IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 004 of 2017

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

ASERI VAKALOLOMA

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: Mr. T. Kilakila
Respondent: Ms. B. Malimali

Dates of Hearing: 27th September 2017, 27th November 2017 (Mention)
Date of Judgment: 28th November 2017

Dates of Written Submissions:
20th October 2017 (Applicant)
6th November 2017 (Respondent)
13th November 2017 (Applicant in Reply)

RULING ON TENDERING OF NAURU JUDGMENT INTO EVIDENCE

1. The Objection

[1] This is a Ruling as to whether a judgment from the Supreme Court of Nauru (whereby it was ordered that the name of the Respondent legal practitioner be struck off from the Roll of legal practitioners in Nauru), can be tendered in disciplinary proceedings in Fiji.

[2] The Respondent legal practitioner is presently facing four counts of professional misconduct before this Commission. On 12th July 2017, an Amended Count 1 was filed by Counsel for the Applicant Chief Registrar in the present proceedings as follows:

Amended Count 1

PROFESSIONAL MISCONDUCT: Pursuant to Section 82(1)(b) of the Legal Practitioners Act 2009

PARTICULARS

***ASERI VAKALOLOMA**, a Legal Practitioner, being the sole proprietor of **VAKALOLOMA & ASSOCIATES** on the 19th day of November, 2015 was adjudged by the Supreme Court of Nauru in Disciplinary Proceedings vide Miscellaneous Proceedings No. 59 of 2015 before the late Hon. Chief Justice Madraiwiwi of Nauru, as guilty of two counts of professional misconduct for which the Respondent was consequently struck off the Roll of Barristers and Solicitors in Nauru and thus in contravention of **Section 82(1)(b) of the Legal Practitioners Act of 2009**.*

[3] In relation to the previous proceedings in Nauru, on 19th November 2015, Chief Justice Madraiwiwi of the Supreme Court of Nauru (sitting as a disciplinary tribunal) found two counts of professional misconduct established against the Respondent legal practitioner and, in the same judgment, ordered that the Respondent legal practitioner's *'name be struck off the Roll of the Court of Barristers and Solicitors and Pleaders of Nauru and that there be no order as to costs.* (See ***Vakaloloma, In re Legal Practitioners (Admission) Rules 1973***, Unreported, Supreme Court of Nauru, Misc.Cause No. 59 of 2015, 19 November 2015, Madraiwiwi CJ; PacLII: [2015] NRSC 27, <http://www.paclii.org/nr/cases/NRSC/2015/27.html>).

[4] Thus, the nub of the Amended Count 1, is the allegation that the Respondent legal practitioner by having his name struck off from the Roll of legal practitioners in Nauru, is guilty of professional misconduct in Fiji pursuant to section 82(1)(b) of the *Legal Practitioners Act 2009*, that is, being *'conduct ... that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'*.

[5] When Counsel for the Applicant Chief Registrar tendered a copy of the abovementioned judgment from Nauru in support of the Amended Count 1 in the present proceedings before this Commission, Counsel for the Respondent legal practitioner objected.

[6] The initial basis of the objection of Counsel for the Respondent was that:

(1) The judgment from Nauru and the Order it contains has not been registered in Fiji as a foreign judgment;

(2) Counsel for the Applicant had been put on notice (via email) the week before the commencement of the September 2017 Sittings of the Commission that there was no agreement as to documents;

(3) The Commission cannot even take judicial notice of the judgment from Nauru;

(4) Being a foreign judgment, Counsel for the Applicant should have filed in the High Court of Fiji a Notice of Motion and Affidavit in Support especially if they wanted to use the judgment from Nauru as the basis for saying that the Respondent has committed an act of professional misconduct in Fiji pursuant to section 82(1)(b) of the *Legal Practitioners Act 2009,* that is, *'conduct of a legal practitioner ... that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'*;

(5) According to section 15(1) of the *Constitution of the Republic of Fiji, 'every person charged with an offence has the right to a fair trial before a court of law'*;

