



# The Strength of Beneficiaries' Rights Under English Law and the Laws of the Caribbean States

The Honourable Mr Justice David Hayton,  
Judge of the Caribbean Court of Justice

**A Transcontinental Trust Conference in Geneva**

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**Remarks**

**By**

**The Honourable Mr Justice David Hayton, Judge of the Caribbean Court of Justice,**

**On the occasion of**

**The Transcontinental Trust Conference in Geneva**

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*The general background as to beneficiaries' rights*

As Millett LJ (as he then was) stated<sup>1</sup>, “There is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.” In recent years, however, many settlors have increasingly wished to diminish their beneficiaries’ rights so far as possible. Draftspersons have accommodated these wishes to the extent that they consider possible and many Caribbean States have responded by enacting legislation making clear how far it is possible to diminish beneficiaries’ rights.

Indeed, the Cayman Islands went so far as to enact Special Trust Alternative Regime legislation to create special trusts known as STAR trusts where what would normally be the beneficiaries’ rights against the trustees are held only by an enforcer or enforcers appointed pursuant to the terms of the trust or by order of the court. Thus, a so-called beneficiary only has rights if he or she has been appointed an enforcer. The legislation specifically states<sup>2</sup>, “A beneficiary of a special trust does

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<sup>1</sup> *Armitage v Nurse* [1998] Ch 241 at 253; further see D J Hayton ‘The Irreducible Core Content of Trusteeship’ in T Oakley (ed), *Trends in Contemporary Trust Law*, Oxford Clarendon Press 1996.

<sup>2</sup> S 100(1) in Cayman Trusts Law Part VIII Special Trust - Alternative Regime. For uses of such trusts see A Duckworth, ‘STAR trusts’ in (2013) 19 *Trusts & Trustees* 215 (Oxford University Press).

not, as such, have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property.”

Leaving aside purpose trusts enforceable only by persons appointed as enforcers, who alone have enforceable rights, beneficiaries’ rights are primarily personal rights within the law of obligations. These rights are to have the trustee distribute income and capital only as provided for in the terms of the trust and to have the trustee manage the trust fund with due care within duly authorised investment parameters. Thus trustees can be required to pay compensation for breach of trust, for example where they have distributed trust property to a person who is not a beneficiary authorised to receive such property or have invested in an asset that is not an authorised investment or have negligently failed to invest the trust fund with the standard of care expected of trustees. This compensation will augment the value of the trust fund, whether in the hands of replacement trustees or forgiven wrongdoing trustees.

Beneficiaries, however, also have proprietary rights, so that these rights will extend to property substituted for trust property as where a trustee purported to purchase property for his private patrimony but used trust money instead of his own to make the purchase. These rights can also extend to property that was transferred in breach of trust to a person who was not a beneficiary but a stranger to the trust, though someone familiar to the trustee eg a relative or a company owned by the trustee. The two advantages of beneficiaries having a proprietary interest in such property owned by the trustee or a stranger are that the property is not available for creditors of the trustee or stranger and that increases in the value of the property benefit the beneficiaries.

This proprietary interest binds the property and property substituted from time to time for it until the property or its traceable substitutions come to be owned by a bona fide purchaser without actual or constructive notice of the trust. A person has constructive notice of a trust where he would have

had knowledge of it if he had made those inquiries and inspections that an honest and reasonable person would have made in all the circumstances.

If a third party no longer has the trust property or its traceable product no proprietary remedy can exist against him, but he may still be liable to pay compensation if he dishonestly dealt with the property. He will be dishonest if he suspected that the property might well be trust property but dealt with it as his own property because he deliberately or recklessly failed to make the inquiries which an honest person would make to check whether it was trust property. Similarly, a person who never received trust property but who dishonestly assisted in a breach of trust is personally liable to pay compensation to the same extent as the wrongdoing trustee whom he assisted.

