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SECRECY DOES NOT STAND COMFORTABLY BESIDE ACCOUNTABILITY:
The Case for the Disclosure of Trustees' Reasons and Settlor Wish Letters

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Abstract

A beneficiary's right to trust information is necessary to ensuring trustees remain accountable to their irreducible core of obligations. However, whether a trustee has acted honestly and in good faith will not manifest itself in the information which the courts currently allow beneficiaries to inspect, such as trust deeds or accounts. Beneficiaries require further information – namely, settlor wish letters, which are mandatory for trustees to consider, and the reasoning behind trustees' decisions to determine compliance with their duties. Yet beneficiaries are denied this information, which equity regards as confidential. This position is enacted in the Trusts Act 2019 and continues to be upheld in persuasive jurisdictions, despite academic and judicial criticism. The broadening of discretionary powers in modern trust instruments – sometimes called 'massively discretionary trusts' – overwhelms beneficial rights, leaving the irreducible core as one of the only remaining apparatuses for beneficiaries to enforce the trust. Five justifications underpin the non-disclosure of trustee's reasons and wish letters and can be rebutted with reference to normative conceptions of the trustees' role: the potential for family embitterment, the impact of disclosure on the role of the trustee, the non-interventionist approach perpetuated by the courts, emphasis on settlor desires for confidentiality, and reconciliation with discovery in litigation. The time is ripe for the courts to empower those whose beneficial rights are overwhelmed by discretion by rejecting the orthodox position, with the Trusts Act 2019 ushering a new era of formality, professionalism, and transparency.

Key Words

disclosure of trust information, massively discretionary trusts, Trusts Act 2019, trustees' reasons, letter of wishes, confidentiality.

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I Introduction

"No one likes being treated like a mushroom … kept in the dark and fed you know what".[1]

While equity requires trustees to exercise their discretionary powers honestly and in good faith, it denies disclosure of the information necessary to determine this to beneficiaries; namely, the reasons behind trustees' decisions and wish letters. This paradox forms a "fundamental conceptual and practical obstacle [for] an aggrieved beneficiary who wishes to challenge the decisions of trustees".[2]

Massively discretionary trusts, where the broad and unfettered discretionary powers granted to trustees overwhelm beneficial rights, are becoming a more common method of asset management. Equity must respond to this by strengthening trustee accountability. The recent formalization of New Zealand's trust law through the Trusts Act 2019 justifies a more transparent approach to trust administration and provides a unique opportunity for the courts to allow the disclosure of trustees' reasons and wish letters to beneficiaries. This will ensure trustees of massively discretionary trusts are meaningfully held to account.

Part II makes clear the need for increased accountability by exploring the rise of massively discretionary trusts, the difficulty in controlling discretionary decision making, and why the right to disclosure, as it currently standards, is insufficient. Part III outlines the disclosure provisions in the Trusts Act 2019, and the implications of these sections for the argument raised in this paper. Part IV considers the leading cases on disclosure in New Zealand and persuasive jurisdictions, concluding the New Zealand courts demonstrate a preference of accountability over confidentiality. Part V makes the case for the disclosure of trustees' reasons and wish letters, by refuting the justifications underpinning the orthodox position with reference to normative societal conceptions of a trustees' role, the supervisory jurisdiction of the court, and reconciliation with other areas of law, particularly

[1] Justice David Hayton, in private conversation; in James Penner "Justifying (Or Not) the Office of Trusteeship with Particular Reference to Massively Discretionary Trusts" (2021) 6 Can J Law Jurisprud.
[2] Jonathan Garton *Moffat's Trust Law* (6th ed, Cambridge University Press, Cambridge, 2015) at 543.

civil procedure. Part VI substantiates this argument by analogizing to conceptions of accountability which underpin both equity and administrative law, ultimately concluding the adoption of similar restraints on discretionary decision making is not only logical, but long overdue.

II The Case for Increased Accountability

A Massively Discretionary Trusts

Trusts play a significant role in New Zealand's legal and socioeconomic context. The initial popularity of the trust stemmed from domestic tax conditions during the 1970's and 1980's.[3] New Zealanders have continued to enthusiastically utilize the trust as a form of asset management; specifically, the discretionary trust,[4] which gained popularity due to the flexibility it provides in structuring legal ownership and beneficial rights to achieve advantages not possible under common law.[5] As such, trusts are "undoubtably here to stay".[6]

Because of their widespread use, it is unsurprising that New Zealand has become a breeding ground for new trust structuring methods.[7] The 21st century saw the drafting of trusts by practitioners that bestowed trustees with broad and unfettered dispositive discretionary

[3] Law Commission *Review of Trust Law in New Zealand: Preferred Approach* (NZLC IP31) at 1.24-1.26. Many overseas jurisdictions imposed high tax rates on trusts, as well as estate and gift duties. The New Zealand jurisdiction does not contain such trust disincentives.

[4] Law Commission, above n 3, at 1.30.

[5] FW Maitland *Equity – A Course of Lectures* (Cambridge University Press, 1910) Lectures III and IV.

[6] Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at 1.1-1.2.

[7] At 17-27; see *Clayton v Clayton* [2016] NZSC 29, *Official Assignee v Wilson* [2007] NZCA 122, *Kain v Hutton* [2008] NZSC 61. See also *Webb v Webb* [2020] UKPC 22.

powers that "effectively govern the whole trust structure".[8] These trusts are commonly described as "massively discretionary trusts" (MDTs).[9]

A common feature of MDTs is that they provide settlors with de facto control over the trust property, despite equity deeming such control to have fallen away with disposition.[10] Settlors may retain control directly through the trust deed as a trustee, 'protector',[11] or 'principal family member',[12] provided with the "absolute and uncontrolled discretion" to appoint, remove, replace beneficiaries and trustees,[13] distribute or resettle trust assets,[14] appoint trust income or capital, or revoke the trust[15] in an unfettered capacity.[16] MDTs which are genuinely settled for the benefit of its beneficiaries still provide trustees with discretionary powers that "do not merely qualify beneficial interests, but effectively displace them, one might even say overwhelm them".[17] Therefore, "everything rides on trustees' decisions, rather than the terms [of the trust]".[18]

Settlors may also enjoy more indirect control by drafting a wish letter to provide to trustees.[19] Wish letters are commonly provided alongside the granting of wide discretions to trustees, and while they are not binding, they are *controlling.*[20] While a trustee must "conscientiously apply their independent discretion", [21] the courts have held they are

[8] Lionel Smith "Massively Discretionary Trusts" (2019) 25 T.&. T. 4, at 397.
[9] At 397; see also Penner, above n 1; see also David Russell and Toby Graham "The Limits of Discresionary Trusts: Have Powers of Addition and Removal been taken a Step too Far?" (2021) 27 T.&. T. 4 280.
[10] Penner, above n 1, at 13.
[11] See, for example, *JSC Mezhdunarodniy Promyshlenniy Bank & Anor v Pugachev & Ors* [2016] EWHC 248.
[12] See, for example, *Clayton v Clayton* [2016] NZSC 29 at [117]-[118].
[13] At [118], see also *Pugachev*, above n 11, see also *Webb v Webb*, above n 7.
[14] *Clayton v Clayton*, above n 12, at [55].
[15] At [55].
[16] At [55]; see also *Pugachev*, above n 11, see also *Webb v Webb*, above n 7.
[17] Smith, above n 8, at 404.
[18] At 417.
[19] *Public Trust v Kain* [2021] NZHC 1000 at [121]-[122].
[20] Smith, above n 8, at 415.
[21] *Public Trust v Kain*, above n 19; see also *Chambers v S R Hamilton Corp Trustee Limited* [2017] NZCA 131.

"*obliged*, as part of the exercise of [their] discretion, to have regard to a settlor wishes for the purpose of making [their] independent assessment of the appropriate course of action".[22]

B Controlling Discretion

Alongside the development of the discretionary trust, the courts formulated techniques to restrain trustees from abusing their discretionary powers. Such techniques consist of core fiduciary duties, such as avoiding conflicts of interest,[23] or investing trust capital prudently and diligently,[24] and 'obligational' or 'custodial' duties, which encompass the 'irreducible core' of duties owed by trustees to beneficiaries.[25] These obligations do not strictly consist of duties relating to property, but rather the duty to act "honestly and in good faith for the benefit of the beneficiaries".[26]

These obligations and duties are 'negative', as they "do not require the holder of a power to do something but forbid certain actions where harm to the beneficiary of the power will result".[27] In circumstances where a trustee does not uphold their obligatory duties in the exercise of their discretionary powers, a court will intervene.[28] As Lord Reid states:[29]

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[22] *Public Trust v Kain*, above n 19, at [123] (emphasis added); see also Geraint W. Thomas "Thomas on Powers" (2nd ed, Oxford University Press, London, 2012) at 1.12; see also David Hayton, Paul Matthews, Charles Mitchell *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, London, 2010).
at 4.10-4.13.

