IN THE SUPREME COURT OF NEW ZEALAND

SC 17/2016
[2017] NZSC 28

BETWEEN	IVAN VLADIMIR JOSEPH ERCEG Appellant
AND	LYNETTE THERESE ERCEG AND DARRYL EDWARD GREGORY AS TRUSTEES OF ACORN FOUNDATION TRUST First Respondents
	LYNETTE THERESE ERCEG AND DARRYL EDWARD GREGORY AS TRUSTEES OF INDEPENDENT GROUP TRUST Second Respondents

Hearing:	1 September 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	C R Carruthers QC and R B Hucker for Appellant G M Coumbe QC and F C Monteiro for Respondents
Judgment:	8 March 2017

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay to the respondents costs of $25,000 plus reasonable disbursements (to be fixed by the Registrar in the absence of agreement between the parties). We certify for two counsel.

REASONS
(Given by O'Regan J)

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The issue

[1] This appeal raises for consideration the approach the courts should take to an application by a beneficiary for an order directing trustees to disclose to the beneficiary information relating to a trust.

Background

[2] The appellant, Ivan Erceg, was a discretionary beneficiary and final beneficiary of two trusts, the Acorn Foundation Trust and the Independent Group Trust. The trusts were settled by the appellant's brother, Michael Erceg, in 2004 and

2002 respectively. Michael Erceg died in a helicopter crash in 2005. Shares in Independent Liquor (NZ) Limited (ILNZ), a successful business associated with Michael Erceg, were transferred to the trusts prior to Michael Erceg's death.

[3] The trustees sold the trusts' shareholding in ILNZ in December 2006. Both trusts were wound up in December 2010. At the time, the appellant was an undischarged bankrupt, having been adjudicated bankrupt on 2 February 2010. The appellant was discharged from bankruptcy on 12 May 2014, but his bankruptcy has not, as yet, been annulled.

[4] Mr Gregory, a trustee of both trusts, gave evidence about the appellant's status as a beneficiary of each of the trusts. Mr Gregory's evidence was that the appellant was not a named beneficiary of either trust. He was one of a class (among a number of classes) of primary discretionary beneficiaries specified in the trust deed for the Acorn Foundation Trust. He was also one of a class (among a number of classes) of secondary discretionary beneficiaries specified in the trust deed for the Independent Group Trust. He was also one of a class of final beneficiaries specified in the trust deeds for both trusts.

[5] In September 2014, the appellant filed a statement of claim in the High Court seeking a declaration that he was a beneficiary of the trusts and an order requiring the trustees to provide him copies of certain documents relating to the trusts. As the trustees admitted the appellant was a beneficiary of those trusts, that aspect of the case fell away and the sole focus of the case became the appellant's attempt to obtain copies of the trust documents.

[6] The appellant sought summary judgment against the trustees and the trustees sought summary judgment against the appellant or, alternatively, an order striking out of his statement of claim. The applications were heard together by Courtney J who dismissed the appellant's application and entered summary judgment in favour of the trustees.[1] Courtney J found that the appellant's interest as a final beneficiary of the trusts[2] and his right to seek information about the trusts in his capacity as a

[1] *Erceg v Erceg* [2015] NZHC 594 [*Erceg* (HC)].
[2] At [16]–[21].

discretionary beneficiary[3] amounted to property for the purposes of s 101 of the Insolvency Act 2006, and therefore vested in the Official Assignee on the appellant's bankruptcy. That property had not re-vested in the appellant and he therefore did not have standing to bring the proceeding.[4] However, in case she was found to be wrong on that point, she went on to consider whether the appellant would have been entitled to the order he sought in the event that he had standing.[5] She concluded that she would have, in that event, exercised her discretion against requiring the trustees to provide copies of documents about the trusts to the appellant.

[7] The appellant appealed to the Court of Appeal, which dismissed his appeal.[6] The Court of Appeal reversed the finding of the High Court Judge as to standing, but found that she had been correct to exercise her discretion against ordering disclosure of any trust documents to the appellant.

[8] This Court granted leave to the appellant to appeal, the approved question being: "Should the conclusion that disclosure not be made/required be set aside?"[7] The trustees gave notice that they supported the judgment of the Court of Appeal on other grounds, namely on the basis that the appellant did not have standing to seek the orders requiring the trustees to provide copies of documents to him. We will deal first with the merits of the application for orders requiring the trustees to give copies of trust documents to the appellant, before considering the standing issue.

What does the appellant seek?

[9] In his statement of claim, the appellant sought an order requiring the trustees to provide nine categories of documents. These were listed in the schedule to the judgment of the Court of Appeal and for ease of reference we reproduce that schedule at the end of this judgment.

[10] As is apparent from that schedule, the disclosure sought by the appellant was extensive. It involved the inevitable disclosure of confidential information about the

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3 At [22]–[28].
4 At [31].
5 At [33]–[62].
6 *Erceg v Erceg* [2016] NZCA 7, [2016] 2 NZLR 622 (Ellen France P, Wild and Miller JJ) [*Erceg* (CA)].
7 *Erceg v Erceg* [2016] NZSC 69.

operation of the trusts, the business transactions they had entered into, the identity of the beneficiaries, what beneficiaries had received by way of distributions from each trust and the trustees' reasons for decisions they had made. There was nothing in the statement of claim to indicate that the appellant was prepared to accept some lesser disclosure, although there was a specific reference to the fact that the appellant was prepared to provide undertakings of confidentiality including an undertaking to provide access to the documents solely to his professional advisors.

[11] In this Court, counsel for the appellant, Mr Carruthers QC, proposed in his oral submissions that the Court should consider an incremental process, under which certain "core" documents should be disclosed (subject to confidentiality undertakings) with provision to allow for further applications to the Court if, on reading the disclosed documents, it became apparent that further information was required. Mr Carruthers described "core" documents in his written submissions as consisting of "at least the trust deed and accounts or other documents as to the existence of trust property and documents to ensure that the trustees have exercised their powers in accordance with the trust deed".

[12] In his oral submissions, Mr Carruthers also proposed conditions as to confidentiality which had not been proposed in the lower Courts, although there had been before the Court of Appeal a proposed protocol which was designed to achieve similar objectives.

[13] The confidentiality conditions proposed by Mr Carruthers in this Court had the following features:

(a) documents would initially be provided to the appellant's solicitors and counsel;

(b) the documents would be available for inspection by the appellant in the presence of his solicitors or counsel;

(c) the documents would not be further copied;[8]

(d) the documents may be made available to experts consulted by the appellant's solicitors or counsel, under the supervision of the solicitors or counsel; and

(e) subject to the Court's directions, there may be redactions to preserve sensitive issues of confidentiality such as health or unknown beneficiaries or similar issues.

Is the Court's role limited to reviewing the trustees' discretion?

[14] Before turning to the issue of how the Court should exercise its jurisdiction in cases such as the present, we first deal with a preliminary point as to the nature of the Court's task. The Court of Appeal said that the evaluation of the factors that need to be considered in determining whether disclosure of trust information should be made and, if so, the extent of the disclosure, was a matter of discretion for trustees.[9] It added:[10]

> It follows that the Court, if it becomes involved in disclosure, will be reviewing the exercise of a discretion by the trustee. It should therefore apply the well-established principles governing review by a Court of a discretionary decision. The Court should not intervene unless satisfied the trustee erred in law or principle, overlooked a relevant point, factored in an irrelevant point or made a decision that is plainly wrong. The words "plainly wrong" refer to a decision that was simply outside the permissible ambit of the trustee's discretion.
>
> (footnote omitted)

[15] Mr Carruthers argued that the Court of Appeal had wrongly confined the Court's power by defining it as the review of a discretionary decision. He pointed out that the jurisdiction of the Court to supervise and if necessary intervene in the administration of a trust is part of the Court's inherent jurisdiction, and is not reliant on there being a challenge to a particular decision made by trustees.