Underlying the trust obligation is the inherent jurisdiction of the court to supervise and, if need be, to intervene in the administration of a trust<sup>3</sup>. This jurisdiction can be invoked so as to obtain disclosure of information so as to enforce the beneficiaries' core right to bring the trustees to account for their distributive and managerial roles as trustees and to help discretionary beneficiaries to make a persuasive case to the trustees for a discretionary distribution<sup>4</sup>. Initially, the beneficiaries need to know that they are beneficiaries. Thus, beneficiaries of full capacity have a right to be informed that they are beneficiaries so that they can invoke the court's supervisory jurisdiction unless, as in the case of a broad flexible discretionary trust, they are peripheral objects of powers not having a realistic prospect of actually benefiting under the trust. In the case of beneficiaries who are minors and mental patients it seems that the persons legally responsible for their care need to be informed by the trustees so that the trustees themselves can be put into a

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<sup>3</sup> *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 309.

<sup>4</sup> Indeed, if a discretionary beneficiary does not know who the trustee is, as where a settlor has exercised his power to change the trustee from T1 to T2 and then T3, the court can order the settlor to disclose T3's details to the beneficiary: *Murphy v Murphy* [1998] 3 All ER 1. The court may also order documents relating to the exercise of a settlor's fiduciary powers to be disclosed to the beneficiaries: *In the Matter of the HHH Trust* [2012] Jersey R C 127B, 28 June 2012.

position to be able responsibly to consider whether or not to exercise their powers to benefit such beneficiaries.

Trustees are then obliged to disclose the following information at the expense of requesting beneficiaries<sup>5</sup>.

- i The trust document, documents of appointment, retirement and removal of trustees (or protectors) and documents exercising powers of appointment in favour of beneficiaries or powers to add or subtract persons from the class of beneficiaries.
- ii Trust accounts.
- iii Trust fund investment details and persons occupying trust property, plus formal documents eg mortgage deeds, leases.
- iv Details of dealings with the trust fund, whether changing investments or making distributions to beneficiaries.
- v Legal advice and instructions to lawyers as to the trustees' duties and the meaning of the terms of the trust unless relating to the personal protection of the trustees against hostile litigation from beneficiaries.

To provide trustees with the necessary confidential leeway to perform their discretionary functions properly, trustees are not obliged to disclose an excepted class of documents:

- i the agenda and minutes of trustees' meetings;
- ii reasons for their decisions or a settlor's letter of wishes;

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<sup>5</sup> See E Campbell & J Hilliard, 'Disclosure of Information by Trustees', Chap 9, D Hayton (ed) *International Trust Laws* 3<sup>rd</sup> ed 2011, Jordans, Bristol.

iii letters between the trustees themselves or with other persons holding powers under the trust;

iv letters between the trustees (or other power holders) and the beneficiaries.

*The key contexts in which to assess the strength of rights*

### **Fixed trusts**

Most family trusts are no longer fixed trusts where property is held on trust by T for A for life, then for B absolutely. Here A must receive the income and so discover that he is a beneficiary, while B must be informed that he will be entitled to capital on A's death. B can then monitor whether or not T is unfairly exercising his investment powers so as to favour A, interested in as high an income as possible even though this puts the capital at risk. In this simple form of trust A will be personally entitled to receive the compensation for any loss of income caused by a breach of trust. Moreover, because A and B between them are absolutely entitled to the trust property they are entitled to have T transfer the trust property to themselves or their nominees as they jointly direct. This entitlement exists for any group of beneficiaries who are of full capacity and between themselves absolutely beneficially entitled to all the trust property, even if this may frustrate the settlor's purposes. Thus, some Caribbean jurisdictions have enacted legislation to oust this right in trusts for beneficiaries<sup>6</sup> or to allow non-charitable purpose trusts<sup>7</sup> to be created to fulfil a settlor's purposes.

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<sup>6</sup> Bahamas' Trustee Act 1998 s 87

<sup>7</sup> Eg Anguilla, British Virgin islands, Barbados, Bahamas, Bermuda, Cayman Islands, St Vincent, Nevis, St Lucia.

