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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 118/2019
[2020] NZSC Trans 27

BETWEEN **LAMBIE TRUSTEE LIMITED**
Appellant

AND **PRUDENCE ANNE ADDLEMAN**
Respondent

Hearing: 2 December 2020

Coram: William Young J
Glazebrook J
O'Regan J
Ellen France J
Williams J

Appearances: D A T Chambers QC and J M McGuigan for the Appellant
A S Ross QC and R A Rose for the Respondent

CIVIL APPEAL

MS CHAMBERS QC:
May it please your Honours, Lady Chambers and Ms McGuigan appearing for the appellant Trustee.

MR ROSS QC:

E ngā Kaiwhakawā, tēnā koutou. Ko Ross tōku ingoa. Kei konei māua ko Ms Rose mō te kaiwhakahē Mrs Addleman. May it please the Court, Ross with Ms Rose for the Respondent, Mrs Addleman.

WILLIAM YOUNG J:

Tēnā kōrua, thank you.

MS CHAMBERS QC:

Your Honours, you should have the appellant's road map in front of you which does literally start with a little road map which, if I'd had my way, would have had a little car running along it but my computer skills didn't stretch that far. But that outlines in diagrammatic format the argument that I am going to present to your Honours this morning.

I want to start with identifying the issue before the Court. The appellant submits that the issue is in the modern trust context in which disclosure of information to beneficiaries is based on obligations theories of trust and is governed now clearly by legislation. How should the doctrine of privilege operate as between trustees and beneficiaries so as to make, and here I'm referring to the purpose and principles of the Trusts Act 2019, to make trust law more accessible to make sure it operates as a mechanism to resolve trust-related disputes and to avoid unnecessary cost and complexity?

And your Honours come to that decision in the context of a country which has the highest rate per capita of family trusts in the world. The research indicates that we have four times as much per capita land held by trustees than comparable jurisdictions such as England and UK and, of course, part of that is a reflection of iwi trusts ownership but nevertheless our context is that family trusts are heavily used in this country by a large number of New Zealanders, Māori and Pākehā.

I move on to the five key propositions which underpin the appellant's case. The first is that the starting point in regard to disclosure of legal advice must

be is the document privileged? If it is privileged then it's not disclosable except where there is a joint interest privilege and, of course, waiver or fraud, the normal exceptions. And joint interest privilege is going to be, in my submission, one of the area your Honours will focus on, and the appellant will submission that joint interest privilege can exist between trustee and beneficiaries in regard to legal advice privilege, not litigation privilege, where there is a shared interest in the subject matter of the communication at the time of the communication.

The second key principle is that Aotearoa now – well, at from January next year – the law in regard to disclosure of information to beneficiaries is no longer purely common law but significantly guided by the Trusts Act and, of course, the Evidence Act 2006 and the Lawyers and Conveyancers Act 2006.

And so the third principle is that there has to be caution in regard to the older cases and the textbooks, because your Honours come to this area of law with a completely new context. So the limited assistance of those older authorities and the textbooks, I submit, is due to a number of factors. First of all, a lot of them are pre-*Erceg v Erceg* [2017] NZSC 28; [2017] 1 NZLR 320 they're based on the old proprietary model of trusts, which constantly referred to who paid for the advice, whereas now of course with *Erceg* and clearly with the Trusts Act, which adopted the *Erceg,* your Honours' approach in regard to obligations-based theory specifically in its provisions, those older authorities are far less relevant. And I do submit that those older authorities should not be read like statutory provisions without any regard to how trust law and the law of privilege has developed over the last hundred years and the changes in family trusts in New Zealand, how they're structured now, and that's a point I'll come back to. And some of the case relied on by my friend, when analysed properly, do not actually support the propositions that he purports they do. Some of the comments are obiter, *Blades v Isaac* [2016] EWHC 601 (Ch), [2016] WTLR 589 (Ch) for example relates to costs and the comments on privilege are obiter. He attempts to draw a distinction between hostile and friendly litigation on the basis of *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (Ch) and *Re Buckton* [1907] 2 Ch 406 , but if your Honours view those cases

the Judges were clearly talking about distinctions in regard to the costs regime, not privilege and disclosure, and of course many of them are concerned with a very different legislative environment. In any event, in regard to the case law, none of which is binding on your Honours or course, and the textbooks, including *Lewin on Trusts*, which the Court of Appeal relied on, it's virtually impossible to reconcile what they say anyway. It's impossible, in my submission, to instil relevant principles from the authorities. They are all over the place.

So we say in alternative to that what we do have now is an Act which is the culmination of a 10-year review process by our Law Commission which attempts to encapsulate under the umbrella of the Act the law in regard to disclosure to beneficiaries and that's, as we can see in the purpose and principles, to enable families and businesses to manage their affairs with confidence. And the most talked about, and certainly the most contentious part of our Trust Act, is those provisions relating to disclosure. I'm sure your Honours are aware of that. And we agree with our learned friends that in regard to this aspect the Trusts Act is largely a codification of your Honours' decision in *Erceg*. But what's truly significant for this appeal is that Parliament did not legislate to remove professional legal privilege in regard to the trustee/beneficiary relationship.

WILLIAM YOUNG J:
Is privilege referred to in the Trusts Act?

MS CHAMBERS QC:
No.

WILLIAM YOUNG J:
So what do you take from that?

MS CHAMBERS QC:
I take from that, Sir, that it confirms that the correct approach is to start with privilege because of –

WILLIAM YOUNG J:

But if there was a carve out of privilege you would have expected it to be there. If the intention was that privileged documents should be carved out and be exempt from disclosure wouldn't you expect that to be in there?

MS CHAMBERS QC:

No, Sir. It's the other way round because –

WILLIAM YOUNG J:

Except against a background where there is authority supporting disclosure of privileged material?

MS CHAMBERS QC:

Well, in my submission, Sir, *B v Auckland District Law Society* [2003] 2 AC 736 resolves this issue because Parliament must have been taken to know about that key case in regard to privilege.

WILLIAM YOUNG J:

But that wasn't a trust case, was it?

MS CHAMBERS QC:

No, but it was a case about the principles of privilege, and what it says is that if you – and it was concerned with legislation, the Law Practitioners Act 1982, and investigation, and it says that if Parliament intends for the common law privilege to be removed it must use explicit language and there is no explicit language in the Trusts Act.

WILLIAM YOUNG J:

But against a situation where absent legislation there wasn't a general recognition of privilege available to trustees against beneficiaries in respect of trustee obtained legal advice it's not really the *B* situation, is it?

MS CHAMBERS QC:

No, Sir, I don't agree with that. The cases do recognise privilege. They talk about whether or not it applies, the fact that the privilege existed and in particular litigation privilege.

WILLIAM YOUNG J:

Of course it exists. Of course it does. For my part I think you're in difficulty in relation to anything before September 2014 because I can't see how that could have a litigation component.

MS CHAMBERS QC:

The appellant trustee claims privilege on two grounds. One is litigation and one is advice.

WILLIAM YOUNG J:

It's a different kind. Yes, I understand that. Anyway, carry on, sorry.

MS CHAMBERS QC:

The earlier stuff obviously by advice.

WILLIAM YOUNG J:

I'm just sharing some doubts I have with you.

MS CHAMBERS QC:

Yes. Well, I think, I'm sure I can convince your Honour on the privilege issue.

WILLIAM YOUNG J:

Okay, we will see.

MS CHAMBERS QC:

And as you can see from the literal road map that we have supplied your Honours with, we say effectively the second major hurdle is in regard to whether legal opinions are the subject – as to whether or not they can be disclosed as if they are subject to joint privilege and therefore can be disclosed then the Court or the trustees must go on and consider under the

Trusts Act at section 50, or the equivalent is *Erceg* at paragraph 51, that key principle: is it necessary to ensure, is disclosure necessary to ensure that beneficiaries have sufficient information to enable trustees to be held to account, and both *Erceg* and the Trusts Act says that's what you're looking for, is it necessary to disclose this information to enable trustees to be held to account? And this is the fourth principle that I'm referring to, which is that there is a second hurdle, which is if it's not privileged does it meet the *Erceg*/Trusts Act criteria for disclosure? And the appellant says, well, it's very hard to see how, given that Mrs Addleman now has the trustees, she has the minutes of the Trust, she has the memorandum of wishes, she has the details of the trustees and she has all financial accounts that are available, that it is necessary for Lambie to be held account that she also gets legal advice.

WILLIAMS J:

It does seem to me that's where the battle is. This isn't really a fight about whether privilege is there or taken away, there's no doubt there privilege, it's just privilege as against who, and that's the joint privilege question, and the test is necessity or reasonable necessity on your analysis, because if it wasn't reasonably necessary it would be irrelevant and therefore not disclosable anyway. So, I mean, this is a narrow and quite simple question: if it can be said that holding the trustees to account – and that must include in terms of complying with their legal duties as trustees – makes it reasonably necessary for legal advice to that effect to be provided, then it meets the test.

MS CHAMBERS QC:

I disagree, your Honour, and where I suggest you're wrong is you're conflating the two tests. There's two different tests. One is for joint privilege, which is do they have a common interest in the communication? Then at the second hurdle – and if they do and if it's therefore disclosable, because a trustee can't assert sole privilege against beneficiaries – then you drop down to the next issue, which is *Erceg*: okay, it's disclosable, is it necessary for them to have it?

WILLIAMS J:

But you see it's the same test, it's the same test…

MS CHAMBERS QC:

Oh, I don't think it is, Sir.

WILLIAMS J:

Because – what was your first standard?

MS CHAMBERS QC:

Do they have a joint interest in the information?

WILLIAMS J:

Right, in the disclosure of the document. So, how do you establish joint interest?

MS CHAMBERS QC:

Well, you establish joint interest –

WILLIAMS J:

Because it's necessary for the beneficiary to hold the trustee to account.

MS CHAMBERS QC:

No, no, no.

WILLIAMS J:

That's the only interest the beneficiary has.

MS CHAMBERS QC:

No. Because when you're looking at privilege, because of the policy reasons you need to look to see whether or not they were, they still had a joint interest in getting that information.

WILLIAMS J:

Yes, I'm trying to get to the bottom of what that joint interest is.

MS CHAMBERS QC:
Okay, well, would you…

WILLIAMS J:
Sure.

MS CHAMBERS QC:
I'm obviously coming to that. But I need to take your Honours, in particular the President, to why I say privilege has not been excluded by the Trusts Act, and then I'm going to come to the joint privilege. Because I agree with your Honour, that joint privilege issue is a key issue for this appeal.

WILLIAMS J:
Well, for my part it's the only issue.

MS CHAMBERS QC:
Yes, okay. But the importance of privilege is a kind of background to that as well, so I'm hoping it will assist your Honour if I start at that and then come to joint privilege, and that's the kind of logical way to approach it too.

So in that second hurdle, is it necessary, and also of course both the trustees, if they're approached independently, and the Court, must look at those 13 factors, which are largely from *Erceg*, under section 53 of the Act.

And the fifth key principle is that there are good policy reasons for adopting the appellant's approach.

So those are my key principles. I don't intend to spend much time on the Court of Appeal's decision where privilege is dealt with in one paragraph. The appellant's arguments in regard to the Court of Appeal decision are set out in full in the written submissions. In summary, it is submitted the Court of Appeal approach was totally unworkable, it's a blanket, it's black and white, it suggests that beneficiaries will be able in all instances to see trustees' legal advice because, ipso facto, a trustee and beneficiary will always have a joint

interest in the subject matter of the advice and all legal advice will be necessary to hold the trustees to account. Under the Court of Appeal approach Mrs Addleman could ring the trustee every week and say: "Had any more legal advice? Please provide it."

So moving to privilege. In *Erceg* this Court held that the supervisory jurisdiction must be exercised in accordance with principle and we submit that the appellant's approach is similarly based on principle, and that principled approach, in my submission, must recognise three key principles. First, privilege is a fundamental right available to all and particularly perhaps those who hold funds on account of another person and who are subject to onerous duties. And secondly, privilege is not just a rule of evidence but a fundamental condition on which the administration of justice rests. The privilege is upheld not for an individual but to recognise the wider interests of all of those who might otherwise be deterred from telling the whole truth to their lawyers, and as Briggs J said in *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32 at 62, confidence may be overridden by the exercise of the Court's discretion information provided in a confidential way to a trustee but privilege cannot.

So on this issue it is submitted that this is not a contest between privilege and the Court's supervisory jurisdiction. Privilege is king. Privilege wins. It is not necessary to balance privilege against competing public interests because the balance from the sixteenth century onwards has always come down in upholding the privilege and whether the principle operates as a bar to the emergence of truth and to the overall public detriment is not a relevant legal consideration.

And the final principle on privilege relied on is that the trustees' interests in obtaining legal advice without the fear of it being seen by a beneficiary is necessary to the administration of trusts.

Now I do want to take your Honours to the *Auckland District Law Society v B* [2002] 1 NZLR 721 and *B v ADLS*. This is the bloodstock partnership

litigation involving Russell McVeagh where Russell McVeagh had given some documents but still expressly reserving privilege to Auckland District Law Society in regard to a disciplinary complaint and I want to start with the dissenting judgment in the Court of Appeal which was upheld by the Privy Council, and you will find that decision in the bundle of authorities, volume 1 of the appellant under tab 7, and if your Honours could refer to the then Chief Justice's decision at paragraph 1, and her Honour says: "Legal professional privilege protects from disclosure confidential communications between a client and his legal adviser for the purpose of legal advice. Such protection is essential if advice is to be candidly informed and given. Where the advice is sought in connection with litigation, the privilege is an important part of the fundamental right of unimpeded access to the Courts. Even where litigation is not immediately in prospect, the privilege recognises the public benefit in legal professional assistance if members of the community are to avoid disputes," part of the aims of the Trusts Act, try and avoid disputes, "and order their affairs lawfully. As such, it supports the principle of legality upon which our society is organised," making sure trustees comply with the law, they *need* to be able to take legal advice. "Legal professional privilege is subject to exceptions. It does not protect advice for the purposes of fraud or illegality. And it may be limited by legislation. In the absence of express statutory language, such an important protection could be displaced only by statutory implication which, as a matter of interpretation of the statute, is clearly necessary."

WILLIAM YOUNG J:

I don't think anyone's suggesting that privilege has been taken away by statute.

MS CHAMBERS QC:

Oh, I thought your Honour was.

WILLIAM YOUNG J:

What I understand the argument is that the people who are, as it were, within the circle, who are entitled to see the documents, include beneficiaries, it's not

that legal advice given to trustees can be accessed by third parties to the trust, and I see this case as being referable to that.

MS CHAMBERS QC:

Yes, Sir. What –

WILLIAM YOUNG J:

On whose behalf for the trustees seeking legal advice? They weren't seeking legal advice on their own behalf, they were seeking legal advice on behalf of the Trust, and on that basis presumably the beneficiaries. And that's the argument for the respondent in a nutshell.

MS CHAMBERS QC:

Well, Sir, that's why we say you need to analyse the issue from first of all the principled approach, which is is there a privilege, and then is there a joint privilege? Because in some situations trustees will not –

WILLIAM YOUNG J:

Why not just ask on whose behalf was the advice obtained?

MS CHAMBERS QC:

Which is the same as is there a joint privilege.

WILLIAM YOUNG J:

Well, let's just say one question then rather than two. I mean, by and large advice obtained from lawyers is going to be privileged unless there's some nefarious scheme afoot. The real issue here is on whose behalf was the advice being sought?

MS CHAMBERS QC:

Well, as set out in the written submission, our position is that the client is clearly the trustee.

WILLIAM YOUNG J:

Okay, well, that's a more helpful issue to pursue rather than whether we're dealing with a statute that takes away privilege, which is the Russell McVeagh case.

MS CHAMBERS QC:

Okay, well, maybe if I just draw your Honours', if we're all agreed on that, if I just draw your Honours' attention to those paragraphs that I say establish this fundamental point. I draw your Honours' attention to paragraph 139, which is Tipping J, and there's the ruling by his Honour that rights such as privilege can only be "curtailed by clear and express words" and "to the extent necessary to meet the ends which justify the curtailment". And in the Privy Council, which is at tab 6 of the appellant's submissions, you can see the summary effectively of the principles I've just put to your Honours in the summary of the case, and the key discussions are at paragraph 2 where the a "necessary implication" is a statutory provision was "one which necessarily followed from the express provisions of the statute" and –

WILLIAM YOUNG J:

I really don't think that's the argument.

MS CHAMBERS QC:

No, okay. I do just finally want to though refer your Honours to 37 onwards, which talks about how important privilege is, even in murder cases, and how the lawyer's mouth is shut forever and how it's not a balancing exercise, privilege is not a balancing exercise, which is part of the reasons why we say you have to look at joint privilege on the basis of the normal test, not in regard to the balancing exercise under the Trusts Act, and that's paragraph 46 where they expressly say you don't do any balancing, privilege is king.

ELLEN FRANCE J:

Why do you focus on joint interest?

MS CHAMBERS QC:

I focus on joint privilege because the – otherwise we have a privilege between the trustee and the lawyer, so why – the modern approach to when do beneficiaries get documents tends to focus on, we say, effectively, is there a joint interest. Were they, and sometimes it's – were they effectively getting the, sometimes it's called, getting advice on behalf of the trust.

ELLEN FRANCE J:

Well, isn't that the question? I'm just not sure how helpful the notion of "joint interest" is in the context of privilege.

MS CHAMBERS QC:

Yes, well, the – it's because the legislation refers to joint interest and so do the cases, but I'll move on to that.

WILLIAM YOUNG J:

Can we just add one slightly other discordant element into it? Might it not be within the inherent jurisdiction of a Court of equity giving directions to trustees to say not to, as it were, confine itself to concepts of jointness but to give a general direction as to how the affairs of the Trust should be administered? I mean the trustees would be entitled to go to the Court and say: "Should we? This is material we've been asked to hand over. What do you think?" and the Court could give a direction, couldn't it?

MS CHAMBERS QC:

Yes, it could. But obviously today what we're concerned about is direction from this Court as to the principles which apply when a beneficiary says: "I want to see all the legal advice that the trustees have received."

WILLIAM YOUNG J:

All right, okay.

MS CHAMBERS QC:

And will there be disputes about whether or not your principles apply? Yes, of course there will, in which case they go to Court.

I also before I move on to the next topic because I'm getting the message that I need to move on, but section 5(9) of the Trusts Act is important here too because it provides that unless the Trusts Act specifically overrules legislation, that legislation applies. So thus the Evidence Act applies. So that again indicates a parliamentary policy, in my submission, that the normal rules of privilege apply to this relationship. There is nothing which says otherwise.

So I want to move on to policy reasons as to why the trustees' legal advice with or without litigation should be subject to the normal rules of privilege, and the first point is that it enables the trustees to be properly advised and to ensure that trusts are properly administered. We want trustees of these complex trusts which hold significant property to get legal advice so that they do their job properly. We want to encourage them to go to lawyers, not discourage them. We don't want cowboys out there guessing what their obligations are because they're too frightened to go and see a lawyer because some adverse beneficiary is going to get the advice.

GLAZEBROOK J:

But why would we assume beneficiaries were adverse?

MS CHAMBERS QC:

Well, why would we assume that they're altogether happy chappy little people who are all together and want the same interests? And, your Honour, if you look at the way trusts operate, as Ricketts says in his article, which is in the authorities of the appellant, you're always going to be making a decision which disappoints a beneficiary. As soon as you make a distribution to one beneficiary the others are disappointed.

GLAZEBROOK J:

But legal advice wouldn't be in relation to beneficiaries and that wouldn't in any event be able to be disclosed but if you're seeking legal advice on an acquisition of a huge piece of land and there's issues in respect of whether that might be prudent in the circumstances given issues with subdivision, et cetera, why would you assume that beneficiaries are going to be necessarily adverse in any way other than making sure that the trustees are doing their job?

MS CHAMBERS QC:

I agree, your Honour, and that, I say, is joint privilege. No issues of dispute. The trustees and the beneficiaries have the same joint interest on that communication, that is, making sure they comply with the rules of tax and other rules applicable to large subdivisions, no issue. There will be cases where there is clearly joint privilege between beneficiaries and trustees, I'm not disputing that.

GLAZEBROOK J:

Well, maybe you need to go on to when that is, because I'm having difficulty and had difficulty from your submissions in working out exactly what types of documents you say are and are not disclosable.

MS CHAMBERS QC:

Yes. Okay…

GLAZEBROOK J:

Well, I don't want to necessarily take you out of order. It's just that I think we're all having difficulty working out exactly what the proposition is and exactly what types of documents, and that was one of the reasons in the leave judgment we asked to have some idea of the types of legal advice we were talking about, because it's very difficult, looking at this in the abstract.

MS CHAMBERS QC:

Yes, okay. Well, what I'm suggesting is that where there's an adverse interest where the beneficiaries are effectively not on all fours with the trustees in terms of the particular communication, then there's no joint privilege. So –

GLAZEBROOK J:

Look…

MS CHAMBERS QC:

You want specific examples.

GLAZEBROOK J:

What does that mean exactly?

MS CHAMBERS QC:

Okay. Well, a joint interest – so this is effectively under joint privilege – would arise in circumstances where, for example, the example your Honour gave, tax issues on a subdivision. Red line investment, advice on red line investment, advice on the process of selling a trust asset, advice on an attack on the trust by a third party. In some cases, advice on settlors' wishes. Joint interest, they would have a joint interest in making sure the settlor's wishes had regard to.

WILLIAM YOUNG J:

Are you saying that all – have you disclosed any advice from solicitors?

MS CHAMBERS QC:

Not yet, no.

WILLIAM YOUNG J:

So is your position in this case that none of it is disclosable?

MS CHAMBERS QC:

Yes, Sir. But we accept that some of it is definitely subject to joint privilege. But then we say it doesn't get past the second hurdle of being necessary to hold their trustees to account. Some of it is definitely joint privilege.

WILLIAM YOUNG J:

Some of it must be routine, it must just be conveyancing documents.

MS CHAMBERS QC:

Pardon?

WILLIAM YOUNG J:

Some of it must be entirely routine.

MS CHAMBERS QC:

No, no. Remember the order, we're only concerned with opinions and advice.

WILLIAM YOUNG J:

Yes, but some of it will be, will still be entirely routine, won't it? I mean, there was a sort of request for information, what we're actually dealing with. But this goes back over, what, 30 years?

MS CHAMBERS QC:

Mhm.

WILLIAM YOUNG J:

It's hard to think that there wouldn't be advice which was of a routine nature that couldn't – that practically was given to the Trust as an institution and thus to all who were beneficiaries.

MS CHAMBERS QC:

Yes, agreed. But then the question is is it necessary to disclose routine advice to a beneficiary in order to uphold the, make sure the Trust is being complied with? Why is that relevant to that?

WILLIAM YOUNG J:

Well, it may be – and one of the things, we don't know a lot about the fact, but one of the reasons may be that a lot of Trust documents have been destroyed.

MS CHAMBERS QC:

Well, there's very good evidence on that. I mean, they were on facsimiles, the evidence shows they faded, they went, there was a loss of, the computer wipe-out and so on, I mean, we are talking over 30 years. So the evidence –

WILLIAM YOUNG J:

I thought destroyed – I mean, I haven't gone into the evidence. I'd taken from the word "destroyed" something more active had happened rather than merely damage caused by the effluxion of time.

MS CHAMBERS QC:

Yes, I don't think your Honour should take that.

WILLIAM YOUNG J:

Okay.

MS CHAMBERS QC:

That is the tone put on by my learned friends. But in fact if you read the evidence you'll see that a lot of it was on old facsimile paper, it faded, and also there's been different trustees, there's been a full search back to all the previous trustees to try and find as much information as possible.

WILLIAM YOUNG J:

All right, okay.

MS CHAMBERS QC:

But this is not a case where there has been deliberate destruction of Trust documents.

GLAZEBROOK J:

Well, does it matter anyway because if those Trust documents aren't available I think what was being put to you the legal advice might actually fill in some gaps that are now not able to be filled in with Trust documents, whether they were destroyed on purpose or whether they've become destroyed by a flood or the effluxion of time.

MS CHAMBERS QC:

Well, what are the gaps? There has to be a more careful analysis of gaps though. They don't have an automatic right of disclosure. So the issue is does a routine opinion –

GLAZEBROOK J:

Well, they may do if this was routine information that was merely related to what you say is routine Trust activities.

MS CHAMBERS QC:

How does that ensure that Mrs Addleman is satisfied that the Trust has been complied with if it relates to whether or not a subdivision's profits are taxable?

GLAZEBROOK J:

Well, it may have something to do with whether they were prudent in entering into the transaction. It may disclose that there was adverse interests that were, I don't know, some kind of cheapened price for somebody who was related to the Trust. Who knows, because without seeing the documents you've no idea, have you?

MS CHAMBERS QC:

No, that's true. That's true but it is my submission that if you're dealing with what is simply routine, bog-standard advice on that type of issue that that is not disclosable under the Trusts Act or *Erceg*.

