SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Dempsey* [2008] QCA 122
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant/respondent) **v** **PAUL ANTHONY DEMPSEY** (respondent/appellant)
FILE NO/S:	Appeal No 9467 of 2007 SC No 4250 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 May 2008
DELIVERED AT:	Brisbane
HEARING DATE:	28 April 2008
JUDGES:	McMurdo P, Keane JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellant to pay the respondent's costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – where the appellant arranged for loans to be made to his clients from a litigation lender for the purpose of covering the costs associated with prosecuting their claims – where the loan moneys from the litigation lender were paid into the appellant's trust account and then drawn upon as required to meet the costs incurred – whether the loan moneys amounted to "disbursements" which "the client must pay, or reimburse, to the practitioner" within the meaning of s 48IC of the *Queensland Law Society Act* 1952 (Qld) PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – where under the retainer between the appellant and his clients it was agreed that the amount of GST payable upon the appellant's fees would be added to the clients' accounts – whether the appellant's right under the retainer to recover from the clients his GST liability is precluded by the operation of s 48IB and s 48IC of the *Queensland Law Society Act* 1952 (Qld)

Queensland Law Society Act 1952 (Qld), s 48IB, s 48IC

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567, applied
Brown v Heffer (1967) 116 CLR 344; [1967] HCA 40, cited
DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510, applied
Jessup v Queensland Housing Commission [2002] 2 Qd R 270; [2001] QCA 312, applied
KLDE Pty Ltd v Commissioner of Stamp Duties (Qld) (1984) 155 CLR 288; [1984] HCA 63, applied
Legione v Hateley (1983) 152 CLR 406; [1983] HCA 11, applied
Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia & Ors (1991) 30 FCR 491; [1991] FCA 344, applied
Tailby v Official Receiver (1888) 13 App Cas 523, applied

COUNSEL: K C Fleming QC, with P W Telford, for the appellant
W Sofronoff QC SG, with J M Rosengren, for the respondent

SOLICITORS: Dempseys Your Lawyers for the appellant
Legal Services Commission for the respondent

[1] **McMURDO P:** This appeal should be dismissed with costs. Keane JA has set out the relevant issues and facts in this appeal so that my reasons can be briefly stated. The appeal concerns the interpretation of Pt 4B Div 2A of the *Queensland Law Society Act* 1952 (Qld) (repealed)[1] ("the QLS Act") and its effect on fee agreements made between the appellant, Paul Anthony Dempsey, and his clients, Ms Wickham and Mr Curlewis.

[2] It is common ground that the primary judge correctly identified the following. Neither claim was straightforward. Mr Dempsey conducted both claims professionally, competently and honestly. He achieved a successful settlement for each client but his fees were substantial with the result that the clients recovered considerably less than Mr Dempsey's professional fees and disbursements.[2]

[3] I agree with Keane JA's reasons on the first issue in this appeal: the outlays paid on behalf of the clients by Mr Dempsey from funds raised through "litigation loans" were disbursements within the terms of ***D*** in s 48IC(1) of the QLS Act. There is nothing I wish to add to those reasons. The appeal on this issue fails.

[4] I have taken a slightly different path to reach the same conclusion as Keane JA on the second issue in the appeal: whether Mr Dempsey was prevented by Div 2A of Pt 4B of the Act from passing on his liability to pay goods and services tax ("GST") on the services supplied by him to his clients under his agreements with them.

[5] The provisions of the QLS Act relevantly provide:

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[1] Repealed by *Legal Profession Act* 2007 (Qld), s 767, effective on 1 July 2007.
[2] *Legal Services Commissioner v Dempsey* [2007] QSC 270; SC No 4250 of 2007, 25 September 2007 at [3] and [4].

"**3. Definitions**
In this Act –
…
"costs" includes disbursements.
...
"fees", for work of a practitioner or firm, means charges, other than costs.
...
48IB Purpose
The purpose of this Division is to provide for the maximum payment for a practitioner's or firm's conduct of a speculative personal injury claim.

48IC Maximum payment for conduct of speculative personal injury claim
(1) The maximum amount of fees that a practitioner or firm may charge and recover from a client for work done in relation to a speculative personal injury claim must not be more than the amount worked out using the formula –

$$[E - (R + D)] X 0.5$$

where –
E means the amount to which the client is entitled under a judgment or settlement.
R means the total amount the client must, under an Act for a law of the Commonwealth or another jurisdiction, or otherwise, refund on receipt of the amount to which the client is entitled under the judgment or settlement.
D means the total amount of disbursements the client must pay, or reimburse, to the practitioner or firm in relation to the speculative personal injury claim.
…
(4) This section applies despite part 4A and section 48I.[3]
…"

[6] The following matters were not in dispute. Mr Dempsey's professional work on behalf of each client involved "conduct of a speculative personal injury claim". He was liable under the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("GST Act") Div 9,[4] to pay 10 per cent GST on the value of the services he supplied to the clients. Under the terms of the agreements between Mr Dempsey and the clients, they were each "required to pay all GST payable on [Mr Dempsey's] fees and the appropriate amount will be added to [the] account which will be in a form sufficient for [them] to claim input credits if [they] are permitted to do so."