### **Discretionary trusts of a regular nature**

Discretionary trusts are very common indeed. Beneficiaries under such trusts can fall into three categories. They may be objects of a trust power of appointment or of a fiduciary mere power of appointment or of a non-fiduciary personal power of appointment.

An example indicating the differences between these three categories is where trustees hold property on trust for 125 years to distribute the income between such of the descendants of X as they may see fit, but the trustees have power, instead, to pay income within three months of receipt to such of the descendants of Y as they may see fit, while the settlor, and after his death his widow, may appoint income within three months of receipt by the trustees and capital at any time to such of the descendants of Z as they may see fit.

The trustees must pay income to such of X's descendants as they choose to the extent that they do not decide within three months, instead, to pay income to Y's descendants and to the extent that the settlor does not decide within the three months to pay it to such of the descendants of Z as he chooses. X's descendants are in the strongest position as one or more of them *must* receive the income unless the trustees or the settlor exercise their powers within three months of the trustees' receipt of the income. The descendants of X and Y have the right to have the trustees consider from time to time in a responsible manner whether to benefit them and, if so, to what extent, with the needs of X's descendants being considered more significant than those of Y's descendants. The hopes of benefiting of X's descendants are thus stronger than those of Y's descendants. The descendants of Z are in the weakest position because the settlor (or his widow) owes no duties whatsoever to them, being able to ignore them completely or to benefit some and ignore others in spiteful irresponsible fashion.

Often, there will be a duty to accumulate and not distribute the income eg for the 125 year trust period, but the trustees will have a discretionary power within that period to distribute the income or the capital from time to time to such persons falling within the class of “Beneficiaries” as the trustees may decide in their absolute discretion. The Beneficiaries in a family or dynastic discretionary trust will straightforwardly be the settlor’s descendants and their spouses or cohabiting parties of the same or the opposite sex. The settlor will give the trustees a letter of wishes as to his expectations and the purposes for which he expects the trustees to exercise their discretionary powers. This letter will normally state that it is not legally binding. It does, however, have legal significance because it contains crucial matters that the trustees need to take into account, though they can then decide not to follow particular wishes in all the circumstances which, of course, may change significantly over a lengthy trust period. The settlor may decide that the letter should not be expressed to be confidential not to be disclosed to any beneficiaries, but should, instead, be free to be disclosed or not disclosed as the trustees see fit. He may even give a copy of the letter to his adult children.

Unless special terms are inserted in the trust instrument, the Beneficiaries who are the objects of the trustee’s discretionary powers will, as indicated above, have plenty of rights to see nonexcepted documents relating to the trustees’ functions and to seek further clarifying information, so that they can discover whether there are grounds for suing the trustees in respect of a breach of trust.

These rights, however, are not absolute. In *Schmidt v Rosewood Trust Ltd*<sup>8</sup> it was held that the rights are simply an aspect of the inherent jurisdiction of the court to supervise and, if need be, intervene in the administration of a trust. The court must first satisfy itself that the claimant has

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<sup>8</sup> [2003] UKPC 26, [2003] 2 AC 709; also see *Foreman v Kingstone* [2004] 1 NZLR 841, [2005] WTLR 823.

sufficient interest to justify the court's intervention. Thus he must have a fixed interest or have a discretionary interest that affords him a realistic possibility of receiving trust property, not merely having a remote or peripheral or theoretical possibility of actually benefiting. If he does have such an interest, the court needs to consider what documents need to be disclosed, whether completely or in redacted form and, taking account of commercial and personal confidentiality, what safeguards need to be imposed (whether by undertakings to the court or by arrangements for professional inspection only by lawyers or accountants) to limit the use which may be made of documents or information disclosed under the court's order.