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8 Mr Carruthers QC explained that this was intended also to provide that none of the information contained in the documents would be disclosed to any person, except solicitors, counsel and experts consulted by the appellant's solicitors or counsel in accordance with [13](d).

9 *Erceg* (CA), above n 6, at [31].

10 At [32].

[16] Mr Carruthers accepted that an application could be brought as a challenge to a previous discretionary refusal by the trustees to disclose trust documents, but said that it was wrong to describe that as the only jurisdictional basis for the Court to intervene. In a case where the Court is asked to exercise its inherent jurisdiction to supervise, and if necessary intervene, it was not reviewing a decision of a trustee and was not, therefore, limited in its power of intervention to determining whether the trustee had erred in law or principle, overlooked a relevant point, factored in an irrelevant point or made a decision that was plainly wrong. Rather, the Court was making its own determination as to whether it needed to invoke its inherent jurisdiction to supervise and, if necessary, intervene in the administration of the trust concerned.

[17] Ms Coumbe QC accepted that where an application seeks the exercise of the Court's inherent jurisdiction, the Court's decision is not to be regarded as the review of a discretionary decision by a trustee, limited in the manner described above. She argued that the Court of Appeal's reference to the limited basis of intervention was intended to refer to the limited basis on which the Court of Appeal could intervene in relation to the exercise of the discretion by Courtney J in the High Court. We do not read the Court of Appeal decision in that way. Nor, for reasons we will come to, do we consider the Court of Appeal's ability to intervene in relation to the High Court decision has such a limited basis.[11]

[18] We consider the correct position is that the Court's jurisdiction on an application for the exercise of the supervisory jurisdiction is not limited to the grounds of review of a discretionary decision by the trustees. Rather, the Court must exercise its jurisdiction as a court of equity, exercising its own judgment as to whether disclosure ought to be made at all and, if so, to what extent and on what conditions.

[19] The supervisory jurisdiction is an inherent jurisdiction of the Court. It is complementary to the Court's statutory jurisdiction under the Trustee Act 1956.[12]

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11 See [63]–[70] below.

12 The present case relates only to the inherent jurisdiction and we do not express any view about the statutory jurisdiction under the Trustee Act 1956.

What is the jurisdiction to require disclosure?

[20] As already noted, the appellant is both a discretionary beneficiary and a final beneficiary of the trusts. We intend to approach the question of jurisdiction from the point of view of a discretionary beneficiary who has a mere expectation in relation to the assets of the trust, rather than any fixed or contingent proprietary interest. That is because recent case law makes it clear that the jurisdiction of the Court to require the provision of trust information to a beneficiary is not dependent on the beneficiary having a proprietary interest.[13] The appellant does not therefore need to rely on his status as final beneficiary to pursue his claim. This approach also allows us to put to one side the arguments about the effect of the appellant's bankruptcy on his interests as final beneficiary.

[21] We will begin by reviewing the cases on which counsel based their arguments. Counsel agreed on a number of points emerging from these cases, but disagreed on others. None of the cases are binding on this Court. We will evaluate what they say before setting out our own views on the approach that should be taken to applications of the kind made by the appellant in this case.[14]

Schmidt v Rosewood Trust Ltd

[22] The leading case is the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*, an appeal from the Staff of Government Division of the High Court of Justice of the Isle of Man.[15]

[23] In *Schmidt*, Lord Walker of Gestingthorpe considered whether a beneficiary's claim to disclosure of trust documents should be regarded as a proprietary right. He reviewed authorities such as *O'Rourke v Darbishire*,[16] *Re Cowin*[17] and *Re Londonderry's Settlement*.[18]

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[13] This is explained below at [25]–[34].

[14] Since the hearing of the appeal, the Ministry of Justice has released a draft Trusts Bill for consultation. That draft includes provisions dealing with disclosure of trust information by trustees.

[15] *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709.

[16] *O'Rourke v Darbishire* [1920] AC 581 (HL).

[17] *Re Cowin* (1886) 33 Ch D 179 (Ch).

[18] *Re Londonderry's Settlement* [1965] Ch 918 (CA).

[24] In *Cowin*, North J rejected the proposition that a beneficiary with a proprietary interest in the trust was entitled as of right to copies of documents held by the trustee. Rather, he found that the interest of an individual beneficiary to disclosure of documents might, in some circumstances, be contrary to the collective interests of the beneficiaries as a body, in which case the Court may determine in its discretion to refuse to order disclosure.

[25] The Privy Council in *Schmidt* rejected the proprietary basis for the right to seek disclosure of trust documents. Rather, their Lordships determined that "the more principled and correct approach" was to regard the right to seek disclosure as an aspect of the Court's inherent jurisdiction to supervise, and if necessary, to intervene in, the administration of a trust. So the right of a beneficiary to seek the Court's intervention did not require that the beneficiary had a fixed and transmissible beneficial interest. A discretionary beneficiary could also seek such intervention.[19]

[26] In coming to this conclusion, Lord Walker referred with approval to the observations made by Kirby P in his dissenting judgment in *Hartigan Nominees Pty Ltd v Rydge*, a decision of the Court of Appeal of New South Wales.[20] Lord Walker made it clear that since the decision in *Cowin*, a beneficiary with a vested and transmissible beneficial interest in the property of the trust did not have any entitlement as of right to disclosure of trust documents. Thus, not only was it unnecessary for a beneficiary to have a proprietary interest in order to seek disclosure, it was also not necessarily the case that the Court would order disclosure to such a beneficiary, if the Court considered that the interests of the beneficiaries as a whole would be adversely affected by such disclosure.[21]

[27] Lord Walker said it was fundamental to the law of trusts that the Court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust. So, no matter how wide the trustees' discretion may be, this jurisdiction still applies to the trust in question.[22]

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19 *Schmidt*, above n 15, at [51].
20 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA) at 421–422.
21 *Schmidt*, above n 15, at [54] and [67].
22 At [36]; citing *Randall v Lubrano* (1975) 72 NSWLR 621 at [3].

[28] He undertook a review of the authorities that supported the approach of treating the jurisdiction to require disclosure as an aspect of the inherent supervisory jurisdiction of the Court.[23] In particular, he referred to:

(a) *Chaine-Nickson v Bank of Ireland*, in which Kenny J of the High Court of Ireland noted that if no potential beneficiary of an entirely discretionary trust was able to have access to any trust documents, that would mean that nobody could call the trustees to account for the proper exercise of their trust powers.[24] That would also be the consequence of applying the proprietary approach in the case of such a trust.

(b) *Spellson v George*, in which Powell J of the Equity Division of the Supreme Court of New South Wales said a discretionary beneficiary has more rights than just the right to have the trustee bona fide consider whether or not to exercise the trustee's discretion in the beneficiary's favour.[25] The additional rights were to have the trust property properly managed and to have the trustee account for his or her management.

