IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

Application No. 012 of 2015 and
No. 015 of 2015

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

SURUJ SHARMA

First Respondent

AND:

PATEL SHARMA LAWYERS

Second Respondent

Coram: Dr. T.V. Hickie, Commissioner

Counsel for the Applicant: Mr. A. Chand
Counsel for the Respondent: Mr. D. Sharma and Mr. N. Lajendra

Date of Hearing: 22nd April 2016

Dates of Submissions post-hearing:
Respondent (6th May 2016)
Applicant in Reply (6th June 2016)

Date of Judgment: 21st September 2016

RULING
RESPONDENT'S INTERLOCUTORY APPLICATION FOR DISMISSAL

1. The Issue

[1] This is a Ruling in relation to an Interlocutory Application filed by the First Respondent seeking Orders for a permanent stay/dismissal of four Counts filed by the Applicant against both the First and Second Respondents.

[2] The case involves a missing Will and a dispute between the Testator's mother (the "First Complainant") and the Testator's widow (the "Second Complainant"). When the Testator's Will could not be found, a grant of Letters of Administration was made in favour of the Second Complainant. Later, when the Will was found, a hearing took place in the High Court at Suva between the First and Second Complainants where the Will was pronounced valid. Both

parties have blamed the Respondents for what occurred including the associated legal costs incurred in those proceedings.

2. The Counts

[3] On 14th October 2015, an Application was filed by the Chief Registrar setting out three allegations against the Respondent, two of Professional Misconduct and one of Unsatisfactory Professional Misconduct, as follows:

Count 1

Professional Misconduct: Contrary to Section 82(1)(a) of the *Legal Practitioners Decree 2009*.

PARTICULARS

SURUJ PRASAD SHARMA, a Legal Practitioner and principal of law firm named and styled as "Patel Sharma Lawyers" prepared a Will for Salen Prakash Maharaj dated 22nd December 2006 under which Maya Wati Prakash, mother of the said Salen Prakash Maharaj was the beneficiary and later acted for Pranita Devi, wife of the said Salen Prakash Maharaj in taking out Letters of Administration for Pranita Devi for the estate of Salen Prakash Maharaj, against the interests of Maya Wati Prakash, which conduct was contrary to section 82(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct.

Count 2

Unsatistactory Professional Conduct: Contrary to Section 81 of the *Legal Practitioners Decree 2009*.

PARTICULARS

SURUJ PRASAD SHARMA, a Legal Practitioner and principal of law firm named and styled as "Patel Sharma Lawyers" between 22nd December 2006 and 23trd January 2010 failed to keep proper record of the Will of Salen Prakash Maharaj dated 22nd December 2006 which was prepared by the said law firm, which conduct was contrary to section 81 of the Legal Practitioners Decree 2009 and was an act of unsatisfactory professional conduct.

Count 3

Professional Misconduct: Contrary to Section 82(1)(a) of the *Legal Practitioners Decree 2009*.

PARTICULARS

SURUJ PRASAD SHARMA, a Legal Practitioner and principal of law firm named and styled as "Patel Sharma Lawyers" between 25th November 2008 and 11th October 2013 failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006 which was prepared by

Patel Sharma Lawyers, thereafter, proceeded on instructions of one Pranita Devi and obtained grant of Letters of Administration in the Estate of Salend Prakash, to the said Pranita Devi to the deteriment of Maya Wati Prakash who was the sole beneficiary pursuant to the Will of Salen Prakash Maharaj, as the said Maya Wati Prakash was subjected to unnecessary cost for initaing High Court ACtiin No. HPP 3 of 2010, which conduct was contrary to section 82(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct.

[4] On 22nd October 2015, when the matter was first called before the previous Commissioner, Justice P.K. Madigan, it was adjourned – as it was on two further occasions (on 5th and 11th November 2015) making three adjournments in all – so as to allow the Applicant to consider representations made by Counsel for the Respondent and also for the Applicant to file further and better particulars.

[5] In the meantime, on 13th November 2015, a second Application was filed by the Chief Registrar setting out a new allegation against the Respondent of Professional Misconduct as follows:

Count 1

Professional Misconduct: Contrary to Section 82(1)(a) of the *Legal Practitioners Decree 2009*.

PARTICULARS

SURUJ PRASAD SHARMA, a Legal Practitioner and principal of law firm named and styled as "Patel Sharma Lawyers" between 25th November 2008 and 11th October 2013 failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006 which was prepared by Patel Sharma Lawyers, thereafter, proceeded on instructions of Pranita Devi and obtained grant of Letters of Administration in the Estate of Salend Prakash to the said Pranita Devi, which grant subsequently was revoked by the Suva High Court and as a result caused the said Pranita Devi unnecessary costs, which conduct was contrary to section 82(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct.

[6] On 16th November 2015, Justice Madigan consolidated this second application with the initial application (so as to become Count 4). He then adjourned the matter until 27th January 2016 to be listed before the new Commissioner to fix a hearing date.

[7] 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 10th February 2016, following my swearing-in on 9th February 2016.

[8] On 10th February 2016, the Respondent filed and served an Interlocutory Application seeking Orders for a permanent stay/dismissal of the four Counts. The matter was adjourned until 24th March 2016, so as to give the Applicant time to respond.

[9] On 24th March 2016, Orders were made for the filing of affidavits together with the filing of submissions and the matter listed for hearing on 22nd April 2016.

[10] On 22nd April 2016, the matter proceeded to hearing, following which, Orders were made for the parties to file and serve written submissions.

[11] This judgment has taken into account the written submissions filed by each party before and after the hearing on 22nd April 2016, as well as the oral submissions they each made the hearing on 22nd April 2016. I note that two affidavits have also been filed: one by the First Respondent sworn on 9th February 2016, and one by Kelevi Veidovi (a Court Officer employed by the Applicant) sworn on 8th April 2016. There are a number of matters raised in each of those affidavits that remain untested, as neither person has been called to give evidence at this stage.

2. Background

[12] The undisputed facts in relation to this matter are as follows:

(1) On 22nd December 2006, Ms Dipika Mala, a clerk in the First Respondent's firm, prepared Wills for Mr. Salen Prakash Maharaj and his mother, Maya Wati Prakash. Both Wills were witnessed by Dipka Mala and Merewai Doughty (also an employee in the First Respondent's firm);

(2) After the execution of the Wills on 22nd December 2006, Mr. Maharaj took his original executed Will with him. That is, it was taken by the client and not left with the firm for safe keeping in the firm's "Will Vault";

(3) On 24th November 2008, Mr. Maharaj died in a car accident;

(4) On 15th December 2008, Maya Wati Prakash (Mr. Maharaj's mother) and Pranita Devi (Mr. Maharaj's widow) came to the Respondent's office and Maya Wati Prakash and Pranita Devi gave joint instructions to the firm to prepare to apply for Letters of Administration;

(5) Between 15th December 2008 and 6th January 2009, there was some "falling out" between Maya Wati Prakash and Pranita Devi;

(6) On 6th January 2009, Pranita Devi, the widow of Mr. Maharaj, returned to the First Respondent's firm and gave sole instructions to the firm to apply for Letters of Administration in relation to the Estate of Mr. Maharaj (as being the widow of Mr. Maharaj, she was the only person under Fijian Law who was entitled to the Estate);

(7) On 16th February 2009, Letters of Administration were issued by the High Court at Suva in relation to the Estate of Mr. Maharaj;

(8) On 23rd January 2010, Mr. Maharaj's Will was found in the home of Maya Wati Prakash by her daughter, Subhashni Lata Singh, and such Will named Maya Wati Prakash as the sole beneficiary of the Estate of Mr. Maharaj;

(9) On 15th February 2010, Ms Prem Lata Narayan of Prem Narayan, Barristers and Solicitors, commenced proceedings in the High Court at Suva on behalf of Maya Wati Prakash seeking Orders that –

> (a) the Court declare probate of the Will of Salen Prakash Maharaj dated 22nd December 2006;
>
> (b) the Letters of Administration granted on 16th February 2009 be revoked; and
>
> (c) the Defendant provide an account of the Estate to date.

