

BETWEEN



LEGAL SERVICES BOARD

Applicant

SIMON GILLESPIE-JONES

Respondent

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### APPELLANT'S OUTLINE OF SUBMISSIONS

#### Part I: Certification as to form

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

#### Part II: Issues

2. The principal questions raised by this appeal are these:

- 20 (a) where a solicitor acting as principal (rather than as agent of the client) retains a barrister, is the barrister entitled to compensation from the Fidelity Fund (pursuant to Part 3.6 of the *Legal Profession Act 2004* (Vic) ("the Act")) if the solicitor misappropriates the trust money given to him by the client to pay for all the client's costs of the litigation? and
- (b) given the purpose and content of the statutory regime governing all dealing with all trust money contained in a solicitor's trust account, can there be a "*failure to pay or deliver*" the money to that barrister when the solicitor has not satisfied the regulatory requirements for the disbursement of trust money in payment of the barrister's fees?

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FILED ON BEHALF OF: the Appellant  
DATE OF DOCUMENT: 18 April 2013  
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**Part III: Certification as to section 78B of the *Judiciary Act* 1903 (Cth)**

3. The Appellant considers that notice need not be given pursuant to section 78B of the *Judiciary Act* 1903 (Cth).

**Part IV: Citations**

4. The reasons for judgment of the primary Judge (in the County Court of Victoria) are not reported: *Legal Services Board v Gillespie-Jones* [2011] VCC 223 (ie the Trial Judgment ("TJ")).
- 10 5. The reasons for judgment of the Victorian Court of Appeal are also not reported: *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 (ie the Court of Appeal Judgment ("CA")).

**Part V: Facts**

6. The relevant facts the subject of this case are not in dispute. The parties filed an agreed statement of facts in the Court of Appeal.
7. The client was charged with serious sexual offences in 2005 ("the Charges").
8. In mid-2006, the client first retained Mr Grey (the principal of Poulton Elliot & Grey) as his solicitor to defend him against the Charges. On that occasion, Mr Grey did not tell the client what professional charges and fees he would charge for his services or how they would be charged.
- 20 9. Some time after this, but before 9 August 2006, Mr Grey discussed his fees and charges with the client, and he asked the client to get \$10,000 ready in cash.
10. On 9 August 2006, the client paid \$10,000 to Mr Grey, which was made up of a combination of cash and a cheque made out to cash.<sup>1</sup>
11. On about 15 September 2006, the client paid a further \$11,700 to Mr Grey, by a combination of cheques and cash.<sup>2</sup>
12. Some time in September 2006, Mr Grey briefed Mr Robert Richter QC to appear for the client at the committal hearing.
- 30 13. On about 16 September 2006, the client wrote a cheque in the amount of \$15,000 made out to Mr Richter QC and gave it to Mr Richter QC's clerk.

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<sup>1</sup> TJ [29]

<sup>2</sup> TJ [29]

14. Mr Richter was not briefed to appear after the committal and only charged \$6,600 for his services at the committal. Consequently, on 21 September 2006, Mr Richter QC's clerk refunded the balance of \$8,400 to Poulton Elliot & Grey. This amount was never refunded to the client.
15. Grey had appropriated \$30,100 of the money paid to him by the client by November 2006 because at that time, \$6,600 had been properly paid to Mr Richter and the bank account of Poulton Elliot & Grey had a balance of \$1,890.66.<sup>3</sup>
- 10 16. In December 2006, Mr Grey briefed the Respondent to appear for the client in respect of the Charges. Mr Grey retained the Respondent as the principal rather than as agent for the client.<sup>4</sup> On 11 December 2006, the Respondent first appeared in Court for the client.
17. On about 18 December 2006, the Respondent's clerk rendered a tax invoice in the amount of \$4,070 to Mr Grey. Mr Grey paid that invoice on 8 January 2007.
18. Between 19 December 2006 and 13 January 2007, the client made 7 payments by direct internet transfer to Poulton Elliot & Grey's trust account. Each payment bore a description inscribed by the client at the time of the transaction<sup>5</sup>:

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Date	Amount	Payment Description
19 December 2006	\$5,000.00	"Mic Grey & S Jones"
20 December 2006	\$5,000.00	"Grey & S G Jones"
21 December 2006	\$5,000.00	"Grey & Sg Jones"
22 December 2006	\$5,000.00	"Grey & Simon *4"
23 December 2006	\$5,000.00	"Grey & Sg Jones <sup>5</sup> "
12 January 2007	\$5,000.00	"Grey & Jones 6"
13 January 2007	\$5,000.00	"Grey & Jones 7"

19. On about 19 February 2007, the Respondent's clerk rendered a tax invoice in the amount of \$14,790 to Mr Grey. Mr Grey paid that invoice on 25 May 2007.
20. On about 23 March 2007, the Respondent's clerk rendered a tax invoice in the amount of \$7,900 to Mr Grey. On 25 May 2007, Mr Grey paid \$3,210 of that invoice, leaving an unpaid amount of \$4,690.

