The significance of the *Addleman* case

Webinar: ([ ] CPD hour)

7 July 2021, 12pm – 1pm

The Supreme Court has held that much legal advice that trustees receive during the course of the administration of a Trust must be disclosed to beneficiaries.

The *Addleman* facts

The case involves two sisters: Annette Jamieson who at the time of the Supreme Court hearing was 67 and Prue Addleman who is 71. Neither of the sisters has had any children.

When Ms Jamieson was 19 she broke her spinal cord in a swimming accident in Sydney and was rendered a quadriplegic. She has needed constant medical care ever since.

In 1981 she received $1,029,084 in damages.

Some of the money that she received in damages was settled on a Trust which later invested in a very successful property development in Howick.

A Trust was formed – the Lambie Trust – and by the time of the trial there was one trustee, Lambie Trustee Limited, a Company of which Ms Jamieson is the sole shareholder and director.

In November 2002 Ms Addleman who knew nothing about the Trust – received a letter from one of the former trustees in which she was informed that there was a Trust; that she was a beneficiary of it; and that she was to be paid $4.2m. She was told that it "*represents the full distribution of funds that will be coming to you from the Trust*."

Ms Addleman wrote to the Trust and asked for a copy of (a) the Trust Deed, (b) Trust Financials and (c) some other documents. She was given the Trust Deed and some documents which detailed changes in the composition of the trustees, but no more.

10 years later – in 2014 – Ms Addleman wrote again and asked for the financials.

The High Court decision

The High Court decision is reported as *Addleman v Lambie Trustee Limited* (2017) 4 NZTR 27-016.[1]

Ms Addleman's claim was dismissed on the grounds that the Trust was settled with the primary purpose of ensuring Ms Jamieson's welfare and financial security.

The Court of Appeal decision approving the admission of new evidence

The case went to the Court of Appeal and in *Addleman v Lambie Trustee Limited* (2018) 4 NZTR 28-036[2] Mrs Addleman succeeded in an application to produce further evidence

[1] [2017] NZHC 2054

concerning the purpose of the Trust which indicated that the capital of the Trust was not confined to damages that had been paid to Ms Jamieson for her injuries.

The Court of Appeal's decision

In *Addleman v Lambie Trustee Limited* 5 NZTR 29-016[3] the Court of Appeal overturned the High Court decision and held that Ms Addleman was entitled to be given copies of legal advice that the trustees had received and which had been paid for from Trust funds together with and other documents that were necessary to enable Ms Addleman to scrutinise whether the Trust had been administered properly.

The decision was stayed

In *Addleman v Lambie Trustee Limited (No 2)* – (2020) 5 NZTR 30-003[4] the Court of Appeal granted an application for a stay by Ms Jamieson after she had successfully sought leave to appeal to the Supreme Court.[5]

The Supreme Court's decision

In *Lambie Trustee Ltd v Addleman* 5 NZTR 31-004[6] Justice William Young delivered a judgment on behalf of the Supreme Court in which, it has been held that Ms Addleman is entitled to be given copies of all the legal advice that the trustees had received up to the day when Ms Addleman served the trustee with Court proceedings.

This webinar is primarily focussed on the Court's requirement that a beneficiary must be provided with copies of the legal advice that the trustees had received.

The nature of the legal advice

Ms Addleman sought disclosure of a wide range of Trust documents, including:

> *"... 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 Supreme Court asked Ms Jamieson's lawyers to summarise the nature of the legal advice that they wished to withhold from Ms Addleman and their response was that the advice concerned was said to be "*advice/opinions obtained either by the Trustee Company or by a former trustee*" that:

(a) "*Ranged from matters of Trust administration*"

(b) "*To advice about the trustees' discretionary powers*" and

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[2] [2018] NZCA 616
[3] [2019] NZCA 480
[4] [2020] NZCA 194
[5] The decision of the Supreme Court granting leave to appeal is reported as *Lambie Trustee Ltd v Addleman* 4 March 2020 [leave judgment] (2020) 5 NZTR 30-002, [2020] NZSC 14
[6] [2021] NZSC 54

(c) "*Dealings with beneficiaries*."[7]

The Supreme Court has held that documents in all three categories – except those that came into existence after Ms Addleman served Court proceedings on Ms Jamieson, were to be provided to her.

Why is this decision important?

Lawyers who have acted for trustees whose actions have been criticised by beneficiaries will be aware of the problems they face when they seek legal advice as to whether the criticisms are valid. The trustees when facing the prospect of litigation concerning their conduct will want to get legal advice and they will not want to pay it from their own resources, and they will certainly not want to provide a criticising beneficiary with copies of advice that discloses that the criticisms may have some substance.

In short, the trustees will want to know how they can get advice which will not be made available to the beneficiaries.

Paying for the advice from a trustee's private resources

I have advised trustees in the past that when faced with criticisms of their conduct, they cannot safely arrange for Trust funds to be used for the advice and they must either arrange for another trustee to pay for the advice from his/her private resources or they should pay for the advice from their own resources.

