Neutral Citation Number: [2019] EWCA Civ 517

Case No: A3/2018/1017(A)

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**
**(Mr John Martin QC sitting as a deputy judge of the High Court)**

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 28 March 2019

**Before:**

**SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT**
**LORD JUSTICE FLAUX**
and
**LORD JUSTICE JONATHAN BAKER**

**Between:**

**The Law Society of England and Wales**
**Claimant/Respondent**

**and**

**Rajesh Singh Pathania**
**Defendant/Appellant**

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**Mr Alexander Hill-Smith** (instructed on **DirectAccess)** for the **Appellant**

**Mr James Ramsden QC** (instructed by **Devonshires Solicitors**) for the **Respondent**

Hearing date: 5th March 2019

# Approved Judgment

**Sir Geoffrey Vos, Chancellor of the High Court:**

Introduction

1. This appeal raises an issue as to the assets that are caught by the statutory trust which arises when the Law Society of England and Wales (the "Law Society") has intervened in a solicitor's practice on the grounds that it has reason to suspect dishonesty.

2. The judge decided that that "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" in paragraph 6(2)(a) ("paragraph 6(2)(a)") of schedule 1 of the Solicitors Act 1974 (the "1974 Act") included the right to recover loans made by the errant solicitor from his client account to third parties prior to the intervention. He declared that the Law Society was entitled at the date of the intervention to the choses in action represented by the loans in question.[1] He put the matter in that way because he had reasoned in his judgment that there was no legal difference between the relationship between a bank and its customer, on the one hand, and a lender and a borrower under a loan agreement, on the other hand. Therefore, the judge explained, since monies held in a solicitor's bank account were obviously covered by the words "all sums of money" (being owed by the banker as a debt to the solicitor - see *Foley v. Hill* (1848) 2 HL Cas 28 per Lord Cottenham LC at pages 36-7), monies loaned by the solicitor from his client account were to be regarded in the same way.

3. The appellant, who is a former solicitor, Mr Rajesh Singh Pathania ("Mr Pathania"), contends that the judge was wrong and that the words "all sums of money" in their relevant statutory context do not include the right to recover loans made from the firm's client account. Mr Alexander Hill-Smith, counsel for Mr Pathania, submits that "all sums of money" only include monies held in bank accounts or that were immediately accessible to the solicitor, and cannot refer to a loan where repayment is dependent on specific terms and on the borrower actually complying with them.

4. It appeared in the course of oral argument that the judge had in fact taken further the definition of "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" between delivering his judgment (on 10th October 2017) and making his consequential order (on 13th March 2018). The judge included in paragraph (2) of his order a declaration that Mr Pathania should account to the Law Society for any loss or reduction in value of the loans if it was caused by his "error, misconduct, default or failure". He explained the reason for this order in paragraph 4 of his "Note on Outstanding Issues" dated 6th March 2018, which said that Mr Pathania "was in the position of a bare trustee of the choses in action from the date of intervention. His duty was to account for his dealings or failures to deal with the trust assets".

5. Mr James Ramsden QC's oral submissions for the Law Society emphasised that it would be a breach of trust and a breach of fiduciary duty for the solicitor to pay any monies out of his client account without compliance with the Solicitors' Accounts

[1] The 10 loans in respect of which he found in favour of the Law Society were listed in Schedule 1 to his order dated 13th March 2018.

Rules 1998. Accordingly, paragraph 6(2)(a) must encompass money that ought to have been in the client account, but was not, because it had been paid away in breach of duty. Money in a client account, submitted Mr Ramsden, retained its status as a sum "of money held by or on behalf of the solicitor … in connection with … his practice", even after it had been paid away unlawfully and even if it were later repaid by the solicitor to the client account. That was why the Law Society maintained that the judge had been right to require Mr Pathania to account for the monies that were missing from the client account as a result of his default. As will later appear, it seems to me that another question requiring consideration is whether money paid away in breach of trust might also qualify as a sum "of money held by or on behalf of the solicitor … in connection with … any trust of which he is or formerly was a trustee" under paragraph 6(2)(a)(ii).

6. In addition to these issues as to the proper meaning of "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice [or] any trust of which he is or formerly was a trustee" in paragraph 6(2)(a), the appeal raised two other subsidiary issues on the footing that the judge was right as to the meaning of "all sums of money":-

   i) Whether the judge was wrong to order the account in paragraph (2) of his order, since on that footing only the Law Society could recover the loans that Mr Pathania had made.

   ii) Whether the judge was wrong to provide in paragraph (6) of his order that any monies due from Mr Pathania to the Law Society should be set off against any sums due to Mr Pathania from the Solicitors' Compensation Fund (the "Fund").

7. It is necessary first to set out some of the basic factual background and the relevant sections of the legislation. The regime applicable when the Law Society intervenes in a solicitor's practice has undergone a number of statutory changes. In order properly to understand the meaning of the words currently used by the legislature, it will, in due course, be necessary also to consider some of those changes.

Factual background

8. Mr Pathania was the sole principal of Newland Solicitors ("Newlands"), a firm practising from 25 New Road, London El 1HE.

9. On 28th May 2009, the Law Society passed a resolution (the "Resolution") under paragraph 6(1) of Schedule 1 to the 1974 Act that it had reason to suspect dishonesty on the part of Mr Pathania and that the monies referred to in paragraph 6(2)(a) and the right to recover or receive them should vest in the Law Society. On 29th May 2009, the Law Society wrote to Mr Pathania notifying him of its exercise of its power to intervene on the ground of suspected dishonesty and enclosing a certified copy of the Resolution.

10. On 1st June 2009, the Law Society, acting by the Solicitors Regulation Authority (the "SRA"), intervened in Newlands' practice (the "Intervention") under section 35 of the 1974 Act.

11. On 29th June 2010, Mr Pathania was made bankrupt, and on 4th February 2011, he was struck off the Roll of Solicitors by a decision of the Solicitors' Disciplinary Tribunal. On 28th June 2011, Mr Pathania was discharged from bankruptcy. He subsequently took assignments from his trustee in bankruptcy of the right to sue for various loans that he had made prior to the Intervention. 18 of these loans were in issue before the judge.

12. Thereafter, Mr Pathania obtained judgment in the County Court for £9,250 against a Mr Thassavar Iqbal Sharif ("Mr Sharif") in respect of what the judge held to have been a loan he had made to him from Newlands' client account. Mr Pathania later alleged that Mr Sharif's solicitors had misappropriated the sums intended to satisfy the judgment, and claimed against the Fund. The Law Society was added as a party to the proceedings, and that led to it uncovering that such loans had been made prior to the Intervention.

