IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

ILSC Action No: 001 of 2016

BETWEEN:

CHIEF REGISTRAR
Applicant

AND:

TEVITA V.Q. BUKARAU
Respondent

Counsel for the Applicant: Mr A. Turuva (21st April 2016)
Ms V. Prasad (6th June 2016)

Respondent: In Person

Dates of Hearing: 21st April and 6th June 2016

Date of Judgment: 7th June 2016

JUDGMENT
and
SENTENCE

1. "Failing to respond" to the Chief Registrar – professional misconduct

[1] This case raises an important issue in relation to the onus upon members of the profession to respond in a timely manner to any notice they may receive from the Legal Practitioners' Unit (LPU) within the Office of the Chief Registrar (which has the responsibility for investigating complaints against members of the profession).

[2] The issue seems to have been a source of some ongoing confusion within the profession despite the previous Commissioner, Mr Justice P.K. Madigan, attempting to clarify early in his tenure (through judgments in *Chief Registrar v Luseyane Ligabalavu* [2012] FJILSC 3; Case No.003 and 004.2012 (23 October

2012) <http://www.paclii.org/fj/cases/FJILSC/2012/3.html>, and again in *Chief Registrar v John Rabuku* [2013] FJILSC 6; Case No.013.2013 (30 July 2013) <http://www.paclii.org/fj/cases/FJILSC/2013/6.html>), as to the need for practitioners to respond in a timely manner to such notices. Indeed, it was still a problem as highlighted by Justice Madigan in *Chief Registrar v Teresia Rigsby*, Case No.006.2015 (dated 29 November 2015 and handed down on 3 December 2015), the final judgment handed down by His Lordship before he completed his term as the Legal Services Commissioner.

[3] It would appear that the issue has not been helped by a number of important judgments having not been posted previously on paclii (something that is being rectified) and continues to be a source of confusion, if the present case, as well as some of the questions raised in a recent continuing legal education (CLE) seminar hosted by the Commission for the legal profession in April 2016, are any guide.

[4] I am aware that the Commission, apart from having the protection of the public at its core, has an educational role to play for the benefit of the profession. Hopefully, this judgment will assist in further clarifying such matters.

2. The Count

[5] On 12th January 2016, an Application was filed by the Chief Registrar setting out one allegation of Professional Misconduct against the Respondent as follows:

> **'Count 1**
>
> **Allegation of Professional Misconduct: pursuant to Section 82(1)(a) of the *Legal Practitioners Decree of 2009*.**
>
> PARTICULARS
>
> **TEVITA VAKAYARUTABUA QAUQAU BUKARAU**, a Legal Practitioner, being the sole proprietor of **MUSKITS LAW**, failed to provide to the Chief Registrar with a sufficient and satisfactory explanation in writing of matters contained in the complaint of **MITIELI TUQIRI** dated 23rd October 2015, as required by the Chief Registrar by a

notice dated 19th November 2015, pursuant to section 105 of the *Legal Practitioners Decree of 2009* and thereafter failed to respond to a subsequent reminder notice dated 16th December 2015, issued by the Chief Registrar pursuant to section 108(1) of the *Legal Practitioners Decree of 2009*, which conduct is a breach of section 108(2) of the *Legal Practitioners Decree 2009* and is an act of Professional Misconduct.'

[6] It is important for the Respondent, as well as for the legal profession generally, that I set out in full the relevant sections of the *Legal Practitioners Decree 2009* (see <http://www.paclii.org/fj/promu/promu_dec/lpd2009220/>), so that there is no confusion as what is a legal practitioner's responsibility when the practitioner receives a notice from the Chief Registrar or the Legal Practitioners' Unit within the Chief Registrar's Office in relation to a complaint.

[7] Section 104 informs the legal practitioner of the complaint. It states:

'Practitioner or law firm to be informed

104. **Upon receipt of a complaint** under section 99 **or commencement of an investigation** under section 100, **the Registrar shall refer the substance** of the complaint or the investigation—

(a) in the case of complaint or investigation **against a legal practitioner**—**to the legal practitioner;**

(b) in the case of complaint or investigation **against a law firm**—**to all the partners of the law firm**; or

(c) in the case of complaint or investigation **against any employee or agent** of a legal practitioner or law firm—**to the legal practitioner or the one or more partners of the law firm**.' [My emphasis]

[8] Pursuant to section 105, the Registrar then seeks from the practitioner 'a sufficient and satisfactory explanation in writing' as follows:

'Registrar may require explanation

105.—(1) Upon receipt of a complaint under section 99 or commencement of an investigation under section 100, **the Registrar may require that the legal practitioner or the law firm by written notice to furnish to the Registrar within the time specified** in that notice **a sufficient and satisfactory**

explanation in writing of the matters referred to in the complaint.

(2) The Registrar may by notice in writing require a legal practitioner or law firm to provide to the Registrar a sufficient and satisfactory explanation of any matter relating to that practitioner's or that law firm's conduct or practice. Such explanation shall be provided in writing to the Registrar within the time specified in the notice.'

[9] Pursuant to section 106, the 'Registrar may require production of documents'.

[10] When there has been a failure by the practitioner to respond to the section 105 or 106 notice, **then the Registrar may issue a "warning" notice pursuant to section 108** which states as follows:

'Failure to provide explanation or production of documents etc

108.—(1) **Where any legal practitioner or law firm fails to comply with any notice issued under section 105 or section 106**, the Registrar may notify the legal practitioner or law firm in writing that **if such failure continues for a period of fourteen days** from the date of receipt of such notice, the legal practitioner or law firm will be liable to be dealt with for **professional misconduct.**

(2) **If such failure** referred to in subsection (1) **continues for a period of fourteen days** from the date of such notification to the practitioner, **such failure shall be deemed to be professional misconduct**, unless the legal practitioner or law firm furnishes a reasonable explanation for such failure. In any proceedings before the Commission, the tendering of a communication or requirement from the Registrar with which the legal practitioner or law firm has failed to comply, together with proof of service of such communication or requirement, shall be prima facie evidence of the truth of the matters contained in such communication and any enclosures or annexures accompanying such communication.' [My emphasis]

[11] Thus, when there has been no response to the initial notice under s.105 or s.106, **the Registrar may then issue a second notice pursuant to section 108(1) which is in effect a warning** that if the failure continues for a further 14 days from receipt by the practitioner of the second notice, the practitioner is liable to be dealt with for **professional misconduct.**

[12] If the practitioner still fails to respond after 14 days from receipt by the practitioner of the second notice, then **pursuant to section 108(2) such failure**

shall be deemed to be professional misconduct unless the legal practitioner or law firm furnishes a reasonable explanation for such failure.

[13] Put simply, if an Application is filed by the Chief Registrar with the Commission alleging professional misconduct pursuant to sections 82(1)(a), 83(1)(g) and/or 108(2), **it is NOT the substance of the initial complaint** lodged under section 99 or the commencement of an investigation under section 100 that become the basis of the Chief Registrar's application, rather **it is an allegation that there has been a "failure to respond" by the legal practitioner to the notice issued by Chief Registrar pursuant to s.108(1)**, that is, to provide a sufficient and satisfactory explanation in writing which is deemed to be professional misconduct pursuant to section 108(2).

[14] Sections 82(1)(a) and 83(1)(g) of the Decree state as follows:

> '82.—(1) For the purposes of this Decree, 'professional misconduct' includes –
>
> *(a)* unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, **if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence**;'
>
> and
>
> '83.—(1) Without limiting sections 81 and 82, the following conduct is capable of being "unsatisfactory professional conduct" or "professional misconduct" for the purposes of this Decree:
> …
>
> *(g)* conduct of a legal practitioner or law firm in **failing to comply with any orders or directions of the Registrar** or the Commission **under this Decree**'. [My emphasis]

[15] Thus, whilst a practitioner may wish to have a hearing before the Commission arguing the baselessness of a particular complaint, it is not the "substance" of the complaint for which the particular application of professional misconduct has been lodged by Chief Registrar. Rather, it is **the omission** of failing to respond to the notice issued by the Chief Registrar (usually via the LPU) pursuant to s.108(1) that is the basis of alleging professional misconduct.

2. Factual background to the offence

[16] A complaint was lodged with the Applicant on 23rd October 2015 regarding the Respondent pursuant to section 99 of the *Legal Practitioners Decree 2009*.

[17] The Applicant instituted investigations pursuant to section 100 of the said Decree.

[18] On 19th November 2015, the Applicant wrote to the Respondent pursuant to **section 104** of the said Decree enclosing a copy of the complaint together with documents received.

[19] By a separate letter of the same date, the Applicant wrote to the Respondent pursuant to **section 105** of the said Decree granting him 21 days from the date of receipt of the letter 'to furnish to the Chief Registrar's office with a sufficient and satisfactory explanation in writing of the matters referred to in the complaint … dated 23/10/15'. [My emphasis] Significantly, the letter stated: 'We wish to bring to your attention **section 108** of the **Legal Practitioners Decree** 2009.'

[20] Both of the above letters were sent as "attachments" to an email that was sent by the Applicant to the Respondent at 11.37am on Thursday, 19 November 2015.

[21] On 30th November 2015, a letter was sent to the Chief Registrar as follows:

> *'I have personal commitments to attend to in New Zealand over the period 3 Dec to 16 December [2015].*
>
> *Because of the above I am seeking the indulgence of the Court and the respective judicial officers concerned handing [sic] or firm matters to have the matters adjourned to early next year as I shall not be in the country.*
>
> *Cases involved are:*
> *…*
> *Thank you kindly …'*

[22] The three matters listed in the Respondent's abovementioned letter involved cases listed before the Master in the High Court at Suva. There was no mention in the letter of the pending LPU investigation and/or the section 105 notice dated 19th November 2015.

[23] At the bottom of the letter, however, was a notation that it was being copied to the '**LPU**, Masters Chambers, AG's Chambers and Aca Rayawa Law'. [My emphasis]

[24] Presumably, this was a roundabout way of putting the LPU on notice that the Respondent would not be able to respond within the 21 days time period as set out in the section 105 notice dated 19th November 2015, that is, by 9th December 2015 'to furnish to the Chief Registrar's office with a sufficient and satisfactory explanation in writing'.

[25] As to why the Respondent could not find the time to answer the notice sent from the LPU on behalf of the Chief Registrar in the 14 days between the 19th November 2015 (when the Applicant first notified the Respondent) and the 2nd December 2015 (the day before the Respondent went to New Zealand), has never been satisfactorily explained.

[26] In any event, on Thursday, 17th December 2015 at 15.04pm, an email was sent from the Chief Registrar's Office pursuant to **section 108(1)** of the said decree attaching a notice dated 16th December 2015 from the Applicant to the Respondent stating that although 'I have not received a written explanation or response from you as required under section 105 of the Legal Practitioners Decree 2009', the Applicant was granting the Respondent 'a further period of fourteen (14) days from the receipt of this notice to furnish … a response'. The Respondent was reminded: 'I bring to your attention **section 108(2)** of the **Legal Practitioners Decree** of 2009 for you perusal and further necessary action.'

[27] On Friday, 18th December 2015 at 11.36am, the Respondent replied via email

stating: '**Noted and thank you for the extension. <u>Shall provide our reply before extension deadline</u>**.' [My emphasis]

[28] Despite the Respondent having been given 21 days in the original notice of 19th November 2015 to respond, followed by an extension of a further 14 days from receipt of the second notice dated 16th December 2015 (received on 17th December 2015) in which to respond, making 42 days in total, there was no response sent from the Respondent to the Applicant 'with <u>a sufficient and satisfactory explanation in writing</u> of the matters referred to in the complaint … dated 23/10/15'.

[29] On 12th January 2016, (after some 55 days had passed from receipt of the s.105 notice dated 19th November 2015 and 32 days had passed from receipt on the 17th December 2015 of the s.108(1) notice), the Applicant filed an application with the Commission alleging deemed professional misconduct by the Respondent in his failure to provide the Chief Registrar with a sufficient and satisfactory explanation in writing in relation to the s.108(1) notice.

[30] The above application was initially listed to be "called" on 27th January 2016, however, as Justice Madigan had resigned as Commissioner prior to that date, the parties were advised that the first return date was postponed until a new Commissioner had been appointed.

[31] Having been appointed as the new Commissioner as from 22nd January 2016, I then arranged for a call over of this matter to take place following on 11th February 2016, following my swearing-in on 9th February 2016.

[32] On 11th February 2016, the Respondent sought an adjournment to consider the matter before entering a plea. This request was granted and the matter was adjourned until 24th March 2016 for a plea to be entered and a date to be allocated for hearing as a defended matter or as a plea in mitigation. In the meantime, the Applicant received on the 18th March 2016 the Respondent's reply to the matters referred to in the section 108(1) notice that had been received by him on 17th December 2015 (that is, a delay of 93 days or three months and 2 days including the end date).

[33] On 24th March 2016, the Respondent entered a plea of "not guilty". Orders were then made for the serving of draft agreed facts and documents to culminate in the Applicant filing by 14th April 2016 an agreed set of facts and an agreed bundle of documents and for the matter to be listed for hearing on 19th April 2016.

[34] On 19th April 2016, when the parties initially appeared before me to commence the hearing, they had not been able to reach agreement as to an agreed set of facts and an agreed bundle of documents. There had, however, been correspondence between them that highlighted they may have been at cross-purposes. In short, the Applicant had been concentrating on the failure to respond to the section 108(1) notice. The Respondent, on the other hand, wanted to argue the substance of the complaint as to the alleged conduct of the Respondent that had been made originally to the Chief Registrar as detailed in the section 105 notice. Accordingly, the matter was stood down to enable the parties to discuss an agreed set of documents as well as the matter generally.

[35] When the matter was again called later that morning, the Commission was advised by the Respondent that the discussions had been fruitful as it had enabled the parties to clarify the matter, such that the Respondent now wished to change his plea to a plea of "guilty".

[36] Orders were then made for a short adjournment of 48hours to allow the Respondent time to file brief written submissions in mitigation and for the Applicant to respond. The matter was then adjourned to 21st April 2016 for the hearing of a plea in mitigation.

