IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 003 of 2015

BETWEEN:

RAMAN PRATAP SINGH

Applicant

AND:

CHIEF REGISTRAR

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: Mr A.K. Singh, together with the Applicant in person
Respondent: Mr. A. Chand

Dates of Hearing: 27th November, 5th and 6th December 2017
Date of Judgment: 7th December 2017

EX TEMPORE RULING ON STAY

1. Background

[1] This is a Ruling in relation to an application filed on 1st December 2017 on behalf of the Applicant legal practitioner for a Stay of a Judgment of this Commission pending the determination of an appeal by the Applicant to the Fiji Court of Appeal. In support of the motion, Counsel for the Applicant relies on an affidavit of the Applicant sworn on 30th November 2017.

[2] Counsel for the Respondent Chief Registrar opposes the application.

[3] On 13th February 2017, I found one count of professional misconduct had been established against the Applicant legal practitioner. Such conduct arose from when the legal practitioner was acting for a client involving proceedings issued in the High Court at Labasa seeking Orders to enforce an agreement for the transfer of land. My finding was that the legal practitioner had failed to inform the client '*by providing written confirmation both at the outset and during the course of the matter ... as to the*

issues raised ... the steps which were likely to be required, how long it was likely to be before the matter be concluded and progress from time to time'. Further, it was found that such '*conduct was contrary to section 83(1)(a) and [rules] 8.1(1)(b) and (d) of the Legal Practitioners [Act] 2009 and was an act of professional misconduct'.*

[4] Section 83(1)(a) of the *Legal Practitioners Act 2009* states that '*the following conduct is capable of being ... "professional misconduct" for the purposes of this Decree: (a) conduct consisting of a contravention of ... the Rules of Professional Conduct'.*

[5] Rules 8.1(1)(b) and (d) of the *Rules of Professional Conduct and Practice* state:

> *'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.*
>
> ...
>
> *(d) At the earliest reasonable opportunity provide the client with written confirmation of the matters set out in paragraphs (a) and (b) above.'*

[6] As I stated in my said judgment (at [42]) '... ***<u>This is a serious finding of professional misconduct that has been admitted by the Respondent legal practitioner.</u> I am also satisfied that it has been established on the evidence before me.'*** I then concluded my judgment by stating (at [43]):

> *'Following my making Orders in accordance with this judgment, I will then be making separate Orders for the filing of written submissions on penalty and setting a date for hearing of a plea in mitigation in relation to Count 2. I expect that such submissions will also include suggestions as to how I should proceed in providing compensation to the complainant together with what Orders, if any, I can make to assist the complainant in finally obtaining the transfer of the land.'*

(See ***Chief Registrar v Raman Pratap Singh***, Unreported, ILSC Case No. 003 of 2015, Commissioner Hickie, 13 February 2017; PacLII: [2017] FJILSC 3, <http://www.paclii.org/fj/cases/FJILSC/2017/3.html>.)

[7] Orders were then made for the filing of written submissions on penalty and a date for sanctions hearing that took place on 11th April 2017 with judgment being delivered on 18th April 2017. (See ***Chief Registrar v Raman Pratap Singh (Judgment on Sanctions)***, Unreported, ILSC Case No. 003 of 2015, Commissioner Hickie, 18 April 2017; PacLII: [2017] FJILSC 8, <http://www.paclii.org/fj/cases/FJILSC/2017/8.html>.)

[8] Part of the Orders that I made in my judgment of 18th April 2017 were as follows:

> *'1. In the Application filed before the Commission in Case No. 003 of 2015, Chief Registrar v Raman Pratap Singh, it is hereby ordered that the practising certificate of Raman Pratap Singh be suspended for a period of 15 months commencing as from today, 18th April 2017.*
> *2. Order 1 is suspended forthwith conditional upon the Respondent, Raman Pratap Singh, signing and filing today with the Commission to then be filed forthwith with the High Court Civil Registry, a consent order undertaking to complete (and setting out in specific details) the first 11 steps (i.e., a to j) set out in his Supplementary Submission filed with the Commission on 11th April 2017.*
> *3. The matter is adjourned for further hearing at 10.00 am on Monday, 27th November 2017.*
> *4. Should the Commission be satisfied at the adjourned hearing on 27th November 2017, that the Respondent has completed all of the steps set out in his 'Supplementary Submission' dated 11th April 2017, or that he has used his best endeavours to do so, the Commission will consider reducing the period of suspension but to no less than 8 months to take effect from that date.'*

[9] The matter returned before me on Monday 27th November 2017 (as per Order 3 of my Orders of 18th April 2017) for the Applicant legal practitioner to provide an update as to the completion or otherwise of the '*steps (i.e., a to j) set out in his Supplementary Submission filed with the Commission on 11th April 2017*'.

[10] In my *ex tempore* judgment delivered following the appearance on 27th November 2017, I noted as follows:

> *'[6] Apart from tendering a letter dated 25th April 2017 (with receipt acknowledged on 28th April 2017), there has been no other evidence placed before me today that the Respondent has done anything further in the past eight (8) months to comply with his written Undertaking signed and filed with the Commission on 18th April 2017 which were also filed with the High Court Civil Registry on 18th April 2017.*
> *[7] Counsel for the Chief Registrar wrote to the Respondent on 3rd October 2017 (a copy of which was sent to the Commission) and has also been tendered today noting that the Respondent was in breach of the consent*

orders in that he was to provide a written report as per paragraph f, every three (3) months to both the Legal Practitioners Unit within the Office of the Chief Registrar and a copy to this Commission. There is no dispute that no such reports have been provided.

[8] Counsel for the Chief Registrar has submitted today that in view of the above the Commission should now activate Order 1 of my orders of 18th April 2017, that is, to suspend the Respondent for a period of 15 months.

