BEFORE THE INDEPENDENT LEGAL SERVICES COMMISSION

AT SUVA, FIJI

Application No. 003 OF 2011

BETWEEN	:	**CHIEF REGISTRAR**
		Applicant
AND	:	**DIVENDRA PRASAD**
		Respondent

BEFORE	:	**Commissioner, Hon. Mr. Justice Paul Madigan**
Counsel	:	**Mr. A. Chand and Ms. M. Rakai for the Applicant**
		Mr. R. Naidu for the Respondent
Dates of Hearing	:	**28, 29, 30 November 2011**
Date of Judgment	:	**24 January 2012**
Date of Sentence	:	**7 March 2012**

SENTENCE

1. The respondent herein was the subject of three separate complaints alleged against him, which complaints resulted in fourteen separate counts laid by the Applicant herein before the Commission, pursuant to Section 111(1) & (2) of the Legal Practitioners Decree 2009.

2. The first complaint made by one Sashi Raj was the subject matter of five charges of professional misconduct, and one charge of unsatisfactory professional conduct, contrary to Sections 82 & 81 of the Decree, respectively.

3. The second complaint, made by one Madhwa was the subject of six charges of professional misconduct.

4. The third complaint, made by one Ramendra Singh was the subject of two charges of professional misconduct.

5. These charges arising from the three distinct complaints were listed for hearing before the then Commissioner for Legal Services and three dates were set for hearing; viz 28, 29, & 30 November, 2011.

6. The respondent entered pleas of guilty to the six charges arising out of complaint 2, and the Commission therefore conducted an enquiry into the allegations relating to the six charges for the first complaint and the two charges relating to the second complaint, on the 28th November and on two days thereafter.

7. In a detailed and very well reasoned judgment the then Commissioner, applying the correct standard of proof, found that only one charge of professional misconduct and one charge of unsatisfactory professional conduct had been established in respect of the first complaint against the respondent. Four further charges of professional misconduct were found to be not established.

8. The Commission found that in respect of the third complaint, the two charges of professional misconduct against the Respondent could not be made out.

9. Brief facts relating to the first complaint were that; on the 25th March 2009 the complainant Sashi Raj was injured in a motor vehicle accident. He instructed the complainant to act for him in the recovery of damages. The complainant executed a fee agreement with the respondent for a percentage of the total settlement/judgment figure plus VAT and disbursements or such other fees as may be agreed to between the parties.

10. The Commission found that Divendra Prasad in approaching the solicitors for the insurance company proposing a settlement of the matter, he did so without the express instructions of his client, thereby professionally misconducting himself.

11. The Commission went on to find that by not keeping his client informed of the progress of the matter, the respondent had breached the obligation on a solicitor to keep a client informed of progress of proceedings, thereby conducting himself unsatisfactory in a professional capacity.

12. The commissioner in his judgment considered that the professional dereliction of duty on the part of the Respondent in respect of the first complaint was not serious, however, it is an inescapable fact that one instance of professional misconduct and one instance of unsatisfactory professional misconduct have been found established against the Respondent.

13. Such conduct, although reprehensible, would not in the words of Section 88 (1)(b) of the Legal Practitioners Decree, " justify a finding that the practitioner is not a fit and proper person to engage in legal practice." No matter how trivial a case and no matter how busy the practitioner may be, it must obviously be intrinsically accepted practice to seek consent for every act undertaken on behalf of a client in proceedings, as well as to report back to the client on a regular and frequent basis. Why the Respondent did not exercise such prudent contact with the client in this case is unclear.

14. In mitigation, the Respondent submits that he honestly believed that he was doing "an acceptable thing". Rather alarmingly, he submits that the practice of "writing without prejudice letters for settlement without obtaining instructions from the client has been accepted as appropriate in Fiji.". He adds that he was acting in the best interests of his client, who suffered no prejudice as a result of the settlement.

15. While the finding of the then Commissioner who heard evidence relating to the charges must be accepted, and while this Commissioner in sentencing on those findings does not have the prerogative to discuss the ethics of client instruction and contact, it would appear to be axiomatic in a claim for damages that the choice between settlement and litigation be a choice for the client, properly advised, to make himself. It is impossible to say in the absence of litigation whether the client has been prejudiced or not.

