SCC File No.: 37272

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

B E T W E E N :

VALARD CONSTRUCTION LTD.

APPELLANT
(Appellant)

- and -

BIRD CONSTRUCTION COMPANY

RESPONDENT
(Respondent)

-and-

SURETY ASSOCIATION OF CANADA

INTERVENER

CONDENSED BOOK OF THE APPELLANT, VALARD CONSTRUCTION LTD.

(Pursuant to Rule 45 of the *Rules of the Supreme Court of Canada*)

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OUTLINE OF THE APPELLANT'S ORAL ARGUMENT

SUMMARY OF ORAL ARGUMENT

1. When a trust is created in circumstances where the beneficiaries are unaware of it, the trustee has a duty to take reasonable measures to make available to the intended beneficiaries information about existence of the trust.

2. In this case, the trustee's duty was time sensitive as the trust property (the right to bring a claim under the Bond) expired at a specified date and did expire before the beneficiary learned of the trust.

Fulfillment of the Trust Must Not be Left to Chance

3. The trustee, Bird, did not consider the interests of beneficiaries or its role as trustee – it took no steps whatsoever to make available to beneficiaries information about the existence of the trust.

4. Valard, a beneficiary, did not ask if there was a Bond until it was too late. The project manager of this "large, experienced and sophisticated contractor" had never seen a labour and material payment bond on an oil sands project and was "totally shocked" the trust existed.

Tab 2, examination of Cameron Wemyss

5. Fulfillment of the trust purpose must not be left to chance. Equity imposes on the trustee reasonable duties necessary to protect the trust property.

6. Here, the reasonable duties required Bird to take steps to notify Valard of the Bond.

7. Even when there was interaction between Bird, Langford and Valard within the prescribed 120-day notice period, Bird chose to remove Valard from the email string instead of informing Valard about the existence of the Bond. Had Valard been informed of the Bond, it would have obtained the benefit of the trust.

Tab 4, August 10, 2009 emails

Accountability Is Fundamental

8. The essential ingredient of a trust is the duty to account. Not telling the beneficiaries of the trust is inconsistent with and repugnant to this duty and undermines the purpose of the trust.

Tab 5, "The Irreducible Core Content of Trusteeship" at p. 49

9. A "trust must be both visible to beneficiaries and enforceable by them". Trustees cannot be made accountable if beneficiaries are unaware of their beneficial interest.

Tab 6, "The Trustee's Duty to Provide Information to Beneficiaries" at p. 2

No Other Means of Acquiring Knowledge

10. Section 33 of Alberta *Builders' Lien Act* does not provide a means to acquire knowledge of, or access to bonds. The *Act* does not contemplate bonds or require their disclosure.

Tab 8, *Builders' Lien Act*, R.S.A. 2000, C. B-7 at s. 33

Fundamentals Apply – Not Labels

11. All trusts carry equitable duties. Labelling a trust as "bare", "naked", "simple", "dry" or "limited" is unhelpful.

12. The settlor's motivation is also irrelevant. The trust is required to overcome issues of privity and allow sub-subcontractors to realize the benefit of the Bond. Once the trust is created, the general rules of trust law are engaged. A trust is a trust, is a trust.

13. Equitable duties apply unless the settlor specifically and expressly modifies them in the trust instrument. Here, the trust instrument modified only the equitable obligation to take legal action to enforce the trust, not the duty to take reasonable measures to make available to the beneficiaries information about the existence of the Bond.

Tab 1, the Bond

THE GUARANTEE COMPANY OF NORTH AMERICA

Suite 1402
10025 102A Avenue
Edmonton, AB T5J 2Z2
Tel 780-424-2266
Fax 780-424-3310
www.gcna.com

LD

DEC 3 2008

Standard Construction Document
CCDC 222 - 2002

LABOUR AND MATERIAL PAYMENT BOND
(Trustee Form)

No: ES1073909 Amount: $ 659,671.00

LANGFORD ELECTRIC LTD. as Principal, hereinafter called the Principal, and THE GUARANTEE COMPANY OF NORTH AMERICA a corporation created and existing under the laws of Canada duly authorized to transact the business of Suretyship in all Provinces and Territories of Canada as Surety, hereinafter called the Surety, are held and firmly bound unto BIRD CONSTRUCTION COMPANY as Obligee, hereinafter called the Obligee, in the amount of SIX HUNDRED FIFTY NINE THOUSAND SEVEN HUNDRED SEVENTY ONE AND 00/100 dollars ($ 659,671.00) lawful money of Canada, for the payment of which sum the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally.

WHEREAS, the Principal has entered into a written contract with the Obligee, dated the 20th day of October in the year 2008 for

SUNCOR ENERGY MEM 2 BAY SHOP EXPANSION

In accordance with the Contract Documents submitted, and which are by reference made part hereof and are hereinafter referred to as the Contract.

The Condition of this obligation is such that, if the Principal shall make payment to all Claimants for all labour and material used or reasonably required for use in the performance of the Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1. A Claimant for the purpose of this Bond is defined as one having a direct contract with the Principal for labour, material, or both, used or reasonably required for use in the performance of the Contract, labour and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment directly applicable to the Contract provided that a person, firm or corporation who rents equipment to the Principal to be used in the performance of the Contract under a contract which provides that all or any part of the rent is to be applied towards the purchase price thereof, shall only be a Claimant to the extent of the prevailing industrial rental value of such equipment for the period during which the equipment was used in the performance of the Contract. The prevailing industrial rental value of equipment shall be determined, insofar as it is practical to do so, by the prevailing rates in the equipment marketplace in which the work is taking place.

2. The Principal and the Surety, hereby jointly and severally agree with the Obligee, as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed or materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of its contract with the Principal and have execution thereon. Provided that the Obligee is not obliged to do or take any act, action or proceeding against the Surety on behalf of the Claimants, or any of them, to enforce the provisions of this Bond. If any act, action or proceeding is taken either in the name of the Obligee or by joining the Obligee as a party to such proceeding, then such act, action or proceeding, shall be taken on the understanding and basis that the Claimants, or any of them, who take such act, action or proceeding shall indemnify and save harmless the Obligee against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting to the Obligee by reason thereof. Provided still further that, subject to the foregoing terms and conditions, the Claimants, or any of them may use the name of the Obligee to sue on and enforce the provisions of this Bond.

3. It is a condition precedent to the liability of the Surety under this Bond that such Claimant shall have given written notice as hereinafter set forth to each of the Principal, the Surety and the Obligee, stating with substantial accuracy the amount claimed, and that such Claimant shall have brought suit or action in accordance with this Bond, as set out in sub-clauses 3 (b) and 3 (c) below. Accordingly, no suit or action shall be commenced hereunder by any Claimant;

   (a) unless such notice shall be served by mailing the same by registered mail to the Principal, the Surety and the Obligee, at any place where an office is regularly maintained for the transaction of business by such persons or served in any manner in which legal process may be served in the Province or Territory in which the subject matter of the Contract is located. Such notice shall be given.

Standard Construction Document
CCDC 222 - 2002

LABOUR AND MATERIAL PAYMENT BOND
(Trustee Form)

i. in respect of any claim for the amount or any portion thereof, required to be held back from the Claimant by the Principal, under either the terms of the Claimant's contract with the Principal, or under the lien legislation applicable to the Claimant's contract with the Principal, whichever is the greater, within one hundred and twenty (120) days after such Claimant should have been paid in full under the Claimant's contract with the Principal;

ii. in respect of any claim other than for the holdback, or portion thereof, referred to above, within one hundred and twenty (120) days after the date upon which such Claimant did, or performed, the last of the work or labour or furnished the last of the materials for which such claim is made under the Claimant's contract with the Principal;

(b) after the expiration of one (1) year following the date on which the Principal ceased work on the Contract, including work performed under the guarantees provided in the Contract;

(c) other than in a Court of competent jurisdiction in the Province or Territory in which the work described in the Contract is to be installed or delivered as the case may be and not elsewhere, and the parties hereto agree to submit to the jurisdiction of such Court.

4. The Surety agrees not to take advantage of Article 2365 of the Civil Code of the Province of Quebec in the event that, by an act or an omission of a Claimant, the Surety can no longer be subrogated in the rights, hypothec and privileges of said Claimant.

5. Any material change in the contract between the Principal and the Obligee shall not prejudice the rights or interest of any Claimant under this Bond, who is not instrumental in bringing about or has not caused such change.

6. The amount of this Bond shall be reduced by, and to the extent of any payment or payments made in good faith, and in accordance with the provisions hereof, inclusive of the payment by the Surety of claims made under the applicable lien legislation or legislation relating to legal hypothecs, whether or not such claim is presented under and against this Bond.

7. The Surety shall not be liable for a greater sum than the Bond Amount.

IN WITNESS WHEREOF, the Principal and the Surety have Signed and Sealed this Bond 25th day of November in the year 2008.

SIGNED and SEALED
In the presence of

LANGFORD ELECTRIC LTD.
Principal

Signature

Name of person signing

THE GUARANTEE COMPANY OF NORTH AMERICA
Surety

Signature
ANDRE GIASSON
Name of person signing
Attorney-in-fact

(CCDC 222 – 2002 has been approved by the Surety Association of Canada)

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required of a subcontractor?
A Just in case an issue arises or there's a default on someone's part, that the bond can step in and take care of that.

Q Take care as in pay them?
A If required of them, yeah. Yeah.

Q Now, when a bond is required and obtained for a specific project, this one in case, what do you do with the bond when you receive it?
A It just gets filed and put on -- put into our records.

Q And I think you outlined to counsel that it's not posted onsite?
A No.

Q Are any other steps taken by yourself to cause the subcontractor who obtains the bond to provide it to their subs?
A No.

Q Now, in this particular project are you aware if a bond was required of Bird by Suncor?
A It was not.

Q And do you know the value of the contract between Bird and Suncor?
A Not offhand. It -- it's probably less than $10 million.

Q Now, at any given time do you work on more than one project?
A Yeah.

Q And in 2009 were you working on multiple projects?
A I was, yeah.

Q Approximately how many would you work at at any given time?
A Usually two to three.

Q Okay. I'm going to bring you back to 2009 and ask --
A Yeah. Yeah.

Q -- do you remember working on the water reclamation facility in Fort McMurray?
A No.

Q How about Suncor's Firebag mine site?

ahead and made this settlement and I didn't -- and I could never figure out why they -- why they had the right just to go ahead and do that.

Q Did you ever call any of your contacts at Bird about this issue?
A No, 'cause I was dealing with Milt on this and Milt kept -- kept reassuring me that he'll get it worked out, get it worked out.

Q Did you ever think it would be prudent to escalate the dispute to Bird or Suncor?
A I wasn't trying to rock the boat with -- you know, I -- I definitely didn't want to rock the boat with Suncor and I didn't really want to rock the boat with -- between Langford and -- and Bird. I figured that they were -- you know, they -- Langford basically did that -- you know, did a lot of -- a lot of -- you know, any projects of Bird up in the Fort McMurray area that I saw, Langford were -- was always doing the electrical work for them. So they seemed to be working hand-in-hand. So I wasn't -- I really want to rock that -- that boat either with them, figuring that Milt had -- had a better chance of getting the money than -- than if I was going to start going after them.

Q Okay. And we're standing here today purely because the labour and material payment bond did, in fact, exist on this project?
A Yes.

Q So why did you never ask about security?
A Because I never thought there would be one out there. Like, they -- it's just not -- it's, like -- I mean, I was -- when I found out, I was totally shocked there was a labour and material bond.

I just -- like, I've never been -- you know, ten -- ten years of my experience I've been on some larger project, I've been on smaller projects, and everywhere else. I've just never seen a labour and material bond issued on a plant site. I've seen them on municipality works, but not -- not on a plant site.

Q Did you have internal discussions about nonpayment at Valard?
A Yes.

Q With whom did you have those discussions?
A With Richard and Phil. Richard Buchanan, who's the controller of the company, And Phil Seeley, who's my boss.

Q And did either of those individuals mention that you should seek security for payment?
A No, 'cause -- because they -- they'd never -- they'd never heard -- heard of a, you

Chris Moore

From: Chris Von Klitzing [cvonklitzing@bird.ca]
Sent: Monday, August 10, 2009 1:35 PM
To: 'Milton Sterling'; 'Marc St. Arnaud'
Cc: Don Cameron
Subject: RE: Serious problem

Milt,

Suncor is already upset with us about the extra costs and it took months to get this first $215,000 approved only as a favor to Bird. Anyone else wouldn't have received near that amount. It is impossible for us to go back to the owner. I'm not sure how Valard could rack up a bill like this, even being as disorganized as they were on site. We would help you if we could, but Suncor was already upset with our last claim.

