The continuing controversy – the basis of a beneficiary's access to "trust" documents? The *Londonderry* "proprietary" approach and the *Schmidt* discretionary approach*: Rangelea Holdings Pty Ltd v Adnyamathanha Traditional Lands Association & ors* [2025] SASCA 32 *per curiam* (Livesey P, Bleby and David JJA) at [296] and following

[296] Over the last twenty years two conflicting approaches have emerged in Australia regarding the basis at general law upon which a beneficiary may access trust documents and information, which may be described as the *Londonderry* proprietary approach and the *Schmidt* discretionary approach.
[297] In *Schreuder v Murray (No 2)*, Buss JA (as his Honour then was) explained these two approaches and observed that there was "some uncertainty" regarding which applied in Australia:[218]

Two different approaches are discernible from the case law in relation to the right (if any) of a beneficiary to inspect "trust documents" or receive information: see *Rouse* (at [88]). One approach is based on the observations of Lord Wrenbury in *O'Rourke* (at 626), as explained by Gummow J in *Re Simersall* (at 588) and by Dawson and Toohey JJ in *Breen* (at 89): see [72]-[75] above. The other approach is based on a trustee's fiduciary duty to keep the beneficiaries informed and to render accounts: see *Hartigan Nominees* (at 421-422) (Kirby P, dissenting); at 438-447 (Sheller JA). Traditionally, there has been a distinction between strict trusts on the one hand and discretionary trusts on the other in relation to access to "trust documents" or information. In *Schmidt*, however, the Privy Council held that a beneficiary's right to inspect "trust documents" or receive information in the possession of the trustee was merely a procedural right for the court to make an order in its discretion as part of its supervisory jurisdiction in relation to trusts. The decision in *Schmidt* was followed by Gzell J in *Avanes*. However, in *McDonald* and in *Schaverien v Jones* [2007] NSWSC 1429, Bryson AJ declined to follow *Schmidt* and *Avanes*: see, generally, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) at [1716]. The current state of the non-statutory law on this issue is attended by some uncertainty.

298. The Western Australian Court of Appeal ultimately considered that it was "unnecessary" to express "an opinion on these issues (including

whether the approach of the Privy Council in *Schmidt* represents the law of Australia)" because the cause of action in that case was not based on an alleged breach of duty in failing to provide a beneficiary with access to trust documents or information.[219]

299. In *Schmidt v Rosewood Trust Ltd*, the appellant sought "to obtain trust accounts and other information" from the trustees of two Isle of Man settlements.[220] The Privy Council considered whether a beneficiary's right or claim to disclosure of trust documents should be regarded as a proprietary right. After considering the authorities on the subject,[221] the Privy Council endorsed the approach of Kirby P and Sheller JA in *Hartigan Nominees*:[222]

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. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion: see Lord Wilberforce in *Gartside v Inland Revenue Comrs* [1967] UKHL 6; [1968] AC 553, 617–618 and in *In re Baden* [1970] UKHL 1; [1971] AC 424, 456–457, Templeman J in *In re Manisty's Settlement* [1974] Ch 17, 27–28 and Warner J in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1617–1618. Mr Brownbill's submission to the contrary effect tends to prove too much, since he would regard the object of a discretionary trust as having a proprietary interest even though it is not transmissible (except in the special case of collective action taken unanimously by all the members of a closed class).

Their Lordships are therefore in general agreement with the approach adopted in the judgments of Kirby P and Sheller JA in the Court of Appeal of New South Wales in *Hartigan Nominees Pty Ltd v Rydge* 29 NSWLR 405. ...

300. In *Jacobs' Law of Trusts in Australia*, the authors questioned the Privy Council's reliance on the views of Kirby P and Sheller JA, observing

that *Hartigan Nominees Pty Ltd v Rydge* "was a case in part on discretionary trusts, and Kirby P's judgment was in most respects a dissenting one".[223]

301. Ultimately, whilst *Schmidt* suggests that it may be "incorrect to speak of a "right" of a beneficiary to inspect trust documents, subject to exceptions ..., because the matter lies within the court's discretion by balancing competing interests",[224] and the Privy Council allowed that the right to access documents is "sometimes not inappropriately described as a proprietary right", the issue was better viewed as "one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts":[225]

Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts. There is therefore in their Lordships' view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in *In re Baden* [1970] UKHL 1; [1971] AC 424, 448–449) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction.

