IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 118/2019
[2021] NZSC 54

BETWEEN		LAMBIE TRUSTEE LIMITED Appellant
AND		PRUDENCE ANNE ADDLEMAN Respondent

Hearing:	2 December 2020
Further memoranda filed:	10 May 2021
Court:	William Young, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	D A T Chambers QC and J M McGuigan for Appellant A S Ross QC and R A Rose for Respondent
Judgment:	1 June 2021

JUDGMENT OF THE COURT

A **With the clarification that the orders for disclosure made by the Court of Appeal do not extend to legal advice given from June 2015 in connection with this litigation and with leave reserved to Lambie Trustee Ltd to revert to this Court in relation to advice received after 7 November 2014 and before June 2015, the appeal is dismissed.**

B **Costs are reserved.**

REASONS
(Given by William Young J)

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The appeal

[1] This appeal arises out of a dispute between two sisters, Annette Jamieson and Prudence Addleman. It concerns the Lambie Trust. The sole trustee is Lambie Trustee Ltd, a company which Ms Jamieson controls. Ms Jamieson and Mrs Addleman are both beneficiaries. In issue is the extent to which legal advice received by the Trust should be disclosed to Mrs Addleman.

[2] In proceedings commenced on 16 June 2015, Mrs Addleman sought disclosure of a wide range of trust documents. This extended to:

> … 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 …

[3] In the High Court, Woolford J accepted the argument that the Lambie Trust was, in substance, a "sole purpose" trust for the benefit of Ms Jamieson and had been funded with her money.[1] This conclusion heavily influenced his refusal to order any disclosure of trust documents.

[4] On the basis of further evidence admitted for the purposes of the appeal,[2] the Court of Appeal was distinctly sceptical of the contention that the trust had been solely funded by Ms Jamieson and held that in any event, "the Trust cannot properly be regarded as a 'sole purpose trust' or 'essentially [Ms Jamieson's] trust".[3] Looking at the case on that basis, the Court of Appeal directed disclosure by Lambie Trustee Ltd of:[4]

> … all documents in its possession or power relating to the Lambie Trust in the following categories:
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> (i) financial statements;
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> (ii) minutes of meetings; and

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1 *Addleman v Lambie Trustee Ltd* [2017] NZHC 2054, (2017) 4 NZTR ¶27-016 [HC judgment] at [67] and [73].

2 *Addleman v Lambie Trustee Ltd* [2018] NZCA 616, (2018) 4 NZTR ¶28-036 (Kós P, Miller and Clifford JJ).

3 *Addleman v Lambie Trustee Ltd* [2019] NZCA 480, (2019) 5 NZTR ¶29-016 (Cooper, Clifford and Gilbert JJ) [CA judgment] at [60].

4 Order D.

(iii) any legal opinions and other advice obtained by the trustees and funded by the Trust.

[5] Leave to appeal to this Court was granted only in relation to the last category of documents:[5]

> Leave to appeal is granted on whether the Court of Appeal was correct to order the applicant to disclose to the respondent any legal opinions and other advice obtained by the trustees of the Lambie Trust and funded by the Trust.

[6] The approved question was expressed in this way:[6]

> The approved question is whether the Court of Appeal was correct to reject the applicant's claims of legal advice privilege and litigation privilege respectively.

[7] The Court noted in its reasons:

> [2] We ask counsel for the applicant to include in her submissions to the Court such general information about the nature of the legal opinions and other advice as possible, so that the Court has a proper context in which to consider the privilege issues. For the avoidance of doubt, we confirm the Court does not seek to view the documents themselves. The hearing will be confined to issues of principle only.

Lambie Trustee Ltd's submissions in response to this request were in these terms:

> 30. The appellant claims legal advice privilege in relation to advice / opinions obtained either by the trustee company or by a former trustee. The advice / opinions fall across a spectrum of issues, ranging from matters of trust administration to advice about the trustees' discretionary powers and dealings with beneficiaries.
>
> 31. The appellant further claims litigation privilege in respect of communications between the appellant, its legal advisers, and third parties which were made etc for the dominant purpose of a proceeding (from 16 June 2015, when Mrs Addleman filed her statement of claim) or for the dominant purpose of an apprehended proceeding (from 24 September 2014, when the respondent's former solicitors threatened proceedings).

[8] Our leave decision confined the appeal to whether Lambie Trustee Ltd could resist disclosure of legal advice on the basis of legal advice or litigation privilege. As it turned out, the arguments advanced on behalf of Lambie Trustee Ltd extended to

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5 *Lambie Trustee Ltd v Addleman* [2020] NZSC 14, (2020) 5 NZTR ¶30-002 (Glazebrook, O'Regan and Ellen France JJ) [SC leave judgment] Order A (citation omitted).

6 Order B.

broader conceptions of confidentiality, a general invocation of disclosure principles adopted by this Court in *Erceg v Erceg*[7] and an attempt to rely on the Trusts Act 2019, which came into full effect on 30 January this year (that is, after the hearing of the appeal but before judgment). As well, counsel for Lambie Trustee Ltd, relying on the last sentence in the leave judgment, invited us to issue a judgment addressing only the general principles which should apply and leaving it to determine what documents should be disclosed.

[9] We are not prepared to broaden the scope of the appeal beyond the question on which leave was granted, although we will discuss, in passing, some (although by no means all) of the arguments which we regard as outside of that scope. Nor are we prepared to confine ourselves to general principles, only leaving it to Lambie Trustee Ltd to itself determine how those principles apply to the documents in its possession. In respect of virtually all documents in question, the necessary corollary of the principles we adopt is that the documents are to be disclosed. There is, however, a limited category of documents in respect of which we reserve leave to Lambie Trustee Ltd to come back to the Court if it wishes to persevere with its claim to privilege.

[10] The leave decision refers to "legal advice privilege and litigation privilege". These are expressions which appear in provisions in the Evidence Act 2006 which we discuss later.[8] They are both subsets of the broader concept of legal professional privilege. For reasons we explain later, we will generally refer to legal professional privilege rather than its two subsets.[9]

[11] We address the appeal under the following headings:

(a) The factual background.

(b) What advice is subject to the disclosure order?

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7 *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.
8 See below at [65]–[68].
9 See below at [65].

(c) General principles as to disclosure by a trustee of trustee information to beneficiaries and their application to this case.

(d) Is disclosure precluded by legal professional privilege?

(e) Costs.

(f) Disposition.

The factual background

The Jamieson family

[12] The parents of Mrs Addleman and Ms Jamieson were Alexander and Merryl Jamieson. Alexander Jamieson was a businessman who was associated with a number of businesses in Australia and elsewhere. In his commercial activities, he was very private. He died on 2 November 2001. His wife, Merryl Jamieson, died on 19 September 2012. They had four children, Mrs Addleman, Ms Jamieson and their two younger siblings, Anthony and Meredith. Mrs Addleman is 71 and Ms Jamieson is 67. They do not have children. Ms Jamieson has never married. The Jamieson family was primarily based in Sydney, which is where Mrs Addleman, Ms Jamieson and their siblings grew up. For most of her adult life, Mrs Addleman has lived in the United Kingdom with her husband Martin Addleman.