[9] Counsel for the Respondent has submitted (as I have understood his submission) that the Respondent should be given the opportunity to commence proceedings in the High Court, Labasa to enforce the agreement to transfer the land from Mr Cadigan to Mr Lal.

...

[11] In my judgment of the 18th April 2017 I had described this matter as a "disgraceful episode". I had hoped that having given the Respondent the opportunity to make amends he would grasp the opportunity. He has failed to do so. Therefore, I have no alternative but to activate Order 1 of my Orders of 18th April 2017.'

[11] Following the delivering of my above judgment on 27th November 2017, Counsel for the Applicant legal practitioner stated that he wished to make an oral application for a stay. He explained that the basis of his application (as I understood him) was that I may have made an error concerning the transfer of the land as this was '*the charge which he [the legal practitioner] was acquitted*'. He also stated that I had failed to take into account the early plea of guilty, however, shortly thereafter Counsel retracted the claim that it was "early".

[12] Counsel for the Chief Registrar opposed the application, stating that it could only be entertained if an appeal was "on foot" (which there was not).

[13] In relation to the oral application made before me on 27th November 2017, I advised Counsel for the Applicant legal practitioner that I agreed with the submission of Counsel for the Chief Registrar. That is, I would not be considering his oral application for a stay until he had filed an appeal with the Court of Appeal, following which he could then make a formal application to the Commission to consider a stay (pending the appeal). Further, I indicated that the present Sittings would be continuing until Thursday 7th December 2017, should he wish for such an application to be heard during the present Sittings.

[14] I have subsequently discovered that a similar stance was taken by Commissioner Connors following his judgment in ***Chief Registrar v Dorsami Naidu*** (Unreported, ILSC, Case No. 024 of 2013, 16 August 2010); PacLII: [2010] FJILSC 20, <http://www.paclii.org/fj/cases/FJILSC/ 2010/20.html> where the legal practitioner had been found to be guilty of five counts of unsatisfactory professional conduct and two counts of professional misconduct. Apparently, the legal practitioner immediately made an oral application for a stay before Commissioner Connors. Although I am not aware if there is a written judgment setting out the ruling by Commissioner Connors on that application, the ruling is mentioned in a subsequent judgment of His Lordship, Justice Marshall (the then Resident Justice of Appeal) concerning the legal practitioner's application for a stay before him. As Justice Marshall explained (at [7]):

> *'On the 13th of August 2010, the Commissioner delivered his judgement [sic] ...*
> ...
> *Immediately thereafter, the Appellant sought to make an application for stay but given that he had not filed a Petition of Appeal, the application which was made orally, was dismissed. He subsequently filed a written application before the Commission which was heard on the 17th day of September 2010 and the Commissioner having considered submissions made by counsel for the Appellant and the Respondent, declined to impose a stay and dismissed the application'.*
>
> (See ***Dorsami Naidu v Chief Registrar*** (Unreported, Fiji Court of Appeal, Case No. ABU 0038 of 2010, Marshall RJA, 2 March 2011; PacLII: [2011] FJCA 17, <http://www.paclii.org/fj/cases/FJCA/2011/17.html>) ('*Naidu*').

[15] Returning to the present matter, on 1st December 2017, a Notice of Motion together with an affidavit in support (sworn by the Applicant legal practitioner on 30th November 2017) was filed with the Commission seeking a stay of the Order made on 27th November 2017 (pending hearing of an appeal). In the affidavit in support, Counsel for the Applicant legal practitioner has stated (at paragraph [13]) that the Applicant has filed on (30th November 2017) a Notice of Appeal and Grounds of Appeal (with a copy annexed as "Annexure E").

[16] Having now followed, in my view, the correct procedure (as similarly required by Commissioner Connors in *Naidu*), the Notice of Motion was listed before me on 5th December 2017. By agreement between Counsel, Orders were then made for the filing and serving of an affidavit in reply by the Respondent, as well as the filing and serving of written submissions by Counsel for each party and the matter was listed for hearing

yesterday, 6th December 2017. This is then my ex tempore ruling in relation to the application for a stay of my Order of 27th November 2017.

2. The Law

[17] In ***Chief Registrar v Anand Kumar Singh*** (Unreported, ILSC, Case No. 024 of 2013, Commissioner Mr. Justice P.K. Madigan, 28 November 2013), His Lordship observed (at [7]):

> *'In the case of Dorsami Naidu v Chief Registrar (ABU0038.2010), the Court of Appeal sets out in very clear and in very definitive terms, the principles relating to applications for stay of proceedings where the Respondent is a successful professional regulator'.*

[18] *Dorsami Naidu v Chief Registrar* (as I have noted earlier above), concerned an appeal of the Commission's decision to refuse an application for a stay of execution of its Orders, pending an appeal on the substantive matter. After reviewing the law in Fiji, Justice Marshall concluded:

> *'28. I have no doubt that the simple rules that govern the application in this case come down to two. These are:*
> *(1)* ***Is there proven a special circumstance which stands in the way of the regulator*** *successful at first instance, whose position is strengthened by representing an important public interest,* ***from enforcing the fruits of his judgment?***
> *(2) Are there* ***special or exceptional chances of success*** *with regard to the practitioners [sic] appeal?'* [My emphasis].

