HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

LEGAL SERVICES BOARD APPELLANT

AND

SIMON GILLESPIE-JONES RESPONDENT

Legal Services Board v Gillespie-Jones
[2013] HCA 35
14 August 2013
M27/2013

ORDER

1. *Appeal allowed.*

2. *Order 1 of the orders made by the Court of Appeal of the Supreme Court of Victoria on 19 April 2012 be set aside, and, in its place, order that:*

   (a) *the appeal from the order made by the County Court of Victoria on 1 April 2011 be allowed; and*

   (b) *paragraphs 1–4 of the order made by the County Court on 1 April 2011 be set aside, and, in their place, order that the appeal from the decision of the Legal Services Board made on 20 October 2009 be dismissed.*

On appeal from the Supreme Court of Victoria

Representation

N J Young QC with S R Senathirajah for the appellant (instructed by Legal Services Board)

M F Wheelahan SC with M F Fleming SC and B J McCullagh for the respondent (instructed by Billings Cloak)

CATCHWORDS

Legal Services Board v Gillespie-Jones

Legal practitioners – Legal Practitioners Fidelity Fund ("Fidelity Fund") – Barrister briefed by solicitor to appear for client – Money paid into general trust account by client on account of legal costs – Money misappropriated by solicitor – No finding that client instructed solicitor to pay third parties – Whether barrister entitled to claim against Fidelity Fund for unpaid fees.

Words and phrases – "default", "failure to pay or deliver trust money", "pecuniary loss", "persons for or on whose behalf money is held", "transit money", "trust money".

Legal Profession Act 2004 (Vic), Pts 3.3, 3.6.

1 FRENCH CJ, HAYNE, CRENNAN AND KIEFEL JJ. In 2006, a person charged with criminal offences ("the client") retained Mr Michael Grey ("the solicitor"), who was the principal of the firm Poulton Elliott & Grey, to act for him in connection with forthcoming criminal proceedings. The respondent, Mr Gillespie-Jones ("the barrister"), was briefed by the solicitor to appear for the client in those proceedings. The client made a series of payments to the solicitor on account of his legal costs. Most of the monies supplied were misappropriated by the solicitor. The amount remaining was insufficient to meet the barrister's unpaid fees. The barrister made a claim against the Legal Practitioners Fidelity Fund ("the Fund").

2 The Fund is maintained by the Legal Services Board ("the Board") under the *Legal Profession Act* 2004 (Vic) ("the LPA")[1]. Compensation is payable out of the Fund[2] where a claim is allowed under Pt 3.6 of the LPA. A claim may be allowed under that Part where a person establishes that there has been a default which has caused that person pecuniary loss[3]. One circumstance of default is when a law practice fails to pay or deliver trust money received by it, where the failure arises from an act of dishonesty[4].

3 The barrister's claim was rejected by the Board. Her Honour Judge Kennedy of the County Court of Victoria allowed the barrister's appeal and his claim[5]. The Court of Appeal of the Supreme Court of Victoria (Nettle, Redlich and Hansen JJA) dismissed an appeal from her Honour's decision[6].

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1 *Legal Profession Act* 2004 (Vic), s 6.7.15(1). Amendments were made to the *Legal Profession Act* 2004 with effect from May 2007. These reasons refer to the Act as it stood as at the time of the relevant events, prior to the date that these amendments took effect.

2 *Legal Profession Act* 2004, s 6.7.16.

3 *Legal Profession Act* 2004, s 3.6.7.

4 *Legal Profession Act* 2004, s 3.6.2.

5 *Gillespie-Jones v Legal Services Board* [2011] VCC 223.

6 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68.

The client's payments

4 Prior to the barrister being briefed, the solicitor and a senior counsel had acted for the client in committal proceedings. During this period, the client paid the sum of $21,700, by way of cheques and cash, to the solicitor on account of his legal costs. Not all of these monies were paid by the solicitor into his law practice's general trust account. The client also paid directly to the senior counsel an amount greater than the fees ultimately rendered by the senior counsel; the senior counsel's clerk transferred the balance of $8,400 to the solicitor. This amount was never refunded to the client. The barrister was briefed to appear for the client between December 2006 and April 2007. Between 19 December 2006 and 9 May 2007, the client paid a further $55,000 to the solicitor. Of the total sum of $85,100 received by the solicitor, the solicitor dishonestly appropriated $63,030 to himself.

5 The $55,000 which was paid to the solicitor in the latter period was effected by 11 electronic transfers of $5,000 each from the client's account to the solicitor's law practice's general trust account. Seven of the transfers were denoted with the name of the solicitor together with the name of the barrister such as in "Grey & SG Jones" or "Grey & Simon". The other four transfers referred to the barrister as "Sgj via M Grey" or similar.

6 In his evidence before the primary judge, the client explained that he used initials and words such as "Sgj via M Grey" on the transfers because the solicitor had told him that he, the solicitor, had to pay the barrister. The client understood that he could not himself engage a barrister. When the solicitor asked him for money, he assumed that it related to "whatever expenses" including the engagement of whoever was to appear for him. When asked to whose engagement he referred, he replied: "[e]verybody that come and help me". Asked whether there was a person specified, he answered: "[y]es, is [the barrister] and I think the doctor was included, I think [the solicitor] say that, you know, I need to pay him for more legal expenses." The client's instruction was "to pay [the solicitor], to pay whoever that has been engaged." He assumed that the money the solicitor had asked him to pay "was to pay whoever, that [the solicitor] said he was going to pay."

7 It may at the least be inferred that the payments were made by the client at the request of the solicitor and that they were made in order to enable the solicitor to pay the client's legal costs. The primary judge considered whether the instruction, so far as it related to the barrister's fees, was more specific and made

findings in that regard[7]. It is also to be inferred that the monies were not to be used for any purpose other than the payment of legal costs and that any balance was to be repaid to the client.

8 The barrister periodically submitted memoranda of his fees to the solicitor, but the client did not see them. There was no costs agreement between the barrister and the solicitor or between the client and either the solicitor or the barrister. The client was not told what the solicitor's or the barrister's fees might be. The total of the barrister's fees was $53,610, of which $31,540 was unpaid. There is no dispute that the barrister's fees for the services that he had rendered were fair and reasonable. There does not appear to be any dispute that, had the monies not been misappropriated, there would have been sufficient money in the solicitor's law practice's general trust account to meet the client's legal costs, including the barrister's fees.

The LPA – Pt 3.6

9 The general purposes of the LPA[8] are to improve the regulation of the legal profession and facilitate the regulation of legal practice on a national basis. It was enacted as part of national reforms which aimed to regulate the legal profession in a uniform manner throughout Australia[9]. The LPA was based largely on[10] the first edition of the Model Provisions[11], which had been provided to the Standing Committee of Attorneys-General in July 2004.

10 Provision is made for the Fund in Pt 6.7 of the LPA. The Board is required to maintain it[12] and to pay into it contributions and levies from legal

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7 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [84]-[94].

8 *Legal Profession Act* 2004, s 1.1.1.

9 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 November 2004 at 1541.

10 Victoria, Legislative Assembly, Legal Profession Bill 2004, Explanatory Memorandum at 1.

11 Parliamentary Counsel's Committee, *Legal profession—model laws project: Model Provisions*, (2004).

12 *Legal Profession Act* 2004, s 6.7.15(1).

practitioners, together with certain other monies[13]. The stated purpose of the Fund is that it "is to be applied by the Board for the purpose of compensating claimants in respect of claims allowed under Part 3.6 in respect of defaults to which that Part applies."[14]

11 Part 3.6 appears in Ch 3, which deals with a number of subjects. On this appeal, attention is directed to Pts 3.3 and 3.6, which are respectively entitled "Trust Money and Trust Accounts" and "Fidelity Cover". Other subjects dealt with in Ch 3 include "Manner of Legal Practice" and "Professional Indemnity Insurance".

12 The purpose of Pt 3.6 is stated in s 3.6.1. It is to compensate persons[15] "for loss arising out of defaults by law practices arising from acts or omissions of associates"[16]. The LPA defines[17] an associate to include a partner in the law practice. Section 3.6.7(1) identifies a person entitled to claim and the essential elements of the claim. It provides:

> "A person who suffers pecuniary loss because of a default to which this Part applies may make a claim against the Fidelity Fund to the Board about the default."

13 It may be observed at this point that s 3.6.7(1) is cast in terms of causation. The event which causes pecuniary loss, and upon which a claim may be based, is "a default". The centrality of a default to the scheme for compensation in Pt 3.6 is confirmed by the provision dealing with the Board's powers in respect of a claim. The Board may disallow a claim "to the extent that the claim does not relate to a default for which the Fidelity Fund is liable."[18]

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13 *Legal Profession Act* 2004, s 6.7.17. See also *Legal Profession Act* 2004, s 6.7.24.

14 *Legal Profession Act* 2004, s 6.7.16.

15 See below at [24]-[26].

16 The section also refers to defaults by approved clerks, but it will not be necessary in these reasons to mention this class of person.

17 *Legal Profession Act* 2004, s 1.2.4(1)(a)(ii).

18 *Legal Profession Act* 2004, s 3.6.14(2).

14 The definition of "default" assumes importance on this appeal as does the definition of "pecuniary loss". In the case of a law practice, "default" means[19]:

> "(a) …
>
> (i) a failure of the practice to pay or deliver trust money or trust property that was received by the practice or an associate of the practice in the course of legal practice by the practice or an associate, if the failure is constituted by or arises from an act or omission of an associate that involves dishonesty; or
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> (ii) a fraudulent dealing with trust money or trust property that was received by the practice or an associate of the practice in the course of legal practice by the practice or an associate, if the fraudulent dealing is constituted by or arises from an act or omission of an associate that involves dishonesty".