[23] *Boardman v Phipps* [1967] 2 AC 46 (HL).

[24] David Hayton "The Irreducible Core of Trusteeship" in AJ Oakley *Trends in Contemporary Trust Law* (1st ed, Oxford University Press, New York, 1997) at 47

[25] Jessica Palmer "Theories of Trust and What they Might mean for Beneficiary Rights" [2010] NZ L Rev 541 at 551 citing *Armitage v Nurse* (1997) EWCA Civ 1279, at 253H-254A, per Millet J.

[26] At 551, citing Hayton, above n 24, at 47.

[27] John McGhee *Snell's Equity* (31st ed, Sweet and Maxwell, London, 2005) at 29-024.

[28] McGhee, above n 27, at 29-025; see Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Sweet and Maxwell, London, 2014)

[29] *Dundee General Hospitals Board of Management v Walker*, above n 22, at 905.

> If it can be shown the trustees considered the wrong question, or that, although they purported to consider the right question, they did not really apply their minds to it or perversely shut their eyes to the facts, or that they did not act honestly or in good faith … the court will intervene.

Textbooks helpfully list specific circumstances where a trustee will breach their obligatory duties to beneficiaries. Such circumstances include a fraudulent exercise of power,[30] or the exercise of a power for an improper motive,[31] without considering relevant factors,[32] made capriciously,[33] or unreasonably.[34]

C Disclosure: A Mechanism for Accountability

Accountability is a fundamental characteristic of all trusts - even MDTs.[35] As Millet J stated in *Armitage v Nurse*:[36]

> The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts.

The courts, recognizing this, established beneficiaries' rights to disclosure of trust information, which allows beneficiaries to understand their interest and, importantly,

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[30] *Cloutte v Storey* [1911] 1 Ch 18 at 32 and 33 per Farwell LJ; see also Robert A. Pearce and Warren Barr *Pearce and Stevens' Trusts and Equitable Obligations* (6th ed, Oxford University Press, Oxford, UK, 2015). at 771; Hayton, Matthews and Mitchell, above n 22, at 50.36-50.37.

[31] A court will intervene if the trustee exercises, the power for extraneous motives, or simply refuses to exercise the power when required to; see Pearce and Barr, above n 30, at 772; see for example *Klug v Klug* [1918] 2 Ch 67 at 71; see also Garton, above n 2, at 532-534.

[32] *Dundee General Hospital Board of Management v Walker* [1952] 1 All ER 896 (HL), at 905. If a trustee considered the wrong question, or did not apply their mind to the right question, or perversely shut their eyes to the facts, did not act honestly or in good faith, the court will intervene; see Hayton, Matthews and Mitchell, above n 22, at 57.27.

[33] *Re Manisty's Settlement* [1974] Ch 17 at 26 per Templeman J; the Court defined capriciousness as "irrational, perverse, or irrelevant to any sensible expectation to the settlor"; see also Mark Studer "Modern Trustee Decision Making – Unpacking the Duty of Proper Consideration" (2016) 22 T.& T. 9 991 at 996.

[34] In *Futter v Revenue and Customs* [2013] UKSC 26, [2013] WLR 172, the level of unreasonableness must amount to "perversity"; see also Pearce and Barr, above n 30, at 774–775; see also Garton, above n 2, at 532-534.

[35] Palmer, above n 25, at 560; see also Lewin, above n 28, at 906-907; see also Smith, above n 8.

[36] *Armitage v Nurse*, above n 25, at 253FF.

ensure trustees are accountable to their duties and obligations owed.[37] The right to disclosure is "fundamental, for it lies at the heart of trustee accountability, which in itself underpins the core concepts of a trust".[38]

The courts commonly allow the disclosure of documents such as the trust deed, trustee resolutions and details of debts.[39] However, this does not go far enough. The very nature of dishonesty or fraud is that it is deceptive and so will not be manifestly obvious in basic financial and trust information.[40] Thus, at the very least, beneficiaries require information which allows them to identify the reasoning and considerations of trustees to determine whether a discretionary decision was bona fide. As MDTs grant trustees with broader, unfettered discretionary powers, the irreducible core becomes one of the only ways in which a beneficiary, whose beneficial rights are overwhelmed by discretion, can enforce the trust. Thus, adequate disclosure is not only necessary but key to the protection of the fundamental principles underpinning trusts.

The scope of beneficiaries' rights to disclosure is, as the law currently stands, limited to non-confidential information. For 170 years, the law has regarded trustees' reasons for their decisions as confidential.[41] More recently, the courts have also regarded settlor wish letters as confidential, arguing disclosure would reveal the trustees' reasons.[42] Both of these pieces of information are crucial to determining whether a trustee's decision is bona fide valid. This is because it allows an identification of flaws in the reasoning behind a trustee's discretionary decision. Trustee's reasons provide the information necessary to determine whether a trustee considered relevant or irrelevant factors, acted dishonestly, in bad faith, or for an improper motive. Furthermore, trustees are bound to consider a settlors wish letter

[37] McGhee, above n 27, at 29-025; see also Lewin, above n 28, at 907.
[38] Thomas, above n 23, at 12.01. See also Hayton Matthews and Mitchell, above n 22, at 1.74.
[39] At 559; see also McGhee, above n 27, at 29-025.
[40] At 559.
[41] In *Re Beloved Wilkes Charity* [1851] EWHC 52 (Ch), 3 Mac & G 440, 42 ER 330 (Ch), at 448, the rule was first articulated. It was then followed in *Re Londonderry's Settlement (Peat v Walsh)* [1965] Ch 918, [1965] 2 WLR 229.
[42] *Public Trust v Kain,* above n 19; see also *Chambers v S R Hamilton Corp Trustee Limited,* above n 21.

when making decisions. Thus, access to said letter is necessary to ascertain whether the letter was considered.

The denial of this information makes it difficult for a beneficiary to determine and *prove* a trustee acted improperly. This creates difficulties in holding discretionary trustees accountable to their irreducible core. This is because, as identified by Lord Truro in *Re Beloved Wilkes Charity*,[43] "a trustee who [simply states] they have met, considered, and come to a conclusion, the court then has no means of saying they have failed their duty, or to consider the accuracy of their conclusion".[44]

The rule that confidential trust information cannot be disclosed to beneficiaries is over 170 years old, originally articulated prior to the intellectual developments triggered by *McPhail v Doulton*,[45] and the evolution of modern discretionary trust instruments.[46] The continuing applicability of the rule is therefore questionable. The development of equity "remains demand-led and … continues to lag behind the realization of novel trust devices".[47]

III Current Position in New Zealand: The Trusts Act 2019

The newly enacted Trusts Act 2019 (the Act) contains provisions regarding the disclosure of trust information to beneficiaries. The disclosure regime sparked considerable

[43] *Re Beloved Wilkes Charity*, above n 41.

[44] At 448; see also Garton, above n 2, at 531.

[45] Garton, above n 2, at 554; citing *McPhail v Doulton* [1970] UKHL 1, [1971] AC 424 (HL).

[46] Smith, above n 8, at 415; see also Garton above n 2, at 531; see also Hayton, Matthews and Mitchell, above n 22, at 50.37.

[47] Daniel Clarry, 'Fiduciary Ownership and Trusts in a Comparative Perspective' (2014) 63 ICLQ 901, at 902.

discussion amongst practitioners[48] and academics.[49] In light of the arguments raised in this essay, the Act's disclosure position and its impact on said arguments should be considered.

A Section 9: Meaning of 'Beneficiary'

Section 9 of the Act defines 'beneficiary' as "a person who has received, or who will or may receive, a benefit under a trust…and includes a discretionary beneficiary". A 'discretionary beneficiary' is "a person who may benefit under a trust … but who does not have a fixed, vested, or contingent interest in trust property".[50]

B Section 49: Meaning of 'Trust Information'

Section 49 defines 'trust information' as "any information regarding the terms of the trust, the administration of the trust, or the trust property … that is reasonably necessary for the beneficiary to have to enable the trust to be enforced".[51] Sections 51 and 52 further define two types of trust information for the purposes of disclosure.