[37] Following the plea in mitigation hearing on 21st April 2016, I then began drafting this judgment. As I began to do so, however, it became obvious that I needed more information. Having read again the written submissions of the parties as well as the judgments that had been cited, I was having difficulty understanding the basis underpinning the formation of the tariff that had been cited to me by Counsel for the Applicant. That is, upon what criteria "the tariff" had been set and what should the Commission consider when deciding upon

what sanction to impose in this current matter.

[38] Therefore, I arranged for the Secretary of the Commission to write to the parties in an attempt to clarify certain matters. In particular, the parties were advised that as I had not been able to understand (either from the cited judgments or the submission of the Applicant) **upon what basis** the tariff of '*suspension of practice of a period from one to three months, coupled with a fine'* was set by the previous Commissioner, I had endeavoured to review the penalties imposed in some other relevant jurisdictions (the states of Queensland and New South Wales in Australia that have similar legislation to Fiji, as well as the province of Ontario in Canada and in England and Wales).

[39] The parties were advised that I had been greatly assisted by (and to which I wished to bring to their attention), **The Solicitors Disciplinary Tribunal of England and Wales** which had recently published in December 2015, the **4th edition of 'Guidance Note on Sanctions,** <http://www.solicitorstribunal.org.uk/Content/documents/GUIDANCE%20NOTE%20ON%20SANCTIONS%204th%20edition%20December%202015%20website.pdf>. The Tribunal, in turn, had based its approach upon the three stages set out in ***Fuglers and Others v Solicitors Regulation Authority*** **[2014] EWHC 179 Admin** (per The Honourable Mr Justice Popplewell, at paragraph [28]) (see <http://www.bailii.org/ew/cases/EWHC/Admin/2014/179.html>). That is, to consider 'the seriousness of the misconduct', 'the purpose for which sanctions are imposed' and then to 'choose the sanction which most appropriately fulfils that purpose'.

[40] The parties were further advised that I would be using the above 'as a guide in deciding upon the appropriate sanction in this matter'. The parties were invited to submit any short written submissions they wished to make addressing those criteria and a timetable was provided should they wish to do so. In addition, the attention of the parties was drawn to section 124(2)(b) of the of the *Legal Practitioners Decree 2009* in relation to costs and that I was of the view that I should consider the question of costs, however, before making an Order in that regard, I would be allowing both parties to address me further on this issue at the conclusion of the handing down of my judgment on 7th June 2016.

[41] In light of the above, the parties were put on notice that this matter would now be relisted at 2pm on Monday, 6th June 2016, so as to allow each party to clarify anything arising from this notification prior to the handing down of my judgment.

[42] This judgment, therefore, has taken into account the further written submissions submitted by each party as well as the further oral submissions they each made before me on 6th June 2016.

3. Submissions in mitigation

Background to the offence

[43] In summary, as to the background to the offence, the Respondent submitted in mitigation, as follows:

(1) In relation to the circumstances of the offence, he highlighted that he is both remorseful but frustrated as although he initially acted for both parties in drafting between them a sale and purchase agreement, after a dispute arose between the parties, he withdrew acting for the vendor and thus he did not answer the initial notice from the LPU as he saw his client solely as the purchaser not the vendor. He did note, however, that he sent to the LPU a carbon copy of a letter dated 30th November 2015 that he had sent to the Registrar advising that he would be in New Zealand from 3rd-16th December 2015 and asking for three of his cases to be adjourned;

(2) The Respondent was already on leave after the reminder notice dated 16th December 2015 was received on 17th December 2015 – as by then the legal vacation had begun on 14th December 2015 up to and including the 15th January 2016. By the time of the Respondent's return from the legal vacation on 15th or 16th January 2016, the Applicant had already filed on 12th January 2016 the present application before the Commission returnable on 27th January 2016.

(3) In view of the above, at the beginning of the hearing of the plea in mitigation on 21st April 2016, the Respondent mentioned, "I had wanted to make an application to the Court [sic – Commission] … seeking if this matter could be redirected back to the Chief Registrar". The Commission was advised that a letter had been sent the day before (20th April 2016) from

the Respondent to the Applicant seeking the Registrar's consent to this proposed course of action pursuant to section 121(5) of the *Legal Practitioners Decree 2009.* The Commission was further advised that in discussions prior to the hearing on 21st April 2016, apparently Counsel for the Applicant had advised the Respondent that such consent was not forthcoming from the Chief Registrar. After some further questioning of the Respondent by the Commission, the Respondent advised he was abandoning this course of action "although … powers exist under section 121(5)". Section 121(5) of the said Decree states:

> *'(5) The Commission may,* ***with the consent of the Registrar and the legal practitione****r or the partner or partners of a law firm, make any orders by consent, either before or after the hearing in the Commission. Any order by consent shall have the same effect and force as an order of the Commission under this Decree.'* [My emphasis]

(4) The Respondent also advised "I note that there is also 121(3) where you [The Commissioner] can make" an order. Section 121(3) states:

> *'(3)* ***The Commission may make any interlocutory or interim orders as it thinks fit before making its final decision*** *in an application for disciplinary proceedings against a legal practitioner or law firm or any employee or agent of a legal practitioner or law firm.'* [My emphasis]

(5) Again, the Respondent did not pursue such an application concluding on that issue: "… because of the position taken by the Registrar I have abandoned it all".

[44] In relation to the background to the offence and why referring the matter back to the Chief Registrar was not appropriate, the Applicant submitted in reply as follows:

(1) The position of the LPU is that the Respondent was acting on both sides of a sale and purchase agreement (even if the Respondent's fees were eventually paid by the purchaser);

(2) A letter dated 12th November 2015 from the Respondent to a lecturer at the Fiji National university (where the complainant vendor was a student) clearly states: '**We represent [the complainant]** in the above Sale & Purchase transaction" and sought the lecturer's 'indulgence that he [the complainant vendor] be released [from lectures] to attend at appropriate

times to facilitate completion of his transaction" [My emphasis];

(3) Counsel for the Applicant had sought instructions from the Chief Registrar that morning on the section 121(5) application raised the Respondent. The Chief Registrar had asked as to the status of the case and when he was advised that the matter was listed for mitigation and sentencing "my instructions were that we won't be consenting to the Respondent's request and that we will just be proceeding".

Submissions on penalty

[45] The Respondent submitted on penalty, in summary, as follows:

(1) The Respondent is 56 years of age and was admitted to the legal profession in Fiji in 1992 and has been operating his own law firm since 2007;

(2) The Respondent has assisted the proceedings by pleading guilty;

(3) This is the first occasion where the Respondent has appeared before the Commission and has no prior matters with the Fiji Law Society;

(4) The Respondent operates a small firm as a sole practitioner;

(5) The Respondent is the sole breadwinner with a spouse and five children (ranging in ages from 25, 22, 19, 16 and 14) with the two eldest unemployed, the middle child at university and the youngest two still at school;

(6) The Respondent has noted that in offences of a similar nature, the practitioner has been fined the sum of $500 as well as had some period of suspension imposed. Taking into account, however, the Respondent's prior good record, as well as his financial circumstances, it was submitted that the matter only calls for a reprimand or, in the alternative, only a fine should be imposed, or, in the further alternative, a reprimand and a fine. The Respondent submitted either or both would be suitable rather than a suspension from practice as a suspension will be a harsh punishment particularly as the Respondent conducts a sole practice and is the only breadwinner in a large family.

[46] The Applicant submitted in reply as follows:

(1) The Respondent's alacrity to admit the allegation and his obvious remorse stand him in good stead as it saved the Commission time and resources;

(2) There are no aggravating factors;

(3) The appropriate tariff ranges from a fine of $500 together with a suspension

of one to three months' duration depending upon the seriousness of the matter;

(4) The Respondent's failure to or lack of correspondence whatsoever to the Applicant and by failing to adhere to Commission's Orders is a sign of discourtesy and disrespect to the Commission and regulating body;

(5) That a higher range of the tariff is appropriate for this matter reflecting the seriousness of the offence.

(6) As for the appropriate penalty, the Applicant cited as a guide –

(a) *Chief Registrar v Rabuku* [2013] FJILSC 6; Case No.013.2013 (30 July 2013) – where the practitioner was fined $500 and suspended from practice for three months. In *Rabuku*, the Commissioner, Justice Madigan, cited observations he made in an earlier case of *Chief Registrar v Luseyane Ligabalavu* [2012] FJILSC 3; Case No.003 and 004.2012 (23 October 2012) (not to be confused with the later 2013 case – as was initially cited to me – of *Chief Registrar v Melaia Ligabalavu* and *Luseyane Ligabalavu* [2013] FJILSC 7; Case No.007.2012 (7 June 2013), see <http://www.paclii.org/fj/cases/FJILSC/2013/5.html>);

(b) *Chief Registrar v Sushil Chand Sharma* [2013] FJILSC 7; Case No.014.2013 (30 July 2013), <http://www.paclii.org/fj/cases/FJILSC/2013/7.html> – where the practitioner was fined $500 and suspended from practice for one month;

(c) *Chief Registrar v Vilitati Daveta* [2013] FJILSC 10; Case No.007.2013 (20 August 2013), <http://www.paclii.org/fj/cases/FJILSC/2013/10.html> – where the Commission did 'not impose any additional penalty … to penalties of closure of practice already ordered' in earlier proceedings;

(7) The sole matter where a only fine was imposed but with no suspension, was *Case No.013.2015* (25 November 2015) where the practitioner was fined $1500 and not suspended due to the fact that they had provided a medical report.

4. The Legal Vacation - a reasonable explanation for failure to respond?

[47] As noted above, why the Respondent could not have answered the initial s.105 notice from the LPU in the 14 days between 19th November and 2nd December 2015 (he having left for New Zealand on 3rd December 2015) has never been properly explained, apart from his submission that he had sent to the LPU a copy of a letter he had sent to the Chief Registrar explaining that he would be away in New Zealand from 3rd-6th December 2015 and could three matters be adjourned.

[48] The problem is that it is not the initial s.105 notice that forms the basis of the deemed professional misconduct as per section 108(2). Indeed, the Applicant provided in the s.108(1) notice dated 16th December 2015 'a further period of fourteen (14) days from receipt of this notice [i.e. 17th December 2015] to furnish the Chief Registrar's office with a response'. Thus, by not responding within that 14 days' period, that is, arguably by 30th December 2015, then, as per section 108(2) of the Decree 'such failure shall be deemed to be professional misconduct'.

[49] There is, however, a defence set out in section 108(2), that is, the conduct is deemed professional misconduct 'unless the legal practitioner or law firm furnishes a reasonable explanation for such failure'. The reasonable explanation that was suggested in a roundabout way by the Respondent (even though he was pleading guilty) was that it was the legal vacation (which did not conclude up to and including 15th January 2016) and the LPU filed their application on 12th January 2016.

[50] Putting the legal vacation argument to one side for the moment, why, upon his return from New Zealand on 16th December 2015, the Respondent did not answer the Applicant following the s.108(1) notification providing an extension of 14 days is strange. This is particularly so, when on Friday, 18th December 2015, at 11.36am, the Respondent replied via email to the LPU stating: *'Noted and thank you for the extension.* ***Shall provide our reply before extension deadline.***' [My emphasis]

[51] Thus, even if the Respondent was on the legal vacation that had commenced on

15th December 2015, **he had given his personal undertaking in writing to the Chief Registrar of the High Court** – a solemn matter – **that he would reply before the extension deadline** (of the additional 14 days), which, on my calculations, expired on 30 December 2015 if one includes the receipt on 17th December as the first of the 14 days in which to respond.

[52] When there had been no reply from the Respondent, the Applicant then filed on 12th January 2016 the present application before the Commission.

[53] As Justice Madigan made clear in *Luseyane Ligabalavu* [2012] at [2] and [6]-[8]:

> '[2] … **failure to respond** to the Registrar is not only in **direct contravention to the stipulation in Section 105 of the Legal Practitioners Decree** but is also showing complete disdain and disregard for the authority of the head of the regulatory arm of the profession. Should such practice go unchecked then the profession would become totally unmanageable with the public then being unprotected and the spirit of the legislation defeated …
>
> [6]The Commission regards **non-compliance with the Chief Registrar's requests and demands are very serious failures** on the part of a practitioner. If a practitioner cannot regulate his own affairs how can he regulate the affairs of his clients?
>
> [7] To defy authority and in doing so to contravene the provisions of Division 3 of the Legal Practitioners Decree 2009 **calls into question the practitioner's suitability to be in practice**. In its role of guardian of professional standards the Commission has no option but to suspend the Respondent's right to practice.
>
> [8] As counsel for the Registrar says **a fine is not an appropriate remedy for disrespecting the Registrar** …' [My emphasis]

[54] Most of the above passages (except paragraph [8]) were cited by Counsel for the Applicant in his submissions to the Commission in relation to the appropriate penalty to be imposed on the Respondent in this matter.

[55] *Luseyane Ligabalavu* [2012] involved a failure 'to respond to a complaint by the Chief Registrar or to a subsequent notice seeking an explanation' between 15th December 2011 and 23rd January 2012 (approximately 40 days or 1 month and 9 days). To put that into proper context, however, the practitioner was also found to have 'failed to attend an arbitration hearing scheduled by the Chief

Registrar in respect to another complaint'. In addition, the practitioner 'failed to comply with the orders of the Chief Registrar to settle a complaint … by paying … a balance of $200'.

[56] Thus, in *Luseyane Ligabalavu* [2012], 'the Commission found established against the Respondent **two counts of professional misconduct**' as well as a failure to comply with an Order of the Chief Registrar – serious matters indeed. Perhaps, it was unsurprising then, for it to be ordered that the practitioner would not be eligible for a practising certificate from 23 October 2012 until 1st of March 2015 (over two years), as well as to pay the sum of $200 previously ordered to be paid by the Chief Registrar.

