

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

No. 010 of 2015

BETWEEN:

AMRIT SEN

Applicant

AND:

CHIEF REGISTRAR

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: Mr. G. O'Driscoll for and appearing with the Applicant Mr. A. Sen

Respondent: Ms. V. Prasad (until February 2017 sittings) thereafter Mr. T. Kilakila

Date of Hearing: 27th November 2017

Date of Judgment: 5th February 2018

RULING ON
1. APPLICANT'S INTERLOCUTORY APPLICATION
FOR PERMANENT STAY AND/OR DISMISSAL

AND

2. RESPONDENT'S ORAL APPLICATION
FOR AN ADJOURNMENT

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1. The Application/s

- [1] This is a Ruling in relation to an Interlocutory Application filed by the Applicant legal practitioner seeking an Order for a permanent stay/dismissal of seven Counts filed against him that I heard on 27th November 2017.
- [2] Prior to the commencement of the hearing of the application on 27th November 2017, Counsel for the Respondent Chief Registrar sought an adjournment. I refused his oral application. Although Counsel for the Respondent indicated, at the time, that he did not require a written ruling outlining my reasons, I have done so in the body of this judgment, in the interests of transparency and lest there be any doubt as to why the hearing proceeded.

2. Background

- [3] The legal practitioner acted as the common solicitor on a sale and purchase agreement in 2007 between a vendor landlord and a purchaser tenant. The validity of the agreement was conditional upon the parties engaging the services of a surveyor and obtaining a registered plan before the transfer could proceed. At one stage a letter was sent on the letterhead of the firm of the legal practitioner on behalf of the vendor demanding either balance of payment or vacation of the property. In subsequent legal proceedings filed by the vendor seeking orders for specific performance of the agreement, the legal practitioner acted on behalf of the purchaser in defending the action. In 2013, the purchaser lodged a complaint against the legal practitioner.
- [4] On 2nd October 2015, an Application was filed with the Commission setting out 10 allegations of Professional Misconduct against the legal practitioner.

[5] After the application was first called on 15th October 2015, there followed a number of mentions (on 26th October 2015 and 11th February 24th March and 21st April 2016), concerning the provision of further and better particulars. On 7th June 2016, Counsel for the legal practitioner indicated that as there had been no resolution, he would now be filing a formal application seeking that the matter be stayed or dismissed. Orders were made accordingly setting out a timetable for the filing of a formal application together with any affidavit/s in support, the filing and serving of written submissions and a date for hearing in the September 2016 Sittings of the Commission.

[6] On 18th July 2016, in accordance with the agreed timetable, Counsel for the Applicant legal practitioner filed a Summons and an Affidavit in Support, seeking an Order for a permanent stay/dismissal of the 10 Counts filed by the Respondent Chief Registrar. The basis of the application was upon the following three grounds:

1. The charges against the respondent is [sic] prejudicial by reasons [sic] of the fact that the applicant has filed the charges without proper investigation and without giving an opportunity to the respondent to further respond to any query raised.

2. The charges against the respondents [sic] are defective and do not constitute professional by reasons of the fact that there has been no prejudice against any persons and the facts pursuant to which the charges have been filed are misconceived.

3. That the charges against the respondent is in breach of Section 14(1)(a) of the Constitution of the Republic of Fiji.'

[7] The Applicant's affidavit in support (sworn on 16th July 2016) annexed the following:

(1) Request dated 21st December 2016 made on behalf of the Applicant legal practitioner seeking further and better particulars of the Chief Registrar;

(2) Reply dated 21st March 2016 from Mr Aminasi Turuva of the Legal Practitioners Unit on behalf of the Chief Registrar;

(3) 1st Affidavit of Ram Narayan (the complainant purchaser) sworn on 7th January 2016;

(4) 2nd Affidavit of Ram Narayan sworn on 27th January 2016;

(5) Affidavit of Chandrika Prasad (the vendor) sworn on 2nd April 2016;

(6) Agreement to Mediate between the Applicant legal practitioner and the

complainant purchaser, Ram Narayan, dated 6th June 2016, to be held before Master Robinson of the High Court at Labasa;

(7) Terms of Settlement reached at the mediation held in the High Court at Labasa between the parties before Master Robinson on 6th June 2016 and signed on 17th June 2016.

[8] On 12th August 2016, Counsel for the Respondent Chief Registrar filed an Affidavit in Reply by Sofaia Baravi, an investigating officer within the Legal Practitioners Unit, sworn on 12th August 2016, annexing the following:

(1) Letter dated 21st May 2009 from the firm of the Applicant legal practitioner to the complainant purchaser seeking either payment of the balance of the purchase price (\$500.00) or that purchaser vacate the property;

(2) Statement of Chandrika Prasad (the vendor) dated 9th July 2015;

(3) Statement of Ram Narayan (the complainant purchaser) dated 9th July 2015;

(4) Statement of Binesh Naidu (former employee of the Legal Practitioners Unit) dated 10th August 2016;

(5) Statement of Vinay Sharma (former Acting Senior Legal Officer of the Legal Practitioners Unit) dated 12th August 2016.

[9] On 8th September 2016, Counsel for the Applicant legal practitioner filed an Affidavit in Reply sworn by the Applicant on 6th September 2016, together with written submissions in support of the application.

[10] On 16th September 2016, Counsel for the Respondent Chief Registrar filed written submissions in response arguing that the application be dismissed.

[11] When the Summons was called on 22nd September 2016, it was adjourned by consent for hearing in the December 2016 Sittings as an appeal was pending before the Court of Appeal (listed in that Court's November 2016 Sittings), involving the same parties, however, in relation to an earlier application that had been dismissed on 8th August 2014 by the previous Commissioner, Justice P.K. Madigan, raising (amongst other matters) the same issue in relation to '*Section 14(1)(a) of the Constitution of the Republic of Fiji*'. (See *Amrit Sen v Chief Registrar*, Unreported, ILSC, Action No. 026 of 2013, 8 August 2014; PacLII: [2014] FJILSC 5, <<<http://www.pacalii.org/fj/cases/FJILSC/2014/5.html>>.)

[12] On 29th November 2016, the Court of Appeal dismissed the appeal of the Appellant legal practitioner from the 2014 judgment of Justice Madigan. (See *Amrit Sen v Chief Registrar*, Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 0064 of 2014, 29 November 2016, Calanchini P, Basnayake and Kumar JJA; PacLII: [2016] FJCA 158, <<http://www.pacii.org/fj/cases/FJCA/2016/158.html>>.) In particular, Basnayake JA (with whom Calanchini P and Kumar JA agreed) stated at [35]:

'Section 82 (1) (a) of the Legal Practitioners Decree 2009 is concerning professional misconduct, which is not an offence. These are rules made for the purpose of maintaining dignity of professional bodies. Therefore charges of misconduct do not fall within the purview of Section 14 (1) (a) of the Constitution.'

[13] On 7th December 2016, after both Counsel had noted the above judgment of the Court of Appeal that '*charges of misconduct do not fall within the purview of Section 14 (1) (a) of the Constitution*' (and thus the third ground for seeking the stay or dismissal in the present application was no longer applicable), the application seeking an Order for a permanent stay/dismissal based on the other two grounds was set down for hearing at 9.00am on 10th February 2017 with a time estimate of two hours.

[14] On 8th February 2017, Counsel for the Respondent Chief Registrar filed an '*Additional Bundle of Documents*' containing the following:

- (1) 'Statement of Ram Narayan dated 25/8/2016';
- (2) 'Statement of Rakesh Sharma dated 25/8/2016', Senior Court Officer, High Court Labasa who interpreted the statement of Ram Narayan dated 25/8/2016;
- (3) 'Statement of Inoke Soqonalawa dated 25/8/2016 with attachments', who, on 8th May 2014, surveyed the land the subject of the sale and purchase agreement.

[15] On 10th February 2017, when the hearing of the Interlocutory Application was to commence, Counsel for the Respondent Chief Registrar advised that she sought to formally withdraw and discontinue Counts 1, 2 and 6. Orders were made accordingly in that regard. Counsel for the Respondent Chief Registrar also sought to amend the particulars in regards to Count 10 from '*High Court Civil*

Action No HBC 23 of 2004 (Labasa) to *High Court Civil Action No HBC 8 of 2011 (Labasa)*, however, that was deferred to allow Counsel for the Applicant legal practitioner to obtain instructions. Having heard nothing further since 10th February 2017, I will grant leave to amend this count.

