

Left holding the baby? – Disputed funds in trust

Trust balances subject to competing claims remain a perennial headache for callers to the QLS Ethics Centre.

Common scenarios include:

- a joint retainer gone wrong;
- a client holding creditors at bay with an “irrevocable authority”; or
- settlement retentions.

Often a party may assert a claim but then not take any steps to back it up, leaving the solicitor with an expensive and time consuming problem.

In the clearest cases a trustee solicitor may decide a claim is spurious and unilaterally determine to whom the funds should be paid.

This is not something to be done lightly, nor can we necessarily protect ourselves by relying on client instructions. Obligations as trustee and obligations to our client or may be quite distinct and even conflicted.

Some practical tips

Retention at settlement: Disputes over retention monies are common, the time and effort spent resolving these often entirely disproportionate to the sum involved. Hastily drawn letters signed by paralegals that may or may not reflect prior arrangements by telephone are a good recipe for problems down the track.

- accept retention monies as a last resort, and only if the terms are carefully drawn. The agreement should be in writing and signed off by your client and the counterparty.
- the retention agreement should set out what the parties must do, the time by which this must be done and authorize distribution in default.¹

Irrevocable authority to pay from pending settlement funds: usually regarded by the firm as a side issue at the time, this scenario can potentially transfer liability from the client to the solicitor.

- any indication that funds will be dealt with in a certain way can be construed as an undertaking.² Telephone discussions must be confirmed in writing and the terms of any agreement signed off in accordance with the firm’s undertakings policy. If no undertaking by the firm is intended, this must be absolutely clear.
- even if you do not give an undertaking, liability can arise as an agent,³ as trustee of funds (arguably) subject to a third party legal interest or equity⁴ or by knowing assistance in the client’s breach of their own obligations.⁵

¹ Such a standing authority must be treated with caution. See “irrevocable undertakings”, below.

² *Webster v Shueard* [2012] SASC 93.

³ *Grogan v Orr* [2001] NSWCA 114 (2 August 2001), the solicitor was found to be liable at first instance, exonerated on appeal.

⁴ *Barnes v Addy* (1873) LR 9 Ch App 244 (“first limb – knowing receipt”).

⁵ *Barnes v Addy* (note 4) (“second limb – knowing assistance”); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89. See *FTV Holdings Cairns Pty Ltd v Smith* [2014] QCA 217 for a good summary of the different

- an “irrevocable authority” may or may not actually be irrevocable.⁶ The outcome of that determination may have profound effect on the solicitor’s obligations. A solicitor should not suggest (especially to an unrepresented party) that such an authority is adequate – or any – security.

Internal controls prevent mistakes:

- clear policies setting out an appropriate process, backed up by training and regular reminders will reduce the chance of a firm inadvertently being drawn into the dispute.
- transfer funds to a joint trust ledger or take administrative steps to ensure that money subject to dispute, an undertaking or joint trust cannot be inadvertently distributed.⁷

Ok. We did all of that and there is still a dispute. What now?

- if appropriate, advise all parties in writing that the funds in trust do not bear interest, and seek authority to invest them.
- consider ending your retainer with your client, or at least refer them for independent advice.
- if the sum in dispute is modest and the entitlement fairly clear, you may consider the approach suggested on the QLS website in the Trust Accounting FAQ’s [here](#). It is important to note that this process is not a safe harbour from civil liability.
- the new div 2A, pt 3.3 of the *Legal Profession Act 2007* (Qld) provides a safe harbour process for an amount held “for the sale of a lot”. It is not settled whether this provision applies to sums other than deposits, and may not necessarily overcome the problem of an inconsistent undertaking.
- otherwise, consider an interpleader action. Interpleader is an application to the Court for direction made under Chapter 21 of the *Uniform Civil Procedure Rules 1999* (Qld). An example in which the interpleader solved the solicitor’s problem (including an order for costs) see; *Riabkoff v Abenergy Properties Pty Ltd* [2012] NSWSC 724. For the perils of delaying the application, see *Nan v Su & Co (A firm)* [2007] WASC 164.
- Prior to invoking the jurisdiction of the Court, write to the parties and inform them that:
 - you cannot release funds to either without joint authority;
 - if any party institutes proceedings you will pay the funds into Court; and
 - if the parties do not give you a joint authority by a specified date, you will seek the interpleader order and costs. Before seeking such an order you should end any retainer with a party.

David Bowles
Ethics Solicitor
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forms liability may take. For an example of a solicitor being personally liable for following their client’s instructions in a “knowing assistance” case see *Sheather v Staples Waste Removals Pty Ltd (no 2)* [2014] FCA 84.

⁶ *Halsted (Bankrupt) v The Official Trustee in Bankruptcy, in the matter of Halsted (Bankrupt)* [2011] FCA 1242.