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TRUST LAW

What trustees can do about *Addleman*

The suggestion that a trustee can't get legal advice without having to disclose it to beneficiaries will deter well-qualified people from acting as trustees

Anthony Grant

After my recent article on the Supreme Court's decision in *Addleman*, ADLS asked me to present a webinar on the case.

It attracted a large audience. It's clear from the feedback that many ADLS members want more information about actions that might be taken to reduce the risk of trustees having to give beneficiaries copies of legal advice which the trustees have obtained concerning criticisms and complaints beneficiaries have made about them.

For readers unfamiliar with the *Addleman* decision, here's why it's important.

It is increasingly common for beneficiaries to criticise trustees. When the threats are serious enough, the trustees will want to know whether the criticisms have substance and, if so, what might be done about them. They will want the advice they obtain to be protected by privilege so it can't be seen by beneficiaries.

The courts have long held that when trustees obtain legal advice and pay for it with monies from the trust, beneficiaries

are entitled to see it. There is a secondary pathway by which beneficiaries can achieve the same outcome, the so-called 'joint interest exception'. Underlying this doctrine is the theory that the legal advice is obtained for the benefit of both the trustees and the beneficiaries so both are entitled to see it.

The Supreme Court's decision has cast doubt on whether legal advice trustees pay for from their own resources can be withheld from beneficiaries. This arises from one sentence in the decision: "Advice paid for by a trustee may nevertheless be trustee information." Elsewhere in the decision it appears that trustees may be obliged to provide beneficiaries with what the Supreme Court calls 'trustee information'. Unhelpfully, the court did not give any guidance on the circumstances in which advice a trustee pays for from non-trust resources can be withheld from beneficiaries.

Helpful suggestions

Below are some actions trustees might take to reduce the prospect that advice might be disclosed to beneficiaries. It isn't legal advice; these are merely some suggestions that are intended to be helpful in response to numerous requests made at the webinar and I accept no responsibility for them.

- Trustees should never use trust monies to pay for legal advice about criticisms beneficiaries have made about them.
- Trustees should consider seeking oral – and not written – advice about criticisms of their conduct and how best the trustees should respond to the criticisms.
- When instructing a legal adviser, a trustee might say something like this: "Although it has been said that 'the courts can expect trustees not to seek advice as to how to resist litigation', I consider I am entitled to pay for advice from my own resources to learn whether a criticism made of me might be justified and, if so, what I might do about it. Your advice is intended for me alone and it is not intended to be made available to the beneficiaries."
- Use a corporate trustee where one person is a shareholder and another is a director. The shareholder might seek advice of criticisms made of the company.

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The shareholder might say, "although I have no role in the management of the company, I am aware it has been the subject of criticism and threats by a beneficiary. I seek advice in my capacity as a shareholder of the company, with no role in its management, to learn whether the criticism may have any validity. The advice is not being sought on behalf of the company's director or the trust's beneficiaries."



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- Arrange for a third party to seek the advice.
- Obtain trustee liability insurance but not with monies paid directly by the trust. Advice to a trustee from a professional indemnity insurer ought never to be considered advice that is sought for the benefit of beneficiaries.
- Incorporate an anti-*Addleman* clause in trust deeds. Such a clause might read:
"In recognition of the problems that exist in recruiting suitable people to be trustees of the trust if legal advice that a trustee receives in response to criticisms of that person's conduct is to be made available to beneficiaries,

any advice a trustee receives in such circumstances is not to be disclosable to beneficiaries if the trustee has paid for the advice from non-trust resources.

"If, contrary to this clause, a beneficiary seeks disclosure of the advice, that person will cease to be a beneficiary as from the date of the request and will have no right to receive any benefit from the trust."

The last words of that passage are designed to get around the unusual wording of the term

'beneficiary' in the Trusts Act 2019.

The suggestion that a trustee can't get legal advice without having to disclose it to beneficiaries will deter well-qualified people from acting as trustees. It is in the interests of the community that actions should be taken to restore a level of confidence that could be lost by prohibiting trustees from being able to get confidential advice on the effect of their actions. ■

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On Demand webinar available soon, [click here](#) ■

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