Confidences – a question of succession

Rule 9.1 of the *Australian Solicitors Conduct Rules 2012* (ASCR) provides that we must not disclose any information which is confidential to a client and acquired by us during the client's engagement to any person except as permitted in rules 9.1.1, 9.1.2 and 9.2 ASCR.

The duty of confidence continues after the client engagement ends.[1] If the client dies, the duty to maintain confidences endures. The policy reasons for this are articulated by Chief Justice Rehnquist who delivered the majority judgment in *Swidler & Berlin and James Hamilton v United States*[2]:

> "…there are weighty reasons that counsel in favour of posthumous application. Knowing that communication will remain confidential even after the death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."

Client legal privilege is seen as a sub-set of client confidential communications.[3] It is not as broad as the duty of confidentiality, nor does it rest in our conduct rules. The privilege is seen as a fundamental right. The privileged communications are protected from compulsory disclosure unless ousted by statute or waived.

Similar to our duty of confidence the client legal privilege is not ousted by reason of the client's death. The confidences and the privilege vest in the client's personal representatives.[4] As Lord Lindley states in *Bullivant v Attorney-General for Victoria*[5]:

> "The mere fact that a testator is dead does not destroy the privilege. The privilege is founded upon the views which are taken in this country of public policy, and that privilege has to be weighed, and unless the people concerned in the case of an ordinary controversy like this waive it, the privilege is not gone – it remains."

It is for the personal representative or successor in title to waive any confidences or privilege. If a personal representative or successor in title to an interest of the deceased client in specific property chose to waive the confidence or privilege then it is our duty to disclose to that person all relevant information, including notes of the deceased client's instructions.[6]

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[1] *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 49 (Richardson J) ('*Gartside*').

[2] 524 US 399, 407.

[3] Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013), 337.

[4] *Gartside*, 49 (Richardson J).

[5] [1901] AC 196, 206.

[6] *Gartside*, 44 (Cooke J).

Hodson LJ in *Schneider v Leigh*[7] emphasised that client legal privilege is the privilege of the client. His Honour qualified this statement by stating that, "the privilege enures for the benefit of successors in the title to the party to an action, at any rate, where the relevant interest subsists"[8].

What of a client's bankruptcy? How does bankruptcy affect the asserting of client legal privilege? In *Worrell and Anor v Woods*[9], Finn J noted the following:

- at common law a person is entitled to preserve from compulsory disclosure the confidentiality of statements and other materials that have been made or brought into existence for the sole purpose of seeking or being furnished with legal advice or for the sole purpose of preparing for existing or contemplated litigation;

- while the entitlement can be overridden by statute, it is presumed that Parliament would only do so clearly by express words or by necessary implication[10].

The prevailing view is that a trustee appointed to administer the affairs of a bankrupt client is not entitled to assert that client's legal professional privilege unless permitted by statute.[11] The privilege is a personal right of the client and remains with the client.[12]

In *R v Dunwoody*[13], McMurdo P held:

> "whether legal professional privilege remains with the bankrupt is perhaps not beyond doubt. Legal professional privilege is essentially a concept personal to the bankrupt, it is not property. It can only be removed by statute where there are the clearest words or by necessary implication."

Where a corporate client enters into liquidation, the liquidator is the successor in title to the privilege and may waive the privilege.[14] The reason for this approach as compared to the position of a bankrupt client is that the agent which controls the client legal privilege is the company's board of directors, when the company is solvent. Such power passes to the liquidator on insolvency because its function is more analogous to the agency that has ceased.[15]

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[7] [1955] 2 QB 195.

[8] Ibid, 203.

[9] (1999) 90 FCR 264.

[10] *Baker v Campbell* (1983) 153 CLR 52.

[11] Dal Pont, above n 3, 388.

[12] *Re Steele; Ex parte Official Trustee in Bankruptcy v Clayton Utz (a firm)* (1994) 49 ALR 716, 725.

[13] [2004] 149 A Crim R 259, 267.

[14] *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447, 455.

[15] See the reasoning in *Commodity Futures Trading Commission v Weintraub* (1985) 471 US 343, 356-7.