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<sup>3</sup> TJ [33]

<sup>4</sup> TJ [136]

<sup>5</sup> TJ [34], [35], [36]

21. On about 23 April 2007, the Respondent's clerk rendered a tax invoice in the amount of \$26,850 to Mr Grey. Mr Grey did not pay that invoice.
22. Between 6 May 2007 and 9 May 2007, the client made 4 payments by direct internet transfer to Poulton Elliot & Grey's trust account. Each payment bore a payment description as inscribed by the client<sup>6</sup>:

Date	Amount	Payment Description
6 May 2007	\$5,000.00	"Sgj via Grey *1"
7 May 2007	\$5,000.00	"Sgj via M Grey *2"
8 May 2007	\$5,000.00	"Sgj via M Grey *3"
9 May 2007	\$5,000.00	"Sgj via M Grey *4"

- 10 23. The substance of the client's evidence at the trial was that he 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.<sup>7</sup>
24. At the time when Mr Grey received the money from the client, the client did not know what amounts had been sought to be charged by Mr Grey, the Respondent or any of the medical experts engaged on the client's behalf.
25. As at 20 April 2007, the client expected to be repaid some of the money he paid to Mr Grey, as he believed that he had paid Mr Grey more than his actual costs.
26. The client never received an invoice or account from Mr Grey or the Respondent.
- 20 27. After the completion of the 4 fund transfers in May 2007 totalling \$20,000, Mr Grey paid \$18,000 to the Respondent on 25 May 2007. The remaining \$2,000 was appropriated otherwise.<sup>8</sup>
28. As at November 2007, the client had not received any of the invoices or memoranda of fees rendered by the Respondent, or any request for payment of his invoices.
29. The Respondent did not have a costs agreement made in accordance with the Act in respect of the legal services he had provided.

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<sup>6</sup> TJ [34], [35], [36]

<sup>7</sup> TJ [39]

<sup>8</sup> TJ [37]

## Part VI: Arguments

### Grounds 1 to 5: Trust funds were not held "for or on behalf of" the Respondent

30. As was accepted by the Court of Appeal,<sup>9</sup> in order for the Respondent to be entitled to compensation from the Fidelity Fund, he had to establish that the solicitor was holding the money that the client paid into the solicitor's trust account for the Respondent or on his behalf.
31. A number of key findings of fact were made by the Trial Judge and accepted by the Court of Appeal:
- 10 (a) the client's intention was that the money he paid to the solicitor be used to pay all of the costs of the litigation, including to pay the solicitor, counsel and experts;<sup>10</sup>
- (b) all of the money paid by the client to the solicitor was held by the solicitor as trust money;<sup>11</sup> and
- (c) the solicitor retained the barrister, acting as principal, and not as agent of the client.<sup>12</sup>
32. It follows from paragraph 31(a) and (b) above, and as was implicitly accepted by both the Trial Judge and the Court of Appeal, the solicitor's ability to drawdown on the trust money to pay his legal costs (which included his disbursements) was tightly controlled by the statutory regime (eg sections 3.3.14, 3.3.18 and 3.3.20 of the Act, and regulation 3.3.34 of the *Legal Profession Regulations 2005*).<sup>13</sup>
- 20 33. It follows from paragraph 31(c) above and from the definition of "*Legal costs*" in section 1.2.1 of the Act that, the Respondent's fees were a debt owed by the solicitor and not the client. So far as the client was concerned, those fees would be a disbursement in the solicitor's bill of costs to the client. The same applies to the fees incurred by the solicitor in engaging an expert witness. Those fees represented a disbursement of \$16,880 incurred by the solicitor.<sup>14</sup>
34. There a number of other statutory provisions whose effects are important.
- 30 35. First, section 3.3.2(1) of the Act defines "*trust money*" to include:
- (a) money received by a law practice on account of "*legal costs*" in advance of providing legal services; and

<sup>9</sup> CA [58]-[62]

<sup>10</sup> TJ [39]-[41], [84] and [89]; CA [12] and [54]

<sup>11</sup> TJ [90]-[91] and [93]; CA [19]-[20]

<sup>12</sup> TJ [136]; CA [64]-[65]

<sup>13</sup> TJ [95]-[97]; CA [34]-[35]

<sup>14</sup> TJ [42]

(b) "*transit money*" received by the practice.

