

LEGAL SERVICES BOARD

Appellant

SIMON GILLESPIE-JONES

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification as to form

1. These submissions are in a form suitable for publication on the Internet.

Part II: Issues

2. The principal issues raised by this appeal are as follows:
 - (a) whether, on the facts as found or accepted, it was open to infer that the respondent was a person '*for or on whose behalf*' (within the meaning of section 3.3.1(a) of the *Legal Profession Act 2004* (Vic) ('the Act')) the trust money the subject of the default was held, whether upon a *Quistclose* trust or otherwise;
 - (b) whether the Court of Appeal erred in determining that the client had created a *Quistclose* trust in favour of the respondent; and
 - (c) whether there was a '*failure to pay or deliver*' the trust money, within the meaning of section 3.6.2 of the Act, having regard to the regulatory requirements in connection with the disbursement of trust money.

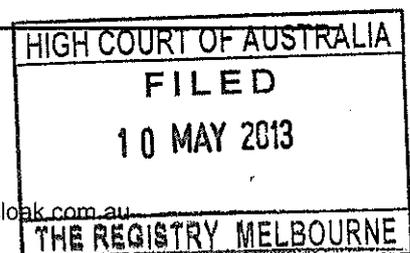
Part III: Certification as to section 78B of the Judiciary Act 1903 (Cth)

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

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Part IV: Whether appellant's statement of material facts is contested

4. The facts as set out in the Agreed Summary before the Court of Appeal (**AB 95-7**), and repeated in paragraphs 6 to 29 in the appellant's submissions, are not in contention.
5. To that Summary should be added the following:-
 - (a) As to the matter set out at paragraph 23 of the appellant's submissions regarding *'the substance of the client's evidence'* as to who he was paying on account of the legal costs of his defence, there are relevant passages of evidence set out at paragraphs 39-40 of the primary judge's reasons for judgment (hereafter 'TJ'): **AB 62**;
 - (b) The Court of Appeal found in respect of the 11 electronic transfers, each of \$5,000, made between 19 December 2006 and 24 May 2007 as follows: *'Of the \$55,000 so transferred, on 8 January 2007, the solicitor paid \$4,070 to the respondent and on 25 May 2007, he paid a further \$18,000 to the respondent. In the result, the respondent received \$22,070 of the \$55,000 and the solicitor dishonestly misappropriated the remaining \$32,930 to himself.'*: Court of Appeal Judgment (hereafter 'CA') [11] **AB 102**;
 - (c) The primary judge found that that there was insufficient evidence of the solicitor having undertaken any work to establish an entitlement to legal fees: CA [12] **AB 102**; TJ [41] **AB 63**;
 - (d) The primary judge found that *'...all of the moneys which the client paid to the solicitor were paid on implied terms that the solicitor would hold the moneys for the purpose of paying out to counsel and other consultants what was due to them from time to time.'*: CA [73] **AB 121**.

Part V Legislation

6. The respondent agrees that the statutory provisions attached as an Annexure to the appellant's submissions are relevant, but says that, in addition, reference should be made to:-
 - (i) section 3.3.1, *Purposes*;
 - (ii) the definition of *'power'* in section 3.3.2;
 - (iii) the definition of *'pecuniary loss'* in section 3.6.2; and
 - (iv) section 3.6.5, *Defaults to which this Part applies*.

The additional provisions are attached as an Annexure.

7. Part 3.6 of the Act contains the scheme of compensation for pecuniary loss as a result of default in relation to trust money. Section 3.6.7(1) is the primary statutory provision establishing the entitlement to claim on the Legal Practitioners Fidelity Fund for compensation, as follows:

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) *(etc)*

8. Section 3.6.5 provides for the '*defaults to which this Part [ie Part 3.6] applies*'. Relevantly, it provides:

3.6.5 Defaults to which this Part applies

(1) *This Part applies to—*

- (a) *a default of a law practice arising from or constituted by an act or omission of one or more associates of the practice, if this jurisdiction is the relevant jurisdiction for the only associate or one or more of the associates involved;*
- (b) *(etc)...*

9. There are definitions of '*default*', and '*pecuniary loss*' in s.3.6.2 as follows:

'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;*
 - (ii) *(etc)*
- (b) *(etc)*

