

IN THE MATTER OF:
THE LEGAL PRACTITIONERS ACT 1981

Action No. 8 of 2012 3

IN THE MATTER OF:
DAVID JOHNSON

REASONS FOR DECISION

The practitioner was charged with unprofessional conduct by way of an amended charge filed on the 31st May 2013 pursuant to leave granted by the presiding member on the 29th May 2013.

The practitioner filed a response to that charge on the 6th August 2013.

The matter proceeded to hearing before the Tribunal on the 1st & 2nd July 2014.

A Book of Documents was tendered and marked Exhibit "1".

The charge was laid by the Legal Practitioner's Conduct Board.

The charge arose out of a complaint of Theodore Palaxides dated the 17th of March 2011¹.

As a result of the Legal Practitioners (Miscellaneous) Amendment Act 2013 the Legal Professional Conduct Commissioner assumed the conduct of the charge in

¹ p34 Exhibit 1

accordance with the transitional provisions set out in Schedule 2 to the Amending Act namely, s.13(4).

At the hearing of the matter the Commissioner was represented by Mr M. Burnett. The practitioner was represented by Mr A. Lazarevich.

The charge alleged unprofessional conduct by the practitioner constituted by a course of conduct.

Count 1

The practitioner appropriated the sum of \$30,435.34 from his trust account towards payment of accounts of Johnson Lawyers for legal costs without authority of his client Jeeves Bistro Pty Ltd ("Jeeves Bistro") and without otherwise being entitled to do so.

Counts 2, 3 and 4

Those Counts allege, in summary, that on the 1st of June 2010 the practitioner failed to comply with the requirements of Regulations 12(b)(iv), 14(1)(a)(iii), 15(1)(a) and 15(2)(c)(iii) of the Legal Practitioner Regulations ("the Regulations") in the manner in which he received trust money namely, a settlement sum of \$40,000 and kept trust ledgers and recorded and receipted same.

Each Count was particularised in detail.

The practitioner filed a response on 6 August 2013.

The practitioner denied the charge of unprofessional conduct.

The practitioner responded to each of the particulars of the Charge.

The background and history of the matter is complex.

The Charge arises out of the practitioner's conduct in the course of his representation of Jeeves Bistro Pty Ltd ("Jeeves Bistro") and Smartsshop Pty Ltd ("Smartsshop").

Many of the factual matters giving rise to the Charge are not in dispute.

In the course of submissions we were provided with a chronology.

Given the complex factual matrix we consider it helpful to set out salient background and relevant details before we address the charge.

There are a number of key players in the events, namely :

Dorothea Tomazos ("Tomazos")

Theodore Palaxides ("Palaxides")

Sotiros Portellos ("Portellos")

Smartsshop

Jeeves Bistro

Accordent Pty Ltd ("Accordent")

Discussion

In or about January 2009 the practitioner accepted instructions from Tomazos to assume the conduct of two separate actions in the civil division of the Holden Hill Magistrates Court.

The first action No. 784 of 2008 was on behalf of Smartsshop as plaintiff against McGees and RMBL Investments as defendants. Tomazos was a director of Smartsshop.

The second action No. 764 of 2008 was on behalf of Jeeves Bistro against the same defendants. Palaxides was a director of Jeeves Bistro, Tomazos was never a director of Jeeves Bistro.

The litigation involving Jeeves Bistro, Smartsshop and the defendants was to protect the leases that had been entered into between Accordent and either Jeeves Bistro or Smartsshop to reinforce that the leases were legally binding – the mortgagee asserted that the leases were a sham – evidence of the practitioner².

The practitioner gave evidence himself that he ultimately came to believe the leases were a sham – one of the reasons the plaintiffs were keen to settle and exit the litigation. The practitioner believed Jeeves Bistro was effectively the alter ego of Soterios (Portellos) – evidence of the practitioner³.

² Transcript p46

³ Transcript p58

Upon receiving instructions from Tomazos the practitioner opened and maintained separate files. Smartsshop file number 090019 and Jeeves Bistro file number 090020. Evidence of the practitioner⁴.

The practitioner's time was put against two separate files and two separate trust ledgers were created. The files were initially treated by the practitioner as two separate matters - evidence of the practitioner⁵.

On the 28th January 2009 Jeeves Bistro in conjunction with Tomazos executed a written retainer agreement with Johnson Lawyers. The agreement noted that Portellos and Jeeves Bistro Pty Ltd had authority to instruct Johnson Lawyers⁶.

During the course of the hearing it was agreed between the Commissioner and the practitioner that reference in the Retainer Agreement to Portellos was in error. It should have been a reference to Tomazos. We will refer to Tomazos throughout these reasons. When the balance of the agreement was amended to delete Portellos and substitute Tomazos that particular reference was overlooked. Tomazos and Jeeves Bistro were each authorised to instruct Johnson Lawyers in relation to Jeeves Bistro.

Paragraph 3 of the agreement provided that Johnson Lawyers must maintain a separate trust account for the purpose of holding clients' funds in anticipation of⁷ disbursements and legal fees⁸.

