

**BEFORE THE IMMIGRATION ADVISERS  
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2012] NZIACDT 30

Reference No: IACDT 010/12

**IN THE MATTER**

of a referral under s 48 of the Immigration  
Advisers Licensing Act 2007

**BETWEEN**

**Immigration Advisers Authority**

Authority

**AND**

**UKFE**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Authority:** C Pille, Department of Labour, Auckland.

**Adviser:** In person

Date Issued: 28 June 2012

## DECISION

### Introduction

- [1] This matter is an “own motion complaint” presented by the Registrar pursuant to section 46 of the Act.
- [2] It is important to make it clear the Registrar is not complaining the Adviser has behaved improperly; rather there has been a disagreement as to the proper procedure for banking and accounting for client funds.
- [3] Each has a reasoned approach as to the proper method, and the Registrar wishes to obtain a determination on the issue from the Tribunal so the position is clear to the profession.
- [4] The parties have agreed that while the procedure of lodging a complaint is not ideal, given that the Registrar has emphasised “there is no concern regarding consumer protection, at issue in this complaint”; it appears to be the most appropriate mechanism for determining the issue.
- [5] In these circumstances, the Tribunal orders that:
- [5.1] The Adviser’s name and any identifying information will not be published.
- [5.2] This decision is fully reasoned and will be published, so the Registrar and the profession have the Tribunal’s determination on the issue.
- [5.3] In terms of the formal disposition of this matter the Tribunal has concluded the Adviser’s position is correct, and the complaint is accordingly dismissed.
- [6] The disputed issue is the treatment of *mixed funds* received by licensed immigration advisers. That is, *mixed* in the sense that a single payment includes both funds the adviser is required to hold as client funds, and other funds that belong to the adviser, for example as payment of fees the adviser is presently entitled to.
- [7] Advisers are required to maintain separate bank accounts for each category of receipt; but when the receipt is a single payment with both components, initially the funds must go into one or other of the two bank accounts.
- [8] The Registrar says the payment is to go into the practice account, and the Adviser says it goes into the client account. Both agree the balance is subsequently transferred to the other account.
- [9] The Tribunal’s view is that the Adviser must pay mixed funds, initially into the client account, and then clearly document the payment of those funds from the account.

### The Disputed Issue

- [10] The disputed issue concerns *client funds*. That is, all funds paid in advance for fees and disbursements, or any other purpose for which the adviser must hold funds.
- [11] When a licensed immigration adviser receives such funds, until they are paid to the adviser as fees, or paid to a third party as disbursements, they are held separate from the adviser’s own funds.
- [12] Clause 4 of the Licensed Immigration Advisers Code of Conduct (“the Code”, found at [www.iaa.govt.nz](http://www.iaa.govt.nz)) provides, in relation to client funds:

“Client Funds

A licensed immigration adviser must:

- a) establish and maintain a separate clients' bank account for holding all clients' funds paid in advance for fees and/or disbursements; and
- b) withdraw funds held on behalf of clients only when payments for fees and/or disbursements fall due; and
- c) use funds held on behalf of clients only for the purpose for which they were paid to the adviser."

- [13] Accordingly, a licensed adviser is required to keep two bank accounts; one of which for present purposes will be described as the *practice account*. That is, a bank account from which the adviser operates their practice. The funds in that account may be used to pay staff, rent, drawings, and the like. The funds belong to the adviser (or the company operating the practice).
- [14] The second bank account will be identified as the *client account*, that is the account identified in the Code as being the one maintained to keep client funds paid in advance.
- [15] Both the Registrar and the Adviser agree on that structure. The point on which they disagree relates to a client who makes a payment of mixed funds; that is to say, a single payment that includes client funds, and funds to which the adviser is entitled (such as payment for fees already due).
- [16] To take a realistic example, a client may make a payment using a single cheque of \$2,000, comprised of:
- [16.1] \$150 paid to cover costs already incurred for an initial consultation.
- [16.2] \$300 paid in advance from which fees payable to Immigration New Zealand will be drawn when a future application is lodged.
- [16.3] \$1,550 paid in advance for future fees expected to be incurred by the adviser.
- [17] Both the Registrar and the Adviser accept a client may pay by a single cheque or bank transfer, without requiring separate payments for client funds, and other money. To do so would inevitably confuse clients in some instances.
- [18] Accordingly, that single payment must initially be deposited into either the practice account, or alternatively the client account.
- [19] The Registrar says the \$2,000 should be deposited into the practice account, and the balance transferred to the client account.
- [20] The Adviser says the \$2,000 should be deposited into the client account, and the balance transferred to the practice account.
- [21] Both agree that using the figures in the example, the \$150 for fees already incurred will be in the practice account and \$1,850 will be in the client account (fees payable in the future to Immigration New Zealand of \$300, and fees yet to be earned by the adviser of \$1,550).
- [22] The Tribunal is required to determine which account the \$2,000 should be deposited into before transferring the balance.
- [23] In some instances, payments are made by internet banking, and the details of the payer may not immediately be known, when insufficient detail is included in the bank instruction.

