**IN THE INDEPENDENT**
**LEGAL SERVICES COMMISSION**

No. 016of 2015

BETWEEN:

**CHIEF REGISTRAR**

Applicant

AND:

**VIREN KAPADIA**

Respondent

**Coram:** DrT.V. Hickie, Commissioner

**Counsel for the Applicant:** Mr. A. Chand
**Counsel for the Respondent:**Mr. B.C. Patel and Mr. S. Parshotam

**Date of Hearing:**9th June 2016

**Dates of Submissions post-hearing:**
Applicant (4th July 2016)
Respondent (6th July 2016)

**Date of Judgment:** 21st September 2016

## JUDGMENT

### 1. The Issue

[1] This case raises an important issue as to **whether there is an onus** upon members of the profession **into'making full and proper enquiries into the status' of a declarant**prior to the execution of a caveat document? Further, doessuch a failurefulfill the basis of a charge of 'unsatisfactory professional conduct'?

[2] The position taken by the Legal Practitioners Unit (LPU) within the Office of the Chief Registrar on this issue is completely at odds with that of the Respondent (and, arguably, if the evidence given in this case is to be accepted as a guide, then some of the leading members of the legal profession in Fiji, and, perhaps, the vast majority of legal practitioners in the country). Hopefully, this judgment will assist in clarifying the legal position for both groups.

## 2. The Count and preparation for hearing

[3] On 30th November 2015, an Application was filed by the Chief Registrar setting outone allegation of Unsatisfactory Professional Conductagainst the Respondent as follows:

**Count 1**

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

PARTICULARS

**VIREN KAPADIA**, a Legal Practitioner, onthe 28thday of October 2014witnessed the signature of one RohitLatchanon a caveat document No. 804806, without making full and proper enquiries into the status of the said RohitLatchanprior to the execution of the said caveat document when in fact Mr. Latchan**was declared a bankrupt and was legally not eligible to sign as the company director** of Latchan holdings Limited, which conduct was a contravention of theprovisions of Section 81of the*Legal Practitioners Decree 2009*. [My emphasis]

[4] The application was initially listed for mention on 27th January 2016. As Justice Madigan had, however, 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.

[5] 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 on 11th February 2016, following my swearing-in on 9th February 2016.

[6] On 11th February 2016, Mr.SubhasParshotam appeared on behalf of the Respondent. A plea of "not guilty" was entered and the matter was set down for hearing on 9th June 2016 noting that an overseas counsel would be appearing with Mr.Parshotam. The matter was listed for mention on 24th March 2016 so that further Orders could be made in preparation for the hearing.

[7] On 24thMarch 2016, Orders were made in relation to the parties filing an agreed set of facts.Although the parties could not reach an agreement in relation to that document, they did, however, file on 19th April 2016, an*Agreed Bundle of Documents* - something that I will return to later in my judgment.

[8] On 22nd April 2016, further Orders were made in relation to the filing and serving of an opening by the Applicant as well as for some supplementary documents to be served by the Respondent upon the Applicant to be considered for inclusion as a supplementary bundle of agreed documents.

[9] On 3rd June 2016, the parties filed a supplementary bundle of agreed documents titled*Supplementary (No.1) Agreed Bundle of Documents*.

[10] In light of the considerable volume of documents that had now been filed (as part of the Applicant's initial application,together with the *Agreed Bundle of Documents* and the *Supplementary (No.1) Agreed Bundle of Documents*), the parties were contacted via the Secretary of the Commission and asked to file an 'Agreed Short Chronology'. On 8th June 2016, as an agreement had not been reached, each party filed their own 'Chronology'.

[11] On 9th June 2016, the matter proceeded to hearing, following which, Orders were made for the parties to file and serve written submissions.The parties were advised that judgment would be on notice. This then is my judgment.

**3. Background to the Complaint**

[12] On 8th July 2014, a Sale and Purchase Agreement was made between Ram Lagan, a dairy farmer (the vendor) andLatchan Holdings Limited (the purchaser) for the sale of two properties as follows:

(1) The vendor was to transferhis two-thirds shares in the freehold properties comprised in Certificate of Title Vol.36 Folio 3580, part of land known as "Waidalice" in Tailevu on the island of VitiLevu, containing an area of 200 acres;

(2) The vendor was also to transfer his undivided one half share comprised in Native Lease No.29608 that piece of land known as "Waidalice" showing on Lot 1 on Plan TL 1365 in Verata, Tailevu and containing an area of 2.3067 hectares;

(3) The sale also included a number of animals, milking sheds, labour quarters and associated items;

(4) The total amount of the sale was $498,466.67, a sumto be paid over 20

years, with an interest free Mortgage of $500,000,provided by the vendor to the purchaser. Settlement was to be within 60 days of 8th July 2014. ('Sale & Purchase Agreement – 08/07/14' and 'Mortgage -28/07/14',*Agreed Bundle of Documents*, 19th April 2016, Doc.No.3, pp.8-16 and Doc.No.16, pp.43-50; and Doc.17, pp.51-56)

[13] **The Sale and Purchase Agreement, Mortgage and Transfer in relation to the above sale, were prepared by <u>Solanki Lawyers</u> acting for the purchaser, Latchan Holdings Limited**, as follows:

(1) The Sale and Purchase Agreement was signed by the vendor, Ram Lagan, in the presence of David Toganivalu, Barrister & Solicitor. On behalf of the purchaser, *'The Common Seal of Latchan Holdings Limited was affixed … and signed by Officers duly authorised'*. Those signatures made on behalf of the company appear to be the same as those that appear on a caveat lodged on 28 October 2014 against the property, that is, RohitLatchan and Gardiner Whiteside;

(2) The Mortgage was executed on 28th July 2014, and bears 'The Common Seal of Latchan Holdings Limited' affixed before 'the properofficers' of the company. Those signatures made on behalf of the company appear to be the same as those that appear on a later caveat lodged against the property, that is, RohitLatchan and Gardiner Whiteside. Although it is not stamped or written on the document as to the name of the solicitor who signed on behalf of the mortgagee, Ram Lagan, it would appear that it is the same signature as appears on the Transfer, that is, BhupendraSolanki, Solicitor;

(3) The Transfer was also executed on 28th July 2014, and was signed by the Transferor, Ram Lagan, in the presence of Vandhna Narayan, Barrister and Solicitor. It was also signed by BhupendraSolanki, Solicitor for the Transferee, Latchan Holdings Limited.

('Sale &Purchase Agreement – 08/07/14', 'Mortgage – 28/07/14', 'Transfer of CT 36/3580', 'Letter from Solanki Lawyers to Sherani& Co, dated 22/10/14', *Agreed Bundle of Documents*, 19th April 2016, Doc.No.3, pp.8-16 and Doc.No.16, pp.43-50;Doc.No.17, pp.51-56; Doc.No.18, pp.57-58; and Doc.No.3, p.4)

[14] Also, on 8th July 2014, the Vendor, made a Will appointing Pranita Devi Jattan of Sydney and Gardiner Whiteside (Chartered Accountant and the Secretary of Latchan Holdings Limited) as the Executors and Trustees of his Estate with the salient points being as follows:

(1) The Testator bequeathed *'my property located at Walia, Nausori, comprised in Certificate of Title No 36280 to OM WATI ... for her own use and benefit absolutely';* and

(2) The Testator also bequeathed ***'the residual of all my assets … to my wife, KEOLA PATI … for her own use and benefit during her life time and upon her demise to my grandson PRAYAG LAGAN*** *(father's name* ***Prakash Lagan****) for his own use and benefit absolutely'*; [My emphasis]

(3) The Will was **prepared by Solanki Lawyers(who were also acting for the purchaser, Latchan Holdings Limited, in relation to the abovementioned sale);**

(4) The Testator, Ram Lagan, signed the Will in the presence of David Toganivalu, Barrister & Solicitor, and BhupendraSolanki, Barrister & Solicitor.('Will of Ram Lagan – 08/0714', *Agreed Bundle of Documents*, 19th April 2016, Doc.No.20, pp.61-62.)

[15] The Transfer was stamped on 6th August 2014 in readiness for settlement and there is a receipt imprint on the document signifying that duty was paid in the sum of $8,001.00. ('Transfer of CT 36/3580', *Agreed Bundle of Documents*, 19th April 2016, Doc.No.18, pp.57-58.)

[16] On 19th August 2014, the vendor, Ram Lagan, died.

[17] **On 5th September 2014, KeolaPati lodged a caveat over Certificate of Title Vol.36 Folio 3580**, part of land known as "Waidalice" in Tailevu on the island of VitiLevu, containing an area of 200 acres (**part of the land that the deceased vendor had included in the sale and purchase agreement signed on 8th July 2014**).('Certificate of Title, Vol.36 Folio 3580', enclosed with *Application No.016 of 2015,* filed by the Applicant with the Independent Legal Services Commission, 30th November 2015, pp.41-45)

[18] In fact, an earlier caveat had been lodged two years before that of KeolaPati's against the same property. **On 13th March 2012, Prakash Lagan (the son of Ram Lagan), had lodged** (via Jamnadas& Associates, Barristers & Solicitors) **Caveat No.756320 claiming an interest in the first of the two properties the subject of the sale to Latchan Holdings Limited**, that is, Certificate of Title Vol.36 Folio 3580, (the 200 acres of land known as "Waidalice" in Tailevu) by virtue of Prakash Lagan allegedly having *'provided services with my knowledge, skills and finance to enable my father Ram Lagan, to hold two-third shares and the original Certificate of Title'*;
('Caveat by Prakash Lagan', *Agreed Bundle of Documents*, 19th April 2016, Doc.No.19, pp.59-60.)

[19] On an unconfirmed date in October 2014, the legal firm of Sherani&Co,was contacted by a representative (or representatives) from Latchan Holdings Limited in relation to the "stalled" sale from the Estate of Ram Lagan. Presumably, advice was given that Latchan Holdings Limited needed to lodge a caveat to protect the company's interest as purchaser. As there was no documentary evidence tendered at the hearing before the Commission confirming such advice, nor any oral evidence given either from a witness representing Latchan Holdings Limited or by the Respondent himself, all that can be inferred is that at some stage **on or after 13th October 2014, when Sherani& Co opened a file in relation to this matter (for which there is documentary confirmation), advice was given to lodge a caveat following which instructions were given by a representative (or representatives) from Latchan Holdings Limited for Sherani& Co to proceed to draft a caveat on behalf of Latchan Holdings Limited.** (See 'Cover of file from Sherani& Co', Doc.No.1, *Supplementary (No.1) Agreed Bundle of Documents*, 3rd June 2016, pg.1)

[20] According to a letter dated 23rd April 2015, signed by the Respondent on behalf of Sherani& Co and sent to the Chief Registrar in response to the initial complaint lodged by the vendor's son with the Chief Registrar, the alleged background in relation to the drafting the caveat was as follows:

> *'9. On or about 9th October 2014, Sherani& Co received instructions from the secretary of Latchan Holdings Limited, Gardner*

*Whiteside, a Chartered Accountant in private practice to act for the company to complete the purchase of the undivided two third shares in Certificate of Title Vol 36 Folio 3580, a farm in Waidalice, Tailevu with livestock on it from late Ram Lagan …'*

AND

'14. *Gardner Whiteside,the Secretary of Latchans Holdings Limited and RohitLatchan, an employee, came to see Mr.VirenKapadia at the office ofSherani& Co to give instructions to register the caveat. Mr. Whiteside also advised Mr.VirenKapadia to take further instructions from RohitLatchan who was authorised [as the Chief Executive] to sign for the company. A copy ofthe resolution of Latchan Holdings Limited authorizing RohitLatchan is attached …*

(See 'Sherani& Co.'s letter to CR – 23/04/15', and 'Resolution of Directors', *Agreed Bundle of Documents*, 19th April 2016, Doc.No.14, pp.31-37; and Doc.No.21, p.63.)

[21] On 21st October 2014, Rohit Singh, a conveyancing clerk with Sherani& Co, sent an email to Solanki Lawyers advising that:

*'**We have been instructed by <u>Mr. RohitLatchan</u>** to obtain copies of the following documents from your office:*

*TIN letter of Latchan Holdings Limited*
*Stamped Transfer of CT #3580*
*Stamped Transfer of NL #29608*
*CGT Certificates & Receipts for payment of the CGT from thedeposit sum paid in the matter'*
[My emphasis]

('Email dated 21 October 2014 from Rohit Singh of Sherani& Co to Solanki Lawyers', *Supplementary (No.1) Agreed Bundle of Documents*, 3rd June 2016, Doc.No.2, p.2)

[22] On the same date (21st October 2014), an email reply was sent by "Bhupendra" of Solanki Lawyers to Rohit Singh as follows:

*'VinakaRohit*

*We will organize the same and have it delivered to you by tomorrow morning.*

*Regards*
*Bhupendra'*

(Email dated 21 October 2014 from Bhupendra of Solanki Lawyers to Rohit, *Supplementary (No.1) Agreed Bundle of Documents*, 3rd June 2016, Doc.No.2, p.2)

[23] On 22nd October 2014, the Respondent departed Fiji for Brisbane, Australia, returning to Fiji on 28th October 2014. (See 'eTicket Receipt' and 'Itinerary Details' 'prepared for Kapadia/VirenMr'by Argo Travel Ltd, together with copy of 'Republic of the Fiji Islands Passport' 'VirenKapadia No.836666', and stamped 'Fiji Immigration Departed 22 Oct 2014' and 'Fiji Immigration Entry 28/1014', tendered at hearing on 9th June 2016 to become 'Mr. Kapadia's travel in the week of the 22nd of October 2014 to the 28th of October 2014',Doc.No.10, *Supplementary (No.1) Agreed Bundle of Documents*.)

