

**IN THE INDEPENDENT LEGAL SERVICES COMMISSION**  
**AT SUVA**

ILSC No. 001 of 2021

**BETWEEN:** CHIEF REGISTRAR

APPLICANT

**AND:** ULAMILA FA TUITUKU

RESPONDENT

**Counsel:** Mr. S. Ali for the Chief Registrar  
Mr. J. Rabuku for the Respondent

**Date of Hearing** : 27<sup>th</sup>-29<sup>th</sup> July 2022

**Written submissions** : 22<sup>nd</sup> September 2022

**Date of Ruling** : 23<sup>rd</sup> January 2023

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**JUDGMENT**

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**Introduction**

1. On 16<sup>th</sup> December, 2020, an Application was filed by the Chief Registrar setting out one allegation of Professional Misconduct Conduct against the Respondent as follows:

**COUNT 1**

**Professional misconduct:** *Contrary to Section 82 (1) (a) of the Legal Practitioners Act 2009.*

**PARTICULARS**

*ULAMILA FA TUITUKU a Legal Practitioner being the principal practitioner of LAW SOLUTIONS, on the 5<sup>th</sup> day of June, 2020 borrowed money in the sum of \$300.00 from her client namely JINCHAO XU and therefore conducted herself in a manner which breached Rule 1.6 of the Rules of Professional Conduct and Practice and is an act of professional misconduct.*

2. This application was first mentioned on the 25<sup>th</sup> January, 2021 on which day the Respondent was granted time to endeavor to settle the matter however, as it did not

materialise, the matter was taken up for hearing on the 27<sup>th</sup> July, 2022. Upon explaining the allegation and the Respondent not accepting liability, the inquiry proceeded.

3. The complainant, Jinchao Xu was called on behalf of the Applicant and the Respondent testified on her behalf and with the evidence of these two witnesses the inquiry was concluded. Time was granted for written submissions and the Respondent tendered the same on her behalf on 22<sup>nd</sup> September, 2022 and the matter was set for judgement/determination. Accordingly, my judgement/determination upon the consideration of the evidence, exhibits and the written submission, is thus.
4. To establish and prove the allegation of Professional Misconduct as preferred the Applicant should satisfy on the civil standard that the Respondent did borrow \$300 from Jinchao Xu when any relationship of solicitor and client existed between them.

#### **Summary of Evidence**

5. The complainant has come to Fiji in 2008 as an employee in a Fishing Company, which he quit in 2015 and started his own business. He had acquired citizenship subsequently and since 2015 all his legal matters have been attended to by Ms. Fa.
6. According to the evidence of **Mr. Jinchao Xu** the Complainant, he has known the Respondent practitioner, Ms. Fa since 2015 and it was a Real Estate Agent who introduced the Respondent to the Complainant and the Respondent since then attended to his legal matters when required.
7. In 2020, he obtained her services in respect of an agreement to sell his Yacht "MV Boardroom", and it was on 5<sup>th</sup> of July 2020, a Friday he had so engaged her services for the said matter. The legal fee according to him was \$200. That evening (or late afternoon) the Respondent Ms. Fa had called him and requested for \$300 (cash). The Complainant was reluctant to give this money initially but as she promised to repay and return the said sum as a loan within the immediate week following, he had given her the money. Then a staff of the Respondent was sent to his office and \$300 was collected. Upon requesting, a receipt had been provided to the Complainant (vide-exhibit AE 1). The following week the Complainant has called and requested for the repayment when the Respondent informed that she cannot repay the said amount as

she had provided extra legal services. As she was not returning the money the Complainant had immediately on 2<sup>nd</sup> July, 2020 made a complaint to the Legal Practitioners Unit (LPU) of the Chief Registrar's Office.