If requested to disclose documents and information, the trustee in substance puts itself in the position of the court in exercising a proper discretion. If the trustee refuses to make the proper disclosure in a case where it clearly ought to have made disclosure, the beneficiary's costs of bringing the court case to obtain disclosure will have to be paid by the trustee and it may be that a new trustee will be appointed.

As already mentioned, the Beneficiaries are not entitled to see an excepted class of documents relating to the trustees' exercise of their discretions. The presumption is that a letter of wishes concerns the exercise of such discretions and so the trustees need not disclose it to the Beneficiaries unless this is considered to be in the interests of sound administration of the trust and the proper discharge of the trustees' powers and discretions<sup>9</sup>.

Once, however, the Beneficiaries have been able to discover enough facts to enable them to institute legal proceedings for breach of trust against the Trustee that cannot be struck out as a

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<sup>9</sup> *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32. To enable a divorce court to make appropriate financial orders in the light of resources that are likely to be available to a spouse, trustees usually provide information to assist the court.

“fishing expedition”, designed to discover if there are some facts to justify bringing breach of trust proceedings, the disclosure rules governing civil litigation apply. These rules enable the Beneficiaries to see all relevant documents including the letter of wishes. There is something of a Catch 22 situation, however. How can Beneficiaries institute breach of trust proceedings on the ground that the Trustee has not exercised discretionary powers in a good faith manner that gives effect to the settlor’s expectations and purposes, but to frustrate them, if the Beneficiaries cannot see the letter of wishes setting out those expectations and purposes?

*“Red Cross” trusts, “Black-hole” trusts and sham trusts*

Instead of creating a straightforward family discretionary trust under which, subject to the exercise of various powers, there is a duty to accumulate income by adding it to the capital for 125 years, the settlor could create what can conveniently be called a “Red Cross” trust. Here the settlor designates as the Beneficiaries, capable of benefiting from the exercise of powers of appointment over income and capital, the Red Cross and such individuals as the trustees from time to time in their absolute discretion may select to be Beneficiaries other than the settlor and his spouse.

Indeed, in the most extreme scenario the settlor could create what may conveniently be called a “black-hole” trust. He could state that the Beneficiaries shall be the individual who wins the gold medal in the 100 metres in the last Olympic Games before expiry of the trust period of 125 years and such individuals (other than the settlor and his spouse) as the Trustees may select from time to time to be Beneficiaries. A detailed letter of wishes from the settlor to the Trustees from time to time will then make clear the settlor’s intentions but will be expressed to be “Most Confidential: Not to be Disclosed by my Trustees to Anyone.” Until a person of full capacity has been made a Beneficiary and knows this, how can the trust be monitored, how can the Trustees be made

accountable for their conduct? There will ultimately, however, be some Beneficiary at some stage able to do this.

The settlor, however, has to avoid the danger of his trust being held to be a sham trust, which is a trust where the real deal between the settlor and the trustee is that, despite whatever are the written terms of the trust, the trustee is to deal with the trust assets as directed by the settlor. The real trust is a trust to hold the assets to the order of the settlor.

There may be a genuine trust where the terms of a trust reserve to the settlor or a Protector a very wide range of powers. These may include power to replace the trustee, to change the governing law of the trust or the accounting currency of the trust, to add or subtract persons within the class of Beneficiaries, to veto proposed distributions or proposed sales of specified assets or to direct a distribution to Beneficiaries or a sale of specified assets. Reference to such a power when exercising it shows respect for the integrity of the trust.

To help avoid the creation of sham trust, a settlor may provide that there is to be an annual audit of accounts by a firm of accountants in the jurisdiction of the law governing administration of the trust, who, on top of their fee are to be entitled as a beneficiary to US\$ 1,000 per year (or its index-linked equivalent). In the interests of secrecy, however, the settlor may go on to provide that without the prior written consent of the Protector, no one other than the auditing accountants shall have any right to see trust accounts or to seek any information of any nature in relation to the management of the trust fund or as to distributions of income or capital. The settlor does, nevertheless, provide that the Protector has the power to request information and accounts from the Trustee, in which event the Trustee must supply such information and accounts as soon as reasonably practical. The efficacy of this will be considered below.