'pecuniary loss', in relation to a default, means-

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

10. For the purposes of the Act, section 1.2.1 provides that '*trust money has the meaning given in section 3.3.2*'.

11. There are definitions of '*trust money*' and '*transit money*', in s.3.3.2 as follows:

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 law practice, that is the subject of a power, exercisable by the practice or an associate of the practice, to deal with money for or on behalf of another person;"*

[as per the definition substituted by amending Act 12/2007]

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;

12. Part 3.3 of the Act provides for the regulation of trust money held by law practices and approved clerks. There is a 'purposes' provision commencing the Part, to which the Court of Appeal had regard in construing the Part 3.6 compensation scheme¹, as follows:

3.3.1. Purposes

The purposes of this Part are-

- (a) *to ensure that trust money is held by law practices and approved clerks in a way that protects the interests of persons for or on whose behalf money is held, both in and outside this jurisdiction;*
- (b) *(etc)...*

Part VI Arguments

The respondent, on the facts as found or accepted, satisfied the statutory ingredients for compensation

13. The Court of Appeal correctly held that –
- (a) the client paid monies to the solicitor to be applied for a particular purpose, namely payment of legal costs to be charged by the solicitor, and to pay others retained to assist with the client's defence CA [54] **AB 114**;
 - (b) the payment of the monies for that purpose established a trust fund of a *Quistclose* nature CA [55] **AB 114**;
 - (c) it is to be inferred that the client impliedly put the trust fund beyond his power of immediate recall CA [58]² **AB 116**;
 - (d) the respondent had a contingent interest in the trust fund, such as to give rise to an enforceable right to due administration of the fund³, and also to have the solicitor account to him CA [59]⁴ **AB 116**;

¹ CA [48]-[50] **AB 112**.

² See, *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 at 223 (Peter Gibson J). See also, *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 618-9 (Mason CJ and Dawson J).

³ See, *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 at 222-3 (Peter Gibson J), citing *In re Northern Developments (Holdings) Ltd* (unreported), 6 October 1978 (Megarry V-C); *General Communications Ltd v Development Finance Corporation of New Zealand Ltd* [1990] 3 NZLR 406 at 415-9 (Tompkins J); and at 434 (Court of Appeal, Hardie Boys J).

⁴ *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (in liq)* (1999) 96 FCR 217 at 230-1 [54], [55] (Hill, Sackville and Finn JJ).

- (e) the respondent's contingent interest in the trust fund had the consequence that the respondent was a person "for and on whose behalf" the fund was held within the meaning of section 3.1.1 of the Act CA [60] **AB 117**;
- (f) the solicitor failed to pay or deliver trust money to the respondent, and that failure arose from an act or omission of the solicitor that involved dishonesty, with the consequence that there was a "default" within the meaning of section 3.6.2 of the Act CA [61] **AB 117**;
- (g) because of the default, the respondent suffered "actual pecuniary loss" within the meaning of section 3.6.7 of the Act, being the amount of his fees that were due CA [62] **AB 117**.

Appeal Grounds 1 to 5: Was trust money held 'for or on behalf of' the respondent?

14. The Court of Appeal noted that the words '*for or on behalf of*' conveyed a protean connotation not necessarily limited to legal or equitable beneficial interests: [53]. The Court correctly held that a claimant barrister's interest in trust money held by a solicitor in advance of the provision of the barrister's services could constitute a '*contingent interest*' in the fund created by a Quistclose trust arrangement thereby meeting the implied limitation arising from section 3.1.1 of the Act that the trust money be held '*for and on behalf of*' the barrister for the purposes of the Act.
15. The breadth of the definition of '*trust money*' in section 3.3.2 supports the Court's construction. On the facts found the money paid by the client to the solicitor for, inter alia, future barrister fees was either '(a) *money received on account of legal costs in advance of providing the services*', or '(d) *money controlled by the law practice ... pursuant to a power to deal with money for or on behalf of another person that is — (i) exercisable by the practice [etc]...*'.
16. The primary judge did not characterise the nature of the respondent's interest in the misappropriated trust money, but her Honour did treat the respondent's claim for compensation as requiring satisfaction that the money the subject of the claimed 'default' meet the definition of 'trust money' in section 3.2.2. Her Honour first referred to subparagraph (a) of the definition. She held, at TJ [91], that the "*(t)he money given to Mr Grey [the solicitor] by Mr See [the client] clearly met this definition and the defendant did not challenge this characterisation in oral submissions.*" Her Honour then considered subparagraph (d) of the definition. She continued, at paragraph 92, "*The money advanced would also appear to fall within part (d) ... Thus the money was received subject to a power to deal with the money for and on behalf of Mr See for the payment of the legal costs of his defence, including by payment to third parties such as the defendant... Accordingly, I am satisfied that each of the amounts paid to Mr Grey constituted 'trust money' or 'trust property'*". These findings are not disputed. The appellant does not submit that the primary judge (or the Court of Appeal) misconstrued the definition of 'trust money' in connection with these findings.

