IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

NO. 009 of 2013

BETWEEN :

CHIEF REGISTRAR
Applicant

AND**:**

ADISH KUMAR NARAYAN
Respondent

Applicant : Mr V Sharma and Mr M Waibuta
Respondent : Mr C B Young and Mr Ashnil K Narayan

Dates of Hearing : 7th March 2014 and 16th June 2014
Date of Judgment : 2nd October 201

JUDGMENT

1. The Chief Registrar has made one allegation against the Respondent ("the Practitioner") to be heard before the Commission. The complaint made reads:

> ***PROFESSIONAL MISCONDUCT: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009***
>
> ***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 22204095 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 Execrise 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. The practitioner, by his counsel, had initially made an application to have the proceedings stayed on the basis of delay, or in the alternative to have the charge struck out on the basis of insufficiency of evidence. Those applications were dismissed.

3. The practitioner then agreed a major part of the Chief Registrar's documentary evidence and moved the Commission for a declaration that there be no case to answer.

That application not succeeding for reasons discussed below, the parties agreed that their respective cases be reduced to written submissions to the Commission for final determination on the merit of the Registrar's allegation. This then is the final determination of the allegation.

4. An essential matter raised by the practitioner in each of his applications and again in his final submissions concerns the nature of the proceedings that are heard before the Commission. There appears to be quite a misunderstanding throughout the profession and in particular by the present practitioner, of the exact nature of proceedings in the Commission when an allegation has been referred to it by the Registrar for hearing. The operative word is hearing and not trial. Although the Commissioner and the Commission have the roles of Judge of the High Court and the High Court respectively, hearings before the Commission are hearings by way of an enquiry and not adversarial trials. As such formal rules of evidence do not apply (see section 114 of the Decree) and it will only be in exceptional circumstances that interlocutory applications and no case applications will be entertained. The whole purpose of a hearing before the Commission is to establish the validity of the application made by the Registrar and if so established to then make an appropriate penalty order; at all times seeking to protect the interests of the consumer public, while endeavoring to maintain high standards of ethics and practice within the profession.

5. This can be done only after hearing and seeing ALL of the evidence that is available to the Commission. For that reason an application to dismiss that allegation after the Registrar has presented his evidence is premature. In a trial it could well be, and often is, that a concluded prosecution case does not disclose all the elements of an offence; however in a full hearing with no trial evidentiary restrictions, the presentation of the practitioner's case may well alter the Commission's view of the allegation.

6. The Practitioner is correct when he says that the Commission has in the past dismissed an application for being frivolous and vexatious. This was done in 2012 in the case of ***Vimotaad's Investment (Fiji) Ltd v Koya (***Matter No 005 of 2012) where the Registrar had declined to pursue a complaint made; but the complainant (Vimotaad) used section 111(2) of the Decree to by-pass the Registrar and make his frivolous complaint directly to the Commission. The complaint not being of a failure of professional standards but merely an attempt to use the Commission to obtain monies owing, it was dismissed forthwith as being beyond the jurisdiction of the Commission.

7. This Commission now then turns to the merits of the allegation made by the Registrar.

8. The background facts leading to the complaint are these:

i. On or about the 2ndJune, 1994, the practitioner acted for both the vendor and the purchaser in the sale of a Crown Lease 9019. The sale by the vendor Mr. Shiu Prasad was to the complainant, Mr Nardeo Kumar on a full credit basis secured by a mortgage back and a Crop Lien made payable to the practitioners firm for onward transmission to the mortgagor. The crop lien being about to

expire at the end of 1999, the practitioner wrote to the complainant mortgagor advising him to execute a renewal of the crop lien. In the letter of renewal the mortgagor was warned that if he did not enter into a new crop lien, then it might then be necessary for the Mortgagee to enforce his rights under the mortgage.

ii. In the course of year 2000, the mortgagee (the complainant Mr. Kumar) fell into arrears under the mortgage and a notice of demand dated 1 June 2000 was served on the mortgagee. There being no satisfaction of the demand the practitioner on behalf of the Mortgagor Mr Shiu Prasad advertised a mortgagee sale of the property in the National Press.

iii. In response to the advertisement, an offer to purchase that was acceptable to the Mortgagee was received and as a consequence a Memorandum of Transfer (consented to by the Director of Lands) was executed and registered on the 2nd February 2001.

