LETTERS OF WISHES

This article analyses the different categories of letters of wishes, their different implications on the trustee's duty, the comparative judicial approaches to the recognition and treatment of letters of wishes, as well as the offshore statutory models governing the trustee's duty of disclosure. This article argues that, whilst the law is less than certain, a resort to statutory reform is unnecessary. It is argued that the current position on letters of wishes, post-*Rosewood*, is that of a judicial discretion based on the court's inherent duty to supervise the trust, shifting the emphasis in the law to the trustee's accountability. This shift to accountability is consistent with the obligational theory of trust. It is argued that this does not represent a complete shift to accountability. Instead, the court must still undertake a balancing exercise – between the trustee's duty to account that entitles the beneficiaries to inspect trust documents and records on request, and the trustee's duty to act in the best interests of the beneficiaries that requires the trustee to reject a request for disclosure in appropriate circumstances – in deciding whether the trustee has disclosure obligations on a letter of wishes towards the beneficiaries.

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I. Introduction

1 A letter of wishes,[1] a separate document from a trust instrument, is commonly given by a settlor to the trustees of his will to provide guidance as to how he would like the trustees to exercise their powers.[2] A letter of wishes thus represents a less direct means by which a

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1 Henmans, Letters of Wishes <http://www.henmans.co.uk/images/Letters%20of%20wishes.pdf> (accessed 19 August 2008).

2 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 835.

settlor controls the devolution of trust property. Today, besides the use of letters of wishes in the context of pension trusts,[3] they are also commonly used in *inter vivo* trusts, facilitating the offloading of assets by the settlors from the testamentary estate, and minimising tax liability.

II. Different categories of letters of wishes and the trustee's duty

2 Generally, there are three categories of letters of wishes. The first is a legally binding letter, a mandatory document to be read alongside the trust instrument. The second is a letter which is designed to have only legal significance. The third is a letter which is only morally binding, and thus an action cannot be brought against the trustees for failing to act in accordance with the letter.[4] The categorisation of a letter of wishes is important – the trustee's duty and the availability of remedies to the beneficiaries differ in each category. A trustee can differentiate between a legally significant[5] letter of wishes, and a morally binding one,[6] by the specific way in which each is drafted. For example, the latter would contain words to the effect that the trustee is not under any legal obligation to consider the letter, and so would not be held accountable in relation to the taking into account of, or for failing to take into account, such wishes.

3 It has been observed that some legal advisers have recommended the use of a memorandum of wishes, over a letter of wishes.[7] This is based on the rationale that since a settlor does not sign the memorandum, it removes the risk of it being held to impose a trust

3 At least in the United Kingdom, pension trusts use a letter of wishes to perform two functions: (a) to nominate a person within the class of discretionary potential beneficiaries (it performs a legal function in adding someone to the class to whom the trustees may make a payment, usually a lump sum on death); (b) to specify a non-binding indication of wishes by the member (this is normally used both to give flexibility, so that the trustees are not tied to a particular letter of wishes, and better protection from an inheritance tax perspective). See also, *C Allen v TKM Group Pension Trust Limited* (L00370) at [30]–[31] dated 25 April 2002; *B Cameron v The Trustees of the Digital Equipment Company Pension Plan* (M00949) at [73]–[74] dated 14 April 2005, both decisions of D Laverick, Pensions Ombudsman, on the duty of disclosure on pension trustees of their reasons in reaching decisions.

4 See *Bank of Nova Scotia Trust Co (Bahamas) v Ricart de Barletta* (1985) Buttersworth Offshore Service 5 at 8–9.

5 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 836.

6 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 839.

7 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 835.

and it being part of the trust instrument – a risk which remains with the use of a letter of wishes.[8] However, it is suggested that the use of a memorandum of wishes does not achieve any reduction in risk – its significance is the same as a letter of wishes. It serves the same purpose as a letter of wishes, such as to provide information on a settlor's intentions. It is these intentions which determine the trusts on which the assets are held.[9]

4 The core element of a trust is the right of a beneficiary to enforce the trusteeship.[10] In *Armitage v Nurse*, Millett LJ held that "if the beneficiaries have no rights enforceable against the trustees, there are no trusts".[11] The beneficiary's right of enforcement is only effective and meaningful if the beneficiary is aware of his status as a beneficiary and has access to the required information to render the trustees accountable for their actions.[12] Only if the beneficiary is so informed can any obligation of executors and trustees to provide trust information on request have any substance. A trust must be both visible to the beneficiaries and enforceable by them.[13]

5 A duty at the heart of the trust relationship is the trustee's duty to inform a beneficiary of his entitlement. As such, every beneficiary is entitled to see the trust accounts.[14] However, this duty is only limited to providing information duly requested by a qualified applicant – a trustee generally has no duty to volunteer information.[15] A beneficiary's right is confined to information which concerns him.

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8 See David Hayton, "English Fiduciary Standards and Trust Law" (1999) 32 Vand J Transnat'l L 555 at 574–575:

> To minimize the impact of a letter of wishes signed by the settlor, the trustee often merely prepares a memorandum of wishes after extensive consultation with the settlor. However, such a memorandum is likely to be regarded as a legally significant letter of wishes, with the court rejecting a trustee's self-serving attempts to rely on morally binding terminology used by the trustee in the memorandum as creating a situation similar to that of a mere morally binding letter.

9 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 835.

10 David Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 94 at 104.

11 [1998] Ch 241 at 255.

12 Gavin Lightman, "The Trustee's Duty to Provide Information to the Beneficiaries" (2004) 1 PCB 23 at 25.

13 Gavin Lightman, "The Trustee's Duty to Provide Information to the Beneficiaries" (2004) 1 PCB 23 at 25.

14 This is construed by Lindley LJ in *Low v Bouverie*, [1891] 3 Ch 82 at 99 as an obligation "to give all his *cestui que trust*" on demand information with respect to the mode in which the trust fund has been dealt with and where it is.

15 See Megarry VC in *Tito v Waddell (2)*, [1977] Ch106 at 242–243, *per* Megarry VC, and *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 431, *per* Mahoney J (CA).

6 The impact of a letter of wishes on the trustee's duty to inform a beneficiary of his entitlement, and the duty of disclosure, depends on whether the letter is regarded as a mandatory document to be read alongside the trust instrument, or a document which is intended to have only legal significance, or a document which is only morally binding.