[7] The learned primary judge found that Mr Dempsey sought reimbursement of his own obligation to pay GST by increasing the professional fees he charged the

3 Part 4A (Client agreements) and s 48I (Maximum payment for work).
4 See especially s 9-5(a), s 9-10(1), s 9-10(2)(b), s 9-40 and s 9-70.

clients under the client agreement.[5] Under s 48IC the amount Mr Dempsey could charge his clients was fixed by the formula, despite the client agreement. His Honour held that the obligation imposed on Mr Dempsey under the GST Act did not impinge or override s 48IC.[6]

Discussion

[8] Courts should not interpret statutory provisions as interfering with the contractual rights of parties unless that legislative intent is plain. The legislative intent of Pt 4B Div 2A (which comprises only s 48IB and s 48IC) is contained in s 48IB. This is clear from both the heading and the terms of s 48IB. Relevantly, it is to provide for the maximum payment for Mr Dempsey's conduct of the clients' claims. The heading to s 48IC strongly suggests that the section will specify how that maximum payment is to be calculated. The legislative intent in respect of the amount of fees recoverable by a practitioner or firm from a client for work done in the conduct of speculative personal injury claims is clearly discernable from the terms of Pt 4B Div 2A. It is that the amount of fees, as defined in s 3 and calculated according to the formula in s 48IC, cannot be exceeded. It follows that Pt 4B Div 2A is intended to apply notwithstanding a contractual agreement between a client and a practitioner or firm that higher fees will be paid. A reading of s 48IC(1) in its statutory context supports this conclusion. Pt 4B Div 2A displaces the usual position (that the client agreement governs what can be charged)[7] in respect of speculative personal injury claims. The QLS Act does provide a mechanism for a practitioner or firm to charge more than the formula amount under s 48IC(1) for a speculative personal injury claim but only by applying in writing to the Council of the Queensland Law Society for approval: s 48IC(2). There is no suggestion in the QLS Act that any other mechanism, such as a client agreement, will allow a practitioner or firm to charge more than the formula amount under s 48IC(1) in respect of the conduct of speculative personal injury claims.

[9] That view is also supported by the explanatory notes to the *Justice and Other Legislation Amendment Bill* 2003 (Qld), which inserted Pt 4B Div 2A into the QLS Act.[8] The notes state that "[t]he amendments ensure that a practitioner may receive no more by way of professional fees from a judgment or settlement than does his or her client".[9] This does not suggest that the legislature intended to enable a practitioner or firm to charge more than the formula amount under s 48IC(1) through a client agreement. Pt 4B Div 2A was plainly intended to limit of the maximum fees able to be charged and recovered from a client by a practitioner or firm for the conduct of a speculative personal injury action.

[10] The crucial question as to whether s 48IC applies to the accounts sent to the clients by Mr Dempsey is whether the clients' agreed obligation to pay the GST amounts to "fees" under s 48IC. The term "fees" is relevantly defined in s 3 as "charges, other than costs".[10] The term "charge" is not further defined in the QLS Act. It can be taken to have its ordinary meaning. The noun "charge" is given as its primary

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5 *Legal Services Commissioner v Dempsey* [2007] QSC 270; SC No 4250 of 2007, 25 September 2007 at [61].

6 *Legal Services Commissioner v Dempsey* [2007] QSC 270; SC No 4250 of 2007, 25 September 2007 at [62].

7 QLS Act, s 48I(1)(a).

8 See *Acts Interpretation Act* 1954 (Qld), s 14B(1)(c).

9 Explanatory Notes on Amendments, Justice and Other Legislation Amendment Bill 2003 (Qld) 77.

10 Costs is defined in QLS Act, s 3, as "includ[ing] disbursements".

meaning in the *Australian Oxford Dictionary*[11] "a price asked for goods or services". Its secondary meaning is "a financial liability or commitment". The clients' agreed obligation to pay the GST was a charge to their accounts with Mr Dempsey. It was an amount Mr Dempsey charged them for his services; part of the price he asked for his services; under the agreements each client was liable to pay it. The broad definition of "fees" in the QLS Act means that its use in s 48IC encompasses each client's agreed obligation to pay the GST component of the total amount charged to them by Mr Dempsey.

[11] The next question is whether the GST falls under **R** (refunds) or **D** (disbursements) in the formula in s 48IC(1), to effectively increase what can be charged by Mr Dempsey. It is patently clear from definitions of **R** and **D** in s 48IC(1) that any amount of GST required to be paid, whether by Mr Dempsey under the GST Act or by the clients under their agreement with Mr Dempsey, was not within either **R** or **D**.

[12] Of course, nothing in Pt 4B Div 2A prevented Mr Dempsey from requiring the clients to pay the GST amount under the agreements as long as the maximum amount of his fees (including GST) did not exceed the formula amount in s 48IC. But there is no suggestion that is the position here.

