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TRUST LAW/LEGAL PROFESSIONAL PRIVILEGE

Why *Addleman* is such a **difficult decision**

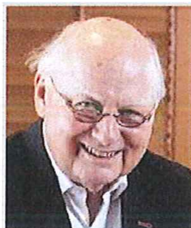
While secrecy of this nature may not reflect well on trustees, it would be unrealistic to think they will want to create a paper trail that will assist people to sue them

Anthony Grant

When a trustee receives a letter from a beneficiary, claiming the trustee has acted in breach of trust, what should the trustee do?

Typically, the trustee will consult a lawyer and ask if the criticisms are justified and, if so, ask what the trustee should do about it.

If the lawyer advises the trustee that there is substance to the beneficiary's complaint, the trustee will want to withhold the advice from the beneficiary since the beneficiary may use the letter as evidence to remove the trustee or to make a financial claim against him or her or to publicise the trustee's conduct and harm his or her reputation.


Anthony Grant

Assume the trustee is a solicitor acting as a professional trustee. Can the solicitor withhold the legal advice from the beneficiary?

I have advised trustees in the past that if they arrange for the trust to pay for legal advice in those circumstances, the beneficiary will almost certainly be allowed to see it since the beneficiaries are the beneficial owners of the trust's resources and are entitled to know what has been bought with 'their' money.

The Supreme Court has gone further than this in *Lambie Trustee Ltd v Addleman* [2021] NZSC 54 (1 June 2021), saying that even if the trustee pays for the advice with his or her own money, "This may not work ... and advice paid for by a trustee may nevertheless be trustee information" which must be disclosed to beneficiaries.

One of the realities of trusteeship these days is that many beneficiaries who don't get what they want are willing to make unreasonable threats and claims against trustees in ways that would not have happened a few years ago

This important statement appears in – of all places – a footnote in the judgment that Justice William Young gave on behalf of the five members of the court. It is footnote 33 and I will refer to it in more detail shortly.

In the *Addleman* case, the Supreme Court was not given copies of the advice the trustee had obtained, and that the plaintiff beneficiary wanted to see. Instead, the court asked counsel for the trustee to summarise the nature of the advice it wished to withhold from the beneficiary.

The summary said the documents were "advice/opinions obtained ... by the trustee ... ranging from matters of trust administration to advice about the trustee's discretionary powers and dealings with the beneficiaries".

Disclosure required

The Supreme Court has held that all the documents in those categories must be given to the beneficiary since they contain advice "of a kind that [the trustee] would be required to hand over to a replacement trustee".

The only category of advice the trustee has been allowed to withhold from the beneficiary is legal advice that the trustee obtained after it was served with court proceedings.

The trustee has, however, been given permission to apply to the court to withhold some of the advice that preceded the service of the legal proceedings, although whether any application it makes will succeed seems doubtful since "the courts can expect trustees not to seek advice as to how to resist litigation without having first sought advice [which must be disclosed to a beneficiary] as to the appropriate stance to take on the point at issue". [92]

What should trustees do about this?

ADLS has organised **a webinar** on the *Addleman* decision that will be held on 7 July, and I suspect the topic of most interest to those who attend will be what trustees can do to circumvent the court's decision.

An obvious response to the decision will be to seek oral advice from a lawyer in the hope that there will be no record of the advice that is given. While secrecy of this nature may not reflect well on trustees, it would be unrealistic to think they will want to create a paper trail that will assist people to sue them.

It may seem dishonourable for a lawyer trustee to adopt such a course of action but one of the realities of trusteeship these days is that many beneficiaries who don't get what they want are willing to make unreasonable threats and claims against trustees in ways that would not have happened a few years ago.

I referred earlier to footnote 33 of Justice William Young's judgment, where he said legal advice that a trustee pays for with his/her own money "may be trustee information" that must be disclosed to beneficiaries. He went on to say that "personal information that is not privileged may have to be produced in discovery".

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> **I believe the *Addleman* decision may not be confined to trustees but will also apply to executors [as] the duties of an administrator are to be deemed to be express trusts for the purposes of the Trusts Act**

As I understand it, the court is saying that if trustees pay for legal advice with their own money, the beneficiaries may be entitled to have copies of it except to the extent that the advice is subject to legal professional privilege or some other privilege.

The difficulty

The hard part about the Supreme Court's decision is this. A trustee who receives a threatening letter will want to know whether the complaint is justified. If the trustee pays for the advice with his or her own money, the advice would traditionally be the subject of legal professional privilege.

But the Supreme Court appears to say that the trustee's role in the trust may require him or her to obtain the advice for the benefit of the beneficiaries – with the consequence that the advice may not be the subject of legal professional privilege.

The relevant words in the judgment are "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 need to maintain legal professional privilege lies at the heart of all mature legal systems so people can get advice without having to fear that the advice will be publicised to their detriment.

If a trustee is accused of acting in breach of trust and if the accusation has substance, the act of seeking advice 'as to the appropriate stance to take on the point at issue' may reveal the trustee's vulnerability. It remains to be seen if advice on 'the appropriate stance to take on the point at issue' may not be protected by legal professional privilege.

I believe the *Addleman* decision may not be confined to trustees but will also apply to executors since Part 1 of Schedule 4 to the Trusts Act 2019 inserts a new provision into the Administration Act 1969 (it's s 4B). This says the duties of an administrator are to be deemed to be express trusts for the purposes of the Trusts Act, and the Trusts Act applies to those trusts.

The possibility that advice on the personal liability of trustees and administrators may not attract legal professional privilege would be startling. As Lord Brougham once said: "If [the privilege] did not exist... a man wouldn't venture to consult any skilful person or would only dare to tell his counsel half his case." ■

Anthony Grant is an Auckland barrister specialising in trusts and estates

The webinar on 7 July will be chaired by Vicki Ammundsen

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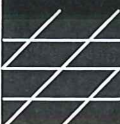

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