

HHH Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Breton, Milner
Judgment Date:	28 June 2012
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Text

[2012] JRC 127B

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Commissioner.**, and Jurats Le Breton and Milner.

IN THE MATTER OF HHH EMPLOYEE TRUST

AND IN THE MATTER OF THE B SUB-TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984, (revised
edition)

Between
B
Representor

and
C
First Respondent

and
E
Second Respondent

Advocate A. D. Hoy for the Representor.

Advocate E. C. P. Mackereth for the Second Respondent.

Authorities

In the matter of HHH Trust [\[2011\] JRC 235](#) .

Re Bird Charitable Trust and the Bird Purpose Trust [\[2008\] JLR 1](#) .

Lewin on Trusts (18th edition).

[Imperial Group Pension Trust Ltd -v- Imperial Tobacco Ltd \[1991\] 1 WLR 589](#) .

Prudential Staff Pensions Ltd -v- Prudential Assurance Co Ltd and others [2011] EWHC 960 .

Mettoy Pension Trustees Limited -v- Evans [\[1990\] 1 WLR 1587](#) .

In the matter of the B, C and D Settlements [\[2010\] JLR 653](#) .

S -v- L [\[2005\] JRC 109](#) .

Schmidt -v- Rosewood Trust Ltd [\[2003\] 2 AC 709](#) .

Bathurst (Countess) -v- Kleinwort Benson (Channel Islands) Trustees Ltd [2007] WTLR 959 .

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

Spellson -v- George [\[1987\] 11 NSWLR 300](#) .

Re the Freiburg Trust [2004] JRC 056 .

Re Londonderry Settlement [\[1965\] Ch 918](#) .

Re Rabiotti 1989 Settlement [\[2000\] JLR 173](#) .

Trust — wider disclosure sought by the representor from the first and second respondents.

THE COMMISSIONER:

- 1 This judgment is concerned with whether a settlor of a trust is under an obligation to make disclosure to a beneficiary and, if so, the extent of that obligation.
- 2 By its re-amended representation, the representor ("B") seeks wide disclosure from the first respondent ("the Trustee") as trustee of the HHH Employee Trust ("the Trust") and of sub-trusts created under it and from the second respondent ("the settlor") which is the settlor of the Trust. The Court directed that the issue of disclosure from the settlor should be dealt with separately. The judgment of Clyde-Smith, Commissioner, of the 15th December 2011 ([\[2011\] JRC 235](#)) sets out some of the background, but it is helpful to set out again the salient features of the matter.
- 3 The settlor, a multinational company, established the Trust by deed on 4th December, 1998, for employees of the settlor. The settlor is excluded from benefit. B began employment at the settlor in Paris in July 1992 and moved to the settlor in London in August 1993. By virtue of his employment, B became a beneficiary of the Trust.
- 4 By deed of appointment dated 18th February, 2000, the trustee created the B Sub-Trust of which B and his family are beneficiaries. The value of the B Sub-Trust as at 16th March, 2009, was approximately US\$ 30M. In March 2005, B took leave of absence and his employment with the settlor eventually terminated on 15th August, 2005.
- 5 There have been extensive exchanges between the parties and their respective advisers, a small part of which is summarised in the judgment of 15th December, 2011, but, leaving aside the deterioration in relations between B and the trustee, at the heart of this matter lies a concern on the part of B that no benefit can be obtained by B or his family from the B Sub-Trust without a liability to UK Income Tax and National Insurance contributions arising in an amount equating to 62% of the current value of the B Sub-Trust, and this contrary to representations B may say were made to him by the settlor before contributions were made to the Trust and as a result of certain decisions subsequently made by the trustee and/or the settlor. These potential liabilities raise issues as to the indemnities that the trustee would require whether in appointing out funds or in retiring as trustee.
- 6 Proposals and counter proposals to address or mitigate this have been put forward in correspondence, but the parties and their advisers have been unable to agree on a way forward.
- 7 Tracking the matter procedurally, the first draft representation prepared on behalf of B and notified to both the trustee and the settlor in July 2010 sought the removal of the trustee as trustee in favour of Ogier Trustees Limited, an order that an account be taken of the losses of the B Sub-Trust due to the trustee's actions and the payment to B of the amount found

due. The settlor was not named as a respondent at that stage.

- 8 The draft representation was subsequently amended and when first brought before the Court on 26th November, 2011, the settlor was named as a second respondent and although the body of the draft was substantially the same, it no longer sought the removal of the trustee. The relief sought was now limited to the seeking of disclosure against both the trustee and the settlor (as a party having a connection with the Trust) and an order for wasted costs.
- 9 The representation was supported by an affidavit sworn by Nigel George Andrew Pearmain dated 21st January, 2011, in which he asserted that it was essential that in order for B to obtain full detailed and accurate advice regarding the tax implications of his interest in the B Sub-Trust, he should be provided with all documents in the possession, custody and power of the trustee and settlor set out in the prayer to the representation. The representation was also supported by an extensive affidavit from Véronique Favreau, B's French advocate, which sought disclosure on potentially more hostile grounds, namely that she believed full disclosure would demonstrate:-

“(a) that [the Trustee] (a US company) as shown on the trust deed of the [Trust] is not the real Settlor of the [Trust]. A [company in the same group] located in the UK is, or several UK companies are Settlers of the [Trust] casting doubts on the nature of the [Trust] itself.

(b) having expressed my belief that the Settlor is de facto Trustee of the [Trust] and that the discretionary powers of [the Trustee] only apply as directed by [the Settlor], I am advised that may not be a correct legal analysis of [the Settlor's] fiduciary position under Jersey law as it holds no assets. However I am advised that it may be the case that based on future disclosure and on the actual involvement of [the Settlor] in the [Trust], it is revealed that [the Trustees] are acting as nominees for [the Settlor] and that the very existence of the [Trust] is at risk.”

- 10 The representation came before the Court on 13th April, 2011, for directions and in his short oral judgment Clyde-Smith, Commissioner, said this:-

“As far as [the settlor] is concerned the representation is entirely unclear as to its role, why it has been convened and the basis upon which disclosure and other relief is sought from it. A further issue has arisen, namely the effects of HMRC's “Employment Income through Third Parties document” in respect of which Mr Hoy has said it may still be possible to mitigate the consequences with the co-operation of the trustee. Accordingly he saw merit in Mr MacRae's suggestion of a stay to allow the parties to work together on this .

