IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 002 of 2017

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

NACANIELI BULISEA

Respondent

Applicant: Mr. T. Kilakila
Respondent: Mr. J. Maisamoa

Dates of Hearing: 28th September 2017, 27th November 2017
Date of Judgment: 30th November 2017

Dates of Written Submissions:
6th October 2017 (Applicant)
18th October 2017 (Respondent)
27th October 2017 (Applicant in Reply)
20th November 2017 (Applicant Supplementary)
20th November 2017 (Respondent Supplementary)

JUDGMENT

1. The application in summary

[1] This is an application alleging that a legal practitioner misled a judge of the High Court of Fiji by informing the judge that the legal practitioner's application for renewal of his practising certificate (as well as that of his principal employer together with that of his fellow associates in the legal firm), had been lodged for renewal that day, when, in fact, his application and those of his fellow employees were not lodged until the following day and his principal the day thereafter.

[2] **The case, although principally concerned with the question of defining 'knowingly mislead a court', is another warning to legal practitioners as to the need to be aware of the mandatory requirements** set out in sections 42(1) and (2) of the *Legal Practitioners Act 2009* **that *'during the month of January in each and every year'*, a practitioner shall *'apply for and obtain from the Registrar'* a practising certificate. I have asked my staff to make sure that a copy of this judgment is brought to the attention of the President of the Fiji**

Law Society for dissemination to her members as a matter of priority.

2. The Count

[3] On 31st May 2017, an Application was filed by the Chief Registrar setting out an allegation of Professional Misconduct against the Respondent as follows:

'Count 1

ALLEGATION OF PROFESSIONAL MISCONDUCT**: pursuant to **Rule 3.1 of the Rules of Professional Conduct and Practice**, **Section 83(1)(a)**, and **Section 82(1)(a)** of the **Legal Practitioners Act of 2009

PARTICULARS

***NACANIELI BULISEA,** a Legal Practitioner, on the 28th day of February, 2017 misled the court vide HAC 56/14 that the applications for practicing certificate for the period 1st March 2017 to 28th February 2018, for himself, his principal at the time, and his fellow associates then, had been lodged with the Legal Practitioners Unit that same day when in fact the applications were lodged on 1st March 2017 and he did not have sufficient proof at the time as a basis for making such a representation to court in breach of **Rule 3.1** of the **Rules of Professional Conduct and Practice**, which is an act of professional misconduct contrary to **Section 83(1) (a)** and **Section 82(1)(a)** of the **Legal Practitioners Act of 2009**.'* [Underlining my emphasis]

[4] Section 83(1)(a) of the *Legal Practitioners Act 2009* states:

> *'Conduct capable of constituting unsatisfactory professional conduct or professional misconduct*
>
> *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 Act:*
>
> *(a) **conduct consisting of a contravention** of this Act, the regulations and rules made under this Act, or **the Rules of Professional Conduct**'* [My emphasis].

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

> *'Professional Misconduct*
>
> *'82.—(1) For the purposes of this Act, **"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].

[6] Rule 3.1 of the *Rules of Professional Conduct and Practice (Schedule of the Legal Practitioners Act 2009)* states:

> *'CHAPTER 3—RELATIONSHIP WITH THE COURT*
>
> *3.1 A practitioner shall not* ***knowingly*** ***deceive or*** ***mislead*** *the Court'* [My emphasis].

[7] Thus the allegation is professional misconduct pursuant to section 83(1)(a) of the *Legal Practitioners Act 2009*, i.e., '*conduct consisting of a contravention of … the Rules of Professional Conduct',* namely Rule 3.1 of the *Rules of Professional Conduct and Practice*, whereby '*a practitioner shall not knowingly … mislead the Court'.* Further, it is alleged that pursuant to section 82(1)(a) of the *Legal Practitioners Act 2009*, such conduct is also professional misconduct as it '*involves a substantial … failure to reach or maintain a reasonable standard of competence and diligence'.*

[8] The particulars of the charge are quite simple. It is alleged that on the 28th day of February 2017, the Respondent legal practitioner misled a judge of the High Court of Fiji that the renewal applications for practising certificates '*for himself, his principal at the time, and his fellow associates … had been lodged with the Legal Practitioners Unit'* that day, that is, with the Office of the Chief Registrar, when, in fact, the applications were not lodged until the following day (1st March 2017). Further, when the Respondent legal practitioner told the judge on 28th February 2017 that the renewal applications for the practising certificates had been lodged, the Respondent legal practitioner *'did not have sufficient proof at the time as a basis for making such a representation'.*

3. Procedural history

[9] On 25th September 2017, when the charge was heard before the Commission, Counsel for the Applicant called no witnesses. Instead, he simply relied upon documentary evidence, including transcripts from the proceedings in the High Court. In response, Counsel for the Respondent legal practitioner called two witnesses: Mr Nacanieli Bulisea (the Respondent himself) and Mr Adriu Misiki (another legal practitioner who worked with the Respondent). Orders were then made for the filing and serving of written submissions and the parties were advised that judgment would be on notice. This then is my judgment.

[10] As I read through the written submissions, there was clearly, some confusion by Counsel for the Respondent legal practitioner as to the applicable category of mens rea relevant to this offence. In my view, there were a number of cases from within Fiji as well as some other common law jurisdictions to which Counsel for both parties should be made aware. Accordingly, I arranged for the Secretary of the Commission to write to Counsel for each party on 13th November 2017 (which was the Monday of the fortnight prior to the present Sittings), serving them with a list of the cases and a very short summary as to their possible relevance to the present proceedings. In addition, both Counsel were provided with the web address for each case and invited to provide supplementary written submissions to be filed and served by the Monday prior to the commencement of the present Sittings (i.e., by 20th November 2017).

[11] When the matter was listed for mention at the commencement of these present Sittings (27th November 2017), both Counsel made brief oral submissions and the parties were advised that judgment would then be on notice.

[12] In reaching my judgment, therefore, I have taken into account the following submissions:

(1) *'Closing Submissions'* of the Applicant filed on 6th October 2017;

(2) *'Respondent Submission'* filed on 18th October 2017;

(3) '*Submissions in Reply'* of the Applicant filed on 27th October 2017;

(4) *'Applicant's Further Submissions'* filed on 20th November 2017;

(5) *'Written Comments in regards to Case Authorities'* of the Respondent filed on 20th November 2017; and

(6) the brief oral responses made before me by Counsel for each party on 27th November 2017.

[13] I will now set out the evidence upon which each party relies to prove and/or defend the action, before moving onto a consideration of whether this evidence establishes both elements (i.e., the actus reus and mens rea) of the charged offence.

4. The Evidence of the Applicant

[14] As noted above, Counsel for the Applicant did not call any witnesses. Instead, he simply relied upon the following documents (as Counsel for the Applicant noted in his *'Closing Submissions'* dated 6th October 2017) being:

(1) The court transcript (Record) of 28th February 2017 in ***FICAC v Ana Laqere & Ors***, Suva High Court Criminal Action No. 56 of 2014;

(2) The court transcript (Record) of 1st March 2017 in ***FICAC v Ana Laqere & Ors*;**

(3) A copy of the Respondent's letter dated 20th March 2017; and

(4) A copy of the Respondent's application for a practicing certificate for the current period, 1st March 2017–28th February 2018.

(1) *The court transcript (Record) of 28th February 2017*

[15] In relying upon the court transcript (Record) of 28th February 2017, Counsel for the Applicant in his *'Closing Submissions'* dated 6th October 2017 (at paragraphs [9]–[10], page 3) has highlighted the following:

> *'6. The court record … clearly shows at pages 21, 23, 39, 40, and 41 of the bundle that the Respondent misrepresented to the Court the actual status of his application for practicing certificate which resulted in the Court being misled.*
>
> *7. At page 23 of the bundle, the Respondent, when asked at least twice by the Judge, confirmed unequivocally that his application for practicing certificate along with that of his associates had been lodged that same day. Hence, despite being given the opportunity by the Judge to clarify or explain his position further, the Respondent opted to maintain his misleading response to Court.*
>
> *8. Clearly, one cannot go behind the record as the record depicts the actual reflection of the proceedings on the said day.'*

[16] In response, Counsel for the Respondent legal practitioner in his *'Respondent Submission'* dated 18th October 2017 (at paragraphs [1.3]–[1.6], page 1) has submitted:

> *'1.3 Since, the Respondent was directly under the control of the firm his renewal fee would be paid by the firm.*
>
> *1.4 On 28th February 2017 the Respondent has obtained the renewal form in which he prepared and filled the relevant areas of the form than [sic] signed before the commissioner for oaths than [sic] he submitted to the firm administrator– Mrs. Vakaloloma.*

1.5 Before the Respondent came to court he was assured by the Administrator that his application together with other associates would be lodged at the LPU.

1.6 When he appeared before the Court on the 28th February 2017 ***he informed the court what exactly was in the court record transcript*** *in relation to criminal case number 56 of 2014'* [My emphasis].

[17] Counsel for the Applicant in his *'Submissions in Reply'* dated 27th October 2017 has responded briefly as follows:

(1) In relation to the assertion by Counsel for the Respondent legal practitioner that his misrepresentation was due to the firm's administrator not having lodged the application, Counsel for the Applicant has submitted (at paragraph [9], page 3):

'9. The Respondent at page 8 of his submissions seems to assert that the fact the applications for practicing certificates were lodged with the LPU on 1st March 2017, was something out of his control and lays the blame squarely on the firm for that failure. While noting that there may have been some deficiencies in Mr Vakaloloma's conduct of his firm operations, ***at the end of the day, each and every legal practitioner admitted in Fiji is responsible for the satisfaction of his or her own licensing requirements*** *in order to lodge the application on time and have a valid license for the next operating period'* [My emphasis];

(2) In relation to the transcript, Counsel for the Applicant has submitted (paragraph [18], page 6):

'18. Further, ***the Respondent has in his submissions confirmed that he does not dispute the relevant court record for the 28th of February 2017 and 1st March 2017 respectively*** *vide HAC 56/14. Hence, noting that one cannot go behind the Court record, and the record shows that the Respondent did not make any attempts during the said proceedings to make further inquiries with his office or to clarify to the Court the information he received from his office staff, then* ***it stands to reason that the Respondent deliberately opted to inform the Court as he did knowing that the same was not true'*** [My emphasis].

