IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002352
[2015] NZHC 594

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

Hearing:	5 December 2014
Appearances:	C M Meechan QC and R B Hucker for Plaintiff G M Coumbe QC and F C Monteiro for First and Second Defendants
Judgment:	27 March 2015

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 27 March 2015 at 4.30 pm and re-issued on 5 May 2015
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date…….

Introduction

[1] Under s 101 of the Insolvency Act 2006 all of a bankrupt's property vests absolutely in the Official Assignee upon the bankruptcy. The main issue in this case is whether the right of a discretionary beneficiary to seek disclosure of trust documents constitutes property for the purposes of s 101.

[2] The plaintiff, Ivan Erceg, is a discharged bankrupt.[1] Prior to his bankruptcy in 2010 he was both a discretionary and final beneficiary of the Acorn Foundation Trust and the Independent Group Trust. These trusts were settled by Mr Erceg's late brother, Michael Erceg, in 2002 and 2004 respectively. The trusts were wound up in December 2010 without any distribution being made to Mr Erceg. In this proceeding Mr Erceg asserts that, as a beneficiary, he is entitled to seek disclosure of documents relating to the administration of the trusts. He is seeking an order requiring the former trustees to provide a variety of documents relating to the trusts and has applied for summary judgment.[2]

[3] The first defendants were the trustees of the Acorn Foundation Trust and the second defendants the trustees of the Independent Group Trust. They argue that any right Mr Erceg had to seek disclosure of trust documents constituted property for the purposes of s 101 and vested in the Official Assignee upon bankruptcy; as a result Mr Erceg does not have standing to bring this proceeding. Alternatively, they say that if Mr Erceg is entitled to bring the proceeding I should exercise my discretion against ordering disclosure. They oppose the summary judgment application and have applied for summary judgment against Mr Erceg or, alternatively, an order striking out his statement of claim.

Jurisdiction

[4] The plaintiff's summary judgment application falls within r 12.2(1) of the High Court Rules under which the Court may grant summary judgment if satisfied that the defendant has no defence to a cause of action or a particular part of any cause of action. The concept of "no defence" was described in *Pemberton v*

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1 Mr Erceg was discharged from bankruptcy in 2014.

2 The plaintiff also sought a declaration that he is a beneficiary of the trusts but the defendants do not dispute that fact so there is no need for a declaration.

Chappell as being the "absence of any real question to be tried", or as "no bona fide defence, no reasonable ground of defence, no fairly arguable defence".[3]

[5] The defendants' summary judgment application falls within r 12.2(2) which permits summary judgment against a plaintiff if the Court is satisfied that none of the causes of action in the statement of claim can succeed. This rule operates where a defendant has a clear answer to the plaintiff's claim that cannot be contradicted.[4]

[6] The defendants' strike-out application falls within r 15.1 under which the Court may strike out a pleading if it discloses no reasonably arguable cause of action. This is a jurisdiction to be exercised sparingly and in clear cases, on the basis that pleaded facts are assumed to be true and where the cause of action is so clearly untenable that it cannot succeed.[5] The Court should be slow to strike out a claim in a developing area of the law.[6]

Application to adduce further evidence

[7] On the morning of the hearing both parties sought to adduce further affidavit evidence. I allowed two of the affidavits to be read. These were an affidavit by Daniel Francis Ayers affirmed on 4 December 2014 and a second affidavit of Darryl Edward Gregory sworn on 4 December 2014. There was no objection to either of these affidavits.

[8] There was, however, objection by the defendants to Mr Erceg's application for leave to file a further affidavit by him sworn on 2 December 2014. The affidavit was well out of time. Ms Meechan QC, for Mr Erceg, explained that the plaintiff lives overseas and there were inevitable delays obtaining a sworn affidavit. She described the affidavit as addressing the settlor's intentions and responding to Leanne Erceg's affidavit. Ms Meechan acknowledged that the affidavit was not determinative of any issue in the case but submitted that it provided important context, particularly in relation to the nature of the relationship between the plaintiff and Michael Erceg.

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3 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at p185.
4 *Westpac Banking Corp v MM Kembla NZ Ltd* [2001] 2 NZLR 298 (CA).
5 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 269, affirmed in *Couch v Attorney-General* [2010] 3 NZLR 149 (SC) at [33].
6 *Couch v Attorney-General* [2010] 3 NZLR 149 (SC) at [33].

[9] There was opposition to the filing of the affidavit, not only because it was significantly out of time and had been provided to the defendants only the day before the hearing, but also because it contained what Ms Coumbe QC, for the defendants, described as prejudicial material, including a suggestion that Michael Erceg had made a specific promise to provide further financial support to the plaintiff.