[13] For these reasons I would also dismiss the appeal on the second issue.

[14] **KEANE JA:** The appellant, Mr Dempsey, is a solicitor. In 1999 he was retained by Mr Mark Curlewis to act on his behalf in a claim to recover damages for personal injuries sustained by him. In 2002 Mr Dempsey was also retained by Ms Katherine Wickham to act on her behalf in a claim to recover damages for personal injuries sustained by her at work. Each of these claims was resolved by settlement; but the professional fees charged by Mr Dempsey for his services in each case were sufficiently high as to become a matter of concern to the respondent, the Legal Services Commissioner.

[15] The Legal Services Commissioner instituted proceedings seeking declarations to the effect that Mr Dempsey charged and recovered from his clients more than was permitted by s 48IC of the (now repealed) *Queensland Law Society Act* 1952 (Qld) ("the Act").

[16] The learned primary judge made declarations that:

(a) disbursements and outlays paid from Mr Dempsey's trust account in the prosecution of his clients' claims were "disbursements" as defined by s 48IC of the Act;

(b) the maximum amount of fees that Mr Dempsey was entitled to charge his clients in accordance with the formulae specified in s 48IC of the Act included any tax payable pursuant to the *A New Tax (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act");

(c) Mr Dempsey was not entitled to charge Ms Wickham or Mr Curlewis or deduct from their settlement moneys, any amount in respect of GST he may have been liable to pay on the supply of legal services to those clients.

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[11] 2nd ed, 2004.

[17] Mr Dempsey appeals against these declarations. The focus of Mr Dempsey's challenge is upon the proper interpretation of s 48IC(1) of the Act. Accordingly, to understand the arguments which arise in this Court, it is necessary to refer first to the terms of s 48IC of the Act. I will then state the issues in more detail and the reasons of the learned primary judge before turning to a discussion of the arguments in this Court.

The Act

[18] Section 48IC of the Act follows s 48IB in Div 2A of Pt 4B inserted into the Act by the *Justice and Other Legislation Amendment Act* 2003. Section 48IB provided: "The purpose of this Division is to provide for the maximum payment for a practitioner's or firm's conduct of a speculative personal injury claim."

[19] Section 48IC(1) of the Act provided:

> "**48IC Maximum payment for conduct of speculative personal injury claim**
>
> (1) The maximum amount of fees that a practitioner or firm may charge and recover from a client for work done in relation to a speculative personal injury claim must not be more than the amount worked out using the formula-
>
> [E - (R + D)] X 0.5
>
> where-
>
> ***E*** means the amount to which the client is entitled under a judgment or settlement.
>
> ***R*** means the total amount the client must, under an Act, or a law of the Commonwealth or another jurisdiction, or otherwise, refund on receipt of the amount to which the client is entitled under the judgment or settlement.
>
> ***D*** means the total amount of disbursements the client must pay, or reimburse, to the practitioner or firm in relation to the speculative personal injury claim.
>
> …"

[20] It is common ground that the claim by each of Ms Wickham and Mr Curlewis was a "speculative personal injury claim" for the purposes of s 48IC(1) of the Act.

The issues

[21] The first issue in the case arose in relation to the meaning of "disbursements" in element D in the formula prescribed by s 48IC. Obviously, the formula which fixed the maximum amount of fees that a legal practitioner may charge and recover operated in such a way that the greater the quantum of "disbursements", the lower would be the maximum level of the practitioner's remuneration.

[22] The issue was whether outlays paid on behalf of each client by Mr Dempsey from funds raised by means of "litigation loans" were to be regarded as disbursements to be subtracted from settlement moneys in order to calculate the maximum fees Mr Dempsey could charge under the formula.

[23] As between Mr Dempsey and each of his clients, it was agreed that fees would be charged at an hourly rate. It was agreed that if the client was not able to fund the outlays associated with the claim, it "will be necessary for the Client to enter into a litigation loan to fund all the costs as set out in Clause 4". By cl 4 of the agreement

between the client and Mr Dempsey, it was agreed that the client would "pay all costs properly incurred by the firm" including outlays payable to third parties. In each case, the client agreed that Mr Dempsey was entitled to terminate the retainer if the client failed "to provide money to be paid into trust as … required" to meet the client's obligation to pay "costs to be incurred on the client's behalf". Because neither Ms Wickham nor Mr Curlewis could pay for the outlays associated with their claims, Mr Dempsey arranged the "litigation loans" to fund the payment of outlays incurred in the course of prosecuting his clients' claims.

