

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA545/2017  
[2019] NZCA 480

BETWEEN PRUDENCE ANNE ADDLEMAN  
Appellant  
AND LAMBIE TRUSTEE LIMITED  
Respondent

Hearing: 19 March 2019

Court: Cooper, Clifford and Gilbert JJ

Counsel: A S Ross QC and R A Rose for Appellant  
D A T Chambers QC and I F Williams for Respondent

Judgment: 4 October 2019 at 10 am

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**JUDGMENT OF THE COURT**

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- A The application to adduce further evidence is granted.**
- B The appeal is allowed.**
- C The judgment of the High Court is set aside.**
- D Within 30 working days of the date of this judgment the respondent is to provide the appellant with all documents in its possession or power relating to the Lambie Trust in the following categories:**
- (i) financial statements;**
  - (ii) minutes of meetings; and**
  - (iii) any legal opinions and other advice obtained by the trustees and funded by the Trust.**
- E Leave is reserved to apply to the High Court for further directions in the case of any disagreement as to any redaction made in the documents provided in accordance with these orders.**

- F To the extent any documents in these categories are no longer available, the respondent is to serve on the appellant within the same 30-day period an affidavit from a person having the relevant knowledge explaining what efforts have been made to locate the missing documents and what is thought to have become of them and when.**
- G The respondent is to pay the appellant’s costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.**
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## REASONS OF THE COURT

(Given by Gilbert J)

### Table of Contents

<b>Introduction</b>	[1]
<i>Lambie Trust</i>	[2]
<i>Distribution to Mrs Addleman</i>	[7]
<i>Mrs Addleman’s requests for Trust documents</i>	[8]
<b>Proceedings</b>	[12]
<b>High Court judgment</b>	[16]
<b>Appeal</b>	[18]
<b>Applicable principles</b>	[20]
<b>Did the High Court err in applying these principles?</b>	[24]
<i>Documents sought</i>	[25]
<i>Context for and objective of request</i>	[32]
<i>Nature of Mrs Addleman’s interests</i>	[36]
<i>Confidentiality</i>	[50]
<i>Practical difficulty in providing the information</i>	[52]
<i>Whether the documents sought disclose reasons for trustees’ decisions</i>	[53]
<i>Likely impact of disclosure on trustee and other beneficiaries</i>	[54]
<i>Likely impact of disclosure on settlor and third parties</i>	[58]
<i>Whether disclosure can be made while protecting confidentiality</i>	[59]
<b>Conclusion</b>	[60]
<b>Result</b>	[61]

## Introduction

[1] This is an appeal against a judgment of the High Court refusing an application by a beneficiary for disclosure of trust documents.<sup>1</sup>

### *Lambie Trust*

[2] The appellant, Prudence Addleman, and her younger sister, Annette Jamieson, now aged 70 and 66, are the only two people named as both discretionary and final beneficiaries of a trust known as the Lambie Trust (the Trust) established by a Deed of Trust dated 19 March 1990 (Trust Deed). The named settlor was Robert Palmer, their cousin. The original trustees were: their father, Alexander Jamieson; their brother, Anthony Jamieson; Mr Palmer; and Wayne Hanna, an accountant. The respondent, Lambie Trustee Ltd, has been the sole trustee of the Trust since April 2006.<sup>2</sup> Ms Jamieson is the sole director and shareholder of Lambie Trustee Ltd.

[3] Apart from Mrs Addleman and Ms Jamieson, the only other final beneficiaries of the Trust are two companies controlled by Ms Jamieson, Edmonton Company Ltd SA, a company incorporated in Australia, and Mercadeo E Inversiones Gil SA, a company incorporated in Panama. The discretionary beneficiaries of the Trust are: the final beneficiaries; any child or remoter issue of any of the final beneficiaries; any wife, husband, widow or widower of any final beneficiary; and any lawful charitable object. Neither Mrs Addleman nor Ms Jamieson have children. Ms Jamieson has never married. Thus, Ms Jamieson and Mrs Addleman are the only living final beneficiaries, and they and Mrs Addleman's husband, Martin Addleman, are the only living discretionary beneficiaries of the Trust.

[4] The Trust fund is defined in the Trust Deed as: the sum of NZD 10.00; any property transferred by the settlor to the trustees; any property acquired by

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<sup>1</sup> *Addleman v Lambie Trustee Ltd* [2017] NZHC 2054 [High Court judgment].

<sup>2</sup> Mr Hanna resigned as a trustee on 4 August 1992. Mr Palmer was removed as a trustee on 22 September 1992. Anthony Jamieson, the brother, was removed as a trustee on 13 September 1993 and replaced by Donald Hargrave, an accountant, and Peter Kemps, a solicitor. Mr Jamieson senior retired as a trustee on 1 May 2000 and was replaced by Ms Jamieson. Ms Jamieson and Messrs Hargrave and Kemps retired as trustees on 20 April 2006 and were replaced by the respondent, Lambie Trustee Ltd.

the trustees for the purposes of the Trust; any monies and investments representing this property; and any income generated.

[5] On the vesting day, the trustees are to hold the remainder of the Trust fund on trust for such of the final beneficiaries then living and the corporate final beneficiaries still registered as tenants in common in equal shares, if more than one. The vesting day is defined as the day before the final day of the perpetuity period, being 80 years from the date of the Trust Deed.

[6] The Trust is a discretionary trust. The Trust Deed does not differentiate between the discretionary beneficiaries in any way. Until the vesting day, the trustees may in their absolute discretion pay or apply the Trust fund or any part of it towards the support, maintenance and benefit of all or any of the living discretionary beneficiaries and towards the benefit of any corporate discretionary beneficiary. Similarly, the rights of final beneficiaries are equal as between them.

#### *Distribution to Mrs Addleman*

[7] Mrs Addleman, who lives in England, and Ms Jamieson, who lives in Australia, have been estranged for over 20 years. Mrs Addleman was not even aware of the Trust's existence until around the time of her father's death in late 2001. She did not find out that she was a beneficiary of the Trust until November 2002 when she received a letter from Peter Kemps, a solicitor who was then one of the trustees of the Trust, advising that a distribution of NZD 4.257 million was to be made to her. Mr Kemps' letter dated 20 November 2002 explained:

As you know, I am one of the Trustees of the Lambie Trust established in New Zealand in March 1990. The other Trustees are Don Hargrave and your sister, [Ms Jamieson].

