

CARDS ON THE TABLE? – DISCLOSURE OF TRUST INFORMATION TO BENEFICIARIES

Vanessa Bruton QC
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AGENDA

1. Legal principles
 - Existing law – *Erceg, Addleman, Lewis v Tamplin*
 - New Trusts Act
 - Discovery in litigation – *Gavin v Powell*
2. Tricky disclosure / discovery issues
3. Best practice tips for trustees

Legal Principles – Existing Law (1)

***Erceg v Erceg* [2017] 1NZLR 320, [2017] NZSC 28**

[51] We see the starting point as being the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to the beneficiaries. A beneficiary who seeks such an account may seek access to documentation necessary to assess whether the trustee has acted in accordance with the trust deed. That can be expected to be the basis on which the beneficiary will seek disclosure of trust documentation.

. . .

[53] However, 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 interests of the beneficiaries, not just the beneficiary requesting disclosure.

Erceg 10 Factors (1)

1. Documents that are sought
2. Context for request and objective of beneficiary in making request?
3. Nature of interest held by the beneficiary seeking access
4. Issues of personal or commercial confidentiality?
5. Any practical difficulty in providing information?

Erceg 10 Factors (2)

6. Do documents sought disclose trustees' reasons for decisions?
7. Likely impact on trustee and other beneficiaries if disclosure made?
8. Likely impact on settlor and third parties if disclosure made?
9. Can disclosure be made while still protecting confidentiality?
10. Can safeguards be imposed on use of trust documentation?

Erceg – Result

[99] Primary discretionary beneficiary would normally have a good case for disclosure of trust deed and financial statements

“When my story has been told, the need to continue life’s journey will no longer be required. The blood and death that will flow will stain both Darryl and Lynne.”

- Disclosure not ordered. Genuine reason for concern as to what [appellant] would do with the information if he received it

Erceg Application

Addleman v Lambie [2017] NZHC 2054; (2017)
4NZTR 27-003; (2017) 31 FRNZ 373

- Dispute between sisters – Prudence Addleman and Annette Jamieson
- Lambie Trust – settled 1990. Sole trustee – Lambie Trustee Ltd
- Annette sole director and shareholder
- Primary purpose – Annette’s welfare / financial security
- Source of wealth – compensation from local Council for accident – Annette quadriplegic 1972, aged 19

Addleman v Lambie (2)

- Main asset – shares in Howick Parklands Limited (conducted successful subdivision);
- 4 final beneficiaries:
 - Annette, Prudence, 2 overseas companies owned by Annette;
 - Prudence added at Annette's insistence to provide for contingency of Annette's early death;
- DBS – FBS, their issue, spouses / widowers; charities

Addleman v Lambie (3)

- Girls' father – Mr Jamieson and Annette (nominal settlor)
- Mr Jamieson – power of appointment
- 9 May 2000 – Mr Jamieson letter of wishes for ultimate distribution of trust funds
- Prudence to receive 25%
- Annette consulted and agreed

Addleman v Lambie (4)

- November 2001 – Mr Jamieson dies
- Prudence threatens legal proceedings against father's estate
- \$4.257m paid from Trust to Prudence – Annette says to retain / rebuild relationship (25% of trust fund)
- Letter to Prudence – Trustees have decided to bring distribution forward (before death of mother) so you can make your own decisions re use of funds
- Prudence - thank you, then requests for information

Addleman v Lambie (5) - Proceedings

- June 2015 - comprehensive suite of documents requested by Prudence for 24 years since settlement
- Basis – “in order to ensure Trust property is being properly managed and there is proper accountability of trustees in terms of trust deed”