Regards,

Chris von Klitzing
Project Manager
(780) 452-8770 office
(780) 619-9502 cell
cvonklitzing@bird.ca

-----Original Message-----
From: Milton Sterling [mailto:miltsterling@telus.net]
Sent: Monday, August 10, 2009 1:58 PM
To: chris von klitzing; Marc St. Arnaud; Cameron Wemyss
Subject: Serious problem

HI Chris

We have a serious problem with Valard.

After we sent in the summary indicating the $ 258,000.00 costs for the limestone work we thought that was the total for the billings. When I spoke to Cameron from Valard this AM, regarding the payment Suncor offered he indicated the payment Suncor offered of $ 215,000.00 was not adequate as he had further invoices totaling another $ 190,000.00 which they incurred from April 19th to April 30th which never appeared on the summary sheet and were never sent on. I had never received an email from him with these costs and I have just received copies of all these invoices this afternoon and am trying to access how this happened.

Chris let me know how you think we should proceed.

--
Sincerely,
Milt Sterling

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Trends in Contemporary Trust Law

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The Irreducible Core Content of Trusteeship

DAVID HAYTON

INTRODUCTION

At the core of the trust concept is a duty of confidence imposed upon a trustee in respect of particular property and positively enforceable in a Court of Equity by a person.[1] As Lord Evershed MR has stated,[2] '[n]o principle, perhaps, has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective must have ascertained or ascertainable beneficiaries.' The beneficiaries' rights to enforce the trust and make the trustees account for their conduct with the correlative duties of the trustees to the beneficiaries are at the core of the trust. A beneficiary will be a beneficiary under a fixed trust with a vested or contingent entitlement to income or capital (as the case may be) or a beneficiary under a discretionary trust with an entitlement[3] to put his case to be considered for a distribution of income or capital (as the case may be) by the trustees who must make such a distribution to one or more of the discretionary beneficiaries[4] (subject to any temporary power or duty to accumulate income for the benefit of capital beneficiaries[5]). Exceptionally, charitable trusts for purposes (necessarily benefiting the public) are enforceable by the Crown as *parens patriae* via the Attorney-General or the Charity Commissioners.[6]

[1] Underhill and Hayton, *Law of Trusts and Trustees* (15th edn.), 3; Lewin, *Law of Trusts* (16th edn.), 1; Hanbury and Martin, *Modern Equity* (14th edn.), 46; *Morice* v. *Bishop of Durham* (1804) 9 Ves. 399, 405; *Re Endacott* [1960] Ch. 232; *Re Denley's Trust Deed* [1969] 1 Ch. 373. This paper is concerned with the internal trustee–beneficiary relationship and not with the external relations of trustees with third-party creditors. To protect such third parties' right of subrogation to the trustee's right of indemnity (an equitable lien) against the trust fund a settlor's purported exclusion of the trustee's right of indemnity probably ought not to be effective against third parties not reimbursed by the trustee.

[2] [1960] Ch. 232, 246.

[3] Even the object of a discretionary power who is aware of the power is entitled to put his case to the trustees: *Re Manisty's Settlement* [1974] Ch. 17, 25; *Re Gulbenkian's Settlements (No 2)* [1969] 2 All ER 1173, 1179.

[4] The discretionary trustees must distribute the income within a reasonable period and a beneficiary will have a right to be considered for an income payment until all such income has been distributed to the beneficiaries.

[5] A duty to accumulate income for an accumulation period will be enforceable by the capital beneficiaries benefiting thereby.

[6] See now Charities Act 1993, ss. 1–20, 24–35.

As a matter of property law, in the rare case where all the beneficiaries are of full age and capacity and between them absolutely entitled to the whole trust property they have a power,[7] if unanimous, to terminate the trust and divide the property between themselves as they agree.[8] Otherwise, the trustees are bound to account to the trust beneficiaries for what they have done with the trust property, whether in their administrative, managerial role or in their distributive, dispositive role. The trustees will be accountable to the beneficiaries for profits made or losses flowing from a breach of fiduciary duty, except to the extent that a clause in the trust instrument ousts an otherwise applicable duty or exempts the trustees from accounting for profits or losses arising in breach of fiduciary duty.

In recent years, fears of increasingly litigious beneficiaries spurred on by their lawyers have led settlors and trustees to consider how far they can go in restricting beneficiaries' rights to information and trustees' potential liabilities. They can place reliance on the facilitative liberal laissez-faire approach of English law[9] that allows a settlor to generate his local law for his autonomous trust so long as it is not inconsistent[10] with, or repugnant[11] to, the very trust relationship that he is purporting to create or uncertain or otherwise administratively unworkable[12] or contrary to some rule of public policy.[13]

It thus becomes necessary to consider what is the irreducible core

[7] In Hohfeld's terminology: J. W. Harris (1971) 87 *LQR* 31, 62–3.

[8] *Saunders* v. *Vautier* (1841) 4 Beav. 115, *Stephenson* v. *Barclays Bank* [1975] 1 WLR 88.

[9] See S. Gardner, *An Introduction to the Law of Trusts* 13–14, 35, 38–9; *Wilkins* v. *Hogg* (1861) 31 LJ Ch. 41, 43; *McLean* v. *Burns Phelps Trustee Co. Pty. Ltd* [1985] 2 NSWR 623, 640–1, *Midland Bank Trustee (Jersey) Ltd* v. *Federated Pension Services* (Jersey CA, unreported, 21 Dec. 1995); *Armitage* v. *Nurse* (unreported, Jacob J. (High Ct.), 17 July 1995); *Roywest Trust Corporation (Bahamas) Ltd* v. *Savannah NV* (unreported, Telford Georges CJ of Bahamas, 22 July 1997); express choice-of-law possibilities under Recognition of Trusts Act 1987.

[10] A settlor cannot convert what is an equitable charge or a debtor–creditor relationship into a trust merely by calling it a trust. Thus, the right of the 'trustee' to mix 'trust' moneys with his own and use them as he likes subject to an obligation to repay a similar amount of money is inconsistent with any trust, so preventing one arising.

[11] Where there is duly segregated trust property vested in a trustee, otherwise than simply as security for a debt, and it is clear that a bare trust for the settlor was not intended to be created nor beneficial ownership in the trustee, then any exclusion or exemption clause the effect of which would be to create such a bare trust or such beneficial ownership will be struck out as repugnant to the fundamental nature of the trust: *Midland Bank Trustee (Jersey) Ltd* v. *Federated Pension Services*, n. 9 above. As stated by the Law Commission Consultation Paper No 124 on Fiduciary Duties, para. 3.3.6, 'It is clear that trustees are subject to a core level of duty from which they cannot be exempted.'

[12] e.g. *McPhail* v. *Doulton* [1971] AC 424, 457; *R.* v. *District Auditor, West Yorkshire Metropolitan CC* [1986] RVR 24, *Re Kolb's WT* [1962] Ch. 531.

[13] e.g. the rule against remoteness of vesting or against perpetual purpose trusts or the rule against a settlor effectively settling property on himself determinable upon bankruptcy.

content of trusteeship of property that sets limits to the free will of the settlor.

RIGHTS TO INFORMATION

As a necessary incident of the trustee–beneficiary relationship at the core of the trust the trustee is under a duty to find and pay a beneficiary entitled to an income or capital payment, thereby making such beneficiary aware that he is a beneficiary.[14] In the case of a discretionary trust, since the beneficiary's entitlement to put his case to the trustees for the exercise of their discretion in his favour is of no effect unless he is aware of it, and since he cannot be expected to become aware of it unless the trustees draw it to his attention it must surely be a necessary incident of the trustee–beneficiary relationship that the trustee must be under a duty to take reasonable steps[15] to make a discretionary beneficiary aware that he be such.[16] Knowledge of the trust is necessary to make the trust effectual with the trustees being accountable to the beneficiaries for their stewardship of the property: unaccountability to the beneficiaries arising from the trustees not letting them know that they are beneficiaries is inconsistent with, and repugnant to, the purposes for which the settlor transferred the trust property to the trustees or the fundamental requirement of accountability to beneficiaries before there can be duties of trusteeship.[17] Thus beneficiaries, even if discretionary, have a right to information revealing what the trustees have done with the trust property,[18] though not the reasons[19] for the exercise of distributive powers in favour of beneficiaries.

The essential ingredient of trusteeship is the duty to account which affords the beneficiaries a correlative right to have the court enforce the

[14] *Hawkesley* v. *May* [1956] 1 QB 304, 322; *Burrows* v. *Walls* (1855) 3 De G M & G 233, 253; *Brittlebank* v. *Goodwin* (1868) LR 5 Eq. 545, 550.

[15] These will require a businesslike approach depending on the size of the class and the extent to which a sub-class may be regarded as the primary object of the settlor's bounty cf. *Re Manisty's Settlement* [1974] Ch. 17, 25; *Hartigan Nominees Pty. Ltd* v. *Rydge* (1992) 29 NSWLR 405, 432; *Re Baden's Deed Trusts* [1973] Ch. 9, 20, 27.

[16] Cf. *Scally* v. *Southern Health & Social Services Board* [1992] 1 AC 294, 306–7.

[17] Cf. *Hawkins* v. *Clayton* (1988) 164 CLR 539, 553. A clause directing the trustees not to inform any discretionary beneficiary that he be such unless so directed by the settlor or the protector should either negate the trust or more likely, be regarded as repugnant to the trust: such a person should only be made the object of a power.

[18] *Re Londonderry's Settlement* [1964] Ch. 594; *Chaine-Nickson* v. *Bank of Ireland* [1976] IR 393; *Spellson* v. *George* (1987) 11 NSWLR 300, 315; *Lemos* v. *Coutts & Co.* [1992–3] CILR 460; *West* v. *Lazard Bros (Jersey) Ltd* [1987–8] JLR 414; *A.G. of Ontario* v. *Stavro* (1995) 119 DLR (4th) 750.

[19] *Re Londonderry's Settlement*, n. 18 above, *Wilson* v. *Law Debenture Trust Corp.* [1995] 2 All ER 337; *Hartigan Nominees Pty. Ltd* v. *Rydge*, n. 15 above.

trustees' fundamental obligation to account. Where there are beneficiaries with such correlative right so that there is a trust, do objects of a fiduciary power of appointment have a right to be informed that they are such objects and then have a right to make the trustees account, so providing all relevant information about their stewardship of the trust property? It would seem not.[20] Such rights are not crucial to underpinning the trust obligation because the beneficiaries entitled in default of exercise of the power have the requisite rights supporting the correlative duty of the trustees that is at the core of the trust obligation.

Thus, Templeman J, in discussing a fiduciary power in favour of the settlor's relations and the employees of the settlor's company where the trustees consider but decide not to exercise the power or exercise it only in favour of the settlor's children, stated:[21]

> During that period the existence of the power may not be disclosed to any relation or employee and the trustees may not seek or receive any information concerning any relation or employee. In my judgment it cannot be said that the trustees in those circumstances have committed a breach of trust and that they ought to have advertised the power or looked beyond the persons who are most likely to be the objects of the bounty of the settlor. The trustees are, of course, at liberty to make further enquiries but cannot be compelled to do so. . . . If a person within the ambit of the power is aware of its existence he can require the trustees to consider exercising the power, and in particular, to consider a request on his part for the power to be exercised in his favour. The trustees must consider this request, and if they decline to do so or can be proved to have omitted to do so, then the aggrieved person may apply to the court which may remove the trustees and appoint others in their place. This, as I understand it, is the only right and only remedy[22] of any object of the power.

Exceptionally, so as to give effect to the implicit wishes of the settlor, it would seem that if the ultimate beneficiary entitled in default of appointment will not be ascertainable until the end of the trust (e.g.

[20] However, in *Spellson* v. *George*, n. 18 above, it was held that objects of a power had the same rights to information as beneficiaries of a discretionary trust but, in context, the settlor could have been regarded as impliedly conferring such rights on the objects of the power primarily intended to benefit from expected exercises of the trustees' powers. Further see second following paragraph in text (after citation from Templeman J).

[21] *Re Manisty's Settlement*, n. 15 above, 25.