The appellant has submitted that the circumstance that the money was intended to pay all the costs of litigation, including potentially the solicitor, is inconsistent with the 'transit money' provisions: Submissions, paragraphs 35 – 38.

17. Although the primary judge found that the trust money was not “transit money”, and that the solicitor was entitled to some of the money for his own costs, this did not deprive the fund of the character of “trust money”. And, as the appellant observes, the solicitor’s right to draw on the trust money for his own costs was contingent on complying with procedures and requirements under the Act and Regulations: section 3.3.20(1)(b). None of these features displaced the respondent’s contingent interest in the trust money.

The appellant has submitted that the respondent’s fees were ‘legal costs’ not able to be paid from the trust account because of section 3.3.20(1)(b): Submissions, paragraphs 39 - 42

18. The regulation by section 3.3.20(1)(b) of the Act of the solicitor’s ability to pay legal costs from trust money does not have the consequence that the respondent did not have the contingent interest in the trust money identified by the Court of Appeal. Section 3.3.20 is not exhaustive of the ways that trust monies may be dealt with, or disbursed. In form, the section is enabling and facultative. Of its nature as trust money, there are many other ways that such money might be required to be dealt with, say, in accordance with a specific mandate given by a client which is not inconsistent with the purpose for which the trust money is held.
19. In this regard, the Court of Appeal correctly held, first, that the provision had nothing to do with a solicitor withdrawing trust money for payment of legal costs owed to a barrister⁵; secondly, that payments by a solicitor out of moneys received on trust subject to instructions to deliver (transit money), or out of moneys received on trust subject to a power, being governed by ss.3.3.16 and 3.3.17, were required only to be dealt with in accordance with the instructions or the power, as the case may be⁶; and, thirdly, given the solicitor retained the respondent as principal rather than agent, it was to be inferred that the terms of the *Quistclose* trust were that the solicitor would hold the moneys on trust for payment therefrom to the respondent of what was due by the solicitor to the respondent⁷.

Quistclose trust elements and application

20. The Court of Appeal’s exposition of the principles relating to trusts of a *Quistclose* nature was conventional.⁸ Critical to the establishment of such a trust, said the Court, was, first, ‘*an intention that the moneys are advanced for an exclusive and specific purpose*’, and secondly, that ‘*those funds not form*

⁵ CA [64] AB 118.

⁶ CA [64] AB 118.

⁷ CA [65] AB 118.

⁸ The Court cited (fn 31 and 32) AB 115, in particular, *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 502-3; 102 ALR 681 at 691-693, *George v Webb* [2011] NSWSC 1608 at [191] – [197], and *Legal Services Commissioner v Brereton* [2011] VSCA 241 at [93]ff. See also Heydon & Leeming, *Jacobs’ Law of Trusts in Australia*, 7th edn, at [214] - [215]. The NSW Court of Appeal has recently discussed the *Quistclose* trust concept generally in *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135, especially at [29] – [52], per Campbell JA, Meagher and Barrett JJ agreeing. The Court of Appeal’s explanation of the principles defining a *Quistclose* trust is consistent with these case authorities. And generally, see P J Millett, ‘*The Quistclose Trust: Who Can Enforce It?*’, April 1985, 101 LQR 267, especially at p.290.

*part of the assets of the trustee*⁹. Although the appellant has submitted that the Court erred in concluding that a *Quistclose* trust arose on the established facts, the appellant does not submit that the Court erred in its characterisation of the necessary ingredients for a *Quistclose* trust.

