Trusts & Trustees Advance Access published September 30, 2014

It's a privilege

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Abstract

A trustee cannot, it has been held, resist on the grounds of legal professional privilege disclosure to a beneficiary of legal advice taken for the purpose of administration of the trust and paid for from the trust fund. How this principle is reconciled with privilege being a fundamental human right is unexplained by the authorities. Since confidentiality is necessary to claim privilege, it is proposed that a trustee's duty to account to beneficiaries generally, but not always, negates confidentiality and thus privilege; but if the trustee had a reasonable expectation of confidentiality, it should be able to claim privilege.

Introduction

Legal professional privilege is a fundamental human right long established in the common law.[1]

> Normally disclosure [to a beneficiary] will be ordered of . . . instructions to and legal advice obtained from the trustees' lawyers for the guidance of the trustees in the discharge of their functions as trustees and paid for from the trust fund . . .[2]

It might appear from these quotations that 'fundamental human rights' cease at the door of trusteeship

This article analyses whether this is the case.

The principle in the second quotation above applies in both Part 31 of the Civil Procedure Rules 1998 ("CPR")[3] disclosure and under *Schmidt v Rosewood*[4] principles, and appears to apply in relation to both legal advice privilege and litigation privilege (together 'legal professional privilege'). Various rationales have been put forward to explain the principle, including that the privilege in legal advice to a trustee is held for the benefit of the beneficiaries and privilege is therefore no answer to the beneficiary's demand for disclosure,[5] joint privilege,[6] joint interest,[7] and that the legal advice was paid for from the trust fund.

The thesis of this article is instead that, because of a trustee's duty to account to beneficiaries in relation to a trust, there is normally no confidentiality between the trustee and the beneficiary class in relation to the trust affairs. In the absence of confidentiality there is no privilege, and this is the true explanation for the principle. This article then examines this thesis in certain specific contexts which can arise in the administration of trusts. The other proposed rationales in relation to the principle are then briefly considered; the privileged status in the beneficiary's hands of the legal advice disclosed is then considered; and finally the thesis of this article is considered in the context of the related rule that a company's legal advice is not normally privileged as against its shareholders.

In this article a 'communication' means a communication to/from a lawyer as part of a trustee

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1. *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21.
2. Lewin on Trusts (18th edn, Sweet & Maxwell) para 23–45.
3. Part 31 of the Civil Procedure Rules 1998 in England deals with disclosure of documents in litigation. The equivalent in the Isle of Man is chapter 5 Part 7 Rules of the High Court of Justice 2009.
4. [2003] UKPC 26.
5. Lewin on Trusts (n 2) para 23–45.
6. *Schreuder v Murray (No 2)* [2009] WASCA 145 at paras 10 and 94.
7. Phipson on Evidence (18th edn, Sweet & Maxwell) at 24–02.

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doi:10.1093/tandt/ttu185

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obtaining legal advice (and relates equally to legal advice privilege as litigation privilege).

Disclosure of legal advice to beneficiaries

Lewin on Trusts[8] refers to several 19th century cases in support of the principle that a trustee may not on the grounds of privilege refuse a beneficiary's demand for disclosure of legal advice (obtained for the guidance of trustees in the discharge of their functions as such and paid for from the trust fund). However, these cases do not explain the underlying rationale of the principle.

In *Wynne v Humberston*[9] the court said that:

> [t]here can be no question that the rule is that, where the relation of trustee and *cestui que trust* is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the *cestui que trust.* They are taken for the purpose of administration of the trust, and for the benefit of the persons entitled to the trust estate, who will have to pay the expense thereby incurred.

In *Talbot v Marshfield*[10] disclosure was sought by a beneficiary of instructions to and the opinion of counsel which were with reference to whether the trustees were justified in making a certain advance to some beneficiaries under a clause in the will trust. Neither confidentiality nor privilege was claimed in respect of the instructions and opinion. The reasons given by the court why the beneficiary had a right to see the instructions and opinion were because they were:

> to guide [the trustees] in the exercise of a power delegated to them by the trusts of the will, and which, if exercised, would affect the interests of the other *cestuis que trust.* The opinion was taken before proceedings were commenced or threatened, and in relation to the trust.

And

> . . . if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any *cestuis que trust* a right to see the case and opinion.

The reasons why these circumstances override privilege were not further analysed.

In *W Dennis and Sons v West Norfolk Farmers Limited*[11] the principle was stated (so far as relevant) as follows:

> The general rule, which applies . . . as between a trustee and his beneficiaries is thus stated at pages 518 and 519 of the Annual Practice 1943: "a cestui que trust . . . is entitled to see cases and opinions submitted and taken by the trustee for the purpose of the administration of the trust; but where stated and taken by the trustees not for that purpose, but for the purpose of their own defence in litigation against themselves by the cestui que trust they are protected . . .

Principles of legal professional privilege

Privilege is a 'right to resist the compulsory disclosure of information'.[12] Legal professional privilege is a manifestation of the principle protecting confidentiality;[13] the privilege is based on the need to obtain legal advice and all things reasonably necessary in the

8. (n 2).
9. (1858) 27 Beavan 421; (1858) 54 ER 165.
10. (1865) 2 Dr & Sm 549; (1865) 62 ER 728.
11. [1943] Ch 220, as recorded in *CAS (Nominees) Limited v Nottingham Forest PLC* [2002] BCC 145.
12. Lord Millett in *B v Auckland District Law Society* [2003] 2 AC 736, para 67.
13. Phipson (n 7) at 23–01.