(12) **In the meantime, on 11th March 2010, Maya Wati Prakash lodged a complaint with the Office of the Chief Registrar against the Respondent** alleging that:

> *'... he [the First Respondent] was holding the original Will submitted to him by Salen Prakash Maharaj deceased and he was saying that he does not have any Will but actually he was keeping it'.*

(13) On 7th May 2010, Mr. Willy Hiuare of HM Lawyers wrote to the Respondent advising that he was acting on behalf of Prainta Devi and was seeking to contact the clerks from the Respondent's firm who witnessed the Will of Salen Prakash Maharaj, namely Dipka Mala and Merewai Doughty;

(14) On 11th May 2010, the Respondent's firm replied to Mr. Hiuare that *'this Office would be happy to assist you in whatever way possible as regards the matter'* and advised that Dipa Mala was still with the firm, however, Merewai Doughty had left the firm's employment in or about 2008 and the firm understood she was married and living in Ireland. Mr. Hiuare was invited to *'call into the office and interview'* Ms Mala *'and take whatever statement is appropriate and factual'*;

(15) On 15th May 2010, a meeting was held at the Respondent's firm between Mr. Hiuare, Ms Mala and the First Respondent, the main details of which were confirmed in a letter of the same date from Mr. Hiuare to the First Respondent wherein Mr. Hiuare noted:

> *'2. Upon hearing from you and Dipka Mala* ***on the issue of forged [W]ill****, I reserve it for an expert hand writer to verify it.*
> 3. *In relation to plaintiff and defendant joint authority to you to take out the letter of administration, please send a copy of their instructions to you and related documents deemed fit. This will conclude [sic] their intention to take out the Letters of Administration on the basis of no existence of any [W]ill, and foremost, to avoid any allegation of misconduct by your office. As transpired, it's the deceased sister who has no legal/equitable right to the estate that culminated the dispute and subsequently instructed Ms Prem Narayan to institute the present action.*
> 4. *Once we received, document(s) requested, I will advise Ms Prem Narayan of the same that the parties', if need be to settle this matter outside of court because in any case, the lawful wife is also entitled in law to the deceased estate.'* [My emphasis]

(16) On 20th May 2010, the Respondent's firm sent to Mr. Hiuare a copy of two instruction sheets –

(1) 15 December 2008 – 'Instructions to Act' from Pranita Devi and Maya Wati *'To prepare LA under joint names: Prainta Devi Maya Wati';*

(2) 6 January 2009 - 'Instructions to Act' from Pranita Devi Maharaj *'To apply for LA in the Estate of Salen Prakash'*

(17) On 24th June 2010, a mediation was conducted between the Complainant and the Respondent by Ms. Akanisi of the Chief Registrar's Office. **It is noted that there is a dispute between the Applicant and Respondent as to whether the complaint was resolved at that mediation.**

(18) On 12th October 2012, Mr. Hiuare wrote to the Respondent's law firm:

> *'Kindly be advised that* ***we will subpoena Ms. Dipka Mala*** *[sic] (f/n Amrit Prasad)* ***to justify in court in regards to the Forged Will*** *dated 22/12/2006* *since she is one of the witnesses and her signature appears on the said Will*. *The hearing is set for 29th and 30th of October, 2012 in the Suva High Court.'* [My emphasis]

(19) On 17th October 2012, Mr. Hiuare wrote again to the Respondent's law firm:

> *'2. We met with Ms. Prem Narayan, she indicated not to subpoena Ms. Dipka Mala.*
> *3. We request if we can subpoena Ms. Dipka or not based on our last discussion.'*

(20) On 11th October 2013, Justice S.N. Balapatabendi in the High Court at Suva ruled in favour of Maya Wati Prakash (the mother) pronouncing that the Will dated 22nd December 2006 was valid and that the Letters of Administration granted to Pranita Devi (the widow) on 16th February 2009 be revoked forthwith. (See ***Prakash v Devi***, Unreported, High Court of Fiji at Suva, Civil Action No. HPP 03 of 2010, 11 October 2013) (Paclii: [2009] FJHC 43, <http://www.paclii.org/fj/cases/FJHC/2013/528.html>).

(21) Despite having the above judgment ruled in her favour, this was not the end of the matter for the plaintiff, Maya Wati Prakash. She pursued her original complaint (previously lodged with the Chief Registrar on 11th March 2010) against the Respondents. This became the basis of two counts filed by the Applicant with the Commission that were later withdrawn on 30th July 2014.

(22) On 14th October 2015, (some 14 and a half months later), a new application was filed by the Applicant with the Commission, again based upon the initial complaint of Maya Wati Prakash dated 11th March 2010. This became the basis of Counts 1, 2, and 3 against the Respondents in the present Application before the Commission.

(23) In the meantime, on 14th November 2013, Pranita Devi, the unsuccessful defendant in the High Court proceedings of *Prakash v Devi*, also lodged a complaint against both the First Respondent and Mr. Willy Hiuare. It became the basis of a separate application that was later filed on 13th November 2015 by the Applicant with the Commission alleging one count of professional misconduct against the Respondent. On 16th November 2015, that separate application was consolidated by Justice Madigan so as to become the basis of what is now Count 4 in the present Application before the Commission against

the First Respondent.

[13] In his judgment in ***Prakash v Devi***, Balapatabendi J noted at [16], that under cross-examination, the defendant, Pranita Devi:

> '*… admitted that the deceased from year 2006 – 2007 period was having defacto relationship with one Ms Pranita Singh, a girl of 15 year old, in the same house. She stated that she used to sleep with the Plaintiff as the deceased was also living in the house with one Ms. Pranita Singh.'*

[14] Perhaps, the above may provide, in part, an answer as to the secrecy concerning the making of the deceased's Will in December 2006 of which only his mother and sister were involved (his sister making and attending the appointment with her mother and brother) and of which Pranita Devi, as his widow, was unaware.

[15] **In any event, the factual chronology that I have set out in paragraph [12] above provides the first reason as to why there needs to be a full hearing before the Commission. That is, so as to clarify (not that there was a valid Will - that has already been determined by in the High Court by Balapatabendi J), but as to:**

(1) the circumstances surrounding the making of the Will and its misplacement; and

(2) whether any blame should be attributed to the Respondent and his firm for the cost incurred in relation to the various legal proceedings having to be instituted, that is –

(i) for a grant of Letters of Administration when the Will could not be found; and

(ii) when the Will was eventually found, for an application having to be made by the sole beneficiary to have the High Court declare that the Will was valid and to defend a claim of "forgery" by the testator's widow.

[16] Indeed, the judgment in ***Prakash v Devi*** also provides further background as to how the current complaint before the Commission may have eventuated - based perhaps upon the following observations made by Balapatabendi J at [32]-[36]:

> *'32. As the issue of forgery has been specifically pleaded and some evidence was led to that effect, and inconsideration of the above judgment, I now consider the issue of forgery in this case.*
>
> *33. The burden falls on the Defendant to establish that fraud was involved in the sense that the signatures on the will dated 22*

December 2006 was not the signature of the deceased and has been forged.

