

**IN THE INDEPENDENT  
LEGAL SERVICES COMMISSION**

**NO.004/2009**

**BETWEEN: CHIEF REGISTRAR APPLICANT**

**AND: SHEIK HUSSEIN SHAH RESPONDENT**

**APPLICANT : Ms V Lidise**  
**RESPONDENT : Mr G O'Driscoll**

**DATE OF HEARING: 15<sup>th</sup>, 16<sup>th</sup>, 19<sup>th</sup>, 22<sup>nd</sup> April 2010 & 6<sup>th</sup> May 2010**  
**DATE OF JUDGMENT: 15<sup>th</sup> June, 2010**

**JUDGMENT**

1. The Applicant brings by way of Application before the Commission eleven Complaints by six Complainants against the Respondent, all alleging Professional Misconduct or Unsatisfactory Professional Conduct.
2. Clause 81 of the Legal Practitioners Decree 2009 provides that Unsatisfactory Professional Conduct includes :- "*conduct of a legal practitioner....., 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...*".
3. The definition focuses on elements of competence and diligence. Neither of these terms are defined in the Decree and should therefore be given their ordinary everyday meaning. The dictionary defines "diligence" to mean "care and conscientiousness in one's work".

4. "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.
5. The Legal Practitioners Decree 2009 provides for two categories of Professional Misconduct. The first category provides that Professional Misconduct includes unsatisfactory professional conduct of a legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence.
6. The second category provides that Professional Misconduct shall include conduct of a legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
7. The Decree then expands on what factors may be taken into account in determining whether a person is "fit and proper" for the purposes of section 82 by allowing that regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under the Decree.

#### **COMPLAINT NO 1**

Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree No 16 of 2009

#### **Particulars**

Sheik H Shah a legal practitioner on the 7<sup>th</sup> day of September 2006 issued Bashir Khan, on behalf of Vunimoli Sawmill Limited, ANZ 'Sheik Hussein Shah', Trust Account cheque no 000128 019 092 0008347058 for the sum of thirty five thousand dollars which was subsequently dishonored when presented to the bank due to insufficiency of funds, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

8. The evidence before the Commission was that a cheque in the sum of \$105,000 had been deposited to the credit of the Respondents Trust Account and prior to that cheque being cleared the Respondent drew a cheque in accordance with instructions for the sum of \$35,000.
9. At the close of the case for the Applicant the Respondent admitted the allegation.

## COMPLAINT NO 2

**A Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree No 16 of 2009**

### **Particulars**

Sheik Hussein Shah a legal practitioner, on the 1<sup>st</sup> day of February 2009, having received the sum of \$2000 in November 2008 from Ifereimi Tikoivatukoula to institute civil proceedings against Colonial Fiji Life Limited, negligently prepared a Writ of Summons on behalf of Ifereimi Tikoivatukoula without stating the basis or grounds upon which the claim therein was based, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

**B Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree No 16 of 2009**

### **Particulars**

Sheik Hussein Shah a legal practitioner, after the 23<sup>rd</sup> day of February 2009, failed to notify his client Ifereimi Tikoivatukoula that he has left Labasa and had relocated his law practice to Suva, which conduct occurred in connection with Sheik Hussein Shah's practice of law, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

10. Both complaints arise from instructions given by the Complainant to the Respondent in the first or second week of November 2008 with respect to the termination of the Complainant's employment by Colonial Fiji Life Limited on 12<sup>th</sup> of December 2007. At that time the Complainant was the District Sales Manager, Northern Division, for Colonial Fiji Life Limited and was engaged pursuant to a contract dated 23<sup>rd</sup> of January 2002 [Ex A1].

11. The Complainant sought advice from the Respondent and on the basis of that advice engaged him to fight his case against Colonial. The Complainant says that the Respondent sought \$2,000 and would commence his case straight away. The fees were paid on the 21<sup>st</sup> of November 2008 and a receipt issued [Ex A2]. The Complainant then says that the Respondent did not commence the action straight away and that he checked with him regularly for about 3 months and then a Writ of Summons was ultimately filed in February 2009 after the Respondent said that he had sent a draft to Daniel Singh in Suva for settling.