[22] This still seems the position for someone who is merely the object of a power (see n. 27 below) as opposed to a beneficiary under a trust in whose favour extra powers may be exercised e.g. powers of maintenance or advancement (*Re Lofthouse* (1885) 29 Ch. D 921, *Klug* v. *Klug* [1918] 2 Ch. 67) or of augmenting pensions (*Mettoy Pension Trustees Ltd* v. *Evans* [1991] 2 All ER 513, where at 549 Warner J opined that Lord Wilberforce's views in *McPhail* v. *Doulton*, n. 12 above, 456–7 as to ways for the court to execute a discretionary trust could generally be applied to carry out discretionary fiduciary powers and thus he exercised the power to augment pensions where (i) it was impossible for such power to be exercised because the employer-trustee was in liquidation and the liquidator was in an impossible conflict-of-interest situation and (ii) the beneficiaries had earned their rights and expectations). Further see n. 27 below.

settlor's issue alive at the end of the perpetuity period or such charitable organizations as the trustees shall decide upon at the end of the perpetuity period) then pragmatically, those objects of the power that are the primary objects of the settlor's bounty within the perpetuity period should have the right to make the trustees account and provide information as to their stewardship. Thus, in a trust conferring upon the trustees power to accumulate income or to appoint income or capital to the settlor's issue (or to a spouse or cohabitee of a descendant who becomes bankrupt) and, subject thereto, directing distribution at the expiry of a co-extensive perpetuity and accumulation period[23] amongst such of the issue then alive or such then existing charities as the trustees select in their absolute discretion, issue or a spouse or co-habitee thereof to whom a payment has been made[24] will be entitled to 'police' the trust and make the trustees account for their stewardship[25] unless the settlor reveals a contrary intention. After all, such a contrary intention is not repugnant to the trust concept, accountability to the default beneficiary sufficing to create the fundamental trust obligation.[26]

It is, therefore, submitted that a settlor can validly insert a clause in his trust instrument to emphasize that the objects of a power have no right to be informed that they are objects and no right to obtain information from the trustees as to their stewardship of the trust property or otherwise to make the trustees account for their trusteeship. It suffices that the default beneficiary alone has a right to make the trustees account and to impeach any exercise of their fiduciary power that is in bad faith or perverse or irrelevant to any sensible expectation of the settlor,[27] ex-

[23] Many jurisdictions have co-extensive perpetuity and accumulation periods, as did England before panicked into the Thellusson Act 1800.

[24] Ordinarily, receipt of trust property by an object of a power should not make him a beneficiary for the purposes of having a right to information, etc. In a trust a power to add persons to the class of beneficiaries will if exercised make the added person a beneficiary with rights to information etc.

[25] Cf. *Spellson* v. *George*, n. 18 above, 315–16.

[26] Even in a 'blind' trust there will ultimately be accountability once the sensitive period of office of the settlor is over or once a contingent ultimate beneficiary is ascertained at the end of the trust period.

[27] See *McPhail* v. *Doulton*, n. 12 above, 441, where Lord Hodson states, 'Whether the trust is discretionary or not the court must be in a position to control its execution in the interests of the objects of the trust. Where there is a mere power entirely different considerations arise. The trust in default controls and he to whom the trust results in default of exercise of the power is in practice the only one competent to object to a wrongful exercise of the power by the donee' and Lord Guest states (445) 'The court apart from a mala fide exercise of the power has no control over the exercise of the power. If it is not exercised the fund goes to those entitled in default.' In *Lutheran Church of Australia* v. *Farmers' Co-operative Trustees Ltd* (1970) 121 CLR 628, 639 Windeyer J states 'If it is a power the court cannot dictate to the trustees whether it should be exercised or not exercised. That discretion is committed to them', though going on to point out that if trustees refuse to consider the exercise of the power the court will remove them at the instigation of objects of the power.

cept that an object of a power, who is aware that he is such, can insist that he be considered for an appointment and seek the removal of the trustees if they refuse to consider whether or not to exercise the power.

In the case of a discretionary trust, particularly for a large class of discretionary beneficiaries e.g. for the settlor's issue, the settlor's other relations, employees of the settlor's company or any company of which the settlor is a director, the question arises whether the trust obligation can be sufficiently underpinned by an obligation to account to the primary beneficiaries of the settlor's bounty, so as to justify a court upholding an express direction of the settlor that only issue are to be informed of their rights and to have a right to information and to make the trustees account for their trusteeship. It is submitted that this is an attempt to convert a discretionary trust for a large class into a discretionary trust for a small class with a discretionary power in favour of a larger class,[28] so that the settlor's direction should be ignored as repugnant to the discretionary trust for a large class. He cannot derogate from the trustee's duty to take reasonable steps to make discretionary beneficiaries aware that they be such, though he can indicate what he considers to be reasonable steps, e.g. searching for close relatives but only putting an advert annually up on a works notice board or in a Christmas newsletter.

TRUST DOCUMENTS AND LETTERS OF WISHES

The beneficiaries' rights to inspect trust documents are now seen as better based not on equitable proprietary rights but on the beneficiaries' rights to make the trustees account for their trusteeship.[29] Thus, beneficiaries under fixed or discretionary trusts have the right to see all documents relating to the management and administration of the trust by the trustees and to the distributive function of the trustees[30] except to the extent that such documents would reveal the reasons for the exercise of the trustees' sensitive discretions[31] or are confidential e.g. letters between trustees and a beneficiary relating to the beneficiary's personal needs or a letter of wishes from the settlor to his trustees if expressly or impliedly confidential.[32]

[28] A well-advised settlor will, of course, create only a discretionary power for the larger class intended as reserve recipients of his bounty.

[29] *Hartigan Nominees Pty. Ltd* v. *Rydge*, n. 15 above; *A.G. of Ontario* v. *Stavro*, n. 18 above (beneficiaries of unadministered residuary estate legally and beneficially owned by executor subject to fiduciary duties); Ford and Lee, *Principles of the Law of Trusts* (2nd edn.), 425.

[30] See n. 18 above. Exact rights will vary depending upon whether the beneficiary is interested in income or in capital.

[31] See n. 19 above and J. D. Davies (1995) 7 *Bond. LR* 5.

[32] *Hartigan Nominees Pty. Ltd* v. *Rydge*, n. 15 above; *Tierney* v. *King* [1983] 2 Qd. R 580, *Re Londonderry's Settlement*, n. 18 above.

However, a settlor cannot, by purporting to make all trust documents (e.g. the trust instrument, trust accounts, documentary evidence of title to trust assets) confidential to the trustees and not to be disclosed to the beneficiaries (except during the course of litigation[33] when one party has a right to discovery of the other's documents that are relevant to the dispute[34]), oust the accountability of the trustees that is fundamental to the very existence of the trust. Such an overwhelming confidentiality clause would either be ignored as repugnant to the trust intended to be created by the settlor or, indeed, construed as confidential to the trustees and the settlor to whom alone the trustees are intended to be accountable so that a trust exclusively in his favour would arise.

The settlor, surely, cannot require his trustees to withhold the information without which the beneficiaries cannot vindicate the rights that the settlor purported to give them in his trust instrument.[35] He cannot wholly give with one hand and wholly take away with the other[36] if the court finds a genuine intention to give. However, there is no reason why a settlor-beneficiary while he holds a sensitive public office should not place his investments in the hands of trustees and for the duration of that office effectively give up his right to information about trust investments. Indeed, it seems a settlor-beneficiary can by contract forgo some rights to information from the trustee,[37] though regulatory rules as to minimum information rights may then be imposed in the public interest, as in the pensions trusts context.[38]

[33] There are professional restraints on lawyers pleading and particularizing that the trustees did not act in good faith or otherwise acted in breach of trust without *prima facie* evidence of such; hostile litigation will be struck out if it is merely an attempt to go fishing in the hope that something will turn up to justify the claims made.

[34] Much latitude is afforded: *Compagnie Financière et Commerciale* v. *Peruvian Guano Co.* (1882) 11 QBD 55, 63; generally, see Matthews and Malek, *Discovery* (1992).

[35] A non-binding letter of wishes (as opposed to a letter of wishes intended to prevail over a sham part of a trust instrument) does not confer any rights on the beneficiaries and so should not rank as a trust document. It is not intended to be futile but to indicate (*prima facie* and subject to changing circumstances) the purposes for which the trustees are supposed in a responsible way to exercise their discretionary powers (*Re Hay's ST* [1981] 3 All ER 786, 792) so it must be disclosed in the discovery process of litigation. Until then, beneficiaries should have no right to see it, whether because it is not a trust document or, if it is, it is impliedly confidential if given only to the trustees.

[36] Cf. in the contractual context *MacRobertson Miller Airline Services* v. *Commr. of State Taxation* (1976) 50 ALJR 348, 351 and in the property context *Green* v. *Ashco Horticulturist Ltd* [1966] 2 All ER 232, 239. A clause in the trust instrument automatically terminating a beneficiary's interest if he seeks by court action to make the trustee account should be struck out as repugnant to the interest granted and as an attempt to oust the jurisdiction of the court, though a provision making his interest terminate or empowering the trustees to terminate his interest if he seeks to impeach the trust and recover assets by virtue of forced heirship rights under the *lex successionis* of the deceased should be valid: *Rhodes* v. *Muswell Hill Land Co.* (1861) 29 Bev. 560, *Re Williams* [1912] 1 Ch. 399.

[37] *Tierney* v. *King*, n. 32 above.

[38] e.g. Pension Schemes Act 1993, ss. 113, 114, 115 and Pensions Act 1995, s. 41 and regs. thereunder; Australian Superannuation Industry (Supervision) Act 1993 and regs. thereunder.

USE OF PROTECTOR AS CUT-OFF DEVICE

Use of a 'protector' (or 'committee' or 'board') with lesser or greater powers of direction or veto is becoming increasingly popular. Can a settlor therefore use a protector as the accountable person so as to avoid the inconvenience of the trustees being troubled by 'irritating' beneficiaries? Since the settlor intends the benefit of his trust to be not for the protector but for the beneficiaries the core right to obtain information about the trustees' stewardship must be held by the protector as a fiduciary:[39] any attempt expressly to state that his rights and powers are purely personal to him for his own benefit would surely be ignored as repugnant to the nature of his irreducible core function.[40] Thus, the beneficiaries would have a right to obtain information from the trustees joining the protector as co-defendant if need be.

Would it help the settlor and beneficiaries if the trustees were expressly accountable to the protector alone, unless the beneficiaries could establish on a balance of probabilities (or a *prima facie* case) that the protector was acting in bad faith, whereupon the trustees would become accountable to the beneficiaries? It is thought not. After all, how can the beneficiaries realistically hope to establish on a balance of probabilities (or a *prima facie* case of) bad faith if they have no means of finding out anything that has been going on? The substance of the matter is that the point of such a clause is to prevent the beneficiaries from having any effective rights and so it is repugnant to the original intention to confer equitable rights upon the beneficiaries.

EXPRESS OUSTER OF ACCOUNTABILITY AS TO SOME PROPERTY

Hayim v. *Citibank*[41] is a facilitative Privy Council decision revealing that in special circumstances minimal accountability may subsist for a

[39] On usual fiduciary role of protector see J. Mowbray QC (1995) 5 *OTPR* 151, D. Hartnett and W. Norris [1995] *Private C B* 109, Underhill and Hayton, *Law of Trusts & Trustees* (15th edn.), 23–5.

[40] The terms of the trust instrument and the circumstances when the trust is created (e.g. nature of major investment, position held by original protector) will be relevant as to whether powers are personal or fiduciary and whether the fiduciary duty is greater than merely a duty to act in good faith. If the inherent nature of the protector's function (e.g. to make trustees account so as to look after the beneficiaries' interests or to appoint a new trustee as replacement for the existing trustee) relates to management of the trust property for the beneficiaries' benefit then any clause stating such functions or powers are only personal and not fiduciary should be disregarded as repugnant to the core duty of the protector. Where the protectorship is intended to be an enduring office then the Isle of Man High Court has held that the court has an inherent jurisdiction to appoint a protector: *Steele* v. *Paz Ltd*, unreported, 10 Oct. 1995, Isle of Man appeal (P. W. Smith QC and T. B. Hegarty QC) from acting Deemster.