34. *It is noted that there was no expert evidence of handwriting led in this case for comparison and no documents were produced in this regard. It is my considered view that* ***mere suggestion to witnesses that the signature in the will is not similar to the signature of deceased is not sufficient to establish forgery in civil standard of proof****. I conclude that the Defendant has failed to establish forgery in this case as there was no acceptable evidence before court, even if the court assumes that the forgery of the signature is an issue for determination in the minutes of the pretrial conference.*
35. *I also conclude that* ***the execution of the will is an admitted fact*** *and as a result it was not necessary for the Plaintiff to call either of the attesting witnesses to the will dated 22 December 2006 to establish due execution and hence validity.*
36. *I note that the parties in this case are in this predicament due to the inadvertence of the solicitors acted in the preparation of the will. When all the parties visited after the death of Salen Prakash Maharaj, they were categorically informed that there was no will. The same solicitor subsequently acted for the Defendant and took steps to take out Letter of Administration in favour of the Defendant. When the will was discovered and submitted to the solicitor, he contacted the Defendant and informed that there is a will and thereby the Letter of Administration is in issue.* ***The solicitors are duty bound be [sic] maintain proper records and registers for the wills prepared by them on behalf of their clients.*** *It appears that there was no such accurate system registration and recording of wills in the law firm. It also appears that the will is not registered. Wills (Amendment) Act requires the registration of will to avoid the circumstances similar to this case. It is further observed that the existence or the non- existence of a will to a complete 3rd party, by the solicitors after the death is also a matter of concern of the court.* ***In my view, the conduct of the solicitor acted for parties initially in preparation of the will and Letter of Administration is unacceptable and unsatisfactory****.'* [My emphasis]

[17] **Surely the above comments provide a second reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the Respondent so as to establish whether or not any blame should be attributed to the Respondent and/or his firm.** Alternatively, a full and proper inquiry may well clear his name and that of his firm.

4. Preliminary arguments

[18] The core of the argument of Counsel for the Applicant is that if there was a Will prepared by the Respondent's law firm, then, as a competent and diligent legal practitioner or law firm, they should have kept a copy of the Will - as Counsel for the Applicant submitted at the hearing on 22nd April 2016: *"How long does*

it take to make a copy of the same and keep it?" "Further, if it was not registered, they could have made two originals and kept one."

[19] As I understood Counsel for the Applicant's argument, *"every practitioner must keep duplicate copies of every document they make"*. That is:

> *"It's a matter of competence and diligence, a competent and diligent legal practitioner would do that because it is fundamental obligation of the practitioner that the work he or she carries out keeps proper minutes, keeps the documents that they have prepared, keeps proper records of the same so that in future if there is any issues arising from the document that has been prepared from issues arising from the work that they have done."*

[20] Counsel for the Applicant explained that the practice is now that practitioners make three originals, one is if it's to be registered with the High Court Civil Registry (probate registry), one is to be kept with the law firm, and one is to be given as a copy to the client. In 2006, however, as Counsel for the Applicant conceded, there was no such requirement.

[21] Leading Counsel for the Respondents noted in reply at the hearing on 22nd April 2016, that there was no rule or law or requirement in 2006 to say that there was supposed to be two originals made of a Will by a practitioner, indeed, he emphasised that some clients *"are very selective and say 'this is my private document I don't want anyone else to'"* have a copy. He further explained: *"The Chief Justice's Practice Direction in 2012 makes it very clear that you need to make 3 copies and have 3 originals … one to be registered …, one to be kept in the firm and one to be given to the client."* It was not an offence, however, in 2006, nor was there a Practice Direction to say that you needed to make two originals of the Will.

[22] In fact, it is my understanding, that contrary to the submissions that I have summarised above made by Counsel for both the Applicant and Respondents at the hearing on 22nd April 2016, '*Practice Direction No 2 of 2012 - Wills and Non Contentious Probates Registry Practice'* issued on 14th December 2012 by His Lordship, Chief Justice A.H.C.T. Gates, states at point [2]: *'In order to achieve registration, **two** originals of the deceased's "Will" are to be filed at the Registry together with the original Birth Certificate of the Testator'* and a

completed Form No. W1. [My emphasis]
(SeePaclli*:*
http://www.paclii.org/fj/directions/prac_directions/pdn2o2012wancprp739/ - ww.paclii.org/fj/directions/prac_directions/pn1o2011wocicp607/>]

[23] In any event, in his judgment in ***Prakash v Devi***, Balapatabendi J found at paragraph [20] that *'It is clear from agreed facts of the pretrial conference minutes that the execution of the will by the deceased is admitted'*, at [23] that the *'will dated 22 December 2006 … satisfies all necessary requirements for a valid will'* and, as such, stated at [37]: *'I pronounce the will dated 22 December 2006 is the valid will'.*

[24] As for the argument that the if the Respondent's clerk had been more competent or diligent they would have made a photocopy of the Will, Leading Counsel for the Respondent submitted in response, that **in law a photocopy would be of no effect**, and the parties would still have needed to go and look for the original signed Will. Indeed, as I understand the First Respondent's position, as submitted through his Counsel (without, of course, having had as yet the benefit of any evidence led before me), by the 9th December 2008, the First Complainant's daughter had been advised that there was a draft of the Will on the computer of the Second Respondent. After the First Respondent had disclosed that this was the case and discussed that issue with the parties, the First Respondent advised them that all he had was a draft and the parties needed to go and find the original signed Will. The Respondent further advised that if the parties could not find the original signed Will, then, in law, the only option available was to commence litigation in the High Court on that premise (presumably arguing that a copy of the draft unsigned Will downloaded from the Respondent firm's computer was evidence of the Testator's intention) or to apply for Letters of Administration. The parties were advised to go home and discuss how they wished to proceed.

[25] T**he above scenario as outlined by Counsel for the Respondent, provides a third reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the Respondent so as to establish whether or not any blame should be attributed to the Respondent and his**

firm. Alternatively, a full and proper inquiry may well clear the First Respondent's name (despite the comments from Balapatabendi J in *Prakash v Devi)*, especially as no evidence was heard in that case from either the First Respondent or any member of his staff.

[26] Interestingly, no argument was raised before me by Counsel for either party as to the relevance or otherwise of Section 18 of the *Wills (Amendment) Act 2004* which states:

'Failure to produce will

> ***18. Any person who, having in his possession*** *or under his control any will or codicil of a deceased person* ***or any paper or writing purporting to be such a will*** *or codicil, fails or neglects to produce and deposit the same with the Court, or, where there is reason to believe that the deceased person's estate is a small estate, with Chief Registrar of the High Court within 30 days of learning of the death of the deceased person, commits an offence and is liable on conviction to a fine of $1,000.'*

It is noted that '*Practice Direction No 2 of 2012'* at point [6] draws the attention of practitioners to the above section.

5. Ruling on each Count and associated complaints

Count 1

[27] Count 1 alleges 'Professional Misconduct: Contrary to Section 82(1)(a) of the *Legal Practitioners Decree 2009'*. That is, the First Respondent prepared a Will for Salen Prakash Maharaj dated 22nd December 2006 under which Maya Wati Prakash, the mother of Salen Prakash Maharaj was named as the sole beneficiary. Later, the First Respondent acted for Pranita Devi, the widow of Salen Prakash Maharaj in taking out Letters of Administration for her in relation to Estate of Salen Prakash Maharaj. It is submitted by the Applicant that this was against the interests of Maya Wati Prakash and, as such, was conduct that was contrary to section 82(1)(a) of the *Legal Practitioners Decree 2009*.

[28] Section 82(1)(a) of the *Legal Practitioner's Decree 2009* states:

'Professional Misconduct

> *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'.* [My emphasis]

[29] As I have understood the submission of Counsel for the Applicant, the First Respondent has been charged under section 82(1)(a) due to his conduct and/or that of his firm which involves '**a substantial … failure** to reach or maintain a reasonable standard of competence and diligence' by preparing a Will for Salen Prakash Maharaj (wherein the testator named his mother as the sole beneficiary, arguably to the detriment of the testator's wife, Pranita Devi) and then later acting for Pranita Devi, as the widow of Salen Prakash Maharaj, in taking out Letters of Administration for her in relation to Estate of Salen Prakash Maharaj, which was against the interests of Maya Wati Prakash (the sole beneficiary under the missing Will).

