IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 002 of 2016

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

VILIMONE VOSAROGO (AKA FILIMONI WR VOSAROGO)

Respondent

Coram: Dr T.V. Hickie, Commissioner

Counsel for the Applicant: Mr A. Chand
Respondent: Ms B. Malimali (22nd & 23rd September 2016) with Mr Vosarogo;
Mr Vosarogo in person 28th November 2016 and 7th December 2016; and
Mr Vosarogo in person with Ms B. Malimali assisting on 3rd February 2017

Dates of Written Submissions pre-hearing:
Applicant (6th October 2016)
Respondent (14th October 2016)

Dates of Hearing: 28th November 2016, 7th December 2016 and 3rd February 2017
Date of Judgment: 6th February 2017

RULING ON (1) APPLICANT'S INTERLOCUTORY APPLICATION FOR AMENDMENT OF CHARGE; AND (2) RESPONDENT'S INTERLOCUTORY APPLICATION FOR CHARGES TO BE STRUCK OUT

1. Introduction

[1] On 26th November 1865, a novel written by an Oxford academic and mathematician, Charles Lutwidge Dodgson, under the nom de plume (or pen name), 'Lewis Carroll', was published by Macmillan titled, ***Alice's Adventures in Wonderland***. It is a novel that has remained with me, and no doubt for many other lawyers, since childhood.

[2] Even though, from that novel, Chapter 11, *'Who Stole the Tarts?'* and Chapter 12, *'Alice's Evidence',* may bear a familiar similarity to the bizarreness which can occasionally occur in a courtroom setting, it is Chapter 7, *'A Mad Tea-Party',* and the words of the March Hare, ***"Then you should say what you***

mean", that perhaps should be a motto for all lawyers, as the following extract highlights:

> *'The Hatter opened his eyes very wide on hearing this; but all he said was, "Why is a raven like a writing-desk?"*
> *"Come, we shall have some fun now!" thought Alice. "I'm glad they've begun asking riddles.—I believe I can guess that," she added aloud.*
> *"Do you mean that you think you can find out the answer to it?" said the March Hare.*
> *"Exactly so," said Alice.*
> *"Then you should say what you mean," the March Hare went on.*
> *"I do," Alice hastily replied; "at least—at least I mean what I say—that's the same thing, you know."*
> *"Not the same thing a bit!" said the Hatter. "You might just as well say that 'I see what I eat' is the same thing as 'I eat what I see'!"*
> *"You might just as well say," added the March Hare, "that 'I like what I get' is the same thing as 'I get what I like'!"*
> *"You might just as well say," added the Dormouse, who seemed to be talking in his sleep, "that 'I breathe when I sleep' is the same thing as 'I sleep when I breathe'!"*
> *"It is the same thing with you," said the Hatter, and here the conversation dropped, and the party sat silent for a minute, while Alice thought over all she could remember about ravens and writing-desks, which wasn't much.'*
>
> (Lewis Carroll, ***Alice's Adventures in Wonderland,*** Sterling Publishing Co., New York, 2005, p.62-63; See also, online version, Cleave Books, 'Good Reading on Line', <http://www.cleavebooks.co.uk/grol/alice/won07.htm>)

[3] I reflected upon the above after having sat in the Commission's tribunal hearing room in Suva in late November and early December last year hearing arguments about the applicability or not of duplicity to the present case. Coincidentally, this was just on 151 years since the words from Mr Carroll's novel were first published in late November 1865. Subsequently, one of my tasks over this past hot summer has been to write a judgment clarifying the law on duplicity and then applying that to the present case before me. Duplicity is a topic that has, over the years, stretched the mind of many a lawyer (both prosecutors and defence lawyers alike) and, of which, judgments can, arguably, at times, be as confused as attempts to solve the Hatter's riddle as to *"Why is a raven like a writing-desk?"* Hopefully, this judgment will not create more confusion but assist in providing some further clarity as to how to apply the law on duplicity and leave for others to solve the Hatter's riddle.

2. Background

[4] On 27th June 2016, an Application was filed by the Chief Registrar setting out three allegations of Professional Misconduct against the First Respondent in relation to the operation of the First Respondent's Trust Account.

[5] On 15th September 2016, Counsel for the Applicant provided a '*Prosecution Case Statement'* (that was later filed on 25th September 2016) wherein it was indicated at paragraph 11 that **the Applicant would seek leave to amend Count 3 to include sections 12(4) and 12(6) of the *Trust Accounts Act 1996*.**

[6] When the parties appeared before me on the first return date of the application, 22nd September 2016, I declared that I had come to know the Respondent legal practitioner, Mr Vosarogo, when we did a long trial together as co-Counsel defending a FICAC prosecution in 2015. In the circumstances, I asked Counsel for the Applicant whether there was any objection taken to my hearing this present matter before the Commission in relation to Mr Vosarogo? Counsel for the Applicant indicated there was no such objection. For the record, in 2015, Mr Vosarogo appeared as Counsel defending one of five co-accused persons where I appeared, together with another Australian Counsel, instructed by a local practitioner, representing another of the co-accused.

[7] Counsel for the Applicant then advised (as was mentioned in his *'Prosecution Case Statement'* dated 15th September 2016), that he was now seeking the Commission's leave to amend Count 3 to include reference to sections 12(4) and 12(6) of the *Trusts Accounts Act 1996*. Counsel for the Respondent indicated that she would be opposing that application. The matter was adjourned until the following day, 23rd September 2016, when it was indicated to the Commission by Counsel for the Applicant that discussions had taken place overnight between the parties and that Counsel for the Respondent had indicated that, apart from opposing the Application to Amend Count 3, she also wished to make an application in relation to an alleged *'duplicity of the charges'*. Further, the parties were in agreement in asking to have each application dealt with by me "on the papers". As such, Orders were made for the filing and serving of written submissions and both applications adjourned

for judgment.

[8] Having read the parties' respective written submissions, I had both parties notified that the applications would be relisted before me on 28th November 2016 (which was the first day of the November/December 2016 Sittings of the Commission) not for judgment, but to clarify certain issues prior to judgment. At that relisting, I noted that (perhaps it was my fault the way the Orders had been drafted), however, the Respondent's application was "buried in the middle" of his submissions in response. Thus, the way I saw it, the Respondent was making an oral application, as he had not filed a formal application, whereas Counsel for the Applicant had provided me with a draft application that had been provided to the Commission. No objection was taken to me proceeding to hear each application in this way.

[9] I then explained that I wished to ask questions of both parties so as to clarify their submissions and also drew the attention of both parties to an article by Jill Hunter (later Professor), 'Prosecutors' Pleadings and the Rule against Duplicity', (1980) 3 *University of New South Wales Law Journal* 248. (See Austlii: <http://www.austlii.edu.au/au/journals/UNSWLawJl/1980/2.pdf>.) After providing a copy of that article to each party, I asked them to consider what was contained therein and made Orders for each party to submit any further written submissions and adjourned the matter for hearing on 7th December 2016. I had then hoped to be in a position to deliver my Ruling in relation to each application. Unfortunately, as I considered my judgment over this past summer, it became clear that there were further issues in relation to Counts 2 and 3 that had not been canvassed previously in submissions and, for which, I needed to allow the parties the opportunity to address me. Hence, I relisted the matter at the beginning of these Sittings (last Friday, 3rd February 2017) to allow them to do so.

[10] Apart from raising with the parties on 3rd February 2017, certain issues that had arisen as I was considering my judgment and giving each of them the opportunity to address me on them, I also raised at the conclusion of the hearing in 3rd February 2017, as to how the parties wished me to confirm as to how they wished for me to proceed where there had not been strict compliance with the

Orders that I had made on 23rd September 2016 regarding the filing of formal applications. It was noted that the draft application of the Applicant to Amend Count 1 had been eventually “stamped” by the Secretary of the Commission and served on 6th October 2016, but it appeared that no original copy had been filed and left with the Commission. This was resolved by Counsel for the Respondent providing the Commission with his copy for photocopying and raising no objection to the “stamped” but not filed application. Similarly, even though the Respondent had raised in his submissions his objection to the proposed Amended Count 3 together with his objections to Count 1 and Count 2 and was also now objecting to Count 3 in its present form, Counsel for the Applicant was of the view that as he had previously agreed that such objections could be dealt with by way of an oral application with written submissions in support (and had now been supplemented by further oral argument), no formal written application was needed, at this late stage, to be filed with the Commission. Further, both parties agreed that I should deliver one judgment dealing with both applications, that is, covering all three Counts as presently filed with the Commission including the Applicant’s proposed Amended Count 3. I thank Counsel for the Applicant as well as the Respondent legal practitioner for their sensible approach. This then is my Ruling.

3. The Law

[11] The reason that I had drawn the attention of both parties to the article from Professor Hunter, was that, although published in 1980, it dealt with a number of the cases raised by the parties presently before me in their respective written submissions. Further, Professor Hunter had, in my view, succinctly encapsulated in her article a method that may have assisted the parties in the present application before me in analysing whether one or all there Counts were duplicitous and further to understand (as she noted at 250) that there is a *‘distinction between an information that is bad for duplicity and one which is bad for uncertainty’*. As Professor Hunter explained (at 250-251):

> *‘The* first step *in either case is to see* ***if more than one offence is contained in an information*** *… Once it is determined that more than one offence exists,* ***it is then necessary to look at the way in which the offences are joined****. If they are joined in the alternative, then the information is uncertain;* ***if they are joined conjunctively, the information is duplicitous*** *…*

The most common pitfall for courts faced with this issue is for the first step to be by-passed and an examination of the form of joinder substituted to determine the form of the defect *...* *The use of "and" or "or" may operate merely to connect two adjectives describing a single offence rather than to connect two offences* *...*

The first step of ascertaining the number of offences created in a statutory provision *appears deceptively simple. That is until one is confronted with the mass of confusing cases which do not provide any guidance of the metes and bounds of a statutory offence. Generally the cases say no more than one must determine the intention of Parliament. How the intention of Parliament is to be determined is not explained.'* [My emphasis]

[12] Apart from examining, as Professor Hunter noted (at 267), *'the approach of the Courts in analysing the number of offences created by Parliament and restated in the information'* and *'equating the number of offences with either portions of the defendant's behavior or with the results of such behaviour',* she also examined (at 250-251) where:

'*... only one offence is contained in an information****, but either the particulars or the evidence indicate that that offence has been committed more than once****. This may create what the English courts refer to as* ***a latent duplicity in the information****.*

Definitional problems of similar complexity as those arising in relation to determining the offences created in a statute arise in determining the number of offences contained in a defendant's actions.' [My emphasis]

[13] Two schools of thought have developed in this area as outlined by Kirby J in his judgment in the Australian High Court in ***Walsh v Tattersall*** [1996] HCA 26; (1996) 188 CLR 77. The first being *'the practical approach'* encapsulated by House of Lords in ***Director of Public Prosecutions v Merriman*** [1973] AC 584. The second favouring '*the rule of stringency'* represented by the approach of the majority of the High Court of Australia in *Walsh v Tattersall.*

[14] Interestingly, Professor Hunter's article was one of three academic criticisms of the stringent approach that were later cited by Kirby J in his judgment in *Walsh v Tattersall*. Kirby J characterised such criticisms as having, what he termed, an ***'impatience with technicality'*** as he explained (at 93-94):

'In recent years, courts in England have embraced a less stringent approach to complaints about duplicity. They have done so by taking what they have described as a "practical" or "commonsense" approach and by rejecting what they have called "technicalities which have no

> ***relevance to modern procedure in criminal prosecutions": Director of Public Prosecutions v Merriman*** *... This approach has gained a degree of support from some academic writers, impatient about the potentiality of the rule against duplicity to afford a technical refuge to an accused person otherwise lacking a case with substantive merit: see for example Glanville Williams, "The Count System and the Duplicity Rule"* [1966] *Criminal Law Review* 255 at 265*; Solhany, "Duplicity - Is the Rule Still Necessary?"* (1964) 6 *Criminal Law Quarterly* 205; *and Hunter, "Prosecutors' Pleadings and the Rule Against Duplicity" ...* ***The English authorities, and some of the impatience with technicality that lay behind academic criticisms, have lately led a number of Australian courts to depart from the rule of stringency suggested by the old line of authority****... In South Australia, the Merriman approach was favoured in Weinel v Fedcheshen* [1995] SASC 5216; (1995) 65 SASR 156*. That decision was substantially embraced by the Full Court of the Supreme Court of South Australia in this case ...*
> ***Thus, behind the resolution of this appeal lies an important question of legal policy****. Scholarly analysis of judicial decisions on this subject has produced scathing criticisms, suggesting a failure on the part of the judiciary to identify the applicable principles (See Hunter* at 267). ***Only by clarifying the essential reasons for the earlier stringent approach of this Court****, for example in Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 ***will a coherent doctrine be found which can accommodate demands for a more "modern", "practical" and "commonsense" rule*** *but which is still appropriate to the accusatory character of criminal procedure in Australian courts.*
> [My emphasis]

[15] As Kirby J noted, in *Walsh* (at 104) *'the respondent [prosecutor] relied heavily on Lord Diplock's statement in Merriman'* (cited in the latter at 607 C) as follows:

> *'The rule against duplicity, viz that only one offence should be charged in any count of an indictment ... has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence.* ***Where a number of acts of a similar nature committed*** *by one or more defendants* ***were connected with one another, in the time and place of their commission or by their common purpose****, in such a way that they* ***could fairly be regarded as forming part of the same transaction or criminal enterprise****, it was the practice, as early as the eighteenth century,* ***to charge them in a single count of an indictment****.'*
> [My emphasis]

[16] Similarly, in the present case before me, Counsel for the Applicant in his written submissions dated 26th October 2016 (at paragraph 9), has relied upon the above statement from Lord Diplock in *Merriman* (as was later cited by

Madigan J at para 35 in ***Chaudhry v State***, unreported, High Court of Fiji at Suva, Criminal Miscellaneous Action Nos. HAM 236 of 2013 and HAM 239 of 2013, 6 March 2014; Paclii: [2014] FJHC 122, <http://www.paclii.org/fj/cases/FJHC/2014/122.html>). Interestingly, the Respondent legal practitioner has also cited (at paragraph 3.3) of his written submissions dated 1st November 2016, the same statement from Lord Diplock in *Merriman* as *'the basis of the challenge based on duplicity of charges'* in Counts 1 and 2 in the present case before me.

