Chapter 7. The Duty to Account

Introduction

[7.05]

This chapter examines some of the principles and issues which have been the focus of the disciplinary bodies and the courts in relation to solicitors' trust accounts. The purpose of the chapter is, therefore, to emphasise some of the more important ethical issues in relation to trust moneys that are developing in Queensland, and in other jurisdictions which have adopted the ASCR. The chapter does not seek to act as a comprehensive guide to practitioners' duties in relation to trust accounts or as a primer in how to operate and maintain a trust account. All practitioners have a duty to be thoroughly conversant with the relevant rules and legislation that regulate the operation of trust accounts and to stay abreast of developments in the law and the way the regulators and disciplinary bodies respond to alleged breaches. This chapter focuses on some of the deliberations and findings of those regulators and disciplinary bodies in recent times, together with some landmark appellate decisions, and considers how they may impact on practice in the contemporary regulatory environment.

Primarily, practitioners should have regard to:

- *Legal Profession Act 2007* (Qld) (LPA), Pt 3.3, "Trust money and trust accounts".[1]
- *Legal Profession Regulation 2007* (Qld), Pt 3, "Trust money and trust accounts". The Regulation largely discusses the recording practices for law practices which receive trust money.[2] Even practitioners who have significant experience in operating, maintaining and supervising trust accounts would be well advised to spend some time looking at each of the specific requirements in the Regulation.
- *Trust Accounting Guidelines: Trust Money and Trust Accounts*.[3]

1 These provisions amended the relevant parts of the *Trust Accounts Act 1973* (Qld) and will replace the Parts of that Act which applied to solicitors' trust accounts (as from 1 April 2008).

2 This replaces those provisions of the *Trust Accounts Regulation 1999* (Qld) which related to solicitors (as from 1 April 2008).

3 Published by the Queensland Law Society (Version 2, updated 30 August 2009): http://www.qls.com.au/For_the_profession/Practice_support/Resources/Trust_accounting_resources/Trust_Accounting_Guide (accessed 24 October 2013).

The prevalence of trust account irregularities

Brief history of misconduct

[7.10]

Although standardisation of trust account requirements across jurisdictions was long overdue and the LPA provisions are drafted in a clear and carefully structured way, there was some scepticism from practitioners in relation to the claim that the new regulatory regime would minimise compliance requirements. There is a body of material and resources which indicate how the legal regulator in Queensland, the Legal Services Commissioner, deals with breaches of trust account duties and what types of breaches are likely to constitute professional misconduct.

Even the most experienced of practitioners would do well to study the relevant legislation and the QLS publication cited above. It is interesting to note that the American Bar Association's equivalent publication, *The ABA Guide to Lawyer Trust Accounts*, contains a self-test for United States attorneys. Lawyers who believe they do not need to read the book are often motivated to do so after taking the self-test. About 39% of those practitioners who were sanctioned in Queensland in the years 2001-2005 were struck off, and the majority of those were for misusing trust accounts. Other sanctions handed down for trust account breaches include fines of up to (so far) $40,000 (and the potential for a maximum fine of $100,000), as well as significant periods of suspension. In fact, research conducted by Linda Haller[1] shows that between 1930 and 2000 in Queensland, 46% of all charges successfully brought against solicitors were for trust account matters, and of these, 22% involved fraudulent use of the trust money, 22% were for unauthorised handling of the money (without fraudulent intent) and 26% involved book-keeping errors and failure to comply with audit requirements etc.

The degree and instances of misconduct, if we consider charges brought before the disciplinary bodies to be a good indicator, have been remarkably stable over time. Between 1930 and 1935, the disciplinary body heard 12 matters which involved trust account breaches and all 12 matters resulted in findings against the practitioner charged. In the five years between 1995 and 2000, the SCT heard 14 matters which involved trust account breaches and all 14 matters resulted in findings against the practitioner charged. A survey of hearings before the (then) Legal Practice Tribunal (LPT) (between 2004 and February 2008) revealed that eight out of 31 matters involved breaches related to trust accounts (about 25%) and of those, all resulted in findings against the practitioner and three resulted in a striking off.[2] Since virtually all breaches of the duty to account (even those that are relatively minor, such as *Ferguson*,[3] discussed at [7.35]) are referred to a disciplinary Tribunal for hearing, it does appear that virtually all improper or inept dealings with trust accounts are likely to lead to a penalty. Given the generally punitive approach to breaches of these duties taken by the disciplinary bodies, the court, the media and the public, it is not surprising that the effect of even a public reprimand in this area can be significant for a practitioner's reputation and professional standing.

1 L Haller, *Solicitors Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis* (2001)

13(1) *Bond Law Review* 1.

2 It should be noted, however, that complaints about trust account irregularities made by clients are not that common. According to the LSC, *2011-2012 Annual Report*, p 57, about 1.8% of inquiries were trust fund-related.

3 *Legal Services Commissioner v Ferguson* [2006] LPT 007.

