Getting to the Bottom of Discretionary Trusts:

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1. This is considered from the point of view of the party without the trust interest.

What do you want to know?

2. You will certainly want to know what are the assets (and income) of the trust.

3. You should also consider whether the trust is nuptial. For, if it is, it is variable by way of a property adjustment order pursuant to s.24(1)(c) of the Matrimonial Causes Act 1973:-

> "*an order varying for the benefit of the parties to the marriage and of the children of the family or either of any of them any ante-nuptial or post-nuptial settlement (including such settlement made by will or codicil) made on the parties to the marriage, other than one in the form of a pension arrangement …*"

4. Nuptiality is not straightforward, and is an issue that would need an entire lecture on its own. The "classic" ("classical"?) judicial description of a nuptial settlement for these purposes comes from Hill J, who said in *Hargreaves*[1]:

> "*…This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because* ***what it is dealing with is what we commonly know as a marriage settlement****, that is, a settlement made in contemplation of, or because of, marriage, and with reference to the interests of married people, or their children.*"

5. But the power to vary nuptial trusts was "born" in the Matrimonial Causes Act 1859, only two years after divorce was removed from the jurisdiction of the Ecclesiastical Courts and brought into the Civil Courts, and (more importantly) for the next 100 years plus (until 1965) was the only bi-directional power the court had to re-distribute assets between parties on divorce. Thus the courts were keen to, and did, broaden their power as far as they possibly could to bring as much as possible within its scope so that, for example, in in *Brooks v Brooks*[2] per Lord Nicholls:-

> *"In the Matrimonial causes Act 1973 settlement is not defined, but the context of section 24 affords some clues. Certain indicia of the type of disposition with which the section is concerned can be identified reasonably easily. The section is concerned with a settlement 'made on the parties to the marriage'. So, broadly stated, the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children. Conversely, a disposition which confers an immediate, absolute interest in an item of property does not constitute a settlement of that property"*

[1] [1926] P 42, 45
[2] [1996] AC 375, 391

"Settlement" has become "disposition", in this case a (private) pension, under which H could elect to provide out of the fund a pension for a spouse.

6. Furthermore, it is possible for a nuptial trust to cease to be nuptial - *Charalambous*[3] - although in that case it was held that that had not actually happened because, Per Thorpe LJ[4]

> *"The parties remain joint protectors. Their children remain in the beneficial class. The removal was apparently motivated by the desire to preserve the assets against claims that might be brought by the spouses' creditors. The parties may be reinstated to the beneficial class. The powers of the joint protector are extensive. Any decision of the trustees to distribute or accumulate requires the consent of the protector under clauses 8 and 22 of the deed of settlement. Subsequent to the removal of the parties there is clear evidence that the husband has in fact benefited substantially from the Hickory Trust which has provided him with working capital by substantial loans to one of his businesses."*

7. Finally, it may be possible for a non-nuptial trust to become nuptial, but at the moment there is conflicting first instance authority:
   a) In *Quan v Bray*[5] Coleridge J expressed himself of the view (on a preliminary issue as to whether a trust was a nuptial settlement) that *"a settlement which is non nuptial at its creation* ***could itself later become "nuptialised"*** *if there was, in fact, a flow of benefit to the parties during the marriage from the trust"*, whereas
   b) in *Joy v Joy-Morancho*[6], Sir Peter Singer expressly disagreed with Coleridge J:

> *"109 In the Court of Appeal decision in Charalambous v Charalambous [2004] EWCA Civ 1030, [2004] 2 FLR 1093 Arden LJ at [53] when considering the scope of the word "made" within the statutory context of a "settlement … made on the parties to the marriage" reflected that "the word 'made' relates back to the moment of creation of the settlement.* ***At that point in time it must be within the description 'made on the parties to the marriage****…Were it to be otherwise every truly dynastic settlement, bereft of nuptial character at the outset but providing benefits for an individual who subsequently becomes either a husband or a wife, would arguably become variable under section 24(1)(c) as soon as that individual, once married, received any benefits. I am satisfied that that is not the law, notwithstanding the breadth of attribution historically afforded to settlements treated as nuptial.*

8. Thus it is clear that, in order to consider – or for the court to decide – whether a trust is nuptial might require consideration of:
   a) The terms of the trust
   b) The terms of any variation of the trust
   c) The way in which the trust assets have been used/applied/made available for the parties

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[3] Reported as C v C [2005] Fam 250
[4] §45
[5] [2014] EWHC 3340 (Fam)
[6] [2015] EWHC 2507 (Fam)

9. You will want to know whether, even if the trust is non-nuptial, it can be said to be a "resource" of the other party pursuant to the *Thomas v. Thomas*[7] line of authorities. To decide whether you can pursue such a case, you will want to understand the historic use to which the trust assets have been put.

