

# Lawyer Issue



# The Bahamas – Protecting the Confidentiality of Trusts

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Section 83 of the Trustee Act is an enactment unique to the Bahamian jurisdiction which attempts to codify the rights and obligations of trustees in relation to disclosure. The disclosure of trust information by trustees has been the subject of judicial debate for centuries; and as trusts have developed so too has the jurisprudence on the rights of beneficiaries and third parties to trust information and documentation. Recently, the trust has come under intense scrutiny from regulators and tax agencies alike, so the clarity Section 83 provides not only assists the appointed trustee and designated beneficiaries, but provides comfort to settlors who wish to keep their wishes private and desire to shield his/her trustee from unwanted interference.

Subsections (1) and (2) simply require the trustee to take reasonable steps to inform a beneficiary with a vested interest under the trust of its

existence and general nature of their interest or in the event there is no beneficiary with a vested interest, a person who is capable of enforcing the trust and the general nature of the interest entitling him/her to enforce. This formalizes the long settled duty of a trustee to notify the objects of the trust of its existence, first discussed in Lloyd v Attwood (1859) 3 De G. & J. 614 at 649. The subsections clearly limit the notification to the existence of the trust and the general nature of that interest, which settles any doubt as to the scope of the duty to notify.

However, the trustee may escape the aforesaid duty of notification in the event it deems, in its absolute discretion, that such notification would not be in the best interest of the beneficiary(s). Obviously the exercise of this discretion would need to be exercised properly and in accordance with the fiduciary obligation the trustee owes the beneficiaries under the settlement.

Subsection (3) expressly prohibits disclosure of the existence of the trust to (a) any beneficiaries who are interested only contingently; (b) any persons who are only objects of discretionary powers; or (c) any other persons who are not entitled to vested interests under the trust. This does not prohibit disclosure to the class of persons aforesaid if it is necessary or convenient in connection with distributions or in the interest of the trust as a whole. The trustee retains the absolute discretion to disclose the existence of the trust in subsection (4); but the decision to make such disclosures should be made thoughtfully.

Subsection (5) deals specifically with the disclosure of the trust instrument, financial statements of the trust and all financial statements of companies wholly owned by the trustees of the trust. This is helpful as there has been both judicial and academic discussion as to the scope of the term 'trust documents'. With the burgeoning use of trusts for increasingly diverse purposes, so too has the type of documents attributed to trusts and their management.

The disclosure of trust documentation to beneficiaries often causes trustees angst, as they must balance their duty to protect the confidentiality of trust information against the interests of the beneficiary and their desire to be informed. While beneficiaries who hold a vested interest in the trust are entitled to trust documents, all other persons are specifically excluded from access unless the trustee deems disclosure necessary for the proper administration of the trust and is for the trusts overall benefit. In the event a trustee wishes to disclose documentation, it must consider any request from a beneficiary which has requested confidentiality and determine if confidentiality is in the best interest of other beneficiaries.

Notwithstanding the trustee's ability to disclose trust documents to vested beneficiaries, subsection (8) prohibits the production of (i) any document revealing the wishes of the

settlor; (ii) documents relating to the exercise of any discretion of the trustee; or (iii) any documents disclosing deliberations or reasons for the exercise of the trustee's discretion. This prohibition extends to any process of discovery or inspection within litigation. One can understand Parliament's sacrosanct treatment of a trustee's exercise of its discretion but the provision severely limits the ability of a beneficiary trying to sustain a claim against a trustee for the wrongful exercise of a its discretion.

Section 83 clarifies the common law principle established in In re Londonberry's Trusts: Peat v. Walsh [1965] Ch. 918 which recognizes a beneficiaries' entitlement to access trust documents, save for information or documents evidencing the deliberations of trustees when exercising his/her discretionary powers. The Act sets clear parameters as to the scope of the disclosures, the class of persons entitled to disclosure and the type of documents which are accessible.

While the trust instrument can always prescribe additional entitlements of disclosure upon a beneficiary(s), the enactment of Section 83 displays a Parliamentary intention to protect trustees from unwarranted disclosures, preserve the sanctity of the trustee's discretion and to afford privacy to the settlor's wishes. Although the Trustee Act was enacted in 1998, section 83 has remained largely untested in the Bahamian Courts. There are no published Bahamian cases which consider the ambit of section 83.

Recently, the English High Court considered the extent of Section 83 in the case of Dawson Damer & Others v. Taylor Wessing [2015] EWHC 2366 (Ch). Here, the beneficiaries of a Bahamian trust sought the disclosure of legal advice provided to the trustee by its English solicitors. Judge Behrens found that the Bahamian Trustee Act differed from the English common law rules and the beneficiaries were not entitled to information that the Trustee was not required to disclose

under Section 83. He concluded:

“I have great difficulty in following the concept that the principles of disclosure in relation to trustees and beneficiaries can in some way be separated from legal professional privilege...If and in so far as the exception in paragraph 10 of Schedule 7 is restricted to the English law of disclosure and if and in so far as the documents discoverable under English law are more extensive than those under Bahamian law it does not seem to me a proper use of the 1998 Act to enable the Claimants to obtain documents that they could not obtain in the Bahamian proceedings.”

Judge Behrens’ decision is currently under appeal in England, but his affirmation of the protection

afforded to trustees under section 83 and his comparison to the English common law position is noteworthy.

Historically principles of disclosure by trustees were established by the common law. The clarification provided by Section 83 is sure to be challenged in the near future but there is little doubt that its enactment provides the settlor and trustee with a higher level of confidentiality and protection. Its exclusivity to the Bahamian jurisdiction continues to provide the Bahamas with an advantage over other jurisdictions as to the level of protection afforded to trustees of Bahamian trusts.



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