<u>LEGAL SERVICES BOARD v GILLESPIE-JONES</u> (M27/2013)

<u>Court appealed from</u>: Court of Appeal of the Supreme Court of Victoria [2012] VSCA 68

<u>Date of judgment</u>: 19 April 2012

<u>Date special leave granted</u>: 15 March 2013

This application arises from the appellant's disallowance of the respondent's claim, under s 3.6.6 of the *Legal Profession Act* 2004 (Vic) ('the Act'), for compensation for pecuniary loss suffered by the respondent because of a default by a solicitor in misappropriating funds held in trust.

In or about 2005 a man ('the client') was charged with criminal offences. He retained a solicitor, to act on his behalf. In December 2006, the solicitor retained the respondent as barrister to represent the client. Between 19 December 2006 and 9 May 2007, the client paid the solicitor a total of $55,000 for legal costs in relation to his defence. The solicitor paid a total of $22,070 of the $55,000 to the barrister, but dishonestly misappropriated the remaining $32,930 to himself.

At the hearing in the County Court of Victoria, the respondent contended that he was a 'person' within the meaning of s 3.6.7 of the Act, and thus entitled to make a claim against the Fidelity Fund under that section. Judge Kennedy accepted that argument. Her Honour held that the money paid by the client to the solicitor was 'trust money' within the meaning of s 3.3.2(a) of the Act, and further or alternatively, money within the meaning of s 3.3.2(d) of the Act which was '*received by the practice [of the solicitor] ... the subject of a power, exercisable by... an associate of the practice, to deal with ... for or on behalf of another person*'. Her Honour gave judgment for the respondent for such amount as was determined by the Costs Court to be a '"fair and reasonable value" of the legal services that he provided to the client in the period December 2006 to 20 April 2007.

The appellant's appeal to the Court of Appeal was unsuccessful. The Court (Nettle, Redlich and Hansen JJA) found the fact that the client paid the money to the solicitor to be applied to a particular purpose implied that the relationship thereby established was a *Quistclose* trust, creating an interest by the respondent in the trust money. It was implicit in the client's arrangement with the solicitor that the respondent's and other persons' rights to receive payments out of the fund were conditional upon the respondent and those other persons having a present right to payment. If so, it would follow that, since the amount of the obligation owed to the respondent was not determined or agreed before the solicitor misappropriated the fund, the respondent did not acquire a vested equitable interest in the fund. This did not mean, however, that the fund was not held for, or on behalf of, the respondent within the meaning of s 3.3.1. In the reality of the circumstances which obtained, the logical and most probable inference was 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.

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. But the respondent's 'interest' did not depend upon the existence of a present unfulfilled obligation to pay and deliver the money. Even before his fees fell due, the respondent had a contingent interest in the fund, in that it was held on trust for payment to him when his fees became due. The respondent, therefore, had an enforceable right to due administration of the fund and, ultimately, to have the solicitor account to the respondent out of the fund for the amount found to be due upon a memorandum of fees being rendered in enforceable form.

In the result, the judge was correct to hold that the failure of the solicitor to pay the respondent's fees due out of the fund was a default within the meaning of s 3.6.2 and the default arose from an act or omission of the solicitor that involved dishonesty. Equally, the judge was correct that the solicitor's failure to pay counsel out of the fund in accordance with the terms of the trust caused counsel loss equal to the amount of the fees which were due, and that it was 'actual pecuniary loss' within the meaning of s 3.6.7.

The grounds of appeal include:

- The Court erred in its determination that the respondent had a proprietary interest in trust money at the time of the "*default*" by the solicitor, such that he was entitled to compensation from the Fidelity Fund pursuant to Part 3.6 of the *Legal Profession Act* 2004.

- The Court erred in holding that the respondent had a contingent proprietary interest in the trust money at the time of the "*default*" and that this interest was sufficient to found his claim for compensation from the Fidelity Fund.

- The Court erred in determining that the client had created a *Quistclose* trust over the trust money, in favour of the respondent.