**IN THE COURT OF APPEAL**
**OF SOLOMON ISLANDS**

**(Goldsbrough, JA)**
*Civil Jurisdiction*

**On appeal from High Court Civil Case 327 of 2007**

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| **BETWEEN:** | **SOLGREEN ENTERPRISES LIMITED**<br>*Represented by M. Bird*<br>**First Appellant** |
| **AND:** | **YUNG HUANG FISHERY COMPANY LIMITED**<br>*Represented by M. Bird*<br>**Second Appellant** |
| **AND:** | **KAZUO NGASAWA, HWANG SHU FEN, XU XIU FENG and MARY BAURA**<br>*Represented by M. Bird*<br>**Third Appellant** |
| **AND:** | **NATIONAL BANK OF SOLOMON ISLANDS LIMITED**<br>*Represented by J. Sullivan, QC*<br>**Respondent** |
| **AND:** | **CHARLES KAUKAUI ASHLEY**<br>*Representing himself*<br>**Joined as party to proceedings by order dated 10 February 2009** |

**Date of Hearing:** **9 December 2008, 5 January 2009 and 27 February 2009**
**Date of Decision:** **3 April 2009**

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## Application for orders subsequent to judgment

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1. In Civil Appeal to the Court of Appeal No 2 of 2008 on 4 July 2008 a directions order was made requiring, inter alia, the appellants to pay into court on or before 11 July 2008 a total of $612,750.00 being the admitted debt of $600,000 and security for costs in the sum of $12,750.

2. On 11 July 2008 a cheque drawn on the trust account of the legal practitioner for the appellant was deposited with the Registrar of the Court of Appeal in the sum referred to above.

3. In the week commencing 14 July 2008 the Court of Appeal heard this appeal, and determined that it should be dismissed, awarding costs of the appeal to the respondent. That decision was delivered on 11 August 2008.

4. The Court of Appeal was not told, and the Registrar to the Court of Appeal did not until later discover, that the cheque dated 11 July 2008 was dishonoured by the bank on which it was drawn. There is every reason to conclude that had this information been known to the Court of Appeal, the appeal would not have been heard.

5. The decision by the drawing bank to dishonour the cheque was made on 17 July 2008. The Registrar of the Court of Appeal was not told of this decision until much later in 2008.

6. An application was filed by the respondents to the appeal on 28 November 2008 for the Registrar to pay to them the $612,750.00. In turn the Registrar issued proceedings (Civil Case 36 of 2009) against Mr Ashley based on the dishonoured cheque. That case was settled on 11 February with payment into court to be made by 20 February 2009 by Mr. Ashley of the same sum, each party to that case paying their own costs. That sum of $612,750 has been paid by Mr Ashley and remitted to the respondent to this appeal.

7. On 3 February 2009 an amended application was filed on behalf of the respondents. The orders sought in the amended application are:-

    i. The Registrar pay the sum of $612,750 out of Court to the trust account of the respondent's solicitors within 7 days;
    ii. The appellants pay the respondent's costs of and incidental to this application and the appeal (less $12,750) on an indemnity basis
    iii. and further and/or in the alternative
        a. Charles Kaukui Ashley be joined as a party
        b. Mr Ashley pay
            i. $600,000 to the respondent
            ii. The respondent's costs of the appeal and of this application on an indemnity basis within 30 days of any order.
        c. The Registrar of the Court of Appeal be directed to
            i. Copy the material before the Court in this application and the Court's record of this application including any formal orders and reasons therefore and deliver the same to each of the President of the Court of Appeal, the Chief Justice of the

High Court and the President of the Bar Association by way of complaint and

ii. Deliver a copy of those complaints to each of Mr Ashley and the solicitors for all other parties within 30 days of the making of an order in that regard

iv. This application be certified for two counsel

v. Such further orders as the Court thinks fit.

8. In the course of hearing the application referred to above several orders have been made. In particular, an order was made *inter partes* on 5 February 2009 that Mr C. A. Ashley (trading under the firm name or style of A & A Legal Services) be joined as a party. By this time the original appellants had filed notice of change of advocate.

9. By virtue of the order made on 27 February 2009 in Civil Case 36 of 2009 the original sum of $612,750 has been paid over by the Registrar following receipt of same from Mr. Ashley. It therefore follows that the first order sought in (as set out in paragraph 7 above) is no longer pressed in this matter. What remains is the question of costs on the appeal, the costs on this application, interest payable on the amount ordered to be paid by 11 July 2009 but not actually paid over until 27 February 2009, the basis for costs and quantum.

10. The evidence in this application from the appellants comprises:-

    i. Order for security 4 July 2007
    ii. Court of Appeal judgment 11 August 2008
    iii. Amended application of 3 February 2009
    iv. Affidavits of Kingmele dated 28 November 2008, 4 and 25 February 2009
    v. Affidavit of Katahanas dated 27 February 2009
    vi. Affidavit of Nagasawa dated 20 February 2009 filed in civil case 35 of 2009
    vii. Evidence under subpoena from Ben Patrick Anderson, ANZ bank officer
    viii. Evidence under subpoena from Patrick Suiti, ANZ bank officer.

