IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 004 of 2016

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

ALIPATE QETAKI

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: Mr. A. Chand
Respondent: Mr. N. Barnes

Date of Hearing: 12th April 2017

Date of Judgment: 18th April 2017

JUDGMENT ON SANCTIONS

1. The offences - professional misconduct – *opening a trust account without first obtaining the written approval of the Attorney-General*

[1] This is a judgment as to the sanctions to be imposed in a matter whereby a legal practitioner in establishing a trust account with a bank (so as to comply with the mandatory requirement that all legal firms must establish and keep a trust account), never first obtained the written approval of the Minister for Justice as required by the *Trust Accounts Act 1996*. Accordingly, the legal practitioner was charged (to which he pleaded guilty) to two counts of professional misconduct contrary to sections 83(1)(h) and 82 (1)(a) of the *Legal Practitioners Decree 2009.*

[2] For the record, the two Counts stated:

'Count 1

PROFESSIONAL MISCONDUCT: Contrary to Section 3(1) of the Trust Accounts Act 1996 and sections 83(1)(h) and 82(1)(a) of the Legal Practitioners Decree 2009

PARTICULARS

Alipate Qetaki, *a legal practitioner, on or around 13th April, 2016 opened a trust account for his law firm Qetaki's Advisory & Consultancy with the Bank of South Pacific (BSP), Suva Branch, bearing Account Number 805***** without first applying to the Minister for Justice and seeking the written approval of the Minister for Justice pursuant to section 3(1) of the Trust Accounts Act (as amended by Trust Accounts (Amendment) Decree No. 32 of 2012), which conduct constitutes professional misconduct pursuant to sections 83(1)(h) and 82(1)(a) of the Legal Practitioners Decree 2009.*

Count 2

PROFESSIONAL MISCONDUCT: Contrary to section 3(1B) of the Trust Accounts Act 1996 and sections 83(1)(h) and 82(1)(a) of the Legal Practitioners Decree 2009

PARTICULARS

Alipate Qetaki, *a legal practitioner, on or around 13th April, 2016 opened a trust account for his law firm Qetaki's Advisory & Consultancy with the Bank of South Pacific (BSP), Suva Branch, bearing Account Number 805***** without first satisfying the officer in charge of the branch of Bank of South Pacific that he as a Trustee has complied with the requirements of section 3(1) of the Trust Accounts Act 1996 by failing to provide to the officer in charge a copy of the written approval of the Minister, pursuant to section 3(1B) of the Trust Accounts Act (as amended by Trust Accounts (Amendment) Decree No. 32 of 2012), which conduct constitutes professional misconduct pursuant to sections 83(1)(h) and 82(1)(a) of the Legal Practitioners Decree 2009.*

[My emphasis and anonymisation]

[3] Sections 82(1)(a) and 83(1)(h) *the Legal Practitioners Decree 2009* state as follows:

> *'82.—(1) For the purposes of this Decree,* ***"professional misconduct" includes*** *–*
> *(a) unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm,* ***if the conduct involves a substantial*** *or consistent* ***failure to reach or maintain a reasonable standard of competence and diligence****;'*
>
> and
>
> *'83.—(1) Without limiting sections 81 and 82,* ***the following conduct is capable of being*** *"unsatisfactory professional conduct" or* ***"professional misconduct"*** *for the purposes of this Decree:*
> *...*
> *(h) conduct of a legal practitioner or law firm consisting of* ***a contravention of the provisions of the Trust Accounts Act 1996*** *(as amended from time to time)'.* [My emphasis]

[4] Section 3(1) of the *Trust Accounts Act 1996* states:

*"Before establishing any trust account under this Act, **a trustee shall apply to the Minister and seek the written approval** of the Minister.* [My emphasis]

[5] In addition, sections 3(1A), (1B) and (1C) of the *Trust Accounts Act 1996* state:

(1A) In making an application to the Minister under subsection (1), the trustee shall provide to the Minister all relevant particulars with respect to trust account, including information about the bank, the office or branch thereof at which the trustee intends to open the account, and the proposed name of the account.

*(1B) Before establishing any trust account, the trustee shall satisfy the officer in charge of the office or branch of the bank that the trustee has complied with the requirements of subsection (1) by **providing a copy of the written approval of the Minister** to the officer in charge of the office or branch of the bank.*

*(1C) The officer in charge of the office or branch of a bank where a trustee seeks to establish a trust account shall not establish any such trust account until the officer is provided with **a copy of the written approval of the Minister** under subsection (1).'* [My emphasis]

[6] Section 2(1) of the *Trust Accounts Act 1996* states:

'"Minister" means Minister for Justice of the Republic of Fiji'.

[7] Even though the *Trust Accounts Act 1996* and the two counts for which the Respondent is now being sanctioned before the Commission, each refer to the approval letter having to be from the '*Minister for Justice',* the "Agreed Facts" filed in the Commission on 4th April 2017, together with a witness statement dated 1st March 2017 from Mr Aminisai Naidike of the BSP, each refer to the approval letter having to be from the Attorney-General. I can take Judicial Notice that the two ministerial positions are currently held by the same person, hence, that the terms 'Minister for Justice' and 'Attorney-General' have been used in this matter interchangeably. I do not think much turns on that in any event.

2. Factual background to the offence

[8] The Respondent legal practitioner was admitted as a Barrister and Solicitor of the High Court of Fiji in August 1977. According to his Curriculum

Vitae (tendered by his Counsel as Annexure 4 of his written submissions dated 12th April 2017), prior to 2016, the Respondent legal practitioner had had a long career working as lawyer for various government agencies commencing as a Legal Officer and then Assistant General Manager of the iTaukei Land Trust Board between 1977-1985, followed private practice from July 1985 until May 1987, then serving as Parliamentary Counsel from 1987-1997, Permanent Secretary for Justice 1997-2003, then Law Reform Commissioner from 2003 and, more recently, as General Manager of the iTaukei Land Trust Board from May 2008 until March 2015.

[9] Why I mention this background is that, apart from the just under two years in from July 1985 until May 1987, it would appear that the Respondent legal practitioner had not worked in private practice for nearly 30 years until he applied on 9th March 2016 for a practising certificate for his consultancy firm by lodging an application with the Chief Registrar's office.

[10] On 10th March 2016, the Chief Registrar replied in writing to the Respondent legal practitioner setting out the mandatory requirements for establishing a trust account.

[11] It is unclear as to the actual date, however, around this time in March 2017 the Respondent attended upon the Bank of the South Pacific ("BSP") First Branch in Suva to open a bank account in the name of "Qetaki Advisory & Consultancy".

[12] An email dated 11th March 2016, was sent from Mr. Aminiasi Naidke, the Officer-in-Charge of the "BSP" First Branch in Suva, to the Respondent setting out the requirements for opening a trust account as follows:

(1) A valid practising certificate;

(2) A certified true copy of the Trustee's notification;

(3) A copy of approval letter from the Registrar and Attorney-General to act as a trustee and to open a trust account;

(4) A minimum deposit of $250.00 to open the account.

[13] On 12th March 2016, the Respondent emailed the Legal Practitioner's Unit

and forwarded the Bank's requirements.

[14] On 23rd March 2016, the Respondent was issued with a conditional Practising Certificate that was valid only until 31st March 2016, with the condition being that the Respondent was to open a trust account on or before 31st March 2016.