36. Section 3.3.2(1) of the Act defines "*transit money*" 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. Typically, this occurs where the trust money in question is earmarked for a specific payee (eg a cheque that is to be handed across at settlement).
37. Money in a law practice's trust account must not be used to pay any debts of the law practice or of the lawyer: section 3.3.18 of the Act. This does not prevent money in a trust account being withdrawn to pay the law practice's account for legal costs (including disbursements), provided that the requirements of the Act are satisfied.
38. There was no challenge to the Trial Judge's finding that the trust money paid by the client to the solicitor was not "*transit money*", since the money was not intended by the client to be used exclusively for persons other than the solicitor. The Trial Judge described the money as "composite money" and explicitly found that the solicitor was entitled to some of the money for his own costs.<sup>15</sup> Moreover, questions as to how, when and in what proportions the money would be used by the solicitor to pay persons who had been retained for the client's benefit was undetermined.
39. Secondly, as mentioned above, the Act restricts the ways in which trust money can be applied to pay "*legal costs*". Money in a law practice's trust account must not be used to pay "*legal costs*" unless the relevant procedures or requirements prescribed by the Act and the regulations are complied with: section 3.3.20(1)(b).
40. For the purposes of section 3.3.20(1)(b), money in a law practice's trust account must not be used to pay legal costs unless:
- (a) it is in accordance with a costs agreement; or
  - (b) it is in accordance with instructions that have been received by the law practice and that authorise the withdrawal; or
  - (c) it is in reimbursement of money already paid by the law practice on behalf of the client; and
  - (d) before effecting the withdrawal, the law practice sends the client a request for payment or a written notice of withdrawal;
- or alternatively to (a) to (d)
- (e) the law practice gives the client a bill and:
    - (i) the client has not objected within 7 days;

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<sup>15</sup> TJ [86]-[90]

- (ii) the client has objected within 7 days but has not applied for a review of the legal costs under the Act within 60 days after being given the bill; or
- (iii) the money otherwise becomes legally payable.

(regulation 3.3.34)

41. It was not in dispute that at the time the solicitor took the money, the solicitor had not complied with the requirements that had to be satisfied before he could withdraw trust money to pay disbursements that the solicitor had incurred in respect of the Respondent's fees.<sup>16</sup>
- 10 42. The Court of Appeal correctly held that in order for the barrister to be entitled to compensation from the Fidelity Fund, he must establish that he had a proprietary interest in the money held by the solicitor, although it considered that a contingent proprietary interest would suffice.<sup>17</sup>
43. The Court of Appeal held that the respondent had an interest in the trust money, relying on a *Quistclose* trust analysis.<sup>18</sup> The Court of Appeal arrived at this conclusion without the benefit of submissions on the point, since the respondent did not contend or submit on the hearing of the appeal that a *Quistclose* analysis was appropriate.
- 20 44. The Court of Appeal's *Quistclose* trust analysis is wrong: it is divorced from, and inconsistent with, the consideration of key provisions of the Act prescribing how trust money can be applied, and it departs from the Trial Judge's finding<sup>19</sup> that the money was held by the solicitor on trust for the client to be applied in accordance with the client's instructions for the payment of all legal costs (including disbursements) incurred by the solicitor.
- 30 45. In effect, the Court of Appeal's finding of a *Quistclose* trust amounted to a finding that the money was "*transit money*". The Court of Appeal did not analyse the case in these terms, no doubt because the Trial Judge rejected a submission that the money over which the Respondent claimed an interest was transit money,<sup>20</sup> and the Respondent did not challenge that finding before the Court of Appeal. Nevertheless, the statutory concept of "*transit money*" reflects the elements of what might be regarded as a *Quistclose* trust under the general law.
46. On the established facts in this case, there was no scope for a "*transit money*" or *Quistclose* trust analysis. The key facts are that:

<sup>16</sup> CA [63]; TJ [100]-[102]

<sup>17</sup> CA [50]-[53], [57] and [60]

<sup>18</sup> See *Barclay's Bank Ltd v Quistclose Investments Ltd* [1973] AC 567; *In Re Australian Elizabethan Theatre Trusts* (1991) 30 FCR 491 at 502 (Gummow J); *George v Webb* [2011] NSWSC 1608, [197]; *Legal Services Commissioner v Brereton* [2011] VSCA 241, [97]

<sup>19</sup> TJ [90]-[91]

<sup>20</sup> TJ [84]-[89]

- (a) the barrister was the solicitor's (as opposed to the client's) creditor; and
- (b) the trust money given to the solicitor by the client was not intended to be used exclusively for the Respondent or even for an identified person or class of persons other than the solicitor – the client intended that the solicitor would also be paid for his services from that amount.<sup>21</sup>
47. The prohibition contained in section 3.3.18 of the Act on a solicitor using money in a trust account to pay for his or her debts precludes the Respondent from having any interest in the money given by the client because, as the Trial Judge and the Court of Appeal found, the solicitor had retained the Respondent as principal.<sup>22</sup> Consequently, counsel's fees were a debt of the solicitor.
48. In the Appellant's submission, the correct legal analysis is that when a client gives money to a solicitor for legal costs in advance of those legal costs being incurred, the money is held in trust for the client only and not in trust for the solicitor (or any other person engaged by the solicitor in the course of his or her retainer, including counsel). The solicitor has physical custody of the money he holds on trust, and he is entitled to deal with the money only in accordance with the rights and procedures laid down in the Act. One of those rights is to apply the money for "legal costs" (which includes counsel's fees) in accordance with the procedure prescribed by the Act and the Regulations. The Act and the Regulations are a complete code in that regard.
49. The terms of the *Quistclose* trust ultimately found by the Court of Appeal illustrate why there is no scope for such a trust under the scheme imposed by the Act. For example, in paragraph 57 of the Judgment, the Court of Appeal finds that a term of the *Quistclose* trust was that the right to receive payment (out of the money) was "*conditional upon the respondent and ... other persons having a present right to payment*" [emphasis added]. In paragraph 59 of the Judgment, the Court of Appeal states "*the solicitor had an obligation to pay the respondent out of the fund when and if the respondent rendered a memorandum of fees in enforceable form*" [emphasis added]. In paragraph 68 of the Judgment, the Court of Appeal concedes that it may have been an implied term of the *Quistclose* trust that the "*solicitor would hold the moneys on trust to pay out to the respondent in satisfaction of the respondent's fees only so much as the respondent might lawfully have charged the client if the solicitor had retained the respondent on behalf of the client as agent for the client: in other words, that the solicitor should not pay out to the respondent any more than might be found upon review under Div 7 of Pt 3 to be a fair and reasonable amount of legal costs*" [emphases added].
50. The Court of Appeal's *Quistclose* analysis also appears to be founded on a number of speculations about the purpose of the arrangement between the