11. No evidence in this application was produced by the appellants; in any event the affidavit of Nagasawa dated 20 February 2009 was before the court. Evidence from Ashley comprised his affidavit of 13 February 2009, on which leave to cross examine was granted.

12. Little is in issue within this application. The cheque was drawn on the trust account, it was dishonoured. The appellants had not paid the full amount to their legal practitioner. They had paid an amount, inter alia, of $112,750 to their legal practitioner prior to the appeal hearing. The legal practitioner has by now paid the $612,750 on the dishonoured cheque to the Registrar. No-one informed the Court of Appeal of the failure to pay security and the agreed debt as ordered prior to the appeal. Any party aware of the failure, in particular any legal practitioner, was so obliged. So much is not in issue in this application.

13. In issue is when the legal practitioner for the appellants became aware of the default. The cheque was presented to the paying bank on 16 July 2008 and dishonoured on 17 July 2008. In his evidence Mr. Ashley denied knowledge of the dishonour until being told by the Registrar of the fact in October 2008. Whilst in his affidavit he did not state that this was the first time the fact of dishonour became known to him, in cross examination he replied to questions indicating that between July and October 2008 he was not aware of the dishonour. This is in contradiction of evidence from the paying bank, from two officers and from the documents produced by the bank under subpoena. From the documentary evidence it is clear that a charge was made by the bank at every month end in July, August and September 2008 for the provision of bank statements. From the documentary evidence a charge was made by the bank on 15 July 2008 for provision of a statement. That same day a deposit was made into the account in the sum of $50,000, which is the same amount in cross-examination Mr Ashley agreed represented one half of the $100,000 he had been given by his client.

14. Oral evidence from Suiti was received to the effect that on 17 July 2008 he took part in a telephone conversation from the bank to a mobile telephone number provided by Mr Ashley's office. The person who answered the telephone identified himself as Mr Ashley. A discussion ensued over the impending dishonour and resulted in a proposal from the bank customer to make a deposit before 12 noon. At 1300 hrs and with no deposit, the cheque was dishonoured. In cross examination the mobile telephone number called was sought, that question being answered as 97306. No further questions were asked in cross-examination as to the alleged conversation. It was not put to the officer that he may be mistaken or was being deliberately dishonest in making the allegation. No further evidence was called on the telephone conversation in response.

15. Given the evidence I am satisfied that the conversation as described by Suiti took place, and that statements recording the dishonour were despatched to the customer in July 2008. I then conclude that Mr Ashley knew of the impending dishonour prior to it actually taking place on 17 July 2008, that an offer was made by him to deposit prior to 12 noon, which deposit never took place, and that the dishonour was confirmed in the statement sent to Mr Ashley at the end of July 2008. I can make no finding that Mr. Ashley saw that statement but that does not go to show anything other than, if indeed he did not see and check that statement, his trust account and his clients are even worse off than one might first consider. I am satisfied of the above not only on the balance of probability required within civil proceedings, but beyond reasonable doubt.

16. I further note, and this was not out in issue by Mr. Ashley, that his client trust account was already overdrawn by 14 July 2008. This is not directly relevant to these proceedings, but it demonstrates the flaw in the way Mr. Ashley handles his trust account. There can be no other finding than breach of trust if a legal practitioner's client trust account is overdrawn. By the ordinary definition of same, a safe place where the funds of clients are held pending disbursement for legitimate expenses or billed costs, a client trust account cannot be overdrawn.

17. On the issue of what was paid to Mr Ashley by the client, the appellant in these proceedings, it is clear that this amounted to a total of $112,750. This accords with the evidence both of Nagasawa and Ashley. There is an issue as between the two of them as to what this money was to be applied to. Mr Ashley contends that he could apply it to his unpaid bills, although there is no evidence from Mr Ashley as to those bills, or even if they were ever issued. Absent that evidence, I conclude that the whole of the money from Nagasawa and or his associates was destined to be applied to the impending appeal and not to settle any account Mr. Ashley might chose to apply it to.

18. The respondent bank was never going to receive the $612,750 that was ordered to be paid by the appellants prior to trial before that appeal, this is now clear even when the appellants agreed to pay it before the order was made against them. At best, if Mr. Ashley had not otherwise converted the money paid to him by his clients, they would have received $112,750. I understand the submission by the respondents that Mr Ashley should pay the interest foregone on the total amount, in that the appeal should not have been heard, but I do not accept the submission. One of the reasons why I do not accept that submission is that, even if the appeal had been dismissed for failure of the appellants to comply the respondent bank would still have been obliged to pursue the appellants for their money. Interest foregone on the balance must be paid by the appellants, interest foregone on $112,750 until date of payment is ordered against Mr. Ashley. That interest is calculated at the respondent bank default rate and I agree that it is the appropriate rate on which to base this part of the order, and note that it was not put in issue by counsel. I also do not overlook that Mr. Ashley has now paid the total in Civil Case 36 of 2009 without having first received that amount in total from the client.