[10] Having reviewed the affidavit I concluded that a good deal of it was in the nature of submission rather than evidence and that some of the evidence it did contain was prejudicial, both because there was no time for the defendants to respond and because of its inherent nature. I therefore declined leave to file the affidavit.

The meaning of "property" under the Insolvency Act 2006

[11] Whether Mr Erceg has standing in this proceeding depends on whether his interests under the trusts constitute property for the purposes of s 101 of the Insolvency Act 2006. "Property" is defined broadly in the Insolvency Act and includes both property of all kinds and rights, claims and interests in relation to property:[7]

> **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.

[12] In *Official Assignee v Trustees Executors Ltd* Ronald Young J considered the differences between the definitions in the Insolvency Act 1967 and the Insolvency Act 2006.[8] The issue in *Trustees Executors* was whether a bankrupt's KiwiSaver account was property for the purposes of s 101. The defendant was the trustee of two bankrupts' KiwiSaver accounts. It argued that the definition of property in the 2006 Act was narrower than in the 1967 Act.

[13] Ronald Young J referred to *Official Assignee v NZI Life Superannuation Nominees Ltd*, decided under the 1967 Act, which (unlike the 2006 Act) included "any valuable thing" in the definition of property.[9] Blanchard J had concluded that the interest of a member in a superannuation fund was a "valuable thing" under that

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7 Insolvency Act 2006, s 3.
8 *Official Assignee v Trustees Executors Ltd* [2014] NZHC 345.
9 *Official Assignee v NZI Superannuation Life Nominees Ltd* [1995] 1 NZLR 684 (HC).

definition so that a member's rights under the scheme could be viewed as a contingent interest arising out of that valuable thing; the rights therefore vested in the Official Assignee upon bankruptcy. The *Trustees Executors* defendants sought to distinguish *NZI Life Superannuation Nominees Ltd* on the basis that because the 2006 definition did not include any reference to a "valuable thing" it was therefore narrower than the definition in the 1967 Act.

[14] Ronald Young J did not accept that there was any change in the reach of the two definitions and saw the differences as attributable to drafting styles. Noting that the Insolvency Act 2006 is designed to ensure that creditors are entitled to the maximum return from a bankrupt's estate so that all assets of the bankrupt can be used to pay the highest possible percentage of their debts before discharge, the Judge concluded:[10]

> The 2006 definition relies upon the phrase that "property" means "property of every kind". The rest of the 2006 definition retains that broad flavour. In contrast with the 1967 definition, the 2006 definition does not specifically mention "things in action" as property. Yet there can be no doubt that "things in action" come within the 2006 definition of "property of every kind". Finally, as the Assignee pointed out in its submissions, if Parliament had intended to significantly change the definition of property (a matter of considerable importance in the Insolvency Act 2006) then some comment in the Parliamentary debate would be expected. There was no such comment noted in the debates.

[15] I agree with the decision in *Trustees Executors* and approach the present case on the basis that there is no material difference between the current provision and its predecessor. The definition of property is very wide and clearly intended to have the broadest reach possible, capturing all interests in and rights broadly connected with property.

Mr Erceg's interest as a final beneficiary is property for the purposes of s 101

[16] Ms Coumbe advised that both trust deeds provided that on the vesting date the trust funds were to be held for "such of the Final Beneficiaries then living, and if more than one, as tenants in common in equal shares".[11]

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[10] At [38].

[11] Ms Coumbes' memo of 8 December 2014; there was no request by the defendants that I inspect the deeds myself.

[17] Mr Erceg's interest as a final beneficiary was a future (albeit contingent) equitable proprietary interest in the trusts' assets. The nature of such an interest was confirmed by the Court of Appeal in *Johns v Johns*.[12]

[18] The relevant part of the trust deed in *Johns v Johns* was similar to the trust deeds in this case; it directed the trustees to hold the residue of the trust fund as at the date of distribution upon trust for the settlors' children equally, with substitutional grandchildren in the case of any child who did not survive to the date of distribution. The issue was whether the interest of a final (described as residual) beneficiary was a future interest for the purposes of the proviso in s 21(2) of the Limitation Act 1950. The Court said:[13]

