IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M27 of 2013

BETWEEN

LEGAL SERVICES BOARD

Applicant

SIMON GILLESPIE-JONES

Respondent

10 **APPELLANT'S OUTLINE OF SUBMISSIONS IN REPLY**

Part I: Certification as to form

1. This reply submission is in a form suitable for publication on the Internet.

Part II: Arguments in Reply

Trust funds were held "for or on behalf of" the client (and not the Respondent)

2. The analysis in the Respondent's submissions ("RS") is flawed. It misstates and misapplies the Trial Judge's findings of fact concerning the nature of the trust and misapprehends the scheme and effect of the Act.

3. As to the facts, it is inaccurate to say as the Respondent does in RS [16] that the Trial Judge did not characterise the nature of the Respondent's interest in the
20 misappropriated trust money. In fact, her Honour proceeded on the basis that the Respondent did not have, and did not need to have, any interest in the trust money: see TJ [40], [84] and [90]-[99].[1] In these passages, the Trial Judge made it very clear that the money was held by the solicitor on trust for and on behalf of the client for the payment of all of the legal costs of his defence. This was why the Trial Judge concluded that the money fell within paragraph (a) of the definition of "*trust money*" in s 3.3.2. It was also why the Trial Judge concluded that, consistently with s 3.3.14(1), the money could only be disbursed in accordance with the client's instructions under s 3.3.14: see TJ [99] (**AB74-75**).

4. Contrary to RS [16], limb (d) of the definition of "*trust money*" is not applicable. It
30 applies to money the subject of a "*power*" that is exercisable by the solicitor "*for or on behalf of another person*". It is directed to cases where the solicitor has been granted a power as an executor or under a power of attorney, where the money is being dealt with by the solicitor for or on behalf of another. It does not refer to the payment of costs and disbursements incurred by a solicitor. The definition of the phrase "*power given to a law practice*" in s 3.3.2(3) supports this view, as does s 3.3.17 and regulations 3.3.31 and 3.3.32.

5. Although the Trial Judge considered that paragraph (d) applied, she reached that conclusion by reference to the same facts as those that brought the case within

[1] AB62, 72 and 73-75

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paragraph (a) of the definition, ie the money was received and held by the solicitor "*for or on behalf of Mr See for the payment of the legal costs of his defence, including by way of payment to third parties such as the plaintiff*".[2] This construction of limb (d) is unsound because it would not afford limb (a) any independent operation; it would always be the case that money received on account of legal costs in advance of providing legal services would fall within limb (d). Parliament should not be presumed to have intended limb (a) to be superfluous.[3]

6. The scheme of the Act needs to be considered in light of the Trial Judge's factual findings. The money received by the solicitor comprised either cash payments that were required to be paid into his general trust account, or electronic transfers that went directly into that trust account. All payments were to be held by the solicitor on the client's behalf for the payment of all of the costs of his defence.[4] Pursuant to s 3.3.14, money standing to the credit of the solicitor's general trust account was held exclusively for the person on whose behalf the money was received (ie the client), and could only be disbursed in accordance with a direction given by the client. None of the money was available for the payment of the solicitor's debts, including his debts to barristers or other consultants: see s 3.3.18. However, the money could be applied by the solicitor in paying legal costs and disbursements that the client owed to the practice in accordance with the relevant procedures or requirements of the Act and the regulations: see s 3.3.20.

7. Thus, while the solicitor had physical custody of the money he held on trust, he was entitled to deal with the money only in accordance with the Act. One of those rights was to apply the money for "*legal costs*" (which includes counsel's fees incurred by the solicitor as principal) in accordance with the procedure prescribed by the Act and the Regulations. The Act and the Regulations are a complete code in that regard.

Section 3.3.20(1)(b) of the Act

8. The Respondent's construction of section 3.3.20(1)(b) of the Act is incorrect.[5] Section 3.3.20(1)(b) does not expressly provide that it is exhaustive of the ways in which money in a solicitor's general trust account can be dealt with or disbursed. However, only ss 3.3.14(1) and 3.3.20(1)(b) authorise the disbursement of money from a general trust account. These sections are complementary in that the concept of a specific direction from the client is found in both s 3.3.14(1)(b) and regulation 3.3.34(3)(ii). When the relevant provisions are read in context and by reference to the other provisions of Part 3.3 of the Act, it is clear that Parliament's intention is that trust money is to be dealt with by a solicitor only in the ways provided for in Part 3.3 and the regulations made in respect of it.

9. Further, given the proscriptive terms of s 3.3.18 and the overlap between ss 3.3.14 and 3.3.20, the Appellant submits that the generality of s 3.3.14(1)(b) is cut down by ss 3.3.18 and 3.3.20. The consequence is that a solicitor is only entitled to use trust money to pay his or her legal costs (including disbursements) if he or she complies with section 3.3.20(1)(b) of the Act and the regulations made in respect of it.