[24] The learned primary judge summarised the terms of the loan agreements:

> "The litigation loan agreements were in identical terms. They recited that the clients had retained the respondent to conduct litigation to recover damages for personal injuries on a speculative basis, and that:
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> > 'In conducting such litigation, (the respondent) has and/or will incur outlays on behalf of the litigant including but not limited to, filing fees, counsel's fees, the cost of expert reports, travel, accommodation and witness costs for witnesses and potential witnesses, postage, photocopying and facsimile charges (the 'outlays').'
>
> The agreements then provided:
>
> > '1. The litigant … authorises the lender to pay … to the credit of (the respondent's) trust account and to debit that amount … to the litigant's account pursuant to this agreement.
> > 2. The litigant agrees to pay … interest at the rate of 18 per cent per annum …
> > 3. …
> > 4. The litigant further agrees to pay to the lender the whole of the amount outstanding … forthwith after the receipt of the proceeds of the litigation upon the successful completion of the litigation.
> > 5. … Successful completion … occurs when the litigant becomes entitled, pursuant to a judgment compromised or otherwise to receive payment of at least (the amount of the advance) …
> > 6. …
> > 7. For the purposes of better securing the litigant's obligation hereunder the litigant hereby charges the proceeds of such litigation with repayment of his indebtedness to the lender … and irrevocably directs (the respondent) to pay to the lender such amount out of the said proceeds.'"[12]

[25] In accordance with the terms of each loan agreement, the funds advanced to each client were deposited by the litigation lender to Mr Dempsey's trust account in the name of each client. Outlays necessary to enable the claims to proceed were paid out of the moneys held in trust by Mr Dempsey for the particular client.[13]

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[12] *Legal Services Commissioner v Dempsey* [2007] QSC 270 at [16].

[13] [2007] QSC 270 at [17].

[26] Mr Dempsey's position in relation to the first issue was that the moneys paid to his trust account by the lenders on behalf of each client were not amounts of disbursements "paid or reimbursed" to him in relation to the claim of the client. On Mr Dempsey's behalf, it was argued that, because there was no payment to Mr Dempsey of the amount of these outlays, they were irrelevant to element D in the formula prescribed by s 48IC of the Act. It was said that the outlays which were disbursed were not Mr Dempsey's moneys but the moneys of his clients, they being held in his trust account for their respective benefit.

[27] The second issue which arose in this case was whether Mr Dempsey was entitled to charge his clients an additional sum by way of GST upon the fees payable for his services. In this regard, Mr Dempsey relied on the term contained in each client agreement to the effect that any GST payable on his fees was to be added to the client's account. He argued that s 48IC of the Act did not expressly deny effect to an agreement between solicitor and client whereby the solicitor's liability to pay GST was passed on to the client.

The decision of the learned primary judge

[28] On the first issue, as to the meaning of "disbursements" in s 48IC to the Act, Mr Dempsey's argument was put in the following terms:

> "… Money paid into the trust account of a practitioner … and held and used in payment of disbursements in the course of litigation is not a payment or reimbursement *to the practitioner or firm*. Such payments are made *to* the relevant provider of goods or services, e.g. to counsel or to a doctor. The solicitor acts as a mere trustee making payment. The D component only applies if the solicitor is the payee, i.e. where payment is made in satisfaction of a debt due by the client to the solicitor.
>
> The disbursements … in s 48IC are those … paid by, or to be paid by, or incurred by, the practitioner … in the course of the speculative personal injury claim and which the solicitor has 'no prospect of being paid … except by virtue of a judgment or order against the other party to the proceedings'. Those are the disbursements which must be paid or reimbursed *to* the practitioner …"[14] (emphasis in original)

[29] The learned primary judge rejected Mr Dempsey's argument. His Honour said:

> "The respondent's argument focuses particularly on the phrase 'to the practitioner' in the definition of D. Monies paid by the client into the practitioner's trust account are not, the respondent submits, paid to the practitioner and even if paid to enable the practitioner to defray the cost of disbursements incurred in the conduct of the client's claim are not disbursements for the purposes of s 48IC.
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> …
>
> The enduring definition of 'disbursements' is that given by Lord Langdale MR in *Re Remnant* [1849] 50 ER 949. In an endeavour to obtain a coherent statement of principle the Master of the Rolls took the advice of the Taxing Masters as to what constituted a professional disbursement. They advised (50 ER 953):

[14] [2007] QSC 270 at [29].

> 'That such payments as the solicitor in the due discharge of the duty he has undertaken is bound to make, so long as he continues to act as solicitor, whether his client furnishes him with money for the purposes or with money on account, or not: as, for instance, fees of the officers of the court, fees of counsel, expense of witnesses etc. …
>
> We think also, that the question whether such payments are professional disbursements or otherwise, is not affected by the state of the cash account between the solicitor and the client; and that (for instance) counsel's fees would not the less properly be introduced into the bill of costs as a professional disbursement, because the client may have given money expressly for paying them; …'

Having accepted their opinion, Lord Langdale went on (954):

> 'And it seems to me a very reasonable and proper rule, that those payments only, which are made in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered or allowed as professional disbursements in the bill of costs.'

Remnant has been accepted as a correct exposition. See *Weiss v Clayton Utz* (1993) 114 FLR 159; re *Doyle*; *ex parte Peak Downs Copper Mining Co (No 2)* (1873) 4 QSCR 22.