13. On 30th June 2014, the Law Society issued these proceedings (Claim No. HC14C02586) against Mr Pathania claiming recovery of monies belonging to the Law Society.

14. On 12th August 2014, the Law Society served Particulars of Claim claiming declarations that (a) the improper loans made by Mr Pathania out of his client account before the Intervention were vested in the Law Society, (b) an account of all monies improperly paid out of Mr Pathania's client account, and (c) an order for payment to the Law Society of all such sums.

15. On 13th March 2018, the judge's order related to all or part of 10 of the 18 loans that had been considered at the trial. The judge gave Mr Pathania permission to appeal paragraphs (1)-(3) and (6) of his order permitting the issues I have mentioned to be argued. Patten LJ refused permission to raise further grounds of appeal on 25th July 2018.

The 1974 Act

16. Section 35 of the 1974 Act provides as follows:-

> "35. The powers conferred by Part II of Schedule 1 shall be exercisable in the circumstances specified in Part I of that Schedule."

17. Paragraph 1(1) of Part I of Schedule 1 of the 1974 Act provides as follows:-

> "1(1) Subject to sub-paragraph (2), the powers conferred by Part II of this Schedule shall be exercisable where —
>
> (a) the [Law] Society has reason to suspect dishonesty on the part of -
>
> (i) a solicitor, or
>
> (ii) an employee of a solicitor, or
>
> (iii) the personal representative of a deceased solicitor,

> in connection with that solicitor's practice or former practice or in connection with any trust of which that solicitor is or formerly was a trustee or that employee is or was a trustee in his capacity as such an employee; …
>
> (c) the [Law] Society is satisfied that a solicitor has failed to comply with rules made by virtue of section 31, 32 or 37(2)(c); …"

18. Paragraph 2 of Part I of Schedule 1 to the 1974 Act provides that "[o]n the death of a sole solicitor paragraphs 6 to 8 shall apply to the client accounts of his practice".

19. Paragraph 3 of Part I of Schedule 1 to the 1974 Act provides that "the powers conferred by Part II of this Schedule shall also be exercisable … where – (a) the [Law] Society is satisfied that there has been undue delay – (i) on the part of a solicitor in connection with any matter …".

20. Part II of Schedule 1 to the 1974 Act starts with paragraph 5 which related to power of the High Court to order that no payment shall be made without its permission of "any money held by him (in whatever manner and whether it was received before or after the making of the order) on behalf of the solicitor or his firm".

21. Paragraph 6 of Part II of Schedule 1 to the 1974 Act provides as follows:-

> "6(1) Without prejudice to paragraph 5, if the [Law] Society passes a resolution to the effect that any sums of money to which this paragraph applies, and the right to recover or receive them, shall vest in the [Law] Society, all such sums shall vest accordingly (whether they were received by the person holding them before or after the [Law] Society's resolution) and shall be held by the Society on trust to exercise in relation to them the powers conferred by this Part of this Schedule and subject thereof [and to rules under paragraph 6B] upon trust for the persons beneficially entitled to them.
>
> (2) This paragraph applies –
>
> (a) where the powers conferred by this paragraph are exercisable by virtue of paragraph 1, to all sums of money held by or on behalf of the solicitor or his firm in connection with –
>
> (i) his practice or former practice,
>
> (ii) any trust of which he is or formerly was a trustee, or
>
> (iii) any trust of which a person who is or was an employee of the solicitor is or was a trustee in the person's capacity as such an employee;
>
> (b) where they are exercisable by virtue of paragraph 2, to all sums of money in any client account; and
>
> (c) where they are exercisable by virtue of paragraph 3, to all sums of money held by or on behalf of the solicitor or his firm in connection with the trust or other matter in connection with which the [Law] Society is

satisfied there has been undue delay as mentioned in sub-paragraph (a) of that paragraph.

(3) The [Law] Society shall serve on the solicitor or his firm and on any other person having possession of sums of money to which this paragraph applies a certified copy of the Council's resolution and a notice prohibiting the payment out of any such sums of money.

…

(6) If any person on whom a notice has been served under sub-paragraph (3) pays out sums of money at a time when such payment is prohibited by the notice, he shall be guilty of an offence …".

22. Paragraph 6A of Part II of Schedule I to the 1974 Act ("paragraph 6A"), which was added by section 77(6) of, and Schedule 16 to, the Legal Services Act 2007, provides as follows:-

"6A(1) Without prejudice to paragraph 5, if the [Law] Society passes a resolution to the effect that any rights to which this paragraph applies shall vest in the [Law] Society, those rights shall vest accordingly.

(2) This paragraph applies to any right to recover or receive debts due to the solicitor or his firm in connection with his practice or former practice.

(3) Any sums recovered by the [Law] Society by virtue of the exercise of rights vested under sub-paragraph (1) shall vest in the Society and shall be held by it on trust …".

23. Paragraph 7 of Part II of Schedule 1 of the 1974 Act ("paragraph 7") provides as follows:-

"7(1) If the [Law] Society takes possession of any sum of money to which paragraph 6 or 6A(3) applies, the [Law] Society shall pay it into a special account".

24. Paragraph 8 of Part II of Schedule 1 of the 1974 Act ("paragraph 8") provides as follows:-

"8. Without prejudice to paragraphs 5 to 7, if the High Court is satisfied, on an application by the [Law] Society, that there is reason to suspect that any person

(a) holds money on behalf of the solicitor or his firm, or

(b) has information which is relevant to identifying any money held by on behalf of the solicitor or his firm,

the court may require that person to give the [Law] Society information as to any such money and the accounts in which it is held".

25. Paragraphs 9 and 10 of Part II of Schedule 1 to the 1974 Act deal respectively with the production of documentation to the Law Society and communication redirection orders, made on an intervention.

26. Paragraph 11 of Part II of Schedule 1 of the 1974 Act ("paragraph 11") provides as follows:-

> "11. (1) If the solicitor … is a trustee of a trust, the [Law] Society may apply to the High Court for an order for the appointment of a new trustee in substitution for him. …"

The judge's judgment

27. It is necessary to explain in a little more detail how the judge reached the conclusions he did. At paragraph 6 of his judgment, he explained the findings he was making in relation to the loans Mr Pathania had made as follows:-

> "6. There are now 18 such loans in issue (although the Society initially pleaded 37). For reasons given later in this judgment, I find that some of those loans were made by Mr Pathania (a) prior to the intervention and (b) using monies initially derived from Newlands' client account, although to some extent those monies were subsequently repaid by Mr Pathania. On that basis, what Mr Pathania held at the date of the intervention was a number of choses in action, consisting of the right to receive the repayment of the loan monies in accordance with the terms of the loans".