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shape of communications to the legal advisers are protected from disclosure in order that legal advice may be obtained safely and sufficiently.[14]

There can be no privilege without confidentiality; so if for example an otherwise privileged document has entered the public domain there can be no claim for privilege.[15]

A communication may be confidential (and thus privileged) as between some persons and not others.[16] A communication or communications between A and B may be partly confidential (and thus privileged) and partly non-confidential (and not privileged) as between them.[17]

A trustee's duty to account to beneficiaries

The right of a beneficiary to monitor and protect his interest by obtaining accounts from the trustee is at the very core of the trust concept, so that he has the means to discover whether there has been a breach of trust which can be remedied,[18] and in normal circumstances a trustee ought to be ready at the request of a beneficiary to give him full and accurate information as to the amount and state of the trust property. Beneficiaries with a life interest or an interest in remainder, vested or contingent, and beneficiaries under discretionary trusts, have accounting rights.[19]

The duty (called in this article the 'duty to account') of a trustee to account and provide information to the beneficiaries means that in normal circumstances confidentiality as between them in relation to the trust property and affairs is impracticable; accountability requires transparency.[20]

The duty to account is part of the irreducible core obligations of trustees which cannot be excluded.[21]

For example, if the trustee pays an amount of tax from the trust fund based on legal advice from a tax lawyer as to why it was payable, in order to comply with the obligation to account fully to the beneficiary as to the payment and why it was made the trustee must have an obligation to disclose this legal advice even though otherwise privileged. Equally, if a trustee sells trust property at a discount due to a defect in title, he must have an obligation to disclose to the beneficiary the legal advice he obtained as to the defect if he is to fully account to the beneficiary. A trustee sells shares to a third party giving warranties and compromises a claim from the third party under those warranties on the basis of legal advice that the claim will succeed; to account to a beneficiary fully as to payment of the claim the legal advice must be disclosed. Numerous other examples could be given.

Schmidt v Rosewood decided that the courts will enforce a beneficiary's right of access to documents relating to the trust in order to uphold the beneficiary's entitlement to a reasonable assurance of the manifest integrity of the administration of the trust by the trustees.[22] A beneficiary's right to seek disclosure of trust documents applies whether the beneficiary has a transmissible or non-transmissible (that is, discretionary) interest, or is the object of a mere power (of a fiduciary character).[23] The corollary of the beneficiary's entitlement as to the integrity of the administration of the trust is the trustee's

14. ibid.
15. ibid at 23–17.
16. ibid at 26–27.
17. For example, the situations dealt with in Phipson (n 7) at 23–49 and 23–56 (third paragraph).
18. Underhill and Hayton, *Law of Trusts and Trustees* (18th edn, LexisNexis) at 56.2 citing *Armitage v Nurse* [1998] Ch 241 at 253.
19. ibid 56.3.
20. 'Sunlight is said to be the best of disinfectants; electric light the most efficient policeman': Justice Louis D Brandeis 'Other peoples money – And how bankers use it' (1914).
21. Kessler and Sartin, *Drafting Trusts and Will Trusts* (11th edn, Sweet & Maxwell) paragraph 29.3; also Underhill & Hayton (n 18), paragraphs 56.14–19.
22. [2003] UKPC 26 at paragraph 52 expressing general agreement with the approach adopted in the judgments of Kirby P and Sheller JA in the Court of Appeal of New South Wales in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.
23. *Schmidt v Rosewood* [2003] UKPC 26 at para 66.

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duty to account, which duty therefore applies to discretionary and non-discretionary beneficiaries. The court's decision whether to intervene (under the *Schmidt v Rosewood* jurisdiction) in the administration of a trust by ordering disclosure in a particular case is a question of balancing the competing interests of different beneficiaries, the trustees themselves, and third parties,[24] but the starting point must be that disclosure be made unless there is a competing interest. *Schmidt v Rosewood* therefore supports the proposition that confidentiality between trustee and beneficiary in relation to the trust affairs is, absent special circumstances, impossible.

The effect on privilege of the duty to account

Accordingly, so far as there is not confidentiality between trustee and beneficiary in relation to the trust's affairs, privilege in communications relating to those affairs cannot be claimed by the trustee as against the beneficiary, but can be claimed by the trustee as against the rest of the world.

It is submitted that the absence of confidentiality due to the duty to account is the true rationale for the principle that privilege could not be claimed by the trustee against disclosure of legal advice in the cases referred to above.

But since legal professional privilege is a manifestation of the principle protecting confidentiality, there may be special circumstances in which a communication between the trustee and his lawyer in relation to the trust affairs should be regarded as attracting confidentiality as against one or more beneficiaries.

Such circumstances would arise where the trustee had, in making the communication, a reasonable expectation that the communication would remain confidential from the beneficiaries (or one or more of them).