iv. A year later, on the 31st January 2002, the complainant, having then instructed new Solicitors to act for him, wrote to the practitioner enquiring if there was any surplus owing to him after the mortgagee sale. It is a matter of interest and a particularly relevant fact for the purposes of this enquiry that apart from the request with regard to surplus funds that might be due, no mention was made of the mortgagee sale nor was any complaint made through the new Solicitors.

v. There was in fact no surplus due to the complainant but an amount of $675 still outstanding. The practitioner wrote to the new Solicitors on the 11th February 2002 informing them of this fact.

vi. On the 24th October 2012, the complainant Mortgagor lodged his complaint with the Chief Registrar requesting compensation for the loss of "his land" and that "appropriate action" be taken against the practitioner.

THE PRACTITIONER'S FIRST SUBMISSION ON JURISDICTION

9. As a preliminary point the Practitioner by his Counsel argues that that the mischief complained of does not come within the purview of either section 82 or 83 of the Decree. In effect he submits that the particulars of the complaint against him do not state any offence.

10. This argument was dealt with in some detail by the Commission in a ruling on the practitioner's Application for Stay, (Ruling 009 of 2013 dated 25 September 2013) in which it was held that the examples of misconduct listed in section 83 of the Decree are not exhaustive and in any event any conduct undertaken by the Practitioner need not necessarily be confined to competence or fitness to practice but it may include any conduct that the Commission might find to be professionally blameworthy, dishonourable or unethical.

11. In the case of ***Law Society of N.S.W. v Marando***

[2013]NSWADT267, it was said:

"*However it is well settled that the statutory definition of professional misconduct does not exclude the common law definition emerging from the oft-cited case of* ***Allison v Gen Council of Medical Education and Registration*** *[1894] 1KB 750; that is "conduct which would reasonably be regarded as disgraceful or dishonorable by professional [colleagues] of good repute and competency""*

12. The Commission adopts these definitions and finds that the conduct of the practitioner complained of, if established is well within the disciplinary jurisdiction of this tribunal.

13. That being so, I now turn to consider the merits of the complaint, merits which have been argued in great detail by written submission from both Counsel for the practitioner and Counsel for the Registrar. I am most grateful for the assistance that these very well researched and erudite submissions has provided.

AGE OF THE COMPLAINT AND THE CONSEQUENCES THERETO

14. It has always been the contention of the practitioner that the complaint in effect dating back to June 1994, or perhaps even by consequent dealings to June 2000, is not conduct that the Decree would have jurisdiction over. He submits that misconduct in those years was the responsibility of the Fiji Law Society and furthermore, that the complainant making his complaint as late as October 2012, cannot have been aggrieved by the perception of misconduct but was merely acting out of spite because he received no surplus from the sale of the property, a surplus that he had been led to believe by his new Solicitors that might well be due to him.

15. It is well known within the profession that the Decree was promulgated by the Administration of the time to counter the inertia of the Law Society in dealing with complaints against practitioners. It also established this Commission as a spearhead to enquire into allegations of misconduct and in its role to protect the consumer public to regulate the profession through education and discipline in an attempt to set and maintain high standards of professional ethical conduct.

16. Section 101(2) of the Decree 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".

17. This section was not seeking to make the Decree operate retrospectively but was in effect setting no time limits on complaints which would then allow for the investigation of and enquiry into complaints that were already with the Law Society.

18. There is therefore no merit in the practitioner's submission that the conduct is too "old" to be enquired into. Nor is the motive of the complainant an issue that concerns this Commission. I concern myself as Commissioner with practitioners and their conduct and not with complainants and any motive he or she might have.

THE ALLEGATION

19. By acting for both the vendor and the purchaser of a Crown Lease in 1994, and then in year 2000 acting for the Vendor on a mortgagee sale when the purchaser as Mortgagor defaulted on his mortgage, the Registrar, while not alleging it to be so in the particulars of the complaint, is in effect alleging that this conduct by the practitioner in his professional capacity is conduct to the prejudice of the purchaser complainant arising from a conflict of interest. They submit that from the time that the Practitioner acted for both parties in the transaction in 1994, the potential for conflict was present and that indeed that conflict did arise in June 2000 when the purchaser defaulted on his payments to the vendor under the mortgage which secured the whole sale price. On instructions from the earlier vendor, the practitioner advertised a sale of the leasehold property and when the vendor/mortgagee accepted an offer the practitioner acted to transfer the property to the new purchaser. This was done they say to the prejudice of the earlier purchaser who was also a client of the practitioner.