28. At paragraph 10, the judge said that it was convenient to combine sub-paragraphs (1) and (2) of paragraph 6 into the following "single statement of their effect":-

> "Upon the passing by the [Law] Society of a resolution to that effect, all sums of money held by or on behalf of the solicitor or his firm in connection with his practice or former practice, and the right to recover or receive them, shall vest in the [Law] Society (whether they were received by the person holding them before or after the [Law] Society's resolution) and shall be held on the statutory trust".

As will appear, in due course, I take the view that this an inaccurate approach to statutory construction.

29. At paragraphs 11-12, the judge described the issues that he was deciding as follows:-

> "11. In those circumstances, there are issues (1) as to whether the loans were at the date of the intervention or subsequently "sums of money" held (a) by or (b) on behalf of Mr Pathania; (2) whether the fact that they were made initially out of client account means that they were at the date of intervention or subsequently held in connection with Newlands' practice; and (3) whether the right to recover or receive those loans vested in the [Law] Society on intervention or subsequently, or remained throughout with Mr Pathania.
>
> 12. In formulating those issues, I have taken the relevant period as the date of intervention and subsequently. …"

It will be immediately apparent that these are not the only issues that were reflected in the order that the judge ultimately made.

30. The judge then dealt with Lightman J's decision in *Dooley v. The Law Society* 23rd November 2001, unreported ("*Dooley*"), Lawrence Collins J's decision in *Re Ahmed & Co* [2006] EWHC 480 (Ch), [2006] ITELR 779 ("*Ahmed*"), Mann J's decision in *The Law Society v. Austin* [2013] EWHC 3002 (Ch) ("*Austin*"), to each of which I shall return. He endorsed *Dooley*, which had been accepted as correct in *Ahmed*, as deciding that "the right to recover practice monies or professional fees which became payable before or after the date of the intervention" did not vest in the Law Society as "sums of money" under paragraph 6(2)(a). He distinguished *Austin* by saying that Mann J had not there been dealing with debts, so that what he had said was of limited assistance.

31. The judge then went on to distinguish *Dooley* as follows at paragraph 14:-

> "14. There is, however, a factual distinction between the position considered in [*Dooley*], namely the entitlement to sums (such as payment for services rendered) which had never formed part of the monies of the practice, and the position in the present case, where loans were initially made from monies held on client account. That distinction leads, in my judgment, to a different result. That is for the following reasons."

32. As I have already explained, his reason was that there was no legal distinction between the customer/bank relationship and the lender/borrower relationship, and, therefore, both monies held in a solicitor's bank account and monies loaned by the solicitor from his client account were to be regarded as falling within the meaning of "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" in paragraph 6(2)(a).

33. The judge said that paragraph 6A was introduced by the Legal Services Act 2007 to reverse the effect of *Dooley*, although the paragraph had seemingly never been used because "in a typical intervention the administrative effort involved in identifying and pursuing book debts will be too great" (paragraph 16). The judge's reason for rejecting the suggestion that the inclusion of paragraph 6A meant that a "resolution under paragraph 6 did not have the effect of vesting in the [Law] Society the right to recover a debt of any nature" was that such an argument would mean that paragraph 6(2)(a) did not cover client account monies held by a bank. He concluded that "the debts referred to in paragraph 6A are those (such as outstanding fees) that arise from contractual arrangements other than loans". It may be noted in this connection that the way Mr Ramsden put his argument on this point was to submit that paragraph 6A referred only to ordinary debts (such as professional fees), but not to claims for breach of trust or breach of fiduciary duty arising from improper use of client account monies.

34. The judge then rejected the submission that paragraphs 6(3) and 7, by referring to persons or the Law Society having or taking "possession" of sums of money to which paragraph 6 applies, lead to the conclusion that "sums of money" can only be those capable of being paid into a bank account. The judge said that there was no warrant for "construing the reference to "sums of money" in paragraph 6 as confined to cash, or to money repayable on demand (since that would prevent it applying to money held

on time deposit), or to money held by a bank". He did not see "any reason in this context to distinguish one type of loan from another; and, just as paragraph 7 cannot apply even to money in client account until it is actually received, so it will apply to money received in respect of other debts on receipt".

35. The judge, therefore, concluded at paragraph 18 that "a resolution under paragraph 6 of Schedule 1 [had] the effect of vesting in the [Law] Society, as included in the expression "sums of money held by or on behalf of the solicitor or his firm", the right to recover loans made out of monies connected with the solicitor's practice. That right extends both to receipt of monies when paid and to the prosecution of proceedings to compel payment. The decision whether or not to pursue such proceedings lies with the [Law] Society, moderated only by the duties it has as a public body".

36. The judge decided that the loans were made "in connection" with Newlands' practice. That position was not affected even if the money taken from client account was reimbursed by the solicitor: "[t]he solicitor is in a position to make the loan only because he has access to client monies held by him for the purposes of his practice, and that in my judgment is sufficient to make the loan itself connected to the practice". It was not argued before the judge that the monies representing the loans paid away were "sums of money held by or on behalf of the solicitor … in connection with … any trust of which he is or formerly was a trustee" under paragraph 6(2)(a)(ii). Indeed, the judge did not even mention that part of the provision, save insofar as he cited a passage from Mann J's judgment in *Austin*.

37. The judge then concluded at paragraph 21 that in principle any loans made by Mr Pathania using monies derived from client account vested in the Law Society on the date of Intervention, together with the right to recover them. The judge held that "[i]f any of the loans is repaid, the repayments will fall to be held on the statutory trusts; and if any repayments have already been made, Mr Pathania will have to account for them". The Law Society had conceded that if Mr Pathania had made reimbursements, he would be entitled to be treated as a potential beneficiary under that trust.

38. When analysing the first loan, which he held did not vest in the Law Society, the judge held at paragraph 26 that Mr Pathania remained entitled to pursue his claim against the Fund, "but, since that [Fund] is administered by the [Law] Society, the amount of the claim is to be set off against the value of those loans that did vest in the Law Society on intervention".

39. The judge's order included the following declarations:-

> "(1) In relation to the advances made to the individuals or entities listed in Schedule 1 to this Order the [Law Society] is entitled at the date of the Intervention into Newlands solicitors on 1st June 2009 to the choses in action represented by the monies so advanced;
>
> (2) If the value of the choses in action represented by the monies advanced to the individuals or entities listed in Schedule 1 to this Order has been extinguished or reduced in consequence of [Mr Pathania's] error, misconduct, default or failure [Mr Pathania] must account to the [Law Society] for such lost or reduction in value;

> (3) The value of the choses in action represented by the monies advanced to the individuals or entities listed in Schedule 1 to this Order shall otherwise be valued by reference to actual recoveries and/or by reference to the prospect of recovery.

