IN THE SUPREME COURT OF NEW ZEALAND SC 17/2016

BETWEEN **IVAN VLADIMIR JOSEPH ERCEG**

APPELLANT

AND **LYNETTE THERESE ERCEG AND DARRYL EDWARD GREGORY AS TRUSTEES OF ACORN FOUNDATION TRUST**
LYNETTE THERESE ERCEG AND DARRYL EDWARD GREGORY AS TRUSTEES OF INDEPENDENT GROUP TRUST

RESPONDENTS

Hearing:	1 September 2016
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	C R Carruthers QC and R B Hucker for the Appellant G M Coumbe QC and F C Monteiro for the Respondents

CIVIL APPEAL

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ELIAS CJ:

Good morning.

MR HUCKER:

May it please Your Honours, Hucker for the appellant.

MS COUMBE QC:

May it please Your Honours, Ms Coumbe for the respondent trustees and I'm appearing with my junior, Ms Monteiro.

ELIAS CJ:

Ms Coumbe, it's your application so we'd like to hear you on it and the Court is interested in authority for what you're asking us to do in particular.

MS COUMBE QC:

Yes, Your Honour. Thank you for the early start, which is appreciated.

You will have in front of you a set of four of the key cases in this area, one from the Court of Appeal and three from the High Court. If I could just – what I will do is work from the memorandum that I filed in advance and indicate how, you know, I'll follow that but add to it in terms of the authority and reasoning. In that memorandum I set out in paragraph 6 just six items of information that we would like to have suppressed in the event that they are mentioned in oral argument, either by us, the Court, or the other side. The trustees make this application in the interests of the beneficiaries as a whole. I acknowledge from the outset and the authorities I've given you confirm that of course you start with a basic, fundamental presumption of open justice, that justice must be administered in open Court, and subject to the full scrutiny of the media. So that's the starting point and then when is it displaced, the Court of Appeal case that I have given you, *McIntosh v Fisk & Anor* [2015] NZCA 74 says that that's where – you undertake a balancing exercise and the question is whether the potential risks reach a sufficiently high level in the judgment of the Court to displace that presumption.

Now, in the High Court we sought and were granted a blanket order suppressing any publication of the oral argument and other than the fact that the application had been made. In the Court of Appeal there was reluctance to make the same, an order of that scope and so we lowered it down, as I indicated in my memorandum, and what we've done now is gone through the written submissions for both parties and just identified what we see as a bare minimum of items that, in my submission, could create difficulties for the trustees or the beneficiaries.

So the first ground on which we rely is that, of course, this relates to some quite personal family matters and very confidential family trusts and the cases I have given you do acknowledge that where there is that family flavour that will be a ground to suppress information. Of course, in some proceedings like Family Court and I understand tax proceedings there are express powers and this is a more general civil matter but the Court has powers to make such an order under Rule 5 or under s 25 of the Supreme Court Act 2004.

ELIAS CJ:

What's the basis of recourse to the inherent jurisdiction?

MS COUMBE QC:

Well I think it is essentially a balancing exercise.

ELIAS CJ:

What is it though? Or is it that the applicant must show that it is necessary in the interests of justice which I think is the approach adopted in the Australian cases?

MS COUMBE QC:

Well, Your Honour, yes of course but I think it's also very fact specific and so that I will identify some, you know, specific grounds –

ELIAS CJ:

But if you start with an at large balancing of the interests of everyone involved you immediately get into, you don't start with any principle it seems to me. I'm searching for what principle you say the Court should be working with.

MS COUMBE QC:

Yes, Your Honour. Perhaps balancing exercise is overstating it and we start with of course the principle of open justice, the scrutiny of the media.

ELIAS CJ:

So what displaces it?

MS COUMBE QC:

Where really the broader public interest doesn't require publication of these particular details but their publication would create risks to individuals or to those to whom the information relates.

ELIAS CJ:

Well I just wonder whether that is paying insufficient attention to the principle you first mentioned of open justice and whether you don't have to start by articulating a public reason why suppression is of benefit in the interests of justice.

MS COUMBE QC:

Well I think it's apparent from the cases that I've given you that the Courts do recognise that where there are matters of close, you know, family information are matters that might create risks to personal safety, for example, in this case Mrs Erceg has given evidence and it's before the Court that because of past media intrusions and publicity she has had to hire a security consultant to advise her and her family on security measures that there have been aerial photographs of her house in the press and things like that.

So the Courts recognise that there are also sort of individual interests that should be taken into account but I accept that it's a high threshold to displace

that starting presumption and what we say here is that there are a number of factors that in combination, which leaves limited items of information go to, which are issues of privacy, family privacy, individual privacy, safety, family harmony.

GLAZEBROOK J:

I don't quite understand the safety issue? What are the specifics of the safety issue?

MS COUMBE QC:

It's raised because the information, the specific information that I've identified and the large sums involved will identify some beneficiaries, for example, Michael Erceg's elderly mother or one of the trustees, Lyn Erceg, as having, you know, large wealth and there has already been –

GLAZEBROOK J:

But the Rich List presumably also does that and nobody says the Rich List should be suppressed and, in fact, it possibly did lead to the issue with the kidnapping plot some years ago.

MS COUMBE QC:

Yes Your Honour. Well There has been already publicity around this case and around this family, in particular, is subject to a greater than normal level of scrutiny and so, in my submission, the publication of those details would add to that.

GLAZEBROOK J:

I still don't really understand the safety, especially compared to the NBR Rich List and as I say the actual evidence that it could well have led to.

MS COUMBE QC:

Yes, Your Honour. I can't put it any higher than that the trustee, Mrs Erceg, does have a concern about some of these details being made public and that

I can only give the evidence that they have had to hire security consultants in the past.

GLAZEBROOK J:

But that's because of a concern about media intrusion and taking photographs. It's a paparazzi concern, isn't it?

MS COUMBE QC:

Yes, it is.

GLAZEBROOK J:

So it's not really safety, as such. I know that that might be in terms of the sort of things that happen with Princess Diana. There's been allegations of safety but I don't think we're going to that extent, are we?

MS COUMBE QC:

No, I'm not going to that extent. I'm saying that we have had these orders made in the Courts below and that does seem to have perhaps affected the level of publicity and it's certainly the trustee's preference for the benefit of the beneficiaries generally to have those particular matters continue to be suppressed. There is also an issue about – I call it an allegation or a suggestion that was made for the first time from the Bar in the Court of Appeal and has been repeated in submissions in this Court that one of the trustees may have benefitted herself through a share transfer for which there is no evidential foundation and which the allegation –

ELIAS CJ:

Allegations get made in Courts all the time. I'm just really feeling for how practical the course that you're urging on us is in other cases. It does seem to me that the cases that you cite, the reasons are a little bit underwritten on this point. I have looked at some cases in Australia which are not – which are quite comparable although under a statutory power to suppress whereas we're under the common law, inherent jurisdiction, which have arisen in quite comparable cases to this, the Rinehart litigation, for example, or a case

involving Paul Hogan in which the High Court of Australia said you have to show that it's necessary to make the suppression order and gives a few examples and of course there is a higher authority which also develops some sort of exceptions to the general principle that the Court proceedings are going to be open. But those are generally where there are vulnerable people, like people with mental health problems or infants or something like that. I think you need to convince us what the principle should be, that the Court should apply, when an application for suppression is made and I'm not sure that it's enough to simply say that it would be embarrassing or that the litigants would prefer these details to be kept private or something like that. If you have a strong principle like open justice then you need to mount an argument that posits an equally strong principle, perhaps derived from the Bill of Rights or something like that. But to simply say to us, "We would prefer that this be suppressed and it's an open balancing exercise," doesn't immediately appeal to me.

MS COUMBE QC:

Yes, Your Honour. I agree with you that the cases that have addressed this that I have handed you don't really grapple with what the basic principle should be and I have to acknowledge that I cannot put the matter any higher than I have in terms of the reasons for seeking suppression in this case. Perhaps, you know, we began with a blanket suppression in the High Court which was then a more limited one in the Court of Appeal and so this issue hasn't really been teased out. But at a very practical level, there are some matters that I can simply avoid referring to but I cannot – I think I've indicated to you at the highest I can really put it in terms of why we would seek to continue, in effect, as we have in the Courts below to have those matters suppressed now.

Of course there may be other matters that emerge in the course of argument that I'm not expecting as happened in the – which I can address later.

ELIAS CJ:

You can make an application if that's –

MS COUMBE QC:

I can address later, but I think I have put it at the highest I can.

ELIAS CJ:

Thank you, Ms Coumbe. Mr Hucker, do you want to be heard?

MR HUCKER:

Yes, thank you Your Honour. The request for confidentiality orders, Your Honours, have been a request made by the respondents at all hearings of this proceeding.

As was the position adopted by the appellant at first instance and in the Court of Appeal, the appellant advised the Court's decision on the application. There are, however, aspects of the respondents' memorandum that require response. There are, with respect, no issues of personal safety for Millie Erceg or Mrs Erceg, Michael Erceg's widow, in relation to the appellant.

The appellant has been providing care for his mother in Zurich over the past year given her recent serious –

GLAZEBROOK J:

To be honest, I can't see because the appellant is here in the Court proceedings so any issues of safety and confidentiality must arise from threats other than the appellant by their very nature.

MR HUCKER:

Yes, Your Honour, it doesn't appear, however, that there is any specific threat that has been identified.

ELIAS CJ:

None has been suggested.

MR HUCKER:

I just wanted to clarify, Your Honours, that to the extent there was an implication that that was –

GLAZEBROOK J:

That's why I asked specifically but it would have to have been a threat from somebody other than the appellant who would have full knowledge of what was alleged in the proceedings.

MR HUCKER:

I accept that, Your Honour, and the last point, Your Honour, is that there is the suggestion in paragraph 6(g) of the memorandum that there are matters raised that have no evidential foundation. That position is not accepted by the appellant. The respondents have proffered evidence as to the quantum of the sale proceeds of Independent Liquor.

ELIAS CJ:

But I'm not even sure that that's relevant to the quite narrow issue that we have to decide here. How is it going to come into the matter?

MR HUCKER:

I accept that, Your Honour. It was simply a ground raised in support in the memorandum by my learned friend.

ELIAS CJ:

Yes, well these are matters that the respondent would prefer are not in the public domain and we understand that.

ARNOLD J:

One of the matters in that list at paragraph 6 of the appellant's memorandum is the value of the assets received by your client under the will. Is that something that you would seek, your client would seek to be suppressed or not?

MR HUCKER:

No Sir.

ARNOLD J:

No.

MR HUCKER:

The appellant's position, Sir, is simply to a respect fee request of the trustees for confidentiality to the extent the trustees seek those matters. Otherwise the appellant adopts a principle of transparency in terms of the approach to the proceeding, Your Honour.

ARNOLD J:

Thank you.

MR HUCKER:

Unless Your Honours have any questions those are the submissions in relation to the confidentiality order.

ELIAS CJ:

Thank you Mr Hucker, thank you. Ms Coumbe, there's nothing arising out of that, is there?

MS COUMBE QC:

No, Your Honour.

ELIAS CJ:

All right, well we'll consider this application and tell you what we will do when we resume at 10. Thank you.

COURT ADJOURNS: **9.24 AM**

COURT RESUMES **10.02 AM**

ELIAS CJ:

Yes, now, we've considered the application for the suppression order and the application is declined. We will give full reasons later.

Thank you, Mr Carruthers.

MR CARRUTHERS QC:

Thank you, Your Honours. I've provided an outline for the argument I propose to make. It takes up a response to the respondent's written submissions, in essence, which accounts for, perhaps, its longer-than-usual length.

I've looked first at the nature of the right or the nature of the interest that the appellant has and I've noted that he's one of a class of primary discretionary beneficiaries in the Acorn Foundation trust deed. It's one of a class of secondary discretionary beneficiaries in the Independent Group Trust deed and he's one of a class of final beneficiaries in both trust deeds. I've then looked at the nature of the right in relation to both discretionary beneficiary and final beneficiary and I've noted in paragraph 3 that as a discretionary beneficiary there is no interest vested or contingent, merely an expectation. I've given Your Honours the references to the cases on which I rely for that proposition. The way in which the references are constructed is that there is a reference to the paragraph of the case. There is a reference to the tab number and then there's a reference to the volume of the appellant's case in which the case appears.

ELIAS CJ:

Can you just tell me, when were the trust deeds provided?

MR CARRUTHERS QC:

No, we don't have the trust deeds at all.

ELIAS CJ:

You don't have the trust deeds?

MR CARRUTHERS QC:

No.

ELIAS CJ:

When you say that he's one of a class of primary discretionary beneficiaries and so on, how's that gleaned?

MR CARRUTHERS QC:

Well, it's gleaned in this way. There was initially before Associate Judge Bell a denial that the appellant was a beneficiary in any way. Then in the second Gregory affidavit which is the reference I've given, the position of the appellants are clarified. So that's how it arises.

ELIAS CJ:

I see. Right.

MR CARRUTHERS QC:

So the conclusion I've drawn just on this preliminary issue, really to clear it away, is that there's no relevant distinction between a discretionary beneficiary and a final beneficiary for present purposes. What's important is that the nature of the right on which we rely is founded not on any equitable or proprietary right which a beneficiary may have, but on the trustee's fiduciary duty to account to a beneficiary and it's a duty which is referred to as fundamental and in this case my submission is it's the extent of this duty which is really in issue.

So then I've got to just the way in which that fundamental duty to account arises. I've referred to *Schmidt v Rosewood* [2003] UKPC 26, [2003] 2 AC 709 but I'll just identify for you the passages in *Foreman v Kingstone* [2004] 1 NZLR 841 (HC) and *Re Maguire (deceased)* [2010] 2 NZLR 845 (HC) on which I rely. *Foreman* is under tab 18 in volume 1 and the reference at paragraph 82 is in these terms. It's under Her Honour's discussion of the principles and in paragraph 82 Her Honour records, "In approaching the issue, the Privy Council cited with approval from judgments which relied on

fundamental principle in analysing the obligations of trustees and the correlative rights of beneficiaries under trust instruments. A trust creates fiduciary obligations on trustees who owe duties to beneficiaries and beneficiaries have correlative rights. A fundamental duty of trustees is to account to beneficiaries for the administration of the trust. There is nothing in the *Schmidt* decision that suggests that departure from that fundamental obligation. Indeed, it would be an extreme result if, in confirming the same rights of access to trust documents for beneficiaries with a transmissible interest and those with a discretionary interest or as objects of a mere power, a fundamental trustee obligation was in any way diminished or varied. To the contrary, the Privy Council endorses an approach to the issue based in fundamental principle. So that's the origin of the jurisdiction to support the application that's made.

Then in *Maguire* which is under tab 19, the next tab, under 27 I just simply draw attention to that, where Justice Asher supports the approach that Justice Potter took in *Foreman* and, indeed, relies in part on her judgment at paragraphs 97 and 98 as recorded there.

So I've then looked at the consequence of that fundamental duty that's been identified and I make these submissions, that the beneficiaries must have an entitlement to inspect documents of the trust from which their rights may be deduced. The financial statements of the trust and the documents demonstrating proper administration and management of the trust affairs and property, and that's really a paraphrase of *Foreman* at paragraph 85. The underlying point is that the beneficiaries need to know what their rights are, which is why the duty to account arises.

Then I've submitted at paragraph 7 that *Schmidt* and the New Zealand cases which have relied on it do not define or recognise a core category of trust documents to which there is a right of access, although my submission is there must be basic documents from which rights may be deduced. And then the cases note that the approach to the whole question of disclosure is left within the discretion of the Court and its supervisory jurisdiction, and there is a

recognition of the possible need for the Court in some cases to balance competing interests of different beneficiaries, the trust deeds and third parties, and to limit disclosure and put safeguards in place.

I've just noted there the approach of the Court of Appeal where it adopted the considerations in *Schmidt* and added one of its own and I'm content with those considerations as the approach that the Court adopts to its supervisory jurisdiction.

I've then looked at what we submit is the proper test and in this respect I'm relying on the written submissions but if I can just take you through those to identify the paragraphs on which we specifically rely. At paragraph 9 the submission that's made is that the source of the right of access to trust documents lies in the Court's inherent jurisdiction to ensure the proper administration of the trust and to ensure that trustees have acted properly. Then I've just put to one side the proprietary interest.

ELIAS CJ:

Can I just ask, my understanding has been that there is at least authority, higher authority, for the proposition that a beneficiary is entitled to an account.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

And that doesn't depend upon breach of trust or anything like that.

MR CARRUTHERS QC:

No.

ELIAS CJ:

Why are you applying, effectively, for discovery? Why are you not applying for an account and is there authority that says that that ability to obtain an account by a beneficiary doesn't apply to a discretionary beneficiary?

MR CARRUTHERS QC:

No. The propositions are that an aspect of the duty to account entitles the discretionary beneficiary to access to documents allowing that discretionary beneficiary to see what rights may be deduced. So there are the core trust documents, the trust deeds, and then the cases support the financial statements and resolution showing the administration of the trust. So that is part of the duty to account. So what we have applied for is access to the documents but the principle on which that application depends is the obligation of the trustees to account.

GLAZEBROOK J:

Why do you accept there could be competing obligations, I think is probably the question being put to you. Why is it not an absolute obligation to provide those documents based on the requirement to account, and is there a difference? Because, in fact, the cases as I understand it, at least, where they're not discretionary beneficiaries do have an absolute obligation of account and there might be an ability not to provide certain information or to provide it in a particular form which might have to do with the running of a business, for instance, related to a trust. So it's actually – there are core documents which mightn't have the other sort of documents in terms of the confidential documents in terms of a business but I thought it was an absolute right.

MR CARRUTHERS QC:

Well, Your Honour, the only –

GLAZEBROOK J:

Or an improper purpose. There may be an improper purpose.

MR CARRUTHERS QC:

Yes. Those Jersey cases that my learned friend relies on go down that line. No, Your Honour, my submission is that it is an absolute right. It's a fundamental rule is the way in which the cases are put but what I'm

recognising is that there may be conditions put on the way in which that fundamental rule or absolute right is recognised and Your Honour instanced running a business. The other cases show that there may be conditions of ill health. There's always an issue about the statement of the testator's wishes so that there are categories of documents where the Courts have recognised that it may be inappropriate for those to be disclosed and it's recognising those considerations is the way I don't put it as absolute.

GLAZEBROOK J:

All right. So you're saying that that applies whether it's discretionary or fixed.

MR CARRUTHERS QC:

Yes, I do, yes.

ELIAS CJ:

I can see that making inquiry if there are irregularities in an account or something like that is something that a beneficiary must be able to pursue, but I wouldn't have thought that there was anything like a right to more information than an account.

MR CARRUTHERS QC:

But it is – the nature of the account is the entitlement to –

ELIAS CJ:

Well, why do you say that? You say the nature of the account is that you're entitled to find out everything about the trust but that can't be right.

MR CARRUTHERS QC:

It's not everything about the trust. The beneficiaries are entitled to access to documents so that they can satisfy themselves as to what their position is.

ELIAS CJ:

What's the authority for that?

MR CARRUTHERS QC:

Well, that's exactly what *Schmidt*, *Foreman* and *Maguire* say.

