

# Receipt of monies in advance of performing work

In 1998 Bar Council sought the advice of David Bennett QC in respect of receipt of fees by barristers performing work under direct access rules. Members may wish to retain a copy of this advice with their New South Wales Barristers' Rules.

## Opinion

I am asked to advise the New South Wales Bar Association on the following questions:

1. In the absence of a fee agreement and disregarding Rule 77 of the New South Wales Barristers' Rules and Regulation 26J of the Legal Profession Regulation 1994 (NSW), what is the legal nature of the manner in which those monies are held by barristers? Specifically, do those bare circumstances give rise to a trust?
2. Does that situation change where, pursuant to a fee agreement, monies become payable on the happening of a certain event? A particular example of this question would be where a barrister is briefed to appear on a number of days and by his/her agreement stipulates that the whole fee is payable in advance. If a client pays that fee in advance on a non-refundable basis, what is the nature of the way in which the monies are held?
3. What effect, if any, does Regulation 26J(2) have upon the situation?

I propose first to deal with the topic generally and then to deal with the specific questions asked. It is convenient to deal with the topic under the following headings:

1. The general law of trust
2. The effect of s38P of the *Legal Profession Act 1987 (NSW)*
3. The effect of Regulation 26J
4. The effect of Rule 77
5. Practical consequences
6. Answers to the specific questions asked.

## 1. The general law of trust

One of the three essential elements for the creation of a trust is that there be an intention to create a trust. This, of course, does not necessarily mean that the person creating the trust is aware of the legal nature of the concept; but it does require that the person intends the funds to be held for himself or herself and not to become part of the general assets of the trustee: See *Knight v. Knight* (1840) 3 Beav. 1458, 49 ER 58; *Jacobs on Trusts*, 6th edition, @213.

The intention to create a trust need not be explicitly spelt out. The Court will look at the nature of the transaction and the surrounding circumstances: *Walker v. Corboy* (1990) 19 NSWLR 382. If the

inference is drawn that the parties had the intention of protecting an interest in the beneficiary and that a trust was the appropriate means of doing so, then a constructive trust will be inferred: see, e.g., *Bahr v. Nicolay* (No. 2) (1988) 164 CLR 604.

There is no authority of which I am aware on the application of these principles to barristers. There is very limited authority on their application to solicitors.

The leading case in this area is *Kirk v. Commissioner of Police* (1988) 19 FCR 530, a decision of the Full Federal Court comprising Fox, Davies and Beaumont JJ. The issue was whether funds in the trust account of a solicitor could be seized by the Commissioner of the Australian Federal Police under s243E of the *Customs Act 1901 (CTH)* which, in the events which had happened, authorised seizure of the client's property.

The Court cited a large number of early English authorities establishing that a solicitor was entitled to demand funds in advance as a condition of acting in contested litigation. Fox J, dissenting, drew the inference that the funds were not held in trust for the client. Davies J drew the opposite inference. Beaumont J, having rejected the applicability of the concept of a *Quistclose* trust, held that it was not necessary to decide whether there was a trust or a debt because in either event the funds could be seized.

The result is that the case is not of great assistance. What it does indicate is that there is at least some doubt as to whether, in the general situation, funds held by a solicitor on account of costs are trust funds or simply the property of the solicitor on the basis that, if they are not used, there is a debt owing as to the balance from the solicitor to the client.

There is no other direct authority.

The possibility of there being a *Quistclose* trust (named after the decision of the House of Lords in *Barclays Bank Limited v. Quistclose Investments Limited* [1970] AC 567) was rejected by both Davies and Beaumont JJ. It is not an appropriate concept in the situation where the purpose for which the funds are held involves payment to the trustee himself or herself.

It is therefore necessary to analyse the precise terms upon which the money is paid in order to ascertain whether or not it is held on trust. In this regard it is clear that it is possible for monies paid in advance either to be made the subject of a trust or to be made the subject of a debt with no trust relationship. Either result can be achieved with virtual certainty. If, for example, there is an express agreement that the money will be held by the barrister on trust, there is no doubt that there is a

trust. Similarly, if there is an express agreement that the money is to become the property of the barrister and that there is merely to be a debt back if the fund are not fully used, it is clear that there is no trust.

Assuming that the parties do not spell out the terms with this degree of clarity, there are certain phrases and certain types of conduct which would provide clear indicia one way or the other. Thus the payment of monies into a trust account would be a clear indication that the monies are intended to be held on trust (although this would be less strong an indicium where the client was unaware of the existence of the trust account). The use of the words 'security for costs' might be an indicium of trust since it would suggest that the barrister had a security interest over the funds which otherwise remained the property of the client. The phrase 'pre-payment' is a slight indicium of debt as is an express obligation to repay in the event that the funds are not utilised. The phrase 'on account of costs' is, in my view, neutral.