[41] [1987] AC 730.

period. To avoid death-duty problems and putting his elderly brother and sister, A and M, (92 and 87 years old when the testator died) at the mercy of the beneficiaries under his will, the testator directed in respect of a Hong Kong house which he subjected to a trust for sale (with power to postpone sale) and which was occupied by A and M, '[m]y executors and trustees shall have no responsibility or duty with respect to such house . . . [their] only duty and responsibility shall arise upon receipt of proceeds of said residence or upon the death of the survivor of A and M whichever shall first occur.' The provision was 'understandable and explicable' and was designed to enable A and M, though not beneficiaries, to remain in the home rent-free so long as the trustee saw fit. 'If clause 10 were exploited for any other purpose the beneficiaries could complain and the court could find that [the trustee] had not properly exercised the discretion conferred on it to postpone sale either in the interests of the beneficiaries or of A and M.'[42] Thus, if the power to benefit A and M was used to benefit the trustees they would be accountable to the beneficiaries, as would fully occur on the death of the survivor of A and M.

Of course, *Hayim* concerned only a small part of the trust property. At the other extreme one often sees attempts to oust the accountability of trustees in large measure in respect of a controlling shareholding in a trading or an investment company which may represent virtually all the assets of the trust. Such attempts start by purporting to exclude any duty to make inquiry as to the running of the company or to interfere therein unless the trustees have actual knowledge that the company is being run dishonestly or by a person suffering from mental incapacity. The problem remains that a trustee still has a power to inquire and to intervene and is required[43] 'to be prudent and exercise the degree of care he would in conducting his own affairs but mindful, when making investment decisions, that he is dealing with another's property', while 'a professional person, a trust corporation, held out as an expert will be expected to display the degree of skill and care and diligence such an expert would have'.

To deal with this problem one can insert a further clause such as:

> irrespective of the position under the company law applicable to any company in which the trustees have a controlling shareholding, the trustees must treat themselves and be regarded as having no power to inquire into or intervene in the affairs of any such company unless it comes to their actual knowledge that the affairs of the company are being run dishonestly or by a person suffering from mental incapacity and must also treat themselves and be regarded as having no power to take steps to ascertain whether or not the affairs of the company

[42] *Ibid.* 746.
[43] *Per* Lord Nicholls (1995) 9 TLI 71, 75–6.

are being run dishonestly or by a person suffering from mental incapacity, so that they are entitled and bound to assume that the affairs of the company are being run honestly and by a person of full capacity until the contrary comes to their actual knowledge.

Are the trustees then, in substance, under any real duty to beneficiaries in respect of such property so as to give rise to a trust obligation, especially if the company is run by the settlor or by his nominee and no dividends are declared, the company making loans and gifts to persons, some of whom happen to be beneficiaries under the trust? It is too easy for the trustee from the outset to let the settlor (or his nominee) run the company as he likes so that the trust is alleged to be a sham. To avoid such an allegation it seems that the trustees need consciously (with some written evidence) to consider whether or not to exercise their controlling shareholding power. This will require them to make inquiries to ascertain whether or not there is any factual basis to remove the settlor or his nominee from running the company, thereby negating much of the point of the clause and indicating that the purported effect of much of the clause is repugnant to the concept of trusteeship.

USE OF THE SETTLOR OR PROTECTOR TO RELEASE TRUSTEES FROM LIABILITY

Can trustees be protected by the settlor reserving to himself an overriding power to release the trustees from any liability, such power binding the beneficiaries, and being regarded simply as making their interests defeasible or revocable at the whim of the settlor? It is thought not. A trust revocable by the settlor or a trust defeasible by the settlor exercising a general power in favour of himself or a special power in favour of someone else is different in concept from a trust created by S in favour of X, Y, and Z subject to X, Y, and Z not being entitled to sue the trustees for a breach of trust whenever S decides they cannot sue the trustees.

The latter amounts to a bare trust for S, to whom alone the trustees are accountable, with a power to benefit X, Y, and Z: neither X nor Y nor Z can have a right against the trustees if the so-called 'right' ceases to be a right whenever S decrees.[44] If the trustees are really only accountable to S, then no trust exists in favour X, Y, and Z to whom the trustees are not accountable.

Similar arguments apply if the settlor conferred the above overriding power on a protector.

[44] See n. 36 above.

EXCLUSION OF DUTIES

Exclusion of a duty is different from exemption from liability for breach of duty because it prevents any breach of duty from arising, so there can be no question of removing a trustee for breach of duty, which may arise where an exemption clause simply exempts a trustee from liability for breach of duty.

As already seen, the fundamental interrelated core duties to disclose information and trust documents and to account to the beneficiaries for the trustees' stewardship of the trust property, so as to be liable for losses or profits in relation thereto, cannot be excluded. However, duties to avoid a conflict of interest may be excluded,[45] while where investment is concerned the degree of care of a gratuitous trustee or a paid professional trustee (already adverted to[46]) can be diminished.

Clearly, a settlor who has just won £10 million in the National Lottery can transfer £5 million to professional trustees (on discretionary trusts for himself and his spouse and issue) under a duty to speculate recklessly with it with intent to treble it or lose it all in a five-year period on the basis that the £5 million is money that a sole beneficial owner can well afford to lose. It must follow that if the settlor is a starving artist who has just won a £50,000 prize which he transfers to trustees on discretionary trust for himself, his wife, and children under an express duty to speculate recklessly with it with intent to double it or lose it all in a two-year period, as if it were money that a sole beneficial owner can well afford to lose, then no beneficiary can complain if the money is lost.[47]

Thus, there is no core duty of care (other than to act in good faith[48]) that cannot be excluded in relation to investment. Only if the relevant clause in a trust instrument intended to benefit the beneficiaries purported to enable the trustee to speculate with the trust fund for its own private purposes, without being accountable therefor, would such clause be struck down as repugnant to the trust for affording the trustee uncontrollable powers of disposition i.e. absolute ownership.

The duty to act in good faith (i.e. honestly and consciously) in respect of any trust matter cannot, of course, be excluded. To do so would make a nonsense of the trust relationship as an obligation of confidence. It would make the trustees a law unto themselves free from the jurisdiction

[45] See Arts. 33 and 61, Underhill and Hayton, n. 1 above, *Re Penrose* [1933] Ch. 793, *Re Beatty's WT* [1990] 3 All ER 844, 846; *Re Hart's WT* [1943] 2 All ER 557.

[46] See text to n. 43 above.

[47] The settlor's advisers will not be liable if he took a fully informed risk.

[48] Thus, the duty to speculate recklessly will require the trustees consciously and rationally addressing their minds to the risks of particular investments rather than merely stick pins in to a list of possible investments or automatically do what the settlor tells them: *Turner* v. *Turner* [1984] Ch. 100.

of the court and the court will not recognize this if the trustees were intended to be trustees and not absolute owners.[49]

EXEMPTION CLAUSES

Similarly, an exemption from liability for breach of the duty to act in good faith cannot have effect, because that would empty the area of obligation so as to leave no room for any obligation. A trustee will not be acting in good faith if he acts fraudulently or dishonestly i.e. to benefit himself or third parties at the expense of the beneficiaries. Can a trustee, therefore, protect himself against being 'liable for any loss or damage which may happen from any cause whatsoever unless such damage shall be caused by his own actual fraud'? In the case of unpaid trustees of a family trust Jacob J, much impressed by the use of the word 'actual',[50] held[51] this clause to be effective where:

> the defendant trustees wilfully or recklessly disregarded the terms of the trust but did not do so dishonestly, [even though] it amounts to the settlor, having set out in detail all the terms of the trust, going on to say 'Actually it does not matter if you disregard any of these, provided you do so honestly' . . . 'His own actual fraud' is very strong language indeed. I do not think it can encompass honest[52] but wilful or reckless breaches. The trust was undertaken by trustees who knew they would not be liable unless they were fraudulent. It would be wrong to impose on them any liability for honest acts.

The judge was impressed by the fact that this exemption clause is found in the standard work, Hallett's *Conveyancing Precedents* at pages 796–7 where Mr Hallett observes, 'This clause is extremely wide but can reasonably be required by gratuitous trustees and has been accepted by settlors in such circumstances.'

An alternative approach would be for a clause to provide that the trustees may do anything or omit to do anything that would otherwise amount to a breach of trust if they *bona fide* consider such action or

[49] See *Re Jeffrey* [1984] 4 DLR 704, 710, endorsed in *Boe* v. *Alexander* (1988) 41 DLR (4th) 520, 527.

[50] If 'actual' is omitted then it seems a *contra proferentem* construction could be used to treat 'fraud' as including unconscionable conduct or a lack of good faith e.g. acting recklessly or deliberately committing a breach of trust expected to be in the best interests of the beneficiaries albeit with a small risk (which materializes) that it might harm a beneficiary.

[51] *Armitage* v. *Nurse* (unreported, 17 July 1995).

[52] Both counsel and judge assumed honesty to be a very subjective concept, though for dishonest assistance in breach of fiduciary duty it has objective connotations: *Royal Brunei Airlines* v. *Tan* [1995] 3 All ER 97, 105–7, endorsing fraud as including taking 'a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take' as held in *R.* v. *Sinclair* [1968] 1 WLR 1246, 1249 and *Baden Delvaux* v. *Société Générale* [1992] 4 All ER 161, 234.

inaction to be in the best interests of the beneficiaries as a whole. One can see the sense of such provision to deal with unforeseeable eventualities and it does require the trustees consciously and honestly to consider seriously what they should or should not do.

This leads one to submit, with respect, that Jacobs J goes too far in so far as his view allows a trustee to act with reckless indifference to his trusteeship as if he were not a trustee. A trustee, even a settlor-trustee, must at the very least be under a duty to act conscious of the terms of the trust, though he can then be exempted from liability for negligence. In the case of a paid trustee it should certainly be the case that a clause purporting to exclude him from liability for reckless indifference should be struck down as repugnant to the core paid-trusteeship function, if indeed such reckless indifference be not regarded as dishonest.

It is clear that a trustee, paid or unpaid, can be exempted from liability if he acts in good faith[53] and from liability for negligence[54] but what about gross negligence, *culpa lata* in Roman or Scots law?[55] A distinction first needs to be made between gross negligence and recklessness. It is submitted that recklessness is worse than (gross) negligence and should be regarded as a positive, affirmative, intentional, 'could-not-care-less' attitude taken by a defendant deliberately indifferent to his responsibilities. Negligence should be regarded as a negative state, a lack of due attention, a failure to take care to a greater or lesser extent.

There seems no reason in principle why a settlor should not have freedom to exempt his trustees from liability for losses flowing from negligence, covering ordinary and gross negligence,[56] but not extending to losses flowing from recklessness in the sense of deliberate indifference to one's responsibilities because the latter would enable the trustees to act in bad faith and negate a core duty of the trustees.

[53] *Gaimerrow Securities Ltd* v. *National Westminster Bank plc* (unreported, 20 Dec. 1990, Harman J).

[54] Except for trustees of unit trusts or debenture trusts or in their investment role trustees of pension trusts: Financial Services Act 1986, s. 84; Companies Act 1985, s. 192; Pensions Act 1995, s. 29. Further see P. Matthews [1989] *Conv.* 42; s. 30 Trustee Act 1925 should not prejudice the position: Underhill and Hayton, n. 1 above, 560–1.

[55] *Knox* v. *MacKinnon* (1888) 13 App. Cas. 753, 765; *Rae* v. *Meek* (1889) 14 App. Cas. 558; in context the wording of some exemption clauses may be construed *contra proferentem* as not extending to omissions considered to be gross negligence.

[56] In *Roywest Trust Corporation (Bahamas) Ltd* v. *Savannah NV*, n. 9 above, Telford Georges CJ in dealing with a clause exempting against loss from any cause whatsoever except 'actual fraud' stated, 'The words are wide enough to include gross negligence and dereliction of duty. . . . There is no good reason why this exclusion clause should be rejected. . . . This is not in any sense unreasonable . . . the parties have been bargaining on terms of equality. . . . In striking the bargain it seemed reasonable to accept a stringent exclusion clause for a *quid pro quo*. . . . The exclusion clause would not, however, cover acts which were void because of self-dealing or which did not fall within the trustee's powers.'