7 Exceptionally, a settlor's intention may be for the trustee to accept a letter of wishes as a *legally binding* document which overrides any contrary terms contained in the trust instrument.[16] Some factors which would persuade the court that this was so intended include the use of mandatory language, the degree of precision with which the letter of wishes is couched, the length and complexity of the trust instrument in contrast to the simplicity of the letter of wishes. It is suggested that in this context since a beneficiary has a right to see the formal trust instrument, he also has a right to see the informal letter of wishes, since the legally binding terms of the trust arise via the incorporation of both documents.[17] In addition, if the trust instrument or letter of wishes stipulates that any term is to be kept secret from the beneficiary, this would be rejected by the court as being repugnant to the fundamental concept of trust that a beneficiary must have a meaningful right to make the trustee properly account for his trusteeship.[18]

8 The most common situation is that a settlor intends that a letter of wishes be only of legal significance[19] – that of the second category – in revealing the purposes for the extensive range of powers and discretions conferred on the trustees.[20] Such a letter is not legally binding on the trustee. The trustee does not have to follow exactly the wishes set out in the letter. Instead, it is *legally significant* in that it provides some guidance for a trustee (and any successor or replacement trustees), which the trustee has to consider, in exercising his powers and discretions. It also clarifies the purposes and expectations which the settlor had in mind when he granted the broad powers and discretions

16 See David Hayton, "English Fiduciary Standards and Trust Law" (1999) 32 Vand J Transnat'l L 555 at 573:

> A settlor may contemporaneously provide with a discretionary trust instrument a letter in which he directs the trustees to pay the income to him for the rest of his life, and which the trustees must sign to acknowledge that they must implement its terms; then during the settlor's life, the real trust is in the letter, not in the discretionary trust instrument (except for administrative powers and any powers of appointment, etc).

17 *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897 at 923 (HC).

18 *Armitage v Nurse* [1998] Ch 241 at 253, *per* Millett LJ (CA), and *Scally v Southern Health & Social Services Board* [1992] 1 AC 294 at 306–307 (HL). The latter is a case of an employment contract dealing with an implied term.

19 See, for example, *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.

20 *Re Hay's Settlement Trusts* [1981] 3 All ER 786 at 792 (Ch).

to the trustee.[21] Once a trustee has considered the guidance provided, he is free to exercise his independent judgment to accord with changing circumstances. The trustee would not be held accountable for exercising his powers and discretions in a particular manner as long as he has considered the guidance provided.

9 Moreover, since the disclosure of information to beneficiaries is now contingent on the core accountability of the trustees to them,[22] such a legally significant letter is a crucial document which the beneficiaries ought to be able to inspect, together with the trust instrument, so that the beneficiaries are in a meaningful position to demand that the trustees account for the proper exercise of their discretions. Only if the beneficiaries can ascertain the purposes and expectations of the settlor (instead of relying on the trustees' assertions which cannot be proved one way or the other), can they possibly allege that the trustees failed to properly exercise their discretion in furthering these purposes and expectations, but instead did so arbitrarily, or took into account irrelevant factors, or failed to take into account relevant factors.[23]

10 A settlor who is determined to ensure that his letter of wishes remains confidential can make it simply *morally binding*[24] without the attendant legal significance, so that it need not be disclosed even if the beneficiary brings a legal action against the trustee. Unlike a legally significant letter of wishes, there are no legal obligations imposed on a trustee to consider a morally binding letter. A trustee would not be accountable with regard to his taking into account such wishes. As long as a morally binding letter is not a sham[25] inserted by the trustee without the settlor's consent or without the settlor's mind being directed to it to appreciate and approve of it,[26] it is suggested that a court should give effect to this expression of the settlor's intention in creating a mere morally binding letter.

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21 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 836.

22 See *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 (PC).

23 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 837.

24 See Paul Matthews, "Letters of Wishes" (1995) 5 OTPR 176 at 181 and 184.

25 See Matthew Conaglen, "Sham Trusts" [2008] 67(1) Cambridge Law Journal 176; *A v A, St George Trustees Ltd* [2007] EWHC 99 (Fam).

26 David Hayton, "English Fiduciary Standards and Trust Law" (1999) 32 Vand J Transnat'l L 555 at 574.

III. The comparative judicial recognition and differential treatment

11 The majority of letters of wishes belong to the second category – those intended to have only legal significance. One significant uncertainty which the courts have had to grapple with when dealing with legally significant letters of wishes is whether settlors can expressly or impliedly provide that such letters not be disclosed to anyone, but instead kept secret and confidential. In turn, this depends on whether the beneficiaries have a right to have access to the letter of wishes, and use it to determine the settlor's purposes and to check whether the trustees are exercising their powers properly in order to achieve these purposes. This issue commonly arises where it is believed that a trust is not being properly administered, and a beneficiary intends to take steps to compel its proper administration and to preserve his entitlement under the trust.[27] In such a situation, the trustee's duty to account and provide information, and the beneficiary's ability to demand its disclosure and the discharge of such duty, become crucial.[28]

12 The law on this is unclear at best. This is due to the lack of English decisions on this issue, and the different approaches which have been adopted by other Commonwealth jurisdictions. The importance of this issue has been emphasised by the Privy Council in *Schmidt v Rosewood Trust Ltd v Rosewood* ("*Rosewood*"), which re-evaluated the basis of the disclosure of letters of wishes.[29] The Privy Council preferred an approach based upon the court's inherent jurisdiction to supervise, instead of following the traditional proprietary rationale set out in *Re Londonderry's Settlement* ("*Londonderry*").[30]

27 See Gerwyn Ll H Griffiths, "An Inevitable Tension: The Disclosure of Letters of Wishes" (2008) 4 Conv 322 at 322. Griffiths notes that when "a trust is being properly administered and is continuing, a beneficiary has no right to interfere in its administration but has to wait passively to receive the benefits to which he is entitled under the trust".

28 See J Wadham, *Willoughby's Misplaced Trust* (Gostick Hall Publications, 2nd Ed, 2001). Peter Willoughby stated that: "Whenever a beneficiary is concerned as to the due administration of the trust or wishes to challenge the validity of a trust there will normally be an attempt to obtain all trust documents and records held by the trustees."

29 [2003] 2 AC 709 at [7]. *Rosewood*, it should be pointed, was not about letter of wishes, but trust accounts and other information about trust assets.

30 [1965] Ch 918 (CA).

