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Trust Administration: Secrecy and Responsibility

Abstract

[extract] My contention in this paper has been that control over all trusts by the courts is indispensable. For that reason, there must be the means of bringing cases of suspected maladministration (and illegality) to the attention of the courts. Otherwise, review of discretions cannot occur where it is needed. Although settlors may choose trusts in forms that are loose, in the last resort the need for control must take precedence over the wish for secrecy. The existing law does not always provide the necessary means for controlling trustees, and changes in the law are desirable.

Keywords

trusts, discretion, administration of trusts

ARTICLES

TRUST ADMINISTRATION: SECRECY AND RESPONSIBILITY

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Trusts are held valid today in looser forms than was the case thirty years ago. The change began with the decision of the House of Lords in *McPhail v Doulton*¹ in 1971. Discretionary trusts had become popular in the years following the Second World War due to high levels of taxation. Many of their tax advantages had disappeared by 1971, but during the intervening years an over-fine distinction had emerged in practice between trusts and powers of appointment. Prior to 1971 trusts, but not powers, had to conform to a requirement that all their beneficiaries could be listed. The requirement applied to trusts in which beneficiaries had fixed interests and those where their interests were discretionary. The onus of demonstrating that a complete list could be drawn up rested on those alleging the validity of the trust, but although the courts were generally satisfied with reasonable evidence that this was possible,² the requirement created considerable problems for one particular area of trusts in which entitlement to benefit depended upon membership of a class - trusts set up to benefit employees together with (usually) former employees and dependants.

Such trusts were always discretionary and in many cases it was practicable to administer them without compiling a complete list of beneficiaries. Their validity came to a head in *McPhail v Doulton*, in which it was held that a less strict certainty requirement - the test hitherto applicable only to powers - would suffice. Discretionary trusts would be held valid if one could tell of any person who was asked whether he or she was within the range eligible to benefit. A complete list of them would no longer be necessary.

In so deciding, the House of Lords put greater emphasis on practical application than on conceptual nicety or control; and it is practical application that has been the trigger for the developments since 1971 that have loosened the conceptual requirements for trusts even further. There are many passages in their Lordships' opinions however which demonstrate that the relaxation of the certainty requirement was not intended to affect overall control of the administration of trusts by the courts. But these later developments may have led to such a result.

1 [1971] AC 424. The case was not tax-driven, as is sometimes supposed. Earlier developments were.
2 *Re Saxone Shoe Company Ltd's Trust Deed* [1962] 1 WLR 943, especially at 953 per Cross J.

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The decision of Templeman J in *Re Manisty*³ in 1974 extended, but only to a limited extent, the range of discretionary trusts and powers for persons in which designation of all the beneficiaries is not a mandatory requirement. A discretionary trust was held valid that conferred on the trustees power to add more persons to a list of beneficiaries that had been designated by the settlor in the trust deed. In theory the trustees could add anyone in the world, though in practice they would only be able to confer benefits on those who could be said to be within the scope of the settlor's intentions as evidenced by the deed.

Whether or not the identity of those added became known, it would not be much more difficult to monitor how the trustees' discretions in such a trust were being exercised than in other discretionary trusts. Nevertheless the decision involved a considerable issue of principle - a trust was being held valid in which the settlor had not chosen all his beneficiaries himself.

A much more major development along that line occurred in 1981 in *Re Hay's Settlement Trusts*.⁴ Megarry VC indicated that a discretionary trust would be valid that conferred on the trustees power to provide benefits for anyone they chose, without designation of beneficiaries in the trust deed being necessary. The only limitation that he envisaged was the need for a gift over in the event that the trustees did not exercise their power. Yet all that this means is that in theory the trustees do not have to exercise their power - in practice they will. Trusts in this remarkably loose form can now be validly created *inter vivos* or, in the United Kingdom and Queensland but in no other Australian state, by will.⁵ In some instances they will be little more than a mechanism for disposition. No indication is given in this form of trust of what the settlor's real intentions may have been, so that monitoring how the trustees exercise their discretions is virtually ruled out.

Thus settlors have a wide choice in determining the form of discretionary trust that appeals to them most. They may reveal their intentions or keep them secret. In London at least, trusts with an element of secrecy in them have become popular. The reason is that they can be coupled with a memorandum that specifies in some detail what settlors want to happen - greater detail in fact than would be easy to include in the trust deed itself. The memorandum will be sent to the trustees, and may even have been discussed with them beforehand. But it will not form part of the trust deed, may well not be referred to in it, and can be changed or added to. Such memoranda can be associated with any form of discretionary trust or power, but will clearly have greater significance in *Hay* type trusts. At the time they are drafted however, little thought is given to the problems that could occur if a need should arise at a later stage to review the way in which the trustees have exercised their discretion.