(6) In ***Americhip Inc v Dean*** [2015] 3 NZLR 498, the High Court of New Zealand in deciding on a "*forum conveniens*" issue had to consider, amongst other matters, *'would a Chinese judgment be likely to give rise to an issue estoppel in subsequent New Zealand proceedings?'* Katz J stated at paragraphs [31] - [32] that *'... As there is no statute allowing for reciprocal enforcement of Chinese judgements [sic], any recognition would need to be in accordance with common law conflict of law principles'* the requirements of which are set out *in 'the leading case on issue estoppel'* being ***Carl Zeiss Stifung v Rayner and Keeler Ltd (No 2)*** [1967] 1 AC 853;

(7) In ***Ziems v Prothonotary of the Supreme Court of NSW*** (1957) 97 CLR 279; AustLII: [1957] HCA 46, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1957/46.html>, a majority of the High Court of Australia found that the existence of a conviction for manslaughter was not of itself sufficient to justify the practitioner's name being automatically struck from the roll;

(8) Counsel for the Respondent also tendered a copy of the judgment of the House of Lords in ***Huntington v Attrill*** [1893] AC 150 in relation to *'the rule of international law which prohibits the Courts of one country from executing the penal laws of*

another'.

[7] Counsel for the Applicant submitted in reply that:

(1) The Commission could take judicial notice of the Nauru judgment as it was a public document;

(2) In the Respondent's *'Application for a Practising Certificate'* declared on 2nd March 2017, he has ticked "Yes" in *'Part D: Statements on personal Character'* to the following questions:

> *'3. Been refused admission or struck off the roll of barristers and or/solicitors and/or legal practitioners in Fiji **or elsewhere**?*
> *4. Been refused a practising certificate, had it suspended or cancelled in Fiji **or elsewhere**?*
> *5. Been found guilty of professional misconduct in Fiji **or elsewhere**?*
> *6. Been found guilty of unsatisfactory professional misconduct in Fiji **or elsewhere**?*
> [My emphasis]
>
> (See Applicant's Bundle dated 13th May 2017, pages 120 and 122, Exhibit "A" 10)

(3) Further, the Respondent has then stated in his *'Application for a Practising Certificate'*:

> *'Complaint on my failure to disclose being struck out of the Role [sic] of Barrister and Solicitor of the Republic of Nauru. My failure being for not being notified until February 2017 when I was informed by the CR's office ... ';*

(4) In light of the above acknowledgement by the Respondent as to the existence of the judgment and his name being struck off the Roll of legal practitioners in Nauru, the Commission in Fiji can take judicial notice of the judgment to that effect from Nauru;

(5) Counsel for the Applicant also raised as an issue as to the applicability of the High Court Rules, however that submission was not further developed by him.

[8] I advised Counsel that they would be given time to develop their respective submissions dealing with this objection while the hearing continued on the other three counts. After Counsel for the Applicant called various witnesses in relation to Counts 2, 3 and 4, it became clear that he was at this stage offering no other evidence in support of Count 1 other than tendering the judgment from Nauru to

which objection had been raised and a ruling would now need to be made. In particular, Counsel for the Applicant made clear that if the Respondent gave evidence, then he would be seeking to cross-examine the Respondent on matters in relation to the judgment from Nauru. Accordingly, the matter was then adjourned to these present Sittings on Monday, 27th November 2017, and Orders were made for the filing of the written submissions in relation to the objection raised by Counsel for the Respondent. This then is my Ruling as to whether a copy of the said judgment from Nauru can be tendered in these proceedings.

2. The Submissions

[9] The written submissions of Counsel for the Applicant Chief Registrar are (in summary) as follows:

(1) The proceedings before this Commission '*are disciplinary proceedings, and the rules of evidence are not as stringent as in ordinary Courts'*. Indeed, section 114 of the *Legal Practitioners Act 2009 'ought to be construed ... to cover for scenarios ... [such as] in this case, [where] the Applicant has opted to rely solely on documents'*.