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<sup>21</sup> TJ [39]-[41]; CA [54]

<sup>22</sup> TJ [136]; CA [64]-[65]

client and the solicitor.<sup>23</sup> In effect, the Court of Appeal contrasted two factual situations, one in which a client pays money to a solicitor as trustee for the client but with a mandate to use the monies to pay the solicitor or counsel as required;<sup>24</sup> and another in which the logical and most probable inference is that the client impliedly put the funds beyond his power of immediate recall and subjected them to a trust for payment to counsel and other persons retained to assist in the defence.<sup>25</sup> The Court of Appeal was not in a position to draw an inference of the kind described in the second case. First, any such inference would be inconsistent with the facts found by the Trial Judge. The notion that such a trust could be inferred by the Court of Appeal takes no account of the Trial Judge's finding that the solicitor's own costs were to be met out of the relevant funds. Secondly, the barrister was retained by the solicitor acting as principal and not as agent for the client, so that the barrister's fees would represent a debt due by the solicitor to the barrister. Thirdly, the Court of Appeal's reasoning is inconsistent with the mandatory requirements of the Act governing the withdrawal of trust money to pay legal costs, including disbursements, incurred by a solicitor in acting for the client.

51. In any event, on the facts as established, the Court of Appeal was wrong in concluding that a *Quistclose* trust could arise under the general law. In order for a *Quistclose* trust to arise, three matters must be established:<sup>26</sup>

- (a) there must be a mutual intention to that effect – both the settlor and the trustee must have intended the money to be applied to the same special purpose;
- (b) the money must have been given exclusively for that purpose (or perhaps more accurately, for an identified person or class of persons)<sup>27</sup>; and
- (c) the trustee must have been intended not to have the benefit of any of the money.<sup>28</sup>

52. None of those three requirements is satisfied in this case. As to the first requirement, there was no evidence (both at trial and on appeal) as to the solicitor's (ie the trustee's) intention. As to the second requirement, the Trial Judge found that the money was intended by the client to be applied to pay many people, ie anyone who was to assist in his defence, including the solicitor, counsel and experts. That finding was not challenged in the Court of

<sup>23</sup> CA [58]

<sup>24</sup> CA [56]

<sup>25</sup> CA [58]

<sup>26</sup> *Legal Services Commissioner v Brereton* [2011] VSCA 241 at [93]-[104] per Tate JA (with whom Nettle and Ashley JJA agreed); *Re Aust Elizabethan Theatre Trust* (1991) 30 FCR 491 at 500-505 per Gummow J

<sup>27</sup> *Re Aust Elizabethan Theatre Trust* (1991) 30 FCR 491 at 502 per Gummow J

<sup>28</sup> especially, *Legal Services Commissioner v Brereton* [2011] VSCA 241 at [103] per Tate JA (with whom Nettle and Ashley JJA agreed); *Re Aust Elizabethan Theatre Trust* (1991) 30 FCR 491 at 501 per Gummow J

Appeal.<sup>29</sup> Finally, the finding that the solicitor was also intended to be paid out of the money negates the establishment of the third requirement.<sup>30</sup>

53. Accordingly, there was no scope for a *Quistclose* analysis to apply so as to enable the Respondent to acquire an interest in the money that the client paid into the solicitor's trust account to meet his future legal costs.

