

**ROUSE & ORS v IOOF AUSTRALIA TRUSTEES LIMITED No.
SCGRG-98-257 Judgment No. S181 [1999] SASC 181 (13 May
1999)**

Last Updated: 22 June 1999

Court

SUPREME COURT OF SOUTH AUSTRALIA

Judgment of the Full Court

Hearing

01/03/99 to 02/03/99, 28/04/99.

Catchwords

Plaintiffs are beneficiaries of a trust seeking inspection of documents held by defendant trustee - trustee is the plaintiff, and some of the beneficiaries defendants, in separate proceedings - documents sought by beneficiaries comprise trustee's brief to counsel in the separate proceedings - whether documents sought are trust documents - whether right of a beneficiary to inspect trust documents is subject to any qualification - whether trustee has discretion to refuse to permit inspection - whether trial judge decided a hypothetical issue.

Materials Considered

- Trustee Act 1936 (SA) s84B, s84C and s84E, referred to.
- Bass v Permanent Trustee Co Ltd [1999] HCA 9;
- O'Rourke v Darbishire [\[1920\] AC 581](#);
- Breen v Williams (1996) 186 CLR 71;
- Re Simersall [\[1992\] FCA 221](#); [\(1992\) 35 FCR 584](#);
- Hartigan Nominees Pty Ltd v Rydge [\(1992\) 29 NSWLR 405](#);
- In Re Londonderry's Settlement [1965] Ch 918;
- Butt v Kelson [\[1952\] Ch 197](#);
- Re Fairbairn [\[1967\] VicRp 72](#); [\[1967\] VR 633](#);
- Morris v Morris [\(1993\) 9 WAR 150](#), considered.

Representation

UNGER, A A BURDETT, DEEP CREEK HOLDINGS P/L, AUSPINE LTD, SAPFOR TRADING P/L, SEAS SAPFOR FORESTS P/L, T J DENT, AND W OOI:

Counsel: MR T GRAY QC WITH MR R ROSS-SMITH AND MR C BRIGHT -
Solicitors: PHILLIPS FOX

Respondent IOOF AUSTRALIA TRUSTEES LIMITED:
Counsel: MR R WHITINGTON QC WITH DR R BAXTER - Solicitors: JOHNSON
WINTER & SLATTERY, MINTER ELLISON

SCGRG-98-257

Judgment No. S181

13 May 1999

On Appeal from THE HONOURABLE JUSTICE WILLIAMS

(Full Court: Doyle CJ, Perry and Martin JJ)

ROUSE & ORS v IOOF AUSTRALIA TRUSTEES LIMITED

[\[1999\] SASC 181](#)

Full Court: Doyle CJ, Perry and Martin JJ

1. DOYLE CJ. The appellants are the beneficiaries of a trust. The respondent is the Trustee of that trust. The appellants brought an action in this Court claiming the appointment of an inspector of the trust pursuant to s84C of the [Trustee Act 1936](#). Along the way they also sought an order that they be permitted to inspect and copy certain documents in the possession of the trustee. The respondent resists these orders.
2. The proceedings came before a judge of this Court. He took the view that there were no relevant facts in dispute, and that he could and should decide, as a question of law, whether the mere fact that the appellants are beneficiaries of the relevant trust gives them a right to inspect the documents in question. He took the view that deciding that question would "go a long way to disposing of the action."
3. Accordingly, he took the view that it was convenient and in the interests of justice that he should determine, as a question of law, the question of whether in the particular circumstances of the case the respondent was entitled to withhold the documents from the appellants.
4. The judge concluded that, in the circumstances, the appellants had no right as of course to inspect the documents in question. As I understand his judgment, he decided that the mere assertion of their status as a beneficiary did not give them the right to inspect the documents in question.

5. The appellants appealed against that decision. They complain about the procedure adopted by the judge, submitting that it was unfair and inappropriate. They submit that he made errors of fact and they submit that he has erred in law.

The facts

6. The appellants are a number of individuals and four corporations.
7. The appellants are investors in what the judge called a managed investment scheme. It is a scheme that involves the planting, growing, harvesting and milling of pine trees and the sale of the produce. The scheme involves long term investment. There are about 20,000 investors in all. The scheme is a substantial one.
8. The scheme is constituted by a number of agreements. The main ones are a Trust Deed and a Tripartite Agreement.
9. A feature of the scheme is that the appellants as investors are beneficiaries of a trust. The respondent IOOF Australia Trustees Limited ("IOOF") is the Trustee of that trust. There may be a series of trusts in fact, but that does not of itself appear to present any particular issue in this case.
10. SEAS Sapfor Forests Pty Ltd ("the forest company") is described by the judge as the scheme manager. As I understand the scheme, the forest company issues prospectuses to the public, receives monies subscribed by investors, plants pine forests and superintends the growth of pine trees to maturity. The forest company is under a general obligation to manage the scheme, to report regularly to IOOF, to account to IOOF and to meet IOOF's expenses. The forest company is required to provide detailed information to IOOF.
11. SEAS Sapfor Harvesting Pty Ltd ("the milling company") is responsible for the felling and milling of trees and for the sale of the timber.
12. The forest company is a subsidiary of Auspine Limited ("Auspine"). I am unsure whether the milling company is also a subsidiary of Auspine. The judge states that the milling company is associated with the forest company.
13. In broad terms the role of IOOF is to act as a trustee for investors. It is obliged to ensure that the forest company and the milling company perform their obligations under the Trust Deed and the Tripartite Agreement. IOOF is required, if necessary, to enforce the terms of the documents constituting the scheme and to do so for the benefit of investors. Generally, its role is to protect their interests. As the judge said:

"... it is of the essence of the role of the Trustee that it should act as a watchdog or steward in the interests of investors and oversee the activities of the Forest Company."

