



**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**CAUSE NO: FSD NO 207 OF 2023 (IKJ)**

**IN THE MATTER OF THE Z TRUST**

**AND IN THE MATTER OF THE TRUSTS ACT (2021 REVISION)**

**IN CHAMBERS**

**Before:** The Hon. Justice Kawaley

**Appearances:** Harney Westwood and Riegels for Harneys Trusts (Cayman) Limited  
(the "Trustee")

**Heard:** On the papers

**Date of Decision:** 11 September 2024

**Draft Reasons**

**Circulated:** 19 September 2024

**Reasons delivered:** 26 September 2024

*Trust-recovery of assets believed to have been misappropriated-implications for confidentiality-appropriate directions to be given by the Court-Trusts Act (2021 Revision), section 48*

**REASONS FOR DECISION****Introductory**

1. By an Ex Parte Originating Summons dated 20 July 2023, the Trustee applied for directions in relation to the Z Trust, an open-ended unit trust fund (the “Trust”), amidst concerns that underlying investors’ commercial interests were at risk. The former Manager and the sole unit trust holder were designated as Defendants, but no notice of the ex parte application was given to them. On 28 July 2023, the former Manager was removed and FFP (Advisors) Limited (“FFP”) was appointed as Interim Receiver and Interim Manager to assume control of the management of the Trust’s affairs.
2. By an interlocutory Summons dated 2 August 2024, the Trustee applied for further directions from this Court. The Trust is registered with the Cayman Islands Monetary Authority (“CIMA”) and its sole unit holder has been struck-off the local register of companies. The present application was made on notice to both CIMA and the Financial Secretary. On 11 September 2024, I granted the various directions sought including the following direction in relation to which I promised to furnish short reasons on general matters of legal principle:

*“3. Pursuant to section 48 of the Trusts Act (2021 Revision), GCR Order 85 and/or the inherent jurisdiction of the Court:*

*(a) the Trustee or FFP may disclose confidential information as defined in the trust deed... to the extent either the Trustee or FFP considers is necessary:*

*i) to investigate what has become of the Trust’s assets or to take steps to protect or recover those assets; or*

*ii) to update persons who appear to the Trustee and FFP to have understood their funds would be invested in the Trust (whether or not such direct investment occurred), save that such permission shall not extend to disclosure of any information that would identify any unitholder(s) or purported investor(s) believed to be unconnected to the suspected misappropriation of assets of the Trust without the consent of such unitholder or purported investor.”*

3. These are the reasons for that decision to approve disclosure both retrospectively and prospectively.

**The Trustee's submissions**

4. The practical need to deploy the confidential information was clear on the face of the terms of the draft Order the Trustee's counsel sought. First, for investigatory or recovery purposes. Second, for the purposes of informing stakeholders of steps being taken on their behalf.
5. The Trustee's counsel explained the legal need for the direction sought in summary as follows:

*“72. The direction is sought prospectively and retrospectively. The direction is needed because the definition of confidential information in the Trust Deed is broad (clause 36.1) and permitted exceptions to the prohibition on disclosure of confidential information to third parties under the Trust Deed does not extend to the present situation (clause 36.2). The exceptions in clause 36.2 are limited (in summary) to disclosure where the information is or has become publicly available, to any agent to whom the party disclosing has delegated its rights/powers, or to the extent required to do so under any relevant law, order, judgment or pursuant to the requirements of any regulatory authority.*

*73. The Trust Deed provides the Trustee and Manager with the power to amend the deed (clause 28). However, any amendment, assuming not immaterial, requires sanction of a unitholder resolution (clause 28.1.). Given the position with the sole unitholder...it is not possible to use the amendment provisions in the Deed and given the Court's supervision of this matter, it is submitted it would in any event not be appropriate to do so without a direction from the Court...*

*76. The Trustee submits that it and FFP would be unable to properly pursue their investigations (or arguably at all) if they were not able to disclose information about the Trust to third parties. Given the sole unitholder is struck off...it is submitted that it is appropriate for information that would ordinarily be disclosed to the unitholder about the investigations and potential asset recovery to instead be disclosed to persons appearing to be underlying investors. Disclosure in this latter context would be subject to the views of the Trustee and FFP as to the appropriate level of detail and in form in which any information should be shared, to ensure that the investigation is not compromised.”*

6. This was, in purely practical terms, a clear and compelling case for approving the disclosure sought. The legally prescribed stakeholder in a commercial trust vehicle could not be informed (and, by necessary implication, consulted) about the management of the Trust. It was contended that the underlying investors, who appeared in any event to be the real economic stakeholders, ought to be informed instead. In our system of law, absent any clearly applicable legal rule explicitly expressed in a private law instrument or a statutory provision, the practical requirements of a particular factual and legal matrix are often a strong indicator as to what the content of the relevant legal rules must be.