(c) *Murphy v Murphy*, a decision of Neuberger J, which Lord Walker described as "illuminating and helpful".[26] In *Murphy*, Neuberger J, then a Judge of the Chancery division, described the Court's power to order disclosure as "the wide and flexible jurisdiction of the court of equity", which involved "a broad discretion".[27]

[29] Having considered these authorities, Lord Walker summarised his conclusion. A beneficiary's right to seek disclosure of trust documents is best approached as an aspect of the inherent jurisdiction of the Court to supervise and where appropriate

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23 At [56]–[63].
24 *Chaine-Nickson v Bank of Ireland* [1976] IR 393 (HC) at 396. That issue does not arise in this case because there are also final beneficiaries and, in any event, disclosure of some trust documents has already been made to the appellant's mother and her legal advisers: *Erceg v Erceg* [2014] NZHC 155, [2015] NZAR 1227 [*Erceg* 1].
25 *Spellson v George* (1987) 11 NSWLR 300 (SC) at 316.
26 *Schmidt,* above n 15, at [64].
27 *Murphy v Murphy* [1999] 1 WLR 282 (Ch) at 292.

intervene in the administration of trusts. This means there is no dividing line between the right of discretionary beneficiaries and those of beneficiaries having a proprietary interest in the trust.[28]

[30] Lord Walker said the jurisdiction required the Court to determine:

(a) whether a discretionary beneficiary should be given any relief at all;

(b) what classes of documents should be disclosed, either completely or in redacted form; and

(c) what safeguards should be imposed (whether by undertakings to the Court, arrangements for professional inspection or otherwise) to limit the use to which any disclosed documents could be put.[29]

[31] The first of those questions reflected his view that disclosure was not mandatory. While disclosure will obviously enhance monitoring of the trustee's duty to account, other considerations, such as confidentiality (particularly commercial or personal confidentiality), may have greater weight in some cases.

[32] The essentially confidential nature of a private trust was emphasised in *Londonderry*, in which Danckwerts LJ emphasised the confidential nature of the trustee's role and said the trustee's role would become impossible if the trustee was required to disclose "to any beneficiary any information or other matters in regard to beneficiaries that [the trustee] had received".[30] Similar sentiments were expressed by Mahoney and Sheller JJA in *Hartigan*.[31]

[33] Although Lord Walker disagreed with aspects of both *Londonderry* and *Hartigan*, his views on the importance of confidentiality appear to be similar to those cited above. In summarising his conclusions, he was clear that no beneficiary (and particularly no discretionary beneficiary) is entitled as of right to disclosure of

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28 *Schmidt*, above n 15, at [66].
29 At [54].
30 *Londonderry*, above n 18, at 935–936.
31 *Hartigan*, above n 20, at 436 and 442.

"anything which can plausibly be described as a trust document".[32] In deciding whether to order disclosure, the Court may have to balance the competing interests of different beneficiaries, the trustees and third parties. This is especially so where issues of personal or commercial confidentiality arise.

[34] Neither Mr Carruthers for the appellant nor Ms Coumbe for the respondents took issue with the articulation in *Schmidt* of the basis for the Court's jurisdiction to require a trustee to disclose information or provide copies of trust documents to a beneficiary. But they disagreed about its application in the New Zealand cases that followed it, particularly *Foreman v Kingstone*.[33]

Foreman v Kingstone

[35] In *Foreman*, Potter J applied the approach set out in *Schmidt*. Having analysed the decision she set out a list of matters to be taken into account by a Court in the exercise of its supervisory jurisdiction. The list was derived from the judgment of the Privy Council in *Schmidt*. The list is:[34]

> (a) Whether there are issues of personal or commercial confidentiality;
>
> (b) The nature of the interests held by the beneficiaries seeking access;
>
> (c) The impact on the trustees, other beneficiaries and third parties;
>
> (d) Whether some or all of the documents can be withheld in full or redacted form;
>
> (e) Whether safeguards can be imposed on the use of the trust documentation (for example, undertakings, professional inspection etc) to limit any use of the documentation beyond that which is legitimate; and
>
> (f) Whether (in the case of a family trust) disclosure would be likely to embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole.

[36] She prefaced her reference to these factors by describing an approach involving the balancing of two principles. She said the entitlement of beneficiaries to disclosure of trust documents pursuant to the fundamental obligation of a trustee

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[32] *Schmidt*, above n 15, at [67].
[33] *Foreman v Kingstone* [2004] 1 NZLR 841 (HC).
[34] *Foreman*, above n 33, at [90].

to be accountable to beneficiaries must be measured against another fundamental principle that the autonomy of trustees in the exercise of their discretions under the trust instrument must be ensured.[35] The latter principle explained why trustees were not obliged to disclose to beneficiaries their reasons for exercising their discretionary power.

[37] Potter J dealt with the potential concern as to confidentiality of trust documentation. She commented:

> [93] The fundamental duty of the trustees is to be accountable to all beneficiaries. That cannot be compromised by a settlor's desire for confidentiality in relation to his and the trust's personal and financial affairs unless there exist exceptional circumstances that outweigh the right of the beneficiaries to be informed.

[38] Potter J then summarised her conclusions as follows:

> [97] Beneficiaries are entitled to receive information which will enable them to ensure the accountability of the trustees in terms of the trust deed. They are entitled to have the trust property properly managed and have the trustees account for their management. They are entitled to receive trust accounts … . This goes well beyond the right to be "considered" by the trustees which, in the defendants' submission, is the extent of entitlement of a discretionary beneficiary.
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> [98] These are fundamental rights of beneficiaries. They are not absolute rights which arise from documents or information being categorised as "core trust documentation". They will be subject to the discretion of the Court in its supervisory jurisdiction when trustees seek directions or beneficiaries seek relief against refusal by trustees to disclose.
>
> …
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> [100] In this case, I conclude that there are no circumstances which would persuade the Court to override the fundamental rights of the plaintiffs as beneficiaries to the extent of the orders made to disclose.

[39] In *Foreman*, Potter J concluded that the desire of the settlor of the trusts in issue in that case to maintain confidentiality was understandable, but concluded that it did not amount to an "exceptional circumstance that would justify a Court in relieving the trustees of their duty to be accountable to beneficiaries, and in denying to the beneficiaries their right to be informed".[36]

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[35] At [89].
[36] At [93].

[40] She also addressed the concern that disclosure may foment family discord. She expressed the view that, although the decisions made by trustees may cause friction and acrimony, that would not be a reason for denying beneficiaries information to which they were entitled. She pointed out that denial of information may in itself be the cause of friction or exacerbate friction.[37]

[41] Both counsel were content to adopt the list of factors set out in *Foreman* which we have reproduced above. That list was reproduced in both the High Court judgment[38] and the Court of Appeal judgment.[39] However, there was a dispute between counsel as to the observations in *Foreman* suggesting a right by an immediate beneficiary to core trust documents that is not overridden by confidentiality concerns unless there are "exceptional circumstances".

Court of Appeal decision in the present case

[42] The Court of Appeal took issue with that aspect of Potter J's judgment. To put this in context, we summarise briefly the Court of Appeal's guidance on how requests for disclosure should be dealt with (leaving aside its comments about the Court's task being limited to the review of a discretion on the part of the trustee, to which we have already referred).[40]

[43] The Court said that the trustee should approach a request for disclosure as one calling for the exercise of a discretion in the discharge of the fiduciary duty owed to the beneficiary. A Court should view it as an incident of its supervisory function over trusts and trustees.[41]

[44] If a request for disclosure is made to a trustee, the trustee must determine what, if any, disclosure will best:

(a) ensure the sound administration of the trust;

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37 At [95].
38 *Erceg* (HC), above n 1, at [46].
39 *Erceg* (CA), above n 6, at [30].
40 Above at [17]–[18].
41 *Erceg* (CA), above n 6, at [26].

