TRUST LAW

When legal advice to trustees must be shown to beneficiaries

By Anthony Grant, Trusts & Estates Litigator

When trustees face the threat of litigation they will usually take legal advice for which they will get the trust to pay.

It does not occur to many of them that the beneficiaries will probably be entitled to see the advice. This is because the trust's moneys are not the trustees' moneys to spend on their self-protection but they are the beneficiaries' moneys, to be spent on the beneficiaries' wellbeing.

One of the richest people in the world – Gina Rinehart – has learned this lesson the hard way (*Hancock v Rinehart (Privilege)* [2016] NSWSC 12). In litigation involving huge sums of money, she took quite a lot of legal advice to learn what she could do to respond to the claims of beneficiaries.

When the beneficiaries asked to see the advice, she claimed that the documents were protected by legal professional privilege. The Court did not agree. Brereton J of the New South Wales Supreme Court held (at para [6]) that:

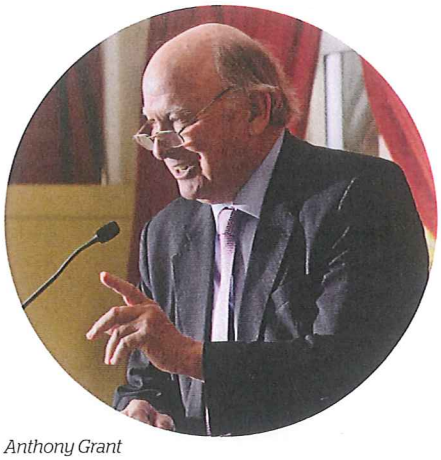
"Legal advice obtained by a trustee for guidance in the administration of the trust or the proper exercise of trust powers belongs to the trust, not to the trustee personally. On the other hand, advice obtained for the trustee's personal assistance, such as in resisting litigation brought against the trustee by a beneficiary, belongs to the trustee alone. Thus to make good her claim, Mrs Rinehart must establish not only that the disputed documents were privileged, but that the privilege was hers personally, and not that of the trustee of the trust."

Mrs Rinehart received five legal opinions from one of Australia's leading QCs, the cost of which was charged to the beneficiaries' accounts. Mrs Rinehart had explained at the time to her daughter (who became the plaintiff) that it was necessary for her to take further legal advice "because of problems" that her son John was said to be causing and also "given the need to protect the Hope Downs Development".

Brereton J said (at para [15]), "Payment of the cost of obtaining legal advice out of trust property is at least *prima facie* evidence that it was obtained on behalf of the trust and not for the trustee personally."

It appears from the judgment that Mrs Rinehart had fired some of her lawyers. A successor lawyer swore an affidavit on her behalf in which he claimed that documents recording legal advice were privileged, but in which he did not set out the evidence in support of the claims for privilege in respect of each document.

To overcome this shortcoming, Mrs Rinehart's lawyer asked the judge to look at the documents and decide whether the claims to privilege were justified. The judge refused to do this, saying (at para [18]), "[T]he issue is whether a person claiming privilege can sustain the claim by adducing no testimonial evidence of the purpose for and circumstances in which the subject documents were created, but merely asking the Court to inspect the documents for the purpose of ruling on the claim ..."



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He said (at para [36]), "[I]t would be contrary to justice to uphold her claim [for privilege] solely on the basis of an inspection of the documents."

So, the wealthiest woman in Australia has ended up in the position where all the advice that she appears to have received about the litigation with her children, and which presumably describes the weaknesses and vulnerabilities of her position, has had to be given to the beneficiaries who sued her.

A recent New Zealand decision on this subject is *Burgess v Monk* [2016] NZHC 527, a decision of Brewer J. Although the decision concerned the responsibilities of executors, the principles are equally applicable to trustees. This is what his Honour said:

"When an executor obtains legal advice he or she is not obtaining legal advice in his or her personal capacity but in the capacity of a representative who must adhere to a prescribed mandate and observe fiduciary duties owed to residuary legatees. In the context of an express trust, the fact that the trustees have a duty to account to beneficiaries means that the trustees cannot successfully assert the doctrine of privilege. In my view, the same justification is readily apparent in the context of an unadministered estate. This is because executors must also account to the residuary beneficiaries by virtue of their duty to carry out their administration tasks honestly and diligently." (at para [17])

"The executors ... were receiving legal advice to ensure they were administering the estate in accordance with the law. Accordingly, communications the executors had with legal advisors in relation to the discharge of their legal duties are relevant to the claims being brought by Mr Burgess." (at para [20])

"I have decided Mr Burgess is entitled to any legal communications that are relevant to his allegations that the executors have breached their duties of even handedness and good faith in relation to the administration of the estate and which are not protected by litigation privilege." (at para [21])

I advise trustees who get into conflict with beneficiaries that they should pay for the cost of legal advice personally and not with trust funds. If they do this, the advice will not be accessible by the beneficiaries.

But many professional trustees will balk at the prospect of having to pay for legal advice for a trust of which they are not beneficiaries and from which they receive only modest remuneration.

What are the lessons from this for lawyers who act as trustees?

Do not act as a trustee in a personal capacity but, if you do, you should know that if you seek legal advice on whether a beneficiary's claim against you may be good, the advice will probably be accessible by a beneficiary who demands to see it. If you want to avoid this risk, you should be prepared to pay for the advice with your own moneys and not with trust funds.

Anthony Grant is one of the speakers at ADLS's upcoming Cradle to Grave Conference taking place in May 2017. For more details or to register, see the back cover of this issue or visit www.adls.org.nz/cpd.