ELIAS CJ:

Well, yes, but I don't understand. *Schmidt* has been criticised in some of the texts but I'm trying to get it back to the basic principle first. If there is a right to account that takes you a long way here, unless you have a creeping notion of what an account is and that may be where you're pulling in more information but that – I don't see how you get from, I don't see why you wouldn't start with an application for an account and then there may be subsequent questions that are thrown up. But why do you start by saying we need to have all the documents that will enable us to go on a fishing expedition.

MR CARRUTHERS QC:

No, no, it's not a fishing expedition at all. The account itself, the calling for the account, is the calling for the documents that allow the beneficiaries to see from which their rights are deduced and to enable them to see that there has been proper administration of the trusts.

ELIAS CJ:

And for that you rely on *Schmidt*.

MR CARRUTHERS QC:

And on *Foreman* and *Maguire*.

ELIAS CJ:

Is there any text you want to take you to on this?

MR CARRUTHERS QC:

No, Your Honour. It's described in all of the cases as a fundamental rule and my submission is I don't need to go beyond that.

I think if Your Honour will just bear with me while I take you through –

GLAZEBROOK J:

Is that perhaps the normal definition of an account?

MR CARRUTHERS QC:

I suppose the question – the question arises –

GLAZEBROOK J:

It might be in this particular context, but …

MR CARRUTHERS QC:

In this context it has to be because what – the question which arises is what would the trustees do by way of account.

GLAZEBROOK J:

Well, if you've got a fundamental right to know what happened with the trust then an account might mean that you have to say what's happened with the trust and how it's been administered and then link it back, presumably, to the trust deed because it would be meaningless without that, and link it back to the powers in the trust deed.

MR CARRUTHERS QC:

Yes, but I think the way into that is for the trustees to disclose the documents on which they rely for their administration of the trust.

GLAZEBROOK J:

I can understand that argument, so any account would have to be linked back to those documents.

MR CARRUTHERS QC:

Yes and I think the exchanges we're having really turn on the way in which an account would be performed and the way in which we have argued the case is the account requires the disclosure of the documents that we're seeking.

So I've then gone, I've dealt with paragraph 9 just on the Court's inherent jurisdiction. I've then referred to paragraphs 13 to 23 as to the need for a presumption and there is some issue about the use of the word "presumption". The Court of Appeal has said that there's not a presumption one way or the other but there has to be a starting point. If one has a fundamental rule there has to be a starting point. We've chosen to describe that as a presumption because conveniently that's the way it's referred to in *Foreman*. So what I have submitted in paragraphs 13 through 23 is that there is a need for a presumption because that really reflects the performance of the fundamental rule.

Now, if I just pick it up in paragraph 22 for Your Honour the Chief Justice, just where the interaction between *Foreman* and *Maguire* and in *Maguire* the passage that we've cited as part of the 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.

ELIAS CJ:

How were trust documents confined in that?

MR CARRUTHERS QC:

Well, the difficulty with the cases is that they're not really defined and I think Justice Kirby pointed to this in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA of NSW) but that's where there was a resistance to the concept of core documents and I think there is an issue as to just exactly what trust documents are and my submission is the better way to look at it as to the documents that were unnecessary to enable the discretionary beneficiaries to deduce their rights and then to look at documents that are necessary to see that there is proper administration of the trusts and what's recognised in those categories are the financial statements and the relevant resolutions on disposal of property, for example. But, Your Honour, there isn't a convenient definition of trust documents and I think that's a recognition that it probably varies from case to case.

The big debate about trust documents about whether the testators' letter of wishes or notice of wishes is within that category and we're not concerned with that here.

ELIAS CJ:

Well, there are also in the cases concerns about the internal operation of the trustees in deciding how to exercise the discretions conferred on them and I thought that the cases say that absent some basis for requiring that sort of information to be disclosed, it doesn't have to be under the beneficiaries right to obtain although, of course, in consequential litigation it may be the subject of discovery.

MR CARRUTHERS QC:

The answer to Your Honour is it really will depend on what documents one's talking about on how far down, how far one goes into the workings of the trustees one goes and if, for example, the reasons for decision is one area where there's a recognition that the trustees aren't obliged except where that becomes an issue, to disclose reasons in the first instance but –

ELIAS CJ:

In *Schmidt v Rosewood* [2003] UKPC 26, [2003] 2 AC 709, I can't remember, there was a background of litigation, wasn't there?

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

So it wasn't just an application for disclosure as here?

MR CARRUTHERS QC:

No.

ELIAS CJ:

In the old cases dealing with the right to account there must be some discussion of what an account is?

MR CARRUTHERS QC:

Well…

ELIAS CJ:

What I'm really putting to you, I suppose is *Schmidt* is it in territory in which discovery is overlapping with the issues of what a beneficiary is entitled to which is what we're concerned with in this case?

MR CARRUTHERS QC:

No, *Schmidt* is not coloured by any issue of discovery, *Schmidt* looks squarely at the beneficiaries' rights.

ELIAS CJ:

But it was against a background of a, well that was my understanding, a background of litigation rather than it simply being an application. I might be wrong about that so you should correct me if I am.

ARNOLD J:

I thought it was just a claim for disclosure because it was the –

ELIAS CJ:

It was, so it is comparable to this.

ARNOLD J:

– deceased's son who was the administrator of his father's estate and also a beneficiary was seeking disclosure because, given the nature of these trusts and so on it was difficult to know what had happened so he was just trying to find out, as I understand.

MR CARRUTHERS QC:

And that's why it is entirely on point here because that's precisely what the appellant's concerned with in this case.

ARNOLD J:

Your definition at paragraph, well not definition, description at paragraph 36 of your submissions of the core documents, I'll just turn it up. So the trust deed, the accounts, documents as to the existence of trust property so I suppose sort of asset list and then documents to ensure that the trustees have exercised their powers in accordance with the trust deed. I mean if that was confined to formal documents like trustee's resolutions and so on, you know, that provides a boundary in terms of core documents –

MR CARRUTHERS QC:

Yes it does.

ARNOLD J:

– trust deed accounts, list of assets, resolutions?

MR CARRUTHERS QC:

Yes.

ARNOLD J:

But you would say it goes further or may go further?

MR CARRUTHERS QC:

It may go further and I think the key is to look at the documents from which the rights may be deduced. So it's the sort of case, Your Honour, where my submission ultimately would be that the basic group of documents that Your Honour has identified would be disclosed with leave to apply further if issues arise from the nature of the documents that have been disclosed, for example, if they lead to an indication that there are other documents that are relevant to the performance of the administration of the trust or if, in looking at those documents, there is a category of administration that hasn't been

disclosed and covered but arises. So it may be an exercise that becomes incremental.

I was looking, Chief Justice, at those passages in *Schmidt* on which I've relied and they're at paragraphs 57 and 59 of *Schmidt. Schmidt* is in volume 2 of the authorities under tab 27.

WILLIAM YOUNG J:

Sorry, what paragraph?

MR CARRUTHERS QC:

Paragraphs 57 and 59 are the two that I've referred to in my outline of –

GLAZEBROOK J:

Sorry, I missed what tab, was it tab 27?

MR CARRUTHERS QC:

Tab 27 in volume 2, Your Honour. Can I just deal with those two cases because this is Lord Walker who delivered the advice of the Privy Council in *Schmidt* and he draws on the Irish case of *Chaine-Nickson v Bank of Ireland* [1979] IR 393 at 56 cites what the background of the case is and then at 57, "After stating the general rule that a beneficiary with a vested interest is entitled to disclosure," Justice Kenny continued, "However, in the case of the discretionary trust, none of the potential beneficiaries have any right to be paid capital or income. All the trust fund is held by the trustees, in this case on discretionary trusts, and if the plaintiff is not entitled to the trust accounts and particulars of the investments it follows that none of the potential beneficiaries have a valid claim to any information from the trustees. The result is that trustees are not under an obligation to account to anyone in connection with their management of the trust fund. The logical conclusion from the defendant's argument leads to remarkable consequences. The amount of remuneration to which the trustees are entitled is specified in the settlement and the potential beneficiaries have an interest in seeing that the amount is not exceeded for they are the persons who will ultimately benefit by payments

of capital and income. The defendant's contention, however, has the result that they do not have to account for or disclose the amount of their remuneration. This seems to me to be contrary to the basic concept of the trust deed being accountable for his management of the trust fund, and then it discusses that case and then at 59 deals with *Spellson v George* (1987) 11 NSWLR 300, the Australian case, and deals with the facts and then concludes just between letter C and D, "That the whole passage merits study, the conclusion is as follows: the question then is whether a person whose status is only that of a potential object of the exercise of a discretionary power can properly be regarded as one of the trust of the relevant trustee. I do not doubt that he can and should properly be so regarded for although it is true to say unless and until the trustees exercises his discretion in his favour, he has no right to receive and enjoy any part of the capital or income of the trust fund. It does not follow that until that time arises he has no rights against the trustee. On the contrary, it is clear that the object of a discretionary trust, even before the exercise of the trustee's discretion in his favour, does have rights against the trustee. Those rights, so it seems to me, are not restricted to the right to have the trustee bona fide consider whether or not to exercise his – the trustee's – discretion in his – the object's – favour but extended the right to have the trust property properly managed and to have the trustee account for his management, a view I am glad to say which appears to have been shared by Justice Holland and Justice Kenny.

ELIAS CJ:

The other point to be taken from that, because I had a slight question about, but the Privy Council is obviously approving the approach taken here, is that that was another case in which three of the trusts had actually been wound up. I was going to ask you whether that makes a difference because that, as I understand it, is the position here.

MR CARRUTHERS QC:

The only difference it makes is that because there's no trust business that's ongoing, the –

ELIAS CJ:

The confidential matter doesn't – yes. But that is interesting that that was a case where I think there were four trusts, were there, and three of them had been wound up. It doesn't affect the principle.

MR CARRUTHERS QC:

Yes but I think the importance for my argument is that that Privy Council is looking at conventional principles in Ireland and Australia adopting them and they're the principles I've relied on in *Foreman* and *Maguire*.

ELIAS CJ:

The way in which, as I understand it, this case has been criticised is in – not that it would be contrary to your argument, it might help it – is in suggesting that it's a matter of discretion and the suggestion made is that that puts the matter round the wrong way, that there's an entitlement and then the trustees may apply for the Court to exercise the discretion to cut down the entitlement in a particular case.

MR CARRUTHERS QC:

Yes. There are two ways that it could be handled. A beneficiary can apply to the Court to exercise the supervisory jurisdiction which is the exercise of the fundamental right and that's what the reference that you made picks up. The other way that it might occur is on a request by a beneficiary a trustee may apply to the Court for directions but the Court would still be exercising a supervisory jurisdiction rather than –

ELIAS CJ:

Yes. In the one case it is exercising it on the basis of a presumption of disclosure and rather than the general discretion that is that *Schmidt* seems to assume.

MR CARRUTHERS QC:

Yes. I think that is, in some passages the use of the word "discretionary" is a little unfortunate.

GLAZEBROOK J:

And on your argument the beneficiary shouldn't have to apply for the Court to exercise its jurisdiction. It should just write and say please provide me this information and it should be provided.

MR CARRUTHERS QC:

Yes, and if it's not –

GLAZEBROOK J:

Then you would have to make an application.

MR CARRUTHERS QC:

One gets into this position, yes, yes.

I was just taking you through the passages in the written argument that I wanted to draw attention to and I think I got to – I'd just drawn attention to paragraphs 13 to 23 and then 24 to 32 I've looked at the scope of the disclosure and I then come to the conclusion in paragraph 33 where I've submitted this approach that we've described in the previous paragraphs provides the appropriate balance between the interests of the trustees to carry out their functions unimpeded and the beneficiary's right to information to ensure that the trust property is properly managed. The presumption of transparency is consistent with the modern legal landscape of disclosure and ensures that the Court is able to properly fulfil its inherent jurisdiction to supervise the administration of trusts.

Now, the next section I come to in my oral argument deals with the Court's jurisdiction and I just make these submissions because in my submission the Court of Appeal doesn't seem to have recognised the different facets of the jurisdiction. So I've said there are two facets in the context of the present case. First there can be reliance on the inherent jurisdiction of the Court to supervise and if necessary intervene in the administration of trusts, or secondly the application may be brought as a challenge to a previous

discretionary refusal by the trustees to disclose trust documents and that's really just an adaptation of the proposition in *Breakspear v Ackland* [2008] EWHC 220, [2009] Ch 32 that I've given you. I don't need to take you to it. *Breakspear* actually puts those two facets the other way around. But in the way in which we're arguing the case, the primary reliance is on the supervisory jurisdiction.

I've given a reference to the written submissions. I want to come back to that in a different context just in a moment. I've said that the application relies on both facets of the jurisdiction but primarily on the Court's inherent jurisdiction and then I've submitted that the Court of Appeal doesn't seem to have recognised the two distinct aspects of the jurisdiction and I'll just take you to those passages. I'm in the case on appeal under tab 19, which is the judgment. I begin at paragraph 25 where the Court said, "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.

Now, let me pause there because there is in fact a preliminary category to those two that the Court has identified in that sentence. What the Court in that passage in my submission overlooks is that there is a category where the Court is required on an application by a beneficiary not to review the trustee's decision but to exercise its inherent jurisdiction and supervisory powers and that's the category in which we rely on primarily.

Then the Court goes on to say in 26 –

ELIAS CJ:

Is this argument really just to forestall suggestions of a deferential approach to the trustee's so-called discretion? I mean, why do you need it?

MR CARRUTHERS QC:

Well, I want to make sure that the way in which the Court decides this case reflects the essential basis on which the application is made, that is, that it relies on the inherent jurisdiction and the supervisory jurisdiction of the Court and not necessarily any review.

ELIAS CJ:

It's not a section 68 Trustee Act 1956 application?

MR CARRUTHERS QC:

No.

WILLIAM YOUNG J:

Was that section invoked or not in the application?

MR CARRUTHERS QC:

No, it wasn't. No.

GLAZEBROOK J:

But put my simply isn't it just I'm entitled to these documents and they're not being provided so, yes, it's the supervisory jurisdiction but it's not very supervisory because it might be later depending upon what the documents say but at the moment isn't it just the supervisory jurisdiction consists of telling trustees to do what they have to do anyway?

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

But that depends on whether there is a discretion –

GLAZEBROOK J:

No I understand that obviously but your argument is it's to do what they have to do with at least in respect of what might be called core trust documents.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

Whatever they're defined as.

MR CARRUTHERS QC:

Yes, and the only room for movement on that is a recognition that there may be particular issues like confidentiality, terminal illness, unknown issue of the settlor, issues like that.

ELIAS CJ:

But that would have to be made out by the party, the trustees?

MR CARRUTHERS QC:

By the trustees, yes.

ELIAS CJ:

Yes. Well, but we're at a preliminary stage where –

MR CARRUTHERS QC:

Yes we are.

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

Your Honour –

ELIAS CJ:

I am a little bothered that, I mean section 68 is there surely even if this is an inherent jurisdiction it would be exercised by reference to section 68. I mean, I don't know that it matters at all really.

MR CARRUTHERS QC:

No, all I can say in answer to that, Your Honour, is the way in which the case was first presented.

ELIAS CJ:

Yes, the way in which you came. Well I think often it doesn't really much matter how cases get before the Courts.

MR CARRUTHERS QC:

No.

ELIAS CJ:

You have to do substantive justice.

MR CARRUTHERS QC:

Yes I understand that, yes. Well, Your Honours, with that exchange I don't need to go any further. In paragraph 14 I've just drawn attention to the passages where the Court has dealt with its jurisdiction and then when we come to 31 and 32 that the Court then deals with the exercise that the trustees discretion and I think at that point if Your Honours would just note that that's where I really need to refer to paragraphs 81 and 86 of the written submissions and I don't need to take you to that because I'm content with the exchange that we've had.

GLAZEBROOK J:

It seems to me if you've got an application for directions it seems odd to say it's reviewing a discretion.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

Because the trustee may just say, “Do I have to provide these documents and there’s not a review of a discretion in most circumstance because the trustee’s just asking the question.

MR CARRUTHERS QC:

On a direction, yes.

ELIAS CJ:

Well it's not a review jurisdiction. The word “review” may be used but it's –

MR CARRUTHERS QC:

No.

ELIAS CJ:

– and certainly it's not being put forward on that basis, it's being put forward that it's an entitlement.

GLAZEBROOK J:

Well, yes, it's just that on paragraph – even on that grounds, on paragraph 32 of the Court of Appeal it says that it's reviewing a discretion.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

Well I think that's wrong.

GLAZEBROOK J:

Well that's not very helpful if the question of the trustees is, “We actually don't know whether we have to and we have no particular view on whether we have

to disclose it or not, we're just asking you whether we do Court," in an application for direction.

MR CARRUTHERS QC:

Yes, on a trustee's application, yes. So what I've then submitted at 15 is that the exercise of the Court's supervisory jurisdiction is separate and distinct from the exercise of a discretion by the Court, the supervisory jurisdiction is not limited by the considerations which apply to a review or appeal from the exercise of discretion and the distinction is –

ELIAS CJ:

Well it may. I mean in a particular case if an application was made under section 68 for something that a beneficiary is not entitled to as of right the Court might well take into account the reasons the trustees give for not acquiescing, so it really just depends on what's in issue, doesn't it?

MR CARRUTHERS QC:

Yes, Your Honour, that's correct and really my paragraph was just directed to try to just –

ELIAS CJ:

Yes, well I think you are meeting, you're really trying to meet the Court of Appeal view that this is –

MR CARRUTHERS QC:

Yes I was, yes. And then I've just drawn attention to the submissions that the respondents make and I don't need to go there. So I then come to what I submit is the real issue and I've submitted that it is as to the safeguards or as to where the safeguards ought to be imposed in order to recognise the trustee's role in the protection of other beneficiaries and I've then set out the propositions in support of the appeal and I have canvassed those in my argument.

Then I've gone on to look at the propositions that have been put by the respondents as disqualifying the appellant from access to trust documents and they're at paragraphs 100 to 119. So this is really in reply to the respondents' submissions and I've identified the categories. The first category was confidentiality and I've submitted that that aspect can be met by terms, that is terms as to who may look at the documents and in what circumstances and I come to that issue in just a moment.

Then there's a category of threats and disruptive influence and that's dealt with in paragraphs 108 and 109. This is, in my submission, quite an important aspect because what is being criticised is historic conduct by the appellant and the emails that are relied on finish in May 2009 and they have a context. They have a family dispute context and some of the features that are relevant in that context are first the previous support, which Michael Erceg had provided to the appellant, had been stopped by the trustees. The trustees were in a position to prevent the appellant's bankruptcy but chose not to do so. That is by –

ARNOLD J:

Do you mean by that advancing him money?

MR CARRUTHERS QC:

Well, because that was what Michael was doing, yes. I do mean advancing him money. Yes.

Then I've said that the trustees denied –

ELIAS CJ:

But in any event, I don't want to interrupt you on this and go on but it depends what mindset you come to this from. If you come to it from a mindset that there is an entitlement of a beneficiary then it's difficult to see that conduct would disqualify in a way that couldn't be managed. It's different if you think that it is entirely at large and a discretion has to be exercised in terms of whether to provide information because then it might be that conduct is

relevant but for my part I can't really see that it is – it can be particularly significant depending on how wide you cast the net in terms of what information is available to the beneficiary.