Adopting the national approach

[7.15]

In the Explanatory Note to the *Legal Profession Bill 2007*, the Attorney-General stated that the aim of the national model laws developed by the Standing Committee of Attorneys-General (SCAG) was to reduce cross-border compliance costs, to remove regulatory barriers to national legal practice and to provide consistent protection to consumers of legal services across jurisdictions.

The new trust account provisions[1] established the way in which Queensland complies with the national uniform approach to trust accounts. The purposes of the model trust account provisions are to:[2]

- ensure that trust money is held by law practices in a way that protects the interests of persons for whom money is held, both inside and outside Queensland's jurisdiction;
- minimise compliance requirements for law practices that provide legal services within and outside Queensland's jurisdiction;
- ensure that the Queensland Law Society (QLS), as the supervising entity, can work effectively with corresponding authorities in other jurisdictions in relation to the regulation of trust money and trust accounts.

Practitioners who breach the duty to account are liable for a range of sanctions and disciplinary measures. The nature of the conduct and omissions involving trust money is such that one breach often leads to another as the error has a flow-on effect. A practitioner who fraudulently misappropriates trust money will virtually without exception (as we shall see below), and regardless of any mitigating circumstances pleaded, be held to be guilty of professional misconduct. A single act of misappropriation will often be followed by an attempt to conceal the misdeed and misrepresentations to clients, auditors, regulators and even courts. Once a trust account irregularity occurs, it needs to be dealt with immediately and in a transparent way, as required by the legislation.

1 LPA, Pt 3.3.

2 LPA, s 236.

The duty to account

Rationale for duty to account

[7.20]

First, it is important to note that s 237 of the LPA provides that trust money is money which is *entrusted* to a law practice:

> ***trust money*** means money entrusted to a law practice in the course of or in connection with the provision of legal services by the practice, and includes –
>
> (a) money received by the practice on account of legal costs in advance of providing the services; and
>
> (b) controlled money received by the practice; and
>
> (c) transit money received by the practice; and
>
> (d) money received by the practice, that is the subject of a power, exercisable by the practice or an associate of the practice, to deal with the money for another person.

"Entrusted" is not defined in the Act, but a definition would add to the impact of the use of the term. Considering the number, and nature of, disciplinary matters with which the professional regulators and courts deal in relation to unethical and unlawful dealing with trust account funds, one might think that the quality of trust which attaches to money received by a firm in this way to be clear and fundamental. The *Concise Oxford English Dictionary* provides that to entrust something to another means to "put something into the person's care" or to "assign a responsibility" when handing over that thing.[1] We can reasonably conclude that trust money, therefore, is not simply money which is given to a practitioner for some purpose or other. The general law has long held that when an agent is entrusted with money for the benefit of another, that the agent then becomes a trustee of that money.[2] The common law has recognised the duty of a solicitor, as a trustee, to account for how money received on trust has been dealt with.[3] It has also been considered by the common law to be a necessary consequence of this duty that practitioners set up and maintain an accurate and transparent accounting system to track and deal with this money, and for partners to exercise personal responsibility and vigilance in monitoring it.[4]

The principle that money held on trust for the client needs to be recorded and tracked in a transparent and accessible way is preserved in, and is the rationale for s 257 of the LPA, which prohibits the intermixing of trust money with any other money (unless authorised by the Law Society):

> (1) A law practice must not, otherwise than as permitted under subsection (2), mix trust money with other money.

Maximum penalty – 100 penalty units.

(2) A law practice is permitted to mix trust money with other money to the extent only that is authorised by the law society and under any conditions imposed by the law society in relation to the authorisation.

It is imperative that practitioners understand that money in a trust account can only be transferred or withdrawn for the same purpose for which it was received, and if it is to be used for any other purpose then the client's written authority needs to be obtained. As we will see later in this chapter, the unauthorised withdrawal of trust account funds, often to the general account for the payment of costs and outlays, is probably the cause of more findings of professional misconduct than any other professional or ethical breach. Section 256 of the LPA provides that:

(1) Money standing to the credit of a trust account kept by a law practice is not available for the payment of debts of the practice or any of its associates.

(2) Money standing to the credit of a trust account kept by a law practice is not liable to be attached or taken in execution for satisfying a judgment against the practice or any of its associates.

(3) This section does not apply to money to which a law practice or associate is entitled.

1 See: http://oxforddictionaries.com/definition/english/entrust (accessed 25 October 2013).

2 *Mann v Hulme* (1961) 106 CLR 136 at 141.

3 *Re Simersall* (1992) 108 ALR 375 at 379 per Gummow J.

4 Personal vigilance has always been a requirement in the sense that the general law has recognised that lawyers may be vicariously liable for the acts and omissions of their employees: *Lloyd v Grace Smith & Co* [1912] AC 716. In relation to the duty to keep transparent accounts, Gummow J in *Re Simersall* (1992) 108 ALR 375 at 380 observed that one of the essential elements of a private trust is that the trustee is subject to a personal obligation to hold and deal with the trust property for the benefit of the beneficiaries, and a necessary incident of that obligation is the liability of the trustee to account to the beneficiaries for his stewardship of the trust property. That being so, a further necessary incident of the control of the trust property by the trustee is the trustee's obligation to keep proper accounts and to allow inspection of them by the cestui que trust.

