HAS THE TRUSTS ACT 2019 ABROGATED THE COURT'S INHERENT JURISDICTION TO ORDER DISCLOSURE OF REASONS FOR TRUSTEES' DECISIONS TO A BENEFICIARY?

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Prior to the Trusts Act 2019 (the Act), a court was able to exercise its inherent jurisdiction and order that certain trust information be made available to a beneficiary to uphold the trustees' common law "duty to account" to beneficiaries. However, in exercising that inherent jurisdiction, the court would consider a number of factors, including whether the information contained reasons for trustees' decisions. A beneficiary was not normally entitled to such information at common law. However, a court was able to make an order for disclosure of reasons for trustees' decisions where this was justified. The Trustee Act 1956 was silent on the "duty to account" and on any corresponding obligations for trustees to provide trust information to beneficiaries. The Act creates a significant shift from the pre-Act regime in that it sets out the obligations on trustees to provide trust information to beneficiaries. Interestingly, the Act expressly excludes "reasons for trustees' decisions" from the definition of "trust information". As such, trustees' obligations under the Act do not apply to that information. This raises the question whether the Act abrogates the pre-Act inherent jurisdiction of the court to order disclosure of trustees' reasons for their decisions. This article considers the scope of the court's inherent jurisdiction where a matter is regulated by statute and analyses the Act to answer this question.

I INTRODUCTION

This article addresses the issue whether the exclusion of "reasons for trustees' decisions" from the definition of "trust information" in the Trusts Act 2019 (the Act) abrogates the inherent jurisdiction of the court to be able to order disclosure of such reasons to a beneficiary. Prior to the Act, a court was able to make an order that certain trust information be made available to a beneficiary who had

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requested that information. The court's power in this regard derived from its inherent jurisdiction to supervise and, if necessary, intervene in the administration of trusts.[1] As the Trustee Act 1956 was silent on the obligations of trustees to make trust information available to beneficiaries, the rules governing disclosure of trust information were entirely judge-made. The landmark case of *Erceg v Erceg* was a significant development in the law of trusts, clarifying the factors that a court should consider in determining whether disclosure of trust information to a beneficiary was appropriate.[2] These factors included taking into account the type of information requested and whether it would reveal the reasons for trustees' decisions. Such information would not normally be made available to a beneficiary.[3] Courts' reticence to have beneficiaries accessing trustees' reasons for their decisions was to ensure trustees could exercise their discretionary powers unfettered and uninfluenced by beneficiaries. However, it is notable that, prior to the Act, a court could order disclosure of this information to a beneficiary where this was justifiable.

Unlike its predecessor, the Act regulates the disclosure of trust information by a trustee to a beneficiary. It creates a presumption that "trust information" will be available to a beneficiary, subject to the trustee considering a number of factors set out in the Act. The definition of "trust information" in the Act expressly excludes "reasons for trustees' decisions". Therefore, there is no presumption that this information will be made available to a beneficiary. The Act's position is somewhat consistent with the common law, as beneficiaries did not previously have any right to such information. However, as noted in the case of *Lambie Trustee Ltd v Addleman*, there is a difference between the principles explained in *Erceg* and the Act.[4] The Act regulates the disclosure of trust information and expressly excludes "reasons for trustees' decisions" from its scope. The Court noted that the consequence of this may be that the residual power of a court to order disclosure of such information

1 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, adopted in *Foreman v Kingstone* [2004] 1 NZLR 841 (HC).

2 *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

3 At [56].

4 *Lambie Trustee Ltd v Addleman* [2021] NZSC 54, [2021] 1 NZLR 307 at [59].

has now been abrogated by the Act.[5] However, the significance of the difference between the pre-Act position and the Act was not an issue in *Addleman*, so was not discussed by the Court and is therefore unresolved.[6]

This article examines the ambit of the court's inherent jurisdiction to determine whether it survives the enactment of the Act, to the extent that a court is able to order that reasons for trustees' decisions be made available to a beneficiary. Although the Act is paramount, case law shows that the inherent jurisdiction of the court can continue even where a matter is regulated by statute, provided that in exercising that jurisdiction a court does not contravene any relevant statutory provision. The view presented in this article is that the court's inherent jurisdiction to order disclosure of trustees' reasons for their decisions to a beneficiary can continue to complement the Act. The exercise of this jurisdiction should be reserved, however, for limited instances where disclosure of trustees' reasons to a beneficiary is necessary to ensure justice and accountability of the trustees.

This article is set out as follows: Part II discusses the pre-Act position on the court's inherent jurisdiction to order disclosure of reasons for trustees' decisions. Part III provides an analysis of the ambit of the court's inherent jurisdiction where a matter is regulated by statute; it determines whether or not the Act abrogates the court's inherent jurisdiction to order disclosure of reasons for trustees' decisions. Part IV concludes by noting the complexity of the issue, but finds that the court's inherent jurisdiction survives.