- [16] Counsel for the Applicant legal practitioner also raised two preliminary issues. First, his client had filed a petition with the Supreme Court appealing from the judgment of the Court of Appeal of 29th November 2016 and Counsel needed to obtain instructions whether to seek a deferral of the present application until the Supreme Court had delivered its ruling. Second, Counsel referred me to the *'Additional Bundle of Documents'* that had been filed on 8th February 2017 by Counsel for the Chief Registrar and which Counsel for the Applicant legal practitioner stated had been served only at 12 noon on 9th February 2017. In particular, Counsel for the Applicant legal practitioner drew my attention to the *'Statement of Ram Narayan [the complainant] dated 25/8/2016'* and then Counsel made two points (in summary):
- (1) The statement *"is in a way of rebutting an affidavit that he [the complainant] had given which is part of the Applicant's paperwork"*. That is, in the statement, the complainant *"appears to be alleging an affidavit he had given stating that he had no real issues with the complainant/respondent"* is incorrect. In fact, he is claiming in the statement that he was forced to make that affidavit;
 - (2) The statement is relevant to the stay application, however, as Counsel for the Applicant legal practitioner was only served the day before (that is, 9th February 2017), he needed to obtain instructions.

- [17] I then raised with Counsel for the Respondent Chief Registrar the following concerns:

- (1) Why, if the complainant's statement had been signed on 25th August 2016, had it not been disclosed to Counsel for the Applicant legal practitioner until 9th February 2017, the day before the hearing of Interlocutory Application? In particular, why had it not been mentioned during the appearances in the September and/or November/December 2016 Sittings of the Commission that there was further material to be disclosed? Indeed, why had it not even been mentioned at the Call Over the previous Friday, 3rd February 2017, for the

February 2017 Sittings?

(2) Of more concern was that the statement of the complainant, Ram Narayan, dated 25th August 2016 contained the following at page 2 (referring to the Affidavit of the legal practitioner dated 16th July 2016 annexing the Affidavits of Ram Narayan sworn on 7th and 27th January 2016):

'I want to say here that I did not discuss or give the contents of the two affidavits to Amrit Sen. I confirmed that both affidavits were already prepared when I arrived in Amrit Sen's office. I refused to sign two times on the first affidavit later I was convinced and assured by that he will be my witness, that assurance made me sign the first affidavit.

Second affidavit I was assured by Sushil Sharma that everything was okay that assurance made me signed the second affidavit.'

[My emphasis]

(3) It was clear that what was in the above statement of the complainant purchaser of 25th August 2016 was in conflict with his two affidavits sworn on 7th and 27th January 2016 respectively that were set out as Annexures "C" and "D" to the affidavit of the Applicant legal practitioner sworn on 16th July 2016.

[18] In light of the above, I vacated the hearing and suggested to both Counsel to obtain instructions as to how they wished to proceed including referring the matter to the police. The matter was then adjourned until 16th February 2017 for mention.

[19] On 16th February 2017, Counsel for the Respondent Chief Registrar advised that her client would be making a complaint "to the police by tomorrow" (that is, 17th February 2017). Counsel for the Respondent also noted that the respective Commissioners for Oaths who had witnessed the affidavits presumably would need to be interviewed as to what occurred. The matter was then adjourned until 11th April 2017 for mention.

[20] The matter was then mentioned in both the April and June 2017 Sittings whilst awaiting the outcome of the police investigation. When the police investigation had still not been finalised by the time of the September 2017 Sittings, (together with the fact that a dispute had arisen between Counsel as to what the police were being asked to investigate), I decided to set down for hearing at the commencement of the next Sittings (27th November 2017), the Application of the

legal practitioner seeking an Order for a permanent stay/dismissal of the remaining seven counts. Counsel for the Applicant indicated that he would rely solely on his submissions previously filed on 8th September 2016. Permission was granted to Counsel for the Respondent Chief Registrar to file additional submissions in response and for Counsel for the Applicant to reply (if he sought to do so).

3. Ruling on the Respondent's oral application for an adjournment

[21] On 27th November 2017, prior to the commencement of the hearing of the legal practitioner's interlocutory application, Counsel for the Respondent Chief Registrar sought for the hearing to be deferred whilst the Chief Registrar awaited a report from the police as to the outcome of their investigation into the various affidavits sworn by the complainant in this matter. Counsel for the Chief Registrar advised from the Bar Table that an inspector of police had advised that the police had reached a conclusion the previous Friday in relation to their investigation. Although Counsel could not say as to the outcome of the police investigation, he sought that the hearing of the legal practitioner's interlocutory application be deferred as the police investigation "*will shed light on the course of this matter*". Counsel for the Applicant opposed the oral application for an adjournment asking rhetorically, as to what the police have been doing "*we don't know*". Further, Counsel for the Applicant submitted that there were sufficient documents before the Commission to argue the point of the application and should the police decide to charge the complainant or the legal practitioner that is irrelevant to the present application. As Counsel for the Applicant noted, a charge is not a conviction.

[22] I refused the oral application for an adjournment. As I have noted above (at the commencement of this ruling), although Counsel for the Respondent indicated that he did not require for me to provide a written ruling refusing his oral application, I believe that, for transparency (and lest there be any doubt as to why the hearing proceeded), I should provide my written reasons. Hence, I now do so:

(1) The initial decision in 2016 to grant an adjournment of the application for strike out/dismissal was by consent of Counsel for the parties whilst we awaited

the outcome of the appeal to the Court of Appeal on the argument involving section 14(1)(a) of the Constitution. That decision to await the outcome of the appeal to the Court of Appeal was in line with my earlier judgment in 2016 in **Chief Registrar v Singh**, Unreported, ILSC, Action No. 003 of 2015, 7 June 2016; PacLII: [2016] FJILSC 3, <<http://www.pacii.org/fj/cases/FJILSC/2016/3.html>>. It was also in accordance with my judgment in **State v Bainimarama, ex parte Bokini; Makutu v Attorney-General**, Unreported, High Court of Fiji at Suva, Civil Action Nos. HBJ 015 of 2008 and HBC132.2008, 9 December 2008; PacLII: [2008] FJHC 337, <<http://www.pacii.org/fj/cases/FJHC/2008/337.html>>), a case that I had to consider when I had been sitting previously as a Judge of the High Court of Fiji. In **Bokini**, I had cited the reasoning of the Fiji Court of Appeal in **Goldenwest Enterprises v Pautogo** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 0038 of 2005, 3 March 2008) (PacLII: [2008] FJCA 3, <<http://www.pacii.org/fj/cases/FJCA/2008/3.html>>), which, in turn, cited the English and Welsh Court of Appeal in **Re Yates' Settlement Trusts. Yates and Anor v. Paterson and Ors** [1954] 1 WLR 564; [1954] 1 All ER 619;

(2) We were now no longer awaiting the outcome of a decision from the Court of Appeal on the same constitutional argument, as judgment had been handed down in relation to that issue on 29th November 2016. Further, even though the Applicant had subsequently filed an appeal to the Supreme Court from that decision, when the present application was mentioned during the September 2017 Sittings to set it down for hearing in the November/December 2017 Sittings, neither Counsel sought to have the allocation of the hearing date deferred subject to that appeal being heard by the Supreme Court. For the record, I note that the appeal was heard and judgment delivered during the October 2017 Sittings of the Supreme Court wherein the Court refused the application for Special Leave to appeal and affirmed the judgment of the Court of Appeal dated 29th November 2016. (See **Amrit Sen v Chief Registrar**, Unreported, Supreme Court of Fiji, Civil Appeal No. CBV0010 of 2016, 27 October 2017, Marsoof, Hettige Chandra JJ; PacLII: [2017] FJSC 31, <<http://www.pacii.org/fj/cases/FJSC/2017/31.html>>.)

