disclosed to Mr. Rabaiotti.

70 We do not think it would be in the best interests of the beneficiaries as a whole for the trustees to intervene in the English matrimonial proceedings.

71 As stated at the beginning of this judgment, we can only speak authoritatively on the law of Jersey, which is the proper law of two of the settlements. However, doing the best we can, we believe that the general principles which we have described above (excluding, of course, all reference to Article 25 of the 1984 Law) also reflect the law of the British Virgin Islands. For these reasons we have made the same order in relation to the two settlements governed by the law of BVI, as we have in respect of the two settlements governed by Jersey law.