[57] As for the three cases cited by the Applicant in relation to penalty, I have had the Secretary of the Commission check the Commission's files to clarify the exact details. The three cases can be summarised as follows:

(1) *Chief Registrar v John Rabuku* [2013] FJILSC 6; Case No.013.2013 (30 July 2013) – a s.105 notice was issued on 27th May 2013, a reminder s.108(1) notice was issued on 17th June 2013 and an application was filed with the Commission on 10th July 2013. This meant that the practitioner failed to respond between 27th May 2013 and 10th July 2013 (45 days or 1 month and 14 days including the end date). In relation to the specific s.108(1) notice, it meant that the practitioner failed to respond for 24 days between the issuing of the notice and the LPU filing the application with the Commission. The practitioner was fined $500 and suspended from practice for three months;

(2) *Chief Registrar v Sushil Chand Sharma* [2013] FJILSC 7; Case No.014.2013 (30 July 2013) – a s.105 notice was issued on 13th May 2013, a reminder s.108(1) notice was issued on 17th June 2013 and an application was filed with the Commission on 10th July 2013. This meant that the practitioner failed to respond between 13th May 2013 and 10th July 2013 (59 days or 1 month and 28 days including the end date). In relation to the specific s.108(1) notice, it meant that the practitioner failed to respond for 24 days between the issuing of the notice and the LPU filing the application with the Commission. The practitioner was fined $500 and suspended from practice for one month;

(3) *Chief Registrar v Vilitati Daveta* [2013] FJILSC 10; Case No.007.2013 (20 August 2013) – a s.105 notice was issued on 24th July 2012, a s.108(1) reminder notice was issued on 21st May 2013 and an application was filed with the Commission on 20th June 2013. This meant that the practitioner failed to respond between 24th July 2012-20th June 2013 (332 days or 10 months and 28 days including the end date). In relation to the specific s.108(1) notice, it meant that the practitioner failed to respond for 31 days between the issuing of the notice and the LPU filing the application with the Commission. No additional penalty was imposed to the penalty of closure of the practice that had already been ordered in earlier proceedings.

[58] In addition, there have been similar penalties applied in *Chief Registrar v Anand Singh*, Case No.024.2013 (7 November 2013) and *Chief Registrar v Teresia Rigsby*, Case No.006.2015 (29 November 2015).

[59] In *Anand Singh*, a s.105 notice was issued on 26th June 2013, a reminder s.108(1) notice was issued on 29th July 2013 and an application was filed with the Commission on 12th August 2013. This meant that the practitioner failed to respond between 26th June and 12th August 2013 (48 days or 1 month and 18 days including the end date). In relation to the specific s.108(1) notice, it meant that the practitioner failed to respond for 15 days between the issuing of the notice and the LPU filing the application with the Commission. The practitioner was suspended from practice for two months for which he sought a stay from the Commissioner (that was refused) pending his appeal.

[60] He then made an application before a single judge of the Court of Appeal pursuant to section 20(1) of the Court of Appeal Act. As the President of the Fiji Court of Appeal, Mr Justice W.D. Calanchini, observed in *Anand Kumar Singh v Chief Registrar* [2013] FJCA 141; ABU58.2013 (20 December 2013), <http://www.paclii.org/fj/cases/FJCA/2013/141.html>, in refusing an application for a stay pending appeal:

> '[9] … Having considered the affidavit material and the oral evidence given at the hearing, the learned Commissioner concluded that the letter dated 9 August 2013, being just three days before the expiration of the Respondent's [2nd notice] deadline, was a tactical delay measure. The

explanation in the letter and the proven medical evidence did not amount to a reasonable explanation for non-compliance. The complaint of professional misconduct against the Appellant was found to be established. The Commissioner imposed a penalty of two months suspension of the Appellant's practising certificate from the date of the judgment being 7 November 2013 …

[16] In my view public confidence in the legal profession in Fiji can only be established and maintained by effective professional regulation and enforcement. The task of effective regulation falls to the Chief Registrar under the Decree. Any legal practitioner who disregards attempts by the Regulator to protect the public in Fiji is undermining the regulatory regime in the Decree thereby undermining public confidence in the profession. **By ignoring the Chief Registrar's correspondence** from 26 June to 9 August 2013 and then only at the last moment providing an explanation that was held not to be reasonable **the Appellant has failed to acknowledge his professional responsibility and failed to either accept or recognise the important role of the Chief Registrar to act in the public interest. The public interest dictated an appropriate response** to the matter raised by the Chief Registrar and it also dictated that such a response be provided in a manner that was consistent with the highest professional standards.' [My emphasis]

[61] In relation to the application for stay, the President observed:

[20] Although it is not for a single judge of the Court to delve into the merits of the appeal, it is necessary to assess the Appellant's grounds to determine whether any one of them meets the high threshold of exceptional chances of success that may constitute a special circumstance to be considered along the other factors relevant to the present case …

[62] As for penalty, the President noted:

'[28] Ground 6 concerns the sentence imposed by the learned Commissioner and **in my judgment the penalty of two months suspension is not wrong in law and does not even raise an arguable point**.' [My emphasis]

[63] I have had the Secretary of the Commission check with the Court of Appeal Registry as to the status of that appeal and the Secretary was advised that the matter is still pending as the Appellant has yet to file the necessary record to pursue the appeal.

[64] In *Teresia Rigsby*, a s.105 notice was issued on 1st May 2015, a reminder s.108(1) notice was issued on 26th May 2015 and an application was filed with the Commission on 22 September 2015. This meant that the practitioner failed

to respond between 1st May and 22nd September 2015 (145 days or 4 months and 22 days including the end date). In relation to the specific s.108(1) notice, it meant that the practitioner failed to respond for 120 days or 4 months and 22 days between the issuing of the notice and the LPU filing the application with the Commission. The practitioner was fined $500 and suspended from practice for one month.

[65] Even in Rigsby, however, despite having been assisting as a receiver for suspended practices, the practitioner was not exempt from what had become virtually a sanction of "mandatory suspension" for failing to respond, as Justice Madigan noted:

> '[3] In substantial written mitigation the practitioner has given reasons for not complying with the CR's request, chiefly being the loss of the relevant file while she was attending to thousands of files as receiver for suspended practices.
> [4] Previous cases in this Commission (and unfortunately far too many) show a tariff of one to three months' suspension for not responding to the CR, the regulatory head of the profession. **A suspension at the lower end of the tariff is kept for those** who like this practitioner **admit their transgression at an early stage and have good reasons for not responding.**
> [5] Helping the CR by attending to receiverships of other practices is a very noble pursuit but **it cannot excuse a practitioner from ignoring not one but a follow-up request for information**. Practitioners are mistaken to think that the reply needs to be a detailed defence to the complaint made. **Any response to the CR will vitiate the laying of a charge such as this, even if it is to tell him that the file is missing and more time is needed to compile necessary documentation**.' [My emphasis]

[66] As for *Case No.013.2015*, the sole matter where only a fine was imposed ($1,500) and no suspension, a s.105 notice was issued on 2nd September 2015, a reminder s.108(1) notice was issued on 29th September 2015 and an application was filed with the Commission on 27th October 2015. This meant that the practitioner failed to respond between 2nd September and 27th October 2015 (56 days or 1 month and 26 days including the end date). In relation to the specific s.108(1) notice, it meant that the practitioner failed to respond for 29 days between the issuing of the notice and the LPU filing the application with the Commission. At the hearing on 3rd November 2015, the practitioner had submitted a medical report not as a defence but as part of her plea in mitigation.

[67] In the present case before me, the initial s.105 notice was issued and received on 19th November 2015. As noted above, there was no response other than a "CC" (carbon copy) being forwarded to the LPU of a letter dated 30th November that had been sent to the Chief Registrar requesting him to adjourn three matters in the High Court. When the s.108(1) notice dated 16th December 2015 was received on 17th December 2015, the Respondent gave his personal undertaking in writing to the Chief Registrar that he would reply before the extension deadline. Despite giving his written undertaking, the Respondent never replied. An application was then filed with the Commission on 12th January 2016. This meant that the practitioner failed to respond between 19th November 2015 and 12th January 2016 (62 days or 2 months and 1 day including the start and end dates). In relation to the specific s.108(1) notice, it meant that the practitioner failed to respond for 27 days between the issuing of the notice and the LPU filing the application with the Commission.

[68] If I have understood the submissions of the Respondent correctly, on the one hand, he has entered a plea of guilty. On the other hand, he says that he responded to the s.105 Notice of 19th November 2015 by way of a "copy letter" to the LPU (of an original letter addressed to the Chief Registrar dated 30th November seeking adjournments for three cases in the High Court). Further, he says that although he sent an email on 17th December saying he would respond to the s.108(1) Notice of 16th December 2015 (received on 17th December 2015), the legal vacation operated from 14th December 2015 until 15th January 2016. As the Respondent has submitted, by then 'matters had proceeded towards the Commission', that is, the present Application filed with the Commission on 12th January 2016.

[69] I have noted the submissions of the Applicant on penalty 'that the tariff ranges from a fine of $500 together with suspension of one to three months depending upon the seriousness of the matter' and that although the Applicant has submitted that there are no aggravating factors, 'the Applicant submits that a higher range of the tariff is appropriate for this matter.'

[70] I have also noted that the Respondent submitted that a reprimand would suffice.

In the alternative, he submitted there should be a fine in the sum of $250. He has noted that 'the cases have usually been in the vicinity of $500', however, 'because of the groundless basis of the claims' [allegedly made by the complainant], this should be reduced to $250. In the further alternative, he submitted there should be a reprimand together with a fine of $250.

[71] The Respondent has also asked in his written submissions that the Commission take into account the continual harassment he alleges that he has suffered from the complaint during these proceedings. In particular, the Respondent alleges that he received from the complainant some 30 text messages in the period from 3pm Saturday 16th April until 8.30am on Monday 19th April 2016 (of which he made the Applicant aware in correspondence on 18th April 2016) as well as making the Commission aware during his appearance before the Commission on Tuesday, 19th April 2016. This allegation was not disputed by Counsel for the Applicant.

[72] Whilst I have noted that this is the Respondent's first offence in some 24 years of practice, I am also aware of the need for both specific and general deterrence in relation to such professional misconduct where a practitioner fails to respond to the Chief Registrar. Indeed, on my calculations, there were two occasions when the Respondent failed in his professional obligations. First, he failed to satisfactorily answer the initial letter of 19th November 2015 (apart from sending to the LPU a carbon copy of a letter dated 30th November addressed to the Registrar on other matters saying he was in New Zealand from 3rd to 16th December 2016). Second, after he returned from New Zealand, he acknowledged receipt of the Registrar's s.108(1) "warning " notice of 16th December 2015 by promising to respond before the extension deadline, however, he did not comply with his undertaking. His explanation is that he was by them on the legal vacation.

[73] **There is, however, a counter argument**. The initial s.105 notice of 19th November 2015 gave the Respondent until 12noon on 11th December 2015 'to furnish to the Chief Registrar's office with a sufficient and satisfactory explanation in writing'. The Respondent responded by way of a copy letter to the LPU of 30th November 2016 advising that he would be in New Zealand

from 3rd to 16th December 2015. Although this may not have been a satisfactory response or explanation, the Applicant did grant the Respondent an extension in the s.108(1) notice dated 16th December 2015 and received by the Respondent on 17th December 2015, wherein the Respondent was advised that 'the Chief Registrar's office grants you a further fourteen (14) days … to furnish … a response'. The question is was this extension affected by the legal vacation?

[74] According to a legal notice issued by the Chief Justice, Mr Justice A.H.C.T. Gates, and published in *The Republic of Fiji Islands Gazette*, No.48 dated Friday, 10th July 2015 'pursuant to section 28 of the High Court Act (Cap.13)', the Chief Justice had ordered and directed 'that a legal vacation shall commence on Monday 14th December, 2015 and conclude on Friday January 15th January 2016 (both dates inclusive)'. The notice was also publicised elsewhere. (See, for example, Talebula Kate, 'Legal vacation', *Fiji Times*, Thursday, 10 December 2015, <http://www.fijitimes.com/story.aspx?id=333284>.) Thus, the legal vacation commenced on Monday, 14th December 2015 (two days before the Respondent returned from New Zealand) and concluded on Friday, 15th January 2016. Arguably, the further 14 days time period in which to respond as provided in the s.108(1) notice sent from the LPU to the Respondent dated 16th December 2015 (and received on 17th December 2015), did not begin "to run" until after the conclusion of the legal vacation, that is, from the 16th January 2016, and did not conclude until 29th January 2016. If that argument is correct then the Application lodged by the LPU with this Commission on 12th January 2016 was 19 days premature and should not have been filed until 30th January 2016.

[75] In the 2015 legal vacation notice published in *The Republic of Fiji Islands Gazette*, on 10th July 2015, it stated:

> *"(4) The time of the vacation* ***shall not be reckoned in the computation of the times*** *appointed or* ***allowed by the high Court Rule****s for amending, delivery, or filing any* ***pleadings****."* [My emphasis]

[76] Why this becomes important is that, as I noted in ***Giesbrecht v Cross*** [2008] FJHC 356; Civil Action 540.2007 (25 November 2008) (see <http://www.paclii.org/fj/cases/FJHC/2008/356.html>), (when I had been sitting formerly as a Judge of the High Court of Fiji), at [53]:

'… the Respondent has not been able to show any specific reference as to where the Courts in Fiji have held that time does run in the High Court during the legal vacation period. Thus, it must follow that **time does not run**. That is, the law must be, as has been previously the case:
"*The time of the vacation shall not be reckoned in the computation of the times appointed or allowed by the high Court Rules for amending, delivery, or filing any pleadings*." [My emphasis]

[77] I also made clear in *Giesbrecht,* however, that the legal vacation did not apply for matters in the Fiji Court of Appeal - citing single judgments by Shameem JA and Ward P. (See ***Ports Authority of Fiji v C&T Marketing Limited No.1*** [2001] FJCA 42; [2001] 1 FLR 76; (21 February 2001) Civil Appeal No. ABU0004 of 2001S, Shameem JA); ***Rajesh Prasad v Narhari Electrical Company and Bank of Baroda*** (Unreported, Fiji Court of Appeal, Civil Appeal no. ABU 02/06, Ward P)***; Transport Workers Union v Arbitrational Tribunal and Air Pacific Limited*** (Unreported, Fiji Court of Appeal, Civil appeal No. 111 of 2006, Ward P).