Ground 6: No failure to pay or deliver if non-compliance with statutory requirements for the making of the payment

- 10 54. The purpose of the fidelity fund cover provided by Part 3.6 of the Act is to compensate clients for loss arising out of defaults by law practices. The "default" alleged by the Respondent is the solicitor's failure to pay or deliver trust money (ie relying on limb (a)(i) of the definition of "default" contained in section 3.6.2 of the Act). A failure by the solicitor to pay the Respondent's fees does not entitle the Respondent to make a claim under Part 3.6 of the Act. It is the failure to pay trust money, which enlivens Part 3.6 of the Act. Consequently, the Respondent had to establish that he had an immediate right to receive payment for his fees from the money paid to the solicitor by the client.
- 20 55. The statutory requirements must be satisfied before money being held by a solicitor on account of legal costs is capable of being attributed to and appropriated for specific legal costs. That is to say, until those requirements have been met, there can be no failure to pay trust money held in a solicitor's trust account to a barrister who has been retained by the solicitor acting as the principal.
- 30 56. In its reasons, the Court of Appeal held that section 3.3.20 and regulation 3.3.34 are concerned with a solicitor withdrawing money from a trust account in order to pay legal costs owing to the solicitor by the client, and not with a case where a solicitor withdraws trust money from a trust account to pay legal costs owed by the solicitor to a barrister (ie to satisfy a debt due by the solicitor to the barrister).<sup>31</sup> The distinction dawn by the Court of Appeal is flawed because it fails to take into account that section 1.2.1 of the Act defines legal costs to include disbursements. Legal costs owed by a solicitor to a barrister would constitute a disbursement in the solicitor's bill of costs to the client. Furthermore, given the definition of legal costs, section 3.3.20 and regulation 3.3.34 cannot be read down so that they only apply to solicitors who withdraw trust money to pay their own professional fees (excluding disbursements).
57. The fact that Parliament did not intend that a solicitor should be able to pay counsel's fees without complying with regulation 3.3.34 is confirmed by regulation 3.3.35. It provides, in effect, that where trust moneys are paid

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<sup>29</sup> CA [54]

<sup>30</sup> TJ [39]-[41], [89]; CA [54]

<sup>31</sup> CA [64] and [65]

directly to a barrister's clerk, the clerk is required to comply with the same procedure as contained in regulation 3.3.34 before withdrawing the money to pay counsel's fees. It would be an anomalous result if counsel's fees can be paid by a solicitor without complying with the regulatory procedure simply because he retained the barrister as a principal, when the same regulatory requirements would apply if the solicitor paid the fees to the barrister's clerk.

- 10 58. Accordingly, there was no failure to deliver trust money to the Respondent, as he had no proprietary interest in it. And at the time that the solicitor appropriated the money from the funds paid by the client into trust, he was not under a duty to pay any of it to the Respondent. It follows that the Respondent has not suffered an actual pecuniary loss resulting from the solicitor's appropriation of the money.
59. These conclusions do not give a narrow scope to the operation of Part 3.6 of the Act. Rather they preserve the integrity of the Act.
- 20 60. The Court of Appeal rightly accepted that Parliament's core purpose in imposing the statutory regime for dealing with trust money was to protect trust money in the hands of solicitors.<sup>32</sup> Important features of that regime are that money standing to the credit of a trust account is not available to pay the solicitor's debts, save that the solicitor can withdraw money for payment of legal costs and disbursements owing to the solicitor if the relevant procedures or requirements prescribed by the Act have been met. It follows then an insurmountable barrier to the Respondent's claim is that there could be no failure to pay or deliver trust money in payment of the fees that the solicitor owed to counsel unless and until the solicitor had complied with the relevant procedures and requirements of the Act.
- 30 61. The statutory controls over the use of trust money to pay legal costs operate independently of the provisions contained within Part 3.6 of the Act. They affect Part 3.6 only where the failure to pay being relied upon is a failure to pay legal costs. It would not otherwise arise, for example, where the client seeks repayment or directs payment to a third party.

*Adverse consequences of the Court of Appeal's analyses*

62. If the Court of Appeal is correct in its *Quistclose* analysis, all money paid by a client into a solicitor's trust account to meet future legal costs, including counsel's fees incurred by the solicitor and representing a disbursement to the client, would not have to be dealt with by the solicitor in accordance with sections 3.3.14, 3.3.18 and 3.3.20 of the Act and regulation 3.3.34. Consequently, the Court of Appeal's reasoning would effectively provide a pathway around the protective provisions of the Act, and is contrary to the objectives of the Act as identified in sections 3.3.1(a) and (b).

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<sup>32</sup> CA [33]-[36]

63. On the Court of Appeal's analysis, there is potential for the Fidelity Fund to be materially and adversely impacted. First, there is a risk that the Fidelity Fund would become the *de facto* guarantor of the bad debts of solicitors. Secondly, it could also expose the Fidelity Fund to multiple claims in respect of the misappropriation of a given amount of trust money in excess of the amount of money actually taken. For example, in this case, in addition to the claim made by the barrister, if the client were minded to do so, he could have claimed on the Fidelity Fund on the basis that the solicitor had fraudulently dealt with the trust money by taking the money for himself. The expert doctor who had been retained by the solicitor could also have claimed on the Fund in the amount of \$16,880.<sup>33</sup> On the Court of Appeal's approach, each would have suffered a compensable loss "because of" the solicitor's default.