[18] **I note that the court transcript (Record) of 28th February 2017 contains the following relevant statements**:

(1) At page 15 of the Court Record of 28th February 2017, after approximately 4.15pm (page 21 of the Applicant's Bundle at Tab B):

'Mr Bulisea:	*... I have an administrative issue that needs to be taken care of, of my practicing [sic] certificate* ***it's been filed today*** *and we need a response from the LPU for ...*
Judge:	*So, your practising [sic] certificate will come to an end ...*
Mr Bulisea:	*Expire today.*

Judge: *Okay. From tomorrow, you are not allowed to appear before me.*
Mr Bulisea: *Of course, yes, My Lord.'*
[My emphasis]

(2) At page 17 of the Court Record of 28th February 2017 (page 23 of the Applicant's Bundle at Tab B) –

'Judge: *Yes, what happened to your situation?*
Mr Bulisea: *... Actually,* ***all the practicing lawyers*** *normally we submit all ours because of our principle [sic] so* ***we submit it together today*** *and we will wait for it tomorrow.*
Judge: ***When did you submit your application****?*
Mr Bulisea: ***Today, My Lord****.*
Judge: ***You submit it today****?*
Mr Bulisea: ***Yes, My Lord****.'*
[My emphasis]

(3) At page 18 of the Court Record of 28th February 2017 (page 24 of the Applicant's Bundle at Tab B) –

'Judge: *No, the problem is that how about Mr. Vakaloloma's situation.[sic]****He also submitted his application***
Mr Bulisea: ***Yes, yes, My Lord****.'*
[My emphasis]

(2) ***The Court Transcript of 1st March 2017***

[19] In relying upon the Court Transcript of 1st March 2017, Counsel for the Applicant in his *'Closing Submissions'* dated 6th October 2017 (at paragraphs [6]–[8], pages 2–3) has highlighted the following:

> *'9. According to pages 39 – 41 of the bundle, the Court confronted the Respondent about the subject misrepresentation in Court the previous day to which the Respondent admitted his fault.*
> *10. Indeed ...* ***when asked by the Judge … whether he misled the Court on 28th February 2017, the Respondent admitted so*** *and also confessed the basis of information was that* ***the office would look at the application****. Hence, the Respondent has manifestly shown that the alleged assurance he had at the time for informing the Court as to the status of the applications was inconclusive and indeed totally opposite from what he represented in Court on 28th February 2017.'*
> [Counsel for the Applicant's emphasis]

[20] Counsel for the Respondent legal practitioner has replied in his *'Respondent Submission'* dated 18th October 2017 (at paragraphs [1.7]–[1.9], page 1), as

follows:

> *'1.7 On 1st March 2017 at the morning court session the Respondent was not appearing because of the fact his practising certificate was not renewed.*
> *1.8 At 2pm the same day the Respondent was summon[ed] by the High Court to appear in which he appeared and **he stated exactly what was in the court record transcript of 1st March 2017***
> *1.9 The Respondent apologised to the court for what transpired in court on the 28th day of February 2017 court session in relation to criminal case no. 56 of 2014'* [My emphasis].

[21] As noted above, Counsel for the Applicant has responded in his *'Submissions in Reply'* dated 27th October 2017 (at paragraph [18], page 6), that Counsel for the Respondent legal practitioner does not dispute the contents of the transcript.

[22] **I note that the court transcript (Record) of 1st March 2017 (after approximately 2.00pm) contains the following relevant statements from pages 13–15 of the Court Record of 1st March 2017** (pages 39–41 of the Bundle at Tab B):

> *'Judge:* *... Did you advise the Court that you applied for practicing[sic] certificate yesterday?*
> *Mr Bulisea:* ***Yes, My Lord, I can confirm that I apply yesterday*** *because my confirmation is that the office will look at the application yesterday before I came to Court in the afternoon, My Lord ...*
> *...*
> *Judge:* *Mr Bulisea, I expect that lawyers should conduct his or her official things in a more responsible manner, right?* ***If you inform the Court something that you did, you must be in a position to confirm and stand for that.*** *How can you tell the Court that we applied when you are not sure that your application went to the Legal Practitioners Unit or not?*
> *Mr Bulisea:* ***Yes, My Lord, I do apologise [sic] for that misconfusion.***
> *...*
> *Judge:* *... if you come to Court and tell that I lodged my application,* ***you should have seen that your applications went and lodged. Get a confirmation whether it's lodged*** *then you are supposed to inform the Court, yes, my application has been lodged.*
> *Mr Bulisea:* *Thank you, My Lord.*
> *Judge:* *Without knowing that, how can you inform the Court, my application has been lodged?*
> *Mr Bulisea:* ***I do apologise [sic], My Lord for my stance and my actions yesterday****.'*
> [My emphasis]

(3) ***The Respondent's letter dated 20th March 2017***

[23] Counsel for the Applicant has submitted in his *'Closing Submissions'* dated 6th October 2017 (at paragraphs [11]–[15], pages 3–4):

> *'11. Further, the Applicant also points to the Respondent's own response letter dated 20th March 2017 as it reveals certain concessions towards the making out of the count. Therein, at paragraphs 4 and 5 the Respondent had clearly admitted that he informed the Court on 28th February 2017 that his application for practicing certificate, including those of his associates and principal, had been lodged on the same day.*
>
> *12. However, at paragraph 10 the Respondent highlighted that he had only lodged his application for practicing certificate on the 1st March 2017 along with that of his fellow associates.*
>
> *13. At paragraph 11 the Respondent also confirmed that the application for practicing certificate for his principal, Mr Vakaloloma, had not been lodged as of 1st March 2017.*
>
> *14. The Respondent also at paragraph 14 confessed that he apologise [sic]d to the Court for his utterance of 28th February 2017 and that these verbal representations were made to the best of his knowledge. However, as is made clear from the subject court transcript for 28th February 2017, the Respondent did not at any point in time alert the Court that he was representing information to the best of his knowledge.*
>
> *15. In page 3 of the Respondent's letter, he also mentioned under "response to allegations" that he informed Court as he did based on the assurance and confirmation from the firm's administrator that the subject applications for practicing certificates* ***would be lodged*** *on the 28th February 2017. Clearly, by the Respondent's own admission, he knew at the time when he made the verbal representation in open Court that the applications had not been lodged with the Legal Practitioners Unit (LPU). However, in Court as confirmed by the aforementioned transcript, the Respondent without hesitation relayed that the subject applications had been lodged, which was an error the gravity of which, it can be safely taken, he understood fully at the time'* [Counsel for the Applicant's emphasis].

[24] Counsel for the Respondent legal practitioner did not specifically address the contents of his letter dated 20th March 2017, however, in his *'Respondent Submission'* dated 18th October 2017 (at paragraphs [6.8]–[6.11] page 3), **he made some general submissions** as follows:

> *'6.8 Also* ***the Respondent has clearly stated in his response to the complaint that he did not deny what he has stated in court on 28th February 2017****, but his utterance in court was made based on the assurance made to him by the administrator of the Vakaloloma & Associates.*

6.9 Further to that the Respondent has made clear that he signed his statutory declaration on the 28th February 2017 and submitted it to the administrator of the firm – Mrs. Vakaloloma before he went to court that morning of 28th February 2017.

6.10 So, what he uttered or pronounced in court was based on the signed declaration pertaining to his renewal application for practising certificate together with the assurance Mrs. Vakaloloma who is in charge of the administration of the Firm.

6.11 The Respondent has apologised to the court on the 1st March 2017, and such apology was recorded and it was not argued by the Applicant' [My emphasis].

[25] Counsel for the Applicant in his *'Submissions in Reply'* dated 27th October 2017 (at paragraph [20], pages 6–7) responded as follows:

> *'20. Further, the Respondent's own letter dated 20th March 2017, in response to the Applicant's referral of the issue, stated at page 3 of the bundle under the heading, 'Response', that the assurance and confirmation he received from his office was that the, "applications for practicing certificates will be lodged by our administrator…". **Again, it is quite clear that the Respondent was very aware of what the actual status of the applications were when he went into Court that morning but instead of informing Court as to that exact position, he decided to interpret that information to mean something totally other than what he had been updated with.** As a result, the only conclusion which could be derived from that action is that the Respondent, despite knowing the actual status of the applications, that they had not yet been lodged with the LPU, went on and matter of factly [sic] represented to the Court, that the applications had already been filed. The Respondent's conduct displays the deliberate failure in not affording the Court the courtesy to be fully informed of the true position of the applications state, which resulted in the Court being misled and Court time wasted in addressing this issue'* [My emphasis].

[26] **I note that the Respondent's letter dated 20th March 2017 to the Chief Registrar contains the following relevant statements:**

(1) On page 2 of the Bundle at Tab A –

> *'3. That **I did informed [sic] the Court that we have lodged** ours, mine with my other Associates Counsels **today 28th February 2017**.*
>
> *4. That **I did informed [sic] the Court** when answering question form the Bench **that Mr Vakaloloma's PC was also lodged on the same day 28th February 2017**.*
>
> *…*
>
> *10. I did informed [sic] the Court of my position that I personally lodged our application (myself and the associate's lawyers i.e. Mr Maisamoa, Mr. Raikanikoda and Mr. Misiki) today 01st March 2017 at about 11.30am.*
>
> *11. That on 01st March 2017 at 2:00pm I did informed [sic] the Court that*

Mr Vakaloloma has not lodged his application' [My emphasis].

(2) On page 3 of the Bundle at Tab A:

'In fact as an Officer the Court, ***I did informed [sic] the Court of my position that my application was lodged on 28/02/17*** *mainly based on the assurance and confirmation that my application together with other Associated Lawyers applications for practicing certificate will be lodged by our Administrator on directive of our Principal before the end of business on 28/02/17 (Expiry date) to avoid a late lodgment fee of $100.00 each'* [My emphasis].