(2) *'This distinction should be further highlighted by the fact that this matter is before a Commission of enquiry rather than any other Court'* as highlighted by Justice Madigan in ***Chief Registrar v Narayan*** (Unreported, ILSC Case No. 009 of 2013, 2 October 2013; PacLII: [2014] FJILSC 6, <http://www.paclii.org/fj/cases/FJILSC/2014/6.html>), wherein His Lordship stated at paragraphs [4] - [5] as follows:

> *4. An essential matter raised by the practitioner in each of his applications and again in his final submissions concerns the nature of the proceedings that are heard before the Commission. There appears to be quite a misunderstanding throughout the profession and in particular by the present practitioner, of the exact nature of proceedings in the Commission when an allegation has been referred to it by the Registrar for hearing. The operative word is hearing and not trial. Although the Commissioner and the Commission have the roles of Judge of the High Court and the High Court respectively, hearings before the Commission are hearings by way of an enquiry and not adversarial trials. As such formal rules of evidence do not apply (see section 114 of the Decree) and it will only be in exceptional circumstances that interlocutory applications and no case applications will be entertained. The whole purpose of a hearing before the Commission is to establish the validity of the application made by the Registrar and if so established to then make an appropriate penalty order; at all times seeking to protect the interests of the consumer public, while*

endeavoring to maintain high standards of ethics and practice within the profession.
5. This can be done only after hearing and seeing ALL of the evidence that is available to the Commission. For that reason an application to dismiss that allegation after the Registrar has presented his evidence is premature. In a trial it could well be, and often is, that a concluded prosecution case does not disclose all the elements of an offence; however in a full hearing with no trial evidentiary restrictions, the presentation of the practitioner's case may well alter the Commission's view of the allegation;

(3) According to the *Civil Evidence Act 2002*, "*civil proceedings*" are defined (*'in addition to civil proceedings in any of the ordinary courts of law'*) to include:

> *(a) civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply; or*
> *(b) an arbitration or reference, whether or not under an enactment,* ***but does not include civil proceedings in relation to which the strict rules of evidence do not apply*** [Counsel for the Applicant's emphasis];

(4) In the alternative, *'in the event that the Commission was minded ... to rule that the Civil Evidence Act 2002'* applied, regard should be had to section 3(1) of that Act which states that *'in civil proceedings, evidence must not be excluded on the ground that it is hearsay'*;

(5) *'The Commission could utilize its inherent powers to require the Applicant to call in a suitable witness'* to verify the authenticity of the judgment;

(6) *'The Applicant also relies on the decision in* ***Borges v. Fitness to Practice Committee of the Medical Council & Anor*** *[2004] IESC 9 (29 January 2004) where the Supreme Court of Ireland dealt with a disciplinary matter of a medical practitioner. In that instance, the Medical Council was unable to produce the relevant witnesses and relied solely on the record of proceedings from the United Kingdom. The Supreme Court appreciated the challenges that the Council faced there.'* (See BaiLII: [2004] IESC 9, <http://www.bailii.org/ie/cases/IESC/2004/9.html>; [2004] 1 IR 103). *'While the circumstances differ in part, the comments of the Supreme Court are very relevant to how section 114 of the Legal Practitioners Act 2009 should be read.* ***The Court's comments [in Borges] echoed the need for fairness in the waiving of evidentiary restrictions but again, noted that as a Commission of enquiry, the Medical Council [of Ireland] should be allowed to look into the merits of the allegations'*** (My emphasis);

(7) *'To preclude the Nauru judgment from being entered into evidence, would be inconsistent with the functions of the Commission'*;

(8) The Respondent legal practitioner's application for a practising certificate in Fiji (see page 122 of the Applicant's bundle of documents at Tab B) *'has clearly indicated that he has been struck off the Roll of Barristers and Solicitors in Nauru and that he has been previously found guilty of professional misconduct. Therefore, the Respondent's own admissions bolster the fact that the subject judgment under Tab A was properly handed down by the Nauru Supreme Court and is the correct record'*;

