Disclose or withhold?

Gillian Coumbe QC discusses a recent case where the New Zealand Supreme Court considered the principles governing disclosure of trust information to beneficiaries

Gillian Coumbe QC is a barrister practising in Auckland, New Zealand. She acted for the respondent trustees in this case

'There is no absolute right to any trust document. However, where the request is made by a close beneficiary for access to core documents such as the trust deed and accounts there will normally be an expectation of disclosure.'

The New Zealand Supreme Court's judgment in *Erceg v Erceg* [2017] is notable for a number of reasons. First, the court upheld a blanket refusal by the trustees to give the appellant, a discretionary beneficiary, access to any trust documents. Although the appellant was a primary beneficiary of one of the two trusts, the court did not even permit him to see the trust deed or trust accounts. Secondly, the court adopted a flexible, continuum-based approach to disclosure, the strongest case for access involving a request for 'core' trust documents by a 'close beneficiary'. In such a case there will now be an expectation of disclosure, unless there are exceptional circumstances. Thirdly, the court adopted an interestingly expansive appellate test, taking the view that an appeal court can make its own fresh assessment whether to order disclosure. Finally, the court considered the ability of a bankrupt discretionary beneficiary to seek trust information, an issue on which there is little prior case law.

Issues in the case

The case was part of a protracted, bitter dispute over two discretionary trusts, the Acorn Foundation Trust (Acorn) and Independent Group Trust (Independent). The trusts had been settled by the late Michael Erceg, a wealthy New Zealand businessman and founder of the successful Independent Liquor Group. Michael died in a helicopter crash in 2005. The appellant, Ivan Erceg, was Michael's older brother. The trusts were wound up in 2010, at a time when the appellant was bankrupt. The appellant received no further distribution from either trust, but had received substantial benefits from Michael's estate. Soon after he was discharged from bankruptcy in 2014 the appellant brought a proceeding against the trustees seeking disclosure of an extensive, audit-like list of documents.

The trustees provided some basic information, including confirmation of the appellant's status as a primary beneficiary of Acorn, a secondary beneficiary of Independent, and a final beneficiary of both trusts. However, they refused to give him a single trust document. Given his past conduct (described by the Supreme Court as 'reprehensible') there was a real concern that any disclosure to him would likely lead to harassment of the other beneficiaries and the trustees. The appellant's bankruptcy at the relevant time also meant that he had no reasonable expectation of receiving a distribution.

The case was not brought as a review of the trustees' discretionary refusal to disclose. Rather, the appellant sought to invoke the court's inherent supervisory jurisdiction.

In the High Court Courtney J held that the appellant's right to seek trust information was 'property' as defined in the Insolvency Act 2006 (NZ). That right had vested in the official assignee on the appellant's bankruptcy, and had never revested. The appellant therefore had no standing to bring the proceeding. The judge stated that even if she were found to be wrong on that question she would have exercised

her discretion against ordering any disclosure. The Court of Appeal reversed the finding on standing, but dismissed the appeal because the judge had not erred in exercising her discretion to withhold all disclosure. Although the Court of Appeal's own preference would have been to order limited disclosure to an independent third party, there was no basis to interfere with the judge's discretion. The Supreme Court agreed with the Court of Appeal on standing, and then made its own fresh assessment and decided, given the unusual circumstances, that disclosure should not be ordered. The appeal was again dismissed.

The case law before *Erceg*

Before *Erceg* the leading case on disclosure to beneficiaries of trust information was the Privy Council decision (emanating from the Isle of Man) in *Schmidt v Rosewood Trust* [2003]. Lord Walker of Gestingthorpe confirmed that a requesting beneficiary need not have a proprietary interest in the trust capital or income. A discretionary beneficiary, who has no such interest, could therefore seek disclosure. However, Lord Walker also stated that there was no absolute right to any trust document. Rather, there was only a right to seek access. Disclosure was then a matter for the court's discretion in the exercise of its inherent supervisory jurisdiction.

Lord Walker identified three key issues for the court's discretionary judgment:

- should there be disclosure at all;
- what categories of documents should be disclosed; and
- should safeguards such as confidentiality undertakings be imposed.

Schmidt has been followed by first instance courts in New Zealand and in the United Kingdom. Its reception in Australia has been mixed.

In *Foreman v Kingstone* [2004], a decision of the New Zealand High Court, Potter J formulated a now well-known list of factors to guide the exercise of the court's discretion. The list included the three *Schmidt* factors plus three more:

- whether there are confidentiality issues;
- the likely impact of disclosure on the trustees, beneficiaries and third parties; and
- whether disclosure would embitter family relations.