16. The finding that the practitioner has engaged in both professional misconduct and in unsatisfactory professional conduct in respect of this complaint leads to the following castigatory orders:

1) the legal practitioner be reprimanded.
2) the legal practitioner pay costs in the sum of F$10,000 to this commission.
3) the legal practitioner pay $87 witness expenses for the hearing.

17. At the first day of hearing, the Respondent practitioner entered pleas of guilty to six charges that the Chief Registrar proffered in respect of the second complaint against him. The six charges were all for professional misconduct as a result of instructions he had received from one Madhwa to claim for damages from Covec (Fiji) Limited ("Covec") for injuries the said Madhwa had received during the course of his employment at Covec.

Background to the second complaint

18. Madhwa the complainant had signed a fee agreement with the Respondent, the agreement being that the legal fees would be on the contingency of settlement or judgment at a percentage figure plus V.A.T. and disbursements.

19. On the 9th September 2005 proceedings were issued on behalf of the complainant in the High Court at Suva by the Respondent. The proceedings were uncontested, Covec having ceased operations in Fiji.

20. On the 8th March 2006 the Respondent obtained a default judgment in favour of the complainant against Covec for damages which were later assessed by the Master of the High Court to be $56,894.41 as well as costs to the complainant of $2,000.

21. The Respondent subsequently took action to execute the judgment by seeking to have a residential property owned by Covec sold. This resulted in a separate and distinct Court Action in which the Respondent sought the following orders:

i) that the highest tender in the sum of $555,000 be accepted and that the property be transferred to the maker of that tender,

ii) that the original damages in the sum of $56,894.41 plus costs of $2,000 be deducted from the sale proceeds and be paid to Diven Prasad Lawyers Trust Account

iii) that a further sum of $8,148.17 being Legal costs and disbursements on the sale of the property be deducted and paid to the Respondent's trust account .

22. On the 15th April 2008, the Master of the High Court granted all of the orders sought on the complainant's behalf including the sum of $8,148, and on the 17th November 2008 the sum of $67,042.60 w paid to the Respondent's trust account from which he deducted the sum of $8,148.17 and kept it. The $67,042.60 was made up of $56,894.41 being the judgment sum, plus $2,000 costs and $8,148.17 being the costs in selling the property.

23. Unfortunately, now in hindsight , the Respondent did not see fit to disburse the $2,000 costs award obtained in the second action to his client, nor did he realise that action to execute the judgment was part and parcel of the total claim for damages, and therefore the original percentage costs agreement should have covered the whole transaction.

24. In addition to charging additional fees for executing the judgment, the Respondent unfortunately again claimed disbursement expenses in the second action, which expenses related to the original action

The Charges

25. The six charges of professional misconduct relating to this transaction can be briefly summarised as follows:

1. The Respondent professionally misconducted himself in that after costs of $2,000 had been awarded in his client's favour he failed to disburse these or a percentage of these to the client.

2. The respondent professionally misconducted himself in that having agreed with his client to charge a percentage of damages claimed; he further billed the client for $5,000 in professional fees specifically for execution of the judgment awarded in his client's favour.

3. The respondent professionally misconducted himself in that in the course of the execution of judgment already made in his client's favour, he erroneously sought the award of $5,000 legal costs in respect of execution of the judgment and was then subsequently awarded those costs, when it had already been agreed that costs would be billed to the complainant at an agreed percentage figure.

4. The respondent professionally misconducted himself in that in claiming disbursements in the execution of judgment proceedings, he wrongly claimed costs amounting to $309.38, which costs had already been incurred in the substantive claim for damages.

5. The respondent professionally misconducted himself in that in the course of the action for execution of the judgment, he wrongly claimed costs of $300 for the preparation of twelve letters which costs should have been included in the agreed fees with his client for the substantive issue.

6. The respondent professionally misconducted himself in that in the proceedings for execution of the judgment, he erroneously claimed legal costs of $750 in respect of 5 court appearances when this amount should have been included as part of the legal costs agreed to be paid I respect of the substantive action.

26. As can be seen several of these charges are duplicitous and despite the six counts which the respondent has pleaded guilty to, the nefarious conduct alleged encompasses two basic elements.

1.) that the respondent erroneously regarded the proceedings to have the judgment executed, as separate and distinct from the default judgment itself and that In this belief he claimed disbursement costs twice, a claim that was awarded, therefore affording him the chance to "double-dip"; and

2.) that the respondent in unexpectedly being awarded costs of $2,000 on behalf of the complainant did not account until this day to his client for these costs.

