


Estate Law Update 2021

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Setting up an engagement to advise a trustee

- Can an object or beneficiary get a document from a trustee?
- Does it make a difference if the document is subject to LPP?
- Does the context of the request make a difference?


- Why wait years for a request, before thinking about how to answer the request?



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Beneficiary or object's rights absent litigation


- 1st concept that impinges:
 - In short, outside threatened litigation, must the request be accepted?
 - Beneficiary's rights to trust documents, absent threat of litigation: *Hartigan Nominees v Rydge* (1992) 29 NSWLR 405
 - Position of beneficiary vs object.
 - Re-emergence of the discretionary approach (not proprietary rights): *Jordan v Goldspring* [2021] NSWSC 7; *Webster v Murray Goulburn Co-Op* [2018] FCA 990
 - Some timidity elsewhere, sticking with proprietary approach: *Chan v Valmorbidia Custodians Pty Ltd* [2020] VSC 590
 - Merits of NZSC multifactorial approach: *Erceg v Erceg* [2017] 1 NZLR 320



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LPP – advice privilege


- 2nd – is LPP a complete answer by trustee, where advice was not in context of litigation?
- *prima facie* advice to trustee as such if fund pays: *Hancock v Rinehart* [2016] NSWSC 12
- Advice to a trustee – for the trust –
 - if subject to LPP, privilege is held jointly with the beneficiaries: *Dawson-Damer v Taylor Wessing* [2020] Ch 746
 - thus, the trustee cannot claim privilege as against the object/beneficiary: *Passmore Privilege (4ed)* [6-022]
 - litigation privilege follows a different path – we will get to that!



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Setting up engagement - non-litigious advice

- So this is the clue.
 - The engagement is with the trustee, in its personal capacity, as someone desiring to protect itself against making an error.
 - To further avoid the characterisation as a trust document – the trustee pays personally.
- Developing area.
- Issues of both advice privilege and litigation privilege reserved before NZSC: *Lambie Trustee v Addleman* (heard 2 December 2020).
 - See decision below: [2019] NZCA 480.



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Litigation privilege

- Litigation privilege follows a different path:
 - Note the procedure being invoked: request/discovery/subpoena
 - Often the trustee will not seek advice personally, but as trustee
- Where litigation is against a third party (not a requesting beneficiary):
 - a beneficiary may be denied access, where requester may use the documents to prejudice the trustee in its conduct of the litigation or other unitholders: *Webster v Murray Goulburn Co-Op* [2018] FCA 990
- Where the litigation is against the requesting beneficiary:
 - A beneficiary is not entitled to advice sought by trustee about the substance of a dispute with the trustee: *Passmore Privilege (4ed)* [6-022]



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