14. As I earlier observed, the scheme is constituted by a number of deeds and agreements. The judge below has referred to them in some detail. I do not need to do so.
15. The judge is also hearing the trial of two consolidated actions ("the management dispute"). In the management dispute, IOOF has sued the forest company, the milling company and Auspine. IOOF makes claims against these companies arising out of the operations of the scheme. I gather that IOOF alleges breaches over a number of years of the obligations imposed on these companies under the scheme.
16. The management dispute is proving to be lengthy, complex and costly. The hearing began in September 1998. The case is still proceeding and apparently is likely to proceed for some months.
17. The forest company and Auspine are investors in the scheme. The result is that although they are defendants in the management dispute, they are also numbered among the investors upon whose behalf and in whose interest IOOF claims to act in the management dispute.
18. The appeal now before the Court is brought in the action against IOOF. I will refer to the present case as "the inspection case". In the inspection case the plaintiffs are a number of individual and corporate investors, including the forest company and Auspine. The inspection case was instituted in February 1998.
19. Before the inspection case began, the plaintiffs had been calling upon IOOF to permit them to inspect and to copy a large number of documents in the possession of IOOF. They are documents relevant to IOOF's conduct as trustee of the scheme, and also documents relevant to the management dispute. Over a period of time IOOF has made a good many documents available to the plaintiffs. However, it has done so reluctantly, and the appellants claim it has done so only under the threat of legal proceedings. It is unclear to me precisely what has been made available, and what has not been made available, but I do not think that that matters. It does not appear to be disputed that a large number of documents have been made available. The appellants have complained and still complain about IOOF's reluctance to disclose trust documents to them, and IOOF's slowness in doing so.
20. When the judge isolated the point of law referred to above, it appears that the main dispute over access related to two groups of documents that

I OOF continued to refuse to disclose to the appellants. I mention, so that it is not overlooked, that the appellants' claim for the appointment of an inspector is still outstanding. There may be some other documents that I OOF has not disclosed or refuses to disclose, but my impression is that if there are other such documents, they are of no great importance now.

21. The two remaining groups of documents were described by the judge as follows:

"(1) witness statements, expert reports, legal advice instructions to legal representatives, assessments of prospect of success and other documents forming part of the trustee's brief to counsel in the Management dispute and for which the trustee has legal professional privilege in relation thereto.

(2) Communications between the Trustee and an association of investors - Covenant Investors Association (CIA) - being an unincorporated body formed to represent the interests of approximately 20,000 investors who are currently participants in the scheme." (Emphasis added by the judge.)

22. The first group, as I will call them, is more or less self explanatory. They are documents that comprise counsel's brief in the management dispute. A more detailed description is given in an exhibit to an affidavit sworn by Mr Grainger. For obvious reasons the Court does not know just what these documents are. I consider it reasonable to assume that some of the documents in counsel's brief are documents that were created for other purposes, and have an independent existence. It is likely that these documents have already been disclosed to the appellants. However, there will be other documents created specifically for the purpose of inclusion in counsel's brief that have not been disclosed.

23. The second group requires some explanation. There is a body called the Covenant Investors Association ("the CIA"). It is an incorporated association, and the appellants point out that the judge wrongly described it as unincorporated. In my opinion that is absolutely irrelevant. The judge is also wrong in saying that it is formed to represent the interests of about 20,000 investors in the scheme. According to an affidavit from the chairman of the CIA, the CIA was incorporated to represent the interests of investors in the scheme, but has a membership of about 700 investors. The appellants complain that this error by His Honour indicates that the judge wrongly thought that the appellants, who are obviously dissatisfied with I OOF, are a very small minority of the investors. I do not think that the judge proceeded on that basis and I consider that the complaint made on this score is quite irrelevant to the issues arising on appeal. My impression is that the status of the CIA has played no part in the judge's reasoning.

24. In fairness to the appellants I should say that they complain that the judge's decision to isolate a point of law, before all the facts had been heard, has played a part in the making of these errors and other errors of which they complain.
25. The inspection case has come before the Court a number of times. A number of subsidiary issues have been resolved along the way.
26. The judge was in the course of hearing the management dispute. He was concerned that matters that might require decision in the management dispute might also require decision in the inspection case, because in each case it may become necessary to construe the Trust Deed containing the basic obligations of the main parties. He foresaw the possibility, if the two cases were dealt with by different judges, of embarrassment to the fair and efficient trial of the management dispute. The judge therefore directed that the inspection case be brought before him. That was done with my knowledge and approval, in the exercise of my responsibility for listing arrangements within the court. However, it was done at the initiative of the judge.
27. The judge then identified, as suitable for early resolution in the inspection case, the issue of whether there are special circumstances entitling IOOF to refuse to allow the appellants to inspect the documents in question. He expressed the issue that way because he acknowledged that, as beneficiaries of the trust, the appellants have a right to inspect trust documents unless there is some sound reason for denying them that right.
28. It was in this context that the judge dealt with the issue just identified by me. However, I need to identify some other matters that were part of the background to the issue and to the decision.
29. The judge proceeded on the basis that the appellants made their claim to inspect the two groups of documents on the footing that they were entitled to inspect the documents as of right. He noted that the appellants did not, and submitted that they did not need to, identify any particular justification for their claim to inspect the documents, other than their status as beneficiaries.
30. The judge proceeded on the basis that there was no allegation of impropriety by IOOF. However, he made it clear that he was aware that the appellants did complain about IOOF's past and continuing refusal to provide information. I consider that it is clear from his judgment that he realised that the appellants had reservations about the propriety or wisdom of the conduct of IOOF in connection with the management dispute, and that they might well challenge the conduct of IOOF once they had obtained the information that they sought.

