

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Civil Petition No. CBV 0011 of 2014
(Court of Appeal No. ABU 068/2013)

BETWEEN : CHIEF REGISTRAR

PETITIONER

AND : IQBAL KHAN

RESPONDENT

Civil Petition No. CBV 0012 of 2014
(Court of Appeal No. ABU 068/2013)

BETWEEN : IQBAL KHAN

PETITIONER

AND : CHIEF REGISTRAR

RESPONDENT

CORAM : Hon. Mr. Justice Saleem Marsoof, Justice of the Supreme Court
Hon. Mr. Justice Sathya Hettige, Justice of the Supreme Court
Hon. Mr. Justice Brian Keith, Justice of the Supreme Court

COUNSEL : Mr. Avneel Chand for the Petitioner in Civil Petition No. CBV 011.2014
Mr. Gavin O'Driscoll for the Petitioner in Civil Petition No. CBV 012.2014

Date of Hearing : 11 April 2016

Date of Judgment : 22 April 2016

JUDGMENT OF THE COURT

Marsoof, J

I have read a draft of the Judgment of Keith J, and I agree with his reasoning and conclusion.

Hettige, J

I agree with the reasoning and conclusion of the Judgment of Keith J.

Keith, J

Introduction

1. The legal profession is highly regulated in Fiji, as it is in most parts of the world. That is not surprising. Legal practitioners are expected to demonstrate high standards of integrity and professionalism at all times, and it is important for those standards to be monitored and seen to be maintained. That is why Part 9 of the Legal Practitioners Decree (“the Decree”) is devoted to the topic of professional standards. In this case, it is alleged that the conduct of a particular legal practitioner fell below the high standards expected of him.
2. The legal practitioner is Iqbal Khan. He faced one allegation of *unsatisfactory professional conduct* relating to his conduct in March 2008, and one allegation of *professional misconduct* (which was divided into two parts) relating to his conduct in January 2009. Both allegations were found proved by the Independent Legal Services Commission (“the Commission”), and Mr. Khan was suspended from practice for 15 months. His appeal to the Court of Appeal was partially successful. The Court of Appeal quashed the Commission’s finding of *professional misconduct*, but upheld the finding of *unsatisfactory professional conduct*. Mr. Khan now applies for special leave to appeal to the Supreme Court against the dismissal of his appeal from the finding of *unsatisfactory professional conduct*, and the Chief Registrar (who is the officer responsible for investigating complaints against legal practitioners and commencing disciplinary proceedings against them) applies for special leave to appeal to the Supreme Court against the allowing of Mr. Khan’s appeal against the finding of *professional misconduct*.

3. Mr. Khan is not only challenging the upholding by the Court of Appeal of the finding of unsatisfactory professional conduct. He is also contending that the hearing before the Commission was unfair in a number of respects, not least of which is that the Commissioner should have recused himself from hearing the case. So Mr. Khan argues that at the very least he is entitled to a fresh hearing of the one disciplinary charge which the Court of Appeal upheld. The facts of the case are therefore of some importance, and I trust that I will be forgiven for going into them in some detail. I should add that, although Mr. Khan was represented at the hearing of his application for special leave by Mr. Gavin O'Driscoll, Mr. O'Driscoll for the most part adopted the written submissions which had been prepared by Mr. Khan himself.

The facts

4. Mr. Khan. Mr. Khan is 67 years old. He has been practicing law for many years. He has been a barrister and solicitor of the High Court of Fiji since 1980, and for a while he served as a resident magistrate. At one stage in his career he hoped to be appointed a judge of the High Court. It looks as if he moved to Australia in the late 1980s because in 1988 he was admitted as a solicitor in Queensland. However, he suffered a setback in his career when he was suspended by the Queensland Law Society from practicing as a solicitor, and his name was subsequently removed from the roll of barristers in Queensland for failing to disclose that fact when he applied for admission as a barrister: see the judgment of the Court of Appeal of Queensland in Barristers' Board v Khan [2001] QCA 92 (13 March 2001). He returned to Fiji to practice law at some stage, because he was practicing in Fiji at the time of the first complaint in 2008.
5. The first complaint. On 4 June 2008, a complaint was made to the Fiji Law Society about Mr. Khan. I shall refer to the complainant as Mr. X. Mr. X had been charged with a man who I shall refer to as Mr. Y with obtaining money by false pretences. The allegation was that they had been claiming that they could arrange for overseas visas to be issued to their clients. Mr. X's case was that Mr. Y had been entirely responsible for the fraud. Mr. X decided to engage Mr. Khan to represent him, and on 28 March 2008

he paid \$500 on account of Mr. Khan's fees. That evening he met Mr. Khan's clerk. He claimed that he told the clerk about the case, making it clear that he had been falsely implicated in the fraud, and that Mr. Y had been solely responsible.

6. On the following day, 29 March 2008, Mr. X was watching the news on television. He claimed that in one of the items it was reported that Mr. Khan was representing Mr. Y. Mr. X was concerned about that. How could he allege through his lawyer that Mr. Y had been exclusively to blame if his lawyer was representing Mr. Y as well? Accordingly, Mr. X informed Mr. Khan's clerk that he was withdrawing his instructions. He claimed that the clerk tried to persuade him not to do that, but "to join with [Mr. Y] and prove the state wrong". In other words, the clerk was asking Mr. X not to blame Mr. Y, but to join Mr. Y in saying that there had not been any fraud at all. Mr. X claimed that he told the clerk that he did not want to lie in court. He asked the clerk for his \$500 to be refunded to him. He claimed that the clerk told him that it would be refunded in a few days, but it never was.
7. Mr. X claimed that when he went to court on 15 April 2008, Mr. Khan was there. Mr. Khan asked him if he had received the disclosures, and Mr. X replied that he had not. He claimed that he told Mr. Khan that he did not want Mr. Khan to continue to represent him, and that he wanted his \$500 back. He claimed that Mr. Khan just walked away, and that subsequently Mr. Khan's clerk told him that they would not be returning his money to him, and that he could do whatever he liked.
8. This summary of Mr. X's complaint has been taken from his original complaint, and it accords with his oral evidence to the Commission save in two respects. First, he told the Commission that he thought that he was not going to be charged for the time it took for Mr. Khan's clerk to take his instructions on the evening of 28 March 2008. Secondly, when giving evidence to the Commission, he claimed that when he had spoken to Mr. Khan at court on 15 April 2008, Mr. Khan had promised to return his \$500 to him.

