

# Access by beneficiaries of ‘trust documents’ – as of right or judicial consent?

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**Abstract:** Disputes about the right of a beneficiary of a trust to inspect trust documents are commonly encountered, but there is little appellate authority on the issue. In March 2011 the New South Wales Supreme Court delivered judgment in the matter of *Silkman*. The decision stands for the proposition that the limited approach contained in *Schmidt v Rosewood Trust* is preferred over the more expansive approach contained in *In re Londonderry’s Settlement*; *Peat v Walsh*. Under the *Schmidt* approach, a beneficiary does not have a proprietary interest in trust documents, with the result that a beneficiary will not have an automatic right of production and inspection of such documents. Rather, a beneficiary may only obtain such documents by requesting the Court to exercise its inherent jurisdiction to intervene in the administration of the trust.

This article examines the *Silkman* decision in detail, and discusses its legal implications.

## Introduction

A vexed issue confronted in a number of situations (whether in the context of family disputes involving trust estates or disputes involving widely held managed investment schemes) is the right of a beneficiary to inspect ‘trust documents’. Although commonly confronted, there is little appellate authority on the issue.

On 11 March 2011, Hammerschlag J delivered the judgment of *Silkman, Dorise Enid v Shakespeare Haney Securities Limited (ACN 087 437 783) in its capacity as responsible entity of the Shakespeare Haney Premium Income Fund (ARSN 106 223 483)*.<sup>1</sup> The decision has shed further light on the scope of a beneficiary’s entitlement to inspect and obtain trust documents.

The decision stands for the proposition that the limited approach contained in *Schmidt v Rosewood Trust*<sup>2</sup> (‘Schmidt Approach’) is preferred over the more expansive approach contained in *In re Londonderry’s Settlement*; *Peat v Walsh*<sup>3</sup> (‘Londonderry Approach’). Pursuant to the Schmidt Approach, a beneficiary does not have a proprietary interest in ‘trust documents’, with the result that a beneficiary will not have an automatic right of production and inspection of such documents. Rather, a beneficiary may only obtain such documents by requesting the Court exercise its inherent jurisdiction to intervene in the administration of the trust.

## Background facts

The defendant was the responsible entity (i.e. trustee) of a registered managed

investment scheme (‘scheme’) registered pursuant to Chapter 5C of the *Corporations Act 2001* (Cth). The plaintiff was a member of the scheme. The constitution of the scheme provided that the defendant held the scheme assets on trust for the members of the scheme.

The assets of the scheme were investments in mortgage backed securities. As a result of the global financial crisis, withdrawals from the scheme were suspended.

The plaintiff sought certain information from the trustee of the scheme, which ostensibly dealt with the ‘nature, condition and value of trust assets’.

After the defendant refused the plaintiff’s request, the plaintiff commenced proceedings via a summons in the NSW Supreme Court.

## Whether the beneficiary could inspect and obtain ‘trust documents’ – rejection of the Londonderry Approach

The plaintiff submitted that it could obtain the requested documents as of right. The plaintiff relied on the Londonderry Approach to argue that it could inspect the ‘trust documents’ held by the defendant (as trustee) as of right, with the right being an equitable proprietary interest of the plaintiff (as beneficiary). Hammerschlag J<sup>4</sup> observed that:

“The plaintiff put her case relying exclusively on the line of authority commencing in the modern era with *Re Londonderry’s Settlement* ... which attributes a beneficiary’s right to inspect ‘trust

documents’ held by the trustee to an equitable proprietary interest of the beneficiary in them.”

Further:<sup>5</sup>

“The underlying idea is that such documents are themselves either trust property or are so closely related to trust property that they may be characterised as documents in which a beneficiary has such an interest. ... Gummow J described this right as proprietary in nature although falling short of a full beneficial interest.”

The Court<sup>6</sup> outlined the implication if the Londonderry Approach was to apply:

“On the Londonderry approach the plaintiff need do no more than establish that the defendant is her trustee and that the documents sought are so-called trust documents. The relief is as of right and does not require the exercise of any judicial discretion in favour of the plaintiff. The plaintiff put that trust documents means documents which evidence or record the nature, condition, and value of the assets of the Scheme, and that all the documents called for by Summons meet these criteria.”

That is, if the Londonderry Approach applied and the documents are ‘trust documents’, then the plaintiff would be entitled to them as of right.

## Application of the Schmidt Approach

The Court discussed the Schmidt Approach, by observing<sup>7</sup> that the decision stood for the proposition that:

“... a trustee has no equitable proprietary interest in documents so as to give rise to a right of production and inspection but that, as one aspect

of the Court's inherent jurisdiction to intervene in the administration of trusts, an order for inspection and production of documents by a trustee may be made at the instance of the beneficiary..."

