IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 008 of 2015

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

RENEE DEVINA SINA LAL

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: Mr. A. Chand with Ms. V. Prasad
Respondent: Ms. R. Lal with Mr. A. Bale; Mr. Bale 7th February 2018
Dates of Hearing: 27th November 2017, 1st and 7th December 2017, 5th February 2018 and 7th February 2018

Dates of Written Submissions:
5th December 2017 (Applicant Chief Registrar)
5th December 2017 (Respondent legal practitioner)
7th December 2017 (Applicant Chief Registrar)
7th February 2018 (Respondent legal practitioner)

Date of Judgment: 14th February 2018

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<u>1. Introduction</u>

[1] This is a ruling involving three separate formal applications, two by the Applicant Chief Registrar and one by the Respondent legal practitioner. The parties between them are seeking 11 Orders (one in the alternative). In

addition, I have also been asked to make rulings on two objections and two oral applications.

[2] Obviously, I am aware that what follows is a lengthy ruling. I am also aware of the current catchcry as to the need for "transparency" in all areas of public life, including the judiciary. I am further aware of the problems highlighted by Professor Vicki Waye, some nine years ago, when, writing in the *University of Western Australia Law Review*, she asked 'Who are Judges Writing for?', concluding (at p. 299):

> *'Whatever strategies the judiciary adopt to make their judgments more accessible it is clear that they face a tremendously difficult task in finding the right balance between transparency and comprehensibility ... currently in Australia that balance is skewed too far in favour of transparency'.*
>
> (See V.Waye, 'Who are Judges Writing for?' (2009) 34 *UWA Law Review,* 274-299, <http://www.austlii.edu.au/au/journals/UWALawRw/2009/5.pdf>.)

[3] In many respects Waye is correct - especially at the appellate level and her view (at p. 275) that *'Australian High Court decisions are long and complex'* - as anyone who has had to wade through some of the judgments from the High Court of Australia (and also the New South Wales Court of Appeal) can attest. Interestingly, members of the latter have been known to "recognise" (as Waye has paraphrased at p. 281) that *'overly extensive reasoning may mask significant issues and make important findings of law and fact difficult to detect'* and to "counsel" trial judges in that regard. Surely, however, one size does not always fit all. In particular, it has been my experience having served in Fiji as a trial judge in the High Court, an ex officio justice on the Court of Appeal and now as the Commissioner of the Independent Legal Services Commission, tha0t writing a judgment after a trial or making a ruling following an interlocutory hearing is vastly different to drafting a judgment at the appellate level. At first instance, on some occasions, a court or tribunal might be called upon to provide a relatively short judgment, at other times, it is not so clear cut. So often it can depend upon the issues, pleadings, evidence and law, that a judge/presiding officer

has been required to consider.

[4] In the present matter, in writing a judgment encapsulating three separate formal applications (supported by multiple affidavits and submissions) for rulings in relation to 11 different orders (one in the alternative), two objections, as well as a ruling upon two oral applications, one of which was made at the commencement of the final hearing seeking an Order that Counsel for the Chief Registrar be made to withdraw from appearing, I have tried to find a balance between providing sufficient reasons for each ruling whilst doing justice to each application/objection. It has not been helped by the affidavits filed. It also highlights, again, what Justice Madigan noted in ***Chief Registrar v Adish Kumar Narayan*** (Unreported, ILSC, Case No.009 of 2013, 2 October 2014; PacLII: [2014] FJILSC 6 <http://www.paclii.org/fj/cases/FJILSC/2014/6.html>), as a '*misunderstanding throughout the profession and in particular by the present practitioner, of the exact nature of proceedings in the Commission',* something to which I will return near the end of this ruling.

[5] I hope that what follows will assist not just the parties appearing presently before me but the profession generally including those from the Office of the Chief Registrar. I do not begrudge the time spent. It is one of my tasks as the Commissioner in not just making judgments and rulings but also, where possible, to assist in an educative role for the profession. If I am incorrect, this can be remedied on appeal, as I was reminded during the hearing on 7th February 2018, by Counsel who appeared for the Respondent. To quote the wonderful Leonard Cohen: "*I don't consider myself a pessimist. I think of a pessimist as someone who is waiting for it to rain. And I feel soaked to the skin."* (Leonard Cohen, *Observer,* 2 May 1993)

2. The Applications

[6] On 23rd November 2017, a Notice of Motion was filed by the Chief Registrar seeking the following Orders:

> '*1. That the hearing dates allocated from the 28th November 2017 to 1st December 2017 be vacated or alternatively the proceedings be part-heard;*

2. *That the evidence of Reema Yogeshrai Gokal and Pratima Yogesh Rai Gokal be heard in the next Commission sitting.*
3. *Any other orders that the Honourable Commission deems just and equitable in this case.*
4. *Costs be costs in the cause.'*

[7] On the 29th November 2017, the legal practitioner filed a Cross-Motion seeking the following Orders:

> *'(a) **THAT** the Affidavit of Tevita Cagina sworn on 24th November, 2017 and filed on 24th November, 2017 be struck out from the record of ILSC APPLICATION No.8 of 2015; and*
> *(b) **THAT** the application for adjournment be refused; and*
> *(c) **THE** Applicant produce the Complainant and that the application proceed to hearing on 1st December, 2017; and*
> *(d) **THAT** the taking of evidence of the Complainant Reema Gokal and witness Pratima Gokal by skype be refused; and*
> *(e) If the Applicant is unable to proceed to hearing on 1st December, 2017 that the application be dismissed; OR IN THE ALTERNATIVE*
> *(f) **THAT** the action be permanently stayed.'*

[8] On 1st December 2017, Counsel for the Chief Registrar, explained that **the alternative Order sought by the Applicant in the 1st Notice of Motion that the proceedings be part-heard was no longer applicable** and that *"... depending on the result of the application [for vacation of the hearing] ... we submit that **we would require an adjournment of the entire proceedings**"*. Counsel for the Chief Registrar then made an oral application in relation to the Order sought, *"if that could be amended to say 'An adjournment of proceedings'* rather than it being part-heard."

[9] Also, on 1st December 2017, a second Notice of Motion was filed by the Chief Registrar seeking the following Orders:

> *'1. That the Applicant be granted leave to file with the Commission and serve on the Respondent additional disclosures;*
> *2. That the Applicant be granted leave to amend Counts 3 and 8;*
> *3. Any other orders that the Honourable Commission deems just and equitable in this case.'*

[10] There have been seven affidavits filed:

(1) 1st Affidavit of Melvin Nitish Kumar (Acting Court Officer, Legal Practitioners Unit, within the Office of the Chief Registrar), sworn on 22nd

November 2017 and filed on 24th November 2017 (in support of the 1st Notice of Motion for vacation of the hearing or alternatively it be part-heard);

(2) Affidavit of Tevita Cagina (Messenger, Legal Practitioners Unit, within the Office of the Chief Registrar), sworn and filed on 24th November 2017 (as to attempts at service of 1st Notice of Motion);

(3) 1st Affidavit of the Respondent legal practitioner sworn and filed on 29th November 2017 (opposing motion for adjournment and in support of the cross-motion);

(4) 2nd Affidavit of Melvin Nitish Kumar sworn and filed on 30th November 2017 (in reply to the 1st affidavit of the Respondent legal practitioner);

(5) 3rd Affidavit of Melvin Nitish Kumar sworn and filed on 1st December 2017 in support of the 2nd Notice of Motion (for leave to amend Counts 3 and 8 and for leave to file and serve additional disclosures);

(6) 2nd Affidavit of the Respondent legal practitioner sworn and filed on 11th December 2017, in response to the 3rd affidavit of Melvin Nitish Kumar;

(7) 4th Affidavit of Melvin Nitish Kumar sworn and filed on 18th December 2017, in reply to the 2nd affidavit of the Respondent legal practitioner.

[11] There have been four sets of written submissions filed:

(1) 5th December 2017 (Applicant Chief Registrar);

(2) 5th December 2017 (Respondent legal practitioner);

(3) 7th December 2017 (Applicant Chief Registrar);

(4) 7th February 2018 (Respondent legal practitioner).

3. Background

[12] The substantive application in this matter was filed in the Commission on 30th September 2015. It alleges seven counts of professional misconduct and one count of unsatisfactory professional misconduct as follows:

'Count 1

***PROFESSIONAL MISCONDUCT**: Contrary to Section 82(1)(b) of the Legal Practitioners Decree of 2009*

PARTICULARS

***Renee Devina Sina Lal**, a Legal Practitioner, since 26th March 2007 until to date whilst acting for both the vendor, Ms. Reema Yogreshrai Gokal (Executrix and Trustee of the Estate of Maganlal Gokal) and the purchaser], Mr. Prakash Chandra, for sale of CT No. 7881 on Lot 5 on DP No. 1820 for a consideration sum of $330,000 and failed to disburse to Ms. Reema Yogreshrai Gokal the total sum that she was entitled to receive from the proceeds of sale of the said property, which conduct is an act of professional misconduct pursuant to **section 82(1)(b)** of the Legal Practitioners Decree of 2009.*

Count 2

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

PARTICULARS

***Renee Devina Sina Lal**, a Legal Practitioner, on 22nd February, 2007 whist acting for Ms. Reema Yogreshrai Gokal, influenced Ms. Reema Yogreshrai Gokal to sign on three (3) blank pages on the pretence that she would thereafter, send the proceeds from the sale of CT No. 7881 on Lot 5 on DP No. 1820 to Ms. Reema Yogreshrai Gokal which she was entitled to receive as a beneficiary, which conduct is an act of professional misconduct pursuant to **section 82(1)(a)** of the Legal Practitioners Decree of 2009.*

Count 3

PROFESSIONAL MISCONDUCT: Contrary to Section 82(1)(b) of the Legal Practitioners Decree of 2009

PARTICULARS

***Renee Devina Sina Lal**, a Legal Practitioner, on the 28th March 2007 whilst being one of the trustees of the Trust Account of Jamnadas & Associates and acting for Ms. Reema Yogreshrai Gokal, authorized in the Jamnadas & Associates Trust Account payment voucher for the release of the sum of $254,000 to ANZ when she had failed to obtain the consent and authority from the said Ms. Reema Yogreshrai Gokal to release the sum of $254,000 from the Trust Account of Jamnadas & Associates on whose account the said sum was held in the trust account, which conduct is an act of professional misconduct pursuant to **section 82(1)(b)** of the Legal Practitioners Decree of 2009.*

Count 4

PROFESSIONAL MISCONDUCT: Contrary to Section 82(1)(b) of the Legal Practitioners Decree of 2009

PARTICULARS

Renee Devina Sina Lal*, a Legal Practitioner sometime between November and December 2014, placed undue influence on Ms. Reema Yogreshrai Gokal to enter into a "Deed of Settlement and Discharge" in order to release the remaining sum of money that Ms. Reema Yogreshrai Gokal was entitled to receive from the proceeds of sale of CT No. 7881 on Lot 5 on DP No. 1820, which conduct is an act of professional misconduct pursuant to* ***section 82(1)(b)*** *of the Legal Practitioners Decree of 2009.*

Count 5

UNSATISFACTORY PROFESSIONAL CONDUCT: Contrary to Section 81 of the Legal Practitioners Decree of 2009

PARTICULARS

Renee Devina Sina Lal*, a Legal Practitioner sometime between November and December 2014, failed to give a copy of the signed and executed "Deed of Settlement and Discharge" to Ms. Reema Yogreshrai Gokal that she was made to sign in order to receive the remaining sum of money trhat she was entitled to receive from the proceeds of sale of CT No. 7881 on Lot 5 on DP No. 1820, which conduct is an act of unsatisfactory professional conduct pursuant to* **section 81** *of the Legal Practitioners Decree of 2009.*

Count 6

PROFESSIONAL MISCONDUCT: Contrary to Section 82(1)(b) of the Legal Practitioners Decree of 2009

PARTICULARS

Renee Devina Sina Lal*, a Legal Practitioner sometime between November and December 2014, after placing undue influence on Ms. Reema Yogreshrai Gokal to sign, failed to adhere to the terms of "Deed of Settlement and Discharge" by not releasing the full residue sum of money that Ms. Reema Yogreshrai Gokal was entitled to receive from the proceeds of sale of CT No. 7881 on Lot 5 on DP No. 1820, which conduct is an act of professional misconduct pursuant to* **section 82(1)(b)** *of the Legal Practitioners Decree of 2009.*

Count 7

PROFESSIONAL MISCONDUCT: Contrary to Section 82(1)(a) and Section 108(2) of the Legal Practitioners Decree of 2009

PARTICULARS

Renee Devina Sina Lal*, a Legal Practitioner, failed to comply with a Notice issued under section 105 and 106 of the Legal Practitioners Decree of 2009 by the Chief Registrar dated 7th August 2015 and thereafter failed to respond to a subsequent reminder notice dated 17th August 2015 issued by*

the Chief Registrar pursuant to section 108 of the Legal Practitioners Decree of 2009, which conduct is a breach of section 108(2) of the Legal Practitioners Decree and is an act of professional misconduct.

Count 8

PROFESSIONAL MISCONDUCT**: **Contrary to Section 82(1)(b) of the Legal Practitioners Decree of 2009

PARTICULARS

***Renee Devina Sina Lal**, a Legal Practitioner, and whilst being one of the trustees of the Trust Account of Jamnadas & Associates, on or around the 28th March 2007, authorized the withdrawal of $254,000 held in the Trust Account of Jamnadas & Associates and utilized the said sum for her own benefit, which conduct is an act of professional misconduct pursuant to **section 82(1)(b)** of the Legal Practitioners Decree of 2009.'*

[13] The first listing of this matter was **for mention** on 22nd October 2015, before the previous Commissioner, Justice P.K. Madigan. When the matter was called, it was adjourned at the request of the Respondent legal practitioner, as she sought answers from the Chief Registrar to a written request that she had sent to him that morning seeking further and better particulars.

[14] On 16th November 2015, on the second call of this matter, the Respondent legal practitioner informed Justice Madigan, that, apart from Count 1, *"... in relation to **the other charges they allege that as a trustee I carried out certain activities**. I want the documents [from the Chief Registrar for him] to show (1) I was a trustee and (2) I carried out those activities".* [My emphasis]

[15] As shall be seen in a more detailed chronology and analysis set out later in this ruling (when examining the cause of the adjournments), the Respondent legal practitioner continued to seek documentation initially from the Chief Registrar to show that she was not a trustee of the Trust Account of the legal firm of Jamnadas & Associates. When no documentation was forthcoming from the Chief Registrar, together with the filing of a witness statement on 24th March 2016 from the principal of the firm of Jamnadas & Associates, alleging that the Respondent legal practitioner was a trustee, the Respondent

legal practitioner then sought documentation from elsewhere, in particular, to try and locate the trustee's report for the trust account of the firm of Jamnadas & Associates for 2006 and 2007. The Respondent legal practitioner seemed to be of the view that by showing that she was not a trustee, then most, if not all, of the eight counts would be withdrawn.

[16] As shall be seen later in this ruling, despite the Respondent legal practitioner claiming in an appearance on 15th February 2017 that *"the auditor has confirmed to me via email that I wasn't a trustee in 2006 and 2007"*, the best that was provided the following day was an email from the auditor to the Respondent legal practitioner also of 15th February 2017 confirming '*you did not sign the trustee's report for 2006 and 2007'.* [My emphasis] In addition, on 14th June 2017, the ANZ Bank confirmed that the Respondent legal practitioner was not a signatory to the Trust Account of the legal firm of Jamnadas & Associates.

[17] As the Applicant Chief Registrar, however, was of the view that this still left the eight counts unresolved, the matter was set down for hearing for four days in the November/December 2017 Sittings of the Commission. In addition, Orders were also made for the legal practitioner to file a Summons seeking further and better particulars such that the application could be heard in the September 2017 Sittings prior to the final hearing set down for the November/December 2017 Sittings.

[18] On 26th June 2017, Mr. Amani Bale, from the firm of Lal Patel Bale Lawyers, wrote to the Commission on behalf of the Respondent legal practitioner (received by facsimile transmission on 27th June 2017), seeking an extension of a further 21 days to file the Summons seeking further and better particulars. The extension was sought on the basis that the Respondent legal practitioner *'has had to travel overseas urgently to attend to a family emergency… and will not be back until the 6th of July 2017'* and *'she also needs to have urgent … surgery while she is there as it is not available in Fiji'*.

[19] In light of the above, Mr. Bale was advised by email dated 28th June 2017 (with a copy sent to Counsel for the Chief Registrar), that an extension had been granted of 14 days (that is, until 11th July 2017) *'conditional upon a medical certificate being filed with the Commission and served upon Counsel for the Chief Registrar also by 12 noon on Tuesday 11 July 2017'*.

[20] **Neither a medical certificate nor a Summons seeking further and better particulars, were ever filed by or on behalf of the Respondent legal practitioner.** Instead, on 11th July 2017, Mr. Bale attended the Commission's offices and indicated that as he was unsure which document he was to file on behalf of the legal practitioner, he would seek instructions. Mr. Bale did not return that day to the Commission or in the week subsequently.

[21] Therefore, after a week had passed, the Secretary of the Commission wrote to Mr Bale on 19th July 2017 (with copies sent to both the Respondent legal practitioner and Counsel for the Chief Registrar) confirming the above and that the Respondent legal practitioner was *'now in breach of the conditions set by the Commissioner for the grant of the extension to file the Summons'* as follows:

> *'Dear Mr Bale,*
>
> *I refer to my email dated 28th June 2017.*
>
> *I note that you were advised in relation to the request that you were making on Ms Lal's behalf (due to her ... surgery in New Zealand) seeking an extension to the timetable previously ordered by the Commission for her to file a Summons seeking further and better particulars, 'the Commission is prepared to grant* ***an extension of 14 days (i.e. by 12 noon on Tuesday 11 July 2017)*** *conditional upon a medical certificate being filed with the Commission and served upon Counsel for the Chief Registrar also by 12 noon on Tuesday 11 July 2017'.*
>
> *I further note that you then attended the Commission's offices on 11th July 2017 and indicated that as you were unsure which document you were to file on behalf of Ms Lal that you would seek instructions, however, you did not return that day or subsequently. Hence, Ms Lal is now in breach of the conditions set by the Commissioner for the grant of the extension to file the Summons.*

I have been in contact with the Commissioner who has indicated this will be raised at the Call Over listed for 8.45am on 18th September 2017 when Ms Lal will be asked to provide an explanation. The LPU will also be invited to address the Commission on this issue.

The Commissioner has also asked me to confirm to the parties that the substantive matter is set for a final hearing in the November/December 2017 Sittings of the Commission and that hearing will not be adjourned because of a delay in seeking further and better particulars.

Yours sincerely'

[22] **At the appearance on 18th September 2017, the Respondent legal practitioner (who appeared with Mr. Bale) did not seek to pursue the issue of filing a Summons seeking further and better particulars.** Instead, the parties dealt with preparation for the hearing and the time estimate. Hence, it was confirmed that the matter was set down for hearing as from Tuesday, 28th November 2017 with a time estimate of four days.

[23] Just over some seven and a half weeks later, on 9th November 2017, Counsel for the Chief Registrar wrote a letter to the Commission with a copy to the Respondent legal practitioner (that was received by the Commission on 13th November 2017), advising as follows:

'Reference is made to the abovementioned matter which is listed for trial commencing from 28th November 2017.

We wish to inform the Commission, as well as the Respondent that two of our witnesses, namely, Reema Gokal (complainant) and her mother, Pratima Gokal ***would be testifying by way of skype****.*

They are unable to travel due to personal and financial difficulties hence their evidence would be taken through Skype.

The Applicant submits that most courts in Fiji including even the Court of Appeal allows proceedings by way of Skype.

Should the Respondent have any issues or objections *to evidence of these two witnesses taken by Skype,* ***we suggest that the Respondent could file a formal application and perhaps the Commission could give a written Ruling on the application****.'*

[My emphasis]

[24] On 17th November 2017, Mr. Bale (from Lal Patel Bale lawyers) sent a letter directly to the Secretary of the Commission (with a copy to the Chief Registrar) as follows (in part):

> *'We are of the view that should the Chief Registrar wish to call evidence by SKYPE that formal applications be made so that we can respond to it. It is highly unusual for an application to come to the court by way of letter.*
>
> *We are also of the view that the learned prosecutor's view is misconceived ... **The learned Prosecutor needs to make a formal application** ...*
>
> *For the record and from the information provided on the letter, the Respondent at this juncture opposes any applications for taking evidence via SKYPE.'*
> [My emphasis]

[25] **A week later, on 23rd November 2017, Counsel for the Chief Registrar filed a Notice of Motion and Affidavit in Support seeking (NOT that the evidence** of the complainant, Reema Yogeshrai Gokal, as well as the evidence of another witness, Pratima Yogesh Rai Gokal, **be taken by Skype**), **rather, that the hearing be vacated or alternatively part-heard and the evidence** of the complainant, Reema Yogeshrai Gokal, as well as the evidence of another witness, Pratima Yogesh Rai Gokal, both of whom were residing in India, **be heard in the next Sittings of the Commission**.

[26] On Monday, 27th November 2017, at the commencement of the November/December 2017 Sittings of the Commission, the interlocutory application of Counsel for the Chief Registrar (seeking that the hearing be vacated or alternatively part-heard) was called. The Commission was advised that the Respondent legal practitioner had only been served with the application just prior to the matter being called that morning. In addition, Counsel for the Chief Registrar made an oral application for leave to amend Counts 3 and 8 and also for leave to file further disclosures. The Respondent legal practitioner objected to both applications and sought time to file an affidavit as well as a cross-motion for the substantive matter to proceed during the November/December 2017 Sittings or be struck out.

[27] Orders were then made for the Respondent legal practitioner to file and serve a Cross-Motion and Affidavit in Support by Wednesday, 29th November 2017 and Counsel for the Applicant Chief Registrar to file an Affidavit in Reply by Thursday, 30th November 2017. The hearing of the two Motions (Motion to vacate the hearing by the Applicant Chief Registrar and the Cross-Motion by the Respondent legal practitioner for the hearing to proceed or be struck out) was listed for Friday, 1st December 2017. The oral application seeking leave to amend Counts 3 and 8 and leave to file further disclosures was to be considered after the outcome of the hearing of the other two applications.

[28] On 1st December 2017, Counsel for the Applicant Chief Registrar appeared with Mr. Prasad and the Respondent legal practitioner with Mr. Bale. I began by asking both parties as to why we could not commence the hearing taking the evidence of Mr. Jamnadas? Counsel for the Applicant Chief Registrar explained that he was seeking an adjournment as he now had two further witness statements to serve from persons who worked in the firm of Jamnadas & Associates and who *"were closely associated with this transaction",* that is, the disbursement of the $254,000. The Respondent legal practitioner submitted that the person who should be called first should be the complainant, Reema Gokal. In addition, I was advised that the Respondent legal practitioner had just been served with over 50 pages of further disclosure material that had been supplied by the police to the Chief Registrar (in response to a separate investigation) and, therefore, the Respondent legal practitioner would need to be given time to consider that documentation. After expressing my displeasure to Counsel for the Applicant at these turn of events, the matter was stood down for two hours to provide the Respondent legal practitioner sufficient time to consider the material that had just been disclosed.

[29] When the matter was again called, after the short adjournment, the parties entered into consent orders that same day (including that the Applicant Chief Registrar file and serve a Notice of Motion and a supporting affidavit seeking leave to disclose further documents and leave to amend Counts 3

and 8, together with the filing of submissions by both parties). All three applications were then put over for hearing on 7th December 2017.

[30] On 7th December 2017, Counsel for the Applicant Chief Registrar appeared with Mr. Prasad and the Respondent legal practitioner with Mr. Bale. Prior to the commencement of the hearing, the Respondent legal practitioner had sent a letter by facsimile transmission earlier that morning raising a preliminary issue that she had already discussed with Counsel for the Chief Registrar, that is, that the Consent Orders of 1st December 2017 had not provided for the Respondent legal practitioner to respond by way of affidavit and further written submissions to the second affidavit of Mr. Kumar in support of the 2nd Notice of Motion (that is, seeking leave to file further disclosures and leave to amend Counts 3 and 8) and was now seeking to file such documentation in response. When the parties appeared for the hearing, the Respondent legal practitioner outlined the proposed course of action. Counsel for the Chief Registrar agreed. Accordingly, Orders were made by consent for the filing of a further affidavit by each party and further submissions by the Respondent legal practitioner, as well as the listing of the three applications for mention on 5th February 2018 if so needed (at the commencement of the February 2018 Sittings for any further preliminary issues to be raised), otherwise the hearing of the three applications was adjourned until 14th February 2018 for any final clarifications prior to a ruling on the three motions.