*A. The pre-*Rosewood *position*

13 The English position on letters of wishes before *Rosewood* is best summarised by Lord Wrenbury in *O'Rourke v Darbishire*:[31]

> [A beneficiary] is entitled to see all trust documents because they are trust documents and because he is a beneficiary … The proprietary right is a right to access to documents which are your own.[32]

14 It is immediately clear that this bases the entitlement to access to trust documents on the proprietary right in the trust property. It is also clear that although this definition stresses the important principle that beneficiaries generally have a right to view documents concerning the management and administration of the trust, the failure to provide an exhaustive definition of "trust documents" results in much confusion. This undesirable state of affairs is still with us, with no court having been able to come up with a comprehensive and definitive list of illustrations.[33]

15 Another important pre-*Rosewood* decision is *Londonderry*, where the English Court of Appeal attempted to impose certain limits on the beneficiary's right to have access to all trust documents.[34] More specifically, the judges tried to reconcile the proprietary basis of the right with situations where the trustees felt constrained by their duties of confidentiality to others. The court held that there are certain documents which should not be disclosed – essentially documents which relate to the reasons behind the trustees' decisions. It was ruled that the obligations of confidence of the trustees overrode the proprietary rights of the beneficiaries, and thus such documents were not trust documents at all.[35]

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31 [1920] AC 581 (HL).

32 *O'Rourke v Darbishire*, [1920] AC 581 at 626–627, *per* Lord Wrenbury (HL). Lord Wrenbury further noted at 626–627 that:

> If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. They [trust documents] are in this sense his own. Action or no action, he is entitled to access to them.

33 In *Re Londonderry's Settlement* [1965] Ch 918 (CA), Salmon LJ categorised "trust documents" as documents in the possession of the trustees containing information about the trust which the beneficiaries are entitled to know. However, it is suggested that this adds little in the search for clarity.

34 Mary Ambrose, "Disclosure to Beneficiaries – Whither Confidentiality?" (2006) PCB 236 at 236.

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

> Now as regards the letters written by individual beneficiaries, or other people for that matter, to the trustees, I think the right conclusion is that they are not really trust documents at all … It seems to me there must be cases in which

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16 What emerges from *Londonderry* is that the overriding duty of confidentiality which attaches to certain documents, such as letters of wishes, can be owed to other beneficiaries, the settlor and the trustees themselves. Subjecting the trustees' decision-making processes to the beneficiaries' scrutiny would not only fetter the trustees' discretion,[36] but would also discourage the taking up of trusteeship.[37]

17 It should also be noted that several defences are available to prevent the disclosure of certain kinds of information, even if the classification of those information results in an initial presumption of disclosure.[38] One of the defences[39] is that a trustee is not required to disclose his reasons[40] for exercising a discretionary power, unless it is in the course of civil proceedings instituted against him for exercising his discretion in an improper manner.[41] This defence has been reaffirmed in *Londonderry*, where the court unanimously refused the beneficiary access to documents that would reveal why the trustees distributed the trust assets in that particular way. It was held that the trustees of a discretionary family settlement, which it was in that case, 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.[42]

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documents in the hands of trustees ought not to be disclosed to any of the beneficiaries who desire to see them.

36 See *Re Londonderry's Settlement* [1965] Ch 918 at 935–936, *per* Danckwerts LJ (CA):

> It seems to me that where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they *cannot properly exercise that confidential role 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*. [emphasis added]

37 See the Cayman Islands case of *Lemos v Coutts & Co* (1992) Cayman Islands ILR 460, where the *Londonderry* principle was followed.

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

39 See *Re Beloved Wilkes' Charity* (1851) 3 Mac & G 440 (Ch D).

40 Civil proceedings must, of course, be properly instituted with fully particularised facts of breaches; a mere fishing expedition does not enable reasons to be discovered: Rules of Court O 18 r 12 (Singapore).

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

42 *Re Londonderry's Settlement* [1965] Ch 918 at 935 (CA). The courts have continued to show a higher regard for this principle than other requirements of disclosure, as seen in *Wilson v Law Debenture Trust Corp* [1995] 2 All ER 337, where Rattee J felt compelled to give effect to settled principles of trust law and rejected the request for the trustees of a pension scheme to disclose their reasons for exercising their discretion.

18 Despite the well-established nature of this defence, there has been much recent debate as to whether letters of wishes fall within the scope of the defence, and thus can be exempted accordingly.[43]

B. The impact of Rosewood

19 The starting position now on a claim by a beneficiary for disclosure of trust information is *Rosewood*.[44] In *Rosewood*, the trustees relied on *Londonderry* in arguing that a discretionary beneficiary and the possible object of a power of appointment – who had no proprietary interest in the trust property, and accordingly the trust documents and information – possesses no right to disclosure. In rejecting this, the Privy Council held that the true basis for the jurisdiction to order disclosure of information relating to the trust was the court's inherent jurisdiction to supervise, and if necessary intervene in, the administration of trusts.[45] Such jurisdiction could be invoked by any person who has either a discretionary or proprietary interest in the trust and whose interest is not too peripheral or remote;[46] and thus could also be invoked by the object of a discretionary trust or of a fiduciary power.[47] This jurisdiction was to be discretionary in all cases.[48]

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43 For a powerful argument supporting the proposition that they do, see, Mowbray, Tucker *et al* (eds), *Lewin on Trusts* (London: Sweet & Maxwell, 18th Ed, 2008) at pp 819–821.

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

45 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 729, *per* Lord Walker (PC): "Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts."

46 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734–735, *per* Lord Walker (PC): "In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."

47 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734, *per* Lord Walker (PC):

> Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts. There is therefore in their Lordships' view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character).

48 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734–735, *per* Lord Walker (PC):

> … no beneficiary (and least of all a discretionary object) has an entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the different interests of different beneficiaries, the trustees themselves and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation

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20 This decision has a substantial impact on the character of the trust documents and information to which a beneficiary can claim access. Past decisions which confined access to trust documents, and generated guidelines as to what constitutes a trust document for this purpose, are no longer applicable.

21 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 them.[49] Although it may be that in practice, the duty of a trustee to provide access to existing documents may be less onerous with regard to information not in a documentary form, it is suggested that it should not be possible for either a trustee, or a settlor via his letter of wishes, to prevent disclosure by resorting to oral communications only.

22 Not only does *Rosewood* remove the requirement for a clear division between interests which carry the right to apply for access to documents and information, and interests which do not,[50] it also removes any need for a bright dividing line between documents and information which may, and which may not, be the subject of an application. Accordingly, all documents relating to the trust, and all information so held by the trustee, may be subject to a court's order of disclosure in appropriate circumstances. The question in every 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.[51]

C. Exploring the relationship between the pre- and post-Rosewood principles

23 The recent English Chancery Division decision in *Breakspear v Ackland* ("*Breakspear*"),[52] where the issue was whether the trustees of a discretionary trust were required to disclose the settlor's letter of wishes to the beneficiaries, provided an opportunity for the court to clarify the effects of *Rosewood* on letters of wishes.

