I Want Information!
Beneficiaries' Basic Right or Court Controlled Discretion?

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Abstract

Core to the concept of a trust is that its beneficiaries have an entitlement to secure its proper administration. Essential to the effective exercise of this entitlement is the ability to access information relating to the management of the trust property. The notion that beneficiaries have an equitable interest in the trust property traditionally translated into beneficiaries' access to trust information being perceived as evincing a proprietary foundation. This has been challenged in the last decade or so, in large part as a result of the incidents of the modern discretionary trust. In its place suggestions have been made for a broad curial discretion to govern beneficiaries' access to trust information. This article queries moves in this direction, not only as inconsistent with the nature of a trust but for fear of prompting greater litigation over trusts.

I TRUSTEE DUTY AND CORRESPONDING BENEFICIARY RIGHT

Litigation surrounding the access by beneficiaries to information relating to the management of trust property has surfaced perennially over the years. Its backdrop is hardly obscure. Underscoring the concept of a trust is duality so far as ownership of trust property is concerned. Trustees, by definition, have legal ownership of trust property, which carries an entitlement, at common law, to deal with the property as and how they wish, like any other persons who hold unencumbered title to property. But insofar as trustees are obliged, in equity, to manage the trust property for the benefit of others — the beneficiaries — equity has long since curtailed, by fiduciary and other duties, the trustees' otherwise plenary 'enjoyment' of the trust property. That 'enjoyment' yields to the interests of the beneficiaries, who have an entitlement — and the most compelling individual and collective interest — to secure the proper administration of the trust property.

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It is for this reason that equity located certainty of object as an essential element of the trust relationship. Were an alleged trust to lack a 'definite object' — 'somebody, in whose favour the court can decree performance' — what would remain is 'an uncontrollable power of disposition', which is 'ownership and not trust'.[1] To effectively monitor the administration of the trust property, it went without saying that beneficiaries needed information regarding the performance of the trustees' duties and powers. To this end, equity imposed on trustees a 'duty to account' to beneficiaries.[2] That duties almost invariably spawn correlative rights in the person(s) to whom the duties are owed in turn prompted the frequent reference, in both the case law and commentaries, to the beneficiaries' 'right' to information concerning the trust.

Yet as with many so-called 'rights', the beneficiaries' general law right to information is not unqualified. In this brief article my aim is to note some relevant qualifications against the backdrop of recent (and, for context, not so recent) case law, which challenge the historical understanding of the beneficiaries' 'right', with particular emphasis in the second half of the paper on how these developments have sought to address a tension between trustee accountability and settlor confidentiality.

As a preliminary observation, it is necessary to say a little more regarding the duality of ownership notion mentioned above. Although the reference to duality here implies that beneficiaries collectively have ownership of the trust property, in equity, it is not always accurate to describe beneficiaries' interests as having an 'ownership' flavour. A 'dogma' that, where legal ownership vests in a trustee, equitable 'ownership' must in each case be vested in someone else, has been rejected by the High Court.[3] And as ownership brings with it connotations of 'property', the extent to which beneficiaries' interests in a trust have a proprietary flavour may well be queried.

It is apt, at this time, to explain the use of the term 'property' in this context. Beneficiaries' interests can be described as proprietary in the sense that, collectively, they have an equitable interest in the trust property (namely its corpus). Proprietary notions are also legitimately utilised in the context of the distribution (or appointment) of the trust corpus or, more commonly, income. So beneficiaries of so-called fixed trusts are said to have a right to receive a fixed proportion of the trust income and, usually upon the termination of the trust, a fixed proportion of the trust corpus. Because, under the terms of the trust, the beneficiary

[1] *Morice v Bishop of Durham* (1804) 32 ER 656, 658 (Sir William Grant MR).
[2] See, eg, *Wroe v Seed* (1863) 66 ER 773, 774–5 (Stuart VC).
[3] *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98,112 [25] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

has an entitlement to receive distributions, the 'interest' of the beneficiary is often branded as proprietary. On this reasoning, as beneficiaries of discretionary trusts are not entitled to call for any part of the trust income or corpus, but await in the hope of having the trustee exercise his or her discretion as to appointment in their favour, they are usually described as lacking an interest of a proprietary nature in the trust estate.[4]

There are further wrinkles, moreover, in speaking of 'property' interests in the trusts context. For instance, the modern superannuation trust, aside from involving the 'beneficiary' contributing in part to the trust property, generally reserves any right to claim the fund until some future date. It is, in this sense, a claim to future property that, at least for the beneficiary, is contingent upon reaching a certain age. Conversely, a unit trust ordinarily envisages an existing interest in property in the form of 'an aliquot share or interest in the undivided assets of a trust that are held for investment or profit by the trustee for the benefit of the unit holders or beneficiaries of that unit trust',[5] which can, subject to the terms of the trust, be transferable.

II CHARACTERISATION OF BENEFICIARY'S RIGHT — 'PROPRIETARY'?

