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Aide memoire – Adelaide Tax Discussion Group

TOPIC: **Lambie v Addleman**

DATE: **9am, 6 December 2024**

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1. Two cases have been exhausting the equity Bar in Auckland for some years. The 'Alphabet case' was decided in the NZSC last week, and is a sad and tragic story.[1]

2. Then there is the long-running litigation between Mrs Prudence Addleman and her sister, Ms Annette Jamieson, about the Lambie Trust. This trust seems to have originated in the money made by developing a farm in Howick, Auckland. It is not lost on the participants in this case that one of the major thoroughfares in Howick is "Bleakhouse Road".

1 South Australian Legal Practitioners' Conduct Rules

3. I will deal with the above rules, as it is useful for everyone to know the constraints under which lawyers work. And the lawyers' conduct rules contain some concepts relevant to other professions.

4. These rules "provide a comprehensive set of legal profession rules which bind all legal practitioners in South Australia including (for the sake of clarity) those who choose to practise exclusively as barristers".[2]

1.1 The general rules at the beginning are often overlooked

5. Rule 3 says that (underlining added):

> *A legal practitioner's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.*

6. Rule 4 relevantly provides that a legal practitioner must also:

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1 *A, B and C v D and E as trustee of the Z Trust* [2024] NZSC 161.

2 Part B of the Rules constitutes conduct rules applicable to barristers. There is not special reason to go to that Part today.

(a) act in the best interest of a client in any matter in which the practitioner represents the client;

(b) deliver legal services competently,[3] diligently and as promptly as reasonably possible;

(c) avoid any compromise to their integrity and professional independence.

7. Finally in this group of general rules, Rule 5 is headed "Standard of conduct – dishonest or disreputable conduct". Relevantly, it requires that a legal practitioner must not engage in conduct, in the course of legal practice or otherwise, which:

(a) demonstrates that the practitioner is not a fit and proper person to practise law;

(b) is likely, to a material degree:

(i) to be prejudicial to, or diminish the public confidence in, the administration of justice;

(ii) to bring the profession into disrepute.

1.2 My approach

8. I operate under a similar, though simpler, Code of Conduct when hearing disputes on the STEP Disciplinary Tribunal.

9. And I tend to go to these more general principles, first, when considering matters.

10. And when I am assisting a lawyer with an ethical quandary, I do read over these general rules first to situate who you read more specific rules that often apply in Australia.

11. In any set of conduct rules in Australia, all other rules must be read in light of, and in this case subject to, these broader principles.

1.3 Relevance here

12. Today we will be discussing the concept of joint privilege, and having a joint interest in privilege.

13. Particularly, we will be discussing the reported case of *Lambie v Addleman* [2021] 1 NZLR 307; [2021] NZSC 54. It dealt with a claim of joint interest in privilege, by a beneficiary of a trust and the trustee. The Court ordered that documents be provided to the beneficiary, which were copies of advice provided to the trustee.

14. I will suggest, but cautiously, how a competent legal practitioner can in some circumstances set up an engagement so as to mitigate that kind of risk.

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[3] As to this Rule 4.1.3, I consider that "competence" extends to how you set up an engagement.

2 Facts of *Lambie v Addleman*

15. Paraphrasing the headnote in the New Zealand Law Reports,[4] and acknowledging that I am using much of the wording and phrasing chosen by the court reporter, the facts can be summarised in a short compass:

    (a) The Lambie Trust was a discretionary trust. It was settled in 1990.

    (b) Mrs Addleman was one of the beneficiaries. She did not learn of the existence of the trust until 2001.

    (c) She did not know that she was a beneficiary until 2002.

    (d) She learnt by receiving a letter from the trustee informing her that the trustee had decided to distribute to her about NZD4.26 million.

    (e) In that letter she was told that this would be her final distribution.

    (f) In 2003, she wrote to the trustee and asked about the assets of the trust. She asked whether she still had a beneficial interest in any trust property.

