

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

BETWEEN: DRAKE & CO., a Partnership
practising as Solicitors, Barristers
and Notaries at Level 2, Chandra
House, Apia:

First Plaintiff

A N D: ANZ BANK (SAMOA) LTD
(formerly the Bank of Western
Samoa) a duly incorporated
banking corporation having its
registered office and principal
place of business in Samoa at
Beach road, Apia:

Second Plaintiff

A N D: THE COMMISSIONER OF
INLAND REVENUE:

Defendant

Counsel: R Drake for first plaintiff
TK Enari for second plaintiff
The Attorney General, BP Heather, for defendant

Judgment: 6 April 1998

JUDGMENT OF SAPOLU, CJ

This is the latest judgment in a series of judgments that the Court has had to deliver in these proceedings.

Essentially, the relevant facts for the purpose of this judgment are that the first plaintiff is a partnership and law firm of barristers and solicitors; the second plaintiff is the first plaintiff's banker; and the defendant is the Commissioner of Inland Revenue. The defendant in 1997 carried out an inquiry into the affairs of the first plaintiff for the purpose of a review of its tax liability and that of its partners in respect of the years 1991 to 1995 inclusive. In the course of that inquiry, the defendant made several requests to the first plaintiff, its accountants, and the second plaintiff for information considered to be relevant to the inquiry. Included in the information which was sought by the defendant were records, statements and documents relating to client trust accounts kept by and in the possession of the first plaintiff, and records, statements and documents relating to client trust accounts kept by the first plaintiff but are in the possession of the first plaintiff's accountants or the second plaintiff.

The first plaintiff refused to comply with the requests from the defendant and sought an interim injunction and various declaratory orders. The Court has already dealt with and denied the first plaintiff's motion for an interim injunction. Counsel for the first plaintiff has also abandoned all the declaratory orders sought for the first plaintiff except for an order which is in effect to declare that records, statements and documents relating to clients trust accounts kept by the first plaintiff are protected

from production or disclosure by legal professional privilege. The general position of the second plaintiff as indicated by its counsel is that the second plaintiff will abide by any decision given by the Court. I will therefore deal first with the first plaintiff's position.

The remaining issue on which the Court is required to give judgment, namely, the protectability of trust account records in the possession of a solicitor by legal professional privilege, has already been decided by the New Zealand Courts. In the case of *Re Merit Finance and Investment Group Ltd [1993] 1 NZLR 152* the liquidators of a company applied to the Court for an order directing a firm of solicitors to produce client trust account records as well as solicitors' statements of clients' accounts and bills of costs. The clients of the firm of solicitors concerned did not waive privilege and the solicitors therefore raised the claim of legal professional privilege. In dealing with this aspect of the case, Master Kennedy-Grant in the High Court of New Zealand referred to two conflicting views previously expressed in the High Court of New Zealand and then concluded in pages 158 and 159 by saying :

"The essential question in any consideration of whether or not a document is "privileged is, was it brought into existence for the purpose of 'getting or "giving confidential legal advice or assistance?" *13 Halsbury's Laws of "England (4th ed) para 74 and R v Uljee [1982] 1 NZLR 561 at p.570.*

- "I accordingly accept Ms Olsen's third submission that solicitors' statements "and/or bills of costs and trust account records, do not as categories of "document attract legal professional privilege. A particular document or part "of a particular document may attract legal professional privilege as a "communication made for the purpose of getting or giving confidential legal "advice or assistance. If there are any such documents among those of which "production is sought, or any such passages in any such documents, then the

"claim of legal professional privilege must be made in relation to the particular "documents or passages".

The Attorney-General who sought to rely in the present case on *Re Merit Finance* also cited the judgment of Master Kennedy-Grant in the High Court of New Zealand in the subsequent case of *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209 where the learned Master stated at pages 212 and 213 :

"For the reasons stated by me in the *Merit Finance and Investment Group Ltd* [1993] 1 NZLR 152, I hold that trust account records, bills of costs and "statements of account are not privileged by virtue of their nature. They may "contain passages in respect of which privilege can properly be claimed. If "they do, the claim must be made in respect of particular passages in the "individual documents".