The purpose of legal professional privilege is to ensure that a 'man must be able to consult his lawyer in confidence since otherwise he might hold back half the truth' and 'the client must be sure that what he tells his lawyer in confidence will never be revealed without his consent'.[25] This applies no less where the client is a trustee, and is consistent with the due administration of the trust since if a trustee felt he could not tell his trust lawyer the whole truth, flawed decision-making based on incomplete information would follow to the detriment of the beneficiaries. Such communications, so far as having the quality of confidence as against the beneficiary seeking disclosure, should therefore be privileged.

The law can distinguish between confidential and non-confidential communications which take place as part of one package or relationship.[26] There is no reason therefore why some communications could be privileged as against the beneficiary and others not. The court is used to deciding whether material has the quality of confidence.[27] Once confidentiality, and therefore privilege, in a communication is established, it can be asserted in answer to any demand from the beneficiary for the communication;[28] it is an absolute right[29] which cannot be overridden by the trustee's duty to account.

There are three answers to an argument that this result may hamper the due administration of the trust by excessively restricting the beneficiaries' ability to

24. ibid at para 67.
25. Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court, Ex p B* [1996] 1 AC 487 at 507.
26. Halsbury Laws of England, 4th edn, 2003 reissue, para 417.
27. ibid at para 402.
28. Phipson (n 7) at 23–03.
29. ibid at 23–07, and also *R v Derby Magistrates Court, Ex p B* [1996] 1 AC 487 where privilege could not be overridden by the court in respect of documents which could potentially provide a defence to a charge of murder.

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have an accounting because all relevant material will not be before the court. First is that as stated above privilege is an absolute right and there is no balancing act to be performed by the court; any balancing exercise was resolved centuries ago in favour of the claim to privilege[30] to protect lawyer/client confidentiality. Second, it is likely that it will be in comparatively rare circumstances that the claim to confidentiality (and thus privilege) is made out, particularly in relation to information which is important to an accounting. Third is that, rather than frustrating the due administration of the trust, such is promoted by the trustee being able to claim privilege in such circumstances—from the point of view of the beneficiaries it is preferable that the trust be administered on the basis of legal advice which is based on full information, rather than the risk that the trustee feels constrained to hold back sensitive material from legal advisors and flawed legal advice results.

An expectation of confidentiality could reasonably arise where the trustee's personal affairs intersect with the trust affairs.

For example, a trustee could take legal advice as to the effect of an illness he may have on administration of the trust, but could reasonably expect that information about such illness which he gave to the lawyers be confidential from the beneficiaries, even if the cost of that legal advice was properly paid from the trust fund. Or a trustee might have personal financial problems which may lead to bankruptcy, and may at the expense of the trust fund take legal advice as to how to minimize the effects of that on the administration of the trust, but would not wish the beneficiaries to be able to access all the financial information provided to the lawyer. Or a corporate trustee may give sensitive commercial information about its business in order that the lawyer can advise fully on a particular matter in the trust administration (eg a conflict issue). In each case the communications should be confidential and thus privileged from the beneficiaries.

The case of a third party seeking to set the trust aside illustrates the issue. Examples are the settlor seeking to set the trust aside on the grounds of mistake or undue influence; the settlor's trustee in bankruptcy seeking to set the trust aside under insolvency legislation; or an adverse equitable proprietary claim to the trust property. The trustee will either remain neutral, in which case his costs would normally be ordered to be paid from the trust property;[31] or, if the trustee is the only suitable defendant, the court may give the trustee leave to defend the claim at the expense of the trust property.[32] In either case, the trustee will doubtless proceed to make full disclosure to and receive advice from his lawyers. The third party as a putative beneficiary of the trust property has no right to require disclosure of legal advice to the trustee.[33] However, if the third party's claim succeeds, he will be found to have been the true beneficiary of the trust property. In such circumstances, it seems wrong that he would then be able to require disclosure of all communications between the trustee and its legal advisors, which he could then perhaps use to attack the trustee personally. Yet that would be the legal position if the rule relating to disclosure of privileged documents to beneficiaries is based on the authorities referred to above (ie that privilege is held for the benefit of the beneficiaries, joint privilege, joint interest, or payment of the cost from the trust property). On the other hand, the trustee would have communicated with his lawyers on the basis, and with the reasonable and legitimate expectation, that such communications would be confidential from the third party. It is therefore submitted that such communications should be regarded as having the necessary quality of confidentiality as against the third party to found a claim for privilege.

30. Phipson (n 7) at 23–07.
31. Lewin on Trusts (n 2) at 21–111. See also *re Strathmullen Trust* [2014] JRC 056.
32. Lewin on Trusts (n 2) at 21–115 and 116.
33. *Wynne v Humberston* (1858) 27 Beavan 421; (1858) 54 ER 165.

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Privilege as between former and new trustee

The thesis of this article also rationalizes the disclosure position, as between former and new trustee, in relation to legal advice. All the property of the trust typically vests in the new trustee, as does responsibility for administration of the trust affairs (including such of its past affairs as are outstanding or affect its future affairs). A new trustee is entitled to require the former trustee to deliver up to him all records, books, and other papers belonging to the trust.[34] Therefore confidentiality as between former trustee and new trustee in relation to the property and administration of the trust is largely impossible. So far as confidentiality between them is absent, the former trustee cannot resist delivery of communications and legal advice on the grounds of privilege.

