

IN THE COURT OF APPEAL, FIJI
On Appeal from the Independent Legal Services Commission

CIVIL APPEAL NO. ABU 046 OF 2020
ILSC Case No. 001 of 2018

BETWEEN : **PARVEEN PRAKASH**

Appellant

AND : **GYANESHWAR PRASAD LALA**

1st Respondent

THE CHIEF REGISTRAR OF THE HIGH COURT OF FIJI

2nd Respondent

Coram : **Prematilaka, RJA**
Andrews, JA
Clark, JA

Counsel : **Ms N Devi, on behalf of the Appellant**
Mr A Chand, on behalf of the 2nd Respondent
No appearance by or on behalf of the 1st Respondent

Date of Hearing : **6 September 2024**

Date of Judgment : **27 September 2024**

JUDGMENT

Introduction

[1] The Fidelity Fund (“the Fund”) is established pursuant to s 22(1)(v) of the Trust Accounts Act 1996 (“the TAA”) and distributed by the Independent Legal Services Commission (“the Commission”) pursuant to s 23(1) of the TAA for the purpose of:

... reimbursing persons 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. ...

- [2] In a decision delivered on 19 June 2020, the Commissioner, directed that the Appellant, Mr Prakash, be paid \$96,900 from the Fund, together with interest at 3 percent per annum as from 10 May 2018.¹ The Commissioner further directed that the Appellant was to bear his own costs in respect of his application for reimbursement from the fund. The Appellant has appealed against the Commissioner's directions as to interest and costs.
- [3] As this is the first occasion on which a decision of the Commission as to a claim against the Fund has been before this Court, this judgment is given as a judgment of the Full Court, to which all members of the Court which heard the matter have contributed.

Background

- [4] On 19 April 2011, Mr Prakash entered into an agreement to buy a property for \$95,000. He instructed the 1st Respondent, Mr Lala, a solicitor in practice in Suva, to act for him in the transaction. The Appellant paid Mr Lala \$5,000 on 18 April 2011 (the initial deposit), \$1,900 on 19 April 2011 (stamp duty), and \$90,000 (the balance of the purchase price). All payments were deposited into Mr Lala's trust account.
- [5] The transaction did not proceed to settlement, because of issues between the owners of the property. Mr Lala did not contact Mr Prakash about the matter, and did not respond to enquiries from Mr Prakash, or solicitors acting for him. In September 2012, Mr Prakash became aware that Mr Lala's practice had closed down, and a new firm of solicitors was operating from the premises. They were not able to assist Mr Prakash, although an accounts clerk who had worked for Mr Lala and then for the new firm, told

¹ *Prakash v Lala* [2020] FJLSC 5; ILSC Case No 001.2018 (19 June 2020).

him that his money was not in Mr Lala’s trust account, and that he had “taken the money and was supposed to return it but has not done so”.

[6] Mr Prakash issued proceedings against Mr Lala in the High Court at Suva, and on 30 April 2013 obtained a judgment by default against him for \$96,900, together with costs of \$325.00 (“the default judgment”). Mr Prakash’s efforts to execute the default judgment were to no avail because, as the Commissioner put it, Mr Lala “had left the jurisdiction, leaving behind a trail of debts, but no assets”.

[7] Mr Prakash filed an application to the Commission for reimbursement from the Fund on 10 May 2018, stating that he had exhausted all avenues to get back the moneys he had put into Mr Lala’s trust account, but had been unable to do so.

The Commissioner’s directions

[8] The Commissioner was satisfied that Mr Prakash had “suffered loss through theft or fraudulent misappropriation of money entrusted to a legal practitioner in private practice”.² He recorded that Mr Prakash was the only former client of Mr Lala who was seeking a full reimbursement of stolen money and that Mr Prakash’s application was the first ever application made for reimbursement from the Fund. He recorded that no payments were currently due from the Fund, and that there was no evidence to suggest that reimbursement of Mr Prakash’s actual loss from the Fund was not financially feasible.³

[9] As to interest and costs, the Commissioner said:⁴

... [Mr Prakash] is not entitled to any interest from the trust funds. There was no award of interest on the default judgment. However, [Mr Prakash] has succeeded with his application for a reimbursement of money from the

² Commissioner’s decision, at paragraphs [20]-[22].

³ Commissioner’s decision, at paragraphs [23]-[24].

⁴ Commissioner’s decision, at paragraph [25].

Fidelity Fund. I award him special interest at the rate of 3% per annum from the date the application was filed (10 May 2018) until the payment is made from the Fidelity Fund, but not any costs for this application.

