

THE SOLICITOR AND HIS CLIENTS' INTEREST

During the past quarter of a century two questions have arisen in connection with the practice of solicitors, which have caused some misgivings in the minds of members of the profession and, no doubt, also in the minds of the more discerning members of the public. The first of these questions is as to how the public can best be protected from and indemnified against the defalcations of dishonest members of the profession and the second concerns the rights and duties of solicitors with regard to interest earned on money deposited with them by their clients.

The two questions are inter-related, because the wider that the practice involved in the second question is spread amongst solicitors, the greater is the likelihood of the first question arising and of it involving losses of some magnitude. Basically both questions turn upon the larger question of the nature of the solicitor's duty towards his clients and, perhaps, as to which of the persons with whom he has business dealings can be regarded as his clients for the purpose of his professional practice as a solicitor. Before proceeding to a discussion of the first two questions it will be necessary to examine these last two questions.

THE SOLICITOR'S DUTY

A solicitor is an officer of the court, and originally was an officer of the Court of Chancery at a time when that court exercised an exclusive jurisdiction in equity. It follows that his dealings with the general public were regulated by the court of which he was an officer and which in its inception at any rate, was a court of conscience. Thus, the dealings between a solicitor and his client were governed by the strict rules of equity which had been evolved to regulate dealings between trustees and their beneficiaries and not by the rules of the common law which had been designed to effect justice between persons, supposedly of equal bargaining capacity. Thus in *Nocton v. Ashurton*¹ it was held that a solicitor, who had not made full disclosure to his client, was liable to compensate the client, although the circumstances were not such as would necessarily have sustained an action at common law. In the words of Viscount Haldane L.C.:

When, as in the case before us, a solicitor has had financial transactions with his client, ... a Court of Equity has always assumed jurisdiction to scrutinize his actions.²

It follows that a solicitor, apart from the remuneration to which he is entitled for his professional services, cannot make a profit out of a transaction, which he is engaged to conduct on behalf of his client.

1. [1914] A.C. 932 (H.L., Eng.).

2. *Ibid.*, at p. 956.

Furthermore, even his professional remuneration is subject to scrutiny and, if deemed excessive, to modification by the court.³ For example, as a general rule where a solicitor acts in a conveyancing matter for a client his professional fees are regulated by statute, and if he charges more, his client will be able to recover the excess.⁴ But suppose that in the course of the transaction the solicitor, acting as an agent for an insurance company, persuades the client to take out a policy of insurance with that company on his newly acquired house. Now, if the solicitor fails to disclose his agency and the fact that the insurance company has agreed to pay him a commission on all policies effected through his agency, his client will be able to recover from him the amount of commission paid in respect of the policy. Moreover, even if he does disclose the agency to his client, he must obtain his client's consent if he wishes to retain the commission.⁵ In such a case it is important to appreciate that the client has been deprived of nothing, because it is the general rule of insurance companies that no commission is payable to a person in respect of policies effected on his own behalf, and that the profit made by the solicitor is not derived from his use of the client's property.

What then is the duty of a solicitor with regard to property entrusted to him by his client? In the first place, it is quite clear that, if the client has expressly directed the solicitor to invest moneys or to let his property to tenants, the solicitor must, on ordinary common law contractual principles, account to the client for dividends received as a result of the investments and for rents received from tenants of the property. On the other hand, it may be that the client merely deposits money or allows money to remain with his solicitor pending the outcome of litigation or the completion of some transaction but without giving any express directions as to the investment of that money in the interim. In this case it must be appreciated that the transaction does not constitute a loan where the whole object of the transaction is that the borrower is to have the use of the money for his own purposes, to make what profit he can out of it, and is under no obligation other than to return in due course a sum of money equivalent to that which was lent.

It has long been established that a solicitor owes a fiduciary duty to his client, imposing upon the solicitor an obligation to use the utmost good faith in all his dealings with his client. The extent of this obligation with regard to the property of a client entrusted to a solicitor was laid down more than eighty years ago by the English Court of Appeal in *Re Hallett's Estate*.⁶ In the words of Sir George Jessel M.R.:

.... it must now be considered settled that there is no distinction, and never was a distinction, between a person occupying one fiduciary position or

3. Halsbury, *Laws of England*, (3rd ed.), vol. 36, at pp. 106-107.

4. S.R. & O. Rev. 1948, Vol. XXI.

5. *Workman and Army and Navy Auxiliary Co-operative Supply Ltd. v. London and Lancashire Fire Insurance Co.* (1903) 19 T.L.R. 360, at p. 362, *per* Kekewich J.; *Copp v. Lynch and Law Life Assurance Co.* (1882) 26 Sol. Jo. 348; *Jordy v. Vanderpump* (1920) 64 Sol. Jo. 324.

6. (1880) 13 Ch.D. 696.

another fiduciary position as to the right of the beneficial owner to follow the trust property . . .⁷

The Master of the Rolls was, of course, rejecting the conclusion of Fry J., in *Ex p. Dale & Co.*,⁸ that a person, whose fiduciary duty is not derived from his status as a trustee of an expressly created trust, is not under the same strict equitable duty as a trustee and that the person to whom such a fiduciary duty is owing has not the same extensive remedies as has the beneficiary under an express trust. Can there be any doubt, then, that a solicitor to whom a client entrusts property, in his capacity as a solicitor, owes the same duty to his client as is owed by a trustee to his *cestui que trust*? If such is the case, then there is abundant authority for the proposition that an express trustee who improperly employs trust moneys for his own purposes must account to the beneficiaries for the profit made by its use and that, if the circumstances are such that the amount of profit made cannot be ascertained, he will be liable to pay interest at the rate of 5% *per annum*.⁹

To summarise; it would appear that in this context a solicitor owes two duties to his clients. First, he must not make a profit, apart from his ordinary professional fees, out of any transaction effected on behalf of a client unless he has made full disclosure of that profit to his client and his client has consented. Secondly, if he employs the property of his client for his own purposes he must account to the client for any profit made and, if he is unable to account, he will be liable to pay to his client interest at 5% *per annum* on the value of the property so employed.