The Complainant then went to the High Court to check if the document was filed and ascertained that it was filed on the 20<sup>th</sup> of February 2008. A copy of the Writ of the Summons was tendered as [Ex A3].

12. By letter dated 20<sup>th</sup> of March 2009 Munro Leys Lawyers acting on behalf of Colonial Fiji Life Limited sought that the proceedings be discontinued or amended and sought further and better particulars of the claim [Ex A4].
13. The Respondent now says that he was in regular contact with the Complainant and that some research was carried out in the company of the Complainant in Labasa. He further says that the quantum of the claim was in fact formulated by the Complainant.
14. The Respondent says that he had advised the Complainant that his claim was "novel".
15. Following receipt of the request for further and better particulars from Munro Leys on behalf of Colonial the letter was discussed by the Respondent with the Complainant and draft answers were noted on the letter.
16. At about this time the Complainant says that the Respondent sought a further \$1,000 from him before he would proceed further with the claim. The Complainant says that he told the Respondent that he wouldn't pay any more money. He says he was not happy with what was being done on his behalf by the Respondent and he looked for another lawyer to obtain further advice.
17. From this point on it would be seem, on the evidence of the Complainant, that he consulted a number of lawyers. Initially Mr Chaudhry of Gordon & Chaudhry was engaged to give some advice and then Mr S R Valenitabua was engaged and a Notice of Change of Solicitor was filed [Ex A5] on the 24<sup>th</sup> of June 2009.
18. An amended Writ of Summons was then filed on 24<sup>th</sup> of July 2009 [Ex A6] by Mr Valenitabua.
19. In the course of his evidence the Complainant indicated that he had now engaged Mr Semi Leweniqila to represent him and a further Writ of Summons has been filed.
20. The very nature of the claim and the terms of the Complainant's employment agreement make it not surprising that the statement of claim has been amended on a number of occasions.
21. The Respondent says that he kept the Complainant informed at all times of his intention to relocate from Labasa to Suva and that the Complainant had his telephone number at all times.

22. The Complainant acknowledged signing "Instructions to Act" [Ex R1] which instructs the Respondent "in the following:- Compensation claim with Colonial Injunction Application".
23. The document states:- "AND I further agree to pay the agreed fees and disbursements for your professional services.  
Fee quoted \$5,000 plus 20% of the judgment sum  
Agreed -  
Paid \$2,000 retainer."
24. Injunctions proceedings were commenced by Mr Valenitabua to restrain Colonial from taking assets of the Complainant. It would appear from Ex R2 that the Complainant had very high expectations with respect to his claims.
25. The Respondent says he did not receive from the Complainant instructions sufficient to enable the injunctions proceedings to be commenced.

### **COMPLAINT 3**

**A Unsatisfactory Professional Conduct: Contrary of section 81 of the Legal Practitioners Decree No 16 of 2009**

#### **Particulars**

Sheik Hussein Shah a legal practitioner, between the 17<sup>th</sup> day of December 2003 and 21<sup>st</sup> of March 2006, failed to keep Ram Pratap reasonably informed of matters relating to the instructions received from Ram Pratap with respect to a civil suit for damages, which conduct occurred in connection with Sheik Hussein Shah'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**

Sheik Hussein Shah a legal practitioner, between the 17<sup>th</sup> day of December 2003 and the 2<sup>nd</sup> day of March 2007, delayed the progress of the matter Ram Pratap & Others v Kamini Narayan civil action No HBC 375 of 2000 at Labasa which he had been instructed in respect of by Ram Pratap, which conduct occurred in connection with Sheik Hussein Shah'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.

26. At the conclusion of the case for the Applicant the Respondent admitted both complaints and consented to orders for the payment of the sum of \$500 to the Complainant with respect to each complaint together with witness expenses in the sum of \$144.00. The Respondent further undertook to the Commission to make application to the High Court at Lautoka to reinstate the proceedings on behalf of the Complainant and if successful to progress those proceedings without delay on a pro bono basis.

