

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO.002/2009

BETWEEN: CHIEF REGISTRAR APPLICANT

AND: HEMENDRA NAGIN RESPONDENT

**APPLICATION : Ms V Lidse
RESPONDENT : Mr B C Patel**

DATE OF HEARING : 26TH April 2010 - 29TH April 2010

DATE OF JUDGMENT: 7TH May 2010

JUDGMENT

1. There is before the Commission by a way of Application 3 Complaints. The first of these Complaints contains 4 allegations. The second Complaint 3 allegations and the third Complaint 1 allegation.
2. Complaints 1C and 1D were on 27th of April 2010 withdrawn by the Applicant and are dismissed. Complaints 1A and 1B were at the conclusion of the case for the Applicant dismissed and in this judgment the reasons for that dismissal are published.
3. On the 27th April 2010 Complaint number 3 was withdrawn by the Applicant and is dismissed.
4. The Respondent admits the allegation contained in Complaint 2B.

COMPLAINT NUMBER 1

A Unsatisfactory Professional Conduct: Contrary to section 81 and 83(1) (a) of the Legal Practitioners Decree 2009

Particulars

Hemendra Nagin a legal practitioner, on the 3rd day of August 2008 charged James Prem Singh excessive legal fees in respect to his instruction to inquire into and claim against the Estate of Suruj Pal Singh, which conduct occurred in connection with Hemendra Nagin's practice of law, falling 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.

B Unsatisfactory Professional Conduct: Contrary to section 81 of the Legal Practitioners Decree 2009

Particulars

Hemendra Nagin a legal practitioner between the 25th of February 2008 and the 7th of August 2008, in his capacity as principal of Sherani and company failed to inform James Prem Singh of the conflict of interest that existed in respect to his instructions to inquire into the transfer of his mother's, Bhan Mati Singh, interest in the land situated at 403 Grantham Road, Suva registered in the name of Suruj Pal Singh in CT 21368 being Lot 9 on deposited Plan 3114, which conduct occurred in connection with Hemendra Nagin's practice of law, falling 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.

5. James Prem Singh, the Complainant, is the son of Suruj Pal Singh and Bhan Mati Singh. Bhan Mati Singh held a lease with respect to Lot 9 in DP 3114 being 403 Grantham Road Samabula.
6. In about 1967 as a result of an acrimonious separation Bhan Mati Singh transferred a 50% interest in her leasehold property at 403 Grantham Road Samabula to her husband Suruj Pal Singh [Ex RA25] following the transfer Suruj Pal Singh and Bhan Mati Singh each held an undivided one half share in the leasehold of the property.
7. Suruj Pal Singh had subsequent relationships with Madan Kuar and Daya Wali.

8. In 1982 Suruj Pal Singh reached agreement with Prem Masih Sukhu, the owner of the freehold title to the land, to transfer the freehold title to him Suruj Pal Singh. The consideration for this transfer was evidenced in a Deed prepared by Hemendra Nagin and dated 17th March 1982.
9. The Deed [Ex RA66] recites "And whereas the said property is presently leased by virtue of registered lease no 58869 to the lessee and his wife Bhan Mati (father's name Gobardhan Maharaj) of 403 Grantham Road Samabuta Suva in Fiji domestic duties."
10. As a result of the registration of transfer No 192239 [Ex RA66] the freehold title was transferred into the name of Suruj Pal Singh and Bhan Mati Singh retained her undivided one half share in the leasehold.
11. Suruj Pal Singh died on the 6th of February 2008 and probate of his last Will & Testament was on the 3rd of April 2008 granted to Madan Kumari.
12. After leaving limited interests Suruj Pal Singh left all his property to Bharat Singh.
13. On the 12th February 2008 Bhan Mati Singh granted a Power of Attorney to James Prem Singh.
14. In February 2008 it would appear that contact was made by Margaret M Salter, sister of James Prem Singh, with Radhika Naidu a solicitor and employee of Sherani & Co. Instructions were apparently given by Ms Salter to claim against the Estate of late Mr S P Singh [Ex RA6]. It would also appear that arrangements were made by Ms Salter for Mr James Prem Singh to call upon Sherani & Co with respect to these instructions.
15. By email of 22nd February 2008 from Ms Salter to Ms Naidu [Ex RA6] it was said "please note, all charges will be paid by Mr James Prem Singh. Should there be a problem, I will settle any costs incurred."
16. The email also asks that Mr James Prem Singh be contacted to sign and lodge a claim attached to that communication. The claim is detailed in [Ex RA7].

