No. 299

In the Court of Appeal of Guernsey

(Civil Division)

The 15th day of July, 2002 before Christopher Simon Courtenay Stephenson Clarke, Q.C., presiding, Jonathan Philip Chadwick Sumption, Q. C. and Michael George Tugendhat Q. C.

ALAN STUART-HUTCHESON

Appellant

V.

SPREAD TRUSTEE COMPANY LIMITED

Respondent

In the Appeal of the above Appellant from the decision of the Royal Court on 16th March, 2001;

Whereas, on 7th and 8th January, 2002 THE COURT heard Advocates St. J. A. Robilliard and R. J. Collas for the respective parties thereon;

THE COURT this day issued Judgment in the terms attached hereto and ORDERED as follows:-

1. Within seven days of the date hereof the Respondent shall allow the Appellant or his Advocate to inspect the documents referred to in 3 below.

2. Thereafter the Respondent shall provide to the Appellant good photocopies of such of the documents referred to below as the Appellant may request, conditional upon payment by the Appellant of the Respondent's photocopying charges at 20p per page. The said photocopies shall be provided within 7 working days of the Appellant's request.

3. The documents referred to in this Order are:

(a) Documents relating to the Peter Acatos No. 2 Settlement ("the Trust") that:

i) Create or define the terms of the Trust; and/or

ii) Appoint, or record the appointment of Trust Property to beneficiaries or revoke such appointment; and/or

iii) Appoint or remove any beneficiaries thereof.

(other than the Letter(s) of Wishes which are not the subject of the Appellant's Application before the Court).

(b) All minutes of the meetings of (a) the Shareholders and (b) the Directors of Cedar Investments Limited ("Cedar").

(c) The Annual Accounts of the Trust and Cedar.

(d) Invoices and like documents raised by the Respondent or any other company or organisation which is related directly or indirectly to either the Respondent or its beneficial owners against the Trust insofar as the same relates to charges and expenses of carrying out the Trust.

4. In respect of the period prior to the appointment of the Respondent as a trustee of the Trust this Order relates only to such of the above documents as are in the possession of the Respondent or any of its officers or associated companies.

5. The Appellant to receive recoverable costs in accordance with the Court of Appeal Recoverable Cost Rules unless either party makes an application to the Court within 7 days of the handing down of this Order. Any such applications should be accompanied by an affidavit, a skeleton argument and copies of any authorities relied on.

Registrar of the Court of Appeal

ALAN STUART-HUTCHESON & SPREAD TRUSTEE COMPANY

CLARKE. J.A.

Introduction

1. At issue in this appeal are the rights, if any, of a discretionary beneficiary under a Guernsey trust created prior to the commencement of the Trusts Law (Guernsey) 1989 ("The Trusts Law") to information as to the trust and its assets, and to documents in the possession or control of the trustee. We have been greatly assisted by the submissions of Advocate Robilliard, on behalf of the Appellant, and Advocate Collas, on behalf of the Respondent trustee. The Respondent adopted a neutral stance to the Appellant's application, and had itself sought the direction of the Court as to the extent of its obligations. Advocate Collas has helpfully put before us the contentions that could properly be put forward in opposition to those of the Appellant.

The facts

2. On 12th November 1977 Peter Alexander Acatos executed the Peter Acatos No 2 and No 3 Settlements. These are family settlements. This appeal is concerned with the No 2 Settlement. By that settlement the Settlor established discretionary trusts for the benefit of persons and classes of persons as set out in the Second Schedule to the Settlement. The class of beneficiaries included "The children of Thalia Maria Hutcheson nee Acatos ... their wives, children, grandchildren, and great-grandchildren and spouses thereof". The Appellant, Alan Stuart-Hutcheson, is a son of Thalia Maria Hutcheson, who was the sister of the Settlor. Ian Stuart-Hutcheson ("Ian") is, also, the son of Thalia Maria Hutcheson. By a Supplemental Deed of 12th December 1983 Ian was excluded from the class of beneficiaries of the No 2 Settlement. By a Deed of Exclusion dated 30th June 1986 the Appellant was excluded (but not irrevocably) from the class of beneficiaries of the No 3 Settlement.

