

***Chief Registrar v Naidu***  
**ILSCJ05/2017; [2017] FJILSC 2 (15 February 2017)**

*This summary is not intended to be a substitute for the reasons of the Independent Legal Services Commission or to be used in any later consideration of the Commission's reasons*

**Facts**

This case concerns an alleged conflict of interest by Mr Dorsami Naidu, which if proven, would have been a contravention of rule 1.3 of the *Rules of Professional Conduct and Practice*, thereby constituting professional misconduct under section 82(1)(a) of the *Legal Practitioners Act 2009* ('LPA').

The relevant facts took place during the administration of the estate of the deceased, whom in 1998 had died intestate, leaving behind a large cane farm held under a native title lease. In 1999, under a grant of letters of administration, the deceased's son Mr Rajesh Pillay was appointed sole trustee of her estate for himself and his four siblings. Unfortunately, Mr Pillay's suitability as a trustee was doubtful. This was not least because of his poor management of the cane farm during the period from 1999 to 2005, the lease for which was at risk of termination because various breaches of covenant.

To rectify this ongoing issue, Mr Naidu was engaged on behalf of all five parties to execute a deed of appointment, signed in 2005, whereby Mr Pillay would consent to be replaced as sole trustee by two of his siblings. Shortly thereafter, Mr Naidu instituted proceedings in the High Court at Lautoka to give effect to this deed. It was this action which was said to give rise to the purported conflict: namely that Mr Naidu was acting against the interests of Mr Pillay – a former client – in having him removed as trustee.

**Judgment**

The Commissioner took great difficulty with the substance of this allegation, which was pursued by the Chief Registrar of its own volition (under section 124 of the *LPA*), in the absence of a complainant.

On application by Mr Naidu, the count of professional misconduct was struck out. This was done on two separate bases:

1. the facts did not disclose any actual or perceived conflict of interest; and
2. even if they did, Mr Naidu had obtained informed consent from all parties involved.

On the first basis, the Commissioner held that the Chief Registrar had misconceived their claim. This is because Mr Naidu was not acting against Mr Pillay in the High Court proceedings in seeking to give effect to the deed. It is difficult to see how the mere removal of a trustee could ever involve such a conflict given that a trustee does not derive any personal interest from their position, but rather owes a fiduciary duty of undivided loyalty to the beneficiaries (see generally *Breen v Williams* (1996) 186 CLR 71). In the circumstances of the present case it was in fact in Mr Pillay's own interests (as a beneficiary) that he be removed as trustee, so as to save the cane farm lease from termination.

On the second basis, the Commissioner held that the Chief Registrar's own evidence (from the other four siblings) clearly corroborated Mr Naidu's defence, namely that he fully advised all five parties and obtained their consent to prepare the deed and enforce it by means of a court order. However, it was rather concerning that the Chief Registrar pursued its claim *without* having first interviewed Mr Pillay himself, whose interests were said to have been compromised. This was unacceptable practice, which is certainly not justified by the Chief Registrar's explanation that on one night, '[the] judicial vehicle ... could not make it [to his house] ... due to heavy rain and road condition [sic] and it was also getting dark'.

The Commissioner emphasised that, but for the restrictions on remedies contained within section 124(2) of the *LPA*, he would have been minded to making an indemnity costs order in favour of Mr Naidu for what was arguably 'an abuse of process' by the Chief Registrar. Notwithstanding this unfortunate predicament, it was suggested that an aggrieved legal practitioner (like Mr Naidu) might potentially be able to obtain redress through a 'Mosely-type Order', which would involve an indefinite stay of proceedings until certain costs are paid by the applicant (see *Chief Registrar v Vosarogo* (Unreported, ILSC Application No. 002 of 2016, 6 February 2017), citing *R v Mosely* (1992) 28 NSWLR 735).