[30] The response of Leading Counsel for the Respondent at the hearing on 22nd April 2016, was that this Count must be bound to fail because:

(1) The First Respondent did not prepare the Will;

(2) There was no prejudice to the mother, Maya Wati, (as the sole beneficiary under the missing Will) because she actually had already taken steps to protect herself by instructing Prem Narayan to lodged a claim against for $62,000 against the Estate;

(3) The First Respondent's *"firm has made a Will for the deceased who was a client of the firm and the widow [following his death] has now asked for Letters of Administration to be taken out. In law, in the absence of a Will, as the provision [in Fiji] is that the widow is going to be the one who will be appointed, and so in that respect … [the First Respondent's] firm has not done anything out of the context of a lawful application but if anyone has a claim against the Estate … then, of course, they have the right to make [a] claim against that".*

[31] In Reply, Counsel for the Applicant *'submitted that although Count 1 is factually incorrect, as it should have read the law firm [the Second Respondent] had prepared a Will instead of the "First Respondent", the charge is otherwise*

properly laid', as the First Respondent *'would have been charged for the conduct of his employee',* Dipka Mala, citing in support section 111(3)(c) of the *Legal Practitioners Decree 2009* which states:

> *'Commencement of disciplinary proceedings*
>
> *111.—(1) The Registrar may commence disciplinary proceedings against a legal practitioner or a law firm or any employee or agent of a legal practitioner or law firm by making an application to the Commission in accordance with this Decree and containing one or more allegations of professional misconduct or unsatisfactory professional conduct.*
>
> *…*
>
> *(3) Disciplinary proceedings may be commenced by the Registrar under subsection (1) … before the Commission, against—*
> *…*
> *(c)* ***in the case of allegations*** *of professional misconduct or unsatisfactory professional conduct* ***against any employee*** *or agent of a legal practitioner or law firm—****the legal practitioner*** *or the one or more partners of the law firm.* [My emphasis]
>
> (See Paclii: <http://www.paclii.org/fj/promu/promu_dec/lpd2009220/>)

[32] Counsel for the Applicant further *'submitted that … the Respondents would not be prejudiced by an amendment of Count 1'.* Counsel cited in support the judgment of Shameem J in ***Leweniqila v The State*** (Unreported, High Court of Fiji at Suva, Criminal Case No. HAM0031D of 2004S, 2 June 2004, Shameem J) (Paclii: [2004] FJHC 209, <http://www.paclii.org/fj/cases/FJHC/2004/209.html>), where the '*prosecution had filed an amended application with new offences a month prior to the date set for hearing'*. Shameem J found that as *'the new offences alleged are laid on the basis of the same evidence in respect of the same allegations and in respect of the same acts'*, she was *'unable to discover any substantial difference in his approach [of Counsel for the Defendant] in respect of either Information, and therefore to discover any prejudice'*.

[33] Whilst this Count may have been incorrectly drafted, that is a matter for Counsel for the Applicant to consider. It is clear that the First Respondent did not draft the original Will of Salen Prakash Maharaj dated 22nd December 2006. A member of his firm did. It is agreed, however, that later, the Respondent

acted for Pranita Devi, the widow of Salen Prakash Maharaj in taking out Letters of Administration for her in relation to Estate of Salen Prakash Maharaj and that this was against the interests of Maya Wati Prakash. **In my view, as to whether such conduct by the First Respondent was contrary to section 82(1)(a) of the *Legal Practitioners Decree 2009,* needs to be fully ventilated at a hearing. It thus provides a fourth reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the Respondent and his firm.**

Count 2

[34] Count 2 alleges 'Unsatisfactory Professional Conduct: Contrary to Section 81 of the *Legal Practitioners Decree 2009'*. That is, the Respondent failed to keep 'proper record' of the Will of Salen Prakash Maharaj dated 22nd December 2006, which conduct was contrary to section 81 of the *Legal Practitioners Decree 2009* and was an act of unsatisfactory professional conduct.

[35] Section 81 of the *Legal Practitioner's Decree 2009* states:

> *'Unsatisfactory Professional Conduct*
>
> *81. For the purposes of this Decree, "unsatisfactory professional conduct" **includes conduct of a legal practitioner or a law firm** or an employee or agent of a legal practitioner or a law firm, occurring in connection with the practice of law **that falls short of the standards of competence and diligence** that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner or law firm.'* [My emphasis]

[36] As I have understood the submission of Counsel for the Applicant made at the hearing on 22nd April 2016, the First Respondent has been charged under section 81 due to his conduct and/or that of his firm that *"falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner or law firm",* in not making a second original copy of the Will of Salen Prakash Maharaj on 22nd December 2006.

[37] The oral submissions of Leading Counsel for the Respondent made at the hearing on 22nd April 2016 in relation to Count 2 is that this Count must be

bound to fail because:

(1) The Respondent did not prepare the Will;

(2) This was that this was not the law in 2006;

(3) If there is any negligence alleged by the First Complainant on the part of the Respondent and/or his firm, then, rather than disciplinary proceedings, this should be a matter where the First Complainant should "Sue the firm";

(4) The wording of the Count, 'failed to keep proper record of the Will', is not defined in the particulars, and only now, at a strike-out application, is Counsel for the Applicant "saying that 'oh you should have kept another original, second original'";

(5) The evidence will not change in this matter as to what was kept by the First Respondent's firm and that is the computer archive record of an unsigned Will. What the Second Respondent did in 2006 was not a disciplinary offence in 2006 and even in 2012 the obligation was to prepare three Wills but in terms of registration there is no compulsory obligation to register the Will *"and so even though the Chief Justice has gone and created a new set of rules but he hasn't gone to the extent to make it compulsory to register the Will"* or *"it doesn't say that you have to keep a copy [that is] … another record of the Will in your files as well".*

[38] In Reply, Counsel for the Applicant has argued in his 'Further Written Submissions' dated 6th June 2016:

> '*11. … the consumer public or clients of a law firm have some expectations from their solicitors … due to the very nature of the fiduciary relationship that a client and solicitor have. It is further submitted that despite the fact that there is no statutory requirement for law firms to keep original Wills of clients and records, a prudent practitioner ought to keep original Wills made by the law firm as well as proper record of the same as to safeguard the client's interest as well as the law firm's interest.*
> *12. It is unfortunate that the Respondents have submitted that since the law does not require them to maintain a record or keep Wills, they thus have no responsibility.* ***Any client would expect that a competent and diligent legal practitioner would keep proper records that they could rely on****.'* [My emphasis]

[38] Importantly, Counsel for the Applicant has cited in his 'Further Written Submissions' at paragraph [13] the judgment of Balapatabendi J in ***Prakash v Devi*** and noted that:

> '… **the evidence at the hearing** of the High Court … was … as follows:

> *'Subsequently to the Deceased's death on 24 November 2008, the Plaintiff and her family members had approached the law firm of Patel Sharma & Associates enquiring about the Deceased's will* ***and were informed by the law firm that the Deceased had not made any will.****'* [My emphasis]

[40] In fact, this statement was NOT evidence given at the hearing in the High Court. Rather, in Balapatabendi J's judgment at paragraph [2] Her Lordship set out *'Some of the back ground facts in so far as they are relevant,* ***as stated in the Statement of Claims*** *[sic]'.* Her Lordship included in her judgment an excerpt from paragraph [7] of the Statement of Claim, that is, that '*the Plaintiff and her family members had approached the law firm … and were informed by the law firm that the Deceased had not made any will'.*

[41] It should also be noted that neither the First Respondent nor Ms Dipika Mala, (the clerk in the Second Respondent's firm who prepared the Wills for both Mr. Salen Prakash Maharaj and his mother, Maya Wati Prakash), were called to give evidence in the High Court in the matter of *Prakash v Devi.*

[42] Whilst I agree with Counsel for the Respondents that it is clear that the First Respondent did not personally prepare the Will and, further, I note that the relevant Practice Direction was not introduced until December 2012 (just under six years after the Will in dispute in this matter had been prepared), **in my view, there are two issues that need to be fully ventilated at a hearing arising from this Count:**

(1) Whether '*Subsequently to the Deceased's death on 24 November 2008, the Plaintiff and her family members … were informed by the law firm that the Deceased had not made any will"*?