English and Scots cases holding that an exemption clause did not extend beyond ordinary negligence to gross negligence (in the narrow sense or in the broad sense including recklessness) depend on particular *contra proferentum* constructions as held in the 21 December 1995 reserved judgment of the Jersey Court of Appeal (in *Midland Bank (Trustee) Jersey Ltd* v. *Federated Pension Services*), stating (44) 'It follows from our consideration of earlier authorities above that a clause exempting trustees from liability for breaches of trust due to gross negligence is not to be regarded as being void for repugnancy to the nature of a trust.' Thus a clause that 'the Trustee shall not be liable for anything other than a breach of trust knowingly and wilfully committed' was *prima facie* valid to exclude liability for gross negligence, but was construed *contra proferentem* so that the trust would be liable if it knowingly and wilfully committed an act which amounted to a breach, and not only if it knowingly and wilfully committed an act which *at the time of commission was known* to the trustee to be a breach of trust.

The Court held (48) that the trustee's conduct 'was not mere negligence consisting of a departure from the normal standard of conduct of a paid professional trustee, but a serious, unusual and marked departure from that standard which amounted to "gross negligence"' within Article 26(9) of the Trusts Jersey Law 1984 (as retrospectively substituted by Article 5 of the Trusts (Amendment) (Jersey) Law 1989) which provides, 'Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence.'

Where there are two (or more) trustees it seems that the existence of one 'proper' or 'managing' trustee should enable the co-trustee to be wholly exempted from liability if in good faith obeying the directions of the 'proper' trustee upon whom the settlor has conferred complete and uncontrolled powers without the concurrence of, nor reference to, the co-trustee.[57] Thus, in such fashion a second trustee necessary to make good title to land or to hold foreign property can incur no responsibility for joining in good faith with the 'proper' trustee to carry out transactions at his direction. However, if the second 'sleeping' trustee becomes suspicious that the 'proper' trustee is probably acting improperly then he should seek the court's directions at the expense of the trust fund because he would not be acting in good faith but would be dishonestly[58] assisting a breach of trust if he proceeded to comply with the 'proper'

[57] *Re Arnott* [1899] IR 201.

[58] In *Jones* v. *Gordon* (1877) 2 App. Cas. 616, 629 Lord Blackburn stated, 'If the jury or whoever has to try the question of fact came to the conclusion that [X] must have had a suspicion that there was something wrong and that he refrained from asking questions not because he was an honest blunderer or a stupid man but because he thought in his secret mind—I suspect there is something wrong and if I ask questions and make further inquiry

trustee's directions, and so would lose the benefit of the exemption clause.

SETTLOR'S FULLY INFORMED CONSENT REQUIRED

Where a trustee benefits from reduction of the ordinary duties of trustees to lesser duties there needs to be full frank disclosure to the settlor, so that a fully informed consent can be given, because a fiduciary relationship exists even before the trust instrument is finally executed.[59] The greater the reduction in the trusteeship duties (e.g. to the bare core of duties) the greater the need to make full and frank disclosure (evidenced in writing) and to obtain the fully informed consent in writing of the settlor or a written acknowledgement that he was strongly advised to seek independent legal advice, yet voluntarily assumed the risk of not seeking such advice.[60]

The sanction for the trustee's breach of fiduciary duty is that the trustee will not be able to rely on the relevant clause because it is wholly offensive to Equity's standards of integrity that the trustee could take personal advantage of the settlor's confidence.[61] It would seem that a successor trustee will be equally disadvantaged on the basis that it is a donee of the legal title with a beneficial equitable interest to the extent of the value conferred by remuneration and exemption clauses as already vitiated in equity by the circumstances surrounding their creation.[62]

CONCLUSIONS

A settlor can validly spell out that objects of fiduciary powers are not to have any individual right to be informed that they are objects (the trustees only being under a general core duty,[63] subject to the sanction of

it will no longer be my suspecting it but my knowing it—I think that is dishonesty.' Further see *Macmillan Inc.* v. *Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, 769, 783 and *Royal Brunei Airlines* v. *Tan*, n. 52 above, 105–7.

[59] *Galmerrow Securities Ltd* v. *National Westminster Bank plc*, n. 53 above, where Harman J accepted 'as a correct statement of the law' Stephenson LJ's observations in *Swain* v. *Law Society* [1982] 1 WLR 17, 26 'as establishing that fiduciary duties can exist before any trust has been created'. Also see *Jothann* v. *Irving Trust Company* (1934) 270 NYS 721, affd. 277 NYS 955.

[60] See Kessler, *Drafting Trusts and Will Trusts* (2nd edn.), para. 4.012; Prideaux, *Forms & Precedents in Conveyancing* (25th edn.), iii 156; Hallett, *Conveyancing Precedents*, 801 n. 30, *Encyclopaedia of Forms & Precedents* (5th edn.), 512.

[61] *Baskerville* v. *Thurgood* (1992) 100 Sask. LR 214, 227–30 (CA).

[62] Successor trustees should not be regarded as purchasers: remuneration clauses are regarded as gifts subject to a condition (*Re White* [1998] 2 Ch. 217, *Re Duke of Norfolk's ST* [1982] Ch. 61) and exemption clauses confer a bounty by saving trustees the costs of insuring against the liabilities excluded.

[63] See *Re Hay's Settlement* [1981] 3 All ER 786, 793.

removal, to survey the range of objects and take whatever businesslike steps they consider necessary to appropriate consideration of making appointments in favour of the reserve objects of the settlor's bounty) nor to have any rights to make the trustees provide information about their stewardship of the trust property or be otherwise accountable to the objects. It is only if a particular object becomes aware that he is an object that he then has a core right to request the power to be exercised in his favour, subject to the sanction of the court removing the trustees if they ignore him.

Where beneficiaries of a trust are concerned, the settlor cannot, even in the case of discretionary beneficiaries, oust the duty of the trustees to take all reasonable steps to inform the beneficiaries that they are beneficiaries, and to account to them. However, the settlor can effectively prevent them from seeing any letter of his wishes given to the trustees, particularly if he expressly states that such letter is confidential to the trustees until forced by litigation to make discovery of documents in their custody. He cannot prevent them, however, from having the core right to see trust documents the withholding of which would prevent the beneficiaries from being in a position to vindicate or enjoy their position as beneficiaries.

While a temporary express ouster of almost all accountability can be stipulated for in special circumstances, an exemption clause cannot oust the trustees' duties to act in good faith. If the settlor's fully informed consent be obtained a clause can exempt the trustees from liability for negligence, whether or not a great or marked departure from the normal standard of conduct, but not from liability for dishonesty which is taken to include acting deliberately with reckless indifference to the interests of the beneficiaries.

Thus, while there is a strong contract-like basis for gratuitous family trusts to be regarded as 'deals' made with trustees for the benefit of the beneficiaries,[64] any provisions apparently reducing the deal, instead, to one for the benefit of the trustees or of the settlor (or protector), entitled in default of the trustees exercising inherently revocable powers in favour of objects specified by the settlor, must either be struck out as inconsistent with, or repugnant to, the original deal for the benefit of the beneficiaries or be implemented as the real deal.

[64] J. Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 109 *Yale LJ* 625.

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The trustees' duty to provide information to beneficiaries
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Cases: Abacus Trust Co (Isle of Man) Ltd v Barr [2003] EWHC 114 (Ch); [2003] Ch. 409 (Ch D)

Hartigan Nominees Pty Ltd v Rydge (1992) 29 N.S.W.L.R. 405

Lewis, Re [1904] 2 Ch. 656 (CA)

Schmidt v Rosewood Trust Ltd [2003] UKPC 26; [2003] 2 A.C. 709 (PC (IoM))

***23** *To what extent are trustees obliged to inform beneficiaries of the existence of their beneficial interests under the trust and to provide them with information about the trust and its administration?*

I am honoured to be invited to give this year's Withers Trust Lecture at Kings. The lecture is prestigious and for this reason, for the lecturer, a challenging proposition. Not long after Lord Walker's lecture last year [1] I had occasion to consider the rule in *Hastings-Bass* [2] in the case of *Abacus Trust Co (Isle of Man) v Barr* [3] ("*Abacus*"), and if my decision was in any way courageous departing (as I did) from a line of authority and making my own furrow on the question whether a decision successfully challenged on *Hastings-Bass* grounds was void or voidable, I acknowledge the encouragement to my resolution afforded by Lord Walker's lecture. My decision was not appealed to the Court of Appeal. Instead there was an appeal to the legal profession as a whole by way of legal periodical. I have in mind in particular the article [4]: "The Law Relating to Trustees' Mistakes-Where Are We Now?" by Mr Brian Green Q.C., a member of the same stable, Wilberforce Chambers, as leading Counsel for the unsuccessful party in *Abacus*. Such an appeal has decided advantages over an appeal to the Court of Appeal: (1) there is no requirement of giving notice of the appeal to anyone and the judge has no right to be heard; (2) there is no limitation of the issues raised to those raised before the judge; (3) there is no limitation of the arguments advanced to those advanced before the judge; and (4) there is no further appeal. Judges become accustomed to viewing in silence and with amused (or bemused) detachment the subsequent deconstruction of their judgments. Moses himself, the story reads, when brought back to this world ***24** could not recognise in developed Jewish law the founding principles which he had himself laid down.

In *Abacus* [5] it was not argued before me, and it was not open to me to hold, that the whole *Hastings-Bass* rule and its basis required reconsideration. To keep the rule within bounds, in the absence of any challenge to the trustee's decision on the ground of mistake, it seemed to me that it must rest on some breach of fiduciary duty, and I expressed the view that the rule merely gave particular expression to the duty of trustees to obtain and take into account available information relevant to the decision which they have to make. [6] This was of course only the first word on the topic, and I await with interest the further words which plainly will be forthcoming.

Topic of lecture

Enough reminiscing of the past. I must now turn to the topic of this lecture, a topic of practical importance and some difficulty which has found (at least until recently) remarkably limited consideration in the authorities, text books and journals. Shortly before I was invited to give this lecture I was troubled as the trustee of a settlement by the question raised as to how far I was obliged to provide information about the trust to a beneficiary which the beneficiary had no need to know and the provision of which might prove positively harmful to the beneficiary. That experience led me, when I received the invitation, to choose as my topic the extent of the duty of trustees to inform beneficiaries of the existence of their beneficial interests and provide information regarding the trust and its administration.

This provision of information by trustees to their beneficiaries is at the heart of the trust relationship. As Professor Hayton explains in his article "Developing the Obligation Characteristic of the Trust", [7] the core element of a trust, indispensable for its existence, is the right of a beneficiary to enforce the trusteeship, in default of which the beneficial ownership remains with the settlor. As Millett L.J. said in *Armitage v Nurse* [8]: "If the beneficiaries have no rights enforceable against the trustees, there are no trusts": *i.e.* no trusts other than a resulting trust for the settlor. He went on to say that "every beneficiary is entitled to see the trust accounts". This is spelt out by Lindley L.J. in *Low v Bouverie* [9] as an obligation "to give all his cestui que trust" on demand information with respect to the mode in which the trust fund has been dealt with and where it is. The gloss may be added that the beneficiary's right is confined to ***25** information which concerns him. If the beneficiary's interest is in capital alone, he may have no interest in the details of the distribution of income. Further the term "beneficiary" may not include the objects of a fiduciary discretionary power. For the view has been expressed that the settlor may confer on or withhold from such objects any accounting or enforcement right. [10] Leaving aside for the moment these two matters of detail, it must be plain that the right of enforcement is only rendered effective and meaningful if the beneficiaries first of all know that they are beneficiaries and secondly possess or have access to the required information to render the trustees accountable for their actions. A trust must be both visible to beneficiaries and enforceable by them.

Shortly after I had decided on this topic, the Privy Council gave its judgment in the case of *Vadim Schmidt v Rosewood Trust Limited* [11] ("*Schmidt*"). Lord Walker's seminal analysis of the questions of law raised by the issues in the case goes a long way to clarifying and updating the law, but it necessarily leaves unresolved related questions not addressed and indeed occasions the need for reconsideration of earlier authorities on those questions. My purpose in this lecture is to ventilate some of those questions and venture some thoughts on them in the hope that they may shortly be authoritatively answered.

The authorities as they stand distinguish three different scenarios. The first is where a person seeks trust information as a beneficiary and the question arises whether the trustees are bound to provide him with that information. That was the scenario in *Schmidt*. The second is where a testator by his Will gives legacies or creates trusts. Are the executors under a duty to inform legatees and beneficiaries of the terms of the Will so far as they relate to them? The third is where a settlor creates an *inter vivos* trust. What (if any) duty are the trustees of the trust under to inform the beneficiaries of their entitlement under the trust? In the case of each of the three scenarios the further questions arise as to whether any duty imposed on the trustees or executors by the general law can be limited or indeed totally abrogated and whether the trustees and executors can be exonerated in respect of any breach of duty by the provisions of the settlement or Will. In some legal systems the answers to all these questions are to be found in a comprehensive statutory code (*e.g.* The Bahamas Trustee Act 1998), but in the UK the source lies in case law, ancient and modern.