20. Having dealt with the preliminary "interlocutory" issues of jurisdiction, validity of the allegation in terms of relevance and age, the parties then each turned to their own analysis of the common law on conflict of interest vis a vis a Solicitor and his/her clients. Each side provided detailed case law from England, Australia and Fiji and each had differing views on the import and interpretation of this case law. The Commission will discuss the relevant case law and come to its own considered opinion but before doing so will set out what it considers to be the conflict of interest if any.

WHEN DID THE CONFLICT ARISE?

21. At the time that both parties who appeared to have come to a prior amicable relationship came to the offices of the practitioner, they were clear in their intentions and instructions. Mr. Shiu Prasad ("SP") had agreed to transfer ownership of his leasehold property to Mr. Nardeo Kumar ("NK") who had no funds. It was also agreed that to give effect to this transaction, NK would give a mortgage over the lease back to SP for the entire sale price and that to guarantee the repayments NK would also execute a crop lien in favour of SP to enable cane payments (which were arranged to be paid into the practitioner's trust account) to be applied to the mortgage repayments.

22. This transaction then is claimed by the Registrar to be the first of two conflicts of interest.

23. In early June 2000 the term of the crop lien was coming to an end and the practitioner wrote to the Lienor (NK) requesting him to attend on him to execute a new lien or an extension of the original lien. This the Lienor NK did not do and unhappily he fell into arrears on the mortgage repayments. On instructions from SP, the mortgagee, the practitioner advertised sale of the property by way of a mortgagee sale. A suitable offer was received and as a consequence the land was transferred to a new purchaser and registered against the Leasehold Title. None of these actions, (advertisement of the mortgagee sale, transfer to another) was communicated to NK.

24. This sequence of events (in mid 2000) is alleged by the Registrar to be the second conflict of interest whereby the practitioner is acting for one client to the prejudice of another client.

25. The practitioner, by his Counsel's analysis of the relevant legislation at the time (in 1994) and by his interpretation of the case law (applicable in year 2000) disputes that he was acting in conflict of interest on either of the two occasions.

THE CASE LAW

26. The leading case that is relevant to this scenario is the House of Lords decision in ***Prince Jefri Bolkiah v KPMG (a firm)*** [1999] 1 All E.R. 517 and in particular the unanimously adopted speech of Lord Millet. In that case, the appellant, a Prince of the Sultanate of Brunei had for some period acted as a Chairman of an investment agency of the Sultanate and in that capacity had employed KPMG, an accountancy firm to act as auditors during which time they acquired a great deal of confidential information as to the personal assets and their whereabouts of H.R.H., the Prince. In 1998, the Prince was relieved of his position amidst claims of financial irregulatory and subsequently the Government of the Sulanate desired to instruct the firm KPMG to act for it in its investigation of the Prince and his financial affairs. The Prince sought to have the firm injuncted from so acting because he regarded that they were in conflict of interest having acted for him previously and were privy to a great deal of his confidential information. The court of appeal, found in favour of the firm and the Prince appealed to the House of Lords.

27. Lord Millet (in equating professional obligations of solicitors with those of accountants as in this case) decided that in cases where a solicitor is acting against the interests of a former client, the only duty a solicitor has is to keep confidential any information that the Solicitor may have been privy to in the course of the prior relationship. His Lordship said this (at p.527, b):

> *"Where the Court's intervention is sought by a former client, however, the position is entirely different. The Court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the Solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."*

And later (at p527e):

> *"Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case."*

28. To counter this clear and unanimous statement of the law from their Lordships' House, Counsel for the Applicant Registrar refer the Commission to the later case of ***Simon Winters v Mishcon de Reya***[2008] EWHC2419 (Ch), a decision

of the Chancery Division of the High Court of England and Wales in which Henderson J. in discussing the implications of the ***Bolkiah*** said (at para 93):

> "*The first argument was that the court should intervene in exercise its common law power to supervise the conduct of Solicitors. It was submitted that this power is well established and that Lord Millet cannot possibly have meant to sweep it aside, or leave no scope for its operation, when he said that the "only duty" owed by a Solicitor to a former client is a duty to preserve confidential information. "*

