ORDER THAT NO PERSON OTHER THAN THE PARTIES CAN ACCESS THE COURT FILE WITHOUT THE LEAVE OF A JUDGE.

ORDER PROHIBITING PUBLICATION OF FACTS RELATING TO SETTLEMENT OF FUNDS ON THE ERCEG FAMILY TRUST REFERRED TO AT THE HEARING.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA217/2015
[2016] NZCA 7

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

Hearing:	17 September 2015
Court:	Ellen France P, Wild and Miller JJ
Counsel:	C R Carruthers QC and R B Hucker for Appellant G M Coumbe QC and F C Monteiro for First and Second Respondents
Judgment:	4 February 2016 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondents' costs for a standard appeal on a band A basis with usual disbursements.

C Order that no person other than the parties can access the Court file without the leave of a Judge.

D Order prohibiting publication of facts relating to settlement of funds on the Erceg Family Trust referred to at the hearing.

REASONS OF THE COURT

(Given by Wild J)

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Introduction

[1] This appeal, from a judgment of Courtney J delivered in the High Court at Auckland on 27 March 2015,[1] raises three questions:

(a) *Standing*: Did the Judge err in holding that the appellant had no standing to seek disclosure of information relating to the two trusts of which he was a beneficiary, and that the respondent trustees therefore had no duty to disclose the information requested?

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[1] *Erceg v Erceg* [2015] NZHC 594 [decision under appeal].

(b) *Discretion*: If the Judge erred on issue (a), did she also err in holding that she would have exercised her discretion against ordering any disclosure to the appellant, had she been required to rule?

(c) *What disclosure?*: If the Judge erred both on (a) and (b), what documents or information should the Judge have ordered be disclosed to the appellant?

Background

[2] The first respondents are the trustees of the Acorn Foundation Trust. The second respondents are the trustees of the Independent Group Trust. As no distinction is required, we will refer to them as "the trustees". The two Trusts (the Trusts) were settled by the late Mr Michael Erceg in 2004 and 2002 respectively.

[3] Although not named, the appellant was within the classes of both discretionary and final (or residuary) beneficiaries of each of the Trusts. The appellant is the late Mr Michael Erceg's brother.

[4] The Trusts were wound up in December 2010 without any distribution being made to the appellant.

[5] The appellant had been adjudicated bankrupt on 2 February 2010. He was discharged from bankruptcy on 12 May 2014. Thus, he was bankrupt when the Trusts were wound up, his bankrupt estate being administered by the Official Assignee.

[6] Having unsuccessfully requested from the trustees the documents set out in the schedule to this judgment (the schedule documents), the appellant commenced a proceeding in the High Court at Auckland on 5 September 2014. He sought a declaration that he is a beneficiary of the Trusts and an order requiring the trustees to provide him with copies of the schedule documents. He applied for a summary judgment granting him both the declaration and the order.

[7] The trustees' response, in addition to opposing Mr Erceg's application for summary judgment, was to apply for summary judgment against the appellant in his claims, alternatively for an order striking out his statement of claim.

[8] Those were the opposing claims that came on for hearing before Courtney J on 5 December 2014 and that were addressed in her judgment of 27 March 2015.

[9] We will refer to the relevant parts of Courtney J's judgment in dealing with the three questions put to us.

Question One: Standing?

[10] Courtney J held the appellant had no standing to request disclosure of the schedule documents. She accepted the trustees' argument, repeated to us by Ms Coumbe QC, that the appellant's interests in the Trusts were "property", as defined in s 3 of the Insolvency Act 2006:

> **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

[11] The Judge considered that definition easily encompassed the appellant's future, contingent equitable proprietary interest in the Trusts' assets, as a final beneficiary. She adopted the approach taken in three earlier High Court cases, that a discretionary beneficiary, although having no proprietary interest in a trust's assets, nevertheless has a right to seek disclosure.[2]

[12] Courtney J then held the right of a discretionary beneficiary to seek disclosure was a right in relation to property because, if there was no fund or property, there was no trust. She rejected, as too narrow an approach, the appellant's argument that there was no purpose in including the right to seek disclosure as property for the purposes of s 101 of the Insolvency Act as it could not benefit the Official Assignee. Section 101 vests all the bankrupt's property in the Assignee on adjudication and extinguishes the bankrupt's rights in the property.

