

# Disclosure to beneficiaries and privilege

KATE SULLIVAN

---

In the High Court decision of *Burgess v Monk*<sup>1</sup> the plaintiff claimed that the trustees of his mother's estate breached fiduciary duties owed to him of even-handedness and good faith in relation to the administration of the estate.

He applied for particular discovery against the trustees seeking all documents relating to their administration of the estate including any legal advice they had received.

The trustees opposed the discovery application on the basis that the documents sought were privileged.

His Honour Justice Brewer found that in a claim for breach of fiduciary duty the impugned trustees are not able to assert legal privilege to protect themselves as the privilege belongs to the trust.<sup>2</sup> He also noted that proprietary theory is not the jurisdictional basis upon which beneficiaries are now granted access to trust documents.<sup>3</sup>

Beneficiaries have a right to disclosure to ensure that trustees are properly carrying out their duties and the privilege is held for the benefit of the beneficiaries rather than the personal benefit of the trustees. On this basis a trustee cannot rely on legal

privilege as an answer to a beneficiary's request for disclosure.<sup>4</sup>

However, His Honour stated that not all legal advice obtained by trustees is required to be disclosed. Trustees are not required to disclose legal advice obtained for the purpose of their own defence if they are being sued by beneficiaries.

In that case litigation privilege still applies, but trustees are still liable to disclose trust documents.

Accordingly the dominant purpose of the communication is highly relevant when deciding whether a document is subject to legal professional privilege.<sup>5</sup> If the purpose of the trustees communication was to obtain advice on how to prepare for their own defence then the trustees may rely on legal professional privilege, but if the purpose of the communication was to receive legal advice to ensure the trustees were correctly administering the estate then these communications are relevant and not protected by legal professional privilege.<sup>6</sup>

The High Court also found that similar principles apply in relation to disclosure to beneficiaries by personal representatives

of an unadministered estate as apply to disclosure by trustees to beneficiaries of an express trust.

Beneficiaries of an unadministered estate suing for breach of fiduciary duty have a right to seek disclosure of matters concerning the estate. This extends to include privileged material to the extent the material relates to the executors discharge of fiduciary duties.<sup>7</sup>

The plaintiff was therefore entitled to any legal communications relevant to his allegations that the trustees have breached their fiduciary duty that were not protected by litigation privilege.

If trustees or executors wish to assert legal professional privilege over advice received they will need to think very carefully about the purpose of the advice sought, how they engage lawyers, and when they seek legal advice.

---

1 *Burgess v Monk* [2016] NZHC 527.

2 At [9].

3 At [10].

4 At [10].

5 At [12].

6 At [20].

7 At [17].