[31] The parties complied with timetable set out in the consent orders other than Order 3, whereby **the Respondent legal practitioner failed to file and serve by 21st December 2017, any further submissions in reply**. Therefore, on 9th January 2018, the Secretary of the Commission sent an email to the Respondent legal practitioner (with a copy to Mr Bale as well as Counsel for the Chief Registrar and the LPU), as follows:

> *'Dear Ms Lal*
>
> *Pursuant to order 3 of the Consent Order dated 7th December 2017 the Respondent was to file written submissions by 12noon on Thursday, 21st December 2017.*

Kindly note that as of this email the Commission has not received the said submissions.

Kind Regards'

[32] **<u>The Commission received no response to the above email</u> from either the Respondent legal practitioner and/or Mr. Bale.**

[33] On 20th January 2018, the Secretary of the Commission wrote to the parties attached to an email (including Ms Prasad from the LPU and Mr Bale of Lal Patel Bale Lawyers) which was also then hand delivered to the LPU and Lal Patel Bale Lawyers) as follows:

> *'I confirm that the above matter is listed for mention on Monday, 5th February 2018 (for the parties to raise any preliminary issues) and then for further hearing at 8.30am on Wednesday, 14th February 2018, to allow the parties to address in relation to any clarifications the Commissioner may have arising from your respective written submissions before he delivers his ruling.*
>
> *In that regard, the Commissioner has noted that, as per Order 3 of the Consent Orders file on 7th December2017, the Respondent legal practitioner was to file and serve by 21st December 2017, any further submissions in reply. As no further submissions have been filed, it is presumed that the Respondent is relying upon what she has already filed.*
>
> *In the meantime, the Commissioner has asked me to write to both parties to advise that he has read all the documents filed and, if necessary, can proceed to complete a ruling in relation to each of the 11 Orders sought across the three applications without the need for further oral submissions.*
>
> *Before the Commissioner proceeds, however, he asks for each party to please respond in writing to this letter advising whether they are still seeking to appear on 5th February 2018 and/or 14th February 2018, to raise anything arising from the documentation filed, or whether each is agreeable to the Commissioner now completing his ruling and handing that down on 14th February 2018?*
>
> *Yours sincerely'*

[34] **On 22nd January 2018, Counsel for the Chief Registrar replied (with a copy to the Respondent)**, *'that the Applicant is amenable to the Commission delivering a Ruling ... without the need to call the matter on the 5th and 14th February for oral hearing'.*

[35] **As there had been <u>no reply from the Respondent legal practitioner</u>** by 12 noon on 25th January 2018, the Secretary of the Commission wrote to the parties (which was sent by hand delivery to the Legal Practitioners Unit for the attention of Mr Chand and Ms Prasad and to Lal Patel Bale Lawyers for the attention of the Respondent legal practitioner and Mr Bale) as follows:

> *'I refer to my letter of 20th January 2018 in relation to the above matter.*
>
> *I note that on 22nd January 2018, Counsel for the Chief Registrar replied "that the Applicant is amenable to the Commission delivering a Ruling ... without the need to call the matter on the 5th and 14th February for oral hearing".*
>
> *I further note that I have received no reply from either the legal practitioner or Mr Bale who has been assisting her.*
>
> ***Therefore, as there has been no agreement from the legal practitioner for the Commissioner to proceed to deliver a Ruling without the need to call the matter*** *on the 5th and 14th February 2018,* ***<u>I confirm that this matter will now be listed for mention in the Call Over List of the February 2018 Sittings, that is, at 9.30am on Monday, 5th February 2018</u> <u>and</u> then for further hearing at 8.30am <u>on Wednesday, 14th February 2018</u>****, to allow the parties to address in relation to any clarifications arising from your respective written submissions before the Commissioner delivers his ruling.*
>
> *As the legal practitioner has previously advised at the appearance on 7th December 2017 that she will be in New Zealand with Mr Bale on 5th February 2018,* ***<u>she is to make sure that she has an agent briefed to appear on 5th February 2018, in particular, why there has been no compliance with Order 3 of the Consent Orders file on 7th December2017</u>,*** *(whereby the Respondent legal practitioner was to file and serve by 21st December 2017, any further submissions in reply)* ***and also why there has been no reply to the letter from the Commission of 20th January 2018****.*
>
> *Yours sincerely'*

[36] On 5th February 2018, Counsel for the Chief Registrar appeared with Ms. Prasad and the Respondent legal practitioner with Mr. Bale. The Respondent legal practitioner was asked to explain her behaviour in not filing her written submissions in reply by 21st December 2017, not answering the reminder email from the Secretary of the Commission and not answering the letter

from the Secretary of the Commission of 20th January 2018. The Respondent replied, *"on the 21st December I was away from work as I was ill"*. **No medical certificate was, however, tendered in verification**. As for not answering the email from the Secretary of the Commission, the Respondent legal practitioner claimed, "*I'm not sure if I received an email"*. After it was pointed out that the Secretary had sent the email to both parties (and Counsel for the Applicant also confirmed that he had received the email), the Respondent legal practitioner apologised. I do note, however, that there may have been confusion as to whether the email was received on 9th or 10th January 2018. It was later confirmed prior to the commencement of the hearing on 7th February 2018, that an email dated 9th January 2018 from the Secretary of the Commission, was received by both the Respondent and Mr. Bale. As for the letter dated 20th January 2018, the Respondent legal practitioner acknowledged that she received the letter, however, she said that she had misunderstood what was required and apologised.

[37] The Respondent legal practitioner then indicated that she still wished to make submissions (even if they were to be oral submissions on 14th February 2018) responding to Counsel for the Chief Registrar seeking leave to amend Counts 3 and 8 and also leave to rely upon the further disclosure material. Counsel for the Applicant Chief Registrar then indicated that he was prepared to allow the Respondent legal practitioner time to do so on the basis that he could respond. This was a generous gesture in my view noting that the Respondent legal practitioner had been arguing prejudice caused by delay and then on 7th December 2017, the Respondent legal practitioner had sought only that morning by way of facsimile transmission and then confirmed in her appearance with Mr. Bale later that day, that she sought an adjournment of the hearing of the three interlocutory applications, as she sought to respond by way of affidavit and further written submissions to the 2nd Notice of Motion seeking leave to file further disclosures and leave to amend Counts 3 and 8. Despite the Respondent legal practitioner's oral application being granted on 7th December 2017 to vacate the hearing so as to allow the Respondent legal practitioner the opportunity to file a further affidavit and submissions, she had then failed to comply with her own

consent order to file the submissions and then there was no further communication from her and/or Mr. Bale between the filing of the second affidavit on 11th December 2017 and the appearance on 5th February 2018, some 55 days later.

[38] After some discussion on 5th February 2018, the Respondent legal practitioner was given 48 hours to file and serve by 10.00am on 7th February 2018, any further written submissions in reply. The matter was then set down for a hearing at 2.00pm on 7th February 2018 to allow the parties to address further any specific issue from their written submissions, noting that as I had read all the documentation filed to date, I did not expect to hear it all again in oral submissions. An Order was also made for the filing of the disclosure material solely for the purposes of the interlocutory applications upon which Counsel for the Applicant Chief Registrar was seeking leave to file as part of the documentation in the substantive application. That is, what the parties had now agreed were 53 pages (that is, 51 pages of documentation attached to a two page letter incorrectly dated 10th November 2016) from the Fiji Police to the Chief Registrar received on 13th November 2017, as well as the two witness statements (from staff of the firm of Jamnadas & Associates) that had been served upon the Respondent legal practitioner on 1st December 2017, namely that of Shammi Lata and Niumai Wati Seduadua. Similarly, an Order was also made for the filing and serving of two documents upon which the Respondent legal practitioner was seeking to rely for the purpose of her interlocutory cross-application (and which had not been annexed to her affidavits of 29th November and 11th December 2017), being an email dated 15th February 2017 from Gardiner Whiteside (of GH Whiteside) to the Respondent legal practitioner concerning the audited accounts of the firm of Jamnadas & Associates of 2006 and 2007 and a Deed of Release allegedly signed by the complainant on 25th November 2014. The parties were also put on notice that following the hearing on 7th February 2018, I would be seeking to finalise my ruling over part of the following days and weekend and that the previous hearing date of 14th February 2018, would now be used as the date for the handing down of my ruling in relation to the three applications.

[39] On 7th February 2018, Counsel for the Chief Registrar appeared with Ms. Prasad and Mr. Bale appeared with the Respondent legal practitioner. After Mr. Bale announced their appearances, the Respondent legal practitioner then spoke advising that she had been served late the previous afternoon with an application in a different matter returnable that morning in the High Court seeking to appeal a winding up order. The Respondent explained that the judge before whom the parties had appeared in the High Court had stood the matter down until 3.00pm that day. Instead of making an application for an adjournment before the Commission, the Respondent legal practitioner made an oral application seeking leave for her to be excused in appearing before the Commission on the hearing that was about to commence and, instead, she sought to be represented by Mr. Bale. As she stated for the record: *"There is no application for an adjournment, Mr. Bale has full instructions and he will continue."* Counsel for the Applicant Chief Registrar had no objection. The application was granted and the Respondent was excused.

[40] The hearing then commenced with Mr. Bale making a preliminary oral application that one of the Counsel appearing for the Applicant Chief Registrar, Mr. Chand, should withdraw (from appearing at this hearing of the interlocutory applications). Mr. Bale submitted that the oral application was being made on the basis that Mr. Chand was allegedly appearing as both counsel and a witness in the same case. Mr. Chand responded to the oral application and Mr. Bale replied. I indicated that I would rule upon that oral application as part of the one overall ruling that I would deliver in relation to three interlocutory applications, two objections and now two oral applications. Mr. Bale then spoke to the written submissions that had been filed earlier that morning (in relation to responding to the Chief Registrar's application seeking leave to amend Counts 3 and 7 and also leave to file further disclosures in relation to the substantive matter). Mr. Bale also addressed other matters. Mr. Chand responded. The details of those respective oral submissions, where relevant, I have included as part of this ruling.

[41] At the end of the hearing on 7th February 2018, counsel were advised that my ruling would be on to notice and, if possible, I would attempt to deliver it in the next few days or at the latest by 8.30am the following Wednesday, 14th February 2018 and, as such, they should still keep that time and date available. When the recent "Cyclone Gita" warning issued in relation to Fiji was being revised during the day on 13th February 2018, I decided, in consultation with my staff that the safest option for all involved in this matter (that is, both counsel and my staff) was to deliver my ruling last night, 13th February 2018, just in case the cyclone did "hit" Suva during late evening and into 14th February 2018. Fortunately, the "eye" of the cyclone passed overnight without coming directly to Suva. I did, however, proceed with listing the matter yesterday afternoon/evening where I read a draft of my ruling to Counsel for both parties. At the end of my delivery, I asked each Counsel whether they wished to raise any amendments of a factual nature before I provided them with a final typed and signed judgment. Each advised that they did not. We then discussed my draft Orders. These were finalised and appeared at the end of this ruling. Counsel were advised that due to the lateness of the hour (it was then after 7.00pm and a cyclone warning had been issued for later that evening), a finalised and signed copy of the ruling would be available to both Counsel the following day, that is, 14th February 2018. Therefore, I now set out below my finalised ruling in relation to each of the three formal applications, the two objections and the two oral applications.

4. The application that the hearing be vacated/part-heard; the cross-motion that the application for an adjournment be refused

(1) Affidavit, submissions and case law cited by Applicant seeking the adjournment

[42] In support of the order sought in the Applicant's Notice of Motion filed on 23rd November 2017 that the hearing be vacated or alternatively part-heard, the Applicant has filed an *'Affidavit in Support'* of Melvin Nitish Kumar, Acting Court Officer, Legal Practitioners Unit (LPU), (within the Office of the Chief Registrar), sworn on 22nd November 2017, wherein Mr Kumar has

set out at paragraphs [5]-[13] the reasons for seeking the adjournment. I think it is important that I set out those reasons in full as follows:

‘5. ***THAT*** *the two main witnesses, namely, Reema Yogeshrai Gokal and Pratima Yogesh Rai Gokal who reside in Mumbai, India are incapacitated from travelling to Fiji due to financial reasons.*

6. ***THAT*** *our Office was informed of their predicament by way of an email dated 31st October 2017. Annexed herewith and marked as* ***"MNK1"*** *is a copy of the email from Ms. Reema Gokal to Mr. Avneel Chand.*

7. ***THAT*** *on the 1st of November 2017, Ms. Gokal also emailed the Applicant reiterating the difficulties that she faced in travelling to Fiji to attend the trial. Annexed herewith and marked as* ***"MNK2"*** *is a copy of the email from Ms. Reema Gokal to the Applicant.*

8. ***THAT*** *I am informed that after receiving the said email, Mr. Avneel Chand (hereinafter referred to as "Mr. Chand") then on the 6th of November 2017 liaised with the Chief Registrar (Applicant) and sought his instructions on the said matter.*

9. ***THAT*** *thereafter, Mr. Chand liaised with the Ministry of Foreign Affairs and spoke with one Ms. Karalaini Belo seeking assistance in identifying the personnel to contact at the Fiji High Commission in India so as to liaise with the counterpart there requesting to accommodate video conferencing for our witnesses to give evidence via Skype.*

10. ***THAT*** *Mr. Chand was initially advised by Ms. Belo to liaise with Fiji's Second Secretary to India, Mrs. Azreen Khan based in New Delhi but was later informed to first write to the Permanent Secretary of Ministry of Foreign Affairs as a matter of protocol.*

11. ***THAT*** *the Applicant's office, on the 16th of November 2017, sent a letter dated 15th November 2017 to the Permanent Secretary of Ministry of Foreign Affairs. Annexed herewith and marked as* ***"MNK3"*** *is a copy of the letter from the Applicant to the Permanent Secretary of Foreign Affairs.*

12. ***THAT*** *to date there has not been any response received from the Ministry of Foreign Affairs to our letter dated 15th November 2017.*

13. ***THAT*** *I am informed that Mr. Chand followed up with the Ministry of Foreign Affairs on 22nd November 2017 and was informed by one Mr. Asaeli Tabulutu that the Permanent Secretary was away and that the letter was still with the Acting Permanent Secretary and for Mr. Chand to email him the letter dated 15th November 2017 in order for him to attempt to expedite the matter. Annexed herewith and marked as* ***"MNK4"*** *is a copy of the email from Mr. Chand to Mr. Tabulutu.*

14. ***THAT*** *given the difficulty faced by the two key witnesses in travelling to Fiji for the trial and the attempts made by the Legal Practitioners Unit for a Skype hearing which to date has not been accommodated, the Applicant prays for an order that the allocated hearing dates of 28th November 2017 to 1st December*

2017 in this matter be vacated to a date allocated in the Commission's next sitting or alternatively that this matter be part heard and adjourned part heard for Ms. Reema Yogeshrai Gokal and Pratima Yogesh Rai Gokal's evidence to be heard in the Commission's next sitting.'
[Non-bold underlining is my emphasis]

[43] In their joint submissions in support of the application that the hearing be vacated or alternatively part-heard, Counsel for the Chief Registrar (*'Written Submissions'*, 5th December 2017, paragraphs [10]-[13], page 3), have summarised the need for the adjournment as follows:

'10. On the 31st of October 2017, by way of an email the complainant informed of her predicament of not being able to travel to Fiji for the Trial.
11. Thereafter, the Counsel for the Applicant obtained instructions and was instructed by the Applicant to facilitate the taking of the evidence of the complainant and her mother by way of Skype.
12. Counsel for the Applicant made arrangements with Ministry of Foreign Affairs to accommodate video conferencing of the witnesses via Skype however, due to time constraints the Counsel for the Applicant was unable to facilitate the taking of the evidence by way of Skype as such the Notice of Motion and Affidavit in support was filed on the 23rd of November 2017.
*13. **The Applicant submits that good cause has been shown to seek an adjournment of the Trial to allow witnesses residing in India to travel to Fiji**.'*
[My emphasis]

[44] I will return to paragraph [13] of the above submissions when considering whether to grant the adjournment and also the cross-motion seeking an Order *'That the taking of evidence of the Complainant Reema Gokal and witness Pratima Gokal by Skype be refused'*.

[45] In terms of the law applicable in relation to adjournments, the joint submissions of Counsel for the Chief Registrar *('Written Submissions'*, 5th December 2017, paragraph [14], pages 3-5), have cited the judgment of Justice Pathik in the High Court of Fiji in ***State v Suliasi Sivaro*** (Unreported, High Court of Fiji, Criminal Appeal No. 0038 of 1996, 26 August 1996; PacLII: [1996] FJHC 140, <http://www.paclii.org/fj/cases/FJHC/1996/44.html>). In allowing an appeal by the State against the refusal by a magistrate to grant an

adjournment that was then followed by the acquittal of the accused, His Lordship stated (at page 3, paras [3] and [5]) as follows (which I have cited in part from the joint submissions):

> *'The granting of an adjournment is always the exercise of a judicial discretion. (ROBERT TWEEDLE MACAHILL and REGINAM, (Crim. App. 43/80 FCA) ...* ***For the learned Magistrate to say that it was a "final" hearing day and he will not budge from that means that he is fettering the exercise of the judicial discretion vested in him which he cannot do.*** *This approach of his is certainly going to cause injustice to the parties. Not only that,* ***this was a very serious offence*** *... I find* ***that if ever there was a case for the exercise of discretion it was this****. On this aspect I refer to the following passage from the judgment of ATKIN L.J. in MAXWELL v KEUN (1928) 1 K.B. 645 at 653 C.A.:*
>
> > *"...* ***if it appears that the result of the order made below is to defeat the rights of the parties altogether****, and to do that* ***which the Court of Appeal is satisfied would be an injustice*** *to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."*
>
> *As stated earlier the Court has to consider* ***whether in this case it was an appropriate, fitting and lawful exercise*** *of the learned Magistrate's discretion to acquit the accused.*
>
> *A similar situation arose in the Hong Kong Court of Appeal case of ATTORNEY-GENERAL v TUNG YING CHUEN (1987) 2 HKC 349 at 350 and I find the following passage from the judgment of KEMPSTER J.A. pertinent to this case:*
>
> > *"... We incline to the view that* ***not only must someone sitting in a judicial capacity give an opportunity for the explanation of failure by any party to have a case ready****, whether in relation to documents, the availability of witnesses or otherwise* ***but also, unless****, for example,* ***a party has shown a contemptuous disregard of his obligation to further the expeditious discharge of business****, for that party to put his house in order* ***within a reasonable time****.*
> >
> > *... After all,* ***the interests of the community have to be considered as well as those of the individual charged****. Really there is only one way in which the judge's discretion could properly have been exercised and that was* ***to grant a further short adjournment to allow for provision to be made for the material witness to be brought before the court*** *or for some explanation to be given for her absence."'*
> >
> > *[My emphasis in bold and underlined]*

[46] The joint written submissions of Counsel for the Chief Registrar of 5th December 2017 have also cited further from the Judgment of Justice Pathik as follows (page 4, paragraph [1]):

> '... *In R v BIRMINGHAM JUSTICES, ex.p LAM & ANOR (1983) 3 AER 23, 28 WOOLF J said:*
>
> > *"When exercising the discretion which they have whether or not to adjourn cases, the justices have to exercise their discretion judicially.* ***Doing that, they must be just not only to the defendants but to the prosecution as well.*** *They must not use their powers to refuse an adjournment to give a semblance of justification for their decision to dismiss the prosecution when the refusal of an adjournment means that that is an inevitable consequences."'*
> >
> > *[My emphasis in bold and underlined]*

(2) Objection to answers by Counsel for Chief Registrar 1st December 2017 being received into evidence

(i) Submissions

[47] At the appearance on 7th December 2017, Counsel for the Chief Registrar also raised for the first time, that the answers which he gave to me from the Bar Table to my questions of him on 1st December 2017, should also form part of the submissions stating:

> *"... our suggestion is that if the Commission could also, could also rely on whatever was the exchange of the, the discussion, between the Commission, between yourself and me on Tuesday [sic] when this application was, when our application, our initial application was [for the] initial adjournment ..."*

[48] The oral response of the Respondent legal practitioner on 7th December 2017 was to object and sought to address on that issue, when the matter was listed in the February 2018 Sittings, as she explained:

> *"I wondered whether you would like to hear from us further before the issue that Mr. Chand raises about what he submitted to you the other day? For me, it's contentious because it's the issue of the evidence from the bar table. It depends on what he is asking Your Lordship to consider. Which matter and which item that he was referring to? So, what I would suggest or I would think would be a prudent course is when Your Lordship is back, in your next session, if you wish to have some clarifications from us, we could address you on that, and then your Lordship could make a ruling ..."*

[49] The issue had already formed part of the Respondent legal practitioner's

second set of written submissions (*'Submissions'*, 5th December 2017, paragraphs [3.1]-[3.5], pages 5-6), wherein she submitted, in summary, as follows:

(1) Counsel for the Chief Registrar was giving evidence from the Bar Table on 1st December 2017 as to the need for an adjournment;

(2) By giving evidence from the Bar Table, this was contrary to what had been said in ***Chief Registrar v Vosarogo*** (Judgment on Sanctions) (Unreported, ILSC, Action No. 2016, 29 September 2017; PacLII: [2017] FJILSC 12, <http://www.paclii.org/fj/cases/FJILSC/2017/12.html>), where at paragraph [54] in that case, in relation to the submissions of Counsel for the Applicant, I had stated, *'... submissions from the Bar Table, however, are not evidence and there was no documentary evidence to which my attention was drawn by Counsel for the Applicant ...'.* Further, in relation to the submissions of Counsel for the Respondent also in *Vosarogo*, I again had stated, *'submissions from the Bar Table are not evidence. There has been no documentary evidence to which my attention was drawn by Counsel for the Respondent to support her submission ...';*

(3) *'At the call of this matter on 1st December, 2017 Mr Chand, Counsel for Chief Registrar told the Commission'*

> *'3.4 (a) That the Summons to the Complainant, Reema Gokal and witness Pratima Gokal was served via email in October 2017. There is no documentary evidence before the Commission that this did occur. Furthermore service via email is not a permitted form of service in the High Court without leave of the Court.*
>
> *(b) That the complainant, Reema Gokal and Pratima Gokal were notified of the trial date in June 2017, after the June sittings of the Commission. There is no documentary evidence before the Commission that this did occur.*
>
> *(c) That the complainant, Reema Gokal and Pratima Gokal were told to make travel arrangements and to bear all their expenses. There is no documentary evidence before the Commission that this did occur.*
>
> *(d) That Mr. Chand did meet with the complainant, Reema Gokal and Pratima Gokal when they were in Fiji. However he could not say when this occurred. There is no evidence of this before the Commission.*
>
> *(e) That the complainant, Reema Gokal and Pratima Gokal always responded to emails and noted the trial dates. There is no documentary evidence of this before the Commission.*

> (f) *Mr Chand obtained instruction of Chief Registrar to proceed via SKYPE. No evidence of these instructions.*
>
> *3.5 Given that these statements were evidence from the Bar Table, without any documentary evidence, the Commission cannot use or rely on such evidence of Mr. Avneel Chand led on 1st December, 2017'.*
>
> [Underling my emphasis]

(4) *'The Commission must rely on the evidence as contained in the affidavits of Kumar, Cagina, subject [to] these submissions and the affidavit of the Respondent.'*

[50] The joint submission of Counsel for the Chief Registrar in reply on this issue *('Written Submissions'*, 7th December 2017, paragraph [7], page 2), was:

> *'The Applicant submits that the Counsel for the Applicant was not giving evidence from the bar table. On the 1st of December 2017, the Learned Commissioner enquired about certain issues with the Counsel for Applicant as such these were not evidence given from the bar table but were response to the enquiries made by the Learned Commissioner.'*

(ii) Discussion

[51] In considering my ruling on this objection, I note as follows:

(1) Whilst the Commission is not bound by the rules of evidence, I did <u>not</u> indicate on 1st December 2017 that in my ruling (as whether to grant the application to vacate the hearing), I would be relying upon the answers given by Counsel for the Chief Registrar to my questions. In my view, the responses of Counsel for the Chief Registrar need to be put in context. Counsel for the Chief Registrar was simply responding to my questions so that I had a general background at the commencement of an interlocutory hearing that did not proceed. This was immediately followed by the matter being stood down whilst the Respondent legal practitioner examined the further disclosure material from the police, following which, consent orders were made providing a timetable for the filing of further documents and the hearing was then adjourned until 7th December 2017. Hence, I did not even begin to hear from the Respondent legal practitioner on the interlocutory applications including whether she disputed or wished to raise objections to the outline given by Counsel for the Chief Registrar to my questions;

(2) I note that the Respondent legal practitioner in her written submissions of 5th December 2017 and again at the appearance on 7th December 2017 indicated that she objected and wished to speak further to that objection at the hearing in the February 2018 Sittings;

(3) The reference to *Vosarogo* is somewhat out of context. *Vosarogo* was a final hearing (as opposed to an interlocutory application) on the sanctions to be imposed where a legal practitioner had pleaded guilty to negligently operating a trust account and submissions were being made by both counsel in relation to the operation of a trust account and who suffered because of it being negligently operated without any documentary evidence being tendered in support by either counsel. With that said and also noting that Courts (including rules of procedure) have traditionally allowed some flexibility in relation to interlocutory applications, however, evidence in support should usually be by way of affidavit filed with appropriate supporting documentation depending upon the urgency of the matter;

(4) Even though this is an interlocutory application where, on 1st December 2017, I took general notes of the responses made by Counsel for the Chief Registrar to my questions (which has now been helpfully summarised in the submissions of the Respondent legal practitioner dated 5th December 2017), for me to base my ruling on those responses is another matter entirely. In short, the objection is granted in part. That is, whilst I have noted that Counsel advised me on 1st December 2017 that there are "2 witnesses in India", the remainder of Counsel's responses to me from that appearance will not form part of my ruling in relation to the three applications. In even taking into account this response from Counsel as to the whereabouts of two of the witnesses, I note that such a response is also consistent with the contents of an email dated 31st October 2017 (sent from the complainant, Reema Gokal, to Mr Avneel Chand, one of the Counsel appearing for the Chief Registrar in this matter), that has been set out as annexure 'MNK1" to the affidavit of Melvin Nitish Kumar sworn on 22nd November 2017 and filed on 23rd November 2017. In that email, Ms Gookal makes clear *'my mum and I will not be coming to Fiji'* and that *'You [Mr Chand] can tell the court that we are penniless and unable to attend the case'*. The Respondent legal practitioner has not placed before me anything to suggest that there

was a change of travel plans after 31st October 2017 and, therefore, I accept that the two witnesses, Reema Gokal and her mother, Pratima Gokal, were in India during the November/December 2017 Sittings of the Commission, that is, 27th November to 7th December 2017.

