

**IN THE INDEPENDENT  
LEGAL SERVICES COMMISSION**

NO. 009 OF 2013

BETWEEN:

**CHIEF REGISTRAR**

Applicant

AND:

**ADISH KUMAR NARAYAN**

Respondent

**Applicant** : Mr. V Sharma

**Respondent** : Mr. C B Young

**Dates of Hearing** : 15th July and 13th August 2013

**Date of Judgment** : 25th September 2013

**RULING**

1. The Applicant has filed one complaint against the practitioner respondent ("the Practitioner") which reads as follows:

*Adish Kumar Narayan a legal practitioner, between the 2nd of June 1994 to the 1st of August 2000 having being instructed to act for the purchaser (Nardeo Kumar) and the vendor (Shiu Prasad) to prepare a memorandum of agreement, prepare and lodge Mortgage and Crop Lien in relation to the sale of Crown Lease number 9019 formerly known as Lot 3 Plan RR 1240, Lot 18 Plan RR 1302 Part of Yaladro (Tovatova) formerly CT 6594 covered by certificate of registration number 222/04095 comprising an area of 7.2438 hectares, then issued a Notice of Demand in favour of the vendor against the purchaser, advertised the said land for Mortgagee Sale, and executed and lodged Transfer by Mortgage in Exercise of Power of Sale, all of which were contrary to the interest of the Purchaser, his client, which conduct was in contravention of Section 82(1)(a) of the Legal Practitioners Decree 2009 and was an act of Professional Misconduct."*

2. Before proceeding to hearing of the complaint, the practitioner makes application to this Commission by way of Summons for a stay of proceedings on the basis of delay and secondly that the proceedings be stayed because neither the charge nor the evidence disclosed reveals any offence contemplated by the Legal Practitioners' Decree 2009 ("the Decree").

3. Counsel for the practitioner filed detailed and helpful submissions in support of the applications and addressed the Commission in support of and in expatiation of those submissions. Counsel for the Applicant filed written submissions in reply along with an Affidavit of a staff member of the Legal Practitioners' Unit of the Chief Registrar's Office.

4. The factual matrix of the complaint is that in early June 1994, the practitioner acted for both the vendor and the purchaser of a parcel of Crown Leasehold land. He prepared and registered the agreement for sale and purchase, a mortgage to secure the entire consideration and a crop lien to

repay the mortgage. FSC directed all proceeds under the lien to the offices of the Practitioner until the end of May 1999 when the Practitioner wrote to the complainant registered proprietor advising him to renew the crop lien which was to expire on 3rd January 2000. The mortgagor fell into arrears and as a result a mortgagee sale of the Lease was advertised by the practitioner in the national Press on 17th June 2000. An offer was received and accepted by the Mortgagee and a transfer pursuant to the mortgagee sale was executed on 1st August 2000, consented to by the Director of Lands and duly registered against the Crown Lease. The complainant on the 31st January 2002 by his then Solicitors wrote to the practitioner enquiring if there was any surplus from the Mortgagee Sale that might then accrue to him as the original mortgagor. [There was indeed nothing owing but an outstanding amount of \$575.63].

5. The original purchaser/mortgagor made complaint to the Chief Registrar on the 24th October 2012 that his Lease had been put to Mortgagee Sale by the Practitioner without his knowledge.

### **THE APPLICATION TO STAY PROCEEDINGS**

6. The application by way of summons is that the proceedings are an abuse of process in that the allegation is so old that prejudice would be caused to the practitioner leading to an unfair trial and "would otherwise be unjust and oppressive for the Respondent to be tried in the circumstances; and /or by reason of the passage of time since the Respondent is alleged to have committed the offending conduct it would, having regard to the circumstances, be unjust or oppressive to allow the matter to proceed".

7. A second limb to the application is that the proceedings be dismissed "as the particulars of charge and the evidence disclosed and relied on by the Applicant.... is "fatally flawed" and does not found any irregularities or other offending conduct sufficient to bring the disciplinary proceedings against the Respondent nor do they otherwise disclose professional misconduct or any other disciplinary act which thereby amounts to a misuse of the due process and process (sic) of the Commission."