40. Paragraph 6 of the judge's order provided that the Law Society's "entitlement in paragraph (5) of this Order [i.e. to payment of any sum found to be due to it] be off-set against any entitlement [Mr Pathania] might establish to payment from the [Fund] administered by the Law Society".

Issues to be determined

41. In these circumstances, it seems to me that the court needs to consider the following specific issues:-

    i) Issue 1: Whether the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice [or] any trust of which he is or formerly was a trustee" in paragraph 6(2)(a) as at the date of the Intervention include:-

        a) monies paid by the solicitor out of client account in breach of trust and/or fiduciary duty before the Intervention (1) if not repaid, and (2) even if repaid;

        b) the choses in action represented by the 10 loans; and/or

        c) only monies held in bank accounts or that were immediately accessible to the solicitor?

    ii) Issue 2: Whether the judge was wrong to order the account in paragraph (2) of his order?

    iii) Issue 3: Whether the judge was wrong to hold that any monies due from Mr Pathania to the Law Society should be set off against any sums due to Mr Pathania from the Fund?

The statutory history and the authorities

42. Before considering these issues, it is necessary to look briefly at the statutory history of the relevant legislation and those authorities that have in the past considered these issues directly or indirectly. The relevant legal background is best understood if this exercise is undertaken chronologically.

*Solicitors Act 1941*

43. Section 2 of the Solicitors Act 1941 (the "1941 Act") established the original version of the Fund, and the First Schedule to the 1941 Act was entitled "Provisions with regard to the formation; administration and application of the compensation fund and matters connected therewith". Paragraph 4 of that schedule gave the Council of the Law Society the power to require production or delivery up of "all deeds, wills, securities, papers, books of account, records, vouchers and other documents" where it had "reasonable cause to believe" that the solicitor had been guilty of dishonesty.

Paragraph 5 of that schedule applied where the Council was "satisfied that a solicitor" had been guilty of dishonesty, and allowed it to apply to the court for an order that "no payment shall be made without the leave of the court … by any banker … out of any banking account in the name of such solicitor …".

*Solicitors Act 1957 (the "1957 Act")*

44. The 1957 Act was a consolidation of the Solicitors Acts 1932 to 1956. Under section 31, the First Schedule applied where the Council had reasonable cause to believe that a solicitor had been guilty of dishonesty. Section 32 established "the Compensation Fund" to which the Second Schedule applied. Paragraphs 1 and 7 of that schedule were in similar terms to paragraphs 4 and 5 and of the First Schedule of the 1941 Act.

*Solicitors Act 1965 (the "1965 Act")*

45. The 1965 Act, according to its long title, extended "the powers of the Law Society in relation to property in the control or possession of certain solicitors and other persons, including the distribution of clients' money". Sections 10-13 substituted a new Schedule 1 for the old First Schedule to the 1957 Act, and extended its provisions to apply to solicitors guilty of delay, and to the personal representatives of certain deceased solicitors. Section 14 automatically vested client accounts in the Law Society on the death of a sole solicitor. Paragraphs 1 and 7 of Schedule 1 to the 1965 Act were in similar terms to paragraphs 1 and 7 and of the Schedule 1 to the 1957 Act. Paragraph 10 was, however, entirely new. It provided as follows

> "The Society may, on a resolution in that behalf made by the Council, take control of all sums of money due from the solicitor or his firm to, or held by him or his firm on behalf of, his or his firm's clients or subject to any trust of which he is the sole trustee or co-trustee only with one or more of his partners, clerks or servants, and for that purpose the Society shall serve on the solicitor or his firm, and, … on any banker and any other person having possession or control of any such sums of money a notice … prohibiting the payment out of such sums of money …".

46. It will be observed that the structure of the 1965 Act was somewhat different from the structure of the 1974 Act, but that the concepts of (a) "vesting" came in by section 14 where a sole solicitor died, and (b) "taking control" of all sums of money held by the solicitor on behalf of clients was added to the existing power to ask the court to order that no payment should be made out of any bank account. Paragraph 10 of Schedule 1 also introduced the idea that a notice was to be served on any banker or other person having "possession or control of any such sums of money".

*The 1974 Act*

47. The 1974 Act, as I have already indicated, changed the wording of the paragraphs concerning intervention significantly. I have already set out the relevant paragraphs above.

*Dooley* (2001)

48. As the judge said and is recorded above, *Dooley* decided that the right to recover fees payable before or after the intervention did not vest in the Law Society as "sums of money" under paragraph 6(2)(a). Lightman J said this about the meaning of paragraph 6:-

> "9. … Mr Crystal raises the question whether there vests in the Society the right to recover sums due to the solicitor, and if it does he submits that the Society is in the position of a receiver and manager with a duty of care owed to the solicitor to get in all outstanding debts. In my view the statutory provisions make clear beyond question that there vest in the Society only sums held by the solicitor (e.g. in bank accounts) or on behalf of the solicitor (e.g. by agents for him or to his account); the right to recover sums due from former clients to the solicitor remains vested in the solicitor and the solicitor can alone commence and pursue proceedings for recovery of the debt. The entitlement of the solicitor is however fettered in two regards. First any recovery automatically vests in the [Law] Society. Second implicit in the statutory scheme the solicitor is precluded from any dealing with the debts before payment which operates to evade or undermine the scheme and the protection intended to be afforded to clients and the Society.
>
> 10. The short answer to the second question is accordingly that there is not vested in the Society the right to recover practice monies or professional fees which became payable before or after the date of the intervention. There is vested only the right to such monies when paid (whether before or after the intervention). The short answer to the third question is that, even as the Society has no right to recover outstanding practice monies or professional fees, there can be no duty to do so."

*Rose v. Dodd* [2005] EWCA Civ 957; [2005] ICR 1776 ("*Rose v. Dodd*")

49. In *Rose v Dodd*, Mummery LJ considered the scope of the Law Society's intervention in a solicitor's practice. He explained at paragraph 24 that the object of intervention under the 1974 Act was to safeguard the interests of the public. It did not, however, empower the Law Society to "take the practice over, to continue to carry it on by providing legal services to clients of the firm or to close it down. The ownership of the assets and goodwill of the practice are unaffected by the intervention and could be disposed of notwithstanding the intervention. Client files and client money are a different matter, however, as the conduct of the practice is affected by the intervention". Mummery LJ continued by saying that the most drastic consequence was the suspension of the practising certificate of the solicitor where there was a suspicion of dishonesty. At paragraph 27, he said that "[t]he focus of the legislation is on precautionary and preventive powers, such as taking control of practice funds and mail, stopping the operation of the practice's client account, taking possession of practice papers, and removing clients' papers and files, rather than running the practice, hiring and firing staff and accepting instructions from clients".