31. The judge noted that undertakings as to confidentiality were offered as a means of meeting IOOF's complaint that to allow inspection would be to prejudice the confidentiality of documents of considerable importance to its case in the management dispute. The terms of the undertaking were reduced to writing.
32. The judge observed (para 15) that an investor who got access to counsel's brief in the management dispute might be in a position to challenge the conduct of IOOF and the course upon which it had embarked. He noted that such an investor might seek to persuade other investors to put pressure on IOOF to compromise. The ability of an investor to do these things would depend upon the undertakings to which the investor was subject, and upon decisions made by the Court about the use that the investor might make of the information once the documents had been inspected. I do not think it likely that the judge overlooked that. Nor do I consider that, in the relevant parts of his judgment, the judge was in any sense making adverse findings that the appellants would breach undertakings that they had offered. In the relevant parts of his judgment the judge was doing no more than identifying what might conceivably occur. In my opinion it is self evident that the appellants seek to inspect the relevant documents to ascertain whether they have cause to challenge the conduct of IOOF and it is self-evident that if they think they have, they will endeavour to do so. A decision to allow them access to the documents may well give rise to further difficult issues about the use they should be permitted to make of the knowledge that they acquire in this way.
33. The judge noted that there were associations between Auspine and some of the appellants. These are associations which might suggest those appellants are sympathetic to or supporters of Auspine in the management dispute. However, he noted that there was no such association in the case of certain of the appellants (para 20).
34. The judge noted that IOOF asserts that Auspine and some or all of the other appellants have brought the inspection claim for an improper purpose. That purpose is to embarrass IOOF in the conduct of the management dispute. However, he put that allegation to one side for the time being, because he proposed to decide, first of all, whether the asserted entitlement to inspect the relevant documents existed at all.
35. I do not think that the judge overlooked the fact that the appellants' claim to inspect the documents in question rested not just on their equitable rights as beneficiaries, but also upon rights that they claim to have under s84B of the [Trustee Act](#). I say this because the judge referred (para 60) to their claim for the appointment of an inspector under s84C of the [Trustee Act](#). My understanding is that the judge was not intending to deal with the claim for the appointment of an inspector, or with the assertion of rights

conferred by s84B. He anticipated that deciding the issue of law that he had isolated would assist in resolving the issues that arose under s84B and s84C.

The judge's conclusions

36. The judge accepted that a beneficiary has a right to inspect trust documents and other documents relevant to the administration of a Trust. His conclusion appears from the following part of his reasons:

"89 The beneficiary's prima facie right of inspection does not stand alone. That right must be measured alongside the whole bundle of rights and obligations created by the trust instrument. This process is the balancing exercise referred to by the Full Queensland Supreme Court in *Tierney v King* ([1983](#)) [2 Qd R 580](#) at 583 and by Salmon LJ (as the "reconciliation" of rules) in *Londonderry's Settlement* (1965) 1 Ch at 936-7. In the present case I am prepared to decide the matter upon the basis of a necessity (created by the Trustee's duty as steward or watchdog) as giving rise to a special circumstance. The Trustee cannot effectively carry out its allotted task under the Trust Deed if, at the suit of some of the 20,000 covenant holders it must (even with the safeguard of undertakings) disclose its hand with respect to the litigation concerning the Management Dispute. This is a powerful reason for recognising the case as an exception to the general rule. I have already observed how a covenant holder in possession of confidential information could do irreparable harm to the Trustee's case in the Management Dispute. In my opinion it is essential to the proper discharge of the Trustee's function that it be entitled to maintain confidentiality with respect to counsel's brief - at least for the time being. The need for confidentiality may extend beyond the brief. The trustee has seen fit to have some communications with a group of beneficiaries. I do not know the substance of these communications and I have not heard argument thereon.

90 A trustee need not necessarily have to disclose to all beneficiaries the trustee's communications with a particular beneficiary (see *Hartigan* at 433 and *re Londonderry* (1965) Ch at 934); if IOOF has been using the views of the Covenant Investor Association as a sounding board then confidentiality may well extend to those communications if the papers are to be treated as trust documents. I only mention this point because it should not be thought that the material before me is the only material in the Trustee's files which may be kept from the eyes of the covenant holders. In the present case a Master can examine the documents and hear argument. If necessary, the alleged abuse of process can then be investigated

93 In my opinion at least for the duration of the Management Dispute special circumstances exist as a result whereof a covenant holder is not entitled to exercise a right to inspect the confidential documents now in question in the hands of the Trustee. It is inimical to the purposes of the Trust that beneficiaries should

have an entitlement "as of course" to inspect the documents now in question with the possibility that the Trustee's position in the Management action may be undermined. Nothing in these reasons will preclude a beneficiary from exercising rights which are supported by adequate reasons beyond the bare assertion of status as a beneficiary."

37. No doubt to facilitate that decision being tested on appeal, the decision was drawn up and sealed as an order in the following terms:

"The court orders that there be a declaration that for the time being none of the plaintiffs is entitled to inspect the defendant's brief to counsel in the Management Dispute (being the subject matter of Actions No 480 of 1993 and 1299 of 1996 in this Court)."

Complaints about procedural and factual matters

38. The appellants complain that the judge erred in isolating the issue of law that he did isolate. It was done over their opposition. They complain that, to decide the entitlement to access, they (or at least the Court) had to know what was in the relevant documents. At the least, they complain that a better description of the documents was required. They complain that without evidence the judge could not assess the need for confidentiality of the material, the likely interference with IOOF's performance of its function, and the risk of harm to the interests of beneficiaries as a result of disclosure of counsel's brief in particular. They complain that isolating the point of law was inappropriate, and that the procedure adopted operated unfairly and prejudicially to them.

39. I will deal shortly with the particular complaints that they made. In the end I conclude that these complaints are unfounded.

