Legal Advice privilege after Lambie Trustee Limited v Addleman

On 1 June 2021, the Supreme Court issued its Judgment in *Lambie Trustee Limited v Addleman* [2021] NZSC 54 settling when trustees must disclose their legal advice to beneficiaries of a trust.

The underlying dispute in *Addleman* was between two sisters, A and B the beneficiaries of a trust whose sole trustee was a company controlled by A. B requested information about the trust, which in part, A resisted. A sought legal advice in regard to B's requests both before and after B issued proceedings to oblige disclosure. Among other things, the proceedings sought disclosure of:

> *… all legal opinions and other advice obtained by the trustees for the purposes of the Trust Fund and funded from the Trust Fund, including all those that might be privileged as against third parties …*

The issue on appeal was the extent to which legal advice received by A, qua trustee, should be disclosed to B.

Pausing to reflect

Beneficiary led challenges to the correctness of trustee decisions is a regular occurrence in the courts. When the challenges succeed, the beneficiary's court costs along with the trustees' own solicitor-client costs often fall on the trustees personally without an accompanying right to seek indemnity from the trust property. This risk coupled with the increased focus on 'beneficiary rights' in the Trusts Act 2019[1], is likely to see more trustees seeking legal advice on the factors they ought to consider when, say, deciding on distributions, especially final distributions, or about when and if to make disclosure of basic or general trust information.

Importantly, when trustees seek guidance from their legal advisors they often do so in an atmosphere of acrimony between them and the beneficiary(ies). For instance, when a beneficiary seeks a distribution from the trust property that the trustees are not minded to make, the position can quickly become hostile.

Legal advice cannot substitute the trustees' own consideration of relevant factors and decision-making, but if the trustees take a different view to the advice they receive, that divergence (assuming the beneficiary sees the advice) may become one more 'arrow in the quiver' for the challenging beneficiaries.

Additionally, the legal advice may well contain guidance on the factors that the trustees should consider when exercising their discretion. So, by dint of receiving disclosure of the legal advice, the challenging beneficiary may well get a heads-up on the reasons for the trustees' decisions, when they could not have sought those reasons under the disclosure

[1] See the 'Giving information to beneficiaries' provisions in ss. 49 to 55 of the Act and the ability for beneficiaries to challenge whether a trustee's act, omission, or decision in was or is reasonably open to them in ss. 126 and 127.

provisions in sections 50 to 55 of the Trusts Act 2019 because section 49(b) excludes 'reasons for trustees' decisions' from the definition of 'trust information' for which a beneficiary is entitled to request disclosure.

It follows that the extent to which a beneficiary can seek disclosure of the legal advice given to trustees is an important and sensitive matter and may undermine when and if the trustees seek such advice.

Continuing with *Addleman*

All lawyers are familiar with the concept of privilege, namely, the right to refuse to disclose certain communications and information in court proceedings. Most familiar perhaps is section 54 of the Evidence Act 2006 which codifies the privilege in respect to professional legal advice and section 56 that does the same for communications or information made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (aka 'litigation privilege').

In the face of B's application for disclosure of "*… all legal opinions and other advice obtained by the trustees for the purposes of the Trust Fund …*", A asserted privilege against disclosure, both on the basis of professional legal advice and litigation privilege.

In the latter regard, it is noteworthy that during the course of escalating requests for disclosure and in the face of reluctance by A in giving that disclosure, B's lawyers raised the possibility of court proceedings to force the issue on 3 occasions before actually issuing them.

Legal principles

The Supreme Court stated that issue in the appeal are the principles which apply to court-ordered disclosure of information by trustees to beneficiaries and not the rights of discovery in litigation between beneficiaries and trustees.

The Court stated that information generated or held for the purposes of a trust is not the personal property of the trustees, it is "trustee information". By contrast, information held by a trustee relating to a trust which is personal to the trustee, was "personal information" (para [43]).

At para [51], the SC stated:

> *Whether information is personal to the trustee and thus not subject to court-ordered disclosure is distinct from whether a trustee may claim legal professional privilege. That said, where the information consists of legal advice, some considerations (for instance who paid for the advice) may be material to both issues. As a rough rule of thumb, advice paid for using trust money is most unlikely to be personal to a trustee. This is because trustees must not use trust funds for their own purposes.*

Pausing here, consider the trustee who, seeing difficulties ahead in their interactions with beneficiaries, seeks advice about what to do vis-à-vis actions affecting the trust, but paying for that advice out of their own pocket and not seeking indemnity from the trust. This is ostensibly "personal information".