The Trust is a discretionary Trust and you are named as one of the discretionary beneficiaries. The Trustees in their discretion have decided to make a distribution of part of the Trust fund to you. While it had been intended that this distribution would not take place until the passing of your mother, the Trustees have decided to bring the distribution forward so that you can be in a position to make your own financial decisions regarding these funds and can use the funds to meet your own expenditure.

The sum that will be distributed to you is NZ\$4,257,000.00 and represents the full distribution of funds that will be coming to you from Lambie Trust.

Please note that this distribution bears no relationship to the estate of your late father. Neither Don nor I act in your late father's estate nor in respect of any other of his affairs or those of your mother.

*Mrs Addleman's requests for Trust documents*

[8] Mrs Addleman was curious to know more about the Trust, its assets and income. In March 2003, she wrote through her solicitors to Mr Kemps enquiring about the assets of the Trust and whether she still had a beneficial interest in any Trust property. She asked for a copy of the Trust Deed, the Trust's accounts and other Trust documents. The trustees were reluctant to provide any information about the Trust to Mrs Addleman. However, Mrs Addleman persisted with her requests and Mr Kemps wrote to her solicitors in December 2003 saying he was obtaining independent legal advice as to the trustees' obligations. Following further unanswered correspondence from Mrs Addleman's solicitors, Mr Kemps wrote on 19 April 2004 enclosing a copy of the Trust Deed and documents showing the appointment and removal of trustees. Mr Kemps advised:

We are able to assure your client that the distribution that has been made to her is proper and that the Trustees have at all times acted honestly and have fulfilled all of their duties required by law.

We are also able to advise that the Trust is a discretionary trust established by deed dated 19 March 1990 so the question of your clients "entitlement" is entirely a matter for the discretion of the Trustees.

We have been ascertaining the Trustees legal duties which are not entirely clear given the state of the law. ... The law is clearly evolving in respect to trustees duties of disclosure of information.

It does appear however that your client is entitled to the Trust Deed and documents altering trustees and I enclose a copy of the original Trust Deed and the documents dealing with the appointment of trustees and I confirm that the current Trustees are Annette Merryl Jamieson, Donald Boyd Hargrave and the writer.

Given the discretionary nature of the Trust, there is no further question to be answered with regard to your client's entitlement.

[9] Mrs Addleman did not pursue the matter further until 24 September 2014 when she wrote again through her solicitors seeking comprehensive information about the Trust including copies of all financial statements dating back to its inception. Mr Kemps responded on 3 October 2014 advising that the three trustees to whom the letter had been addressed, himself, Ms Jamieson and Mr Hargrave, were no longer

trustees, having been replaced some years ago. Mr Kemps said that since the earlier correspondence, “we have also established clearly that Lambie Trust was seeded exclusively from funds which arose from an accident settlement for Annette Jamieson”. Mr Kemps said he would take instructions from Ms Jamieson who would be likely to require specialist trust advice before responding to the “extraordinary request for information”.

[10] On 19 November 2014, Mr Kemps wrote again to Mrs Addleman’s solicitors in the following terms:

We refer to your letter of 7 November and respond:

1. We act for the Trust. The current Trustee is Lambie Trustee Limited.
2. Mr Robert Palmer was nominally the settlor. Following our communications to you in 2004 we were made aware by Mr Palmer that the trust was funded from Annette Jamieson’s accident settlement. A signed statement from Mr Palmer is attached.
3. Records for the entire 24 year history of the Trust do not exist. We are ascertaining what records do exist.
4. We have authority to accept service of proceedings.
5. We will be responding more fully when we know what records there are in existence.

[11] The signed statement from Mr Palmer attached to this letter is dated 14 November 2014 and reads:

1. I am the Settlor and a Trustee in the Trust deed of the Lambie Trust (“Lambie Trust”) dated the 19<sup>th</sup> day of March 1990.
2. Lambie Trust was established at the initiative of my uncle Alexander Jamieson an Australian resident who had commenced a property development business in New Zealand in 1986.
3. I ran the property development business for my uncle from 1986 until late 1992. The business was operated through a company called Howick Parklands Limited (“HPL”), a company formed on 19<sup>th</sup> September 1986.
4. The shares of HPL were initially held by me, as to 99 shares. I held the shares in trust and had no personal ownership interest in the business.
5. On several occasions my uncle Alexander Jamieson told me that Lambie Trust and the property development business operated

through HPL was funded by monies belonging to his daughter Annette Merryl Jamieson. I did not personally settle assets or funds on Lambie Trust.

6. Annette had suffered serious permanent injuries after diving into a public swimming pool in North Sydney Australia when she was in her teens. As a result of a Court case brought by her father on Annette's behalf against the local authority which operated the swimming pool, Annette received a substantial sum in settlement of her claim. Mr. Jamieson told me he had invested the settlement funds for Annette for some years but that the settlement funds and earnings were the monies used to fund the HPL business. Mr Jamieson told me on many occasions that he had to be more diligent with these funds than his own because they were Annette's.
7. I believe Annette's accident settlement funds were initially introduced to New Zealand to purchase a block of land of 42 hectares known as Somerville Estate Farm in 1986.
8. When the documentation for Lambie Trust was drawn up, in addition to Annette's name, Annette's sister Prudence Addleman was added as a beneficiary of Lambie Trust at the suggestion of Annette, so that, if Annette died, there would be another named family member as a beneficiary.
9. On several occasions from the time I was first involved in HPL and Lambie Trust, my uncle Alexander Jamieson told me that Lambie Trust and the ongoing property business operated through HPL would be for the benefit of his daughter Annette. Annette is a quadriplegic. Because of her permanent injuries and the special needs she has which were clearly going to be long term, Mr Jamieson was concerned that her funds be invested in a way that would provide good long term growth.
10. Annette's ability to control HPL was further strengthened by a resolution of shareholders passed on 14<sup>th</sup> January 1987 appointing her as a Director of HPL. Mr Jamieson wanted Annette to have a more hands on interest in HPL and the business here.

