

DISCLOSURE OF TRUST INFORMATION: DISCRETIONARY OR PRINCIPLE-BASED JURISDICTION?

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In *Erceg v Erceg*,¹ the Supreme Court of New Zealand (Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ) considered the vexed issues surrounding the disclosure of information relating to a trust. In a unanimous judgment delivered by O'Regan J, the Court approved the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*,² and set out in detail the correct approach to be adopted in determining whether to order trustees to disclose trust information to beneficiaries. However, contrary to what is arguably the orthodox view, the Court rejected the notion that the inherent supervisory jurisdiction to order disclosure involves the exercise of discretion. Rather it was "better seen as a jurisdiction that must be exercised in accordance with principle, after careful assessment of the factors relevant to the disclosure sought by the particular beneficiary".³

FACTS

In 2004, the appellant's brother settled two trusts: the Acorn Foundation Trust and the Independent Group Trust. The appellant was one of a class of primary discretionary beneficiaries of the former, one of a class of secondary discretionary beneficiaries of the latter, and one of a class of final beneficiaries of both. The respondents were the trustees of each of the trusts. Part of the trust property comprised shares in Independent Liquor (NZ) Limited. That shareholding was sold in 2006, and both trusts were wound up in December 2010. At that time, the appellant was an undischarged bankrupt. He was discharged from bankruptcy in 2014, but at the time of judgment his bankruptcy had not yet been annulled.

In September 2014, the appellant commenced proceedings in the High Court of New Zealand seeking "an order requiring the trustees to provide him copies of certain documents relating to the trusts".⁴ At first instance, Courtney J dismissed the appellant's application and entered summary judgment in favour of the trustees. Her Honour concluded that the appellant did not have standing,⁵ and stated that in any event, she would not have exercised her discretion to require the trustees to provide copies of documents relating to the trusts. On appeal, the primary judge's conclusion as to standing was overturned. However, the Court of Appeal found that she was correct to exercise her discretion against requiring disclosure. The Supreme Court granted leave to appeal on the sole issue of whether the conclusion that disclosure should not be made should be set aside.

DECISION

Nature of the Court's task

The Supreme Court first considered the preliminary issue of the nature of the Court's task on an application for disclosure of trust information.⁶ The Court of Appeal had taken the view that its function was limited to a review of the trustee's discretionary decision to disclose (or not to disclose) trust

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[2017] NZSC 28 (hereafter referred to as '*Erceg*').

² [2003] 2 AC 709.

³ *Erceg* [2017] NZSC 28 at [50].

⁴ Although the appellant had originally sought a declaration that he was a beneficiary of the trusts, that fact was admitted by the trustees and was therefore not before the court: *Erceg* [2017] NZSC 28 at [5].

⁵ On the basis that "the appellant's interest as a final beneficiary of the trusts and his right to seek information about the trusts in his capacity as a discretionary beneficiary amounted to property for the purposes of s 101 of the *Insolvency Act 2006* (NZ), and therefore vested in the Official Assignee on the appellant's bankruptcy": *Erceg* [2017] NZSC 28 at [6].

⁶ *Erceg* [2017] NZSC 28 at [14].

information. If correct, any application to a court would necessarily be limited to the narrow grounds on which a discretionary decision may be reviewed, as opposed to the more extensive grounds available for the incorrect application of a rule.⁷ The Supreme Court disagreed with the Court of Appeal on this point, stating the correct position as follows:

[T]he Court's jurisdiction on an application for the exercise of the supervisory jurisdiction is not limited to the grounds of review of a discretionary decision by the trustees. Rather, the Court must exercise its jurisdiction as a court of equity, exercising its own judgment as to whether disclosure ought to be made at all and, if so, to what extent and on what conditions.⁸