40. However, I should say at the outset that I do not agree that the judge was wrong to isolate the issue that he did, and to decide it when he did. That is not to say that all judges would have done the same. There are always difficulties in doing what the judge did in the course of this case. In *Bass v Permanent Trustee Co Ltd* [\[1999\] HCA 9](#) the High Court has reminded us of the dangers of attempting to rule upon questions of law that are not based upon a concrete situation and do not give rise to a binding decision. With reference to the circumstances of the case before them, the majority in their judgment said at [49]:

"As the answers given by the Full Court and the declaration it made were not based on facts, found or agreed, they were purely hypothetical. At best, the answers do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established. What those facts are is not stated, nor can they be identified with any precision. They may be all or some

only of the facts. What facts are determinative of the legal issue involved in the question asked is left open. Such a result cannot assist the efficient administration of justice. It does not finally resolve the dispute or quell the controversy. Nor does it constitute a step that will in the course of the proceedings necessarily dictate the result of those proceedings. Since the relevant facts are not identified and the existence of some of them is apparently in dispute, the answers given by the Full Court may be of no use at all to the parties and may even mislead them as to their rights. Courts have traditionally declined to state - let alone answer - preliminary questions when the answers will neither determine the rights of the parties nor necessarily lead to the final determination of their rights. The efficient administration of the business of courts is incompatible with answering hypothetical questions which frequently require considerable time and cause considerable expense to the parties, expense which may eventually be seen to be unnecessarily incurred."

41. In the present case there are some practical difficulties flowing from the general nature of the point decided by the judge. I will return to these in due course. However, on the other hand, the judge was rightly concerned that investigating all of the matters that the appellants wanted to investigate would take a considerable amount of time, and that the process of investigation would itself give rise to practical difficulties in preserving confidentiality. If, as he ultimately found, the general nature of the documents in question was, in the particular circumstances, an answer to the claim to inspect the documents, there were obvious advantages of convenience and justice in deciding the issue in the manner in which the judge did so.
42. To put it simply, if a claim to inspect trust documents on the sole basis that that is what they are, is adequately answered by the trustee saying that the documents are confidential documents comprising the brief to counsel in major litigation in which the trustee is engaged, the disclosure of which might embarrass the trustee and prejudice the interests of beneficiaries as a whole, then there is obvious advantage in the judge so deciding at an early stage.
43. The other side of the coin is that, as the judge acknowledged, deciding this issue did not dispose of all the issues in the inspection case. The manner in which the issue has been dealt with has also given rise to some uncertainty about the precise import of what the judge did decide. The appellants, by way of complaint, treat the decision as being more categorical and absolute than it in fact is. On the other hand, in fairness to the appellants, there is room for debate about the precise reach and effect of the declaration that the judge made.
44. I do not consider that the judge has answered a question that is purely hypothetical. There are some difficulties in identifying precisely what is

decided, but that is another matter. A little further on I will set out the basis upon which the judge proceeded. The decision reached by the judge does make it clear that, if the appellants are to get access to the documents in question, at least in reliance upon their equitable rights, they will have to assert some better basis than they have asserted so far. As will appear later, I consider that the order should, in the interests of clarity, be modified.

45. I consider that it was open to the judge to take the course that he did. I reach that conclusion notwithstanding the fact that the course that he took has given rise to some difficulties. I emphasise, in fairness to the judge, that hearing the matter out to the bitter end presented its own difficulties, and the judge clearly took the course that he did in the belief that that was conducive to the efficient administration of justice. Only time will tell whether the judge's belief was correct.
46. I do not agree that the judge was not entitled to follow the course that he took, nor do I agree that he was not entitled to decide the question that he did decide. The decision that he has given leaves it open to the appellants to put forward some other basis for the right to inspect the documents, or to propose some procedure or limit upon the right that fairly meets IOOF's objection. To say this is not to suggest that there is some easy way around the obstacle to inspection created by the judge's decision. I merely make the point that the judge's decision is, on its terms, a limited one. The reasons make it clear that it is a limited one. I refer in particular to the last of the paragraphs set out above from the reasons of the judge.
47. I do not accept that the course taken by the judge has operated unfairly on or to the prejudice of the appellants, as long as the limited nature of the decision is properly understood. However, to make that point good I will have to deal with the particular complaints made by the appellants. Finally, for what it is worth, only time will tell whether the course followed by the judge was in fact the best way to proceed. However, the fact that that is so does not mean that the judge was not entitled to proceed as he did.
48. I now turn to more particular complaints.
49. Complaint is made that the judge failed to understand that, before him, the appellants who were defendants in the management dispute did not seek to inspect the relevant documents, and that those who did seek to inspect them were offering appropriate undertakings to preserve the confidentiality of the documents as against the defendants in the management dispute.
50. There is no substance in that submission. The judge clearly appreciated that the appellants, to meet the difficulty arising from the fact that some of them were defendants in the management dispute, were

prepared to limit the claim to inspection to certain of the appellants, and were prepared to give undertakings. The real issue is whether, that having been done, IOOF was nevertheless entitled to refuse to allow inspection.

51. Closely linked to this is a complaint that the judge took the view that a particular appellant, because of past links to Auspine, was not a person who should be allowed to exercise the right of inspection. It is unnecessary to decide the point. The point does not affect the issue of principle, and the fact that the judge expressed the view that he did played no part in his ultimate decision.
52. The appellants complain that the judge decided that if access to the documents were allowed, the information disclosed would find its way to the defendants in the management dispute, to the prejudice of IOOF's case. The appellants emphasise that they were seeking information about the case, so that they could understand why IOOF had embarked upon major litigation, and so that they could understand the risks and benefits that they faced as investors.
53. The judge's reasons in this respect might have been better expressed. However, my firm impression is that the judge made no adverse finding on these points. What he did was to consider the claim to inspect the relevant documents taking into account the nature of the documents in question, and the use to which information gained in that way might be put. The points that he made about the possible use of the information gained from inspecting the documents were obviously right. In essence, the judge was saying no more than that having regard to the nature of the documents in question, the information that they contained might be used in a certain way, and that its disclosure was attended by certain risks of prejudice to the position of IOOF. The fact is that if some of the appellants get access to the documents, those appellants may attempt to use the information gained to oppose in one way or another the course of action being pursued by IOOF.
54. To say that is to make no criticism of the relevant appellants, and in no way to suggest that they would breach any undertakings imposed upon them. Indeed, one has to acknowledge the possibility that it might emerge that they have good cause to challenge the course of action taken by IOOF. The issue that the judge had to address was whether, in the circumstances identified by him, the Court must accept that IOOF has a discretion to refuse to permit inspection of the documents because of the possibilities identified by the judge.
55. It needs to be emphasised that the function of the Court in these proceedings is to decide whether the trustee has a discretion to refuse to permit inspection, not to decide whether that discretion, if it exists, should be exercised. Its exercise is a matter for IOOF.