⁴ Transcript p55

⁵ Transcript p82

⁶ p154 Exhibit 1

⁷ p150 Exhibit 1

⁸ p150 Exhibit 1

A retainer agreement in similar terms was executed by Smartsshop in which Tomazos was identified as the person authorised to give instructions on behalf of Smartsshop⁹.

ASIC searches¹⁰ indicate that Palaxides was director of Jeeves Bistro as and from the 27th March 2007. Ben Gerblich was a director from the 20th October 2008 until 21st October 2009. Ben Gerblich and Palaxides were the directors of Jeeves Bistro at the time of the execution of the retainer agreement but not at the time the litigation settled and funds were received into the trust account. At that time Palaxides was the sole director.

In his letter to the Board dated 6 April 2011¹¹, the practitioner noted:

"It was a term of the Terms of Engagement that my instructions would come from Ms Tomazos".

That was not an accurate statement.

Paragraph 41 of the Terms of Engagement¹² noted:

"The client warrants that the following person(s) have full authority to instruct Johnson Lawyers, Tomazos and Jeeves Bistro Pty Ltd) and by signing this agreement undertakes and accepts all of the above terms."

In his response at paragraphs 1.12 and 1.12.4 the practitioner asserted that Tomazos acted at all relevant times as if she was a director of Jeeves Bistro. On about the 10th of October 2009 Palaxides wrote to the practitioner and confirmed that

⁹ p155 Exhibit 1

¹⁰ p177-178 Exhibit 1

¹¹ p44 Exhibit 1

¹² p154 Exhibit 1

Tomazos was the sole person who had authority to give instructions on behalf of Jeeves Bistro in the matter of the litigation¹³.

On the 24th June 2009 the trial of the actions commenced in the Holden Hill Court. Mr Strawbridge appeared as counsel for the plaintiff in both matters¹⁴.

The actions were heard together but were not consolidated. Evidence of the practitioner¹⁵.

On 6 December 2012 Mr Strawbridge in an email exchange with the Board noted that his instructions were to negotiate a resolution of the Court proceedings as a whole. The two actions had always been treated as if they were one as the discovery and other documents will establish. There was only one witness, Tomazos. Mr Strawbridge's accounts did not differentiate between the two actions for that reason¹⁶.

There were separate claims by each company for separate causes of action relating to the money it is alleged those companies had spent or lost individually – evidence of the practitioner¹⁷.

The trial resumed on 11 February 2010¹⁸.

The matter seemingly did not resolve however there were subsequent settlement negotiations involving solicitors for the defendants, the practitioner and Mr Strawbridge. An offer to settle dated 31st May 2010 with the heading "Jeeves and

¹³ p303 Exhibit 1

¹⁴ p146 Exhibit 1

¹⁵ Transcript p56

¹⁶ p136 Exhibit 1

¹⁷ Transcript p81

¹⁸ p148 Exhibit 1

Smartsshop" was contained in an email from Juniper Watson of Piper Alderman to the practitioner and copied, inter alia, to Mr Strawbridge¹⁹.

The terms of the settlement included that the proceedings were to be discontinued, the practitioner's clients are to provide fully executed withdrawals of caveats and Ms Watson's client was to provide a trust account cheque for \$40,000 inclusive of any and all GST payable to Johnson Lawyers Trust Account.

Mr Strawbridge responded to Ms Watson on 31 May 2010, advising that (on instructions) he was authorised to agree²⁰.

There was no breakdown of the amount of the settlement funds as between Jeeves and Smartsshop. Evidence of the practitioner²¹. This was confirmed by Mr Strawbridge in his letter to the Board of the 4th of December 2012²².

The practitioner gave evidence that the conversation about paying money into the trust account was with Tomazos who instructed that the money be paid to the Smartsshop account²³.

In answer to a proposition put by his counsel in XN that there might have been a couple of different ways that the (trust account) entry could have been done, one possibility could have been to split the money evenly between Jeeves Bistro and Smartsshop and \$20,000 deposited into each account.

¹⁹ p253 Exhibit 1

²⁰ p274 Exhibit 1

²¹ Transcript p66

²² p136 Exhibit 1

²³ Transcript p5

The practitioner responded:

*"....all accounts from Jeeves were paid by either Dorothea or companies associated with Soterios or Gerblich on behalf of Accordent and I suppose I took the view that the companies were, for all intents and purposes, companies that belonged to the Smart Group as a result of learning about why they were incorporated and their purposes for incorporation and the fact that there was no money paid by any of the shareholders in Jeeves Bistro either Theo or any of the other persons that had been shareholders."*²⁴

In answer to a question from the Presiding Member:

"Do you think that was your call to make to put it in the colloquial for you to make those assumptions about what would happen with moneys in the trust as opposed to clarifying what your instructions were?"

The practitioner responded:

"Dorothea was a very sophisticated lawyer. She instructed me that money would be applied to Smartsshop, ...if she wasn't sophisticated, if she wasn't a lawyer, I probably would have put my mind to it but because she was and she was giving me instructions and insisting that she give me instructions and no-one else, that's particularly with Gerblich.

