

## Title

The challenge of maintaining the privacy of a non-testamentary discretionary trust with multiple permissible beneficiaries

## Summary

Assume X is an innocent discretionary beneficiary of an irrevocable non-testamentary trust with multiple permissible beneficiaries (the “trust”). Y is a not-so-innocent co-beneficiary, that is to say he has not been paying his just debts. The *trustee* being a fiduciary owes each a duty to keep the affairs of the trust confidential. Absent special facts, however, neither beneficiary owes the other such a fiduciary duty. Is there anything that X can lawfully do to prevent Y or Y’s creditors from subjecting X’s equitable property interest to public scrutiny? The *Sergei Viktorovich Pugachev Case*, [2015] EWCA Civ. 139 [England and Wales Court of Appeal (Civil Division)] suggests that at least when it comes to litigating issues such as whether the trust is a sham or whether the trustee is subject to the control of the defendant-beneficiary the other beneficiaries may have an uphill battle keeping the terms of the trust private. The *trustee’s* duty of confidentiality is covered generally in §6.2.3 of *Loring and Rounds: A Trustee’s Handbook* (2016) [pages 631-632], which is reproduced in its entirety below.

## Text

### §6.2.3 *Duty of Confidentiality* [from *Loring and Rounds: A Trustee’s Handbook* (2016)]

*Moreover, since a fiduciary relationship exists even before the trust instrument is finally executed, if a settlor has imparted confidential information to the trustee, the fiduciary relationship will forbid its disclosure to anybody else. Indeed, it is wholly offensive to Equity’s standards of integrity that the trustee could take personal advantage of the settlor’s confidence.*<sup>474</sup>

**The current trustee.** *Intentional breaches.* A corollary of the trustee’s general duty of loyalty is the specific duty to keep all the affairs of the trust confidential.<sup>475</sup> The trustee’s duty to act solely in the interest of the beneficiaries means that third parties are told only what the law requires the trustee to divulge, *e.g.*, information mandated by regulatory, supervisory, and taxing authorities,<sup>476</sup> or what furthers the interests of all the beneficiaries, *e.g.*, information needed by executors of pour-over wills and trustees of related trusts.<sup>477</sup> “Even in providing information to or on behalf of beneficiaries, however, the trustee has a duty to act with sensitivity and, insofar as practical, with due regard for considerations of relevancy and sound administration, and for the personal concerns and privacy of the trust beneficiaries.” Breach of

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<sup>474</sup>Paul-Jean Le Cannu, *Trusts and Money Laundering in English Law: The Duties of Confidentiality and Disclosure of Trustees and the Obligations Arising Out of Sections 93a, 93b and 93d of the Criminal Justice Act 1988*, 2 *Global Jurist Topics* No. 2, Article 4 (2002).

<sup>475</sup>*See* Restatement (Second) of Trusts §170 cmt. s. *See also* §5.4.1.1 of this handbook (the trust beneficiary’s right to information and confidentiality) and §8.8 of this handbook (whom trust counsel represents).

<sup>476</sup>Restatement (Third) of Trusts §78 cmt. i.

<sup>477</sup>*See* Restatement (Third) of Trusts §78 cmt. i; Restatement (Second) of Trusts §170. *See also* 2A Scott on Trusts §170.

confidence was one of three traditional bases for equity jurisdiction, the others being fraud and accident. The law of trusts, the law of agency, and the law governing lawyers are separate offshoots of the branch of equity that remedied breaches of confidence.<sup>478</sup> Unauthorized disclosure to third parties, at minimum, is grounds for removal.<sup>479</sup>

*Negligent breaches.* A breach of confidence need not necessarily implicate the trustee's duty of loyalty. The trustee who maintains in digital form confidential information pertaining to the terms of the trust, its settlor, its beneficiaries, and/or the subject property assumes a duty to keep that information secure.<sup>1</sup> Thus, the trustee could be held personally liable for the consequences of negligently failing to protect such information from the predations of cybercriminals. The trustee's costs of prudently insuring against the quantifiable costs of cybercrimes, both avoidable but for the trustee's ordinary negligence and unavoidable, ought to be reimbursable from the trust estate.<sup>2</sup>

*Co-liability of third parties.* What about the liability of the third party who receives the confidential information? If the third party exploits the information in ways that are injurious to the trust, or if the third party and the trustee are somehow connected such that the trustee is in conflict of interest, then the third party may well share liability with the trustee, provided the third party knew of the trust's existence.<sup>480</sup> In England, a third party may incur liability if he, she, or it exploits confidential information pertaining to the trust in order to "dishonestly assist" the trustee in misapplying the trust property, or to induce him to do so.<sup>481</sup> If the misapplication was for the third party's benefit, then the third party might well be held accountable as a constructive trustee of the misapplied property.<sup>482</sup> For a detailed discussion of third-party fiduciary liability of the trustee's agents, see Section 7.2.9 of this handbook.

*Keeping critical information from beneficiaries themselves.* As to whether a trustee may keep information pertaining to the affairs of the trust secret not only from third parties but also from the beneficiaries themselves, see Section 5.4.1.1 of this handbook (right to information and confidentiality).

**The former trustee.** The trustee's fiduciary duties to the beneficiaries (or to the trust's charitable purposes, as the case may be) will not cease even upon the proper transfer of legal title to a qualified successor trustee. The transferor-trustee, for example, remains burdened with the duty of undivided loyalty, to include the incidental sub-duty of confidentiality.<sup>3</sup> In the face of such residual trust-related burdens, divestiture of bare legal title, in and of itself, will not also divest the transferor-trustee of standing to litigate matters pertaining to the trust's proper administration.<sup>4</sup>

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<sup>478</sup> See generally Chapter 1 of this handbook.

<sup>479</sup> See Bogert, *Trusts and Trustees* §527. See generally §7.2.3.6 of this handbook (trustee removal).

<sup>1</sup> See generally Huw Thomas, *Defend your data*, Dec. 2014/Jan. 2015 STEP Journal 55 (how trustees should approach information security).

<sup>2</sup> See generally §3.5.2.3 of this handbook (expenses reimbursable from the trust estate).

<sup>480</sup> See generally Lewin on Trusts ¶20-49 through ¶20-50 (England).

<sup>481</sup> Lewin on Trusts ¶20-49 through ¶20-50 (England).

<sup>482</sup> Lewin on Trusts ¶20-49 (England).

<sup>3</sup> Not only is a former trustee-fiduciary saddled with such residual fiduciary duties, so also is the former agent-fiduciary. The attorney-at-law in the post-termination-of-the-representation period particularly comes to mind in this regard.

<sup>4</sup> *But see* Old National Bancorp v. Hanover College, 15 N.E.3d 574 (Ind. Sup. Ct. 2014) (the court apparently oblivious of maxim that equity exalts substance over form that is discussed in §8.12 of this handbook).