#### **COMPLAINT NO 4**

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

#### **Particulars**

Sheik Hussein Shah a legal practitioner, since the 16<sup>th</sup> day of July 2009 failed to refund the sum of \$1,000 received on behalf of Deep Chand after he (Sheik Hussein Shah) failed to represent Deep Chand in a bail application in Labasa Magistrate Court, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

27. On the 15<sup>th</sup> of July 2009 the Respondent was attending the Valelevu Police Station when he was approached by Umesh Prakash the brother-in-law of the complainant. The Complainant was at that time in Police custody at Valelevu Police Station and the Respondent was instructed to obtain bail for the Complainant. The Respondent says that he indicated that his fees would be \$1,500 but that the next day the Complainant's wife and Umesh Prakash attended upon him and tendered the sum of \$1,000 which he agreed to accept as his fee. A receipt issued to Umesh Prakash for that sum [Ex R14].
28. The Respondent says that the instructions related to making a bail application at the Valelevu Police Station only and that he was there from 8.00 am to 2.00 pm on that day.
29. He says that he was unsuccessful in getting the Complainant bailed as the Police wished to take the Complainant to Labasa for interview and charging.
30. Whilst the Complainant remained in custody at Valelevu the Respondent says that he was able to organize for the transfer to Labasa to take place at an earlier date than otherwise intended and that the Complainant was in fact transferred by boat over night on the 16<sup>th</sup> July arriving Labasa on the 17<sup>th</sup> of July.
31. The Respondent agreed to go to Labasa to continue the application for bail. The Complainant says that the Respondent was going to Labasa in any event for a soccer tournament. The Respondent denies this to be so.

32. At Labasa the Respondent says that he was able to have the Complainant released from custody on the basis that he attend daily for further interview. This occurred on the afternoon of Saturday 17<sup>th</sup> of July.
33. Whilst the Complainant suggests that it was intended that the Respondent himself act as surety the Respondent denies that this was ever the case and that he was only engaged in his professional capacity to obtain bail on behalf of the Complainant.
34. The Complainant ultimately went to court in Labasa and at that time the Respondent had returned to Suva. The Complainant then engaged another solicitor, Mr Sen, for the sum of \$1,000 to obtain bail for him at court.
35. The Complainant says he is entitled to have the fee paid to the Respondent refunded.
36. The Respondent acknowledges that no bill of costs issued to the Complainant as it is his practice not to give a bill of cost if the fee is paid in advance.

### **COMPLAINT NO 5**

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

#### **Particulars**

Sheik Hussein Shah a legal practitioner, on the 18<sup>th</sup> day of May 2007, failed to appear for Prabhu Lal in the High Court at Labasa in criminal case No HAC 3 of 2005, for which he had received the sum of \$400 from Prabhu Lal to seek an adjournment, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

37. The Complainant in this matter is a serving prisoner having been sentenced to 10 years imprisonment on the 24<sup>th</sup> of May 2007 for 10 counts of rape and 2 counts of indecent assault [Ex A24].
38. The Respondent says that on the 18<sup>th</sup> of May 2007 the Complainant came to his office in Labasa and asked if he would represent him on 1 count of rape. The Respondent says that the Complainant did not have his disclosures and the Respondent sought that he pay the sum of \$400 which amount was paid at that time. The Respondent says that the services he provided were talking to him for about 1 hour and that his charge out rate is \$150 per hour.
39. The court record of the High Court of Labasa [Ex R15] shows that on the Monday the 21<sup>st</sup> of May 2007 at 9.30 am the Complainant's proceedings were called for trial. At that time the

record indicates that the Complainant said "I have just spoken to a lawyer. It was Mr Sheik Shah. He told me to get the documents to his office."