[24] Also on 22nd October 2014, BhupendraSolanki of Solanki Lawyers forwarded to Rohit Singh at Sherani& Co, seven documents associated with the proposed land transfer of the property by Latchan Holdings Limited the subject of this complaint.('Letter from Solanki Lawyers to Sherani& Co, dated 22/10/14', *Supplementary (No.1) Agreed Bundle of Documents*, 3rd June 2016, Doc.No.3, p.4.)

[25] On 27th October 2014, aletterprepared by Rohit Singhwas hand delivered by Agnes Shute of Sherani& Co,to RohitLatchan of Latchan Holdings Limited. The letter stated as follows:

> *'We refer to the above matter and enclose herewith the following:-*
>
> *1] Caveat over Certificate of Title No. 3580*
> *2] Caveat over Native Lease No. 29608*
>
> ***Please arrange execution of the abovementioned documents by the Company Director****and return the same to use for registration purposes.*
>
> *Should you require any further clarification in the matter please do not hesitate to contact our Mr.RohitSingh.'*
> [My emphasis]
>
> ('Letter from Sherani& Co to RohitLatchan, dated 27/10/14', *Supplementary (No.1) Agreed Bundle of Documents*, 3rd June 2016, Doc.No.6, p.7.)

[26] On 28th October 2014, RohitLatchanreturned to the offices of Sherani& Co with the signed caveat (having been signed by Latchan Holdings Limited under

common seal with what appears to be the signatures of RohitLatchan, Director, and Gardiner Whiteside, Secretary). **It is not disputed that the declaration section of the caveat was thencorrectly completed by Mr.Latchanbefore the Respondent. <u>What is disputedby the Applicant is</u>** whether Mr.Latchan had the capacity to make such a declaration (presumably, an issue in separate proceedings currently before the High Court at Suva) and**<u>whether the Respondent should have made</u>, prior to the signing of the caveat, '*<u>full and proper enquiries into the status of … RohitLatchan</u>*… *when Mr. Latchan was a declared a bankrupt'* (a matter to be decided by this Commission).** ('Caveat – 28/10/14', *Agreed Bundle of Documents*, 19th April 2016, Doc.No.2, pp.6-7.)

[27] On 30th October 2014, Sherani& Co lodged with the Registrar of Titles on behalf of Latchan Holdings Limited, a caveat on Certificate of Title Vol.36 Folio 3580 under No.804806.('Lodgment Slip (Registration of Caveat), dated 30/10/14', *Supplementary (No.1) Agreed Bundle of Documents*, 3rd June 2016, Doc.No.7, p.8.)

[28] **On 19th February 2015, Prakash Lagan (the son of Ram Lagan, the deceased vendor), lodged a complaint with the Applicant against the Respondent** as follows:

> *'**Professional misconduct and/or negligence in not checking if RohitLatchan had the proper legal authority to sign legal documents**<u>taking into account</u> the fact that **he had been adjudicated bankrupt** in 21st February 2006. (see court order attached). **Further RohitLatchan is not a Director of Latchan Holdings Limited** (see Annual Return of 2013 attached) and a copy of caveat No.804806 which <u>he signed as a Director of Latchan Holdings Limited and witnessed by Mr.VirenKapadia</u> of Sherani and Company who lodged the application.'*
> [My emphasis]
>
> ('Compliant - 19/12/15', *Agreed Bundle of Documents*, 19th April 2016, Doc 1, pp.1-5)

[29] On 2nd April 2015, two letters were sent by the Applicant to the Respondent at Sherani& Co, pursuant to sections 104 and 105 of the *Legal Practitioners Decree 2009*, advising the Respondent of the complaint and seeking his response respectively. (*Agreed Bundle of Documents*, 19th April 2016, Docs.9-13, pp.26-30).

[30] On 23rd April 2015, Sherani& Co replied to the Chief Registrar. ('Sherani& Co.'s letter to CR – 23/04/15', *Agreed Bundle of Documents,* 19th April 2016, Doc 14, pp.31-37).

[31] On 27th April 2015, the Chief Registrar forwarded to the Complainant a copy of the written response from Sherani& Co.('CR's letter to Praksh Lagan – 27/04/15', *Agreed Bundle of Documents,* 19th April 2016, Doc.23, p.65).

[32] On 12th May 2015, the Complainant replied to the Chief Registrar explaining that:

> *'**MrRohitLatchan is boldy signing as a Director and acting as a CEO. This is partially or wholly facilitated by the negligence of Sherani& Co**, and other lawyers who have failed to do proper checks on MrRohitLatchan ...*
> *...*
>
> *In conclusion, **my mother, whom I am acting for with Power of Attorney, is directly prejudiced by this alleged agreement as she has a "lifetime" beneficiary of the will,** which in this case is on two properties ... **in latter the Latchan Holdings Limited's Caveat is prior in time over my mum Mrs. KeolaPati's Caveat!***
>
> *The supplied document granting Mr. RohitLatchan authority to act, names him as a CEO and he has also signed multiple documents as Director, in breach of the companies act [sic]. My or any others disputing of the sale before this point, or the Caveat on the property being an issue that should not affect a current complaint.*
>
> ***It therefore appears that Sherani& Co have been negligent in their dealings in this matter, please deal with them** and if possible MrRohitLatchan as able to within your powers to the highest degree.'*
>
> [My emphasis]
>
> ('PrakashLagan's letter to CR – 12/05/15', *Agreed Bundle of Documents,* 19th April 2016, Doc.23, p.65).

[33] On 30thNovember 2015, anApplication was filed by the Chief Registrar with the Commissionalleging one count of'Unsatisfactory Professional Conduct' against the Respondent.

[34] In the meantime, on 10th December 2015,an Order was made by the Master of the High Court at Suva (and sealed on 17th December 2015) extending the caveat (that is the subject of the complaint before the Commission) '*until further Order of the Court'*.As no objection was raised by Counsel for the Applicant as to the filing of a copy of that Order with the Commission as part of the Respondent's case, I presume that the Order of the Master is still valid and continuing. (See 'Order – Before the Master of the High Court Mr Sharma in Chambers on Thursday the 10thDay of December 2015', *Memorandum of Counsel (on behalf of the Respondent),* 10th June 2015).

**4. The Hearing**

*(1) The Applicant's case*

[35] At the commencement of the hearing on 9th June 2016, Counsel for the Applicant was asked by the Commission to clarify where it was said in any legislation or any rule of the 'Rules of Professional Conduct and Practice' (attached as a Schedule to the *Legal Practitioner's Decree 2009*) that there was an onus upon a legal practitioner to ask a declarant as to their capacity to attest to a declaration before taking a declaration and then witnessing it.

[36] Counsel for the Applicant explained that the Applicant was relying upon s.189(1) of the *Companies Act* which states:

> *'**If any person who has been declared bankrupt** or insolvent by a competent court in Fiji or elsewhere **and has not received his discharge acts as director of**, or directly or indirectly takes part in or is concerned in the management of, **any company**, except with the leave of the court, he **shall be liable to imprisonment for a term not exceeding 2 years or to a fine not exceeding $1,000, or to both**.'*[My emphasis]

[37] According to the oral submissions of Counsel for the Applicant at the hearing on 9th June 2016:

(1) *"... the applicant's case is based on the documentary evidence [in] the agreed bundle and as the Count reads that on the 28th day of October 2014 the respondent witnessed the signature of one RohitLatchan on a caveat document number 804806 ...";* and

(2) *"...it's signed on behalf of a company so there should have been some due care and diligence exercised by this practitioner to check whether Mr. Latchan had the legal capacity to sign on behalf of the company."*

[38] Counsel for the Applicant in his Written Submissions filed post-hearing on 4th July 2016, has further set out in paragraphs [3]-[7] therein the core of the complaint against the Respondent:

> *'[3] The Respondent practitioner had been charged* ***for the failure to make full and proper enquiries of the fact that RohitLatchan was a bankrupt and legally was not eligible to sign on behalf of the company***.
> *...*
> *[5] Section 189(1) of the then Companies Act ...*
> *[6] ... makes it very clear that a bankrupt or an insolvent person shall not only [not] act as a Director of a company but shall also not be involved directly or indirectly in the management of any company.*
> *[7] As such, Mr. Latchan was not, in law, competent to sign the caveat document as a Company Director.* ***The Respondent was a legal practitioner ought to have known the said requirement and made proper enquiries.***
> *...*
> *[9] The Respondent [sic] submits that Mr. Latchan in law was not competent or eligible to act for the company in any capacity. As such, as a legal practitioner who is entrusted with the responsibility of upholding the rule of law,* ***the Respondent was under a duty of care to ascertain Mr. Latchan's capacity to act for the company before he witnessed his signature on the caveat document****.'* [My emphasis in bold]

*(2) The Respondent's case*

[39] At the hearing on 9th June 2016, Leading Counsel for the Respondent,in his opening, commenced by challenging the Count (charge) against his client noting:

> *"... the charge is in relation to one specific allegation i.e that he [the Respondent] witnessed the declaration of RohitLatchan when he [RohitLatchan] was a bankrupt ... we will show from evidence that factually they [the Applicant] are wrong ...* ***Mr. Kapadia did not prepare the caveat and neither did he witness the two signatories to the sealing of the caveat he merely took the declaration****..."* [My emphasis]

[40] Leading Counsel for the Respondent then submitted that the problem with the Applicant's case is as follows:

(1) The clients (Mr Whiteside as the Secretary of Latchan Holdings together with RohitLatchan, an employee)came and saw the Respondent and gave him instructions to lodge a caveat to protect the company's interest as purchaser. The Respondent then gave those instructions to MrRohit Singh, a clerk within the Respondent's firm, to attend to the preparation of the caveat.

(2) The statement on the caveat that RohitLatchanwas a 'company director' was incorrect, however, that error was irrelevant, as Leading Counsel for the Respondent explained:

> *"... the allegation that because he [MrLatchan] is a bankrupt he cannot act as a company director, we accept that, we are not disputing that part of it.* ***What we are saying is that the declaration by law, section 3 of the Statutory Declarations Act [which sets out the prescribed form for a statutory declaration], doesn't require the occupation of the declarant****, so if I have put in 'a moonwalker' then I think Mr. Kapadia [the Respondent] would have to go to a long way to find out whether he [MrLatchan] had walked on the moon or not so."*[My emphasis]

(3) There is no law that says a bankrupt cannot make a statutory declaration. Indeed, section 52 of the *Bankruptcy Act* "allows the bankrupt to be employed, be part of the civil service, to be employed in their army" and in the present case "he was employed, as a resolution says, as a CEO of the company, not as a director".Mr Whiteside, as the Secretary of the company, advised the Respondent to take further instructions from RohitLatchan who was authorised (as the Chief Executive) to sign on behalf of the company as per a 'Resolution by the Directors of Latchan Holdings Limited' dated 18th November 2010.

[41] Subsequent to the hearing,Counsel for the Respondent havenoted in their joint written 'Submissions' dated 6thJuly 2016 (at paragraph [46], page 18), that:

> *'Section 107of the Land Transfer Act states what is to be included in the caveat:*
>
> > *"Particulars to be stated in and to accompany caveat*
> >
> > *107. Every caveat shall state the name, address and description of the person by whom or on whose behalf the same is lodged and, except in the case of a caveat lodged by order of the court or by the Registrar, shall be signed by the caveator or his agent and attested by a qualified witness and shall state with sufficient certainty the nature of the estate or interest claimed and how such estate or interest is derived."'* [Counsels' emphasis]

[42] Further, in their joint written 'Submissions' dated 6th July 2016, Counsel for the Respondent have noted (at subparagraph (r), page 6) that *'The caveat was extended by the High Court on 10 December 2015 until further Order of the Court.'*

*(3) The Count and the evidence presented at the Hearing*

[43] It is clear from the evidence presented at the hearing on 9th June 2016, that theCount in the Application filed with the Commission could, perhaps, have been a little more precisely drafted. Indeed, the written *Opening Submissions of the Applicant* filed on 26th April 2016 incorrectly stated the following:

> *'1. On or around 28th October, 2014,* ***the Respondent legal practitioner prepared a caveat*** *document number 804806 for and on behalf of his client and caveatorLatchan Holdings Limited.*
> *2. On 28th October, 2014,* ***the Respondent legal practitioner witnessed the signatures*** *of one RohitLatchan and [the] Secretary of Latchan Holdings Limited, which was affixed to caveat document number 804806.'*[My emphasis]

[44] **For the record, there is no evidence that the Respondent witnessed the signatures of eitherRohitLatchan or Gardiner Whiteside (the Secretary of Latchan Holdings Limited)on the caveat document to which the Common Seal of Latchan Holdings was affixed.**Indeed, the Respondent was in Australia in the week of the 22nd of October 2014 to the 28th of October 2014.The Respondent did, however,upon his return to Fiji from Australia on 28th October 2014, take the declaration of RohitLatchan, in accordance with s.107 of the *Land Transfer Act*.