*Ahmed* (2006)

50. In *Ahmed*, Lawrence Collins J considered the nature of the trust arising on intervention under schedule 1 to the 1974 Act. He approved *Dooley* at paragraph 10 saying: "The right to recover sums due from former clients to the solicitor remains vested in the solicitor. The solicitor alone can commence and pursue recovery proceedings, and the Law Society has no duty to pursue such proceedings. But any recovery effected by the solicitor would vest automatically in the Law Society subject to the statutory trust". Lawrence Collins J dealt with the statutory history at paragraphs 89 to 96 and concluded as to the nature of the trust created by paragraph 6 as follows at paragraph 114:-

> "In my judgment the background to the need for the powers and the structure of Part II of Schedule 1 make it clear that the paragraph 6 trust was not intended to be, and could not have been intended to be, an ordinary private law trust. The Law Society inherits, like a trustee in bankruptcy, a situation not of its own making including records which are often in a chaotic state, in which it does not know initially where all the funds lie, and then, having recovered the funds, does not know who the claimants to the funds are. It has, nonetheless, to determine entitlement to the funds and distribute to those identified as claimants to the funds. It would be difficult if the Law Society were, in that context, to be burdened with overly excessive or onerous duties as a private law trustee under paragraph 6. I accept the Law Society's submission that the trust created under paragraph 6 can be labelled a statutory trust. Similarly, the term "beneficiaries" can be used, in the sense of statutory beneficiaries entitled under paragraph 6 to a share of the funds vested in the Law Society (as opposed to beneficiaries of a private law trust)".

*Legal Services Act 2007*

51. As I have already said, the Legal Services Act 2007 introduced paragraph 6A into Schedule 1 to the 1974 Act seemingly for the reasons mentioned by the judge.

*Austin* (2013)

52. *Austin* concerned an application for a freezing order made by the Law Society against defendants implicated in a mortgage fraud alongside a solicitor that was the subject of an intervention resolution under paragraph 6(2)(a). The firm had received purchase monies of some £400,000 and, before intervention, disbursed half of that out of its client account (£160,000 to a "Fast Money" account and £40,000 to a third party). The Law Society claimed that the defendants were constructive trustees of the £200,000 as a result of the mortgage fraud. That was not a proprietary claim to trace any monies (though such claims were also made), but was based on the personal claim having vested in the Law Society as a result of the alleged fraud upon the intervention by the effect of paragraph 6(2)(a).

53. Mann J held that the words of paragraph 6(2)(a) could "be readily made applicable to any sums of money which were [formerly] held on trust and which are either sums of money or, in my view, some other traceable form which can still be seen to be held by the solicitor, or conceivably by others who have obtained it from the solicitors". But Mann J held that paragraph 6(2)(a) was not applicable to "sums of money represented

by a constructive trusteeship claim" without "doing so much violence to them that they lose all relevant meaning". He said expressly that such a claim did not fall within the expression "all sums of money held by or on behalf of the solicitor or his firm". He went on to say that "[w]hat sub-paragraphs (1) and (2) are focusing on is sums of money which the solicitor's firm holds. It does not deal with consequential causes of action which might arise if those monies go missing".

54. Mann J continued by explaining:-

> "9. … Mr. Coleman sought to say that the obligation to make good the loss to the trust fund which one assumes that person to be under … means that any sum of money which that person holds is money falling within the definition. In my view, that is simply not an interpretation which is open to the court. The money that such a wrongdoer holds may in a loose sense be money out of which he may ultimately have to satisfy a liability if an order is made that person is obliged to make good the default, but only in a very loose sense. The same would apply to any other item of property held by that person, but Mr. Coleman frankly admitted that he could not extend those words to include real property or even shares.
>
> 10. In my view, this section is not aimed at imposing some sort of notional charge or appropriation on property which happens to take the form of cash in the hands of the wrongdoer. The section is intended to catch monies, or conceivably [property] represented [by] monies which can be followed from the relevant solicitors' practice monies in paragraph [6(2)(a)(i)] or trust monies under [paragraph 6(2)(a)(ii)]. That interpretation is, in my view, reinforced by the provisions of paragraph (3) which provides for the service of a resolution on a person "having possession of sums of money to which this paragraph applies". The most natural and, indeed, in my view only possible interpretation of that sub-paragraph is one in which one is talking about identifiable sums of money which have flowed out of the solicitor's [sic] first, as is anticipated by the two previous sub-paragraphs. Once a notice is served under paragraph (3) there is a prohibition of payment out "of any such sums of money". That is, in my view, a form of words which is applicable only to an identifiable sum of money which has its source in the solicitors' firm and not a sum of money which happens to be identifiable as being a sum of cash held by the recipient of the notice. It is important to notice that sub-paragraph (6) imposes a criminal sanction for contravening the previous sub-paragraphs and it would be strange if there were a criminal sanction imposed for breach of a notice which somehow freezes a sum of money in the hands of a third party to which there is no tracing claim. In my view, looking at the wording of the paragraph, all the pointers are towards it being a paragraph which is intended to get back for the SRA monies which should never have left the firm of solicitors in the first place and not to extend to cash which happens to be in the hands of a person accused of constructive trusteeship as is sought to be imposed in the present case".

55. Mann J then disagreed at paragraph 11 with a decision of Master Teverson to the opposite effect in *The Law Society v. Sritharan*, 5th June 2008, unreported, where the Master had placed reliance on the words "the right to recover and receive them".

Mann J said those words could not extend the meaning of the important words "sums of money". He agreed that it might "well be that it is a good idea" that the Law Society should have the right that it asserted in that case, but that was "not a reason for giving an over-stated meaning to the words in paragraph 6". Mann J thought that the policy considerations were "addressed, at least to a great extent if not completely, by [paragraph 6A]".

The first issue as to the proper meaning and extent of the words "all sums of money held by or on behalf of the solicitor … in connection with … his practice [or] any trust of which he is or formerly was a trustee" in paragraph 6(2)(a)

56. This issue raises the correctness of four approaches to the meaning of paragraph 6.

i) The Law Society's main argument that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" include monies paid by the solicitor out of client account in breach of trust and/or fiduciary duty.

ii) A variation of the Law Society's main argument that I have already mentioned, namely the suggestion that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … any trust of which he is or was formerly a trustee" include monies paid by the solicitor out of client account in breach of trust and/or fiduciary duty.

iii) The judge's main ground for his decision, namely that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" include the choses in action represented by the 10 loans.

iv) Mr Pathania's main argument that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" include only monies held in bank accounts or that were immediately accessible to the solicitor.