[15] On 1st April 2016, the Applicant advised the Respondent by way of email that the Respondent was non-compliant with the condition placed on his conditional Practising Certificate and, as such, his Practising Certificate had expired.

[16] On 2nd April 2016, the Respondent emailed the Legal Practitioners Unit advising that he had been unable to comply with the condition placed on his conditional Practising Certificate due to the short time he had been given to do so and also due to the fact that he had just returned from his village after attending two funerals (of his elder sister and a nephew).

[17] Also on 2nd April 2016, the Respondent emailed a potential client advising as to the above (and copying the email to the LPU) concluding: *'As such I request that you instruct another Solicitor to take this matters up as appropriate as it will be unlawful for me to act on this matter without a valid Practising Certificate.'*

[18] On 6th April 2016, the Applicant's office emailed the Respondent and advised that the Respondent's conditional Practising Certificate had been extended until 15th April 2016 and was ready for collection.

[19] On 7th April 2016, a copy of the Respondent's Practising Certificate was emailed to Mr Aminiasi Naidke at the BSP-First Branch in Suva.

[20] **On 8th April 2016, BSP advised the Respondent that he would need to provide a copy of the Attorney-General's approval.**

[21] **Strangely, on the same date, 8th April 2016, despite not having a copy**

of the Attorney-General's approval, (it would appear from *'Transaction History Listing*' tendered at the plea in mitigation hearing on 12th April 2017), BSP opened an account in the name of "Qetaki Advisory & Consultancy" with a nil balance.

[22] On 11th April 2016, BSP debited the account $10.00 for stamp duty which took the account into -$10.00 debit.

[23] **On 13th April 2016, the Respondent provided $250.00 cash to BSP which was deposited into the account of Qetaki Advisory & Consultancy - even though the Respondent had not at that time received written approval from the Attorney-General to open such an account.**

[24] **On the same date, 13th April 2016, Mr Naidke from the BSP emailed the Legal Practitioners Unit and the Respondent to advise that the trust account for "Qetaki Advisory & Consultancy" had been opened.**

[25] Further bank fees were then incurred on 14th April in the sum of $9.00, and on 30th April in the sums of $0.01, $5.00 and $0.45, in three separate transactions.

[26] **On 20th April 2016, the Respondent wrote to the Attorney-General and sought his approval for opening the trust account** for "Qetaki Advisory & Consultancy".

[27] **On 13th May 2016, the account was closed** with the final transactions on that date being reversal of stamp duty ($10.00) together with an unspecified $0.06, leaving a balance of $235.60, of which $235.48 was returned to the Respondent and the Bank retaining the remaining $0.12.

[28] **On 2nd September 2016, the Bank of the South Pacific pleaded guilty in the Magistrate's Court at Suva** for failure to comply with the requirements of the *Trust Accounts Act 1996*. That is, the Bank, by opening a trust account for the Respondent without first being provided an

approval letter from the Minister for Justice, had failed to comply with section 3(1)(1C) which requires that '*The officer in charge of the office or branch of a bank where a trustee seeks to establish a trust account shall not establish any such trust account until the officer is provided with a copy of the written approval of the Minister.'* (See ***State v Bank of the South Pacific,*** unreported, Fiji Magistrate's Court, Criminal Case No. 1280 of2016, 2 September 2016, P. Liyanage, Resident Magistrate; PacLII: [2016] FJMC 131, <http://www.paclii.org/fj/cases/FJMC/2016/131.html>.)

[29] The Bank had been prosecuted pursuant to section 28(1)(a) of the *Trust Accounts Act 1996,* which states:

> *'(1) A person who*
>
> *(a)* ***Contravenes or fails to comply with any provision of the Act*** *is guilty of an offence against this Act and is liable on conviction to a penalty of $3,000'.*

[30] The Bank was fined $1,500.00 with the Magistrate remarks on sentence including:

> *'... your counsel submitted that you had no intention to defraud the legislation but* ***this [was] an oversight of the employee who handled the action****. The defence counsel also said that the bank investigated to the wrong immediately and will take action against the employee.'* [My emphasis]

[31] According to a witness statement made on 1st March 2017 by Mr Aminiasi Naidke of the BSP First Branch in Suva (and prepared by the Legal Practitioners Unit for use in the current proceedings before the Commission), when the Respondent gave him the *'letter from the chief registrar [granting the Respondent a temporary practising certificate] which I thought was [an] approval letter to open [a] trust account',* Mr Naidke then forwarded the documents to the *'new accounts department of the BSP to open the trust account of Qetaki advisory & Consultancy'.* Mr Naidke has then stated:

> *'Latter [sic] I was informed by our BSP operation department that I need to obtain [a] letter of approval from [the] Attorney General to open a trust account from Mr Qetaki as trust account No. 805***** was opened.* [My anonymisation] *Then I informed Mr Qetaki ...'*

[32] Mr Naidke then made a significant concluding statement:

> *'Due to* ***opening of account*** *for the customer Mr Qetaki* ***was been my mistake*** *as not checking the check list requirement and in which I was taken to court last year and our bank was penalised $1500.00 fine. Also our bank BSP reprimanded me for* ***my negligence*** ***as it was my responsibility*** *not any other department of the bank.'*
> [My emphasis]

[33] Initially, this matter was set down for a "strike out" hearing in the February 2017 Sittings. That was withdrawn and instead the matter was set down for a defended hearing in the April 2017 Sittings. At the Call Over at the beginning of the April 2017 Sittings, Counsel for the Respondent advised that he had been instructed to enter a plea of guilty to both counts. Hence, the defended hearing allocated for 12th April 2017 was varied to the hearing of a plea in mitigation.

[34] Orders were then made for Counsel for the Respondent to file written submissions, noting that I would be considering the 5th edition of *'Guidance Note on Sanctions'* published by the Solicitors Disciplinary Tribunal of England and Wales on 8th December 2016 as a guide as to what sanction/s should be imposed in this matter. (See <http://www.solicitorstribunal.org.uk/sites/default/files-sdt/GUIDANCE%20NOTE%20ON%20SANCTIONS%20-%205TH%20EDITION%20-%20DECEMBER%202016.pdf>.) A copy of that publication was provided by me to Counsel for the Respondent (Counsel for the Applicant already having obtained a copy from me in previous matters). I then set the matter down for a "sanctions" hearing at 12 noon on 12th April 2017.

[35] In the 5th edition of the ***'Guidance Note on Sanctions'*** published by the Solicitors Disciplinary Tribunal of England and Wales, the Tribunal has explained (page 6, paragraph [7]) that its 'approach to sanction' is based upon the three stages set out in ***Fuglers and Others v Solicitors Regulation Authority*** **[2014] EWHC 179 Admin** (per The Honourable Mr Justice Popplewell, at paragraph [28]) (see <http://www.bailii.org/ew/cases/EWHC/Admin/2014/179.html>). That is:

> *'The first stage is* ***to assess the seriousness of the misconduct****. The second stage is* ***to keep in mind the purpose for which sanctions are imposed by such a tribunal****. The third stage is* ***to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question****.'*
> *[My Emphasis]*

[36] This judgment, therefore, has taken into account the written submissions filed on behalf of the Respondent legal practitioner as well as the further oral submissions made by each party before me on 12th April 2017.