[45] The drafting of the Count, however, is not the only problem with the Applicant's case. According toCounsel for the Respondent in their joint written 'Submissions' dated 6th July 2016 (from paragraph 9 on page 3, to paragraph 12, subparagraph (t), on page 6), the problems with the Applicant's case, from an evidentiary perspective, are as follows:

> *'9.* ***The Applicant did not call any oral evidence and relies of the Caveat; RohitLatchan's Order of Bankruptcy and s.189 of the Companies Act to support the charge****.*
> *10. There is no evidence that the Applicant carried out any investigation in this matter and there is no indication that after receiving the Respondent's explanatory letter dated 23 April 2015 the Applicant tried to ascertain how RohitLatchan came to be described as a company director in the declaration.* ***The Applicant did not interview the senior conveyancing clerk, Rohit Singh, who prepared the Caveat or RohitLatchan himself or the company secretary, Gardiner Whiteside.***
> …

12. *The Respondent called two witnesses, Rohit Singh and Mr W W Clarke and has put in documents appearing in the Agreed Bundle and the Supplementary Bundle.* ***The Applicant accepted the authenticity of the documents and did not challenge their contents save for suggesting that the Respondent should prove the contents by calling the maker of the document. That was not necessary. The documents, if authentic, speak for themselves.****It was for the Applicant to contradict the contents of documents by calling evidence but he did not do so. Indeed, he could not do so because he did not interview the material witnesses … The evidence shows:*

*…*

*(i) Gardiner Whiteside, the Secretary of Latchan Holdings Limited and RohitLatchan, an employee of the company came to see Mr.VirenKapadiaat the office of Sherani& Coto give instructions to register the caveat.* ***Mr. Whiteside also advised MrKapadia to take further instructions from RohitLatchan who was authorised to sign for the company****.*

*(j)* ***Mr. Whiteside provided Mr.Kapadia a copy of the Resolution of Directors dated 18 November 2010 authorisingRohitLatchan to sign on behalf of Latchan Holdings Limited*** *"every instrument to which the company's seal is required to be affixed".*

*(k) The caveat was prepared by Rohit Singh a senior conveyancing clerk in the employment of Sherani& Co … who had worked for the firm for over 17 years and had prepared over 100 caveats …*

*(l) Rohit Singh asked his secretary Agnes Shute to type "Company Director" as the occupation of RohitLatchan… [as] RohitLatchan had signed the Sale & Purchase Agreement and the Mortgage as company director and had assumed that was correct.* ***He said he did not do a company's office search of Latchan Holdings Limited because that was not necessary for the purpose of the caveat.***

*…*

*(o)* ***The caveat was signed by Latchan Holdings Limited under common seal beforeRohitLtachan came into the officeof Sherani& Co to sign the declaration in the caveat*** *…*

*(p)* ***Mr.Kapadia witnessed the declaration.Latchan Holdings Limited did not affix its common seal to the Caveat in the presence of MrKapadia and neither of the two signatories witnessing the affixing of the seal sign[ed] in the presence of Mr.Kapadia.****'*

[My emphasis]

[46] Although I agree with much of what Counsel for the Respondent have set out in their above submissions as to what they have termed 'the evidence shows' in this case, **I note that paragraphs 12(i) and (j) (in relation to the instructions allegedly given by Mr Whiteside to the Respondent) were not agreed to by Counsel for the Applicant at the hearing<u>despite the fact that such allegations were set out in documents contained in the *Agreed Bundle of Documents* filed with the Commission on 19th April 2016</u>.** Indeed, <u>such allegations were set out in the letter dated 23rd April 2015</u>, (signed by the Respondent on behalf of Sherani& Co and sent to the Chief Registrar in response to the complaint lodged by the vendor's son) <u>and that letter together with seven annexures (including the '*Resolution of Directors'*</u>dated 18 November 2010authorisingRohitLatchan to sign on behalf of Latchan Holdings Limited) <u>appeared in the *Agreed Bundle of Documents*</u>. Further, at the commencement of the hearing, Counsel for the Applicant noted that he relied upon the same *Agreed Bundle of Documents*to support his case:

> *"Now sir I have **<u>the Applicant's case is based on the documentary evidence in the agreed bundle</u>** and as the count reads that on the 28th day of October 2014 the Respondent witnessed the signature of one RohitLatchan on a caveat document number 804806 …"*
> [My emphasis]

[47] Soon after Counsel for the Applicant made the above statement, however, the following exchange took place between the Commission and Counsel for the Applicant(whilst the chronology of the case was being discussed) as follows:

> *'Commissioner:* *Then Mr. Whiteside, the Secretary of the company, and RohitLatchan, an employee, gives Mr. Kapadia instructions to register a caveat and he also advises him to take further instructions from him whose authorised to sign for the company,**do you dispute that**?*
> *Mr. A Chand:* ***No we are <u>not</u> aware of that facts sir that those instructions were given**.*
>
> *Commissioner:* *Okay so you can't agree to that?*
> *Mr. A Chand:* *Yes.*
>
> *Commissioner:* *Even though if we go to page 33 tab 14 **if we look at that letter there and you're saying because this is just Mr. Kapadia's response to the Chief Registrar there's issues there that you can't factually agree to or you dispute** or ...*

*Mr. A Chand:* *At this moment* ***I can't say that we dispute****.* ***What I'm saying is we are at a very difficult situation to agree to those facts.***

*Commissioner:* ***Okay, so just so I'm clear, do you dispute or not that Mr. Kapadia is given instructions from Mr. Whiteside?***

*Mr. A Chand:* ***No, we are not privy to that information sir.***

*Commissioner:* *Okay* ***but you are privy to the Resolution*** *that we had earlier at [page] 63 aren't you? [That is, the Resolution of Directors of Latchan Holdings dated 18 November 2010 authorisingRohitLatchan to sign on behalf of Latchan Holdings Limited]*

*Mr. A Chand:* ***Yes.***

*Commissioner:* ***Right, you've got that. You're not disputing that?***

*Mr. A Chand:* ***No.***

*Commissioner:* *Page 63 in the middle just again Mr. Chand is that you not disputing that are you - that's* ***the resolution of the directors dated the 18th of November 2010****?*

*Mr. A Chand:* ***Again Commissioner, we are not sure whether this is a document that is indeed a resolution by the directors*** *because we are not aware whether they, we do not have any meetings of those minutes, or* ***unless my learned friend would be calling the directors and saying that they had actually on a certain date agreed to these*** *and …*

*Commissioner:* ***So if Mr. Patel was calling Mr. Whiteside and he gave evidence to that effect what's your position then****?*

*Mr. A Chand:* ***Then we would not have anything to do with this document but again we are then basing our argument on law - the fact that this resolution is directly …[in conflict] to section 189 of the Company's Act****.'*

[My emphasis]

[48] This was, however, not the last exchange between the Commission and Counsel for the Applicant concerning theResolution of the Directors of Latchan Holdings authorisingRohitLatchan to sign on behalf of Latchan Holdings Limited, as Counsel for the Applicant shortly returned to it explaining:

*'Mr. A Chand:* ***Yes, we are not much objecting to the "authenticity" of the document, perhaps the "veracity"of the document is.***

*Commissioner:* *Hold on just pass that by me again. You are not disputing the "authenticity" of the document?*

*Mr. A Chand:* ***Perhaps the "veracity" so of the document and how that was …***

*Commissioner:* *Just explain to me what you saying there because* ***if you are not disputing the "authenticity" of the document then surely Vicky DorthyLatchan and Anita Sami who are directors here have signed these things unless you got one of them to say they never signed this?***

*Mr. A Chand:* ***No, that's what I'm saying My Lord.With "authenticity" we not saying they haven't signed it but we would like to know more into the contents of the document what the document contains.'***
[My emphasis]

[49] Thus,in summary, the position of Counsel for the Applicant (as I understood his submission),was that he was not questioning the *authenticity*ofthe Resolutionof the Directors of Latchan Holdings authorisingRohitLatchan to sign on behalf of Latchan Holdings Limited, rather he said that he was questioning the *veracity* of the document. It was unclear to me at the hearing as to what Counsel for the Applicant was questioning in relation to the Resolutionwhen he distinguished between authenticity and veracity. I note that in Barbara A. Kipfer's,***Roget's 21st Century Thesaurus in Dictionary Form*** (The Philip Lief Group, New York, 1992, p.887),in the entry for '**veracity**' one of the words associated with its meaning is ***'authenticity'***. Further, according to the ***Concise Australian Legal Dictionary*** (5thedn, LexisNexis, Chatswood, 2015, p.50) ***authenticity***is defined as: *'Genuineness;* ***veracity****; reliability'*.[My emphasis] Whilst I concede that veracity can have a further legal meaning as to truthfulness under oath, I am still at a loss to understand the submission of Counsel for the Applicant on this point, particularly when he did not take it further in his post-hearing written submissions dated 4th July 2016.

[50] Putting theauthenticity/veracity argument to one side, the main submission of Counsel for the Applicant was that even if a witness such asMr. Whiteside was called on behalf of the Respondent to verify the legitimacy of the Resolution document (as well as the instructions that were given by Mr. Whiteside to the Respondent), the position of the Applicant would be that '*then we would not have anything to do with this document'* and that, in any

event, '*we are then basing our argument on law - the fact that this resolution is directly … [in conflict with] section 189 of the Company's Act'* (that is, that Mr.RohitLatchan, being a declared bankrupt, could not act as a director or on behalf of the company, Latchan Holdings Limited).

[51] It was unsurprising then that following the first of the above exchanges (between the Commission and Counsel for the Applicant) at the commencement of the hearing on 9th June 2016, Leading Counsel for the Applicant then submitted to the Commission:

> *"I think at some stage sir after he [Counsel for the Applicant] has explained to you, what* ***I would like to do is to pose some further questions … through the Commission*** *that should be asked of the Applicant to explain …* ***before we really, as you say, "know exactly what to meet"****, because one of my gripes sir here is, and it is becoming very obvious from the exchange between the Commission and my learned friend, is this – he is saying 'I can't admit this because I don't know. They have to call Mr. Whiteside to say this is a Resolution'. Now* ***these documents were given to them [the Legal Practitioner's Unit] way back –[they] never came back and said "proof of authenticity", nobody came back to us****."*[My emphasis]

[52] **Despite the argument over the admissibility or otherwise as to the letter dated 23rd April 2015**, (signed by the Respondent on behalf of Sherani& Co and sent to the Chief Registrar in response to the complaint lodged by the vendor's son), **it was in the *Agreed Bundle of Documents* filed with the Commission on 19th April 2016. I have accepted it**(not as a business record –noting that it was drafted whilst possible legal proceedings before the Commission were in contemplation by the author), **rather, I have accepted it so as to provide some contextual background to the charge.** I have not accepted, however, all of the representations contained within the letter. Indeed, I am of the view that much of what is stated in the letter has little bearing in relation to my overall judgment as to whether the charge laid by the Applicant has been proven.