21. As to whether, on the facts of the case, a *Quistclose* trust had been created, the Court restated the findings of the primary judge that the client had paid the moneys to the solicitor to be held by the solicitor to satisfy legal costs to be charged by the solicitor and to pay counsel and other persons retained to assist the defence.¹⁰ The Court said¹¹, ***'The fact that the client paid the money to the solicitor to be applied to a particular purpose appears to us to imply that the relationship thereby established was a Quistclose trust creating an interest by the respondent in the trust money.'***
22. That the respondent was a specifically intended beneficiary of the 'particular purpose' for which the moneys were provided by the client to the solicitor is established by the fact that seven of the eleven electronic transfers of \$5,000 (ie those made between 19 December 2006 and 24 May 2007) '*...were described on the transfers as being to Grey '&' the Respondent...and four of the 11 transfers ...made between 7 May and 9 May 2007 [were] described on the transfers as 'SGJ [scil the Respondent] "via" M Grey.'*: CA [10] **AB 101-2**. Having regard to this demonstration of the client's 'purpose', it is submitted that the Court's conclusion that a *Quistclose* trust had been established in respect of these moneys was correct.
23. The Court explained the nature of the arrangement as follows¹²:

'Presumably, the purpose of the arrangement was to persuade the solicitor to retain counsel and thereby to expose the solicitor to a liability to pay counsel. Possibly, it was also to enable the solicitor to assure counsel that the funds to pay counsels' fees were safely in hand. Either way, the purpose would have been defeated if the client could have demanded the return of the moneys at will. 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. The factual matrix which supported that conclusion included the series of electronic transfers to which we have referred (at Reasons [5]-[6]) in which the Respondent was designated and which impressed those transactions with the specific purpose that those moneys were for the payment of the Respondent's fees... Under the terms of the trust so constituted, 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.'

It is submitted that these factual inferences and conclusions are, using the Court's words, '*logical and... probable*.' The competing 'legal analysis' contended for in the appellant's submissions at [48] and [50] should be rejected.

24. As it was '*implicit*' in the arrangement that the respondent's right to receive payments out of the fund was conditional upon the respondent having a present right to payment¹³, the respondent had not acquired a '*vested*

⁹ CA [56] **AB 115**.

¹⁰ CA [54] **AB 114**.

¹¹ CA [55] **AB 114**.

¹² CA [58] and [59] **AB 116**.

¹³ CA [57] **AB 115**.

equitable interest at the time the solicitor misappropriated the fund. Notwithstanding, by the arrangement the respondent had a '**...contingent interest in the fund, in that it was held in trust for payment to him when his fees became due.**'¹⁴ Moreover, said the Court, '*The Respondent, therefore, had an enforceable right to due administration of the fund...*'¹⁵ It is submitted that this characterisation of the *Quistclose* trust interest is correct.

25. The Court's conclusion that the relevant facts gave rise to a *Quistclose* trust interest is supported by the reasons of Tompkins J in the New Zealand High Court in *General Communications Ltd v Development Finance Corporation of New Zealand Ltd* [1990] 3 NZLR 406 and, on appeal, of the Court of Appeal (Cooke P, Bisson and Hardie Boys JJ) at [1990] 3 NZLR 425 ff. In that case, money was given to solicitors of Video Workshop by DFC, a financier, to be applied to pay future suppliers of equipment to Video Workshop. It was held by the Court that (i) in paying funds to the solicitors, DFC intended to authorise them to assure the suppliers that funds were in hand; (ii) as the purpose of the arrangement would be defeated by DFC being able to revoke it at will, it had put the funds beyond its power of recall; and (iii) the trust so created was for the benefit of, and enforceable by the suppliers.

Did the Court err in concluding that a Quistclose trust arose on the facts as established, as submitted by the appellant?