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[2] At [24]. The Judge followed Potter J in *Foreman v Kingstone* [2004] 1 NZLR 841 (HC), Asher J in *Re Maguire (deceased)* [2010] 2 NZLR 845 (HC) and Venning J in *Erceg v Erceg* [2014] NZHC 155, [2015] NZAR 1227.

[13] The Judge concluded that a “right … in relation to property”, in terms of the s 3 definition, includes the right of any beneficiary to seek disclosure of trust documents. Accordingly, the appellant’s right to seek disclosure had vested in the Official Assignee upon the appellant’s bankruptcy, and had not re-vested upon his discharge from bankruptcy.

[14] We disagree with the Judge’s approach to standing. In our view the appellant has standing. It derives from his status (or capacity) as a beneficiary of the Trusts. The appellant’s bankruptcy did not alter or annul that status. It is that beneficiary status that entitles the appellant to have the trustees’ duties to beneficiaries enforced, and to that end to request disclosure of trust documents by the trustees.[3] Approached differently, the answer to the question “is the appellant a stranger to the trust?” is a definite “no”. This was essentially the approach advocated by Mr Carruthers QC, although he addressed it in relation to Question Two, and we outline this in [22] below. We agree that the nature of a beneficiary’s interest is properly a factor relevant to the exercise of the trustees’ discretion to disclose.

[15] For the respondent trustees, Ms Coumbe submitted to us: Standing to apply to the court depends upon the applicant having status as a beneficiary and therefore the equitable right to compel administration of the trust, including to seek disclosure from the trustees. It is this right that confers standing, and it is this right (and the wider right to compel due administration) that constitutes “property” as defined in the Insolvency Act.

[16] We agree with the first, but not the latter, part of this submission. The first part of the submission correctly founds standing upon the applicant’s status as a beneficiary. Inconsistent with that, the latter part of the submission would found standing upon the rights the status gives a beneficiary. So if the right is lost, the standing that gives rise to that right is also lost. We do not agree with that back-to-front reasoning.

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[3] See David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton: Law of Trusts and Trustees* (18th ed, LexisNexis, London, 2010) at [56.23]; G E Dal Pont *Equity and Trusts in Australia* (6th ed, Thomson Reuters, Sydney, 2015) at [20.15]–[20.30]; Chris Kelly and Greg Kelly *Garrow and Kelly: Law of Trusts and Trustees* (7th ed, LexisNexis NZ, Wellington, 2013) at [25.9]; and *Johns v Johns* [2004] 3 NZLR 202 (CA) at [34].

[17] Upon our straightforward approach, it is unnecessary to consider whether a beneficiary's right to seek disclosure from the trustees is "property". It is still more unnecessary to consider whether the appellant's rights as a final and discretionary beneficiary of the Trusts were "property": having beneficiary status is not itself property, even if some of the rights that come with that status are.

[18] A claim in respect of any breach of trust that occurred while the appellant was bankrupt would, on the face of it, accrue to the Official Assignee. But the question whether the Official Assignee or the appellant is the correct person to bring any such claim does not arise at this point. If and when it arose, and the Official Assignee did not pursue any available claim, the appellant could. Ms Coumbe's argument proceeded on the assumption the appellant was acting on his own behalf. However, it may transpire that he is actually acting on behalf of his creditors. There is nothing wrong with his doing that.

[19] Accordingly, we answer Question One: "Yes, the Judge did err in holding that the appellant had no standing to seek disclosure of information relating to the two trusts of which he was a beneficiary".

Question Two: Incorrect exercise of discretion by the Judge?

The test for disclosure

The opposing arguments

[20] Counsel differed as to the correct test or approach to disclosure of trust documents to beneficiaries by trustees. In the description "trust documents", we include any document recording wishes or instructions conveyed by the settlor to the trustees — any so-called "wish list".[4]

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[4] Although what is encompassed within the definition "trust documents" is not finally settled, it has long been the law that trustees are not required to provide, at the request of beneficiaries, their reasons for their discretionary decisions. But a "wish list" falls within the category of "trust documents". As Kirby P noted in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (NSWCA) at 419: "It was not created by the trustees. It is not an insight into the mind of the trustees. It is an indication of the wishes of the instigator of the trust to which the trustees are themselves attending". Similarly, see the statements by Briggs J in *Breakspear v Ackland* [2008] EWHC 220, [2009] Ch 32 at [46]–[48].