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of the claims of a beneficiary (especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

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

50 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734, *per* Lord Walker (PC).

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

52 [2008] EWHC 220 (Ch).

24 In *Breakspear*, a settlor created a discretionary family trust,[53] and appointed himself and his accountant as trustees. At the time of the creation of the trust, the settlor was in poor health, and in the process of separating from his wife. The beneficiaries included the settlor, his children and a remote issue with the settlor's future third wife, who was subsequently added under a trust clause. The settlor signed a letter of wishes to the effect that his future third wife must be adequately provided for if she survived him, and gave it to the other trustee. Although the settlor passed away in November 2002, the claimants – the settlor's children from his first marriage[54] – were unaware of the existence of the trust until January 2005. The existence of the letter of wishes was only made known to them several months after that. Subsequently, they sought disclosure of the letter of wishes. This was rejected by the trustee, who argued that the letter contained confidential information, and that at least one of the claimants did not have any entitlement to it as he was the object of a mere power. Moreover, the disclosure of the letter would lead to discord within the family.

25 The court endorsed the *Londonderry* principle and reaffirmed that it remains good law.[55] The *Londonderry* principle states that the process of the exercise of discretionary dispositive powers by trustees is inherently confidential,[56] and that this confidentiality exists for the benefit of beneficiaries, rather than merely for the protection of the trustees.[57] The court held that in the absence of special terms, the confidentiality in which a letter of wishes was enfolded was something given to the trustees for them to use, on a fiduciary basis, in accordance with their best judgment, for the interests of the beneficiaries and the sound administration of the trust.[58] As such, the trustees need not disclose such a letter on the request of the beneficiaries, unless the disclosure was in the interests of the sound administration of the trust, and the discharge of their powers and discretions.

26 However, Briggs J went on to hold that the beneficiaries' claim for disclosure of the letter of wishes should be allowed due to the peculiar facts obtained in the case. The main reason behind the decision

53 *Breakspear v Ackland* [2008] EWHC 220 at [25], *per* Briggs J (Ch).

54 The claimants were also the default beneficiaries of the trust.

55 *Breakspear v Ackland* [2008] EWHC 220 at [53], *per* Briggs J (Ch).

56 See *Breakspear v Ackland* [2008] EWHC 220 at [23], *per* Briggs J (Ch).

57 *Breakspear v Ackland* [2008] EWHC 220 at [25], *per* Briggs J (Ch).

58 *Breakspear v Ackland* [2008] EWHC 220 at [62], *per* Briggs J (Ch):

> 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.

was the trustees' stated intention to seek the court's sanction for any future scheme of distribution.[59] Once this is done, the contents of the letter of wishes would be relevant to the court's appraisal of the trust. In such a situation, the requirement to give the beneficiaries a proper opportunity to address the court on the question of judicial sanction, and being fully aware of the content of the letter to which the trustees would by then have carefully considered, clearly outweighed any risk of family strife as a result of the disclosure of the letter. As such, by seeking the court's sanction, the trustees would necessarily have surrendered any form of confidentiality protection against a full disclosure and examination of their reasoning, and also resulting in the displacement of the *Londonderry* principle.[60]

27 Briggs J undertook a detailed investigation into the relationship between the pre- and post-*Rosewood* principles governing the disclosure of letters of wishes. He considered the important questions of how letters of wishes should be treated, how far that treatment should differ from the discretionary *Rosewood* approach, and also examined the extent to which the pre-*Rosewood* principles have survived.[61]

28 Briggs J also dealt with the defence that unless it is in the course of civil proceedings founded upon an allegation of exercising their discretion in an improper manner, a trustee is not required to disclose his reasons for exercising a discretionary power.[62] Although he conceded that he was sceptical towards the argument that letters of wishes can fall within this defence,[63] he nevertheless went on to examine the ground of confidentiality, another major ground for non-disclosure, placing it clearly as a separate and distinct ground[64] as set out by the judgments in *Londonderry*.[65]

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59 *Breakspear v Ackland* [2008] EWHC 220 at [101], *per* Briggs J (Ch): "I therefore propose to order disclosure as sought by the claimants. I make it clear that, but for the trustees' stated intention to seek sanction for any future scheme of distribution, I would have upheld their refusal to disclose it."

60 *Breakspear v Ackland* [2008] EWHC 220 at [98], *per* Briggs J (Ch).

61 See Gerwyn Ll H Griffiths, "An Inevitable Tension: The Disclosure of Letters of Wishes" (2008) 4 Conv 322 at 324.

62 See, generally, *Re Beloved Wilkes' Charity* (1851) 3 Mac & G 440 (Ch D). This case represents the starting point that English law has, for over 150 years, protected trustees from having to give reasons for their discretionary decisions at the request of the beneficiaries.

63 Briggs J commented in *Breakspear v Ackland* [2008] EWHC 220 at [24] (Ch): "For my part, I doubt whether any of the categories were framed with wish letters in mind."

64 Mowbray, Tucker *et al* (eds), *Lewin on Trusts* (London: Sweet & Maxwell, 18th Ed, 2008) at pp 819–824.

65 *Breakspear v Ackland* [2008] EWHC 220 at [20]–[24] (Ch). Briggs J stated at [25]:

> There has been a long-standing debate whether wish letters fall within any of the excluded categories identified in the Court of Appeal's order, and in particular within the last part of category 4 which I have underlined above.

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29 Briggs J also undertook a consideration of two important pre-*Rosewood* cases, the decision of the New South Wales Court of Appeal in *Hartigan Nominees Pty Ltd v Rydge* ("*Hartigan*"),[66] and the Royal Court of Jersey in *Re Rabaiotti's Settlement Trusts* ("*Rabaiotti*")[67] – both of which dealt with the issue of the disclosure of letters of wishes, and supported his finding in *Breakspear* that the inherent nature of a letter of wishes drafted independent of the trust instrument renders it inherently confidential, and so unavailable to the beneficiaries who request to inspect it.[68]

30 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 trustee 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 discretions. The majority of the court rejected this argument, holding that the letter need not be disclosed.

31 Mahoney JA affirmed the *Londonderry* principle, and held that the right of a beneficiary to obtain documents or disclosure of information in relation to the trust is limited to documents which constitute trust property. As such, this right did not extend to the property of the trustee.[69] Moreover, information need not be disclosed if the result of disclosure would be to reveal the reasons why a discretionary power has been exercised, and would likely 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 trust property.[70] Sheller JA also affirmed confidentiality

> *I shall refer to them as the Londonderry excluded categories* … Of greater significance however is the principle which I consider clearly emerges from the judgments, namely that the process of the exercise of discretionary dispositive powers by trustees is inherently confidential, and that this confidentiality exists for the benefit of beneficiaries rather than merely for the protection of the trustees. *I shall refer to it as the Londonderry principle.* [emphasis added]

66 (1992) 29 NSWLR 405, *per* Mahoney JA and Sheller JA, Kirby P dissenting.