As the foregoing reveals, notions of ownership and property are ostensibly fluid in nature in the trusts context (as in others). Even the traditional characterisation of a discretionary beneficiary's 'interest' — as no more than an expectancy, and thus non-proprietary in the sense noted above — has been challenged of late in the insolvency and family law statutory environment.[6] And at the other end of the spectrum, the common assumption that unitholders have a proprietary interest in the trust property has been challenged in several caveat cases.[7]

Yet to speak in terms of 'property', as distinct from mere personal entitlements or obligations, is not simply a matter of nomenclature. Equity accords to 'proprietary' interests a higher status than those of a

[4] See, eg, *Gartside v Inland Revenue Commissioners* [1968] AC 553, 607 (Lord Reid); *Walter v Handberg* [2003] VSCA 122, [15] (Chernov JA).
[5] *Reef & Rainforest Travel Pty Ltd v Commissioner of Stamp Duties* [2002] 1 Qd R 683, [11] (McPherson JA).
[6] See, eg, *Australian Securities and Investments Commission v Carey* (No 6) (2006) 153 FCR 509; *Kennon v Spry* (2008) 238 CLR 366.
[7] Compare, eg, *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90 with *Re S & D International Pty Ltd* (No 4) (2010) 79 ACSR 595. See also the discussion in D K L Raphael, 'Caveats and Unit Trusts' (2007) 81 *Australian Law Journal* 881.

personal nature (as does the common law),[8] and courts of equity (in line with their common law counterparts) have traditionally been loathe to interfere with existing proprietary rights, especially under the guise of a judicial discretion.[9] Personal claims or entitlements in equity, conversely, are grounded heavily in discretion, inherent in the maxim that equity acts *in personam*.

Against this backdrop, it is perhaps unsurprising that the proprietary-personal divide should surface on the issue of beneficiaries' access to trust information. In a sense, the fact that the trust is a curious amalgam of the personal and the proprietary[10] presents an invitation for debate, which has hardly proven foreign to the characterisation of a beneficiary's 'right' to information. Courts historically tended to view this 'right' to information as one consonant with the right to access and view 'trust documents'. Perhaps the leading judicial statement here is that of Lord Wrenbury in *O'Rourke v Darbishire*:

> If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors,[11] he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries. [12]

Other than Lord Parmoor, who made more oblique statements directed to an ostensibly similar object,[13] those observations, in so far as they target the nature of a beneficiary's right, saw no parallel in the speeches of the other Law Lords. They must be viewed in the context of the factual

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[8] This in turn explains, for instance, why an equitable claim must yield to a bona fide purchaser for value of the property to which the claim is made: *Foskett v McKeown* [2001] 1 AC 102, 130–2 (Lord Millett).

[9] This explains, say, why courts will not impose a remedial constructive trust if 'there is an appropriate equitable remedy which falls short of the imposition of a trust': *Giumelli v Giumelli* (1999) 196 CLR 101, 113 (Gleeson CJ, McHugh, Gummow and Callinan JJ).

[10] See Austin Scott, William Fratcher and Mark Ascher, *Scott and Ascher on Trusts* (Wolters Kluwer, 5th ed, 2007) Vol 3, 803–17 (in the context of how it translates into the beneficiaries' 'interests').

[11] In this context, whether the same principles apply to executors as to trustees: see Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, Australia, 2013) 395–6.

[12] [1920] AC 581, 626–7.

[13] See *O'Rourke v Darbishire* [1920] AC 581, 619–20.

scenario before the court, which, as the extract above hints at, involved the parameters of a claim to legal professional privilege by a trustee. It is not disputed that joint privilege can arise over legal advice sought by a trustee in the ordinary course, such that a beneficiary is entitled to view that advice.[14] But it does not necessarily follow that this is the consequence of any proprietary interest in the documents themselves.

III 'PROPERTY' IN TRUST DOCUMENTS OR INFORMATION

Lord Wrenbury's remarks have, in any event, proven influential in the characterisation of beneficiaries' 'rights' to information. What underscores his Lordship's observations, and had for years been accepted legal principle, is that 'trust documents', however defined, 'belong' to the beneficiaries. They are, in this sense, the property of the beneficiaries. This underscored the judgments of members of the English Court of Appeal in the leading case of *Re Londonderry's Settlement*[15] some 45 years later, which clearly continued to inform Australian law, as is evident from the majority judgments delivered in *Hartigan Nominees Pty Ltd v Rydge*.[16]

The property here seems to have been viewed as property in the documents themselves, that is, the (traditionally) paper on which the information was contained. This (too) conveniently avoided the old chestnut of whether or not information itself can constitute property.[17] Equity, after all, never went so far as to brand information as property, preferring in the main to protect information via an *in personam* obligation. The equitable doctrine of confidential information is the exemplar in this regard.

Upon this proprietary foundation, the relevant inquiry comes down to whether or not the documents to which the beneficiaries seek access are 'trust documents'. If they are 'trust documents', they are the property of the beneficiaries, and thus access is an entitlement that should not be denied in the exercise of judicial discretion. Salmon LJ in *Re Londonderry's Settlement*,[18] to this end, opined that 'trust documents' contain 'information about the trust which the beneficiaries are entitled to know', and thus branded them as documents in which 'the beneficiaries have a proprietary interest … and, accordingly, are entitled to see'. This

[14] See *Schreuder v Murray (No 2)* (2009) 41 WAR 169.
[15] [1965] Ch 918.
[16] (1992) 29 NSWLR 405.
[17] On this debate see generally Mark Thomas, 'Information as Property: Humanism or Economic Rationalism in Millennium?' (1998) 14 *Queensland University of Technology Law Journal* 203.
[18] [1965] Ch 918, 938.

characterisation did not always prove sufficiently discriminatory to clearly distinguish documents that were trust documents from those that were not. Difficulties could arise where alleged trust documents contained information that the beneficiaries were not entitled to know — in *Londonderry*, reasons for discretionary decisions as to appointment, and in *Hartigan Nominees*, information the creator of the trust supplied in confidence. Yet the decided cases revealed no insurmountable challenges in setting parameters to accessing information.