10. Finally, you will want to know whether there might be evidence that the trust holds assets beneficially for the other party (*Prest v Petrodel Resources*[8]) – so the source of funds for the purchase(s).

What can you ask for?

11. The trust itself:
    a) The identity of the settlor
    b) The trust deed or other instrument establishing the trust (or other entity)
    c) Any documents varying the terms thereof and any other supplemental instruments.
    d) All letters of wishes, or other expressions of wishes, current or past
    e) Details of the current trustee(s)
    f) Details of the current protector

12. Financial:
    a) Accounts (for a proportionate/relevant number of years)
    b) Management or draft accounts
    c) Other financial records of the value of assets held, liabilities and income;
    d) Acquisitions/receipts by the trustees, and their source (for a proportionate/relevant number of years)
    e) Dispositions made by the trustees (for a proportionate/relevant number of years)
    f) Details (or estimate) of the <u>current</u> value of assets recorded

13. Benefit:
    a) a schedule of all capital and income distributions to the beneficiary
        i) ? or at his direction
        ii) ? whether outright or by way of loan
        (for a proportionate/relevant number of years)
    b) copies of all requests for the above
    c) details of any particular purpose or reason for the making the above, or making them in the manner in which they were made

14. Involvement:
    a) the role played by the beneficiary
        i) in the business activity or investment(s) of the trust
        ii) in the determination of any request from any beneficiary
    b) any benefits received by the beneficiary as a result
    c) correspondence/other communications between the beneficiary (or on his behalf) and the trustees or protector

What can you expect to get – voluntarily?

15. It <u>may</u> be that you obtain at least <u>some</u> disclosure voluntarily. In <u>*BJ v M J(Financial Order: Overseas Trust)*</u>[9] at §18 Mostyn J said:

[7] [1995] 2 FLR at 670
[8] [2013] AC 415

18…If the trustees have refused to participate meaningfully or helpfully in the inquiry then neither they nor their beneficiary can complain if the court draws robust conclusions as to the likelihood of future benefit. In Whaley v Whaley, as it happens, I conducted the pre-trial review and recorded in the preamble to the order a recital expressing the court's expectation that the principal trustee, Mr Hess, attend in person to give oral evidence at the final hearing. Mr Hess did not do so, and Baron J found that 'Mr Hess was/is prepared to do the husband's bidding'. In her judgment at para [35] Black LJ stated:

> *'The views to which Baron J was led by the rest of the evidence were plainly bolstered by Mr Hess not being available to give evidence despite the fact that the order made by Mostyn J at the pre-trial review included in the preamble a recital of the court's expectation that he attend in person to give oral evidence at the final hearing.'*

16. See also the comments of Moylan J in *B v B* set out in §19 of *BJ v MJ*:

> *As a general point, trustees must consider whether co-operation with this court is in the interests of their trusts. However cautiously the court approaches its statutory task, there must be an increased risk that the court will obtain or might obtain the wrong picture in the absence of all the information. Why should trustees consider it in their beneficiary's or the trust's interests to take a risk that this court might obtain an inaccurate picture? I would hope they would decide that it is not.'*

17. Mostyn J concludes at §21:

> *I can, therefore, see why overseas trustees may not want to submit to the jurisdiction of the English court. They may prefer to keep their powder dry and to wait to see what judgment emerges before deciding whether or not to resist enforcement proceedings in their local court. I have to say, however, that I find it hard to see why participation by the trustees in a helpful or meaningful way in this court's inquiry qua witness could be construed as a submission to the jurisdiction.*

18. The trustees may therefore take the view that, whatever their obligations to make disclosure, their refusal to do so may be seen as indicating an attempt to hide evidence of, for example:
    a) the very readiness to make a distribution to upon which you will rely in your *Thomas* argument
    b) the fact that their "beneficiary" provided all the funds for the purchase of an asset which is, as a result, beneficially his in any event.

What can you expect to get - otherwise?

From the other (spouse) party

19. This is the most straightforward route if the beneficiary spouse has been "involved" with the trust – whether as settlor or otherwise.

[9] [2012] 1 FLR 667

20. Obviously, however, you can only obtain what he has in his possession or has power to obtain. He may well say "I shall have to ask the trustees", and/or "I have asked the trustees – they say 'no'".