(9) The *Foreign Judgments (Reciprocal Enforcement) Act Cap 40* is concerned with the *'enforcement of Court orders against absconding judgment debtors'*, and *'has no relevance or applicability in this instance'*;

(10) The judgment is listed on the PacLII website and thus *'a public document which the Commission can safely take on judicial notice'* together with the fact that a copy of the judgment that is included in the Bundle before the Commission includes *'the signature of the presiding Hon. Chief Justice is noted therein with the stamp of the Court affixed alongside'*.

[10] The thrust of the written submissions of Counsel for the Respondent legal practitioner reply (in summary) are as follows:

(1) Section 39 of the *Legal Practitioners Act 1973* of Nauru states:

> *39. Except when making an interim suspension order under section 40, the Chief Justice shall not exercise with respect to any practitioner any of the disciplinary functions conferred on him by this Part of this Act without giving that practitioner a reasonable opportunity of being heard in his own defence, either in person or by a barrister and solicitor or pleader.*

Despite section 39, *'CJ Madraiwiwi siting as the Disciplinary Tribunal [in Nauru] ordered that Mr. Vakaloloma be struck off the roll without giving him an opportunity to be heard by way of mitigation - either written or oral'*. Further, *'Mr. Vakaloloma was also not made aware by the Disciplinary Tribunal of Nauru that it would be sitting to deliver its ruling'* and *'only found out about the ruing [sic] from the Chief Registrar [in Fiji]'*. Thus, the crux of the submission is that the judgment contains a procedural error that goes to the heart of the judgment. That is, despite section 39 of the *Legal Practitioners Act 1973* of Nauru stating that *'the Chief Justice **shall not** exercise ... disciplinary functions ... without*

giving that practitioner a reasonable opportunity of being heard' (my emphasis), the practitioner was not given such *'a reasonable opportunity'* of making submissions prior to the sanction being imposed that the Respondent legal practitioner's *'name be struck off the Roll of the Court of Barristers and Solicitors and Pleaders of Nauru';*

(2) In order to rely upon the judgment from Nauru and the Order it contains, *'the Chief Registrar must REGISTER the Order in Fiji first'* and *'there is no reciprocal agreement between Fiji and Nauru'* to allow a judgment from Nauru to be registered in Fiji. In that regard, Counsel for the Respondent legal practitioner has cited a judgment of the Supreme Court of Vanuatu ***In re the Foreign Judgment (Reciprocal Enforcement) Ordinance* 1963** (Unreported, Civil Case No. 146 of 1996, 15 January 1997; PacLII: [1997] VUSC 2; <http://www.paclii.org/vu/cases/VUSC/1997/2.html>, where Acting Chief Justice Lunabek (as he then was) *'had to consider an application for a foreign judgement [sic] in the context of where there is no system of registration of foreign judgements [sic]'*, and His Lordship stated that he had been *'referred to and assisted by the written notes made by Mr N. D. Hudson in his contributions to Kimes, 1996, International Law Directory'* where it was stated:

> *... [In Vanuatu] there is no system of enforcement by Registration, and a foreign judgement in personam to which English laws of Vanuatu apply can only be sued upon as a cause of action in fresh proceedings, by the parties to the foreign judgement or their privies... (at p. 660).*
>
> [My emphasis];

(3) Counsel for the Respondent legal practitioner has cited again paragraphs [31]–[32] from *Americhip Inc v Dean* citing, in turn, *Carl Zeiss (No 2)* that I have previously set out in part above;

(4) Counsel for the Respondent legal practitioner has also cited ***Narain Shipping Company Ltd v Government of American Samoa*** [1979] FJLawRp 21; [1979] 25 FLR 153 (28 November 1979); PacLII: <http://www.paclii.org/fj/cases/FJLawRp/1979/21.html>, wherein the Fiji Court of Appeal citing ***Emanuel v. Symon*** [1908] 1 KB 302, set out the *'five cases in which Courts ... will enforce a foreign judgment'*;