II DISCLOSURE OF TRUSTEES' REASONS FOR DECISIONS PRIOR TO THE ACT

Prior to the Act, the Trustee Act 1956 applied to trusts. However, the Trustee Act 1956 was largely silent on a number of trustee obligations. These gaps were supplemented by the common law. The "duty to account" to beneficiaries was one of the trustee duties established at common law and has been considered fundamental to the trust concept.[7] In order to hold trustees to account, beneficiaries

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5 At [44]. It should be noted that it is more likely the Court was referring to the "inherent jurisdiction" here as opposed to the "residual power" of the court. This is because inherent powers (or residual powers as they are also known) must derive from somewhere – either from statute or the court's inherent jurisdiction. As a court's ability to order disclosure of trust information derives from its "inherent jurisdiction", the terminology in this quote would make better sense if it read "inherent jurisdiction". Accordingly, this article has used what it considers to be the correct terminology – whether the Act now abrogates the "inherent jurisdiction" (as opposed to inherent or residual power) of the court to be able to order that reasons for trustees' decisions be made available to a beneficiary. As noted later in this article, confusion around the two terms is not uncommon and many cases have used the terms interchangeably, which has been said to be technically incorrect. See Rosara Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 CantaLR 220; Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 897; and below, Part III, A, 1.

6 *Lambie Trustee Ltd v Addleman*, above n 4, at [59].

7 *Foreman v Kingstone,* above n 1, at [93].

would need to have access to certain trust information. Accordingly, the right to trust information was a corollary of the trustees' duty to account to beneficiaries.

The case of *Schmidt v Rosewood* considered that a court's ability to order disclosure of trust information to a beneficiary arose from its inherent jurisdiction to supervise and intervene in the administration of trusts.[8] A court therefore was not constrained to order disclosure only where the beneficiary had established a proprietary right to the information.[9] Nevertheless, *Schmidt* confirmed that a beneficiary's right to trust information was not absolute. A court would consider the type of information requested by a beneficiary and the particular circumstances to determine whether disclosure was appropriate. Pre-Act case law in New Zealand was consistent with *Schmidt*.[10] Courts have considered that certain trust information, including the trust terms,[11] financial statements relating to the trust,[12] minutes of trustee meetings,[13] legal advice obtained by the trustees for the purpose of administering the trust,[14] a settlor's memorandum of wishes,[15] and records of trustee decisions (excluding reasons),[16] should be made available to beneficiaries who request this information. However, there was no expectation at common law that reasons for trustees' decisions would be provided by trustees to beneficiaries.[17] English and New Zealand cases show that a beneficiary's ability to access such information would be exceptional, not the norm.[18] The case of *Erceg* in New Zealand, which helpfully set out factors that a court should consider in determining whether to order disclosure of trust information, included whether the documents sought would disclose the trustees' reasons for their decisions. The Court went on to state that it "would not normally be appropriate to require disclosure of the trustees' reasons for particular decisions".[19] So, while trustees were not bound to provide beneficiaries with reasons for their decisions, and the courts did not see this as information

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8 *Schmidt v Rosewood Trust Limited,* above n 1.

9 *Schmidt v Rosewood Trust Limited,* above n 1, adopted in *Foreman v Kingstone*, above n 1.

10 *Foreman v Kingstone*, above n 1; and *Erceg v Erceg*, above n 2.

11 *Erceg v Erceg*, above n 2, at [62].

12 *Addleman v Lambie Trustee Ltd* [2019] NZCA 480 at [64].

13 At [64].

14 *Lambie Trustee Ltd v Addleman*, above n 4, at [51].

15 *Jacomb v Jacomb* [2020] NZHC 1764 at [16]; *Erceg v Erceg* [2016] NZCA 7, [2016] 2 NZLR 622 at [20], n 4; and *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32.

16 *Jacomb v Jacomb*, above n 15, at [16].

17 See *Re Londonderry's Settlement* [1964] 3 All ER 855 (CA); *Wilson v Law Debenture Trust Corp plc* [1995] 2 All ER 337 (Ch); and *Erceg v Erceg*, above n 2, at [56].

18 See above n 17.

19 *Erceg v Erceg*, above n 2, at [56] (emphasis added).

that a beneficiary should normally receive, the common law by implication accepts that there may be exceptional circumstances that warrant disclosure.