56. The appellants submit that the judge erred in proceeding on the footing that the appellants did not complain about IOOF's conduct, and in proceeding on the basis that there was no assertion of a breach of trust by IOOF. In my opinion there is no substance in that submission. The judge was obviously aware that the appellants were complaining about IOOF's past delay in making disclosure, and continuing refusal to make disclosure. He was obviously aware that they were concerned about the propriety of the course of action being pursued by IOOF, and that their difficulty was that they claimed to have insufficient information to decide whether they should challenge the course of action taken by IOOF.
57. The appellants complain that they were shut out from raising all of their concerns. For example, the appellants tendered an affidavit containing evidence discovered after the hearing before the judge. They say that they now know that some parts of counsel's brief in the management dispute have been shown to some members of the CIA. They submit that this was concealed from them and from the judge. They submit that, if this is so, IOOF has not been behaving impartially as between the beneficiaries. They submit that those parts of the brief that have been disclosed can no longer be regarded as confidential. They submit that this is an example of the sort of thing that might well have come out had the judge had all the facts before making his decision.
58. Sitting on appeal this Court is not in a position to determine just what has happened in this respect. However, in my opinion there is nothing untoward in the mere fact that some investors have seen some part of what is in the brief of IOOF's counsel. There could be a variety of reasons why that might have occurred. For example, the relevant documents might have been disclosed in response to a reasonable question for information, or in connection with the relevant investor giving evidence in the case. Nor does limited disclosure of the contents of counsel's brief necessarily destroy the confidentiality that would otherwise apply to that part of the brief. For these reasons the matter raised is not as significant as the appellants would suggest.
59. This Court is not in a position, without embarking upon a substantial inquiry, to determine whether IOOF has been dealing selectively with beneficiaries in a manner that gives rise to a breach of its duty. Nor is this Court in a position to decide if any such dealings were wrongly concealed from the judge. As to that, I note that the judge contemplated that IOOF might have been using members of the CIA as a sounding board. He said:

"89The need for confidentiality may extend beyond the brief. The trustee has seen fit to have some communications with a group of beneficiaries. I do not know the substance of these communications and I have not heard argument thereon.

90 A trustee need not necessarily have to disclose to all beneficiaries the trustee's communications with a particular beneficiary (see *Hartigan* at 433 and *re Londonderry* (1965) Ch at 934); if IOOF has been using the views of the Covenant Investor Association as a sounding board then confidentiality may well extend to those communications if the papers are to be treated as trust documents. I only mention this point because it should not be thought that the material before me is the only material in the Trustee's files which may be kept from the eyes of the covenant holders."

I think it most unlikely that the judge would have been surprised to learn that some investors had seen some part of the withheld material.

60. The appellants are not precluded from raising these matters before the judge. I must say I have the impression that side issues are being given undue prominence in the inspection claim, but I appreciate that I do not know all of the facts. Be that as it may, in my opinion the proposed fresh evidence does not establish matters that demonstrate that the judge's decision should be set aside. Nor does it demonstrate a fatal flaw in the procedure adopted by the judge.

61. The appellants complain that the judge overlooked or failed to deal with their application for an order enforcing such rights as they have under s84B of the [Trustee Act](#). They complain about the failure to deal with their application for an appointment of an inspector under s84C. Section 84B provides as follows:

"(1) A trustee shall keep such records relating to his administration of the trust property as may be prescribed."

62. A beneficiary of a trust has a right to require production of such records: s84B(2). Section 84C provides as follows:

"(1) The Supreme Court may, of its own motion, or on the application of any person who has, in the opinion of the court, a proper interest in the matter, appoint an inspector to investigate the administration of any trust."

63. This section does not fetter the scope of the discretion to make an appointment.

64. The judge did not overlook the claim for the appointment of an inspector. Implicit in what he has said in his reasons is a decision that IOOF's refusal to allow inspection of the documents is not, of itself, a matter that would support the appointment of an inspector. To the extent that that is implicit in his reasoning, I find no fault in that reasoning. There is no reason to appoint an inspector if the trustee is exercising a discretion available to it.

65. As I understand his reasons the judge has not gone further than that. It remains open to the appellants to argue that the appointment of an inspector is a way around the problems of confidentiality that the judge considered gave rise to a discretion to refuse inspection. I doubt whether they are. An inspector is required by s84E to make a report in writing to this Court and to the Attorney-General upon the result of an investigation. My tentative view is that it would not be appropriate for either the Court or the Attorney-General to attempt to decide whether IOOF is acting properly in its conduct of the management dispute. However, that is a matter that remains for consideration.
66. It is also my view that the judge has not attempted to decide whether or not the appellants have a right of inspection under s84B. As to that, the first issue that arises is the fundamental question of whether the documents in question are prescribed trust records. The *Trustee Regulations 1996* set out the records that must be kept. Most of the prescribed records are financial and accounting records, and administrative records relating to the trust assets. I doubt whether the documents in issue are of this type. My impression is that documents of this type have already been disclosed. Much of what one would expect to find in counsel's brief does not appear to me to fall within the description of prescribed records. I suspect that some of the documents in counsel's brief would be prescribed records, but I suspect that those are documents that have an independent existence and have been or can be inspected in any event. The prescribed records do include "each letter received by the trustee and a copy of each letter sent by the trustee." The second group of documents in question therefore literally fall within that provision. There remains the question of whether these letters relate to the administration of the trust property. And there is the more difficult issue of whether the right of inspection conferred by s84B is subject to the same limit as that which the judge identified in relation to the equitable right of inspection.
67. The answer to the appellants' complaint about these matters is that the judge has not decided these points, and they remain for decision.
68. Finally, there is a kind of catch-all complaint that, having set out to decide an issue of law, the judge unfairly and wrongly determined a series of factual issues adversely to the appellants, and made an apparently absolute final order.
69. I have dealt with the individual complaints. When the judges reasons are properly understood, he has not made the suggested errors.

