

Unsent Office Cheques Result in Suspension of Practising Certificates

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"INDEFINITELY DEFERRED PAYMENTS" AMOUNTS TO MISCONDUCT

Although the following decision does not relate to any breaches of Trust Accounts monies and fiduciary duties, it does nevertheless highlight the fact that other issues may arise from a routine Trust Account Audit and the law firms and legal practitioners should be ever-vigilant in their legal practices and in dealing with any monies received from clients and paid into a firm's office account.

In a recent decision from the Victorian Civil and Administrative Tribunal (Administrative Division) three experienced practitioners who were the partners in the legal practice were prosecuted by the Legal Services Commissioner of Victoria for incorrect and improper use of monies received from clients.

Three equity partners in a Victorian law firm, Anderson Rice, were guilty of professional misconduct at common law by reason of their firm's dealings with moneys obtained from its clients for disbursements made to third party service providers such as Counsel and expert, providing reports for litigation purposes, etc.

The charges brought against the practitioners include:

Professional misconduct within the meaning of the relevant legislation, namely misconduct at common law, in that the practitioner engaged or participated in a procedure

designed to withhold payment of Disbursement Amounts received in the periods from May 2004 to December 2005, and from December 2005 to June 2007, thereby acting in gross breach of the professional duty to make prompt payment of third party fees incurred in the ordinary course of advising the firm's clients, having expressly sought and obtained payment from each relevant client.

The evidence for the above charges was discovered in a routine investigation into the firm's trust account commenced by the Board. The investigation disclosed that for the periods ending 31 May 2007 and 30 June 2007, office cheques totalling just over \$541,000 had not been presented. A significant number of the un-presented cheques related to money received by the firm from its clients on account of unpaid third party disbursements, predominantly barristers' fees, and received in the period from 28 May 2004 to 19 June 2007.

As at 30 June 2007, the firm had in its possession 216 unsent office cheques addressed to third party service providers, such cheques having been drawn in the period 13 May 2005 to 19 June 2007 totalling just over \$305,000. Each of the unsent cheques had been retained by the firm's accounting staff and /or, alternatively, deliberately not been sent or delivered by the firm's accounting staff to the payee of the cheque. At all material times, this

procedure was a matter within the knowledge of the practising equity partners of the Firm.

Between the Board and the practitioners it was agreed that the charges did not allege that the funds were trust moneys, nor that there was a breach of fiduciary duty, and such issues were not before the Tribunal. The Commissioner conceded for the purpose of the hearing that the relevant service providers were engaged directly by the firm and not in the way that created any contractual obligation as between any client of the firm and a service provider. As a result of this concession, the Commissioner concentrated his charges against the practitioners on the broader proposition that it was professional misconduct for the members of the firm to get in moneys to meet disbursements and indefinitely to defer the payment of the disbursements for which they had been put in funds whether the moneys in question were trust moneys or not.

The effect of the monies being so received by the firm from its clients and subsequently detained for an indefinite period was that the moneys were then credited to the firm's office account thereby reducing the firm's overdraft, moneys were therefore used for the firm's working capital and the firm obtained an advantage by the delay in paying its barristers and third party service providers with the monies received from the

clients for that precise purpose. The longest detention of funds was for a period of over three years.

The practitioners pleaded guilty to the charges. Counsel on behalf of the Commissioner submitted that the guilty plea by the practitioners indicate their admission that they had systematically and persistently acted in gross breach of their professional duty to make prompt payment of fees in circumstances where their firm had expressly sought and obtained from each relevant client payment in respect of each such fee. The Commissioner, sought from the Tribunal Orders to suspend the respondent practitioners' practising certificates for a period of 12 months and payment of the Commissioner's costs of the proceedings.

In response, Counsel for the respondent practitioners submitted that their clients recognised that their actions had been wrongful. The practitioners also provided the Tribunal with a long list of testimonials from a variety of referees. In addition

the respondents submitted that with the charges and proceedings having taken such a long time to proceed through the Tribunal, the partners of the firm have not been able to take any action which would improve the firm's situation by either taking in younger equity partners or merging the practice with another firm. Further, the firm's financial position was delicate and assets had to be realised for repayments of loans, and the firm still had a significant liability to the ATO for arrears in PAYE and GST payments. Counsel for the respondents urged the Tribunal to be lenient and consider a fine and/or reprimand as sufficient punishment for the practitioners so that they can attend to rebuild the firm's fortune to their benefit and to the benefit of their employees.

In conclusion, having considered the submission from Counsel for both parties, the Tribunal ordered that each practitioner's practising certificate be suspended for a period of nine months and pay the Commissioner's costs equally and to a total agreed sum of \$50,000.00. ●

Trust Account Alert.

The Society has received notice from the Law Society of NSW that email scammers are still active.

How does it start?

An innocent email enquiry, in this case relating to family law, from someone living overseas. Cheques are forwarded for settlement monies or for debt collection matters for purported clients and/or their spouses in Australia, Hong Kong, Canada or Japan.

What happens?

The cheque or bank drafts are in foreign currency. We have examples of cheques that have been stolen or are otherwise fraudulent. The cheques arrive at the firm and are deposited and then drawn upon. Even if the cheque is not drawn upon when the cheque is later dishonoured the trust account is debited a different amount due to the difference in buying and selling rates, as well as exchange rate fluctuations. In addition there may be dishonour fees. In the present case, resulting in a deficiency in the trust account of in excess of \$6,000.

What should you do?

DO NOT deposit these cheques into your trust bank account. Any trust funds received under unusual circumstances should not be drawn upon until your bankers have provided written confirmation of clearance of the instrument.

You should also discuss the risks with your bank. ●

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For further information on what constitutes a valid CPD-approved legal email **Suzie Simmons, Editor of *Balance* at publicrelations@lawsocnt.asn.au**