(iii) ***1st Ruling*** **-** objection **granted in part**

[52] **My 1st Ruling is that the objection raised by the Respondent legal practitioner, that the answers given by Counsel for the Chief Registrar on 1st December 2017 not form part of the submissions of Counsel for the Chief Registrar, is granted in part. Apart from accepting that the complainant, Reema Gokal and her mother, Pratima Gokal, were in India at the time of the November/December 2017 Sittings of the Commission, I will not be basing my rulings as to whether to grant or refuse the various applications on the responses made by Counsel for the Chief Registrar to my preliminary questions on 1st December 2017.**

(3) Case law cited by Respondent legal practitioner in cross-motion seeking refusal of the adjournment

[53] The Respondent legal practitioner has cited the following cases in her written submissions dated 5th December 2017 in support of her cross-motion that the application for an adjournment be refused:

(1) ***Goldenwest Enterprises v Pautogo*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 0038 of 2005, 3 March 2008) (PacLII: [2008] FJCA 3, <http://www.paclii.org/fj/cases/FJCA/2008/3.html>);

(2) ***Gasparetto v Sault Ste-Marie*** [1973] 2 OR 847 (Div Ct);

(3) ***Piggot Constructions v United Brotherhood*** (1974) 39 DLR (3d) 311 (Sask.CA);

(4) ***State v Agape Fishing Enterpr*****ises** (2008) FJHC19; HAA 011.2008 (15 February 2008);

(5) ***Macahill v R*** [1980] FJCA 1; Crim. App. No 43 of 1980 (30 September 1980);

(6) ***Acting Chief Registrar v Singh*** [2009] FJILSC 1;

(7) ***Chief Registrar v Iqbal Khan*** [2010] FJILSC 6.

(4) General principles on adjournments – Goldenwest

[54] In relation to the discretion as to whether or not to grant an adjournment, I note the general principles to be applied as set out by the Court of Appeal in *Goldenwest* stated at paragraphs [37]-[39] as follows:

> *'37. **<u>Generally</u>, this is the principle covering courts' discretion to adjourn or not to adjourn.** If refusal to grant an adjournment amounts to a denial of a fair hearing and hence denial of natural justice or procedural fairness, or where a refusal to adjourn would cause definite and irreparable harm to the party seeking it, an adjournment should be granted ...*
> *38. An objecting party is compensated by costs – unless the adjournment would cause irreparable damage to it. Then a court must weigh up the competing interests and consequences ruling according to the fairness and justice of the particular case.*
> *39. There is, however, a requirement that there be no 'fault' on the part of the party seeking the adjournment ...'*

[55] Recently, Mr. Justice Mohamed Mackie in the High Court in ***General Machinery Hire Ltd v New India Assurance Co Ltd*** (Unreported, High Court of Fiji at Lautoka, Civil Action No. HBC 248 of 2014, 7 December 2017; PacLII: [2017] FJHC 929, <http://www.paclii.org/fj/cases/FJHC/2017/929.html>) at para [17] succinctly restated the test as follows:

> *'In view of the principles enunciated in **Goldenwest Enterprises Ltd** ... an application for adjournment of trial can be decided mainly on the following questions;*
>
> A. *Will refusal to grant an adjournment amount to the denial of a fair hearing and hence denial of natural justice or procedural fairness? Or where a refusal to adjourn would cause definite and irreparable harm to the party seeking it?*
> B. *Would it cause irreparable damage to the objecting party or could it be compensated by awarding cost?*
> C. *Is there any 'fault' on the part of the party seeking the adjournment?'*

[56] Whilst noting the above principles, as set out by the Court of Appeal in *Goldenwest,* to be applied in civil matters when a party is seeking an adjournment of a trial, **<u>I am of the view that I should also take into account that one of the parties is the regulator of a profession representing the public interest</u>**, as has been noted by the President of the Court of Appeal, for example, when considering an application for a stay

from a judgment of the Commission. (See, for example, ***Anand Kumar 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>; and ***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>)).

(5) Will refusal to grant an adjournment amount to the denial of a fair hearing or definite and irreparable harm to the party seeking it?

[57] Clearly, a refusal to vacate the hearing and grant an adjournment until at least the next Sittings of the Commission would cause '*definite and irreparable harm'* to the Chief Registrar representing the public interest that the complaint be heard. Amongst a number of allegations is a dispute as to the whereabouts of a sum totalling $254,000.

(6) Would it cause irreparable damage to the objecting party or could they be compensated by awarding costs?

[58] Arguably, the damage to the Respondent legal practitioner is that she had prepared for a hearing set down for four days. There is a cost to her taking time out of her legal practice. There is also the question of what costs have been incurred when the Respondent legal practitioner was representing herself assisted by Mr. Bale. Further, I have not been convinced that by granting an adjournment it would cause *'irreparable damage to the objecting party'*.

[59] I also note that section 124 of the *Legal Practitioners Act 2009,* limits any award that the Commission may order in relation to costs and expenses to those against a respondent legal practitioner. Section 124(2) clearly states: '***The Commission shall not make any order for payment of costs and expenses against the Registrar or the Attorney-General.'*** [My emphasis]

[60] I do have the power, however, to make costs orders against a practitioner even if I do not make an adverse finding against them as section 124 makes clear:

'124.—(1) After hearing any application for disciplinary proceedings under this Decree, ***the Commission may make such orders as to the payment of costs and expenses as it thinks fit against any legal practitioner*** *or partner or partners of a law firm.*
…
(3) Without limiting subsection (1) ***the Commissioner may,***
(a) without making any finding adverse to a legal practitioner *or law firm or any employee or agent of a legal practitioner or law firm, and*
(b) ***if the Commission considers that the application for disciplinary proceedings was justified and that it is just to do so,***
order that legal practitioner *or partner or partners of the law firm as the case may be to* ***pay to the Commission and the Registrar such sums as the Commission may think fit in respect of costs and expenses*** *of and incidental to the proceedings, including costs and expenses of any investigation carried out by the Registrar.'*
[My emphasis]

[61] **Thus, although I cannot compensate the Respondent legal practitioner by the awarding of wasted costs to her due to the adjournment sought by the Chief Registrar, I can exercise my discretion and make no order for costs against the Respondent legal practitioner in opposing the Applicant's motion for the vacating of the hearing and/or in relation to her cross-motion such that even if she is unsuccessful I can defer deciding this issue until the end of the substantive matter. Presumably, this is why one of the Orders sought by the Applicant is that 'costs be costs in the cause'.**

[62] In addition, in ***Chief Registrar v Vosarogo*** (Unreported, ILSC, Application No. 002 of 2016, 6 February 2017; PacLII: [2017] FJILSC 1, <http://www.paclii.org/fj/cases/FJILSC/2017/1.html>), I discussed as to when the Commission might entertain a "Mosely type Order" (see ***R v Mosely*** (1992) 28 NSWLR 735; (1992) 65 A Crim R 452). That is, as I noted in *Vosarogo* at para [118]: *'If I cannot award costs against the Applicant, should I be considering granting a stay until the costs of the Respondent legal practitioner (if any) … be met …'*

[63] The test for granting such a "Mosely type Order" was set out by Santow JA in ***R v Fisher*** (2003) 56 NSWLR 625; Austlii: [2003] NSWCCA 41):

'*The power of granting a stay ... until wasted costs are paid* ***is to be used only for the rare and extreme case of gross unfairness*** *...* ***That is to say, unfairness which, exceptionally, can override the public interest in pursuing a ... prosecution, though to be weighed against what is the urgency of bringing the case to trial.'***
[My emphasis]

[64] **Apart from having to be convinced by the Respondent legal practitioner that what she has experienced is a '*rare and extreme case of gross unfairness'***, I would first need (as I said in *Vosarogo* at paragraph [131]) a formal application from the Respondent legal practitioner setting out the legal costs and disbursements involved and for both parties to address me as to whether I have the powers to grant such an Order together with the appropriateness of doing so. At this time, I have not been so convinced, I have no such application before me and I am barred by section 124(2) of the *Legal Practitioners Act 2009* in making the usual Order for costs against the applicant that would usually be made in a civil case for costs thrown away due to the granting of an application for the vacation of a hearing.

[65] Further, there is the issue to whether a legal practitioner can claim professional legal costs for appearing on their own behalf. Whilst this was made permissible in ***London Scottish Benefit Society v Chorley*** (1884) 13 QBD 872, reaffirmed more recently by the English and Welsh Court of Appeal in ***Malkinson v Trim*** [2002] EWCA Civ 1273, I note, however, doubt has been cast upon that decision elsewhere. Although approved by the High Court of Australia in ***Guss v Veenhuizen (No 2)*** (1976) 136 CLR 47); AustLII: [1976] HCA 57, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1976/57.html>, doubt was later expressed by way of obiter dicta in ***Cachia v Hanes*** (1994) 179 CLR 403; (1994) 120 ALR 385; AustLII: [1994] HCA 14, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1994/14.html>. Recently, the New Zealand Court of Appeal in ***Joint Action Funding Ltd v Eichelbaum*** [2017] NZCA 249, 14 June 2017, <http://www.nzlii.org/nz/cases/NZCA/2017/249.html>, said at para [57], '*the lawyer-litigant exception should no longer apply in New Zealand*'. Further, in December 2017, the High Court of Australia granted an application for special leave to appeal on the same issue. (See

Coshott v Spencer & Ors [2017] HCATrans 263, 15 December 2017, Keiff CJ and Bell J; AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2017/263.html>.) I also note that the issue of costs in the present case might also be complicated by the fact that it has not just been the Respondent legal practitioner who has been appearing in this matter, but also that she has been assisted by Mr. Bale who also appeared as Counsel at the hearing on 7th February 2018.

[66] Finally, on the costs issue, if the Respondent legal practitioner is making allegations as to the way that the Applicant Chief Registrar has brought these proceedings (which she has done in her affidavit sworn on 29th November 2017 at paras [44]-[48], going so far as to suggest at para [44] that *'in fact the way that the prosecution is being conducted is malicious'*), she always has the option of initiating separate proceedings elsewhere.

(7) Is there any 'fault' on the part of the party seeking the adjournment?

(i) What was the cause of the earlier adjournments?

[67] I am reminded of what occurred in *Goldenwest,* where (as the Court of Appeal summarised at paragraph [4]-[5]) *'On the first day of the trial, Counsel for Goldenwest sought an adjournment due to the absence in the US of two shareholders and directors',* the adjournment was refused, the trial proceeded and *'the Court made an order for the winding up of Goldenwest'.* As the Court of Appeal noted (at paragraph [1]), 'the core issue' in the appeal was *'the exercise of judicial discretion in refusing an adjournment'.* The Court then highlighted at paragraph [42]:

> *'... Goldenwest's position is that there is nothing in the record to support the proposition that it was at fault in any of the delays or what may be perceived to be delays in bringing the matter to trial: there is nothing on the record to show that it was "at fault" in earlier adjournments ...'.*

[68] **In the present case, according to the Affidavit of the Respondent legal practitioner sworn on 29th November 2017 (para [5], sub-para (1)), the substantive application (containing eight counts) was listed on 15th October 2015 *'for Hearing'*. <u>Such a statement is incorrect</u>.**

[69] An excerpt from the front page of the application filed with the Commission on 30th September 2015 in relation to the initial listing on 15th October 2015, states: *'This application is listed for mention/~~hearing~~ before the Commissioner'.* **Clearly, the application was listed <u>for mention</u> and not for a final hearing <u>with a line having been put through the word "hearing"</u>.** Also, the Respondent legal practitioner is an experienced legal practitioner. Presumably, she would have been aware (after having been served) that the first return date of an application whether in a tribunal or a court, is to make sure that the Respondent has been served, whether they are ready to enter pleas (and if not, why not), or if they are seeking an adjournment, the reasons as to why that should be granted. Further, even if the Respondent legal practitioner had entered pleas of guilty on the first return date to each of the eight counts, a timetable would have been made for the filing of submissions on penalty. As it turned out, the first return date of the application was amended from 15th until 22nd October 2015.

[70] On 22nd October 2015, the parties first appeared before the previous Commissioner, Justice P.K. Madigan. Soon after the announcement of appearances, the recording continues as follows:

> *"Commissioner: Ms Lal, the Chief Registrar has filed 8 counts against you for professional misconduct.*
> *Ms Lal: Yes, My Lord, I have been served with the application.*
>
> *Commissioner: You have read the charges?*
> *Ms Lal: Yes, My Lord.*
>
> *Commissioner: You understand it?*
> *Ms Lal: Yes, I do.*
>
> *Commissioner: What do you say about it?*
> *Ms Lal: I, at this stage My Lord, I have written to the Chief Registrar as of this morning and have asked him for further and better particulars. I've asked for some 13 pages or 14 pages of further and better particulars."*

[71] **The Respondent legal practitioner then made clear that *"I would like those particulars and then respond to these charges my lord."*** The matter was put over until 16th November 2015 for mention.

[72] On 16th November 2015, soon after the matter was called, an exchange began between the Respondent legal practitioner and the Commissioner as follows:

> *"Ms Lal:* *My Lord, this matter was adjourned as I had made a … on the Chief Registrar's office on the 22nd of …*
>
> *Commissioner:* *Yes.*
>
> *Ms Lal:* *I've requested about 30 odd pages of disclosures from the Chief Registrar's Office. I've received a letter dated the 9th of November which basically says we not giving you any of the disclosures or information that I have requested.*
>
> ***Commissioner:*** ***What's your next step there Ms Lal?*** *[My emphasis]*
>
> *Ms Lal:* *Well, first of all My Lord, I would like to understand why the Chief Registrar's office does not wish to give me any of the information that I have requested ..."*

[73] The Respondent legal practitioner then went into detail as to what had been requested and how she felt that she was given an inadequate response from the Chief Registrar's office. **<u>The Commissioner, then attempted to clarify as to whether or not the Respondent legal practitioner as a trustee was particularly relevant:</u>**

> *"Commissioner:* ***Just taking the first charge Ms Lal****, it was [a] complaint that the Vendor of some land failed to get the money, the sales money. …* ***what documents would you need for that? All they need is Ms Gokal [the complainant] to come along and said my land was sold for this much and I haven't got this much?***
>
> *Ms Lal:* *Yes, My Lord, <u>the statement from Ms Gokal do not say that</u> and <u>in relation to</u>* ***<u>the other charges they allege</u>*** *<u>that</u>* ***<u>as a trustee</u> I carried out certain activities****. I want the documents to show (1) I was a trustee and (2) I carried out those activities.*
>
> *Commissioner:* *You say you were not a trustee?*
>
> *Ms Lal:* *I was not.*
>
> *Commissioner:* *You were not a trustee?*
>
> *Ms Lal:* *No, I was not.*
>
> *…*
>
> *Commissioner:* *Well … I'm rather concerned that the first charge you say that Ms Reema Gokal does not say that she didn't get all the money?*
>
> *Mr. Chand:* *My lord, that is* ***<u>the basis of bringing these charges, she not receiving the monies</u>*** *and that is the whole point of us bringing these charges before the Commissioner and* ***we have said it in our letter that we will be bringing***

	them on witness stand and she could have the right to cross-examine.
Ms Lal:	*Yes, but **there isn't a sufficient statement from Ms Gokal. You haven't attached my responses** in relation to Ms Gokal. You haven't addressed the police issues that are before the police. You haven't addressed the fact that Ms Gokal has been charged with impersonating police officers. These issues are relevant to this matter.*
Mr. Chand:	***My Lord, our position is that those matters are not relevant to this matter**. **<u>The facts that are relevant to this matter is that the client was never paid the monies that she was entitled to</u>** ... What she did impersonation of whatever she did to ... apart from this transaction is not relevant because we're not charging Ms Reema Gokal before the Commission. If that is the case the Respondent has every right to take the matter before the police and the Criminal Court and have her charged."*

[74] **In my view, it is clear, that even at this early stage, the parties were at cross-purposes.** The Respondent legal practitioner wanted, not only to have answers to her voluminous request for particulars, but also for copies of all her responses included in the documentation before the Commission together with various issues going to the credibility of the complainant. The view of Counsel for the Chief Registrar was that such matters, if relevant, were, arguably for cross-examination at a final hearing.

[75] **If the Respondent legal practitioner, disagreed with the position taken by Counsel for the Chief Registrar, then the next step for the Respondent legal practitioner was to bring an application seeking further and better particulars and/or for the matter to be struck out.** Indeed, Justice Madigan had, in my view, highlighted such an option, when asking of the Respondent legal practitioner, "***What's your next step there Ms Lal?"*** <u>In fact, perhaps, even at this early stage, whether the trusteeship issue had become already somewhat of a "red herring" so to speak and that the crucial issue was the evidence and credibility of the complainant</u>, was highlighted in the following exchanges between the Commissioner (Justice Madigan), the Respondent legal practitioner and Counsel for the Chief Registrar on 16th November 2015:

"Commissioner:	*Well you can argue all day on this Ms Lal and Mr. Chand but I am going to adjourn the argument until the 27th of January 2016 before the new Commissioner. Maybe you can make some progress through correspondence between now and the 27th of January.*
Ms Lal:	*My Lord, the Chief Registrar's office does not respond. They do not communicate with us and when we try and make appointments they try ...*
Commissioner:	***It seems to me that this case could be run on the evidence of Ms Gokal [the complainant] whoever she is.***
Ms Lal:	***Yes, yes, absolutely.***
Commissioner:	*And **the fact that it is before the police, Mr. Chand is correct, is [of] no relevance,** as you [are]being charged on your professional misconduct not on your criminal liability if there be any criminal liability Ms Lal.*
Ms Lal:	*No, there is no criminal liability.*
Commissioner:	*It is just **your** professional activity.*
Ms Lal:	*Yes, I understand what you saying My Lord, but what I am saying, is the information in the criminal matter is relevant.*
Commissioner:	*Maybe ...*
Ms Lal:	*As for trying to sort this matter with the Chief Registrar's Office, My Lord, the Chief Registrar does not communicate with us, does not speak to us.*
Commissioner:	*I will ... Mr. Chand, Ms Lal said she wasn't a trustee ... you must have some documentation to prove that you have to prove that at the hearing.*
Mr. Chand:	*Yes, yes.*
Commissioner:	***She was a trustee cause that is an element of all your facts.***
Mr. Chand:	***Yes, yes.***
Commissioner:	*... I won't get further involved on that is for the new Commissioner to decide what to do and I hope you're going to resolve something before that the 27th of January 2016. I note in here he will advise you of any other dates that he would rather he or she on any other date he or she would call. Good luck in the meantime Ms Lal.*
Ms Lal:	*Thank you, My Lord."*

[76] What is interesting from the above exchange is that:

(1) Justice Madigan as **the Commissioner stated, and the Respondent legal practitioner agreed, that much of the case '*could be run on the evidence of Ms Gokal [the complainant]'*;**

(2) Justice Madigan made the point, the fact that there may be a matter

before the police involving the complainant, '***is no relevance***' **to the Respondent legal practitioner being charged with professional misconduct**;

(3) Justice Madigan said to Counsel for the Chief Registrar that **the Respondent legal practitioner** was a trustee '***is an element of all your facts***' and Counsel for the Chief Registrar agreed. From what I can discern from my reading of the transcript, **this was a global statement made by** Justice Madigan **without him going into the specific details of each count.** As to why this was agreed to by Counsel for the Chief Registrar, or at least not clarified by him, I do not know. It might have been a "slip of the tongue". That, however, is purely speculative. **It might, however, provide a reason as to why the trusteeship issue became such a major focus of the Respondent legal practitioner throughout 2016 and much of 2017** as she sought initially to have Counsel for the Chief Registrar produce documents to show that she was a trustee and, when this was not forthcoming, (particularly after the filing of the statement on 23rd March 2016 from Mr Jamnadas stating that she was a trustee), she then sought such documents from elsewhere. Presumably, the Respondent legal practitioner had formed the view that once it was shown that she was not a trustee the entire matter would be withdrawn or, if not, an application would be made by her to have the proceedings struck out on the basis that she was not a trustee.