17. By letter dated 26th February 2008 signed by James Prem Singh and his mother Bhan Mati Singh [Ex RA22] it would appear that Sherani & Co were engaged for the following:-
- 1 Contest the will of the late Mr Suruj Pal Singh, as his surviving legally married wife.
 - 2 Place caveats over all assets of the late Mr Suruj Pal Singh including all titles to property, shares in Samabula Electrical Works Limited and any other assets, until such time as resolution of all claims.
 - 3 Makes claims against Mr Bharat Singh, Mr Raj Pal Singh, Ms Madan Kuar and Ms Daya Wali (aka Elizabeth) for all monies extorted from the late Mr Suruj Pal Singh.
 - 4 Make claim for 50% of all property compensation received as part of compulsory land acquisition for the purposes of road widening at 403 Grantham Road, Samabula Suva.
18. It would appear from the evidence that there were regular email communications between James Prem Singh, Ms Salter and Sherani & Co. In addition Mr James Prem Singh travelled to Fiji from time to time and attended upon Sherani & Co.
19. Upon the initial instructions being given by Mr James Prem Singh on his attendance at Sherani & Co payment in the sum of \$5,000 by way of retainer was sought by Sherani & Co and was paid by Mr Singh. By memorandum of fees titled "Tax Invoice" dated 13th August 2008 [Ex RA73] fees were rendered to Mr Singh for work done by Sherani & Co. This tax invoice details the sum of \$5,000 that was paid and renders fees and disbursements totalling \$2,369.86 which resulted in a refund to Mr Singh of \$2, 630.14.
20. The tax invoice is a detailed chronology of work performed between 22nd February 2008 and the 8th August 2008.
21. It is not possible for me to conclude that the fees charged are excessive based upon the evidence that has been placed before the Commission.
22. From the evidence it is apparent that the alleged conflict of interest is based upon the fact that in 1982 Mr Nagin drafted a Deed between Prem Masih Sukhu and Suruj Pal Singh together with a transfer of the freehold land at 403 Grantham Road Samabula. There is no evidence before me to suggest that the Deed was drafted other than in accordance with the instructions received from the parties to it. The Deed acknowledges the interest of Bhan Mati Singh as holding an undivided one half interest in the leasehold of the property.

23. There is no legal requirement for the lessee in these circumstances to consent to the transfer of the freehold title. The transfer of the freehold title was subject to the leasehold interest. This is borne out by the memorials on the certificate of title following registration of the transfer.
24. There is no evidence to support the allegation that there was indeed any conflict of interest in Sherani & Co taking and acting on instructions from Mr James Prem Singh and his sister Ms Salter notwithstanding that 26 years earlier that firm had acted on transfer of the freehold upon the apparent instructions on Suruj Pal Singh.
25. There is no apparent impropriety in that earlier transaction.
26. It became apparent in the course of the hearing when evidence was given by the Deputy Registrar of Titles, Torika Goneca, that advice had been given by her to James Prem Singh that Hemendra Nagin had acted inappropriately in not obtaining the consent of Bhan Mati Singh to the transfer of the freehold title in 1982. Torika Goneca in the course of her evidence acknowledged that there was no requirement for that consent to have been obtained. It is regrettable that advice, of this type is given by Civil Servants without legal training.
27. There is no evidence sufficient to support the complaint and accordingly it is dismissed.