(2) Whether such conduct in not making a second original of the Will in 2006 *'falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner* ***or law firm****'?*

[43] **The above provides a fifth reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the Respondent and his firm.**

Count 3

[44] Count 3 alleges 'Professional Misconduct: Contrary to Section 82(1)(a) of the *Legal Practitioners Decree 2009'*. That is, the Respondent, between 25th November 2008 and 11th October 2013, failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006 and then proceeded on the instructions of the widow, Pranita Devi, to obtain a grant of Letters of Administration in the Estate of Salend Prakash, that was to the benefit of Pranita Devi and to the detriment of Maya Wati Prakash who had been named as the sole beneficiary pursuant to the Will of Salen Prakash Maharaj. Further, this caused Maya Wati Prakash to be subjected to unnecessary costs in having to initiate proceedings in the High Court (to have the Will dated 22nd December 2006 declared valid and the Letters of Administration granted to Pranita Devi on 16th February 2009 to be revoked).

[44] The submission of Leading Counsel for the Respondents at the hearing on 22nd April 20-16 was that this Count is a duplication of Count 1. This argument was further summarised by Counsel for the Respondents (in their further joint written 'Submissions in Support of Dismissal of the Complaints' dated 6th May 2016 (at paragraph 11, subparagraphs [i]-[iii], page 6), where they submitted that:

(1) No particulars or relevance has been provided as to why the two dates are specified, that is, 'between 25th November 2008 and 11th October 2013'

(2) It is mischievous to allege that the First Respondent failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj when the Applicant knew that the original signed Will was not in the custody of the Second Respondent but had been taken by the testator with him on 22nd December 2006 after the Will had been signed;

(3) The Respondent proceeded on the instructions of the widow, Pranita Devi, and obtained a grant of Letters of Administration only after a signed copy of the Will was not found as at 6th January 2009.

[46] In Reply, Counsel for the Applicant has argued in his 'Further Written Submissions' dated 6th June 2016 (at paragraphs 22-23):

(1) Counts 1 and 3 are not duplicate allegations as Count 1 is alleging a conflict

of interest whereas Count 3 is alleging the detriment caused to the First Complainant *'as a result of the conflicting situation'*;

(2) Had the Respondent's law firm *'kept and maintained proper record, the ensuing detriment'* to both the First and Second Complainants *'would have been avoided'.*

[47] Whilst I agree with Counsel for the Respondents that it is clear that there appears to be some duplication between Count 3 and Count 1 (as to the alleged conflict of interest and whether it allegedly caused financial detriment), **in my view, there are two issues that need to be fully ventilated at a hearing arising from this Count:**

(1) **Whether the First Respondent**, **having been aware that his firm had prepared the Will of Salen Prakash Maharaj** dated 22nd December 2006 and seen an unsigned copy on the Second Respondent's computer in 2008 (wherein the testator's mother, Maya Wati Prakash, had been named as the sole beneficiary), **was then in an ethical conflict in proceeding on the instructions of the widow**, Pranita Devi, and obtaining a grant of Letters of Administration in the Estate of Salend Prakash Maharaj, to the benefit of Pranita Devi and **to the detriment of Maya Wati Prakash**?

(2) **Once the widow returned alone** (without the testator's mother) to the office of the Second Respondent on 6th January 2009, seeking to give instructions for the First Respondent to act on the widow's behalf to obtain a grant of Letters of Administration, **should the First Respondent not have referred the widow to another law firm?**

[48] **This then provides a sixth reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the Respondent and his firm.**

Count 4

[49] Count 4 also alleges 'Professional Misconduct: Contrary to Section 82(1)(a) of the *Legal Practitioners Decree 2009'*. That is, the First Respondent failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006 and, thereafter, proceeded on the instructions of Pranita Devi and obtained a grant of Letters of Administration in the Estate of

Salend Prakash to the benefit of Pranita Devi, which grant was subsequently revoked by the High Court at Suva resulting in Pranita Devi incurring unnecessary legal costs.

[50] The written submissions of Counsel for the Respondents in relation to this argument has, in part, repeated some of the submissions in relation to Count 3, that is, the Applicant knew that the Will was not in the custody of the Second Respondent and that it had been taken by the testator on the same day after the Will had been signed and the First Respondent only proceeded on the instructions of the widow and obtained a grant of Letters of Administration after a signed copy of the Will was not found as at 6th January 2009. Further, Counsel for the Respondents have noted in their further joint written 'Submissions in Support of Dismissal of the Complaints' dated 6th May 2016 (at subparagraph [v], page 7), that the widow, *'rather than accepting that a signed Will had been located and agreeing to revoke the Grant decided to fight the case on the grounds that the Will was a forgery'*.

[51] In Reply, Counsel for the Applicant in his 'Further Written Submissions' dated 6th June 2016 has reiterated paragraph [21] of those submissions wherein he has argued: *'Had the law firm kept and maintained proper record, the ensuing detriment to MWP [the First Complainant] and Prainta Devi [the Second Complainant] would have been avoided.'* In addition, at paragraph [26] of his submissions Counsel for the Applicant has cited at paragraph [37] from the judgment of Balapatabendi J in ***Prakash v Devi***, that I have already set out in full at paragraph [15] above in this judgment wherein, in essence, Her Lordship stated that '*the parties in this case are in this predicament due to the inadvertence of the solicitors acted in the preparation of the will'* and '*The solicitors are duty bound be [sic] maintain proper records and registers for the wills prepared by them on behalf of their clients.'*

[52] Even though, there appears to be some duplication between this Count and Count 3, **in my view, there are four issues that need to be fully ventilated at a hearing arising from this Count:**

(1) **What advice was given** by the First Respondent to the widow in January 2009?

(2) **Should the First Respondent have given any advice to the widow at all** and, instead, immediately explained that he was in a potential conflict situation and referred the widow to another law firm to act on her behalf?

(3) **What was said in 2010 by both the First Respondent and Ms Mala to the widow's new solicitor, Mr. Hiuare**, in relation to the authenticity of the Will?

(4) **Why did the widow and Mr. Hiuare reject such claims as to authenticity and, is it correct**, as alleged by Counsel for the Respondents (in their further joint written 'Submissions in Support of Dismissal of the Complaints' dated 6th May 2016 (at subparagraph [vii], pages 7-8), **that the widow *'wanted to run a bogus defence'*** that the Will *'found on 23rd January 2010 … was a forgery'*?

[53] **This then provides <u>a seventh reason as to why there needs to be a full hearing before the Commission</u> in relation to the conduct of the Respondent and his firm.**

The mediation issue

[54] Counsel for the Respondents have also raised in relation to the four Counts that a mediation had been held between the First Complainant and the First Respondent on the 24th of June 2010 at which the First Respondent thought the matter had been resolved. Some four years later, on 10th September 2014, a statement was taken from the First Complainant by an investigator within the office of the Applicant, alleging that there was no settlement reached at the mediation held in June 2010.

[55] In Reply, Counsel for the Applicant has noted in his 'Written Submissions Opposing Application for Dismissal' dated 21st April 2016 at paragraph [17]: '*The Respondent's version of the outcome of mediation that took place on 22 June 2010 is in conflict with the Applicant's version'.* Further, at [19] he has submitted that, despite there being no mediation notes as to the outcome, *'the fundamental issue is not whether mediation minutes were kept or not but <u>whether the complaint was resol[v]ed or not</u>.'* [My emphasis]

[56] I note that the two affidavits filed dispute whether there was a settlement. **Clearly, whether or not there was a settlement between the First**

Complainant and the Respondent needs to be fully ventilated at a hearing.