Ms Jamieson's accident

[13] In 1972, Ms Jamieson, then 19, was catastrophically injured in an accident in a swimming pool in Sydney operated by a local authority. She sued the local authority and, in 1979, was awarded damages which, after an appeal, she eventually received in 1981. The amount paid to her was AUD 1,029,084.

The Howick development

[14] As far as we can tell from the limited information before us, the funds held by the Lambie Trust result largely from the development of what was once a farm in Howick, Auckland.

[15] The possibility of this development was raised with Alexander Jamieson by his nephew, Robert Palmer. A company, Howick Parklands Ltd (HPL), was incorporated on 19 September 1986. Mr Palmer held 99 per cent of the shares in the company and he was initially the sole director. Mr Palmer held these shares on trust but it is not entirely clear who the beneficial owner was. What is clear is that Mr Palmer acted on the direction of Alexander Jamieson. HPL duly acquired the land and commenced development.

[16] Ms Jamieson's position in this litigation is that it was her money which funded the purchase and the tenor of her evidence was that Mr Palmer held the shares in HPL on trust for her (albeit possibly through Alexander Jamieson as an intermediary). Her general position is supported by a statement signed by Mr Palmer on 14 November 2014 and in an affidavit to the same effect by Mr Palmer, which was before the High Court.

[17] This development did not initially run smoothly. Some of the background is discussed in the judgment of Thomas J in *Howick Parklands Building Co Ltd v Howick Parklands Ltd*.[10] But despite these difficulties, the development was, in the end, successful and very profitable.

The Lambie Trust

[18] The Lambie Trust (the Trust) was established on 19 March 1990. The settlor was Robert Palmer. The original trustees were Alexander Jamieson, Anthony Jamieson, Mr Palmer and Wayne Hanna, a New Zealand accountant.

[19] Mrs Addleman and Ms Jamieson, along with two companies, Edmonton Co Pty Ltd SA (incorporated in Australia) and Mercadeo E Inversiones Gil SA (incorporated in Panama) (both controlled by Ms Jamieson), are the final beneficiaries. On the vesting day (80 years from the date of the establishment of the trust), the trustees are to hold the remainder of the Trust fund on trust for such of the final beneficiaries then living and the corporate final beneficiaries still in existence as tenants in common in equal shares.

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[10] *Howick Parklands Building Co Ltd v Howick Parklands Ltd* [1993] 1 NZLR 749 (HC).

[20] The trust is discretionary. The discretionary beneficiaries are the final beneficiaries, any child or remoter issue, wife, husband, widow or widower of any final beneficiary, and any lawful charitable object. Mrs Addleman's husband is thus a discretionary beneficiary.

[21] Anthony and Meredith are not beneficiaries.

[22] A power to remove trustees and to appoint new trustees was vested in Alexander Jamieson and, after his death, in his administrator.

Transactions affecting the Lambie Trust and changes of trustee

[23] In 1991, the shares held by Mr Palmer in HPL were transferred to the Lambie Trust.

[24] Mr Hanna resigned as a trustee on 4 August 1992. Mr Palmer was removed as a trustee on 22 September 1992. Anthony was removed as a trustee on 13 September 1993 and replaced by Donald Hargrave, a New Zealand accountant, and Peter Kemps, a New Zealand solicitor. Alexander Jamieson retired as a trustee on 1 May 2000 and was replaced by Ms Jamieson. As noted, Alexander Jamieson died on 2 November 2001. Ms Jamieson and her mother were his executors.

[25] Ms Jamieson and Messrs Hargrave and Kemps retired as trustees on 20 April 2006 and were replaced by the appellant, Lambie Trustee Ltd. Ms Jamieson is the sole director and shareholder of Lambie Trustee Ltd.

The "memorandum of wishes"

[26] On 9 May 2000, Mr Kemps wrote to Alexander and Merryl Jamieson. This letter has been referred to in the litigation as a "memorandum of wishes". It followed a visit to Sydney by Messrs Kemps and Hargrave. It also followed the 1 May 2000 retirement of Alexander Jamieson as a trustee and the appointment of Ms Jamieson. The letter is in these terms:

> Thank you very much for your hospitality during our recent visit. [Mr Hargrave] and I were well satisfied with the progress we were able to make during our visit and appreciated your assistance.

> I wanted to summarise the understanding [Mr Hargrave] and I had of Mr Jamieson's wishes for ultimate distribution of Lambie Trust funds. Apart from the allowance to be paid to Mrs Jamieson's relatives, the ultimate distribution of the Trust fund is to be as follows:
>
> 1. A fund of NZ$2,000,000 to be set aside to provide income for Anthony and his children during their lifetimes.
>
> 2. Of the balance of the Lambie Trust fund 40% but not more than NZ$10,000,000 to be set aside for the Paraplegic and Quadriplegic Organisation and other charities.
>
> 3. Of the balance 50% to be paid to [Ms Jamieson] and 25% each to Meredith and [Mrs Addleman].
>
> Your instructions are that Anthony's fund is to be administered on his behalf during his lifetime and income and capital made available to him and his family at the discretion of the Trustees.
>
> [Mr Hargrave] and I are dealing with [Ms Jamieson] on a number of other matters including the funding of further land purchases by Lambie Trust and the development of those properties by Mr Noma [a business associate of Mr Jamieson].

As noted above at [21] and below at [33](b), Anthony and Meredith are not beneficiaries. This means that the memorandum was not in accordance with the trust deed.

Distribution to Mrs Addleman

[27] Mrs Addleman first became aware of the Trust's existence around the time of her father's death in late 2001. She did not find out that she was a beneficiary of the Trust until November 2002 when she received a letter from Mr Kemps:

> As you know, I am one of the Trustees of the Lambie Trust established in New Zealand in March 1990. The other Trustees are Don Hargrave and your sister, [Ms Jamieson].
>
> The Trust is a discretionary Trust and you are named as one of the discretionary beneficiaries. The Trustees in their discretion have decided to make a distribution of part of the Trust fund to you. While it had been intended that this distribution would not take place until the passing of your mother, the Trustees have decided to bring the distribution forward so that you can be in a position to make your own financial decisions regarding these funds and can use the funds to meet your own expenditure.
>
> The sum that will be distributed to you is NZ$4,257,000.00 and represents the full distribution of funds that will be coming to you from Lambie Trust.