Clearly the Court should encourage resolution of these issues between the parties and I therefore agree to grant a stay for that period. Thereafter if

the representor wishes to pursue his representation seeking information then he has leave to file an amended representation within twenty-eight days of the expiration of the stay. In my view that would involve a substantial re-writing of the representation, deleting all that part of it which currently relates to a potential removal of the trustee and prayer g [wasted costs], and setting out clearly and with particularity, what information is sought, the purpose for which it is being sought and the basis upon which disclosure should be ordered by the Court. It should also address the issue of confidentiality in so far as other beneficiaries not convened are concerned and of who should pay the costs of the exercise. In so far as the purpose for seeking disclosure relates to tax matters, then I would expect the application to be supported by the advice of tax counsel.”

- 11 Accordingly, the representation was stayed for six weeks to allow the parties to resolve the matter by agreement, if possible, and B was given leave to file an amended representation within 28 days of the expiration of that stay.
- 12 The parties were unable to resolve matters during the six weeks' stay. The time for filing the amended representation expired on 22nd June, 2011, and on 13th August, 2011, an amended representation was filed out of time. The amended representation had now added to it hostile claims against both the trustee and the settlor alleging false representations on the part of the settlor and claiming that as a consequence of these false representations, and certain failures of the trustee, B had lost the opportunity to enter into beneficial tax planning strategies. Damages were sought against both the trustee and the settlor, as well as disclosure.
- 13 B was immediately faced with summonses by both the trustee and the settlor seeking to strike out the amended representation on the grounds that it was filed out of time and failed to comply with the requirements of the Commissioner's judgment of 13th April, 2011, in that it continued to combine both an application by B as a beneficiary for disclosure and hostile claims against the trustee and the settlor. In response B sought leave to file a re-amended representation which removed the hostile claims and once again sought only disclosure from both the trustee and the settlor. On 15th December, 2011, the Commissioner gave B leave to file the re-amended representation and, as previously mentioned, directed that the issue of disclosure against the settlor should be dealt with separately.
- 14 In the re-amended representation the requirements for disclosure are now summarised in paragraph 52 by reference to an opinion from tax counsel as follows:-

"52. In the premises [B] needs and requires from the respondents full and detailed disclosure of advices, letters, memoranda, notes of conferences documents and correspondence in order to enable [B] to obtain full and proper tax advice regarding the [Trust] and the proposals contained in Ogier's letter of 11 October, 2010, and the KPMG October advice and any other proposals which may be made by the respondents, or by [B's] advisers, in respect of such matters ("proposals"). More particularly, [B] requires disclosure of the documents and categories of documents identified in the Opinion of Michael Sherry

dated [23 November, 2011,] (“the Opinion”), for the reasons more particularly set out in the Opinion.”

- 15 As the Commissioner observed in paragraph 14 of his judgment of 15th December, 2011, what he had anticipated was tax counsel advising B on his tax affairs being able to set out with some particularity precisely what information he needed and what documents or categories of documents he needed to see. The instructions to Mr Michael Sherry (“Counsel”), however, took a different tack. Those instructions were as follows:-

“A. Counsel is asked to list any documents (or classes of documents) he would expect to be provided by the respondents in relation to the [Trust] in order to resolve any tax and legal issues, and provide reasoning as to why such documentation should be provided, taking into account the following:-

a. What documentation ought properly be in the possession, custody or power of the respondents which could be provided in a proportionate manner to the beneficiaries in order for them to fully and accurately understand the legal and tax implications of participating in the [Trust] and the losses that have arisen?”

b. What documents (or classes of documents) would you ordinarily expect to have been sought and obtained by a settlor, an employer and trustee of [a Trust]? Would a trustee ordinarily take legal and taxation advice at various stages of [a Trust's] existence:-

i. On establishing the [Trust?]

ii. On establishing sub-funds for the existing beneficiaries.

iii. On contributing assets to the [Trust]/ sub-funds:-

iv. At the time of publication of a new finance bill or draft legislation to be included in a future bill:

B. Would any taxation or legal advice be helpful and/or necessary for a beneficiary to understand their own tax position in relation to [a Trust]?

C. Would you expect any taxation or legal advice to take into account the consequences (for the beneficiaries) of the settlor not being the contributor to [a Trust]? Would you expect such advice(s) to be shared with beneficiaries as and when they were obtained or retained solely by a settlor, employer and/or trustee?

D. What communications would typically be made to a beneficiary by a settlor, employer and/or trustee in relation to the following:-

i. When [a Trust] was established (or on joining the firm)?

ii. When contributions were made?

iii. When the beneficiary wished to extract value?

iv. On annual reporting and/or support in understanding any personal tax implications in relation to the [Trust]?

v. General advice on the implications of entering into (and continuing involvement) the [Trust] structure, and what it sought to achieve for the beneficiaries?

E. Would Counsel expect that any critical issue identified by the Settlor/Employer leading it to consider the set-up of a new structure to be shared with the beneficiaries of the family structure?

F. Upon consideration of the Respondent's communication to date does Counsel have any concerns or comments in relation to the same? In particular is there any particular action that should be taken by B at this stage aside from the proceedings?"

- 16 Thus counsel had been invited not to advise on what documents he needed to see in order to advise B on his tax affairs but what documents might exist in the hands of the trustee and settlor to resolve not just tax but any legal issues. Not surprisingly the list of documents sought from the settlor, drawn up from counsel's advice and presented at the hearing, was very wide. That list has been annotated to refer back to the opinion and supplemental opinion of counsel so as to make clear the purpose for which disclosure was sought in each case, but taking the list itself (and not the purposes), the width of disclosure sought from the settlor is best illustrated by setting it out in full:-

List of documents requested by the [B]...

"1. In this list, the term "communications" shall include all correspondence and documents whether electronic email or paper correspondence including telephone calls, meetings and discussions and the notes of such telephone calls, meetings and discussions howsoever recorded or stored.

2. The terms "Settlor" and "Trustee" shall include all subsidiaries or associated companies or entities of the Settlor and Trustee and all predecessor trustees of the present Trustee.

1 The Trust Deed together with all deeds of variation, amendment or addition and all Deeds of Appointment and Retirement.