*I did not question those instructions and I didn't think it was my obligation to question those instructions."*²⁵

²⁴ Transcript p66

²⁵ Transcript 67

There is no file note of my conversation with Tomazos on this topic nor any authority executed by Tomazos or Palaxides directing the settlement funds to be paid into the Smartsshop trust account.

In the letter to the Board of 6 April 2011²⁶ the practitioner stated:

"In addition I was told by Tomazos that she had Jeeves Bistro authority to make decisions and instruct me in all matters relating to it – this was confirmed by Mr Gerblich.

Settlement was negotiated on the basis that both litigations had been consolidated and both would be resolved in terms of the attached letter.

The offer contained an obligation for the payment of \$40,000 inclusive of any and all GST into Johnson Lawyers Trust Account.

The money was paid into the Smartsshop Trust Account and was applied in accordance with written instructions provided by Ms Tomazos.... The terms of settlement, you will note that the terms relate to both Jeeves Bistro and Smartsshop and the payment was divided between both.

At no time was I instructed to pay the money into separate trust accounts or account for the money as between Jeeves Bistro and Smartsshop."

There is no mention in this letter of the authority executed by Palaxides on behalf of Jeeves Bistro nor mention that the funds applied to the Jeeves Bistro Account were not in accordance with the written authority of Tomazos. The letter makes no mention of how it came to be that the settlement funds were deposited into the

²⁶ p44 Exhibit 1

Smartsshop account in the first place and on whose authority the funds were so deposited.

There is no mention of any verbal instructions by Tomazos to deposit the funds into the trust account of Smartsshop.

In his letter by way of email to Mr Fletcher of the Board dated 14 June 2011²⁷ in response to some queries by the Board, the practitioner noted with respect to the trust moneys:

"It was paid into the account as Smartsshop was the joint plaintiff to the action and the money was paid to settle the action."

As we have observed earlier in these reasons there were two separate proceedings with separate plaintiffs although the actions were heard together.

In its letter to the practitioner dated 17 June 2011²⁸ the Board raised this question:

"You accepted instructions to act for Jeeves Bistro Pty Ltd and recovered \$40,000 for the benefit of Jeeves Bistro Pty Ltd and Smartsshop as joint plaintiffs. Who instructed you to pay the entire settlement sum into a trust account for Smartsshop at the exclusion of your client Jeeves Bistro Pty Ltd?"

In his letter of 30 June 2011 the practitioner noted:

"The cheque in settlement was payable to Johnson Lawyers Trust Account and the only relevant trust account existing at that time was in the name of Smartsshop Pty Ltd and so the money was placed into that

²⁷ p51 Exhibit 1

²⁸ p52 Exhibit 1

trust account pending instructions from the person authorised to provide instructions as to how the money should be distributed.

Please find attached the authority to deduct moneys from that account signed by the authorised person, Dorothea Tomazos."

The statement that the only relevant trust account existing at the time was in the name of Smartsshop Pty Ltd was not correct. It is clear that there was a trust account for Jeeves Bistro.

There is a document with reference to Account No. 090020 (Jeeves Bistro). Account headed "Trust Statement of Account as at 14 July 2011".²⁹

The ledger records moneys being deposited and transferred on account of fees.

Various trust account receipts clearly indicate moneys being deposited into the Jeeves Bistro Account No. 090020, noted as held on account of costs and disbursements with a trust account receipt³⁰.

On 31 May 2010, Tomazos for and on behalf of Smartsshop Pty Ltd authorised Johnson Lawyers to deduct payment for their accounts for file number 090019 (the Smartsshop account) from the funds held in the trust account and for the remainder of the funds to be allocated against the outstanding accounts of files numbered 090205, 090257 and 090239³¹.

²⁹ P65-66 Exhibit 1

³⁰ Pp81 & 84 Exhibit 1

³¹ p269 Exhibit 1

A similar authority was signed by Tomazos for and on behalf of Smartsshop Pty Ltd on 31 May 2010³² and authorised Johnson Lawyers to deduct payments for their accounts in File No. 090019 (the Smartsshop file).

Both authorities were executed as follows:

“Signed by Dorothea Tomazos as director of Smartsshop Pty Ltd.”

The authorities as executed by Tomazos on behalf of Smartsshop did not authorise the payment of any accounts in relation to the Jeeves Bistro File No. 090020.

On 1 June 2010 an amount of \$40,000 was receipted for the file 090019 Smartsshop Pty Ltd, Smartsshop Pty Ltd v. McGees (SA)³³.

On 1 June 2010 Palaxides for and on behalf of Jeeves Bistro Pty Ltd executed an authority authorising Johnson Lawyers to deduct payment for their accounts for file number 090020 (the Jeeves Bistro file) from the funds held in the trust account³⁴.

The authority was signed;

“Signed by Theo Palaxides as director of Jeeves Bistro Pty Ltd.”

The authority signed by Tomazos authorised disbursement of funds to several accounts including payment of fees for Smartsshop and outstanding Accordent accounts.

It made no mention of Jeeves Bistro and made no mention that the authority was being executed for and on behalf of Jeeves Bistro.