    (g) She asked for a copy of the trust deed, the trust's accounts, and other trust documents.

    (h) The trustee replied saying he was obtaining independent legal advice as to the obligations of a trustee.

    (i) In April 2004, the trustee sent her a copy of the trust deed and documents showing the appointment and removal of trustees.

    (j) Mrs Addleman did nothing further for about 10 years.

    (k) In 2014, she again wrote to the trustee, this time seeking comprehensive information, which included financial statements.

    (l) There was some correspondence and the possibility of proceedings being issued was referred to in letters from 1 April 2014.

    (m) In June 2015, Mrs Addleman commenced the present proceedings seeking an order for disclosure of information including legal opinions and advice.

16. Mrs Addleman was unsuccessful in the High Court (the trial court in New Zealand) but enjoyed success in the Court of Appeal. The Court of Appeal ordered various things be disclosed, but the focus here is on advices and opinions paid for from trust resources.[5]

17. An appeal was brought to the ultimate appellate court in New Zealand, the Supreme Court. Noting that the Court of Appeal dealt in terms of advices and opinions paid for from trust resources, the trustees were somewhat limited by reference to the Court of Appeal's decision. They could not call into question wider principles.

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4 [2021] 1 NZLR 307

5 The Court of Appeal ordered disclosure of "any legal opinions and other advice obtained by the trustees and funded by the trust".

18. That was the scope, so that we do not have a detailed discussion in the Supreme Court about whether funding of advice by the trustee is a necessary prerequisite to joint privilege or more properly a joint interest in privilege.

19. On its appeal to the Supreme Court of New Zealand, the trustee argued that it was entitled to deny advices and opinions given from the time litigation was contemplated, which it argued was from September 2014. It also resisted disclosure of other information relating to the administration of the trust.

3 Apparent conflicts in the rules, with joint interest in privilege

3.1 Explaining choices and following instructions

20. Some of the conduct rules sit very oddly with a joint interest in privilege. In particular, Rule 7, headed "Communication of advice", provides:

    (a) A legal practitioner must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement".

    (b) And clause 8 of the conduct rules provides that: "a legal practitioner must follow a client's lawful, proper and competent instructions."

21. Here, the trustee will, *ex hypothesi*, have been the client.

22. It may be that the client trustee gives you instructions, but the instructions may not be perfectly revealed by the terms of the written opinion or advice.

23. In particular, it may be that the factual instructions turn out to be wrong, without attributable fault.

24. A beneficiary, pressing for a copy of a written advice, may be tempted to act upon that advice without knowing the factual or contextual basis for obtaining that advice.

25. This is a very dangerous position for the lawyer to be in. When I have been in an analogous position, I made it clear to the successor administrator that the executors had raised questions about the factual basis of the instructions by my then instructing solicitors. I warned the person to whom I provided the advice not to rely on the advice in their affairs.

26. It is the personal relationship between the client, contemplated by Rules 7 and 8, on the one hand, with the lawyer, on the other hand, which makes for considerable sensitivity in handing over an opinion provided originally to the trustee.

27. It may be that the alternatives laid before the trustee client had to be explained in person, and without that explanation the giving of advice under clause 7 of the conduct rules would have been substantially incomplete.

28. The relationship between solicitor and client is very dependent upon the abilities and personality of the client. It may be that the trustee client was high-functioning or sophisticated, but that the beneficiary seeking the advice does not have that advantage.

29. The consequence of having a joint privilege or a joint interest in privilege is that you may have to hand over an incomplete advice, unexplained, and without the contextual elements, to a beneficiary who may be adverse to the trustee at that stage.

30. It is another reason to be wary about making any written opinion dependent upon unstated assumptions or instructions.

3.2 Confidentiality – how it fits with a joint interest in LPP

31. A legal practitioner must not disclose any information which is confidential to a client, and acquired by the practitioner during the client's engagement, to any person who is not within certain limited categories. This is under clause 9 of the conduct rules.