3 [1974] Ch 17.

4 [1981] 3 All ER 786. The power is technically an intermediate one.

5 *Horan v James* [1982] 2 NSWLR 376; *Re Beatty* [1990] 3 All ER 844; *Succession Act* 1981 (Queensland) sec 64. No distinction is taken in this paper between dispositions drafted as discretionary trusts and trust dispositions employing powers.

No case in the United Kingdom has raised the issue of whether those who know or who suspect that they are within the range of intended beneficiaries of a trust and that a memorandum exists which indicates the intentions of the settlor, can see that memorandum. But that issue was brought into the open in Australia by *Hartigan Nominees v Rydge*,⁶ a decision of the Court of Appeal of New South Wales. The question whether secret administration of trusts is justifiable is raised directly. But the case raises a further question that needs to be asked - whether, in a new age of 'secret' trusts, the beneficiaries and the courts have the means, when necessary, of assuring themselves that trustees are exercising in a proper way the very wide discretions entrusted to them.

Before answering these questions, we need to look at earlier authority on the willingness of courts to intervene where it is alleged that trustees have not exercised their discretions properly. The authorities concern discretions generally, but apply to discretions to distribute funds. Two distinct groups of cases are relevant. The first takes its stand on the principle that the settlor has entrusted the exercise of discretions to trustees so it is not for the courts to substitute their views for those of the trustees. The second takes its stand on the proposition that beneficiaries of a trust have rights in respect of trust assets and that trust 'assets' can include trust documents. The first group of cases has the effect that trustees are not obliged to disclose the reasons why they have exercised a discretion in a particular manner. The second provides a corrective to that in a limited way, by allowing beneficiaries to see some documents relating to the trust.

The spearhead of the first view is the decision of Lord Chancellor Truro in *Re Beloved Wilkes' Charity*.⁷ Trustees had from time to time a duty to select a 'lad' to be sent to Oxford to be educated and become a minister of the Church of England. If a suitable candidate came forward from some preferred parishes, that candidate was to be selected. If no suitable candidate came forward from those parishes, the trustees had more general discretion. The trustees selected a candidate from outside the preferred parishes, but it was alleged that a suitable candidate had presented himself from within them. The Lord Chancellor, refusing to intervene and review the trustees' decision, laid down as a general rule that the trustees could not be made to state their reasons for coming to a decision entrusted to them alone. That view, expressed in a form tantamount to encouraging the trustees to remain silent, has prevailed ever since. They can do so even if objectively their decision seems to be a perverse one.

If however trustees choose to give their reasons for exercising a discretion in a particular manner, those reasons and the decision based upon them can be reviewed. In *Klug v Klug*,⁸ a clear case existed for a power under a trust to be exercised in favour of a lady who had married without her mother's consent. The mother was a trustee and refused to concur in the exercise of the power, giving as her reason that she disapproved of her daughter's marriage.

6 (1992) 29 NSWLR 405 (hereinafter referred to as '*Hartigan Nominees*').

7 (1851) 42 ER 330.

8 [1918] 2 Ch 67.

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The court overruled her. It is said that trustees' decisions can also be reviewed if they did not approach the question before them in good faith, or if they considered the wrong question, or if in considering the right question they did not apply their minds to it properly, or if they 'perversely shut their eyes to the facts'.⁹

But the courts will not force trustees to provide ammunition for an attack upon themselves on any of those grounds by compelling them to indicate their reasons for particular decisions. So despite the existence of those formal grounds for complaint, beneficiaries who wish to challenge the exercise of a discretion are in difficulties unless they possess some external evidence of the failure of trustees to carry out their duties properly.

In general, the United Kingdom precedents have been followed in Australia. But the issue is put a little differently. Irrespective of whether trustees' reasons for exercising a discretion are available to them, the courts say that they are willing to look at the circumstances surrounding the exercise of a discretion (including the nature of any enquiries made) in order to assure themselves that the relevant questions have been given 'real and genuine consideration'.¹⁰ This seems right in principle, but may not help beneficiaries very much in practice. Thus McGarvie J in *Karger v Paul*,¹¹ while indicating that a discretion that 'has been exercised irresponsibly, capriciously or wantonly' will not have received due consideration, still accepts the authority of *Re Beloved Wilkes' Charity* as authorisation.