3. On 5th April 1979 Peter Acatos died. On 10th July 1990 Spread Trustee Company Limited, the Respondent, became the trustee of the Settlement in place of the two persons who were then trustees. I shall refer to the Respondent hereafter as "the Trustee" and the No 2 Settlement as "the Trust".

4. The assets of the Trust include 50% of the issued shares of a company named Cedar Investments Ltd ("Cedar"). The Acatos No 3 Settlement owns the other 50%. The Trust also owns a substantial shareholding in a company formerly named Acatos and Hutcheson PLC, but now named Pura PLC, of which Ian was formerly Chief Executive. Cedar has a wholly owned Gibraltar subsidiary named Redhill (International) Ltd ("Redhill"). Redhill owns property in Gibraltar consisting of apartments, parking space, a supermarket and a car show room. That property is financed by a mortgage. Since the mid 1990s the Appellant has been employed as manager of the Redhill property, for which he receives an annual fee. He has in the past received benefits from the Trust.

The dispute.

5. The Appellant has concerns about the running of the Trust by the Trustee, upon which he has been in correspondence with the Trustee, and BGL Reads International Management Ltd, a company, to whom the Trustee has delegated the administration of the Trust, since the end of 1999. Those concerns include a number of matters: [i] that he has not received from the Trust a benefit, which he was led by his brother Ian to believe he would receive, namely the Gibraltar property, free of mortgage; [ii] that the Pura shares have plummeted in value since 1990 and, as he believes, should have been sold long ago, [iii] that the trust may have inadvisably borrowed money on the security of those shares; [iv] that Ian may have exerted inappropriate influence on the Trustee; [v] that the trust proposes to sell the Gibraltar property, which would deprive him of income. It has not been suggested that these concerns are not genuine. Whether any of these concerns are justified is not something which we either can, or should, determine. But they provide the context in which the current application was made.

The application.

6. In August 2000, following earlier requests in correspondence, the Appellant applied for delivery up to him of the following:

> "[1] the Trust Instruments and all other formal trust documentation relating to the Peter Acatos No 2 and No 3 Settlement ("the Trusts") from their creation to date;

[2] all Minutes of Cedar Investments ("Cedar") from 1.1.90 to date;

[3] all accounts of both Trusts and Cedar from 1.1.90 to date;

[4] copies of all invoices raised by the Respondent or any other company or organisation which is related directly or indirectly to either the Respondent or its beneficial owners against the Trusts and Cedar."

Insofar as the application relates to the No 3 Settlement it has been adjourned sine die.

The Trusts Law (Guernsey) 1989

7. Prior to 1989 there was no legislation in Guernsey governing trusts generally. In 1988 the States Advisory and Finance Committee submitted a report to the States recommending that legislation governing trusts should be enacted locally (see Billet d'Etat IX 1988 item VI at pp 244-6). The report made plain that the object of the new legislation was to dispel uncertainty concerning trusts in Guernsey. The legislation was to follow the general pattern of the Trusts (Jersey) Law 1984. The ensuing Projet de Loi was contained in Billet d'Etat XV 1988 and was considered by the States at their meeting of 28th July 1988.