This is, however, it is suggested, unless the context in which the communication was made gives rise to confidentiality. So, for example, where the outgoing trustee obtains legal advice in relation to the change of trustees and associated matters such as the terms of indemnities in the deed of retirement and appointment of trustees, that advice should be confidential as regards the new trustee and therefore the former trustee ought to be able to resist disclosure of such on the grounds of privilege (even though the cost of that advice is typically paid for from the trust fund).

Delivery of communications to the new trustee does not result in a loss of confidentiality (and thus privilege) in them as against the world at large, since (as in the case of disclosure to beneficiaries) they were not confidential between new and former trustee in the first place.

In *re the Bird Charitable Trust,*[35] a Jersey case, a trustee (Basel Trust Corporation (Channel Islands) Limited) had applied to the Jersey Royal Court to determine the validity of the appointment of new co-trustees. The Jersey court upheld the appointments and ordered that Basel's costs be paid from the trust fund. Basel resigned, and some time later the co-trustees were replaced by Equity Trust (Bahamas) Limited. Equity sought from Basel its legal advice in relation to the application to court, and on being refused applied to the Jersey court to obtain it. The court held that although one starts from a presumption that an incoming trustee should be placed in just as good a position in all respects as the outgoing trustee (and thus, if the retiring trustee has information or documents about the administration of a trust, he must normally make these available to the incoming trustee), nevertheless the court has a discretion as to whether specific documents or information are to be supplied in a particular case.[36] Basel did not argue nor did the court deal with any issue that the legal advice was privileged as against Equity; however such an argument may (if the thesis of this article is correct) have failed on the basis of an absence of confidentiality between Basel (as former trustee) and Equity (as successor trustee not involved in the previous litigation).

In the event the Jersey court decided that Basel had not discharged the onus of showing that the legal advice could not be of assistance to Equity in relation to the need to satisfy itself that the trust had been properly administered. The court said that substantial sums were spent on the legal advice and that it is entirely proper for an incoming trustee to wish to satisfy itself that these sums were reasonably and properly incurred; and that although the principle of Basel being reimbursed for its legal fees out of the trust fund could not be questioned (given the previous court order as to costs), there may be issues as to quantum. Disclosure was therefore ordered. One might have thought that such quantum issues would be better dealt with by a process such as taxation (or assessment) of costs, but that is not material here.

Disclosure of reasons

The thesis of this article may be tested by considering the position of communications which may disclose a trustee's reasons for a decision.

34. Lewin on Trusts (n 2) at 23–97 citing *Tiger v Barclays Bank* [1952] All ER 85.
35. [2012] JRC 006.
36. Holding that the position was accurately stated in Lewin on Trusts (n 2) at paras 23–97, 23–98 and 23–99.

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Under the court's supervisory jurisdiction (the *Schmidt v Rosewood* jurisdiction) a trustee exercising a discretion is not in general obliged to disclose its reasons for a particular decision,[37] and disclosure will not be ordered by the court of documents (including legal advice) containing reasons for the trustee's decision.[38] But this rule does not exclude the obligation under Part 31 CPR to give disclosure in litigation seeking to impeach the validity of trustee's actions.[39] If as part of the administration of the trust the trustee takes legal advice (paid for from the trust fund) as to a decision and in so doing tells the lawyer his reasons for the decision, is that communication vulnerable to Part 31 disclosure by a beneficiary or is it privileged? If the basis for the rule against disclosure of reasons is the confidentiality of reasons from beneficiaries, but the communication is not privileged, this would undermine the thesis of this article. The basis for the rule therefore needs to be considered.

The rule against disclosing reasons is well established; however the precise grounds for the rule are uncertain.[40] Various grounds for the rule were suggested by the Court of Appeal in the leading case *Re Londonderry's Settlement;*[41] but the only judge in that case to mention 'confidentiality' as a ground was Danckwerts LJ who had already agreed with Harman LJ, and Harman LJ had not referred to, and therefore it appears that the Court of Appeal was not relying on, confidentiality as a ground for the rule.[42] The rule against disclosing reasons is easily explained on other grounds[43] relating to the efficient administration of a trust and confidentiality as a ground is not required. Equally it appears that the rule is not absolute, as the court has discretion under the *Schmidt v Rosewood* jurisdiction to order disclosure of documents disclosing reasons,[44] which one would not expect to be the case if the documents were confidential as against beneficiaries. On this basis communications disclosing reasons are not confidential, and are therefore not privileged, as between trustee and beneficiary, and a beneficiary could obtain Part 31 CPR disclosure of communications containing them. This position is not inconsistent with the thesis of this article.

Beddoe application

In connection with a *Beddoe* application a trustee normally discloses his legal advice, both to the judge dealing with the *Beddoe* application and the beneficiaries who are parties to that application.[45] In such an application, full disclosure of relevant matters is essential[46] otherwise the trustees will not be fully protected. The thesis of this article is not inconsistent with this principle: so far as communications are not confidential as between trustee and beneficiary then disclosure should be made; if special circumstances exist and they are confidential (and therefore privileged) as between them then the trustee has a choice between waiving privilege (if needed to obtain full protection) or not. Since this is a voluntary choice by the trustee, it does not contradict the thesis of this article.