9. If Mr. X's account was accurate, a number of criticisms could be made of Mr. Khan and his clerk. It could be said that Mr. Khan should not have continued to represent Mr. X once he was aware that Mr. X's defence amounted to an attack on Mr. Y. It could be said that his clerk should not have encouraged Mr. X to abandon his attack on Mr. Y and to rely on a defence which was consistent with Mr. Y's case. And it could be said that Mr. Khan should have ensured that the \$500 was returned to Mr. X.
10. On 1 March 2009, the Fiji Law Society wrote to Mr. Khan. The letter enclosed a copy of Mr. X's complaint of 4 June 2008, and asked for Mr. Khan's comments on it. In his response to it of 21 April 2009 Mr. Khan was more concerned about justifying his retention of the \$500 than addressing the complaint that it had been inappropriate for him to continue to represent Mr. X. He did not address that issue at all. He did not say whether he had been representing Mr. Y as well, nor did he deal with the complaint that there had been a conflict of interest in him representing both Mr. Y and Mr. X at the same time. The thrust of Mr. Khan's response was that he had incurred costs in travelling to Suva to represent Mr. X, that those costs exceeded the \$500 initially paid by Mr. X, and that those costs had been incurred *before* Mr. X had withdrawn his instructions for Mr. Khan to represent him.
11. The second complaint. On 23 February 2009, another complaint was made to the Fiji Law Society about Mr. Khan. The complainant was a police officer who was an acting inspector at the time. I shall refer to him as Mr. Z. The nature of his complaint appears from his oral evidence to the Commission. On 27 January 2009, Mr. Z was watching the news on television. There was an item about a senior police officer who was being sued for assault. Mr. Khan was interviewed in his capacity as the lawyer representing the plaintiff. Mr. Z has always accepted that Mr. Khan did not name the police officer concerned in that interview, but he claimed that Mr. Khan was holding a writ of summons on which both his name and his rank of *acting* inspector could be seen. Since he also claimed that he was the only acting inspector at the time, the effect of Mr. Z's evidence was that his colleagues would have realised that Mr. Khan was referring to him, even if only his rank and not his name had been visible. In fact, the writ had been

issued that day, though Mr. Z went on to say that he was not served with the writ until the morning of the following day, 28 January 2009.

12. That evening Mr. Z was watching the news on television again. The first item on the news related to the allegation which was being made against him. The reporter said that a businessman from Sigatoka had issued proceedings against a senior police officer who was based at CID headquarters in Suva, and that in those proceedings the businessman was alleging that he had been subjected to brutality by the police following his arrest the previous week. Included in the broadcast was an interview with Mr. Khan. A transcript of what he said was obtained from the television company, and it shows that in the course of that interview Mr. Khan said:

"He [ie the businessman] is a first time offender; never appeared in a court of law, the police officers grabbed him from his house, drag [sic] him, take him to the police station, keep him there, and assault him."

The reporter then referred to a medical report which the police had obtained on the businessman, and the transcript shows that in the course of the interview Mr. Khan said:

"The police legal report confirms that the injuries he suffered was in police custody, its their own report, and there they describe injuries; that he got a black eye, injuries on his left leg, knee, bum. All black clots, if one could only see the photographs, it's shocking, and this must stop."

The reporter then said that Mr. Khan had already spoken to the Commissioner of Police about the case, and the transcript shows that in the course of the interview Mr. Khan said:

"The Commissioner told us that he had warned the police officers, that they don't do these things but if you do, you'll take the full brunt of the law, so therefore we are not suing the commissioner, we are suing the police officers individually, so they'll have to sell their underwear to pay the damages, because this report speaks for itself, this is a police medical report where they confirm that this person was assaulted in police custody, now somebody must explain."

The reporter concluded his report by saying that "legal documents" had been served on the police officer that morning, and that the Police Professional Standards Unit had started its own investigation into the case.

13. It is accepted that Mr. Z's name was not mentioned in this broadcast either, so the only way a viewer could know that it was Mr. Z who was being sued would have been if he had seen the previous day's broadcast and had been able to read Mr. Z's name on the writ which Mr. Khan was holding. In fact, the writ referred to Mr. Z as Inspector ..., not *Acting* Inspector ..., so when Mr. Z told the Commission that his rank of *acting* inspector could be seen on the writ, he was incorrect.
14. But for that, if Mr. Z's account was accurate in all other respects, three criticisms could be made of Mr. Khan. First, it could be said that he should not have commented on the case at all save to say that his client had issued proceedings against a police officer for assault while his client had been in custody at a police station. After all, there was pending litigation which had already been commenced by the issue of the writ, and it could be said that Mr. Khan should not have talked about the strength of the case or outlined some of the evidence which would be relied upon to support his client's allegations. It could be said that that might have had the effect of prejudicing the mind of whoever would eventually have to decide whether the allegations against Mr. Z were true. Secondly, it could be said that the language Mr. Khan used, particularly about the police officers having "to sell their underwear to pay the damages", was not appropriate for a legal practitioner. Thirdly, it could be said that Mr. Khan overstated his client's case. Although the writ named only one police officer as a defendant, Mr. Khan had said that police officers (ie in the plural) were being sued.
15. On 27 March 2009, the Fiji Law Society wrote to Mr. Khan. The letter enclosed a copy of Mr. Z's letter of complaint of 23 February 2009, and asked for Mr. Khan's comments on it. In his response of 17 April 2009 Mr. Khan chose not to deal with the allegation. Instead, he expressed surprise that the Law Society could have written to him asking for his comments on the allegation bearing in mind "that the President and the council members are all lawyers", and "that the matter is before the High Court and before the Police Professional Standards for internal investigation". He added that these facts "should have warned you ... if you had any knowledge of the law that the matter is sub judice", and that for that reason it was inappropriate for him to comment on the letter. He

said that writing to him and seeking his comments on the letter was “a waste of time and an insult ... when the facts ... speak for itself”. He requested the Law Society to “appoint intelligent, competent and experienced lawyers who could screen the complaints”, and he added that in his view Mr. Z’s complaint “should have been thrown in the rubbish bin or in the gutter”. He concluded by saying that he was willing to appear before the Law Society’s Council and “give them a piece of advice that it is about time that the ... Council members should take some interest in protecting their members rather than sending correspondences that have no substances”.

16. Some people might say that this letter used inappropriately robust – indeed offensive – language in criticising the Law Society for doing no more than it was required to do, namely to investigate complaints against its members. Some people might also say that it was a bit rich for Mr. Khan to be criticising the Law Society for not being aware of the effect of a matter being *sub judice*, when the core allegation against him was that he had ignored the fact that there was pending litigation when he had made the comments he had.

The disciplinary charges

17. A total of 25 disciplinary charges were originally laid against Mr. Khan. They were subsequently reduced to three (complaints 1, 3 and 4), and on the morning of the hearing of those complaints by the Commission, the Chief Registrar elected not to proceed on complaint 3. The hearing therefore proceeded on complaints 1 and 4 only.
18. Complaint 1. Complaint 1 related to Mr. Z’s complaint. It was divided into two parts, each alleging professional misconduct. The particulars of complaint 1A were:

“On 28th of January 2009, Mr. Iqbal Khan failed to conduct himself in a professional manner when he appeared on Fiji One News at 6pm and made open derogatory remarks saying ‘ ... the police officers grabbed him from his house, drag him, take him to police station, keep him there and assault him ... ’ and he added ‘we are suing the police officers individually, so they’ll have to sell their underwear to pay for

the damages, because this report speaks for itself, this is a police medical report where they confirm that this person was assaulted in police custody ...' which comments were against the Police Officers who were involved in a matter concerning his client on National Television, which conduct was an act of professional misconduct."

