

**Judgment 39/2004**

**A Limited and B Limited v. HM Procureur – Court  
of Appeal (Civil Appeal 347) – 15 September, 2004**

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**Criminal Justice (Fraud Investigations) (Bailiwick of Guernsey) Law, 1991 – notice by HM Procureur requiring disclosure of information – appellants applied unsuccessfully to Royal Court for permission to inform the trust beneficiaries of the notice – ‘tipping-off’ offences provided for under the 1991 Law – duties of a trustee under the Trusts (Guernsey) Law, 1989 – appeal dismissed.**

**IN THE COURT OF APPEAL OF GUERNSEY**

The 15<sup>th</sup> day of September, 2004 before Peter David Smith, Esq. Q.C., presiding. Christopher Simon Courtenay Stephenson Clarke, Esq. Q.C. and Dame Heather Steel, D.B.E., Q.C.

A LIMITED  
B LIMITED

Appellants

V

H.M. PROCUREUR

Respondent

IN THE APPEAL of the above Appellants from  
the decision of the Royal Court given on 24<sup>th</sup> August 2004;

THE COURT, having heard Advocates R G  
Shepherd, for the Appellants, and P Robey, for the Respondent, thereon, GAVE JUDGMENT in  
the attached terms, DISMISSED the appeal and AWARDED COSTS in the appeal to the  
Respondent.

K. H. TOUGH  
Registrar of the Court of Appeal

**IN THE COURT OF APPEAL OF GUERNSEY**

**A LIMITED AND B LIMITED V. HM PROCUREUR**

**Judgment delivered by Clarke. J. A**

**Wednesday, 15<sup>th</sup> September, 2004**

1. This is an appeal from a judgment of Day, LB given on 24<sup>th</sup> August 2004, whereby he declined to make an order directing or permitting the Appellants to inform the beneficiaries of a trust, of which the first Appellant is the trustee, of the receipt by the first Appellant of a written notice from HM Procureur under the provisions of the **Criminal Justice (Fraud Investigations) (Bailiwick of Guernsey) Law 1991** (“the 1991 Law”).
2. The first appellant (“A”) is a trust corporation. It is the trustee of a Guernsey Trust. I shall refer to it hereafter as “the Trustee”. The principal beneficiary of that trust is X. The other beneficiaries are members of his family. All the beneficiaries are resident abroad. The second appellant (“B”) is a bank, which holds accounts in the name of the Trust and of various companies connected with the Trust. I shall refer to it hereafter as “the Bank”.
3. X has been under investigation abroad in connection with certain alleged offences, with which he has now been charged. The authorities in that jurisdiction made a request to the Guernsey authorities for assistance.
4. The 1991 Law empowers HM Procureur by written Notice to require a person under investigation under that Law, or any other person whom he has reason to believe has relevant information, to attend before HM Procureur at a specified time and place to answer questions or otherwise furnish information with respect to any matter relevant to the investigation: *section 1 (2)*. It also entitles him to require the person under investigation or any other person to produce at a specified time and place any specified

documents which appear to HM Procureur to relate to any matter relevant to the investigation, or any documents of a specified class which appear to him so to relate: *section 1 (3)*. HM Procureur is authorised to take copies of these document and to require the person producing them to provide an explanation of any of them: *section 1 (3) (a)*. Those powers are exercisable by HM Procureur when it appears to him (a) that on reasonable grounds there is a suspected offence involving serious or complex fraud, wherever committed, and (b) that there is good reason to exercise the powers for the purposes of investigating the affairs, or any aspect of the affairs, of any person.

5. On the 15<sup>th</sup> July 2004 HM Comptroller, who by section 3 of the Law is included in the definition of “Her Majesty’s Procureur”, issued a notice to the Trustee under the 1991 Law (“the Notice”), requiring the Trustee to attend to answer questions, to furnish information and to produce a sizeable number of documents set out in an annexure. The Notice required the information and documents to be produced on the 21<sup>st</sup> of July 2004 at the offices of the Trustee. A similar notice was issued to the Bank. The Notice named X and his wife together with the Trust and a number of companies, some or all of which were companies owned, directly or indirectly, by the Trust as the persons under investigation.
6. The Trustee and the Bank had been aware, prior to the service of the Notice, which occurred on 16<sup>th</sup> July 2004, that HM Procureur was conducting an investigation under the 1991 Law, and had discussed with the Guernsey authorities (without prejudice to any position that might be taken later as to the validity and scope of any notice, once issued) what documents might be disclosed. Subject to any question that may arise hereafter as to the validity and scope of the Notice, and in the absence of any reasonable excuse, the Trustee is bound by the 1991 Law to comply with the Notice. Failure to do so is a criminal offence: *section 1 (11)*.
7. The **Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) (Amendment) Law, 2002** contains provisions preventing the disclosure of the existence of fraud investigations (“tipping-off”). Section 24 provides as follows:

“Offences as to “tipping-off”.