(b) discharge the powers and discretions in respect of the fiduciary obligations owed by the trustee to the beneficiary, in particular the duty to account; and

(c) meet the trustee's obligation to fulfil the settlor's wishes?[42]

[45] In relation to the third of those factors, the Court cited with approval the observation by Briggs J in *Breakspear v Ackland* to the effect that the exercise by a trustee of the trustees' powers was an essentially confidential process.[43] Briggs J said this confidentiality was of benefit to all beneficiaries by protecting family information, reducing the scope for litigation and encouraging trustees to accept office without the fear of challenge by beneficiaries.

[46] The Court of Appeal then cited with approval the list of matters that could be taken into account by the Court in the exercise of its supervisory jurisdiction set out in *Foreman*, which Potter J derived from the Privy Council advice in *Schmidt*. We have set these out above.[44] The Court described the list as being widely acknowledged as an excellent guide. The Court of Appeal added an additional matter to the list, namely "the nature and context of the application for disclosure".[45]

[47] Having set out these principles, the Court then turned to the observation made by Potter J suggesting a right by an immediate beneficiary to core trust documents that is not overridden by confidentiality concerns unless there are "exceptional circumstances".[46] It noted that this was at odds with the conclusion reached by Briggs J in *Breakspear* and that Venning J in a previous decision had described it as an overstatement of the position.[47] That previous decision related to disclosure of certain trust documents to the appellant's mother and her legal advisers (subject to redactions and an undertaking as to confidentiality) (*Erceg* 1).[48]

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42 At [29].
43 *Breakspear v Ackland* [2008] EWHC 220, [2009] Ch 32 at [54].
44 Above at [35].
45 *Erceg* (CA), above n 6, at [30], citing *Erceg* 1, above n 24, at [33].
46 Set out above at [37].
47 *Erceg* (CA), above n 6, at [34]–[35].
48 *Erceg* 1, above n 24.

[48] The Court of Appeal also noted the criticism of this aspect of *Foreman* by Professor Peter Watts, and expressed agreement with Venning J and Professor Watts.[49] It said no beneficiary has an entitlement as of right to disclosure and there is, therefore, no presumption favouring disclosure (or against disclosure).[50]

Erceg 1

[49] As the Court of Appeal noted, Venning J expressed the view in *Erceg* 1 that Potter J was wrong to say that exceptional circumstances were required to outweigh a beneficiary's "right" to be informed. Venning J said the right of the beneficiary was to have the trust properly managed. In order for trustees to be held to account, disclosure of trust documents may be required. The beneficiary's right to seek disclosure is ancillary to the right to have the trust properly managed. What information needs to be disclosed will depend on the obligation in issue. And confidentiality considerations may mean disclosure is limited.[51]

The supervisory jurisdiction

[50] While the supervisory jurisdiction of the Court has been described in the New Zealand cases following *Schmidt* as a discretion, we think it is better seen as a jurisdiction that must be exercised in accordance with principle, after careful assessment of the factors relevant to the disclosure sought by the particular beneficiary.[52]

[51] We see the starting point as being the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries. A beneficiary who seeks such an account may seek access to documentation necessary to assess whether the trustee has acted in accordance with the trust deed. That can be expected to be the basis on which the beneficiary will seek disclosure of trust documentation.

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49 *Erceg* (CA), above n 6, at [37]–[38]; referring to Peter Watts "Yet more expansion of the roles of Courts in private lives" *NZLawyer* (New Zealand, 25 January 2013) at 20.

50 At [27].

51 *Erceg* 1, above n 24, at [32].

52 The discretionary approach has been met with some criticism. See for example GE Dal Pont, "Beneficiaries and trust information" (2014) 39 Aust Bar Rev 46; and Rebecca Rose, "'All I ask for is information' – what does *Erceg v Erceg* mean for the disclosure rights and obligations of beneficiaries and trustees?" [2016] NZLJ 365.

[52] Given the wide variety of situations that may call for the Court to exercise its is supervisory jurisdiction, it is hard to articulate any hard and fast rules. That is why the list of factors set out in *Foreman* have been seen as a helpful guide to a judge asked to exercise the jurisdiction.

[53] However, it must be borne in mind that there will normally be a number of beneficiaries and the underlying principle in deciding whether disclosure will be made will be identifying the course of action which is most consistent with the proper administration of the trust and the interests of the beneficiaries, not just the beneficiary requesting disclosure.

[54] This brings into play interests of confidentiality, which were seen as significant in *Breakspear*, where the task of the trustee in exercising dispositive discretionary powers was described as "essentially confidential". However, *Breakspear* must be seen in its context: the application was for disclosure of a "wish letter" from the settlor to the trustees. The wish letter was contemporaneous with the trust deed and was expressed to be non-binding. It set out matters that the settlor wanted the trustees to take into account when exercising their dispositive powers. It was found to be confidential in nature.[53]

[55] It also brings in to play the principle that trustees are not required to give reasons to discretionary beneficiaries for the manner in which they exercise their discretions.[54] This means that trustees may decline to disclose to a beneficiary documents that set out their reasons (or may redact documents to remove material showing those reasons).

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[53] *Breakspear,* above n 43. An order requiring disclosure of the wish letter was made in *Breakspear* on the grounds that the trustees intended to apply to the court to sanction a scheme of distribution of the trust fund and disclosure was required to give the beneficiaries a proper opportunity to address the court on the proposed scheme. However, the decision by the trustees to refuse disclosure, which was made before the scheme was proposed, was considered to be reasonable.

[54] *Foreman*, above n 33, at [99]; and *Londonderry*, above n 18, at 928 and 933 per Harmon LJ and 936–937 per Salmon LJ. There was no challenge to the proposition that trustees are not required to disclose their reasons in argument and we do not therefore express a concluded view on it.

[56] Drawing these threads together, we consider the matters that need to be evaluated in relation to an application for disclosure of trust documents include the following:

(a) *The documents that are sought*. Where a number of documents are sought, each document (or class of document) may need to be evaluated separately, given that different considerations may apply to basic documents such as the trust deed and more remote documents such as the settlor's memorandum of wishes.

(b) *The context for the request and the objective of the beneficiary in making the request*. The case for disclosure will be compelling if meaningful monitoring of the trustee's compliance with the trust deed in the administration of the trust could not otherwise occur. In this regard, it may be relevant that disclosure has been made to other beneficiaries. However, assuming no improper motive on the part of the beneficiary seeking information, the fact that disclosure has previously been made to other beneficiaries will rarely be a decisive factor against disclosure.

(c) *The nature of the interests held by the beneficiary seeking access*. The degree of proximity of the beneficiary to the trust (or likelihood of the requesting beneficiary or others in the same class of beneficiaries benefitting from the trust) will also be a relevant factor.

(d) *Whether there are issues of personal or commercial confidentiality*. Recognition should be given to the need to protect confidential matters of a personal or commercial nature. The Court should also take into account any indications in the trust deed itself about the need for confidentiality in relation to commercial dealings or private matters in relation to particular beneficiaries.

(e) *Whether there is any practical difficulty in providing the information*. If the information sought by the person requesting the information

would be difficult or expensive to generate or collate, that may be a factor against requiring its disclosure.

(f) *Whether the documents sought disclose the trustee's reasons for decisions made by the trustees*. It would not normally be appropriate to require disclosure of the trustees' reasons for particular decisions.

(g) *The likely impact on the trustee and the other beneficiaries if disclosure is made*. In particular, would disclosure have an adverse impact of the beneficiaries as a whole that would outweigh the benefit of disclosure to the requesting beneficiary? In the case of a family trust, this may include the possibility that disclosure would embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole. However, on the other hand, non-disclosure may have a similar effect.[55]

(h) *The likely impact on the settlor and third parties if disclosure is made.* The impact that disclosure will have on the settlor and/or on third parties will need to be considered.