67 [2000] JLR 173, *per* Deputy Bailiff Birt (Royal Court of Jersey).

68 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 839. Hayton notes that the opinions of foreign courts are divided on this issue.

69 For example, this includes material prepared by the trustees for their own purposes such as to administer the trust or discharge their duties. See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 432, *per* Mahoney JA (CA).

70 See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWL.R 405 at 436, *per* Mahoney JA (CA):

> I would, for myself, see the matter of confidentiality as being of particular significance in discretionary trusts of the present kind. In deciding questions of disclosure, it is important in my opinion to have regard to the essential

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as a basis for requiring 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, he concluded that the letter was given to the trustees in circumstances of confidence, rendering it unavailable to the beneficiaries.[71]

32 *Hartigan* was endorsed by the Royal Court of Jersey in *Rabaiotti*. Here, John Rabaiotti had been ordered in English matrimonial proceedings to disclose all letters of wishes in relation to any trusts of which he was a beneficiary. The trustees of four relevant settlements – two of which were governed by the law of Jersey – applied for directions to the court of Jersey on whether the trustees should disclose such relevant documents to him. The court held that the presumption is that letters of wishes should not be disclosed,[72] with the burden on a beneficiary who seeks disclosure to make out a case for its disclosure.[73] However, the court ordered that disclosure be made in the

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> nature of such discretionary trust. Such a trust is not a mere commercial document in which the public may have an interest. It is a private transaction, a disposition by the settlor of his own property, ordinarily voluntarily, in the manner in which he is entitled to choose. Special cases apart, it is proper that his wishes and his privacy are respected. In a discretionary trust of this kind, the settlor has placed confidence in his trustee and has on that basis transferred property to him. It has, I think, been the purpose of the law to respect that trust. It depends upon confidence and confidentiality. The settlor seeks to have the trustee resolve, without unnecessary abrasion, the conflicting claims of persons in an area, the family, where disputes are apt to be bruising. In cases of this kind, if a settlor's wishes cannot be dealt with in confidence, the purpose of the trust may be defeated.

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

> 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.

72 *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 191, *per* Deputy Bailiff Birt (Royal Court of Jersey). Deputy Bailiff Birt added:

> The position is similar to that concerning trust documents, save that it is the reverse situation. One starts with a strong presumption that a letter of wishes or other document falling within the *Londonderry* exceptions, does not have to be disclosed to a beneficiary. The burden lies on the beneficiary who requests the court to order the disclosure of such a document against the wishes of the trustees. Nevertheless, there is power in the Court to do so if the Court is satisfied that there are good grounds for ordering disclosure in a particular case.

73 See *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 193, *per* Deputy Bailiff Birt (Royal Court of Jersey): "So far as the letter of wishes is concerned, the court starts in the opposite position to that for the accounting documents. There is a strong

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case as it feared that not doing so might result in the English court concluding that his interest in the four settlements was greater than it actually was.[74]

33 The court in *Rabaiotti* specifically rejected Kirby P's dissenting judgment in *Hartigan* that a beneficiary should generally be entitled to know the reasons for a trustee's decision. The court in *Rabaiotti* believed, among other reasons, that this would "inhibit full and free discussion, and be likely to lead to ill-feeling and to fruitless litigation".[75] The court in *Rabaiotti* also held that letters of wishes generally fell within the terms of the *Londonderry* excluded categories,[76] because the contents of such letters would form an important part of the trustees' consideration of the exercise of their powers, and to require that they be disclosed would very likely undermine the trustees' immunity from the provision of reasons for the exercise of their discretions, and lead to the exact problems which the immunity was designed to avoid in the first place. Although the court in *Rabaiotti* approved of the majority decision in *Hartigan* to respect the implied confidentiality requested by the settlor, *Rabaiotti* concluded that the court retained the discretion to order disclosure notwithstanding confidentiality. This was based on the principle that:[77]

> *A court of Equity has a general supervisory jurisdiction over trusts … to ensure that the trustees are accountable to the beneficiaries* on whose behalf they hold the assets. Indeed, trustees may surrender their discretion to the Court. In our judgement, it would be inconsistent with the general position of the Court if it did not have the power to order disclosure of a letter of wishes or other document, which did not have to be disclosed on Londonderry principles, where it was satisfied that it was essential to do so. [emphasis added]

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presumption against the disclosure. The court will not order inspection of a letter of wishes unless a clear case is made for its disclosure."

74 *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 193–194, *per* Deputy Bailiff Birt (Royal Court of Jersey).

75 *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 188, *per* Deputy Bailiff Birt (Royal Court of Jersey).

76 See *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 188, *per* Deputy Bailiff Birt (Royal Court of Jersey): "Although the exact wording used in the order drawn up in *Londonderry* did not have a letter of wishes in mind, we are satisfied that such a letter is covered by the principle which governed the decision in *Londonderry*."

77 *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 191, *per* Deputy Bailiff Birt (Royal Court of Jersey). Deputy Bailiff Birt added:

> The position is similar to that concerning trust documents, save that it is the reverse situation. One starts with a strong presumption that a letter of wishes or other document falling within the *Londonderry* exceptions, does not have to be disclosed to a beneficiary. The burden lies on the beneficiary who requests the court to order the disclosure of such a document against the wishes of the trustees. Nevertheless, there is power in the Court to do so if the Court is satisfied that there are good grounds for ordering disclosure in a particular case.

34 Moving on, Briggs J in *Breakspear* attempted to answer the crucial question of how far, if at all, principles derived from the pre-*Rosewood* regime were still relevant post-*Rosewood*. He acknowledged arguments that they no longer apply (including a powerful argument by Lightman J, who commented extra-judicially that "the principles stated in earlier cases (and in particular *Londonderry*) may no longer apply at least with the same stringency")[78] and instead, what should be adopted is a "balancing exercise" which might, in appropriate cases, require disclosure. In response to Lightman J's arguments, Briggs J referred to *Rosewood*, where the Privy Council reviewed both *Hartigan* and *Londonderry*.