8. Nearly all of learned Counsel's submissions both oral and written in support of his client's application deal with this second limb and do not address the question of prejudice occasioned by delay apart from glibly inviting the tribunal to "infer prejudice without proof of specific prejudice" being a phrase taken from dicta in the N.Z. Court of Appeal in *R v Accused* [1993] 2 NZLR 286, 288 where the Court suggested that that could be done where there has been long delay. There are no specific examples of prejudice given.

9. In support of his application to stay or dismiss proceedings, the practitioner by his counsel first takes issue with the charge itself. He submits that the definitions given in the Decree of professional misconduct (which is the allegation made against him under s. 82(1)(a)) are not applicable to the conduct impugned. He claims that the definitions in s.81, s.82 and s.83 do not apply to his client's alleged activities. He submits that this offence is not covered by the transitional provisions in the Decree (s.131) and therefore both currently and historically there can be no offence.

10. He further submits that the misconduct alleged was not at the time proscribed and therefore the Decree cannot operate to reprove the conduct retrospectively.

11. Counsel submits in the alternative that the circumstances in which the complaint was made

are such that to proceed with this complaint would be an "abuse of process"; he suggests that the complaint was not a complaint of there being a conflict of interest but rather a complaint made at a very late stage and out of grievance because the complainant had not received any surplus funds from the mortgagee sale. In developing this point, counsel stresses that there was no suggestion of fraud or dishonesty on the part of the practitioner and that at the time (in 1994) he was merely doing what was allowed to be done by the legislation then pertaining.

12. Counsel's final ground for stay or dismissal of the complaint is that in the entire transaction between the two clients of the Practitioner there was never any conflict of interest, nor was there any risk of client confidentiality being compromised.

## **THE APPLICANT'S RESPONSE**

13. The Applicant by his counsel submits in reply that the Commissioner has no inherent jurisdiction to strike out or stay an application before hearing for the reason that the Decree does not provide for it. He further submits that the provisions of the Decree (and in particular sections 112 and 121 ) make it mandatory for the commission to **hear** a complaint before making any order to dismiss, strike out or stay for abuse of process.

As if not to believe his own submission that there is no power to stay proceedings, counsel then goes on to discuss the common law principles relating to stay of prosecution.

14. Counsel then proceeds in his written submissions to discuss the powers of the registrar to lay complaints and discusses the issue of conflict of interest.

15. He answers in detail the Practitioner's concerns on retrospective application of the Decree and concludes by submitting that the evidence so far disclosed is sufficient to prove that the practitioner acted in conflict of interest and that the matter can be dealt with only by way of hearing.

## **POWERS OF THE COMMISSION**

16. Before analysing the merit of the Practitioner's submissions, the powers of the Commission in respect of stay and or refusal to hear complaints must be clarified.

The provisions of various sections of the Decree lead to the irrefutable actuality that the Commissioner and the Commission have to all intents and purposes the same status and powers of a Judge and the High Court respectively.

- *s. 85(2) requires the Commissioner to be a Judge or qualified to be a Judge;*
- *s.118 affords the Commissioner the same privileges and immunities of a Judge of the High Court;*
- *s122(3) makes orders of the Commission, when filed, to be of the same consequence as an order of the High Court;*
- *s. 128 creates an appeal path only to the Court of Appeal.*

17. Inherent Jurisdiction is a doctrine whereby the High Court (and *ergo* the Commission) can control its own procedures and processes outside any Legislative constraints; for example to ensure that the tribunal is not used abusively or that its processes are not unfairly invoked. There can be no doubt that this Commission does have inherent powers to stay proceedings in appropriate circumstances; whether it be for delay causing unfair prejudice to a practitioner Respondent; to ensure fairness to a particular party; or to prevent abuses of its own processes.