8. The Deputy Bailiff summarised the contents of the Trust Law in his judgement in these words, which I gratefully adopt:

> "The Trusts Law is divided into 5 Parts and extends to some 76 Sections. Part I relates to preliminary matters – the existence, validity and proper law of trusts, and the jurisdiction of the Royal Court. Part 2 enacts provisions which are applicable only to a Guernsey trust and relate to: - the creation, validity and duration of Guernsey trusts; the appointment, retirement and discharge of trustees; the duties of trustees; the general powers of trustees; liability for breach of trust; protective trusts, class interests and certain powers; failure, lapse and termination of trusts; powers of the Court; variation, etc. of trusts; and permitted investments. Part 3 enacts provisions applicable only to a foreign trust. Part 4 enacts provisions of general application, including, relevant for present purposes, applications for directions (s.62), general powers of the Court (s.63) and the nature of a trustee's interest (s.66). Part 5

makes provision for various supplemental matters, including, again relevant for this case, extensive savings provisions (s.74)."

Section 72 of the Trusts Law provides that:

> *"(1) Subject to section 74, and except where provision to the contrary is made, this Law applies to trusts created before or after the commencement of this Law".*
>
> *(2) This Law, apart from sections 52 to 56, does not apply to a trust in so far as there is vested in the trustees any interest in real property in the Bailiwick."*

Section 74 [2] provides that:

> *"Nothing in this Law derogates form the powers of the court which exist independently of this Law:*
> .....
>
> *[b] in respect of trusts, trustees or trust property."*

Express provisions in the Trusts Law in relation to information.

9. Two sections of the Trusts Law deal expressly with the provision of information by the Trustees. Section 22 reads as follows:

> *"(1) Subject to the terms of the trust, a trustee shall, at all reasonable times, at the written request of any beneficiary (including any charity named in the trust) or of the settlor, provide full and accurate information as to the state and amount of the trust property.*
>
> *(2) In its application to a trust arising from a document or disposition executed or taking effect before the commencement of this law subsection (1) shall only operate for the benefit of a beneficiary whose interest in the trust property becomes vested before the commencement of this Law, but this subsection shall not prejudice any rights that the beneficiary may have under the terms of the trust".*

Section 22(2) was inserted into the Law by an amendment to the draft Projet which was proposed by H.M.Procureur and seconded by the

President of the Advisory and Finance Committee when the draft Projet was debated.

10. It is common ground that the Appellant is not a beneficiary whose interest in the trust property became vested before the commencement of the Law.

11. Section 33 of the Law provides:

> *"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."*

The Appellant does not seek to obtain documents, which reveal any of the matters referred to in section 33 [a] – [b].

12. Since the Appellant falls within section 22 (2) and is, thus, someone for whose benefit section 22(1) does not operate "*but without prejudice to any rights that he may have under the terms of the trust*", it is necessary to decide (a) whether, prior to the commencement of the Law, persons in his position, (whom I shall describe, somewhat inelegantly, as "non-vested discretionary beneficiaries") had any right under the general law to obtain information from the Trustee; and (b) whether any such right has survived, been preserved, or abrogated by the Law.

The position prior to the Trusts Law

Guernsey

13. No authority has been cited to us in which any Guernsey court has decided what rights a discretionary beneficiary of a Guernsey trust, or, indeed any other beneficiary, had, prior to the Trusts Law to information, in whatever form, from the Trustee. There is, however, a substantial body of authority on the question in English law.

English Law

14. Under English law beneficiaries, including discretionary beneficiaries, have a right, within limits, to receive information from the trustee in relation to the affairs of the trust. The basis of that right has been said to arise either because the beneficiary has some form of proprietary right in respect of trust documents or because the trustee has a duty to account to the beneficiaries in respect of his stewardship of the assets of the trust.

15. Thus in **O'Rourke v Darbyshire** (1920) A.C. 581, in the House of Lords Lord Parmoor said:

> "A cestui que trust, in an action against his trustees, is generally entitled to the production for inspection of all documents relating to the affairs of the trust. It is not material for present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que trust, or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission or the establishment of the status on which the right is based."

Lord Wrenbury said:

> "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 judgements a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own."