WILLIAMS J:

I think you have to look at the context.

MS CHAMBERS QC:

Agreed.

WILLIAMS J:

You have to look at the context there which is 30 years of radio silence in circumstances where the beneficiary discovers the existence of the Trust in which she is a beneficiary 12 years, is it, or whatever it is, after its creation and after a good deal of expenditure and perhaps some distributions. I don't know. You'd want to start with the proposition that it's necessary to disclose this material unless there's a good reason not to simply because there has been no holding to account from the beginning. It's time to rebalance the scales, wouldn't you think?

MS CHAMBERS QC:

Well…

WILLIAMS J:

I mean if you were a beneficiary would you put up with it?

MS CHAMBERS QC:

Well, Sir, there's a couple of issues here. Let me address that. First of all the 30 years of radio silence is again, I suggest, not accurate in terms of the facts because what happens here is that the Trust is run by the sisters' father and other trustees right up until when the current trustee is appointed which is late in the day. I'm just trying to find that date for you. May 2000. So she's not even a – the Lambie Trustee is not even a trustee till then.

WILLIAMS J:

That's not relevant, is it? The question is what does this beneficiary need to hold the Trust to account and given that there's been largely silence except for the deed and, what was the other thing, and the appointment process for trustees, you're not going to run everything through the mill to work out whether she's entitled to anything else. Given the length of time of radio

silence you'd start with a proposition that it's necessary for her to see some of this background unless there's a good reason not to, I would have thought.

MS CHAMBERS QC:

Well, perhaps when you come to the exercise of the discretion under the Trustee Act, Trusts Act, that would be a relevant factor because the case law says you take into account all the circumstances. But just to remind your Honour though that there's the distribution of $4.2 million in 2002 and at about that time Mrs Addleman says: "Can I please have some more information?"

WILLIAMS J:

Yes. "I've never heard of this Trust," she says. "Can I have some information?"

MS CHAMBERS QC:

That's right, yes, and –

WILLIAMS J:

Sounds fair, doesn't it?

MS CHAMBERS QC:

Yes, and she is given some further information.

WILLIAMS J:

Well, she's given the Trust deed and the appointment process, and the identity of the trustees.

MS CHAMBERS QC:

And the letter of wishes.

WILLIAMS J:

And the letter of wishes, quite right, and that's all.

MS CHAMBERS QC:

Yes, but then there is radio silence in terms of Mrs Addleman. That appears to satisfy her request at that time and nothing happens for 10 years.

WILLIAMS J:

I don't think that's right, is it? Having looked through the letters, there are repeated letters from Buddle Findlay complaining about radio silence, to use my metaphor, of Mr Kemps for what seemed like months, perhaps years.

MS CHAMBERS QC:

2004 is when the Trust deed and the documents altering the Trust deed are given to Mrs Addleman. Then there are no requests for further information until 2014, which is Buddle Findlay acting, okay?

WILLIAMS J:

Right. So once the deed is given, it falls asleep.

MS CHAMBERS QC:

There seems to be, from the trustees' viewpoint it's a reasonable assumption that nothing further is requested because nothing further is requested at that stage. But 2014 kicks off this current round of litigation and, as you know, your Honour, now Mrs Addleman has in addition minutes and the financial statements, so she's in a different position.

WILLIAMS J:

Right. So in 2004…

MS CHAMBERS QC:

19 April 2004?

WILLIAMS J:

This is where Mr Kemps says: "You're not entitled to anything else"?

MS CHAMBERS QC:

I'm not sure whether he uses those exact words but he does provide the Trust deed and documents. I think the letters say things like the trustees getting legal advice and so on. Remember the law is changing in this area at this time throughout this period.

WILLIAMS J:

Yes, I seem to recall letters from Buddle Findlay saying: "Where's your legal advice?" Those are presumably before 2004?

MS CHAMBERS QC:

No, that only starts in 2014, Sir, the latest requests, which…

GLAZEBROOK J:

Perhaps if we get back to your two-stage test.

MS CHAMBERS QC:

Yes, your Honour.

GLAZEBROOK J:

So first of all you say there has to be joint privilege and so you look at whether that's the case. Now when you answered me you said: "But if these are totally routine documents they shouldn't be disclosed," but I'm assuming you mean because they're not necessary under your second stage, not the first stage?

MS CHAMBERS QC:

That's exactly what I'm saying, your Honour.

GLAZEBROOK J:

And I still want to know exactly what the difference or what particular types of legal advice – now I think, I can understand the litigation privilege one but you're not suggesting that, because at the time of litigation privilege one can understand you might have an adverse interest to the beneficiary?

MS CHAMBERS QC:

That's right, so no joint interest.

GLAZEBROOK J:

You might not, of course, because it might be litigation with a third party and you accept that that would be joint interest.

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

What I'm trying to work out is you certainly don't say there's the blanket, a blanket non-disclosure of just ordinary legal privilege documents?

MS CHAMBERS QC:

Legal advice, correct,

GLAZEBROOK J:

So I just want to know how you draw the line and how, in a simple situation, a trustee could draw the line?

MS CHAMBERS QC:

Right…

GLAZEBROOK J:

Because litigation privilege I can understand that, that is clearly adverse if somebody, if a beneficiary is suing the trustee and you're taking advice, the trustee is taking advice on that litigation, I can understand the litigation privilege but, so…

MS CHAMBERS QC:

Yes. So you can see that principle that if you're getting advice when the interests diverge then it's privilege. Thus litigation privilege automatically if the beneficiary's suing the trustee, because their interests are totally different. They might have a joint interest if they're together, between beneficiaries for

example, if two or three beneficiaries joined to sue a trustee they could have a joint interest under section 66 of the Evidence Act. But the law and the cases clearly indicate that litigation privilege still applies, and it's because of that distinction in interest.

GLAZEBROOK J:
So I understand that argument.

MS CHAMBERS QC:
You understand that. So the first test is it litigation privilege –

GLAZEBROOK J:
No, no, but I – oh, well, is it litigation privilege, in an adverse sense.

MS CHAMBERS QC:
And then you go to legal advice privilege, and the issue there will be, because it's governed by section 54 of the Evidence Act, whether there's joint privilege because section 66 applies to section 54, and it is accepted, as I am sure your Honours have realised, that where there is an identity of interest the privilege will be shared between the trustees and the beneficiaries and the trustee cannot assert legal advice privilege against the beneficiary although, of course, we go on to say it's still not automatically disclosed to beneficiaries because you have to go through the section 51 and 53 of the Trusts Act process or *Erceg* before you disclose.

GLAZEBROOK J:
Well, what say the legal advice is: "I think I might have made a mistake. I might be in breach of trust. Can you give me advice on whether I'm in breach of trust or not?" Is that a joint interest?

MS CHAMBERS QC:
No joint privilege. No, no. No, no, no.

GLAZEBROOK J:

But that would be appalling, wouldn't it, because the trustee himself or herself thinks they're in breach of trust and the beneficiary can't have the legal advice that says yes or no, you are in breach of it?

MS CHAMBERS QC:

Well, because the problem with that is that they have different interests. They're going to the lawyer to get advice on whether or not they have breached trust. If you say they both have the same lowest common denominator interest then lawyers will never go to a lawyer to ask if they've breached trust.

WILLIAM YOUNG J:

Well, they shouldn't ask the Trust to pay for the advice.

MS CHAMBERS QC:

Well, payment, on our submission…

WILLIAM YOUNG J:

It can't be irrelevant. It may not be decisive.

MS CHAMBERS QC:

Well, except that on that approach you would say, well, as long as the trustee pays for the advice personally the issue of accountability doesn't apply. That kind of doesn't work either.

WILLIAM YOUNG J:

Well, it might not completely work but if the trustee pays for the advice personally then there's something to be said for the view the trustee's not getting advice on behalf of the Trust.

MS CHAMBERS QC:

Well, if, your Honour, obligations theory of trust, then the Trust is not a legal entity. So he's either getting advice as a trustee, which we say he is, in which

case he's got a privilege because he's the client, and there's a joint privilege or there isn't, and there's no joint privilege because their interests have diverged at that time.

WILLIAMS J:
Why?

GLAZEBROOK J:
Well, have they, because the trustee's interest can only be the beneficiary's interest. The trustee can't have a personal interest.

MS CHAMBERS QC:
Well…

GLAZEBROOK J:
Unless it's "how much do I have to pay for being in breach of trust" in which case that may well be a personal interest.

MS CHAMBERS QC:
Well, except that in my submission they're not necessarily the same and this comes down to – so if we say that the jointish interest arises because they have a shared interest in the subject matter of the communication and that when that shared interest goes the joint interest goes as well, if that's the test, then you can't just look at a test on the basis "what's the lowest common denominator between these two groups". For example, fashioning a joint privilege out of a claim that the beneficiaries and trustees have a joint interest because they want to ensure the Trust is properly administered in accordance with its terms, if you just say, well, they've always got that interest, then you must reach the conclusion that there is no privilege in regard to trustees' advice.

WILLIAM YOUNG J:
No, absolutely not. There's complete privilege against third parties.

MS CHAMBERS QC:

Okay, no privilege between beneficiaries and trustees. That must always be the case if that's the test.

WILLIAM YOUNG J:

Well, it probably – that may be the case. What would be wrong with that? You tell me.

MS CHAMBERS QC:

Well, what's wrong with that, Sir, is that – the policy reasons that I was coming to. Beneficiaries are not a nice little unified group. They all have different interests themselves. So you can have situations where trustees need to get legal advice on things like the different treatment of income versus capital beneficiaries, iwi trusts who are required to balance difficult issues, like maximising financial return with requirements that the Trust achieves wider social and cultural objectives, immediate requests for assistance versus future generations, divorce or breakdown of relationships where two beneficiaries divorce and often one of them is a trustee. Perhaps a beneficiary wants to acquire a Trust asset at an under-value, a principal beneficiary, and the trustee goes: "Well, what do I do? I want advice on this. What are my obligations?"

WILLIAM YOUNG J:

I would have thought that's a classic case where the advice should be that the trustee should act in the interests of the Trust and whether the advice is held on behalf of all trustees. I think it would be remarkable if that advice could be withheld from other beneficiaries.

MS CHAMBERS QC:

Well, I would, in my submission, I would say it would depend on the circumstances of the case because it may not be in the interests of other beneficiaries, it might be in the interests of this particular beneficiary. The trustees still have to make a decision on whether or not to allow that key beneficiary to buy the asset at under-value and if you say, well, your legal

advice is going to be disclosable to all beneficiaries and the lawyer, of course, would have to say to the client trustee: "By the way, I can't guarantee that this advice is privileged before you come and talk to me," it just – it's contrary to *Erceg*'s decision which relied on *Re Londonderry's Settlement* [1965] Ch 918 (CA) and *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA) that the autonomy and confidential nature of a trustee's role is recognised for very important reasons. They are inherently in a conflict position in a way because the different beneficiaries are going to have different results from this Trust and we have a much more litigious environment now.

So what I'm saying, Sir, is that the policy issue is that you want the trustees to go and get legal advice when they're in a difficult position. If we say to them: "Oh, by the way, if you go and talk to a lawyer about this issue that you've got with this group of beneficiaries over here who are saying they want certain distributions," or whatever they want, "you're going to have show everyone that advice," it's going to result in a chilling effect, and what you're going to end up with, I suggest, your Honours, is that client trustees are going to say to their counsel: "Don't write anything down. I'm not going to write anything down either. Let's just keep it oral."

WILLIAM YOUNG J:
But that would be a reason for not having discovery.

MS CHAMBERS QC:
Well, except in my submission it is a good policy reason. I mean look how complicated trusts have become now. In New Zealand with family trusts, as your Honours know, they usually have a huge number of discretionary beneficiaries and classes of discretionary beneficiaries and a much smaller number of final. They have powers, sometimes with the trustees, sometimes residual with the settlor or appointor to remove beneficiaries, to appoint beneficiaries, to remove trustees, usually a very wide discretion on distribution. So we have complicated terms and if we say we want this law to work to avoid litigation complexity, to help New Zealanders resolve issues in regard to their trusts, you need to take into account, in my submission, the

strong policy of the importance of trustees being able to go and get legal advice when they are in a position of conflict with beneficiaries which is all too common, all too common.

The alternative is fishing, expensive litigation, trustees not being prepared to accept office because they know that they're going to be subject to scrutiny by disappointed or hostile beneficiaries, and the cowboy who I draw cantering through the courtroom saying: "I'm not getting legal advice because every single member of my iwi is going to be entitled to get that advice," and they're going to go through it and they're going to say: "Can I litigate?"

WILLIAMS J:
Those are the Indians, not the cowboys.

MS CHAMBERS QC:
So as to when joint interest applies, I do refer your Honours in the roadmap to *Cross on Evidence,* which is in the materials put in by the respondents, and a case which quotes the case of Rodney Harrison J where he says –

WILLIAM YOUNG J:
Rodney Harrison J?

WILLIAMS J:
And QC?

MS CHAMBERS QC:
Oh dear, whoops.

WILLIAM YOUNG J:
Has something happened I haven't heard about?.

MS CHAMBERS QC:
Hang on, I've got the wrong one. Rodney Hansen J. Sorry, Sir. No, he hasn't – no, not quite Mr Harrison yet.

"It will be a question of fact in each case whether the relationship creates a joint interest in the subject matter of the communication at the relevant time. Whether or not a joint interest will arise in a communication will depend on its subject matters and the respective roles of the parties, all to be considered at the time the advice is given," and that's quote from *GDF I LLP v Melview (Kawarau Falls Station) Investments Limited (in Rec)* [2012] NZHC 1432. So it's a question of fact, and it's going to depend on the particular circumstances.

If you take just a broad-brush assumption that trustees and beneficiaries always have a common interest, then effectively there would be no privilege between trustees and beneficiaries, and that immediately triggers those policy issues that I've referred to –

WILLIAMS J:
But you've got the backdrop of the factors in, the *Erceg* factors, which require you to take into account the autonomy issue against necessity and all of that sort of – why is that not the right place to make this decision?

MS CHAMBERS QC:
Because privilege is king, that's really, and my learned friend –

WILLIAMS J:
Yes, but you're really arguing that privilege should be shrunk because to do otherwise would be to invite litigation Armageddon and…

MS CHAMBERS QC:
No, I'm…

WILLIAMS J:
And that's because you say privilege is a trump. But if the second stage provides sufficient protection for your policy issues, why narrow privilege?

MS CHAMBERS QC:

Well, we say because privilege is such a fundamental concept you must look at that first, because that stops disclosure, regardless of the balancing exercise under *Erceg*.

WILLIAMS J:

Agreed. But your point is that if you go to the lowest common denominator, as you describe it –

MS CHAMBERS QC:

Oh, yes.

WILLIAMS J:

– which is if you have always have a joint interest in the lawful administration of the Trust then you've never got privilege.

MS CHAMBERS QC:

Yes.

WILLIAMS J:

Perhaps, but does that matter if the safeguards at the *Erceg* stage or the Trustee Act stage stop litigation Armageddon?

MS CHAMBERS QC:

Well, I accept that's a relevant factor, I see the point your Honour's making. I would respond to that, Sir, by saying that because I'm arguing for a principled approach, unlike my friend, what the Court has to do is say: "Well, listen, folks, where it's legal advice you've got to start with privilege. What is the law of privilege? Is it a joint privilege?" And in some cases there's going to be joint privilege. Then you go down to that second test. So I would argue, your Honour, that because that principle of privilege is so important to our law, and for all the reasons that I'm sure your Honours are well aware of you have to apply that law first, and because Parliament has basically in my submission said that's what you have to do, because they didn't take the opportunity in

the Trusts Act to say: “Oh, and by the way you can ignore trustee solicitor-client privilege.

GLAZEBROOK J:
Okay. So when don’t we have a joint privilege in terms of trustee and beneficiary?

MS CHAMBERS QC:
Right.

GLAZEBROOK J:
So you say it’s too broad to say they both have an interest in the due administration of the Trust, you didn’t like my suggestion that the trustee has no personal interest because their interest is the interests of the beneficiaries and that’s the basis of the fiduciary relationship?

MS CHAMBERS QC:
Yes, yes, I don’t like that.

GLAZEBROOK J:
You didn’t like that either?

MS CHAMBERS QC:
No, because – no.

GLAZEBROOK J:
So what do you say?

MS CHAMBERS QC:
Well…

GLAZEBROOK J:
I’m sorry, I’m being slightly facetious, but what do you say it is?

MS CHAMBERS QC:

Yes, I'm sure.

GLAZEBROOK J:

I'm sorry, I probably was being too facetious there.

MS CHAMBERS QC:

Yes, so I take it from the joint, the word "joint interest" from that Evidence Act, so where their interest diverged, so for example, a trustee getting advice on a possible breach of trust, their interests diverge. Advice where beneficiaries disagree, such as the family trust where the parents are separated, the mother wants –

GLAZEBROOK J:

I can see the examples. If you could just put it in sort of one sentence because if we're trying to look at giving guidance and we're looking at a simple way trustees can work out what is and what isn't. So you said where their interests diverge, the trustees' interests and the beneficiaries' interests diverge. Is that the one sentence?

MS CHAMBERS QC:

Yes, I think I tried to start off with it as my first key proposition. A joint interest in the subject matter of the communication at the time it comes into existence.

GLAZEBROOK J:

So if you become a beneficiary afterwards, ie, you're born, I don't mean that you're added but you effectively are born after the communication, you wouldn't be able to get that communication or your guardians wouldn't be able to get that for you on your behalf?

MS CHAMBERS QC:

Well, I would have thought you would because you would be, of course, a potential beneficiary and your interests as a potential beneficiary would have been in alignment.

GLAZEBROOK J:

Well, you weren't in existence and normally we don't – people not in existence aren't taken account of but…

MS CHAMBERS QC:

Well, presumably you were anticipated by the Trust Deed.

GLAZEBROOK J:

Yes, all right, so you're not really meaning at the time in that sense, you're just saying –

MS CHAMBERS QC:

Well, I've – "at the time it comes into existence" is in accordance with the cases, the cases add that proviso, and I think it's probably a fair proviso.

GLAZEBROOK J:

But you accept future beneficiaries?

MS CHAMBERS QC:

You can't later say: "Oh, I know I got that advice at the time when we weren't in conflict but, hey, we are now so I'm not disclosing it." That's what that's for.

GLAZEBROOK J:

All right, but you accept future beneficiaries?

MS CHAMBERS QC:

Yes, I do, I do.

ELLEN FRANCE J:

If you look at section 66 of the Evidence Act, what are you saying? How does that apply here?

MS CHAMBERS QC:

Because section 66 provides that overall solicitor/client privilege which is what we're talking about now and says that if there's a joint interest then the

privilege can't be asserted against the other joint privilege holder. But you're saying?

ELLEN FRANCE J:

Well, I'm just querying is that what it says, 66. If you look at 66(1)(a) is that what you say that's saying?

MS CHAMBERS QC:

Yes, I am. I'm saying that that –

ELLEN FRANCE J:

Because they're a third party, is that –

MS CHAMBERS QC:

Against third parties, yes. So section 66 applies to both litigation privilege and advice privilege. But to have a joint privilege where you hold it jointly, that goes back to the issue of whether the advice is obtained. It goes back to section 54, in fact, of the Evidence Act which provides for privilege in regard to communications with legal advisers.

ELLEN FRANCE J:

No, no, I understand that. I'm just trying to understand how section 66(1)(a) helps you. So presumably you read the beneficiary as being the third party, is that right?

MS CHAMBERS QC:

No, no, I read the – if the beneficiary has got a joint interest, they're the person that holds it jointly.

WILLIAMS J:

Yes, it's not a creation of joint interest, it's simply saying if there is a joint interest, both or the several parties to that joint interest, can claim privilege against a third party.

MS CHAMBERS QC:

That's right.

WILLIAMS J:

So it's not actually focused on us, it simply assumes this situation to exist, without creating it.

MS CHAMBERS QC:

Yes, yes.

GLAZEBROOK J:

Well, it makes it clear they're entitled to see the privileged material if they have a joint interest and it also makes it clear that they can be stopped giving it to someone else if their joint privilege holder doesn't want it to be disclosed.

MS CHAMBERS QC:

That's right.

GLAZEBROOK J:

So it's really just setting out what happens if you've joined. You can look at it, you can asset privilege against third parties –

MS CHAMBERS QC:

That's exactly right.

GLAZEBROOK J:

– and you can be stopped disclosing it.

WILLIAM YOUNG J:

Can I just ask you, say your partner was replaced by another trustee, could that trustee insist on having all these documents?

MS CHAMBERS QC:

Yes.

WILLIAM YOUNG J:

Suggest that it's not really a privilege that's personal to the trustees

MS CHAMBERS QC:

No, but I suggest that's solved by the fact that the person who requested the professional advice was doing in their capacity as trustee of the Trust, and this next person has now assumed that capacity. If you, I mean obviously you must –

WILLIAM YOUNG J:

I suppose, just a sort of an entirely off-the-cuff preliminary view I have is that if the trustee, if a replacement trustee's entitled to it, then it's a document in respect of which the privilege is not personal to the trustee and therefore it might be thought to follow that it would be susceptible to disclosure at the suit of a beneficiary.

MS CHAMBERS QC:

Well, except, Sir, the whole point of privilege is that you can get advice from your lawyer without revealing it to someone who is in an adverse position to you, thus we have litigation privilege.

WILLIAM YOUNG J:

But say the Court just said: "We're unhappy about the way the Trust has been administered, we're going to appointment the Public Trustee as trustee of this Trust."

MS CHAMBERS QC:

Yes.

WILLIAM YOUNG J:

The Public Trustee might be in an adverse position to your client, but I still think the new trustee would be entitled to all the Trust-paid legal advice. You may want to think about that.

ELLEN FRANCE J:
Well, earlier on you accept that, I noted, some of the material is subject to joint privilege…

MS CHAMBERS QC:
Yes.

ELLEN FRANCE J:
Although you'd then say not reasonably necessary to disclose. So what are some examples of the types of things you're accepting are subject to joint privilege, in this case? I'm not talking more generally.

MS CHAMBERS QC:
Well, that's difficult, your Honour, to be specific about because of course the trustee's position is that that is not disclosable because it doesn't meet the criteria under the Trusts Act.

ELLEN FRANCE J:
Well, you can't even give sort of general categories of what sorts of things we're talking about?

MS CHAMBERS QC:
Well, I could, I think, give an example of legal advice on tax issues as to subdivision.

Just before I move off this joint interests aspect and the privilege issue generally and ask Ms McGuigan to address your Honours on the second hurdle, which is the Trusts Act, I do emphasise that of course the legislation and the case law has always recognised that advice which goes to the reasons for the trustees' decisions cannot be disclosed and we would say that is because there's no joint interest and also because it's in accordance with the appellant's approach to trusts which is that there needs to be protection for trustees to make the decisions that they do without constant review by unhappy beneficiaries, and that and the recognition really throughout all of the

cases of litigation privilege is the principle that we now put before your Honours as appropriate in these cases.

Now I know Ms McGuigan wishes to address your Honours on the second hurdle we say which is the application of the Trusts Act in this particular case.

MS McGUIGAN:

"Wishes to" might be a little strong. Good morning, your Honours. I have been tasked with that part of the oral argument which addresses the Trusts Act. The Trusts Act sets out the trustees' obligation to account to beneficiaries and deals expressly with giving trust information to beneficiaries. The appellant acknowledges that the Act is not yet in force but says that it will obviously apply from 30 January 2021 and that any principled approach would have regard to it. In any event, the Act essentially codifies *Erceg* in relation to information disclosure obligations and so is relevant to this Court's analysis.

The trustees information disclosure obligations are contained in Part 3, subpart 3, of the Act. If I might refer your Honours first to section 50 of the Act, the Act is in tab 2 of the appellant's first bundle of authorities, and section 50 sets out the purpose of giving information to beneficiaries "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."

Now as in *Erceg*, the Trust Act provides that obligations of disclosure to beneficiaries are founded on the idea of accountability of trustees to beneficiaries for the stewardship of assets. The Trust Act is based on the idea that beneficiaries should be able to hold the trustees to account by way of two prescribed presumptions of disclosure. The first, and that's at section 51 of the Act, is that every beneficiary is entitled to basic trust information. So section 51(1) there is a presumption that a trustee must make available to every beneficiary the basic trust information set out in subsection (3). If we trot down to subsection (3), the basic trust information is that a person is a beneficiary, the name and contact details of the trustee,

appointment and removal of trustees and the right of the beneficiary to request a copy of the terms of the Trust or trust information.

The Act's second presumption is at section 52 and that is beneficiaries should be able to request trust information regarding the terms of the Trust, the administration of the Trust, or the Trust property, where it is reasonably necessary for the beneficiary to have that information to enable the Trust to be enforced.

However, both presumptions can be rebutted. If the trustees, having considered the 13 factors outlined in section 53 which align with this Court's factors in *Erceg* reasonably consider that the presumption does not apply. So if we look first at section 51(2) –

WILLIAM YOUNG J:
So just pause. This only applies, suggests that the information has to be withheld, that the trustee can't pick and choose between beneficiaries, is that right?

