



A Practical Approach to Dealing with Trust Funds

Olde & Anor re Propestate Pty Ltd (in liq) [2009] NSWSC 859

External administrations routinely present challenges which demand practical (as well as legal) solutions. A recent example occurred during the Administration and subsequent Liquidation of a former Raine & Horne multi franchise operator in the Hills District of Sydney (“the Real Estate Agency”).

By way of background:

- The Real Estate Agency operated 7 real estate sales and rental trust accounts purportedly in accordance with the *Property, Stock and Business Agents Act 2002* (“the Act”) and was, on our appointment, the trustee of those trust accounts.
- Unfortunately, it was not easy to identify who was entitled to the money held in those accounts as the Real Estate Agency’s records were not maintained as well as they could otherwise have been and there had been withdrawals from the accounts for which the Real Estate Agency had not accounted to its customers.

Our appointment as Administrators was confined only to acting as Administrators of the Real Estate Agency and did not extend to acting as Trustee of the trust accounts. As such, on our appointment, we had 3 options with respect to the trust accounts:

1. Do nothing.
2. Attempt to determine ownership of the trust funds, even though we had no legal obligation to do so.
3. Take steps to arrange the appointment of a replacement trustee who would ultimately only face the same challenges we were facing (with associated costs and delay).

After considering our ethical as well as our legal obligations, we considered it was prudent for us to determine the ownership of the trust funds. Although this obligation fell outside the scope of our appointment, we considered that it was prudent for us to expend time and work investigating the beneficial owners of the trust funds given:

1. The classes of people affected – mum and dad investors relying on rent to service mortgage repayments and vendors/purchasers relying on the deposit to settle the sale/purchase of properties.
2. The pressing demands made by many of the people affected for payment of the trust funds and the time critical nature of the transactions underlying the trust funds.

More information

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After expending considerable time and work identifying the beneficial owners of the trust funds, approximately \$45,000 remained unidentifiable in the trust account. We were unable to identify the beneficial owners of those funds, principally because we received claims of a value greater than that deposited in the account and we were unable to determine which of the claimants had the better claim to the trust funds.

Those claimants were not, however, completely left without a remedy for any misappropriation of their money. They were entitled to bring claims against the Property Services Compensation Fund under Part 10 of the Act as administered by the Commissioner for Fair Trading (“**the Fund**”). In total, the Fund paid \$444,739 in respect of 78 claims.

The unidentifiable balance held in the trust account formed the basis of an application by Somerset Ryckmans on our behalf to Acting Justice Bryson of the Supreme Court of NSW for remuneration in *Olde & Anor Re Propestate Pty Ltd (In liq)* [2009] NSWSC 859. As the funds were not assets of the then Liquidation, we could not seek approval in our capacity as Liquidators. Instead, we made the application to the Court exercising its supervisory powers over trust property and trustees.

The Commissioner of Fair Trading (by way of subrogation to the rights of the claimants who made successful claims against the Fund) and a factoring company to whom the Real Estate Agency factored its debts opposed our application. Neither party was able to assert a proprietary entitlement to the trust funds. Instead, they each contended that it was inappropriate that our remuneration be paid from the trust account on discretionary grounds.

After summarising the background facts, His Honour noted that:

“If liquidators are left to work for nothing, or think they may be, trust funds are unlikely to be managed properly. No-one would be happy to hear that the administrators had learnt that the bank accounts were trust accounts and just left them alone and done nothing about them. I would not be.”

His Honour then observed that:

1. The Court has a general discretion when considering applications for remuneration.
2. In response to an objection about the delay in bringing the application - it was appropriate for us to attend to the practicalities about people’s entitlements to the trust fund before bringing a claim for remuneration.
3. The allowance of remuneration was appropriate and it should be charged against the remaining balance of the trust funds.

In light of recent adverse publicity concerning the conduct of certain external administrators, it was also pleasing for His Honour’s judgment to conclude with the following remarks:

“I do not find anything in what [Taylor Woodings] have done which is significantly adverse to an allowance of remuneration: if anything my conclusion is that their attention to the trust fund and their energy should be commended.”

How Taylor Woodings can assist

Taylor Woodings has extensive experience with formal and informal insolvency assignments. Across all appointments, we work hard to find practical solutions to the challenging situations that we face with the desired aim of maximising returns for all stakeholders.



Some of our recent formal appointments include:

- Acting as receivers of a Real Estate Agency in North Sydney with a significant residential rent roll.
- Acting as administrators and deed administrators of a national e-commerce and vocational training organisation with offices in all state capital cities and which operated through 9 companies, as part of which we worked with all stakeholders to establish a pooled Deed of Company Arrangement for all 9 companies.
- Acting as administrators and liquidators of a high profile vocational education college in New South Wales with more than 35 staff and 500 students, as part of which we worked with Federal and State government and student representatives to find a successful outcome for the 500 students affected by the external administration.
- Acting as receivers and administrators of a number of hotels and licensed clubs across metropolitan and regional areas of New South Wales and Victoria.

Confidential discussion

If you wish have a confidential discussion about any aspect of external administrations, please contact one of our Taylor Woodings partners in Sydney, Perth or Melbourne.

More information

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