2A (1) A person is guilty of an offence if –

- (a) *he knows or suspects that Her Majesty's Procureur is conducting an investigation, or proposing to conduct an investigation, using his powers under this Law; and*
- (b) *he discloses to any other person information or any other matter which is likely to prejudice that investigation or proposed investigation.*
- (2) .....
- (3) .....
- (4) *In proceedings against a person for an offence under subsection (1), it is a defence to prove that he did not know or suspect that the investigation or proposed investigation was likely to be prejudiced”.*

8. The Trustee submits that it is faced with a dilemma. It has received the Notice, which requires the production of a raft of documents and information. It wishes to inform the beneficiaries of the receipt of the Notice and its contents, and, in particular, to inform X, since he is the principal beneficiary of the Trust, and the person most interested in the Notice. In particular it wishes to be able to consider with him whether or not and, if so, on what basis, and to what extent, it should challenge the Notice. Moreover it contends that it is under a duty to show X the notice, and may reasonably expect to be sued by X, if it fails to inform him of its existence and contents.

9. After receipt of the Notice the Trustee inquired of the Guernsey authorities, as a matter of prudence, whether it was free to inform X of the Notice. The upshot of that inquiry was that, on 15<sup>th</sup> March 2002, Advocate Robey wrote a letter the last paragraph of which reads as follows:

*“At our meeting you enquired whether there would be any objection to [X] being notified of the investigation and advised of the impending service of notices under the above Law [i.e. the 1991 Law]. I advised you that this would be an unusual course of action, but I would make enquiries of the investigating authority to see if they had any objection to this. I now have had the opportunity of taking the views of the investigating authority and they have confirmed that because of the nature of the investigation and the need for confidentiality it is imperative that [X] is not informed of the continuing investigation and the request that is being made for your clients for information”.*

10. Accordingly, so the Trustee says, it faces, on the one hand, being sued by X for not informing him of the Notice, and, on the other, finding itself subject to criminal sanction, if it does. The Trustee says that it has no reason to believe that disclosure of the Notice to X would be likely to prejudice the investigation and that HM Procureur has not provided it with any reason to think that that is so. In any criminal prosecution the Crown would, of course, have to prove that disclosure would be likely to prejudice the investigation. But, if the Crown did establish that disclosure would be likely to have that consequence, it would be for the Trustee to prove that it neither knew, nor suspected, that that would be so. The Trustee understandably thinks that where, before disclosure, HM Procureur asserts that disclosure would prejudice the investigation, it could be in difficulties in saying that it did not even suspect that disclosure might have that result.
11. These concerns led to the application that the Lieutenant Bailiff refused. The principal relief claimed by that application was that:

*“(1) the First Applicant be directed and/or permitted to inform the beneficiaries of the Trust (of which the First Applicant is trustee) of the existence and terms of an order dated 16 July served upon the Applicants by HM Procureur under the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law 1991 with a date for compliance of 21 July 2004 (subsequently, varied to the 28<sup>th</sup> July 2004) (the “Fraud Order”) and to supply them with a copy;”*

The Bank joined in the application in order to be bound by the result.

