

# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**THE TRUSTEE FOR THE DRB GROUP ACT TRUST v CANBERRA  
HYDRALIC ENGINEERING SERVICES PTY LTD (Civil Dispute) [2022]  
ACAT 30**

**XD 811/2021**

**Catchwords:** **CIVIL DISPUTE** – debt recovery action – email generated invoice altered by third party - amount paid based on bank details in altered invoice – correct invoice never received – fraudulent invoice – email scam ‘phishing’ – which end of transaction did fraudulent activity occur – debt left undischarged – respondent liable

**Cases cited:** *David Securities Pty Ltd & Ors v Commonwealth Bank of Australia* (1992) 175 CLR 353  
*Young v Queensland Trustees Ltd* (1956) 99 CLR 560

**Tribunal:** Senior Member K Katavic

**Date of Orders:** 8 April 2022

**Date of Reasons for Decision:** 8 April 2022

AUSTRALIAN CAPITAL TERRITORY )  
CIVIL & ADMINISTRATIVE TRIBUNAL ) XD 811/2021

BETWEEN:

**THE TRUSTEE FOR THE DRB GROUP ACT TRUST TRADING AS  
RAPIDCLEANDRB AND DRB EQUIPMENT REPAIRS**  
Applicant

AND:

**CANBERRA HYDRAULIC ENGINEERING SERVICES PTY LTD ACN 113  
220 581 TRADING AS CANBERRA HYDRAULICS**  
Respondent

**TRIBUNAL:** Senior Member K Katavic

**DATE:** 8 April 2022

### **ORDER**

The Tribunal orders that:

1. The respondent must pay the applicant the sum of \$5,829 comprised of:
  - (a) \$5,499 for the debt; and
  - (b) \$330 for the ACAT filing fee.

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Senior Member K Katavic

## REASONS FOR DECISION

### Introduction

1. The relationship between the parties in this matter began as a simple purchase of goods. What transpired serves as a cautionary tale for businesses and consumers using electronic platforms to send invoices in an age of frequent cyber fraud and email scams or ‘phishing’.
2. The applicant commenced civil dispute proceedings in the tribunal seeking recovery of a debt owed by the respondent for the purchase of a machine. The respondent denies liability on the basis that he paid the invoice sent to him which as it was later discovered contained incorrect bank account details. The applicant only seeks payment of the principal amount and the ACAT filing fee. There is no claim for interest on the debt.
3. There is no real controversy between the parties as to the sequence of events and the general facts. I set these out below. The main issue and contention between the parties is whether the debt has been discharged and if not which party bears responsibility for the incorrect direction of the payment that was made.

### The hearing and evidence before the tribunal

4. The parties were represented at the hearing by relevantly authorised directors of both companies, Mr Bookham for the applicant and Mr Jess for the respondent. Neither hold legal qualifications and did their best to assist the Tribunal and convey their respective positions. Both Mr Bookham and Mr Jess gave sworn evidence before the Tribunal.
5. The applicant relied upon a bundle of documents and a timeline lodged on 25 January 2022,<sup>1</sup> and an email and related documents from MYOB dated 10 March 2022.<sup>2</sup>

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<sup>1</sup> Exhibit A1

<sup>2</sup> Exhibit A2

6. The respondent relied upon a statement from Mr Jess containing its response and various other attachments<sup>3</sup> and also a timeline with attachments lodged on 16 February 2022.

### **History of events**

7. The following facts are not in contention.
8. On or before 24 March 2021, Mr Jess had a discussion with Mr Bookham about purchasing a machine. Mr Jess, on behalf of the respondent, agreed to buy the machine and Mr Bookham, on behalf of the applicant, agreed to send Mr Jess an invoice. Mr Jess would collect the machine upon payment of the invoice.
9. On 25 March 2021 at 7:34am, Mr Jess received an email from “SALES AccountRight@apps.myob.com” which stated:

*Dear Customer :*

*Our banking details have changed please ensure your records are now updated to reflect the information listed on your attached invoices*

*Please contact us immediately if you are unable to detach or download you Invoice. Thank you*

10. Attached to the email was an invoice purportedly from the applicant containing bank account details.
11. Mr Jess transferred the invoiced amount from the respondent’s bank account to the bank account stated on the invoice.
12. Later, on 25 March 2021, Mr Jess contacted the applicant to check if payment had been received so he could pick up the machine. He was advised it had not. A few days later he again inquired with the applicant as to whether the funds had been received. At this point both parties considered it was unusual the money had not appeared in the applicant’s bank account and Mr Jess forwarded the email with the invoice to the applicant. The applicant advised Mr Jess that the bank account stated in the invoice did not belong to the applicant and this was not the invoice generated by the applicant’s MYOB software.

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<sup>3</sup> Exhibit R1

13. On or about 29 March 2021, Mr Jess contacted ANZ bank to investigate and stop the payment. He was advised this process could take up to 28 days.
14. The respondent agreed to release the machine to the applicant upon being provided with a cheque for the amount which was not to be banked until after the bank carried out its enquires and retrieved the transferred funds.
15. The applicant reported the incident to the Australian Federal Police and the Australian Cyber Security Centre, neither were particularly helpful.
16. Both parties took steps to have their systems and computers checked by professionals for any corruption.
17. On 21 April 2021, the applicant sent an email to the respondent demanding payment and notified the respondent it would bank the cheque. Several days later the applicant banked the cheque and it was dishonoured.
18. By 27 October 2021, ANZ concluded its investigation and advised the respondent that the funds could not be retrieved and the details of the recipient could not be provided for privacy reasons.
19. The applicant subsequently commenced these proceedings seeking to recover the outstanding amount for the machine.

