

**IN THE LEGAL PRACTITIONERS
DISCIPLINARY TRIBUNAL**

ACTION NO. 26 of 2013

IN THE MATTER OF:

THE LEGAL PRACTITIONERS ACT 1981

and

IN THE MATTER OF:

SIMON BOJKO

REASONS FOR DECISION

The practitioner has been charged with unprofessional conduct by charge dated 6 November 2013.

The matter came on for hearing before the Tribunal on 5 August 2014.

Ms Frances Nelson QC appeared for the Legal Profession Conduct Commissioner. There was no appearance for or on behalf of the Practitioner.

A book of documents was tendered and marked Exhibit 1.

PRELIMINARY

Difficulty was experienced by the then Legal Practitioners Conduct Board (“the Board”) in serving the Charge upon the practitioner.

The letter from the Board to the practitioner dated 21 February 2014 (page 114 Exhibit 1) sets out the detail of attempts that had failed, thus far, to serve the practitioner.

In their letter to the practitioner of 5 March 2014 (page 117 Exhibit 1) (sent to the practitioner’s last known address at 25 Lorne Avenue, Magill, that also being the address that the practitioner advised the Board was his forwarding address), the Board indicated that it would make an application for an order for substituted service. That letter was also emailed to the practitioner (page 116 Exhibit 1).

On 6 March 2014, the Tribunal made an order for substituted service of the charge in the following terms :

- There be substituted service of the charge herein by delivering to the practitioner’s last known address at 25 Lorne Avenue, Magill South Australia 5072.
- Matter adjourned for directions on Thursday 3 April 2014 at 9.00am.

The Board, by letter to the practitioner addressed to him at 25 Lorne Avenue, Magill dated 20 March 2014 (page 126 Exhibit 1) advised the practitioner that service had been effected in accordance with the order of the Tribunal. The charge was hand delivered to the address at 25 Lorne Avenue, Magill. David Jeffrey Chambers had handed the documents to Mrs Mary Bojko, the practitioner's mother, in a stamped envelope. Mrs Bojko agreed to forward the envelope to the practitioner.

Additionally, the affidavit of service of Mr Chambers was enclosed with the letter. The letter of 20 March was also emailed to the practitioner (page 127 Exhibit 1).

An Affidavit of Service sworn by Mr David Chambers was filed in the Tribunal on 5 March 2014 (page 140 Exhibit 1).

The secretary of the Tribunal, Mr Glenn Hean, forwarded to the practitioner on 18 July 2014, correspondence confirming that the matter was listed for hearing on 5 August 2014.

Prior to the commencement of the hearing Mr Bojko was called in the precincts of the Tribunal. There was no appearance by him.

The proceedings were, as we say, commenced on 6 November 2013 pursuant to the then provisions of the *Legal Practitioners Act 1981* ("the Act").

On 1 July 2014 (the relevant day) amendments to that Act came into force.

On 1 July 2014, the Tribunal ordered that the Legal Professional Conduct Commissioner be substituted as complainant in these proceedings.

The *Legal Practitioners (Miscellaneous) Amendment Act 2013* provides in Section 14 that (relevantly) for the purposes of any proceedings assumed by the Commissioner for conduct which has occurred before the relevant day, the principal Act as amended by the Amendment Act applies in relation to conduct as if “unsatisfactory professional conduct” was replaced with “unsatisfactory conduct” and “professional misconduct” was replaced with “unprofessional conduct” wherever occurring in the Act.

More particularly, unsatisfactory conduct and unprofessional conduct have the same meanings as in the principal Act as in force immediately before the relevant day.

For the purpose of these proceedings therefore, we have regard to the definition of “unprofessional conduct” as defined in Section 5 of the *Legal Practitioners Act 1981* prior to the relevant day.

“Unprofessional conduct” was defined to mean (relevantly) :

- (b) “Any conduct in the course of or in connection with practice by the legal practitioner that involves substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute”.

“Unsatisfactory conduct” was defined to mean conduct in the course of or in connection with practice by the legal practitioner that is less serious than unprofessional conduct but involves a failure to meet the standard of conduct observed by competent legal practitioners of good repute.