57. I shall deal with these sub-issues by looking first at the wording of paragraph 6 itself, the relevance of other parts of Schedule 1 to the 1974 Act, and I will then consider each of the 4 competing positions in turn.

*The wording of paragraph 6 in its current statutory context*

58. It is important to start with an analysis of the words themselves. As I have already pointed out, the judge combined the effect of paragraph 6(1) and paragraph 6(2)(a) to suggest that they provided that "[u]pon the passing by the [Law] Society of a resolution to that effect, all sums of money held by or on behalf of the solicitor … in connection with his practice … , and the right to recover or receive them, shall vest in the [Law] Society … and shall be held on the statutory trust". This formulation suggests that that the effect of paragraph 6(2)(a) is to vest the right to recover or receive "all sums of money" in the Law Society.

59. In my judgment, this construction is a misunderstanding of paragraph 6(1) which provides that "if the [Law] Society passes a resolution to the effect that any sums of

money to which this paragraph applies, and the right to recover or receive them, shall vest in the Society, all such sums shall vest accordingly". The words "and the right to recover or receive them" qualify the "resolution" that the Law Society may pass. They do not, in any sense, qualify the statutory exposition of the assets to which paragraph 6(1) applies. That is found in paragraph 6(2)(a) and is simply "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice [or] any trust of which he is or formerly was a trustee".

60. The only importance of this somewhat focused approach is that one cannot extract from paragraph 6, as the judge seems to have done by combining paragraphs 6(1) and 6(2)(a), the statutory intention that the **assets** that vest in the Law Society include the right to recover or receive assets that have been paid away. Paragraph 6(1) provides that if the Law Society passes an intervention resolution "to the effect that any sums of money" covered by paragraph 6(2)(a) **and** "the right to recover or receive them", shall vest in the Law Society, then "all such sums shall vest accordingly" and shall be held by the Law Society on the statutory trusts. In other words, the reference to the right to recover the "sums of money" in paragraph 6(1) is not an indication of what the term "sums of money" is intended to cover.

61. In this connection, it is important also, in my judgment, to notice that paragraph 6(2)(a), in defining what paragraph 6 applies to, uses the term "all sums of money held" by the solicitor. As a matter of the normal use of language, the word "held" in this context would seem to point to monies available to the solicitor at the date of the intervention. Had the formulation been intended to be retrospective, the draftsman could easily have added words to indicate such retrospectivity.

*The relevance of other parts of Schedule 1 to the 1974 Act*

62. Paragraph 6(3) is, as the parties agreed, also important. It provides for the Law Society to serve a copy of its resolution on certain persons. The persons specified are "the solicitor or his firm and on any other person having possession of sums of money to which this paragraph applies". It also provides for the Law Society to serve on these persons "a notice prohibiting the payment out of any such sums of money". These provisions are obviously intended to operate to freeze the sums of money to which paragraph 6(2)(a) applies as at the date of the intervention. Some help, however, is, in my view, gained from paragraph 6(3) as to the nature of the "sums of money" intended to be covered by paragraph 6(2)(a), because the third persons holding those monies, apart from the solicitor, are described as those "having possession of them". This reference to possession of the sums of money covered by paragraph 6(2)(a) is not conclusive, I think, but it is another indication that the paragraph is looking at sums of money actually "held" at the time of the intervention.

63. Paragraph 7 provides a similar indication that the sums of money referred to in paragraph 6(2)(a) can be taken into the possession of the Law Society. It provides simply that, if the Law Society "takes possession of any sum of money" to which paragraph 6 applies, it shall be paid into a special account. I am not sure that this takes the understanding of what sums are referred to beyond paragraphs 6(2)(a) and 6(3).

64. Paragraph 8 points once again to the likelihood that paragraph 6(2)(a) is referring to sums of money actually held at the time of intervention by the solicitor or a third

party. It provides that "if the High Court … is satisfied that that there is reason to suspect that any person … holds money on behalf of the solicitor", information can be required from that person.

65. Mr Hill-Smith placed great reliance on paragraph 6A, which he submitted demonstrated that debts were not covered by paragraph 6(2)(a). Paragraph 6A was, of course, introduced to reverse the effect of *Dooley*, but it undoubtedly extended the assets which could be vested in the Law Society upon intervention. It provided by paragraph 6A(2) that it applied to "any right to recover or receive debts due to the solicitor or his firm in connection with his practice …". Again, I do not regard paragraph 6A as conclusive, since it refers to "debts". It is common ground that ordinary debts owed to the solicitor were never covered by paragraph 6(2)(a). Accordingly, paragraph 6A cannot be conclusive as to whether assets apart from ordinary debts might or might not be covered by the term "all sums of money held by or on behalf of the solicitor … in connection with his practice [or] any trust of which he is or formerly was a trustee …" in paragraph 6(2)(a).

66. Likewise, in my view, paragraph 11 is not conclusive. Paragraph 11 enables the Law Society to apply to the High Court to appoint a new trustee in place of the solicitor. That may be indicative, as Mr Hill-Smith submitted, that the Law Society needed to take a further step to assert control over trust assets, but it does not point one way or another to the correct meaning of "all sums of money held by or on behalf of the solicitor … in connection with his practice [or] any trust of which he is or formerly was a trustee" in paragraph 6(2)(a).

*The Law Society's argument that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" include monies paid by the solicitor out of client account in breach of trust and/or fiduciary duty*

67. Against this background, I turn to the Law Society's central argument that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" in paragraph 6(2)(a) include monies paid by the solicitor out of client account in breach of trust and/or fiduciary duty before the Intervention (1) if not repaid, and (2) even if repaid.

68. The Law Society places great reliance on the judge having drawn attention at paragraph 14 of his judgment to the factual distinction between the debts in *Dooley* and the debts in this case. It seeks also to support the judge's reasoning that the loans in this case are on the same footing as the debtor/creditor relationship between banker and customer. In my judgment, these arguments are inconsistent as I shall explain in due course. I will return to *Dooley* in the context of the judge's approach to choses in action.