WHO ARE A SOLICITOR'S CLIENTS?

A solicitor, like any other person, engages in a large number of day to day business transactions, which have no connection with his profession. For example, he will have to purchase the every day necessities of life, be they goods or services. In these cases it is clear that the transactions have no connection with his professional practice as an officer of a court of equity and this will be so, as a general rule, even if the person with whom he deals are people for whom he acts, or has acted, in connection with their legal business in the course of his professional practice. With regard to such every day transactions, concerned with the ordinary necessities of life, his rights and obligations will be governed by the common law rules of contract, which leave him free to make a profit at the expense of the other parties to those transactions.

It is simple enough to say that a solicitor's clients are those persons on whose behalf he acts in matters which are usually handled by a solicitor. It is a much more difficult matter to identify what matters are usually handled by solicitors. In England and in Australia the evolution of the modern solicitor has been a gradual process and the activities in which he engages in the course of his practice have tended to expand over the years and, no doubt, continue to expand. This changing and

7. *Ibid.*, at p. 720.

8. (1879) 11 Ch.D. 772.

9. *Jones v. Foxall* (1852) 15 Beav. 388.

expanding nature of a solicitor's practice was remarked upon over sixty years ago by Madden C.J., in *Shannon v. Whiting*,¹⁰ a case concerning the misappropriation of clients' moneys:

As to what is in law "solicitors' business", it is quite certain that the definition will have presently to be extended Originally, of course, the position was that an attorney was a man put in the place of a litigant to conduct his litigation at common law. A solicitor was one who was admitted by the Court of Chancery to conduct proceedings before it, and a proctor was a man who was authorised and employed to do ecclesiastical or matrimonial work, and a conveyancer was a man whose business it was to investigate and clear up titles to land, and to prepare conveyances of land and transactions of that kind. At one time, all these were perfectly separate, but nowadays they have all become one. Anyone practising now is an attorney, a solicitor, a proctor and a conveyancer. Notoriously the kind of business which it is alleged was done by the firm is one which is quite common amongst solicitors; everyone does it. No one has given evidence of it in this case, but there is no one in the profession who does not know it is done every day, and the business done now is such as would make Lord Ellenborough turn in his grave. It is part of the march of that progress that tends to provide people with everything on the one spot — a sort of legal Whiteley's, or Universal Stores. You can go to a solicitor and he will draw your marriage settlement, or further on he will obtain you a divorce without sending you to a proctor, or he, knowing the ways and devices of money lenders, and possessing the tackle to handle them safely, instead of allowing your innocence to fall foul of them, will find it for you with the least trouble or danger, and he finds his remuneration either in the participation or the receipt of a commission according as he finds the money or is the lender of it. On the other hand, if you have got money to lend, he will lend it for you safely, and will steer you clear of the modern Montague Tiggs or the Peruvian Mines which broke the heart of Mr. Pipchin. He will either bring or defend your action in the same office without any trouble, and finally make you insolvent, or draw your will according as you have or have not anything left at the end of the business. The result is that it is notorious, and everyone knows, that the receiving of large sums and the disposal of them on commission is almost universal; but for all that, it may be that the law holds yet that it is not 'solicitor's business.' It is adding another business to 'the solicitor's business' which solicitors carry on.

Now, whether or not this continuing expansion of the activities of solicitors is desirable, is, for the moment, beside the point. The question is whether, when a solicitor carries out transactions that at first sight appear to have a closer connection with Lombard Street than with the Courts of Justice, he owes a fiduciary duty to the persons on whose behalf he carries them out. The probable answer appears to be that, if those persons originally came to him as clients who required him to carry out transactions that were within the usual course of a solicitor's business, *stricto sensu*, and the further transactions were entrusted to him as a result of the confidence engendered by his handling of the earlier transactions, then he continues to be bound by the fiduciary duty.¹¹

With these rough guides as to the nature of a solicitor's duty and as to the identity of his clients, it is possible to consider the related questions of the ownership of interest on money entrusted to a solicitor's care and of the best means to safeguard the public from and to indemnify them against losses arising from the defalcations of solicitors.

10. (1901) 7 Argus L.R. 49, at p. 57 (Victorian Supreme Court).

11. *Carter v. Palmer* (1841) 8 Cl. & F. 657.

INTEREST ON CLIENTS' MONEY

Clearly, even where a solicitor confines himself to his traditional role as an officer of the court in the conduct of legal proceedings, be they contentious or non-contentious, and to his functions as a conveyancer, clients' money on account of counsel's and court fees will be entrusted to him and even larger sums will find their way into his hands as a result of or pending the completion of conveyancing transactions. Now, even supposing that the solicitor and the courts act with all the diligence and expedition which the public has every right to expect, but does not always get, and if the solicitor in a busy practice pays all of the moneys he receives into a non-interest bearing current account, there will probably be a very substantial balance in that account at all times. This state of affairs will benefit no one but the bank. If, on the other hand, the solicitor elects to put a substantial proportion of such monies on interest bearing deposit account, the problem arises as to the disposal of the interest so earned. As we have already seen it undoubtedly belongs to the clients and, since the object of this article is to vindicate the obvious rather than to elucidate the 'obscure',¹² some reference must be made to a recent House of Lords decision on the matter.