> *The first question is whether the plaintiff's residual interest amounts to a future interest in the trust property. The answer to that must be in the affirmative. The plaintiff has an interest in the trust property. The fact that it is contingent on survival to the date of distribution and that there being trust property available for distribution at that time does not prevent it from being an interest*: see *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 …
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> …
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> In general terms future interests, that is, those which have not yet fallen into possession, can be of three kinds: (1) interests which are indefeasibly vested but of which possession is postponed to let in an intermediate interest; (2) interests which are vested subject to divesting in favour of a substituted interest; and (3) interests which are contingent.[14]
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> …
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> A contingent interest is one in respect of which both vesting and possession depend upon whether the contingency is or is not fulfilled. The element of futurity is implicit in the contingency. It would be highly anomalous if the question whether such an interest as this was or was not a future interest … depended upon whether the contingency was fulfilled. If that were the case no one would know whether the interest qualified as a future interest until it was known whether the contingency had been fulfilled.
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> …
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> *The crucial difference between contingent and vested interests on the one hand and discretionary interests on the other is that possession of the former interests, if enjoyed at all, is enjoyed as of right; whereas discretionary interests are never enjoyed as of right; their enjoyment is always subject to the discretion of the trustees.*
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> (emphasis added)

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12 *Johns v Johns* [2004] 3 NZLR 202.
13 At [45], [46], [47] and [49].
14 At [46].

[19] Ms Meechan sought to distinguish *Johns v Johns* from the present case on the basis that it concerned a defined contingent interest that existed as of right and, further, that the beneficiary could compel vesting. I do not accept that argument. Mr Erceg's interest as a final beneficiary was the same as the residual interest considered in *Johns v Johns*.

[20] It must follow that Mr Erceg's interest as a final beneficiary was property for the purposes of s 101. It vested in the Official Assignee upon Mr Erceg's bankruptcy and did not re-vest upon his discharge from bankruptcy. As a result Mr Erceg does not have standing to bring this proceeding in his capacity as a final beneficiary.

[21] Ms Meechan argued that even if Mr Erceg's interest as a final beneficiary was property for the purposes of s 101 he nevertheless had standing by virtue of his discrete interest as a discretionary beneficiary. Ms Coumbe resisted that analysis but I agree that Mr Erceg is entitled to have his interest as a discretionary beneficiary considered independently. I turn to that question next.

A discretionary beneficiary's right to seek information about a trust is property for the purposes of s 101

[22] A discretionary beneficiary does not have a defined or vested interest in the trust property but rather "an expectation or hope" that the trustee will exercise his or her discretion in the beneficiary's favour.[15] It was not suggested that this mere expectancy could constitute property for the purposes of s 101. However, although a discretionary beneficiary has no proprietary interest in the trust assets, he or she does have certain rights associated with that status. These are the equitable rights against the trustees to enforce the due administration of the trust and to be considered for a distribution. They are assured by the right to seek both information and, if necessary, the assistance of the Court through its inherent jurisdiction to supervise trusts.

[23] Before the Privy Council's decision in *Schmidt v Rosewood Trust Ltd,*[16] the right of a beneficiary to seek disclosure of trust documents was viewed as an aspect of the beneficiary's proprietary interest in the trust property. On this view of the right there was a distinction between a beneficiary with a vested interest and a

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15 *Hunt v Muollo* [2003] 2 NZLR 322 (CA) at [11].

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

discretionary beneficiary. Only the former had the requisite proprietary interest in the trust assets to have the concomitant right to access trust documents. In *Schmidt* the Privy Council rejected that distinction and (approving the approach taken on this point by Kirby P and Sheller JA in *Hartigan Nominees Pty Ltd v Rydge*[17]) concluded that:[18]

> …[t]he more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in the administration of trusts.

[24] In New Zealand this approach was followed by Potter J in *Foreman v Kingstone*,[19] Asher J in *Re Maguire (deceased)*[20] and Venning J in *Erceg v Erceg*.[21] I proceed on the basis that it is established that a discretionary beneficiary has a right to seek disclosure even though he or she has no proprietary interest.

[25] Ms Meechan argued that because Mr Erceg's interest as a discretionary beneficiary was not property for the purposes of s 101, nor was his right to seek disclosure of the trust documents. She pointed out that the exercise of such rights could neither add to nor decrease the assets of the bankrupt discretionary beneficiary's estate and submitted that the right to seek disclosure did not translate to any interest in property and therefore did not amount to a "right … in relation to property" for the purposes of the definition of property in the Insolvency Act.

[26] I consider that the right of a discretionary beneficiary to seek disclosure of documents relating to the administration of the trust is a right in relation to property because it is a right that is broadly connected with property. A trust does not exist without a trust fund or property, subject matter being one of the three essentials for a valid trust. If there is no fund or property there is no trust. The proper administration of a trust necessarily involves the management of the trust property. Self-evidently, a trustee's obligation to account to beneficiaries can only exist by reference to the trust property.