#### Part VII: Legislation

64. Copies of the relevant statutory provisions are attached as an Annexure.
65. Except where otherwise indicated in the Annexure, each of those provisions is still in force, in that form, as at the date of these submissions.

#### Part VIII: Orders sought

66. The Appellant seeks the following orders:
1. The appeal be allowed.
  2. Paragraph 1 of the orders made by the Court of Appeal on 19 April 2012 be set aside, and in its place, order that the Applicant's appeal in respect of the orders made by her Honour Judge Kennedy on 1 April 2011 in the County Court of Victoria in proceeding number CI-10-00720 ("the County Court Proceeding") be allowed.
  3. Paragraphs 1 to 5 of the orders made by her Honour Judge Kennedy on 1 April 2011 in the County Court Proceeding:
    - (a) be set aside; and
    - (b) in their place:
      - (i) the decision of the Applicant made on 20 October 2009 be affirmed pursuant to section 3.6.23(5)(a) of the Act; and
      - (ii) the County Court Proceeding otherwise be dismissed.

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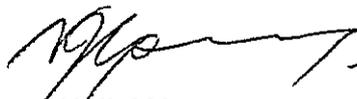
<sup>33</sup> TJ [42]

4. Such further or other orders as the Court deems fit.

**Part IX: Time estimate**

67. The Appellant estimates that 2 hours will be required for the presentation of its oral argument.

18 April 2013



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## ANNEXURE TO APPELLANT'S OUTLINE OF SUBMISSIONS

### APPLICABLE STATUTES AND REGULATIONS AS THEY EXISTED AT THE RELEVANT TIME

Version No. 012

## Legal Profession Act 2004

Act No. 99/2004

Version incorporating amendments as at 6 June 2006

### 1.2.1 Definitions

In this Act—

"**legal costs**" means 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 but not including interest;

"**trust money**" has the meaning given in section 3.3.2;

[The definition of "*legal costs*" has since been amended but not in any way relevant to the issues raised by this Appeal]

### 3.3.2 Definitions

(1) In this Part—

"**general trust account**" means an account maintained by a law practice or an approved clerk with an approved ADI for the holding of trust money received by the practice or clerk, other than controlled money or transit money;

"**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;

"**trust account**" means an account maintained by a law practice or an approved clerk with an approved ADI to hold trust money;

"**trust money**" in relation to a law practice, means 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, and includes—

- (a) money received on account of legal costs in advance of providing the services; and
- (b) controlled money; and
- (c) transit money; and

- (d) money controlled by the law practice (or by an associate, alone or with another associate), pursuant to a power to deal with money for or on behalf of another person that is—
  - (i) exercisable by the practice (or by an associate alone or with another associate); or
  - (ii) exercisable jointly and severally with the person or a nominee or nominees of the person—

but does not include money to which section 3.3.3 applies;

[The definition of “*trust money*” has since been amended but not in any way relevant to the issues raised by this Appeal]

#### **3.3.14 Holding, disbursing and accounting for trust money**

- (1) A law practice or an approved clerk must—
  - (a) hold trust money deposited in a general trust account of the practice or clerk exclusively for the person on whose behalf it is received; and
  - (b) disburse the trust money only in accordance with a direction given by the person.

Penalty: 120 penalty units.

- (2) Sub-section (1) applies subject to an order of a court of competent jurisdiction or as authorised by law.
- (3) A law practice or an approved clerk must account for the trust money as required by the regulations.

Penalty: 60 penalty units.

#### **3.3.16 Transit money**

- (1) A law practice that has received transit money must pay or deliver the money as required by the instructions relating to the money—
  - (a) within the period (if any) specified in the instructions; or
  - (b) subject to paragraph (a), as soon as practicable after it is received.

Penalty: 120 penalty units.

- (2) The law practice must account for the money as required by the regulations.

Penalty: 60 penalty units.

[Section 3.3.16 has since been amended but not in any way relevant to the issues raised by this Appeal]

### **3.3.18 Protection of trust money**

- (1) Money standing to the credit of a trust account maintained by a law practice or an approved clerk is not available for the payment of debts of the practice or any of its associates or the approved clerk.
- (2) Money standing to the credit of a trust account maintained by a law practice or an approved clerk is not liable to be attached or taken in execution for satisfying a judgment against the practice or any of its associates or the approved clerk.
- (3) This section does not apply to money to which a law practice, an associate of a law practice or an approved clerk is entitled.

### **3.3.20 Dealing with trust money: legal costs and unclaimed money**

- (1) A law practice may do any of the following, in relation to trust money held in a general trust account or controlled money account for a person—
  - (a) exercise a lien, including a general retaining lien, for the amount of legal costs reasonably due and owing by the person to the practice;
  - (b) withdraw money for payment to the practice's account for legal costs owing to the practice if the procedure prescribed in the regulations is complied with;
  - (c) after deducting any legal costs properly owing to the practice, deal with the balance as unclaimed money under the **Unclaimed Moneys Act 1962**.
- (2) An approved clerk may do any of the following, in relation to trust money held in a general trust account—
  - (a) withdraw money for payment to a barrister for whom the clerk acts in respect of the barrister's account for legal costs owing to the barrister if the procedure prescribed in the regulations is complied with;
  - (b) withdraw money in accordance with the instructions of the client or as otherwise authorised by law;
  - (c) deal with the balance as unclaimed money under the **Unclaimed Moneys Act 1962**.
- (3) Sub-sections (1) and (2) apply despite any other provision of this Part but have effect subject to Part 3.4.