12. The Trustee relied, in support of its allegation, on two recent English Authorities: **C v S and Others (Money Laundering: Discovery of Documents)** [1999] 1 WLR 1551; and **Governor and Company of the Bank of Scotland v A Ltd** [2001] 1 WLR 751, in which the English Court of Appeal had addressed issues arising out of the application of the tipping off provisions in section 93D of the Criminal Justice Act 1988.
13. In the former case C was attempting to trace sums of money that C claimed had been misappropriated by defendants other than B, a bank. C obtained, ex parte, a Norwich

Pharmaceutical order that B should make disclosure of documents that would assist C in tracing the sums misappropriated. B had made reports of money laundering relating to the money to the Economic Crimes Unit of the National Criminal Intelligence Service (“NCIS”). These reports were subject to the tipping off provisions. The NCIS declined to give B an assurance that there would be no prosecution if it complied with the ex parte order, and made it clear that “*any disclosure of its difficulties could amount to tipping off*” (1552E). The ex parte Norwich Pharmaceutical order was later discharged. C appealed. Before the appeal was concluded the NCIS accepted that disclosure of the documents in question to C would not impede their investigations. As a result the tension between the interests of an applicant for a Norwich Pharmaceutical order and the obligations of a bank under the tipping off provisions ceased to exist, and C’s appeal was allowed by consent. However, the Court of Appeal took the opportunity to give guidance on the approach that the courts should take.

14. In the course of his judgment Lord Woolf, LCJ, said this:

*“The fact that the statutory provisions make it an offence to tip off in the specified circumstances provides considerable, but not unqualified, protection of investigations into money laundering from the adverse consequences of orders of the court which could interfere with the investigation. The court will not make an order which it would otherwise make if it would result in a person being required to commit a criminal offence: see Rowell v Pratt [1938] A.C. 101, 106, per Lord Wright. However courts are required to protect the interests of litigants who find themselves in a similar position to that which exists here. They are therefore entitled to satisfy themselves that an offence will be likely to be committed if disclosure were to be made before refusing an order for disclosure. In addition they will want to explore the possibility of reconciling the position of the party to the litigation seeking the assistance of the court and the investigating authority by making a more restricted order for disclosure than would otherwise be made.”*

15. As is apparent from that passage, the Court was there concerned with the interests of (a) the applicant in respect of whom it had never been in dispute that it “*would have been entitled to obtain the initial order requiring B to make disclosure but for the investigations being conducted by the NICS*” (1555C), (b) the bank, and (c) the investigating authority. In such a context the Court may well require to be satisfied that an offence really will be likely to be committed before refusing the relief to which the applicant would otherwise, without doubt, be entitled. It is material to note that the dilemma that the bank faced, if the Norwich Pharmaceutical order continued in force, was of

the most pressing kind: if it disobeyed the order, it faced criminal sanction, as it did if it obeyed it.

16. Lord Woolf M.R. went on to say (at page 1555 F – G):-

*“All the situations in which the problem can arise cannot be anticipated and the guidance has to be adapted to the circumstances of the particular case. The authorities which can be involved in relevant investigations may differ but in the guidance we refer to the N.C.I.S. as a convenient representative for all the authorities. Subject to this, it is anticipated that if the approach which we recommend is followed this should provide protection for the institution and the party seeking disclosure without prejudicing the investigations of the N.C.I.S. The guidance is as follows.”*

Lord Woolf then set out guidance under eight headings as to how the issue should be approached in the future.

17. The seventh of those guidelines was this:

*“(7) It will be for the N.C.I.S., or other investigating authority, to persuade the court that, were disclosure to be made, there would be a real likelihood of the investigation being prejudiced. If the N.C.I.S. did not co-operate with the institution (and with any requirements of the court) in advancing such a case, the court could properly draw the inference that no such prejudice would be likely to occur and could accordingly make the disclosure order sought without offending the principle in Rowell v Pratt [1938] A.C. 101 and without putting the institution at risk of prosecution.”*

18. In the **Bank of Scotland** case A had substantial sterling and dollar accounts at the bank. The bank considered that that money could have been obtained by a particular type of fraud and communicated with the police. As a result the bank became aware that investigations were being conducted into activities closely associated with A. The police told the bank not to reveal what they had told the bank. The bank feared that it would be exposed on two fronts. If it paid money out of the accounts, it could be liable to third parties as a constructive trustee. If it did not pay the moneys out, it would face an action by A and would not be able to defend itself against such a claim because the police objected to the bank revealing what they had told the bank. The proceedings then took a somewhat curious course. Lightman, J, granted, at his suggestion, an injunction against

the bank, restraining it from making any payment from the accounts without the permission of the court. A then applied for an order against the bank that the sums held in the accounts be paid out to its solicitors. The judge to whom the application was made was told in private of the injunction by Counsel for the bank. That judge made an order that, unless an application was made by the bank to the court before a specified date the bank would have to pay over the money to A's solicitors. The result of all this was that A became aware that there was a serious criminal investigation underway. By the time the case reached the Court of Appeal most of the money in the accounts had been released by the bank to A, and the order of Lightman, J had been discharged by Laddie, J. The judgement of the Court of Appeal was confined to issues of costs and the guidance that could be given to banks in these circumstances.