[77] According to the Respondent legal practitioner (para [6] of her affidavit sworn on 29th November 2017):

> '***The matter has been listed and called approximately 20 times*** *since the filing of the initial charges. The primary reason for the adjournment is that I have been seeking particulars from the Chief Registrar in order to understand the charges laid sufficiently to be able to mount a proper defence.'*
> [My emphasis]

[78] The Respondent legal practitioner has further stated (at paras [9]-[10] and [16]):

> *'9. All the adjournments to date have been the direct result of the Chief Registrar not investigating the complaint …*
> *10. The bulk of the adjournments has been to receive information that I have been procuring or forcing to be obtained. And* ***no adjournment has been caused by me*** *…*

....
16. *Without a file and records, I cannot mount a defence. Hence my request for particulars.'*
[My emphasis]

(ii) Chronology

[79] So there is transparency as to what has occurred in this matter, I have had my staff prepare a chronology from the Commission's file and then checked that against the relevant transcripts which they have typed from the audio recordings made from the first appearance on 22nd October 2015 until the application to vacate that was made returnable on 27th November 2017 (apart from 6th June 2016 where there is no recording available). The chronology is as follows:

Date	Particulars
October 2015 Sittings	
22.10.2015	New application filed on 30.09.2015 and *application is **listed for mention*** on 15.10.2015 at 8.15am. Later amended to 22.10.15. - Matter called. - **Respondent legal practitioner requested answers to further and better particulars**. - Matter adjourned to 16.11.2015.
November 2015 Sittings	
16.11.2015	- Matter called. - **Respondent legal practitioner requested answers to further and better particulars**. - Matter adjourned to 27.01.2016 before new Commissioner. (Later amended to 10.02.2016).
Feb.2016 Sittings	
10.02.2016	- Matter called. - **Both sides not ready to proceed.** - 28 days granted to the Applicant to serve statement from principal of firm to the Respondent legal practitioner by 09.03.2016 - Matter adjourned to 24.03.2016 for mention.
March 2016 Sittings	
24.03.2016	- Matter called. - **Counsel for the Applicant suggested that the Respondent legal practitioner might need time to read through the Statement as it was only served on the Respondent legal practitioner a day before the mention date.** - Parties were directed to meet and resolve some of the issues in relation to documents. - Matter adjourned to 21.04.2016 for mention
April 2016 Sittings	
21.04.2016	- Matter called

	- **Both sides agreed for need to try and retrieve documents from 3rd parties.** - Matter adjourned to 06.06.2016 for mention **at the request of both Counsel**
June 2016 Sittings	
06.06.2016	- Matter called - Matter adjourned to 22.09.2016 for mention
Sept.2016 Sittings	
22.09.2016	- Matter called. - **9 documents served by Respondent on LPU on 20.09.2016 relating to trusteeship**. - Matter adjourned to 07.12.2016 **at the request of the Applicant (to allow LPU time to verify documents)** and for mention to fix a hearing date
Dec.2016 Sittings	
07.12.2016	- Matter called. - It was ordered that: - **The Respondent legal practitioner to file and serve letter from Auditor** by 21.12.2016 - **The parties are to meet and discuss the 8 counts** – such discussion to take place before the next mention on 06.02.2017 - Matter adjourned for mention on 06.02.2017
Feb.2017 Sittings	
06.02.2017	- Matter called and debated. - **Respondent legal practitioner had still not obtained letter from Auditor.** - Matter adjourned for mention until 8.30am on 15.02.2017 **at the request of the Respondent legal practitioner**
15.02.2017	- Matter called. - Matter adjourned for mention until 16.02.2017 at 10.30am **at the request of the Respondent legal practitioner.**
16.02.2017	- Matter called. - Matter adjourned until 11.04.2017 at 8.30am for mention **at the request of the Applicant.**
April 2017 Sittings	
11.04.2017	- Matter called and debated. - The following orders were made: • ANZ Bank deliver to the office of the Chief Registrar all documents appointing the trustees of the account number 1549539 styled as Jamnadas & Associates Trust Account for 2006 and 2007 period within 14 days of this order • ANZ Bank confirm to the office of the Chief Registrar the names of the trustees of the account numbered 1549539 styled as Jamnadas & Associates Trust Account for the years 2006 and 2007 within 14 days of this Order - Matter adjourned for mention until 05.06.2017 at 8.30am
June 2017 Sittings	
05.06.2017	- Matter called 8.30am – ANZ Bank not in attendance.

	- Applicant advised had **called ANZ Bank there was no answer**, the person served is not at work. - Matter stood down until 2.30pm **at the request of the Applicant.** - 2.30pm – Mr Rokotuivaqali appeared for ANZ Bank; was instructed to liaise with the legal officer of the bank and provide documentation relating to the Consent Order dated 11.04.2017; matter stood down until 5.00pm. - 5.00pm – Mr Ronal Singh of Munro Leys appeared for ANZ Bank; returnable on 08.06.2017 at 8.30am for ANZ Bank to provide documents.
08.06.2017	- Matter called. - Matter adjourned for mention at 8.30am on 14.06.2017 **as Applicant needs time to consult the Chief Registrar and the Complainant on the documents served i.e. Deed and Affidavit of Brent Turner of ANZ Bank**
14.06.2017	- Matter called - The following orders were made: • Matter adjourned for mention at 8.45am on Monday, 18.09.2017 • **The Respondent is to file and serve an application for particulars by 12 noon on 27.06.2017** • **Application to be set down for hearing at 8.30am on Tuesday, 26.09.2017** • The hearing of the substantive application set down from Tuesday, 28.11.2017.
Sept.2017 Sittings	
18.09.2017	- Matter called - **Respondent legal practitioner advised had not filed application for particulars. Instead, ready to proceed with the hearing.** - Hearing of substantive matter confirmed for 28.11.2017 with time allocation of 4 days
Nov/Dec.2017 Sittings	
27.11.2017	Application to vacate hearing on 28.11.2017

[80] A review of the above reveals that the matter was called twice before the previous Commissioner, Justice Madigan and <u>has then been called in 10 separate Sittings before me over the period February 2016 until November 2017</u>. In two of those Sittings, it was called on three separate days, in both the February and June 2017 Sittings. In the June 2017 Sittings, it was stood down three times on the first day, 5th June 2017, as the Commission waited for an appearance from the ANZ Bank which occurred late that afternoon.

[81] In relation to the appearances that came before me between 10th February 2016 and 18th September 2017 (prior to the application to vacate listed on

27th November 2017), I note that the Respondent legal practitioner requested many of the adjournments (with the consent of, or not opposed by, Counsel for the Chief Registrar) on the basis that the Respondent legal practitioner was seeking to prove to the Chief Registrar that she was not a trustee of the trust account of the legal firm Jamnadas & Associates (by obtaining a document from the auditor and later a document from the ANZ Bank) and by proving that she was not a trustee, therefore the entire matter was misconceived.

[82] At the same time, **Counsel for the Chief Registrar continued, in my view, to make clear** that, <u>even if the Respondent legal practitioner was able to show that she was not a trustee</u> of the trust account of the legal firm Jamnadas & Associates, <u>it was not the end of the entire matter</u>, as the following exchange with me on 7th December 2016 makes clear:

"Commissioner: ... Mr. Chand, if you get the letter from GH Whiteside who were the auditors, put aside what the principal says, the auditor says that this person was never a trustee ever, then where does that take your case?

Mr. Chand: We will then verify that with the other witness that we're relying on, the former employer, and then reconsider the charges.

Commissioner: ... You know it's quite clear if the auditor says that this person was never a trustee ever - and why would the auditor ever lie - then there's a big question here about where this is going, isn't it?

*Mr. Chand: No, **<u>but not all charges are on the issue of trustee</u>** so ...*

Commissioner: No, I understand, but some of these matters ...

Mr. Chand: That's when we reconsider the charges Sir"

[83] **The issue of the Respondent legal practitioner seeking documentary verification that she was not a trustee continued into 2017**. The first mention on 6th February 2017 (at the beginning of the February 2017 Sittings of the Commission) concerned the Respondent legal practitioner still not having obtained a document from the auditor to support her stance that she was not a trustee of the trust account of the legal firm Jamnadas & Associates. **The Respondent legal practitioner also raised (for what I understand to have been the first time in the proceedings before the Commission), that *"I've got a discharge from Ms Gokal [the complainant] that she has received all the moneys".***

[84] **As to why it took a year and three months for this to be mentioned before the Commission I do not know. In particular, it appears contrary to what the Respondent legal practitioner submitted to me (as I understood her submission) when this matter was first called before me on 10th February 2016. At that time, the Respondent legal practitioner stated that, apart from having documentation in relation to the complainant withdrawing the complaint made in 2011, the Respondent legal practitioner had no documentation in relation to this matter:**

> "*My Lord, what I have done is I have requested a 14 pages of particulars. Now, if I may My Lord, the reason is,* ***this matter emanates from my previous employment which I have no documents, no files, no records, whatsoever*** *… this complaint first arose in 2011 to which I responded and the complainant withdrew her complaint and I have the documentation in relation to that. I asked for particulars, My Lord, because the charges are not specific, there are not enough information in relation to it. My Lord, with respect, I wrote a 14 page letter to which I received a one page reply from the Chief Registrar which basically says that the charges are appropriate sufficient particularized and he says that he will produce the information evidence at trial. Now, My Lord, if that's the case, what happen is I cannot prepare adequately. I'm trying to instruct counsel on this matter, that the charges are extremely serious,* ***I do not have a single document in relation to this matter*** *and the Commission must have the information that I am requesting. Now, if my friend's position remains that they do not have to supply anything else to me then, of course, I am lead to the option to make a formal application to your Sir for determination on that particular issue. Umm that's my first point that I wanted to raise as housekeeping matters this morning My Lord.*"
> [My emphasis]

[85] **Apart from what documentation Respondent legal practitioner did or did not have in her possession, as to why she had not instead brought an application either for further and better particulars to be provided and/or that documents be produced, or for the matter to be struck out (on the basis that the complainant had signed a Deed of Release and that the legal practitioner was not responsible for the Trust Account), again I do not know. Alternatively, rather than press to have the matter set down for a final hearing (and object as to the delay), the Respondent legal practitioner initially requested adjournments whilst seeking further and better particulars, followed by either on her own request,**

or in conjunction with the Applicant, agreeing to numerous adjournments whilst seeking documents from the auditor and ANZ Bank. A reading of the above chronology reveals the Respondent legal practitioner's contribution to the delay. Further, there has never been any action taken by her to alert the Chief Registrar as to her objections to an unreasonable delay in the hearing of this matter until she filed her cross-motion and affidavit in support on 29th November 2017.

[86] Instead, it was my frustration at the delay that I made clear to the Respondent legal practitioner as the following excerpt, from the transcript of the appearance before me on 6th February 2017, reveals:

"Commissioner:	*... Part of the charges here about questions whether she [the Respondent legal practitioner] failed to disburse the moneys to her [the client]?*
Ms Lal:	*But that's not my responsibility Sir.*
Commissioner:	*Right, let's have a look at the various things from here. And you're saying that she [the complainant] signed [a release] plus if the auditors says that you have nothing to do with the trust account, you're not the trustee of the trust account, then none of these counts should stand, is that what you're saying to me?*
Ms Lal:	*That is what I'm saying and that is what the auditor will confirm, he confirmed this to me by telephone on Friday.*
Commissioner:	*Is, I'm just thinking aloud here because **it's getting to the stage ... where you're … making an interlocutory application or what are we actually going to do?***
Ms Lal:	*What I'm gonna to do Sir is, if you going to mention it in the next two weeks, I'm going to make sure that I provide the audited reports and the letters to Mr. Chand and the Chief Registrar to give them time to consider. **In the event that Mr. Chand and the Chief Registrar do not accede to reducing or withdrawing the charges, I will then make an interlocutory application.**"*

The appearance on 6th February 2017 later concluded:

"Commissioner:	*Okay. The order is the matter is adjourned for mention at 8.30am next Wednesday week 15th February 2017. **I think you understand Ms Lal, I do want to get this sorted out** because ...*
Ms Lal:	*So do I.*
Commissioner:	*If we still haven't got things from you, **I am going to make certain orders or you're going to have to put in an application or we're setting the matter down for hearing in the April sittings**. You can't get the material,*

we're just going to have it to set it down for hearing. I think I've been quite generous with the time.

Ms Lal: *Yes.*

Commissioner: ***But I think this has come to an end right?***
Ms Lal: *I agree My Lord.*

Commissioner: *Okay.*
Ms Lal: *I want this matter brought to an end as well.*

Commissioner: *Okay, you're excused."*

[87] On 15th February 2017, the Respondent legal practitioner appeared and advised that she had still not received a letter from the auditor confirming that she was not a trustee of the trust account of the legal firm Jamnadas & Associates. The matter was then adjourned until the following day.

[88] On 16th February 2017, the Respondent legal practitioner appeared and advised that she had provided to Counsel for the Chief Registrar a copy of an email from the auditor of the trust account of the legal firm of Jamnadas & Associates confirming that she was not a trustee of that firm's trust account. In addition, she also alleged that she had a "Deed of Discharge" that had been signed by the complainant. In her view, that should have been the end of the entire eight counts before the Commission or at least an amending of the counts. Counsel for the Chief Registrar, however, was not so sure as the following excerpt reveals:

"Ms Lal: *And we would like to allow the CR for sometime to go through that issue that is the first issue. In relation to the second issue, I have an additional document which is currently in storage and I will provide the original of that for sighting by my friend, that is the Deed of Discharge which I have My Lord.*

Commissioner: *That was what signed by a client or something?*
Ms Lal: *That was signed by the complainant.*

Commissioner: *... well ... there's a number of different counts here.*
Ms Lal: ***Yes, but these two documents***

Commissioner: *Yes?*
Ms Lal: ***Deal with all the counts**.*

Commissioner: *Right.*
Ms Lal: *And the CR and myself and Mr. Chand*

Commissioner: *This is Reema Gokal?*

Ms Lal:	*Correct.* ***So if Mr. Chand, myself and CR be given time to discuss all those information with the view of either amending the charges*** *...*
Commissioner:	*Right, so what have you got to say there Mr. Chand?*
Mr. Chand:	*... Sir I do confirm that we did have a discussion before coming in here today to this Commission's Sitting. And <u>I also confirm that we are in receipt of the email between the auditor and the Respondent and that email, I may read,</u> says that 'we refer to your email below', this is the email from the auditor to the Respondent, 'As requested we advise that you did not sign the trustee's report for 2006 and 2007 that is normally prepared by the firm each year as part of its reporting requirements under the Trust Account Act 1996. Many Thanks.'* ***It doesn't say… it doesn't confirm the issue that she was not a trustee, <u>what it says that she does not sign the audit report</u>****."* [My emphasis]

[89] In relation to the Deed of Release, Counsel for the Chief Registrar was again, in my view, conciliatory, noting:

> *"Ms Lal has indicated that it is in her archives, she needs time to locate that. So if she is able to provide that, that will also assist us in considering of the charges."*

[90] Counsel for the Chief Registrar, however, also made clear that in relation to the alleged signing of a Deed of Release *"at the moment she [the complainant] is saying something else"*.

[91] I also made clear that as we had two different views, that of the complainant and of the Respondent legal practitioner on the Deed of Release issue (as well as that of the principal of the firm and the Respondent legal practitioner on the trusteeship issue), the documents would be either accepted by the Chief Registrar or the matter would have to be set down for a hearing at the next mention in the April 2017 Sittings, to which the Respondent legal practitioner agreed as follows:

"Commissioner:	*'Cause I would have thought, both of you, it's never going to resolve some of these issues or not. If it's resolved, and they have accepted or she [the complainant] said, 'I don't accept this' and they have to look for a date for hearing. We will agree that is where we are going, aren't we?*
Ms Lal:	*Yes, that is where we going My Lord.*
Commissioner:	*Okay."*

[92] When the matter was called for mention on 11th April 2017, a copy of the alleged Deed of Release had not been provided by the Respondent legal practitioner as Counsel for the Chief Registrar explained: *"My learned friend has a predicament that we might ... we might show it or give it to the complainant and I had assured them that we are not going to do that ..."*

[93] The Respondent legal practitioner then advised that, after an undertaking had been provided by the Chief Registrar, she would now be handing over the Deed to the Chief Registrar that, she claimed, would "deal with a number of those charges". She also raised the ongoing trusteeship saga. Again, I explained that this could not continue and needed to be dealt with at a final hearing as the following excerpt from the transcript of 11th April 2017 reveals:

"Ms Lal:	*My Lord, ... in relation to the charges these issues are documentary issues, it's about trusteeship and the second part is in relation to the deed. I have a copy of the deed and we indicated to the Chief Registrar yesterday that we could hand over the deed and the Chief Registrar has indicated to us that it will not be put on the blogs or release to third parties. So we are happy to release that deed with an undertaking.* ***That deed deals with a number of those charges****. The principal.*
Commissioner:	*So you're saying it may will he will have to then consider some of these counts?*
Ms Lal:	*Yes, My Lord, yes and we have discussed that with the Chief Registrar.* ***Now the second issue my lord is that the trusteeship.***
Commissioner:	*Yeah.*
Ms Lal:	*That has been the difficult issue here. Now I am required to mount a defence. In order to mount a defence my lord, I require certain information ... The Chief Registrar must provide me with the documents to show that I am the trustee or not. The Chief Registrar has unable to do so because my former employer has said he doesn't have the document, the auditor has not wanted to release the documents. My Lord the reason I am going back for that is the principle issue is that I am a trustee. Now that has to be proven in the document.*
Commissioner:	***Sure, but if he can't prove his case, then I will dismiss it.***
Ms Lal:	*Yes, My Lord, I understand that.*
Commissioner:	***But if you understand what I'm saying****?*
Ms Lal:	*Yes, of course.*

Commissioner:	***This cannot go on.***
Ms Lal:	*No.*
Commissioner:	***This has been going on since the September 2015.***
Ms Lal:	*Yes, My Lord, I understand. So what the Chief Registrar had discussed with our office was that if we could assist him in certain bits of material he would then reconsider those charges in relation to the trusteeship*
.	
Commissioner:	*You heard and that's why ...*
Ms Lal:	*And we're working towards that My Lord and <u>we're pretty close in terms of giving him what he requires</u>.* ***Now… there is an independent third party who does have it, the bank****. Now Mr. Chand and I had discussed that and if we could get some orders to get those documents from the bank that would assist us and Mr. Chand and the Registrar can then consider that issue of the trusteeship. They don't have any document, it is on someone's word at the moment."*

[94] At the request of the parties, I then made an Order for the ANZ Bank to provide information and documents relating to the trust account of the legal firm Jamnadas & Associates for the period 2006-2007. This resulted in three appearances in a single day on 5th June 2017 due to a failure by the Bank to initially answer a subpoena and the matter having to be stood down until a legal representative for the bank appeared before the Commission and was issued with a warning. Three days later, on 8th June 2017, the ANZ Bank provided an affidavit sworn by Brent Turner, Chief Risk Officer of the ANZ Banking Group based in Suva, who, after apologising for the delay in responding to the above Order, stated that:

(1) *'any documentation relating to the period 2006 and 2007 will have been destroyed and is no longer held by the bank'*;

(2) *'ANZ holds a trust account in the name of Jamnadas & Associates ... opened in 1997 ... and* ***<u>the sole signatory</u>*** *... was* ***<u>Mr. Dilip Jamnadas</u>****'*;

(3) *'to the best of my knowledge information and belief t****<u>here was only one signatory</u>*** *to the trust account in 2006 and 2007 and that was* ***<u>Mr. Dilip Jamnadas</u>****'*.

[95] In the meantime, on 2nd June 2017, (just prior to the commencement of the June 2017 Sittings), the Respondent legal practitioner <u>finally</u> provided to Counsel for the Chief Registrar a copy of the Deed of Release allegedly signed by the complainant. Counsel for the Chief Registrar indicated on 8th

June 2017, following the appearance by the ANZ Bank, that he needed time to consult with the Chief Registrar in relation to the affidavit from the ANZ Bank, the Deed of Release and speaking with the complainant who was in India. The parties were advised that I was only allowing an adjournment until 14th June 2017.

[96] **On 14th June 2017, Counsel for the Chief Registrar appeared and advised that *"my instructions are that we proceed with the charges as they are"*, that is, the eight counts. Accordingly, I set the matter set down for hearing for four days in the November/December 2017 Sittings of the Commission. <u>Orders were also made for the Respondent legal practitioner to file a Summons seeking further and better particulars and a hearing date allocated for that application to be heard on 28th September 2017</u> (during the September 2017 Sittings) prior to the final hearing set down for the November/December 2017 Sittings.**

[97] **No application seeking further and better particulars, however, was filed by the Respondent legal practitioner in accordance with the timetable made on 14th June 2017**. Despite an extension being granted, as requested by Mr. Bale, (subject to the provision of a medical certificate) neither the Respondent legal practitioner nor Mr. Bale complied with that extension. Indeed, as noted above, apart from Mr. Bale attending the Commission on 11th July 2017, wherein he indicated to the Secretary that as he was unsure which document he was to file, he would seek instructions, the Commission did not hear further from the Respondent legal practitioner or Mr. Bale. Therefore, a further 69 days passed between Mr. Bale's advising on 11th July 2017 that he would return to file a document (and never did) and the next appearance before the Commission on 18th September 2017.

[98] When the matter was listed in the Call Over list on 18th September 2017, to check whether it was ready to proceed on 26th September 2017, the Respondent legal practitioner made clear (without explanation) that she was not pursuing an application of seeking further and better particulars as the

following transcript (typed by my staff) from the recording of the appearance on that date makes clear:

"Ms. Lal:	*My Lord* ***on the last occasion I had asked to file an application for particulars. I have not done so****. We are ready to proceed with the hearing which is allocated on the 28th of November*
Commissioner:	*Just so I am clear, we are not doing particulars?*
Ms. Lal:	*No.*
Commissioner:	*So, you are ready for the hearing in December?*
Ms. Lal:	*We wrote to Mr. Chand and he had responded to us…*
Commissioner:	*Right.*
Ms. Lal:	***Not to our satisfaction but it's better that we proceed to hearing****."*

[My emphasis]

[99] I also note that only Counts 3 and 8 specifically allege in the particulars that the Respondent legal practitioner *'whilst being one of the Trustees of the Trust Account of Jamnadas & Associates' 'authorized the payment voucher for the release of $254,000'* (Count 3) and *'authorized the withdrawal of $254,000 held in the trust account of Jamnadas & Associates'* (Count 8).

[100] I further note that Melvin Nitish Kumar, Acting Court Officer, Legal Practitioners Unit, in his Affidavit in Reply sworn on 18th December 2017, has stated at paragraphs [7]-[8]:

> *'7. **THAT** I am informed that the documents provided by the ANZ Bank to the Commission on the 8th of June 2017 did not provide confirmation on trusteeship issues which was the issue under contention but rather provided information on signatories of the trust account. Hence, the issue about trusteeship continued to be pursued by* ***the Applicant until the Applicant finally decided to amend the charge in the absence of any documentation to confirm the issue of trusteeship****.*
>
> *8. **THAT** I am informed that the prosecution could amend the charges anytime before the close of the prosecution case. Hence, I am aware that there is no prejudice caused to the Respondent and more so when the Respondent had always been of the position that she was never a trustee. Further, an adjournment would eliminate any prejudice caused to the Respondent as an adjournment would give her time to prepare her defense [sic].'*
>
> [My emphasis]

[101] **Thus, Counsel for the Chief Registrar has decided not to pursue the trusteeship issue**. Accordingly, as per his 2nd Notice of Motion, he is seeking leave to amend Counts 3 and 8 so as to allege delete the reference to the Respondent legal practitioner being a trustee **and instead to simply allege that the Respondent legal practitioner *'authorized the payment voucher*** *for the release of $254,000'* (Count 3) and ***'authorized the withdrawal of $254,000*** *held in the trust account of Jamnadas & Associates'* (Count 8). [My emphasis] This is something to which I will return shortly.

(iii) The particulars in Counts 1, 2, 4, 5, 6, and 7

[102] I note that the particulars in the remaining six counts allege, in summary, as follows:

(1) Count 1 – that the Respondent legal practitioner *'failed to disburse to Ms. Reema Yogeshrai Gokal the total amount that she was entitled to receive from the proceeds of sale*';

(2) Count 2 - that the Respondent legal practitioner *'influenced Ms. Reema Yogeshrai Gokal to sign on three (3) blank pages on the pretence that she would thereafter, send the proceeds from the sale ... to Ms. Reema Yogeshrai Gokal'*;

(3) Count 4 – that the Respondent legal practitioner *'placed undue influence on Ms. Reema Yogeshrai Gokal to enter into a "Deed of Settlement and Discharge" in order to release the remaining sum of money that Ms. Reema Yogeshrai was entitled to receive from the proceeds of sale';*

(4) Count 5 – that the Respondent legal practitioner *'failed to give a copy of the signed and executed "Deed of Settlement and Discharge" to Ms. Reema Yogeshrai Gokal';*

(5) Count 6 – that the Respondent legal practitioner *'failed to adhere to the terms of the "Deed of Settlement and Discharge" by not releasing the full residue of money that Ms. Reema Yogeshrai Gokal was entitled to receive from the proceeds of sale*';

(6) Count 7 – that the Respondent legal practitioner *'failed to comply with a Notice issued under section 105 and 106 of the Legal Practitioners Decree 2009 by the Chief Registrar dated 7th August 2015 and thereafter failed to*

respond to a subsequent reminder notice dated 17th August 2015 issued by the Chief Registrar pursuant to section 108 of the Legal Practitioners Decree 2009'.

