

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

**NO. 008/2009
NO. 001/2010**

BETWEEN: CHIEF REGISTRAR

Applicant

A N D: HAROON ALI SHAH

Respondent

**Applicant: Ms V. Lidise & Mr A. Chand
Respondent: Ms N Khan**

**Date of Hearing: 30th September 2010
Date of Judgment: 30th September 2010**

JUDGMENT ON SENTENCE

1. The Respondent has being found guilty of three counts of professional misconduct and one count of unsatisfactory professional conduct.
2. The most serious count of professional misconduct is that resulting from the conviction for the assault of his opponent's client in the precincts of High Court Lautoka. The conviction was on the 6th June 2005 and the assault occurred on the 14th February 2005.
3. A further count of professional misconduct and the count of unsatisfactory professional conduct arise from the Respondent's conduct in a conveyancing transaction when he was acting for both the vendor and the purchaser. The transaction extended from the 23rd October 2006, when instructions were received, until the 20th March 2007, when the transfer was registered.
4. The third count of professional misconduct arises in connection with the administration and disbursement of trust funds between 1995 and 2008.
5. Section 121 of the Legal Practitioners Decree sets forth the powers of the Commission upon a finding of professional misconduct or unsatisfactory professional conduct. The ultimate sanction is that the legal practitioner's name be struck from the roll and the most lenient penalty is a reprimand.

6. When considering the appropriate penalty it is necessary to consider not only the nature of the misconduct but also those of the following issues as are relevant:-
- (i) The frequency of the misconduct and prior finding of misconduct;
 - (ii) The lawyers age and professional experience;
 - (iii) The lawyers attitude;
 - (iv) The lawyers (lack of) appreciation of wrong doing;
 - (v) Testimonials and opinions by third parties;
 - (vi) Illness and stressors suffered by the lawyer;
 - (vii) The loss suffered by third parties as a result of the lawyers misconduct;
 - (viii) The loss already suffered by the lawyer personally as the result of the misconduct.
7. If satisfied that the conduct is an isolated blight on an untarnished professional career then a less severe penalty may be appropriate - Legal Practitioners Conduct Board v Nicholson (2006) 243 LSJS 293.
8. The level of experience may be relevant and if may, if the misconduct is a one-off in and otherwise unblemished lengthy professional career, support the conclusion that it was entirely out of character and does not warrant a severe disciplinary sanction, dependant of course on the seriousness of the misconduct - Chamberlain v Australian Capital Territory Law Society (1993) 118 ALR 54.
9. It was said in New South Wales Bar Association v Evatt (1968) 117 CLR 177 at 184
- "The Respondent's failure to understand the error of his ways of itself demonstrates his unfitness to belong to a profession where, in practice, the client must depend on the standards as well as the skill of his professional adviser."*
10. The main purpose served by disciplinary proceedings is to protect members of the public from misconduct by lawyers - Southern Law Society v Westbrook (1910) 10 CLR 609 at 622. This recognizes the public interest in the integrity of the members of the profession, so central to public confidence in the legal system. In New South Wales an appellate judge branded the protective function as a "recognition of the social value in the availability of the services provided to the public, combined with an understanding of the vulnerability of many who require such services" - New South Wales Bar Association v Meakes (2006) NSWCA 340.
11. The aim of professional disciplinary proceedings is a means to safeguard the reputation of the profession - Southern Law Society - Westbrook (1910) 10 CLR 609. Related to this are the objectives of maintaining proper standards in the profession and setting an example to other lawyers - De Pardo v Legal Practitioners Complaints Committee (2000) 170 ALR 709. It cannot be denied, to this end, that a disciplinary sanction may deter other lawyers from engaging in the impugned conduct and also deter the lawyer disciplined and so indirectly protect the public against like defaults. It is said that this

means that a court or tribunal, in making a disciplinary order, takes account of the message that the order conveys to other lawyers, particularly young lawyers – Re Drew (1920) 20 SR (NSW) 463 at 466.

12. The fact that professional disciplinary proceedings are directed at a chiefly protective objective does not deny that they may generate an outcome that is punitive in effect. The courts have not denied the deterrent effect of disciplinary orders, but have emphasized the link between deterrence and the central protective aim – Law Society of New South Wales v Foreman (No 2) (1994) 34 NSWLR 408 at 441. Protection of the public may thus justify a "punitive response". Such a response shows the grave view the court or tribunal takes of the misconduct; a failure to mark its censure and disapproval via a punitive response in the case of grave misconduct may be viewed by the public as almost tacit approval – Legal Practitioners Conduct Board v Boylen (2003) 229 LSJS 32. The imposition of a fine, although apparently punitive in effect, may have a protective effect in discouraging other lawyers from misconduct – Re a Medical Practitioner (1995) 2 Qd R 154, or at least a deterrent effect on the lawyer who has been fined. It may even operate, in some circumstances, to deprive the lawyer of monetary gain that was secured by the unprofessional conduct – Legal Services Commission v Mullins (2006) LPT 012.