Foundation of the jurisdiction to require disclosure

The Court then went on to consider the precise foundation of the jurisdiction to require disclosure. Although the appellant was a final beneficiary and a discretionary beneficiary, the Court chose to deal with the matter as if the appellant were a discretionary beneficiary with a "mere expectation in relation to the assets of the trust, rather than any fixed or contingent proprietary interest".⁹ The Court observed that recent case law had made it clear that "the jurisdiction of the Court to require the provision of trust information to a beneficiary is not dependent on the beneficiary having a proprietary interest".¹⁰

In confirming this approach, the Court approved of the leading decision of the Privy Council, on appeal from the Isle of Man, in *Schmidt v Rosewood Trust Ltd*.¹¹ Lord Walker, delivering the advice of the Board, abandoned the traditional approach which grounded a beneficiary's right to disclosure of trust documents in the beneficiary's equitable proprietary interest in trust property.¹² Instead, he considered that "the 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".¹³

The Court also considered the decision of the New Zealand Court of Appeal in *Foreman v Kingstone*.¹⁴ In that case, Potter J set out a list of factors, derived from *Schmidt*, to be taken into account by a Court in exercising its supervisory jurisdiction.¹⁵ Her Honour considered that while beneficiaries have a right to receive information, the right is not an absolute one which arising from the categorisation of documents or information as "core trust documentation".¹⁶ Rather, the right to information is "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".¹⁷ While the Court generally approved of the decision in *Foreman* it did not, as we explain below, agree that the right or entitlement to information involved a discretion.

The Supreme Court's endorsement of the approaches in *Schmidt* and *Foreman* confirms the rejection of the proprietary approach in New Zealand law, and brings New Zealand in line with the English approach (subject to the issue of the nature of the jurisdiction, discussed below).¹⁸

⁷ *Erceg* [2017] NZSC 28 at [14].

⁸ *Erceg* [2017] NZSC 28 at [18].

⁹ *Erceg* [2017] NZSC 28 at [20].

¹⁰ *Erceg* [2017] NZSC 28 at [20].

¹¹ [2003] 2 AC 709.

¹² See, eg, *O'Rourke v Darbishire* [1920] AC 581; *Re Londonderry's Settlement* [1965] Ch 918.

¹³ *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 729 [51].

¹⁴ [2004] 1 NZLR 841. As noted in *Erceg* [2017] NZSC 28 at [35].

¹⁵ See *Erceg* [2017] NZSC 28 at [35].

¹⁶ *Foreman v Kingstone* [2004] 1 NZLR 841 at [98].

¹⁷ *Foreman v Kingstone* [2004] 1 NZLR 841 at [98].

¹⁸ This is the first time the Supreme Court has had the chance to consider *Schmidt*, although it was adopted in two decisions of the High Court before the present case: *Foreman v Kingstone* [2004] 1 NZLR 841 at [83]; *Re Maguire (deceased)* [2010] 2

The correct approach to applications for disclosure of trust information

The Court considered that the starting point is the “obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries”.¹⁹ It explained that a beneficiary who seeks such an account “may seek access to documentation necessary to assess whether the trustee has acted in accordance with the trust deed”, and it is on this basis that an application will usually be made.²⁰ However, the Court emphasised:

Given the wide variety of situations that may call for the Court to exercise its supervisory jurisdiction, it is hard to articulate any hard and fast rules. That is why the list of factors set out in *Foreman* have been seen as a helpful guide to a judge asked to exercise the jurisdiction.²¹

The Court identified as the underlying principle in determining whether or not to grant disclosure the need to identify “the course of action which is most consistent with the proper administration of the trust and the interests of the beneficiaries, not just the beneficiary requesting disclosure”.²² It concluded that the following matters should be taken into account:²³

- (a) The documents that are sought.
- (b) The context for the request and the objective of the beneficiary in making the request.
- (c) The nature of the interests held by the beneficiary seeking access.
- (d) Whether there are issues of personal or commercial confidentiality.
- (e) Whether there is any practical difficulty in providing the information.
- (f) Whether the documents sought disclose the trustee’s reasons for decisions made by the trustee.
- (g) The likely impact on the trustee and the other beneficiaries if disclosure is made.
- (h) The likely impact on the settlor and third parties if disclosure is made.
- (i) Whether disclosure can be made while still protecting confidentiality.
- (j) Whether safeguards can be imposed on the use of trust documentation.

