Barristers and the Fidelity Fund

Emma Beechey reports on *Legal Services Board v Gillespie-Jones* [2013] HCA 35

The High Court overturned a decision of the Victorian Court of Appeal which had upheld a barrister's right to claim against a solicitors' fidelity fund for unpaid fees. The High Court held unanimously that the barrister could not claim against the fidelity fund for his unpaid fees in circumstances where the solicitor had misappropriated to himself trust funds that were provided by the client on account of the client's legal costs including the barrister's fees. However, the 7-judge bench split 4:3 as to reasoning for the decision. Four judges found that the critical fact was the absence of a finding that the client had instructed the solicitor to use the trust money specifically to pay the barrister. The other three judges found that the barrister did not have a beneficial interest in the trust money and so was not entitled to claim against the fidelity fund.

The case concerned the Victorian Legal Practitioners Fidelity Fund ('Fidelity Fund') but its reasoning is equally applicable in New South Wales as both states have introduced relevantly uniform legislation governing the legal profession generally and trust money and fidelity funds in particular.[1] This note refers to the relevant Victorian provisions as considered by the High Court. The corresponding New South Wales provisions can be found in the footnotes.

The facts

The client retained Mr Michael Gray, a solicitor, to act for him in relation to criminal proceedings. Mr Gray briefed Mr Simon Gillespie-Jones to appear in those proceedings. No costs agreement was entered into between the barrister and the solicitor, nor was there a costs agreement between the client and either the solicitor or the barrister. The client paid in excess of $55,000 to the solicitor on account of the client's various legal costs, including the barrister's fees. The solicitor misappropriated the majority of the funds paid by the client. The barrister periodically submitted memoranda of his fees to the solicitor but the client did not see them. The barrister's total fees were $53,610 of which $31,540 was never paid. By the time the matter reached the High Court, there was no dispute that the barrister's fees were fair and reasonable. Had the solicitor not misappropriated the funds, it appeared that there would have been sufficient funds available to pay the barrister in full.

The barrister made a claim on the Fidelity Fund for $31,540. The Legal Services Board, which maintains the Fidelity Fund, rejected the claim. The County Court of Victoria allowed the claim on appeal and the Supreme Court of Victoria dismissed an appeal from the County Court decision.

Trust money and the Fidelity Fund

Part 3.3 of the LPA deals with trust money and trust accounts.[2] Section 3.3.1(a)[3] provides that one of the purposes of Pt 3.3 is 'to ensure that trust money is held by law practices … in a way that protects the interests of persons for or on whose behalf money is held'. There was no dispute in this case that the money was trust money. Section 3.3.14(1)(b)[4] requires a law practice to disburse trust money only in accordance with a direction given by the person on whose behalf the trust money is received.

Part 3.6 of the LPA deals with fidelity cover.[5] Section 3.6.1[6] contains a purpose provision which states:

> 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.[7]

Section 3.6.7(1)[8] provides:

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

'Default' is defined in s 3.6.2[9] as including 'a failure of the practice to pay or deliver trust money'.

First instance

At first instance, Kennedy J found that the barrister was entitled to claim against the Fidelity Fund because he was a person who had suffered pecuniary loss because of the solicitor's default, being the failure to pay or deliver trust money.[10] The default was the solicitor's breach of s 3.3.14(1)(b) in failing to pay the trust money in accordance with the client's direction to pay the client's legal costs and instead using the money for himself.[11] Her Honour found that it was not necessary for the barrister to have a legal or equitable interest in the moneys entrusted to the solicitor such that he was a person 'on whose behalf' the trust monies were held. It was sufficient in this regard that there was a failure to pay or deliver the trust money to the barrister.[12]

Her Honour also rejected an argument by the Board that there was no failure to pay because the procedural steps required by the Act and the Regulations for the withdrawal of trust money[13] had not yet been complied with such that the barrister did not have an immediate right to receive the money. Her Honour found that it could hardly be supposed that there could only be a failure to pay where a solicitor had properly taken steps to render a bill before misappropriating trust money.

Court of Appeal

The Court of Appeal interpreted Pt 3.6 in light of Pt 3.3 and, applying the language of s 3.3.1 in particular, found that a person entitled to claim against the Fidelity Fund in respect of a default in relation to trust money must be a person 'for or on whose behalf' the trust money was held.[14] Accordingly, it was necessary for the person to have some interest in the trust money, although the interest did not necessarily need to be a legal or equitable beneficial interest.[15] The Court found that the circumstances in which the client paid the money to the solicitor gave rise to a Quistclose trust which gave the barrister a contingent interest in the fund.[16] This contingent interest made the barrister a person for or on whose behalf the trust money was held and therefore a person entitled to bring a claim against the Fidelity Fund.

As to whether there was no failure to pay because the procedural requirements for withdrawal of trust money had not been met, the Court of Appeal found that those procedural requirements cited by the Board were not relevant in the circumstances.