My conclusions, independently of the legislation, regulations and rules, are:

- i. Whether or not there is a trust depends upon the intention of the parties.
- ii. It is possible to use verbal formulae which will clearly create or clearly not create a trust.
- iii. It is possible to use verbal formulae or engage in conduct which suggests the presence or absence of a trust.
- iv. Each case must be looked at on its own facts in the light of precise communications between the parties.

## 2. The effect of the *Legal Profession Act 1987 (NSW)*

Sub-section 61(8) of the Act contains the following two definitions:

*controlled money* means money required to be dealt with in accordance with subsection (2)(c) that, under the direct or indirect control of the solicitor by whom or on whose behalf it is received, is for the time being held otherwise than in a general trust account at a bank in NSW.

*trust money* means money required to be dealt with in accordance with subsection (2)(a).

Clearly these definitions take the matter no further.

Section 38P of the Act provides:

- (1) A barrister is not, in the course of practising as a barrister, to receive money on behalf of another person unless authorised under this section.

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(2) The regulations may authorise a barrister to do so. For that purpose, the regulations may apply to barristers any of the provisions of Part 6 (Trust Accounts).

This section merely authorises the making of regulations. It does not, in my view, relevantly affect the construction of the Regulations.

## 3. The effect of Regulation 26J of the Legal Profession Regulation 1994 (NSW)

Regulation 26J of the Regulation provides:

(1) A barrister may, in the course of practising as a barrister, receive money in advance for costs to accrue due to, or to be paid by, the barrister.

(2) This clause does not affect any trust to which money received by a barrister is subject, or any obligation of a barrister under such a trust.

This clause is clearly drafted so as not to determine the present question one way or the other. It merely activates the exception under s 38P. Whatever obligations exist under the Act in relation to trust money apply if the money is trust money and do not apply if the money is not trust money.

## 4. The effect of Rule 77 of the New South Wales Barristers' Rules

Rule 77 provides: 'A barrister must not, in the barrister's professional work, hold, invest or disburse any funds for any other person.'

This rule only applies if there is a trust obligation.

## 5. Practical consequences

It follows from what I have said that the appropriate course for a barrister to take is for him or her to enter into an agreement with the client to the effect that the money paid in advance is paid on the following terms:

- the money becomes the property of the barrister immediately;
- the amount paid will operate in satisfaction pro tanto of bills rendered by the barrister to the client from time to time;
- if there is any surplus at the conclusion of the litigation or termination of the retainer, the barrister agrees to repay that surplus as a debt;
- it is the intention of the parties that no trust be created in relation to the funds.

In my view, in the absence of any specific

countervailing factors (such as contrary language used by the barrister or the client), such an agreement would have the effect that a prepayment does not become trust money.

## 6. Answers to the specific questions asked

I answer the specific questions asked as follows:

### 1. In the absence of a fee agreement and disregarding Rule 77 and Regulation 26J, what is the legal nature of the manner in which those monies are held by barristers?

Specifically, do those bare circumstances give rise to a trust?

- Whether or not there is a trust depends upon the terms on which the money is paid. This will vary from case to case.
- It is possible to use language or engage in conduct which will make it clear that the money is or is not trust money.
- It is possible to use language or engage in conduct which provide indicia one way or the other.
- In the bare circumstances where the phrase 'security for costs' is used, in my opinion it is more probable than not that no trust is created, but this cannot be stated with certainty in view of the absence of authority and the tendency of modern courts to favour clients over members of the legal profession in doubtful areas.

### 2. Does that situation change where, pursuant to a fee agreement, monies become payable on the happening of a certain event? A particular example of this question would be where a barrister is briefed to appear on a number of days and by his/her agreement stipulates that the whole fee is payable in advance. If a client pays that fee in advance on a non-refundable basis, what is the nature of the way in which the monies are held?

In these circumstances, subject to whatever rights the client may have under the Legal Profession Act to set aside the agreement on the basis of its general unreasonableness, the money becomes the property of the barrister absolutely on payment.

### 3. What effect, if any, does Regulation 26J(2) have upon the situation?

None.

**David Bennett**

12 May 1998

# At the Lectern

**'Appellate Workshop' #, Thursday 20 July.**  
Convenor: Geoff Lindsay S.C.

The Appellate Workshop will focus on preparations for appeal. This seminar is recommended to all readers.

**'Land & Environment Court: Practice Directions' #, Monday 24 July.**

Speaker: Brian Preston S.C.

Chair: Malcolm Craig QC

Brian Preston S.C. will be speaking on Practice Directions in the Land & Environment Court. This seminar is recommended for any member interested in this jurisdiction.

**'Legal Disputes in Sport: Breakfast with John Boulton' #, Friday 28 July.**

Speaker: John Boulton, Director, Australian Institute of Sport

Chair: The Hon. Thomas E F Hughes AO QC

Is our legal system an appropriate, or even necessary, means to resolve sporting disputes? John Boulton, the Director of the Australian Institute of Sport, will speak on this topic, with a view to the forthcoming Sydney 2000 Olympic Games. Not to be missed!

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