3. Applying the approach to sanction based upon the three stages in *Fuglers*

(1) THE FIRST STAGE – 'to assess the seriousness of the misconduct'

[37] In assessing the seriousness of the misconduct, the 5th edition of the *Guidance Note on Sanctions* has explained at paragraph [16] as follows:

> *'The Tribunal will assess the seriousness of the misconduct in order to determine which sanction to impose.* ***Seriousness is determined by a combination of factors****, including:*
> - *the respondent's* ***level of culpability*** *for their misconduct.*
> - ***the harm caused*** *by the respondent's misconduct.*
> - *the existence of* ***any aggravating factors****.*
> - *the existence of* ***any mitigating factors****.'*
>
> [My emphasis]

(a) 'The respondent's level of culpability for their misconduct'

[38] According to Counsel for the Respondent (*'Mitigation'*, 12th April 2017, page 7, paragraph [29]):

> *'****Mr Qetaki's culpability for his conduct is minimal****, he should have paid more attention and been more aware but he wasn't and now knows better.* ***No member of the public has been harmed, the trust account has not operated and client money was never at risk, as there were no transactions*** *through the account once it was established and there are, in our submission, no aggravating factors.'*
> [My emphasis]

[40] Counsel for the Respondent has also cited (at page 7, paragraph [31), ***Myers v Rotherfield*** [1939] 1 KB 109 at 127, wherein it was said by Slesser J that:

> *'It is essential, in my view, as a matter of general principal, that the misconduct of a solicitor must be brought home* ***personally to him****.'*

[41] The point being made by Counsel for the Respondent (page 7, paragraph [32]) is that *'this misconduct can only be brought home personally to Mr Qetaki by the most technical of breaches as the result of an unfortunate mistake.'*

[42] Counsel for the Applicant Chief Registrar submitted in response that in terms of culpability, it must be noted that the Respondent has been a senior legal practitioner for just under 40 years. The requirements of the *Trust Accounts Act* are there for a purpose. Legal practitioners cannot open a trust account without the approval of the Minister for Justice as this involves the movement of moneys.

[43] Applying the criteria set out in the 5th edition of the '*Guidance Note on Sanctions'*, I have assessed the Respondent legal practitioner's level of culpability as follows:

(i) 'The respondent's motivation for the misconduct'

- I accept the submission of Counsel for the Respondent (*'Mitigation'*, 12th April 2017, page 8, paragraph [36](a)), that the misconduct occurred *'without any intent to breach the Act'.* Indeed, I have been shown no evidence to the contrary. Apart from providing $250.00 cash as requested by BSP to open the account, no other transactions took place apart from the Respondent incurring various bank fees. Overall, the whole process cost him (on my calculations) $14.52, as well as two counts of professional misconduct being laid against him;

(ii) 'Whether the misconduct arose from actions which were planned or spontaneous'

- I accept the submission of Counsel for the Respondent (at page 8, paragraph [36](b)) that the misconduct arose *'as a result of unplanned events'*. It was clearly not planned. Perhaps, it was not exactly spontaneous, but the Respondent seems to have acted on the spur of the moment when contacted by BSP to deposit the $250.00 and thus committed two counts of professional misconduct;

(iii) 'The extent to which the respondent acted in breach of a position of trust'

- The breach involved here was of the *Trust Accounts Act* at the very lower end of the scale;

(iv) 'The extent to which the respondent had direct control of or responsibility for the circumstances giving rise to the misconduct'

- I accept the submission of Counsel for the Respondent (page 7, paragraph [32]: *'Had the Bank officer not made a mistake then neither would Mr Qetaki.*'
- **I do also accept, however, the submission of Counsel for the Chief Registrar that this is <u>a mandatory requirement</u> for a sole practitioner.** Indeed, the Respondent was issued with two conditional practising certificates and it had been made clear to him in the email of 11th March 2016 from Mr Naidke of the BSP that he needed '*copy of approval letter from the registrar and attorney general to act as a trustee AND OPEN A TRUST ACCOUNT'*. **Whilst the requirement could have been better phrased so as to make it abundantly clear that TWO letters were required (one from the Chief Registrar and one from the Minister for Justice), this was the Respondent's legal responsibility.** One can only hope that BSP, having now been prosecuted, have a standard form which clearly states that two separate letters are required.

(v) 'The respondent's level of experience'

- The Respondent legal practitioner was admitted to the Fiji Bar in August 1977. Therefore, he has been a solicitor with nearly four decades of experience (even if most of it has been in government);

(vi) 'The harm caused by the misconduct'

- I accept the submission of Counsel for the Respondent (at page 8, paragraph [36](c)) that *'no harm was caused to the public'*. I do also accept, however, as noted above, the submission of Counsel for the Chief Registrar that this is a mandatory requirement for a

sole practitioner and it is there for a reason;

(vii) 'Whether the respondent deliberately misled the regulator (Solicitors Regulation Authority v Spence [2012] EWHC 2977 (Admin))'

- I accept the submission of Counsel for the Respondent (at page 8, paragraph [36](d)) that the Respondent *'made no attempt to hide or dissemble before the Chief Registrar (regulator)'.*

(b) 'the harm caused by the respondent's misconduct'

[44] I have noted the forceful submission of Counsel for the Chief Registrar that the harm must been seen in the winder context that this is a mandatory requirement for a sole practitioner and it is there for a reason – the movement of moneys.

[45] According to Counsel for the Respondent legal practitioner ('Mitigation', 12th April 2017, page 7, paragraph [33]):

> '*If any member of the public was asked his or her opinion of Mr Qetaki's contravention in this case we submit that* ***"the man on the Clapham Omnibus" would simply regard the contravention as an honest mistake at most*** *or likely* ***an extremely unfortunate and technical breach*** *of the rules for which no sanction should be imposed.'*
> [My emphasis]

[46] It was interesting that Counsel for the Respondent legal practitioner has cited *"the man on the Clapham Omnibus"* as to how the harm should be viewed in this case. Clapham Junction is one of the busiest interchanges of public transport for trains and buses in Britain. The use of the term was recently review by the United Kingdom Supreme Court in ***Healthcare at Home Limited v. The Common Services Agency*** [2014] UKSC 49; (BailII: <http://www.bailii.org/uk/cases/UKSC/2014/49.html >), where Lord Reed (with whom Lord Mance, Lord Kerr, Lord Sumption and Lord Hughes agreed) explained the application of the term at paragraphs [1] to [4]:

> *'1.* ***The Clapham omnibus has many passengers. The most venerable is the reasonable man****, who was born during the reign of Victoria but remains in vigorous health.* ***Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-***

minded and informed observer, all of whom have had season tickets for many years.

2. *The horse-drawn bus between Knightsbridge and Clapham, which Lord Bowen is thought to have had in mind, was real enough. But its most famous passenger, and the others I have mentioned, are legal fictions.* ***They belong to an intellectual tradition of defining a legal standard by reference to a hypothetical person****, which stretches back to the creation by Roman jurists of the figure of the bonus paterfamilias. As Lord Radcliffe observed in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, 728:*

> *"The spokesman of the fair and reasonable man,* ***who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself****."*

3. *It follows from the nature of the reasonable man, as a means of describing a standard applied by the court, that it would misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus ….* ***The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court*** *of circumstances which bear on its application of the standard of the reasonable man in any particular case; but* ***it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard****.*
4. *In recent times, some additional passengers from the European Union have boarded the Clapham omnibus. This appeal is concerned with one of them: the reasonably well-informed and normally diligent tenderer.'*
[My emphasis]

[47] As the Supreme Curt noted, this hypothetical person has been used by courts in the common law world for well over a century. This person is well-travelled. On a cursory look, I found that they had even been spotted in the Securities and Futures Appeal Tribunal of Hong Kong, where they were referred to as the *'mythical (and fair-minded) observer, the man on the Shaukiwan tram'*. (See The Securities and Futures Tribunal, Hong Kong, 15 May 2009: SFAT Application No. 7/2007, 8/2007 & 9/2007 (Application for Review by Ms NG Chiu Mui, Mr LAW Kai Yee and Ms TANG Yuen Ting), <http://www.sfat.gov.hk/english/determination/AN-7_and_8_and_9-2007-Determination.pdf>.

