

IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

NO.006/2009

BETWEEN: CHIEF REGISTRAR APPLICANT

AND: NILESH LAJENDRA RESPONDENT

APPLICATION: Ms V. Lidise

RESPONDENT: Mr. D. Sharma and Mr. P Sharma

DATE OF HEARING: 3rd February, 2010

DATE OF JUDGMENT: 13th April, 2010

JUDGMENT

1. By amended complaint filed on the 3rd February, 2010 the Respondent was alleged to have committed two counts of unsatisfactory professional conduct. The particulars of the alleged breaches are that:

Nilesh Lajendra, a legal practitioner on the 30th of June 2009 at Suva, received the sum of \$30,000 into the Lajendra Law Trust Account on behalf of Attendra Singh following a successful application filed in civil action HBC 534/05S and has subsequently failed to release the said \$30,000 to Attendra Singh, a conduct which continues to occur in connection with Nilesh Lajendra'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.

And that:

Nilesh Lajendra, a legal practitioner on the 22nd of June 2009 at Suva, withdrew formally from representing Attendra Singh in the matter of Covec Fiji Ltd v Attendra Singh ABU83/07 and has subsequently failed to release the said Attendra Singh's files in respect of the same matter, despite the fact that the matter is still pending before the Fiji Court of Appeal, a conduct which continues to occur in connection with Nilesh Lajendra'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.

Agreed Facts

2. Counsel for the parties agreed on the following facts:

- a) Mr. Atendra Singh (hereinafter referred to as the Complainant), is a retired civil servant and resides at 24 Aidney Road, Suva.
- b) Nilesh Lajendra (hereinafter referred to as the Respondent) is a legal practitioner operating as a sole practitioner from his office at 98 Gordon Street, Suva.
- c) In April 2003 the Complainant entered into a contract with Covec (Fiji) Limited (hereinafter referred to as Covec) a foreign owned company, whereby Covec was to extract road material from his land at Waivola, Londoni Road, where there was quarry.
- d) Covec had itself entered into a contract with the Public Works Department (PWD) on behalf of the government to construct roads in the Tailevu area. To that extent the continuation of the Complainant's contract with Covec was dependent on the continuation of the contract Covec had with the PWD.
- e) Covec fell behind in meeting its obligations to PWD which led to the termination of their contract as a result of their breach. This directly affected the Complainant's contract with Covec as Covec would no longer need to extract road materials from the Complainant's quarry.
- f) About mid 2005 after Covec's contract with PWD was terminated, Covec ceased operations of the quarry. Following a survey conducted on behalf of the Complainant by Sinclair King Merz, and engineering firm, the Complainant became aware that Covec had extracted more quarry material than it had paid for.

- g) The Complainant through counsel, namely Gavin O'Driscoll from O'Driscoll & Seruvatu lawyers filed a Notice of Motion in Suva High Court case Atendra Singh v Covec (Fiji) Limited HBC 534 of 2005 on the 26th of October 2005 seeking a Mareva injunction against several of Covec's vehicular assets. He also filed a Writ of Summons against Covec and a Statement of Claim suing Covec for among other things, special and general damages for breach of its contract with the Complainant.
- h) On the 12th of December 2005 Justice Coventry granted a Mareva injunction over the vehicular assets the Complainant had identified in his Notice of Motion. To that end, Covec and its servants and agents were ordered not to dispose or encumber the 18 vehicles identified and to maintain them until further order of the Court. [Ex A1.1].
- i) On the 17th of February 2006 Justice Coventry ordered Covec to pay the Complainant the contract price of the balance of the extracted rock for which he had not been paid, the value of which was yet to be settled.
- j) On the 24th of March 2006, the Master of the High Court then, Mr. J Udit made a consent order that Covec pay the sum of \$102,311.10 to the Complainant by the 7th of April 2006 [Ex. A 1.2]
- k) Covec failed to comply with the order of the 24th of March 2006. On the 27th of September 2006 Coventry J ordered Covec to deposit into Court the sum of \$102,311.10 being the calculated cost of the extracted rock Covec had not paid the Complainant for. It was recorded that there had been no application to set aside in respect of the sum.
- l) On the 23rd of November 2006 Justice Coventry refused Covec's application to set aside the default judgment entered against them for failing to comply with the Court's orders of the 27th of September 2006. The Court set aside the initial default judgment and entered judgment in default in inter alia, the following terms:
- i. Judgment in a sum to be assessed for the loss occasioned by the Defendants (Covec) to the Plaintiff (the Complainant) for failure to perform its contractual obligations to PWD as per paragraph 16 of the Statement of Claim;
 - ii. General damages to be assessed for breach of contract;
 - iii. A sum to be assessed in respect of the cost of rehabilitation of the plaintiff's properties;
 - iv. Continuation of a Mareva injunction over all the Defendant's equipment and property;
 - v. Interest on the sums awarded at 5% from date of issue of Writ of Summons until payment; and
 - vi. Costs to be assessed or taxed