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17 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA).
18 At [51].
19 *Foreman v Kingstone* [2004] 1 NZLR 841 (HC).
20 *Re Maguire (deceased)* [2010] 2 NZLR 845 (HC).
21 *Erceg v Erceg* [2014] NZHC 155.

[27] Ms Meechan argued that the right to seek disclosure could not benefit the Official Assignee, suggesting that there would, therefore, be no purpose in including it as property for the purposes of s 101. That is too narrow an approach for two reasons. First, the right to seek trust documents would provide the Official Assignee with the means of investigating the status of a trust suspected of being a sham. Secondly, when viewed in conjunction with the right to be considered for a distribution, it could, theoretically, benefit the Official Assignee because it is possible that trustees would make a distribution to the bankrupt (albeit unlikely because only the bankrupt's creditors would benefit).

[28] For these reasons I conclude that a "right … in relation to property" includes the right of any beneficiary to seek disclosure of trust documents. That means that Mr Erceg's right to seek disclosure vested in the Official Assignee upon his bankruptcy and did not re-vest upon his discharge from bankruptcy.[22]

Has the Official Assignee abandoned the right to seek disclosure?

[29] Ms Meechan submitted that, even if Mr Erceg's right to seek disclosure did vest in the Official Assignee upon bankruptcy, the principle of abandonment applied. She said that the Official Assignee had taken no steps to exercise the right during the administration of the bankruptcy, and that correspondence in evidence showed that he did not intend to do so. This submission assumed that the right, having been abandoned, still exists and is available for Mr Erceg to reclaim. Ms Coumbe did not accept that the principle of abandonment applied in this statutory context, and submitted that, in any event, the Official Assignee had not evinced any intention to abandon rights vested in him.

[30] At common law abandonment is a recognised mode of losing title to property.[23] However it is not clear whether it applies in the context of insolvency given that it would have to sit alongside the constrained disclaimer provisions of the Insolvency Act.[24] Moreover, in this case what would be abandoned is a right, rather than physical property, and it has been suggested that in such cases the effect of

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22 It was not suggested that I hear from the Official Assignee regarding this issue but it is a matter on which the Official Assignee might wish to be heard in the event that Mr Erceg appeals my decision on this point.

23 *Edmonds Judd v Official Assignee* [2000] 2 NZLR 135 (CA) at [23].

24 *Edmonds Judd* at [22]; see also *De Alwis v Luvit Foods International* HC Auckland CIV-2002-404-1944, 24 March 2010 at [33]-[39].

abandonment is not to leave the right available for the bankrupt to reclaim but to relinquish or surrender the right of action, which thereafter has no further existence.[25]

[31] It is not necessary to decide these questions at present because even if the principle of abandonment applied in this context I am not satisfied that the Official Assignee had evinced an intention to abandon the right and sufficiently manifested that intention.[26] The Official Assignee's statement that as the right in issue is the right of a discretionary beneficiary, it "cannot force [the trustee to make] a payment and would appear to have no claim to pursue", does not, in my view, amount to abandoning the right.[27]

[32] It follows from these conclusions that Mr Erceg does not have standing to bring this proceeding. However, in case I am wrong on this point I go on to consider how I would have exercised the discretion had my decision been different.

The Court's discretion to order disclosure

The nature of the discretion

[33] Whilst the right of a discretionary beneficiary to seek disclosure of trust documents and information about the trust is now settled in New Zealand, the position is less clear in terms of the discretion of the trustees to give, or the Court to order, disclosure. In particular, there have been conflicting statements regarding the extent to which the settlor's requirement or wish for confidentiality is to be taken into account.

[34] I start by noting that, in approving the approach taken by Kirby P and Sheller JA in *Hartigan Nominees Pty Ltd v Rydge*[28] as to the nature of the discretionary beneficiary's right to seek disclosure, the Privy Council in *Schmidt* did not go further and adopt Kirby P's minority view regarding the exercise of the Court's discretion to require disclosure of information and documents where the settlor has imposed a

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25 *Edmonds Judd* at [26].