The Supreme Court has held in *Addleman* that paying for the advice from a trustee's private funds may not work. In a footnote to the Supreme Court's decision it was held that:

> *"advice paid for by a trustee may nevertheless be trustee information"*

ie information that cannot be withheld from a beneficiary.

The Court went on to say that:

> *"Although not subject to Court-ordered disclosure, personal information which is not privileged may have to be produced in discovery."*[8]

In this sentence the Court appears to say that if the advice is "*privileged*" it may be able to be withheld from a beneficiary.

But it is clear from another aspect of the Supreme Court's decision that the issue is not as simple as that.

The Court said that:

> *"All of the advice [ie the three categories of them] is undoubtedly covered by legal professional privilege in the*

[7] Para 7
[8] Para 52

> *sense that, as against anyone not jointly interested in it, Lambie Trustee Limited is entitled to assert privilege. The only question is whether Mrs Addleman has a joint interest in the advice. To the extent to which she has such a joint interest, Lambie Trustee Limited is not entitled to claim privilege against her."*[9]

In other words even though the advice that a third party lawyer gives to the trustee is protected by legal professional privilege, if the beneficiary has a "*joint interest*" with the trustee in the advice, the trustee must disclose it to the beneficiary.

In para 67 of the decision the Court expanded on this reasoning:

> *"... 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."*[10]

The Court considered the topic of disclosure from two different perspectives:

(a) **Advice that is paid for by the Trust**

If the advice that the trustees obtain is paid for from Trust funds, it would appear to be disclosable to beneficiaries on the grounds that the Trust funds are owned beneficially by the beneficiaries and they are entitled to know how "*their*" money has been spent. Both the Court of Appeal and the Supreme Court approved of the following statement from Lewin on Trusts, where it dealt with this topic:

> *"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 and 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 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."*[11]

Note that in the above passage, it was held that even though the advice received from the lawyer is privileged, the beneficiaries are entitled to see it.

[9] Para 64
[10] Para 67
[11] Para 73

(b) **Advice that falls within three categories**

The Supreme Court divided information that a trustee receives into three categories:

(i) "*Trustee information*."

(ii) "*Personal information*."

(iii) "*Disclosable information*."

"Trustee information"

This is information that is generated or held for the purposes of a Trust.

It was held that it

> *"includes all records, books and other papers belonging to the Trust and other papers (not belonging to the Trust) in the hands of a former trustee so far as they contain information relating to the Trust. They include Minutes of meetings and internal memoranda of a corporate trustee and correspondence files."*

The Court concluded, in relation to the information that was being withheld that:

> *"there is no evidential basis for concluding that any of the advice [that the trustee wanted to withhold from Ms Addleman] is personal to the trustees. We conclude that it is of a kind that [the trustees] would be required to hand over to a replacement trustee. It is thus 'trustee information'."*

"Personal information"

This was defined as information that is held by a trustee that is personal to the trustee.

The Court said of this category of information that where it

> *"consists of legal advice, some considerations (for instance who paid for the advice) may be material... 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."*[12]

In other words, advice that trustees obtain that is paid for from Trust funds will almost invariably be disclosable to beneficiaries since "*trustees must not use Trust funds for their own purposes*."

In paragraph 52 of its decision, the Supreme Court said that:

[12] Para 51

> *"Although not subject to Court-ordered disclosure, personal information which is not privileged may have to be produced in discovery."*

"Disclosable information"

This is information of a type that the Supreme Court held in *Erceg* [2017] 1 NZLR 320 is to be provided to beneficiaries.

Common interest privilege and the Joint Interest Exception

The Court dealt with the disclosure of information not only by reference to the source of money that was used to pay for the advice but also by reference to the legal doctrines of "*common interest privilege*" and the so-called "*joint interest exception*."

Where a trustee has a common interest with a beneficiary, privilege cannot be asserted against the beneficiary:

In paragraph 67 the Supreme Court held that that legal professional privilege cannot be exercised against a person who is jointly interested in the documents in respect of which privilege is claimed.

As for the "*joint interest exception*," the Court held that

> *"the joint interest exception first developed in respect of the law of Trusts and the ability of beneficiaries to obtain legal advice given to trustees in relation to the administration of a Trust. There is now a substantial body of authority applying the joint interest exception to disputes between trustees and beneficiaries. This is summarised in a passage cited by the Court of Appeal from the then latest version of Lewin on Trusts."*

The passage in Lewin is this:

> *"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 and 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 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."*[13]

It was held that the joint interest exception applied to

[13] Para 73

> *"legal advice given to the trustees relating to the general administration of the Trust including the distribution to Ms Addleman in 2002."*

The rationale for this exception is that it is

> *"founded on the assumption that advice to which it applies is obtained for benefit of beneficiaries."*[14]

> "*The general pattern of the authorities is that advice received before litigation is contemplated is subject to the joint interest exception*."[15]

> "*[The fact that] litigation is a possibility or even a likelihood at the time advice is taken is not of controlling significance. What is required for the joint interest exception not to apply is that the advice be sought for the dominant purpose of defending litigation. Given the obligations of a trustee to act appropriately and in the interests of the Trust as a whole, the starting point for the Courts should be the assumption that trustees seeking advice in respect of contemplated litigation are looking for guidance as to the right course of action (in respect of which the joint interest exception will apply). And the Courts can expect trustees not to seek advice as to how to resist litigation without first having sought advice (to which the joint interest exception will apply) as to the appropriate stance to take on the point at issue*."[16]