(i) *Whether disclosure can be made while still protecting confidentiality*. This may require that copies of documents supplied to a beneficiary are redacted to ensure non-disclosure of confidential information.

(j) *Whether safeguards can be imposed on the use of the trust documentation*. Examples would include undertakings and inspection by professional advisers only and other safeguards to ensure the documentation is used only for the purpose for which it was disclosed.

[57] We agree with Mr Carruthers that it is important to identify what trust documents are sought, meaning that, in a case such as the present, it is sensible to consider the request for disclosure on a category by category basis. Mr Carruthers

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55 As Potter J noted in *Foreman*: see the discussion at [40] above.

was critical of the lower Courts for not doing this but it is hard to see why such a wide-ranging list of documents were sought in the original claim, without gradation or categorisation, if the appellant wanted a category by category approach to be adopted in the Courts below.

[58] As mentioned earlier, the cases that were put to us in argument vary considerably in relation to the categories of documents sought. It can be misleading to see a case relating to a confidential memorandum of wishes, for example, as providing guidance in relation to a case involving a request for basic documents such as the trust deed and trust accounts.

[59] The nature of the beneficiary's interest will also be significant. A named beneficiary or a member of a class such as the immediate family of the settlor, who can be expected to either receive dispositions from the trust or, at least, to be a strong candidate to do so, will have a far more compelling case for disclosure than, say, a charitable institution that is within the category of institutions to which a disposition could be made but has no other association with the trust.

[60] As noted earlier, the starting point is the obligation of trustees to administer the trust in accordance with the trust deed and their duty to account to beneficiaries. So the strongest case for disclosure would be a case involving a request from a close beneficiary for disclosure of the trust deed and the trust accounts, which would be the minimum needed to scrutinise the trustees' actions in order to hold them to account.

[61] The appellant relied on *Foreman* for the proposition that there is a presumption that a discretionary beneficiary is entitled to be provided with copies of trust documents demonstrating how the trust has been administered and managed and what has become of the trust property. He argued the presumption should be applied in the present case, something that was strongly resisted by the trustees.

[62] In the normal run of things, trustees will provide these to close beneficiaries on request or proactively, without the need for a request. If they refuse, a court will be likely to require disclosure unless, to use Potter J's formulation, there are

"exceptional circumstances".[56] This is the so-called "presumption" of disclosure, noted earlier. We see it more as an expectation that basic trust information will be disclosed to a close beneficiary who wants it. But there may be room for debate about who is a close beneficiary and the request for disclosure may go beyond such basic information. The greater the scope of the request and the remoter the interest of the beneficiary, the more room there will be for argument about the appropriateness of disclosure.

Appellate standard

[63] Ms Coumbe argued that, as the High Court decision is a discretionary decision, the jurisdiction of the Court of Appeal on appeal is limited. An appeal to the Court of Appeal can succeed only if that Court finds there was an error of principle in the High Court decision, the High Court took account of irrelevant considerations or failed to take into account a relevant consideration or the High Court decision was plainly wrong.[57]

[64] Ms Coumbe said that this had been accepted by both counsel in the course of argument in the Court of Appeal, but the appellant was now arguing that the Court of Appeal had a fresh discretion. She pointed out that this was inconsistent with *Schmidt*, where the Privy Council did not exercise a discretion afresh at appellate level, but rather stated the legal principles and remitted the matter to the first instance Court to determine the application.

[65] Ms Coumbe's submission that the High Court decision is discretionary reflects the approach taken by the High Court Judge in the present case. Courtney J adopted the following statement as to the approach to be taken by Briggs J in *Breakspear*:[58]

> There are no fixed rules, and the trustees need not approach the question with any pre-disposition towards disclosure or non-disclosure. All relevant

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[56] *Foreman*, above n 33, at [93]. In *Re Maguire (deceased)* [2010] 2 NZLR 845 (HC) at [30], Asher J said a trustee must disclose "unless there are good reasons not to".

[57] *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Blanchard, Tipping and McGrath JJ. In *Kacem v Bashir*, the lower Court decision was found not to be a discretionary decision so this test did not apply in that case. An example of the application of this form of appellate review can be seen in *May v May* (1982) 1 NZFLR 165 (CA) at 169–170.

[58] *Erceg* (HC), above n 1, at [44]; citing *Breakspear*, above n 43, at [73].

> circumstances must be taken into account, and in all cases other than those limited to a strict review of the negative exercise of a discretion, both the trustees and the court have a range of alternative responses, not limited to the black and white question of disclosure or non-disclosure.

[66] Courtney J found, in reliance on that quotation, that although a beneficiary is entitled to seek disclosure, the Court when considering an application such as the one made in the present case "will consider all the relevant aspects, including the extent to which the trustees assumed an obligation of confidence in relation to the administration of the trust".[59]

[67] It is true that most of the cases referred to in argument treat the Court's power of decision in relation to an application such as the present one as involving the exercise of a discretion. The use of that term in many of the cases is, however, a counterpoint to the earlier cases which found that the beneficiary's claim for disclosure depended on his or her proprietary rights, which led to the conclusion that a discretionary beneficiary could not claim for disclosure to be made to him or her. In using the term "discretionary", the Courts were essentially expressing the view that the entitlement to make a claim for disclosure did not require a proprietary interest in the trust, so that discretionary beneficiaries and vested beneficiaries were both entitled to claim disclosure, and neither had a right or entitlement to receive an unredacted copy of every trust document.

[68] We do not see the supervisory jurisdiction as discretionary: it is better seen as a jurisdiction.[60] For example, there will be little to debate about a case where the Court forms the view that disclosure of basic documents such as the trust deed and accounts is necessary to allow a beneficiary with a clear interest to hold the trustee to account and finds that no countervailing factor such as confidentiality arises. In such a case, it is hard to see how the Court could say it would, despite those factors, exercise its "discretion" to refuse a disclosure order in relation to those documents. Rather, the Court's obligation to intervene in its supervisory jurisdiction would be engaged. In less clear cut cases, however, the decision will require consideration of a wide range of factors. We see such consideration as involving assessment and judgment.

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[59] *Erceg* (HC), above n 1, at [45].

[60] See the discussion at [50] above.

[69] *Kacem v Bashir* involved a decision dealing with an application by a parent of two children to relocate them to Australia, against the wishes of the other parent, who intended to remain in New Zealand.[61] It involved consideration of s 4 of the Care of Children Act 2004, which says the welfare and best interests of the children must be the first and paramount consideration in the making of any decision under the 2004 Act. Section 5 of that Act sets out a non-exhaustive list of principles that must be taken into account, to the extent they are relevant to the issue being decided. This Court said a decision under these provisions was a matter of assessment and judgment, not discretion, even though it endorsed an observation that there are "no starting points or presumptions" in coming to the decision.[62] Such a decision was subject to a general appeal, under which the appellant is entitled to judgment in accordance with the opinion of the appellate court, even where the opinion involves an assessment of fact and degree and involves a value judgment.[63]

[70] In the present case, the decision of the High Court was subject to a general right of appeal to the Court of Appeal under s 66 of the Judicature Act 1908. We do not see any reason to distinguish the nature of the appeal in the present case from that in *Kacem v Bashir*. That being the case, we consider the Court of Appeal was free to decide the case according to its view, and not constrained as it would be if the *May v May* standard applied.[64]

The present application

[71] We propose to evaluate the application by considering the factors identified at [56] above.

Documents that are sought

[72] We will consider the documents sought by the appellant in categories.