[48] In Fiji, this person may well be, for example, the person on the bus from Nadi to Suva, Lautoka to Ba, Ba to Suva, Suva to Nausori or Labasa to

Savusavu. It matters not where they are travelling. Rather, as the Supreme Court noted in *Healthcare*, it is the application of a legal standard, an impersonal objective standard. For while I do understand the submission of Counsel for the Respondent, in attempting to put the harm caused in context, at the end of the day, as Lord Radcliffe (cited by Lord Reed in *Healthcare*) explained just over 60 years ago: *'The spokesman of the fair and reasonable man … is and must be the court itself.'*

[49] Applying the criteria set out in the 5th edition of the *'Guidance Note on Sanctions'*, I have assessed *'the harm caused by the misconduct'* of the Respondent legal practitioner as follows:

(i) 'the impact of the respondent's misconduct upon those directly or indirectly affected by the misconduct, the public, and the reputation of the legal profession. The greater the extent of the respondent's departure from the "complete integrity, probity and trustworthiness" expected of a solicitor, the greater the harm to the legal profession's reputation'

- I accept the submission of Counsel for the Respondent (page 7, paragraph [29] that: *'No member of the public was harmed, the trust account has not operated and client money was never at risk, as there were no transactions through the account once it was established …'* In my view, '*the impact of the respondent's misconduct'* has been minimal. Apart from depositing $250.00 when requested to do so by BSP, he did not operate the account and it was closed soon afterwards;

(ii) 'the extent of the harm that was intended or might reasonably have been foreseen to be caused by the respondent's misconduct'

- Again, in my view, there has been no allegation or finding of dishonesty against the Respondent legal practitioner, such that '*the extent of the harm that … might reasonably have been foreseen to be caused by the respondent's misconduct'* was minimal.

(c) 'The existence of <u>any aggravating factors'</u>

[50] According to Counsel for the Respondent legal practitioner ('Mitigation' submission, 12th April 2017, page 8, paragraph [36]): *'(e) there are no aggravating factors'.*

[51] The 5th edition of the *'Guidance Note on Sanctions'* includes some nine criteria (though not an exhaustive list) of *'aggravating factors'*. Arguably, two of them might be applicable:

(i) 'misconduct where the respondent knew or ought reasonably to have known that the conduct complained of was in material breach of obligations to protect the public and the reputation of the legal profession'

- I accept that the Respondent legal practitioner ought reasonably to have known that such misconduct '*was in material breach of obligations to protect the public and the reputation of the legal profession';*

(ii) 'the extent of the impact on those affected by the misconduct' -

- Counsel for the Applicant noted the impact of the wider harm from a regulatory perspective. On the other hand, Counsel for the Respondent legal practitioner stated that this was a technical breach. I have already accepted above that, in my view, '*the impact of the respondent's misconduct'* has been minimal.

(d) 'The existence of <u>any mitigating factors'</u>

[52] Counsel for the Applicant did not mention any mitigating factors during in his oral submissions on 12th April 2017.

[53] Counsel for the Respondent legal practitioner in his written *'Mitigation'* submissions dated 12th March 2017, listed (at pages 8-9, paragraphs [37]-[39]) three matters in relation to *'personal circumstances and mitigating factors'*.

[54] According to the 5th edition of the *'Guidance Note on Sanctions'* (page 10), '***matters of <u>purely personal mitigation are of no relevance in determining the seriousness of the misconduct'</u>***. Such matters, however, ***'will be***

considered *...* ***when determining the fair and proportionate sanction'*** to be applied. I have done the same.

[55] Applying the criteria discussed in the 5th edition of the *'Guidance Note on Sanctions'*, I have assessed *'the existence of any mitigating factors'* as follows:

(i) 'misconduct resulting from deception or otherwise by a third party (including the client)'

Whilst arguably, this is not applicable, the misconduct did result from the BSP opening the account and then asking the Respondent to deposit $250.00 which he did.

(ii) 'the timing of and extent to which any loss arising from the misconduct is made good by the respondent'

Not applicable.

(iii) 'whether the respondent voluntarily notified the regulator of the facts and circumstances giving rise to misconduct'

I do note from the items of correspondence (including many emails) between the Respondent, the Legal Practitioners Unit, the Bank, and the Attorney-General's Chambers, that the Respondent kept the regulator up to date as to his actions. Indeed, it may have been the Respondent alerting the regulator as to the problem as any reading of the correspondence reveals a certain naiveté on the part of the Respondent who seems to have thought that by keeping the regulator informed he was somehow complying with the legal requirements.

(iv) 'whether the misconduct was either a single episode, or one of very brief duration in a previously unblemished career'

The account was open for one month with one transaction – the initial deposit of $250.00 to open the account. Accordingly, the misconduct was a single episode as well as being of a very brief duration in a previously unblemished career.

(v) 'genuine insight, assessed by the Tribunal on the basis of facts found proved and the respondent's evidence

Yes.

(vi) 'open and frank admissions at an early stage and/or degree of cooperation with the investigating body' -

Yes. As noted above, it would seem from a reading of the correspondence that it took a long time for the Respondent to realise what he had done.

(2) <u>THE SECOND STAGE</u> – 'to keep in mind the purpose for which sanctions are imposed'

[56] The 5th edition of the *'Guidance Note on Sanctions'* does not explicitly discuss this stage. An insight, however, has been provided by Popplewell J in *Fuglers* at paragraphs [30]-[32],

> *32. As this and other authorities make clear, although two elements of the sanction's purpose may be to punish the solicitor in question and to deter repetition of similar or other misconduct by him, these are not the main purposes.* ***The primary purpose of the sanction is to deter others and uphold the reputation of the profession*** *(see e.g.* ***Solicitors Regulation Authority v Anderson*** *[2013] EWHC 4021 (Admin) per Treacy LJ at [72]). In determining sanction the tribunal will properly have in mind* ***<u>the message which the sanction will send to other solicitors for the purposes of promoting and maintaining the highest standards by members of the profession, and the high standing of the profession itself in its reputation with the public at large</u>****. This latter aspect engages not only the public's confidence in the standards maintained by practising solicitors, but also its confidence in the organs of a self regulating body to conduct effective and fair disciplinary regulation.'*
> [My emphasis]

[57] I have taken note of the discussion by Popplewell J in *Fuglers* as to '*the purpose for which sanctions are imposed'*.

(3) <u>THE THIRD STAGE</u> – 'choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question'

(i) The Respondent: No sanction

[58] Counsel for the Respondent legal practitioner has submitted ('*Mitigation'* submissions, 12th April 2017, page 9, paragraphs [40]-[43]):

> *'40. … The overriding purpose of a sanction is protect the public from harm and to maintain public confidence in the reputation of the legal profession (citing Solicitors Disciplinary Tribunal,*

Guidance Note on Sanctions, 5th edition, December 2016, page 3).