The other approach:

> "is that the right of a beneficiary to inspect trust documents is founded not upon any equitable proprietary right but upon the fiduciary duty of a trustee to keep the beneficiary informed and to render accounts. On this approach the existence of a proprietary right may be sufficient to grant a right of access, but is not necessary. This approach to the issue is to be found in **Hartigan**

Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405 at 421-2 per Kirby P (dissenting) and at 442-445 per Sheller JA"

per Doyle CJ in **Rouse v IOOF Australia Trustees Ltd** 2 ITELR 289, 308.

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.

Information and documents

17. The earlier authorities deal with the production of trust documents. But a trustee may be bound to provide information regardless of whether it already exists in documentary form. The eccentric trustee who never kept written records could not, for that reason, resist accounting for what he had done with the trust property. The general principles are set out in **Snell's Equity (30th 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".

Advocate Robilliard submitted that a right to information, as opposed to a right to documents, was first recognised in English case law in the case of **Murphy v Murphy (1999) 1 WLR 282, 290** where Neuberger J said:

> "Further, Mr McDonnell said that, as a discretionary object of the defendant's 1965 settlement, the plaintiff is asked to ask the trustees for information as to the nature and value of the trust property, the trust income, and as to how the trustees have been investing and distributing it. Although there is no English authority on this point, this submission appears to be supported by the Irish case **Chaine-Nixon v Bank of Ireland** and it is treated as being the law of England in the two leading text books on the topic, namely **Snell's Equity 29th edition (1990)** pp 231-232 and **Underhill and Hayton's Law of Trusts and Trustees 15th ed. (1995)**, p.657. On behalf of the defendant, Mr Blackett-Ord, quite rightly, in my view, accepts that the plaintiff does, as a matter of principle have these right in relation to the defendant's 1965 settlement."

18. 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)."

It may be that it is only in **Murphy v Murphy** that one first finds an express recognition in a decided English case that, in this context, a beneficiary includes the object of a discretionary trust. That that should be so is in accordance with the principle upon which the right to information rests. A discretionary beneficiary, at any rate if he belongs to a limited class, as in most family trusts, has an interest in having the trusts observed by virtue of being a permissible object of the Trustee's discretion. This gives him a similar interest in receiving an account of the unappointed assets as any other kind of beneficiary. It may be highly material for a discretionary beneficiary to know what has happened to the trust fund, not least because the size and nature of the assets of the trust may be relevant to whether any share in them should be appointed to him.

Guernsey Law prior to 1989

19. Trusts do not form part of Norman law from which Guernsey customary law is, in part, derived. The trust is, in origin, an English law concept, developed by English judges and, subsequently, by the Courts of those countries whose law is, or is derived from English law. But, well prior to 1989, the concept of a trust and the concomitant duties of a trustee and rights of a beneficiary had been recognised in Guernsey. As the Deputy Bailiff said in the present case:

> "Without undertaking any comprehensive review of what I believe is overwhelming evidence for such statement (that the concept of trusts was, in principle, recognised in Guernsey prior to 1989) one need only look at a variety of facts:- the large number of statutory trusts, either created or envisaged on subjects ranging from testamentary matters in the 19th century to social insurance matters in the 1970's (coincidentally the Law immediately following the Trust Law in volume XXXI of the Ordres en Conseil is the Saint Peter's Church Hall (Trust) (Guernsey) Law, 1989); the number of trusts administered by the Royal Court itself; the widespread practice of many decades, at the least, of creating trusts, either testamentarily or inter vivos; and (perhaps most pertinently) the jurisprudence of the Royal Court itself in recognising the existence of trusts (for recent examples of which, see the observations of Frossard DB in C.K.Consultants (Plastics) Limited and Frossard B in Beachcomber Hotels Limited)."

Further information as to the history of the development of trust law may be found in an article of Advocate Robilliard: "Foundations of Guernsey as a Trust Jurisdiction" Vol 2 No 8 Trust and Trustees (1996) pp 6 – 10.