### **The Parties' Positions**

#### *The Registrar's position*

- [24] The Registrar contends:

- [24.1] The client account is a separate bank account, and it must be solely for the purpose of holding client funds paid in advance.
- [24.2] The client account must be separate from any other business account run by the adviser.
- [24.3] The client account is to be a transparent tool for protecting client funds. If a client account is used for all transactions, then it will be less transparent, and less effective for client protection.
- [24.4] When a payment for both fees paid in advance and fees due is received, then the entire payment should be deposited into the practice account, and fees paid in advance deposited into the client account.
- [25] The Registrar points to clause 4 of the Code, and supplementary Guidelines which the Registrar publishes. In particular, the following provisions of the Guidelines:
- “7. A separate client account is a bank account established solely for the purpose of holding client funds paid in advance. It must be separate from any other business account run by the licensed immigration adviser’s business.
  - ...
  - 14. Fees or disbursements are considered to be paid in advance if the payment is received before the business day the service is supplied or the disbursement is paid. Any payments received on or after the business day the service is supplied or the disbursement is paid are not considered to be paid in advance.
  - ...
  - 21. Your client account should be used for holding payments and disbursements received in advance only. If you both receive payments from your clients in advance and for services already supplied you should transfer to your client account only those funds which are to be held in advance.
  - 22. The purpose of the client account is to be a transparent tool for protecting client funds paid in advance. If your client account is used for all of your client transactions this tool will be less transparent and a less effective mechanism for client protection.”
- [26] The Registrar, through his counsel, elaborated on his reasoning in a submission that responded to a Minute issued by the Tribunal identifying the issues, and potential views.
- [27] The first point was that transparency in banking and accounting for funds is the Registrar’s primary concern. Transparency assists in achieving the primary purpose of the Act expressed in section 3, namely consumer protection.
- [28] The Registrar’s submission was that the client account should not “be used to filter out fees and disbursements into an operation or practice account”, as that did not achieve maximum transparency. However, that submission was not supported by accounting evidence. Further, it did not answer the Tribunal’s concern expressed in the Minute that under conventional trust accounting principles, an initial deposit into a trust account, not a general business account, would be regarded as the optimum one for maintaining transparency.
- [29] The particular concern identified in the Minute was that the disbursement of funds out of a client account involves clearly identified funds, and requires very specific documentation. Whereas, if client funds were initially receipted into a general bank account, the auditing process to ensure that all client funds are accounted for, and transferred into the client account, is an area of risk that is less easily audited.
- [30] The submission also identified the nature of the documentation required in relation to client accounts, and gave context to the Registrar’s understandable concerns. Those matters are discussed below.

