

## KEY POINTS

**What is the issue?**

The Supreme Court of New Zealand has held that trustees are obliged to disclose to a beneficiary all legal advice funded by the trust and received by the trustees up to the commencement of legal proceedings between trustees and beneficiary.

**What does it mean for me?**

Practitioners and trustees alike should be aware of the extent of disclosure of trust information to beneficiaries.

**What can I take away?**

Awareness of the extent of disclosure when advising settlors, trustees and beneficiaries.

# (Un)privileged position

POLINA KOZLOVA DISCUSSES THE EXTENT OF DISCLOSURE TO BENEFICIARIES FOLLOWING A RECENT NEW ZEALAND SUPREME COURT DECISION



On 1 June 2021, the Supreme Court of New Zealand (the Supreme Court) released its judgment in *Lambie Trustee Limited v Addleman*,<sup>1</sup> which sets out the rights of beneficiaries to access legally privileged trust documents. This case provides useful clarity for those who advise trustees as to which documents may be disclosed to beneficiaries when requested.

**BACKGROUND**

The underlying dispute in *Addleman* was between two sisters, Mrs Addleman and Ms Jamieson. Mrs Addleman and Ms Jamieson are two of the four daughters of Mr and Mrs Jamieson. In 1972, when she was 19 years old, Ms Jamieson dived into a tidal pool in Sydney and broke her spinal cord. Mrs Addleman moved to England around the time of Ms Jamieson's accident and has lived there ever since. Following her accident, Ms Jamieson sued the local council for negligence and was awarded damages of approximately AUD1 million.

Ms Jamieson entrusted the accident funds to her father, Mr Jamieson, to hold for her benefit. Some years later, Mr Jamieson's nephew, Mr Palmer, proposed the purchase of farmland in New Zealand for subdivision. With Ms Jamieson's agreement, the funds were used to help meet the cost of acquiring

the farmland, and the subdivision was very successful.

The Lambie Trust (the Trust), with which the proceedings were concerned, was settled by Mr Palmer in 1990. The original trustees were Mr Jamieson, Anthony Jamieson, Mr Palmer and Wayne Hanna, an accountant. The final beneficiaries of the Trust were Ms Jamieson and Mrs Addleman, and two offshore companies controlled by Ms Jamieson. The discretionary beneficiaries of the Trust were the final beneficiaries; any issue, wife, husband, widow or widower of any final beneficiary; and any lawful charitable object.

Since 2006, Lambie Trustee (the Trustee), a company that Ms Jamieson is the sole director and shareholder of, has been the sole trustee of the Trust. Since the Trust's establishment, it has made distributions to Ms Jamieson to cover her care. Mrs Addleman, on the other hand, was not aware of the Trust's existence until 2002, when the Trustee contacted her to advise that a distribution of AUD4.2 million was to be made to her as a full and final distribution of funds that would be coming to her from the Trust.

In March 2003, Mrs Addleman's solicitors wrote to the Trustee requesting information, including a copy of the trust deed, the trust accounts and other trust documents. The Trustee

provided Mrs Addleman with some basic information but not all the information that she sought.

In 2014, Mrs Addleman's solicitors again wrote to the Trustee asking for additional information. The Trustee did not provide anything further.

In June 2015, Mrs Addleman commenced proceedings in the High Court seeking orders from the court to oblige the Trustee to make the requested disclosure, including disclosure of the legal advice that had been given to the Trustee.

### HIGH COURT DECISION

The High Court held that the Trust was a 'sole purpose trust in effect' as it was effectively established only for the support and maintenance of Ms Jamieson. The High Court also found that the Trust had always been administered on a strictly confidential basis and that, therefore, there could be no expectation of disclosure to beneficiaries.

### COURT OF APPEAL DECISION

The Court of Appeal of New Zealand (the Court of Appeal) overturned the High Court's decision and ordered the Trustee to provide Mrs Addleman with all documents she sought.