[103] Section 111 of the *Legal Practitioners Act 2009* states:

> *'111.—(1) The Registrar may commence disciplinary proceedings against a legal practitioner or a law firm or any employee or agent of a legal practitioner or law firm* ***by making an application to the Commission*** *in accordance with this Decree and* ***containing one or more allegations of professional misconduct or unsatisfactory professional conduct****.'*
> [My emphasis]

[104] Section 112 of the *Legal Practitioners Act 2009* then states:

> *'112.—(1) Upon receipt of the application to commence disciplinary proceedings under section 111,* ***the Commission shall conduct a hearing into each allegation particularised in the application****.'*
> [My emphasis]

[105] As I noted in *Vosarogo* at para [67]:

> *'[67] Thus, in accordance with my understanding of the above sections [111 and 112], I would have thought that the Applicant in filing an Application before this Commission must:*
> *(1) allege either "unsatisfactory professional conduct" and/or "professional misconduct" involving a breach of a section/s of the Legal Practitioners Decree 2009; and*
> *(2) also provide sufficient particulars of the alleged conduct to substantiate the alleged breach such that the Respondent legal practitioner is aware of the case that they have to meet and for the Commission to conduct a hearing into each allegation particularised in the application.'*

[106] **In my view, the above summary of counts 1, 2, 4, 5, 6 and 7, that I have taken from the particulars filed (and which are set out in full at the beginning of this ruling), meet the tests set out in sections 111 and 112 as explained in *Vosarogo*, as they provide '*sufficient particulars of the alleged conduct to substantiate the alleged breach such that the Respondent legal practitioner is aware of the case that they have to meet and for the Commission to conduct a hearing into each allegation particularised in the application*'.**

[107] **If, however, I am incorrect, <u>I do not understand why the Respondent legal practitioner has not previously filed an application with the Commission seeking for an Order for the provision of further and better particulars or for the matter be struck out</u> as occurred in *Vosarogo.*** As I have set out above, Justice Madigan "flagged" to the Respondent during the second appearance in this matter on 16th November 2015, that the initiative was with her when asking: "***What's your next step there Ms Lal?"*** I note that in the first appearance before me on 10th February 2016, when the Respondent legal practitioner alleged that "***<u>I do not have a single document in relation to this matter</u>****" and "if <u>my friend's position remains that they do not have to supply anything else</u> ... of course, <u>I am lead to the option to make a formal application to your Sir for determination on that particular issue".</u>* Indeed, I emphasised to the Respondent legal practitioner: *"At the same time if you're not happy where things are at I will expect by the 24th [March 2016] that you [are] going to be putting in some application"*, to which the Respondent legal practitioner replied *"very well, My Lord".* As I have also set out in some detail above, <u>just under a year later on 6th February 2017, still no application had been made</u>. When I had pressed the Respondent legal practitioner at that time, she advised that*: "In the event that Mr. Chand and the Chief Registrar do not accede to reducing or withdrawing the charges, I will then make an interlocutory application."* I had made clear in response: *"... you're going to have to put in an application or we're setting the matter down for hearing in the April [2017] sittings".* The application did not occur. Even after I finally made an Order in the June 2017 Sittings for the Respondent legal practitioner to file an application seeking further and better particulars, she never complied. Further, even when I granted an extension to do so (after the request by Mr. Bale), the application was never filed.

(iv) The particulars in Counts 3 and 8

[108] In relation to counts 3 and 8, the only two counts that mention the Respondent legal practitioner as a trustee, as I have noted above, **Counsel for the Chief Registrar is seeking to amend Counts 3 and 8 so as to delete the reference to the Respondent legal practitioner being a trustee**

and to simply allege in the particulars that the Respondent legal practitioner '*authorized* ** *in the Jamnadas & Associates Trust Account **payment voucher for the release of $254,000 to ANZ when she failed to obtain the consent and authority ... to release the sum'* (Count 3) and *'**authorized the withdrawal** of $254,000 held in the trust account of Jamnadas & Associates and utilized the said sum for her own benefit'* (Count 8).

[109] I do note that there is a vast difference between either authorising a payment voucher for the release of $254,000 or authorising a withdrawal of that amount and being the person who signed the cheque. **Is the Chief Registrar alleging that the Respondent legal practitioner somehow deceived the sole signatory, Mr. Dilip Jamnadas, into signing the cheque for the release or withdrawal of $254,000? It is unclear.**

[110] **Therefore, should I decide by the end of this Ruling not to dismiss or permanently stay all eight counts set out in the application of the Chief Registrar, I will be ordering in relation to Counts 3 and 8 the provision of further particulars together with a short prosecution case statement outlining a summary of the evidence and the legal basis upon which the Application is brought in relation to these two Counts.**

(v) Finding on whether previous 'fault' on the part of the party seeking the adjournment

[111] **Returning to the question as to whether there has been *previous 'fault' on the part of the party seeking the adjournment'*, my finding is that I have not been convinced that the delay in the hearing of this matter lies principally at the feet of the Chief Registrar.**

[112] As I have already noted above, the Respondent legal practitioner never filed an application seeking further and better particulars. **Further, despite a timetable being ordered** (to give the Respondent legal practitioner the opportunity to do so such that it could be heard on 26th September 2017, during the September 2017 Sittings, prior to the final hearing set down for

the November/December 2017 Sittings), **the Respondent legal practitioner did NOT comply with that timetable**. **Even when an extension was granted (at the request of Mr. Bale), no application was filed.**

[113] **Instead, on 19th July 2017, Mr Bale wrote a letter to the Chief Registrar** (that was not copied to the Commission, however, it has been annexed as annexure "RDSL6" to the 1st affidavit of the Respondent legal practitioner sworn on 29th November 2017) **seeking further and better particulars** as follows:

> *'In light of all of the above documents, I again write to your office asking for further and better particulars …*
> *This is despite repeated previous requests to your office for the provision of the same made on 22nd of October, 5th of November and again on the 10th of November 2015.*
> *…*
> *Whilst we have also provided evidence from the auditors of the Jamnadas & Associates to show that Ms Lal was not a signatory of the Jamnadas Trust Account for the period in question together with the Affidavit of the Risk Officer of the ANZ bank we are still left in a situation where your office still wants to proceed with the charges as they currently stand.'*
>
> (See Letter Amani Bale, Lal Patel and Bale, 19th July 2017, Annexure "RDSL6", *'Affidavit of Renee Devina Sina Lal'*, sworn and filed on 29th November 2017.)

[114] The letter from Mr. Bale then went on to cite section 14(2)(e) of the *Constitution of the Republic of Fiji* and the ruling of the previous Commissioner, Justice P.K. Madigan in ***Chief Registrar v Devanesh Prakash Sharma and R Patel Lawyers*** (Unreported, ILSC, Action No. 029 of 2013, 12 November 2014; PacLII: [2014] FJILSC 7, <http://www.paclii.org/fj/cases/FJILSC/2014/7.html>), in particular, paragraphs [16] and [54]-[58].

[115] **In my view, the present case is different to what occurred in *Devanesh Sharma*. In particular, here we have a number of allegations concerning the whereabouts of a sum of $254,000 that was held in a trust account and not paid to the beneficiary, including an allegation that the sum was**

utilised by the Respondent legal practitioner. Obviously, the truth of such allegations can only be determined at a full hearing. Thus, apart from Counts 3 and 8, it is clear what is being alleged.

[116] I also note that the ruling in *Devanesh Sharma* has been appealed and, after the Chief Registrar's application for an 'enlargement of time to appeal against the Judgment (Ruling)', was granted on 14th June 2016, it is waiting to be heard. (See ***Chief Registrar v Devanesh Prakash Sharma and R Patel Lawyers***, (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 0012 of 2016, 14 June 2016; PacLII: [2016] FJCA 83, <http://www.paclii.org/fj/cases/FJCA/2016/83.html>).) In granting the application, Guneratne JA asked rhetorically *'Are there then Arguable Points to grant leave on the criterion of merits and /or prospects of success in Appeal?'*, and then replied at para [35]:

> *'In answer to that question the following struck me as being arguable points – viz*
> *(i)* ***should "a practice" in ignoring the entreats*** *(to use a term employed by the learned Commissioner)* ***made by legal practitioners … be ignored by the Chief*** **Registrar** *in instituting proceedings …? Would that amount to procedural unfairness?"*
> *(ii) …* ***would it amount "procedural unfairness" given*** *the fact that the learned Commissioner himself found that* ***there was "no malice or vindictiveness" in regard to the Appellant's conduct****?*
> *(iii)* ***where should the line be drawn*** *between acts done "without malice or vindictiveness" and acts amounting to "abuse of process?".*
> *(iv)* ***How are those questions to be answered in relation to the criterion of prejudice*** *to the parties concerned? …'*
> [My emphasis]

[117] **I further note that the Court of Appeal in *Amrit Sen v Chief Registrar*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 0064 of 2014, 29 November 2016, Calanchini P, Basnayake and Kumar JJA; PacLII: [2016] FJCA 158, <http://www.paclii.org/fj/cases/FJCA/2016/158.html>), **has stated that <u>the provisions of the Constitution of the Republic of Fiji in relation to "offences" do not apply to charges of misconduct before the Commission</u>**. In particular, Basnayake JA (with whom Calanchini P and Kumar JA agreed) stated at paras [33]-[35]:

> *'[33] Section 14 (1): A person shall not be tried for (a) any act or omission that was not an offence under either domestic or*

international law at the time it was committed or omitted. The submission of the learned counsel is that at the time of committing the alleged acts the Legal Practitioners' Decree was not in operation and therefore the Commission is without jurisdiction. The above submission is made on the presumption that the appellant had been charged for an offence. The learned counsel has considered section 82 (1) (a) as constituting an offence.

[34] ***An offence is an act, attempt or omission punishable by law*** *(Section 4 (1) of the Crimes Decree 2009 Cap 17A). Interpretation Act Section 2 (1) describes an offence as follows:* ***"Offence" means any crime, felony, misdemeanor or contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided".*** *Penalty means the maximum penalty which may be determined and imposed by a court (Section 3 (4) of the Sentencing and Penalties Decree Cap 17B. Oxford Dictionary defines an offence as a breach of a law or rule; an illegal act.*

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

[My emphasis]

[118] On 27th October 2017, **the Supreme Court** refused the application for Special Leave to appeal by the legal practitioner in *Sen* and **affirmed the judgment of the Court of Appeal**. (See ***Amrit Sen v Chief Registrar****,* Unreported, Supreme Court of Fiji, Civil Appeal No. CBV0010 of 2016, 27 October 2017, Marsoof, Hettige Chandra JJ; PacLII: [2017] FJSC 31, <http://www.paclii.org/fj/cases/FJSC/2017/31.html>.) In relation to the Constitutional argument, the petitioner relied upon the following ground as Chandra J set out at para [9](e):

> *'That the Court of Appeal erred in law in failing to hold that the Constitution of Fiji was a Supreme Law that superseded Section 101(2) of the Legal Practitioners Decree and further erred in holding that section 101(2) of the Legal Practitioners Decree permitted charges filed against the appellant for purported acts or omissions prior to 2009 contrary to correct interpretation of the said Section 14(1)(a) of the Constitution of Fiji and further erred in holding that the said section is only applicable to criminal cases prescribed in Criminal Procedure Decree.'*

[119] As Chandra J (with whom Marsoof and Hettige JJ agreed) stated at para

[30]:

> *'[30] The Court of Appeal dealt with these arguments before it at paragraphs [33] to [36] and arrived at the conclusion that **the charges against the Petitioner did not fall within the ambit of Section 14(1)(a) of the Constitution**. <u>This Court does not see any flaw in the conclusion reached</u> on this point by the Court of Appeal and therefore this ground fails.'*
> [My emphasis]

[120] Therefore, in light of the judgment of the Supreme Court in *Sen*, affirming the view of the Court of Appeal, '***charges of misconduct [before the Commission] do not fall within the purview of … the Constitution'.***

[121] Returning to the present case, on 24th August 2017, Counsel for the Chief Registrar replied to Mr. Bale as follows:

> *'In relation to Counts 1, 3, 4, 5 and 6, the Applicant would be relying on the evidence of the complainant Ms. Reema Gokal and her mother Pratima Gokal. The statements of the two witnesses are contained in the Bundle on 30th September 2015.*
> *In relation to Counts 3 and 8, the Applicant would rely on the evidence of Mr. Dilip Jamnadas whose statement is contained in the Additional Disclosure filed on 23rd March 2016.*
> *In relation to Count 7, the Applicant would be relying on its records and the delivery documents that show that both Notices were received by the law firm.'*

[122] When reading Mr Bale's letter of 17th July 2017, I was reminded of a ruling in the Federal Court of Australia in ***South Sydney District Rugby League Football Club Ltd V News Limited & Ors,*** [1999] FCA 1710, 9 December 1999)**;** AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1999/1710.html>) when, in refusing an application for interlocutory relief (that began the long and tortious litigation involving the sport of rugby league in Australia which was eventually finalised by a judgment of the High Court), Justice Hely explained at para [179], that *'… Souths and the NRL had declared their position in December 1997. Souths then threatened legal action if it was excluded from the 2000 competition, but [the] NRL proceeded to implement the merger notwithstanding that threat.'* As Hely J noted it was a 'standoff': *'But to look at the matter in that way is to pay insufficient regard to the position of*

*the other clubs ... **<u>Nor is the declaration of a position [by Souths] an acceptable substitute for the timely institution of proceedings</u>**'.* [My emphasis]

[123] Further, I note that in the affidavit of the Respondent legal practitioner sworn on 29th November 2017 in support of her cross-motion, she has stated at paragraphs [6]-[7]:

> *'6. ... I received a letter dated 24th August 2017 from the Chief Registrar not addressing the issues I had raised and **<u>that they would call witness[es] and rely on the documents they had filed</u>**. These were the very documents and Statements that I had been seeking particulars of ...*
>
> *7. As a result of the Chief Registrar's position I had no choice but to look for the particulars elsewhere. <u>I took **active steps** to find the information requested</u>. At the heart of the matter is the issue of trusteeship. At all material times I was not a trustee of Jamnadas & Associates ...'*
>
> [My emphasis]

[124] I note that **the Respondent legal practitioner has not explained as to why her 'active steps' did not include <u>complying</u> with the orders made on 14th June 2017 for her to file an application seeking further and better particulars that was to be heard (as per the agreed timetable) in the September 2017 Sittings prior to the final hearing set down for the November/December 2017 Sittings. Also, she has failed to explain her and/or Mr. Bale's failure to comply with the extension granted on 28th June 2017 to Mr. Bale to file an application on her behalf by 11th July 2017.**

[125] **<u>Further, the Respondent legal practitioner has not explained as to why, if she was dissatisfied with the response sent on behalf of the Chief Registrar on 24th August 2017 in reply to Mr. Bale's letter of 17th July 2017 seeking further and better particulars, she did not file an application to be heard in the September 2017 Sittings seeking an Order that further and better particulars be provided.</u>**

[126] **I also disagree with the statement at paragraph [7] of the affidavit of the legal practitioner sworn on 29th November 2017 in support of the**

cross-motion, that *'at the heart of the matter is the issue of trusteeship'*. The question of trusteeship was only raised in the particulars in relation to Count 3 and Count 8. As I have noted above, <u>Counsel for the Chief Registrar is seeking to amend Counts 3 and 8 so as to delete the reference</u> to the Respondent legal practitioner being a trustee and to simply allege in the particulars that the Respondent legal practitioner *'authorized the payment voucher for the release of $254,000'* (Count 3) and *'authorized the withdrawal of $254,000 held in the trust account of Jamnadas & Associates'* (Count 8).

[127] A reading of the summary of particulars for Counts 1, 2, 4, 5, 6 and 7 that I have set out above, reveals that ***'the heart'* of each of those matters is <u>not</u> dealing with '*the issue of trusteeship*'**. In fact, <u>trusteeship is not even mentioned</u>.

[128] In addition, I note that on 23rd March 2016, Counsel for the Chief Registrar filed an additional disclosure, that being a witness statement of Mr. Dilip K. Jamnadas signed on 23rd March 2016. In that statement, Mr. Jamnadas (apart from alleging that the Respondent legal practitioner was a trustee), has also alleged (amongst other matters) that it was the Respondent legal practitioner who '*was in charge of the day to day running of the firm'*, that payments were made in the firm by a payment voucher being *'authorized by one of the partners (myself or Renee Lal) before a cheque'* was prepared, that Mr. Jamnadas was not involved in the matter the subject of this complaint and that '*the file ... was subsequently removed from our office by Renee ...'* .

[129] I have attempted to avoid including the unsubstantiated allegations and conclusions reached by Mr. Jamnadas in his witness statement. They should not have been there. They are not facts. Indeed, some of the material included in the various witness statements and affidavits filed in this matter thus far is something to which I will return at the end of this ruling.

[130] **One particular allegation that is made by Mr. Jamnadas is his witness statement is <u>extremely serious</u>. In essence, <u>he is alleging that a large part</u>**

of the funds from the sale of a property that were meant for the vendor were instead transferred to an ANZ Bank account in Auckland, New Zealand, (without the vendor's authorization) to which the Respondent legal practitioner and/or her sister 'have or had ownership control or access' and the remaining balance is missing.

[131] **The allegations of Mr. Jamnadas provide a major reason as to why there needs to be a full hearing before the Commission. The public interest requires transparency. Indeed, only by holding a full hearing can the complainant, Reema Gokal, the principal of the firm, Mr. Jamnadas and (should I grant leave to allow the Applicant to rely upon the additional disclosures), Niumai Wati Seduadua (who allegedly signed as the receiver of a cheque for $254,000 in the firm) and Shammi Lata (who allegedly did a transfer to Wasabi Investments in New Zealand under instructions in the firm), give evidence (including being cross-examined) as to what they allege occurred. In addition, any other relevant persons that Counsel for the Chief Registrar, or the Respondent legal practitioner, wish to call, can also give evidence including being cross-examined.**

[132] **Whilst, I understand the frustrations of the Respondent legal practitioner wanting to show that it has been wrongly alleged that she had been a trustee of the trust account of Jamnadas & Associates, there seems to be misunderstanding on her part (and Mr. Bale assisting her) that by demonstrating that she was not a trustee that somehow she would be absolved of all eight allegations.** Indeed, the letter from Mr. Bale, of 24th August 2017, shows this confusion, when **it concludes that despite the legal practitioner showing that she** ***'was not a signatory of the Jamnadas Trust Account*** *for the period in question together with the Affidavit of the Risk Officer of the ANZ bank* ***we are still left in a situation where your office still wants to proceed with the charges*** *as they currently stand'*. [My emphasis]

[133] Further, for the Respondent legal practitioner to submit in her affidavit

sworn on 29th November 2017 in support of the cross-motion that *'At the heart of the matter is the issue of trusteeship',* reveals **a misunderstanding that six of the eight Counts laid against her are not about her trusteeship** and the Chief Registrar is seeking to amend the other two counts to delete the reference to trusteeship. Perhaps the *'cause of the earlier adjournments',* (as the Respondent legal practitioner sought to convince the Chief Registrar that she was not a trustee), has been focusing on a side issue when the major issue is what has happened to the $254,000 and who is responsible for the alleged disappearance of that sum?

[134] **Therefore, I do not find that it has been *'fault'* on the part of the Chief Registrar that was the cause of the earlier adjournments.**

[135] That, however, is not the end of the matter. I must also examine whether there is any fault on the part of the Applicant (that is, Counsel for the Chief Registrar and/or the staff within the Legal Practitioners Unit) in seeking the present adjournment?

(vi) What is the cause of the need for this adjournment?

[136] As the Court of Appeal noted in *Goldenwest* at para [42]:

> *'As to the proposition that Goldenwest could be considered dilatory in that the hearing date had been set in advance, by consent between Counsel, so that any failure of witnesses to be present indicated "fault", **Goldenwest's response is** ... that when on the day Counsel for Mr Pautogo failed to appear **Goldenwest could have taken advantage** of the striking out of the Petition **but did not do so**. Hence, it should not now, and should not on the day of the trial, be held "at fault" in light of its cooperation and not standing in the way of Mr Pautogo's right to be heard and to put his case.'*
> [My emphasis]

[137] Similarly, it is my view, having reviewed the long history of the many adjournments in this matter, that Counsel for the Chief Registrar has been more than conciliatory. He has not opposed the adjournments sought as the Respondent legal practitioner located documentation first from the auditor to show that she was not a trustee (the best being an email of 15th February 2017 that she 'did not sign the Trustee's Report for 2006 and 2007') and

then to wait upon a response from the ANZ Bank (with the best being an affidavit of 8th June 2017 that she was not a signatory to the trust account) and then to consider the "Deed of Settlement and Discharge" that was not raised in the proceedings before the Commission until the February 2017 Sittings and not produced to the Chief Registrar until 2nd June 2017, (just prior to the commencement of the June 2017 Sittings). Counsel then sought an adjournment of a week to consider the bank documentation, the Deed, liaise with the Chief Registrar and complainant. Counsel then returned a week later on 14th June 2017 to advise that his instructions were to proceed and seek a hearing date. This was allocated for 28th November 2017. An Order was also made for the Respondent legal practitioner to file an application for further and better particulars to be heard on 26th September 2017. That hearing did not occur because the Respondent legal practitioner failed to file the application even after being granted an extension. Instead, when the matter was listed on 18th September 2017 in the call over list of the September 2017 Sittings, the Respondent legal practitioner advised that she was not proceeding with the application and the appearance just became a confirmation of the hearing date.

[138] In relation to the cause of the need for this adjournment, as I have noted above, this is an interlocutory application and, whilst I have taken note of what was said by Counsel for the Chief Registrar on 1st December 2017, by way of background that the two witnesses were in India, I have ruled that I will not be relying upon Counsel's answers to my preliminary questions in making my ruling as to whether or not to vacate the hearing and grant the adjournment. Hence, I now turn to the affidavit of Melvin Nitish Kumar sworn on 22nd November 2017 and filed on 23rd November 2017, in support of the order sought in the 1st Notice of Motion that the hearing be vacated.

(vii) *Objection as to affidavit Mr. Kumar sworn on 22nd November 2017*

[139] The Respondent legal practitioner objects to the above affidavit being received into evidence to support the application for an adjournment (*'Submissions'*, 5th December 2017, para [3.6], page 6). The Respondent legal practitioner's general objection is (as set out at paras [3.7]-[3.8]):

'3.7 The affidavit is irregular as <u>there is no authority by the Chief Registrar for Kumar to swear the affidavit on behalf of the Applicant</u>.

3.8 The Chief Registrar is a judicial officer appointed under the Administration of Justice Act. The functions and duties of the Chief Registrar cannot be delegated. Kumar is swearing an affidavit stating that he has the authority to swear the affidavit on behalf of the Chief Registrar. <u>He does not state when he was given the authority and he does not state in which capacity and to which extent he has the authority to swear the affidavit</u>. It is not sufficient for Kumar to say that he has the authority. In the absence Kumar lacks the authority to swear the affidavit on behalf of the Chief Registrar. <u>Kumar must show that he has the proper authority to swear the affidavit which he has failed to do so</u>.'

[My emphasis]

[140] I note that the Respondent legal practitioner has then set out (at paras [3.11]-[3.26]), her specific objections in relation to various paragraphs of the affidavit.

[141] In their joint reply, Counsel for the Chief Registrar have stated (*'Response of the Applicant'*, 7th December 2017, para [8]):

'The Applicant relies on section 114 of the Legal Practitioners [A]ct 2009 which states ...

*"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 or partner or partners of the law firm in respect of whom or whose law firm an application for disciplinary proceedings is made, an opportunity to make written submissions and to be heard, and **<u>the commission must act fairly</u>** in relation to the proceeding."'*

[My emphasis]

[142] In relation to rules of procedure, section 127 of the *Legal Practitioners Act 2009* states:

'Rules of procedure

127.— (1) The Commission may from time to time make rules in respect of the making, hearing and determination of applications of disciplinary proceedings under this Decree.

(2) The Commission may make such other rules for the effective performance of its functions under this Decree.'

[143] There have been no rules of procedure made by the Commission '*in respect of the making, hearing and determination of applications of disciplinary proceedings'* before the Commission.