COMPLAINT NO 2

A Unsatisfactory Professional Conduct: Contrary to section 81 and Rule 1.1 of the Rules of Professional Conduct and Practice of the Legal Practitioners Decree No 16 of 2009.

Particulars

Hemendra Nagin a legal practitioner, on one occasion between the 8th of November 2004 and the 14th of December 2004 abused the relationship of confidence and trust with his clients Mohammed Afzal Khan and Shairul Begum Khan by advising them to increase the consideration value for the sale of the land situated at Donu Place, Tamavua registered in CT 28572 being Lot 1 on Deposited Plan No 6012 which they agreed to sell to Subhash Chand, the increase being from \$350,000 to \$400,000, when they would not benefit from the added increase of \$50,000, which conduct occurred in connection with Hemendra Nagin's practice of law, falling 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.

B Unsatisfactory Professional Conduct: Contrary to section 81 of the Legal Practitioners Decree No 16 of 2009

Particulars

Hemendra Nagin a legal practitioner, between the 11th day of August 2004 and the 14th day of December 2004 acted for both parties in a transaction for the sale and purchase of land owned by Mohammed Afzal Khan and Shairul Begum Khan situated at Donu Place Tamavua registered in CT 28572 being Lot 1 on Deposited Plan No 6012 to Subhash Chand thereby creating a conflict of interest to the detriment of Mohammed Afzal Khan and Shairul Begum Khan, which conduct occurred in connection with Hemendra Nagin's practice of law, falling 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.

C Unsatisfactory Professional Conduct: Contrary to section 81 of the Legal Practitioners Decree No 16 of 2009

Particulars

Hemendra Nagin a legal practitioner, between the 11th day of August 2004 and the 14th day of December 2004 acted for both parties in a transaction for the sale and purchase of land owned by Mohammed Afzal Khan and Shairul Begum Khan situated at Donu Place, Tamavua registered in CT 28572 being Lot 1 on Deposited Plan No 6012, to Subhash Chand and failed to protect the best interests of Subhash Chand which compelled the said Subhash Chand to issue a Writ of Summons against Mohammed Afzal Khan and Shairul Megum Khan in order to protect his interests, which conduct occurred in connection with Hemendra Nagin's practice of law, falling 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.

28. In this matter the Respondent was simultaneously acting for the vendor, the purchaser, the mortgagee and it would appear from the evidence the real estate agent.

29. The Complainants Mohammed Afzal Khan and Shairul Begum Khan were the owners of a parcel of land in Tamavua which they desired to sell.

30. Titus Narayan of Titus Real Estate negotiated the sale of the land to Subhash Chand. This followed the Complainants having entered into an agreement with Mr Narayan whereby

he was engaged to find a purchaser for the land and became entitled by way of commission for such of the purchase price as exceeded \$350,000. The agreement was for a period of 3 months only.

31. It was during the 3 month period that Mr Narayan introduced Subhash Chand.

32. The Complainant was taken by Titus Narayan to the office of Sherani & Co to engage Hemendra Nagin to act on his behalf. Subhash Chand had also engaged Hemendra Nagin of Sherani & Co to act on his behalf in the transaction.

33. A sale and purchase agreement was prepared by Mr Nagin for the sale of the property at a of consideration of \$380,000. The agreement was conditioned inter alia that the settlement of the sale was to take place on or before the 31st of October 2004.

34. To facilitate the settlement the vendor had to arrange the release of a scheme plan with respect to the subject land.

35. Settlement was not able to be effected on or before 31st October 2004 and a further agreement was reached between the Complainant and Subhash Chand whereby the consideration was reduced to \$350,000 and settlement was to be effected on or before 15th December 2004.

36. This agreement also contained a provision for liquidated damages in the sum of \$50,000 should there be default on the part of either party in the completion of the agreement [Ex RC6].

37. Following the execution of the first agreement [Ex RC2] a deposit in the sum of \$40,000 was paid by the purchaser to Sherani & Co.

38. By letter dated 29th of October 2004 Colonial Bank issued a housing loan offer to Subhash Chand for a loan in the sum of \$400,150. The purpose of the loan was described as being "purchase freehold vacate land" [Ex RC5].