It must be understood, however, that the proprietary foundation for beneficiaries' access to trust information that emanated from *O'Rourke v Darbishire*, and was confirmed in *Londonderry*, owed its genesis against a trusts law backdrop punctuated by the prevalence of the fixed trust. Each case preceded the burgeoning use of the discretionary trust following the House of Lords' 1971 decision in *McPhail v Doulton*.[19]

Lord Wrenbury's focus on property was hardly surprising, given that the interests of beneficiaries of fixed trusts have traditionally been viewed in proprietary terms. It stood to reason that those beneficiaries should be entitled to a property interest — that is, a right — in 'trust documents'. This reasoning has, as appears below, been challenged by the modern discretionary trust, the beneficiaries of which ordinarily have no more than an expectancy of receiving a distribution from the trust, and thus no property rights as such. The question may be asked: should a lack of a property right in the trust estate — namely a right to call for income or corpus — translate to a corresponding lack of a property interest in (or right to) trust documents? Expressed another way, does trustee discretion to appoint translate to (court) discretion to provide information? Or are the two unrelated?

If the judgment of Mahoney JA in *Hartigan Nominees Pty Ltd v Rydge* serves as a guide, it cannot be assumed that property in the documents in question vests as a result of a correlative proprietary interest in any particular asset of the trust. The property attaches as a result of being a beneficiary, not as a result, it seems, of the nature of the beneficiaries' interest in the trust property.[20] His Honour explained the point this way:

> [T]he right of a beneficiary to have on request inspection of documents or disclosure of information in relation to the trust is, in general, limited to

[19] [1971] AC 424 (where the House of Lords applied to discretionary trusts the same test for certainty of object as applied previously only to mere powers). Indeed, it has been suggested that the discretionary approach espoused by the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 (a discussion of which forms the next part of the article) is a logical progression from *McPhail v Doulton*: Tsun Hang Tey, 'Trustee's Duty of Disclosure' (2012) 24 *Singapore Academy of Law Journal* 191, 206–8.

[20] Cf *Breen v Williams* (1996) 186 CLR 71, 89 (Dawson and Toohey JJ).

> documents and information which is — or is in the sense here relevant — the property of the trust. It does not extend to documents or information as to which, as a beneficiary, he has no proprietary interest. It is not necessary that he have in it a present proprietary interest quantifiable in nature in a specific asset. A beneficiary may have an interest in it as part of an unadministered fund. But that which is sought must, in the relevant sense, be the property of the trust. [21]

Interestingly, earlier in the judgment Mahoney JA had queried whether the right in question should exist in the event of a request for information made by 'a person who is only a possible beneficiary under a discretionary trust'.[22] His concern was that the class of possible beneficiaries here 'may be extensive and, to an extent, the persons who are or may be a member of the class may not be clearly defined'. As to the latter point, though, sufficient definition to meet the 'criterion certainty test' is a prerequisite to a valid discretionary trust.[23] And if Mahoney JA, by referring to a beneficiary with an interest 'as part of an unadministered fund', had in mind the beneficiary of a deceased estate prior to its completed administration, the law is clear that such a person has at this time no more than a right to secure the proper administration of the estate.[24] That right is one shared with the beneficiaries of discretionary trusts, and lies at the core of the beneficiary principle.

To the extent that the 'right' is grounded in the beneficiary principle, that a beneficiary has no fixed entitlement to call for any part of the trust income or corpus should make little difference to his or her standing to seek information. This is because, whether the trust is a fixed or discretionary one, or some hybrid between the two, its beneficiaries have an entitlement to secure its proper administration. Were that right confined to beneficiaries entitled to call for any part of the trust income or corpus, trustees of discretionary trusts could escape accountability and, in the words of Sir William Grant MR noted earlier, would enjoy 'ownership and not trust'.[25]

IV SHIFT FROM 'PROPERTY' TO 'DISCRETION'?