2 Communications between the Settlor and Trustee requesting that the Trustee act as Trustee and raising all or any issues in relation to the Trust and/or Sub-Fund including but not limited to the contribution of assets to the Trust from Third Parties or entities including subsidiaries or associated Companies or entities of the Settlor discussing and/or setting out.

a. How the Trust and Sub-Funds was or were intended or expected to operate?

b. The tax and National Insurance Contributions (hereafter "NIC") treatment of the

Settlor and/or third parties or entities making or contemplating making contributions to the Trust and/or Sub-Funds;

c. The tax and NIC treatment of the Trust and Sub-Funds;

d. The tax and NIC treatment of beneficiaries by reference to contributions to the Trust and Sub-Funds, and their operation and the provision of distributions or benefits from the Trust whether by way of outright payment to beneficiaries of income or capital or by way of loans or other benefits including the transfer of assets to schemes (including pension or retirement schemes) or to other trusts.

3 Communications between the Trustee and/or its professional advisers on the one hand and the Settlor and/or its professional advisers on the other, discussing and/or setting out, or relating to the matter set out in 2 a. to d. inclusive above.

4 All communications whensoever between the Settlor and/or the Trustee and/or the professional advisers of the Settlor and/or Trustee on the one hand and HRMC and/or the Jersey Comptroller of Income Tax on the other, discussing and/or setting out or relating to the matters listed in 2 a. to d. inclusive above including but not limited to tax returns.

5 All internal communication with the Settlor and the Trustee including communication between the subsidiaries or associated companies or entities of the Trustee and of the Settlor discussing and/or setting out or relating to the matters listed in 2 a. to 2 d. inclusive above.

On establishing sub-funds for the existing beneficiaries

6 The Deed of Appointment together with all deeds of variation, amendment or addition and all Deeds of Appointment and Retirement.

7 The Trustee's Resolution as Trustee of the Trust.

8 All related minutes of the Board of the Trustee.

9 Communication between:-

a The Settlor and/or any subsidiary or associated companies or entities connected with the Settlor that employ or employed the Representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Fund on the one hand the Settlor's professional advisers;

b The Settlor and the Trustee including communications between their respective advisers;

c The Trustee and their professional advisers;

d The Settlor and/or any subsidiary or associated companies or entities connected with the Settlor employing the Representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Funds on the one hand and those individual

beneficiaries including the Representor;

e The Trustee on the one hand and the Representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Funds.

f All internal communication within the Settlor and the Trustee including communication between the respective subsidiaries or associated companies or entities of the Trustee and of the Settlor and their professional advisers.

10 The communications referred to in 9 above include but not limited to:

a In respect of 9a. and 9f. above, the tax and NIC implications of any proposed appointment and any trust law implications;

b In respect of 9b. and 9f. above,

(i) The wishes of the Settlor and/or any subsidiary or entity of the Settlor or third party making or contemplating making contributions to the Trust and/or Sub-Funds for the benefit of the intended objects of the Sub-Funds to be established;

(ii) Advice received by the Settlor as to the consequences including Tax and NIC treatment consequences of accepting such Trust and/or Sub-Fund and as to the manner in which a Trust and/or Sub-Trust might be established.

c In respect of 9c. and 9f. above, advice as to the consequences including tax and NIC consequences of accepting such Trust and/or Sub-Fund and as to the manner in which such a Sub-Fund might be established.

d In respect of 9d., 9e. and 9f. above the consequences including tax and NIC consequences for the Representor and/or existing or intended primary beneficiaries of the Trust including any Sub-Fund.

e In respect of any employee joining the Settlor, notification to the Trustee of the identity of the new employee as beneficiary including documentation explaining how the Trust and/or Sub-Funds were intended or expected to operate including a description of the tax and NIC treatment or consequences for the employee and the Trust and/or Sub-Fund.

On contributing assets to the Trust/Sub-Funds

11 All communications of wishes from the Settlor and/or any subsidiary or associated companies or entities connected with the Settlor or third party making or contemplating making contributions to the Trust and/or Sub-Funds.

12 Resolutions of the Settlor and/or third parties or entities of making or contemplating making contributions to the Trust and/or Sub-Funds.

13 The Resolutions of the Trustee accepting all and any such contributions referred to in paragraph 12 above.

14 Communications between:

- a The Settlor and/or any subsidiary or associated companies or entities connected with the Settlor employing the Representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Funds on the one hand and the Settlor's professional advisers;*
- b The Settlor and the Trustee including communications between their respective advisers;*
- c The Trustee and their professional advisers;*
- d The Settlor and/or any subsidiary or entity connected with the Settlor employing the Representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Funds and those individual beneficiaries;*
- e The Trustee on the one hand and the Representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Funds.*
- f All internal communication with the Settlor and the Trustee including communication between the subsidiaries or associated companies or entities of the Trustee and of the Settlor and their professional advisers.*

15 The communications referred to in paragraph 14 above to include:-

- a In respect of 14a. and 14f. above, the tax and NIC implications of any proposed appointment and any trust law implications;*
- b In respect of 14b. and 14f. above,*
 - (i). The wishes of the Settlor and/or any subsidiary or entity of the Settlor making or contemplating making contributions to the Trust and/or Sub-Funds for the benefit of the intended objects of the Trust and/or Sub-Funds to be established;*
 - (ii). Advice received by the Settlor as to the consequences including Tax and NIC treatment of establishing the Trust and/or Sub-Funds and as to the manner in which a Sub-Fund might be established.*
- c In respect of 14c. and 14f. above, advice as to the consequences including tax and NIC consequences of accepting such a trust and/or Sub-Fund and as to the manner in which such a Trust and/or Sub-Fund might be established.*
- d In respect of 14d; 14e. and 14f. above the consequences including tax and NIC consequences for the Representor and/or existing or intended primary beneficiaries of the Trust including any Sub-Fund.*
- e In respect of any employee joining the Settlor, notification to the Trustee of the identity of the new employee as beneficiary including documentation explaining how the Trust and/or sub-fund was intended/expected to operate including a description of the tax and NIC treatment or consequences for the employee and the Trust and/or*

*Sub-Fund.****At the time of publication or public notification of a new financial bill or draft legislation to be included in a future bill and/or case law****16 Communication between:-*

- a. The Settlor and/or any subsidiary or entity connected with the Settlor employing the Representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Funds on the one hand and the Settlor's professional advisers;*
- b. The Settlor and the Trustee including communications between their respective advisers.*
- c. The Trustee and their professional advisers;*
- d. The Settlor and/or any subsidiary or entity connected with the Settlor employing the representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Funds and those individual beneficiaries;*
- e. The Trustee on the one hand and the Representor and/or existing or intended primary beneficiaries of the Trust and/or Sub-Funds.*
- f. All internal communication within the Settlor and the Trustee including communication between the subsidiaries or associated companies or entities of the Trustee and of the Settlor and their professional advisers.*