The second group of cases provides hardly any corrective to the situation. Beneficiaries, including beneficiaries of discretionary trusts,¹² have a right to inspect trust documents.¹³ In *Re Londonderry's Settlement*,¹⁴ beneficiaries who were objecting to the exercise of a discretionary power under a trust contended that this right enabled them to inspect correspondence that the trustees happened to have retained concerning the exercise of the power, and written agenda and minutes of the trustees' meetings. Counsel for the beneficiaries argued strongly that trustees are not entitled to carry on the administration of their trust in secret. But it was clear to the court that the effect of inspection would be to reveal to the beneficiaries the reasons that lay behind the trustees' decisions. In the court's view, this should not be allowed to occur. Whatever consequence followed from the trust documents rule, the need for confidentiality overrode it. So although the rule will sometimes enable beneficiaries to acquire information that is useful to them, it cannot be used to circumvent the principle that trustees are entitled to withhold from beneficiaries the reasons why discretions entrusted to them have been exercised in a particular manner.¹⁵

9 See *Dundee General Hospitals v Walker* [1952] 1 All ER 986, especially at 905 per Lord Reid. Fraud is also a ground of complaint of course.

10 See *Karger v Paul* [1984] VR 161, especially at 164-6 per McGarvie J.

11 *Ibid* n 10.

12 *Spellson v George* (1987) 11 NSWLR 300. See further on this point at p 13.

13 *O'Rourke v Darbishire* [1920] AC 581.

14 [1965] Ch 918.

15 Discovery may not be used for this purpose either: see *Hartigan Nominees* at 437 per Mahoney JA. Likewise allegations of fraud and suits to secure administration. Cf RE Megarry's comments in (1965) 81 LQR at 196-7.

In addition Mr WA Lee (in his *Principles of the Law of Trusts* written with Professor Ford) has convincingly demonstrated, in a passage that cannot be improved upon,¹⁶ that the trust documents rule is too insecure in its foundation and too uncertain in its operation to provide a valid criterion for distinguishing between cases where it is proper to maintain confidentiality and cases where disclosure is justified.

We can now turn to the facts of *Hartigan Nominees*.¹⁷ A \$10 trust was constituted by a friend of the real settlor - who I will refer to as such, and who later transferred substantial sums to it. The trust was discretionary and specified the beneficiaries amongst whom the trustees were to distribute the fund. They were all members or spouses of members of the settlor's family; but there was an ultimate power in the trustees to add to the range of beneficiaries in certain circumstances - in this respect the trust followed the *Manisty* precedent. Distribution of the fund was to be in the trustees' 'absolute and uncontrolled discretion'. The trust was clearly a valid one but associated with it, though not mentioned in it, was a memorandum signed by the settlor that could be assumed to indicate the way in which he wished his trustees to exercise their discretionary powers. The existence of this memorandum was divulged to one of the beneficiaries by the solicitors for the settlor's estate, who wrote to her saying that '... whilst it is possible that you might at some time in the future receive a distribution from the trust, there is no provision in [the] Memorandum which would entitle the Trustees to make any payment to you at this time'. A different beneficiary thereupon asked to see the memorandum, but the trustees declined his request. He brought an action seeking to establish two things: first, that the beneficiaries were entitled to inspect the memorandum; second, that the trustees were bound not to take the contents of the memorandum into account when exercising their discretions. No misconduct was alleged. At first instance the second contention was rejected but the first was accepted, subject to certain conditions. The judge was not asked to look at the memorandum and did not do so. An appeal was taken on the first contention only, and the court was asked to look at the memorandum. The court treated the memorandum as fresh evidence however and refused to look at it on that ground.¹⁸ The appeal was allowed, Kirby P dissenting. The beneficiary had no right to see the memorandum.

Mahoney JA accepts that trustees must exercise their discretions in a reasonable manner, but provides little encouragement to beneficiaries who wish to challenge decisions that trustees have reached. He comes down firmly in favour of maintaining the right of trustees to administer a trust without having to explain how they are doing it, and is willing to accept that this may sometimes disadvantage beneficiaries.¹⁹ The memorandum must be for the trustees' eyes alone.

16 Para 936.1.

17 *Ibid* n 6.

18 In view of the decision reached by the Court of Appeal, it is most unlikely that anything turns on the point. Memoranda should be consulted only when unavoidable under a review. See also at pp 16-17 and n 48.