The Court left whether disclosure of 'personal information' might nevertheless be ordered. It may be that the Trusts Act 2019 changes the position. The definition of 'trust information' in s. 49 of the Act pays no heed to 'who paid' in terms of defining 'trust information'. Instead, the definition refers to '*any information regarding the terms of the trust, the administration of*

the trust, or the trust property that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced'.

It follows that advice paid for by the trustee personally, may yet be disclosable as 'trust information' had the Act been applied. The effect of the Trusts Act 2019 was not addressed by the Court because the hearing occurred on 2 December 2020, that is, before the Act came into effect on 30 January 2021.

Categories of legal advice

At para [63], the Court referred to the 3 categories of legal advice in the matter before them:

(a) legal advice given to the trustee relating to the general administration of the trust, including the distribution to B before any disclosure requests had been made;

(b) legal advice given to the trustee as to what documents should be disclosed to B; and

(c) legal advice given to the trustee in connection with the litigation.

There was no contest that all 3 categories were privileged as against anyone not jointly interested in it i.e. third parties outside the trust. The question was: could privilege be asserted against B?

At para [67], the SC stated as a general principle:

> *… legal professional privilege, whether statutory or common law, cannot be exercised against a person who is jointly interested in the documents in respect of which privilege is claimed*

This principle is codified in s.66(1)(b) of the Evidence Act.

At para [73] the Court cited with approval the following extract from Lewin on Trusts (19th ed, Sweet & Maxwell, London, 2015) at [23-048]):

> *Normally disclosure will be ordered of cases submitted to, and opinions of, counsel taken by the trustees, and other instructions to and legal advice obtained from the trustees' lawyers, for the guidance of the trustees in the discharge of their functions as trustees, and paid for from the trust fund. Even though such advice is privileged, the privilege is held for the benefit of the beneficiaries, not for the personal benefit of the trustees, and so privilege is no answer to the beneficiary's demand for disclosure. A beneficiary should, of course, seek disclosure from the trustee, or if necessary in proceedings to which the trustee is a party, and not directly from the lawyer who gave the advice since the lawyer is bound by privilege and is in no position to waive it at the instance of a beneficiary*

Referring back to the '3 broad categories of legal advice', the Court, unsurprisingly, held at para [74] that "*It is clear beyond argument that the joint interest exception applies to the documents within the first category*". Importantly, the Court added:

> *The joint interest exception is founded on the assumption that advice to which it applies is obtained for the benefit of beneficiaries. It follows that there may be circumstances in which that assumption no longer applies. Where this happens, the joint interest on which the exception is based has come to an end. The instances in which the joint interest exception have been held not to be applicable have largely*

> *involved advice received by trustees in respect of hostile litigation between them and the beneficiary.*

In regard to the second category, that is legal advice given to the trustees as to what documents should be disclosed to B, the Court noted at para [91] how the overwhelming number of cases referred to the Court held that a beneficiary did not have a joint interest in trustee-commissioned legal advice concerning advice received after litigation had been commenced (or perhaps when it was very imminent). Whereas the general pattern of the authorities is that advice received before litigation is contemplated *is* subject to the joint interest exception.

At para [92], the Court concluded:

> "*We accept that the joint interest exception may cease to apply prior to litigation being commenced, for instance where the parties have reached the point in which their positions are sufficiently conflicting to justify the conclusion that the trustees are taking advice for the purpose of resisting claims or demands by the beneficiary*."

The Court referred to a ".. *dominant purpose approach as applied for the purposes of litigation privilege may provide a sensible basis for identifying that point*". In other words, what is required for the joint interest exception not to apply is that the advice be sought for the dominant purpose of defending litigation.

By contrast, where litigation may be a possibility or even a likelihood at the time advice is taken is not to be taken as of controlling significance. So, in the case before the Court, the fact that B's lawyers had raised the possibility of court proceedings to force the issue of disclosure did not cross the point of bringing the joint interest in the advice to an end.