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.**

21. I find support for this view in the observations of Frossard, DB, in **CK Consultants (Plastics) Limited v Vines & Barnett Christie Finance Limited (1982).** In that case the question arose as to whether or not constructive trusteeship was recognised in Guernsey. The argument was that, even if Guernsey recognised trusts, it did not recognise the notion of constructive trusts. The Deputy Bailiff said:

> "Before I refer to those cases I must consider Mr van Leuven's submission as to whether and to what extent the law of trusts and, in particular, the doctrine of constructive trusts is part of the law of Guernsey... It is of interest to note that this very Court is trustee of various charitable funds and Pothier, a very learned author of the customary law, himself, in Volume VII p.547 recognises a fidei-commis which is, of course, translated a trust. I accept that our law of trusts has not progressed as in England and we do not have the many statutes on trust as England has. Nevertheless, I am of the opinion that trusts are recognised in Guernsey and for guidance we seek reported decisions in other jurisdiction (sic) but disregard their statute....
>
> I now turn to the more difficult question and that is, is the concept of constructive trusts part of our law. In my opinion, I answer, yes, because we recognize trusts".

In other words, the recognition and acceptance of trusts in Guernsey carried with it the need to seek guidance from jurisdictions, which have a law of trusts, and recognition of the concept of constructive, as well as express trusteeship, as an integral part of the law of trusts.

22. Advocate Collas suggested to us that the absence of pre-1989 case law on the topic of beneficiaries' rights to information might indicate that, prior to that date, persons in the position of the Appellant had no rights to information from the Trustee and that it was only section 22(1) of the Trusts Law that gave them any such right. The argument, if valid, would appear equally to disentitle beneficiaries whose interests have vested. I cannot accept it. The fact that there are no cases on the subject does not mean that non-vested discretionary beneficiaries had no rights. Whether they did or not must, in my judgement, depend on what is inherent in the adoption and recognition of trusts in Guernsey.

23. It is, also, relevant to consider what the position would be if discretionary beneficiaries such as the Appellants had no rights to information about the trust or its assets. Assume that in 1977 X settles property on his trustee on discretionary trusts for a class of identified beneficiaries. If none of those beneficiaries had any right to information as to the state of the trust fund there would appear to be no effective accountability on the part of the trustees. Advocate Collas sought to make such lack of accountability to non-vested discretionary beneficiaries under pre-1989 Trusts more palatable by suggesting that the Settlor would be entitled to the relevant information. Whether that was so was a matter of some debate before us. But, even if he was so entitled, the Settlor may be dead, and his legal representatives may have no reason or incentive to seek information from the trustees. If the trust was established by will, the legal representatives may themselves be the trustees or may have conveyed the trust fund to Trustees and have no further interest in the matter. Even if the Settlor or his representatives are entitled to information, there seems little reason why Guernsey law should disentitle those who are, classically, entitled to the information, namely the beneficiaries, including non-vested discretionary beneficiaries.

24. Similar considerations impressed themselves on the Irish High Court in **Chaine-Nickson v The Bank of Ireland (1976) I.R. 393.** In that case a discretionary beneficiary sought information from the trustees as to a number of matters, including copies of the trust accounts and the balance sheet and profit and loss accounts of a private company owned by the trust. Kenny, J., said:

"However, in the case of a discretionary trust, none of the potential beneficiaries have any right to be paid capital or income. All the trust fund is held by the trustees in this case on discretionary trusts and, if the plaintiff is not entitled to the trust accounts and particulars of the investments, it follows that none of the potential beneficiaries have a valid claim to any information from the trustees. The result is that the trustees are not under an obligation to account to anyone in connection with their management of the trust fund. This logical conclusion from the defendants' argument leads to remarkable consequences.