[78] Thus, the question remains, what then is the effect of notices issued by the Chief Registrar upon a practitioner pursuant to sections 105 and 108(1) of the *Legal Practitioners Decree 2009*? They are clearly legal notices. Indeed, the effect of a failure to respond to a s.108(1) notice is deemed professional misconduct pursuant to section 108(2). Could they be termed "pleadings" even though no legal proceedings have been instituted before the Commission at that stage?

[79] Section 122 (3) of the ***Legal Practitioners Decree 2009*** states:

'Once an order made by the Commission is filed in the High Court under subsection (2), the order becomes an order of the High Court, and may be enforced accordingly in accordance with the **Rules of the High Court**.'

[80] **ILSC Practice Direction No.1 of 2009,** issued by Commissioner J.R. Connors, on 22 October 2009, in relation to appeals, states:

'Pending the formulation of rules to the contrary ***the Court of Appeal Rules [Cap.12] shall apply as if the proceedings*** *before the Independent Legal Services Commission* ***were civil proceedings before the High Court****.'*

[81] Thus, the Commission operates on the same level as the High Court. Its Orders

once filed in the High Court become Orders of the High Court and can be enforced in accordance with the Rules of the High Court. Appeals from Orders of the Commission are in accordance with the Court of Appeal Rules.

[82] Unfortunately, for the Respondent, however, I cannot find that the definition of pleadings extends to notices issued by the Chief Registrar to a practitioner prior to the commencement of proceedings in the Commission. I am of the view that sections 105 and 108(1) notices are not pleadings. It is not as though a writ of summons had been issued by the Commission. Indeed, at that stage, no application had been filed by the Applicant with the Commission. One only needs to read 'Order 18 Pleadings' of the High Court Rules to confirm that notices sent by the Chief Registrar to a legal practitioner are not pleadings.

[83] Further, it is not as though the Registrar had filed a statement of claim upon the Respondent and that it was then up to the Respondent to reply by filing a defence. As the High Court of Australia (per Mason CJ and Gaudron J) observed in ***Banque Commerciale SA v Akhil Holdings Ltd*** [1990] HCA 11; (1990) 169 CLR 279; 92 ALR 53 (9 April 1990) at [7] <http://www.austlii.edu.au/au/cases/cth/HCA/1990/11.html>:

> '… The filing of a defence is a formal step in proceedings. The defence is part of the pleadings which identify the issue for decision. More significantly in the present case, it is a step which precludes a plaintiff from entering default judgment.'

And as Brennan J, observed in the same case:

> 'In ***Thorp v. Holdsworth*** (1876) 3 Ch D 637, at p 639, Jessel M.R. stated the object of pleadings:
>
> > "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX. was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."'

[84] I do not believe that the issue needs to be referred to the Court of Appeal as a Case Stated. The wording of the Legal Vacation notice is clear on its face: '*the*

computation of the ***times*** *appointed or allowed by* ***the High Court Rules*** *for amending, delivery, or filing any* ***pleadings****'.* **Therefore, the legal vacation is not relevant in the computation of times set out in notices** sent by the Chief Registrar to a legal practitioner pursuant to s.108(1) of the *Legal Practitioners Decree 2009.*

5. The "tariff" for failure to respond?

[85] I accept that the previous Commissioner applied 'a tariff of one to three months' suspension for not responding to the CR, the regulatory head of the profession'. I further accept that the President of the Fiji Court of Appeal observed, on 20th December 2013, when refusing the stay application of *Anand Kumar Singh*, that 'the penalty of two months suspension is not wrong in law and does not even raise an arguable point'.

[86] My own view is that a tariff of one to three months' suspension, whilst perhaps not wrong in law, is arguably at the higher end of the scale and if it is to be imposed has to be placed in context and explained as to why it is necessary for it to be imposed instead of some other sanction such as a fine.

[87] There is no doubt that failure to answer the regulatory body of the profession is professional misconduct (which, nowadays, has been enshrined in legislation in Fiji, as in most common law jurisdictions). As noted earlier in this judgment, in considering the tariff, I have endeavoured to review the penalties imposed in some other relevant jurisdictions (that is, the states of Queensland and New South Wales in Australia that have similar legislation to Fiji, the province of Ontario in Canada, as well as in England and Wales).

[88] As was noted in 2009 in Australia by the then Legal Services Commission for New South Wales:

> 'Failure on the part of a practitioner to provide information or documents or otherwise assist my office, without reasonable excuse, is declared to be professional misconduct. A large number of the prosecutions brought against practitioners are due to failure to respond ... **A failure to respond can ultimately result in a practitioner being struck off the roll of practitioners.**'(See Steve Mark, 'The office of the Legal Services Commissioner – consumer protection', *Precedent*, Issue 90, January/February 2009, pp.15-16,

<http://www.olsc.nsw.gov.au/Documents/olsc_article.pdf>.
[My emphasis]

[89] The problem was explained by the New South Wales Administrative Decisions Tribunal in ***Law Society of New South Wales v Treanor*** [2005] NSWADT 285 (5 December 2005) (see <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/285.html>), at paragraphs [18]-[21]:

> '18 This Tribunal has previously stated its view that **the Legislature intended solicitors to fully and speedily respond to requests for information in the complaint investigation process, and underscored the seriousness of the failure to do that by creating the statutory offence**. *Legal Services Commissioner v Browne [2004] NSW ADT 63* and *Law Society v Kekatos [2005] NSW ADT 79*.
>
> 19 The Solicitor's general ill health may have amounted to a reasonable excuse for a belated (or even an extremely belated) compliance with the Notice, but we say that those are concepts which measure in weeks or months, not years. We are satisfied that the Solicitor's ill health did not, in all the circumstances, amount to a reasonable excuse …
>
> 20 We note that, although not specifically raised as defence, but raised by way of explanation, the Solicitor indicated that by the time of receipt of the Notices he held neither of the relevant instruction files, and so could not fully and properly answer. Although, at first blush, that response may appear to give an indication of the reasonable excuse …, close consideration indicates otherwise. **In circumstances where the Solicitor has lost control of the file, the statutory notice is complied with by the Solicitor declaring that which he does personally recall about the matter** (if anything), **what he is able to glean from his retained office and general records, and the fact that he cannot now refer to the file**. Similarly, any demand for files or paperwork is appropriately responded to by setting out the facts that resulted in the file leaving the Solicitor's control.
>
> 21 **Had the Solicitor so responded, the Notices would have been complied with, and the statutory professional misconduct would not have been committed**.' [My emphasis]

[90] In ***Council of the Law Society of NSW v Treanor*** [2009] NSWADT 115 (20 May 2009) (see <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2009/115.html>), which was a second appearance by the practitioner, it was ordered:

> '17 In relation to the orders sought by the Council of the Law Society, having regard to the nature of the breaches and the fact that the respondent practitioner is not currently the holder of a practising certificate, it appears

that **there is a protective nature to be discerned about the first order sought, namely, that <u>the respondent practitioner not be issued with a practising certificate until such time as the notices are complied with</u>**. That order appears to be completely justified in the circumstances of the case. In relation to the application for a fine to be imposed, the Tribunal acknowledges the force of the discussion that is sometimes warranted about the utility of a fine but in the present case, **in view of the respondent practitioner's record and repeated failure to comply with notices and his record of being fined in relation to a combination of other matters and a failure to comply with notices, it appears to the Tribunal that <u>a further fine is warranted</u> in the circumstances of this case**. <u>That fine should operate as a warning signal to the legal profession regarding compliance with … notices and **the need to co-operate with investigators no matter how apparently minor the matter under investigation**</u>. Every failure to comply with a notice without reasonable excuse is deemed by the Act to be professional misconduct. It is to be noted that the previous fine of $7,000 involved two categories of professional misconduct with the failure to comply with … notices … In that case a mitigating factor was the respondent practitioner's state of health but at the hearing the Tribunal was satisfied that he was fit to continue practice. In the present matter the Tribunal has no mitigating evidence or any evidence at all from the respondent practitioner. **Having regard to all those matters, a fine of $6,000 should be imposed**. In relation to costs, the applicant has informed the Tribunal that those costs can be properly accommodated by an order for the payment of $2,000. In the absence of any indication of the existence of exceptional circumstances or any indication to the contrary, the applicant is entitled to the costs of the proceedings and **a costs order in the sum of $2,000 appears to be a reasonable assessmen**t.'

[91] Thus, the emphasis in New South Wales, as well as in other jurisdictions, has been upon substantial fines and costs and sometimes suspensions pending the legal practitioner satisfactorily complying with a notice from investigators. Occasionally, it has also included supervision. For example, in ***Legal Services Commissioner v Maurice John McCarthy*** [2010] NSWADT 269 (15 November 2010) (see <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2010/269.html>), where a practitioner had failed to properly respond to requests between December 2007 and February 2009, the New South Wales Administrative Decisions Tribunal stated:

> '40 On the face of it, the conduct of the solicitor in failing to comply with the notice and in failing to honour his undertaking to the LSC is so egregious that it must give rise to doubts about his fitness to practice within the criteria established by ***Allinson v General Council of Medical Education and Registration*** [1894] 1 QB 750. On one view of his conduct the solicitor treated the LSC with gross contempt.

41 However the Tribunal is persuaded that contempt is not the explanation for the solicitor's conduct but rather an inability to face unpleasant situations. However, nothing in the evidence before us gives us confidence that in a similar situation the problem will not recur. For that reason, we are of the opinion that a stronger sanction is required … **We believe that formal supervision should be ordered for a period** … In that regard we propose to adopt the alternative suggestion made by the solicitor's counsel which will have him making a regular telephone report to the office of the LSC. We have decided that this should continue for a period of 2 years. In addition for the same period we will impose a condition similar to that imposed in *Knudsen*. [See ***Legal Services Commissioner v Peter Stanley Knusden*** [2006] NSWADT 245 - If at any time the Respondent is required by the Applicant or by the Legal Services Commissioner to provide information or documents relating to his practice as a solicitor, he is to seek advice regarding compliance with this requirement as soon as he practicably can … from a legal practitioner of appropriate seniority nominated by the Applicant following consultation with the Respondent.]

42 On the basis of that supervision for a relatively lengthy period we are comfortable that it is not necessary to prevent the solicitor from continuing to practice even though we find him guilty of professional misconduct.

43 There should also be a public reprimand, the imposition of a fine and an order that the solicitor pay the costs of the LSC. As to the quantum of the fine, the sum of $8,000 was suggested. **However in the circumstances of this case the Tribunal is of the opinion that the fine should exceed that amount and proposes to fix the fine at $10,000** …

The solicitor is ordered to pay the costs of the LSC as agreed upon or assessed.' [My emphasis]

[92] In ***Council of the Law Society of New South Wales v Sheehan No.2*** [2010] NSWADT 135 (See <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2010/83.html>), it was ordered not only that the practitioner be publicly reprimanded, fined in the sum of $4,000 and to pay the costs of the proceedings, but also it was recommended to the relevant body that his 'practising certificate be suspended until such time as he provides the relevant file or the statutory declaration' the subject of the investigation notice.

[93] There has been occasion, however, where no fine or suspension was imposed although the practitioner was ordered to pay the costs of the proceedings to be

agreed or taxed. For example, in ***NSW Bar Association v Howen (No2)*** [2003] NSWADT 235 (24 October 2003) (see <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2003/156.html>), the New South Wales Administrative Decisions Tribunal noted at [4] and [5] that *'there was nothing to indicate to us that the Respondent was in general a lazy person; rather the contrary'* such that one of the questions for determination was '*if the Respondent was influenced to misconduct wholly or partly by psychological factors'* did that reduce his culpability and could '*the possible effects of those factors be controlled so that any risk of the Respondent re-offending is removed or reduced to an acceptable level?'*

[94] In deciding to impose no fine (and there was no consideration of a suspension) the Tribunal explained:

> '23. Notwithstanding mitigating factors, failure to comply with a notice … is professional misconduct. A … Notice is an important device for assisting the Councils and the Commissioner to investigate and resolve complaints against practitioners. Failure to comply with a notice may frustrate an investigation or make the investigation more difficult, time consuming and costly. **We cannot deal with failure to comply with a notice as if the failure were a trivial matter**.
> 24. We think that the offences are closely related and that the total of fines should represent the total culpability of the Respondent.
> 25. We take into account the fact that the Respondent has been under considerable financial pressure. In this case with its exceptional psychological factors, and having regard that to weaken Mr Howen's financial position may again aggravate those factors, we have decided not to impose fines upon him. **If the psychological factors had not impressed us as significant in these matters we would certainly have imposed fines of considerable amounts.**
> 26. **Contrition with its usual emotional overtones is not relevant as such in these cases where punishment is not a purpose**. It is not helpful to look for emotional and repeated declarations of regret. What is relevant and useful in the context of cases such as this is a state of mind that is that kind of contrition that consists of a determination not to indulge in the same or similar conduct again however unemotionally or briefly that determination may be expressed. We think that the Respondent in his present state of mind is resolved not to offend in a similar way in future.' [My emphasis]

[95] In Queensland, in ***Legal Services Commissioner v Robin John Slipper*** [2008] LPT 8, (see <http://www.austlii.edu.au/au/cases/qld/QLPT/2008/8.html>), the

Queensland Legal Practice Tribunal observed:

> '[22] It has been said repeatedly in matters before this Tribunal and equivalent bodies in the other States that it is essential that legal practitioners respond promptly when an investigating authority seeks a reply or an explanation about complaints. **Complaints by members of the public must be investigated expeditiously and resolved if confidence in the system established for regulating the conduct of lawyers is to be maintained.** Often it is delay in dealing with a client's matter which prompted the complaint in the first place. **The need for a timely response is emphasised in the legislation by providing for a time limit of 14 days to respond to a notice. Failure to respond within that period means that, prima facie, the legal practitioner has been guilty of professional misconduct**. If nothing else, this should serve as a forceful reminder to members of the legal profession of their obligation to co-operate with the investigating entity. Had the respondent complied with the request for information, the time of the LSC and the stressful experience for the respondent would have been reduced, if not eliminated …
>
> [26] The orders are that:
>
> 1. The respondent be publicly reprimanded.
> 2. The respondent pay a penalty of $2,000 to be paid within three months.
> …
>
> 4. The respondent pay the Legal Services Commissioner's costs in the amount of $2,000.'