> Please note that this distribution bears no relationship to the estate of your late father. Neither [Mr Hargarve] nor I act in your late father's estate nor in respect of any other of his affairs or those of your mother.
>
> …

Mrs Addleman's requests for trust information

[28] In March 2003, Mrs Addleman wrote, through her solicitors, to Mr Kemps enquiring about the assets of the Trust and whether she still had a beneficial interest in any Trust property. She asked for a copy of the trust deed, the trust's accounts and other trust documents. In the course of the correspondence which followed, Mr Kemps wrote to her solicitors in December 2003 saying he was obtaining independent legal advice as to the trustees' obligations. Following further correspondence from Mrs Addleman's solicitors, Mr Kemps wrote on 19 April 2004 enclosing a copy of the trust deed and documents showing the appointment and removal of trustees.

[29] Mrs Addleman did not pursue the matter further until 24 September 2014, when she wrote again through her solicitors seeking comprehensive information about the Trust, including copies of all financial statements dating back to its inception. There followed further correspondence up until 19 November 2014.

[30] Later in these reasons we discuss the November 2003–November 2014 correspondence in some detail.[11] For the moment, it is sufficient to note that:

(a) by November 2014, the only documents made available to Mrs Addleman were:

(i) a copy of the trust deed and documents recording the appointment and removal of trustees (which had been disclosed in 2004); and

(ii) the statement of Mr Palmer of 14 November 2014 referred to above at [16];

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[11] See below at [83]–[94].

(b) the possibility of proceedings being issued was mentioned in letters of 1 April 2004, 24 September 2014 and 7 November 2014; and

(c) the proposition that the Howick development[12] was "seeded exclusively" from Ms Jamieson's compensation was first mentioned in a letter from Mr Kemps of 3 October 2014, with the Court of Appeal drawing the inference, not challenged before us, that Mr Kemps was only told that the trust was a sole purpose trust sometime after April 2004 and "likely" around 14 November 2014, which was the date of Mr Palmer's statement.[13]

The Court of Appeal's evaluation of the "sole funding" and "sole purpose" contentions

[31] In the High Court, the Judge accepted that the Lambie Trust had been funded using Ms Jamieson's compensation money.[14] He also accepted that the Lambie Trust had been set up for substantially the "sole purpose" of providing for Ms Jamieson,[15] and that Mrs Addleman had been added as a beneficiary only as a "back stop" to cover the contingency that Ms Jamieson might die prematurely.[16]

[32] In its judgment, the Court of Appeal was highly sceptical of the sole funding argument and rejected the sole purpose argument. This was based on two lines of reasoning.

[33] The first was that on the material disclosed to Mrs Addleman, the case as advanced by Lambie Trustee Ltd was not particularly plausible:

(a) If the Howick development had been funded using Ms Jamieson's compensation and the purpose of the Trust was to provide for her lifelong needs, it is odd that this was not acknowledged in the Trust

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12 The reference was to the Lambie Trust having been "seeded" in this way but, in context, this was a reference to the Howick development.
13 CA judgment, above n 3, at [42].
14 HC judgment, above n 1, at [67].
15 At [73].
16 At [47] and [66].

deed, for instance by prioritising her interests over those of the other beneficiaries.[17]

(b) The case advanced was not congruent with Alexander Jamieson's wishes, as recorded in the letter of May 2000, that substantial benefits should be provided to persons who were not beneficiaries of the Trust, namely Anthony and his children, and Meredith. The same applies to the reference in that letter to "Mrs Jamieson's relatives".[18]

(c) The Court went on to say that if the Trust truly was a "sole purpose trust", it was surprising that Mr Kemps did not learn of this "until sometime between April 2004 and November 2014 (likely around the time of Mr Palmer's statement dated 14 November 2014)".[19] Mr Kemps and Mr Hargrave commenced serving alongside Alexander Jamieson as trustees of the Trust in September 1993 (with Alexander Jamieson not retiring as trustee until 1 May 2000) and Mr Kemps was throughout the solicitor to the Trust.

[34] The second line of reasoning relied on by the Court of Appeal drew on new evidence received by that Court:

(a) Records obtained from the archived files of the Overseas Investment Commission show that Chapman Tripp wrote to the Commission in July 1986 seeking approval on behalf of Recibo Shipping SA (Recibo) (a company incorporated in Panama in 1976) to purchase the undeveloped land in Howick. The purchase price was NZD 4 million, payable as NZD 2 million in cash and NZD 2 million over two years (NZD 1 million payable in August 1987 and the balance in August 1988). The land was to be acquired for the purposes of carrying out a residential subdivision. It was anticipated that the proposed activity would result in NZD 4 million being introduced to cover the initial part

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17 CA judgment, above n 3, at [40].
18 At [41].
19 At [42].

of the purchase price and to fund the development. Chapman Tripp advised that Recibo was directed by Alexander Jamieson, but day-to-day management and administration would be undertaken by his nephew, Mr Palmer.[20]

(b) In a further letter dated 21 August 1986, Chapman Tripp attached a balance sheet for Recibo certified by Alexander Jamieson as the corporation's attorney. This showed that as at 31 March 1986, Recibo had no liabilities and assets worth in excess of NZD 12 million, comprising industrial property in Australia valued at AUD 3 million plus bank deposits in three denominations: AUD 900,000, DM 3,700,000 and USD 950,000.[21]

(c) The Commission gave consent in September 1986 and settlement of the purchase occurred.[22]

(d) Title to the land was initially taken in the name of Mr Palmer in November 1986, but transferred to HPL a year later, in November 1987. At that time, Mr Palmer held 99 of the 100 shares in HPL, but according to a letter from Chapman Tripp to the Commission in February 1987, the beneficial owner of HPL was Lake Real Estate SA, another company incorporated in Panama. As with Recibo, Lake Real Estate SA was said to be controlled by one of Alexander Jamieson's family trusts. This cannot have been the Lambie Trust because it had not been established at this stage.[23]

(e) The Court found it difficult to see how Ms Jamieson could have funded the Howick purchase.[24] The AUD 1,029,084 compensation which she finally received in 1981 was all the money she had at the time. She used these funds to purchase a flat in Wimbledon for GBP 300,000

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20 At [47].
21 At [48].
22 At [48].
23 At [48].
24 At [49].

> (AUD 472,000) in late 1981 and a house in the United States for USD 267,000 (AUD 296,000) in 1987. As well, around 1986, Ms Jamieson made an unspecified loan to Mr Palmer because he was in financial difficulty.[25]

[35] The Court noted:

> [49] These contemporaneous records are not readily reconcilable with the evidence Ms Jamieson and Mr Palmer gave in the High Court as to the source of the funding for the Howick development. Given the significant purchases made by Ms Jamieson following receipt of her compensation payment, it seems unlikely there would have been sufficient available to fund the purchase and development of the Howick land. Rather, it appears that Recibo had substantial funds on hand and would not have needed recourse to what remained of Ms Jamieson's compensation payment for this purpose. There is no mention of Ms Jamieson being the true intending purchaser as the beneficial owner of Howick Parklands Ltd through Recibo, Lake Real Estate or otherwise.