40. The court then adjourned the matter until the following day for trial and proceeded to swear the assessors.
41. The record then indicates that on the 22<sup>nd</sup> of May 2007 at 9.30 am the accused said "I have no lawyer. Mr Shah did give me some instructions. He said the disclosures is incomplete."
42. The court went on to confirm that all disclosures had in fact been given some 2 years prior.
43. A clerk from the Respondents office in Labasa also gave evidence before the Commission of the Complainant attending the office and of her having issued a receipt detailing he was charged with 1 count of rape.
44. The Complainant is a fisherman with little education.
45. The Respondent suggests he didn't appear on the 21<sup>st</sup> and 22<sup>nd</sup> of May 2007 as he was unaware, from the information given to him by the Complainant as to what court the matter was in. I note that the court complex in Labasa contains both the Magistrate Court and the High Court within the same building.

#### **COMPLAINT NO 7**

**A Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree No 16 of 2009**

#### **Particulars**

Sheik Hussein Shah on the 31<sup>st</sup> day of December 2008 failed to honour the agreement that he and his client Mohammed Tahadil had entered into concerning the agreed legal fees that would be charged in respect of the civil proceedings at the Labasa High Court in civil action HBC 5 of 2008 by charging Mohammed Tahadil a further sum of \$8000, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

**B Professional Misconduct: Contrary to section 82(1)(b) and 83(1)(a) of the Legal Practitioners Decree No 16 of 2009**



### Particulars

Sheik Hussein Shah on the 14<sup>th</sup> day of March 2008, abused the relationship of confidence and trust he had with his client Mohammed Tahadil by forging the signature of Mohammed Tahadil in the document titled the "instruction to Act" date 4<sup>th</sup> of March 2008, which conduct occurred in connection with Sheik Hussein Shah's practice of law and would justify a finding that he is not a fit and proper person to engage in legal practice.

**C Professional Misconduct: Contrary to section 82(1)(b) and 83(1)(a) of the Legal Practitioners Decree No 16 of 2009**

### Particulars

Sheik Hussein Shah on the 18<sup>th</sup> of August 2008, abused the relationship of confidence and trust he had with his client Mohammed Tahadil by forging the signature of Mohammed Tahadil in the letter to the Manager of the Bank of Baroda of Labasa dated the 18<sup>th</sup> of August 2008, which conduct occurred in connection with Sheik Hussein Shah's practice of law and would justify a finding that he is not a fit and proper person to engage in legal practice.

46. The Complainant is a taxi driver in Labasa and was the executor named in the Will of his late father. In 2007 he sought a grant of Probate of his father's Will and a caveat was lodged by his brother. He then went to see the Respondent to have the caveat removed.
47. He says the Respondent agreed to act for him in the removal of the caveat for a fee of \$250 plus his air fares from Labasa to Suva and return.
48. The Complainant's brother filed papers in the High Court and again the Complainant engaged the Respondent to act for him. The Complainant says that the Respondent said if the matter concluded in 2 years the fee would be \$5,000 and if it took longer than that the fee would be \$6,500. He said the matter completed in less than 2 years and the Complainant says that he paid the sum of \$5,100 to the Respondent.
49. The action brought by the Complainant's brother appears to be matter No HBP 05 of 2008 in which judgment was given on the 31<sup>st</sup> of December 2008 in favor of the Complainant.
50. The court, Singh J, made the following order:-*"...The Plaintiff's claim is therefore dismissed with costs which I summarily fix in the sum of \$2,000. Given the length of trial I would have awarded higher costs but \$2,000 is the maximum costs claimed in the defence."* The fees charged for this matter appear in a very incompetent "bill of costs" for the period 19<sup>th</sup> February 2008 to 31<sup>st</sup> December 2008 in the sum of \$5,000 plus VAT [Ex A20] in addition to these fees the Respondent also included "bill of cost" fee totaling \$3,000 plus VAT with respect to a "motion filed by Mohammed Jahandil and others". Mohammed Jahandil is the brother of the Complainant.