41. *… this case is **an appropriate case for no sanction at all**. The public was not harmed and needs no protection from Mr Qetaki, there is no danger of a repeat offence and the pubic confidence in the reputation of the profession has only been minimally affected, if at all, by his mistake which can only be described as innocent.*
42. *Mr Qetaki has already been punished beyond the level of his culpability by the fact that **he has been without a PC** while these proceedings have been on foot **amounting to a de facto suspension since May 2016** …*
43. *It is submitted that a measured and proportionate [response] to the circumstances of this case requires the acknowledgment of fault that Mr Qetaki has given, recognition of his de facto suspension and a limited order for costs …'*

[59] **Whilst I do accept that this might be a case for no sanction to be imposed and a limited order for costs, I am not so sure that the de facto penalty imposed to date has been since May 2016**. In his oral submissions made on 12th April 2017, Counsel for the Respondent advised that the Respondent had worked as a consultant in Naru from April until October 2016. **I accept, however, that the Respondent has not worked since then – a period of nearly seven months.**

(ii) The Applicant: Reprimand and fine

[60] Counsel for the Applicant in his oral submissions on 12th April 2017, submitted, in summary, as follows:

(1) He cited ***Bolton v The Law Society*** [1994] 1 WLR 512 emphasising the purpose of sanctions being the protection of the public, not to punish but to deter other practitioners (See BailII: <http://www.bailii.org/ew/cases/EWCA/Civ/1993/32.html>);

(2) He then tendered a copy of ***Legal Institute of Victoria Limited Services v Lim*** [2005] VLPT 6 (14 April 2005) (AustLII: <http://www.austlii.edu.au/au/cases/vic/VLPT/2005/6.html>.) In *Lim*, which also involved breach of a statutory requirement on a trust account. The practitioner was reprimanded and fined $500.00.

[61] In relation to *Bolton*, I note that the 5th edition of the *'Guidance Note on Sanctions'* in discussing the 'purpose of sanctions' has stated (at page 5, paragraph 6):

> *'The case of Bolton v The Law Society [1994] 1 WLR 512 sets out the fundamental principle and purposes of the imposition of sanctions by the Tribunal:*
>
> *"Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal."*
>
> *"... a penalty may be visited on a solicitor ... in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way ..."*
>
> *"... to be sure that the offender does not have the opportunity to repeat the offence; and"*
>
> *"... **the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth** ... a member of the public ... is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires." (per Bingham, then Master of the Rolls)'*
> [My emphasis]

[62] It should be noted that *Bolton* involved the sale of a lower ground floor flat in his wife's house to her brother. As Lord Bingham MR noted (at [2]):

> *'2. Mr. Bolton acted as solicitor in this transaction, apparently for his wife, his brother-in-law, and the Leeds and Holbeck Building Society, which was to advance £45,000 odd to assist Mr. Egwu to buy the flat upon the security of the flat. **Mr. Bolton duly received a cheque for £45,000 from the Building Society. It was then his duty to hold that money in his client account until the conveyance of the lower ground floor flat was made to his brother-in-law and security documentation in favour of the Building Society was executed**. He did not do that. Having received the cheque on 10th May 1989 he started, as early as 16th May, disbursing that money. In just over a month he disbursed the whole sum, partly to mortgagees and partly to the Inland Revenue and, as to £25,000, to his wife. The brother-in-law never paid the £20,000 which was due from him in addition to the Building Society's advance or any part of it. The sale to the brother-in-law was never completed. The security documentation was never executed. The money received from the Building Society was disbursed without its*

receiving the security which was the condition of its making any advance.

...

4. When interviewed Mr. Bolton admitted, apparently without prevarication, that these payments had been made. He admitted that the monies received from the Building Society had been misused and acknowledged the shortage. That shortage was, however, made good very shortly thereafter in full on llth September 1990. That did, however, leave the Building Society-out of pocket so far as sixteen months' interest was concerned and it issued a writ for that sum which led to the entry of judgment in default for £9,000 odd on 7th January 1991. That judgment was satisfied.'
[My emphasis]

[63] In *Bolton,* a solicitor was initially suspended by the Solicitors Disciplinary Tribunal. On appeal, however, '*the Queen's Bench Divisional Court ... substituted an order that he be fined £3,000'*. The Law Society then appealed that decision to the English and Welsh Court of Appeal. Although Bingham MR was of the view that suspension was the appropriate sanction, he decided that *'it would ... be oppressive to reinstate the Tribunal's order two-and-a-half years after the order was made, and sixteen months after the Divisional Court quashed it'*. He used the opportunity, however, of *'**saying something in more general terms about the principles which underlie cases such as this** ... in the hope that it may serve to make these principles better known and dispel any misunderstanding that there may be in any quarter.'* Hence, the principles that have been set out extensively in his judgment and cited in the 5th edition of the *'Guidance Note on Sanctions'* as well as by Popplewell J in *Fuglers.*

[64] In relation to Mr Bolton's conduct, Bingham MR was of the view (at [7]):

> *'... **Mr. Bolton's conduct**, even if accepted as honest, **represented a flagrant departure from the elementary rules which bind anyone**, most of all a solicitor, **holding a sum of money on behalf of someone else**. The fact that a close family relationship was involved made it more, not less, necessary to act with scrupulous propriety ... **nothing could disguise the fact that Mr. Bolton's conduct was, indeed, as the Tribunal held, "wholly unacceptable".**'*
> [My emphasis]

[65] Hence, apart from *Bolton* providing a guide '*about the principles which underlie cases such as this',* that is, where a solicitor wrongly uses funds held in trust, I am not sure that the principles are as applicable to the present case.

[66] In relation to the case of *Lim,* also cited by Counsel for the Applicant, the practitioner was charged with receiving trust funds when not entitled to do so as the judgment explained:

> *'Mr. Lim is charged with misconduct in that he wilfully or recklessly contravened [the section] ... as follows: "A legal practitioner ... who does not hold a practising certificate authorising the receipt of trust money must not receive trust money."*
> *It is common ground that Mr. Lim held a practising certificate when he received the trust monies concerned, but not a practising certificate that authorised him to receive trust money*.'

[67] In Lim, the practitioner notified the relevant bodies that he had opened a trust account '*stating that "my firm has just been instructed in a litigation matter and* ***the gross fees will exceed the $40,000 limit****" ... because he was aware that gross fees in excess of $40,000 would require him to pay an increased premium for professional indemnity insurance'.* A reply from the Legal Practice Board was sent to Mr Lim asking for his authority to complete the form and return it so as to enable it '*to open a Statutory Deposit Account so that interest on the Statutory Deposit Account could be paid by the bank to the Board'*. At that stage no approval had been given changing the status of practising certificate to one that authorised him to receive trust money. In the meantime, the practitioner commenced receiving funds and *'trust monies were* ***deposited into the account on eleven occasions****, the first on 6 March 2003 and the last on 23 April 2003'*. His misconduct was seen as 'unsatisfactory conduct' for reasons as the Tribunal explained:

> *'The turning point in this matter is the renewal form [of his practising certificate] completed by Mr Lim on 14 April 2003.* ***The renewal form showed Mr Lim to be the holder of a practising certificate which did not authorise the receipt of trust monies. Mr Lim altered the renewal form to replace the word "without" trust monies with the word "with" trust monies".*** *It must have become apparent to him at that stage that the Law Institute considered him to at that time hold a practising certificate that did not authorise the receipt of trust monies, and it must have been apparent to him that*

