

IN THE INDEPENDENT  
LEGAL SERVICES COMMISSION

NO.003/2009

BETWEEN: CHIEF REGISTRAR APPLICANT

AND: SHERANI & CO RESPONDENT

APPLICATION : Ms V Lidise  
RESPONDENT : Mr B C Patel

DATE OF HEARING: 30<sup>th</sup> April 2010  
DATE OF JUDGMENT: 7<sup>th</sup> May 2010

JUDGMENT

1. The Applicant brings by a way of application before the Commission a complaint of unsatisfactory professional conduct contrary to section 81 and 83(1)(a) of the Legal Practitioners Decree No 16 of 2009.
2. The particulars of the complaint are:- "Sherani & Co a law, firm between the 29<sup>th</sup> day of July 2009 and the 12<sup>th</sup> day of August 2009, abused the relationship of confidence and trust it had with Mohammed Sareem in the matter of the purchase of land from Sun Insurance in which they had advised Mohammed Sareem, which conduct occurred in connection with Sherani & Co's practice of law, falling short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent law firm".
3. On the behalf of the Applicant evidence was given by the Complainant Mohammed Sareem.

4. The Complainant having negotiated a lease of premises at 61 Maala Street, Samabula from Sun Insurance Limited had commenced to occupy those premises. Following upon his occupation of the premises Sun Insurance elected to sell the property. The property was sold via Harcourts by way of a tender process. Mr Arvin Pillay of Harcourts assisted the Complainant with the preparation of this tender.
5. The tender took the form of a sale & purchase agreement [Ex. AS46] whereby an offer in the sum of \$250,000 was made by the Complainant's company, Suva Forklift Hire Limited to purchase the property.
6. The tender was made on 21<sup>st</sup> July 2009.
7. Tenders were considered by Sun Insurance Limited after close of tenders on Wednesday 22<sup>nd</sup> July 2009.
8. The General Manager Operations of Sun Insurance Limited, Lolesh Sharma, says that the company resolved to negotiate with Suva Forklift Hire Limited to facilitate a sale at \$272,000.00 notwithstanding that the highest tender was \$280,000.00. Mr Pillay of Harcourts was engaged to conduct these negotiations with Mohammed Sareem the complainant, on behalf of Suva Forklift Hire Limited.
9. Following negotiations agreement was reached, it would appear, and the sale & purchase agreement was amended to reflect the purchase price of \$272,000.00. The original sale & purchase agreement [Ex. AS46] was executed under seal by Suva Forklift Hire Limited prior to being lodged by way of tender on the 21<sup>st</sup> July 2009.
10. On 28<sup>th</sup> July 2009 when the document was amended to reflect the agreed purchase price those amendments were initiated by Mr Sareem on behalf of Suva Forklift Hire Limited.
11. This sale & purchase agreement was then resubmitted to Sun Insurance Limited who appear to have made further amendments with respect to the deposit (requiring a 10% deposit to be paid), with respect to the settlement date (requiring settlement within 42 days), limiting the default period to 30 days and requiring rent to be paid up until settlement. Mr Pillay conveyed these amendments to Mr Sareem who rejected them.

12. Upon the evidence before the Commission, Mr Sareem indicated to Mr Pillay that he would have discussions with Mr Padam Lala the Chairman of Sun Insurance with respect to the requested amended conditions.
13. It is at this point that the real issue for determination by the Commission arises. That is whether Mr Sareem on behalf of Suva Forklift Hire Limited engaged Sherani & Co to act on behalf of the company with respect to the intended purchase from Sun Insurance Limited.
14. The evidence of Mr Sareem is that on 29<sup>th</sup> of July 2009 in the afternoon he, having sent an email to Mr Nagin, [Ex RS35A] attended upon Mr Nagin for the purpose of engaging him to act on behalf of Suva Forklift Hire Limited on the intended purchase from Sun Insurance Limited.
15. Mr Nagin denies that Mr Sareem attended upon him on 29<sup>th</sup> of July 2009 and in support of that contention tenders to the Commission the Visitors Record Book of Sherani & Co [Ex RS73]. This document shows no record of Mr Sareem having attending upon Sherani & Co's offices on that day and shows that Mr Nagin was in fact engaged with other clients throughout the afternoon of 29<sup>th</sup> of July 2009.
16. Mr Pillay gives evidence that he informed Mr Sareem that Sun Insurance were engaging Sherani & Co to act on their behalf and that they insisted that Mr Sareem have another solicitor. Ex RS4 shows Sherani & Co as the legal firm for the vendor and the solicitor acting as Hemendra Nagin. The particulars with respect to the purchaser are blank.
17. Mr Sareem in his email to Mr Nagin of the 29<sup>th</sup> of July 2009 is clearly aware of the dictate of the Sun Insurance that they use Sherani & Co and that he use a different lawyer [Ex RS35A].
18. Mr Sareem however says that he did attend upon Mr Nagin on the afternoon of 29<sup>th</sup> of July 2009 that he had a conversation with Mr Nagin who at that time was possessed of a file with respect to the intended transaction. He said that Mr Nagin in the course of that conference indicated that it was a simple conveyancing transaction and he saw no difficulty in acting on behalf of Mr Sareem.