In *Brown v. Inland Revenue Commissioners*¹³ the appellant, a Scots solicitor whose range of activities would have astonished Sir John Madden,¹⁴ let alone Lord Ellenborough, had been in the habit of placing sums of money entrusted to him by his clients upon interest bearing deposit accounts with his bank. Fortified by a written opinion of his professional body, the Law Society of Scotland, as to the propriety of his actions,¹⁵ he retained some of the interest so earned for his own use, and, furthermore, included it in the return of his income for the purpose of income tax as profits earned from the exercise of his profession. However, the Commissioners rejected this contention and refused to permit the interest to be treated as income arising out of the exercise of the appellant's profession and proceeded to tax it on the basis that it was his unearned income.

The House of Lords unanimously supported the Commissioner's assessment of the interest as unearned income but in doing so appears to have held that the interest was not the income of the appellant at all but that of his clients to whom the sums placed upon deposit belonged. However, it is not the object of this paper to investigate the paradoxes of taxation law but to attempt to ascertain whether a solicitor can be justified in any circumstances in retaining interest earned by money deposited with him by his clients. In *Brown's* case, all of their Lordships, with the exception of Lord Donovan, appeared to think that there might be cases in which a solicitor would be justified in so doing.

12. "the vindication of the obvious is sometimes more important than the elucidation of the obscure" *per* Holmes J., cited by Professor Frederick L. Schuman, (1943) 52 Yale LJ. 938.

13. [1964] 3 W.L.R. 511 (H.L., Scot.).

14. *Supra*, n. 10.

15. Report of the Law Society, 1951. The text of the opinion is set out in [1964] 3 W.L.R. 511, at p. 514 in the speech of Lord Reid.

Lord Reid said:¹⁶

As regards implied agreement I do not doubt that clients could agree, if they so chose, to their solicitor making a profit out of their money by using it in certain ways in certain circumstances. The fact that a solicitor is in a fiduciary position does not prevent him from making agreements with clients who are *sui juris* and are fully aware of the facts. And there might be circumstances from which such an agreement could be implied.

Lord Evershed said:¹⁷

I readily accept that a solicitor may acquire the right to interest on money invested by him on behalf of a client by appropriate agreement with the client.

Lord Guest said:¹⁸

Accordingly, unless there is some agreement between the solicitor and his client, entitling the solicitor to retain the interest this belongs to his client.

Lord Upjohn said:¹⁹

But this interest belongs collectively to the clients and not to the solicitor . . . its retention by the solicitor cannot be justified without the clients' consent. So the solicitor must explain the matter to his client and obtain his assent thereto.

It is appreciated that their Lordships were sitting as a Scottish Appellate Court and that in certain circumstances an agreement unsupported by consideration may be legally binding in Scotland but it is submitted with respect that these views of their Lordships do not represent the law in those jurisdictions where an agreement to be legally binding must be supported by valuable consideration. The question before their Lordships was not one of an independent profit made by a solicitor in the course of conducting business on behalf of his client. By "independent" it is meant that the profit so made was one, such as an insurance commission, which in no circumstances could have accrued to the client, independently of the fiduciary duty owed to him by his solicitor. In such a case the solicitor's disclosure to his client and the client's consent to his retention of the "profit" is sufficient to discharge the fiduciary duty.²⁰

On the other hand, as we have already observed, where a client has entrusted his money to a solicitor and the solicitor invests it, the product of the investment, be it dividend or interest, is the property of the client. For that property to be transferred to the solicitor he must show either that the client has made a gift of it to him or that it has been transferred to him for valuable consideration. In normal circumstances, because of the presumption of undue influence in the case of gifts *inter vivos* to a

16. [1964] 3 W.L.R. 511, at p. 515.

17. *Ibid.*, at p. 518.

18. *Ibid.*, at p. 519.

19. *Ibid.*, at p. 523.

20. *Supra*, n. 5.

solicitor by his client, it would be almost impossible for the solicitor to establish a valid gift. To rebut this presumption the solicitor must not only prove that the gift was a reasonable one in the circumstances but also that the client had competent and independent legal advice from someone fully acquainted with all of the circumstances.²¹ Again, provided that the solicitor has received the usual professional remuneration for the transaction in question, it is difficult to appreciate what consideration can possibly move from him to support an agreement allowing him to retain the interest on his client's money in the form of additional remuneration.

It has been suggested that the additional work entailed in keeping an account of the client's money is sufficient consideration to support an agreement permitting the solicitor to retain any interest earned by that money whilst it is in his care.²² This suggestion ignores the fact that a solicitor is under a statutory duty to keep proper accounts of his clients' moneys²³ and that, therefore, it must be assumed that the authorised scales of remuneration include an element to cover the cost of discharging that duty. In the words of Lord Donovan:²⁴

If I may say so, I think the council recognised the difficulty it was in; for, in effect, the ruling says that if certain work is too difficult or impracticable then a charge may be made for other work which the solicitor would be doing in any event. The premise is really irrelevant to the conclusion.