> *the renewal form related to a practising certificate to commence from 1 July 2003. Mr Lim gave evidence, which I accept, that he believed that the Law Institute must have made a mistake, but* ***he did not make any enquiry of the Law Institute at that stage. He simply continued to receive two amounts of trust money after that date.*** *… I would be satisfied that Mr Lim was reckless in his contravention … in respect of the trust monies received on 16 and 23 April 2003. However, those deposits were received a very short time after 14 April 2003 and Mr Lim did act promptly in rectifying the situation when he varied his practising certificate on 29 April 2003 to permit the receipt of trust monies.'*
> [My emphasis]

[68] I would view *Lim* as being in a different category to what has occurred in the present case. In *Lim*, the practitioner **received trust monies on 11 occasions over a period of 49 days (exactly seven weeks) apparently exceeding $40,000.** The last two deposits occurred after he had received his practising certificate renewal form on 14 April (which he wrongly self-amended) and then within two weeks he had properly rectified the matter. Perhaps, he was fortunate not to have been found to be reckless. As noted above, he was reprimanded and fined $500.00

(iii) The Respondent: Brief response

[69] Counsel for the Respondent, in his brief oral submissions in response to those of Counsel for the Applicant on 12th April 2017, summarised his position thus:

(1) There should be no sanction ordered other than an Order for costs with time to pay;

(2) A fine would be harsh in the circumstances, particularly where the Respondent has not worked for some months;

(3) In looking at the totality of the case, there will be no repeat of the conduct;

(4) As for the deterrent effect, this was a mistake;

(5) Even though the Respondent has been a practitioner of many years, he was inexperienced so far as dealing with trust accounts;

(6) The criticism of the Respondent is slightly unfair when all he did was make the deposit as required by the bank.

[70] I did comment to Counsel for the Respondent at the time, that if he was trying to argue a mistake, then it would seem to be a mistake of law not fact, as to what was required. It was initiated by the Bank wrongly opening the account compounded by the Respondent complying with the Bank's request to provide $250.00 as a requirement to establish the account. Therefore, the mistake, (whilst somewhat understandable), was not an excuse. (See ***Ostrowski v Palmer*** (2004) 218 CLR 493; 206 ALR 422; AustLII: [2004] HCA 30, <http://www.austlii.edu.au/au/cases/cth/HCA/2004/30.html>, 16 June 2004.)

(iii) Particular sanctions

[71] The 5th edition of the *'Guidance Note on Sanctions'* (paragraph [23], page 11) has explained that **a reprimand** *'justifies a sanction at the lowest level'*.

[72] The *'Guidance Note on Sanctions'* then explains (paragraph [25], page 11) that in relation to **a fine**:

> *'A Fine will be imposed where the Tribunal has determined that the seriousness of the misconduct is such that a Reprimand will not be a sufficient sanction, but neither the protection of the public nor the protection of the reputation of the legal profession justifies Suspension or Strike Off.'*

It further notes (at paragraph [27], page 12):

> *'In the absence of evidence of limited means, the Tribunal is entitled to assume that the respondent's means are such that they can pay the Fine which the Tribunal decides is appropriate.'*

[73] **I do not believe that this matter justifies a fine. My question is whether it justifies a reprimand.**

(v) Personal mitigation

[74] The 5th edition of the *'Guidance Note on Sanctions'* has noted in relation to personal mitigation as follows (page 18, paragraphs [53]-[54]):

'53. ***Before finalising sanction, consideration will be given to any particular personal mitigation advanced by or on behalf of the respondent.*** *The Tribunal will have regard to the following principles*:

*"**Because orders made by the tribunal are not primarily punitive**, it follows that considerations which would ordinarily weigh in **mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases**. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. .... All these matters are relevant and should be considered. But none of them touches the essential issue, which is **the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness**. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. **But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member**. Membership of a profession brings many benefits, but that is a part of the price." (Bolton above* [at paragraph [16] in Bailii]*).*

54. ***Particular matters of personal mitigation that may be relevant and may serve to reduce the nature of the sanction****, and/or its severity include that:*

- ***the misconduct arose at a time when the respondent was affected by physical or mental ill-health*** *that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation must be supported by medical evidence from a suitably qualified practitioner.*
- ***the respondent was an inexperienced practitioner*** *and was inadequately supervised by his employer.*
- ***the respondent made prompt admissions and demonstrated full cooperation*** *with the regulator.'*
  [My emphasis]

[75] Applying the above criteria to the present case, I have assessed personal mitigation as follows:

(i) '*the misconduct arose at a time when the respondent was affected by physical or mental ill-health that affected his ability to conduct himself to the standards of the reasonable solicitor'* – not applicable;

(ii) '*the respondent was an inexperienced practitioner and was inadequately supervised by his employer'* – not applicable – though I have noted that apart from just under two years in private practice over 30 years ago, the Respondent has worked in government for most of his nearly 40 years as a legal practitioner;

(iii) '*the respondent made prompt admissions and demonstrated full cooperation with the regulator'* **– *applicable***.

[76] Of the three 'mitigating factors' submitted by Counsel for the Respondent legal practitioner in personal mitigation (pages 8-9, paragraphs [37]-[39]), I have taken note of the fact that:

(1) This is a single incident in an otherwise unblemished record;

(2) The Respondent expresses his remorse and *'accepts that he should have been more ware of his responsibilities, although as a public service lawyer for the majority of his career trust accounts were not a matter he was used to dealing with'*.

[77] I have previously noted the submission submitted by Counsel for the Respondent (page 8, paragraph [36](d)), that the Respondent *'made no attempt to hide or dissemble before the Chief Registrar (regulator)'*.

[78] In summary:

(1) The Respondent legal practitioner has pleaded guilty to two counts of ***Professional Misconduct***. The misconduct occurred between April and May 2016;

(2) I have come to the view that **the Respondent's level of culpability in relation to both counts is low and the harm caused has been minimal;**

(3) A reprimand could be appropriate in the circumstances though Counsel for the Respondent legal practitioner has asked that no sanction be imposed so that the practitioner's name is not entered in the Discipline Register as having had a sanction imposed on him.

[79] **I have come to the view that the major fault in this matter lay at the feet of the BSP**. Hence, why the bank was charged, pleaded guilty and was fined in the Suva Magistrate's Court on 2nd September 2016, pursuant to section 28 of the *Trust Accounts Act 1996*. I note that a copy of the Magistrate's judgment was tendered in the present matter by Counsel for the Respondent as part of his mitigation submissions (see *'Mitigation'*, 12th April 2017,Tab 1]. In my careful reading of that judgment, I have not been able to find in either the summary of agreed facts or in the Magistrate's sentencing remarks, any suggestion that somehow BSP was duped or misled by the Respondent. There is also no suggestion of some form of a joint criminal enterprise between Mr Naidke and the Respondent. Indeed, the bank acted on its own volition in wrongly opening the account prior to receiving a letter of approval from the Minister for Justice.