[57] **This then provides <u>an eighth reason as to why there needs to be a full hearing before the Commission</u> in relation to the conduct of the Respondent and his firm.**

The First Complainant knew the Testator had custody of the Will

[58] A supplementary statement was taken from the First Complainant on 29th September 2015 wherein the First Complainant stated in relation to the preparation of the Will on 22nd December 2006:

> *'After preparing[,] the Will was read back to us and explained by Ms Mala. I and my son agreed what all was written on those two wills. The clerk Ms Mala then took those two wills <u>for the lawyer to sign</u>. After signing those two Wills by the lawyer **<u>both the original Wills were handed over to my son Salen</u>**.'* [My emphasis]

[59] Whilst there may be some argument as to the Complaint's confusion and recollection in the above statement as to who signed the Wills (it was not the Respondent), it is clear that the Complainant stated that '*both the original Wills were handed over to my son Salen'*. Obviously, it raises issues as to the basis of the complaint against the Respondents and, in particular, Counts 2, 3 and 4. There is an argument that the Respondents may have been caught in the "cross-fire" (so to speak) between the First and Second Complainants. The Applicant's argument is, however, that if the Respondent had maintained a "proper record" in the first place, then the dispute would not have arisen. **Whilst I have noted the plausible arguments of Counsel for the Respondents, in my view, again, this all needs to be fully ventilated at a final hearing.**

[60] **This then provides <u>a ninth reason as to why there needs to be a full hearing before the Commission</u> in relation to the conduct of the Respondent and his firm.**

Inordinate delay

[61] A further argument of Counsel for the Respondents is the inordinate delay in the bringing of these proceedings by the Applicant. The First Complainant lodged her initial complaint in 11th March 2010. According to Counsel for the

Respondents in their further joint written 'Submissions in Support of Dismissal of the Complaints' dated 6th May 2016 (at paragraphs [27-29], page 10):

> *'[27] In June 2010 the allegation that the Practitioner faced was that it was alleged he was holding the Original Will of SPM and he was saying that he did not have the Will …*
> *[28] MWP [the First Complainant] made this complaint on 11th March 2010 and yet she knew that she had already found the original Will in her home on 23rd January 2010.*
> *[29] This was why the Practitioner had insisted that the mediation had resolved the matter because it was confirmed at the mediation that MWP and not the Practitioner had SPM's original Will.'*

[62] Thus, after the mediation was held on 24th of June 2010, as far as the First Respondent was concerned, the matter was resolved.

[63] According to Counsel for the Respondents in their further joint written 'Submissions in Support' dated 6th May 2016 (at paragraph [17], page 9): *'From 24th June 2010 until 16th July 2014, when the two initial charges were laid, there was complete silence on the part of the Chief Registrar's Office for 4 years'*. As Counsel for the Respondents have asked rhetorically (at paragraph [18], page 9): *'If the matter had not been resolved through mediation on 24th June 2010 why was no step taken for over 4 years after that?'*

[64] On 30th July 2014, 14 days after the two charges were laid, they were withdrawn. Then, some 15 months later, on 14th October 2015, the Applicant brought the current first three Counts against the Respondent, followed by a fourth Count filed on 13th November 2015. Leading Counsel for the Respondents in his oral submissions raised the point that the Applicant should have explained to the First Respondent the reason for such a delay and to have placed the First Respondent in such a *"predicament as a practitioner when you have the pendulum swinging over you for the last five, six years, it is disconcerting"*. Indeed, as Leading Counsel for the Respondents submitted during his oral argument on 22nd April 2016:

> *"… if a matter is a criminal charge, then you need to prosecute within 12 months period time because that then expedites the hearing and both parties know where they stand. But when you keep a disciplinary charges hanging on and [an] allegation hanging for five, six years - as we make this application to strike My Lord, there has been an unexplained delay*

for six years - and ***even though I concede that Justice Madigan had allowed them the liberty to bring charges again****, but it doesn't excuse the six year time frame without explanation. In the absences of time and explanation that is an abuse of process."* [My emphasis]

[65] Counsel for the Applicant had previously noted (in his written submissions dated 21st April 2016) that:

> '32. *The Applicant had complied with the statutory requirement of referring the complaint to the Respondent as per section 104 of the Legal Practitioners Decree 2009.*
> *33. Thereafter, the Applicant was not required to consult with the legal practitioner ...'*

[66] Perhaps, the somewhat long history of this complaint, was compounded by the fact that although the initial complainant was lodged by the First Complainant with the Applicant in March 2010 (and, soon afterwards, separate legal proceedings were instituted on her behalf in the High Court to have the Will dated 22nd December 2006 pronounced valid and the Letters of Administration revoked), the final hearing did not take place in the High Court at Suva until October 2012 with judgment delivered by Balapatabendi J a year later in October 2013. It would be unusual if the comments made in Her Lordship's judgment, three years after the initial complaint, did not spur either or both of the parties to lodge further complaints with the Applicant.

[67] Again, **this is why it needs to be determined at a hearing as to whether or not there was a settlement between the First Complainant and the First Respondent at the mediation held in June 2010 and whether the comments of Balapatabendi J in relation to the behavior of the First Respondent are correct**, noting that neither the First Respondent nor Ms Dipika Mala (the clerk in the First Respondent's firm who prepared Will), were called to give evidence during the hearing in the High Court.

[68] **This then provides <u>a tenth reason as to why there needs to be a full hearing before the Commission</u> in relation to the conduct of the Respondent and his firm.**

Attitude of the Applicant's staff

[69] A final argument of Counsel for the Respondents is in relation to the alleged attitude of the staff within the office of the Applicant. Counsel for the Respondents explained that the First Respondent had spent some considerable time going through each of the disclosures provided by the Applicant and set that response out in a detailed affidavit to which the general response from the Applicant has been "we'll just leave it for trial". As Leading Counsel for the Respondent noted in his closing oral submissions at the hearing on 22nd April 2016:

> *"… in an affidavit if you don't respond to it My Lord it's all accepted as agreed facts and that's what we saying - it's a lackadaisical attitude that's been shown in this matter that has caused us a great deal of concern and its basically smacks of [inappropriate] conduct to us."*

[70] Counsel for the Applicant had previously argued in his written submissions dated 21st April 2016 at [35] that: *'…these grounds have … not been properly pleaded, the Respondent has failed to highlight what conduct of the Applicant was oppressive.'*

[71] Whilst the Commission can sympathise with the position of the First Respondent, I am not sure how this would form the basis of underpinning the basis for striking out the Application at this stage. **If comments are to be made as to how the Applicant has conducted this matter, it may form part of the Respondents' submissions at a final hearing as to why one or more Counts should be dismissed and/or to invite the Commission to make comment in its final judgment if the Commission considers it to be so appropriate.**

[72] **This then provides <u>a Eleventh reason as to why there needs to be a full hearing before the Commission</u> in relation to the conduct of the Respondent and his firm.**

<u>5. The Law</u>

(1) Abuse of process

[71] Whilst I have endeavored to summarise and consider (as set out above) the

submissions of Counsel for the Respondents as to why the Commission should grant a permanent stay or dismissal in relation to each of the four Counts laid in this matter, I note that Counsel for the Respondents have cited in their joint written submissions (dated 8th April 2016) the following cases concerning abuse of process:

(1) ***Walton v Gardiner*** (1993) 177 CLR 378; 112 ALR 289; (Austlii: (1993) HCA 77, <http://www.austlii.edu.au/au/cases/cth/HCA/1993/77.html>) – where the High Court of Australia discussed abuse of process in the context of a disciplinary tribunal, and (as Counsel for the Respondents have submitted) *'how it can be visited an[d]applied at any particular stage of a set or proceedings'*; and

(2) ***Prescott v Legal Professional Disciplinary Tribunal*** (Unreported, Supreme Court of South Australia, 30 September 2009, Layton J) (Austlii: [2009] SASC 309, <http://www.austlii.edu.au/au/cases/sa/SASC/2009/309.html>) – where (as Counsel for the Respondents have noted) '*there is a useful discussion concerning the jurisdiction of a disciplinary tribunal to dismiss for an abuse of process as is contended in these submissions in respect of the matter before the Commission'*.