Analysis of other rationales

Other rationales (mentioned in the introduction to this article) as to a trustee's inability to claim privilege as against the beneficiary are now considered.

37. Lewin on Trusts (n 2) at 29–210.
38. ibid at 29–211.
39. ibid at 29–213.
40. ibid at 29-210.
41. [1965] Ch 918, CA.
42. Although Lord Walker in *Schmidt v Rosewood* [2003] UKPC 26 at para 49 saw Londonderry as considering 'the need to protect confidentiality in communications between trustees as to the exercise of their dispositive discretions, and in communications made to the trustees by other beneficiaries'.
43. Various grounds are set out in Lewin on Trusts (n 2) at 29–210. Another may be the proposition that while the decision will not be disputed in most cases, if reasons are given they will be disputed by someone in all cases.
44. Lewin on Trusts (n 2) at 23–40.
45. ibid at 21–125.
46. ibid at 21–125 fn 28, and CPR Practice Direction 64B at para 7.1.

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Privilege is held for the benefit of the beneficiaries

That the privilege is held for the benefit of the beneficiaries is the reason given by the learned authors of Lewin on Trusts[47] as to why a trustee cannot resist on the grounds of privilege disclosure to beneficiaries of communications. Against that, however, it is respectfully submitted that privilege is not 'property' which can be owned or held, and therefore cannot be subject to a trust. Although referred to as a right,[48] it can also be regarded as an absence of duty. The privilege means that a person is under no duty to disclose the communications to another party, and the other party has no right to require disclosure. Such an absence of duty is not a right which can be sold or realized or turned to account, or asserted so as to place another person under a duty to do something positive which might be for the benefit of the beneficiaries. Nor, it is respectfully submitted, should a 'fundamental human right'[49] be regarded as being held for the benefit of another. If legal privilege is held for the benefit of beneficiaries, then presumably the privilege against self-incrimination should also be so held, however that seems contrary to the decision in *Bishopsgate Investment Management Ltd (In Provisional Liquidation) v Maxwell*.[50] Lewin on Trusts does not cite authority for the proposition put forward, nor does it appear to have been relied on in any of the cases.

It is respectfully submitted that the reason proposed in Lewin relates more to the circumstances in which privilege must be deployed (claimed or waived) by trustees and the extent to which the court would intervene in that issue. If the trustees and beneficiaries have competing interests in such deployment difficult issues may arise. There seems little in the way of authority on this issue. It is submitted that the correct approach should be that if the trustee can claim the privilege as against the beneficiaries (on the basis set out above) then it is an absolute right and the court would not intervene to require disclosure to beneficiaries or third parties (assuming the trustee had not otherwise lost privilege), but to the extent that the trustee does not have privilege as against the beneficiaries (for the reasons outlined above) there is no reason why trustee decisions about such deployment would not be policed by the court in the same way as other administrative decisions taken by the trustee in its capacity as trustee.

A similar point relates to information held by the trustees in their capacity as such. This might not be trust property, nor subject to any privilege, however the court will police any deployment of the information which is contrary to the trustee's duties in relation to same.[51]

Joint privilege

Phipson[52] states that persons who grant a joint retainer to solicitors retain no confidence against one another, and neither can claim privilege against the other for documents generated in respect of the joint retainer, however that either may maintain a claim against the rest of the world and privilege may only be waived jointly and not by one alone. Joint privilege was the basis for the decision in *Schreuder v Murray (No 2)*[53] that the trustee could not resist disclosure to a beneficiary on the grounds of privilege. However, there seem to be two problems with joint privilege as a rationale. First is that there is no joint retainer, as the lawyer is retained by the trustee not the beneficiary. Second is the principle that joint privilege may only be waived jointly and not by one party alone; yet the proposition that a trustee cannot effectively waive privilege in legal advice obtained by it without a waiver also from all the beneficiaries seems strange and there appears to be no authority to this effect; indeed in practical terms in most cases it would be

47. Note 2 above, at 23–45. See also 23–50 which refers to rights to confidentiality being held for the benefit of the beneficiaries as a whole.
48. 'A right not to be required to disclose' is Phipson's (n 7) description at 23–03.
49. (n 1) above.
50. [1993] Ch 1 in which the Court of Appeal held that the privilege against self-incrimination extended to an individual in a fiduciary position from whom his principal was seeking an account of the transactions he had carried out on behalf of the principal.
51. For example, duties of confidentiality (see Underhill & Hayton (n 18) at paragraph 56.31 et seq).
52. (n 7) at 24-01.
53. [2009] WASCA 145 at paras 10 and 94.

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impractical or impossible for the trustee to obtain waivers from the beneficiaries.