It is worth considering the decision of the High Court in *Easton v Guardian Trust* [2021] NZHC 519 issued 2½ months before *Addleman*, where Cooke J held at para [19]:

> *The reason why the trustee is entitled to withhold disclosure to the beneficiary who is a prospective plaintiff is that the interests of the beneficiary, and that of the trust have diverged. They are now adversaries. They no longer have the common interest on which the privilege depends. Whilst a trustee has a duty to provide information to beneficiaries and also to treat beneficiaries impartially, the primary duty of the trustee is to act in the best interests of the trust (i.e. the beneficiaries as a whole) and to further its purposes. Once there is an adversarial relationship it becomes contrary to the best interests of the trust for the beneficiary who is suing the trust to see all the legal advice the trustee is receiving about the matters subject to the claim against the trust. The trustee cannot be obliged to litigate with a beneficiary and at the same time treat them as sharing a common interest in the management of the litigation.*
>
> *…*
>
> *The relevant division of interest occurs when adversarial litigation is contemplated*

So, the Supreme Court effectively substituted Cooke J's more generous test of: 'where litigation is contemplated', with the more stringent one of 'where litigation had commenced or is very imminent'. And what the High Court called 'common interest' in the privileged advice, the Supreme Court described as a 'joint interest'.

When does the joint interest exception begin?

The Court drew a distinction between the trustees seeking advice in respect of contemplated litigation, but are looking for guidance as to the right course of action (in respect of which the

joint interest exception will apply), as compared with seeking advice as to how to resist actual or imminent litigation.

The Court clearly took the view that the advices may cross the line of distinction at separate points even though they relate to the same subject matter.

In regard to the third of the category of legal advice, that is advice given to the Trustee in connection with the litigation, the Court held once the beneficiary had commenced proceedings concerning the administration of the trust, the litigating beneficiary is no longer entitled to disclosure of legal advice received by the trustees in relation to that litigation. The Court was swayed by the fact that maintaining the privilege in this instance was "… *consistent with the realities of the dispute*" (para [98]) and that from this point the trustee and B were distinctly on different sides.

Cooke J in *Easton* more colourfully put it at para [20] as the position where the beneficiary who wished to sue the trustees must be able to be treated as being 'outside the tent'.

Importantly, the Court indicated that B's joint interest in the legal advice received by the trustee would not have persisted if, instead of waiting for B to commence proceedings, the trustee had itself sought directions and in doing so had made it clear that it would resist disclosure (para [99]).

Will trusts

The privilege held by a person in life, passes to their executors and heirs on their death[2].

This can be significant where the prospective claimant against the estate is a will beneficiary entitled to the same right of 'trust information' disclosure as the discretionary beneficiary enjoyed in *Addleman*. It follows that a will trust beneficiary's rights to privileged advice only extends to the advice obtained by the executor/trustees not to the pre-existing privilege held by the deceased. And then, only to the advice for which a joint interest subsists.

There are exceptions, most notably in ss. 11 and 11A of the Family Protection Act 1955 and at common law[3].

Summary

1. While legal privilege applies to all legal advice obtained by trustees in relation to a trust, a 'joint interest exception' applies to entitle beneficiaries to see that advice on the assumption that the advice is obtained for their benefit.
2. The 'joint interest exception' ceases to apply (possibly prior to, but definitely after, litigation is commenced) where the parties (the trustees and claiming beneficiaries) have reached the point where their positions are sufficiently conflicting to justify the conclusion that the trustees are taking advice for the purpose of resisting claims or demands by them. The test is the "dominant purpose" for why the advice was sought (i.e. is the purpose for defending the litigation).
3. That litigation may be a possibility or even a likelihood at the time advice is taken is not of controlling significance and is unlikely to meet the 'dominant purpose' test. Advice sought, even where litigation is contemplated, that is aimed at looking for guidance as

[2] Colin Passmore on Privilege (4th edn at para 6-124 to 6-129, page 632), Matthews & Malek on Disclosure (5th edn, at para 11.01, page 339) and Thanki on The Law of Privilege (3rd edn, at para 1.37, page 16).
[3] Re Maguire 2 NZLR 845 (privilege is claimable while administration of the estate is not completed).

to the right course of action (as compared with seeking advice as to how to resist actual or imminent litigation) the “joint interest exception” will apply.

4. Generally, legal advice paid for by the trustee is personal information not likely to be subject to court-ordered disclosure whereas the same advice paid for by the trust property is likely to be disclosable - because trustees must not use trust funds for their own purposes. But note that *Addleman*:

   a. Addresses the common law rights of disclosure to beneficiaries and not discovery in litigation as between beneficiaries and trustees.

   b. Must be treated as a pre-Trusts Act 2019 decision (i.e. as applying the pre-Act common law).

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