

Supreme Court evaluates scope of trustees' protection in contentious trust litigation

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Discovery applications in contentious trust litigation in the Bahamas can be made by beneficiaries. In a decision handed down earlier in 2018 (*Dawson-Damer v Grampian Trust Company Ltd* (2015/CLE/gen/0034)), the Supreme Court assessed the protection afforded to trustees by virtue of Section 83 of the Trustee Act 1998,⁽¹⁾ which provides that a trustee cannot be bound or compelled by way of discovery to disclose information and documents about a trust.

Background

Section 83 provides as follows:

(8) Notwithstanding anything to the contrary in this section, trustees shall not be bound or compelled by any process of discovery or inspection or under any equitable rule or principle to disclose or produce to any beneficiary or other person any of the following documents, that is to say –

(a) any memorandum or letter of wishes issued by the settlor or any other person to the trustees, or any other document recording any wishes of the settlor;

(b) any document disclosing any deliberations of the trustees as to the manner in which the trustees should exercise any discretion of theirs or disclosing the reasons for any particular exercise of any such discretion or the material upon which such reasons were or might have been based; or

(c) any other document relating to the exercise or proposed exercise of any discretion of the trustees (including legal advice obtained by them in connection with the exercise by them of any discretion)...

*(10) No such prohibition or restriction, and nothing in this section, shall prejudice the validity of any trusts or the entitlement of any beneficiaries who have in any manner become aware of any trusts to obtain orders of the Court for administration or accounts, or for the execution of the trusts, or any other order of the Court **not being** an order for the discovery, inspection, disclosure or production of such documents as are described in subsection (8), or for any information or disclosure which by subsection (2), (3), (5)(a) or (7) trustees are under no legal obligation to make. (Emphasis added.)*

Facts

In *Dawson-Damer* a trustee had used Section 83(8) as a basis to refuse a disclosure request.

The applicant's counsel argued that:

- the section could not be invoked to protect the trustee from any wrongdoing or alleged breach of fiduciary duties;
- the section could not exonerate trustees from liability; and
- the power to disclose or provide full disclosure is a fiduciary power and a trustee must supervise its use.

It was also claimed that relying on Section 83(8), if it is found to apply to hostile litigation, was impermissible where it infringes the 'equality of arms' principle enshrined in the constitutional right to a fair hearing (Article 20 of the Constitution). Therefore, this would be unconstitutional if Section 83(8) were to provide otherwise, and preserve the court's inherent jurisdiction.

Decision

In his ruling, Justice Winder analysed the history of Section 83(8). When the section was introduced in 1998, it derived from the beneficiary's proprietary right to obtain documents as set out in the trust cases leading up to *Re Londonderry's Settlement* ([1965] Ch 918).

Schmidt v Rosewood Trust (2003/AC/709) later held that disclosure was a matter for the court's discretion as part of its supervisory jurisdiction over trusts. The case was followed by *Breakspear v Ackland* ([2009] Ch 32). The court considered Justice Hayton's interpretation of the section referred to in Paragraph 9.51 of *The International Trust* with reference to Section 83(8) of the Trustee Act, holding that:

Indeed it is arguable that the Act does not remove the Court's inherent jurisdiction to order trustees to disclose information to those interested in the trust, including those without vested interests... For example, it is suggested that a Court would be very reluctant to sit back and accept that it was powerless to intervene in a case where the beneficiaries could show that the trustees were administering the trust wholly improperly and wanted to find out more... They must show a good reason for wanted the information such as a reasonable suspicion that the trust is not being administered properly.

However, in *Dawson-Damer* there were neither allegations of fraud by the trustee nor any evidence or allegations of bad faith. The applicant's case was built primarily on the allegation of a breach of duty (ie, the trustee had failed to consider the applicant's needs).

Winder held that:

On my interpretation, I would read 'trustee' to mean a trustee acting bona fide or not fraudulently. I cannot accept that any prima facie case of breach of trust exposes all of the confidential material in the hands of the trustee to be disclosed when the purpose of Section 83(8) is clearly to restrict disclosure. It seems to me that wrongdoing, for which Section 83(8) protection will not be maintained, must rise to the level of fraud and/or mala fides. Mala fides in the sense of dishonest of belief or purpose. (Paragraph 39.)