19. Costs of the appeal were ordered to be paid by the appellants. Costs of the appeal are submitted to be $102,270. This amount was not put in issue by counsel now representing the appellants. The costs to be paid on the appeal are therefore assessed to be $102,270. I order that they be paid within 30 days from the date of delivery of this judgment.

20. Costs of this application are a different matter. They are sought on an indemnity basis, rather than on a standard basis. Again the amounts claimed have not been put in issue by counsel for the appellants or by Mr. Ashley. They are claimed both against the appellants and in the alternative against Mr. Ashley. Mr Ashley simply submitted that no orders for costs should be made against him.

21. It is worth noting at this point that in Civil Case 36 of 2009 Mr Ashley filed a third party notice against his former clients on 9 February 2009. Particulars of that claim have not yet been filed.

22. This application would not have been necessary had Mr. Ashley not issued a cheque that he had no funds to cover. It was wrong of him to draw a cheque on his client account without knowledge that he had funds from the client to cover the amount. In this event the cheque was dishonoured. One perhaps

could say that this was fortunate, for were it to have been otherwise, the funds, not having been received from the client, would have come from the deposited funds of other clients. Consideration also needs to be given to Mr. Ashley's duty to the court. Drawing a cheque on his client account is a representation to the court that he had cleared funds in that account.

23. Whilst counsel in opposition did not make submissions on whether indemnity costs are indicated, I must still be satisfied that they are so indicated. I do so in this instance because of the dishonest behaviour of counsel referred to above. Even were it the case that the legal practitioner had been told by his client that a deposit was to be made into his client account (see paragraph 3 of the affidavit of Ashley dated 13 February 2008) he could not in honesty draw a cheque on his client account without first ensuring that the deposit had been made. He could not, in all honesty, maintain that he was unaware until October 2008 the cheque had been dishonoured, without making admission that he failed to administer the funds in his client account with any diligence.

24. Costs of the application are therefore ordered against Mr. Ashley on an indemnity basis in the sum of $244,690.11.

25. Given these orders it must be clearly understood, and I note that it is accepted in submissions, that credit must be given to both Mr Ashley and to the appellants by the respondent bank for payments made by the one or the other to the respondents. That proviso applies to all of the financial orders contained herein.

26. As to the orders sought regarding reference of this matter to the various persons referred to in paragraph 3 (c) (i), I decline to so order. I do, however, order, not on the application but because I regard myself as obliged to do so, that the conduct outlined in this judgment be brought to the attention of the Chief Justice so that he may consider institution disciplinary proceedings under the Legal Practitioners Act (as amended). No reference to the President of the Court of Appeal is presently necessary and the Bar Association will be aware of this judgment through distribution.

27. The judicial process in this jurisdiction relies heavily on the integrity of counsel appearing before it. Before they are licensed, legal practitioners must undergo training. Following that they are admitted to practice. Each year they renew their practising certificate they declare themselves to be fit and proper person to be regarded as legal practitioners. Being a registered legal practitioner brings many rights and responsibilities. Principally it brings the right to charge members of the public for services in representing them in court proceedings. It is a right to earn money when others cannot do so. With that right comes a responsibility to act in an honest and ethical way. In this instance it appears to this court that a legal practitioner has behaved neither with honesty nor with due regard to the ethics of his profession.

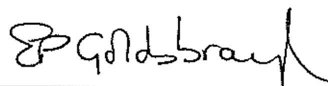
28. There appears to me to be grave consequences for the administration of justice in this jurisdiction if it be the case that such behaviour on the part of legal practitioners is permitted. Whilst it is presently the case that there exist no

rules made under the Legal Practitioners Act covering the creation and handling of client trust account, there is ample authority at common law relating to money held by another for a specific purpose[1]. Those rules have been ignored in this instance. It is a matter for the Solomon Islands Bar Association in the first instance to ensure that its members understand these rules, and for the same Association to take the lead in determining whether rules are required specifically for this jurisdiction. I can do no more than encourage such a consideration by the Bar Association and perhaps a shift from their focus on dress standards to a more substantive and holistic approach.

29. The orders of this court are therefore:-

1. The appellants pay costs of this appeal in the sum of $102,270 within 30 days from the date hereof.
2. Interest foregone on $612,750 from the due date until the hearing of this application is in total $67,293.38 payable to the respondents in the sum of $54,910.96 by the appellants and in the sum of $12,382.40 by Mr. Ashley both amounts to be paid within 30 days.
3. Costs of this application in the sum of $244,690.11 to be paid by Mr. Ashley within 30 days.
4. Mr. Ashley's conduct in this matter is referred to the Chief Justice under section 8A Legal Practitioners Act as amended as a complaint on conduct.

Dated this 3rd day of April 2009



Goldsbrough, JA.

[1] See Lord Wilberforce in Barclays Bank v Quistclose Investments Ltd [1968] UKHL 4 (31 October 1968)