[144] Instead, what is applicable is the *Legal Practitioners Act* 2009. Section 111(1) sets out how proceedings are commenced by the Registrar *'making an application to the Commission in accordance with this Decree and containing one or more allegations of professional misconduct or unsatisfactory professional conduct*'. Pursuant to section 111(5) *'The Registrar shall provide a copy of the application— (a) in the case of disciplinary proceedings against a legal practitioner – to the legal practitioner'.*

[145] In relation to hearings, apart from section 114(1) which states that '*the commission must act fairly',* section 112(2) states:

> *'**The Commission shall give** or cause to be given to every legal practitioner or partner of the law firm against whom an application under section 111 for disciplinary proceedings is made, a **reasonable notice of the time when and the place where the Commission is to conduct its inquiry**, and such legal practitioner or partner of the law firm may appear and be heard in person or by counsel on those disciplinary proceedings.*' [My emphasis]

[146] As for appeals, Commissioner J.R. Connors issued on 22nd October 2009, **ILSC Practice Direction No.1 of 2009,** which states:

> *'Appeal from a decision of the Independent Legal Services Commission*
> *(Legal Practitioners Decree 2009 – section 128)*
>
> *Pending the formulation of rules to the contrary **the Court of Appeal Rules [Cap 12] shall apply as if the proceedings** before the Independent Legal Services Commission **were civil proceedings before the High Court**.'* [My emphasis]

[147] Although not specifically applying to the Commission, I note that the contents of affidavits in the High Court are governed by Order 41 rule 5. It

states:

> *'(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1) to paragraph (2) of this rule and to any order made under Order 38, rule 3,* ***an affidavit may contain only such facts as the deponent is able of his own knowledge to prove****.*
> *(2) An affidavit sworn for the purpose of being used* ***in interlocutory proceedings may contain statements of information or belief*** *with the sources and grounds thereof.'*
> [My emphasis]

[148] As Gates J (as he then was) observed in ***Prasad v State (No.6)*** [2001] FJLawRp 6; PacLII: [2001] 2 FLR 39, 17 January 2001, <http://www.paclii.org/fj/cases/FJLawRp/2001/6.html>, there is according to Order 41 rule 5(2) of the High Court Rules, *'the lesser threshold test applicable for interlocutory proceedings of "statements of information or belief with the sources and grounds thereof"',* however, *'imperfect evidence for interlocutory purposes will only suffice for interlocutory applications'.* At the same time, His Lordship qualified this statement citing from the judgment of Sir Moti Tikaram, the then Acting President of the Fiji Court of Appeal in relation to a Chamber Application in ***The Registration Officer for the Suva City Fijian Urban Constituency v James Michael Ah Koy*** (Unreported, Fiji Court of Appeal, Civil App. No. 23 of 1992, 5 January 1994; PacLII: [1994] FJCA 1, <http://www.paclii.org/fj/cases/FJCA/1994/1.html>), where *'Taniela Tabu applied to the Court of Appeal for a stay of the Court of Appeal proceedings and asked to be joined as an aggrieved person as also the then Supervisor of Elections'.* According to Tikaram AP, in relation to Mr Tabu's affidavit:

> ***'He does not say that the Applicant has authorized him to file his affidavit. Nor does he say on whose behalf he has filed the affidavit*** *…*
> *Bearing in mind that Mr. Tabu is not a party to these proceedings a substantial part of his affidavit is, in my view, either irrelevant, inappropriate or objectionable. I, therefore, propose to ignore all those paragraphs dealing with legal arguments, his thought processes and his attacks on the Supervisor of Elections.'*
> [My emphasis]

[149] As Gates J noted in *Prasad No.6* (applying the above):

> *'The proposed Interested Party has his counsel who is the appropriate conduit for the presentation of legal argument. It is not permissible to use affidavits in support as an occasion to argue the facts or the law.*

Affidavits are vehicles for the succinct presentation of facts as evidence to the court*. I have to ignore therefore all those paragraphs which are irrelevant, argumentative, or unfactual.'*
[My emphasis]

[150] Further, I also note that Gates J in ***Kim Industries Ltd, In Re (No 1)*** [2000] FJLawRp 41; [2000] 1 FLR 141, 7 July 2000; PacLII: <http://www.paclii.org/fj/cases/FJLawRp/2000/41.html>, (which was cited by him in *Prasad No.6)* had to consider whether a notice of demand (signed not by the petitioner but their solicitor), as well as a defective affidavit, were admissible in a winding up petition. In relation to the notice of demand, His Lordship stated:

> *'The Creditor, or someone with his authority, would appear to be the persons contemplated as being able to sign and to issue such a notice. The common law rule was "qui per alium facit, per seipsum facere videtur" [He who does anything by another is deemed to have done it himself]. Quain J in* ***Re Whitley Partners Ltd*** *[1886] 32 Ch.D 337 at 340 said: "We ought not to restrict the Common Law Rule,......., unless the statute makes a personal signature indispensable".'*
>
> *I conclude therefore that* ***no procedural advantage attaches to a narrow legalistic approach*** *to the signing of the Demand Notice.* ***Common sense also dictates that it should be open for the notice to be signed either by the Creditor himself or by his authorised agent*** *...'*

As for the defective affidavit, His Lordship concluded:

> ***'Modern business efficacy expects courts to recognise how businesses are managed today and not to waste the time of a corporation's most senior officers with matters now reliably and safely delegated****. It is noteworthy that Pennycuick J considered the strict application of the rule, which was directory only, inconvenient and likely to be amended.*
> *His lordship accepted there would be proper cases [petitioner absent overseas as in* ***Re African Farmers Ltd*** *[1906] 1 Ch. 640, or where material facts were more within the knowledge of the deponent than of the petitioner himself.* ***Nowadays this will often arise****. I consider a Divisional Manager to be an appropriate witness to depose to the affidavit verifying in compliance with Rule 25.'*
> [My emphasis]

[151] Returning to the present matter, I accept that in the body of the affidavit Mr Kumar *'does not say that the Applicant has authorized him to file his affidavit. Nor does he say on whose behalf he has filed the affidavit'.* He

simply says, *'I am employed at the Office of the Chief Registrar within the Legal Practitioners Unit'*, and that '*I am duly authorized to swear this affidavit'*. The backsheet is, however, endorsed in accordance with Order 41 r.9(2) of the High Court Rules which states:

> *'Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.'*

[152] During the hearing on 7th February 2018, Mr. Bale, who was appearing on behalf of the Respondent legal practitioner, made the submission that Mr. Kumar should have stated both in the body of his affidavit sworn on 22nd November 2017, that he was authorised by the Chief Registrar to make the affidavit on behalf of the Chief Registrar, and Mr. Kumar should have annexed a written authorisation to that effect. In support of that submission, Mr. Bale noted (as I understood him) that there had been a ruling (the specific name of which he could not recall) of Justice Gates where His Lordship had said that affidavits from law clerks should not be accepted unless they set out on whose behalf they were authorised to make the affidavit. Later, during the same hearing on 7th February 2018, Mr. Bale mentioned that he thought it was *"Punja's case"*. Without further details, I can only presume that Mr. Bale was attempting to refer to the ruling of Justice Gates in *Kim Industries.*

[153] Even if the Commission is not bound by formal rules of evidence or procedure, is such an alleged irregularity fatal as to not state **in <u>the body</u> of the affidavit** '*that the Applicant has authorized him to file his affidavit'* and *'on whose behalf he has filed the affidavit'*? I think not. Mr. Kumar has stated in the body of the affidavit his employment *'at the Office of the Chief Registrar within the Legal Practitioners Unit'* and his duties. Further, it is stated on the backsheet, in accordance with Order 41 rule 9, that Mr. Kumar's affidavit was *'filed on behalf of: Applicant'*. I do not accept that, in addition, a letter to that effect, has to be annexed to the affidavit, as submitted by Mr. Bale. Whilst noting that '*the commission must act fairly'* as required by section 114, <u>the sensible approach of Gates J in *Kim Industries* is what I will be applying to present matter</u>. **Even if I am**

incorrect, the High Court Rules did apply and the affidavit was deemed to be irregular (as per Mr. Bale's oral submissions) such that the authorisation had to be not only stated on the backsheet but stated both in the body of the affidavit as well as with a letter setting out the authorization annexed, <u>I would grant the Applicant Chief Registrar leave</u> to rely upon the affidavit of Mr Kumar sworn on 22nd November 2017 and filed on 23rd November 2017 and admit it into evidence.

[154] I also note that there are specific objections that have been made in the written submissions of the Respondent legal practitioner as well as in the oral submissions of Mr Bale to the affidavit of Mr Kumar pursuant to Order 41 rule 5(2) of the High Court Rules, which states, that *'An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof'*. I have endeavoured to consider the objections of the Respondent legal practitioner and what I understood to have been the oral submissions of Mr Bale together in the one ruling, as follows:

(1) <u>In relation to paragraph [5]</u>, the objection is that Mr Kumar has not stated the source of the information and the grounds or reason for the belief *'That the two main witnesses, namely Reema Yogeshrai Gokal and Pratima Rai Gokal who reside in Mumbai, India are incapacitated from travelling to Fiji due to financial reasons'* – I agree Mr Kumar has not complied. Is this unfair? No, as I note that the following two paragraphs of his affidavit (paragraphs [6] and [7]) cite emails from the complainant dated 31st October and 1st November 2017 annexed to the affidavit (as **"MNK1"** and **"MNK2"**) that were sent to Counsel for the Chief Registrar and to the Chief Registrar respectively. Hence, I reject this objection;

(2) <u>In relation to paragraphs [6] and [7]</u>, the objections are that Mr Kumar is exhibiting emails purporting to be sent to Counsel for the Chief Registrar and the Chief Registrar respectively which are "Gmail" addresses and not an official Legal Practitioners or Chief Registrar's email address – clearly, both the Respondent legal practitioner and Mr. Bale (who also raised this at the hearing on 7th February 2018), are not aware of the problems of the govnet email system and that "Gmail" is a recognised form of secure email

used by many in the judicial department and elsewhere in the civil service. I can take judicial notice of this fact. Hence, I reject this objection;

(3) In relation to paragraph [8], the objection is that Mr Kumar has not stated the source of the information and the grounds or reason for the belief that after Counsel for the Chief Registrar received the email from the complainant, the Counsel liaised with the Chief Registrar and sought his instructions - I agree that Mr Kumar has not complied. Is this unfair? Not really as it does not affect the issue as to the cause of the need for the adjournment;

(4) In relation to paragraphs [9] and [10], the objections are that Mr Kumar has not stated the source of the information and the grounds or reason for the belief that Counsel for the Chief Registrar *'liaised with the Ministry of Foreign Affairs'* and was told to *'to first write to the Permanent Secretary of Ministry of Foreign Affairs as a matter of protocol'* - I agree that Mr Kumar has not complied. Is this unfair? Not really, as it still does not affect the issue as to the cause of the need for the adjournment. More importantly, I note that paragraph [11], which then follows, cites (and then annexes as **"MNK3"**) a letter dated 15th November 2017 sent from the Chief Registrar to the Permanent Secretary of Foreign Affairs. Hence, I reject this objection;

(5) In relation to paragraph [12], the objection is that Mr Kumar has not stated the source of the information and the grounds or reason for the belief that after a letter was sent dated 15th November 2017 from the Chief Registrar to the Permanent Secretary of Foreign Affairs *'to date there has not been any response received'* - I agree that Mr Kumar has not complied. Is this unfair? No. Surely, if there had been a response, Counsel for the Chief Registrar would have shown it to Mr Kumar so that he could annex a copy to the affidavit;

(6) In relation to paragraph [13], the objection is that Mr Kumar has not stated the source of the information and the grounds or reason for the belief that Counsel for the Chief Registrar *'followed up with the Ministry of Foreign Affairs on 22nd November 2017'* and when informed by a Mr. Tabulutu that the Permanent Secretary was away, Counsel for the Chief Registrar sent an email on 22nd November 2017 to Mr. Tabulutu, a copy of which is annexed as **"MNK4"**. Further, it appears as though Counsel for the

Chief Registrar is giving information through Kumar which is not permitted - I agree that Mr Kumar has not complied and stated who gave him a copy of the email, however, is this unfair? No. Mr Kumar has instead annexed a copy of the email. This is what he also did at paragraph [11] (to which no objection has been taken) when Mr Kumar annexed as **"MNK3"** a copy of a letter sent from the Chief Registrar to the Permanent Secretary of Foreign Affairs.

[155] Further, I note that neither in her cross-motion, nor in a separate motion, or even in her appearances on 27th November, 1st or 7th December 2017, did the Respondent legal practitioner make an application to be granted leave to have a hearing where the Applicant would produce Mr. Kumar for him to be cross-examined on his affidavit sworn on 22nd November 2017 and filed on 23rd November 2017. Further, the Respondent legal practitioner did not respond to the letter from the Commission of 20th January 2017 and take the opportunity to advise that she would be either filing an application or making an oral application on 5th February 2018 asking for a listing during the February 2018 Sittings to hear an application seeking leave to cross-examine Mr Kumar.

[156] I should also acknowledge, however, that the Respondent legal practitioner, as an experienced practitioner, would no doubt be aware that the granting of an application to cross-examine the deponent of an affidavit at the hearing of an interlocutory motion is rare. As the Court of Appeal stated in ***Charan v Public Service Commission (No.1)*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 2U of 1992S, 24 March 1994, Helsham P and Quilliam and Ward JJA); PacLII: [1994] FJCA 15, <http://www.paclii.org/fj/cases/FJCA/1994/15.html>), that is:

> *'It is clear that ... the Court may grant interlocutory relief including an order under Order 38 rule 2(3) for oral examination of the maker of any affidavit in the proceedings. However, this has only been allowed in exceptional circumstances in judicial review proceedings. Recent cases suggest there is a trend to allow oral examination more easily than previously but such a course must still be regarded as exceptional. The danger of interlocutory proceedings of this nature is the tendency to prolong proceedings that are, by their very nature, intended to be*

expeditious and the risk that it leads to the temptation to decide matters of fact that are not relevant.'

Whilst the above was expressed in relation to judicial review proceedings, similarly, in my view, in proceedings before the Commission, cross-examination will not generally be permitted on an interlocutory application.

(viii) ***2nd Ruling*** *– Objection as to affidavit of Mr. Kumar sworn on 22nd November 2017 being allowed into evidence – Objection refused*

[157] **Accordingly, my 2nd Ruling is that the Objection as to the affidavit of Melvin Nitish Kumar (sworn on 22nd November 2017 and filed on 23rd November 2017) being admitted into evidence, is refused. Therefore, the affidavit is admitted into evidence.**

(8) Oral application for Mr. Chand appearing as Counsel for the Chief Registrar to withdraw

[158] At the commencement of the hearing on 7th February 2018, Mr Bale said that he wished to make a preliminary application. That is, that Mr. Chand should withdraw in appearing as Counsel for the Chief Registrar in the hearing of the interlocutory applications. In a nutshell, the application was being made on the basis that Mr Chand could not appear as both counsel and a witness in the same case.

(i) Submissions

[159] The basis of the application was that the facts stated in the affidavits of Mr Kumar were, in reality, those of Mr Chand. As I understood Mr Bale, he was suggesting that Mr Kumar was just the "mouthpiece" of Mr Chand so to speak.

[160] In support of this submission, Mr Bale cited, as an example, a comparison between para [5] of the submissions of Counsel for the Applicant Chief Registrar dated 7th December 2017 (filed in response to the submissions of the Respondent dated 5th December 2017) and that of para [9] of the 2nd affidavit of Mr Kumar sworn on 30th November 2017. In his example, Mr Bale noted that at para [5] of the submissions, Counsel for the Applicant

Chief Registrar states that the matter has been called '17 times' whereas in para [9] of the 2nd affidavit of Mr Kumar, it is stated that the matter has been called '14 times'.

[161] When I highlighted for Mr Bale that both statements used the word 'approximately' and suggested that there was a difference between *'approximately 14 times'* and '*approximately 17 times'* and thus that would show that Mr Kumar was, in fact, not Mr Chand's mouthpiece, Mr Bale begged to differ. He said that while 'approximately' may mean 15 or 16 times, it did not mean 14 times. Indeed, Mr Bale then suggested that this was an example of the affidavits of Mr Kumar and the submissions of Mr Chand being different whereas in other aspects they were the same. I must confess, as best as I tried to understand this submission, Mr Bale has failed to convince me.

[162] Mr Bale then tendered a copy of Order 41 rule 5(2) of the *High Court Rules* (supra) which is also set out in the written submissions of the Respondent legal practitioner of 5th December 2017 at para [3.10], that is, that *'An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof'.* Mr Bale noted that in the 2nd affidavit of the Respondent legal practitioner sworn on 11th December 2017, the Respondent legal practitioner has stated at para [5]:

> *'Mr Chand and Ms Prasad are giving evidence through Kumar in paragraphs in the affidavit. The information contained in the affidavit are not from Kumar's own knowledge. He does not state his source of information for the contents of the affidavit when he is leading evidence of Mr Chand and Ms Prasad.'*

Mr Bale then referred to Mr Kumar's 4th affidavit sworn and filed on 18th December 2017 wherein Mr Kumar has acknowledged at para [5] that the reason he is swearing affidavits is that Mr. Chand and Ms. Prasad cannot be both counsel and a witness with Mr Kumar stating:

> ***'THAT*** *in response to paragraph 5 [of the 2nd affidavit of the Respondent legal practitioner], Mr. Chand and Ms. Prasad are counsels in carriage of this matter and I am aware that one cannot be a witness and counsel in the same matter.'*

[163] Mr Bale then referred me back to the written submissions of the Respondent legal practitioner of 5th December 2017 at paras [3.13]-[3.14] in relation to the affidavit of Mr Kumar sworn on 22nd November 2017 wherein Mr Kumar has stated at para [6]: *'That our office was informed of their predicament by way of an email dated 31st October, 2017. Annexed herewith and marked as "NMK1" is a copy of the email from Ms Reema Gokal to Mr. Avneel Chand'.* In response, the Respondent legal practitioner has submitted at [3.14]:

> *'Kumar is giving evidence that he does not have actual knowledge of. He cannot prove this of his own knowledge. Furthermore if the statement is made on information and belief, he has to state the source of the information and the grounds or reason for the belief. He has not done so. In paragraph 6 Kumar is exhibiting an email purporting to be sent to Mr. Aveenal Chand. This email address is a Gmail address and not an official Legal Practitioners or Chief Registrar's email address. There is no evidence that firstly the email address is that of Mr Avneel Chand, and that it is his professional email address to be used by the Legal Practitioners Unit or the Chief Registrar. Furthermore, the email exhibited as "NMK1" is only sent to Mr Avneel Chand and not to Kumar. Mr Avneel Chand is giving evidence through Kumar Paragraph 6 of the affidavit must be expunged for being in breach of Or. 45 r.1 and Or. 45 r 2 High Court Rules 1988.'*

[164] I do not intend to waste more time and resources in setting out each of Mr Bale's oral submissions on this point, that is, that Mr Kumar's affidavits are, in reality, those of Mr Chand. I have already made a ruling above to admit Mr Kumar's affidavit sworn on 22nd November 2017 and filed on 23rd November 2017.

[165] On the issue that Mr Chand should withdraw from appearing as Counsel for the Chief Registrar in the present interlocutory applications, I asked Mr Bale as to whether he was also seeking that Ms Prasad withdraw as she was the joint author of the written submissions with Mr Chand and was also appearing with Mr Chand. Mr Bale's response was that he was not seeking that Ms Prasad withdraw as it was only Mr Chand who was giving evidence through Mr Kumar. For the record, I note that Mr Bale's response is, of course, contrary to the statement at para [5] in the 2nd affidavit of the Respondent legal practitioner sworn on 11th December 2017, to which Mr

Bale previously drew my attention, wherein the Respondent legal practitioner has stated that both *'Mr Chand and Ms Prasad are giving evidence through Kumar'*.

[166] I then invited Mr Chand to respond. In summary, his oral submissions were as follows:

(1) He was relying upon the joint written submissions (dated 7th December 2017) citing section 114 of the *Legal Practitioners Act* 2009, that is, the Commission is not bound by the rules of evidence;

(2) He also agreed that the High Court Rules do not apply to the Commission;

(3) Mr Kumar has set out in his affidavit sworn on 22nd November 2017, details as to his employment '*at the Office of the Chief Registrar within the Legal Practitioners Unit'* and his access to file notes, etcetera. He has also stated *'I am informed'* where he has been told certain information.

[167] Mr Bale, in reply, did not specifically address that the Commission is not bound by the rules of evidence or that the High Court Rules do not apply to the Commission. Instead, Mr Bale, submitted, as I have previously set out above, (when dealing with the specific objections to the affidavit of Mr Kumar), issues as to why the affidavit should be rejected.

[168] I note that whilst objections were raised in the written submissions of the Respondent legal practitioner dated 5th December 2017 in relation to Mr Kumar's affidavit sworn on 22nd November 2017, it was on the basis that the affidavit be struck out even though such an order was never sought in the cross-motion filed on 29th November 2017, as it was with the affidavit of Tevita Cagina. I also note that neither was it sought as an order in the cross-motion that Mr Chand be ordered to withdraw appearing as Counsel for the Chief Registrar, nor was it raised in the written submissions of the Respondent legal practitioner of 5th December 2017 or 7th February 2018.

[169] I also note that this objection was never raised by the Respondent legal practitioner as an oral application in her appearances on 27th November, 1st

or 7th December 2017. Further, it was not raised by the Respondent legal practitioner at the call over of this matter in the present Sittings, that is, on 5th February 2018, only two days prior to Mr Bale raising the objection on 7th February 2018.

[170] I note that Mr Bale did not cite or tender any law in support of his objection. Further, Mr Bale has failed to convince me that Mr Kumar is simply the mouthpiece of Mr Chand.