Appeal

- [10] On behalf of Mr Prakash, Ms Devi submitted that the Commissioner erred in finding that Mr Prakash was not entitled to interest on the default judgment. She further submitted that the Commissioner failed to consider s 4(1) of the Law Reform (Miscellaneous Provisions) (Death and Interest Act) 1935, and thereby failed to order interest from the date of the default judgment. She submitted that the purpose of s 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest Act) is to compensate a party for the loss of use of money due to the party from the date of the cause of action arising, or the date of judgment, reflecting the time value of money.
- [11] Ms Devi further submitted that the rationale behind awarding interest from the date of a judgment is to ensure that the successful party is fully compensated for the loss incurred, and that delaying the commencement of interest until the date an application was made to the Fund. She submitted that “the Fund stands in place of the 1st Respondent to satisfy the judgment of the High Court.”
- [12] Finally, Ms Devi submitted that the Commissioner erred in failing to award Mr Prakash costs, when he had been put to costs in engaging solicitors in proceedings against Mr Lala and in the application to the ILSC.
- [13] In his submissions on behalf of the 2nd Respondent, Mr Chand referred the Court to the Ruling of his Honour Justice Kulatunga, Commissioner, in *Hemant Kumar v Ligabalavu* in which interest was also ordered at 3 percent per annum from the date of the application to the Commission, and no order made as to costs.⁵ He submitted that the Commissioner’s

⁵ *Hemant Kumar v Ligabalavu* [2023] FJILSC 2; ILSC No. 16.2022 (5 January 2023).

decision on Mr Prakash’s claim was in line with the Ruling in *Hemant Kumar* and was fair and equitable, and should not be disturbed.

Does this Court have jurisdiction to hear the appeal?

[14] In his submissions for the 2nd respondent, Mr Chand also submitted that this Court does not have jurisdiction to hear an appeal against a decision made by the Commissioner on a claim against the Fund. He submitted that in deciding a claim against the Fund the Commissioner was in effect exercising an “administrative”, rather than a “judicial”, role. He submitted that s 23 of the TAA gives the Commissioner an absolute discretion in deciding claims, interest and costs against the Fund, and the TAA does not allow for any appeal against such decisions.

[15] The Court gave leave to Ms Devi to file further written submissions on behalf of Mr Prakash on the issue of jurisdiction. The Court also received supplementary submissions from Mr Chand in reply.

[16] Ms Devi submitted that Mr Chand’s submission was misconceived and untenable in law. She submitted that the ILSC is established pursuant to s 84(1) of the Legal Practitioners Act 2009 (“the LPA”), to have “such powers, functions and duties as prescribed in this Act or any other written law”.⁶ She also referred to s 86 of the LPA, which sets out the powers and functions of the ILSC. She referred in particular to s 86(1) and (2) of the LPA which provide:

86 Functions and powers of Commission

(1) The Commission has the functions conferred by this Act or any other written law.

(2) The Commission has all the powers necessary to perform its functions, including the powers conferred on the Commission under this Act or any other written law.

⁶ Section 84(1), LPA.

- [17] Ms Devi submitted that the powers and functions of the Commission are expressly not restricted to the LPA, and extend to any other written law. She submitted that it follows that if any written law confers powers, functions and duties upon the Commission, the Commission is legally empowered to act to discharge those functions and duties in accordance with such other law and in conjunction with the LPA.
- [18] She submitted that the Commissioner's orders, decisions and directions are not absolute and immune from challenge by the appeals mechanism under the LPA. She submitted that s 128 of the LPA makes an express provision for the Court of Appeal to hear an appeal against any order of the Commissioner at the instance of the parties or the Chief Registrar.
- [19] Ms Devi further submitted that Mr Chand's submission that the Commissioner's decision as to Mr Prakash's claim against the Fund was "administrative", ran contrary to the express provisions of s 86 of the LPA, and was inconsistent with Mr Prakash's rights under s 16 of the Constitution.
- [20] Mr Chand's submissions in reply focussed on the Fund itself. He referred to advice from the Funds Trustee, that the Fund at present holds approximately \$1.8 million, and that in recent years there has been a stark increase in claims against the Fund. Mr Chand submitted that all liabilities of the Fund (including contingent claims) should be considered by the Court when determining whether interest and costs ought to be awarded in favour of claimants.
- [21] Mr Chand further submitted that the Fund is the "last recourse", and claims should be stringently scrutinised, so that they are not treated as claims against a defaulting party or party in breach, where all nature of loss and damages is considered. He submitted that if the Commission and the Court were to treat every claim against the Fund as if it were an action for loss and damages filed in Court, then the Fund would be easily exhausted and genuine future claimants would be deprived of their valid claims. He submitted that this would defeat the legislature's intention and purpose in establishing the Fund.