A presumption in favour of disclosure?

The appellant relied on a suggestion in *Foreman* that there is “a right by an immediate beneficiary to core trust documents that is not overridden by confidentiality concerns unless there are ‘exceptional circumstances’”,²⁴ and submitted that there was a presumption favouring disclosure.²⁵ This view had not found favour with the Court of Appeal, which had held that “no beneficiary has an entitlement as of right to disclosure and there is, therefore, no presumption favouring disclosure (or against disclosure)”.²⁶ In explaining the nature of this so-called presumption, the Supreme Court said:

NZLR 845 at [30].

¹⁹ *Erceg* [2017] NZSC 28 at [51].

²⁰ *Erceg* [2017] NZSC 28 at [51].

²¹ *Erceg* [2017] NZSC 28 at [52].

²² *Erceg* [2017] NZSC 28 at [53].

²³ *Erceg* [2017] NZSC 28 at [56]. Cf the list in *Foreman v Kingstone* [2004] 1 NZLR 841 at [90].

²⁴ *Erceg* [2017] NZSC 28 at [41].

²⁵ *Erceg* [2017] NZSC 28 at [61].

²⁶ *Erceg* [2017] NZSC 28 at [48].

In the normal run of things, trustees will provide these to close beneficiaries on request or proactively, without the need for a request. If they refuse, a court will be likely to require disclosure unless, to use Potter J's formulation, there are "exceptional circumstances". This is the so-called "presumption" of disclosure, noted earlier. We see it more as an expectation that basic trust information will be disclosed to a close beneficiary who wants it.²⁷

The Court correctly, we submit, distanced itself from the language of a presumption. The "expectation" referred to by the Court appears to be a non-legal one, with no substantive effect on an application for disclosure. If a presumption truly operated, the onus of proof would shift to the trustee to establish why disclosure should not be made.

Does the supervisory jurisdiction of the court involve a discretion?

Following *Schmidt*,²⁸ and indeed in *Schmidt* itself,²⁹ it has been common to refer to the supervisory jurisdiction of the court as involving a discretion. However, contrary to this view, the Supreme Court stated that, "it is better seen as a jurisdiction that must be exercised in accordance with principle, after careful assessment of the factors relevant to the disclosure sought by the particular beneficiary".³⁰

The Court acknowledged that many of the cases refer to the Court's power to require disclosure as involving the exercise of a discretion.³¹ However, it rationalised the use of the term "discretion" in those cases as "a counterpoint to the earlier cases which found that the beneficiary's claim for disclosure depended on his or her proprietary rights, which led to the conclusion that a discretionary beneficiary could not claim for disclosure to be made".³² The Court explained that in those cases the Courts were in essence using the term discretion to make clear that (i) a claim for disclosure does not require a proprietary interest, and (ii) neither vested nor discretionary beneficiaries have a "right or entitlement to receive an unredacted copy of every trust document".³³

In seeking to justify its conclusion that the supervisory jurisdiction was not discretionary, the Court used the example of a case where the Court formed the view that disclosure of basic trust documents would be necessary to allow a beneficiary to hold the trustee to account, and where no countervailing considerations arose:

In such a case, it is hard to see how the Court could say it would, despite those factors, exercise its "discretion" to refuse a disclosure order in relation to those documents. Rather, the Court's obligation to intervene in its supervisory jurisdiction would be engaged. In less clear cut cases, however, the decision will require consideration of a wide range of factors. We see such consideration as involving assessment and judgment.³⁴

The characterisation by the court of the jurisdiction as one to be exercised according to principle, combined with the list of matters to be taken into account, appears to be aimed at addressing some of the difficulties associated with characterising the jurisdiction as "discretionary". Dal Pont has noted the "difficulties with resting beneficiaries' access to trust information squarely within judicial discretion

²⁷ *Erceg* [2017] NZSC 28 at [62].