(ii) Law

[171] Even if I am incorrect on this point, I note that there is different opinion in different jurisdictions as to when Counsel should withdraw, especially when there is a fused profession as there is in Fiji. Hence, I have looked to the applicability of the rule in Canada, another common law country with a fused profession. Again, there have been differing opinions. In 1952, Cartwright J in the Supreme Court of Canada in ***Stanley v. Douglas*** [1952] 1 SCR 260; CanLII: 1951 CanLII 30 (SCC), <http://canlii.ca/t/22rwh>) stated at p.273:

> *'The form of expression employed by Humphreys J. in* ***Rex v. Secretary of State for India*** *[[1941] 2 KB 169] ... would appear to shew rather that* ***counsel ought not to give evidence than that such evidence is legally inadmissible.***
>
> *However the matter may stand in England, it appears to me that* ***such evidence is at present legally admissible in Canada****.*
>
> …
>
> *While these decisions bring me to the conclusion that the evidence of counsel in the case at bar was legally admissible, each of them contains, as indeed does every case which I have read in which the matter is discussed, a clear expression of judicial disapproval of counsel following such a course.'*

[172] Just on 22 years later in ***Maryland Casualty Co. v. Roy Fourrures Inc.*** [1974] SCR 52; CanLII: 1973 CanLII 141 (SCC), <http://canlii.ca/t/1xtz7>, Pigeon J who delivered the judgment of the Supreme Court said:

> *'The trial judge should not have tolerated the participation of this counsel in the trial, but he [the trial judge] was not thereby excused from the obligation of taking this testimony into consideration ...'*

[173] A further 18 years later in ***R v Deslauriers***, 1992 CanLII 4022 (MB CA), CanLII: <http://canlii.ca/t/1pflt>, a helpful discussion was set out by Twaddle JA (with whom Phil and Helper JJA agreed) in the Manitoba Court of Appeal as follows:

> `*It is a long-established rule that a lawyer should not be both counsel and a witness in a case. Speaking on the Divisional Courts behalf following the hearing in* ***R v Secretary of State for India*** *[1941] 2 KB 169, Humphreys, J. said (at p. 175n):*
>
> > *"... A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as counsel and witness in the same case."*
>
> **…**
>
> *In my experience, this rule has been applied not only in cases where evidence is given viva voce, but also in cases where it is given by affidavit.* ***This means that a lawyer should not appear as counsel on a motion where his affidavit is before the court****. Nor should he appear on an appeal from an order made on that motion.*
>
> *The rigour of this rule is sometimes relaxed where the facts deposed to by counsel are non-controversial or where the interests of justice demand it. This relaxation is, however, a concession to expediency, ordinarily permitted only where the lawyer's credibility will not be impeached and where neither his conduct nor judgment is questioned.*
>
> ***The scope of the rule*** *is not limited to cases where counsel gives evidence directly. It* ***extends to cases in which counsel relies on an affidavit sworn on the basis of information received from counsel, whether or not the affidavit expressly says so****. My brother Philp recalls a case, heard last spring, in which this Court insisted that independent counsel be retained in such circumstances.*
>
> *Counsel's objective role is also compromised in a case such as this* ***where his own conduct or judgment has to be taken into account by the court in resolving an issue between the parties****. Counsel ends up in these circumstances justifying his own conduct and judgment and attacking those of opposing counsel.* ***This is a situation which should be avoided. Whenever possible, other counsel should be retained****.*
>
> *Reluctant as we therefore were to hear counsel, we recognized that in a case involving allegations of delay it was undesirable that further delay should be encountered as a result of a rule which had not been applied in the Queen's Bench and which may not have been fully understood. Of the two evils,* ***we preferred to ignore the lack of counsel's objectivity*** *and to subjugate our own embarrassment at having to debate the issue of reasonableness with those whose conduct*

*and decisions were being judged **in the interest of avoiding the further delay that would otherwise have occurred**.'*

[174] Two years later in ***Webb v Attewell***, 1994 CanLII 8699 (BC CA), Justice Southin of the British Columbia Court of Appeal said at paras [31]-[33]:

> *'[31] Mr. MacLeod was in error when he said that Mr. Samuels' being called by the plaintiff would prevent him continuing as counsel and Mr. Samuels was in error when he yielded too readily to that assertion.*
>
> *[32] The law does not forbid a barrister appearing for his client because he has given, or may have to give, evidence. The rule of professional practice is that he or she ought not to do so when doing so may put the court in an invidious position. The court is in an invidious position when counsel gives evidence on a contested issue. When counsel does that, he or she is also in the embarrassing position of inviting the court to accept counsel's evidence rather than that of another witness.*
>
> *[33] **The question of whether counsel should retire in the middle of a case because the other side threatens, without warning given before the case begins, to call him, or does call him, is not one to be decided by counsel** whose decision it is simply by a general rule. His own client's proper interest, including the cost of instructing other counsel, may require him to continue. It would, I think, have been better if the learned judge had simply said to counsel for the plaintiff, "Well, call him if you wish and let us get on with it". Only at the end of the examination in chief would it have been possible to determine whether Mr. Samuels' continuing as counsel would either put the court in an invidious position or embarrass Mr. Samuels. If it had then been clear to Mr. Samuels that that situation had arisen, he, as a matter of proper professional practice, would have properly retired.'*

[175] More recently, Justice Woods in the Tax Court of Canada in ***Williamson v. The Queen***, 2009 TCC 222 (CanLII: <http://canlii.ca/t/23cn6>), decided not to require counsel to withdraw considering the delay, explaining at para [22]:

> *'Like the appeal court in Deslauriers, I have decided to overlook Ms. Kennedy's actions in the interest of not further delaying these proceedings by requiring different counsel. These proceedings have been outstanding for a considerable period of time, and it is desirable that they be heard on their merits without further delay.'*

[176] Of particular interest was a decision of Monnin CJ in the Court of Queen's Bench in Manitoba, in ***Alevizos v. Manitoba Chiropractors Association et al***, 2007 MBQB 56 (CanLII), <http://canlii.ca/t/1r2ns>, where the plaintiff

'sued the Association and the various members involved in his prosecution [for professional misconduct]' alleging *'malicious prosecution, misfeasance in public office and conspiracy'* and *'that the investigator was negligent in his investigation'*. The plaintiff sought *'to have the defendants' trial counsel … removed as solicitors of record and as counsel at trial'*, as it was alleged that the firm had previously advised the association *'that it could use a professional misconduct prosecution in order to remove a member from its Board'*. His Lordship, while expressing '*serious doubts of the bona fides of Dr. Alevizos'*, eventually agreed that *'the likelihood of the firm's advice being an issue at trial requires that the solicitors of record for the defendants should be removed'* but noted that should the defendants be successful at the final hearing, '*it would be open to them to seek recovery of those costs from Alevizos [on the motion] in addition to whatever other costs they are entitled'*. Of relevance to the present matter, was the citation by Monnin CJ of a judgment of the Manitoba Court of Appeal in ***Canadian Pacific Railway Company v. Aikins, MacAulay & Thorvaldson,*** 1998 CanLII 5073 (MB CA), <http://canlii.ca/t/1flgf>, where Monnin JA (with whom Twaddle and Lyon JJA agreed) stated at para [19]:

> *'The second issue is one that was not addressed by any of the parties, but it is one which must sound alarm bells for any court hearing a matter of this nature:* ***the concept or practice of removal litigation****. It is incumbent to ask if there is genuinely an issue of conflict, or is the issue simply being raised as a strategic tool where it might well advantage the party raising it simply to delay matters or for other positioning purposes? … One result of removal litigation can be that a party to litigation could achieve a modicum of success simply by ensuring that the matter is not heard expeditiously.'*

[177] I consider that for Mr. Bale (who was present during each of the previous appearances on 27th November, 1st and 7th December 2017 and 5th February 2018 involving the interlocutory applications), to make on 7th February 2018, a preliminary oral application that opposing Counsel be made to withdraw, just before I was to hear any final submissions on the three interlocutory applications (where one of the Respondent's main arguments has been prejudice caused by delay), was disingenuous to say the least.

[178] Nevertheless, Mr. Bale was entitled to make his oral application, even at the

eleventh hour. As I explained to him, however, that whilst I would hear his oral application, I would not be adjourning the hearing of the final submissions on the three interlocutory applications so as to deliver my ruling on his oral application. Instead, I noted that my ruling on his oral application would be included as part of the one overall ruling on the three applications, the two objections and now two oral applications. I will now rule on Mr. Bale's oral application for Mr. Chand to withdraw.

[179] In considering Mr. Bale's oral application, I have wondered how was his appearance as Counsel arguing the applications on 7th February 2018, was any different from that of Mr. Chand? Mr. Bale has been heavily involved in this litigation. It was Mr. Bale, from the firm of Lal Patel Bale Lawyers, who, on 26th June 2017, wrote to the Commission, seeking an extension of a further 21 days to file the Summons seeking further and better particulars. It was Mr. Bale who, on 11th July 2017, attended the Commission's offices and indicated that as he was unsure which document he was to file, he would seek instructions. It was Mr. Bale who, on 17th July 2017, wrote to the Chief Registrar '*asking for further and better particulars'.* Indeed, it was Mr. Bale who signed and filed the submissions on the morning of 7th February 2018, prior to his appearance at the hearing that afternoon.

[180] Why I raise the involvement of Mr. Bale in these proceedings is that one of the central arguments as the basis of the Respondent legal practitioner's cross-application for the proceedings to be struck out or permanently stayed is due to delay. Mr. Bale says that Mr. Chand should withdraw for appearing as Counsel when the affidavits from Mr. Kumar upon which Mr. Chand is relying are in reality his own. On the other hand, Mr. Bale presumably sees no issue in his appearing as Counsel on behalf of the Respondent legal practitioner to argue delay, when, arguably, Mr. Bale has been involved in the litigation since at least 2017 and has, arguably, also made a contribution to the delay, when he did not pursue the application for further and better particulars in July 2017 (while the Respondent legal practitioner was away in New Zealand) and, further, did not do so even after being granted an extension and, instead, wrote another letter (on 26th August 2017) seeking

further and better particulars. Was not Mr. Bale then, by appearing as Counsel on 7th February 2018, also facing a potential problem as, arguably, he could have been called as a witness (if leave was so granted upon an application made by Mr. Chand, or if Mr. Bale was so called by the Commission itself pursuant to section 116(1) of the *Legal Practitioners Act 2009*), concerning his contribution to the alleged delay during 2017? **<u>This is all purely speculative</u>**. As was said by Justice Grant in ***Law Society of New Brunswick v Vaughn Barnett***, 2006 NBQB 104 (CanLII), <http://canlii.ca/t/1mwm7>, at para. [16], citing Justice Rideout in ***LeBlanc v. Allain*** [2003] N.B.J. No. 130; 2003 NBQB 141 (CanLII), <http://canlii.ca/t/5c8p>, where in considering the question of removal of counsel purely on speculation, Rideout J noted at para [36[:

> *'The authorities are clear that <u>mere speculation that counsel for a party may be required to testify is not a sufficient enough threshold to remove that counsel</u>. **There must be <u>a very real likelihood</u>** before such a serious step is taken.'*
> [My emphasis]

[181] As I have noted above, neither the Respondent (nor Mr. Bale) sought leave to cross-examine Mr. Kumar to show that his affidavits were those of Mr. Chand or to apply to call Mr. Chand. **<u>Again, it is all purely speculative</u>**.

[182] On that point, Grant J's decision in *Law Society of New Brunswick v Vaughn Barnett*, in relation to costs is relevant to the present matter and Mr. Bale's oral application for Mr. Chand to withdraw in the hearing of these three interlocutory applications. Although Grant J in *Barnett*, granted the Respondent legal practitioner's application for an adjournment, His Lordship refused the motion for disqualification of opposing Counsel and made his views clear on what he thought of that application when awarding costs, stating at paras [30]-[31]:

> *'[30] In my view this motion was a tactical maneuver only. Mr. Barnett cited no Rule of Court, no statute or any common law authority in support of it, **merely his own allegations based on weak or non-existent evidence**. I will reflect that finding in my award of costs.*
>
> ***<u>Disposition</u>***
> *[31] Mr. Barnett's motion for an adjournment of the Law Society's application for enforcement of the injunction is allowed and <u>his</u>*

> *motion for disqualification of Mr. McElman is refused. I award costs to Mr. Barnett of $500.00 on his motion for the adjournment and costs to the Law Society of $1,500.00 on the motion for disqualification. The net amount of $1,000.00 costs is payable by Mr. Barnett to the Law Society forthwith.'*
> [My emphasis]

[183] Similarly, I note that Mr. Bale in his oral application, (to use the words of Grant J from *Barnett),* '*cited no Rule of Court, no statute or any common law authority in support of it,* ***merely his own allegations based on weak or non-existent evidence'***.

[184] Before Mr. Bale brings a future such application, he might consider **Rule 3.4 of the '*Rules of Professional Conduct and Practice'*** in the *Schedule* to the *Legal Practitioners Act 2009* which states:

> *'A practitioner shall not, save in exceptional circumstances, continue to act for a client in a matter in which* ***the practitioner is likely to be a witness*** *unless:—*
>
> *(i) the practitioner's evidence relates solely to an uncontested matter;*
> *(ii) the practitioner's evidence relates solely to formal matters;*
> *(iii) the practitioner's evidence will relate solely to the nature and value of legal services rendered;*
> *(iv) refusal to act or withdrawal from the matter will jeopardise the client's interest.'*

[185] Apart from '***allegations based on weak or non-existent evidence'*** I have seen no basis where Mr. Chand was likely to be a witness, particularly, where no such prior formal application was made by the Respondent legal practitioner or by ay of an oral application during each of the previous appearances (at which Mr. Bale was also present) on 27th November, 1st and 7th December 2017 and 5th February 2018 involving the interlocutory applications.

[186] I do not intend to waste further time on this issue. I note that Mr. Bale during his oral submissions as to the alleged irregularity of Mr. Kumar's affidavits, suggested ***"I'm just saying aloudly, when these goes on appeal, these matters will all come …"*** and, later when I clarified, *"so that's the original complaint, objection, that Mr Chand should recuse himself because he is a witness in his own case",* Mr Bale replied *"Yes"* and added further soon

after that ***"… the reason why I raise it cause I want it in the judgment"***. Hence, if Mr Bale and/or the Respondent legal practitioner now wish to take this on appeal it is included in the ruling.

[187] In summary, on the oral application of Mr. Bale for Mr. Chand to withdraw, I accept the submission of Mr. Chand. That is, that Mr. Kumar has set out in his affidavit sworn on 22nd November 2017, details as to his employment '*at the Office of the Chief Registrar within the Legal Practitioners Unit'* and that he has access to file notes, etcetera. Further, I accept as part of that employment, as Mr. Kumar has stated in his affidavit, *'I am informed'* where he has been told certain information. I accept this to also be the case with the three further affidavits of Mr. Kumar sworn on 30th November, 1st and 18th December 2017. Therefore, Mr. Bale has failed to convince me that Mr. Chand is appearing as a witness in his own case.

(iii) ***3rd Ruling*** *– Oral application for Mr. Chand appearing as Counsel for the Chief Registrar to withdraw –* ***Application refused***

[188] **Accordingly, my 3rd Ruling, is that for the reasons that I have outlined above, the oral application of Mr. Bale made on 7th February 2018 for Mr. Chand to withdraw appearing as Counsel for the Chief Registrar on the hearing of the interlocutory applications, is refused.**

(9) Do I accept the need for this adjournment?

[189] **Having accepted into evidence the 1st affidavit of Melvin Nitish Kumar together with the four documents annexed thereto, do I accept the need for an adjournment?**

[190] In relation to cases that have come before the Commission regarding adjournments, I note that the Respondent legal practitioner has cited in her submissions (*'Written Submissions'*, 5th December 2017, paras [5.29]-[5.30], page 16) the ruling of Commissioner Connors in ***Chief Registrar v Iqbal Khan*** (Unreported, ILSC, Action Nos. 009 and 010 of 2009, 28 April 2010; PacLII: [2010] FJILSC 6, <http://www.paclii.org/fj/cases/FJILSC/2010/6.html>), where the

application was granted, however, $5,000 in costs was awarded against the Respondent legal practitioner seeking the adjournment, with Commissioner Connors adding that '*In the event the costs are not paid the Respondent's practicing certificate is suspended until such time as the cost are paid without further order'*.

[191] Actually, the litigation between ***Chief Registrar v Iqbal Khan*** involved four judgments involving adjournments (the ruling from Commissioner Connors granting an adjournment and then a ruling later by Justice Madigan refusing an adjournment that was unsuccessfully appealed by the legal practitioner to the Court of Appeal and then the Supreme Court) as follows:

(1) ***Chief Registrar v Iqbal Khan***, 28 April 2010, (noted above) whereby Commissioner granted the application but awarded 5,000 in costs against the legal practitioner seeking the adjournment;

(2) ***Chief Registrar v Iftakhar Iqbal Ahmad Khan*** (Unreported, ILSC, Action No. 009 of 2009, 11 November 2013) – an application for an adjournment was refused by the Commissioner, Justice P.K. Madigan, with the ruling cited in his decision in ***Chief Registrar v Iftakhar Iqbal Ahmad Khan*** (Unreported, ILSC, Action No. 009 of 2009, 11 December 2013, Commissioner Justice P.K. Madigan; [2013] FJILSC 19, <http://www.paclii.org/fj/cases/FJILSC/2013/19.html>);

(3) ***Iftakhar Iqbal Ahmad Khan v Chief Registrar***, ABU0068.2013 (25 September 2014; PacLII: [2014] FJCA 160, <http://www.paclii.org/fj/cases/FJCA/2014/160.html>) – whereby an appeal by the practitioner on an aspect of Justice Madigan's ruling of 11th November 2013 refusing an adjournment was dismissed;

(4) ***Chief Registrar v Iqbal Khan***, CBV0011.2014 (22 April 2016); PacLII: [2016] FJSC 14, <http://www.paclii.org/fj/cases/FJSC/2016/14.html>) – with the Supreme Court confirming that the ruling of Justice Madigan of 11th November 2013 '*not to grant an adjournment was well within the reasonable ambit of the Commissioner's discretion'*.

[192] The third of the above four cases involving the Chief Registrar and Iqbal Khan and the issues of adjournments, came before the Court of Appeal in

2014 (*Iftakhar Iqbal Ahmad Khan v Chief Registrar,* [2014] FJCA 160). It involved a number of grounds including the refusal of the Commissioner, Justice Madigan, to grant an adjournment on 11th November 2013. It is the most comprehensive of all of the cases (of which I am aware) involving applications before the Commission since its establishment in 2009 as to the principles to be applied in granting an adjournment.

[193] As Guneratne JA (with whom Chandra and Kumar JJA agreed), explained (at para [32]), *'the said refusals may well be tested on the basis whether they amounted to a denial of a fair hearing as postulated by the principle audi alteram partem ["to hear the other side"]'*. He then outlined at paras [34]-[37] the principles to be considered as follows:

> *'[34] The Courts have repudiated earlier suggestions that, the principles of natural justice do not apply to disciplinary bodies. "They must act fairly just the same as anyone else and are just as subject to control by the Courts." (vide:* ***Buckoke v. Greater London Council*** *[1971] Ch. 655.*
>
> *[35] The Legal Practitioners Decree (2009) in pursuance of which the impugned proceedings have taken place do not speak of any right to adjournments.*
>
> *[36] Nevertheless, reflecting on the epigram of Byles, J, in* ***Cooper v. Wandsworth Board of Works*** *[1863] 14 CB (NS) 180 that, "the justice of the common law will supply the omission of the legislature", I am inclined to the view that, there is nothing in the said Decree or any other law that prevents a similar approach being adopted in Fiji, at least as a presumption and ought not to be excluded for the sake of administrative or a tribunal's convenience for "convenience and justice are often not on speaking terms." (vide:* ***General Medical Council v. Spackman*** *(1943) AC 627 at 638.*
>
> *[37] It follows then that, "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting and the subject matter to be dealt with and so forth." (vide:* ***Russell v. Duke of Norfolk*** *[1949] 1 All ER 109 at 118 and* ***Lloyd v. McMahon*** *[1987] AC 625 at 702).'*

[194] Guneratne JA then applied the above principles 'to the proceedings under consideration' in *Iftakhar Iqbal Ahmad Khan v Chief Registrar* (supra) (and the ruling of Madigan J to refuse an adjournment on 11th November 2013) as follows:

*'[39] It is to be noted that, both the Court of Appeal in England and the House of Lords have held that, in disciplinary proceedings which demand a rapid hearing and decision, natural justice may even be excluded (vide: **Fraser v. Mudge** [1975] 1 WLR 1132) though on some occasions it has been held that, "principles of fairness must be observed." (vide: **R v. Home Secretary, ex parte Tarrant** [1985] QB 251.*

*[40] It has also been said that, "arrangements for hearings must be fair and justice may not be sacrificed to speed." (vide: **R v. Portsmouth CC, ex parte Gregory & Moss** [1991] 2 Admin. LR 681).*

[41] But, as the record reveals proceedings against the Appellant had been initiated as way back in the year 2009 and the trial for whatever reasons had got underway only in 2013.

[42] I do not think I could substitute my view to that of the Commissioner's, unless I could say that, he has exercised discretion wrongly. The Commissioner has exercised discretion and I cannot say that, it has been exercised wrongly …'

[195] The Court of Appeal went on, however, to exonerate the legal practitioner of two of the three counts. Both the Chief Registrar and the legal practitioner appealed. There were a number of issues involved in the appeal to the Supreme Court. (See *Chief Registrar v Iqbal Khan*, 22 April 2016 (supra)). In relation to the *'The applications for an adjournment'*, this was dealt with by Keith J (with whom Marsoof and Hettige JJ agreed) as follows:

*'48. When refusing the application for an adjournment, the Commissioner thought that Mr. Khan had been less than frank with the Commission when he (or someone acting on his instructions) had written at the bottom of his letter to the Chief Registrar that the Chief Registrar had agreed to the hearing being adjourned. The Commissioner described the note as "false and deceitful". The Commissioner was also sceptical about the genuineness of the application in the light of the many attempts which Mr. Khan had made to get the hearing put off. He was to describe the current application as "clearly a further delay tactic". As I read the judgment of the Court of Appeal, that was the principal reason why it thought that it could not say that the Commissioner had exercised his discretion wrongly when refusing to adjourn the hearing. For my part, I can see entirely where the Commissioner was coming from, but **if in truth Mr. Khan needed specialist medical advice so urgently that it could not wait for another week, and if the relevant medical expertise was not available in Fiji, then the request for an adjournment despite everything which had happened before should have been granted**.*

…

*50. Having said that, although Mr. Khan was advised to see a specialist "as soon as possible", **the report did not say that he***

> ***needed specialist medical advice so urgently that it could not be put off for a week.*** *And although Mr. Khan was advised to see a specialist overseas****, the report did not say that the relevant medical expertise was not available in Fiji.*** *Indeed, the Commissioner noted that there was no evidence that Mr. Khan had gone to Australia for that advice. There was no evidence placed before the Commissioner of any appointment having been made with a specialist in Australia. In the circumstances, the Commissioner's decision not to grant an adjournment was well within the reasonable ambit of the Commissioner's discretion.'*
>
> [My emphasis]

[196] Returning to the present case, I note that the cause of this adjournment is that there are two witnesses in India, one of whom is the complainant, who, along with Mr. Jamnadas will be crucial - not just for the case of Counsel for the Chief Registrar - but for the public interest in resolving what has transpired to an allegedly missing $254,000.

[197] In her first affidavit of 29th November 2017, the Respondent legal practitioner has responded to the alleged cause of the need to vacate the hearing (in part) as follows:

> *'27. The complainant in this matter is Reema Gokal. She is a Fiji citizen and is in India on a visitors permit. I annex hereto and mark with the letters "****RDSL15****" with a copy of her passport ID page and her visa to India. Pratima Yogesh Rai Gokal is the mother of the complainant and is also a Fiji citizen in India on a visitors permit. I annex hereto and mark with the letters* ***"RDSL16"*** *with a copy of her passport ID page and visa.*
>
> *28. The complainant and her mother do not have a right to reside in India and are visitors. As a result and a condition of their visitors visas the complainant and her mother must have return tickets to Fiji. I annex hereto and make with the letters* ***"RDSL17"*** *with a copy of Indian visitor's visa requirements from Fiji website.*
>
> *29. The complainant and her mother have been in Fiji for another case. In particular the complainant and her mother came to Fiji for the Family Case being 07/SUV/0152. In this action the complainant and her mother are seeking maintenance. I annex hereto and mark with the letters "****RDSL18****" with a copy of the Court documents in this matter showing Pratima Gokal's address as Nadi, Fiji. She has been attending Court in this matter where she is claiming maintenance of $27,690 [twenty-seven thousand six hundred and ninety dollars]*
>
> ...

> *37. The complainant cannot say that she does not have any money to travel to Fiji, when her place of residence is Fiji and she is on a visitors permit in India ... Furthermore the Complainant has been travelling in and out of Fiji frequently ...'*
> [Underlining my emphasis]

[198] Even though much of the above is argumentative and not simply the recitation of facts, there was no objection raised by joint Counsel for the Applicant at the appearances on 1st and 7th December 2017 and/or in their joint written submissions of 1st and 5th December 2017, or in their letter of advice of 21st January 2017, confirming for the Commission to proceed to ruling on 14th February 2018 *'without the need to call the matter on the 5th and 14th February for oral hearing'*.

[199] My observations in relation to the above are these:

(1) The passports annexed as "**RDSL15"** and "**RDSL16" <u>expired in March 2017</u>, so how can the Commission know what is the current visa status in India of the complainant, Reema Gokal and her mother, Pratima Gokal?** I note that the photocopy of Pratima Gokal's passport has a stamp *"Received 26 Mar 2014 Chief Registrar's Legal Practitioner's Unit',* so presumably Counsel for the Chief Registrar must have also seen this document?

(2) **How relevant to the present application is the fact that a Judgment Debtor Summons was issued in August 2016** against Yogesh Maganlal Gokal where Pratima Gokal was the applicant **followed by a bench warrant being issued on 22nd September 2016 against Yogesh Maganlal Gokal for his non-appearance?** There is no documentary evidence before me that Pratima Gokal '*has been attending Court in this matter'* after 22nd September 2016;

(3) Probably, the most relevant document is the photocopy of the '*Indian visitor's visa requirements from Fiji website'* annexed at **"RDSL17"** setting out that there is a requirement that if a person is on a tourist visa then the tourist must have *'a copy of return itinerary or ticket issued by airlines or travel agent'.*

[200] **I am concerned that the three affidavits of Mr. Kumar, as well as the**

two sets of written submissions of Counsel for the Chief Registrar, do not address the current visa status in India of the complainant, Reema Gokal and her mother, Pratima Gokal, together with the requirement that as tourists they must have *'a copy of return [a] itinerary or ticket issued by [the] airlines or travel agent'.*

[201] In particular, there is no affidavit from Mr. Kumar (or some other appropriate person from the Legal Practitioners Unit within the Office of the Chief Registrar) saying that (despite it obviously being hearsay, but noting, however, that the Commission is not bound by the rules of evidence):

(1) They have spoken with the complainant, Reema Gokal and her mother, Pratima Gokal, who have advised as to their current visa status in India (and then setting out in an affidavit what has been relayed as that visa status);

(2) The complainant, Reema Gokal and her mother, Pratima Gokal, have provided copies of their up to date passports including the relevant page with the visa stamp (and then annexing copies to the affidavit);

(3) Whether or not the complainant, Reema Gokal and her mother, Pratima Gokal, hold *'a copy of return itinerary or ticket issued by the airlines or travel agent'* and, if not, why not;

(4) What are the specific financial details of the complainant, Reema Gokal and her mother, Pratima Gokal, including bank statements, how and when did they last travel to India (including who paid for the travel), how are they living in India, how long have they been there and when are they next expecting to return to Fiji and who is paying for the travel.