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[48] See for example Morris Legal "What Information do I need to Provide to Beneficiaries Under the Trusts Act 2019?" 25 March 2021 < http://www.morrislegal.co.nz>; John Bassett and Brigit Morrison "The Big Picture: New Rules for Trusts – A Toolkit for Trustees" Bell Gully 7 December 2020 <https://www.bellgully.com>; Chapman Tripp "Disclosure of Trust Information to Beneficiaries" 2 September 2020 <https://chapmantripp.com> ; Lois Gilmor "The Trusts Act is Changing: What You Need to Know and How to be Prepared" <https://www.publictrust.co.nz>; Rhonda Powell "The New Trusts Act 2019; Key Changes to Consider" 29 November 2019 New Zealand Law Society Law Talk Issue 935 <https://www.lawsociety.org.nz>; Nathaniel Walker and Fayez Shahbaz "Trustees – Information Retention and Disclosure" Russell McVeagh August 21 2020 <https://www.russellmcveagh.com>.

[49] See for example Henry Brandts-Giesn, Sarah Kelly, "Recent Developments in the Law and Administration of Trusts in New Zealand" (2018) 24 T.&. T. 7 696; Anthony Grant "What Documents is a Beneficiary Entitled to See?" Anthony Grant Barrister https://anthonygrant.com; Geoffrey Cone, Claudia Shan, Simon Barber "A Trusts Act for New Zealand" (2019) 25 T.&. T. 9 891; Rebecca Rose "All I Ask For is Information" [2016] NZLJ 365–370; see also Jack Alexander, Callum Burnett "The New Zealand Trusts Bill: An Overview of Proposed Reforms" (2018) 24 T.&. T. 9, at 901.

[50] Section 9. The definition confirms New Zealand's rejection of the proprietary-based approach to disclosure, where a beneficiary was required to prove a vested interest before disclosure could be made; *Re Londonderry's Settlement,* above n 41.

[51] Trusts Act 2019, s 49(a); see also *Schmidt v Rosewood Trust* [2003] UKPC 26, 2 AC 709; see also Geoff McLay "How to Read New Zealand's New Trusts Act 2019" (2020) 13 Journal of Equity 325 at 344.

'Basic trust information', defined in s 51(3)(a)-(d), includes the fact that a person is a beneficiary, the name and contact details of trustees, details of the appointment, removal or replacement of trustees, and the ability for beneficiaries to request further information under s 52.[52] 'Further trust information', is referred to in s 52. Although not explicitly defined, it likely includes trustee resolutions, minutes, financial material, details of debts and gifting.[53]

1 Disclosure of Reasons under the Act

Section 49(b) excludes the reasons for trustees' decisions from the meaning of trust information.[54] Using a strict interpretation, this confirms Parliament's approval of the orthodox position. However, the section can also be read to mean trustees' reasons are not disclosable for the *purposes* of the Act - but does not exclude their disclosure *outside* of the Act's regime, under the court's supervisory jurisdiction. Such an interpretation leaves open the ability for the courts to change the law as suggested in this paper.

As 5(8)(b) states, the Act is "not an exhaustive code" and intends to compliment the rules of common law and equity except where "those rules are inconsistent with the provisions of this Act".[55] What 'rules' take priority in such a situation is unclear, however looking to statutory context is helpful. Section 5(9), which deals with the interrelationship with other enactments impacting trusts, states in circumstances where there is inconsistency "the provisions of that other enactment prevail".[56] The Act also *expressly* replaces or abolishes areas of law, such as the rules against perpetuities.[57]

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[52] Trusts Act 2019, s 51(3).

[53] These were the documents requested in *Erceg v Erceg* [2017] NZSC 28, at 351(10).

[54] William Young J observed this was of "possible significance"; *Addleman v Lambie Trustee Limited* [2019] NZCA 480, at [60].

[55] Trusts Act 2019, s 5(8)(b).

[56] Section 5(9).

[57] Trusts Act 2019, s 16(5).

These provisions suggest that the Act *can* be subordinate to other areas of law and, when rules are not *expressly* replaced, altered, or abolished, the common law should prevail. This is a preferable interpretation, as it would ensure equity is not "mechanically applied",[58] and will not impede on the ability for the courts to alter the common law pursuant to societal changes. The Law Commission did not intend for the provisions in the new Act to "represent a new dawn" and sought to "preserve the magic" that lay behind the development of equity.[59] Helpfully, the Commission provided a table which, in their view, identified each provisions interaction with case law.[60] This table is found in appendix 1. In said table, the provision regarding disclosure is labeled as a "modification of case law" but where "case law will remain relevant", suggesting the Law Commission foresaw potential for the courts to alter the disclosure rules, and did not want the Act to restrict this.[61] Thus, under this interpretation, the courts are *not* prevented from changing the disclosure position, and allowing trustees reasons to be disclosed.

C Presumption of Disclosure

The Act creates two rebuttable 'presumptions' of disclosure. Section 51 presumes 'basic trust information' will be provided to beneficiaries proactively by trustees. Section 52 presumes trustee's will "…within a reasonable period, give a beneficiary or the representative of a beneficiary the trust information [requested]".[62] This section applies to "further trust information" not contained under s 51.

Some commentators suggested the Act's presumptions altered the common law position, because the Supreme Court in *Erceg* instead described an 'expectation' of disclosure.[63]

[58] McLay, above n 51, at 330.

[59] Law Commission, above n 3, at 3.15.

[60] At 3.66.

[61] At 3.66-3.67.

[62] Trusts Act 2019, s 52(1).

[63] Alexander and Burnett, above n 42, at 910; the authors considered the Act to be a "significant departure" from the approach in *Erceg v Erceg*, above n 53; see also Chartered Accountants "Submission to the Justice Committee on the Trusts Bill 2017" at 17; see also New Zealand Law Society "Submission to the Justice Committee on the Trusts Bill 2017" at 8.

This is simply a matter of semantics. The Court in *Erceg* described the expectation as one where "in the normal run of things, trustees will provide [basic trust information] to close beneficiaries […] proactively, without the need for a request",[64] with a close beneficiary being described as someone with "a mere expectation in relation to the assets of the trust".[65] The talk of "proactive disclosure" and "close beneficiaries" is reminiscent of the Act's basic trust information presumption in s 51 and definition of beneficiary in s 9.[66]

Furthermore, the Supreme Court in *Addleman* recently considered the disclosure position since *Erceg* to be "substantially the same under the Trusts Act".[67] As McLay states, "while the Supreme Court did not explore its choice of 'expectation' rather than presumption … [the] process of decision making looks to be relatively similar to the Acts".[68]

D Procedure for Deciding Whether Presumption Applies

The presumptions in ss 51 and 52 are rebuttable. Before deciding whether either of the presumptions apply, trustees must consider the factors listed in s 53.[69] If the trustees consider any of the factors properly apply, the presumption of disclosure is rebutted.[70] This section generally enacts the approach to disclosure taken by the Supreme Court in *Erceg*.[71] While 'basic trust information' under s 51 is also subject to the s 53 factors, the information in s 51 is rudimentary to a beneficiary's ability to understand their interest and contact trustees. Thus, the scope of acceptable justifications under s 53 for the non-disclosure of such basic information to beneficiaries is likely to be narrowly enforced by the courts.

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[64] *Erceg v Erceg*, above n 53, at [62].
[65] At [20].
[66] At [62].
[67] *Addleman v Lambie Trustee*, above n 54, at [57].
[68] McLay, above n 51, at 344.
[69] Trusts Act 2019, s 53.
[70] Section 53.
[71] *Erceg v Erceg*, above n 53, at [52]; originally articulated in *Foreman v Kingston* [2004] 1 NZLR 841 (HC), at [99]; see also McLay, above n 51, at 345.

1 Disclosure of Wish Letters under the Act

The status of wish letters under the Act is unclear. Section 45 lists the "core" documents that trustees must retain as part of their disclosure obligations – including "any letter or memorandum of wishes from the settlor".[72] The purpose of s 45 is to require trustees to retain documentation "of significance to the management of [the] trust" and "essential [to] retain in fulfilment of the trustees' duties".[73] The Law Commission recommended wish letters be included as a "relevant document that a trustee will usually have to consider".[74]

There is a definitional mismatch between 'core trust information' in s 45 and 'basic trust information' under s 51(3). If 'core trust information' in s 45 is, as the Law Commission described, essential for the fulfilment of trustee' duties – including those owed to beneficiaries – it is unclear why this definition should differ 'basic trust information' to be actively disclosed to beneficiaries under s 53. The Law Commission explained s 45 is "not intended to imply any special status to the documents listed other than they must be retained".[75] Yet the fact that the documents listed in s 45 are "essential" for a trustee to appropriately carry out their duties invertedly implies such a status.