32. The exceptions that are relevant here are:

    (a) Under clause 9.2.1 – the client expressly or impliedly authorises disclosure – it is unexplained whether the existence of a joint interest in privilege constitutes such an authorisation.

    (b) The practitioner is permitted or is compelled by law to disclose – my view is generally that I want a court order before I go disclosing things, or instructions if the client is able to give same.

4 Limited grant of leave

33. The New Zealand Supreme Court in *Lambie v Addleman* explains the very limited grant of leave, which was confined to dealing with the order of the Court of Appeal, which in turn had ordered disclosure to the beneficiary of "all legal opinions and other advice obtained by the trustees for the purposes of the Trust Fund and funded from the Trust Fund, including all those that might be privileged as against third parties".

34. Other categories of documents which had been ordered to be disclosed were not controversial by the stage of the New Zealand Supreme Court appeal, and included financial statements and minutes of meetings.

35. So, this grant of leave really structures the opinion of the New Zealand Supreme Court.

36. And having made it decision in principle, the Supreme Court then said that there was only a "limited category of documents in respect of which we reserve leave to Lambie Trust Ltd to come back to the court if it wishes to persevere with its claim to privilege". This was in relation to certain documents involving the period between indication that there may be legal action, and the commencement of suit.

5 Joint privilege vs joint interest in LPP

37. The New Zealand Supreme Court then explains the difference between joint privilege and a joint interest in privilege. Refer [70] and following.

38. In the case of a trustee and beneficiary, it is not joint privilege, because the New Zealand Supreme Court characterised that as requiring joint instructions by persons.

39. Rather, a trustee who solely instructed nevertheless did so for the benefit of the beneficiaries, and the beneficiaries had a joint interest in the privilege with the trustee. Refer [73]. The Supreme Court explains this at [74] in this way:

> *The joint interest exception is founded on the assumption that advice to which it applies is obtained for the benefit of beneficiaries. It follows that there may be circumstances in which that assumption no longer applies. … The instances in which joint interest exception have been held not to be applicable have largely involved advice received by trustees in respect of hostile litigation between them and the beneficiary.*

6 Setting up the Engagement

40. Therefore, where I have set up an engagement for trustees who do not desire to share advice obtained with beneficiaries, I have uniformly done it on this basis:

    (a) The trustee makes it clear that it is concerned about its personal position and liability, if certain defined events happen. Those events will inevitably surround administration of the trust, but the focus of the question is the personal liability of the trustee.

    (b) The trustee approaches you in its personal capacity, seeking such advice, and engages you in the trustee's personal capacity, not as trustee.

    (c) It follows from that, that the trustee must pay for the advice from its own resources. It must not be seen to be instructing on behalf of the beneficiaries, thus giving rise to the rationale for there being a joint interest in privilege.

41. I note that the New Zealand Supreme Court, in a line which does not seek to give definitive advice, says that it is not decisive that the estate does not pay for the advice.

> *[51] Whether information is personal to the trustee and thus not subject to court-ordered disclosure is distinct from whether a trustee may claim legal professional privilege. That said, where the information consists of legal advice, some considerations (for instance who paid for the advice) may be material to both issues. As a rough rule of thumb, advice paid for using trust money is most unlikely to be personal to a trustee. This is because trustees must not use trust funds for their own purposes.*

42. Perhaps there remains uncertainty, but if you can undermine any rationale for there being a joint interest in privilege, and place the focus not on the position of the beneficiaries but the position of the trustees in their personal capacity, making sure that the trust estate (and thus the beneficiaries) do not bear any costs in relation to the giving of advice, and can

provide advice in a way that rationally deals with the real risk faced personally by the trustee, I cannot see why you would be unable to refuse to hand over the advice.

7 Commentators

43. Following the decision of the New Zealand Supreme Court, new editions issued of both Colin Passmore's "Privilege" (5th Edition, 2024) and Paul Matthews & Hodge M Malek KC's "Disclosure" (6th Edition, 2024).