19 See 435-8 in particular.

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The emphasis in Sheller JA's judgment is slightly different.²⁰ He too firmly opposes interference with the way in which trustees exercise their discretions, but specifically links this to the 'motives, reasons or the process of reasoning' that lie behind what trustees have decided. Thus if a particular memorandum did not indicate reasons, there would be no ground for the trustees to withhold it from the beneficiaries. But memoranda will ordinarily indicate reasons, and on that ground will be confidential to the trustees. Sheller JA realises that it is important in the interests of good trustee-beneficiary relations that the trustees disclose to beneficiaries what it is reasonable for them to disclose. He is also a little more forthcoming than Mahoney JA on the grounds that could justify intervention by the courts. But neither of these points is likely to have much practical impact. In the result he shares Mahoney JA's view that trustees are able to administer a trust secretly and that beneficiaries' rights to enquire into its administration are strictly limited.

Two further points should be noted. First, it is accepted that settlors may indicate the level of secrecy they want in the administration of a trust. Thus if the trust deed expressly provides that the trustees are to be given 'uncontrolled' or 'absolute' discretion, or that certain aspects of trust administration are to be dealt with by the trustees in confidence, such provisions are to be given weight.²¹ Second, the significance of the trust documents rule in the present context is discounted. It is important for beneficiaries to satisfy themselves that the assets of the trust are safe and in good order, so that accounts for instance are to be made available to them.²² But that is an issue which is wholly distinct from that of access to the reasons why trustees have exercised their discretions in particular ways. Mr WA Lee's view is accepted that the trust documents rule is inadequate as a more general rationale for disclosure, Sheller JA referring to the rule as an 'unhelpful trail'.²³

The general nature of trustees' duties is also affirmed. Taken in conjunction with them, the effect of the decision of the court can be summarised as follows. Trustees of discretionary trusts have to consider the range of beneficiaries who are eligible to benefit under the trust. They need not identify all of them, though they should seek harder to do so when the class of beneficiaries is small. They do not have to advertise for undiscovered beneficiaries or make specific enquiries of known ones to discover what their needs are. They may consult some only of the beneficiaries. They may act upon information sent to them by some only of the beneficiaries. They may consult the settlor in person or have regard to a memorandum he or she has supplied. They are under no duty to explain to beneficiaries the nature of their entitlements,²⁴ or to inform beneficiaries when they exercise their discretions.

20 See 444-7 in particular.

21 See particularly at 436 per Mahoney JA and at 446 per Sheller JA. Cf Kirby P at 420, and see further at p 14.

22 Thus *Re Fairbairn* [1967] VR 633 retains its importance as an authority, although the reasoning in the judgment may be rather wide.

23 At 444. Cf Mahoney JA at 443. At 432, Kirby P agrees with the view expressed in para 936.1 of Ford and Lee (*ibid* n 16) that the rule 'gives rise to far more problems than it solves'.

24 See at p 13 on whether there is a duty to inform them of the existence of the trust under which they could benefit.

They can refuse to explain why they have not, or how they have, exercised their discretions. They can refuse to show to beneficiaries documents or correspondence which indicate the reasons lying behind their decisions; so that beneficiaries may not see the settlor's memorandum, correspondence with or concerning the beneficiaries or some of them, or notes or minutes which have been prepared by or for the trustees or for the guidance of future trustees.

However, they must not just do what the settlor wants. Nor may they delegate the exercise of their discretions. They must themselves assess the significance of whatever material relevant to the exercise of their discretions is before them, making further enquiry as they think fit.²⁵ They must review matters from time to time, and their decisions must be taken in the light of the circumstances then existing. They must not automatically rely on old information or make undue future commitments on the basis of present information. They may consult the settlor but do not have to do so.

The cumulative effect of these propositions stacks the chances against a beneficiary who believes that he or she has been unjustly denied benefits. In practice there is very little that a beneficiary can do to bring the matter into the open unless he or she has external evidence of how the trustees actually arrived at their decisions. The courts are loath to intervene unless the trustees disclose their reasons. The courts will not order the trustees to disclose those reasons. The courts will not allow the beneficiary to see any documents that would reveal those reasons. It is no wonder that Kirby P felt unable to go along with the majority in the court. Was he right or was the majority?