More controversially, Potter J also suggested that, especially in relation to core trust documents, there was a presumption of disclosure that could not be overridden by confidentiality concerns unless there were 'exceptional circumstances'. That aspect of Potter J's reasoning was questioned in two subsequent decisions of the New Zealand High Court, and by Briggs J in *Breakspear v Ackland* [2008], a decision of the England and Wales High Court. This issue therefore remained unresolved and was the subject of argument in *Erceg*.

In Foreman, *Potter J suggested that there was a presumption of disclosure that could not be overridden by confidentiality concerns unless there were 'exceptional circumstances'.*

Disclosure principles stated by the Supreme Court

The Supreme Court in *Erceg* confirmed that there is no absolute right to any trust documents. Rather, the governing principle is what level of disclosure, if any, would best serve the interests of the trust and of the beneficiaries as a whole. While acknowledging that there are no 'hard and fast rules', the court set out its own list of factors that should be considered in the context of an application for the exercise of the supervisory jurisdiction. The court preferred to call the exercise an 'assessment and judgment' rather than a discretion, a point discussed further below. The list incorporates all the *Schmidt*/*Foreman* factors with some refinements:

- The categories of documents sought. The Supreme Court placed considerable emphasis on this. The case for disclosure of core documents, such as the trust deed and trust accounts, will be stronger than for more remote documents such as a settlor's memorandum of wishes.
- The context and objective of the request. A request for disclosure will be more compelling if it is the only means of monitoring the trustees' compliance with the trust deed in the administration of the trust. If disclosure has already been made to other beneficiaries, that may provide sufficient accountability, and so will be a relevant factor. But the court stated that this will rarely be a decisive factor against disclosure unless the beneficiary has an improper motive.
- The nature of the beneficiary's interests in the trust. There are two aspects to this. The first is the beneficiary's proximity to the trust. Thus a 'close' beneficiary, such as a named beneficiary or an immediate family member, will have a much stronger interest than, say, a charity within a wider class of institutions. Also relevant is the likelihood of the requesting beneficiary actually receiving a future distribution from the trust. The financial and other circumstances of the beneficiary may therefore be taken into account.
- Whether the information is subject to personal or commercial confidentiality. Any confidentiality indications in the trust deed itself will be relevant, although not decisive. Other evidence of the settlor's expectations and intentions at the time of the trust's creation may also be considered.

- Whether there is any practical difficulty in providing the information. Any significant expense or other difficulties in collating the information will count against disclosure. Presumably this may also be addressed, where appropriate, by requiring the requesting beneficiary to meet the reasonable costs of giving the information.

- Whether the documents sought disclose the trustees' reasons for their decisions. As has long been the case under the *Londonderry* principle, the trustees' reasons for their discretionary dispositive decisions will not normally be disclosed. Again, this will be subject to the overriding judgment of the trustees and the court.

- The likely impact of disclosure on the trustees and other beneficiaries. Disclosure may damage relations within the family or between the trustees and beneficiaries. This may justify withholding certain information, or withholding information from a particular beneficiary who is seen as a disruptive influence.

- The likely impact on the settlor and third parties. This may arise, for example, where the documents contain confidential information relating to a third party, such as sensitive commercial information.

- Whether disclosure can be made while still protecting confidentiality. Redacting confidential information from a document may (but will not always) sufficiently remove any concerns.

- Whether additional safeguards can be imposed. Confidentiality undertakings may be required, and/or restrictions may be imposed on inspection, for example limiting inspection to the beneficiary's professional advisers. The Supreme Court did not comment on the Court of Appeal's preferred approach of appointing a mutually agreed independent third party to review the documents, but that is another option.

The strongest case for disclosure will involve core documents and a close beneficiary.

A test of exceptional circumstances?

In assessing the above factors, what is the standard to be applied? Both Courtney J and the Court of Appeal in *Erceg* rejected Potter J's suggested presumption of disclosure rebuttable only by exceptional circumstances. They saw it as a question of discretion, with no presumption either way.

The Supreme Court has adopted more of a continuum-based approach. The strongest case for disclosure will involve core documents and a close beneficiary. In this strongest case, the court stated, there will be an 'expectation' of disclosure rather than a presumption. The court accepted that this expectation can be displaced, if the relevant factors establish exceptional circumstances. Thus, at least in relation to core documents and close beneficiaries this is an important shift from the broader discretionary approach in *Schmidt*. Core documents were described by the court as documents, such as the trust deed and accounts that are necessary to assess whether the trustees have administered the trust in accordance with the trust deed.

But it seems, implicitly, that the test will be less stringent the remoter the interest of the beneficiary and the wider the categories of documents requested. As the Supreme Court observed, 'there will be more room for argument'. The weakest case for disclosure may involve a charity, or a document containing the trustees' reasons, or material on which those reasons are based such as a confidential memorandum of wishes. At that opposite end of the continuum the normal expectation will presumably be one of withholding. The Supreme Court's approach still entails an overriding discretion, or 'judgment' (as the court preferred to call it) according to the particular circumstances.