15 A "pecuniary loss" is defined to mean[20]:

> "(a) the amount of trust money, or the value of trust property, that is not paid or delivered; or
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> (b) the amount of money that a person loses or is deprived of, or the loss of value of trust property".

It may be observed that par (a)(i) of the definition of "default" corresponds with par (a) of the definition of "pecuniary loss" as does par (a)(ii) with par (b). Here, the barrister's pecuniary loss is said to have resulted from the trust money which was not paid or delivered. That loss is neither more nor less than the amount of the money not paid or delivered.

16 What constitutes a "failure to pay or deliver trust money" is not specified. In the context of a practice in receipt of trust money, it must be taken to convey non-compliance with an instruction to pay or deliver trust money to another person, that instruction having been given by the client or other person entitled to give such an instruction. It must be understood, in the context of a default, as an instruction to pay to a third person because it is contemplated that the failure to pay or deliver it may result in loss to that person.

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19 *Legal Profession Act* 2004, s 3.6.2.

20 *Legal Profession Act* 2004, s 3.6.2.

17 "Trust money" is not a term defined in Pt 3.6. A definition can be found in s 3.3.2(1), in Pt 3.3. "Trust money" in relation to a law practice is there generally defined as:

> "money received in the course of or in connection with the provision of legal services by the law practice for or on behalf of another person".

More specifically, it includes "money received on account of legal costs in advance of providing the services". "Legal costs" is defined[21] to mean "amounts that a person has been or may be charged by, or is or may become liable to pay, a law practice for the provision of legal services including disbursements". There can be no doubt that the sums paid by the client in this case were trust money in this sense.

18 "Trust money" also includes "transit money", which is defined[22] to mean "money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice"[23]. It will be recalled that the failure of a practice to pay or deliver trust money, in the definition of default, comprehends such an instruction.

The LPA – Pt 3.3

19 The issues raised by the Board's submissions and by the reasons of the Court of Appeal direct attention to the relationship, if any, between Pts 3.6 and 3.3. It is therefore necessary to identify those aspects of Pt 3.3 which are said to be relevant to the construction of Pt 3.6 and to an entitlement to claim or recover compensation.

20 One issue concerns the protective purpose of Pt 3.3 and the persons to whom that Part is directed. Section 3.3.1(a) states that one purpose of Pt 3.3 is "to ensure that trust money is held by law practices … in a way that protects *the interests of persons for or on whose behalf money is held*" (emphasis added).

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21 *Legal Profession Act* 2004, s 1.2.1.

22 *Legal Profession Act* 2004, s 3.3.2(1).

23 The definition of "trust money" in s 3.3.2(1) of the *Legal Profession Act* 2004 also includes "controlled money", which is defined as money received by a law practice subject to a written direction to deposit it in an account over which the practice has exclusive control, and money the subject of a "power to deal" with it for or on behalf of another person. Neither is relevant to the issues on the appeal.

21 Another issue raised by the Board concerns compliance with certain procedures of Pt 3.3 and whether this was a precondition to making any payment to the barrister. The starting point is the requirement that a general trust account be maintained by a law practice[24]. Trust money, with certain exceptions, must be deposited in such an account[25]. The law practice must hold trust money deposited in its general trust account "exclusively for the person on whose behalf it is received" and "disburse [it] only in accordance with a direction given by the person."[26] An exception to the rule that trust money must be deposited in a general trust account is transit money[27]. This is no doubt because it is subject to a specific instruction to pay a third party.

22 Two particular provisions concerning dealings with, and more particularly withdrawals from, a general trust account are relied upon by the Board. Section 3.3.18(1) provides that money standing to the credit of a general trust account "is not available for the payment of debts of the practice". The Board says that the relevant contract was between the solicitor and the barrister and therefore that the barrister's fees were a debt owed by the solicitor.

23 Section 3.3.20(1)(a) provides for a law practice to exercise a lien for legal costs (a term, it will be recalled, which is defined to include disbursements). But a lien does not provide an authorisation to withdraw trust money. Section 3.3.20(1)(b) requires that trust money may only be withdrawn "for payment to the practice's account for legal costs owing to the practice" if the procedures prescribed in the regulations are complied with. Regulation 3.3.34[28] prescribes such procedures. Unless there is a costs agreement (and, it will be recalled, there was no costs agreement in this case) or the money is owed to the practice by way of a reimbursement of money already paid on behalf of a person, an instruction is required from the client authorising the withdrawal[29]. The regulations also require, for a withdrawal, that the law practice requests payment

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24 *Legal Profession Act* 2004, s 3.3.11.

25 *Legal Profession Act* 2004, s 3.3.13.

26 *Legal Profession Act* 2004, s 3.3.14(1).

27 *Legal Profession Act* 2004, s 3.3.13(1)(c).

28 Of the Legal Profession Regulations 2005 (Vic).

29 Legal Profession Regulations 2005, reg 3.3.34(3)(a).

to be made and sends a bill to the client, and that the client does not make an objection to the bill within a specified period[30].

The decisions below and issues on the appeal

24 It is convenient to refer first to a matter which is no longer in issue. Section 3.6.1 states the purpose of Pt 3.6 to be to compensate "clients"[31]. The Board, by reference to this section, held that compensation could be paid only to a client of a law practice. Neither the primary judge[32] nor the Court of Appeal[33] accepted that this view was supported by Pt 3.6, read as a whole. They both held that the word "person" in s 3.6.7, which sets out who may make a claim against the Fund, ought to be given its ordinary meaning.

25 That construction is plainly correct. The reference to "clients" must be taken to refer to part only of the class of persons who may seek compensation, given that s 3.6.7, the operative provision, contains a different and wider term. That "persons", and not just clients, are to be compensated, if they can establish the matters required by s 3.6.7, is confirmed by: the reference to "persons" as claimants in the Model Provisions[34], upon which Pt 3.6 is based; the wording of s 6.7.16, referred to above[35]; and s 3.6.28.

26 Section 3.6.28 provides that an associate of a law practice may make a claim under s 3.6.7 if the associate suffers pecuniary loss because of a default of the law practice arising from the act or omission of another associate of the practice. As the Court of Appeal observed[36], it would be difficult to discern a legislative intention to allow innocent associates of a defaulting solicitor to have access to the Fund but not innocent third parties.

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30 Legal Profession Regulations 2005, regs 3.3.34(3)(b), 3.3.34(4).

31 Section 3.1.1(2) of the *Legal Profession Act* 2004 is in similar terms.

32 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [57]-[58].

33 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [41].

34 Parliamentary Counsel's Committee, *Legal profession—model laws project: Model Provisions*, (2004), s 802.

35 At [10].

36 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [39].

The first issue – compliance with Pt 3.3 procedures

27 Her Honour the primary judge found that a "default", for the purposes of Pt 3.6, was established[37] and that the barrister had suffered a pecuniary loss as a result[38]. Her Honour found that there had been a failure to pay or deliver trust money.

28 In characterising the relevant money, her Honour did not accept the barrister's submission that the money was "transit money"[39]. Her Honour found that each of the payments made by the client to the solicitor was provided for paying "everybody that was to come and help him" in his defence. Her Honour rejected the submission that "composite money" could be stamped with the character of transit money. It is to be inferred that her Honour was referring to money intended to be paid to more than one person. Her Honour said that, because different consequences follow if money is transit money, such as it not having to be paid into a law practice's general trust account, it is necessary for it to be clearly identified as such. It had not been clearly identified in the present case because the money was "potentially designated for [the solicitor] himself"[40].

29 Her Honour appears to have considered that the money could satisfy that part of the definition of "trust money" which refers to money that is the subject of a power to deal with it for or on behalf of another person[41], although her Honour took the "other person" to be the client. This finding does not assume importance on the appeal. The finding to which attention is now directed is that the money was trust money because it was "received by the practice on account of legal costs in advance of providing the services"[42].

30 The solicitor's failure to pay or deliver trust money was constituted by the solicitor's failure to pay in accordance with a direction given by the client[43]. The

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37 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [107]-[108].

38 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [110]-[111].

39 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [84]-[90].

40 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [89].

41 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [92].

42 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [90]-[91].

43 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [97], [99].

obligation cast by s 3.3.14(1)(b), to disburse trust money "only in accordance with a direction given by the person", had been breached. It was breached because the solicitor disbursed the trust money, her Honour found, "contrary to the direction given by [the client] to pay for his legal costs and instead [the solicitor] … used that money for himself." [44]

31 It has earlier been observed[45] that a "failure to pay or deliver trust money" in the context of the definitions of "default" and "pecuniary loss" necessarily involves an instruction to pay or deliver trust money to a third person which is not complied with. It is a feature of her Honour's findings, one which is important to the outcome of this appeal, that her Honour did not find that such an instruction was given to pay the barrister's fees. The effect of the findings is in fact contrary to the existence of such an instruction.

32 In relation to whether there had been a default, her Honour found[46] that the money was received by the practice on account of legal costs and could be disbursed only in accordance with the client's directions under s 3.3.14. This suggests that the initial instruction did not involve a direction to pay a third party. Her Honour's conclusion that there had been a default did not involve a finding of a failure to comply with an instruction to pay a third party but, more generally, that s 3.3.14 had been breached because the solicitor used the money for himself and not for its designated purpose, the payment of legal costs[47]. These findings are consistent with those concerning whether the trust money was transit money. Significantly, the finding that the money was designated by the client to the solicitor on account of costs, generally, would appear to involve a rejection of any finding that there was at the same time an instruction to pay the barrister.

33 Her Honour rejected the Board's argument that a "failure" to pay trust money was dependent upon a solicitor's compliance with the procedural requirements of Pt 3.3 and in particular s 3.3.20[48]. Her Honour held that, if a solicitor has disbursed trust money contrary to the client's directions, then that

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44 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [97].

45 At [16] above.

46 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [99].