[73] We will categorise them as follows:

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61 *Kacem v Bashir*, above n 57.
62 At [31] and n 22 per Blanchard, Tipping and McGrath JJ.
63 At [32]; applying *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
64 *May v May*, above n 57.

(a) Category 1: Item 1 of the schedule (the trust deed and deeds of variation) and Item 6 (financial statements). These are basic documents for which the strongest case for disclosure can be made. Copies of these documents were provided to the legal advisers of the appellant's mother in *Erceg* 1.[65]

(b) Category 2: Item 2 (minutes and resolutions). We see this category as similar to Category 1, save for the fact that disclosure without redactions may reveal the reasons of the trustees for the dispositions made by them.

(c) Category 3: Item 3 (documents relating to the dealings between the trusts and ILNZ), Item 4 (share valuations), Item 5 (gifting and debt documents), Item 7 (bank statements). These documents raise obvious issues of commercial confidentiality.

(d) Category 4: Items 8 and 9 (corporate documents of ILNZ).[66] These are not really trust documents at all, though copies of the accounts were presumably held by the trustees when they were shareholders in ILNZ. It is hard to see why the trustees would hold the documents in Item 9, which could be expected to be held by the responsible executives of ILNZ under its new ownership.

The context for the request and the objective of the beneficiary making the request

[74] The context for the request is that the appellant received no distribution from either trust. There appears to have been a degree of acrimony between the appellant and the late Michael Erceg and there is obvious acrimony between the appellant and the trustees. Lynne Erceg deposed that Michael Erceg had indicated to her that he did not want the appellant to have anything to do with his affairs.

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65 *Erceg* 1, above n 24, at [49]–[54].

66 The shorthand descriptions of the items in the schedule are for ease of reference but they are shorthand only: the exact nature of what the appellant requested is set out in the schedule.

[75] Nine reasons were identified by Mr Carruthers for the request for the disclosure of information in the present case. These reasons, and our comments on them, are as follows:

(a) The immediacy of the appellant's interest compared with that of his mother, in respect of whom some disclosure orders were made in *Erceg* 1. That has to be balanced against the reality that the appellant was behind the application made by his mother in *Erceg* 1. Mrs Erceg sought orders that copies of any disclosed documents be provided to the appellant as "family adviser". Venning J made it clear that he was not prepared to order disclosure to the appellant because of the acrimony within the family and aspects of the appellant's conduct, to which we will refer below.[67]

(b) The circumstances surrounding the transfer of shares from the late Michael Erceg to the trusts. Counsel did not elaborate on this factor and on its face it does not appear to be of any great relevance to the present application.

(c) The fact that the late Michael Erceg's will included a declaration that it was Michael Erceg's wish that Lynne Erceg should "provide assistance to members of my family and employees of [ILNZ] in the way that I have during my lifetime and that she shall help them as I would have in times of need". Although not articulated, the premise of this submission seems to be that this created an obligation on Lynne Erceg as trustee of the trusts to ensure that a distribution was made from the trusts to the appellant. That suggestion has to be seen against the background that the appellant received a very substantial sum from Michael Erceg's estate. Mr Carruthers argued that the inclusion of this provision in the will indicated that the late Michael Erceg would not have been concerned to keep information confidential from close family members, since he wanted those family members to be looked after. We would not be prepared to make that

[67] *Erceg* 1, above n 24, at [37]–[38] and [47].

inference, in the face of evidence that the late Michael Erceg was, in fact, concerned about disclosure, particularly to the appellant.

(d) The business arrangements between the late Michael Erceg and the appellant in relation to a company, SY24 Ltd. The appellant deposed that Michael Erceg had proposed that the shares would be sold to the Acorn Foundation Trust and then subsequently transferred to the appellant. He exhibited a draft agreement relating to such a sale, but Mr Gregory said the proposed sale was in connection with a proposal for the use of the tax losses of the company, and not an arrangement of the character described by the appellant. In the context of competing summary judgment applications, in circumstances where evidence has not been tested by cross-examination, it would not be appropriate to make a finding either way. But we do not accept that on the evidence before the Court there is any basis for the appellant's apparent contention that this entitled him to a disposition from either trust or even gave a greater expectation than for other beneficiaries of the same class, nor do we see it as adding anything to his case for disclosure of trust documents. The appellant advanced in both the High Court and Court of Appeal an argument that the late Michael Erceg had sent him an email referring to the fact that the appellant and other members of the family were beneficiaries of the trusts and saying that the appellant did not need to be concerned because of the very high value of the shares in ILNZ and the fact that this made the family secure. The doubts about the authenticity of the email were not resolved in the lower Courts.[68] It is not possible to rely on it as supporting the appellant's case in light of that unresolved doubt.

(e) The refusal of the trustees to acknowledge that the appellant was a beneficiary. If that was a reason, it does not remain one because the position was clearly outlined in an affidavit filed by one of the trustees, Mr Gregory, in the High Court.

[68] *Erceg* (HC), above n 1, at [54]–[59]; and *Erceg* (CA), above n 6, at [45].

(f) The fact that the trustees were not only trustees of the trusts, but also executors of the late Michael Erceg's estate, directors of ILNZ and, in the case of Mr Gregory, was a legal adviser to Lynne Erceg and to the estate. On the face of it there seems to be nothing untoward about any of those matters and we do not see them as providing any basis of expectation of disposition from the trusts or any special reason for disclosure.

(g) The fact that the trusts were wound up on 24 December 2010. This followed the sale of the shares in ILNZ. Again we do not see any particular significance in that event.

(h) The fact that when the shares in ILNZ were sold, Lynne Erceg remained as a 13 per cent shareholder.[69] As this was not raised in evidence and there is no evidence rebutting it, we do not think we can say anything useful about it. We do, however, record that in her submissions Ms Coumbe said that the explanation for this was not that a distribution be made to Lynne Erceg, but that a retention of shareholding by the trustees was required as part of the terms of sale. In the absence of evidence, we put this to one side.

(i) The possibility of one or more distributions being made to non-beneficiaries of the trust. There is nothing to indicate that this occurred and we also discount this.

[76] In his written submissions, counsel for the appellant also argued that the fact that Lynne Erceg proved in the bankruptcy of the appellant a debt owed to her by the appellant was a reason indicating that disclosure was necessary. Again, we see that as an irrelevant consideration in the present context.

[77] We do not consider that the particular grounds raised by the appellant add anything to the appellant's case. As we see it, the case for disclosure relies on the

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[69] In their written submissions, counsel for the appellant said this was an 18 per cent shareholding, but it seems the correct figure was 13 per cent.

appellant's status as a discretionary beneficiary (who is entitled to have the trusts administered lawfully and properly), rather than any specific aspects of the personal relationship between him and Lynne Erceg or the factors outlined above. If anything, the reasons given by Mr Carruthers indicate that the appellant is on something of a fishing expedition, trying to find a basis for challenging the actions of the trustees that have led to the assets of the trusts being distributed to people other than him. We do not see this as enhancing his case.[70] It must be remembered that as a discretionary beneficiary, the appellant had no entitlement to distributions from either trust – rather his entitlement was limited to being considered as a possible recipient of such a distribution.

[78] Ms Coumbe argued that disclosure of material relating to the trusts to the appellant would inevitably lead to further litigation. She described the appellant as a divisive figure within the Erceg family and highly litigious. She provided the Court with a list of proceedings in which the appellant had been involved.[71] There was a well-founded concern, she argued, that if the appellant were to find out who the discretionary beneficiaries of the trusts were, particularly those to whom distributions had been made, he could commence unmeritorious claims or encourage others to do so.