A Case against Disclosure of Reasons for Trustees' Decisions

The principle that trustees exercising a discretionary power are not bound to disclose their reasons to a beneficiary is well-founded. If trustees' reasons for exercising their discretion were subject to scrutiny by beneficiaries, people would be reluctant to accept a trusteeship position.[20] As per Salmon LJ in *Re Londonderry's Settlement:*[21]

> It might indeed well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might ensue, added to their present not inconsiderable burdens.

The Court ultimately held that:[22]

> … documents bearing on the deliberations of the trustees leading to their decisions (taken in good faith) as to the exercise of discretionary powers [were not required to be disclosed], for those were decisions taken in a confidential role and the trustees were not bound to disclose their motives and reasons.

The case of *Wilson v Law Debenture Trust Corp plc* followed *Re Londonderry* and confirmed that in the context of pension trusts, the position is the same: trustees are not bound to give reasons for the manner in which they exercise their discretion.[23] The Court considered that to make trustees subject to this scrutiny would do no favours for the beneficiaries as a whole and could make the lives of trustees intolerable.[24]

The position in *Schmidt* (that a beneficiary had no absolute right to any trust document) was consistent with the principle that trustees were not bound to provide reasons for their decisions because no beneficiary has an absolute right to such information, or any trust information for that matter. The New Zealand cases of *Foreman v Kingstone*[25] and *Erceg* adopted the reasoning in *Schmidt.* These cases show that a court should take into account the type of information requested, the nature of the request, and the wider impact that disclosure may have when exercising its inherent jurisdiction. As previously mentioned, *Erceg* specifically stated that reasons for trustees' decisions would not normally be available to a beneficiary. Courts' reluctance to fix bright-line rules in these

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20 *Re Londonderry's Settlement*, above n 17, at 857.

21 At 862.

22 At 855.

23 *Wilson v Law Debenture Trust Corp plc*, above n 17.

24 At 342, quoting Salmon LJ in *Re Londonderry's Settlement*, above n 17.

25 *Foreman v Kingstone*, above n 1.

cases emphasises the importance of balancing the accountability of trustees with the need to ensure that trustees are able to exercise their discretionary powers unfettered.

B Case for Disclosure of Reasons for Trustees' Decisions

Because beneficiaries did not have a right to access reasons for trustees' decisions at common law, what remains is the exception to that general principle – there would need to be something out of the ordinary for a court to make an order for such information to be made available to a beneficiary. While there does not appear to be a specific case in England or New Zealand post-*Schmidt* where disclosure of trustees' reasons has been ordered by a court exercising its inherent jurisdiction, there are authorities suggesting that some circumstances may warrant disclosure of such information to a beneficiary.

The English cases *Re Londonderry* and *Wilson* provide support for a beneficiary being able to access trustees' reasons for their decisions where a trustee has acted in bad faith or improperly. *Re Londonderry* held that while beneficiaries were not entitled to reasons for a trustee's decision to exercise a discretionary power, this position was dependent on the trustee acting in good faith.[26] In *Wilson* it was stated that if there was evidence that a trustee had acted improperly, whether from an improper motive or by taking into account or not taking into account factors which the trustee should have taken into account, then disclosure may be appropriate.[27] Further, the soft wording in *Erceg* (that reasons for trustees' decisions would not normally be made available to a beneficiary) left scope for a court to go against the norm and order disclosure of reasons for trustees' decisions where that was justified.

There is also a practical reason why beneficiaries should be able to access trustees' reasons for their decisions where there is evidence to suggest untoward conduct of the trustees. This is because a beneficiary should be able to make an informed decision whether to commence legal proceedings against the trustees. A beneficiary may need to know the trustees' reasons in advance of litigation to make this assessment, and this information would likely be disclosed through the discovery processes in any event.

C Summary

What is apparent from the pre-Act common law is that reasons for trustees' decisions would not normally be disclosed. The principle that trustees were not bound to provide reasons for their decisions to beneficiaries was a necessary one. Conversely, there was no legal impediment to a court ordering that such information be disclosed to a beneficiary. The court's power to make such an order derived from its inherent jurisdiction to supervise and intervene in the administration of trusts. Indeed the common law alludes to the fact that an order for disclosure of trustees' reasons for their decisions may

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26 See *Re Londonderry's Settlement*, above n 17.

27 See *Wilson v Law Debenture Trust Corp plc*, above n 17, at 388.

be necessary to avoid injustice where there was evidence to suggest a breach of conduct duty by the trustee.

III ANALYSIS OF THE ACT AND AMBIT OF THE COURT'S INHERENT JURISDICTION

This article is of the view that the court's pre-Act ability to order disclosure of reasons for trustees' decisions to a beneficiary, although not the norm, should continue under the Act.