Nonetheless, wish letters fall under s 53 – 'other trust information'. Such information can be actively requested by beneficiaries and are again subject to the factors in s 53.[76] Importantly, s 53(b) allows a trustee to consider "personal or commercial confidentiality" before disclosing the information requested. As wish letters are commonly provided to trustees on the condition that they remain confidential, s 53(b) will be used to justify non-disclosure.[77]

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[72] Trusts Act 2019, s 45(h).

[73] Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (R130) at 111-112.

[74] At 112

[75] At 112-113.

[76] Trusts Act 2019, s 53.

[77] See *Breakspear v Ackland* [2008] EWHC 220, [2009] Ch 32 at [58], where Briggs J described "the sole or predominant purpose of [wish letters] being used in furtherance of an inherently confidential process".

Section 53 demonstrates how the inconsistencies between the Act and common law are already evident. Confidentiality as a justification for non-disclosure has been doubted in the Courts since the Acts passing – namely by the Court of Appeal and Supreme Court in *Addleman*.[78] The Court of Appeal held a desire for absolute confidentiality is inapplicable when disclosure was necessary for meaningful trustee accountability and when ancillary claims of trustee misconduct were present.[79] This inconsistency can be explained by new trust drafting methods forcing the courts to consider novel questions of accountability and confidentiality in the context of broader, unfettered discretionary powers Thus, while confidentiality may be a genuine factor for trustees to consider under the Act, it is doubtful a court would give much weight to this if a disclosure decision were challenged.

E Summary

The disclosure position under the Trusts Act 2019 is as follows. First, trustees' reasons are excluded from the meaning of 'trust information' in s 49 and are not required to be disclosed to beneficiaries. However, adopting the interpretation suggested in this essay means the courts can change this position. Second, s 53 allows trustees to deny the disclosure of wish letters on grounds upon which the courts doubt is justified.

IV Judicial Treatment of Trustees' Reasons and Wish Letters

The Trusts Act 2019 is not a code.[80] Common law continues to be relevant to the interpretation and application of the disclosure provisions.[81] Thus, a consideration of the

[78] *Addleman v Lambie Trustee,* above n 54; see also *Lambie Trustee Limited v Addleman* [2021] NZSC 54, where the Supreme Court allowed the disclosure of legal advice obtained by trustees regarding their actions under the 'joint interest' exception.

[79] *Addleman v Lambie Trustee,* above n 54, at [55].

[80] Trusts Act 2019, s 5(8); see also McLay, above n 51, at 331.

[81] Law Commission, above n 3, at 3.15, 3.66; see also McLay, above n 54, at 332.

leading cases in New Zealand and persuasive jurisdictions is necessary to determine how courts deal with issues raised in this essay.

A New Zealand

Jacomb v Jacomb concerned the disclosure of a wish letter to an estranged beneficiary.[82] The court issued a blanket refusal of disclosure.[83] The usefulness of this case is however limited, because the claimant's personal circumstances (their criminal record and previous attempts at undermining the trustees), was the central focus of the Court - as opposed to accountability.[84] However, the Court admitted "documents concerning the settlors' wishes [to be] … rudimentary in order for a beneficiary to understand the nature of the trust and their interest".[85]

Gavin v Powell concerned the disclosure of trust documentation under discovery.[86] Proceedings were also occurring for the replacement of a trustee.[87] Nation J reiterated while a court will not order disclosure of trustees' reasons for exercising discretion,[88] they may "nonetheless be compelled through discovery or subpoena to disclose their reasons when their decision is being directly attacked in proceedings".[89] Proceedings must allege "the exercise of a trustee[s] power in a manner that is ultra vires, vitiable on the basis of

[82] *Jacomb v Jacomb* [2020] NZHC 1764.
[83] At [16], [51].
[84] At [16].
[85] At [16].
[86] *Gavin v Powell* [2019] NZHC 2866; see also *Vandy v Vandy* [2019] NZHC 3080 at [59], [88], [96], which also concerned disclosure under discovery.
[87] *Gavin v Powell,* above n 86, at [11].
[88] At [39]; citing Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Sweet and Maxwell, London, 2014) at 23-099.
[89] At [40]; citing G E Dal Pont and D R C Chalmers *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, Sydney, 2000) at 622.

relevance of considerations or bad faith".[90] This is because "fishing expeditions" are not freely permitted by the courts.[91]

Addleman v Lambie Trustee Limited, is the most recent appellate decision concerning the disclosure of trust information.[92] While the Court accepted the settlor had intended the trust to operate with "absolute confidentiality", disclosure was necessary because the applicant was one of the only two living beneficiaries, with the second beneficiary also the director of the sole trustee company.[93] The applicant was therefore the only person able to scrutinize the administration of the trust. For this reason, the Court held disclosure was justified despite desires for confidentiality.[94] Finally, the Court considered the ancillary accusation of trustee misconduct (in this case, an incorrect distribution) made a case for disclosure "inevitably stronger".[95]

McGuire v Earl concerned the request for disclosure of trust documents - including a wish letter - to the applicant who was one of the two living beneficiaries.[96] The trustees submitted the information requested, if disclosed, would reveal the reasons for their decisions and create family disharmony.[97] While the Court accepted the claimant was not entitled to the reasons for trustees' decisions, this was "not a basis for the trustees' blanket withholding of the information sought".[98] Associate Judge Lester allowed disclosure – including documents containing the trustee's reasons - instead suggesting potentially sensitive information should be redacted.[99] This treatment of the rule suggests

[90] *Jaspers v Greenwood* [2012] NZHC 2433 per Kós P.
[91] *Gavin v Powell,* above n 86, at [41]; See also Geraint W. Thomas and Alistair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, United Kingdom, 2010), at 12.43; see also Pearce and Watt, above n 30, at 782-783.
[92] *Addleman v Lambie Trustee Limited,* above n 54.
[93] At [2], [42].
[94] At [51].
[95] At [38].
[96] *McGuire v Earl* [2020] NZHC 3083 at [4].
[97] At [31].
[98] At [30].
[99] At [32].

dissatisfaction. The Court also held the wish letter should be disclosed, despite containing a directive from the settlor that it be kept confidential.[100] Citing *Addleman*, the "prima facie invalid" distribution made to a non-beneficiary was sufficient to override the confidentiality concerns of the settlor.[101]

1 Applicability of New Zealand Authority

As this section demonstrates, there is a lack of appellate court jurisprudence that considers the disclosure of a wish letters. There is also a complete lack of appellate decisions which consider the disclosure of reasons, with the two Supreme Court decisions explicitly declining to comment on the issue.[102] New Zealand, as a relatively new jurisdiction lacks authority on the specific points raised in this essay. This analysis will proceed comparatively, considering persuasive jurisdictions.

B United Kingdom

The leading authority on the disclosure in the United Kingdom is *Breakspear v Ackland.*[103] In this case, Briggs J confirmed trustees are not accountable to beneficiaries for their reasons behind their decisions. This is because, as Briggs J considered, "the exercise of a trustee's dispositive discretionary power [is] an essentially confidential process".[104] Nevertheless, Briggs J in obiter recognized the "force of the contrary proposition [in that] the conferral of greater confidentiality upon the exercise of trustees of their discretionary powers [may] reduce the practical extent to which they can be held to account" and that [beneficiaries] "cannot be expected to ascertain whether a trustee correctly exercised their powers" if wish letters are not disclosed.[105]

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[100] At [39]-[41].

[101] At [41].

[102] *Erceg v Erceg,* above n 63, at [54]; *Addleman v Lambie Trustee Limited,* above n 54.

[103] *Breakspear v Ackland,* above n 77.

[104] At [54]. Briggs J was not bound to reach this conclusion, with *Londonderry* receiving a "general endorsement" in *Schmidt*; see [57]; see also Thomas and Hudson, above n 91, at 12.18.

[105] *Breakspear v Ackland,* above n 77, at [55], [56].