However, the recent cases also confirm (as had been stated as long ago as *In re Cowin* [1886] UKLawRpCh 138; 33 Ch D 179 in 1886) that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials

placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

302. The authors of *Lewin on Trusts* have summarised the general principles stated in *Schmidt v Rosewood Trust Ltd* as follows:[226]

(1) A beneficiary has a right to seek disclosure of trust documents.[227]

(2) That right, although sometimes not inappropriately described as a proprietary right, is best approached as an aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts.[228] This jurisdiction is referred to in this chapter as the trust supervisory jurisdiction.

(3) A proprietary right is neither sufficient nor necessary to entitle a beneficiary to disclosure of trust documents.[229]

(4) A proprietary right is not sufficient to entitle a beneficiary to disclosure because there may be circumstances (especially of confidentiality) in which even a vested and transmissible interest is not a sufficient basis for requiring disclosure of trust documents.[230]

(5) A proprietary right is not necessary because a discretionary beneficiary, including an object of a fiduciary power, though he does not have a transmissible interest (save in the case of collective action by a closed class[231]), may be entitled to protection from a court under the trust supervisory jurisdiction. But the circumstances in which he may seek protection, and the nature of the protection which he might expect to obtain, will depend on the court's discretion.[232]

(7) The differences between discretionary trusts and fiduciary powers are a good deal less significant than the similarities between them.[233] There is no reason to draw any bright dividing line between them in the context of rights to seek disclosure; nor between fixed transmissible and non-transmissible discretionary interests in the context of rights to seek disclosure.[234]

(8) *Re Londonderry's Settlement*[235] and more recent cases have begun to work out in some detail the way in which the court should exercise its discretion in cases where disclosure is sought.[236]

(9) There are three areas in which the court may have to form a discretionary judgment: (i) whether a discretionary object (or some beneficiary with only a remote or wholly defeasible interest) should be granted any relief at all, (ii) what classes of documents should be disclosed, either completely or in redacted form, and (iii) what safeguard 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.[237]

303. In *Avanes v Marshall*, Gzell J followed *Schmidt* but determined that "trust accounts" constitute a class of documents that are not affected by the decision in *Schmidt*,[238] referring to Justice Millett's statement in *Armitage v Nurse* that "[e]very beneficiary is entitled to see the trust accounts, whether his interest is in possession or not".[239] Although the documents considered by Gzell J in *Avanes v Marshall* were preparatory to the preparation of the trust accounts, and not trust accounts, his Honour explained:[240]

In *Armitage v Nurse* [1998] Ch 241 at 253–254, Millett LJ said there are irreducible trust obligations, and at 261 he indicated that the result of one such obligation is that every beneficiary is entitled to trust accounts.

In my view, those principles are unaffected by the decision of *Schmidt*. But the documents numbered 2 to 3 and 5 to 9 are preparatory to the preparation of the trust accounts. They comprise requests for advice by the accountants of the solicitors on matters of law and advice by the accountants to the solicitors on matters of accounting affecting the presentation of the accounts and the presentation to the solicitors of draft accounts and explanations of how they were compiled.

In my view, these documents go to the deliberations of trustees. This includes the accountants' presentation of a reconciliation of work undertaken for consideration by the trustees in arriving at a decision as to what fees should be paid. Again for deliberation and not as part of the final accounts.

Since deliberations by the trustees precede their determination to have trust accounts drawn up, I see the balancing process as coming down in favour of protecting the trustees from scrutiny of their deliberations leading up to the

drawing up of the accounts. That part of their administration should not become the subject of a fishing expedition by beneficiaries.

In my view, none of the documents is discoverable under the principle in *Londonderry* excluding from inspection the reasoning process of the trustees or under the balancing process enunciated in Schmidt.