MR CARRUTHERS QC:

Yes. Well, with respect, Your Honour, I agree and that's the – I mean, the proposition has to be for the respondents that bad behaviour disqualifies or overrides the fundamental rule and so all my submission is directed to is the background where the suggestion seems to be that bad behaviour disqualifies the appellant and I've just set the context there.

Well, Your Honour, I've set out in that, in answer to the respondent's submission the propositions that we put so I've dealt with conduct. In C, again, that's probably a conduct issue about being the driving force behind his mother's claim but that case was settled prior to the hearing before the Court of Appeal. The respondents were removed as trustees in the relevant trust and there's no question of the appellant having any further involvement with those proceedings. They're at an end. It's said, then, that another disqualifying factor is the remote prospect of further distribution. Well, without access to trust documents the appellant can do little more than speculate from known facts and there's a criticism about speculation but that's all we can do is point the Court to factors that indicate that the account is warranted.

O'REGAN J:

Doesn't the winding up kick in that, doesn't the fact that it's been wound up kick in that?

MR CARRUTHERS QC:

Your Honour, if – yes. If one's looking at distribution in terms of the trust deed Your Honour must be right. If one's looking at whether there is the prospect of a claim succeeding is probably the better way of looking at it.

GLAZEBROOK J:

And in any event, the cases would actually suggest, that you took us to, that it's a right in any event because it's a right for proper administration whether or not there's a remaining expectancy especially since in the particular case, one of the cases three of the trusts had been wound up.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

And so presumably no prospect of a future distribution.

MR CARRUTHERS QC:

And you'd still –

GLAZEBROOK J:

And yet still the obligation was said to exist.

MR CARRUTHERS QC:

Yes. Yes, I think that Your Honour Justice O'Regan's right to pick me up. The word "distribution" really was inapt.

Then there's the issue of disclosure of documents to other beneficiaries. That was in separate litigation and the orders were made limiting disclosure and confidentiality undertakings were given. So it can't be relevant that there has been disclosure to other beneficiaries, the point is there hasn't been disclosure to the appellant and then it said no complaint has been about the trustee's administration. Well again, the appellant is really not in a position to comment in the absence of access to trust documents and the fact that there's been no other complaint, in my submission, is not relevant to the argument.

And then I submitted that all of the propositions put by the respondents can be met by appropriate terms. The answer is not to deny access completely but to impose terms which properly protect the position of the trustees and other

beneficiaries. And one of the themes that comes through the respondents' argument throughout the case is the question of discord in family relationships and that's dealt with quite neatly by Justice Potter in *Foreman* at paragraph 95. *Foreman* is under tab 18 in volume 1 and at 95 Her Honour said, "It's not surprising that the outcome of the exercise by the trustees of their discretions pursuant to the powers vested in them by the trust deed is less acceptable to some beneficiaries than to others. It may cause friction or acrimony that that is not of itself a reason for denying beneficiaries information to which they are entitled. Indeed, the denial of information may be the cause of friction or exacerbate friction because lack of relevant or inaccurate information will frequently lead to conjecture, suspicion and resentment by those denied. The suspicion and resentment is likely to be directed not only towards the trustees but any advisory trustee, other beneficiaries and the settlor.

Then I've gone on to look at appropriate terms and these are just put forward as an illustration of what might be done. Documents provided to appellants, solicitors and counsel, documents available for inspection by the appellant in the presence of his solicitors or counsel, documents not to be further copied, documents may be made available to experts consulted by the appellant's solicitors or counsel under supervision of the solicitors or counsel, and subject to the Court's directions there may be redactions to preserve sensitive issues of confidentiality such as health or unknown beneficiaries or similar issues. I've submitted that there really cannot be any principled objection to disclosure. The emphasis is on the fact that any issue concerning rights which the appellant may have will be governed by the advice he receives from his solicitors or counsel, so it's not a matter of the appellant having open access to deal with the documents as he thinks fit. Necessarily it's going to be a matter for advice.

Then I've submitted that the whole analysis is consistent with the approach in *Foreman* and I've given you the paragraphs. I don't need to take you to that.

O'REGAN J:

Were these terms before the lower Courts as well? Were they put forward there?

MR CARRUTHERS QC:

I think what was before the Court were the protocols that are in the case and I refer to those at the –

O'REGAN J:

But are they broadly similar to these?

MR CARRUTHERS QC:

Yes. The answer to Your Honour's question is no, those terms weren't before the Court of Appeal in exactly that form but the protocols were and they are more restrictive, probably, than those terms but what – all I was concerned to do, Your Honour, was to give a guide as to the sort of terms that might be imposed and the reasons why one would do that.

Because we've got to that point, I'll refer to the protocols in a moment. I'll take you to them now. They're in volume 1 of the case and I've just given the page references as 21 to 26. They're tab 7 is the proposed protocol and at 21 and 22 and 23 and 24 is the respondent's response and then at 25 is a comparison between the documents that we're seeking and the categories disclosed in what was Erceg 1. That's Mrs Erceg's claim, Millie Erceg's claim, and I come in a moment just to give you a reference to Justice Venning's judgment there where for someone who was a more remote beneficiary than the appellant in this case received a disclosure of documents that I can identify for you in a moment.

ELIAS CJ:

Is the correct analysis, though, that there are two stages, one is dealing with information to be disclosed, second, invocation of the Court's inherent jurisdiction to protect confidence where it arises?

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

And the two shouldn't really be muddled, should they?

MR CARRUTHERS QC:

No, no because I think it's appropriate for me to accept that the appellant is willing to recognise proper imposition of terms.

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

If I can just be quite clear that these protocols were designed at a time before I was in the case so the reference to me was –

ELIAS CJ:

But you're seeking what you have indicated in 22 and no one's yet had to deal with that so we might as well, subject to what is, you know, what the respondents have to say. Is that right?

MR CARRUTHERS QC:

Well, what we seek is in schedule A to –

ARNOLD J:

It's a schedule to the Court of Appeal judgment at page 97.

GLAZEBROOK J:

Schedule A is at page 4 of the – I'm not sure whether it's the same. It looks like it, so it looks like it's the same.

MR CARRUTHERS QC:

And the other reference is the one that I took you to behind the protocols where there is a comparator between schedule A and the order in Erceg 1. The schedule at page 97 of the case is schedule A, which is what's being sought.

ELIAS CJ:

In some of the cases on account that I've looked at, there often are serial orders made. First you get your account, then you challenge something that's happened and then you get further disclosure. There's quite an interesting judgment of Sir Peter Millett in Hong Kong final Court of Appeal in which he sort of describes this process without – in very confident terms without any authority being cited because I suppose he was the authority. I wonder whether at this stage some of the information that you're seeking here goes into that core obligation category, obligation to account, I mean, details of all share transfers blah blah. One would have thought the accounts of the trusts and the trust deed certainly but doesn't there have to be something further before a beneficiary is entitled to more than that?

MR CARRUTHERS QC:

Well, from the public documents, from the Companies Office records we know that there were a number of transfers of shares. So –

ELIAS CJ:

But won't they be disclosed in the accounts?

MR CARRUTHERS QC:

Well …

ELIAS CJ:

To the extent that you're entitled to them.

MR CARRUTHERS QC:

Your Honour, if I can just go back to the observation you made to me about Sir Peter Millett. Probably in a not very elegant way that was the point I was making to Justice Arnold earlier on about it being an incremental process. So Your Honour has put it more accurately than the way in which I did. I accept that and yes, it is likely that the accounts will lead into some of this information. In fact, I know it does because that's the advice that we've got in relation to the compilation of that schedule and the description of why those documents are necessary. So a serial approach to the issue, I'm content with that.

ELIAS CJ:

I must say, he uses terms that don't really mean very much to me but –

GLAZEBROOK J:

Where are we?

ELIAS CJ:

I don't think we've got it in front of us.

GLAZEBROOK J:

We haven't got it in front of us?

MR CARRUTHERS QC:

No it's not –

GLAZEBROOK J:

Have we got it anywhere?

MR CARRUTHERS QC:

No I saw the registrar bring it into Her Honour so none of us have got it.

GLAZEBROOK J:

Okay.

ELIAS CJ:

Well what he says is, “An account is not a remedy for a wrong, trustee and most fiduciaries or accounting parties and their beneficiaries or principals do not have to prove there’s been a breach of trust in order to get an account,” but, sorry, there was some passage in which he indicated, I can't find it in a hurry. Anyway, I thought he said that you have to challenge the sum. Anyway, I think there is a general process that is referred to there. I see, here it is. “An account isn't a remedy, it's merely the first step in a process which allows the beneficiary to identify and quantify any deficit in the trust fund,” et cetera. “Once the plaintiff has been provided with an account he can falsify and surcharge it.” I don't really know what the means but anyway, and then you can get a further account and further inquiries, he suggests.

MR CARRUTHERS QC:

Well I think the way in which we have approached the question of disclosure is to identify what we can see immediately as documents that we need for the purpose of examining the rights that we can, that we can deduce for ourselves and issues about the administration of the trust so that's as far as I can take it, Your Honour, as I've already conceded. I can see that it may well be a serial process.

O’REGAN J:

The paragraph 3 of your 22 talks about not further copying the documents. Would that also extend to not disclosing their contents to other people?

MR CARRUTHERS QC:

Yes it would Your Honour. I think the –

GLAZEBROOK J:

Apart from the experts presumably?

MR CARRUTHERS QC:

Apart from the experts, yes.

O'REGAN J:

Yes, I mean, obviously.

MR CARRUTHERS QC:

No, I took that Your Honour, yes.

WILLIAM YOUNG J:

How could that be enforced if he's not in New Zealand?

MR CARRUTHERS QC:

Well the documents will be in New Zealand so.

WILLIAM YOUNG J:

But he doesn't live in New Zealand.

MR CARRUTHERS QC:

Well he doesn't at the moment live in New Zealand. He's looking after his mother who is ill in Switzerland but he is backwards and forwards in New Zealand. Right at this moment he's in your Court.

GLAZEBROOK J:

That's presumably covered by the ii, "Available for inspection," under "Presence"?

MR CARRUTHERS QC:

Yes, that's right.

GLAZEBROOK J:

And one assumes that means physical presence both of him and the documents?

MR CARRUTHERS QC:

Yes it does, it's not a matter –

GLAZEBROOK J:
So not an Internet presence?

MR CARRUTHERS QC:
It's not a matter of releasing the documents to him so the answer to Your Honour Justice Young is that the documents would be staying here.

I've got to the question of reasons for account. Now this section is only in the submissions if it were necessary to give reasons to justify the order for account but in the analysis that I've made it's not necessary for me to give reasons and, Your Honours, I think I can conveniently leave that section entirely.

I've gone on to then deal with what is sought and I've disclosed – we're really in the discussion that we've had I've drawn attention to schedule A and then submitted that there's no onerous scope and there's no real need for any confidentiality. I've drawn attention to the protocols.

I've then gone on next to deal with standing and I've discussed this with my learned friend. The standing issue arose because the respondents gave notice that they wanted to support the judgment on other grounds and in preparing the written submissions we decided to deal with submissions on that issue and of course my friend has responded on really what is her argument and I said that I would deal with it orally to the extent that I would so that any reply that I have would only be on the issue of jurisdiction to make disclosure rather than on standing. That's just so that we can conveniently deal with the argument.

I've then just simply submitted that we support the reasoning and result of the judgment of the Court of Appeal. It's largely because it captures exactly the argument that we made and if I can just take you to that under tab 19 in paragraph 14 on page 82. The Court says, "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 trustee's duties to beneficiaries enforced and to that end to request disclosure of trust documents by the trustees. Approached differently, the answer to the question, is the appellant a stranger to the trust is a definite no. This is essentially the approach advocated by counsel, although he addressed it in relation to question 2 and we outline this in paragraph 22 below. We agree that the nature of a beneficiary's interest is properly a factor relevant to the exercise of the trustee's discretion to disclose. Well, that's on a slightly different point.

The argument on this issue of standing as far as the appellant is concerned is set out fully in the written submissions at 97 to 171 and I'm content to rely on those and I don't wish or need to address you orally on the issue of standing beyond that.

If Your Honours please, those are my submissions in support of the appeal.

ELIAS CJ:

Can I just ask, in the statement of claim there was a claim for a declaration that the plaintiff is a beneficiary. Has that been overtaken?

MR CARRUTHERS QC:

I think that has been overtaken by Mr Gregory's second affidavit.

ELIAS CJ:

Yes, thank you.

Yes, Ms Coumbe.

MS COUMBE QC:

Your Honours, I can see you are troubled by the idea that a beneficiary might not have a right, an absolute right of access to what you call core trust documents and I do want to address that because I think that would be quite a

shift from where the law is at the moment and I think it would leave trustees in quite a difficult position in terms of managing their function.

I can deal with discretion and move straight into that issue if that's your preference but what I might just do first is outline just what the basis for the right to intervene in terms of, or what is the basis of the beneficiaries right to seek information and in my submission section 68 does not come into it because section 68 of the Trustee Act only relates to the exercise of trustee exercising powers conferred by that Act and as the Law Commission I think expressly noted in one of its reports, it was either the Fourth Issues Paper or it was number 31, the issue of beneficiaries getting information is not dealt with in the Trustee Act, it is a matter of the common law, it is dealt with in the cases and so their entire analysis really was looking at whether, in terms of where things have been left by *Schmidt* is that appropriate or is some statutory modification of that needed but certainly there is an express acceptance and certainly that was my own view on looking through the Trustee Act that this was not something that was covered by section 68 and there is, this application was quite squarely, it's clear from the statement of claim and from the notice of application for summary judgment, that it is squarely brought under the Court's discretionary jurisdiction and I want to go in and examine in a bit more depth.

GLAZEBROOK J:

What do you mean by "discretionary jurisdiction"?

MS COUMBE QC:

I'll go back to –

GLAZEBROOK J:

Can I just say because the Court's ability to control trustees in my understanding is not a discretionary jurisdiction? The Court can't say, "Oh, I don't feel like that today."

MS COUMBE QC:

Yes, but –

GLAZEBROOK J:

At common law or under the Trustee Act so what do you mean?

MS COUMBE QC:

What I'm talking about – perhaps I should go back to almost to the beginning. Originally, of course, the right to seek information was thought to be based on the proprietary, that is a vested, vested in possession or interest in the trust assets. So that right only applied to a beneficiary with a present vested interest in possession or someone like a remainder man who had an interest vested in interest. Now that effectively meant really the beneficiary got the documents because the beneficiary was the owner of them. But even at that stage, even, you know, late 1800s when that was still the basis for seeking the information as it was, for example, in *Cowin* which I won't take you to but it's referred to in my submissions where Justice North, even in that case which did involve a remainder man. So the person had a proprietary interest in the trust assets. The Court made it very clear that that was a still discretionary, they had a discretion in determining whether or not to give access to the documents and that wasn't –

GLAZEBROOK J:

I think you'd better take us to the case.

MS COUMBE QC:

Yes I'll take you to that case.

ARNOLD J:

Well it's referred to by the Privy Council in *Schmidt* at paragraph 67.

MS COUMBE QC:

Yes, and I'm going to come back to that too because I think that that case and other cases like *Murphy v Murphy* [1999] 1 WLR 282 (Ch) and *Spellson v George* in particular all had quite an influence on where

Lord Walker ended up and I think it is really important to understand that because I am concerned at the moment that the Court is kind of, I think, has leapt forward quite a long way in terms of, you know, where things should be and I would like to take you through my analysis.

So *Cowin v Cowin* is at tab 7 of our bundle.

ELIAS CJ:

Sorry, this view that you cannot have any entitlement of trust documents is not really one that I would have a problem with, that that is the rule and then you have to apply to the Court if you want trust documents. What I am concerned about is the right to an account and what that entails?

MS COUMBE QC:

Well, Your Honour, and what I think is clear from the cases is that it's not a matter of there being an entitlement to certain documents and then it's a discretion after that and nor is it a matter of the trustees having to go to the Court and get directions should they wish to withhold documents in a particular category, and I'll come again to another decision a bit further on where that specific issue was addressed.

So even in *Re Cowin* (1886) 33 Ch D 179 we have a situation where someone with a vested interest comes along to the Court and wanted documents related to the assets of the trust, certain properties that were owned. *Cowin* is at tab 7. The documents related to trust deeds relating to certain properties owned by the trust. Because this was in the days where you had to show a proprietary interest, there was a prima facie right and at the bottom of page 184 we have Justice North saying, "The first question is whether the plaintiff is prima facie entitled to inspect the trust title deeds and other documents. If he is, the question will arise whether any good reason has been shown for depriving him of that prima facie right." So he had a prima facie right. He was a beneficial owner in the sense of the trust property, but we turn over to 186 and he says – this is further down to about the last third – "It seems to me that the plaintiff is entitled to see the deed subject to this. There might be

circumstances which would justify the trustees in withholding them from him, but nothing has been shown which can justify them in doing so." He goes on at 187 and says, "I do not say that he is entitled as of right but only that he's entitled under the circumstances because there might be a state of circumstances under which the right to production would not exist."

But it is also from that case, also from *Re Londonderry's Settlement* [1965] Ch 918 (CA), but the point I'm just making is that even under that proprietary ground sort of regime it was discretionary and nowhere was there any statement that come what may a beneficiary is entitled to any particular document. The trustees were always recognised as having a discretion and it certainly wasn't contemplated that every time they might want to exercise that discretion they would have to seek directions from the Court.

ELIAS CJ:

Londonderry was the one I was thinking of earlier where they wanted to seek disclosure of how the trustees had decided to exercise the discretion as to appointment among beneficiaries and I quite understand that, that there's no entitlement to that. I'm hung up about this entitlement to account.

MS COUMBE QC:

Certainly a lot of the cases were concerned with withholding of, you know, information about the reasons but I think they did go further than that and I think that *Cowin* is an example of that where the Court clearly was sort of anticipating that there could be other circumstances where there might need to be some withholding and I'll come on to some more recent cases.

GLAZEBROOK J:

If you look at *Cowin*, one can understand in a proprietary context that you would say you are the beneficial owners of that property, therefore prima facie you're entitled to the title deeds and to know all about that property. That doesn't say anything about if Cowin had said, "Can I have the trust deed, please, to see whether I'm a beneficiary?" They could say, "Well, sorry, we're not going to give you the trust deed." Because in an obligation to account, at

the very least one ought to know whether you are a beneficiary and in an obligation to account whether in fact what's been done is in accordance with the trust deed. Knowing that you've got a particular title to a particular property may not be part of – or that the trust has may not be part of the particular obligation to account but as a proprietor and as a beneficial owner that might give you greater rights to that particular piece of information.

MS COUMBE QC:

Yes. I think the Court still does recognise a discretion there and certainly Lord Walker –

GLAZEBROOK J:

Well, it's not a discretion. It's actually saying there may in particular circumstances be something that displaces what is effectively a right to ask for your own property.

MS COUMBE QC:

Well that is seen as an overriding discretion that kind of thing in some of the cases like *Rouse v IOOF Australia Trustees Limited* [1999] SASC 181, (1999) 73 SASR 484, in the Australian case, *Re Rabaiotti* [2000] JLR 173 (JRC), the Jersey case, where the Courts recognise that in those decisions – perhaps I'll come to those soon but once –

GLAZEBROOK J:

Well *Cowin* is really only saying and overriding discretion to what is effectively a right because you are an owner.