The issue restated

70. Before coming to the question of whether IOOF is entitled to refuse inspection of the documents, it may be helpful to restate the issue that the judge sought to isolate and to decide. I say this because, as I mentioned earlier, there are some difficulties of identifying just what the judge has decided, and in understanding the effect of the order that has been made.
71. The issue that the judge decided arose in a context that can be described in a manner that is non controversial.
72. IOOF, as trustee, is engaged in major litigation in which it purports to act in the interests of investors in a managed investment scheme. The investors for whom IOOF acts, and in relation to whom it is a trustee, number some 20,000. Some of those investors are concerned about IOOF's course of action, and about the wisdom of what it is doing. They have required IOOF to produce for their inspection a large number of trust documents. Over a period of time IOOF has done so. The Court is not in a position at present to decide whether IOOF should have done so more readily or sooner than it did so. A large amount of material has been disclosed. Concerned investors now want to inspect the contents of counsel's brief in the management dispute. Some of that material probably has an independent existence, and can be inspected on that basis without opening up counsel's brief. It is likely that some of that material has been inspected already. Much and perhaps most of what is withheld by IOOF is sensitive material which, if it fell into the hands of those opposed to IOOF in the management dispute, could be used to prejudice the position of IOOF and through it the interests of investors in the scheme. To say this is not to assume that IOOF is right, but merely to record that IOOF claims to be advancing the interests of investors in the scheme. The investors who seek to inspect counsel's brief have offered undertakings to protect the confidentiality of the material inspected. However, once they have inspected it, it is foreseeable that they will seek leave to use the information that they have gained in a manner that will be adverse to the course of action that IOOF is pursuing. Their ability to do so would be subject to the control of the Court. At this stage the investors do not assert a breach of trust or impropriety by IOOF in connection with the management dispute. The investors want to know whether they have grounds to do so.
73. The investors have certain rights under the Trust Deed. Those rights include the right to require the forest company to call a meeting of investors with the view to that meeting giving directions to IOOF.
74. In the inspection case the investors have not claimed that they have been prevented from exercising their rights under the Trust Deed. They have not claimed that their attempt to exercise those rights has been frustrated. Nor have they demonstrated that reasonable requests for information about the course of conduct being pursued by IOOF, as distinct

from requests for access to primary documents, have been rejected. The matters just mentioned by me were not referred to by the judge, but as I understand things what I have said accurately reflects the position.

75. In that context the judge has considered whether IOOF is entitled to refuse to disclose to the relevant investors the contents of counsel's brief in the management dispute, and the contents of certain correspondence with the CIA. As I understand his reasons, the matters set out by me are findings that the judge made, expressly or implicitly. The judge did not decide a hypothetical issue.
76. The judge has decided that the investors do not have an unqualified right to inspect trust documents.
77. He has treated the documents in issue as confidential, and in my opinion was entitled to do so, subject only to the point that the circumstances of the correspondence between IOOF and the CIA remain unclear. The judge seems to have treated that correspondence as correspondence between a trustee and a beneficiary which might well be confidential. He recognised that it may be necessary for that issue to be examined more closely, and for an officer of the court to examine the correspondence: see para 90 of the reasons.
78. The judge has decided that the confidential nature of the material in question, and its importance to IOOF in the management dispute, lead to the conclusion that IOOF is entitled to refuse to disclose it to the investors. He has decided, in effect, that IOOF's conduct of the management dispute should not be subject to a right in its beneficiaries to require disclosure of material prepared for the purpose of or in connection with that litigation.
79. He has not decided upon the claim to inspect documents pursuant to s84B of the [Trustee Act](#), nor upon the claim to have an inspector appointed pursuant to s84C.
80. He has not made any adverse findings about the appellants. He has not found that they would misuse information acquired by them as a result of an inspection. His decision is that the nature of the material in question is such that IOOF should not have to submit to it being inspected, even subject to undertakings as to confidentiality.
81. He has decided that on the premise that no specific allegation of breach of trust or impropriety is made against IOOF.
82. Towards the end of his reasons he says (para 91):

"In the present case the rights of the beneficiaries are suspended to the extent necessary to facilitate the proper discharge of the trustee's function as a litigant in carrying through its stewardship".

83. In the light of what I have just said about the nature of the issue that the judge decided, that statement appears to go too far. The judge did not intend to decide that all rights of the beneficiaries were suspended while the management dispute is in progress. When his reasons are examined as a whole it is clear that all he decided was that the trustee was entitled to refuse the claim to inspect the documents in exercise of the equitable right vested in the beneficiary of a trust, having regard to the basis upon which and the circumstances in which the right was asserted.

84. I also consider that the order as drawn up (see above) is expressed in terms that are too absolute and sweeping, having regard to the limited nature of the issue decided by the judge. I will come back to this.

The right to inspect

85. After that lengthy preamble, I come to the ultimate questions. They are three in number. First, are the relevant documents trust documents? Secondly, if they are, is the right of a beneficiary to inspect trust documents subject to any qualification? Thirdly, if it is, do the circumstances as described by me give rise to a discretion on the part of IOOF to refuse to permit inspection?