[36] Although expressed in cautious terms, the Court of Appeal judgment casts a major shadow over the factual accuracy of the sole funding case advanced by Lambie Trustee Ltd and Ms Jamieson. That case is implausibly at odds with the terms of the trust deed and the May 2000 letter and is inconsistent with the contemporaneous documents which were introduced in evidence in the Court of Appeal. As well, the Court flatly rejected the view that the Trust could be properly regarded as a "sole purpose trust" or "essentially [Ms Jamieson's] trust".[26]

[37] The significance of this is twofold: first, the primary basis on which the High Court declined Mrs Addleman's application is not sustainable; and, secondly, given the serious doubts and findings about Lambie Trustee Ltd's rationale for its actions, the circumstances surrounding the establishment and operation of the Lambie Trust are such as to invite inquiry by a beneficiary.

What advice is subject to the disclosure order?

[38] The disclosure ordered by the Court of Appeal extended to "any legal opinions and other advice obtained by the trustees and funded by the Trust".[27] Construed

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25 At [46].
26 At [60].
27 Order D(iii).

literally, this extends to all legal advice given to Lambie Trustee Ltd right up until the Court of Appeal judgment and perhaps in relation to the appeal to this Court as well.

[39] The prayer for relief in Mrs Addleman's statement of claim set out at [2] above reads most naturally as referring to advice which was then in existence – that is, at the time this proceeding was commenced. If it was intended to encompass future advice received by Lambie Trustee Ltd in respect of its defence of the proceeding, we would expect that to have been spelt out in the pleading. We will set out later in this judgment the reasons given by the Court of Appeal for rejecting the claim of legal professional privilege as against Mrs Addleman. That reasoning was entirely adequate to reject legal professional privilege as against Mrs Addleman in respect of advice in existence at the time the proceeding commenced. In contradistinction, if the Court had intended to order disclosure to Mrs Addleman in respect of advice received by Lambie Trustee Ltd in relation to the present litigation, we have no doubt that more elaborate reasons would have been provided.

[40] For these reasons, we see the order as not extending to legal advice given from June 2015 to Lambie Trustee Ltd in connection with this litigation. But, because we heard argument in relation to this advice we will nonetheless discuss whether Lambie Trustee Ltd is entitled to legal professional privilege in relation to it.

General principles as to disclosure by a trustee of trustee information to beneficiaries and their application to this case

Disclosure and discovery

[41] In issue in this appeal are the principles which apply to court-ordered disclosure of information by trustees to beneficiaries. We are not directly concerned with rights of discovery in litigation between beneficiaries and trustees, although the joint interest exception to legal professional privilege sometimes arises in respect of discovery.

[42] A document which is subject to legal professional privilege for disclosure purposes will be likewise subject to the same privilege when it comes to discovery and vice versa. In contradistinction, information that is personal to trustees in the sense

which we are about to explain and is not privileged is subject to discovery but is not susceptible to court-ordered disclosure.

Terminology: "trustee information", "personal information" and "disclosable information"

[43] Information generated or held for the purposes of a trust – that is information held by trustees as trustees – is not the personal property of the trustees.[28] In this part of the judgment we will refer to such information as "trustee information". We distinguish such information from information held by a trustee relating to a trust which is personal to the trustee, to which we refer as "personal information".

[44] Trustee information is susceptible to court-ordered disclosure to beneficiaries. But disclosure will only be required by the courts if appropriate to ensure trustee accountability. Under equitable principles, disclosure will not normally be ordered in relation to information bearing on discretionary decisions by trustees. As we will note, it may be that the residual power to order disclosure of such information has been abrogated by the Trusts Act.[29] More importantly for our purposes, trustees who have legal professional privilege as against a particular beneficiary in relation to particular information may not be compelled to disclose that information to that beneficiary. In this part of the judgment, we describe information which ought to be disclosed to a beneficiary as "disclosable information".

[45] There is some awkwardness over this terminology. What we call trustee information corresponds to what the Trusts Act describes as "core documents".[30] A difficulty with using that expression in this judgment is that "core documents", or like expressions, have sometimes been used in the different sense of "disclosable information".

[46] Our concepts of trustee information, personal information and disclosable information warrant brief elaboration.

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28 This is not to say that an individual beneficiary has a proprietary interest in it, albeit that all beneficiaries, acting in concert, may have such an interest under the rule in *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282 (Ch).

29 See s 49(b) of the Trusts Act 2019 and also [59] below.

30 Section 45.

Trustee information

[47] As we have noted, trustees are required to retain documents recording trustee information, and where there is a change of trustees, outgoing trustees must hand over such documents to their successors. This latter obligation is discussed in *Lewin on Trusts* in this way:[31]

> **Transfer of trust papers on change of trusteeship**
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> **21-119** A new trustee is entitled to require the former trustee to deliver up to him all records, books and other papers belonging to the trust. He is also entitled to inspect and copy other papers (not belonging to the trust) in the hands of the former trustee so far as they contain information relating to the trust. The papers to which he is so entitled include the minutes of meetings of the trustees and the internal memoranda of a corporate trustee, and correspondence files.

[48] Corresponding obligations are provided for in ss 45 to 48 of the Trusts Act. These provide for obligations of trustees to keep and pass on to their successors core documents, which are defined as including "documents necessary for the administration of the trust".[32]

[49] Trustee information may include advice trustees obtain from third parties. Trustees must retain and hand over to their successors records of such advice. For reasons which will become apparent, it is difficult to see how a retiring trustee could ever claim legal professional privilege as against a successor in respect of such advice.

Personal information

[50] Not all information relating to a trust and held by a trustee is information generated or held for the purposes of a trust.

[51] 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.

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31 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) [*Lewin* (20th ed)] (footnotes omitted). For an illustration of this rule in action, see *Tiger v Barclays Bank Ltd* [1951] 2 KB 556.

32 Trusts Act, s 45(i).

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.[33]

[52] Although not subject to court-ordered disclosure, personal information which is not privileged may have to be produced in discovery.

Disclosable information

[53] The general principles as explained in our decision in *Erceg* are set out in the Court of Appeal judgment in a way which is not substantially in dispute and which we are content to paraphrase.[34]

[54] Trustees must administer the trust in accordance with the trust deed and account to beneficiaries. The Court has jurisdiction to supervise the administration of trusts and intervene where appropriate. A beneficiary seeking to hold trustees to account may need access to documents to assess whether the trustees have acted in accordance with their obligations. The underlying principle is to identify the course of action most consistent with the proper administration of the trust and the interests of beneficiaries generally, not just the beneficiary seeking disclosure. Interests of confidentiality must be considered. Trustees are not usually required to disclose to discretionary beneficiaries their reasons for exercising their discretion in the manner they did.[35]

[55] *Erceg* (agreeing in this respect with the judgment of the Privy Council in *Schmidt v Rosewood Trust Ltd*[36]) affirmed that the jurisdiction to order disclosure is founded on the obligation of trustees to account for their administration rather than an assumed proprietary right of beneficiaries in the copies of the relevant documents held

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33 This may not work the other way and advice paid for by a trustee may nevertheless be trustee information.