A settlor may also provide a “no contest” clause that if any Beneficiary initiates legal proceedings to challenge the validity of any provision in the trust instrument or any act or omission of any Trustee or Protector he shall cease to be a Beneficiary thereby enhancing the position of other Beneficiaries. If the challenge is successful the ‘no contest’ clause will be ineffective, whether because the clause is construed as only applying to unsuccessful contests or because the beneficiary has just been enforcing his proprietary rights and he cannot be prevented from accessing the courts to vindicate such rights. If the challenge is unsuccessful the ‘no contest’ clause will be effective to forfeit the claimant’s rights unless the challenge was justifiable because made in good faith on some reasonable basis justifying the claimant exercising the essential attribute of a proprietary interest, namely, the right to go to court to vindicate that interest. This is the position according to the law of England<sup>10</sup> and Caribbean States<sup>11</sup>.

Finally, the trust instrument may contain an exemption clause stating that no trustee or protector is to be liable for any act or omission unless found to have been acting dishonestly, which extends to a person pursuing a course of action recklessly indifferent whether or not this is contrary to the beneficiaries’ interests. Such a clause is valid according to English law<sup>12</sup> and Caribbean States’ laws<sup>13</sup>. Where trustees have a controlling interest in a company run by the settlor or persons appointed by him it is difficult for trustees to protect themselves against possible liabilities

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<sup>10</sup> *Nathan v Leonard* [2003] 1 WLR 827.

<sup>11</sup> *AN v Barclays Private Bank & Trust (Cayman) Ltd* [2006] CILR 367, [2007] WTLR 568, *AB v MB* 18 Dec 2012, unreported Cayman decision of Smellie CJ expanding upon his decision in *AN*.

<sup>12</sup> *Armitage v Nurse* [1998] Ch 241; *Spread Trustee Company Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 AC 194.

<sup>13</sup> Except s 20(10) Trust Ordinance 1990 Turks & Caicos precludes exemption from liability for fraud, wilful conduct or negligence.

especially if they would wish to leave the company to run itself. The Virgin Islands Special Trust Act 2003 creates a special VISTA structure<sup>14</sup> intended to enable a trustee to do that safely.<sup>15</sup>

### **The search for meaningful beneficiaries' rights to bring the trustees to account for their conduct**

Beneficiaries have no rights if, after apparently having been made Beneficiaries under a discretionary trust, the trust document states that, without the written consent of the settlor no Beneficiary has the right to bring any claims against the trustees or the settlor in respect of any of their actions or omissions occurring in the lifetime of the settlor. The result of such statement is that the trust property is held to the settlor's order in his lifetime. It is the settlor's property and can only be disposed of after his death by a testamentary document executed with due formalities<sup>16</sup>.

The position is similar if T holds property on trust as to both capital and income for the settlor during his lifetime and thereafter for his children equally unless he appoints the capital unequally between such of his descendants as he sees fit. In actuality, T is holding the trust fund to the order of the settlor. The beneficiaries have no rights because the settlor is the beneficial owner of the fund and can deal with it as he pleases, needing, if he wishes to dispose of whatever remains at his death, to do this by a testamentary document complying with the requisite formalities. In The Bahamas, however, such a trust where the settlor in substance has reserved the whole trust fund for himself is treated as a valid inter vivos trust<sup>17</sup>, though if there is trust property situated

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<sup>14</sup> See C McKenzie, 'VISTA trusts' in D Hayton ed *International Trust Laws* 3rd ed cited fn 4 above.

<sup>15</sup> See also trustees' protection in Bahamas' Trustee (Amendment) Act 2011 s 13 where someone has power to direct trustees as to their investment role.

<sup>16</sup> *BQ v DQ* 2010 SC Bda 40, [2011] WTLR 373

<sup>17</sup> Trustee Act 1998 s 3(2)(i).

elsewhere there may well be problems after the settlor's death if the trust document had not complied with the requirements for a testamentary disposition.