[17] In *Walsh,* the argument of the prosecution was summarised by Kirby J (at 103) thus:

> *As a matter of practicality, the respondent submitted,* ***the payments to the appellant were part of a continuous course of conduct****, intimately connected with one another,* ***so as, in effect, to constitute the one continuing criminal enterprise****. This Court was urged to reject such meritless technicalities. So went the arguments for the respondent.'*
> [My emphasis]

[18] According to Kirby J in *Walsh* (at 104), various 'principles governing duplicity in criminal counts' can be gleaned from examining 'a number of previous decisions in which questions of duplicity in criminal pleadings have arisen'. In particular, he noted (at 106):

> ***'More recently, and after Merriman was decided in the House of Lords, the same strict rule was followed in this Court in S v The Queen*** *[1989] HCA 66; (1989) 168 CLR 266. Gaudron and McHugh JJ explained why (at 284):*
>
> > *"The rule against duplicitous counts in an indictment originated as early as the seventeenth century ... It may be ... that the rule grew out of the strict formalities associated with criminal pleadings at a time when the difference between misdemeanour and felony was the difference between life and death. However, the rule against duplicitous counts has, for a very long time, rested on other considerations.* ***One important consideration is the orderly administration of criminal justice****. There are a number of aspects to this consideration: a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied;* ***in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should***

> ***arise, of a plea of autrefois acquit or autrefois convict** ...*
> ***The rule** against duplicitous counts **has also long rested upon a basic consideration of fairness, namely, that an accused should know what case he or she has to meet**."'*
> [My emphasis]

[19] Some other 'principles governing duplicity in criminal counts' that Kirby J outlined in *Walsh* (at 107-109) were as follows:

> *'4. For the foregoing reasons of history, good prosecution practice and fair conduct of criminal trials, **the general rule of our legal system is still this: that a prosecutor may not ordinarily charge in one count of an indictment, information or complaint two or more separate offences provided by law** ... So much is borne out by many authorities: Marshall (1972) 56 Cr App R 263 at 265. Willis (1972) 57 Cr App R 1...*
> *5. **The apparent artificiality of insisting on applying the rule against duplicity in its full rigour has been highlighted** ... **where criminal acts occurred in very close proximity to each other**. If, for example, criminal acts occurred within a few minutes of time and in close physical proximity, **could they be regarded as components of the one activity, so as to be susceptible to treatment as a single count**: Jemmison v Priddle [1972] 1 QB 489. If the events were seen **as part of the one transaction or criminal enterprise** this approach has been held to be **permissible** in England: Director of Public Prosecutions v Merriman [1973] AC 584 at 607. If a precise understanding of the charge laid, **although evidenced by multiple acts, is that it represents a single crime, then a single count is permissible**: Montgomery v Stewart (1967) 116 CLR 220 ....*
> *6. **Particular problems arose** for the application of the duplicity rule **in the case of offences which**, of their definition, **were constituted by continuous activity**. Such offences as keeping a brothel, required proof of particular acts at different times. Similarly, conduct which need not, but in some circumstances might, be constituted by activity over time could quite properly be charged in a single count. Instances where this **qualification to the rule against duplicity has been upheld include cases involving charges of harassment … and trafficking in drugs** ... Various verbal formulae have been offered as a suggested test for **whether the criminal acts are sufficiently close in time and space** as to "fairly and properly be identified **as part of the same criminal enterprise or the one criminal activity**" Hamzy (1994) 74 A Crim R 341 at 348. These valiant attempts by judges have been criticised as "glib": Hunter ... at 267. Judges themselves have acknowledged that judicial views in particular cases are not always easy to reconcile ... Ultimately, what is presented is a question of fact and degree for decision in each case: R v Eades (1991) 57 A Crim R 151 at 156. **Various indicia are proposed to sustain a single count against the charge of duplicity, notwithstanding that it may permit evidence to be adduced of events which, taken individually, could constitute separate offences. The indicia include:** (a) the connection of the events in point of time; (b) the similarity of the acts; (c) the physical proximity of the place where the events happened; and (d) the intention of the accused throughout the conduct Weinel v Fedcheshen (1995) 65 SASR*

> *156 at 170 per Perry J.* ***Perhaps an indication of the considerable difficulty of the task to be found in is the fact that, in many of the leading cases, there is (as in this case) a division of judicial opinion*** *...*
> *7. Because of the foregoing, it must be accepted as correct that "****the courts have never managed to produce a technical verbal formula of precise application which constitutes an easy guide*** *... as to whether the common law rule [against duplicity] has been infringed" Stanton v Abernathy (1990) 19 NSWLR 656 at 666 per Gleeson CJ ... it is not very useful to say that it is "desirable" or "preferable", where separate offences are arguably shown, that the prosecution should formulate separate charges ...* ***Unless courts are prepared to support such homilies with sanctions in the case of breach they are unlikely to much influence day to day prosecution practice*** *...* ***Clearly, a great deal depends on the nature of the offence*** *... Exceptions to the general rule against duplicity have been allowed where the multiple acts relied on by the prosecution are so close in time and place that they can be viewed as one composite activity; where the offence is one that can be classified as continuing in nature ... (See for example R v Lawson (1952) 1 All ER 804; Tomlin (1954) 38 Cr App R 82)... However, such cases apart, although the courts in England ... and New Zealand ... have taken a more lenient view, this Court has, until now, favoured a rule of strictness. The question is whether this Court should now soften that stance.*
> *...*
> *9.* ***A finding that the rule against duplicitous charges has been breached does not oblige the court, coming to that conclusion, to dismiss the charge.*** *Where the defect is one of patent duplicity, the proper course is to put the complainant to an election to remove the embarrassment (Iannella v French (1968) 119 CLR 84 at 102 applying R v Molloy [1921] 2 KB 364; R v Disney [1933] 2 KB 138). Where the defect is latent and the particulars do not remove it, the court may direct further particulars; require the complainant to elect and to identify the alleged offences; and/or exercise the power to permit an amendment (Johnson v Miller (1937) 59 CLR 467 at 490 per Dixon J ...). If the latent defect, once exposed, suggests a risk that the accused might not have a fair trial on the charges as pleaded, the court should require correction (S v The Queen (1989) 168 CLR 266 at 276).'*

[20] Despite the criticisms of Kirby J as to the *'impatience with technicality'* of some academic commentators, the article from Professor Hunter had (in my view) as I have noted above, provided an analysis that may have assisted the parties in the present case before me in crystallising their arguments. For completeness, I note that Professor Hunter has been an academic at the University of New South Wales in Sydney, Australia, where I have been a Visiting Fellow and Sessional Lecturer for a number of years, though I last taught in a course with her well over 10 years ago. In her article, Professor Hunter had (in summary) suggested that the first step in analysing an information or charge is to begin by determining if more than one offence is

contained in the charge. If it is so determined, then the next step is to ask how have the offences been joined? If the offences have been listed in the alternative, then the information is uncertain. If the offences have been joined conjunctively, then the information is duplicitous.

[21] As to the differences in form between ‘patent’ and ‘latent’ duplicity, the Victorian Government Solicitor’s Office has summarised it thus:

> *‘There are generally considered to be two ways in which a charge might offend the rule against duplicity: These are:*
>
> ***Patent duplicity**, where <u>a single charge alleges the commission of two separate offences</u>.*
>
> ***Latent duplicity** (also called 'latent ambiguity' or 'latent uncertainty'), where <u>a single charge alleges the commission of only one offence</u>, but the **evidence led by the prosecution** in relation to the charge **discloses a number of separate offences**, all of which could fit the allegation described in the charge.*
>
> *In either case, the accused may be prejudiced in a number of ways by a duplex charge.*
>
> (See Victorian Government Solicitor's Office, 'Double or nothing' - The rule against duplicity in charging criminal offences’, *Updates on legal developments by the Victorian Government Solicitor's Office,* Monday, 28 April 2014, <http://blog.vgso.vic.gov.au/2014/04/double-or-nothing-rule-against.html>)

[22] Indeed, as Leeming JA explained in the NSW Court of Criminal Appeal in ***Environment Protection Authority v Truegain Pty Ltd*** (2013) 85 NSWLR 125 (with whom RA Hulme J and Button J agreed) (Austlii: [2013] NSWCCA 204, <http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2013/204.html>) at [52] (page140):

> *‘The principles were stated by Basten JA in Hannes v Director of Public Prosecutions (Cth) (No 2) [2006] NSWCCA 373; (2006) 205 FLR 217 at [9] and endorsed in Einfeld v The Queen [2010] NSWCCA 87; (2010) 200 A Crim R 1 at [131]:*
>
>> *“**There are two steps in the process of identifying duplicity or uncertainty**. <u>The first</u> is to consider <u>the statutory description of the offence</u> in order to identify **what is <u>the act or conduct prohibited</u>**. <u>The second</u> is to identify **the act or conduct <u>set out in the pleading</u> as constituting the offence** in the particular case. <u>Where a particular act is prohibited if it has one of a number of qualities, it is likely that only one offence is committed</u> in relation to each act, even if such an act has more than one of the proscribed qualities.”*

That echoes what Jordan CJ had said in Ex parte Polley; re McLennan (1947) 47 SR (NSW) 391 at 392, namely that ***the question whether an enactment creates one offence or several <u>depends upon its subject matter and language</u> considered in their context** ...'*
[My emphasis]

<u>4. The Application to amend Count 3</u>

[23] It is appropriate that I deal with each Application in the order in which they were raised. Hence, I will rule first on the Applicant's Interlocutory Application for Amendment of Count 3.

[24] Count 3 in its present form states:

<u>'Count 3</u>

<u>PROFESSIONAL MISCONDUCT:</u> Contrary to sections 12(5) and 17(b) of the <u>Trust Accounts Act 1996</u> and 82(1)(a) and 83(1)(h) of the <u>Legal Practitioners Decree 2009</u>

<u>PARTICULARS</u>

Vilimone Vosarogo also known as Filimoni WR Vosarogo, *a legal practitioner and principal of Mamlakah Lawyers from the period 1st October 2014 to 30th September 2015 failed to provide the auditors the client, namely, Daniel Percy Kym Sun Wah's authority letter for withdrawal of monies from the trust account after being requested by the auditors, which conduct was in contravention of sections 12(5) and 17(b) of the Trust Accounts Act, 1996 and was an act of professional misconduct pursuant to section 82(1)(a) and 83(1)(h) of the Legal Practitioners Decree 2009.'*

[25] **The proposed amended Count 3 seeks to insert as part of the offence the alleged <u>contravention of sections 12(4) and 12(6) in addition</u>** to sections 12(5) and 17(b) of the *Trust Accounts Act 1996* and sections 82(1)(a) and 83(1)(h) of the *Legal Practitioners Decree 2009*. **It is also sought to include the alleged contravention of sections 12(4) and 12(6) of the *Trust Accounts Act 1996* <u>in both the alleged offence as well as the particulars</u> of the alleged offence** as follows:

<u>'Count 3</u>

<u>PROFESSIONAL MISCONDUCT:</u> Contrary to sections 12(4)(5)(6) and 17(b) of the <u>Trust Accounts Act 1996</u> and 82(1)(a) and 83(1)(h) of the <u>Legal Practitioners Decree 2009</u>

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Vilimone Vosarogo also known as Filimoni WR Vosarogo, *a legal practitioner and principal of Mamlakah Lawyers from the period 1st October 2014 to 30th September 2015 failed to provide the auditors the client, namely, Daniel Percy Kym Sun Wah's authority letter for withdrawal of monies from the trust account after being requested by the auditors, which conduct was in contravention of sections 12(4)(5)(6) and 17(b) of the Trust Accounts Act, 1996 and was an act of professional misconduct pursuant to section 82(1)(a) and 83(1)(h) of the Legal Practitioners Decree 2009.'*

[26] On its face, I cannot understand the alleged particulars in Count 3 containing the reference to 'the auditors the client'. I presume that what the Applicant was attempting to plead as the particulars in Count 3 was that the Respondent legal practitioner failed to provide the auditors (after being requested by them to do so) with the client authority letter of Daniel Percy Kym Sun Wah authorising withdrawal of funds from the trust account. Presumably, the particulars in Count 3 should read: *'failed to provide the auditors* ***with*** *Daniel Percy Kym Sun Wah's authority letter for withdrawal of monies from the trust account after being requested by the auditors* ***to do so****'* such that the word 'with' and 'to do so' are included in the particulars and the words and punctuation '*the client, namely,'* deleted.