8. After refusing to repay, Ms. Fa has sent a further invoice bearing No.038/20 which had been handed over to the Complainant after the 12<sup>th</sup> July, 2020 (exhibit AE4). Complainant says that she was not his family. He admits her cousin was working for him and that Ms. Fa used to visit her cousin and also meet up with the Complainant regularly.
9. On the 2<sup>nd</sup> June, 2020 he admits meeting Ms. Fa on the transfer of his boat and he had met her with the prospective buyers and Indian national and a Chinese national. He had met Ms. Fa at 29 Pender Street and held the discussion there. It was suggested she quoted \$500 which Xu denies and his position is that the sum agreed was \$200. He also says that she requested for \$300 from other party. It was suggested that the \$200 was for the Knolly Street property matter which the Complainant denied and said it was inclusive for the boat agreement.
10. It is common ground that the Complainant had moored a boat at the Yacht Club and had to pay mooring charges and he had also entered into an agreement to sell the boat. The Yacht Club had issued a bill of cost through Prasad Lawyers for a sum of \$2,500. It had been negotiated and brought down to \$1,000. Ms. Fa's services had been obtained and she had negotiated this matter. Thereafter, the boat was released to the new owners. The Complainant says that Ms. Fa was paid by the buyers as well but is not aware as to the exact amount. He admitted that the purpose of complaint to the LPU was to get Ms. Fa to return the \$300 taken as a loan. The applicant concluded their evidence with this witness.

#### **Respondent's evidence**

11. According to the Respondent, she has been in active practice for 30 years with her office at Pender Street since 2003 and known the Complainant whom she refers to as *Jeffery*. She had first come into contact with him due to a property transaction and introduced by a Real Estate Agent. Since then, they have been having a cordial and friendly relationship which Ms. Fa describes as a '*love-hate relationship*' and they used to visit each other on a regular basis and also, she provided legal advice as and

when he requested, mostly free of charge. The continued connection has also been due to her cousin been employed by the complainant.

12. Ms. Fa says that Jeffery (Xu) was never a client of Law Solutions her law firm and she explained the procedure of engaging a client at her law firm. She further elaborated that the Complainant was just a friend and that she had no files for him at her office, nor any letter of engagement and no retainer as at the day she obtained money. As for the sequence of events connected to this transaction, she says that on Tuesday the 2<sup>nd</sup> July, Jefferey came to her office in the afternoon and requested that she sort out and attend to two matters. Firstly, the withdrawal of an offer for sale of No. 41 Knolly Street property and secondly the sale and purchase agreement of the boat. She had quoted \$500, however, the Complainant had refused and said he had no money but only paid \$200.
13. Ms. Fa's position is that the first item will normally cost to about \$600 to \$800 and her charges per hour is around \$500. She however has agreed to attend to these matters for \$200. She had drafted the sale and purchase agreement and given a draft on the 2<sup>nd</sup> July. With the handing over of the draft and receiving \$200 the professional engagement between her and the Complainant ended there, she says.
14. On the 3<sup>rd</sup> June she was informed that Mr. Xu was waiting outside and when she checked he had wanted an invoice for the \$200 he paid; Invoice No. 036/20 was issued. Then on Friday around 3pm the Complainant had come with two others and wanted to see the agreement; despite it been during curfew (COVID), she had come to the office and made available the agreement to the two persons who came with the Complainant. They have signed the same and left.
15. Then she says that the Complainant inquired from her if he knew anyone at the Suva Yacht Club. She says that she asked for \$300 which he refused but admits that it was given later. However, the Complainant had requested for a paper (receipt) which she had then prepared and sent to his office through her clerk. She admits that there was an undertaking to repay the \$300 (vide exhibit AE 1). This transaction she says was between friends and she had obtained \$300 on Friday.

16. On the following day, Saturday 6<sup>th</sup> of July when she was at her house at Samabula, the Complainant had wanted her to urgently help him with the Yacht Club to give access to the buyers of the boat. There had been an arrears of mooring fees for 12 months which the Yacht Club was demanding an upfront payment. She had contacted Mr. Devendra Prasad the Solicitor and also spoken to the Commodore at the Yacht Club and sorted out the matter. Around 10.30AM she had met the Complainant and told him that she will bill him for these services that would include calls taken to the Commodore, emails sent and letters prepared.
17. The following Monday or Tuesday, the Complaint had come with a bill of costs from Devendra Prasad Lawyers demanding the payment of \$2,600 which Ms. Fa had negotiated and had it reduced to \$1000. Then she had invoiced him for these services in a sum \$872 (including \$72 as VAT) by invoice number 038/20 (exhibit AE3) which was dispatched to the Complainant which he did not accept. However, he had called her the following day and alleged that she had not done any work and that she had not returned the \$300, when she had informed him that he has not paid \$800 as her fees. With this conversation she says their '*relationship had fallen flat*' and a complaint was made to the LPU against her.
18. Ms. Fa finally said that she feels strongly about this matter and she feels that it is a *witch hunt* and that she had been a practitioner for 30 years and she is saddened by these events. She also said that the LPU is not a debt collecting agent.

