



WEEKLY TAX BULLETIN

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Avoiding disclosure of trust assets – details matter

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One of the key trust related areas that continues to be subject to court attention is the ability of beneficiaries to access the records of a discretionary trust.

Trust documents

Broadly, the case law appears to make distinctions between the various types of trust documents, namely:

- accounts and records (eg the trust deed and any variations) of the trust;
- confidential information (such as agreements between trustees and third parties); and
- private records and advice given to trustees in exercising their duties.

Generally, potential beneficiaries of a trust will only have access to the accounts and records of the trust.

For example, in the recent decision of *Wang v Cai* [2021] NSWSC 1162, where beneficiaries had serious concerns as to the maladministration of the relevant trusts, the court largely rejected initial requests for information that were held to be "extraordinarily broad in scope". This was despite the fact that the Court accepted that in due course, much of the information requested might ultimately be provided on discovery during legal proceedings.

It is important to note that the definition of what amounts to trust "records" can be very wide, as set out in the (in)famous decision in *Hancock v Rinehart (Trust documents)* [2018] NSWSC 1684, although critically this case involved an outgoing trustee, as opposed to beneficiaries wanting access to trust records.

Rules for access

Jordan v Goldspring [2021] NSWSC 7 is another relevant recent decision, which in summary confirmed the following.

- There are 2 streams of authority concerning the entitlement of a discretionary object to access documents of a trust. One view is that beneficiaries have the right automatically, and another that suggests it is the court that has the right to grant access in its discretion.
- The preferred approach appears to be that the court has the power to grant access, in its discretion.

- Before granting access however, a court must be satisfied that those seeking access are in fact beneficiaries or discretionary objects, or within a class of beneficiaries or discretionary objects, or persons interested in the property subject to a trust. That is, a mere stranger to a trust cannot assert an entitlement, in equity, to inspect or obtain the documents of the trust.
- Only a court can force a trustee to disclose trust documents to a beneficiary seeking access. Before doing so, a court must however be satisfied that the documents requested are in fact required by the beneficiary to help ensure the proper supervision and administration of the trust.

Smorgon case

In a further recent decision involving the well-known Smorgon family, namely, *Smorgon v ES Group Operations Pty Ltd & Ors* [2021] VSC 608, more context has been given as to the approach of the court in this area.

Broadly, the factual matrix involved a family member, who was not a primary beneficiary of most trusts in the group, seeking access to a vast array of information of many trusts.

The trustee resisted disclosure of the documents sought for a number of reasons, including that the documentation would:

- reveal further commercially sensitive and confidential information;
- be difficult, time-consuming and expensive to collate; and
- be oppressive.

Terms of trust deed

The position in relation to any disclosure is always subject to the conduct of the parties and can be impacted on by the terms of the trust instrument - another reminder of the "read the deed" mantra often featured in this *Bulletin*.

Here, most of the relevant trust deeds contained a specific clause restricting disclosure to a beneficiary, as follows:

"Restriction on disclosure of documents

In addition to any right of the Trustee under general law to refuse disclosure of a document, the Trustee cannot be required to disclose to a beneficiary or to any other person:

1. *a document which discloses deliberations of the Trustee about the way in which the Trustee exercises any discretion, power or authority or discloses the reasons for exercise of a discretion, power or authority in a particular way or discloses the material on which the reasons are or might have been based; or*
2. *any other document relating to the exercise or proposed exercise by the Trustee of a discretion, power or authority given by this Deed or under law."*

Decision

In relation to most of the trusts in question, the aggrieved family member was not a "close beneficiary" – ie, they were not "someone who (could) be expected to either receive distributions from the trust or, at the least, to be a strong candidate to do so".

Instead, the settlor had taken the deliberate course upon the establishment of each trust of naming the aggrieved party to ensure that they would be no more than a "General Beneficiary" – a class whose breadth

extended to enormous lengths. This remote connection was reinforced by the fact that the relevant beneficiary had never received distributions or any information concerning the trusts.

Furthermore, the demand for access extended to every document that had come into existence pursuant to the affairs of each of the trusts for the previous 7 years. The application for access was said to be driven by a desire to "know how the trust money is invested and administered" and to "demonstrate how the assets of the trust are invested, including the assets and liabilities of the trusts and documents which support the investments and the liabilities".

In denying disclosure, the Court confirmed that it is important to have regard to the essential nature of discretionary trusts. That is, a discretionary trust is not a mere commercial document in which the public may have an interest. Rather it is a private transaction, a disposition by the settlor of their own property, ordinarily voluntarily, in the manner which they are entitled to choose. Special cases (eg where there is evidence of trustee mismanagement) apart, it is proper that these wishes and privacy be respected.

Conclusion

The crafting of discretionary trust deeds, and the methodical reading of those deeds, is critical for a range of tax planning issues.

Similarly, there are key issues that will turn on the drafting of a trust deed in relation to disclosure requirements to potential beneficiaries.

Thus, in *Smorgon*, in relation to 2 further trusts where the relevant beneficiary was in fact essentially a "primary beneficiary" – and there were no clauses in the trust deed restricting disclosure – disclosure of the trust deeds, profit and loss statements and balance sheets was granted by the Court.

This disclosure was however subject to the beneficiary entering into suitable confidentiality arrangements (whether by deed or by undertakings to the court) ensuring the beneficiary would not disclose the contents (save to legal and accounting advisers or as otherwise required by law). The disclosure was also subject to the trustee of each of the trusts having an opportunity to redact the names of any beneficiaries shown to have received distributions or to hold unpaid present entitlements.