[Ex. A 1.3]

- m) The assessment of damages was not carried out until approximately a year later. On the 16th of November 2007 Justice Coventry delivered a ruling awarding the Complainant damages in the total sum of \$586,416.55 which did not include the interest that was to be calculated [Ex. A 1.4]
- n) On the 28th of December 2007 Covec being dissatisfied with the default judgment entered and the damages it had to pay the Complainant, appealed to the Fiji Court of Appeal in civil case ABU 83 of 2007. At this point Gavin O'Driscoll had remained as counsel for the Complainant in all the matters against Covec.
- o) The record of the proceedings of the High Court in HBC 534/2005 is [Ex. A 1.5]
- p) At the time, the Complainant was not the only person who instituted legal proceedings against Covec. Madhwa a former employee of Covec sued Covec for damages. The suit was successful and the Madhwa was awarded damages in the sum of \$56,894.41. [Ex. A 1.6]
- q) To facilitate the payment of damages, Madhwa through his counsel Diven Prasad of Diven Prasad Lawyers had filed an Originating Summons on the 23rd of August 2007 seeking an order for the sale of the property CT. No. 8814 on DP 2080 in Suva, belonging to Covec. The application was granted and the Court on the 5th of November 2007 ordered the sale of the property at CT No. 8814 on DP 2080 in Suva belonging to Covec. [Ex. A 1. 7]
- r) Madhwa then on the 18th of March 2008 filed an application in the High Court against Covec in Civil Case 76 of 2008 seeking the acceptance of the tender by Pravish Kumar Punja and that the property at CT No. 8814 be sold to him. More importantly the application sought an order that the sum of \$5,894.41 together with Mr. Prasad's costs be deducted from the proceeds of the sale of the house to be paid to the Trust Account of Diven Prasad Lawyers.
- s) On the 15th of April 2008, the Master ordered that the property at CT 8814 be sold to Pravish Punja for the tender amount of \$555,000 and that the damages owed to Madhwa be paid to him from the sale proceeds. [Ex. A 1.8]
- t) On the 5th of June 2008 Diven Prasad filed a Motion for provisional title to the property at CT No. 8814 to be granted to Pravish Punja and that all caveats and encumbrances be discharged by the Registrar of Titles.

- u) The matter was called before the Master on the 23rd of June 2008 and he queried whether there was any caveat against the property at CT 8814. However counsel who appeared for the applicant was not aware of the existence of any caveats. The matter was next called on the 1st of July 2008 and the Master ordered that the documents filed be sent to the Complainant, upon becoming aware of a caveat the Complainant had registered against the property on the 24th of December 2007. [Ex. A 1.9]
- v) On the 29th of July 2008 the Complainant wrote a letter to the Senior Court Officer of the Suva High Court requesting copies of the judgments and orders made in respect of Madhwa's matters against Covec namely civil actions HBC 467/05 and HBC 76/05. [Ex. A 1.10]
- w) The Complainant thereafter became interested in intervening in civil action HBC 76/05 in order to protect his interests against Covec. Consequently he began considering engaging the services of a different lawyer to represent his interests in the Covec matters, namely, the appeal that Qoro Legal filed on behalf of Covec against the substantive ruling on damages in civil action HBC534/05 and to become an intervener in HBC 76/05
- x) In early July on more than one occasion, the Complainant met the Respondent to discuss a number of legal matters. One of those matters was that the Complainant needed a contract drawn up to regulate the repair work that the designated contractor would have to do for the Complainant's house. In addition, the Complainant had referred the letter of demand he had received dated the 7th of July 2008 from Kohli & Singh on behalf of Jay Lal Builders to the Respondent. [Ex. A 1.11]
- y) On the 11th of July 2008 the Complainant paid the Respondent the sum of \$500 as retainer for the preparation of a building contract and to respond to the demand letter from Kohli & Singh. [Ex. A 1.12]
- z) On the 15th of July 2008 the Respondent faxed a letter to Kohli & Singh dated the 14th of July on behalf of the Complainant in response to their letter. [Ex. A 1.13]
- aa) At some point toward the latter end of July 2008, the Complainant had discussed with the Respondent, legal representation in the Covec appeal. The Respondent advised the Complainant to bring him his files. Consequently the Complainant recovered all his files in respect of the Covec matter from Mr. O'Driscoll after settling his bill.