³² p270 Exhibit 1

³³ p 273 Exhibit 1

³⁴ p261 Exhibit 1

In his response at paragraph 1.12.6 the practitioner asserted that when viewed in context the written authorities signed by Tomazos and Palaxides dated 31st May 2010 were correctly to be understood as written directions given on behalf of both Smartsshop and Jeeves Bistro.

We cannot agree with the interpretation of the authorities as asserted by the practitioner. The authorities executed by Tomazos and Palaxides are clear, and limited in their scope.

In his letter of the 30th of June 2011, the practitioner also said this:

"Johnson Lawyers was authorised to take instructions from Dorothea Tomazos pursuant to the retainer which has already been provided to you. It was not my decision to exclude anyone from receiving the payment from the trust account.

Attached is a statement of account in respect of Jeeves Bistro Pty Ltd totalling \$17,120.92. Including the amount for Smartsshop Pty Ltd the total costs paid for on behalf of my client by interests associated with Dorothea Tomazos were \$35,826.59. To the best of my recollection none of this money was paid by the complainant and accordingly under general legal principles, Smartsshop Pty Ltd and Ms Tomazos would be entitled to claim reimbursement for the cost paid."

This response by the practitioner (leaving aside whether it is a valid expression of a legal principle) does not address and avoids the issue of the necessity to obtain proper written instructions with respect to the receipt and disbursement of the trust funds. In his response at paragraph 1.13 the practitioner admitted that Jeeves Bistro

had an undefined entitlement in the whole of the \$40,000 settlement sum, but says that Jeeves Bistro had directed the payout of that entitlement.

In his letter of to Board of 17 August 2011 the practitioner said:³⁵

"I advise that I have finally been able to take statements from two former directors of Jeeves Bistro Pty Ltd (company) who are in the process of providing me with documents to confirm that Ms D Tomazos acted at all relevant times as a shadow director of the company made all decisions in respect of the Court action totally funded through companies she was associated with and to the best of their knowledge and recollections, Mr Palaxides contributed no money to the company and made no decisions as a director of the company."

The practitioner gave evidence in similar terms³⁶.

In his letter to the Board dated 21 March 2012³⁷ the practitioner said this:

"I repeat under the terms of engagement I did not have to obtain Mr Palaxides' consent as the duly authorised director had authorised Dorothea Tomazos. Ms Tomazos has not been accurate in her statement she had made in her letter to you dated 24 October 2011; she was the authorised person in respect to giving instructions on behalf of Jeeves Bistro; there was no conversation as to splitting the money between Jeeves Bistro and Smartsshop nor did she mention that she had to discuss any issue with Mr Palaxides."

³⁵ p88 Exhibit 1

³⁶ Transcript p47

³⁷ pp107 – 108 Exhibit 1

Again this comment avoids the relevant issues as to which entity Ms Tomazos was purporting to represent in her instructions and the need for her instructions to address the deposit of the funds into the trust account and their subsequent dispersal.

There cannot be any doubt that Ms Tomazos wore two hats. One as a person authorised to instruct on behalf of Smartsshop and the other as a person authorised to instruct on behalf of Jeeves Bistro.

Whilst the practitioner was careful to document the authority from Tomazos on behalf of Smartsshop to disperse the funds once in the Smartsshop trust account, no such care was exercised in relation to Jeeves Bistro.

There is a complete paucity of evidence of any instruction written or verbal to the practitioner in relation to the interest of Jeeves Bistro with respect to the settlement sum, the apportionment of the settlement sum as between Jeeves Bistro and Smartsshop, the payment of such settlement funds into trust and the subsequent disbursement thereof, save and except the limited authority executed by Palaxides on the 1st of June 2010³⁸.

In short, the documentary evidence records no specific instruction on behalf of Jeeves Bistro nor for that matter, Smartsshop as to the receipt of moneys into the trust account.

The only instructions for settlement were that the funds were to be paid to the trust account of Johnson Lawyers. The decision to deposit the settlement funds into the Smartsshop trust account came from the verbal instruction of Tomazos, for which there is no written record or file note. The practitioner relies upon his memory

³⁸ p271 Exhibit 1

The settlement proposal did not make any specific reference as to which entity was to receive the funds.

On 1 June 2010 G Zhao of Johnson Lawyers wrote to Tomazos enclosing invoices and statements of account noting that the \$40,000 would be used to pay off the Smartsshop account and the remainder would be used to pay part of Accordent's account and that it would retain the \$2,500 in trust for Tomazos to send us a tax invoice³⁹.

On 2 June 2010 various transfers were made from the trust account in relation to file number 090019 re Smartsshop Pty Ltd v. McGees. Those transfers related to reference nos. 1155, 1156, 1157 and 1158 on the statement being transfers with respect to Smartsshop accounts. Reference no. 1159 – transfer from matter 090019 to 090020 with respect to Jeeves Bistro Pty Ltd v. McGees in the sum of \$1,279.68 as per instructions by client.