Appellate standard

The trustees exercised their discretion to refuse to disclose any documents to the appellant. The appellant applied to the court in its inherent supervisory jurisdiction for an order directing disclosure. Courtney J held that she could exercise a fresh discretion. This approach is consistent with earlier cases such as *Schmidt*, *Foreman* and *Breakspear*.

On appeal the position became somewhat murky. The Court of Appeal, surprisingly (as the appellant had not brought his case on this basis) articulated the role of the first instance judge as one of review of the trustees' discretion. But the Court of Appeal then approached the appeal on the basis that the judge had indeed exercised a fresh discretion. The court adopted the well-settled restrictive approach of an appellate court determining an appeal from a judicial discretion: has the judge erred in principle or made a decision that was plainly wrong? Having held that Courtney J had properly exercised her discretion, the Court of Appeal dismissed the appeal, even though the court's own preference would have been to order limited disclosure to an independent third party.

The Supreme Court took a different approach. The court preferred to describe the supervisory jurisdiction as one of assessment and judgment rather than a judicial discretion. The distinction between a value judgment and discretion can be a thin one. And the same list of relevant factors will need to be considered, whether the task is called a discretion or a judgment. Further, as the court noted, this is contrary to the earlier cases mentioned

above where the approach was described as discretionary.

This rebranding does have significance in relation to the ability of an appellate court to interfere. The Supreme Court applied its own earlier decision in *Kacem v Bashir* [2010], a child relocation case. There the court had held that where a decision is 'an assessment of fact and degree and entails a value judgment' then the restrictive criteria applicable to an appeal from the exercise of a discretion do not apply. Rather, the appellate court makes its own fresh assessment on the merits. On this basis the Supreme Court said that the Court of Appeal was free to form its own view about whether any disclosure should be made to the appellant in this case.

It remains to be seen whether this approach will be endorsed elsewhere. It appears to differ from that evident in the recent judgment of the UK Supreme Court in *Ilott v The Blue Cross* [2017] where Lord Hughes stated that, whether best described as a 'value judgment' or a 'discretion', the appeal court's approach is the same: has the judge erred in principle or in law?

Application of the disclosure principles in this case

Ultimately the discretion/judgment distinction did not affect the outcome in *Erceg* because the Supreme Court, on conducting its own fresh assessment, reached the same result as Courtney J, namely that no trust documents should be disclosed to the appellant.

The Supreme Court divided the documents sought by the appellant into four categories. These were: category 1, trust deeds and trust accounts; category 2, minutes and resolutions; category 3, documents relating to dealings between the trusts and Independent Liquor; and category 4, corporate documents of Independent Liquor (which the court doubted were trust documents at all).

The request for access to the Acorn documents was evaluated first. As the appellant was a primary discretionary beneficiary of that trust he could normally have expected disclosure of the category 1 documents. However, given the unusual features of the case, the court decided that disclosure should not be ordered. Implicitly the court accepted that the circumstances were exceptional. The factors that particularly influenced the court were:

- The appellant's bankruptcy. He had had no realistic expectation of a distribution at the relevant time.
- The appellant's divisive conduct. This included past threats he had made against the trustees (with predictions of 'blood and death') and threats to publicly reveal confidential trust information. He had a disruptive influence within the family and was the driving force behind earlier separate proceedings brought by his elderly mother against the trustees. His application was described by the court as 'something of a fishing expedition' to find a basis for challenging the trustees' decisions to make distributions to beneficiaries other than him.

The Supreme Court concluded that there was genuine reason for concern that disclosure, which would reveal the identity of the other beneficiaries and who had received what, would involve a risk of harassment and further fruitless litigation. Moreover, the trustees' concerns about disclosure to the appellant could not be met by redactions, confidentiality undertakings, or limiting disclosure only to his counsel. The interests of the beneficiaries as a whole would therefore be better served by withholding all documents. The trustees were still accountable as disclosure had been made to some other beneficiaries and their lawyers and there had been no complaint about the administration of the trusts.

In light of their conclusion that the Acorn category 1 documents should not be disclosed, the court also declined to order disclosure of the Independent category 1 documents, or of any other remoter categories of documents.

The Supreme Court concluded that there was genuine reason for concern that disclosure, which would reveal the identity of the other beneficiaries and who had received what, would involve a risk of harassment and further fruitless litigation.