I respectfully agree with the view on this aspect of the law expressed by Master Kennedy-Grant. From my own research, I have also not be able to find any subsequent New Zealand case which takes a different view of the law from that expressed in *Re Merit Finance* or *Kupe Group Ltd*. In fact in *Cross on Evidence* (1996) 5th New Zealand edition, the learned editor at p.275, para 10.23 refers to the case of *Merit Finance* with approval. I had also dealt with this question of legal professional privilege in *A & P Cain Ltd v Electric Power Corporation* (C.P. 62/96; judgment delivered on 9 October 1997) where, after referring to a number of New Zealand authorities, I accepted that, as a general principle, information which is given by a client to a legal adviser for the purpose of obtaining legal advice or assistance is protected by legal professional privilege unless the client has waived the

privilege which belongs to him. Given that solicitors' statements of clients' accounts, bills of costs and clients' trust accounts records do not, as categories of documents or by their nature, attract legal professional privilege, the general principle applies to them unless such documents contain passages in respect of which privilege can properly be claimed.

I have also examined the judgments by members of the New Zealand Court of Appeal in the case of *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 which was relied on by counsel for the first plaintiff. It is clear to me that the Court in that case did not make a decision on the question of legal professional privilege in relation to solicitors trust accounts. That question was simply not in issue in that case.

The remaining motion for a declaratory order by the first plaintiff is therefore refused.

I turn now to the position of the second plaintiff. In view of the decision I have reached in respect of the first plaintiff's remaining motion for a declaratory order and the reasons for that decision, I am also of the view that the records, statements and documents relating to trust accounts kept by the first plaintiff but are in the possession of the first plaintiff's accountants or the second plaintiff do not by their nature alone or as a category of documents attract legal professional privilege. If any particular record, statement or document or part thereof contains any passage in respect of which privilege can properly be claimed, then an appropriate application must be made to the Court in respect of that particular passage.

I have also considered section 6 of the Banking Ordinance 1960 in relation to the second plaintiff. That provision provides that on the application of a party to a "legal proceeding" a Court or Judge may, on summons, order that such party may inspect and take copies of any entries in the books of a bank for the purpose of such proceeding. The expression "legal proceeding" is defined in section 2 of the Ordinance to mean any civil or criminal proceeding or inquiry in which evidence may be given, and includes an arbitration. The tax inquiry by the defendant in this case is, in my view, not a "legal proceeding" in terms of the Ordinance. Therefore, section 6 does not apply to this case.

There is another matter. Counsel for the first plaintiff suggested that the defendant should specify the names of the clients whose trust accounts records he wants to inspect. This is not necessary in the present circumstances. In my view, it may not be possible for the defendant to specify the name of any client of the first plaintiff for he may not be in a position to know the names of any of those persons with trust account records, statements or documents in the possession of the first plaintiff or even the second plaintiff. One must not overlook that the defendant's inquiry is a statutory tax inquiry under the Income Tax Administration Act 1974 for the purpose of a review of the tax liability of the first plaintiff and its partners and not of any particular client of the first plaintiff. All that I wish to remind the defendant and the members of the Inland Revenue Department of is their statutory duty of maintaining secrecy of matters relating to the revenue Acts which come to their knowledge.

In all then, I make the following order :

(a) The records, statements and other documents relating to trust accounts kept by the first plaintiff or its partners and are in the possession of the first plaintiff, its partners, its accountants, or the second plaintiff shall be produced to the defendant or other members of the Inland Revenue Department as authorised in writing by the defendant.

(b) Production in terms of paragraph (a) of this order is subject to the right of the first plaintiff to object to producing any particular record, statement or document or any particular part of any particular record, statement or document which is properly protected by legal professional privilege as a communication between the first plaintiff and their client or clients for the purpose of getting or giving legal advice.

(c) Leave is reserved to any party to apply for rulings in respect of any claim of legal professional privilege in respect of any particular record, statement or document or a particular part of any particular record, statement or document or otherwise as may be necessary in connection with the carrying out of these orders.

(d) Production is to be made within 7 days of this order and may be made by way of copies.

(e) Counsel to file memorandum as to costs within 10 days.

TFM Sufala
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CHIEF JUSTICE

Solicitors:

Drake & Co Law Office, Apia for first plaintiff

Kruse, Enari & Barlow Law Office, Apia for second plaintiff

Attorney-General's Office, Apia for defendant