**Position of the parties**

20. The applicant relies upon the investigation conducted by MYOB to assert the fraud occurred at the respondent's end.
21. On 10 March 2022, MYOB concluded its investigation of the applicant's system and in an email<sup>4</sup> advised that:
  - (a) On 24 March 2021 at 3:11pm, the applicant's MYOB email system, on behalf of the applicant, sent the invoice with the correct Westpac Bank details to canberrahydraulics@bigpond.com;

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<sup>4</sup> Exhibit A2

- (b) On 25 March 2021 at 7:34am, the respondent received an invoice containing incorrect bank details at the email address canberra hydraulics@bigpond.com which was not sent from the applicant's MYOB email system;
  - (c) The respondent's email account had likely been breached with the invoice being intercepted and then resent to the respondent's email address.
- 22. Mr Jess says the respondent never received an email from the applicant on 24 March 2021 at 3:11pm. He says the only email he received was the one dated 25 March 2021 at 7:34pm. He says he was expecting an invoice and paid it according to what was attached to that email. He says he discharged the debt because he made a payment according to the only information he had been provided. He submits that any mistake as to the invoice or interception by a third-party is not the respondent's fault and does not affect the debt being discharged. He relies upon the respondent's bank statement to establish payment was made. He also told the Tribunal that his computer had been checked with no corruption found.
- 23. Mr Bookham does not dispute the respondent never received the email dated 24 March 2021 at 3:11pm. He submits the email from MYOB supports the applicant's position and demonstrates the mistake did not occur at the applicant's end. He says the applicant is not responsible for what happened after the MYOB email was generated and left the applicant's email address on 24 March 2021 at 3:11pm. He submits the mistake is the applicant's and the debt has not been discharged.
- 24. Both parties agree the invoice was intercepted and altered by a third-party. While both parties told the Tribunal they had their computer systems checked, the Tribunal does not have any evidence, other than the MYOB email, from a suitably qualified professional to determine how or when the emailed invoice was intercepted. Ultimately, for the reasons below it does not matter.
- 25. It falls to the Tribunal to decide if the respondent's conduct discharged the debt and whether or not it remains liable to pay the applicant.

**Debt recovery and mistaken unintended recipients**

26. The above history of events depicts what is now a common tale of fraudulent activity involving third parties and internet payments. However, the application before the Tribunal is an application to recover a debt. It is not a case about the recoverability of a mistaken payment to an unintended recipient nor is it an action for breach of contract.
27. As this is a debt recovery matter, it is enough for the applicant (creditor) to assert the debt, and unlike a cause of action for breach of contract it is not for the applicant (creditor) to affirmatively allege and prove.<sup>5</sup> The respondent must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration.<sup>6</sup> There is no doubt that money paid by mistake whether in fact or law or both, is likely recoverable.<sup>7</sup> But in this case, the respondent's ability to take separate action to recover the mistaken payment does not answer the applicant's claim and it must still allege and prove payment by way of discharge.
28. In this case, was there a mistake? Was the debt paid? The respondent alleges it paid the debt by transferring the money into a bank account nominated on an invoice he assumed was sent by the applicant. The difficulty is that on the evidence before the Tribunal that email was not sent by the applicant. He had no other information upon which to make payment and no basis to doubt the accuracy of the information contained in the invoice he received. The applicant asserts that it did not send the invoice upon which the respondent paid and the debt remains unpaid.
29. Based on the evidence before me, I accept the applicant did not send the incorrect invoice to the respondent.<sup>8</sup> I also accept that what the respondent received was the doing of a third-party intercepting the email that was sent from

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<sup>5</sup> *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 569

<sup>6</sup> *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 569-570

<sup>7</sup> *David Securities Pty Ltd & Ors v Commonwealth Bank of Australia* (1992) 175 CLR 353

<sup>8</sup> Exhibit A2

the applicant.<sup>9</sup> I accept the respondent had no reason to question the invoice and its arrival was anticipated. Nonetheless, responsibility for correct payment rests with the respondent and it was incumbent upon the respondent to exercise care in ensuring payment was made. The money was paid into an account that did not belong the applicant<sup>10</sup> and it remains unpaid.

30. In addition, the respondent's provision of a cheque for payment which was later dishonoured provides a second basis for challenge by the applicant. The payment was to be made by way of cheque, albeit with conditions, but later upon the expiration of those conditions, the respondent failed to discharge the debt as the cheque was dishonoured.
31. The respondent disputes the debt still exists, but I disagree. The debt is not discharged because the respondent thought the money was being transferred to the applicant. It is not dissimilar to a cheque missing in the mail or being dishonoured as was the case here. A debt is not discharged simply because a debtor asserts a cheque was written and posted but lost or dishonoured. Similarly, asserting payment was made based on a bank statement showing money left the respondent's bank account and was transferred to another bank account labelled by the respondent as being to "DRB Equipment" is not evidence of the debt being discharged. I accept the respondent intended to pay and thought it had, but the debt remains undischarged.

### **Conclusion**

32. For these reasons, the respondent must pay the applicant the sum of \$5,829 comprising \$5,499 for the debt and \$330 for the ACAT filing fee. In any event, the respondent may have the ability to claim on his business insurance as I have found the mistake was not caused by the applicant, but rather the respondent was the victim of third-party fraud.

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<sup>9</sup> Exhibit R2 page 1-2

<sup>10</sup> Exhibit R2 page 1-2

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Senior Member K Katavic

**Date of hearing:** 29 March 2022  
**Applicant:** Mr D Bookham, authorised representative  
**Respondent:** Mr N Jess, authorised representative