[53] As for the 'Resolution of the Directors' dated 18th November 2010 authorisingRohitLatchan to sign on behalf of Latchan Holdings Limited,

again, it was in the *Agreed Bundleof Documents*filed with the Commission on 19th April 2016. The Respondent has satisfied the evidentiary onus of producing such a document before the Commission to support his case as to why RohitLatchan was accepted by the Respondent and the staff of Sherani& Co as being able to legitimately sign documents on behalf of Latchan Holdings Limited. If Counsel for the Applicant wished to challenge how the Respondent and/or the staff of Sherani& Co were given the document, he was free to do so. He did not. **If he wanted to challenge, as he termed it, the "veracity" of the document, then he needed to put Counsel for the Respondent on notice rather than agreeing to the Respondent's letter dated 23rd April 2015 (and the Resolution attached as annexure "G" to that letter) being included in the *Agreed* Bundle of Documents.**

[54] In any event, as I understand the Application, the authenticity/veracity of the Resolution document is not the basis of the Count laid by the Applicant before this Commission. Indeed, the Commission is the wrong forum for such a challenge. Instead, that is a matter for the proceedings pending in the High Court. **For the record, there is no evidence before the Commission that the Respondent and/orthe staff of Sherani& Co have done anything other than follow the instructions that they received on behalf of the company, Latchan Holdings Limited,to prepare and lodge a caveat to protect the company's interest pending the finalisation of the transfer of the property comprised in Certificate of Title Vol.36 Folio 3580 from theEstate of the Late Ram Lagan.**

[55] It is clear from the documentary evidence as well as the oral evidence of Mr. Singh, a conveyancing clerk from Sherani& Co, that hegave instructions to Ms. Agnes Shute (a typist with the firm) to prepare the caveat, the subject of the complaint before the Commission. As to why Mr.Latchan was described in the caveat as a 'director' of Latchan Holdings Limited and, further, why there was no need to undertake a company search to check if Mr.Latchan was a director of the said company, Mr Singh, explained in cross-examination as follows:

*'Mr. A Chand:* *Now witness you had also said that you relied upon in giving instructions to Ms. Chute to prepare this caveat document* ***you relied on the documents that were submitted by Mr. Solanki****?*

*Witness:* ***Yes sir****.*

*Mr. A Chand:* *And you said that the resolution was provided to you which is at tab 21 of the agreed bundle?*

*Witness:* *Yes.*

*Mr. A Chand:* *Now if you see tab 21 and if you see the first point where it says 'directors' hereby resolve' and the first point says 'that the Chief Executive officer of the company,RohitLatchan' are you following that witness?*

*Witness:* *Yes.*

*Mr. A Chand:* *Now could you clarify you said that the documents that were provided to you were the sale and purchase agreement, the transfer document, the mortgage document and company resolution?*

*Witness:* *Yes sir.*

*Mr. A Chand:* *And the company resolution says 'the chief executive officer'. Now could you just explain****why then had you put 'company director' for corresponding with RohitLatchan in the declaration when the resolution clearly says he is 'the chief executive officer'?***

*Witness:* ***Sir, if you refer to the company resolution, the last tab says 'that any instrument to be signed by him' which refers to RohitLatchan'as a signatory to the company's common seal shall have the same effect as if' he was the 'director of the company'.***

*Mr. A Chand:* *And did you make any searches as to whether he was a company director?*

*Witness:* ***There was no need to do a company search for Latchan's Holdings Limited. The caveat document which is being questioned here was in the interest of Latchan's Holdings protecting Latchan's Holdings interest as purchaser pursuant to that sale and purchase agreement.***

*Mr. A Chand:* *I have no further questions sir.'*

[My emphasis]

[56] It is also clear from the documentary evidence that in the Annual Return of Latchan Holdings Limited for 2013, the Directors were listed as Viki Dorothy Latchan and Anita Sami. ('Annual Return of Latchan Holdings Limited',

*Agreed Bundle of Documents,* Doc.No.6, pp.21-23).These were the same two persons who were stated and signed as Directors of Latchan Holdings Limited in the Resolution of 18th November 2010. Neither in the Resolution of 18th November 2010, nor in the Annual Return for 2013 was Mr.RohitLatchan listed as a director of Latchan Holdings Limited. Indeed, in the earlier Resolution, Mr.RohitLatchan is listed as 'Chief Executive Officer' who was 'appointed by the directors … as a signatory to the common seal' of Latchan Holdings Limited. There being no evidence to the contrary, I accept that Mr.RohitLatchanwas stated in error on Caveat No.804806 as a 'director' of Latchan Holdings Limited simply due to an error on the part of Mr Singh relying upon the documents supplied to him by Solanki Lawyers. Any other findings in relation to those and other related documents are matters for the High Court and not relevant to the present complaint before the Commission.

**5. The Law**

*(1) Is there a legal basis underpinning the Applicant's case?*

[57] There is then the question of the **legal** basis of the Applicant's case, recalling that **Counsel for the Applicant cited no statute, 'Rules of Professional Conduct and Practice' (attached as a Schedule to the *Legal Practitioner's Decree 2009*), or case law**, in support of the proposition that it is*'Unsatisfactory Professional Conduct: Contrary to Section 81 of the Legal Practitioners Decree 2009'*to have witnessed the signature of a declarant on a caveat document without making full and proper enquiries into the status of the declarant, in particular, to check that the declarant was NOT a declared bankrupt and that he was, in fact, legally eligible to sign the caveat as a company director.

[58] Section 81of 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]

[59] The problem for the Applicant is that **nowhere has it been shown as to why <u>in law</u> there is an onus upon a legal practitioner** tobe 'making full and proper enquiries into the status' of a declarant prior to the execution of a caveat document.

[60] Further, **<u>the client</u>**of theRespondent's firm was Latchan Holdings Limited. It was not challenged by Counsel for the Applicant in his cross-examination of Mr Singh that:

(1) instructionshad been given by the client to register the caveat on behalf of Latchan Holdings Limited;

(2) the Resolution of Directors (Vicki Dorothy Latchan and Anita Sami) dated 18th November 2010 authorisedRohitLatchan to sign on behalf of Latchan Holdings Limited as follows (*'Agreed Bundle of Documents'*,page 63):

> *'<u>RESOLUTION BY THE DIRECTORS OF LATCHAN HOLDINGS LIMITED</u>*
>
> *With respect to the common seal of the company the Articles of Association provides in clause 114 that* ***the common seal of the company*** *"**shall only be used** by the authority of the directors or of a committee of the directors authorized by the directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director and shall be counter signed by a secretary or by a second director* ***or by some other person appointed by the directors for that purpose**"*
>
> *The directors hereby resolve*
>
> - *that the Chief Executive Officer of the company,* ***Mr.RohitLatchan, be appointed by the directors****, in accordance with clause 114, as a person appointed and authorised by the directors,* ***as a signatory to the company's common seal****, and*
> - *that he shall be* ***authorised to sign every instrument to which the company's seal is required to be affixed, and***
> - *that* ***any instrument signed by him*** *as a signatory to the company's common seal* ***have the same effect as if signed by a director of the company***'. [My emphasis]

[61] Again, as to why the Respondent <u>would then be required at law</u>into 'making full and proper enquiries into the status' of Mr.RohitLatchan (beyond the above

resolution of the directors) has, in my view, never been explained.

[62] By contrast, Counsel for the Respondent cited both at the hearing of this application (and later in their joint written submissions),the judgment of Rodney Hansen J in the High Court of New Zealand in ***Harlow Finance & leasing Ltd v Sterling Nominees Ltd*** [2001] NZHC 511; (2001) 15 PRNZ 633. The case involved a successful application by a landlord to rescind a previous order granting relief in favour of a tenant company (Harlow). In addition, the landlordsought an order 'for costs on an indemnity basis' against the tenant company (Harlow), a director of the tenant company (Mr. Johnson)and the tenant company's solicitor (Ms. Webber). In relation to the landlord seeking costs against the company's solicitor, Ms. Webber, (who had acted on behalf of the tenant company in bringing the initial application in the High Court seeking 'an Order granting relief against forfeiture' that was later rescinded), Rodney Hansen J noted as follows:

> *'[18]* ***I was not referred to any direct authority to support the proposition that actions on behalf of a company by a person, such as an un-discharged bankrupt who is prohibited from holding office or participating in its management, could not bind the company*** *...*
> *[19] ...The fact that a director is prohibited from holding office or participating in the management of the company does not invalidate actions taken on behalf of the company: s 158 Companies Act 1993. Mr Johnson was the company's director and responsible for its management in fact, even if it was an offence for him to do so. The proceedings were properly constituted ...*
> *...*
> *[22] It was submitted that Harlow's solicitor, Ms. Webber, should be liable because of her failure to ascertain that Mr. Johnson is an un-discharged bankrupt and without the authority to initiate proceedings on behalf of Harlow.* ***I have already expressed my view that Mr. Johnson's disabilities were not of such a nature as to prevent his binding the company, either by authorising the issue of proceedings on its behalf or by entering into other transactions. That of itself is fatal to application for costs against the solicitor.*** *Regardless, I am satisfied that this is not a case in which it would be appropriate to make the solicitor liable for costs on any basis.*
> *...*
> *[26]* ***Mr.McAnally [for the landlord] submitted that on receiving instructions from Mr. Johnson, Ms. Webber should have taken steps to establish whether or not there was any impediment to his acting as a director of the company or otherwise instructing her on its behalf.*** *He relied on an affidavit from a legal secretary which was filed to show that, with the use of the internet, it is possible within a matter of minutes to*

*obtain a company search disclosing the names of directors and of ascertaining whether a named director is a bankrupt. He submitted that Ms. Webber should have taken these steps as a matter of routine even if she had no reason to think that Mr. Johnson may not be entitled to act for the company.*

*[27]* ***In my opinion, his argument fails, as does the application against Ms. Webber for costs****, for three principal reasons.*

*[28] First, I accept Ms. Watson's submissions that the evidence filed on behalf of Sterling does not establish to the requisite standard that Mr. Johnson is indeed a bankrupt …*

*…*

*[31] Secondly,* ***I consider that as a general rule it would cast an unrealistically and unnecessarily high duty on a solicitor issuing proceedings to be required to carry out a detailed enquiry to verify a persons authority to issue proceedings on behalf of a company or other entity****. It is elementary that a solicitor should not act if he or she has any reason to doubt that the person from whom instructions are being received has no authority or lacks the relevant legal capacity.* ***But, in the absence of some indication of a disability, I see no reason in principle or any practical necessity for a solicitor to go behind the word of a client.That would be antithetical to the relationship of solicitor and client and, as Ms. Watson submitted, would put a solicitor under a continuing obligation to monitor the financial and legal status of their clients.***

*[32] Thirdly, on the facts as deposed to by Ms. Webber there could have been no reason why she should have been put on enquiry as to Mr. Johnson's status. She states that over the period 1997/2000 she received instructions from Mr. Johnson in relation to eleven or twelve property transactions, some of which involved Harlow. In many of these she was required to deal with financial institutions, none of whom ever gave her reason to think that Mr. Johnson's financial standing was in question. When she first received instructions from him, on behalf of Harlow, she carried out a company search which showed him as a director.*

*[33] I can find no dereliction of duty by Ms. Webber which could make her liable to an award of costs.'*[My emphasis]

[63] Counsel for the Applicant in his Written Submissions dated 4th July 2016 (at paragraph 11), has suggested that *Harlow* 'cannot be compared to the current case':

> *'as here … Mr. Latchan has been declared a bankrupt by a competent court of law and still remains to be one whereas in the case of Harlow … Mr.Johnson, who had initiated the proceedings on behalf of Harlow was not indeed a bankrupt. Secondly, Ms. Webber, solicitor for Harlow had carried out a company search whereas in the current case the Respondent solely relied on what was provided by the client.'*

[64] In his judgment in *Harlow*,Rodney Hansen J noted at [29] that a private investigator who filed an affidavit 'was able to establish a strong basis for

inferring the Wilfred Johnson involved with Harlow was indeed the undischarged bankrupt', however, at [30] he concluded that '[H]aving regard to the evidence as whole, I do not find it proved that Mr Johnson is a bankrupt'. Rodney Hansen J then went on to make the point that, in any event, (as cited above), '*That would be antithetical to the relationship of solicitor and client and, as Ms. Watson submitted,* ***would put a solicitor under a continuing obligation to monitor the financial and legal status of their clients****.'*
[My emphasis]

[65] I disagree with Counsel for the Applicant that *Harlow* 'cannot be compared to the current case'. Although *Harlow* involved the institution of legal proceedings that eventually failed, I find much in the judgment of Rodney Hansen J to be of relevance with the current case before the Commission, in particular:
(1) '*The fact that a director is prohibited from holding office or participating in the management of the company does not invalidate actions taken on behalf of the company'*(para 19);
(2) '*I consider that as a general rule it would cast an unrealistically and unnecessarily high duty on a solicitor issuing proceedings to be required to carry out a detailed enquiry to verify a person's authority to issue proceedings on behalf of a company or other entity'*(para31);
(3) '*... in the absence of some indication of a disability, I see no reason in principle or any practical necessity for a solicitor to go behind the word of a client. That would be antithetical to the relationship of solicitor and client and, as Ms Watson submitted, would put a solicitor under a continuing obligation to monitor the financial and legal status of their clients'*(para31);
(4) 'O*n the facts as deposed to by Ms. Webber there could have been no reason why she should have been put on enquiry as to Mr. Johnson's status'*(para31).