- bb) On the 31st of July 2008 the Complainant paid the Respondent the sum of \$500. [Ex. A 1.14]
- cc) On the 4th of August 2008, the Madhwa matter was called before the Master and the Respondent appeared on behalf of the Complainant as an interested party. The Respondent wrote a letter to the Complainant the same day confirming his discussions with the Complainant and the outcome of his appearance before the Master. [Ex. A 1.15]
- dd) In the proceedings of the 4th of August 2008, the Court allowed the Complainant an opportunity to find a buyer willing to purchase the house at CT 8814 for more than the \$555,000 that Mr. Pravish Punja had tendered for. Furthermore, the Complainant was ordered to file his Intervener application by the 11 of August 2008 and that if after the filing of the Intervener the Complainant did not have a higher offer for the property then, it would be sold to Mr. Punja.
- ee) In his letter of the 4th of August 2008 the Respondent had informed the Complainant that he had perused the Covec appeal papers and would require a retainer of \$3,000 to be paid within the next three days. The letter made it clear that work would commence only upon the receipt of the retainer which was amount was not negotiable.
- ff) The Complainant replied to the Respondent's letter of the 4th of August 2008 [Ex. A 1.16]
- gg) On the 8th of August 2008 the Complainant paid the Respondent a further sum of \$3000. [Ex. A 1.17].
- hh) The Complainant in order to protect his interests and ensure that Covec would be able to pay the damages awarded to him, namely the \$102,311.10 and the \$586,417.55, instructed the Respondent to file the Intervener application in the Madhwa matter. On the 11th of August 2008 the Respondent filed a Motion and Affidavit in Support deposed by the Complainant. [Ex A 1. 18].
- ii) After filing the Notice of Motion for the Intervener application, the Respondent filed a Notice of Change of Solicitors on behalf of the Complainant in place of O'Driscoll in respect of the Covec appeal on the 12th of August 2008. [Ex. A 1.19].
- jj) On the 16th of September 2008 the Respondent withdrew the Intervener Application. The Court ordered that the Registrar of Titles was to issue Provisional Title in favour

of Pravish Kumar Punja and that all Caveats and further encumbrances be discharged. [Ex. A1.20]. On the same day the Respondent sent a letter to the Complainant informing him of the Intervener proceedings and the Court's directions. [Ex. A 1.21].

- kk) The Respondent in preparing for the Covec appeal ABU 83/2007 filed written submissions on behalf of the Complainant on the 1st of October 2008 [Ex. A 1. 22].
- ll) On the 6th of October 2008, the Complainant wrote to the Respondent in response to letters received from the Respondent. The letter covered matters relating to the withdrawal of the Intervener application and the Covec appeal. [Ex. A 1.23].
- mm) The Respondent replied briefly on the 7th of October 2008. The Complainant on the same letter he received from the Respondent made a further note addressed to the Respondent. [Ex. A 1. 24].
- nn) The Respondent argued the Covec appeal on behalf of the Complainant after which judgment was delivered on the 7th of November 2008 in favour of Covec.
- oo) The orders made in the appeal judgment were inter alia as follows:
- i. That the default judgment entered by Coventry J on the 23rd of November 2006 was set aside.
 - ii. The judgment for the plaintiff in the sum of \$586,417.55 ordered by Coventry on the 16th of November 2007 was set aside.
 - iii. Covec was to pay the Complainant's costs fixed at \$30,000
 - iv. The Mareva injunction granted by Coventry J was to be dissolved, but after the Covec had paid the plaintiff's costs.
- pp) The decision was reached on the basis that without the consent of the Minister of Lands, pursuant to section 6(1) of the Land Sales Act, any contract or lease entered into was void *ab initio*, illegal and unenforceable. It was undisputed that Covec was a Chinese company. In the absence of the Minister's consent in the contract between the Complainant and Covec, the Court of Appeal found that neither party to the lease agreement could sue for breach of any of its terms. [Ex. A 1.25].
- qq) In order to facilitate the payment of the costs made in his favour, the Complainant instructed the Respondent to institute proceedings for the recovery of the \$30,000 from the balance of the monies held by the Court in respect of Madhwa matter. On the 1st of December 2008 the Respondent filed a Notice of Change of Solicitors in 534/05 in which Mr. O'Driscoll had previously represented the Complainant. [Ex. A 1.26]. On the same day he filed a Notice of Motion and Affidavit in Support in civil action HBC 534/05 seeking an order to recover the \$30,000 from the balance of monies held by the Court in respect of the Madhwa matter as it emanated from the same substantive matter. [Ex. A 1. 27].