7. As for the legal jurisdiction the Court was invited to exercise, the following central thesis was advanced:

*“75. The direction is sought pursuant to section 48 of the Trusts Act. Alternatively, the Trustee seeks a direction pursuant to the inherent jurisdiction of the Court. There does not appear to be any authority directly on point. It is submitted, however, that the following principles identified in Lewin, although in the context of disclosure sought by beneficiaries, indicate that the Court has an inherent jurisdiction with regards to matters of disclosure in a trust context:*

*a. The right of a beneficiary to seek disclosure is ‘best described as an aspect of the court’s inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts’ or the ‘trust supervisory jurisdiction.’*

*b. Following Schmidt v Rosewood Trust Ltd the Court’s approach to a request by a beneficiary for disclosure is one calling for the exercise of discretion rather than adjudication of a proprietary right. That decision marked a ‘shift towards judicial discretion in place of hard and fast rules.’ There is scope for discretion both as to the mode and extent of disclosure.*

*c. The Court’s inherent jurisdiction to supervise and where necessary intervene in the administration of a trust by ordering disclosure of documents is limited to cases where disclosure is sought by a beneficiary or other person interested in the trust. It does not extend to third parties seeking disclosure. It is submitted that this is intended to clarify that third parties cannot apply for disclosure relying on an inherent jurisdiction of the Court to order to obtain pre-action disclosure, and should be considered in that limited context; rather than being prohibitive of an exercise of discretion in the specific situation in this case. The circumstances of this case are unusual – a Trustee and Court-appointed manager require permission to disclose information for the purposes of investigating the misappropriation of Trust assets.*

*d. An application to the Court whether made by the trustee or beneficiary seeking disclosure will normally be made as a claim for the determination of a question arising in the execution of a trust (that is, the equivalent to section 48).”*

8. The legal basis for the jurisdiction the Court was invited to exercise was, at first blush, far less clearcut than the practical case for permitting the disclosure sought. Nonetheless, the fact that the Court possesses an inherent jurisdiction to order disclosure to a beneficiary was potentially powerful support for the proposition that the Court must be empowered to permit a trustee to voluntarily give disclosure to *de facto* beneficiaries. Disclosure to strangers to the Trust was another matter.

## The Trust Deed

9. An important part of the commercial context is the Trust Deed itself. It bears much resemblance to the articles of a fund company. Units may be subscribed for, unit holders have limited liability, units may be issued in classes and series, units may be redeemed, a Net Asset Value of the Trust must be calculated, rights of redemption may be suspended, and the Trustee must maintain a register of units. The Trustee and Manager are given indemnities, the Trustee may replace the Manager and the Trustee may be removed by the unit holders with the Manager's consent. As far as amendment is concerned:

- (a) the general rule is that unitholder approval is required;
- (b) however, the Trustee may amend where, *inter alia*, the interests of the unit holders will not be prejudiced and or the amendment is required for regulatory or other legal compliance.

10. It was rightly submitted that the express power of amendment in the Trust Deed could not be exercised in the absence of unitholder approval. Regulatory or other legal compliance did not apply to the Trustee's current conundrum.

11. An important provision in the Trust Deed was not directly adverted to in the course of argument, but clearly provides the basic foundation for the Trustee's general administrative role, most broadly, and also, more narrowly, why the Trustee sought the disclosure directions. Clause 19.1 provides:

*“Power of Trustee to deal with Trust Fund. Subject to the provisions of this Deed, the Trustee shall have full and unrestricted power to acquire, deal with in any way and dispose of the assets comprising the Trust Fund as if it were the beneficial owner of such assets...”*

12. This provision is significant, because it confirms that the Trustee as legal and beneficial owner of the Trust assets has authority to pursue all legally available remedies to recover them.

13. As regards termination, the unit holders may resolve to terminate the Trust (there are other grounds of termination as well) and are entitled a *pro rata* share of the cash realised from the Trust assets relevant to their unit class. Termination seems analogous to a voluntary winding-up in relation to a fund company where the participating shareholders, those with a real economic interest in the fund, can often vote for a winding-up. It is well recognised that when a voluntary winding-up commences, primary regard must be had to the interests of the real stakeholders, not those charged primarily with managing the fund: *Re Asia Private Credit Fund 2020* (1) CILR 134 (CICA, at

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paragraph 99). The significance of rules designed to regulate the governance of ordinary business activities of commercial vehicles typically fade away once they enter the liquidation phase.