The amount of remuneration to which the trustees are entitled is specified in the settlement and the potential beneficiaries have an interest in seeing that the amount is not exceeded, for they are the persons who will ultimately benefit by payments of capital and income. The defendants' contention, however, has the result that they do not have to account for or disclose the amount of their remuneration. This seems to me to be contrary to the basic concept of a trustee being accountable for his management of the trust fund. In a case where the investment powers of the trustee under a discretionary trust are limited, the beneficiaries have a clear interest in getting information as to how the trust fund has been invested but again, if the defendants' contention is correct, the potential beneficiaries can never get the details to ascertain whether the trust fund has been invested in accordance with the terms of the settlement. Indeed, the trustees might make loans out of the trust fund to themselves, and the potential beneficiaries would have no means of ascertaining this. These remarkable results of the defendants' argument convince me that the proposition advanced by their counsel is not the law and a potential beneficiary under a discretionary trust is entitled to copies of the trust accounts and to information as to the investments which represent the trust fund. The obligation of the trustees is not satisfied by giving particulars of the payments made by them".

25. Accordingly, in my judgement, prior to the enactment of the Trusts Law, non-vested discretionary beneficiaries of a Guernsey trust had, under Guernsey customary law, a right to see documents of the trust and to receive information about the trust and its assets commensurate with that enjoyed by such beneficiaries under English law.

26. What then was the effect of the Trusts Law?

The submissions of the Appellant.

27. Advocate Robilliard submitted to the Deputy Bailiff and, initially, to us that a clear distinction was to be made between a right to information and a right to documents. Section 22(1) relates to information but not to documents. The right to information is now, by statute embodied in that subsection, the benefit of which was denied to the Appellant by section 22(2). But neither section 22 (2) nor any other section addressed the question of the Appellant's entitlement to trust documents. That the Appellant had an entitlement to see trust documents was, he submitted, recognised by section 33, which contains restrictions on the trustee's obligations to disclose documents; and the existence of such an entitlement was supported by the provision in section 74(2) that nothing in the Trusts Law should derogate from the powers of the Court which exist independently of the Trusts Law in respect of trusts, trustees or trust property. That shows, he submits, that the Court retained its powers to order, for instance, the provision to the beneficiary of trust accounts.

28. If Advocate Robilliard's submissions are well founded, curious consequences would seem to follow. Assume a trust whose accounts are usually drawn up at the year end. Beneficiaries such as the Appellant could not require their trustee to tell them what the state and amount of the trust fund was on, say, 1st February 2002 since that would be a request for information. But they could obtain the trust accounts for the year ending 31st December 2001 (assuming them to be in writing) and, presumably, after they came into existence, those for the year ending 31st December 2002. As will be seen hereafter I do not believe that the answer to this case lies in such a distinction.

The decision of the Deputy Bailiff

29. The Deputy Bailiff decided that, since the passing of the Trusts Law the duty to provide full and accurate information as to the state and amount of the trust property arose *"solely from the provisions of the Trust Law, the primary source for which is section 22(1)"*. He declined to make the distinction urged upon him by Advocate Robilliard between information and documents. In his judgement the obligation to provide full and accurate information on the state and amount of the trust property included an obligation to provide all trust documents relevant to the provision of such information. He regarded sections 21 and 22(1) as enacting provisions strikingly similar to the law as stated in the 1904 edition of Underhill (cited above). Section 33, he held, merely provided a

gloss on the obligation under section 22(2) to provide documents. It did not relate to any separate self-standing duty to disclose documents. His overall conclusion was that, but for the enactment of section 22(2), the Appellant would have been entitled to receive some, at least of the document he wanted. But, in view of section 22(2), section 22(1) was not available to him. If the result was unsatisfactory or unfair it was for the legislature to act.

30. The Deputy Bailiff expressly declined to decide whether non-vested discretionary beneficiaries enjoyed any rights to information prior to the Trusts Law. He did so because, in his view, the effect of the Law was that, henceforth, unless a beneficiary could bring himself within section 22(1), he had no right to information, whatever the position had been under the customary law prior thereto.