(5) In ***Workcover Authority of NSW v Placer (PNG) Exploration Ltd*** (Unreported, National Court of Justice of Papua New Guinea, Case No. OS 48 of

2005, N3003, 13 March 2006; <http://www.paclii.org/pg/cases/PGNC/2006/47.html>) PacLII: [2006] PGNC 47, *'whereby the Plaintiff lodged with the Registry in Port Moresby the certificate of the award from the Compensation Court in the Registry of the Supreme Court of NSW'*, Lay J dismissed the plaintiff's action for registration of the foreign judgment noting:

> *The findings of fact recorded in the judgement [sic] of the Compensation Court NSW are not evidence for the purposes of proving those same facts before this Court because through error the Defendant was not heard, it was injuriously affected by the judgement [sic]; and it could not fairly be said it was a party for the purpose of binding it to those findings in other proceedings*;

(6) The citation in his submissions by Counsel for the Applicant of the judgment of the Supreme Court of Ireland in *Borges* does not, in fact, bolster the case of the Applicant. Indeed, the Irish court cited, in turn, the judgment of the English and Welsh Court of Appeal in ***In re A Solicitor*** [1992] 2 All ER 335 where *'an English solicitor, who had qualified ... in Western Australia, was struck off the roll of practitioners in Western Australia because it was found that she had committed perjury in connection with her divorce'*. The "striking off" in Western Australia then became the basis of a subsequent complaint to the Solicitors' Disciplinary Tribunal of England and Wales, i.e., *'that she had been guilty of conduct unbefitting a solicitor'* and it was found proven *'on the basis that there was no reason to doubt the decision of the Australian tribunal'* and her name was to be struck off the Roll in England and Wales. *'The solicitor appealed against the tribunal's findings and order'* arguing *'that the Australian board's findings were inadmissible in evidence before the tribunal [in England and Wales] and that the tribunal had failed to apply the correct standard of proof'*. As Keane CJ noted in *Borges*, the English and Welsh Court of Appeal in *In re A Solicitor 'in deciding the weight to be attached to the Australian board's findings'* explained that the Solicitors' Disciplinary Tribunal of England and Wales *'would have to bear in mind a variety of considerations, including (a) the evidence adduced before the board, (b) the apparent fairness or otherwise of the proceedings before the board, (c) the standard of proof adopted by the board and (d) the absence of any right of appeal from the board's findings'*. Indeed, the Supreme Court of Ireland noted that:

'The right of a person to have the evidence against him given orally and tested by cross-examination before the tribunal in question may be of such importance in a particular case that to deprive the person concerned of that right would amount to a breach of the basic fairness of procedure to which he is entitled by virtue of Article 40.1 of the [Irish] Constitution ... It is because, depending on the nature of the evidence, its admission in that form may offend against fundamental concepts of fairness, which are not simply rooted in the law of evidence, either in its statutory or common law vesture. As Henchy J. put it in ***Kiely v Minister for Social Welfare*** *([1977] IR 276),*

> *"Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice." ';*

(7) In applying the four criteria cited above from *In re A Solicitor*, Counsel for the Respondent legal practitioner, submits three of the four criteria are offended:

(i) the apparent fairness or otherwise of the proceedings before the board – the Respondent *'was not given an opportunity to mitigate'* nor notice as to when judgment was to be delivered;

(ii) the standard of proof adopted by the board – *'the Tribunal did not state the Standard of Proof it was adopting'*. I note that Counsel for the Applicant has drawn my attention (for which I thanked him) in that regard to paragraph 13 of the judgment from Nauru which stated that "*professional misconduct requires a high Standard of Proof*" citing ***Bhandari v Advocates Committee [1956] 3 ALL ER 742*** as well as the well known High Court of Australia case judgment in ***Briginshaw v Briginshaw [193] 60 CLR 336***. As I understood the submission by Counsel for the Respondent, however, the Chief Justice does not go on to state what and how he was in fact applying in the proceedings in Nauru;

(iii) the absence of any right of appeal from the board's findings – the Ruling not only *'did not state the usual time allowed for appeal'*, as no notice was given to the Respondent of the judgment until early 2017, *'his statutory right of appeal (if any) would have lapsed around December 2015'*.