*The Adviser's position*

- [31] The Adviser's position is that the Code is consistent with all funds received from clients being deposited into the client account, and any funds due to the practice then being transferred to the practice account. In fact, his view is that only this approach is fully compliant with the Code, not the Registrar's view that the initial deposit of mixed client funds should be placed in the practice account.
- [32] He does accept there can be instances, such as payment of an invoice for services already provided being appropriately receipted direct into the practice account. In such cases, there is no element of "client funds" – it is a payment properly received as the practice's funds.
- [33] The Adviser's position is that the only funds held in the client account will be funds sourced from clients and further, the only payments from that account will be payments made on behalf of clients. Generally, this will comprise either paying fees to Immigration New Zealand on behalf of the client, or payment of fees due by the client by a transfer of funds from the client account to the practice account.
- [34] The Adviser fully accepts the principle that there must be two separate bank accounts and that the client account must never be used by the practice to pay expenses such as staff salaries, rent or other transactions, which are practice (and not client) transactions. The only funds in the client account will be funds sourced from clients, and the adviser must fully document and account for those client transactions as trust funds.
- [35] Accordingly, no fees will be paid out of the client account to the practice account until a GST invoice is raised (where a GST invoice is required), and in any case an invoice meeting the requirements of the Code.
- [36] In relation to disbursements, they are transferred when the payment is made (the documentation varies, as it is not necessarily in New Zealand currency, or paid in New Zealand).
- [37] In relation to the Code, he says:
- [37.1] Clause 4(a) of the Code requires a separate bank account for all client funds, and all funds should be deposited into it, until the adviser can identify and document the practice as being entitled to the funds.
- [37.2] Clause 4(b) of the Code requires a tax invoice to be issued before fees are taken.
- [37.3] Clause 4(c) of the Code requires that all funds be dealt with in accordance with client instructions. Accordingly, until client instructions are documented, giving authority to deal with the funds, they must remain in the client account.
- [38] His position is that full compliance in dealing with client funds can only be achieved by depositing all (or virtually all) funds received from clients into the client account, and disbursing them from there when authorised, and documented.
- [39] He reviewed the Guidelines and addressed clause 21 which contains the direction:
- "If you both receive payments from your clients in advance and for services already supplied you should transfer to your client account only those funds which are to be held in advance."
- [40] His response was that the requirement was met in the case of his practice, as the process involved receiving funds, then creating the records that permit the funds to be allocated to the practice account, and that was invariably after the funds were initially received.
- [41] He also emphasised the requirements of clause 23 of the Guidelines, which require client records that track all transactions for a period of seven years.

- [42] In a supplementary submission, the Adviser referred to the provisions dealing with solicitors' trust accounts. He referred to the Lawyers and Conveyancers Act 2006, and the Lawyers and Conveyancers Act (Trust Account) Regulations 2008. The references demonstrate that for lawyers' and conveyancers' trust accounts there is an imperative to bank all client funds into a trust account when receiving "money for, or on behalf of, any person", and only disburse the funds when authorised. In short, those provisions support the approach he contends for if that statutory regime was applicable.

## Decision

### *Legal status of the client account*

- [43] Before considering the submissions for the parties, the legal status of client funds is material, as that underpins the requirements in the Code.
- [44] Client funds are trust funds, and advisers are required to treat them as such.
- [45] A trust is created when a person has property or rights which he or she is bound to exercise for or on behalf of another person, or to achieve some particular purpose. The person holding the property or right in that way is the trustee.
- [46] Client funds are a clear example. Funds are received from a client, held by the adviser for a particular purpose, and the adviser is required to keep the funds separate from her or his own property.
- [47] An essential consequence of funds being held on trust is that the funds are not property which the trustee holds and may deal with as their own property. The trustee must deal with the funds in accordance with the terms of the trust.
- [48] It follows that receipt of trust funds is not the same as receiving payment, and simply having a debt to be repaid. For example, a bank loan is an advance of funds to the borrower who takes the funds and deals with them, and owes a debt back to the bank.
- [49] If a trustee deals with funds other than in accordance with the terms of a trust that is a breach of trust. The trustee cannot simply make good the liability later and claim to have avoided breaching the trust.
- [50] For example, if a trustee invests funds, say in a finance company deposit, unless that is in accordance with the terms of the trust, or is authorised by statute, there is a breach of trust. It is no answer to say the funds were in fact safe, and the trustee recovered the investment.
- [51] This background is material, as the licensed immigration adviser must deal with the funds in accordance with the terms of the trust, and adds some dimension and perspective to the requirement in the Code that the adviser must not mix client funds with their own funds.
- [52] The terms of a trust will generally be determined from the understanding between the party settling funds in the trust, and the trustee. In the present case, the terms of the Code will be determinative. The advisers are holding themselves out as receiving funds in accordance with the Code, and must comply with it.
- [53] However, there is a further legal imperative to ensure that those funds are dealt with in a manner that ensures the separate nature of trust funds, and the obligations attaching to them are respected.

