

Case Update

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PRACTICE AREA : Legal Practice
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CASE : *Legal Services Board v Gillespie-Jones* [2013] HCA 35

THE DECISION

A Barrister does not suffer a compensable loss if an instructing solicitor misappropriates money held in trust for costs.

BACKGROUND

The Respondent, a barrister, was briefed by a solicitor to appear for a client in criminal proceedings. The client made a series of payments to the solicitor on account of his anticipated future legal costs, including the solicitor's own fees and barristers' fees. However, the solicitor misappropriated most of this money, such that the amount remaining was insufficient to meet all of the Respondent's fees.

The Respondent sought compensation from the Fidelity Fund, which is maintained by the Legal Services Board ("the Board") under the Legal Profession Act 2004 ("the Act"). The Respondent argued that his claim should be allowed under Part 3.6 of the Act, on the basis that he had suffered a pecuniary loss as a result of the solicitor's default. The default was said to be the solicitor's failure to pay or deliver trust money to the Respondent.

APPEAL TO THE COUNTY COURT

The Board rejected the Respondent's claim. The Respondent then successfully appealed to the County Court. The County Court held that the Respondent had suffered a pecuniary loss as a result

of the solicitor's default, because but for the misappropriation, the Respondent would have been paid all of his fees out of the money paid into trust.¹

COURT OF APPEAL DECISION

The County Court's decision was upheld by the Court of Appeal, which allowed the Respondent's claim on the basis that the solicitor had failed to pay him money to which he was beneficially entitled pursuant to a Quistclose trust.²

By special leave, the Board appealed to the High Court.

APPEAL TO THE HIGH COURT OF AUSTRALIA

French CJ, Hayne, Crennan and Kiefel JJ (“the Majority”) held that the Respondent's claim against the Fidelity Fund should be disallowed, because he had not suffered a relevant pecuniary loss. There can be no failure to pay or deliver trust money unless there is an instruction to the solicitor to pay or deliver the money to the barrister, and it is not complied with.³ The County Court had not made any finding that the instructions the client gave to the solicitor amounted to an instruction to pay the Respondent.⁴ Their Honours held that the effect of the County Court’s finding was that the money was intended to be held by the solicitor and disbursed according to the client’s further directions.⁵ That Court's findings were not challenged in the Court of Appeal, and could not be revisited by the High Court.⁶ Therefore, the Majority held that it could not be said that the solicitor had failed to pay or deliver trust money to the Respondent.

Bell, Gageler and Keane JJ (“the Minority”) held that Part 3.6 of the Act required a claimant on the Fidelity Fund to establish a beneficial entitlement to the money misappropriated from trust, such that he sustained an actual pecuniary loss as a result of the failure of the solicitor to pay or deliver the trust money to him.⁷ Their Honours held that the Respondent had no entitlement to, or expectation of, payment of trust money in payment of his fees because he had been retained by the solicitor as principal (and not as agent for the client).⁸ That is, the solicitor was personally liable to the Respondent for the latter’s fees.

¹ *Legal Services Board v Gillespie-Jones* [2013] HCA 35 (“the Judgment”) at [81]

² Judgment at [83] – [86]

³ Judgment at [56] and [60]

⁴ Judgment at [65]

⁵ Judgment at [61]

⁶ Judgment at [64]

⁷ Judgment at [142]

⁸ Judgment at [143] – [145]

The Majority in effect held that it was unnecessary for them to decide whether the Court of Appeal was correct in its finding of a Quistclose trust in favour of the Respondent given their construction of Part 3.6 of the Act.⁹

In contrast, the Minority examined in detail the question of whether a Quistclose trust had been created in favour of the Respondent.¹⁰

WAS A QUISTCLOSE TRUST CREATED IN FAVOUR OF THE RESPONDENT?

Their Honours confirmed that a Quistclose trust is not a non-express trust for non-charitable purposes.¹¹

They also confirmed that, as with any other express trust, in the case of a Quistclose trust, 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.¹² Their Honours went on to explain that 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; and it does not matter for this purpose that the date of distribution may vary between classes of beneficiaries or within a class of beneficiaries.¹³

The Minority reiterated that any Quistclose trust would not fail for want of sufficient clarity of intention on the part of the client and the solicitor 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 the solicitor 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.¹⁴

In their Honours' view, 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.¹⁵ 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.¹⁶ The contractual relationship provides one of the most common bases for the establishment or implication and for the definition of a trust.

⁹ Judgment at [51] – [52]

¹⁰ Judgment at [112] – [127]

¹¹ Judgment at [112]

¹² Judgment at [116]

¹³ Judgment at [117]

¹⁴ Judgment at [118]

¹⁵ Judgment at [119]

¹⁶ Judgment at [119]

Critically, the Minority held that while a relationship established or regulated by statute can provide another basis for a trust relationship, 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.¹⁷

Their Honours reasoned that in this case, the trust relationship found by the Court of Appeal could not be reconciled with the rights conferred by the Act on the client in respect of trust money and obligations imposed on the solicitor by Part 3.3 of the Act limiting the ways in which he could disburse trust money.

Specifically, the Minority held that for the purposes of Part 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.¹⁸ According to their Honours, in respect of money within that category, the statutory obligations of the solicitor were to deposit the money in his general trust account 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".¹⁹

Their Honours held that those statutory obligations were inconsistent with the solicitor holding the whole or any part of the money on trust for the respondent or other persons retained by the solicitor to assist in the client's defence.²⁰ They were consistent only with the solicitor holding the money on trust exclusively for the benefit of the client and subject to the instructions of the client.

The Minority went on to also hold that by further operation of the Act, unless and until the solicitor 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 of the solicitor's debt, including any debt he might owe to persons he retained to assist in the client's defence.²¹ The solicitor 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. In this case, there was no dispute that the solicitor had failed to comply with those statutory requirements.

¹⁷ Judgment at [119]

¹⁸ Judgment at [121]

¹⁹ Judgment at [123]

²⁰ Judgment at [123]

²¹ Judgment at [124]

This case unequivocally confirms that a Quistclose trust is a form of express trust and that it is not a trust for non-charitable purposes. It also establishes that a trust relationship will not be recognised or enforced, if and to the extent the trust relationship would give rise to rights or obligations inconsistent with those conferred or imposed by statute.