19. The Court of Appeal accepted that the bank was in a genuinely difficult situation (see paragraph 40). Its mistake had been not to recognise that there was no point in obtaining relief against A. What it should have done was to seek an interim declaration, under the relevant provision of the Civil Practice Rules, against the SFO, declaring what information could properly be disclosed. The Court said this:

*“In determining the terms of any declaration which would be granted, the court would pay most careful attention to the views of the SFO as to what would or would not prejudice the SFO's investigation. With the assistance of the Court, in the great majority of cases there is unlikely to be any difficulty in determining the terms of an interim declaration. The life of the interim declaration would probably be short since in the majority of cases it will only be necessary to conceal the existence of the investigations for a fairly limited period.”*

Nevertheless, as it said:

*“The fact that the courts now have these powers [ to grant interim advisory declarations] must not, however, be regarded as a substitute for financial institutions taking the decisions which should be their commercial responsibility. The courts' powers are discretionary and only to be used where there is a real dilemma which requires their intervention”.*

20. It is to be noted that the dilemma which faced the bank in that case, so far as tipping off was concerned, was that it could not defend A's otherwise unimpeachable claim to the money in the accounts unless it revealed the existence of the investigation, and, thus, risked criminal prosecution by doing so. Such a claim was not only reasonably to be expected: it was, in the event, actually made.

21. In neither of those two cases did the Court have to make an interim declaration. Whilst in some cases there may be no difficulty in deciding what declaration to make (if any), this will not always be so, particularly in a jurisdiction such as this, where the authorities are asked to provide assistance in the investigation of crimes said to have been committed abroad. In such a case the only connection with Guernsey may be that assets have been deposited in, or transferred from, or via, the Bailiwick, and HM Procureur, and, thus, the Court, may be largely dependent on information provided by foreign authorities with much greater knowledge of the underlying investigation, when endeavouring to assess the risk posed to investigations by disclosure. A further difficulty arises from the fact that the impact of disclosure may be hard to gauge before it takes place, and yet become obvious after it has occurred. The investigating authorities may only suspect that disclosure may prejudice the investigation, but their suspicions may turn out to be entirely well placed. Accordingly, as it seems to me, if the court embarks upon an assessment of the potential prejudice from disclosure it would have to have regard to what the investigators think might happen, as well as what they think would.

*The submissions of the Trustee*

22. The Trustee contends that it is only right that it should take account of the views of the beneficiaries in deciding how to respond to the Notice. It contends that the Notice concerns the disposition of documents which are trust documents and trust property, over which the beneficiaries have rights; and that the fact that the Notice has been issued is, itself, information which the Trustee has received in its capacity as a Trustee, and which the Trustee, at least arguably, has to use for the benefit of the beneficiaries. It says that it has, or may have, a fiduciary duty to inform the beneficiaries of the Notice, and that if it fails to do so, the beneficiaries will later make a claim for breach of fiduciary duty.
23. The Trustee contends that it is in a similar dilemma to that which faced the Bank in **C v S** and the Trustee in **Bank of Scotland**. Its duty is to inform the beneficiary of the Notice; but, if it does so, it is at risk of prosecution. In those circumstances the Court should intervene to resolve the dilemma. In so doing the Court will be entitled “*to satisfy [ itself] that an offence will be likely to be committed if disclosure were to be made before refusing an order for disclosure*”.