[66] Points (3) and (4) above have not, in my view, been satisfactorily answered by Counsel for the Applicant either at the hearing or in his subsequent written submissions filed post-hearing on 4th July 2016. That is, why should a solicitor go behind the word of their client and, if that is the obligation that Counsel for the Applicant seems to be suggesting, then upon what basis in law is '*a solicitorunder a continuing obligation to monitor the financial and legal status*

*of their clients'?*Further, in relation to the present case, **there could have been no reason why the Respondent should have been put on enquiry as to MrRohitLatchen's status**.As Counsel for the Respondent have noted in their joint written 'Submissions' dated 6th July 2016 (at subparagraph (c) on page 4):

> *'The Agreement, the Transfer and the Mortgage**were prepared by [previous solicitors] Solanki Lawyers**, acting for Latchan Holdings Limited, and were executed by the vendor and the purchaser.'*
> [My emphasis and addition]

[67] Indeed, it is clear that the signatures made on behalf ofLatchan Holdings on the Sale and Purchase Agreement dated 8th July 2014, that were signed in the presence of David Toganivalu, Barrister and Solicitor, are similar to those in the Caveat signed on 28th October 2014, that is, the signatures of RohitLatchan, Director and Gardiner Whiteside, Secretary. Neither BhupendraSolanki, Barrister and Solicitor, from the firm of Solanki Lawyers, nor David Toganivalu, Barrister and Solicitor, (before whom the Sale and Purchase Agreement was signed and the Common Seal of Latchan Holdings Limited affixed), were called by the Applicant at the hearing of the present application before the Commission. (See Document 3, pages 8-16, '*Agreed Bundle of Documents'*, dated 19th April 2016.) Also, I am unaware of any proceedings, past or pending before the Commission, where either or both of those lawyers and/or their firms, have been prosecuted by the Applicant for having signed documentation in relation to this matter involving Latchan Holdings Limited.

[68] **Further, in the email correspondence dated 21st October 2014, as well as in the letter dated 22nd October 2014, between Solanki Lawyers and Rohit Singh, the Conveyancing Clerk at the Respondent's firm, there is no mention of any problem regarding RohitLatchan being a bankrupt.** (See the *'Supplementary (No.1) Agreed Bundle of Documents'*, dated 3rd June 2016, Tabs 2 and 3.) Why then would the Respondent and/or his conveyancing clerk, Mr Singh, have any reason to query the status of RohitLatchan and make enquiries to verify whether or not RohitLatchan was an undischarged bankrupt?

[69] This then leads to a further submission made by Counsel for the Respondent in their joint written 'Submissions' dated 6th July 2016 (at paragraph 32), that is:

*'**The Respondent was entitled to assume that RohitLatchan would have told him that he was not a company director and it was not for the Respondent to ask.** The evidence before the Commission is that RohitLatchan was a man well experienced in business and was the CEO of Latchan Holdings Limited. He was given, and had, the opportunity to read and understand the caveat before he came in to sign the declaration. It must be presumed that he did read the caveat because he signed as a witness to the affixing of the seal. He should be presumed to have also read the declaration he was to sign. In these circumstances **it was for RohitLatchan to ensure that he did not pass himself off as a company director when he was not.**'* [My emphasis]

[70] Counsel for the Respondent have cited in support(in their joint written 'Submissions' dated 6th July 2016 at paragraph [32]) the judgment of the English and Welsh Court of Appeal in***John Mowlem Construction Plc v Neil F Jones & Co***[2004] EWCA Civ 768; [2007] Lloyd's Rep PN 4,where,as Counsel for the Respondent have noted,*'the question was whether the solicitors should have asked their client if they had public liability insurance'*. (See Bailii: <http://www.bailii.org/ew/cases/EWCA/Civ/2004/768.html>). Counsel for the Respondent havecited the following excerpt from the judgment of Tuckey L J (with whom Judge LJ and Kay LJ agreed):

*'16. The judge was also referred to **Carradine Properties Ltd. v DJ Freeman & Co.** [1999] Lloyds Law Rep. P N 483, a 1982 decision of this court not reported at the time. In that case it was alleged that solicitors should have asked their property company client whether it had public liability insurance which would have covered the company's liability for damage caused by its demolition contractors to a third party. After a three and half day hearing each member of the court (Lord Denning M.R., Eveleigh and Donaldson L.JJ) gave extemporary judgments upholding the judge's conclusion that the solicitors had not been negligent. No authority is cited in the judgments and it cannot be said that the judges spoke with one voice as to the extent that a solicitor may owe duties to his client beyond the terms of his express retainer. Each judge however based his decision on the fact that the solicitors were entitled to assume that their experienced client would have told them if they had insurance; it was not for the solicitors to ask. As a decision on its own facts this case is a useful illustration of the extent of solicitors' duties, but I do not think it was intended to lay down principles of general application to cases of this kind. Each case must depend upon it own facts.*

*20. None of Mr. Palmer's arguments [on behalf of John Mowlem Construction Plc] persuade me that the judge*

> *reached the wrong conclusion on liability. The Solicitors were not retained to advise about insurance by their client, who was perfectly competent to deal with such matters. Nevertheless, when, out of the blue, what was thought to be a tactical counterclaim was threatened, would a reasonably competent solicitor have immediately asked about insurance and advised notification? I think the judge's view that he would not is unassailable, supported as it is by the fact that such questions did not occur at the time to other experienced solicitors.'* [Emphasis by Counsel for the Respondent]

[71] **Surely, the above is another answer to the why the Respondent would NOT be required to be 'making full and proper enquiries into the status' of Mr.RohitLatchan (beyond the resolution of the directors). That is, '*supported as it is by the fact that such questions did not occur at the time to other experienced solicitors',* remembering that it was Solanki Lawyerswho had previously prepared all of the documentation associated with the proposed purchase by Latchan Holdings from Ram Lagan of his farm (and associated items), that is, the Sale and Purchase Agreement, the Transfer, the Mortgage, as well as the Will of Ram Lagan.**

*(2) The validity of the Caveat*

[72] Counsel for the Respondent in their joint Written Submissions dated 6th July 2016 (at paragraphs44-51), have set out why the caveat complies with the requirements of the *Land Transfer Act*, concluding at paragraph 52 that *'[T]he caveat was valid and properly registered under the Land Transfer Act'*.

[73] I note that on 10th June 2016, the day after the hearing, Mr.Parshotam as one of the joint Counsel for the Respondent, filed and served a 'Memorandum of Counsel' that stated in part as follows:

> *'2. In the course of the hearing, Counsel on behalf of the Respondent made reference to the Caveat (the subject of the application) being extended by an Order of the High Court (at Suva) and undertook to the Commission that a copy of the Order will be provided to the Commission.*
> *3. A copy of the said Order – made on 10 December 2015 and sealed by the High Court on 17 December 2015 – is attached.'*

[74] I note that Counsel for the Applicant in his 'Written Submissions' dated 4th July 2016, has not discussed this issue instead confining his argument to section 189(1) of the *Companies Act*and the submission (at paragraph 7) that:

> *'7. As such, Mr.Latchan was not, in law, competent to sign the caveat document as a Company Director. The Respondent as a legal practitioner ought to have known the said requirement and made proper enquiries.'*

[75] It is not the role of the Commission to make findings as to the validity of otherwise of the caveat lodged by Latchan Holdings. That issue,(and the validity of a caveatlodged earlier on 13th March 2012, against the same property, by Prakash Lagan, as well as a further caveat lodged in September 2014 by Mr. Lagan's mother), will presumably be decided at some stage in pending proceedings before the High Courtat Suva.

[76] **Accordingly, I will be restricting my judgment to the present application before the Commission. That is, the alleged 'unsatisfactory professional conduct' of the Respondent on 28th October 2014 in taking the declaration by Mr.RohitLatchan in relation to 'the allegation contained' in Caveat No.804806.**

*(3) The Clarke evidence*

[77] Counsel for the Respondent have noted in their joint written 'Submissions' dated 6th July 2016 (at paragraph 12, subparagraphs(s)-(t) on page 6), as follows:

> *'12. ...*
>
> *(s)* ***Mr. Clarke testified about the practice of legal practitioners witnessing statutory declarations.He said he had spoken to 5 experienced practitioners*** *(Adish Narayan in Ba, Chen Young in Lautoka, Ms.Vasantika Patel in Nadi, CeasarLateef and SubhasParshotam in Suva)* ***and they all confirmed his own practice, that the status of the declarant is normally not checked or enquired unless special circumstances warranted it. Certainly neither he nor any of the 5 legal practitioners ever asked a declarant if he was a***

***bankrupt or make that status check with the Official Receiver.***

*(t)* *Mr. Clarke explained that the common practice was for the practitioner to verify the declarant's name by asking for some identification; to ask the declarant if he or she understood the contents of the declaration and agreed with it; and then to ask for the declarant to sign the declaration, before witnessing the signature.'*
[My emphasis]

[78] I notethat '*SubhasParshotam in Suva*' is also one of the joint Counsel for the Respondent (such that it would be inappropriate for me to attribute any weight as to what he informed Mr. Clarke).I also note that Mr. Clarke's evidence was, obviously, both hearsay and opinion evidence, however, no objection was raised by Counsel for the Applicant in relation to Mr. Clarke's evidence.

[79] I am also aware, however, of the comments of Oliver J in ***Midland Bank Trust Ltd v Hett Stubbs and Kemp*** [1979] Ch 384, a case which Counsel for the Respondents have cited in their joint written submissions. Oliver J observed at 402 (B-D):

> *'... I have heard the evidence of a number of practicing solicitors. Mr. Harman [Senior Counsel for the Plaintiffs] modestly contented himself with calling one; but Mr. Gatehouse [Senior Counsel for the Defendants]—mindful, no doubt, of what is said to be the divine preferencefor big battalions—called no less than three.* ***I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type.****The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession,* ***some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received****. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would havedone had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court;* ***whilst evidence of the witnesses' view of what, as a matter of law, thesolicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide****.'*[My emphasis]

[80] In my view, the evidence of Mr. Clarke was not the same as that given in ***Midland Bank Trust Ltd*** before Oliver J. Instead, it was,what Oliver J referred to as,evidence as to an '***accepted standard of conduct … sanctioned by***

***common usage'***.

[81] Further, I note that section 114 of the*Legal Practitioners Decree 2009* states:

> *'Commission not bound by formal rules of evidence*
>
> *114.* ***The Commission is not bound by formal rules of evidence****, other than those in this Decree relating to witnesses,* ***but must give the legal practitioner*** *or partner or partners of the law firm* ***in respect of whom*** *or whose law firm* ***an application for disciplinary proceedings is made, an opportunity to make written submissions and to be heard****, and the Commission must act fairly in relation to the proceeding.'*[My emphasis]

[82] Counsel for the Applicant, despite carrying the ultimate burden of proof, did not object to Mr Clarke's evidence, did not lead any evidence to the contrary and, in his 'Written Submissions' dated 4th July 2016, did not address Mr Clarke's evidence. I accept the short summary (an excerpt of which I have reproduced above) that was provided by Counsel for the Respondent in their joint written 'Submissions' dated 6th July 2016 in relation to the salient points arising from Mr Clarke's evidence. I found Mr Clarke's evidence both relevant and important opinion evidence as to '*the practice of legal practitioners witnessing statutory declarations'* in Fiji.

*(4) Section 81of theLegal Practitioners Decree 2009*

[83] This then brings me to the substance of the charge against the Respondent, that is, that his 'conduct was a contravention of theprovisions of Section 81of the*Legal Practitioners Decree 2009'*.