(3) At the same time, I have noted what the Court of Appeal said in **Goldenwest** (at [51]) in balancing ‘justice and fairness’:

*'This Court has every sympathy with the wish of trial courts to maintain a tight rein on proceedings and to ensure expeditious hearings. This is particularly so if a trial date has been set, or if the history of a matter reveals a litany of delays particularly caused through adjournments. Adjournments by consent between the parties can indicate a lack of preparation and attention to the need for litigation to be conducted in a timely manner. The Court is aware that in too many instances adjournments are or may be sought as a matter of course and that due to the Court's schedule and a mounting number of cases, adjournments may too readily be gained. It is understandable that as an antidote to this, a Court may ultimately be loath to grant an adjournment where otherwise a trial is ready to proceed and the Court has set a firm date after a number of adjournments. **At the same time, Courts must be careful to ensure that all the circumstances must be borne in mind and that ultimately expedition is not the sole measure. Justice and fairness are essential features of the consideration for a request for an adjournment.**'*

[My emphasis]

(4) The application for strike out/dismissal was filed on 18th July 2016. A date for hearing was originally set down in the September 2016 Sittings. It was then vacated awaiting the outcome of the legal practitioner's appeal to the Court of Appeal in relation to Section 14(1)(a) of the Constitution. When that appeal was dismissed on 29th November 2016, the application was mentioned on 7th December 2016 and a date for hearing of the application for strike out/dismissal was set down for 10th February 2017. On 8th February 2017, the Respondent filed the 'Additional Bundle of Documents' containing, in particular, the 'Statement of Ram Narayan dated 25/8/2016'. The hearing of the application for strike out/dismissal was vacated whilst Counsel referred the statement to the police. When the matter was mentioned during the September 2017 Sittings, some seven months had passed. As there was still no resolution in sight in relation to the police investigation, the application for strike out/dismissal had been outstanding for some 14 months and noting that the hearing had been vacated twice previously, I set the application down for hearing on 27th November 2017. In my view, considering the above history of the application for strike out/dismissal, it had been delayed long enough and should be heard;

(5) Having then been advised from the Bar Table on 27th November 2017, just as the hearing was due to commence, that the police had advised the Chief Registrar's office the previous Friday (24th November 2017) that they had concluded their investigation, but no details could be provided by Counsel for the Respondent Chief Registrar as to the outcome, I came to the view that if, arising

from the police investigation, the complainant, the legal practitioner, the Commissioners for Oaths before whom the affidavits were sworn and/or any other person/s who may have allegedly induced the complainant to swear false affidavits were to be charged, then these were matters for the police and the criminal courts, not for the Commission;

(6) In my view, therefore, for the reasons outlined above, ‘justice and fairness’ required that the application of the legal practitioner for a strike out/dismissal of the seven counts should proceed and a ruling be provided (which I shall now do).

4. Preliminary oral submissions

[23] I have noted the preliminary oral submissions made by Counsel for the Applicant on 27th November 2017, in relation to the complainant, Ram Narayan, (in summary) as follows:

(1) “... *the statement of Mr. Ram Narayan made in August 2016, not being sworn, cannot override the [earlier] affidavits that he swore which were confirmed by the Commissioners who took the oath*”;

(2) “*he should have clearly stated that he understood that by doing that further affidavit [sic], he was opening himself upto a possible perjury charge by having signed two previous affidavits under oath. He is also imputing certain allegations by making this statement on the two judicial officers, the two Commissioners for Oath who swore his affidavits ...*”;

(3) His statement of 25th August 2016 does not address the Terms of Settlement signed on 17th June 2016 following a mediation on 6th June 2016 which states at clause 2: ‘*That defendant [Ram Narayan] agrees that dispute between them arose out of a misunderstanding about the role of Maqbool & Company in the issuance of a certificate of title to him*’;

(4) Clause 3 of the Terms of Settlement states: ‘*That both parties agree that in consideration of the plaintiff withdrawing the action against the defendant, **the defendant wants to retain the plaintiff as his legal counsel***’; [My emphasis]

(5) the Terms of Settlement were signed on 17th June 2016 “*which was well into the time when this complaint was on foot and signed here by Mr Ram Narayan [the complainant] as well as being witnessed by, the Judicial Clerk/Clerical Officer at the Labasa High Court and duly stamped by the Registrar at Labasa High Court ...*”;

(6) “... there is really no sense in hearing from him anymore. He is such a discredited witness, that he could not possibly convince this Commission of any liability, guilt, whatever you want to call it on the part of Mr. Sen”;

[24] **Whilst there is much force in the above oral submissions, they provide the first reason as to why there needs to be a full hearing before the Commission.**

In effect, there are six affidavits as well as four witness statements that are relevant to the present application. It is clear to me, after having read each of them, there are a number of discrepancies the resolution of which can only be determined at a final hearing. **The public interest requires transparency.** **Indeed, only by holding a full hearing can the complainant explain his initial witness statement, his two subsequent affidavits, the Terms of Settlement of the mediation held before the Master in the High Court at Labasa and then his subsequent witness statement. Apart from the complainant providing his explanation as to what occurred, no doubt there will be witnesses called from the Chief Registrar’s Office, the two Commissioners for Oaths before whom the affidavits were sworn, perhaps the previous Master from the High Court at Labasa and any other relevant persons the respective Counsel wish to call.**

5. Ruling on each Count and an associated complaint

[25] Having considered the preliminary submissions of Counsel for the legal practitioner as to the reliability of the complainant, I will now deal with each of the counts in turn and whether any or all should not proceed, as well as making a ruling on an associated complaint.

Count 3

[26] Count 3 alleges as follows:

‘Count 3

ALLEGATION OF PROFESSIONAL MISCONDUCT: pursuant to Section 82(1)(a) of the Legal Practitioners Decree of 2009

PARTICULARS

Amrit Sen, a Legal Practitioner, being the sole proprietor of Maqbool & Company, having been retained by both Chandrika Prasad (vendor) and Ram

*Narayan (purchaser) for the sale and transfer of a portion of land contained within CT No. 23998 in or about July 2007 and having drawn up and/or prepared the Sale and Purchase Agreement dated 30 July 2007; thereafter, acted contrary to the interest of Ram Narayan (purchaser) on behalf of Chandrika Prasad by issuing letter dated 21 May 2009 that gave notice to Ram Narayan (purchaser) for payment of \$500 or giving of vacant possession within 30 days, after a dispute arose between Chandrika Prasad (vendor) and Ram Narayan (purchaser) for the non-payment of the final installment [sic] of \$500 of the purchase price, which conduct amounts to acting in conflict of interests and is an act of professional misconduct pursuant to section 82(1)(a) of the **Legal Practitioners Decree of 2009.***

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

Professional Misconduct

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

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

[28] In summary, Count 3 alleges that the legal practitioner having been retained by both the vendor and purchaser for the sale and transfer of land including preparation of the sale and purchase agreement, then acted on behalf of the vendor by issuing a letter to the purchaser requiring payment of \$500 or vacant possession within 30 days, which amounted to acting where a conflict of interest existed. Such conduct is allegedly an act of professional misconduct pursuant to section 82(1)(a) of the *Legal Practitioners Act* of 2009, as (presumably the allegation is that) it 'involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence'.

[29] According to the written submission of Counsel for the Applicant legal practitioner ('*Submissions*' dated 8th September 2016, paragraph [10], page 4), '*it is not disputed that without the knowledge of the respondents a letter was indeed written*' to the purchaser, that '*was withdrawn*' and both the vendor and purchaser '*say that no prejudice has been caused to them*'. The vendor '*has categorically stated that he had never retained the respondents for any work*' and that '*after*

the said letter was written by the clerk of the firm', the purchaser 'was represented by the 1st respondent and he has not been prejudiced in any manner whatsoever'.