[19] Lest there be any doubt as to the correctness of this approach, I note that 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.paclii.org/fj/cases/FJCA/2013/141.html>, the President of the Court of Appeal stated:

> *'[12] In* ***Native Land Trust Board –v- Shanti Lal and Others*** *(unreported CBV 9 of 2011; 20 January 2012), the Supreme Court (Gates CJ) cited with approval the principles summarised by the Court of Appeal in* ***Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd*** *(unreported ABU 11 of 2004; 18 March 2005) for determining whether there are sufficiently exceptional circumstances for the grant of stay relief pending appeal ...*
> *[13] These principles have evolved from cases that have usually involved money judgments. It is therefore not surprising that in such cases the factor of the public interest is not one that usually calls for any substantive consideration*

or analysis. However as Marshall JA noted in ***Naidu –v- The Chief Registrar*** *(unreported ABU 38 of 2010; 2 March 2011)* ***the situation is different where a regulator in the person of the Chief Registrar representing the public interest has been successful in proceedings before a disciplinary tribunal.*** *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.'*

[14] ... ***The only special circumstance which may stand in the way of the successful regulator is the fact that the appeal will be rendered nugatory in the event that a stay is not granted ...'***
[My emphasis].

[20] Further, in ***Iqbal Khan v Chief Registrar*** (Unreported, Fiji Court of Appeal, Case No. ABU 68 of 2013, Calanchini P, 23 May 2014); PacLII: [2014] FJCA 60, <http://www.paclii.org/fj/cases/FJCA/2014/60.html>, the President of the Court of Appeal again stated:

'[10] The principles that are usually considered by a court when determining whether there are sufficiently exceptional circumstances for the grant of stay relief pending appeal have evolved from cases that usually involve money judgments (See: ***Native Land Trust Board –v- Shanti Lal and Others*** *unreported CBV 9 of 2011; 20 January 2012 per Gates CJ). However as Marshall JA pointed out in* ***Naidu –v- The Chief Registrar*** *(unreported ABU 38 of 2010; 2 March 2011) the position is different in a case where a regulator in the person of the Chief Registrar representing the public interest has been successful in proceedings before a disciplinary tribunal. The Chief Registrar is the regulator of the legal profession under the Legal Practitioners Decree 2009 and in opposing an application for stay pending appeal as the successful party in the disciplinary proceedings at first instance he acts in the public interest. Thus it is the public interest that assumes a far greater significance in such applications than might otherwise be the case in stay applications involving money judgments.*

[11] In proceedings before a disciplinary tribunal ***the only special circumstances standing in the way of the successful regulator enjoying "the fruits of the judgment" would be the fact that the appeal may be rendered nugatory in the event that a stay is not granted ...'***
[My emphasis].

[21] Counsel for the Applicant in his *'Submission of the Appellant'*, dated 6th December 2017, has cited the following:

(1) ***Ward v Chandra*** (Unreported, Supreme Court of Fiji, Civil Appeal No. CBV0010 of 2010, Gates CJ, 20 April 2011; PacLII: [2011] FJSC 8, <http://www.paclii.org/fj/cases/FJSC/2011/8.html>) - as to the principles governing a stay application;

(2) ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 001 of 2004S, Tompkins JA and Scott JA, 18 March 2005; PacLLI: [2011] FJSC 8, <>) - citing ***McGechan on Procedure*** (2005 text on New Zealand Civil Procedure) and the need to *'carefully weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful'* citing, in turn, ***Duncan v Osborne Building Ltd*** (1992) 6 PRNZ 85 (CA) at 87;

(3) ***Rogers v R*** (1994) 181 CLR 251 - on the distinction between issue estoppel and res judicata;

(4) ***Island Maritime Ltd v Filipowski*** (2006) 80 ALJR 1168; [2006] HCA 30 – on double jeopardy.

[22] Counsel for the Respondent Chief Registrar in his *'Respondent's Written Submissions of the Appellant'*, dated 6th December 2017, has cited the following:

(1) ***Chief Registrar v Iftakhar Iqbal Ahmad Khan*** (Unreported, ILSC, Application No. 009 of 2009, Justice Madigan, 14 February 2014; PacLII: [2014] FJILSC 13, <http://www.paclii.org/fj/cases/FJILSC/2014/13.html>) – as to the principles relevant to stay applications from orders of the Commission set out by the Court of Appeal in *Anand Kumar Singh v Chief Registrar* (2013) and *Dorsami Naidu v Chief Registrar* (2011), and also in ***Haroon Ali Shah v Chief Registrar*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 50 of 2012, Calanchini AP, 3 December 2012; PacLII: [2012] FJCA 101, <http://www.paclii.org/fj/cases/FJCA/2012/101.html>;

(2) ***Chief Registrar v Mohammed Azeem Ud-Dean Sahu Khan***, (Unreported, ILSC, Application No. 16 of 2013, Justice Madigan, 10 September 2013; PacLII: [2013] FJILSC 12, <http://www.paclii.org/fj/cases/FJILSC/2013/12.html>) at [14] – stating that *'The authorities dictate overwhelmingly that considerable weight must be given to the public interest when deciding whether to stay orders, especially in a professional regulatory context.'*

[23] I am of the view that Counsel for the Respondent has correctly set out the law in relation to stay applications arising from orders made by the Commission and this is confirmed in my review of the law set out above.

[24] At the hearing of the stay application yesterday, however, Counsel for the Applicant, made an oral submission citing a supplementary case of ***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.paclii.org/fj/cases/FJCA/2010/41.html>) as to what he understood to be the correct test set out by the Full Court of the Fiji Court of Appeal in relation to stay applications from orders of this Commission. As Counsel for the Applicant explained, *Abhay Kumar Singh v Chief Registrar* was his own case when he had previously appeared before the Commission in 2009 for which a judgment was handed down on 25th January 2010 ordering that his name be struck from the Roll of legal practitioners in Fiji. At the time, the legal practitioner then sought a stay of that order. As no appeal had been filed, the matter was stood down to enable this to occur. When that was done, the Applicant then returned before the Commission and a hearing took place of his application for stay. It eventuated in Commissioner Connors refusing the application. In the meantime, the Chief Registrar had *'proceeded to execute the Commissioner's Order by placing a line through the Appellant's name thereby removing him from the Roll'* of the Legal Practitioners in Fiji.