The foregoing sets the stage for a 2003 Privy Council decision, *Schmidt v Rosewood Trust Ltd*,[26] the upshot of which remains to be fully

[21] (1992) 29 NSWLR 405, 432.
[22] *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432.
[23] *McPhail v Doulton* [1971] AC 424.
[24] *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694, 717 (Viscount Radcliffe); *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306, 313–14 (Full Court).
[25] *Morice v Bishop of Durham* (1804) 32 ER 656, 658.
[26] [2003] 2 AC 709.

understood. What is clear is that Lord Walker, who delivered the advice of the Board, sought to move away from the proprietary foundation underscoring beneficiaries' access to trust information. His Lordship did not find it surprising that Lord Wrenbury's remarks in *O'Rourke v Darbishire*[27] had been cited so often, 'since they are a vivid expression of the basic distinction between the right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property) and the right of a litigant to disclosure of his opponent's documents (which is part of the law of procedure and evidence)'.[28] But this did not render those remarks 'a reasoned or binding decision that a beneficiary's right or claim to disclosure of trust documents or information must always have the proprietary basis of a transmissible interest in trust property', as this was not an issue in *O'Rourke v Darbishire*. The Board instead favoured a different approach, which it expressed in the following language:

> Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion … [29]

On a narrow reading of the above, his Lordship was arguably doing no more than consigning to history the view that a beneficiary's access to trust documents is grounded in any property interest. There is also the confirmation, not unheralded in the previous case law,[30] that access to trust information is not confined beneficiaries of fixed trusts but, in line with the beneficiary principle — itself underscored by the court's power to supervise trusts — can accrue to beneficiaries of discretionary trusts. The similarities between discretionary beneficiaries and objects of a power of appointment[31] meant, moreover, that distinguishing between the two for this purpose lacked a basis in principle. Lord Walker went on to emphasise that a shift from the proprietary foundation was no 'open door' to information, and that historical restrictions on information remained. This appears from the following remarks:

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[27] [1920] AC 581, 626–7.
[28] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, [50].
[29] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, [51].
[30] See, eg, *Randall v Lubrano* (Unreported, Supreme Court of New South Wales, Holland J, 31 October 1975); *Spellson v George* (1987) 11 NSWLR 300, 315–17 (Powell J); *Murphy v Murphy* [1999] 1 WLR 282, 290 (Neuberger J).
[31] See *McPhail v Doulton* [1971] AC 424, 448–9 (Lord Wilberforce).

> However the recent cases also confirm … that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are *issues as to personal or commercial confidentiality*, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief. [32]

The difficulties raised by Lord Walker's statements, however, focus on the extent to which they have made the court's discretion the ultimate determinant of beneficiaries' access to trust information. If so, it is no longer correct to speak of a beneficiary's 'right' to that information. There is an ostensible shift from an application to the court to enforce an existing (proprietary) entitlement to documents to an application to the court in its discretion for an order requiring the disclosure of information.

This, in turn, raises the prospect that what had in the past been assumed to come within beneficiaries' rights to information may not be so. At the same time, the introduction of judicial discretion in granting the relevant remedy produces scope for the court to order trustees to disclose to beneficiaries, whether with or without conditions, information previously assumed to have been outside that to which beneficiaries were entitled. An example could be trustees' reasons for decisions as to appointment, which had at least since *Re Londonderry* been generally seen as beyond the province of the beneficiaries. Another example, which is discussed below in more detail, is information that the settlor has directed remain confidential. It may well be, then, that under this approach the need to distinguish 'trust documents' from other documents is reduced.

Yet judicial discretion, while utile in ostensibly securing justice in each individual case, has its price. Areas of law punctuated by judicial discretion are commonly those that witness the greatest litigation. The reason is not difficult to discern. Set rules, for their faults, foster predictability in judicial outcomes; broad discretion, even if 'judicially' exercised,[33] is far less less amenable to predictability. It is therefore unsurprising that litigation over access to trust information, where the

[32] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, [67] (emphasis added).

[33] To exercise a discretion judicially is inconsistent with its exercise in an arbitrary or capricious sense, and translates into a positive obligation to exercise it 'on fixed principles', 'according to rules of reason and justice, not according to private opinion … benevolence … or sympathy': *Williams v Lewer* [1974] 2 NSWLR 91, 95 (Rath J).

Schmidt discretion has been in issue, has reached the adjudicative stage in the United Kingdom, Australia and New Zealand.[34]

V ANTIPODEAN RESPONSES

Gzell J in *Avanes v Marshall*[35] certainly saw *Schmidt* as shifting the legal goalposts. His Honour noted that whereas the decision of the English Court of Appeal in *Re Londonderry's Settlement* proceeded on the basis that there is an entitlement to inspect trust documents subject to exceptions, under the reasoning in *Schmidt* 'there is no right to inspection of trust documents and it is for the court to decide whether inspection should be granted by balancing competing interests'.[36] The ultimate existence of judicial discretion did not, said his Honour, abrogate the trustee's duty to keep accounts or to grant a beneficiary access to them. On this view, there remains a duty, albeit one bookended not by a corresponding right but a judicial determination of what information should be disclosed.[37] Gzell J endorsed the *Schmidt* approach. The New Zealand High Court in *Foreman v Kingstone*[38] and, more recently, Hammerschlag J in *Silkman v Shakespeare Haney Securities Ltd*,[39] have done likewise. Interestingly, in each of these cases the outcome would have been the same had the *Londonderry* approach been applied.

At least from an Australian perspective, this seems an odd course of action. The leading Australian case, also from New South Wales, *Hartigan Nominees Pty Ltd v Rydge*,[40] evinced no quantum shift from *Londonderry* in its two majority judgments. To the contrary, Mahoney and Sheller JJA largely endorsed the principles espoused in *Londonderry*.[41] If indeed *Schmidt* is a departure from *Londonderry*, one would expect the New South Wales Court of Appeal to be the driver for change, at least in New South Wales. That *Schmidt* is not even binding in the United Kingdom, given that it was a Privy Council decision (emanating from the Isle of Man), makes it the more surprising that it should have enjoyed such an uncritical welcome in the Antipodes.