31. As will be seen from the above summary of his judgement, the Deputy Bailiff must have regarded the Trusts Law as codifying the law in relation to the provision of information, at least so far as information about the state and amount of the trust property is concerned, and as abrogating any right to such information that non-vested discretionary beneficiaries may previously have enjoyed.

The nature of the Trusts Law.

32. The Trusts Law is not expressed to be, and, in my view, is not, a statute codifying the whole law of trusts or even the whole law on disclosure of information. There are a number of documents (such as the Trust Deed and supplements thereto, documents excluding or adding beneficiaries and documents relating to the appointment or retirement of trustees) which a beneficiary may be entitled to see whether or not they contain information as to the state and amount of the trust assets. In my judgement the purpose of the Trusts Law was to declare and delineate certain basic principles. That that is so appears both from a study of its contents and from the report to the States that led to the Projet de Loi. In that report the President stated that the Trusts Law would:

> "follow the general pattern of the Jersey Law... and would seek to set out a basic infrastructure of legal principle on the authority of which trustees, beneficiaries and settlers could operate with certainty and confidence. It would incorporate many of the principles of English trust law, but not all such principles, and not necessarily without modification".

To the extent that the Trusts Law modifies the principles of English trust law, those principles must, of course take effect as modified. But there is nothing in the Trusts Law that purports to take away any existing rights of non-vested discretionary beneficiaries to information. On ordinary principles it should be presumed not to do so in the absence of clear provision to that effect. There is no such provision. On the contrary section 22(2) makes clear that it shall not prejudice any rights that a non-vested beneficiary may have under the terms of the trust. Section 73 (1), provides that:

> *"In this Law, unless the context otherwise requires –*
>
> *"terms of a trust" means the written or oral terms of a trust, and any other terms applicable under its proper law"*

The proper law of the present trust is that of Guernsey under whose customary law, prior to 1989, non-vested discretionary beneficiaries had, as I hold, rights to information. Section 22(2) preserves those rights.

The explanation of section 22 (2) given by HM Procureur to the States.

33. When section 22 (2) was introduced by amendment to the draft Projet an explanation was given for the amendment to the States by H.M. Procureur in the following terms:

> "The second amendment is at section 22, this is an improvement which has been considered after representations from people who are going to be involved with trusts, and after general consultation it is felt advisable to restrict the rights of beneficiaries to receive information concerning the trust, in the case of existing trusts, to the existing rights. Obviously, if you create a trust and wish to put in as a possible beneficiary your great nephew, you don't want him coming round and asking questions about a trust which he may never be interested in. So that is a technical matter but it's been put forward with the general approval of interested parties."

Although some reliance was place on this passage by Advocate Robilliard below, he did not rely on it before us, nor did Advocate Collas. Nor do I. There is, in my view, nothing unclear in the language of the Trusts Law that is resolved by the Procureur's statement. Insofar as that statement indicates an intention to preserve the existing rights of non-vested beneficiaries it goes no further than the statutory language itself. Insofar as it suggests that such beneficiaries did not enjoy any rights under

customary law to information it cannot determine what that customary law was. It may well be that section 22 (2) was added to the Law because of a belief that section 22 (1) went, or might go, further than existing law but that begs the question as to what that existing law was, which we must decide. The effect of the subsection, as I see it, is to prevent the provisions of section 22(1) applying retrospectively in the case of a beneficiary whose interest in the trust property had not vested. Given such a provision, the legislature did not need to decide how far, if at all, section 22(1) created additional rights, and, understandably, would not have wished to do so (unless it had to) given the paucity of decided authority in Guernsey. The question was, therefore, left to the Court.

34. In short I am in agreement with the Deputy Bailiff that, subject to section 22(2), the Applicant would be entitled to receive at least some of the documents that he requests. But, in disagreement with him, I do not regard section 22 (2) as an obstacle to the Appellant's application. This is not because what he seeks are documents as opposed to information, but because, contrary to what the Deputy Bailiff found, Section 22(2) did not take away what I hold to have been the pre-existing rights of the Appellant under Guernsey customary law.