Kirby P supports his conclusion that the memorandum should be disclosed to the beneficiaries on a number of grounds.²⁶ Trustees do not require absolute protection, nor need they fear being harassed by inquiries. The courts will be able to protect them when the need arises. There are advantages in having family dissent dealt with openly that override the advantages of secrecy. Secrecy of administration should occur only when it is shown to be justifiable. Trustees will have more reliable information on matters relevant to the exercise of their discretions if the administration of the trust is conducted less secretly. It is more difficult than it should be for beneficiaries who believe that they have cause for complaint to bring the matter out into the open.

These are impressive arguments. Secrecy *per se* is bad, and the reasons for it need to be strong. Family dissent is not prevented or cured by it. Trustees may have to put up with some badgering by the occasional awkward beneficiary. The President's last two grounds are particularly compelling. It is very possible for trustees to take *bona fide* decisions that are based on inadequate information. It is true that in practice the threshold for court intervention is extremely high.

But it does not follow that the President is right in concluding that the beneficiaries should be able to inspect the memorandum. That conclusion is

25 See further on this point at p 14-15 and n 41.

26 See particularly at 418-21.

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driven by the argument in the case before him and in fact distorts policy issues in the area that should be kept separate. Three principles are central. The first is that settlors are free to choose the type of trust that they want, and indicate the degree of secrecy which they think is appropriate for its administration. The second is that discretions given to trustees are to be exercised by them alone, subject to review at the instance of beneficiaries only when review is unavoidable. The third is that courts must be able to control the administration of a trust when that becomes necessary. The first of these principles raises the question whether the degree of secrecy that can be achieved through some trusts and powers is a good or bad thing. That is an issue between the settlor and his or her beneficiaries. The second raises the question whether beneficiaries have the means of bringing cases of suspected maladministration to the attention of the courts when it is needed. That is an issue between the beneficiaries and the trustees. The third raises the question whether the courts' ultimate control over trusts has been prejudiced by the developments that have occurred since 1971. That is an issue on which settlors should not be able to have it all their own way. There is thus a need to balance the degree of secrecy that settlors and trustees may desire with the capacity to exercise control which must exist in the beneficiaries and the courts.

We must start with those discretionary trusts in which the intended beneficiaries are designated in the trust deed.²⁷ I would not wish to argue against the practice of sending a confidential memorandum to trustees in such cases. Nor should it make a difference that the memorandum is referred to in the trust deed; or that the trustees have disclosed its existence to the beneficiaries - whether they do so or not should be up to them. Matters that are valuable for trustees to know about but which are not suitable for inclusion in the trust deed can be brought to the trustees' attention in a formal manner without binding them. If a settlor has resolved to adopt this course, his or her choice should not be overridden by the courts. The whole point of the memorandum is lost if it is not kept confidential to the trustees. There is irony in the dilemma in which Kirby P found himself, whether to defend openness or choice. For the likely result of compelling trustees to make the memorandum available to beneficiaries in a case where beneficiaries are designated in the trust deed would be to make more settlors choose *Hay* model trusts where they are not. More rather than less secrecy would result.

I also think it may be legitimate to draw inferences from a settlor's decision to designate his beneficiaries in the trust deed.²⁸ It is a choice that was not open in earlier years, and is something that he or she now need not do. Where he or she has chosen to do so, it is reasonable to infer that the settlor will not mind his or her beneficiaries knowing of the possibility that they may benefit under the trust; they can then be expected to take an interest in its operation and ask the usual questions concerning its assets. They also become the obvious persons to bring cases of suspected maladministration to the attention of the

27 Including trusts of the *Manisty* type.

28 The suggestions for controlling the administration of trusts that are made at pp 14-15 do not depend on it however. They are supportable independently.

courts. A measure of control by the beneficiaries over the trustees has been provided by the settlor, and the settlor should be taken as having envisaged it. That does not conflict with the fact that discretions²⁹ being exercised by trustees will not ordinarily be reviewed.

A number of more specific issues now needs to be dealt with, all of which receive mention and some consideration in *Hartigan Nominees*. First, does the right of beneficiaries to inspect trust documents extend to beneficiaries under a discretionary trust? Powell J in *Spellson v George*³⁰ held that in principle it did, but Mahoney JA in *Hartigan Nominees*³¹ expresses doubts on how far the right can be carried, and points to the burden falling on trustees if large numbers of discretionary beneficiaries sought to exercise it. That consideration should prevail over any supposed 'proprietary' basis of the trust documents rule so that the right should not be freely exercisable, in employee trusts for instance.³² But Powell J's view should prevail where the number of beneficiaries is small, especially in family trusts. The rule thus needs to contain an element of discretion.