[25] The legal practitioner then made an application for a stay to the Court of Appeal which was heard by the Full Court of Appeal over five days in March and April 2010. In their joint judgment delivered on 7th May 2010, the Full Court of Appeal comprising Their Lordships, Acting President Byrne and Justice Calanchini, ordered that the Appellant legal practitioner be granted a temporary stay of one month until 8th June 2010 with the notation in the judgment that *'whether or not any extension of the stay will be granted will depend on the circumstances existing on 8th of June'*. I have no documentary evidence placed before me as to what occurred on or after 8th June 2010.

[26] For the purposes of this stay application now before me, Counsel for the Applicant has submitted that as the judgment of the Full Court of Appeal in *Abhay Kumar Singh v Chief Registrar* overrides any of the later single Justice of Appeal judgments cited by Counsel for the Respondent in his written submissions. In particular, Counsel for the Applicant has cited paragraphs [42]-[43] from the judgment of the Full Court of Appeal in *Abhay Kumar Singh* as to the test that Counsel for the Applicant says is applicable in an application for a stay from orders of the Commission as follows:

'[42] This Court considers that this argument might succeed before the Full Court and that at least the appellant should be given the opportunity of presenting such an argument there. On one view, in our judgment it would be open to the Full Court to find that the appellant was denied natural justice by the decision of the Commissioner.

[43] We therefore consider that ***the appellant has an arguable ground of appeal*** *here and that, subject to what we say hereafter,* ***prima facie he would be entitled to be granted a stay for some period because of the Commissioner's apparently making a finding that was wrong in law.***' [My emphasis]

[27] Applying the above to the present application, Counsel for the Applicant has submitted that the applicable test is therefore, that there has to be '*an arguable ground of appeal*' rather than the two-limbed later test set out by Justice Marshall in *Naidu*, that is, '*Is there proven a special circumstance which stands in the way of the regulator ... from enforcing the fruits of his judgment' and 'Are there special or exceptional chances of success'?*

[28] When Counsel for the Applicant was asked then in relation to the second limb how did he reconcile the later judgments of His Lordship, Justice Calanchini, such as in *Iqbal Khan* in 2014 (decided some four years after Justice Calanchini's joint judgment with Acting President Byrne in *Singh* of 2010), Counsel for the Applicant replied that presumably Justice Calanchini must not have been cited his own judgment by counsel who appeared in those later applications for a stay. Counsel for the Applicant then concluded his submissions on this point stating that a Full Court of Appeal judgment as was handed down in in *Abhay Kumar Singh* must override any later single Justice of Appeal decision.

[29] In relation to the second limb and the chances of success of the appeal, as I have understood the submission of Counsel for the Applicant, my judgment of 11th April 2017 contains an error of law. According to Counsel for the Applicant, the error was that in considering the penalty for Count 2 (to which the Applicant pleaded guilty and to which I had also found established on the evidence), I had wrongly considered matters that had been part of Count 1, the count that had been dismissed. In that regard, Counsel for the Applicant took me to page 7 of my judgment of 18th April 2017 and said that I took into account a period of misconduct longer than the 14 years and five months that had been particularised in Count 2, that is, from April 1999 until

September 2014. I noted Counsel's argument, however, (and without going into the detailed merits of his appeal which is something for the Court of Appeal), I drew the attention of Counsel to the fact that even though I had mentioned in my judgment that it was clear from the evidence that the period of misconduct began probably some 10 months earlier than April 1999 and continued past September 2013, I had accepted that the period of misconduct for which the practitioner was now being sanctioned was for the shorter period as I made clear at pp.7-8 as follows:

> *'I do accept, however, that Count 2 (to which the Respondent has pleaded guilty and to which I have also independently found proven), has particualrised that the misconduct began 'around April 1999 to September 2013' (some 14 years and five months) for which he is now being sanctioned. I also accept that the 'Draft Agreed Facts' filed with the Commission on 24th March 2016, stated that 'The Respondent legal practitioner acted ... from around April 1999 to September 2013'.*

[30] The other error in my judgment, as I have understood the oral submission of Counsel for the Applicant (made before me yesterday), is that it was an error to have taken into account whether or not the work in relation to the transfer of the land had been completed when deciding upon the final sanction. I then had Counsel for the Applicant clarify this submission and, as I understood him, his submission was that even though there was no dispute as to the Applicant being required to complete the 11 steps set out in his undertaking and the consent orders of 11th April 2017, the ultimate sanction that should have been imposed was a fine rather than a period of suspension. Counsel did agree, however, that the Applicant should have appealed earlier the Orders of 18th April 2017 and sought a stay at that time if he was saying that the ultimate sanction imposed of a suspension was harsh and, instead, the sanction should have been a fine. In that regard, Counsel for the Applicant then concluded (as I understood his submission without citing any authorities in support), that in no other similar jurisdictions had the sanction for similar misconduct been the imposition of a period of suspension rather than a fine.

[31] In response, Counsel for the Respondent submitted that the law on the granting of a stay from an order of the Commission was well settled. He noted that he had cited a number of judgments in his written submissions that supported this view. He also noted that in *Iqbal Khan* in 2014, President Calanchini had made the point (paragraph [20], pages 11-12):

'[20] It is therefore necessary to determine whether any one of the Appellant's grounds of appeal meets ***the high threshold of exceptional chances of success*** *that may constitute a special circumstance to be considered together with the other factors relevant to the present application. However this process does not involve a consideration of the merits of the grounds of appeal for the simple reason that it is not for a single judge of the Court of Appeal to determine the appeal itself.* ***That remains the function of the Court of Appeal.***'
[My emphasis]

[32] Thus, Counsel for the Respondent submitted, the test for a stay on the success aspect of the appeal was not, as submitted Counsel for the Applicant, '*an arguable ground*', rather, it was ***'exceptional chances of success'***.