From the Trustees – The Court's Supervisory Rôle

21. This is (now) a matter of discretion – for the trustees or, potentially, for the court. *In re Londonderry's Settlement*[10], which held that a beneficiary could be compelled to disclose only those documents which he had a right to demand from the trustees, has been effectively superseded by *Schmidt v Rosewood Trust Ltd*[11] and *Breakspear and others v Ackland*[12], in which the court has ordered disclosure absent such a right.

22. In the last of those cases, Briggs J surveyed the authorities, and in particular referred to the "*Londonderry*[13] principle" that *"the exercise of discretionary dispositive powers by trustees is inherently confidential, and that this confidentiality exists for the benefit of beneficiaries rather than merely for the protection of the trustees"*.

23. However, the question whether to disclose confidential documents is a question for the discretion of the trustees (or the court), not an adjudication on a proprietary right of beneficiaries to see trust documents. It is to be addressed primarily on an assessment of the objective consequences rather than by reference to the subjective purpose for which disclosure was sought.

24. In general trust documents are 'confidential' (and not disclosable) where they relate to matters of internal administration, or to the exercise of dispositive powers by the trustees – so that a letter of wishes from the settlor is inherently confidential (*Breakspear*). However, that principle may be overridden in a divorce case where there is a special interest in knowing the facts, and in that case Briggs J indeed ordered the production of the letter of wishes since the trustees intended to apply to the court for its sanction of a proposed scheme of distributions of the trust fund and the letter of wishes would be "key" to the court's consideration of that application.

25. Documents such as company accounts are (probably) the more familiar stuff of the type considered in *Schmidt v Rosewood*, e.g. at §51:

> *"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 trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest…*
> *…*
> *54 It will be observed that Kirby P said that for an applicant to have a proprietary right might be sufficient, but was not necessary. In the Board's view it is neither sufficient nor necessary. Since In re Cowin 33 Ch D 179 well over a century ago the court has made clear that there may be circumstances (especially of confidentiality) in which even a vested and transmissible beneficial interest is not a sufficient basis*

[10] [1965] Ch 918
[11] [2003] 2 AC 709
[12] [2009] Ch. 32
[13] [1965] Ch 918

for requiring disclosure of trust documents; and In re Londonderry's Settlement and more recent cases have begun to work out in some detail the way in which the court should exercise its discretion in such cases. There are three such areas in ***which the court may have to form a discretionary judgment: whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court****."*

26. This approach has been adopted in Guernsey (*Countess Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd*[14]) in non-matrimonial proceedings, but also in Jersey in *U Limited v. B*[15], where English court ordered H, who was the settlor of a trust, to use his best endeavours to obtain copies of the trust accounts for the previous three years, including by writing personally to the trustee, warning that in default of disclosure adverse inferences might be drawn against him as to the availability of trust funds to him, even though he and W had been excluded as beneficiaries. In addition, if disclosure were not made H was ordered to provide the English court with a full account of his knowledge of the settlement assets. The trustees wanted to disclose only very limited information, and asked the Royal Court to approve that decision. The Royal Court did not and, subject to safeguards as to confidentiality, ordered disclosure of the trust accounts and those of its underlying companies as being in the interests of the beneficiaries as a whole because:

a) The settlement was one of a number of trusts created for the benefit of the wider family and disclosure of the accounts was sought for use in divorce proceedings involving members of that family
b) The English court had been provided with financial information in respect of all the family trusts except this settlement and it therefore had an incomplete and potentially inaccurate picture of the family finances.
c) If disclosure were refused, W would not be impeded or prevented from pursuing her contentions before the English court; indeed, she would be able to pursue them-but on potentially inaccurate information
d) The failure to disclose the accounts was protracting the divorce proceedings and impacting adversely on the businesses owned by the settlement
e) It was in the interests of H's children and the wider family that the divorce proceedings between H and W should be determined fairly and on the basis of accurate financial information
f) Privacy in respect of the accounts was not an issue because of H's knowledge of the underlying assets, which he would be required to provide to the English court if disclosure were not made.

<u>From other parties</u>

27. The disclosure obligations of other <u>parties</u> may go further than requiring him to produce documents specifically required by the court. In *Tchenguiz-Imerman v Imerman (Application for Joinder)*[16], Moylan J said:

[14] [2007] W.T.L.R. 959
[15] 2011 JLR 452
[16] [2014] 1 FLR 865

"[40] There has been some debate during the course of the hearing as to what disclosure obligations will be imposed on the adult beneficiaries as a result of them becoming parties to these proceedings. In my view, as parties they would be under an obligation to disclose ***all documents relevant to the issues raised within these proceedings****, which would include:*

i) whether the trusts are or are not nuptial settlements;

ii) what are the resources held within the trusts;

iii) the manner in which the trustees would be likely to exercise their discretion; and

iv) any other issue going to the likely ability to enforce any order which this court might make."