(4) ***The Respondent's application for a practising certificate for the current period***

[27] In his *'Closing Submissions'* dated 6th October 2017 (at paragraphs [16]–[18], page 4), Counsel for the Applicant submitted:

> *'16. ... the Respondent's application for [a] practicing certificate for the current period ... was lodged on 1st March 2017 instead of 28th February 2017 as emphatically maintained by the Respondent in open Court on 28th February 2017.*
>
> *17. In terms of page 1 ... the top of the page demonstrates that the High Court Civil Registry had entered the date of payment of application fees as 1st March 2017 and* ***not*** *28th February 2017. Indeed, toward the bottom of page 1, it clearly shows that a LPU Registry staff member had approved the application for filing and payment of application fees on 1st March 2017 at 11:30am.*
>
> *18. Now while the Respondent attested the application on 28th February 2017 as manifested in the signed statutory declaration of the application at page 60 of the bundle that does not however reflect the date of lodgment. Instead, the date of lodgment is correctly stipulated in the first page of the application and also at page 66 of the bundle where a copy of the receipt issued by the High Court Civil Registry is present which shows that the Respondent paid the application fees for his application for practicing certificate on 1st March 2017.'*
> [Underlining my emphasis]

[28] **For the record, I note that** whilst the Statutory Declaration (accompanying the Respondent's application for a practising certificate for the period 1st March 2017 to 28th February 2018) was declared at Suva on 28th February 2017, **on the first page of the application form it is clearly handwritten that the date of receipt was *'1/3/17'***. Further, at the bottom of the first page of the application, it is handwritten: '*approved for filing. Pay $300–00+$100 late fee $400'*. It is also accompanied by a signature and dated *'1/3/17 11.30am'*.

5. The Evidence of the Respondent

[29] In relation to the Respondent's evidence before this Commission, Counsel for the Applicant has submitted in his *'Closing Submissions'* dated 6th October 2017 (at paragraphs [21]–[22], page 5):

> *'21. The Respondent when asked [during giving evidence before the Commission as to] what he meant when he stated to the Court that his application had been filed on 28th February 2017,* ***he clarified that he meant that the application had been filed with the LPU****. However,* ***as the relevant Court transcript confirms, the Respondent did not make this distinction clear to the Court at the time****. Evidently, the Respondent also confirmed that he did not mean filing to include lodgment with the LPU.*
>
> *22. Additionally, the Respondent when asked whether he had liaised with the firm administrator as to the actual status of his application and that of his associates and the principal that morning, prior to making the subject representations to Court,* ***he stated that he never contacted the law firm again after leaving for Court that morning and that as a result, he was unaware of the true state of the applications and importantly, whether they had been lodged with the LPU****'* [My emphasis].

And further at paragraphs [24]–[26] (pages 5–6):

> *'24. Significantly, the Respondent was also asked* ***whether he alerted the Court that his position or representation was based on his belief or best knowledge****. To this end* ***the Respondent stated that he did not make this qualification to the Court*** *and the Court record as highlighted supports this answer.*
>
> *25. The Respondent also went on to confirm that* ***he never asked for the matter to be stood down in order to verify with his office*** *on the status of the applications. As a result,* ***he deliberately allowed the Court to proceed on the inaccurate submission he had made****.*
>
> *26. In terms of being confronted by Court on 1st March 2017 as to his misleading submissions in open Court,* ***the Respondent conceded his misrepresentation and stated that he had apologized [sic]****'* [My emphasis].

[30] Counsel for the Respondent legal practitioner has replied in his *'Respondent Submission'* dated 18th October 2017 (at paragraphs [1.7]–[1.9], page 1) as follows:

> *'1.1 On 1st March 2017 at the morning court session the Respondent was not appearing because of the fact his practising certificate was not renewed.*
>
> *1.2 At 2pm the same day the Respondent was summon[ed] by the High Court to appear in which he appeared and* ***he stated exactly what was in the court record transcript of 1st March 2017***

1.3 The Respondent apologised to the court for what transpired in court on the 28th day of February 2017 court session in relation to criminal case no. 56 of 2014' [My emphasis].

[31] Interestingly, Counsel for the Respondent legal practitioner did not call Mrs Vakaloloma (the firm's administrator) to confirm that she gave any undertaking to the Respondent that the application would be filed on 28th February 2017. Even if such an undertaking had been given, the fact that he did not check with her during that day (for example, at the morning tea or luncheon adjournments) that the application had **IN FACT** been lodged meant that its relevance would arguably be limited to mitigation.

6. The burden of proof

[32] Having set out the evidence upon which both Counsel relied upon, I now propose to consider whether the charge is established.

[33] In relation to the burden of proof carried by the Applicant in these proceedings, I note that in ***Chief Registrar v Cevalawa***, (Unreported, ILSC Case No. 006 of 2011), (5 December 2011); PacLII: [2011] FJILSC 6, <http://www.PacLII.org/fj/cases/FJILSC/2011/6.html>, Commissioner Connors stated (at [32]–[33]):

> *'[32] In A Solicitor and The Law Society of Hong Kong [[2008] HKCFA 15; [2008] 2 HKLRD 576; (2008) 11 HKCFAR 117; FACV 24/2007 (13 March 2008) HKLII <http://www.hklii.hk/eng/hk/cases/hkcfa/2008/ 15.html>] the Chief Justice at paragraph 116 said:*
>
> > ***"In my view, the standard of proof for disciplinary proceedings in Honk [sic] Kong is a preponderance of probability under the*** Re H ***approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable if [sic] is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability, if that is properly appreciated and applied in a fair–minded manner, it will provide appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time protecting their members from unjust condemnation."***

> *[33] I am therefore of the opinion that the appropriate standard of proof to be applied is the civil standard varied according to the gravity of the fact to be proved, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong'* [Underlining my emphasis].

[34] I agree with the approach of Commissioner Connors. I have previously discussed in ***Chief Registrar v Kapadia*** (Unreported, ILSC Case No.016 of 2015, 21st September 2016); PacLII: [2016] FJILSC 8, <http://www.PacLII.org/fj /cases/FJILSC/2016/8.html> (at paragraphs [102]–[117]), a similar approach to *'the burden of proof in proceedings before the Commission'*. I have also applied such an approach more recently in ***Chief Registrar v Ram*** (Unreported, ILSC Case No.002 of 2015, 6th February 2017); PacLII: [2017] FJILSC 4, <http://www.PacLII.org/fj/cases/FJILSC/2017/4.html> (at paragraphs [87]–[90]).

7. The actus reus: was the Court misled?

[35] It is quite clear from the transcript of 28th February 2017 that in four separate statements, the Respondent legal practitioner had advised the Court that his application had been filed that day. In addition, in a separate fifth statement (made also on that date), the Respondent legal practitioner informed the Court that the application of his principal, Mr Vakaloloma, had also been filed that day. It is not disputed by Counsel for the Respondent legal practitioner that the Court was misled by the incorrect content of each of those FIVE statements. **Thus, the actus reus of the offence has been satisfied.**

8. The applicable mens rea: what meaning should be attributed to the term *"knowingly"*?

[36] **What is disputed, however, is whether the Respondent legal practitioner *knowingly misled the Court.*** This, in turn, has required **the focus of the submissions as to the applicable form of mens rea** and, in particular, the meaning of the term *"knowingly"*.

(1) *The submissions of Counsel for the Applicant*

[37] Counsel for the Applicant has cited in his '*Submissions in Reply'* dated 27th October 2017 (in summary):

(1) Counsel has noted that the Applicant carries the onus citing ***Woolmington v Director of Public Prosecutions*** [1935] AC 462, where it was said that *'the Prosecution had the onus to prove that the accused had the requisite knowledge being disputed'* – I agree;

(2) In relation to ***Millar v Ministry of Transport*** [1986] 1 NZLR 660, where the New Zealand Court of Appeal *'highlighted 4 categories of offences which specified whether a fault element was required',* Counsel has submitted that this was *'designed ...* ***to help decipher the fault element where the statute was either silent or ambiguous*** *...* ***and further did not contain qualifying terms such as "knowingly"*** *or "willfully", which would clearly demarcate the precise guilty mind applicable'*. Thus, *'the Strawbridge defence is also inoperable in this instance as the evidence does not support the Respondent's reliance on the same'*. Indeed, *'A further consideration of Strawbridge ... reveals that the reasoning ... supports the Applicant's contention that* ***the appropriate mens rea in the situation where the statute utilizes [sic] the term "knowingly", should be "knowledge"'*** (My emphasis). Further, Counsel for the Applicant has noted (at [22]), that *'Even upon a consideration of the Strawbridge approach, the Respondent claims that he had honest belief borne out of reasonable grounds to justify the representation which he made. Yet even under that test must the Respondent's argument fail because* ***he did not have reasonable grounds*** *to support his subject representation'* (My emphasis);

(3) In relation to *Miller*, Counsel for the Applicant has highlighted (at [25]) that '*the accused ... was serving 2 separate disqualifications of his driving license ... but claimed that he believed the new period applied retrospectively to the previous period already served. However, the Court noted that he had not made any enquiries with the Court Registry as to the effect of the Orders which may have enlightened his understanding to that regard.* ***Similarly, the Applicant reiterates that the Respondent's further failure*** *to seek to have the matter stood down for instance, and then* ***to check on the status of the applications****, would have been a much more prudent approach he could have taken instead of informing the Court wrongly knowing that such confirmation was not available to him at the time'* (My emphasis); and

(4) Counsel for the Applicant has also cited in his '*Submissions in Reply'* at [16], section 20 of the ***Crimes Act 2009*** which defines "knowledge" as '***A person has knowledge*** *of a circumstance or a result* ***if he or she is aware that it exists*** *or will exist in the ordinary course of events'* (My emphasis).