MS COUMBE QC:

You were the owner. But I think it's significant that even in that context of a proprietary interest and therefore a right to, a prima facie right, there was still an overriding discretion which the trustees could exercise and when we come to *Murphy v Murphy* Justice –

WILLIAM YOUNG J:

You're jumping through *Londonderry,* is there a particular passage in *Londonderry* that you rely on or not? It's basically a case about something else but is there anything in *Londonderry* that you –

MS COUMBE QC:

There was a particular passage but I'll find that and come back to that but –

GLAZEBROOK J:

As I understood with *Londonderry* I don't think there was a suggestion there was any documented issue as to how that exercised the discretion laws there.

MS COUMBE QC:

It didn't involve the same issue as in this case where there are issues about disclosure of identity or other beneficiaries and so on but if I –

GLAZEBROOK J:

I thought the issue there, but I might be wrong, was just whether they had to send you a letter explaining why they had in circumstances where there wasn't a written record but I might be wrong.

WILLIAM YOUNG J:

Well at the bottom of page 935 the Judge says, "It seems to me there must be cases in which documents in the hands of the trustees ought not to be disclosed to any of the beneficiaries who desire to see them." And I think the point was a good one which was taking the affidavit of Lord Nathan that, "To disclose such documents might cause infinite trouble in the family out of all proportion to the benefit which might be received from the inspection of the same." I think it's fair to say the Judge is still really thinking about decision documents bearing on decisions as to why – bearing on decisions as to discretionary determinations made by the trustees, although it is expressed in general terms. Is that the passage you were thinking of anyway?

MS COUMBE QC:

It may have been but when –

ELIAS CJ:

And *Londonderry* is significant because it attaches to discretionary beneficiaries as well, isn't it, it's one of those authorities that makes that point.

MS COUMBE QC:

Although in *Londonderry* it was still, I think basically the basis for disclosing information was still seen to be proprietary. It really wasn't until we get to cases like *Murphy v Murphy* and *Chaine-Nickson*. Now *Murphy v Murphy* is a decision that Justice Neuberger, as he then was, that was a case of a discretionary trust so the plaintiff had no fixed beneficial interest in the trust assets and sought access to information. In this case identity of trustees in the first instance and Justice Neuberger clearly sought –

GLAZEBROOK J:

So where are we with that?

MS COUMBE QC:

I'm at page 9 of my submissions but I'm dealing with *Murphy v Murphy* which is –

GLAZEBROOK J:

We haven't got it though.

WILLIAM YOUNG J:

We have, it's tab 9 of the –

MS COUMBE QC:

Tab 9 of our bundle.

ELIAS CJ:

We'll take the adjournment shortly. Sorry, I'm just being reminded it's time for the morning adjournment but you might want to finish this.

MS COUMBE QC:

Shall I just finish with *Murphy*?

ELIAS CJ:

Yes.

MS COUMBE QC:

So this did involve a discretionary beneficiary seeking information and Lord, Justice Neuberger wasn't attracted to the proprietary approach and he said that really you were invoking the Courts equitable jurisdiction when you seek equitable or inherent jurisdiction when you seek access to documents and he saw that as carrying with it a broad discretion and he also, so that on page 291, half way down at E he emphasised the wide jurisdiction of the Court on page 292. At about D he says, "There is power to make such an order, namely, the wide and flexible jurisdiction of the Court in equity which carries with it a wide discretion." So that was the basis for –

WILLIAM YOUNG J:

Sorry what page, sorry, 292?

MS COUMBE QC:

This is on page 292.

WILLIAM YOUNG J:

Letter what?

MS COUMBE QC:

At D. So this is where we see really the first move towards the, moving away from the proprietary ground to giving access to discretionary beneficiaries access to information and the Court looking, well what's the underlying basis for that and it was this equitable jurisdiction and he then goes on to look at, he

says it's a raw discretion and then he looks at, well does the beneficiary, should the beneficiary in this case be given access or not, and he says that he's influenced by a number of things. This is at the bottom of 292, if I can just summarise them. He looked at his status, was he a remote beneficiary, what were his needs, what was his financial position? In this case he was legally aided. He wasn't rich on the face of it so he maybe a reasonably worthy claimant. Then he says, thirdly, while it's clear he has fallen out to a very substantial extent with the defendant he is nonetheless one of his four children, so that was a very close relationship and at the time of the trust settlement he had been one of two.

So he said that those factors in combination led him to think that the request was a reasonable one, the request for access. He goes on to say further down at D and E that since we're now letting, you know, discretionary beneficiaries in the door we do need to have some constraints. He says, "It appears to be it would be most undesirable for this Court to make orders which would be likely to result" –

GLAZEBROOK J:

Sorry, I think I've lost you again, where are you?

MS COUMBE QC:

Okay, I'm on page 293 at E. He talks about trustees of discretionary private trusts which often have, of course, a very large number of beneficiaries. He says, "Being badgered with claims for consideration to be given to their claims for trust monies or for accounts as to how trust monies have been spent." And he said, "The duties are quite onerous enough without such added problem."

So what I think is really significant in this case is that we have Justice Neuberger recognising that even in relation to trust, what my friend would call core trust documents, it's not just, there's not an automatic right. There is a discretion in the trustees and he, in this case, exercised the discretion. I think it was still on the basis further on, further, you know, the

trustees could come back with further information against that if they wanted to but because of that was this a beneficiary with real prospects of a distribution? Yes, because of their close proximity to the settlor and their financial position and, of course, it wasn't a beneficiary where there had been the difficulties that exist in this case with this beneficiary. So this was the move to the discretionary, sorry, to the equitable ground.

He also makes the point on page 298 that it's just a general caution there against fishing expeditions and, but I think that this case is a really important one and it's also followed by *Spellson v George* and *Hartigan Nominees*. Now in both of those cases the equitable –

ELIAS CJ:

I think we will have to take the adjournment and you do need to develop this so we'll take the morning adjournment now and you can take us to those cases when we get back. Thank you, Ms Coumbe.

COURT ADJOURNS: 11.38 AM

COURT RESUMES 11.54 AM

ELIAS CJ:

Thank you.

MS COUMBE QC:

Your Honours, moving on from *Murphy v Murphy* the other two decisions that played some part in Lord Walker's analysis was *Spellson v George* (1987) 11 NSWLR 300 and *Hartigan Nominees*. Now, in both of those, in *Spellson v George*, which was a decision of a single Judge, the Judge again rejected the proprietary approach and said that this right of beneficiaries to seek information is just the corollary of the trustee's fiduciary obligation to account. So they are two sides of the same coin. The trustees have a duty to account and the beneficiaries, therefore, have a corresponding right to seek information. That is an equitable right and I will be coming on later to develop

that as an equitable chose in action but that is an equitable right they have to seek that information and similarly in *Hartigan* we had –

WILLIAM YOUNG J:

In *Spellson*, was there any reference to discretion or not?

MS COUMBE QC:

I don't think discretion was an issue in that case. It was more – unlike in *Murphy* where it was in *Spellson v George* they were really just setting out and articulating the basis of the right of a discretionary beneficiary which was very, very firmly grounded in this present equitable right to seek information which is encompassed within or ancillary to the right to due administration of the trust and of course it's an equitable right and equity is always discretionary. Well, almost always.

ELIAS CJ:

Well, a Court order is always discretionary in equity but the right might be. It's quite helpful to go through these authorities, Ms Coumbe, if that's all right with you.

MS COUMBE QC:

It's in volume 2 of the appellant's bundle.

ELIAS CJ:

Tab 24.

MS COUMBE QC:

He starts out on page 315 by saying, "The current view, of course, that a discretionary beneficiary doesn't have a proprietary interest in the trust assets would lead you to conclude that there is no right of access." But then goes on to say, well, he thinks the better basis – and he describes it at 316 in B to C, "The liability to account, the obligation to account. The beneficiary has a correlative right to approach the Court for its assistance in enforcing that obligation of the trustee to account." So that's where – it just is a little more

detailed than the way it was articulated by Lord Neuberger but it's clear they were talking about the same thing. It's that fiduciary obligation carries with it the correlative duty, the right, to approach the Court and seek its assistance in terms of getting access to documents and again – and in E and F talks again about the right of a discretionary beneficiary, although they have no interest in the trust assets, and we don't dispute that, they have the right to have the trustee bona fide consider whether or not to exercise the trustee's discretion in his favour. That's the right to due consideration. I'm talking about the right to due administration which is having the trust properly managed and accounting to the beneficiary and that's what gives that corresponding right, therefore, to go to the Court and at that point we say the Court has a discretion whether to give the documents or not, to grant them or not, and that is when we there get to *Schmidt* and in *Schmidt* Lord Walker reviewed those cases and perhaps I should find that. Anyway, we'll see that where Lord Walker gets to on page 729 – this is at tab 27 of volume 2 at paragraph 51 – he says 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 intervene in the administration of the trust." Then he says – and I think this next bit is key to understanding the basis of this – "The right to seek the Court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest, that is, a fixed and transmissible interest in the assets of the trust." He says, "The object of a discretionary trust or the object of a discretionary depository power has the same right to seek access to documents." They've called it sort of a further inherent jurisdiction but here they're being a bit more specific and they describe it as seeking the protection from a Court of equity. That echoes what was said by Lord Wilberforce in *Gartside v Inland Revenue Commission* [1968] AC 553 (HL) where he talked about – that was a tax case but where it's relevant is that Lord Wilberforce did not think a discretionary beneficiary, because there was no proprietary interest in the trust assets, that beneficiary did not have a sufficient interest in those assets to make it taxable. But what the beneficiary did have was, number 1, a right to due consideration. That is a consideration for a discretionary distribution and number 2, a right to due administration and that was the right to due administration which he said gave – he could seek protection from a

Court of equity to enforce that and the right to – and again it's been recognised that that right to due administration encompasses within it, as part of that, of course, the right to seek information because the obligation of the trustee of due administration encompasses the obligation to account so again we see here – and this is important. It's also important to our –

ELIAS CJ:

Sorry, can you pause a moment so I can look at *Gartside*? I can see the right to be considered as a potential recipient and to have his right protected by a Court of equity. It's a mile away from this because it's about when he's liable to be taxed for an interest but I can't see the reference to due administration in this.

MS COUMBE QC:

Well, I think that right to have his interest protected by a Court of equity has always been interpreted as a reference to the due administration. I mean, there's no doubt that there are both of those rights and for example – I'll come to this – the High Court of Australia in *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366, for example, recognised them both. Occasionally the right to due consideration is referred to as encompassing both. I've seen that done as well and sometimes there is a more precise differentiation between the two but there is no doubt that they both attract the protection of a Court of equity and certainly that is how Lord Walker saw it in this extract from *Schmidt* that I've talked to you about. When you move further on, I don't need to take you right through it but from page 731 onwards Lord Walker talks about the cases that had gone before, the cases that I've just talked about, and how they establish that equitable right.

I'll just make a comment about *Chaine-Nickson*. My learned friend referred to that case and said, you know, it's – here we have a Judge saying it would be remarkable if there were no obligation to account to discretionary beneficiaries. It would be remarkable and therefore the implication is an absurd outcome that this Court should disregard but actually what the Judge was saying there was because it was argued that discretionary beneficiaries,

because they had no proprietary interest in the assets, had no right to access information and of course the Judge said, well, that's silly because then if no one could access them that would be remarkable. But what they didn't say was that everyone can always access them. Of course it would be odd if no one could but that is not what we are saying. We are, as part of our case, we acknowledge the obligation to account, the corresponding right to seek information but that doesn't mean that everyone gets access to everything and –

WILLIAM YOUNG J:

You've got a reasonably strong passage in paragraph 54 of *Schmidt* where Lord Walker says, "There are three such areas in which the Court may have to form a discretionary judgment whether a," and the first one is, "Whether a discretionary object or some other beneficiary with only a remote or wholly defensible interest shall be granted relief at all."

MS COUMBE QC:

Yes, that's right, and –

GLAZEBROOK J:

Can I just interrupt there, because that as a discretion on the Court not as the Court of Appeal said, a discretion on the trustees which is then only reviewable by the Court on discretionary principles in terms of a decision that no reasonable trustee could come to. So I don't have so much difficulty in saying that the Court could exercise the discretion which is all that's being said at paragraph 54, rather than that the trustees get to exercise the discretion which is then only in very limited cases reviewable by the Court.

MS COUMBE QC:

I think it's been accepted that the discretion is on the part of both the trustees and the Court that the trustees, essentially it would proceed –

GLAZEBROOK J:

Well the Court of Appeal said, “It's only reviewable on no reasonable trustee could possibly have come to that decision,” this isn't what is being said at paragraph 54, it seems to me.

MS COUMBE QC:

Well where the Court of Appeal said that it was a review, I think we would part company with just on that point.

GLAZEBROOK J:

All right.

MS COUMBE QC:

Because in my view, if you're looking at it starting with the trustees and moving up the Court chain to Appeal, the trustees have a discretion and that is, so there is this –

ELIAS CJ:

Well I really wonder whether it's useful to say discretion because I would have thought that, myself, that Lord Walker’s statement in paragraph 54 could simply have omitted the word “discretionary” there. “The Court may have to form a judgment,” would be sufficient. It just, it imports such much overlay the use of a word like “discretion”.

MS COUMBE QC:

But if you turn to paragraph 67, I think you have more difficulty taking words out of what he’s saying because there he says, he makes it even more plain or plainer that it is a discretion on the part –

WILLIAM YOUNG J:

So what, 67?

MS COUMBE QC:

Yes.

MS COUMBE QC:

Especially where there are –

ELIAS CJ:

Well a judgment has to be made. I, for myself, think that some of these cases which are dealing with disclosure of everything relating to the trust and all trust documents as this case is dealing with, are a mile away from a case where what you're looking for is requiring account which is usually described as a right of a beneficiary and these cases say it doesn't matter if you're a discretionary beneficiary or you've got a vested interest. So if we confined ourselves to the right to accounts, what's the problem? Why is there a discretion do you say?

WILLIAM YOUNG J:

Neuberger says there is.

ELIAS CJ:

Well I know that but let's have –

MS COUMBE QC:

What *Schmidt* I think established very clearly is that you can, if you are a mere object of a discretionary power as, for example, Mr Erceg is here. He's a – you still have a right to seek information because you have that equitable right to do so, to corresponding to the trustees fiduciary duty, but there isn't a right of account, it is a discretion. This –

GLAZEBROOK J:

Well it's difficult to say you've got a right to seek information but then you don't have any right to get it.

WILLIAM YOUNG J:

You have a right to review it and I'm not using this technically in decision not to give it to you. You have a right to seek something but not a right to get it.

MS COUMBE QC:

Yes.

WILLIAM YOUNG J:

Like you can have a right to –

ELIAS CJ:

You can ask.

WILLIAM YOUNG J:

– but not a right to indicate.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Is that the sense in which you're using it?

MS COUMBE QC:

Well that is – I'm saying that the right is a right to seek information and that is a right that both a discretionary and a vested beneficiary have and the trustees then have a discretion. The Court – Lord Walker in *Schmidt* has accepted that the Court then had – at least the first instance – Court has a discretion.

ELIAS CJ:

But he's talking about anything that can plausibly be described as a trust document. It's such a – his focus is not on the sort of thing we're talking about here, it seems to me.

MS COUMBE QC:

What was sought in *Schmidt*, there was an earlier discovery application and because there were proceedings on foot, there was a large amount that had actually been distributed to the uncle – or the father, I'm sorry – which was

unaccounted for so you can see why there was – but the application was brought squarely in terms of this decision within the trust jurisdiction and it did expressly relate to or was described as seeking fuller disclosure of trust accounts and information about trust assets, not by way of discovery but by virtue of the discretionary interest and expectations which the appellant had. So it was a case about – I mean, if you were going to have a category of core trust documents then certainly the trust accounts would be in it and so Lord Walker's analysis and his squarely putting this as discretionary does cover that and it was subsequently described in a decision, I think, well, he was by then Lord Neuberger, more recently, talked about *Schmidt*, admittedly not in the context of disclosure of documents but he said the Court wasn't saying there was some sort of freewheeling discretion to do whatever it thought fair. It's principled and I'll come to this further but you start with a right to apply and then the trustees have a discretion and it's to be exercised in a principled way and the Court has gone some way already in *Schmidt* and in *Foreman* and other High Court decisions to articulating factors that would be relevant to the analysis and without this discretion at the door of the trustees the very thing that Justice Neuberger talked about in *Murphy* would happen because discretionary trusts can and often have traditionally been drafted in quite wide terms. There may be quite a number of both primary and secondary beneficiaries. If there were some absolute right to get hold of accounts on the part of every beneficiary and if the trustees could only withhold the documents in those categories by seeking directions from the Court I think that would become really unworkable. That would remove, I think, a vital element of the trustee's function and powers that has been recognised in the cases. It's now 13 years since *Schmidt*. This is the way it's been approached. It hasn't led to major problems, any problems, really. And the Law Commission and the Law Society – and you'll have seen the papers and the responses in this area – and where they seem to have come, you know, the Law Commission liked the idea of having some kind of presumption of disclosure but they made it clear that the people who could apply for information or for what was called basic information, are you a beneficiary, who are the trustees, this is before you get into any documents, that those people were people who had a real expectation of benefitting so that the

whole purpose of confining it like that was so that it wasn't open slather for everyone to come along and deluge trustees with requests for information. The people who were the qualifying beneficiaries that the Law Commission talks about, and I've annexed the relevant –

ELIAS CJ:

That's talking about a pretty wide duty to inform, isn't it, and access to a wide range of information.

MS COUMBE QC:

Well, normally as Your Honour has said it wouldn't – I mean, the range of information sought in this case goes beyond fishing. It's a deep sea trawling exercise which amounts to almost a forensic investigation of the trust's affairs over its, over both the trust's affairs over their lifetime but we have had a situation where trustees have had this discretion since *Schmidt* articulated – they've always had a discretion going back to *Cowin*. I mean even if *Cowin* didn't exactly deal with this kind of fact situation it undoubtedly accepted the fact that there was a discretion. There always has been and but before it was recognised that there was this prima facie right if you had a proprietary interest whereas now it's put more squarely on the basis that you have this equitable right to seek disclosure and if the equitable right is elevated more probably that then assists our property argument which I'll come to soon but we have been content in our submissions to express it as a right to seek information at this stage but, and I'll come – even in relation to cases pre-*Schmidt* like *Rabaiotti.* Now that – I'll take you to that in a minute. That was a decision case in the Jersey jurisdiction which is a common law jurisdiction. It has an ultimate appeal right to the Privy Council, so we're not out in the boonies, it is a, you know, and it has a lot of specialist trust expertise and you can see that in their decisions.

So in *Rabaiotti*. just by way of background –

GLAZEBROOK J:

Are you taking us to that?

MS COUMBE QC:

I'm going to take you to it in a minute but just by way of background, in that case it was accepted that, because this is pre-*Schmidt* and they haven't decided whether to adopt *Schmidt* there yet but it was accepted that there was what they called a strong presumption in relation to trust disclosure of trust documents when the beneficiaries sought access. As strong presumption that trust accounts, trust deed would be provided.

On the other hand, in relation to letters of wishes, there was a strong presumption the other way, that they wouldn't be provided and against that background of a strong presumption, I'll take you to that case and to, in particular, they talk about *Rouse.*

O'REGAN J:

What tab is it?

