TRUSTEE'S DUTY OF DISCLOSURE

The right of beneficiaries to information and the trustee's duty of disclosure tend to accentuate the tension between ensuring that the beneficiaries' proprietary interests in the trust are vindicated and other concerns such as not placing the trustee under duties so onerous as to discourage trusteeship, balancing obligations of confidentiality owed by the trustee to third parties, respecting the settlor's freedom to dispose of his property, and maintaining harmony rather than sowing discord in family trusts. This article analyses the tension, and seeks to chart a way forward

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I. Disclosure and the rights of beneficiaries

1 There are good reasons why the trustees ought to owe a duty of disclosure to the beneficiaries. Most important is the consideration that without information about a trust and its administration, the beneficiaries will be hampered in their ability to ensure the proper administration of the trust.[1] As noted in *Armitage v Nurse*,[2] "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". While documents may be disclosed through the process of discovery in court proceedings, the issue is a non-starter if in the first place the beneficiary's right to monitor its stewardship is rendered nugatory by his lack of knowledge that he has an interest in the trust. Unless the trustees are under a duty to disclose the trust to the

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1 Denis S K Ong, *Trusts Law in Australia* (Sydney: Federation Press, 3rd Ed, 2007) at p 244.

2 *Armitage v Nurse* [1998] Ch 241 at 253 (CA), *per* Millett LJ. See also, Charles Mitchell, "Disclosure of Information to Discretionary Beneficiaries" (1999) 115 LQR 206 at 206. For this reason, it has been suggested that a clause attempting to keep the existence of the trust secret from the beneficiaries and prohibiting persons from informing the beneficiary that he or she is a beneficiary is, therefore, repugnant to the trust concept: D Hayton, "The Irreducible Core Content of Trusteeship" in *Trends Contemporary Trust Law* (A J Oakley ed) (Oxford: Clarendon Press, 1996).

beneficiaries, the very existence of the trust may be unknowable, as well as unknown, to those who alone can hold the trustees to account.[3]

2 For the purposes of ascertaining his entitlement under the trust, or of ascertaining if there is misdemeanour, the beneficiary may ask his trustee to disclose information that is often contained in existing documents such as:

(a) the trust deed, deeds of appointment and removal of trustees, and deeds exercising the dispositive powers of the trustees;

(b) trust accounts and reports (such as the actuarial reports and valuation reports) relating to the trust property;

(c) contracts and leases relating to the use and enjoyment of trust property;

(d) the agenda for and minutes of meetings of the trustees;

(e) correspondence between the trustees and beneficiaries, or between trustees and other power holders; and

(f) legal or other professional advice relating to the trust, including the instructions pursuant to which the advice was obtained.

3 The question of the nature of the rights of the beneficiaries – whether they are rights *in rem*[4] or *in personam*[5] – has been the subject of debate.[6] Following the judgment in *Armitage v Nurse*, it is a logical extension to view a number of the duties that trustees owe to beneficiaries as falling within the "irreducible core", and therefore proprietary in nature in order to give effect to the rights of the beneficiaries.

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3 Gavin Lightman, "The Trustee's Duty to Provide Information to the Beneficiaries" (2004) 1 PCB 23 at 34. See also *Re Murphy's Settlements* [1999] 1 WLR 282, [1998] 3 All ER 1, where Neuberger J ordered that the defendant must disclose the identities of the trustees of the category A settlements. He cited the principle stated by Templeman J in *Re Manistry's Settlement* [1974] Ch 17, [1973] 3 WLR 341, [1973] 2 All ER 1203 that the object of a discretionary power vested in trustees can, if he is aware of its existence, require the trustees to consider exercising the power in his favour, which would be wholly frustrated if he had no knowledge of the identity of the trustees, and no means of compelling disclosure of their identity by a person who had such knowledge and could easily provide it to the applicant.

4 Austin Wakeman Scott, "The Nature of the Rights of the Cestui Que Trust" (1917) 17 Col LR 269.

5 See, *eg*, Harlan F Stone, "The Nature of the Rights of the Cestui Que Trust" (1917) 17 Col LR 467.

6 D M Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can BR 219.

4 In a trust, the beneficiaries are collectively the beneficial owner of the trust assets, and the mark of proprietorship would be the exclusion of the availability of such assets to outsiders of the trust. The duty of the trustees to exclude non-beneficiaries from the enjoyment of the trust assets,[7] and the duty to convey the trust assets should all beneficiaries legally make the decision to terminate the trust,[8] should therefore sit at the "irreducible core" of the trust. To give effect to these, however, it is pertinent that the beneficiaries are aware of the nature of the trust, with the trustees being accountable.

5 Nonetheless, while it is not generally difficult to reach agreement that trustees should be held accountable, appeals to a broad notion of trustee accountability are not enough to justify disclosure of all documents available to the trustees; to say that accountability is part of the irreducible core of trusteeship[9] only begs the question as to what the trustees are actually required to account for.[10]

6 Issues surrounding the right of the beneficiaries to information and the trustee's duty of disclosure therefore tend to centre on the fundamental notion that a trust is subject to the inherent supervisory jurisdiction of the courts, and that the courts only intervene to ensure the proper administration of the trust. To determine if the court's intervention is for the proper administration of the trust, we must balance, *inter alia*, the tension between ensuring that the beneficiaries' proprietary interests in the trust are vindicated and other concerns such as not placing the trustees under duties so onerous as to discourage trusteeship, balancing obligations of confidentiality owed by trustees to other third parties such as the settlor[11] or as a result of commercial secrets, respecting the settlor's freedom to dispose of his property as he wishes by imposing certain conditions and checks, and maintaining harmony rather than sowing discord in family trusts.[12] Therefore, holding the trustees accountable to the beneficiaries is but one façade

7 R C Nolan, "Equitable Property" (2006) 122 LQR 232.

8 *Saunders v Vautier* (1814) 4 Beav 115.

9 Rose-Marie Belle Antoine, *Trusts and Related Tax Issues in Offshore Financial Law* (New York: Oxford University Press, 2005) at p 106, para 7.28.

10 D M Fox, "Disclosure of a Settlor's Wish Letter in a Discretionary Trust" (2008) 67(2) CLJ 252 at 253. In *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484 at 499–500, Doyle CJ lamented "the lack of guidance from the case law" on the scope of the trustee's discretion to refuse beneficiaries access to trust documents, but conceded that it was "impossible and pointless to state the scope of the discretion with any precision".

11 Lusina Ho, "Trustees' Duties to Provide Information" in *Exploring Private Law* (E Bant & M Harding eds) (Cambridge University Press, 2010) at pp 355–356.

12 Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 557; Lusina Ho, "Trustees' Duties to Provide Information" in *Exploring Private Law* (E Bant & M Harding eds) (Cambridge University Press, 2010) at p 345.

that must be taken into account in determining if disclosure should be ordered.[13]

II. Proprietary conception

7 Prior to *Schmidt v Rosewood Trust Ltd*[14] ("*Rosewood*"), the trustees clearly had a duty to allow the beneficiaries access to trust documents.[15] The classic exposition of the basis of that proposition is encapsulated in the House of Lords decision of *O'Rourke v Darbishire*[16] ("*O'Rourke*"):

> [A beneficiary] is entitled to see all the trust documents because they are trust documents and because he is a beneficiary.

8 However, it should be noted at the outset that even pre-*Rosewood*, there was never a general obligation for the trustees to give full information to those who considered themselves entitled to an equitable interest under the trust. The traditional common law position was that information should be provided only to those with proprietary interest in the trust property,[17] and who thus had a right of access to any "trust documents".[18] This right to disclosure is distinguished from the procedural process leading up to litigation known as "discovery".

9 *O'Rourke* is the leading case for the above proposition. In *O'Rourke*, the appellant beneficiary sought to obtain disclosure of documents containing legal advice given to the settlor during his lifetime, and to his executors after his death. He alleged fraud by the settlor's solicitor.[19] The court held that a beneficiary was generally entitled to inspect all documents relating to the trust. The court further explained that the beneficiary had such a right because the trust

13 Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 559–560; Lusina Ho, "Trustees' Duties to Provide Information" in *Exploring Private Law* (E Bant & M Harding eds) (Cambridge University Press, 2010) at p 345.

14 [2003] 2 AC 709; [2003] 3 All ER 76.

15 The same does not apply to strangers to the trust; Rose-Marie Belle Antoine, *Trusts and Related Tax Issues in Offshore Financial Law* (New York: Oxford University Press, 2005) at p 101, para 7.13.

16 [1920] AC 581 at 626.

17 *O'Rourke v Darbyshire* [1920] AC 581.

18 *Re Londonderry's Settlement* [1965] 2 WLR 229; see also J C Campbell, "Access by Trust Beneficiaries to Trustees' Document Information and Reasons" (2009) 3 J Eq 97 at 114–130 for a detailed examination of the authorities that have been associated with the "proprietary basis" in the trustee's duty of disclosure of information to beneficiaries.

19 See also *Schmidt v Rosewood* [2003] 2 AC 709 at [44].

documents were considered a part of the trust property, and thus, just as the trust belonged to him, so did the documents.[20]

A. Problematic foundation

10 While it seems logical to draw this extension – as the rights of beneficiaries will not have anything to attach to without trust property[21] – the proposition that the beneficiary's right to information is founded on his having a proprietary interest in the trust document is problematic for two reasons.