Nonetheless, the Court held that *normally*, the disclosure of wish letters to beneficiaries would be inappropriate, being "axiomatic that a document bought into existence to be used in furtherance of an inherently confidential process is itself confidential" and as such, disclosure of said document would be inappropriate.[106] However, in this specific case, Briggs J considered the confidentiality of the wish letter had already been displaced as the specific trust was due to be wound up, in which the letter would be relevant to the appraisal.[107] The wish letter was therefore disclosed.[108] However without this "peculiar factor of sanction", the Court would have refused disclosure.[109]

C Australia

The leading case disclosure in Australia is *Hartigan Nominees Pty Ltd v Rydge*.[110] Here, the New South Wales Court of Appeal considered the beneficiaries to inspect the wish letter of a trust that conferred "absolute and uncontrolled discretion" in the trustees.[111]

Kirby P dissented, providing a vehement critique of the orthodox position. In holding that a wish letter is "trust documentation"[112] the President stated while information provided in an expectation of confidentiality "should normally" be protected, beneficiaries should nonetheless have access to wish letters.[113] Furthermore, Kirby P considered Australian society to accept a greater level of accountability for people who hold a private law office than that of the English courts, and as such the position regarding the non-disclosure of

[106] At [56]-[58]. If anything, it is axiomatic to describe discretionary decision making, in which trustees continue to be subject to their irreducible core, as confidential.
[107] At [98].
[108] At [98].
[109] At [98]. See also Thomas and Hudson, above n 91, at 12.22.
[110] *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (NSWCA).
[111] At 5, per Kirby P.
[112] At 23, per Kirby P.
[113] At 22, per Kirby P. See also Garton, above n 2, at 556.

trustees reasons should be rejected.[114] Kirby P's dissent was cited favorably by the New Zealand Court of Appeal in *Addleman*.[115]

Mahoney J, representing the majority, upheld the orthodox disclosure position regarding trustees' reasons and wish letters. First, the wish letter could not properly be considered trust property, as it was "created to aid the exercise of a trustee's discretionary power and not for the beneficiaries".[116] Second, issues of confidentiality - especially where potentially sensitive information was contained in a wish letter - is a good and proper reason to deny disclosure.[117]

D Summary

As this section has demonstrated, judicial considerations of confidentiality and accountability differ. The decisions in *Addleman* and *McGuire* demonstrate how accountability is preferred over secrecy and confidentiality.[118] This is despite persuasive overseas cases such as *Breakspear* and the majority in *Hartigan Nominees* suggesting expectations of confidentiality can take priority over disclosure.[119] Nation J's dicta in *Gavin* reveals the inconsistencies between disclosure under discovery, and the non-disclosure of reasons and wish letters under the court's supervisory jurisdiction. Furthermore, the favorable treatment of Kirby P's dissent by the Court of Appeal in *Addleman,* and the critical discussion of the orthodox position in *McGuire*, suggests new approach to disclosure is on the horizon.

[114] *Hartigan Nominees Pty Ltd v Rydge,* above n 110, at 22 per Kirby P.

[115] *Addleman v Lambie Trustee Limited,* above n 54, at [33].

[116] *Hartigan Nominees Pty Ltd v Rydge,* above n 110, at 52, per Mahoney J. This reasoning is now redundant; *Schmidt v Rosewood Trust,* above n 45; see also Trusts Act 2019, s 49.

[117] At 53, per Mahoney J.

[118] *Addleman v Lambie Trustee,* above n 54; *McGuire v Earl,* above n 96.

[119] *Breakspear v Ackland,* above n 77; *Re Hartigan Nominees,* above n 110.

V The Case for the Disclosure of Trustee's Reasons and Wish Letters

A Questioning Non-Disclosure

The authoritative case on the non-disclosure of trustee's reasons is *Re Londonderry's Settlement*.[120] The decision stands for two principles. First: trustees' reasons are confidential and therefore not disclosable to beneficiaries, because the exercise of a trustee's discretion is a confidential process.[121] Second: the right to disclosure stems from a proprietary interest; this has since been rejected by the Privy Council and New Zealand Supreme Court.[122]

This has become known as the '*Londonderry* principle'.[123] The justifications for this principle, which the Court of Appeal provided, continue to be agreed with in persuasive jurisdictions, notably Australia and England.[124] This is despite the decision and principle being subject to criticism.[125] Furthermore, in those cases where the principle has been upheld, Judges' nonetheless question whether the outcome leaves trustees sufficiently accountable to beneficiaries.[126]

In *Breakspear,* Briggs J asked;[127]

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[120] *Re Londonderry's Settlement,* above n 41.

[121] At 928 per Harman LJ; see also *Re Beloved Wilkes Charity,* above n 43, at 449.

[122] *Schmidt v Rosewood Trust,* above n 51, at 55; as cited favourably in *Erceg v Erceg* above n 63.

[123] Garton, above n 2, at 552; see also Hayton, Matthews and Mitchel, above n 22; see also Thomas, above n 27; see also McGhee, above n 27.

[124] See for example *Breakspear v Ackland,* above n 103; *Hartigan Nominees Pty Ltd v Rydge,* above n 110.

[125] See *Re Hartigan Nominees,* above n 110, per Kirby P; Smith, above n 8; R E Megarry "Notes: The Ambit of a Trustee's Duty of Disclosure" (1965) 81 LQR 192 at 196; see also Thomas, above n 22; see also Garton, above n 2; see also Hayton, Matthews and Mitchell, above n 38; see also David Hayton "Current Trust Law Issues Emerging from Recent Cases" Presentation to the Caribbean Court of Justice, 4 May 2010, at 14.

[126] D. M. Fox "Disclosure of a Settlors Wish Letter in a Discretionary Trust" 2008 67 Cambridge L.J. 2 252 at 253 citing *Breakspear v Ackland,* above n 77.

[127] *Breakspear v Ackland,* above n 77, at [14].

> [whether] the need to preserve the confidentiality of trustees' decision making has been overtaken by changes in social attitudes, in which notions of openness and accountability … have gained prominence at the expense of privacy and confidentiality.

In *Re Hartigan Nominees*, Kirby P noted:[128]

> Australian society accepts a greater level of accountability than has, until now, been accepted by the laws of England … this may be seen most clearly in the field of public law … [and] reflects [different] attitudes to the role of the individual in society … and the accountability of one person to another before the law

Therefore, the *Londonderry* principle is at risk. As Smith predicts;[129]

> There is a serious possibility that [the *Londonderry* principle] [will be] subject to revision … accountability is part of the irreducible core of trusteeship, and secrecy does not stand comfortably beside accountability.

Trust law in New Zealand has – and is continuing to - undergo formalization. The Trusts Act 2019 initiated "the most extensive change [to] the trusts landscape … in 60 years",[130] and confirms New Zealand's status as a leading jurisdiction in trust law. Alongside this formalization, now is the prime opportunity for the New Zealand courts to lead the "long-overdue" rejection of the *Londonderry* principle.[131]

B Justifications of the Principle

[128] *Re Hartigan's Nominees,* above n 110, at 17 per Kirby P.

[129] Smith, above n 8, at 419.

[130] Alexander and Burnett, above n 49, at 901.

[131] Hayton Matthews and Mitchell, above n 22, at 56.24.

Five 'justifications' of the *Londonderry* principle can be identified from both the original decision,[132] and its subsequent treatment;[133]

1. Family embitterment.
2. The impact of disclosure on the role of trusteeship;
3. The non-interventionist approach to discretion;
4. Settlor desires for confidentiality;
5. Reconciling disclosure with discovery in civil litigation.

Each of these justifications will be discussed in turn.

1 Family Embitterment and Impact on the Role of the Trustee

The Court of Appeal in *Londonderry* believed the disclosure of reasons to beneficiaries would place an "intolerable burden" upon trustees.[134] The Court also thought disclosure of reasons would cause "infinite trouble" in families".[135] This is because "nothing would be more likely to embitter family feelings … were the trustees obliged to state their reasons for the powers entrusted to them".[136]

Salmon LJ stated:[137]

> It might indeed well be difficult to persuade any persons to act as trustees were there a duty to disclosure their reasons, with all the embarrassment, arguments, and quarrels that might ensue.

[132] *Re Londonderry's Settlement,* above n 41.
[133] See for example *Re Hartigan Nominees,* above n 110; see also *Breakspear v Ackland,* above n 77.
[134] *Re Londonderry's Settlement,* above n 41, at 935.
[135] At 935, per Danckwerts LJ.
[136] At 942, per Salmon LJ.
[137] At 937, per Salmon LJ.

These concerns cannot justify the continuing applicability of the principle. Equity is not responsible for maintaining family relationships; it is responsible for ensuring the trustee, empowered by the faith and confidence of the settlor, acts for the benefit of the beneficiaries. The nature of trusteeship – and succession more generally – is that dealings are tightly intertwined with private family matters that conflict or disagreement is difficult to avoid.