THE CHARGE

The charge contains a number of counts, all alleging conduct by the practitioner during the course of the practitioner’s employment with a firm of solicitors, Georgiadis Lawyers (“the firm”) with respect to his dealings with a client of the firm, Mr Desmond Christensen (“Mr Christensen”).

The gravamen of the charge is that on two separate occasions, February 2012 (Count 1) and June 2012 (Count 2), the practitioner misappropriated the sum of \$1,000 on each such occasion being trust money. In addition, Count 3 alleged that in December 2012, the practitioner fraudulently misappropriated firm money in the sum of \$1,000.

On each of the occasions referred to in Counts 1 and 2, the practitioner received cash payments in the sum of \$1,000 from Mr Christensen and provided a handwritten note acknowledging receipt of the payment to him.

Mr Christensen had become a new client of the firm on or about 31 January 2012. The practitioner was noted as the solicitor with the conduct of the matter.

It is alleged with respect to each of Counts 1 and 2 that each payment was not delivered to the firm accounts manager to enable it to be deposited into the firm's trust account and that such payments were not deposited into the firm's trust account. The practitioner did not disclose to the firm's accounts manager or to the firm that the cash payments had been received. The practitioner did not issue a trust account receipt in respect of these payments and did not take reasonable steps to enable the firm to issue a trust account receipt in accordance with its obligations under the *Legal Practitioners Regulations 2009*.

With respect to Count 3, it is alleged that a further sum of \$1,000 was paid by Mr Christensen to the practitioner on 17 December 2012. A pre-printed receipt (bearing receipt no. 50 from a receipt book) was completed by hand by the practitioner and provided to Mr Christensen.

The money was not deposited into the firm's account nor was such money delivered to the firm's accounts manager to enable it to be deposited into the firm's account.

The practitioner did not disclose the receipt of such sum to the firm's accounts manager and it is alleged that the practitioner dishonestly withheld the cash payment from the firm.

Counts 4 and 5 allege that the practitioner failed to issue trust account receipts to Mr Christensen or failed to take reasonable steps to enable the firm to issue trust account receipts in breach of the *Legal Practitioners Regulations* and in addition, the practitioner failed to deposit the cash received from Mr Christensen on account of legal fees into the firm's trust account and/or failed to take reasonable steps to ensure that the cash was paid into the firm's trust account.

The practitioner did not file any reply in the proceedings and has taken no part in the proceedings before this Tribunal either himself or by instructing any other legal practitioner to appear on his behalf.

The history of the matter is set out with some degree of particularity in affidavits prepared by the Board in relation to these proceedings and also in relation to the proceedings it commenced by summons in the Supreme Court on 15 March 2013

seeking a suspension of the practitioner's practising certificate until further order (page 213 Exhibit 1).

The history and affidavits would indicate a more extensive number of dealings involving other clients in addition to Mr Christensen with respect to receipt of funds. The documents also refer to other conduct by the practitioner. None of the affidavit material has been responded to by the practitioner.

We proceed only on the basis however of the matters that are the subject of the current charge. We treat the other matters detailed in the history and affidavits as background material. We do not rely upon them as the basis for our conclusions.

The affidavit of Mr Christensen sworn on 30 August 2013 (page 152) corroborates the particulars of charge, in particular the payment of three sums of money by him to the practitioner.

The first two sums were paid prior to the firm rendering any account to him. Mr Christensen received receipts for each of those sums.

The third payment of \$1,000 was paid after he received an account from the firm. He was provided with a receipt for this payment from a receipt book.

Mr Paul Christensen (the son of Desmond Christensen) had some dealings in the matter as his father was elderly and had no previous dealings with lawyers.

Mr Paul Christensen, in his affidavit of 30 August 2013 (page 164 Exhibit 1), deposed to speaking to the practitioner about payment in cash in the context of seeking to limit the costs of the case to \$3,000 and inquiring as to whether cash would "carry more currency" (para 13 page 166).

Mr Paul Christensen deposed that the practitioner indicated no to that inquiry, because the money goes into the firm's trust account. Mr Paul Christensen also deposed in para 30 of his affidavit (page 168 Exhibit 1) that he queried the practitioner about the account that had been forwarded to his father and also that the \$2,000 had not been mentioned on the account. The practitioner indicated he would "fix it up".