24. In respect of the latter issue the Trustee relies on the fact that, although HM Procureur has stated that disclosure should not be made to X because it would be likely to prejudice the investigation. HM Procureur has never given the Trustee any reasons for that view. In the course of the hearing before the Royal Court, Advocate Robey informed the Lieutenant Bailiff that he had a letter from the foreign investigating authority giving a reasoned argument for non-disclosure, which that authority did not want to be provided to the applicant. The DB decided that it would not be appropriate for him to look at this letter in private. But, as the Trustee claimed, with some justification, this circumstance only rendered its position the more acute since it revealed the existence, but not the substance, of reasons supposedly justifying non-disclosure.
25. The Trustee submits, that in the absence of reasons being put forward by the investigating authority, the Court can only conclude that prejudice is not likely to result from disclosure.
26. The Lieutenant Bailiff discussed, and dismissed, the application in the following terms:

*“24. Miss Roland identifies a trustee’s primary fiduciary obligations as being to preserve the integrity of the trust fund, and to act in the best interests of the beneficiaries. In this case, it is in the best interests of the beneficiaries to be informed of HM Procureur’s Notice. Moreover, the Applicants need to take instructions from the beneficiaries as to whether the fraud notice should be resisted. But it is not seriously argued that if they do not provide the beneficiaries with the opportunity to give those instructions, they can reasonably anticipate being sued for breach of duty. Admittedly, as already indicated (para 7), they say they are on the horns of a dilemma – wrongly to disclose or wrongly not to disclose? But non-disclosure can only be wrong (in the sense used) and potentially actionable if there is someone to whom a duty of disclosure is owed. As Mr Robey put it, how can it be wrong not to disclose? It is unsurprising that that argument is not, in truth, advanced, as it must be flawed.*

*25. The beneficiaries who are not identified in the Notice can have no possible interest in the fact that investigations are being carried out, to the extent that if they are not so informed of that fact that they will have a future cause of action for breach of duty. (One wonders what relief or damages might be sought). Similarly, there can be no duty on the part of the Applicants to inform the two persons who are named in the Notice of the pending investigations, a breach of which could be actionable. In this case, there can be no half way house as far as disclosure is concerned. Either these beneficiaries are informed of the investigations*

*or they are not. Whatever may have been the position prior to the enactment of the statutory tipping-off provisions, X and the other named person are exactly those at whom the legislation is aimed. If it was now the duty of a trustee, or other person in comparable relationship, to inform a beneficiary of investigations in circumstances similar to those in this case, then the tipping-off provisions would be meaningless. They are designed to give due protection to such investigations. I respectfully accept that such protection may not be unqualified, to adopt the description of Lord Woolf MR in C v S (at p 1554 B), as the guidance in that case demonstrates. However, no such situation to which that guidance might apply begins to arise in this case.*

26. *The position adopted by the Applicants in this case was well-meaning but in my conclusion misguided. There undoubtedly will be cases arising in Guernsey (to my certain knowledge they have already done so) when it will be perfectly proper to follow the guidance provided by C v S and the Bank of Scotland (subject to any modifications required by local circumstances). For the reasons I have endeavoured to expound this is not one of them. The Applicants may well desire the comfort of a court order to bolster their stated belief that HM Procureur's investigations will not be prejudiced if the beneficiaries are informed of them. That, in my view, can only be a luxury to which on principle they are not entitled, and must therefore be rejected. This Court must not encourage self-indulgence in financial institutions by becoming immersed in spending its valuable time and resources on matters which are without essential substance. This Court should only become involved when there is a real dilemma which requires its intervention. Unless that threshold is reached, that should be an end of the matter.*
27. *The application is dismissed.*

## The submissions of the Trustee

27. The Trustee contends that, in reaching the conclusion that he did, the Lieutenant Bailiff was in error. They say that they do, and did, contend that they reasonably anticipated being sued for breach of duty, and that the Court should have proceeded to examine the likelihood of prejudice to the investigation if disclosure of the notice took place, and endeavoured to reconcile the position of the Trustee and HM Procureur. Having looked at the transcript of the hearing below, it seems to me that the Trustee was, indeed, contending that it would be in breach of duty if it did not provide the beneficiaries with a copy of the Notice and that the Lieutenant Bailiff was in error in thinking that it did not.
28. At one stage it appeared to be contended that it was not necessary for the Trustee to establish that there was a potential clash between two conflicting legal obligations. But Advocate Shepherd, accepted, in my view rightly, that, if his clients were under no legal obligation to show the beneficiaries the Notice, they could not claim to be faced by such a dilemma as would require the Court to declare what they could or could not do. He did, however, contend that if the Trustee could reasonably expect a claim for not having given the beneficiaries a copy of the Notice, and such a claim was arguable, it was incumbent upon the Court to perform the reconciliation of opposing interests illustrated by the two English authorities.
29. I am not persuaded that the position is as clear cut as that. The Appellants invite the court to exercise a discretionary remedy in their favour by ordering that they should be permitted to disclose the Notice to the beneficiaries, the practical effect of which would be that it was not open to the Guernsey authorities to prosecute the Trustee for making such disclosure. In deciding whether or not to embark upon this exercise it seems to me that it is necessary to examine the acuteness or otherwise of the dilemma facing the Appellants.
30. I turn then to consider whether or not the Trustee is liable to be sued for breach of duty by, for instance, X for failing (a) to inform him of the fact that it has received the Notice and (b) to provide a copy of it.
31. In **Alan Stuart-Hutcheson v Spread Trustee Company** this Court had to consider the extent to which a beneficiary of a discretionary trust was entitled to have access to certain documents relating to the affairs of the Trust. In the course of my judgement I