If reasons are disclosed, and cause do cause strife, but are nonetheless made bona fide, the decision will be valid and a beneficiary will be unable to do anything. As Samuels states;[138]

> Trustees need not be afraid of giving reasons…so long as they act bona fide, without malice, with no proper motive … the exercise of their power cannot be challenged.

They continue;[139]

> While the truth might hurt a beneficiary, [nothing can] excite more suspicion and ill-feeling than an unreasoned and apparently arbitrary decision of the trustees.

Under the Trusts Act 2019, trustees' may consider the consequences which the Court in *Londonderry* feared.[140] Sections 53(g) and (h) allows trustees to consider the effect of disclosure on the trustees, beneficiaries, family relationships, and the relationship between the trustees and beneficiaries.[141] Thus, if trustees fear disclosure of reasons may genuinely cause a deterioration of relationships, they *can* rebut the presumptions of disclosure.[142] Furthermore, following the advice in *McGuire,* trustees can also redact potentially sensitive information.[143] However, concerns about disrupting family relations should not *in and of itself* act as a justification for not disclosing trustees' reasons.

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[138] At 223.

[139] Alec Samuels "Disclosure of Trust Documents" (1965) 26 Mod. L. Rev. 2 220 at 222.

[140] *Re Londonderry's Settlement,* above n 41.

[141] Trusts Act 2019, s 53.

[142] Section 53.

[143] *McGuire v Earl,* above n 96.

Furthermore, the Court of Appeal's characterisation of disclosure as an "intolerable burden" on the trustee is problematic. This position can only be explained by the Courts also problematic description of the trustees' role as confidential:[144]

> Trustees [of discretionary trusts] are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation [to ascertain] whether [the trustees] have exercised their discretion in the best possible manner.

Briggs J held a similar position, suggesting the confidentiality of trustee's decisions would "encourage suitable trustees to accept office, undeterred by a perception that their discretionary deliberations will be [subject] to scrutiny".[145]

This description is fundamentally inconsistent with the role of the modern-day trustee and should be eschewed.[146] No matter how wide a trustee's discretion is "a trustee is still a trustee" and continues to be subject to various duties and obligations.[147] Such duties are *dependent* on transparency to be genuinely enforceable. Thus, confidentiality is inherently inconsistent with the fundamental premise of the trustee-beneficiary relationship. Vulnerability is also inherent to the concept of accountability, and by virtue of being empowered by equity and the settlor, trustees must accept the rationality of their decisions must be subject to scrutiny for the irreducible core to exist. A trustee who does not wish to be scrutinized for their decisions, regarding property which they *do not beneficially own*, arguably should never take up office.

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[144] *Re Londonderry's Settlement*, above n 41, at 189, per Danckwerts LJ. Other statements suggest the Court's views on discretionary trusts cannot be reconciled with modern-day understanding; for example, Harman LJ described a discretionary trust as "merely a fiscal dodge"; at 927.

[145] *Breakspear v Ackland,* above n 77, at [54].

[146] Samuels, above n 139, at 221 where the author describes this definition as a "novel proposition unsupported by authority".

[147] *Re Hartigan Nominees*, above n 110, at 17; citing *Randall v Lubrano* (1975) 72 NSWLR 621 at [31].

The position taken by the Court in *Londonderry* and *Breakspear* can only be explained by what Kirby P describes as the "benevolent paternalism" over trustees.[148] The protection from criticism afforded to trustees by the *Londonderry* likely stems from the desire of the 1960's English judiciary to protect a profession which, at the time, was almost exclusively undertaken by upper middle class white men like themselves.[149]

Paternalism is incompatible with the normative moral and professional standards New Zealand society places upon trustees. Trustees are no longer "retired country gentlemen giving their services gratuitously".[150] Instead, trustees are usually professional trustee companies or individuals directly advised by solicitors who are accustomed to justifying their conduct.[151] Trustees who are properly advised and genuinely administer the trust bona fide need not worry about the disclosure of their reasons, which will bring no basis for challenge. As suggested previously, someone who is discouraged from becoming because they need to disclose their reasons should signal, they are not fit to be a trustee in the first place, as they are unwilling to become subject to the moral obligation's equity places upon trustees.[152]

With an estimated 400,000 trusts in New Zealand,[153] and no centralised trust register, secrecy is no longer an option for those who depend on trusts to protect their assets and livelihoods.[154] New Zealand society expects more of those who administer the property of others, especially considering the popularity of the trust in this jurisdiction and the wide-ranging scope of people who now Act as trustees. This expectation is reflected by the

[148] At 18.

[149] Bridget J Crawford and Anthony C. Infanti "A Critical Research Agenda for Wills, Trusts and Estates" (2014) 49 *Real Property, Trust and Estate Law Journal* 2 317 at 340.

[150] Samuels, above n 139, at 222.

[151] At 222.

[152] Smith, above n 8, at 417.

[153] Law Commission *Some Issues with the Use of Trusts in New Zealand – Second Issues Paper* (IP20) at 2.1; citing Anthony Grant and Nicola Peart "The Case for the Spouse or Partner" (paper presented to the NZlS trusts conference, June 2009).

[154] Trusts Bill 2017 290-3 – Second Reading (9 May 2019)

codification of mandatory duties in Part 3 of the Act, which are unable to be modified or excluded by the terms of the trust.[155] Not only were these duties codified not only to require compliance but allow trustees *themselves* to understand their obligations.[156] This signifies the era of trust informality and secrecy coming to an end. The continuing relevance of the *Londonderry* principle cannot be reconciled with approach.[157]

2 The Non-Interventionist Approach

The courts are reluctant to intervene in the discretionary decision making of trustees and impose their own discretion against the settlors' original settlement.[158] Therefore, a non-interventionist approach is frequently taken.[159]

However, this approach can no longer be reconciled with the modern-day supervisory jurisdiction of the courts over trusts. Greater transparency and accountability of trustees is regarded as "long overdue".[160] *Londonderry* pre-dated the "conceptual developments triggered by *McPhail v Doulton* and the more extensive scope of judicial supervision envisioned, suggesting the principle no longer has a place in New Zealand's modern legal environment.[161] In response to the broadening of discretionary powers in modern trust instruments, the courts should "reassert a measure of control via a more robust interventionist approach" to ensure these wider powers are confined within the boundaries of equity.[162]

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[155] Trusts Act 2019, s 22. See ss 23-27 for the mandatory duties of trustees.
[156] Trusts Bill 2017 – Second Reading (9 May 2019); see also Trusts Bill 2017 290-3 (Select Committee Report) at 2.
[157] Anthony Grant "Trusts Act Brings Maturity to the Market" 17 July 2020 Latest News ADLS <https://adls.org.nz>.
[158] Thomas, above n 22, at 11.06.
[159] Garton, above n 2, at 553; see also Thomas, above n 24, at 11.06.
[160] Thomas, above n 24, at 11.49.
[161] Garton, above n 2, at 554; citing *McPhail v Doulton* [1970] UKHL 1, [1971] AC 424 (HL).
[162] At 554; see also Hayton Matthews and Mitchell, above n 22, at 56.46

This inconsistency with modern-day judicial supervision is demonstrated with reference to the rule in *Hastings-Bass*.[163] This rule allows trustees' decision to be voided by the court if it can be shown the trustee a) had taken into account factors which they ought not have or b) had not taken into account factors they ought have.[164] In applying the rule, a court must examine the "constituent elements of a trustee's [discretionary] decision" – in other words, the trustees' reasons behind the decision in question.[165]

While the rule was originally intended to protect beneficiaries,[166] most applications are made by trustees and professional indemnity insurers.[167] This is because the rule allows the decision in question to be "technically expunged", thereby allowing trustees to avoid the consequences of improper decision making.[168] Such consequences are usually tax related.[169] Trustees will therefore willingly disclosure the reasons for their decision to attract the application of the rule in *Hastings-Bass* and have their decision – and its consequences - voided.[170]

The injustice here is clear. An aggrieved beneficiary, who suspects a trustee has improperly exercised their discretion, is prevented by law from accessing the reasons behind the decision; but a trustee, who seeks to engage the rule in *Hastings-Bass* and avoid the consequences of their improper decision making will willingly do so – but only in the context of avoiding the consequences of their actions. As Thomas puts it;[171]

> Does it really make sense to allow a trustee himself to volunteer disclosure of his reasons for acting and … argue those reasons were flawed to attract the application of the *Hastings-*

[163] Thomas, above n 22, at 12.36; See also Pearce and Barr, above n 29, at 772. See also Lisa M Butler "Reviewing Trustees Decisions: The Right to Reasons" (1999) 7 Australian Property Law Journal 1, at 3.
[164] Garton, above n 2, at 540; see also Vicki Ammundsen "Hastings-Bass Revisited" (June 24 2018) Matters of Trust <https://mattersoftrust.co.nz>.
[165] Butler, above n 163, at 3.
[166] Garton, above n 2, at 557.
[167] At 557.
[168] Ammundsen, above n 164.
[169] Garton, above n 2, at 538.
[170] At 554.
[171] At 20.117.