**Facts not in dispute and are common ground**

19. On the consideration of the totality of the evidence of both the complainant and the practitioner following are common ground and are not in dispute.
  - a. The Respondent was and is a legal practitioner;
  - b. The Respondent and the complainant were known to each other from around 2015 and the complainant first met her in relation to a lease of a property introduced by a Real Estate Agent named Andrew.
  - c. Since then, the Respondent did attend to legal matters and provided legal advice to the complainant as and when he sought her advise/services.
  - d. Until 2020 their relationship was cordial apart from the Respondent attending to legal matters, they have been in friendly terms visiting and associating each other as friends.

- e. On 3<sup>rd</sup> June, 2020 the Respondent had attended to the legal matter in respect of the withdrawal of the offer to purchase a property at Knolly Street and Deed of agreement for the sale of MV Boardroom for which the Respondent had charged and was paid \$200 as her fees.
- f. The Respondent has obtained a sum of \$300 from the complainant on the 5<sup>th</sup> June, 2020 and issued a receipt of acknowledgement with an undertaking and promise to repay the same on or before 12<sup>th</sup> June. 2020 (Exhibit AE1).
- g. The Respondent has provided the services in relation to the release of MV Boardroom including corresponding with the Royal Suva Yacht Club, discussions with Mr. Spencer, email correspondence in this respect, discussion with Mr. Prasad for the reduction of the legal fees.
- h. The Respondent issued a bill of cost in a sum of \$872 by invoice dated 7<sup>th</sup> June, 2020 and number 038/20 as legal fees for the services provided in relation to the release of MV Boardroom.
- i. Borrowing of \$300 by the Respondent was a loan and was to be paid back on the 12<sup>th</sup> June, 2020.

**Exhibits marked and produced**

20. The following documents were marked and produced as exhibits in the course of this inquiry;
- (1) Exhibit AE1- acknowledgement receipt for \$300 dated 5<sup>th</sup> June, 2020 given by Ms. Fa the Respondent,
  - (2) Exhibit AE2- Letter of explanation dated 02<sup>nd</sup> July, 2020 written by the Respondent to the Chief Registrar.
  - (3) Exhibit AE3- invoice number 038/20 dated 7<sup>th</sup> June, 2020 issued by Law Solutions to the Complainant for a sum of \$800 Legal Fees for MV Boardroom matter.
  - (4) Exhibit AE4- invoice number 036/20 dated 3<sup>rd</sup> June, 2020 issued by Law Solutions to the Complainant for a sum of \$200 Legal Fees for withdrawal of offer to purchase and agreement for sale of MV Boardroom matter.
  - (5) Exhibit AE5- letter of explanation dated 7<sup>th</sup> July, 2020 written by the Respondent to the Chief Registrar with the following annexes: emails dated 5<sup>th</sup> June, 2020 and 10<sup>th</sup> June sent to Diven Prasad; and letter dated 5<sup>th</sup> June, 2020 sent to the Commodore of the Yacht Club; and letter dated 6<sup>th</sup> June, 2020 sent to Mr. Diven Prasad.

(6) Exhibit AE6- letter of explanation dated 20<sup>th</sup> August, 2020 written by the Respondent to the Chief Registrar.

**The Respondent-Practitioner's position/case**

21. On the reading of the written submission tendered on behalf of the Respondent, it appears she has taken up the following arguments and positions:
- (1) That she had not breached section 82(1) as the alleged conduct does not involve failure maintain a reasonable standard of *competence and diligence*;
  - (2) That she does not have any beneficial interest in the complainant as stated in Rule 1.6 (para 7 of the written submission);
  - (3) That a solicitor and client relationship did not exist between her and the Complainant.

As regards (1) and (2) above, the said submissions are legal issues based on the interpretation of term “professional misconduct” and the interpretation of rule 1.6 which will be dealt when the interpretation of “professional misconduct” is considered. As for submission number (3), the existence or non-existence of the solicitor and client relationship is more of a question of fact that will be considered and determined upon the evaluation of the evidence at a later point.