## **Proceedings**

[12] In June 2015, Mrs Addleman commenced proceedings in the High Court at Auckland seeking orders requiring the respondent to provide comprehensive financial and other documents relating to the Trust. In its statement of defence, the respondent denied it had an obligation to disclose any further Trust documents. It pleaded by way of an affirmative defence that the 2002 distribution to Mrs Addleman was made in terms of a resolution by the trustees pursuant to a "Memorandum of Wishes of Mr and Mrs Jamieson as Settlers, whereby 25% of the value of the Trust's net asset value was distributed to [Mrs Addleman] as a full and final settlement". The respondent claimed

that Mrs Addleman’s acceptance of the distribution meant that the trustees legitimately treated her as having relinquished “all future beneficial rights” and that, in any event, she “has only a theoretical possibility of receiving a further distribution”. The respondent pleaded that there are “strong reasons” for preferring Ms Jamieson and the Memorandum of Wishes confirms that Mrs Addleman “should receive the 25% portion given to her”.

[13] The so-called memorandum of wishes is a letter from Mr Kemps to Mr and Mrs Jamieson dated 9 May 2000. Because of the reliance placed on this letter, we set it out:

Thank you very much for your hospitality during our recent visit. [Mr Hargrave] and I were well satisfied with the progress we were able to make during our visit and appreciated your assistance.

I wanted to summarise the understanding [Mr Hargrave] and I had of Mr Jamieson’s wishes for ultimate distribution of Lambie Trust funds. Apart from the allowance to be paid to Mrs Jamieson’s relatives, the ultimate distribution of the Trust fund is to be as follows:

1. A fund of NZ\$2,000,000 to be set aside to provide income for Anthony and his children during their lifetimes.
2. Of the balance of the Lambie Trust fund 40% but not more than NZ\$10,000,000 to be set aside for the Paraplegic and Quadriplegic Organisation and other charities.
3. Of the balance 50% to be paid to [Ms Jamieson] and 25% each to Meredith<sup>3</sup> and [Mrs Addleman].

Your instructions are that Anthony’s fund is to be administered on his behalf during his lifetime and income and capital made available to him and his family at the discretion of the Trustees.

[Mr Hargrave] and I are dealing with [Ms Jamieson] on a number of other matters including the funding of further land purchases by Lambie Trust and the development of those properties by Mr Noma.

[14] The respondent filed an amended statement of defence on 13 June 2017, shortly prior to the hearing in the High Court. The main change was to add a pleading to the effect that the Trust had been funded exclusively by the compensation payment

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<sup>3</sup> Meredith is the youngest of the four children in the Jamieson family, Prudence, Annette and Anthony being older.



Ms Jamieson received in 1981 of AUD 1,029,000. The respondent asserted that these funds found their way to the Trust in the following manner:

- a) In 1972 Annette Jamieson had an accident at a public swimming pool. She became a quadriplegic.
- b) [Ms Jamieson] successfully sued the Warringah Shire Council. In 1979 she received a settlement sum of just over AUD 1,029,000.<sup>4</sup>
- c) [Ms Jamieson] placed this sum with her father Alexander Jamieson who found investment opportunities for her to consider and managed her investments. Alexander consulted [Ms Jamieson] and [she] ultimately made all investment decisions. Alexander held the sum and earnings from the sum on trust for [Ms Jamieson] (**the funds**).
- d) In the mid 1980s with [Ms Jamieson's] agreement the funds were used to provide a loan to Robert Palmer. Also, following extensive discussions with [Ms Jamieson] and with [her] agreement, Alexander invested the funds in a business opportunity in New Zealand provided by Robert.
- e) To protect [Ms Jamieson's] funds, Alexander instigated the settlement of the Lambie Trust. Alexander was the instigator and a de facto settlor of the Lambie Trust.
- f) Alexander instigated the transfer of the funds he held on trust for [Ms Jamieson] to the Lambie Trust. The source of funds for the Lambie Trust was therefore [Ms Jamieson's] accident settlement funds. [Ms Jamieson] is also a de facto settlor of the Lambie Trust.

[15] The proceeding was heard over three days following the filing of affidavits by Mrs Addleman, Ms Jamieson and Mr Palmer, each of whom was cross-examined.

### **High Court judgment**

[16] Woolford J dismissed Mrs Addleman's disclosure claim in its entirety for reasons given in his judgment delivered on 25 August 2017. The Judge considered there should be no order for disclosure of any documents for seven principal reasons:<sup>5</sup>

- (a) The Trust was settled for the primary purpose of ensuring Ms Jamieson's welfare and financial security. The cost of her care is extraordinarily high and will continue throughout her life. These costs

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<sup>4</sup> Ms Jamieson obtained the award in 1979 but, because of an appeal, she did not receive the funds until 1981.

<sup>5</sup> High Court judgment, above n 1, at [65]–[71].

are currently AUD 250,000 per annum but are likely to increase. By contrast, all four children, Mrs Addleman, Ms Jamieson, Anthony and Meredith are beneficiaries of a separate family trust, the AJ Trust, settled in 1978, which has no connection with the Lambie Trust.

- (b) Mrs Addleman was only included as a beneficiary of the Trust on a contingent basis in case Ms Jamieson died at an early age.
- (c) The Trust was settled with Ms Jamieson's compensation payment and earnings thereon.
- (d) Mrs Addleman has already received what was said to be a final distribution of NZD 4.257 million in 2002, calculated as 25 per cent of the Trust's net funds at that time. This was in accordance with Mr Jamieson's memorandum of wishes. The Judge considered there was no real prospect of Mrs Addleman receiving any further distribution.<sup>6</sup>
- (e) The extent of disclosure already provided, including the statement from Mr Palmer dated 14 November 2014 confirming the source of the funds transferred to the Trust and the letter from Mr Kemps to Mr Jamieson in 2000 recording Mr Jamieson's wishes as to the distribution of funds from the Trust.
- (f) The real prospect of further intra-familial discord and litigation if the orders requiring disclosure were made.
- (g) There was no suggestion of a breach of trust or fiduciary duty in the administration of the Trust. The Trust Deed was drafted by lawyers, and lawyers and accountants were said to be regularly involved in its affairs with tax returns being filed annually. The Judge found that the application was directed to finding a basis for challenging the trustee's actions rather than being based on a particular concern

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<sup>6</sup> At [74].

about the administration of the Trust. The Judge considered this was a major factor favouring dismissal of the application.