The nature of a disbursement was succinctly explained by Dal Pont, *Law of Costs*, (at p 4):

> 'A 'disbursement' is a payment made on behalf of a client. … Essentially disbursements refer to money which, for the purposes of the … proceeding, have been actually paid out to other people, such as witnesses, counsel, professional advisers and so forth, and so can be distinguished from 'costs' … that are intended to cover remuneration for the exercise of professional legal skill by a lawyer. … Expressed another way, these types of disbursements … are money paid on behalf of a client of a lawyer to a third party that can properly be included in the bill of costs.'

… The statutory formula (D) refers to the total amount of disbursements the client must pay, or reimburse, to the solicitor in relation to the claim.

'Disbursements' is a term which, at least since 1849, has had a particular and well understood legal meaning. It is to be expected that the draftsman of s 48IC intended the word when used in the section to have that meaning. As O'Connor J said in *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 531:

> 'Where words have been used which have acquired a legal meaning it will be taken, prima [facie], that the

> legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context. To use the words of Denman J in *R v Slator* … - 'but it always requires the strong compulsion of other words in an Act to induce the court to alter the ordinary meaning of a well known legal term.' '.

…

It would be an odd thing if the draftsman of s 48IC meant disbursements to have a different connotation and to have that character only in those circumstances where the client paid the solicitor directly and not 'on account'. There is no obvious reason why the draftsman would have adopted such a meaning, or why he would ignore the established meaning of the term.

…

I cannot believe that vagaries in the mode of payment can determine whether or not [an] item of expenditure was a disbursement. Such an approach to the construction of the section would allow solicitors to circumvent it …

The section should not be given such a construction. The evident purpose of Division 2A is to protect litigants who bring speculative personal injuries claims and who retain legal practitioners on that express basis. The formula by which the protection is achieved is not to be given a meaning which would allow for capricious results or which, by the adoption of one mode of payment over another, allow a practitioner to erode its effectiveness."[15]

[30] As to the issue in relation to GST, the learned primary judge said:

"The terms of the client agreement … allowed the respondent to recover … the amount of GST he had to pay as a consequence of providing legal services … The question is whether the *GST Act* together with the terms of the costs agreements allowed the respondent to recover from his clients an amount greater than that derived from the application of the formula.

In my opinion the answer is negative. The *GST Act* imposes upon the respondent an obligation to pay to the Australian Tax Office 10 per cent of the value of the services he supplied to the clients. The *GST Act* imposed no obligation on either of the clients to pay the GST. What the respondent did was to increase the fees payable by the clients by the amount of the liability imposed on him by the *GST Act*. He sought reimbursement for his obligation to pay the tax by means of increasing the professional fees he charged the clients. The client agreement allowed him to pass on the amount of the tax liability.

However the respondent was not justified in claiming the additional amount. His obligation to pay the tax remained his. The amount he could charge the clients by way of fees was fixed by the formula, despite the client agreement. It does not allow for any augmentation because the respondent came under an obligation to pay GST. The formula fixes the maximum amount the respondent could charge the clients by way of his professional fees.

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15 [2007] QSC 270 at [29] – [44].

> Independently of that statutory limitation the *GST Act* imposed on the respondent an obligation to pay tax, the amount of which was fixed by the value of the services he supplied. The two statutes operate independently according to their provisions. The *GST Act* does not impinge upon or override s 48IC of the Act."[16]

The arguments on appeal

"Disbursements"

[31] On Mr Dempsey's behalf, it is argued that the learned primary judge erred in failing to understand the word "disbursements" in its context in s 48IC. The scope of the word must be understood bearing in mind the contextual indication that the only disbursements referred to are those amounts which "the client must pay, or reimburse, to the practitioner … in relation to the speculative personal injury claim." It is said that the amounts paid to Mr Dempsey on account of outlays to be incurred thereafter were not amounts of disbursements "paid to" Mr Dempsey because the economic burden of the outlays defrayed by these payments was borne by the client and not by the solicitor.

[32] It may be said immediately that the appellant's argument, if accepted, would produce the odd result that a solicitor who was willing and able to bear the financial burden of outlays incurred in the prosecution of a speculative personal injuries' action would be entitled to recover less by way of remuneration for his services than a solicitor who did not bear that burden but let it fall upon the client. Nevertheless, the appellant insists that this consequence follows ineluctably from the circumstance that the only disbursements included in element D of the statutory formula are those which must be "paid, or reimbursed, to" the solicitor. I disagree.

[33] The legal rights and obligations which flow from the arrangements between Mr Dempsey, his clients and the lenders can be analysed in two ways so as to reveal a payment of amounts of disbursements which the clients were obliged to make to Mr Dempsey. First, it may be said that there was a payment to Mr Dempsey of amounts on account of outlays required to be made for the purpose of the claim when the lender paid, at the client's direction and on behalf of the client, the loan moneys advanced to the clients to Mr Dempsey to be held in his trust account on account of outlays. The client was obliged to make this payment by the terms of the retainer between Mr Dempsey and each client. If the moneys were not paid, Mr Dempsey was entitled to terminate the retainer. Secondly, it may be said that there was a payment to Mr Dempsey of the amount of a disbursement when that amount was appropriated by Mr Dempsey, in accordance with the standing authority of the client, by payment of a cheque drawn by him upon the funds standing to the credit of the client in Mr Dempsey's trust account to discharge a liability incurred by Mr Dempsey to a third party in the course of pursuing the client's claim.