304. The view that the discretion of the court does not extend to a denial of access to "trust accounts" has found favour in the High Court of New Zealand.[241] However, Professor Dal Pont has warned that it is "no foregone conclusion" that the Privy Council in *Schmidt* "intended to segregate trust accounts from the court's discretionary purview" given that no distinction between "trust accounts" and "other information" was drawn.[242]

305. The discretionary approach adopted in *Schmidt* has been endorsed in several Australian decisions,[243] though it has been questioned in others.[244] The differing views on the approach to be adopted regarding access to trust documents by beneficiaries have been the subject of extra-curial and academic commentary; for example, according to Professor Dal Pont:[245]

Yet the application in *Schmidt* was, in the words of Lord Walker, both 'to obtain trust accounts and other information from the trustees of the two settlements'.[246] As the reasons do not distinguish 'trust accounts' from 'other information', it is no foregone conclusion that his Lordship intended to segregate trust accounts from the court's discretionary purview. If he did – and there are, as noted above, indeed compelling justifications for making this distinction should the *Schmidt* approach represent Australian (and NZ) law – it requires the law to differentiate a 'trust account' (to which beneficiaries are entitled) from other documents (any entitlement to which rests upon a favourable exercise of the court's discretion). If so, when it comes to beneficiaries' claims to information regarding the trust, there is a difference in the law's response between, on the one hand, financial accounts (such as a profit and loss statement or balance sheet) and, on the other hand, documents of a different kind (say, the trust deed, title documents to trust property, trust resolutions, etc).

306. In *Webster v Murray Goulburn Co-Operative Co Ltd (No 3)*, Beach J discussed the "continuing debate" regarding the *Londonderry* proprietary approach and the *Schmidt* discretionary approach to determining whether a beneficiary may inspect trust documents and information:[247]

There have been two approaches in the authorities to whether a beneficiary may inspect documents held by a trustee. The first approach is referred to as the "proprietary" approach. The second approach is referred to as the "discretionary" approach. The "proprietary" approach can be traced to *Re Londonderry's Settlement* [1965] 1 Ch 918. The "discretionary" approach can be traced to the advice of the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2003] 2 AC 709. In Australia, some judges have followed the proprietary approach, for example *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 435E per Mahoney JA (but cf Kirby P at 421G to 422A and Sheller JA at 444B); *McDonald v Ellis* [2007] NSWSC 1068; (2007) 72 NSWLR 605 at [46] to [52]; and *Deutsch v Trumble* at [66] to [73]. Other judges have followed the discretionary approach, for example *Avanes v Marshall* [2007] NSWSC 191; (2007) 68 NSWLR 595 at [15]; *Silkman v Shakespeare Haney Securities Ltd* (2011) 5 BFRA 483; [2011] NSWSC 148 at [17] to [27]; and *AIT Investment Group Pty Ltd v Markham Property Fund No 2 Pty Ltd* [2015] NSWSC 216 at [66] to [90]. The different approaches also remain the subject of academic debate. For example, *Jacobs' Law of Trusts* at [17-16] states that "there are undoubted difficulties in both the proprietary approach and more modern approaches offered in substitution for it". *Ford and Lee: The Law of Trusts* (Thomson Reuters, online) at [9.7230] refers to the proprietary approach as a "largely discredited principle" and notes that one objection to it is that it "justifies argument that beneficiaries under strict trusts have the right to see not only the trust accounts but also all other documents in the possession or under the control of the trustees. This is not supported by case law".

...

Further, even on the proprietary approach it is recognised that the so-called right of a beneficiary to inspect trust documents is not unqualified but admits of a discretion to refuse access to documents having regard to the

circumstances of the particular case, including the need to ensure that the trustee is able to discharge its obligations to the beneficiaries as a whole; see *Rouse v IOOF Australia Trustees Ltd* [1999] SASC 181; (1999) 73 SASR 484 at [92] to [103] per Doyle CJ.