35 In *Rosewood*, the documents of which disclosure was sought were trust accounts, and it was clear that such documentary information about the trust assets meant that the *Londonderry* basis of exclusion from disclosure did not apply. The Privy Council in *Rosewood* was mainly concerned with the issue of whether the assumption – that the basis of a beneficiary's claim to disclosure was proprietary in nature – meant that mere discretionary objects could have no such entitlement. The Privy Council concluded that the true basis of a beneficiary's claim to production of documents by trustees was that it was an aspect of the court's inherent jurisdiction to supervise, and if appropriate to intervene in, the administration of a trust, including a discretionary trust. As such, the nature of the beneficiary's interest was in principle irrelevant, and it was no answer to the claim of a mere object to have the trust duly administered that he was not a beneficiary in the full proprietary sense.

36 Briggs J also noted that apart from the conclusion that the grant or withholding of disclosure sought by a beneficiary is essentially a discretionary matter for the court – and not a matter of right depending upon "bright dividing lines"[79] – the Privy Council did not express any disapproval at the way in which the principled basis for refusing inspection on grounds of confidentiality[80] was set out by the Court of Appeal in *Londonderry*.[81] On the contrary, Lord Walker in *Rosewood* described the need to protect confidentiality as "one of the most important limitations on the right to disclosure of trust documents"[82]

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

79 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734, *per* Lord Walker (PC).

80 See *Re Londonderry's Settlement* [1965] Ch 918 at 935–936, *per* Danckwerts LJ (CA).

81 *Breakspear v Ackland* [2008] EWHC 220 at [40], *per* Briggs J (Ch).

82 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 728 (PC). See also Mary Ambrose, "Disclosure to Beneficiaries – Whither Confidentiality?" (2006) PCB 236 at 244:

> Duties of confidentiality owed to beneficiaries, settlors and fellow trustees are still an important factor in limiting a beneficiary's right to see certain trust

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and recognised the importance of *Londonderry* in the development of the principles regulating the exercise of discretion.[83] On this basis, Briggs J opined that the Privy Council's approval of Kirby P's approach in *Hartigan* was limited to that part of his analysis with which Sheller JA concurred.[84] Moreover, the obviously non-confidential nature of the documents of which disclosure was sought in *Rosewood* meant that Lord Walker's comments about the importance of confidentiality should be considered as only *obiter dicta*. As such, Briggs J concluded that *Rosewood* did not represent a departure from the *Londonderry* principle, and that he was "bound to continue to treat the *Londonderry* principle as still being good law".[85] Thus, the position, to Briggs J, is that letters of wishes should, subject only to the court's overriding discretion, be regarded as confidential and not disclosable.[86]

37 Although *Breakspear* goes a long a way in filling up the gap in the law,[87] it is clear that Briggs J's holding that *Rosewood* could not have overruled the earlier principles represents just one way of interpreting that decision. It is suggested that Lord Walker's judgment in *Rosewood* cannot be read as being totally conclusive on that point. A strict reading of Lord Walker's judgment would lead many to conclude that any right to disclosure of documents such as letters of wishes did not, as past authorities indicated, depend on what documents the beneficiary wanted to see or on the extent to which he had a proprietary right over the trust fund. Instead, the beneficiary's right only came about due to the court's inherent discretion to intervene on his behalf.[88] It is also clear

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documents. These duties were set out in *Re Londonderry* and accepted as an important factor by Lord Walker in *Schmidt* in deciding whether to disclose or not. *This would appear to afford an element of protection for certain types of trust information, principally letters of wishes,* documentation relating to trustee decision-making and information which breaches the confidence owed to other beneficiaries. [emphasis added]

83 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 730, *per* Lord Walker (PC):
Since *In re Cowin* well over a century ago the court has made clear 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; and *In Londonderry* and more recent cases have begun to work out in some detail the way in which the court should exercise its discretion in such cases.

84 *Breakspear v Ackland* [2008] EWHC 220 at [41], *per* Briggs J (Ch).

85 *Breakspear v Ackland* [2008] EWHC 220 at [57], *per* Briggs J (Ch).

86 Briggs J's adoption of this view highlighted his preference for the view of Mowbray, Tucker *et al* (eds), *Lewin on Trusts* (London: Sweet & Maxwell, 18th Ed, 2008) at pp 818–824 to that of the authors of *Underhill*. See David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at pp 837–839.

87 Gerwyn Ll H Griffiths, "An Inevitable Tension: The Disclosure of Letters of Wishes" (2008) 4 Conv 322 at 327.

88 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 729, *per* Lord Walker (PC):

(*cont'd on the next page*)

that post-*Rosewood* decisions have adopted *Rosewood*, but this has not been at the expense of the erosion of the principles enunciated in pre-*Rosewood* decisions such as *Londonderry*.[89]

38 Moreover, it is argued that Briggs J's view – that subject to the court's overriding discretion, letters of wishes should be regarded as confidential and not disclosable – cannot be accepted. Briggs J's reasoning misses out on a very important difference between the old and new approaches. The effect of *Rosewood* on future cases was that any idea that the beneficiaries have certain rights has been very clearly replaced by a discretion based upon the court's inherent duty to supervise the administration of trusts. As Lord Walker noted in *Rosewood*, "no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document".[90] As a result, it has been observed that the necessary consequence of this change is that the emphasis in the law shifts from confidentiality to accountability.[91] Moreover, the shift to accountability is also consistent with the obligational theory of trusts – "a trust is an obligation and so requires the trustee to owe duties to the beneficiaries, who have a correlative right to make the trustee account to them for the carrying out of those duties".[92] As Lord Millett noted in *Armitage v Nurse*, "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."[93] This explains why trustees must disclose the content of documents concerning the administration of the trust to the beneficiaries – unless the beneficiaries can monitor the trustees' performance of their duties effectively, they

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> *Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts.* The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. [emphasis added]

89 See, for example, the approach of the High Court of New Zealand in *Foreman v Kingstone* [2004] 1 NZLR 841 (HC).

90 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734, *per* Lord Walker (PC).

91 See Gerwyn Ll H Griffiths, "An Inevitable Tension: The Disclosure of Letters of Wishes" (2008) 4 Conv 322 at 327–328, where Griffiths remarked that "it must, otherwise how is the court to discharge its function?" Hayton has also noted that the "disclosure of information to beneficiaries is now based on the core accountability of trustees to them". See David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 837.

92 David Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 96 at 97.

93 *Armitage v Nurse* [1998] Ch 241 at 253, *per* Millett LJ (CA).

would not be in any meaningful position to enforce the performance of those duties of the trustees.[94]

39 Accordingly, it is suggested that disclosure of letters of wishes should, and would, be more readily available, since they are key documents which the beneficiaries must be able to have access to if they are to be in any meaningful position to bring the trustees properly to account for the improper exercises of their discretions and powers.