High Court

French CJ, Hayne, Crennan and Kiefel JJ

French CJ, Hayne, Crennan and Kiefel JJ rejected the Board's argument that compliance with the procedures for dealing with trust money in Pt 3.3 was a condition of compensation under Pt 3.6. Their Honours found that the Board was seeking 'to impute to the legislature an intention which is neither reasonable nor rational' and that Pt 3.6 could 'reasonably be taken to be founded upon that assumption that, where there has been a dishonest dealing with trust money, procedures are unlikely to have been complied with'.[17]

Turning to the question of who was entitled to claim compensation from the Fidelity Fund, their Honours focused their attention on the provisions of Pt 3.6. Their Honours stated that, as the purpose of Pt 3.6 was remedial and beneficial, the relevant provisions should receive as generous a construction as the actual language of the provisions permits. Their Honours continued:

> 'What Pts 3.3 and 3.6 have in common, it will be seen, is that they identify a person who has an interest in the money in the sense that the person may suffer loss if it is dealt with other than according to instructions. However, the class of persons identified is not limited to persons beneficially entitled to trust money and s 3.3.1 should not be read as limited in this way'.[18]

Thus, not only Pt 3.6 but also Pt 3.3 should now be understood as applying to all those persons who may suffer loss if trust money is dealt with other than according to instructions. This broad scope given to the protections in both Pts 3.3 and 3.6 is markedly different from the confined approach applied by Bell, Gageler and Keane JJ.

Accordingly, French CJ, Hayne, Crennan and Kiefel JJ found that neither a proprietorial interest nor any entitlement to the trust money or trust property was required to support a claim against the Fidelity Fund.[19] The question of whether the barrister had an interest in the trust money, such as that of a beneficiary of a Quistclose trust, was therefore not to the point.[20]

However, their Honours ultimately found that in the circumstances of this case the barrister did not have an entitlement to claim against the Fidelity Fund because the client had not given a direction to the solicitor to pay the barrister.[21] Such a direction, their Honours found, must be a direction to pay the trust money to an identifiable person.[22] It was said to be a feature of the primary judge's findings that her Honour did not find that such an instruction to pay the barrister was given.[23] The descriptions placed on the electronic transfers by the client such as 'Grey & SG Jones', 'Grey & Simon' or 'SGJ via M Grey' and the evidence given by the client before the primary judge that he had provided the money for the engagement of 'everybody that come and help me' and 'to pay whoever that has been engaged' were insufficient

to constitute such a direction because they directed payment to both the solicitor and the barrister and perhaps others.

Accordingly, the result was that the money was intended to be held by the solicitor and disbursed according to the client's further directions yet to be provided.[24] Their Honours noted that the findings made by the primary judge as to the client's instructions were not challenged in the Court of Appeal, nor before the High Court and could not be revisited.[25]

Importantly, their Honours added that it was 'neither necessary nor appropriate' to decide whether a barrister would have a claim against the Fidelity Fund if the client had paid the solicitor an amount on account of counsel's fees (or disbursements generally) and the solicitor had misapplied those monies, with their Honours concluding that variation of the facts 'may, we do not say must, yield a different application of the LPA'.[26]

Bell, Gageler and Keane JJ

In contrast to the leading judgment, Bell, Gageler and Keane JJ found that the Court of Appeal was correct to find that the entitlement to compensation was limited to those 'for or on whose behalf' trust money was held. Their Honours found that the compensatory purpose of Pt 3.6 was encompassed within the protective purpose in Pt 3.3 and that the compensatory purpose of Pt 3.6 was:[27]

> '... advanced by construing the requisite causal connection between a default and the suffering of pecuniary loss as conferring an entitlement on persons 'for or on whose behalf' trust money is held to claim against the Fidelity Fund'.

Further, their Honours held that such persons were those who had a beneficial interest in the trust money.[28]

However, their Honours found that the Court of Appeal had been incorrect to characterise the circumstances of the case as giving rise to a Quistclose trust. To infer such a trust relationship would have been inconsistent with the rights and obligations conferred or imposed by the LPA.[29] Their Honours concluded that the barrister had no interest, present or contingent, in the trust money.[30] Instead, the solicitor held the money on trust exclusively for the benefit of the client and the barrister suffered only the non-payment of a debt owed by the solicitor.[31] Their Honours concluded:[32]

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

Conclusion

Although the barrister in this case was ultimately unsuccessful in his claim against the Fidelity Fund, the judgment of French CJ, Hayne, Crennan and Kiefel JJ has left the door ajar to barristers' claims in future, in appropriate factual circumstances. Their Honours have also established a broad and generous test for determining the scope of the protective provisions of both Pts 3.3 and 3.6.

Endnotes

1. *Legal Profession Act 2004* (Vic) ('LPA'); *Legal Profession Act 2004* (NSW) ('LPA (NSW)').
2. 2 LPA (NSW), Pt 3.1.
3. LPA (NSW), s 242.
4. LPA (NSW), s 255(1)(b).
5. LPA (NSW), Pt 3.4.
6. LPA (NSW), s 418 is expressed slightly differently: 'to establish and maintain a fund to provide a source of compensation for defaults by law practices arising from acts or omissions of associates'.
7. At first instance and in the Court of Appeal, the Board was unsuccessful in arguing that the barrister was not eligible for compensation because he was not a 'client' so he did not come within the purpose of the part. This issue was not appealed to the High Court.
8. LPA (NSW), s 436.
9. LPA (NSW), s 419.
10. *Gillespie-Jones v Legal Services Board* [2011] VCC 223.
11. At [97].
12. At [99].
13. LPA, s 3.3.20; *Legal Profession Regulation 2005* (Vic), r 3.3.34; LPA (NSW), s 261; *Legal Profession Regulation 2005* (NSW), r 88.
14. *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [51].
15. At [53].
16. At [55], [59].
17. *Legal Services Board v Gillespie-Jones* [2013] HCA 35 at [48], [45].
18. A [51].
19. At [55].
20. At [52].
21. At [61].
22. At [56].
23. At [31].
24. At [61].
25. At [64].
26. At [66].
27. At [141].
28. At [142].
29. At [119]–[120], [126].
30. At [127].
31. At [143].
32. At [145].