(2) ***The submissions of Counsel for the Respondent***

[38] Counsel for the Respondent legal practitioner in his *'Respondent Submission'* dated 18th October 2017 commenced by citing the judgment of Justice Winter in ***State v Hong Kuo Hui*** [2005] FJHC 732; HAC40.2004 (2 May 2005) who, in turn, cited the discussion of the New Zealand Court of Appeal in ***Millar v Ministry of Transport*** [1986] 1 NZLR 660 (at 665–666). In *Millar*, according to Winter J, the Court set out *'4 categories of mens rea offences where the statute does not state what, if any, mens rea element is required'*, they being:

(1) Implied Mens Rea – *'The prosecution has both a persuasive and an evidential burden to prove mens rea'*;
(2) *"The Strawbridge Approach" –* (from *R v Strawbridge* (1970) NZLR 909) as per Cooke P at 665 in *Millar, 'requires ... some evidence that the accused had an honest belief in facts which would make his act lawful'* ***together with 'some evidence*** *or basis for thinking that* ***it was on reasonable grounds'*** (My emphasis);

(3) Strict Liability – *'The prosecution is required to prove the actus reus, but in relation to one or more elements of the actus reus, there is no mens rea element to prove'*; and

(4) Absolute Liability – *'The offence is complete upon proof of the actus reus. There is no requirement to prove mens rea'.*

[39] Counsel for the Respondent legal practitioner then discussed the second of the above four categories, that is, "*The Strawbridge Approach*", that is, **where a defendant had an honest and reasonable mistake of fact** which, if true, would render the behavior of a defendant innocent. The submission of Counsel for the Respondent is that the Respondent legal practitioner had an *'honest belief that his application would be submitted to the LPU on the said date together with the assurance made to him by the administrator – Mrs Vakaloloma'* (My emphasis).

Counsel for the Respondent legal practitioner has not mentioned, however, that the belief had to be reasonably held.

[40] Counsel for the Respondent legal practitioner then argued, somewhat confusingly in my view, *'that since the word "knowingly" is present in the wordings of rule 3.1 it would rule out implied mens rea so the only one that would be applicable would be Strawbridge approach'* and that in the present case *'the prosecution must disprove that the Respondent's act was not honest belief on reasonable grounds'.*

[41] Despite arguing that the 'honest and reasonable mistake' approach of *Strawbridge* is applicable to the present matter, Counsel for the Respondent legal practitioner then *'submitted that the only thing this court is to determine whether the Respondent's action was intentionally or unintentionally taking into consideration the wording of the rule 3.1 of the Legal Practitioner Act 2009'* and *'that* ***the use of the word "knowingly" … will require mens rea*** *whether he was really deceiving the court or not'*. Counsel for the Respondent legal practitioner then concluded '*that the Respondent in this case has no intention and he has acted with honest belief that what he stated in court on 28th February 2017 was in accordance with the assurance issued to him by Mrs. Vakaloloma'.*

[42] So, on the one hand, Counsel for the Respondent legal practitioner has argued that the applicable mens rea category is the '*Strawbridge* approach', but then on the other, he has argued that '***the use of the word "knowingly" … will require mens rea'.*** He has then added, somewhat confusingly, that '*the Respondent in this case has no intention and he has acted with honest belief*'. This seems to again imply the *Strawbridge* approach, however, without mention that the honest belief must also be reasonable.

[43] Further confusing matters, Counsel for the Respondent legal practitioner concluded his *'Respondent Submission'* dated 18th October 2017 (at [13.0]) as follows:

(a) *That the wordings of* ***rule 3.1 would requires mens rea to be proven*** *by the Applicant*
(b) *That the Respondent has no intention to deceive or mislead the court on 28th February 2018*

(c) *That the Rule 3.1* ***would not fall under strict or absolute liabilities nor implied mens rea****, but would fall under Strawbridge approach*

(d) *That* ***the Respondent has the honest belief*** *that what he stated in court was based on the application form signed before commissioner for oath together with the assurance from Mrs. Vakaloloma that his application would be submitted on the 28th February 2017*

(e) *That the Applicant must disprove that the Respondent was not acted with honest belief in uttering those words in court on 28th February 2017*

(f) *That the Respondent submits that the allegation as per Count 1 be dismissed and acquit the Respondent based on that the Respondent has no intention to deceive or mislead the court.'*

(3) ***My view as to the applicable mens rea***

[44] I agree with the applicant that the inclusion of the qualifying term "knowingly" in Rule 3.1 of the *Rules of Professional Conduct and Practice* (*Schedule of the Legal Practitioners Act 2009*) clearly rendered the 'Strawbridge defence' relied upon by the Respondent inoperable. The focus should instead be upon determining the precise meaning and scope of the term "knowingly", as it appears in its statutory context.

[45] It is appropriate to begin with a consideration of the plain meaning of the term. According to the ***Concise Oxford English Dictionary***, (J.B. Sykes (ed.), 6th edn, 1979, Oxford University Press, Oxford, page 599), "knowingly" is defined as an adverb, that is, '*in a knowing manner; consciously, intentionally',* as in *'I have never knowingly injured him'.* It also explains (at page 16) that an "adverb" is a *'word that modifies or qualifies another word … expressing a relation of place, time, circumstance, manner cause, degree, etc'.* Further, ***Roget's Thesaurus of English words and phrases***, (George Davidson (ed.), 150th edn, Longman Group UK Limited, London, 2003, *'490 Knowledge'*, page 257), defines "*knowingly"* as an adverb, *'with knowledge'*.

[46] Therefore, in Rule 3.1 where it is stated that, '*A practitioner shall not knowingly deceive or mislead the Court'*, the word "knowingly" is an adverb to the verbs "*deceive"* and *"mislead".* That is, it modifies or qualifies those two verbs. In plain English, it might be said that '*A practitioner shall not WITH KNOWLEDGE deceive or mislead the Court'.*

[47] As for the word "deceive", this is defined by the ***Concise Oxford English***

Dictionary (page 264), as to *'persuade of what is false, mislead purposely'.* "Mislead" is defined (page 697), as to *'lead astray, cause to go wrong, in conduct or belief'.* Further, *Roget's Thesaurus* notes, amongst a number of meanings, that "mislead" can be defined as the verb "deceive" of the noun "deception". (See '542 Deception', page 294). Thus, to deceive or mislead can in one context be one of the same. To '*knowingly deceive'* is to say that *WITH KNOWLEDGE* one has *persuaded of what is false purposely*. Similarly, to *'knowingly mislead* is to say that *WITH KNOWLEDGE* one has *lead astray in a belief* or has deceived.

[48] According to the ***Concise Australian Legal Dictionary*** (5th edn, LexisNexis, Chatswood, 2015, page 411), in discussing 'misleading or deceptive conduct in regards to section 18 of *Australian Consumer Law*, it has noted thus:

> *'The most appropriate meaning for **"deceive"** is to cause to believe what is false, **to mislead as to a matter of fact**, to lead into error, to impose upon, delude, or take in; the most appropriate meaning for **mislead** **is to lead astray** in action or conduct, to lead into error or to cause to err: Weitmann v Katies Ltd (1977) 29 FLR 336.'*

[49] In support of his case, Counsel for the Applicant has, at paragraph [29] of his *'Closing Submissions'* dated 6th October 2017, cited ***Chief Registrar v Ram Chand*** (Unreported, ILSC No. 017 of 2013, 3rd October 2013, Justice Madigan; PacLII: [2013] FJILSC 14, <http://www.paclii.org/fj/cases/FJILSC/2013/14.html>. In explaining that case, he noted that:

> *'…the practitioner in that instance double booked his diary for matters before the Magistrate Court and the High Court on the same day. The practitioner then wrote a letter to the High Court highlighting certain claims of eye disability which would preclude his availability for the matter. However, on the very same day, the practitioner still attended to the trial before the Magistrate's Court. The Commissioner then, in his disdain of the practitioner's conduct stated that, "**his letter to the High Court was obviously deceitful** and the practitioner's claim of genuine hardship is not borne out by the document he produces"'* [My emphasis].

[50] Counsel for the Respondent legal practitioner at paragraph [12.0] of his *'Respondent Submission'* dated 18th October 2017 (page 9) has submitted in Response:

> *'The case authority **Chief Registrar v Ram Chand** … is totally irrelevant … because the Respondent in that case intentionally deceive[d] the court by writing a letter stating that he has some eye disability. Such letter was to*

prevent him from appearing in High Court instead he appeared in Magistrate Court for hearing of a case same day.

... he knowingly deceive[d] the High [Court] ... so that he could attend hearing at the Magistrate, ***here, in this instant case the Respondent has no intention to deceive the court*** *taking into account that he submitted his declared application to the firm and the firm assured him that application would be filed on 28th February 2017 even though he later learned that his application was still with the firm, which was beyond his control.'*
[My emphasis]

[51] Counsel for the Applicant in his '*Submissions in Reply'* dated 27h October 2017, has briefly replied (at [11]) in relation to his citation of *Chand*:

'The Applicant strongly begs to differ and maintains that whilst noting some of the factual differences to the matter at hand, certain parallels have been distinguished in its earlier submissions, which still make it [Chand] a case in point.'

[52] I note that in *Chand*, according to Justice Madigan, *'the Chief Registrar proffered the following complaint (as amended) against the Respondent':*

"Ram Chand, a legal practitioner, on the 27th of October, 2011 in the matter HPA 32755 and 32086 knowingly deceived and or misled the High Court by way of his letter dated 17th of October, 2011 where he sought an adjournment due to his medical condition stating that he had undergone an eye operation and had been advised not to stress his eyes for at least three months when on the same day which was the 27th of October, 2011 he appeared for and conducted a full hearing in the Tailevu Magistrate Court in the matter State v Jaspal Singh Criminal Case No 64 of 2011, which conduct was a contravention of Rule 3.1 of the Rules of Professional Conduct and Practice and was an act of professional misconduct."
[My underlining of '*knowingly deceived and or misled'*]

[53] Thus, in *Chand*, the allegation was that the legal practitioner '***knowingly deceived and or misled'*** the High Court. The particulars in the present case are simply that the Respondent '*on the 28th day of February 2017, misled the court'* Although the particulars do not include the word "knowingly", that is inferred from the reference in Count 1 to the '***ALLEGATION OF PROFESSIONAL MISCONDUCT****: pursuant to* ***Rule 3.1 of the Rules of Professional Conduct and Practice'.*** Thus, the allegation is that the Respondent *("knowingly") 'misled the Court'.* Apart from Justice Madigan noting in *Chand* at [11] (as cited by Counsel for the Applicant in his submissions) that the *'letter to the High Court was obviously deceitful*', His Lordship in *Chand* also stated at [8] '*For the practitioner*

to avoid this fixture <u>by deceit</u> *is serious professional misconduct indeed'* and at [9] *'to abandon the High Court in favour of a contemporaneous brief in a Magistrate's Court without leave is professional misconduct and* ***<u>to do so by deceit</u>*** *is serious misconduct'* (My emphasis). Thus, Justice Madigan found in *Chand* that what the practitioner did was deceitful.