### *Discussion – best practice*

- [54] As client funds are held on trust, and the Code sets up a regime where all client funds must be deposited into a client account, it is difficult to criticise the system advocated for by the Adviser.

- [55] Given the inevitability of mixed payments, depositing funds into a client account is the prudent approach. If there are mixed funds, ensuring that they are initially deposited into the account designated for funds held on trust is the most prudent option. That is because, for the bank account where trust funds are held, all transactions require written records demonstrating authority to deal with the funds when they are disbursed from the account.
- [56] The Adviser contends full compliance will effectively ensure that there is an interval during which all funds must necessarily remain in the client account until an entitlement to fees is documented (with a compliant invoice), or disbursed to pay other client expenses (and also documented). The exception would be payment of fees on an invoice already raised.
- [57] The Registrar contends that putting all the funds into the client account reduces the value of the client account as a *transparent tool for protecting client funds paid in advance*.
- [58] The difficulty with the Registrar's contention is that when funds are deposited into a *trust account*, then the funds must not be moved from there without the holder of the account having, at the time of the transfer, documentation:
- [58.1] Establishing that the client has given authority for the funds to be moved; and
- [58.2] Recording how the adviser applied the funds.
- [59] When funds are in a trust account, as a matter of basic principle, fund movements into and out of the account are highly transparent, and precisely documented.
- [60] The Registrar confirmed his expectations in relation to documenting client account transactions. The key elements are:
- [60.1] The Adviser must hold a copy of a written agreement authorising the payment of fees for services, and disbursements.
- [60.2] The Adviser must have issued, and kept a copy of an invoice for fees incurred, or disbursements paid.
- [60.3] If the agreement allows it, the Adviser may take fees, even though the work relating to the fee is incomplete.
- [60.4] It is sufficient to maintain the records for each transaction, and there are no specific requirements to maintain *extensive financial ledgers for all accounts*.
- [60.5] One of the Registrar's considerations is the need to have a simple system that is practicable for advisers with limited experience and skills in managing information systems.
- [61] It appears that the Registrar does expect that for each client, the adviser must be able to identify all transactions; and produce both contractual authority for fees, and an invoice for each payment. That is consistent with clause 3(e) of the Code, which requires advisers to maintain *complete client records that track all transactions for a period of seven years*.
- [62] The Registrar's experience is that in practice, client accounts are a repository almost exclusively for Immigration New Zealand fees paid in advance, and held until disbursed. Fees are paid only when the Adviser is entitled to them, so they are not frequently being deposited into, or held in the Client Account.
- [63] It is understandable the Registrar takes the view that depositing client funds into the practice account and transferring Immigration New Zealand fees makes the client account transparent, in the sense it is simple. However, I do not accept it is transparent in that there is a readily audited record of the initial receipt of client funds and a means of ensuring it is clear there is a documented entitlement to the portion of the receipt not transferred to the client account.

- [64] Auditing of client funds is not a requirement, and not something the Registrar will ordinarily undertake. Nonetheless, a purpose of the client account is to ensure that client funds can be accurately identified, and transactions investigated as necessary.
- [65] Where client account deposits are initially deposited into the practice account, an investigation or audit of the client account would need to extend to the practice account. Only then could the investigator determine whether all client funds have been transferred to the client account.
- [66] Ensuring all client funds had been properly transferred from a practice account to a client account may be regarded as a more problematic audit process than having a starting point of all client-originated funds being deposited into the client account.
- [67] Assurance of disbursement of funds from a client account is highly transparent and documented. Identification of client funds in a practice account is less clear.
- [68] The Registrar's approach is understandable, as a significant motivation is simplicity, which is important to achieve compliance.
- [69] The cost of the simplicity is a less transparent system, as client funds are mixed in the practice account, without clearly identified documentation authenticating the transfers to the client account.
- [70] Whereas, if all client receipts go to the client account, the funds only move from that account with clear documentation, the minimum being an agreement and an invoice.
- [71] I accept the Adviser's submission the regime that applies to solicitors' trust accounts is a valid analogy, in that it illustrates best practice. For present purposes, it is sufficient to note section 110 of the Lawyers and Conveyancers Act 2006 and regulation 12 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, supported by other provisions in the legislation, require that:
- [71.1] All funds received for or on behalf of any person must be promptly paid into a trust account.
- [71.2] Full records of the receipt of the funds and banking of the funds must be maintained.
- [71.3] The client's instruction or authority must be obtained for any payment out of the account, and a written record kept.
- [71.4] A specific regime for charging, notifying the client, and then taking fees from the trust account is set out.
- [72] The Adviser correctly says the method he uses to receive, bank and apply client funds would be the only acceptable method were he doing so under the lawyers' and conveyancers' trust account requirements.