The Court of Appeal held that Mrs Addleman fell under the category of a 'close beneficiary of the Trust' and that the documents should be disclosed to her because otherwise there would be no one who could hold the Trustee to account, as the Trustee and other beneficiaries were controlled by Ms Jamieson. The Court of Appeal's focus was on the need for the beneficiary to be able to properly scrutinise the Trust, and documents necessary for such scrutiny must be made available to a beneficiary.<sup>2</sup>

The Court of Appeal overturned the High Court's finding that the Trust was a sole purpose trust for the following reasons:

- It found that Mrs Addleman was not named as a beneficiary merely as a back stop in case Ms Jamieson died, as there were other beneficiaries to whom the trust fund could be appointed.
- The Trust did not consist solely of Ms Jamieson's compensation money and was therefore not a sole purpose trust; Mr Jamieson had also settled his personal funds on the Trust. Mr Jamieson would not express a wish to leave 25 per cent to Mrs Addleman if the Trust funds belonged solely to Ms Jamieson.

The Court of Appeal held that solicitor/client privilege did not attach to communications between the Trustee and its lawyers. The legal advice and opinions obtained by the Trustee to



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guide it in the discharge of its duty as trustee and paid for out of the Trust were documents created for the benefit of the beneficiaries. The Court of Appeal considered that ordering disclosure of the trust documents was 'most consistent with the proper administration of the Trust and the interest of beneficiaries overall'.

The Trustee obtained leave to appeal the Court of Appeal's decision on solicitor/client privilege and the disclosure of legal advice obtained by the Trust to the Supreme Court.

### SUPREME COURT DECISION

The Supreme Court unanimously held that the Trustee was obliged to disclose to Mrs Addleman all legal advice funded by the Trust and received by it prior to the commencement of the present proceedings.

The key question before the Supreme Court was whether legal advice held by trustees is information over which the trustees can claim legal professional privilege against the beneficiary. The Supreme Court held that it depends on whether the beneficiary has a joint interest in the advice: legal professional

privilege cannot be exercised against a person who is jointly interested in the documents (the joint interest exception). In the trust context, this joint interest exception is founded on the assumption that advice to which it applies is obtained for the benefit of the beneficiaries. This is true when the advice relates to the administration of the trust. In that situation, the trustees cannot normally rely on legal professional privilege to withhold documents. However, if that assumption does not apply (e.g., if the advice is not being obtained for the benefit of beneficiaries), then the joint interest does not exist and privilege can be exercised against the beneficiary.

In this case, the Supreme Court found that the Trustee and Mrs Addleman have a joint interest in the administration of the Trust and, therefore, the Trustee could not claim privilege in relation to the legal advice obtained by the Trust regarding its administration. However, the Supreme Court confirmed that the 'joint interest exception' has a limitation. It ceases to apply where the trustees and challenging beneficiary have reached the point where their positions so conflict that the trustees are now taking advice for the purpose of resisting the claims or demands against them.

### CONCLUSION

*Addleman* is a reminder to trustees of the application of legal professional privilege in relation to the common-law rights of disclosure to beneficiaries. If trustees are obtaining advice on trust administration and paying for that advice with trust funds, the advice is unlikely to be privileged as against beneficiaries and may have to be disclosed. It has been argued by some New Zealand legal professionals that if the legal advice was paid for by the trustee out of its own money, then it is 'personal information' belonging to the trustee and not likely to be subject to court-ordered disclosure. However, it must be borne in mind that the judgment was decided on common-law principles before the *Trusts Act 2019* (the Act) came into force.<sup>3</sup> The wide definition of 'trust information' in s.49 of the Act may well include 'personal information' of the trustee about the trust or its administration, and so it is possible that legal advice for which the trustee paid out of its own pocket will also be disclosable. We are yet to see this being argued in New Zealand courts.

#CONTENTIOUS TRUSTS AND ESTATES  
#NEW ZEALAND #TRUSTS

<sup>1</sup> [2021] NZSC 54 <sup>2</sup> In keeping with the principles of *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.  
<sup>3</sup> Rhonda Powell TEP, 'Old wine in a new barrel', *Trust Quarterly Review* (Vol17 Iss4)