Gzell J in *Avanes v Marshall & Ors*<sup>8</sup> explained the Schmidt Approach:

"... the Privy Council rejected the proprietary interest theory and adopted the approach that the right to seek disclosure of trust documents was an aspect of the court's inherent jurisdiction to supervise and, if necessary, to intervene in the administration of trusts. Since that right was not confined to proprietary interests, the object of a discretion or a mere power might also be entitled to protection."

Gzell J in *Avanes* considered that the Schmidt Approach should be accepted, and that:

"... the decision should not be regarded as abrogating the trustee's duty to keep accounts and to be ready to have them passed, nor the trustee's obligation to grant a beneficiary access to trust accounts. But when it comes to inspection of other documents there should no longer be an entitlement as of right to disclosure of any document. It should be for the court to determine to what extent information should be disclosed."

It should be noted that Gzell J distinguished between 'trust accounts' and 'trust documents'. It seems that under the Schmidt Approach, trustees are obliged to disclose trust accounts, and not trust documents. Further guidance may be needed to distinguish between 'trust accounts' and 'trust documents'.

Hammerschlag J considered that the Schmidt Approach should be preferred, as the Londonderry Approach has the following jurisprudential difficulties:

- it is difficult to ascribe a workable and principled definition to the term 'trust document';
- an object of a discretionary trust who has an interest in the due administration of the trust but who has no proprietary interest in the assets is (illogically) denied disclosure;
- the only limitation on disclosure is by reference to third parties in maintaining confidentiality, and that such a limitation is arbitrary; and
- reconciling a beneficiary's entitlement to documents such as a settlor's statement of intention or a trust deed with the fact that these instruments are themselves not assets or appurtenant to assets of the trust.

It is submitted that the rejection of a beneficiary's 'equitable proprietary interest' in trust documents is correct. It has been held that a beneficiary (whether of a unit trust or a discretionary trust) does not have an equitable interest in trust assets<sup>9</sup>. Specifically, whilst a trustee's right of indemnity subsists, it is difficult for a beneficiary to claim any interest / entitlement in the trust assets. This is because whilst the right of indemnity subsists, that right may be exercised by the trustee of any trust asset. It is only when the right of indemnity is extinguished will a beneficiary be able to determine the assets of the trust which remain (and to which the beneficiaries may be entitled).

### Non-application of the Schmidt Approach

The court considered that using the Schmidt Approach, it would intervene only if it were shown that the defendant had fallen short of its duty to disclose. The court refused to exercise its discretion because the defendant did not fall short of any disclosure obligations, with the scope of the documents requested by the plaintiff not able to cure that deficiency;

- the purpose of the plaintiff's requests were to assess whether there were actionable breaches of trust by the defendant, and not whether the defendant had fallen short of its failure to provide information; and
- the scope of the documents requested was extremely wide.

### Matters that would not cause the Schmidt Approach to deny production

The court considered that if disclosure could be compelled pursuant to the Schmidt Approach, then:

- the unfettered discretion granted to the defendant in the scheme's constituent documents to invest does not entitle documents to be withheld from production; and
- any improper purpose attributed to the plaintiff would not erode an entitlement to compel inspection.

### Whether the requested documents were 'trust documents'

The plaintiff contended that 'trust documents', for the purposes of obtaining disclosure from the defendant, included documents which 'evidence or record

the nature, condition and value of the trust assets'. It was held that even if the Londonderry Approach was accepted, the documents which the plaintiff sought did not meet the plaintiff's definition of 'trust documents' as they related to:

- securities in favour of the defendant referable to investments which were offered but not actually given – this would have allowed access to information on 'securities' which were never assets of the trust;
- potential defaults on mortgage investments held within the scheme – such information extended beyond trust documents, as they did not directly relate to trust assets; and
- accounts recording advances and repayments – documents which answer this category would extend to primary recordings of every payment and receipt on every mortgage investment. This would be beyond the characterisation of documents which evidence and record the nature, condition and value of trust assets.

Whilst the Court did review the requested documents to determine whether those documents fell within the scope of that which evidenced and recorded the nature, condition and value of the trust assets, the Court did not definitively define the term 'trust document'.

### The court's discretion to exclude on the grounds of confidentiality

Hammerschlag J referred to the South Australian Supreme Court's decision in *Rouse v IOOF Australia Trustees Limited*,<sup>10</sup> which dealt with a trustee's discretion to refuse inspection of trust documents on the grounds of confidentiality. Such a discretion may be exercised if:

- the trustee has reasonable grounds to conclude that the disclosure of trust documents will not be in the best interests of the beneficiaries as a whole; and
- such disclosure will prejudice the ability of the trustee in discharging its obligations under the trust.