Joint interest

Phipson[54] states that even when there is not a joint retainer, privilege may not be claimed between persons who have a joint interest in the subject-matter of the communication, citing cases deciding (by analogy with the trustee/beneficiary relationship) that a company cannot generally claim privilege as against a shareholder. The rule as between company and shareholder is discussed further below, but none of the cases cited in Phipson (nor the cases in relation to the trustee/beneficiary relationship on which they rely) use the expression 'joint interest', nor is that expression easily capable of definition. A trustee and beneficiary appear to have divergent rather than joint interests in litigation between the trustee and a third party, and they are affected by the outcome in different ways; save in so far as wishing to ensure that his conduct of the litigation is not vulnerable to criticism by the beneficiaries (so as to give rise to a breach of trust claim or disallow his recovery of costs from the trust fund) the trustee is (in the more usual situation where there is no risk the trust fund will be exhausted by the litigation) indifferent to the outcome of the litigation, and whether it results in a net loss or gain to the trust fund. On the other hand, the beneficiary class has the economic interest in the outcome of the litigation. That these interests conflict is illustrated by the *Beddoe* procedure, which allows the trustee obtain protection as against the beneficiaries; and the making of a *Beddoe* order reinforces the absence of commonality of interest between trustee and beneficiary, as the outcome of the litigation does not then even affect the trustee from a costs point of view.

Payment from the trust fund

Certain of the cases give as a reason that the legal advice was, or could be, paid for from the trust fund. So it was stated in *Talbot v Marshfield*[55]*:*

> if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any *cestuis que trust* a right to see the case and opinion.

Similar views were expressed in *Wynne v Humberston*[56].

A trustee is entitled, both at common law and under statute, to be indemnified out of the trust property in respect of liabilities properly incurred in connection with the performance of his duties and the exercise of his powers and discretions.[57] If a trustee properly obtains legal advice, he has an indemnity in respect of the consequent expense. There is no reason in principle why a trustee may not take legal advice which is privileged as against beneficiaries, yet it remains an expense properly incurred.

Examples were given above as to situations in which the trustee may disclose to his lawyer information which he may expect would remain confidential as against the beneficiaries, and it was noted that this may promote the efficient administration of the trust. One example was the trustee taking legal advice as to the effect of an illness he may have on administration of the trust. Why should the cost of such advice not fall on the trust fund? It surely helps the administration of the trust to take such advice. Yet if the communication (or part of it) had the quality of confidence, why should it not remain confidential and thus privileged, however it is paid for?

54. (n 7) at 24–01. This is also the approach adopted by Passmore on Privilege as criticised in Steen and Lilly (n 61 at p 73, 74) and B Thanki (ed), *The Law of Privilege* (2006) as quoted in *Schreuder v Murray (No. 2)* (n 53 at paragraph 86).
55. (1865) 2 Dr & Sm 549; (1865) 62 ER 728.
56. (1858) 27 Beavan 421; (1858) 54 ER 165.
57. Lewin on Trusts (n 2) at 21–03 and 21–04.

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The principle of an indemnity for the expense of legal advice does not, it is submitted, answer the question whether privilege exists, and indeed is not referred to in many of the cases (for example the *CAS (Nominees)*[58] case). The fact that advice was paid for from the trust fund will be evidence of its purpose (ie the administration of the trust estate) and can be taken into account by the court in determining a claim by the trustee for confidentiality in relation to same, but it is only one factor and not determinative, and does not preclude the possibility of confidentiality.

For example, a trustee is entitled to have his legal costs of applications to court within the *re Buckton* categories (1) and (2),[59] but there is no authority that in consequence beneficiaries are entitled to have the trustee's legal advice in relation to such applications.

As another example, on the appointment of a new trustee the costs fall on the trust fund (generally, on capital).[60] That will include the cost of legal advice properly taken by the retiring trustee in relation to the change of trustee. That advice should remain privileged as against new trustee and beneficiaries (since the outgoing trustee could expect it to have been taken confidentially from them), yet disclosure of it could not be resisted if payment from the trust fund was the basis for the disapplication of a claim to privilege.

Privilege after disclosure

If a trustee cannot resist on the grounds of privilege disclosure of legal advice to a beneficiary, what is the privileged status of the advice in the hands of the beneficiary if there is later litigation between trustee and third party, the legal advice in the hands of the trustee is privileged from disclosure to the third party, but disclosure of the legal advice is sought by the third party from the beneficiary?

This question has two parts: (i) the effect of the disclosure to the beneficiary on the privileged nature of the advice in the hands of the trustee and (ii) the privileged status of the copies of the advice in the hands of the beneficiary.

In relation to the first part of the question, the thesis of this article explains why the communications in the hands of the trustee remain subject to the trustee's privilege. Disclosure to a beneficiary of communications does not result in a loss of confidentiality (and thus privilege) in those communications, since there was no such confidentiality in the first place between trustee and beneficiary. The communications disclosed remain confidential and therefore privileged as against the rest of the world in the hands of the trustee, and that privilege is of the trustee who alone can waive it. It is submitted that this rationale, rather than common interest privilege as proposed by Steen and Lilly,[61] explains this question. Although Steen and Lilly suggest that disclosure to a beneficiary of the trustee's legal advice may result in a waiver of privilege, it is more appropriate to analyse such disclosure in terms of its effect on confidentiality.[62] The argument in favour of loss of privilege would be that disclosure is inconsistent with confidentiality, however as seen above there is no confidentiality in the first place to lose. It would be sensible to demonstrate that the disclosed communications remain confidential in the hands of the beneficiary as against the rest of the world by recording the purpose for which disclosure was made (ie as part of the duty to account), and by obtaining confidentiality undertakings.

