

Fraud does not pay

In a recent far-reaching judgment the Supreme Court of New South Wales has confirmed that proceeds of fraud can be recovered from third parties in some circumstances.

The fraudster was the Finance Director of a large hotel and investment group. He was able to forge the common seals and signatures of his employer on borrowing documents for finance deals that his employer knew nothing about. He was then able to divert the proceeds to himself, and then to his friends and associates. When the balloon went up he fled overseas with most of his ill gotten gains.

His friends and associates left in Australia were sued by the finance company (represented by Kemp Strang) for the moneys they had received from the fraudster. The basis of the claim was that the moneys received by the fraudster were effectively stolen moneys which he held on constructive trust for the financier, and that the circumstances in which his friends and associates received part of those moneys would have indicated fraud or breach of trust to an honest and reasonable person.

It was argued that when the fraudster's friends received the moneys they remained impressed with a

constructive trust in favour of the finance company, and that they each were required to account to the finance company for the moneys received.

As is usual in fraud cases, there were many complicated facts underlying the relevant transactions. The defendants had themselves been lending moneys to the fraudster and claimed that the moneys he paid them were repayments of his personal loans.

Justice Simos concluded that the defendants had "wilfully shut their eyes to the obvious"

In his judgment Justice Simos concluded that the defendants were liable upon the basis that the relevant circumstances would have put an honest and reasonable person on enquiry and that their failure to make proper enquiry had not been innocent. They had in effect "wilfully shut their eyes to the obvious".

The decision is of assistance to banks, finance companies and lenders of all kinds where a fraud has been perpetrated on them and the proceeds end up in the hands of third parties who should have suspected that their windfall was too good to be true.

THE KEMP
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BRIEF

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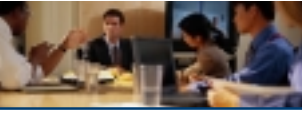


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We give you tips for email combat and an inside view of the Takeovers Panel.



When customers default, Banks must look to all means to protect themselves. Combining accounts (also sometimes called 'setting off', 'blending', 'merging' or 'consolidating') should not be overlooked. It can be a powerful device in a banker's tool kit.

Combining accounts - a powerful recovery tool

A credit balance in a customer's account represents a debt owed by the bank to the customer and conversely a debit balance represents a debt owed by the customer to the bank. If a customer has a number of accounts with a bank, some in credit and others in debit, when the bank combines accounts, it is simply recording the net position between the bank and the customer.

Where does the right arise from?

Banks have a common law right to combine accounts and almost invariably a contractual one. The contractual right is usually contained in the standard operating terms and conditions and/or in its security documents. The upshot is that where a customer has two or more accounts with a bank then it can usually combine the balances at any time and even without notice if necessary.

What limits are there to the right of combination?

Accounts that may be combined must be held by the customer in the same capacity, eg. a trust account cannot be combined with a customer's personal overdraft.

The right to combine accounts can however be negated by an express or implied agreement to keep accounts separate. Courts will usually imply an agreement to keep a fixed loan account and a credit account separate. Standard terms and conditions and security documents of most banks usually overcome this problem by expressly allowing the bank to combine any accounts held for the customer.

Also, the debt owed by the customer to the bank must have arisen as a result of the bank conducting its business as a banker, and not out of other business carried on by the bank.

There are other limitations on the right to combine accounts. For instance, one recent case established that the right of a voluntary administrator to be indemnified out of a company's property for any debts incurred and any remuneration accrued up to the date a bank combines accounts, has priority over a bank's right to combine.

Things to consider:

Banks have a common law right to combine accounts...

- combining accounts would generally only be done in unusual circumstances, probably involving default by the customer. Care needs to be taken before a customer's accounts are combined
- look first for a contractual right to combine the accounts in question. Without it, the bank may not have the right to combine as the situation may be one where the Courts imply an agreement to keep the accounts separate
- ensure there has been no express agreement to keep the accounts separate
- ensure the debts between the bank and the customer were incurred as a result of the banking relationship, and not some other business enterprise.
- check the capacity in which the accounts are held. If in doubt, seek legal advice!

Revolution! Today Australia, tomorrow the world

After an already long gestation period with many complications, the Financial Services Reform Bill, officially targetted to be passed and come into effect on 1 October 2001, entered into yet another round of public policy consultation, stated by the ASIC to deal with administrative issues arising from the Bill. The major hurdle to date has been the constitutional crisis that threatens the Bill's older sibling, the Corporations Law.

According to the Minister for Financial Services, the Hon Joe Hockey, the legislation will revolutionise financial services in Australia, benefiting the 17 million consumers of financial products. It is also tipped to give the financial services industry an opportunity to become a major exporter of services to 3 billion people around the world. Let's hope it can live up to expectations!