**Professional Misconduct contrary to Section 82 (1) (a)**

22. The allegation preferred against the Respondent is that of *Professional misconduct* contrary to Section 82 (1) (a) of the Legal Practitioners Act. However, the LPA does not have an exhaustive definition of the term “*Professional Misconduct*”, but an inclusive definition is found in a descriptive form in sections 82 (1)(a), 82(1)(b), 83(1) and 83(2) of in Part 9, Division 1, of the LPA as follows;

*“Professional misconduct*

*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 and diligence;*

*(b) ..... ”*

and,

“83.—(1) Without limiting sections 81 and 82, the following conduct is capable of being "unsatisfactory professional conduct" or "professional misconduct" for the purposes of this Decree:

(a) conduct consisting of a contravention of ..... the rules of professional conduct and practice.

(b)-(h) .....

and,

“83.—(2) 'professional misconduct' includes malpractice, and 'unsatisfactory professional conduct' includes unprofessional practice or conduct.”

23. Section 82 of the LPA defines '*professional misconduct*' inter alia to include;
- (a) unsatisfactory professional conduct of a legal practitioner, if the conduct involves a *substantial or consistent failure to reach or maintain* a reasonable standard of competence and diligence; or
- (b) conduct of a legal practitioner, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law, that would justify a finding that the practitioner is *not a fit and proper person* to engage in legal practice.
24. Section 83(1)(a) to (h) of the LPA specify conduct and violations capable of constituting professional misconduct or 'unsatisfactory professional conduct' are listed which *inter alia* include the contravention of the provisions of the LPA, the regulations and rules made thereunder, or *the Rules of Professional Conduct*. The said list is not exhaustive but is inclusive.
25. Further, “malpractice” is included to 'Professional misconduct' whilst “unprofessional practice or conduct” is included to 'unsatisfactory professional conduct' by virtue of section 83(2) of the LPA. However, '*malpractice*' and '*unprofessional practice or conduct*' are not defined.
26. In **Chief Registrar V. Adish Kumar Narayan** [ILSC No. 009 / 2013] (25<sup>th</sup> September 2013), the scope of sections 81-83 was considered and it was expounded thus;
- “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”.

27. In **Chief Registrar V. Adish Kumar Narayan** ILSC No. 009/2013 (2<sup>nd</sup> October 2014) the scope of sections 82 and 83 were farther expanded and where it was held that that the statutory definition of professional misconduct does not exclude the common law definition thus;

“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.

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 dishonourable by professional [colleagues] of good repute and competency"."

28. In **Complaints Committee No 1 of the Auckland District Law Society v C** [2008] 3 NZLR 105 (HC) it was said;

“[33] ... While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such

*conduct ... [A] range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner."*

29. Neither of the 'definition' sections 81 or 82 in fact defines or gives any precise content to the principal concepts of 'unsatisfactory professional conduct' and 'professional misconduct'. Hence, the inclusive definitions merely provide that the (undefined) concept includes the conduct described therein and also others. The definitions so being in the inclusive form therefore provides a gateway to lawfully bring in other forms of conduct as *unsatisfactory professional conduct* and *professional misconduct*.
30. Following these definitions, sections (a)-(h) of section 83(1) provides in common and without distinction, instances of conduct capable of being either unsatisfactory professional conduct or professional misconduct. Neither of the 'definition' sections in fact defines nor gives precise content to the principal concepts of 'unsatisfactory professional conduct' and 'professional misconduct'. Therefore, these inclusive definitions enable and permit other forms of unsatisfactory professional conduct and professional misconduct conduct to be brought in. This is how the common law definitions are able to lawfully find its way in to the definitions of unsatisfactory professional conduct and professional misconduct within the meaning of the LPA.
31. 'Professional misconduct' as defined in section 82(1)(a) includes the concept of 'unsatisfactory professional conduct'. If the same acts come within both definitions, then the what is the distinguishing and determining factor? To come within the meaning of Professional Misconduct it should be of '**a substantial or consistent**' nature. This appears to be one of the distinguishing and determining factor between unsatisfactory professional conduct and professional misconduct.
32. In contrast to section 82(1)(a), Professional misconduct under section 82(1)(b) of the LPA includes conduct that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice. The statutory provision includes the situation where the conduct occurred otherwise than in connection with the practice of the law. Conduct which does not involve 'professional' misconduct in the strict and literal sense but is such as to support the conclusion that the person is

not a fit and proper person to be in practice, has been brought within the definition of professional misconduct by section 82(1)(b).