[30] Counsel for the Respondent Chief Registrar submitted in response ('*Applicant's Submissions*' dated 16th September 2016, paragraph [23], page 6) '*that prejudice was caused to the complainant [purchaser] as he had paid the remaining \$500.00 to the Respondent which was to be paid to' the vendor. Further, the legal practitioner 'had failed to inform' the vendor 'that the balance of \$500.00 was paid and later High Court proceedings were instituted against the complainant [purchaser]'.*

[31] **In my view, as to whether such conduct by the legal practitioner was contrary to section 82(1)(a) of the *Legal Practitioners Act 2009*, needs to be fully ventilated at a hearing. It thus provides a second reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the legal practitioner and his firm.**

Count 4

[32] Count 4 alleges as follows:

'Count 4

ALLEGATION OF PROFESSIONAL MISCONDUCT: pursuant to Section 82(1)(a) of the *Legal Practitioners Decree of 2009*

PARTICULARS

*Amrit Sen, a Legal Practitioner, being the sole proprietor of **Maqbool & Company**, having been retained by both Chandrika Prasad (vendor) and Ram Narayan (purchaser) for the sale and transfer of a portion of land contained within CT No. 23998 in or about July 2007 and having drawn up and/or prepared the Sale and Purchase Agreement dated 30 July 2007 and having acted on behalf of Chandrika Prasad by issuing letter dated 21 May 2009 that gave notice to Ram Narayan (purchaser) for payment of \$500 or giving of vacant possession within 30 days; thereafter, acted on behalf of Ram Narayan (purchaser) in High Court Civil Action No HBC 8 of 2011 (Labasa), contrary to the interests of Chandrika Prasad (vendor), the subject matter of the proceedings being eviction of Ram Narayan (purchaser) after a dispute arose between Chandrika Prasad (vendor) and Ram Narayan (purchaser) for the non-payment of the final installment [sic] of \$500 of the purchase price, which conduct amounts to acting in conflict of interests and is an act of professional misconduct pursuant to **section 82(1)(a) of the *Legal Practitioners Decree of 2009***.'*

- [33] In summary, Count 4 alleges that the legal practitioner having been retained by both the vendor and purchaser for the sale and transfer of a portion of land including preparation of the sale and purchase agreement and then having acted on behalf of the vendor by issuing a letter to the purchaser requiring payment of \$500 or vacant possession within 30 days, thereafter acted for the purchaser in defending proceedings issued in the High Court at Labasa by the vendor for eviction of the purchaser which amounted to acting where a conflict of interest existed. Such conduct is allegedly an act of professional misconduct pursuant to section 82(1)(a) of the *Legal Practitioners Act* of 2009, as (presumably the allegation is that) it **‘involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence’**.
- [34] According to the written submissions of Counsel for the Applicant legal practitioner (‘*Submissions*’ dated 8th September 2016, paragraph [10], page 4),
- ‘... the 1st respondent never acted for [the vendor] Chandrika Prasad. Secondly, any letter written to [the purchaser] Ram Narayan was withdrawn and it was Ram Narayan’s decision to retain the respondents. Both Ram Narayan and Chandrika Prasad confirm that no prejudice has been caused to them and further Chandrika Prasad had given his written consent that he had no objection for the respondent to act for Ram Narayan’.*
- [35] Counsel for the Respondent Chief Registrar submitted in response (‘*Applicant’s Submissions*’ dated 16th September 2016, paragraph [24], page 6):
- ‘... the Respondent’s letter to the Complainant dated 21st of May, 2009 proves that [the vendor] Mr. Chandrika Prasad had retained the Respondent. ... paragraph one of the letter of the Respondent at page 39 of the disclosure bundle ... states[:]*
- ‘We act on instructions from our above named client who is the legal owner of the above property.’*
- [36] **In my view, as to whether such conduct by the legal practitioner was contrary to section 82(1)(a) of the *Legal Practitioners Act 2009*, needs to be fully ventilated at a hearing. It thus provides a third reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the legal practitioner and his firm.**

[37] Count 5 alleges as follows:

'Count 5

ALLEGATION OF PROFESSIONAL MISCONDUCT: pursuant to Section 82(1)(a) of the Legal Practitioners Decree of 2009

PARTICULARS

*Amrit Sen, a Legal Practitioner, being the sole proprietor of **Maqbool & Company**, provided a bill of costs dated 26 August 2013 for work undertaken on behalf of Ram Narayan for Civil Action No HBC 8 of 2011 that contained false information with regard to appearances made in the High Court on 16 June 2011 and 29 June 2011, which could mislead any person who would rely on the said bill of costs as to the amount of work carried out by Amrit Sen on behalf of Ram Narayan, which conduct is an act of professional misconduct pursuant to **section 82(1)(a) of the Legal Practitioners Decree of 2009.***

*Alternatively, Amrit Sen, a Legal Practitioner, being the sole proprietor of **Maqbool & Company**, failed to diligently [to] undertake the preparation of a bill of costs issued by Maqbool & Company to Ram Narayan dated 26 August 2013 which resulted [in] the bill of costs having false information with regard to appearances made in the High Court on 16 June 2011 and 29 June 2011, which could mislead any person who would rely on the said bill of costs as to the amount of work carried out by Amrit Sen on behalf of Ram Narayan, which conduct is an act of professional misconduct pursuant to **section 82(1)(a) of the Legal Practitioners Decree of 2009.***

[38] In summary, Count 5 alleges that the legal practitioner provided a bill of costs dated 26th August 2013 for work undertaken on behalf of the purchaser Ram Narayan in relation to Civil Action No. HBC 8 of 2011 that contained false information with regard to appearances made on 16th and 29th June 2011. In the alternative, it is alleged that the legal practitioner failed to diligently undertake the preparation of a bill of costs dated 26th August 2013 which resulted in the bill of costs having false information with regard to appearances made on 16th and 29th June 2011. Such conduct is allegedly an act of professional misconduct pursuant to section 82(1)(a) of the *Legal Practitioners Act* of 2009, as (presumably the allegation is that) it '***involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence***'.

[39] According to the written submissions of Counsel for the Applicant legal

practitioner (‘*Submissions*’ dated 8th September 2016, paragraph [10], page 4),

- (1) ‘... a bill of costs was raised in accordance with Order XXXVIII of the Magistrate Court Rules ... prepared by the secretary [of the firm] in accordance with file records;
- (2) ‘... the complainant did not dispute the bill of costs and he was entitled to have the same taxed in accordance with Order XXXVIII Rule 2 and 3 of the Magistrate Court Rules Cap.14’;
- (3) ‘There was a Magistrates Court action against Ram Narayan in respect of the bill of costs which has been settled as per annexure “G” [the Terms of Settlement dated 17th June 2016] ... in the affidavit ... sworn on 16th July 2016’ of the legal practitioner.

[40] Counsel for the Respondent Chief Registrar submitted in response (‘*Applicant’s Submissions*’ dated 16th September 2016, paragraphs [25]-[28], pages 6-7):

- (1) ‘... count five is in relation to false information in the bill of costs’;
- (2) ‘the bill of costs may have been made in accordance with Order XXXVIII of the Magistrate Court Rules however, the contents ... had false information regarding appearances made in the High Court’ and such bill was ‘prepared by the Respondent’s firm’;
- (3) ‘... the Complainant did not dispute the bill of cost[s] as he would not have access to the Court records’.

[41] **In my view, as to whether such conduct by the legal practitioner was contrary to section 82(1)(a) of the *Legal Practitioners Act 2009*, needs to be fully ventilated at a hearing. It thus provides a fourth reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the legal practitioner and his firm.**

Count 7

[42] Count 7 alleges as follows:

‘Count 7

ALLEGATION OF PROFESSIONAL MISCONDUCT: pursuant to Section 82(1)(a) of the *Legal Practitioners Decree of 2009*

PARTICULARS

Amrit Sen, a Legal Practitioner, being the sole proprietor of Maqbool & Company, having had caused dispute between Chandrika Prasad (vendor) and Ram Narayan (purchaser) by not releasing the sum of \$500 that was paid into the trust account of Maqbool & Company by Ram Narayan (purchaser) on behalf of Chandrika Prasad (vendor) on or about 30 August 2008 being the final installment [sic] of the purchase price pursuant to the Sale and Purchase Agreement dated 30 July 2007 and having had acted on behalf of Chandrika Prasad by issuing [a] letter dated 21 May 2009 that gave notice to Ram Narayan (purchaser) for payment of \$500 or giving of vacant possession within 30 days; thereafter, acted in an unconscionable manner by taking fees and acting in a matter that came into being due to incompetence and lack [of] diligence on the part of Amrit Sen, which conduct is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'

[43] In summary, Count 7 alleges that the legal practitioner (having caused a dispute between the vendor and purchaser by not releasing the sum of \$500.00 that was paid previously by the purchaser into the legal practitioner's trust account as the final instalment of the purchase price and then acting on behalf of the vendor by issuing a letter that gave notice to the purchaser demanding payment of the \$500.00 or the giving of vacant possession within 30 days), thereafter acted in an unconscionable manner by taking fees in a matter that came into being due to the incompetence and lack of diligence on the part of the legal practitioner. Such conduct is allegedly an act of professional misconduct pursuant to section 82(1)(a) of the *Legal Practitioners Act* of 2009, as (presumably the allegation is that) it 'involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence'.