[80] I am reinforced in my view by the *'Transaction History Listing*' tendered at the plea in mitigation hearing on 12th April 2017, that I have set out earlier in this judgment, which clearly shows that **BSP alone opened an account in the name of "Qetaki Advisory & Consultancy" on 8th April 2016 with a nil balance even though BSP had not at that time received a copy of written approval from the Attorney-General to open such an account. Further, on 11th April 2016, BSP alone debited the account $10.00 for stamp duty which took the account into -$10.00 debit. It was then on 13th April 2016, that the Respondent provided $250.00 cash to BSP which was deposited into the account of Qetaki Advisory & Consultancy, following which, on that same date, an email was sent by** Mr Nadike at BSP to both the Respondent and the Legal Practitioners Unit informing them (as the agreed facts in the Magistrate's Court proceedings noted ***'that the Trust Account had been opened by the accused [BSP]'.***

[81] **What the Respondent should have done**, rather than providing on 13th April 2016 the $250.00 cash requested by the bank, **was to have refused to provide the $250.00 and pointed out** to Mr Nadike (or whoever he was dealing with at BSP on that day) **that the account had been wrongly**

opened by BSP as the Bank had not at that time received a copy of written approval from the Attorney-General to open such an account.

[82] The problem was, as the Respondent's letter of 6th October 2016 to the Chief Registrar, makes clear: '***I had no knowledge of or was aware of the requirement*** *to seek the approval of the Attorney General and Minister for Justice before the opening of the Trust Account.'* [My emphasis] (See 'Letter response … dated 06/10/2016', page 2, paragraph iv, 'Application', 24th October 2016, Doc.24, page 45.)

[83] I accept that this may well have been the case. It does not justify what happened but provides an explanation.

[84] Indeed, in a letter dated 10th March 2016 from the Chief Registrar to the Respondent that *'any consultancy firm run by a legal practitioner ought to have a trust account'* and that *'having a trust account is mandatory',* there was no mention of the approval requirements to obtain a trust account. (See 'Letter from the Chief Registrar dated 10/03/2016 sent to Alipate Qetaki', '*Application*', 24th October 2016, Doc.4, p.8.) Similarly, the 'Guide to the Form' and 'Checklist' attached to the 'Application for a Practising Certificate' make no mention. (See 'Application for a Practising Certificate by ALipate Qeatki dated 9th March 2016', '*Application*', 24th October 2016, Doc.3, pp.1-7.) Perhaps, there was another information form. Alternatively, presumably the onus is on the legal practitioner to find out what is required. Indeed, the only written evidence that I have seen mentioning the trust account requirements was the email of 11th March 2016 from Mr Naidke at BSP and, as I have already mentioned, clarity could not be said to be its strong point and one could, perhaps, understand how on one reading of it that a letter from then Chief Registrar agreeing to open a trust account would suffice. The problem is that the onus was on the practitioner to read section 3(1) of the *Trust Accounts Act 1996* which make sit very clear that: '*Before <u>establishing</u> any trust account …, **a trustee shall apply to the Minister and seek the written approval** of the Minister.'*

[85] **In relation to Count 1**, it has been particularised that the Respondent ***'****legal practitioner, on or around 13th April, 2016* ***opened a trust account*** *...* ***without first applying to the Minister for Justice and seeking the written approval of the Minister for Justice*** *pursuant to section 3(1) of the Trust Accounts Act'* and that such *'conduct constitutes professional misconduct pursuant to sections 83(1)(h) and 82(1)(a) of the Legal Practitioners Decree 2009'.* This is in relation to the Respondent providing $250.00 to BSP to be deposited into the account.

[86] I have noted that Counsel for the Respondent legal practitioner has submitted in his '*Mitigation'* submissions, dated 12th April 2017 (at page 4, paragraphs [17]-[18]), that:

> *'17.* ***Mr Qetaki did not open the account****. The only party who can open a bank account is the Bank as even after receiving the AG's approval the Bank could have refused to open the account.*
>
> *18. However* ***once the Bank account was opened Mr Qetaki was then in a position to establish the account****. Establishing consisted, in our submission, of depositing a cheque into the account. It is, we submit, to Mr Qetaki's credit that we were instructed not to pursue a line of argument seeking to define "establish" which is not defined by the Trust Account Act but rather to take a practical and common sense approach and admit fault.'*
>
> [My emphasis]

[87] **I agree that the prohibited conduct in Count 1 is not opening an account**. Rather, the prohibited conduct is pursuant to section 3(1), that is, '*(1) Before establishing any trust account under this Act,* ***a trustee shall apply to the Minister and seek the written approval*** *of the Minister.'* Thus, the prohibited conduct is 'before establishing the account' first ***'applying to the Minister for Justice'*** and seeking ***'the written approval'.*** In any event, I am glad that the Respondent instructed his Counsel not to pursue that line of argument and accepted that whilst the Bank opened the account he was at fault in providing the $250.00 rather than highlighting the problem to the Bank and then a week later writing to the Minister to seek his approval.

[88] **In relation to Count 2**, it has been particularised that the Respondent ***'****legal practitioner, on or around13th April, 2016* ***opened a trust account … without first satisfying the officer in charge of the branch of Bank of South Pacific*** *that he … a copy of the written approval of the Minister, pursuant to section 3(1B) of the Trust Accounts Act …* and that such *'conduct conduct constitutes professional misconduct pursuant to sections 83(1)(h) and 82(1)(a) of the Legal Practitioners Decree 2009'.*

[89] Again, I have noted that Counsel for the Respondent legal practitioner has submitted in his '*Mitigation'* submissions, dated 12th April 2017 (at page 5, paragraphs [19]-[20]), that:

> *'19.* ***Having accepted that he had established a trust account on charge 1 Mr Qetaki also accepts*** *that although there was no intent whatsoever to mislead or deceive* ***he had inadvertently breached section 3(1B) of the Trust Account Act because he had not first satisfied the Officer in Charge by providing him with a copy of the AG's approval****.*
> *20. It is in our submission that Charge 2 is an extremely technical charge and one that adds little to the circumstances of the case. The Bank officer's actions effectively denied Mr Qetaki the opportunity to satisfy the officer, as the officer acted precipitously.* ***Unfortunately for Mr Qetaki when he deposited the cheque, as requested by the Officer, unwittingly established the account without first satisfying the bank officer****. However there was no dishonesty or intentional breach of the Act.*
> [My emphasis]

[90] **I agree that the prohibited conduct in Count 2 was induced by the negligence of the bank officer.** Indeed, the Magistrate noted in their sentencing remarks: *'…your counsel submitted that you had no intention to defraud the legislation but* ***this an oversight of the employee*** *who handled the action'*. Further, as I have previously noted above, in the witness statement taken by the LPU from Mr Naidke, the BSP bank officer who opened the account, he has stated that the '***opening of account*** *…* ***was been my mistake****', 'our bank BSP reprimanded me for* ***my negligence as it was my responsibility'.*** *not any other department of the bank.'* I accept, however, **that the Respondent should have been more careful.**

[91] In relation to sanctions, Counsel for the Respondent has noted in his

'*Mitigation'* submissions, dated 12th April 2017 (at page 5, paragraph [21]), that:

> *'Charges 1 and 2 arise out of the same set of circumstances and constitute the same wrongdoing, (mistake), accordingly* ***the two charges should we submit attract only one sanction****.'*
> [My emphasis]

[92] In support, Counsel for the Respondent has cited (at page 9, footnote 2) the 5th edition of the *'Guidance Note on Sanctions'* that states (at page 7, paragraph 14):

> *'****Multiple allegations involving essentially the same wrongdoing committed concurrently*** *and drafted in the alternative, or numerous similar examples of wrongdoing committed over a period of time, sometimes come before the Tribunal. When some or all of such allegations are found proved,* ***it may be disproportionate and unjust to impose a sanction for each matter****. In such a situation the Tribunal may in respect of matters found proved:*
>
> - ***impose a sanction, determined by the totality of the misconduct****, which is specified as being in respect of all those matters; or*
> - *impose a sanction on the more serious allegation/s, and make no separate order (or sanction) in respect of other more minor matters.*'
>
> [My emphasis]

[93] Counsel for the Chief Registrar did not dispute this submission, that is, that the two counts should be dealt with together. He did submit, however, as noted above, that the sanction that should be imposed should be a public reprimand together with a fine.