39. At this time the sale and purchase agreement executed by the parties reflected a consideration of only \$350,000.

40. It is from this point on that the evidence of the Complainant and Respondent differs.
41. The Complainant says that he was called to the office of Sherani & Co on 14th of December 2004 for the purpose of executing what he describes as a "supplementary agreement" which had a consideration of \$400,000 and provided for settlement on or before the 31st of December 2004. He questioned the impact of this agreement on him and was informed by Mr Nagin, he says, that a tax invoice would issue reflecting that he was receiving only \$350,000 and that the additional \$50,000 was to be refunded to Mr Chand. To facilitate this occurring the Complainant was required to execute an Irrevocable Authority directed to Sherani & Co to pay Mr Chand the sum of \$50,000 out of the settlement monies.
42. Mr Nagin gives evidence that the Complainant and Mr Chand attended his office on the 10th December 2004 and jointly gave instructions for the preparation of the sale and purchase agreement with a consideration of \$400,000.
43. While no explanation is offered as to why this was to occur it is implied that the benefit to the Complainant was the release by installments of the deposit of \$40,000.
44. In the course of the transaction the Complainant says he informed Mr Nagin that there were no rates levied on the subject land as it was "Waste Land". Mr Nagin in his evidence says that he caused his conveyancing clerk Rohit Singh to make enquires with Suva City Council and was informed that there were no rates levied with respect to the subject land.
45. Following settlement a demand was made by Suva City Council on the purchaser for rates from 1996, (the date from which the Complainant acquire the land), for arrears of rates which arrears amounted to in excess of \$19,000.
46. Mr Chand has subsequently commenced recovery action against the Complainant for these rate arrears. The sale and purchase agreement contained the following terms.....:-
"the vendor will hand over to the purchaser receipts (or show sufficient evidence of payment) of city rates, land rent, telephone, electricity and water charges paid up to the date of settlement (or such of them as are applicable)."
47. Clause 15 of agreement provided "the agreements obligations and warranties of the parties hereto herein set forth in so far as the same has not been fulfilled at the time of

completion of this transaction shall not merge with the giving and taking of title to the said property."

48. Also following settlement of the sale the Complainant received a demand and ultimately a Writ of Summons issued by Sherani & Co on behalf of Titus (sales) Agency Limited wherein a commission on a sale price of \$400,000 being in the sum of \$43,000 was claimed.

THE LAW

49. Unsatisfactory professional conduct is defined in Clause 81 of the Decree as including "conduct of a legal practitioner or a law firm or an employee or agent of a legal practitioner or a law firm, occurring in connection with the practice of law that falls 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 or law firm."
50. The definition focuses on elements of competence and diligence. Whilst neither of these terms are defined it might be expected that they be given their ordinary meaning. The dictionary defines "diligence" to mean "care and conscientiousness in one's work".
51. "Competence" is defined as "having the necessary skills or knowledge to do something successfully". It is thought that this requires a legal practitioner to be bound not only to complete tasks in a timely and punctual manner, as required by the requirement of diligence but to complete them with the level of skill and precision that a member of the public is entitled to expect from any professional person whom they have trusted to carry out work for them.

STANDARD OF PROOF

52. The relevant standard of proof to be applied to disciplinary proceedings was considered at length by The Court of Final Appeal of the Hong Kong Special Administrative Region in *A Solicitor and The Law Society of Hong Kong* Final Appeal No. 24 of 2007 (Civil). There the court considered inter alia relevant authorities from the Privy Council, the High Court of Australia and the High Court of New Zealand (whose decision in *Z and Dental Complaints Assessment Committee*, [2007] NZAR 343, was subsequently confirmed by the Supreme Court of New Zealand [2008] NZSC 55).
53. The Privy Council in *Campbell v Hamlet* [2005] UKPC 19 held that the criminal standard of proof was to be applied in all disciplinary proceedings concerning the legal profession.

