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The Chief Executive
Bar Association of Queensland
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BRISBANE

Attention: Mr. Dan O'Connor

Dear O'Connor,

Re: Committee Ruling - Proceedings against a Firm or Solicitor for Unpaid Fees

I refer to the Notice to Members dated 19 October 2000, advising of a Committee Ruling and observations, including the following proposition:

“... the members of the Association are reminded that, as the law presently stands, they cannot maintain an action against a firm or solicitor or the firm's or solicitor's client for fees.”

I accept that, as a general proposition, this is undoubtedly correct. I believe, however, that there are at least two situations in which an action may successfully be maintained by a barrister in respect of outstanding fees.

One situation is where the instructing solicitor has received funds in trust - whether from the client, or from a third party - expressly for to pay counsel's fees. In such a case, I consider it is at least strongly arguable that, from the moment that the funds are placed in the solicitor's hands, the barrister has a beneficial interest in those funds, and may maintain a suit in equity to enforce the trust. Moreover, if the solicitor applies the funds otherwise than in payment of counsel's fees, a suit for equitable compensation may be maintained.

Having had occasion recently to consider the cases mentioned in the Committee's observations, I do not consider that any of them - or the reasoning which underpins them - precludes such a cause of action. Accepting that an agreement by a solicitor to pay counsel's fees is not an enforceable contract at common law, that the obligation of a solicitor to pay counsel's fees is merely a "debt of honour", and that an action therefore does not lie to recover counsel's fees either as a debt, as an *indebitatus assumpsit* count, or as a *quantum meruit* claim in quasi-contract for work and labour done, this does not appear to me to preclude the kinds of equitable claims which I have mentioned.

Such claims do not depend on the barrister's having an enforceable right to be paid (either by the solicitor or by the client), but on the fact that the solicitor received funds which (even in the absence of an enforceable right of payment) were appropriated to payment of counsel's fees. If the client placed funds in the solicitor's hands by way of a gift to a barrister, and the solicitor misappropriated those funds, there is no doubt that

an equitable claim could succeed. The barrister's position can be no worse if funds are placed in the solicitor's hands for payment to the barrister, not by way of a gift, but in satisfaction of a "debt of honour".

A case relevant to this point is *Francey v. Cashman*, an unreported decision of Master McLaughlin in the Supreme Court of New South Wales, dated 5 July 1996. In that case, the plaintiff (a barrister) was retained in proceedings on a "speculative" basis. The proceedings succeeded; a sum of money was awarded by way of damages; and there was also an award of costs. Rather than taxing the costs, the instructing solicitors negotiated a lump-sum amount. The barrister claimed that the lump-sum amount received by the instructing solicitors in respect of the costs "were to the extent of the [barrister's] outstanding fees impressed with a trust in favour of [the barrister]". The master dismissed an application to strike out the claim, stating:

"I do not consider that it is appropriate that I express any view as to the prospects of success of the plaintiff grounded upon the equitable principles which I have outlined. It is necessary for me merely to express a view as to whether I consider that the claim of the plaintiff is an arguable claim: I consider it is; or the obverse, whether I consider the plaintiff's claim is doomed to failure: I consider that it is not."

A second arguable basis on which a barrister may maintain proceedings in respect of outstanding fees - although not, strictly, to recover outstanding fees - is where the barrister sues for loss or damage occasioned by conduct of the solicitor which breaches the *Trade Practices Act*. (Conceivably, a similar cause of action may be maintainable in respect of breaches of other statutory provisions, such as the *Fair Trading Act*, or even a tortious cause of action, such as fraud, or perhaps even negligence.)

In *Shand v. Doyle* (unreported decision of the Full Court of the Supreme Court of Western Australia, 16 September 1996), the plaintiff (Mr. Shand QC) asserted - amongst other causes of action - that his instructing solicitors were guilty of "misleading or deceptive conduct" in contravention of s.52 of the *Trade Practices Act*. The Full Court declined to strike out, or summarily dismiss, Mr. Shand's claim.

Regrettably, the precise facts relied on by Mr. Shand QC as giving rise to a cause of action under the *Trade Practices Act* are not identified in the Reasons for Judgment of the Full Court. So let me, instead, suggest a hypothetical case in which such a cause of action could be maintained. Let us assume that a barrister accepts a brief to appear at a trial on the basis of a representation that the solicitor holds funds in trust to pay counsel's fees. Since the *Trade Practices Act* does not ordinarily apply to natural persons, it must also be assumed that this representation was made in circumstances which attract the operation of the *Trade Practices Act* in respect of the conduct of a natural person: for example, that the representation was made over the telephone, by use of a postal service, or perhaps in the course of inter-State trade. Let it be assumed that the barrister would not have accepted the brief, but for the solicitor's representation that funds were held in trust. Let it be assumed, moreover, that the barrister can prove loss or damage as a result of accepting the brief - for example, that after accepting the brief, the barrister was offered another brief for an appearance on the same day, and

had to turn that brief away. If in these circumstances it is established that the solicitor's representation was false - that no funds were held in trust - it is not immediately apparent to me why a claim for damages under the *Trade Practices Act* could not succeed.

Apart from the two arguable situations mentioned above, in which a barrister may bring proceedings in respect of outstanding fees (although not, strictly, to recover outstanding fees), there is also the possibility that the law may change. Indeed, in *Shand v. Doyle*, each of the members of the Full Court expressed themselves in terms recognising that the traditional rule is due for appellate reconsideration. Kennedy ACJ said:

“Although I accept the rule preventing a barrister from commencing an action for the recovery of his or her fees has been accepted for a considerable period of time and has not been subjected to any serious challenge, I have reached the conclusion that the plaintiff should be given the opportunity of testing the position and that summary judgment should not therefore be granted. The policy considerations justifying the rule have not in recent times been adequately evaluated. When this is done, the answer to the critical question posed in these proceedings should become more readily apparent.”

Similarly, Roland J said:

“We are told that there is no recent authority in Australia where the rule has been challenged. Counsel for the plaintiff submits, in all of the circumstances, that notwithstanding the antiquity of the rule, if the main support for its continuance will not affect the public policy which gave it continued life ... , then why in 1995, when the concept of the fee being an honorarium cannot be sustained, should such a rule remain. I am inclined to agree. ... Where one plank upon which the relevant principle was said to sit is no longer necessary, and the other involves the fiction that the fee is an honorarium, it may be that it is time to look at the rule again.”

I draw these matters to the attention of the Committee, because I feel that it would be disappointing if the Committee's Ruling was understood as precluding a barrister from instituting proceedings, at least where the cause of action falls outside the historical and traditional rule mentioned in the Committee's observations. I am not personally convinced (despite the remarks of the Full Court of Western Australia in *Shand v. Doyle*) that the historical and traditional rule is likely to be over-turned in the foreseeable future; nor am I convinced that it would be a good thing for the Bar if it were. Still, in light of substantial judicial authority for the view that the rule is ripe for reconsideration, it would be unfortunate if the Committee's Ruling were to be construed as discouraging members from pursuing their right to explore that issue in the courts.

Yours faithfully,

Anthony J.H. Morris QC