[17] In addition to these major factors, the Judge identified two minor factors that needed to be weighed in the balance. The first was that there were no financial records available for the years ended prior to 31 March 1999. As a result, there would be either no documentation, or incomplete documentation, relating to the Howick subdivision and Howick Parklands Ltd. Secondly, “as a sole purpose trust in effect”, the Trust had always been administered on a strictly confidential basis and, absent any evidence of a breach of trust or fiduciary duty, there was no reason to disclose its private dealings.<sup>7</sup>

### **Appeal**

[18] Mrs Addleman contends on appeal that the High Court erred in three principal respects:

- (a) The Court misapplied the principles governing these types of applications, as recently clarified by the Supreme Court in *Erceg v Erceg*.<sup>8</sup>
- (b) The Court allowed itself to be distracted by wide-ranging, unsubstantiated and self-serving evidence led by the respondent at the expense of determining the largely legal issue of whether Mrs Addleman was entitled to disclosure.
- (c) There was, in any event, no sound evidential foundation for the key factual findings made by the Judge. Mrs Addleman seeks to adduce further evidence in support of the appeal which she contends demonstrates that these findings were incorrect. This evidence comprises documents obtained from archived public records.

[19] Ultimately, Mrs Addleman submits that the reasons given by the High Court for declining the application in its entirety were wrong in fact or law. The respondent

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<sup>7</sup> At [73].

<sup>8</sup> *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

supports the Judge's reasoning which largely reflected her submissions at the trial. It will therefore be convenient to address the appeal by examining each of the Judge's reasons for declining to order any disclosure. Before doing so, we briefly summarise the applicable principles.

### **Applicable principles**

[20] A decision whether to order disclosure to a beneficiary requires assessment and judgment upon which reasonable minds might disagree. Such a decision does not involve the exercise of a discretion. The appeal standard is therefore as directed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.<sup>9</sup> That means Mrs Addleman is entitled to this Court's view as to whether disclosure ought to have been ordered, unconstrained by the limitations on appeals against the exercise of a discretion as set out in *May v May*.<sup>10</sup> This approach was confirmed by the Supreme Court in *Erceg*.<sup>11</sup>

[21] There is no dispute about the applicable principles. These were recently reviewed by the Supreme Court in *Erceg*. Trustees have fundamental duties to administer the trust in accordance with the trust deed and to account to beneficiaries. The Court has jurisdiction to supervise the administration of trusts and intervene where appropriate. A beneficiary seeking to hold trustees to account may need access to documents to assess whether the trustees have acted in accordance with their obligations. The underlying principle is to identify the course of action most consistent with the proper administration of the trust and the interests of beneficiaries generally, not just the beneficiary seeking disclosure.<sup>12</sup> Interests of confidentiality must be considered.<sup>13</sup> Trustees are not required to disclose to discretionary beneficiaries their reasons for exercising their discretion in the manner they did.<sup>14</sup>

[22] The Supreme Court set out a non-exhaustive list of the matters to be considered on an application for disclosure of trust documents:<sup>15</sup>

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<sup>9</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

<sup>10</sup> *May v May* (1982) 1 NZFLR 165 (CA) at 169–170.

<sup>11</sup> *Erceg v Erceg*, above n 8, at [68]–[70].

<sup>12</sup> At [53].

<sup>13</sup> At [54].

<sup>14</sup> At [55].

<sup>15</sup> At [56].

- (a) The nature of the documents sought — whether basic such as the trust deed or more remote such as the settlor’s memorandum of wishes.
- (b) The context for the request and the beneficiary’s objective in making it.
- (c) The proximity of the beneficiary’s interest to the trust.
- (d) The need to protect confidential information of a personal or commercial nature.
- (e) Any practical difficulty in providing the information.
- (f) Whether the disclosure concerns the trustees’ reasons for making particular decisions.
- (g) Whether disclosure would have an adverse impact on the beneficiaries overall, outweighing the benefit of disclosure to the requesting beneficiary.
- (h) The likely impact of disclosure on the settlor or third parties.
- (i) Whether disclosure can be ordered while still protecting confidentiality.
- (j) Whether safeguards can be imposed to guard against misuse of trust documentation.

[23] The Supreme Court considered “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”.<sup>16</sup> The Court expected that trustees would normally provide to close beneficiaries on request, if not proactively, trust accounts and other documents showing how the trust had been administered and what had become of the trust property.<sup>17</sup>

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<sup>16</sup> At [60].

<sup>17</sup> At [62].

### **Did the High Court err in applying these principles?**

[24] The Judge followed the Supreme Court's guidance in *Erceg* and considered each of the relevant factors identified in that judgment. Having completed that exercise, the Judge undertook his analysis by identifying seven major and two minor factors (several overlapping or at least interlinked) which he considered weighed against granting the application. These were a subset of the *Erceg* factors the Judge had already considered. The issue on appeal comes down to whether we agree with the Judge's assessment of these factors.