69. It is necessary first, however, to consider the true construction of paragraph 6(1) as a matter of principle and in the context of its statutory history. The 1941 Act introduced the concept of allowing the Law Society to apply to the court for an order prohibiting payments "by any banker … out of any banking account" in the solicitor's name. The 1965 Act added to that the possibility of the Law Society passing a resolution to "take control of all sums of money due from the solicitor or his firm to, or held by him or his firm on behalf of, his or his firm's clients or subject to any trust

of which he is the … trustee". The important difference in that formulation from the one used in paragraph 6 of the 1974 Act is that it allowed the Law Society to take control of (a) "all sums of money due from the solicitor … to his … clients or subject to any trust of which he is the … trustee", in addition to (b) all sums of money held by [the solicitor] on behalf of … his … clients or subject to any trust of which he is the … trustee". At that stage, therefore, it might have been argued that paragraph 10 of Schedule 1 to the 1965 Act would have applied to (and allowed the Law Society to take control of) debts due from the solicitor to clients. On that basis, if the solicitor had paid the client's monies away, and owed a duty to replace or repay the monies to the client, the Law Society could probably have enforced that obligation as money due from the solicitor to his client. It is not perhaps worth exploring how paragraph 10 in the 1965 Act might have applied to debts owed by third parties to the solicitor.

70. The formula adopted in Schedule 1 to the 1974 Act was also different in that paragraph 10 in the 1965 Act referred to the service of a notice on any banker or other person having "possession or control of any such sums of money", whilst paragraph 6(3) in the 1974 Act only refers to a notice being served on "any other person having possession of sums of money to which this paragraph applies". The removal of the word "control" in paragraph 6(3) may not be directly significant, but it does further indicate that the legislation changed.

71. The parties addressed no argument to the reasons for these changes, despite themselves drawing attention to the statutory history. It would be surprising, I think, if the legislature had intended to narrow the scope of the Law Society's powers, but it does seem as if, when paragraph 6A was added in 2007, it was realised as a result of *Dooley* that it had done so. The question here, however, is, as I have said, not about ordinary debts but about monies allegedly paid away by the solicitor in breach of trust/ fiduciary duty before the Intervention.

72. Undoubtedly, as Mr Ramsden argued, the solicitor has acted in breach of fiduciary duty. He must also, as it seems to me, account for the monies that he paid away in breach of his trust obligations to his clients on the footing of wilful default. The problem, as I see it, however, is that there is no fund to which the formulation in paragraph 6(2)(a) can attach. Whilst, at the date of intervention, the solicitor is obliged to account to the client for the monies he has paid away on the footing of wilful default, and would be held liable to pay equitable compensation to the client for his breach of fiduciary duty, he holds no sum of money to which those obligations attach. I have the same difficulty as Mann J had in *Austin*. He alluded at paragraph 8 to the possibility that paragraph 6(2) might apply to sums of money in "some other traceable form which can still be seen to be held by the solicitor, or conceivably by others who have obtained it from the solicitors". He could not, however see how the words in paragraph 6 covered "the obligation to make good the loss to the trust fund which one assumes that person to be under". As he said: "[t]he money that such a wrongdoer holds may in a loose sense be money out of which he may ultimately have to satisfy a liability if an order is made that person is obliged to make good the default, but only in a very loose sense". It was not, however a sum of money held by or on behalf of the solicitor in connection with his practice. There was, as Mann J said, no money that he was holding.

73. Accordingly, I do not think that the Law Society's main argument can succeed. I do not think that the claims of clients for breach of fiduciary duty and breach of trust, in

respect of monies paid away before the intervention, can vest in the Law Society as "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice". I do not see how the monies missing from the client account, which were previously held on trust for clients, can be regarded as still being "sums of money" under paragraph 6(2)(a), simply as a result of the solicitor's breaches of trust and fiduciary duty to those clients in paying the monies away on loan. Undoubtedly, the clients have claims against the solicitor for breaches of trust and fiduciary duty, but there are no "sums of money" actually held by or on behalf of the solicitor after the loans have been paid away. Just as the debts in *Dooley* did not amount to "sums of money held by or on behalf of the solicitor" at the date of intervention, the solicitor's obligation to replace the monies paid away is not a sum of money held by him.

*The argument that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … any trust of which he is or was formerly a trustee" include monies paid by the solicitor out of client account in breach of trust and/or fiduciary duty*

74. This further argument in favour of such sums being covered by paragraph 6(2) is one that was actually not advanced, or at least not clearly articulated, by the Law Society. It is reliance on the words in paragraph 6(2) that provide for "all sums of money held by or on behalf of the solicitor … in connection with … any trust of which he is or formerly was a trustee" to vest in the Law Society. Sums of money in respect of which the solicitor was a trustee at the date of the intervention would, if held by or on his behalf, vest in the Law Society, even if that trust was only an implied, resulting or constructive trust. The question is, therefore, whether, when a solicitor pays away monies in breach of trust before the intervention, he can properly be said still to hold those monies on any kind of trust for the client.

75. As I have already said, the solicitor is obliged to account to the client for the monies he has paid away on the footing of wilful default, and to pay equitable compensation to the client for his breach of fiduciary duty. It seems to me, however, that the argument that these obligations are "sums of money held by or on behalf of the solicitor … in connection with … any trust of which he is … a trustee" suffers from the same problem as the argument that they are "sums of money held by or on behalf of the solicitor … in connection with … his practice". As I have said, the solicitor holds no monies, either on trust or in connection with his practice, because he holds no monies at all. He has paid them away.

76. Accordingly, I do not think that there is another way to put the Law Society's argument that can bring it within paragraph 6(2)(a)(ii). The claims of clients for breach of fiduciary duty and breach of trust, in respect of monies paid away before the intervention, cannot vest in the Law Society as "all sums of money held by or on behalf of the solicitor or his firm in connection with … any trust of which he is or formerly was a trustee".

*The judge's point that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" include the choses in action represented by the 10 loans*

77. The next question is whether, even if the breach of trust/fiduciary duty argument is wrong, the judge was right to hold that the choses in action represented by the 10 loans paid away were "sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice". The answer to this point, in my judgment, reiterates some of the points already made.

78. First, monies paid by the solicitor out of client account in respect of loans made to third parties before the Intervention are not "sums of money held by or on behalf of the solicitor" when the resolution is passed. Quite the reverse, they are monies paid away by the solicitor.

79. Secondly, the focus of the legislation, and therefore, the intervention is, as Mummery LJ said in *Rose v. Dodd* is "on precautionary and preventive powers, such as taking control of practice funds and mail, stopping the operation of the practice's client account, taking possession of practice papers, and removing clients' papers and files". It is hardly precautionary and preventative to vest debts in the Law Society giving it the responsibility to collect them, whether they are practice debts or unlawful loans.

80. Thirdly, I agree with the broad approach to the construction of paragraph 6 adopted in *Dooley*, *Ahmed* and *Austin*. I think Lightman J was right when he said in *Dooley*: "the statutory provisions make clear beyond question that there vest in the Society only sums held by the solicitor (e.g. in bank accounts) or on behalf of the solicitor (e.g. by agents for him or to his account)". The recipients of the loans were in no sense holding the monies they borrowed as agents for the solicitor.