[33] Counsel for the Respondent further submitted that the decision in *Abhay Kumar Singh* could be distinguished on its facts. According to the oral submission of Counsel for the Respondent, the grant of the stay by the Full Court of Appeal in *Abhay Kumar Singh* was only for a short interim stay of a month so as 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. The Appellant is asking this court for an order that the line drawn through his name be removed so that we can consider his application for a stay of the Commissioner's decision. He is asking for both orders so that he can finalise the 90 or so existing files in his office. We consider that the risk to the public under those circumstances does not outweigh what is just and reasonable under the circumstances. We have concluded that in the interest of fairness to both the Appellant and his existing clients, ***the public interest would be better served by permitting the Appellant to finalise his existing files.***'
[My emphasis]

[34] Counsel for the Respondent then submitted that, by way of contrast, there is no such evidence that has been placed by the Applicant before this Commission in the present case. I have also noted that in the affidavit of the Applicant sworn on 30th November 2017, the issue of completion of existing client files is not raised. In any event, on this issue, Counsel for the Respondent also referred me to paragraph [18] of the judgment in *Iqbal Khan* of 2014, where President Calanchini stated:

'[18] The Appellant also raises the issue of the public interest and his professional obligations to his clients during the period of suspension. It is appropriate to comment briefly on this issue. It is sufficient to note that there are many able

practitioners in Lautoka and the surrounding towns who are more than capable of ensuring that the Appellant's clients will have their proceedings completed according to law. The fact that some of these proceedings are proceeding in court at short notice is not a reason for granting a stay. Furthermore, any consequential short term hardship to employees and staff of the Appellant's law firm is not a sufficiently special circumstance to outweigh the public interest that is of paramount consideration in such cases as the present.'

[35] Counsel for the Respondent submitted that the best that could be said as to the Applicant's case is that it is arguable and, in that regard, also referred me to paragraph [23] in *Iqbal Khan* of 2014, where President Calanchini concluded:

> *'So far as the grounds of appeal encapsulate these issues, having considered the Appellant's submissions I am not satisfied on the material that is presently before the Court that any one ground has an exceptional chance of succeeding. In my judgment the best that can be said in relation to the issues raised in the grounds of appeal is that there are some grounds that may be described as arguable.'*

[36] In relation to the first argument of Counsel for the Applicant that I was in error imposing a period of suspension and not a fine, as had been the penalty imposed in similar jurisdictions, Counsel for the Respondent submitted that this oral submission of Counsel for the Applicant was incorrect. In that regard, Counsel for the Respondent drew my attention to his *'Submissions on Penalty'* dated 7th March 2017, that had been filed prior to the sanctions hearing on 11th April 2017, wherein he cited (and to which I made reference in my judgment of 18th April 2017 at paragraph [29]) the decision in ***Legal Services Commissioner v Burgess*** [2013] VCAT 350 (28 March 2013) (AustLII: <http://www.austlii.edu.au/au/cases/vic/VCAT/2013/350.html>) *'whereby two charges were in relation to the practitioner failing to communicate effectively and promptly with his clients'* to which the practitioner pleaded guilty. In the first matter, *'there had been consistent failure on the part of the Respondent practitioner to communicate with his client; the period being **8 years**'*. In the second matter, *'the practitioner had failed to communicate with his client for a period of **4 years'***. In addition, *'the Respondent practitioner had previous findings made against him by the Tribunal'*. Counsel for the Respondent had previously cited in his submissions of 7th March 2017 that **in *Burgess 'the practitioner was suspended for 9 months*** *and upon completion of suspension he was to practice under an employee [practising certificate only] for a period of 12 months'*. Counsel had also cited, in particular, paragraph [79] from *Burgess* (which I cited in my judgment of 18th April 2017 at [29]) where it was stated:

'The Tribunal also accepts that general deterrence is a particularly important objective in this case. The misconduct committed by the Respondent strikes at the very essence of a competent solicitor's practice. While there is no suggestion that the Respondent misappropriated client moneys or otherwise acted dishonestly, his conduct caused gross delay in the conduct and finalisation of numerous files, coupled with a serious failure to communicate with clients and act upon their instructions. There is no doubt that such behaviour caused serious anxiety, frustration and stress to clients as well as direct and indirect additional costs. ***In addition, such behaviour inevitably and deservedly brings the profession into disrepute and warrants sanctions sufficiently severe to reflect appropriate condemnation and send the clearest message to the legal profession that such conduct will not be tolerated.***'
[My emphasis in bold]

[37] Counsel for the Applicant then immediately apologized he was in error on that submission and withdrew it.

[38] In relation to the second argument of Counsel for the Applicant that it was an error for me to have taken into account whether or not the work in relation to the transfer of the land had been completed when deciding upon the final sanction, Counsel for the Respondent stated this his notes were that on 13th February 2017, it was the Applicant who stated that he could get a surveyor to make a plan and apply to the Department of Town and Country Planning which he estimated would take "3-4 weeks to get done", that is, by 27th March 2017. Further, Orders were then made on 13th February 2017 for the filing of written submissions on penalty and the matter was adjourned for hearing on 11th April 2017. At that moment during the stay hearing yesterday, so that there could be no misunderstanding, I read out to both Counsel the following notation (made by me on 13th February 2017 in consultation with the Applicant as well as Counsel for the Chief Registrar) which I had recorded as follows:

'And the Commission notes:
(1) The Resp to engage a surveyor to prepare the sketch plan & make application to the Town & Country Approval Board at the Resp's cost.
(2) If there is obstruction by the vendor Mr Cadigan the Respondent is to file an application to the High Court at Labasa to enforce Clause 12 of the Sale & Purchase Agt to obtain access for the survey to be completed.'

[39] Counsel for the Respondent agreed with my notation. Counsel for the Applicant made made no comment.