17 Such communications referred to at paragraph 16 above to include discussions and/or setting out the possible or probable tax and NIC consequences or treatment of such notified or new finance bill or draft legislation on past and future transactions relating to:

- a. How the Trust and/or Sub-Funds were intended or expected to operate;*
- b. The tax and NIC treatment of the Settlor and/or third parties or entities making or contemplating making contributions to the Trust and/or Sub-Funds.*
- c. The tax and NIC treatment of the Trust and/or Sub-Fund;*
- d. The tax and NIC treatment of beneficiaries by reference to contributions to the Trust and/or Sub-Fund, its operation and the provision or distribution of benefits from the Trust and/or Sub-Fund whether by way of outright payment to the beneficiaries of income capital or loans or other benefits including the transfer of assets to schemes (including pension or retirement schemes) or to other trusts.*
- e. All internal communication within the Settlor and the Trustee including communication between the subsidiaries or associated companies or entities of the Trustee and of the Settlor and their professional advisers.*

18 Accounts and accounting reports and ledgers for the Representor's Sub-Fund.

19 Annual employer contributions request forms and bonus request forms completed by the Representor.

20 The letter of contributions referred to in paragraph 1.2.1 of KPMG's letter to McGrath Elliot of 18 June 2010.

21 All communication between the Trustee and/or Settlor and GSC Solicitors and relating to the Representor or Sub-Fund and used by either the Trustee and/or Settlor to make decisions on the Representor's wishes and requests.

22 All legal and/or tax and NIC advice in possession of the Settlor and/or Trustee and used and/or referred to make decisions on the Representor's wishes and requests."

- 17 As summarised in paragraph 10 of his supplemental opinion counsel considers there is need for information so that informed choices can be made now as to what to do with the B Sub-Trust, but also to understand whether B was disadvantaged by opting to forego bonus in favour of a contribution to the Trust, or as counsel says in paragraph F.1.2 of his opinion, whether B has any claims against the settlor arising out of the explanation (or lack of it) of the incidence and burden of taxation. As can be seen Mr Mackereth's submission was that the latter strays into the territory of pre-action disclosure.

Settlor's connection with the Trust

- 18 Apart from settling assets into the Trust, the settlor has the following connection with it:-

Clause 5 sets out the powers of appointment and advancement of the Trustee.

(i) Pursuant to Clause 16, it has the power to remove trustees and the power to appoint one or more persons as new or additional trustees. It was agreed between the parties and we accept that this is a fiduciary power (see *Re Bird Charitable Trust and the Bird Purpose Trust* [\[2008\] JLR 1](#) at paragraph 80).

(ii) Under Clause 25, it has the power to appoint any person as protector. A protector's role, if one was appointed, was limited to consenting to certain decisions of the trustee. No protector has been appointed. It was agreed by the parties, and we accept, that this is a fiduciary power (see again *Re Bird* paragraphs 84, 85, 90 and 91(v)).

(iii) Under Clause 6(4) it has the following power of amendment:-

“(4) The Settlor may with the consent of the Trustee amend (whether by alteration, deletion or addition) any provision of Clause 5 hereof or any other provision of this Settlement (of an administrative nature) in its application to all or any specified assets held pursuant to this Settlement by a written instrument executed by the Trustees and the Settlor. Notwithstanding the foregoing, no such amendment shall make this Settlement revocable, but any such

amendment shall have effect from such time as may be specified in the instrument whereby the same is effected and the time so specified may be the date of such instrument or any reasonable time subsequent thereto so as to give the amendment future effect.”

- 19 There is a further power for the trustee to make amendments contained in Clause 21 as follows:-

“21. With the prior or simultaneous written consent of the Settlor, the Trustees may at any time during the Trust Period by deed vary amend add to or delete any or all of the administrative powers herein and in the Schedules declared and contained PROVIDED ALWAYS that:-

(1).they shall be satisfied that such variations amendments additions or deletions are for the benefit of all or any one or more of the Beneficiaries; and

(2).they shall have obtained a prior written opinion approving any such variations amendments additions or deletions from a lawyer qualified for at least five years in the jurisdiction of the Proper Law.”

- 20 The parties were not in agreement as to whether the power to amend vested in the settlor under Clause 6(4) was a fiduciary power.

Power to amend

- 21 Lewin on Trusts (18th edition) sets out a three-fold division of powers at paragraph 29–14 into beneficial, limited and fiduciary:-

“Beneficial powers

29–15 Some powers, by their nature or their express terms, may be exercised in any way for the benefit or purposes of the donee, as he wishes and without restriction. They may be called beneficial powers. A general power of appointment, being a power to appoint an interest to anyone in the world including the donee himself, is the type of such a power. But there are other instances of beneficial powers. A power of revocation reserved to the Settlor on the creation of a settlement, since the effect of exercising it will be to re-vest the assets in him, is necessarily a beneficial power. A power to direct investments, though in general it will be construed to require the donee to act in the interest of the beneficiaries, may be worded so as to permit the donee to exercise it for his own benefit, and where a Settlor settles shares in a trading company of which he retains control he may also retain a beneficial power of that kind .

Limited powers

29–16 Limited or restricted powers must be exercised in good faith for the purposes for which they are given, which in this case are restricted. They differ from beneficial powers in that they are conferred for the benefit of one or more beneficiaries other than the donee. A special power of appointment is an example, being a power to appoint a beneficial interest to a given beneficiary or one or more of a class of beneficiaries. The constraints on the exercise of a limited power are expressed in the doctrine of a fraud on a power: an exercise of the power can be impeached if (i) it was made for a corrupt purpose, such as the benefit of the donee himself, (ii) it was made pursuant to a previous agreement between the donee and the appointee by which a person who was not an object to receive a benefit or (iii) it was made for a purpose foreign to the power, even if not communicated to the appointee. Hence the donee cannot validly exercise it for a purpose or with an intention foreign to the instrument by which the power was created. On the other hand, unless the power is also a fiduciary power, the donee is under no obligation to exercise it or to consider doing so. He is therefore free to leave it unexercised or to release it if he thinks fit, even if he does so in his own interests .