The issue for this paper to determine is whether (1) a court can exercise its inherent jurisdiction complementary to the information disclosure regime in the Act and order disclosure of reasons for trustees' decisions as part of its role to supervise and intervene in the administration of trusts; or (2) the definition of "trust information" in the Act, which excludes "reasons for trustees' decisions", is in contradiction to the continuation of the court's inherent jurisdiction in this regard. The concept of inherent jurisdiction and the information disclosure regime will now be considered.

A The Court's Inherent Jurisdiction

1 Defining its scope

The scope of the court's inherent jurisdiction is difficult to define and is better understood by looking at its broad principles:[28]

> … it is both unwise and unnecessary to seek to define the scope of the Court's inherent jurisdiction. Broad principles governing its exercise is all that is required. The Court may invoke its inherent jurisdiction whenever the justice of the case so demands. It is a power which may be exercised even in respect of matters which are regulated by statute or by rules of Court providing, of course, that the exercise of the power does not contravene any statutory provision. The need to do justice is paramount.

With this in mind, Rodriguez Ferrere considers that the key principles of the court's inherent jurisdiction are that it:[29]

(a) is exercised where necessary;
(b) has the aim of avoiding injustice; and
(c) exists in the absence of explicit statutory regulation, but is not easily wrested away from the courts by legislative action.

Therefore, the court has wide scope to intervene in a matter under its inherent jurisdiction. Conversely, parliamentary sovereignty must be respected,[30] so where a matter is regulated by statute, the wording of the statute must be considered carefully to determine whether it displaces the court's inherent

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28 *R v Moke* [1996] 1 NZLR 263 (CA) at 267, cited in *Harley v McDonald* [1999] 3 NZLR 545 (CA).

29 Marcelo Rodriguez Ferrere "The Inherent Jurisdiction and its Limits" (2013) 13 Otago LR 107 at 142.

30 See AV Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1959) at 406–414 for a detailed overview of the relationship between parliamentary sovereignty and the rule of law.

jurisdiction. Only where the statute clearly deviates from the continuation of the court's inherent jurisdiction should its displacement be entertained.[31] Authorities confirm that a court can exercise its inherent jurisdiction even in matters that are regulated by statute, so long as they do not contravene a statutory provision.[32]

Accordingly, matters that are not codified or overruled by statute (the residue) make up the inherent jurisdiction.[33]

Case law can assist with determining whether a statute has displaced the court's inherent jurisdiction. However, it is worth noting that many cases on this topic have used the concepts of the court's "inherent jurisdiction" and "inherent power" interchangeably. This has caused some confusion.[34] For clarity's sake, it is helpful to distinguish the two.

Only the High Court exercises inherent jurisdiction.[35] "[O]ther courts exercise inherent powers but not inherent jurisdiction".[36] "All courts possess inherent powers which flow from a court's existing jurisdiction".[37] Inherent powers are therefore "those powers which every court possesses to enable it to give effect to its jurisdiction".[38] Those inherent powers "may be exercised where necessary in the interests of justice, but they are parasitic on the court first possessing jurisdiction".[39] It is outside the scope of this article to say much more on this or to analyse the terminology used in the cases. Instead, this article is focused on examining cases to help with determining when a statute might oust the court's inherent jurisdiction.[40]

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31 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at 646.

32 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 675.

33 Ferrere, above n 29, at 109.

34 See Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand", above n 5; and Joseph *Joseph on Constitutional and Administrative Law*, above n 5, at 897.

35 See Joseph *Joseph on Constitutional and Administrative Law*, above n 5, at 897.

36 At 897.

37 At 901.

38 Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand", above n 5, at 220.

39 At 220.

40 This article is specifically focused on whether the inherent jurisdiction has been abrogated in respect of a court being able to order that reasons for trustees' decisions be made available to a beneficiary. There are other provisions in the Act's information disclosure provisions (ss 49–55) that would need to be considered separately when assessing the impact of the provision on the court's inherent jurisdiction; for example, s 53 replicates the *Erceg* factors. However, this discussion and analysis is best left for another article.

2 *Case law*

The case of *Taylor v Attorney-General* discussed the inherent jurisdiction of the court where an order was made in respect of a matter that was regulated by statute.[41] The case considered whether the Supreme Court (now the High Court) had correctly exercised its inherent jurisdiction in making an order prohibiting publication of particulars that would lead to the identification of witnesses.

Section 46 of the Criminal Justice Act 1954 and s 375(2) of the Crimes Act 1961 were relevant, as they provided for the making of orders suppressing publication of evidence and the names of persons associated with the proceedings.

The order made by the Court in *Taylor* in exercising its inherent jurisdiction was wider in that it prohibited publication of anything that could lead to identification of the witnesses, not just names. Richmond J (in the majority) held that s 46 of the Criminal Justice Act 1954, however, did:[42]

> … not have the effect of depriving the Supreme Court of any inherent power which it may have to prevent publication of names and other particulars which may lead to the identification of witnesses.