- rr) The Complainant's application was listed for the 12th of December 2008. When called before the Master on this date, the Master had occasion to consider the effect of the Court of Appeal decision of the 7th of November 2008 in civil appeal ABU 83 of 2007 on the proceedings before him.
- ss) On the 20th of January 2009 Qoro Legal filed a Notice of Motion in civil matter HBC 534/05 that the balance of the money held by the Court in respect of the Madhwa v Covec matter be deposited into his Trust Account on behalf of Covec. In the same application, he sought an alternate order for the \$30,000 costs awarded in the Complainant's favour be deducted from the balance of the monies held by the Court after which the difference could then be paid into his Trust Account. [Ex. A 1.28].
- tt) Three days later, Mr. Qoro filed a further application to Strike Out the Complainant's application in 534/05 on the ground that it disclosed no reasonable cause of action, was vexatious and an abuse of process of the Court. Additionally the application for Strike Out was based on the grounds that the Fiji Court of Appeal decision of the 7th of November 2008 in ABU 83 of 2007 which had held that neither party to the lease agreement dated the 5th of April 2003 could sue for breach of any of its terms as it was entered into in breach of the express prohibition of section (1) of the Land Sales Act and as such could only be regarded as void ab ignition, illegal and unenforceable. [Ex. A 1. 29].
- uu) Both applications filed by Mr. Qoro for the striking out and the recovery of the balance of the monies in the Madhwa matter have not been determined to date and are the subject of pending Fiji Court of Appeal applications discussed below in paragraphs 51 and 52.
- vv) On the 30th of January 2009 the Complainant sent a letter to the Respondent indicating that he had not received a statement of the Respondent's legal fees as well as the documents Mr. Qoro had filed on behalf of Covec. The Respondent stated that he could not instruct the Respondent unless he was informed about the nature of the applications filed and that he expected to be provided with the documents. [Ex. A 1. 30].
- ww) The Respondent replied to the Complainant on the same day and explained the nature of the application and the reason for the delay in the photocopy of the documents. In paragraph 5, the Respondent stated, "*We note that there is outstanding fees and that entitles us to hold on to any documents that we receive. This is provided for in the Legal Practitioners Act.*" The letter attached with it the Respondent's bill of costs in respect of all the work done for the Complainant. [Ex. A 1.31].

- xx) On the 26th of March 2009, the Complainant's application to recover the \$30,000 from the balance of the monies held in Court in respect of the Madhwa v Covec matter was granted in the Complainant's favour by the Master. The order stated that the sum of \$30,000 was to be paid into the Respondent's Trust Account. In addition, he ordered that the balance of the monies were to remain deposited in Court until the Court of Appeal had finalized the issue of the \$102,000 which Covec was still yet to pay the Complainant. [Ex. A 1.32].
- yy) On the same day, the Respondent sent a letter to the Complainant informing him of the success of the application for the \$30,000. He informed the Complainant that the Court had ordered that the money be paid into his Trust Account. In the same letter he attached his Bill of Costs and encouraged the Complainant to make arrangements to settle his bill. [Ex. A 1.33].
- zz) The Respondent also wrote to the Officer in Charge of the High Court of Suva to facilitate the terms of the Master's order of the 26th of March 2009. [Ex. A 1.34].
- aaa) On the 13th of May 2009, the Acting Senior Court Officer of the Suva High Court raised a payment voucher for the payment of the \$30,000 to the Respondent's Trust Account.
- bbb) Whilst the Respondent had been corresponding with the High Court to facilitate payment of the \$30,000 he had received a Summons filed by Qoro Legal against the Complainant on the 6th of April 2009 similar to the terms of the Summons to Strike out referred to in paragraph 43. However, this application was filed in the Fiji Court of Appeal seeking to clarify the orders made earlier on the 7th of November 2008 in civil appeal no. ABU83 of 2007.
- ccc) The Summons and Affidavit in Support sought inter alia the following orders:
- v. That the Complainant's Writ of Summons and Statement of Claim filed against Covec in Civil Action No. 534/05 be dismissed and struck out for disclosing no reasonable cause of action; and
 - vi. That the Consent Order for payment of \$102,311.10 by Covec to the Complainant, sealed on the 29th of March 2006 be set aside
- ddd) The Summons to strike out was listed for hearing on the 22nd of June 2009. [Ex. A 1.35].
- eee) The Respondent wrote to the Complainant on the 17th of June 2009 advising the Complainant about the service of Qoro's application. In this letter the Respondent stated that his office had tried to telephone him unsuccessfully a number of times. The Respondent wanted to know what the Complainant's instructions were in relation to Covec's application in the Court of Appeal. [Ex. A 1.36].