Second, does the right of beneficiaries to be informed at a suitable time of the existence of the trust under which they could benefit extend to beneficiaries under a discretionary trust? Again Mahoney J A has reservations,³³ doubting whether the decision in *Hawkesley v May*³⁴ to the effect that beneficiaries with fixed interests in a trust fund have such a right, applies to discretionary beneficiaries. Mahoney J A is on strong ground as the duty would be a positive one on the trustees to inform them, and much harder to comply with than a duty only to respond to questions asked by them. But a duty to inform would seem consistent with a settlor's decision to designate his or her beneficiaries in the trust deed, and the need to bring cases of suspected maladministration to the attention of the courts. As in the case of a right to inspect trust documents, a duty to inform would in some instances be reasonable; and could apply as a matter of practice where the number of beneficiaries is small or where effective circularisation of the group eligible to benefit is feasible.

Third, what are the effects of the inclusion in a trust deed of provisions enjoining secrecy? In particular, can such provisions override the trust documents rule? The argument in favour is that, even if settlors choose to designate their beneficiaries in the trust deed, they can still choose to relieve trustees of some of the formal burdens of administering the trust. The argument against is that the rule is one which affects the safety of the assets of a trust and not the exercise

29 All discretions come under this principle, and this paper takes its examples from a variety of them, although it is principally concerned with powers of appointment and discretionary trusts to distribute. Discretions are easier to challenge if the issues with which they are concerned are precise - cf *Klug v Klug* *ibid* n 8. The issues facing trustees in a trust of the *Hartigan Nominees* type will not ordinarily be as precise as that.

30 Above n 12.

31 At 425 and 432.

32 Trusts for employees and family trusts inevitably produce differences of administration in practice. Different overall rules for them are not necessary however. Different and stricter rules are necessary for superannuation funds.

33 At 432.

34 [1956] 1 QB 304.

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of a discretion. The argument in favour seems to prevail. The matter is regarded as one affecting trustees and beneficiaries only, and the trust documents rule is not regarded as sufficiently linked to control by the courts to justify being mandatory. Thus in *Tierney v King*,³⁵ a clause in the trust deed of a superannuation fund providing for confidentiality in the administration of the fund enabled the trustees not to disclose an actuary's report concerning the fund. I do not welcome the result, but even Kirby P³⁶ seems to accept it and it is in fact difficult to see how to prevent it, short of giving the trust documents rule greater authority than it deserves in its present form. There is a real danger however that trustees will not scruple to stick to what they see as their rights under trust deeds when a provision enjoining secrecy may only have been included as a matter of common form. In some instances, the whole of a trust deed should be construed in order to see whether it is really meant.

Fourth, what are the effects of the inclusion in a trust deed of a clause conferring on the trustees 'uncontrolled' or 'absolute' discretion in the way in which they arrive at their decisions. Such a provision affects the right of the courts to control trustees. It is more than a matter between the settlor, his trustees, and the beneficiaries.³⁷ The considerations which entitle the courts to review discretions must be the same regardless of whether such a provision is inserted in the trust deed. It is inherent in discretions given to trustees that a wrongful exercise of them can be corrected. The point was made by Lord Reid in *Dundee General Hospitals v Walker* when he said that '... by making his trustees the sole judges of the question a testator does not entirely exclude recourse to the courts by persons aggrieved by the trustees' decision'.³⁸ The jurisdiction of the court cannot be ousted. Whether or not courts will exercise it and review discretions is a different matter and will depend on the nature of the issue given to the trustees to decide and on the way³⁹ it was conferred, as well as on the manner in which they decided it.

With these issues dealt with, we can return to the question whether beneficiaries who are designated in a trust deed are able to monitor the exercise of trustees' discretions to the degree that is appropriate and bring cases of suspected maladministration to the attention of the courts when it is needed. I do not think that they are always able to do so. Whether secrecy of trust administration has been specifically entrenched in the deed or not, beneficiaries may understandably feel that trustees are not administering a trust fairly. Kirby P is justified in his view that the threshold for court intervention is unreasonably

35 [1983] Qd R 580. Only the presence of the clause can justify the court's conclusion, for the report seems within the category of trust documents. Whether the decision is justifiable in the superannuation context is another matter.

36 In *Hartigan Nominees* at 414 and 420.

37 See further at pp16-17.

38 See n 9 above at 905. The question given to the trustees for final decision was a particular one. But Lord Reid's principle would seem of general application.