Therefore, in appropriate circumstances, the court's power to order disclosure pursuant to Order 24 Rule 3(1) of the Rules of the Supreme Court survives. **(2)** Alternatively, if an applicant can demonstrate fraud or bad faith on the part of the trustee in the exercise of its duties, an application may be moved for specific disclosure despite Section 83(8). The court determined that any argument that Section 83(8) could shield trustees' activities, even in the face of wrongdoing, would be untenable.

The applicant argued that since she had been given a legal opinion, this waived all of the documents referred and relative to that legal opinion. The argument was denied.

The court decided that discovery is not an essential element of a fair trial and that Article 20(8) is not contravened if Section 83(8) bars all disclosure of the material listed in the section because:

the intention of Parliament, in enacting Section 83(8) was the removal of the ability for litigants to commence an action and compel disclosure as part of the discovery process

rather than a complete ouster of the jurisdiction of the Court to order disclosure.

As the allegation concerned a failure to consider the applicant, the court was unsatisfied that a *prima facie* case of breach of duty was sufficient to undermine the protection afforded under Section 83(8).

Parliament's sole intention was to confer on the trustees the right to withhold documents and nothing more. Certain information could be disclosable because the duty to consider is a duty to inquire and ascertain. Winder held that, as it related to specific requests by the applicant, the trustee ought to disclose what was considered because it related to claims which the applicant had sought to challenge before making the appointments.

The trustee was also ordered to provide particulars of considerations that affected its decision making, including facts and matters – allegedly considered by another trustee and another Bahamian company – which it had supposedly relied on.

The court determined that the request requiring the trustee to state particulars of the occasions where it had pleaded that it had considered the applicant was permissible, but the response should be restricted to occasions relating to the appointments referred to in the action.

The court held that information relating to the applicant's request for documents should be disclosed – specifically, an opinion that had been provided to the applicant (but not the original of the final copy) and the documents which formed part of the instructions to form the advice. The court asked to inspect the opinion and instructions to determine whether any other documents related to the material already disclosed, as it would be unfair to withhold these under the doctrine of waiver.

Disclosures which went beyond what was pleaded in the requests and amounted to soliciting evidence were refused. The documents(3) covered by Section 83(8) could not to be disclosed because:

- there was no allegation of wrongdoing so as to elude the statutory protection afforded to trustees; and
- the doctrine of waiver did not apply in that context.

Comment

Where trust proceedings involve claims of impropriety against a trust, Section 83(8) cannot be relied on to provide protection to a trustee. Further, disclosure should be ordered only in relation to certain documents. A breach of duty will not suffice to defeat the protection afforded by Section 83(8).

In the absence of fraud or bad faith, such circumstances need not warrant court intervention to disclose the trustee's confidential material. However, in appropriate limited cases, the court's power to order disclosure pursuant to Order 24 Rule 3(1) of the Rules of the Supreme Court survives despite any literal construction to Section 83(8) to the contrary.

If an applicant can demonstrate fraud or bad faith on the part of a trustee in the exercise of its duties, an application may be moved for specific disclosure despite Section 83(8).

For further information on this topic please contact [Sophia Rolle-Kapousouzoglou](mailto:srolle@lennoxpaton.com) at Lennox Paton by telephone (+1 242 502 5000) or email (srolle@lennoxpaton.com). The Lennox Paton website can be accessed at www.lennoxpaton.com.

Endnotes

(1) Section 83 was amended by the Trustee (Amendment) Act of 2011. The phrase "trustees shall not be bound" was replaced with "no person shall be bound", thereby extending the scope of individuals to whom the section applies. The new Section 83(11) states that: "This section shall apply if and so far only as a contrary intention is not expressed in the trust instrument and shall have effect subject to the terms of that instrument."

(2) The rule which provides for an order for discovery states that:

3. (1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit.

(3) The documents covered by Section 83(8) include:

(a) any memorandum or letter of wishes issued by the settlor or any other person to the trustees, or any other document recording any wishes of the settlor; (b) any document disclosing any deliberations of the trustees as to the manner in which the trustees should exercise any discretion of theirs or disclosing the reasons for any particular exercise of any such discretion or the material upon which such reasons were or might have been based; or (c) any other document relating to the exercise or proposed exercise of any discretion of the trustees (including legal advice obtained by them in connection with the exercise by them of any discretion).

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AUTHOR

**Sophia Rolle-
Kapousouzoglou**