- ff) The Complainant did not respond to the Respondent's letter.
- ggg) On the 22nd of June 2009 the Respondent appeared before a single judge in Chambers for hearing of Qoro Legal's application to strike out the Complainant's overall cause of action.
- hhh) Mr. O'Driscoll was present at the FCA with the Complainant. He spoke briefly with the Respondent before the commencement of the Chamber proceedings before Pathik J. The Respondent sought leave to withdraw as counsel for the Complainant and informed the Court that Mr. O'Driscoll would take over.
- iii) Having entered Mr. O'Driscoll's appearance, the Court granted leave for the Respondent to withdraw.
- jjj) Mr. O'Driscoll, informed the Court that that he intended to file an appeal against the judgment of the Court of Appeal of the 7th of November 2008 and therefore requested an adjournment in respect of the Covec's Summons to strike out. Leave was granted for Mr. O'Driscoll to file his Motion for leave to appeal the FCA judgment by Friday the 26th of June 2009. [Ex. A 1.37].
- kkk) After the adjournment was granted, the Complainant sent a letter to O'Driscoll & Company dated the 22nd of June 2009 instructing and authorizing Mr. O'Driscoll to obtain his file and documents from the Respondent and to do as he best advised. [Ex. A 1. 38].
- lll) Having received the Complainant's letter, Mr. O'Driscoll sent a letter to the Respondent informing him that the Complainant had instructed him (O'Driscoll) to take over carriage of the Covec appeal and a second matter that was unrelated to the Covec case. The letter also requested that the Respondent hand over the files in respect of both matters. [Ex. A 1.39].
- mmm) The Respondent replied on the 24th of June 2009 stating that the Complainant still owed him legal fees in respect of file FCA NO. ABU 83 of 2007S and once the Complainant had settled his bill, the files would be released. The files in respect of the other matter requested for were released by the Respondent to O'Driscoll & Co. [Ex. A 1.40].
- nnn) On the 30th of June 2009, the Respondent received the cheque of \$30,000 from the High Court of Suva payable to His Trust Account. The cheque was in respect of the Master's order of the 26th of March 2009. The Respondent issued a receipt for the cheque. [Ex. A 1.41 and Ex. A 1.42].

- ooo) The Respondent created a Trust Account ledger entry for the Complainant on the 30th of June 2009. [Ex. A 1.43].
- ppp) On the 1st of July 2009, Mr. O'Driscoll filed an application on behalf of the Complainant in the form of a Notice of Motion and Affidavit in Support seeking leave to appeal out of time and leave to appeal to the Supreme Court against the decision of the Fiji Court of appeal of the 17th of November 2008 in ABU 83 of 2007. [Ex. A 1.44].
- qqq) On the 7th of July 2009 after the cheque for the \$30,000 was processed and cleared the Respondent wrote to the Complainant. [Ex A 1.45]. The Complainant did not reply to this letter.
- rrr) On the 22nd of July 2009 the Respondent sent another letter to the Complainant. [Ex. A 1.46]. The Complainant did not reply to this letter.
- sss) On the 3rd of December 2009 the application was determined. The Court of Appeal dismissed the application and ordered the Complainant to pay Covec's cost in the sum of \$6000 within 21 days. The order was sealed on the 20th of January 2010. [Ex. A 1.47].
- ttt) To date, the Respondent continues to retain the \$30,000 payable to the Complainant in his Trust Account.
- uuu) The Respondent also continues to hold all of the Complainant's files in respect of the civil action HBC 534 of 2005 and Civil Appeal No. ABU 83 of 2007.
- vvv) Covec's applications both in the High Court and the Fiji Court of Appeal to strike out the Complainant's Writ of Summons and statement of Claim in civil matters HBC 534/05 and ABU 83/07 are still pending.
- www) The award of costs of \$6000 against the Complainant in respect of his application for leave to appeal to the Supreme Court has not been paid. Qoro Legal filed a Notice of Motion on the 23rd of December 2009 seeking among other things that the \$6000 award of costs be deducted from the \$30,000 held in the Respondent's Trust Account. [Ex. A 1.48].
- xxx) The Office of the Chief Registrar has confirmed that the Respondent remains on record as counsel for the Complainant in respect of Suva High Court civil action No. HBC 534 of 2005 – Atendra Singh v Covec Fiji Limited in which the Summons to

Strike Out remains pending, awaiting determination by the Fiji Court of Appeal. [Ex. A 1.49].