drew attention to the fact that no Guernsey authority had been cited upon this question. I then referred to the leading English decision of the House of Lords in **O'Rourke v Darbyshire** and the Australian decision of **Hartigan Nominees Pty Ltd v Rydge** (1992) 29 NSWLR 405, addressing the question whether a beneficiary was entitled to access to documents because of some proprietary right in the cestui qui trust, or because of a duty on the part of the trustee to keep the beneficiary informed and to render accounts. In the course of my judgement I said this:

*“16. There is, to my mind, no antithesis between these two approaches. In essence the duty of the trustee to provide information about the trust and its assets arises from the obligations of a trustee towards the beneficiaries of the trust that are inherent in the concept of trusteeship. These include an obligation to hold and dispose of assets for the benefit of the beneficiaries in accordance with the terms of the trust and to account to the beneficiaries for his stewardship of them. Even the so called proprietary right in respect of trust documents arises, as Lord Wrenbury said “because they are trust documents and because he is a beneficiary”. They are only “in a sense” his own. In the case of discretionary beneficiaries without any vested interest in the trust property it is difficult to see how documents or information belonging to the trust are in any sense his own. Any entitlement on their part to information arises because of the duty of a trustee to account to the beneficiaries, including discretionary beneficiaries, for what he has done in relation to the trust assets”.*

32. In relation to English law I referred to the general principles set out in **Snell's Equity (30<sup>th</sup> edition)** at page 264:

*“Another duty of a trustee is to keep accounts and produce them to any beneficiary when required. Trustees must also when required give any beneficiary all reasonable information as to the manner in which the trust estate has been dealt with... Further, in the absence of special circumstances, they must allow a beneficiary to inspect all title deeds and other documents relating to the trust estate. In this context, a beneficiary includes a contingent beneficiary or an object of a discretionary trust, save that trustees who exercise discretionary powers (e.g. under a discretionary trust) need not disclose why they have exercised their discretion in a particular way and so they may refuse to allow a beneficiary to inspect documents which will reveal such information, such as minutes of their meetings”. ]*

33. I went on to say:

*“I have no doubt that, as a matter of principle, a beneficiary of a trust has a right to information from the trustees as to the assets of the trust and their manner of dealing with them. That this is so has certainly been recognised for a long time both in the textbooks and in the decisions of the Courts, many of*

*which are referred to either in **Snell** or **Underhill** or in **Halsbury's Laws, Fourth Edition, Volume 48**, paragraph. 855. The Deputy Bailiff in his judgement referred to article 47 of the 1904 edition of **Underhill on Trusts**, which states:*

*“(1) A trustee must –*

- a. keep clear and accurate accounts of the trust property; and*
- b. at all reasonable times, at the request of the beneficiary, give him full and accurate information as to the amount and state of the trust property (and permit him or his solicitor to inspect the accounts and vouchers, and other documents relating to the trust).”*

34. I then went on to consider whether or not similar duties arose under the law of Guernsey and held that they did. I said this:

*“20. That, prior to the 1989 Law, trusts had become part of Guernsey law is not in dispute; what is in issue is the extent to which the general law of trusts in England had become part of the law of Guernsey. To that question the answer is, in my judgement, to be found by a consideration of the process by which trusts came to be part of Guernsey law. They did so because settlors established trusts, whether inter vivos or by will, the validity of which was recognised and, where necessary, enforced by the Royal Court. In addition the Legislature in a number of Laws recognised and adopted the notion of trusteeship. In thus importing, as it were, the English concept of a trust and trustees those concerned must be regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable. The trustee's obligation to account for his execution of the trust is a characteristic of a trust, as is recognised by Article 2 of the **Hague Convention on the Law Applicable to Trusts and on their Recognition**: see the Schedule to the **English Recognition of Trusts Act 1987**.*