The particulars of complaint 1B were:

"On 28th of January 2009, Mr. Iqbal Khan failed to conduct himself in a professional manner when he appeared on Fiji One News at 6pm and openly talked about the proceedings in the High Court matter no 31 of 2009 of [the name of the businessman] vs [Mr. Z] whilst [the] proceedings were still pending which conduct was an act of professional misconduct."

Complaint 1A could be read in two ways. It could have been a complaint about the derogatory language Mr. Khan had used. Alternatively, it could have been a complaint about his criticism of individual police officers. Complaint 1B was a complaint that Mr. Khan had spoken in public about pending litigation which was *sub judice*. There was no complaint relating to Mr. Khan's statement that police officers (in the plural) were being sued.

19. Complaint 4. Complaint 4 related to Mr. X's complaint. The particulars of complaint 4 were:

"Iqbal Khan a legal practitioner, between the 28th of March 2008 and the 29th of March 2008 in his capacity as principal of Iqbal Khan & Associates, having received the sum of \$500 from [Mr. X], failed to disclose to [Mr. X] that he was also acting for [Mr. Y] the co-accused who had conflicting defences in the criminal matter the said [Mr. X] was charged thereof, falling short of the standards of professional competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner, which conduct was an act of professional misconduct."

Despite the last two words in the particulars, the complaint alleged unsatisfactory professional conduct, not professional misconduct. That is what the statement of the complaint before the particulars said. The particulars show that the complaint was limited to the criticism of Mr. Khan for continuing to represent Mr. X once he had

become aware that Mr. X's defence amounted to an attack on Mr. Y. There was no complaint relating to Mr. Khan's responsibility (if any) for what his clerk was alleged to have said to encourage Mr. X to abandon his attack on Mr. Y and to rely on a defence which was consistent with Mr. Y's case. Nor was there any complaint relating to the failure to return Mr. X's \$500 to him.

The meaning of "professional misconduct" and "unsatisfactory professional conduct"

20. I should say something about the terms "professional misconduct" and "unsatisfactory professional conduct". "Unsatisfactory professional conduct", in relation to a legal practitioner, is defined by section 81 of the Decree as including

"conduct ... 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 ..."

This definition was not intended to be exhaustive: that is the effect of the definition saying that it *includes* conduct of this kind.

21. "Professional misconduct", in relation to a legal practitioner, is defined by section 82(1) of the Decree as including

"(a) unsatisfactory professional conduct ... if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence; or

(b) conduct ...that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice ..."

It is plainly more serious than unsatisfactory professional conduct. Again, by defining "professional misconduct" as including these matters, the draftsman was not intending the definition to be exhaustive. Unfortunately, it is not possible to tell whether the

professional misconduct alleged against Mr. Khan in complaints 1A and 1B was conduct of the kind referred to in section 82(1)(a) or of the kind referred to in section 82(1)(b) as the document setting out the complaints referred, in relation to both complaints, to section 82(1)(O). This was obviously a typing mistake as there is no section 82(1)(O), but it is not possible to tell definitively which of sections 82(1)(a) or 82(1)(b) was intended. Having said that, complaints 1A and 1B do not relate to Mr. Khan's competence or diligence. They really relate to his judgment and behaviour, and I proceed therefore on the assumption that the allegation was that his professional misconduct was of the kind referred to in section 82(1) (b).

22. Section 83(1) of the Decree set out examples of conduct which is capable of amounting to "unsatisfactory professional conduct" or "professional misconduct". They include conduct consisting of a contravention of the Rules of Professional Conduct. And section 83(2) of the Decree provides that "professional misconduct" includes malpractice and that "unsatisfactory professional conduct" includes unprofessional practice or conduct.

The proceedings before the Commission

23. *The recusal applications.* The complaints were originally due to be determined by Mr. Commissioner Connors, a former judge of the High Court. Mr. Khan requested Mr. Commissioner Connors to recuse himself. The basis of the application was that Mr. Khan had commenced proceedings against Mr. Commissioner Connors and his wife in 2005 or 2006, and had subsequently discontinued them. That application was refused. Mr. Khan went on to make a further application on the same grounds, but Mr. Commissioner Connors dismissed that application as an abuse of the Commission's process. Mr. Khan lodged an appeal to the Court of Appeal against those rulings, but on 19 February 2013 he withdrew his appeal. Accordingly, on 11 March 2013, the hearing of the complaints was fixed for nine days from Tuesday 5 November 2013 to Friday 15 November 2013 before Mr. Commissioner Madigan, a judge of the High Court, so Mr. Khan's wish to have the complaints determined by someone other than Mr. Commissioner Connors was realised.

24. On 31 October 2013, ie a few days before the first day of the hearing, Mr. Khan filed a notice of motion applying for Mr. Commissioner Madigan to recuse himself. I shall have to deal with that application in some detail because Mr. Commissioner Madigan's refusal of that application is the first reason why Mr. Khan contends that the hearing before the Commission was unfair. But having refused that application on 5 November 2013, Mr. Commissioner Madigan was prepared to adjourn the hearing for a few days until Monday 11 November 2013. It was thought that with the reduction in the number of complaints five days would leave sufficient time for the hearing to be completed.
25. The applications for an adjournment. On Friday 8 November 2013, ie the working day before the hearing was due to start, Mr. Khan wrote to the Chief Registrar asking him to agree to an adjournment of the hearing for three weeks on the ground that he had to go overseas urgently for medical treatment. The letter attached a medical report dated the previous day. The Commissioner was alerted to that development that afternoon. He instructed his secretary to inform Mr. Khan that the hearing would be going ahead the following Monday even if Mr. Khan was not there. The letter (or a copy of it) had reached the Commissioner by the Monday, and someone had written on the bottom of it: "Note: Mr. Khan spoke to [Chief Registrar] personally at 2.15 pm 8/11/13. He had kindly consented for that adjournment." The Commissioner was informed that the Chief Registrar was saying that he had done no such thing. He had just told Mr. Khan that the application for an adjournment would have to be made to the Commissioner on the Monday by Mr. Khan or his lawyers.
26. Mr. Khan's application for an adjournment bore a striking resemblance to a similar application he had made to Mr. Commissioner Connors on 31 March 2010. The hearing of the disciplinary charges had been fixed for 5 days starting on 3 May 2010. The basis of the application was that he had a medical appointment in Australia on 4 May 2010. It turned out that this appointment had only been made on 6 April 2010, and Mr. Commissioner Connors reluctantly granted the application for the adjournment only because Mr. Khan had consented to an order that he should pay the costs thrown away.