14. Here, (1) the sole legal unit holder no longer existed (and was in any event seemingly not the person with the real economic stake in the Trust), (2) Trust assets appeared to be missing, and (3) the normal business of the Trust appeared to be at an end. The scheme of the Trust Deed suggests that the Trustee is right (by analogy with a liquidator) to:

(a) have regard to the interests of and consult with the underlying investors when all that remains is for the affairs of the Trust to be wound-up; and

(b) pursue appropriate asset recovery proceedings in respect of assets which belong to the Trust, but which appear to be missing.

15. Disclosing confidential information for the purposes of consulting with underlying investors (potentially the real Trust beneficiaries) and recovering Trusts assets which are missing were clearly necessary incidents of pursuing those twin goals.

16. However, Clause 36 (“**CONFIDENTIALITY**”) expressly provides as follows:

*“36.1 **Information to be kept confidential.** The Trustee, the Manager and each Unitholder shall keep confidential, and not make use of or disclose to any person, any information or matter relating to the Trust, or any information or investment or any information or matter relating to the affairs of the Trustee or Manager or any Unitholder (**confidential information**).*

**36.2 Circumstances in which disclosure is permitted.** Notwithstanding Clause 36.1:

*(a) The Trustee, the Manager or a Unitholder may disclose any confidential information to the extent that such confidential information becomes generally available to the public through no act or omission of the Trustee, manager or the Unitholder; as the case may be;*

*(b) The Trustee and the Manager may disclose such confidential information to any agent, any person to whom it has delegated any of its rights, privileges, powers, duties, trusts and discretions, pursuant to Clause 25, any service provider or any professional adviser appointed by it provided that the person receiving such confidential information is bound by a duty of confidentiality;*

(c) *The Trustee, the Manager or a Unitholder may disclose any confidential information to the extent that it is required to do so under any law or regulation, by judicial or governmental order, judgment or decree or pursuant to the requirements of any competent regulatory or other authority.”*

17. Apart from disclosure of confidential information which (a) has entered the public domain, or (b) is disclosed to advisers or agents obliged to preserve the confidential character of the information, disclosure is only expressly permitted under circumstances amounting to compulsion of law.
18. The Trust Deed cannot, however, sensibly be construed as overriding the Trustee’s fundamental right of access to the Court to obtain relief under section 48 of the Act. Nor can it be seen as abrogating the Trustee’s rights as owner of the Trust assets to take legal steps to recover them. In this context, the confidentiality obligations in the Trust Deed must be viewed as, to a material extent at least, designed to preserve value of the Trust assets for the benefit of unitholders. If the Trust was a commercial vehicle, the Trust Deed had to be construed in a manner which supported rather than undermined business efficacy.
19. It followed that Clause 36 could only be construed as conferring on the Trustee, by necessary implication, a power to disclose confidential information to such extent as was reasonably required for the purposes of consulting with those economically interested in the Trust and pursuing asset recovery steps.

### **Legal merits of the disclosure application**

#### **Section 48 of the Trusts Act (2021 Revision) (the “Act”)**

20. Section 48 of the Act provides as follows:

***“Application to the Court for advice and directions***

*48. Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person’s own responsibility, to have discharged that person’s duty as such trustee or personal representative in the subject matter of the said application: Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice*

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*or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court.”*

21. Section 48 confers jurisdiction on the Court to give advice and/or directions to a trustee without limiting the scope of the advice or directions which may be sought. This provision does not, in my judgment, provide a substantive legal basis for approving the disclosure the Trustee sought to make. There is a distinction between a legal basis for obtaining directions and a legal basis for the course of action with respect to which the Court’s directions are sought. On the other hand, section 48 does provide a clear statutory basis for the Trustee to disclose confidential information to the Court in the context of an application for advice or directions, substantively pursued after obtaining an interlocutory Confidentiality Order.

**Non-statutory source of jurisdiction to approve the deployment of confidential information in a manner not contemplated by the express terms of the Trust Deed**

22. The disclosure directions sought fell into two categories, (1) disclosure to underlying investors and (2) disclosure to third parties for the purposes of asset recovery efforts. Essentially the same broad principles applied to these two categories of disclosure, despite nuances of difference. This is because there is no express power to disclose to either category of person but the implied power to do so arises from the same source: Clause 19.1, and the Trustee’s power to deal with the Trust assets. As Cresswell J observed in *Re Shiu Pak Nin and HSBC International Trustee Limited* 2014 (1) CILR 173

*“89. The principles of construction applicable to a trust deed are the same as those applicable to any other instrument or utterance (see e.g., Chartbrook Ltd. v. Persimmon Homes Ltd. ([2009] 1 A.C. 1101, at para. 14, per Lord Hoffmann) and Marley v. Rawlings...”*

23. As the Trustee’s counsel rightly submitted, the general rule in trust law is that information about a trust is confidential as between trustee and beneficiaries, but that the trustee has a discretion to share information where this is consistent with the best interests of administering the trust. According to *Lewin on Trusts*, 20<sup>th</sup> ed. (paragraph 21-026):