On 2 June 2010 there was a further transfer Reference no. 1163 to Accordent Pty Ltd/Soterios Portello transfer from matter number 090019 to 090257 as per instruction from the client \$14,147.57, and on 2 June 2010 reference 1173 Accordent Pty Ltd/Soterios Portello litigation with the District Court of SA transfer from matter number 090019 to 090257 as per instructions from the client \$16,287.77.

The amount paid to Accordent who was not a plaintiff in either proceedings totalled \$30,435.34.

On 5 October 2010 reference 01520 payment of balance of trust account to client \$2,500.

³⁹ p271 Exhibit 1

These various transfers appear on the trust account statement for Smartsshop as at 14 July 2011⁴⁰.

In its letter of 24 July 2012, the Board wrote to the practitioner providing some detail of its concerns arising out of the transaction and the nature of the instructions.

In his letter to the Board of 5 September 2012⁴¹ the practitioner in his response to the issues raised by the Board said this:

"Dorothea Tomazos did not at the relevant time inform me that both parties were entitled to half of the funds nor is that consistent with her subsequent request referred to in my earlier letter dated 21 March 2012.

The fact that she had the authority to deal with the money is reinforced by her authority given on 1 October 2010 to pay out the remainder of the money in the account in the sum of \$2,500 to parties associated with herself".

Again, this response from the practitioner does not address the relevant issue – the nature of the instructions for the initial deposit into the trust account and its subsequent dispersal.

Whilst Ms Tomazos was a person authorised to instruct on behalf of both Smartsshop and Jeeves Bistro, the authorities executed by Ms Tomazos were clearly marked and identified as instructions in her capacity as a director of Smartsshop and not of Jeeves Bistro. The only authority with respect to the Jeeves Bistro interest was signed by Palaxides for and on behalf of Jeeves Bistro.

⁴⁰ pp63-64 Exhibit 1

⁴¹ pp128, 131 Exhibit 1

Again, in his letter of 5 September 2012 the practitioner said this:

"I was unaware of how she was accounting for this money and which entity would have been entitled to the proceeds of \$40,000. That was something for her to advise on and something that I could not speculate on. Ms Tomazos would have advised me if Jeeves Bistro had an entitlement to the settlement money which she did not do, even after attempting to change her authority, and this is reinforced by the instructions she provided on 1 October 2010."

In his letter, the practitioner further said this:

"Pursuant to the terms of engagement Ms Tomazos had authority to provide instructions on behalf of Jeeves Bistro and no-one else is authorised to provide those instructions".

The terms of engagement do not reflect that proposition.

Tomazos and Jeeves Bistro Pty Ltd were both authorised to provide instructions.

On 3 June 2010 Tomazos emailed G Zhao:

"I cannot agree to your proposal as Theo will not agree. Please will you transfer the monies to the following account after settling of legal fees on the Smartsshop and Jeeves Bistro matter? As discussed yesterday I will provide you with a bank account number for transfer of the funds."

(This was in response to the email of 1 June referred to in earlier paragraphs of these reasons from Mr Zhao to Tomazos)⁴².

⁴² p182 Exhibit 1

Mr Zhao forwarded a copy of the letter from Tomazos to the practitioner. Shortly thereafter the practitioner emailed Tomazos:

"Dorothea, the money was placed in Smartsshop ledger and has been transferred in accordance with your written instructions save for \$2,500 As you were aware it was agreed that once the money had come in, you would pay the outstanding accounts. There is still money outstanding on the Kleio Pty Ltd, Accordent Pty Ltd and Soterios"⁴³.

On 3 June 2010 Tomazos responded saying:

"David, I did not have authority for Theo's money. I am sorry but the funds need to be put back and transferred to the account sent to Tony. Please speak to Sotiri."⁴⁴

The practitioner responded on 3 June 2010:

"Dorothea cannot do, the money has been transferred."

Tomazos responded on 3 June 2010:

"Please David, this has placed me in a very difficult position"⁴⁵.

In answer to the question from the Presiding Member:

"When you did get her email saying look "Theo does not agree with any of this transfer out to the accounts", did you check that with Theo at that stage and say "well what's this about".

⁴³ p 181 Exhibit 1

⁴⁴ p180 Exhibit 1

⁴⁵ p180 Exhibit 1

The practitioner answered:

"No."

In response to the further question:

"Why not?"

The practitioner answered:

"Because she had the authority to give instructions. In hindsight it may be something that would have been prudent for me to do but I was coloured by the offensive call from Soterios. It was him wanting the money." ⁴⁶

In answer to a question by his counsel in XN whether it would have been appropriate to have a joint ledger recorded for the money to be put into the names of Jeeves Bistro and Smartsshop the practitioner responded:

"Her instructions were that it was going to Smartsshop and she had authority to give those instructions".

Counsel asked a further question in XN:

"Would you want to have a joint authority that was in the name of both (Tomazos and Palaxides) so that they were both signing off on exactly the same direction?"

The practitioner responded:

"I did not prepare those authorities somebody else did the authorities as well as withdraw the caveat".

⁴⁶ Transcript p69

The practitioner did not address the question – namely whether there should have been a joint authority. The practitioner seemingly sheeting the responsibility for that decision to “somebody else”.