[34] The argument advanced on behalf of Mr Dempsey proceeded upon the first of these analyses. Since I am of the opinion that Mr Dempsey's argument must fail, even on the ground chosen by him, it is unnecessary to consider whether a payment to Mr Dempsey for the purpose of element D in the statutory formula was revealed by the second mode of analysis.

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16 [2007] QSC 270 at [60] – [62].

[35] The loan moneys were advanced to the clients by the litigation lenders and were paid to Mr Dempsey by the clients. Though the funds were paid directly by the lenders to Mr Dempsey, they were paid to him by the clients because the lenders were merely handing over the moneys lent to the clients at the clients' direction. Each payment to Mr Dempsey was a payment to him on account of outlays to be incurred in prosecuting the clients' claims. The effect of the arrangement was that, in this way, the client's claim would be pursued by Mr Dempsey. Had the client not authorised and directed the litigation lender to pay the loan moneys to Mr Dempsey to enable necessary outlays to be paid by him, Mr Dempsey would not have been in funds to meet those outlays. Mr Dempsey had not agreed to meet the cost of outlays for which his client had not put him in funds; the client had agreed with Mr Dempsey that the client would provide the funds necessary to meet the costs properly incurred by Mr Dempsey. Mr Dempsey was entitled to terminate his retainer if the client did not meet his or her contractual obligation to pay the necessary amounts to him. The payment of the funds to Mr Dempsey on account of outlays was thus necessary so that Mr Dempsey remained under an ongoing obligation to prosecute the client's claim. It can, therefore, be seen that the payments made to Mr Dempsey on account of disbursements were made in satisfaction of each client's contractual obligations to Mr Dempsey even though those obligations could not be categorised as obligations in the nature of a debt.

[36] That the client was obliged to pay these moneys to Mr Dempsey on account of outlays **before** they were outlaid by Mr Dempsey rather than **after** the outlays had been paid, ie by way of reimbursement for payments initially made by Mr Dempsey, does not mean that the amounts were not properly described as the "total amount of disbursements which the client must pay to the practitioner". Element D in the statutory formula comprehended sums which the client was obliged to pay to the practitioner, as well as sums which the client was obliged to "reimburse" to the practitioner. It is clear that element D was concerned, not only with the repayment of the amount of outlays after they had been incurred by the solicitor ("reimbursement"), but with the payment to the solicitor of moneys for necessary outlays in advance of those outlays being paid by the solicitor. Subject to the argument to which I refer in the next paragraph, it is difficult, with respect, to see how the reference in element D to amounts of disbursements **paid to** a solicitor can sensibly be said not to refer to moneys paid to the solicitor on account of liabilities to be incurred to third parties in order to prosecute the client's claim.

[37] Mr Dempsey's argument depends on the proposition that the moneys for outlays were not paid to him because he received and held them, not for his own benefit in satisfaction of a debt owed to him by the client, but as trustee for his client. This proposition cannot be accepted. The moneys deposited to Mr Dempsey's trust account by the client pursuant to the client's obligation under the retainer to enable outlays to be paid were amounts truly "paid to the solicitor" even though they were held by him in his trust account.

[38] It is not correct to speak of the moneys held in trust by Mr Dempsey in the circumstances of this case as moneys held solely for the benefit of the client. The position was relevantly explained by Hope JA, with whom Glass JA agreed, in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties*:[17]

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[17] [1980] 1 NSWLR 510 at 518 – 520 [14] – [18]. The judgment of Hope JA has been cited with evident approval in *Chief Commissioner of Stamp Duties v Buckle & Ors* (1998) 192 CLR 226 [37];

"These essential features of interests arising under private trusts are thus described in Jacobs' *Law of Trusts*, 3rd ed, p 109: '… the trustee must be under a personal obligation to deal with the trust property for the benefit of the beneficiaries, and this obligation must be annexed to the trust property. This is the equitable obligation proper. It arises from the very nature of a trust and from the origin of the trust in the separation of the common law and equitable jurisdictions in English legal history. The obligation attaches to the trustees *in personam*, but it is also annexed to the property so that the equitable interest resembles a right *in rem*. It is not sufficient that the trustee should be under a personal obligation to hold the property for the benefit of another, unless that obligation is annexed to the property. Conversely, it is not sufficient that an obligation should be annexed to property unless the trustee is under the personal obligation.'