26. The appellant has submitted (at paragraph [51] of its Submissions) that three matters must arise for a *Quistclose* trust to be established, and submits that none of the three matters was established in this case.
27. First, the appellant has submitted that there must be a *mutual* intention, by both settlor and trustee, that the funds be applied to the same special purpose, and it is said that there was no evidence as to the solicitor's (ie the trustee's) intention (par 52) in the present case.
28. The mutual intention of client and solicitor does not need to be established by direct evidence. The principle is that, "*...if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it for the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply for that purpose.*": *Gilbert v Gonard*¹⁶. The mutual intention is established by the facts showing directly, or from which it may be inferred, that funds were tendered by a client to the solicitor for a specific purpose, and the solicitor accepting the funds with notice of that purpose.¹⁷ The evidence in the present case, including the solicitor's banking records at exhibit H (Appeal Book p 17ff), was a sufficient foundation from which the relevant mutual intention could be inferred.

¹⁴ CA [59] AB 116.

¹⁵ *Ibid.*

¹⁶ (1884) 54 LJ Ch 439 at 440 per North J, cited with approval by Lord Millett in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at [76].

¹⁷ On entering into arrangements which have the effect of creating a trust, regardless of subjective intention, see *Byrnes v Kendle* (2011) 243 CLR 253 at 274 [55].

29. Secondly, the appellant has submitted (at paragraphs [51] and [52]) that the money must have been given *exclusively* for the purpose. The appellant then points to evidence that a *number* of persons were to be paid, at least potentially, out of the trust monies whereby, the appellant submits, that the money was not given exclusively for a purpose. In response, the respondent submits that a *Quistclose* trust, as with any express trust, may be established for a number of purposes, not merely one purpose, or in favour of a number of ascertained beneficiaries, not merely a single beneficiary.¹⁸
30. Thirdly, the appellant has submitted (at paragraphs [51] and [52]) that, for a *Quistclose* trust to arise, the trustee must have been intended not to have the benefit of any of the money. The Court of Appeal correctly held that it was a necessary feature of a *Quistclose* trust that '*those funds not form part of the assets of the trustee*', but this ingredient is not inconsistent with the Court's finding that a *Quistclose* trust arose on the facts as found. The circumstance that the solicitor was a potential beneficiary in respect of his own costs does not mean that the inference of a trust in favour of the respondent was thereby defeated. The monies were nonetheless "trust money" for the purposes of the Act, and the solicitor was not free to deal with the money as his own without complying with the terms of the Act. There is nothing in this feature of the case that displaces the Court of Appeal's characterisation of the respondent's interest in the trust money as a '*contingent interest in the fund, in that it was held on trust for payment to him when his fees became due*': CA [59].
31. The appellant has also submitted, at paragraph [46], that there was '*...no scope for... a Quistclose trust analysis*', because of two 'key facts', viz: (a) that the barrister was the solicitor's (as opposed to the client's) creditor; and (b) that the trust money given to the solicitor by the client was not intended to be used exclusively for the respondent, but the client intended that the solicitor would also be paid for his services from that amount.
32. The respondent joins issue with this submission. First, the circumstance that the respondent was the solicitor's creditor rather than the client's creditor in respect of the services provided to the client does not displace the inference of a contingent interest arising out of the client paying money to a solicitor on account of future anticipated services to be provided by a barrister for the client. No authority is cited for the implicit proposition that the *Quistclose* trust concept could not accommodate such a circumstance.¹⁹
33. Secondly, it is not the case that, notwithstanding these so-called 'key facts', it was not open to infer an intention to create a *Quistclose* trust in favour of the respondent having regard to the totality of factual circumstances referred to by the Court of Appeal. The appellant's competing characterisation in its Submissions at paragraph [48], as to '*the correct legal analysis*' — viz that the trust established by the client's provision to the solicitor of funds for the legal costs of his defence is a trust for the client himself only, with a right in the solicitor to deal with the funds only in conformity with the rights and procedures laid down in the Act — does not properly accommodate the Court's identification, that the client's '*purpose would have been defeated if*

¹⁸ *Re Elizabethan Theatre Trust* (1991) 30 FCR 491 at 499 (Gummow J)

¹⁹ On the 'flexibility' of the *Quistclose* trust concept, see Heydon & Leeming, *Jacobs' Law of Trusts in Australia*, 7th edn, at [215] p.14 and [261] p.16; and on the 'flexibility' of express trust generally, see also *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 503 (Gummow J).