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34 Although a New South Wales judge has expressed the view, extrajudicially, 'explicit recognition that access to information is granted as an exercise of the inherent jurisdiction over trusts, and involves some discretionary judgments, involves [no] greater uncertainty than was recognised in previous decisions' (J C Campbell, 'Access by Trust Beneficiaries to Trustees' Documents, Information and Reasons' (2009) 3 *Journal of Equity* 97 at 146–7), the case law and arguments post-*Schmidt* suggest that this is not a widely held view.

35 (2007) 68 NSWLR 595.

36 *Avanes v Marshall* (2007) 68 NSWLR 595, [14].

37 Ibid [15].

38 [2004] 1 NZLR 841.

39 [2011] NSWSC 148, [27] (albeit '[a]bsent clear appellate guidance').

40 (1992) 29 NSWLR 405.

41 See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 434–5 (Mahoney JA), 442–5 (Sheller JA). Contra, 417–22 (Kirby P, dissenting on the confidentiality point).

It is curious to note, to this end, that the Board in *Schmidt*, immediately after its critical statement directed to the court's inherent jurisdiction, expressed 'general agreement' with the approach adopted in the judgments of Kirby P and Sheller JA in *Hartigan Nominees*.[42] The agreement here targeted their Honours' shift from a proprietary basis for access to information, but conveniently made no mention of the fact that the majority in *Hartigan* in no other way purported to interfere with a beneficiary's 'right' to information.[43]

Orthodoxy prevailed, however, when *Schmidt* was argued before Bryson AJ in *McDonald v Ellis*,[44] decided some six months after *Avanes*. At least so far as beneficiaries in non-discretionary trusts were concerned, his Honour considered that the majority judgments in *Hartigan Nominees* should be treated as authoritative by first instance New South Wales judges.[45] This Bryson AJ interpreted as meaning that a beneficiary is entitled to see trust documents and have information about trust property, which entitlement has a proprietary foundation. Any ostensible doctrinal hurdles to describing the rights of discretionary beneficiaries as proprietary in this context were insufficient, said his Honour, to justify the 'drastic solution' that access to trust documents should be relegated to the discretion of the court.[46]

In any event, existing New South Wales authority is against the proposition that discretionary beneficiaries have no entitlement to trust information.[47] And it may be added that any difficulties in distinguishing trust documents from non-trust documents are arguably less problematic in practice than those generated by opening the door to a wide judicial discretion. There certainly did not appear, before Gzell J's *ex tempore*

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[42] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, [52] and [53].

[43] Accordingly, it is difficult to concur with the suggestion that *Hartigan* is not inconsistent with *Schmidt*, in the sense that the disclosure of information is subject to the court's inherent jurisdiction (see Tsun Hang Tey, 'Trustee's Duty of Disclosure' (2012) 24 *Singapore Academy of Law Journal* 191, 200).

[44] (2007) 72 NSWLR 605.

[45] *McDonald v Ellis* (2007) 72 NSWLR 605, [46].

[46] Ibid [48]. Newnes J in *Murray v Screuder* (2009) 1 ASTLR 340, [57], in line with the remarks of Bryson AJ in *McDonald v Ellis*, refused to apply what was said in *Schmidt* to a non-discretionary trust. Though Newnes J's judgment was affirmed on appeal (*Schreuder v Murray (No 2)* (2009) 41 WAR 169), the Western Australian Court of Appeal found it unnecessary to decide this point. See also G Dawson, 'A Fork in the Road for Access to Trust Documents' (2009) 3 *Journal of Equity* 1 (who maintains that the reasoning in *McDonald v Ellis* 'is least likely to cause damage to equitable precedent in New South Wales while at the same time providing trustees and beneficiaries of fixed trusts with greater certainty as to their rights and obligations': at 13).

[47] See, eg, *Randall v Lubrano* (Unreported, Supreme Court of New South Wales, Holland J, 31 October 1975); *Spellson v George* (1987) 11 NSWLR 300, 315–17 (Powell J).

decision in *Avanes*, any intractable hurdles in determining the parameters of the beneficiaries' right to information.

VI IMPACT ON CONFIDENTIALITY OBLIGATIONS

Aside from the uncertainty inherent in the *Schmidt* 'discretionary' approach, and the attendant litigation it is likely to spawn, there is its potential to upset confidential arrangements established by the settlor (or a person at the settlor's direction).[48] The crucial issue in *Hartigan Nominees Pty Ltd v Rydge*[49] sets the scene. The issue was whether a beneficiary of a discretionary trust, who was the grandchild of its creator,[50] could compel its trustee to disclose a memorandum of wishes provided by the creator. A majority of the court (per Mahoney and Sheller JA, Kirby P dissenting) held that this document, which expressed the creator's wishes regarding the distribution of the trust estate, should not be disclosed because the creator had supplied it to the trustees on a confidential basis. That the creator did not disclose his wishes in, or in a document attached to, the trust instrument, but delivered a separate memorandum of wishes to the trustees, justified that inference. This meant, said Sheller JA, that the trustees obtained the contents of the memorandum in circumstances of confidence, which bound them not to disclose the contents to the respondent and to withhold the memorandum from him.[51] Mahoney JA emphasized the importance of confidence in the family environment:

> In a discretionary trust of this kind, the settlor has placed confidence in his trustee and has on that basis transferred property to him. It has, I think, been the purpose of the law to respect that trust. It depends upon confidence and confidentiality. The settlor seeks to have the trustee resolve, without unnecessary abrasion, the conflicting claims of persons in an area, the family, where disputes are apt to be bruising. In case of this kind, if a settlor's wishes cannot be dealt with in confidence, the purpose of the trust may be defeated. [52]

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[48] Omitted is a discussion of information the confidentiality of which derives other than from the direction of the settlor, such as confidential business information where the trust operates a business. In this event, the information is ordinarily within the beneficiaries' domain, although its confidentiality vis-à-vis third parties may dictate restrictions or controls on its disclosure: see, for example, *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, 499–500 (Doyle CJ).

[49] (1992) 29 NSWLR 405.

[50] The creator was not the settlor, but the trust was created at his instigation.

[51] *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 446.

[52] Ibid 436. Immediately before this observation, his Honour stated that '[s]pecial cases apart, it is proper that [the settlor's] wishes and his privacy be respected' at 436. However, no indication was supplied as to what 'special cases' might involve.

These remarks echoed those of Danckwerts LJ nearly 30 years earlier in *Re Londonderry's Settlement*,[53] also in the family environment, that trustees who are given discretionary trusts that involve a decision upon matters between beneficiaries are given 'a confidential role'. Although this observation formed the backdrop to the court's determination that trustees are not obliged to disclose to beneficiaries reasons for the exercise of their discretion as to appointment, it does highlight the value courts place on confidence vested by a settlor in his or her trustee(s). There was, tellingly, no indication in Lord Walker's speech in *Schmidt* of any intention to depart from the confidentiality that underscored the judgments in *Londonderry*.[54]

Hartigan is entirely consistent with the proprietary foundation for beneficiaries' access to trust information. The reason why the memorandum of wishes fell outside the beneficiaries' purview, and thus could not be accessed, was that it was not a trust document. It was not, accordingly, property of the trust (and thus the beneficiaries), but the property of the trustee.

The foregoing does not obviate the tension between the need for accountability in trustees for their decision-making and the need to preserve an obligation of confidentiality. The majority in *Hartigan Nominees* sided with the latter in the event of conflict, whereas the dissentient, Kirby P, sided with the former. His Honour saw the memorandum of wishes as a trust document, 'an essential component of, or companion to, the trust deed itself'.[55] And although accepting that accompanying disclosure of a confidential document of this kind could in some instances be 'hurt, embarrassment and general consternation', he opined that this must be balanced against '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'.[56]

Kirby P nonetheless conceded the possibility that a different outcome might follow had a settlor expressly asked the trustees to keep the memorandum of wishes secret. Accepting that his Honour expressed no firm conclusion to this end, it is nonetheless difficult to appreciate why inferred confidentiality should be treated any different to express

[53] [1965] Ch 918, 935–6.
[54] A point made by Briggs J in *Breakspear v Ackland* [2009] Ch 32, [40] and [41].
[55] *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 419.
[56] Ibid 420. See also *Foreman v Kingstone* [2004] 1 NZLR 841, [95] (Potter J) (who surmised that 'the denial of information may be the cause of friction or exacerbate friction, because lack of relevant and accurate information will frequently lead to conjecture, suspicion and resentment by those denied').

confidentiality. The law generally makes no such distinction. Perhaps what can be said is that the court can be more confident of the settlor's intention where it is manifested expressly than where reliance upon inference is necessary.

In any event, courts do not appear to have been too circumspect in making the said inference. The separation of the memorandum or wish letter from the trust instrument, in the context of distributions of property within the (extended) family unit, has proven sufficient for this purpose. In the subsequent decision in *Breakspear v Ackland*[57] Briggs J remarked that, as the defining characteristic of a 'wish letter' is that it contains material that the settlor desires that the trustees should take into account when exercising their discretionary powers, it is created for 'the sole purpose of serving and facilitating an inherently confidential process'. His Lordship saw it as 'axiomatic' that a document created for the sole or dominant purpose of being used 'in furtherance of an inherently confidential process is itself properly to be regarded as confidential, to substantially the same extent and effect as the process which it is intended to serve'.[58]

VII OVERRIDING CONFIDENTIALITY?