Indeed, in The Bahamas not only are there statutory provisions stating that reservation of a wide range of specified powers by the settlor does not prevent there being a valid trust, there are also provisions in s 83 of the Trustee Act 1998 that purport drastically to restrict discretionary beneficiaries' rights to know that they are beneficiaries and to disclosure of documents and information. Where there are discretionary trusts, trustees are only under an obligation to take reasonable steps to ensure that *one* beneficiary "who is capable of enforcing the trusts is aware of the existence of the trusts and of the nature of the interest entitling him to enforce them"<sup>18</sup>, though they have a power, which ought to be treated as a fiduciary power, to disclose the existence of the trust to other discretionary beneficiaries if necessary or convenient in connection with distributions to such persons or if they consider such disclosure in the interests of the trust as a whole<sup>19</sup>. In respect of these other discretionary beneficiaries the trustees are under no obligation to disclose any documents or information to them<sup>20</sup>, though they have a power, which ought to be treated as a fiduciary power, to do so at the expense of such beneficiaries<sup>21</sup>.

Hopefully, the one beneficiary will enforce the trusts but, perhaps, out of self-interest he may not. It may be that the trustees having fiduciary powers to disclose the existence of the trusts to other discretionary beneficiaries and then disclose relevant trust documents and information to them, may responsibly exercise those powers so as to make disclosures, but, out of selfinterest, they may not. A beneficiary then faces an obstacle in s 83(10) stating, "Nothing in this section shall

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<sup>18</sup> Ibid s 83(1)(b) and s 83(3).

<sup>19</sup> Ibid s 83(4).

<sup>20</sup> Ibid 83(5)(a).

<sup>21</sup> Ibid s 83(5)(b).

prejudice 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 [documents or information] which trustees are under no legal obligation to make.”

It seems likely that judges will interpret the exception at the end of the section as applying only to orders other than orders for administration of the trust by the court or the taking of accounts by the court, when the trustees’ duty to account to beneficiaries is at the core of the trust obligation. The problem over obtaining an order for administration or accounts, however, is the difficulty of obtaining enough factual information to justify an application to the court for such an order. In such a situation it may be that the beneficiaries can challenge the refusal of the trustees to exercise their fiduciary powers to disclose to beneficiaries that they are beneficiaries and to disclose relevant trust documents and information and can allege that in the special circumstances the trustees are obliged to disclose such documents and information. If the challenge is successful the situation then falls outside the prohibition in s 83(10) because the trustees are then under a legal obligation to make disclosure.

Where legislative<sup>22</sup> provisions for disclosure are “subject to the terms of a trust”, the approach of the courts<sup>23</sup> is that the restrictive terms of a trust cannot oust the court’s inherent jurisdiction under *Schmidt v Rosewood Trust Co* to order the disclosure of documents and information as part of the courts’ role to supervise and, if necessary, intervene in the administration of a trust.

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<sup>22</sup> Anguilla Trust Ordinance 1994 s 28(1)(c) , Barbados International Trusts Act 1995 s 28(2).

<sup>23</sup> *Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd* [2007] WTLR 959 , Guernsey Royal Court interpreting s 22 Trusts (Guernsey) Law 1989.

The attitude the courts take is that if a settlor genuinely intended to create a trust obligation, then they will ignore any terms of a trust that are repugnant to the obligatory nature of a trust and that attempt to oust the courts' inherent supervisory function<sup>24</sup>. Thus, in a recent Bermudian case<sup>25</sup> where the Protector alone had the right to disclosure of trust documents and information from the Trustees, effect was not given to an apparently absolute direction that, except to the extent that the Trustees with the prior written consent of the Protector otherwise determine, "no person or persons shall be provided with or have any claim right or entitlement to or in respect of any accounts... or any information of any nature in relation to the Trust fund or the income thereof or otherwise in relation to the Trust or the trusts powers and provisions thereof and whether from the Trustees or any other person."