[21] For the appellant, Mr Carruthers submitted Courtney J had applied the wrong test. She had rejected the correct approach adopted by Potter J in *Foreman v Kingstone*[5] and by Asher J in *Re Maguire (deceased)*,[6] both of which draw directly on the 2003 judgment of the Privy Council in *Schmidt v Rosewood Trust Ltd*.[7] Instead, she favoured the approach taken by the majority of the Court of Appeal of New South Wales in 1992 in *Hartigan Nominees Pty Ltd v Rydge*[8] and more particularly by Briggs J in the English High Court in *Breakspear v Ackland* in 2008.[9] Mr Carruthers argued that Courtney J wrongly adopted a presumption against disclosure because the settlor had expressed confidentiality considerations in each of the Trust deeds.

[22] Mr Carruthers also contended that Courtney J's whole approach to the Court's jurisdiction to direct disclosure was awry, because she sought to found the jurisdiction in a proprietary claim or entitlement. The correct position is that the jurisdiction derives from the Court's inherent jurisdiction to supervise trusts, which exists independently from any proprietary claim. Mr Carruthers cited *Erceg v Erceg*,[10] *Re Maguire (deceased)*,[11] *Foreman v Kingstone*[12] and *Schmidt v Rosewood Trust Ltd*[13] as supporting the approach for which he contended. The right to disclosure relied on by the appellant is an incident of the trustees' fiduciary duty.

[23] For the respondent trustees, Ms Coumbe supported Courtney J's approach as principled and correct. In particular, she submitted the Judge had rightly rejected a default presumption in favour of disclosure, which she submitted is not supported by authority. On the other hand, the Judge had not adopted a presumption against disclosure, but rather had taken "a very measured approach", applying the guidelines suggested by the Privy Council in *Schmidt v Rosewood Trust Ltd*, and adopted in a

5 *Foreman v Kingstone*, above n 2.
6 *Re Maguire (deceased)*, above n 2.
7 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709.
8 *Hartigan Nominees Pty Ltd v Rydge*, above n 4.
9 *Breakspear v Ackland*, above n 4.
10 *Erceg v Erceg*, above n 2, at [14]–[19].
11 *Re Maguire (deceased)*, above n 2, at [27]–[28] and [30].
12 *Foreman v Kingston*, above n 2, at [81] and [93].
13 *Schmidt v Rosewood Trust Ltd*, above n 7, at [36].

number of decisions of the New Zealand High Court, notably by Potter J in *Foreman v Kingstone*.[14]

[24] It is unnecessary to give a fuller summary of counsel's opposing arguments, because we are confident they are comprehensively considered in [25] to [53] following.

Our view as to the correct approach

[25] Because counsel differ, and given the lack of guidance at an appellate level in New Zealand, we set out what we consider is the correct approach to disclosure. This is the proper approach both for a trustee, faced with a request by a beneficiary for disclosure, and also for the Court. That is so whether the Court is required, on an application by a beneficiary, to review the trustee's decision on a request for disclosure, or whether the Court is dealing with an application by a trustee for directions as to how the trustee should deal with a request for disclosure.[15]

[26] A trustee should approach a request by a beneficiary for disclosure of trust documents as one calling for the exercise of discretion in discharge of the fiduciary duty a trustee owes a beneficiary. This duty was described in one of the leading texts as "… the core accountability of trustees to [beneficiaries]".[16] When the Court is involved, it should approach review of the trustee's decision as an incident of its supervisory function over trusts and trustees.[17] It is wrong and unnecessarily complicated for a trustee or the Court to approach disclosure as an inquiry as to whether or not the beneficiary making the request has a proprietary right to inspect — that is, as requiring "the adjudication upon a proprietary right".[18] "It is neither sufficient nor necessary" that an applicant beneficiary establish a proprietary right as a precondition for disclosure.[19]

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14 *Foreman v Kingston*, above n 2, at [90].

15 Under ss 68 and 66 respectively of the Trustee Act 1956.

16 David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (17th ed, LexisNexis, London, 2007) at [60.51], cited by Briggs J in *Breakspear v Ackland*, above n 4, at [46]. The same point is made in the most recent edition of *Underhill and Hayton: Law of Trusts and Trustees*, above n 3, at [56.51].

17 *Schmidt v Rosewood Trust Ltd*, above n 7, at [36], [51] and [66]; *Re Maguire (deceased)*, above n 2, at [27].