[27] **In any event, apart from the particulars that would need to be amended, the main issue that I need to determine is whether I should allow the offence in Count 3 to be amended to include the alleged contravention of sections 12(4) and 12(6) of the *Trust Accounts Act 1996*. Thus, the first step I need to take is to consider what is the act or conduct prohibited in the various sections of the *Trust Accounts Act*. Second, how does this affect the alleged breach of sections 82(1)(a) and 83(1)(h) of the *Legal Practitioners Decree 2009*?**

[28] **I intend to concentrate initially with the alleged contravention of sections 12(4) and 12(6) as well as with sections 12(5) and 17(b) of the *Trust Accounts Act 1996.* I will then consider the alleged breach of sections 82(1)(a) and 83(1)(h) of the *Legal Practitioners Decree 2009*.**

[29] **Section 12(5) of the *Trust Accounts Act 1996* states:**

'Audit of Trust Accounts and accounting and other records

(5) ***No person shall fail to promptly provide*** ***such*** ***explanation and information*** *when required by the auditor.'* [My emphasis]

[30] Clearly, section 12(5) cannot be read on its own. It needs to be read in conjunction with another section so as to clarify what is the '***such*** ***explanation and information'*** to which the section refers. **Section 12(4) of the *Trust Accounts Act 1996* states:**

> *(4)* ***An auditor*** *appointed under this Act* ***shall have a right of access*** *at all times to the accounting and other records of the trustee required to be kept by the trustee pursuant to this Act including all tiles [sic - files] containing information supporting or relevant to entries in the accounts the subject of the audit and to any books, accounts, cheques or other records (including any business or private bank account) relating to an account designated or evidenced as a trust account of the* ***trustee and may require from the trustee*** *and any partners servants or agents of the trustee* ***such explanation and information*** *as the auditor desires for the performance of the auditor's functions under this Act.'*
> [My emphasis]

[31] **The submission of Counsel for the Applicant is that section 12(5)** in stating that *'No person shall fail to promptly provide such* ***explanation and information*** *when required by the auditor'*, **is referring to the explanation and information referred to in section 12(4) and thus sections 12(4) and (5) should be read together. I agree**.

[32] As for **section 12(6) of the *Trust Accounts Act 1996,* it states:**

> *'(6) For the proper performance of the auditor's functions under this Act,* ***the auditor may require the trustee****, and any partners or employees of the trustee,* ***to produce*** *for the auditor's examination such books, accounts or records as the auditor may request.* ***No person shall fail to comply promptly with such request by the auditor****.'* [My emphasis]

[33] **The submission of Counsel for the Applicant is that section 12(6) should be read together with sections 12(4) and 12(5). I disagree**.

[34] Apart from noting that there is no definition in section 2(1) of the *Trust Accounts Act 1996* as to the meaning of 'books, accounts or records', **the act or conduct prohibited in section 12(6) is different from that prohibited in**

sections 12(4) and(5).

[35] **The act or conduct prohibited in sections 12(4) and(5) concerns the auditor being given rights under section 12(4)**, that is, *'a right of access'* to all records ***'and may require from the trustee*** *...* ***such EXPLANATION AND INFORMATION as the auditor desires'*** **and then under section 12(5) the conduct that is prohibited is** *'failing to promptly provide such* ***explanation and information*** *when required by the auditor'.*

[36] By contrast, **section 12(6) concerns the auditor being given the right to require a trustee to PRODUCE DOCUMENTS and the conduct that is prohibited is** ***'fail to comply promptly with such request by the auditor'***.

[37] In my view, the conduct in sections 12(4) and (5) concern an auditor having a right of access to records and being able to request from a trustee an explanation and information to an auditor arising from that access. **The prohibited conduct then is a failure by a trustee to provide 'such explanation and information'.** Section 12(6) concerns the auditor requiring a trustee to **produce documents** and the failure by a trustee to so comply.

[38] Thus, **the act or conduct prohibited in sections 12(4) and (5) is a failure to provide 'such explanation and information' to an auditor, whereas in section 12(6), the act or conduct prohibited is a failure to produce documents to an auditor. Clearly, the offence arising out of sections 12(4) and (5) is a different offence to that stated in section 12(6).**

[39] Count 3 also alleges, however, a further contravention, that is, of **section 17(b) of the *Trust Accounts Act*. The section states:**

'Obstruction

17. *No person shall:-*

(a) obstruct, threaten or intimidate or attempt to intimidate an auditor or inspector in the exercise of any powers or functions, auditor or inspector; or

(b) ***fail to comply as soon as reasonably practical*** *with* ***any requirement or request for information which an auditor*** *or inspector* ***is empowered to make*** *of that person* ***by the provisions of this Act****.'*

[My emphasis]

[40] Thus, **the act or conduct prohibited in section 17(b) is 'obstruction' by a failure '*to comply as soon as reasonably practical*'** with any request by an auditor ***'for information'***. It should be noted that s**ection 12(5)** has already stated that '***No person shall fail to promptly provide such explanation and information*** *when required by the auditor'* after being given a right of access to the trustee's records pursuant to section 12(4). **Is section 17(b) then a duplication of section 12(5)?** For an answer it should be noted how the *Trust Accounts Act 1996* is drafted. PART 3 of the *Trust Accounts Act 1996* concerns *'AUDIT OF TRUST ACCOUNTS'* and covers sections 11 to 18 dealing with:

- Section 11 – '*Auditor - appointment, qualifications, and cessation of appointment';*
- **Sections 12 and 13 - *'Audit of Trust Accounts and accounting and other records';***
- Section 14 - *'Duty of auditor';*
- Section 15 - *Audit of accounts on ceasing to be trustee';*
- Section 16 – *'Appointment of trust account inspector by Law Society or Minister';*
- **Section 17 - '*Obstruction';***
- Section 18 – *'Duties of banks'*.

[41] Therefore, while sections 12 and 13 concern the '*Audit of Trust Accounts and accounting and other records',* section 17 is concerned with the *'Obstruction'* of an auditor. Hence, this would explain why, in my view, the sections are set out under two different headings. Sections 12 and 13 relate to 'the audit' and requesting '***such explanation and information'*** from a trustee. Section 17 concerns 'obstruction' and **the act or conduct prohibited in section 17(b) is a failure '*to comply as soon as reasonably practical* *with* *any requirement or request for information which an auditor … is empowered to make'.***

[42] I also note that in an earlier joint *'Ex Tempore Ruling'* handed down by me on 23rd September 2016 (which involved both an application by the Respondent in

the present matter, as well as an application by the legal practitioner, Laisa Lagilevu Vodo, for the issuing of a temporary practicing certificate by the Chief Registrar's Office), I observed at [15]-[16] as follows:

> *'[15] I also note that in both cases Counsel for the Applicant have confirmed that the allegations against the respective Respondents are that <u>they have been negligent not fraudulent.'</u>*
>
> (See ***Chief Registrar v Vosarongo [sic]; Chief Registrar v Vodo,*** unreported, Independent Legal Services Commission, Nos. 002 and 003 of 2016, 23 September 2016; Paclii: [2016] FJILSC 6, <http://www.paclii.org/fj/cases/FJILSC/2016/6.html>.)

[43] Thus if Counsel for the Applicant had previously conceded that the allegations against the two Respondent legal practitioners were '*that <u>they have been negligent not fraudulent</u>'*, would this not come within sections 12 and 13 of the *Trust Accounts Act 1996,* that is, offences arising out of the *'Audit of Trust Accounts and accounting and other records',* rather than section 17 and offences arising from alleged *'Obstruction'*?

[44] **Arguably, sections 12(4) and (5) highlight negligence, whereas section 17 points to intentional 'obstruction' either directly or indirectly.** Hence, why (I can only presume), that Parliament provided the different offences in sections 12 and 13 compared with section 17. Sections 12 and 13 are concerned with 'the audit' and *'failing to promptly provide such explanation and information'* as required by the auditor. By contrast, section 17 is concerned with 'obstruction' and makes it an offence to either *'(a) obstruct, threaten or intimidate or attempt to intimidate an auditor ... in the exercise of any powers or functions'*, or *'(b) fail to comply as soon as reasonably practical with any requirement or request for information which an auditor ... is empowered to make'.*

[45] I further note that it is the Applicant's Application to amend Count 3. No case law, however, has been provided to me by Counsel for the Applicant to support his submission as to how the sections have been interpreted either previously by a Court in Fiji or, perhaps, how similar legislation may have been interpreted elsewhere. Rather, I was advised by Counsel for the Applicant at the hearing on

7th December 2016, that in relation to sections 12(4), 12(5) and 12(6) *"we do not have any case authority to mention"*.

[46] I should also mention that this is not the first time that I have had Counsel for the Applicant before me arguing an interpretation of sections of the *Trust Accounts Act 1996* which differed from that of my own. Indeed, it was only on 21st September 2016, that I had to strike out a charge laid by the Applicant against a legal practitioner because of differing statutory interpretations in relation to the *Trust Accounts Act 1996*. *(See* ***Chief Registrar v Nacolawa*****,** unreported, Independent Legal Services Commission, No. 004 of 2015, 21 September 2016; Paclii: [2016] FJILSC 4, <http://www.paclii.org/fj/cases/FJILSC/2016/4.html>.)

[47] In *Nacolawa*, I discussed at [38]-[45] the difference between '*a purposive or literal approach'* to statutory interpretation and concluded at [46] that unless there is ambiguity, the correct approach is the application of the '*the golden rule' of statutory interpretation favoured by all three justices in the Supreme Court in* ***Suva City Council v R B Patel Group Ltd****, that is, 'that the words of a statute must prima facie be given their ordinary meaning'*. (See ***Suva City Council v R B Patel Group Ltd*****,** Unreported, Supreme Court of Fiji, Supreme Court Appeal: CBV0006 of 2012, 17 April 2014, Marsoof, Hettige and Wati JJSC); (Paclii: [2014] FJSC 7, <http://www.paclii.org/fj/cases/FJSC/2014/7.html>).

[48] I do not see ambiguity in the present case before me. For the reasons that I have set out above, in my view, sections 12 and 13 are concerned with 'the audit' and failing ***'to promptly provide*** *such explanation and information'* as required by the auditor, whereas section 17 is concerned with 'obstruction', that is, either (a) **directly** *'obstruct'* or (b) **indirectly obstruct by** '*fail[ing] to comply as soon as reasonably practical with any requirement or request for information which an auditor ... is empowered to make'*.

[49] If, however, I am incorrect in my interpretation, then why would Parliament duplicate the same offence in different sections, that is, in both section 12(5) and section 17(b)? **Further, if there is ambiguity, I note that Counsel for the**

Applicant has not provided any extrinsic materials to assist me in finding in favour of his interpretation that section 12(5) and section 17 are the same offences.