#### *Documents sought*

[25] The Judge was concerned about the breadth of the disclosure requested. He considered that an order in the terms sought would be unduly burdensome and far beyond the minimum necessary for Mrs Addleman to confirm the proper administration of the Trust.<sup>18</sup> The Judge noted that Mrs Addleman had already received a copy of the Trust Deed, documents evidencing changes of trustees, the statement from Mr Palmer dated 14 November 2014 as to the source of funds transferred to the Trust, and a copy of the letter from Mr Kemps to Mr Jamieson in 2000 confirming his wishes as to the distribution of funds from the Trust. The Judge commented that a memorandum of wishes is often regarded as highly confidential and yet the trustee had been willing to disclose it to Mrs Addleman.<sup>19</sup>

[26] We consider the Judge was justified in expressing concern about the breadth of the disclosure sought by Mrs Addleman in her claim. Mr Ross QC, who was not counsel for Mrs Addleman in the High Court, responsibly acknowledged at the outset of the hearing of the appeal that the request was over-broad. He advised that the request is now confined, at least in the first instance, to the Trust's accounts, minutes of trustee meetings (with reasons for decisions redacted) and any legal advice or opinions paid for by the Trust. Nevertheless, given that the trustees kept from Mrs Addleman that she was a beneficiary of the Trust for over 12 years and their sustained refusal thereafter to divulge any documents revealing the Trust's assets and

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<sup>18</sup> High Court judgment, above n 1, at [35].

<sup>19</sup> At [69].

how these have been administered, it is understandable that Mrs Addleman cast her application for disclosure as widely as she did, possibly anticipating that this would be her final opportunity to obtain any further information about the Trust. We do not see this as a disqualifying factor. The Court still needed to determine whether any of the documents sought should be disclosed, including for example core documents such as the Trust's accounts.

[27] While we do not endorse the test posited by the Judge — the *minimum necessary* to confirm the proper administration of the Trust — at least some further disclosure would be required to satisfy even that test. Mrs Addleman has no means of assessing whether the Trust has been administered properly if she does not receive any financial information concerning its assets and how these have been dealt with. The limited disclosure provided to date — confined to the Trust Deed and the identity of the trustees from time to time — effectively leaves her in the position of having to accept the type of assurance Mr Kemps gave in his letter on 19 April 2004 that the distribution was “proper” and the trustees “have fulfilled all of their duties required by law”.

[28] One of a trustee's fundamental duties is to maintain proper accounts in respect of trust property and have these available for inspection by beneficiaries. This is a necessary incident of a trustee's fiduciary duty to account to the beneficiaries. Failure to keep such accounts is a breach of trust. While a beneficiary does not have an absolute right to the accounts, the circumstances in which such accounts may properly be withheld from a close beneficiary are likely to be limited.<sup>20</sup> As the Supreme Court observed in *Erceg*, “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”.<sup>21</sup>

[29] On the face of the Trust Deed, Mrs Addleman would have to be regarded as close beneficiary for these purposes. As noted, she is one of only two living

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<sup>20</sup> *Foreman v Kingstone* [2004] 1 NZLR 841 (HC) at [88].

<sup>21</sup> *Erceg v Erceg*, above n 8, at [60].

discretionary and final beneficiaries and the trustees considered it appropriate to make a substantial distribution to her in accordance with Mr Jamieson's wishes.

[30] The Judge was also concerned that some of the documents sought may be protected by solicitor/client privilege because the request included legal opinions, advice and other communications between trustees and their advisors.<sup>22</sup> That some of the documents covered by the request may have attracted solicitor/client privilege, is obviously not a good reason for declining to give any disclosure, nor did the Judge suggest otherwise. However, legal advice or opinions obtained by trustees to guide them in the discharge of their duties as trustees and paid for out of trust funds are trust documents created for the benefit of the beneficiaries. The privilege attaching to such communications may be asserted against third parties but not by the trustees against the beneficiaries.<sup>23</sup> We consider this aspect of the Judge's concern about the nature of the documents requested was misplaced. To the extent that these documents might reveal the reasons for the trustees' decisions or confidential information about a beneficiary, this concern can be addressed in other ways, for example by way of redaction.

[31] Ms Jamieson is not only a beneficiary, she controls the sole trustee and the two corporate beneficiaries. The only other beneficiaries are Mrs Addleman and her husband. There is no one else who can scrutinise the administration of the Trust and hold the trustees to account. It follows that unless basic Trust documents are disclosed to Mrs Addleman, the trustees' administration of the Trust will remain secret and beyond scrutiny. In these circumstances, in the absence of some very good reason to the contrary, we consider the more narrowly confined categories of Trust documents now sought should be disclosed to Mrs Addleman. Applying the underlying principle identified by the Supreme Court — the course of action most consistent with the proper administration of the trust and the interests of beneficiaries generally — disclosure of sufficient documents to enable Mrs Addleman to scrutinise whether the Trust has been administered properly should be made. As we explain below,

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<sup>22</sup> High Court judgment, above n 1, at [33].

<sup>23</sup> Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015), at [23-048].



the other criteria also support our conclusion that these documents should be disclosed.

*Context for and objective of request*

[32] The Judge accepted that a discretionary beneficiary is entitled to have a trust administered lawfully and properly and an order for disclosure of trust documents may be necessary to enforce that right.<sup>24</sup> However, the Judge observed that there was no suggestion of any breach of trust or fiduciary duty in this case. The Judge considered this was a major factor weighing against making any order.<sup>25</sup>

[33] Trustees are fiduciaries and beneficiaries are entitled to hold them to account. Without basic trust documents including the accounts, they cannot do so. It should not be necessary for a beneficiary to demonstrate a breach of trust before being entitled to disclosure. Kirby P explained why this must be so in *Hartigan Nominees Pty Ltd v Rydge*.<sup>26</sup>

To accept, as a principle for entitlement to access that a beneficiary should be able to show misconduct or wrongdoing on the part of a trustee is to impose an unreasonably high barrier to the effective supervision by the court of the actions of trustees ostensibly subject to that supervision. The actions of trustees have validity only in so far as they further the purposes of the trust and are lawful. It should not be necessary for things to have reached such a sorry pass, that misconduct or breach of trust can properly be alleged, for the beneficiaries effectively to invoke the protective scrutiny and supervision of the court. There are professional limitations upon the pleading of fraud and misconduct. They may not be alleged without a proper foundation in fact. Effectively then, the imposition of that requirement unduly impedes the court's protection to extreme cases. Yet there may be many other cases, falling short of fraud or misconduct, which justify rendering the trustee accountable to the law.