Right of a bankrupt beneficiary to seek disclosure

The respondent trustees acknowledged that the appellant's bankruptcy did not affect his status as a beneficiary. However, they contended that his interests as a beneficiary, including the right to seek information, were 'property' that vested in the official assignee under the Insolvency Act 2006 (NZ). Therefore, they argued, the appellant had no standing to bring the proceeding to enforce that right. There were two main limbs to this argument. First, as Courtney J had decided, the right to seek information was a right 'in relation to property'. Secondly, it was part of the equitable right to due administration of the trusts and that right was also within the wide definition of 'property'. In *Kennon v Spry* [2008] a majority of the High Court of Australia had held that the right to due administration was 'property' in a relationship property context. The Supreme Court dealt only briefly with this issue, preferring to focus on the appellant's continuing beneficiary status, and held that his bankruptcy did not affect his capacity to seek disclosure.

The appellant's interest as a final beneficiary was a future contingent proprietary interest in the trust assets. The Supreme Court did accept that the appellant's rights as final beneficiary

'had vested in the Official Assignee'. The court was however content to approach the question of standing solely on the basis of the appellant's status a discretionary beneficiary.

Some key points to take from the judgment

The Supreme Court's decision provides welcome guidance for trustees and the courts. Some key points to be taken from the judgment are as follows:

- The Supreme Court has confirmed that there is no absolute right to any trust document. However, where the request is made by a close beneficiary for access to core documents such as the trust deed and accounts there will normally be an expectation of disclosure, unless there are exceptional circumstances. The court did not indicate what test will apply in other instances, involving remoter beneficiaries and wider classes of documents, but it will presumably be less stringent, perhaps a good reason test. At the other end of the continuum, documents such as wish letters will normally be withheld. The court retains an overriding judgment to make such order that, in the particular circumstances, is in the best interests of the trust and the beneficiaries as a whole.

- The *Erceg* case is unusual. The courts have seldom upheld a blanket refusal to disclose any trust documents. A few examples include the decisions of the Jersey Royal Court in *Re Y Trust* [2014] and *Re M and L* [2003]. In both cases the requesting beneficiary had a clear ulterior motive. In the recent UK High Court case of *Blades v Isaac* [2016] the trustees initially refused access to any documents, including the trust accounts. That was because of their genuine concern that disclosure would damage relations between the requesting beneficiary and her sister. Eventually the trustees did provide the documents, and so the case was only about costs. But the Master observed that the trustees should have made disclosure. The circumstances were not as compelling as in *Erceg*.

- This case has focused attention on the long-recognised right of a discretionary beneficiary to seek disclosure, and illustrates the difficulties this can cause in practice. The use of discretionary trusts is widespread. Frequently trust deeds contain widely drawn classes of beneficiaries. This increases the chances of a 'rogue beneficiary', and also increases the potential for a deluge of requests from a large number of beneficiaries. The Supreme Court's ruling that a fresh assessment may be made by appellate courts may also (at least in New Zealand) encourage successive appeals. Settlors desiring to preserve confidentiality and to avoid costly, protracted disputes will therefore need to reconsider how widely the net of beneficiaries is cast. A clearly worded confidentiality clause in the trust deed will also be important. Such clauses will not be determinative but may carry some weight.

- A discretionary beneficiary who becomes bankrupt will (at least under New Zealand insolvency law) still be able to seek trust information from the trustees, and to apply to the court for an order for disclosure. Rights as a final beneficiary may, however, vest in the assignee. These are matters that may also influence the drafting of trust deeds.

Settlors desiring to preserve confidentiality and to avoid costly, protracted disputes will need to reconsider how widely the net of beneficiaries is cast.

In November 2016 the New Zealand Ministry of Justice released a draft Trusts Bill for consultation. Some but not all of the provisions in the draft bill relating to disclosure are consistent with Supreme Court's subsequent judgment in *Erceg*. The draft bill contains a presumption that trustees will inform 'qualifying beneficiaries' (those who have a reasonable likelihood of a distribution) of basic trust information such as their beneficiary status, and their right to request information. There is a further presumption of disclosure to requesting beneficiaries. Both presumptions are rebutted where the trustees 'reasonably consider' that the information should be withheld. The relevant factors are very similar to the *Schmidt/Foreman* factors as restated by the Supreme Court. A final version of the bill is likely to be introduced into Parliament later this year. It will be interesting to see whether it will contain any changes to reflect the Supreme Court's continuum-based approach to disclosure, including the court's requirement of exceptional circumstances if core trust documents are to be withheld from close beneficiaries. ■

Blades & ors v Isaac & anr [2016] WTLR 589
Breakspear v Ackland [2008] WTLR 777
Erceg v Erceg & ors [2016] WTLR 1575; [2017] NZSC 28
Foreman v Kingstone [2004] 1 NZLR 841
Ilott v The Blue Cross [2017] UKSC 17
Kacem v Bashir [2010] NZSC 112; [2011] 2 NZLR 1
Kennon v Spry [2008] HCA 56
Re M and L Trusts [2003] WTLR 491
Schmidt v Rosewood Trust [2003] WTLR 565; [2004] WTLR 887
Re Y Trust [2014] (1) JRL 199