The Evidence

3. Apart from the documents tendered and referred to in the agreed facts the Applicant tendered 5 Tax Invoices rendered by the Respondent to the Complainant [Ex. A 2 – Ex. A 5] and the Respondent tendered correspondence to and from the Complainant's current solicitor [Ex. R1 – R2 and R 6]. A will and trust deed drawn by the Respondent on instructions from the Complainant were also placed in evidence [Ex R 4 and R 5]. Bank statements with respect to the Respondent's trust account were tendered and admitted as [Ex. R 3].
4. The Complainant in evidence stated that he retained the Respondent to do all legal work associated with Covec for the total amount of \$3500.00 and that accordingly the fees detailed in Ex A 2, A3 and A6 were not payable.
5. He acknowledged that he paid a further retainer in the sum of \$500.00 for the work detailed in Ex A4.
6. Whilst acknowledging that he instructed the Respondent to prepare a will and trust deed detailed in ex. A5 he denies liability for payment of these fees as he says he was quoted the sum of \$750.00 for the trust deed and that he should not have to pay for the will as has never paid for a will before and that there were errors in it. He acknowledges that these issues were not raised with the Respondent.
7. The allegations against the Respondent do not contend that he overcharged the Complainant for any of the work that he did for him.
8. Most relevantly the complainant maintained in his oral evidence that the Respondent terminated the retainer with respect to the Covec matters on the 22nd June, 2009 in the precinct of the Fiji Court of Appeal and said that after termination of the retainer he engaged Mr. O'Driscoll to represent him again.
9. Exhibit A 1.44 is a Notice of Motion and supporting affidavit subsequently filed by Mr. O'Driscoll on behalf of the Complainant. Paragraph 12 of that affidavit sworn by the Complainant on the 26th June, 2009 states:

"On or around 17th June, 2009 I approached Mr. Gavin O'Driscoll to reengage him in respect of this matter, he having handled the matter throughout the course of its time wending its way through the High Court."
10. The Respondent says in his oral evidence that Mr O'Driscoll and the Complainant were both at the Fiji Court of Appeal on the 22nd June, 2009 and that Mr. O'Driscoll approached him at the bar table and informed him that he was now acting for the Complainant. The Respondent says that this was the first he knew and that he then

sought leave of the court to withdraw. This is supported by the transcript of the court proceedings [Ex A 1.37].

11. Applying the civil standard of proof modified taking account of the gravity of the facts to be proved I am satisfied that the Respondent's retainer with respect to matter ABU 0083 of 2007 was terminated by the Complainant.

The Lien

12. The Respondent maintains that he has a lien over the file and the moneys held in trust pending payment of his outstanding fees.
13. *The "retaining" lien (sometimes termed the "general" lien) gives solicitors the right to retain, until all their costs and charges as solicitors are paid¹*

all documents or other chattels (including money);

that are the property of a client, and

that have lawfully come into the solicitors' possession in their capacity as the client's solicitors:

Where the client instructs another solicitor, the former solicitor who is owed fees will usually retain the file for this purpose. Yet it is not so limited; the lien may be exercised over documents such as a certificate of title, a bill of exchange, letters patent, an application for shares, a debenture trust deed, a policy of insurance and letters of administration. As the client has no right, whilst the lien subsists, to inspect these documents or take copies of them,² the lien can create a serious impediment for a client. Upon payment of the costs owing the client is entitled to an order for the delivery up of those documents: - Riley Solicitors Manual. 18,000.

14. *Where the client discharges the solicitor other than for misconduct,¹ as a general rule the solicitor's lien endures until the payment of costs, with the result that the solicitor cannot be compelled to produce or hand over the documents in question.² In this event, the client's interest in having his or her file for the purpose of conducting an existing proceeding is outweighed by the unfairness to the solicitor in having to give up the lien in circumstances where, without any just or reasonable cause, the client has terminated the retainer and instructed another solicitors.³ ... The more general provision relating to client's documents on termination of a retainer - likewise recognises an exception, where the client has terminated the retainer, to the duty to hand over to a client documents to which the client is entitled.*

The client bears the onus of proving misconduct in a professional capacity; general allegations of overcharging or trivial allegations against solicitors are unlikely to satisfy this onus.⁴ Although proof of professional misconduct at general law (as to which is not required, proof of unsatisfactory professional conduct as defined under statute may be sufficient for this purpose. - Riley Solicitors Manual 18,040.