[54] What has been alleged in the present case is that the Respondent 'knowingly misled' the High Court. To borrow a phrase from Mr Justice Wilkie in ***Brett v The Solicitors Regulatory Authority*** [2014] EWHC 2974 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2014/2974.html>, ***'<u>I am in no doubt that the court was misled</u>'.*** Further, to paraphrase Mr Justice Wilkie from *Brett,* to say that, in the present case, the Respondent *"knowingly" allowed the court to be misled is, in effect,* ***<u>a finding of dishonesty</u>***. To reach that view, Mr Justice Wilkie asked in Brett at [89]:

> *'... **the dual questions** (a) <u>was the court in fact allowed to be misled</u>, and, (b) <u>what was Mr Brett's state of mind</u> when these circumstances arose in which the court was allowed to be misled?'* [My emphasis]

[55] In the present case, as I have said above, **<u>I am in no doubt that the High Court was in fact allowed to be misled</u>**. The question then becomes ***'<u>what was the Respondent's state of mind</u> when these circumstances arose in which the High Court was allowed to be misled?'***

[56] As noted above, prior to handing down judgment in this matter, I had the Secretary of the Commission write to Counsel for each party providing them with a list of what I view to be potentially relevant cases. I will now summarise each of those cases, in addition to the submissions made by each Counsel as to their relevance.

(4) *Relevance of case law*

(i) *<u>Receiver-General v Griffith</u>*

[57] The term *"knowingly"* was considered by Chief Justice Davson in ***Receiver–General v Griffith*** [1908–1925] 2 FLR 76 (20 September 1920); PacLII: [1920] FJLawRp 2, <http://www.PacLII.org/fj/cases/FJLawRp/1920/2.html>, where the defendant was convicted '*under section 87 of the Customs Ordinance 1881, for*

"knowingly" delivering for conveyance dutiable goods on which duty had not been paid'. According to Davson CJ (pages 76–77):

> *'... I think that the language of* ***the section must be construed according to the ordinary and natural meaning of the words,*** *and that the legislature has made it an offence to do the thing described in the section, provided it be done "knowingly" and in my opinion* ***the "knowledge" required before a conviction can take place is*** *(so far as this case is concerned)* ***the knowledge that the goods dealt with are dutiable goods on which the duty has not been paid*** *...*
> ***Similarly, if the legislature had intended that the act should not be unlawful unless done with intent to defraud it would, in my opinion, have used those words instead of the word "knowingly"*** *...'* [My emphasis].

[58] Counsel for the Applicant submitted in relation to *Griffith* that 'knowledge was the appropriate fault element' and the prosecution did not need to prove 'intention to defraud' and if parliament had intended that to be the case, then it would have used such precise words instead of the word "knowingly". In the present case, 'rule 3.1 has clearly marked the word "knowingly" and it correctly denotes it as the fault element' and what the Respondent did he did so "deliberately" and not because he was 'operating under mistake or good faith'.

[59] Counsel for the Respondent has submitted that *Griffith* involved a strict liability offence.

(ii) *Trotter v Senior Collector of Customs*

[60] Some 44 years later, Acting Chief Justice Hammett considered the term *"knowingly"* in ***Trotter v Senior Collector of Customs*** [1964] 10 FLR 94; PacLII: [1964] FJLawRp 30, <http://www.PacLII.org/fj/cases/FJLawRp/1964/30.html>, where, according to the headnote (page 94), '*The appellant ... was convicted of being* ***knowingly concerned*** *in an attempt at the fraudulent evasion of Customs duty chargeable on an electric hair drier, which the appellant had requested his mother to send from Australia'* (My emphasis). According to Hammett A/g CJ (at pages 97E–98A):

> *'... to establish the charge in this case, it was essential for the prosecution to prove,* ***not merely that the appellant knew*** ***there were two unmanifested parcels for him*** *on this plane,* ***but also*** ***by either direct or circumstantial evidence that*** *...* ***he expressly or by implication*** *...* ***authorised that act*** *[to avoid inspection by customs]...*
> ***It is clear that the appellant at no time saw this parcel or handled it or had it in his possession before it was impounded by the Customs Authorities***.

> *There was no specific finding of fact by the trial Court that the appellant knew that this particular parcel contained this hair drier.*
> *… In view of the fact that* ***there is no evidence that the appellant issued any instructions*** *to his subordinates as to how this particular parcel was to be handled and that many unmanifested parcels addressed to the appellant or his section had in the past been handled in precisely the same way as this parcel was handled, with the tacit consent and approval of the Customs Authorities, I do not feel able so to find, on the evidence in this case. I have come to the conclusion that* ***this essential ingredient in the case for the prosecution was not established*** *with that degree of certainty required to sustain a conviction on a criminal charge'* [My emphasis].

[61] Counsel for the Applicant has submitted that the customs officer in *Trotter 'was accused of having knowingly attempted to conceal a package so as to avoid paying duty … However the Court ruled that the accused did not have the requisite knowledge'.* By way of contrast, in the present case, *'the Respondent here knew at the time of his representation to the Court that the applications had only been left with the law form [sic] and not lodged with the LPU'.*

[62] Counsel for the Respondent has submitted that the offence in *Trotter* required *'mens rea on the part of the appellant'*. In that regard, Counsel for the Respondent has cited ***Hereniko v The State***, (Unreported, High Court of Fiji, Criminal Appeal No. 0044 of 1996; PacLII: [1996] FJHC 42, <http://www.PacLII.org/fj/cases/FJHC/1996/42.html>, where the appellant was convicted of knowingly harbouring a prisoner illegally at large. Fatiaki J stated: *'Quite plainly the offence requires a quite specific 'mens rea' on the part of an offender before he can be convicted'* citing, in turn, ***R v Hallam*** (1957) 41 Cr App R 111, where, in considering an offence of being '*knowingly in possession of an explosive substance*', the Court of Criminal Appeal of England and Wales stated, *'it does seem that it is an ingredient in the offence that he knew it was an explosive substance'.* Relating this to the present case, Counsel for the Respondent has submitted:

> *'… the Respondent must have some evidence to prove that he was not knowingly deceive or mislead the court, but must also know that he has those evidences, and those evidence must be relevant in which to safe guard his utterance in the court in which it would disclose the honest belief that he would not knowingly deceive or misled the court based on those evidence'.*

Perhaps it is my failing, however, despite reading the above at least four

times, I could not understand this submission.

(iii) *Qarase v Fiji Independent Commission Against Corruption*

[63] The term *"knowingly"* was more recently considered by the Fiji Court of Appeal in ***Qarase v Fiji Independent Commission Against Corruption*** (Unreported, Fiji Court of Appeal, Criminal Appeal No. AAU66.2012, 30 May 2013; PacLII: [2013] FJCA 44, <http://www.PacLII.org/fj/cases/FJCA/2013/44.html>), the background to which Chandra JA (with whom Calanchini AP and Basnayake JA agreed) explained at [21]:

> *'As set out in the agreed facts, the Appellant had applied for shares on behalf of the said companies and the prosecution case was that* ***he had not declared his interests*** *in those companies when the applications were considered by the Board as there was a conflict of interest, and that* ***he had participated in the decisions to allot the shares*** *which actions were prejudicial to other Fijians* ***and later on regarding the decisions to pay dividends*** *to those companies'* [My emphasis].

[64] In *Qarase,* as Chandra JA noted at [53]: '*The charges against the Appellant ... were six counts ... of "Abuse of Office" contrary to s.111 of the Penal Code and three counts ... of "Discharge of duty with respect to property to which he has a private interest" contrary to s.109 of the Penal Code (Cap. 17)'.* Although not specifically stated as an element of the offence, section 109 involved **a public officer not declaring a private interest when the awarding of government contracts was being considered**. As Chandra JA explained at [69]–[74]:

> *'[69] As regards the application of S.109 there are no cases in Fiji which have had occasion to consider its application. The same provision is found in the Penal Codes of some common law jurisdictions such as British Virgin Islands, Australia, Papua New Guinea, Solomon Islands, Gilbert Islands, Tuvalu. The Privy Council had occasion to consider its application in a case from British Virgin Islands,* ***Wheatley v The Commissioner of Police of the British Virgin Islands*** *[2006] UKPC 24 (4 May 2006). S.82 of the British Virgin Islands has the same provision as S.109 of the Fiji Penal Code.*
> *[70] In Wheatley's case he was employed by the Government as Financial Secretary and was bound by orders and regulations applicable to the conduct of public officers. These orders and regulations forbade an officer from engaging in any private activity which might conflict with his official duties or responsibilities, or which might place him or give the appearance of placing him in a position to use his official position for his private benefit. An officer who formed the opinion that any private activity in which he was engaged against this prohibition was obliged to declare it fully to the Governor and either discontinue the activity or divest himself of the interest or undertake not to pursue the activity save on conditions laid down by the*

*Governor. **No government contract was to be let to a public officer** in the contracting department **or to any partnership or company of which he was a member or director unless the interest had been disclosed and permission given to proceed**. If an officer considered that he was being required to act illegally, improperly or unethically he was obliged to report the matter. One of the duties of the first appellant was to administer, and act as accounting officer for, certain public works projects.*

*[71] The Appellant, Wheatley, had a direct interest and played a very prominent role in, and acted as a management consultant to two business enterprises. **He did not disclose his interest in the two enterprises and in two construction contracts he signed on behalf of the government**. He had been one of the signatories for the payment vouchers and payments for those contracts.*

[72] The Privy Council confirmed that Wheatley, the appellant had a direct interest and played a very prominent role in, and acted as a management consultant to, two enterprises owned by the 2nd appellant.