Exhibited to the affidavit of Mr Paul Christensen (Exhibit PC 1) (page 172 Exhibit 1) is the handwritten receipt dated 20 February 2012 which states as follows :

"I Desmond Christensen gave Simon Bojko of Georgiadis Lawyers \$1,000 (Trust Account) for legal fees."

That document has a signature under which is written "S. Bojko".

The other receipts appearing at pages 173 and 174 do not mention the trust account but the receipt for 7 June 2012 refers to "in payment for legal representation" and again bears a signature, apparently of Mr Bojko.

Ms Yvonne Gibbon of Georgiadis Lawyers, the Office and Accounts Manager, was authorised by the firm to provide details to the Board.

She swore an affidavit which was filed in the Supreme Court dated 14 March 2013 (page 227 Exhibit 1).

At paragraph 44 of the affidavit, Ms Gibbon set out a schedule of the amounts of money the practitioner admitted taking including trust money and firm money. Item No. 24858 File Christensen records an amount of \$3,000 in cash taken from the client and not paid into trust. No credit was shown to trust.

At paragraph 45, Ms Gibbon deposed to the content of a conversation at a meeting with the practitioner on 18 February 2013 wherein the practitioner admitted that he had taken \$13,326.95 of which he had repaid \$2,200.

Ms Gibbon swore a second affidavit in the Supreme Court proceedings on 7 June 2013 (page 253 Exhibit 1).

Ms Gibbon deposed in that affidavit to the circumstances relating to payment of monies by Mr Christensen.

At paragraph 9 of that affidavit, Ms Gibbon deposed that she had checked the accounting records of Georgiadis Lawyers and can confirm that there is no record of any of the payments referred to in the three receipts being deposited into the trust accounts or firm accounts, nor does the firm's file maintained for Mr Christensen's matter contain copies of those receipts.

Ms Gibbon's affidavit confirms that amounts totalling \$9,539.07 were received from Mrs Mary Bojko (the mother of the practitioner) between 19 April 2013 and 25 April 2013.

Ms Gibbon had no contact with Mr Bojko between 8 March 2013 when she contacted him by text inquiring as to whether he would sign the Form 5 in relation to cancelling his practising certificate (to which he did not respond) and a text message on 7 May 2013 from the practitioner inquiring as to whether there could be a receipt for the money transferred.

In a letter to the practitioner dated 28 May 2013, (page 60 Exhibit 1) the Board set out in some detail the allegations made by the firm.

The letter noted that the practitioner had not taken part in the Supreme Court proceedings seeking to suspend his practising certificate and that the practitioner did not oppose the making of the interim orders.

The letter from the Board (page 60 Exhibit 1) said this :

“The purpose of these inquiries is to obtain the necessary information to enable the Board to make a final resolution as to whether there is a basis for disciplinary action against you in the Legal Practitioners Disciplinary Tribunal”.

In their letter of 28 May 2013 the Board sought information from the practitioner concerning his dealings with Mr Christensen.

On 28 May 2013, the Board wrote to Mr Bojko addressed to his email address, enclosing a copy of the letter dated 28 May 2013 but not the enclosures referred to in that letter. The letter confirmed that the original letter and enclosures would be sent to the address at 25 Lorne Avenue, Magill.

By email dated 12 June 2013 (page 79 Exhibit 1) the practitioner asserted that it was impossible for him to respond to the letter within the timeframe provided and sought a three month extension.

The Board responded to that letter in their email of 12 June 2013 (page 78 Exhibit 1) advising that an extension of 3 months was not agreed, observing that most of the

material annexed to the Board's letter would be familiar to him, given that he had conduct of the relevant matters when employed by the firm. The practitioner was invited to provide more detailed reasons as to his inability to respond in a period of less than 3 months and in addition, the Board indicated that it may be that the practitioner could reply to the Board's letter in stages, dealing with each client or sub-heading within the letter. In any event, the Board indicated an agreement for a further extension of time of four weeks from the date of their letter (12 June 2013).

The practitioner has not responded to their letter and as noted previously, he has not filed a reply in these proceedings.