11 Firstly, where the person wishing to seek disclosure is the object of a discretionary trust or power – as that person has no identifiable proprietary interest in the trust property[22] – it would lead to the conclusion that he has no right to disclosure.[23] In cases such as *Rosewood*, where there is no beneficiary with a fixed interest, the effect of the proprietary view of disclosure would be that no one would have a right to information which enabled supervision of the trustees.[24]

12 Secondly, there is difficulty in determining what is meant by trust documents for the purposes of disclosure – giving rise to the possibility of abuse where the trustees might be given too great a degree of protection by artificially classifying certain documents as not being trust documents. Whereas it might be obvious that the expression "trust documents" is capable of extending beyond the trust deed, it is equally clear that the expression cannot sensibly be used to refer to all documents in existence that relate in some way to the trust.[25] The characteristics of trust documents as enumerated by Salmon LJ in

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20 *Cf Gartside v IRC* [1968] AC 553 for when objects of a discretionary trust have a proprietary right.

21 See also Patrick Parkinson & David Wright, "Equity and Property" in *The Principles of Equity* (Patrick Parkinson ed) (Lawbook Co, 2nd Ed, 2003) pp 55–92 at p 58.

22 *The International Trust* (J Glasson & G Thomas eds) (Bristol: Jordans, 2nd Ed, 2006) at p 558.

23 But note, in *Murphy v Murphy* [1999] 1 WLR 282, Neuberger J held that the court had power, pursuant to its equitable jurisdiction, to order the provision of information to a member of a discretionary trust. In that case, however, at 290, notwithstanding acknowledging the court's equitable jurisdiction, the court emphasised that "the plaintiff is merely within the class of discretionary beneficiaries" in explaining its reasons against disclosure.

24 See Lionel David Smith, *Access to Trust Information: Schmidt v Rosewood Trust Ltd* (2003) 23 Estates, Trusts & Pensions Journal 1 at n 14. See also Rose-Marie Belle Antoine, *Trusts and Related Tax Issues in Offshore Financial Law* (New York: Oxford University Press, 2005) at p 106, para 7.27.

25 *The International Trust* (J Glasson & G Thomas eds) (Bristol: Jordans, 2nd Ed, 2006) at p 557.

Re Londonderry's Settlement[26] ("*Londonderry*") – that: (a) they are documents in the possession of the trustees as trustees; (b) they contain information about the trust which the beneficiaries are entitled to know; (c) the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them – are circular in nature,[27] and do not go towards establishing with any certainty what is, or is not, a trust document.

B. Defences

13 Yet, even if the classification of information results in an initial presumption of disclosure, several defences are available to resist the application of the rule that the beneficiary is entitled to inspect the trust documents simply by virtue of his proprietary interest in them.[28] The trustee does not have a general duty to provide information.[29] The trustee's duty is limited only to providing information duly requested by a qualified applicant. A beneficiary's right is confined to information that concerns him, including notice of his entitlement under the trust. Even then, the duty only extends to informing *sui juris* beneficiaries of the trust,[30] and there is no duty to explain the terms of the trust to the beneficiaries.[31] The right of the beneficiary can be compromised when disclosure involves commercially sensitive documents, or when it is prejudicial to the interests of other beneficiaries.

14 One major limitation on the right to disclosure is that, generally, the trustees are protected from having to give reasons for their exercise of discretion. In *Re Beloved Wilke's Charity*,[32] it was held that as a general rule, "the Court ought not to require persons to state reasons for conduct which they are authorised to pursue". The trustees are not obliged to provide reasons for their exercise of discretionary power unless it is in the course of civil proceedings instituted against them for exercising their discretion in an improper manner.[33]

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26 [1965] Ch 918.

27 Gerwyn LLH Griffiths, "An Inevitable Tension: The Disclosure of Letters of Wishes" (2008) 4 Conv 322 at 324; [2005] *The Conveyancer and Property Lawyer* 93 at 93.

28 See E Campbell & J Hilliard, "Disclosure of Information by Trustees" in *The International Trust* (J Glasson & G Thomas eds) (Jordan Publishing Ltd, 2nd Ed, 2006) at p 555.

29 See *Tito v Waddell (No 2)* [1977] Ch 106 at 242–243, *per* Megarry VC and *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 431 (CA), *per* Mahoney J.

30 *Hawkseley v May* [1956] 1 QB 304.

31 *Tito v Waddell (No 2)* [1977] Ch 106 at 242.

32 (1851) 3 Mac & G 440 at 449.

33 See *Talbot v Marshfield* (1865) 2 Drew & Sm 549.

15 Consequently, in *Londonderry*, the English Court of Appeal imposed limitations on the beneficiary's right to trust documents – documents which related to the reasons behind the trustees' decisions were not to be disclosed.[34] Here, a default beneficiary under a settlement, dissatisfied with the decision by the trustees to appoint the remaining capital to other discretionary objects rather than to her, sought the disclosure of a wide range of documents, including trust accounts, the agendas for and minutes of the trustees' meetings, and correspondence between the trustees, appointers, settlors and beneficiaries. It was held that the trustees of a discretionary family settlement, such as in the case of *Londonderry*, would be unable to discharge their sensitive role effectively if "at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner".[35]

16 In *Londonderry*, the judges attempted to reconcile the proprietary basis of the right to inspect trust documents with situations where the trustees felt constrained by duties of confidentiality to others. Danckwerts LJ rationalised that the obligations of confidentiality of the trustees overrode the proprietary rights of the beneficiaries such that such documents were not trust documents at all.[36] Harman LJ, while not ruling out that such documents could be described as trust documents, maintained that the principle of confidentiality overrode the ordinary rule governing disclosure.[37]

17 What emerges from this is that the overriding duty of confidentiality that attaches to certain documents can be owed to other beneficiaries, the settlor and the trustees themselves.[38] Subjecting the trustees' decision-making processes to the beneficiaries' scrutiny would

34 Mary Ambrose, "Disclosure to Beneficiaries – Whither Confidentiality?" [2006] PCB 236 at 236. Four categories of documents in particular were highlighted in *Re Londonderry's Settlement* [1965] Ch 918: (a) the agenda of the trustees' meetings; (b) the correspondence between trustees or appointors under the settlement; (c) correspondence between the trustees and appointors and the beneficiaries; and (d) minutes of meetings and other documents disclosing the deliberations of the trustees as to the manner in which they should exercise their discretionary powers.

35 *Re Londonderry's Settlement* [1965] Ch 918 at 935 (CA). See also *Wilson v Law Debenture Trust Corp* [1995] 2 All ER 337.

36 See *Re Londonderry's Settlement* [1965] Ch 918 at 935 (CA), *per* Danckwerts LJ.

37 *Re Londonderry's Settlement* [1965] Ch 918 at 933.

38 *Breakspear v Ackland* [2008] EWHC 220 (Ch) at [24].

not only fetter the trustees' discretion,[39] but would also discourage people from taking up the office of trusteeship.[40]

III. Inherent supervisory jurisdiction

18 With *Rosewood*, the law appears to have moved away from the proprietary approach,[41] to such an extent that it has been suggested that all previous decisions must now be read subject to it.[42] In *Rosewood*, the trustees relied on *Londonderry* to argue that a discretionary beneficiary and the possible object of a power of appointment had no proprietary interest in the property of the trust, and thus no right to disclosure. The Privy Council noted the conceptual difficulties of reconciling the different judgments in *Londonderry*, highlighting specifically that only Salmon LJ explicitly adopted the proprietary reasoning in *O'Rourke*.[43]

19 The Privy Council also considered the proprietary approach in *O'Rourke*, and confined it to its facts. It stated that the factual circumstances in *O'Rourke* were such that if the appellant's claim was correct, the executors would never have had any legal or equitable title to the settlor's estate, to the effect that the appellant would have been entitled to the entire estate, and any documents which formed part of it (and thus such documents would have been in fact his property).

20 The Privy Council then went on to reject the trustees' argument, and held that the true basis for the jurisdiction to order disclosure to a beneficiary, of information relating to the trust, was the court's inherent jurisdiction to supervise and intervene in the administration of trusts.[44] Such jurisdiction could be invoked by any person who has either

39 See also Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 557–558, citing *Re Londonderry's Settlement* [1965] Ch 918 at 936 (CA), *per* Danckwerts LJ.

40 See *Re Londonderry's Settlement* [1965] Ch 918 at 935–936 (CA), *per* Danckwerts LJ. However, these reasons have been criticised: *eg*, Sir Gavin Lightman, *The Association of Contentious Trust and Probate Specialists Newsletter* Issue 58; Toby Graham, "Disclosure of Letters of Wishes and Confidentiality of Trustees' Deliberations after *Schmidt*" (2008) 14 *Trusts & Trustees* 231 at 234; Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 558.

41 See also Lusina Ho, "Trustees' Duties to Provide Information" in *Exploring Private Law* (E Bant & M Harding eds) (Cambridge University Press, 2010) at p 346; Richard Dew, "Trusts and Disclosure" (2011) 5 PCB 241 at 241.

42 *The International Trust* (J Glasson & G Thomas eds) (Bristol: Jordans, 2nd Ed, 2006) at 556.

43 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [50].

44 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [51], *per* Lord Walker.

a discretionary or proprietary interest in the trust, and accordingly, also by the object of a discretionary trust or of a fiduciary power.[45]

21 This jurisdiction was to be discretionary in all cases,[46] with the court having to exercise its discretion in three areas: (a) whether the beneficiary or object should be granted relief at all; (b) what classes of documents to disclose (in their entirety or in redacted form); and (c) what safeguards to put in place to limit the use of the information disclosed.[47]

22 The Privy Council then went on to cite with approval *Hartigan Nominees Pty Ltd v Rydge*[48] ("*Hartigan*"), which found the proprietary approach unsatisfactory, and where the court explained that a proprietary interest in the trust property may be sufficient, but not necessary, for the court to uphold the beneficiary's right to inspect the documents. In *Hartigan*, the issue before the New South Wales Court of Appeal was whether the beneficiaries or potential beneficiaries of a discretionary trust had the right to access a letter of wishes which the trustees had considered in carrying out the trust. Here, a discretionary beneficiary argued that he was entitled to inspect the letter, and that the trustees should not have taken it into account when exercising their discretion.