[84] Section 81 of the*Legal Practitioners 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.'*

[85] In his 'Written Submissions' dated 4th July 2016, Counsel for the Applicant did not address section 81 of the*Legal Practitioners Decree 2009*. He did, however, make submissions on that point at the hearing on 9th June 2016, including that:

> *"... our position is that a member of the public would expect a reasonable and competent legal practitioner to exercise due care and diligence when witnessing documents specially documents such as caveat and affidavit is."*

And further:

> *"... this is a caveat document and secondly it's signed on behalf of a company so there should have been some due care and diligence exercised by this practitioner to check whether Mr. Latchan had the legal capacity to sign on behalf of the company."*

[86] It struck me when reviewing this submission following the hearing, that surely the ***'due care and diligence'***that'***a member of the public would expect [of] a reasonable and competent legal practitioner'*** '*when witnessing documents specially documents such as [a] caveat and affidavit'* **would be that the practitioner has correctly administered the declaration**in the manner as set out in Section 3 of the Statutory Declarations Act and confirmed by Mr Clarke in his evidence,when questioned by Leading Counsel for the Respondent, as follows:

| | |
|---|---|
| *'Mr. BC Patel:* | *Now coming back to your own personal practice, have you witnessed declarations in a caveat or statutory declarations before as a legal practitioner?* |
| *Mr. W Clarke:* | *Yes on many occasions.* |
| *Mr. BC Patel:* | *And could you tell the Commission when the declarant comes in with the declaration what is you are procedure for getting the declaration signed?* |
| *Mr. W Clarke:* | *If the person is known to me or a client, I won't need to verify their identity by asking for a driver's license or some form of identification that would satisfy me that the person is in fact who it is that's purporting to be in front of me. But, assuming all of that there's no question about identity,* ***what I would do is just ask the person whether they have read the caveat and the contents that are being asserted in the caveat and I*** |

***would then ask whether they understand what is being said and if they confirm that as well I will say 'okay please proceed and swear … and make the declaration'."***

*Mr. BC Patel:* *And would he then sign it in your presence and would you then witness it?*
*Mr. W Clarke:* *Yes.*

*Mr. BC Patel:* *Now would you ask the declarant as to whether the occupation stated is correct or not?*
*Mr. W Clarke:* *No.*

*Mr. BC Patel:* *Would you check with anywhere outside whether the occupation stated is correct or not?*
*Mr. W Clarke:* *No, because in my view the declaration is made by that person and they are attesting [to] the truth of what is being said in that declaration so it's their document not mine I'm just there as a witness.*

*Commissioner:* *Just on that Mr. Clark, so for you … as long as you're satisfied about his identity, it's their document, if they are making a false document that's their problem?*
*Mr. W Clarke:* *Yes.*

*Mr. BC Patel:* *And would you check whether the declarant was a bankrupt or not?*
*Mr. W Clarke:* *No.*

*Mr. BC Patel:* *Would you ask him are you a bankrupt?*
*Mr. W Clarke:* *No.'*
[My emphasis]

[87] **There is no evidence before the Commission that the Respondent did not correctly administer the declaration in the manner as set out by Mr Clarke above.**

[88] Mr. Clarke also confirmed in his evidence that his procedure aligned with that of other senior practitioners in Fiji as follows:

*'Mr. BC Patel:* *In that process did you ring up others practitioners in Fiji to see whether you were the one out from the pack or?*
*Mr. W Clarke:* *Yes, I did.I consulted with a number of colleagues from within the profession.*

*Commissioner:* *How many would you say?*

*Mr. W Clarke:* *There were 5.*

*Commissioner:* *And you call them senior practitioners?*
*Mr. W Clarke:* *Yes, I would.*
*...*

*Mr. W Clarke:* *...from my experience I would regard [them] as among the leaders of the profession.*

*Commissioner:* *And their view?*
*Mr. W Clarke:* *Exactly the same as the process that I have outlined.*

*Commissioner:* *So you went through them, I'm asking you, "whether you'd ask if someone is a bankrupt" and these sorts of things?*
*Mr. W Clarke:* *Yes.*

*...*
*Mr. W Clarke:* ***Well the consensus was, that the general consensus was, that to require anymore of a practitioner to start shaking the bona fides [of a declarant] … or just going through basically having to satisfy themselves about the matters I think where that are before this Commission is just unrealistic and impractical and one even said that "the whole profession would be in trouble".'***
[My emphasis]

[89] **Mr. Clarke further confirmed in his evidence, when cross-examined by Counsel for the Applicant, that he would not go behind what was declared as true in a declaration** as follows:

*'Mr. A Chand:* *Just one question sir, ...you have said for caveats ... one of the things as a solicitor you would look into is whether the person has a caveatable interest. Now, if a declarant is signing on behalf of a company purporting to be a director of the company, now in those circumstances, would you as a practitioner check whether that person is competent or e0ligible to sign on behalf of the company?*
*Mr. W Clarke:* ***No, I wouldn't****. I mean you'd be looking at, I mean generally these things aren't static ... there's information passing back and forth between you and the client and* ***if the company has indicated to me that this is the person who is going to be signing on its behalf or that's the person from within the company that I've been dealing with as [the] …authorised representative of the company that would normally be sufficient for me****.*

*Mr. A Chand:* *Sir you are saying just mere information from the company or the person purporting to be the director is enough information to?*

*Mr. W Clarke:* ***Yes because I go back to the proposition that I made before which is that when I witnessed some body's declaration I've already asked them whether they read it and whether that's true and if they tell me it's true I will frankly I'm sort of bound to accept that if they're prepared to declare.'***
[My emphasis]

[90] At the hearing on 9th June 2016, the Commission raised with Counsel for the Applicant the question that surely the procedure that was being proposed by Counsel for the Applicant that before any document was witnessed by a legal practitionerthelegal practitioner was required to undertake enquiries as to the veracity of what was being stated in the declaration, would take time and increase the costs for a member of the public?Counsel for the Applicant replied that it was "mainly to do with property documents or documents such as a caveat" and this would just require a telephone call and/or a letter.This was something that the Commission later specifically raised with Mr Clarke as follows:

*'Commissioner:* *You can't just call up and say "is this person a bankrupt'?*

*Mr. W Clarke:* ***No and you certainly can't just call up [and] ask "who the directors of the company are" because the whole system is manual, it's upon thousands and thousands of files in a store room.***

*Commissioner:* *So just on that, you are saying what you'd normally do to do ... [a] search for [a] company you would have to get one of you are clerks to fill out a form and go and actually make ...?*

*Mr. W Clarke:* *And pay a fee and depending on where that file is. I mean you wouldn't get it straight away. It would take several hours if so it's possible and happens a lot - you not going to get the search the same day. You'll have to come back the next day. Of course, there are files that have never been found at all within companies but that's ...*

*Commissioner:* *Now I understand, Mr. Patel do you have anything arising from that?*

*Mr. BC Patel:* *No sir thank you.*

*Commissioner:* *Mr. Chand anything?*
*Mr. A Chand:* *No sir.'*

[91] **Counsel for the Respondent have cited in their joint written 'Submissions' dated 6th July 2016, two important cases as to the test that should be applied when considering what(according to Counsel for the Applicant)'*a member of the public would expect [of] a reasonable and competent legal practitioner'* **'*when witnessing documents specially documents such as [a] caveat and affidavit',*** theybeing ***Bolam v Friern Hospital Management Committee*** [1957] 1 WLR 583; [1957] 2 All ER 118 and (as discussed earlier above) ***Midland Bank Trust Ltd v Hett Stubbs and Kemp*** [1979] Ch 384.

[92] In ***Bolam***, McNair J(sitting as a judge with a jury in a medical negligence claim before the Queen's Bench Division), in his charge tothe jury instructed them thus (as reported at page 587; and 122):

> *'I myself would prefer to put it this way, that* ***he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art****... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to* ***what is really substantially the whole of informed medical opinion.'***
> [My emphasis]

[93] In ***Midland Bank Trust Ltd,*** Oliver J in the Chancery Division, stated at 402 (H)-403(A-B) the test to be as follows:

> *'Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practicing a highly skilled and exacting profession, but I think that* ***the court must beware of imposing upon solicitors—or upon professional men in other spheres—duties which go beyond the scope of what they are requested and undertake to do****. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test.* ***The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession****, and cases such as Duchess of Argyll v. Beuselinck[1972] 2 Lloyd's Rep. 172; Griffiths v. Evans [1953] 1 W.L.R. 1424 and Hall v.*

*Meyrick[1957] 2 Q.B. 455 demonstrate that* ***the duty is directly related to the confines of the retainer***. [My emphasis]

[94] In his 'Written Submissions' dated 4th July 2016, Counsel for the Applicant has not cited any cases in relation to section 81 of the*Legal Practitioners Decree 2009*.

(5) *The procedure for taking a declaration*

[95] There has been no evidence placed before the Commission that the procedure for the taking of the declaration was otherwise than in accordance with Section 3 of the ***Statutory Declarations Act***(Ch.43) 1971, which states: *'A statutory declaration made in Fiji for use in Fiji shall, unless otherwise prescribed in any other written law, be* ***in the form prescribed in the Schedule****'*. [My emphasis] The Schedule sets out the prescribed form as follows:

***'STATUTORY DECLARATION***
*(Section 3)*

*I.....*
*of.....*
*solemnly and sincerely declare that .....'*

**I note that there is no requirement in the prescribed formabove that the declarant's occupation be included.**

[96] In relation to the taking and signing of a Declaration, again, I note from Mr Clarke's evidence (set out above), that he explained:

*"when I witnessed some body's declaration I've already asked them whether they read it and whether that's true and if they tell me it's true, I will, frankly, I'm sort of bound to accept that if they're prepared to declare."*

[97] Mr. Clarke's evidence also accords with that as set out by Law Access (New South Wales, Australia) as follows:

***'Signing***
*The place (that is, the name of the town, suburb or locality) and date of the declaration, and the name of the witness before whom it is taken, must be stated at the end of the statutory declaration. This is called a jurat.*

> *The declaration should be signed by the declarant in the presence of the witness. The declarant must acknowledge the truth of the statements in the declaration. The witness should say to the declarant words to the effect:* Is this your name and signature, and do you declare the contents of this declaration to be true and correct to the best of your knowledge and belief?
> *After the declarant has said 'yes', they should sign the declaration.'*
>
> (See
> <http://www.lawlink.nsw.gov.au/__ca256b560008768e.nsf/0/3224169a9321351f4a256c850009c268>)

[98] There is no requirement under the *Oaths Act 1900*(New South Wales) for the declarant to state their occupation in a statutory declaration (see sections 21 and 24 and Schedule 9), though it is required underAustralian Commonwealth (federal)law as set out in the Statutory Declarations Regulations 1993 pursuant to the *Statutory Declarations Act 1959* (Commonwealth) (see Regulation 3 and Schedule 1,
<http://www.austlii.edu.au/au/legis/cth/consol_reg/sdr1993389/sch1.html>). There is no such requirement in Fiji for a declarant to include their occupation in a statutory declaration. Indeed, inthe United Kingdom these days,a simple 'Statement of Truth' is preferred in many instances to a statutory declaration, for example, when *'providing evidence in support of an application … to [the] Land Registry'* such as:

- *'when you apply to be registered as proprietor of land on the basis of adverse possession, or if for some other reason there are no documents proving your title, or such documents have been lost*
- *when you apply to register a right acquired by prescription*
- *when you apply for an entry in the register to protect an undocumented interest in land*
- *when you apply to cancel a restriction protecting a trust in land that has come to an end'*

Indeed, as *'Practice Guide 73: Statements of Truth'* makes clear:

> *'Before November 2008, the normal method of providing such evidence was by statutory declaration. In November 2008,* ***Land Registry adopted statements of truth as an alternative form of evidence, following the precedent set by the civil courts****.'*
> [My emphasis]
>
> *(*See '*Practice Guide 73: Statements of Truth',* Gov.UK,

<https://www.gov.uk/government/publications/statements-of-truth/practice-guide-73-statements-of-truth>; see also, *'Practice Direction 22 – Statements of Truth'*, Ministry of Justice, United Kingdom, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part22/pd_part22>).

[99] Apart from the incorrect occupation issue, there has been no evidence placed before the Commission that the signing of the declaration before the Respondent was otherwise than in accordance with the *Statutory Declarations Act* to sustain a charge that such 'conduct was a contravention of theprovisions of Section 81of the*Legal Practitioners Decree 2009'*.

[100] **To be clear, the proceedings before this Commission are solely in relation to the complaint lodged by the vendor's son** that the Respondent witnessed the signature of a person on a caveat document (signed on behalf of the purchaser company) without the Respondent making full and proper enquiriesinto the status of the declarant when in fact the declarant was declared a bankrupt and legally not eligible to sign as a company director, and thus such conduct by the Respondent was a contravention of theprovisions of Section 81of the*Legal Practitioners Decree 2009*.

[101] Thus, I am not being asked (nor is it the appropriate forum) to make findings as to the validity or otherwise of the caveat prepared and lodged by the Respondent's firm. I am also not being asked to make findings as to the validity or otherwise of the various documentation prepared by Solanki Lawyersin relation to the proposed purchase by Latchan Holdings from Ram Lagan, that is, the Sale and Purchase Agreement, the Transfer, the Mortgage, as well as the Will of Ram Lagan. Presumably, these are all matters to be heard and decided in the proceedings pending before the High Court at Suva.