In spite of this rebuff from the judiciary, the profession, as represented by its professional associations, has not let the matter rest. Indeed, it appears to have rejected the unanswerable logic of Lord Donovan in favour of its own original and quite illogical opinion which it had disseminated amongst its members, thereby, in the case of the English Law Society,²⁵ providing another dismal example of what Mr. Meagles called "our English holding-on by nonsense, after every one has found it out."²⁶ However, in lending its support to a bill to give statutory effect to its 'nonsense' the Law Society has proceeded in a thoroughly English way. That it to say it has made an apparent concession, which, if any court had been called upon to consider the matter, it would have been held bound to concede without statutory authority. Section 8 of the Solicitors Act, 1965 provides as follows:

(1) Rules made under section 29 of the principal Act shall make provision for requiring a solicitor, in such case as may be prescribed by the rules, either —

(a) to keep on deposit in a separate account at a bank for the benefit of the client money received for or on account of a client; or

21. Halsbury, *op. cit.*, n. 3, at p. 87 *et seq.*

22. [1964] 3 W.L.R. 511, at p. 518.

23. The Solicitors' Accounts Rules, 1945-1959, S.R. & O., 1944, No. 781.

24. [1964] 3 W.L.R. 511, at p. 524.

25. In 1958 the Council of the Law Society of England had expressed a similar opinion to that of the Law Society of Scotland, *supra*, n. 15.

26. *Little Dorrit*, Chap. II.

- (b) to make good to the client out of the solicitor's own money a sum equivalent to the interest which would have accrued if the money so received had been kept on deposit.
- (2) The cases in which a solicitor may be required to act in accordance with rules made pursuant to this section may be defined, among other things, by reference to the amount of any sum received or the period for which it is or is likely to be retained or both; and such rules may include provision for enabling a client (without prejudice to any other remedy) to require that any question arising under the rules in relation to the client's money be referred to and determined by *the Society*.
- (3) *Except as provided by rules made pursuant to this section, a solicitor shall not be liable by virtue of the relation between solicitor and client to account to any client for interest received by the solicitor on moneys deposited at a bank being moneys received or held for or on account of his clients generally.*²⁷

It has been said that equity comes not to destroy but to fulfil the law²⁸ and perhaps the mildest comment, in the light of the decision in *Brown's* case, that can be made with regard to subsection (3) of section 8 of the Solicitors Act is that it comes to destroy equity. A more virile and intelligible way of describing its operation is as "nothing more nor less than a straight out statutory misappropriation of trust funds the property of the public."²⁹

The provisions of subsection (1) and (2) can only be regarded as a *quid pro quo* for subsection (3) and in that case it is pertinent to examine the *quid*. It is proposed that, in the sole discretion of the *Law Society*, a solicitor who is in possession of client's money may be directed by the rules *made by the Law Society*, to place that money on deposit for the benefit of the client. The guiding principles are to be the size of the sum of money involved and the period of time that it is likely to remain in the solicitor's possession. It is submitted with no reservations, that if a solicitor is entrusted with a large sum of money or even with a smaller sum in circumstances which would lead a reasonable man of business to suppose that it will remain in the solicitor's possession for sufficient time to earn a significant sum of interest, provided that it is placed in an interest bearing deposit account, it then becomes, independently of statutory authority, the duty of the solicitor to place it on deposit and to account to his client for the interest so earned. In other words, quite apart from his fiduciary duty towards his client, a solicitor is under a common law obligation to use, in conducting the business affairs of his client, all the skill and care that a reasonable businessman would use in the conduct of his own business affairs.³⁰ To keep a client's money idle and unproductive in circumstances where a reasonable man of business would realize that it could be productive is quite clearly a breach of the solicitor's ordinary common law contractual duty to his client.

27. Italics supplied.

28. Maitland, *Equity*, Lecture II.

29. See the observations of W. J. Baldock, Former President of the Law Society of New South Wales; Sydney Morning Herald, March 5th, 1965, p. 2.

30. Halsbury, *op. cit.*, n. 3 *supra*, at p. 99 *et seq.*

Thus, in effect, the profession has obtained all the advantages of subsection (3) at the expense of making a "concession" to do what it was already legally obliged to do. Is there any other possible justification for subsection (3) ?

Both in *Brown's* case and in the professional opinions that have been advanced in support of the practice now embodied in subsection (3) only two arguments have been put forward. The first was stated, without disfavour, by Lord Upjohn in *Brown's* case:³¹

"A practice", said his Lordship, "whereby a solicitor uses his clients' money, too small in individual amounts or held for too short a time to make individual investment worthwhile in the interest of the client but which, in the aggregate, amounts to a large floating sum, to earn interest for him is an entirely innocent and commonsense practice which harms no one and probably indirectly benefits the general body of clients.

So put the case is superficially convincing, but who is to determine the circumstances in which the practice is innocent? Not the courts but the governing body of the profession whose members stand to benefit by the practice. They are to be not only the makers of the rules but also the sole interpreters of them. The process savours more of the Darktown Poker Club³² than of natural justice. Again, no one has yet explained how an indirect benefit can possibly accrue to the general body of clients; unless, perhaps, the implication is that if solicitors are provided with a statutory authority to misappropriate their clients' moneys they will be less vulnerable to a temptation to indulge in other forms of misappropriation. It is significant that the appellant in *Brown's* case was unable to convince either the House of Lords or the Commissioners that any of the cases arising in his very extensive practice involved the receipt of interest in circumstances rendering it impracticable to account to his clients for that interest. No evidence was called in the case to substantiate that claim and so far as the utterances of the professional bodies go, there is no indication that persons skilled in banking and accountancy have been asked to express an opinion.

The second plea is that, if the solicitors do not make a profit out of their clients' money, the banks will. This is the nadir of special pleading, and the complete answer to it is that banks, as the whole world knows, are in business for that very purpose, whereas, rightly or wrongly, the general public are under the impression that solicitors are in practice for the primary purposes of giving legal advice to and transacting legal business on behalf of their clients. Indeed, in *Brown's* case the appellant did try to maintain before the Commissioners that he was acting in the capacity of a private banker to his client, but that contention was summarily rejected. Lord Upjohn said:³³

31. [1964] 3 W.L.R. 511, at p. 523.