Fiduciary powers

29–17 Fiduciary powers are a class of limited powers. The significance of the distinction, which has been elaborated in recent authority, is that the donee of a fiduciary power owes a duty to the objects of the power to consider from time to time whether and how to exercise it and they have various remedies open to them if the donee does not or cannot do so. He is not bound to exercise it merely by virtue of its being a fiduciary power, the duty being to consider its exercise, though in the case of what is called a trust power he is bound to exercise it. If he does exercise it, the donee is subject to the doctrine of a fraud on a power in the same way as the donee of a non-fiduciary limited power. Generally, a fiduciary power cannot be exercised, or be left unexercised, by the donee for his own benefit, even if he is one of the objects of the power. It is possible, however, for the trust instrument to authorise the donee, whether a Trustee or a third party, to exercise (or refrain from exercising) a fiduciary power in a way which benefits himself. Given the duty to consider exercising the power, a fiduciary power cannot be released. It is possible, however, for the trust instrument to authorise a release of a fiduciary power by the donee (or another), though that does not negate the duty of the donee to consider exercising a fiduciary power unless and until it has been released.”

- 22 The authors of *Lewin* at paragraph 30–56 consider that if a power is reserved to the settlor it will normally be a beneficial power:-

“30–56 We consider that if the power is reserved by the Settlor it will normally be a beneficial power, whether or not the Settlor is a beneficiary, since a Settlor is unlikely to intend to restrict the power. When vested in other parties, since the exercise of a power to amend a trust instrument has an effect on the trusts similar to that of exercising a special power of appointment,

we consider that, like a special power of appointment, it is a limited and not a fiduciary power, unless it is conferred on Trustees in virtue of their office. A power conferred by a pension fund trust deed on the employer company, which (with participating companies) was entitled as a beneficiary to any surplus of the trust fund after providing all benefits, to increase the benefits “in its absolute discretion” has been held to be a fiduciary power. The reasoning, however, is doubtful and the decision is perhaps better treated as an instance of the special duty, recognised in later decisions, of an employer under a pension trust not knowingly to injure the relationship of trust and confidence between employer and employee.”

23 *Lewin* deals with employers' powers under pension trusts at paragraph 29–45:-

“29–45 A special constraint derived from employment law applies to the exercise by employers of their powers under pension trusts. The trust instrument and rules under it are to be taken as being impliedly subject to the limitation that the rights and powers of the employer can only be exercised in accordance with the implied obligation that the employer will not knowingly injure the relationship of confidence and trust that ought to exist between employer and employee. That constraint does not prevent the employer from considering its own interest in deciding how to exercise its powers, but it must not set limits to the benefits provided for members or pensioners for any collateral purpose, without regard to their legitimate expectations.”

24 The authority cited by *Lewin* for this proposition is [Imperial Group Pension Trust Ltd -v- Imperial Tobacco Ltd \[1991\] 1 WLR 589](#), a case involving a pension fund where the consent of the employer was required for the exercise of a power to amend. Sir Nicholas Browne-Wilkinson VC said this at page 532:-

“There remains the submission of Mr Topham for the employed members which I accept. Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the Settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. The beneficiaries have given no consideration for what they receive. The Settlor, as donor, can impose such limits on his bounty as he chooses, including imposing a requirement that the consent of himself or some other person shall be required to the exercise of the powers .

As the Court of Appeal have pointed out in *Mihlenstedt-v Barclays Bank International Ltd* [1989] IRLR 522 , a pension scheme is quite different.

Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases, including the present, membership of the pension scheme is a requirement of employment. In contributory schemes, such as this, the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being

volunteers have given valuable consideration. The company employer is not conferring a bounty. In my judgment, the scheme is established against the background of such employment and falls to be interpreted against that background.

In every contract of employment there is an implied term:

‘that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee;’ *Woods v W M Car Services (Peterborough) Ltd.* [1981] ICR 666, 670, ***approved by the Court of Appeal in*** *Lewis -v- Motorworld Garages Ltd* [1986] ICR 157.

I will call this implied term ‘the implied obligation of good faith’. In my judgment, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer.”

- 25 This obligation of good faith was reviewed extensively recently in *Prudential Staff Pensions Ltd -v- Prudential Assurance Co Ltd and others* [2011] EWHC 960 (Ch), where at paragraph 124 Newey J said this:-

“[124] In National Grid co plc -v- Laws* [1997] PLR 157, ***Robert Walker J noted (in paragraph 88) that ‘the Imperial Tobacco duty does not prevent the employer from looking after its own financial interests, even where they conflict with those of members and pensioners’. When the case reached the House of Lords on other points, Lord Hoffmann observed that the members had accepted that Robert Walker J had been right to take the view that the employer was entitled to act in his own interest provided that he had regard to the reasonable expectations of the members’: see *National Grid Co plc -v- Mayes* [2001] UKHL 20, [2001] 2 All ER 417, [2001] 1 WLR 864 ***at para 11.***”**

- 26 In reliance on these authorities Mr Mackereth submitted that the settlor's power to amend contained in Clause 6(4) was a limited power. Mr Hoy, whilst accepting the settlor's obligation of good faith as employer, submitted that the power would be illusory if not fiduciary, given that the sole objects of the exercise of the power were employees of the settlor (the settlor itself being excluded) and this in reliance on the case of *Mettoy Pension Trustees Limited -v- Evans* [1990] 1 WLR 1587, the reasoning of which Lewin at paragraphs 30–56 regarded as doubtful.

- 27 Under the scheme established by the Trust there is a legal relationship of employer and employee and it falls to be interpreted against that background, so that the implied obligation of good faith, as described in *Imperial Group Pension Trust* applies. However, as made clear in *Prudential Staff Pensions*, in deciding whether to propose amendments to Clause 5 of the trust deed, the settlor is entitled to consider its own interests as employer

provided it has regard to the reasonable expectations of the beneficiaries. It has its own interests, financial or otherwise, in the future operation of the scheme to look after. It is for that reason, in our view, that the consent of the trustee is required to any amendments the settlor proposes, the trustee as a fiduciary being solely concerned with the interests of the beneficiaries. The fact that the settlor can consider its own interests does not in our view render the power illusory. In Clause 21 of the trust deed where the trustee has the power to amend, it is the trustee which is required to be satisfied under Clause 21(1) that any amendments are for the benefit of the beneficiaries; in giving its consent, the settlor is again entitled in our view to take its own interests into account.

- 28 We conclude that the settlor's power to amend the trust deed under Clause 6(4) is not a fiduciary power, but is a limited power. Accordingly we find that the settlor has retained two fiduciary powers under the Trust namely the power to appoint a protector and the power to appoint and remove trustees.