It was held that the joint interest survived until the day the proceedings were issued in June 2015. Although the correspondence that passed between the parties before that time contained threats of litigation it was held that "*there was at least a possibility of further disclosure being voluntarily made by [the trustee]*."[17]

The joint interest privilege expired with the onset of litigation since "*the beneficiary and trustees no longer have a joint interest in the subject matter of the litigation*."[18]

In the case of "*friendly litigation*" the Court held that the joint interest of the trustee and beneficiary would "*survive the commencement of proceedings*."[19]

Legal advice received by a trustee during the course of litigation may be discoverable to beneficiaries

It was recently held in *Easton v The NZ Guardian Trust Company Limited* [2021] NZHC 1117, 18 May 2021 that in litigation involving three defendants, advice that the trustee

[14] Para 74
[15] Para 91
[16] Para 92
[17] Para 93
[18] Para 95
[19] Para 99

received during the course of litigation was to be disclosed to the other defendants. Cooke J said:

> *"...The evidence now received at trial is that all of the beneficiaries could potentially dispute the actions taken by the trustee depending on what those actions were. This is not a situation where a trustee sought advice on the subject matter of potential litigation brought by a dissenting beneficiary against the Trust. It is a situation when the trustee was deciding upon the course of conduct when there were different views among the beneficiaries. In those circumstances the trustee's obligation when dealing with the contentious matters is to treat the beneficiaries equally. Any legal advice received by the trustee in deciding upon the course of action cannot be withheld from the beneficiaries. The rationale for applying the exception to the general rule that beneficiaries are entitled to see the legal advice obtained by the trustees concerning Trust affairs does not apply.*
>
> *This means that the trustee is only able to claim litigation privilege as against a beneficiary challenging the ultimate decision. Documents created for the dominant purpose of the anticipated litigation are able to be withheld. But legal advice on the decisions that the trustee is to make, and which informs the decisions by the trustee on the performance of their duties as trustee cannot be withheld from the beneficiaries."*[20]

What about legal professional privilege?

One of the fundamental aspects that all mature legal systems possess is that a person should be free to seek and obtain legal advice about their conduct without the advice being disclosable to people who may use the advice against that person's interests. It is sometimes called "*solicitor client privilege*."

It is not clear to me that the Supreme Court has retained the right of a trustee to seek and obtain such advice.

What can trustees do about this?

The main purpose of this webinar is to consider ways in which lawyers might be able to safely seek and obtain advice on criticisms of their conduct. These are my suggestions:

(a) **Arranging for the advice to be paid for personally**

It is clear from the Supreme Court's decision that advice received by a trustee, which is paid for from Trust funds, is likely to be disclosable to the beneficiaries. The advice must therefore be paid for from other sources.

One way for this to occur is for the solicitor trustee to pay for the advice himself/herself. Most professional trustees in this position will be loath to do

[20] Paras 11-12

that since they didn't accept the position of trustee with the intention of having to pay for such advice from their own resources.

A solicitor trustee can ask the settlor or a member of the family for whose benefit the Trust is primarily established, to pay for the advice from his/her resources.

A question arises as to whether trustees can legitimately make a distribution to the "*family trustee*" to enable that person to pay for the advice. I do not know of a case where this subject has been examined but I would not be surprised if a Court thought that the making of a distribution to a "*family trustee*" to enable that person to pay for legal advice on the trustees' exposure to liability, was an abuse of the power to make a distribution.

(b) **Oral advice**

The trustees may decide that a safer path is to pay privately for oral advice.

Whether such advice can be suppressed from disclosure is not certain. It is conceivable that a beneficiary with sufficient resources may be able, within the rules of Court, to obtain disclosure of oral advice. Even so, the obtaining of oral advice, paid for privately and not from Trust resources, may assist to suppress the disclosure of the advice.

(c) **Marking advice as being subject to solicitor client privilege**

The Supreme Court has held that:

> *"The Courts can expect trustees not to seek advice as to how to resist litigation without first having sought advice as to the appropriate stance to take on the point at issue."*

The trustees may, despite this wording, seek advice with their own private funds on how they should respond to allegations of misconduct. Although the Supreme Court says that the Courts "*can expect trustees not to seek*" such advice, the trustees may decide to expressly seek advice for that purpose. They might give instructions to the advising lawyer that:

> *"Although the Supreme Court has said that 'the Courts can expect trustees not to seek advice as to how to resist litigation' we consider that we are entitled to pay for advice from our own resources to learn what we might do about the allegations that are made against us. Our instructions to you are that the advice is to be given to us expressly for that purpose and it is not intended to be made available to any of the beneficiaries."*

Whether constraints of this nature will work is not clear.

(d) **Other strategies**

Vicki Ammundsen will be chairing the webinar and I am looking forward to having a dialogue with her on this important topic.

Presenter: Anthony Grant