23 The majority of the court in *Hartigan* rejected this argument, holding that the letter need not be disclosed. Mahoney JA affirmed the *Londonderry* principle and held that the right of a beneficiary to obtain on request documents or disclosure of information in relation to the trust is limited to documents that constitute the property of the trust. As such, this right did not extend to the property of the trustee.[49] Moreover, information need not be disclosed if the result of disclosure would be to reveal the reasons behind the exercise of a discretionary power and would be likely to give rise to family difficulties. Information given to a trustee in confidence would also not be available to beneficiaries because it cannot be disclosed, even if it constitutes the property of the trust.[50]

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45 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734, *per* Lord Walker. See also Gavin Lightman, "The Trustee's Duty to Provide Information to the Beneficiaries" (2004) 1 PCB 23 at 27.

46 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734–735, *per* Lord Walker.

47 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [54], *per* Lord Walker.

48 (1992) 29 NSWLR 405.

49 See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 432, *per* Mahoney JA.

50 See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 436, *per* Mahoney JA.

24 Sheller JA also affirmed confidentiality as a basis for requiring the trustees not to disclose documents in their possession. Since a separate letter was delivered in *Hartigan* and the wishes were not disclosed in the trust instrument or a document attached to it, Sheller JA concluded that the letter was given to the trustees in circumstances of confidence, and thus need not be disclosed to the beneficiaries.[51]

25 *Hartigan* and its emphasis on the trustees' duties of confidentiality are not inconsistent with the Privy Council's ruling in *Rosewood* that the disclosure of information is subject to the court's inherent jurisdiction.[52] Here, it must be noted that the court already has the discretion to control or intervene in a trust under certain circumstances (*eg*, where the trustees neglect or refuse or are unable to discharge their duty). Therefore, the development in *Rosewood* should be viewed as an extension of the court's existing discretion.[53]

A. Subsequent clarification

26 Unfortunately, *Rosewood* is lacking in two aspects. Firstly, the court did not provide any form of follow-up explication of the relocation of disclosure to the court's inherent supervisory jurisdiction. Further, the court did not provide any criteria as to when it would decide to exercise its new-found discretion in favour of a beneficiary

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51 See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 445–446, *per* Sheller JA:

> That (the instigator of the trust) did not disclose his wishes in, or in a document attached to, the deed of settlement, but delivered a separate memorandum of wishes to the trustees, leads to the conclusion that it was his, and thus the settlor's, intention that his wishes should remain confidential, and consequently that the contents of the memorandum were obtained by the trustees in circumstances of confidence, which bound the trustees not to disclose them to the respondent and to withhold the memorandum from him.

At 421, *per* Kirby P dissenting:

> It is enough in my view, that the document has been disclosed as one which is affecting a decision being made by a trustee which potentially affects the respondent. To this extent, the trustees in this case did disclose their reasoning. They acted properly in doing so. They acted properly in taking into account Sir Norman Rydge's memorandum. But they were incorrectly advised to withhold that memorandum from the respondent, as a beneficiary who sought access to it. Only by securing such access could the beneficiary fully exercise his rights. Those rights included the rendering of the trustees accountable before the law for the discharge of their duties as trustees.

52 Indeed it was held in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [54], approving *In re Cowin* (1886) 33 Ch D 179, that "there may be circumstances (especially of confidentiality) in which even a vested and transmissible beneficial interest is not a sufficient basis for requiring disclosure of trust documents".

53 Hayton & Marshall, *Commentary and Cases on the Law of Trusts and Equitable Remedies* (London: Sweet & Maxwell, 12th Ed, 2005) at p 651.

claimant,[54] beyond the fact that it would have to balance the competing interests of all the parties involved.[55] The main problem that *Rosewood* poses is that it has thrown the law into uncertainty as regards the actual outer limits on the disclosure of information,[56] although various academics have since gone far towards shedding light on the rationality of the court's decision.

27 More recently, the issue of disclosure in the post-*Rosewood* climate has been examined in the English Chancery Division decision of *Breakspear v Ackland*[57] ("*Breakspear*"). Here, Briggs J ordered that a letter of wishes written by the settlor to the trustees of a discretionary settlement be disclosed to the beneficiaries. Although the settlor passed away in November 2002, the claimants[58] were unaware of the existence of the trust until January 2005. Moreover, only several months subsequent to that was the existence of a letter of wishes made known. The beneficiaries had applied to the court to challenge the trustees' refusal to disclose the letter, and to invoke the court's inherent supervisory jurisdiction to order its disclosure.

28 There was at that stage no question of any contentious proceedings between the parties. Thus, the beneficiaries could not seek disclosure and inspection under the process of discovery of the letter, along with any other relevant documents in the trustees' control. The trustees intended, however, to wind up the trust a few years later, and to apply to the court at that stage for sanction for a scheme of distribution of trust assets to the beneficiaries. The contents of the settlor's letter of wishes would become directly relevant to that application.[59] The trustees resisted disclosure of the letter of wishes on the grounds that the letter contained confidential information, and that at least one claimant did not have entitlement to view the letter given that he was the object of a mere power. Moreover, the trustees argued that its disclosure would lead to family discord.

29 Briggs J held that the need to avoid having to reconsider whether the letter should be disclosed at that later stage justified its disclosure in the proceedings before him. But without that exceptional fact he would have treated the settlor's letter as confidential to the trustees. It was not enough to justify letting the beneficiaries see the

54 Davies, "Integrity of Trusteeship" (2004) 120 Law Q Rev 1.
55 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [67].
56 See, for example, comments in *McDonald v Ellis* [2007] NSWC 1068 at [51] and Michael Gibbon, "Beneficiaries' Information Rights" (2011) 17(1) *Trusts & Trustees* 27 at 32–33.
57 [2008] EWHC 220.
58 The claimants were also the default beneficiaries of the trust.
59 D M Fox, "Disclosure of a Settlor's Wish Letter in a Discretionary Trust" (2008) 67(2) CLJ 252 at 252.

letter that they wanted to plan their lives and were interested to know how the settlor might have wanted the trustees to exercise their dispositive powers in the future.[60] In an exercise of the balancing test as envisioned by *Rosewood*, while acknowledging that his decision might cause family discord, Briggs J balanced that consideration against the risks of increased costs and delay which might arise by deferring disclosure in the special circumstances of the case.[61]

30 The court endorsed the *Londonderry* principle and reaffirmed that it remains good law that the process of discretionary dispositive powers by the trustees is inherently confidential,[62] and that this confidentiality exists for the benefit of the beneficiaries rather than merely for the protection of the trustees.[63] The court held that in the absence of special terms, disclosure was subject to the trustees' best judgment on a fiduciary basis, in the interests of the beneficiaries and the sound administration of the trust.[64] *Breakspear* is an example of a case where the disclosure is in the interest of the sound administration of the trust.[65]

31 *Breakspear* provides clarification of the *Rosewood* principle by setting out guidelines according to which the court's discretion ought to be exercised, in the specific context of disclosure of letters of wishes.[66] More significantly, it affirms the fundamental notion that all trusts are subject to the inherent supervisory jurisdiction of the courts, and that it rejects the proprietary analysis as a ground for disclosure.[67] In fact, Briggs J sought to further clarify the various competing interests of all parties involved. Briggs J emphasised that there is an inevitable tension

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60 *Breakspear v Ackland* [2008] EWHC 220 at [97]–[98].

61 *Breakspear v Ackland* [2008] EWHC 220 at [99].

62 *Breakspear v Ackland* [2008] EWHC 220 at [53].

63 *Breakspear v Ackland* [2008] EWHC 220 at [24].

64 *Breakspear v Ackland* [2008] EWHC 220 at [62]:

> 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 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.

65 Briggs J did go on, however, to register his scepticism that a settlor should be allowed to fetter trustees' discretion by the inclusion of special terms as to confidentiality in the wish letter itself: *Breakspear v Ackland* [2008] EWHC 220 at [99].

66 *Breakspear v Ackland* [2008] EWHC 220 at [23], [24], [32], [54], [58] and [66]–[73], noted in Michael Gibbon, "Beneficiaries' Information Rights" (2011) 17(1) *Trusts & Trustees* 27 at 30. See also Rebecca Lee, "Disclosure of Letters of Wishes in Family Settlements: *Breakspear v Ackland*" (2009) 28 *Estates, Trusts & Pensions Journal* 105 at 108–109.

67 *Breakspear v Ackland* [2008] EWHC 220 at [38].

between the advantages of confidentiality on the one hand, and on the other, the advantages of disclosure in relation to wish letters.[68] Briggs J also pointed out that there is a need to achieve a certain degree of certainty in the law with regard to disclosure so as to discourage litigation – the assumption in *In re Beddoe; Downes v Cottam*[69] that trustees can always obtain directions of the court at modest expense is wrong in modern times.[70] *Breakspear* upholds the principle of protecting the trustees from having to give reasons for their discretionary decisions at the request of the beneficiaries,[71] which has been part of English law for over 150 years. The court's duty of supervision is confined to the question of honesty, integrity and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases. However, if the trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the court may say that they have acted by mistake and in error, and that it will correct that decision.[72]

32 It is clear from the above analysis that *Rosewood* has not eliminated the case for trustee confidentiality in general, and the doctrine in *Londonderry* that the trustees are not required to account for their exercise of discretion in particular. Rather, it is, perhaps, more accurate to say that the considerations underlying the case law prior to *Rosewood*, such as the beneficiary's proprietary interest in trust documents, the settlor's entitlement to dispose of his property the way he pleases, the need to hold the trustee to account, the need to preserve familial harmony and the concern that the trustees not be placed under too onerous a duty, have been extracted and subsumed under the new law post-*Rosewood*. They remain serious concerns to be weighed against one another when deciding whether to order disclosure, although other factors such as costs may now also apply. This is especially pertinent where the trust estate is small, and the trustee would have to apply to the court to determine whether to disclose the document which could potentially deplete the trust estate substantially.