MS McGUIGAN:
Which provision, sorry, Sir?

WILLIAM YOUNG J:
Section 51(2). Or, well, maybe every beneficiary, I suppose it's ambiguous, it may – if the trustee reasonably considers that the information should not be made available to every beneficiary…

MS McGUIGAN:
Yes, so section 51 is dealing with the basic trust –

WILLIAM YOUNG J:
Right, sorry, yes.

MS McGUIGAN:

Yes. So before giving the information the trustee is required to take into account the factors set out in section 53 and if the trustee reasonably considers after that that the information should not be made available to every beneficiary the presumption does not apply and the trustee may decide to withhold some or all of the basic trust information from either a particular beneficiary or classes of beneficiaries, and the same applies at section 52(2) in terms of the trustees' considerations of whether to provide the disclosure.

Of significance is the fact that the Act does not make disclosure to beneficiaries a mandatory or a default duty. Rather, the giving of information to beneficiaries is described as an "information obligation" and it's subject to that balancing. Furthermore, the definitions of "core documents". "basic trust information" and "trust information" do not include legal advice to the trustees.

WILLIAM YOUNG J:

What about they "do not include", you mean they don't mention?

MS McGUIGAN:

It's not expressly mentioned, Sir. If I –

WILLIAM YOUNG J:

So where's the definition of "trust information"?

MS McGUIGAN:

That, Sir, is at section 49. "Trust information" means: "Any information regarding the terms of the trust, the administration of the trust or the trust property, and that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced, but does not include –

WILLIAM YOUNG J:

I mean, the words "any information" are quite broad.

MS McGUIGAN:

Yes. Sir, on the appellant's argument legal advice could fall within, legal advice could be in relation obviously to the terms of the Trust, the administration of the Trust or the Trust property, but that's dealt with at the first stage when we're dealing with whether there is a shared interest in the privilege, which my learned friend has already addressed the Court on.

WILLIAM YOUNG J:

Okay. So assuming that there is –

MS McGUIGAN:

A shared interest.

WILLIAM YOUNG J:

– a shared interest, or assuming that effectively privilege can't be claimed against the beneficiary, then legal advice is within any information.

MS McGUIGAN:

Yes, that's right, Sir, and then it goes down to whether it should be disclosed under the section 53 factors.

WILLIAMS J:

So if you proceed from the basis that the only relevant interest a beneficiary has, according to *Erceg* and *Schmidt v Rosewood Trust Limited* [2003] 2 AC 709 (PC), from memory, is the due administration of the Trust, section 49(a)(ii) simply repeats that.

MS McGUIGAN:

Simply repeats, sorry, Sir, that…

WILLIAMS J:

That the only interest a beneficiary has in the information of the Trust is that relating to the due administration of the Trust.

MS McGUIGAN:

Yes, and I think that –

WILLIAMS J:

According to the obligations approach to trust enforcement.

MS McGUIGAN:

And I think that's quite clearly set out at section 13 of the Act, Sir, which deals with the characteristics of expressed trusts, which is that it is a fiduciary relationship holding to account…

WILLIAMS J:

Yes, that's right.

MS McGUIGAN:

And also obviously section 50 of the Act, which sets out the purpose for why information is provided to a beneficiary.

WILLIAMS J:

So “reasonably necessary” is a broad concept, isn’t it? It’s more than “relevant”, there’s a necessity test, but it’s reasonably necessary?

MS McGUIGAN:

Yes, I agree with that, Sir.

WILLIAMS J:

Right. You wouldn't default to a narrow interpretation of that, would you?

MS McGUIGAN:

No, I think, Sir, that the first stage is whether it is trust information, and I am assuming that for the most part it will be.

WILLIAMS J:

Yes, almost everything will be, according to this.

MS McGUIGAN:

Yes, I agree. So then you're dealing with the individual circumstances of the case under section 53. But I completely accept that you don't take a narrow approach to the interpretation of the provisions but also more generally to the balancing exercise, but it is a balancing exercise.

WILLIAMS J:

Yes, sure, but it is in its own way a nice bright-line, isn't it?

MS McGUIGAN:

Yes.

WILLIAMS J:

I just don't understand why this is difficult.

MS McGUIGAN:

I'm getting that impression, Sir.

O'REGAN J:

How does this fit in with section 66 of the Evidence Act which talks about those who have a joint interest in privileged information having access to it? It says they're not restricted from having access or seeking access to the privileged matter. Do you say that having access or seeking access then defaults back to the *Erceg* or Trusts Act criteria?

MS McGUIGAN:

So Sir, yes, the first stage is is there a shared interest in the subject matter of the communication.

O'REGAN J:

Well, let's assume there is, yes.

MS McGUIGAN:

So the Trusts Act assumes that there is, yes, and at that point you then balance the *Erceg*, well, the section 53/*Erceg* factors as to whether it should

be disclosed to the beneficiary. That is, is it necessary to hold the trustee to account?

WILLIAMS J:
Well, not quite. Once you've established it's necessary to hold the trustee to account, is their account availing consideration such as familial conflict, all of those sorts of things, that might make you stop anyway, right? Isn't that the point in 53?

MS McGUIGAN:
Yes, Sir, that's better expressed.

WILLIAMS J:
Right. Well, that makes sense, so it's for a judge to try and be wise around the realities of trust administration.

MS McGUIGAN:
As the Act encourages following this caution in *Erceg*.

WILLIAMS J:
Yes, once you've established reasonable necessity.

MS McGUIGAN:
Yes.

O'REGAN J:
But I mean section 53 and *Erceg* both contemplate it will be the trustees exercising those judgements initially.

MS McGUIGAN:
Yes, and the Act contemplates that as well with its purpose and principle provisions, that the law should be accessible and not complicated or expensive, and so yes, exactly.

WILLIAMS J:

Good point. So I should have said the trustee to be wise in light of the realities of New Zealand trusts.

O'REGAN J:

And in the absence of that the Court doing it for them.

WILLIAMS J:

Yes, and in the event the trustee's a cowboy, or an Indian, for the Court.

MS McGUIGAN:

I think so. I think though, your Honours, looking at section 49 is quite important because the definition of "trust information", obviously it's broad. It relates to any information in relation to those particular things, but it's only that information which is reasonably necessary for the beneficiary to have to enable the Trust to be enforced and does not include reasons for trustees' decisions. So right out of the gate the appellant would submit that the Act excludes legal advice which relates to trustees' reasons for decision. It also excludes –

WILLIAM YOUNG J:

It relates to? Say a trustee seeks advice as to the range of matters available to be considered and that advice is provided, would that itself be excluded?

MS McGUIGAN:

I hate to just stand here and say it depends, your Honour, but if the advice that you received back from your lawyer set out: "These are all the things you've told me about why you would like to do something," and –

WILLIAM YOUNG J:

Well, it might depend. All right: "You have told me that you intend to decide to exercise a particular power on this basis, X Y A B C, I agree you can." All right, well, that probably is something that is likely to be excluded.

WILLIAMS J:

If a trustee, well, take the iwi trust, for example, it's standard procedure in my experience for iwi trusts to have distribution policies which are the basic reasons against which distributions are made. So much for marae, so much for education, and so on and so forth. Those are routinely disclosed.

MS McGUIGAN:

And of course it's available to any trustee to disclose their reasons.

WILLIAMS J:

Yes, but the sky didn't fall down. Why are we even worried about this?

MS McGUIGAN:

Because the Trusts Act prevents it in the sense that obviously the trustee can do it but the trustee cannot be required to disclose reasons for their decisions.

WILLIAMS J:

No, but those policies that precede the reasons, I just…

WILLIAM YOUNG J:

They're not the reasons for an individual decision.

WILLIAMS J:

No, they're not their individual reasons, no.

GLAZEBROOK J:

Well, there'd be a question mark whether they are reason for decisions or a policy under which you make a decision. I would suggest they probably are disclosable.

WILLIAMS J:

Yes, I would have thought so and it would be good for the due administration of trusts that they are disclosable.

MS McGUIGAN:
Sort of like a framework?

WILLIAMS J:
Exactly.

O'REGAN J:
But the question is whether disclosing the legal advice discloses the reason. So if you just said to the lawyer: "What are the things we have to take into account?" –

WILLIAMS J:
"What are going to be my reasons, please?"

O'REGAN J:
– and the lawyer advised on that, that's not disclosing the reasons, is it?

MS McGUIGAN:
I agree with that, Sir.

O'REGAN J:
But if the lawyer says: "You've told me you're going to do this for the following five reasons and here's my advice about it," well, that would be a problem, won't it?

MS McGUIGAN:
I agree with that.

WILLIAM YOUNG J:
But the word is "does not include the reasons". It's not, I suppose, what piqued my interest when you said "relates to reasons".

O'REGAN J:
Yes. It's more than "relates to". It's got to actually disclose the reasons for a particular decision.

MS McGUIGAN:

I agree with that. Perhaps this is the point –

WILLIAM YOUNG J:

Can we – sort of very punctilious about morning tea. We'll take the adjournment. Fifteen minutes.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.49 AM

MS McGUIGAN:

Your Honours, shortly before the morning adjournment we were addressing the issue of disclosure of trustees' reasons for decisions, and at this point I would like to pick up on my friends' argument in their submissions that the supervisory jurisdiction of the court can be exercised contrary to a statutory provision. So my friends rely on section 8 of the Act, which we could turn to, which states that the inherent jurisdiction of the court is not affected, to suggest that although the court could not order a trustee to disclose reasons under the Act it could do so under its supervisory jurisdiction.

WILLIAM YOUNG J:

What part of the submission are you referring to?

MS McGUIGAN:

It's paragraph 56 of the submissions, Sir.

O'REGAN J:

Of Mr Ross' submission?

MS McGUIGAN:

Yes, Sir. So those submissions read: "Reasons would fall outside the definition of 'trust information' in the Act, but that does not deprive courts of the power to order that they be disclosed, if warranted, when exercising their supervisory jurisdiction."

WILLIAM YOUNG J:

And you say that's not right?

MS McGUIGAN:

Yes, Sir. My submission is that proposition is directly contrary to the established authorities.

WILLIAM YOUNG J:

So it's contrary to the Act or contrary to authorities?

MS McGUIGAN:

Contrary to authorities as to the scope of the court's inherent jurisdiction. And I'll refer the Court to the case of *R v Moke* – sorry, I shouldn't have said "refer", Sir, I don't have a copy of it with me. But the citation for that is (1995) 13 CRNZ 386.

GLAZEBROOK J:

And what was the name of the case, sorry?

MS McGUIGAN:

R v Moke, which is M-O-K-E. It's a Court of Appeal decision by President Cooke with Justice McKay and Thomas.

GLAZEBROOK J:

And what does it say?

MS McGUIGAN:

At 391 it says that it's obviously unwise and unnecessary to seek to define the scope of the Court's inherent jurisdiction: "It is a power which may be exercised even in respect of matters which are regulated by statute or by rules of Court providing, of course, that the exercise of the power does not contravene any statutory provision. The need to do justice is paramount." So that's at 391. And then at pages 393 to 394 it goes on: "The notion that the Court should exercise its inherent jurisdiction in harmony with the relevant

legislation seems irrefutable. Parliament is to be presumed to have enacted the legislation in the public interest and to further the ends of justice. Where it is necessary to utilise the Court's inherent jurisdiction it is done for the same purpose. Parliament and the Courts can effectively function in tandem." Their Honours there refer to the principle that the courts should in developing the common law proceed in parallel and by analogy with the course pursed by Parliament and describe that principle as well established. It then went on to say that: "The same principle is equally relevant to the application of the Court's inherent jurisdiction. It is to be developed and exercised in harmony with the relevant legislation."

WILLIAM YOUNG J:

Well, that's relatively straightforward, that a particular legislative scheme addressed to the issues that would be taken into account in what would otherwise be the exercise of inherent jurisdiction may displace the inherent jurisdiction. There is section 8(1) of the Trusts Act which perhaps is a little enigmatic in its application here. Have you got that up?

MS McGUIGAN:

I do, Sir. And I draw their Honours' attention to, it says "except to the extent that this Act previous otherwise".

WILLIAM YOUNG J:

Okay. So does the Act provide that the Court in its inherent jurisdiction may not require reasons to be provided or does it alternatively merely provide a mechanism by which requests for information can be made and are to be dealt with? That's why I said it's a little bit enigmatic as to what it means here.

MS McGUIGAN:

I agree with that although it does go on at subsection (2) to say that the Court must have regard to the purpose and the principles of the Act when exercising its inherent jurisdiction, and I would also say it should have regard to section 49 in terms of what is the type of trust information that we're talking

about and that it just expressly does not include reasons for trustees' decisions. So I would –

GLAZEBROOK J:
Can I just find out what we're talking about here because I thought the Court of Appeal had said, well, reasons for decisions can be taken out of any legal advice that's handed over?

MS McGUIGAN:
Yes, that's right but I'm just –

GLAZEBROOK J:
So we're not talking about anything that's actually at issue in this case, are we?

MS McGUIGAN:
No, other than that in my submission my learned friend's submission is to try to broaden the sort of exercise of the Court supervisory jurisdiction and I would just suggest that that's inconsistent with the authorities about the proper scope of that jurisdiction.

WILLIAM YOUNG J:
Is he right because he's cited authorities saying that there are cases where reasons have been required?

MS McGUIGAN:
Dawson-Damer v Taylor Wessing which is…

WILLIAM YOUNG J:
Dawson-Damer and was there *Trilogy Management Ltd v YT Charitable Foundation (International) Ltd* [2015] JRC 166?

GLAZEBROOK J:
Well, from my memory it was if you write it down it might well be something that is actually disclosable.

MS McGUIGAN:

A trustee's reason?

GLAZEBROOK J:

A trustee's reasons, and looked at on a sort of judicial review basis some of the decisions suggest, but we're not talking about any of that stuff here, are we, so do – and it's quite complicated and do we need to get into it? That's my real question here.

MS McGUIGAN:

Yes, I accept your Honour's point.

GLAZEBROOK J:

Because it is very complicated and we wouldn't want to deal with it in the abstract without knowing what we're talking about.

MS McGUIGAN:

No, that's right. I guess my only submission would be that the Act carves out reasons –

GLAZEBROOK J:

Yes, I understand that.

MS McGUIGAN:

– in the same way that the case law has done.

GLAZEBROOK J:

And the Court of Appeal decision actually carved out reasons as well, from memory.

MS McGUIGAN:

Yes.

WILLIAMS J:

It does seem these days like something of an historical artefact, doesn't it? I'm not saying it's not there. It's of course there. But it belonged to a different time.

MS McGUIGAN:

Your Honour, I don't agree with that. I think in some respects it's even more important in the current modern environment of trusts than perhaps it was in the, dare I say it, slightly paternalistic line of cases that sort of date back from the nineteenth century. Here the trustee, and Lady Chambers has referred, your Honours, to some examples where the trustees are put in, I wouldn't it describe it as a position of sort of hostile conflict, but there's no doubt that they are trying to manage a number of varying interests and balancing them, and in that situation if they choose to keep their decision-making confidential then Parliament has made the choice to respect that. Obviously it's up to the individual trustees as to whether they disclose their reasons, and that's a separate point, but I don't agree that it's archaic. I think it's really important to the administration of trusts.

WILLIAM YOUNG J:

So if it is the case that as of now reasons can be required, that is before this Act comes into effect, you say the Act has revoked the ability of the Court to require reasons to be given?

MS McGUIGAN:

I say it's very clearly set out in the Act which – and if we look at the –

WILLIAM YOUNG J:

But you are saying the power of the Court to require reasons as previously exercised has now been revoked?

MS McGUIGAN:

Sir, I don't think it has ever really been properly exercised in the –

WILLIAM YOUNG J:

Well, I'm looking at a *Trilogy* case which is –

MS McGUIGAN:

Yes, we can – of course, I can go all over the Commonwealth and find cases for any proposition.

WILLIAM YOUNG J:

But there are cases where a jurisdiction to that effect has been exercised?

MS McGUIGAN:

Not in New Zealand that I'm aware of.

WILLIAM YOUNG J:

No, no.

O'REGAN J:

But I think –

GLAZEBROOK J:

But in any event we don't need to deal with it. It doesn't arise.

WILLIAM YOUNG J:

No, at all.

O'REGAN J:

I think *Erceg* just said it would not normally be required. It didn't say it would never be required.

MS McGUIGAN:

So in *Erceg* at 55: "It also brings into play the principle that trustees are not required to give reasons to discretionary beneficiaries for the manner in which they exercise their discretions. This means that trustees may decline to disclose to a beneficiary documents that set out their reasons (or may redact…)."

WILLIAMS J:
What section are you reading, sorry?

MS McGUIGAN:
Sorry, Sir, that's paragraph 55 of *Erceg*. Sorry, my learned friend is also drawing my attention to paragraph 56(f) of *Erceg* which states: "Whether the documents sought disclose the trustees' reasons for decisions made by the trustees," and that's your Honour's point, that "it would not normally be appropriate to require disclosure of the trustees' reasons for particular decisions."

The Trusts Act, which in all of these regards adopts the approach of this Court in *Erceg*, provides that the trustee in the first instance, or the Court, will need to be satisfied that disclosure of a particular piece of legal advice, which must on the appellant's argument be subject to joint privilege, is necessary to hold the trustee to account. As *Erceg* foreshadows, the assessment may require evaluation of each document or hopefully, more likely, classes of documents, and the reference for that is *Erceg* at 56(a) and 57. The touchstone is whether the information is reasonably necessary to account. There is no right or entitlement to disclosure. The right of the beneficiary is to have the Trust property properly managed, not a right to be informed, and that's *Erceg* at 49 and also the Act at section 50.

So your Honours, the appellant's argument is that what is necessary in a particular case will depend on *Erceg* factors, including the interests of the beneficiaries as a whole. There may be situations where the trustees obtain advice because that course is in the best interests of the beneficiaries but disclosure of the particular advice to any one or more beneficiary is not in the best interests of all beneficiaries. In some cases rather a trustee's ability to seek legal advice, including to make full and frank disclosure to her lawyer, is what is actually in the best interests of all the beneficiaries.

WILLIAM YOUNG J:

Well, how is this dealt with, to be dealt with by the Courts? Are we to be – should they deal with it on the basis of, well, here's a category advice, we're not persuaded one way or the other whether it's necessary? Should the Court take the view, well, it might be necessary, therefore we require disclosure, or could it say, well, the beneficiary hasn't established that it's necessary so we refuse disclosure, or is the Court expected to look through all the documents?

MS McGUIGAN:

Well, I think, Sir, obviously we're dealing on our argument just here with documents which are subject to the joint interest privilege.

WILLIAM YOUNG J:

No, I do – well, which – yes, I agree. So I mean if you wanted to maintain a position that they were not required to be shown, the best thing may have been to show them to the Court, mightn't it? How can we – I mean except by reference to the broad context of a dispute, how are we to decide whether legal advice, the details of which we don't know, should be disclosed under either our inherent jurisdiction or if our judgment is after the 30th of January, which is possible, that – inconsistently with the Act?

MS McGUIGAN:

I think it's a – obviously context is king, so it's really difficult to analyse whether a document should be disclosed without taking into account all of the different contexts in relation to the Trust. But, for example, if the advice related to a transaction –

WILLIAM YOUNG J:

So I'm asking what we do here. What do we do here? You're simply saying: "We're not showing you anything." How do we deal with that? Do we just say, "Well, the respondent hasn't been able to identify documents which are necessary for her to ensure the Trust is administered," which is a rather, I think, lame proposition because how could she without having them?

You have the documents but you're just asserting generally they don't need them. So how do we cut through that and get to an answer?

MS McGUIGAN:

Yes. I know that Lady Chambers will address your Honours on that issue, but broadly we've got a situation at the moment where the trustee has been ordered to disclose all legal advice and opinions over the entire Trust period in relation to both legal advice and litigation privilege.

WILLIAM YOUNG J:

That was against a background of some fairly, I suppose, adverse factual findings in the Court of Appeal.

MS McGUIGAN:

Although, your Honour, that –

WILLIAM YOUNG J:

I've put it slightly too highly. Suggestions of the likelihood of adverse findings.

MS McGUIGAN:

Your Honour, that wasn't the basis of the decision though. The basis of the decision was that the legal advice and opinions were basic Trust documents which were necessary to be disclosed. So my learned friend will come next to applying the *Erceg*/Trusts Act to the Court of Appeal decision but in relation to the issue of how this Court will deal with it, the appellant would say we need some guidance about where there is a joint interest because at the moment there's just no ability to assert the privilege at all and…

WILLIAM YOUNG J:

Well, you've got it really from the Court of Appeal. If it was paid for by the Trust the starting point is there's a joint interest.

MS McGUIGAN:

We're saying that's wrong, Sir.

WILLIAM YOUNG J:

Yes, okay, well, if I were to modify it I would probably say if it's obtained on behalf of the Trust, qua trustee, the starting point will be joint interest.

MS McGUIGAN:

Well, perhaps I will cede now to my learned…

WILLIAM YOUNG J:

You may not want more of that sort of guidance. I don't know.

MS McGUIGAN:

That does actually conclude my part of the oral argument, if it pleases the Court.

WILLIAM YOUNG J:

So you're going to deal with this issue of how do we decide?

MS CHAMBERS QC:

I am and if your Honour – I can deal with that now if your Honour is minded. So what we're suggesting happens in this particular case is that this Court's decision is delivered as to what the principles are when dealing with privileged documents with a request from beneficiaries and then the trustee will obviously take some time to apply those principles to the legal advice that the trustee has and then disclose any documents which are required to be disclosed. Obviously, if there is dispute then the matter will need to be remitted back to the High Court because – and that's partly, Sir, in this particular case, because of the procedural route that it's taken, and the normal rules in the High Court Rules would cover any dispute and obligations of disclosure and so on, the discovery process and the ability to challenge privilege. And, if it came to it and we were still in dispute about what is and isn't privilege, then yes, a Judge would probably have to read the document.

GLAZEBROOK J:

So if we say anything obtained on behalf of the Trust, qua trustee, is disclosable then it would be the *Erceg* factors and I think what's being put to you is because we have no idea what this document is, these documents are, we can't give any guidance on that at all. Do you agree with that?

MS CHAMBERS QC:

Well, except in one respect. You know that some of the advice is in regard to routine matters over the course of 30 years, such as, and I gave your Honours the example of tax, advice to the trustees on what tax they were liable to pay in regard to subdivisions, undertakings that this trustee has undertaken. So using that as an example, is that kind of legal advice in your Honour's opinion necessary in this case, taking into account the *Erceg* factors, to enforce the Trust?

GLAZEBROOK J:

Well, it could be because it might be they had advice that said the scheme you've got for not paying tax on the subdivision is illegal, which is ignored. I'm not suggesting that has been the case but it's hard to say if you get a tax advice that's – because in fact for the due administration of the Trust you want to make sure that they have followed it and that the advice is actually correct so that you're not going to have an issue with the revenue down the track, for instance. It just seems difficult to –

MS CHAMBERS QC:

Well, except – yes, yes. Except, I suppose, I mean the context is accountability to the beneficiary for the due administration of the Trust. I mean, to stretch it to, that Mrs Addleman is going to be concerned in her capacity as trustee that the trustee may have not paid the correct amount of tax, paid too much or paid to little.

GLAZEBROOK J:

Well, have you seen the penalties that can arise if you don't pay the right amount of tax? It could wipe out the whole Trust.

MS CHAMBERS QC:

Well, the trustees paid too much tax.

GLAZEBROOK J:

Well, that's even better, you get it back then. But with not as high an interest rate as you would if you had failed to pay it.

MS CHAMBERS QC:

Okay.

WILLIAMS J:

I guess the point is that given 30 years of, I'll not say radio silence, let me say relative silence, you must get to a point of kind of reverse, and in pragmatic terms, reverse onus, because she knows so little. How can she know, how can we know…

MS CHAMBERS QC:

Well…

WILLIAMS J:

I mean, in a sense the Trust has walked itself into this corner.

MS CHAMBERS QC:

Perhaps. Except that if we're now looking at the position, she does have all of the financial statements, and that's a key bit of information. I mean, in terms of accountability, the financial statements have to be, and the minutes…

WILLIAMS J:

Yes, that's progress.

MS CHAMBERS QC:

And the Trust deed and the wishes, have to be, you know, the fundamentals, and I think that's kind of reflected in the legislation too.

WILLIAMS J:

Yes. So, you see, we're left to the position where you've given us a hint about one category, I'm not sure whether you're prepared to give us a hint about any other categories, but if the dispute comes down to reasonable necessity category by category, we'd have to know what the categories are and then the other side will have to be able to justify per the *Erceg* factors why access to them is reasonably necessary and that exercise is just impossible to undertake right now.

MS CHAMBERS QC:

Well, the submission is really that your Honours look at it in terms of legal advice that trustees might get, and you know the type of legal advice the trustees might get and I've given you examples.