33. As the said definitions are couched in the inclusive form, the matters and conduct as identified and specified in section 83 comes within the scope of unsatisfactory professional conduct as well as professional misconduct and will similarly amount to contraventions of 81 and 82 as the case may be. However, as these definitions are inclusive, and because these or similar expressions were in common use before the LPA was enacted, common law tests for the assessment of such conduct continues to be relevant. In **Adamson v Queensland Law Society Inc**, (1990) 1 Qd R 498, 507; Thomas J. said, with respect to professional misconduct:

*“...the test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.”*

Such conduct has also been described as conduct that would reasonably be regarded as disgraceful or dishonourable by the practitioner’s professional colleagues of good repute and competency. (Allinson v General Council of Medical Education and Registration [1894] 1 QB 750); and the discussion in Dal Pont, Lawyers’ Professional Responsibility (Lawbook Co, 6th ed, 2017).

34. In **Council of the NSW Law Society v McEncroe [2015] NSWCATOD 109**, considering section 497 of the Legal Profession Act which is similar to that of section 82(1)(a) of the LPA of Fiji in relation to an allegation of borrowing money from a client it was held that;

*“63. Having regard to the authorities referred to, the Tribunal finds that the conduct of the Solicitor in entering the loan was professional misconduct within the common law definition of professional misconduct as “conduct which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency” and also under section 497 of the Act as conduct that involved “a substantial failure to maintain a reasonable standard of competence and diligence”.”*

35. As such I am satisfied that the breach of Rule 1.6; borrowing from a client, amounts to professional misconduct in contravention of section 82(1)(b) as it is within the common law definition of professional misconduct as conduct which would be reasonably regarded as regarded as disgraceful or dishonourable.

36. Thus, if I may recap and summarise, in the light of the aforesaid statutory provisions and the judicial dicta, 'professional misconduct' within the meaning of Section 83(1)(a) will include any unsatisfactory professional conduct including unprofessional practice or conduct, which amounts to a substantial failure to reach or maintain a reasonable standard of competence and diligence; and it also includes malpractice as well. All these 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 matters set out in section 83 and it may include any conduct that the Commission might find to be professionally blameworthy, disgraceful, dishonourable or unethical.

#### **Rule 1.6**

37. The allegation is based on the breach of Rule 1.6 of the Rules of Professional Conduct and Practice and the said rule is as follows;

*"1.6 A practitioner shall not borrow from nor provide security to a client, nor be in any way involved in the borrowing from or provision of security to a client by any spouse, parent, child or sibling of the practitioner, or any company or other entity in which the practitioner or any such family member has any beneficial interest. For the purposes of this rule, "client" shall mean any person (save any person advised by another practitioner independently instructed in respect of that transaction) between whom and a practitioner (or any partner or employer of a practitioner) any relationship of solicitor and client exists.*

*This rule does not apply where the client is—*

- *(a) a member of the family of the practitioner;*
- *(b) any corporation or other entity in which all the beneficial interest is vested in one or more members of the family of the practitioner;*
- *(c) a corporation carrying on the business of banking;*
- *(d) a corporation carrying on the business of insurance;*
- *(e) a building society or other corporation conducting a business of lending money to the general public;*
- *(f) a Government instrumentality;*
- *(g) a company listed on any stock exchange, or any subsidiary thereof;*
- *(h) such other client or class of clients as the Registrar may from time to time direct."*

38. Thus, on a plain reading of Rule 1.6 it is clear and unambiguous that the said Rule prohibits a practitioner from,

- a). borrowing from or providing security to a client, or
- b). in any way getting involved in the borrowing from or provision of security to a client, by;
  - i. any spouse, parent, child or sibling of the practitioner, or
  - ii. any company or other entity in which the practitioner or any such family member has any beneficial interest.

Thus, both direct as well as indirect borrowing is prohibited and, in this rule, “client” is defined to mean any person between whom and a practitioner *any* relationship of solicitor and client exists.