[72] In ***Walton v Gardiner***, the High Court of Australia confirmed (in 3:2 decision) a judgment of the New South Wales Court of Appeal (*Gill v Walton* (1991) 25 NSWLR 190; Gleeson CJ and Kirby P; Mahoney JA dissenting) in '*staying disciplinary proceedings, against the relevant respondent, in the Medical Tribunal'* of NSW for an abuse of process. As the majority judgment of Mason CJ, Deane and Dawson JJ observed at [26]:

> *'In its application to the Tribunal, the concept of abuse of process requires some adjustment to reflect the fact that the jurisdiction of the Tribunal, which is not a court in the strict sense, is essentially protective - i.e. protective of the public - in character. Nonetheless, the legal principles and the decided cases bearing upon the circumstances which will give rise to the inherent power of a superior court to stay its proceedings on the grounds of abuse of process provide guidance in determining whether, assuming jurisdiction to do so, the circumstances of a particular case are such as to warrant an order being made by the Supreme Court staying proceedings in the Tribunal on abuse of process grounds. In particular, in a context where the disciplinary power of the Tribunal extends both to the making of an order permanently removing a medical practitioner from the Register with consequent loss of entitlement to practise and to the imposition of a fine of up to $25,000 ...* ***there is***

> ***plainly an analogy between the concept of abuse of a court's process in relation to criminal proceedings and the concept of abuse of the Tribunal's process in relation to disciplinary proceedings***. *As was pointed out in Jago … (See, in particular, (1989) 168 CLR, per Mason CJ at pp 30-34; per Deane J at pp 59-61; per Toohey J at p 72; per Gaudron J at pp 76-78.), the question whether criminal proceedings should be permanently stayed on abuse of process grounds falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice. The question whether disciplinary proceedings in the Tribunal should be stayed by the Supreme Court on abuse of process grounds should be determined by reference to a weighing process similar to the kind appropriate in the case of criminal proceedings but adapted to take account of the differences between the two kinds of proceedings. In particular,* ***in deciding whether a permanent stay of disciplinary proceedings in the Tribunal should be ordered, consideration will necessarily be given to the protective character of such proceedings and to the importance of protecting the public from incompetence and professional misconduct*** *on the part of medical practitioners.'* [My emphasis]

[73] ***Prescott v Legal Professional Disciplinary Tribunal***, was a single judge decision of the Supreme Court of South Australia, involving an 'Application for judicial review of proceedings before the Legal Practitioners Disciplinary Tribunal' as Layton J explained at [3]:

> *'The orders sought by the plaintiff are based on* ***allegations which are said to amount to an abuse of process or breach of natural justice*** *if the first defendant, the Legal Practitioners Disciplinary Tribunal ("Legal Practitioners Tribunal"), proceeds to hear the complaint against him. The allegations include the following.* ***The length of delay*** *in the bringing of charges against him, in combination with the relatively minor nature of the charges being pursued, and* ***the long period of time already taken*** *for the Legal Practitioners Tribunal hearing. Further, that through no fault of the plaintiff, the Legal Practitioners Tribunal is now* ***seeking to re-hear the complaint*** *with yet further delay and causing additional stress.'*
> [My emphasis]

[74] In ***Prescott***, Layton J cited at [72]-[73] from the judgment of the Full Court of the Supreme Court of South Australia in ***James v Medical Board of South Australia*** [2006] SASC 267; (2006) 95 SASR 445 wherein he noted:

> *'[72] … in James, Anderson J (with whom Bleby and Gray JJ agreed), in finding that the Medical Board had power to stay its proceedings for*

abuse of process, provided some commentary, albeit in obiter, that the Legal Practitioners Tribunal does have the power to order a stay. His Honor said (at 457[55]):

> ***"Disciplinary tribunals such as the [Medical] Board and the Legal Practitioners Disciplinary Tribunal are vested with implied powers to control all aspects of procedure which relate to procedural fairness.*** *That, of course, is subject to the overriding supervisory power of the Supreme Court. It is my view that an allegation of an abuse of process comes within the implied powers of the Board." [Emphasis added.]* [By Layton J]

[73] For this proposition, his Honour relied upon Forbes, Disciplinary Tribunals (2nd ed), where the author states (at 147): …

> *"The courts of law have inherent power to see that their processes are not abused. One application of the "abuse of process" doctrine is an order dismissing or permanently staying an action which is so long delayed that the defendant cannot be expected to assemble a case and make effective use of the right to be heard. Frivolous or vexatious proceedings may be treated in the same way.* ***The courts have extended the principle to prevent abuse of disciplinary proceedings and Tribunals may apply it themselves."'***
> [My emphasis]

[75] ***James*** involved an argument (as noted at [37]) that *'the dominant purpose of the complaints before the Board was to lay a basis for an attack on the guilty verdict of the jury in the second trial'* concerning the evidence of a medical expert. Hence, Anderson J cited a number of judgments including at [38] that of the House of Lords in ***Hunter v Chief Constable of West Midlands*** [1982] AC 529 (in particular that of Lord Diplock) and at [42] the English and Welsh Court of Appeal in ***Smith v Linskills*** [1996] 2 All ER 353 which, in turn stated:

'We consider that the law was accurately stated by Ralph Gibson LJ in Walpole [1994] 1 All ER 385 at 396, [1994] QB 106 at 120 when he said:

> *"I am unable to attach any decisive importance to the point about dominant purpose upon which [counsel for the plaintiffs] relied. In Hunter's case … the collateral attack upon the final decision of Bridge J on the voir dire was an abuse of process because based upon no sufficient fresh evidence. The fact that the purpose of the plaintiffs was to provide themselves with an argument upon which to attack the true validity of their convictions supported the conclusion that those proceedings amounted to an abuse of process; but it seems clear to me that, if their purpose had been the apparently more acceptable aim of recovering damages for the injuries which they claimed were inflicted by the police, the proceedings would unquestionably have remained an abuse of*

process because it constituted a collateral attack upon a final decision which was manifestly unfair to the defendants and because it was such as to bring the administration of justice into disrepute. No doubt, when it is present, some collateral purpose on the part of the plaintiff, other than the pursuit of his remedy at law, will be relevant to the assessment of the case and to the exercise of the court's discretion for the purpose of deciding whether it is shown so clearly to be an abuse of process that the proceedings should be struck out. If, however, it is clearly shown that the plaintiff's claim is a collateral attack upon a final Judgment within the principle stated and applied in Hunter's case, then the simple purity of his purpose in seeking financial damages alone would not save his action."

We agree. The rule with which we are here concerned rests on public policy. The basis of that public policy ... is the undesirable effect of relitigating issues such as this.' [My emphasis]

[76] In my view, **the Application before the Commission brought by the Chief Registrar is in relation to the conduct of the First Respondent and his law firm, it is not a rehearing of whether of not there was a valid Will** (as had been previously adjudicated by Balapatabendi J on 11th October 2013, where Her Lordship ruled in favour of Maya Wati Prakash and pronounced that the Will dated 22nd December 2006 was valid and that the Letters of Administration granted to Pranita Devi on 16th February 2009 be revoked).

[77] As for the question of delay, in my view, this is not the type of case where (as Anderson J noted in *James* citing *Forbes, Disciplinary Tribunals*) '*an action which is so long delayed that the defendant cannot be expected to assemble a case and make effective use of the right to be heard'*. As the Fiji Court of Appeal stated in ***Pratap v Christian Mission Fellowship*** (Unreported, Court of Appeal, Barker, Henry and Scott JJA)(Paclli: [2006] JCA 41, <*http://www.paclii.org/fj/cases/FJCA/2006/41.html>)* at [23]:

*'**The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution** has been considered by this court on several occasions. Most recently, in Abdul Kadeer Kuddus Hussein v. Pacific Forum Line IABU 0024/2000 – FCA B/V 03/382) the court, readopted the principles expounded in Birkett v. James [1978] AC 297; [1977] 2 All ER 801 and explained that:*

*"**The power should be exercised only where the court is satisfied** either (i) that **the default has been intentional and contumelious**, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii) (a) that*

> ***there has been inordinate and inexcusable delay*** *on the part of the Plaintiff or his lawyers, and (b) that* ***such delay would give rise to a substantial risk that it is not possible to have a fair trial*** *of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."* [My emphasis]

(2) Charges are doomed to failure

[78] It was submitted by Counsel for the Respondents in their joint written submissions (dated 8th April 2016) that by undertaking an analysis (through various case law) of what constitutes 'professional misconduct', the present matter not could not be said to be a case where the Respondent's behaviour comes within the definition. As Counsel for the Respondents submitted at paragraph [107]:

> *'To assert as has been done in counts 1 and 3 in application 012 and in count 1 in application 015 is to require a finding to be made the seriousness of which is reflected in the judgment that the Practitioner is thereby found to be permanently or indefinitely unfit to practice.* ***This cannot, on any reasonable view of the matters, be considered to be applicable to the conduct in question, where the cause of action for the Letters of Administration was undertaken in the honest and genuine belief that a signed Will did not exist****.'* [My emphasis]

[79] Surely, whether the conduct in question constitutes 'professional misconduct' is a matter for hearing the whole of the evidence and considering submissions filed on behalf of each party once all the evidence has been heard.