34 CA judgment, above n 3, at [21].

35 See *Erceg*, above n 7, at [55] and n 54. It was common ground between the parties in *Erceg* that trustees are not required to give reasons to discretionary beneficiaries for the manner in which they exercise discretionary authority. However, as there was no challenge to this proposition in argument, the Court chose not to express a concluded view on it. At [56(f)], the Court said that it "would not normally be appropriate" to require such disclosure.

36 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709.

by the trustees (compare *Re Londonderry's Settlement*[37]). The Court in *Erceg* observed:

> [51] We see the starting point as being the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries. A beneficiary who seeks such an account may seek access to documentation necessary to assess whether the trustee has acted in accordance with the trust deed. That can be expected to be the basis on which the beneficiary will seek disclosure of trust documentation.

[56] The judgment noted that "the strongest case for disclosure would be a case involving a request from a close beneficiary for disclosure of the trust deed and the trust accounts, which would be the minimum needed to scrutinise the trustees' actions in order to hold them to account".[38] The Court expected that trustees would normally provide to close beneficiaries on request, if not proactively, trust accounts and other documents showing how the trust had been administered and what had become of the trust property.[39]

[57] The position is substantially the same under the Trusts Act. Sections 49 to 55 deal with the ability of beneficiaries to obtain "trust information". This is defined in s 49 as meaning:

> (a) … any information—
>
> (i) regarding the terms of the trust, the administration of the trust, or the trust property; and
>
> (ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but
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> (b) does not include reasons for trustees' decisions.

Section 50(1) provides:

> **50 Purpose and application of sections 51 to 55**
>
> (1) The purpose of sections 51 to 55 is to ensure that beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees.

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37 *Re Londonderry's Settlement* [1965] Ch 918 (CA).
38 *Erceg*, above n 7, at [60].
39 At [62].

[58] *Erceg* and ss 51 to 55 do not authorise the disclosure of personal information. More importantly for present purposes, trustee information in respect of which trustees may claim legal professional privilege against a disclosure-seeking beneficiary is not disclosable information in respect of that beneficiary.

[59] As will be apparent, there is a difference of possible significance between the principles explained in *Erceg* and the Trusts Act. Under the former, the disclosure of documents bearing on discretionary decisions is not necessarily excluded. In contradistinction, under s 49(b) of the Trusts Act, there is an exclusion in relation to "reasons for trustees' decisions". The significance of this difference is not in issue before us and there is no need for us to discuss it.

The effect of the Court of Appeal judgment and our leave decision

[60] In terms of our taxonomy, the Court of Appeal judgment proceeds on the basis that the legal advice now in issue is:

(a) trustee information and not personal to the trustees who received it; and

(b) disclosable information.

[61] The Court of Appeal order applies only to advice paid for by the trust. Lambie Trustee Ltd was given an opportunity to provide information in relation to the nature of the advice and, as we have explained, responded in only very general terms. There is no evidential basis for concluding that any of the advice is personal to the trustees. We conclude that it is of a kind that Lambie Trustee Ltd would be required to hand over to a replacement trustee. It is thus trustee information.

[62] The Court of Appeal's conclusions as to why the legal advice is disclosable information covered much ground. But the only issue on which we granted leave to appeal is whether disclosure is precluded by legal professional privilege. This is the issue to which we now turn.

Is disclosure precluded by legal professional privilege?

The issues

[63] There are three broad categories of legal advice about which we heard argument:

(a) legal advice given to the trustees relating to the general administration of the trust, including the distribution to Mrs Addleman in 2002;

(b) legal advice given to the trustees as to what documents should be disclosed to Mrs Addleman; and

(c) legal advice given to Lambie Trustee Ltd from June 2015 in connection with this litigation.

Although we do not see the order made by the Court of Appeal as encompassing advice in the last of these categories, we heard argument as to this advice and, for this reason, will discuss it.

[64] All of the advice is undoubtedly covered by legal professional privilege in the sense that, as against anyone not jointly interested in it, Lambie Trustee Ltd 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 Ltd is not entitled to claim privilege against her.

The Evidence Act provisions

[65] The Evidence Act deals separately with "Privilege for communications with legal advisers" (s 54) and "Privilege for preparatory materials for proceedings" (s 56). In the appeal, the former was referred to as "legal advice privilege" and the latter as "litigation privilege". They are subsets of the common law principles of legal professional privilege. The principal difference for the purposes of both the Evidence Act and the common law as to professional legal privilege is that litigation privilege (applying to material compiled "for the dominant purpose of preparing for"

actual or apprehended litigation[40]) covers a broader range of material (in particular, communications with third parties).

[66] Section 53(1) and (5) of the Evidence Act provide:

> **53 Effect and protection of privilege**
>
> (1) A person who has a privilege conferred by any of sections 54 to 59 in respect of a communication or any information has the right to refuse to disclose in a proceeding—
>
> (a) the communication; and
>
> (b) the information, including any information contained in the communication; and
>
> (c) any opinion formed by a person that is based on the communication or information.
>
> …
>
> (5) This Act does not affect the general law governing legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, nor for the purpose of, a proceeding.

[67] The privilege sections in the Evidence Act being primarily concerned with the disclosure of information for the purposes of proceedings (for instance, by way of discovery) rather than disclosure which is the purpose of a proceeding, it is open to question whether this appeal falls to be determined under the Evidence Act or the common law. This, however, is a question which we need not determine. This is because 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. In respect of statutory privilege, this is provided for by s 66(1)(b) of the Evidence Act:

> **66 Joint and successive interests in privileged material**
>
> (1) A person who jointly with some other person or persons has a privilege conferred by any of sections 54 to 60 and 64 in respect of a communication, information, opinion, or document—
>
> (a) is entitled to assert the privilege against third parties; and

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[40] See s 56(1) of the Evidence Act 2006.

(b) is not restricted by any of sections 54 to 60 and 64 from having access or seeking access to the privileged matter; and

(c) may, on the application of a person who has a legitimate interest in maintaining the privilege (including another holder of the privilege), be ordered by a Judge not to disclose the privileged matter in a proceeding.

…

[68] We construe the slightly elliptical language of s 66(1) as reflecting a number of related common law concepts in relation to legal professional privilege: common interest privilege, joint privilege, and the joint interest exception to privilege. Each warrants explanation, brief in the case of the first two and more elaborate in respect of the third.

Common interest privilege

[69] Common interest privilege arises where a number of people involved in a dispute share information (including legal advice) amongst themselves and concerns whether such sharing is a waiver of privilege. Where the sharing is confined to those who share what the law regards as common interest, such sharing does not waive privilege against third parties.

