

Chief Registrar v Kapadia
ILSCJ07/2016; [2016] FJILSC 8 (21 September 2016)

This summary is not intended to be a substitute for the reasons of the Independent Legal Services Commission or to be used in any later consideration of the Commission's reasons

Facts

This case concerns an allegation of ‘unsatisfactory professional conduct’ in contravention of section 81 of the *Legal Practitioners Act 2009* (*LPA*), made against Mr Viren Kapadia regarding his involvement in the conveyance of two properties from Mr Ram Lagan (the vendor) and Latchan Holdings Ltd (the purchaser).

At all relevant times, Mr Kapadia was employed with Sherani & Co, the firm which was acting for the purchaser in the transaction. The circumstances which gave rise to the present complaint arose because of the vendor’s untimely death prior to settlement and the delay thereafter in the completion of the transfer. Mr Kapadia had quite appropriately advised the purchaser to lodge a caveat in order to protect its interests in the sale, and had consequently witnessed the signing of the relevant declaration made by Mr Rohit Latchan (in the capacity of a company director).

The initial complaint was made by the son of the deceased vendor, who had also instigated proceedings in the High Court relating inter alia to the validity of the sale and purchase agreement itself. The applicant’s case was based upon the following two assertions:

1. that Mr Latchan, because of his declared bankruptcy, was not competent at law to act for the purchaser company – supposedly because such conduct was proscribed by section 189(1) of the *Companies Act 1985* (*CA*); and
2. that the financial status of a declarant was something into which Mr Kapadia ought to have made full and proper enquiries prior to the execution of the caveat document, and that his failure to do so constituted unsatisfactory professional conduct.

Judgment

The Commissioner was of the view that the charge against Mr Kapadia should be dismissed, on two separate bases:

1. the applicant had not established a sound legal basis for the proposition that a failure to enquire into the status of a declarant could ever ‘[fall] short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner’ (*LPA* s 81); and
2. even if there were certain circumstances in which it could, the applicant had not proved its present case to the requisite standard, namely upon the ‘balance of probabilities’.

On the first basis, the Commissioner held that whilst it was undoubtedly within the relevant ‘standards of competence and diligence’ for practitioners to correctly administer declarations in the manner prescribed by section 3 of the *Statutory Declarations Act 1971*, it would go too far to impose upon them ‘a continuing obligation ... to monitor the financial and legal status of their clients’ (see *Harlow Finance & Leasing Ltd v Sterling Nominees Ltd* [2001] NZHC 511 [18]). In reaching this conclusion, the Commissioner drew parallels with an action in tort for professional negligence, wherein the duties of a practitioners relate directly to the terms their retainer (see *Midland Bank Trust Ltd v Hett Stubbs and Kemp* [1979] Ch 384, 402). As such, it would be an undesirable and unnecessary extension to the law to expect a practitioner to go behind the word of their client. This means that the onus rests firmly with the client to ensure that they are complying with applicable statutory proscriptions, such as that contained in section 189(1) of the *CA*.

On the second basis, the Commissioner held that even if some circumstances might necessitate a practitioner making further enquiries about a declarant’s status, Mr Kapadia’s failure to do so in the present case was justified for two reasons. Firstly, there had been contemporary resolution of the directors of the purchaser company authorised Mr Latchan (as Chief Executive Officer) to sign on behalf of the company. Secondly, there existed previous documentation had been witnessed by other experienced practitioners from Sherani & Co without question (therefore raising no suspicions about possible issues with capacity). As such, it was not possible to conclude that, on the balance of probabilities, his omission constituted unsatisfactory professional conduct.