[Sections 3.3.20(1)(b) and (2)(a) have since been amended but not in any way relevant to the issues raised by this Appeal]

Version No. 002

## Legal Profession Regulations 2005

S.R. No. 152/2005

Version incorporating amendments as at 9 May 2007

### 3.3.34 Withdrawing trust money for legal costs—law practices

- (1) This regulation prescribes, for the purposes of section 3.3.20(1)(b) of the Act, the procedure for the withdrawal of trust money held in a general trust account or controlled money account of a law practice for payment of legal costs owing to the practice by the person for whom the trust money was paid into the account.
- (2) The trust money may be withdrawn in accordance with the procedure set out in either sub-regulation (3) or (4).
- (3) The law practice may withdraw the trust money—
  - (a) if—
    - (i) the money is withdrawn in accordance with a costs agreement that complies with the legislation under which it is made and that authorises the withdrawal; or
    - (ii) the money is withdrawn in accordance with instructions that have been received by the practice and that authorise the withdrawal; or
    - (iii) the money is owed to the practice by way of reimbursement of money already paid by the practice on behalf of the person; and
  - (b) if, before effecting the withdrawal, the practice gives or sends to the person—
    - (i) a request for payment, referring to the proposed withdrawal; or
    - (ii) a written notice of withdrawal.
- (4) The law practice may withdraw the trust money—
  - (a) if the practice has given the person a bill relating to the money; and
  - (b) if—
    - (i) the person has not objected to withdrawal of the money within 7 days after being given the bill; or
    - (ii) the person has objected within 7 days after being given the bill but has not applied for a review of the legal costs under the Act within 60 days after being given the bill; or
    - (iii) the money otherwise becomes legally payable.
- (5) Instructions mentioned in subregulation (3)(a)(ii)—

- (a) if given in writing, must be kept as a permanent record; or
  - (b) if not given in writing, must be confirmed in writing either before, or not later than 5 working days after, the law practice effects the withdrawal and a copy must be kept as a permanent record.
- (6) For the purposes of sub-regulation (3)(a)(iii), money is taken to have been paid by the law practice on behalf of the person when the relevant account of the practice has been debited.

[Regulation 3.3.34(5) has since been amended but not in any way relevant to the issues raised by this Appeal]

### 3.3.35 Withdrawing trust money for legal costs—approved clerks

- (1) This regulation prescribes, for the purposes of section 3.3.20(2)(a) of the Act, the procedure for the withdrawal of trust money held in a general trust account of an approved clerk for payment of legal costs owing to a barrister for whom the clerk acts by the person for whom the trust money was paid into the account.
- (2) The trust money may be withdrawn in accordance with the procedure set out in either sub-regulation (3) or (4).
- (3) The approved clerk may withdraw the trust money—
  - (a) if—
    - (i) the money is withdrawn in accordance with a costs agreement that complies with the legislation under which it is made and that authorises the withdrawal; or
    - (ii) the money is withdrawn in accordance with instructions that have been received by the clerk and that authorise the withdrawal; or
    - (iii) the money is owed to the barrister by way of reimbursement of money already paid by the barrister on behalf of the person; and
  - (b) if, before effecting the withdrawal, the barrister or clerk gives or sends to the person—
    - (i) a request for payment, referring to the proposed withdrawal; or
    - (ii) a written notice of withdrawal.
- (4) The approved clerk may withdraw the trust money—
  - (a) if the barrister or clerk has given the person a bill relating to the money; and
  - (b) if—
    - (i) the person has not objected to withdrawal of the money within 7 days after being given the bill; or

- (ii) the person has objected within 7 days after being given the bill but has not applied for a review of the legal costs under the Act within 60 days after being given the bill; or
  - (iii) the money otherwise becomes legally payable.
- (5) Instructions mentioned in subregulation (3)(a)(ii)—
- (a) if given in writing, must be kept as a permanent record; or
  - (b) if not given in writing, must be confirmed in writing either before, or not later than 5 working days after, the approved clerk effects the withdrawal and a copy must be kept as a permanent record.
- (6) For the purposes of sub-regulation (3)(a)(iii), money is taken to have been paid by the barrister on behalf of the person when the relevant account of the barrister maintained by the approved clerk has been debited.

[Regulation 3.3.35(5) has since been amended but not in any way relevant to the issues raised by this Appeal]

Version No. 022  
**Legal Profession Act 2004**

No. 99 of 2004

Version incorporating amendments as at 8 November 2007

**3.6.1 Purpose**

The purpose of this Part is to compensate clients for loss arising out of defaults by law practices arising from acts or omissions of associates and defaults by approved clerks.