[50] In that regard, I note, that when there is ambiguity on its face as to the meaning of a statute, Courts can consider the use of extrinsic materials to assist in resolving their interpretation of such legislation. Such an approach in Fiji to the use of extrinsic materials was discussed by me at length in ***Auditor General v Reserve Bank of Fiji*** (Unreported, High Court of Fiji, Case No. HBC42 of 2008, 8 August 2008) (Paclii: [2008] FJHC 194, <http://www.paclii.org/fj/cases/FJHC/2008/194.html>) at [17] and cited again recently by me in *Nacolawa* at [39]-[40]. It is important that I restate part of my judgment in *Nacolawa* here:

> *'[39] … in* ***Auditor General v Reserve Bank of Fiji*** *… (a case that I had to consider when I had been sitting previously as a Judge of the High Court of Fiji) … I explained at [17]:*
>
> > *'… As Counsel for the Defendant noted in oral submissions, in relation to the interpretation of modern statutes, it is entirely appropriate these days for Courts to look at the observations made at the time of the party moving Bill … as the House of lords affirmed in* ***Pepper (Inspector of Taxes) v Hart*** [1993] 1 AC 593 *…'*
>
> *[40] Indeed, as I observed in Auditor General v Reserve Bank of Fiji, the reasoning in* ***Pepper*** *was applied in Fiji by a majority judgment of the Court of Appeal in* ***Bull v Commissioner of Inland Revenue*** *(Unreported, Court of Appeal of Fiji, Civil Action Nos. ABU0017 of 1997S and ABU0018 of 1997S, 15 May 1998, Tikaram P and Thompson JA) (Paclii: <http://www.paclii.org/fj/cases/FJCA/1998/21.html>). That view was confirmed by a majority judgment of the Supreme Court of Fiji in* ***Bull v Commissioner of Inland Revenue (Majority Judgment)*** *(Unreported, Supreme Court of Fiji, Civil Action Nos. CBV0005 and CBV0006 of 1998S, 10 March 1999, Lord Cooke of Thorndon and Sir Anthony Mason JSC) (Paclii: [1999] FJSC 5, <http://www.paclii.org/fj/cases/FJSC/1999/5.html>), wherein they said at pages 6-7:*
>
> > *'Use of History*
> >
> > *There was a submission made during the course of argument that the Court should not have regard to extrinsic materials. It is, of course, right to say that the* <u>*courts resort to extrinsic materials in order to interpret statutes only in cases of ambiguity*</u> *(*<u>Re Bolton; Ex parte Beane</u> (1987) 162 CLR 514)*. If the text is clear, the text must*

prevail. If, however, the text is ambiguous or admits of more than possible interpretation ... it is now widely accepted in many common law jurisdictions that recourse by the courts to legislative history and extrinsic materials is a legitimate aid to interpretation. For present purposes it is sufficient to refer to the decision of the House of Lords in Pepper v. Hart [1993] AC 593 *<u>where the rule excluding reference to Parliamentary materials as an aid to statutory construction was relaxed</u> so as to permit such reference when-*

(1) the legislation is ambiguous or obscure or leads to absurdity,

(2) the material relied upon consists of statements by a Minister or other promoter of a Bill together with such other Parliamentary material as is necessary to understand such statements, and

(3) the statements are clear. In our view, the extrinsic materials to which reference can be made as an aid to statutory construction are not limited to Parliamentary materials. In the past, at least for the purpose of identifying the "mischief" sought to be remedied by legislation, resort has been made to the reports of committees of experts or other persons on which legislation has been based. We see no reason why reports of that kind cannot be used as an aid to statutory construction, without being confined in their use to the identification of the mischief aimed at. Indeed, we consider that it would be unwise to limit the extrinsic materials to which a court can legitimately have regard, so long as the pre-conditions of ambiguity and clarity are observed and the materials are of such a kind that they do throw significant light on the statutory intention."'
[My emphasis]

[51 I note that in the *'Prosecution Case Statement'* dated 15th September 2016, it is submitted at paragraph 10:

> *'**Count 3** is in relation to **<u>the practitioner failing to provide the auditors, upon their request</u>, <u>the client authority letter</u> authorizing withdrawal.** The legal basis on which this charge is based is by **invoking sections 12(5) <u>and</u> 17(b)** of the Trust Accounts Act 1996 ...*
> [My emphasis]

[52] When I re-read this whilst considering my judgment, I was reminded of the words of Professor Hunter that I had cited much earlier in this judgment: *'The* first step *in either case is to see <u>if more than one offence is contained in an information</u> ... Once it is determined that more than one offence exists, <u>it is then necessary to look at the way in which the offences are joined</u>. If they are joined in the alternative, then the information is uncertain; **if they are joined conjunctively, the information is duplicitous** ...'.* Applying those words to the present case, I note that:

(1) In my view, (as I have explained above) there are two offences. Section 12(5) is concerned with 'the audit' and specifically failing *'to promptly provide such explanation and information when required by the auditor'* whereas section 17(b) is concerned with 'obstruction' and specifically failing '*to comply as soon as reasonably practical with any requirement or request for information which an auditor ... is empowered to make';*

(2) As I have '*determined that more than one offence exists, it is then necessary to look at the way in which the offences are joined'. As* ***'they are joined conjunctively, the information is duplicitous'.***

[53] Having noted that neither party had addressed me in relation to section 17(b) in either their written or oral submissions, I had this matter relisted on 3rd February 2017, at the beginning of the February 2017 Sittings of the Commission, before handing down this judgment, so as to clarify this and one other issue in relation to Count 3, as well as to clarify a further issue that had arisen in relation to Count 2 of which I shall come to later in this judgment.

[54] My understanding of the thrust of the oral submissions of Counsel for the Applicant was that sections 12(4), 12(5), 12(6) and 17(b) are to be read together as the conduct involved was all one offence arising from the Respondent legal practitioner not providing the auditors with a copy of the client's authority letter. That is, it was one particular act of the Respondent that makes him in breach of those provisions of the *Trust Accounts Act*.

[55] In response, the Respondent legal practitioner cited the *'Prosecution Case Statement'* dated 15th September 2016 and submitted that there was no evidence outlined in that summary that would support a breach of section 17(b), that is, there was *"nothing to suggest obstruction".* His primary objection to the proposed Amended Count 3 was that the addition of section 12(6) was duplicitous. The issue that has now been raised by the Commission in relation to section 17(b) confirms the objection. In short, the Respondent submitted, it is a "crowded charge", such that it is unclear what are the elements of the alleged offence.

[56] **As I have set out above, my view of the relevant sections, and their**

applicability to Count 3, in summary, is thus:

(1) Sections 12 and 13 come under the heading in the *Trust Account Act* in relation to the *'Audit of Trust Accounts and accounting and other records';*

(2) **Section 12(4)** concerns providing the auditor with rights, that is, **'*A RIGHT OF ACCESS*' to all records** AND that the auditor *'may require from the trustee ...* ***such explanation and information as the auditor desires****'*. It is to be read in conjunction with section 12(5) **that prohibits a trustee from *'failing to promptly provide SUCH EXPLANATION AND INFORMATION*** *when required by the auditor';*

(3) Section 12(6) concerns the auditor being given **the right to require a trustee to PRODUCE DOCUMENTS** and it is prohibited for a trustee to '*fail to comply promptly* ***with such request*** *by the auditor';*

(4) Clearly, by his own *'Prosecution Case Statement'*, Counsel for the Applicant has highlighted that the conduct alleged in Count 3 is '***the practitioner failing to provide the auditors, upon their request, [with] the client authority letter authorizing withdrawal',*** conduct which would come squarely within section 12(6), that is, the right of an auditor to require a trustee **to PRODUCE DOCUMENTS** and it is prohibited for a trustee to '*fail to comply promptly* ***with such request*** *by the auditor'*. That is different from the granting of a right access to records AND to '*require from the trustee ...* ***such explanation and information as the auditor desires****'*. Hence, it is duplicitous to include both sections 12(5) and 12(6) in the same Count as they are different forms of prohibited conduct;

(5) **As for section 17, it is concerned with 'obstruction'**, specifically section 17(b) that no person shall '*fail to comply as soon as reasonably practical with* ***any requirement or request for information which an auditor*** *or* ***is empowered to make****.'* Again, it is duplicitous to include both sections 12(5) and 17(b) in the same Count as they are different forms of prohibited conduct.

[57] **Therefore, Count 3, either in its present form (including sections 12(5) and 17(b)) or in the proposed amended form (including sections 12(4)(5)(6) and 17(b)) cannot be allowed to proceed. Both forms offend as being patent duplicity, that is, a single charge alleging the commission of two offences in Count 3 in its present form and three separate offences in its proposed amended form. Those offences being:**

(1) Sections 12(4) and 12(5) the prohibited conduct being a failure to '*promptly provide SUCH EXPLANATION AND INFORMATION'* to an auditor in connection with an audit;
(2) Section 12(6) the prohibited conduct being for a trustee to '*fail to comply promptly with such request'* from an auditor to produce a document;
(3) Section 17(b) the prohibited conduct being 'obstruction' and for a trustee to '*fail to comply as soon as reasonably practical* with ***any requirement or request for information which an auditor ... is empowered to make***'.

[58] **Accordingly, the application to amend Count 3 to include section 12(6) is refused. In my view, Count 3 even in its present form is also duplicitous as sections 12(5) and 17(b) are different offences.**

[59] **Counsel for the Applicant must now decide how he wishes to proceed in light of my Ruling and to state clearly as to what is the prohibited conduct pursuant to the *Trust Account Act* that Counsel for the Applicant alleges is professional misconduct. That is, to either include sections 12(4) and (5) or section 17(b) in Count 3. Further, does he wish to include section 12(6) in a new Count 4 or perhaps section 17(b) in a new Count 5? If so, he will need to provide better particulars.** As was said by Hidden J in ***Director of Public Prosecutions (NSW) v Kevin Frederick Edward Gardner & Anor*** (unreported, NSWSC, 15 May 2013; Austlii: [2013] NSWSC 557, <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2013/557.html>) at paragraph 14:

> '***A finding of duplicity does not mean that the charge must be dismissed. Where the duplicity is patent the prosecution should be put to an election***. ***Where it is latent*** *various courses may be taken, including the direction of further particulars: Walsh v Tattersall per Kirby J at p 110.* ***In the present case her Honour effectively put the prosecutor to his election*** *by ruling that he could rely only on one victim,* ***as well as ordering further particulars***.'
> [My emphasis]

[60] I have also noted above that in the *'Prosecution Case Statement'*, Counsel for the Applicant has stated that '***Count 3*** *is in relation to* ***the practitioner failing to provide the auditors, upon their request, the client authority letter authorizing withdrawal'.*** Such conduct, in my view, is either negligent or deliberate but not

both. If it is negligent, it seems closely aligned with the conduct prohibited in section 12(6). If it is deliberate, it would be an 'obstruction' coming within the prohibited conduct set out in section 17(b). These are matters for Counsel for the Applicant to consider.

[61] Thus, I formally refuse the Applicant's Draft Amended Application to Amend Count 3 (to include reference to section 12(6) of the *Trust Accounts Act 1996*). I am prepared to consider, however, allowing Counsel for the Applicant to draft a new Amended Count 3 to include a reference to either:
(1) sections 12(4) and 12(5) of the *Trust Accounts Act 1996;* or
(2) section 12(6); or
(3) section 17(b);
but not all three in the one Count and to which certain conditions may apply in allowing that amendment. There would also need to be an amendment as to the particulars to clarify the particularisation of the offence as I have foreshadowed earlier in my judgment. I will return to the question of allowing Counsel for the Applicant to draft a new Amended Count 3 at the end of my judgment.

[62] **I now turn to the second part of the alleged offence in Count 3 that being the alleged breach of sections 82(1)(a) and 83(1)(h) of the *Legal Practitioners Decree 2009*.**

[63] **Section 82(1)(a) of the *Legal Practitioners Decree 2009* states:**

> *82.—(1) For the purposes of this Decree,* ***'professional misconduct'*** *includes –*
>
> > *(a) unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm,* ***if the conduct involves <u>a substantial or consistent failure</u> to reach or maintain <u>a reasonable standard of competence and diligence</u>'****.*
> > [My emphasis]

[64] **Section 83(1)(h) of the *Legal Practitioners Decree 2009* states:**

> *'83.—(1) Without limiting sections 81 and 82, the following* ***conduct is capable of being "unsatisfactory professional conduct" or "professional misconduct"*** *for the purposes of this Decree:*
>
> > *...*
> > *(h)* ***conduct of a legal practitione****r or law firm* ***consisting of <u>a contravention of the provisions of the Trust Accounts Act 1996</u>*** *(as amended from time to time);'*

[My emphasis]

[65] Counsel for the Applicant in his written *'Submissions in Reply'* dated 26th October 2016, has drawn my attention to **section 111(1) of the *Legal Practitioners Decree 2009*** which *'gives powers to the Chief Registrar to commence disciplinary proceedings'*. **The section states:**

> *'111.—(1) The Registrar may commence disciplinary proceedings against a legal practitioner or a law firm or any employee or agent of a legal practitioner or law firm* ***by making an application to the Commission*** *in accordance with this Decree and* ***containing one or more allegations of professional misconduct or unsatisfactory professional conduct****.'*
> [My emphasis]

[66] In addition, **section 112(1) of the *Legal Practitioners Decree 2009* states:**

> *'112.—(1) Upon receipt of the application to commence disciplinary proceedings under section 111,* ***the Commission shall conduct a hearing into each allegation particularised in the application****.'*
> [My emphasis]

[67] **Thus, in accordance with my understanding of the above sections, I would have thought that the Applicant in filing an Application before this Commission must:**

(1) allege either *"unsatisfactory professional conduct" and/or "professional misconduct"* involving a breach of a section/s of the *Legal Practitioners Decree 2009;* and

(2) also provide sufficient particulars of the alleged conduct to substantiate the alleged breach such that the Respondent legal practitioner is aware of the case that they have to meet and for the Commission to conduct a hearing into each allegation particularised in the application.