26 See *Re Mayall, ex parte Galbraith* [1936] NZLR 270; *Re Butler-Harrison* [1959] NZLR 427 (SC).

27 Email from Helen Langley to Ivan Erceg concerning the administration of his bankruptcy (24 November 2011).

28 *Hartigan Nominees Pty Ltd v Rydge*, above n 17.

requirement or expressed a desire for confidentiality. Kirby P considered that a confidential memorandum of the settlor's wishes should be disclosed, in part because that would be consistent with the "generally greater level of accountability" in Australian society, reflected in both public and private law, than in England.[29] The majority, Mahoney JA and Sheller JA, took a very different view, considering that the English law expressed in *Re Londonderry's Settlement* also applied in Australia.[30]

[35] *Re Londonderry's Settlement* held that the trustees of a discretionary trust exercise a confidential role and that any claim by a beneficiary must be carefully considered in light of that. This approach was summarised by Danckwerts LJ: [31]

> It seems to me that where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner. Of course, if a case is made of lack of bona fides, that is an entirely different matter. In that case I agree it becomes necessary to examine exactly what has happened because that is in an action and not in a theoretical application for directions, as the present case appears to me to be. It appears to me that the documents are confidential and the trustees' duty would become impossible and the execution of the trust would become impossible if the trustees were bound to disclose to any beneficiary any information or other matters in regard to beneficiaries that they have received.
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> For these reasons, therefore, it seems to me there must be a very restricted application of the observation that beneficiaries are entitled to see all trust documents. The matter must be one which is subject to special circumstances and the right to disclosure cannot apply to all trust documents.

[36] In *Hartigan* Mahoney JA said:[32]

> In deciding questions of disclosure, it is important in my opinion to have regard to the essential nature of such discretionary trusts. Such a trust is not a mere commercial document in which the public may have an interest. It is a private transaction, a disposition by the settlor of his own property, ordinarily voluntarily, in the manner which he is entitled to choose. Special cases apart, it is proper that his wishes and his privacy be respected.
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> In a discretionary trust of this kind, the settlor has placed confidence in his trustee and has on that basis transferred property to him. It has, I think, been the purpose of the law to respect that trust. It depends upon confidence and confidentiality. The settlor seeks to have the trustee resolve, without

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29 At p421.
30 *Re Londonderry's Settlement* [1965] CH 918 (CA).
31 *Re Londonderry's Settlement* at 935-936.
32 At 436.

> unnecessary abrasion, the conflicting claims of persons in an area, the family, where disputes are apt to be bruising. In cases of this kind, if a settlor's wishes cannot be dealt with in confidence, the purpose of the trust may be defeated.
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> It has been the practice of the Chancery Courts to protect trustees from interference in the administration of such trusts. Thus, there is, it has been said, a general right of a beneficiary to have trusts administered by or under the supervision of the court. But rules have been evolved to ensure that, unless there be cause, there will be no interference with the administration of the trust by the trustee. As a matter of principle, the discretion of the trustee has been respected by the courts. It is not necessary to pursue the detail of the established law in relation to proceedings for the administration of trusts.

[37] Similarly, Sheller JA, having referred with agreement to *Re Londonderry's Settlement*, observed that:[33]

> By constituting a trust as a discretionary trust a settlor reposes in the trustee a duty in exercising the discretion to take account of matters which may be sensitive and personal, matters which it is likely neither settlor nor trustee nor a beneficiary would wish to be disclosed. A requirement of disclosure of such matters may confine or undermine the proper exercise of the discretion reposed in the trustee. It is, I think, sensible, in the context of a trust and absent bad faith, that the law allow discretionary powers to be exercised without the need for disclosure by trustees of their reasons. The principle was challenged in argument before us. It is, however, in my opinion, far too well settled as part of the law of trust for us not to accept and apply it.

[38] That the Privy Council in *Schmidt* shared these views (rather than those of Kirby P) is evident from the following comments on the exercise of the Court's discretion to require disclosure:[34]

> Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

And later:[35]

> Since *In Re Cowin* 33 Ch D 179 well over a century ago the court has made clear that there may be circumstances (especially of confidentiality) in which even a vested and transmissible beneficial interest is not a sufficient basis for

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33 At p442.
34 At [67].
35 At [54].

> requiring disclosure of trust documents; and *In Re Londonderry's Settlement* and more recent cases have begun to work out in some detail the way in which the court should exercise its discretion in such cases. There are three such areas in which the court may have to form a discretionary judgment: whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court.