51. The Complainant also received a bill of cost for the period 5<sup>th</sup> October 2007 to 14<sup>th</sup> February 2008 in the sum of \$3,750 plus VAT [Ex R11] which is said to relate to "removal of caveat".
52. All these fees were the subject of an action brought by the Respondent against the Complainant in the Labasa Magistrate Court. The learned Magistrate in a Ruling dated 2<sup>nd</sup> June 2009 [Ex A21] found in favor of the Respondent.
53. The only evidence of payment by the Complainant to the Respondent is two receipts in the total sum of \$3,250 (which note \$500 balance) [Ex A17] and a hand written note of the Complainants [Ex A18] which states "total money paid to lawyer \$5,100". This document shows a break up of the monies as being: "5 flights to Suva \$1,000, making affidavits \$500, filing papers High Court \$200, and also motion \$150", and \$3,250 which would appear to be the monies referred to in the receipts [Ex A17].
54. The Respondent relies, as he did before the learned Magistrate, on a document titled "Instruction to Act" dated 4<sup>th</sup> March 2008 [Ex A22] which describes the work to be done as:-  
1. Oppose Notice of Motion - \$3,000, 2. Defend Writ of Summons - \$5,000".
55. The Complainant denies signing these documents and says that his signature is forged. The instruction detailed in Ex A22 and the charges in Ex A20 appear to correspond.
56. The fees in Ex R11 appear to relate only to the removal of the caveat and placing a caveat on behalf of the Complainant.
57. The way in which the bills of costs are drafted leaves much to be desired as they contain no detail of the actual charges for the work done but merely a total figure for the work set forth in a brief narrative.
58. The Respondent and his clerk gave evidence that the instruction document was signed in their presence by the Complainant. The Respondent denies signing the documents for the Complainant.
59. Whether he signed the instructions or not it would seem that instructions were given by the Complainant to the Respondent to act in all the matters briefly described in the two bills of costs [Ex A20 & Ex R11].
60. The Complainant denies signing "the instruction to act" and claims that his signature on that document [Ex A22] is forged. The only evidence before me of the alleged forgery is the evidence of the Complainant.

61. The Complainant further alleges that the Respondent executed an authority in favor of the Bank of Baroda for the payment of \$6,500 to the Respondent [Ex A23]. The Complainant denies signing the document and says that his signature has been forged.
62. Again the Respondent and his clerk both gave evidence and say that the document was signed in their presence by the Complainant.

#### THE LAW

63. The Complainant alleges with respect to complaints 7B and 7C that the Respondent forged his signatures on two documents.
64. The legal burden of proving all facts essential to a claim normally rest upon the plaintiff in a civil suit or the prosecutor in criminal proceedings. One of the clearest Australian expressions of the general rule is the following statement of Wolf J A in *Currie V Dempsey* (1967) 69 SR (NSW) 116 at 125 :- "The burden of proof in the sense of establishing a case, lies on the plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg. if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, would constitute a good defence, that is, "avoidance" of the claim, which, prima facie, the plaintiff has."
65. It is said that a fundamental requirement of any judicial system is that the person who desires the court to take action must prove the case to its satisfaction. – *Dickinson v Minister of Pension* [1953] 1 QB 228 at 232.
66. It follows therefore that the Applicant bears the burden of proving that the signatures of the Complainant on the documents were indeed forgeries.

#### STANDARD OF PROOF

67. 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).

68. 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.
69. The High Court of Australia in *Rejtek 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.."*
70. 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."*
71. 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."*
72. 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."*
73. 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

### Complaint No 1

The Respondent having admitted the allegation is found guilty of professional misconduct.

### Complaint No 2

74. From the evidence it is apparent that the drafting of the Respondent left much to be desired. It is not unusual for the defendant to civil proceedings to write as Munro Leys Lawyers did seeking further and better particulars with respect to the claim. This itself does not show that the Respondent has been guilty of professional misconduct.
75. The question for determination is whether the drafting of the Writ of Summons was conduct that involved a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence.
76. In making this determination it is necessary to consider the evidence applying the relevant standard of proof. The facts to be proved are important and accordingly the standard of proof must rise.
77. Whilst the drafting of the Writ of Summons did not meet the expectations of the Complainant and may well have been done more competently I am not of the opinion applying the relevant standard of proof that the Respondent has conducted himself in such a way as not to keep a reasonable standard of competence and diligence.
78. The second complaint particularized within complaint number 2 was that the Respondent had failed to inform the Complainant that he had relocated his law practice to Suva.
79. On the evidence of the Complainant and of the Respondent and applying the relevant standard of proof I cannot be satisfied that the Complainant was not aware of the Respondent's intention to relocate.
80. I accept the Respondent's evidence that the Complainant was a regular attender at the Respondent's office and that he took a very "hands on" approach to his litigation.