It is trite to observe that the obligation to ensure that he had appropriate instructions and the necessary authorities to deal with settlement of the action, the deposit of the funds into trust and the dispersal of trust funds was that of the practitioner.

In his letter of 12 March 2012 to the Board⁴⁷ the practitioner said this :

“All the money, apart from the amount of \$2,500, was transferred prior to Ms Dorothea Tomazos rescinding her instructions. We relied on her instructions in good faith and accordingly the money was paid out under authority.

It was Mr Soterios Portellos who first rang requesting money and subsequently Ms Tomazos said she was changing her instructions but by the time I had received the telephone calls, the money was already transferred and so the rescission was too late”.

The practitioner in his letter did not explain why the rescission was too late.

There was no reason at all that once the rescission of instructions was made or the issue raised as to the lack of instructions for Jeeves Bistro, the money could not have been transferred back to the trust account pending further clarification of instructions. The funds had been deposited to the practitioner's firm account.

⁴⁷ p107-108 Exhibit 1

This is particularly so in circumstances where significant sums were transferred to files which were not in any way associated with Jeeves Bistro or the litigation conducted on behalf of Smartsshop and Jeeves Bistro.

It is clear that the practitioner as the proceedings continued became concerned at his exposure to costs and payment of his legal fees by Portellos, Accordent, Smartsshop and Jeeves Bistro.

In relation to Accordent he said this⁴⁸:

"Well as soon as the money had dried up I became concerned because they had a history of moving from legal firm to legal firm and leaving substantial debt and that became apparent after taking instructions."

In his evidence he deposed that discussions about paying money were with Dorothea because he decided not to continue acting for Sotiros because he found it increasingly difficult talking to him so his communication was with Dorothea.

The practitioner stated⁴⁹ that the conversation to pay off the Accordent accounts would have occurred at the time that Tomazos signed the authorities and there was a discussion over a number of months that he wanted the Accordent accounts paid off at settlement.

The practitioner further stated in his evidence that he had had an angry conversation with Portellos prior to Tomazos' email of the 3rd of June (rescinding her instructions) after Tomazos had informed Portellos that she had given instructions to pay the money out. Portellos wanted the money.

⁴⁸ Transcript p59

⁴⁹ Transcript p90

There can be no doubt that the practitioner was feeling exposed about outstanding legal fees not only in relation to the Smartsshop and Jeeves Bistro accounts but also the Accordent account. The practitioner was clearly very anxious to be paid at settlement in relation to the outstanding accounts and had substantial professional interest in ensuring that the settlement sum of \$40,000 was applied to his outstanding accounts.

We have no hesitation in finding that for a variety of reasons the practitioner was acting for very difficult clients.

On 17th March 2011 Palaxides complained to the Legal Practitioners Conduct Board. The complaint alleged. "He instituted litigation on behalf of the company and settled the claim for the sum of \$20,000. He has failed to account to me or the company for the settlement fund. I believe he has taken the money to settle legal accounts of another party without my permission."⁵⁰

Findings

We make the following findings and in so finding refer to the preceding discussion.

The practitioner was engaged to represent both Smartsshop and Jeeves Bistro. He opened and maintained two separate files and two separate trust accounts.

Tomazos and Smartsshop executed a retainer with Johnson Lawyers and both had authority to instruct Johnson Lawyers with respect to Smartsshop.

⁵⁰ P34 Exhibit 1

Tomazos and Jeeves Bistro executed a retainer with Johnson Lawyers. Tomazos and Jeeves Bistro were authorised to instruct Johnson Lawyers in relation to Jeeves Bistro.

In litigation commenced in the Holden Hill Court, Mr Neil Strawbridge was engaged as Counsel for each of the plaintiffs Smartsshop and Jeeves Bistro in their respective proceedings. Those proceedings were heard together but were not joined. Whilst settlement may have been arrived at "globally" there were two separate actions and two separate files. The files themselves were never joined and the practitioner continued to operate them as separate files.

The proceedings were compromised in the sum of \$40,000 in respect of both proceedings. The terms of settlement provided for the \$40,000 to be paid to the trust account of Johnson Lawyers. The settlement sum was with respect to both actions. Jeeves Bistro and Smartsshop each had an undefined interest in the settlement sum.

We find that Tomazos was at all material times authorised to instruct for and on behalf of both Jeeves Bistro and Smartsshop. That does not mean however that her instructions from time to time were given on behalf of each of Smartsshop and Jeeves Bistro.

We find that it was behoven upon the practitioner when he took instructions from Tomazos to ascertain whether those instructions were given on behalf of both clients. It is apparent that when instructions were given by Tomazos particularly verbally, that those instructions were not clearly articulated as to which "hat(s)" she was wearing i.e. whether she was instructing for or on behalf of both or either of Smartsshop or Jeeves Bistro.

The \$40,000 was paid to the trust account in relation to the Smartsshop file. The receipt bore no notation that Jeeves Bistro had any interest in the money.