[39] I refer, finally, to Briggs J analysis in *Breakspear v Ackland*,[36] which contains a thoughtful discussion about the rationale for the *Londonderry* principle:[37]

> At the heart of the *Londonderry* principle is the unanimous conclusion (most clearly expressed by Danckwerts LJ) that it is in the interest of beneficiaries of family discretionary trusts, and advantageous to the due administration of such trusts, that the exercise by trustees of their dispositive discretionary powers be regarded, from start to finish, as an essentially confidential process. It is in the interests of the beneficiaries because it enables the trustees to make discreet but thorough inquiries as to their competing claims for consideration for benefit without fear or risk that those inquiries will come to the beneficiaries' knowledge. They may include, for example, inquiries as to the existence of some life-threatening illness of which it is appropriate that the beneficiary in question be kept ignorant. Such confidentiality serves the due administration of family trusts both because it tends to reduce the scope for litigation about the rationality of the exercise by trustees of their discretions, and because it is likely to encourage suitable trustees to accept office, undeterred by a perception that their discretionary deliberations will be subjected to scrutiny by disappointed or hostile beneficiaries, and to potentially expensive litigation in the courts.
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> I recognise the force of the contrary proposition, best enunciated by the editors of Underhill & Hayton, that the conferral of a general confidentiality upon the exercise by trustees of their discretionary powers may in particular cases reduce the practical extent to which they can be held to account. Trustees undoubtedly are accountable for the exercise of those powers, but it seems to me quite wrong to suppose that the courts have been mindless of the existence of that core principle of accountability, during the period of more than 150 years when the law has been that it is better for confidentiality to be afforded. While Kirby P and those who sympathise with his views may be right in recognising that, in society generally, the principle of fiduciary accountability has gained ground in recent years, it seems to me that this is better described as a process whereby the strict principles whereby a trustee has always been accountable has spread to other areas of society, where the concept of fiduciary obligations by those who hold property or exercise power or authority on behalf of others, or over their affairs, has come to be more generally recognised.

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36 *Breakspear v Ackland* (2008) EWHC 220; [2008] 3 WLR 698 (Ch).

37 At [54]–[56].

> Nor can I see any persuasive basis for thinking that the reasoning which led the English courts to think it appropriate in the interests of beneficiaries, and in the administration of trusts, to confer confidentiality on the exercise by family trustees of their discretionary dispositive powers has ceased to hold good.

[40] These issues were considered in both *Foreman* and *Maguire*. In *Foreman*, Potter J was concerned with applications by discretionary beneficiaries for disclosure of extensive information relating to the administration of the trusts. Having referred to the decisions in *Re Londonderry's Settlement* and *Schmidt* on this point, Potter J said:[38]

> Approached as a matter of principle, the entitlement of beneficiaries to disclosure of trust documents pursuant to the trustees' fundamental obligation 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. Hence, trustees are not obliged to disclose to beneficiaries their *reasons* for exercising their discretionary power (*Re Londonderry's Settlement*).
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> (emphasis in original)

[41] However, later in her judgment Potter J made observations that suggested that the importance of confidentiality should, in the usual course, yield to the interests of the beneficiary:[39]

> But when a trust is established, obligations and co-relative rights are created. Otherwise there is no trust. 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 …
>
> 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 to have the trustees account for their management. They are entitled to receive trust accounts …
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> 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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> Beneficiaries are not entitled to the reasons for the exercise by the trustees of their discretions. They are obligated to respect the autonomy of the trustees pursuant to broad discretions vested in them by the trust deed.

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38 At [89].

39 At [93], [97], [98] and [99].

[42] In *Re Maguire,* Asher J, although concerned with the basis on which disclosure may be sought by beneficiaries with a vested interest (being residuary beneficiaries in an unadministered will trust), added observations about the position of discretionary beneficiaries, taking a similar view to Potter J. Noting the divergent views in Australia on the applicability of *Schmidt*, the Judge observed that:[40]

> While it is possible to conceptualise the discretionary beneficiary's rights in terms of a limited or contingent interest resting on their chose in action against the trustees, *the preferable approach is to consider the beneficiary's rights to access trust documents as arising from a trustee's duty to account for its actions to the beneficiaries and adhere to the terms of the trust. As part of that duty to account, the trustee must on a reasonable request, disclose trust documents to a vested or discretionary beneficiary, unless there are good reasons not to do so.* On this basis the accounts of a trust would generally be disclosed on the direct request as would documents relating to the assets of the trust and the trustee's actions in relation to those assets. However, a confidential memorandum of wishes might not be disclosed if an intention on the part of the settlor that they not be disclosed may be discerned, or viewed objectively, such disclosure may not be in the interests of the beneficiaries as a whole.

[43] *Foreman* and *Maguire* suggest a default position in favour of disclosure. However, in *Erceg v Erceg* Venning J considered that it overstated the case to suggest that there need to be exceptional circumstances to outweigh a beneficiary's "right" to be informed; that case concerned an application by Mrs Millie Erceg (the mother of plaintiff in this case) for access to trust documents of the Acorn Foundation Trust. She also sought to have any order allowing her access extend to Mr Erceg. The latter aspect of the application was declined. Venning J considered that the matter was to be considered in the context of the application, the disclosures sought and the relevant obligations in issue, noting that where there were issues of personal confidentiality disclosure may properly be limited.