47 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [97], [99].

48 *Gillespie-Jones v Legal Services Board* [2011] VCC 223 at [101]-[102].

solicitor has "failed" to pay trust money, regardless of whether he or she has complied with procedures.

34 The Board now repeats the submission that it made to the Court of Appeal on this issue. It submits that because a claim under Pt 3.6 involves a failure to pay trust money, the barrister must establish that he had an immediate right to receive payment for his fees at the time of default. Until the procedural requirements of Pt 3.3 have been met, there can be no failure to pay trust money held in a law practice's trust account. In the Board's submission, the requirements of Pt 3.3 present an insurmountable barrier to the barrister's claim.

The second issue – who is entitled to claim compensation?

35 In the Court of Appeal, the Board argued that it was necessary to interpret Pt 3.6 in light of Pt 3.3, and in particular the protective purpose of the latter, which is stated in s 3.3.1(a). The Board contended that an entitlement to claim under Pt 3.6 is limited, by implication derived from s 3.3.1, to the interests of persons "for or on whose behalf" trust money was held by the defaulting solicitor. Such a person must have a legal or equitable interest in the money.

36 The question which the Court of Appeal posed for itself was "whether [the barrister] was a person 'for or on whose behalf' the money the subject of default was held"[49]. The Court accepted[50] that, insofar as Pt 3.6 is concerned with providing compensation to those who suffer pecuniary loss regarding trust money, Pt 3.6 is "logically to be seen as limited to the interests of persons for or on whose behalf the trust money the subject of the default was held." This followed because Pt 3.6 is concerned with trust money, amongst other things, and Pt 3.3 regulates how such money is to be dealt with.

37 The Court of Appeal considered that the word "interests" in s 3.3.1 is co-ordinate with the expression "for or on whose behalf" the money or property is held; but it did not follow that "interests" were limited to legal or equitable interests[51]. It was sufficient that the barrister had a contingent interest in the fund, constituted by the monies paid by the client, which was held on trust for payment to him when his fees became due[52]. The Court of Appeal characterised

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49 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [51].

50 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [49]-[50].

51 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [53].

52 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [59].

the trust as one in the nature of a *Quistclose* trust[53], which was to be implied from the fact that the client paid the monies to the solicitor to be applied to a particular purpose[54].

38 The Board submits that the facts do not permit this finding. It further submits that a trust of the kind identified by the Court of Appeal is inconsistent with the requirements of Pt 3.3, which prescribe how trust money is to be applied. In particular, s 3.3.14 requires that trust money be held exclusively for the persons "on whose behalf it is received" and that it be disbursed only in accordance with a direction given by that person.

39 By Notice of Contention, the barrister challenges the underlying premise for the Court of Appeal's finding. He contends that the Court of Appeal erred in holding that the benefit afforded by Pt 3.6 may only be given to a person "for or on whose behalf money is held". In the barrister's submission, none of the provisions of Pt 3.6 requires that a claimant have an interest of this kind. On this view, the Court of Appeal's construction imports a limitation upon the class of persons entitled to claim compensation, one which is not consistent with the language of Pt 3.6.

Is compliance with Pt 3.3 procedures a condition of compensation under Pt 3.6?

40 Clearly the monies paid by the client fall within that part of the definition of "trust money" which refers to "money received on account of legal costs in advance of providing the services", as the primary judge found. As such, they were required to be paid into the solicitor's law practice's general trust account, from which point they would have become subject to the provisions of Pt 3.3 concerning dealings with trust money.

41 Section 3.3.20(1)(b) and its associated regulation[55] apply when a law practice withdraws monies to pay its legal costs including disbursements. However, in this case, the law practice had not paid the barrister the fees in question. No question of reimbursement arose. Section 3.3.18(1) denies the availability of monies standing to the credit of the general trust account to meet the debts of the practice. That section is directed to the unilateral action of withdrawal from the account, on the part of a law practice, for that purpose.

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53 After *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

54 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [55].

55 Legal Profession Regulations 2005, reg 3.3.34.

42 These provisions do not, in their terms, appear to be referable to the circumstance where a client gives an instruction to disburse monies. The primary judge did not, however, find that such an instruction was given. In any event, the relevant instruction was given by the client before monies were paid into the general trust account. If the instruction had been found to be directed to payment of the barrister's fees, the monies would have qualified as transit money, in which case they would not have been subject to these provisions. But her Honour rejected that contention.

43 In these circumstances, it cannot be said that a specific instruction to pay the barrister's fees was given such that the provisions of Pt 3.3 to which the Board refers do not apply. Nevertheless, the Board's submission that, because the procedures required by Pt 3.3 were not complied with, there could not have been a "failure to pay or deliver trust money" within the meaning of Pt 3.6 cannot be accepted. It cannot be accepted because the legislature could not reasonably be taken to have intended them to apply in the circumstance of a default.

44 Part 3.6 is predicated upon acts of dishonesty giving rise to a default. The Board's submission is that, regardless of this circumstance, the legislature intended to condition recovery of compensation for the default to the defaulting solicitor's compliance with procedural requirements regarding payments that he or she did not intend to make. This is curious logic. Had the solicitor in this case not been acting dishonestly, he would surely have sought the necessary approvals to pay the barrister's fees and it seems likely that they would have been given.

45 Part 3.6 is concerned with compensating persons who suffer pecuniary loss as a result of a default. It contains no statement that compensation is to be conditional upon compliance with the procedural requirements of Pt 3.3, nor can such a condition be implied on ordinary rules of construction. To the contrary, Pt 3.6 may reasonably be taken to be founded upon the assumption that, where there has been a dishonest dealing with trust money, procedures are unlikely to have been complied with.

46 The matters dealt with in s 3.6.14(3) are relevant to the question of legislative intention. That provision gives the Board power to disallow or reduce a claim in certain circumstances, which, in general terms, involve the conduct or knowledge of a claimant in connection with the act of default or the claim. One particular circumstance, referred to in par (d) of the sub-section, is when proper records are not created or kept, and the claimant knew or ought reasonably to have known that they would not be kept or would be destroyed.

47 Two observations may be made regarding this provision. First, the circumstance identified in par (d) confirms, if it be necessary, a legislative

understanding that, in dishonest actions or dealings with trust money or property, proper records are not likely to be kept. The same may be said of compliance with procedures. Secondly, it is evident that the legislature has turned its mind to the circumstances where compensation might be denied or reduced, having regard to the conduct or knowledge of a claimant. It is difficult then to infer that the legislature also intended to deny compensation because of a defaulting solicitor's omissions in respect of which a claimant had no knowledge or control.

48 Fundamentally, the Board seeks to impute to the legislature an intention which is neither reasonable nor rational. In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[56], it was said that when a judge assigns labels such as "absurd" or "irrational", he or she is assigning a ground for concluding that the legislature could not have intended a statute to operate in a particular way, and that an alternative interpretation is to be preferred. This is such a case. It is preferable to adopt a construction that will avoid a consequence which appears irrational or unjust[57]. Part 3.6 cannot sensibly be read as conditioning recovery to compliance with procedures in Pt 3.3.

Who is entitled to claim compensation?

49 The starting point for a consideration of whether the barrister is within the class of persons entitled to claim compensation must be the provisions of Pt 3.6. It is necessary to give close consideration to its provisions, as those most clearly relevant to a determination of this question[58]. In particular, attention should be directed to the definitions of "default" and of "pecuniary loss".

50 This is not to deny the importance of purpose to the construction of Pt 3.6. The relevant purpose is that of Pt 3.6 itself, which is to provide compensation where a person suffers pecuniary loss as a result of a default, as those terms are defined. That purpose is remedial and beneficial, and the provisions of Pt 3.6 which bear upon the question should therefore receive as generous a construction as the actual language of those provisions permits[59]. It is to the actual language

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56 (1981) 147 CLR 297 at 321; [1981] HCA 26.

57 *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 350; [1975] HCA 28.

58 See *Fleming v The Queen* (1998) 197 CLR 250 at 256 [12]; [1998] HCA 68; *Baini v The Queen* (2012) 246 CLR 469 at 476 [14]; [2012] HCA 59.

59 *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652 at 675; [1997] HCA 35; *IW v City of Perth* (1997) 191 CLR 1 at 27; [1997] HCA 30.

of the Part that resort should be had[60] to determine the limits, if any, on the class of persons who may benefit from the provision it makes for compensation.

51 The purpose of Pt 3.3 is to regulate dealings with trust money and deter persons from dealing with that money contrary to, or without, instructions and contrary to the interests of persons on whose behalf the money is held. The extent to which dishonest dealings may be deterred by such provisions is another matter. What Pt 3.3 and Pt 3.6 have in common, it will be seen, is that they identify a person who has an interest in the money in the sense that the person may suffer loss if it is dealt with other than according to instructions. However, the class of persons identified is not limited to persons beneficially entitled to trust money and s 3.3.1 should not be read as limited in that way.

52 So understood, the question whether the barrister had some interest in the trust money, such as that of a beneficiary of a *Quistclose* trust for payment of his fees, is not to the point. The question Pt 3.6 poses, which will determine the barrister's entitlement to claim compensation, is whether he suffered a pecuniary loss as a result of a default.

53 Reference has been made above[61] to the two circumstances of default provided for in Pt 3.6 and the pecuniary loss which corresponds with them. It is the person who suffers such loss in the circumstance of a default who is entitled to claim compensation. The question is whether the barrister is such a person.

54 The second circumstance of default is a fraudulent dealing with trust money or property which results in the loss or deprivation of money or the loss of value of trust property. It identifies a person who has a proprietorial interest in trust money or property. That person's loss is the diminution of that interest as a result of the fraudulent dealing. It is not suggested that the barrister has suffered such a loss.