[96] In ***Council of Queensland Law Society v Whitman*** [2003] QCA 438, (see <http://www.austlii.edu.au/au/cases/qld/QCA/2003/438.html>), where the 'respondent misappropriated trust monies [of $630.00], employed [an] employee to practise as solicitor without [an] appropriate practising certificate, falsely represented to the Queensland Law Society the nature of [the] employee's employment, and failed to produce documents on request to the Queensland Law Society', he was 'suspended for nine months' by the Tribunal from which he appealed to the Queensland Court of Appeal. Chief Justice de Jersey observed (with whom McPherson JA and Jones J agreed):

> [6] … As to the manner in which a solicitor should treat such an enquiry, the Tribunal observed:
>
> "**When faced with such a request or inquiry from their professional body, a solicitor is in much the same position as when dealing with the court.** A solicitor has a duty to be truthful even to his own detriment, not just a duty to be truthful, but a positive duty to be full and frank and for his answers to be candid as well as truthful."
>
> [7] Especially bearing in mind that the end purpose of the Law Society's

> investigation is protection of the public, and not the quasi-criminal prosecution of an allegedly errant solicitor directed to the possible imposition of a penalty … one could not gainsay that observation, which is **consistent with the high standard of candour and general fidelity expected of practitioners ...**
>
> [36] That leads into an overarching consideration. The respondent was generally uncooperative with the appellant, and apparently took an unduly combative approach before the Tribunal. **Neither the investigation, nor the hearing, is criminal in nature: it is a process directed towards protection of the public. Recognizing that, a practitioner is duty bound to cooperate reasonably in the process …**
>
> [41] I consider the matters established against the respondent, taken alone, warranted a substantial period of suspension. **I would have ordered his suspension for 12 months**, but the difference between that and the nine months in fact ordered would not justify interference by this court.' [My emphasis]

[97] The above judgment was most recently cited by the Queensland Civil and Administrative Tribunal in ***Legal Services Commissioner v Karl Scott*** [2015] QCAT 402 (see <http://www.austlii.edu.au/au/cases/qld/QCAT/2015/402.html>), (involving charges of 'unauthorised disbursement of trust money' as well as a failure 'to comply with an investigative requirement'), the practitioner's name was removed form the Rolls and was also ordered to pay the Applicant's costs). The Tribunal reiterated at [44]:

> 'The primary purpose of the disciplinary process is to protect the public. A practitioner is duty bound as an officer of the court and as a legal professional to co-operate reasonably in the investigative and hearing processes. **The respondent's lack of co-operation bears on his lack of a proper appreciation of the public interest which should have informed his professionalism**.'

[98] A study by Haller published in 2001 in relation to 'Disciplinary Hearings in Queensland 1930-2000', has proved illuminating. As with other jurisdictions, professional misconduct has never been defined in legislation instead being 'primarily guided by the common law test of professional misconduct' as set out in ***Allinson v General Council of Medical Education*** **[**1894] 1 KB 750, that is, **'conduct which would be reasonably regarded as disgraceful or dishonourable by professional brethren of good repute and competency'**. As Haller noted, in Queensland, 'the common law definition has been extended by a partial statutory definition of professional misconduct', such that various

sections of legislation 'deem a failure to provide an explanation of a matter under law society investigation within the period allowed to be professional misconduct'. (See Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', *Bond Law Review*, Vol.13, Issue 1, Article 1, pp.1-45, at page 21, <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1195&context=blr>.)

[99] Interestingly, Haller (at 21) found 'the most common specific charge within the compliance category of charges related to a failure to supply an explanation for alleged misconduct' [20%] even though the legislation 'requires a solicitor to respond to a complaint' and that 'failure to do so is deemed to be professional misconduct'.

[100] In relation to penalty, Haller observed (at 22):

> 'The statutory provisions … were presumably included to give Law Society investigations 'more teeth'. Therefore, the legislation deems a breach of those sections to be professional misconduct. This would infer that Parliament intended such breaches to be taken as seriously as a finding of professional misconduct pursuant to the common law test. This investigation was interested in whether Parliament's apparent intention was reflected in the imposition of orders as harsh as those imposed where the common law test of professional misconduct was satisfied.
>
> This did not appear to be the case. In cases in which the only charges found proved related to a breach of … [failing to respond], the vast majority of solicitors were only fined (67%) or censured (13%). Only 1 was struck off and the remainder were suspended (18%). This shows that the tribunal did not give effect to Parliament's intention that a breach of … [failing to respond], be treated as seriously as other forms of professional misconduct. **Breaches of … [failing to respond], were dealt with relatively leniently, usually by way of a fine**, while a finding of professional misconduct pursuant to the common law test was taken much more seriously and led to 48% of solicitors being struck off.' [My emphasis]

[101] Haller's conclusion as 'to Parliament's intention that a breach of … [failing to respond], be treated as seriously as other forms of professional misconduct' on penalty is arguable. While there is no doubt that it is professional misconduct and has been enshrined as such in legislation, surely Parliament also intended

that any penalty to be imposed must be measured. Is everyone to suffer virtual mandatory suspension for a failure to answer? The context must also be considered. Further, is the reason for the failure to answer because there has been some form of dishonesty by the practitioner? As the New South Wales Administrative Decisions Tribunal observed in ***McCathy*** (cited above), surely the failure must be 'so egregious that it must give rise to doubts about [the practitioner's] … fitness to practice within the criteria established by ***Allinson****'?* **That is, 'conduct which would be reasonably regarded as disgraceful or dishonourable by professional brethren of good repute and competency'**.

[102] If the protection of the public is paramount, then I would have thought that an important issue would have been **whether a practitioner responded to the investigatory body even after the issuing of the application** for failure to respond.

[103] Indeed, this has been one of the major focuses of the Law Society of Upper Canada that has the responsibility for regulating lawyers and paralegals in the province of Ontario. As a report prepared by the Society's Director on summary hearings held between 2006 and 31st July 2014 (dealing with 'governance issues such as failing to respond to, or cooperate with, the Law Society, or failing to maintain financial records') noted:

> 'Of the 257 summary hearings held to date, findings of professional misconduct have been made in 246 matters …
>
> With respect to the penalties imposed, in 139 of the 246 hearings **(57%), licensees were given either an indefinite period of suspension or** a definite period of suspension which was **to continue indefinitely until the licensees fully cooperated with the Law Society** …
>
> In addition to the penalties imposed above, costs were awarded against the licensee in 233 hearings (95% of the hearings held) and have ranged from $100 to $25,000.'
>
> (See Zeynep Onen, *'Director's Report - Summary Hearings'*, Law Society of Upper Canada, September 2014, pp6-7, <https://www.lsuc.on.ca/uploadedFiles/Director'sReport-SummaryHearingsSeptember2014FINAL.pdf>.)

[104] According to the Director's Report (at pg6), the penalties imposed were:

Admonition – 1.5%
Reprimand – 27%
Fine – <1%
Definite Suspension – 15%
Indefinite Suspension – 1.5%
Definite & Indefinite Suspension – 55% (in 10 of which fines were also imposed)

[105] Of particular interest was the following finding (at pg7):

> '**In 107 of the 246 hearings, licensees cooperated** with the Law Society in the period **after the application was issued but before the date of the summary hearing.** In these situations, a lesser penalty was imposed at the hearing – **usually a reprimand or a definite period of suspension**.
>
> In **57% of** the hearings (139 hearings), **licensees did not cooperate or only partially cooperated** with the Law Society **prior to hearing**, resulting in a more severe penalty (usually **a definite followed by an indefinite period of suspension** as noted above). These 139 hearings relate to 129 licensees.'

[106] As for those who failed to cooperate the Report noted (at pp7-8):

> 'A review of the 129 licensees who had not cooperated at the time of the hearing (and, therefore, received an indefinite suspension as part or the entire penalty imposed) reveals that:
>
> - **41 licensees (32%) had their licences revoked or were given permission to surrender their licences** in subsequent discipline hearings or have died subsequent to the hearing without being reinstated (3 licensees).
>
> - **32 licensees (25%) subsequently cooperated** with the Law Society:
>   - 13 of the licensees cooperated and were **reinstated within 3 months** of the summary hearing;
>   - 7 of the licensees cooperated and were **reinstated 3-6 months** after the summary hearing;
>   - 4 licensees cooperated and were reinstated 6-12 months following the summary hearing;
>   - 5 licensees cooperated and were reinstated 12-24 months after the summary hearing; and
>   - 3 licensees cooperated and were reinstated >24 months after the summary hearing.
>
> - **56 licensees (43%) have not cooperated** with the Law Society to date **and remain suspended**:
>   - 7 licensees have been suspended for 3-6 months following the summary hearing;
>   - 10 licensees have been suspended for 6- 12 months following the summary hearing;
>   - 5 licensees have been suspended for 12 to 24 months following the summary hearing;

- 10 licensees have been suspended for 2 to 3 years following the summary hearing;
- 8 licensees have been suspended for 3 to 4 years following the summary hearing;
- 2 licensees have been suspended for 4 to 5 years following the summary hearing; and
- 14 licensees have been suspended for more than 5 years following the summary hearing.'

[107] Thus, the Law Society of Upper Canada's emphasis in relation to 'governance issues', (whilst noting that this includes not just 'failing to respond to, or cooperate with, the Law Society', but also 'failing to maintain financial records'), has been admonition or reprimand (28.5%). Where there was cooperation after 'the application was issued but before the date of the summary hearing', then 'a lesser penalty was imposed'. That is, 'usually a reprimand or a definite period of suspension'.

[108] As noted above, in England and Wales, **The Solicitors Disciplinary Tribunal**, has recently published in December 2015, **the 4th edition of 'Guidance Note on Sanctions**'. In relation to the 'Tribunal's approach to sanction', it has noted at paragraph [6]:

> 'Guidance on the Tribunal's approach to sanction is set out in ***Fuglers and Others v Solicitors Regulation Authority*** **[2014] EWHC 179** (per The Honourable Mr Justice Popplewell, para. 28) as follows:
>
> "28. There are three stages to the approach... The first stage is to assess **the seriousness of the misconduct**. The second stage is to keep in mind **the purpose for which sanctions are imposed** by such a tribunal. The third stage is to **choose the sanction which most appropriately fulfils that purpose** for the seriousness of the conduct in question."' [My emphasis]

[109] In determining 'the seriousness of the misconduct in order to determine which sanction to impose', it noted at paragraph [14]:

> '… Seriousness is determined by a combination of factors, including:
> - the respondent's culpability for their misconduct
> - the harm caused by the respondent's misconduct
> - the existence of any aggravating factors
> - the existence of any mitigating factors'

[110] It then lists specific details relevant to when assessing each of the above four

criteria. In relation to mitigation, it specifically notes at the end of paragraph [18]:

> 'Matters of purely personal mitigation are of no relevance in determining the seriousness of the misconduct. However, they will be considered by the Tribunal when determining the fair and proportionate sanction …'

[111] Whilst suspension from the Roll is for serious misconduct, this is not to say that the Courts of England and Wales have been shy in applying serious sanctions. Indeed, although most 'failure to respond' matters are dealt with by sanctions imposed after a hearing before the Solicitors Disciplinary Tribunal, the creation of the Legal Ombudsman and various investigative powers has resulted in two practitioners in England who failed to comply with requests from the Legal Ombudsman being dealt with for contempt.

[112] In 2011, in ***Deputy Chief Legal Ombudsman v Howard Robert Gillespie Young*** [2011] EWHC 2923 (14 November 2011) (see <http://www.bailii.org/ew/cases/EWHC/Admin/2011/2923.html>); [2012] 1 WLR 3227, Mr Justice Lindblom in the High Court of England and Wales, dealt with the first case of its kind under the relevant legislation. As His Lordship noted at [34]-[38]: …

> '34 … the Office for Legal Complaints encompasses the role of the ombudsman. The ombudsman does not investigate allegations of professional misconduct, which continue to be dealt with by the relevant approved regulator, but he does investigate complaints about the provision of legal services …
>
> 35. The 2007 Act makes specific provision to enable an ombudsman to obtain documents or information in the course of his investigation of a complaint …'
> …
>
> 38. Provision for the enforcement of a requirement to produce documents or provide information … is made …
> (4) If the court is satisfied that the defaulter has failed without reasonable excuse to comply with the requirement, it may deal with- (a) the defaulter, and (b) … as if that person were in contempt.'

[113] Young was found guilty of being in contempt, however, as he argued (as set out at [74]) that he had purged his contempt 'since he had done all that he reasonably could to help', to which His Lordship agreed, the Court concluded

(at [77]) 'that this was not a case in which imprisonment was called for, but that a financial penalty was clearly justified' and fixed 'the level of the fine at £5,000'. He was also ordered (at [75]) to pay the Ombudsman's costs that were 'summarily assessed at … £4,497'.

[114] The Solicitors Disciplinary Tribunal later considered the contempt finding as well as a number of breaches of the Solicitors Practice Rules and Solicitors Code of Conduct and ordered that the practitioner be 'Struck Off the Roll of Solicitors'. He was also ordered to pay the SRA's costs summarily assessed at £23,532.00. (See ***Solicitors Regulation Authority v Howard Robert Gillespie Young***, Solicitors Disciplinary Tribunal, Case No.10661-2010, 14th March 2013, <http://www.solicitorstribunal.org.uk/Content/documents/10661.2010.Young.pdf>).

[115] Only a year after the above contempt finding in *Young*, another contempt application was brought by the Legal Ombudsman for failure to respond. In ***The Queen on the Application of Deputy Chief Legal Ombudsman v Michael Edward French*** [2012] EWHC 113 (18 January 2012) (see <http://www.bailii.org/ew/cases/EWHC/Admin/2012/113.html>), Mr Justice Wyn Williams in the High Court of England and Wales, dealt with a practitioner for contempt who had failed between April and November 2011 to answer the Ombudsman, the practitioner having previously been suspended for an indefinite period in February 2011 by the Solicitors Disciplinary Tribunal for failing to respond to it. He had also been ordered by the Tribunal to pay the SRA's investigation and legal costs totaling £10,021.29. (See ***Solicitors Regulation Authority v Michael Edward French***, Solicitors Disciplinary Tribunal, Case No.10604-2010, 21st February 2011, < http://www.solicitorstribunal.org.uk/Content/documents/10604-2010%20-%20French.pdf>). In considering the appropriate penalty for the finding the practitioner in contempt, His Lordship imposed ([at 22]) 'a sanction of 4 months' imprisonment, but suspended for 12 months' and also ordered 'that the defendant should pay the claimant's cost assessed in the sum claimed'.