[44] According to the written submissions of Counsel for the Applicant legal practitioner ('Submissions' dated 8th September 2016, paragraphs [19]-[20], page 7):

(1) '*... neither the firm nor the 1st respondent had ever acted for Chandrika Prasad [the vendor]. Chandrika Prasad has confirmed this in his affidavit' sworn on 2nd April 2016, which is the annexure marked "B" in the affidavit of the legal practitioner sworn on 16th July 2016;*

(2) '*Chandrika Prasad has further said that it was his choice not to collect the money and he was never prejudiced'*;

(3) '*Chandrika Prasad has stated he has never paid any fees to the respondent [legal practitioner] or his firm'*;

(4) *'There is no evidence of payment of fees and no fee was ever taken from Chandrika Prasad and it is confirmed by him in his affidavit'* sworn on 2nd April 2016, which is the annexure marked "B" in the affidavit of the legal practitioner sworn on 16th July 2016;

(5) *'Accordingly, the entire charge is factually incorrect, false and baseless'*.

[45] Counsel for the Respondent Chief Registrar submitted in response (*'Applicant's Submissions'* dated 16th September 2016, paragraphs [30]-[31], page 7):

(1) *'... the Respondent's letter to the Complainant dated 21st of May, 2009 proves that Mr. Chandrika Prasad had retained the Respondent. The Applicant refers to paragraph one of the letter of the Respondent at page 39 of the disclosure bundle, it states;*

'We act on instructions from our above named client who is the legal owner of the above property.'

(2) *'The Applicant relies on the letter sent to the complainant on the 21st of May 2009 on behalf of their client, Mr. Chandrika Prasad'* (*'Bundle'*, Document 8, Tab B, page 39).

[46] I am concerned that the particulars in Count 7 do not set out as to by whom it is alleged fees were paid to the legal practitioner and when. If the Count is alleging that the legal practitioner 'acted in an unconscionable manner by taking fees' from the vendor, I agree that **there is no documentary evidence** (to which my attention has been drawn in the 155 pages of Bundle of documents filed on behalf of the Chief Registrar with the Commission) **to support such an allegation**. Indeed, what occurred according to the vendor, Chandrika Prasad, is made clear in his affidavit sworn on 2nd April 2016, at paragraphs [12]-[17] (annexure 'E' in the Affidavit of the legal practitioner dated 17th July 2016):

12. *After the agreement, I had a dispute because of Ram Narayan causing trouble.*
13. *I came to the office of Maqbool & Company and I was advised that Amrit Sen will not be available for a few days.*
14. ***I spoke to his clerk Malti who wrote one letter and she signed it but I did not make any payment.***
15. *Later on when Mr Amrit Sen came back he advised me that letter written by his clerk was done so without his knowledge and told me to the office of Maqbool & Company and I was advised that it had to be withdrawn which I agreed.*

16. *He advised me that I had to arrange my own solicitors if I wanted anything regarding my agreement with Ram Narayan, so I engaged my solicitors Lomaloma Esq to act on my behalf.*
[My emphasis]

[47] **In my view, Counsel for the Chief Registrar needs to provide in relation to Count 7 sufficient particulars, that is, as to whom is it alleged that fees were taken and when, together with a short prosecution case statement outlining a summary of the evidence and the legal basis upon which the Application is brought in relation to this Count.**

[48] Therefore, in light of this Ruling, I will be ordering that the Respondent file within four days further particulars in relation to Count 7 together with a short prosecution case statement.

Count 8

[49] Count 8 alleges as follows:

'Count 8

ALLEGATION OF PROFESSIONAL MISCONDUCT: pursuant to Section 82(1)(a) of the Legal Practitioners Decree of 2009

PARTICULARS

Amrit Sen, a Legal Practitioner, being the sole proprietor of Maqbool & Company, failed to provide receipts to Ram Narayan for payments made as legal fees amounting to \$1,300 that was paid by Ram Narayan in installments [sic] legal costs incurred in High Court Civil Action No HBC 8 of 2011 (Labasa), which conduct is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'

[50] In summary, Count 8 alleges that the legal practitioner failed to provide receipts to the purchaser Ram Narayan for payments for legal fees amounting to \$1,300.00 paid by installments by Ram Narayan to the legal practitioner's firm in relation to defending the civil action in High Court at Labasa filed by the vendor. Such conduct is allegedly an act of professional misconduct pursuant to section 82(1)(a) of the *Legal Practitioners Act* of 2009, as (presumably the allegation is that) it **'involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence'**.

[51] According to the written submissions of Counsel for the Applicant legal practitioner (‘*Submissions*’ dated 8th September 2016, paragraph [21], page 8):

*‘Count 8 was formulated without investigations being undertaken. Ram Narayan who has been called a liar by the applicant [Chief Registrar] has confirmed that he was given a receipt for all payment[s] made by him. **Should the investigators have requested for the duplicate of the receipt[s], the same could have been provided.**’* [My emphasis]

[52] Counsel for the Respondent Chief Registrar submitted in response (‘*Applicant’s Submissions*’ dated 16th September 2016, paragraph [32], page 7): that the Respondent was well aware of the allegations against him and he was required to respond the same. As to what inference is to be drawn, if any, because the legal practitioner did not provide a copy of the receipts when the original complaint was sent to the legal practitioner, has, arguably, not been addressed directly by Counsel for the Respondent Chief Registrar in her submissions.

[53] Obviously, at a final hearing, the Chief Registrar bears the persuasive burden of proving the allegation as set out in Count 8. As this is the legal practitioner’s interlocutory application, however, for a strikeout/dismissal, the legal practitioner carries the onus as to why the count should be struck out/dismissed. Despite making the submission on 8th September 2016 that ‘*should the investigators have requested for the duplicate of the receipt[s], the same could have been provided*’ (presumably to mean by the legal practitioner), no such documentation (that is, duplicate of the receipts), were filed with the Commission and served upon the Chief Registrar in the following 14 months between 8th September 2016 and the hearing of the strike out application on 27th November 2017. As to what inference is to be drawn, if any, because the legal practitioner has not provided a copy of such receipts is a matter for a final hearing. If, however, receipts are produced, they may still be disputed, all of which will require evidence to be taken at a final hearing.

[54] **In my view, therefore, as to whether such conduct by the legal practitioner was contrary to section 82(1)(a) of the *Legal Practitioners Act 2009*, needs to be fully ventilated at a hearing. It thus provides a fifth reason as to why there needs to be a full hearing before the Commission in relation to the**

conduct of the legal practitioner and his firm.

Count 9

[55] Count 9 alleges as follows:

'Count 9

ALLEGATION OF PROFESSIONAL MISCONDUCT: pursuant to Section 82(1)(a) of the Legal Practitioners Decree of 2009

PARTICULARS

Amrit Sen, a Legal Practitioner, being the sole proprietor of Maqbool & Company, failed to require Ram Narayan to obtain independent legal advice when instructed by Ram Narayan to act on his behalf in High Court Civil Action No HBC 8 of 2011 (Labasa) when there was sufficient evidence and/or material within the knowledge of Amrit Sen that would suggest that Ram Narayan may have a potential claim against Amrit Sen for negligence, which conduct is a breach of Rule 1.9 of the Rules of Professional Conduct and Practice and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'

[56] In summary, Count 9 alleges that the legal practitioner failed to require that the purchaser, Ram Narayan, obtain independent legal advice when instructed by Ram Narayan to act on his behalf in defending the civil action brought in the High Court at Labasa by the vendor, when there was evidence within the knowledge of the legal practitioner that would suggest that the purchaser, Ram Narayan, may have a potential claim against the legal practitioner for negligence which is a breach of Rule 1.9 of the Rules of Professional Conduct and Practice. Such conduct is allegedly an act of professional misconduct pursuant to section 82(1)(a) of the *Legal Practitioners Act* of 2009, as (presumably the allegation is that) it *'involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence'*.