10. This is borne out by considering the application of some of the key provisions of Part 3.3 to the facts of this case. The effect of ss 3.3.13 and 3.3.17A is that all the money given by the client was required to be deposited into the solicitor's general trust account. In this case, the electronic transfers went directly into the trust account.

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[2] TJ [92] and [94] (**AB73-74**)
[3] *Project Blue Sky Inc v ABA* (1998) 194 CLR 355 at 382 ([71])
[4] TJ [29] (**AB60**) and [34]-[40] (**AB61-63**)
[5] RS [18]

Money in the trust account was held exclusively for the person on whose behalf it was received, which the Trial Judge held to be the client.[6] The client did not at any time direct that money be withdrawn from the trust account and applied to pay the solicitor's costs or disbursements, whether pursuant to s 3.3.14(1)(b) or regulation 3.3.34(3)(ii). At all material times, the client was not aware of the solicitor's costs and disbursements. Accordingly, if the solicitor wanted to withdraw money from the trust account to pay his legal costs or disbursements (such as the Respondent's fees), he had to comply with section 3.3.20(1)(b) of the Act and the regulations made in respect of it.

11. As a result, the submissions made in RS [19] should be rejected. The Respondent does not address the definition of "*legal costs*" in section 1.2.1 of the Act, which provides that legal costs include disbursements. Sections 3.3.16 and 3.3.17 do not apply because the money was neither transit money nor the subject of a power. The prohibition contained in section 3.3.18 of the Act on a solicitor using money in a trust account to pay for his or her debts precludes the Respondent from having any interest in the money given by the client because, as the Trial Judge and the Court of Appeal found, the solicitor had retained the Respondent as principal.[7] Consequently, counsel's fees were a debt of the solicitor.

No Quistclose Trust

12. RS [17] misstates the Appellant's submissions on this aspect of its case. The Appellant has never argued that the money given by the client was not trust money. Clearly, it was trust money that the solicitor held for and on behalf of the client on account of legal costs. The Appellant's point is that the Trial Judge's findings of fact, including the fact that the client intended the trustee (ie the solicitor) to have an entitlement to some of the money, mean that the money cannot be the subject of a *Quistclose* trust in favour of the Respondent.

13. Contrary to what is submitted in RS [20], the Court of Appeal made the following errors in its *Quistclose* analysis. First, it misapprehended the elements necessary to establish a *Quistclose* trust – it found such a trust , notwithstanding that the client transferred the money to the solicitor to meet all his future legal costs, including the solicitor's costs and disbursements. Secondly, it made no finding as to the relevant intention of the solicitor (ie trustee) – both the settlor and the trustee must have intended the money to be applied to same special purpose. Thirdly, the analysis was not available to the Court of Appeal because neither party raised such an argument at trial or on appeal, and the Trial Judge found that the Respondent did not have an interest in the money.

14. The submissions in RS [28] cannot remedy the error identified in paragraph 13 above. The Court of Appeal does not at any point in its Judgment advert to the solicitor's intention. Further, *Gilbert v Gonard*[8] does not say anything about the intention of the trustee (inferred or otherwise), as it was irrelevant to the Court's analysis. Also, in that case, North J found that the beneficiary was the person who gave the money.

15. As to RS [22], [23] and [34], the Respondent's argument fails to acknowledge that the cash payments were directed solely to the solicitor, the first seven electronic transfers were described as being to the solicitor and the Respondent, and the last four

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[6] Section 3.3.14(1)(a) and TJ [84] (**AB72**) and [90]-[99] (**AB73-75**)
[7] TJ [136] (**AB83**); CA [64]-[65] (**AB118**)
[8] (1884) 54 LJ Ch 439

electronic payments totaling $20,000 (ie payments made during 7-9 May 2007) resulted in the Respondent receiving $18,000 from the solicitor.[9]

16. In relation to *General Communications Ltd v Development Finance Corporation of New Zealand Ltd*[10] referred to in RS [25], the case is readily distinguishable because the trustee (ie the solicitors of Video Workshop) were not intended to have a beneficial interest in the money. In any event, if the facts support it, there will be an express or implied contractual term in the retainer between client and solicitor prohibiting the client from unilaterally recalling the money pending an opportunity for the solicitor to render a bill of costs (or taxation) for work carried out to that point in time.

