

Are trust documents privileged?

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Blades -v- Isaac and Alexander

The recent English High Court case of Felicity Blades v Richard Isaac and Christopher Alexander, 21 March 2016, is a useful reminder to trustees about the confidentiality of legal advice and wishes of a Beneficiary.

Background

This case concerned a will trust (the **Trust**) created upon the death of Mrs Lee. The deceased's will appointed executors and trustees, two of whom renounced probate so leaving a sole trustee of the Trust. A co-trustee of the Trust was later appointed. The defendants in the case were the trustees of the Trust (the **Trustees**), who were solicitors in an English law firm.

Information concerning the estate and the Trust had been requested from the Trustees by the deceased's daughter who was a Beneficiary of the Trust and became the claimant in the case. The Trustees initially refused to disclose the information requested as they were concerned about the effect on the family relationships given the family's history. The claimant did not feel that there were difficulties with her relationship with her sister and in any event contended that it should not be up to the trustee to manage relationships within her family. The claimant also stated that she and her sister "*were both adults and we do not need a trustee to manage our relationship for us*".

Following the claimant's request for information, the Trustees sought advice from English counsel and, following that advice, they continued to resist disclosure. Eventually the claimant issued proceedings in the English High Court.

Sometime after proceedings were issued, the Trustees sought advice from different counsel whose advice differed from the first. As a result the Trustees gave the disclosure. The Court was, therefore, only left to deal with the question of costs incurred rather than the substantive question

of disclosure. As part of its judgement, however, the Court did make some helpful remarks both on the need for a trust and whether legal advice was privileged.

The Need for a Trust

The Court did not accept it relevant to the matter whether or not the Claimant felt she needed a trust or trustee. The judge stated, *“even on the basis that the sisters do not need a trust, the estate assets belonged to the Testatrix to deal with, and . . . she decided . . . she would impose a trust on her assets on her death. Whether the Testatrix was wise or not to do this is not a matter for the Claimant, nor indeed for [the Court]. In the absence of a Saunders v Vautier application by all the Beneficiaries, the Claimant by herself has no business or right of imposing her own will on the trust . . . She is entitled to the rights conferred on her by the trust, neither more nor less”*.

This is a helpful comment from the Court emphasising that trustees are bound by the terms of the trust and not by the views of particular beneficiaries or whether other people in the same situation would have created a trust. It is clear that provided the settlor had the necessary intention and capacity, then it is not up to individual Beneficiaries to determine if they are happy with assets being held through a trust.

Disclosure and Privilege

When determining who should bear the costs of the application, the Court needed to consider whether the Trustees had acted reasonably in initially refusing disclosure. As part of this, the Court considered whether the advice received from counsel was potentially disclosable to the Beneficiaries as trust documents or if it was protected by legal privilege as alleged by the Trustees.

It should of course be noted that even if legal advice is a trust document, this does not mean that a Beneficiary has an absolute entitlement to see it. There may be reasons to refuse disclosure in the interests of the Beneficiaries as is the case for all other trust documents. However, if the advice is a trust document then a trustee would normally require a positive reason not to disclose to a beneficiary who requests sight of that advice. If the advice were privileged the Trustee would not need to justify non-disclosure unless it decided to waive privilege.

Privilege is a complex issue but, as a general rule, advice obtained from lawyers in the contemplation or context of litigation is normally privileged and does not need to be disclosed to the other side in a dispute. In this case, the Court drew a distinction between personal advice sought and paid for by trustee, perhaps if they are at risk of being sued, and advice obtained as trustee for the benefit of the trust. In the former case the costs of the advice would normally be borne personally by the trustee and in the latter as the advice is for the benefit of the trust then the costs would be borne by the trust fund. The Court stressed that a trustee cannot expect to take legal advice at the expense of the trust fund and then this not to be a trust document. The judge commented, *“The opinion had been obtained by the defendants, as trustees, for the benefit of the trust rather than for their benefit personally, and therefore it was proper for them to pay for it from trust funds. But the corollary of this was that it was a trust document, and therefore in*

the same category as other trust documents, that is, available to the beneficiaries if the court so considered. In relation to such documents, there can be no legal professional privilege as between trustee and beneficiary. Arguments about privilege . . . were therefore simply irrelevant.”

What Should Trustees Do When Seeking Legal Advice?

Trustees should therefore be aware when seeking legal advice about whether they are prepared for this advice to be seen by beneficiaries as a trust document. The rules of privilege would continue to apply to the legal advice if third parties attack the trust fund but not in respect of beneficiaries viewing that advice as a trust document. Therefore, if trustees are concerned about their own conduct or position against beneficiaries they should ensure that any legal advice sought which they would not wish to have to disclose is taken in their personal capacity and not paid for out of the trust fund. Privilege is a complicated area and therefore the question of privilege should be discussed with the lawyer providing the advice before it is issued. It is not the case that all legal advice is privileged in all circumstances.

Position in Other Jurisdictions

Although this is an English case, we consider that this reflects the law that would also be applied in the jurisdictions on whose trust law Ogier advises being Jersey, Guernsey, the British Virgin Islands and the Cayman Islands.

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