[94] **In coming to a conclusion as to the sanction to be imposed, I agree that the two counts should be dealt with together**. As to what sanction should be imposed, I have taken into account the following:

(1) The background to the offending;

(2) The role played by the officer at the BSP;

(3) The oral submissions made by Counsel for the Applicant on 12th April 2017 together with his tendering of the judgment in *Lim* and his citation of *Bolton*;

(4) The written submissions of Counsel for the Respondent (together with

the four annexures thereto being the judgment of the Magistrate's Court of Suva in *State v BSP*; the judgment of the Commission in the matter of *Chief Registrar v Abhay Singh*; the judgment in *Myers v Rothfield*; the Curriculum Vitae of the Respondent), as well as the oral submissions made on 12th April 2017.

[95] I have come to the view that, although the Respondent has pleaded guilty to two counts of professional misconduct, **what occurred and why, must rate at the lower end of the scale.** In that regard, I am reminded of the view of the Solicitors Disciplinary Tribunal of England and Wales where in the 5th edition of its 'Guidance Note on Sanctions', it has stated (at page 10, paragraph 21):

> *'No Order*
>
> *22. The Tribunal may conclude that, having regard to all the circumstances, and **where the Tribunal has concluded that the level of seriousness of the misconduct or culpability of the respondent is low**, that **it would be unfair or disproportionate to impose a sanction**. In such circumstances, the Tribunal may decide not to impose a sanction, save for an order for costs.'*
>
> [My emphasis]

[96] **Accordingly, as I have concluded that the level of seriousness of the misconduct is low, in my view, it would be disproportionate to impose a sanction. Therefore, I have decided not to impose a sanction, save for an Order for costs.**

3. Costs

[97] Counsel for the Respondent legal practitioner has submitted in his '*Mitigation'* submissions, dated 12th April 2017 (at page 10), that there should be *'a limited order for costs to reflect the measured and professional manner in which Mr Qetaki has dealt with the charges'.*

[98] Counsel for the Applicant in his oral submissions on 12th April 2017, submitted, in summary, as follows:

(1) The Applicant had to prepare for a strike-out application that was withdrawn, then prepare for a defended hearing (involving briefing a witness as well as general preparation for trial) which did not eventuate as the Respondent pleading guilty on the day of the hearing;
(2) Accordingly, the Respondent should pay the costs of the Applicant for bringing the proceedings in the sum of $1000.

[99] In his oral submissions made in reply on 12th April 2017, Counsel for the Respondent legal practitioner accepted that the amount sought by Counsel for the Applicant was 'fair' but sought time to pay.

[100] I have taken note of what the 5th edition of the *'Guidance Note on Sanctions'* has stated (at page 19, paragraphs [57]-[58]):

> ***'Costs against Respondent: allegations admitted/proved***
>
> ***General considerations***
>
> *57. The Tribunal, in considering the respondent's liability for the costs of the applicant, will have regard to the following principles, drawn from* ***R v Northallerton Magistrates Court, ex parte Dove (1999) 163 JP 894:***
>
> - *it is not the purpose of an order for costs to serve as an additional punishment for the respondent,* ***but to compensate the applicant for the costs incurred by it in bringing the proceedings*** *and*
> - *any order imposed* ***must never exceed the costs actually and reasonably incurred*** *by the applicant.*
>
> *58. Before making any order as to costs, the Tribunal will give the respondent the opportunity to adduce financial information and make submissions …'*

[101] In assessing costs, I am of the view that the sum quoted by Counsel for the Applicant for the costs of bringing the application ($1,000.00) is more than reasonable.

[102] In addition, I note that the Commission also put aside time for a strike out application and a defended hearing that eventuated into a plea in mitigation. As such, I am of the view that a similar sum of $1,000 should be paid to the Commission.

[103] Accordingly, pursuant to section 124 of the *Legal Practitioners Decree 2009*, I have summarily assessed the costs of the Applicant for bringing the proceedings in the sum of $1000.00.

[104] Similarly, pursuant to section 124 of the *Legal Practitioners Decree 2009*, I have summarily assessed that the Respondent is to pay to the Commission the sum of $1000.00 towards the reasonable costs incurred by the Commission in this matter.

[105] I note that the Respondent has not held a practising certificate for just under 12 months. I note that he undertook consultancy work in Naru between April and October 2016 and, according to the oral submissions of Counsel for the Respondent legal practitioner made on 12th April 2017, the Respondent has earned no income since returning to Fiji – a period of approximately 6-7 months. **Accordingly, I am prepared to agree in part with the submission of Counsel for the Respondent and to allow the Respondent 28 days to pay the fixed costs that I have summarily assessed. That is, both of the above sums are sum to be paid within 28 days of today, that is, by 12 noon on Monday, 15th May 2017**.

4. Thanks to Counsel

[106] Before closing, I wish to record my thanks to the Counsel who appeared before me for their clear and helpful submissions. Apart from being realistic, it saved an enormous amount of time both at the hearing and in my being able to write a judgment over this past Easter weekend – which is to the benefit of both parties, the Commission and the general public that where a plea of guilty has been entered that such proceedings (in the absence of special circumstances) are dealt with as soon as practicable.

[107] In that regard, the standard of submissions tendered by Counsel for the Respondent (supplemented by his succinct oral submissions) is the standard that I expect of all practitioners who appear before the Commission. Submissions that are poorly drawn, meander and do not address the appropriate criteria are of little assistance. By way of contrast, submissions that are succinct, address the relevant criteria, make

clear what is conceded and what is not (and why, with supporting authorities), enable a judgment to be written which can then clearly set out the reasons as to why certain sanctions have or have not been imposed, such that if either, or both, of the parties are of the view that the Commission has fallen into error, that can then clearly be set out for the Court of Appeal.

[108] Similarly, Counsel for the Chief Registrar used succinct oral submissions including the citing of relevant case law making clear his stance and why.

ORDERS

[109] The formal Orders of the Commission are:

1. In the Application filed in ILSC Case No. 004 of 2016, *Chief Registrar v Alipate Qetaki,* I find both counts of professional misconduct have been proven by the Applicant's plea of guilty.
2. As the level of seriousness of the misconduct is low, no sanction is to be imposed. Accordingly, the Respondent's name will not be entered in the Discipline Register.
3. Pursuant to section 124 of the *Legal Practitioners Decree 2009*, the costs payable by the Respondent towards the reasonable costs incurred by the Applicant are summarily assessed in the sum of $1,000.00.
4. Pursuant to section 124 of the *Legal Practitioners Decree 2009*, the costs payable by the Respondent towards the reasonable costs incurred by the Commission are summarily assessed in the sum of $1,000.00.
5. Both of the above sums set out in Orders and above are to be paid within 28 days of today, that is, by 12 noon on 15th May 2017, $1,000.00 is to be paid to the Chief Registrar and $1,000.00 is to be paid to the Commission.

Dated this day of 18th April 2017.

Dr. Thomas V. Hickie
COMMISSIONER