Joint privilege

[70] Where two or more people directly and jointly commission legal advice from the same lawyer, they have a joint privilege in the advice which they are given. They are both entitled to have access to the advice (and thus to any documents which record it). Joint privilege also arises where there is a direct relationship of agency or partnership between the person who obtained the advice and those seeking disclosure.

[71] Mrs Addleman and the trustee or trustees for the time being of the Lambie Trust did not jointly commission the obtaining of legal advice and the trustees were not acting as Mrs Addleman's agent in obtaining legal advice. It follows that there is not joint privilege in the legal advice in issue.[41]

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[41] Confusingly, the expression "joint privilege" is sometimes used to refer to the joint interest exception, see for instance *Schreuder v Murray (No 2)* [2009] WASCA 145, (2009) 260 ALR 139 at [10]. They are, however, separate concepts.

The joint interest exception

[72] The joint interest exception to legal professional privilege is engaged in circumstances in which the joint interest in legal advice is less direct than in the case of joint privilege. Thus a company and its shareholders may share a joint interest in legal advice obtained by the company[42] despite the company not being an agent of its shareholders and those shareholders not having a direct proprietary interest in the assets of the company.[43]

[73] Interestingly, 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 the trust.[44] 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*:[45]

> 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

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42 See for instance *Gouraud v The Edison Gower Bell Telephone Co of Europe* (1888) 57 LJR 498 (Ch); *W Dennis and Sons Ltd v West Norfolk Farmers' Manure and Chemical Co-Operative Co Ltd* [1943] Ch 220 (Ch) at 222–223; and *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch), [2011] Ch 296 at [58].

43 As is noted in Hodge M Malek (ed) *Phipson on Evidence* (19th ed, Sweet & Maxwell, London, 2018) at [24-02], n 10, a shareholder has no right to see documents held by a company. So in practice, the joint interest exception applies only where, in litigation between a company and shareholder, the company attempts to resist discovery in respect of legal advice on grounds of legal professional privilege.

44 See *Dawson-Damer v Taylor Wessing llp* [2020] EWCA Civ 352, [2020] Ch 746 at [27]–[30]. See also Paul Matthews and Hodge M Malek *Disclosure* (5th ed, Sweet & Maxwell, London, 2017) at [11.88].

45 CA judgment, above n 3, at [30], citing Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015) at [23-048] (footnotes omitted). A passage to the same effect is at [21-059] in the latest edition of *Lewin* (20th ed), above n 31.

> advice since the lawyer is bound by privilege and is in no position to waive it at the instance of a beneficiary.

This is supported by a raft of authority from at least 1858[46] down to the present.[47]

[74] It is clear beyond argument that the joint interest exception applies to the documents within the first category listed in [63](a). In respect of the documents in [63](b) and [63](c), the issues that we have to address are whether the dispute between Lambie Trustee Ltd and Mrs Addleman resulted in their joint interest coming to an end, and, if so, when. 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.[48]

[75] The joint interest exception is as applicable to litigation privilege as to legal advice privilege. Let us assume litigation by Lambie Trustee Ltd against a negligent financial adviser. Legal advice in relation to that litigation would be subject to privilege. So too would relevant communications with third parties. But assuming Mrs Addleman did not have a position in respect of the litigation in conflict with that of the Trust, she would have a joint interest in that legal advice and third party communications, with the result that privilege could not be invoked against her. So what is in issue is not the point in time at which Lambie Trustee Ltd might start to claim litigation privilege, but rather if and when the joint interest between Mrs Addleman and the Trust came to an end.

The approaches adopted in the High Court and Court of Appeal

[76] In the High Court and Court of Appeal, the primary focus was on whether Mrs Addleman was entitled to what might be described as substantial disclosure. Little attention appears to have been directed to privilege in respect of legal advice. It

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46 *Wynne v Humberston* (1858) 27 Beav 421 at 423–424, 54 ER 165 at 166–167.
47 *Lewis v Tamplin* [2018] EWHC 777 (Ch), [2018] WTLR 215 at [59]–[60].
48 See [95] below.

was mentioned only in passing in the High Court judgment, with the Judge noting that some of the documents might be subject to privilege.[49]

[77] The Court of Appeal cited the passage from *Lewin* that we have set out and dealt with the susceptibility of legal advice to disclosure in this way:[50]

> … legal advice or opinions obtained by trustees to guide them in the discharge of their duties as trustees and paid for out of trust funds are trust documents created for the benefit of the beneficiaries. The privilege attaching to such communications may be asserted against third parties but not by the trustees against the beneficiaries.

A new approach to joint interest?

[78] In her submissions on behalf of Lambie Trustee Ltd, Ms Chambers QC suggested that cases dealing with joint interest decided before *Schmidt* were now of limited relevance.[51] On her argument, those cases proceeded on the basis that beneficiaries had an ownership interest in the documents recording legal advice given to trustees. It followed, she submitted, that with the shift to the obligation to account rationale for the entitlement to disclosure, the premise on which these cases were decided has fallen away.

[79] We do not accept this argument. It is, at least, open to question whether references in the pre-*Schmidt* judgments to the proprietary interests of beneficiaries in the documents recording legal advice given to the trustees were intended to be taken literally. And, in any event, whether trustee documents are generally susceptible to court-ordered disclosure (which is largely the point to which those references were addressed) is a question which is distinct from whether, and if so when, what would otherwise be an entitlement to disclosure is limited by legal professional privilege.

[80] A joint interest for the purposes of legal professional privilege does not depend on a shared ownership of the documents in respect of which privilege is claimed. There is no authority to suggest that this is so. Indeed, the cases mentioned above in

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49 HC judgment, above n 1, at [33].
50 CA judgment, above n 3, at [30] (footnote omitted).
51 *Schmidt*, above n 36.

which companies and their shareholders have been held to have a joint interest in advice given to the company show that a shared ownership interest is not necessary.

[81] Unsurprisingly, there are a number of post-*Schmidt* cases in which the joint interest of beneficiaries and trustees in trust advice has been held to defeat claims to legal professional privilege.[52] We see no reason to depart from the approach adopted in those cases.

Legal advice given to the trustees relating to the general administration of the trust, including the distribution to Mrs Addleman in 2002

[82] As we have explained, there is no basis upon which Lambie Trustee Ltd may maintain a claim to legal professional privilege against Mrs Addleman in respect of this advice.[53]

Legal advice given to the trustees as to what documents should be disclosed to Mrs Addleman

[83] It will be recalled that Mrs Addleman instructed solicitors in 2003 who, on her behalf, wrote several letters to Mr Kemps seeking information. The first of these letters is dated 26 March 2003. There was no threat of litigation in that letter and it resulted in a response from Mr Kemps of 2 May 2003, which is not material for present purposes. There was a further request for information made by letter of 13 November 2003. This letter provided reasons for her request and then went on:

> 5. While Mrs Addleman is comfortable with the trustees being aware of the reasons for her request, we note that as a matter of law Mrs Addleman is entitled to the information she has requested. Of course you will be aware that the duties of trustees in a case such as this to furnish beneficiaries with relevant information arise as a matter of general law out of trustees' obligations of due administration of the trust including to account to beneficiaries and provide them with information on request.