Importance of duty to account

[7.25]

Given that a desire to bolster and improve consumer confidence in the legal services market is a key rationale in the new regulatory regime in Australia, it is to be expected that the professional regulators may be even more vigorous in the investigation and prosecution of trust account breaches than has been the case previously, and that the disciplinary bodies may well take a more punitive approach than the Solicitors Complaints Tribunal before it (especially given its independence and the inclusion of a lay member). Historically, there was some strident judicial criticism of a perceived inadequacy of penalties, and of the lack of published reasonings behind the sanctions imposed for many of the more serious incidents of professional misconduct dealt with by the Solicitors Complaints Tribunal. Some of this criticism is candidly meted out by Pincus JA in *QLS v Carberry; A-G v Carberry*:[1]

> It is my respectful opinion that, at least in major matters, the Tribunal's practice of stating unreasoned conclusions, when dealing with such a serious question as possible removal of a practitioner, is entirely unsatisfactory. A result of the practice can be that conclusions are reached as a matter of impression, rather than by careful analysis of the details of the evidence. Perhaps the Tribunal members are not adequately paid; for whatever reason they were unwilling or unable to formulate any explanation of the basis of the assertion.

There is ample judicial authority that trust account matters are amongst those most damaging to public confidence and that they will be dealt with as such. In *Law Society of New South Wales v Jones*,[2] Street CJ (with whom Reynolds and Samuels JJA agreed) remarked that:

> Reliability and integrity in the handling of trust funds are fundamental prerequisites in determining whether an individual is a fit and proper person to be entrusted with the responsibilities belonging to a solicitor. Members of the public, many of them wholly inexperienced and unskilled in matters of business or of law, inevitably must put great faith and trust in the honesty of solicitors in the handling of moneys on their behalf. The Court must ensure that this trust is not misplaced.

Of course, the power of a disciplinary tribunal to suspend or strike off a practitioner was a mechanism for public protection (incapacitation), rather than for punishment, long before the enactment of the LPA.[3] In addition to judicial commentary in relation to the perceived empathy of the Solicitors Complaints Tribunal with practitioners in some matters, there is comprehensive research which suggests that the Tribunal took too much account of personal mitigating factors when determining a penalty. Before the convening of the Legal Practice Tribunal (and its subsequent amalgamation with QCAT), for example, there is little doubt that, on both a statistical and conceptual analysis, the SCT imposed suspensions rather than striking off at a rate higher than would be expected if public protection was the overarching rationale informing penalty. Haller concludes that:[4]

> One possible explanation for the high rate of suspension is that the tribunal has operated under a more retributive model than has previously been conceded. In other words, in cases in which the tribunal would otherwise strike a solicitor from the roll, the tribunal may have taken personal mitigating factors into account to spare the individual the greater shame of being struck off. The tribunal may hope that the solicitor will choose to retire from practice voluntarily following the suspension … given the high rate of sole practitioners who appear before the tribunal [60% between 1977 and 2000] the tribunal may believe the effect will be … that it will be difficult for the solicitor to resurrect their practice after a period of suspension.

With the express consumer rights focus of the LPA, we can expect that the QCAT will continue and perhaps further restrict the circumstances under which a mere suspension, rather than a striking off, will adequately protect the public.[5] Suspension is an acknowledgment that the practitioner will be fit to recommence practice at the end of the suspension period and the tribunal needs to be convinced, in imposing a suspension, that this will be the case.[6]

1 QLS v Carberry; A-G v Carberry[2000] QCA 450 at [6].

2 Law Society of New South Wales v Jones(1977) NSWCA 333 at 10.

3 See the judgment of Barwick CJ (with whom all members of the court agreed) in *Harvey v Law Society of New South Wales* (1975) 49 ALJR 362.

4 L Haller, *Waiting in the Wings: The Suspension of Queensland Lawyers* (2003) 3(2) *Queensland University of Technology Law and Justice Journal* 397.

5 For a recent decision in which QCAT considered that a public reprimand, the payment of the Commissioner's costs and the payment of a pecuniary penalty constituted a more appropriate response for a practitioner who misappropriated trust money on three occasions, on the grounds that his physical and mental health were significant circumstances for mitigations, see *Legal Services Commissioner v Wilson* [2013] QCAT 307.

6 *Attorney-General v Kehoe* [2001] 2 Qd R 351.

In what ways is the duty to account most commonly breached?

[7.30]

The Haller study of the 70-year period, referred to above (at [7.10]), classified trust account breaches as fraud, unauthorised trust account moneys in general account (without intent to defraud), failure to account for trust moneys, refusal to release money and other breaches of the *Trust Accounts Act 1973*. A survey of matters dealt with by the disciplinary bodies reveals that this continues to be the case.