33 Also, it is suggested that once it has been established that the documents in question provide the reasons for the trustees' exercise of discretion, it remains upon the beneficiaries to prove that their interests outweigh the need to preserve confidentiality.

68 *Breakspear v Ackland* [2008] EWHC 220 at [9].
69 [1893] 1 Ch 547.
70 *Breakspear v Ackland* [2008] EWHC 220 at [10].
71 *Breakspear v Ackland* [2008] EWHC 220 at [54], noted in Michael Gibbon, "Beneficiaries' Information Rights" (2011) 17(1) *Trusts & Trustees* 27 at 31.
72 *Breakspear v Ackland* [2008] EWHC 220 at [15].

IV. Changing nature of trust

34 The court in *Rosewood* started off its discussion of the issue of disclosure to discretionary beneficiaries with a brief background of the trust, and how it had changed over the course of the 20th century.[73] Previously, the trust instrument was mostly used in the private sphere, as a means of transferring wealth within the family.[74] The group of beneficiaries was usually small and readily identifiable. The administration of the trust was by and large simple and uncomplicated, and the trustees were usually related to, or knew, the settlor on a personal basis.

35 However, the trust has since evolved and is now used extensively as a commercial instrument. For instance, in the US, over 90% of the money held in trusts is in commercial trusts as opposed to personal (private) trusts.[75] Trusts are also created in offshore jurisdictions by wealthy individuals as instruments to protect their assets, primarily to avoid taxation.[76] However, as *Rosewood* has also demonstrated, the "web of camouflage"[77] that such trusts may rely on to preserve the individual's fortune might cause great difficulties for the beneficiaries later on, should the settlor become unavailable due to death or other circumstances. From the convoluted set of facts in *Rosewood*, it may be difficult to determine whether an individual has the *locus standi* to compel disclosure in the first place. That such trusts are normally made out for the benefit of a wide class of potential beneficiaries only exacerbates the situation.

36 In the light of the changing face of the trust, it is possible that the court decided to do away with the proprietary requirement and take over the responsibility of deciding whether a beneficiary should be accorded disclosure of trust documents,[78] based on the need to protect the beneficiaries from overly onerous burdens of proving *locus standi*, and possibly to also protect them from trustees who, for unscrupulous reasons, could exploit the proprietary rule to obstruct inquiries.

37 By rejecting the proposition that a proprietary interest in the trust fund was either a necessary or sufficient condition for having rights to trust information, *Rosewood* has commendably opened up the possibility of persons – such as a beneficiary with a contingent interest

73 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [34].
74 J H Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce" (1997) 107 Yale LJ 165.
75 J H Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce" (1997) 107 Yale LJ 165 at 166.
76 A G D Duckworth, "The Trust Offshore" (1993) Vand J Transnat'l L 931.
77 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [36].
78 J D Davies, "Integrity of Trusteeship" (2004) 120 LQR 1 at 5.

in the trust fund or the object of a discretionary trust or power – having information rights and the court ordering disclosure in their favour.[79] However, the strength of the object's claim to be considered for a distribution of the fund and the likelihood of a distribution being made in his favour will nonetheless remain important factors in determining whether disclosure should be made to him.[80] Furthermore, the court might have to take into account countervailing defences such as the insertion of a confidentiality clause into the trust deed requiring the trustees to treat certain documents as confidential,[81] that the disclosure of the document concerned would not be in the general interest of the beneficiaries, that the information sought is commercially sensitive,[82] or that the documents sought were irrelevant compared to the prejudice from the disclosure to other beneficiaries.[83]

79 *The International Trust* (J Glasson & G Thomas eds) (Bristol: Jordans, 2nd Ed, 2006) at p 563. It has been suggested that while confidentiality clauses are generally respected, those that attempt to oust the jurisdiction of the court may not be upheld: Gavin Lightman, "The Trustee's Duty to Provide Information to Beneficiaries" (2004) 1 PCB 23 at 29. See also Richard Wilson & Henrietta Labes, "*Schmidt v Rosewood*: A Closer Inspection" (2004) 3 PCB 161 at 165.

80 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [67]; *Murphy v Murphy* [1998] 3 All ER 1 at 11–12; *The International Trust* (J Glasson & G Thomas eds) (Bristol: Jordans, 2nd Ed, 2006) at p 564. See also case law from Australia such as *McDonald v Ellis* [2007] NSWC 1068; BC200708266 and academic commentaries that argue that different judicial approaches ought to be taken in relation to beneficiaries of fixed trusts and those of discretionary trusts: see, for example, Lusina Ho, "Trustees' Duties to Provide Information" in *Exploring Private Law* (E Bant & M Harding eds) (Cambridge University Press, 2010) at p 351 which advocates different *prima facie* principles for different categories of beneficiaries, such as the *prima facie* principle in favour of disclosure to beneficiaries of fixed trusts, subject to two limits of ensuring that the interests of the beneficiaries as a whole are not compromised and not overburdening the trustees, as opposed to the *prima facie* principle that until an appointment has been made in favour of an object of a personal power, he or she is not entitled to obtain any trust information.

81 In *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 728, Lord Walker characterised the need to protect confidentiality as, "one of the most important limitations on the right to disclosure of trust documents". The extent to which settlors can include provisions in trust deeds to restrict beneficiaries' access to trust information has yet to be considered in detail by the courts. Academics have, however, suggested that the settlor's wish for confidentiality is but one significant consideration to be taken into account in the court's exercise of discretion which must be weighed against other competing concerns: Lusina Ho, "Trustees' Duties to Provide Information" in *Exploring Private Law* (E Bant & M Harding eds) (Cambridge University Press, 2010) at pp 355–356.

82 Dawn Goodman, "'To Disclose or Not to Disclose?' – Disclosure of Private Company Information in a Trust Context" (2010) 16(9) *Trusts & Trustees* 784 at 793, which notes that there may be a greater need for safeguards where the documents requested to be disclosed "relate to the affairs of an underlying company and there are concerns about commercial sensitivity".

83 *The International Trust* (J Glasson & G Thomas eds) (Bristol: Jordans, 2nd Ed, 2006) at 564 and 566. According to an academic (Lionel David Smith, *Access to Trust Information: Schmidt v Rosewood Trust Ltd* (2003) 23 *Estates, Trusts & Pensions Journal* 1 at 6):

(*cont'd on the next page*)

V. Support from *McPhail v Doulton*

38 *Rosewood* seems at first blush to be an abrupt departure from the orthodox position that a beneficiary has a right to disclosure of trust documents by virtue of his proprietary interest in the trust.

39 However, the court may have been influenced[84] by the seminal decision of *McPhail v Doulton*[85] ("*McPhail*"). Prior to *McPhail*, one of the tests for determining whether a discretionary trust was valid was the same as that of a fixed trust – whether a complete list of the beneficiaries could be drawn up. The proprietary basis for disclosure and inspection was enunciated in cases such as *O'Rourke* and *Londonderry*, decided in an environment in which there were many more fixed trusts, and trusts, if discretionary in nature, usually had relatively small classes of beneficiaries.[86]

40 In *McPhail*, however, the court decided that the test for determining whether an individual was a beneficiary should be the same for a discretionary beneficiary and the object of a power, *ie*, the "given postulant test". With this less stringent test, the number of possible beneficiaries of a discretionary trust became much greater. In the case of trusts designed to protect a settlor's assets – such as in *Rosewood* – the classes of discretionary beneficiaries are normally very wide.

41 In view of *McPhail*, it is possible that the court in *Rosewood* decided that it would be impractical to allow each and every beneficiary to inspect the trust documents as this would create enormous practical difficulties for the trustees.[87] Thus, to relocate the entitlement to disclosure to the court's jurisdiction was the sensible thing to do. If any beneficiary wanted to view the trust documents, he would first have to apply to the court, which would then decide whether to allow the request.[88] However, on the flipside, the court now bears the burden of

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> At the very least, *Schmidt* suggests that just as a beneficiary's right to information is not absolute, so, conversely, a trustee's plea of confidentiality in relation to the exercise of a discretion may be merely one factor among several for the court to consider when deciding upon a claimant's demand for such information.

84 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [66], where the court indicated that the law was developing in the direction set by *McPhail v Doulton* [1970] 2 WLR 1110. See also Richard Wilson & Henrietta Labes, "*Schmidt v Rosewood*: A Closer Inspection" (2004) 3 PCB 161 at 165.

85 [1970] 2 WLR 1110.

86 Richard Wilson & Henrietta Labes, "*Schmidt v Rosewood*: A Closer Inspection" (2004) 3 PCB 161 at 166.

87 Richard Wilson & Henrietta Labes, "*Schmidt v Rosewood*: A Closer Inspection" (2004) 3 PCB 161 at 166.

88 Richard Wilson & Henrietta Labes, "*Schmidt v Rosewood*: A Closer Inspection" (2004) 3 PCB 161.

filtering a potential flood of requests from the beneficiaries who wish to view trust documents.