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52 See for example *Tamplin*, above n 47, at [59]–[60]; *Blades v Isaac* [2016] EWHC 601 (Ch), [2016] WTLR 589 at [51]; *Schreuder*, above n 41, at [10]–[12] per Pullin JA and [94(d)–(e)] and [95] per Buss JA, with whom McLure JA agreed at [1]; *Trilogy Management Ltd v YT Charitable Foundation (International) Ltd* [2015] JRC 166, 2015 (2) JLR 15 at [29], endorsing what was said to this effect at [21]; and *Burgess v Monk* [2016] NZHC 527, [2016] NZAR 438 at [10] and [21].

53 Disclosure of advice which reveals the reasons for a decision might be able to be resisted even if not privileged. But given the basis on which leave to appeal was granted, we are only concerned with privilege.

> 6. Accordingly, on behalf of Mrs Addleman we formally request the information outlined … above and ask that you forward it to us so that we may advise Mrs Addleman in relation to it.

[84] In his response of 19 December 2003, Mr Kemps stated:

> In view of the fact that the writer is a Trustee of the Trust, I have requested independent advice to be given to the Trust as to its legal obligations.

[85] After some follow-up letters of 23 December 2003 and 8 March 2004, Mrs Addleman's solicitors wrote again on 1 April 2004. This letter concluded in this way:

> 5. If we do not receive a meaningful reply to our letter dated 13 November 2003 by 9 April 2004, we will be advising our client to consider her options which include the issues of proceedings. This should not be necessary.

[86] On 19 April 2004, Mr Kemps responded. The relevant passages of this letter are:

> We are also able to advise that the Trust is a discretionary trust established by deed dated 19 March 1990 so the question of your client's "entitlement" is entirely a matter for the discretion of the Trustees.
>
> We have been ascertaining the Trustees' legal duties which are not entirely clear given the state of the law. You will be aware for … example that the case you quote is subject to an appeal to the Court of Appeal and the judgment in that case in the High Court was given after your request for information. The law is clearly evolving in respect to trustees' duties of disclosure of information.
>
> It does appear however that your client is entitled to the Trust Deed and documents altering trustees and I enclose a copy of the original Trust Deed and the documents dealing with appointment of trustees and I confirm that the current Trustees are [Ms Jamieson], [Mr Hargrave] and the writer.
>
> Given the discretionary nature of the Trust, there is no further question to be answered with regard to your client's entitlement.

[87] There matters rested until 24 September 2014, when Mrs Addleman's solicitors again wrote to Mr Kemps. This letter set out a substantial narrative of events and particularised requests for information. In the letter, the solicitors noted:

> 6. We consider the request for information is reasonable. Our client is entitled to receive information which will enable her to ensure the accountability of the trustees in terms of the Trust Deed. She is entitled to have the Trust property properly managed and to have the

> trustees account for their management. The information that our client has requested is necessary for these purposes and given our client is both a discretionary and a final beneficiary there should be no disagreement that she is entitled to receive it.
>
> …
>
> 9. We note that our request for information is similar to the information our client sought from the Trust by various letters in 2003 and 2004. Despite us first writing to Mr Kemps on 26 March 2003 requesting information it was not until 19 April 2004 that the most basic of information was provided. During that time our firm's letters to Mr Kemps of 13 November 2003, 23 December 2003 and 8 March 2004 went unanswered except a communication that the Trust was taking legal advice on 19 December 2003. Three months then went by without further contact until, after prompting, some information was provided on 19 April 2004. No substantive reasons for withholding information from our client were provided in 2003 or 2004 and we are unsure why there was such reluctance to furnish our client with information. We reserve our client's rights to seek further information in due course.
>
> 10. In light of the lengthy and inexplicable delays that occurred with our last requests for information in 2003 we ask that this current request be attended to promptly. Our client seeks the Trust's response to the request for information not later than 15 October 2014 which is a reasonable timeframe to compile the requested information. Given that we have previously requested similar information in 2003 but it was not provided then, if necessary, our client is prepared to make a formal application to the Court to receive the information requested. If that occurs and costs are incurred they will be sought from the trustees as such an application should not be necessary.

[88] Mr Kemps replied on 3 October 2014. The letter noted the change of trustees since the earlier correspondence. It then went on:

> Since correspondence some years ago we have also established clearly that Lambie Trust was seeded exclusively from funds which arose from an accident settlement for [Ms Jamieson].
>
> …
>
> We will seek instructions from our client and anticipate that our client will need specialist Trust advice regarding the extraordinary request for information contained in your letter.

[89] Mrs Addleman's solicitors wrote again on 7 November 2014. This letter concluded in this way:

> 4. Our client previously sought the Trust's response to the request for information by 15 October 2014. You have advised that the Trust will seek specialist advice. We ask that the names of the new trustees and

> the requested information is provided by 14 November 2014 as a timeframe of 7 weeks from our initial request should be sufficient for your client to obtain advice and provide the information. If such information is not provided then our client will seek appropriate directions from the Court. Please confirm that your firm is authorised to accept service of any proceedings issued against the Trust.

[90] Mr Kemps responded on 19 November 2014:

> 1. We act for the Trust. The current Trustee is Lambie Trustee Limited.
>
> 2. Mr Robert Palmer was nominally the settlor. Following our communications to you in 2004 we were made aware by Mr Palmer that the trust was funded from Annette Jamieson's accident settlement. A signed statement from Mr Palmer is attached.
>
> 3. Records for the entire 24 year history of the Trust do not exist. We are ascertaining what records do exist.
>
> 4. We have authority to accept service of proceedings.
>
> 5. We will be responding more fully when we know what records there are in existence.

[91] With one exception involving an unusual fact pattern,[54] the cases cited to us in which it has been held that a beneficiary did not have a joint interest in trustee-commissioned legal advice concerned advice received after litigation had been commenced (or perhaps when it was very imminent).[55] In contradistinction, the general pattern of the authorities is that advice received before litigation is contemplated is subject to the joint interest exception.[56] There has, however, been little focussed discussion in the cases as to the persistence of the joint interest in the period between contemplation and commencement of litigation.

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[54] The exception is *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 477. In a construction dispute between a builder and the trustee of a unit trust owning the land upon which residential apartments were being built, the plaintiff builder sought access to privileged documents held by the defendant in relation to its claim against it. This was on the basis that the plaintiff had units in the trust (at [14]). The substance of the situation between the parties when the documents were created was contentious, with the formal relationship between them of trustee and beneficiary in respect of units in the trust being coincidental (at [30]–[31]). There was thus no joint interest in the privileged material (at [34]).