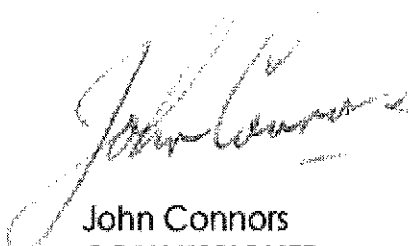
54. The High Court of Australia in *Reffek v McElroy* (1965) 112 CLR 517 held that the civil standard of proof applied but said at paragraph 10: "**The "clarity" of the proof required where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved: see *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J..**"
55. And at paragraph 11 the court said: "**No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: see *Helton v Allen* (1940) 63 CLR 691 per Dixon, Evatt and McTiernan JJ.**"
56. The Supreme Court of New Zealand in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 in applying the flexible application of the civil standard said at paragraph 116: "**We acknowledge the serious impact that adverse disciplinary decisions can have on the right of individuals to work in their occupation and on personal reputations. The flexible application of the civil standard will, however, give all due protection to persons who face such proceedings.**"
57. In *A Solicitor and The Law Society of Hong Kong* the Chief Justice at paragraph 116 said: "**In my view, the standard of proof for disciplinary proceedings in Hong Kong is a preponderance of probability under the *Re H* approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability. If that is properly appreciated and applied in a fair-minded manner, it will provide appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation.**"
58. I am therefore of the opinion that the appropriate standard of proof to be applied is the civil standard varied according to the gravity of the fact to be proved, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong.

CONCLUSION

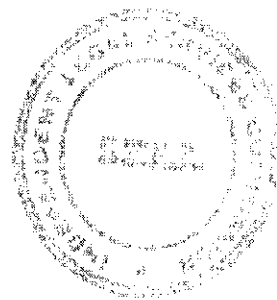
59. From the evidence before the Commission I cannot be satisfied that there was any benefit to the Complainant in entering into the agreement of the 14th of December 2004 that is the agreement with the consideration of \$400,000. The suggestion that the benefit flowing was the release of the deposit by instalments is not in my opinion a conclusion that can be reasonably drawn from the evidence before the Commission. In this regard I find the Complainant to be a person who has had a most unsatisfactory result in what should have been a relatively simple land transfer.
60. Whilst it is not relevant to the proceedings before this Commission the conduct of the agent in claiming commission on what can be best described as an artificial purchase price is reprehensible.
61. I am satisfied on the basis of the evidence before the Commission, including the loan approvable to Mr Chand, that the purchase price was increased to \$400,000 for the benefit of the purchaser and that the possible consequences including the potential for a claim by the agent for commission were not raised with the Complainant accordingly I find the allegation established.
62. The issue with respect to the failure to adjust rates on settlement is on the evidence less clear but it is apparent that insufficient enquires were made by the solicitors on behalf of the vendor and more importantly the purchaser to ensure that rates were adjusted on settlement. The Respondent was able to obtain from Suva city Council a letter [Ex RC38] for the purposes of these proceedings but the Commission is asked to accept that no such advice was available prior to settlement of the sale and purchase agreement between the Complainant, his wife and Mr Chand.
63. I am of the opinion that the conduct does fall within the definition of Unsatisfactory Professional Conduct and that the requisite standard of proof has been established and accordingly I find the allegation proved.

ORDERS OF THE COURT

1. Complaint 1A - Complaint Dismissed
2. Complaint 1B - Complaint Dismissed
3. Complaint 1C - Complaint withdrawn and Dismissed
4. Complaint 1D - Complaint withdrawn and Dismissed
5. Complaint 2A - I find the Respondent guilty of Unsatisfactory Professional Conduct
6. Complaint 2B - The offence having been admitted a finding of Unsatisfactory Professional Conduct is recorded
7. Complaint 2C - I find the Respondent guilty of Unsatisfactory Professional Conduct
8. Complaint 3 - Complaint withdrawn and Dismissed



John Connors
COMMISSIONER



Dated: 7 May 2010