13. As far back as 1917 Scrutton LJ in Moody v Cox [1917] 2 Ch 71 at 91 said :-

"it may be that a solicitor who tries to act for both parties puts himself in a position that he must be liable to one or the other whatever he does ... it would be his fault for mixing himself with the transaction in which he has two entirely inconsistent interests and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them."

14. Lawyers owe a fiduciary duty to give undivided loyalty to their clients, which cannot be fulfilled if that duty is owed to two or more parties whose interests are in opposition. Wilson JA said in Davey v Woolley, Hames, Dale & Dinwall (1982) 35 OR (2d) 599 at 602

"the underlying premise ... is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between ... his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith."

15. In Marron v J Chatham Daunt Pty Ltd [1998] VSC 110 Byrne J said

"the difficulty ... which must be acknowledged is that where a party is contemplating

retaining a solicitor who acts for another ... the party will often not recognize a conflict which is possible, pending or even then existing. It is the solicitor who should in the normal course be the first to apprehend this. And so the parties rely upon the solicitor, not only to have the integrity to withdraw when conflict arises, but also the perception to sense its pendency before it arises in fact. The solicitor, then, must be constantly vigilant and alert to perceive the possible emergence of a conflict of interest ... What is involved here is that the solicitor is entrusted by the client with the task of acting as a lookout for and then as an arbiter of this conflict and, where this does or is likely to arise, perhaps to act in a way which may be contrary to the solicitor's own interest ... This is a trust which not every client would be content to confer upon another person, even a solicitor. It is one which a client should not be expected to give without a proper understanding of its implications."

16. Counsel for the Respondent has emphasised that the assault occurred following severe provocation by the victim and that contact was in fact instigated by the victim.

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17. It is submitted that the Respondent has held a practising certificate for 28 years without any prior incidents and that this incident occurred five and a half years ago and that nothing has occurred since.

18. It is further submitted that the Respondent is a community minded person, being a former member of parliament and has acted as Attorney General of Fiji.

19. Counsel for the Applicant had directed the Commission's attention to authorities which require the Commission to look not at the Respondent's fitness to hold a practicing certificate at the time of the commission of the offence leading to the conviction but today - Legal Practitioners Conduct Board v Morel [2004] SASC 168, The Council of New South Wales Bar Association v Sahade [2007] NSWCA 145.

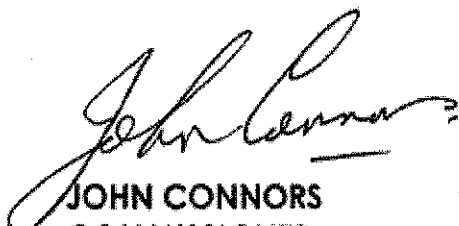
20. The conduct is however in my opinion of such seriousness that a significant penalty needs to be imposed to act as a deterrent and to ensure there is no reoffending by the Respondent.

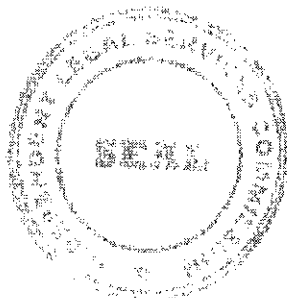
21. A period of suspension is therefore called for however I propose to effectively suspend that sanction for 12 months provided a significant amount of pro bono work is performed by the Respondent.

22. The remaining complaints involve client's being out of pocket and it is acknowledged that it is not the role of a tribunal such as this to look to fines as source of revenue and on that basis I propose that the former clients be compensated for their loss or have some compensation for that loss without any fines being imposed.

ORDERS

1. The Respondent's practising certificate is conditioned from today as follows:
 - (i) The Respondent is to undertake five criminal trials in the High Court Lautoka on behalf of the Legal Aid Commission at no cost before the 1st of October 2011. Such trials are to have an estimated duration of not more than five days each.
2. The trials are to be selected by the Director, Legal Aid Commission.
3. The condition is to be removed on the Director Legal Aid Commission certifying to the Chief Registrar that the five trials have been satisfactorily completed
4. Such the condition not be removed on or before the 1st of October 2011 the Respondent's practising certificate shall be suspended for five months from that date without further order.
5. The Respondent is to pay the sum of \$7,000 to the Commission for payment to Joo Young Lee and Soon Ah Huh.
6. The Respondent is to pay to this Commission from his trust account the sum of \$4,060 and from his office account the sum of \$778 for payment out to Jagat Singh.
7. The Respondent is to pay to this Commission witness expenses totalling \$2,881.65.
8. The payments in orders 5, 6 and 7 are to be made within 28 days, failing which the Respondent's practising certificate is suspended without further order until payment is made.
9. In the event that the Respondent is unable due to circumstances outside his control to complete the five criminal trials referred to in order 1 prior to the 1st of October 2011 liberty is granted to apply to this Commission.


JOHN CONNORS
COMMISSIONER



30 SEPTEMBER 2010