18. For Counsel for the Registrar to submit that there is no Legislative power to invoke the inherent jurisdiction suggests an unfortunate misunderstanding of the nature of the doctrine of inherent jurisdiction.

## DISCUSSION OF THE INSTANT CASE

19. It has been said many times in rulings on application for stay, both in Fiji and abroad that a stay will be granted only in exceptional circumstances. For example in the case of **Dhansukh Bhika and ors** HAM85D.2008S (18 Aug 2008), Shameem J. cited with approval the dicta of Pain J. in **Waisale Rokotuiwai** HAC 0009/95, where he said:

*I accept that this Court has inherent jurisdiction to prevent abuse of its process in criminal proceedings. Concurrent with that is a duty (confirmed in the Constitution) to ensure that the accused receives a fair trial. This is made abundantly clear in the cases cited by Counsel. The ultimate sanction is the discretion invested in the Court to grant a permanent stay. However such a stay "should only be employed in exceptional circumstances" (Attorney General's Reference (No.1 of 1990) [1992 QB 630, endorsed by the Privy Council in **George Tan Soon Gin v Judge Cameron** [1992] 2 A.C. 205").*

20. The practitioner submits that the malfeasance alleged in this case dates back to 1994 and he was charged with the complaint before this Commission only on 18 June 2013, a delay he submits of 19 years. If the matter were as simple as that then his submission of unreasonable delay might well have force in persuading this Commission to stay proceedings on the basis of unreasonable delay. The circumstances however are not that simple. Counsel for the Chief Registrar would submit that the continuing offence runs until 1st August 2000, and given that the complaint was made to the Chief Registrar only on the 24th October 2012, then the delay would not be unreasonable at all. It may well be that the practitioner will be able to persuade the Commission that an offence was not being committed as late as year 2000, however on the papers which Counsel for the practitioner tells the commission he has no objection to, there is an indication of a continuing offence.

21. To found a case for stay due to delay it must be proved that the applicant has been unfairly prejudiced in his defence. The applicant has not provided any evidence of, nor has he made any submission relating to, prejudice that might be occasioned to him as a result of the "delay", if there is in fact unreasonable delay.

22. Irrespective of when the alleged misconduct occurred the charge was laid within 8 months of the complaint being received; this Commission does not consider that the delay is inordinate and there appears to be no prejudice to the practitioner in the preparation of his defence to the allegation.

23. The application for stay of proceedings on the grounds of unreasonable delay is refused.

24. The Practitioner has submitted that the Decree passing into Law in 2009 does not contemplate regulating conduct occurring prior to that year, and says further that the alleged offending is not a matter that the Fiji Law Society ("FLS", the previous disciplinary body) had been seised of, and therefore caught by the transition provisions of section 131 of the Decree. He devotes a large part of his submissions to the topic of retrospective operation of the Decree.

25. With respect to the research and industry of senior Counsel for the practitioner, his

submissions on both counts are misconceived. The transition provisions of s.131 are concerned solely with the mechanics of getting unresolved "Law Society" complaints before the Registrar and then to the Commission if appropriate and there is nothing in those provisions which would even suggest that other previous complaints not with the FLS are "statute barred." The issue of retrospective application of new law is irrelevant and unnecessarily distracting. With the well known history of the FLS' inactivity on complaints against practitioners, the Legislature is, by this Decree, merely putting in place an alternative administrative procedure for supervision of the profession and for the resolution of complaints. There is in the Decree no new draconian duties, nor penalties for omissions placed on practitioners that would unfairly affect them in retrospect. The Decree applies to conduct of practitioners when complained of or detected be that conduct in the indeterminate past or in the present day.