39 A settlor may indicate that he or she wishes his trustees to be the final arbiters of particular points. *Re Coxen* [1948] Ch 747 at 761-2 provides an example. But the jurisdiction of the court is not ousted altogether, which is what the *Dundee Hospitals* case decides. It is a decision of a strong House of Lords consisting of Lords Normand, Morton, Reid, Tucker and Cohen and is less well known than it deserves to be, probably because it is one of the very rare appeals on a point of trust law from the Court of Session in Scotland. The decision seems consonant with English and Australian trust law.

high. A better balance needs to be achieved between trustees' powers and beneficiaries' rights. It could be secured in a number of ways.

One possible way is to build on the view of McGarvie J in *Karger v Paul*⁴⁰ that the courts need to look at the extent and nature of the enquiries that trustees have made before exercising their discretions. That is a most relevant factor, and Kirby P's most compelling argument in favour of the less secretive administration of trusts is the danger that trustees can act *bona fide* but on insufficient information, when further information could have been obtained.⁴¹ But courts can only do so if trustees are prepared to indicate what enquiries they did make. In my view, in suitable cases, they should be made to do so.

But I would go further than that and also require in suitable cases that trustees be made to indicate what their reasons were for exercising a discretion in a particular way or not at all. If beneficiaries are able to show independently of any memorandum that a decision by trustees seems to be perverse, in the sense that there seems to be no rational ground on which it could have been taken, that should constitute a case to be answered. The same requirement should be the criterion for making trustees indicate what enquiries they made. It would, as a requirement, be strict enough to provide trustees with the protection that they need.

To achieve such a result would require a relaxation of the rule derived from *Re Beloved Wilkes' Charity*.⁴² The case is itself an example of the need for relaxation: if it could have been shown objectively that a suitable candidate from a preferred parish had come to the notice of the trustees, it would have been right to ask them why he had not been selected. It would not have been a question of comparing candidates, only of being assured that the candidate from the preferred parish was not suitable. *Klug v Klug*⁴³ can provide another example: if the mother had remained silent, the court should not have been powerless.

It would not follow that trustees would have to make a complete disclosure to the beneficiaries of all matters relating to the administration of the trust. In many instances quite simple factual explanations that would not damage their longer term administration of the trust would suffice. Certainly, confidential memoranda would not have to be made available. The recognition that in some instances trustees could be asked to explain their position might itself be sufficient to achieve a better balance between the interests of the two sides.

40 Above n 10.

41 At 420. The argument almost convinced me. There are many discretionary trusts in which the trustees cannot be expected to seek information. But there are others in which they could, yet under the present law the trustees will not be in breach of duty if they do little about it. The result will frequently be that they know more of the needs and circumstances of some beneficiaries than of others, especially if some beneficiaries have been assiduous in communicating with them. This must be a source of concern. But the suggestion made above that in suitable cases trustees should be made to indicate the range of their enquiries could do a lot to redress the situation.

42 Ibid n 7. In England the Charity Commission could now look into such a case.

43 Ibid n 8.

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These suggestions, taken together, would succeed in materially altering for the better the balance between trustees and beneficiaries. It is for this reason that I believe Kirby P to have been firing at the wrong target. He should have aimed his fire at *Re Beloved Wilkes' Charity* rather than at *Re Londonderry's Settlement*.⁴⁴ In order to give adequate protection to beneficiaries designated in the trust deed itself, it is not necessary to abandon the generally useful practice of enabling trustees to see something of settlors' real intentions as expressed in confidential memoranda.

Quite different issues arise when the beneficiaries under a discretionary trust or power are not, or are not sufficiently, designated in the trust deed. At the far end of the spectrum, where trustees have been given an express power to appoint to themselves, there will not be a problem.⁴⁵ There is no point in controlling what happens when a right equivalent to absolute ownership has been conferred. Neither is there a problem where a general power has been conferred and a *Hay* type trust is only a mechanism for disposition. The trustees are intended to exercise their powers as they wish.

But in other situations there can be a problem. A general outline of the settlor's intent may have been included in the trust deed; or a memorandum may have been sent to the trustees specifying the class of beneficiaries to be benefited. In these situations a serious issue arises, especially in the latter. The position of members of the class is an impossible one. There is virtually nothing they can do to find out about the trust. Even if they know of its existence, they can only surmise that they are among its intended beneficiaries. They will certainly not be able to discover how it is being administered. Short of a stroke of luck, they will only be able to complain if the trustees themselves divulge enough to make it possible. The result is dismaying. Trustees of *Hay* type trusts can in practice escape control by the beneficiaries and by the courts. It cannot be said that justice is being seen to be done.