[11] The written submissions of Counsel for the Applicant Chief Registrar in Reply

are (in summary) as follows:

(1) '*... since these are disciplinary proceedings, the argument by [the] Respondent concerning the applicability of the Foreign Judgments (Reciprocal Enforcement) Act Cap 40 is respectfully, misconceived as it has no applicability in the present matter ... the policy behind Cap 40 was to provide a legislative mechanism by which judgment creditors could ensure that absconding judgment debtors would not escape from paying up the amounts that were due. It also ensures that the Court system in one jurisdiction is not ridiculed by absconding debtors in a foreign jurisdiction*';

(2) Further, the term *'judgment'* is defined in section 2(1) in the said Act as *'a judgment or order given or made by a court in any civil proceedings or a judgment or order given or made by a court in any criminal proceedings* ***for the payment of a sum of money in respect of compensation or damages to an injured party***' [Counsel's emphasis];

(3) In addition, from a reading of other sections of the Act (sections 3(2) and 12) as well as judgments such as ***Rays Haulage Pty Ltd v Khan*** (Unreported, High Court of Fiji, Civil Case No. HBC89 of 2011, 30 April 2013); PacLII: [2013] FJHC 207, <http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/2013/207.html>, together with Order 71 and Rule 1 of the *High Court Rules (1988) Fiji*, *'it can be ascertained that the true purpose of Cap 40 and Cap 39 was to cater for reciprocal treatment of "money judgments"'*.

3. My Ruling

[12] After having carefully considered the objection of Counsel for the Respondent legal practitioner, I have come to view that her objection is misconceived in that:

(1) Counsel for the Applicant is not seeking to register in Fiji a judgment from Nauru to enforce a monetary order. Rather, Counsel for the Applicant is seeking to tender a judgment from a foreign jurisdiction to support the allegation in Amended Count 1 that the Respondent legal practitioner by having his name struck off from the Roll of legal practitioners in Nauru, is guilty of professional misconduct in Fiji pursuant to section 82(1)(b) of the *Legal Practitioners Act 2009*, i.e., being *'conduct ... that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'*; and

(2) Section 15 of the Constitution is inapplicable. As the Fiji Court of Appeal stated in ***Sen v Chief Registrar*** (Unreported, Fiji Court of Appeal, ABU0064.2014, 29 November 2016); PacLII: [2016] FJCA 158, <http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJCA/2016/158.html> at [35] in relation to section 14 of the Constitution equally applies, that is:

> *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* [My emphasis];

[13] By the same token, after having carefully considered the submissions of Counsel for the Applicant, I have come to view that his reliance solely upon the judgment and Order made by Madraiwiwi CJ *"sitting as a Disciplinary Tribunal"* in Nauru, is also misconceived.

[14] Although this Commission is not bound by the rules of evidence, a legal practitioner must be given an opportunity to be heard. This is made clear in section 114 of the *Legal Practitioners Act 2009*, which provides:

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

[15] In *Ziems,* a majority of the High Court of Australia agreed that it was necessary to investigate the circumstances surrounding the conviction rather than accepting it on its face. According to Dixon CJ (at 283):

> *In the Supreme Court [of New South Wales] the view seems to have been adopted ... that the conviction and sentence constituted grounds in themselves for disbarring the appellant and that the court should not be concerned to go behind them and review the facts or circumstances. No doubt the fact of the conviction and sentence is in itself a matter of great importance but* ***I do not agree that all the circumstances lying behind them should not be taken into consideration before determining that the appellant should not remain a member of the Bar*** [My emphasis]

I should note that although Dixon CJ was in dissent on the overall outcome, he agreed with the majority on this point.