27. Both positions in legal practice are untenable and unjustifiable and it is hardly surprising therefore that the respondent would readily admit to such malfeasance.

28. In mitigation, the respondent expresses genuine remorse. As soon as the unpaid $2,000 was brought to his attention he wished to pay the full sum plus interest to the client.

    In respect of the costs claim of $8,148.17 he was initially of the mistaken view, he says, that he was entitled to claim these costs but again, when it was pointed out to him, his immediate reaction was to resolve the matter and repay e sum at once to the Commission.

    He claims that the bill of costs was prepared by a staff member and being in a busy practice he relied too much on the staff member and failed to properly check the bill before signing it . He claims the oversight to be an isolated incident and that there is no evidence to suggest that he was deliberately defrauding his client.

29. The respondent has provided character references from both the Profession and Academia, while submitting that the misconduct here was totally out of character.

30. As opposed to lack of communication with a client displayed in the first complaint above, the purposeful withholding of funds rightfully due to the client, along with "double-dipping " as to professional fees are far more serious allegations against the practitioner, allegations which by the pleas of guilt have been established.

31. The range of sanctions available to the tribunal on the finding of allegations established, range from a reprimand to the striking off a practitioner's name from the roll of barristers and solicitors. Each case of course turns on it's own facts and striking off must be reserved for the most serious departure from professional standards. It is now accepted that in deciding on sanctions, a disciplinary Tribunal must act in the public interest and protect the consumer community from wayward practitioners. To serve that purpose the Tribunal must decide whether the subject practitioner is a fit and proper person to continue in practise.

32. As the Supreme Court of South Australia said in ***The Law Society of South Australia v. Murphy*** (1999) SASC 83 :

> *"the Court acts to protect the public and the administration of justice by preventing a person from acting as a legal practitioner , and by demonstrating that the person is , by reason of his or her conduct, not fit to remain a member of the profession that plays an important part in the administration of justice and in which the public is entitled to place great trust."*

33. In the High Court of New Zealand decision in ***Daniels v Complaints Committee 2 of the Wellington District Law Society*** (2011) NZHC 1359 the Court said;

> (sanctions) *"ensure there is deterrence, both specific to the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are give that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession."*

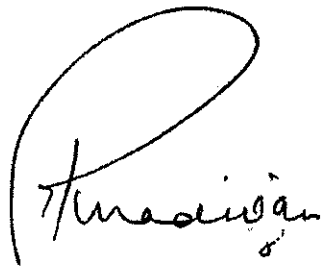
34. That being the case, the wrongdoing displayed by the charges relating to the second complaint is not the most serious of it's kind. The charges arise out of one civil action and there is nothing before the Commission to suggest that the practitioner has in his more than twelve years in a busy personal injury practice ever offended in a like matter before. The Commission, not hearing the evidence on the charges, is not in a position to make findings as to honesty or negligence and can only make appropriate orders consequent to the pleas of guilty and the facts agreed between both the applicant and the respondent. It may be that the Respondent signed the bill of costs prepared by his practice manager in undue haste without checking the detail but even if so, it does not absolve the practitioner from charging an additional professional fee of $5,000 on the proceedings to execute judgment. The retention of the $2,000 costs due to the injured litigant is inexplicable and reprehensible, yet not being a pattern of behaviour on the part of the practitioner , he is not a threat to the public consumer of legal services and therefore it cannot be said that he is unfit to practice law.

35. In the premises and in respect of the second complaint I make the following orders:

(1) The respondent is again reprimanded.
(2) He is to pay a penalty to the Commission of $20,000.
(3) The respondent is to refund the sum of $2,000 together with interest to the complainant Madhwa.
(4) The respondent is to refund the sum of $6,359.38 erroneously claimed to the High Court at Suva to return it to Covec.

Final Comprehensive Orders

1. The respondent is reprimanded
2. The respondent is to pay $30,000 penalty to the Commission.
3. The respondent is to refund $2,000 plus interest to the complainant Madhwa
4. The respondent is to refund the sum of $6,359.38 to the High Court for onward transmission to Covec.
5. The respondent is to pay $87 witness expenses to the Commission.
6. If all monetary impositions are unpaid by the 30th April, 2012, the Respondent's practising Certificate will be suspended until such time as they are all paid.



Justice Paul K. Madigan
Commissioner

At Suva

7th March 2012