[40] As I have set out in paragraph [18] above, I have come to the view that a two-limbed approach is to be applied when considering whether to grant a stay of a judgment in favour of a public regulator (as was held by the Court of Appeal in *Naidu*). That is:
(1) Is there proven a special circumstance which stands in the way of the regulator from enforcing the fruits of his judgment?
(2) What are the chances of success of the appeal?

[41] In relation to the second limb, I have noted the clear test set out by His Lordship, President Calanchini in *Haroon Ali Shah* (2012), *Anand Kumar Singh* (2013) and in *Iqbal Khan* (2014) as to the requirement of there being ***exceptional chances of success*** rather than an arguable case.

[42] In considering the present application I will now apply the two-limbed test and the requirement in the second limb that there be exceptional chances of success.

3. The Application

(1) Is there proven a special circumstance which stands in the way of the regulator from enforcing the fruits of his judgment?

[43] The first ground of the Applicant's application is '*That if the stay is not granted the Applicants [sic] appeal will be rendered useless and or nugatory.*' As noted above, His Lordship, Justice Calanchini (as the President of the Fiji Court of Appeal) stated in *Anand Kumar Singh* at [14] that: '*The only special circumstance which may stand in the way of the successful regulator is the fact that the appeal will be rendered nugatory in the event that a stay is not granted*'. Again, in *Iqbal Khan,* His Lordship, Calanchini P, stated that '*the only special circumstances standing in the way of the successful regulator enjoying "the fruits of the judgment" would be the fact that the appeal may be rendered nugatory in the event that a stay is not granted*'. Apart from noting the use of the word '*will*' by His Lordship in *Singh* and in the later decision of *Khan* his use of the word '*may*', it is clear that in relation to the present case, the claim of the Applicant that the *'appeal will be rendered useless and or nugatory'* is a special circumstance to be considered in determining whether to grant a stay.

[44] According to the affidavit of the Applicant legal practitioner (at paragraph [19]) '... *if [a] stay is so granted by the Commissioner I will make sure to have the appeal records*

prepared and the appeal be listed for hearing before the full Court of Appeal by August 2018'.

[45] If the above statement is correct, then if a stay is not granted, this would mean that the Applicant will have served by August 2018 approximately eight months of his suspension of 15 months. I am not sure how that would support the Applicant's claim that without the grant of a stay, the *'appeal will be rendered useless and or nugatory'.* Also, as Counsel for the Respondent made the point in his oral submissions, it is a matter for the Court of Appeal and not the Applicant as to when an appeal will be heard.

[46] On that point, I note in *Iqbal Khan*, Justice Madigan, made various Orders on the 11th December 2013, including that in relation to both counts the legal practitioner's practising certificate be suspended for a period of 15 months with immediate effect and that both suspensions take effect concurrently. Thus, the practitioner was not eligible to apply for a practising certificate until March 2015. Following the dismissal of an application for a stay by Madigan J (on 14th February 2014), an application for a stay was heard before the Court of Appeal on 26th March and 14th April 2014. Judgment was delivered on 23rd May 2014, wherein Calanchini P noted (at [11]) the special circumstance of *'the fact that the appeal may be rendered nugatory in the event that a stay is not granted',* thereafter concluding (at [11]): *'that is unlikely to be the position in this case since there is every likelihood that the appeal will come on for hearing in the Court of Appeal before March 2015',* that is, before the end of the period of suspension.

[47] A further point that arises from *Iqbal Khan* is that the court is not bound to only consider the fact that much of the period of suspension may have been served by the time the appeal is heard. As Calanchini P explained (at [12]–[13]):

> *'[12] Although admittedly a substantial part of the period of suspension of the Appellant's practising certificate will have passed by the time the appeal is heard, it is my view that* ***this consideration alone is not sufficient for the Court to exercise its discretion in the Appellant's favour****. As noted earlier, this view is based on the premise that the Respondent represents an important public interest. The public interest that the Chief Registrar as regulator is concerned with is the protection of the public from a provider of legal services in the person of the Appellant who has been found guilty on two counts of professional misconduct. Under such circumstances the*

public interest in the determination of a stay pending appeal application is entitled to significant weight. In ***New South Wales bar Association –v- Stevens*** *[2003] NSWCA 95; 52 ATR 602 Spigelman CJ at paragraph 108 stated:*

> *"In such a context the exercise of the Court's power to stay must give significant weight to the protection of the public and the public interest involved in ensuring that persons who practice the profession of law comply with the highest standard of integrity."*

[13] It follows that a legal practitioner in the position of the Appellant ***must show that there is a cogent reason constituting special circumstances*** *to justify granting a stay. As Chesterman J in* ***Legal Services Commissioner –v- Baker*** *[2005] QCA 482 at paragraph 28 observed:*

> *"In particular it should be accepted that an application for a stay of a recommendation that his name be removed from the roll of Legal Practitioners should show a cogent reason for the stay, and he will not do so merely by showing that he will be unable to practise his profession until his appeal is heard and allowed. Every practitioner who is suspended from practice or whose name is removed from the roll suffers that prejudice but* ***it is clearly not right that a stay is, or should be granted as a matter of course****. Something more must be shown than must be such as outweigh [sic] the public interest in having unfit practitioners debarred from practice. That interest is to be afforded particular significance".'*
> [My emphasis].

[48] In relation to this first question, '*Is there proven a special circumstance which stands in the way of the regulator from enforcing the fruits of his judgment?*', I have reached the same conclusion in relation to the present application as did Marshall RJA in *Naidu* (at [29]):

> *'Therefore the answer to the first point is that there are no special circumstances proved. Therefore this Court should refuse the stay pending appeal application.* ***In these circumstances the legal rules intend that the Plaintiff, here the Chief Registrar should enjoy the fruits of litigation at first instance ...'***
> [My emphasis].

(2) What are the chances of success of the appeal?