27. Mr. Khan did not attend the hearing on Monday 11 November 2013. He had already gone to Australia. He was represented by Mr. Akuila Naco. Mr. Naco's instructions were limited to applying for the adjournment. The Commissioner refused that application, and the hearing was adjourned for 20 minutes to enable Mr. Naco to take instructions. When the hearing reconvened at about 9.30 am, Mr. Naco asked for an adjournment until 11.30 am as Mr. O'Driscoll had been instructed in the meantime to represent Mr. Khan, and he was not available until then. Mr. O'Driscoll had represented Mr. Khan on the recusal application the previous Tuesday, but he had not hitherto been instructed to represent Mr. Khan at the main hearing. The Commissioner refused that application as well. I shall have to return to these applications later as the Commissioner's refusal to adjourn the hearing is the second reason why Mr. Khan contends that the hearing before the Commissioner was unfair.
28. The hearing itself. Once the applications for the adjournment of the hearing had been refused, the hearing proceeded with Mr. Naco continuing to represent Mr. Khan. Both Mr. Z and Mr. X gave oral evidence, the effect of which I have already summarised. Although Mr. Naco cross-examined them, he did not put a positive case to either of them, save to ask Mr. X whether, when Mr. Khan was representing Mr. Y, Mr. Khan was "acting on [the] instructions of somebody else". Mr. Naco did not call any witnesses, and told the Commissioner that so far as he was aware, Mr. Khan had not made any arrangements for any witnesses to come to court. The hearing was adjourned for written submissions to be filed. It had lasted only about 1½ hours. That was in part attributable to the fact that only two witnesses had been called, but mostly because the disciplinary charges which Mr. Khan faced had been whittled down to two.
29. The written submissions. The written submissions filed on behalf of the Chief Registrar did not just deal with whether the disciplinary charges should be found proved. They also addressed the question of the appropriate disciplinary sanction if either or both of the disciplinary charges were found proved. In that connection, it identified a number of factors which it invited the Commission to take into account. They included that as a very senior practitioner and a former judicial officer, higher standards of behaviour could

be expected of Mr. Khan. They referred to the manner in which Mr. Khan had conducted the proceedings. But most significantly, they referred to Mr. Khan's suspension from practice as a solicitor in Queensland and his removal from the roll of barristers there. It was submitted that in the light of those proceedings Mr. Khan should not be treated with the leniency which a first-time offender might expect.

30. The written submissions filed on behalf of Mr. Khan took the form of a submission of no case to answer. That may have been tactical. If it was treated as a submission of no case to answer and was refused, Mr. Khan could have argued that it was open to him to call evidence. The Commissioner did not say whether he was treating the submission as a submission of no case to answer, but he did talk of Mr. Khan's "audacity" in filing what purported to be a submission of no case to answer. Whatever the Commissioner thought about it, though, there was no application for further evidence to be called.
31. *The application for a new hearing.* The reference to the Queensland proceedings in the written submissions filed on behalf of the Chief Registrar caused Mr. Khan concern. Even though they were referred to in the context of the appropriate disciplinary sanction in the event of either of the disciplinary charges being found proved, they were being brought to the Commissioner's attention before any finding had been made on the disciplinary charges. That prompted Mr. Khan to apply for a new hearing of the charges against him to be presided over by a different commissioner. That application was heard by Mr. Commissioner Madigan on 26 November 2013. He refused that application in a written ruling dated 11 December 2013, the same day as he handed down his judgment on the disciplinary charges and the appropriate disciplinary sanction. There was no appeal from that ruling. That is not surprising. This was not the first time that the proceedings in Queensland had been mentioned. The Commissioner knew all about them since one of the charges which had been withdrawn related to Mr. Khan's alleged failure to mention them when applying annually for the renewal of his practising certificate in Fiji.

32. The purported withdrawal of Mr. Z's complaint. On 3 December 2013, Mr. Z wrote the Commission purporting to withdraw his complaint against Mr. Khan. He explained that when he had made his complaint, he had been led to believe that Mr. Khan was hostile to the police. He had since been informed that Mr. Khan's father had been an inspector of police, and that Mr. Khan had successfully defended a number of police officers in the course of his career. He added that he had spoken to Mr. Khan, and they had "sorted the matter amicably".
33. Some people might be a little sceptical about the reasons Mr. Z gave for withdrawing the complaint. With a little imagination, a number of possibilities might spring to mind. But that would just be speculation, and that has no place in the law. I proceed on the assumption that the letter expressed Mr. Z's genuine sentiments. Having said that, the Chief Registrar decided that the investigation into Mr. Z's complaint should continue. He was entitled to do that as section 100(1) of the Decree enabled him to continue investigating a complaint even after its withdrawal
34. The handing down of the judgment. On 11 December 2013, the Commissioner handed down his judgment. He upheld both disciplinary charges. His judgment also addressed what the disciplinary sanction should be. He did not think that it would be appropriate to order that Mr. Khan's name be struck from the roll, but he concluded that Mr. Khan's conduct required his practicing certificate to be suspended for 15 months on each of the charges, those suspensions to take effect concurrently with each other. Mr. Khan was also publicly reprimanded and ordered to pay costs of \$1,500.
35. Mr. Khan had been expecting the Commissioner's judgment to deal only with whether the disciplinary charges had been proved. In the event that one or other or both of them were proved, he was expecting to be given the opportunity then to make representations on what the appropriate disciplinary sanction ought to be. The Chief Registrar says that the Commissioner was only following the Commission's usual practice of dealing with both liability and sanction in the same judgment, but the fact that Mr. Khan claims not to have

been given the opportunity to address the Commissioner in mitigation is the third reason why Mr. Khan contends that the hearing before the Commission was unfair.

36. The appeal. Mr. Khan appealed against the Commission's decision to the Court of Appeal. He applied to the Court of Appeal for a stay of his suspension until the hearing of the appeal, but that application was refused. The Court of Appeal's judgment allowing the appeal on complaint 1 but dismissing the appeal on complaint 4 was handed down on 22 September 2014. By then Mr. Khan had been suspended from practice for about 9½ months. It ordered that the "remaining period of suspension" of Mr. Khan's practicing certificate be "lifted with immediate effect". The Court of Appeal must, I think, be treated as having quashed the suspension which had been ordered on complaint 1, and reduced the suspension on complaint 4 from 15 months to the 9 months and 11 days which had elapsed since the Commissioner's judgment.