7.1 Passmore

44. Passmore notes that the Supreme Court of New Zealand was only concerned with "court-ordered" disclosure of information by trustees to beneficiaries pursuant to a directions application. He was not concerned with "rights of discovery in litigation between them". This is an important distinction, but practically the beneficiary will get there one way or another if you are not careful.

45. As to the former, Passmore notes that a passage in *Lewin* had been approved by the Supreme Court to the effect "that normally disclosure is ordered of cases submitted to, and opinions of, counsel taken by the trustees, and even though such advice is privileged, the privilege is held for the benefit of the beneficiaries, not for the personal benefit of the trustees, and so privilege is no answer to the beneficiary's demand for disclosure".[6]

46. Interestingly, at paragraph 6.077 of Passmore, Passmore says:

> *It is of interest to note that the Judge in Tamplin referred to advice "sought for the benefit of the Tamplin Trust". Suppose that advice is sought more for the benefit of the trustees because litigation is threatened by the beneficiaries but is inadvertently paid for out of trust funds. the principle then to become, that the advice is disclosable to the beneficiary only where it was sought for the benefit of the trust and properly paid for out of trust funds? Otherwise, there is some risk that the beneficiary gets to see advice which, had it been paid for by the trustees themselves, the beneficiary would not have been entitled to see.*
>
> *Otherwise the "who pays" rule can be too blunt and instrument and at odds with the position in relation to shareholder and company, as discussed next. There is no case law discussing this point directly, albeit it was arguable adverted to by the New Zealand Supreme Court ...*[7]

47. The passage discussed from about 6-107 in Passmore reads as follows:

> *[51] Whether information is personal to the trustee and thus not subject to court-ordered disclosure is distinct from whether a trustee may claim legal professional privilege. That said, where the information consists of legal advice, some considerations (for instance who paid for the advice) may be material to both issues. As a rough rule of thumb,*

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6 Refer *Lewin* 19th Edition, paragraph 23-048.
7 Refer *Lambie v Addleman*, NZSC [51].

> *advice paid for using trust money is most unlikely to be personal to a trustee. This is because trustees may not use trust funds for their own purposes.*

7.2 Matthews and Malek on Disclosure

48. The treatment in this book is much briefer, but focuses on a doctrinal point. This focuses on the old test around proprietary interests in the documents. That theory has passed, at least in places other than New South Wales, and possibly also in New South Wales. The New Zealand Supreme Court in *Lambie v Addleman* was asked to disregard all pre-existing case law on disclosure of trust documents under court order to a beneficiary, given this change in jurisprudential basis of the right to have such disclosure.

8 Costs

49. The other matter ultimately dealt with by the New Zealand Supreme Court in *Lambie* was the costs position in that court and below.

50. This is an unhappy situation. Not only did Mrs Addleman get an order that she should receive out of the trust "for actual costs in relation to the appeal", but the following further orders were made:

> *B Lambie Trustee Ltd is not entitled to any indemnity for costs and expenses in connection if the appeal to this Court, including both its own legal fees and any solicitor-client costs and disbursements due to Mrs Addleman.*
>
> *C Lambie Trustee Ltd is to reimburse the Lambie Trust (from funds not sources from the Trust) the costs awarded by this Court on the appeal.*
>
> *D The orders of this Court at B and C, above, apply to the award of costs in the Court of Appeal.*

51. The key problem here was that the trustees did not seek a *Beddoe* order directing them whether they ought to defend Mrs Addleman's case. The difficulty for the trustees is captured at [11]:

> *In terms of the approach to the indemnity, what comprises disqualifying conduct in this context may be "broadly construed" and can, as we have noted above, capture the unreasonable conduct of litigation. Further, it must have been apparent to the trustees that on the authority some further disclosure, at least, had to be made to Mrs Addleman.*

52. The effect, I understand, is cataclysmic.

53. We do know that in July the High Court sent the matter to mediation, and it is widely known in Auckland that the mediation did not progress in November, as anticipated, but may now proceed in February.

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5 December 202