*(6) The Burden of Proof*

[102] In relation to the burden of proof in proceedings before the Commission, it was recently said by the Court of Appeal in ***IfthakharIqbal Ahmad Khan v Chief Registrar***(unreported, Court of Appeal, Appeal Case No.ABU0068.2013, 25 September 2014; Paclii:[2014] FJCA 160, <http://www.paclii.org/fj/cases/FJCA/2014/160.html>)(perGuneratne JA with whom Chandra and Kumar JJA agreed) at [52] that:

*'Consequently, proceedings being instituted against the Appellant (the practitioner),* ***the burden in law was fairly and squarely on the Respondent to prove the facts alleged*** *in the said complaints at the ensuing trial.*

[103] In ***Ali v Nisha***[1977] 23 FLR 77; (Paclii: [1977] FJCA 1,25 March 1977, Gould VP, Marsack and Henry JJA,<http://www.paclii.org/fj/cases/FJCA/1977/1.html>), the Court of Appeal had to consider whether a learned magistrate was 'reasonably satisfied' that there was evidence sufficient to show that adultery had been committedto grant a decree nisi in divorce proceedings. In his judgment, Henry JA (with whom Gould VP and MarsackJA agreed) cited the oft quoted passage of Dixon J in the High Court of Australia in ***Briginshaw vBriginshaw***(1938) 60 CLR 336 at 362 where His Honour said:

*'But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.* ***In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.****Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.'*[My emphasis]

[104] Henry JA also cited in ***Ali v Nisha***a subsequent judgment by Dixon J in ***Wright v Wright***(1948) 77 CLR 191 at 210:

*'While our decision is that the civil and not the criminal standard of persuasion applies to matrimonial causes including issues of adultery, the difference in the effect is not as great as is sometimes represented. This is because, as is pointed out in the judgments in Briginshaw v. Briginshaw …****the nature and gravity of an issue*** ***necessarily determines the manner of attaining reasonable satisfaction*** ***of the truth of the issue and because the presumption of innocence is to be taken into account****.'*
[My emphasis]

[105] Henry JA further noted in ***Ali v Nisha***that *'This passage was approved by Lord Denning in Blyth v. Blyth (1966) A.C. 643'* at 668 (E-F). Indeed, Lord Denning

concluded in***Blyth*** at 669 (C-D):

> *'So far as the standard of proof is concerned, I would follow the words of Dixon J. which I have quoted … In short it comes to this: so far as the grounds for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but* ***the degree of probability depends on the subject-matter****.* ***In proportion as the offence is grave, so ought the proof to be clear****. So far as the bars to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone as the case may be'* [My emphasis]

[106] In relation to the burden of proof in proceedings before the Commission, I note that Madigan J in ***Chief Registrar v Marawai and Chaudhry***(Unreported, Case No.002 of 2012, 12 September 2012) (Paclii: [2012] FJILSC 1, <http://www.paclii.org/fj/cases/FJILSC/2012/1.html>), concluded at [13]:

> *'In reviewing the evidence and submissions in this enquiry I have been ever mindful of* ***the requisiteburden of proof, which is the preponderance of probabilities****, more particularly defined in this Commission[']s judgment in* ***C.R. v H.A. Shah. ILSC 007/2012*** *[sic 2011].'* [My emphasis]

[107] In ***Chief Registrar vHaroon Ali Shah (Judgment)***, (Unreported, ILSC Case No.007 of 2011, 1st June 2012), Madigan J stated at [6] as follows:

> *'The standard of proof required in disciplinary proceedings is not prof beyond reasonable doubt, but a varying standard of the civil standard, referred to at times as the "preponderance of probabilities" (See* ***A Solicitor v Law Society of Hong Kong*** *[2008] 2 HKLRD 576, HK Court of Final Appeal).* ***The more serious an act or omission alleged, the more improbable it must be regarded, and in proportion to the improbability the evidence will need to be more compelling****. I have kept this standard uppermost in my mind when considering the charges against the Respondent.'* [My emphasis]

[108] In***A Solicitor v Law Society of Hong Kong***(cited by Madigan J in ***Shah*** above), Mr. Justice Bokhary PJ(with whom Li CJ, Chan and Ribeiro PJJ and Mason NPJ agreed)concluded at [116]:

> *'****In my view, the standard of proof for disciplinary proceedings*** *in Hong Kong* ***is a preponderance of probability*** *under the* ***Re H*** *approach****. The more serious the act or omission alleged, the more inherently improbable must it be regarded****. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability.****If that is properly appreciated and***

*applied in a fair-minded manner, it will provide an appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation.'* [My emphasis]
(See Asianlii: [2008] HKCFA 15, <http://www.hklii.hk/eng/hk/cases/hkcfa/2008/15.html>)

[109] In relying upon ***Re H & Others (Minors) (Sexual Abuse: Standard of Proof)***[1996] AC 563 and the *'preponderance of probability under the Re H approach'*,Bokhary PJ also cited in***A Solicitor v Law Society of Hong Kong***an excerpt from the judgment of Lord Nicholls in ***Re H*** as follows:

*'65. In a speech with which Lord Goff of Chieveley and Lord Mustill agreed, Lord Nicholls said this at p.586 D–G:*

*"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that* ***the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability****. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under- age stepdaughter than on some occasion to have lost his temper and slapped her.* ***Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.*** *Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred.* ***The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established****."*

*That, as Lord Nicholls pointed out at p.587C-E, goes to the "in-built flexibility" of proof on a preponderance of probability, not the creation of a new standard.'* [My emphasis]

[110] Interestingly, before adopting in ***A Solicitor v Law Society of Hong Kong***the approach of Lord Nicholls in ***Re H,***Bokhary PJ undertook a review of the law as

to the standard of proof in civil proceedings as applied in England and Wales, Scotland, Canada and Australia, as well as by the Privy Council,(citing such cases as ***Blyth v Blyth***and the 'statement by Dixon J in ***Briginshaw vBriginshaw'***) and how that standard has been applied in Hong Kong. One of his more interesting comments was as follows:

> *'75. I cannot recall what I thought about it when, some 40 years ago, I first came across this passage in Kenny's Outlines of Criminal Law, 18th ed. (1962) at pp 501-502:*
>
> > *"**The progressive raising of the standard of proof, as the gravity of the accusation to be proved increases**, is illustrated in an extract from Lord Brougham's speech in defence of Queen Caroline [in the House of Lords in 1820]: **'The evidence before us'; he said, 'is inadequate even to prove a debt – impotent to deprive of a civil right – ridiculous for convicting of the pettiest offence – scandalous if brought forward to support a charge of any grave character – monstrous if to ruin the honour of an English Queen**.'"*
>
> *What strikes me about it now is this. **While the learned editor refers to "a progressive raising of the standard of proof", <u>Lord Brougham was actually talking about the strength (or rather the lack of strength) of the evidence.</u>** Whatever the nature of the case, it is always necessary for the tribunal of fact to ask itself: **what are the crucial issues and what is the important evidence on them**?'*[My emphasis]

[111] Bokhary PJ's citing of *Kenny's Outlines of Criminal Law*and the reference to Lord Brougham was in the following contextas Gerald Uelmen (trial advocate and Santa Clara University Professor of Law), has explained:

> *'Brougham was representing Queen Caroline of England in proceedings before Parliament. King George IV, who had just succeeded to the Crown, was seeking to divorce his wife, Queen Caroline, on grounds of her adultery. Parliament was considering a special bill that would deprive the Queen of her title ...It was certainly the British "trial of the century" for 1820.'*
>
> (See Gerald F. Uelmen, 'Lord Brougham's Bromide: Good Lawyers as Bad Citizens', 30 *Loy. L. A. L. Rev.* 119; reproduced in *Santa Clara Law Digital Commons,* 1 January 1996,<http://digitalcommons.law.scu.edu/facpubs/379/>)

Whilst Brougham's advocacy is often cited in the context of ethics and the fearless advocate (as was similarly discussed by Uelmen in his article cited above), Bokhary PJ instead focused onLord Brougham's submission regarding evidence, that is, **the strength of the evidence must be relative to the nature of the charge**. Thus, the strength of the evidence required in proving a debt is far different to proving one of the most serious allegations onecould then make in Britain in 1820, that is,alleging adultery by the Queen of England so as to form the basis of an application for a divorce and depriving her of her title.

[112] Returning to Fiji, in ***Chief Registrar v Adish Kumar Narayan***(Unreported, Case No.009 of 2013, 2 October 2014**)**, (Paclli: [2014] FJILSC 6,<http://www.paclii.org/fj/cases/FJILSC/2014/6.html>), Madigan J applied the*'preponderance of probabilities' approach* concluding at [39]:

> '*In the application of the law pertaining on both occasions and in application of* ***theburden of proof pertaining to a very senior practitioner on a very serious allegation*** *this Commission finds that the complaint against the practitioner is* ***not established.***
> [My emphasis in bold not underlined]

[113] I notethat the judgments of Madigan J (sitting as the ILSC Commissioner) in ***Chaudhry***(2012), ***Shah***(2012)and ***Narayan*** (2014)were each appealed. ***Chaudhry*** appealed to the Court of Appeal and then the Supreme Court. On 20th April 2016,the Supreme Court unanimously ordered (amongst other matters):

> *'5. It is declared that* ***the judgment of the Independent Legal Services Commission dated 12th September 2012 stands affirmed****, and accordingly the sentence imposed on Mr. RajendraChaudhry by the said Commission on 5th October 2012 shall stand, and his period of suspension from legal practice will be up to 1st March 2017.'*
> [My emphasis]
>
> (See ***Chaudhry v Chief Registrar*** (Unreported, Supreme Court Case No.CBV0001 of 2015, Gates CJ, Marsoof and Keith JJSC,20 April 2016) **(**Paclii: [2016] FJSC 3, <http://www.paclii.org/fj/cases/FJSC/2016/3.html>)

[114] As for the judgmentsof Madigan J in both ***Shah*** and ***Narayan,*** I was previously advised earlier this year by Counsel appearing on behalf of the Chief Registrar in another case (*Chief Registrar v Raman Pratap Singh*) that in relation to ***Narayan***there is an appeal pending before the Court of Appeal filed by the Chief Registrar (see ***Chief Registrar v Raman Pratap Singh***, Unreported, ILSC Case No.003 of 2015, 7 June 2016, at [39] and [44]) (Paclii: [2016] FJILSC 3, <http://www.paclii.org/fj/cases/FJILSC/2016/3.html>).In ***Shah***, following judgments being delivered by Justice Madigan on 1st and 22 June 2012 in relation to finding the offences proven and imposing a sentence respectively, an application was made before a single judge of the Court of Appeal for a stay pursuant to Rule 34 of the Court of Appeal Rules. As the President of the Fiji Court of Appeal, Mr. Justice W.D. Calanchini, observed in ***Haroon Ali Shah v Chief Registrar*** (Unreported, Court of Appeal Case No.ABU50.2012, 3 December 2012), (Paclii: [2012] JFCA 101, <http://www.paclii.org/fj/cases/FJCA/2013/141.html>, in refusing an application for a stay pending appeal:

> *'[9]. The Appellant has appealed both the findings of guilt made on 1 June 2012 and the penalty imposed by the Commission on 22 June 2012 and seeks a stay pending the determination of his appeal by the Court of Appeal.*

I am unaware as to the current status of the appeal in ***Haroon AliShah*** (2012).

[115] Theinaugural ILSC Commissioner prior to the appointment of Justice Madigan, was the former High Court Judge, Mr. Justice John Connors. In ***Chief Registrar v Sheik Hussein Shah*** (2010)(Unreported, ILSC Case No.024 of 2010, 30 September 2010) (Paclii: [2010] FJILSC 24, <http://www.paclii.org/fj/cases/FJILSC/2010/24.html>), Commissioner Connors, after reviewing the standard that has been applied to disciplinary proceedings in various common law jurisdictions, concluded at [11] that the burden of proof to be applied by the Independent Legal Services Commission in Fiji was to be as follows:

> *'...**the appropriate standard of proof to be applied is the civil standard varied according to the gravity of the act to be proved**, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong.* '[My emphasis]

[116] Accordingly, I have adopted the same standard as set out by Commissioner Connors in ***Sheik Hussein Shah***(2010),and to which Justice Madigan referred toin both***Haroon AliShah***(2012)(citing ***A Solicitor v Law Society of Hong Kong***) and ***Marawai and Chaudhry***(2012) as ***'the preponderance of probabilities'***,(the latter judgment being affirmed by the Supreme Court earlier this year). Madigan J also applied this standard in***Narayan*** (2014).