42 Hence, when viewed in the light of the developments of the law, *Rosewood* – although it may seem abrupt – appears a logical progression of the law. The trustee's duty to provide information dovetails with his primary duties. The trustee is not obliged to provide reasons for his dispositive decisions because the object of a discretion has a mere right to be considered, rather than a legitimate expectation that the particular discretion will be exercised in his favour.[89] Looking at disclosure of trust information in terms of the beneficiaries' rights rather than the trustees' duties, the beneficiaries are given rights to information to allow them to hold the trustees to their primary duties.[90] The duties of the trustee determine what rights to information the beneficiaries need.[91] The trustee must give the beneficiaries such information as is necessary to enable them to properly evaluate whether the trustee has complied with his primary duties.[92]

43 The proposition that a beneficiary may see trust documents that he has a proprietary interest in is seen as one factor the court may take into consideration when exercising its inherent jurisdiction to order disclosure. It is certainly not incompatible with the interpretation that disclosure is predicated on the need to hold the trustees to account.[93] If a beneficiary can prove that he has a proprietary interest in the trust and the trust document, then surely the trustee owes an even more

89 See, however, *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 718, where Robert Walker J suggested that a beneficiary may in certain circumstances have a legitimate expectation that a discretion will be exercised in his favour, and that such a beneficiary may be entitled to reasons before the trustees denied him of that expectation.

90 *The International Trust* (J Glasson & G Thomas eds) (Bristol: Jordans, 2nd Ed, 2006) at p 559; *Re Rabiotti 1989 Settlement* [2001] JLR 173 at 183; D Hayton, "The Irreducible Core Content of Trusteeship" in *Trends in Contemporary Trust Law* (T Oakley ed) (Clarendon, 1996) at pp 49–50; Lionel David Smith, *Access to Trust Information: Schmidt v Rosewood Trust Ltd* (2003) 23 *Estates, Trusts & Pensions Journal* 1 at 5.

91 See Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 542 for a similar view: "[B]eneficiaries' rights ought to correspond with trustees' duties."

92 See also D Hayton, P Matthews & C Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (LexisNexis Butterworths, 17th Ed, 2006) at pp 672–674; Gavin Lightman, "The Trustee's Duty to Provide Information to Beneficiaries" (2004) 1 PCB 23 at 36–37; and Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 542.

93 See similar arguments made in Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 555 and 564 in a different and wider context, regarding the nature of trusts as a unique combination of the proprietary and obligation based models.

pronounced duty to manage the trust in the best interests of its proprietary owner.

VI. Australia

44 The first few cases to apply *Rosewood* were non-English. These cases were hesitant to read the relegation of disclosure under the umbrella of the court's inherent jurisdiction as widely revolutionising the scope of the documents that should be disclosed. It is clear that *Londonderry* is still good law even when the balancing test is applied.

45 In the Supreme Court of Victoria case of *Crowe v Stevedoring Employees Retirement Fund*[94] ("*Crowe*"), Balmford J held that *Londonderry* still applied in Australia despite *Rosewood*.[95] The plaintiff was a member of a fund that had both accumulation and defined benefit sections. The plaintiff sought various items of information relating to increases to defined benefits regarding the classification base wage, which was itself increased. The information sought fell mainly in two categories: (a) information on how and from what source the benefit increase was funded; and (b) fund documents including minutes, records, correspondence, actuarial reports and advice and other relevant documents.

46 The key issue that arose for consideration was that of the obligations of a trustee to account. In essence, the judge ordered disclosure on the basis that the relevant materials sought to be disclosed were within the class of trust documents to which a beneficiary would normally be provided access.[96] Some factors placed on the balancing scale were the fact that there was no evidence that any of the material sought contained or revealed the reasons for any decision of the trustee,[97] and that the arguments made on considerations of confidentiality were not made out.[98]

47 What was particularly interesting was the judge's proposition that it was possible, and seemingly appropriate, that information be brought into existence by the fund's actuary that was not yet in

94 [2003] VSC 316; [2003] PLR 343.

95 *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316; [2003] PLR 343 at [37]. The case could also possibly be distinguished on the basis that it dealt with a superannuation trust, which differs from discretionary trusts in the non-volunteer nature of superannuation and the consideration for benefits.

96 *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316; [2003] PLR 343 at [89].

97 *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316; [2003] PLR 343 at [88].

98 *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316; [2003] PLR 343 at [30] and [43].

existence.[99] The proposition does not appear to be grounded in any existing case law and seems to represent an extension of the principle of trustee disclosure. However, it could find justification under the *Rosewood* balancing test that gives the courts the jurisdiction to decide what, and how much, should be disclosed.

48 It has also been commented that the reasoning taken by Salmon LJ in *Londonderry* is problematic.[100] Despite having agreed with the majority that the mere fact that a document was part of the trust did not give the beneficiary a right to inspect it, he proceeded with an alternative approach that a characteristic of trust documents which the beneficiaries were entitled to was their containment of information that the beneficiaries were entitled to know.[101] It is submitted that such a view is circular, and does little to clarify the jurisprudence behind the shift in the approach taken by the courts.

49 The analysis of the Privy Council in *Rosewood* has been accepted by the High Court of Victoria in *CPT Custodian v Commissioner of State Revenue (Vic)*,[102] summarising the relevant law and the progress in approach.

50 However, in relation to fixed trusts, two conflicting decisions were subsequently made by the New South Wales Supreme Court: *Avanes v Marshall*[103] ("*Avanes*") and *McDonald v Ellis*[104] ("*McDonald*"), which created uncertainty in Australia's position on the issue of access to information by beneficiaries of fixed trusts. In *Avanes v Marshall*, Gzell J followed the approach of the Privy Council in *Rosewood* that the beneficiaries no longer have a right to disclosure of any trust information and any disclosure is subject to the court's exercise of its discretion,[105] although *Rosewood* was a case on discretionary trusts and thus its position on the trustees' duties of disclosure in relation to fixed trusts was *obiter*.[106] Conversely, in *McDonald v Ellis*, Bryson JA declined to follow *Avanes* for the reason that it gave rise to uncertainty in the

99 *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316; [2003] PLR 343 at [20].

100 Denis S K Ong, *Trusts Law in Australia* (Australia: The Federation Press, 2007) at pp 246–247.

101 *Re Londonderry's Settlement* [1965] 1 Ch 918 at 938.

102 (2005) 224 CLR 98 at [17], *per* Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ in delivering the judgment of the High Court.

103 [2007] NSWSC 191; BC200701448.

104 [2007] NSWSC 1068.

105 *Avanes v Marshall* [2007] NSWSC 191 at [15].

106 Georgia Dawson, "A Fork in the Road for Access to Trust Documents" (2009) 3 J Eq 39 at 39 and 43; Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 556.

law,[107] thus adopting the traditional approach of basing the right of a beneficiary of a fixed trust to the access of information on his proprietary interest in the trust.[108]

51 This uncertainty in the law has yet to be resolved. Although the Court of Appeal of the Supreme Court of Western Australia in *Schreuder v Murray (No 2)*[109] did not follow the approach taken by Newnes J in the lower court of following *McDonald*,[110] the court deftly avoided deciding the issue of whether the approach in *Avanes* or *McDonald* should be adopted – by concluding that the facts at hand pertained not to the "right of a beneficiary of a discretionary trust to inspect trust documents" in a case where the cause of action was based on the trustee's breach of duty in failing to allow the beneficiary access to information, but "whether a trustee could refuse to disclose documents containing legal advice about the due administration of the trust on the ground of legal professional privilege", which was not decided in *Rosewood*,[111] and thus it was not necessary for the court to decide whether *Avanes* should be followed.[112] The decision of *Schreuder* was more recently followed by the Supreme Court of Victoria in *Krok v Szaintop Homes Pty Ltd*.[113]

52 There remains no High Court of Australia decision relating to the beneficiaries' rights to trust information and documents.[114] Thus, the position in Australia as to the right of beneficiaries of fixed trusts to information continues to be as uncertain as before, and awaits resolution by an appellate court.[115]

107 Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at 556; *McDonald v Ellis* [2007] NSWC 1068 at [51].

108 *McDonald v Ellis* [2007] NSWC 1068 at [52].

109 [2009] WASCA 145.

110 [2009] WASC 51.

111 *Schreuder v Murray (No 2)* [2009] WASCA 145 at [11], *per* Pullin JA; at [93], *per* Buss JA and McLure JA concurring.

112 *Schreuder v Murray (No 2)* [2009] WASCA 145 at [12], *per* Pullin JA; at [93] and [99], *per* Buss JA and McLure JA concurring.

113 [2011] VSC 16; BC201100297 at [14].

114 J C Campbell, "Access by Trust Beneficiaries to Trustees' Document Information and Reasons" (2009) 3 J Eq 97 at 134.

115 Georgia Dawson, "A Fork in the Road for Access to Trust Documents" (2009) 3 J Eq 39 at 51; also see J C Campbell, "Access by Trust Beneficiaries to Trustees' Document Information and Reasons" (2009) 3 J Eq 97 for a detailed examination of the case law, with a focus on Australian law, on the issue of trustees' duty of disclosure.

VII. New Zealand

53 *Rosewood* was considered in the New Zealand case of *Foreman v Kingstone*[116] ("*Foreman*") in the year following *Crowe*. In this case, certain discretionary beneficiaries of a family trust who were concerned about a number of aspects of the trust instrument requested from the trustees some 13 categories of documentation and information. The trustees were happy to provide copies of the trust deed, but refused to furnish any other information on the basis that doing so in a personal family trust could only lead to conflict and disharmony, and that such disclosure was only being sought here in order to find a basis upon which to challenge the exercise of the trustees' discretion.

54 The New Zealand High Court concluded that a right to information had been established, and ordered that all financial statements relating to the trust, including matters such as details of distributions, assets and liabilities and deeds of appointment be disclosed. The case has been used as an illustration that the tide is turning in favour of disclosure to the beneficiaries – even where the beneficiaries do not have a fixed interest in the trust but are merely discretionary beneficiaries.[117] It should, however, be pointed out that the High Court did not allow the beneficiaries to uncover the reasons for the trustees' decisions or details of communications between the trustees and the settlor in the capacity of advisory trustee.