Disclosure of trust information pursuant to request by established beneficiary

The starting point today on any claim by a beneficiary for disclosure of trust information must be the judgment of Lord Walker in *Schmidt*. The facts of that case are highly complicated as are the provisions of the two settlements in *26 respect of which information was sought. It is sufficient to summarise the relevant facts very briefly. The two settlements were established under the law of the Isle of Man, one in 1992 and one in 1995. The claimant's father was the cosettlor and since 1997 the defendant (a trust company) had been the trustee of both settlements. The defendant received as such trustee on the trusts of the two settlements over $105 million. The settlor died unexpectedly and intestate in 1997 and letters of administration to his estate in the Isle of Man were granted to the claimant on August 17, 1998. According to the claimant his father during his life and the claimant since his father's death were beneficiaries under the settlements and indeed trust monies totalling over $14.6 million were paid to the claimant as administrator of his father's estate between August and October 1998.

In June 1998 the claimant commenced proceedings in the Isle of Man against the defendant as trustee, its directors and several other defendants alleging breach of trust and breach of fiduciary duty and in July 1998 obtained an order prohibiting any dealings with the assets of the settlements and requiring (by way of discovery) extensive disclosure of information. The disclosure obtained was unsatisfactory and, to obtain fuller disclosure of trust accounts and information about trust assets, in June 1999 the claimant brought the present proceedings claiming entitlement as a beneficiary under the settlements to such disclosure.

The claimant in his personal capacity in the case of one of the settlements was a possible object of a very wide power to add him to the class of beneficiaries. The trustees had discretion as to whether to exercise the power, but in view of the terms of a letter of wishes written by his father to the trustees he had a particularly strong claim. The issue raised was whether the object of such a power had a right to apply to the court for an order for such disclosure. Answering this question required determination of the basis on which the jurisdiction to order disclosure rested. There was authority (most particularly in the judgment of Salmon L.J. in *Re Londonderry's Settlement* [12] for the proposition that a beneficiary's right to disclosure of trust documents and information should be regarded as a proprietary right, and that accordingly only beneficiaries with a proprietary interest in the property of the trust (and accordingly in the trust documents and trust information) had any right to disclosure. On this basis it was argued by the trustees in *Schmidt* by way of defence that a discretionary beneficiary and the possible object of a power of appointment, who had no proprietary interest in the property of the trust (and therefore the trust documents and information), had no such right to disclosure. The Privy Council, however, rejected this defence, holding that the existence of a beneficiary's proprietary interest was not the basis for the jurisdiction to order disclosure to a beneficiary of information relating to the trust. In its place the Privy Council laid down (1) that its true basis was the court's inherent *27 jurisdiction to supervise and (where appropriate) intervene in the administration of trusts; (2) that the jurisdiction could be invoked by any person with an interest in the trust whether proprietary or discretionary, and accordingly both by the object of a discretionary trust or of a fiduciary power; and (3) that the jurisdiction was discretionary in all cases:

"... no beneficiary (and least of all a discretionary object) has an entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the different interests of different beneficiaries, the trustees themselves and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief." (para.[67]).

In summary (a) the right of a beneficiary is not a right to access to trust documents or information, but an equity incident to his beneficial interest entitling him to invoke the discretionary jurisdiction of the court to require the trustee to make disclosure. In the words of Nicholas Le Poidevin in a valuable article with the enticing title: "The Elephant's Child", [13] "*Schmidt* is one of many instances of the modern tendency of the court to prefer discretion to hard and fast entitlements"; (b) a beneficial interest carries with it this incident whether it is transmissible or non-transmissible (*i.e.* discretionary)

and whether it is the interest of the object of a discretionary trust or that of the object of a power; (c) if the existence of the interest is uncertain, *e.g.* if it depends upon the resolution of an issue of construction of the settlement by the court, the court will (at any rate in any ordinary circumstances) defer any decision whether to give any direction to the trustees to make disclosure until the issue of construction has been decided.

The implications of the decision in Schmidt

The decision in *Schmidt* does not expressly in any way question or limit the principle stated by Millett L.J. in the Court of Appeal in *Armitage v Nurse* already cited that every beneficiary is entitled to see the trust accounts (though *Armitage v Nurse* was cited in argument). One would surely expect the Privy Council to make it plain if it intended to overrule so established a line of authority. But on the other hand the principles are stated by the Privy Council in quite general and absolute terms without any qualification, and the view is ***28** plainly maintainable that the principles stated override and replace any principles previously applied by the courts. This indeed must be the case if the principles stated by Millett L.J. and Lord Walker are not reconcilable. They are only reconcilable if the principles stated by Lord Walker are to be read as applicable where (and only where) the documents and information sought do not constitute "trust accounts". Or if the principles stated by Millett L.J. are to be understood as meaning that in case of requests for trusts accounts the trustees discretion whether to provide them can lawfully only be exercised in favour of making disclosure. If it is necessary to draw the line between trust accounts (in respect of which beneficiaries have a right of access) and other documents and information (in respect of which they have no right but merely an equity), the exercise may prove extremely hard to draw and prove a trap for the unwary (and indeed the wary). There is not time in this lecture to explore this topic further. I shall concentrate my attention on the information and documents to which the beneficiaries have no right and to which the principles stated by Lord Walker apply.

The decision in *Schmidt* has a far-reaching impact on the character of the trust documents and information to which a beneficiary can claim access. Authorities have in the past confined access to "trust documents" and generated a degree of learning as to what is and what is not a trust document for this purpose. This exercise can now be seen to be futile. There is for present purposes no distinction in principle between access to trust documents and to trust information which is not in documentary form: both are property of the trust. In practice the requirement of trustees to provide access to existing documents may be less onerous than to provide information not already in documentary form and this may be relevant to the exercise of the court's discretion. It should not be possible for trustees (or a settlor in his statement of wishes) to circumvent the possibility of disclosure by resort to oral communications only. Even as the decision in *Schmidt* abrogates the need for a sharp or bright dividing line between interests which do and interests which do not carry with them the right to apply for access to documents and information (see para.[66]), so also it abrogates the need for such a line between documents and information which may and which may not be the subject of an application. All documents relating to the trust and all information held by the trustee as such are trust property and accordingly the possible subject of a direction for disclosure. The question in each case must be whether in the particular circumstances of the case the legitimate requirement of the beneficiary to obtain access is such as to outbalance the competing interests and objections to disclosure of other beneficiaries, the trustees and third parties.

Practical examples of the new approach

Three examples of situations may be given where this new approach may be apposite.

***29** The first situation is where the settlement purports expressly or impliedly to confer or exclude a right of access to trust documents or information. The question raised is whether those provisions are legally effective or whether access remains a matter of discretion for the court. I would incline to the view that the court's power to supervise and intervene in the administration of a trust cannot (at any rate in any ordinary case) be used to derogate from the rights of access granted by the settlement. On the other hand the court cannot readily countenance any attempt by a settlor to detach

from an interest conferred by a settlement what is an ordinary incident of that interest, *e.g.* accounting and enforcement rights and the right to be informed about trust affairs. As I have already said, Professor Hayton has suggested that settlors can exclude the objects of powers of appointment from having any enforcement or accounting rights which are in the ordinary case incidents of their beneficial interests so long as there remain at all times beneficiaries who possess these rights, *e.g.* beneficiaries entitled in default of exercise of the powers. I find it difficult to find a principled basis for this suggestion, though there may be strong practical reasons for it. It would (for example) facilitate effectuating a settlor's intention that (a) beneficiaries entitled in default of exercise of the power should indeed become entitled unless exceptional circumstances occasion the exercise of the power in favour of a peripheral object (*e.g.* a charity); and (b) that the peripheral object should not be entitled to interfere in trust affairs in the meantime. It may be said that the existence of the other beneficiaries possessing accounting and enforcement rights is sufficient to secure the continued enforcement of the trust, but the interest of those beneficiaries may be diametrically opposed to those of the objects of the power. In the circumstances (as it seems to me) a provision in the settlement excluding enforcement or accounting rights and indeed the express exclusion of any right of access to trust documents or information may not (indeed perhaps should not) preclude the object from inviting the court to exercise its jurisdiction to direct disclosure, though no doubt the settlor's wishes may be a relevant factor in the exercise of the court's discretion.

The second situation is where the settlor has provided the trustees with a confidential memorandum of wishes, which, though lacking legal force, sets out how the settlor wishes the trustees to exercise a discretion which he has conferred on them or has orally confided his wishes to them. Lord Walker pointed out how prevalent has become the practice of conferring on trustees wide discretions in favour of a widely defined class of beneficiaries and of confidentially outside the settlement imparting to those trustees the settlor's wishes how those discretions shall be exercised, and that this practice is used as a cloak against transparency securing that the terms of the settlement give no reliable indication of who will in the event benefit from the settlement (see para.[1]).

***30** The third situation is where a beneficiary seeks disclosure of documents or information revealing the reasoning of the trustees in reaching their decisions how to exercise their discretionary powers. Pre-*Schmidt* authorities established the principles: (1) that a beneficiary's right to disclosure of trust documents does not extend to confidential documents relating to or revealing the reasoning of the trustees in reaching their decisions how to exercise their discretionary powers relating to distributions of capital or income to beneficiaries: see *Londonderry* above; and accordingly (2) that discretionary beneficiaries are not in general entitled to know how or why the trustees' discretion is not exercised in their favour. To sidestep this limitation on their access to this information, it has been the practice of particularly concerned and committed beneficiaries to sue the trustees for breach of trust in respect of the exercise of the discretion and seek full disclosure of that same information through the disclosure procedure in the action: see *Scott v National Trust.* [14] The device can only succeed if the beneficiaries can establish a *prima facie* case of breach of trust, that the proceedings are not an abuse of process, and that the court in its discretion should order disclosure.

A changed climate

The climate may be seen to have changed regarding the desirability of the principle that trustees can withhold disclosure of their reasons with total impunity and the refusal of trustees to disclose the reasons for the exercise of their discretion can have repercussions for the trustees. The refusal of trustees to give an explanation for a decision in circumstances calling for an explanation, may support an inference of a breach of trust: see *Taylor v Midland Bank Trust Co Ltd.* [15] There may be a need to give reasons when plainly a reason is called for, *e.g.* for defeating the legitimate expectation of a beneficiary: see *Scott.* The climate change is most particularly apparent in the pension field. [16] In the case of a pension trust the Pensions Ombudsman, who is empowered by the Pensions Schemes Act 1993 to give a remedy for "maladministration", has held that it is maladministration for trustees to refuse to disclose the reasons for their decision. [17] Going beyond this,

the limitations on the rights of beneficiaries to scrutinise the reasons for decisions on the exercise of discretion affecting them has been the subject of trenchant criticism. As Pearce and Stevens state [18]:

"... there is an inherent inconsistency between the principle of equity that trustees should not act improperly and the absence of any right of *31 beneficiaries to know how decisions are reached and so subjected to proper scrutiny".

And they suggest that today equity should not be bound by 19th century cases (and I would add 20th century cases) which place the interests of trustees above those of beneficiaries and that no discretion should be able to be exercised without proper scrutiny.

I would suggest that the principles stated in earlier cases (and in particular *Londonderry*) may no longer apply at least with the same stringency since the decision in *Schmidt*. The court may now, after carrying out the appropriate balancing exercise, in proper cases require disclosure both of confidential memoranda of wishes and of confidential documents. In carrying out the balancing exercise guidance may be found in the judgments of the Court of Appeal (and most particularly the dissenting judgment of Kirby P) in *Hartigan Nominees Pty Ltd v Rydge* [19] ("*Hartigan*").