19. Mr Sareem also gives evidence that he had on previous occasions engaged Sherani & Co to act on his behalf. These occasions included the purchase of domestic real estate and litigation involving his former employer.
20. Whilst Mr Sareem copies a number of emails to people including Mr Nagin there is no evidence of Sherani & Co having corresponded with Mr Sareem apart from a request from a law clerk seeking details with respect to the intended mortgage advance from ANZ. Sherani & Co having been engaged by ANZ to act in the matter.
21. Subsequent to the 29<sup>th</sup> of July 2009 as a result of the Complainant's failure to pay the full 10% deposit and to agree to the other amendments proposed by Sun Insurance Limited to the sale & purchase agreement, Sun Insurance Limited terminated the agreement. This termination was communicated to the Complainant by letter dated the 12<sup>th</sup> August 2009 from Sherani & Co [Ex RS45].
22. Following receipt of this letter the Complainant forwarded a lengthy email [Ex AS64] to various people at Sun Insurance Limited but that email was not forwarded to Sherani & Co.

#### THE LAW

23. The issue for determination by the Commission is whether Sherani & Co had been engaged by the complainant or not.
24. The issue is considered in **Australian Energy Ltd v Lennard Oil NL** [1986] 2 Qd R 216 at 237 where Thomas J said "Unless it affords direct evidence of the formation of a contract, conduct of the parties is relevant only when it leads to the necessary inference that somewhere, somehow, the parties must have made a particular agreement. It would be preferable to say that the admissions of parties (including admissions by a course of conduct) may be sufficiently clear to persuade a court to infer that there has been a variation of a contract even though no evidence can be produced to show when, where, by whom or in what particular words such agreement was made. The principle is not limited to variation. The formation of a contract, ... the existence of a contract and its basic terms, ... or an additional or varied term ... may be inferred from the conduct of the parties, notwithstanding the absence of the usual evidence of formation and content .... Of course, it is only in cases where the evidence is clear that such inferences will be drawn; but there is nothing in principle which prevents proof of a contract by admissions."

25. The issue is further considered in **Groom v Crocker** [1939] 1 KB 194 Scott LJ said at 222:-  
"The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of the solicitor and client has in fact been established between them."

26. In **Pegrum v Falharly - Supreme Court Of Western Australia (Full Court)** IPP J said:-  
Applying the rule expressed by Thomas J in **Australian Energy Ltd v Lennard Oil NL**, the de facto relationship of solicitor and client has to be a necessary and clear inference from the proved facts before a retainer will be presumed."

#### **STANDARD OF PROOF**

27. The relevant standard of proof to be applied to disciplinary proceedings was considered at length by The Court of Final Appeal of the Hong Kong Special Administrative Region in **A Solicitor and The Law Society of Hong Kong** Final Appeal No. 24 of 2007 (Civil). There the court considered inter alia relevant authorities from the Privy Council, the High Court of Australia and the High Court of New Zealand (whose decision in **Z and Dental Complaints Assessment Committee**, [2007] NZAR 343, was subsequently confirmed by the Supreme Court of New Zealand [2008] NZSC 55).

28. The Privy Council in **Campbell v Hamlet** [2005] UKPC 19 held that the criminal standard of proof was to be applied in all disciplinary proceedings concerning the legal profession.

29. The High Court of Australia in **Rejtek v McElroy** (1965) 112 CLR 517 held that the civil standard of proof applied but said at paragraph 10: "**The "clarity" of the proof required where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved: see *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J..**"

30. And at paragraph 11 the court said: "**No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: see *Helton v Allen* (1940) 63 CLR 691 per Dixon, Evatt and McTiernan JJ.**"

31. The Supreme Court of New Zealand in **Z v Dental Complaints Assessment Committee** [2008] NZSC 55 in applying the flexible application of the civil standard said at paragraph

116: "We acknowledge the serious impact that adverse disciplinary decisions can have on the right of individuals to work in their occupation and on personal reputations. The flexible application of the civil standard will, however, give all due protection to persons who face such proceedings."

32. In *A Solicitor and The Law Society of Hong Kong* the Chief Justice at paragraph 116 said: "In my view, the standard of proof for disciplinary proceedings in Hong Kong is a preponderance of probability under the *Re H* approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability. If that is properly appreciated and applied in a fair-minded manner, it will provide appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation."

33. I am therefore of the opinion that the appropriate standard of proof to be applied is the civil standard varied according to the gravity of the fact to be proved, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong.

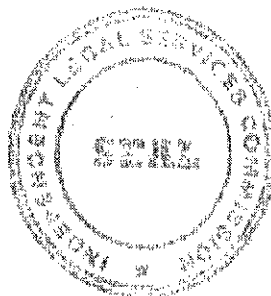
#### CONCLUSION

34. Applying the requisite standard of proof I am not satisfied that on the evidence before me that there is a "necessary and clear inference" to enable a presumption that the Respondent was retained by the Complainant. This being so the application must be dismissed.

#### ORDERS

1. Application dismissed.

  
John Connors  
COMMISSIONER



Dated: 7 May 2010