*the client could have demanded the return of the money at will', and its consequent 'logical and most probable inference' 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.'*²⁰

34. Thirdly, the appellant's references to *'the client intended that the solicitor would also be paid for his services from that amount'* (at paragraph [46](b)) oversimplifies the primary judge's relevant factual findings at TJ [39] to [40], ignoring the context provided by the primary judge's immediately preceding factual findings at TJ [23] to [38], in particular the findings at TJ [34] to [35] regarding electronic transfers in which the respondent barrister was specifically identified, and in a number of instances exclusively identified, as the intended beneficiary.

35. Moreover, the primary judge's summary of the substance of the evidence at TJ [40] regarding the client's intention to pay *'everybody that was to come and help him'*, upon which the appellant places reliance, is immediately followed by paragraph [41]:

'Although this might include Mr Grey [ie the solicitor] himself, the Board did not press any claim in respect of the value of Mr Grey's work. This was an appropriate concession to make given the paucity of evidence as to any work he performed and his failure to prosecute any claim including by serving any account.'

36. The weight the appellant seeks to assign the primary judge's finding regarding the client's intention to pay *'everybody that was to come and help him'* is also undercut by the primary judge's findings at TJ [128] to [132] where her Honour identifies the *"particular sum[s] of money"* that the [respondent barrister] would be able to identify' as his own *'pecuniary loss because of the default identified'*.

Were the funds held 'for and on behalf of' the respondent? — Appellant's Submissions [48]

37. The appellant has submitted that the respondent did not have any *'proprietary interest'* in the trust fund at the time of its misappropriation (see Notice of Appeal Ground 1), not even a contingent proprietary interest (see Notice of Appeal Ground 2), submitting that only the client ought to be regarded as having any beneficial interest in the trust fund (see appellant's Submissions [48]). That submission should be rejected. The scheme of the Act does not limit the capacity of a client to create a trust for the benefit of others, including persons such as the respondent. Section 3.3.14 of the Act provides that the law practice must hold trust money, *'exclusively for the person on whose behalf it is received'*²¹.

38. As the respondent submits above, the circumstances in which the moneys were paid by the client to the solicitor for, inter alia, counsel's future fees created a contingent interest in the trust fund in favour of the respondent that the moneys be held in trust for payment to him when his fees became due. The appellant's implicit argument that in order to show that the funds were

²⁰ CA [58] AB 116.

²¹ "[P]erson" includes the plural: *Interpretation of Legislation Act 1984* (Vic), s 37(c).

held 'for and on behalf of' the respondent for the purposes of the Part 3.6 scheme of compensation, the claimant must have a full and vested beneficial interest in the funds as at the time of misappropriation, is not supported by any provision in the Act.

39. No provision of the Act requires a claimant under Part 3.6 to be able to demonstrate that he, she or it had a vested beneficial interest in the trust money as at the time of default. Nothing in the Act implies that a claimant may not be able to rely upon a *Quistclose* trust interest to demonstrate that the relevant misappropriated trust money was held 'for and on his behalf', within the meaning of those words in the LPA, at the relevant time.
40. The appellant has submitted, at Submissions [47], that there is a prohibition in section 3.3.18 against a solicitor using money in a trust account to pay his or her own debts, and that this prohibition necessarily includes paying counsel's fees where the solicitor has retained the counsel as principal. But on this argument, the solicitor would never be able to pay counsel's fees from trust money, even if the formalities of a rendered account, (etc), were present, and even were there a specific mandate from the client to pay the barrister from the trust money notwithstanding such formalities had not yet been satisfied. Such a construction of section 3.3.18 would produce absurdity and impracticality.

Appeal Ground 6: The appellant has submitted that there was no 'failure to pay or deliver' if solicitor had not satisfied statutory requirements for drawing trust money in favour of respondent — Appellant's Submissions [54] – [61]