40 However, it is important to note that this does not represent a complete shift to accountability *per se*. Instead, a broader claim of confidentiality may be available to trustees, even in the absence of an express or implied provision on confidentiality in the trust deed limiting the beneficiary's rights of access to information – a claim that maintaining the confidentiality of certain trust documents is in the interests of the discharge of the trustee's duties to the beneficiaries as a whole.[95] In *Rosewood*, the Privy Council emphasised the trustee's right to assert confidentiality on broad grounds relating to the due administration of the trust:[96]

> No beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties.

41 As a result, this means that the courts must undertake a balancing exercise when determining whether trustees have disclosure obligations on letters of wishes. The *prima facie* entitlement to access to trust documents and records arises from the trustee's duty to hold property for the benefit of beneficiaries and his corresponding duty to account. However, this is balanced against the trustee's duty to act in the best interests of the beneficiaries, which may not always justify disclosure of such documents.

42 Moreover, since a legally significant letter of wishes is normally intended by the settlor to be for the benefit of the settlor, beneficiaries and the trustees, so as to ensure that all parties are clear as to how the trustees should exercise the broad powers and discretions conferred on them, it is suggested that there is therefore no implied necessity to make the letter of wishes confidential to the trustees, and more importantly, to

94 Charles Mitchell, "Disclosure of Information to Discretionary Beneficiaries" (1999) 115 LQR 206 at 206.

95 Tina Cockburn, "Trustee Duties: Disclosure of Information" [2005] Murdoch UEJL 13 at [50] (AustLII).

96 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 734, *per* Lord Walker (PC).

make it unavailable for the inspection of the beneficiaries. Even if the settlor stipulates that his legally significant letter of wishes should be kept confidential from the beneficiaries, it is suggested that it is unlikely that a court would accept such a move. An analogy can be drawn with the court's non-acceptance of a similar arrangement with regard to the trust instrument. Such an arrangement which prevents any obligation of accountability to beneficiaries is inconsistent with the very existence of the trust.[97]

43 Similarly, a beneficiary unable to inspect a legally significant letter of wishes – that clarifies the purposes and expectations of the settlor and which is crucial to the operation of a flexible discretionary trust – would find it extremely difficult to raise the claim that the trustees exercised their discretions contrary to the very purposes of the trust. In order to prevent such a situation, and to ensure that trustees are placed under a meaningful obligation, it is suggested that a legally significant letter of wishes should be made available to a beneficiary upon request, though any information given by a person in confidence to the settlor to be shared only with the trustees may be deleted.[98]

IV. The offshore statutory models

44 The statutory regimes in certain offshore trust jurisdictions contain detailed provisions on the disclosure of documents, such as a letter of wishes, covering the question of confidentiality since it is accepted that certain types of trust documents should be ring-fenced to protect the duties of confidence owed to the settlor, other beneficiaries or the trustees themselves.

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97 *Armitage v Nurse* [1998] Ch 241 at 253, *per* Millett LJ: "[T]here 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." See also *Foreman v Kingstone* [2004] 1 NZLR 841 at [93], *per* Potter J (HC): "But when a trust is established, obligations and correlative rights are created. Otherwise there is no trust. The fundamental duty of the trustees is to be accountable to all beneficiaries. That cannot be compromised by a settlor's desire for confidentiality in relation to his and the trust's personal and financial affairs unless there exists exceptional circumstances that outweigh the right of the beneficiaries to be informed."

98 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (London: Butterworths LexisNexis, 17th Ed, 2007) at p 838.

45 In Guernsey, s 22 of the repealed[99] Trusts (Guernsey) Law 1989[100] stipulated that the trustee must provide on request full and accurate information on the state and amount of trust property.[101] Moreover, s 33 provided[102] a carve-out for any information which reveals the trustees' deliberations, touches on the reasons for trustees' decisions, and any material on which such decisions were or might have been based.[103]

46 These sections were discussed in the post-*Rosewood* Guernsey case of *Countess Bathurst v Kleinwort Benson (CI) Trustees Ltd*.[104] There, Countess Bathurst applied under s 22 for the disclosure of the trust instruments relating to two trusts and other trust documents, including letters of wishes written by her brother (the settlor) to the trustees. She found out that she had been excluded from any benefits under the trust, and the trust assets were already distributed to another beneficiary. Even though it was clear that these documents might provide some explanation as to why she had been excluded, the court rejected her request. The court decided that those documents were not generally documents which might disclose the trustees' reasons for the exercise of their discretionary powers, and so did not come within the carve-out of s 33. In light of the uncertainty that has arisen from this decision, it has been suggested that s 33 should be expanded to clarify that letters of wishes which reveal the intentions of the settlor, or of any beneficiary of the trust, are exempted from disclosure, but this is subject to the terms of the trust deed or an order of the court.[105] Section 38(1)(b) of the Trusts (Guernsey) Law 2007 now provides exactly such a clarification.[106]

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99 Repealed by s 83 of The Trusts (Guernsey) Law 2007.

100 The Trusts (Guernsey) Law 1989 s 22 as amended by The Trusts (Amendment) (Guernsey) Law 1990 (now repealed).

101 The equivalent is s 26(1) of The Trusts (Guernsey) Law 2007.

102 The Trusts (Guernsey) Law 1989 s 33 as amended by The Trusts (Amendment) (Guernsey) Law 1990 (now repealed):

> A trustee is not (subject to the terms of the trust and to any order of the court) obliged to disclose documents which reveal:
>
> (a) his deliberations as to how he should exercise his functions as trustee;
>
> (b) the reasons for any decision made in the exercise of those functions;
>
> (c) any material upon which such a decision was or might have been based.

103 The equivalent is s 38(1) of The Trusts (Guernsey) Law 2007.

104 Unreported, Royal Court of Guernsey, 38/2004, 14 September 2004.

105 Mary Ambrose, "Disclosure to Beneficiaries – Whither Confidentiality?" (2006) PCB 236 at 241.

106 Section 38(1)(b) of The Trusts (Guernsey) Law 2007 stipulates: "A trustee is not, subject to the terms of the trust and to any order of the Royal Court, obliged to disclose any letters of wishes."