Similarly, Fullagar J (in the majority) explained (at 288):

> *In a case of this kind it is essential, in my opinion, to begin by defining the ground on which an order of disbarment is to be made. It is stated in general terms by saying that the person in question is not a fit and proper person to be permitted to practise at the Bar. The next question is - at what facts is it proper to look in order to see whether that conclusion is established? The answer must surely be that we must look at every fact which can throw any light on that question. But, descending to particularity,* ***is it the conviction that is the vital thing, unchallengeable and conclusive of the ultimate issue? Or must we look beyond the conviction, and endeavour to ascertain, as best we can on the material before us, the facts and circumstances of the particular case?*** *To my mind, there can be only one answer to these questions. The conviction is not irrelevant: it is admissible prima facie evidence bearing on the ultimate issue, and may be regarded as carrying a degree of disgrace itself. But, in the first place,* ***its weight may be seriously affected by circumstances attending it, and it must be permissible to look at the conduct of the trial****. And, in the second place, it is on what the man did that the case must ultimately be decided, and we are bound to ascertain, so far as we can on the material available, the real facts of the case. It is only when we have done this that we can be in a position to characterise the conduct in question, and to see whether we are really justified in saying that a man is disqualified from practising his profession. I would only add that there is one thing that we manifestly cannot do.* ***We cannot look behind the conviction to the extent of saying that there is much evidence that the appellant was driving his car in a state of intoxication, and refuse to look any further behind it*** [My emphasis];

And Taylor J agreed (at 303):

> *In the circumstances it is, I think, incumbent upon us to examine the facts which led to the appellant's conviction for the purpose of seeing whether they disclose conduct on his part which shows that he is not a fit and proper person to remain a member of the Bar.*

[16] Indeed, the judgments of the Supreme Court of Ireland in *Borges* and the English and Welsh Court of Appeal *In re A Solicitor*, make clear that a disciplinary tribunal in one country cannot simply accept the tendering of the judgment of a disciplinary tribunal from another country without considering the weight to be attached to that foreign judgment including *'the apparent fairness or otherwise*

of the proceedings' and *'the standard of proof adopted'.*

[17] I noted in my Ruling of 14th June 2017 at [11], when granting the legal practitioner an interim practising certificate, the judgment from Nauru:

> *... involved a single justice of the Supreme Court of Nauru (Madraiwiwi CJ) "sitting as a Disciplinary Tribunal" considering two counts of professional misconduct. It was alleged that the legal practitioner had improper dealings with a prosecution witness while engaged as defence counsel without informing the Director of Public Prosecutions, that is, that the legal practitioner spoke privately with a prosecution witness who came to see him in his motel room with another person and further that the legal practitioner had been 'importuning' a prosecution witness to swear an affidavit incriminating herself. Madraiwiwi CJ was satisfied that the two counts of professional misconduct were established, following which, in the same judgment, he ordered that the legal practitioner's 'name be struck of the Roll and that there be no order as to costs'.* ***I note that there is no explanation in the judgment as to what criteria was applied in arriving at that sanction and whether or not there had been an opportunity for the legal practitioner to address the court as to what sanctions might be imposed if such a finding was made.*** *Further, there is also no indication in the judgment as to how and when the legal practitioner could appeal and to where (i.e Nauru or Australia). Similarly, Counsel for both parties before me could not advise as to the appeal process in Nauru in relation to disciplinary proceedings for the legal profession* [My emphasis].

[18] If the Respondent legal practitioner was:

(1) not given ***an opportunity to address the court as to what sanctions might be imposed*** before that occurred; and

(2) not served or made aware of the judgment from Nauru until this year via the Chief Registrar from Fiji, then this raises issues concerning the reliance by the Chief Registrar upon that judgment solely as the basis for satisfying the onus upon him in disciplinary proceedings in Fiji in establishing a charge of professional misconduct.