55 It is the first circumstance of default and its corresponding loss which is relevant to the barrister. A person may suffer pecuniary loss where there has been a failure to pay or deliver trust money or property. The pecuniary loss suffered is that which is not paid or delivered. Neither a proprietorial interest nor any entitlement to the trust money or property is required, beyond the fact that,

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60 *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638; [1984] HCA 55.

61 At [14]-[15].

but for the default, the trust money or property would have been paid or delivered to the person.

56 A qualification is necessary with respect to the last statement. A person will not have suffered pecuniary loss as a result of a default merely because, had monies not been misappropriated, there would have been sufficient trust money to meet the person's claim. This seems to us to be the approach taken by her Honour the primary judge. There can be no "failure to pay or deliver" trust money or property unless there is an extant instruction to the practice to pay or deliver the money or property, and it is not complied with. The instruction must necessarily be to pay or deliver the trust money or property to an identifiable person. It is that person who will suffer loss if the instruction is not complied with.

57 The person so identified in Pt 3.6 is also identified in Pt 3.3, in the definition of "trust money". Such a person is the third party who is the intended recipient of trust money which is the subject of an instruction for payment or delivery to that person. That money is "transit money".

58 Both Pts 3.6 and 3.3 therefore comprehend that trust money may be held not only for and on behalf of a person beneficially entitled to it, but also on behalf of a person who is the subject of an instruction that trust money be paid or delivered to that person. To the limited extent to which it is necessary to do so, s 3.3.1(a) should be taken also to refer to a third party recipient of transit money as a person "for or on whose behalf money is held". That person's interests depend upon the instruction given being complied with. The barrister might have been such a person, had there been a finding that the client gave the relevant instruction[62].

59 It is unnecessary to consider the Board's further submission that a "failure to pay or deliver" trust money is to be equated with a "failure to account". The conclusion sought to be drawn from this premise is that the only person to whom a law practice could pay or deliver trust money is the person beneficially entitled to it. The submission relied on cases involving statutes in terms which differ from the LPA and brings to mind the cautionary statement in *Baini v The Queen*[63] that such an approach is likely to mislead. Attention should be directed to the text of the statute in question.

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62 See [31], [61].

63 (2012) 246 CLR 469 at 476 [14].

Was the barrister entitled to claim compensation?

60 For the barrister to succeed, it is necessary that there has been a failure to pay or deliver trust money to him. In the event of such a default, he will have suffered the necessary pecuniary loss. A failure to pay or deliver trust money requires that the solicitor was instructed to pay the barrister's fees upon receipt of his memoranda of fees.

61 The barrister's claim founders on the findings of the primary judge respecting the instruction given by the client. Her Honour's findings in connection with default do not contain the necessary finding that there was a relevant instruction and those relating to whether the money was transit money are inconsistent with such an instruction having been given. The effect of her Honour's findings is that the money was intended to be held by the solicitor and disbursed according to the client's further directions.

62 Her Honour's opinion that transit money cannot be composite money was no doubt influential to the finding of default. It raises the question whether transit money is sufficiently identified by an instruction to pay more than one person and to pay them an as yet unascertained sum of money. But this is not a question that is raised on this appeal.

63 In his submissions, the barrister sought to show that the payments made by electronic transfer could only have been intended for him, because the solicitor's costs were to come out of the earlier payments. But reliance could only be placed upon the circumstance of the manner of those payments, by a combination of cash and cheques payable to the solicitor's law practice. There was no relevant finding by the primary judge in this regard.

64 The submissions point up the essential difficulty for the barrister on this appeal. It is not disputed that the findings made by the primary judge concerning the instructions given by the client were not challenged in the Court of Appeal. They are not now the subject of the appeal to this Court and cannot be revisited.

65 On those findings, the retainer was not made on behalf of the client. The solicitor was personally responsible for the barrister's fees. The instructions the client gave the solicitor did not amount to an instruction to pay the barrister's fees without further reference to the client.

66 It is neither necessary nor appropriate to decide whether a barrister retained by a solicitor on behalf of a client would have a claim against the Fund if the client had paid the solicitor an amount on account of counsel's fees (or disbursements generally) and the solicitor misapplied those monies. It is

important, however, to emphasise that the actual disposition of this case, as distinct from the more general discussion of the operation of the LPA, turns upon the facts of the particular case. Variation of either or both of the aspects of the facts of this case that have been noted may, we do not say must, yield a different application of the LPA.

Orders

67 The appeal should be allowed and order 1 of the Court of Appeal of the Supreme Court of Victoria of 19 April 2012 set aside. In lieu thereof it should be ordered that the appeal from the decision of the County Court of Victoria be allowed and pars 1 to 4 of the order of that Court of 1 April 2011 set aside. In lieu thereof it should be ordered that the appeal from the decision of the Legal Services Board of 20 October 2009 be dismissed.

68 There is no need for an order for costs, the Board having undertaken to pay the barrister's costs of the appeal regardless of the outcome and to not seek to disturb orders for costs made in the courts below.

BELL, GAGELER AND KEANE JJ.

Introduction

69 A client pays money to a law practice on account of legal costs, including barristers' fees and other disbursements, to be incurred in the course of the law practice providing legal services. The law practice misappropriates the money. Can a barrister retained by the law practice recover unpaid fees from the Legal Practitioners Fidelity Fund maintained under the *Legal Profession Act* 2004 (Vic) ("the Act")?

70 That is the ultimate question that arises in respect of a claim made against the Fidelity Fund by Mr Simon Gillespie-Jones, a member of the Victorian Bar. The claim was disallowed by the Legal Services Board ("the Board") but upheld on appeal by Mr Gillespie-Jones to the County Court of Victoria (Judge Kennedy)[64] and on further appeal by the Board to the Court of Appeal of the Supreme Court of Victoria (Nettle, Redlich and Hansen JJA)[65].

71 The Board now appeals, by special leave, to this Court from the decision of the Court of Appeal. The result is that the ultimate question should be answered in the negative, the appeal should be allowed, and orders should be made having the effect of restoring the Board's disallowance of the claim.

Facts

72 Mr Gillespie-Jones was retained by Mr Michael Grey, an Australian legal practitioner engaged in legal practice on his own account in Victoria. The retainer, between December 2006 and April 2007, was to defend a client of Mr Grey. The client was an individual charged with criminal offences. There was no written agreement between Mr Gillespie-Jones and Mr Grey or between the client and either Mr Gillespie-Jones or Mr Grey.

73 Judge Kennedy found that the retainer constituted a contract between Mr Gillespie-Jones and Mr Grey[66]. Implicit in that finding was that Mr Gillespie-Jones agreed to provide legal services to the client in consideration of Mr Grey paying Mr Gillespie-Jones the fair and reasonable value of those legal services when billed to Mr Grey.

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64 *Gillespie-Jones v Legal Services Board* [2011] VCC 223.

65 *Legal Services Board v Gillespie-Jones* [2012] VSCA 68.

66 [2011] VCC 223 at [136].

74 Mr Gillespie-Jones billed Mr Grey $53,610 between December 2006 and April 2007. There is now no dispute between the parties that the amount so billed was the fair and reasonable value of the legal services Mr Gillespie-Jones provided to the client with the result that Mr Grey became indebted to Mr Gillespie-Jones in that amount.

75 Mr Grey received from the client $85,100, paid directly or indirectly between August 2006 and May 2007. The payment was in two main tranches. Before Mr Gillespie-Jones was retained by Mr Grey, the client paid $21,700 to Mr Grey partly in cash and partly by cheque and a barrister's clerk, to whom the client had made a direct payment, refunded $8,400 to Mr Grey. After Mr Gillespie-Jones was retained by Mr Grey, the client paid $55,000 into Mr Grey's general trust account by electronic transfer in discrete amounts of $5,000, each accompanied by the client's contemporaneous written explanation that the transfer was for "Grey & Jones" or "Sjg [that is, Mr Gillespie-Jones] via Grey" or some variant of those two alternatives.

76 Notwithstanding those variations in the method and timing of payment, Judge Kennedy found, in respect of the total amount of $85,100 the client paid to Mr Grey, that the client "was paying on account of any legal costs in relation to his defence, including 'everybody that was to come and help him' in his defence", a category of persons which "might include Mr Grey himself" as well as medical experts to be engaged by Mr Grey[67]. Her Honour specifically found that Mr Grey did not receive any part of the amount paid to him by the client subject to instructions to pay or deliver it to Mr Gillespie-Jones[68]. Those findings accord with the written explanation Mr Gillespie-Jones gave when making his claim against the Fidelity Fund that the client "paid the money to Mr Grey for legal services including disbursements (barristers fees and other out of pocket expenses)". The evidence before Judge Kennedy established that, when paying to Mr Grey, the client did not know what amounts had been sought to be charged by Mr Grey, by Mr Gillespie-Jones, or by any medical expert and that, as at April 2007, the client expected to be repaid some of the money he had paid to Mr Grey because he believed that he had paid Mr Grey more than his actual costs.

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67 [2011] VCC 223 at [40]-[42], [84], [92], [138].

68 [2011] VCC 223 at [89]-[90], [138].

77 Of the total amount of $53,610 Mr Gillespie-Jones billed to Mr Grey, Mr Grey paid to Mr Gillespie-Jones $4,070 in January 2007 and $18,000 in May 2007, leaving $31,540 unpaid. There is no dispute between the parties that Mr Grey dishonestly disbursed the remaining $63,030 of the $85,100 paid to him by the client for purposes of his own. The evidence before Judge Kennedy established that Mr Grey did so by keeping for himself some of the cash the client paid him and otherwise by making unauthorised withdrawals from his general trust account.