Kawaley CJ held that the clause was valid as a mechanism that the settlor had inserted to assist in the Trustee's administration of the trust, but that effect should not be given to it to the extent that the court considered it would substantially impair the fundamental requirements of trustee accountability. He held that intervention by the court in ordering disclosure of "historical basic financial information about the Trust assets"<sup>26</sup> was required in order to make the Trustee accountable for its administration of the Trust, "bearing in mind that a core requirement of a valid trust is that the beneficiaries must be in a position to hold trustees accountable in respect of the trustee's fundamental duty to duly administer a trust."<sup>27</sup>

It would thus appear that even if the Protector's power to withhold consent to disclosure of documents and information to beneficiaries was expressed to be a personal non-fiduciary power,

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<sup>24</sup> See *AN v Barclays Private Bank & Trust (Cayman) Ltd* [2007] WTLR 565 at 597 per Smellie CJ; *Tam Mei Kam v HSBC International Trustee Ltd* [2011] HKFCA 34 at [41]-46] endorsing [2010] HKCA 197 at [61] et seq.

<sup>25</sup> *In the Matter of an Application for Information about a Trust* [2013] SC Bda 12 March 2013.

<sup>26</sup> *Ibid* at [63]. The judgment was delivered in anonymised form and more detailed factual findings and specifications of documents to be disclosed were set out in a Confidential Appendix.

<sup>27</sup> *Ibid* at [49].

such that its exercise should not be capable of challenge in the courts unless the power was exercised fraudulently, its exercise could still be challenged. After all, if it could not be challenged and overridden the beneficiaries would not be in a position to hold the Trustees to account so that there would be no trust obligation.

### **Conclusion**

Ordinarily, beneficiaries have strong enforceable rights to enable them to monitor the activity of their trustee and make him produce written accounts of his stewardship of the trust property<sup>28</sup>. They are then in a position to falsify the accounts if particular conduct of his was not authorised under the trust document or trust law and make him augment the trust fund up to the value it would have had if he had performed his duties in the authorised manner. They are also in a position where he did not manage the investments with due care to surcharge his accounts with the extra money there would have been in the trust fund but for his failure to exercise the due standard of care. They may also find that they have proprietary rights as indicated above against the trustee or third parties or even personal rights against persons dishonestly involved in breaches of trust by the trustee.

Where a settlor has intended to create a genuine trust obligation, attempts by settlors or legislatures substantially to diminish beneficiaries' rights to make their trustee account are construed by the courts as not being capable of ousting the courts' inherent jurisdiction to supervise and, if necessary, intervene in the administration of a trust so as to ensure that some meaningful obligation is owed by the trustee to beneficiaries to account for his conduct.

I should say to Liechtenstein lawyers, to whom this paper is presented in Vaduz, that where a meaningful trust obligation continuing beyond the settlor's life was intended in a Liechtenstein

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<sup>28</sup> On production of accounts and falsification and surcharge of accounts see D Hayton, P Matthews & C Mitchell (eds) *Underhill & Hayton Law of Trusts and Trustees* 18<sup>th</sup> ed 2010 LexisNexis, London paras 87.2 et seq.

trust, it seems to me that the trust should not be construed as ousting the broad statutory jurisdiction of the Princely Liechtenstein Court of Justice to intervene in the administration of a trust so as to benefit the beneficiaries.<sup>29</sup>

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<sup>29</sup> Thus, if a trust instrument had not supplemented beneficiaries' statutory rights, so that only the settlor could enforce his trust in his lifetime under Arts 899, 923, 924 and 925, there is no reason why after his death the beneficiaries should not be able to obtain accounts etc so as to be able to remedy breaches of trust that occurred in the settlor's lifetime: see Arts 923 para 2, Art 924 para 1, Art 925 para 5, Art 926 para 4 and Art 927.