Is the Settlor a trustee for the purpose of the Trusts (Jersey) Law 1984?

- 29 Mr Mackereth submitted, and Mr Hoy did not demur from the proposition, that the settlor is not a trustee for the purposes of the Trusts (Jersey) Law 1984 ("the Trusts Law"). That stems from the definition of a trustee under Article 2 as someone who **"holds or has vested in [him] or is deemed to hold or have vested in [him] property (of which the person is not the owner) in the person's own right"** The settlor does not hold property or have property vested in it. It has transferred the property it has settled out of its ownership to the trustee. There are a number of provisions within the Trusts Law governing the duties of a trustee that could not apply to someone without stewardship of the trust property. Article 21(3) for example, states that **"a trustee shall, subject to the terms of the trust, preserve and enhance the value of the trust property so far as is reasonable"**. Article 21(5) obliges the trustee to keep accurate accounts of the trustee's trusteeship. None of this can apply to someone without stewardship of trust property. Article 9A of the Trusts Law allows a settlor to retain certain powers under the trust without affecting the trust's validity and it does not indicate that the settlor thus becomes a trustee for the purposes of the Trusts Law if it does so.

- 30 We agree that the settlor is not a trustee for the purposes of the Trusts Law and that accordingly Article 29 dealing with disclosure by a trustee has no application to the settlor. Both parties submitted however and we accept that the Court has jurisdiction over the settlor under Article 51(2)(a)(iii) as being a person **"having a connection with the trust."** As Mr Mackereth pointed out, the question of whether the Court has jurisdiction is only the first limb of the inquiry, as it must go on to decide what principles should govern the exercise that jurisdiction. The mere fact that the settlor may have in its possession information in relation to the Trust is not, without more, grounds for requiring it to be disclosed under the Court's supervisory jurisdiction to someone else interested in the Trust such as a beneficiary.

- 31 Article 51 was considered by the Court of Appeal in the case of *In the matter of the B, C and D Settlements* [2010] JLR 653 where the Court said this at paragraph 38:-

“38. This provision is expressed in the widest possible terms. There is no apparent limit on the type of order that can be made, so long as it ‘concerns’ a beneficiary or person connected with the trust; and there is no attempt to specify the degree of connection required in the latter case. Nevertheless, it is clear that some limit must be imposed on the width of the jurisdiction conferred by the article. Thus, it would not be permissible to regard the article as providing a source of jurisdiction to grant relief where no other cause of action existed merely because the defendant happened to be a beneficiary under some trust. Nor could the article be used, for example, to justify making a disclosure order against an attorney merely because the attorney had drafted a trust instrument in a wholly unrelated matter and so could be said to be connected to a trust. These examples are more than limitations on exercise of the jurisdiction: they go to the scope of the art. 51 power.”

- 32 The Court of Appeal approved the judgment of Birt, Deputy Bailiff, in *S -v- L* [2005] JRC 109, where, at paragraph 22 he said that the Court's jurisdiction under Article 51(2) must be exercised on a sensible and principled basis.

- 33 Mr Hoy did not seek to argue that simply because the settlor may have information in relation to the Trust, the Court should grant the relief sought. Both counsel referred to the following passage in paragraph 23–104 of *Lewin* as providing by analogy the necessary framework for the exercise of the Court's jurisdiction:-

“Disclosure by protector to beneficiaries

23–104 Where a protector has fiduciary functions in relation to the trust, beneficiaries may seek disclosure of information and access to documents held by the protector in connection with those functions, on the basis of principles in *Schmidt v Rosewood Trust Ltd.*”

- 34 In *Schmidt -v- Rosewood Trust Ltd* [2003] 2 AC 709, the Privy Council held that although a beneficiary's right to seek disclosure of trust documents could be described as a proprietary right, it was best approached as one aspect of the Court's inherent and fundamental jurisdiction to supervise and, if appropriate, to intervene in the administration of the trust, including a discretionary trust.

- 35 The authority cited by *Lewin* as providing support for the above proposition is the decision of the Guernsey Royal Court in *Bathurst (Countess) -v- Kleinwort Benson (Channel Islands) Trustees Ltd* [2007] WTLR 959. In that case, Lady Bathurst had been excluded as a beneficiary of the trust and shortly thereafter the entirety of the trust fund had been appointed out to a BVI company, the whole with the consent of the protector. Counsel had

agreed that there was no difference between the position of the protector and the trustees in relation to disclosure (paragraph 113) and it was not therefore necessary for the Court to decide whether the protector owed Lady Bathurst personal or fiduciary duties. In granting her application for disclosure, it is of note that the orders requiring disclosure of letters of wishes, the various appointments, the trust accounts and the accounts of underlying companies were all made as one might expect against the trustee (strictly, the former trustee) although it would seem that the protector may have had copies of the same. The order for disclosure against the protector was limited to his consultations with the trustee over the giving of his consent, i.e. disclosure against him was limited to the exercise of his fiduciary functions.

- 36 The paragraph in *Lewin* (23–102) which deals with disclosure by a settlor to beneficiaries, is limited to cases where the settlor has the power to appoint trustees and the beneficiary requires disclosure of the identity of the present trustee so as to enable the beneficiary to exercise his right to information as against the trustee (see [Murphy -v- Murphy \[1999\] 1 WLR 282](#)). *Lewin* does not address the right of a beneficiary to seek disclosure more generally from a settlor, but we see no reason to distinguish between a settlor's fiduciary role and that of a protector when it comes to the Court's supervisory jurisdiction. If the Court is properly and effectively to supervise, and if necessary, intervene in the administration of trusts, then its jurisdiction must extend not only to the trustee but to any other persons undertaking a fiduciary role within the trust. That jurisdiction arises not only under Article 52 of the Trusts Law but also under the Court's inherent jurisdiction.
- 37 Where, as here, the settlor has fiduciary powers in relation to a trust, Mr Hoy pointed to the obligation a fiduciary owes to the objects of the power to consider from time to time whether and how to exercise them and to do so on a fully informed basis (see paragraph 29–17 of *Lewin* cited above). He then took what we would regard as an extreme position, namely that such a person would have to run a parallel office to the trustee, so that it was fully informed as to the administration of the trust at all times and in all respects and this in order to be in a position to discharge its fiduciary obligations. One of the reasons for seeking from the settlor documents which Mr Hoy accepted one would ordinarily seek from the trustee was to ascertain whether the settlor actually had them and was therefore keeping itself fully informed.
- 38 In *Lewin* there is some discussion at paragraph 14–41, in the context of a power to appoint new trustees which it says is distinct from other kinds of fiduciary powers, on whether the fiduciary responsibility bites only if and when the appointor decides to make an appointment, or extends further so that the appointor has a duty to consider, from time to time, whether to exercise the power. In the case of a nominated person, the authors express the view that if there is a duty, they would not consider it an onerous one:-

“We do not think that a nominated person can be expected to have a detective role, so that he is required to keep the Trustees under surveillance But if the nominated person has become aware of facts that provide grounds for the appointment of a new Trustee, and he has accepted his

fiduciary function, for instance by making previous appointments, it does not seem to be harsh to impose upon him the duty of considering whether appointments should be made.”