We find that there was no written instruction from Tomazos representing either Smartsshop and/or Jeeves Bistro as to how the settlement sum was to be apportioned between those entities and more particularly as to how those funds were to be deposited in the trust account. Insofar as the verbal instructions for Tomazos are concerned, the best that can be said is that the nature of those instructions was unclear, there was no clear indicator that she was instructing for and on behalf of both Smartsshop and Jeeves Bistro. It is entirely unsatisfactory that the only evidence on that topic is the practitioner's memory.

We find that the practitioner obtained no proper instructions as to the payment of the settlement funds into the Smartsshop trust account nor as to the interest of Jeeves Bistro in the settlement funds. He should have obtained those instructions.

In the circumstances we find that the practitioner's conduct in receiving a verbal, ill-defined instruction from Tomazos as to the payment of the settlement funds into the trust account of Smartsshop was inadequate and an inappropriate basis for the practitioner to deposit those funds to the Smartsshop trust account with no reference to the interest of Jeeves Bistro. We find that the practitioner had no proper or adequate instructions to authorise the deposit the monies to the Smartsshop trust account without any notation as to the interest of Jeeves Bistro in those funds.

Tomazos, on behalf of Smartsshop, gave instructions as to the disbursement of funds in the trust account. Those authorities related to payment of Smartsshop accounts and Accordent accounts.

Palaxides, on behalf of Jeeves Bístro, authorised payment of Jeeves Bistro accounts from moneys in trust.

Palaxides on behalf of Jeeves Bistro did not authorise payment of the Smartsshop accounts nor the Accordent accounts nor the payment made to Smartsshop the client for the balance funds.

Tomazos on behalf of Smartsshop did not authorise payment of the Jeeves Bistro account.

We find that the instructions for dispersal of the trust funds were totally inadequate and inappropriate especially so given our findings as to the inappropriateness of the initial deposit of the funds into the Smartsshop account with no notation as to the interest of Jeeves Bistro. We find that the dispersal of the funds should only have been made on the duly executed authorities of both Jeeves Bistro and Smartsshop.

We find that 3 June 2010 after funds had been transferred on 2 June 2010 from the Smartsshop account holding the settlement sum of \$40,000 received on behalf of both Jeeves Bistro and Smartsshop to Smartsshop or Accordent, Tomazos emailed G Zhao of Johnson Lawyers advising that she could not agree to the proposal of 1 June (i.e. the \$40,000 will be used to pay off the Smartsshop account and the remainder will be used to pay part of Accordent's account and \$2,500 would be retained in trust – as Theo (Palaxides) will not agree. Tomazos requested that funds be paid to a nominated bank account after payment of the legal fees of Smartsshop and Jeeves Bistro.

We find that Tomazos advised the practitioner in writing that she did not have authority for Theo's (Palaxides) money and that the funds needed to be put back and transferred to the account sent by Tony.

We find that the practitioner refused to act upon those further instructions from Tomazos.

We find that the practitioner when confronted with the clear indication from Tomazos that she did not have Palaxides' authority should have immediately been alerted to the possibility that he did not have proper authority to, at the very least, disperse the funds. The practitioner should immediately have sought clarification of his instructions not only from Tomazos but also Palaxides.

We find that the practitioner should have immediately re-instated the funds to his trust account to abide further instructions.

There is no doubt that the parties in this matter namely, Portellos and Tomazos together with Jeeves Bistro, Smartsshop and Accordent were difficult clients.

The practitioner had clear interests in his firm's outstanding fees in relation to all matters being paid at settlement.

We find however that the practitioner's personal interests and that of his firm coupled with his fear that he was being manipulated by Portellos in particular overrode the practitioner's clear duty and responsibility to deal with the settlement monies, their deposit into and dispersal from his trust account in accordance with the duly executed authorities of both Smartsshop and Jeeves Bistro.

COUNT 1

We find that on the 2nd of June 2010 the practitioner appropriated the sum of \$30,435.34 from his trust account towards payment of accounts of Johnson Lawyers for legal costs without authority of his client Jeeves Bistro Pty Ltd (Jeeves Bistro) without otherwise being entitled to do so, contrary to section 31(1) of the Act.

COUNT 2

We find that on the 1st of June 2010 and at all material times thereafter the practitioner failed to comply with the requirements of regulation 12(b)(iv) of the Legal Practitioners Regulations 2009 in that he received trust money, namely the \$40,000 settlement sum, but did not make out a receipt that recorded the name of Jeeves Bistro as being a person for whom the money was received.

COUNT 3

We find that on the 1st of June 2010 and at all material times thereafter the practitioner failed to comply with the requirements of Regulation 14(1)(a)(111) of the Legal Practitioners Regulations 2009 in that he did not record in a cash receipts book in respect of the receipt of the \$40,000 settlement sum, a reference to Jeeves Bistro as the client.

COUNT 4

We find that on the 1st of June 2010 and at all material times thereafter the practitioner failed to comply with the requirement so Regulation 15(1)(a) and 15(2)(c)(iii) of the Legal Practitioners Regulations 2009, as charged

COUNT 5

We find that the practitioner breached his fiduciary duties to his client Jeeves Bistro in that he failed to act in the best interests of Jeeves Bistro and allowed his personal interest to conflict with the duty that he owed to Jeeves Bistro, as charged.