In addition to the many positive duties and obligations prescribed by the legislation, the LPA *expressly prohibits* the following practices in relation to trust accounts and trust money:

- a barrister is not, in the course of practising as a barrister, to receive trust money;[1]
- withdrawing trust money from a general trust account other than by cheque – specifically prohibited are ATM and cash withdrawals, withdrawals and transfers by telephone, and electronic funds transfer (except where authorised by the Law Society);[2]

- intermixing trust money with other money;[3]
- causing a deficiency in a trust account (or trust account ledger) or being the cause of a failure to pay or deliver any trust money (where "deficiency" includes the non-inclusion or exclusion of the whole or any part of an amount that is required to be included in the account);[4]
- knowingly receiving or recording the receipt of money for the trust account under a false name.[5]

1 LPA, s 246.

2 LPA, s 252.

3 LPA, s 257.

4 LPA, s 259.

5 LPA, s 262.

Administrative incompetence and lack of diligence

[7.35]

Stress, fatigue and long working hours are commonly cited as reasons for a failure to comply with the record-keeping, accounting and procedural standards expected in relation to trust accounts. Many of the reasons for judgment of the disciplinary bodies suggest some understanding of and empathy with the stresses that can afflict solicitors, especially sole practitioners.

These stresses and circumstances are generally not a matter of mitigation, however, and are acknowledged as the cause of poor, inadequate and sometimes "reckless" or "cavalier" administrative procedures which are held to be the cause of the breaches (rather than any intention to defraud). Penalties for this category of breach usually involve the requirement of an undertaking to complete further relevant training, fines, reprimands and sometimes suspension.

One illustrative matter in which the LPT was prepared to accept personal factors as mitigating to the extent that a breach of the duty to account deserved only a small fine was *Legal Services Commissioner v Ferguson*.[1]

1 Legal Services Commissioner v Ferguson[2006] LPT 007.

Case study: Legal Services Commissioner v Ferguson

Legal Services Commissioner v FergusonIn this case an experienced solicitor was acting for the vendor in the sale of a hotel. The practitioner had received $17,000 from the purchaser as a deposit to be retained in his trust account. About a month later he paid that money to his client without the authorisation of the purchaser. A clerk in the practitioner's office had made the payment believing that the parties to the sale had agreed to its release, despite the fact that the practitioner had not sought a signed release. The purchaser had in fact started to move into the premises and had started operating the business using the vendor's stock, and the vendor had done all the necessary transfers of the liquor licence to the purchaser. Only when the contract fell through did the purchaser discover the transfer of the deposit to the vendor. The purchaser then made a complaint to the Commissioner. The deposit money was immediately repaid once this issue was drawn to the practitioner's attention and the Chief Justice (convening the Tribunal) held that there was no question of dishonesty. Instead, it was a simple case of misapprehension, and therefore unsatisfactory professional conduct rather than professional misconduct. A fine of $1,000 was imposed.

This matter represents what would probably be the least serious breach of the duty that would attract a tribunal hearing, but the fact that it was referred by the Commissioner indicates that any breach of the duty to account is likely to be referred for prosecution, with all the stress and uncertainty that surely holds for the practitioner involved.

Personal factors were also of some application in a matter resulting in a suspension in *Queensland Law Society Inc v Priddle*,[1] in which the court considered the adequacy of a penalty of suspension (and in place of which the QLS sought a striking off) in relation to the failure of a solicitor to adequately manage his trust account.

1 Queensland Law Society Inc v Priddle[2002] QCA 297.

Case study: Queensland Law Society Inc v Priddle

The solicitor was a trustee for a trust (the beneficiaries of which included some of his relatives) which invested trust money from the sale of a rural property. About $85,000 of that trust money, and some of the practitioner's own money, was invested in various companies which were not profitable and the money was lost. Over a period of about 10 years, very few accurate accounting records were kept concerning the way in which the money was dealt with, moved or invested. After a number of attempts by the complainants to uncover the details of the investments, the practitioner told the beneficiaries' solicitors that “his investments and his stewardship had not gone well but he will make sure that nobody loses a cent”. The court agreed with the SCT that the practitioner's conduct in prevaricating about the trust account and other records and in avoiding contact with the beneficiaries was not deceitful or dishonest and that he had not used the trust money for his own purposes. McMurdo P held that “the respondent's conduct seems to have arisen from his difficulty in admitting to his relatives and the Society that his poor judgment was responsible for the loss of a substantial amount of trust money”.[1] Her Honour also considered that an incident in which the practitioner had been held hostage at gunpoint in his city office for 15 hours by a “disturbed gunman” (ending when the solicitor wrestled the gun away from the assailant) was some explanation of the respondent's “grossly unsatisfactory conduct”, as were some other health, financial and marital difficulties.

1 *Queensland Law Society Inc v Priddle* [2002] QCA 297 at [12].