**3.6.2 Definitions**

In this Part—

*default* means—

- (a) in the case of a law practice—
  - (i) a failure of the practice to pay or deliver trust money or trust property 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; or
  - (ii) a fraudulent dealing with trust property that was received by the practice in the course of legal practice by the practice, where the fraudulent dealing arises from or is constituted by an act or omission of an associate that involves dishonesty;

...

[The definition of “*default*” has since been amended but not in any way relevant to the issues raised by this Appeal]

**3.6.7 Claims about defaults**

- (1) 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.
- (2) A claim is to be made in writing in a form approved by the Board.
- (3) The Board may require the person who makes a claim to do either or both of the following—
  - (a) to give further information about the claim or any dispute to which the claim relates;
  - (b) to verify the claim or any further information, by statutory declaration.

#### **3.6.14 Determination of claims**

- (1) The Board may determine a claim by wholly or partly allowing or disallowing it, or otherwise settling it.
- (2) 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.

...

#### **3.6.15 Maximum amount allowable**

- (1) The 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.
- (2) This section is subject to section 3.6.18.
- (3) This section does not apply to costs payable under section 3.6.16 or to interest payable under section 3.6.17.

**PROVISIONS AMENDING THE APPLICABLE STATUTES AND REGULATIONS**

**Legal Profession Amendment Act 2007**  
**No. 12 of 2007**

**4 Definitions**

- (1) In section 1.2.1 of the Principal Act—
- (a) insert the following definitions—
  - (f) in the definition of "legal costs", after "to pay" insert "to";

**33 Trust money and trust accounts**

- (1) In section 3.3.2(1) of the Principal Act—

- ...
- (e) for the definition of "trust money", in relation to a law practice, substitute—

*"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
- (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;"

- ...
- (2) After section 3.3.2(2) of the Principal Act insert—

- "(3) A reference in this Part to a power given to a law practice or an associate of the practice to deal with money for or on behalf of another person is a reference to a power given to the practice or associate that is exercisable by—
- (a) the practice alone; or
  - (b) an associate of the practice alone (otherwise than in a private and personal capacity); or
  - (c) the practice or an associate of the practice jointly or severally, or jointly and severally, with either or both of the following—
    - (i) one or more associates of the practice;

- (ii) the person, or one or more nominees of the person, for whom or on whose behalf the money may or is to be dealt with under the power."

**36 New section 3.3.14A inserted**

After section 3.3.14 of the Principal Act insert—

**"3.3.14A Manner of withdrawal of trust money from general trust account**

- (1) A law practice or an approved clerk must not withdraw trust money from a general trust account otherwise than by cheque or electronic funds transfer.

Penalty: 120 penalty units.

- (2) Without limiting subsection (1), the following are specifically prohibited—
- (a) cash withdrawals;
  - (b) ATM withdrawals or transfers;
  - (c) telephone banking withdrawals or transfers.
- (3) The regulations may make provision for or with respect to withdrawals by cheque or electronic funds transfer.
- (4) This section has effect despite anything to the contrary in any directions given to the law practice or approved clerk concerned, even if the directions are given by a person who is otherwise legally entitled to give the law practice or approved clerk directions in respect of dealings with trust money."

**38 Transit money and trust money subject to specific powers**

- (1) In section 3.3.16(1) of the Principal Act, for "A law practice" substitute "Subject to section 3.3.17A, a law practice".

**40 Further trust money and trust account amendments**

- (3) In the Principal Act—
- (a) in section 3.3.20(1)(b) and (2)(a), for "procedure prescribed in the regulations is" substitute "relevant procedures or requirements prescribed by this Act and the regulations are";

**64 Fidelity cover**

(1) In the Principal Act—

(b) for the definition of "default" substitute—

*"default means—*

(a) in the case of a law practice—

(i) a failure of the practice to pay or deliver trust money or trust property 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; or

(ii) a fraudulent dealing with trust property that was received by the practice in the course of legal practice by the practice, where the fraudulent dealing arises from or is constituted by an act or omission of an associate that involves dishonesty; or

**Legal Profession (Amendment) Regulations 2007**  
**S.R. No. 31/2007**

**14 Further trust money and trust account amendments**

(2) For regulation 3.3.34(5) of the Principal Regulations substitute—

"(5) Instructions mentioned in subregulation (3)(a)(ii)—

(a) if given in writing, must be kept as a permanent record; or

(b) if not given in writing, must be confirmed in writing either before, or not later than 5 working days after, the law practice effects the withdrawal and a copy must be kept as a permanent record."

(3) For regulation 3.3.35(5) of the Principal Regulations substitute—

"(5) Instructions mentioned in subregulation (3)(a)(ii)—

(a) if given in writing, must be kept as a permanent record; or

(b) if not given in writing, must be confirmed in writing either before, or not later than 5 working days after, the approved clerk effects the withdrawal and a copy must be kept as a permanent record."