18 See Briggs J's succinct description in *Breakspear v Ackland*, above n 4, at [52].

19 *Schmidt v Rosewood Trust Ltd*, above n 7, at [54], and see [51]–[54], where the Court applied the

[27] No beneficiary has an entitlement as of right to disclosure of trust documents.[20] Consequently, there is no presumption favouring disclosure. But nor is there a presumption against disclosure.

[28] Whether to disclose, and, if so, the extent of disclosure, are discretionary decisions for the trustee. Thus, if the trustee decides to disclose, the trustee's discretion encompasses whether the disclosure should be complete or partial (for instance, made with redactions).

[29] In making the decision, the question for a trustee is always: What, if any, disclosure will best:

(a) ensure the sound administration of the trust?[21]

(b) discharge the powers and discretions in respect of the fiduciary obligations the trustee owes the beneficiary, in particular the trustee's duty to account?[22]

(c) meet the trustee's obligation to fulfil the settlor's wishes? This refers to the principle that the exercise by a trustee of the trustee's dispositive discretionary powers is "an essentially confidential process". That was the phrase used by Briggs J in *Breakspear v Ackland* where the Judge gave this explanation of the confidential process:[23]

> 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'

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views of Kirby P and Sheller JA in *Hartigan Nominees Pty Ltd v Rydge*, above n 4, but went somewhat further than Kirby P's observation at 421–422 that it may be sufficient, but was not necessary, for an applicant beneficiary to have a proprietary right. This is the approach that has now consistently been adopted in a number of High Court decisions: *Erceg v Erceg*, above n 2, at [15]–[17].

20 *Schmidt v Rosewood Trust Ltd*, above n 7, at [67].

21 *Breakspear v Ackland*, above n 4, at [62]; *Erceg v Erceg,* above n 2, at [32].

22 *Breakspear v Ackland*, above n 4, at [62]; *Re Maguire (deceased)*, above n 2, at [30]; *Foreman v Kingstone*, above n 2, at [97]; *Erceg v Erceg*, above n 2, at [32].

23 *Breakspear v Ackland*, above n 4, at [54]; *Erceg v Erceg,* above n 2, at [32] ("where there are issues of personal confidentiality disclosure may properly be limited").

> 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.

Patently, this requires a trustee to balance those aims, the latter two of which may be opposed in any particular case.

[30] The considerations for a trustee will be circumstances-dependent, but the following list set out in *Schmidt v Rosewood Trust Ltd* has been widely acknowledged as an excellent guide:[24]

(a) Whether there are issues of personal or commercial confidentiality;

(b) The nature of the interests held by the beneficiary or beneficiaries seeking disclosure;

(c) The competing interests of — and therefore the impact on — the beneficiary or beneficiaries seeking disclosure, the trustee(s) themselves, other beneficiaries and any affected third parties;

(d) Whether some or all of the documents can be withheld in full, or disclosed only in a redacted form;

(e) Whether safeguards should be imposed on the use of the disclosed trust documentation (for example, undertakings or professional inspection) to avoid illegitimate use;

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24 This is the list Potter J set out in *Foreman v Kingstone*, above n 2, at [90], which the Judge drew from *Schmidt v Rosewood Trust Ltd*, above n 7, largely at [67].

(f) Whether (in the case of a family trust) disclosure would be likely to embitter family feelings and the relationship between the trustee and applicant beneficiary to the detriment of the beneficiaries as a whole.

To this list can be added:

(g) The nature and context of the application for disclosure.[25]

[31] The balancing of these and any other relevant factors is for the trustee in the exercise of the trustee's discretion.

[32] It follows that the Court, if it becomes involved in disclosure, will be reviewing the exercise of a discretion by the trustee. It should therefore apply the well-established principles governing review by a Court of a discretionary decision. The Court should not intervene unless satisfied the trustee erred in law or principle, overlooked a relevant point, factored in an irrelevant point or made a decision that is plainly wrong.[26] The words "plainly wrong" refer to a decision that was simply outside the permissible ambit of the trustee's discretion.

A comment about Foreman v Kingstone

[33] We add a comment about one aspect of Potter J's judgment in *Foreman v Kingstone*. Potter J stated:[27]

> 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.

[34] This was one of the passages cited by Briggs J in *Breakspear v Ackland*, in the course of his careful review of Commonwealth authorities.[28] Although Briggs J

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25 *Erceg v Erceg*, above n 2, at [33]. There, Venning J distinguished an application made to enable counsel for the applicant beneficiary to advise the beneficiary as to her position and potential rights (the application the Judge was considering), from an application in the context of discovery "in properly and responsibly instituted proceedings which raise, for example, a possible breach of trust".