[55] In some of the cases (for instance, *Redwood Group Ltd v Queenstown Gateway (5M) Ltd* [2018] NZHC 3439), the correlation between the dates of the advice and the inception of proceedings is not clear.

[56] By way of example, see the summary way this issue was addressed in *Mason v Cattley* (1883) 22 Ch D 609.

[92] 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.[57] Although we do not see the concept of litigation privilege as directly applicable, the dominant purpose approach as applied for the purposes of litigation privilege may provide a sensible basis for identifying that point.[58] On this basis, that litigation is a possibility or even a likelihood at the time advice is taken is not of controlling significance.[59] 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 having first sought advice (to which the joint interest exception will apply) as to the appropriate stance to take on the point at issue.

[93] Although the possibility of proceedings had been mentioned in the letter from Mrs Addleman's solicitors of 1 April 2004 and again in the letter of 24 September 2014, the primary subject matter of the correspondence was whether the proper administration of the trust warranted the disclosure which was sought. The position advanced by Mr Kemps as late as 3 October 2014 was that advice was being sought and even in the letter of 19 November 2014 (in which Mr Kemps acknowledged having authority to accept service of proceedings), Mr Kemps talked of further

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57 In *Talbot v Marshfield* (1865) 2 Dr & Sm 549, 62 ER 728, which concerned two sets of advice, the first was obtained before litigation and the second after it had been commenced. The joint interest exception applied to the first but not the second. The way the judgment is expressed suggests that the position may have been different if litigation had been threatened before the first advice was provided.

58 This is consistent with how these issues were analysed in *Caldwell v Harper* (1994) 7 PRNZ 521 (HC), *Burgess*, above n 52, and *McCallum v McCallum* [2019] NZHC 1925, (2019) 5 NZTR ¶29-018.

59 In *Easton v The New Zealand Guardian Trust Co Ltd* [2021] NZHC 519 at [18], Cooke J concluded that the joint interest exception ceased to apply at the point at which the beneficiary and trustee are "adversaries", a proposition with which we agree. However, he concluded that this point was reached when "adversarial litigation is contemplated". As will be apparent, we do not see contemplation of litigation as the point at which the joint interest exception necessarily ceases to apply.

inquiries as to what records were in existence. The implication of this is that there was at least a possibility of further disclosure being voluntarily made by Lambie Trustee Ltd.

[94] Given the tenor of this correspondence, it is difficult to resist the view that Mrs Addleman's joint interest in the advice received by Lambie Trustee Ltd persisted up until the issue of proceedings in June 2015. That said, in light of the way in which our leave judgment is expressed, Lambie Trustee Ltd may, if it wishes to persist in its claim of privilege in advice received after 7 November 2014 and before the commencement of proceedings, revert to this Court in relation to such advice. If Lambie Trustee Ltd wishes to do so, it should file a memorandum to that effect with the Court within 14 days of the date of this judgment, giving particulars of the advice in respect of which privilege is asserted.

Legal advice given to Lambie Trustee Ltd for the purposes of this litigation

[95] The authorities generally support the view that once a beneficiary commences litigation concerning the administration of a trust, the litigating beneficiary is not entitled to disclosure of legal advice received by the trustees in relation to that litigation.[60] The judgments on the point tend to be succinctly expressed but they must proceed on the basis that, from that point, the beneficiary and trustees no longer have a joint interest in the subject matter of the litigation.

[96] Mr Ross QC for Mrs Addleman resisted the application of those authorities here. His argument was that despite the acrimony between the parties, this litigation is not hostile. There is no claim for breach of trust. Rather, it concerns the due administration of the trust in which Mrs Addleman and the trustees continue to share a joint interest. He noted that it would have been open to Lambie Trustee Ltd to seek the directions of the Court. The premise of his argument was that, had it done so, Mrs Addleman's continuing joint interest in the advice Lambie Trustee Ltd received would have been plain.

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60 *Talbot*, above n 57; *Thomas v Secretary of State for India in Council* (1870) 18 WR 312; *Caldwell*, above n 58, at 526; *Burgess*, above n 52, at [11]–[12] and [21]; and *Redwood Group Ltd*, above n 55, at [117].

[97] We have some sympathy for this position. Lambie Trustee Ltd has aligned itself entirely with Ms Jamieson. Part of its rationale for doing so – that the trust was a sole purpose trust for her benefit – was rejected by the Court of Appeal. The other – that the trust had been solely funded by her – is distinctly questionable. Lambie Trustee Ltd's argument that the joint interest has come to an end rests in part on its possibly inappropriate decision to align itself so closely with the interests of Ms Jamieson.

[98] Despite these reservations, we are of the view that Lambie Trustee Ltd is entitled to assert privilege in legal advice received after the commencement of proceedings. This is consistent with the authorities to which we have already referred. It is, as well, consistent with the realities of the dispute. From the point at which litigation was commenced, Lambie Trustee Ltd and Mrs Addleman were distinctly on different sides, as is perhaps signified by the otherwise routine consideration that the statement of claim seeks costs against Lambie Trustee Ltd.

[99] The cases in respect of hostile litigation on which Mr Ross relied primarily related to costs, not disclosure. We can conceive of situations of friendly litigation involving a trust in which the joint interest of trustee and beneficiary survives the commencement of proceedings. But trustees are entitled to have a position on disclosure. Where that position is challenged in litigation (whether on a directions application or proceedings by a beneficiary), a conclusion that the beneficiary and the trustee have a joint interest in the maintenance of that may not be self-evident. In the context of this particular dispute, we are of the view that Mrs Addleman's joint interest in legal advice received by Lambie Trustee Ltd would not have persisted if, instead of waiting for Mrs Addleman to commence proceedings, Lambie Trustee Ltd had, say in May 2015, sought directions and in doing so had made it clear that it would resist disclosure.

Costs

[100] Mrs Addleman has been substantially successful on the appeal.

[101] On that basis, the orders sought by Mr Ross are:

> Mrs Addleman should receive her actual costs for this appeal out of the Trust; and
>
> [Lambie Trustee Ltd] should:
>
> (a) not be entitled to reimburse itself from the Trust for any costs incurred in relation to this appeal; and
>
> (b) be required to reimburse the Trust (from funds not sourced from the Trust) any amount of costs that this Court awards on this appeal.

[102] We invite submissions from the parties as to costs: on behalf of Mrs Addleman, within 21 days of delivery of this judgment and, in reply, within 21 days of service of Mrs Addleman's submissions.

Disposition

[103] The formal orders of the Court are that:

(a) With the clarification that the orders for disclosure made by the Court of Appeal do not extend to legal advice given from June 2015 in connection with this litigation and with leave reserved to Lambie Trustee Ltd to revert to this Court in relation to advice received after 7 November 2014 and before June 2015, the appeal is dismissed.

(b) Costs are reserved.

Solicitors:
Kemps Weir Lawyers, Auckland for Appellant
Bell Gully, Auckland for Respondent