55 On the strength of *Foreman*, it would seem harder to argue against the need for disclosure if the documents are of the types that go to the core of the trusteeship, such as trust deeds and deeds of appointment. While the trustees' decisions are still subject to non-disclosure, the same does not apply to many of the documents relating to their exercise of power. To this extent, the law prior to *Rosewood* on what can be disclosed seems to be under expansion, rather than revolution. For such documents, should the trustees argue against disclosure on grounds such as avoiding potential familial conflict, their reasons would need to be more cogent. On the other hand, if the information sought is more remote, it would be easier for the trustees to make a case against disclosure. And when it is not very clear-cut whether the documents are indeed "core" documents, the court would have to decide whether disclosure should be whole or partial, or if any safeguards should be implemented.[118]

116 [2004] 1 NZLR 841.

117 David Simcock, "The Taxation of Trusts" (2007) 13 *New Zealand Journal of Taxation Law and Policy* 20 at 51, para 4.3.

118 This seems to be in line with Lord Walker's statement in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [66].

56 While these considerations give the trustees some guidelines as to what information should, and should not, be disclosed, the approach allows the court to retain a great deal of flexibility as each request for disclosure must ultimately be considered on its facts, rather than on some arbitrary classification of documents being, or not being, "trust documents". It is clear that such an approach rejects the proprietary analysis. Instead, it regards the right to information as stemming from, and founded on, the trustees' overall duty to account for their trusteeship.[119]

57 In the recent New Zealand High Court case of *Re Maguire*,[120] the residuary beneficiaries sought orders requiring the respondent executors and trustees to disclose files relating to the transfer of two properties into joint tenancy, any prior wills of Bryan James Maguire, and any other files relating to Bryan James Maguire, his finances and affairs. The residuary beneficiaries were concerned that on Bryan Maguire's death these properties had passed by survivorship to Patrick Maguire (one of the executors and trustees), and that as residuary beneficiaries they had not shared in their value. The respondents refused to provide the materials sought. They accepted that the residuary beneficiaries were entitled to information relating to trust property and the trustees' dealings with the property. However, they submitted that what was sought was information relating to property that was not part of the residuary estate.

58 With regard to the claim against the respondents as trustees, the New Zealand High Court endorsed *Foreman*, and concluded that:[121]

> While it is possible to conceptualise the discretionary beneficiary's rights in terms of a limited or contingent interest resting on their chose of action against the trustees, the preferable approach is to consider the beneficiary's rights to access trust documents as arising from a trustee's duty to account for its actions to the beneficiaries and adhere to the terms of the trust. As part of that duty to account, the trustee must on a reasonable request, disclose trust documents to a vested or discretionary beneficiary, unless there are good reasons not to do so. On this basis the accounts of a trust would be generally disclosed on the direct request, as would documents relating to the

119 Gerwyn LLH Griffiths, "Antipodean Revelations – The Beneficiary's Right to Information after *Rosewood*" [2005] *The Conveyancer and Property Lawyer* 93 at 93. See also *Foreman v Kingstone* [2005] WTLR 823 (HC, NZ) at 859, *per* Potter J:

> In the case of persons named or included by definition as discretionary beneficiaries under a trust instrument, circumstances that might exclude them from relief would be limited, because to decline disclosure of accounts and information would be a direct conflict with the trustees' fundamental obligation to be accountable to the beneficiaries.

120 [2010] 2 NZLR 845.

121 *Re Maguire* [2010] 2 NZLR 845 at [30].

> assets of the trust and the trustee's actions in relation to those assets. However, a confidential memorandum of wishes might not be disclosed if an intention on the part of the settlor that they not be disclosed may be discerned, or viewed objectively, such disclosure may not be in the interests of the beneficiaries as a whole. If a trustee is in doubt, it can apply to the court for a direction under s 66 of the Trustee Act 1956. If a beneficiary's request is refused by a trustee and the beneficiary considers that refusal to be wrong, the beneficiary can apply for an order from the court. The court will consider that application in its supervisory jurisdiction.

59 The New Zealand High Court went on to hold that it is:[122]

> … preferable to approach disclosure as an exercise of the trustee's discretion, and of the court's supervisory discretion, rather than the recognition of a property right. That is the route that will best allow for a judgment as to whether in the light of the objectives of the trust and the objective assessment of the consequences of disclosure, an order should be made.

60 The New Zealand High Court did not make an order for disclosure in the present case because the documents sought did not relate to the trust asset which was the residuary estate, but to the earlier affairs of Bryan Maguire, which were confidential to him and his personal representatives.[123] As such, they did not pass to the residuary trust. However, it is clear that the court's analysis rejects the proprietary approach, and instead endorses the approach taken in *Foreman*.[124]

VIII. Canada

61 The Canadian courts have approached the issue from a starting point that the beneficiaries have a *prima facie* proprietary interest in the trust, and are thus entitled to the production of documents relating to advice sought and obtained in relation to the administration and management of the trust.

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122 *Re Maguire* [2010] 2 NZLR 845 at [31]; see, however, a contradictory view in Richard Dew, "Trusts and Disclosure" (2011) 5 PCB 241 at 242 that it was wrong for the judge "to consider that his decision was a matter of discretion or that he could refuse [their] request [for access to documents regarding the administration of the trust]" as the residuary beneficiaries *collectively* had a proprietary right to the documents.

123 *Re Maguire* [2010] 2 NZLR 845 at [37].

124 See Jessica Palmer, "A Modern Law of Trusts: Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ L Rev 541 at n 67, stating that *Re Maguire* [2010] 2 NZLR 845 represents the position that it is necessary that beneficiaries have rights of access to trust information so as to enforce the trustees' duties.

62 Humphries J in *Macpherson v Macpherson*[125] applied the reasoning of *Rosewood* and held that:[126]

> [A] beneficiary, simply by asserting a claim, does not have an entitlement as of right to disclosure; the strength of the claim must be balanced against the competing interests such as a personal or commercial confidentiality.

63 It seems that the adversarial nature of the parties as spouses in dispute and the practical need for the parties to administer the trust fund in a situation where there was no alternative means of managing the pension fund were factors that were taken into consideration.[127]

64 The wife could only assert her rights through the husband, and it was finally held on "fairness and good faith"[128] that the opinion which the husband sought should be made available to her, whether it was based on her proprietary interest as beneficiary or part of the good faith duty of the husband as trustee.[129]

65 The approach in *Rosewood* was characterised as not giving the beneficiary a right to obtain documents merely by asserting a claim,[130] and thus the trustee could not resist disclosure simply by questioning "the claimant's right to be considered a beneficiary".[131] This opens the way to a balancing test of competing interests.[132]

66 Similarly, Rogers J in *Patrick v Telus Communications Inc*[133] approached the issue from a starting point that the plaintiffs were beneficiaries of a trust administered by the defendants, and were thus entitled to a proprietary interest in the trust's affairs.[134] However, the countervailing factor that the administration of the plan was done by the defendants in their capacity as the employers, rather than the trustees, of the plaintiffs, was taken into account.[135] The defendant further relied on *Rosewood* to assert that documents relating to a trustee's exercise of a discretionary power are exempt from production.[136] However, it was held that unless disclosure was

125 [2005] BCSC 207.
126 *Macpherson v Macpherson* [2005] BCSC 207 at [18].
127 *Macpherson v Macpherson* [2005] BCSC 207 at [21].
128 *Macpherson v Macpherson* [2005] BCSC 207 at [23].
129 *Macpherson v Macpherson* [2005] BCSC 207 at [23]–[26].
130 *Macpherson v Macpherson* [2005] BCSC 207 at [18] and [27].
131 *Macpherson v Macpherson* [2005] BCSC 207 at [27].
132 *Macpherson v Macpherson* [2005] BCSC 207 at [27].
133 [2005] BCSJ 1762.
134 *Patrick v Telus Communications Inc* [2005] BCSJ 1762 at [20].
135 *Patrick v Telus Communications Inc* [2005] BCSJ 1762 at [20].
136 *Patrick v Telus Communications Inc* [2005] BCSJ 1762 at [28].

"prejudicial to the trustee's ability to discharge his trust obligations",[137] the documents demanded may not be withheld from the beneficiary seeking them, once the beneficiary demonstrates a *prima facie* beneficial interest in the trust (and thus, a *prima facie* proprietary right to trust documents).[138] *Rosewood* was further explored, and Rogers J decided that the difference in the plaintiff's position, as to whether he was suing over the propriety of an exercised discretion or simply as a potential beneficiary *simpliciter*, could be of significance in the scope of information available for inspection by the plaintiff.[139]

67 These two cases aptly highlight the Canadian position: (a) a plaintiff has to be able to assert a *prima facie* present or potential beneficial interest in the trust,[140] and (b) there have to be no countervailing factors which would be prejudicial to the trustee's effective administration of the trust, before the documents demanded may be produced. The Canadian courts have shown a liberal willingness to look into several factors such as the relationships between the parties in order to ascertain the practicality and the impact of disclosure,[141] while making a distinction between potentially different classes of trust documents.

IX. Hong Kong and Singapore

68 The courts in Hong Kong appear to have accepted *Rosewood* as laying down the applicable law in relation to a trustee's duty of disclosure of information to the beneficiaries. For example, *Rosewood* was referred to without adverse comment in the recent case of *Tam Mei*

137 *Patrick v Telus Communications Inc* [2005] BCSJ 1762 at [39].

138 *Patrick v Telus Communications Inc* [2005] BCSJ 1762 at [39].

139 *Patrick v Telus Communications Inc* [2005] BCSJ 1762 at [31].