If that is the view (which we share) taken in respect of a nominated person such as a protector, then it must surely apply to a settlor who has retained such a power.

- 39 In *Schmidt -v- Rosewood Trust Ltd*, the Privy Council approved the judgment of Powell J in *Spellson -v- George* [1987] 11 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.”

- 40 The obligations of a trustee are therefore clear. As a corollary of its obligation to hold and deal with the trust property for the benefit of the beneficiaries, it is liable to account to them by the provision of information and explanations. But what is the position of a settlor, who has no stewardship of trust property? The answer it seems clear to us is that a settlor's liability to account lies in relation to the fiduciary powers that the settlor has retained. It is as a corollary of the existence of the settlor's obligations under those fiduciary powers that a settlor has a duty to account to the beneficiaries and which the Court exercising its supervisory jurisdiction should police.
- 41 This view of the Court's supervisory jurisdiction is supported by its approach to its jurisdiction in trust cases, other than in the context of ordering the disclosure of information. In *Re the Freiburg Trust* [2004] JRC 056, the Court held that it had jurisdiction to remove a protector that exercised fiduciary functions on the following basis:-

“6. A protector is in the position of a fiduciary and the Court must have power to police the activities of any fiduciary in relation to a trust whether he be called a protector or indeed by any other name. Such a jurisdiction is a necessary incident of the duties to protect the interests of beneficiaries, especially minor and

unascertained beneficiaries, and to ensure that the wishes of the Settlor are respected as far as may be possible and appropriate.”

- 42 A similar approach was taken in *Re Bird Charitable Trust and the Bird Purpose Trust* [2008] JLR 1 at paragraph 86 and *S -v- L* [2005] JRC 109 at paragraph 22 (referred to with approval in *Re B, C and D Settlements* at paragraph 39).
- 43 Furthermore, the express examples of the types of orders that may be made against trustees in Article 51(2)(a)(ii) of the Trust Law reflects the central role that trustees have in relation to a trust. The omission of such broad examples in regard to other persons having a connection with the trust implies that the orders that can be made in the ordinary course against such persons are likely to be more limited than against the trustee.
- 44 As Mr Mackereth said it is commonplace for settlors to reserve certain fiduciary powers. This is reflected in Article 9A of the Trust Law, which allows certain powers to be reserved without affecting the validity of the trust. It would be striking and undesirable if such reservation of powers by settlors potentially exposed them to onerous disclosure obligations at the suit of beneficiaries or objects of the trust as if they were trustees. When settlors hand over trust property to the trustees they are intending the stewardship to pass to the trustees and for their own role to come to an end, save for the limited functions they may retain.
- 45 We would summarise the position as follows:-

Pre-action disclosure

- (i) B, as a beneficiary, has a right to seek disclosure of information and access to documents held by the settlor in connection with the exercise by the settlor of its fiduciary powers under the Trust.
 - (ii) That right is best approached as an aspect of the Court's jurisdiction under Article 51 of the Trusts Law, or, alternatively, the Court's inherent jurisdiction to supervise, and where appropriate, intervene in, the administration of trusts.
- 46 Neither counsel argued against the provisional observations made by the Commissioner in his judgment of 15th December, 2011, on the legal principles to be applied in relation to a request for disclosure, which, for convenience, we repeat here:-

“21. It is clear that there is a distinction between disclosure under trust law and under civil proceedings. Quoting from Underhill and Hayton Law of Trusts and Trustees 18th Edition at paragraph 56.38:-

‘However, despite the change in the procedural rules, the broad distinction between on the one hand disclosure to a trust beneficiary as such

beneficiary and on the other disclosure to a litigant in civil proceedings remains the same. Disclosure is a process only coming into play once civil proceedings have been commenced, and only in relation to matters in issue in those proceedings. But trust beneficiaries or objects have the right to seek to hold their trustees to account irrespective of litigation, and covering the whole range of their interests in the trust, not restricted to any matters which might be in dispute. But it should be noted that the scope of disclosure in civil procedure is more pervasive than the right to hold trustees to account, and covers, for example, documents withheld under the latter right because they might reveal the trustees' private deliberations.'

22. This distinction informed the Court's desire in April of this year to clarify the nature of the proceedings commenced by [B] which although brought under Article 51 of the Trusts Law combined both hostile proceedings and an application for disclosure. There was nothing to prevent [B] from bringing hostile proceedings but if so they would be better commenced by way of Order of Justice and disclosure in those proceedings will follow as a procedural matter ancillary to the enforcement of the hostile claim. [B] has now extracted the hostile claims from the representation so that it is clear that by that representation he is invoking the supervisory jurisdiction of the Court pursuant to Article 51 of the Trusts Law in which he seeks disclosure as a beneficiary .

23. [The Trustee] maintains that it has made very full disclosure and that there are proper grounds for refusing any further disclosure. However, it would seem that beneficiaries of a trust exercising their rights as such, unlike ordinary litigants, are not restricted by the general rule against pre-action disclosure. Both *In Re C Settlement* (2002) JLR 312 and *In Re Internine and Azali Trusts* (2006) JLR 195 are authority, I believe, for the proposition that strangers to a trust cannot attempt to circumvent the general principle against pre-action disclosure by the use of Article 51 but I am not aware of any principle preventing beneficiaries, who may be concerned about the actions of their trustees or actually contemplating hostile action, from independently exercising their rights as beneficiaries to seek disclosure generally. The very purpose of such disclosure is to ascertain whether the trustees have fulfilled their duties and if not, to take action to remedy the same. [B] is not, of course, a stranger to the [HHH Employee Trust] or to the [B] Sub Trust."