CONCLUSION

We have no hesitation in accepting the uncontroverted sworn evidence of Mr Christensen, Mr Paul Christensen, Ms Yvonne Gibbon and Mr Dimitrios Georgiadis. The practitioner has had ample opportunity to respond to the matters raised about his conduct and in addition, had ample opportunity to participate in the Supreme Court proceedings seeking suspension of his practising certificate and the proceedings before the Tribunal. He has chosen not to do so.

We find therefore that the conduct alleged and particularised in the charge is established.

We now turn to consider whether the practitioner established conduct can be characterised as unprofessional conduct.

The particulars of Counts 1 and 2 relate to the misappropriation of trust monies and failure to deal with trust monies in accordance with the *Legal Practitioners Act Regulations*.

The particulars of Count 3 allege misappropriation of firm money in the sum of \$1,000.

We were referred by Ms Nelson QC to a decision of the Full Court of the Supreme Court of South Australia *Legal Practitioners Conduct Board v. Warburton (2014) SASCF 65 (20 June 2014)* a case in which the practitioner had misapplied trust funds.

Justice Blue in his reasons said in paragraph 18 :

"In my view, the practitioner's conduct was a serious breach of trust, aggravated by the circumstance that the conduct was in direct non-compliance with a Court order. The public are to be protected from such conduct. It is important that the profession be reminded in the clearest of terms of their responsibilities in regard to trust monies. As a consequence,

the profession can be expected to comply with their obligations as trustee. In this way, public confidence can be maintained."

In *Warburton*, the Court quoted from the observations of King CJ in *Re A Practitioner* ((1982) 30 SASR 27 30-31) :

"The Trust Account should be sacred so that monies paid into the account should only be paid out to the persons to whom the money belonged or as they directed. In this case there was clearly an intentional misuse of trust monies. The practitioner made use of monies entrusted to him for his client's purposes for the purposes of the companies in which he had an interest. It is true that he intended to pay the money back and in fact did pay the money back in the sense of banking the cheques from the hospitals in due course and rectifying the irregularity in the trust account. His conduct nevertheless was an affront to the sanctity of a practitioner's trust account and this Court has a duty to vindicate the unviability of the trust imposed upon a practitioner to treat his client's money in all respects as their money and to use their money for their purposes and no other..... No matter how good the intentions of a practitioner might be, no matter how confident he might be that the money can be made good, whenever a client's money is deliberately used for a purpose other than for the purpose for which the client entrusts it to the practitioner, there is an act of dishonesty on the part of the practitioner and one which exposes the client to some element of risk as to his money."

We have no hesitation in concluding that the practitioner's conduct particularised in Counts 1 and 2 wherein the practitioner misappropriated for his own use, the client's funds which should have been paid to the firm's trust account and the practitioner's conduct as particularised in Count 3 wherein the practitioner misappropriated for his own purposes the funds paid by the client for and on behalf of legal fees when an account had been rendered by the firm for legal fees is conduct which involves a substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

In so finding, we have taken into account that the practitioner has wholly or substantially made restitution of the sums misappropriated either personally or by his mother.

We find that the practitioner's conduct as particularised in Counts 4 and 5 failing to comply with Regulations 12(1) and 12(2)(b) of the *Legal Practitioners Regulations* and breaching Section 31(1) of *The Act* is also unprofessional conduct.

We find that the practitioner's conduct is unprofessional conduct of the most serious kind.

Notwithstanding the powers contained within Section 82(6) of the *Legal Practitioners Act*, we find that the only appropriate course is for the matter to be referred to the Supreme Court for determination.

An application for costs was made by Ms Nelson QC on behalf of the Legal Profession Conduct commissioner. We consider it appropriate to make an order for costs.

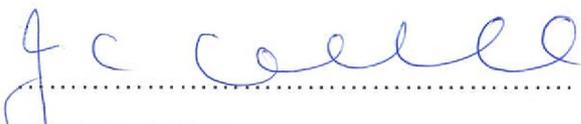
DETERMINATION

- (1) The Tribunal recommends that disciplinary proceedings be commenced against the practitioner in the Supreme Court.
- (2) That the practitioner pay the Legal Profession Conduct Commissioner and the Legal Practitioner's Conduct Board's costs of and incidental to these proceedings as may be agreed or adjudicated in the Supreme Court.



MAURINE PYKE QC

Presiding Member



JON CLARKE



JANINE MASON

18 AUGUST 2014