

IN THE INDEPENDENT LEGAL SERVICES COMMISSION
AT SUVA

ILSC No. 016 of 2022

BETWEEN: **HEMANT KUMAR**
APPLICANT

AND: **LUSEYANE RAI LIGABALAVU**
RESPONDENT

AND: **THE CHIEF REGISTRAR**
AMICUS CURIAE

Counsel: **Mr. A. Patel for the Applicant**
 Mr. A. Chand for the Amicus Curiae

Date of Hearing: 13th September 2022

Written submissions: 21st September 2022

Date of Ruling : 5th January 2023

RULING

Introduction

1. The Applicant Mr. Hemant Kumar, made this application dated 4th of November 2022 pursuant to section 23 of the Trust Account Act 1996 (as amended), *inter alia* seeking reimbursement of \$10,000.00 from the fidelity fund and for interest thereon. The Respondent Practitioner Ms. Luseyane Rai Ligabalavu had been struck off the roll of legal practitioners as far back as 17 October 2013 in ILSC Application Nos. 002 of 2013 and 003 of 2013.

Brief facts

2. The Applicant was the vendor of property comprised in Housing Lease No. 286251 and the Respondent Practitioner, Ms. Ligabalavu was representing the purchaser in respect of the said Sale and Purchase. The said property was subject to a charge of the FNPF in a sum of \$10,000.00. On the 19th January 2010, the Applicant has paid \$10,000.00 to

the Respondent Practitioner, Ms. Ligabalavu to settle the said charge on the property. However, the said Practitioner instead of depositing the same in to the trust account and releasing the said charge has utilized the said funds for other purposes. Upon a complaint and an inquiry, the said practitioner, was found guilty of professional misconduct and struck off the roll of legal practitioners by the Judgment of this Commission dated 17 October 2013 in ILSC Application Nos. 002 of 2013.

3. The Applicant who was also the complainant has made this application for reimbursement of the said sum of \$10,000.00 from the Fidelity fund to which the Chief Registrar appearing as *Amicus Cueriae* did not resist. It is admitted and is common ground that the said Practitioner was paid the said sum of \$10,000.00 with specific instructions to repay FNPF and discharge the charge on the property which the Practitioner failed to comply with. (vide-Para 5 of the Affidavit in Reply dated 1 December 2022). It is also conceded that the Applicant is entitled to receive and to have the said sum of \$10,000.00 reimbursed from the Fidelity fund.

The Fidelity Fund

4. Fidelity Fund was established by virtue section 22 of the Trust Accounts Act 1996 as amended by Trust Accounts (Amendment) Act 2009. As per section 23 of the Said Act the object and purpose of this fund is to reimburse persons who suffer loss of trust funds or loss of any money or other property entrusted to a legal practitioner through stealing or fraudulent misappropriation by such dishonest legal practitioners in private practice or by any clerk or servant of such legal practitioner.

5. Section 23 of the Act provides as follows:

“ (1) *The Fidelity Fund constituted by section 22 shall be applied at the direction of the Commission for the purpose of reimbursing person who suffer loss through the stealing or fraudulent misappropriation by a legal practitioner in private practice on his or her own account or in partnership with others, or by any clerk or servant of such legal practitioner, of any money or other property entrusted to such legal practitioner, clerk or servant in the course of such practice. No reimbursement shall be made under this section however in respect of the loss of any money or other property entrusted to a legal practitioner, clerk or servant for the sole purpose of*

investment. The word "investment" in this subsection shall have the same meaning as it has in section 6 (2).

(2) The total amount which may be applied from the Fidelity Fund in the reimbursement of all persons who suffer loss through stealing or fraudulent misappropriation by the same legal practitioner or servant or clerk of such practitioner shall not exceed the sum of \$50,000.00 in any 12 months period.

(3) The Commission may direct, notwithstanding the preceding subsection, after taking into account all liabilities of the fund whether ascertained or contingent, that such amount in excess of the total amount limited by the previous subsection be paid as it thinks fit towards reimbursement of such persons.

(4) In considering any claim pursuant to this section, the Commission may in its absolute discretion direct that there be paid to the Applicant out of the Fidelity Fund in addition to the amount to which the Applicant would otherwise be entitled pursuant to this section, interest on such part of the claim for such period and at such rate as the Commission may determine, and such costs and expenses as the Commission may consider have been reasonably incurred by the Applicant in making and proving the Applicant's claim pursuant to this section.

(5) The Funds Trustee shall pay from the Fidelity Fund such amount and to such person as the Commission may direct in accordance with its obligations under this section."

6. An Applicant who seeks reimbursement is thus required to prove that; (a) he had suffered loss; (b) by reason of stealing or fraudulent misappropriation by the Respondent practitioner; (c) of any money or other property entrusted to such legal practitioner; (d) in the course of Respondent practitioner's private practice. Entrustment in element (c) comprises two elements namely: (i) to place in the possession of something, (ii) subject to a trust.