[49] In the event that my above conclusion in relation to the first limb is incorrect, I will now briefly deal with the second limb, i.e., '*the chances of success of the appeal*'.

[50] The original sanction imposed upon the Applicant on 18th April 2017 was there be a suspension of his practising certificate for a period of 15 months commencing as from that date. That Order was then deferred to allow the Applicant time to comply with his undertaking to complete, before 27th November 2017, the steps (i.e., a to j) set out

in his 'Supplementary Submission' (dated 11th April 2017). It should be emphasised that this is **not the first** opportunity I have given the Applicant legal practitioner to take steps towards the completion of the conveyance. It was brought to my attention by Counsel for the Respondent in their *'Affidavit in Reply Opposing Application for Stay'*, dated 5th December 2017, (at paragraph [8]), that on 13th February 2017:

> *'[T]he Applicant ... had indicated to the Commission that he would engage the surveyor to prepare a sketch plan and lodge the plan with the Town & Country Planning Office at his own cost and further in the event there is any obstruction from the vendor, Mike Cardigan, the Applicant ... would make an application in the Labasa High Court'.*
> [My emphasis]

[51] My handwritten notes from the hearing that day (i.e., 13th February 2017) that I have set out earlier above confirm the Respondent's statement in this regard.

[52] I note that similar offers were made in writing by the Applicant and filed with the Commission in his submissions on 28th March 2017 and then again in his supplementary submissions filed on 11th April 2017, the day of the sanctions hearing, as paragraph [26], subparagraph (ii), of my judgment of 18th April 2017 explains:

> *'(1) In his 'Mitigation Submission', dated 28th March 2017 (at page 2, paragraphs (c), (d) and (f)), the Respondent legal practitioner offered to:*
>
> - *Engage the Surveyor to have the land surveyed at the Respondent's cost and have a separate certificate of title issued under the complainant's name;*
> - *If there is a dispute with the vendor, then to institute proceedings (at the Respondent's cost) compelling the vendor to grant access;*
> - *Compensate the total fees paid by the complainant together with such interest as the Commission deems just.*
>
> *(2) On 11th April 2017, the Respondent filed a 'Supplementary Submission' (with the consent of the Applicant and permission of the Commission), wherein he confirmed: 'I agree to attend to the following and in the interim complete the matter before the next sitting in December session, wherein the substantive decision would be reviewed.' He has then listed 13 steps (as well as five items necessary to carry out the survey) that he will undertake to do (at his personal cost) between April and December 2017 so as to try and complete the transfer for the complainant.'*

[53] The steps listed as 'a to j' in the Applicant's *'Supplementary Submission'* of 11th April 2017, became the basis of Order 2 of my Orders of 18th April 2017. In addition, Order 4 of 18th April 2017, set out that if the Commission was satisfied on 27th November

2017, that the Respondent had completed all of the steps or *'that he has used his best endeavours to do so, the Commission will consider reducing the period of suspension but to no less than 8 months to take effect from that date'.*

[54] After I made my orders on 18th April 2017, there was no application made seeking a stay or any time thereafter. I note that in his 'Notice of Appeal', the Applicant seeks, as one of the Orders, that '*a more lenient and appropriate* ***sentence by way of fine*** *be imposed*' [My emphasis].

[55] On 27th November 2017, the Applicant appeared before me with Counsel to advise as to the extent of his compliance with his undertaking to this Commission and the Consent Order (filed with the High Court Civil Registry so as to become an Order of the High Court). After it had become clear that the Applicant had done little over the past six months to comply with his undertaking and the Consent Order, I activated Order 1 of my Orders of 18th April 2017, that is, the Respondent's practising certificate is suspended for a period of 15 months.

[56] On one view, a possible argument is that the Applicant was not able to file an appeal and seek a stay until the sanction had been finalised on 27th November 2017, after the Applicant reported to the Commission, his progression, if any, towards fulfilling his undertaking and the Consent Order.

[57] On another view, the Applicant knew as of 18th April 2017 that his practising certificate had been suspended for 15 months, however, that suspension was in itself deferred to allow the Applicant time to comply with his undertaking and consent order. The degree of compliance might have been a factor in my determination as to whether to reduce the period of suspension but it was clear that the suspension would not be less than eight months. There was, however, no possibility that the sanction of a suspension would be altered to that of a fine.

[58] The fact that the Applicant gave a signed undertaking to this Commission as well as signed a Consent Order to be filed with the High Court, '*to complete the 11 steps (i.e., a to j) set out in his Supplementary Submission filed with the Commission on 11th April*

2017' when he knew that this would (at best) reduce the period of his suspension, does not make any sense if he was really seeking a fine rather than a suspension.

[59] I accept, that if the Orders that I made on 18th April 2017 were similar to in effect to a "*Griffiths remand*", as the High Court of Australia found permissible in ***Griffiths v The Queen*** [1977] HCA 44; (1977) 137 CLR 293 (17 August 1977); AustLII: < http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1977/44.html>), then a sentence would not yet have been passed. In *Griffiths*, the Appellant had been convicted, however, the process of sentencing was deferred for 12 months to allow the Appellant to enter into a recognizance, with reports being provided to the Court as to his progress. As Barwick CJ noted (at [44]), what *'the trial judge did in this case, so far from sentencing the applicant, he merely remanded him for sentence'*. In the present case I did not defer the process of sentencing. The Applicant, in accordance with Order 1 of 18th April 2017, was sentenced to a suspension of 15 months, deferred until the hearing on 27th November 2017, to allow the Applicant the opportunity to comply with his undertaking and consent order and possibly reduced the period of suspension. This was not, arguably, a "*Griffiths-type remand*". Again, this might become a matter for the Court of Appeal to consider in more detail.