81. It is I think also relevant to consider the nature and size of the Labasa commercial center. Taking all of these matters into account it is my opinion that the complaint has not been made out.

### Complaint No 3

82. At the conclusion of the case for the Applicant the Respondent admitted both allegations within complaint number 3 accordingly he is found guilty of two counts of unsatisfactory professional conduct as particularised within complaint number 3.

### Complaint No 4

83. The evidence of the Complainant and his brother in law is in the circumstance difficult to accept with respect to the most relevant issues.

84. It is clear on the evidence that the Respondent was engaged at Valelevu to obtain bail on behalf of the Complainant. It is also clear that the sum ultimately agreed by way of fees was \$1,000. There is then no dispute that the Respondent had accompanied the Complainant to Labasa where he again attended upon the police and sought bail on behalf of the Complainant.

85. I reject the suggestion made by the Complainant that it was intended that the Respondent would act as surety for the Complainant and that the sum of \$1,000 was intended as a bail bond.

86. Accepting as I do that the Respondent performed work on behalf of the Complainant at Valelevu and at Labasa I am not satisfied that the complaint has been made out.

87. The Respondent in his evidence says that no memorandum of fees was furnished as it is not his practice to furnish a memorandum of fees where the fees are paid in advance. This would appear to be a very imprudent practice.

88. The complaint is not made out and therefore must be dismissed.

### Complaint No 5

89. The evidence of the Complainant in this matter whilst being in part a little vague was supported by the record of the High Court in Labasa. The Complainant was a fisherman and not educated.

90. The Respondent gave evidence as did his former clerk. It is not disputed that the Complainant came to the offices of the Respondent and spoke with him for some period of time. It is also not disputed that the Respondent failed to appear for the Complainant in Labasa High Court. The issue is was the Respondent furnished with instructions sufficient to enable him to appear or alternatively did he lead the Complainant to believe that he would in fact appear.
91. On the evidence of the Complainant, the Respondent and the Respondent's clerk I am satisfied, based upon the relevant standard of proof, that the Respondent is guilty of unsatisfactory professional misconduct.

#### Complaint No 7

92. There are three allegations contained within complaint number 7 all of which relate to instructions given by Mohammed Tahadil, the Complainant, to the Respondent with respect to various proceedings relating to the administration of the Estate of the Complainant's father.
93. The second and third allegation relates to allegations that the Respondent forged the Complainant's signature on two occasions. This is denied by the Respondent in his oral evidence. His evidence is supported by the evidence of his former clerk who was present when both documents were signed and she says that the documents were signed by Mr Tahadil in the presence of the Respondent. As is detailed earlier the burden rest upon the Complainant to prove that the signatures were indeed forged. The only evidence placed before me is the oral evidence of the Complainant that he did not sign the documents.
94. On the basis of the evidence I cannot be satisfied that the Complainant has discharged the burden cast upon him to prove that the signatures are indeed forged and that they were forged by the Respondent. Accordingly the second and third allegations must be dismissed.
95. The first allegation is that the Respondent overcharged the Complainant for the work performed in respect to the various matters pertaining to the administration of the Estate of the Complainant's father.
96. The question of costs in these matters has already been the subject of litigation between the Complainant and the Respondent before the learned Magistrate in Labasa. The learned Magistrate found in favor of the Respondent.
97. I am satisfied that the Respondent carried out work in accordance with instructions given to him by the Complainant which are detailed in the two bills of costs [Ex A20 and Ex R11].

103. The conduct and administration of trust funds is indeed a serious matter as the funds are not those of the legal practitioner and this poses a very high standard on the way in which legal practitioners administer their trust accounts.