Let me say now that I prefer the "discretionary" approach of Lord Walker of Gestingthorpe as he expressed the position in *Schmidt v Rosewood Trust Ltd*. And I do not consider that such an approach is to be limited to the scenario where the interest of the beneficiary is no higher than an actual or potential object of a discretionary trust.

307. Justice Beach remarked that "it is surprising that one still needs to debate these matters", observing that the *Schmidt* discretionary approach presented a "commercial and workable solution".[248] Beach J ultimately determined:[249]

Further, and for completeness, I should say that I do not consider that there is dicta in *Breen v Williams* (at 89) per Dawson and Toohey JJ of a type that compels me to adopt the proprietary approach, although even if I took such an approach the plaintiff's application still fails as I have said. The passage prayed in aid by the plaintiff is preceded by discussion making it plain that the appellant in that case was not making any trust claim over documents. And indeed their Honours said "[No] analogy can be drawn between her situation and that of a beneficiary under a trust". Further, their Honours' observations concerning *Re Londonderry's Settlement* of course pre-date *Schmidt v Rosewood Trust Ltd*. Further, their Honours were referring to the fact that *Re Londonderry's Settlement* had been accepted by some lower courts. I do not consider that their Honours' observations go anywhere close to the scenario that the High Court was contemplating in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134] and [135].

308. In *Kayler-Thomson v Colonial First State Investments (No 2)*, Colvin J agreed with Beach J's observation that it is surprising that these matters are still debated, whilst noting that the debate is extensive:[250]

Some of the authorities would confine the right of a beneficiary to inspect documents concerning the management and administration of a trust to the extent of the proprietary interest. Others relate the right to the supervisory

jurisdiction of the Court when it comes to the administration of trusts. The debate is extensive: see, for example, *Spellson v George* (1987) 11 NSWLR 300 at 315–7; *Re Simersall* at FCR 587– 8; ALR 378–9; *Avanes v Marshall* (2007) 68 NSWLR 595; [2007] NSWSC 191 at [11]; *McDonald v Ellis* (2007) 72 NSWLR 605; [2007] NSWSC 1068 at [52]; *Fay v Moramba Services Pty Ltd* [2009] NSWSC 1428 at [99]; *Silkman v Shakespeare Haney Securities Ltd (in its capacity as responsible entity of the Shakespeare Haney Premium Income Fund)* [2011] NSWSC 148 at [27]; *Re Estate Late Chow Cho-Poon* [2013] NSWSC 844 at [208]; *Hancock v Rinehart* [2013] NSWSC 1402 at [24]; *Mercanti v Mercanti* [2014] WASC 64 at [33]- [34]; *Schreuders v Grandiflora Nominees Pty Ltd* [2014] VSC 310 at [43]; *Fast v Rockman (infants by Rockman, their litigation guardian)* [2015] VSCA 61 at [45]; *AIT Investment Group Pty Ltd v Markham Property Fund No 2 Pty Ltd* [2015] NSWSC 216 at [74]; *Guest v Guest* [2015] VSC 761 at [71]- [72]; *Deutsch v Trumble* (2016) 52 VR 108; [2016] VSC 263 at [73]; *Wright v Stevens* [2018] NSWSC 548 at [252]- [286]; *Sayour Holdings Pty Ltd (atf Sayour 2 Family Trust) v Combined Projects (Arncliffe) Pty Ltd* [2018] NSWSC 649 at [29]; and *Chan v Valmorbida Custodians Pty Ltd* [2020] VSC 590 at [71].

However, the supervisory jurisdiction extends to being able to compel a trustee to provide information, as was recognised by Gageler J in *Palmer v Ayres (in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)* (2017) 259 CLR 478; 341 ALR 18; 118 ACSR 380; [2017] HCA 5 at [103].

It may be that for parties with a proprietary interest there is a right to access the documents and for parties with a lesser interest the Court will require access to be provided where it is persuaded that it is necessary or appropriate to do so in the exercise of its supervisory jurisdiction. There is much to be said for the observation of Beach J in *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 3)* [2018] FCA 990 at [115] that 'it is surprising that one still needs to debate these matters'.