34. Since that decision the Privy Council has considered, in the case of **Vadim Schmidt v Rosewood Trust Ltd**, the whole question of the entitlement of beneficiaries, including discretionary beneficiaries, or the objects of discretionary powers, to obtain trust documents and other information from trustees of a settlement. The judgement of the Privy Council was given by way of appeal from a decision of the Staff of Government Division of the Isle of Man. It is, thus, not binding upon this Court. Nevertheless it should, in my judgement, be regarded as an authoritative statement of the law of England and Wales in relation to these matters, (since there is no indication of any

difference between the law of the Isle of Man and that of England and Wales in this field), and thus, as a guide, subject to any distinctive features of the Trusts Law or factors peculiar to Guernsey, as to how Guernsey law should approach similar questions.

36. In the course of his judgment Lord Walker of Gestingthorpe reviewed the state of authority on the question. He observed that:

*“it is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust , including a discretionary trust”.*

He went on to address the question as to whether a beneficiary’s right, or claim, to disclosure of trust documents should be regarded as a proprietary right or founded upon some other basis. He considered the line of cases beginning with **O’Rourke v Darbyshire** (1920) AC 581, and concluded:

*“51. 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 trust. The right to seek the court’s intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain will depend on the court’s discretion”.*

37. In a later paragraph he said this:

*“67 However the recent cases also confirm (as had been stated as long ago as In re Corwin in 1886) that 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. Disclosure may have to be limited and safeguards may have to be put in place ...”*

38. There is, in my view, no material distinction between the approach adopted in relation to the law of Guernsey prior to the Trusts Law by this Court in *Stuart Hutcheson* (where a beneficiary was held to be entitled in principle to information from the trustees as to the assets of the trust and the way in which the trustee had dealt with them, subject to discretionary considerations as to whether the court should make any and, if so, what order) and that set out in *Schmidt* (where the right to seek disclosure of trust documents is treated as one aspect of the Court's inherent jurisdiction to supervise the administration of a trust, in respect of which the Court will exercise a discretion); and I note that in the recent decision of **Countess Bathurst v Kleinwort Benson**, Lieutenant Bailiff Patrick Talbot, Q.C. thought the same (see paragraph 65). I draw attention, however to the fact that the statement in *Schmidt* that “*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*” may, so far as Guernsey is concerned, be too broad in the light of the apparently imperative provisions of section 22 of the Trusts Law.
39. It is, however, material to note that the reason why a court may require a trustee to provide information to a beneficiary is because of the duties that fall upon a trustee by virtue of his acceptance of that office. He is, as the Trusts Law says, “*to execute and administer the trust .... in accordance with the provisions of this Law and, subject thereto in accordance with the terms of the trust and only in the interests of the beneficiaries*” (section 18). He is “*to preserve and enhance so far as is reasonable the value of the trust property*” (section 19). He is to keep accurate accounts and records of his trusteeship (section 21) and “*subject to the terms of the trust ...at all reasonable times, at the written request of any beneficiary... provide full and accurate information as to the state and amount of the trust property*” (section 22). In the light of the decision in **Stuart Hutcheson** that the Trusts Law is not to be regarded as a codification of the Guernsey law of trusts, there will be other respects in which trustees may be required by the court to provide information to beneficiaries (e.g. as to how they have dealt with trust property or otherwise executed the trust). But it is important to remember that, whatever be the precise extent to which the court will require a trustee to produce information to a beneficiary, the underlying reason for doing so is to secure the proper administration of the trust and to hold the trustee to account for his execution of the trust.