The Bill contains over 550 provisions, so no matter what else it does, it should create a lot of work. It proposes a uniform regulatory framework that will apply to all existing financial products and any person carrying on a financial services business. This includes insurance, superannuation and securities dealing.

The reforms are far reaching and likely to affect many clients, not just those directly involved in financial services and products. And don't forget the upcoming extended privacy laws. Here is a taste of what we can look forward to:

- licensing of financial service providers - all persons who carry on a financial services business will need to obtain a financial service provider's licence
- financial service provider conduct and disclosure - minimum standards of conduct will apply to financial service providers when dealing with clients
- codes of conduct - industry participants are encouraged to develop new codes in light of the new provisions
- licensing of financial product markets - licensing will be required where financial products are regularly traded or information about their prices is provided
- licensing of clearing and settlement facilities - this regime will largely mirror those applying to financial product markets.

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Cyber-space takeover battles

Before the CLERP Act reforms came into effect on 13 March 2000, disgruntled takeover targets and bidders raced off to Court. Now they email the Takeovers Panel ...

Tips for email combat

Having survived a few skirmishes before the Panel, we offer the following tips to would-be protagonists:

- combat largely consists of trading insults over the internet - so gear up for hostilities by setting up a group email. For the more important insults, request a "delivery receipt" - it's amazing how brilliant legal arguments tend to go missing in cyber-space.
- usually three members are appointed as "the Panel" for proceedings. Most of your dealings will be with the Panel executive.
- the Panel will issue a "brief" and invite the parties to make submissions and counter submissions via email. Down the track, the Panel will email draft findings for your comment. Theoretically the process should be quick; in practice - as countless emails bounce back and forth - it can take longer than the old style Court hearings.
- just because you have ASIC on side doesn't mean you'll emerge the victor - the Panel is no mere rubber stamp for the corporate watchdog.

- check out the Panel's website at "www.takeovers.gov.au", which has Panel Policies, Panel Decisions and Panel Rules.

Conferences - Panel style

At the start of a Conference recently attended, the lawyers were told not to speak unless they were spoken to. This allowed the Panel to interrogate the clients more efficiently. Before the interrogation, clients were warned that if they lied, they could go to gaol.

As you might expect, it is almost impossible for lawyers to remain silent and quite funny watching them try. This is about the only fun most clients are likely to experience at a Conference. Apart from being bombarded with questions from the three Panel members, the client is unlikely to get costs, even if they win the war. Costs are the exception rather than the rule for Panel proceedings. And remember: if you're not happy with the result, there is no complaining to the Court until the bid is over.

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In upcoming editions of the Kemp Strang Brief, we will be interviewing one of the firm's partners or staff. Our first interview is with Peter Kerr, a senior partner with Kemp Strang's Property and Finance group.

Peter, tell us something about Kemp Strang and yourself.

I became a partner in 1984 and for 17 years have headed up the Banking & Finance Practice Group.

The firm has about 60 lawyers and is of sufficient size to attract high calibre clients and challenging work. The Partners of the firm are committed to encouraging our people to develop their skills, but to also make time for family and other interests.

How do you see Kemp Strang as being different from other law firms?

Kemp Strang's hallmarks are first class legal advice, personal service and a practical approach. The firm culture is different to most large firms we deal with. One of the things we emphasise is that our lawyers take a personal interest in their clients and also in the long term development of the solicitors working with them. Having a rounded life away from the office is always encouraged.

What are Kemp Strang's Objectives?

We want to provide outstanding service and the highest quality legal advice to our clients. If we can achieve these things we will be very pleased.

What are your interests outside work?

My family, of course, and water polo which I have been involved with since I was a teenager. Luckily my family shares my passion for the sport. I am President of the Australia Water Polo Association and serve on the FINA Doping Panel.

You were involved in the recent Sydney Olympics. What can you tell us about your experience?

To give the Judges' Oath at the Opening Ceremony was special. So too was participating as a referee in the sport, as I had done in Atlanta in 1996.

The highlight for me was the victory by the Australian women's water polo team in the gold medal match. The women truly earned the right to participate in the Olympic Games, and to achieve victory 100 years after water polo was first played by men in the Olympics was remarkable.



New Partners

We recently welcomed former partners of Greaves Wannan & Williams - Rob Wannan, Paul Frederick, John Coates AO and Mark Procajlo. Of particular interest is the leading speciality brought in agribusiness and rural law, including water rights. You might be familiar with John Coates as President of the Australian Olympic Committee.

ANZ Appointment

The partners are very pleased that our firm's position to do work for ANZ Bank has recently been confirmed. We will continue to provide the highest quality legal advice based on a close understanding of the Bank's business and requirements.

New Technology

We recognise that electronic communication, collaboration and information sharing can make life easier, especially for our clients. Over the coming months we will be implementing 'infoCommerce', an IT initiative that will allow us to work closer and share information with you electronically.

We will tell you more about our new technology and what it can do in our next Brief.

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