The recusal application

37. I deal first with the three reasons advanced by Mr. Khan for his complaint that he was denied a fair hearing before the Commission. The first is the Commissioner's refusal to recuse himself. The application was based on what the Commissioner had said to Mr. Khan on an occasion when Mr. Khan had appeared as counsel for the defendant in a criminal case in the High Court before the Commissioner in his capacity as a Judge of the High Court. When he was addressing the assessors in his closing speech on 13 April 2011, Mr. Khan read to the assessors the statement of a witness who had given oral evidence in the course of the trial. He pointed out to the assessors that the statement was inconsistent with the oral evidence which the witness had given, and he submitted therefore that it undermined her credibility. After the assessors had left court, Madigan J called what Mr. Khan had done "dishonest". That is borne out by the court record which shows Madigan J to have said:

"Mr. Khan you read out an inconsistent statement to the assessors. Knowing the law, that was dishonest. The law is clear that a previous inconsistent statement is not evidence it is what is said in court that is

evidence and if the inconsistencies are so great it may go to credibility."

In the circumstances, Mr. Khan argued that it would hardly be fair for Mr. Commissioner Madigan to preside over the disciplinary proceedings. A reasonable and informed observer might well think that Mr. Commissioner Madigan's impartiality was compromised by his belief that Mr. Khan had behaved dishonestly in his conduct of a previous case.

38. In his ruling, the Commissioner referred to the previous applications which Mr. Khan had made to Mr. Commissioner Connors to recuse himself, and to the fact that Mr. Khan had waited until the last minute before applying for Mr. Commissioner Madigan to recuse himself. Those facts led him to conclude that Mr. Khan was abusing the Commission's process, but he did not dismiss the application on that basis. Instead, he considered the application on its merits. Importantly, he said that in the course of the previous criminal trial he had ruled that the statement of the witness could not go before the assessors as an exhibit. In those circumstances, by reading the statement to the assessors, Mr. Khan had resorted to *tactics* which were dishonest – presumably because it had been an illegitimate attempt to get round the previous ruling – and the Commissioner added that at no time had he called Mr. Khan's *credibility* into question. The Commissioner concluded that a reasonable and informed observer would not say over 2½ years later that he could not determine the disciplinary charges Mr. Khan faced impartially. The Court of Appeal agreed.
39. The law in this area has become settled over the years. The leading case in Fiji is the Supreme Court's judgment in *Koya v The State* [1998] FJSC 2. Ironically the suggestion that the judge in that case might have been impartial came from Mr. Khan! The court noted that there were two schools of thought. In *R v Gough* [1993] AC 646, the House of Lords had held that the test to be applied was whether there was "a real danger or real likelihood, in the sense of possibility, of bias". On the other hand, in *Webb v The Queen* [1994] HCA 30, the High Court of Australia had held that the test to be applied was whether "a fair-minded but informed observer might reasonably apprehend or suspect

that the judge has prejudged or might prejudice the case". The Court in Koya thought that there was little, if any, practical difference between the two tests.

40. Having said that, the problem with the Gough test which Webb identified was that it placed "inadequate emphasis on the public perception of the irregular conduct". It was "the court's view of the public's view, not the court's own view, which [was] determinative". That persuaded the Court of Appeal in England in Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 to say at [85]

"... that a modest adjustment of the test in Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

The House of Lords in Porter v Magill [2002] 2 AC 357 approved that statement of principle, and in my view, that test should represent the law in Fiji. On a fair reading of the Commissioner's ruling, that is the test he applied.

41. All this begs the question of what constitutes bias. Plainly bias arises where the judge has an interest in the outcome of the case which he is to decide. To all intents and purposes, the existence of bias in such a case is presumed. The Court of Appeal appeared to think that because the Commissioner did not have an interest in the outcome of the proceedings, this was not a case in which he needed to recuse himself. I say that because the Court of Appeal in its judgment cited the principal cases in which that proposition was established – Dimes v The Proprietors of the Grand Junction Canal (1852) 3 HL Cas 759 and R v Camborne Justices ex parte Pearce [1955] 1 QB 41 – before going on immediately to say that the allegation of bias was unfounded.

42. So what about cases like the present one in which the judge did not have an interest in the outcome of the case? No hard and fast rules can be laid down as it all depends so much on the facts of the particular case. Some useful guidance was given by the Court of Appeal in England in Locabail (UK) Ltd v Bayfield Properties Ltd [2002] 2 WLR 870. The court said at [25]:

“ ... a real danger of bias might well be thought to arise ... if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person’s evidence with an open mind on any later occasion; ... or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.”
(Emphasis supplied)

43. With these considerations in mind, I turn to whether, on the test which the Commissioner correctly applied, he should have recused himself. It is important to bear in mind the actual issues which the Commissioner would have to decide. In complaint 1, there was unlikely to be any issue of fact for him to determine. The issue was going to be whether the language which Mr. Khan had used when interviewed for the broadcast had been appropriate, and whether it had been proper for him to comment on pending litigation. I acknowledge that the complaint that Mr. Khan should not have commented on pending litigation could be said to have carried with it the implication that Mr. Khan had used underhand tactics to influence the judge in the civil action against Mr. Z. There is, in that sense, a measure of similarity between the Commissioner’s previous criticism of Mr. Khan in his capacity as Madigan J and the allegation in complaint 1B. But looking at it

in the round, I have concluded that the fair-minded and informed observer would not think that what had happened in April 2011 meant that there was a real danger that in November 2013 the Commissioner would allow that – even unconsciously – to affect his ability to decide complaint 1 impartially.

44. I accept that in complaint 4 there could well have been issues of fact for the Commissioner to decide. Had Mr. Khan agreed to represent Mr. Y at his trial, or was he just appearing for Mr. Y at an initial hearing as agent for the lawyers who would be representing him at his trial (which, as we shall see, was what Mr. Khan would have said at the hearing had he been present at it)? And had Mr. Khan become aware that Mr. X's defence amounted to an attack on Mr. Y? But as the Commissioner himself said, he had not called Mr. Khan's credibility into question in 2011, and complaint 4 did not relate to underhand tactics of any kind. The issue was whether, on the assumption that Mr. Khan was to represent Mr. Y at his trial and had agreed to represent Mr. X as well knowing that his defence amounted to an attack on Mr. Y, there was a conflict of interest between his clients which made it improper for him to represent both of them. Again, looking at things in the round, I have concluded that the fair-minded and informed observer would not think that what had happened in April 2011 meant that there was a real danger that in November 2013 the Commissioner would allow that – even unconsciously – to affect his ability to decide complaint 4 impartially.
45. There are two final points I should mention. First, the Court of Appeal regarded as significant the fact that Mr. Khan had twice asked Mr. Commissioner Connors to recuse himself and that both applications had failed. The only relevance of that, I think, is that it might suggest that asking a judge to recuse himself was a tactic which Mr. Khan used, and might not reflect what *he* truly thought the fair-minded and informed observer might think about the judge's impartiality. Again, I do not see how that helps. The question is not what *Mr. Khan* thought the fair-minded and informed observer would think. The question is what *the court* thinks the fair-minded and informed observer would think.