[79] In May 2009, the appellant sent an email to Lynne Erceg in which he threatened to discuss family matters with the media and commented: "when my story has been told, the need to continue life's journey will no longer be required. The blood and death that will flow will stain both Darryl [Mr Gregory] and Lynne. The costs will be greater than can be imagined at this time."

[80] Mr Carruthers said that these threats were made in 2009 and should not be seen as indicative of the way the appellant would respond if disclosure were made.

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70 In *RBC Trust Company (Jersey) Ltd v E* [2010] JCA 231 at [34](ii), the Court of Appeal of Jersey said "an order for disclosure will not ordinarily be made under Article 51 [of the Trusts (Jersey) Law 1984] if the order would amount to pre-action disclosure, that is to say disclosure designed to enable the applicant to see if he has grounds for hostile action".

71 The list included some 50 court judgments, beginning with *Fource Four New Zealand Ltd v Curtling* [1994] 1 ERNZ 542 (EmpC) and continuing to *Sensation Yachts Limited v The Ship Texas* [2011] FCA 1058.

[81] The appellant also was the driving force behind *Erceg* 1, and, as noted earlier, Venning J determined that it would be inappropriate for any disclosure to be made to the appellant in his then capacity as adviser to his mother.

[82] We see these as matters of some concern, and as counting against disclosure being made to the appellant of information identifying beneficiaries, particularly those who have received dispositions from the trusts.

The nature of the interest held by the appellant

[83] The appellant's status as a beneficiary is described in some detail above.[72] He is not a named beneficiary of either trust but is one of a class (among a number of classes) of primary discretionary beneficiaries and also one of a class of final beneficiaries of the Acorn Foundation Trust. It is difficult without seeing the trust deed to know how widely the net of primary beneficiaries spreads, but it is clear that the appellant is not a named beneficiary and although a primary beneficiary, is one of many.

[84] His position in relation to the Independent Group Trust is more remote, because he is only one of a class (among a number) of secondary beneficiaries for that trust, and also one of a class of final beneficiaries. Again it is difficult to evaluate his position accurately without seeing the trust deed, but his position is more remote in relation to this trust than in relation to the Acorn Foundation Trust.

[85] Ms Coumbe emphasised that the appellant's bankruptcy at the time the trusts were wound up[73] and the fact that he had been a significant beneficiary under the late Michael Erceg's will (he had received a distribution of $95 million) meant there was never any real prospect of the appellant receiving any part of the distributions made by the trustees. We do not consider we can accept that at face value without knowing more about the reasons for distributions to others which the trustees, as they are entitled to do, have kept confidential.

72 Above at [4].
73 His rights as final beneficiary had vested in the Official Assignee.

[86] The appellant does not need to see the trust deed in order to establish that he is a beneficiary of either trust, given that this information has been made available to the Court through Mr Gregory's evidence. However, at least in relation to the Acorn Foundation Trust, in which he is one of a class of primary beneficiaries, we see the expectation noted earlier that disclosure of basic trust documentation would be made as potentially applying.[74] We see this as less obvious in relation to the Independent Group Trust. His desire to see the financial statements is in order to see the way in which the assets of the trust have been dealt with prior to the winding up of the trust.

Personal or commercial confidentiality

[87] Ms Coumbe said there were significant issues of confidentiality arising from any possible disclosure to the appellant. She pointed to the fact that the trust deed for the Acorn Foundation Trust contains a confidentiality provision, which provided that the trustees should not disclose any information or document relating to the trust to any person "unless required by law". She said that this emphasised the importance attached to confidentiality by the late Michael Erceg, whom she said had clearly expressed a wish that the appellant not be involved with or be "anywhere near" the affairs of the trusts. These matters carried considerable weight in the High Court, and this approach was upheld by the Court of Appeal.[75]

[88] For the reasons we have given earlier, we do not think that a settlor's desire for confidentiality of information relating to the trust itself will ordinarily warrant a refusal to disclose documents of the kind in Category 1 above to a close beneficiary. In the present case, we do not attach much weight to the confidentiality provision in the Acorn Foundation Trust deed because on its own terms, it contemplates disclosure if required by law and so does not assist in deciding *whether* disclosure is required by law.

[89] However, in a case where the request is made by a figure who has conducted himself in the way in which the appellant has and has made both threats against the trustees and threats to publicly disclose confidential information, these considerations obviously have much more significant weight than would normally be

74 Above at [62].
75 *Erceg* (HC), above n 1, at [51]–[59]; and *Erceg* (CA), above n 6, at [44] and [46].

the case. This is particularly so in relation to the disclosure of the identity of discretionary beneficiaries, which would be apparent from the face of the trust deeds were they disclosed, because of the potential for harassment of those beneficiaries.

[90] The confidentiality concern applies with much greater weight to documents in Category 2, since minutes will likely disclose reasons for particular decisions made by the trustees. Commercial confidentiality will arise in relation to the documents in Categories 3 and 4, particularly those relating to the sale of the shares in ILNZ because no public disclosure of the terms of the sale has been made.

[91] We see, therefore, confidentiality considerations as having significant weight in relation to Categories 2–4, but less so in relation to Category 1.

Practical difficulty

[92] There does not appear to be any practical difficulty in providing the information requested, apart from the Category 4 information in relation to ILNZ. That information would likely now be held by ILNZ itself, which is no longer controlled by the trustees.

Disclosure of reasons

[93] We have dealt with this above.

Impact on other beneficiaries if disclosure is made

[94] The potential for harassment of beneficiaries to whom dispositions have been made is real in this case, and so disclosure of any information identifying them could be damaging to them. The potential for more litigation is another factor which could affect beneficiaries. In light of the appellant's past conduct, his application can be seen as potentially using the court process to assist him in the continuation of his reprehensible conduct.

Impact on settlor and third party

[95] The only factor that is relevant under this heading is the potential disclosure of confidential information in relation to ILNZ, which may have an adverse effect on the current owners of ILNZ.

Protecting confidentiality

[96] The proposed measures to protect confidentiality have been outlined earlier.[76] Disclosure to counsel without disclosure to the appellant can be expected to provide an assurance of confidentiality. But such disclosure would place counsel in a difficult position of advising the appellant without being able to disclose the basis for the advice. Disclosure to the appellant himself carries risks given the factors identified earlier, particularly his threat to disclose confidential information in the media and the harassment he has undertaken in relation to the trustees.

Safeguards on use of the documentation

[97] Similar comments apply in relation to this heading.

Our approach

[98] As the Court of Appeal addressed the issue on the basis that the High Court was effectively reviewing a discretionary decision by trustees and that the Court of Appeal itself had a limited role,[77] and as it also rejected the presumption from *Foreman*,[78] we think we should consider the application for disclosure afresh.

[99] We start with the Category 1 documents in relation to the Acorn Foundation Trust, of which the appellant is in the class of primary discretionary beneficiaries. A primary discretionary beneficiary would normally have a good case for disclosure of the trust deed and financial statements relating to the trust. In the present case the conduct of the appellant gives genuine reason for concern as to what he would do with the information if he received it. As he was bankrupt at the time distributions

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76 Above at [13].
77 *Erceg* (CA), above n 6, at [32].
78 At [33]–[38].

were made, he could not have expected a distribution to be made, given that it would essentially have benefited his creditors rather than himself.