29. Henderson J. then went on to analyse New Zealand and Australian authorities, including the N.Z. High Court case of ***Raats v Gascoigne Wicks*** [2006] NZHC 598; cases which decided that there may be scope for the Court to exercise its traditional jurisdiction over the conduct of solicitors in certain cases which are not covered by the "***Bolkiah*** principle" and that one of the types of case in which it may be appropriate for the Court to intervene is where a solicitor seeks to act for one of two former joint clients against the other. He noted that ***Raats*** decided that such cases were likely to be exceptional but that Commonwealth jurisprudence recognizes the existence of such a jurisdiction "and give effect to it where the fair minded observer would think that the administration of justice required the solicitor not to act".

30. It is noteworthy that Henderson J, while pointing out these arguments and decisions from the Southern jurisdictions chose not to decide the point, but "assumed" that "there may be rare circumstances in which the court will intervene" (para94).

31. Counsel for the Applicant Registrar refer the Commission to other Australian cases where a less restrictive approach to that laid down by The House of Lords has been applied and invites the Commission to follow this less restrictive approach rather than the "end of retainer" argument of Lord Millet in the House of Lords.

32. Until such time as the Supreme Court in New Zealand or the High Court of Australia decides otherwise, then this Commission is bound to follow the unanimous House of Lords decision in **Prince Jefri** rather than the obiter opposing view of a Judge in the Chancery Division of the High Court (in which he didn't really decide anything at all.) Counsel for the practitioner has made reference to three cases in which the High Court of Fiji has followed the decision of the House of Lords (**Aleem's Investment Ltd v Danford**(2006) FJHC 91; **RC Manubhai &Co v Herbert Construction** (2009) FJHC219 and **Abbco Builders Ltd v Fineland Investments** HBC76 of 2011).

ANALYSIS

33. In 1994 when the practitioner was the Solicitor for both parties in this transaction, the Legal Practitioners Act Cap 254 allowed for such a practice because included in the Scale of Costs at the end of the Act is a separate fee for when the Solicitor is acting for both parties. Although it was perhaps unwise for the practitioner to so act, there was no legal or ethical restriction on him in doing so.

34. I bear in mind the evidentiary test in professional disciplinary matters. This was clearly set out in the Hong Kong case of **A Solicitor** v **Law Society of**

H.K.[2008]2HKLRD and adopted by this Commission in **Haroon Ali Shah** [007 of 2011] where it was said:

> "*The test is not proof beyond reasonable doubt, but a varying standard of the civil standard referred to at times as the* preponderance of probabilities". *The more serious an act or omission alleged the more improbable it must be regarded and in proportion to the improbability the evidence will need to be more compelling".*

35. The conduct of the practitioner in advising on and in drawing up the sale and purchase agreement, the mortgage back and the crop lien was conduct permissible at the time. As a very senior practitioner in this jurisdiction it is unimaginable that he would not have advised both parties independently and appropriately on the consequences of the contracts that they were entering into. I find then that this conduct in 1994 was neither professional misconduct nor unsatisfactory professional conduct.

36. I turn then to the second transaction which the Chief Registrar appears to claim is a conflict of interest, even though that is not stated in the charge.

37. In applying the principle of law established unanimously by the House of Lords in **Prince Jefri Bolkiah v KPMG** (supra), the obligations that the practitioner had towards the Mortgagor, Mr Kumar ceased when the contracts entered into were registered and became effective. In Lord Millet's words it "came to an end with the termination of the retainer". It cannot be said, nor is there any evidence before this Commission, that the practitioner as a result of these dealings came into possession of any confidential information which would preclude him from ever acting against Mr Kumar again.

38. In law, there is no conflict of interest here. Furthermore, the question must arise whether when one client defaults in his obligations to the prejudice of another client, how far a practitioner can go to protect the interests of both clients. A defaulting client surely cannot demand that a practitioner does not act to his prejudice. That proposition would go to re-enforce the strict principle expounded in **Prince Jefri**.

39. In the application of the law pertaining on both occasions and in application of the burden of proof pertaining to a very senior practitioner on a very serious allegation this Commission finds that the complaint against the practitioner is **not established.**

JUSTICE PAUL MADIGAN
COMMISSIONER

2nd OCTOBER 2014