Case study: Williams v Council of the Queensland Law Society Inc

In *Williams v Council of the Queensland Law Society Inc*,[1] the court considered, inter alia, the severity of a suspension of 12 months for a number of trust account irregularities and breaches. The solicitor applicant in the appeal had lodged late audit reports for the previous two years, failed to undertake monthly trust account reconciliations as soon as practicable after the end of each month, received or transferred clients' funds directly to his general account (or disbursed them to third parties without lawful authority to do so) and drew on the trust account when the withdrawal was more than the cleared funds available in the particular account for the particular matter. The amounts involved in all of these breaches were described by the court as “very modest ones” since there had been no pecuniary loss to any of the practitioner's clients and all deficiencies had been restored. In its decision, the Tribunal had clearly described how one mistake or deficiency in administering the account had led to other breaches in a chain of incompetence that snowballed and evidenced what both the Solicitors Complaints Tribunal and the Court of Appeal referred to as “a capacity for recklessness and carelessness”.

The Tribunal remarked that it was obvious that Mr Williams' difficulties were created by his continued and persistent failure to reconcile his trust accounts, to issue receipts, his failure to bank, and his failure to post transactions to trust account ledgers. The practitioner was required to undertake the next Trust Account Module of the QLS Practice Management Course, ordered to pay a $10,000 penalty to the Fidelity Fund, ordered to install and operate a computerised trust account system and given a 12-month period of suspension from practice in the event that he defaulted on any of the terms of the orders of the Tribunal.

The suspension was activated when the practitioner had difficulty in meeting the payment schedule for the fine due to financial difficulties. Although the court appreciated the fact that the practitioner had completed the required training and installed the required computer management system (and the community was thereby somewhat protected from the risk of similar breaches in the future) and, by the time of the appeal, had paid the significant deterrent penalty, the suspension was upheld (although effectively reduced to six months).

1 Williams v Council of the Queensland Law Society Inc[2005] QCA 388.

The Legal Practice Tribunal soon after dealt with another complaint concerning this practitioner regarding an unexplained 15-month delay to take any steps whatsoever in relation to a personal injury matter and of failing to respond to the client despite 42 attempts by the client to contact the solicitor. Considering the fact that the practitioner had consequently sold his practice, and complied with all the other penalties, the Tribunal took the view that if it had been dealing with the matter at the same time it would not have increased the already substantial $10,000 fine. The practitioner was now employed with another firm and the only penalty imposed was a reprimand. The perils of poor practice management and what they can lead to in terms of ethical breaches and penalties are well illustrated by this matter.

Deliberate breaches

[7.40]

Deliberate breaches consisting of unauthorised transfers of money from a trust account to the practitioner's general account, ostensibly for the purposes of covering the client's liability to the firm for costs and outlays, have mostly been dealt with by a period of suspension or a significant fine. In *Legal Services Commissioner v Twohill*,[1] a married couple deposited approximately $44,000 into the practitioner's trust account on the basis that the practitioner would not disperse the money from that account without their written instructions or upon an order from the Family Court. The practitioner transferred funds from this account of about $11,000 into his general account for costs and outlays over an 18-month period. The Family Court subsequently made orders for the distribution of the $44,000 to be held in trust and the deficiency then came to light. The solicitor admitted the breaches, made good the amounts and explained his conduct by saying he had believed the family law issue to have been resolved. There was no argument that the practitioner would have been entitled to those amounts, but the transfers were premature and unauthorised. The court held that this was serious misconduct and a substantial departure from what may reasonably be expected of competent practitioners and was, therefore, professional misconduct. The Chief Justice was concerned that an experienced and well-regarded member of the profession had acted in such a precipitate way and with such lack of judgment. He imposed a $5,000 fine (for both public protection and as individual deterrence) and an order for the practitioner to undertake CLE in trust accounting. The longitudinal data clearly shows that these sorts of unauthorised withdrawals are the most common breaches of the duty to account and the relatively severe penalties imposed indicate that the disciplinary bodies have usually been motivated by a perceived need for deterrence. Considering that these sorts of unauthorised transfers and withdrawals are easily prevented with a competent management system, and an understanding of the straightforward provisions of the relevant legislation, there is really no excuse for such breaches.

1 Legal Services Commissioner v Twohill[2005] LPT 001.

Deliberate fraud

[7.45]

Dishonesty has been given a somewhat narrow, and perhaps at times, generous (to some practitioners at least) interpretation by the disciplinary bodies and courts. In some of the matters discussed in this chapter the court seems to be of the view that avoiding contact with clients and others in an effort to conceal errors and oversights, or to delay admission of them, is not dishonest, and that dishonesty only really occurs where there is some direct pecuniary benefit to the practitioner. There is, however, a fine line between a deliberate lack of frankness, candour, and dishonesty. In *Priddle*,[1] for example, McMurdo P seems to agree with the SCT that the practitioner's conduct in not admitting to the beneficiaries that he had lost their money was "misleading and [he] demonstrated delaying tactics and a lack of frankness", but that[2] this same conduct was "not deceitful or dishonest". It may be that with the stronger focus on consumer protection and on community expectations of lawyer's conduct and standards, this distinction will come under some pressure. Given the high levels of public distrust of lawyers discussed in Chapter 1, one would think that the promotion of scrupulous candour and honesty as a virtue that ought to be synonymous with the practice of law would weigh against such distinctions.