46. Secondly, the Court of Appeal thought that there was a “significant difference” between calling a practitioner dishonest and saying that he had resorted to dishonest tactics in advancing his client’s case. The implication is that this was a distinction which the Commissioner had drawn. I do not think that it was. As I have said, the Commissioner merely said that he had never called the credibility of Mr. Khan into question.
47. For these reasons, I have concluded that there was no need for the Commissioner to recuse himself.

The applications for an adjournment

48. When refusing the application for an adjournment, the Commissioner thought that Mr. Khan had been less than frank with the Commission when he (or someone acting on his instructions) had written at the bottom of his letter to the Chief Registrar that the Chief Registrar had agreed to the hearing being adjourned. The Commissioner described the note as “false and deceitful”. The Commissioner was also sceptical about the genuineness of the application in the light of the many attempts which Mr. Khan had made to get the hearing put off. He was to describe the current application as “clearly a further delay tactic”. As I read the judgment of the Court of Appeal, that was the principal reason why it thought that it could not say that the Commissioner had exercised his discretion wrongly when refusing to adjourn the hearing. For my part, I can see entirely where the Commissioner was coming from, but if in truth Mr. Khan needed specialist medical advice so urgently that it could not wait for another week, and if the relevant medical expertise was not available in Fiji, then the request for an adjournment despite everything which had happened before should have been granted.
49. As it was, the Commissioner did not think much of the medical report. It was from a doctor in Lautoka and was dated 7 November. 2013. It referred to Mr. Khan having seen the doctor on 3 October 2013 for a particular complaint. It went on to refer to symptoms unrelated to that complaint which Mr. Khan had been experiencing since 5 November 2013, and following an examination of those symptoms a particular clinical finding was

noted. The report concluded by saying that Mr. Khan had been “advised to see a specialist ... overseas as soon as possible”. The Commissioner was under the impression that Mr. Khan had not seen the doctor since 3 October 2013. That is not right. He must have seen the doctor on or after 5 November 2013 for the doctor to have examined him for the symptoms he had been experiencing since 5 November 2013.

50. Having said that, although Mr. Khan was advised to see a specialist “as soon as possible”, the report did not say that he needed specialist medical advice so urgently that it could not be put off for a week. And although Mr. Khan was advised to see a specialist overseas, the report did not say that the relevant medical expertise was not available in Fiji. Indeed, the Commissioner noted that there was no evidence that Mr. Khan had gone to Australia for that advice. There was no evidence placed before the Commissioner of any appointment having been made with a specialist in Australia. In the circumstances, the Commissioner’s decision not to grant an adjournment was well within the reasonable ambit of the Commissioner’s discretion.
51. What about the Commissioner’s refusal to put the case back for two hours to enable Mr. O’Driscoll to represent Mr. Khan at the hearing? The Commissioner refused to do that because he thought that Mr. O’Driscoll should have been there at 9.00 am when the hearing was due to begin. I have to say that if Mr. O’Driscoll had previously been instructed to represent Mr. Khan at the hearing as the Commissioner thought, then to have denied Mr. Khan the opportunity to be represented by someone who would have been prepared for the hearing unlike Mr. Naco with his limited instructions would have been questionable. The Commission could afford to lose two hours bearing in mind that Mr. Khan was now facing just two complaints. But although Mr. O’Driscoll had represented Mr. Khan on the recusal application, he had not been briefed for the hearing. He told us that himself on the application for special leave to appeal. He would therefore have been in no better position to represent Mr. Khan than Mr. Naco had been. Had the Commissioner appreciated that, I have no doubt that he would still have refused to put the case back. That would again have been well within the reasonable ambit of the Commissioner’s discretion.

52. For these reasons, I have concluded that the Commissioner cannot be faulted for refusing the application for the adjournment or the application to put off the hearing until later in the morning.

The opportunity for mitigation

53. I have no reason to doubt that the Commission's usual practice is to deal with liability and sanction in the same judgment. The Chief Registrar knew that – unsurprisingly because he is a party to every disciplinary case heard by the Commission. But Mr. Khan says that neither he nor Mr. O'Driscoll who accompanied him to the hearing on 11 December 2013 when the Commissioner handed down his judgment had been aware of that. They had wanted to present Mr. Khan's mitigation in the event of one or other or both of the disciplinary charges being proved. We were not told whether the Commission's practice is published anywhere, and if this is to continue to be its practice, the practice should be publicised in some way.
54. Having said that, I do not think that the practice is a good one. It means that the Commission may well be told things which it should not be told until the disciplinary charges have been proved. The Queensland proceedings are an example of that. It so happened that the Commissioner was aware of them, but if he had not been, it would not have been proper for him to have been told about them before he had handed down his judgment on whether the disciplinary charges had been proved. I encourage the Commission to look again at its practice and consider whether it serves the public interest.
55. The fact remains that Mr. Khan did not have the opportunity to address the Commission in mitigation after the disciplinary charges had been proved. The disciplinary sanction was therefore fixed by the Commissioner in ignorance of what Mr. Khan would have wanted to draw to his attention in mitigation. The Court of Appeal described this as a "procedural lapse". I agree, and I deal with the consequences of it later on in this judgment when I consider the disciplinary sanction imposed on Mr. Khan on its merits.

Complaint 1

56. Having addressed Mr. Khan's criticisms of the course which the proceedings took, I now turn to the two complaints themselves. I deal with complaint 1 first. I remind myself that it related to Mr. Z's complaint, and was divided into two parts, complaint 1A relating either to the derogatory language Mr. Khan had used or to Mr. Khan's criticism of individual police officers, and complaint 1B being that he had spoken in public about pending litigation which was *sub judice*. Both complaints 1A and 1B were complaints of professional misconduct as opposed to unsatisfactory professional conduct. The findings of guilt on complaints 1A and 1B were the findings which Mr. Khan successfully appealed against to the Court of Appeal, so here we are considering the Chief Registrar's application for special leave to appeal.

57. The Commissioner was under the impression that complaint 1A related to Mr. Khan's criticism of individual police officers. When dealing with this complaint in his judgment, the Commissioner noted that Mr. Khan's conduct had been in breach of rule 3.5 of the Rules of Professional Conduct and Practice incorporated into the Decree. That provides:

"A practitioner shall not on behalf of a client attack a person's reputation without good cause."

The Commissioner added:

"By showing [Mr. Z's] name on the writ and by then going on to complain of violent assaults by the police, the practitioner is, on behalf of his client, in a very public arena attacking the reputation of [Mr. Z] without the matter having been decided by a court of law."

In fact, the Commissioner had misunderstood the Chief Registrar's case on complaint 1A. It had not related to the fact that Mr. Khan had criticised individual police officers. Rule 3.5 of the Rules of Professional Conduct and Practice had not been referred to, let alone relied on. The complaint related only to the derogatory language Mr. Khan had used. That was apparent from the closing written submissions of counsel for the Chief Registrar. On that issue, the Commissioner merely said that the language Mr. Khan had used had been "very strong".