WILLIAMS J:

Yes, well, you've given us one example.

MS CHAMBERS QC:

Well, no, well, of my client's legal advice that they've obtained. But I've given you examples of, I mean, we could call it "transactional advice", the Trust and subdivision. There's also obviously advice on the Trust deed, how you interpret it. I'm not saying Lambie have got this, I'm saying it's the type of advice we know trustees get and what their obligations are, and then there's advice in regard to how to exercise those discretions. I would say trust advice falls within those three categories. Now when in a particular case is that trusted legal advice going to be necessary for a beneficiary to make sure that the trustees are complying with the trust deed?

WILLIAMS J:

And the problem is we have no idea.

MS CHAMBERS QC:

Well…

WILLIAMS J:

We're not used to giving, I mean, you're leaving us in a position where we have to basically give abstract advisory opinions, and we're not very good at that.

MS CHAMBERS QC:

You're extremely good at that, Sir.

WILLIAMS J:

Well, we don't like doing it.

MS CHAMBERS QC:

No.

WILLIAMS J:

Because we understand the pitfalls of doing so.

MS CHAMBERS QC:

Although at the end of the day with this Court what we seek, what the appellant seeks and what I suggest all litigants seek, is principle, the principle to be applied, not the answer to a particular case, that can be left for people much further down the food chain, ie, you know, a High Court judge, if necessary, if there's still dispute. But if you give us clear principles dealing with when it is going to be necessary. But of course even in *Erceg* your Honours said: "Well, it's very hard to have hard and fast rules in regard to every situation because the situations that arise with trusts are so diverse," so you give a list of factors, and the legislation's taken the same approach. And that kind of approach is likely to be suitable in regard to the issue before your Honours.

GLAZEBROOK J:

Can I take you back up the steps that, because I think we probably haven't given you enough opportunity to argue why obtained on behalf of the Trust, qua trustee, then it's disclosable, and that would include litigation privilege.

So I know I said to you that I understood the argument in terms of litigation privilege. That didn't mean that it was accepted either by me or by the rest of the Court, and so you probably need to go back up that step and say whatever you need to say about why litigation privilege applies and why that isn't a joint interest and also about the test that Justice Young just suggested in terms of anything obtained on behalf of the Trust, qua trustee, is disclosable because that would not exclude litigation privilege from that test.

MS CHAMBERS QC:

Include litigation privilege, mmm. Right, well, thank you for that, your Honour. I agree with that and so I will go back into reverse gear, and what I'm – the kernel of the argument as to why if you get advice on behalf of the beneficiaries – if a trustee gets advice, they're always getting advice on behalf of the beneficiaries. If we take it right back to the obligations theory of trusts which is now accepted, then a trust is not an entity. So the person getting the advice under the Law Practitioners Act is clearly the trustee. They're the client. And so when you come to privilege you cannot just say, well, because you're getting advice in regard to your role as a fiduciary in regards to these beneficiaries they become effectively clients as well. You are getting advice wearing a hat, a trustee hat, and you're not there getting advice on behalf of the beneficiaries. So if we –

GLAZEBROOK J:

Although you say sometimes you are. I'm sorry to interrupt but you did accept that sometimes the trustee will be doing that even on a theory of obligation.

MS CHAMBERS QC:

You're still getting – it's slightly different, isn't it? There's the client and then there's who is the client? It's got to be trustee, and that's where I say these other cases which say is he getting it personally are all very confusing.

GLAZEBROOK J:

All right, I understand, so you say the beneficiaries aren't the client –

MS CHAMBERS QC:

No.

GLAZEBROOK J:

– but in some cases there will be a joint privilege?

MS CHAMBERS QC:

They will hold a joint privilege, that's right.

WILLIAM YOUNG J:

Can we be specific? If you look at volume 2 of the evidence at page 63 there's a reference to legal advice and I'd quite like you to say on whose behalf that advice was sought.

GLAZEBROOK J:

Volume 2.

WILLIAM YOUNG J:

Volume 2, page, sorry, 26 at the top. 201.0026. So Kemps say: "I have requested independent advice to be given to the Trust as to its legal obligations." So a later trustee you would accept, I think, would be entitled to obtain that advice as of right against Mr Kemp?

MS CHAMBERS QC:

On my argument, as you know, the Trust is not a legal entity so he's not getting advice on behalf of the Trust. He's seeking advice on behalf of the trustees and a later trustee can access that advice in terms of privilege because their interest is the same. So –

WILLIAM YOUNG J:

But you would say that it's advice that none of the beneficiaries is entitled to call for without – sorry – beneficiaries are barred by legal professional privilege from demanding access to that advice.

MS CHAMBERS QC:

If their interests are not the same in regard to that advice.

WILLIAM YOUNG J:

But wouldn't the question as to what information can be disclosed or should be disclosed be of equal relevance to all beneficiaries? Wouldn't the correct legal position as to that be of all the – of equal significance?

MS CHAMBERS QC:

You're seeing it through a different lens from me. My argument says the trustee, that the policy reason why you need to say should the trustee be able to get legal advice without disclosing it to the beneficiaries? The answer is yes, where that advice relates to a position, relates to an issue which the beneficiary has a different interest in, a different view. And that's a very good test, Sir, because it solves this problem of allowing trustees to get legal advice when there is dispute with the beneficiary or a beneficiary or a group of beneficiaries because you want them to do that.

WILLIAM YOUNG J:

But there isn't really a dispute at this stage.

WILLIAMS J:

Except over giving over of information.

MS CHAMBERS QC:

Yes, there's –

WILLIAM YOUNG J:

No, no, there's a request for information. The trustee says: "Well, crikey, I want to know what to do. I'll get some legal advice."

MS CHAMBERS QC:

Yes.

WILLIAM YOUNG J:

So there's no dispute. You say there might be an incipient dispute or there might be the seeds of a dispute.

MS CHAMBERS QC:

Back at tab 19. What is the date of that?

WILLIAM YOUNG J:

It's 19 December 2003.

GLAZEBROOK J:

I think that was before anything was disclosed, wasn't it?

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

There was a request for information and nothing whatsoever had been disclosed, if I remember.

WILLIAM YOUNG J:

I think there'd been a little bit. I think there might have been –

GLAZEBROOK J:

Or is that an earlier one?

MS CHAMBERS QC:

Yes, 2004 is the reply to tab 23.

WILLIAM YOUNG J:

Sorry, yes, yes.

GLAZEBROOK J:

Yes, I thought it was: "I want this." "I don't know what to do. I'm going to get legal advice and I'll get back to you," which was the reasonable way of

proceeding because if he – mind you, might've thought he should've known but…

MS CHAMBERS QC:

If you look at 201.0030 which is under tab 23 you'll see the reply from Kemps Lawyers, and remember the – Mrs Addleman at this stage is seeking information to verify that the distribution is her proper entitlement and they say it's proper, it's a discretionary trust deed, when it's established. They say: "We have been ascertaining the Trustees legal duties which are not entirely clear given the state of the law." It will be after your Honours' decision, of course. "You will –

WILLIAM YOUNG J:

This is a reference to the *Foreman v Kingstone* [2004] 1 NZLR 841 that's running through the Courts at the time?

MS CHAMBERS QC:

Yes. "You will be aware for the example that the case you quote is subject to an appeal to the Court of Appeal," the judgment is due, the law is clearly changing. "It does appear however that your client is entitled to the Trust Deed and documents altering trustees and I enclose…" da-da-da-da-da. "I confirm" who the current trustees are.

WILLIAM YOUNG J:

But the advice wasn't provided?

MS CHAMBERS QC:

No.

GLAZEBROOK J:

I'm interested in you saying a Trust isn't a legal entity. It was never a legal entity.

MS CHAMBERS QC:

I agree. I completely agree.

GLAZEBROOK J:

So even if it was a proprietary view, it was a proprietary view in terms of having a proprietary interest in the assets which, of course, will be the case in a fixed trust situation.

MS CHAMBERS QC:

I agree.

GLAZEBROOK J:

All right, that's all right.

MS CHAMBERS QC:

What I think your Honour will find is what counsel has found is that when you look at the cases in this area there's a kind of sloppiness of language which is really confusing and so they talk about the Trust as though it is a legal entity and that you're getting advice on behalf of the Trust. We say you really have to put your little spotlight on some of these cases and say: "Well, hang on a minute. Was it the trustee? Who was the client? Who's got privilege? Do they have a joint privilege?" And that structure in fact gives a solution which we say is in compliance with the aims of the legislation because it gives a clear step-through and principled approach to New Zealanders, and I would also add, your Honour, that some of the cases talk about, well, they don't have a shared interest when the trustee is getting advice personally. I don't know whether you've noticed that. I mean I think that's a nonsense as well, an absolute nonsense. They're always acting as a trustee when they're getting advice in their role as trustee, and we know they get sued as trustees specifically, it's always on the intituling. A trustee can't act personally, they can only act as a trustee. So when you look at those cases where they're talking about if a trustee's getting personal advice, that's privileged, you'll recall some of the cases talk about that. My submission is that, analysed properly, what they're actually talking about is the same concept that we are

suggesting for this Court. That is, they are getting advice because in a situation where a trustee and at least one beneficiary's interests have diverged, so there's no joint interest.

GLAZEBROOK J:
Can I ask you whether it can be put another way?

MS CHAMBERS QC:
Yes.

GLAZEBROOK J:
And the only reason I'm doing so is that some of the terminology earlier was using this, or you in fact used that terminology, and that was an disputer in incipient dispute. Because it's just slightly difficult to know whether a trustee and one beneficiary would change. If you say, I mean, you're talking advice on the entitlements under a trust deed and whether the discretionary beneficiaries in that particular deed are entitled to this particular distribution because there's an income beneficiary and a capital beneficiary, well, you don't know before then whether in fact the advice will be yes, they are, or no, they're not, and you're always going to be in dispute with one of the – or at least have a different interest from one of the beneficiaries because you're saying: "Well, can I give this distribution to the capital beneficiaries when there's an income beneficiary?" that's the easiest example. Now the answer might be yes, it might be no, but whatever, you're going to be in a dispute with one of them and it does become slightly difficult in those circumstances to say there's no joint interest, doesn't it? Because you're wanting to know how to administer that Trust and you're wanting to know where money can to legally.

MS CHAMBERS QC:
Yes. Actually your Honour's formulation is a good one, the in dispute or in incipient dispute, because what you need to capture is the situation where the trustees are, as your Honour says, considering something and needing legal advice in regard to a decision which they know will benefit one beneficiary

over another, one group of beneficiaries over another group of beneficiaries, so…

GLAZEBROOK J:

And why though can't that be dealt with at the second stage, why do you have to deal with it at the first stage? Because the second stage you do have that ability to say: "This is going to sow a whole lot of seeds of discord."

MS CHAMBERS QC:

Because unless there's joint privilege, privilege applies.

GLAZEBROOK J:

No, I understand the submission…

MS CHAMBERS QC:

Oh, sorry.

GLAZEBROOK J:

It's just I suppose I'm saying if we say that the joint privilege is there is just about every case, because in every case the beneficiary will have an interest – just going back to Justice Young's formulation. So it's really to say why that formulation is wrong – and I've lost it – oh, no, that's right: anything obtained on behalf of the Trust qua a trustee is disclosable. So if we say that, that means it's disclosable because it's joint interest.

MS CHAMBERS QC:

I've got a bit lost. Justice Young's –

GLAZEBROOK J:

It's really saying why is that wrong…

MS CHAMBERS QC:

Well, because you don't –

GLAZEBROOK J:

Because if it's, or to what extent is it wrong?

MS CHAMBERS QC:

It's wrong because you don't obtain advice on behalf of a trust, you obtain it as a trustee, and we know trustees have a privilege, they have litigation privilege and they have legal advice privilege, and so, and because you have to apply the privilege rules because the trust that didn't revoke those, and you can't revoke those by a side-wind because they're so fundamental, then you must come down to the test of, well, hang on a minute, is it a truly joint interest in regard to this communication because the trustees and the beneficiaries were not in dispute and were not in incipient dispute and therefore no privilege applies.

GLAZEBROOK J:

And are you happy with the "not in dispute or incipient dispute" language?

MS CHAMBERS QC:

I am, I am, your Honour, I think that's an excellent formulation. Because I was trying to capture that situation where trustees are getting advice not because there's a beneficiary jumping up and down and saying: "Hang on a minute, I want this," and dah, dah, dah, dah, but where they know that they are making decisions which could lead to dispute between beneficiaries.

GLAZEBROOK J:

Thank you. I didn't want to put words in your mouth that weren't there, so.

MS CHAMBERS QC:

No, that's very helpful for discussion for me too, your Honour.

If you want an example – just to finish off this issue of how the cases talk about personal interest – *Dura (Australia) Constructions Pty Limited v Hue Boutique Living Pty Limited* [2011] VSC 477, which is in my friends' casebook, is a very good example. It's an Australian case, Victorian Supreme Court, and

it's in my friends' casebook volume 1 at tab 17 and, if your Honours go to paragraph 17 of this decision, this was a property development in a trust and the builder held 20 per cent of the units in the trust and the builder commenced proceedings to litigate disputes under the building contract and the builder sought disclosure of advice obtained by the trustees, including legal advice, from its solicitors on the basis that the builder was a beneficiary of the trust, and it had a joint privilege in that advice. And so it is consistent with my argument that if you look at the modern cases they tend to look at this issue under the joint privilege head.

So starting at paragraph 16 in fact, Macaulay J starts at the statement of the foundation of joint privilege in *Farrow Mortgage Services Pty Limited (in liquidation) v Webb* (1996) 39 NSWLR 601: "the privilege which protects these communications from disclosure belongs to all persons who joined in seeking the service or obtaining the advice," well, that's obvious, "The privilege is a joint privilege. So it is also if one of the group of persons in a formal legal relationship communicates with a legal advisor about a matter in which the members of the group share an interest." "Accordingly no privilege attaches to such communications as against others who, with the client, share an interest in the subject matter of the communication." Both parties together can maintain it "against the rest of the world". And he quotes Buss JA in *Schreuder v Murray (No 2)* [2009] WASCA 145, (2009) 260 ALR 139: "The beneficiary will not be entitled to a joint privilege with the trustee if the confidential communications, information or documents relate to legal services obtained for the benefit of the trustee personally," and you see I'm saying that if you really analyse it that comes into our approach, which is where there's no joint interest.

ELLEN FRANCE J:

Well, if you go to *Schreuder*, to that Judge's analysis, which is in your bundle at tab 15 at paragraph 94(d), the Judge says: "There will be a joint privilege if the confidential communications," et cetera, "relate to legal services in connection with the management or administration of the trust and the trustee," et cetera, "have a joint interest in the subject matter," and then: "The

joint interest … will derive from his or her duties to the beneficiaries or in respect of the trust fund," which does seem to be perhaps a slightly longer version of Justice Young's qua trustee test.

MS CHAMBERS QC:

Yes. So you're looking at 94(d)?

ELLEN FRANCE J:

Yes. So I'm going back to *Schreuder*, however it's said, which is at tab 15 of your bundle.

MS CHAMBERS QC:

Yes, although the Court also refers to the joint – "the trustee (in his or her capacity as trustee) and the beneficiary (in his or her capacity as a beneficiary, and either alone or as a member of a class of beneficiaries) have a joint interest in the subject matter…"

ELLEN FRANCE J:

But if you go on to (e), that joint interest derives from the duties to the beneficiaries, and the joint interest of the beneficiary will derive from his or her vested interest in the Trust. That doesn't seem to exclude the dispute or incipient dispute idea.

MS CHAMBERS QC:

Well, you see, my argument, your Honour, is that if you then go to (f) they say: "The beneficiary will not be entitled to a joint privilege with the trustee if the confidential communications, information or documents relate to legal services obtained for the benefit of the trustee personally (for example, if the trustee seeks legal advice as to … her personal rights or liabilities in connection with an alleged breach of trust or threatened legal proceedings against him or her personally)."

ELLEN FRANCE J:

Well, that's the hostile litigation scenario.

MS CHAMBERS QC:

Yes. Well…

ELLEN FRANCE J:

Your dispute or incipient dispute is much broader than that, if I'm understanding it correctly.

MS CHAMBERS QC:

Well, I am submitting that it fits within the same lens that I am suggesting that this case does because it's another example of this distinction in the cases where they say, well, you're getting advice personally, that's different, and when you look closely, I suggest, your Honour, at the cases you will come to the conclusion that when they say if you're a trustee getting advice personally it is in a situation where there is dispute or incipient dispute against the trustee. So they do in fact make the same, I suggest, very sensible difference, distinction, that is consistent with our legislation and with my argument. But they just talk about it as the trustee getting advice personally. They put a different language on it, and I'm suggesting that language, what they're suggesting, is awful because, of course –

WILLIAM YOUNG J:

You mean "personally" means "qua trustee"?

MS CHAMBERS QC:

Well, I mean, what does it –

WILLIAM YOUNG J:

It's a funny way of saying it.

MS CHAMBERS QC:

Yes, well, I think it's a very confusing way of saying it because that person who says: "Oh, my god, am I possibly being sued as breach of trust?" they go and get legal advice, obviously they're there as a trustee, in their capacity as a trustee.

WILLIAM YOUNG J:

Yes, yes, I know that, but on behalf of the Trust. They're not getting advice on behalf of the Trust, not getting advice as to what the Trust should be doing about something.

MS CHAMBERS QC:

Well…

WILLIAM YOUNG J:

I mean it does seem to me to be a very simple approach to this joint privilege question. Was the advice obtained on behalf of the Trust and a strong indicator that it was is that the Trust paid for it.

MS CHAMBERS QC:

Well, the problems I have with that is that as soon – if a trustee says: "Oh, I really need to get legal advice on this," and: "Oh, I've got really litigious beneficiaries. I'm not going to get legal advice if they're going to see it. I'll go off and pay for it myself."

WILLIAM YOUNG J:

Why would the trustee really worry about that if the trustee is standing independently between the beneficiaries administering solely in the interests of the Trust?

MS CHAMBERS QC:

Because it's not always clear. It's not a happy-clappy world out there –

WILLIAM YOUNG J:

No, I understand that.

MS CHAMBERS QC:

– and the beneficiaries often have very conflicting interests and the poor trustee is sitting there trying to sort out –

WILLIAM YOUNG J:

The trustee can always go to the Court.

MS CHAMBERS QC:

Well, is that consistent with the principles and purposes of the Act? You don't want New Zealanders in all these Trusts to go to the Court every time there's a problem. It's the last thing you want. You want law that works for trustees on the ground and you want them to comply with their legal obligations and you want them to operate in accordance with the Trust deed and to do that most of them need legal advice.

So your Honour, Justice France, I do think that *Schreuder* is another example of what I was talking about in regard to *Dura* as well. That is that there's different words used, and just going back briefly to –

WILLIAM YOUNG J:

Are there any cases which say that Trust advice related to the administration of the Trust and funded by the Trust is not subject to disclosure at the request of a beneficiary?

MS CHAMBERS QC:

Well, litigation privilege isn't, is in that category and it's not disclosable.

WILLIAM YOUNG J:

Yes, yes, I'm talking about – I'm cutting out the situation where a trust is being sued, where it's hostile litigation. Now there may be an issue about whether this is hostile litigation but in relation to situations before litigation is commenced is there any authority that suggests that advice sought by a trustee as trustee relating to how the Trust should be administered and paid for by the Trust is protected by privilege against a beneficiary?

MS CHAMBERS QC:

Well, there's *Redwood Group Ltd v Queenstown Gateway (5M) Ltd* [2018] NZHC 3439 which is a decision of the High Court which follows *Erceg*, and it is in our cases.

WILLIAM YOUNG J:

Is that in your bundle?

MS CHAMBERS QC:

Volume 2, tab 14.

ELLEN FRANCE J:

That is litigation privilege, isn't it, that one?

MS CHAMBERS QC:

And legal advice privilege upheld. Both. So this was after *Erceg* and applied *Erceg*, and Redwood Group, which is a reasonably well known development group, Mr Gates, said it was a beneficiary in its pleadings in a joint – it was a joint venture, it said, and Redwood alleged that the two companies, Clearmont, sorry, CQ Trustee Company Limited and Queenstown Gateway (5M) were – owned its shares on trust for the plaintiff and another party.

WILLIAM YOUNG J:

Sorry, could I just cut to the chase here? Looking at para 124 the Judge says: "Leaving aside the question of payment, the Category Two documents are not documents created by or for a trustee concerning the administration of the trust." Are there other documents in issue created by or for a trustee concerning administration of the trust in issue in this case?

MS CHAMBERS QC:

Yes, paragraph 101 sets out the two categories of documents that were in dispute, one under litigation privilege and one under solicitor/client privilege originally.

WILLIAM YOUNG J:

All right, so…

MS CHAMBERS QC:

The discussion…

WILLIAM YOUNG J:

So it's really category one documents that are critical, is it?

MS CHAMBERS QC:

Yes, that is a fair comment, Sir, I agree, but it's hard to argue why the approach would be different for solicitor/client privilege. So if you go to 114 where his Honour says: "Well, I'm following *Erceg*," and the starting presumption is that privilege can be claimed and disclosure is not required. Well, that must be right in regard to advice privilege as well. "The only qualifications to that presumption have been the decisions that have said that for the privilege to applicant the advice must be obtained and paid for personally by the trustee. However those requirements themselves stem from a presumption of proprietary interest – that advice that has not be obtained and paid for personally is trust property because it has been paid for from trust assets and therefore cannot be denied to any beneficiary that seeks disclosure," that's your Honour's position. "Following *Schmidt v Rosewood* and *Erceg*, I consider that the factors of whether the advice has been sought in the trustee's personal capacity and how it has been paid for must be considered in the context in which disclosure is sought and cannot apply as automatic limitations on the availability of litigation privilege. In the present context, the trustee is a company, which holds its assets for the named beneficiaries," it does not have any other assets "outside of those beneficiaries". "If one of the beneficiaries brings a claim for breach of trust it would be artificial to hold that the company can claim privilege for legal advice it obtains to defend that claim only if it is acting personally," this is the argument as to why this is unhelpful, "whatever that might mean in the context of a company". "It would be even more artificial to hold that the company can claim that privilege only if it pays for the legal advice personally when it has no

assets other than the trust property from which to pay for the advice." But anyway, I mean, the point is what difference does it make who pays for the advice –

WILLIAM YOUNG J:

Well, the key issue I would have thought is upstream of that, it is whether the documents relate to trust administration and were obtained by the trustee for that purpose. So, looking at para 109 of that judgment, the Judge is saying, referring to *Blades v Isaac*, the authorities are that "advice sought and provided regarding the administration of the trust is trust property and must be available to the beneficiaries". Now you're going to say that's a proprietary analysis. I'm more interested in the fact that its privilege doesn't apply.

MS CHAMBERS QC:

Yes, I do say that that is a proprietary analysis and that –

WILLIAM YOUNG J:

I'm sorry, but more significantly I don't think the judgment helps you. The judge is actually putting to one side documents obtained in the administration of a trust by the trustee for that purpose. So, I mean, I suspect there isn't a case of the kind I put to you.

GLAZEBROOK J:

There isn't a litigation case?

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

So this is saying that there is litigation privilege, as I read it.

MS CHAMBERS QC:

Yes, it is, and it's also saying you don't approach it on a proprietary basis, you base it on the new *Erceg* approach, which is obligations.

WILLIAM YOUNG J:

Well, the issue there was that the trustees were denying that the purported beneficiary was a beneficiary, so it was undoubtedly hostile litigation.

MS CHAMBERS QC:

Yes, agreed. But if you go on, Sir, to 110, I suggest you see another point against your Honour's approach, which is, as the Judge said: "The plaintiffs' key contention is that because the advice as has been claimed was not sought personally," and was paid for from trust assets, that's your Honour's point, they "cannot claim litigation privilege", and that follows from your Honour's approach. If a trustee says, if the test is: "I am getting this advice on behalf of the trust," why is there any litigation privilege, how could there be, if that's the test?

WILLIAM YOUNG J:

Well, I mean, it's obviously going to be a bit smudgy at the margin, but it's easy enough for there to be litigation privilege if the litigation's hostile, the litigation is against the trustee…

MS CHAMBERS QC:

But that comes to my argument. If the advice is obtained in a dispute or an incipient dispute, and just because it's legal advice privilege, the same principle should apply. It's privileged in litigation because of course you should not have to reveal your solicitor's advice to the very person who's suing you, right?

WILLIAM YOUNG J:

Yes, I agree that there's an issue at the point at which litigation privilege kicks in in this case. For instance, I would struggle with the view that advice you provide as to this appeal is information which the respondent is entitled to.

MS CHAMBERS QC:

And you understand what I'm saying to your Honour, that if your principle is anything obtained by the trustee on behalf – obtained on behalf of the Trust or

the trustee in regard to the Trust is discoverable, then that must logically wipe out litigation privilege and that can't be the result.

WILLIAM YOUNG J:
Well, it doesn't wipe out litigation privilege.