1 *Queensland Law Society Inc v Priddle* [2002] QCA 297 at [8].

2 Queensland Law Society Inc v Priddle[2002] QCA 297 at [12].

Fraud with consequent and related breaches

[7.50]

In the matter of the *Council of the Queensland Law Society Inc v Wakeling*,[1] the Court of Appeal considered an application by the Law Society that orders be given to have the practitioner involved struck off in relation to trust account fraud after the Solicitors Complaints Tribunal had imposed a suspension. The argument related to allegations that the practitioner had fraudulently misappropriated trust moneys in the sum of $14,280.99, belonging to a deceased estate, by paying the money from his trust account into the general account and applying it to his own use and benefit. He had no lawful entitlement to the money and the executors of the estate had not authorised the payments.

The amounts transferred were held to grossly exceed what would have been reasonable for the professional services rendered to the estate. Some months later the practitioner restored the deficiency in the trust account by rendering a bill of costs to the estate for about $10,000 and refunding about $4,000 from the general account.

The estate in question was of modest value and the practitioner had provided an estimate of fees in the range of $2,700 to $5,700. The practitioner at first suggested to the Tribunal that the amount of $14,000 had been arrived at by guesswork and then admitted that it was “wildly out”. The practitioner had also delivered a trust account statement which misrepresented the amounts he had transferred from the trust account and gave an inflated balance. The practitioner conceded in the Tribunal to a charge that this balance had been given “recklessly”. He claimed to have provided accounts to the executors which included work that had not been done and for outlays which did not occur. This claim was unusual given that the administration of the estate was not completed by the dates appearing on the account statements. The executors denied ever being provided with the statements and the practitioner eventually conceded that they had not been sent. In the Tribunal these account statements could not be produced by the practitioner. The Tribunal held that these transfers were made recklessly and pointed to the poor state of his administrative systems at the time of the breaches as adding credibility to this view. The Court of Appeal held (per de Jersey CJ with whom Davies and Williams JJA agreed) that the circumstances:[2]

> plainly warranted the conclusion that the respondent thereby acted dishonestly. It was the only conclusion that was reasonably open. One would entertain a strong suspicion that [the account statements] did not exist at the relevant time … The Tribunal's expression of reasons is scant and rather cryptic, and leaves the reader with no conviction that the broader question [of whether the practitioner had acted

dishonestly] was properly addressed.

The Chief Justice is critical (reminiscent of the strong words of Pincus JA, extracted from another trust account matter at [7.25]) of the apparent reluctance of the Solicitors Complaints Tribunal to canvass what appear to be obvious instances of dishonesty. His Honour cited the High Court ratio in *Fox v Percy*[3] to the effect that an appellate conclusion can be reached where the decision at first instance is so “glaringly improbable” or “contrary to compelling inferences” that the appellate court “must not shrink from giving effect to” its own conclusion. This is even so, the court held, where the judge at first instance has formed a view as to the credibility of a witness. Is there a subtext in these judgments that the previous Tribunal was not tough enough on trust account breaches or inappropriately gave practitioners the benefit of the doubt, when it could, as to the question of dishonesty? Considering the potentially devastating consequences for a lawyer's reputation of a finding of dishonesty rather than just incompetence, was there a perception in these cases that the previous Tribunal was an illustration of lawyers going easy on each other?

It may well be that the approach, deliberations and procedures adopted by the new Tribunal and Commission may more closely mirror that of the court under the old regulatory regime and that, hence, prosecutions for trust account offences may be more vigorous, the conduct of the practitioners involved more closely and sceptically examined and the consequent penalties more severe. If that is so, it will be interesting to observe whether (in conjunction with the new legislative provisions in relation to dealing with trust moneys) there is any consequent increase in the effect of both individual and general deterrence.

1 Council of the Queensland Law Society Inc v Wakeling[2004] QCA 42.

2 Council of the Queensland Law Society Inc v Wakeling[2004] QCA 42 at [7].

3 Fox v Percy[2003] HCA 22 at [29].

Dishonesty-related breaches

[7.55]

Although not examining in his text any of the circumstances of this case, or the published judgments, Dal Pont suggests it is an example where “dishonesty in trust account dealings is demonstrative of the lawyer's general attitude, and so may bring to light other dishonest behaviour”.[1] In the event, other serious misconduct did come to light as a result of the investigation. On one occasion the practitioner admitted to having prepared and filed an affidavit on behalf of a client which he knew to be false. In that affidavit it was sworn that a deceased's last will (over which probate was sought) was dated 29 January 1997. The practitioner knew that the testator had in fact executed another will on 13 December 2002, but claimed that because there was an issue about her testamentary capacity at that later date, there would inevitably be a contest about the validity of the wills. He claimed that this act of dishonesty was due to his being subjected to pressure from the client and that she had “flustered and overborne” him. The practitioner had also misrepresented to the Law Society that he had a diary note provided to him by solicitors for the other side that the testatrix lacked capacity at the time of the later will. Other related breaches and incidents of dishonesty occurred over a two-year period.