[116] Some examples of recent cases in relation to failing to respond to the

investigating body that have been dealt with by Solicitors Disciplinary Tribunal in England and Wales over the past 12 months or so, have been as follows:

(1) ***Solicitors Regulation Authority v Bernadette Teresa McDonald***, Solicitors Disciplinary Tribunal, Case No.1135-2014, 12th April 2016 (see < http://www.solicitorstribunal.org.uk/Content/documents/11315.2014.McDonald.pdf>) – where the practitioner made a number of breaches of the Solicitors Code of Conduct including that 'she failed to cooperate with the SRA' and was fined £10,000, ordered to pay costs of £15,000 and subject to a condition that she 'may not practise as a sole practitioner or sole manager or sole owner of an authorised body' with 'liberty to either party to apply to the Tribunal to vary or rescind the Restriction';

(2) ***Solicitors Regulation Authority v Angus Thien Siang Pang and Francesa See Ching Lee***, Solicitors Disciplinary Tribunal, Case No.11370-2015, 16th December 2015 (see <http://www.solicitorstribunal.org.uk/Content/documents/11370.2015.Phang.Lee.pdf>) – where the practitioners amongst various matters 'failed to take out and maintain Professional indemnity Insurance' as well as provided information to investigators known to be untrue and failed to cooperate with the SRA (to reply to one item of correspondence), the practitioners were fined £10,000 and £2,000 respectively as well as ordered to 'pay the costs of and incidental to the application and enquiry fixed in the sum of £7,000 to be paid on a joint and several basis';

(3) ***Solicitors Regulation Authority v David Alan Eager***, Solicitors Disciplinary Tribunal, Case No.11300-2014, 14th April 2015 (see <http://www.solicitorstribunal.org.uk/Content/documents/11300.2014.Eager.pdf>) – where the practitioner amongst various matters 'failed to take out and maintain professional indemnity insurance', as well as failed to cooperate with the SRA, the practitioner was fined £1,000 and ordered to 'pay the costs of and incidental to the application and enquiry fixed in the sum of £13,000';

(4) ***Solicitors Regulation Authority v Stuart Keith Holman***, Solicitors Disciplinary Tribunal, Case No.11284-2014, 14th January 2015 (see <http://www.solicitorstribunal.org.uk/Content/documents/11284.2014.Holman.pdf>) – where the practitioner amongst various matters failed to notify the SRA concerning matters involving professional indemnity insurance

(that he was practicing uninsured), as well as failed to cooperate with both the Legal Ombudsman and the SRA, the practitioner was 'suspended from practice as a solicitor for an indefinite period' and ordered to 'pay the costs of and incidental to the application and enquiry fixed in the sum of £6,178.10'. The major focus was practicing uninsured.

[117] In ***Eager***, for example, one of the allegations (allegation 1.3) stated:

> 'He failed to cooperate with the SRA in breach of Principle 7 of the SRA Principles 2011 and thereby also failed to achieve Outcome 10.6 or (10.8) of the SRA Code of Conduct 2011.'

Principle 7 of the SRA Principles 2011 states:

> 'These are mandatory Principles which apply to all.
> You must:
> …
> 7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner'
>
> (See <http://www.sra.org.uk/solicitors/handbook/handbookprinciples/part1/content.page>)

Outcome 10.6 or (10.8) of the SRA Code of Conduct 2011 state:

> 'Chapter 10: You and your regulator
> …
> Outcomes
> You must achieve these outcomes:
> …
> O(10.6) you co-operate fully with the SRA and the Legal Ombudsman at all times including in relation to any investigation about a claim for redress against you;
> …
> O(10.8)you comply promptly with any written notice from the SRA'
>
> (See <http://www.sra.org.uk/solicitors/handbook/code/content.page>)

[118] Interestingly, the Tribunal found in ***Eager*** (at [50]) that 'There were no aggravating factors present in this case.'

[119] I am not sure as to the benefit for, or protection of, the public in Fiji in having a mandatory "tariff" suspending a practitioner for a period of one to three months

for 'failing to respond' to the LPU, particularly where it involves a sole practitioner and there is no evidence or any allegation of dishonesty such as trust account irregularities. Indeed, for those other clients of the sole practitioner where their matter involves ongoing litigation, one could argue that a suspension of their lawyer in such circumstances may well disadvantage the client (particularly for those where their case is at a crucial stage of negotiations or proceedings) and their file has to be given to an entirely new practitioner who is unfamiliar with the case.

[120] One may well ask, why then should all of the practitioner's clients be so disadvantaged? Instead, if the initial complaint that originated the request from the LPU to the practitioner involves no serious allegations such as financial irregularities, but is simply professional misconduct due to the fact that the practitioner has failed to respond in a timely manner to the investigating body, should not the practitioner carry the burden (rather than his/her other clients)? That is, should not there be an imposition upon the practitioner of a financial sanction of a fine together with (in appropriate cases) of having to pay the costs of the LPU for that body having to investigate and bring the proceedings and perhaps costs to the Commission, as allowed pursuant to section 124 of the Decree?

[121] I also think it is important for the LPU when bringing such applications before the Commission to make clear as to whether the practitioner has complied with the notice (albeit late) either prior to the first return date of the Application or soon afterwards. **If the practitioner has not so complied then surely this must be one of the first orders sought by the LPU? That is, perhaps on the first return date, that the practitioner be suspended until they have complied with the notice.**

[122] Fiji has in the past sought guidance from the procedures of the High Court of England and Wales in civil procedures when the two jurisdictions were closely aligned, and despite the introduction in England and Wales of the *Civil Procedure Rules 1998*, Courts in Fiji have continued to seek such guidance from time to time such as where there was no express provision in Fiji.

[123] For example, in ***Huong-Lee v Air Fiji Ltd*** [2003] FJHC 28; Case No.HBC0320d.2001S (14 November 2003), (<http://www.paclii.org/fj/cases/FJHC/2003/28.html>), Mr Justice Scott, in ruling whether 'to order trial of a preliminary issue' which he noted 'is essentially discretionary', observed that 'one factor … was the considerable saving of costs which could flow from a preliminary hearing'. In that regard, Scott J cited Order 1 rule 7 of the High Court Rules of Fiji:

> 'Where no express provision is made by these Rules with respect to the practice or procedure in any circumstances arising in any cause or matter then the jurisdiction of the High Court shall be exercised in conformity with the practice and procedure being adopted in the like circumstances by Her Majesty's High Court of Justice in England.'

Scott J then referred to *'Rule 1.1 of the 1999 English Civil Procedure Rules [which] sets out the overriding objective of the Court'*:

> '(1) These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.
> (2) Dealing with the case justly includes, so far as practicable –
> (a) ensuring that the parties are on an equal footing
> (b) saving expense
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party.
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the Courts resources while taking into account the need to allot resources to other cases.'

Thus, Scott J concluded: '*Although these considerations have yet to be formally incorporated into our own Rules I am firmly of the view that the modern approach to case management requires that they be borne in mind.'*

[124] In relation to the appropriate sanction to impose in the present application, I am guided by the approach taken by The Solicitors Disciplinary Tribunal of England and Wales endorsing the approach set out by Justice Popplewell in ***Fuglers***. That is:

(1) 'to assess the seriousness of the misconduct';

(2) 'to keep in mind the purpose for which sanctions are imposed';

(3) 'to choose the sanction which most appropriately fulfils that purpose'.

[125] I have considered the three criteria from ***Fuglers*** when deciding upon the appropriate sanction to be applied in the present application before me as set out below.

(1) Assessing the seriousness of the misconduct

[126] There is no doubt that the Respondent's behavior is professional misconduct by virtue of s.108(2) of the Decree. It is serious. As the 'Guidance Note on Sanctions' set out by The Solicitors Disciplinary Tribunal of England and Wales has noted, there are four factors to be considered - cupability, harm, aggravating factors and mitigating factors. It then sets out various criteria to be assessed in consideration of those four factors.

[127] Applying those criteria to the present application, the seriousness of the Respondent's misconduct is assessed as follows:

(1) 'the respondent's culpability for their misconduct' – the responsibility was upon the Respondent to answer the notices. He should have responded to the s.105 notice before he left for New Zealand on 3rd December 2015. He was given an extension of 14 days as from receipt of the s.108(1) notice on the 17th December 2015. Despite legal vacation commencing on 15th December 2015, it did not apply to the computation of time of the 14 days in which to reply to the s.108(1) notice. Indeed, the Respondent gave the Chief Registrar an undertaking that he would reply to the s.108(1) notice within the time period. He did not. As to the criteria applied by the 'Guidance Note on Sanctions' in relation to culpability, it can be summarised thus –

(i) *'The respondent's motivation for the misconduct'* – he did not give the s.105 notice priority before going to New Zealand, presumably concentrating on his trip. Then, upon his return, he did not give the s.108(1) notice priority, concentrating instead on the legal vacation occurring over the Christmas-New Year period;

(ii) *'whether the misconduct arose from actions which were planned or spontaneous'* – the Applicant has not submitted any evidence before the Commission that the actions were planned other than the Respondent did give an undertaking to comply with the s.108(1) notice – an undertaking he failed to fulfill;

(iii) *'the extent to which the respondent acted in breach of a position of trust'* – again, the Applicant has not submitted any evidence before the Commission in relation to a breach of trust other than the

Respondent did give an undertaking to comply with the s.108(1) notice which he failed to fulfill;

(iv) *'the extent to which the respondent had direct control of or responsibility for the circumstances giving rise to the misconduct'* – As noted above, the Respondent is the architect of his own misfortune resulting in him now being before the Commission. If the Respondent had complied with his own undertaking, the Applicant would not have needed to issue the present application;

(v) *'respondent's level of experience and harm caused'* – As noted above, the Respondent has been a legal practitioner for over 24 years. He should have been aware as an experienced practitioner for the need to comply with an undertaking. As noted by the Solicitors Displinary Tribunal in ***Eager*** (supra) at [50]:

> '… As the sole principal of the firm he had direct responsibility for what was happening and from the point … when the situation became clear he had direct control. He was also quite an experienced solicitor. The Tribunal was unable to identify any harm resulting from the Respondent's actions …, save **the harm to the reputation of the profession** …' [My emphasis]

(2) 'the harm caused by the respondent's misconduct' (upon the public and reputation of the profession) – the Applicant has not submitted any evidence before the Commission in relation to harm other than it being of a general nature in that it is 'a sign of discourtesy and disrespect to the Commission and regulating body' and thus 'a higher range of the tariff is appropriate for this matter reflecting the seriousness of the offence'.

(3) 'the existence of any aggravating factors' (that is, 'that aggravate the seriousness of the misconduct') – there is no alleged dishonesty, however, there is an argument that the seriousness of the misconduct has been aggravated (according to the 'Guidance Note on Sanctions' set out by The Solicitors Disciplinary Tribunal of England and Wales at page 7) 'where the respondent knew or ought reasonably to have known that the conduct complained of was in material breach of obligations to protect the public and the reputation of the profession' and thus professional misconduct. [My emphasis] Section 108(1) of the *Legal Practitioners Decree 2009*, is there to protect the public and the reputation of the profession by providing the Registrar with the power to threaten a finding of professional misconduct against a practitioner who fails to comply within 14 days in providing an answer to a previous section 105 notice, that is, a 'sufficient and satisfactory explanation in writing of the matters

referred to in the complaint'.

I do note, however, that in ***Eager*** cited above, that the Solicitors Disciplinary Tribunal of England and Wales found that 'there were no aggravating factors present' even though it was found that the practitioner 'failed to cooperate with the SRA in breach of Principle 7 of the SRA Principles 2011 and thereby also failed to achieve Outcome 10.6 or (10.8) of the SRA Code of Conduct 2011'. The 'Preamble' to the SRA principles sets out the legislative basis to the principles (that is, they have been 'made by the Solicitors Regulation Authority Board under sections 31, 79 and 80 of the Solicitors Act 1974, sections 9 and 9A of the Administration of Justice Act 1985 and section 83 of the Legal Services Act 2007, with the approval of the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007'). This is similar to Fiji where the 'Rules of Professional Conduct and Practice' are set out as a Schedule to the *Legal Practitioners Decree 2009* pursuant to section 129(8) of the Decree). I further note, however, that the failure in the present case was to answer the section 108(1) within the required 14 days and thus pursuant to section 108(2) is 'deemed to be professional misconduct'.

Arguably, the aggravating factor in the present case before me is that although the Respondent gave a written undertaking to the Chief Registrar that he would respond to the s.108(1) notice, he did not fulfill that undertaking. I do acknowledge, however, that there is a counter argument that it cannot be a circumstance of aggravation where it is already an element of the offence.

(4) 'the existence of any mitigating factors' (that is, 'that mitigate the seriousness of the misconduct') – it is noted that the misconduct was, arguably, of a relatively brief duration in a previously unblemished career of some 24 years.

(2) The purpose for which sanctions are imposed

[128] Protection of the public is the purpose for which sanctions are to be imposed in

this matter together with the reputation of the profession. Each of the various jurisdictions cited in this judgment have emphasised the seriousness of such a breach as a failure to respond to the investigating authority. Indeed, even in ***Howen No.2*** (supra) where the New South Wales Administrative Decisions Tribunal imposed no fine or suspension (due to the circumstances), the Tribunal recognised the importance of a notice at 'to investigate and resolve complaints against practitioners' and that failure to comply could not be dealt with as a trivial matter.