[68] By contrast, if this was a criminal matter, the Office of the Director of Public Prosecutions would, presumably, lay a charge against a legal practitioner in a criminal court alleging an offence pursuant to section 28 of the *Trust Accounts Act 1996* which states:

> '*Offences and penalties*
>
> ***28.*** *- (1) A person who-*
> *(a)* ***contravenes or fails to comply with any provision of this Act*** *is guilty of an offence against this Act and* ***is liable on conviction to a penalty of***

> ***$3,000**; or*
> *(b) <u>with intent to defraud</u> **contravenes or fails to comply with any provision of this Act** is guilty of an offence against this Act and **is liable on conviction to a penalty of $10,000 or to imprisonment for 3 years**.*
> *(2) Any person who is convicted of an offence against this Act shall be guilty of a further offence against this Act if the offence continues after the person is convicted and liable to an additional penalty of $500.00 for each day during which the offence so continues.'*

[69] Thus, the criminal charge would be a breach of section 28(1)(a) or (b) of the *Trust Accounts Act 1996*. The particulars would then allege specific provision/s of the *Trust Accounts Act 1996*. <u>By contrast, where it is a civil offence, charges laid before the Commission should be alleging a breach not of the *Trust Accounts Act 1996*, but of the *Legal Practitioners Decree 2009*</u>, *that is,* **either *"unsatisfactory professional conduct" and/or "professional misconduct"* involving a breach of a section/s of the *Legal Practitioners Decree 2009.*** The particulars of the offence/s should then allege the specific provision/s of the *Trust Accounts Act 1996* that have been breached with sufficient details.

[70] **In the present case, there is an allegation of *"professional misconduct"* pursuant to section 82(1)(a) of the *Legal Practitioners Decree 2009*, that is, '*conduct which involves <u>a substantial or consistent failure</u> to reach or maintain <u>a reasonable standard of competence and diligence</u>*'. Such conduct may involve, as it does in the present case, the alleged contravention of certain provisions of an Act. In the present case, it is alleged breaches of the *Trust Accounts Act 1996.*** In other matters this may involve alleged breaches of the *Penal Code*, the *Income Tax Act* and so forth.

[71] When I had this matter relisted on 3rd February 2017, Counsel for the Applicant explained that the offence in Count 3 was 'Professional Misconduct' and section 83(1)(h) describes the breach, that is, breaches of the *Trust Accounts Act*. Thus, section 83(1) provides examples or particulars as to what constitutes a breach of section 82(1)(a). Therefore, as I understood his oral submission, sections 82(1)(a) and 83(1)(h) of the *Legal Practitioner Decree 2009* are to be read together with the specific breaches of the *Trust Accounts Act* to constitute the one offence.

[72] The Respondent legal practitioner, having already objected to sections 12(4), (5) and (6) being together in the one charge and, as I have note above, described Count 3 as a "crowded charge", submitted that this was even more so when each of the breaches are also alleged to have been breaches of section 83(1)(h). He asked rhetorically how could he get a fair trial when he does not even know the elements of the offence?

[73] In reply, Counsel for the Applicant reiterated that section 83(1)(h) and 82(1)(a) is the offence and the specific trust account breaches, that is the breaches of the *Trust Accounts Act*, does not make separate offences – *"as long as the information is there"* for the Respondent to answer.

[74] **If I do allow Counsel for the Applicant to draft a new Amended Count 3, I expect that he will have considered what I have said in my Ruling and made clear what is the offence and what are the particulars to substantiate that offence such that they are not duplicitous. He also needs to consider whether sections 82(1)(a) and 83(1)(h) are to be read together as one offence, to be read separately as different offences, or as alternate offences. In that regard, he may care to note that in *Chief Registrar v Haroon Ali Shah* (Unreported, ILSC Application No.007 of 2012, Madigan J), (which Counsel for the Applicant has cited in his *'Prosecution Case Statement'* dated 15th September 2016, in reference to Count 1 in the present case, to which I will turn in a moment), that the Respondent was charged in Count 7 in *Shah* that he *'failed to ensure that the said trust account was not overdrawn, which conduct constitute[s] Professional Misconduct pursuant to Section 82(1)(a) of the Legal Practitioner Decree 2009'*. There was no mention of it also including section 83(1)(h). Indeed, as Madigan J made clear in his judgment at paragraph 29 in *Shah*, the Respondent later pleaded guilty *'to the lesser charge of unsatisfactory professional conduct contrary to section 83(1)(h)'*.**

5. The Respondent's application to strike out Count 1

[75] I now turn to the Respondent's application to strike out Count 1. In Count 1 it is alleged as follows:

'Count 1

PROFESSIONAL MISCONDUCT: Contrary to section 82(1)(b) of the <u>Legal Practitioners Decree 2009</u>

<u>PARTICULARS</u>

Vilimone Vosarogo also known as Filimoni WR Vosarogo, *a legal practitioner, principal of Mamlakah Lawyers and trustee of Mamlakah Lawyers Trust Account kept with BSP Bank, Suva Branch, bearing Account Number 7706348 from the period 1st October 2014 to 30th September 2015 failed to ensure that the following individual client accounts were not overdrawn by a total sum of $17,104.57, the said clients being:*

1. ***Mamlakah Health & Safety*** *with overdrawn amount in the sum of $14,090.17*
2. ***Lavenia Padarath*** *with overdrawn amount in the sum of $925*
3. ***Peter and Marica Margetts*** *with overdrawn amount in the sum of $950*
4. ***Eugenia Guruyawa Foon a.k.a Eugine Guruyawa a.k.a Eigine Praveena Agness*** *with overdrawn amount in the sum of $715.89*
5. ***Rickard Jacob Sigurd Af Forselles*** *with overdrawn amount in the sum of $235*
6. ***Ashok and Jagdish Narayan*** *with overdrawn amount in the sum of $150*
7. ***Janendra Murti*** *with overdrawn amount in the sum of $10.11*
8. ***Lai Hui v Changlin Lu & Wang Xiutu*** *with overdrawn amount in the sum of $10.05*
9. ***Daniel Percy Kym Sun Wah*** *with overdrawn amount in the sum of $10*
10. ***Marie Likound a.k.a Marie Brognies a.k.a Marie Ngo Likound Gouet*** *with overdrawn amount in the sum of $8*
11. ***Mosese Maravou*** *with overdrawn amount in the sum of $0.34*
12. ***Mohammed Shareek*** *with overdrawn amount in the sum of $0.01,*

which conduct constitutes professional misconduct pursuant to section 82(1)(b) of the <u>Legal Practitioners Decree 2009</u> which would if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice.'

[76] **So what is the offence alleged in Count 1? A breach of section 82(1)(b) of the *Legal Practitioners Decree 2009*. It states:**

> *'82.—(1) For the purposes of this Decree, 'professional misconduct' includes –*
>
> *…*
>
> *(b)* ***conduct of a legal practitioner****, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law,* ***that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice****, or that the law firm is not fit and proper to operate as a law firm.'*
>
> [My emphasis]

[77] **Thus, <u>the prohibited conduct</u> alleged in Count 1 is '*<u>conduct</u> … that would, if***

established, <u>justify a finding that the practitioner is not a fit and proper person</u> to engage in legal practice'. **<u>The particulars</u>** are that Respondent **'failed to ensure'** that 12 **'individual client accounts were not overdrawn'.**

[78] Hence, <u>the Count is alleging one activity</u>. As Counsel for the Applicant in his *'Prosecution Case Statement'*, dated 15th September 2016, summarised at paragraph 7:

> *'Count 1 alleges that the practitioner as principal of Mamlakah Lawyers and trustee of trust account of the said law firm failed to ensure that individual client accounts of twelve clients were not overdrawn to a total amount of $17,104.57.'*

[79] By contrast, the Respondent legal practitioner in his *'Further Submission to Strike Out'*, dated 1st December 2016, has submitted (what I have grouped together) as two issues for me to consider in relation to Count 1.

[80] <u>The Respondent legal practitioner's first argument</u> (as set out at paragraphs 1.4, 1.10 and 1.11 of his submissions) is that:

(1) '*The most serious complaint against count 1 is on the basis that factually, it consists of 12 individual complaints'* ;

(2) '… that count 1 is uncertain and duplicitous'; and

(3) *'there is a strong argument that ...* ***count 1 does not represent a single activity and an even stronger argument that each of the "transaction"[s] represents a separate offence quite distinct from the others****'*.

[81] <u>The Respondent's second argument</u> is set out at paragraphs 1.13 of his submissions, that is, that part of the wording in **<u>Count 1 is also *'pleading the sanction in the particulars*</u>** *... which is a practice that is unheard of in the common law world'*. That is, Count 1 concludes by stating the sanction, **(that the prohibited conduct *'pursuant to section 82(1)(b) of the <u>Legal Practitioners Decree 2009</u> which would if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice')***. Thus, the Respondent has submitted at paragraph 1.16, *'The particulars must only contain the particulars of the conduct alleged to be "prohibited" and nothing more'*.

[82] Therefore, I have two main issues before me in relation to Count 1 to resolve:

(1) Are the 12 acts alleged in the particulars the components of one offence or are they 12 separate offences?

(2) Does the count, in its present form, plead in the particulars the sanction to be imposed?

(1) Are the 12 acts alleged in the particulars the components of one offence or are they 12 separate offences?

[83] Counsel for the Applicant, in his various written submissions, did not really address (in my view) the argument of the Respondent that the 12 acts alleged in the particulars of Count 1 are 12 separate offences. Thus, at the hearing on 7th December 2016, I had Counsel for the Applicant clarify his position, which was, in summary, that:

(1) *" ... those 12 clients listed in the particulars corresponding with the amounts are better particulars or further particulars to* ***the actual allegation which is 'failed to ensure that the following individual client accounts were not overdrawn'. So that is the offence.*** *And by listing those 12 clients we are actually providing better particulars or specific particulars of which clients' accounts were overdrawn"*;

(2) As for the argument raised by the Respondent legal practitioner that some of the overdrawn accounts occurred as a result of bank charges not the legal practitioner failing to ensure that the accounts were not overdrawn, *"that is his defence"*, rather than making the Count 1 duplicitous;

(3) Similarly, with the Respondent legal practitioner's argument that he is disputing the total amount overdrawn as suggested by the auditors – "*Because then it becomes an evidential issue"*, rather than making the Count 1 duplicitous.

[84] **The crux of the submission of Counsel for the Applicant in relation to Count 1, is that the offence is *'failed to ensure that the following individual client accounts were not overdrawn'* and the particulars are the details of each overdrawn account. I disagree.**

[85] **In my view, the offence is a breach of section 82(1)(b) of the *Legal Practitioners Decree 2009,* that is, '*conduct … that would, if established,***

justify ***a finding that the practitioner is*** ***not a fit and proper person*** ***to engage in legal practice'.*** **The particulars** are that the Respondent ***'failed to ensure that the following individual client accounts were not overdrawn',*** **the details of which are then listed. Each is, in fact, a separate offence. That is, they are 12 separate acts. For some acts the Respondent legal practitioner may raise a defence, for others he may plead guilty. This, in a nutshell, is why the Respondent legal practitioner must succeed in his submission that Count 1 is duplicitous.**

[86] **As for the argument that this is just a series of acts, equivalent to say the criminal offence of 'supply a prohibited drug', such is not the case here. It is not one set of transactions.** Returning to Kirby J's analysis in *Walsh*, the acts did not occur within a short time frame and could not '*be regarded as components of the one activity'* as held in *Jemmison v Priddle*. *'They were not part of one transaction'* or enterprise so as to be permissible to be included in the one count as allowed by the House of Lords in *Merriman*, nor did the '*multiple acts represents a single offence'* as permitted by the High Court of Australia in *Montgomery.*

[87] If I am wrong in my interpretation and, let us say for argument, that there is only one offence, the particulars indicate that that offence has been committed more than once. This indicates a latent duplicity in the Count. That is, as the Victorian Government Solicitor's Office cited above has summarised, '*where a single charge alleges the commission of only one offence, but the* ***evidence led by the prosecution ... discloses a number of separate offences****, all of which could fit the allegation described in the charge ...* ***the accused may be prejudiced in a number of ways by a duplex charge****'.* This follows the view of Kirby J cited above in *Walsh* when he observed: '*If the latent defect, once exposed, suggests a risk that the accused might not have a fair trial on the charges as pleaded,* ***the court should require correction****: S v The Queen (1989) 168 CLR 266 at 276.'*

[88] I did raise at the hearing on 7th December 2016 with Counsel for the Applicant, as to what course should I take where the particulars have indicated that that offence has been committed more than once (here 12 acts), however, where for

some of those acts (such as the bank charges issue) the Applicant will not be able to satisfy on the balance of probabilities that for those acts the Respondent legal practitioner *'failed to ensure that ... individual client accounts were not overdrawn'*. Does the entire Count then fail? The response of Counsel for the Applicant was that *"it doesn't invalidate the Count ..."*. This again is why as Kirby J outlined in *Walsh* the Commission *'should require correction'* as '*the latent defect .. suggests a risk that the accused might not have a fair trial on the charges as pleaded'*. I will be requiring correction by the Applicant.