78 Mr Gillespie-Jones made his claim against the Fidelity Fund on 14 January 2008. As later refined, his claim was for an amount corresponding to the $31,540 in unpaid fees in respect of which Mr Grey had become indebted to Mr Gillespie-Jones. The basis of the claim was that, but for the dishonesty of Mr Grey, the amount would have been paid to him by Mr Grey from the remaining $63,030 paid to Mr Grey by the client. Mr Grey had not billed the client for any work he may have done. The only other disbursement Mr Grey incurred in the course of providing legal services to the client was in respect of a medical expert he had retained. That medical expert too made a claim against the Fidelity Fund, in an amount of $16,880.

County Court

79 Judge Kennedy implicitly accepted that Mr Grey had held the money paid to him by the client on trust for the client and that Mr Gillespie-Jones had no equitable interest in any part of the amount misappropriated by Mr Grey[69].

80 Judge Kennedy concluded that Mr Gillespie-Jones was entitled to compensation from the Fidelity Fund on the basis that he was a person who suffered pecuniary loss because of the default constituted by Mr Grey's disbursal of money entrusted to him by the client contrary to the instructions of the client[70].

81 According to her Honour, the amount of the unpaid fees claimed by Mr Gillespie-Jones was a pecuniary loss Mr Gillespie-Jones was entitled to claim from the Fidelity Fund because of that default in that: using a "common sense approach", Mr Gillespie-Jones had not been paid those fees "because Mr Grey disbursed money designated for legal costs contrary to [the client's] instructions"[71]; and "but for" the default there would have been sufficient funds

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69 [2011] VCC 223 at [98], [120].

70 [2011] VCC 223 at [102]-[103], [108], [132].

71 [2011] VCC 223 at [110].

available to meet all of the client's legal costs including the outstanding fees of Mr Gillespie-Jones[72]. Her Honour found that the amount of the unpaid fees was not reasonably available to Mr Gillespie-Jones from any source other than the Fidelity Fund, in circumstances where Mr Gillespie-Jones had already pursued Mr Grey to bankruptcy[73].

Court of Appeal

82 The Court of Appeal held that Judge Kennedy was wrong to consider that Mr Gillespie-Jones did not need to be a person "for or on whose behalf" the client paid money to Mr Grey to be entitled to claim from the Fidelity Fund[74].

83 The Court of Appeal went on to find that the money paid to Mr Grey by the client had been held by Mr Grey on trust for persons, including Mr Gillespie-Jones, to whom Mr Grey was to become indebted in the course of providing legal services to the client.

84 According to the Court of Appeal[75]:

> "In the reality of the circumstances which obtained, the logical and most probable inference is that the client impliedly put the funds beyond his power of immediate recall and thus subjected them to a trust for payment to counsel and other persons retained to assist in the defence."

"[T]he relationship thereby established", held the Court of Appeal, "was a *Quistclose* trust creating an interest by [Mr Gillespie-Jones] in the trust money"[76] (footnote omitted).

85 Having observed that it appeared to have been implicit in the arrangement between the client and Mr Grey that the "rights" of Mr Gillespie-Jones and other persons to receive payments out of the fund held by Mr Grey "were conditional

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72 [2011] VCC 223 at [111].

73 [2011] VCC 223 at [137].

74 [2012] VSCA 68 at [42]-[50].

75 [2012] VSCA 68 at [58].

76 [2012] VSCA 68 at [55], citing *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

upon [Mr Gillespie-Jones] and those other persons having a present right to payment"[77], the Court of Appeal continued[78]:

> "Under the terms of the trust so constituted, the solicitor [that is, Mr Grey] had an obligation to pay the respondent [that is, Mr Gillespie-Jones] out of the fund when and if the respondent rendered a memorandum of fees in enforceable form. But the respondent's 'interest' did not depend upon the existence of a present unfulfilled obligation to pay and deliver the money. Even before his fees fell due, the respondent had a contingent interest in the fund, in that it was held on trust for payment to him when his fees became due. The respondent, therefore, had an enforceable right to due administration of the fund and, ultimately, to have the solicitor account to the respondent out of the fund for the amount found to be due upon a memorandum of fees being rendered in enforceable form." (footnote omitted)

86 The conclusion of the Court of Appeal was that Judge Kennedy was correct, in the result, to hold Mr Gillespie-Jones entitled to compensation from the Fidelity Fund. The result was justified, it said, on the basis that there had been a failure by Mr Grey to pay or deliver to Mr Gillespie-Jones "trust money that was received by [Mr Grey] in the course of legal practice and held for or on behalf of [Mr Gillespie-Jones]"[79].

Issues in the appeal

87 The Board challenges the finding of the Court of Appeal that Mr Grey held the money paid to him by the client on trust for persons who included Mr Gillespie-Jones.

88 Mr Gillespie-Jones challenges by notice of contention the holding of the Court of Appeal that he needed to be a person "for or on whose behalf" the client paid money to Mr Grey in order to claim from the Fidelity Fund. Mr Gillespie-Jones thereby relies on the approach adopted by Judge Kennedy.

89 Accordingly, the issues in the appeal are:

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77 [2012] VSCA 68 at [57].

78 [2012] VSCA 68 at [59].

79 [2012] VSCA 68 at [61].

(1) Was the whole or any part of the money paid to Mr Grey by the client held by Mr Grey on trust for the benefit of Mr Gillespie-Jones?

(2) If not, was Mr Gillespie-Jones nevertheless entitled to compensation from the Fidelity Fund?

90 The resolution of those issues turns in substantial measure on the construction and operation of provisions of the Act and of the Legal Profession Regulations 2005 (Vic) ("the Regulations") made under the Act.

The Act

91 The purposes of the Act include to improve the regulation of the legal profession, in part by implementing national model provisions for the regulation of the legal profession, and to facilitate the regulation of legal practice on a national basis[80]. The Act was enacted in 2004 following adoption that year by the Standing Committee of Commonwealth, State and Territory Attorneys-General of a national model law for the regulation of the legal profession. The Act was amended to reflect changes in that model law with effect relevantly from May 2007[81]. In the absence of any contention of material differences before and after the amendment, it is sufficient to refer to the Act as amended in May 2007.

92 Within the lexicon of the Act: an "Australian legal practitioner" includes a person admitted to the legal profession under the Act who holds a current local practising certificate[82]; a "law practice" includes an "Australian legal practitioner who is a sole practitioner" as well as a partnership consisting of Australian legal practitioners[83]; an "associate" of a law practice includes a sole practitioner (in the case of a law practice constituted by the practitioner) as well as a partner in the law practice (in the case of a law practice constituted by a partnership of legal practitioners) and an agent or employee of a law practice[84]; "legal services" means work done, or business transacted, in the ordinary course of legal

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80 Section 1.1.1.

81 *Legal Profession Amendment Act* 2007 (Vic).

82 Sections 1.2.1(1) and 1.2.3.

83 Section 1.2.1(1) ("law practice" and "law firm").

84 Sections 1.2.1(1) and 1.2.4.

practice[85]; a "client" includes a person to whom legal services are provided[86]; and "legal costs" means amounts, including disbursements, that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services[87].

93 Chapter 3 of the Act contains provisions explained in outline as "regulating various aspects of the legal profession with the aim of ensuring that law practices and legal practitioners operate effectively in the interests of justice, their clients and the public interest"[88]. Those parts of Ch 3 of immediate relevance to the issues in the appeal are Pts 3.3 and 3.6.

Part 3.3: "trust money"

94 Part 3.3 bears centrally on the first issue in the appeal. In outline, the Part "regulates the receipt, handling of and accounting for clients' money by law practices"[89]. The first of its expressed purposes is "to ensure that trust money is held by law practices … in a way that protects the interests of persons for or on whose behalf money is held"[90].

95 Within Pt 3.3[91]:

> "***trust money***, in relation to a law practice, means money entrusted to the law practice in the course of or in connection with the provision of legal services by the practice, and includes –
>
> (a) money received by the practice on account of legal costs in advance of providing the services; and
>
> (b) controlled money received by the practice; and

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85 Section 1.2.1(1) ("legal services").

86 Section 1.2.1(1) ("client").

87 Section 1.2.1(1) ("legal costs").

88 Section 3.1.1(1).

89 Section 3.1.1(2).

90 Section 3.3.1.

91 Section 3.3.2(1) ("trust money").

(c) transit money received by the practice; and

(d) money received by the practice, that is the subject of a power, exercisable by the practice or an associate of the practice, to deal with the money for or on behalf of another person".

"Controlled money" means "money received or held by a law practice in respect of which the practice has a written direction to deposit the money in an account (other than a general trust account) over which the practice has or will have exclusive control"[92]. "Transit money" means "money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice"[93]. A "power" includes an "authority"[94].

96 That definition of "trust money" within Pt 3.3 is structured in a way that "indicates an exhaustive explanation of the content of the term" and that "also … make[s] it plain that otherwise doubtful cases do fall within its scope"[95]. The general explanation that the term "means" money "entrusted" to a law practice in the course of or in connection with the provision of legal services by the practice cannot be read narrowly or technically so as to cover only circumstances which would give rise to a relationship of trust independently of the operation of the Act. The word "entrusted" is rather to be read according to its ordinary meaning in such a context. The general explanation is therefore to be read as covering any money confided to the care or disposal of the law practice in circumstances which indicate that the money has been earmarked for purposes not being purposes of the practice itself[96]. The further explanation that the term "includes" money received by the law practice within four specified categories indicates that money within those categories is always trust money, whether or not it would otherwise fall within the general conception of money entrusted to the law practice.

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92 Section 3.3.2(1) ("controlled money").

93 Section 3.3.2(1) ("transit money").

94 Section 3.3.2(1) ("power").

95 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 159 [32]; [2008] HCA 45.

96 *Stephens v The Queen* (1978) 139 CLR 315 at 333; [1978] HCA 35; *Francis v Law Society of New South Wales* [1982] 2 NSWLR 191 at 200.