[57] Rule 1.9 of the *Rules of Professional Conduct and Practice (Schedule of the Legal Practitioners Act 2009)* states:

'CHAPTER 1—RELATIONS WITH CLIENTS'

*'1.9 Where a practitioner becomes aware that a client may have a potential claim against the practitioner for negligence, the practitioner **must** advise the client to seek independent advice.'*

[My emphasis]

[58] According to the written submissions of Counsel for the Applicant legal practitioner ('Submissions' dated 8th September 2016, paragraphs [22]-[23], page 8):

(1) *'Ram Narayan in his affidavit has said that he always wanted the 1st respondent to act for him. Ram Narayan has clearly stated he was allowed to take independent advice';*

(2) *'The applicant [Chief Registrar] had failed to provide what claim Ram Narayan [as purchaser] had against the respondent [legal practitioner] when he [Ram Narayan] instructed [the legal practitioner] to appear on that matter', that is, defending the proceedings brought by the vendor in the High Court at Labasa against the purchaser.*

[59] Counsel for the Respondent Chief Registrar submitted in response ('Applicant's Submissions' dated 16th September 2016, paragraphs [33]-[34], pages 7-10) that:

(1) *'... a Legal Practitioner should look out for their clients' [sic] best interest and this cannot be done if a Legal Practitioner takes on two clients who are in conflict with one another';*

(2) The applicant has cited in support the case of *Law Society of NSW v Nguyen* [2009] NSWADT 199 (see Austlii: <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2009/199.html>) as follows –

(i) at paragraphs [76]-[77] and the 'obligation to avoid conflict of interest'. I note that paragraph 76 it is stated -

*'76 xxxviii. In the view of the Tribunal, the duty of loyalty of the Respondent to her client, the mother, forms part of her obligation to avoid [a] conflict of interest. **The Tribunal regards the avoidance of acting against the interests of a client as a basic professional duty of a solicitor. The client is entitled to expect that having had a solicitor act for him or her in a matter[,] that that same solicitor will not thereafter appear and act against the client, nor on behalf of an opponent with a contrary interest.'***

[My emphasis]

(ii) paragraphs [80]-[81] concerning ‘aspects of conflict of interest’ (citing Professor Dal Pont in *Lawyers’ Professional Responsibility*, Thomson Lawbook Co, 3rd edn, 2006, paragraph 4.30, page 75 and paragraph 4.45, pages 76-77);
(iii) paragraph [84] citing *Riley Solicitors Manual* (G.E. Dal Point, LexisNexis, 2005), citing in turn, Wilson JA in a Canadian case of *Davey v Wooley, Homes, Dale & Dingwell* (1982) 35 OR (2d) 599 at 602 and Davies JA in *Alexander (t/a Minter Ellison) v Perpetual Trustees WA Ltd* [2001]NSWCA 240 at [125].

[60] I have previously noted in *Chief Registrar v Dorsami Naidu* (Unreported, ILSC, Action No. 004 of 2015, 15 February 2017; PacLII: FJILSC 2, <<http://www.pacii.org/fj/cases/FJILSC/2017/2.html>>), the applicability or otherwise of *Nguyen*’s case to Fiji, wherein I observed at [31]:

‘... there is also a discussion in Nguyen ... as to the law in Australia, placing an obligation upon a legal practitioner to avoid a conflict of interest even where it is not a ‘confidential/privilege information situation’.

[61] I also note that in the ‘Affidavit of Ram Narayan’ sworn on 7th January 2016, Mr Narayan has stated at paragraph [7] therein:

7. *I was further agreed that Amrit Sen would defend me in HBC 8 of 2011. Chandrika Prasad had no objection for Amrit Sen acting for me. The agreed fees for defending the action was \$2500.0 ... I am fully satisfied with bill of costs and services rendered’ ...*
- ...
9. *I say that Amrit Sen acted with diligence and competently, I have not been disadvantaged or prejudiced by Amrit Sen acting for me.*
- ...
11. *I say that Amrit Sen acted for me as per my instructions. Amrit Sen defended me successfully and he had no further obligations to me. In the circumstance I had no claim of any nature against him.*
12. *I attended court on all occasions and I was fully aware of the proceedings in respect of HBC 8 of 2011.*
13. *My misunderstanding was that I could have title after the case.*
14. *I have taken independent advice and now I am aware that getting a separate title is an involved process that requires subdivision.’*

[62] I further note that in the ‘Witness Statement of Ram Narayan’ signed on 25th August 2016, Mr Narayan states *‘that the contents of the two affidavits dated 7th and 27th January 2016, were not given by me but I was forced to sign them both’.*

[My emphasis] Mr Narayan then makes a number of claims against various

persons, in particular, two Commissioners for Oaths.

[63] I have come to the view that I cannot strike out or dismiss this count, noting the varying stances of the purchaser in his witness statement signed on 9th July 2015, his affidavits sworn on 7th and 27th January 2016 and then his further witness statement signed on 25th August 2016, together with an allegation that the purchaser may have had a potential claim for negligence against the legal practitioner for which the purchaser was not advised to seek independent legal advice. Whether such conduct of the legal practitioner was contrary to section 82(1)(a) of the *Legal Practitioners Act 2009*, needs to be fully ventilated at a hearing. It thus provides a sixth reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the legal practitioner and his firm.

[64] At the same time, in my view, Counsel for the Chief Registrar needs to provide sufficient particulars together with a short prosecution statement in relation to Count 9 detailing what was the alleged ‘sufficient evidence and/or material’ within the knowledge of the legal practitioner ‘*that would suggest that [the purchaser] Ram Narayan, may have a potential claim*’ against the legal practitioner for negligence. Accordingly, I will be ordering that Counsel for the Respondent Chief Registrar file within four days further particulars in relation to Count 9 together with a short prosecution case statement.

Count 10

[65] Count 10 alleges as follows:

‘Count 10

ALLEGATION OF PROFESSIONAL MISCONDUCT: *pursuant to Section 82(1)(a) of the Legal Practitioners Decree of 2009*

PARTICULARS

Amrit Sen, a Legal Practitioner being the sole proprietor of Maqbool & Company, failed to provide regular updates and/or progress reports of the status of High Court Civil Action No HBC 23 of 2004 (Labasa) to Ram Narayan, which conduct is a breach of Rule 8.1(1)(b) of the Rules of Professional Conduct and

Practice and an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.

[66] In summary, Count 10 alleges that the legal practitioner failed to provide regular updates and/or progress reports of the status of High Court Action No.23 of 2004 to the defendant, Ram Narayan, and which is a breach of Rule 8.1(1)(b) of the Rules of Professional Conduct and Practice. Such conduct is allegedly an act of professional misconduct pursuant to section 82(1)(a) of the *Legal Practitioners Act* of 2009, as (presumably the allegation is that) it ‘***involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence***’.

[67] Rule 8.1(1)(b) of the *Rules of Professional Conduct and Practice (Schedule of the Legal Practitioners Act 2009)* states:

‘CHAPTER 8—CLIENT CARE

8.1—(1) ... ***every principal in private practice shall:***

...

(b) ***Both at the outset and during the course of the matter cause the client to be informed, where appropriate, as to the issues raised by the matter, the steps which are likely to be required, how long it is likely to be before it is concluded, and progress from time to time***’.

[My emphasis]

[68] According to the written submissions of Counsel for the Applicant legal practitioner (‘*Submissions*’ dated 8th September 2016, paragraph [25], page 9):

(1) ‘*Ram Narayan was never represented by the 1st respondent or the firm in the action alleged*’, that is, High Court Action No 23 of 2004 at Labasa;

(2) ‘*Ram Narayan in his affidavit [sworn on 7th January 2016] has stated [at paragraph 12] that he was present in court each and every time in his case when it was called*’ that is, High Court Civil Action No. 8 of 2011 at Labasa;

(3) ‘*He has stated that he was fully apprised of all the progress*’;

(4) ‘*It seems that the applicant’s prosecutors do not understand how chamber proceedings are conducted. In chambers, the parties present are generally not noted. Only the presence of the counsel appearing is noted. If the counsel does not appear and then if the party wants his presence to be noted, then the judicial officer may note the same*’;

(5) The legal practitioner ‘*in his affidavit [sworn on] has disclosed ... documents*

that totally negate the allegations made against him and the firm’.

[69] Counsel for the Respondent Chief Registrar submitted in response (‘*Applicant’s Submissions*’ dated 16th September 2016, paragraph [35], page 10) that:

‘... necessary application for amendment for count 10 will be made before the Honourable Commissioner in regards to the case number of the High Court matter’.

[70] I note that, apart from stating an application will be made to amend the case number in Count 10 (presumably from High Court Civil Action No. 23 of 2004 (Labasa) to High Court Civil Action No. 8 of 2011 at Labasa), Counsel for the Respondent Chief Registrar has not addressed the submissions of Counsel for the Applicant legal practitioner in relation to Count 10.