The standard of proof

7. There is a belief that an Applicant claiming reimbursement from the Fidelity Funds is required to prove his claim on a standard higher than the normal civil standard taking into account the gravity of the facts to be proved in view of the following dicta of Commissioner John Connors decision in Chief Registrar v Singh [2010] FJILSC 33 (1 February 2010) in which it was held as follows,

“39. The respondent submits that I should determine the matter relying on the criminal standard of proof. I rules-in my judgment in is matter on the 25th October, 2010 that the correct standard of proof is the civil standard modified taking account of the gravity of the facts to be proved.”

and;

in Chief Registrar v Sheik Hussain Shah [ILSC Case No. 004 of 2009 15 June 2010) in which it was held as follows;

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 Honk 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 limed 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 or the fact to be proved, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong. (emphasis added)

8. According to the said decisions the standard of proof to establish an allegation of fraud in the course of a disciplinary inquiry against a practitioner *is the civil standard varied*

or modified taking account the gravity of the facts to be proved. This principle is laid down in respect of disciplinary proceedings against Practitioners. The rationale is that fraud when proved in disciplinary inquires will have serious adverse ramifications on such person/s.

9. However, the said principle so enunciated cannot be applied in that form in respect of a claim for reimbursement from the fidelity fund. Firstly, such a claim is different and distinct from a disciplinary proceeding *per se*. A claim made on the fidelity fund by an Applicant is akin to that of civil claim. There is certainly a requirement to prove *stealing or fraudulent misappropriation*. Thus, it is similar to that of a civil fraud claim as opposed to and distinct from the proof of a disciplinary allegation against a Practitioner. The standard of proof is should thus be similar to that of a civil fraud claim.
10. The standard of proof in civil fraud claims is the same as in all other civil claims and it is on a balance of probabilities (**vide**-*Bank St Petersburg PJSC & Ors v Arkhangelsky & Ors [2020] EWCA Civ 408*). This means, the Applicant has to show that it is more likely than not that the Respondent Practitioner caused the loss by *theft or fraudulent misappropriation*. Hence to my mind there is no requirement to prove that *stealing or fraudulent misappropriation* has occurred at any higher standard than a balance of probabilities.
11. Hence the Applicant needs to prove is that it is more likely than not to have happened. But what does this mean in practice? The Applicant will need detailed evidence of facts or circumstances which, looked at together, suggest *stealing or fraudulent misappropriation* has occurred. For example, this may include evidence of inconsistent positions, or of suspicious behaviour and in simple terms, the Court will weigh up the evidence for the Applicant and for the Respondent and there must be enough to make the Applicants' claim more probable.
12. On a consideration of the Judgment of this Commission, in the case of The Chief Registrar v Ligabalavu ILSC No. 002 and 003 of 2013, the Application, the Affidavit of the Applicant and the documents along with the Respondent's Response I am satisfied that the following are proved on a balance of probabilities;

- a. the said legal practitioner has been found guilty of professional misconduct specifically for the failure to have the charge on the property discharged upon accepting \$ 10,000.00 from Mr. Hemant Kumar;
 - b. The Applicant did hand over and entrust \$10,000 to the said Practitioner with specific instructions to pay the FNPF for the said discharge;
 - c. the Respondent Practitioner did deposit the said sum into his own account.
13. Further, according to the receipt dated 19th January 2010, annexed to this application, marked "HK1" I am satisfied that the sum of \$10,000.00 had been so paid for the said purpose to Ligabalavu law of which the said Ms. Ligabalavu was the Principal. I am also satisfied that the said practitioner has thereby fraudulently misappropriated the said sum. Accordingly, I hold that the applicant is entitled to reimbursement of the said sum \$10,000.00 under section 23 of the Trust Account Act.
14. The Applicant's counsel did in the course of the argument make an application that interest be paid for the entire period from the date of paying the money to the Practitioner. However, the learned counsel appearing for the Chief Registrar objected to this application and it was submitted that the interest entitlement would be from the date of this application which is the practice followed in similar applications.
15. Accordingly in addition to the principal sum I also award him special interest at the rate of 3% per annum from the date of this application namely 4th November 2022 until the payment is made from the Fidelity Fund. However, I make no order as to costs of this application and the parties to bear the same.
16. Application is allowed.

Orders of the Commission are:

- a) Application is allowed.

- b) The Funds trustee shall pay and reimburse the Applicant the sum of \$10,000.00 with interest at 3% from the date of this application namely 4th November 2022 until the payment in full is made from the Fidelity Fund.
- c) I make no order as to costs of this application.

Dated the 5th day of January, 2023.


Justice Gihan Kulatunga
Commissioner