26 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

27 *Foreman v Kingstone*, above n 2, at [93].

28 *Breakspear v Ackland*, above n 4, at [42].

did not expressly disagree with this passage, it is at odds with his conclusion — the passage we have set out in [29](c) above.

[35] Further, in *Erceg v Erceg,* Venning J observed:[29]

> I consider Potter J overstated the position in suggesting the need for exceptional circumstances to exist to outweigh the beneficiaries' "right" to be informed. The point is, as the Privy Council made clear, that the beneficiary does not have a proprietary right to information; rather, the Court will require disclosure of information to ensure the trustees meet their obligations towards the beneficiaries. The beneficiaries' right is to have the Trust property properly managed. There are corresponding obligations on the trustees to properly manage the Trust and to meet the fiduciary obligations they owe to all beneficiaries. In order to ensure that the trustees are held to account, it may be necessary for the beneficiaries to have access to the relevant Trust documents. The beneficiary's ability to apply to the Court for access to Trust documents, and the Court's discretionary authority to direct access, is ancillary to the beneficiaries' primary right to have the Trust property properly managed. What information may be required to enable the beneficiaries to hold the trustees to account in a particular case will therefore depend on the obligation in issue. The matter must be considered in the context of the application, the disclosures sought, and the relevant obligations in issue. Further, as the Privy Council confirmed, where there are issues of personal confidentiality disclosure may properly be limited.

[36] It may be significant that, while Asher J in *Re Maguire (deceased)* referred to other passages from *Foreman v Kingstone,*[30] he did not refer to the passage set out above at [33], which is hardly consistent with the approach he suggested:[31]

> … 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.

[37] Finally, in an article commenting on the Law Commission's paper *Review of the Law of Trusts: Preferred Approach*,[32] Professor Peter Watts said this:[33]

> Lord Walker in *Schmidt* did not attempt to give much guidance as to how his list of factors might be weighed and applied. *Foreman v Kingstone*,

[29] *Erceg v Erceg*, above n 2, at [32].
[30] Notably, to paragraphs [97] and [98] of *Foreman v Kingstone*, above n 2.
[31] *Re Maguire (deceased)*, above n 2, at [30].
[32] Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012).
[33] Peter Watts "Yet more expansion of the role of Courts in private lives" *NZLawyer* (New Zealand, 25 January 2013) at 20.

> however, has taken an open-government approach to the question and the Commission implicitly endorses this approach. In my view, *Foreman* has got the balance wrong. Even in the absence of an express power to withhold information, at least where a trust deed gives absolute discretion to trustees, it should be assumed that this discretion extends to how much information is to be made available to beneficiaries. In England, Justice Briggs in *Breakspear v Ackland* [2009] Ch 32 declined to adopt the approach in *Foreman*.

[38] We agree with the comments of Venning J and Professor Watts. In our view Potter J at [93] in *Foreman v Kingstone*, set out at [33] above, did get the balance wrong. We consider Venning J's summary in *Erceg v Erceg* of the proper approach, set out at [35] above, is comprehensive and accurate.

Courtney J's approach

[39] Having reviewed the cases,[34] Courtney J concluded a trustee's decision whether to make disclosure to a beneficiary (vested or discretionary) involves consideration of all the relevant circumstances, including the nature of any confidence assumed by the trustee in accepting that role. She considered the position was the same for the Court, on an application such as that made by the appellant. The Judge then set out the factors, drawn by Potter J in *Foreman v Kingstone* from *Schmidt v Rosewood Trust Ltd*, a Court might properly take into account in exercising its discretion.[35]

[40] Four points emerge from the Judge's application of those principles to the appellant's application. The first point involves the basis advanced by the appellant. He had deposed that Mr Michael Erceg told him he (the appellant) and other family members were beneficiaries of the Trusts, which had substantial assets. In support he exhibited an email he claimed Michael had sent him on 5 October 2005:

> 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.

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[34] Decision under appeal, above n 1 at [22]–[44]. Courtney J considered, in turn, *Schmidt v Rosewood Trust Ltd*, above n 7; *Hartigan Nominees Pty Ltd v Rydge*, above n 4; *Foreman v Kingstone*, above n 2; *Re Maguire (deceased)*, above n 2 *Erceg v Erceg*, above n 2; *Re Londonderry's Settlement* [1965] Ch 918, [1965] 2 WLR 229 (CA) ; and *Breakspear v Ackland*, above n 4.