(3) Choosing the sanction which most appropriately fulfils that purpose

[129] According to the 'Guidance Note on Sanctions' set out by The Solicitors Disciplinary Tribunal of England and Wales, 'having determined the seriousness of the misconduct', the Tribunal will then need to assess 'whether to make an order, and if so which sanction to impose'. Even though the Respondent has submitted that a reprimand is the appropriate sanction, I am not satisfied, in considering the seriousness of the misconduct, that such a sanction is appropriate. In particular, here was a case where a practitioner gave an undertaking that he did not fulfill, even allowing for the fact that he may have been somewhat distracted during the Christmas holiday period that coincided with the legal vacation.

[130] As for a fine, I note that the 'Guidance Note on Sanctions' cited above discuss the suitability of a fine in the context *'where the Tribunal has determined that the seriousness of the misconduct is such that a Reprimand will not be a sufficient sanction, but neither the protection of the public nor the protection of the reputation of the legal profession justifies … Suspension'.*

[131] By contrast, the Applicant has submitted that the appropriate tariff ranges from a fine of $500 together with a suspension of one to three months' duration and that in this matter the sanction should be at the higher end of the tariff reflecting the seriousness of the offence.

[132] I note that the 'Guidance Note on Sanctions' cited above suggests in relation to suspension, suggested (at [30]-[32]) that:

'30. Suspension from the Roll will be an appropriate penalty where the Tribunal has determined that:

- the seriousness of the misconduct is such that **neither a Reprimand nor a Fine is a sufficient sanction** or in all the circumstances appropriate
- there is a **need to protect both the public and the reputation of the profession** from future harm from the respondent by removing his/her ability to practise, but
- neither the protection of the public nor the protection of the reputation of the profession justifies striking off the Roll
- **public confidence** in the profession **demands no lesser sanction**
- **professional performance**, including a lack of sufficient insight by the respondent, is such as **to call into question the continued ability to practise appropriately**

31. **Suspension from the Roll, and thereby from practice, reflects serious misconduct**.'

32. Suspension can be for a fixed term or for an indefinite period. A term of suspension can itself be temporarily suspended.'
[My emphasis]

[133] So should a reprimand, fine or suspension apply in matters where the finding has been of a failure by the practitioner to respond to the regulatory authority, (in the case of Fiji, the LPU), which is professional misconduct? I am minded (as cited above) that the recently updated edition of the 'Guidance Note on Sanctions' published by The Solicitors Disciplinary Tribunal of England and Wales has said that the Tribunal's approach to sanction endorsed the approach at set out by Justice Popplewell in the 2014 case of ***Fuglers***. I note that Justice Popplewell said the approach involves three stages. After assessing 'the seriousness of the misconduct' and 'purpose for which sanctions are imposed', the tribunal is to then 'choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question'.

[134] According to Justice Popplewell (at [33]), 'At the third stage, the tribunal will first consider which category of sanction is appropriate from the range which is available to it' ranging from, at one end 'no action', to 'striking off the roll' at the other. He also noted (at [34]) that 'another category of penalty … is to attach conditions to the firms of solicitor's continued practice'. He further noted that: 'Depending on the particular circumstances and the conditions being considered, this may fall, in terms of the hierarchy of severity, above, below or

between a fine and suspension from practice.'

[135] What Justice Popplewell had to say in relation to fines (at [35]) is relevant and it is important that I set out in full:

> 'Where a fine is the appropriate category, **factors which will influence the appropriate level of fine will include** the following:
>
> (1) **Whether the seriousness of the misconduct, and giving effect to the purpose of the sanction, puts the case at or near the top, middle or bottom of the category.** So, for example, where the seriousness of the misconduct is such as to justify a range of sanction which spans a fine or suspension, **and the tribunal concludes that it almost justifies suspension**, a fine at the highest level will be justified; whereas if the misconduct only just exceeds that for which a reprimand would be appropriate, a fine at the bottom end of the bracket will be called for.
> (2) The **level of fines imposed by other disciplinary tribunals** or this court in analogous cases.
> (3) The **size and standing of the solicitor or firm in question**. It is permissible to impose larger fines on more substantial or well known firms because of the important purpose of the sanction in sending out a message to promote and maintain the standards in, and standing of, the profession.
> (4) The **means available to an individual or a firm** can be taken into account in respect of the amount of the fine: see ***D'Souza v Law Society*** [2009] EWHC 2193 (Admin); ***Matthews v SRA*** [2013] EWHC 1525 (Admin) at [22]. In considering means, it is relevant to take into account **the total financial detriment which is suffered, including any costs order**, and any adverse financial impact of the decision itself. That is because the reason why means are taken into account is that justice requires regard to be had to the ability of the individual to pay a particular sum: see ***Matthews*** at [24-25] and ***D'Souza*** at [18].' [My emphasis]

[136] I am satisfied that in this matter 'the seriousness of the misconduct is such as to justify a range of sanction which spans a fine or suspension'. I note that the fines imposed by the Commission over the past three years in relation to s.108(1) breaches have been what Justice Popplewell would term 'at the bottom end of the bracket', that is, mostly $500, where, according to Justice Popplewell the 'misconduct only just exceeds that for which a reprimand would be appropriate'. In Fiji, however, small fines have been applied by the Commission not with a reprimand but together with a period of suspension.

[137] I must admit that I am not altogether clear as to how such an outcome has been

reached in Fiji so as to have become arguably "the tariff" in such matters. Indeed, when I pressed Counsel for the Applicant as to the basis upon which such a tariff has been set, I was none the wiser. This is no reflection upon that particular Counsel. Perhaps the fault is mine. Indeed, I have also been unable to glean the basis for the tariff from any of the following judgments:

- *Chief Registrar v Rabuku* (30/07/2013) - fined $500 and suspended from practice for three months;
- *Chief Registrar v Sushil Chand Sharma* (30/07/2013) - fined $500 and suspended from practice for one month;
- *Chief Registrar v Daveta* (20/08/2013) – no additional penalty as penalties of closure of practice already ordered in earlier proceedings;
- *Chief Registrar v Anand Singh* (07/11/2013) – no fine but suspended from practice for two months;
- *Case No.013.2015* ((25/11/2015) – fined $1,500 but not suspended from practice due to the fact that they had provided a medical report;t
- *Chief Registrar v Teresia Rigsby* (29/12/2015) - fined $500 and suspended from practice for one month.

[138] The only judgment where I was able to ascertain perhaps some basis for the tariff were Justice Madigan's comments in *Luseyane Ligabalavu* (23/12/2012) that I have cited above where His Lordship said at paragraph [8]: 'As counsel for the Registrar says a fine is not an appropriate remedy for disrespecting the Registrar …' I also note (from what I have been able to ascertain) that this was the first of the s.108(2) matters to come before the Commission.

[139] As I have also noted above, the judgment in *Luseyane Ligabalavu* (23/12/2012) needs to be put into proper context, as the practitioner was also found to have 'failed to attend an arbitration hearing' as well as 'failed to comply with the orders of the Chief Registrar to settle a complaint … by paying … a balance of $200'. It was ordered, unsurprisingly, that the practitioner would not be eligible for a practising certificate for over two years, as well as to pay the sum previously ordered. Perhaps, this can partially explain how this case became the starting point from where a tariff developed for a failure to reply to a s.108 notice, as His Lordship noted in *Case No.013.2015* (at [4]: *'A tariff for this*

offence has been set by the Commission at suspension of practice of a period from one to three months, coupled with a fine.' Unfortunately, it does not explain **the basis underpinning the formation of the tariff**, that is, upon **what criteria** the tariff was based.

[140] Indeed, in ***Rabuku*** and ***Sharma***, where judgments were handed down in the same day, the former was fined $500 and suspended for three months, whilst the latter was also fined $500 but only suspended for one month. ***Singh***, by contrast, was suspended for two months but no fine was imposed. In ***Case No.013.2015*** (rather than suspending the practitioner, His Lordship imposed a fine at $1,500 due to the practitioner having submitted a medical report. I consider such a sum to be the appropriate starting point when imposing a fine for professional misconduct before one considers whether to impose a period of suspension from practice.

[141] In the second set of written submissions filed by the Applicant, I have been made aware of two further judgments delivered by Justice Madigan in relation to s.108(2) matters they being as follows:

(1) ***Chief Registrar v Nikolau Nawaikula***, Case Nos.013 and 014 of 2014 (16 February 2015) – the practitioner failed to respond to two separate notices seeking responses to separate complaints. In relation to the first complaint, a s.105 notice was issued on 14th January 2014 and a reminder s.108(1) notice was issued on 28th April 2014. The LPU finally issued an application with the Commission on 19th November 2015 that was made returnable on 4th December 2014. This meant that the practitioner failed to respond for 310 days between the s.105 notice and the application being issued and for 325 days up to and including the first return date. In relation to the s.108(1) notice, it meant that the practitioner failed to respond not just for the 14 days provided in the notice but for some for 206 days until the application was filed and 221 days up to and including the first return date or 7 months and 7 days. As for the second complaint, a s.105 notice was issued on 25th July 2014 and a reminder s.108(1) notice was issued on 29th August 2014. Again, the LPU finally filed an application on 19th November 2015 that was made returnable on 4th December 2014. This meant that the practitioner failed to respond for 114

days between the s.105 notice and the application being issued and for 129 days up to and including the first return date. In relation to the specific s.108(1) notice, it meant that the practitioner again failed to respond not just for the 14 days provided in the notice but for some for 83 days until the application was filed and 98 days up to and including the first return date or 3 months and 6 days. The practitioner was fined $1,000 for each offence (a total of $2,000) and suspended from practice for one month for each offence (a total of two months);

(2) ***Chief Registrar v Kafoa Muaror***, Case No.012.2013 (30 August 2013) a s.105 notice was issued on 24th April 2013 and a reminder s.108(1) notice was issued on 14th June 2013 (dated 10th June 2013). This meant that the practitioner failed to respond between 24th April 2013 and presumably 27th June 2013 (65 days or 2 months and four days including the start and end dates). In relation to the specific s.108(1) notice, it meant that the allegation was that the practitioner failed to respond within 14 days. There was a problem, however, as there was 'no evidence provided by the Registrar as to when the [s.108(1) notice] reminder was received by the firm, if at all'. As Justice Madigan noted at paragraph [5]: '**the offence under section 108(2) is a failure to reply to the reminder, not a failure to reply to the first notice**, and the "reasonable excuse" defence applies to that failure accordingly. What a practitioner may say about his circumstances when the initial section 105 notice is received is irrelevant.'' [My emphasis] Here, the Respondent provided a reasonable excuse as there was no evidence that he received the reminder. Accordingly, His Lordship could not find the allegation established.

[142] What was said by Justice Madigan in *Muaror* I consider to be significant. That is, 'the offence under section 108(2) is a failure to reply to the reminder [notice sent pursuant to s.108(1)], not a failure to reply to the first notice [sent pursuant to s.105]'. The penalties applied solely in s.108(2) matters heard by the Commission between 2012 and 2013 have been summarised in a table and attached as **Annexure "1"** to this judgment. Column 8 in that table is particularly significant, that is, the number of days between the s.108(1) notice having been served on the practitioner and when the Application was filed by the LPU with the Commission because there had been no reply. In one case

(***Singh***), the Applicant filed an application with the Commission just one day after the 14 days' time limit period provided for in the section 108(1) notice. In other cases, however, the Applicant waited a number of months before filing an application with the Commission (see ***Nawaikula No.1*** and ***Nawaikula No.2*** and ***Rigsby***). Further, in column 9, that is, the number of days between the s.108(1) notice being served on the practitioner and the first call date of the LPU's application file with the Commission, the penalties do not seem to have taken into account any variances between the applications.

[143] Of further interest is column 10, that is, the number of days between a s.108(1) notice being served on the practitioner and when the notice was finally answered, if at all, and also, column 11, where aggravating factors were submitted by the LPU and/or stated in the judgment. It would seem that whilst having a practitioner respond after filing or on or before the first return date before the disciplinary tribunal has been a significant issue in other jurisdictions (with the practitioner often being suspended until they did reply), presumably it has not been a factor considered previously by the Commission in Fiji when determining what sanctions to impose (as signified by the absence of such details in most of the judgments).

[144] Counsel for the Applicant who appeared initially in this matter, as well as at the plea in mitigation hearing on 21st April 2016, stated in his written submissions on penalty (noted at paragraph 47 above) that there are no aggravating factors in this matter. By contrast, Counsel who appeared for the Applicant on 6th June 2016 has submitted that the delay in not answering the s.108(1) notice until 18th March 2016 is an aggravating factor. There has, however, been no material put before the Commission by Counsel for the Applicant as to whether the delay in answering the s.108(1) notice was considered as an aggravating factor in any of the previous eight such applications heard by the Commission. Indeed, as set out in Annexure "1", it would seem that it was not considered as an aggravating factor in any of the eight previous judgments. Further, Counsel for the Applicant has not been able to point out to me where it was taken into account in any of the eight judgments as an aggravating factor. There is also an argument, which was not canvassed by the parties in this application, (though I have noted it above and did mention it to the parties at the relisting of this

matter on 6th June 2016) as to whether it can be considered an aggravating factor when it is already an element of the s.108(2) offence, that is, of failing to respond to the section 108(1) notice within 14 days. Accordingly, for these reasons (as well as what I have already set out above) I intend to leave the aggravation submission to one side.

[145] Despite being invited to do so, Counsel for the Applicant did not address in her Supplementary Submissions dated 27th May 2016 either the Solicitors Disciplinary Tribunal's 'Guidance Note on Sanctions' or the approach as set out by Justice Popplewell in ***Fuglers***. Instead, (apart from the aggravation issue), Counsel for the Applicant submitted in her second set of submissions, in summary, as follows:

(1) The Respondent showed discourtesy and disrespect to the Chief Registrar by not responding to the complaint within the time limitation set by section 108(2), that is, within the 14 days of the receipt of the notice on 17th December 2015;

(2) By pleading guilty at an early stage, the Respondent saved the Commission's time and resources which is a mitigating factor;

(3) The Commission should impose a sanction that is proportionate to the gravity of the offence;

(4) The impact of the offence on the complainant should also be taken into account noting that the complaint was lodged on 25th October 2015.