²⁸ See eg, *Foreman v Kingstone* [2004] 1 NZLR 841 at 858 [83], 861 [98]; *Re Maguire (deceased)* [2010] 2 NZLR 845 at 855 [31]. In the English context, see *Breakspear v Ackland* [2009] Ch 32 at 51 [52], 52 [56], 55 [68]. The Australian authorities are mixed on this, in part due to the lack of consensus as to whether the *Schmidt* approach should be followed: compare *McDonald v Ellis* [2007] 72 NSWLR 605 at 617 [46]; *Silkman v Shakespeare Haney Securities Ltd* [2011] NSWSC 148 at [27]; *Avanes v Marshall* (2007) 68 NSWLR 595 at 598 [14].

²⁹ *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 729 [51].

³⁰ *Erceg* [2017] NZSC 28 at [50].

³¹ *Erceg* [2017] NZSC 28 at [67].

³² *Erceg* [2017] NZSC 28 at [67].

³³ *Erceg* [2017] NZSC 28 at [67].

³⁴ *Erceg* [2017] NZSC 28 at [68].

without a backdrop of a general rule or principle”.³⁵ He argues that “[u]nless the parameters of this discretion are clearly established, this represents what appears [to be] an open invitation for beneficiaries to litigate to secure access to information, and for trustees to defend the claims”.³⁶ Heydon and Leeming have also argued against the discretionary approach adopted in *Schmidt*:

At least for strict trusts, the Privy Council has unsettled the law. For all trusts, it has opened up a spectre of a world in which solicitors will be unable to advise trustees whether they should accede to the requests of beneficiaries, because a beneficiary who applies to the court will be able to appeal to a very broad discretion. A decision apparently directed to widening the rights of beneficiaries may have made them less secure.³⁷

The Supreme Court’s approach at least purports to place some boundaries on the jurisdiction by setting out the matters which should be taken into account. On the other hand, these are factors which a court exercising a discretionary jurisdiction would inevitably take into account. It may be that the distinction between a guided discretion and a jurisdiction to be exercised according to principle is one of form rather than substance. However, the consequences of this distinction are far from semantic. Its true effect is to broaden the role of appellate courts. Accordingly, based on this characterisation, the Court rejected a submission that an appeal can succeed “only if that Court finds there was an error of principle in the High Court decision, the High Court took account of irrelevant considerations or failed to take into account a relevant consideration or the High Court decision was plainly wrong”.³⁸ The Court therefore considered the application for disclosure afresh, and for reasons which are not material to this note, the Court ultimately declined to order the disclosure sought.³⁹

CONCLUSION

Erceg is the first occasion on which the Supreme Court of New Zealand has been able to consider, in detail, the correct approach to disclosure of information relating to a trust. The decision confirms the rejection of the proprietary approach in New Zealand law, and provides guidance for lower courts when deciding such applications. That guidance is likely to be applicable in any jurisdiction which has adopted the *Schmidt* approach. The Supreme Court also took a novel approach in characterising the supervisory jurisdiction as principle-based rather than involving an exercise of discretion. The distinction is arguably more apparent than real. Nevertheless, it has real consequences for the role of appellate courts.

³⁵ G E Dal Pont, ‘Beneficiaries and trust information’ (2014) 39 *Australian Bar Review* 46 at 73.

³⁶ Ibid. A similar criticism was advanced in Rose, above n 22.

³⁷ J D Heydon and M J Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) at [17-16].

³⁸ *Erceg* [2017] NZSC 28 at [63].

³⁹ *Erceg* [2017] NZSC 28 at [103].