[35] *Foreman v Kingstone*, above n 2, at [90] (set out at [30] above).

[41] We interpolate here that the authenticity of that email was challenged by the trustees. A computer forensic examiner, Mr Brent Whale, deposed he had not been able to find it amongst the late Mr Michael Erceg's emails, although there were other emails of the same date. Mr Whale expressed the view that the appearance of the email message exhibited by the appellant was inconsistent with a genuine forwarded email. And the appellant had not provided the email or the chain in which it appeared in their original format.

[42] The appellant also claimed he and the late Mr Michael Erceg had, in 2005, discussed transferring the shares of SY24 Ltd (a company of which Michael Erceg was the sole director at the time) to the Acorn Foundation Trust and then on to the appellant. Although the appellant produced a draft agreement for the sale of the shares to the Trust, there was nothing indicating what Michael Erceg wished the Trust to do with the shares had they ever been transferred.

[43] The appellant also produced correspondence between his solicitors and the trustees' solicitors about disclosure. This correspondence evinced no specific concern as to the trustees' conduct. Rather, the appellant's main complaint seemed to be that he had not received any distribution from the Trusts.

[44] The second point is that the trustees had put forward a number of factors as counting against the Court ordering any disclosure of trust documents to the appellant. Many of these had been canvassed in the earlier case between the trustees and Mrs Millie Erceg,[36] and the affidavit of 30 October 2013 made by Lynette Erceg (one of the trustees) in that earlier case had also been put in evidence in this case. The factors advanced by the trustees can be summarised as follows:

(a) Lynette Erceg deposed one of the main reasons for inclusion of the confidentiality clause (in the deed establishing the Acorn Foundation Trust) was Michael Erceg's wish not to have to engage with his family about his wealth. This applied particularly to the appellant: Michael Erceg said he did not want the appellant anywhere near his,

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[36] *Erceg v Erceg*, above n 2. Mrs Millie Erceg is the mother of the appellant and the late Mr Michael Erceg.

Lynette Erceg's or the Acorn Foundation Trust's affairs. Lynette Erceg described a similar confidentiality clause in the Independent Group Trust deed.

(b) Similar evidence from Mr Gregory, the other trustee of the two Trusts. He deposed:[37]

> 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.

(c) In two respects, the trustees were distinctly uneasy about the ramifications if the appellant was given disclosure of trust documents. First, the category of documents he sought would disclose the identities of other discretionary beneficiaries and the nature of distributions made. The trustees were concerned that if the appellant knew these details he would instigate unmeritorious claims or encourage others to do so in an attempt to pressure the trustees. Lynette Erceg supported these concerns by producing emails from the appellant. The Judge described, as "the high point", an email the appellant sent in May 2009 threatening to discuss family matters with the media and commenting "[w]hen my story has been told, the need to continues [sic] life's journey will no longer be required. The blood and death that will follow will stain both Darryl and Lynne.[38] The costs will be greater than can be imagined at this time."[39]

[45] The third point is that Courtney J noted that the appellant had not addressed these criticisms nor provided a copy of the impugned 5 October 2005 email. She accepted counsel's submission that the evidence was insufficient to support a finding that the email was a forgery, or at least she agreed it was unnecessary to make a finding. She also noted the appellant's argument that, leaving the impugned email

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37 Decision under appeal, above n 1, at [53].
38 A reference to the two trustees.
39 At [57].

aside, there was sufficient evidence for the Court to find that the aim of the Trusts was to provide for the wider Erceg family including the appellant. This was a factor favouring disclosure.[40]

[46] The fourth point involved the Judge identifying three considerations that, had she concluded the appellant had standing, would nevertheless have resulted in her exercising her discretion against requiring the trustees to provide the documents sought. First, she considered it clear from the weight of evidence that Michael Erceg wanted the Trusts administered by the trustees in confidence and did not want members of the Erceg family who might benefit under the Trusts to have information regarding them. She stated "this is a matter of considerable significance in the exercise of the discretion".[41]

[47] Second, she considered the prospects of any distribution being made to the appellant "were remote".[42] That was both because he was bankrupt when the Trusts were wound up and the trustees unlikely to have made a distribution that would have vested in the Official Assignee, and because he had "previously received substantial benefits from Michael Erceg's estate, was able-bodied and had no dependents".[43]

[48] Third, no specific complaint "that would arouse concern such as to justify this Court intervening" had been advanced.[44] And that, notwithstanding the recent disclosure to Millie Erceg. The Judge considered that gave "reasonable assurance that intervention by the Court is not necessary".[45]

Did Courtney J err?