Doyle CJ in *Rouse* considered that the exercise of the discretion is subject to the following caveat:

"I do not, in what I have said, contemplate the use of that discretion to enable a trustee to deal in a partial or discriminatory manner as between beneficiaries or groups of beneficiaries, except to the extent that the necessary result of a proper

exercise of the discretion may be that particular beneficiaries are not give access to a document.”

As Hammerschlag J considered that the requested documents were not ‘trust documents’, the court declined to consider the application of the discretion discussed in *Rouse*.

### Comment

The rejection of the Londonderry Approach, and in particular the notion that a beneficiary has an ‘equitable proprietary interest’ in trust documents, is consistent with the view that a beneficiary of a trust does not have a beneficial interest in trust assets. This is particularly so where a trustee’s right of indemnity subsists. Indeed, it is submitted that the Schmidt Approach is consistent with a beneficiary’s general entitlement to the due administration of a trust estate.

The application of the Schmidt Approach rather than the Londonderry Approach shifts the burden with respect to inspection of trust documents from the trustee to the beneficiary. According to the Londonderry

Approach, after it is established that a trust document exists (subject to limited exceptions), the trustee is compelled to provide the documents. However, pursuant to the Schmidt Approach, in order for trust documents to be produced to a beneficiary, a two step approach needs to be satisfied, being:

- **Step One:** the documents need to answer the definition of ‘trust documents’, which according to the decision in *Silkman* may include those which evidence or record the nature, value and condition of trust assets.
- **Step Two:** after being identified as ‘trust documents’, the documents are required for the proper supervision and administration of the trust.

A vexed issue is which documents answer the definition of ‘trust documents’. The court based its decision on the proposition that ‘trust documents’ include those which record or evidence the nature, condition and value of trust assets, and that such documents must directly relate to specific trust assets. It is not sufficient

that the requested documents relate to the operation of the trust.

In the context of the facts in *Silkman*, trust documents may include securities (or investments) actually obtained, and not those which were merely offered. Further, actual defaults on mortgages (or actual bad investments), and not potential defaults (or potential bad investments) would be within the scope of trust documents.

Whilst ‘trust accounts’ do fall within the scope of ‘trust documents’, unlike other ‘trust documents’, a beneficiary may have an entitlement to view accounts as of right. Such an entitlement is based on the trustee’s duty to keep accounts, and provide proper disclosure of such accounts to beneficiaries. As a result (and as opposed to obtaining other trust documents), a beneficiary need not invoke the inherent jurisdiction of the court when seeking disclosure of trust accounts.

However, with respect to trust documents which are not also trust accounts, a beneficiary will need to invoke the inherent jurisdiction of the court so as to obtain



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access to those documents. In doing so, the court must be satisfied that the documents requested are required for the proper supervision and administration of the trust.

That is, a beneficiary needs to meet a higher standard with respect to access of 'trust documents' as opposed to 'trust accounts'.

Trust accounts may not themselves record or evidence the nature, condition and value of trust assets. For example, trust accounts may not record the value of trust assets, if the accounts are based on historical costs.

Certain documents which are used for the purposes of compiling trust accounts (i.e. primary documents) may not themselves be 'trust accounts'. Further, such documents may also not meet the definition of 'trust documents', as they do not evidence or record the nature, condition or value of trust assets. Rather, they evidence or record transactions. As such documents may not be trust documents, the inherent jurisdiction may not be invoked so as to compel production. That is, particulars

with respect to transactions which relate to assets may not themselves be trust documents.

It is still to be seen whether applications for disclosure of trust documents:

- promote fishing expeditions by beneficiaries; or
- in proving that the application is required for the purposes of supervision or administration of a trust, whether the courts will require the beneficiary applicant to satisfy the Court that there is a cause of action (such as a breach of trust) before disclosure is granted.

Further, it was observed by the court that a beneficiary's claim for trust documents should be distinguished from both preliminary discovery and discovery in proceedings which have already commenced.

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#### References

- 1 [2011] NSWSC 148.
- 2 [2003] 2 AC 709.
- 3 [1965] Ch 918.
- 4 At paragraph 17.
- 5 At paragraph 18.
- 6 At paragraph 19.
- 7 At paragraph 20.
- 8 [2007] NSWSC 191.
- 9 See for example *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53 and *Commissioner (Chief) of Stamp Duties v Buckle* (1998) 72 ALJR 243.
- 10 [1999] SASC 181.

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