Emphasising the confidential nature of wish letters did not, however, lead Briggs J to cast upon them blanket protection from disclosure to beneficiaries. Instead his Lordship envisaged that even an express obligation of confidentiality imposed by the settlor upon the trustees could, pursuant to the curial discretion espoused in *Schmidt*, be relaxed or overridden entirely by court order.[59] On a broad reading of Lord Walker's speech, this indeed is open as an exercise of judicial discretion. But where Briggs J arguably went further than even a broad reading of *Schmidt* would allow was in accepting that trustees can, *sans* court approval, elect to disregard a confidentiality obligation imposed by the settlor. The essence of his Lordship's reasoning appears from the following extract:

> In the absence of special terms, the confidentiality in which a wish letter is enfolded is something given to the trustees for them to use, on a fiduciary basis, in accordance with their best judgment and as to the

[57] [2009] Ch 32, [58].
[58] *Breakspear v Ackland* [2009] Ch 32, [58].
[59] Ibid, [56]. On the facts his Lordship concluded that, once the trustees approached the court for sanction of a proposed scheme of distribution, that the contents of the wish letter would be relevant to the court's appraisal of the scheme and, 'in that special context, the risk of family division occasioned by disclosure would then clearly be outweighed by the requirement to give the claimants as potential beneficiaries a proper opportunity to address the court on the question of sanction, in full knowledge of the content of the materials to which the trustees will by then have paid careful regard', [98].

> interests of the beneficiaries and the sound administration of the trust. Once the settlor has completely constituted the trust, and sent his wish letter, *it seems to me that the preservation, judicious relaxation or abandonment of that confidence is a matter for the trustees or, in an appropriate case, for the court*.
>
> Although this may be a matter to be decided on another occasion, I am not persuaded that it is either appropriate or legitimate for a settlor to fetter the trustees' discretion in that respect, either by the inclusion of special terms as to confidentiality in the wish letter itself or, still less, on any subsequent occasion. In this regard I have not, with respect, been persuaded by what appears to have been the contrary view of the majority in the *Hartigan Nominees* case, or by the opinions of those others for whom it appears that the express imposition of an obligation of confidence makes all the difference. *Trustees are fiduciaries exclusively for their beneficiaries and should not in my opinion be asked to accept, nor should they without good cause accept, restraints upon their use of relevant information which would prevent disclosure even where, in their view, disclosure was preferable to the continued maintenance of confidence*.[60]

Unilateral trustee election to ignore confidentiality obligations counters accepted principle when it comes to the preservation of those obligations. A contracting party, for instance, cannot without committing a breach of contract digress from a confidentiality obligation assumed in the contract. Even without contractual protection of information, equity has long exercised a jurisdiction directed to protecting the confidentiality of information communicated in confidential circumstances. A trustee who undertakes to maintain confidential the terms of a wish letter should hardly be able to breach confidence because he or she considers it appropriate to do so. The public interest defence to a breach of confidence, even assuming it forms part of the Australian law,[61] seems difficult to maintain in this context.[62] That in the common case the settlor (or quasi-settlor) of the trust is likely to be deceased at the time when the confidentiality obligation is triggered suggests a more, not less, compelling ground to preserve his or her wishes. There is, moreover, a challenge in fashioning an appropriate remedy here for a breach of confidence.

Ultimately, the law assumes that settlors (or testators) are better positioned to make judgments as to the disposition of their estate than

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[60] *Breakspear v Ackland* [2009] Ch 32, [62], [63] (emphasis added).
[61] See Gino Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 201–5.
[62] Cf. *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 447 (Sheller JA) (who countenanced the possibility that 'some overriding public interest' could be a countervailing circumstance that calls for the disclosure of a document given to the trustees in confidence).

other persons and, in the testamentary context; freedom of testation is, at general law, sacrosanct. The same largely underscores freedom of disposition of property generally. Only if sanctioned by statutorily conferred jurisdiction or otherwise undermined by contrary public policy is there ordinarily any scope for a trustee to disregard the settlor's instructions. That the document in issue is a non-binding expression of the settlor's wishes does not render the confidentiality to which it is subject any less pressing. The obligation is confidentiality; the discretion usually relates to appointment.

An analogy derives from the law of secret trusts. From early times courts have recognised the legitimacy of the disposition of property outside the public terms of a will, in many instances established in this manner with the specific objective of maintaining the secrecy of the ultimate beneficiary. Granted that the analogy is not exact — the trustee is to hold property for one or more secret beneficiaries, as opposed to exercising a discretion in line with non-mandatory wishes — but the similarities so far as confidentiality is concerned are evident. No suggestion of the trustee unilaterally abrogating the secrecy can be found in the case law, nor of the court compelling the disclosure of the relevant secret.

The question then necessarily arises as to whether policy should dictate a different outcome where the settlor purports to *direct* trustees in the exercise of their discretion via an alleged confidential communication. One way of approaching this scenario is to brand such a communication as a *prima facie* trust document, and thus within the beneficiaries' domain.[63] Conversely, letters of wishes are not trust documents, it can be reasoned, because they impose no obligations on trustees or confer any entitlements on beneficiaries.[64] Alternatively, it may be seen as an illegitimate fetter on trustee discretion, and thus unenforceable for infringing public policy. The reality, however, is that a settlor will likely choose as trustees persons who can be trusted to follow his or her

[63] In *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 419 Kirby P viewed a non-mandatory confidential memorandum as a trust document. Mahoney JA (at 433) considered it possible to envisage documents communicated to a trustee that are property of the trust (and therefore trust documents) but are nonetheless confidential. Sheller JA (at 445) did not consider that such a document, leaving aside the issue of confidentiality, would necessarily fall outside the class of documents to which the beneficiaries would be entitled.