81. Fourthly, if the Law Society accepts the correctness of *Dooley*, it cannot logically also support the judges' argument based on *Foley v. Hill*. The judge said at paragraph 15 that: "[t]he chose in action which is the solicitor's right to repayment of the debt due from his banker represented by the sums on client and office accounts is clearly comprehended within the expression "sums of money held by or on behalf of the solicitor or his firm"; and in my judgment the same applies to any other loan made by the solicitor or the firm from monies connected with the practice". If that were correct, then *Dooley* must be wrong. The judge never explained why the distinction that he made between the facts of *Dooley* (practice debts) and the facts of this case (loans made from client account) made all the difference. Even though the words "all sums of money held by or on behalf of the solicitor" were obviously intended to include monies held in a bank account, it does not follow that they were intended to include outstanding loans owed under a quite different debtor/creditor relationship with the solicitor.

82. Moreover, I do not think that the judge gave any satisfactory answer to the arguments (none of which, as I have already said, is by itself conclusive) based on (a) the wording of paragraphs 6(3), 7 and 8, and (b) the introduction of paragraph 6A. The wording of paragraph 6(3) points towards paragraph 6(2)(a) being directed at sums of money in the possession of the solicitor, not sums owed to the solicitor. Paragraph 7 directs attention again to the possession of sums of money, and paragraph 8 to monies held in accounts. Moreover, paragraph 6A was introduced to extend paragraph 6 to

cover "any right to recover or receive debts due to the solicitor or his firm in connection with his practice or former practice", which had been held in *Dooley* not otherwise to be covered.

83. In my judgment, the judge's approach to choses in action simply proves too much. It is true, of course, that a banker's relationship with its customer is that of debtor/creditor, and true also that a banker's customer has a chose in action in respect of its deposits. A creditor under a loan agreement also has a chose in action. But that analysis does not, by itself, answer the question of the proper meaning of paragraph 6. Reading Schedule 1 to the 1974 Act as a whole and in its correct statutory context, paragraph 6 was, in my view and for the reasons I have given, intended to cover all sums of money (actually) held by the solicitor or on his behalf at the time of the intervention (or subsequently paid to the solicitor) in connection with his practice or any trust of which he is or was a trustee. Such sums of money include, of course, bank deposits. They may also include monies held on bare trust for the solicitor, such as sums put out of his possession into the hands of a relative or an associate to avoid the effects of the intervention. That question can await further consideration when it arises on the facts of a future case. The circumstances of different trust arrangements will vary, and it would be unwise to decide in this case more than we need to decide on the present facts. It is sufficient to decide that paragraph 6(2)(a) does not cover monies wrongfully paid out of client account before the Intervention, where there is no specific fund held by or on the solicitor's behalf to which the solicitor's obligation to replace the monies can directly attach. It is not enough that the borrower has an obligation to repay the monies under the terms of a loan agreement.

84. Accordingly, I conclude for the reasons I have given that the judge was wrong to decide, as he did, that the choses in action represented by the 10 loans made by Mr Pathania were covered by the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" in paragraph 6(2)(a) as at the date of the Intervention.

*The argument that the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice" include only monies held in bank accounts or that were immediately accessible to the solicitor*

85. In my judgment, therefore, Mr Hill-Smith was right to argue that the Law Society's resolution under paragraph 6 only covered the monies held by Mr Pathania in bank accounts or that were immediately accessible to him, and monies later received by Mr Pathania in respect of the repayment of the loans.

86. I accept that the outcome is undesirable from the Law Society's point of view. It seems to me to be partly a function of the legislative change between paragraph 10 in the 1965 Act which included "sums of money due from the solicitor" to clients, to a formulation in paragraph 6 which did not include that provision. Paragraph 6A has ameliorated the position, but the Law Society has not historically made use of paragraph 6A. It may wish to do so in the future, but at least the true scope of paragraph 6 will now be more clearly understood. I accept that this judgment does not answer all the trust questions that may in the future arise. It would be inappropriate to have attempted to do so without full argument on those points.

The second issue asking whether the judge wrong to order the account in paragraph (2) of his order?

87. In the light of the conclusion I have reached on the first issue, this question answers itself. Mr Pathania cannot be required to account to the Law Society in respect of his past defaults under paragraph 6. That does not, however, mean that he is not liable to account to his clients for his past breaches of fiduciary duty and breaches of trust. It is just that the Law Society's paragraph 6 resolution does not, in itself, entitle it to that account in respect of the 10 loans. Whenever those loans are repaid, they will, however, as is common ground, be caught by the statutory trusts.

The third issue as to whether the judge was wrong to hold that any monies due from Mr Pathania to the Law Society should be set off against any sums due to Mr Pathania from the Fund?

88. This question may not now need to be answered. As it seems to me, however, the Law Society was right to submit that the Fund is entirely discretionary and that there is no legal right to a payment from the Fund. In those circumstances, Mr Hill-Smith's argument that the two payments were insufficiently closely connected to allow for an equitable set-off misses the point. The fact is that the Law Society may deduct anything that is appropriate from monies it would otherwise pay to an applicant to the Fund. Paragraph 3.3 of the SRA Compensation Fund Rules 2011 provides that any grant out of the Fund is "wholly at the discretion of the SRA" and that "[n]o person has a right to a grant enforceable at law". In *Ahmed*, it was held at paragraph 19 that the Law Society's decisions in respect of the Fund are to be made reasonably and can be judicially reviewed (after a right of appeal to the SRA). It would not, however, in my view, be unreasonable for the Law Society to deduct monies owed by Mr Pathania to the Law Society from any compensation that would otherwise be paid to him. I would dismiss Mr Pathania's appeal on this point.

Conclusions

89. For the reasons I have given, I would allow Mr Pathania's appeal on the first and second issues, but dismiss it on the third issue. The judge's declarations (1)-(3) were not justified on the proper construction of paragraph 6 of schedule 1 to the 1974 Act.

90. The judge was, in my view, wrong to decide that the loans made by Mr Pathania were covered by the words "all sums of money held by or on behalf of the solicitor or his firm in connection with … his practice or former practice [or] any trust of which he is or formerly was a trustee" in paragraph 6(2)(a) as at the date of the Intervention. The Law Society's resolution under paragraph 6 of Schedule 1 to the 1974 Act only covered the monies held by Mr Pathania in bank accounts or that were immediately accessible to him, and monies later received by Mr Pathania in respect of the repayment of the loans.

**Lord Justice Flaux:**

91. I agree.

**Lord Justice Baker:**

92. I also agree.