His Honour went on to state that an empowering provision (such as s 46 of the Criminal Justice Act):[43]

> … should not be interpreted as impliedly abrogating an inherent power of the Court unless the statutory provision is in some way repugnant to the continued existence of the statutory power, as opposed to strengthening the inherent power by widening it, or extending it or by providing an alternative remedy.

His Honour could not detect from the language or purpose of s 46 any intention of the legislature to abrogate any existing powers of the Court.[44]

Wild J also held the view that the relevant provisions in the Criminal Justice Act 1954 and the Crimes Act 1961 should not, "in the absence of a clear indication to the contrary, be construed as reducing other powers".[45] His Honour held that s 46 of the Criminal Justice Act 1954 and s 375(2) of the Crimes Act 1961 placed no limit on the Court's inherent jurisdiction to act effectively in making the order it did.[46]

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41 *Taylor v Attorney-General*, above n 32.

42 At 681.

43 At 687.

44 At 687–688.

45 At 680.

46 At 680.

Wild J agreed with Master Jacob that:[47]

> … the term 'inherent jurisdiction of the court' is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.

In *Broadcasting Corporation of New Zealand v Attorney-General*, the Court agreed with *Taylor*.[48] The case concerned whether the Court could exercise its inherent jurisdiction and order (in relation to the offence in respect of which the accused was convicted and sentenced) that there be no publication of anything other than the fact that a person had been sentenced. Section 375(1) of the Crimes Act 1961 was considered as to whether this provision placed any limits on the inherent jurisdiction of the Court. The Court held that the inherent jurisdiction was exercisable, but that the specific order had gone too far.

Cooke J stated:[49]

> As to statutory provisions, in my opinion there was no statutory authority to sit in closed Court for the sentencing of the prisoner in the present case; nor to give any direction forbidding or restricting publication of a report of the proceedings, except that s 46 of the Criminal Justice Act 1954 would have enabled an order to be made prohibiting the publications of names. … Where the statutes do not apply, the inherent jurisdiction can be availed of, so far as it extends. Its extent requires consideration in this case.

Cooke J went on to note the importance of the spirit of a statute in assessing whether the inherent jurisdiction is interfered with in any way:[50]

> The inherent jurisdiction exists because of necessity. It seems to me that Parliament should not be treated as having interfered with it unless that conclusion is clearly compelled by the terms or spirit of an Act. … There is nothing in the section to suggest that it was any part of the purpose of the legislature to impose limitations on the inherent jurisdiction. Nevertheless I also think that in exercising the inherent jurisdiction the Court should take note of the value placed by Parliament on the presence of accredited reporters and should be very slow indeed to exclude them.

Richardson J also agreed that the inherent jurisdiction was exercisable, but:[51]

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47 At 680, citing IH Jacob "The Inherent Jurisdiction of the Court" (1970) 23(1) Current Legal Problems 23 at 24.

48 *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA).

49 At 128.

50 At 128.

51 At 135.

> Any departure from the principle of open justice in this regard must be no greater than is required in the overall interests of justice. I cannot presently conceive of any circumstances which would justify prohibiting a report that a person had been convicted and sentenced on a specified charge on a particular day; and particulars of the sentence ought to be given publicly with no restraint on publication except perhaps in very rare cases.

Since *Taylor* and *Broadcasting Corporation of New Zealand*, the Bill of Rights Act 1990 and the Criminal Justice Act 1985 were enacted. The case of *Siemer v Solicitor-General* discussed whether those earlier cases were still good law in light of those developments.[52] The issue in the case was whether the Court's inherent jurisdiction enabled non-party suppression orders to be made. Section 138 of the Criminal Justice Act 1985 was largely similar to s 375 of the Crimes Act 1961. The new provision "sought neither to enact a general and complete regime for the making of non-party suppression orders, nor to exclude generally the inherent power to make such orders".[53] Further, the provision "did not provide for the making of an order supressing publication of a judgment".[54] Although s 138 contained express limits on the Court's inherent jurisdiction to make only certain orders, that limitation was not relevant to the order made in the case.[55] Accordingly, the inherent power to suppress judgments had not been extinguished or replaced by s 138 of the Criminal Justice Act 1985. The Court then considered the impact of the Bill of Rights Act 1990 but concluded that suppression orders can be made consistently with that statute where publication of the information would give rise to a real risk of prejudice to a fair trial.[56]

In *Zaoui v Attorney-General*, the Court also considered the scope of the its inherent jurisdiction.[57] The case looked particularly at whether the Court could exercise its inherent jurisdiction to grant bail to a person detained as an illegal immigrant. The Court considered the Immigration Act 1987 and noted only two provisions which explicitly excluded bail being granted. However, the remainder of the relevant part of that Act contained no such exclusions. The Court concluded:[58]

> Part 4A did not exclude the jurisdiction to grant bail in all circumstances. Clear statutory wording was required to take away the inherent jurisdiction to protect the basic liberty of the individual to be free from detention. Consideration of Part 4A was therefore to proceed on the basis that there was a jurisdiction to grant bail in suitable cases unless that was clearly excluded, expressly or by necessary implication.