32. Where, one understands that the rule requiring no man to be a judge in his own cause does not prevail and that the game is not played "according to Hoyle but according to ME."

33. [1964] 3 W.L.R. 511, at p. 521.

Before the Commissioners, the appellant at one time alleged that he was a 'private banker' to his clients, but that obscure phrase, whatever it meant, was decisively negated by the Commissioners, as a matter of fact, on the short ground that lawyers are not bankers.

The interest that has been aroused both in England and Australia with regard to the question of interest on clients' money deposited with solicitors indicates that a substantial amount of the modern solicitor's practice entails not only handling but also the investment of clients' money. It is a fair inference that where there is a strong emphasis on this aspect of practice it is because it is more lucrative than other aspects. It should then occasion no surprise that when the dishonest solicitor, fortunately a rarity, misappropriates his clients' moneys, the amounts involved will be large enough to attract public comment. Rare, rather than common occurrences, are the essence of news and it is, therefore, not surprising that the defalcations of a solicitor should receive wide publicity and, no doubt, it is in the public interest that this should be the case. However, such adverse publicity is damaging to the profession as a whole and, although it may be impossible to legislate so as to exclude any possibility of solicitors misappropriating their clients' money, it may be possible to ensure that the clients are properly indemnified against loss.

PROTECTION OF THE CLIENT

In most common law countries a lawyer can be admitted to practise as soon as, or shortly after, he attains his majority. From then on, provided that he is not guilty of proven professional misconduct, he may continue to practise law as long as he wishes and, in many cases, will do so for a period of fifty years or more. That being the case, it is surely beyond human ingenuity to devise a system of selection for the profession that will eliminate the possibility of anyone being admitted to practise law, who may in the far distant future, as a result of unforeseeable pressures or aberrations, yield to temptation and misappropriate his clients' moneys. The writer is not aware of any statistical study as to the backgrounds and motives of solicitors who have been struck off the rolls for this offence but gather from the reports of the Law Society's Disciplinary Committee that the defaulters are not confined to persons of any particular background. It follows that, if the profession is to maintain the public confidence, it must do everything in its power to mitigate losses occasioned by its defaulting members even if that entails the underwriting of the small minority of dishonest members by the honest majority.

It is only of comparatively recent years that the legal profession has accepted the principle that it has a collective responsibility to the public to take steps to ensure that no client suffers a financial loss as the result of defalcations by his solicitor. In New Zealand the acceptance of the responsibility of the profession appears to have been spontaneous and in 1929 the Auckland District Law Society established a fund for the compensation of clients whose money had been misappropriated by their solicitors. This fund was called the Lawyers' Indemnity or Compensation Fund and was maintained by contributions from the practising

solicitors in the district. It was not until 1936, when a Solicitors' Fidelity Guaranty Fund was established in New South Wales, that the principle was accepted in Australia and the first of such funds in Canada was not established until 1939.

In England the establishment of a compensation fund does not appear to have emanated from any sense of collective responsibility of the profession as a whole but from public pressure. It is true that the question had been the subject of sporadic discussion in the profession for upwards of forty years but nothing was done about it until 1941 and then probably only as a result of trenchant criticisms in the press and in Parliament occasioned by a number of serious defalcations by solicitors in 1938 and 1939.³⁴ By the end of 1950 compensation funds had been established in England, Scotland, The Union of South Africa, New Zealand, in the majority of the States of the Commonwealth of Australia and in most of the Provinces of Canada.

The form of these funds on the whole follows the pattern of the original contributory schemes under which a fund is built up from contributions levied upon practising members of the profession, although in some cases a portion of the fund is devoted to paying the premiums on a supplementary policy of insurance. The obvious defect of such schemes is that the amount of compensation payable to defrauded clients is, of necessity, limited by the amount of money available in the fund. Of recent years, although the number of individual defalcation has not noticeably increased, the amounts involved have been large enough to imperil the liquidity of some of the funds. For example, the accounts of the compensation fund annexed to the English Law Society's Annual Report for the year ended 31st December, 1960, although they showed a surplus of income over outgoings of £77,363.13. 4. were footnoted to the effect that the figures in the accounts did not include claims, which may or may not be admitted, totalling £882,744.

Now, whether such claims can be eventually substantiated or not their very existence is a cause for disquiet and it is clear that the feeling of disquiet is not confined to England. In both Victoria and New South Wales considerable discussion has taken place in recent years as to the possible method of augmenting and strengthening compensation funds. In Tasmania the compensation fund has had to be substantially underwritten by the Government Insurance Office.

