

Trustees and Legal Professional Privilege

UPDATE

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The Royal Court of Guernsey has recently considered the principles that apply to the creation of privileged documents when advice is obtained by trustees of a trust.

The Royal Court of Guernsey recently considered the question of legal professional privilege ('LPP') as it applies to trustees in the course of the continuing proceedings concerning the TDT. The full factual background to the proceedings concerning the TDT is set out in the speech of Lord Hodge in *Investec Trust (Guernsey) Ltd and another v Glenalla Properties Ltd and others* [2018] UKPC 7. In the course of those proceedings allegations of breach of duty were made against the former trustee of the TDT ('I&B') but those allegations were dismissed after a twelve day trial before the Royal Court. The dismissal of those allegations was subsequently upheld in the Guernsey Court of Appeal and before the Judicial Committee of the Privy Council. Subsequently, I&B claimed to recover out of the assets of the TDT the legal fees that they have incurred and paid personally as a result of these proceedings.

In the course of proceedings before the Royal Court concerning the recovery of those, and other claims, against the assets of the TDT the current trustees of the TDT argued that I&B could not claim LPP over the advice they had taken in relation to the proceedings against them because they were seeking reimbursement of their legal costs out of the TDT estate. The argument was that payment was determinative of the right to claim LPP so that by seeking to recoup their legal costs out of the trust estate no claim to LPP could be maintained.

The Royal Court rejected that argument in a judgment handed down on 30 April 2020. The Royal Court held that if I&B had taken advice personally as to its position in the hostile litigation against it, then LPP was not lost by I&B subsequently exercising their statutory right under the Trusts (Jersey) Law 1984 to recoup their outlay in the form of the legal costs incurred in that litigation. A similar result was reached by the New South Wales Supreme Court in *Grey v BNY Trust Company of Australia Limited (2009) NSWSC 789 Equity Division* on the facts of that case.

Although the facts of the case are unusual it neatly illustrates the need for trustees to be clear as to the basis on which they are seeking legal advice. As described in *Lewis & Anor v Tamplin & Anor (2018) EWHC 777* trustees may find themselves in the position where they wish to seek 'legal advice for the benefit of themselves personally', where, for example, they are facing an allegation that they may have breached the terms of the trust. The cases make it clear that in those circumstances, i.e. where trustees are obtaining advice for their own benefit, they must pay for that advice themselves. On the other hand, 'where the advice is sought for the benefit of the trust as a whole' it is appropriate for the trustees to charge the cost of taking that advice to the trust. However, the consequence of that is that although such advice is privileged as against strangers or third parties to the trust it 'is not privileged as against the beneficiaries, and is liable to be ordered to be produced'.

When seeking legal advice trustees and their lawyers should be clear as to the basis on which that advice is being taken and who is going to pay for it i.e. the trust estate or the trustee personally. That should be recorded in writing and care should be taken that the scope of the lawyers' retainer does not drift so that it becomes unclear in favour of whom any LPP should apply.

The Royal Court's judgment makes it clear that trustees of a trust are entitled to take advice as to their personal position and for that advice to be protected from production to the beneficiaries. However, to secure that position trustees should be careful to ensure that they pay for such personal advice themselves. The Royal Court's decision also makes it clear that if trustees subsequently become entitled to charge their costs outlay to the trust (for example, as in the TDT case, if they successfully resist any hostile proceedings against them) then they will not lose the protection of their personal privilege through the exercise of their statutory right of indemnity.

If trustees intend to take advice as to their personal position, but fail to document that the advice is being taken in that capacity, and pay for that advice out of the trust assets, then they are at risk of the court deciding that the advice should be produced to the beneficiaries.

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