Several consequences follow. **Firstly, an absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate. If he were to execute a declaration that he held the land in trust for himself absolutely, the declaration would be of no effect; it would give him no separate equitable rights; he would remain the legal owner with all the rights that a legal owner has.** At least where co-extensive and commensurate legal and equitable interests are concerned, '… a man cannot be a trustee for himself.': *Goodright v Wells* ((1781) 2 Dougl 771 at 778; 99 ER 491 at 495), per Lord Mansfield. 'You cannot have a legal estate in trust for yourself.': *Harmood v Oglander* ((1803) 8 Ves Jun 106 at 127; 32 ER 293 at 301), per Lord Eldon. Secondly, although the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. Where the trustee is the owner of the legal fee simple, **the right of the beneficiary**, although annexed to the land, **is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons.** In illustrating his famous aphorism that equity had come not to destroy the law, but to fulfil it, Maitland, op cit, at p 17, said of the relationship between legal and equitable estates in land: **'Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here.'**

This relationship can, perhaps, be usefully illustrated by reference to the possession, and the right to possession, of land which is held by a trustee subject to a private trust. As legal owner, and subject to

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R v Hart [2005] QCA 50 at [13]; *Sportscorp Australia Pty Ltd v Chief Commissioner of State Revenue* (2004) 213 ALR 795 at 808 – 809 [78]; *Commissioner of Taxation v Linter Textiles Australia Ltd (In Liq)* (2005) 220 CLR 592 at [53].

any disposition of the right, such as would occur upon the granting of a lease, the trustee has at law the right to possession of the land and, unless somebody else is in possession, under him or adversely to him, he also has the legal possession of the land. He may maintain trespass against anyone who infringes that possession, and ejectment against any person who, without his consent, takes possession. At law a cestui que trust has no right to possession. He cannot sue the trustee at common law in ejectment: *Roe d Reade v Reade* ((1799) 8 TR 118 at 121, 122, 123; 101 ER 1298 at 1300, 1301). If the trustee holds as a bare trustee for a beneficiary absolutely entitled, that beneficiary is, in equity, entitled to be put into possession if he so wishes, but he cannot sue the trustee in ejectment. His right can be enforced only by an order made in the exercise of the equitable jurisdiction of the court. If necessary, the court will, upon an appropriate indemnity being given, compel the trustee to allow the beneficiary to use his name to bring ejectment. When placed in possession by the trustee, at law the beneficiary is merely tenant at will of the trustee, the tenancy being determinable at law at any time on demand of possession by the trustee: *Garrard v Tuck* ((1849) 8 CB 231 at 250; 137 ER 498 at 506); *Melling v Leak* ((1855) 16 CB 652 at 668, 669; 139 ER 915 at 921, 922). As a corollary, the trustee might at law determine the beneficiary's tenancy and recover the land from him in an action for ejectment, and the beneficiary would have no legal defence. He would, of course, have an equitable defence which he has long been able, by statute, to plead in the action at law.

This position can be analyzed in a similar way in respect of all the rights given to a trustee who holds property at law in trust absolutely for a beneficiary. In some cases the rights vested in the trustee may be such that he cannot be compelled to allow the beneficiary to exercise it except (unless, because of the nature of the right, it is not permissible to do so) in his, the trustee's, name. If this analysis be correct, although the beneficiary has an interest in the trust property, the content of that interest is essentially a right to compel the trustee to hold and use his legal rights in accordance with the terms of the trust. Where the trustee holds absolutely for the beneficiary, the beneficiary has a right in equity to be put, so far as practicable and generally subject to appropriate indemnities being given, into a position where directly, or indirectly, or for all practical purposes, he enjoys or exercises the rights which the law has vested in the trustee." (emphasis added)

[39] The extent of each client's beneficial entitlement to the moneys held in Mr Dempsey's trust can be measured by the orders which a court of equity might make to vindicate the client's interest in those moneys.[18] The right of each client as against Mr Dempsey in respect of the moneys paid to and held in trust by Mr Dempsey was no greater than (to use the language of Hope JA) a right to compel Mr Dempsey to hold and use his legal rights in those moneys to meet outlays

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[18] *Tailby v Official Receiver* (1888) 13 App Cas 523 at 536; *Brown v Heffer* (1967) 116 CLR 344; *Legione v Hateley* (1983) 152 CLR 406 at 446; *KLDE Pty Ltd v Commissioner of Stamp Duties (Qld)* (1984) 155 CLR 288 at 297.

incurred in the prosecution of that client's claim. But subject to this right, the moneys in question were in the possession of, and under the control of, Mr Dempsey.

[40] Mr Dempsey received the loan moneys under a personal obligation to disburse the moneys for the purposes of the client's claim; and the client was obliged to pay these moneys to Mr Dempsey in order for the claim to proceed. The client could not have enforced a demand that Mr Dempsey repay the loan moneys to him or her to be used as he or she wished, rather than for the purposes of the client's claim. For the client to demand the moneys, as his or her own to deal with as he or she pleased, would have been inconsistent with the agreements between Mr Dempsey and his clients and, indeed, with the right of the lenders to have the moneys expended on the client's claim. Neither client could have asserted a title to the moneys free of the interests in the lenders, and, indeed, the rights of Mr Dempsey, in respect of the moneys.[19]

[41] The proposition that the moneys held in Mr Dempsey's trust account on account of outlays were held beneficially for the client is quite misconceived. A court of equity could not have made an order compelling Mr Dempsey to pay these moneys to the client, at least in the absence of a termination of the retainer, and even then the rights of the lender would have to be considered.