MS COUMBE QC:

Sorry, it is volume, so our volume, the respondents' volume at tab 18. So what they talk about here is there is a strong presumption of disclosure and will they always be in the interests of all the beneficiaries and how should we approach this? And I've put this case in my submissions because as you'll know I did have a sort of fallback position which was even if there were a presumption it wouldn't be rebutted only by some extraordinary circumstances test but by some sort of good reason test and therefore referred to these cases as examples of how the Courts exercise their discretion even where there is a presumption. And on page 8 from paragraph 26 –

ELIAS CJ:

Sorry, before you get to paragraph 26. Look at the statement from Gzell at paragraph 10. "A duty of a trustee is to keep accounts and produce them to any beneficiary when required."

MS COUMBE QC:

Yes they – yes, but you have to read the judgment as a whole and what they're saying, what they actually go on to say is that it's a presumption, a strong presumption and the question is as they talk about on top of page 5 at 16, they say, "The question which does arise," and this is at the –

ELIAS CJ:

Now, these documents, where is there any statement that says the right of the beneficiary to see the accounts?

WILLIAM YOUNG J:

But the trust documents included the accounts, didn't they?

MS COUMBE QC:

Yes.

ELIAS CJ:

But –

MS COUMBE QC:

Accounting documents and –

WILLIAM YOUNG J:

That's what they were seeking.

MS COUMBE QC:

So, here we are on –

ELIAS CJ:

Is that the same as the –

GLAZEBROOK J:

That's what Gzell says –

MS COUMBE QC:

– sorry, paragraph 4. Paragraph 4, shall we start at paragraph 4, I'm sorry. We have a list of what was then termed the accounting documents, the trust deed, the accounts of the trust and so on.

ELIAS CJ:

Sorry, what paragraph?

MS COUMBE QC:

At 4.

ELIAS CJ:

Yes.

MS COUMBE QC:

Then they move to 10, which is Your Honour's query. One starts with, "The proposition that a beneficiary of a trust is entitled to inspect trust documents, and this is under the heading "accounting documents". So he's talking there about the trust deed and the accounting documents. Then we move on to the top of page 5 and paragraph 16 and this is what is in issue in this case. The question which does arise is whether the right of a beneficiary to see trust documents is an absolute right or whether this Court has a discretion to refuse a beneficiary permission to inspect trust documents in some circumstances. They've gone on to say, then, at 18, a number of cases that suggest this is not absolute and they refer, actually, to *Cowin*, *Londonderry*, this is the passage in *Londonderry* that I was grasping for earlier that I couldn't locate. "For these reasons, 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."

Then there's a reference in paragraph 20 to a case in another jurisdiction where all documents were refused. That was a more obvious case where they were being sought for an improper purpose, but they say the Court of

Appeal, founding itself on *Re Cowin* and *Re Londonderry*, held there were circumstances in which a trustee could withhold trust documents. Then they moved on to talk about *Rouse*, the Australian case, which I think as one of Your Honours has pointed out did involve a company in which the trustees were involved so I won't focus as much on that because a more general principle is made by this Court at paragraph 26 at page 8 and I'd like to go through these because this is at the heart of the way we say the Court should approach this. Even if you were to apply a presumption which we say *Schmidt* doesn't recognise, 26, "In our judgment the Court does have a discretion to refuse to order disclosure of trust documents that a beneficiary is normally entitled to see. Clearly the general principle is that a beneficiary is entitled to see trust documents which show the financial position of the trust, what assets are in the trust, how the trustee has dealt with those assets, et cetera. This is an essential part of the mechanism whereby the trustee can be held accountable." Then he goes on, "But the need for an individual beneficiary to obtain trust documents has to be weighed against the interests of the beneficiaries as a whole. The trustee has a duty to the beneficiaries as a class. If, as in some cases referred to above, the trustee forms the view in good faith that disclosure of documents to which a beneficiary would normally be entitled would be prejudicial to the interests of the beneficiary as a whole, so prejudicial to their interests as a whole. It may refuse to make that disclosure and seek the directions of the Court. Should the trustee fail to seek the directions of the Court, it is open to any beneficiary to bring the matter before the Court for resolution. To that extent, the Court thinks the position is simpler than is suggested at the end of paragraph 100 of the judgment in *Rouse*. The remedy of a dissatisfied beneficiary is not to seek to have the trustee removed but to seek the directions of the Court as to whether the particular trust documents should or should not be disclosed. The Court will then have to balance the competing considerations and decide what is best for the beneficiaries as a whole." In short, the Court agrees with the way the Dail in *Rouse*. The Court does not wish to encourage trustees to refuse disclosure on weak grounds. One starts with a strong presumption. The beneficiary is entitled to see documents of the nature described. There would have to be good reason to refuse disclosure. The Court has an overriding

discretion. So there is a discretion on the part of the trustees and the Court and then he goes on to say, he talks about *Hartigan* on paragraph 33 where he says that – this was the Jersey Law Commission referring to *Hartigan* says, he goes on to say he actually would prefer the equitable approach anyway, the kind of – there is a right to seek accountability as opposed to a proprietary right. So that approach is essentially what we say underlies our case, that of course there is an obligation to account and in most cases this sort of issue won't even arise. But there will occasionally, there will sometimes be a case where the trustees, in the interests of the beneficiaries as a whole, weighing up the relevant considerations which I think are quite usefully set out in the *Schmidt/Foreman* and factors that have been set out by Justice Potter, provide a very useful guide and most trustees will be aware that withholding the trust document or the accounts is unusual and this case was described by the Court of Appeal as unusual and it's because – and I'm going to come back to the particular discretionary factors later, but why that is, is because here unlike, I think, almost any other case that – there are issues about the identities of beneficiaries and wanting to maintain confidentiality about those and so that's, they are all set out in the trust deed. There are issues in the accounts and through the minutes and the resolutions about those sorts of matters arising as well. But over and above that, there is an issue about – which the trustees are very conscious of about what is in the interests of the beneficiaries, particularly those who may have received distributions and particularly this long, now six years after the winding up of the trust, an issue about giving information to this beneficiary who has proved himself to be very litigious, very divisive. Justice Venning in what we call Erceg 1 would not allow disclosure to Mr Erceg as a family advisor and imposed a number of confidentiality restrictions around the disclosure to the other two beneficiaries, Mrs Erceg and Mr Erceg's sister. I don't think it is just a matter of the trustees saying, "Well, Mr Erceg has displayed bad behaviour and so we're not going to make documents available." There are much more fundamental objections to – reasonable objections to disclosure to this beneficiary.

But before I get to that, I'd quite like to spend some time just developing the property argument.

ELIAS CJ:

That's fine. Just before you leave this *Jersey* case, this you say is in support of your fallback argument. Is that right?

MS COUMBE QC:

Well, our position is that *Schmidt* made it very clear that there is a right to apply and that the Court then –

ELIAS CJ:

So your principal argument is that there is no right to obtain, say, the accounts of a trust and you rely on *Schmidt* for that, that you have a right to apply.

MS COUMBE QC:

It's not an absolute right in the sense that it is then subject to the Court's discretion or the trustee's discretion.

ELIAS CJ:

Well, I thought that was the fallback, because it seems to me that this case is saying that – I thought you were arguing for the higher ground, that there is no right to get information about – and I'm not worried about trust information in a flabby sort of sense. I'm looking at the accounts of the trust. I thought your position, your high position is that there is no right. You have the right to apply to the Court. Just pause and listen. I thought your fallback position is that you have a right but it is not an absolute one and the Court has a discretion on application of the trustee to deny you access to that information.

MS COUMBE QC:

No, my main position is, and I think this reflects exactly what was said in *Schmidt*, is that you have a right, and it was also the way it was articulated by Justice Venning in *Erceg 1* that every beneficiary and as *Schmidt* has held objects of discretionary powers, has a right to seek, come to the trustees and

seek an accounting or come to the Court if the trustees decline and both the trustees and then in turn the Court have a discretion about whether to and to what extent to make disclosure and may in appropriate case, refuse, indeed refuse all, well apart from basic information about whether you're a beneficiary and who the trustees are which is basic information that Mr Erceg has, then have a discretion to refuse to disclose any further information beyond that.

And what I'm saying is that if you apply this presumption that, for example, was applied in –

ELIAS CJ:

Well I thought that was exactly what I put –

MS COUMBE QC:

It doesn't really in practice make, it doesn't perhaps may not make a lot of difference in practice because in some ways the balancing exercise, the very balancing exercise that was described by Lord Walker in *Schmidt* that had to be applied to balance the rights of accountability, the obligations of the trustees against and the benefit to a particular beneficiary of getting disclosure to be balanced against the interests of the beneficiaries as a whole, the interests of the trustees, the interests of third parties actually comes pretty close to the approach you would apply anyway even if you started with some kind of presumption and good reason, good reason would apply even where the Court recognises a presumption.

So we would say that on either count there is good reason in this case to withhold further information. He's already got some basic information but to withhold further documents now, six years after the winding up of the trust from this particular beneficiary, in the interests of the beneficiaries as a whole.

So the difference is, I guess, just comes down to whether you start with a presumption or not and we say not. *Breakspear* said not. *Schmidt* clearly thought not, Lord Walker in *Schmidt*, but even in cases which did start with that starting point of a presumption, the test, because it is still discretionary, so

it's a question of whether you call it, start with it being a balancing exercise or start with a presumption combined with an overriding discretion which is decided in terms of good reason, you might not end up in practice with a lot of difference.

Why I suppose, why I'm going for the slightly higher ground of there being no presumption is because that is what the Privy Council decided in *Schmidt* and that appears to have, judging by the number of cases in the 13 years since, we've only got a handful in the High Court, three or four, where that's been applied perfectly well.

So I could now go into the – probably it is logical to deal with the property next and I'll deal with it reasonably briefly and then come back to the particular grounds of discretion in this case as to why we say that there is good reason to withhold in this case and that that was – and again, going back to, perhaps just before I leave that topic, to clarify who does what at which stage. Trustees we say have a discretion. We say it's a balancing exercise and there's no presumption. Even if there were a presumption they would have an overriding discretion. The Court –

GLAZEBROOK J:

Well what are you balancing?

MS COUMBE QC:

What are you balancing? Well, as Lord Walker said and as the Court said in *Rabaiotti*, what you're balancing is the interests in a beneficiary obtaining information and the duties of accountability against, in fact I could read it from Lord Walker is probably the best approach. He says at paragraph 67 of volume 2 of the appellant's volume.

GLAZEBROOK J:

Tab?

MS COUMBE QC:

Tab 27.

ELIAS CJ:

And 67?

MS COUMBE QC:

And 67, yes. What he says there is, "It has been stated as long ago as in *Re Cowin* that no beneficiary and least of all a discretionary object, has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document." Then he says, "Especially when there are issues as to personal or commercial confidentiality," but he's not confining it to that although that is a ground we rely on, "The Court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties," and then he goes on to talk about, "Disclosure may have to be limited." He says, "Evaluation of the claims of a beneficiary may be an important part of the balancing exercise which the Court has to perform on the materials placed before it," and the Court may, for example, have no difficulty concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

So that we would say, for example, someone who was bankrupt at the time, who had already received $95 million from, you know, from elsewhere and had a history of divisive conduct within the family was just such a beneficiary from whom the trustees might well be in their discretion justified in withholding disclosure. And the balancing exercise when you look at it, balancing the competing interests of the different beneficiaries, the trustees themselves and third parties, it actually, you know, has some parallels in the approach of the Court in *Rabaiotti* where they started with a presumption. We're saying you don't need to do that but even if you did, you know, it might not make a lot of difference in the end. If the Court thought it would give, you know, even if the Court decided to say, "Well we prefer to" –

ELIAS CJ:

Ms Coumbe, can I just say, in this case this was fuller disclosure that was being sought of trust accounts, so it wasn't just the –

GLAZEBROOK J:

Wasn't it?

MS COUMBE QC:

Yes, well Your Honour there had been prior discovery.

ELIAS CJ:

There had been disclosure of the accounts of the trust?

MS COUMBE QC:

There had been some disclosure and that had led to further questions.

ELIAS CJ:

And they were asking for further and surely what is said at 67 is really saying that, I mean it depends how you put the emphasis but has any entitlement as of right to disclosure of anything which can plausibly be deceased as a trust document. It's not dealing with the essential disclosure which has already been made here, it's simply saying well you can't just say, “Well, look, this is a, I can plausibly say this is a trust document, I'm entitled to it,” and that's what Lord Neuberger is or Neuberger J is or whoever this is. Sorry, Lord Walker is saying here.

WILLIAM YOUNG J:

The better passage on this from your point of view is 54.

MS COUMBE QC:

I'm sorry, the?

WILLIAM YOUNG J:

The better passage on this is 54, less ambiguous.

MS COUMBE QC:

Fifty-four.

WILLIAM YOUNG J:

The Court may form a discretion judgment effectively that a beneficiary will only remote or wholly –

ELIAS CJ:

Well we've gone through that, it depends –

WILLIAM YOUNG J:

– should not get any relief at all.

ELIAS CJ:

It depends what discretionary really adds to that.

MS COUMBE QC:

But with respect, Your Honour, I think that Lord Walker is stating something fairly plainly and broadly and –

ELIAS CJ:

Well, hold on. It is against the context that the trust accounts have been disclosed and they're seeking more, that's what this case is about.

MS COUMBE QC:

Well we don't know all of the trust – they were seeking fuller disclosure of trust accounts and information about the trust assets so, yes, clearly in the –

GLAZEBROOK J:

And there was an ex parte order that provided for extensive disclosure of information. Now we don't know what – that's paragraph 5. So he'd already had extensive disclosure of information and said it raised more questions than

it answered and sought more. So it was effectively an ex parte – it might say more in the argument as to what he'd already had.

MS COUMBE QC:

Yes, no, I do accept that.

GLAZEBROOK J:

I'm sure it does.

MS COUMBE QC:

And certainly this was not a case where at the heart of it was should a particular beneficiary be deprived of access to anything, and Your Honour is quite right that there had been this further disclosure but nonetheless, there were, I think, clear statements against a background where what was being sought was trust account information and there was no statement that there ought to be a presumption of disclosure in relation to any sort of core documents, that they were applying a presumption. I think they did make it very clear that what they were applying was a balancing exercise. In cases like *Rabaiotti*, of course, they did concern issues about the trust deed and basic trust accounting information and there, which was pre-*Schmidt*, they applied a presumption but they still went on to recognise a broad discretion based on a very similar balancing exercise so that – and so that also ties in again, going back to *Murphy* with Lord Justice Neuberger saying that there ought to be – you don't want trustees. I mean, even in my learned junior has helpfully given me a copy of *Foreman v Kingstone* where even at the end of that we have a statement. This is at volume 1 at page 861.

O'REGAN J:

You need to tell us the tab number.

MS COUMBE QC:

Sorry, tab 18. They start by – Her Honour Justice Potter in 97 talks about beneficiaries are entitled to receive information which will enable them to ensure the accountability of trustees. They are entitled to receive trust

accounts, but then goes on in 98 and this is her conclusion. "These are fundamental rights of beneficiaries. They are not absolute rights which arise from documents or information being categorised as core trust documents. They will be subject to the discretion of the Court in its supervisory jurisdiction when trustees seek directions or when beneficiaries seek relief against a refusal by trustees to disclose." So it will only come into – so the trustees, that doesn't mean that the trustees must seek directions by any means and I haven't found a case which says they must. But they could. I think in *Schmidt* Justice Briggs recognised there were four different ways that these matters can come before the Courts. One was the trustees asking the Court to sanction what they'd done. One was the trustees surrendering their discretion to the Court and seeking directions. One was – then there were two relating to the beneficiary applying, either invoking the Court's discretionary equitable inherent jurisdiction, which is the *Schmidt* approach and the approach that was taken in Erceg 1, or taking the slightly more difficult route of a strict review of the trustee's decision which it has narrower grounds for intervention.

So those sort of, in my submission would exhaust the field in terms of when you would invoke the Court's jurisdiction but it does remain my strong submission that the trustees have been recognised to have a discretion, both before *Schmidt* where there might have been a presumption or a prima facie right because of the legacy of a proprietary approach, but also in the *Schmidt* and post-*Schmidt*, it's been recognised and accepted and there are very many cases now where both here and in England and Australia where the Courts have applied what they see as this discretionary balancing approach in *Schmidt* and *Rabaiotti* was – there is another case that I've referred to. I probably don't need to take you to it because there are a couple of other cases in the respondent's bundle coming out of the Jersey jurisdiction, two cases that I referred to where all disclosure was refused, but applying these very same principles, so one was – I think it's *Re RWB*. I won't take you to it but that was where a woman wanted – she was a former beneficiary and should she get disclosure of documents relating to her period as a beneficiary and the Court said no because of an ulterior motive and similarly with *Re M Trust*.

So having made that strong submission that there is, that the trustees do have a discretion even in relation to trust documents, and that circumstances where that may arise will be quite limited and this is such a case. I can come back to that but perhaps if I briefly outline the property argument because it also does impact to some extent on the discretionary grounds as well.

If I can sum it up. What we say is that it's clear from the cases that the foundation of the basis on which the beneficiary has a right to come to the Court or go to the trustees and seek information is that equitable, present equitable right to enforce due administration which carries with it the right to documents. So to stop, as the Court of Appeal did, at the point where it's established that Mr Erceg is still a beneficiary doesn't complete the argument because, and I think when you look, certainly when I read through the commentaries and the cases the word “standing” is often used in the context of trust law in a different sense to the way it's used in bankruptcy law. It's used in, for example, it's even used I think in *Schmidt* and other cases in the context of, you know, does, for example, putting bankruptcy to one side. Does a mere discretionary object have standing to seek information? Does that sort of discretionary beneficiary have standing to seek information in that sense and the Courts have held that they do and the reason they do is because they have this equitable right to seek, of access to the trustees and to the Courts.

So when the Court exercises its equitable, inherent equitable jurisdiction it's vindicating, if you like, or when its order is vindicating, if you like, that underlying right that exists because if a beneficiary, there may be other instances where some beneficiary have certain rights and other don't but that's how it works and so –

ELIAS CJ:

I must say I find notions of standing and private law cases really the fifth wheel of the coach because either you've got an entitlement or you haven't. Standing is needed where you're entitled to be not a busybody but something

close to being a busybody. But if you have an interest in private law you don't really need to get very fussed about the standing.

MS COUMBE QC:

Well except when your bankruptcy is overlaying that you do because, of course, property is very, very widely defined in the Insolvency Act and it covers not just a proprietary interest in trust assets but we say goes beyond that and includes a chose in action, it includes all choses in action, it includes future rights, contingent rights and it includes personal, you know, personal property as well and this right to seek, this equitable right to seek access, it underlies, the Courts have recognised, underlies the beneficiary's right to seek information has been –

GLAZEBROOK J:

Isn't it partly also if you have to provide information to somebody that actually makes you behave properly, that's the whole idea about freedom of information, isn't it? So, yes, of course it's the right – and the only way the Courts can supervise trusts is through somebody bringing something in front of them so if the trustee isn't going to bring it in front of them then a beneficiary will and that's another reason that you might have but isn't the other fundamental reason just to have these things out in daylight and for the trustees to know whether there will be restrictions or not in respect of who might be able to get it and right reasons you can have but if trustees know that somebody is going to be looking over their shoulder then they'll behave properly.