The ambit of section 22(1)

35. I am, however, in respectful agreement with the Deputy Bailiff that the reference in section 22 (1) to information embraces information in documentary form, including information in existence in written form prior to the making of any request. In enacting section 22(1) the Legislature was, to my mind, seeking to set out a principle of disclosure in terms which broadly reflected existing English law. I can see no reason why the legislature should have intended to distinguish between "information", which section 22(1) requires the trustee to provide, and trust documents which it does not. In my opinion Section 22(1) should receive a construction consistent with the general English law on the question of disclosure by trustees and not one that artificially distinguishes existing documents from "information". Compliance with the duty to provide full and accurate information on the state and amount of the trust property may require the production of existing documents, or fresh information, or both. Nor is information as to the state and amount of the trust property to be limited to the state and amount of the trust property at the time of the request.

The specific requests for information

36. Because he held that the Appellant had no information rights, it was not necessary for the Deputy Bailiff to consider the extent of those rights or how any discretion should be exercised. We must, therefore, decide those questions ourselves.

37. So far as category (1) is concerned Advocate Robilliard told us that the Appellant has already obtained a copy of the original Trust Instrument of the No 2 Settlement in the course of related proceedings. So all that remains in question is the request for "all other formal trust documentation". Advocate Robilliard was content to limit his request to documents (a) creating or defining the terms of the trust; (b) appointing or (I would add) recording the appointment of the trust property to beneficiaries; (c) appointing or removing trustees. He made it clear that he did not seek to see any Letter of Wishes. In my judgement the Appellant is entitled to see such material.

38. So far as category (2) is concerned the Appellant seeks to see the Minutes of the meetings both of the members of Cedar and of the directors of Cedar. The former minutes are - under section 58 of the Guernsey Company Law - open for inspection by the members. The latter are open for inspection by the directors. Advocate Robilliard submits that, since Cedar has corporate directors other than the Trustee, any minutes in the possession of the Trustee can only be in their possession as trustee. This may be so but, even if it is, the question remains whether the minutes of the directors of Cedar are records of the actions of the Trustees, which they should be required to reveal to the beneficiaries. In this respect we must, in my view, look at the substance of the matter. Cedar is, in reality, the creature of the Trustee, beneficially owned as to 50% by the No 2 and No 3 Settlements. The actual directors are two companies in the same stable as the Trustee. Those companies are two of the 7 companies, the others including the Trustee and BGL Reads International Management Ltd, who, according to a search on 28th June 1990, were the registered shareholders of Cedar, which has at all relevant times been beneficially owned by the No 2 and No 3 Settlements. We may, I think, legitimately infer that the Trustee runs the Board. Further Cedar is the vehicle by which the Trustee holds one of the two principal assets of the trusts namely Redhill. In those circumstances it seems to me that these Minutes, too, are liable to be produced

39. In respect of Category (3) Advocate Collas accepted that, if we were against him in principle, these documents i.e. the accounts of the Trusts and Cedar, were documents to which the Appellant should have access.

40. Category (4) seems to me a class of documents to which the Appellant is entitled to have access to the extent that the invoices in question relate to charges and expenses of carrying out the trust.

41. In the case of all four categories of documents, as limited by what I have said above, there is, in my view, no reason why as a matter of discretion, we should refuse to make an order in the Appellant's favour. Nothing in the material put before us or the Royal Court provides any good reason for doing so.

42. The Appellant is not, as Advocate Robilliard accepted, entitled to delivery up of the documents. He is entitled to inspect such of the documents as are in the possession or control of the Trustee. If he wishes to be provided with copies he must pay the Trustee's reasonable copying charges.

43. I would, therefore, allow the appeal and make an order to the effect summarised above, the precise terms of which can be discussed with the Advocates of the parties.

SUMPTION, J.A.

I agree.

TUGENDHAT, J.A.

I agree.