[42] For these reasons, it is, in my respectful opinion, an accurate, and, indeed, an entirely unremarkable, use of language to say that the moneys paid into Mr Dempsey's trust account on account of outlays were paid to Mr Dempsey by the client in relation to the claim. Mr Dempsey's argument in relation to the first issue is misconceived, and must be rejected.

GST

[43] It is common ground that Mr Dempsey and his clients agreed to have added to their account with him "all GST payable on" his fees.

[44] Mr Dempsey accepts that, absent this agreement, he would have been obliged, by the terms of the GST Act, to pay the GST on those fees. On Mr Dempsey's behalf, it is argued that, contrary to the view of the learned primary judge, the GST Act did not prevent him from passing the burden of his liability to pay GST onto his clients by agreement with them. Mr Dempsey argues that no different result was required by s 48IC of the Act. This is said to be because s 48IC had no application to such liabilities, even though these liabilities arose upon the rendering of services for fees. Mr Dempsey argues that the learned primary judge erred in failing to distinguish between the "professional fees" which he was entitled to charge his clients, the maximum amount of which was regulated by s 48IC of the Act, and his liability to pay GST, about which he was entitled to make a specific agreement with his clients which was not regulated by s 48IC of the Act.

[45] Attention is drawn in this regard to the definition of "fees" and "costs" in s 3 of the Act, "costs" being concerned with disbursements rather than fees for the professional work of the solicitor, and to what is said to be an instructive contrast between s 48I of the Act, which refers to "the maximum amount of fees and **costs** a

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[19] Cf *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 580 – 581; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 503; *Jessup v Queensland Housing Commission* [2001] QCA 312 at [6].

practitioner or firm may charge and recover" and s 48IC, which refers to the "maximum amount of the **fees** that a practitioner … may charge or recover". It is said that this difference is emphatic of the absence of a legislative intention to restrict, by s 48IC, the amount which a solicitor might lawfully charge a client as "costs" as distinct from "fees". I disagree with the argument advanced by Mr Dempsey in relation to the effect of Div 2A of Pt 4B of the Act. It is, therefore, unnecessary for me to reach a concluded view as to whether Mr Dempsey's challenge to the reasoning of the learned primary judge was justified.

[46] One may accept that Mr Dempsey's liability to pay GST on the fees earned by him in relation to each client's claim was not the subject of regulation by s 48IC of the Act. The difficulty with Mr Dempsey's argument is that the emphasis which Mr Dempsey's argument places on his liability under the GST Act as a subject matter different from the subject matter dealt with by s 48IC ignores s 48IB of the Act.

[47] Section 48IB expressly declared the intention of the legislature to provide, by Div 2A of Pt 4B of the Act, which consisted only of s 48IB and s 48IC, for "the maximum payment for a practitioner's … conduct of a speculative personal injury claim." The reference in s 48IB to "the maximum payment" can, in context, refer only to the maximum payment by the client to the practitioner, however the amount of that payment may be made up. Whether the payment in question was due for fees or costs, it was necessary to find "provision" for the payment in Div 2A of Pt 4B of the Act.

[48] The only provision of Div 2A of Pt 4B of the Act, other than s 48IB, was s 48IC; and it did not contain any provision which contemplated that a practitioner who conducted a speculative personal injury claim might recover from his or her client payment of an amount by way of reimbursement of the solicitor's liability for GST, or, indeed, any other liability incurred by the solicitor in the course of conducting the claim other than the liability for disbursements. On no view can it be said that Mr Dempsey's liability to pay GST was a "disbursement".

[49] It may be said that this view of the operation of s 48IB is unsustainable, because on this view s 48IB would not permit a solicitor to recover proper outlays incurred by him or her on the client's behalf. But s 48IC, by its reference to "disbursements", plainly contemplates such payments and treats them as legitimate as between solicitor and client. The intention of the legislature in this regard may not have been elegantly expressed, but it was expressed with sufficient clarity to be given effect by the Court. Division 2A of Pt 4B of the Act was clearly intended to protect the position of clients whose bargaining position, vis-à-vis, the solicitor, could be assumed to be weak. While the Court should not be astute to give an expansive operation to legislative interference with freedom of contract, it should also not read down provisions intended to afford a measure of protection to disadvantaged persons such as the clients contemplated by Div 2A of Pt 4B of the Act.

[50] Accordingly, I conclude that s 48IB of the Act precluded Mr Dempsey's claim to recover the amount of his GST liability from his clients even if the terms of the GST Act did not do so.

Conclusion and orders

[51] In my respectful opinion, Mr Dempsey's challenges to the decision of the learned primary judge must be rejected.

[52] The appeal should be dismissed.

[53] Mr Dempsey should pay the respondent's costs of the appeal to be assessed on the standard basis.

[54] **WHITE J:** I have read the reasons of Keane JA and agree with those reasons and the order proposed dismissing the appeal.