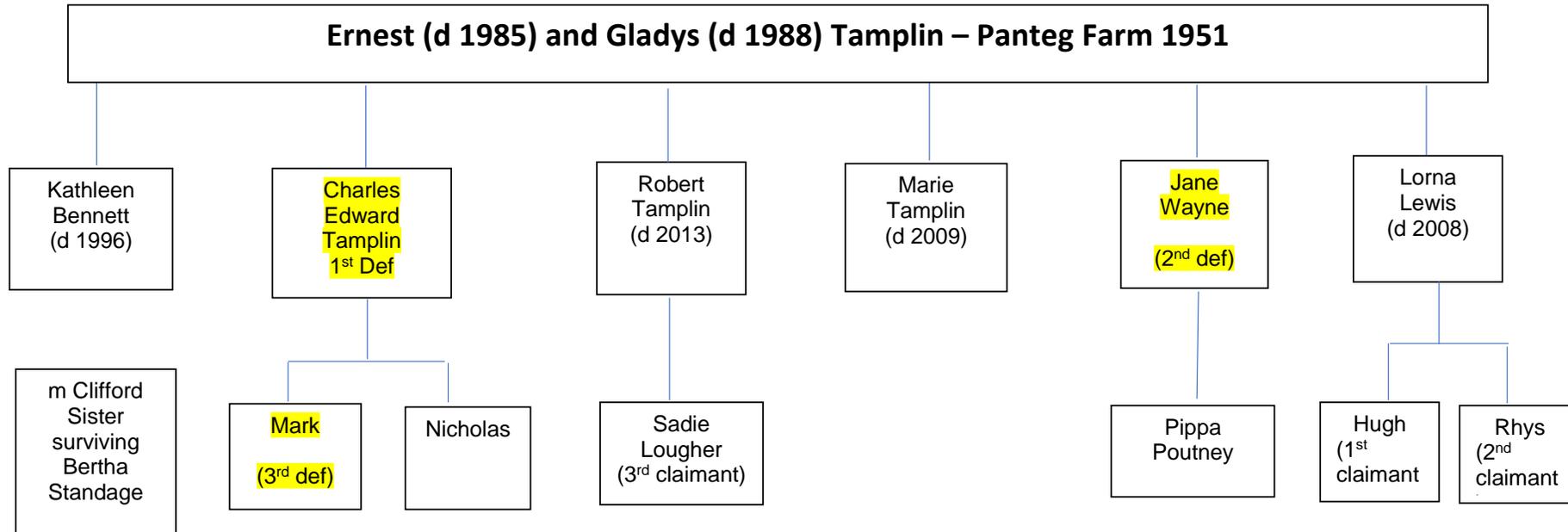
Addleman v Lambie (5) – Proceedings (cont'd)

- Woolford J – Erceg principles – 7 key reasons to decline disclosure:
 1. Trust settled with primary purpose of Annette's welfare. Extraordinary needs \$250Kpa
 2. Prudence included as a contingency only
 3. Source of settlement – Annette's accident compensation
 4. Prudence received 25% "final distribution" \$4.257m
 5. Extent of disclosure already provided. Trust deed, changes of trustees, statement of nominal settlor – accident funds / earnings used to fund HPL; Mr Jamieson's wishes 2000
 6. Prospect of more intra-familial discord / litigation. Threats against father's estate, claims against mother's estate
 7. No suggestion of breach of trust / fiduciary duty in trust admin

***Addleman v Lambie* (6) – Court of Appeal:
Application to adduce further evidence [2018]
NZCA 616**

- Evidence relating to source of trust wealth. Argued should have been discovered. Said to be adverse to allegation / finding that all trust wealth sourced from 1981 damages award
- Application granted
- Appeal hearing March 2019

Tamplin v Lewis [2018] EWHC 777 (1)



1986 – Gladys DOFA – half share of Panteg Farm split between her 6 children “for their own use absolutely and for them to devise bequeath or appoint during their lifetime or in their will as they shall individually decide”

1988 – Gladys dies - her ½ passes to her 6 children

Tamplin v Lewis (2)

- Farm subdivisible – 12.3 acres £10m+
- Position taken by trustees – Edward, Jane and Mark was that upon deaths of Kathleen, Robert, Marie, Lorna interests of surviving siblings increased, if not dealt with under will or deed of appointment
- Claimants say – if children of Ernest and Gladys died intestate, their interest in trust land to devolve on intestacy principles
- Information request refused on basis claimants not beneficiaries
- Judicial intervention. Trustees agreed claimants beneficiaries, with fixed interests

Tamplin v Lewis (3)

- Trustees resisted disclosure, claimed they had management of trust assets. Beneficiaries had to show grounds for real suspicion before Court should interfere / order disclosure. Argument rejected. But on facts, ample grounds for suspicion [52]
- Court will not be satisfied with “say-so” of trustees that beneficiaries have sufficient information. Will make up its own mind
- Extreme / indefensible approach to disclosure. First denied (on very weak basis) claimants were beneficiaries. Then put forward a series of hopeless arguments against giving information
- Less confrontation / more cooperation may have avoided litigation. Trustees must take consequences

New Trusts Act (1)

- Trusts Bill – “trust information”

trust information—

(a) means any information—

- (i) regarding the terms of the trust, the administration of the trust, or the trust property; and
- (ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but

(b) does not include reasons for trustees’ decisions

- Presumption that trustees will provide trust information requested
- BUT trustees may decide the presumption does not apply and may refuse the request for information after taking into account the factors at section 49 (clause 48)
- Note: If no trust info provided trustee required to apply to Court for direction whether decision reasonable

