IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

NO.002/2009

BETWEEN:	**CHIEF REGISTRAR**	**APPLICANT**
AND:	**HEMENDRA NAGIN**	**RESPONDENT**

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

DATE OF HEARING: **16th June 2010**
DATE OF JUDGMENT: **9th July 2010**

JUDGMENT ON SENTENCE

1. The Respondent was on the 7th May 2010 found guilty of two charges of unprofessional conduct and admitted a third count. All three counts arose out of the one transaction when the Respondent acted for the vendor, purchaser, mortgagee and real estate agent in a convencying transaction.

2. The transaction had a most unsatisfactory outcome for the Complainants as they are been sued by the real estate agent for commission on what was an artificial sale price. They have incurred or will incur legal costs of $15,000 with respect to the sorry sago and have faced anguish over which should have been a relatively straight forward conveyancing transaction.

3. Counsel for the Respondent submits that the Respondent is a practitioner of over 30 years standing and an active member of the community. His Rotary service has been acknowledged by him been made a Paul Harris Fellow in 2009.

4. It is also submitted that his wife of 30 years and a daughter are lawyers.

5. The Respondent acknowledges now that he "was unwise to have acted, or to have continued to act, for both parties to the transaction" but says that he did not deliberately set out to cause harm to the Complainants.

6. It is submitted that unbeknown to the Respondent an employed solicitor took instructions from the real estate agent to commence action against the Complainant for commission on the artificial purchase price.

7. The failure to adjust the Suva City Council rates it is submitted it is not such a matter as to "warrant a normal penalty in the special circumstances of this case."

8. The Respondent offers to pay compensation of $10,000 to the Complainants.

9. It is further submitted that the Respondent has suffered as a result of adverse publicity these proceedings have brought and that no further penalty should be imposed.

10. The Applicant submits that there is a sufficient public interest element in the commission of the breaches and that the public must be protected. It is submitted that this is more so as the Respondent is a senior practitioner.

11. The main purpose served by disciplinary proceedings is to protect members of the public from misconduct by lawyers – *Southern Law Society v Westbrook (1910) 10 CLR 609 at* 622. This recognizes the public interest in the integrity of the members of the profession, so central to public confidence in the legal system. In New South Wales an appellant judge branded the protective function as a " *recognition of the social value in the availability of the services provided to the public, combined with an understanding of the vulnerability of many who require such services*" – *New South Wales Bar Association v Meakes [2006] NSWCA 340.*

12. The aim of professional disciplinary proceedings is a means to safeguard the reputation of the profession – *Southern Law Society – Westbrook* (1910) 10 CLR 609. Related to this are the objectives of maintaining proper standards in the profession and setting an example to other lawyers – *De Pardo v Legal Practitioners Complaints Committee (2000) 170 ALR 709*. It cannot be denied, to this end, that a disciplinary sanction may deter other lawyers from engaging in the impugned conduct and also deter the lawyer disciplined and so indirectly protect the public against like defaults. It is said that this means that a court or tribunal, in making a disciplinary order, takes account of the message that the order conveys to other lawyers, particularly young lawyers – *Re Drew (1920) 20 SR (NSW) 463 at 466*.

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

14. *Wooten J in Thompson v Mikkelsen (SC(NSW), 3 October 1974 – unreported)* said:-

> *"... the practice of a solicitor acting for both parties cannot be too strongly deprecated. It is only because of the possibility that something may go wrong in a transaction, or may go wrong during its implementation, that the employment of highly trained professional people at professional scales of remuneration can be justified. To scrutinize a transaction to discover whether something is wrong in a way that may affect his interests, or to notice and deal with something that goes wrong during the transaction, is what a party employs such a person for. He is entitled to assume that the person will be in a position to approach the matter concerned with nothing in mind but the protection of his client's interests against those of the other party. He should not have to depend on a person who has conflicting allegiances and who may be tempted either consciously or unconsciously to favour the other client."*

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

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

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

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

17. Davies JA of the New South Wales Court of Appeal said in *Alexander (trading as Minter Ellison) v Perpetual Trustees WA Ltd [2001] NSWCA 240*

"a conflict of interest is an insidious thing. Aspects of a duty of care, which ought to be seen clearly and distinctly, are seen in a hazy light when a solicitor seeks to reconcile the interests of two clients who each have interests which differ from those of the other. Over many years, in judgments which I have written or in which I have joined, the point has been made that solicitors should never allow themselves to have a conflict of interest. Those judgments appear to have had no impact. Too many solicitors continue to act for two or more clients who have conflicting interests. Year after year, cases come before the courts because a solicitor, in such a position, has failed to fulfill his duty to one or more of his or her clients."

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

"the difficulty ... which must be acknowledged is that where a party is contemplating retaining a solicitor who acts for another ... the party will often not recognize a conflict which is possible, pending or even then existing. It is the solicitor who should in the normal course be the first to apprehend this. And so the parties rely upon the solicitor, not only to have the integrity to withdraw when conflict arises, but also the perception to sense its pendency before it arises in fact. The solicitor, then, must be constantly vigilant and alert to perceive the possible emergence of a conflict of interest ... What is involved here is that the solicitor is entrusted by the client with the task of acting as a lookout for

and then as an arbiter of this conflict and, where this does or is likely to arise, perhaps to act in a way which may be contrary to the solicitor's own interest ... This is a trust which not every client would be content to confer upon another person, even a solicitor. It is one which a client should not be expected to give without a proper understanding of its implications."

CONCLUSION

19. It is unfortunate that the practice of acting for multiple parties has been accepted as appropriate in Fiji for many years. It is and can been seen to be most inappropriate.

20. As observed by McPherson JA of the Queensland Court of Appeal in *Baker v Legal Services Commission [2006] QCA 145*

"the sanction for violation is not intended to punish but is designed for the protection of the public and to maintain confidence in the profession in the estimation of the public and of the profession as a whole."

21. The law is clear that the role of the Commission is to protect to the members of public from misconduct by lawyers and to protect the integrity of the profession.

22. A clear message must be sent to lawyers in Fiji that conduct of the type displayed by the Respondent is inappropriate.

23. The Commission is not for the purpose of fundraising and it is appropriate that a penalty should benefit those that suffer as a result of the unsatisfactory professional conduct. The Complainants have a large bill for legal fees and face the possibility of a judgment against them in favor of the real estate agent.

24. I propose that both of these liabilities to be met by the Respondent.

25. I take into account the order for payment of damages when not imposing a fine on the Respondent.

ORDERS

1. The Respondent is publicly reprimanded.

2. The Respondent is to pay to the Commission for payment out to the Complainants (M A Khan and S B Khan) the sum of $15,000. Such amount is to be paid within 28 days failing which the Respondent's practicing certificate is suspended, without further order, until payment is made.

3. The Respondent is to indemnify the Complainants against any monies ordered to be paid by them or either of them to Titus (Sales) Agency Limited with respect to High Court Action 58/2000.

John Connors
COMMISSIONER

Dated: 9 July 2010