58. When dealing with complaint 1B, the Commissioner noted that Mr. Khan had not named Mr. Z personally. However, he described Mr. Khan as “showing” Mr. Z’s name on the writ. He said that Mr. Khan

*“ ... should have considered that these matters were about to become ‘sub judice’ and therefore it was totally inappropriate for him to discuss those matters and to endeavour to influence the public on public television the day before he was to file them. It is not for the practitioner to pre-empt any future finding of a court on this summons, it was certainly not a matter for open discussion **at this stage.**”*

59. I make two comments about all that. First, I am not sure that it was appropriate for the Commissioner to say that Mr. Khan had *shown* Mr. Z’s name on the writ. That implies that he did that deliberately. There is nothing in the transcripts or the written submissions which suggest that the case against Mr. Khan was that he had done that deliberately, and in the absence of an allegation of that kind, the fairer way to proceed was to treat Mr. Khan as having been *careless* in the way he had held the writ so that Mr. Z’s name had been visible. Secondly, the Commissioner was under the impression that the writ had not yet been issued. In fact, it had been. Page 24 of the court record showed that it had been issued in the High Court Registry in Lautoka on 27 January 2009, the day of the first broadcast, even though page 30 of the court record showed that it had been re-issued in the High Court Registry in Suva on 29 January 2009, the day after the second broadcast.
60. There is one other thing I should add. The Commissioner said that Mr. Khan had even gone “so far as to tell the general public what the Commissioner of Police had concluded about the alleged assaults”. In fact, Mr. Khan had said no such thing. What he had said in effect was that the Commissioner of Police had instructed police officers not to “do these things”, but that if they do, they would receive the full force of the law. In other words, Mr. Khan’s comment about what the Commissioner of Police had said related to general instructions to police officers, not to what had happened in this case.

61. Like the Commissioner, the Court of Appeal thought that the criticism of Mr. Khan in complaint 1A was that he had criticised individual police officers. Its approach to both complaints was informed by the fact that Mr. Z had never been named. As for complaint 1A, the Court of Appeal said that even if Mr. Z's name could have been seen on the writ, Mr. Khan was complaining about the police only in general terms. And even if he could be said to have attacked Mr. Z's reputation, the Court of Appeal took the view that such an attack would not have been without good cause. As for complaint 1B, the Court of Appeal considered that Mr. Khan could not be regarded as having commented on litigation which was *sub judice* when (a) Mr. Z's name had not been referred to and (b) the litigation had not been pending at the time as the writ had not been issued. On that last point, the Court of Appeal made the same error as the Commissioner, but in addition the Court of Appeal regarded as significant the fact that Mr. Z had purported to withdraw his complaint by the time the Commissioner had handed down his judgment.
62. I do not regard this last factor as a material consideration. The fact that Mr. Z did not want to proceed with his complaint did not affect the issue as to whether the disciplinary charges based on it had been made out. Once the Chief Registrar had decided that the investigation should continue, the fact that Mr. Z had purported to withdraw his complaint was not relevant. Nor do I think that it can fairly be said that because Mr. Khan did not mention Mr. Z's name, his criticism of the police was in general terms. In my view, he was talking about a particular case, even though he refrained from naming the police officer concerned.
63. Since both the Commissioner and the Court of Appeal were in error in thinking that complaint 1A related to the fact that Mr. Khan had criticised individual police officers, the true nature of the complaint about the derogatory language he used has not been addressed. One course which we could take would be to remit complaint 1A to the Commission for it to decide whether it had been proved, this time addressing the correct nature of the complaint. But that would take some time, and it is an issue which we are just as well equipped to decide as the Commission. I proceed to do that now.

64. I have no doubt that the language which Mr. Khan used was inappropriate. The remarks he made about the police officers could properly be characterised as derogatory. I would describe them as offensive. It is far from the measured language which one expects a legal practitioner to use. But the charge was one of professional misconduct, rather than unsatisfactory professional conduct, and I would unquestionably have put Mr. Khan's rant into the latter category of behaviour. It was a paradigm example of professional conduct which was unsatisfactory. However, I have asked myself whether the language which Mr. Khan used would justify a finding that he was, to apply the words of section 82(1)(b) of the Decree, "not a fit and proper person to engage in legal practice". That is because, for the reasons given in [21] above, that is what the Chief Registrar set out to prove.
65. I have concluded that the language Mr. Khan used would not justify such a finding. I acknowledge that Mr. Khan's completely inappropriate response to Mr. Z's complaint in his letter of 17 April 2009 to the Law Society suggests that Mr. Khan has a tendency for going over the top. It may therefore not be appropriate to treat his diatribe on television as a wholly isolated incident. It unquestionably justified censure, and a strong warning about his future conduct. But to say that therefore Mr. Khan was not a fit and proper person to engage in legal practice would, in my view, be going a step too far.
66. I turn to complaint 1B. Putting to one side its belief that Mr. Khan was only criticising the police in general terms, the Court of Appeal's approach in effect was to say that because Mr. Z was not named, the litigation which would have been *sub judice* if a writ had been issued by then had not been sufficiently identified. I do not agree. The businessman was named, as was the town he came from, as was where the police officer concerned was based. Bearing in mind that the writ had been issued by then, the critical issue was whether commenting on pending litigation in the way Mr. Khan did amounted to professional misconduct in the sense that it justified a finding that Mr. Khan was not a fit and proper person to engage in legal practice. With respect to the Court of Appeal, I do not think that it grappled with that issue, even though the Commissioner did, albeit not in those precise terms.

67. The prohibition on commenting on pending litigation has long been established. As Lord Denning said in Attorney-General v Times Newspapers Ltd [1973] 1 All ER 815 at p 822e-f:

"It is undoubted law that, when litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause."

For comment on pending litigation to constitute a contempt of court, though, the litigation has to be "actively in suit" and the danger of prejudice to the eventual trial has to be "real and substantial". Even if an action could be said to be actively in suit once the writ has been issued, I doubt whether there was any real danger of the fairness of the eventual trial of the action against Mr. Z being compromised by what Mr. Khan said. The trial was still a long way off, and it was to be presided over by a judge sitting without assessors. Even if he had seen the broadcast, and had remembered it when the action came on for trial, it is unlikely that he would have allowed it to influence him. What Mr. Khan said, therefore, was unlikely to have amounted to a contempt of court.

68. Not that this is decisive. The question is whether what Mr. Khan did amounted to professional misconduct. I would characterise it as conduct which fell short of the standard of behavior which one might expect of a legal practitioner, and if the disciplinary charge had been one of unsatisfactory professional conduct, my view might well have been different. But the charge was one of professional misconduct, and it was formulated, as I said in [21] above, on the basis that Mr. Khan's conduct justified a finding that he was not a fit and proper person to engage in legal practice. I do not think that it was reasonably open to the Commissioner to conclude that such a finding would have been justified.
69. For these reasons, I agree with the Court of Appeal that complaint 1 should not have been found proved against Mr. Khan, though my reasoning has been very different from theirs.