104. I am of the opinion that a monetary penalty is the appropriate penalty in this circumstance detailed. It is necessary to send a message to all legal practitioners of the high standard that is expected of them with respect to the administration of trust accounts. In the circumstance therefore I am of the opinion that a monetary penalty in the sum of \$1,000 is appropriate.

### **Complaint No 3**

105. The two allegations within complaint number 3 were admitted by the Respondent at the conclusion of the evidence on behalf of the Complainant. At that time the Respondent consented to orders being made against him for a fine of \$500 with respect to each complaint together with witness expenses and on the basis that he undertook to have the proceedings reinstated without delay and to pursue those proceedings on a pro bono basis. In the circumstance orders in the terms submitted seem appropriate.

### **Complaint No 5**

106. It is not in dispute that the Respondent failed to appear on behalf of the Complainant at the Labasa High Court. The Respondent says that he spoke with the Complainant for about an hour and that the Complainant did not tell him the date, the court or the charges. The Complainant in his evidence says that he attended and he expected the Respondent to appear on his behalf the next day.

107. It is clear from the evidence that the Complainant is an uneducated fisherman who would have been very reliant upon the Respondent and in these circumstances it would seem appropriate for a monetary penalty to be imposed upon the Respondent for the commission of the act of unsatisfactory professional conduct. It would also seem appropriate for there to be a refund of part of the fees paid by the Complainant to the Respondent as the Respondent failed to carry out the work for which the fees was paid. I consider in the circumstance a fine in the sum of \$750 to be appropriate and a refund of \$250 to the Complainant.



## ORDERS

### Complaint No 1

The Respondent is found guilty of professional misconduct and is ordered to pay to the Commission by way of fine the sum of \$1,000 such amount to be paid within 14 days. The Respondent is further to pay witness expenses totalling \$610.20 to the Commission for payment out to the Applicant within 14 days.

### Complaint No 2

a.) 2A - The complaint is dismissed.

b.) 2B - The complaint is dismissed.

### Complaint No 3

a.) The Respondent having admitted the allegations is found guilty of unsatisfactory professional conduct.

b.) 3A - The Respondent is fined the sum of \$500 to be paid to the Commission within 14 days.

c.) 3B - The Respondent is fined the sum of \$500 to be paid to the Commission within 14 days.

d.) The Respondent is to pay witness expenses totalling \$144 to the Commission within 14 days such amount to be paid out to the Applicant.

e.) The Respondent's undertaking to the Commission to make application to the High Court at Lautoka to reinstate the proceedings on behalf of the Complainant and if successful to progress those proceedings without delay on a pro bono basis is noted.

### Complaint No 4

The complaint is dismissed.

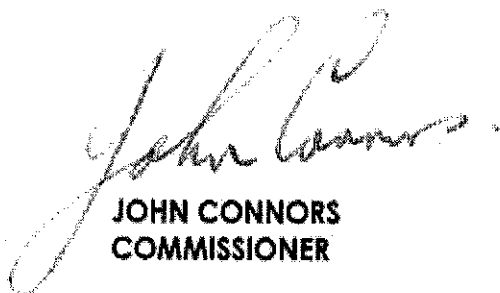
### Complaint No 5

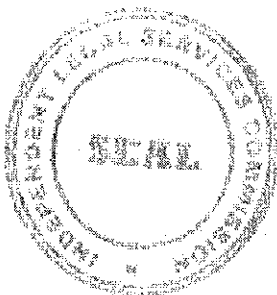
The Respondent is convicted of unsatisfactory professional conduct and is ordered to pay a fine in the sum of \$750 to the Commission within 14 days. The Respondent is further ordered to pay to the Commission a sum of \$250 for payment out to the Complainant.

Complaint No 7

- a.) 7A - The complaint is dismissed.
- b.) 7B - The complaint is dismissed.
- c.) 7C - The complaint is dismissed.

In the event that monies ordered to be paid by the Respondent to the Commission are not paid by the due date then the Respondent's practicing certificate shall be suspended until such time as the monies are paid, without further order.

  
**JOHN CONNORS**  
**COMMISSIONER**



**15 JUNE 2010**