*Discussion – the requirements of the Act and the Code*

- [73] Whether the Adviser's method is best practice is not determinative, as he is not governed by the requirements for lawyers' and conveyancers' trust accounts, and the Act and Code may require a different approach to meet the needs of the profession.
- [74] The Code does not prescribe in detail what documentation is required to maintain the client account. Inevitably banking records will provide a good deal of information, and this is underpinned by the requirement in clause 8 of the Code to document fees payable and, significantly, clause 3(e) requires that all transactions must be recorded, and the record maintained for seven years in a form that can be inspected.
- [75] It appears inevitable that it is necessary to maintain records that reflect a licensed adviser is dealing with trust funds when holding funds in the client account; and they must be able to account for those funds and how they dealt with them.

- [76] The Adviser makes two significant points in relation to the requirements of the Code:
- [76.1] Clause 4 of the Code provides the client account is for “all clients’ funds”, hence client funds should not be deposited into a different account.
- [76.2] Where there are mixed funds, putting the whole payment into the client account necessarily ensures client funds come to the attention of anyone inspecting the records of receipting client funds.
- [77] Neither of the competing methods for dealing with mixed funds will produce a record where the practice receives client funds that are not deposited into a bank account, because, for example, an employee misappropriates cash payments. There are separate procedures to mitigate those risks, but they are not apparently relevant for present purposes.
- [78] The Guidelines do expressly state mixed funds should be deposited into the practice account, in particular clause 21 (above para [25]). However, it is necessary to consider the status of the Guidelines. The Code is issued pursuant to section 37 of the Immigration Advisers Licensing Act 2007, which involves a process of Ministerial approval, and publication in the *Gazette*. Accordingly, the requirements of the Code are not negotiable, they must be observed.
- [79] The Guidelines are a valuable communication from the Registrar to the profession, to assist practitioners apply the Code to their practice, the Registrar accepts they do not have a binding legal effect. The Guidelines make it clear the Code itself is the determining provision, noting:
- “These guidelines do not take the place of the code of conduct. All licensed advisers must continue to ensure that they comply with the code of conduct.”
- [80] Accordingly, the Code is mandatory, but the parties are not bound by the Guidelines.
- [81] I am satisfied Clause 4 of the Code, by requiring that **all** clients funds are held in a separate bank account, has the effect of requiring mixed funds to be deposited into the client account, and other funds transferred from there to the practice account. To do so is both best practice, and conforms to the wording of the Code.

### *Conclusion*

- [82] The Registrar has understandably endeavoured to establish a simple regime where compliance is readily achieved.
- [83] There are two ways of dealing with mixed funds, and the Registrar seeks to have a determinative decision as to the correct approach.
- [84] The approach taken by the Adviser, which founds the complaint, is in my view best practice, and cannot be criticised.
- [85] The final question is whether both approaches to mixed funds are acceptable. I am satisfied they are not. Clause 4 of the Code requires that all client funds be held in the client account.
- [86] There are some observations that should be made:
- [86.1] This decision should not be seen as authorising the use of a client account for any purpose other than dealing with client funds, received from, or for, clients. To do so would breach the requirement for a separate bank account. It would be a potentially serious instance of misconduct to use a client account to operate an adviser’s practice.
- [86.2] Advisers must ensure all funds received from clients that have a component of client funds are deposited into the client account. If there are no client funds, for example it is a payment of fees already due and invoiced, those funds may be deposited direct to the practice account.

[86.3] Properly documenting the transfer of funds from the client account is imperative. Every transaction, as a minimum, will have a record of who the client is, what the purpose is, an invoice supporting the payment, and a written agreement authorising the payment.

[87] The complaint is dismissed.

**DATED** at WELLINGTON this 28<sup>th</sup> day of June 2012

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**G D Pearson**  
Chair