[89] Before leaving this point, I should also mention (as I have previously noted above when discussing Count 3), that Counsel for the Applicant in his *'Prosecution Case Statement'*, dated 15th September 2016, cited at paragraph 8 the case of ***Chief Registrar v Haroon Ali***, ILSC Application No. 007 of 2011, submitting:

> ***'The Applicant [in the present case] relies on section 82(1)(b) as the conduct occurred in connection with the Respondent's practice of law*** *and mainly in his capacity as the trustee of the trust account of Mamlakah Lawyers.* ***The Applicant's position is that a client's account should never be overdrawn.*** *If a client's account is overdrawn, it would suggest another client's monies has been inappropriately used because a trustee can only allow withdrawal to the extent of monies held against each client and not more than that. It is an offence because as is common knowledge that one cannot withdraw more than what is held on their behalf. A similar position was taken in Chief Registrar v Haroon Ali Shah ILSC Application No.007 of 2012. As a trustee, the Respondent was responsible to ensure that none of the client's accounts were overdrawn.'*
> [My emphasis – the words in bold]

[90] I was not provided with a copy of the above judgment in ***Chief Registrar v Haroon Ali Shah*** by Counsel for the Applicant, nor was my attention drawn by him in his written submissions, or in his later oral submissions of 28th November and 7th December 2016, to any specific findings made in that case. Unfortunately, the judgment from Justice Madigan (sitting as the ILSC Commissioner) of 1st June 2012, is also not listed on Paclii – something that I have asked my staff to remedy by liaising with those administering Paclii. I have, however, been able to find a copy of the judgment in the Commission's files wherein Madigan J noted at paragraph 2 therein, that the case that was initially heard '*before the then Commissioner Connors over three days in January 2012 subsequent to which Commissioner Connors relinquished his post*

before delivering judgment' and then *'with the consent of the parties the evidence and submissions [were] reviewed'* by Madigan J and judgment delivered on 1st June 2012 followed by a sentencing judgment delivered on 22nd June 2012.

[91] I have also noted that the legal practitioner then made an application to the Court of Appeal appealing '*both the findings of guilt made on 1 June 2012 and the penalty imposed by the Commission on 22 June 2012'* and sought '*a stay pending the determination of his appeal by the Court of Appeal'*. That application was refused. A copy of that judgment is listed on Paclii: see ***Haroon Ali Shah v Chief Registrar*** (Unreported, Court of Appeal Case No.ABU50.2012, 3 December 2012, Calanchini AP; Paclii: [2012] JFCA 101, <http://www.paclii.org/fj/cases/FJCA/2013/141.html>), paragraphs 9 and 27.

[92] There are six points I wish to make in relation to the reference to *Shah* from the *'Prosecution Case Statement'* filed in the present case before me:

(1) Interestingly, in the *'Prosecution Case Statement'* at paragraph 8, it is stated that in the present case '*the Applicant relies on section 82(1)(b) as the conduct occurred in connection with the Respondent's practice of law*' [my emphasis] and *'[t]he Applicant's position is that a client's account should never be overdrawn'*. Despite then stating further in paragraph 8 that '*it is an offence'* to have an overdrawn account, the submission reaffirms my view stated earlier that the offence in the present case is an alleged breach of section 82(1)(b) of the *Legal Practitioners Decree 2009*. That is, professional misconduct. The particulars of that conduct are the details of the overdrawn account/s.

(2) As for the citation of ***Chief Registrar v Haroon Ali Shah***, **I note in that case there were nine counts – most irrelevant to the present case before me.** Counsel for the Applicant has not made clear as to which Count he was referring when citing the case or, whether he was citing the case overall. I note that in *Shah* Counts 1 and 7 alleged a breach of section 82(1)(a) of the *Legal Practitioners Decree 2009* and particularised a failure to ensure the trust account was not overdrawn. I also note that Madigan J stated at paragraph 29 that the Respondent legal practitioner *'entered a plea of guilty on the first day of the hearing before Commissioner Connors'* in relation to Count 7, that is, '*to the lesser charge of unsatisfactory professional conduct contrary to Section*

83(1)(h) of the Legal Practitioners Decree 2009' and at paragraph 32 Madigan J stated that he 'reluctantly' accepted the plea to the lesser charge.

(3) In Count 1 in *Shah*, the Applicant relied upon the offence of *Professional Misconduct* pursuant to section 82(1)(a) and particularised the conduct as a failure to ensure that trust monies in the sum of $70,000 were not utilised for unauthorised purposes resulting in there being an overdrawn account. To be clear, section 82(1)(a) of the *Legal Practitioner's Decree 2009* states:

'Professional Misconduct

82.—(1) For the purposes of this Decree, 'professional misconduct' includes –

(a) ***unsatisfactory professional conduct of a legal practitioner****, a law firm or an employee or agent of a legal practitioner or law firm,* ***if the conduct involves a substantial or consistent failure*** *to reach or maintain a reasonable standard of competence and diligence'.*

[My emphasis]

(4) **By contrast, in the present case, the Applicant relies in Count 1 upon *Professional Misconduct* pursuant to section 82(1)(b)**. As noted above, *'professional misconduct'* pursuant to section 82(1)(b) is:

'(b) ***conduct of a legal practitioner****, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law,* ***that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice****, or that the law firm is not fit and proper to operate as a law firm.'*

[My emphasis]

(5) Thus in ***Shah,*** **the alleged offence in Count 1 was *'professional misconduct'* pursuant to section 82(1)(a)** of the *Legal Practitioner's Decree 2009*, involving ***'a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'*** and the particulars were a failure to ensure that trust monies were not utilised for unauthorised purposes resulting in there being an overdrawn account. **In the present case, the alleged offence in Count 1 is also *'professional misconduct'*, however, it is pursuant to section 82(1)(b)** of the *Legal Practitioner's Decree 2009*, that is, **'conduct** ***… that would … justify a finding that the practitioner is not a fit and proper***

person to engage in legal practice' and the particulars are the details of the overdrawn account/s (even if, as I have found, that they are 12 separate offences).

(6) Hence, in *Shah* only Counts 1 and 7 are arguably relevant to the present case and even then **the alleged breach in *Shah* in Count 1 was pursuant to section 82(1)(a) not 82(1)(b), whilst the conduct in Count 7 was '*to the lesser charge of unsatisfactory professional conduct contrary to Section 83(1)(h)*'**.

(2) Does the count, in its present form, plead in the particulars the sanction to be imposed?

[93] I agree with the Respondent legal practitioner that the concluding words in Count 1 have pleaded the sanction to be imposed, that is, by stating that the conduct constitutes professional misconduct *'pursuant to section 82(1)(b) of the Legal Practitioners Decree 2009 which would if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice'*.

[94] It is inappropriate for the above words to have been included in Count 1 and they should be deleted.

6. The Respondent's application to strike out Count 2

[95] The Respondent's argument in relation to Count 2 is set out at paragraph 2.1 of his 'Further Submissions' dated 1st December 2016, that is, that *'the facts alleged and or relied upon by the Applicant in both count 1 and count 2 are the same and they breach the rule of duplicity.'*

(1) Are Counts 1 and 2 duplicitous?

[96] Count 2 states as follows:

*'**Count 2***

***PROFESSIONAL MISCONDUCT:* Contrary to section 82(1)(b) of the Legal Practitioners Decree 2009**

PARTICULARS

Vilimone Vosarogo also known as Filimoni WR Vosarogo, *a legal practitioner, principal of Mamlakah Lawyers and trustee of Mamlakah Lawyers Trust Account kept with BSP Bank, Suva Branch bearing Account Number 7706348 from the period 1st October 2014 to 30th September 2015*

failed as a trustee to properly monitor the internal account system within the law firm which led to twelve clients' account being overdrawn, which conduct constitutes professional misconduct pursuant to section 82(1)(b) of the Legal Practitioners Decree 2009.'

[97] Counsel for the Applicant in his *'Submissions in Reply'* dated 26th October 2016, after citing section 111 of the *Legal Practitioners Decree 2009* (which *'gives powers to the Chief Registrar to commence disciplinary proceedings')*, has then cited at paragraph 5 of his submissions, sections 58 and 59 of the *Criminal Procedure Decree 2009.* Section 59 in particular, concerns the *'joinder of counts in one charge or information'* and states at section 59(2) that:

> *'(2)* ***Where more than one offence is charged*** *in a charge or information,* ***a description of each offence shall be set out in a separate paragraph*** *of the charge or information,* ***and each paragraph shall be called a count****.'*
> [My emphasis]

[98] Counsel for the Applicant has then submitted at paragraph 6 that:

> *'...* ***count one and two create two separate offences of professional misconduct****.* ***Count one*** *is in relation to clients' accounts being overdrawn to the sum of $17,104.57 and* ***count two*** *deals with the trustees [sic] failure to properly monitor the internal account system which led to the clients' accounts being overdrawn to the sum of $17,104.57.*
> [My emphasis]

[99] Again, my analysis is undertaken by referring back to the question what is the prohibited conduct? **In my view, the prohibited conduct is a breach of section 82(1)(b) of the *Legal Practitioners Decree 2009,* that is, '*conduct … that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'*.** **The particulars** are that Respondent '***failed as a trustee to properly monitor the internal account system within the law firm which led to twelve clients'* account being overdrawn'.**

[100] So in Count 1, **the prohibited conduct is a breach of section 82(1)(b) and the particulars** are that the Respondent **'failed to ensure that the following individual client accounts were not overdrawn'.** In Count 2, **the prohibited conduct is again a breach of section 82(1)(b) and the particulars** are that Respondent '***failed as a trustee to properly monitor the internal account***

***system within the law firm which led to twelve clients'* account[s] being overdrawn'.**

[101] So in Counts 1 and 2 we have exactly the same offence, **a breach of section 82(1)(b). On its face that is not duplicitous where the particulars are different. The question then becomes are the particulars different?**

[102] **Count 1 was a failure to ensure the accounts were not overdrawn whilst Count 2 was a failure to properly monitor the account system which led to twelve clients' accounts being overdrawn. In other words, does it not follow that Count 2 which was a failure to *'properly monitor the account system which led to twelve clients' account[s] being overdrawn'* was in fact a failure *'to ensure the … accounts were not overdrawn'*? Hence, are not Counts 1 and 2 duplicitous?**

[103] In addition, as I have noted above, the Respondent legal practitioner in his *'Further Submission to Strike Out'*, dated 1st December 2016, has submitted at 2.1 that *'the facts alleged and or relied upon ... in both count 1 and count 2 are the same'*. He has also submitted at 2.4 that *'the Applicant is going to base its evidence from the 1st count to meet the evidential threshold of the 2nd count'*, and again at 2.5, that by using *'the same legislative section ... is also a pointer to the fact that th[e]y intent [sic] to run the same evidence to meet the two counts out of the same series of facts'*. '*Further'*, the Respondent legal practitioner has noted at 2.6, *'the 2nd count is not charged in the alternative but as a seprate [sic] count altogether'* and argues that this signifies *'a scattergun approach'*. Thus at 2.7 the Respondent *'calls for the powers of the Commission to be exercised to ensure that its processes are not abused by those who appear before it'* thereafter citing Deane J in the High Court of Australia in ***Jago v District Court (NSW)***, (1989) 168 CLR 23; Richardson J in ***Moevao v Department of Labour*** (1980) 1 NZLR 464 and Lord Griffiths in the House of Lords in ***R v Horseferry Magistrates Court, Ex parte Bennett*** [1994] AC 42.

[104] At the hearing on 7th December 2016, Counsel for the Applicant disputed the submission of the Respondent legal practitioner that the Applicant was relying upon the same evidence for Count 1 and Count 2, arguing instead:

"Count 1 is the audit report. Count 2 is the auditor's evidence on the way the accounting system was maintained in the law firm."