[60] A further issue to be raised in relation to '*the chances of success of the appeal*', is in relation **to whether and in what circumstances can there be an appeal from an undertaking and/or consent order?** The oral submission of Counsel for the Respondent Chief Registrar was that the Applicant cannot now simply withdraw from his own undertaking and signed consent order. Also, there was there was no case law cited by the Applicant in support of the proposition that he was able to do so. There has also been no mention in the Applicant's affidavit that he was under some misapprehension when he signed both the undertaking before this Commission as well as the consent order filed in the High Court. Therefore, I am not convinced that what the Applicant is now seeking to argue before the Court of Appeal that he can appeal from his undertaking and/or consent order has any '*exceptional chances of success*'. As to the merits of that argument, however, again it is not a matter for me to consider on this stay application, rather, it is for the detailed consideration of the Court of Appeal.

[61] As Calanchini P helpfully explained in *Iqbal Khan* (at [20]):

> *'[20] It is therefore necessary to determine whether any one of the Appellant's grounds of appeal meets the high threshold of* ***exceptional chances of success*** *that may constitute a special circumstance to be considered together with the other factors relevant to the present application. However this process does not involve a consideration of the merits of the grounds of appeal for the simple reason that it is not for a single judge of the Court of Appeal to determine the appeal itself. That remains the function of the Court of Appeal ...*
>
> *[21] ...* ***the grounds of appeal raised by the Appellant can at best be described as arguable.*** *In my judgment the grounds do not have exceptional chances of succeeding ...*
>
> ...
>
> *[23] ... What constitutes misconduct and whether the sentence of 15 months suspension was harsh and excessive are questions for the Court of Appeal'* [My emphasis].

[62] Thus, even if the Applicant's chances of success on appeal are arguable, this does not necessarily meet the threshold of *'exceptional chances of success'* for the grant of a stay of execution of the suspension (pending the appeal).

[63] I have come to the view, therefore, as did Marshall RJA in *Naidu,* when, in considering the chances of success of the appeal, he stated (at [37]):

> *'... that the chances of success of the Court of Appeal interfering with the findings and conclusions of the Commissioner are at best "arguable". They are well short of the special or exceptional chances required for a stay. In my opinion this application for a stay must be dismissed'.*

[64] While the Applicant's chances of success in having the Court of Appeal substitute the suspension for a fine might be arguable, that is well short, however, of what is required for a stay. As for my being in error having taken into account in not reducing the period of suspension the failure of the Applicant legal practitioner to comply with any of the 11 steps he gave as an undertaking to this Commission as well as a consent order filed with the High Court, again, this might be arguable before the Court of Appeal, however, it is well short of what is required for a stay. As I have mentioned in my judgment, I am also not so sure that without more (such as evidence of some misunderstanding on the part of the Applicant) that the Applicant cannot now simply appeal from his own undertaking and signed consent order. In saying this, I am mindful of the fact that it was the legal practitioner who agreed to undertake such steps as part of his plea in

mitigation. In that regard, I think it is important to conclude my refusal of the application for a stay by citing from my sanctions judgment of 18th April 2017 as follows:

> *'[33] It was indicated to both the Applicant and Respondent at the hearing on 11th April 2017 that I was considering a period of suspension in line with that suggested by the Applicant, however, I wanted to know how this was going to assist the complainant.*
>
> *[34] I should mention at this point, that the Respondent legal practitioner, had at the beginning of his oral submissions on 11th April 2017, had a surveyor, Mr Samuela R. Tawake, give evidence. Mr Tawake estimated that there were 2-3 days work required for the initial survey to be completed and it would take 4-6 months altogether to have it passed by the Surveyor General and the Department of Town and Country Planning. He later confirmed through the Respondent's submissions from the Bar Table that the cost would be approximately $4,000 for the surveyor including disbursements.*
>
> *[35] The Respondent submitted that to complete the transfer would require him writing to Mr Cadigan to obtain access for the surveyor and if he refused then proceedings would need to be issued in the High Court at Labasa to get access to the land to complete the surveying work. In addition, the Respondent noted that a caveat would need to be lodged on behalf of the complainant via a court order as the complainant was prohibited from lodging a second caveat by virtue of the Land Transfer Act.*
>
> *[36] Mr Nand, who appeared as Counsel assisting the Respondent, indicated to the Commission from the Bar Table, that he was a 5th year law graduate and would need the supervision of the Respondent to complete the transfer as there were some complexities involved.*
>
> *[37] Counsel for the Applicant Chief Registrar indicated that a suspension between 12 months to 18 months could be suspended whilst the Respondent completed the matter with all associated costs to be paid for by the Respondent including any legal proceedings that may have to be instituted against the vendor. It could then be reviewed in the December 2017 Sittings and if, at that time the transfer was completed, then the proposed period of suspension could be reduced.*
>
> ...
>
> *[39] **The Respondent legal practitioner then indicated that his preferred sanction was to undertake to get the transfer completed at his personal cost, for the complainant to be compensated and to pay a fine**. In the alternative, he sought that the suspension be suspended to enable him to complete the transfer and having to have the matter called in the December 2017 Sittings of the Commission to see if the full suspension is to be imposed or can be reduced.*
>
> *[40] The matter was then stood down to enable the Respondent together with Mr Nand to draft supplementary written submissions detailing what was actually proposed. I have taken that document into account when considering the particular sanctions to be imposed in this matter.'*
>
> [My emphasis].

ORDER

[65] The formal Order of the Commission is:

1. In the Application filed before the Commission in Case No. 003 of 2015 *Chief Registrar v Raman Pratap Singh* seeking a stay of the Order dated 27th November 2017, that the practising certificate of Raman Pratap Singh be suspended for a period of 15 months, is refused.

Dated this 7th day of December 2017.

INDEPENDENT LEGAL SERVICES COMMISSION SEAL

Dr. Thomas V. Hickie
COMMISSIONER