28. In other words, in effect the same "full and frank disclosure" required of H and W.

<u>From non-parties</u>

29. Assuming the person concerned is available for "enforcement" (i.e. he is in the UK), disclosure can be ordered against non-parties to the litigation – trustees, accountants, advisers, for example.

30. FPR 21.2

"Orders for disclosure against a person not a party

21.2.—(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application—

(a)may be made without notice; and

(b)must be supported by evidence.

(3) The court may make an order under this rule only where disclosure is necessary in order to dispose fairly of the proceedings or to save costs.

(4) An order under this rule must—

(a)specify the documents or the classes of documents which the respondent must disclose; and

(b)require the respondent, when making disclosure, to specify any of those documents—

(i)which are no longer in the respondent's control; or

(ii)in respect of which the respondent claims a right or duty to withhold inspection.

(5) Such an order may—

(a)require the respondent to indicate what has happened to any documents which are no longer in the respondent's control; and

(b)specify the time and place for disclosure and inspection.

(6) An order under this rule must not compel a person to produce any document which that person could not be compelled to produce at the final hearing.

(7) This rule does not limit any other power which the court may have to order disclosure against a person who is not a party to proceedings.

Obtaining Disclosure Abroad

31. Of course, the reality is that, in most cases, there is no-one in the UK with the documents you want to see. If there is someone in the EU, then there is the Taking of Evidence Regulation (Council Regulation (EC) 1206/2001).

32. Otherwise, the alternative tool is a Letter of Request.

24.12 Where a person to be examined is out of the jurisdiction – letter of request

(1) This rule applies where a party wishes to take a deposition from a person who is –

(a) out of the jurisdiction; and

(b) not in a Regulation State within the meaning of Chapter 2 of this Part.

(2) The High Court may order the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is.

(3) A letter of request is a request to a judicial authority to take the evidence of that person, or arrange for it to be taken.

(4) The High Court may make an order under this rule in relation to family court proceedings.

(5) If the government of a country allows a person appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose.

(6) A person may be examined under this rule on oath or affirmation or in accordance with any procedure permitted in the country in which the examination is to take place.

(7) If the High Court makes an order for the issue of a letter of request, the party who sought the order must file –

(a) the following documents and, except where paragraph (8) applies, a translation of them –

(i) a draft letter of request;

(ii) a statement of the issues relevant to the proceedings; and

(iii) a list of questions or the subject matter of questions to be put to the person to be examined; and

(b) an undertaking to be responsible for the Secretary of State's expenses.

(8) There is no need to file a translation if –

(a) English is one of the official languages of the country where the examination is to take place; or

(b) a practice direction has specified that country as a country where no translation is necessary.

33. How effective that will be will depend on the local courts. They can be surprisingly helpful, but are not always. In the Bahamas, for instance, trustees are not even obliged to inform beneficiaries of the <u>existence</u> of the trust unless they have a vested interest, and s.83 of their Trustee Act 1998 forbids the trustees form supplying information to beneficiaries with no vested interest if the trust deed so provides – a provision that is becoming more common. They are also prohibited by statute form disclosing documents that would reveal their deliberations of the reasons for the exercise/non-exercise of their powers – including letters of wishes. It is difficult to see them forcing a trustee to make much disclosure in answer to a Letter of Request.

34. In *Charman*, Coleridge J granted an application for the issue of a Letter of Request to Bermuda for the examination of trustees there of the Dragon Trust.

> *"54… despite the husband's vigorous resistance, I granted the request. He appealed to the Court of Appeal but the appeal was dismissed by a series of reserved, detailed and closely reasoned judgments. However, all this forensic activity was to no avail because the judge in Bermuda, Mr Justice Bell, somewhat churlishly in my view, declined to assist the English Court in the face of opposition from the Trustees. He would not order/permit the production of documents by the trustees. He thus rendered any examination of the trustees largely nugatory. There was no time before this hearing for an appeal to be heard in Bermuda against that rather parochial decision of the Bermuda judge."*

35. The Bermudan approach may have softened, as in the 2010 case of *Jennings*[17], the same judge ordered disclosure by trustees. However, in that case H had initially accepted that the trust assets formed part of the joint matrimonial assets, and the judge found that the purpose of the Letter of Request was to gain confirmation of the extent of the trust assets and the manner in which the trustee had administered the trust, and so distinguished Charman on that basis.

36. Every jurisdiction will have its own nuanced view, and local advice is vital.

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[17] [2010] W.T.L.R. 215