MS CHAMBERS QC:
Why not?

WILLIAM YOUNG J:
It has to be reconciled with litigation privilege. There comes a point in a dispute where, which may be hard to define in black and white terms, where it can be said that the advice is no longer being sought on behalf of the Trust as whole or is sought in circumstances where it's unrealistic to treat the beneficiary as, as it were, in on the joke in terms of what the advice covers. So that's a proposition which I'm going to be interested to hear from Mr Ross about. But I don't see it, for instance, as kicking in in 2002 or 2003. When a request is made for information, a trustee seeks advice as to what information should be given. Still less do I see it as applying to anything that happened before 2002 or 2003.

MS CHAMBERS QC:
Well, there's two aspects I reply to your Honour on that and that is that you say, well, there comes a point where the dispute is such it's litigious, but my submission is that there comes a point outside the Court arena where for the same reason, that is you're in a dispute, you need to get legal advice, that you should still get that privilege for basically the same reasons you get litigation privilege and there should be no difference between that.

WILLIAMS J:
But you weren't at that place in 2003, were you? If you look at that letter you took us to in tab 23, Mr Kemps records: "Subsequently your client seeks information to 'verify that the distribution is her proper entitlement'." Well, fair enough you would have thought if there was a cheque for 4.2 something

million in the mail out of the blue. "Can you just tell me something about what my rights might be because I don't know anything about this trust?" That's not conflictual.

MS CHAMBERS QC:
Right, well, now –

WILLIAMS J:
So even on your analysis isn't this disclosable? Isn't what's going on around this time disclosable?

MS CHAMBERS QC:
Well, applying the current law which is effectively in a month's time the Trusts Act, you would go through that test and in terms –

WILLIAMS J:
Let's not go through. No, we're just talking about privilege.

MS CHAMBERS QC:
We're just talking about privilege?

WILLIAMS J:
Yes.

MS CHAMBERS QC:
Well, I think when they – what my test is, Sir, that you look at, for privilege, you look at the time the communication is made and you say was there dispute or incipient dispute in regard to the issue that the communication is about? So you have to look at each communication.

WILLIAMS J:
So there you go, we've got ourselves to this point. There's no incipient dispute here.

MS CHAMBERS QC:

I'd have to go back and have a look at all of the –

WILLIAMS J:

"My client wishes to understand her rights."

MS CHAMBERS QC:

Yes, yes, so she gets the Trust – that she's received her proper entitlement so she gets –

WILLIAMS J:

But my point is at that point legal advice privilege, even on your analysis, does not protect that advice because there is joint privilege on your analysis because there's no conflict or even incipient conflict.

MS CHAMBERS QC:

Mmm.

WILLIAMS J:

That doesn't come till much later when your guy digs his heels in.

MS CHAMBERS QC:

Yes, I'd have to refresh my memory about exactly what the correspondence was saying at the time but your Honour may well be right.

WILLIAM YOUNG J:

Can you suggest any basis for the view that before 2002 all legal advice must have been for the benefit of the Trust and its beneficiaries? Because there was no dispute. There wasn't even a flicker of a dispute, of a potential dispute.

MS CHAMBERS QC:

No, I think I would – that that would be correct.

WILLIAM YOUNG J:

And you say, but you're cautious at least in conceding that extends to the advice sought or apparently sought in 2002, 2003?

MS CHAMBERS QC:

As to disclosure?

WILLIAM YOUNG J:

Yes.

MS CHAMBERS QC:

It's just because I'm just trying to remember exactly what documents Mrs Addleman asked for. I'd have to go back and look at the correspondence. But that sounds right. That sounds right.

WILLIAM YOUNG J:

Say the advice that was given by the solicitors or counsel involved was also in the nature of advice to Ms Jamieson. So the trustees are saying something to Ms Jamieson. Does that take it out of privilege or not?

MS CHAMBERS QC:

You mean they were considering also what documents to give Ms Jamieson? The advice was sought in regard to –

WILLIAM YOUNG J:

No, I'm just interested in how the Trust was being administered and I mean the substance of the case, as I understand it, is that the respondent says this, and I think probably your side of the debate accepts this, that the Trust throughout has been substantially run by and for the benefit of Ms Jamieson?

MS CHAMBERS QC:

Yes. Yes, yes, with the seed money effectively coming from her damages claim.

WILLIAM YOUNG J:

All right, I'll just leave that there, thanks.

MS CHAMBERS QC:

Now let me just gather my thoughts. Right, and so I'm sure your Honours will see the rest of the arguments from *Redwood* in terms of applying *Erceg*. Just one other point on section 56 which relates to litigation privilege. It is in regard to any proceeding, not just hostile proceedings.

O'REGAN J:

Section? What section are you referring to?

MS CHAMBERS QC:

The Evidence Act, section 56, the litigation privilege.

So perhaps I won't go back to *Dura* because I've drawn your Honours – well, if I just briefly respond to your Honour. If you look at *Dura* it does the same kind of approach. It talks about trustees obtaining advice personally and I'm saying that is an equivalent approach to what I'm suggesting, just different language.

I do want to give an example of how the privilege should operate in practice. So if there's a solicitor/client relationship and say Ms McGuigan is acting for Fred and Ms McGuigan is concerned that she's missed a limitation period for Fred and so she consults me as another lawyer and, of course, she has a fiduciary relationship with Fred and of course she has a joint interest with Fred in making sure that the limitation period is complied with, she's got that common interest, but she consults with me but she is not obliged to tell Fred what I said to her. She is obliged to tell Fred and notify him that he may have a claim against her and she is required – but she's not required to inform Fred what I said to her, and that is and will always be privileged, and even where a fiduciary has an inherent interest in the advice, that is not enough. You have to look –

WILLIAM YOUNG J:
Well, I'd hope that she's not charging Fred for the advice.

MS CHAMBERS QC:
No, she's not charging Fred. But remember, Sir – let's hit this one because I was coming to it anyway – under the rules of professional service it doesn't matter who pays you.

WILLIAM YOUNG J:
No. It's just an indication of for whom the advice was being sought.

MS CHAMBERS QC:
It's just an aside, okay. So in the example I've just given, the joint interest is not whether Fred and Ms McGuigan have an interest in –

WILLIAM YOUNG J:
I entirely agree with your approach. There's no requirement to disclose the advice to Fred.

MS CHAMBERS QC:
Yes. So the actual topic of the communication is is Ms McGuigan liable in negligence, and that's a topic that Fred may be very, very interested in. But it's not the same as having a shared interest.

WILLIAMS J:
But you do accept that if Ms McGuigan goes to you to ask your advice about Fred's claim that is disclosable to Fred? Not the limitations issue but the merits of his claim. There is no privilege in that from Ms McGuigan's point of view because they're not in conflict. She's not in conflict with Fred.

MS CHAMBERS QC:
Yes, if she's seeking senior counsel's advice in regard to Fred's general claim, but if she's seeking – see, this is why you have to identify what is the topic of the communication in each situation very clearly, because if you say, well, if

you've got enough common denominator that's enough for joint interest then you can see that the privilege, solicitor/client privilege, really gets watered down viciously. It goes not just for trustees and beneficiaries but for all fiduciaries.

WILLIAM YOUNG J:
It's 1 o'clock now. How far are you away from finishing?

MS CHAMBERS QC:
I think I'm very close, Sir, perhaps 15, 20 minutes.

WILLIAM YOUNG J:
How much time do you require, Mr Ross?

MR ROSS QC:
Well, I had rather hoped my learned friend might have been done by now but I'm in the Court's hands. We'll cope with whatever we're given.

WILLIAM YOUNG J:
Start at two, but it'd be good to finish by 2.15.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.01 PM

MS CHAMBERS QC:
Now, Justice Williams, you were asking me about the destruction of documents. The evidence is that –

WILLIAMS J:
Was I? No, it wasn't me. But anyway…

MS CHAMBERS QC:
No, you talked about how documents had been destroyed and I'd said the evidence wasn't quite that at all.

WILLIAM YOUNG J:
It was probably me actually.

MS CHAMBERS QC:
Oh, well, anyway, the reference, Sirs, is at 201.0142 and you'll see, starting at line 30, that it starts "Mrs Addleman", the only evidence is: "I suspect that Annette had one or more of her staff destroy records," and Mrs Jamieson says: "It's a lie," and she goes on to explain what's happened to the records. So that is certainly accepted

WILLIAM YOUNG J:
So, 201, sorry, what…

MS CHAMBERS QC:
201.0143, starting at line 30.

WILLIAM YOUNG J:
Mr Ross referred to some other material in his submissions, I think…

ELLEN FRANCE J:
He refers to two affidavits, I think, or passages in two affidavits.

MS CHAMBERS QC:
Yes, but if you look at the cross-examination, that's what Ms Rose was putting to Mrs Jamieson, that part of the affidavit.

Now I only had two brief topics in my road map – I'm at paragraph 21 of the road map – to address your Honours on, and the first one I can deal with quickly, which is apply the *Erceg* tests in regard to the Court of Appeal decision. And the short point is there that their Honours did *not* apply the *Erceg* criteria as to when disclosure should be provided to the category of documents of legal advice, and the written submissions set that out in full. So I don't propose to spend more time on that and anyway it's clearly apparent from their Honours' decision.

I do want to finish by dealing with the key reasons why we say the respondent's approach is not satisfactory, and the first is that there is no longer a proprietary right to access trust documents, even if there was –

WILLIAM YOUNG J:
Just going back, I may have got something, maybe there are typographical errors. I'm looking at page 6 of Mr Ross' submissions, footnote 31. Maybe the 2019 date's wrong.

MS CHAMBERS QC:
No, I'll have to have a look at it. It was certainly the evidence of Ms Jamieson that, at trial, that she had not gone out and destroyed documents. I think my junior will try and find that affidavit.

GLAZEBROOK J:
Sorry, I think I might have been on the wrong page of the notes of evidence. What page was it?

MS CHAMBERS QC:
201.0136.

GLAZEBROOK J:
Thank you, I was.

MS CHAMBERS QC:
No, it's not, sorry. It's 201.0142. Sorry, your Honour.

GLAZEBROOK J:
I was on the right – what line were you referring to?

MS CHAMBERS QC:
It starts at line 31 although the earlier discussion is relevant too, and goes over to the next page.

GLAZEBROOK J:
Yes, I've got that, thank you.

MS CHAMBERS QC:
And you'll see she talks about how the thermal fax paper documents were no longer legible, and she says nothing was destroyed that was legible.

So the proprietary right to access documents because the respondents rely in part on that, I'll just briefly summarise why that isn't applicable and, of course, the new Trusts Act comes down very firmly in favour of the obligations-based theory of trust law and section 13 of that Act is the key provision for that because it defines what a trust is based on obligations. And also, of course, contrary to proprietary rights continuing to exist in the face of *Erceg* and in the face of the Act, the Act also recognises that trustees can withhold Trust information, which is sections 51 and 53, and the Act does not provide amongst the duties of trustees that there is a duty to disclose, rather it says the purpose of disclosure is to hold the trustees to account. Section 50.

Now *In Re Cowin* (1886) 33 Ch D 179 is referred to in the road map as to whether a pure proprietary approach ever really existed but we do know that the high point was *O'Rourke v Darbishire* [1920] AC 581 (HL) and that that was firmly rejected in *Schmidt* where the Court said: "No beneficiary … has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties," and that's in *Schmidt* at 678. And of course, *Erceg*, this Court recorded and referred to *Schmidt* with approval and rejected the proprietary basis for seeking disclosure and stated at 49 the right of the beneficiary is to have the Trust properly managed, not a right to be informed. Again reflected in our new legislation. And at 53 in *Erceg* this Court said the beneficiary's right to seek disclosure is ancillary to the right to have the Trust properly managed: "It must be borne in mind that there will normally be a number of beneficiaries and the underlying principle in deciding whether disclosure will

be made will be identifying the course of action which is most consistent with the proper administration of the trust and the interest of the beneficiaries, not just the beneficiary requesting disclosure." And no one here of course challenges *Erceg* and *Erceg* of course was regarded as a clear direction to trustees and beneficiaries and lawyers and has been adopted by Parliament.

The second contention in my friend's submissions which I say there is a, which is unsatisfactory, is who pays cannot make a difference on a principled approach, it's not consistent with *Erceg*, it's not consistent with the Lawyers and Conveyancers Act which provides that a lawyer who provides or undertakes to provide legal services to a client, whether payment is to be made by the client or not, is the legal lawyer/client relationship. And the fundamental obligations of lawyers to keep all information provided to her confidential and to act only in her client's interests doesn't change depending on who pays, and your Honours will be familiar with that, whether separated wife her parents pay and so on.

If one were to say, well, who pays makes a difference, in my submission you run into problems. Because you can simply get round your duty, the trustees could, by paying for the advice to themselves, because if there is a duty to account which requires a disclosure of advice to beneficiaries you could simply sidestep that by paying for it yourself. In a lot of situations trustees will also be beneficiaries. They can simply, the trustees could make a distribution to themselves as beneficiaries and then theoretically pay for the advice and get privilege. You can drive a truck through it. That's not consistent with the purposes and principles of the Act, and furthermore of course there's section 81 of the Trusts Act which is the existing similar provision in the 1956 which says that trustees are entitled to reimbursement of reasonable expenses from the trust fund anyway. That must cover legal fees in most situations.

And, finally, context. The respondent's argument suggests that whether a document is privileged depends on the context in which it is sought. Well, in the appellant's submission privilege does not depend on the motive of the person who's seek access to the document. In reality, Mrs Addleman is both

challenging the trustees' decision not to provide disclosure and seeking the Court's original discretion as part of its jurisdiction to administer trusts. We would end up, on my friend's argument, with two sets of litigation. We'd end up with Mrs Addleman being able to avoid normal privilege by first issuing proceedings for disclosure, saying this is non-hostile litigation, getting discovery of what would otherwise be privileged documents, and then issuing proceedings for breach of trust where, on the respondent's argument, the disclosure would not have been available, and I think on the President's argument, if she'd commenced breach of trust proceedings at the start. Well, that too is unprincipled, and I remind your Honours that President Kós has already accepted that this is clearly a preliminary stoush in leave application in the Court of Appeal, and if you have any doubts on that have a look at the evidence at 201.0119 where Mrs Addleman is asked: "Well, your family had another Trust, the Jamieson Trust, of which you are also a beneficiary with all your siblings and your parents. Why aren't you going after that Trust?" The answer: "Oh, there's only $3 million in that Trust."

WILLIAMS J:
Fair point, I would have thought. Can you give me that page number? 201?

MS CHAMBERS QC:
201.0119. I'm referencing it to being, indicating that this is a preliminary stoush, because we say this Trust, given its background, and Mrs Addleman accepted, has the damages for the diving accident which caused Ms Jamieson to become a quadriplegic and that's why she's got the role in it that she does.

And finally the effect. So that would mean that there'd be a fishing exercise every time by a disgruntled beneficiary who thought they might be able to get more money out of a trust. They'd go first for disclosure provisions, get documents which would be privileged in other sets of proceedings and then attack the Trust's trustees, and then finally –

WILLIAMS J:
Is that right though as a…

MS CHAMBERS QC:
Well, it doesn't sound right, does it, but my friend is saying because this isn't hostile litigation, because it's only for disclosure –

WILLIAMS J:
Yes, yes, I understand the point. I just – if you apply the dispute test that you apply, whether it's litigation or otherwise, then the privilege would attach if there is a whiff, shall we say, of dispute at the time the application is made, and if there isn't then it wouldn't.

MS CHAMBERS QC:
Yes.

WILLIAMS J:
So it's just a purely factual analysis.

MS CHAMBERS QC:
Yes, depending on all the circumstances as per Rodney Harrison J.

WILLIAMS J:
Yes.

WILLIAM YOUNG J:
You've done it again. Rodney Hansen.

MS CHAMBERS QC:
Have I done it again? Did I say – sorry.

And then just finally, of course, the effect of the respondent's approach would be that trustees would also lose mediation and settlement privilege as well.

Finally, briefly as to costs, I see my friends have said, well, everything should be paid for by Lambie Trustee and my brief submission on that is there's no reason for the usual position not to apply. Costs follow the event. And that, of course, is exactly what happened in the Court of Appeal.

Those are my submissions unless I can be of further assistance.

WILLIAM YOUNG J:
Thank you. Mr Ross.

MR ROSS QC:
May it please the Court, may I just tidy up this question about this affidavit and the confusion about the date? Your Honours may recall that the Court of Appeal ordered that affidavits be sworn and filed, supplied, about what had been done to find the documents that were being referred to in the judgment and Mrs Jamieson swore an affidavit in relation to that. It was sworn in November last year but didn't arrive to us until after the case on appeal was prepared but the footnotes that your Honours have referred my learned friend to refer to that affidavit and I can read the text of Mrs Jamieson's affidavit on this subject about destruction of documents. It says: "My father passed away in November 2001. Some time after he passed away my mother and I went through his business records which will have included some records of the Trust and we destroyed most of the old records. Many were in a poor state having been copied on to a type of paper which faded over time so that they were no longer legible. I was not aware of the obligation to retain certain Trust records indefinitely." So there's no question but that Trust records have been intentionally destroyed. We're not necessarily saying that there was anything malicious about it.

WILLIAM YOUNG J:
What about Mr Hargraves? Did Mr Hargraves swear an affidavit?

MR ROSS QC:

Mr Hargraves swore an affidavit and he swore that he'd destroyed everything that was older than seven years. It's a blank. And interestingly Mr Kemps, who knows more about this Trust than anyone else, has not sworn an affidavit in relation to documents but Mrs Jamieson says as a final note in her affidavit that she understands that Kemps Weir holds all of the legal advice in relation to the Trust.

Now I'm taking it as my task today, your Honours, to try to persuade my learned friend actually that my approach is not as unprincipled as she indicated that it was earlier today. My learned friend handed up a road map and I wonder whether we might start with that road map because my fundamental submission to your Honours about this entire case is that this road map takes you to chaos and intellectual dissatisfaction and the reason why it does that is because it starts at the wrong place and it becomes impossible to get back to what the law actually is. The reason why I submit that is that the first question is the wrong question. The first question in this appeal and in the issue that started in the High Court is not is the document privileged. The starting point is that we are in the supervisory jurisdiction of the Court in relation to a formal fiduciary, a trustee, and the question is what information is the beneficiary entitled to against that fiduciary.

I use the word "information" deliberately because it's not confined to documents. A beneficiary is entitled to information. A number of submissions were made today that there would be methods of making sure that beneficiaries did not get legal advice by asking a lawyer. A trustee could ask a lawyer: "Don't put anything in writing but please tell me what's the position." That's still, the answer to that question is still Trust information and a beneficiary is entitled to it in certain circumstances. I would say the same in relation to the materials that go to the lawyer to seek the information. That's also Trust information.

So the starting point is, is this document or is this information Trust information? If it is Trust information, privilege may not be asserted against

the beneficiary and it doesn't matter whether you call it legal advice privilege or litigation privilege, it is irrelevant in the context of a request for information by a beneficiary of her fiduciary. Privilege only becomes relevant in the context of litigation between the beneficiary and the trustee.

WILLIAM YOUNG J:
Well, litigation, or what about forecast litigation?

MR ROSS QC:
For forecast litigation, if – and I'll come to that because my fundamental submission is if a document is Trust information, privilege is irrelevant. Privilege would apply if it is not a Trust document. Now it will not be a Trust document.

WILLIAM YOUNG J:
But what about legal advice to the Trust as to whether to appeal to the Supreme Court from the Court of Appeal decision?

MR ROSS QC:
It's all available under the Court of Appeal order as Trust information. This proceeding reaching the apex of our Courts has not changed from the day those letters were sent asking for information. That is all we are doing.

O'REGAN J:
Well, yes, it has. It fundamentally changed in the Court of Appeal from asking for everything including the kitchen sink and limiting it to what the Court of Appeal ordered.

MR ROSS QC:
That's true.

O'REGAN J:
That was a major change, wasn't it?

MR ROSS QC:

My submission was really directed to what is the principle? What is the basis upon which this request for information is being made? That has never changed. Yes, the scope of that request has been narrowed and I completely accept that. But what is the jurisdiction that we're dealing with? This is not a hostile litigation. The fact that a trustee does not want to give the information inevitably makes it adversarial, but that does not make it hostile litigation with a trustee. By definition, any case where a trustee declines to give information to a beneficiary it will be adversarial, unless the trustee applies him- her- or itself for a direction.

GLAZEBROOK J:

I can sort of understand that in relation to information but I haven't got your point, because you say if it's trust information you can't assert privilege but then you say privilege is relevant in the context of litigation or forecast litigation, how do you reconcile those two?

MR ROSS QC:

I would say it's only relevant in relation to *hostile* litigation, which has a specific meaning in relation to trust information. So hostile litigation is not litigation where people are cross at each other, this is a term of art essentially in trust world. A hostile litigation is where relief is being sought against the trustee personally, breach of trust, "please restore trust funds". If a trustee goes off and gets his or her own advice in relation to that claim against him or her then absolutely that would attract litigation privilege, belongs to the trustee personally. But here we are concerned with a request for information, this is simply a question of administration of the estate, hotly contested, but it's an administration question.

WILLIAM YOUNG J:

Well, I agree that it would be odd if this case were treated differently from the way the dispute may have been dealt with on a trustee's application for directions and an associated application, Beddoe's-type application.

MR ROSS QC:

Yes.

WILLIAM YOUNG J:

In that case it may have been that the trustee could gracefully withdraw and leave the beneficiaries to fight it out.

MR ROSS QC:

Quite. In this case the complication is that we have a trustee who is also a beneficiary and is the only person other than my client who has any genuine interest. So how does one hold a trustee like that to account?

O'REGAN J:

The trustee is Lambie. Is it a beneficiary? No?

MR ROSS QC:

No.

O'REGAN J:

So you're talking about Ms Jamieson?

MR ROSS QC:

Yes.

O'REGAN J:

right.

WILLIAM YOUNG J:

You say you can conflate Lambie with Ms Jamieson?

MR ROSS QC:

I say you can for present purposes, it's controlled entirely by her, and the other two beneficiaries are companies controlled by her, there's no dispute about any of that. So the only other – so my client effectively is the only natural person with an interest in the Trust who might hold the trustee to

account. The trustee has a self-interest and is behaving as one might expect a self-interested trustee to behave, but, in my submission, unlawfully, it's inappropriate.

Now that might be a useful moment to talk about "reasonably necessary" for "to disclose" – sorry, I'll finish the point I'm making, that if a document is in a trust document it's in, privilege is irrelevant. It would not be a trust document if it arises because the trustee takes advice in his or her personal capacity in relation to, say, a threatened or actual breach of trust, the authorities are absolutely clear on this and have been for a very, very long time. But the mere fact that there might be an argument about what information and how much should be disclosed could end up in court is not hostile litigation.

WILLIAM YOUNG J:
What's your best case on that?

MR ROSS QC:
Lewis v Tamplin [2018] EWHC 777 (Ch), [2018] WTLR 215 (Ch), *Blades* –

WILLIAM YOUNG J:
Tamplin? Sorry – yes, I agree *Tamplin* is a good case. The *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, case?

MR ROSS QC:
Rinehart is perfect, *Rinehart* is a high water mark, because *Rinehart* is – actually it's one of the sorts of cases that your Honour referred to about whether a new trustee can require information being passed over to an old one, and of course those trustees were all interested in the trust as well. But Gina Rinehart was pursued for legal advice which she had procured as a trustee for the benefit of the administration of the Trust, but it was all designed to keep out the family in relation to the Trust, and the Court had no difficulty in saying that material has to be handed over, it is Trust information.

WILLIAMS J:

So if we talk about you say, look, the only context is the Court's supervision of fiduciaries and you can disregard the Evidence Act, I'm not sure it's that simple, but you would say you reconcile the two by reading "joint" as if it reflected that?

MR ROSS QC:

The joint interest privilege, in my submission, is – the Evidence Act deals with proof of facts in court and the ability to resist production in court in relation to certain matters, including legal advice, and the Act excludes from the right to withhold any document in which the person asking in that litigation has a joint interest. The rights of a beneficiary to information, or entitlement to ask for it and be considered for it, is actually narrower than what would apply in court because the effect of *Erceg*, of *Foreman*, of *Schmidt* and of the Trusts Act is that if it's a trust document it's within the tent in terms of consideration for disclosure. That includes legal advice. The Act, and these cases had no need to deal specifically with legal advice because it's all within the tent because of this joint interest that they have, not because of the Evidence Act but because they're trustee/beneficiary.

WILLIAMS J:

No, I understand that. Yes, but it's the relationship between those two things that must be sorted through.

MR ROSS QC:

Quite, so –

WILLIAMS J:

So the way to do that is to read that as if it's speaking to the fiduciary relationship which the Court supervises.

MR ROSS QC:

Quite. So even if one, when we've got our hat on in the supervisory jurisdiction, a beneficiary doesn't have an automatic right to the legal advice even though they have a joint interest.