47 In Jersey, Art 25 of the Trusts (Jersey) Law[107] provides for specific protection of trust documents under certain specified circumstances, such as where it might reveal the reasons for the trustee's decisions. Article 25 was discussed in *Rabaiotti*, in which the court examined in detail the circumstances under which trustees should disclose letters of wishes to a beneficiary.[108] The court held that, generally, a beneficiary has the right to inspect trust documents, such as the trust deeds and any documents which show the nature and value of the trust property, the trust income, and the way in which the trustees had invested and distributed the trust property. However, the court retained the discretion to refuse disclosure to a beneficiary upon the court's satisfaction that the disclosure would be contrary to the interests of the beneficiaries as a whole.[109]

48 More importantly, it was held that a beneficiary would not normally be entitled to see a letter of wishes, because not only is such a document covered by the principles laid down in *Londonderry*,[110] it may also be a document which is confidential to the trustees.[111] The court once again retained the discretion to allow disclosure where it was satisfied that there was good reason to do so in the particular circumstances of the case. In this case, the court held there were good

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107 Article 25 of The Trusts (Jersey) Law 1984 (Rev Ed) states:

> Subject to the terms of the trust and subject to any order of the court, a trustee shall not be required to disclose to any person, any document which –
>
> (a) discloses his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or
>
> (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; or
>
> (d) relates to or forms part of the accounts of the trust,
>
> unless, in a case to which sub-paragraph (d) applies, that person 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].

108 Paul Stibbard, "Rabaiotti – Jersey Court Orders Disclosure of Letters of Wishes" (2001) PCB at 150.

109 *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 183, *per* Deputy Bailiff Birt (Royal Court of Jersey): "In our judgment, the court does have a discretion to refuse to order disclosure of trust documents that a beneficiary is normally entitled to see … the need for an individual beneficiary to obtain trust documents *has to be weighed against the interests of the beneficiaries as a whole*." [emphasis added]].

110 *Re Londonderry's Settlement* [1965] Ch 918 (CA).

111 *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 188 and 190, *per* Deputy Bailiff Birt (Royal Court of Jersey): "We are satisfied that such a letter [of wishes] is covered by the principle which governed the decision in *Londonderry* … we would also endorse, as an additional ground … that the letter of wishes need not be disclosed on the ground of confidentiality."

grounds for holding, based on the peculiar facts obtained in the case, that the letter of wishes in relation to each settlement should be disclosed to John Rabaiotti. The earlier letters were already made available to the beneficiary's wife and the English court, and the only child of the settlor supported full disclosure.[112]

49 In the Bahamas, s 83(1)(a) of the Bahamas Trustee Act 1998 states that trustees must take reasonable steps to inform each beneficiary who has a vested interest of the trust's existence and of the general nature of his interest.[113] Trustees must give such beneficiaries information about the trust instrument and all other documents, where the terms of the trust or any exercise of any trust power or discretion can be found. However, trustees have the power to decide whether to disclose information to discretionary beneficiaries, depending on whether they think this is in the interests of the beneficiaries as a whole.[114] Moreover, trustees are not required to disclose any memoranda, letters of wishes or documents which either relate to the exercise of their discretion or explain why they exercised their discretion in a particular way. These provisions protect beneficiaries, the settlor and trustees from what might be revealed on disclosure.[115]

50 As an addition, the Restatement Second of Trusts should be referred to. Section 173 provides:

> The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and *other documents relating to the trust*. [emphasis added]

51 This section of the Restatement was developed as a response to the potential dangers that may arise due to a basic contradiction in the

112 *Re Rabaiotti's Settlement Trusts* [2000] JLR 173 at 193–194, *per* Deputy Bailiff Birt (Royal Court of Jersey).

113 Section 83(1)(a) of the Bahamas Trustee Act 1998 states:

> 83. (1) Subject to the provisions of subsection (2) –
>
> (a) trustees of trusts declared *inter vivos* or otherwise shall be under a legal obligation to take reasonable steps to inform each beneficiary who has, but may not be aware of having, a vested interest under the trusts (whether or not in possession and whether or not subject to defeasance) of the existence of the trusts and of the general nature of that interest; and …

114 Section 83(1)(b) of the Bahamas Trustee Act 1998 states: "Provided that no information shall be given if the trustees in their absolute discretion consider that it would not be in the best interest of the beneficiary to give the information."

115 Mary Ambrose, "Disclosure to Beneficiaries – Whither Confidentiality?" (2006) PCB 236 at 241.

law of trusts[116] – that although the settlor has created a trust and hence required that the beneficiary enjoy his property interest indirectly, it does not mean that the beneficiary should therefore remain unaware of the nature of the property and the details of its management. The beneficiary can only hold the trustee to the proper standards of care and honesty and obtain the benefits to which he is entitled to under the trust, if he is aware of what the trust property consists and how it is being managed. The main issue with regard to this section is whether "other documents" include letters of wishes. The comments to this section of the Restatement shed no light on what might be included, or excluded, in "other documents". There is neither any reported US case interpreting the meaning of trust "documents", nor any commentary on the subject of letters of wishes.[117]

52 It is clear that the statutory models surveyed above do not solve the issue satisfactorily, with a number of them generating their own legislative gaps and interpretative difficulties. Whilst the law on letter of wishes is less than certain, the principles involved can be worked out. A resort to statutory intervention is not the ideal way forward.

V. Conclusion

53 It is argued that Briggs J's holding in *Breakspear* – that subject to the court's overriding discretion, letters of wishes should be regarded as confidential and not disclosable – should not be accepted. Instead, it is suggested that the current position on letters of wishes is as follows. *Rosewood* has replaced the traditional idea that the beneficiaries have certain rights, with a discretion based upon the court's inherent duty to supervise the trust. It has shifted the emphasis to accountability. This shift to accountability is consistent with the obligational theory of trusts. It also explains why trustees must disclose to the beneficiaries the content of documents with regard to the administration of the trust. Only then can the beneficiaries be in any meaningful position to monitor, and enforce, the trustees' performance of their duties effectively.

54 However, this does not represent a complete shift to accountability. Instead, the courts must undertake a balancing exercise in determining whether the trustee has disclosure obligations on a letter

116 Frances H Foster, "Privacy and the Elusive Quest for Uniformity in the Law of Trusts" (2006) 38 Ariz St LJ 713 at 740–741: "In response, they have developed schemes that attempt to achieve a better balance between trust privacy and beneficiaries' need for information."

117 Alexander A Bove, Jr, Esq, "The Trust, The Beneficiary, and The Letter of Wishes – Be Careful What You Wish For" <http://www.bovelanga.com/publications/articles/Letter_of_Wishes.pdf> (accessed 25 August 2008) at p 5.

of wishes towards the beneficiaries. The trustee's duty to hold trust property for the benefit of the beneficiaries and the resulting duty to account entitle the beneficiaries to inspect trust documents and records on request. At the same time, the court must balance this duty against the trustee's duty to act in the best interests of the beneficiaries, and so may reject a request for disclosure of a letter of wishes in appropriate circumstances.