39. In view of the discussion and conclusion at paragraphs 8 - 22 above the submission No. (1) that, she had not breached section 82(1) as the alleged conduct does not involve failure maintain a reasonable standard of *competence and diligence* is misconceived. As for submission No. (2) above on not having a *beneficial interest* is based on premise that the word beneficial interest qualifies the word ‘client’ of rule 1.6. I have considered this at paragraph 24 above. Accordingly, the word “beneficial interest” in Rule 1.6 does not qualify the word “client” but only qualifies the last limb namely “any company or other entity”, which according to the breakdown of the said rule, is unambiguous and clear. As such submission No. (2) is misconceived.

#### **The standard of proof**

40. As set out in the Hong Kong case of **A Solicitor v Law Society of H.K.** [2008]2HKLRD and endorsed in **Chief Registrar V Adish Kumar Narayan**, ILS NO. 009 of 2013 (2nd October 2014) and adopted by this Commission in **Haroon Ali Shah** [007 of 2011] evidentiary test in professional disciplinary matters will is as follows;

*"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". (emphasis added)*

#### **Was the solicitor and client relationship existing?**

41. The existence or the non-existence of the solicitor and client relationship as on the 5<sup>th</sup> of July 2022 is the pivotal issue for determination. The issue in dispute is the date and point at which the services in respect of invoice 038/20 was rendered. According to

the Respondent, the practitioner and client relationship with the Complainant has ended on the 2<sup>nd</sup> July with the receipt of \$200 paid in respect of the same. Further, the Respondent's evidence and the suggestions made to the Complainant was on the basis that the client-solicitor relationship was not existing on the 5<sup>th</sup> July when she borrowed the money. She also in evidence did take up the position that it was on Saturday 6<sup>th</sup> July that she was retained and her services were obtained for the negotiations with the Yacht Club and the release of the vessel. This is the determining factor as far as this allegation is concerned. Therefore, I will now consider this.

42. It is common ground and admitted by both parties that the Complainant did obtain the services of the Respondent in respect of the release of the boat from the Yacht Club and the connected matters. The Complainant in his evidence did state that he met the Respondent with another Chinese and an Indian National in respect of finalizing the agreement on the sale of the boat. This meeting is admitted by the Respondent. However, according to the complainant he is not sure of the exact dates on which he so met the Respondent. In evidence he said that he cannot remember if it was the 5<sup>th</sup> or the 7<sup>th</sup>. The Respondent in evidence did at one point admit that the Complainant came to her office on Friday (the 5<sup>th</sup>) around 3pm with two others and wanted to see the agreement and he was in their office till 4pm. Thus, the fact of the Respondent attending to the legal matters of the Complainant on Friday is in evidence to that extent.

43. Further there to the fact that the Respondent was attending to legal matters as a practitioner has also come in through documentary evidence as follows. The Respondent has provided an explanation to the Chief Registrar by her letter dated 7<sup>th</sup> July, 2020 (Exhibit AE5) with annexes. According to which she admits that from Friday the 5<sup>th</sup> June, 2020 she was trying to sort out the issue of non-payment of the mooring fees. She has annexed to her letter dated 7<sup>th</sup> July, 2020 (Exhibit AE5), emails sent to Diven Prasad. According to which, on the 5<sup>th</sup> of June she had been acting on behalf of the Complainant. In the said email sent at 6.11.53pm, she specifically states as follows.

(a) *"We act for Jinchao Xu of Sea Hunter Private Limited on the above ...."*

(b) *"Our client undertakes that they will not remove the vessel..."*

(c) *"Our client is willing to pay for the mooring ..."*

(emphasis added)