[71] **Balanced against that, however, I have come to the view that I cannot strike out or dismiss this count, noting the varying stances of the purchaser in his witness statement signed on 9th July 2015, his affidavits sworn on 7th and 27th January 2016 and then his further witness statement signed on 25th August 2016. Therefore, this provides a seventh reason as to why there needs to be a full hearing before the Commission in relation to the conduct of the legal practitioner and his firm.**

Alleged attitude of the Respondent’s staff

[72] A further argument of Counsel for the Applicant (‘*Submissions*’, 8th September 2016, Paras [38]-[40]) is in relation to the alleged attitude of the staff within the office of the Chief Registrar and their failure to provide further and better particulars and, instead, the staff of the Chief Registrar stating the issues raised were matters for trial. As I noted in *Chief Registrar v Suruj Sharma* at [71] where a similar allegation was raised:

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

(See *Chief Registrar v Suruj Sharma*, Unreported, ILSC, Action No. 12 of 2015 and No. 15 of 2015, 21 September 2016; PacLII: [2016] FJILSC 5, <<http://www.pacii.org/fj/cases/FJILSC/2016/5.html>>.)

[73] This provides **an eighth reason as to why there needs to be a full hearing before the Commission.**

6. The Law

(1) Conflict of interest

[74] Counsel for the Applicant legal practitioner has submitted on this issue ('Submissions', 8 September 2016, Paras [30]-[33]-[34]) as follows:

(1) *'The legislation that regulated the obligations of legal Practitioners prior to 2009 is the Legal Practitioners Act Cap 254 ... [which] allowed practitioners to act for both parties';*

(2) In *Chief Registrar v Adish Kumar Narayan* (Unreported, ILSC, Action No. 009 of 2013, 2 October 2014; PacLII: [2014] FJILSC 6, <<http://www.pacii.org/fj/cases/FJILSC/2014/6.html>>), *'the former Commissioner [Justice P.K. Madigan] recognized that there was no legal or ethical restriction of a practitioner acting for both parties, (but, however, it was not in our case)';*

(3) *'There is no allegation by any person that the practitioner held any confidential information which was prejudicially used against another';*

(4) *'... the decision of Narayan supra establishes that even if the practitioner had acted for both party [sic] and had taken fees, there was no prima facie misconduct'.*

[75] I have noted the decision of the former Commissioner, Justice P.K. Madigan, in *Narayan*. I have also noted that I reached a similar view in *Chief Registrar v Hari Ram* (Unreported, ILSC, Action No. 002 of 2015, 6 February 2017; PacLII: [2017] FJILSC 4, <<http://www.pacii.org/fj/cases/FJILSC/2017/4.html>>).

[76] In my view, **the present case is different to what I understand occurred in Narayan** (for which judgment was delivered by Justice Madigan on 2 October 2014), **as well as in Ram** (for which I delivered judgment on 6th February 2017).

[77] **By contrast, in the present case, varying stances have been taken by the purchaser. First, in his witness statement signed on 9th July 2015, he made complaints about the legal practitioner. Second, in his affidavits sworn on 7th and 27th January 2016, he then made statements in support of the legal practitioner. Third, he has then made a further witness statement signed on 25th August 2016, saying ‘*that the contents of the two affidavits dated 7th and 27th January 2016, were not given by me but I was forced to sign them both*’.** There is also an allegation that the purchaser may have had a potential claim for negligence against the legal practitioner for which the purchaser was not advised to seek independent legal advice.

[78] As I have already noted above in relation to Count 9, this has provided a seventh reason as to why there should be a full hearing. As a balance, however, I will be making Orders requiring Counsel for the Chief Registrar to provide further particulars in relation to Count 9, as well as a short prosecution case statement setting out the alleged conflict of interest.

(2) The need for a hearing

[79] In his ‘Additional Submissions’ dated 18th October 2017, paragraph [13], Counsel for the Respondent Chief Registrar (who has taken over the carriage of this matter from the original Counsel who prepared the submissions of 16th September 2016), has cited my judgment in *Chief Registrar v Suruj Sharma* where I came to the view that a hearing had to take place as it involved ‘*a number of controversial and contentious issues which ought to be reserved for scrutiny at trial*’. I agree that the present matter bears some similarities. It goes further, however, involving serious allegations of improper and possibly criminal behaviour on the part of one or more persons.

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

(3) Test of exceptional circumstances for a permanent stay/strike out

[81] In his ‘Additional Submissions’ dated 18th October 2017 at paragraph [14], Counsel for the Respondent has cited the judgment of the previous Commissioner, Justice P.K. Madigan, in *Chief Registrar v Adish Kumar Narayan* (Unreported, ILSC, Action No. 009 of 2013, 25 September 2013; PacLII: [2013] FJILSC 13, <<http://www.paclii.org/fj/cases/FJILSC/2013/13.html> >). In dismissing the application for a permanent stay/strike out, His Lordship, stated at [19]: ‘*It has been said many times in rulings on application for stay, both in Fiji and abroad that a stay will be granted only in exceptional circumstances.*’ [My emphasis] In his submissions, Counsel for the Chief Registrar has also drawn my attention to paragraph [32] of the judgment in *Narayan* where His Lordship concluded:

‘The remaining issues relied upon by the practitioner such as the charge being unfair in the circumstances, and whether there was indeed a conflict of interest at the time are issues that can be canvassed in a hearing of this allegation when both parties will be heard, and should the practitioner succeed in making out these objections before the Commission then it could well be that the allegation will be found to be not established or if established, his stated concerns will provide powerful mitigation which will strongly affect any penalty against him. The position is, that although some of the practitioner’s grounds may well be found to be in his favour, the grounds advanced do not raise any ‘exceptional circumstances’ which would cause the Commission to stay proceedings or strike out the complaint.’

[82] Thus, Counsel for the Respondent Chief Registrar has submitted that in his ‘Additional Submissions’ dated 18th October 2017 at paragraph [15]:

Consequently, the threshold for what comes within the ambit of ‘exceptional circumstances’ is quite high and even if in this instance, the Applicant’s grounds were to be found meritorious in some respects during the hearing, which the Respondent strongly contests, even then, the Respondent submits that these grounds do not qualify as exceptional circumstances.

[83] Counsel for the Applicant legal practitioner has cited on this issue the judgment of the previous Commissioner, Justice P.K. Madigan, in *Chief Registrar v Devanesh Prakash Sharma* (Unreported, ILSC, Action No. 029 of 2013, 12 November 2014; PacLII: [2014] FJILSC 7, <<http://www.paclii.org/fj/cases/FJILSC/2014/7.html>>). In particular, he has cited ‘*certain observations*’ taken from paragraphs [45]-[46], [52], [55]-[60].

Counsel for the Applicant legal practitioner has submitted that those observations made in *Sharma* 'are consistent with this case'. I disagree.

[84] **The present case is different to what occurred in *Devanesh Sharma*. Here, we have varying stances taken by the purchaser involving serious allegations of impropriety, the truth of which can only be determined at a hearing.**

[85] Further, Counsel for the Respondent Chief Registrar has submitted in his 'Additional Submissions' dated 18th October 2017 at paragraph [15]:

'Consequently, the threshold for what comes within the ambit of "exceptional circumstances" is quite high and even if in this instance, the Applicant's grounds were to be found meritorious in some respects during the hearing, which the Respondent strongly contests, even then, the Respondent submits that these grounds do not qualify as exceptional circumstances.'

[86] By way of contrast, in *Chief Registrar v Dorsami Naidu* (supra), I ruled against the Chief Registrar as to validity of a charge brought against the Respondent legal practitioner and had no hesitation in striking out the count. As I explained in *Naidu* at [1], the background to the charge in that instance was as follows:

'... The legal practitioner had acted for five siblings in the preparation of a Deed that replaced the original trustee (with his consent) with two of his siblings. The legal practitioner then instituted legal proceedings to give effect to the terms of the Deed whereby the sole trustee was formally replaced by the two new trustees. The Applicant alleges that this is professional misconduct arising out of a conflict of interest in so instituting the legal proceedings. The Respondent legal practitioner alleges that there was no conflict of interest and, hence, no need for a final hearing as all the parties had agreed to the course of action.'