- 47 Whilst accepting that there was no principle preventing beneficiaries, who may be concerned about the actions of their trustees or actually contemplating hostile action, from independently exercising their rights as beneficiaries to seek disclosure, Mr Mackereth argued that where hostile proceedings are in contemplation, it is important that care is taken not to stray beyond the limits of the disclosure that the Court would order if the disclosure was sought in isolation of the potential hostile claim. There was a risk, he said, that an aspiring hostile litigant would issue Article 51 proceedings seeking trust information to which he is not actually entitled under Article 51. The limits of the disclosure sought, he

said, in such circumstances require particularly close scrutiny.

- 48 The potential for a hostile claim by B against the settlor is manifest in our view from the repeated inclusion of hostile claims in the various versions of the representation and from the correspondence.
- 49 In his *“letter before action”* dated 17th June, 2010, Mr Hoy referred to seeking *“substantial pre-action disclosure of Trust Documentation”* and that was repeated in Véronique Favreau's letter of 10th November, 2010. In her affidavit in support of the representation (quoted above) Véronique Favreau made it clear that hostile action is contemplated against the settlor.
- 50 We accept the need for close scrutiny of the very wide ranging demands for disclosure made by B against the settlor in this case.

Decision

- 51 The Court went through the disclosure list provided by Mr Hoy with him. Starting with the first request, namely for the trust deed and all subsequent deeds, the Court asked why this could not be requested from the trustee. The same question arises in relation to much of the documentation requested. As is clear from the judgment of 15th December, 2011, there is a separate process afoot under which the same information is being sought by B from the trustee. No, said Mr Hoy – even if this information can be obtained from the trustee, B requires this information separately from the settlor so that he can assess whether the settlor has been keeping itself fully informed as to the affairs of the Trust so as to be in a position to discharge its fiduciary obligations. We reject this approach, which we find oppressive and wasteful of costs. We see no reason why, in the exercise of our supervisory jurisdiction, we should burden the settlor with the provision of information which B can and should seek from the trustee in the usual way and this simply so that the beneficiary can assess whether the settlor has the information it requires in order to discharge its fiduciary obligations.
- 52 Turning to the two fiduciary powers which the settlor has retained, there has been no suggestion that a protector be appointed to the Trust and there is nothing, therefore, for the Court to police in that regard.
- 53 There has been discussion conducted in open correspondence about the possible removal of the trustee by the settlor and the appointment of a new trustee. On 18th June, 2010, Véronique Favreau wrote to the settlor enclosing a pre-action letter sent to the trustee, stating that the relationship between B and the trustee had irretrievably broken down and requesting the settlor to exercise its power to remove the trustee forthwith and appoint a new trustee in its place. Ogier, for the settlor, responded on 30th June, 2010, asking for evidence to substantiate the allegations made against the trustee so that it could examine

the matter and review the actions of the trustee. However, the draft deed of appointment appended to the first draft of the representation sent by Véronique Favreau to Ogier on 27th July, 2010, did not involve the removal and appointment of trustees but an appointment by the trustee under Clause 5 of the trust deed (powers of appointment and advancement). The settlor was advised by KPMG that such an appointment had serious tax risks and the settlor put forward a simple alternative by which someone other than the trustee was appointed as trustee. By letter dated 28th October, 2010, Carey Olsen for the trustee agreed to this proposal, subject to receiving the usual indemnities. B then brought the representation.

54 Mr Mackereth makes two points in relation to this:-

(i) B is no more entitled to disclosure of the reasons why the settlor decided not to exercise its power of removal and appointment of trustees any more than a trustee can be required to disclose documents showing its reasons (see *Re Londonderry Settlement* [1965] Ch 918 at 938 as endorsed in *Re Rabiotti 1989 Settlement* [2000] JLR 173 at 184–189).

(ii) In any event, the reasons (serious tax risks) were set out in open correspondence.

55 The obligation of the settlor in relation to the fiduciary power to remove and appoint trustees is to consider from time to time whether and how to exercise those powers and it is clear that it has done so. The issue relates not to the exercise or non-exercise of the settlor's power to remove and appoint trustees but to the tax consequences of such a step and the trustee's requirement for indemnities in an amount equivalent to some 62% of the value of the B Sub-Trust.

56 We see no need for the Court to exercise its supervisory powers to order disclosure in respect of this matter conducted as it has been in open correspondence.

57 Furthermore leaving aside the issue of proportionality (see the comments of the Commissioner at paragraph 30 of his judgment of 15th December, 2011), the disclosure sought does not relate to the exercise of any of the settlor's fiduciary powers. The list sets out the purposes for which disclosure is sought in this way:-

“Purpose of the Documents Requested

The requested documents contained in this list are required for the following purposes more fully set out in the Opinion and Supplemental Opinion (“SO”) of Mr Michael Sherry fully set out in the identified paragraphs below.

A. The extent to which the employer, former employer or other contributor to the [Trust] benefited under the [Trust].

B. Advantages and disadvantages to [B] in agreeing to forego

remuneration or bonus on the basis that contributions would be made for his benefit to the [Trust].

C. The extent to which [B] was able to make informed choices about what might be done with the [B] Sub-[Trust].

D. Incidence and liability for Income Tax, Capital Gains Tax, National Insurance and Inheritance Tax and rights to recoup them from the [Trust].

E. The identity and location of contributors to the [Trust].

F. Consultation and communications with [B] on [Trust] fiscal and financial matters.

G. When contributions were made to the [Trust].

H. The consideration and correction of faults with the [Trust].

I. [B's] full employment history.

J. Distributions made to other beneficiaries of other Sub-Funds in light of the December tax rules."

58 As can be seen, none of these purposes have any bearing upon the exercise of the settlor's two fiduciary powers under the Trust. In the main, they relate to the Trust proper and the request for disclosure should be directed to the trustee. In part, they relate to what explanations were given or representations made by the settlor to B before he entered into the scheme and to that extent, they constitute an attempt to obtain disclosure in advance of an action against the settlor for misrepresentation and damages, contrary to the general rule against pre-action disclosure. With respect to the request by B for his full employment history, this is not a matter for the Court exercising its supervisory jurisdiction under Article 51 of the Trusts Law or its inherent jurisdiction in relation to trusts; it has nothing to do with the two fiduciary functions of the settlor within the Trust.

Conclusion

59 For all these reasons, we see no reason on the evidence before us to exercise the Court's supervisory jurisdiction to order disclosure against the settlor, which we discharge from the re-amended representation.