97 The Part applies to a law practice having an office in Victoria, in respect of trust money received by the law practice in Victoria[97]. The law practice is obliged to maintain a general trust account with an approved authorised deposit-taking institution in Victoria[98]. As soon as practicable after receiving trust money, the law practice is obliged to deposit the money in that general trust account[99]. That obligation of the law practice to deposit trust money it receives in its general trust account applies except where the money is: the subject of a written direction to deal with the money otherwise than by depositing it in the account (in which case the law practice must deal with the money in accordance with the direction)[100]; controlled money (in which case the law practice must deposit the money in the account specified in the written direction relating to the money)[101]; transit money (in which case the law practice must pay or deliver the money as required by the instructions relating to the money)[102]; or money that is the subject of a power given to the practice or an associate of the practice to deal with the money for or on behalf of another person (in which case the law practice must ensure that the money is dealt with by the practice or associate only in accordance with the power relating to the money)[103]. Failure of the law practice to comply with the obligation applicable to the category of trust money received by the law practice is in each case a criminal offence.

98 The distinct obligations of the law practice in respect of how the law practice must deal with money within each of the specified categories of trust money indicate that those categories are to be read as mutually exclusive. Money received by the practice on account of legal costs in advance of providing the services, unless accompanied by an appropriate written direction, is not amongst those categories excluded from the general obligation to deposit trust money received in the general trust account of the practice. Money of that kind must therefore always be deposited by the law practice in its general trust account.

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97 Section 3.3.5.

98 Sections 3.3.11 and 3.3.2(1) ("general trust account").

99 Section 3.3.13.

100 Section 3.3.13(1) and (2).

101 Sections 3.3.13 and 3.3.15.

102 Sections 3.3.13 and 3.3.16.

103 Sections 3.3.13 and 3.3.17.

99 Two restrictions imposed by the Part on the holding of trust money deposited in a general trust account of a law practice are of particular importance.

100 First, the law practice is obliged by s 3.3.14 to hold the trust money so deposited "exclusively for the person on whose behalf it is received" and must "disburse the trust money only in accordance with a direction given by the person". Failure of the law practice to comply is, again, a criminal offence. While the word "for", like the expression "on behalf of", "may be used in conjunction with a wide range of relationships", the word is undoubtedly used in that context to "describe a relationship of trustee and cestui que trust"[104]. The statutory obligation of the law practice, in other words, is to hold trust money deposited in its general trust account exclusively for the benefit of the person (or persons) on whose behalf the money was received by the law practice and to disburse that money only at the direction of that person (or those persons).

101 Secondly, by s 3.3.18 the money "is not available for the payment of debts of the practice or any of its associates" save in respect of money to which the law practice or an associate of the law practice "is entitled".

102 By s 3.3.20(1)(b), a law practice is empowered to withdraw money held in its general trust account "for payment to the practice's account for legal costs owing to the practice if the relevant procedures or requirements prescribed by [the Act and the Regulations] are complied with". It accords with ordinary principles of construction[105], and furthers the protective purpose of Pt 3.3, to read that specific power as limiting the general power of a law practice to disburse money from its general trust account in accordance with a direction given by the person on whose behalf the money was received by the law practice. Whether or not that person has directed that the money be withdrawn for payment of legal costs (including disbursements) owing to the practice, the effect of s 3.3.20(1)(b) is that the money cannot be withdrawn by the legal practice from its general trust account for that purpose save on two conditions. One is that the withdrawal is for payment to the practice's own account. The other is that the withdrawal is in compliance with the relevant requirements of the Act and the procedures prescribed by the Regulations.

103 The relevant requirements of the Act are principally those that arise under Pt 3.4, the purposes of which include to regulate the billing of costs for legal

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104 *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374 at 386; [1980] HCA 2.

105 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9.

services and to provide a mechanism for review of those costs[106]. The requirements of Pt 3.4 ordinarily have the effect that (if not the subject of disclosure made by the practice and a written agreement about the payment of costs entered into between the law practice and the client) legal costs owing to a law practice need not be paid by the client unless they are reviewed by a taxing master and are not recoverable by the law practice unless they accord with the fair and reasonable value of the services provided[107].

104 The procedures prescribed by the Regulations allow a law practice to withdraw trust money for payment of legal costs owing to the practice by the person for whom the trust money was paid into the general trust account in two relevant circumstances. One is where the money is withdrawn in accordance with a costs agreement or instructions authorising the withdrawal, or is owed to the practice by way of reimbursement of money already paid by the practice on behalf of the person, provided that, before effecting the withdrawal, the practice gives or sends to the person a request for payment, referring to the withdrawal, or a written notice of withdrawal[108]. The other is where the law practice has given the person a bill relating to the money and the person has not within a specified time objected to the withdrawal of the money or the person has objected but has not within a further specified time applied for review of the legal costs or the money otherwise becomes legally payable[109].

105 In relation to trust money held in its general trust account, a law practice is authorised by s 3.3.20(1)(a) of the Act to "exercise a lien, including a general retaining lien, for the amount of legal costs reasonably due and owing by the person to the practice". The incidents of a general retaining lien of a law practice over money held on trust for a client are well understood. The lien is a common law right, implied by law, to retain the money until the costs of the law practice are paid. It is wholly passive and possessory in nature[110]. It "does not mean that the money is not beneficially the money of the client" and it does not mean that the law practice can pay any part of the money to itself[111].

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106 Section 3.4.1.

107 Sections 3.4.17 and 3.4.19.

108 Regulation 3.3.34(3).

109 Regulation 3.3.34(4).

110 *Barratt v Gough-Thomas* [1951] Ch 242 at 250.

111 *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1 at 20.

Part 3.6: the Fidelity Fund

106 Part 3.6 bears centrally on the second issue in the appeal. In outline, the Part "establishes a system for compensating clients who suffer loss because of a default of a law practice"[112]. It has as its expressed purpose, relevantly, "to compensate clients for loss arising out of defaults by law practices arising from acts or omissions of associates"[113]. The system it establishes is for claims to be made against the Fidelity Fund, which the Board is obliged to maintain[114], into which the Board is obliged to pay annual contributions and levies from legal practitioners[115], and from which the Board is obliged to pay any claim allowed or established against the Fidelity Fund[116].

107 The Part applies to a "default" of a law practice arising from or constituted by an act or omission of one or more associates of the practice[117]. "Default" relevantly means[118]:

> "a failure of the practice to pay or deliver trust money … that was received by the practice in the course of legal practice by the practice, where the failure arises from or is constituted by an act or omission of an associate that involves dishonesty".

108 Entitlement to claim against the Fidelity Fund to the Board "about the default" is conferred by s 3.6.7 on "[a] person who suffers pecuniary loss because of a default to which [the] Part applies". "Pecuniary loss" relevantly means, in relation to a default, "the amount of trust money … that is not paid or delivered" or "the amount of money that a person loses or is deprived of"[119].

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112 Section 3.1.1(2).

113 Section 3.6.1.

114 Section 6.7.15.

115 Section 6.7.17.

116 Section 6.7.18.

117 Section 3.6.5.

118 Section 3.6.2 ("default").

119 Section 3.6.2 ("pecuniary loss").

109 There is specific provision for such a claim to be made against the Fidelity Fund by a non-defaulting associate of a defaulting law practice "if the associate suffers pecuniary loss because of the default"[120]. That specific provision does not operate to give extended meaning to the expression "suffers pecuniary loss because of the default" but rather to make it clear that a person who suffers pecuniary loss because of a default by a law practice is not disqualified from making a claim by reason only of being an associate of that law practice.

110 The Board may determine a claim by allowing or disallowing it in whole or in part and may disallow or reduce a claim to the extent that, among other things, the negligence of the claimant contributed to the loss or the claimant knowingly assisted in or contributed towards, or was a party or accessory to, the act or omission giving rise to the claim[121]. By force of s 3.6.15 (costs and interest aside) "[t]he amount payable to a person in respect of a default must not exceed the amount of the person's actual pecuniary loss resulting from the default".

111 An appeal against a decision of the Board disallowing or reducing a claim lies to a court that would have jurisdiction to determine the claim if the claim were for a debt owing to the claimant[122]. The appeal is by way of a new hearing: the court has jurisdiction to review the merits of the Board's decision and to affirm, vary or set aside the decision of the Board and to make a new decision in substitution[123]. Unless the Board waives the requirement, the appellant is required to establish on the appeal that the whole or part of the amount sought to be recovered from the Fidelity Fund is not reasonably available from other sources[124].

Issue (1): Was Mr Gillespie-Jones a beneficiary?

112 The terminology of a "*Quistclose* trust" is helpful as a reminder that legal and equitable remedies may co-exist. The terminology is not helpful if taken to suggest the possibility apart from statute of a non-express trust for non-charitable

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120 Section 3.6.28.

121 Section 3.6.14.

122 Section 3.6.23(1) and (8).

123 Section 3.6.23(4) and (5).

124 Section 3.6.23(3).

purposes[125]. There is no reason to think that the Court of Appeal departed from orthodox trust analysis so as to contemplate such a possibility in the present case.

113 "[U]nless there is something in the circumstances of the case to indicate otherwise, a person who has 'the custody and administration of property on behalf of others' or who 'has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit' is a trustee in the ordinary sense"[126] (footnotes omitted). A legal practitioner who receives money from a client to be held for and on behalf of the client or another person archetypally answers that description.

114 Unsurprisingly, therefore, there was before the Court of Appeal and remains no dispute between the parties that Mr Grey held the money paid to him by the client as a trustee in the ordinary sense. The first issue is rather about the proper identification of the person or persons for whose benefit Mr Grey held that money on trust. Was the trust solely for the benefit of the client, as Judge Kennedy implicitly accepted, or was the trust for the benefit of Mr Gillespie-Jones and other persons retained by Mr Grey to assist in the client's defence, as the Court of Appeal found?