Both the Tribunal and the court in this matter accepted expert psychiatric evidence that the practitioner had been suffering from a significant mental illness at the relevant time, related to "a number of events in his personal life which can only be described as highly traumatic" and that this was exacerbated by "major practice difficulties". The Tribunal held that the practitioner's behaviour was not explicable otherwise. But the Court of Appeal[2] held that "those circumstances, disturbing though they are, cannot distract the court from the imposition of the sanction of striking off … having regard to the relevant objective, which is protection of the public". His Honour reflected that the impact for the respondent and his family would be, considering his personal circumstances, "regrettably hard and sad", but that a two-year suspension would not be a sufficient penalty to protect the public.[3]

1 G Dal Pont, *Lawyers' Professional Responsibility* (5th ed, Lawbook Co., 2012), [26.19].

2 *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42 at [25] per de Jersey CJ.

3 For a more recent example, see *Legal Services Commissioner v Wilson* [2013] QCAT 307.

Some key concepts and requirements

Trust money

[7.60]

The core principle of the regulatory regime in relation to trust accounts is the protection of the interests of the persons for whom trust money is held.

"Trust money" is defined, non-exhaustively, in s 237 of the LPA and is quite broad in scope (capturing four types of money), the critical quality being that trust money:

> means money entrusted to a law practice in the course of or in connection with the provision of legal services by the practice, and includes –
>
> (a) money received by the practice on account of legal costs in advance of providing the services; and
>
> (b) controlled money received by the practice; and
>
> (c) transit money received by the practice; and
>
> (d) money received by the practice, that is the subject of a power, exercisable by the practice or an associate of the practice, to deal with the money for another person.

The concept of "controlled money" in s 237(1) is defined as:

> money received or held by a law practice for which the practice has a written direction to deposit the money in an account, other than a general trust account, over which the practice has or will have exclusive control.
>
> *Note* – Section 251(6) prevents pooling of controlled money.

So a firm needs to have a written direction to deposit the money in an account which is not a trust account. This may reduce the risk of a client disputing where their money was to be deposited and gives the client the power to determine which account money is deposited in and for what duration.

A fifth category of trust money is delineated by LPA, s 238 (which relates to investment money). The sort of investment money which qualifies as trust money would be money *already* received by, and entrusted to, the firm as a general trust account, written direction, controlled, transit or specific power money. This money is then to be invested for the ancillary purpose of keeping or enhancing the value of the money (or property) pending completion of the matter.

Investment money is trust money if both the following criteria are satisfied:[1]

- the money was entrusted to or held by the practice in the ordinary course of legal practice, primarily in connection with the provision of legal services to or at the direction of the client; and

- the investment is or is to be made in the ordinary course of legal practice and for the ancillary purpose of keeping or enhancing the value of the money or property pending completion of the matter or pending payment or delivery of the money or property to or at the direction of the client.

The *Trust Accounting Guidelines: Trust Money and Trust Accounts*[2] provide two examples of this fifth category of trust money. They are:

Table 7.1.

Example 1:	Settlement money received by a law practice on behalf of a client who sold a property and that is invested on the client's behalf pending the use of the money in the subsequent settlement of the client's purchase of another property is trust money.
Example 2:	Where funds are received in payment of a rendered account of costs and disbursements and that account includes incurred but unpaid disbursements, then that portion of those funds received for the incurred and billed, but unpaid, disbursements will be considered as trust moneys that must be banked to the law practice's general trust account.

1 *Legal Profession Regulation 2007* (Qld), reg 238(3).

2 Published by the Queensland Law Society (Version 2, updated 30 August 2009), p 8: http://www.qls.com.au/For_the_profession/Practice_support/Resources/Trust_accounting_resources/Trust_Accounting_Guide (accessed 25 October 2013).

Expressly excluded investment money

[7.65]

Other investment money is *expressly excluded* from the definition of "trust money" pursuant to LPA, s 238. This includes:

- money entrusted to or held by a law practice in connection with a financial service provided by the practice or associate of the practice in circumstances in which the practice or associate is required to hold an Australian financial services licence covering the provision of the service (whether or not the licence is held at any relevant time);
- money entrusted to or held by a law practice in connection with a financial service provided by the practice or associate of the practice in circumstances in which the practice or associate provides the service as a representative of another person who carries on a financial services business (whether or not the practice or associate is an authorised representative at any relevant time);
- money that is entrusted to or held by a law practice for a managed investment scheme, or mortgage financing, undertaken by the practice.

If the Queensland Law Society considers that there is a doubt (or a dispute) as to whether particular moneys are trust money for the purposes of the LPA, then s 239 provides that the Society may (subject to any decision of a court made in relation to the money in question) decide whether that money is or is not trust money. The Society advises, in the publication cited above, that "[d]ifficulties will sometimes be experienced in determining whether or not money received should be received into the trust account. If there is any doubt, enquiries should be directed to the Queensland Law Society's Audit Section".[1]

1 *Trust Accounting Guidelines: Trust Money and Trust Accounts* (Queensland Law Society, Version 2, updated 30 August 2009), p 10: http://www.qls.com.au/For_the_profession/Practice_support/Resources/Trust_accounting_resources/Trust_Accounting_Guide (accessed 25 October 2013).

