

Trustees' legal advice and privilege

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A difficulty arises when a beneficiary is looking to sue the trustees. The trustees will not be keen to provide their legal advice to the "other side", even though it is still "trust information".

The position has been clarified by the High Court. In *Easton* v *NZ Guardian Trust*, the High Court noted that there is a contest between two important principles – the right of

beneficiaries to receive trust information, and the right of people to receive legal advice on a confidential basis.

The Court said that the new Trusts Act has codified the duties of trustees. The right to see trust information is not an absolute right, but can be refused if the trustees can justify withholding it for one of the reasons set out in the Act. Failing that, trust information must be disclosed if requested. Somewhat surprisingly, a claim for legal privilege is not one of the grounds in the Act trustees can use to withhold information.

If there is a dispute between beneficiaries, the trustees' obligation is to act impartially between them. The position changes where there is anticipated litigation. Then a trustee will have to decide if it is in the best interests of all beneficiaries and the trust as a whole to defend a claim brought by one beneficiary.

At that stage, the Court said their interests will have diverged. The beneficiary and the trustees are now adversaries, and no longer have the common interest on which the availability of trust information is based. Once an adversarial position is reached, the trustees' duty to act in the best interests of the other beneficiaries and the trust means providing legal advice about the dispute to the disputing party is no longer appropriate. The right to legal privilege becomes the priority interest.

This position applies not just in a situation where advice is for the dominant purpose of the litigation (the traditional basis for "litigation privilege"). It also applies to legal advice on what the trustees should do in light of complaints made by the potentially litigating beneficiary. What matters is the loss of common interest to the point that a beneficiary who wishes to sue can be treated as "outside the tent". The Court suggested that once a disagreement reaches that point, it might be prudent as a matter of transparency for trustees to advise the disputing beneficiary that access to privileged material will now be refused.

It is notable that not all litigation will lead to a right to privilege. If the litigation is not adversarial, the privilege may not arise. A common situation is where there are differences between beneficiaries and the trustees go to the court to seek directions on what they should do. But if that litigation reaches a stage that the dispute becomes adversarial, privilege will then arise and require further legal advice to be withheld.

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