[100] The appellant's conduct leads to the confidentiality concerns mentioned earlier. These could be ameliorated by disclosure to his counsel, as happened in relation to *Erceg* 1, where the appellant's mother's counsel was given unredacted copies of the trust deed and accounts. In the present case, unredacted copies could be provided to Mr Carruthers, but we would not be prepared to allow for their disclosure to the appellant. This is because they would provide him with information about the identity of the beneficiaries and, in the case of the financial statements, would presumably also provide him with information about the recipients of dispositions from the trusts. We think the most the appellant could expect in these circumstances would be redacted copies, but given that such redactions would remove the very information the appellant seeks, there is a degree of futility in providing this information to him.

[101] Ultimately we have concluded that, given the unusual features of this case, disclosure should not be ordered even in relation to Category 1 documents relating to the Acorn Foundation Trust. We agree with the Courts below that the interests of the beneficiaries of the trusts will be better served by declining to order any disclosure in this case. This is not a case where disclosure has not been made to any beneficiary, given the disclosure ordered under *Erceg* 1. The risk of harassment by the applicant is significant and the benefits of disclosure being made are outweighed by that potential detriment.

[102] As noted earlier, the appellant is only a secondary discretionary beneficiary of the Independent Group Trust thus his case for disclosure is weaker in relation to that trust. For essentially the same reasons as given above and in light of this additional factor against disclosure, we do not order disclosure of Category 1 documents in relation to the Independent Group Trust either.

[103] Having determined that disclosure should not be ordered in relation to Category 1 documents, we would not order disclosure of any other category of documents either.

Standing

[104] It is not strictly necessary for us to address the standing argument, given our earlier conclusion. But, given the difference of view in the Courts below and the fact we heard full argument on it, we will set out our views, albeit briefly.

[105] Ms Coumbe argued that the appellant did not have standing to apply for disclosure of trust information about the Acorn Foundation Trust and the Independent Group Trust. She said this was because the right to seek disclosure was property of the appellant that vested in the Official Assignee when the appellant was bankrupted in 2010. Although the appellant was discharged from bankruptcy in 2014, his bankruptcy has not been annulled. So the right to seek disclosure remains vested in the Official Assignee.

[106] In the High Court, Courtney J found that the appellant did not have standing. She found the appellant's interests in the trusts (in particular, his interest in the trusts' assets as a final beneficiary) was "property" as defined in s 3 of the Insolvency Act 2006.[79] More importantly in the present context, she also found that the appellant's right, as a discretionary beneficiary of each trust, to seek disclosure of information from the trustees of the trusts was property (as defined), even though he had no proprietary interest in the assets of the trusts in his capacity as a discretionary beneficiary. She considered the right to seek disclosure was a right broadly connected to trust property.[80] That right had vested in the Official Assignee upon the appellant's bankruptcy and had not re-vested in the appellant when he was discharged from bankruptcy.[81]

[107] The Court of Appeal disagreed. It found the appellant had standing, derived from his status or capacity as a discretionary beneficiary of the trusts. That status was not altered by the appellant's bankruptcy.[82] It was not necessary to consider whether the appellant's rights as final and discretionary beneficiary were property:

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79 *Erceg* (HC), above n 1, at [20]. The definition is: "property means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise".

80 At [26].

81 At [28].

82 *Erceg* (CA), above n 6, at [14].

having the status of beneficiary was not property even if some rights associated with that status were.[83]

[108] As noted earlier, the trustees gave notice that they supported the Court of Appeal judgment on the ground that the Court of Appeal should have found the appellant did not have standing.[84]

[109] Ms Coumbe argued that Courtney J's analysis was correct. She accepted the appellant had the status of beneficiary, but said that was not a complete answer. Her argument was that the jurisdiction of the Court to make an order requiring trustees to make disclosure was based on the nexus between trustee and beneficiary arising out of the trust relationship and any order must be made in relation to a right or interest arising directly out of the trust relationship. In invoking the Court's inherent jurisdiction to require disclosure, the appellant was exercising a right to seek disclosure. That right was an aspect of the right of a discretionary beneficiary to the due administration of the trust, which was found to be "property"[85] by the High Court of Australia in *Kennon v Spry*.[86]

[110] Ms Coumbe also referred to other rights that had been held to be property capable of vesting in the Official Assignee on bankruptcy. Examples are the rights of a residuary beneficiary of an unadministered estate,[87] the rights of a member of a superannuation scheme that had not yet vested[88] and the right to make a family protection or testamentary promises claim.[89] She argued the right to seek disclosure should be regarded as analogous to these. She said a broad interpretation of the definition of property best conformed with the scheme and purpose of the Insolvency Act, which required anything of value to the bankrupt to vest in the Official Assignee for the benefit of creditors.

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83 At [17].
84 Above at [8].
85 As defined in s 4(1) of the Family Law Act 1975 (Cth).
86 *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [78] per French CJ and [126] per Gummow and Hayne JJ.
87 *Commissioner of Stamp Duties (Queensland) v Livingstone* [1965] AC 694 (PC).
88 *Official Assignee v Trustees Executors Ltd* [2014] NZHC 345.
89 *Gollan v Official Assignee* [2012] NZHC 1869.

[111] Mr Carruthers supported the Court of Appeal's approach. He said a request for disclosure of information is not proprietary in nature: it does not add to or diminish the assets of a bankrupt discretionary beneficiary. The Official Assignee has a statutory power to obtain documents, independently of any right of the bankrupt.[90]

[112] We do not consider that the bankruptcy of a discretionary beneficiary affects his or her capacity to seek disclosure of trust information from the trustees or the Court. A discretionary beneficiary remains a discretionary beneficiary if he or she is declared bankrupt. If the trustees make any distribution to the discretionary beneficiary, the money or property received by the discretionary beneficiary will be part of the bankrupt estate. So would the proceeds of a successful claim for breach of trust. But we do not think the bankruptcy of a discretionary beneficiary prevents him or her from making an application to the Court for an order requiring the trustees to account or any lesser order, such as an order for disclosure. The discretionary beneficiary is not purporting to act on behalf of anyone else or to be an officious bystander in seeking information. So "standing" in the sense of a proper basis for bringing a claim to Court does not arise. He or she does not need a "right" to claim, in any proprietary sense. The status of discretionary beneficiary suffices. We do not therefore accept that the Court of Appeal erred in reaching the conclusion that the appellant's bankruptcy and the vesting of his property in the Official Assignee did not make him ineligible to make the application to the Court that commenced the present case.

Result

[113] The appeal is dismissed.

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[90] Insolvency Act 2006, s 171.

Costs

[114] The appellant must pay to the respondents costs of $25,000 plus reasonable disbursements (to be fixed by the Registrar in the absence of agreement between the parties). We certify for two counsel.

Solicitors:
Hucker & Associates, Auckland for Appellant
Wilson Harle, Auckland for Respondents

SCHEDULE

DOCUMENTS SOUGHT BY THE APPELLANT

1. The Trust Deed and all or any Deeds of Variation for both the Trusts.

2. All trustee resolutions and minutes for the Trusts.

3. Details and documents relating to all share transfers involving the sale, transfer, purchasing and/or other dealings between the Trusts and Independent Liquor NZ Ltd.

4. Share valuation reports and/or other financial material that supported the trustee resolutions in respect of the Independent Liquor share transaction.

5. Details of debts due to each of the Trusts and all gifting documents (including any schedule of gifting) prepared by the late Michael Erceg as the settlor of each of the Trusts.

6. Financial statements (and to the extent they are held, the accountant's working papers) for each of the Trusts from the date of inception.

7. Bank statements for each of the Trusts since the date of inception.

8. Financial statements of Independent Liquor NZ Ltd for the 2002 to 2007 years inclusive, and to include the Australian and English-based manufacturing companies and all activities of the company.

9. Copy of the Independent Liquor NZ Ltd share register, interests register and minute book.