[34] The case for disclosure will inevitably be stronger if the beneficiary is able to demonstrate misconduct based on the information already available. However, this cannot be a precondition to an order requiring disclosure for the reasons explained by Kirby P. It is merely one factor to consider. So, for example, if trustees decline to provide any form of disclosure to beneficiaries, not even the accounts,

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<sup>24</sup> High Court judgment, above n 1, at [36].

<sup>25</sup> At [71].

<sup>26</sup> *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA) at 419.

the beneficiaries will have no means of holding them to account. The beneficiaries' ability to obtain an order for disclosure in such a case cannot depend on them being able to demonstrate misconduct in the absence of such disclosure, placing them in a catch-22 situation.

[35] We are satisfied that Mrs Addleman has shown she has a legitimate basis for enquiring further into the administration of the Trust. It appears that Ms Jamieson considers she is entitled to administer the Trust assets and income for her sole benefit without regard to the position of any other beneficiary because it is essentially her trust. This is contrary to the express terms of the Trust Deed. We discuss this issue further below when examining the "sole purpose trust" finding, which proved the decisive factor in refusing disclosure in the High Court.

*Nature of Mrs Addleman's interests*

[36] The Judge considered that although Mrs Addleman was one of the two living final beneficiaries and one of the three living discretionary beneficiaries (the third being her husband), the Trust was settled with Ms Jamieson's compensation payment and accrued earnings for the primary purpose of ensuring Ms Jamieson's welfare and financial security.<sup>27</sup> The Trust was "essentially her trust".<sup>28</sup> The Judge accepted Ms Jamieson's evidence that Mrs Addleman was not intended to be a close beneficiary and was only added as a "back stop".<sup>29</sup> The Judge concluded the Trust was in effect "a sole purpose trust".<sup>30</sup>

[37] There is no support for these conclusions in the Trust Deed. The first recital simply records that the settlor "wishes to provide for the persons described as beneficiaries and to create the trusts in this Deed". As noted at [6] above, the Trust Deed does not differentiate between the discretionary beneficiaries or the final beneficiaries. There is no indication in the Trust Deed that Mrs Addleman was named as a discretionary and final beneficiary merely as a back stop in case Ms Jamieson died. There would be no need for Mrs Addleman to be included as a beneficiary at all

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<sup>27</sup> High Court judgment, above n 1, at [46] and [67].

<sup>28</sup> At [33].

<sup>29</sup> At [47].

<sup>30</sup> At [73].

if that were the only purpose because the Trust Deed provides for other back stops to meet this prospect, including “[a]ny lawful charitable object” qualifying as a discretionary beneficiary and the two corporate final beneficiaries. The back stop, sole purpose trust theory is also not consistent with Mr Jamieson’s wish that Mrs Addleman should receive 25 per cent of the balance of the Trust fund, half that of Ms Jamieson but still a substantial sum.

[38] We consider Mrs Addleman must be regarded as a close beneficiary in terms of *Erceg* given she is one of only two living persons named as both a discretionary and a final beneficiary in the Trust Deed. The trustees are obliged to administer the Trust in accordance with the Trust Deed. They cannot disregard the express terms of the Trust Deed and treat Ms Jamieson as the primary beneficiary and Mrs Addleman as nothing more than a backstop beneficiary whose interests need not be considered while Ms Jamieson is alive. For the reasons summarised below, we do not accept the Trust can be regarded as “a sole purpose trust” such that the trustees’ obligations under the clear terms of the Trust Deed are modified or displaced.

[39] First, if Mr Jamieson held Ms Jamieson’s compensation payment on trust solely for her, it seems odd that he would subsequently settle the proceeds on the Trust not only for her benefit, but potentially for the benefit of numerous others. This is particularly so when one considers the comparatively modest compensation amount compared with the high annual cost of Ms Jamieson’s care, which will only increase over her lifetime.

[40] Secondly, if the assets settled on the Trust were entirely sourced from Ms Jamieson’s compensation payment and the Trust was established for the primary purpose of providing for her life-long needs, it might be expected that this would have been recorded in the Trust Deed and her entitlement prioritised over the other beneficiaries.

[41] Thirdly, if the assets settled on the Trust by Mr Jamieson as the *de facto* settlor were seeded entirely from Ms Jamieson’s compensation payment and the Trust was primarily intended to provide for her lifetime care needs, it seems odd that following consultation with Mr Kemps and Mr Hargrave, Mr Jamieson’s instructions were that

substantial benefits should be provided to persons who were not beneficiaries of the Trust, namely relatives of Mrs Jamieson who were not specified, plus Anthony and his children, and Meredith. It is also surprising that Mr Jamieson requested the trustees to set aside part of the Trust assets to provide income for Anthony and his children during their lifetimes but made no similar request for assets to be set aside to provide income for Ms Jamieson during her lifetime.

[42] Fourthly, if assets settled on the Trust were all beneficially owned by Ms Jamieson and were intended primarily for her benefit — “the sole purpose trust” thesis accepted by the Judge — it is surprising Mr Kemps, who remains the Trust’s solicitor, did not find out about this until sometime between April 2004 and November 2014 (likely around the time of Mr Palmer’s statement dated 14 November 2014). It will be recalled that Mr Kemps wrote to Mrs Addleman’s solicitors on 19 November 2014 stating that “[f]ollowing our communications to you in 2004 we were made aware by Mr Palmer that the trust was funded from [Ms Jamieson’s] accident settlement”. Mr Kemps and Mr Hargrave commenced serving alongside Mr Jamieson as trustees of the Trust in September 1993. Mr Jamieson did not retire as a trustee until 1 May 2000. If Mr Palmer’s belief about the source of the Trust funds as set out in his 14 November 2014 statement is correct, it is hard to understand why Mr Jamieson would not have mentioned this to Mr Kemps or Mr Hargrave at any time during the nearly seven-year period they served together as trustees of this trust. Ms Jamieson replaced Mr Jamieson as a trustee from 1 May 2000 and was involved in this capacity with Mr Kemps and Mr Hargrave until 20 April 2006 when they were replaced by Lambie Trustee Ltd as the sole trustee. As noted, Ms Jamieson is the sole director and shareholder of Lambie Trustee Ltd. If the assets settled on the Trust were beneficially owned by her having come from her compensation payment, one might have thought she too would have mentioned this to Mr Kemps at some stage before Mr Palmer came forward with the information in 2014.