[44] The approach taken in *Foreman* and *Re Maguire* does not seem to me to reflect either the majority approach in *Hartigan* or the effect of *Schmidt*. I agree with the approach taken by Briggs J in *Breakspear* that:[41]

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

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40 At [30].
41 At 721.

> trustees and the court have a range of alternative responses, not limited to the black and white question of disclosure or non-disclosure.

[45] I consider that, although a beneficiary (vested or discretionary) is entitled to seek disclosure of information about a trust, the trustee's decision whether to make disclosure involves consideration of all the relevant circumstances, including the nature of any confidence assumed by the trustee in accepting that role. Likewise, in an application of the present kind, the Court 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.

Disclosure in this case

[46] In *Foreman* Potter J took from *Schmidt* a number of factors that might properly be taken into account by the Court in exercising its discretion. I agree that these factors are relevant. In most cases they are likely to represent the full range of factors that will need to be considered. They are:[42]

> (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, e.g. undertakings, professional inspection etc to limit any use of the documentation beyond that which is legitimate;
>
> (f) Whether (in the case of a family trust) disclosure would be like to embitter family feelings and the relationship between the trustees and the beneficiaries to the detriment of the beneficiaries as a whole.

[47] The basis for Mr Erceg's application for an order requiring disclosure is set out in the affidavit he filed in support of his summary judgment application. The main features of that affidavit are assertions that Michael Erceg told him that he (Ivan Erceg), along with other family members, were beneficiaries of the trusts and that there was substantial value in the trusts. He relied on an email that he claimed

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42 *Foreman* at [90].

Michael had sent him on 5 October 2005 to support his claim about these discussions with Michael. The email says:

> You should not be concerned. Transfer of Independent Liquor shares to the trust were at a valuation of less than $500 million. The family is secure.

[48] Mr Erceg also claimed that in 2005 he and Michael had discussions about transferring the shares of SY24 Ltd to the Acorn Foundation Trust and then on to him. He produced a draft agreement as to the sale of the shares to the Acorn Foundation Trust. There was, however, no other document indicating what Michael Erceg intended the trust to do with those shares.

[49] Mr Erceg also produced correspondence between his solicitors and the trustees' solicitors regarding disclosure. However, apart from the statements that "concerns have been expressed in the past as to the administration of the trusts" and "no provision has been made for our clients from trust assets", neither the correspondence nor Mr Erceg's affidavit identified any specific concern regarding the conduct of the trustees. Mr Erceg's main complaint seems to be simply that he has not received any distribution from the trust assets.

[50] The defendants advanced a number of factors that they say count against the exercise of any discretion to allow Mr Erceg access to trust documents. Most of these were canvassed in the previous litigation between the defendants and Mrs Millie Erceg. The evidence relied on in this proceeding includes Lynette Erceg's affidavit of 30 October 2013 filed in that earlier proceeding.

[51] Lynette Erceg rejected Ivan Erceg's claim that Michael Erceg had ever made statements to his family (apart from Lynette) about the trust. She emphasised Michael Erceg's desire for privacy and confidentiality regarding the trusts he had established; that desire for confidentiality was to be viewed against the long history of tension and disharmony within the Erceg family. In her affidavit Lynette Erceg said:

> Michael talked about these problems [the family disharmony] and I recall that one of the reasons why he did not want anyone to know about the trust was that he didn't want to have to engage with his family about this or his wealth …

> If disclosure to anyone were to be directed by the Court, in my opinion, disclosure to Ivan would be most unwise. Ivan is a divisive figure in the family and disclosure of documents to him would increase the risk of family disruption. Michael said that he did not want Ivan anywhere near his, my or the trust's affairs. He made it clear to me that Michael's mistrust and concern over Ivan was one of the main reasons for the inclusion of the confidentiality clause in the deed.

[52] The confidentiality clause to which Lynette Erceg was referring was a clause in the Acorn Foundation Trust deed empowering the trustees to refuse to disclose to any person the deed itself or any document or information relating to the trust, the trust property, the beneficiaries or any document recording the deliberations of the trustees or the reasons for the exercise of any discretion. Lynette Erceg also described a similar clause in the Independent Group trust deed empowering the trustees to refuse to disclose information in relation to trust assets.