Discussion

[22] The starting point is s 84 of the LPA, which establishes the Commission:

84 Independent Legal Services Commission established

- (1) *This section establishes the Independent Legal Services Commission, which shall have such powers, functions and duties as prescribed in this Act or any other written law.*
- (2) *The Commission shall consist to a Commissioner, appointed pursuant to this Act.*
- (3) *The powers, functions and duties, as prescribed in this Act, shall be performed by the Commissioner.*

[23] Section 23 of the TAA provides:

23 Fidelity Fund

- (1) *The Fidelity Fund constituted by section 22 shall be applied at the direction of the Commission for the purpose of reimbursing persons 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 in any 12 month 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 claimant out of the*

Fidelity Fund in addition to the amount to which the claimant 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 claimant in making and proving the claimant'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.*

[Emphasis added]

[24] Thus, pursuant to s 23(2) of the TAA, the maximum total amount that may be applied for reimbursing all persons who suffer loss caused by single practitioner is \$50,000 over a 12 month period. However, s 23(3) of the TAA gives the Commission the discretion to make reimbursement in excess of that amount. Section 23(4) gives the Commission an “absolute discretion” to direct payments of interest and costs in addition to reimbursement.

[25] Section 128 of the LPA provides:

128 Appeals

(1) An appeal shall lie to the Court of Appeal from any order of the Commission at the instance of either the Registrar or any other party to the proceeding.

(2) Such appeal shall be made within such time and in such form and shall be heard in such manner as shall be prescribed by the rules of procedure made under section 127.

[26] Section 128 appears in Part 9 (“Professional Standards”), Division 4 (“Disciplinary proceedings before the Commission”) of the LPA. Within Division 4, the Commission’s functions may be found at ss 111-127. The powers of the Commission on hearing a disciplinary proceeding are set out in s 121, under which the Commission may make any of the **orders** set out at s 121(1)(a)-(r). Section 122 requires any **order** of the Commission to be given to the parties, the Chief Registrar and Attorney-General and to

be filed in the High Court (where it becomes an order of the High Court to be enforced according to the Rules of the High Court).

[27] The Commission also has powers prior to hearing disciplinary proceedings. For example, it may **order** exclusion of members of the public (under s 113), and it may **order** joinder of applications (under s 115).

[28] Section 128 of the LPA, in providing a right of appeal from any **order** of the Commission contrasts with the language in which other statutory appeal rights are given. For example, s 12 of the Court of Appeal Act 1949 provides an appeal in civil cases from any **decision** of the High Court or the Family Division of the High Court.

[29] However, under the TAA the Commission has no power to make an **order** or a **decision**. The Commission's power are to **direct**, only. Under s 23(1) the Fund must be applied "at the **direction** of the Commission" for the purpose of reimbursing loss. Under s 23(3) the Commission "may **direct**" payment of an amount in excess of the statutory limitation. Under s 23(4), the Commission "may **direct**" additional amounts be paid out of the Fund, such as the Commission may determine.

[30] The above analysis leads to the conclusion that the appeal right under s 128 of the LPA is confined to **orders** made by the Commission under the LPA. The Commission makes no **orders** under the TAA. Consequently, the s 128 right of appeal is not applicable to the Commission's powers under the TAA, which are directive in nature.

[31] This construction is consistent with the statutory language but also has the effect of better protecting the sanctity of the Fund, so as to enable it to be applied for the purposes for which it was established. It also accords with the legislative intent (evident in the terms of the discretion given to the Commission in s 23 of the TAA) to avoid the Fund being

dragged into litigation on each occasion a claimant or practitioner is dissatisfied with the Commission's directions under s 23.

[32] Importantly, this construction does not leave applicants for reimbursement and for payment of interest and costs from the Fund without a remedy. Their rights under s 16 of the Constitution are not compromised, as an application may be made for judicial review, under the provisions of s 16.

[33] It is necessary to record that Ms Devi's submission that "the Fund stands in place of the 1st Respondent to satisfy the judgment of the High Court" is misconceived. The Fund was not a party to Mr Prakash's agreement to buy a property, and it was not a party to the proceedings against the 1st Respondent. As Mr Chand submitted, the Fund is a "last recourse" and claims against it should not be treated as claims against a defaulting party, or a party in breach.


[34] Having found that he has no right of appeal against the Commissioner's decision, Mr Prakash's appeal must fail, for want of jurisdiction. The Court would add that, were there jurisdiction to hear the appeal, the Court would have concluded that Mr Prakash achieved a fair and equitable result, and the Commissioner did not err in the exercise of his discretion as to Mr Prakash's claims for interest and costs.

[35] As a postscript, we record Mr Chand's submission seeking "leave of this Court to issue a guideline or directive that in all future claims from the Fund, the Funds Trustee be made a party to the proceeding before the Commission". This Court is reluctant to issue any such directive or guideline. While there is certainly merit in the Commission receiving evidence as to the status of the Fund, and current and contingent claims against it, such evidence should be able to be obtained from the Funds Trustee by affidavit, and filed through the Chief Registrar.

ORDERS

- (1) *The appeal is dismissed for want of jurisdiction.*
- (2) *As this appeal was in the nature of a test case (the issue not having previously come before the Court), it is appropriate that no order for costs be made, and each party is to bear its own costs.*





Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Justice Pamela Andrews
JUSTICE OF APPEAL



Hon. Justice Karen Clark
JUSTICE OF APPEAL