[117] I note that the present application before me concerns one Count of**'Unsatisfactory Professional Conduct'**, that is, as section 81 of the *Legal Practitioners Decree 2009* (cited in full above) states: '*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'*.Although this is a lesser offence than the more serious charge of 'Professional Misconduct', the onus is still upon the Applicant to prove the charge to the civil standard, that is, upon the balance of probabilities, ***according to the gravity of the act to be proved.***

**6. Conclusion**

[118] In reaching my conclusion as to whether the Applicant has satisfied the legal burden upon him to have proven that the Respondent is guilty of 'Unsatisfactory Professional Conduct, I note, in summary, as follows:

(1) **Counsel for the Applicant has not cited any case law, legislation or 'Rules of Professional Conduct and Practice'in support of his case**, that is, where it is stated that there is an onus upon a legal practitioner to ask a declarant as to **their capacity to sign a caveat** before witnessing their signature;

(2) It is clear that **RohitLatchan was authorised as the Chief Executive to sign on behalf of the company as per a 'Resolution by the Directors of Latchan Holdings Limited' dated 18th November 2010**.The Respondent produced a copy of this document to the Applicant in his letter of April 2015. It was included in the *Agreed Bundle of Documents* filed with the Commission on 19th April 2017 and relied upon by Counsel for the Respondent. Thus, the evidential burden shifted to the Applicant if he wished to dispute its validity.Counsel for the Applicant, however,didnot

lead any evidence to the contrary simply submitting from the Bar Table that he did not question the document's authenticity rather its veracity – something which I am still at a loss to understand – nor was this made any clearer for me after reading Counsel's written submissions filed post-hearing – perhaps, the fault is mine. In any event, there has been no reason placed before the Commission as to why the Respondent or his staff would not have accepted the document on face value;

(3) The Mortgage and Transfer were executed on 28th July 2014. The Transfer was stamped on 6th August 2014 in readiness for settlement. Unfortunately, on 19th August 2014, the Vendor, Ram Lagan, died. On 13th October 2014, **Sherani& Co opened a file,and at some stage near that date the Respondent gave advice to a representative/s of Latchan Holdingstolodge a caveat to protect the company's interest as purchaser**.**Sherani& Co then received instructions to lodge a caveat in accordance with that advice. <u>In my view, what the Respondent advised was entirely appropriate;</u>**

(4) By contrast, **if the Respondent had failed to so advise representative/s of Latchan Holdingsto lodge a caveat to protect the company's interest as purchaser, this may well have been the basis of a negligence action**, as occurred, for example, in ***Ram v Grahame & Co***[1975] FijiLawRp 23; [1975] 21 FLR 158 (Paclii: (26 November 1975) (Gould V.P., Spring J.A.) wherein the Court of Appeal noted:

> *'They [the plaintiffs] alleged in their Statement of Claim (inter alia) that the respondents had failed (a) to advise the appellants to lodge caveats against the land; (b)* ***to lodge caveats against the titles to the land … with the Registrar of Titles to protect the interests of the appellants under the agreements for sale*** *and (c) to advise them of their rights under the agreements; and generally had failed to discharge the duty they owed as their solicitors.*
>
> *At the outset it should be emphasised that in considering a claim for negligence against solicitors the facts vary from one case to another, and it is not always possible to lay down general rules. However,* ***the guiding principle is that a solicitor's duty is to use reasonable care and skill in dealing with his client's affairs as the circumstances of the particular case demand****. It is an implied term of a contract between a solicitor and his client that <u>the solicitor should exercise reasonable case</u> [sic - care] and skill in the discharge of his duty.'*[My emphasis]

(5) The Respondent's client was Latchan Holdings Limited. I am satisfied that he fulfilled his duty '*to use reasonable care and skill in dealing with his client's affairs as the circumstances of the particular case demand[ed]'*. Indeed, I am of the view that the Respondent's actions were **entirely appropriate to protect the interests of his client, the purchaser company. His client was neither the deceased vendor nor his estate, nor the deceased vendor's relatives;**

(6) **The complaint lodged with the Chief Registrar that has formed the basis of the current application before the Commission was lodged by Prakash Lagan, the son of the vendor, Ram Lagan. Neither Prakash Lagan, nor Ram Lagan, wasthe Respondent's client.**All the documentation in relation to the Sale and Purchase Agreement, the Transfer and the Mortgage, as well as a Will appointing Pranita Devi Jattan of Sydney and Gardiner Whiteside (Secretary of Latchan Holdings Limited) as the Executors and Trustees of the Vendor's Estate,were prepared by Solanki Lawyers acting for the Purchaser and witnessed by legal practitioners other than the Respondent;

(7) **I have not heard any evidence from the complainant, Prakash Lagan, the vendor's son, as to why he lodged his complaint with the Chief Registrar and/or why he feels aggrieved.** This is not to say that a member of the public cannot make a complaint as to the behavior of a legal practitioner who is not acting on their behalf and/or may have acted for the other party in a legal dispute. Indeed, it would seem that there are separate proceedings pending before the High Court in relation to the sale and purchase of the disputed property. **There was, however, in the complaint dated 19th February 2015 lodged with the Applicant by Prakash Lagan, no mentionthat the sale and purchase agreement between Ram Laganand Latchan Holdings Limited, if declared valid, may defeat Prakash Lagan's claim for which he had lodged a caveat in 2012. Further, in the response dated 12th May 2015 sent by the complainant, Prakash Lagan, to the Applicant,there was no mentionthat according to the Will of Ram Lagan**, apart from Prakash Lagan's mother being granted a lifetime estate, ***'upon her demise*** ... [the Estate would pass to the]***grandson PRAYAG LAGAN*** *(father's name*

***PrakashLagan****) for his own use and benefit absolutely'*.**Presumably, the Estate would pass to Prakash Lagan's son. Whether this has some relevance or otherwise as to the complaint lodged with the Commission remains unexplained.**

(See 'Complaint -19/02/15', and 'Prakash Lagan's letter to CR -12/05/15', *'Agreed Bundle of Documents',* 19th April 2016, Doc.No.1 and Doc.No.23, pp. 1-5 and 65; and copy of Order made by the Master of the High Court at Suva on 10th December 2015 and sealed on 17th December 2015 in *'Memorandum of Counsel',* filed and served on 10th June 2015);

(8) It is my understanding that what Counsel for the Applicantrelies upon to prove his case are the following documents:

(i)the complaintsmade by the vendor's son dated 19th February 2015 and 12th May 2015;

(ii) acaveat document declared on 28th October 2014;

(iii)RohitLatchan's Order of Bankruptcy;and

(iv)a copy of s.189(1) of the *Companies Act.*

**Counsel for the Applicant has called no oral evidence in support of the Application alleging that the conduct by the Respondent in taking the declaration before MrLatchan (and not 'making full and proper enquiries into the status' of MrLatchan), amounted to*'unsatisfactory professional conduct'***in contravention of theprovisions of Section 81of the*Legal Practitioners Decree 2009*, that is, conduct '*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';*

(9) **As to why the Respondent would be required into 'making full and proper enquiries into the status' of Mr.RohitLatchan (beyond the resolution of the directors) has, in my view, never been explained.** Indeed, I have noted above, the assistance of the judgment of Rodney Hansen Jin ***Harlow***(cited to me by Counsel for the Respondent) that '*in the absence of some indication of a disability, I see no reason in principle or any practical necessity for a solicitor to go behind the word of a client. That would be antithetical to the relationship of solicitor and client and … would put a solicitor under a continuing obligation to monitor the financial and legal status of their clients'*;

(10) I found the evidence of Mr. Clarke in relation to the taking of a declaration for a caveat, both relevant and important opinion evidence as to '*the practice of legal practitioners witnessing statutory declarations'* in Fiji. That is, his evidence was not just as to his own practice (but also that of four named senior practitioners to whom he had spoken), evidence as to whatRodney Hansen J in ***Harlow*** referred toas, an '***accepted standard of conduct … sanctioned by common usage'***;

(11) As for the **'*due care and diligence'***that'***a member of the public would expect [of] a reasonable and competent legal practitioner'*** '*when witnessing documents specially documents such as [a] caveat and affidavit',* I would have thought thatthe '*due care and diligence'*expected**would be that the practitioner has correctly administered the declaration**. That is, as administered the declaration in accordance with Section 3 of the Statutory Declarations Act and in the manner as Mr. Clarke set out in his evidence. **There is no evidence before the Commission that the Respondent did not correctly administer the declaration in the manner as set out by Mr. Clarke. Further, the onus was upon Mr.Latchan, not the Respondent, to advise if what he was declaring was not true and correct;**

(12) **As for the enquiries that Counsel for the Applicant expected that a legal practitioner would undertake so as to check the veracity of what was stated in a declaration, in particular, in relation to a company**,Counsel for the Applicant submitted from the Bar Table that this would just require a telephone call and/or a letter. By contrast, **the Respondent called Mr. Clarke who explained that it was not that simple. I accept the evidence of Mr. Clarke**;

(13) It has also never been properly articulated by Counsel for the Applicantas to when the legal practitioner was meant to make such enquiries regarding Mr.Latchan. Was he to do so after the document had been prepared by the firm's law clerk and the client returned to the firm to sign the declaration? Was the legal practitioner meant to then say to Mr.Latchan"Now, before I can take this declaration I have to make my own enquiries as to your status"? If that is what is proposed in all caveat declarations, it seems, in my view (and confirmed by the evidence of Mr. Clarke), divorced from the realities of practice and an additional

unnecessary cost to be imposed upon a client;

(14) In addition to the evidence of Mr. Clarke, Counsel for the Respondent also cited in support **the tests** set out in ***Bolam v Friern Hospital Management Committee*** and ***Midland Bank Trust Ltd v Hett Stubbs and Kemp.***In the latter it was stated:***'The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession***.'I am more than satisfied that the Respondent has met that test;

(15) Finally, in relation to the burden of proof, I have noted the statements of Dixon J in both***Briginshaw*** and ***Wright*** as well as that of Lord Denning in ***Blyth***. That is, '***the nature and gravity of an issue necessarily determines the manner ofattaining reasonable satisfaction of the truth of the issue'*** and '***In proportion as the offence is grave, so ought the proof to be clear.'*** I am of the view that this was encapsulated by Commissioner Connors in his judgment in ***Shah*** (2010), that is, '***the civil standard varied according to the gravity of the act to be proved'***. I am also of the view that a similar standard (described as *'the preponderance of probabilities'*)was applied by Justice Madigan in ***Shah***(2010) (citing ***A Solicitor v Law Society of Hong Kong***),***Marawai and Chaudhry*** (the latter affirmed by the Supreme Court) and in***Narayan***.

[119] For the above reasons, **I am of the view that:**

**(1) The Applicant has failed to prove that that it isunsatisfactory professional conductfor a member of the legal profession (apart from seeking identification) to witness a signature on a caveat document 'without making full and proper enquiries into the status' of a declarantprior to the execution of a caveat document. Therefore, I am not satisfied that the legal practitioner has engaged in unsatisfactory professional conduct;**

**(2) In the alternative, even if, in some circumstances, the failure to make fulland proper enquiries into the status of a declarant were to amount to unsatisfactory professional conduct, I am not satisfied that the Applicant hasproven to the requisite standard that the Respondent's conduct in the present application before me amounted to unsatisfactory professional conduct**particularly in light of the fact that-

(a) the 'Resolution by the Directors of Latchan Holdings Limited' dated 18th November 2010authorisedRohitLatchan (as the Chief Executive) to sign on behalf of the company; and

(b) the documentation in relation to the sale and purchase wasprepared by Solanki Lawyers acting for the Purchaser and witnessed by legal practitioners other than the Respondent, which occurred prior to the Respondent's firm being instructed to preparea caveat, such that the Respondent's actions would be, as the English and Welsh Court of Appeal said in***John Mowlem Construction Plc,'***<u>*supported as it is by the fact that such questions did not occur at the time to other experienced solicitors'.*</u>

[120] Accordingly, the charge is dismissed.

**<u>7. A word of caution</u>**

[121] I note that section 124 of the *Legal Practitioners Decree 2009* limits any award that the Commission may order in relation to costs and expenses as follows:

*'Costs*

> *124.—(1) After hearing any application for disciplinary proceedings under this Decree,* ***<u>the Commission may make such orders</u> as to the payment of costs and expenses as it thinks fit<u>against any legal practitioner or partner or partners of a law firm</u>.***
> *(2)* ***The Commission <u>shall not</u> make any order for payment of costs and expenses <u>against the Registrar</u> 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.'*

[122] It is clear, therefore, that the Commission cannot award costs against the Applicant and/or theChief Registrar's staff, that is, the investigators and lawyers of the Legal Practitioners Unit employed within the office of the Chief Registrar. **Hence, I would expect that <u>BEFORE any prosecution is filed with the Commission to commence disciplinary proceedings against</u>**

**a legal practitioner and/or a legal firm,** that what is to be asserted in the application as to the allegedconduct by the legal practitioner and/or firm **has a sound legal basisso as to be considered an impropriety**. That is,**what is alleged to have been committed could be considered sufficient to be the basis of a charge of 'unsatisfactory professional conduct' or 'professional misconduct' as supported by a relevant Fijian statute, decree, rule and/or the citation of case law from Fiji (or from another relevant common law jurisdiction)in support of that proposition.Further, in the absence of a relevantFijian statute, decree, rule or Fijian case law,** (given that pursuant to section 114 of the *Legal Practitioners Decree 2009*'the Commission is not bound by formal rules of evidence' when conducting disciplinary hearings), **thenI would expect that an expert opinion be obtained from within Fiji confirming that such conduct could be considered as an improprietyto support a charge of 'unsatisfactory professional conduct' or 'professional misconduct'.**

[123] Hopefully, the implementation of the above will assist the Applicant by having the staff of the LPU concentrate uponinvestigating and pursuing allegations of impropriety that have an appropriate**legal**foundation. It will also mean that the Commission's limited resources will be dedicated to conducting disciplinary hearings where there is a legal basis underpinning the complaint, that is, that the alleged conduct,if proven, could be said to amount to 'unsatisfactory professional conduct' or 'professional misconduct'.

**ORDER**

[124] The formal Order of the Commission is:

1. The Application filed before the Commission in Case No. 016 of 2015, *Chief Registrar v VirenKapadia,*isdismissed.

Dated this 21st day of September 2016.

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Dr.Thomas V.Hickie
COMMISSIONER