The second part of the question is to what extent can the beneficiary resist Part 31 CPR disclosure to a third party of the communications which have been disclosed by the trustee to him. It would be harsh if a third party could obtain from the beneficiary communications which the trustee could not be obliged to

58. [2002] BCC 145.
59. *Re Buckton* [1907] 2 Ch 406 as summarized in Lewin (n 2) at 21-79.
60. Lewin on Trusts (n 2) at 14–56.
61. P Steen and D Lilly, 'It's a Real Privilege: Common Interests in Trust Disputes' 19(1) Trusts and Trustees 68 (Feb. 2013).
62. Privilege can be waived by putting before the court privileged material. Giving to a beneficiary a copy of the trustee's legal advice does not result in a waiver of privilege as against the rest of the world (Phipson (n 7) at 26–30 relying on *Gotha v Sothebys* [1998] 1 WLR 114).

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disclose to the third party. Steen and Lilly[63] give the example of a trustee who has taken counsel's opinion in proceedings against the trustee's negligent investment advisor, and has given that opinion to a beneficiary. The investment advisor could not, in proceedings between the trustee and the investment advisor, require Part 31 CPR disclosure of the opinion from the trustee. However the investment advisor could seek an order under Rule 31.17 CPR for disclosure by the beneficiary as a person who is not a party to the proceedings. Can the beneficiary resist disclosure under such an order on the grounds of privilege?

Steen and Lilly suggest that common interest privilege applies to communications provided by the trustee to the beneficiary, to allow the beneficiary to assert privilege against such disclosure. Steen and Lilly suggest that this is on the basis that trustee and beneficiaries have a common interest by virtue of the trustee's equitable obligation to act for the benefit of the beneficiaries, although note that the question has never been tested nor the relationship singled out as one to which common interest privilege applies.

A common interest must be in the outcome of the litigation or an aspect of it, which must affect each party as much as the other(s).[64] Considering only hostile litigation with a stranger to the trust, it is respectfully submitted (for the same reasons as those given above as to why trustee and beneficiary do not have a joint interest) that in fact the interests of the beneficiaries and the trustee in the litigation are divergent rather than common.

Further, common interest privilege does not answer the question of whose privilege it is; if each of the trustee and beneficiary can claim privilege does this mean that each can waive it, or that it cannot be waived without the consent of both parties? Each seem wrong in principle, since the trustee obtained the legal advice and should be able to decide how it is deployed (subject to any duties owed to beneficiaries), and Phipson[65] on the second question says that the position is not clear.

If the thesis of this article is correct, then the explanation given by Phipson[66] for certain cases where common interest was invoked seems preferable. This is that where A gives a privileged document to B, and disclosure from B is sought by C, then so long as the document was shown by A to B in confidence, A can prevent the document being disclosed to C. This was the reason for the decision in *Lee v South West Thames Regional Health Authority*.[67] That case related to an application for pre-action discovery of a memorandum prepared by employees of the South West Thames Regional Health Authority at the request of, and which had been sent to, the Hillingdon Area Health Authority with a view to the latter obtaining legal advice on their liability to the plaintiff. The memorandum was admitted to be privileged in the possession of the Hillingdon Area Health Authority but a copy was also in the possession of the South West Thames Regional Health Authority; since the latter had not prepared it in contemplation of litigation against them the issue was whether they could claim privilege. The Court of Appeal refused disclosure by South West Thames Regional Health Authority on the grounds that to order such disclosure would render worthless Hillingdon Area Health Authority's claim for privilege. So the former was allowed to shelter behind the latter's claim for privilege.

It is therefore suggested that if legal advice is disclosed by a trustee to a beneficiary in confidence, it comes with it a right, possibly a duty,[68] to resist disclosure of it by asserting the trustee's privilege (unless the trustee agrees otherwise or, at least, is given an opportunity to object to disclosure) and if the claim

63. (n 61) above.
64. *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223.
65. (n 7) above, at 24–08 on page 735, second full paragraph.
66. (n 7) above, at 24–08, on page 735, third full paragraph.
67. [1985] 1 WLR 845.
68. For example, by analogy with a solicitor's duty (referred to in Phipson (n 7) at 23–20) to assert his client's privilege or an agent's obligation (Phipson 23-29) to assert his principal's privilege.

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to privilege is disputed taking steps to join the trustee in the application for disclosure. In the case of CPR disclosure by a trustee to a beneficiary this may anyway be the effect of the collateral undertaking under CPR rule 31.22 only to use a document disclosed for the purposes of the litigation in which it was disclosed; it is submitted that an equivalent undertaking ought to be implied in respect of documents disclosed by a trustee under the *Schmidt v Rosewood*[69] jurisdiction or voluntarily.

As regards privileged documents disclosed by a former trustee to a new trustee, in the hands of the new trustee the advice remains privileged as against the world at large for the reasons given above. The former trustee may claim that privilege, and on the basis of *Lee v South West Thames Regional Health Authority*[70] and/or as a successor in title,[71] the new trustee may also claim the privilege. As to which of the former trustee and new trustee may waive the privilege it is submitted that each may do so but it may be prudent to consult with the other to ensure the interests of each and of the beneficiaries are taken into account.