In *Hartigan* the New South Wales Court of Appeal was faced with the question whether a beneficiary was entitled to require the trustees to disclose such a confidential memorandum of wishes. By a majority of two to one (Kirby P dissenting) the Court of Appeal held that he was not so entitled. The first issue raised was whether the letter was a trust document. The majority held that it was not. Kirby P in his persuasive dissent argued that the letter of wishes for all practical purposes was one of the trust documents, for "it is an essential component of or companion to the trust deed itself" and the trust deed "being understood in the light of the memorandum of wishes is effectively to be taken to be supplemented by it" (at 419). The second issue was whether the court could and should direct its disclosure even if it was not a trust document. The majority adopted the conventional approach that (in the absence of a pleaded allegation of fraud or misconduct) trustees should not be required to disclose confidential information relating to the exercise of a discretion and that this included both a confidential expression of wishes by the settlor and their own confidential deliberations. They quoted observations in *Re Londonderry* to the effect that it would be intolerable for trustees to be obliged to disclose or reveal the reasons for the exercise of their discretion and highly undesirable for "dirty linen" to be aired in public. But Kirby P. in his dissent made a strong plea for greater transparency to ensure that the trustees do their duty and are accountable.

"To accept, as a principle for entitlement to access that a beneficiary should be able to show misconduct or wrongdoing on the part of a trustee is to impose an unreasonably high barrier to the effective supervision by the court of the actions of trustees ostensibly subject to that supervision. The actions of trustees have validity only in so far as they further the purposes of the trust and are lawful. It should not be *32 necessary for things to have reached such a sorry pass, that misconduct or breach of trust can properly be alleged, for the beneficiaries effectively to invoke the protective scrutiny and supervision of the court. There are professional limitations upon the pleading of fraud and misconduct. They may not be alleged without a proper foundation in fact. Effectively then, the imposition of that requirement unduly impedes [query confines] the court's protection to extreme cases. Yet there may be many other cases, falling short of fraud or misconduct, which justify rendering the trustee accountable to the law. If there is no such justification, the court can visit its displeasure upon any 'harassment' of the trustee by appropriate orders for costs. It can protect the confidentiality of the settlor or others by special orders and by the adoption of [other] expedients ...;

...

5. It is true that in some cases hurt, embarrassment and general consternation will accompany the disclosure of documents such as the one which is here in question. But against this must be balanced the suspicion which will attend a refusal to give access to a document of great importance to the determination of the financial and other benefits received by beneficiaries. Instead of a rational disclosure of a governing document, the appellants urged that the Court should prevent

that disclosure. In the place of knowledge there will be rumour. In the place of a critical examination of the words of the benefactor, there will be opinions resting upon reported benefits received by members of the family who disclose such benefits. In the place of an opportunity to offer comments about disputed assertions of fact, there may be blind acceptance by the trustees of what may be completely unjustified assertions and opinions expressed by the settlor (or instigator). Better decisions are generally made by those who have the relevant material before them; ... The rule of secrecy which the trustees urge is one which may effectively deny the trustees access to relevant information;

6. There is no reason for the trustees to fear undue harassment by beneficiaries or, for that matter, by the courts. The courts will uphold the discretion reposed in trustees by the trust deed so long as they perform their duties bona fide and without malice. The courts will refuse to supervise the merits of a trustee's decisions so long as they conform to these minimal requirements. It is because of the very limitation of curial intervention that the trustees should ensure that they have the requisite information with which to make the right decisions. If they deny access by beneficiaries to documents such as the memorandum of wishes in this case, they may make their decisions in ignorance of matters known to members of the family which would *33 have helped them. Or they may do so with the assistance of half understood facts provided by a solicitor with partial knowledge or with access to some beneficiaries only ..."

He went on to hold that only by securing such access could the beneficiary fully exercise his rights which included rendering the trustees accountable before the law for the discharge of their duties (at 422E).

The reasoning of Kirby P. (now a judge of the High Court of Australia) is in my view compelling that disclosure to beneficiaries of confidential letters of wishes and trustees' deliberations should not be regarded as immune from disclosure, when disclosure is necessary to enable beneficiaries to monitor performance of their duties by trustees and ensure that they are fully and properly informed. A balancing exercise is called for involving an examination of the best interests of the beneficiaries and the views of the trustees must be a relevant consideration. The views of a protector (if any) appointed by the settlor to protect the interests of the beneficiaries should likewise be relevant. But whether the confidence intended by the settlor (or desired by the trustees) should be broken must depend on the merits of the application. If a settlor in arranging his affairs has recourse to a settlement and a confidential letter or indeed a confidential oral communication of wishes, he runs the risk that the due administration of the settlement, the accountability of the trustees and the safeguarding of the interests of the beneficiaries may require the confidence to be broken overridden by those other considerations. Trustees have no right of confidence or privacy as such: it should only be claimed and respected when the need for it outweighs countervailing considerations.

Duty to inform beneficiaries of their entitlement

Must a beneficiary (and in particular a beneficiary on his attaining full age of 18-years) be informed by trustees of a settlement of his entitlement under the trust and the extent of his entitlement in all circumstances notwithstanding the damage which such disclosure may do to him? There are two sides to the argument. It is a recurrent experience of mankind that, if a person of too young an age knows that he is amply provided for, this may distract him from getting on with his daily life and discourage him from taking all necessary steps to provide for himself or equip himself to do so. The incentive to be self-supporting can be diluted and there may be a risk of a lack of appreciation of the value of money and hard work. On the other hand, it may also be fair that a child should know the identity of any settlor and the extent of any provision made for him, whether the provision (present and past) made for him is the generous act of his parents or someone else, and accordingly the extent of his debt to his parents and the settlor, and the prospect and extent of provision in the future. By reason of the strong views held by them executors and trustees can be placed under considerable pressure by well meaning and well intentioned parents to say *34 nothing or as little as possible on this topic. The executors and trustees may likewise consider that the best interest of the beneficiary may require them to say nothing. The question raised is how far it is open to the trustees to take this course and how far to do so exposes them to the risk of proceedings.

Authority establishes the proposition that in the ordinary course a trustee has no duty to volunteer information: his duty is limited to providing information duly requested by a qualified applicant for it. [20] But there is both a legal and a practical reason for an exception in case of disclosure of a beneficiary's entitlement. The legal reason is that a beneficiary's right to monitor the stewardship of the trustees is nugatory unless the beneficiary knows that he or she has an interest under an *inter vivos* settlement or Will. Further only if the beneficiary is so informed can any obligation of executors and trustees to provide trust information on request have any substance. As a practical matter beneficiaries may need to know their entitlement to provide information required on applications, *e.g.* for scholarships and grants and social security benefits, for tax returns, matrimonial and child care proceedings, to make informed decisions relating to finance, and to decide whether, *e.g.* to sever a joint tenancy or vary a trust.

Disclosure by executors and trustees

Executors

It is common practice, and indeed good practice, for well-advised executors on assuming office or on obtaining probate to send a copy of the Will to each beneficiary named. But the decision of the Court of Appeal in the case of *Re Lewis,* [21] established that, unless the Will otherwise provides, the executors as such have no duty to do so or (more importantly) to inform the beneficiaries of the terms or conditions of any entitlement under the Will unless the Will requires them to do so. The executors must give effect to the provisions of the Will. They must pay legatees without awaiting a demand. [22] But they need do no more. [23] The facts of the case of *Re Lewis* vividly demonstrate the draconian consequences of the rule. In that case the testatrix gave her house to her son Evan who was resident in Patagonia and directed that, if he should not return and claim the house, it should pass to the executor. (In those days, the law report records, it took four or five months to communicate with that country). The executor wrote to Evan informing him of the legacy but did not say a word about the requirement that he return home and claim it. Ignorant of that requirement Evan did not return and died without doing so. Evan's estate as claimant in the *35 action sued the executor complaining of the default in notifying Evan and the consequent unjust enrichment of the executor.

The Court of Appeal held that the executor had been under no duty to disclose the term of the legacy and was fully entitled to the house under the gift over. The claimant conceded that as a general principle an executor was under no obligation to disclose to a legatee his entitlement under the Will, but argued as an exception or qualification to that principle that it did not apply if the executor took a benefit under the legacy and in particular if he took under a gift over in case the legatee did not claim the legacy under the provisions of the Will. The Court of Appeal was not accordingly required to determine the correctness of the principle but only of the suggested gloss on it. All members of the court, however, plainly considered the concession properly made. The only full consideration of the merits of the principle is to be found in the judgment of Romer L.J. He stated that it has been established in *Chauncy v Graydon* [24] that an executor is under no obligation to give notice to a legatee of the terms of a condition of forfeiture attached to a legacy unless the Will imposes on him an obligation to do so; that there was no authority for imposing a duty on an executor, and the difficulties of formulating the duty precluded the court from imposing it in the absence of such authority. The difficulties arose because the duty could not be absolute: the executor might not know where the legatee was living; and a duty to take reasonable care was too uncertain. He accordingly declined to impose it. The notion that the duty to take reasonable care is too uncertain to be satisfactory is scarcely maintainable today. As will subsequently appear, this is the nature of the duty owed by trustees: uncertainty is no obstacle to the imposition of the duty on them.

An alternative explanation for the absence of any duty on the part of the executor was given in the case of *Hawkesley v May,* [25] namely that a Will is a public document available for inspection by anyone interested in doing so and there is accordingly no sufficient need to impose any duty of disclosure on the executors. The latter rationale for the rule laid down in *Re Lewis* is likewise totally unsatisfying, and (if it ever had force) is totally out-dated today. Who today adopts

the practice of regularly visiting the Registry to inspect Wills on the off chance that they may be named as beneficiaries? The closest analogy is the individual obsessed with his own mortality who first thing each day before he decides whether to get up studies the obituary columns in the daily papers to see if his own name appears. The rule in *Re Lewis* is apt to produce the injustice occasioned (as it did) in the case of *Re Lewis*, [26] has nothing to recommend it and plainly requires reconsideration in the light of modern conditions. Ford's ***36** *Principles of the Law of Trusts* [27] in para.9129 states categorically that so far as any case (and in particular *Re Lewis*) suggests that a personal representative or trustee is not under a duty to disclose the terms of a legacy or trust to a beneficiary, it is wrong and not binding on any Australian court. In so doing Ford surely marks the way we should also follow. An obligation should be implied to take reasonable and practicable steps to inform beneficiaries. [28]

Trustees

Whilst remarkably a settlor has apparently no duty to disclose the existence of the trust to the trustees or beneficiaries (see *Fletcher v Fletcher* [29]), the position in this regard of trustees is quite distinct (and this must include the settlor where he is also a trustee). A trust instrument is a private document which does not have to be registered and its very existence may be known only to the settlor and the trustee or trustees and accordingly the settlor alone if the settlor assumes the office of sole trustee. It was for this reason that the judge in *Hawkesley* held inapplicable the rule established in the case of executors. Unless the trustees are under a duty to disclose the trust to the beneficiaries, the very existence of the trust may be unknowable as well as unknown to those alone who can enforce it and hold the trustees to account. There is in the circumstances the overriding need to impose on trustees the obligation to disclose the existence of the trust and its provisions to those entitled to enforce it. The question arose in that case whether a beneficiary on attaining full age should be informed by the trustees of his vested interest in possession. The clear and unequivocal answer was in the affirmative. But does the principle apply to all categories of beneficiary? There is no clear guidance in the authorities and no agreement in the text books on the answer to this question. *Lewin on Trusts* [30] says that it is not clear whether adult beneficiaries with reversionary interests, particularly contingent interests, or defeasible vested interests must be given information as soon as the settlement is made (or presumably on attaining majority) or only if and where their interests vest in possession or capital or income becomes payable to them. On the other hand, Professor Hayton in the 16th edition of *Underhill and Hayton on Trusts and Trustees* (at p.674) states that, whether beneficiaries' interests are under fixed or discretionary trusts, whether in income or in capital, or capital and whether vested or contingent, trustees are necessarily under a duty to take reasonably practicable steps to inform beneficiaries of full age and capacity of their beneficial interest, and the duty in principle extends to informing objects of a power of appointment that they are objects. He only excepts objects of powers where (1) they are not intended by the settlor to have the right to require the ***37** trustees to consider the cases made by them for an appointment; (2) they are members of a secondary class; or (3) the class is huge. I would summarise the exceptions as cases where the settlor has expressly or impliedly manifested the intention to oust the normal rights of objects (in particular by the character of the provisions of the trust). The duty of disclosure is stated in perfectly general terms in *Halsbury's Laws of England* [31] and *Snell's Equity*. [32]