40. It does not seem to me that X or the other beneficiaries can plausibly claim that the court should, in principle, require the Trustee to provide him with a copy of the Notice in order to secure the proper administration of the trust, or to hold the trustee to account for its execution thereof. The assets of the trust are in no way depleted or affected by compliance with the notice, nor will compliance with the Notice result in, or evidence, an improper administration of the trust, or provide information as to the amount of the trust estate, or its disposition, or the manner in which the trustee has carried out its duty as trustee. All that the Trustee is required to do by the Notice is to give information to HM Procureur, and to provide access to documentation and allow the taking of copies.
41. Advocate Shepherd submitted that the Trustee might be in breach of duty in the following way. Whilst the provision of information and documentation to HMP might not, itself, affect the assets of the trust at all, the use of that information by the foreign authorities might prejudice X in that it would deprive him of the ability to settle the dispute between him and those authorities, (in respect of which there are both criminal charges and civil claims), more cheaply than would be possible if the authorities possessed that material. If the Notice was made available to the beneficiaries, they might be able to suggest grounds upon which the validity of the Notice could be challenged, so that the prejudicial (to X) consequences of compliance with the notice could be eliminated or reduced. The effect of X having to pay more than he might otherwise have had to pay because the foreign authorities received all the information required by the Notice could be that Mr X would seek to obtain more money from the trust (of which he is a discretionary beneficiary) than would be the case if he had settled more cheaply. If he were to do that, and if the Trustee were to accede to his demand, then the funds available for distribution to other beneficiaries would be, pro tanto, reduced. Whilst the putative increase in the sum that X had to pay would be prejudicial to him in his personal capacity, the diminution in prospective benefit to the other beneficiaries would be prejudicial to them in their capacity as discretionary beneficiaries. They, at any rate, could legitimately complain that the Trustee owed them a duty to provide them with a copy of the Notice in order to avoid that consequence.
42. I have grave doubts as to the validity of any such claim. It appears to me to go far beyond the provision of information necessary to secure the due execution of the trust or any previous authority. Further, it does not seem to me to be any part of the Trustee's obligation as trustee to provide a discretionary beneficiary with information that may

assist him in relation to his personal affairs, in order to reduce the likelihood that he may seek to obtain from the Trustee a larger distribution than he otherwise might.

43. I do not think it appropriate that we should now rule on the validity of any such claim; not least because any ruling would be one made in proceedings to which none of the beneficiaries was party. What seems to me, however, apparent is that the dilemma that it is suggested that the Trustee faces is very much less than the sort of dilemma with which the English Court of Appeal was faced in the two cases cited.
44. If, contrary to my doubts there was, *prima facie*, a breach of duty on the part of the Trustee in failing to inform the beneficiaries of the Notice, then, if the reason why it had failed to do so was because it feared that to do so would expose it to criminal sanctions, it seems to me that it would have a very strong case for being relieved of liability under section 50 of the Trusts Act, particularly in circumstances where the Court had declined to make an order permitting it so to do.
45. The Lieutenant Bailiff was of the view that it was not seriously argued that failure to inform the beneficiaries of the Notice would be a breach of duty, and that it was not surprising that the argument was not advanced as it must be flawed. In saying that the argument was not advanced he was, in my judgement, in error and that error may have influenced his view as to the quality of the argument. In fairness to him it should be said that the argument that I have summarised in paragraph 41 above was not put to him. In the light of those circumstances it seems to me that we are entitled to readdress the question of whether, in its discretion, the Court should assist the Appellants by embarking upon the exercise of examining the reasons that can be advanced by HM Procureur for believing that disclosure would prejudice the investigation.. In my judgment the dilemma faced by the Trustee is not of such a character as makes it incumbent on the court to do so, since the prospects of a successful claim appear to me to be remote. It is, also, necessary to take into account the fact that that exercise may be one of considerable complexity and difficulty. The discretionary remedy of making an order permitting disclosure to take place ought to be used sparingly. In a proper case it is a most valuable power. But, in my judgement, for the reasons I have stated this is not a case where it is appropriate.
46. I should add that, had I taken a different view, I would not have thought it right to conclude that disclosure of the Notice would not prejudice the investigation because HM Procureur had not provided reasons why disclosure would produce that result. The

proper course would have been to remit the matter to the Royal Court to consider that question by considering, initially, at any rate, in the absence of the Applicants, the reasons given to HM Procureur. If the choice is between finding that there is no reason to conclude that disclosure would prejudice investigation because HM Procureur has not produced the confidential reasons given to him, and examining those reasons in private in order to see what they amount to, the choice must lie in favour of the latter.

47. I would dismiss the appeal.

**SMITH. J.A.**, I agree.

**STEEL, J.A.** I agree