I doubt very much whether the judges who initiated these developments by discounting conceptual nicety realised how far the developments would be taken in discounting control as well. Nor do I think that those judges would have approved it. But neither do I see judges of the present day going into reverse and depriving settlors of the facility for 'secret' trusts with which they are now armed. Where the trustees are professional people who are likely to be paid for their services, the problem will not be so severe. But where this is not the case, and especially where the trustees have personal associations with the intended beneficiaries, as may well be the case in smaller trusts, the beneficiaries may legitimately feel that they are beneficiaries *manqués* and at the trustees' mercy.

Yet it is the settlor who, by his or her decision not to designate them in the trust deed, has put his or her intended beneficiaries in such a position. Is there anything that can be done to establish some degree of control? I can make a few suggestions.

44 Ibid n 14.

45 See *Re McEwen* [1955] NZLR 575.

In *Hay* type trusts there must be a gift over. The gift over must be to a person (or an institution) who can take the assets of the trust beneficially, or otherwise deal with them if the trustees do not exercise their powers fully. If no identifiable person exists who is able to do so, the trust should be held void. But if there is such a person, he or she should be regarded as entitled to ask questions of the trustees.⁴⁶ The crucial question to be asked is whether a memorandum exists that specifies the range of intended beneficiaries. The trustees should be made to answer that question. If such a memorandum exists, the person entitled to take in default should stand in the same relation to it as beneficiaries would do under the suggestions made in the previous section.⁴⁷ He or she would be able to ask further questions when there are grounds for doing so, and be entitled to answers. He or she could bring any suspected maladministration to the attention of the courts.⁴⁸

There is a further instance in which intervention may be needed. A *Hay* type trust could conceal an illegal purpose, money laundering for instance, or an intention to make fraudulent preferences.⁴⁹ Here protection of the community is involved, and not just beneficiaries. Where such circumstances are suspected, intervention may have to be more direct, and the courts should not be hesitant in having the matter brought before them - the status of the person doing so should not be crucial. There is no justification for allowing the looser types of trust now in vogue to cloak illegality.

My contention in this paper has been that control over all trusts by the courts is indispensable. For that reason, there must be the means of bringing cases of suspected maladministration (and illegality) to the attention of the courts. Otherwise, review of discretions cannot occur where it is needed. Although settlors may choose trusts in forms that are loose, in the last resort the need for control must take precedence over the wish for secrecy. The existing law does not always provide the necessary means for controlling trustees, and changes in the law are desirable. They should take the form of requiring trustees to indicate (a) their reasons for, and (b) the range of enquiries they pursued prior to, reaching a decision; but only where the decision seems on the face of it inexplicable. Such changes should enable a review of trustees' discretions to occur when necessary, without adding unduly to the burden of their trusteeship. The practice of sending confidential memoranda to trustees will in some cases assist them in carrying out their duties, and there is no need to abandon the practice or reduce its effectiveness by making the memoranda accessible to beneficiaries.

But trustees should also bear in mind that two members of the Court of Appeal of New South Wales have expressed their view⁵⁰ that secrecy in

46 Cf *Re Thompson* [1934] Ch 342.

47 Ibid pp 14-15.

48 There is thus no more need in this situation for the courts to see the memorandum than where beneficiaries have been designated in the trust deed.

49 The point is taken by Sheller JA in *Hartigan Nominees* at 447. It can affect trusts where the beneficiaries are designated in the trust deed as well as where they are not.

50 Kirby P and Sheller JA do so in different degrees; Mahoney JA may not be in disagreement.

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administration should not be carried further than is needed. Trustees ought not to rest content with withholding information from beneficiaries, but should give active consideration to making it available to them in circumstances where it would assist in maintaining good relations between trustees and beneficiaries, and would not prejudice the proper discharge of their duties. It is to be hoped that trustees and their advisers will not use the strong legal position of trustees to put their own convenience before the interests of their trust.

Trustees should feel a responsibility to give active consideration to these matters, and that responsibility should include answering any reasonable enquiries that beneficiaries make. Trustees need to be punctilious in carrying out their legal duties, but should also feel under some obligation to avoid pursuing the cult of secrecy further than is necessary.