[19] As the Supreme Court of Ireland concluded in *Borges*:

> *The desire of the Council to proceed with an inquiry based on the records of the proceedings in the United Kingdom is perfectly understandable, having regard to the important statutory function entrusted to them of investigating any allegations of professional misconduct against doctors registered in this jurisdiction which come to their attention.* ***However, that consideration cannot relieve the High Court or this court of the obligation***

of ensuring that the right of the doctor concerned to a fair hearing is, so far as practicable, upheld (My emphasis).

[20] I have come to the view, therefore, that the judgment from Nauru can be tendered in these proceedings alleging professional misconduct in Fiji, however, **the weight that I may give to that judgment from Nauru will be another matter entirely**. At the end of these proceedings, I will invite Counsel for both parties to include in their written submissions what weight should be attributed solely to that judgment. Indeed, as I have highlighted above from the submissions of Counsel for the Applicant: *'The Court's comments [in Borges] echoed the need for fairness in the waiving of evidentiary restrictions but again, noted that as a Commission of enquiry, the Medical Council [of Ireland] should be allowed to look into the merits of the allegations'*. I have come to the firm view that this is what should also occur in Fiji in relation to the judgment from Nauru. Thus, I am putting Counsel for the Applicant on notice that simply tendering the judgment from Nauru without more may not satisfy the onus that he carries. That is a matter for him.

[21] In my view, the judgment from Nauru raises three matters relevant to these proceedings:

(1) Whilst acknowledging *'there are no properties in witnesses'*, the Chief Justice then found that the Respondent's conduct of speaking with a prosecution witness was improper and that the Respondent should have first raised the issue with the Court;

(2) Further, the Chief Justice found that the Respondent committed an act for professional misconduct importuning witness to swear an affidavit incriminating herself while engaged as defence counsel in the same proceedings.

(3) Even if the Respondent's conduct amounted to professional misconduct, in either or both of the allegations, did it automatically follow that the name of the legal practitioner should be struck from the Rolls of legal practitioners as appears to have been occurred in Nauru in this case?

(4) As the Respondent was found guilty of professional misconduct and struck off the Rolls in the same judgment in Nauru, does this then raise issues as to whether the judgment is flawed due to a fundamental irregularity? That is, if it

is correct that the Respondent was not given an opportunity to make submissions in mitigation prior to the judgment being handed down on 18th November 2015, then does it follow that the judgment is fundamentally flawed? If the judgment is fundamentally flawed then what weight, if any, can be attributed to it in misconduct proceedings in Fiji?

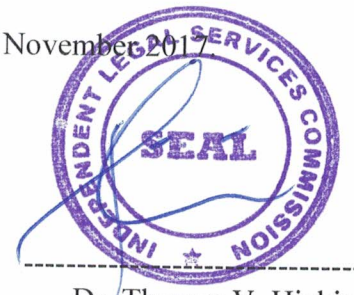
[22] In view of my Ruling, I will now stand the matter down to give both Counsel time to consider their positions and to seek instructions including whether each now wishes to make separate oral applications for an adjournment to arrange witnesses from Nauru to come to Fiji or for the Commission to take their evidence by "Skype" or some other form of video telecommunication. In addition, perhaps, both Counsel may also need to discuss between themselves how they wish to jointly proceed.

ORDERS

[23] The formal Order of the Commission is:

1. In the hearing of the Application filed before the Commission in Case No. 004 of 2017, *Chief Registrar v Aseri Vakaloloma,* the objection of Counsel for the Respondent to the tendering by Counsel for the Applicant of a copy of judgment from the Supreme Court of Nauru in *Miscellaneous Proceedings No. 59 of 2015* is refused.

Dated this day 28th day of November 2017.



Dr. Thomas V. Hickie
COMMISSIONER