15. The Supreme Court of Queensland – Court of Appeal in *Stark v Dennett* [2008] QCA 50 adopted the summary of the law set forth by Drummond J in *Re Weedman* [1996] FCA 1112 where he said:

In the absence of a special agreement, the right of a solicitor to refuse to hand over his former client's papers in order to force the client to pay his costs has long been recognised under the general law. The principles relevant to the assertion of a solicitor's lien upon a change of solicitor are set out in the judgment of Templeton LJ [sic] in Gamlen Chemical at 624, and have been accepted by this Court in CCom Pty Ltd v Jiejing Pty Ltd and Ors (Cooper unreported, 24 June 1992) and Cross v National Australia Bank Ltd (Drummond unreported, 13 May 1993).

'If before the action is ended, the client determines the retainer, the solicitor may, subject to certain exceptions not here material, exercise a possessory lien over the client's papers until payment of the solicitor's costs and disbursements. Thus, in Hughes v Hughes [1958] P 224 at 227–228, Hodson LJ said:

'There is no doubt that a solicitor who is discharged by his client during an action, otherwise than for misconduct, can retain any papers in the cause in his possession until his costs have been paid ... This rule applies, as the authorities show, whether the client's papers are of any intrinsic value or not, ...'

The solicitor himself may determine his retainer during an action for reasonable cause, such as the failure of the client to keep the solicitor in funds to meet his costs and disbursements; but in that case the solicitor's possessory lien, ie his right to retain the client's papers of any intrinsic value or not, is subject to the practice of the court which, in order to save the client's litigation from catastrophe, orders the solicitor to hand over the client's papers to the client's new solicitors, provided the new solicitors undertake to preserve the original solicitor's lien and to return the papers to the original solicitor, for what they are worth, after the end of the litigation.'

This passage cannot be read as limiting the cases in which delivery of the former client's papers will be ordered, the solicitor having terminated the retainer, to those in which the client will suffer a catastrophe, in the sense of irreparable harm in conducting his litigation if denied the papers: Templeton LJ [sic] added in Gamlen Chemical that: 'Where the solicitor has himself discharged his retainer, the Court then will normally make a mandatory order obliging the original solicitor to hand over the client's papers to the new solicitor against an undertaking by the new solicitor to preserve the lien of the original solicitor.' It has also been said that such an order is made 'as of course', where it is the solicitor who discharges the retainer: see Gamlen Chemical at 620. See also Cordery on Solicitors, 9th Ed, para 735.

However, the modern rule is that, while it is the usual practice for such an order to be made where it is the solicitor who has terminated the retainer, 'the court does not do this automatically. Whether it grants the order is an equitable matter, and therefore one of discretion, with the result that it is to be exercised judicially on the facts of the case': A v B [1984] 1 All ER 265 at 274; Gamlen Chemical at 624–625; Ismail v Richards Butler (a firm) [1996] 3 WLR 129 at 139. In Gamlen Chemical,

Templeton LJ [sic], at 624, refers to the Court's overriding discretion with respect to ordering delivery of the client's papers, notwithstanding the general rule referred to above. Whether such a discretion will be exercised in favour of the client depends, according to his Lordship, at 625, 'on the nature of the case, the stage which the litigation had reached, the conduct of the solicitor and the client respectively, and the balance of hardship which might result from the order the court is asked to make'; the existence of such a discretion is based on 'the inherent, albeit judicial, discretion of the court to grant or withhold a remedy which is equitable in character'; *Gamlen Chemical* at 624. In *A v B*, Leggatt J said, at 274, that, in exercising this overriding discretion, the Court should make the order which would best serve the interests of justice and that, in determining where those interests lay, it is necessary to weigh up the principle that a litigant should not be deprived of material relevant to the conduct of his case and so driven from the judgment seat, if that would be the result of permitting the lien to be sustained, and the principle that litigation should be conducted with due regard to the interests of the court's own officers, who should not be left without payment for what is justly due to them.

Where it is the client who discharges the solicitor, other than for the latter's misconduct, a different position obtains: in such cases the general rule is that the solicitor is entitled to keep his lien and the court has no power to interfere with the exercise of it: *Lord v Wormleighton* (1822) Jac 580 at 37 ER 969; *Robins v Goldingham* (1872) LR 13 Eq 440; *Hughes v Hughes* [1958] P 224 at 227-228; *Gamlen Chemical* at 624; *A v B* at 269. In *Hughes v Hughes*, Hodson LJ, delivering the judgment for the Court, explained the reason for this, at 228:

'The litigant need not change his solicitor without good cause. It would be odd if he were in effect able to get solicitors' work done for nothing by the simple expedient of changing his solicitor as often as he chose, leaving a trail of unpaid costs in his wake and demanding the papers without payment when he had no just cause to complain of the conduct of the solicitors instructed and discarded.'

In *Ismail v Richards Butler*, Moore-Bick J said, at 143, that the cases show that where the client has discharged the solicitor, the court has not been willing to interfere with the exercise of the lien, even where the papers concerned are required for pending litigation.