In the United States of America, on the other hand, where the first of the compensation funds was not established until 1958, the contributory system supplemented in some case by policies of insurance purchased out of the funds seems to be working satisfactorily enough. At any rate the figures published by the American Bar Association indicate that the

34. *Guide for the Establishment of Clients' Security Funds* (prepared by the special committee on clients' security funds of the American Bar Association). The writer wishes to express his gratitude to Mr. James E. Remmert, Assistant Director, Division of Committee Services, American Bar Association for his courtesy in supplying him with the American literature on the subject.

various state funds are in a healthy state of solvency, after having met all outstanding claims.³⁵

Although the American experience appears to have been happier than the British, it does not follow as a necessary inference that standards of professional integrity are in fact higher in America than in other common law jurisdictions. Indeed the reason may well be that, because the American lawyer tends to confine the activities of his professional practice to the traditional roles of barrister, solicitor and attorney, the amount of clients' money passing through his practice is small as compared with that passing through the hands of solicitors in jurisdictions where conveyancing and trust management constitute a high proportion of a solicitor's practice. This pertinent factor was drawn to the attention of the Committee on Clients' Security Funds of the American Bar Association in 1960 by the Chief Justice of Alberta, when he observed that "while some large defalcations had occurred in Canada, there is a greater exposure for losses of the type covered by clients' security funds since proceeds from real estate sales generally pass through the hands of Canadian attorneys, and they are more likely to handle trust cash and securities than is usually the case in America."³⁶

Even in the field of litigation, because in some States the American lawyer is not fettered by prohibitions against conducting speculative actions for a contingent fee, the American practitioner will not of necessity be burdened with the holding of substantial sums of money 'on account of costs' pending the outcome of what may well be prolonged litigation. Thus, when these factors are taken into consideration, although the proportion of dishonest solicitors may be no greater in the other common law jurisdictions there is a strong probability that the amount involved in any given defalcation will be larger than it is in America.

It appears, therefore, upon the balance of probabilities, that the possible demands upon a clients' compensation fund will be considerably larger in those jurisdictions in which the nature of a solicitor's practice entails the continual handling of large sums of clients' moneys. Indeed, this appears to be borne out by the anxiety that has found expression in New South Wales and in Victoria as to the ability of their respective clients' compensation funds to meet all possible future claims.

With a view to strengthening its compensation fund the Law Institute of Victoria has sought to utilize one of the causes of its apprehension to augment its compensation fund and the Victorian Legal Profession Practice Act, 1958, has been amended so as to appropriate to the use of the fund interest received on clients' moneys entrusted to their solicitors.

35. *Report on Clients' Security Funds*, (made to the 30th Anniversary Junior Bar Conference of the American Bar Association in 1964.).

36. *Ibid.*, at p. 11.

The relevant parts of section 40 of the Act, as amended now provide:—

- (1) All moneys received for or on behalf of any person by any solicitor unless otherwise paid by the solicitor to such person or as such person directs (whether generally or in any particular case) —
 - (a) shall forthwith be paid into a bank in Victoria to a trust account (whether generally or particular) designated or evident as such; and
 - (b) shall be retained in such trust account until paid to such person or as such person directs or otherwise according to law.
 - (2) Such moneys shall not be available for payment of the debts of the solicitor to any other creditor of the solicitor or be liable to be paid or taken in execution under the order or process of any Court at the instance of any such creditor.
- (2A) [*Introduced by s. 5 of Act No. 7226, 1964*]

Notwithstanding the provisions of sub-section (1) of this section the solicitor shall out of the moneys so received by him —

- (a) on or before the commencing date deposit with the Law Institute of Victoria a sum which is not less than one third of the amount which was the lowest balance in his trust bank account or, where he practices in partnership with another solicitor or solicitors, the trust bank account of the firm on any day during the period of twelve months ending on the thirty-first day of March immediately preceding the commencing date or, where he or the firm maintains more than one trust bank account, the lowest aggregate on any day during that period of the balances in the trust bank accounts of the solicitor or the firm, excluding any accounts that were maintained for the exclusive benefit of a specific person or specific persons; and
 - (b) thereafter keep deposited with the Law Institute of Victoria a sum which is not at any time less than one third of the aggregate of —
 - (i) the amount that was the lowest balance in his trust bank account or the trust bank account of the firm on any day during the current period of twelve months ending on the thirty-first day of March or during the period of twelve months ending on the immediately preceding thirty-first day of March or, where he or the firm maintains more than one trust bank account, the lowest aggregate on any day during either of those periods of the balances in the trust bank accounts of the solicitor or the firm excluding any accounts that were maintained for the exclusive benefit of a specific person or specific persons; and
 - (ii) the amount standing upon deposit by the solicitor or the firm with the Law Institute of Victoria in accordance with the provisions of this section on the day of the lowest balance or balances concerned.
- (2D) The interest accruing in respect of moneys so invested shall be paid to the Solicitors' Guarantee Fund and form part of that Fund.

Clearly this enactment violates the basic principles laid down by the House of Lords in *Brown's* case in that it enables the Law Institute of Victoria to use interest earned by moneys, entrusted by clients to solicitors, for the purpose of paying debts owing by other solicitors to their clients. To argue that such legislation is for the benefit of the public at large evades the issue as to whether the legal profession as a whole has a collective responsibility to the public to make good losses occasioned

by the dishonesty of members of the profession, and is, in effect, to maintain that the public must indemnify itself against such losses.

Whatever may be the legal liability of the profession in this connection there can be little doubt that, in the words of Vanderbilt C.J. "the public holds the organized bar responsible for the conduct of all members of the legal profession so long as they are members of the legal profession."³⁷ Indeed, it is hoped that every right thinking member of the legal profession is prepared to accept, without reservation, the dictum of a former President of the English Law Society to the effect that the Clients' Security Fund is a debt of honour willingly accepted by the profession.