Complaint 4

70. Complaint 4 related to Mr. X's complaint. It was a complaint of unsatisfactory professional conduct as opposed to professional misconduct. The Commissioner did not appreciate that. He was under the impression that complaint 4, like complaints 1A and 1B, was a complaint of professional misconduct. That does not matter in the long run as a complaint of professional misconduct is more serious than one of unsatisfactory professional conduct, so having found what he thought was a complaint of professional misconduct proved, he would inevitably have found this complaint of unsatisfactory professional conduct proved. The finding of guilt on complaint 4 was the finding which Mr. Khan unsuccessfully appealed against to the Court of Appeal, so here we are considering Mr. Khan's application for special leave to appeal.

71. In his judgment, the Commissioner said:

"Whilst it may be acceptable, in the most limited of circumstances, for a practitioner to act for both parties in a commercial or conveyancing transaction, it can never be acceptable in a criminal case where the practitioner has independent and conflicting instructions from his two clients."

The Court of Appeal agreed with that, and so do I. Mr. Khan does not suggest otherwise. Nor was there any suggestion before the Commissioner that the defences of Mr. X and Mr. Y did not conflict with each other or that Mr. Khan was unaware of that. The only relevant issue on which Mr. X was cross-examined was whether, when Mr. Khan was representing Mr. Y, he was acting on the instructions of another firm of solicitors. Indeed, Mr. O'Driscoll confirmed to us that the defence which Mr. Khan would have advanced had he been present at the hearing before the Commissioner was that Mr. Y had not been his client, that he would not therefore have represented him at his trial, and that he only appeared for Mr. Y at one of the early court appearances as an agent of the firm who would be representing him at his trial. The difficulty with that is that Mr. Khan was not there to give that evidence.

72. This leads me on to something else. In his written submissions to us, Mr. Khan set out extracts from the court record of the proceedings in the magistrates' court, which show, he said, that he never appeared for Mr. Y at all. Since these extracts were not part of the evidence before the Commissioner, we cannot take them into account. The irony is that if we could, the extracts would be inconsistent with what Mr. O'Driscoll confirmed to us would have been Mr. Khan's defence.
73. The only remaining issue was whether Mr. Khan's continued representation of Mr. X once he had become aware that Mr. X's defence amounted to an attack on Mr. Y constituted unsatisfactory professional conduct. Both the Commissioner and the Court of Appeal regarded that as axiomatic, because there was no discussion of the issue in their judgments. For my part, I am satisfied that it was open to the Commissioner to conclude that a legal practitioner is guilty of unsatisfactory professional conduct if he continues to represent both his clients in the circumstances of this case.
74. For these reasons, I have concluded that it was open to the Commissioner to find complaint 4 proved.

The sanction of suspension

75. We are now only concerned with the disciplinary sanction on complaint 4. The Court of Appeal reduced the length of the suspension on complaint 4 from 15 months to just less than 9½ months. It did not say why. Maybe the Court of Appeal *itself* thought that suspending Mr. Khan for just less than 9½ months was the appropriate length of the suspension on complaint 4. Alternatively, it may have thought that *the Commissioner* would have imposed a shorter suspension if he had been imposing a sanction on complaint 4 only. The Chief Registrar contends that the latter approach would have been inconsistent with the Commissioner suspending Mr. Khan for 15 months on *both* complaints, even though they were to take effect concurrently with each other. I do not agree. The Commissioner may have thought that the overall length of the suspension for both complaints was 15 months, and instead of suspending Mr. Khan for shorter periods,

but making them take effect consecutively to each other so that the length of the suspension came to 15 months in all; he passed concurrent periods of suspension of 15 months each.

76. In my opinion, the correct approach for the Court of Appeal to have taken was to decide what sanction the Commissioner would have imposed had he been imposing a sanction for complaint 4 only, taking into account the mitigation which would have been advanced on Mr. Khan's behalf had he been given the opportunity to advance it. We know what that mitigation would have been as it has been set out in an affidavit sworn by Mr. Khan since the hearing. He referred to the many lawyers he has employed and supervised over the years, and to the contribution he has made to the community including taking on *pro bono* work. He accepted that what he had said in the interview which had been broadcast had been an error of judgment on his part and he had apologized to Mr. Z. And he produced a number of references from distinguished judges and magistrates testifying, amongst other things, to his competence and integrity, though it has to be said that those references all date back to the 1980s when he was a much younger man.
77. Of particular significance, though, is what he said about complaint 4, the one outstanding complaint. He said that he only represented Mr. Y on one occasion, which was the occasion on which he went to court to represent Mr. X and asked him whether he had received the disclosures. (Mr. X's evidence was that that had been on 15 April 2008). Mr. Khan claimed that this was the one day on which he was asked to appear for Mr. Y as an agent for the lawyers who were representing him. That conflicts with the evidence of Mr. X, which had been that the news on television on 29 March 2008 had referred to Mr. Khan as representing Mr. Y then. Since the Commissioner accepted Mr. X's evidence, Mr. Khan's explanation is not something which affords him any assistance.
78. I have no doubt that the Commissioner would still have suspended Mr. Khan from practice had he been considering the appropriate sanction for complaint 4 only, and had he taken into account the mitigation which Mr. Khan would have advanced. In my opinion, the appropriate period of suspension was 9 months, and I therefore think that this is the

length of suspension which the Commissioner would have fixed. That is so close to what the Court of Appeal ordered that I would not vary its order.

Conclusion

79. For these reasons, I agree with the conclusions which the Court of Appeal reached, even though my flight path in reaching that destination has been very different. The question whether the Commissioner should have recused himself raised a far-reaching question of law, and I would therefore give Mr. Khan special leave to appeal. The distinction between professional misconduct and unsatisfactory professional conduct was relevant to both Mr. Khan's application for special leave to appeal and that of the Chief Registrar. That effect of that distinction also raises a far-reaching question of law, and I would therefore give the Chief Registrar special leave to appeal as well. In accordance with the Supreme Court's usual practice, I would treat the hearing of the petitions for special leave as the hearing of the appeals, but for the reasons I have endeavoured to give, I would dismiss both appeals. In the circumstances, the order for costs which I would make is that there be no order for costs.



A handwritten signature in blue ink, appearing to be "Saleem Marsoof".

.....
Hon. Mr. Justice Saleem Marsoof
Justice of the Supreme Court

A handwritten signature in blue ink, appearing to be "Sathya Hettige".

.....
Hon. Mr. Justice Sathya Hettige
Justice of the Supreme Court

A handwritten signature in blue ink, appearing to be "Brian Keith".

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Hon. Mr. Justice Brian Keith
Justice of the Supreme Court