[73] Lord Bingham in his judgment set out the strictness with which this section was applied:

> *"In the Table of Offences and Penalties in Schedule 1 to the code, the nature of the section 82 offence is summarise [sic]d as "Public Officer exercising powers in respect of matter in which he has private interest." The object of the section is plainly to penalise [sic] public servants who discharged public duties when subject to a private interest of their own in relation to the subject matter of their public duties. As Lindley L J said of any earlier English enactment to like effect (**Nutton v Wilson** (1889) 22 QBD 744, 748, "The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise." It is not an ingredient of the offence that the public should have suffered detriment as a result of the conflict. Nor is it an ingredient of the offence that the public servant should have suffered detriment as a result of the conflict. **Nor is it an ingredient of the offence that the public servant should have acted dishonestly, fraudulently or maliciously. It will be enough that he acted knowingly**. He need not be shown to have profited directly or indirectly from the transaction because of his private interest, but in most cases (as in this) he is no doubt likely to have done so. The code provides no defence to a charge under the section when the existence of the conflict is proved. The English authorities illustrate the strictness with which comparable provisions have been applied: see **Nutton v Wilson**, above; **England v Inglis** [1920] 2 KB 636; **Rands v Oldroyd** [1959] 1 QB 204. Such strictness is necessary to ensure that public powers are exercise to serve exclusively public purposes."*

*[74] The decision in Wheatley's case clearly illustrates the application of the elements of S.109 set out above. One of the most important aspects arising from that decision is the fact that **it is not necessary to establish dishonest, fraudulent or malicious conduct on the part of the accused, it being sufficient that the accused had committed the act knowingly** which shows the strictness with which the section is applied'* [My emphasis].

[65] Counsel for the Applicant had no submissions to make in relation to *Qarase*.

[66] Counsel for the Respondent has submitted that the Appellant had *'knowledge of the conflict of interest, which he supposed to declare it, and choose not to'* and thus *'No wonder the court said that in such situation it [the prosecution] is not require[d] to establishing [sic] dishonesty, fraudulent or malicious conduct on the part of Mr. Qarase, but it is sufficient that Mr. Qarase had committed the act of knowingly taking into account his position as a public office holder'.* Counsel has then submitted that as the Respondent was only an employee of the firm, and *'no control to the speediness of lodging his application'* and that *'the application was not filed it would be out of his knowledge'*. Therefore, *'the Respondent was acted with honesty by disclosing to the court that his application would be filed on the said date, but if such application was not filed than that would beyond his comprehension'.*

(iv) *Simmonds v The Queen (Jamaica)*

[67] In ***Simmonds v The Queen (Jamaica)*** (Unreported, Privy Council, Appeal No. 30 of 1996, 13th October, 1997); BaiLII: [1997] UKPC 48, <http://www.bailii.org/uk/cases/UKPC/1997/48.html>, where one of the issues on appeal concerned *'whether the charge of **knowingly harbouring** restricted goods in contravention of section 210 of the Customs Act requires a specific intent that is, with intent to defraud Her Majesty of any duties thereon or to evade any restriction applicable to such goods'* (my emphasis), Lord Slynn of Hadley in delivering the judgment of the Court, stated at [44]:

> *'In the premises it is the view of their Lordships that **there is nothing in the structure or in the purpose of section** 210, or in the history of the relevant provision as to "knowingly harbouring", **which requires that the words "with intent to defraud** Her Majesty of any duties due thereon, **or to evade** any prohibition or restriction of or applicable to such goods" **be read as part of the offence** of "knowingly harbouring any prohibited, restricted or uncustomed goods". It was therefore not necessary to allege them in the information and the trial judge was not obliged to find as a fact that they had been established before he could convict of "knowingly harbouring"'* [My emphasis].

[68] Counsel for the Applicant has submitted that *'that intent to defraud the Crown was not to be included within the meaning of the provision concerning "knowingly harbouring" as these were distinct offences'*. Similarly, in the present case, *'firstly, rule 3.1 dos [sic] not refer to "intent" as the fault element, and secondly, as was found in Simmonds, the facts were still sufficient for the Court to*

confirm the finding of guilt against the accused based on the mens rea of knowledge'. That is*, ' here … he had knowledge at the time of his representation of the status of the practicing certificate applications, … it was misleading or that he deceived the Court because he knew very well from the last information he had on hand, that the applications had only been forwarded to the law firm'.*

[69] Counsel for the Respondent has submitted that the explanation previously set out above in *Hereniko* would apply as well as the explanation in *Trotter*.

(v) *Ridehalgh v Horsefield; Allen v Unigate Dairies Limited*

[70] As for the general obligations of a legal practitioner and their duties to a Court, Sir Thomas Bingham MR said in ***Ridehalgh v Horsefield; Allen v Unigate Dairies Limited*** [1994] Ch 205; [1994] 3 All ER 848; BaiLII: [1994] EWCA Civ 40, <http://www.bailii.org/ew/cases/EWCA/Civ/1994/40.html>):

> *'Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest,* ***nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents*** *…'* **[My emphasis]**.

[71] Counsel for the Applicant has noted that 'similar to *Brett*' the Tribunal *'again reiterated the need for counsel to follow the … correct processes which are for the purpose of ensuring fairness and proper administration of justice'*.

[72] Counsel for the Respondent has submitted that *'In these two cases it highlights [the] very important issue that a litigator or an advocator must … assist the court in its duty in disclosing the truth to the court in order to avoid breaching that duty'*, however, in the present case, the Respondent *'was neither deceiving nor dishonest to the court, and above all he was trying to assist the court to know their position with respect to the trial that was going on'*. I do not agree with this submission.

(vi) *Walker & Son v Environment Agency*

[73] In ***Walker & Son v Environment Agency*** [2014] WLR(D) 49; BaiLII: [2014] EWCA Crim 100, <http://www.bailii.org/ew/cases/EWCA/Crim/2014/100.html>,

which involved the prosecution of a company for the illegal use of a waste facility without the requisite environmental permit, it was noted (at [4]) that *'The Prosecution case is that all that is needed to prove the offence ... is* ***that a defendant knowingly permitted*** *a particular waste operation,* ***and*** *that* ***as a matter of fact the waste operation was not in accordance with an environmental permit****'* (My emphasis). Mr Justice Simon who delivered the judgment of the Court noted (at [29]):

> *'... **The words 'knowingly' and 'permit' relate to knowledge of the facts** and not as to the existence and scope of the permission or conditions of a licence. **The Prosecution does not have to show that a defendant knew that the matters of which it was aware were not permitted.** There are good reasons for this: there are means of checking the existence and conditions of environmental permits, and **ignorance of these matters should not be a defence** to an environmental offence'* [My emphasis].

[74] Counsel for the Applicant has submitted that *'The matter concerns the allegation that the appellant knowingly conducted a waste operation without the proper environmental permit. The Court held that the Appellant would have had to show that it was unaware that the contracted developer was burning waste on the site at least.'* Applying that reasoning to the present case, *'it cannot be said that the Respondent did not realise [sic] that he was misleading or deceiving the Court'* when he *'conceded in evidence that the applications were not lodged with LPU but were still with the law firm and ... he was given at least three separate opportunities by the Judge when asked, to explain or confirm the status of the applications'*. Further, *'the assurances of the administrator that the applications would be lodged'* did not give *'him a basis for his misleading and deceptive representation that the applications had been lodged'*.

[75] Counsel for the Respondent has submitted that *'in applying this principle ... the Respondent has the knowledge of the facts that he has completed his application together with the sworn statutory declaration and gave the firm to file it on the 28th February 2017, and ... it was not the role of Respondent to know how it is filed to the LPU, but it [sic] must have knowledge that the application was filed'.* Further, *'if the firm did not file that would beyond his understanding'*. I do not understand as to the basis upon which Counsel was making this submission. If the Respondent '*must have knowledge that the application was filed'*, then that would have to be a FACT – something that he could not submit to the Court as he did not

have such knowledge. He had never contacted the firm's secretary after he left for court on 28th February 2017 to confirm that the application had IN FACT been filed with the LPU.

(vii) *Brett v The Solicitors Regulatory Authority*

[76] As to whether "deceit" and to "knowingly mislead" are one of the same, I note the discussion in the judgment from ***Brett*** (as discussed earlier in paragraph [54] of this judgment), wherein the Divisional Court of the High Court of England and Wales considered as to **whether one can act *knowingly though not dishonestly***. This was an appeal from the Solicitors Disciplinary Tribunal (*Solicitors Regulation Authority v Alastair Brett*, Unreported, Case No. 11157–2103). It was heard before the Chief Justice, Lord Thomas of Cwmgiedd and Mr Justice Wilkie, the latter writing the main judgment with whom Lord Thomas agreed. As Mr Justice Wilkie noted in his judgment (at [72]–[73]):

> '72. *One of the main planks to Mr Brett's oral submissions has been an apparent contradiction in the SDT's decision between, on the one hand, disavowing any finding that he acted dishonestly and, on the other hand, finding him guilty of: "knowingly allowing the Court to be misled".*
>
> *73. He contends that such a conclusion, in the circumstances of this case, implicitly involves a finding against him of dishonesty and is indistinguishable from an allegation of deceit which was specifically not charged.'*

[77] Counsel for the Applicant noted the distinction in that case between having *'knowingly allowed the Court to be misled'* and having *'recklessly misled the Court'*. In relation to the present case, however, Counsel has submitted that:

> *'the Respondent here clearly stated in evidence and in his letter of response, that the information he had on hand from the law firm at the time, before attending Court, was that the applications would be lodged. Instead of stating this information ... to the Court, he chose to relay something totally different when he stated that the applications had been lodged. In his evidence he confirmed that he did not seek to stand the matter down for clarification with the law firm on the actual status. The Court record also shows that the Judge asked him on at least three different occasions on the status of the applications to which he affirmatively answered that they had been lodged. He had much opportunity to explain to the Court what he meant by the lodgment process but rather he chose to leave it to the Court to formulate its own conclusion based on his very inconclusive information'.*

Further, it was the Respondent who raised the issue with the High Court of his own volition at 4.00pm on 28th February 2017. Thus,

> *'he could not be taken to have recklessly misled the Court as he had carefully and deliberately brought this detail to the Court's attention .... By doing so, he demonstrated guilty knowledge rather than mere recklessness since he treated the matter cautiously when addressing the Court and gave his answers with certainty. Thereby, his actions were of design rather than by inadvertence'.*

[78] Counsel for the Respondent has submitted that *'in this case the court held that ... Mr. Brett acted recklessly... in allowing the court to be misled rather than knowingly'*. In the present case, the *'court was not misled ... taking into account that the Respondent has the honest belief that his application would be filed on the 28th February 2017 since all the necessary requirements has been complied with by the Respondent'.* I do not agree with this submission.