115 The finding of the Court of Appeal that Mr Grey held the money on a "*Quistclose* trust" for the benefit of Mr Gillespie-Jones and other persons retained by Mr Grey to assist in the client's defence is best seen as a finding, based on the Court of Appeal's determination of the inferred mutual intention of the client and Mr Grey, that Mr Grey held the money on an express trust having two limbs. The first limb, on which the Court of Appeal focused because, on the view it took, that limb was operative to give Mr Gillespie-Jones an interest at the time of default, was for the benefit of persons retained by Mr Grey to assist in the client's defence, the money being payable to those persons at the time Mr Grey became indebted to those persons by reason of their retainers. The second limb was for the benefit of the client if, and to the extent that, the money held by Mr Grey was not exhausted by payment in accordance with the first limb. The Court of Appeal's reference to Mr Gillespie-Jones having a "contingent interest" in the money held on trust is best understood as a reference to Mr Gillespie-Jones

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125 *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 502; *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 187 [80]-[81], 192-193 [100].

126 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165-166; [1993] HCA 1, quoting *Taylor v Davies* [1920] AC 636 at 651 and *Cohen v Cohen* (1929) 42 CLR 91 at 100; [1929] HCA 15. See also *Mann v Hulme* (1961) 106 CLR 136 at 141; [1961] HCA 45.

having an immediate interest sufficient to enforce the trust in advance of any money becoming payable to him.

116 It is, of course, "the established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries"[127].

117 An express trust in the terms found by the Court of Appeal would not fail for want of reasonable certainty as to who are the beneficiaries. "A trust is not uncertain merely because the actual persons to whom the distribution will be made cannot be known in advance of the date of distribution; it is sufficient that … upon that date the beneficiaries can be ascertained with certainty"[128]. It does not matter for this purpose that the date of distribution may vary between classes of beneficiaries or within a class of beneficiaries.

118 Nor would an express trust in the terms found by the Court of Appeal fail for want of sufficient clarity of intention on the part of the client and Mr Grey that such a trust be constituted by reason of the absence of language specifically expressing an intention to create a trust for the benefit of persons retained by Mr Grey to assist in the client's defence. "If the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then there is no reason why in a given case an intention to create a trust should not be inferred"[129].

119 Whether or not parties intend to create in a third party an interest that is appropriate to be created by a trust relationship falls in each case to be determined by reference to the outward manifestation of the intentions of the parties within the totality of the circumstances[130]. Those circumstances centrally include the nature of the relationship between the parties together with such rights or obligations pertaining to that relationship as might arise under statute or at common law. "The contractual relationship provides one of the most common

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127 *Kauter v Hilton* (1953) 90 CLR 86 at 97; [1953] HCA 95.

128 *Kinsela v Caldwell* (1975) 132 CLR 458 at 461; [1975] HCA 10.

129 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 618-619; [1988] HCA 16.

130 *Byrnes v Kendle* (2011) 243 CLR 253 at 275 [59]; [2011] HCA 26; *Walker v Corboy* (1990) 19 NSWLR 382 at 386; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 503.

bases for the establishment or implication and for the definition of a trust"[131]; a relationship established or regulated by statute can provide another basis[132]. Such trust relationship as may arise to give effect to the inferred intention of the parties must mould to statutory rights and obligations of the parties. A trust relationship is not to be recognised or enforced, and is therefore not to be inferred, if and to the extent the trust relationship would give rise to rights or obligations inconsistent with those conferred or imposed by statute[133].

120 The real problem with the trust relationship found by the Court of Appeal lies in the difficulty of reconciling the rights and obligations to which that trust relationship would give rise with the rights conferred on the client and obligations imposed on Mr Grey by Pt 3.3 of the Act. The client is not to be inferred to have waived his statutory rights and Mr Grey is not to be inferred to have assumed trust obligations he could not perform consistently with his statutory obligations.

121 For the purposes of Pt 3.3 of the Act, the category of trust money comprising money received by a law practice on account of legal costs in advance of providing services comprises all money received by a law practice on account of any amount, including any disbursement, that a person may be charged by, or may become liable to pay to, the law practice for any work done or business transacted in the ordinary course of legal practice. The category therefore covers any fees for which the law practice, as distinct from the client, may become liable to pay a barrister and in respect of which, as a disbursement, the law practice may then be entitled to seek reimbursement from the client.

122 The critical finding of Judge Kennedy that the client "was paying on account of any legal costs in relation to his defence, including 'everybody that was to come and help him' in his defence", meant that the totality of the money paid to Mr Grey by the client fell within that category.

123 In respect of money within that category, the statutory obligations of Mr Grey were clear. He was to deposit the money in his general trust account

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131 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In Liq)* (2000) 202 CLR 588 at 603 [27]; [2000] HCA 25, quoting *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569; [1985] HCA 19.

132 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 161-168.

133 *Nelson v Nelson* (1995) 184 CLR 538 at 551-552; [1995] HCA 25; *Miller v Miller* (2011) 242 CLR 446 at 457-459 [24]-[27]; [2011] HCA 9.

and was thereafter to hold the trust money so deposited "exclusively for the person on whose behalf it [was] received" (that is to say, the client) and was to "disburse the trust money only in accordance with a direction given by [that] person". Those statutory obligations were inconsistent with Mr Grey holding the whole or any part of the money on trust for Mr Gillespie-Jones or other persons retained by Mr Grey to assist in the client's defence. They were consistent only with Mr Grey holding the money on trust exclusively for the benefit of the client and subject to the instructions of the client. Because equity regards as done that which ought to have been done, those statutory obligations resulted in Mr Grey having held all of the money exclusively on trust for the benefit of the client immediately from the time of its receipt, whether or not he deposited the money in his general trust account.

124 By further operation of the Act, unless and until Mr Grey became entitled to the whole or any part of it, the money so held on trust for the benefit of the client was not available for the payment of any debt of Mr Grey, including any debt Mr Grey might owe to persons he retained to assist in the client's defence. Mr Grey would become entitled to withdraw the money for the purpose of being paid legal costs owed to him by the client, including by way of reimbursement for any debts he may have incurred to persons retained to assist in the client's defence, only for payment to his own account and only upon compliance with the procedures and requirements prescribed by the Act.

125 In the meantime, Mr Grey had the security of his lien: his common law right to retain the money in the trust account until those legal costs were paid. Persons retained by Mr Grey to assist in the client's defence benefited indirectly from the existence of that lien without need of having any beneficial interest in the money. To the extent that the client impliedly put the money he paid to Mr Grey beyond his power of immediate recall, he did so by subjecting that money which Mr Grey was to hold on trust exclusively for him to the operation of that lien, not by subjecting that money to the operation of any trust for the benefit of any other person.

126 The reasoning of the Court of Appeal, treating the client's entitlement to trust money deposited or required to be deposited by a law practice in its general trust account as non-exclusive, is for the reasons stated contrary to the express terms of the Act. Further, it is apt to give rise to theoretical and practical problems that the legislature could not have intended. For example, a purchaser might entrust to a law practice funds to defray the price of a parcel of land purchased under a contract of which the vendor asserts an entitlement to specific performance, and hence an interest as beneficiary of the funds entrusted to the

law practice for that purpose[134]. Application of a "*Quistclose* trust" analysis would mean that the vendor in this scenario could claim a beneficial entitlement to the funds entrusted by the purchaser to the law practice, even though the purchaser, having purported to rescind the contract, demanded the return of the funds from the law practice of which the purchaser is the client. The legislature is not to be taken to have intended to facilitate the creation of the kind of conflict of interest and duty abhorred by the law[135], and thereby to expose clients to the expense and uncertainty of disputing with their lawyers over the beneficial ownership of trust money.

127 Mr Gillespie-Jones had no interest, present or contingent, in the whole or any part of the money paid by the client to Mr Grey.

Issue (2): Was Mr Gillespie-Jones entitled to claim against the Fidelity Fund?

128 In circumstances where Mr Grey held the money paid to him by the client on trust solely for the benefit of the client, the issue that next arises is whether Mr Gillespie-Jones was nevertheless entitled to compensation from the Fidelity Fund.

129 Under Pt 3.6 of the Act, the relevant provisions of which have already been set out, the entitlement of a person to claim against the Fidelity Fund requires: first, a "default" by a law practice; secondly, the suffering of "pecuniary loss" by the person; and thirdly, the existence of a relevant causal connection between the suffering of that pecuniary loss and that default, connoted by the words "because of". The amount payable is then limited to "the amount of the person's actual pecuniary loss resulting from the default".

130 Exposition of those requirements and that limitation is assisted by reference to legislative history. At the time of the adoption of the model law in 2004, different provisions for claiming compensation from fidelity funds existed in legislation regulating the legal profession in each State and Territory[136]. Most relevant for present purposes is the legislation then existing in Victoria and New South Wales.

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134 cf *Lysaght v Edwards* (1876) 2 Ch D 499 at 506; *Haque v Haque [No 2]* (1965) 114 CLR 98 at 124; [1965] HCA 38; *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 at 300-301; [1984] HCA 63.

135 *Bolkiah v KPMG* [1999] 2 AC 222 at 236-237.

136 Section 80 of the *Legal Profession Act* 1987 (NSW); ss 208 and 214 of the *Legal Practice Act* 1996 (Vic); s 60 of the *Legal Practitioners Act* 1981 (SA); ss 24 and

(Footnote continues on next page)

131 Legislation then existing in Victoria provided for the fidelity fund in that State to be applied "for the purpose of compensating persons who suffer pecuniary loss from a defalcation of, or in relation to", money received by a legal practitioner for or on behalf of a person, other than the practitioner, in the course of or in connection with the practitioner's legal practice[137]. That language had been held not to require a claimant to be either a client who paid the money or a person on whose behalf the money was received[138]. A claim was limited to "the amount of the actual pecuniary loss suffered by the person"[139]. That language had been held to refer to the loss represented by the monetary value of the money the subject of the defalcation and not to include other consequential loss resulting from the defalcation[140].