140 See also *Jachimowicz v Jachimowicz* [2009] NSJ No 493 at [162], where the Canadian position is characterised as trustees being generally obligated to provide trust information on a beneficiary's request; see also *Webster-Tweel v Royal Trust Corp of Canada* [2010] AJ No 1553 at [117]: "A trustee potentially owes a duty to provide information to a large range of beneficiaries, including those with a present interest in the trust property, those with a contingent interest in remainder property, or those who are only an object of a discretionary trust." *Cf Jachimowicz v Jachimowicz* [2009] NSJ No 493 at [163], it was also observed that while a beneficiary with a proprietary interest in the trust may be entitled to inspect trust documents, a discretionary beneficiary may not be similarly entitled.

141 The approach in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 of considering competing factors when determining whether an accounting should be ordered received approval in *Webster-Tweel v Royal Trust Corp of Canada* [2010] AJ No 1553 at [119] and *Martin Estate (Re)* [2009] BCJ No 2020 at [30] (referred to without adverse comment) and [31]; examples of such competing factors include the interests of various parties: *Martin Estate (Re)* [2009] BCJ No 2020 at [31].

Kam v HSBC International Trustee Ltd.[142] In addition, it was held in *Hotung v Ho Yuen Ki*,[143] that the trustees are obliged to disclose trust documents or information where such disclosure forms part of the performance of a duty owed by them to the beneficiaries, albeit in circumstances where certain legislative provisions applied.[144]

69 In Singapore, the issue has neither been decided nor explored. Faced with the scarcity of jurisprudential material on the issue, it is difficult to appraise the approach that Singapore courts would adopt should an issue on point arise. However, considering the weight of English authorities, it is likely that *Rosewood* would be followed. Furthermore, the analysis on a trustee's duty of disclosure in other contexts, such as the disclosure of information to beneficiaries in a situation where the trustee enters into a transaction where there is a conflict of interest has not been regarded as proprietary, but rather, has been viewed as an extension of a trustee's fiduciary duties.[145]

X. Offshore trust legislation

70 In comparison, some legislation in the offshore trust jurisdictions have a similar effect as *Londonderry* in that they aim to put certain categories of documents beyond disclosure.

71 For example, the Mauritian trust law details which categories of documents can be disclosed, and what kinds of documents trustees cannot be compelled to disclose (*eg*, the conduct of trust administration, the trustee's deliberations as to how a power or discretion is to be exercised, *etc*).[146] This approach seems to be the most certain and unambiguous.

142 [2010] HKCU 1460 at [81]; also note the case of *Cheung Kam Mun v Cheung Kam Wai* [2006] HKCU 1416 at [13] where in the context of an application by a beneficiary for disclosure of bank accounts by a personal representative, counsel appears to have agreed that *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 lays out the applicable law in this area and the court did not make any comment on this issue.

143 [2007] 4 HKLRD 384 at 399.

144 Rules of the High Court (Cap 4, Sub Leg) O 85 r 2(3)(a).

145 In *Low Fong Mei v Ko Teck Siang* [1989] 1 SLR(R) 514, L P Thean J (as he then was) acknowledged the existence of a trustee's duty to disclose. In *Loh Sze Ti Terence Peter v Gay Choon Ing* [2008] SGHC 31, the issue of disclosure was explored from the starting point of fiduciary duties. While the case was not directly on point as it discusses the duty of a trustee to make full and frank disclosure of all material facts where he or she enters into a transaction in which he suffers from a conflict of interest, it allows a measure of exploration as to how the courts approach the issue of duties of trusteeship.

146 Trusts Act 2001 (Mauritius) s 33.

72 In Guernsey, s 22 of the repealed Trusts (Guernsey) Law 1989 provided that at all reasonable times, a trustee has to "provide full and accurate information as to the state and amount of trust property" whenever a beneficiary requests it.[147] Subsequently, in the context of a beneficiary of a discretionary trust seeking access to trust documents to discover why she was excluded, the approach in *Rosewood* was followed,[148] and the Royal Court of Guernsey stated that no beneficiary was "[entitled as of right] to disclosure of trust information",[149] but held that in principle, an excluded discretionary beneficiary was still entitled to seek disclosure.[150] In the light of *Rosewood*, there was a proposal to reform the law to the effect that the terms of the trust may expressly provide for the exclusion of the beneficiaries' right to some forms of trust information. Notwithstanding, the beneficiary is still entitled to apply to the court for disclosure of such documents, although the burden of proof is on him to show that he should be entitled to view such documents.[151] However, this reform, now in s 26 of the Trusts (Guernsey) Law 2007,[152] has the effect of making it exceedingly difficult for beneficiaries to be entitled to disclosure, because the beneficiary often needs to view trust documents to discover whether he has any cause of action against the trustees in the first place.[153]

73 The Dubai International Finance Centre has a similar law to that of Mauritius,[154] except that the trustees may apply to the court to show that, under the terms of the trust, they are not sufficiently accountable to the beneficiaries, and if successful, such an application might have the effect of restricting the rights of any beneficiary to trust information. This seems to suggest that the trust document must specifically state that the trustees are accountable to the beneficiaries for certain types of information. If such terms are absent in the trust, the trustees may not be accountable to the beneficiaries for trust information at all – not even the "core" content of the trust. This is an

147 Trusts (Guernsey) Law 1989 s 22.

148 *Countess Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd* (unreported, Royal Court of Guernsey, 38/2004, 14 September 2004) at [111]; see also Georgia Dawson, "A Fork in the Road for Access to Trust Documents" (2009) 3 J Eq 39 at 49.

149 *Countess Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd* (unreported, Royal Court of Guernsey, 38/2004, 14 September 2004) at [111].

150 *Countess Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd* (unreported, Royal Court of Guernsey, 38/2004, 14 September 2004) at [117].

151 Review of Trust Law in Guernsey 2006, Final Report para 22.

152 Trusts (Guernsey) Law 2007 s 26.

153 In particular, in relation to the disclosure of documents relating to the trustees' deliberations or the settlor's letters of wishes, s 38 of the Trusts (Guernsey) Law 2007 provides that trustees are not obliged to disclose such documents, unless the beneficiary can show that disclosure of the requested documents is "necessary or expedient" for specific reasons.

154 Dubai International Financial Centre Trust Law No 11 of 2005 Art 52.

extreme position that locks the beneficiaries out of the management process, leaving the trust property prone to abuse and mismanagement by the trustees.

74 In Jersey, statutorily, a beneficiary[155] (not being a charity) has a positive right to see documents which relate to the accounts of the trust.[156] However, the State also negates certain defined obligations, except in specific circumstances.[157] Subject to the terms of the trust and subject to any order of the court, a trustee may refuse to make disclosure of any document which: (a) discloses his deliberations as regards the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; (b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based; or (c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty.[158] The same applies to documents relating to, or forming part of, the accounts of the trust,[159] except in cases where the person applying for

155 In *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, the Privy Council held that the same position applied to both a beneficiary of a fixed trust and that of a discretionary trust. However, under Art 1 of the Trusts (Jersey) Law 1984 (as amended), "beneficiary" is already defined as including a discretionary object, see <http://www.lawinstitute.ac.je/downloads/2011.10.20%20Trusts%20study%20guide%202011-2012%20FINAL%20with%20ISBN.pdf> (accessed 12 December 2011) at para 5.25.

156 Trusts (Jersey) Law 1984 (as amended) Art 29; *Re Rabaiotti* 2000 JLR 173 at 184 where the Royal Court held:

> As the Jersey Law Commission states, in its helpful and thought-provoking Consultation paper No 1 entitled 'The rights to beneficiaries to information regarding trusts', the provision is not as easy to interpret as it might be because of the use of a double negative. In our judgment, the relevant wording in effect confers a positive right on a beneficiary to see documents which relate to the accounts of the trust. Thus, '… a trustee shall not be required to disclose to any person any documents which relates to or forms part of the accounts of the trust unless that person is a beneficiary' means that, where that person is a beneficiary, the trustee is required to disclose such documents.

Also see <http://www.walkersglobal.com/files/Publication/73592f38-8ded-48d0-bb13-39051c4db816/Presentation/PublicationAttachment/bb327a6a-b7af-4f65-9a45-3b239fa030dc/(Jersey)%20Beneficiaries%20Rights%20to%20the%20Disclosure%20of%20Trust%20Documents.pdf> (accessed 12 December 2011) and <http://www.lawinstitute.ac.je/downloads/2011.10.20%20Trusts%20study%20guide%202011-2012%20FINAL%20 with%20ISBN.pdf> (accessed 12 December 2011) at p 137, paras 5.21–5.22.

157 William V W Norris & Daniel A Hochberg, "The Rights of Beneficiaries to Information Concerning a Trust" (1999) 5 PCB 292 at 293; Trusts (Jersey) Law 1984 (as amended) Art 29.

158 Trusts (Jersey) Law 1984 (as amended) Arts 29(a)–29(c).

159 Trusts (Jersey) Law 1984 (as amended) Art 29(d). The expression "accounts of the trust" was subsequently construed in an expansive manner to include "all accounts, vouchers, coupons, documents, and correspondence relating to the administration of the trust property or otherwise to the execution of the trust, including a full

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information is "a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust or the enforcer in relation to any non-charitable purposes of the trust".[160]

75 However, the seemingly narrow approach of the Jersey provisions is mitigated by the fact that the court may make orders for disclosure. Since the judgment of *Re Rabaiotti*,[161] the law of Jersey as regards disclosure of trust documents to the beneficiaries has already been governed by many of the principles which found favour with the Privy Council in *Rosewood*. The Deputy Bailiff considered his decision in *Re Rabaiotti* not as proceeding upon the existence of proprietary rights,[162] but as being "an essential part of the mechanism whereby the trustee can be held accountable for his trusteeship to a beneficiary".[163] It would seem that in Jersey, the judicial approach to disclosure of information is not vastly dissimilar to that adopted in *Rosewood*.[164] Of all the offshore trust jurisdictions discussed, Jersey takes the most liberal approach to the issue of disclosure.[165]

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inventory of the trust assets and all dealings relating to any real property, (as defined in *Re Londonderry's Settlement* [1965] Ch 918 where the kind of information to which beneficiaries are entitled is set out)": *West v Lazard Bros & Co (Jersey) Ltd* [1987–1988] JLR 414 at 420. *Cf Re Rabaiotti* (2000) JLR 173, where the court noted that in *West v Lazard Bros & Co (Jersey) Ltd* the point was not argued.