44. The letter dated 5<sup>th</sup> June, 2020 address to the Commodore of the Royal Suva Yacht Club annexed to AE5 clearly states as follows:
- “We act for the owners of motor vessel MV Boardroom and we have been instructed to address this letter to you. Our instruction is in relation to the mooring charges that you had charged our client for the mooring of the above vessel...”*(emphasis added).
45. The aforesaid correspondence is admitted. The matter the Respondent has attended to is in relation to the sale and release of MV Boardroom had been invoiced by invoice No. 038/20 dated 7<sup>th</sup> June, 2020 (Exhibit AE3). The said invoice contains 8 items. That is for the services rendered to the Complainant by the practitioner acting as the solicitor *qua* Practitioner. This documentary evidence clearly establish that the Respondent has been acting in her professional capacity on behalf of the Complainant who is referred to as “our client” and states that “*we have been instructed*”. This is a clear admission of the existence of a solicitor and client relationship between the Respondent and the Complainant as on the 5<sup>th</sup> of June 2020.
46. Apart from this the practitioner admits in the said letter dated 7<sup>th</sup> July, 2020 (Exhibit AE5) that she ‘*engaged in this matter from Friday the 5<sup>th</sup> June, 2020.*’ According to the times of the emails, she had been attending to this matter even at 6.11 and 6.49pm. She also has forwarded a letter dated the 5<sup>th</sup> June, 2020 to the Commodore. Therefore, without doubt, this confirms that the Respondent has been acting as the Solicitor of the Complainant on the 5<sup>th</sup>, June, 2020.
47. That being so, the Complainant clearly states that there was no solicitor-client relationship when she borrowed \$300 on Friday. She makes a subtle attempt to impress this commission that she was not involved in providing any services qua solicitor when she borrowed the money. However, her own letters namely exhibit AE2- Letter of explanation dated 02nd July, 2020 and exhibit AE5-letter of explanation dated 7th July, 2020 written by the Respondent to the Chief Registrar contradict her evidence. Thus, whilst I accept that much of the Respondent’s evidence is reliable, but caution is required in relation to several material aspects, and in the light of the aforesaid contradictions, her evidence as to the events and happenings of the 5<sup>th</sup> of June, I do not accept as being truthful. The Respondent is evasive and not truthful to that extent.

48. Correspondingly, the Respondent admits that the Complainant came in the afternoon and inquired if the Respondent knew anybody at the Yacht Club to which she had answered in the affirmative. Then at this moment she had told the complainant to give her \$300. He had refused but had subsequently given her \$300 but demanded a receipt. The Respondent has accordingly given the receipt marked AE1 acknowledging the sum and agreeing to pay back the same on or before the 12<sup>th</sup> June. When the aforesaid evidence is considered in sequence it is apparent that the Respondent practitioner has demanded and obtained or borrowed \$300 from the complainant and this has happened late in the evening. She had sent the receipt through her office staff to the Complainant's office. This further proved that the receipt had been delivered to the Complainant after the Complainant has left the office that day.
49. Accordingly, the evidence clearly proves on a balance of probability that the Respondent practitioner has borrowed the sum of \$300 from the Complainant who was the client at that point. No doubt that due to the long-standing dealings between them the relationship between the Respondent and her client the Complainant was a very close friendship which had been extending for over 4 years. The Respondent had been in and out of the Complainant's office as a relation was also employed by the Complainant. As described by the Respondent herself they have had a love and hate relationship meaning visiting each other almost daily. It even had included giving advice to the Complainant as and when he had demanded.
50. In the normal course of human conduct when 2 persons are interacting as client and practitioner for a considerable period of time it is not unusual to build a friendship and develop a familiarity of a close nature. Even so this does not in any way become a reason or an excuse for a practitioner to violate the norms and standards of conduct she is required to conform when a solicitor client relationship exists. In the circumstances of this incident the complainant had not been willing to part with and give \$300 to the practitioner for the asking. After reluctantly parting with \$300 he has demanded a written receipt and acknowledgment. The Respondent has provided the same specifying the date of repayment too. Is this the natural and normal conduct between persons with such familiarity and a close friendship as claimed by the Respondent? To my mind it certainly is not. Thus, it is apparent that the complainant



had given this money to the Respondent not due to the friendship but due to some coercive circumstances. According to the evidence, at this point of time several issues connected with the sale of the complainant's vessel and the release of the Vessel from the Yacht Club has arisen. The Complainant was in fact obtaining services and legal assistance from the respondent and certainly the solicitor and client relationship was existing between them. Accordingly, I am satisfied on a balance of probabilities that the borrowing of money by the Respondent had taken place when the client-solicitor relationship between the Complainant and the Respondent was existing.