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52 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

53 At [149].

54 At [149].

55 At [149].

56 At [158].

57 *Zaoui v Attorney-General*, above n 31.

58 At 578.

Accordingly, from case law, the court's inherent jurisdiction is not abrogated by matters regulated by statute unless the exercise of the jurisdiction would contravene a statutory provision and it must be clear from statute for the inherent jurisdiction of the court to be displaced.

B Analysis of the Act's Information Disclosure Regime and the Continuation of the Court's Inherent Jurisdiction

The Act contains the obligations on trustees to give certain information to beneficiaries in ss 49 to 55 of the Act (the information disclosure regime). The pre-Act principle that trustees need to be held to account has therefore been adopted in the Act in the provisions requiring trustees to give trust information to beneficiaries.[59]

The Act provides a presumption that trust information will be made available to a beneficiary. Trust information has been defined in s 49 of the Act and:[60]

> (a) means any information—
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> (i) regarding the terms of the trust, the administration of the trust, or the trust property; and
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> (ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but
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> (b) does not include reasons for trustees' decisions.

The presumption that trust information will be made available to a beneficiary, however, will not apply where the trustee, after considering factors set out in s 53, reasonably considers that the information should not be provided.[61] The factors in s 53 largely replicate the factors in *Erceg*.[62] However, whether the information includes reasons for trustees' decisions is not one of the s 53 factors. Instead, "reasons for trustees' decisions" are excluded from the definition of trust information so there is no presumption that they will be made available by trustees to beneficiaries.

Given the Act, an assessment must now be made whether the regulation of the giving of trust information in the Act, and the fact that reasons for trustees' decisions have been excluded from its scope, now limits the court's inherent jurisdiction to order disclosure of such information. Both the express provisions in the Act as well as the intent of the provisions are relevant.[63]

Section 8 of the Act expressly preserves the inherent jurisdiction of the court to supervise and intervene in the administration of trusts, except to the extent the Act provides otherwise. Accordingly, while there is an express intention to preserve the inherent jurisdiction of the court, a contrary

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59 The duty to account does not appear separately among the trustees' duties in the Act. See Trusts Act 2019, pt 3, sub-pt 1.

60 Section 49.

61 Sections 51(2) and 52(2).

62 See *Erceg v Erceg*, above n 2, at [56].

63 *Broadcasting Corporation of New Zealand v Attorney-General*, above n 48, at 128.

provision in the Act will take precedence. It is notable that s 49 of the Act has intentionally excluded "reasons for trustees' decisions" from "trust information", meaning the presumption that trustees must provide beneficiaries with trust information does not apply. The legislature could have included in s 53 a factor similar to *Erceg* that a trustee should consider whether the information includes reasons for trustees' decisions prior to releasing that trust information to a beneficiary. The trustee could then withhold that information in certain cases after considering the factors in s 53. However, considering the Act's stance, if a court were to exercise its inherent jurisdiction and order disclosure of reasons for trustees' decisions, it would effectively be making an order beyond what a trustee was legally obliged to provide under the Act. At first glance, it may appear that the inherent jurisdiction has therefore been abrogated by s 49 of the Act.

However, this article concludes otherwise. The court's inherent jurisdiction can continue to complement the information disclosure regime and its provisions do not prohibit a court from making an order for disclosure of reasons for trustees' decisions. The rationale for this position is now discussed.

1 No express prohibition of beneficiaries receiving reasons for trustees' decisions

It is notable that the Act does not "prohibit" reasons for trustees' decisions being provided to beneficiaries. Section 49 rather states that the definition of trust information does not include reasons for trustees' decisions, and therefore the presumption for disclosure does not apply. Trustees may, however, disclose reasons for their decisions voluntarily. This is an important distinction.

As noted above per Master Jacob, the inherent jurisdiction can apply alongside a court's statutory jurisdiction so long as it would not impinge on the relevant statutory provision(s).[64]

If the Act prohibited beneficiaries from receiving reasons for trustees' decisions, then the court would be limited to its statutory jurisdiction and would have to uphold that provision. However, because the effect of the exclusion of reasons for trustees' decisions from the definition of trust information simply means that the "presumption" does not apply, the court's inherent jurisdiction can continue.