In principle, as it seems to me, the views of Professor Hayton are to be preferred. A core obligation of a trustee must be to inform beneficiaries of their rights including their right to monitor his administration of the trust. The decision in *Schmidt* supports the view that no distinction should be drawn in principle between the rights of discretionary beneficiaries and objects of powers of a fiduciary character. If there is no distinction in respect of the right to apply to the court for disclosure of information, surely no distinction can logically be made in respect of the duty of trustees to inform them of their entitlement. It would surely be remarkable if the object of a discretionary trust or power possessed *locus standi* to apply to the court for the disclosure of trust information but had no right to be informed of his entitlement under the trust. The limitations on the duty owed to the object of a discretionary power accepted by Professor Hayton find some support in the judgment of Templeman J. in *Re Manisty's Settlement* [1974] Ch.17 at 24 and of Neuberger J. in *Murphy v Murphy* [1999] 1 W.L.R. 382. This is not a question addressed by Lord Walker in *Schmidt*, but he adopted an alternative

approach leading to much the same practical effect. He said that, in case of a wide power, the trustees could adopt a sensible approach confining attention to the primary candidates for the exercise of the trustees' discretion (see paras [41] and [42]); and in relation to an application for disclosure by a discretionary object: "In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief." (para.[67]). It is suggested that, whichever approach is adopted, disclosure should only be excused where the class of discretionary beneficiaries or possible objects of a power is such as to render the exercise impracticable or of no practicable value. Regard may be had to the size of the trust fund and the cost of the exercise. But questions of cost are primarily matters which the settlor should be assumed to have in mind when selecting the classes of beneficiaries. Disclosure should surely be made to all the beneficiaries who have a real and practical (as opposed to merely theoretical) interest in the due administration of the trust and a prospect of benefit thereunder. Candidates for the exercise of the discretion in their favour should be informed not least so as to be afforded the opportunity to make representations on their behalf and enable the trustees to make a fully informed decision. If the settlor has selected an individual as a possible beneficiary, the trustees should let him know and have ***38** his say unless the trustees can properly decide blind to exclude him from benefit ignoring his possible claim. There can, as it seems to me, be no distinction between the duties of trustees under express, implied or constructive trusts, though a constructive trustee may not appreciate that he is a trustee until the court determines the existence of the trusteeship.

I should add a word on the requirements for compliance with the duty of disclosure to a beneficiary where applicable. The duty of disclosure requires a real disclosure calculated to ensure that the beneficiary fully appreciates the information to be communicated. The sending of a "common form" letter and the obtaining of an acknowledgement of due performance of the duty will be inadequate unless calculated (having regard to the age, intelligence and circumstances of the beneficiary) to be effective. Going through mere forms will be an avoidance, if not an evasion, of the duty. The need for disclosure, *e.g.* of the income entitlement cannot be masked by adopting an investment policy designed to secure in future a capital as opposed to an income return. It will be a breach of the duty in respect of investment of trust assets to exercise it for such an ulterior purpose-and in any event the beneficiary is entitled to an explanation of the exercise.

Limitations on duty in trust instrument

I turn to the question whether a trustee can be excused by the trust instrument from providing requested information to a beneficiary or disclosing to a beneficiary that he is a beneficiary. Save in the special case of the object of a discretionary power, the answer as it seems to me lies in the core character of these obligations under a valid trust. As Professor Hayton says, such a stipulation must be void as repugnant to the trust created. A trust may authorise enforcement by a person other than a beneficiary, *e.g.* the settlor or a protector, but such a right can only be conferred in addition to, but not instead of, the core rights of the beneficiaries, which are inherent in their interests.

Exemption and exoneration clauses

One effect of the decision in *Schmidt* is that trustees are under no absolute duty to provide information requested of them by beneficiaries. The discretion to refuse to disclose certain information requested of them must be exercised in proper responsible fashion. If they improperly exercise their discretion (*e.g.* by a failure to take account of a key consideration or in an attempt to delay or frustrate beneficiaries' investigations as to whether *ultra vires* investments or distributions were made or a duty of care was breached), they will be liable for breach of duty. The onus will ordinarily be on the trustees to explain and justify the exercise of their discretion to withhold relevant information. Their improper failure promptly to provide the information may provoke proceedings for a direction requiring provision of the information, an order for their removal as ***39** trustees and an adverse order for costs. It may even make them liable to restore to the trust fund the value that would not have been lost if the relevant information had been provided promptly enabling urgent safeguarding measures to be taken. Thus there is some small scope for application of exemption or exoneration clauses.

There is more scope in cases where trustees (or executors) fail to disclose the existence of their beneficial interest to beneficiaries whose claim may be a personal one relating to a lost opportunity. The trustees' failure may *prima facie* constitute a breach of duty and exemption and exoneration clauses may come into play. Such clauses cannot as a matter of trust law exclude from protection a fraudulent breach of trust. For this purpose actual fraud connotes at the minimum an intention on the part of the trustee to pursue a particular course of action either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interest or not:

"It is the duty of a trustee to manage the trust properly and deal with it in the interest of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests, he is acting dishonestly. It does not matter whether he stands or thinks he stands to gain personally from his actions." [33]

On the other hand, exemption and exoneration clauses can validly protect trustees from liability in case of wilful default. Accordingly, if a trustee dishonestly withholds disclosure of information to a beneficiary, he will expose himself, whatever the provisions of the trust, to a claim for breach of trust. But if a trustee withholds disclosure in the perceived best interest of a beneficiary, though his conduct may constitute a deliberate breach of trust and a wilful default, he may still be able to invoke the protection of an exclusion clause which excludes liability for wilful default (see *Woodland Ferrari v UCL Group* [34]) unless no honest or reasonable trustee in his shoes could have had such a perception: *Walker v Stones* [2001] Q.B. 902 (CA on appeal to HL). But the fact that non-disclosure to a beneficiary, *e.g.* on obtaining full age and a vested interest in possession, may not constitute a breach of trust, may not be the end of the story. The beneficiary may become obliged to disclose the existence of his interest, *e.g.* in his tax return or court proceedings. The trustees cannot be a party to any breach of such obligation. Still less can they take steps to "cover up" his entitlement by obtaining "blind" his signature to a tax return revealing his entitlement or to a general power of attorney. The trustee is likely to be held duty bound to ensure that the beneficiary is fully informed before he signs the document in question.

*40 Conclusion

The duties of disclosure to beneficiaries of trustees and executors both of the provisions of the Will or trust affecting them and of the trust affairs and accounts are related obligations. They are both expressions of the obligations of a fiduciary to make full disclosure. A settlor or testator having recourse to a trust or Will to create a settlement must as part of the price for that privilege accept that beneficiaries need to be informed to monitor and enforce performance by the trustees and executors of their duties so far as they relate to them. If the settlor or testator chooses to create a large body of beneficiaries, he must expect wide dissemination of trust information. Mr Christopher McCall Q.C. eloquently puts it in his article entitled: "The End of the Trust as a Disappearing Trick?", [35] a settlor cannot have his cake and eat it. He cannot create a trust, but deprive beneficiaries of the incidental rights essential for the constitution of a valid trust. So far as the law does admit of exceptions, those exceptions should be narrowly drawn and clearly justified by countervailing interests.

I should however add a word of caution to those who hear or read this lecture. A judge who expresses his view of the law without the assistance of counsel's argument is like a mariner who sails dangerous straits without a pilot. He has no such warning as he is accustomed to receiving from that source of shoals or other navigational hazards. Not merely may it be unsafe to rely on what I say without such assistance, but it should not be assumed that, if ever an issue such as is touched on in this lecture comes before me in my judicial capacity, possessed with that assistance even I shall take the same view.

This article is the text of a lecture given by the author at King's College, London on October 21, 2003.

Footnotes

1 See [2002] P.C.B. pp.226-240.

2 [1975] Ch.25; [1974] 2 W.L.R. 904.
3 [2003] 2 W.L.R. 1363.
4 *17 Trust Law International* (2003) 114-128.
5 [2003] Ch. 409.
6 Consider *R. v The Charity Commissioners Ex p. Baldwin* [2001] W.T.L.R. 137 at 148-9, *per* Jack Beatson Q.C.
7 (2001) 117 L.Q.R. 94 at 104.
8 [1998] Ch. 241 at 255.
9 [1891] 3 Ch. 82 at 99.
10 See *Underhill & Hayton Law of Trusts* (16th ed., Butterworths, London) p.672.
11 [2003] 2 W.L.R. 1442.
12 [1965] Ch. 918 at 937.
13 (2001) *Trust Quarterly Review*, 3, p.2.
14 [1998] 1 W.L.R. 226.
15 [2002] W.T.L.R. 95.
16 See Walker J. "Some Trust Principles in the Pension Context" [1996] *Pensions Law Reports* at 112-3.
17 *C Allen* [2002] P.L.R. 333.
18 Pearce, R.A. and Stevens, J., *The Law of Trusts and Equitable Obligations* (2nd ed., LexisNexis UK, 1998) at pp.620-21.
19 [1992] 29 N.S.W.L.R. 405.
20 See Megarry V.C. in *Tito v Waddell (2)* [1977] Ch.106 at 242-3 and Mahoney J. in *Hartigan* at 431.
21 [1904] 2 Ch.656.
22 See *Wroe v Seed* (1864) 4 Giff. 425 at 428-9.
23 This rule does apply to executors when acting as trustees: see *Brittlebank v Goodwin* (1867-68) L.R. 5 Eq. 545 at 550.
24 (1743) 2 Atk 616.
25 [1965] 1 Q.B. 24.
26 See also *The Cancer Research Campaign v Ernest Browne* [1997] S.T.C. 1425.
27 Ford, H.A.J. and Lee, W.A., *Principles of the Law of Trusts*. (2nd ed., Law Book Co, Sydney, 2003) at p.425.
28 *cf. Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294.
29 (1844) 4 Hare 67.
30 17th ed., para.23-03.
31 (4th ed., 1986) vol.17(2) para.475.
32 (30th ed., 1999) para.11-47.
33 Millett L.J. in *Armitage v Nurse* [1998] Ch.241 at 251 D-E.
34 [2003] Ch.115.
35 See [2003] P.C.B. 358-363.

P.C.B. 2004, 1, 23-40

Right to Information

Inspection of contract, etc.

33(1) A lienholder, by notice in writing, may at any reasonable time demand,

(a) of the owner or the owner's agent, the production for inspection of the contract with the contractor,

(b) of the contractor, the production for inspection of

(i) the contract with the owner, and

(ii) the contract with the subcontractor through whom the lienholder's claim is derived,

and

(c) of the subcontractor through whom the lienholder's claim is derived, the production for inspection of the contract with the contractor,

and the production for inspection of a statement of the state of accounts between the owner and contractor or contractor and subcontractor, as the case may be.

(2) If, at the time of the demand or within 6 days after it, the owner or the owner's agent, the contractor or the subcontractor, as the case may be,

(a) does not produce the written contract and statement of accounts, or

(b) if the contract is not in writing,

(i) does not, in writing, inform the person making the demand of the terms of the contract and the amount due and unpaid on the contract, or

(ii) knowingly and falsely states the terms of the contract or the amount due or unpaid on it,

then, if the lienholder sustains loss by reason of the refusal or neglect or false statement, the owner, contractor or subcontractor, as the case may be, is liable to the lienholder in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of the lienholder's lien.

(3) A lienholder, by notice in writing, may at any reasonable time demand of a mortgagee or the mortgagee's agent or unpaid vendor or the unpaid vendor's agent

(a) the terms of any mortgage on the land or any agreement for sale of the land in respect of which the work is or is to be done or in respect of which materials have been or are to be furnished, and

(b) a statement showing the amount advanced and the amount currently due and owing on the mortgage or the amount owing on the agreement, as the case may be.

(4) If the mortgagee or vendor or the mortgagee's or vendor's agent fails to inform the lienholder within 6 days after the date of the demand

(a) of the terms of the mortgage or agreement, and

(b) of the amount owing on it,

then, if the lienholder sustains loss by reason of the failure or by reason of any misstatement by the mortgagee or vendor of the terms or amount owing, the mortgagee or vendor is liable to the lienholder in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of the lienholder's lien.

(5) The court may on application at any time before or after proceedings are commenced for the enforcement of the lien make an order requiring

(a) the owner or the owner's agent,

(b) the contractor,

(c) a subcontractor,

(d) the mortgagee or the mortgagee's agent, or

(e) the unpaid vendor or the unpaid vendor's agent,

as the case may be, to produce and allow a lienholder to inspect any contract, agreement, mortgage, agreement for sale, statement of the amount advanced or statement of the amount due and owing, on any terms as to costs that the court considers just.

RSA 2000 cB-7 s33;2009 c53 s28