WILLIAMS J:

Yes.

MR ROSS QC:

So the Evidence Act actually is not relevant to that. But if you're in litigation with the trustee, or the trustee were – if a beneficiary were in litigation with the trustee, the beneficiary is entitled to that document as part of the discovery process. That privilege cannot be asserted against the beneficiary in the litigation.

WILLIAMS J:

Unless it's –

MR ROSS QC:

So they reconcile in the sense that they deal with different questions. And there's no unless.

WILLIAMS J:

Well, what about the hostility that you were talking about earlier?

MR ROSS QC:

That is in relation – I beg your pardon. If – that would be a no joint interests document, so it doesn't fall within the exception to the –

WILLIAMS J:

Correct. Exactly. So that's how the two worlds get reconciled?

MR ROSS QC:

It works perfectly. My submission, our submission really and I'm going to ask Ms Rose to deal with some more of the cases later, but there's nothing wrong

with the law, and what has been submitted to your Honours, in my submission, is a novel proposition that's never been asserted that a beneficiary can assert, I beg your pardon, a trustee can assert privilege against a beneficiary where that advice is essentially Trust information.

GLAZEBROOK J:
Well, isn't the difference that Ms Chambers would say that if there's a dispute or incipient dispute there's no joint interest and you would say there is a joint interest?

MR ROSS QC:
I'm submitting it's just not –

GLAZEBROOK J:
So you're just drawing the line in a different place?

MR ROSS QC:
It's just not right. The law is very clear about what is –

GLAZEBROOK J:
I know that's what you're saying but what she's saying is the line is drawn in a different place.

MR ROSS QC:
Quite, but I'm simply submitting that that line has never been drawn there before. There is no case that one can point to.

GLAZEBROOK J:
No, I understand the submission but it's not a totally different submission. It's in fact the same submission with the line drawn in a different place.

MR ROSS QC:
I wouldn't regard it as a linguistic difference. It's –

GLAZEBROOK J:

No, it's not linguistics. It's a substantive difference but it's just drawing the line in a different place.

MR ROSS QC:

I think that's a fair –

GLAZEBROOK J:

You say: "I agree that if there's no joint interest there then privilege can be asserted," and your friend would say the same thing, it's just substantively drawing the line in a different place.

MR ROSS QC:

Yes, but I would start from the question: "Is this a Trust document?" If it's a Trust document this privilege question is irrelevant. For the purposes of a beneficiary request for information.

GLAZEBROOK J:

And you'd just take – because again you'd take the definition of "trust document" from the Trustee Act, would you?

MR ROSS QC:

No, I wouldn't. The definition –

GLAZEBROOK J:

Okay, so what's your definition of trust document? I'm really coming back to do you agree with Justice Young's formulation of that?

MR ROSS QC:

Yes.

GLAZEBROOK J:

All right, that's fine.

MR ROSS QC:

And so once you're in that tent privilege is irrelevant. My –

GLAZEBROOK J:

And do you remember what its formulation was? I can go –

MR ROSS QC:

Well, I'm happy to articulate my own.

GLAZEBROOK J:

I'll go back up because it helps us, I think, to know that we're talking about the same thing, if I can find it.

WILLIAM YOUNG J:

I think it's obtained by the trustee, qua trustee.

GLAZEBROOK J:

Yes.

MR ROSS QC:

Yes, and I would add for the purposes of the Trust estate, the benefit of the beneficiaries as a whole or in relation to the administration of the Trust, such as a question of should we give these documents to a beneficiary or what are my obligations in relation to it.

And to allow privilege in that context is to put trust law, in my submission, on its head where instead of that privilege being for the benefit ultimately of the beneficiaries it's being used as a weapon against the beneficiaries for the benefit of a trustee. It's quite wrong, in my submission.

O'REGAN J:

Well, it's not necessarily for the benefit of the trustee. I mean it could be for the benefit of the beneficiaries as a body as opposed to this particular

querulous beneficiary in a case where there's one, I mean like in *Erceg* case, for example.

MR ROSS QC:

Yes, but that would be an exercise of an *Erceg* judgment or a Trusts Act judgment: "Should I or should I not" based on all the factors, but to say: "I'm not going to give it to you because I'm cross with you, I don't want to show it to you," that's not hostility and it's not a basis for not disclosing. So a trustee can't say: "I'm not giving it to you because I asked for that advice," because it's privileged. That's a nonsense, in my submission. But you can say I'm not –

O'REGAN J:

What do you say a trustee should do if faced with a request for information which they see as being a prelude to hostile litigation? They should just go and buy the information, the advice themselves, is that your answer to that?

MR ROSS QC:

No, because I agree with my learned friends in I think some discussion with this Court today that what really matters what is the complexion of this information, what is the context? If it was sought in relation to the administration of the estate and so on, preservation of the assets, whatever it is in relation to the estate, qua trustee, that is Trust information and one cannot buy one's way out of it, and there's a recent case to that effect that was too late to put in our bundle, turned up from Jersey, which I know sometimes people think: "Oh, gosh, tax haven place," but Jersey produces some outstanding trust law, Judges and cases. This is one of those cases where a trust in I think it's called *Arpettaz Settlement* [2020] JRC 161, my learned friend has the citation, where a trustee deliberately went off and got advice that the trustee paid for itself but reserved the right to claim the indemnity against the Trust in due course and the argument was made: "Well, I got that on my own personal account. I paid for it," and the Court says: "Well, you can't do that. Just because you paid for it doesn't mean it's not Trust information." So I revert to, if I may adopt the proposition that the

President was making earlier, who pays isn't the determinative factor but it's sure good evidence that it was done for the benefit or the purpose of the Trust if the trustee helps themselves to the indemnity and gets paid that way. It's pretty hard to say that wasn't for the benefit of a trust, isn't it? It might have been a mistake but why should the beneficiaries pay for the personal advice of trustees in their personal capacity?

O'REGAN J:
Well, you still haven't answered my question.

MR ROSS QC:
I'm sorry.

O'REGAN J:
What do you say a trustee should do if they're faced with a hostile request for information and they want to get some advice about it but they don't want to give it to the hostile person who's asking for it?

MR ROSS QC:
Well, it's not possible to get that out of the Trust category.

O'REGAN J:
Well, doesn't that then show that Ms Chambers is right that that's putting trustees in a position where they can't get legal advice? Isn't that the whole purpose of privilege so that they can get it?

MR ROSS QC:
They're not obliged to hand the advice over. They could say: "No. Our reasons for not handing it over is that – let's take an *Erceg* example.

O'REGAN J:
Well, that's what they've done here. Look where we are.

MR ROSS QC:

Sure, but they could have applied to court. They could have said: “We have this advice. We do not wish to provide it to the trustee. Here are the circumstances why – the beneficiary. The beneficiary doesn’t agree with us. We are seeking the direction of the Court.”

O’REGAN J:

But that doesn’t deal with – I’m asking at the point at which they want to get some advice and their lawyer says to them: “Well, whatever advice I give you you’ll have to give to the other side, so essentially I’m advising the other side as well.”

MR ROSS QC:

With respect, the lawyer would have to say: “This may have to be disclosed to the other side. It’s Trust information you may have to disclose,” and that’s absolutely appropriate. If the trustee doesn’t want to get legal advice about how to administer the Trust, go for your life, but there’ll be consequences with that.

O’REGAN J:

But what I’m saying to you is the point that you're being asked to answer is that privilege is designed to ensure people act with the benefit of legal advice and that it doesn’t count against them…

MR ROSS QC:

Yes.

O’REGAN J:

And Ms Chambers’ point was if we interpret the law as you suggest we should and say privilege is irrelevant, which is a phrase you used, then the trustees are prevented from doing that.

MR ROSS QC:

They cannot hide it from the beneficiary and ultimately from the Court, if there's an argument about it.

WILLIAM YOUNG J:

Well, they can hold it back on the basis they think it's not necessary and the Court can make a decision on that.

MR ROSS QC:

Yes, and that leads me to the point, the Court of Appeal has already decided that it is reasonably necessary that this material be produced and, as I understand it, the question that this Court has granted leave to argue is whether a privilege trumps it. The balancing question, if you like, the *Erceg* question or the Trusts Act question, has already been decided.

GLAZEBROOK J:

Well, that can't possibly have been decided because the Court of Appeal no more than us knew anything whatsoever about what these documents were, so it can't possibly have decided that.

MR ROSS QC:

Well, with respect, your Honour, it has, it has ordered that –

GLAZEBROOK J:

Well, it can't possibly have decided it because…

WILLIAMS J:

Well, it can't possibly have decided it *properly.*

WILLIAM YOUNG J:

Well, it can only have decided it by reference to a category of documents.

MR ROSS QC:

That's right.

WILLIAM YOUNG J:

That is – and it may be that that's in a situation where the documents haven't been handed up for inspection, that may be the only way of doing it.

MR ROSS QC:

The only claim to privilege in relation to these documents in the list of documents is that advice was sought from 2002 in relation to this litigation, when it wasn't even a twinkle in anybody's eye. So the Court of Appeal has determined, based on the status of the documents available in relation to this case, and the new information that was presented to the Court of Appeal which should have been available in the High Court, it was appropriate to order that legal advice be disclosed

GLAZEBROOK J:

Well, don't assume that we don't think that we can overturn that, so don't tell us it's already been decided and we're not going to be able to decide that, because when you come here you come here.

MR ROSS QC:

Well, I apologise, your Honour, I had perhaps misinterpreted the question. But if the question is whether it was reasonably necessary to order this, then we would have included in the bundle all of the new evidence which led to the queries that one can see in the Court of Appeal about whether what the High Court was told was accurate about the source of the funds.

WILLIAM YOUNG J:

The approved question is: "Was the Court of Appeal right to reject the applicant's claims of legal advice privilege and litigation privilege respectively?"

MR ROSS QC:

Yes, it was rejecting the claims to privilege that was the question.

ELLEN FRANCE J:

In relation to that, Mr Ross, do you say that – this might not be the right word – but that the onus is on, in this case the appellant, to show why the *Erceg* factors mean information shouldn't be disclosed, or because it's the Court's supervisory jurisdiction is there a different approach? So I'm thinking of the situation where you don't know, you're not given any information about the particular categories and you have a fairly blanket, well, privilege applies, shouldn't be, not reasonably necessary to disclose. I'm trying to understand what you say the Court's role is then and is there some obligation on the person, the trustees, the Trust, resisting to make the case.

MR ROSS QC:

I hope I understand your Honour's question correctly, but is your Honour referring to in this particular case, given where we are on this case?

ELLEN FRANCE J:

Yes.

MR ROSS QC:

As I understand what has happened, both the High Court and the Court of Appeal have determined the case on *Erceg* and the principles and leave has not be granted to argue that question about whether *Erceg* has been applied correctly, because this Court determined it had been. Part of the *Erceg* test is whether disclosure is reasonably necessary. That question has been answered by the Court of Appeal. I had not understood that that was in issue now. The question was whether privilege trumped that decision that has already been made under *Erceg*, and so in my submission –

WILLIAM YOUNG J:

For my part, I'm inclined to read the leave decision that way, actually.

MR ROSS QC:

I beg your pardon, Sir?

GLAZEBROOK J:

Well, I think we were interested in the issue of privilege but I don't think if we get to the stage where we say it's relevant in some way that…

WILLIAM YOUNG J:

It doesn't preclude this. The reasons for the judgment do say that there's no reason – the application of *Erceg*, that this was an application of this Court's decision in *Erceg*, "…no reason for us to revisit that decision. Nor do we see any appearance of miscarriage in relation to those aspects of the Court of Appeal's decision." That doesn't mean that our minds might not change.

MR ROSS QC:

Well, I quite understand that. I would simply say I would want to address the Court on a great deal more evidence than is currently before you in order to explain how the Court of Appeal got to the position it did in relation to that disclosure order.

GLAZEBROOK J:

I think my problem is that I don't see that there's anything between you apart from working out what the difference is in relation to privilege and joint privilege. So to a degree I think it's probably irrelevant in terms of *Erceg* because what I was cavilling about was saying, well, they've decided it's reasonably necessary so I don't even have to address that because that will relate to the line that we're trying to draw in relation to joint privilege, I think.

MR ROSS QC:

As I understand it the question –

GLAZEBROOK J:

So it's not whether the factors were applied right. It's whether it is in fact reasonably necessary because that seems to me to be part of that line drawing and not necessarily the discretion.

MR ROSS QC:

Yes, well, there I think I have a fundamental difference with my learned friend on principle.

GLAZEBROOK J:

I realise that. It was just a question –

MR ROSS QC:

It's not about line drawing about what's hostile. The fundamental difference is that privilege is completely irrelevant from the point of view of determining *Erceg*. As a thing, privilege is irrelevant.

GLAZEBROOK J:

Well, I mean the trouble is you then say except in a hostile litigation environment which then becomes very difficult to work out exactly what it is you are saying, because you can't say privilege is totally irrelevant and then say: "Oh, yes, but except in this circumstance."

MR ROSS QC:

It's not really an "except". If we are in *Erceg* or Trusts Act world, in other words if we are dealing with Trust information, it is irrelevant. It only becomes relevant if this document or information is not Trust information for the benefit of the Trust.

WILLIAM YOUNG J:

But say you have a trust where there may be an issue of interpretation as to whether one person who undoubtedly is a beneficiary has a particular interest as well. So beneficiary A says: "Yes, under clause 2 of the Trust everyone agrees I'm a final beneficiary but I say that clause 3 of the Trust means I'm also a discretionary beneficiary. So I want to sue for a declaration that I am." Now what does the trustee do? Trustee may say: "Well, I haven't got any skin in this game. It's for the other beneficiaries to oppose it. I'm just neutral," or the trustee may on behalf of the Trust which in a sense is being challenged to

some extent by a third party: “We’re going to defend it,” how would you deal with the Trust information in that situation?

MR ROSS QC:

I would not accept that that’s a third party. That is a beneficiary. There’s a dispute about the interpretation of the Trust and any advice that trustees get in relation to that is Trust information and is not privileged against the beneficiaries. Their normal course would be to take advice from a lawyer, from counsel. That would be available to all beneficiaries. If the beneficiaries, if other beneficiaries end up or perceive that they’re going to be losers, they’re going to be the logical contradictor on the interpretation question and the trustee would abide. If there is no other contradictor the authorities are clear. The trustees should be there to assist the Court and put any contrary propositions that might usefully be put to make sure that the Court can make an informed decision, but they are not a competent. They are simply a trustee to do the law and that is not hostile litigation. That is anything they’ve obtained by way of advice would be available.

WILLIAM YOUNG J:

Are your authorities on what is and what isn’t hostile litigation, do they all concern issues of costs?

MR ROSS QC:

No, and in fact the classic definition of the difference goes back to a case called *Buckton* in 1906 or 1907 which describes the difference between, if you like, friendly litigation or hostile litigation, and it divides it into three categories –

WILLIAM YOUNG J:

Yes, I know, but isn’t that about costs though?

WILLIAMS J:

It’s about pre-emptive costs.

MR ROSS QC:

Yes, I beg your pardon, that is about costs.

WILLIAM YOUNG J:

So I'm just wondering if this distinction you rely on between friendly and hostile litigation has been applied in the context of access to trustee information?

MR ROSS QC:

I can't put my brain on one as yet. *Arpettaz,* which you'll hear about, is pretty close, because that's about litigation that's going on in England and it was a question about whether the trustees should produce advice it had received in relation to that litigation to which it was about to become a party to the principal beneficiary.

WILLIAMS J:

So your hostility –

WILLIAM YOUNG J:

Sorry, can we just see, what's the case? I'm sorry, I haven't got the…

MR ROSS QC:

It's a case called *Arpettaz.*

WILLIAM YOUNG J:

Is it in our bundle or not?

MR ROSS QC:

Regrettably not, because it was decided 10th of August of this year, so I haven't produced it in the bundle.

GLAZEBROOK J:

It seems an odd distinction from me if you're right in the middle of litigation to say that because you happen to be a trustee and in fact are acting on behalf – because if you have one beneficiary as against all of the other beneficiaries,

and some of them could well be infants and not able to resist any claim – that in fact you have to hand over all your legal advice to the other side in the middle of a litigation battle, which is what you're saying is the case.

MR ROSS QC:
I would say that it had to be handed over long before that if there was a question about who was entitled in what respect in relation to a construction question of the –

GLAZEBROOK J:
Well, that might be, but you're in the middle of the litigation and you're taking advice as you go along and you say the logical extension of that is you would still have to hand it over?

MR ROSS QC:
Yes.

WILLIAMS J:
Your point is that there is no other side in that form of litigation, they're all on the same side, the only time there is another side is whether the trustee is directly in the gun personally?

MR ROSS QC:
Exactly.

GLAZEBROOK J:
Well, it's difficult to see that. I'm sure the other 15 beneficiaries might take a different view of that.

MR ROSS QC:
But they're –

GLAZEBROOK J:
You have one recalcitrant beneficiary claiming something that they think is totally outrageous.

MR ROSS QC:

The question is whether privilege can be asserted against that beneficiary and, in my submission, the answer has been since 1850 something, no. The question of how *Erceg* or the Trusts Act discretion should be exercised, which is a different world, the answer is it depends on all the factors that are contained in there. But can privilege be asserted? No. And if the trustee has obtained legal advice that's inconsistent with what a beneficiary says is the correct approach to the Trust, then one can expect the trustee to advance that argument on the basis of that advice in any proceeding, but it's not privileged.

WILLIAMS J:

It might still not get through, on *Erceg* factors.

MR ROSS QC:

If it were simply an application for information, yes, but if it was actual litigation in relation to a construction question any advice that the trustee would have received would be in evidence, because it's not privileged against the beneficiaries.

So the Trusts Act is aimed, is a set of directions to trustees about what to do when presented with a question. It's not a set of instructions to the Court in its supervisory jurisdiction at all.

WILLIAMS J:

Yes, I understand that point.

WILLIAM YOUNG J:

Can I just ask a question, just looking at this? What would happen if the Trust instrument said that the trustees are precluded from providing Trust information to beneficiaries? Would that be applied or would it be just treated as contrary to principle and…

MR ROSS QC:

I would regard it as obviously unlawful and unenforceable. This is a jurisdiction about a person having a responsibility to act in the interests of another, it would just be – I mean, there would be no ability to enforce the Trust, this can't be right.

WILLIAM YOUNG J:

And there was such a provision, I think, in the case you, the Jersey case.

MR ROSS QC:

The Jersey case is pretty extraordinary, but many of them are.

WILLIAM YOUNG J:

The settlor wasn't a very satisfactory chap.

MR ROSS QC:

Doesn't appear to be, no. But the trustee's doing the right thing about asking the Court: "What should I do?" The critical bit for our purposes is from paragraph 51 and at paragraph 53 the Court says: "The principal beneficiary wished to see the advice from counsel," that had been given to the trustees, "for reasons that the Court can readily understand…" The principal says as a beneficiary he enjoys a joint privilege and he wished to see it, "the directions sought and would wish to know, for example, to what extent counsel –

GLAZEBROOK J:

Well, was the beneficiary party to the litigation?

MR ROSS QC:

Yes, he's the first respondent. So he's asking for it. He's a party to the litigation.

GLAZEBROOK J:

But against the Trust?

MR ROSS QC:

Yes.

GLAZEBROOK J:

Well, perhaps can – where are the facts, the easy facts here?

MR ROSS QC:

Paragraph 8 might be useful. I'll back up. This is a case about a potential fraud of hundreds of millions of dollars and there's a judgment against the fraudster for that amount of something over $300 million and it is alleged that some of that money made its way to this trustee in a trust settlement and is essentially held by this principal beneficiary. A worldwide freezing order was granted and the question was whether this Trust in Jersey should submit to the jurisdiction in the United Kingdom in order to determine whether that money belonged to effectively the principal beneficiary or whether it belonged to the people who had been defrauded, and the Trust got advice for itself about what it should do in relation to the English proceeding and sought to keep it confidential from the principal beneficiary. They used their own money to procure that advice. The principal beneficiary said it doesn't take it out of the context of Trust information, therefore your privilege doesn't apply, and the Court agreed. It also declined –

GLAZEBROOK J:

But the principal beneficiary and the Trust were being sued by someone else, isn't that right?

MR ROSS QC:

Yes.

GLAZEBROOK J:

So it's not a question where the trustee and the principal beneficiary were on a different side.

MR ROSS QC:

That's true but –

GLAZEBROOK J:

Which is – so it's not hostile in that sense at all, is it?

MR ROSS QC:

It's very much hostile because the –

GLAZEBROOK J:

Well, it might be hostile because they disagree as to what should happen –

MR ROSS QC:

Very much so.

GLAZEBROOK J:

– but that's not the point really, is it?

MR ROSS QC:

But that's no different from this case. The fact that we are a plaintiff –

GLAZEBROOK J:

No, no, I can understand the argument in relation to this when we're looking at information. What I'm really trying to get my head around is how much wider you want this to be and it strikes me what you want is unless the trustee is being sued for breach of trust, whatever else sort of dispute you have, all information goes to that beneficiary subject to the *Erceg* factors no matter what.

MR ROSS QC:

I beg your pardon, no, I've obviously not made myself clear. If a trustee is being sued for breach of trust and they are in –

GLAZEBROOK J:

No, I understand that's an exclusion from you but in any other situation where the Trust is being sued by someone who purports to be a beneficiary but the trustee says they're not, by one of the beneficiaries who's a querulent beneficiary as against the 5000 others who are not.

MR ROSS QC:

No, I don't accept the proposition. If someone says they're a beneficiary and the trustee takes a different view then and the duty of the trustee is to defend the Trust and assert the privilege that the trustee has against the interloper until for some reason the trustee gets told that the person is not an interloper and is a beneficiary, so their job is to do the opposite, to protect the privilege for the benefit of the beneficiaries. So that's the first case. In relation to the second case a querulous litigant in relation to a document information request or a trust information request, the trustees can take into account the fact that the person is querulous and that's settled law here and, of course, in the Trusts Act is expressed in terms which would allow a trustee to say no.

GLAZEBROOK J:

Well, you probably don't know whether they're querulous until they've heard the case, do you?

MR ROSS QC:

But that's the point, in my submission, your Honour. This Trust exists for the benefit of the beneficiaries and the law is that beneficiaries are entitled to certain types of trust information. Now legal advice is part of the trust information world. Whether to give it or not on the basis of a request is a decision for the trustees to make or the Court.

GLAZEBROOK J:

Right, so you just say there's no such thing as litigation privilege in a trust context, that's what you say?

MR ROSS QC:

If –

GLAZEBROOK J:

Because your hostile has nothing to do with the Trust because hostile litigation is something that's totally outside of the Trust?

MR ROSS QC:

Exactly.

GLAZEBROOK J:

All right.

WILLIAMS J:

So, I'm just working my way through the doctrinal issues that you've been talking about vis-à-vis the relationship between privilege and shall we say *Erceg* for shorthand purposes, and the test in *Erceg* for access is reasonable necessity countered by any contrary maters such as querulousness or whatever. The test for access in terms of litigation is relevance. They're not the same.

MR ROSS QC:

Agreed.

WILLIAMS J:

You'd think that, in the abstract anyway, the *Erceg*/Trust Act test is a narrower one…

MR ROSS QC:

It allows –

WILLIAMS J:

Perhaps not by much but probably.

MR ROSS QC:

It allows more discretion to the trustee to decline to –

WILLIAMS J:

No, I'm talking about the reasonable necessity.

MR ROSS QC:

Yes, higher standard.

WILLIAMS J:

Reasonable necessity is not the same as –

MR ROSS QC:

Relevance.

WILLIAMS J:

– the definition of "relevant" in the Evidence Act.

MR ROSS QC:

I beg your pardon, I agree with that proposition.

WILLIAMS J:

So you could avoid the strictures in the Trust Act by suing.

MR ROSS QC:

Yes, you could, if you were asserting breach of trust.

WILLIAMS J:

Was that really what was – sorry?

MR ROSS QC:

If you were pursuing, say, a claim for breach of trust.

WILLIAMS J:

Well, whatever your claim was, you could get around section 51 to 53 by issuing proceedings, and then you'd be entitled to all of these things because privilege doesn't attach, even if a court might conclude or even a trustee might conclude that this material is either not reasonably necessary or there are other good reasons for even though it is reasonably necessary it not being disclosed.

MR ROSS QC:

Yes, that's right, that is absolutely right, and there's nothing wrong with that. Because the request for information in the normal course is, as my learned friend says, for the administration of hundred of thousands of trusts for routine requests. Where a beneficiary actually sues a trustee in relation to a decision which they say is in breach of trust, or some other thing that the trustee has done wrong in relation to the corpus of the trust, of course they should have everything that's relevant, including any advice that was commissioned which has that joint interest attached to it. Otherwise the Court simply cannot enforce the Trust.

GLAZEBROOK J:

Except if the trustee takes personal advice as to whether he or she is in breach of trust, which seems actually the type of advice you might want to have rather than the other advice.