In *Zaoui v Attorney-General*, there was no prohibition of bail expressed in the statutory provisions considered in that case.[65] Accordingly, in the absence of clear exclusion of the right to bail, the Court's inherent jurisdiction was unfettered. Although this case was in the criminal context and the liberty of the individual was a fundamental consideration, the statutory analysis can be influential in the civil context. Section 49 of the Act and its corresponding provisions do not place a clear exclusion on a

64 See Jacob, above n 47.

65 *Zaoui v Attorney-General*, above n 31, at 578.

beneficiary having access to reasons for trustees' decisions, only that the "presumption" that the information is provided does not arise.

Therefore, a court may exercise its inherent jurisdiction to determine whether an order for disclosure of trustees' reasons for their decisions should be made, without contravening s 49 or other provisions within the information disclosure regime.

2 The information disclosure regime applies to trustees, not to the court

Because the Act regulates when the presumption to give trust information applies and the obligation on the trustee in the giving of that information, a court can enforce those provisions where there has been a breach by a trustee.[66] This is the court's statutory jurisdiction.

Alongside the statutory jurisdiction is the court's inherent jurisdiction to intervene where the information disclosure regime does not apply and where intervention would not contravene the Act's provisions.

As Wild J noted in *Taylor*, quoting Master Jacob:[67]

> … the term 'inherent jurisdiction of the court' is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.

The Act's information disclosure provisions are quite different to *Taylor*, which concerned a statutory provision empowering a court to restrict publication of names of persons associated with proceedings. Even in that situation, it was said that a court could make orders beyond the scope of the statutory empowering provision so long as such an order was not contrary to the provision. There is no specific empowering provision in the Act regulating when a court can order trust information to be made available to beneficiaries.[68] The Act's information disclosure provisions are not about matters

66 Where a beneficiary takes issue with the trustee's omission to provide trust information, it can make an application to the court pursuant to ss 126 and 127 of the Trusts Act.

67 *Taylor v Attorney-General*, above n 32, at 680.

68 Although the court must give trustees directions under s 54, that provision applies where no beneficiary has any trust information, so it will be a very unusual situation where that provision is relevant. Most of the time, at least one beneficiary knows they are a beneficiary of a trust. Access to reasons for decisions will require a beneficiary to know they are a beneficiary and to have details for the trustees, so s 54 is not relevant to the issue that this article addresses.

the court should consider in releasing trust information to a beneficiary,[69] nor are they about when a court should order the provision of trust information to a beneficiary. The provisions apply to trustees.

A court can therefore exercise its statutory jurisdiction and order that trust information be disclosed to a beneficiary, as well as exercise its inherent jurisdiction and order that other information that is not trust information be provided to a beneficiary.

3 The spirit of the Act

Cooke J stated in *Broadcasting Corporation of New Zealand v Attorney-General*, "[i]t seems to me that Parliament should not be treated as having interfered with [the court's inherent jurisdiction] unless that conclusion is clearly compelled by the terms or spirit of an Act".[70]

The purpose of the information disclosure regime in the Act is to enable beneficiaries to enforce the trust and trustee duties.[71] The intent of the provisions is therefore to ensure accountability of trustees. While a trustee is not obliged to disclose reasons for its decisions (nor should it be),[72] the continuation of the inherent jurisdiction of the court to order that such information be made available to a beneficiary (albeit in limited cases) is not in contradistinction to the overall intent of the regime, which is that trustees should be held accountable.

Further, the Act's information disclosure obligations should not exist in a vacuum. The trustee has a number of statutory duties to comply with, such as the duty to act honestly and in good faith (which is a core mandatory duty in the Act)[73] and the duty to avoid conflicts of interest (a default duty).[74] Accordingly, there may be situations where withholding reasons for trustees' decisions may go against other duties owed (for example, where withholding such information was to conceal dishonest or self-serving conduct). A court should be able to exercise its inherent jurisdiction and order disclosure in those situations, as this would align with the intent of the Act to ensure beneficiaries can hold trustees accountable.

C Exercising the Inherent Jurisdiction

Although the Act has not abrogated the court's inherent jurisdiction, the pre-Act common law will continue to apply. The Act is not intended to be a complete code but will continue to be complemented

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69 Compare s 44(3) of the Trusts Act, for example, which sets out matters that a court must consider in regard to whether a trustee has been grossly negligent.

70 *Broadcasting Corporation of New Zealand v Attorney-General*, above n 48, at 128.