Legislation such as the amended s.40 of the Victorian Legal Profession Practice Act not only violates the established rules of equity governing the solicitor and client relationship but also evades the honourable obligations of the profession as a whole. Statute, *pace* Sir Edward Coke, can no doubt make legal the unethical but in a democracy, at least, it cannot make it ethical. It is comforting to know that when similar legislation was proposed in New South Wales, the majority of the legal profession in that State rejected it, and in advocating its rejection a former President of the Law Society of New South Wales put the matter in clear perspective, rendering it intelligible to the intelligent layman, when he said —

The proposals contemplate nothing more nor less than a straight out statutory misappropriation of trust funds the property of the public, for the benefit either directly or indirectly through the Law Society, of all practising Solicitors The proposals are designed to lighten the normal responsibilities of the Society and all practising Solicitors, contrary to all accepted principles.³⁸

A further argument against such legislation, if one is needed, is that it can only damage the relations of the profession with the public who will inevitably interpret it as a sign of unwillingness on the part of the profession as a whole to accept full financial responsibility for the default of any one of its members. Certainly the public relationship aspect has been appreciated both in the United States of America and in England.

At the American Bar Convention in London in 1957, the then Chairman of the Compensation Fund Committee of the Law Society of England said of the fund:³⁹

It is so far the most important step the Law Society has taken in the field of public relations . . . and has done more than anything else to enhance the prestige and honor of the profession.

The first Chairman of the American Bar Association Standing Committee on Public Relations has said:⁴⁰

37. Guide for the Establishment of Clients' Security Funds, (*supra*, n. 34), at p. 3.

38. Sydney Morning Herald, March 5th, 1965, p. 2.

39. Report to Junior Bar Conference, (*supra*, n. 35), at p. 7.

40. Guide for the Establishment of Clients' Security Funds, (*supra*, n. 34).

Heaven speed the day when Indemnification [Clients' Security Fund] is an accomplished fact in this country. I sincerely believe that in and by itself it will improve the public's opinion of us immeasurably almost literally overnight.

Whatever may be the views of the general public with regard to the honesty and integrity of the legal profession as a whole, there can be little doubt as to public assessment of the profession's record for expedition in the conduct of its clients' affairs. The public lays the blame for the law's delays squarely, and perhaps not altogether unfairly, on the shoulders of the profession as a whole. That being the case, if it considers the matter at all, the public may well conclude that it is mainly because of the traditional inertia of the profession that clients' money has to be entrusted to its members for substantial periods of time. The public may even speculate as to why a legal practitioner must be entrusted with substantial sums of money which will not be applied or disbursed by the practitioner immediately. That is not an unfair question and, as a general rule, it is one to which any practising member of the profession is capable of giving a reasonably satisfactory answer. Nevertheless, once it is established that either an individual practitioner or the professional body of which he is a member has a legal right to retain, either as against an individual client or as against clients generally, interest earned upon clients' money during the period it is entrusted to a solicitor, the public cannot be blamed if it concludes that the profession has acquired a vested interest in perpetuating and even extending the law's delays.

SOME CONCLUSIONS

It is submitted that both the question of the accountability of a solicitor for interest earned upon money entrusted to him by his clients and the question of his accountability for the principal moneys involve ethical rather than legal principles. It follows, that if the professional bodies are prepared to advise their members to adopt a purely legalistic approach in their relationships with their clients to the exclusion of the ethical principles involved, whatever prestige the profession may have will be considerably impaired. The public has every right to believe that there is a clear distinction between a professional association and a purely business association and that the distinction should lie in the fact that, whilst a business association exists primarily for the benefit of its members, a professional association is primarily concerned with the maintenance of standards of conduct amongst its members. The business association is concerned with the rights and privileges of its members, the professional association with the obligations and duties of its members towards the public and towards each other.

We live in an age that has become obsessed with something that has been designated "Public Relations". It has become almost a religion with its high priests, the public relations officers, and their acolytes, the efficiency experts. Its god is its public image, whatever that may mean. Lawyers in many jurisdictions have been brain-washed into believing that a conscientious striving towards a knowledge of the law and an equally conscientious endeavour to apply it to the clients' problems is not enough. It is also necessary to become a "man of affairs"; to be knowledgeable about finance, investment and a thousand and one aspects

of one's clients' affairs with which the traditional training of the lawyer does not deal. Indeed, with the ever increasing complexity of the law it would be difficult to design an educational programme that would give the intending solicitor some knowledge of all the diverse branches of law with which he will be confronted in the ordinary course of modern legal practice. To further burden him with the acquisition of knowledge that is readily available elsewhere and which can be dispensed by bankers, accountants and stockbrokers who have made a special study of their subjects is merely to invite him to become an indifferent and inadequately equipped lawyer.

It has often been said that the best lawyer is not the man who supposes that he knows all the law but the man who knows where to find it. By the same token it is submitted that the best "man of affairs" is not the one who considers himself qualified to advise upon every aspect of business activities but the one who can recognise what matters are beyond his competence and who can then direct his client to seek advice from someone who, to his knowledge, is reliable and competent. The matter was put in its proper perspective by the High Court of Australia in *Polkinghorne v. Holland*,⁴¹ when it said:

Solicitors possess, in virtue of their profession, no special skill in the valuation of real property, or of shares, or of marketable securities. It is not in the course of their professional duties to advise on such matters. But it is one thing to say that a valuation or expression of his own judgment on a commercial or financial question is not within the scope of a solicitor's duties, and another thing to say that when he is consulted on the wisdom of investing in the shares of a company of which his client knows nothing, it is outside his province to inquire into the matter and to furnish his client with the information and assistance which the facts upon the [companies] register will give, to point out what inquiries may be made, and, if required to undertake them or *invoke the aid of those who will*.

It is not only because the undue extension of the activities of a solicitor's practice into business fields is likely to render him a less competent lawyer that there is a cause for alarm but also, as we have already observed, because it is those extensions that contribute to the handling of unnecessarily large sums of clients' moneys. Again to over emphasise the business aspects of practice tends to obscure the primary duties of a solicitor as an officer of the court who is ultimately subject to the control of the court.