86. As to the first question, I am prepared to proceed on the basis that the documents in question are trust documents, because the contrary has not been argued. I accept that the documents in question are related to the administration of the trust of which IOOF is trustee. I accept that the documents are documents which IOOF could be expected to pass to its successor, should it cease to be trustee.

87. In the cases to which we have been referred, the entitlement of a beneficiary to inspect trust documents is common ground. The judge approached the matter on the basis that the documents in question were in fact trust documents, and so will I. I merely note that the case law suggests that it will not always be easy to identify what is a trust document.

88. In the case law one can find two different approaches to the basis of the right of a beneficiary to inspect trust documents. One basis is traced back to the words of Lord Wrenbury in *O'Rourke v Darbishire* [\[1920\] AC 581](#) at 626:

" If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to

the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them."

89. Some of the later decisions take what His Lordship said quite literally, and treat him as holding that a beneficiary has an actual proprietary interest in trust documents, and that the existence of that proprietary interest is the hallmark of what is a trust document. I doubt whether that is what His Lordship intended. I consider that the true position is as stated by Dawson and Toohey JJ in *Breen v Williams* (1996) 186 CLR 71 at 89:

"But the right of access of a beneficiary to trust documents arises because of the beneficial interest of the beneficiary in the trust property and it is in that sense that the right may be described as proprietary."

90. On that point see also Gummow J in *Re Simersall* [\[1992\] FCA 221](#); [\(1992\) 35 FCR 584](#) at 588.

91. The other approach is that the right of a beneficiary to inspect trust documents is founded not upon any equitable proprietary right but upon the fiduciary duty of a trustee to keep the beneficiary informed and to render accounts. On this approach the existence of a proprietary right may be sufficient to grant a right of access, but is not necessary. This approach to the issue is to be found in *Hartigan Nominees Pty Ltd v Rydge* [\(1992\) 29 NSWLR 405](#) at 421-422 Kirby P (diss) and at 442-445 Sheller JA.

92. It is unnecessary to resolve this issue. It is unnecessary to do so because the issue is whether a trustee has a discretion to refuse to permit inspection of trust documents under certain circumstances, and that issue arises whatever the basis of the right may be. Describing the right as a proprietary right does not do away with the issue of whether there are circumstances under which a trustee can refuse to permit inspection of trust documents: see *In re Londonderry's Settlement* [1965] Ch 918.

93. I therefore turn to the issue of the qualifications that have been put upon the right of a beneficiary to inspect trust documents.

94. In the case just referred to, the Court of Appeal of England held that trustees were not bound to disclose to a beneficiary the reasons for exercising their discretionary powers, and accordingly were not obliged to disclose trust documents that would disclose those reasons. That decision has been generally accepted in Australia, although not without some dissent: see the reasons of Kirby P in *Hartigan Nominees Pty Ltd v Rydge* [\(1992\) 29 NSWLR 405](#).

95. In *Butt v Kelson* [1952] Ch 197 the defendants, as trustees of a will, held nearly all the shares in a private limited company. They were the sole directors of the company. The Court held that beneficiaries of the trust could not require the defendants to disclose to them all documents in their possession as directors of the company. The interests of other shareholders had to be considered as did restrictions found in the articles upon members, who are not directors, getting access to books of the company. In *Re Fairbairn* [1967] VicRp 72; [1967] VR 633 Gillard J, after reviewing a number of the decided cases, accepted that there may be special circumstances giving rise to an exception to the general rule that trust documents should be produced to a beneficiary for inspection: at 635 and at 638. In *Morris v Morris* (1993) 9 WAR 150 Seaman J doubted whether the beneficiary of a trust estate which included an interest in a business carried on by a trustee in partnership with others, had a general right to inspect records of the partnership on the basis that they were trust documents. In *Hartigan*, to which I have already referred, Kirby P (at 422) and Mahoney JA at 433G and at 435G both appeared to contemplate circumstances in which the beneficiary was not entitled to inspect trust documents. Mahoney JA appears to have rested the exception on the basis of confidentiality. On the other hand, Sheller JA appears to have envisaged only a more limited exception to the right of inspection: at 445D.
96. These are the only cases to which our attention has been drawn.
97. These decisions do recognise that the right of a beneficiary to inspect trust documents is not unqualified. They do not identify any underlying principle by reference to which the refusal of access may be justified.
98. Despite the lack of guidance from the case law, I consider that the trustee must be entitled to refuse access to trust documents, and not only when that is done to maintain the confidentiality of the reasons for the exercise of a discretion when the beneficiaries have no right to access to those reasons. To begin with, there may be cases in which an obligation of confidentiality attaches to documents in possession of the trustee by virtue of the circumstances in which those documents were received. The fact that a person is a beneficiary may mean that the obligation of confidentiality is not an objection to the person inspecting the documents, but in my opinion it is conceivable that there will be cases where a trustee receives a document under circumstances such that, to allow inspection by a beneficiary, would give rise to a breach of obligations of confidentiality imposed upon the trustee. The present case does not fall in this category, because the assertion of confidentiality is made by IOOF, and is not made in response to an obligation imposed upon IOOF.
99. However, it seems to me that it would be right to recognise that a trustee might refuse to permit inspection of trust documents on grounds of

confidentiality, however the claim of confidentiality might arise. To say that is not to say that it will always be open to a trustee to claim confidentiality. It is to do no more than acknowledge that in principle a trustee should be able to advance a claim of confidentiality in answer to a right of inspection asserted by a beneficiary. Whether the claim is a valid answer in a particular case will depend upon the particular circumstances.