[80] It is also important to reiterate what was said by Justice Madigan in ***Chief Registrar v Adish Kumar Narayan*** **[2014] FJILSC 6; Case No.009.2013 (2 October 2014)**, (Paclli: <http://www.paclii.org/fj/cases/FJILSC/2014/6.html>), in relation to interlocutory applications at paragraphs [4]-[5]:

> *'4. An essential matter raised by the practitioner in each of his applications and again in his final submissions concerns the nature of the proceedings that are heard before the Commission. There appears to be quite a misunderstanding throughout the profession and in particular by the present practitioner, of the exact nature of proceedings in the Commission when an allegation has been referred to it by the Registrar for hearing.* ***The operative word is hearing and not trial****. Although the Commissioner and the Commission have the roles of Judge of the High Court and the High*

Court respectively, ***hearings before the Commission are hearings by way of an enquiry and not adversarial trials****. As such formal rules of evidence do not apply (see section 114 of the Decree)* ***and it will only be in exceptional circumstances that interlocutory applications and no case applications will be entertained****.* ***The whole purpose of a hearing before the Commission is to establish the validity of the application made by the Registrar*** *and if so established to then make an appropriate penalty order; at all times seeking to protect the interests of the consumer public, while endeavoring to maintain high standards of ethics and practice within the profession.*

5. ***This can be done only after hearing and seeing ALL of the evidence that is available to the Commission****.* ***For that reason an application to dismiss that allegation after the Registrar has presented his evidence is premature.*** *In a trial it could well be, and often is, that a concluded prosecution case does not disclose all the elements of an offence; however in a full hearing with no trial evidentiary restrictions, the presentation of the practitioner's case may well alter the Commission's view of the allegation.'*
[My emphasis]

[81] I have recently cited the above passage in ***Chief Registrar v Raman Pratap Singh*** (Unreported, ILSC, Case No.003 of 2015, 7 June 2016), where an argument was raised that the alleged behavior of the practitioner was an isolated incident. I noted in ***Singh*** (which I note again here), that in ***Narayan***, Madigan J also dealt with the argument regarding the particulars of the offence as follows:

'9. *As a preliminary point the Practitioner by his Counsel argues that that the mischief complained of does not come within the purview of either section 82 or 83 of the Decree. In effect he submits that the particulars of the complaint against him do not state any offence.*

10. This argument was dealt with in some detail by the Commission in a ruling on the practitioner's Application for Stay, (Ruling 009 of 2013 dated 25 September 2013) in which it was held that the examples of misconduct listed in section 83 of the Decree are not exhaustive and in any event any conduct undertaken by the Practitioner need not necessarily be confined to competence or fitness to practice but it may include any conduct that the Commission might find to be professionally blameworthy, dishonorable or unethical.

11. In the case of ***Law Society of N.S.W. v Marando*** *[2013] NSWADT 267, it was said:*
"However it is well settled that the statutory definition of professional misconduct does not exclude the common law definition emerging from the oft-cited case of ***Allison v Gen Council of Medical Education and Registration*** *[1894] 1KB 750; that is "****conduct which would reasonably be regarded as***

disgraceful or dishonorable by professional [colleagues] of good repute and competency""

12. The Commission adopts these definitions and finds that the conduct of the practitioner complained of, if established is well within the disciplinary jurisdiction of this tribunal.' [My emphasis]

[82] Thus, **as to how the behavior of the Respondent in pursuing a 'cause of action *for the Letters of Administration'* is to be viewed**, (even if it '*was undertaken in the honest and genuine belief that a signed Will did not exist'),* **is a matter for <u>hearing the whole of the evidence and considering submissions once all the evidence has been heard</u>.**

[83] **This then provides <u>a twelfth reason as to why there needs to be a full hearing before the Commission</u> in relation to the conduct of the Respondent and his firm.**

(3) 'Truly exceptional circumstances'

[84] I note that Counsel for the Respondents have also cited in their further joint written 'Submissions in Support of Dismissal of the Complaints' dated 6th May 2016 (at paragraph [34], page 12), the judgment of Madigan J in ***Chief Registrar v Devanesh Sharma*** (Unreported, Case No. 029 of 2013, 12 November 2014) (Paclii: [2014] FJILSC 7, <http://www.paclii.org/fj/cases/FJILSC/2014/7.html>) as to the need to be informed about all allegations. In ***Sharma***, Madigan J concluded at [59]-[61]

'[59] This practitioner and this firm have been treated with rather outrageous prejudice and insouciance despite their repeated requests for particulars and submissions in defence. Their entreaties were ignored and even when shown that some of their charges had no factual basis they insisted on proceeding. In the end they appeared to give up and wanted this Commission to decide on the charges.

[60] The investigators and prosecutors have by their actions or inactions breached the Constitutional rights of the two Respondents enshrined in Sections 14(2)(b), 14(2)(e) and 14(2)(g). By talking only to the complainant and ignoring the Respondents, their right to a fair trial pursuant to section 15(1) has been breached.

[61] This Commission has no hesitation whatsoever in finding that there has been a clear abuse of process in this matter. As a result the proceedings are stayed and the charges before the Commission are struck out.'

[85] In ***Sharma***, Madigan J also made the point at paragraphs [2]-[3]:

> *'[2] In the Commission's judgment in* ***Adish Kumar Narayan [Matter No 009 of 2013]****, it was said that* ***in only truly exceptional circumstances would the Commission entertain an interlocutory application*** *(for the reasons given in* ***Narayan).***
> *[3] This complaint and its prosecution do engender truly exceptional circumstances as will be seen sub.*
> [My emphasis]

[86] **For the reasons that I have outlined at various stages in this judgment, I have come to the view that such is not the case here. That is, that '*truly exceptional circumstances' do NOT* exist (in contrast to what was found by Madigan J in *Sharma*) to grant the relief sought by the Respondents in their *Interlocutory Applications* for a permanent stay or dismissal of each Count. Indeed, I have noted that there are some twelve separate issues that need to be fully ventilated at a hearing. Hence, the *Interlocutory Application* made on behalf of the Respondents for a permanent stay or striking out of the Chief Registrar's applications is dismissed. The Applications of the Chief Registrar filed on 14th October and 13th November 2015 shall proceed.**

[87] Even though I have ruled against the Respondents, I wish to place on the record my appreciation for the detailed and thoughtful written submissions of their Counsel including the clear oral arguments placed before me at the hearing on 22nd April 2016. I also thank Counsel for the Applicant for his assistance.

ORDERS

[88] The formal Orders of the Commission are:

1. In relation to Count 1, the Respondent's interlocutory application for a permanent stay or dismissal is refused.

2. In relation to Count 2, the Respondent's interlocutory application for a permanent stay or dismissal is refused.

3. In relation to Count 3, the Respondent's interlocutory application for a permanent stay or dismissal is refused.

4. In relation to Count 4, the Respondent's interlocutory application for a permanent stay or dismissal is refused.

5. The Applications of the Chief Registrar filed on 14th October and 13th November 2015 shall proceed.

Dated this 21st day of September 2016.

I will now hear the parties in relation to costs and a timetable for setting a date for a final hearing of the substantive Applications filed by the Applicant.

Dr. Thomas V. Hickie
COMMISSIONER