MR ROSS QC:

If the trustee goes off and gets that advice, pays for it him or herself, then no problem, that's privileged, and of course the trustee would. If the trustee was sued for breach of trust they'd get their lawyers and they'd defend their position and they'd get advice in relation to it, and all of that would be privileged in the normal way, there's nothing unusual about it.

WILLIAMS J:

Well, in my experience that's not the way these things play out.

O'REGAN J:

But also you'd just walk around that on your argument by asking for the information first and suing later.

MR ROSS QC:

Well, you don't necessarily get everything first. But that's what holding trusts to account is about. The cases that we refer to, *Blades*, *Tamplin*, is a good example. The fact that there might be a breach of trusts claim later is neither here nor there. The whole point is to be able to hold a trustee to account, nothing wrong with it.

O'REGAN J:

But it does make your distinction between hostile and non-hostile pretty fuzzy, doesn't it, because…

MR ROSS QC:

Well, I accept there's always going to be fuzz in places.

O'REGAN J:

I mean, your clients now have all the information, they have the information, the account and, you know, minutes, et cetera, so presumably they're in a position to know whether they've got a claim or not.

MR ROSS QC:

They know an awful lot more about this Trust – and, yes, they do. And we are not – but that's only as a consequence of the Court of Appeal decision of course. We say we should have had that when we first asked, and we finally got it, and of course this case is now, this hearing, is only about a small corner of that information. But as a big question of principle, nothing wrong with asking for information to –

O'REGAN J:

Yes, but you might have got it earlier if you'd only asked for what you've asked the Court of Appeal for rather than asking for the kitchen sink as well.

MR ROSS QC:

Having seen what we've now got, I very much doubt it.

WILLIAMS J:

Just taking a hypothetical – well, actually not a hypothetical but one scenario in which this sort of issue can play out we saw in the '90s in the Māori fisheries litigation which went through the pre-emptive costs application and applied *Buckton* and so on, and the Courts were clear that the Fisheries Commissioners were trustees and so the parties' costs would be paid out of the corpus which admittedly was rather valuable. But I think those parties would have been horrified to discover that legal advice obtained in the midst of vast litigation, highly hostile, would be made available to the other parties in that litigation and it would probably have made their work impossible. But that's the end result of your thesis.

MR ROSS QC:

Well, I think that depends because if the litigation was an allegation that the Commissioners had misconducted –

GLAZEBROOK J:

Can you just make sure you speak into the microphone, please, because otherwise it doesn't pick up on the transcript?

MR ROSS QC:

I'm sorry. I would say that depends. If the litigation was an allegation that the Commissioners had misconducted themselves, breached the law or their duties in some way as trustees, then they would be –

WILLIAMS J:

It certainly was that the trustees were acting unlawfully in allocating in the form that they were proposing to allocate.

MR ROSS QC:

In which case if it were simply a question of what is the correct interpretation of the statute and has the statute been correctly applied, that would be no different from a trust deed interpretation dispute and it's not actually hostile in *Buckton* world. So if we took the *Buckton* –

WILLIAMS J:

Yes, so that was the basis upon which funding was provided to all of the parties, of course, but no one ever suggested that the advice given to Te Ohu Kai Moana during the course of litigation should ever have been made available to the parties. Even the parties themselves didn't have that temerity.

MR ROSS QC:

Maybe no one asked to test it but – and then maybe all –

WILLIAMS J:

Perhaps it was because you weren't there, Mr Ross.

MR ROSS QC:

I certainly wasn't and maybe all hell would have broken loose and we would have been in some form of this eventually. But what I think would be unfortunate in this case is some kind of suggestion that because a trustee procures legal advice for the benefit of the Trust and the beneficiaries that that somehow imports a privilege for the benefit of the trustee against the beneficiaries. It's only if the trustee is being sued effectively in their personal capacity for breach that –

WILLIAMS J:

How do you draw your line?

MR ROSS QC:

Privilege.

WILLIAMS J:

I can see the simple bright-line attraction of your argument but how do you draw the line in a way that doesn't make the administration of sometimes complex trusts impossible?

MR ROSS QC:

I would submit that there needs to be a bright-line because privilege is a bright-line issue. A document is either privileged against someone or it is not.

WILLIAMS J:

All right, we're at one on that. How do we stop those trusts that are in difficulty because of relentless squabbling between beneficiaries, how do we stop this becoming a way in which they make life for the trustees even worse than it already is or do you say that's just the price you pay?

MR ROSS QC:

I might be driven to the proposition that it's a price you pay but one needs to be careful about fearing that the heavens will fall in any particular case, because most, I would respectfully submit, of these sorts of cases are you've got parties on all sides with different points of view hotly contesting something and a trustee or someone in a corporate position similar to a trustee will also have got advice about what they ought to do, probably prior to it becoming an actual dispute and, in my submission, there's nothing startling about that having to be disclosed to beneficiaries, in other words, the trustee could not assert privilege against those beneficiaries in any litigation.

WILLIAMS J:

This would be an ongoing obligation throughout the litigation, so every communication between counsel and their client would have to be CC'd to the opposition and, let's face it, in reality they're the opposition.

MR ROSS QC:

Yes.

WILLIAMS J:
And in fact there are usually sort of five or six different oppositions with five or six different perspectives.

MR ROSS QC:
I struggle to give your Honour a satisfactory answer to that question that doesn't do violence to ordinary private trust litigation and the rights of beneficiaries and the ability of the Court to supervise that litigation.

WILLIAMS J:
Well, you could do that by modifying your thesis so that truly hostile litigation – you'd have to broaden the idea from not just direct personal attacks on the trustees – is excluded from the model.

MR ROSS QC:
I accept that, your Honour, and the authorities my learned friend will take you to –

WILLIAMS J:
Yes, tend to say that.

MR ROSS QC:
– show that there is fuzz around the edge of definition of what is hostile, and I would submit it's perfectly legitimate to determine that some types of litigation like that are hostile, but I would simply say we're a million miles from that, we're in a document request situation here.

WILLIAMS J:
Yes, but the problem is we're not, you see, because whatever we write is…

MR ROSS QC:
I completely appreciate that whatever this Court says it has to apply to all trusts, and I'm simply submitting to your Honour that the law assists in that regard because it does accept that there are fuzzy edges to what is hostile

and, although I regret that I didn't reach that proposition myself, the authorities that we've referred to do say it can sometimes be difficult to determine whether litigation is hostile or not. But where it is hostile privilege can be asserted, and so I don't see that as being inconsistent with the principle that we're relying on, it's just –

WILLIAM YOUNG J:
Is "hostile" just a sort of a placeholder for circumstances in which there is no longer a joint interest?

MR ROSS QC:
Yes.

WILLIAMS J:
But you would say there's always a joint interest in administration of trust issues.

GLAZEBROOK J:
Yes, exactly.

WILLIAM YOUNG J:
There may come a point where it is unreal to say…

MR ROSS QC:
Where it become artificial to describe it as a joint interest and that –

WILLIAMS J:
Yes.

WILLIAM YOUNG J:
So I would say by this stage this litigation, this situation, may have got to that point.

MR ROSS QC:

Well, that's an interesting proposition, I was wondering whether your Honour might suggest that, given the questions with my learned friend before. I have a response to it which is essentially that that, with respect, can't be right. Because what that means is the more difficult a trustee becomes, the more recalcitrant, the further up the Court system they send you –

WILLIAM YOUNG J:

The more the trustee annoys the beneficiary the more hostile the litigation is and the easier it is to resist disclosure.

MR ROSS QC:

So whatever that test is, we're not in that territory in my submission, because it's simply an encouragement to trustees to be damned difficult, if you'll pardon the language.

GLAZEBROOK J:

Well, it doesn't really, because it would only apply from the time it has become hostile and doesn't apply to anything that has happened beforehand.

MR ROSS QC:

The question would be when is that moment?

GLAZEBROOK J:

Well, exactly, but you're always going to be drawing lines, aren't you?

MR ROSS QC:

That's right.

GLAZEBROOK J:

And I don't see that it's an incentive to be difficult because you still have to give all of the information, you just don't have to give the information for when you're being difficult, and in fact I can't see that it's terribly useful for when they're being difficult because presumably when they're being difficult they will

have some encouragement from their counsel to be “difficult”, in inverted commas.

MR ROSS QC:

It may not be of great assistance to anybody, battle lines have been drawn. But my point is that it would be wrong to regard, in my submission, this proceeding as anything other than a routine, well, a standard request for information by a beneficiary, the only person who’s able to hold a trustee to account in this particular case, for information that’s reasonably necessary to do so.

GLAZEBROOK J:

I don’t have a problem with that as an argument. My issue, as I said to you, is just like Justice Williams trying to work out what the outer bounds of that was and what the effect of that was in the case of fights between beneficiaries effectively that the trustee becomes involved with, as I say, possibly because they have to be because they’re acting on behalf of the minor beneficiaries.

MR ROSS QC:

Yes. But, as I say, if it relates to what are the trusts on which this property is held, what is the correct interpretation, that's just a feature of getting advice. If the trustees could apply to Court for directions, if it’s that sort of case, then we’re not in hostile territory on any definition. This is a classic case where a trustee might well have applied for a direction.

WILLIAM YOUNG J:

Well, an independent trustee would probably have applied for directions as to whether it should hand the documents over.

MR ROSS QC:

That’s right.

WILLIAM YOUNG J:

So if this had been the Public Trustee or a trust company or a lawyers independent of any of the beneficiaries, that is presumably what they would have done.

MR ROSS QC:

I would submit the only reason we're here is that the trustee and the beneficiary are one, essentially, in practical terms, and the only other person who's able to hold the trustee to account is my client.

WILLIAM YOUNG J:

That's not entirely uncommon in New Zealand trusts where the trustee is often aligned in interests and sometimes is the same person as the principal beneficiary or is basically that person's alter ego or creature.

MR ROSS QC:

Quite, and many are the cases where that person's come a cropper because they simply don't distinguish in their minds the difference between being a trustee and being a beneficiary and as soon as we start watering that down in relation to small family trusts we end up with no trust law, in my submission. We just have what might be called the wild west.

WILLIAM YOUNG J:

You conflate the trustee and the person who controls the trust –

MR ROSS QC:

Just won't have a trust. It won't be enforceable because no one will have the information or want it. So that was a long way of dealing with my first point.

WILLIAMS J:

It was your first point?

MR ROSS QC:

Well, I was simply saying the starting point. But that really covers much of what I had to say on a lot of topics. Would your Honours just bear with me for one moment. I did want to take your Honours to the actual claim for privilege in this case because we haven't been there. What is said to be privilege and what's the basis for it.

WILLIAM YOUNG J:

But this is just from a list of documents, isn't it?

MR ROSS QC:

Yes. Well, the –

WILLIAM YOUNG J:

Which is sort of a – okay, well, take us to it.

MR ROSS QC:

I'm happy not to go to the document.

WILLIAM YOUNG J:

No, no, take us there.

MR ROSS QC:

No, it's very spare, your Honour, and the reason for wanting to draw attention to it is that the *Rinehart* judgment is extremely critical of loose claims to privilege that are not sufficiently particularised to justify the claim to privilege in a context like this and so I simply leave that proposition with you. It's a question of evidence. Is there evidence?

WILLIAM YOUNG J:

It's simply saying we claim privilege in relation to advice in 2002 and 2003 and from September 2014.

MR ROSS QC:

From 2002 in relation to the proceeding?

WILLIAM YOUNG J:

Yes.

MR ROSS QC:

All the way through to today. And then there's litigation privilege claim from 2014 in relation to this proceeding. There's no claim to privilege in relation to legal advice other than in relation to this proceeding in the list of documents.

WILLIAM YOUNG J:

So have you asked for legal advice other than what's covered by the claim to privilege?

MR ROSS QC:

Yes.

WILLIAM YOUNG J:

And so that's been refused after the Court of Appeal judgment?

MR ROSS QC:

Yes.

GLAZEBROOK J:

Well, you wouldn't actually expect a list of documents to list documents that weren't specifically relevant to the proceeding though, would you?

MR ROSS QC:

They were. This proceeding sought legal advice, all legal advice. The privilege asserted was in relation to this proceeding. It's a simple question of evidence, I would submit. There is no evidence. We do have my learned friend's submission about what the advice covers which is broader but there's no evidence, and certainly not from someone who knows about it, and that was the point in *Rinehart* that opinions were being expressed by people who either hadn't commissioned the advice or hadn't given the advice and the Court rejected all of it and said it's not good enough.

So that was a second point that I wished to make, that there's no evidential basis for these claims to privilege except for documents relating to this proceeding.

GLAZEBROOK J:
Well, they'd certainly be privileged against third parties, wouldn't they?

MR ROSS QC:
Absolutely.

GLAZEBROOK J:
Well, then, then the issue is whether there's a joint privilege or not, isn't it?

MR ROSS QC:
Well, they simply haven't claimed privilege but yes, and I'd say there's a joint interest in all of the legal advice for the Trust.

GLAZEBROOK J:
But that might be right but you're not really saying they're not privileged documents, at least in relation to third parties, are you?

MR ROSS QC:
Well, I assume that there will be documents that are just legal advice, like my learned friend described, which would of course be privileged against third parties.

WILLIAMS J:
You say that's not claimed against you?

MR ROSS QC:
No. Maybe it is useful to go to the list of documents, unless your Honours are satisfied with my description?

WILLIAM YOUNG J:

Okay, go to it. I have looked at the – but some of my colleagues may not have.

MR ROSS QC:

It's at the back of the evidence bundle, I think, volume 2, tab 28, and it's page 201.0040. This is the affidavit of documents sworn by Ms Jamieson, and you'll see there's a part 1, the normal sort of part. Part 2 is the privilege claim, and you'll see a bulk listing, 2002 to present: "Communications between KempsWeir Lawyers and plaintiff in relation to seeking and providing legal advice about the proceedings, including," advice, et cetera, and it says, "relating to these proceedings *again*" at the end of that box. So that's the legal professional advice claim to privilege. And then the second box from September 2014 is communications in relation to this proceeding, which they say attracts the two types of privilege.

Interestingly, Mr Kemps you might remember wrote that letter saying: "I'm getting independent advice about what the trustees' obligations are," and whoever that was is not listed in that box, 2004 to present, unless it was someone else in his firm, of course, which might not be strictly independent. So that's the claim.

WILLIAMS J:

So do we conclude from that that there was no legal advice prior to 2002?

MR ROSS QC:

No. I think my learned friend said there is legal advice prior to 2002, it's just the privilege hasn't been claimed for it.

WILLIAMS J:

But have you seen it?

MR ROSS QC:

It's just part of the Trust documents and the Court of Appeal ordered they be disclosed – oh, I beg your pardon, did your Honour ask me whether we'd seen any? No. We have not had any legal advice whatsoever.

WILLIAMS J:

Oh, this is on the reasonable necessity argument?

MR ROSS QC:

Presumably.

WILLIAM YOUNG J:

At least on the face of it the reasonable necessity argument would have gone with the leave judgment. So any documents in respect of which it was acknowledged there was joint privilege should have been handed over.

MR ROSS QC:

I'm sorry, the leave…

WILLIAM YOUNG J:

The leave judgment says we're not, that reasonable necessity arguments aren't available, the approved question is as to privilege, litigation privilege?

MR ROSS QC:

Yes.

WILLIAM YOUNG J:

So to the extent to which there are documents which, there's legal advice in respect of which it is acknowledged that there is joint privilege, they should have been disclosed?

MR ROSS QC:

Absolutely.

GLAZEBROOK J:

Well, I had understood Ms Chambers to say anything before 2002 would have been joint privilege, but just not necessary to disclose.

MR ROSS QC:

But in my submission that's not available to my learned friend to submit.

GLAZEBROOK J:

No, I understand…

MR ROSS QC:

But that does appear to be the concession today.

GLAZEBROOK J:

And that would appear to be the case on the basis of the leave judgment in relation to those earlier documents.

MR ROSS QC:

That does appear to be the concession today.

WILLIAMS J:

You say that it's not available on two bases, one, *Erceg* is irrelevant and, two, the Court of Appeal upheld your stance on *Erceg* anyway? You say *Erceg* is irrelevant because it's about privilege, not about access to trust information, and…

MR ROSS QC:

That is exactly our position. And so, as I see it, there's no claim to privilege on any legal advice up till today in relation to things unrelated to the proceeding.

GLAZEBROOK J:

Well, probably relatively difficult to claim, I think, as Ms Chambers accepted, given that, well, given there wasn't a disputed, an operation before that time.

MR ROSS QC:

And the only dispute there's been has been about access to documents.

WILLIAM YOUNG J:

Okay, it's now 3.25. Can I keep the wheels of your argument rolling?

MR ROSS QC:

Certainly. I apologise for any digressions. So I think where that just gets me to in terms of my submission on what our case is about on the fundamental principle. Is this privilege. Does it exist? It is a trump in an information request? The answer is no and the Court of Appeal was right to cite *Lewin*. My learned friend is going to take you to *Lewin* because that seems to be the…

WILLIAM YOUNG J:

Take us to what, sorry?

MR ROSS QC:

Lewin on Trusts. The passage on *Lewin on Trusts*, the charge against the Court of Appeal is that it adopted some kind of possessory or proprietary approach to disclosure. It misdirected itself, relied on *Lewin* in that respect and it's all wrong because of *Erceg*, et cetera, et cetera. Our overarching proposition is that that's just not correct. *Lewin* is replete with a discussion about the approach to document disclosure, deals with access to legal advice in that context. The same paragraph that the Court of Appeal relied upon in the 19th edition is there in the 20th. This has been the law for a very, very long time and no one is suggesting that a change in the approach to disclosure which was to extend the right to get information from the fixed interest type situation to anybody with a legitimate interest, nothing about that was intended to change the fact that legal advice was trust information.

I do want to submit to your Honours about the consequences of allowing any kind of trump in this case in our law generally in relation to fiduciaries. The proposition that a fiduciary cannot assert privilege against a beneficiary in

the trust world has been applied in many similar relationships and just for some of them, partnership, joint ventures, between company and shareholder, between insurer and re-insurer, mortgagee/mortgagor. In my submission one can't carve off this idea of asserting a privilege in a context like this without doing quite a lot of damage, in my submission, to the law in other areas where –

GLAZEBROOK J:
But you say just ordinary litigation privilege doesn't apply if an insurer sued a re-insurer or a –

MR ROSS QC:
Those are joint interest cases where an insurer and re-insurer generally have the same interest and the insurer will not be able to assert privilege against the re-insurer in relation to legal advice that the insurer has received in connection with the claim for the obvious reason that the re-insurer may be on the hook for it and so they share that privilege. The privilege can't be asserted against –

GLAZEBROOK J:
I'm talking about litigation privilege. Let's say you're actually in court.

MR ROSS QC:
Against each other?

GLAZEBROOK J:
Yes.

MR ROSS QC:
Then that'll be hostile litigation. It wouldn't apply. What we're talking about is –

GLAZEBROOK J:

But that isn't what you were saying earlier because you were saying if it is actually about – if it's not actually something about a breach of trust then it's not hostile litigation. So what I want to know is what is hostile litigation and what's not?

MR ROSS QC:

Between insurer and re-insurer hostile litigation would be an allegation by a re-insurer that you should not have settled that claim at the level that you did because you've committed me to a loss that I shouldn't have incurred. Advice that the insurer procured prior to that dispute arising would have joint interest privilege and the insurer would not be able to assert it against the re-insurer. Having got into a dispute, anything that follows in relation to their separate advice would be privileged to each other in hostile litigation. So the basis or the reason for the insurer settling a claim would be a joint interest. After that, if it becomes disputatious, privilege descends.

It has been submitted that three statutes have violence done to them as a result of what we are essentially defending today. One is the Trusts Act, one is the Evidence Act and one is the Lawyers and Conveyancer Act. In relation to the Trusts Act, to try and be brief, my submission is nothing about the Act changes the supervisory jurisdiction, that's clear from section 8, also section 5 has something to say about the subject…

WILLIAMS J:

What's the relationship between section 7 and section 8?

MR ROSS QC:

On the Trusts Act? I just need to grab…

WILLIAMS J:

You'll need to come to the microphone to talk, please.

MR ROSS QC:

As I understand the meaning of the interpretation section in the inherent jurisdiction it is to preserve the supervisory jurisdiction of the Court, that this Act is not designed to oust any particular jurisdiction of the Court unless it's plain that it does.

WILLIAMS J:

7 says don't adopt the usual, preserve the common law if you possibly can "in this case", and that must include the supervisory and inherent jurisdiction of the Court, which is a common law animal.

MR ROSS QC:

Yes.

WILLIAMS J:

The two provisions actually seem inconsistent.

MR ROSS QC:

Do they?

WILLIAMS J:

They're not helping.

MR ROSS QC:

Oh. As I read 7, 7(c), it says the Act: "May be interpreted having regard to the common law and equity but only to the extent that," they, "are consistent with its provisions."

WILLIAMS J:

Yes, which you must read broadly, not narrowly, as you would if you were being a protective High Court.

MR ROSS QC:

Yes. And yet section 8 preserves the freedom of manoeuvre.

WILLIAMS J:

I know.

MR ROSS QC:

I mean, there are a number of unsatisfactory things about the case, this isn't the only one.

WILLIAMS J:

Well, it's not as clear-cut as section 8 saves you, given the terms of section 7.

MR ROSS QC:

Yes. But can I take your Honour to section 5(8)? It might add more confusion, I don't know. So that's a kind of inconsistency regime where if the Act is explicitly inconsistent then common law is gone as well. I would submit it would be a rather surprising idea that by some kind of side wind privilege, which is not mentioned in here, can be used as a trump against a beneficiary. In my submission that would be a stretch way too far. It's a direction to trustees on what they should do in relation to information requests, and the definitions are all concerned with the administration of those requests but has relatively little to say about the full jurisdiction of the Court and its supervisory jurisdiction, in my submission. But there's certainly nothing in here that says you need not disclose legal advice. I think the Evidence Act has been – so that's my essential submission on the Trusts Act. I would submit that legal advice is clearly captured within the definition of trust information in the Act.

In relation to the Lawyers and Conveyancers Act, this appears to be a question about who owns, if you like, or controls or holds the privilege. There's no question that as between solicitor and trustee client, for example, the trustee holds the privilege and is the client and the solicitor may not give that advice to a beneficiary, but that doesn't mean as between the beneficiary and the trustee the beneficiary isn't entitled to the information, it's a completely different question.

Your Honours, I wonder whether I might just take a seat and ask Ms Rose to address you on some of the specific authorities that we are relying on for the generally propositions that I've made, unless there are…

WILLIAM YOUNG J:
No, that's good, thank you.

MS ROSE:
I'm just very conscious of time, your Honours, so forgive me if I am brief as we rattle through a few things. Umming and aahing as to where to start exactly. I think logically it probably is with the text books rather than the cases and then to supplement that and I will just rattle through in terms of giving your Honours some references in terms of starting with the proposition that privilege is irrelevant to anything in terms of an information proceeding. There perhaps is a bit of a distinction to be drawn here too and I'll take your Honours to in terms of how you categorise what is a hostile proceeding in the trust law land and the extension of the sort of fiduciary concept which drove out of the trustee/beneficiary relationship to others such as the companies, the joint ventures and the partnerships, et cetera.

So just beginning with tab 27 of the purple volume which is the second of Mrs Addleman's authorities. At the bottom of what's numbered at the top right-hand corner page 26 of 48, the last paragraph, second or third sentence from the bottom, starts: "A joint privilege also arises where one of a group of persons in a formal legal relationship communicates with a legal adviser on a matter relating to that relationship, eg partner and partner, trustee and beneficiary (unless the existence of the trust is the very matter in dispute in the litigation), company director and shareholder, and joint venturers."

And I'll come to the text books and it might just be easier to work through in logical order but there is confusion in the authorities as to how this particular type of privilege is talked about and the exception that applies to it. Some of the authorities will talk about it as a joint privilege. Some of them will talk about it as a joint interest privilege and some will simply say it arises because

of the special relationship that exists between trustees and beneficiaries, and that really goes back to the fiduciary relationship.

So flipping over to tab 28 which is the text authored by Justice Downs with the commentary to the Evidence Act, and the second page in on that, 267, the last paragraph before the footnotes start, and this is in relation to section 66 and I note that the relevant paragraph is (1)(b), that "is not restricted by any of sections 54 to 60 and 64 from having access or seeking access to the privileged matter." Justice Downs then says: "As between persons with a joint interest, no privilege may be claimed. Thus, the privilege is both a basis for resisting the production of documents to a person who does not share the joint interest, and a basis for compelling the production of documents to a person who does share the joint interest. Thus a claim to privilege cannot be used by a trustee to refuse to disclose legal advice received to a beneficiary, or by a director, to refuse such disclosure to a shareholder, unless the advice relates to a matter in which the director or trustee is pursuing" for her own personal interests.

And this principle between trustee and beneficiary equally applies to estates, unadministered as well, where the executors have the same duties obviously as the trustee/beneficiary scenario.

