

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [City Standards Committee]

BETWEEN

BQ

Applicant

AND

CR

Respondent

Decision on matters raised in Memorandum 20 August 2014 from Counsel for the Respondent

The names and identifying details of the parties in this decision have been changed

Background

[1] On 14 August 2014 I issued a Minute in which I recorded matters discussed at the review hearing on 12 August. The Minute recorded the basis on which the review relating to the complaint alleging that Mr CR had failed to provide certain information was adjourned.

[2] Paragraph [4] of the Minute reads:

The information Mr CR shall be obliged to provide in accordance with this Minute is copies of the trust ledgers that Mr CR retains for the entities as requested by Mr BQ.

[3] In a Memorandum dated 20 August 2014 Mr DS has now raised issues of privilege that require to be addressed.

Mr DS' memorandum

[4] In his Memorandum, Mr DS submits that “a very real concern has arisen over privilege”¹ and that “the whole issue of access to the requested documents must be revisited”.²

[5] He goes on to say “[t]he documents which Mr BQ requests are without doubt privileged. That must be so. Privilege is sacrosanct”.³ He cites authority for his submission.

[6] He then moves on to consider who holds the privilege to the information and having provided details as to the status of the entities, and noted that Mr BQ had been adjudged bankrupt, submits that privilege subsists in persons other than Mr BQ.

[7] In short, his submission is that the information requested is the subject of privilege, Mr BQ does not have the legal right to waive that privilege, and Mr CR has a duty to uphold the privilege.

[8] The conclusion to be drawn from these submissions is that the basis on which the complaint about the failure to provide certain information was adjourned, cannot be fulfilled.

The scope of this decision

[9] It is important to note that [4] of the Minute specified that the information Mr CR is obliged to provide is restricted to “copies of the trust ledgers that Mr CR retains for the entities as requested by Mr BQ”.

[10] I have been provided with copies of further correspondence from Mr BQ to Mr CR in which Mr BQ requests copies of documents, settlement statements, authorities and other material. Mr BQ's complaint included the complaint that Mr CR had failed to provide copies of ledgers relating to companies or trusts connected or associated with Mr BQ.⁴ The Minute restricted the scope of the information to be provided to Mr BQ to the ledgers specified, and further provided at [5] that “following...compliance with this Minute this aspect of the review shall be regarded as complete”.

[11] Consequently, I confirm that Mr CR is not obliged in terms of the Minute to provide anything other than the trust account ledgers and the following paragraphs of

¹ Memorandum DS (20 August 2014) at [7].

² Above n 1.

³ Above n 1 at [8].

⁴ Letter [ET] on behalf of BQ to CR (11 May 2012) and letter BQ to Lawyers Complaints Service (21 April 2012).

this decision do not address Mr DS' submissions insofar as they relate to requests by Mr BQ for documents other than the trust account ledgers.

Are Mr CR's trust account records privileged?

[12] I do not consider that Mr CR is exposed to an allegation that he has breached privilege if he complies with the terms of the Minute. Professional privilege exists in relation to communications with a legal adviser for the purpose of obtaining or giving professional legal advice from the legal adviser. However, financial information kept in connection with a trust account is not privileged. The position is discussed in *Cross on Evidence* and is supported by a footnote which reads as follows:⁵

Solicitors' statements and/or bills of costs and trust account records do not, as categories of document, attract legal professional privilege: *Re Merit Finance & Investment Group* [1993] 1 NZLR 152.

[13] That decision was adopted with approval by Heath J in the more recent case of *A Firm of Solicitors v District Court at Auckland* [2004] 3 NZLR 152. In addition, s 393(4) of the Companies Act 1993 specifically provides that financial information contained in trust account records of a solicitor is not privileged.

[14] The other issue that needs to be addressed is who has ownership of the trust account records. Trust account records are kept for the benefit of the solicitor and to comply with the provisions of s 112 of the Lawyers and Conveyancers Act 2006. In my view, a lawyer's trust account records are the property of the lawyer and not the client.

[15] Of course, the trust account records contain confidential information that Mr CR has a duty to protect and hold in strict confidence.⁶ However, if Mr CR had complied with his reporting obligations then this information would have already been provided to Mr BQ.⁷ I do not therefore consider that Mr CR is exposed to any complaint in this regard.

[16] As a further comment in this matter, and I stress this factor is not determinative in my decision, it is difficult to contemplate that any of the parties in whom Mr DS asserts privilege resides, would object to the trust account records being passed to Mr BQ, particularly as he should or would have had that information previously. If Mr CR and Mr DS continue to hold concerns, it would be expected that they could approach the persons whom they consider hold privilege and request that it be waived.

⁵ Dr Matthew Downs (ed) *Cross on Evidence* (looseleaf ed. Lexis Nexis) at [EVA 54.15].

⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Rule 8.

⁷ This statement is not intended to reflect any decision as to whether Mr CR has complied or not with the reporting obligations.

[17] Finally, in this decision, I do not need to address the question of who now holds privilege in documents other than the trust account records, particularly in respect of those documents which belong or belonged to Mr BQ in his personal capacity, now that he is discharged from bankruptcy.

Decision

The direction in the Minute dated 14 August 2014 is confirmed. There should be no need to vary the dates for compliance as in my email of 14 August I indicated that the process of collating the necessary information should continue whilst this matter was addressed. If further time is needed however, all dates for compliance with the Minute may be extended by one week without reference to this Office for an extension.

With regard to Mr BQ's requests for further information I reiterate the comments made in [6] of the Minute.

DATED this 28th day of August 2014

O W J Vaughan
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr BQ as the Applicant
Mr ET as the Applicant's Representative
Mr CR as the Respondent
Mr DS as the Respondent's Representative