[79] According to *The Solicitors' Code of Conduct 2007 [of England and Wales]*, Rule 11.01 (1), *'You must never deceive or knowingly or recklessly mislead the court'.* As Mr Justice Wilkie noted (at [14]):

> *'14. The guidance in the Code of Conduct concerning Rule 11 provides as follows*:
>
> *"... 12 Rule 11.01 makes a distinction between* ***deceiving the court when knowledge is assumed*** *and misleading the court which could happen inadvertently. <u>You would not normally be guilty of misconduct if you inadvertently mislead the court</u>. However if, during the course of proceedings, you become aware that you have inadvertently misled the court, you must, with your client's consent, immediately inform the court. If the client does not consent you must stop acting. Rule 11.01 includes attempting to deceive or mislead the court*
> *13* ***You might*** *deceive or* ***mislead the court by for example:***
> *a.* ***<u>submitting inaccurate information</u>*** *or allowing another person to do so*
> *…*
>
> *It is to be observed that* ***<u>there is no further guidance on the distinctions</u>,*** *within Rule 11.01,* ***<u>between deceiving the court</u> and <u>knowingly</u>*** *or recklessly* ***<u>misleading</u> the court'*** [My emphasis].

[80] In *Brett* (at [89]) after noting that *'[there is] no doubt that the court was misled'*, Mr Justice Wilkie then went on to consider (at [96]) *'whether the SDT, on the material before it, was wrong to conclude that Mr Brett allowed the court to be misled "knowingly"'*. He concluded (with Lord Thomas agreeing):

> '96. *… there is a fundamental difficulty with the decision of the SDT ... <u>it was not being alleged that Mr Brett was deceitful in misleading the</u>*

court. ***The charge*** *was not framed in that way but* ***alleged knowing misleading of the court***. *The SDT adopted that approach and expressly disavowed any question of it being alleged, or of their finding, that Mr Brett had acted dishonestly. True it is that Rule 11.01 prohibits a solicitor from deceiving the court, or knowingly misleading the court.* ***The rule is drafted on the basis that there may be cases in which a solicitor may knowingly mislead the court but not deceive the court.*** *For my part I find that an extremely difficult distinction to draw in its general application …*

97. *The allegation was that the court was misled by the contents of PF's witness statement and by the absence of any corrective to the misleading impression given by that statement … The allegation was that Mr Brett allowed the court to be misled on this fundamental matter knowing that it was being thus misled. I find it hard to see how that allegation could be made good without impugning to Mr Brett's honesty.*

98. ***In my judgment, the SDT having disavowed making any finding of dishonesty could not properly then proceed to make a finding that Mr Brett "knowingly" allowed the court to be misled in the circumstances of this case which was, without more, in effect, a finding of dishonesty.*** *If it intended not to make a finding of dishonesty whilst finding the charge of knowingly misleading proved,* ***it would have to have spelt out its analysis of how it came about that he acted knowingly though not dishonestly*** *… in the absence of any such reasoning the reader of the decision is forced to the conclusion that the SDT has come to a finding of dishonesty against Mr Brett despite stating that it did not intend to do so. That is an unsatisfactory state of affairs and, in my judgment, amounts to the SDT having got that part of the decision "wrong".*

99. ***On the other hand****, in my judgment,* ***it was open to the SDT on its findings of fact supported by the evidence, to reject Mr Brett's claims only to have been negligent*** *... and, in so doing, to regard Mr Brett's evidence, on those issues, as being unreliable.*

100. *In my judgment, the evidence … pointed inevitably to the conclusion that Mr Brett acted recklessly … in allowing the court to be misled. On that basis it was inevitable that the SDT would, had it properly addressed the issues as it had defined them, have found him guilty of a breach of Rule 11.01 on the basis that* ***he "recklessly" allowed the court to be misled.***

101. *In my judgment it follows, similarly, that in so acting,* ***he was guilty*** *of a breach of Rule 1.02* ***of failing to act with integrity*** *…*

102. *Accordingly, I would allow this appeal by Mr Brett, but only to the extent of quashing the decision of the SDT that he was guilty of a breach of Rule 11.01 by "knowingly" misleading the court and substituting for it a finding that he was guilty of Rule 11.01 by "recklessly" misleading the court. I would reject his appeal against the finding of the SDT that he acted in breach of Rule 1.02 by failing to act with integrity on that occasion'* [My emphasis].

[81] Obviously, there is a difference between Rule 11.01 (1) of '*The Solicitors' Code of Conduct 2007 [of England and Wales]'* which states that *'You must never deceive*

or *knowingly or recklessly mislead the court'* and Rule 3.1 of the *Rules of Professional Conduct and Practice (Schedule of the Legal Practitioners Act 2009)* in Fiji which states that *'A practitioner shall not knowingly deceive or mislead the Court.'* As was explained in *Brett*, in the former there is the distinction between either *"deceive"* or '*knowingly mislead'* (which are both seen as forms of dishonesty), and to *'recklessly mislead'* which is seen as less than dishonest. By contrast, in Rule 3.1 in Fiji it is an offence to either '*knowingly deceive' or 'knowingly mislead'* both of which are, in effect, forms of dishonesty.

(viii) *Solicitors Regulation Authority v Osmond*

[82] In ***Solicitors Regulation Authority v William John Gregory Osmond*** (Unreported, Solicitors Disciplinary Tribunal (of England and Wales), Case No. 11355–2015, 11 September 2015, <http://www.solicitorstribunal.org.uk/sites/default/files-sdt/11355.2015.Osmond.pdf>, a practitioner, when appearing as a witness in a trial, '*gave an answer to the Court which he knew to be less than wholly frank with respect to his professional history'*. Nearing the end of cross–examination, '*when he was asked … whether any allegation of a breach of the Solicitors Code of Conduct had ever been upheld against him'*, he answered "No", which was incorrect as he '*had been suspended from practice for two years*' previously. Four months later, the practitioner '*so advised the solicitors acting for the Claimant … of his incorrect answer in a letter*' and this was later confirmed in a detailed witness statement. Eventually, some two years and nine months after giving his incorrect evidence, the practitioner self–reported to the Solicitors Regulation Authority. Three allegations were put before the Solicitors Disciplinary Tribunal, one of which was the *'that the Respondent had knowingly or recklessly misled the court'*. After a submission by Counsel for the Respondent legal practitioner that ***'"Knowingly" was akin to dishonesty'***, the Tribunal allowed the allegation to be withdrawn (as well as another that claimed a lack of integrity by the Respondent) and *'determined that the totality of the Respondent's wrongdoing could be dealt with in the remaining allegation'*, that is, that **the Respondent *'Behaved in a way that is likely to diminish the trust the public places in him or the profession****, in breach of Rule 1.06 of the Solicitors Code of Conduct 2007*' **rather than having been dishonest**.

[83] Counsel for the Applicant has noted that in *Osmond 'the practitioner had full knowledge that he had been previously suspended but chose to represent something totally opposite to the Court, a parallel which is found in the Respondent's case at hand'*.

[84] Counsel for the Respondent has submitted that *'If knowingly was akin to dishonesty; it is respectfully requested that this tribunal must ask the applicant to show evidence that the Respondent was dishonest to the court.'*

(ix) *He Kaw Teh v The Queen*

[85] Counsel for the Applicant had no submissions to make in relation to the observation of Dawson J in *He Kaw Teh v The Queen* (1985) 157 CLR 523; AustLII: [1985] HCA 43 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1985/ 43.html>, which I referred him to (set out below):

> *'12. Rules of construction must give way to actual expressions of legislative intent, but almost invariably in this context such indications as there are require guilty intent as an ingredient of an offence rather than the contrary. Where some such word as "knowingly" or "wilfully" is used in the description of an offence, there is no difficulty in concluding that guilty intent is required. However, the absence of words such as these, even if the words appear in the description of offences created elsewhere in the enactment, does not mean that an offence is intended to be absolute.'*

He did, however, cite Wilson J (who referred to the *Strawbridge* approach). In any event, Counsel has submitted that *'the Respondent cannot rely on honest belief or mistake for making his representation as they were not borne out of reasonably supportive grounds'.*

[86] Counsel for the Respondent has submitted that:

> *'In applying this principle to this instant case since the word used is "knowingly" there must be some evidence required to prove the intention of the Respondent that he deceive[d] or misled the court. This would mean that the applicant must show the commissioner that there was no existence of the application made by the Respondent. If the applicant proved that there was no existence of such application than [sic] the utterance made by the Respondent would be deceptive and misleading knowing very well that there was no application made.'*

I do not agree with this submission.

(5.) The statements made in the present case

[87] Returning to the present case, **"*knowingly*" relates to *knowledge of the facts*** by the Respondent legal practitioner that the application had not been lodged by him that day with the Chief Registrar via the LPU and NOT to the legal practitioner's conclusion that the application had been lodged based upon the administrator of the firm telling him that she would lodge the application that day. When he so informed the Court after 4.00pm on 28th February 2017 that the applications had been lodged, he did not know that as a FACT as he had not checked with the administrator that this as a matter of FACT occurred.