Unprofessional conduct

In view of our findings the issue to be determined is whether the course of conduct asserted by the Board and as found by us constitutes unprofessional conduct constituted by a course of conduct which is unprofessional when taken together as charged by the Board.

The practitioner's conduct is to be assessed in accordance with the provisions of the Legal Practitioner's Act 1981 prior to the amendments which came into effect on the 1st of July 2014.

The relevant definition in Section 5 of the Act is as follows:

Any conduct in the course of or in connection with the 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

In relation to a legal practitioner it means 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 Commissioner submits that the course of conduct constitutes unprofessional conduct.

The practitioner denies that the conduct is unprofessional and further denies that the conduct was unsatisfactory. In his submissions counsel for the practitioner submitted that at all times the practitioner acted honestly and in good faith.

If there were breaches of regulations relating to the receipt of trust monies the breach did not involve a substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute. Any breaches were technical in nature rather than going to the misappropriation of money or failure to account.

Counsel for the practitioner submitted that there was a need to evaluate the degree or seriousness of the conduct and the extent to which it may fall short of a proper professional conduct.

We agree with that submission⁵¹.

Counsel for the practitioner submitted that even accepting that trust account responsibilities are of fundamental importance to legal practice not every breach of a regulation amounts to unprofessional conduct. He submitted that there is a difference for example between misappropriation of monies or failure to account on the one hand and the case at hand where there is no misappropriation or failure to account but the issue is one of names on ledgers where the issue is explained by the events that occurred.

⁵¹ *Re R (Practitioner of the Supreme Court (1997) SASR 5 @ 60*

Counsel for the practitioner correctly in our view, argued that the issue comes down to the question of whether Mr Johnson had the authority of his client to pay the proceeds of settlement of the litigation into his trust account and secondly to draw on the proceeds of settlement to pay his accounts other than the \$2,500 which was paid to Smartsshop Pty Ltd.

Whilst counsel for the practitioner submitted that the answer to those questions was "Yes" we have found to the contrary. We do not accept that the practitioner's failure can simply be described as a matter of names on ledgers where the issue is explained by the events that occurred.

We agree with the submission of counsel for the Commissioner that a breach of the Act and Regulations relating to the use of trust monies will invariably be regarded as a serious breach.

As we have found it is the practitioner, a principal in his firm with the conduct of the matter, who carries the responsibility and accountability for the payment of money into the trust account and any dispersal or disbursement of funds from the trust account for his or her own fees or other purposes.

We have found that the practitioner appropriated the money held in the trust account without the authority of Jeeves Bistro a party who had an interest in that money, and that the practitioner derived personal or professional benefits from that transfer. We have found that the money in the trust account could only be paid out in accordance with the direction of both Jeeves Bistro and Smartsshop..

That being the case, the authority from *Tomazos* is not sufficient⁵².

⁵² *Jalmoon Pty Ltd (In Liq) v Bow* (1997) 15 ACLC 233

King C. J. in *Re a practitioner* (1982) 30 SASR 270 at 31 said this:

"(this) court has a duty to vindicate the inviolability of the trust imposed upon a practitioner to treat his client's money in all respects as their money and to use the money for their purposes and no other. The public can feel confidence in legal practitioners and their handling of money only if they know there is involved no element of judgment on the part of the practitioner and that the money must remain in his trust account until it is dispersed in accordance with their direction."

Justice DeBelle held in *Legal Practitioners Conduct Board re Fletcher* (2005) SASC 382 at 23:

"The practitioner's lack of proper accounting procedures, his lack of a proper understanding of the obligations concerning his trust account and his failure to pay monies into the trust account and properly apply those monies are especially grave."

Of concern to the Tribunal in these proceedings is the practitioner's somewhat laissez faire attitude to what were effectively his responsibilities to ensure that the settlement funds were dealt with appropriately.

Seemingly he has been prepared to act upon general verbal instructions from Tomazos which are not noted anywhere in the file and entirely inadequate written authorities executed by Smartssshop and Jeeves Bistro.

The Tribunal is concerned that even in submissions from his counsel that the view of the practitioner is that these are technical matters or simply a matter of names on ledgers.

The Tribunal finds that the practitioner has persistently failed to properly record instructions and to ensure that in circumstances where there were two files, two clients each of whom had an interest in the settlement sum, to obtain and record the necessary instructions, execute the appropriate authorities and make the proper notations on the trust account documents.

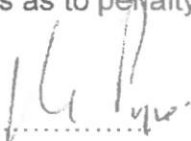
The Tribunal finds that practitioner's personal interest in ensuring that outstanding fees were paid to his firm over took the requirement to ensure that proper instructions and authorities were given and recorded.

In all of the circumstances we find that the practitioner's conduct was unprofessional conduct.

DETERMINATION

The Tribunal finds that the practitioner is guilty of unprofessional conduct constituted by a course of conduct which is unprofessional when taken together as charged.

We will hear the parties as to penalty.



Ms M. Pyke QC Presiding Member



Ms P. McEwin



Mr G. Brown

12 JUNE 2015