[146] At the adjourned hearing on 6th June 2016, I provided the parties with a copy of the table set out as Annexure 1 to this judgment and asked for their comments, if any, noting that previously most offenders had been charged under s. 83(1)(g) and the evidence being s.108(2), rather than, as in the present case being charged under s.82(1) (a) and s.108(2). Further, I noted that neither could find I find evidence of aggravation having been taken into account nor could I understand the criteria upon which the "tariff" had been based and the differing penalties applied.

[147] Counsel for the Applicant submitted, in summary:

(1) the charge under s.81(1)(a) had been because there had been a consistent failure by the Respondent to answer the Chief registrar – first to the s.105 notice and then the s.108(1) notice;

(2) Counsel agreed that the LPU had read again the judgments and perused their

files and (if I have understood her correctly) could find neither submissions on aggravation nor upon what basis the tariff had been set and the issue was not so much the protection of the public but disrespect to the Registrar in not answering the notices.

[148] The Respondent in his Supplementary Submissions dated 5th June 2016 discussed both the Solicitors Disciplinary Tribunal's 'Guidance Note on Sanctions' and the approach as set out by Justice Popplewell in ***Fuglers***, submitted that the Solicitors Regulatory Authority in England and Wales 'has a range of 5 different sanctions that it may impose on a solicitor' compared with the ILSC in Fiji which 'as 18 different variations of sanctions that the Commissioner may impose. Whilst noting that difference, and that 'the range of sanctions available to the Commission is far more varied', the Respondent addressed the three stage approach to sanction set out in ***Fuglers*** case as follows:

(1) <u>First Stage - Assessing the seriousness of the misconduct</u> -

(i) Culpability - The Respondent accepts his culpability and that the fact that he was overseas for part of the period as well as on the legal vacation 'is of no consequence because the CR's office was at work throughout';

(ii) Harm caused - The Respondent accepts that it is 'difficult for [the] Respondent to avoid apportionment of blame that non-reply to CR badly reflects on the profession;

(iii) Aggravating factors - The Respondent has submitted that 'there is very minimal aggravation because this is the Respondent's first breach';

(iv) Mitigating factors – The Respondent submits that –

- he admitted early his breach of failing to respond;
- there was no monetary loss suffered;
- he has assisted in resolving this matter before the Commission;

(2) <u>Second Stage – The purpose for which sanctions are imposed</u> –

The Respondent has submitted that his guilty plea 'is an acknowledgment that he has committed a lapse that falls short of the need to solicitors to conduct their professional duties with integrity, probity and complete trustworthiness';

(3) <u>Third Stage – To chose the sanction which most appropriately fulfills that purpose for the seriousness of the conduct in question</u> –

The Respondent submits that –

(i) 'an order reprimanding the solicitor or law firm for not replying to the Chief Registrar is sufficient';

(ii) In the alternative, 'a fine not exceeding $500';

(iii) A suspension of the solicitor or firm is not recommended.

[149] At the adjourned hearing on the 6th June 2016, I clarified with the Respondent my understanding of his supplementary submissions addressing the three criteria set out by Justice Popplewell in ***Fuglers*** to which he agreed. He had nothing further to add other than noting the recent observation made by the President of the Fiji Court of Appeal, Mr Justice W.D. Calanchini, in ***Chief Registrar v Sharma*** [2016] FJCA 4; ABU 86.2014 (27 January 2016) (Paclii: <http://www.paclii.org/fj/cases/FJCA/2016/4.html>) at [15] that '… the Commission has not made any rules of procedure pursuant to the powers given to it under section 127 of the Decree'. The Respondent suggested that this might be considered together with some guidance on sanctions. I did note, however, that in relation to appeals, there is the Practice Direction issued by Commissioner Connors of 22 October 2009, that is, that 'pending the formulation of rules to the contrary the Court of Appeal Rules shall apply'.

[150] When considering sanctions, in my view, it is also important to consider whether a fine without suspension might be a more appropriate penalty. In that regard, it is interesting to note The Solicitors Disciplinary Tribunal's 'Guidance Note on Sanctions' and their approach to fines, wherein it was observed at paragraphs [23]-[25]:

> '23. **A fine will be imposed where the Tribunal has determined that the seriousness of the misconduct is such that a Reprimand will not be a sufficient sanction**, b**ut neither the protection of the public nor the protection of the reputation of the legal profession justifies** a Restriction Order, **Suspension** or Strike Off.
>
> 24. …
>
> - … In deciding the level of Fine, the Tribunal will consider all the circumstances of the case, including aggravating and mitigating factors. **The Tribunal will fix the Fine at a level which reflects the seriousness of and is proportionate to the misconduct**

- The respondent shall be entitled to adduce evidence that the ability to pay a Fine is limited by his/her means

25. In the absence of evidence of limited means, the Tribunal is entitled to assume that the respondent's means are such that he/she can pay the Fine which the Tribunal decides is appropriate.' [My emphasis]

[151] In my view, a fine should normally be the starting point in such matters as a failure to respond to a notice from the investigating authority. This is the case in the states of New South Wales and Queensland in Australia, the province of Ontario in Canada, as well as in England and Wales. A period of suspension may also be appropriate depending upon the circumstances, including whether the practitioner has complied with the notice between the time of service of the application upon them and the first return date of it before the Commission. Practitioners should also expect that there may well be two orders for costs – one for putting the Registrar and his staff within the LPU through the time and expense of having to bring such an application and the other for the Commission having to deal with the practitioner for failing to comply with the practitioner's statutory responsibility pursuant to s.108(1).

[152] In relation to the present case, having already undertaken above the approach as set out by Justice Popplewell in ***Fuglers***, I am of the view:

(1) The seriousness of the misconduct is such that **a Reprimand will not be a sufficient sanction**;

(2) **Neither** the protection of the public nor the protection of the reputation of the legal profession, however, **justifies a Suspension**;

(3) **It is arguable that the seriousness of the misconduct has been <u>aggravated</u>**, when the Respondent gave a written undertaking to the Chief Registrar that he would respond to the s.108(1) notice which he did not then fulfill. I am aware, however, that is also arguable that this cannot be taken as a circumstance of aggravation where the failure to respond to the s.108(2) notice is an element of the offence. Further, the Applicant submits that the misconduct was aggravated when the notice was not answered until 18th March 2016. When pressed on this at the further hearing on 6th June 2016, however, Counsel for the Applicant could not point me to one example amongst the other eight s.108(2) applications set out in Annexure 1 where

this had been taken into account as an aggravating factor even thought it seemed that in most of those matters there were no details if the s.108(1) notice had ever been answered (and, if so, when);

(4) **It is also arguable that the seriousness of the misconduct has been <u>mitigated</u>** somewhat in that much of it occurred during the legal vacation coinciding with the Christmas-New Year holiday period. Further, this was the first such blemish in a 24 year career in the legal profession;

(5) Apart from outlining in his written submission that he is a sole practitioner with a large family of dependents, the respondent has not adduced any <u>documentary</u> evidence that the ability to pay a fine is limited by his means;

(6) In the absence of evidence of limited means, the Commission is entitled to assume that the Respondent has the means to pay the amount of any fine that the Commission decides to be appropriate in the circumstances.

[153] The Respondent is to be publicly reprimanded and fined the sum of $1,000.00 to be paid within 28 days, that is, to be paid on or before 12 noon on Tuesday, 5th July 2016. I will not suspend him on this occasion.

[154] In addition, pursuant to section 124(2)(b) of the of the *Legal Practitioners Decree 2009*, I should consider the question of costs. Again, I look for guidance to The Solicitors Disciplinary Tribunal of England and Wales approach set out in its 'Guidance Note on Sanctions' as follows:

> 'General considerations
>
> 64. The Tribunal, in considering the respondent's liability for the costs of the applicant, will have regard to the following principles, drawn from *R v Northallerton Magistrates Court, ex parte Dove* (1999) 163 JP 894:
>
> - **it is not the purpose of an order for costs to serve as an additional punishment for the respondent**, but <u>to compensate the applicant for the costs incurred</u> by it in bringing the proceedings
>
> - **any order imposed must never exceed the costs actually and reasonably incurred** by the applicant
>
> 65. Before making any order as to costs, the Tribunal will give the respondent the opportunity to adduce financial information and make submissions:

> "If a solicitor wishes to contend that he is impecunious and cannot meet an order for costs, or that its size should be confined, **it will be up to him to put before the Tribunal sufficient information to persuade the Tribunal that he lacks the means to meet an order for costs in the sum at which they would otherwise arrive**. ... where a solicitor admits the disciplinary charges brought against him, and who therefore anticipates the imposition of a sanction upon him, it should be incumbent upon him before the hearing to give advance notice to the SRA and to the Tribunal that he will contend either that no order for costs should be made against him, or that it should be limited in amount by reason of his own lack of means. **He should also supply to the SRA and to the Tribunal, in advance of the hearing, the evidence upon which he relies to support that contention**" (*Solicitors Regulation Authority v Davis and McGlinchey* [2011] EWHC 232 (Admin) per Mitting J and *Agyeman v Solicitors Regulation Authority* [2012] EWHC 3472 (Admin))
>
> 66. Where the Tribunal decides that the respondent is, notwithstanding his limited means, properly liable for the applicant's costs (either in full or in part) and is satisfied that there is a reasonable prospect that, at some time in the future, his/her ability to pay those costs will improve, **it may order the respondent to meet those costs but direct that such order is not to be enforced without leave of the Tribunal.**
>
> 67. Such an order may be appropriate where the respondent adduces evidence of current absence of income and capital or a total, but temporary, dependence upon state benefits.' [My emphasis]

[155] I note that the Applicant, apart from having to prepare the initial application, has had to prepare three sets of documents, one for the defended hearing that did not proceed on 19th April when the matter was stood down to allow the Respondent to clarify the s.108(2) issue following which Respondent changed his plea to one of guilty, and then for the plea in mitigation hearing on 21st April 2016, and then for the further adjourned plea hearing on 6th June 2016. Accordingly, my preliminary view is that pursuant to section 124(2)(b) of the of the *Legal Practitioners Decree 2009*, the Respondent should, perhaps, pay the Applicant's reasonable costs summarily assessed by me. Before making any final Order in that regard, however, I will allow the parties to also address me further on this issue at the conclusion of the handing down this judgment.

[156] In addition, I note that there have been five appearances before the Commission prior to the handing down of this judgment today, those appearances being on

the 11th February, 24th March, 19th and 26th April 2016 and 6th June 2016. This case has taken a disproportionate amount of the Commission's time for what should have been the entering of a plea on 11th February 2016, followed by a short plea in mitigation hearing on 24th March 2016. I do balance against that, however, the fact that it is not the fault of the Respondent that it has taken some time to clarify "the tariff" that has been previously imposed in such matters. Indeed, Counsel for the Applicant conceded at the further hearing on 6th June 2016, as to the difficulty in understanding the criteria upon which the tariff had been based. My preliminary view is that pursuant to section 124(2)(b) of the of the *Legal Practitioners Decree 2009,* the Respondent should, perhaps, pay to the Commission a sum in respect of costs and expenses of and incidental to the proceedings. Before making a final Order in that regard, however, I will allow the parties to address me further on this issue at the conclusion of the handing down of this judgment.

[157] Let this judgment be a clear message to the profession that such professional misconduct will not be tolerated. If a practitioner comes before the Commission for a breach of a s.108 notice, the starting point for any sanction to be imposed will be a fine in the vicinity of $1,000-$1,500. Practitioners may or may not be suspended (sometimes indefinitely), depending upon the circumstances, including whether they have replied to the Chief Registrar in the time period between the LPU filing the Application and serving it upon the Respondent and the first return date of it before the Commission.

[158] In addition, depending upon the circumstances, practitioners may well be ordered to pay a sum towards the Commission's costs as well as the Applicant's reasonable costs. In that regard, I draw the attention of all practitioners to s.124 of the *Legal Practitioners Decree 2009*:

'*Costs*

'124.—(1) After hearing any application for disciplinary proceedings under this Decree, the Commission may make such orders as to the payment of costs and expenses as it thinks fit against any legal practitioner or partner or partners of a law firm.

(2) The Commission shall not make any order for payment of costs and expenses against the Registrar or the Attorney-General.

(3) Without limiting subsection (1) the Commissioner may,
(a) without making any finding adverse to a legal practitioner or law firm or any employee or agent of a legal practitioner or law firm, and

(b) if the Commission considers that the application for disciplinary proceedings was justified and that it is just to do so,

order that legal practitioner or partner or partners of the law firm as the case may be to pay to the Commission and the Registrar such sums as the Commission may think fit **in respect of costs and expenses of and incidental to the proceedings**, including costs and expenses of any investigation carried out by the Registrar.' [My emphasis]

[159] In closing, I wish to record my thanks to the staff of the LPU and, in particular, the second Counsel (who had to "take over" the carriage of this matter at a late stage after the matter was part-heard on 21st April 2016) for undertaking a comprehensive review of the LPU's files that has greatly assisted the Commission to confirm the details as set out in Annexure "1". Indeed, her concession as to the difficulty in understanding the criteria upon which previous sanctions have been imposed was refreshing.

[160] I also think it is important to quote a further excerpt from the article cited above from the Legal Services Commissioner in New South Wales (published in *Precedent* in 2009), in relation to responding to a notice from the profession's investigating body, so there is no confusion as to the obligation upon a practitioner when they receive a notice from the Chief Registrar:

'**We recommend that practitioners take the following measures if they receive a request for information** from the OLSC [similar to the LPU]:

- Prioritise the response;
- Be aware of the timeframe for responding;
- If in doubt about what is needed in the response, contact the relevant OLSC officer;
- If unable to respond to the letter of request within the time frame stipulated, let the OLSC know and ask for an appropriate extension;
- Answer all of the questions set out in the letter of request and, if unable to answer the question(s), provide the best response possible and reasons as to why the questions cannot be answered;
- Provide all relevant details in relation to the request for information, even if they are not requested; and
- If concerned, obtain legal advice, but legal advice cannot be used as an excuse to delay the response.'

ORDERS

1. The Respondent is publicly reprimanded.
2. The Respondent is fined in the sum of $1,000 to be paid to the Commission within 28 days of today, that is, by 12noon on 4th July 2016.

Dated this 7th day of June 2016.

I will now hear the parties in relation to costs.

Dr. Thomas V. Hickie
COMMISSIONER