It is true that in Australia as in England the judiciary has during the past century come to rely more and more upon the professional bodies and a large measure of the traditional judicial powers with regard to the disciplinary control of solicitors has been delegated to the professional bodies. Nevertheless it should never be forgotten that the ultimate right of control and, indeed, obligation to control solicitors remains vested in the court. To those members of the profession who as yet regard themselves primarily as lawyers and officers of the court, rather than as legally qualified business tycoons, it comes as a shock to read that the President of a State Law Society considers it to be one of his functions to criticize a judge of the Supreme Court of his State for

41. (1934) 51 C.L.R. *per curiam* (Rich, Dixon, Evatt and McTiernan JJ.) Italics supplied.

carrying out his traditional function in reprimanding a solicitor for his conduct of an action in the Supreme Court without first referring the matter to the Law Society.⁴²

The fact of the matter is that if the professional bodies wish to exercise exclusive disciplinary powers over their members then they must reciprocate by assuming exclusive and *unlimited* liability for the actions of their members. Very recently this aspect of the profession's obligations to the public has been put to it in no uncertain terms by the New South Wales Minister for Justice, Mr. J. C. Maddison.⁴³

It is unfortunate that very often the rapacious desires of a few in commercial and professional groups cloud the public image of the rest of the groups. Lawyers are an example of this. I am hopeful the legal profession can put its affairs in order — that remains to be seen. Whether we like it or not, if a group such as this cannot set its house in order then the Government is bound to intervene in the interests of the public.

These are forthright words, the more so because they were spoken, not by a member of a government committed to a socialistic policy of nationalisation, but by a minister whose party is pledged to uphold the principles of private enterprise in so far as they are consistent with the public well-being.

It is submitted that the greatest single step that can be taken by the profession is for it to assume collective responsibility for the complete indemnification of any person who suffers loss as the result of his solicitor's departure from those standards that must be maintained if the profession is to survive as an independent body instead of becoming another branch of an ever growing government bureaucracy.

How then can this desirable object be achieved? It is suggested with respect that up to the moment the professional bodies have not solved the problem and that their present approach by way of the contributory compensation fund can result only in mitigation of loss and not in a complete indemnity in every case. The extent to which defrauded clients are to be compensated is inevitably limited by the amount of money available in the funds.

When the establishment of clients' indemnity funds was being discussed in the United States of America, Dean Griswold of Harvard Law School, in an address to the Cleveland Bar Association, said:⁴⁴

I am thoroughly aware of the fact that the overwhelming proportion of lawyers are scrupulously honest. Would it not be a fine thing if bar associations . . . established an insurance fund, which would guarantee, as a professional and association matter, that no client would suffer loss through the defalcation of his lawyers?

It is to be hoped that every practising lawyer in the common law world will endorse Dean Griswold's assessment of his profession and go one

42. "The Australian", 21st September, 1965, p. 3.

43. *Ibid.*, 5th October, 1965, p. 3.

44. *Guide for the Establishment of Clients' Security Funds*, (*supra*, n. 34), at p. 2.

step further. That further step is to use every endeavour to ensure that his professional body shares his confidence and is willing to demonstrate it by putting it to the actuarial test. In other words, is the profession prepared to ascertain whether its confidence in itself is shared by the insurance companies?

The legalistically minded will immediately raise the objections that no individual solicitor can legally effect a policy of insurance against his own intentional default and that as things stand the profession as a whole has no insurable interest in its individual members. These objections are easily disposed of. In the past the professional bodies have had little difficulty in obtaining legislation vesting in them disciplinary powers over the profession and there can be little doubt that they would have no difficulty at all in persuading a legislature of any political creed to endow them with unlimited statutory liability for the defalcations of their members.

Once the professional body becomes statutorily liable to indemnify the public against the defalcations of its members, there can be no question but that it will have an insurable interest, and only two questions remain to be answered. First, will the insurance companies accept the risk? If Dean Griswold's assessment of the profession is an actuarial fact and not merely a pious belief, the answer must be in the affirmative. If the answer is in the negative, then the profession will have to admit that the "government is bound to intervene in the public interest."⁴⁵

Secondly, if the risk is acceptable and policies are issued, how are the premiums to be met? The answer in this case is to apportion the premium equally between all practising members of the profession by including each member's contribution in the fee payable by him on the issue of an annual practising certificate, constituting his authority to conduct a legal practice. If statutory authority for such a levy is necessary, it is anticipated that the professional bodies will meet with no opposition from the general public in obtaining it. However, the cost to each individual member of the profession may very well be substantial and some of them will argue that they, being honest, should not have to pay for the dishonesty of others. Well, every motorist knows the answer to that objection. Because some drivers are either careless, incompetent or accident prone, those who are not have to pay a substantial sum each year by way of insurance before they can legally drive their motor cars on the public highway, even though they have never caused and, on the balance of probabilities, will never cause damage to any person or property. By the same token, the man who wishes to conduct a legal practice, an operation which in the field of pecuniary damage has as great, if not greater, potentialities than driving an automobile, is being asked to assume a burden no greater than that of the motorist.

In conclusion, it is hoped that an invitation may be extended, without disrespect, to the solicitors' branch of the legal profession to take

45. See the observations of the New South Wales Minister of Justice, *supra*, n. 43.

time off from its absorbing study of what its professional bodies assume to be its “public image” and to devote a little time to an examination of its collective conscience — a not inappropriate exercise for the officers of a court which, in its inception, was a court of conscience.*

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