17. RS [29] misconceives the Appellant's submissions on this aspect of its case. The Appellant submits that when properly analysed, a *Quistclose* trust is not a purpose trust but is a trust for an ascertainable class of beneficiaries: *Re Denley's Trust Deed*[11]; *Re Australian Elizabethan Theatre Trusts*[12]. Neither the class of persons who might assist the client's defence, nor the extent of their alleged interest in the fund, was sufficiently certain or ascertainable to establish a trust for their benefit.[13]

18. The unconvincing attempt in RS [30] to reconcile the fact that the trustee (ie the solicitor) was intended to have an interest in the money with the requirement for the establishment of a *Quistclose* trust that the trustee not have any entitlement to the trust property serves to highlight the artificiality of the Respondent's position. It shows that the only trust that was established in this case is that provided for by limb (a) of the definition of trust money, and that its beneficiary was the client.

19. The criticism made in RS [32] that the Appellant has not referred to any case in support of its submission is unwarranted. The making of the relevant inference turns on the particular facts found by the Trial Judge. Those factual findings, including the fact that the barrister was the solicitor's creditor, do not support the conclusions arrived at by the Court of Appeal.

20. The reasoning of the Court of Appeal identified in RS [33] is unsound. First, there was no basis for the inferences the Court drew. Secondly and in any event, the view that the client impliedly put the funds beyond recall does not lead to a *Quistclose* analysis. This is because, if the facts support it, there will be an express or implied contractual term in the retainer between client and solicitor prohibiting the client from unilaterally recalling the money pending an opportunity for the solicitor to render a bill of costs (or taxation) for work carried out to that point in time. The solicitor also has the protection of the lien provided for in s 3.3.20(1)(a). That would still leave intact the scheme of the Act as contended for by the Appellant.

21. It is the client's intention at the time of giving the money to the solicitor that is relevant. Accordingly, the submissions in RS [5(c)], [35] and [36] are simply a diversion. The fact that after the client gave the money to the solicitor it could not be established how much work the solicitor actually did cannot affect the nature of the trust that was created at the time client paid the money to the solicitor. The Trial Judge's observations at TJ [41] (**AB63**) do not qualify, and do not purport to qualify, her findings that the client paid the money to the solicitor or into the solicitor's general trust account on account of any legal costs that might be incurred in preparing his defence.

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[9] TJ [129] (**AB82**)
[10] [1990] 3 NZLR 425
[11] [1969] 1 Ch 373 at 388 per Goff J
[12] (1991) 30 FCR 491 at 502 per Gummow J
[13] *McPhail v Doulton* [1971] AC 424 at 457 per Lord Wilberforce; *Re Manisty's Settlement* [1974] Ch 17 at 23 and 27-29; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 212

22. As to RS [38] and [39], the Appellant's position is that the Respondent did not have any interest (contingent or otherwise) in the money paid by the client.

No failure to pay trust money

23. RS [40] misconceives the Appellant's submissions on this aspect of its case. There is no absolute prohibition on paying counsel fees where the solicitor has retained counsel as principal. The mechanism provided by section 3.3.20(1)(b) of the Act (and the regulations made in respect of it) permits a solicitor to withdraw trust money to pay legal costs and disbursements, including counsel's fees.

24. As to RS [41]-[43], the correct starting point is that the scheme of the Act is concerned with protecting the persons for and on whose behalf the trust money is held, and that the right to compensation can only be engaged by those who have an interest in the trust money. The Court of Appeal accepted this in CA [48] (**AB112**) and [50] (**AB112-113**). So does the Respondent in RS [13(e)], [14] and [45]. The Appellant's submissions were directed to this issue and contrasted the case pleaded and run by the Respondent, namely that the "*default*" (ie section 3.6.2(a)(i) of the Act) was constituted by the solicitor's failure to pay or deliver the money given by the client.[14] They were not directed towards a solicitor's obligation to keep proper records or the like. Section 3.6.14(3)(d) applies to entitle the Appellant to wholly or partially disallow or reduce a claim where "*proper and usual records were not brought into existence during the conduct of the transaction*". That is a separate (and subsequent) consideration to the issue of whether the claimant has established an entitlement to make a claim. Further, the "*records*" referred to in that provision are those that ought to have been brought into existence "*during the conduct of the transaction*" in respect of which the solicitor was acting for the client. Those records are different from any bill of costs prepared by the solicitor for having acted for the client (in the transaction).

25. The construction contended for in RS [43] also contradicts the finding by the Court of Appeal that is identified in RS [13(f)] and contradicts the Respondent's pleaded case in paragraphs 6H and 6I of the Amended Statement of Claim[15]. Parliament should not be taken to have intended that a failure by a solicitor to pay trust money to one person (ie the client) would entitle a different person with no beneficial interest in the trust money (the client's barrister) to obtain compensation. The purpose of the fidelity fund cover provided by Part 3.6 of the Act is to compensate clients for loss arising out of defaults by law practices: section 3.6.1 of the Act.

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[14] TJ [14] (**AB56**)
[15] **AB5**