MS COUMBE QC:

Well I think the trustees know that now because –

GLAZEBROOK J:

Well they can't know it if they don't have any right, nobody has any right to information, can they, but it's not that it's their proprietary right it's just part of the –

MS COUMBE QC:

Well I'm not saying that no one has any, any beneficiary can apply to the trustees and to the Court and then the considerations that are taken into account will mean that –

GLAZEBROOK J:

No, I'm really just challenging your view that it's only in respect of that and therefore it's a proprietary right in some way on the beneficiaries part and therefore property. Are we moving onto that next section now?

MS COUMBE QC:

Well I'm moving onto property because what I'm, essentially what the argument boils down to on property is that the Courts have also recognised that this right to due administration is a chose in action and the definition of property is very wide. It includes property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, it includes rights, interests and claims of every kind in relation to property however they arise.

Now I've referred on page 12 of my submissions to decisions where it has been held that the current definition incorporates everything that was in the former definition of property and so it has been held to incorporate every valuable thing, interest present, future, vested or contingent arising out of or in relation to property and in the KiwiSaver case that I've mentioned, *Official Assignee v Trustees Executors Limited* [2014] NZHC 345, it was accepted that, for example, rights under superannuation schemes were property, they were future contingent rights that although there was no present right to any property in a fund these future contingent rights were covered.

But where I'm getting to with this is that Mr Erceg was a discretionary beneficiary and also a final beneficiary and what rights and interest does that give him? It gives him, there is the right to due administration which includes the right to seek information which is a chose in action and it was so

described in the *Kennon v Spry* case by the High Court of Australia. He has that right as both the final beneficiary –

ELIAS CJ:

They described the right to information as a chose in action, did they?

MS COUMBE QC:

They described the right to due administration.

ELIAS CJ:

To due administration.

MS COUMBE QC:

Which incorporates a right, which incorporates, necessarily, a right to information to seek an account. They also describe – and he has that right as both a final and discretionary beneficiary.

WILLIAM YOUNG J:

Well do you have to separate out the rights or don't you simply say he has rights under the trust, they're rights which vest in the official assignee?

MS COUMBE QC:

Well I would like to say you don't have to separate them out but at the moment I'm identifying what they are and then I think you can look at them together.

So as a final beneficiary and as a discretionary beneficiary he had the right to seek information and the reason he had that was because that protects his further rights as a discretionary beneficiary to have due consideration of a potential distribution but as a final beneficiary it protected his right, what is basically is a future proprietary interest in the trust assets –

WILLIAM YOUNG J:

Well let's change the facts slightly. Let's assume that there hadn't been an awful family bust up and that after Mr Erceg's bankruptcy the trustees said, "Crickey, we'd better help you out here, here's lots of money." Would that money have had to go to the official assignee because the rights as discretionary beneficiary had vested in the official assignee that was the fruit of that right or would he get it because his bankruptcy was over?

MS COUMBE QC:

Well on our argument he wouldn't get it unless he had got an annulment which means that your debts have actually been repaid and the bankruptcy is annulled.

WILLIAM YOUNG J:

So there's a little bit of authority on this you've cited but not much.

MS COUMBE QC:

I'm sorry?

WILLIAM YOUNG J:

There's a little bit of authority you've cited on this but not very much.

MS COUMBE QC:

Yes, in *Trustees Executors Limited v Official Assignee* [201] NZCA 118, [2015] 3 NZLR 224 the Court of Appeal accepted that absent an annulment rights that vest in the official assignee on bankruptcy do not revest and in that respect New Zealand is a bit perhaps behind, if you like, or is different from in Australia where there is an automatic revesting I think generally after six years but here we don't have that. There is no automatic revesting and so absent an annulment and in this case with massive debts still outstanding there has been no annulment and that's not disputed.

GLAZEBROOK J:

So you're saying even an expectancy vests on the official assignee and if in 20 years time absent an annulment that expectancy becomes a reality that that belongs to the official assignee?

MS COUMBE QC:

I'm saying that the – when you look at –

WILLIAM YOUNG J:

I think what you say is it's not an expectancy because expectancy is, "I hope Mum might leave me some money," but this is –

GLAZEBROOK J:

Well it has been held to be an expectancy.

WILLIAM YOUNG J:

No but this is a set of rights.

MS COUMBE QC:

It's an expectancy insofar as it's an interest in the assets of the trust, it is just an expectancy and we're not suggesting that as a discretionary beneficiary Mr Erceg had that interest in the trust assets. What we're saying is that property goes, the definition of property goes beyond that and encompasses choses in action which have been held to include the right to due administration and –

GLAZEBROOK J:

Yes but the right to due administration – so you're not saying then that if you're a discretionary beneficiary with an expectancy that if after the three year period that expectancy is then realised because somebody decides you do need an operation and gives you some money for it.

MS COUMBE QC:

Well what I'm saying is that –

WILLIAM YOUNG J:

I think you are saying that there's –

MS COUMBE QC:

I think I have to but the thing is, I know it doesn't sound attractive but I think it's actually quite –

GLAZEBROOK J:

Well it doesn't make it sound attractive but it actually sounds right.

MS COUMBE QC:

But the reason it's difficult but what you have to do otherwise is to say that none of his interests actually fall within the definition of property and you've got, for example, his interest as a final beneficiary which is a future contingent interest in the trust assets, it has a proprietary aspect to it.

Now it was held, for example, by the Court of Appeal in the *Johns v Johns* [2004] 3 NZLR 202 (CA) that that kind of interest where a beneficiary –

GLAZEBROOK J:

But that's different because that's actually a vested interest. Now it may not come to anything because it all might be distributed beforehand but the fact that that vests on the official assignee I don't have so much trouble with because that is actual property. The fact that it might be worthless is irrelevant because you might have an interest under a will that's an expectancy, it's an expectancy assuming that the person doesn't change their will.

WILLIAM YOUNG J:

I think the difference, I mean the word "expectancy" can be used in different ways. It can be, "I think Mum's going to leave me some money," that's an expectancy but here I am entitled to a whole suite of rights under a trust, they may or may not bring me anything of value but they are my rights and they

therefore vest in me, they therefore vest in the official assignee on bankruptcy, that's a different argument.

MS COUMBE QC:

Yes, and it's similar to an unadministered residue which is different from just, I think the example my friend gave in his submissions of the student who might stand to benefit under his parents will, in that situation the beneficiary at that point has no rights. The testator can go along and change his will at any time that he likes and no one can have a recourse against him but the Courts, and I've given a number of authorities from the High Court of Australia and the Privy Council which deal with the situation of an unadministered estate or residue. So you have some –

GLAZEBROOK J:

How are you going to apply this to matrimonial issues because it has always been accepted that it's not property for the point of view of a relation property and in fact that's been the basis probably of much of the jurisprudence so far. So a decision here that it vests in the OA would seem to me to have very much wider ramifications so that if in the future something is exercised in their favour, I suppose it might be a valuation issue but –

WILLIAM YOUNG J:

Well it maybe, I mean it maybe that the rights of, I mean there are cases – this is partly dealt with in *Clayton v Clayton* [2015] NZCA 30 but it is a sort of bundle of rights issue.

MS COUMBE QC:

Yes, and in –

GLAZEBROOK J:

Those were rights by their –

WILLIAM YOUNG J:

But this is a right here too. This is a right to be considered.

MS COUMBE QC:

Because whatever –

GLAZEBROOK J:

No it wasn't, that wasn't the right –

WILLIAM YOUNG J:

I know, it's a different set.

MS COUMBE QC:

Yes, but what I'm getting to is I think the closest analogy is the unadministered estate and in *Kennon v Spry*, for example, three out of the five High Court of Australia thought the same analogy applied to the right to due administration under discretionary trust. So the situation with an unadministered estated is the testator dies, someone has become the residuary beneficiary but at that stage no one knows what the assets will be so its contingent but, in the meantime, the person goes bankrupt or maybe they went bankrupt before the person died and it's after acquired property but the Courts have held in *Raymond Saul & Co v Holden* [2008] EWHC 2731, [2009] Ch 313 and *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 (CA), two of the cases in the bundle, the Courts have held there that the official assignee can then step in and those rights vest in him. Now what rights vested in him?

The Courts held very clearly in those cases that what vested in him was a right to due administration because although at that point in time the beneficiary has no proprietary interest in any identified assets that beneficiary does have a chose in action which is an equitable chose in action to bring to ask the person, the executor who is a trustee for some purposes to account or to tell him what's happened to the assets and one of the cases in our bundle, I don't need to take you to it but I will just mention it, is *Burgess v Monk* [2016] NZHC 527 where very recently Justice Brewer, for example, in the High Court, looked at this and said that that meant that residuary beneficiary could seek information during that period and I think that's slightly contrary to what was

said by Justice Asher in *Maguire* but where this is relevant for my purposes is here you have a chose in action which is really just a right to seek information or to otherwise seek due administration being held by the highest Courts to be property that vested in the official assignee in that bankruptcy context and it carried with it, it sort of fruits so that in two of those cases sometime after the discharge even, this was before that Australia had introduced the six year rule, then the assets then vested in the assignee once the residuary estate was ascertained, and it has analogies here because Mr Erceg is a final beneficiary, had a future contingent interest in the residue because he had a defined interest and of course it was contingent on the trustees not distributing all the information –

WILLIAM YOUNG J:

Subject to prior defeasance.

MS COUMBE QC:

Yes, exactly, and so there's a very strong analogy and this is what the Courts decided, the High Court Australia in *Kennon v Spry* I think thought that they were very analogous situations and so you could – one Justice disagreed, it was Justice Heydon who said that he thought not because it had to be, you know, property was normally assignable and this wasn't but I think he was thinking more about the interest in the trust assets as opposed to the chose in action but in any event, I would say that in the context of the Insolvency Act where there is a vesting in the official assignee. The question of assignability isn't that important or relevant and that has been held in a number of cases, *Trustee Executors, NZI Life*, *Raymond Saul*, they were all situations where there was no right to assign but this chose an action nonetheless vested in the official assignee.

WILLIAM YOUNG J:

Isn't there, I mean isn't there something that's addressed – sorry. Isn't there something that's addressed in *Spencer v Spencer* [2013] NZCA 449 of trusts that the concern that this might happen has led to a particular form of drafting

known as a Spencer of trust which is intended to prevent this vesting? You might want to think about that.

MS COUMBE QC:

Yes, there are, you could, for example, potentially define a beneficiary as having certain characteristics, one of which might include a state of solvency, not being bankrupt.

WILLIAM YOUNG J:

Not being bankrupt.

MS COUMBE QC:

So there are ways of addressing it but the legislature, if it didn't like the outcome could intervene and impose an express exemption. It could impose a six year rule like they have in Australia.

GLAZEBROOK J:

Well there is of course the issue as to whether you can draft like that but we are past the adjournment.

ELIAS CJ:

We should take the adjournment. I suppose I find it difficult to understand why it's either/or. It's only either/or, I suppose, if it's property but one can understand since bankruptcy is a flickering state that there can, at the same time, be equitable rights to obtain information in both the official assignee and the bankrupt which still continue. I want to hear something about that. All right, we'll take the adjournment, thank you.

COURT ADJOURNS: 1.05 PM

COURT RESUMES: 2.07 PM

ELIAS CJ:

Yes Ms Coumbe.

MS COUMBE QC:

Your Honour, if I can continue. I don't think I have fully answered a question that was put to me about the fact that on our argument the rights, if they are held to be property and therefore vest as they would be and have to under section 101 in the Official Assignee, what would happen down the track after, for example, Mr Erceg had been discharged from bankruptcy.

Well there are very different outcomes depending on whether it is or isn't property. If it is then it follows that the rights would have vested, the rights being the chose in action plus the rights as a final beneficiary in any residue would all vest in the official assignee absolutely. They would not revest because in terms of the *Trustee Executors* decision in the Court of Appeal there is no revesting unless there is an annulment and there's no annulment unless the debts have been repaid.

So it was almost, seemed to be suggested that it would be unfair on the bankrupt having been discharged if he then were given a distribution to help him on his way, that that would not vest in him but the public interest is also of course and the policy of the Insolvency Act is concerned with creditors and in a situation like this where I think, as at 2014, there were about $50 million still owing –

GLAZEBROOK J:

It wasn't an unfairness, it was an issue as to whether an expectancy when it realises it's something that vests which in fact the case law has said not but, so really that's what I was asking you to answer.

MS COUMBE QC:

But I –

GLAZEBROOK J:

Now Justice Young was giving the distinction between an expectancy that is a hope and expectancy that's based on the right to be considered. Are you picking up on that distinction?

MS COUMBE QC:

I'm just saying it's not really an expectancy it's an actual chose in action that –

GLAZEBROOK J:

No, it has been said to be an expectancy, the right to be considered for a distribution which is what I was asking you about. So the right to be considered for a distribution has been said to be an expectancy.

The final beneficiary, I agree that's different because that's actually an interest. It might be defeasible but it's an interest.

WILLIAM YOUNG J:

I suppose it could be both an expectancy and a chose.

MS COUMBE QC:

Yes it is a chose, I suppose – because I would describe it as an expectancy only in relation to the trust assets whereas I think it's properly described as a chose in action, therefore property in its own right.

GLAZEBROOK J:

What is proper? You see, this is what I'm having some difficulty with.

WILLIAM YOUNG J:

The right to have the trust property administered.

GLAZEBROOK J:

So that's all you're talking about rather than the right in the trust assets?

MS COUMBE QC:

I'm saying he had three rights. He had the first right which was a present equitable right or chose in action which was his right to due administration including his right to information and he had that right both as a final and discretionary beneficiary. As a discretionary beneficiary he had the further equitable right to due consideration and –

GLAZEBROOK J:

What does that give the official assignee if that passes the official assignee?

MS COUMBE QC:

Well can I – but he also had a third right which I'm saying they all passed which was to share in the residue had the vesting date been reached and had there still be money available for distribution. I'm talking now before the winding up at the time of vesting.

WILLIAM YOUNG J:

We have a right to complain if his entitlements as final beneficiary were stripped away improperly.

MS COUMBE QC:

Well that right, you see the right to –

WILLIAM YOUNG J:

That's part of the right of due administration.

MS COUMBE QC:

The right to due administration, to seek information, is to protect really those other two rights. It protects those rights and that's why, for example, in a case like *Raymond Saul* they were seen almost as composite, they were seen as individually constituting property but also as a composite also constituting property and so the question is then, if it vested in the assignee what would – the thing about bankruptcy is that the assignee steps into the shoes of the bankrupt, steps into his shoes and therefore has the rights, warts and all, that

the bankrupt had and so Justice Courtney accepted in the Court below that that meant that it sort of almost gave an ability to see information, again with a view to protecting those other rights should they materialise, should, for example, the right, the final beneficiary right have crystallised while he was bankrupt, it actually didn't but if it had that would have – because I say that did vest in the official assignee and I don't think there's any way it could be said that that wasn't a property right on the authority of *Johns v Johns* and just –

GLAZEBROOK J:

But I haven't been suggesting it is anything. I've been asking you about the right to be considered for discretionary right.

MS COUMBE QC:

So potentially that right, had that vested during his bankruptcy, sorry, had the vesting date been reached that –

GLAZEBROOK J:

Well on your argument even if it was reached well down the track it would still be property that had vested in the official assignee. I don't necessarily have a problem with that. What I'm asking you about is the discretionary beneficiary right.

MS COUMBE QC:

Well I say in terms of the discretionary, as a discretionary beneficiary he had the right to seek information and due administration which protected the right to due consideration and that they were both, in their own rights, property as chose is in action as well and where, if I can, I know we've been going backwards and forwards a bit about this idea of an expectancy but in the cases where the discretionary beneficiary's interest has been dismissed as a mere expectancy it has been because the particular statutory context, like the taxation context or I've given another reference in my submissions to a land tax case where it only was property in those context if it was a proprietary is that right in the trust assets and so therefore it was said, in almost all of those cases what they said was it's not a proprietary interest in the assets it is a

mere expectancy. But I think one needs to go further and analyse and look at, as did some of the Justices in *Kennon v Spry* that these rights in themselves can be property and in *Miah v National Mutual Life Association of Australasia Ltd* [2015] NZHC 993 which I have enclosed, a decision in the High Court, there was a comment there that all choses in action are property and I've referred to, for example, *Leach v Official Assignee* [1975] 1 NZLR 83 (SC) which is a decision of His Honour Justice Cooke and that was a case where there was a right of action and it was – I think I might even take you to that. It's in our bundle, the respondents' bundle at tab 3.

It's slightly removed from the trust content but it illustrates the point on page 85 –

GLAZEBROOK J:

Sorry I missed that, I was looking at –

MS COUMBE QC:

The respondents' bundle, tab 3. This was a decision of His Honour Justice Cook considering whether – the issue was there whether the proceeds of an action for personal injury was within property and he talks about the width, at the top of page 85, of the definition of property. It's often said that that definition encompasses rights of action or causes of action which are chose in action, but not if they relate to, say, personal injury or something personal to that particular bankrupt. But Justice Cooke said that it's wide enough to cover damages for personal injury and the only reason why that sort of right has long been accepted is not vesting in the Official Assignee. It's actually just because there's a rule of law that says that those sort of things are not property, which takes me to a point I was making on page 20 of my submissions which was, you know, why is it okay or if we end up in a situation where you accept that these are rights of property and then they vest in the Official Assignee and then don't re-vest until he has paid off his debts and perhaps earned an annulment, which seems fair enough. What are the policy considerations around that?

GLAZEBROOK J:

But if it's attached to the right as a discretionary beneficiary, then you have to say that the right as a discretionary beneficiary also vests for all time in the Official Assignee.

MS COUMBE QC:

Yes, all of the rights.

GLAZEBROOK J:

That's what I wanted you to talk to me about, not the actual right to seek due administration but the actual right to be considered and then if considered the money is given to him or her and why, if it is in their expectancy, is it property that vests in the Official Assignee for all time?

MS COUMBE QC:

Well, it isn't –

GLAZEBROOK J:

Because it hasn't been the understanding before. I don't accept that *Gartside* are in a context that is any different from this context.

MS COUMBE QC:

Well, it's – I think that it is hard to argue that these chose in action.

GLAZEBROOK J:

No, it's nothing to do with the chose. Well, I'm not sure that the right to be considered is a chose in action. I think possibly the other one is a right to sue for information or a right to sue for due administration but I'm not sure you're suing for due administration. It's just your right that you've got. It's not a separate right from the right as a beneficiary, is it?

MS COUMBE QC:

Well, it has been regarded as a chose in action in a number of cases, including by the majority.

GLAZEBROOK J:

But I'm not sure they're right, to be honest, because a right to sue is a right to sue the – this is just what I was looking up and I missed where you were.

MS COUMBE QC:

It's a right to come to the Court and essentially invoke that right with the Court.

GLAZEBROOK J:

It has no existence apart from the recognition given by law. Well, I mean, it does have an existence in the trustee and in the fiduciary duty.

MS COUMBE QC:

Where is that?

GLAZEBROOK J:

I'm just looking at a definition of chose in action that I just brought up.

MS COUMBE QC:

Well, we rely on that it is or that it comes within personal property.

GLAZEBROOK J:

What I'm really still asking you about is the second one, as a discretionary beneficiary.

MS COUMBE QC:

Well, as Justice Courtney accepted or – she thought that that gave some valuable rights to an Official Assignee and that those rights would all vest and they take things beyond.