[43] Fifthly, there is reason to doubt that the AUD 1 million compensation payment could have been the only source of the Trust’s assets given Mr Jamieson’s wishes, as recorded in Mr Kemps’ letter in May 2000. We explore this issue further below in the context of Mrs Addleman’s application to adduce further evidence. However, on the assumption that the payment of NZD 4.257 million to Mrs Addleman

represented 25 per cent of the Trust's assets, that suggests total assets exceeded NZD 17 million in November 2002. This does not take account of any distributions to Ms Jamieson over the 12-year period of the Trust to that point. Nor does it take account of the NZD 2 million Mr Jamieson wished to be set aside to provide income for Anthony and his children during their lifetimes, or the 40 per cent of the balance, up to NZD 10 million, to be set aside for charities. In terms of Mr Jamieson's wishes, Ms Jamieson's share was to be only 50 per cent of the balance remaining after these amounts were set aside. Mrs Addleman's and Meredith's distributions were to be half of that.

[44] Sixthly, the contention in the statement of defence that the distribution made to Mrs Addleman was final and by accepting it she relinquished all future beneficial rights is incorrect and indicates that the trustees have misapprehended their obligations. This may explain why they did not consider it appropriate to give Mrs Addleman a copy of the Trust Deed when she requested it. As now seems to be accepted, Mrs Addleman remains a discretionary beneficiary and a final beneficiary of the Trust. The distribution made to her did not change her status and her position cannot be disregarded as if she had been written out of the Trust Deed.

[45] Because Mrs Addleman has received no Trust documents showing the Trust's assets and how these have been administered, she has been at a considerable disadvantage in her ability to contest the respondent's claims that the Trust was funded exclusively from Ms Jamieson's compensation payment. No contemporaneous records or documents were produced to support this claim. Following the hearing in the High Court, Mrs Addleman's solicitors have been able to locate some official records that provide some assistance on the topic, including records held by Archives New Zealand and the Overseas Investment Office. We are prepared to receive these documents. While this evidence is not fresh, the records are plainly credible and cogent. Pieced together with the other evidence, the following picture emerges.

[46] Ms Jamieson received AUD 1,029,000 compensation in 1981. These were the only funds she had at that time. Apart from meeting her day-to-day living and care costs, Ms Jamieson used these funds to purchase a flat in Wimbledon for GBP 300,000

(AUD 472,000) in late 1981 and a house in the United States for USD 267,000 (AUD 296,000) in 1987. Ms Jamieson also made an unspecified loan to Mr Palmer after he got into financial difficulty in about 1986. According to Mr Palmer, the property development business operated through Howick Parklands Ltd was also funded by Ms Jamieson's compensation payment. There is reason to doubt this given that this purchase was made in late 1986 for NZD 4 million of which NZD 2 million was paid on settlement in cash.

[47] Records obtained from the archived files of the Overseas Investment Commission show that Chapman Tripp wrote to the Commission in July 1986 seeking approval on behalf of Recibo Shipping SA (Recibo) (a company incorporated in Panama in 1976) to purchase from a Mr Somerville a 42-hectare block of undeveloped land near Howick in Auckland. The purchase price was NZD 4 million, payable as to NZD 2 million in cash and NZD 2 million over two years (NZD 1 million payable in August 1987 and the balance in August 1988). The land was to be acquired for the purposes of carrying out a residential subdivision. It was anticipated that the proposed activity would result in NZD 4 million being introduced to cover the initial part of the purchase price and to fund the development. Chapman Tripp advised that Recibo was directed by Mr Jamieson, but day-to-day management and administration would be undertaken by his nephew, Mr Palmer.

[48] In a further letter dated 21 August 1986, Chapman Tripp attached a balance sheet for Recibo certified by Mr Jamieson as the corporation's attorney. This shows that as at 31 March 1986, Recibo had no liabilities and assets worth in excess of NZD 12 million comprising industrial property in Australia valued at AUD 3 million plus bank deposits in three denominations, AUD 900,000, DM 3,700,000 and USD 950,000. The Commission duly gave consent in September 1986 and settlement of the purchase occurred. Title to the land was initially taken in the name of Mr Palmer in November 1986 but transferred to Howick Parklands Ltd a year later, in November 1987. At that time, Mr Palmer held 99 of the 100 shares in Howick Parklands Ltd but, according to a letter from Chapman Tripp to the Commission in February 1987, the beneficial owner of Howick Parklands Ltd was Lake Real Estate SA, another company incorporated in Panama. As with Recibo, Lake Real Estate SA

was said to be controlled by one of Mr Jamieson’s family trusts. This cannot have been the Lambie Trust because it had not been established at this stage.

[49] These contemporaneous records are not readily reconcilable with the evidence Ms Jamieson and Mr Palmer gave in the High Court as to the source of the funding for the Howick development. Given the significant purchases made by Ms Jamieson following receipt of her compensation payment, it seems unlikely there would have been sufficient available to fund the purchase and development of the Howick land. Rather, it appears that Recibo had substantial funds on hand and would not have needed recourse to what remained of Ms Jamieson’s compensation payment for this purpose. There is no mention of Ms Jamieson being the true intending purchaser as the beneficial owner of Howick Parklands Ltd through Recibo, Lake Real Estate or otherwise.