> *Bass* principle, whereas a beneficiary cannot make a similar claim … because [they are] in a state of ignorance?

This disjunct becomes even more important to confront considering the rise of massively discretionary trusts. With an increase in the exercise of broad discretionary powers, the rule in *Hastings-Bass* while relatively new, will likely be relied on by trustees empowered with broad discretionary that operate trusts with little guidance and seek to reverse decisions with fiscal consequences. Thus, the inconsistency between the modern-day supervisory jurisdiction and the *Londonderry* principle not only causes practical difficulties for beneficiaries, but injustice which sits uncomfortably alongside equity.

3 Settlor Desires for Confidentiality

The conflict between a settlor's desire for confidentiality of trust affairs and the disclosure of trust information is not a novel issue. In *Re Hartigan Nominees,* Kirby P suggested he may have reached a different decision if the settlor had expressed an express desire for the wish letter to remain confidential.[172] Samuels, in his critique of *Londonderry*, seems to agree.[173] With the Trusts Act 2019 allowing trustees to consider issues of confidentiality before disclosing information under s 53, this issue is likely to reach the Courts.

When confronted, how should the courts proceed? The answer involves questioning whether desires for confidentiality can go so far as to undermine a beneficiary's fundamental right to enforce the trust. Afterall, "accountability, and not confidentiality, is the underlying concern of trusts".[174] The New Zealand courts have begun to indicate their answer, with the Court of Appeal in *Addleman* stating "trustees [and settlors] cannot escape their obligations to account to beneficiaries … by asserting personal preferences for privacy

[172] *Re Hartigan Nominees*, above n 110, at 26.
[173] Samuels, above n 139, at 223.
[174] Palmer, above n 25, at 563.

and confidentiality".[175] Indeed, "the primacy of a settlor's intention [has] never been a principle … rigidly applied".[176]

However, the Court of Appeal in *Addleman* also noted there was no confidentiality provision in the trust deed to 'justify' confidentiality.[177] While it has been suggested there should not be *any* confidentiality between trustees and beneficiaries, the position of the settlor differs as they are not subject to the same equitable obligations as the trustees.[178] Thus, if a settlor does request confidentiality *within the trust deed itself,* as the Court of Appeal suggested, there seems to be no reason - *in principle* - why this cannot be given effect.[179] Trustees are of course subject to the mandatory duty to act in accordance with the terms of the trust.[180] However, in such a case, an aggrieved beneficiary will still be unable to determine whether a trustee has considered the wish letter, which they are legally required to do so. Thus, *practically,* this position still cannot be justified.

Overseas jurisdictions have held a settlor cannot oust the supervisory jurisdiction of the court - where the right to disclosure originates - by asserting desires for confidentiality.[181] Courts in such jurisdictions have found clauses that exclude disclosure to beneficiaries cannot prevent a court from ordering disclosure to a beneficiary to enforce the duty to account.[182] While many of these decisions dealt with a *complete* prohibition of disclosure, arguably similar reasoning could be applied to wish letters. Thus, while settlors may validly

[175] *Addleman v Lambie Trustee,* above n 54, at [51].
[176] Pearce and Barr, above n 30, at 607.
[177] At [51].
[178] O'Loughlin Kevin O'Loughlin "It's a Privilege" (2015) 21 T.&. T. 4 at 358.
[179] *Addleman v Lambie Trustee,* above n 54, at [51].
[180] Trusts Act 2019, s 24.
[181] Dakis Hagen and Emma Hargreaves "Void Vetoes and Judicial Discretions: Recent Developments in the Law of Disclosure in Private Trust Administration" (2015) 22 Journal of International Tax, Trust and Corporate Planning 1 5 at 9; see also *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, London, 2010) at 56.19; "it does not seem open to the settlor to definitively exclude the ability of a beneficiary … to invoke the jurisdiction of the court".
[182] Hagen and Hargraves, above n 190, at 9; citing *Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd* (Royal Court of Guernsey) [2007] WLTR 959 at [122].

request trustees keep the letter confidential, this cannot oust the ability of a beneficiary to petition a court to order disclosure via their inherent jurisdiction.

Such an approach would allow the balancing of the rights of settlors and beneficiaries - an issue which the courts continue to grapple with.[183] An approach reminiscent of this is seen in *McGuire*; while the settlor had expressly directed for the wish letter remain confidential, the Court held disclosure was necessary, as a prima-facie invalid distribution had been made, and the letter was required to determine the validity of the distribution.[184] However, the Court balanced this by allowing the appropriate redactions to be made of particularly sensitive information.[185] While this paper recommends a beneficiary need not require prima facie evidence of a breach of trust to engage the supervisory jurisdiction, as this is inconsistent with the concept of accountability, the approach in *McGuire* towards wish letters is to be generally welcomed.

4 Reconciliation with Discovery in Civil Litigation

As was identified in *Gavin v Powell,* it is possible for trustees' reasons to be disclosed to beneficiaries through discovery.[186] The Court, citing Lewin, stated "the rule … that the court will not order disclosure [of] the trustees' reasons … does not exclude the obligation to give disclosure of documents [in] litigation".[187] Civil procedure is particularly helpful when a settlor's wishes, or trustee deliberations, have been communicated orally, in which case cross-examination can be optimized. If trustees' reasons are not provided during proceedings, an adverse inference will be drawn by a court regarding the decision making

[183] Garton, above n 2, at 557; see also Pearce and Barr, above n 30, at 607.
[184] *McGuire v Earl,* above n 96, at [41].
[185] At [41]-[43].
[186] *Gavin v Powell,* above n 86, at [38]-[41]; see also Hayton Matthews and Mitchell, above n 22, at 56.38.
[187] At [39] citing Tucker, Le Poidevin and Brightwell, above n 28.

of the trustee.[188] Proponents of the *Londonderry* principle suggest discovery is a sufficient solution to the issues raised in this paper.[189]

To initiate proceedings and engage the rules of discovery, an aggrieved beneficiary must have a genuine legal claim against a trustee.[190] A theoretical application for directions will be insufficient. This is because the common law "has developed a robust approach to fishing litigation".[191] Thus, as explained in *Gavin*, a beneficiary requires proof "the exercise of a trustee[s] power in a manner that is ultra vires [or in a manner which did not consider the settlors wish letter], vitiable on the basis of relevance of considerations or bad faith".[192]

If a beneficiary suspects a trustee made an invalid decision, or did not consider a wish letter, they will be unable to ascertain this without reference to information only accessible through discovery – and yet discovery requires proof of a claim against a trustee in the first place. This circularity creates a catch-22 situation which is manifestly unfair and inequitable for beneficiaries with genuine suspicions seeking to enforce the trustees' duties against them. Without access to the reasoning behind a discretionary decision at the outset, a beneficiary "has no evidential basis for launching [such] proceedings, and if [trustees] cannot be compelled [to] give up the confidentiality of their reasoning … nothing can be done".[193] This is because beneficiaries under the current law cannot obtain "sufficient evidence to sustain a claim that trustees acted dishonestly, took irrelevant matters into consideration, or failed to take into account relevant factors".[194]

[188] Hayton, above n 125, at 15.

[189] Fox, above 126; see also *Breakspear v Ackland,* above n 77; see also *Londonderry*; above n 41, per Danckwerts LJ.

[190] Thomas, above n 22, at 12.43.

[191] *Breakspear v Ackland,* above n 77, at [13].

[192] *Jaspers v Greenwood* [2012] NZHC 2433 per Kós P.

[193] Hayton Matthews and Mitchell, above n 22, at 56.46.

[194] Pearce and Barr, above n 30, at 782.

Thus, "it would be exceedingly unlikely that there would be even the flimsiest of prima facie cases alleging [a breach of trust by a trustee's discretionary decision] without knowing the trustees' reasons".[195] Litigation costs both time and money and initiating proceedings before one has conclusive evidence is a risk not many are willing to take. This is despite litigation being the only route an aggrieved beneficiary can take as it engages the supervisory jurisdiction and protection of the court.