New Trusts Act (2)

Section 49 factors

1. Nature of the interests in the trust held by beneficiary and other beneficiaries. Includes degree / extent of interest and likelihood of receiving trust property in future.
2. Personal or commercial confidentiality?
3. Expectations and intentions of the settlor at time of creation of trust (if known) about disclosure
4. Age and circumstances of the beneficiary
5. Age and circumstances of other beneficiaries
6. Effect on beneficiary of giving the information
7. Effect on trustees, other beneficiaries, and third parties of giving information

New Trusts Act (3)

Section 49 factors

8. In the case of a family trust the effect of giving the information on – (i) relationships within the family; (ii) the relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole
9. When a large number of beneficiaries or unascertainable beneficiaries, practicality of giving information to all beneficiaries or all members of a class of beneficiaries
10. Practicality of imposing restrictions and other safeguards on the use of the information (for example, by way of an undertaking, or restricting who may inspect the documents)
11. Practicality of giving some or all of the information to the beneficiary in redacted form
12. If a beneficiary has requested information, the nature and context of the request

Discovery in Litigation (1)

- Distinction between type of case
 - Application by trustees for directions re disclosure under current s66 Trustee Act 1956
 - Application by beneficiary for trust information under Part 18 High Court Rules (eg *Addleman*)
 - Claims of breach of trust by beneficiaries or third parties
- Standard discovery (rule 8.7). Documents that are or have been in parties control
 - Documents relied on
 - Documents which adversely affect own case
 - Documents that adversely affect another party's case
 - Documents that support another party's case
 - *Gavin v Powell* [2018] NZHC 2866 – Erceg principles rel. proportionality

Discovery in Litigation (2)

- Breach of Trust Claims. Beneficiary claims (eg *Clement v Lucas* [2017] NZHC 3278; (2017) 4 NZTR 27-35). Reasons for decision relevant to claim
- General rule trustees do not have to disclose reasons
- But what if reasons include legal advice obtained at cost of trust?
- Should trustees claim confidentiality?
- What about neutrality between beneficiaries?
- Adverse inference?

Tricky Disclosure Issues (1)

- What is “trust information” Are financial statements for trust-owned companies trust information at all?
 - *Erceg* – SC para 73(d)
 - *Butt v Kelson* [1952] 1Ch 197
 - *Van Dam v Went* [2015] NZHC 1457

Tricky Disclosure / Discovery Issues (2)

Extent of Privilege / Confidentiality for advice paid for out of trust funds

- *Lewis v Tamplin* at 59/60. Advice sought for the benefit of the trust and at the cost of the trust (and associated letters of instruction and other related correspondence) is not protected from production to beneficiaries (although it may be privileged as against third parties). Is liable to be produced
- *Addleman* – Prudence request “All legal opinions and other advice obtained by trustees for purposes of trust fund and funded from Trust Fund” - Woolford J at [33] may be subject to solicitor-client privilege
- *Gavin v Powell* – Trustee Ballinger (also solicitor) file to be disclosed. Replacement trustee files not – Docs for purpose obtaining legal advice and/or when litigation contemplated
- Section 66 Evidence Act 2006 – Joint and successive interest in privileged material. Confidentiality? Trustee indemnity?

Best Practice for Trustees / Advisors (1)

1. Is a trust a good idea?
2. Great care needed with drafting of trust deeds. Tailor-draft for specific circumstances. Do not make a “back-up” or contingent beneficiary a final beneficiary. Draft to reflect the contingency. Include settlor’s wishes on release of information
3. Do not just “plug-in” to your standard precedents
4. Carefully / dispassionately consider requests for information. Effect of release / refusal to release on beneficiaries as a whole

Best Practice for Trustees / Advisors (2)

5. Overall “smell” / common-sense approach in decisions. “Good guy /gal” gets info, “troublemaker” doesn’t
6. Trustee independence / objectivity critical
7. Refusal to disclose often fosters suspicion (although disclosure can foster acrimony!)
8. Cooperative approach to disclosure, with confidentiality restrictions

Best Practice for Trustees / Advisors (3)

9. Take advice on tricky issues early
10. Consider going on front-foot, applying for directions at early stage
11. Have at least some non-trustee directors on boards of trust-owned companies. Will make for more careful critique of disclosure of company information
12. Be aware that all advice / emails etc paid for from trust may have to be disclosed to beneficiaries. Keep it professional. Consider if better to pay for other than with trust funds

Questions