160 Trusts (Jersey) Law 1984 Art 29.

161 (2000) JLR 173.

162 See *Re Rabaiotti* (2000) JLR 173 at [32] and [33].

163 *Re Rabaiotti* (2000) JLR 173 at [26] and [27].

164 See Georgia Dawson, "A Fork in the Road for Access to Trust Documents" (2009) 3 J Eq 39 at 49, citing *In the Matter of the Internine and the Azali Trusts* [2004] JLR 325, and *In the Matter of the Bastiaan Broere Trust and the Cornelist Broere Trust* 2003 JLR 509. See also <http://www.walkersglobal.com/files/Publication/73592f38-8ded-48d0-bb13-39051c4db816/Presentation/PublicationAttachment/bb327a6a-b7af-4f65-9a45-b239fa030dc/(Jersey)%20Beneficiaries%20Rights%20to%20the%20Disclosure%20of%20Trust%20Documents.pdf> (accessed 12 December 2011) at p 4 for a similar view. However, this position must be qualified by the suggested approach set out in <http://www.lawinstitute.ac.je/downloads/2011.10.20%20Trusts%20study%20guide%202011-2012%20FINAL%20with%20ISBN.pdf> (accessed 12 December 2011) at paras 5.32–5.46 that judicial intervention varies depending on the type of trust information requested to be disclosed: documents falling *prima facie* within the category of "trust accounts" in Art 29 of the Trusts (Jersey) Law 1984; documents falling within that category but which do or may evidence the reasons for which trustees exercised their discretion; documents falling within that category but do not evidence the reasons for which trustees exercised their discretion, yet the interests of the beneficiary conflict with those of other beneficiaries; and documents which are not clearly within the category of "trust accounts".

165 See Georgia Dawson, "A Fork in the Road for Access to Trust Documents" (2009) 3 J Eq 39 at 49–50, which expresses a similar view that the courts of Jersey have been willing to apply *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 to novel

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XI. Concluding remarks

76 Prior to *Rosewood*, trustees had some certainty on the issue of confidentiality. There were documents that had to be produced[166] upon request because they went to the heart of trusteeship. Into this category would fall trust deeds, deeds of appointment, resettlement and removal and financial statements containing information about matters such as assets, liabilities and financial transactions.[167] There were also certain documents that the trustees could not be compelled to disclose, such as the trustees' reasons behind the exercise of a discretion.[168] Further, only beneficiaries who could show a proprietary interest in the trust could request disclosure.[169]

77 In the light of *Rosewood*, past decisions – which confined access to trust documents only on the basis of a proprietary interest – are no longer applicable. *Prima facie*, *Rosewood* has the unwitting effect of eroding certainty.[170] With the "balancing test",[171] there are no hard and fast rules as to what information a trustee can, or cannot, be compelled to disclose,[172] which has now become the court's prerogative. Post-*Rosewood*, trust documents and trust information not in documentary form are both considered properties of the trust and therefore no distinction should be made between the levels of accessibility to each.[173] This is particularly important given that with today's technology, information need not be confined to that contained in documents. Not only does *Rosewood* remove the requirement of a clear division between interests which carry the right to apply for access to documents and information, and interests which do not,[174] it also

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situations which were not envisioned by the Privy Council to be covered by the law set out in that case.

166 D Hayton, "The Irreducible Core Content of Trusteeship" in *Trends in Contemporary Trust Law* (A J Oakley ed) (Clarendon Press, 1996) at pp 46–62.

167 Gerwyn LLH Griffiths, "Antipodean Revelations – The Beneficiary's Right to Information After Rosewood" [2005] *The Conveyancer and Property Lawyer* 93 at 94.

168 *Re Londonderry's Settlement* [1965] 2 WLR 229. The court, motivated by the need to preserve family ties, declared that such documents were not in fact trust documents at all.

169 *O'Rourke v Darbyshire* [1920] AC 581.

170 See Lionel David Smith, *Access to Trust Information: Schmidt v Rosewood Trust Ltd* (2003) 23 *Estates, Trusts & Pensions Journal* 1 at 6. See also Richard Wilson & Henrietta Labes, "*Schmidt v Rosewood*: A Closer Inspection" (2004) 3 PCB 161 at 168. Similar judicial comments were made in *McDonald v Ellis* [2007] NSWC 1068 at [51].

171 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

172 M Ambrose, "Disclosure to Beneficiaries – Whither Confidentiality" (2006) 4 PCB 236.

173 Gavin Lightman, "The Trustee's Duty to Provide Information to the Beneficiaries" (2004) 1 PCB 23 at 31.

174 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [66] (PC), *per* Lord Walker; note, however, that *Schmidt v Rosewood Trust Ltd* did not consider the law applying to

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removes any need for a bright dividing line between documents and information which may, and those which may not, be the subject of an application.[175] Accordingly, all documents relating to the trust and all information so held by the trustee are part of trust property, and a court may order that they be disclosed in appropriate circumstances.

78 *Rosewood* rightly moves the law away from a solely proprietary analysis of the beneficiary's rights to access information, towards an emphasis on the trustee's duties of confidentiality and obligations, as governed, and balanced out, by the court's inherent jurisdiction to see to the administration of the trust.[176] The main question to be asked in each case is whether in the particular circumstances, the legitimate requirement of the beneficiary to obtain access outweighs the competing interests and possible objections to disclosure of the trustees, the other beneficiaries and relevant third parties.[177]

79 This does not mean that the proprietary interest of a beneficiary has become entirely irrelevant.[178] It is merely subsumed as one of the many factors to be weighed in deciding whether disclosure should be made.[179] This can be seen from the general endorsement given in Lord Walker's decision to the judgments of Kirby P and Sheller JA in the New South Wales case of *Hartigan*,[180] which emphasised that access should not be granted on artificial distinctions between proprietary and non-proprietary interests, but instead should be based on the trustee's duty to keep the beneficiary informed and to render accounts.

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objects of personal powers. Also note the uncertainty in the position in Australia as seen in *Avanes v Marshall* [2007] NSWSC 191 and *McDonald v Ellis* [2007] NSWC 1068 which suggests that the right of a beneficiary of a fixed trust to disclosure of information by trustees may not be subject to the court's discretion. For a similar academic view that a different position applies for fixed trusts, see, for example, Lusina Ho, "Trustees' Duties to Provide Information" in *Exploring Private Law* (E Bant & M Harding eds) (Cambridge University Press, 2010) at p 351.

175 See also Richard Dew, "Trusts and Disclosure" (2011) 5 PCB 241 at 246, where it is suggested that for several "usual" categories of trust documents, the general mode by which the court exercises its discretion has become relatively predictable.

176 See also Lusina Ho, "Trustees' Duties to Provide Information" in *Exploring Private Law* (E Bant & M Harding eds) (Cambridge University Press, 2010) at p 346.

177 See also J C Campbell, "Access by Trust Beneficiaries to Trustees' Document Information and Reasons" (2009) 3 J Eq 97 at 145 where it was noted that in each case, the court intervenes in favour of a plaintiff beneficiary to order for disclosure only where such disclosure is required in order to give effect to the "diligent performance of the settlor's intention and the office the trustee has undertaken".

178 See also Richard Dew, "Trusts and Disclosure" (2011) 5 PCB 241 at 241–242.

179 See *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [54].

180 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 421–422. As Kirby P notes, proprietary rights may be *sufficient*; but they are not *necessary* to a right of access.

80 The *Rosewood* position is an improvement as compared to prior case law as it introduces considerably greater flexibility when dealing with issues of disclosure. This allows the courts to weigh, on the facts of each case, the myriad reasons for the disclosure or non-disclosure of a particular document, while developing over time through case law the precise factors that have more weight in determining whether disclosure should be made. Although a degree of uncertainty at this point in time is inevitable as noted above,[181] it is submitted that the articulation of the underlying factors and concerns that drive the court's exercise of discretion in its inherent jurisdiction may bring greater clarity and consequently coherence to the law, as compared to the artificial distinctions made previously that masqueraded pertinent considerations.

81 Yet, despite the need for a more flexible approach to disclosure as revealed by the limitations of the proprietary analysis discussed above, it is vital both for those seeking advice and those giving it, that judicial discretion be exercised in a consistent manner, even if *Rosewood* and the cases that apply it result in a broader disclosure obligation.[182] The trustees need to know what they can, or cannot, do in discharging their fiduciary obligations, and it does not suffice to conclude that they should appeal to the inherent jurisdiction of the court each time they are approached for the disclosure of information. It is hoped that further evolution, and exploration by future courts, will result in clearer applicable principles, and more concrete guidelines as to how the courts will exercise their discretion.

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181 See J C Campbell, "Access by Trust Beneficiaries to Trustees' Document Information and Reasons" (2009) 3 J Eq 97 at 147 for a different opinion that the *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 position which renders the beneficiaries' right of access to information subject to the court's exercise of discretion does not give rise to greater uncertainty than already present pre-*Rosewood*, because even cases which held that beneficiaries had a right to trust information also recognised that such a right was necessarily subject to the circumstances of each case.

182 Gerwyn LLH Griffiths, "Antipodean Revelations – The Beneficiary's Right to Information After Rosewood" [2005] *The Conveyancer and Property Lawyer* 93 at 94.