The catch-22 situation is substantially inconsistent with the fundamental concept of accountability. The whole point of holding someone accountable is to ensure they do not act improperly *in the first place,* thereby avoiding the need for disciplinary action. It was this position that was – arguably incorrectly – taken by the Court in *Londonderry,* with Salmon LJ emphasizing "in the present cases there is no suggestion of any kind, and certainty not a shred of evidence, that the trustees acted otherwise than with the upmost propriety".[196] Yet the right to disclosure has *never* been dependent on the presence of an ancillary claim for breach of trust; a beneficiary is entitled to the documents, because they are a beneficiary, and their relationship with trustees is dependent on being able to enforce the accountability of trustees.

To allow the *Londonderry* principle to be superseded by an order for discovery where improper conduct is evident, but not where a beneficiary is making preliminary inquiries as to whether such conduct occurred, is also inconsistent with the supervisory jurisdiction.[197] To allow trustees' reasons to only be assessed when the court is acting in an adversarial capacity, and when "things have reached such a sorry pass" erodes the supervisory aspect of the Courts jurisdiction.[198] Discovery is a process ancillary to the enforcement of some other claim and stands apart from beneficiary rights and equitable

[195] Samuels, above n 139, at 222. See also Thomas and Hudson, above n 91, at 12.34 (3).

[196] *Re Londonderry's Settlement,* at 937 per Salmon J.

[197] Garton, above n 2, at 552.

[198] *Hartigan Nominees,* above n 110, at 23 per Kirby P.

duties. Beneficiaries must be able to invoke the protective supervision of the court, *irrespective* of ancillary claims for breach of trust.[199]

VI A More Suitable Approach to Disclosure?

The arguments made in this paper speak to the general proposition that trustees must be subject to increased accountability. As the Law Commission noted, because there is no centralised trust register in New Zealand, and therefore no way to obtain information about individual trusts, this has led to a lack of trustee accountability.[200] Furthermore, modern trust instruments which increase the unfettered discretionary powers of trustees present additional issues regarding accountability, as this paper has argued. Where beneficiary rights are not merely determined, but *overwhelmed*, the courts must respond to ensure the irreducible core of trusteeship remains intact.

Discussions of "transparency", "accountability" and "discretionary decision making" are reminiscent of the linguistic formula governing administrative law.[201] Indeed, many of the issues found in both equity and public law are "strongly analogous" as the "distinction between the decision-making process and the decision itself lies at the core of [trustee discretionary decision making], as it does in public law".[202] The powers of both public officials *and* trustees must be "exercised rationally…based on relevant information, and not [exercised] capriciously or out of prejudice".[203]

Proponents of a strict public-private law divide may argue the adoption of public law notions of accountability risks having the affairs of private individuals regulated like that

[199] Thomas, above n 22, at 12.34 (3).
[200] Law Commission, Court Jurisdiction, Trading Trusts, and Other Issues; Review of the Law of Trusts, Fifth Issue Paper (IP28).
[201] Garton, above n 2, at 554; see also *Re Hartigan Nominees*, above n 110, at 7, per Kirby P.
[202] Thomas and Hudson, above n 91, at 11.02 As Greene MR stated in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA); "the grounds on which the exercise of fiduciary power may be challenged are remarkably similar to those laid down as the basis for judicial review".
[203] Thomas and Hudson, above n 91, at 20-116.

of public officials.[204] However, it must be asked whether this is necessarily a precise justification for maintaining differing levels of accountability. While trustees may be private actors, they have voluntarily undertaken a role which places the property – and trust - of another, in their hands. Comparatively, public officials have had the trust and faith of society placed upon them. The common set of values underpinning the exercise of discretion in public law and equity can be "deployed to challenge the justification [of] maintaining a clear distinction between [the two]".[205]

The adoption of principles reminiscent of administrative law does not necessarily entail an assimilation of the two doctrines.[206] Nor does the disclosure of reasons or wish letters "confer any greater right [for beneficiaries] to challenge trustee decisions".[207] All trustees are subject to the supervisory jurisdiction of the courts, and the law already requires trustees to exercise their discretions honestly and in good faith and not improperly, excessively, fraudulently, arbitrarily, or capriciously, and the decision-making process itself is subject to numerous requirements.

Such an approach would not be without precedent in New Zealand. Section 11 of the Family Protection Act 1955 allows the court, under an application under the Act, to "have regard to the [will makers] reasons … for making the dispositions made by his will".[208] Section 11A requires personal representatives have a duty to place before the court all relevant information concerning the deceased estate, including the deceased reasons for the dispositions.[209] While this section obviously does not apply to trusts, it demonstrates the importance of ascertaining the reasons behind discretionary decisions – may that be of a trustee or testator –for determining ones compliance with their equitable duties.

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[204] This was the argument made by Mummery LJ in *Pitt v Holt* [2013] 2 AC 108.

[205] Pearce and Barr, above n 30, at 782.

[206] Garton, above n 2, at 555.

[207] Thomas, above n 22, at 20.113.

[208] Family Protection Act 1955, s 11; see also J Caldwell "Family Protection: Family Law Service NZ" (online ed, LexisNexis) at 7.901.02.

[209] Family Protection Act 1955, s 11A; see also Law Commission *Review of Succession Law – Issue Paper* (IP46) 2021, at 13.29.

VII Conclusion

The rise in massively discretionary trusts presents a risk that beneficiaries will be unable to enforce the irreducible core against trustees. The New Zealand courts should respond to this disquiet by allowing trustee's reasons' and wish letters to be disclosed. The inconsistencies between the *Londonderry* principle with societal expectations of trustees, the supervisory jurisdiction of the court, and reconciliation of disclosure in civil litigation justifies its rejection in New Zealand. The formalization of New Zealand's trust law through the Trusts Act 2019 justifies this more transparent approach and will ensure trustees' of massively discretionary trusts are meaningfully held to account to their equitable obligations. As Thomas Paine one said, "a body of men holding themselves accountable to nobody ought not to be trusted by anybody".[210]

[210] Thomas Paine "The Rights of Man" US History < https://www.ushistory.org>.

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IX Appendices

Appendix 1: Law Commission *Review of Trust Law in New Zealand: Preferred Approach* (NZLC IP31) at 1.24-1.26.

Table A: Interaction of recommendations with case law	
Restate case law principles in statute	
R number	**Description of recommendation**
R1	Characteristics and creation of a trust
R2	Mandatory duties of a trustee
R3	Default duties of a trustee
R5	Retention of information by trustees
R13	Standard of care for trustees
R24	Power to appoint and remove a trustee
R29	Variation and revocation by beneficiaries
R46	Appointment of a receiver for a trust
R47	Trustees' right to indemnity
Modification to case law in new Act, but case law will remain relevant	
R number	**Description of recommendation**
R4	Trustees' exemption and indemnity clauses
R6	Provision of information to beneficiaries
R42	Alternative dispute resolution
Significant modification to case law in new Act and current case law will no longer be relevant	
R number	**Description of recommendation**
R15	Distinction between capital and income
R16	Apportionment of receipts and outgoings
R48	Creditors' claim through trustee's indemnity
R49	Maximum duration of trusts

Appendix 2:

Trusts Act 2019, s 53

Procedure for deciding whether presumption applies

The factors that the trustee must consider (for the purposes of sections 51(2)(a) and 52(2)(a)) are the following:

(a) the nature of the interests in the trust held by the beneficiary and the other beneficiaries of the trust, including the degree and extent of the beneficiary's interest in the trust and the likelihood of the beneficiary receiving trust property in the future:
(b) whether the information is subject to personal or commercial confidentiality:
(c) the expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether the beneficiaries as a whole and the beneficiary in particular would be given information:
(d) the age and circumstances of the beneficiary:
(e) the age and circumstances of the other beneficiaries of the trust:
(f) the effect on the beneficiary of giving the information:
(g) the effect on the trustees, other beneficiaries of the trust, and third parties of giving the information:
(h) in the case of a family trust, the effect of giving the information on—
    (i) relationships within the family:
    (ii) the relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole:
(i) in a trust that has a large number of beneficiaries or unascertainable beneficiaries, the practicality of giving information to all beneficiaries or all members of a class of beneficiaries:
(j) the practicality of imposing restrictions and other safeguards on the use of the information (for example, by way of an undertaking, or restricting who may inspect the documents):
(k) the practicality of giving some or all of the information to the beneficiary in redacted form:
(l) if a beneficiary has requested information, the nature and context of the request:
(m) any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies.

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