Record-keeping and authorities

[7.70]

The LPA provides that permanent records must be kept in respect of all trust money received by the practice. The Regulations mandate specific procedures for recording the receipt of money, the depositing of money, the transfer and withdrawal of trust money, and for the maintenance of the relevant cash book. The fundamental requirement to keep records is prescribed by LPA, s 261:

(1) A law practice must keep in permanent form trust records in relation to trust money received by the practice.

Maximum penalty – 100 penalty units.

(2) The law practice must keep the trust records –

(a) in the way prescribed under a regulation; and

(b) in a way that at all times discloses the true position in relation to trust money received for any person; and

(c) in a way that enables the trust records to be conveniently and properly investigated or externally examined; and

(d) for the period prescribed under a regulation.

Maximum penalty – 100 penalty units.

The Regulation then makes specific requirements for the specific tasks associated with receiving and managing trust money. It is particularly important for practitioners to carefully examine the following requirements:

• receipting of trust account money	reg 34
• deposit records for trust account money	reg 35
• payment by cheque (ie, the withdrawal of trust money from a general trust account of a law practice by cheque)	reg 37
• the withdrawal of trust account funds by electronic funds transfer	reg 38
• recording transactions in trust account cash books	reg 39
• trust accounts receipt cash books	reg 40
• trust account payments cash books	reg 41
• recording transactions in trust ledger account	reg 42
• journal transfers	reg 43
• reconciliation of trust records	reg 44

Regulation 58 of the *Legal Profession Regulation 2007* deals with the withdrawal of trust money for legal costs. This lengthy provision *must be studied in detail*, but can be paraphrased as trust money that may be withdrawn to cover the legal costs and disbursements which the client owes to the firm where:

1. Before effecting the withdrawal the practice gives or sends to the person a written notice of withdrawal or a request for payment, referring to the proposed withdrawal.

2. The money is withdrawn in accordance with a client agreement which authorises the withdrawal or is withdrawn in accordance with written instructions that have been received by the practice and which authorise that withdrawal.

3. The practice may withdraw trust money for its professional costs where a bill has been given to the client which refers to the withdrawal of trust money in payment of the bill – where either:

   a) the client has not objected to the withdrawal of that trust money in payment of the bill within seven days after receiving (not the date of posting) the bill; or

   b) the client has objected within seven days after receiving the bill but has not applied for a review of the legal costs under the LPA within 60 days after receiving the bill.

It is essential that the practice ensures that the written authorities which clients give in relation to the transfer of costs from the practice's trust account are obtained and then retained safely. As seen in some of the case studies above, even an inadvertent failure to do so can have serious disciplinary consequences.

The records required to be kept by s 61 of the Act need to be kept for at least seven years pursuant to the *Legal Profession Regulation 2007*, reg 59:

> (1) This section has effect for section 261 of the Act for the keeping, in a permanent form, of a law practice's trust records in relation to trust money received by the practice.
>
> (2) The trust records are to be kept for a period of 7 years after –
>
> (a) for a trust record mentioned in paragraphs (a) to (m) of the definition *trust records* in section 237(1) of the Act – the only or the last transaction entry in the trust record; or
>
> (b) for any other trust record – finalisation of the matter to which the trust record relates.
>
> (3) This section does not apply to a written direction mentioned in section 248(1)(a) or 251(1) of the Act.
>
> *Note* – Sections 36 and 49 provide for periods for keeping written directions mentioned in sections 248(1)(a) and 251(1) of the Act.

Powers of associates in relation to trust accounts

[7.75]

Section 243 of the LPA provides for a legal practitioner associate, who is duly authorised, to carry out a number of functions in relation to a trust account, which should have the effect of reducing the reliance on principals for some functions in busy practices.[1] These functions are:

(a) the establishment of a trust account;

(b) the keeping of a trust account;

(c) the payment of trust money into and out of a trust account and other dealings with trust money;

(d) the keeping of trust records;

(e) engaging an external examiner to examine trust records;

(f) the payment of an amount into a prescribed account under section 285;

(g) an action of a kind prescribed under a regulation.

The *Legal Profession Regulation 2007* (Qld), reg 46(2) requires that a law practice must give notice to the Law Society of those associates given authority to sign cheques on the general trust account. Given the frequency with which disciplinary matters relate to breaches of trust account duties that involve a failure to adequately supervise staff, it would seem highly prudent for principals to carefully familiarise themselves with the regulations in relation to associates operating trust accounts and signing cheques.

1 And also note s 243(2): If the legal practitioner associate keeps a trust account in relation to trust money received by the law practice, this part and a regulation made under this part apply to the associate in the same way as they apply to a law practice.