[87] In *Naidu*, I found (at [37]) it was clear that *'the Applicant's staff, before filing the present Application with the Commission, had never spoken to Rajesh the person about whom the alleged conflict of interest in Count 2 is based'*. Further, it was *'clear from the excerpts ... of the statements taken by the Applicant's investigator from the four other parties to the Deed that there was an agreement by the five siblings including Rajesh, to replace Rajesh with two others siblings'*, and that *'... a close reading of the Deed, as well as the four statements and Rajesh's affidavit, reveal that it was arguably in Rajesh's interest (as one of the beneficiaries of the Estate) that he be replaced to save the Native Title lease*

from being terminated'. Thus, I concluded at [39]: *I agree with the Respondent legal practitioner. There is no point in allowing the Applicant to continue and have a final defended hearing in relation to Count 2. There was no conflict of interest ...*

[88] Again, what occurred in *Naidu* is vastly different to what is alleged to have occurred in the present case.

[89] I have noted that both Counsel in their respective oral submissions made before me on 27th November 2017 argued that there is also the public interest that needs to be considered. On the one hand, Counsel for the Chief Registrar cited the public interest in having the matter proceed to a final hearing. On the other hand, Counsel for the Applicant legal practitioner responded: *"Now, I know my friend has mentioned about the public interest in proceeding here, but the public has lots of interests and one of them is resources. Now it's quite a costly exercise I'm sure to get this Commission convened."* Counsel for the Applicant legal practitioner explained that the various witnesses who would need to be called at a final hearing include *"the two Commissioners of Oaths who signed the Affidavits"* and *"we will probably have to call Mr. Robinson, the previous Master of the Labasa High Court. This is going to be at a considerable expense"* and the legal practitioner in defending such proceedings will *"have no prospect of recovering any aspect whatsoever"* because of the provisions of the *Legal Practitioner Act 2009* whereby section 124(2) clearly states: *'The Commission shall not make any order for payment of costs and expenses against the Registrar or the Attorney-General.'* Thus, the submission of Counsel for the Applicant legal practitioner was that:

"So, in terms of public interest, and the private interest of Mr. Sen, I think there is no question that, by weighing those interest[s] in each other, ... this Commission should go over onto the side of Mr. Sen, rather than into the side of public interest, whatever that might be ..."

[90] I disagree that the private interest of the legal practitioner Mr Sen should outweigh the public interest of holding a hearing. Indeed, in *Anand Kumar Singh v Chief Registrar* (Unreported, Fiji Court of Appeal, Case No. ABU 58 of 2013, Calanchini P, 20 December 2013); PacLII: [2013] FJCA 141, <<http://www.pacii.org/fj/cases/FJCA/2013/141.html>>), the President of the

Court of Appeal stated at [19]: *'The Appellant has not established any special circumstance that outweighs the paramountcy of the public interest.'* Although, as Calanchini P noted at [13], this was in the context of *'where a regulator in the person of the Chief Registrar representing the public interest has been successful in proceedings before a disciplinary tribunal'* and a practitioner is seeking a stay pending an appeal, His Lordship made the point that *'The Chief Registrar is the regulator of the legal profession and in opposing an application for stay of execution pending appeal as the successful party at first instance he is representing the public interest.'* [My emphasis]

[91] Balanced against that, I have noted the judgment of the Full Court of Appeal in *Abhay Kumar Singh v Chief Registrar* (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 3 of 2010, Byrne, AP and Calanchini, JA, 7 May 2010; PacLII: [2010] FJCA 41, <<http://www.pacii.org/fj/cases/FJCA/2010/41.html>>) where a short interim stay was granted to enable the legal practitioner to finalise a large number of files as Their Lordships made clear in their judgment at [21] when they stated:

'... Whilst we accept that the protection of the public and hence the public interest is always to be given significant weight, we also consider that each case must turn on its specific facts ...'
[My emphasis]

[92] In deciding that the public interest must prevail and a final hearing must take place of the seven counts outstanding against the legal practitioner, I have also noted the comments made in the High Court of Australia in *Walton v Gardiner* (1993) 177 CLR 378; 112 ALR 289; (AustLII: (1993) HCA 77, <<http://www.austlii.edu.au/au/cases/cth/HCA/1993/77.html>>), and, in particular, in the majority judgment of Mason CJ, Deane and Dawson JJ, where, although confirming the grant of a permanent stay of proceedings before a medical disciplinary tribunal, they observed at [26]:

'In its application to the Tribunal, the concept of abuse of process requires some adjustment to reflect the fact that the jurisdiction of the Tribunal, which is not a court in the strict sense, is essentially protective - i.e. protective of the public - in character ... there is plainly an analogy between the concept of abuse of a court's process in relation to criminal proceedings and the concept of abuse of the Tribunal's process in relation to disciplinary proceedings. As was pointed out in Jago ... (See, in

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

[My emphasis]

[93] **In my view, based on the seven reasons that I have set out above in this ruling, the public interest is that a hearing must take place in relation to each of the seven counts.** I am fortified in my view, noting the conclusion reached by Basnayake JA (with whom Calanchini P and Kumar JA agreed) in *Amrit Sen v Chief Registrar* (supra), (dismissing an appeal from a refusal of the Commission to stay proceedings) when His Lordship stated at [36]:

'... Considering the seriousness of the allegations and the voluminous evidence I am of the view that the matters presented by the appellant are not sufficient to stay the proceedings ...'

[94] Further, I have also noted the comment of Marsoof J in the judgment of the Supreme Court in the subsequent appeal in *Amrit Sen v Chief Registrar* (supra) at [1], that

'... disciplinary proceedings such as the one before the Independent Legal Services Commission should not be unduly delayed by applications for stay of proceedings, as the time is of the essence in these matters.'

[95] Accordingly, the application of the legal practitioner seeking a permanent stay/dismissal of seven Counts filed against him, is refused.

[96] Before departing with this matter, I note that at approximately 12 noon on Friday, 22nd December 2017, the Commission received an email from Counsel for the Respondent (which was copied to Counsel for the legal practitioner) advising: ‘*Kindly note that we have received information on the outcome of Police investigations in that Mr Sen has been formally charged.*’ Counsel attached a copy of the charge which stated the legal practitioner had been charged in the Magistrate’s Court at Labasa on 12th December 2017 with ‘*Conspiracy to defeat the course of justice: Contrary to section 190(e) of the Crime[s] Act of 2009*’ with the particulars being:

‘*AMRIT SEN on the, between 25th November, 2013 to 27th January, 2016 at Labasa in the Northern Division, pervert or defeat the course of justice of the two affidavits of RAM NARAYAN.*’

[97] In my view, the receipt of the above did not bar me from proceeding with the delivering of a ruling in relation to the Interlocutory Application of the legal practitioner seeking a permanent stay/dismissal of the seven counts pending in this Commission against the legal practitioner. As I have decided that the application for strike out/dismissal should be refused, accordingly, I will now be allocating a date for a final hearing to take place of the seven counts filed by the Chief Registrar against the legal practitioner.

[98] Should either one or both Counsel seek a stay of the final hearing before this Commission pending the outcome of the criminal proceedings in the Magistrate’s Court at Labasa, that would need to be made in a separate formal application to be filed and heard, if possible, during these present Sittings of the Commission.

ORDERS

[99] The formal Orders of the Commission are:

1. The oral application of the Respondent that the hearing be vacated of the Interlocutory Application seeking a permanent stay/dismissal of the application filed against the legal practitioner in Case No. 010 of 2015, *Chief Registrar v Amrit Sen*, is refused.
2. In the hearing of the Interlocutory Application seeking a permanent stay/dismissal of the application filed against the legal practitioner in Case No. 010 of 2015, *Chief Registrar v Amrit Sen*, the application is refused.
3. In relation to Count 7, Counsel for the Chief Registrar is to file and serve

within four days of today, that is, by 12 noon on Friday, 9th February 2017, further particulars as to from whom is it alleged that fees were received and when, together with a short prosecution case statement outlining a summary of the evidence and the legal basis upon which the Application is brought in relation to Count 7.

4. In relation to Count 9, Counsel for the Chief Registrar is to file and serve within four days of today, that is, by 12 noon on Friday, 9th February 2017, further particulars together with a short prosecution statement detailing what was the alleged sufficient evidence and/or material within the knowledge of the legal practitioner that would suggest that Ram Narayan, may have a potential claim against the legal practitioner for negligence.
5. Leave granted as per the oral application on the 10th February 2017, to amend count 10 in the particulars referring to High Court Civil Action No HBC 23 of 2004 (Labasa) to High Court Civil Action No HBC 8 of 2011 (Labasa)

Dated this day 5th day of February 2018.

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