26. The carefully argued submissions on application of the Decree to earlier misconduct raises ingenious and seemingly attractive hypotheses, but unfortunately for the applicant these are struck down by the provisions of section 101(2) of the Decree which reads:

*"(2) A complaint under s.99 may be made, or an investigation under s.100 may be carried out in relation in relation (sic) to any alleged professional misconduct or unsatisfactory professional conduct occurring before the commencement of this Decree".*

27. Nevertheless, the practitioner does rely on one ground that might relate to retrospective application in that he claims that there were no legislative constraints on practitioners in 1994 preventing them from acting for both parties in a conveyancing transaction. It was only by the coming into being of the Legal Practitioners Act 1997 that there was created such a proscription unless there was prior consent from all parties. He submits that it is unfair therefore that a permissible practice then should now be deemed to be misconduct under the new legislation. This submission would be at the very least arguable if indeed the misconduct alleged did occur in 1994 and only in 1994, however it is also arguable and in fact it appears to be so claimed by the Registrar that the offending conduct relates to professional activities (or perhaps omissions) in the year 2000 when a practitioner could not act for both parties without consent. If, after hearing, the Commission were to decide that the misconduct related to events in 2000, then retrospective application cannot be an issue. The point must be raised at a hearing.

28. The only other matter raised by the practitioner which should be decided before the matter goes to hearing is the validity of the charge. As in criminal cases where the information can be shown to be defective and quashed (s.215 Criminal Procedure Decree 2009), it is open to a practitioner before this Commission to demonstrate that the allegation of the Chief Registrar does not state any offence and cannot by any amendment state an offence then it will be quashed.

29. The practitioner is charged with professional misconduct under section 82(1)(a) of the Decree. That section reads:

*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 or diligence; or*

*(b) conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law or*

*occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not fit and proper person to engage in legal practice, or that the law firm is not fit and proper to operate as a law firm.*

*(2) For the purpose of finding that a legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the matters that would be considered if the practitioner were an application (sic) for admission or for the grant or renewal of practising certificate, including those matters contained in section 44 (a) to (j) of this Decree".*

30. The practitioner submits that section 83 which lists 8 examples of conduct which could be seen to be 'unsatisfactory professional conduct' or 'professional misconduct' cannot apply to him because in June 2000 he was merely acting for a mortgagee trying to enforce his security. That being the case, he submits then the conduct has to fall back on the s 82 definitions ('competence and diligence' or 'not being a fit and proper person') which he argues are two limbs that do not apply to his conduct either. Therefore he concludes, there is no offence made out against him.

31. These submissions again ignore the very wide terms of sections 81, 82 and 83. Section 82 plainly provides that professional misconduct **includes** the conduct stated thereon which assume that other conduct might will be misconduct if the Commission finds it to be so. Section 83 with its 8 examples of misconduct (subsections (a) to (h)) specifically says that they do not limit the definitions in s.82. All three sections provide very wide parameters within which the Commission could find any particular conduct to be either unsatisfactory professional conduct or to be professional misconduct. Such conduct need not be confined to competence, fitness to practise, nor to any of the examples set out in section 83. That being so, the charge is properly laid and it will be then for the Commission after hearing to decide whether the conduct was in fact professional misconduct. It must be stressed at this point that in finding that the charge is valid does not in any way foreshadow any finding that the Commission might make on the merits of the charge.

32. The remaining issues relied upon by the practitioner such as the charge being unfair in the circumstances, and whether there was indeed a conflict of interest at the time are issues that can be canvassed in a hearing of this allegation when both parties will be heard, and should the practitioner succeed in making out these objections before the Commission then it could well be that the allegation will be found to be not established or if established, his stated concerns will provide powerful mitigation which will strongly affect any penalty against him. The position is, that although some of the practitioner's grounds may well be found to be in his favour, the grounds advanced do not raise any 'exceptional circumstances' which would cause the Commission to stay proceedings or strike out the complaint.

33. The charge will not be permanently stayed, nor will it be dismissed for abuse of process. The matter will proceed to hearing and it will be called before the Commission on Friday 27th of September 2013 at 10.00am to set a hearing date.

**25 SEPTEMBER 2013**

**JUSTICE PAUL MADIGAN  
COMMISSIONER**