51. Borrowing money by the Respondent directly from her client the Complainant, certainly constitutes a breach of Rule 1.6. Even if there be no such express prohibition, yet the Respondent's conduct clearly amounts to and can be reasonably regarded as disgraceful or dishonourable when objectively viewed by her professional colleagues of good repute and competency.
52. Between a client and solicitor there always exists a fiduciary relationship. **In Law Society of NSW v Moulton** (1981) 2NSWLR 736 at 739F to 740B Hope JA, with whom Reynolds JA agreed, said:

*"In cases such as the present one, it is essential to remember, indeed to emphasise, that a solicitor stands in a fiduciary relationship to his clients. If he is to have business dealings with them on his own account, and in particular if he is to borrow money from them, the requirements of the law are rigorous. The need for that rigour is obvious. Commonly, to great extent, always to some extent, the solicitor is in position of special influence in respect of his client."*

53. As such borrowing money from a client does conflict with the interests of the client. Further, the Respondent on the 5<sup>th</sup> has obtained \$300 and in acknowledgment issued the receipt dated 5<sup>th</sup> June, 2020 (Exhibit AE1). The said receipt is as follows:

*"I, ULAIMILA FA-TUITUKU of Suva in Fiji, Principal acknowledge receiving the sum of \$300 (Three Hundred Dollars) and ALSO HEREBY ACKNOWLEDGING to pay back the said monies on or before the 12<sup>th</sup> June, 2020".*

I think that borrowing by a legal practitioner any sum of money subject to an express written undertaking to repay on a specific date and not so repaying and failing honour the said written undertaking specially made to a client is disgraceful and

dishonourable conduct. This is further compounded by the attempt to have it set off against an invoice for fees which the Respondent claims to be due from a client. This is admitted in letter dated 02<sup>nd</sup> July, 2020 marked AE2 when the Respondent says as follows:

*"I enclose herewith for your perusal the invoices that were given to the Complainant. I do not owe the Complainant any money at all. As a matter of fact he owes me money on my invoice. However, to avoid unnecessary dramas we can do a switch wherein he pays my invoice and I pay his \$300"*

54. However, in her letter dated 20<sup>th</sup> August, 2020 marked AE6 the Respondent takes a different stand and states that:

*"So when asking your Complainant to lend me \$300 that Friday afternoon, I was not borrowing money from a random stranger. It was done as a loan which was to be paid back. However, when preparing his invoice for the weekend work, the \$300 was deducted from his invoice. He knew I was going to do that so". (emphasis added).*

55. Professor Webb in his text "Ethics, Professional Responsibility and the Lawyer" at page 219 the says:

*"Entering into a relationship of debtor or creditor with a client is problematic as it is often inconsistent with the fiduciary obligations the lawyer owes. The lawyer may be in need of finance and the client may be prepared to act as lender. However, for the lawyer to borrow money directly from clients is difficult. It places the interests of the lawyer in quite opposed positions. To take a loan from a client is likely to be misconduct ..."*

56. The Respondent attempts to have the \$300 set off against an invoice for fees which the Respondent claims to be due from a client which conduct is certainly unethical which to my mind is professionally blameworthy and dishonourable which amounts to Professional Misconduct.

57. The Respondent attempts to trivialize and downplay this act of borrowing from a client, and assert that due to the outstanding fees no loss is cost to the Complainant. Thus in conclusion it is opportune to note the following observations in this regard;

*"...in considering whether a solicitor has been guilty of professional misconduct in a dealing with a client, and in considering the gravity of that misconduct, the fact that the client, in the ultimate event, suffers no loss is of little, if any, relevance. If the acts or omissions of a solicitor constitute professional misconduct, they do so at the time*

when they occur.” (**Law Society of NSW v Moulton** (1981) 2NSWLR 736 at 739F to 740B)

and;

“ *It is no answer to the charge of professional misconduct in relation to transactions with his client’s money that the solicitor did not appreciate that what he was doing constituted misconduct.*” (**Law Society of NSW v Moulton** (1981) 2NSWLR 736 at 740 D to E)

### **Conclusion**

58. In the aforesaid circumstances, this Commission is satisfied on a balance of probabilities (on the higher standard) that the Respondent has acted in breach of rule 1.6 of the Rules of Professional Conduct and Practice, by borrowing from Jinchao Xu when a relationship of solicitor and client existed. Further that her conduct amounts to "professional misconduct" within the meaning of section 82(1)(a) of the Legal Practitioners Act 2009. Thus, I find the allegation of professional misconduct as levelled against the Respondent is proved. I find the Respondent liable for the said allegation of professional misconduct as preferred.

The allegation of Professional Misconduct is proved and I will now hear the parties on the question of sanction.

Dated the 23<sup>rd</sup> day of January, 2023.

  
**Justice Gihan Kulatunga**  
Commissioner