132 Legislation then existing in New South Wales provided for the fidelity fund in that State to be applied "for the purpose of compensating persons who suffer pecuniary loss because of a failure to account"[141]. It defined "failure to account" as "a failure by a solicitor to account for, pay or deliver money … received by, or entrusted to, the solicitor … in the course of the solicitor's practice"[142]. That statutory definition reflected judicial explanation of the expression "failure to account" in the *Legal Practitioners Act* 1898 (NSW) as a "failure to pay or deliver moneys … to or on behalf of a person entitled thereto at the time when such payment or delivery should reasonably have been made"[143]. Accordingly, there was a "failure to account" if and when, "contrary to the

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25(2) of the *Queensland Law Society Act* 1952 (Q); ss 18 and 20(3) of the *Legal Contribution Trust Act* 1967 (WA); s 112 of the *Legal Profession Act* 1993 (Tas); s 91 of the *Legal Practitioners Act* 1974 (NT); s 137 of the *Legal Practitioners Act* 1970 (ACT).

137 Sections 3(1) ("trust money") and 208 of the *Legal Practice Act* 1996 (Vic).

138 *Baker v Law Institute of Victoria* [1974] VR 388 at 396; *Law Institute of Victoria v Baker* (1974) 48 ALJR 160 at 161.

139 Section 214 of the *Legal Practice Act* 1996 (Vic).

140 *Dobcol Pty Ltd v Law Institute of Victoria* [1979] VR 393 at 396-398; *Ristevski v Kyriacou* unreported, Supreme Court of Victoria, 5 August 1997.

141 Section 80(1) of the *Legal Profession Act* 1987 (NSW).

142 Section 79A of the *Legal Profession Act* 1987 (NSW).

143 *Francis v Law Society of New South Wales* [1982] 2 NSWLR 191 at 204.

mandate on which he had received the moneys", a solicitor misappropriated them[144]. The legislation in an earlier form had provided for the fidelity fund to be applied "for the purpose of reimbursing persons who may suffer pecuniary loss by reason of the theft, or fraudulent misapplication by a solicitor … of any moneys ... entrusted to the solicitor … in the course of his practice as a solicitor"[145]. It had been held in that form to confine application of the fund to the reimbursement of persons "having a legal or equitable interest in the moneys entrusted to the solicitor"[146].

133 Turning first to the requirement of the model law enacted in Pt 3.6 that there be a "default" by a law practice, it is apparent that the definition of "default" in Pt 3.6 builds on the definition of "failure to account" in the previous New South Wales legislation, qualifying it to apply only to a case where the failure arises from or is constituted by an act or omission of an associate that involves dishonesty. There is a default within the meaning of the Part where a law practice, by reason of the dishonesty of an associate, fails to pay or deliver trust money according to the mandate on which the trust money was received and is held by the law practice. The default lies specifically in that failure to pay or deliver trust money, not in any broader pattern of dishonest conduct of which that failure might form part.

134 Turning next to the requirement of the model law enacted in Pt 3.6 that a person suffers "pecuniary loss", the definition of "pecuniary loss" in Pt 3.6 did not appear in the previous New South Wales or Victorian legislation or in the previous legislation of any other State or Territory. The first limb of the definition (referring to "the amount of trust money … that is not paid or delivered") is plainly limited to the amount of trust money that the law practice fails to pay or deliver by reason of the dishonesty of an associate. However, the second limb (referring to "the amount of money that a person loses or is deprived of") plainly extends beyond the amount of trust money that the law practice fails to pay or deliver so as to encompass a loss or deprivation of other money that results from such a failure to pay or deliver trust money.

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144 *Law Society of New South Wales v Glenorcy Pty Ltd* (2006) 67 NSWLR 169 at 174 [26].

145 Section 56(1) of the *Legal Practitioners Act* 1898 (NSW) prior to its amendment by the *Legal Practitioners and Other Acts (Amendment) Act* 1974 (NSW).

146 *Anderson v Law Society of New South Wales* unreported, Supreme Court of New South Wales, 21 December 1979 at 5, applying *Australia and New Zealand Banking Group Ltd v Law Society of New South Wales* [1976] 1 NSWLR 686 at 693-694.

135 While the model law enacted in Pt 3.6 adopts the language of the previous Victorian legislation in limiting the amount payable to "the amount of the person's actual pecuniary loss resulting from the default", that limitation must be read with the two limbs of the definition of pecuniary loss. The word "actual" no doubt serves to exclude possible or contingent pecuniary loss. However, unlike the position under the previous Victorian legislation, actual pecuniary loss is not limited to the amount of trust money that is not paid or delivered. It extends by virtue of the second limb of the definition of pecuniary loss to a consequential loss or deprivation of money.

136 Turning finally to the requirement of the model law enacted in Pt 3.6 that a person suffers pecuniary loss "because of" a default, it is apparent that the statutory expression is drawn from the previous New South Wales legislation. That factor is insufficient to conclude that the causal connection the statutory expression connotes can be established (as had been held in respect of the earlier form of the previous New South Wales legislation) only in the case of a person having a legal or equitable interest in the trust money that the law practice failed to pay or deliver by reason of the dishonesty of an associate.

137 Because causation in a legal context is always purposive[147], however, the class of persons capable of answering the description of those suffering pecuniary loss because of a default cannot be divorced from the purpose of Pt 3.6.

138 The class of persons capable of answering the description cannot be confined by reference to the expressed purpose of Pt 3.6 being "to compensate clients". That expression of purpose does not appear in the model law and is best read, as the Court of Appeal suggested, "as providing that the main or dominant purpose of Part 3.6 is to facilitate claims for compensation by clients"[148]. The entitlement to claim compensation in the operative provision in Pt 3.6 is conferred, conformably with the model law, using the undefined term "person" rather than the defined term "client".

139 The purpose of Pt 3.6, encompassing but not limited to the expressed purpose of compensating clients, is rather to be discerned in the relationship between Pt 3.6 and Pt 3.3. The statutory expression of the purpose of Pt 3.3 – to ensure that trust money is held by law practices "in a way that protects the

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147 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 639 [28]-[30], 642-643 [45]-[46]; [2005] HCA 69; *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 29-32.

148 [2012] VSCA 68 at [40].

interests of persons for or on whose behalf money is held" – conforms to the expression of purpose in the corresponding provision of the model law and is reflected in the substance of the rights and obligations set out in Pt 3.3. Trust money is money entrusted to a law practice to be held by the law practice for or on behalf of other persons, who may but need not be clients. In the case of trust money paid or required to be paid into the general trust account of a law practice, the persons "for or on whose behalf" the trust money is held are exclusively persons who have a beneficial interest in that trust money.

140 Part 3.6 provides a safety net for those whose interests are sought to be protected by Pt 3.3, conferring an entitlement to compensation if and to the extent that the protection afforded by Pt 3.3 breaks down due to the dishonesty of an associate of a law practice. The compensatory purpose of Pt 3.6 is encompassed within the protective purpose of Pt 3.3. It is within that protective purpose to compensate persons "for or on whose behalf" trust money is held by a law practice for the adverse pecuniary consequences of the practice departing, by reason of the dishonesty of an associate, from the mandate subject to which that trust money was received and is held.

141 The compensatory purpose of Pt 3.6 is advanced by construing the requisite causal connection between a default and the suffering of pecuniary loss as conferring an entitlement on persons "for or on whose behalf" trust money is held to claim against the Fidelity Fund for the amount of trust money that the law practice fails to pay or deliver together with any further amount of money that the person loses, or of which the person is deprived, as a consequence of that dishonest failure to pay or deliver trust money. The compensatory effect of Pt 3.6 would be extended beyond the protective purpose of Pt 3.3 were the requisite causal connection to be construed as extending to permit claims for the consequential losses of other persons.

142 The Court of Appeal was therefore correct to construe the entitlement to compensation conferred by Pt 3.6 as extending only to persons "for or on whose behalf" trust money is held by a law practice. In respect of trust money paid or required to be paid into the general trust account of a law practice, the Court of Appeal was also correct to equate persons "for or on whose behalf" trust money is held by the law practice with persons having a beneficial interest in that trust money.

143 Mr Gillespie-Jones suffered the non-payment of a debt owed by Mr Grey. He did not suffer the loss of any trust money held for him or on his behalf. The money which Mr Grey failed to pay to Mr Gillespie-Jones was not his to lose, but money to which the client was exclusively beneficially entitled.

144 With due respect to Judge Kennedy, who adopted the contrary view, it is in any event difficult to characterise Mr Gillespie-Jones as a person who suffered loss "because of" the failure of Mr Grey to pay trust money. Mr Gillespie-Jones was always, and could never have been other than, a creditor of Mr Grey. As between Mr Grey and Mr Gillespie-Jones it was immaterial whether Mr Grey used trust money to pay his debt to Mr Gillespie-Jones. Moreover, any payment to Mr Gillespie-Jones by Mr Grey would not have been a payment of trust money. Had he complied with s 3.3.20(1)(b) of the Act, Mr Grey would have paid trust money into the law practice's own account and drawn upon that account to pay Mr Gillespie-Jones. Mr Gillespie-Jones could not have insisted on payment of money from the trust account and Mr Grey could not have drawn money from the trust account to discharge his debt to Mr Gillespie-Jones other than by paying it into his own account.

145 Mr Gillespie-Jones never had any entitlement to, or expectation of, payment of trust money. He did not suffer any loss because of the failure by Mr Grey to pay trust money; he suffered a loss because of Mr Grey's failure to pay his debts.