Down the bottom of tab 29, which is the Kempster text, page 200, there's a heading at 12.43 "Legal Advice Provided to the Trustees" and I'd just maybe get your Honours, rather than me reading them to you, to read paras 12.43 to 12.45, and the key point there being that this is exactly the type of proceeding here where legal advice obtained on their disclosure obligations to beneficiaries, disclosable, citing the decisions of Justice Matthews, again *Erceg* factors may exclude them, but there needs to be good, cogent reasons to do so, not simply an assertion of privilege, at the second paragraph on page 201, and then down at 12.45, 19th century authority there.

Over the page at 12.59, page 204, is the cost issue point, and this again goes back to what is a trust document and what is hostile litigation and that dividing

line. Where it's a necessary incident of administering a trust estate, it's a trust document therefore disclosable, privilege doesn't apply. And if a trustee has behaved reasonably throughout, for example by bringing a directions application, seeking the advice of counsel, et cetera, as was in *Blades*, they ought not to be worried about their indemnity or an adverse costs award. 12.61, that's your Honour Justice Williams' point before that costs were usually borne out of the trust fund where we're in in a category one or two *Buckton* scenario – and I'll take your Honours to that in some of the commentary shortly – but not if it is itself hostile litigation. And I think the dividing there to note is where it's beneficiary/beneficiary litigation, that is hostile. Where it is an application that is brought by the trustee or could be brought by the trustee, it's not hostile, and this very proceeding could well have been brought by the trustee. And just to deal with the sort of floodgates argument about, well, what if we do allow this type of legal advice to be supplied, this has been the position in England for a very long time.

GLAZEBROOK J:

Can I just take you back? I didn't understand, where it's beneficiary/beneficiary litigation then it's hostile, but I don't think that's right, is it? You mean *not* hostile?

MS ROSE:

If there's a warring dispute between beneficiaries and their proceeding is properly categorised as a beneficiaries dispute, then that is hostile. If it is categorised as a trust dispute then it's not hostile. So friendly litigation not hostile, trust dispute, hostile litigation beneficiary dispute.

GLAZEBROOK J:

But if a trustee got involved in that they would be able to have their costs, because it's not hostile against the trustee. So they'd take their costs out of the trust fund.

MS ROSE:

Exactly. So all parties in a trust dispute would get their costs out of the trust fund.

WILLIAMS J:

But not in a beneficiary dispute. Right. The problem here is of course you've got a trustee who's a beneficiary.

MS ROSE:

Exactly.

WILLIAMS J:

How do you categorise?

MS ROSE:

This is an application that could have been and I would say, your Honour, should have been brought by the trustee and so it is a trust dispute under *Buckton* category two. And it doesn't allege any loss to the Trust or that the trustee has caused any loss to the Trust, whereas the driving factor in most cases that claim hostility there is a loss claim, whether that's a breach of trust or otherwise.

WILLIAMS J:

So if it turned into subsequently Ms Jamieson got too much money, then it would be beneficiary/beneficiary and hostile?

MS ROSE:

That's a clear beneficiary, particularly if there was a claim to restore the trust fund. And what a lot of the cases will do, particularly in England and Jersey, when they deal with costs, is they're actually dealing with information claims brought as a breach of trust, which is why they end up in the cost position that they do, they're not straight information proceedings as this litigation is. So there is a distinction to be drawn between them.

So the key paragraph there at 12.61 with respect to the *Schmidt* decision: "The costs of an application by a beneficiary will usually be borne by the trust. The application itself is not hostile litigation but if brought within the context of hostile litigation then it may be treated differently."

WILLIAMS J:
What about the preliminary foray before hostilities commence, such as is being alleged here?

MS ROSE:
In my submission, your Honour, it makes not a blind bit of difference whether this might lead into a hostile litigation down the track. Justice Kirby's comment in *Hartigan* is a classic comment on that where he says it will be a sorry state of affairs if there needed to be a breach of trust claim before you could get information. It would also, in my submission, be a sorry state of affairs if that meant that requesting information put you on the hook for party and party costs, so to speak, where the trustee would then be able to claim their indemnity but the beneficiary wouldn't.

In terms of the next tab at tab 30 which is *Snell on Equity* and the latest 2020 edition at that, I'll just direct your Honours' attention starting at page 821, numbers down the bottom of the page, and the heading "Disclosure of Trust Documents" together with the heading "The Duty to Keep Accounts and Information".

WILLIAMS J:
Can you give me the number again, please?

MS ROSE:
821, paragraph 29-025. Talks about, at the beginning of 29-025, not having a proprietary interest and then over the page talks about *Erceg v Erceg*, clearly contemplating the changes that have happened as a result of that, in light too of the decision in England and *Lewis v Tamplin*, sets out a series of bullet points there, and then down at 29-026 the paragraph reads: "In general,

where trustees seek legal advice for the benefit of themselves personally (for example, in relation to their possible liability for breach of trust), or for the benefit of another trust of which they are trustees, and they pay for it themselves, or out of the funds of that other trust, but without recourse to the … funds from which the applicant beneficiaries stand to benefit, that advice may well be privileged in favour of those trustees as against the applicant beneficiaries. But, where the advice is sought for the benefit of a trust as a whole, and the trustees pay for that out of funds subject to that trust, then such advice, even though it may be privileged as against third parties, is not privileged as against the beneficiaries, and is liable to be" disclosed. And then the next paragraph: "In all cases, documents to be disclosed must be trust documents," not, for example, working papers of professionals, et cetera. And *Tamplin* authority in support of that.

Finally: "Though the Court will be loath," this is the bottom of that page, "to order disclosure of information that reveals trustees' reasons for making a dispositive decision," the court is less reluctant to order administrative decisions such as professional advice given regarding sale or administrative transactions. Made by the trustee in the exercise of a dispositive power produces, et cetera.

And I'll take your Honours to the comments in *Lewin* around how *Schmidt* is actually aligned and extends *Londonderry* rather than simply throwing it out with the bathwater.

And then the same principle, I would submit, applies to the failure to deliver any accounts in terms of restrictions or refusals to supply information without good reason. A trustee who fails to deliver accounts may be ordered to pay the costs of any application to the Court rendered necessary by his default.

Over the tabs to *Phipson*. Not much needs to be said about this here other than paragraph 24-02 which is about the second or third page in, in terms of shareholders and companies for the beginning of that first paragraph and then the bottom half: "This was because the relationship between directors and

shareholders was one between trustee and beneficiaries and the beneficiary is entitled in litigation to see cases and opinions taken by the trustee for the purpose of the administration of the trust but not for the purpose of the trustee's defence against litigation by the beneficiary."

The next text is one authored by now Justice Matthews, the Judge who sat in both *Blades* and *Lewis v Tamplin* and starting at paragraph 11.72 he talks about exceptions to legal professional privilege. This is at page 382 of that text.

GLAZEBROOK J:
Sorry, whereabouts are you?

MS ROSE:
Tab 32, paragraph 11.72. And your Honours will see in that list of (a) to (l) that (d) is "trustee and beneficiary", and what Mr Matthews, as he was then, talks about is "legal professional privilege does not yield to some greater public interest. A number of exceptions to or restrictions on legal privilege in both forms are however said to exist (although some are doubtful)," and the ones I would submit are more doubtful are at the bottom of that list as opposed to the top.

GLAZEBROOK J:
When they say "both forms" are they talking about litigation privilege as well?

MS ROSE:
(Nods). Then if your Honours can flick over to 11.86 which is headed "As between trustee (or personal representative) and beneficiary, or partnership and partner," again I'll just maybe get your Honours to read all of that paragraph which spans 390 to page 391, again emphasising the distinction between person and trust purposes. So the key point there being is you need to get into the tent first, which is the last sentence of that paragraph, but once you're in the tent with an arguable case as a beneficiary at least, privilege is irrelevant or there is none.

Down under the “joint interest privilege” heading, which is on that same page 391 at paragraph 11.88, Matthews and Malek describe the privilege that applies, or the lack of privilege that applies in a trustee/beneficiary context, as also being able to be explained in a different way, that being joint interest privilege, and again I’ll just get your Honours to read maybe 11.88 through to 11.90, which talks about the reasons for that and showing again from the history of *Bray on Discovery* (1885) back to 1800s why this applies and is what it is.

And I’ll come to the paragraph in some more detail, but just to give your Honours the reference, tab 33 at paragraph 6-075 in Passmore reiterates the same sentiment that there are different ways of describing why the exclusion of privilege exists in a trustee/beneficiary context, and what Passmore says there is that although the nature of the nature of the beneficiary’s entitlement to disclosure of trust documents is “aptly described as one of ‘joint interest’” it is clear that all the consequences of that, which he identifies at paragraph 6-003, don’t apply and “the beneficiary’s entitlement to privilege documents does not arise where the document concerns the very issue in dispute between them and was created for the purposes of that dispute”. While we’re still –

WILLIAM YOUNG J:
So does that not apply here?

GLAZEBROOK J:
So is that litigation privilege?

WILLIAM YOUNG J:
Would that not – sorry. But would that not apply here?

MS ROSE:
It does, exactly. So where something is created for anything to do with the interests of the beneficiaries or the trust estate as a whole, there can be no

privilege, whether you describe it as joint interest, joint privilege or a factor just arising because of the special relationship.

WILLIAM YOUNG J:

Sorry, I'm looking at the fourth line of 6-075: "First, as per the *Talbot v Marshfield* (1865) 2 Drew & Sm 549, 54 ER 165 decision and as discussed above, the beneficiary's entitlement to privileged trust documents does not arise where the document concerns the very issue in dispute between them and was created for the purpose of that dispute."

MS ROSE:

So that gets you into the hostile litigation territory. But the advice itself about how do we respond to this proceeding –

WILLIAM YOUNG J:

Yes. So just to be – I mean, one of the examples I've put to Mr Ross was whether advice given to Lambie as to whether to appeal against the Court of Appeal judgment, which I sort of tend to think it would be a bit tough to say that wasn't privileged. He said: "No, none of it's providing, they should have done a Beddoe's application," essentially. But that little extract that I've just read to you and which I may have taken out of context suggests to me that once battle is joined then documents created solely for the purpose of that battle are within privilege, privilege can be claimed.

MS ROSE:

I'll take your Honours to some of the extract in *Lewin on Trusts*, because it's probably a convenient place to deal with it. But, just in summary, appeals are treated as quite a special thing in trust law litigation land and the general position is normally that trustees need to abide the decision or take a backseat role, retain neutrality all the way through. That obviously is emphasised in the context of a section 66 directions application or an information proceeding. There are comments in *Lewin* around where a beneficiary brings an appeal against a lower-instance decision. Again, the same position should apply of the trustee effectively abiding the Court's

decision had they not brought them themselves. It doesn't take it out of the territory of being trust litigation or for the benefit of the trust.

GLAZEBROOK J:

It must depend on the circumstances whether the trustee should abide by the decision or not and especially where you're dealing with beneficiaries who can't enter the fray themselves as I've been saying in terms of either being unborn or minor.

MS ROSE:

Perhaps, your Honour, there's a distinction to be drawn quite easily in terms of confining this proceeding at least to information proceedings. In the UK obviously they all get dealt with as just one claim form, whether it's by a trustee or beneficiary. Here we have the Part 18 procedure where you have to commence by way of a statement of claim if you are a beneficiary whereas a trustee can commence by way of Part 19, put all the evidence before the Court and say: "Court, you tell us what we should do." In my submission, simply bringing a claim that names a trustee as a beneficiary for information where there's no loss alleged doesn't make it hostile. And in a lot of cases there will be no breach of trust claim that will follow from a request for information.

WILLIAMS J:

Have you got some empirical data about that?

MS ROSE:

Well, you just look at the English cases where they say this is a nonsensical submission on privilege and the cases settle and they go away.

WILLIAMS J:

Right, so there's been a big hint? Yes, okay.

MS ROSE:

Just on the last bits out of Passmore, paragraph 6-021 and 6-022 down to 23 talks about recognised joint interest relationships at –

GLAZEBROOK J:

So where are you now?

MS ROSE:

Still in Passmore, tab 33.

GLAZEBROOK J:

So we're going back?

MS ROSE:

Yes. Sorry about that your Honour.

GLAZEBROOK J:

No, that's fine. We just need to know where we are. 6-023, did you say?

MS ROSE:

6-021 to 23, and you'll just note the comment there immediately above the 6-023 paragraph, whatever the precise nature of the beneficiaries' interest in this regard, and while it may not have been described expressly in the case law, it is usually regarded as a form of joint interest or joint interest privilege. Hence the kind of loose or flexible language used in the cases.

And then just over the page at 6-027, dealing with the *Schmidt* decision: "The decision in *Schmidt* was not in any way concerned with and so, it is submitted, does not directly affect the privilege position when a beneficiary seeks access to trust documents in litigation. Although the decision brings to bear a different approach to access requests by introducing a judicial discretion as to whether particular documents should be disclosed by the trustees to the beneficiary, what it does not do is undermine such rights as the

beneficiary has where such documents are privileged," and it continues down talking about *Hartigan* to the end of that paragraph.

6-031 and 32 then deal with companies, partnerships, corporations, et cetera. I'll just note for your Honours that the rules in those contexts and the other ones that are extended and noted are not exactly the same as they are in the trustee/beneficiary land. They arose from the trustee/beneficiary rules but they are not identical.

So that's it on tab 33. At tab 34 which is Thanki on *Privilege*, page 187 under paragraph 436 talks about exceptions to privilege and the third bullet point from the bottom is: "where particular relationships subsist", and what Thanki then says about particular relationships is covered off at paragraph 4.84 on page 207.

O'REGAN J:
We seem to be just getting the same thing said by different people. Is there anything new, because if there isn't I think we've got the references in your written submissions.

MS ROSE:
The one thing that probably is new is the Zuckerman comments which is the last tab of that bundle and it deals with the issue of Lambie Trustee Limited's complaint that there's only one client here in terms of paragraph 6.84 and 6.85, where they say – paragraph 16.84 – "In Practice this means legal professional privilege vests in both clients jointly," and then down at 16.85: "In the case of joint interest privilege, there is only one client and therefore only one privilege holder, but the parties share a joint legal interest in relation to matters on which the privilege holder has taken advice. In some cases of joint interest privilege, for example company and shareholder or trustee and beneficiary, it might be possible to describe the non-client as the ultimate client in practice, if not formally," and notes that they're used interchangeably. And so in my submission it doesn't actually matter who commissions the

advice, it's whether or not the subject matter of that advice relates to a matter concerning the trustees or beneficiaries.

GLAZEBROOK J:
I don't think there's any difference between you on that, so…

MS ROSE:
Where our learned friends probably do differ, your Honour, is the definition of "hostile litigation", and probably the easiest way to deal with that is with reference to the summary that's provided in *Lewin* about the *Buckton* categories, and that is at tab 35 and, just to highlight it, 48-002, paragraph 4, they are "proceedings in which the rights of beneficiaries in the administration".

GLAZEBROOK J:
Sorry, I think I'm on the wrong – where are you, tab 35?

MS ROSE:
Tab 35, and it's a good chunk through the *Lewin* text on page 1038 where it's talking about costs. And I'll leave your Honours to read from 48-002 through to 48-007 in terms of who gets what and when and when an unreasonableness or misconduct position might apply such that the trustee would be denied their indemnity, obviously not changing the position that both parties would start from te proposition of getting all funds out of the trust.

Over at page 1054 are the three *Buckton* categories, and the second of those there is: "Proceedings in which the application is made by someone other than the trustee but raises the same kind of point as in the first category and would have justified an application by the trustee," and what is clear is that categories 1 and 2 are non-hostile litigation, it's only category 3 of *Buckton* that gets you into the hostile territory.

And then just down at paragraph 48-061, dealing with *Schmidt,* and the bottom or the middle of that paragraph which starts: "Where a reasonable

doubt arises where a beneficiary should be given certain disclosure sought the prudent course is often for the trustee to take the initiative in seeking the court's determination on the matter, in which case it is likely that the proceedings will then fall into a *Buckton* category 1."

WILLIAM YOUNG J:
So how much longer do you think you'll be, Ms Roses?

MS ROSE:
I was just going to ask your Honours whether you did want me to take you through the cases, bearing in mind the time?

GLAZEBROOK J:
No.

WILLIAM YOUNG J:
I don't think so, actually.

MS ROSE:
That's all on the texts.

WILLIAM YOUNG J:
Okay, thank you. And are those the submissions for the respondent?

MS ROSE:
From your Honours' perspective is there anything further that we need to say on costs and the position that we seek in our submissions or is the *Buckton* stuff that …

WILLIAM YOUNG J:
So just slightly remind me, I read it, but you're seeking an order for costs…

MS ROSE:
We seek an order for costs for Mrs Addleman out of the Trust fund and then –

WILLIAM YOUNG J:

Yes, and that you say that the appellant shouldn't be entitled to reimburse itself from the Trust fund.

MS ROSE:

The obvious position that if it did then it's still the Trust fund paying.

WILLIAM YOUNG J:

Okay, thank you.

MS ROSE:

As your Honour pleases.

WILLIAM YOUNG J:

So what do you say about costs, just dealing with that?

MS CHAMBERS QC:

I say that costs should just follow the event in the normal way. As I understand it my learned friend, Ms Rose, was addressing *Buckton's* English, the English categories of costs presumably in relation to the costs applications because they don't seem to be relevant to anything else.

WILLIAM YOUNG J:

Well, Ms Rose said effectively that Mrs Addleman should receive solicitor and own client costs.

MS CHAMBERS QC:

Yes, yes.

WILLIAM YOUNG J:

What do you say about that?

MS CHAMBERS QC:

Well, I say that there's no basis for that and this should just be the normal costs rule, and if your Honour, if the Court has any doubts that this is what

Lewin calls contentious trust proceedings, all you need do is look at the statement of claim filed by Mrs Addleman to see the extraordinary list of documents she sought in the High Court from the trustee. This is not just a friendly little "give me documents" application. It never was. The shopping list went on and on and on and only reduced finally in the Court of Appeal at hearing.

WILLIAM YOUNG J:

Just one other question. Just looking at the leave judgment, was there any reason for not handing over all legal advice other than that in respect of which there was a contested claim to joint privilege? I mean you accepted to me this morning that there were documents in respect of which there would have been joint privilege. Shouldn't they have been handed over?

MS CHAMBERS QC:

Well, I think the answer to that is that we do see the appeal as wider than that because the implications as to privilege flow over into the *Erceg* considerations and the fact that the Court of Appeal did not at all address the *Erceg* considerations.

WILLIAM YOUNG J:

You were declined leave to appeal on that point. I suspect that the issue over solicitor/own client costs is the implied assertion that your client has given the respondent the run-around over documents.

MS CHAMBERS QC:

Well, the answer to that is, Sir, that the High Court said, having heard the witnesses, that there should be no further disclosure applying *Erceg*. In the Court of Appeal it was only on the day that my learned friend, Mr Ross, reduced it down to three from the shopping list which went on for pages.

WILLIAM YOUNG J:

There was a slightly different narrative of facts that – the narrative of facts that underpins the Court of Appeal judgment is rather different from that formed Justice Woolford's judgment.

MS CHAMBERS QC:

Yes, that's correct, Sir, but I mean we're not here to argue this I know.

WILLIAM YOUNG J:

No, I know that.

MS CHAMBERS QC:

But can I say that the one issue that was raised in doubt in terms of the Court of Appeal was this issue of where the money was before the Trust was formed –

WILLIAM YOUNG J:

Where the money came from.

MS CHAMBERS QC:

– and before the Trust purchased the shares in Highland Park and in regard to that there's no doubt it became muddy. It was unclear. But it was a long time ago and in terms of the rest of the evidence, you know, it is not the case that the trustee here can be painted to be the bad person. It's not that simple. It's much more complicated. On the appellant's case, as your Honour's know, and it's not denied by Mrs Addleman, her damages went into that Trust. That Trust was primarily to protect a very vulnerable woman financially and physically.

WILLIAM YOUNG J:

I think the second proposition might be in issue as to whether it really is a single purpose trust.

MS CHAMBERS QC:

Well, I understand that on the Trust Deed, Sir, I understand that, but in terms of all the evidence and the role of Ms Jamieson, there's – I mean, Ms Addleman didn't even know the Trust existed, she wasn't involved in its formation, Ms Jamieson is. There's a second family trust for all of the siblings and the parents. The parents weren't even beneficiaries in this Trust.

WILLIAM YOUNG J:

I don't really want to argue the case with –

MS CHAMBERS QC:

There can be no doubt the Trust was the vehicle to protect a person who was a quadriplegic.

WILLIAM YOUNG J:

Well, one other question and it's entirely an open question, it's not rhetorical. Would it have been better for Lambie simply to have sought the directions of the Court as to what it should do with the application for directions rather than align itself with the interests of Ms Jamieson?

MS CHAMBERS QC:

Well…

WILLIAM YOUNG J:

Hindsight's a jolly easy thing, I know.

MS CHAMBERS QC:

Yes, it is a jolly easy thing, but her position was that effectively Mrs Addleman had been paid out of the Trust and was unlikely to receive anything further, and her position was, under *Erceg*, she's not entitled to further documents and the High Court agreed, and a senior Judge, so we're not – you can't put us in the category of running hopeless arguments.

WILLIAM YOUNG J:

Okay, thank you. Fire away on your reply.

MS CHAMBERS QC:

Thank you, Sir. I'll be pretty quick. My friend's argument is that once a Trust document is produced it must be disclosed and no issue of privilege arises, and I won't repeat myself but of course we say that's hopelessly unprincipled and *B v ADLS*, the Privy Council decision, says, emphasises, and I do urge your Honours to read that, that the consequences of not – the consequences of removing privilege even when you've got a big conflict situation such as enforcement of professional standards, or it gives the famous example of the murder accused, trumps everything. So it can't be, well, you can just ignore privilege because it's a Trust document. He accepted, and I think this is important, that the client or the solicitor is the trustee. Now that means section 54 of the Evidence Act kicks in and it says where, effectively if the client is a trustee, the trustee obtains legal advice, services, the trustee has a privilege between the trustee and the legal adviser if it's intended to be confidential. So section 54 is very hard to get around in terms of our legislative environment.

And he said, well, *Rinehart* is an example of a case where trust documents, there was no privilege. Well, I beg to differ. First of all it's clearly distinguishable. Gina Rinehart was trying to maintain legal privilege against a new trustee, not against a beneficiary, and she plainly could not maintain that claim of privilege against a new trustee who is as much entitled to receive the advice as received by the trustee as the previous trustee. So she was trying to argue that she obtained the advice in her personal capacity and not as a trustee at all and, of course, the Court said that can't be right, which is – so it's not a case which crosses against the argument for the trustee.

As to discovery in the High Court and the list of documents, the answer to that is that the discovery affidavit makes clear in paragraph 2 that it is discovery in accordance with 8.7 in regard to the documents and correspondence relating to the plaintiff's requests for disclosure. So it's discovery in regard to those

proceedings. It doesn't list all documents sought in the exercise of its inherent jurisdiction, for example, it also doesn't include financial statements. What it is is it's not a listing in regard to the documents sought, it's just a list of documents relevant to the High Court proceedings seeking disclosure. So that is why it is drafted in the way that it is, and the pleadings in the statement of defence make it clear that the trustee says that it had no duty to disclose.

I adopt Justice Williams' point to my learned friend that on Mr Ross' argument if there is no privilege between beneficiaries and trustees and beneficiaries are entitled to all legal advice except when they're in adverse litigation, it means you can effectively render the tests under the new Trusts Act and *Erceg* as irrelevant in regard to legal advice, and that seems completely wrong, it can't be right, it's completely contrary to the ideas and principles behind the Act and *Erceg.*

Now as to my friend said his two cases that he relied on are *Blades* and *Tamplin.* Now both decisions are the decisions of Mr Matthews, who is Chancery Master, and also the author of Underhill and Hayton and also Matthews and Malek on *Disclosure*. … *Blades* is about costs, so his comments on privileged information is obiter, and so it needs to be seen in that light.

As to Matthews J's decision in *Tamplin,* another decision by his Honour, he does acknowledge right at the outset that the issue appears to have no existing authority and he doesn't cite any authority in respect of his statements in regard to legal professional privilege between trustees and beneficiaries, and he gives no room for the caution in *Schmidt* that beneficiaries will not always obtain disclosure *and* he's inconsistent with *Breakspear*, *and* his view is inconsistent with this Court's view in *Erceg* because he holds the threshold much lower than *Erceg.* So my submission is those cases will not help this Court in terms of a principled result for New Zealanders when dealing with disclosure for beneficiaries and trusts.

And, just finally, my friend points to section 5(9) of the Trusts Act, which is the section which says if there's nothing in this Act which overrules other Acts then other Acts apply, and of course, as you heard from me this morning, my submission is that means the Evidence Act applies, and the Evidence Act is very clear that if the trustee's the client there's a privilege.

Those are my submissions, unless I can be of further assistance.

WILLIAM YOUNG J:
We'll take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 4.20 PM