#### *Confidentiality*

[50] The Judge found that Mr Jamieson was a “very private man” who “kept things close to his chest” and Ms Jamieson is also “a very private individual”.<sup>31</sup> The Judge observed that from inception the Trust has been operated with absolute confidentiality reflecting their wishes.<sup>32</sup> While acknowledging that a settlor’s desire for confidentiality would not ordinarily justify refusing to disclose basic information about the Trust, the Judge accepted that disclosure of the information sought by Mrs Addleman would result in disclosure of information personal and private to Ms Jamieson.<sup>33</sup> The Judge concluded that the “absolute confidentiality of the Trust” weighed against disclosure.<sup>34</sup>

[51] Trustees cannot escape their obligations to account to beneficiaries, including through disclosure of core trust documents, by asserting personal preferences for privacy and confidentiality. There is no confidentiality or other provision in the Trust Deed to justify such an approach.<sup>35</sup> It is also not clear to us why core Trust documents,

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<sup>31</sup> At [48].

<sup>32</sup> At [49].

<sup>33</sup> At [50].

<sup>34</sup> At [51].

<sup>35</sup> Compare *Erceg v Erceg*, above n 8, at [87].

such as the financial statements, minutes of trustee meetings and legal advice paid for by the Trust, would be likely to contain detailed information of a personal and private nature concerning Ms Jamieson such that disclosure would “lay her whole life bare” as the Judge accepted.<sup>36</sup> If these documents do contain information personal and private to Ms Jamieson, this should be able to be dealt with by appropriate redactions being made.

*Practical difficulty in providing the information*

[52] The Judge accepted Ms Jamieson’s evidence that the earliest available financial statements for the Trust are for the year ended 31 March 1999 and any order requiring disclosure of transactions involving Howick Parklands Ltd could not be complied with because that company was incorporated in 1986, subsequently liquidated, and removed from the Companies Register in 2009. This is not an impediment to the disclosure now sought, which must be limited to Trust documents within the power or control of the respondent.

*Whether the documents sought disclose reasons for trustees’ decisions*

[53] This issue has fallen away. Mrs Addleman accepts she is not entitled to this information.

*Likely impact of disclosure on trustee and other beneficiaries*

[54] The Judge was concerned about the prospect of Mrs Addleman pursuing a claim against the trustees if extensive disclosure of Trust documents was ordered:

[45] I regret to say that I have come to the conclusion that [Mrs Addleman’s] previous complaints and proceedings are an indication for me that if extensive disclosure of the Trust’s affairs was made to [Mrs Addleman] she would not rest but in all likelihood would undertake further litigation.

...

[57] [Mrs Addleman] threatened proceedings against their father’s estate and did in fact institute proceedings against their mother’s estate. Given that history there is a real danger that providing further information, however

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<sup>36</sup> High Court judgment, above n 1, at [58].



innocuous, may provide the basis for further litigation and associated disintegration of familial relationships.

[55] There is no suggestion that the proceedings Mrs Addleman brought against her mother's estate were improper or an abuse of the court's process. It should not count against Mrs Addleman that she has previously, on one occasion, sought access to the courts to vindicate her rights. The possibility that Mrs Addleman might pursue a claim against the trustees alleging a failure to discharge their duties cannot justify declining to order disclosure of any Trust documents to her, including the minimum necessary to enable her to assess with her legal advisors whether the Trust has been administered properly. Assuming the Trust has been administered properly, that should be the end of the matter. We see no reason for concern on the evidence that Mrs Addleman would be inclined to misuse the disclosure for the purposes of pursuing a meritless and vexatious claim against the trustees, contrary to responsible legal advice.

[56] The Judge was understandably concerned about the potential impact of further litigation on Ms Jamieson as a highly vulnerable person. Working from the premise that the Trust was "essentially her trust", for "her support and the vehicle for the investment of her accident funds" the Judge considered disclosure of documents in the first category sought, "finances and accounts" would "in effect lay [Ms Jamieson's] whole life bare". The Judge considered Ms Jamieson was "entitled to privacy in order to cope with the burden of quadriplegia and her everyday struggles".<sup>37</sup>

[57] As noted, there is no realistic prospect of independent scrutiny of whether the Trust has been administered properly unless the accounts are disclosed. In any event, to the extent that the documents contain confidential information of a personal nature concerning Ms Jamieson, these concerns can be addressed by appropriate redactions.

*Likely impact of disclosure on settlor and third parties*

[58] This was not a factor weighing against disclosure in the High Court. We consider it has no relevance to the present application.

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<sup>37</sup> At [33] and [58].

*Whether disclosure can be made while protecting confidentiality*

[59] We do not see why legitimate concerns about confidentiality, particularly private and confidential information personal to Ms Jamieson, cannot be addressed by appropriate redactions to the extent this information is set out in the accounts, minutes or legal advice. In our view, any such concern is more appropriately addressed in this way rather than by declining to make an order for disclosure of core Trust documents.

**Conclusion**

[60] For the reasons given, we consider the appeal should be allowed to the extent of the more narrowly confined disclosure now sought. In summary, Mrs Addleman falls into the category of a close beneficiary of the Trust. Unless disclosure of basic Trust documents including the accounts is made to her, there is effectively no one who can hold the trustees to account. Taking account of the further evidence available to us, we are far from persuaded that the Trust was funded solely from Ms Jamieson's compensation payment. Even if it was, the Trust cannot properly be regarded as a "sole purpose trust" or "essentially [Ms Jamieson's] trust". In our assessment, the course most consistent with the proper administration of the Trust and the interests of the beneficiaries overall is to order disclosure of these basic trust records.

**Result**

[61] The application to adduce further evidence is granted.

[62] The appeal is allowed.

[63] The judgment of the High Court is set aside.

[64] Within 30 working days of the date of this judgment, the respondent is to provide the appellant with all documents in its possession or power relating to the Lambie Trust in the following categories:

- (a) financial statements;
- (b) minutes of meetings; and

- (c) any legal opinions and other advice obtained by the trustees and funded by the Trust.

[65] Leave is reserved to apply to the High Court for further directions in the case of any disagreement as to any redaction made in the documents provided in accordance with these orders.

[66] To the extent any documents in these categories are no longer available, the respondent is to serve on the appellant within the same 30-day period an affidavit from a person having the relevant knowledge explaining what efforts have been made to locate the missing documents and what is thought to have become of them and when.

[67] The respondent is to pay the appellant's costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:  
Belly Gully, Auckland for Appellant  
Kemps Weir Lawyers, Auckland for Respondent