[88] Thus, the problem for the Respondent in the present case is that **his submission to the High Court on 28th February 2017 was a CONCLUSION and not a FACT.** Did he make this submission knowingly? That is, did he know that what he was submitting to the Court was simply his conclusion rather than an objective fact? At best, he hoped that the administrator of the firm had lodged the application that same day, however, he did not actually know whether that had occurred. **It was not a fact. What he presented to the Court, however, was that it was a fact, that is, that the applications had been lodged that day (rather than a conclusion on his part).** He knew that he had no confirmation that the applications had in fact been lodged. **Indeed, he knew that this was NOT a fact**. Further, this was not, so to speak, a simple one–off 'slip of the tongue', that he made to the Court. **Rather, he misled the Bench in FIVE separate statements**.

[89] The initial misleading statement was of the Respondent's own volition – not in some confused reply in answering a question from the Bench. It was the Respondent who stood up after approximately 4.15 pm on 28th February 2017 and advised the Court: *"I have an administrative issue that needs to be taken care of, of my practicing [sic] certificate **it's been filed today** and we need a response from the LPU …"* [My emphasis].

[90] As for the second misleading statement, the Bench, after clarifying with our practitioners in Court that afternoon as to the status of their respective applications, returned to the Respondent and asked of him, *"Yes, what happened to your situation?",* to which the Respondent replied, *"… Actually, all the*

practicing lawyers normally we submit all ours because of our principle [sic] so ***we submit it together today and we will wait for it tomorrow****"* [My emphasis]. Clearly, the Respondent was informing the Court that "we", that is, he and the other lawyers in his firm, had submitted their respective applications that day and would be waiting for the practising certificates to be issued the next day.

[91] Following this response, the Bench then asked, "*When did you submit your application?",* to which the Respondent replied, ***"Today, My Lord"*** [My emphasis]. This was the third misleading statement from the Respondent.

[92] So that there was no doubt, the Bench then asked the Respondent again, "*You submit it today?",* to which the Respondent replied, "***Yes,*** *My Lord"* [My emphasis]. This was the fourth misleading statement from the Respondent.

[93] To compound matters, when the Bench asked "… *how about Mr. Vakaloloma's situation. He also submitted his application",* the Respondent replied "***Yes, yes****, My Lord"* [My emphasis]. This was the fifth misleading statement from the Respondent.

8. Conclusion on mens rea

[94] When this matter was relisted on 27th November 2017, I asked Counsel for the Respondent to clarify as to what he was submitting was the applicable category of mens rea, i.e., full mens rea as to intention, or whether the offence was one of strict liability such that an honest and reasonable belief would be a ground of exculpation. Counsel for the Respondent confirmed that the offence is one of full mens rea.

[95] A close reading of the judgment of Winter J in *Hong Kuo Hui*, reveals that, there are three, not four categories of offences: full mens rea, strict liability and absolute liability (following the development of the common law in both Australia and New Zealand). He noted that:

> *'The Prosecution submit that the law in Fiji regarding the categorization of criminal offences is found in the Australian High Court Case of* ***He Kaw Te[h] v R*** *[1985] HCA 43; [1985] 157 CLR 523.* ***He Kaw Te[h]*** *recognise [sic]s three categories of offences, namely: a offences, strict liability offences and absolute liability offences. The categorization of offences in*

New Zealand has developed along the same lines. See ***Millar v Ministry of Transport*** *[1986] 1 NZLR 660* ***("Millar").***

The Prosecution have endeavoured to discuss the mens rea categorisation of the particular offences at page 2 of their submissions, where they address the Canadian Case of ***R v City of Saulte Ste Marie*** *[1978] 85 DLR (3d) 161;* ***Sweet v Parsley*** *[1970] AC 132, 157 and* ***Ministry of Agriculture and Fisheries v Dubchak*** *[9 August 1994] DC WGN.*

I have read the case of ***Dubchak*** *and cannot find the place where the prosecution state that Keane J refers to a fourth category of strict liability. Perhaps counsel was referring to the categorisation of offences in* ***Millar****.'*

[96] It is quite clear, in my view, that the offence in the present case requires full mens rea as to intention to be proven. As Dawson J observed in *He Kaw Teh* (at 594) *'Where some such word as "knowingly" or "wilfully" is used in the description of an offence, there is no difficulty in concluding that guilty intent is required*' [My emphasis].

[97] So what was the intent of the Respondent legal practitioner when advised the Court on 28th February 2017, in FOUR separate statements, that his practising certificate had been filed that day? Similarly, what was the intent of the Respondent legal practitioner when he also advised the Court on 28th February 2017, that his principal, Mr. Vakaloloma, had also submitted his application for a practising certificate?

[98] **When the Respondent legal practitioner misled the Court on five separate occasions the Court on 28th February 2017, it could not be said that he had did so inadvertently.** Counsel for the Respondent, has however sought to argue in his submissions both strict liability and mens rea. The offence is not one of strict liability. Even if it were the case that strict liability applied and it was accepted that the Respondent held an honest belief (which I do not accept), how could it be said that the belief was reasonable given the Respondent's concession that after having given the application form to Mrs Vakaloloma (the firm's administrator), he then left for court that day and did not speak with her again to check if the application/s had been lodged PRIOR to advising the Court after 4.15pm that same afternoon as **A FACT** that the applications had been lodged?

[99] Therefore in my view, when, on 28th February 2017, the Respondent legal practitioner made each of the FIVE misleading statements to the Court, **he did so "knowingly".**

9. Overall Conclusion – whether the offence is proven

[100] In the present case, the Respondent has faced one allegation of 'professional misconduct'. As I noted in *Kapadia* (at 117, and applied in *Ram* at [89]–[90]), *'the onus is still upon the Applicant to prove the charge to the civil standard, that is, upon the balance of probabilities,* ***according to the gravity of the act to be proved'.***

[101] In this regard, I accept the written submissions of Counsel for the Applicant when he concluded (at [27]–[28]):

> *'27. ... the practitioner by incorrectly advising the Court ... as to the true status of the applications ...* ***knowing fully well that his representation was based on inconclusive information, misled or deceived the Court****, which was a substantial failure on the part of the Respondent to reach or maintain a reasonable standard of competence and diligence.*
>
> *28. Hence, on the preponderance of probabilities, being the test for these proceedings as highlighted by this Commission in Chief Registrar v Cevalawa [2011] FJILSC 6 (5 December 2011), there is compelling evidence on record to show that the Respondent has knowingly deceived or misled the High Court ...'* [My emphasis].

[102] Hence, for the reasons that I have detailed in this judgment (see in particular the paragraphs [94]–[99]), I am of the view that:

(1) **the Applicant** has proven (to the appropriate standard, as discussed above from [32]–[36]) **a contravention by the Respondent legal practitioner of Rule 3.1** of the *'Rules of Professional Conduct'*, i.e., '*A practitioner shall not knowingly ... mislead the Court'*;

(2) **The contravention of Rule 3.1 is** '*conduct capable of constituting ... professional misconduct'* and thus **a breach of section 83(1)(a) of the *Legal Practitioners Act 2009***, that is, *'**conduct consisting of a contravention** of ... **the Rules of Professional Conduct**',* which **the Applicant has satisfied** to the civil standard;

(3) Further, **the contravention of Rule 3.1 is also conduct that has**

satisfied to the civil standard **a breach of section 82(1)(a) of the *Legal Practitioners Act 2009***, that is, ***"Professional Misconduct"*** that 'includes ... *unsatisfactory professional conduct* ... ***if the conduct involves a substantial*** *or consistent* ***failure to reach or maintain a reasonable standard of competence and diligence****'*.

[103] In reaching this conclusion, I note what was said by Lord Thomas of Cwmgiedd in *Brett* (at [111]–[113]):

> *'111. ...* ***misleading the court is regarded by the court and must be regarded by any disciplinary tribunal as one of the most serious offences that an advocate or litigator can commit.*** *It is not simply a breach of a rule of a game, but a fundamental affront to a rule designed to safeguard the fairness and justice of proceedings. Such conduct will normally attract an exemplary and deterrent sentence. That is in part because* ***our system for the administration of justice relies so heavily upon the integrity of the profession and the full discharge of the profession's duties and in part because the privilege of conducting litigation or appearing in court is granted on terms that the rules are observed not merely in their letter but in their spirit****. Indeed, the reputation of the system of the administration of justice ... and the standing of the profession depends particularly upon the discharge of the duties owed to the court.*
>
> *112.* ***Where an advocate*** *or other representative or a litigator* ***puts before the court matters which he knows not to be true or by omission leads the court to believe something he knows not to be true****, then as an advocate knows of these duties,* ***the inference will be inevitable that he has deceived the court****, acted dishonestly and is not fit to be a member of any part of the legal profession.*
>
> *113.* ***As conduct that is dishonest, such as misleading the court with such knowledge will inevitably be****, is so serious,* ***it is of the utmost importance that in difficult circumstances which can confront any advocate*** *or litigator,* ***that advocate*** *or litigator* ***has at the forefront of his mind his duty to the court, the necessity to avoid breach of that duty*** *and, if he has any doubt as to how to discharge that duty, by taking independent advice'* [My emphasis].

[104] Finally, I wish to thank my staff for working overtime last night to allow the draft of this judgment to be read to counsel for both parties. I also thank Counsel for being prepared to attend at such a late hour.

ORDER

[105] The formal Order of the Commission is:

1. In the Application filed before the Commission in Case No. 002 of 2017, *Chief Registrar v Nacanieli Bulisea*, the Respondent legal practitioner is found guilty of Count 1, that is, the Respondent legal practitioner is guilty of ***Professional Misconduct***, contrary to section 83(1)(a) of the *Legal Practitioners Act 2009*, as he has breached Rule 3.1(1) of the *Rules of Professional Conduct and Practice (Schedule of the Legal Practitioners Act 2009)* and such conduct is also ***Professional Misconduct***, pursuant to section 82(1)(a) of the *Legal Practitioners Act 2009*, as it '*involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence'.*

Dated this day 30th day of November 2017.

I will now hear the parties in relation to Orders for the filing of written submissions on penalty and setting a date for a sanctions hearing.

_____

Dr. Thomas V. Hickie
COMMISSIONER