[53] Mr Gregory, the other trustee of the Acorn Foundation Trust and Independent Group Trust, also commented on Michael Erceg's desire for confidentiality regarding the trust's affairs:

> While advising Michael on the formation of the Acorn Foundation Trust I warned Michael of the possibility of having to disclose to a beneficiary the financial position of the Trust or even information pertaining to Independent Liquor. Michael was very concerned by this and his solution was to suggest the inclusion of a confidentiality clause in the Acorn Foundation Trust deed.

[54] The defendants do not accept that the 5 October 2005 email is genuine. Not only is it contrary to Michael Erceg's explicit wish for confidentiality, but it has never been located among his emails, even after a search by computer forensic consultant Brent Whale. In describing his search of Michael Erceg's laptop Mr Whale noted that other emails of the same date were found but not the email in question. Mr Whale expressed the view that the appearance of the email message was inconsistent with a genuine forwarded email. In addition, it is significant that, despite requests, Mr Erceg has never provided the email and the chain in which it would have appeared in their native format. Mr Whale expresses real doubts about the authenticity of the email.

[55] Lynette Erceg also points out that in an email to her in 2007 Mr Erceg expressly confirmed that until only "a short time ago" no family member was even aware of the Acorn Foundation Trust's shareholding in Independent Liquor.

[56] There is distinct unease about the ramifications for family relations of Mr Erceg having access to the trust documents and the potential impact on the trustees. The category of documents being sought would disclose the identities of other discretionary beneficiaries and the nature of distributions made. **[This sentence is redacted and will be omitted from all copies of this decision, other than the original on the Court file and the copy delivered to counsel].**

[57] In the earlier affidavit Lynette Erceg produced emails sent to her by Mr Erceg to her which do contain material tending to support her assertions. The high point is probably an email sent by Mr Erceg in May 2009 threatening to discuss family matters with the media and commenting that "when my story has been told, the need to continue life's journey will no longer be required. The blood and death that will follow will stain both Darryl and Lyn. The costs will be greater than can be imagined at this time."

[58] Mr Erceg did not seek to address these criticisms nor provide an electronic copy of the 2005 email prior to the hearing. Ms Meechan submitted that the evidence regarding the email was insufficient to support a finding that it was a forgery and that, even leaving the email aside, there is sufficient evidence to find that the objectives of the trusts were to provide for the wider Erceg family, including the plaintiff, which is a point in favour of disclosure.

[59] For present purposes I agree that it is unnecessary to conclude that the email is a forgery. It is, however, clear from the weight of evidence that Michael Erceg intended that the trusts he settled would be administered by the trustees in confidence and that he did not intend and did not want members of his family who might benefit under the terms of the trusts to have information regarding that. This is a matter of considerable significance in the exercise of the discretion.

[60] Further, Mr Erceg was bankrupt when the trusts were wound up. Although entitled to be considered for a distribution, any such distribution would have vested in the Official Assignee. In addition, Mr Erceg had previously received substantial benefits from Michael Erceg's estate, was able-bodied and had no dependents. In

these circumstances the prospects of any distribution being made to him were remote.

[61] Moreover, apart from non-specific complaints about the administration of the trusts nothing has been advanced that would arouse concern such as to justify this Court intervening. It is relevant that the recent disclosure made to Millie Erceg has not resulted in any allegations of impropriety, giving reasonable assurance that intervention by the Court is not necessary.

[62] In these circumstances, had I concluded that Mr Erceg had standing to bring these proceedings I would nevertheless have exercised my discretion against requiring the trustees to provide the documents sought.

Result

[63] I have concluded that Mr Erceg's right to seek disclosure of trust documents constitutes property for the purposes of s 101. That right vested in the Official Assignee upon Mr Erceg's bankruptcy and still vests in the Official Assignee. As a result Mr Erceg does not have standing to bring these proceedings. But even if Mr Erceg had standing I would have exercised my discretion against requiring disclosure.

[64] Therefore:

(a) Mr Erceg's application for summary judgment is dismissed;

(b) The defendants' application for summary judgment is allowed and judgment entered in the defendants' favour. That renders the application to strike out unnecessary and I therefore dismiss that application.

[65] Counsel may address the issue of costs by memoranda filed by the defendants within seven days, by Mr Erceg within 14 days and by the defendants in reply within 21 days.

[66] At the hearing of this matter I made order to preserve the confidentiality of information provided for the purposes of the hearing. Two of these orders will continue in force:

(a) No person other than the parties may access the Court file without the leave of a Judge;

(b) There is to be no publication of the oral argument before me other than the fact of the applications.

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P Courtney J