GLAZEBROOK J:

I think we're probably still talking at cross-purposes.

MS COUMBE QC:

She thought it was a right in relation to property but we would say it's also in itself property and gave the Official Assignee, then, who steps into the shoes of the bankrupt, could benefit creditors by monitoring, therefore, how that right is exercised, seeking information, and –

GLAZEBROOK J:

We're still talking at cross-purposes. I'm asking you about the right as a discretionary beneficiary and whether that vests for all time in the Official Assignee.

MS COUMBE QC:

On our argument it would, along with the other rights that I've talked about. They would all vest unless there was an annulment.

GLAZEBROOK J:

So if, in the future there was a realisation of the expectancy it would go to the Official Assignee.

MS COUMBE QC:

It would if there were still outstanding debts and therefore the bankruptcy hadn't been annulled because discharge is not the end of things with a bankruptcy, of course. There is no – there may still be quite substantial, as there are here, enormous debts still unpaid and so the Official Assignee continues to administer the estate in bankruptcy, even after discharge, and so any – so, for example, in the various – *Raymond Saul & Co v Holden* [2008] EWHC 2731, [2009] Ch 313, *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 (CA), the cases relating to unadministered residues, once that right vested in the Assignee then the fruits –

GLAZEBROOK J:

That's slightly different because that is a present property right. The residue mightn't be ascertained. You may not know what it is but it is a present

property right to have whatever your share of whatever that residue is, which may be nothing. It's not an expectancy because you have an absolute right.

MS COUMBE QC:

Yes, I agree it is different from a purely discretionary beneficiary but here we have – there what it was the future, it was akin to the interests as a final beneficiary in this case. A future contingent interest in the residue supported by in the meantime a present right to due administration which vested in the Assignee so my argument is that it is by analogy, and when you consider the rights that Mr Erceg had overall they fell within that very broad definition of property and what that means is that had there been a payment, for example, to him a few years after his discharge when there was still large debts unpaid, it would go towards those. If his debts had been paid, there would be – they could apply for a discharge, an annulment. In Australia there's a six year cut-off to make sure that it doesn't go on and on and on but in New Zealand we haven't yet seen fit to or haven't taken the step of putting in that kind of cut-off point. So I think – and of course in this case I suppose you have, you don't have to grapple with it in fact because the trusts were wound up. So this cannot happen. But I can see that in other cases it is a relevant issue. I think there are also arguments the other way in terms of should a debtor be able to walk away from very large debts after three years and then in relation to these rights, which he had all along, be able to receive a large distribution and his creditors are all still unpaid and out of pocket? At least on our approach –

ELIAS CJ:

We're not, of course, dealing with that issue, are we? We really do need to keep it focused on the question before the Court, which is simply the one of disclosure. You're referring to the property dimension and the rights of the Official Assignee only in that context. We don't need to decide whether the assets would be received by the bankrupt.

MS COUMBE QC:

Although, in fact, the rights are interrelated and can be seen in combination as well as on their own.

ELIAS CJ:

Yes, I understand that. Yes.

MS COUMBE QC:

Just before I move on to talk about – perhaps I should just touch on the question of the trusts having wound up and what that means in terms of the ongoing right to seek disclosure under trust law as opposed to any ability in the context of a subsequent action and discovery. There's very little on that. There is one case that was a situation of a trustee company. The trusts had been wound up. The company had been deregistered. The Court said that the right to seek information as a trustee had gone. I've described it in my submissions as any residual right that remains following winding up. So we say the rights vested in the Assignee and then after winding up, whatever residual rights remained continued to remain with him.

ELIAS CJ:

What paragraph are you relying on in this?

MS COUMBE QC:

Your Honour, I'll have to come back to you with that. It's early on where they just refer to the fact that it was discovery and could he also pursue a right under trust law for disclosure at the same time. I've also given it to you because it's an example of, you know, a very, very extensive request for documentation which has some parallels with this case. But in that case, the right was now confined to one under discovery.

One final comment just before I move onto the specific discretionary grounds that we say relate to Mr Erceg in this case. Your Honour, was it *Libertarian Investments Limited v Hall* [2014] 1 HKC 368 case that you referred to earlier?

ELIAS CJ:

Yes.

MS COUMBE QC:

I had a look at that during the lunch break just very quickly and if I could just make a submission about that.

ELIAS CJ:

Yes.

MS COUMBE QC:

It appears to have been in the context of an action for a remedy in relation to a breach of fiduciary duty in relation to the sale for purchase of shares and the plaintiff had sought an account or equitable compensation and the defendant had argued that they should seek an account first and it seemed to me that the purpose of that account was to investigate the situation in order to determine the amount of equitable compensation and so to the extent that it said that there could be requests for further accounts, it was very much in that context to establish the equitable compensation and so in my submission that case is very far removed from the situation that we are dealing with here of the discretionary trust where one beneficiary exercises their right to approach the trustees or to approach the Court and it doesn't, in my submission, that case doesn't at all establish that there must be some right to basic documents and, indeed, Lord Millett in paragraph 167 said that, “Like all equitable remedies an order for an account is discretionary.”

So my submission is that that is just not on all fours with this case and that although *Schmidt* admittedly is not, you know, it has dimensions to it that are not present here either that the articulation of the principles in *Schmidt* are, you know, are a good, you know, that they represent the law that has been established since that time and that New Zealand Courts have followed and I think has more relevance to this situation than the *Libertarian* case.

So moving to the discretion, this is in page 33. There are a number of key grounds on which we say the Court can exercise its discretion. They are all based on the *Schmidt*/*Foreman* factors which were, we say, correctly applied by Justice Courtney in the High Court and correctly reviewed by the

Court of Appeal and they boil down to the issues of confidentiality, Mr Erceg's divisive influence, his remote prospects of receiving a further distribution which, I will submit, remains a relevant consideration even though the trusts have now wound up in terms of his access to information and whether Justice Courtney took into account irrelevant factors as has been suggested.

Now in confidentiality that has always been a core aspect of the exercise of discretion and in this case there are some quite powerful factors. There is, to begin with, the confidentiality clause in the trust deed and this was looked at by Justice Venning and Erceg 1 and then at the Courts in this case and in terms of it basically was interpreted by Justice Venning as really almost restating the case law principles that govern discretion but we say that would really deprive it of any real effect and that it can be interpreted as –

ELIAS CJ:

Well did we see the text of that?

MS COUMBE QC:

I'm sorry?

ELIAS CJ:

Do we have the text?

MS COUMBE QC:

Well Your Honours, in terms of the trust deed, the deeds have always been available for inspection by the Court.

ELIAS CJ:

No, I'm just wondering, in submission –

MS COUMBE QC:

And they are available now if the Court wishes to –

ELIAS CJ:

No, well I don't really want to see it, I just want to know whether – there's no determination on the effect of the clause, is there? I'm just wondering why it's being raised.

MS COUMBE QC:

It's being raised because confidentiality is a key ground.

GLAZEBROOK J:

Well if we don't know what it says, what it wanted to be confidential and why it needed to be confidential, it's difficult to see how we can take it into account.

O'REGAN J:

Well it's in 102 of your submissions, isn't it, was that the one?

MS COUMBE QC:

I'm sorry, I misunderstood. It's at page 33.

ELIAS CJ:

Okay.

MS COUMBE QC:

I'm sorry, we were talking at slight cross-purposes.

ELIAS CJ:

I see, sorry.

ARNOLD J:

But it does have that qualification, "Unless required by law," doesn't it?

MS COUMBE QC:

Yes and then the question is what does that mean, and Justice Venning in Erceg 1 thought that that was really just a reference to the various principles governing the exercise of the trustee's discretion as set out in

Foreman v Kingstone and *Schmidt*. And another possible way of looking at it, because that does tend to then really deprive it of any particular effect. Another way of looking at it would be to say that it does cover the sort of fiduciary obligations but requires the trustees to respect the settlor's wishes as far as possible within those limits, and I think that would be an appropriate way of looking at it and that would still allow for a bare minimum of accountability and including still allowing for the ability as part of the discretion to decline disclosure to a particular beneficiary but at the very least, I should just before I move on from that, there is authority in the cases that some weight should be given to provisions providing for confidentiality.

In *Hartigan*, well *Hartigan* involved a memorandum of wishes but there was an issue as –

ELIAS CJ:

Sorry, can I just ask you, this statement, which I had read before, but my question is how is it before the Court, apart from in your submissions because I thought the trust deed had not been disclosed?

MS COUMBE QC:

The trust deed has been available to the Courts –

ELIAS CJ:

I know but this submission what's that based on that's before the Court?

MS COUMBE QC:

It has been disclosed in I think –

ELIAS CJ:

Was it in one of the affidavits?

MS COUMBE QC:

Affidavits, and also it's set out in the Erceg 1 decision, Justice Venning's decision where he considered it specifically, so it has been opening disclosed.

ELIAS CJ:

Right, I see. Okay, thank you.

MS COUMBE QC:

Tab 4 of volume 1, it's set out in Erceg 1.

GLAZEBROOK J:

I mean I can understand the second part of it and I can understand that there might be some specific things that you don't want in the public domain but.

ELIAS CJ:

Well I'm just commenting on looking at a clause in the trust deed taken from another judgment in different proceedings just strikes me as a slightly odd way for the matter to have come before the Court.

MS COUMBE QC:

As I say, Your Honour, there is a minute in volume 1 of the case on appeal of Justice Faire where he said that we should bring, all the parties should bring the documents should the Court wish to look at those or consider it essential to look at those and they were made available in the High Court. I put it to the Court of Appeal as well and my friend has not applied to see them and the Court has not taken up the position of looking at them but there is – the relevant clauses are all discussed in the submissions and, as I say, the deeds are available if this Court wishes to look at them but nothing turns on – there is also evidence, so at the very least, I think that clause is a powerful statement by the settlor of his desire for confidentiality and evidence has been given about the circumstances in which and the reasons why that was drafted.

There is also evidence from Ms Erceg about why her late husband did not, in particular, want this beneficiary anywhere near the trusts and wanted to maintain confidentiality given the long history of, I think, going over 20 years of family disharmony over questions relating to money and so on.

And Justice Courtney concluded in relation to this that, it is clear from the weight of evidence that Michael Erceg intended that the trusts 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 to have information about that and she said that was a matter of considerable significance to the exercise of discretion and that confidentiality was clearly intended by the settlor to extend to the trust documents, to the identity, protect the identity of other beneficiaries, to – in the *Hartigan* case, for example, where the issue was about disclosure of letters of wishes. The Court accepted that there was evidence of an express wish that they be kept confidential and was prepared to take note of that. Justice Kirby, who took another view and thought it should be disclosed said that if there had been express evidence of such a wish he would have taken that into account. He said that at page 420G that, "If the settlor had expressly asked that this document be kept secret that is something that the Court would take into account," but he thought it had to be express. Justice Mahoney referred to agreeing that it should be withheld, referred among other things, to blind trusts where an express restriction of a particular beneficiary's right to inspect trust instruments, trust accounts may be warranted.

So there is – and I've referred in a footnote to *Tierney v King* [1983] 2 Qd R 580, which is a superannuation case, so there is some authority that with express evidence of express wishes of the settlor.

The Courts will place some weight on confidentiality and particularly so in the context of a family trust such as this where beneficiaries may be treated unequally in terms of distributions and the need to preserve sort of family relationships and so on.

Justice Courtney and the Court of Appeal were both aware that the trusts had been wound up of course but didn't see that as reducing the need to maintain confidentiality or as minimising or answering the sort of likely harassment that was likely to follow if Mr Erceg got more information.

Now in terms of his influence, I've referred you to some of the threats that were made against the trustees which speak for themselves. They admittedly, well they were stated by Lynette Erceg in affidavit to be a sample of what had gone before and since as illustrative only. That hasn't been disputed by the appellant.

Sometime in 2010 the appellant went to live in the south of France, I think in Monaco, and was no longer in New Zealand but from there he was communicating with the official assignee to try and have assigned to him any potential claims against his brother's estate which he described in volume 2 on page 233 as including the trusts, so there was an effort by him to persuade the assignee to assign to him any rights in relation to the trust or the estate that had vested in the assignee. He then, we say, was the driving force behind the litigation that has been brought. He was described in Erceg 2 as a key witness. He had applied to give evidence by AVL because his bank – because of a situation with the Inland Revenue Department at the time and Justice Venning described his importance to the proceeding and that was also brought against Lynette Erceg personally so we've had the threats, we've had his efforts to – and just a sample of those, we've had his efforts to have the causes of action assigned to him and also the subsequent litigation. The trustees, I should point out, were not removed. That's incorrect. They decided to resign as part of a settlement. They wanted to move away from that. In relation to the suggestion that – well, in Erceg 1 when Justice Venning was looking at the application for disclosure by Millie Erceg the appellant wanted to have disclosure of those documents as a family advisor and that was refused and one of the reasons why it was refused was because the Judge accepted the evidence that was before him – which is also before this Court – that this particular beneficiary was a divisive influence.

ELIAS CJ:

Yes but he wasn't dealing with an application by him as beneficiary. So I'm just not sure how far it takes us. This is all matters of background and some colour but is it really central to the matters we have to determine here. I think it can be accepted that this is the background is a bitterly divided family and

that the trustees may be concerned about providing more fuel for further disputes but does it really go much further than that?

MS COUMBE QC:

Well, I think, Your Honour, that it is a significant issue that this particular beneficiary is divisive. There is evidence to that effect. There is evidence of his threats.

ELIAS CJ:

Well, you've made that submission and we do have evidence to that effect. I'm just not sure that what happened in other litigation in which he wasn't applying as a beneficiary is really going to be very helpful to us here.

MS COUMBE QC:

Well, Your Honour, it was accepted in *Foreman* that this is a relevant consideration, the effect on family relations and it is something to be weighed.

ELIAS CJ:

Look, that may well be so. I am wondering why we are wasting so much time on it.

MS COUMBE QC:

In terms of the *Schmidt Foreman* factors and other relevant factors are the prospects of receiving a further distribution and again this goes to – and the Law Society and the Law Commission both focused on this in their reports in terms of, you know, where should things go post-*Schmidt* and that is, I think, a powerful factor against disclosure because what the Courts look at in the context of a discretionary trust, which might involve quite a number of beneficiaries, is do we disclose to everyone? When do we not – there is clearly a discretion and one of the factors is, is it a beneficiary with a real prospect of distribution? A real prospect of distribution means you look at a couple of things. You look at the nature of their interest. Now, the nature of the interest here has been acknowledged to be that he is a primary beneficiary of the Acorn Trust, a secondary beneficiary of the Independent

Trust but you also look at other relevant circumstances and I think this came out clear in the *Murphy* case with Justice Neuberger where you look at what were realistically this beneficiary's prospects of receiving a further distribution and the Courts will look at and this – how likely is it that a reasonable trustee would have made a distribution to this person and we say one of the factors here was the enormous benefits, 95 million, which is not disputed which he had already received, that that is a very powerful factor as to why, looking at it just objectively, you might say that realistically his prospects of a further distribution, despite being a beneficiary, were low and that is a factor that was considered relevant in *Murphy v Murphy* and which the Law Society and Law Commission have also both accepted in terms of their definition of a qualifying beneficiary and a real prospect of benefitting. That is one of the things that you take into account in deciding whether to give information and how much but on top of that he was bankrupt at the relevant time. He was bankrupt at the time that the remaining funds were distributed and the trusts were wound up.

Now even if I've said that all of his rights had vested in the official assignee but even if that is not, that were not the case, say, his rights as a discretionary beneficiary were considered separately, he's still, if any distribution had been made to him, would have, that would have vested in the assignee and gone to his creditors and that would be a very relevant factor for a trustee and in Heath and Whale it suggested that in New Zealand it's most unlikely that trustees would make a distribution in those circumstances. So again that is a relevant factor to whether he had remote or real prospects of distribution in terms of his right as a final beneficiary.

ELIAS CJ:

I just don't understand how we could express any very confident views beyond this being the general background, how we could express any confident views on what might have happened.

MS COUMBE QC:

Well, Your Honour, the Court has a discretion and under –

ELIAS CJ:

Yes, I'm not saying it's not a relevant factor but you're asking us to take it quite far. I mean the trust might not have been wound up, who knows.

MS COUMBE QC:

But his right as a final beneficiary had vested in the assignee that had gone, so even if, you know, I've argued that all of the rights went to the assignee –

ELIAS CJ:

Yes.

MS COUMBE QC:

– but at the very least his rights as a final beneficiary which were a future contingent proprietary and just had vested in the assignee so he had no further rights as a final beneficiary at that point at the time they were wound up. He had no rights and we say – and even if a payment had been made it would have vested in the assignee but he had no right to a payment at all at that stage and even now when the trustees look at should the exercise of discretion be made in his favour, should the Court allow him to have documents, it's still relevant to look at, you know, what were his prospects because it must be in the context of a discretionary trust that no everyone gets to see everything and that there is an assessment to be made and I think, if the Courts take too much of a, you know, do not address this then it leaves trustees and will leave these trustees exposed to what is potentially what is a, you know, an extensive fishing expedition by a beneficiary who was bankrupt at the relevant time, who had already significantly benefitted under Michael Erceg's estate and therefore must, on any reasonable view, have had, you know, remote prospects of a further distribution and all of this now six years after the winding up of the trusts.

So the trustees, you know, as I say, Justice Courtney thought that those were relevant factors. The Court of Appeal agreed so even perhaps if this Court were to take a different, strictly different view, it was within a proper exercise

of Justice Courtney's discretion to make those findings or to come to that view on the evidence that was before her and on the evidence of the trustees.

The disclosure to other beneficiaries, that was suggested to be an irrelevant factor. There has been some disclosure to some of the beneficiaries and we say that was properly taken into account. The trustees and the Court could have just left it there and not even looked at that and still taken the view that overall looking at the interests of the beneficiaries as a whole and of third parties, there shouldn't be disclosure to this particular beneficiary but they gained some comfort from the fact that at least there had been disclosure to some beneficiaries and of course that hadn't led to any complaint or inquiry or even any comment and Mr Erceg is not the –

GLAZEBROOK J:

We don't know whether that's because those other beneficiaries had benefitted from the trusts and therefore had no reason to have any concern about it.

MS COUMBE QC:

Well, I think in Erceg 1 it records that one of those beneficiaries had not benefitted and so – but the fact is that there was no complaint and in a situation like this, as the Law Commission said, it may be that what is really important is has there been sufficient disclosure to sufficient beneficiaries, not everyone is entitled to disclosure and it is a matter – at the end of the day, the trustees must have a discretion but if there has in fact been disclosure to – and in fact on two occasions to these other beneficiaries that in my submission is a relevant – that is one consideration that can be taken into account.

ELIAS CJ:

And you're asking us to take that into account because that didn't apparently lead to any further issue. Is that how you ask us to take it?

MS COUMBE QC:

What I'm saying is Justice Courtney exercised her discretion in accordance with the various factors that had been held to be relevant in this context and she took into account the fact that – or gained, at least, some reassurance from the fact that there hadn't been – nothing had arisen from the earlier disclosure. She took it no further than that, said that that came some reassurance. So it's not as if it was a situation where there had been no disclosure and of course there are other beneficiaries as well. There are many other beneficiaries. Mr Erceg is just one. So the Court of Appeal accepted that that was something she could look at, take into account, but we would say that these other factors are more powerful in terms of the way the discretion should be exercised.