Where it is the client who has terminated the retainer otherwise than for the solicitor's misconduct, I doubt whether there is any residual discretion in the court to order that the former client shall have access to the documents, in the face of the lien, even where the denial of access to the documents may leave the client facing what can truly be regarded as catastrophic disruption to his litigation. Such a discretion could, in my opinion, only be justified on the basis that the interests of justice may require such an order to be made in some cases. But it is difficult to see why the court should disregard the interests of its own officers and leave them without payment for what is justly due to them because insistence on the lien would deprive the former client of material essential to the conduct of his case, where that situation has been brought about by the client discharging the solicitor without any good reason.

16. As stated earlier I am satisfied that the Respondent's retainer was terminated by the Complainant other than for misconduct and accordingly the Respondent has the right to exercise a lien over the file and the moneys held in trust on behalf of the Complainant.

The Trust Accounts Act

17. Section 6 of the Trust Accounts Act 1996 provides:

6. - (1) A trustee shall not withdraw moneys from a trust account except for the following purposes:-

(a) payment to the person on whose behalf the moneys are held or in accordance with that person's directions;

(b) payment to the trustee of disbursements properly paid by the trustee on behalf of the client in question. Disbursements shall be deemed to have been paid on the day the cheque in payment of the disbursement has left the possession and control of the trustee, and the trustee has no reason to believe that the cheque will not be paid on presentation;

(c) payment to the trustee for professional costs in the following circumstances:-

(i) where the payment is supported by authorisation in writing by the person on whose behalf the moneys are held. Where the authorisation is not specific as to the amount to be paid, the trustees shall forward an account to the client in question prior to making such payment;

(ii) in payment of an account which has been delivered to the client and at the expiration of 30 days after delivery no evidence exists of any objection by the client to the quantum thereof;

(iii) where payments in the trust account were received by the trustee in payment or part payment of an account previously rendered to the client in question;

(d) payment that is otherwise authorised by statute or made pursuant to an order of the Court.

18. Section 9 of that act provides:

9. - (1) Within 7 days of demand in writing by the person for whom trust moneys are held by a trustee and to which that person is then entitled, the trustee shall pay to the person entitled thereto the moneys to which that person is entitled or as that person may direct in writing, unless the trustee has already lawfully disposed of the moneys.

(2) Within 7 days of demand in writing made by a person for whom or on whose behalf trust moneys have been received, the trustee shall render to that person a correct and detailed account in writing of all such moneys and of the application thereof.

(3) Nothing in this Section shall deprive a trustee of any recourse or right, whether by lien or otherwise, against trust moneys held by that trustee.

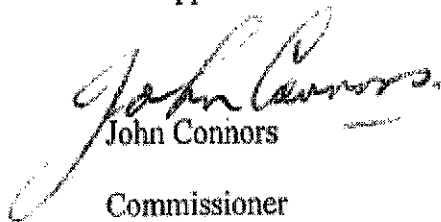
19. It is not disputed that the Complainant has made no written request as required by s. 9 of the Trust Accounts Act.
20. The sum of \$30,000.00 was paid to the credit of the Respondent's trust account on behalf of the Complainant by the High Court in accordance with the order of the Court of the 30th March, 2009. This order was made consequent upon a Notice of Motion and support affidavit filed on behalf of the Complainant on 1st December, 2008.
21. The motion seeks:
- "An Order that from the balance sum of monies deposited by Diven Prasad Lawyrs in favour of the Defendant in Civil Action No. HBC 76 of 2008, \$30,000.00 be paid to the trust account of the Plaintiff's solicitors, Lajendra Law of 98 Gordon Street, Suva."*
22. The supporting affidavit sworn by the Complainant on the 28th November, 2008 states in paragraph 20:
- "On that basis, I apply for order in terms of the Ex-Parte Noticed of Motton filed herein."*
23. It follows therefore that the order granted was the order sought by the Complainant and that the court had no option but to pay the money in accordance with that order to the Respondent's trust account.
24. Not only is the Respondent entitled to retain the sum of \$ 30,000.00 in his trust account by virtue of his lien but he has no authority to pay it out as no request has been made in accordance with s. 9 of the Trust Accounts Act.

Conclusion

25. It is clear from the evidence that the Complainant has received an unsatisfactory result in his attempt to recover moneys allegedly owing to him from Covec but it is equally clear that the Respondent has not acted in such a way as to be guilty of unsatisfactory professional conduct with respect to either of the complaints filed against him.

Orders

The application is dismissed.


John Connors
Commissioner



Dated: 13 April, 2010