[64] Jessica Palmer, 'Theories of the Trust and What They Might Mean for Beneficiary Rights to Information' [2010] *New Zealand Law Review* 54, 560. Also, in falling outside the trust document, wish letters are, as a result of the High Court's decision in *Byrnes v Kendle* (2011) 243 CLR 253, arguably not admissible as a vehicle to interpret its terms. But the judgments in *Byrnes* say nothing explicit about beneficiaries' access to extrinsic documents such as wish letters, or as to the legitimacy or otherwise of trustees being informed by extrinsic documents, as part of their overall discretion, in making appointments of trust income or corpus.

instructions. The distinction in practice, therefore, between a non-mandatory wish letter and a direction may be more of form than substance.

Preferring confidentiality ahead of accountability — which better seems to accord with legal principle — is not without its challenges. For instance, if a wish letter is to remain confidential, and is cited as a ground to refuse a beneficiary a (further) distribution from the trust, it leaves that beneficiary with no means of ascertaining whether the trustees have in fact acted in line with the settlor's wishes. Nor will the court necessarily be positioned to make this assessment, as the court may (as in *Hartigan Nominees*) not be privy to the contents of the wish letter (although this is without prejudice to the court requesting to view the letter).

Yet at the same time this outcome is hardly unheralded. The *Londonderry* ruling, on this point endorsed in *Hartigan Nominees*, made it clear that trustees are not obliged to disclose to beneficiaries reasons for their discretionary decisions to make, or not make, an appointment of trust income or capital. And it is established that courts will not review the exercise of trustee discretion absent evidence of bad faith or a lack of real and genuine consideration.[65] The position of beneficiaries thus differs little whether or not a wish letter informs trustee discretion. The point is of especial significance in the wish letter context because those who seek to view those letters commonly seek thereby to discover reasons why they have been excluded from benefit. It is also of significance because, in the event that a confidential wish letter is supplied, the curial reticence to review the exercise of trustee discretion has a further justification: the confidentiality imposed.

VIII CONCLUSION

Whilst the law as it stood immediately post-*Hartigan Nominees* may not have been a paragon of clarity, and left the parameters of beneficiaries' access to trust information somewhat blurred, it was not so deficient as to call for judicial revolution. Though there were some cases testing the boundaries of the law as stated in *Hartigan Nominees*, these were at the margins, not at the core of the relevant principles.

Yet Lord Walker's speech in *Schmidt*, should it receive broad(er) endorsement in Australia, has the potential to create (far) greater uncertainty. It is curious that, stemming from a jurisdiction that has withstood the Australian push towards remedies over property grounded

[65] *Karger v Paul* [1984] VR 161.

in unconscionable conduct, for fear of creating uncertainty,[66] is a judgment — *Schmidt* — that purports to shift the focus from proprietary rights to documents to judicial discretion as the starting point. Unless the parameters of this discretion are clearly established, this represents what appears an open invitation for beneficiaries to litigate to secure access to information, and for trustees to defend the claims. Areas of law where relief is grounded in broad judicial discretion are, after all, frequent candidates for ongoing litigation, especially where it involves a contest over a fund and there is a belief, often inaccurate, that costs may be met from the fund. To this end, suggestions that *Schmidt* improves the current law via its introduction of greater flexibility[67] arguably underplay its drawbacks. The same may be said of suggestions that the *Schmidt* approach heralds no more than an incremental shift.[68]

If, moreover, its upshot and development in *Breakspear* is to carry favour in Australia, there is the prospect that obligations of confidentiality imposed on and undertaken by trustees could, in some instances, be sacrificed, most likely at the altar of the most demanding beneficiaries. If so, the need for certainty and predictability may well call, as suggested by a New Zealand commentator, for a statutory catalogue of the scope of trustee obligations and beneficiary entitlements in this context.[69]

Ultimately, *Schmidt* and its progeny illustrate the notion that the further one moves away from concepts grounded in property rights to those grounded in personal claims, the greater the instability underscoring the consequent duties, entitlements and remedies. It is indeed questionable whether this is a desirable outcome.

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[66] This is exemplified by English courts' refusal to countenance the remedial constructive trust grounded in unconscionable conduct, and instead resort to presumptions as to common intention: see, eg, *Stack v Dowden* [2007] 2 AC 432.

[67] See, eg, Tsun Hang Tey, 'Trustee's Duty of Disclosure' (2012) 24 *Singapore Academy of Law Journal* 191, 222.

[68] See, eg, Thomas Kaldor, 'Competing Approaches to Beneficiary Access to Trust Information: Perhaps not so much of "a fork in the road"' (2012) 86 *Australian Law Journal* 775.

[69] See Jessica Palmer, 'Theories of the Trust and What They Might Mean for Beneficiary Rights to Information' [2010] *New Zealand Law Review* 541, 563–4. The Queensland Law Reform Commission has initiated this very inquiry in the course of its current review of the Trusts Act 1973 (Qld): see Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld)*, Discussion Paper, WP No 70 (2012) 215–35. Existing provision in the trustee legislation in South Australia as to trustee record-keeping (see *Trustee Act 1936* (SA) s 84B) and in Tasmania entitling 'any person beneficially interested in any property' to apply in writing for trust accounts (see *Trustee Act 1898* (Tas) s 28(1)) do not comprehensively address the issues raised in this article.