The rule in relation to a disclosure of a company's legal advice

The rule, that a company cannot normally claim privilege as against a shareholder, is based in the authorities on an extension of the position in the trustee/beneficiary relationship to the company/shareholder relationship. *CAS (Nominees) Limited v Nottingham Forest PLC*[72] applied this rule as it was stated in *W Dennis and Sons v West Norfolk Farmers Limited*[73]:

> The general rule, which applies equally as between a company and its shareholders and as between a trustee and his beneficiaries is thus stated at pages 518 and 519 of the Annual Practice 1943: 'a cestui que trust . . . is entitled to see cases and opinions submitted and taken by the trustee for the purpose of the administration of the trust; but where stated and taken by the trustees not for that purpose, but for the purpose of their own defence in litigation against themselves by the cestui que trust they are protected . . . on the same principle a ratepayer would be entitled to see cases and opinions taken by the corporation on the subject of rates . . . and so in Gourand v Edison Gower Bell Telephone Co Ltd an action by shareholders against the company, the plaintiffs were held entitled to see communications between the company and their solicitors: but similarly a shareholder could not seek counsel's opinion taken by the company in respect of the matter in dispute between them.'

This rule (the 'company disclosure rule') was regarded by Harman J in *re Hydrosan Ltd*[74] as an application of the decision of the Court of Appeal in *Woodhouse & Co Ltd v Woodhouse*.[75] In that case (as recorded in the *Hydrosan* judgment) it was held that there was a clear exception to the general rule that, where a company takes the opinion of counsel and pays for it out of the funds of the company, a shareholder has a right to see it (the exception being that the rule does not apply where the company has brought an action against the shareholder). As explained by Evans-Lombe J in the *CAS (Nominees)*[76] case:

> [a]s the authorities show the rule is based on principles of trust law, an analogy being drawn between the position of directors as fiduciaries and trustees. As the authorities show directors though not properly described as trustees of the assets of the company within their charge, nonetheless owe fiduciary duties

69. [2003] UKPC 26.
70. [1985] 1 WLR 845.
71. The ability of a successor in title to claim privilege is considered in Phipson (n 7) at 24–04 and ch 23 s 2(g).
72. [2001] 1 All ER 954.
73. [1943] 1 Ch 220.
74. [1991] BCC 19.
75. (1914) 30 TLR 559.
76. [2002] BCC 145.

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to the shareholders which prevent them from applying those assets save for the purpose of the company. Directors are subject to the same duty to shareholders regardless of the size of the company concerned.

The company disclosure rule has been criticized by J Loughrey.[77] A further criticism is that in so far as the company disclosure rule is based on drawing an analogy with the trustee/beneficiary relationship, if the thesis of the present article is correct then such an analogy is inapt. This is because neither a company nor its directors is under a trustee's duty to account as set out above.

It is clear that directors are not trustees as they do not have company property vested in them.[78] Evans-Lombe J in the *CAS (Nominees)* case[79] correctly stated that directors are not properly described as trustees of the assets of the company within their charge, but incorrectly stated that directors nonetheless owe fiduciary duties to the shareholders. A director is indeed a fiduciary, but his duties are owed to the company;[80] in particular a director is not under a duty to account to shareholders.

Nor is a company itself under a duty to account to its shareholders in respect of its property and affairs, save the statutory duties to provide true and fair financial statements and access to certain registers. Such statutory duties are a long way from the duty to account imposed on a trustee, and a shareholder (unless, which would be unusual, the articles provide otherwise) has, outside disclosure in litigation, no right to any further information from or documents of the company.

Accordingly, it cannot be said that there is a duty (either on directors or on a company) to account to shareholders which is sufficient to negative confidentiality in legal advice obtained by a company in the same way as in the trustee/beneficiary relationship. A company should therefore be entitled to have that confidentiality protected by privilege, including as against shareholders.

Conclusion

The thesis of this article provides a rationale for the position as to privilege as between trustee and beneficiary. It is respectfully submitted that it is not necessary to reach for concepts such as joint privilege or joint interest. It is only necessary to realize that in normal circumstances, as between trustee and beneficiary, confidentiality does not exist in relation to the trust affairs, because the duty to account requires transparency. The necessary consequence is that privilege between them does not exist. This is not inconsistent with the trustee's fundamental human rights, because in taking on the trusteeship the trustee has accepted accountability, and, where the trustee has a reasonable expectation of confidentiality in matters which are not important to accountability, that should be protected.

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77. In '*Privileged litigants: shareholder rights, information disclosure and corporate privilege*' JBL 2007, Oct, 778–806.
78. Also, see the comments of Romer J in *Re City Equitable Fire Insurance Co* [1925] Ch 407 at 426.
79. At para 17 of the judgment.
80. Snell's Equity 31st edn at 7-06 fn 17 which notes that 'special circumstances' are needed before a director owes fiduciary duties directly to shareholders; section 170(1) Companies Act 2006; Palmers Company Law 8.2406 et seq; Company Directors: Law and Liability edited by Sinclair, Vogel, and Snowden para 3.2.

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