309. In this case, the primary judge observed that the general law must conform to the statutory duty under the *Trustee Act*:[251]

Section 84B(2) of the Trustee Act renders it an offence not to produce and allow inspection of the prescribed records. It does not expressly empower the

Court to order access to those records. The failure may, of course, constitute strong grounds to exercise other of the powers which are conferred on the Court. Additionally, the exercise of this Court's inherent general law jurisdiction to supervise trusts and order production of trust records must conform to the statutory duty imposed by s 84B of the Trustee Act.

310. The primary judge reviewed at length the cases that considered the jurisdiction of the court to order access to trust records,[252] and appeared to adopt the approach of Gzell J in *Avanes v Marshall*, before concluding:[253]

The entitlement accorded by the general law to trust account records is reinforced by the obligation conferred by s 84B of the Trustee Act such that in the absence of exceptional countervailing considerations an order will generally be made on the application of a beneficiary granting access to records prescribed for the purposes of that section.

311. Whether the *Schmidt* approach or the *Londonderry* approach represents the law in Australia does not appear to have been decided by the High Court or any intermediate appellate court. In the circumstances of this appeal it is not necessary to come to a concluded view.

312. The approach taken in *Schmidt* as summarised by *Lewin on Trusts*, or at the least a version of it, is to be preferred provided the obligations and entitlements imposed by s 84B of the *Trustee Act* are recognised.

313. The principle that beneficiaries have a right to seek the disclosure of trust documents and accounts, and have information about trust property, subject to the exercise of the court's discretion as part of its role in supervising the administration of trusts and overseeing the conduct of trustees, better aligns with the approach reflected in Part 5A of the *Trustee Act* and with the approach taken by Kirby P and Sheller JA in *Hartigan Nominees Pty Ltd v Rydge*,[254] and by the Full Court in *Rouse v IOOF Australia*.[255]

314. That is to say, in the ordinary case, it is an aspect of the trustee's fiduciary duty to keep beneficiaries informed and to furnish them with trust documents and records concerning the administration of the trust

prescribed by s 84B of the *Trustee Act* and reg 5 of the *Trustee Regulations*. Indeed, no criticism could reasonably be made regarding the disclosure of trust documents and records concerning the receipt, management and distribution of trust funds to beneficiaries. This approach acknowledges that there may be occasions for the exercise of the court's discretion, balancing the competing interests for and against disclosure. There may be cases where documents cannot be produced where, for example, there are issues of confidentiality or privilege, issues not raised by this appeal.[256]

315. It follows that the right of beneficiaries to see trust documents and records, and the exercise of the court's discretion, will be clearest in cases dealing with documents prescribed by s 84B of the *Trustee Act* and reg 5 of the *Trustee Regulations*. In that connection it is difficult to see why there should usually be any real constraint on the capacity of the beneficiaries to view and take copies of those trust documents and records which it is a trustee's duty to keep as part of the administration of the trust, whether under statute or at general law.[257] Each case will, however, depend on its particular facts and circumstances. The need to balance the competing interests in the exercise of the court's discretion as part of its supervisory jurisdiction in the manner described in *Schmidt* may, however, arise in other cases where the documents sought are not prescribed and the trustee raises a principled objection to production.

316. That leaves to one side what comprises trust documents and records, as well as trust accounts, an issue not raised by this appeal. In South Australia, that is an issue which must start with the trust documents and records prescribed by s 84B of the *Trustee Act* and reg 5 of the *Trustee Regulations*. Relatively recently, Ward CJ in Eq (as her Honour then was) considered carefully and in some detail in *Wang v Cai* whether or to what extent documents beyond those concerning the terms of the trust, or concerning trust property, or concerning the accounts of the trust, were liable to disclosure.[258] Her Honour observed that the "documents of the trust" may go well beyond the concept of

trust documents to which it has been said that, as a general rule, a beneficiary will have a *prima facie* right to inspect.[259]

317. By contrast, it has also been suggested that it is inappropriate for a beneficiary to seek to examine or obtain any document which is in any way, however remotely, connected with the administration of a trust. On this appeal, no criticism has been made regarding the breadth of the documents sought.