[49] We have measured Courtney J's approach against what we consider to be the correct approach, as we have set it out in [25] to [38] above. We see no mismatch. In particular, we see no error in Courtney J's summary:

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40 At [58].
41 At [59].
42 At [60].
43 At [60].
44 At [61].
45 At [61].

> [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.

[50] We do not consider that any of the matters Courtney J factored in to her review of the trustees' decision was irrelevant. Mr Carruthers submitted three factors the Judge took into account were irrelevant: the fact Mr Erceg had no specific complaint against the trustees; that there had already been a disclosure to Millie Erceg; and the details of previous distributions made to Mr Erceg and his present needs. These are not irrelevant. They tell against any improper administration of the Trusts by the trustees.

[51] Nor do we consider the Judge overlooked any significant point of relevance. Mr Carruthers submitted the Judge failed to take into account a beneficiary's fundamental right to ensure a trust is properly administered. We do not agree. As we have said, that right does not give rise to a presumption of disclosure. The Judge anyway did consider this, noting that documents relating to the Trusts had already been disclosed (to Millie Erceg) and that disclosure did not give rise to claims of improper administration by the trustees. Mr Carruthers also submitted the expert evidence the appellant had obtained in respect of the authenticity of the 5 October email and his evidence about the family dynamic were relevant factors that the Judge failed to take into account. But Courtney J accepted there was insufficient evidence to conclude the email was a forgery. She also accepted the Trusts were intended to provide for the wider family, including the appellant. The Judge was entitled to prefer the evidence of the trustees as to the relationships between family members and the likely impact disclosure would have on them.

[52] Finally, the Judge's decision that (assuming standing) she would have exercised her discretion against requiring the trustees to provide the documents sought, is not a decision that can be said to be "plainly wrong". We do not agree with Mr Carruthers' submission that the Judge took an "all or nothing" approach and failed to assess the extent to which confidentiality could be maintained. Courtney J

fairly considered the factors in favour of and against disclosure before determining no disclosure was appropriate. In the somewhat unusual circumstances here, it was always going to be a fine judgment for the Court whether to order disclosure and, if so, its extent and terms.

[53] For those reasons we answer Question Two: “No, the Judge did not err in concluding that (assuming the appellant had standing) she would nevertheless have exercised her discretion against ordering the trustees to make any disclosure to him”.

Question Three: What disclosure?

[54] Given our answer to Question Two, we are not required to answer this third question. Had we been, we would have ordered disclosure along the following lines:

(a) Failing agreement, an independent person (IP) is to be appointed by the President of the New Zealand Law Society, the costs of the IP to be shared equally between the parties in the first instance.

(b) The trustees are to provide to the IP the Trust deeds, financial statements relating to the winding up of the Trusts, and any resolutions by the trustees recording their decisions as to distributions of the Trust monies.

(c) The IP is to report to the High Court, giving “yes” or “no” answers to the following questions:

    (i) Were any trust monies available for distribution to final beneficiaries, after all other distributions and payments had been made?

    (ii) Were all distributions made to persons who were beneficiaries of the trusts?

    (iii) Did the trustees consider whether or not to make any distribution to the appellant?

(d) In the light of the IP's report, and of this judgment, the High Court is to consider whether it should order the trustees to make further disclosure to the appellant and, if so, of what documents or information and upon what terms.

Result

[55] In the result, although the appellant has succeeded on the standing issue, he has failed on the second, more substantial, issue. Accordingly, we dismiss the appeal.

[56] The appellant is to pay the respondents' costs as for a standard appeal on a band A basis with usual disbursements.

[57] In the course of the hearing we made an order suppressing publication of several specific details of the Trusts, pending delivery of this judgment. We do not consider it necessary to extend that order, save for the facts relating to settlement of funds on the Erceg Family Trust referred to at the hearing.

[58] However, to protect the privacy of other parties related to the Trusts we make an order that no person other than the parties can access the Court file without the leave of a Judge.

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

Schedule: documents sought by the appellant

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

2. All trustee resolutions and minutes for the Trusts.

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

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

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

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

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

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

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