[105] My problem is that, as I explained to Counsel for the Applicant at the hearing on 7th December 2016, not only are the offences in each count the same (a breach of section 82(1)(b)), the particulars in both Counts appear the same (one being a failure to ensure that accounts were not overdrawn and the other a failure to properly monitor the accounting system which resulted in 12 accounts being overdrawn), but also the evidence in both is to be that of the auditor (one aspect being the audit report that 12 accounts were overdrawn and the other aspect being the auditor's evidence as to the way the accounting system was maintained resulting in 12 accounts being overdrawn). Hence, I had asked is that not really the same offence in a different Count? The following exchange highlighted the differences in understanding:

"Commissioner:	*... Okay Mr. Chand what do you want to say about Count 2?*
Mr. A Chand:	*We are saying Sir simply that it's not a duplicity.*
Commissioner:	*Why?*
Mr. A Chand:	*Because we are saying the offence here is he failed to properly monitor the internal accounts system.*
Commissioner:	*Right. Whereas the other is?*
Mr. A Chand:	*And the other is the overdrawn is on the issue of ...*
Commissioner:	*Fail to ensure they were not overdrawn.*
Mr. A Chand:	*Individual client accounts were not overdrawn.*
Commissioner:	***And he has failed to ensure to properly monitor the internal accounts system which lead to them being overdrawn?***
Mr. A Chand:	***Yes.*** *So that is about the individual accounts being overdrawn and this is failing to monitor the internal - monitor the staff or the internal accounting system in general.*
Commissioner:	*What about Mr. Vosarogo's point 'he's just relying on the same evidence'?*
Mr. A Chand:	*No it's not the same evidence. And* ***this evidence would be coming from the Auditors as to how the Respondent had maintained the internal accounting system*** *or whether he indeed maintained any or not and how it was maintained. So* ***that's completely different from***

the specific allegation of individual client's account being overdrawn.

Commissioner: *So your argument is 'it's to do with monitoring the internal accounts system'. Whereas Count 1 is to ensure that they are not overdrawn ... ensuring they not overdrawn and monitoring, isn't that the same thing? And you are saying to me?*
Mr. A Chand: *No they are not the same thing.*

Commissioner: *Okay. Explain to me how? Ensuring that they not overdrawn and monitoring …*
Mr. A Chand: ***Properly monitoring the internal accounting system**. Now if you do not properly monitor the internal accounting system there could be other issues that could crop up in the audit not only overdrawn accounts.*

Commissioner: *So you're saying, just so I'm clear on your argument, Count 1 has said it's ensuring they are not overdrawn, Count 2 is their monitoring.*
Mr. A Chand: ***Failing to properly monitor.***

Commissioner: ***No it says monitor 'which led' to him 'being overdrawn'.***
Mr. V Vosarogo: *That's the language of the charge.*

Commissioner: *Okay. And you're saying [Mr Vosarogo] … that you are relying on the same 12?*
You're saying [Mr Chand] 'no we are relying on the auditors'? What are you relying then on Count 1?
Mr. A Chand: *Count 1 is the audit report.*

Commissioner: *The auditors as well?*
Mr. A Chand: *Count 1 is the audit report. Count 2 is the auditor's evidence on the way the accounting system was maintained in the law firm.*

Commissioner: *Is there anything further with the various law there you want to rely on? Anything further?*
Mr. A Chand: *No.*

Commissioner: *Okay. Mr. Vosarogo, is there something you want to say about Count 2 now you have heard what he said about Count 2 - saying that one of them is ensure - Count 1 is ensuring it's not overdrawn, Count 2 is monitoring which led to it being overdrawn?*
Mr. V Vosarogo: *My reading of this My Lord with respect to my friend is it amounts to the same thing. They have charged with the same section … with the reliance would be arising out of the same evidence and so therefore it is duplicitious."*

[106] **Upon reflection, I came to the view following the hearing on 7th December 2015, that what was really being raised by the Respondent legal practitioner in relation to Count 2 was the issue of "double jeopardy".** That is, whether the Respondent legal practitioner has a plea in bar or is entitled to a stay of proceedings for an abuse of process as there are two offences proceeding arising out of the same set of facts, an issue that was considered in some detail by the High Court of Australia in ***Pearce v R*** (1998) 194 CLR 610 (Austlii: [1998] HCA 57, <http://www.austlii.edu.au/au/cases/cth/HCA/1998/57.html#fnB8>). The background to the argument, was explained by McHugh, Hayne and Callinan JJ in their joint judgment at [1]-[2] and [7] (pages 612-613):

> *'[1]. The indictment charged him (among other things) with maliciously inflicting grievous bodily harm with intent to do the victim grievous bodily harm and with breaking and entering the dwelling-house of the same victim and, while therein, inflicting grievous bodily harm on him. These charges were counts 9 and 10 on the indictment and alleged offences against ss 33 and 110 of the Crimes Act 1900 (NSW).*
>
> *[2]* ***…[the] two charges arose out of a single episode. The appellant broke into the victim's home and beat him****.'*
>
> …
>
> *[7]* ***The elements of the offences charged against the appellant overlap but they are not identical****. The offence under s 33 requires a specific intent to do grievous bodily harm; the offence under s 110 does not. The latter section requires only an intention to do the acts that caused the harm … The offence under s 110 requires a breaking and entering; the offence under s 33 does not. Did charging both offences subject the appellant to double jeopardy?'*

[107] McHugh, Hayne and Callinan JJ then explained how the issue of "double jeopardy" should be resolved where an accused argues the prosecution should be barred from proceeding with two offences at [19]-[20] and [28]-[31] (pages 616-617 and 620-621):

> *'19.* ***Much of the difficulty in determining whether a plea in bar is available when a person is charged with different offences arising out of substantially the same facts can be seen to stem from two sources****: first, the uncertainties inherent in the proposition that it is enough that the offences are "substantially" the same; and secondly, the attempt to identify the "sameness" of two offences by reference to the evidence that would be adduced at trial. But these difficulties may be more apparent than real.*

20. *In each of Chia Gee v Martin (1905) 3 CLR 649 and Li Wan Quai v Christie (1906) 3 CLR 1125.* ***Griffith CJ identified the test for whether a plea in bar would lie as being "whether the evidence necessary to support the second [charge or prosecution] would have been sufficient to procure a legal conviction upon the first"*** *(1905) 3 CLR 649 at 653; (1906) 3 CLR 1125 at 1131. At first sight this might suggest that it is appropriate to consider what witnesses would be called and what each of those witnesses could say about the events which gave rise to the charges.* ***Closer examination reveals that the enquiry suggested is different; it is an enquiry about what evidence would be sufficient to procure a legal conviction. That invites attention to what must be proved to establish commission of each of the offences. That is, it invites attention to identifying the elements of the offences, not to identifying which witnesses might be called or what they could say.*** *It is only if attention is directed to what evidence might be given, as opposed to what evidence was necessary, that the enquiry begins to slide away from its proper focus upon identity of offence to focus upon whether the charges arise out of the same transaction or course of events.*

...

'28. Inevitably, any test of the availability of the pleas in bar which considers the evidence to be given on the trial of the second prosecution except in aid of an enquiry about identity of elements of the offences charged would bring with it uncertainties ... and ***there is no reason to depart from the use of the test which looks to the elements of the offences concerned.*** *Each of the offences with which the appellant was charged required proof of a fact which the other did not. It follows that no plea in bar could be upheld.*

29. *Confining the availability of the plea in bar in this way does not deny the existence of the inherent powers of a court to prevent abuse of its process. That there may be cases in which the repeated prosecution of an offender in circumstances where that offender has no plea in bar available would be an abuse of process is illustrated by Rogers v The Queen (1994) 181 CLR 251.*

30. ***The decision about what charges should be laid and prosecuted is for the prosecution*** *(Maxwell v The Queen (1996) 184 CLR 501 at 512 per Dawson and McHugh JJ, 534 per Gaudron and Gummow JJ).* ***Ordinarily, prosecuting authorities will seek to ensure that all offences that are to be charged as arising out of one event or series of events are preferred and dealt with at the one time.*** *Nothing we say should be understood as detracting from that practice or from the equally important proposition that prosecuting authorities should not multiply charges unnecessarily.*

31. *There was, however, no abuse of process in charging this appellant with both counts 9 and 10. The short answer to the contention that the charging of both counts was an abuse of process is that because the offences are different (and different in important respects) the laying of both charges could not be said to be vexatious or oppressive or for some improper or ulterior purpose (cf Williams v Spautz (1992) 174 CLR 509).*

[108] Gummow J and Kirby J each separately agreed that there was no “double jeopardy” in *Pearce.*

[109] Gummow J also observed at [67] (page 629):

> *‘... It should also be accepted that* ***the inclusion of separate counts for what in substance****, if not entirely in form,* ***is the same offence may be an abuse of process****.’*
>
> [My emphasis]

[110] Kirby J at [125-[127] (pages 652-653) also clarified the narrow application of the plea in bar:

> *125. This Court should accept the same test for a complaint about duplication in a second indictment or second charge as that now adopted in England, the United States and other jurisdictions of the common law.* ***To make the complaint good, it is necessary to show that the subject of the second prosecution or charge is the same offence or substantially or practically the same.*** *The last words allow for minor variations in the verbal formulae of offences under comparison.* ***It is necessary in each case to analyse the essential elements of the offences said to be duplicated.*** *Minor differences of language may be discarded.* ***But elements which add distinct and different features (normally of aggravation) to the definition of an offence will result in differentiation between charges which is legally significant. To prosecute an accused in respect of such different offences is not to offend the rule of the common law against double jeopardy …***
>
> *126 ... In the context of a plea by which an accused person is asserting a right to be relieved of a second criminal prosecution or charge, it is essential that the criteria to be applied should be clear. It is desirable that they be productive of a predictable outcome. Otherwise, time will be lost. Costs will be incurred in argument, at trial and on appeal, attempting to define the "gist and gravamen" of successive charges: a phrase necessarily involving impression.*
>
> *127 ...* ***the plea in bar should be confined to the strict application of*** *the pleas of autrefois convict and autrefois acquit (or* ***the analogous pleas where the charges appear in the same proceedings****) defined in the narrow way I have described ...’*
>
> [My emphasis]

[111] As noted above, the problem that I have with the Applicant proceeding with both Count 1 and Count 2 is:

(1) They are both the same offence – alleging a breach of section 82(1)(b));

(2) The particulars in both Counts appear the same;

(3) The evidence to be relied upon in both is from the same source – the auditors. Indeed, as Counsel for the Applicant stated in his *'Prosecution Case Statement'* dated 15th September 2016: '... ***the Applicant would be mainly relying on the audit report … and the testimony of two witnesses [from the auditing firm] <u>in relation to all the three counts</u>***.'

[112] When I relisted this matter on 3rd February 2017, I raised the issue of double jeopardy with both parties. According to Counsel for the Applicant, Count 1 and Count 2 are two different offences: Count 1 is for overdrawn accounts, while Count 2 is for a general failure to monitor to the accounts which led to them being overdrawn. He also alluded to the fact that there is evidence of "other faults in the accounting system" that will be established from the auditors as witnesses. In response, the Respondent legal practitioner submitted that there was "nothing in the particulars" in Count 2 as to other faults "other than the 12 accounts" being overdrawn. Counsel for the Applicant had no further submissions to make in Reply.

[113] Putting to one side the question of the evidence, and looking solely at the test outlined by McHugh, Hayne and Callinan JJ in the High Court of Australia in *Pearce*, that is, undertaking '***an enquiry about what evidence would be sufficient to procure a legal conviction', 'it invites <u>attention to identifying the elements of the offences, not to identifying which witnesses might be called or what they could say'</u>***, it must said that, in my view, Counts 1 and 2 are the same such to raise the issue of either double jeopardy or an abuse of process. The elements of section 82(1)(b) being relied upon in Counts 1 and 2, in summary, are '***conduct of a legal practitioner … that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'.*** Counsel for the Applicant says the particulars are different: Count 1 is **a failure <u>to ensure</u> 12 accounts were not overdrawn whilst Count 2 was a failure to <u>properly monitor the account system which led to the 12 accounts being overdrawn. In my view, these are not different features, but are one and the same. Therefore, the Applicant cannot proceed with Count 2, or if he wishes to do so, then he must not be allowed to proceed with Count 1. He must make a choice as to how he now wishes to proceed.</u>**

6. Should Counsel for the Applicant be allowed to draft a new Amended Application?

[114] I will now return to the question of allowing Counsel for the Applicant to draft a new Amended Application.

[115] As to how to proceed, I have noted the view of Kirby J that I have cited above in *Walsh*, that is:

(1) ***'A finding that the rule against duplicitous charges has been breached does not oblige the court, coming to that conclusion, to dismiss the charge. Where the defect is one of patent duplicity**, the proper course is to put the complainant to an election to remove the embarrassment';*

*(2) **Where the defect is latent** and the particulars do not remove it, **the court may direct further particulars**; **require the complainant to elect** and to identify the alleged offences; **and/or exercise the power to permit an amendment** ... If the latent defect, once exposed, suggests a risk that the accused might not have a fair trial on the charges as pleaded, the court should require correction'.*

[116] I am also cognisant of what McHugh, Hayne and Callinan JJ said in *Pearce* (citing *Maxwell v The Queen*): '***The decision about what charges should be laid and prosecuted is for the prosecution.'***

[117] I am going to allow the Applicant to amend. My issue is how does this affect the Respondent legal practitioner? I note that:

(1) He was without a practicing certificate from 1st March 2016 until approximately 25th September 2016;

(2) He had Ms Barbara Malimali of Counsel appear on his behalf on 22nd and 23rd September 2016.