71 Trusts Act, s 50.

72 See Part II A of this article.

73 Trusts Act, s 25. Mandatory duties cannot be modified or excluded by contrary trust terms as per s 5(3)–(4).

74 Section 34. This duty can be modified or excluded by the express or implied terms of the trust as per s 5(3)–(4).

by rules of common law and equity, to the extent the Act permits.[75] Under the common law, when a court is exercising its inherent jurisdiction it should consider the *Erceg* factors prior to making an order for information to be released to a beneficiary. As mentioned in this article, it would not normally be appropriate for beneficiaries to have access to reasons for trustees' decisions.[76]

Additionally, the court must have regard to the purpose and principles of the Act when exercising its inherent jurisdiction.[77] The Act's purpose includes "setting out the core principles of the law relating to express trusts".[78] The principles of the Act are that a trust should be administered in a way that is consistent with its terms and objectives and that avoids unnecessary cost and complexity.[79] A court should therefore bear in mind the core principles of trust law that have been restated in the Act. The Act and the common law are consistent to the extent that neither has provided a beneficiary with an entitlement to have access to reasons for trustees' decisions. At common law, access to such information would be the exception, rather than the norm. Going forward, a court should be mindful not to cause undue scrutiny of trustees nor to discourage people from becoming trustees. The court should also avoid unnecessary cost and complexity in the administration of trusts.

The case of *Broadcasting Corporation of New Zealand v Attorney-General* is a useful illustration of a case where, although the Court did have inherent jurisdiction, the exercise of that jurisdiction went too far, bearing in mind that the order made was extremely wide.[80] The Court stated that "in exercising the inherent jurisdiction the Court should take note of the value placed by Parliament on the presence of accredited reporters and should be very slow indeed to exclude them".[81]

To be consistent with pre-Act common law, it will therefore be an unusual situation where a court would exercise its inherent jurisdiction and allow a beneficiary to have access to reasons for trustees' decisions, albeit not trust information under the Act. The starting point should be that reasons are not normally made available as per *Erceg*. The reasoning in Part II of this article is relevant here – there would have to be evidence of some breach of conduct duty by the trustee that would justify release of such information. This may be, for example, where the trustee has acted in bad faith or in pursuit of a self-serving interest.

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75 Section 5(8).

76 *Erceg v Erceg*, above n 2, at [56].

77 Trusts Act, s 8(2).

78 Section 3.

79 Section 4.

80 *Broadcasting Corporation of New Zealand v Attorney-General*, above n 48.

81 At 128.

IV CONCLUSION

This article has addressed the issue of whether the Act, by excluding reasons for trustees' decisions from the definition of trust information, abrogates the court's inherent jurisdiction to be able to order that this information be made available to a beneficiary. This is not an entirely straightforward question to answer and has required an understanding of the pre-Act and Act positions, and the scope of the court's inherent jurisdiction where a matter is regulated by statute.

Prior to the Act, the trustees' common law duty to account to beneficiaries meant that certain trust information was made available to beneficiaries on request. Access to trust information was fundamental to be able to hold the trustees accountable. Where a beneficiary requested trust information and this was not provided, a court could step in under its inherent jurisdiction to supervise and intervene in the administration of trusts and order that the information be disclosed to the beneficiary. However, the right to trust information was not absolute and whether it should be made available to a beneficiary would depend on a number of factors, including the type of information requested and whether the information included reasons for trustees' exercising their discretion. It would not normally be appropriate for beneficiaries to have access to trustees' reasons for their decisions. However, there was no legal impediment to a court ordering release of such information; it would just be wary of doing so. This is because trustees have to be able to perform their role without being unduly scrutinised for their decisions.

The Act now creates a presumption that trust information will be made available to a beneficiary unless it would be reasonable for the trustee to withhold that information, having considered the factors set out in s 53 of the Act. The factors in s 53 largely restate the *Erceg* factors. However, a notable difference is that the Act excludes reasons for trustees' decisions from the definition of trust information (rather than this being a s 53 factor for the trustee to consider prior to releasing this information to a beneficiary). The Act therefore regulates the giving of trust information to beneficiaries but expressly excludes reasons for trustees' decisions from its scope.

This article finds that a court is able to order that information that does not meet the definition of trust information may be made available to a beneficiary under its inherent jurisdiction. Accordingly, a court can order that reasons for trustees' decisions be made available to a beneficiary. This conclusion is based on the wording and spirit of the Act's provisions.

Having said this, it will be unusual for a court to exercise that inherent jurisdiction. A court will be bound by *Erceg*, in that reasons for trustees' decisions will not normally be made available. There would have to be evidence of a breach of conduct duty by the trustee for a court to go against the norm, and intervention would need to be necessary to avoid injustice.

The court's inherent jurisdiction to be able to order that reasons for trustees' decisions be made available to a beneficiary has therefore not been abrogated by the Act.