*“Disclosure will, in the first place, be sought by beneficiaries from trustees. Normally applications for disclosure will be dealt with by trustees and the court will not be involved. In many circumstances, for example in relation to disclosure of trust instruments and accounts to principal beneficiaries with vested interests, trustees have no real choice to refuse disclosure save in special circumstances. But trustees need to have a discretion for*



*the same reasons as the court needs to have a discretion. And so in the context of disclosure of confidential information the trustees have a discretion to determine whether, what and how disclosure should be made and, unless they make an application to the court seeking to surrender their discretion, the decision will be that of the trustees and the decision will stand in the absence of a successful challenge to the decision or successful invocation of the supervisory jurisdiction.” [Emphasis added]*

24. In my judgment, the Trustee in the present case had a discretion, by necessary implication arising out of the terms on which it held the assets under Clause 19.1 viewed in the context of the Trust Deed as a whole (including Clause 36), to do the following. It could disclose confidential information to the underlying investors in circumstances where the sole unitholder could not consult with the Trustee on their behalf. Clause 36 does not confer an express power of disclosure to underlying investors, but business efficacy requires a discretionary disclosure power to be implied. If confirmation for the propriety of implying terms into trust instruments were required, it is provided by a decision of this Court over 20 years ago. In *Lemos et al-v-Coutts (Cayman) Limited et al* 2003 CILR 381 Smellie CJ (as he then was) opined as follows:

*“89 I acknowledge, however, that a construction which would obligate the trustees to sell the ships immediately they no longer held the qualifying belief could also lead to absurdity, the price attainable in the market then prevailing may result in massive losses, as circumstances of forced sale often do. Such a construction could consequently also be criticized as imposing an unworkable regime upon the trustees. It is therefore to be rejected.*

*90 As is often the case, the true construction is not to be found in one extreme view or the other. In my view, where the trustees no longer hold the qualifying belief, or after due consideration are in genuine doubt, there is nothing about the SIPG or the deed itself which would preclude by implication a reasonable hiatus afforded to the trustees within which to decide. That is the construction of para. 3.1 of the SIPG at which I arrive. In order that it be commercially viable and workable, in keeping with its status as a part of a trust arrangement, that in my view is the only term which needs to be implied.” [Emphasis added]*

25. For essentially the same reasons of functionality, an implied power to make disclosure to third parties in the course of recovery action could only properly be found to exist. No authority was cited which directly supported this conclusion, but none was required. The Trustee was expressly empowered to deal with the Trust assets as legal and beneficial owner by Clause 19.1. It must be doubted whether any express confidentiality clause could validly deprive a trustee of the ability to deploy confidential information altogether for the purposes of investigating or prosecuting proceedings to recover misappropriated trust property.

## Merits of disclosure application

### Preliminary

26. The application arose in relation to a commercial trust which was effectively in the process of being wound-up. Its merits fell to be evaluated in legal terms by reference to trust law principles while evaluating the factual merits in a manner not dissimilar to a liquidator's sanction application.

### Disclosure to underlying investors

27. The Trustee established a compelling case for this Court permitting (pursuant to section 48 of the Act) the Trustee to disclose, as conservatively as possible, confidential information to underlying investors although the express terms of the Trust Deed only contemplated consultation with and disclosure to unitholders. This was broadly consistent with the approach commended in '*Lewin on Trusts*' (at paragraph 21-033):

*“the court's discretion should be exercised so as to give effect to the trustees' fundamental duty of accountability and not to thwart it. A settlor's desire for confidentiality cannot compromise that duty...”*

### Disclosure to third parties

28. The Trustee's application for permission to disclose confidential information, as conservatively as possible, to strangers to the Trust for the purposes of attempting to recover misappropriated Trust assets was equally compelling. As the Trustee's counsel submitted in their Skeleton Argument:

*“78...In particular, the purpose of intended disclosures would benefit underlying investors, disclosure is largely to insolvency practitioners within the group, to purported investors or to parties suspected to have been involved in the misappropriation of trust assets (who likely already possess much of the information being disclosed ...)... and it is not proposed that disclosures would extend to information identifying any unconnected unitholder or purported investor.”*

29. By analogy with the fundamental duty to account to beneficiaries, a trustee's duty to protect and preserve trust assets is equally fundamental. Attempts to recover trust property may be viewed as ancillary to this fundamental duty. Accordingly, this Court could only properly grant the permission the Trustee sought.

**Conclusion**

30. For these reasons, on 11 September 2024, I approved the Trustee's decision to disclose confidential information for the purposes of taking steps to recover the Trust's assets.



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**THE HONOURABLE JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**