(3) Section 124 of the *Legal Practitioners Decree 2009* limits any award that the Commission may order in relation to costs and expenses. In particular, section 124(2) states: '***The Commission shall not make any order for payment of costs and expenses against the Registrar or the Attorney-General.'*** [My emphasis]

[118] **If I cannot award costs against the Applicant, should I be considering granting a stay until the costs of the Respondent legal practitioner (if any)**

incurred in having Counsel appear on his behalf on 22nd and 23rd September 2016 (and arguably on 3rd February 2017) be met as well as any costs incurred (if any) in obtaining legal advice in responding to the Applicant's Application to Amend Count 3 and/or in the Respondent bringing his own application to have the three Counts struck out? In that regard, I wish to bring to the parties' attention the judgment of the New South Wales Court of Criminal Appeal in ***R v Mosely*** (1992) 28 NSWLR 735; (1992) 65 A Crim R 452, a judgment of Gleeson CJ (with whom Kirby P and Mahoney JA agreed), prior to Gleeson CJ and Kirby J being later appointed Chief Justice and a justice of the High Court of Australia respectively.

[119] In *Mosely,* on 20 May 1991, a judge of the New South Wales District Court, granted the prosecution an adjournment on the morning at the beginning of a trial, due to the unavailability of two police witnesses. As Gleeson CJ noted (at 737), although there was no provision under the *District Court Act* 1973 (NSW) to award costs in criminal proceedings except *'in certain circumstances following an acquittal of an accused person at a trial'*, the trial judge in the District Court had reasoned:

> *'The court clearly had power to make an order for adjournment and, therefore … he had power to adjourn the matter on terms. It was argued that a power to grant an order on terms necessarily includes a power to frame the relevant term as an order. That submission was accepted.'*

[120] In November 1991, some six months later, *'without having taken any steps to comply with the order for costs, the Crown sought to have the matter brought on again for trial'* and Counsel for the Defendant *'made an application for an order staying the proceedings until the costs were paid.'* This was heard before a different judge of the District Court who, despite the argument of the prosecution that the previous judge *'had no power to make the order for costs'*, *'granted a stay of proceedings until the costs ordered … were paid'*. In August 1992, some 10 months later, the prosecution then appealed to the New South Wales Court of Criminal Appeal.

[121] Despite Gleeson CJ noting (at 740) that **the original District Court judge *'had no power to make the order for costs in question' and thus 'the appeal against that order should be allowed and the order should be set aside'*, he proposed**

(at 741) that the order made by the second District Court judge of staying the proceedings *'should be varied to provide that **the stay of proceedings therein referred to be until the costs thrown away as a result of the adjournment granted … on 20 May 1991 be paid to the respondent**; such costs to be agreed or, failing agreement, to be in such amount as is assessed by a judge of the District Court'*.

[122] A "Mosely type Order" was applied some 11 years later in ***R v Fisher*** (2003) 56 NSWLR 625; Austlii: [2003] NSWCCA 41) wherein Santow JA noted at [1] (page 626):

> *'... **The reasoning in R v Mosely makes it clear** that had the matter originally proceeded as an application by the defendant for a stay of proceedings, until such time as the Crown paid the defendant's wasted costs (from the Crown's inability to proceed on the day of the trial), **that order could have been made provided there were no order actually imposing costs on the Crown**.'*

[123] In *Fisher,* Santow JA explained at [5]-[7] (pages 626-627) the difference between imposing a costs order and granting a stay as follows:

> ***'While it might be argued that the distinction between imposing an order for costs and staying a trial until costs are paid is a narrow one, nonetheless the distinction is real and important.*** *It respects the prohibition upon a court imposing a cost order upon the Crown, a constraint recognised in Dietrich v The Queen (1992) 177 CLR 292.* ***It remains a matter for the Crown as to whether it ultimately chooses to proceed and pay the wasted costs, or decline to proceed.'***
> *[6] It may nonetheless be argued that the effect of the stay ordered in the present case is, in a practical sense, to force the Crown to pay the wasted costs, while eschewing an order compelling it to do so. The argument proceeds that the practical effect of such an order is to force the Crown to make the payment, as otherwise the Crown would be prevented from vindicating the public interest, here in holding directors to account for alleged breaches of their directorial duties.*
> *[7]* ***But the Crown is under no duty to conduct the prosecutions in a grossly unfair fashion.*** *The power of granting a stay against the Crown until wasted costs are paid is to be used only for the rare and extreme case of gross unfairness on the part of the Crown.* ***That is to say, unfairness which, exceptionally, can override the public interest in pursuing a criminal prosecution, though to be weighed against what is the urgency of bringing the case to trial.*** *It is nonetheless certainly not against the public interest that the Crown, as a model litigant, pursue its criminal prosecutions with proper fairness. But to abort a second re-trial in the circumstances of the present prosecution by reason of the Crown's own failure to produce a document, even accepting inadvertence, and then ignore the consequence for the defendant in further wasted costs in*

so proceeding to a third trial, is unjust and unfair, meriting the description of exceptional circumstances.'

[124] The test in granting a "Mosely type Order" was also discussed by Ipp JA in ***Petroulias v R*** (2007) 176 A Crim R 302; [2007] NSWCCA 154 (1 June 2007). The case involved as noted at [1] (page 303) an appeal against a trial judge's decision to dismiss the defendant's '*notice of motion for an order staying proceedings against him until the Commonwealth Director of Public Prosecutions paid the reasonable costs that he had incurred in relation to a trial'* that had been aborted following a ruling by the New South Wales Court of Appeal *'that one of the jurors was disqualified'*.

[125] Ipp JA noted at [13] (page 305) that the appeal involved clarifying: *'...* ***whether the test*** *for granting the relief sought* ***required the applicant to prove that the unfairness*** *he alleged* ***was caused by fault on the part of the prosecution****'*. Ipp JA then went on to explain that the trial judge in refusing the application in *Petroulias* had, in turn, cited *'the test enunciated by Fullerton J in R v Selim [2007] NSWSC 154'*, that is, where her Honour had said (at [57]):

> *'I am content to proceed on the basis that* ***there needs to be demonstrated an identifiable injustice for which it can be sensibly said that prosecuting authorities should be held responsible*** *before a temporary stay is ordered, given that the effect of ordering a stay is to impose on them the costs of previous proceedings before they may be permitted to prosecute again.'*
> [My emphasis]
>
> To this Ipp JA added at [15] (page 305):
> *'I shall assume that Johnson J understood Fullerton J's reference to an* ***identifiable injustice to incorporate fault on the part of the prosecution****.'*
> [My emphasis]

[126] Thus Ipp JA concluded at [23] (page 306):

> *'The authorities to which I have referred establish that the power of the court to grant a stay, permanently or temporarily, stems from the court's power to prevent injustice or unfairness in the trial in a case where a temporary stay is sought, subject to the prosecution paying costs. In my opinion, practically speaking,* ***unfairness cannot be established without proof of fault on the part of the prosecution****.'*

[127] I note that in ***Chief Registrar v Kapadia*** (unreported, ILSC Case No. 016 of 2015, 21 September 2016; Paclii: [2016] FJILSC 8,

<http://www.paclii.org/fj/cases/FJILSC/2016/8.html>), I raised at [122]-[123] that:

> *'[122] It is clear, therefore, that the Commission cannot award costs against the Applicant and/or the Chief 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 a legal practitioner and/or a legal firm</u>,*** *that what is to be asserted in the application as to the alleged conduct by the legal practitioner and/or firm* ***<u>has a sound legal basis so as to be considered an impropriety</u>*** *...*
>
> *[123] Hopefully, the implementation of the above will assist the Applicant by having the staff of the LPU concentrate upon investigating and pursuing allegations of impropriety that have an appropriate* ***<u>legal</u>*** *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'.*

[128] Following my judgment in ***Kapadia,*** I issued 'Amended Practice Direction No.2 of 2016, *'Rules of Procedure – Filing of Prosecution Case Statement'* based upon the above and then stating:

> *'2. Having been satisfied that the allegations, if proven, could amount to unsatisfactory misconduct or professional misconduct,* ***a prosecution case statement shall then be included in the application filed with the Commission*** *outlining a concise summary of evidence, together with a short statement as to the legal basis upon which the application is being brought.*
>
> *3.* ***It is expected that the Respondent having considered the application filed by the Applicant with supporting documentation (including the prosecution case statement), will be in a position on the 1st return date of the application to enter a plea*** *and agree to a timetable for the filing of documents and the allocation of a hearing date either as a plea in mitigation or a defended hearing (including the number of anticipated witnesses).'*
>
> [My emphasis]

.

[129] I note that the original application in this matter presently before me was made returnable on 22nd September 2016. My judgment in *Kapadia* was handed down the previous day, on 21st September 2016 and a Practice Direction (was issued that same day which was slightly amended soon thereafter) and published as *'Amended Practice Direction No.2'* issued on 29th September 2016. I had, however, prior to the above, ordered that in the present matter a

'Prosecution Case Statement' be filed and served by 15th September 2016, outlining a summary of the evidence, together with a statement as to the legal basis upon which the Application is being brought. It was later formally filed and served on 25th September 2016 together with a Draft Amended Application.

[130] In his '*Prosecution Case Statement'*, Counsel for the Applicant had complied as ordered, outlining the three Counts, a 'summary of the evidence', and 'the legal basis upon which the Application is brought'.

[131] Perhaps the drafting of each of the three counts needed more thought. If this were a civil case in the High Court, then, yes, costs would usually follow (or be reserved). Section 124 of the *Legal Practitioners Decree 2009*, however, is there for a reason. Costs cannot be awarded against the Applicant. It is also arguable whether a "Mosely type Order" could be granted by this Commission. In any event, even though I have found against Counsel for the Applicant on all three counts, my preliminary view is that this is not the type of case to consider the making of such an Order. Also, before doing so, I would need a formal application from the Respondent and for both parties to address me as to whether I have the powers to grant such an Order together with the appropriateness or not of doing so. Indeed, I am reminded of the words cited above of Santow JA in *Fisher*: '*The power of granting a stay ... until wasted costs are paid* ***is to be used only for the rare and extreme case of gross unfairness*** *...* ***That is to say, unfairness which, exceptionally, can override the public interest in pursuing a … prosecution, though to be weighed against what is the urgency of bringing the case to trial.'***

[132] Thus, I return to where I began, reflecting upon *Alice's Adventures in Wonderland*, to say what you mean, and the 'Mad Tea-Party'. As a result of the March Hare having been sentenced to death by the Queen of Hearts for "murdering the time" following an attempt to sing for her, "Time" (referred to as "him") halted it forever at 6.00pm – hence why for the Hatter and the March Hare "it's always tea-time" (see pp.64-65) - perhaps an earlier version of the film, ***Groundhog Day,*** released by Columbia Pictures in 1993). Even though I have had to spend many a hot and humid summer day and evening resolving the meaning of each of these three Counts, I cannot so condemn Counsel for the

Applicant for "murdering the time". He was entitled to bring the prosecution as he saw fit (including his application to Amend Count 3) so long as there was not *identifiable gross injustice*. Similarly, the Respondent was also entitled to make his application asking me to consider striking out the three Counts. Thus, although I have found against the Applicant, I cannot order costs against him. I will, however, be ordering that the Applicant file within five days a Further Amended Application in light of this Ruling.

PROPOSED ORDERS

[133] The proposed Orders of the Commission are:

1. The Applicant's Draft Amended Application (dated 15th September 2016 and filed on 6th October 2016) seeking Leave to Amend Count 3 is refused.
2. The Respondent's Oral Application (confirmed in his written submissions dated 14th October 2016) seeking a Ruling that the Counts 1 and 2 be struck out as bad for duplicity and Count 3 be struck out for a failure to provide sufficient particulars, is granted in part, as follows:
   (1) The Commission rules that Counts 1 and 3 are duplicitous and Count 2 offends the rule against double jeopardy;
   (2) In light of the Commission's Ruling, the three Counts cannot be allowed to proceed in their present form;
   (3) The Respondent's Oral Application that the three Counts be struck out is refused;
   (4) The Applicant is granted Leave to file a Further Amended Application within 5 days taking into account the matters raised in this judgment, that is, to file and serve such Further Amended Application by 12 noon on Friday, 10th February 2017.
3. The matter is returnable before me at 9.00am on Monday, 13th February 2017, to hear from the Respondent as to whether he has any objections to make to the Applicant's Further Amended Application and, if not, to set the matter down for hearing.

I will now hear the parties in relation to:

(1) The above proposed Orders; and

(2) A continuation of the Respondent legal practitioner’s practicing certificate.

Dated this 6th day of February 2017.

Dr. Thomas V. Hickie
COMMISSIONER