41. Although section 3.3.20 provides procedures with which a solicitor is required to comply before he could properly withdraw trust money for payment of '*legal costs*', the Court of Appeal at [64] correctly construed those provisions as concerned only 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 to pay legal costs owed by the solicitor to a barrister in respect of services provided by the barrister for the benefit of the client.
42. The appellant at [54] has imported into "failure to pay or deliver trust money" in the definition of 'default' in section 3.6.2 the idea that there must be an immediate right to receive trust money. There is no warrant for such a requirement in the text of the Act. It would be anomalous if a "*failure to pay or deliver*", for the purposes of the definition of '*default*' in s.3.6.2 and s.3.6.5 in relation to trust money could only occur where a solicitor has taken steps to render a bill or a request before drawing down trust money. There is nothing in Part 3.6 which suggests that there will only be a "*default to which this Part applies*" where a solicitor has properly completed such records. Rather, s.3.6.14(3)(d) contemplates that proper records might not be brought into existence or might be destroyed. In such a case the Board may reduce a claim only in circumstances where the claimant, "*knew or ought reasonably to have known that records of that kind would not be kept or would be destroyed.*"
43. The appellant at [58] has also imported into the "failure to pay or deliver trust money" a requirement that there be a failure to pay or deliver such trust money *to the claimant*. That is not part of the statutory language either. As

long as there is a 'default' within the meaning of its definition in section 3.6.2, it being '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', and it is a 'default' to which the scheme applies within the meaning of section 3.6.5, the relevant ingredients for entitlement are satisfied.

The appellant has submitted that there might be 'adverse consequences' – Submissions, paragraphs [62] – [63]

44. The appellant has submitted that the 'result' of the Court's reasoning would be to provide 'a pathway around the protective provisions of the Act'. The appellant claims that there is a risk of the Fund becoming the de facto guarantor of the bad debts of solicitors, and would expose the Fund to multiple claims in respect of a given amount of misappropriated trust money because, so it is supposed, multiple claimants might, on the Court of Appeal's reasoning, be said to have suffered a compensable loss 'because of' a solicitor's default.
45. The appellant's submission that the effect of the decision is to transform the scheme into a guarantor of debts should be rejected: the decision of the Court of Appeal does not have this effect. On the contrary, as the Court recognised²², the scheme is concerned with protecting the persons for and on whose behalf the trust money is held. It is not the existence of indebtedness that engages the right to compensation but, on the Court of Appeal's analysis, an interest in the trust money. Thus, when it comes to assessing compensation, the compensation is for the loss of that interest.²³

DISPOSITION

46. The appeal should be dismissed.

Part VIII: Time estimate

47. The respondent estimates that 2 hours will be required for the presentation of his oral argument.

²² At CA [50]

²³ As to which, see *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, especially at 499, 500 and 508.

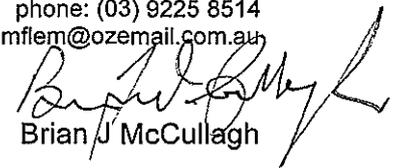


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Dated: 10 May 2013

ANNEXURE TO RESPONDENT'S OUTLINE OF SUBMISSIONS

Legal Profession Act 2004

Act No. 99/2004

Version incorporating amendments as at 6 June 2006

s. 3.3.1

(i) PART 3.3- TRUST MONEY AND TRUST ACCOUNTS

Division 1—Preliminary

3.3.1 Purposes

The purposes of this Part are—

- (a) to ensure that trust money is held by law practices and approved clerks in a way that protects the interests of persons for or on whose behalf money is held, both in and outside this jurisdiction;
- (b) to improve the efficiency and effectiveness of the regulation of trust money and trust accounts for law practices that provide legal services within and outside this jurisdiction;
- (c) to ensure that the Board can work effectively with corresponding authorities in other jurisdictions in relation to the regulation of trust money and trust accounts.

(ii) 3.3.2 Definitions

(1) In this Part—

...

"power" includes authority;

...

(iii) PART 3.6—FIDELITY COVER

Division 1—Preliminary

....

3.6.2 Definitions

In this Part—

...

"pecuniary loss", in relation to a default, means—

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

s. 3.6.5

...

(iv)

Division 2—Defaults to which this Part Applies

...

3.6.5 Defaults to which this Part applies

- (1) This Part applies to—
 - (a) a default of a law practice arising from or constituted by an act or omission of one or more associates of the practice, if this jurisdiction is the relevant jurisdiction for the only associate or one or more of the associates involved; or
 - (b) a default of an approved clerk.
- (2) It is immaterial where the default occurs.
- (3) It is immaterial that the act or omission giving rise to or constituting a default does not constitute a crime or other offence under the law of this or any other jurisdiction or of the Commonwealth or that proceedings have not been commenced or concluded in relation to a crime or other offence of that kind.

...