100. There must be various situations in which a trustee, particularly a trustee conducting a business, would be put in an impossible position if the beneficiary of the trust could, as a matter of right, claim to inspect documents in the possession of the trustee and relevant to the conduct of the business. It is readily conceivable that there will be situations in which an undertaking of confidentiality is not sufficient protection. The fact that the trust is one in which numerous beneficiaries have an interest, and the further fact that those beneficiaries may have differing views about the wisdom of the course of action being pursued by the trustee, only serve to emphasise, in my opinion, the need for the law to recognise some scope for a trustee to refuse to disclose information on the grounds that it is confidential and on the further ground that the disclosure is not in the interests of the beneficiaries as a whole. I make that observation on the basis and on the assumption that the ultimate right of the beneficiaries will be to have the trustee removed if they are dissatisfied with the approach of the trustee.

101. Ultimately, I would rest the existence of the relevant discretion upon the need to reconcile the undoubted duty of a trustee to make disclosure to beneficiaries of information about the trust, and the undoubted duty to permit the inspection of trust accounts and trust documents, with the equally fundamental obligation of a trustee to conduct the affairs of a trust, and particularly a trust which involves the conduct or management of a business, in the interests of the beneficiaries as a whole. I consider that on occasions the reconciliation of these interests may entitle a trustee to decline to provide information to particular beneficiaries, when the trustee has reasonable grounds for considering that to do so will not be in the interests of the beneficiaries as a whole, and will be prejudicial to the ability of the trustee to discharge its obligations under the trust. It may be that the ultimate foundation of the discretion is the obligation of the trustee to discharge its duties to manage the affairs of the trust in the interests of the beneficiaries.

102. I wish to make it clear that the discretion that I envisage is a limited one, and must always be limited by the general duty of disclosure by a trustee to which I have referred. The existence of the discretion cannot be used as an excuse for paternalism or to disregard the interests of beneficiaries. Its existence depends upon the need to protect the trustee's ability to discharge its obligations. The availability of the discretion will depend very much upon the circumstances of the particular case.

103. I therefore conclude that the right of a beneficiary to inspect trust documents is qualified by the existence of the discretion to which I have referred. It is impossible and pointless to state the scope of the discretion with any precision. All that can be said is that there may be circumstances in which the trustee can properly claim that there are trust documents of a confidential nature that a trustee may refuse to disclose to particular beneficiaries in the interests of the discharge of the trustee's duties to the beneficiaries as a whole. Once again, lest I should be misunderstood, there is one other qualification that I would make. I do not, in what I have said, contemplate the use of that discretion to enable a trustee to deal in a partial or discriminatory manner as between beneficiaries or groups of beneficiaries, except to the extent that the necessary result of a proper exercise of the discretion may be that particular beneficiaries are not given access to a document.
104. Having reached the conclusion that I have reached, the third of the issues identified by me arises for decision. That is, whether in the circumstances as described by me IOOF was entitled to refuse to permit inspection of the documents in question.
105. I have previously stated the circumstances in what I consider to be a non controversial fashion. I consider that the documents in question can properly be regarded as confidential documents, because of their connection with the management dispute. I do not suggest that so describing them leads as of course to the result that a beneficiary cannot get access to them. But, having acknowledged that they have that status, and bearing in mind the substantial and complex litigation in which IOOF is engaged, the likely importance of those documents to its case in that litigation, the fact that information gained from them might be used to obstruct the course being pursued by IOOF, the absence of evidence that reasonable requests for information about the merits of IOOF's case have been refused, and the absence of evidence that attempts by the beneficiaries to exercise their rights under the Trust Deed have been ineffectual, I am led to the conclusion that the trustee had a discretion to decline to permit inspection of the documents and therefore was entitled to make the decision that it did make. Of particular significance to that conclusion are the confidential nature of the documents, the absence of evidence that other rights available to beneficiaries under the Trust Deed have been denied or frustrated, and the obligation on the trustee to follow a course that it considers to be in the interests of beneficiaries as a whole. To require the trustee to make disclosure in these circumstances is prejudicial to its ability to meet its obligations as trustee.
106. It can be seen that my decision is a qualified one. It contains some qualifications that the judge did not express, although they may well have been in his mind.

107. I should add that it was not submitted by IOOF that the terms of the Trust Deed gave rise to an express or implied limit upon a beneficiary's right of access to trust documents.

Conclusions

108. On that basis I would uphold the conclusion reached by the judge, and dismiss the appeal.

109. I referred earlier to the terms of the order that was drawn up to reflect the decision of the judge. For the purpose of ensuring that the order is better tailored to the circumstances, I would allow the appeal but only to the extent necessary to vary the order to provide a declaration as follows:

"That none of the plaintiffs is entitled to inspect documents that comprise the brief to counsel retained by the defendant in actions Nos. 480 of 1993 and 1299 of 1996 by reason solely of the fact that such documents are or may be trust documents of a trust of which the defendant is trustee and the plaintiffs are beneficiaries. This declaration is made without prejudice to the entitlement of the plaintiffs to claim to inspect those documents on some other basis."

This declaration leaves it open to the plaintiffs to assert some further basis for a right of inspection of counsel's brief. It also leaves it open to the plaintiffs to pursue their claim to inspect correspondence between IOOF and the CIA, and to pursue other claims made in the proceedings.

110. PERRY J. I agree with the Chief Justice that the appeal should be allowed only for the limited purpose of varying the terms of the order under appeal in the manner suggested by him. I agree in substance with his reasons.

111. I would emphasise that in the particular circumstances of this case, no order for disclosure could conceivably be drawn up, or undertakings given, which might be expressed in terms which would ensure that the risk of disclosure of a kind which could seriously prejudice the conduct of the litigation presently being pursued by IOOF, might be reduced to an acceptable level.

112. In those circumstances, the trustee is entitled to exercise its undoubted discretion to withhold the documents in question.

113. MARTIN J. I agree with the orders proposed by the Chief Justice for the reasons that he has given.