So I'm not suggesting that a complaint is needed before this jurisdiction is exercised. Clearly that's not the case and that's made very clear in *Hartigan* and other cases. But it is, as I say, and the Law Commission seem to have accepted that that notion of sufficient disclosure in the context of a discretionary trust which might have quite a range of beneficiaries and where they thought the trustees must, at the end of the day, have the ability in an appropriate case to say no to one beneficiary, then the fact that there had been disclosure to others would be relevant.

Then come to the final aspect of this. There was no suggestion in the High Court that there was anything about the way this trust had been administered that was in issue, you know, could potentially be some kind of, you know, wrongdoing or maladministration but there have been a number of things that were raised from the bar in the Court of Appeal which we have dealt with and which I think is still being pursued in my learned friend's submissions. So I refer to the distribution resettlement of the trust prior to the vesting date. That is not uncommon but what is also key here is that we say any rights Mr Erceg had in relation to that were gone, they were with the official assignee. It's not for him now all this time later to be, you know, seeking an audit of what happened on that winding up.

That as to the 13% shareholding in Independent Liquor, this was raised from the bar for the first time during the Court of Appeal hearing. Now there is in an affidavit from Mr Erceg a copy of an Overseas Investment Office document which refers to Ms Erceg as having a 13% share on the sale and that document was only relied on in evidence as evidence of who the trustees were at the time. It was only in the Court of Appeal that it was suggested that this might amount to a distribution. So I explained from the bar which was the only way I could do it given the way it had been raised, but that wasn't a distribution at all, rather the trustees and senior managers of the company had been required to hold a percentage of shares as part of the sale for a limited period and I mean if it's still in issue I can provide a short affidavit from Mr Gregory just clarifying that that 13% that is what it related to but I'm sure Your Honours won't need that because –

ELIAS CJ:

I'm sorry, I'm lost as to its relevance but that's probably just me.

WILLIAM YOUNG J:

I'm lost too and I know the point that's been raised but I didn't understand it to be relied on this morning.

MS COUMBE QC:

Yes. Well I'm certainly happy to, you know, in fact in the Court of Appeal we said it should be disregarded because it had been raised from the bar, it should be disregarded and I think it was disregarded by the Court of Appeal and so –

ELIAS CJ:

I don't think it is being put forward that there is any cause shown for investigation. This is a more preliminary request for the information that is said to be due to a beneficiary. There is no adverse inference to be drawn from it but that's what I understand but I mean I can be corrected on that.

MS COUMBE QC:

Well I certainly say that there is no, no adverse inference should be drawn but the fact is we were faced in the submissions with a list of items which were suggested to warrant, you know, that raised questions about the conduct of the trustees and so I've addressed all of those on pages 39 and 40 and we say they should all be disregarded.

GLAZEBROOK J:

But none of the cases say that you do need adverse inference. I mean presumably if there was a real question then there would be no question if there is a discretion but it would be exercised in favour of disclosure.

MS COUMBE QC:

Yes.

GLAZEBROOK J:

But it doesn't follow that if there is nothing that the discretion, if there is a discretion, would be exercised in favour of nondisclosure.

MS COUMBE QC:

No, and I'm not saying that. What I'm really saying is that it just would concern me if the Court had regard to this list of factors which together might raise some question about trustee conduct where they are really without foundation and should be disregarded.

ELIAS CJ:

It's not in issue as far as I understand.

MS COUMBE QC:

So finally Your Honours, the suggestion that Justice Courtney adopted an all or nothing approach we would resist. There were, as you've seen, various protocols before the High Court which were not considered to be an acceptable basis for disclosure. That suggestion that's been put up today has only just been put up today. The first issue, as the Privy Council said, needed to be considered in any case was whether there should be disclosure to this

particular beneficiary and we still maintain that there are grounds here for non-disclosure, quite strong grounds, and that it was within the discretion of the High Court to make, to come to that conclusion. It was a reasonable conclusion and it was open to the Court of Appeal to uphold that as well. The trustees – the suggestion that undertakings as to confidentiality are adequate, I mean, the cases again accept that that is not always going to be the case.

I think the trustees – our position is, to sum up, that *Schmidt* did establish that a discretionary beneficiary has a right to go and seek access, that it is then for the Court to, in its discretion, decide whether to grant that and in practice whether a presumption is applied or whether it is a purely balancing exercise may not in practice make a lot of difference. We say that the test of a good reason to disclose is met in either case and that it was open to the trustees here to withhold in their discretion that if there were rights in beneficiaries to certain documents and the trustees then had to seek directions in order to withhold that would be unworkable, that this has been a workable regime since the *Schmidt* case was decided back in 2003, that the rights that Mr Erceg had in any event were each within that very wide definition of property and that to take them out of that would require some kind of exception in the Insolvency Act itself or in the Trustee Act or at common law – and there is none – that the result is that at the time this trust was wound up his rights as a final beneficiary had vested in the Official Assignee. We say also any rights as a discretionary beneficiary, but in any event, there was sufficient here to justify withholding further documents from him and that we now have had decisions from Justice Venning, from Justice Courtney, and by the Court of Appeal, all taking that view that in this case in relation to this particular beneficiary it was in the interests of other beneficiaries and third parties that there be no further disclosure and that that, in terms of the overall balancing exercise that outweighed – or in terms of the good reason test that outweighed any advantage or benefit at this late stage in well after the winding up of the trusts and after the discharge of Mr Erceg's bankruptcy and giving access, further access, to him than has already – than anything more than the basic information that has already been given.

ELIAS CJ:

The basic information that has been given, just remind me.

MS COUMBE QC:

Well, he has information about his status as a beneficiary and the nature of that, what class of beneficiary, the trustees –

ELIAS CJ:

Is that contained – is there somewhere where we can see what that was? Is that in one of the affidavits?

MS COUMBE QC:

Yes.

ELIAS CJ:

Which?

MS COUMBE QC:

There is an affidavit of one of the trustees confirming that. Tab 8 of the case on appeal, volume 2.

ELIAS CJ:

Thank you, Ms Coumbe. Yes, thank you, Mr Carruthers.

MR CARRUTHERS QC:

May it please Your Honours, I hold to the analysis that I made when I opened the appeal as to the proper test and I emphasised that we're relying on the supervisory jurisdiction of the Court. The issue is whether that is exercised or not and the approach adopted in *Foreman* and *Maguire* that I put to Your Honours when I opened the case remains the position and both *Foreman* and *Maguire* drew on *Schmidt* and followed *Schmidt* and I refer to paragraph 82 of *Foreman* and 27 of *Maguire*. *Foreman* is under tab 18 in volume 1. *Maguire* is under tab 19 in volume 1.

Now, the reconciliation between paragraph 54 of *Schmidt* and *Foreman* and *Maguire* is in my submission captured in paragraph 90 of Foreman. So what Her Honour has done is set out what the test is in her paragraph 82 and then has said the following may be derived from the judgment of the Board in *Schmidt* as matters that may be taken into account by the Court in the exercise of its supervisory jurisdiction and then set out those matters that were in *Schmidt*, taken into *Foreman*, and relied on by the Court of Appeal. So the issue is whether the Court exercises its supervisory jurisdiction and the matters that the Court may take into account are those that *Schmidt* and *Foreman* identify.

Now, to say it's a discretionary jurisdiction is in fact incorrect. With respect, Your Honour the Chief Justice had it correctly that the word "discretionary" in the context of Lord Walker's paragraph 54 is misleading.

Now, I just want to say a word about the factors in the analysis that my learned friend has made of the factors and her emphasis on confidentiality. Can I just take you to the case on appeal volume 2 and I am under tab 9 and I want to go to page 192, please.

Now, this is the will of Michael Erceg and in relation to confidentiality what he has provided is this at paragraph 7. "So as far as legally possible, I direct my trustees to treat this will and its contents as confidential and to disclose the contents of this will to Lynn, Millie, Ivan, Minka and Matthew only, and only then if requested to do so and I request that such beneficiaries do likewise." Then there's another provision in the will affecting confidentiality at page 191 of the case and it's part of clause 4 and it's clause 4(c)(2) where it provides to transfer the residue, described as my residuary estate, to my wife, Lynn. I declare that it is my wish that Lynn shall provide assistance to members of my family and employees of Independent Liquor in the way that I have during my lifetime and that she shall help them as I would have in times of need." So when one's looking at the confidentiality provision that's said to be in the trust deed, one ought to look at what Michael Erceg was saying in relation to confidentiality and support of his family and measure that against the

evidence that's said to be that Ivan shouldn't have anything to do with the affairs of Michael Erceg.

Now, that probably leads on in terms of support to my learned friend's submission that Ivan had had significant support in Michael's lifetime to the extent of 95 million dollars. It's plain from the evidence that Michael and Ivan had worked together and Michael had supported Ivan in a number of ways. I expect that 95 million dollars having been paid needs to be measured against the supposed value of the sale of assets of 1.2 billion dollars.

WILLIAM YOUNG J:

Is the 95 million represented by loans that wasn't given? It's not apparent from the terms of the will unless it's in the loans.

GLAZEBROOK J:

Yes, that's what I was wondering.

MR CARRUTHERS QC:

Now, in the context of looking at those considerations that the Court should have regard to, the question of the trust having been wound up was mentioned and it was put in an earlier submission that the winding up was an answer on the basis that it was said to stand for the proposition that after there had been a winding up an application couldn't be granted. But that doesn't seem to square with what the decision says.

On page 14 there's a heading "the pursuit of information: the second round". If one goes to paragraph 73 which is on page 28, where the Court found, "Here the applicant started by seeking information in the year. He was given trust documents in the form of financial statements. Now he is not seeking information in the year, nor has he brought an action but he is one step back from bringing an action which he has reason to believe he may have but cannot without further information." Then he has to take a sideways step, as it were, to bring a case against not the defunct trustee but its ex-directors for acts of procuration and then the whole issue of documents is dealt with at

paragraph 78 on page 31. "The case may appear to be weak but the benevolence of the rule is not and I am bound to administer it that way in the judicial exercise of discretion. That can be exercised to curtail the amplitude of the documents sought. I would disallow documents that seek to go behind and vet the accounts. I would allow those documents that, despite the difficulties of definition, appear to me to be trust documents such as financial statements and documents and other documents that I identify trust assets and beneficiaries." and then he deals with the proposed orders.

Now my learned friend didn't go back to this and describe which parts were relied on but on the face of it the decision doesn't support the proposition that where trusts have been wound up there cannot be access to them.

Those are my submissions on that on the issue of the –

ELIAS CJ:

Did you find where, I mean, it indicates, I haven't read through it, but the applicant was given trust documents in the form of financial statements. Was that given outside the pre –

MR CARRUTHERS QC:

Beforehand, I think that was –

ELIAS CJ:

– pre-discovery?

MR CARRUTHERS QC:

I think this talks about the second round, I think that was the first round, by the look of it, when he sought documents in the year and was given the financial statements.

ELIAS CJ:

I see, yes.

MR CARRUTHERS QC:

I think that's the proper analysis.

ELIAS CJ:

So the decision we really need is the first round one, if this case is confined to the accounts of the trust? I know that you're seeking more than that.

MR CARRUTHERS QC:

No, no, I'm going to answer Your Honour in those terms. If you go to paragraph 70 or let me go back to where I started at 73.

GLAZEBROOK J:

It actually looks as though, under 37 that there wasn't, I think they were just given, paragraph 37.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

It was by correspondence from lawyers, the first round, and then paragraph 37 he was given information.

ELIAS CJ:

Yes I see.

MR CARRUTHERS QC:

Right.

GLAZEBROOK J:

So it looks as though he just asked for the information, was given it.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

And is now seeking follow-up information, is that your understanding?

MR CARRUTHERS QC:

And I think that's fair, Your Honour, because at 73 it begins here, "The applicant started by seeking information in the year," and that presumably the request that Your Honours refer to in 37.

GLAZEBROOK J:

Yes, because it says something like, "Pursuant of information was by correspondence commencing in…" and the outcome was that in April he got it.

MR CARRUTHERS QC:

Yes, so and that 73 he was given trust documents in the form of financial statements, but then the second round, and this is in response to Your Honour the Chief Justice. In the second round, that's at 78, "I would allow those documents that despite the difficulties of definition appear to me to be trust documents such as financial statements and documents and other documents that identify trust assets and beneficiaries." So it looks as if the orders were made.

I want to turn now in reply to deal with the issue of property and the nature of the property that the Insolvency Act deals with and I'm going to my written submissions to draw attention to the paragraphs on which we rely to say that this is not, that the claim that we are making, asking the Court to exercise its jurisdiction to have the trustees' account by the provision of documents is not property for the purposes of the Insolvency Act and my starting point is at paragraph 98 of the submissions which is on page 31 and the essence of the three paragraphs, 98 to 100, is that the right or interest that we are seeking to claim is not a proprietary right at all, that's the whole basis on which the modern cases have gone off. So we've submitted that the Court of Appeal recognised correctly that the appellant standing emanated from his status as a beneficiary and the Courts inherent jurisdiction are not as a result of any

proprietary claim in trust property or the exercise of any right in relation to trust property. So we say that it was this status which entitled him to enforce the trustee's duties, including the duty to account, and a proprietary interest in trust property, or if a fixed share in trust property is not required to establish a right of access to trust documents. So that's the starting point. And then we go to paragraph 104 and deal with 104 to 106 because it's the nature of the right that we're seeking to enforce and I've submitted it's difficult to see how a request for the provision of information could ever be proprietary in nature in any event. It does not add to or diminish the assets of the estate of a bankrupt discretionary beneficiary.

And then I've drawn attention to the fact that the Official Assignee has a quite independent ability to exercise jurisdiction to obtain documents. It doesn't require to have any rights vested in him for that access and so we've submitted that that section doesn't oust the concurrent ability of the discretionary beneficiary or a named beneficiary to apply for access to documents and then just in passing, in 108 we've submitted that there's a wider public interest in ensuring the proper administration of trusts which are not limited by proprietary concerns.

Then at 116 to 119 as the first example, we've looked at, we've tested the proposition about property in this way and submitted the implications of the right to an account being properly under the Insolvency Act can be tested from two perspectives, and this is the first one. From a beneficiary's perspective, "On the respondent's argument a bankrupt beneficiary would lose an interest under a trust for all time. Similarly statutory rights under the Administration Act would be lost. The overall consequence for a beneficiary is that a parent could never leave property to a child who became bankrupt."

WILLIAM YOUNG J:

Well why do you say that? Are you assuming that the parent dies after the bankruptcy is terminated?

MR CARRUTHERS QC:

Yes Your Honour, that is, that has to be the assumption that's made.

WILLIAM YOUNG J:

Okay, so if I'm left money by my mother and she dies just before I am adjudicated bankrupt well my share in her estate goes to the official assignee, same if she dies while I'm bankrupt. If she doesn't die until after my bankruptcy is finished well I've never had a right anyway because I have what was only ever a mere expectancy unsupported by a right to go to the Court to say, make sure Mum's looking after my interests properly.

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

Which corresponds to the right of a discretionary beneficiary. So I don't think it's actually a very good analogy, is it?

MR CARRUTHERS QC:

Well I will try, I will try again on another one.

WILLIAM YOUNG J:

I'd try and sharpen it up.

ELIAS CJ:

It's a problem with analogies, really.

MR CARRUTHERS QC:

Well it is and it's hard to get one. Well perhaps I can do better on the second of the two and so I've submitted at 122, "If the respondent's argument is correct, the bankrupt's interest in the trust would fall into the bankrupt's estate in a first bankruptcy, following discharge there would be no entitlement. On the respondent's argument to any – in response to any interests under the trusts. So on a second bankruptcy the creditors would have no access to any

interests that the bankrupt had under the trusts." that may be a better example.

And then I've looked at 124 at the policy of the Act and I've submitted that, "The purpose of property vesting in the official assignee is to enable the official assignee to dispose of property and distribute the proceeds to creditors. The importance of allowing a bankrupt to participate fully again in the economic life of the community should not be undermined. The purpose of the Act has a temporal effect, the restrictions of bankruptcy are for a limited period, assets are collected and on discharge the bankrupt resumes his or her pre-adjudication life. The vesting provisions are directed towards ensuring that any entitlement or asset capable of being realised into a cash asset vested in the bankruptcy at or during the bankruptcy is for the benefit of creditors."

So really what we're inviting the Court to do is to interpret the right to an account and to obtain the documents as being outside the definition of property which I think comes to the proposition that Your Honour Justice Glazebrook was putting that it would not properly be regarded as a chose in action.

GLAZEBROOK J:

Well I think – my issue with your friend which is why I was pressing it was that the right to due administration, say there wasn't the final beneficiary issues, so let's put that out because that is an actual interest.

MR CARRUTHERS QC:

Yes, I have to accept that.

GLAZEBROOK J:

But if the only thing you've got is an expectancy or a discretionary interest to be considered then your only interest in having information is, one, to make sure you are considered but also if you are considered to get the property.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

Now if that – so that the information seeking is backing up that right. Now if that right, the second right doesn't vest in the official assignee then there is no point, post discharge, of the official assignee having the related right, it seems to me.

Now if in fact the right as the discretionary beneficiary to get for all time a distribution does vest in the official assignee then I can understand the argument that says the official assignee keeps having that interest. But if the official assignee doesn't get the property what possible interest in due administration does the official assignee have once discharge from bankruptcy occurs?

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

So it seems to me they have to go together.

MR CARRUTHERS QC:

Yes, and just on that nature of the right, we've done an analysis of *Johns* at 144, 145 and 147 but I don't need to take you there.

So those are the submissions I want to make in reply.

ELIAS CJ:

Yes, thank you. Yes Ms Coumbe?

MS COUMBE QC:

I'm going to be brief. Look, I had said before Your Honours, that I was asked a question by Your Honour about where in the Guest case. I said that there was a statement about what happened on winding up of the trusts –

ELIAS CJ:

Yes, and you did say you'd go back to it.

MS COUMBE QC:

– and the nature of the application and I've located the provisions and it's clear from – I simply want to give you the reference because it's at odds slightly with what my learned friend has said about the case. And on page 1 it says that it was an applicant for pre-action discovery under Rule 32.05 at paragraph 1 and then going down to paragraph 5, the Judge said, "Here there cannot be an administrative action in the Court based upon that right to information." The administration action being the right under trust, the action under trust law to seek information which he has clarified earlier. He said, "The trusts have vested and the trustee companies have been deregistered, section," and he talks about the Companies Act. So he says, "It's an application under a discretionary procedural rule of the Court against two ex-directors."

So it was an application pre-action discovery under a rule and the Court did accept that the right to seek information in the context of just that trust beneficiary relationship alone had gone and –

GLAZEBROOK J:

Well I'm not sure because you actually have the trustee having gone which is quite a different matter because if you don't have trustee.

MS COUMBE QC:

Yes, I accept that as a point, definitely a point of distinction but I just simply wanted to give the reference that I did say I would.

GLAZEBROOK J:

Well, but they're looking at the –

MS COUMBE QC:

That I would provide.

GLAZEBROOK J:

Yes, I'm not sure that you can take from that that if the trusts are vested you don't get information when you actually have got a trustee to get any information from.

ELIAS CJ:

Yes, thank you Ms Coumbe.

Well thank you counsel for your assistance. We will reserve our decision in this matter. Thank you.