[202] Balanced against the above, I note that Mr Kumar's affidavit of 22nd November 2017 has annexed the following four documents:

(1) An email dated 31st October 2017 (annexed as **"MNK1"**) – from the complaint to Counsel for the Chief Registrar *'we dont [sic] have any money to pay for airfares and we dont [sic] have money to pay for rent and all living expenses in Fiji', 'we are in debt with our villagers', 'we are penniless and unable to attend the case';*

(2) An email dated 1st November 2017 (annexed as **"MNK2"**) – from the complainant to the Chief Registrar – '*we dont [sic] have money for airfares*

and living expenses in Fiji';

(3) A letter dated 15th November 2017 (sent on 16th November 2017) from the Chief Registrar to the Permanent Secretary of Foreign Affairs (annexed as **"MNK3"**) – requesting *'assistance ... in facilitating a Skype hearing';*

(4) An email dated 22nd November 2017 from Counsel for the Chief Registrar to Mr. Tabulutu, Ministry of Foreign Affairs (annexed as **"MNK4"**) – confirming a telephone conversation of 22nd November 2017 following up the letter from the Chief Registrar of 15th November 2017.

[203] **<u>On my limited understanding of what has occurred, based solely on the affidavits filed, I find</u>**:

(1) There is no indication either, by way of documentation annexed to an affidavit (such as a letter from the LPU to the complainant, Reema Gokal), or the recounting of a conversation in an affidavit filed, from a person who spoke directly with the complainant, Reema Gokal and/or her mother, Pratima Gokal, setting out a formal agreement or even an understanding that was reached between a representative from the Office of the Chief Registrar and the complainant, Reema Gokal and her mother, Pratima Gokal, that the Gokals would privately fund their return from India to Fiji for the hearing commencing on 28th November 2017;

(2) At best, (and this is purely speculative) there may have been an assumption on the part of staff of the LPU within the Office of the Chief Registrar, that the Gokals would privately fund their return from India to Fiji for the hearing commencing on 28th November 2017;

(3) It was only upon receipt of the emails of 31st October and 1st November 2017, that attempts were made to try to arrange an alternative, that is, for evidence to be given by way of Skype;

(4) When no response had been forthcoming from the Ministry of Foreign Affairs by 22nd November 2017, an application was then filed seeking to vacate the hearing or that it be part-heard. Such application was then not served upon the Respondent legal practitioner until the return date of it on Monday, 27th November 2017, at the beginning of the November/December 2017 Sittings, the day prior to when the hearing was set down to commence.

[204] **<u>The above is the most unsatisfactory state of affairs</u>. At the same time, I am cognizant of the serious allegations against the Respondent legal practitioner <u>and that without the granting of an adjournment a hearing cannot take place to resolve whether $254,000 is missing and whether this was due to the failure of the Respondent legal practitioner to disburse that sum to the complainant</u>**. In that regard, I have noted what the Court of Appeal said in *Goldenwest* (at paras [51] and [54]) in relation to balancing 'justice and fairness' when considering an application for an adjournment:

> *'51. This Court has every sympathy with the wish of trial courts to maintain a tight rein on proceedings and to ensure expeditious hearings. This is particularly so if a trial date has been set, or if the history of a matter reveals a litany of delays particularly caused through adjournments. Adjournments by consent between the parties can indicate a lack of preparation and attention to the need for litigation to be conducted in a timely manner. The Court is aware that in too many instances adjournments are or may be sought as a matter of course and that due to the Court's schedule and a mounting number of cases, adjournments may too readily be gained. It is understandable that as an antidote to this, a Court may ultimately be loath to grant an adjournment where otherwise a trial is ready to proceed and the Court has set a firm date after a number of adjournments.* ***At the same time, Courts must be careful to ensure that all the circumstances must be borne in mind and that ultimately expedition is not the sole measure. <u>Justice and fairness are essential features of the consideration for a request for an adjournment.</u>***
> **…**
> *54. In all the circumstances, it appears that the exercise of discretion not to grant an adjournment on the day of the hearing ... was unfair and unjust in its denial to Goldenwest of its right to be heard, and procedural fairness generally.'*
> [My emphasis]

[205] **Therefore, although I am most concerned as to what arrangements, if any, were agreed between the LPU, the complainant and her mother, in relation to travel, I have come to the view, as did the Court of Appeal in *Goldenwest,* that *'In all the circumstances, it appears that <u>the exercise of discretion not to grant an adjournment</u> on the day of the hearing to enable the giving of evidence'* <u>would be *'unfair and unjust in its denial'* to the Chief Registrar representing the public</u> '*of its right to be heard, and procedural fairness generally'*.**

[206] I am fortified in my view in vacating the hearing and granting the adjournment by noting that in their joint written submissions filed in support of the application that the hearing be vacated or alternatively part-heard, Counsel for the Chief Registrar (*'Written Submissions'*, 5th December 2017, para [13], page 3), have stated:

> ***'13. The Applicant submits that good cause has been shown to seek an adjournment of the Trial <u>to allow witnesses residing in India to travel to Fiji</u>.'***
> [My emphasis]

[207] I can only presume that by making such a submission, joint Counsel for the Chief Registrar must have held discussions with the Chief Registrar and the witnesses concerning funding (and/or reimbursement) prior to this submission being filed on 5th December 2017, ***<u>'to allow witnesses residing in India to travel to Fiji</u>'***. **Counsel for the Chief Registrar now have a joint responsibility to ensure that the witnesses *'residing in India … travel to Fiji'* for the next hearing.**

*(10) **<u>4th Ruling</u>** – Application hearing be vacated* – ***Granted***

[208] **<u>Therefore, my 4th Ruling in relation to the application to vacate the hearing date allocated from 28th November until 1st December 2017, is granted. I will, however, be making some further Orders which I will discuss at the end of this ruling confirming that arrangements have been made '*to allow witnesses residing in India to travel to Fiji*'</u>**.

[209] **Obviously, as the hearing did not proceed between 28th November and 1st December 2017, combined with my decision to grant the application to vacate the hearing date, <u>the alternative Order sought by the Applicant in the 1st Notice of Motion that the proceedings be part-heard is no longer applicable</u>**. Indeed, as noted above, on 1st December 2017, Counsel for the Chief Registrar, made an oral application that *"... depending on the result of the application [for vacation of the hearing] ... we submit that **<u>we would require an adjournment of the entire proceedings</u>**"*. He then made an oral application in relation to the Order sought, *"if that could be amended to say 'An adjournment of proceedings'* rather than it being part-

heard." I will grant the oral application made on 1st December 2017, such that if the vacation of the hearing is granted that the entire proceedings be adjourned rather than part-heard, leave is granted to so amend. Further, the Amended Order 1 sought by the Chief Registrar is granted, that is, the entire proceedings are adjourned to a date to be allocated by the Commission.

(11) ***5th Ruling*** – Oral application to amend Order 1 sought – ***Granted; and*** ***6th Ruling*** **-** *Application for adjournment of the entire proceedings* – ***Granted***

[210] **So there is no confusion, my 5th Ruling is that the oral application made on 1st December 2017, by Counsel for the Chief Registrar to amend Order 1 sought in the Notice of Motion filed on 23rd November 2017, such that if the vacation of the hearing is granted that the entire proceedings be adjourned rather than part-heard, leave is granted to so amend. My 6th Ruling is that the Amended Order 1 sought by the Chief Registrar is granted, that is, the entire proceedings are adjourned to a date to be allocated by the Commission.**

(12) ***7th Ruling*** **-** *Cross-motion - adjournment be refused* – ***Declined***

[211] **In addition, the Respondent legal practitioner, in her cross-motion, has sought the following Order: *'That the application for adjournment be refused.'* In light of my above two rulings, my 7th Ruling is that the application seeking an Order that the application for an adjournment be refused, is declined.**

(13) ***8th Ruling*** – *Application evidence of Reema Gokal and Pratima Gokal be heard in the next Sittings* – ***Granted***

[212] **Following on from the above, my 8th Ruling is that application, seeking that the evidence of the complainant, Reema Yogeshrai Gokal, and the witness, Pratima Yogesh Rai Gokal, be heard in the next Sittings of the Commission, is granted.**

5. Respondent legal practitioner's Application for refusal of evidence to be allowed to be taken via Skype

[213] I now turn to the Order sought in the Respondent legal practitioner's cross-

motion seeking ***'THAT** the taking of evidence of the Complainant Reema Gokal and witness Pratima Gokal by skype be refused'.*

(1) Background

[214] As noted at the beginning of this ruling when providing a background to the applications, on 9th November 2017, Counsel for the Chief Registrar sent a letter to the Secretary of the Commission with a copy to the Respondent legal practitioner advising that the complainant and her mother '*would be testifying by way of skype'* from India and that if the Respondent legal practitioner objected then she '*could file a formal application and perhaps the Commission could give a written Ruling on the application'.* On 17th November 2017, the Respondent legal practitioner replied by way of letter to the Commission with a copy to the Chief Registrar advising that she did object to the taking of evidence by Skype and, in any event, the onus was upon the Applicant who *'needs to make a formal application'* to the Commission to seek approval.

[215] **I agree with the Respondent legal practitioner on this issue. It was the responsibility of Counsel for the Chief Registrar to make a formal application to the Commission to seek approval for evidence to be taken via Skype** including setting out in a supporting affidavit the logistics of how this was going to occur such as from the specific location, who would be present to ensure the security and validity of such evidence (that is, it was being taken without the possibility of witnesses speaking to others during the giving of their evidence or during adjournments), not to mention there were sufficient copies of the bundles of documents so as to ensure that what the witness had in Mumbai when giving evidence was the same as being used in the Commission's hearing room in Suva. Also, if approved, technical arrangements needed to be arranged with the Secretary of the Commission, well in advance of the hearing set down as from 28th November 2017, to test that the equipment was working between the Fiji High Commission in India and the Commission's hearing room in Suva and, further, whether it was even feasible, taking into account the time difference, to arrange such a hearing.

[216] **Further, my limited understating, without any affidavit evidence having been provided by Counsel for the Chief Registrar, let alone any details set out in his letter of 9th November 2017, is that <u>there is a time difference of some six and a half hours between Mumbai and Suva such that 10.00 am in Mumbai would be approximately 4.30pm in Suva</u>.** It is quite clear that if evidence was allowed to be taken by Skype from the complainant and her mother, it would require such evidence to be taken of at least six hours per day, with breaks not included, perhaps over 2-3 days. How this was going to be achieved without my staff agreeing to sit until very late each evening (who, for the record, receive no payment for overtime and, instead, receive time in lieu and, apart from a meal allowance, have to arrange or pay for their own transport home), is unclear. The practicalities, (or should that be impracticalities), that were assumed to be covered in suggesting taking evidence by Skype (without setting out specific details), surprises me.

[217] Similarly, in the **<u>2nd Notice of Motion</u> dated 1st December 2017, there is no application seeking a specific order that the evidence of the Complainant, Reema Gokal and the witness, Pratima Gokal, be taken by Skype.** Rather, the Orders sought are in relation to being granted leave to file and serve additional disclosures and leave to amend Counts 3 and 8.

[218] I again note, however, as set out above, when I decided to grant the application for vacation of the hearing and the adjournment until the next Sittings, that in their joint submissions, Counsel for the Chief Registrar (*'Written Submissions'*, 5th December 2017, para [13], page 3), have concluded:

> *'The Applicant submits that good cause has been shown to seek an adjournment of the Trial <u>to allow witnesses residing in India to travel to Fiji</u>.'*
> [My emphasis]

[219] Thus, in relation to the issue as to whether or not to allow evidence to be taken by Skype, **I have before me only a cross-motion of the Respondent seeking an order *<u>'THAT</u> the taking of evidence of the Complainant***

Reema Gokal and witness Pratima Gokal by Skype be refused.'

(2) Submissions of Respondent

[220] According to the submissions of the Respondent legal practitioner dated 5th December 2017 in support of the cross-motion in relation to the Skype issue, she has noted (at para [5.9]):

> *'It is important to note that at the time of writing the letter dated 9th November 2017 the Chief Registrar had not made any arrangements for evidence of the complainant Reema Gokal and Pratima Gokal to be taken by Skype. The Chief Registrar began making arrangements for evidence to be taken by Skype on 15th November, 2017. (See Kumar affidavit sworn on 22nd November 2017 and filed on 23rd November, 2017 and served on 27th November 2017). This was after the Chief Registrar wrote to the Commission advising it that the evidence of the Complainant Reema Gokal and witness Pratima Gokal would be taken by Skype.*

[221] My reading of the 1st affidavit of Mr. Kumar of 22nd November 2017 concurs with the submission of the Respondent legal practitioner. I have also not been provided with any reasons as to why the complainant, Reema Gokal and the witness, Pratima Gokal, cannot attend Fiji with the support of the Chief Registrar for which an order can be sought at the end of the matter for such costs to be repaid by the Respondent if appropriate.

[222] The three affidavits of Mr. Kumar, as well as the two sets of written submissions of Counsel for the Chief Registrar, do not address the Skype issue. Indeed, if I am to accept the *'Written Submissions'*, 5th December 2017, para [13], page 3, (which I have above), joint Counsel for the Applicant have concluded in their submissions that '*good cause has been shown to seek an adjournment of the Trial <u>to allow witnesses residing in India to travel to Fiji</u>.'*

[223] The Respondent legal practitioner in her first affidavit of 29th November 2017 has addressed the Skype issue under the heading 'Right to fair trial'. Part of her statement is as follows:

> *'51. The complainant is refusing to come to give evidence before the Commission. She is making an excuse when as a visitor she must have a return ticket to Fiji.* ***She wants to give evidence by Skype. But given the facts of this case, her credibility is being***

> ***challenged by me. For this she needs to give oral evidence in Fiji before the Commission so that we can see her demeanour when she answers questions***. *She also needs to be in Fiji so that if she perjures herself there can be recourse against her ...'* [My emphasis]

[224] Even though the above is not a fact but rather a submission, I will include it as part of the Respondent legal practitioner's application as to why an order should be made that '*the taking of evidence of the Complainant Reema Gokal and witness Pratima Gokal by Skype be refused'.* I have, however, not included some of the other parts of the affidavit in relation to the Skype issue as, in my view, the statements are argumentative and of questionable assistance.

[225] I also note that neither party has cited in their respective written submissions any case law on the Skype issue, although, I note, that during the appearance on 27th November 2017, the Respondent legal practitioner submitted (as recorded in the transcript of those proceedings) as follows:

> *"In relation to the witnesses of overseas, My Lord. They are Fiji Citizens, residents in Fiji, but with Visitor's Permit in India. Mr. Chand is asking for them to give Skype evidence in convenience. The Court of Appeal, **there is a Judgment of the Court of Appeal about Skype evidence**. Mr. Chand hasn't made any suitable arrangements, that's not contained in the Affidavit."* [My emphasis]

[226] I thank the Respondent legal practitioner for bringing this to my attention. In addition, Mr. Bale, who appeared as Counsel for the Respondent on 7th February 2017, tendered a copy of the judgment of the Fiji Court of Appeal in ***Lotawa v State*** (Unreported, Fiji Court of Appeal, Criminal Appeal No. AAU0091 of 2011, 5 December 2014, Calanchini P, Gamalath and Madigan JJA; PacLII: [2014] FJCA 186, <http://www.paclii.org/fj/cases/FJCA/2014/186.html>).

(3) The Law

[227] My research has found that there are, in fact, two recent judgments of the Court of Appeal in relation to the use of Skype: ***State v Hurtado*** (Unreported, Fiji Court of Appeal, Criminal Appeal No. AAU00148 of 2015, 30 September 2016, Calanchini P, Goundar and Alfred JJA;

PacLII: [2016] FJCA 115, <http://www.paclii.org/fj/cases/FJCA/2016/115.html>) and ***Lotawa v State*** (2014.)

[228] In the most recent of the two judgments, *State v Hurtado*, Goundar JA (with whom Calanchini P and Alfred JA agreed) explained at paras [37]-[39] two important factors to be considered whether to grant the use of Skype:

> *'[37] Section 131 (1) [of the Criminal Procedure Act 2009] sets out a general rule that all evidence must be received in the presence of the accused, or his or her lawyer if the personal attendance has been dispensed with. What this means is that the witnesses must be physically present in court for their testimonies to be received in the presence of the accused, unless the judge has authorised taking of evidence from a remote location or the use of any other procedure or means by which evidence may be taken during the trial,* ***where issues of safety or the interests of justice require the use of such means*** *under subsection (2). In my judgment, the phrase 'any other procedure or means' can include the use of Skype or similar technology to receive oral evidence from witnesses during the trial,* ***if the issues of safety or interests of justice require the use of such means****. There was no witness safety issues in the present case. The crucial question for the learned trial judge was whether the interests of justice required the use of Skype to receive oral evidence from overseas witnesses.*
>
> *[38] The phrase 'the interests of justice' appears in many statutes and is a phrase often referred to by courts. It is a phrase that the courts have not attempted to define and its application depends on the context of the legislation (**Re Chapman & Jansen** (1990) FLC 92-139 per Nicholson CJ). In the context of a criminal statute, Malcolm CJ referred to the phrase in **Mickelberg v The Queen (No 3)** 8 WAR 236 and said at p 252:*
>
> > *"The interests of justice in a particular criminal case are to ensure that a person who is accused of a crime is convicted if guilty and acquitted if innocent after he has had a fair trial. The interests of justice also extend to the public interest and in due administration of justice."*
>
> *[39]* ***It is clear that the interests of justice are not confined to the interests of an accused.*** *The only matter that the learned trial judge considered when he authorized the use of Skype was the respondent's constitutional right to call witnesses. But the right to call witnesses was not an issue. The issue was the mode of calling witnesses.* ***The interests of justice required the learned trial judge to ensure the trial was fair to both the defence and the prosecution and that there was accountability over the witnesses called by the parties.*** *Witnesses who give evidence from overseas via Skype escape any form of accountability*

because the domestic courts lack jurisdiction to hold them responsible for perjury or contempt if they lie on oath. So there is a risk that an overseas witness may not give truthful evidence via Skype because of lack of any form of accountability. The learned trial judge did not consider any of these matters when he authorized the respondent to lead evidence from his overseas witnesses on a contested issue of language difficulty via Skype. For these reasons, I am satisfied that the learned trial judge erred in law in authorizing the use of Skype to receive evidence from overseas witnesses in the circumstances of this case. Ground 3 is upheld.'

[229] Even though the application filed before the Commission alleging eight counts against the Respondent legal practitioner are not criminal proceedings, I have noted from the Court of Appeal in *Hurtado,* **the interests of justice require me to ensure:**
(1) the hearing before the Commission is fair to both the Applicant Chief Registrar and the Respondent legal practitioner; and
(2) there is accountability over the witnesses called by the parties at any such hearing.

[230] **I have not been referred by Counsel for the Chief Registrar to any '*issues of safety'* of either of the witnesses**, that is, the complainant, Reema Gokal and/or her mother, Pratima Gokal, **requiring either or both to give evidence by Skype instead of in person**. As for *'the interests of justice to require the use of such means'*, that is, to use Skype as an alternative to the two witnesses travelling to Fiji due to their alleged financial plight, apart from the two emails from the complainant of 31st October and 1st November 2017, (sent to Counsel for the Chief Registrar and to the Chief Registrar respectively), **I have also not been provided with any reasons as to why such travel cannot be funded by the Chief Registrar**. Indeed, as I have noted above, in their written submissions, Counsel for the Applicant have concluded that '*good cause has been shown to seek an adjournment of the Trial to allow witnesses residing in India to travel to Fiji'*. Presumably, in making such a submission, for an adjournment on the basis that the complainant, Reema Gokal and/or her mother, Pratima Gokal, have no money to travel to Fiji, then Counsel must also be aware that to proceed with

a hearing, travel will have to be funded by the Chief Registrar for which an order can be sought at the end of the matter for the reimbursement of such costs to be met by the Respondent legal practitioner <u>if appropriate.</u>

[231] I note that I specifically asked Counsel for the Chief Registrar to confirm at the hearing on 7th February 2018 (which he did), that they had no application and no submissions to make in relation to the Skype order sought by the Respondent legal practitioner.

[232] I also note in ***Lotawa v State*** (a copy of which was tendered by Mr. Bale*)*, Madigan JA (with whom Calanchini P agreed) explained at para [6] what he perceived to be both the benefits but also the potential problems with Skype:

> *'Skype is a relatively new medium used extensively in social media and for personal contact between parties in place of telephones. It is noted that it has been used in Courts for the taking of evidence in Canada, Sri Lanka, Australia and in Fiji and as such* ***it has been a very useful medium for the admission of evidence in 2 obvious circumstances. First, for the protection of a "vulnerable" witness****, provided for in sections 295 and 296 of the Criminal Procedure Decree 2009* ***and secondly for the good administration of justice, to hear a witness from abroad*** *pursuant to section 131(2) of that Decree. <u>Evidence by "skype" although convenient and immediate, suffers of course from the vagaries of any other electronic medium</u> in that it can crash, perform erratically or be deceptive as to colour, sound and light. The quality of its transmission will depend on the quality of the equipment being used at each station and in particular the cameras both at transmission and reception.* ***It is impossible when receiving evidence by "skype" to properly observe the demeanour and reactions of a witness: in a case heavily dependent on credibility, the witness' words are often no match for his or her reaction to questions or for his or her display of sincerity or insincerity in giving evidence. <u>It is therefore a much inferior method of receiving evidence, inferior to live viva voce evidence</u>*** *and for these reasons alone, although allowed by s.131(2) and section 295,* ***<u>it should be used only rarely for vulnerable witnesses and hardly ever for convenience reasons</u>****. In any event as Gamalath JA says care must be taken by the presiding Judge to comply with the procedure set out in s.295 and state judicially why he is allowing evidence to be adduced by that medium.'*
>
> [My emphasis]

[233] Gamalath JA also said in *Lotawa v State* (with whom Calanchini P also agreed):

[26] Receiving evidence via Skype is a special procedural mechanism contained in Part XX of the Criminal Procedure Decree, 2009.

...

[29] Before embarking on receiving evidence via Skype a judge should comply with certain mandatory procedural steps to satisfy himself as to the legality and justification for receiving evidence via Skype.

...

[32] The application is to be heard as a chambers application; see section 295 (2) of the Criminal Procedure Decree 2009.

[33] Each party to the trial shall be given an opportunity to make submissions in respect of the application; see section 295 (2).

...

[36] In my opinion, since this entails a special procedure relating to admission of evidence of vulnerable witnesses/complainants, at its conclusion the Judge/Magistrate should adduce reasons in writing to explain how he arrived at a decision. This in my view is a mandatory requirement.

[37] As can be understood, Section 295 of the Criminal Procedure Decree, 2009 sets out a mandatory procedure to follow by a Court, before a decision is made under Section 296 of the Criminal Procedure Decree 2009.

[38] The pre-requisite that should be satisfied under Section 295 should be carefully followed by a Court before moving into act under Section 296 of the Criminal Procedure Decree 2009.'

[234] Again, whilst noting that a hearing before the Commission is not a criminal proceeding, I have noted the above from the Court of Appeal in *Lotawa,* in particular:

(1) The use of Skype is important in cases involving the need '*for the protection of a "vulnerable" witness';* and

(2) *'for the good administration of justice, to hear a witness from abroad'*.

[235] Balanced against that I have also noted from the Court of Appeal in *Lotawa:*

(1) *'It is ... a much inferior method of receiving evidence ... to live viva voce evidence and for these reasons alone ... it should be used only rarely for vulnerable witnesses and hardly ever for convenience reasons';*

(2) It should '*be heard as a chambers application'* with '*each party ... given an opportunity to make submissions in respect of the application'* and the presiding officer should '*state judicially why he[/she] is allowing[/refusing] evidence to be adduced by that medium'*.

(4) ***9th Ruling*** *– Skype be refused -* ***Granted***

[236] Having had the opportunity of reading the various affidavits in the present matter, I am of the view that because of the type of allegations involved, I require all witnesses to be present in Fiji giving evidence before the Commission in the Commission's hearing room in Suva. **Accordingly, my 9th Ruling is that the cross-motion of the Respondent legal practitioner seeking an order *'THAT the taking of evidence of the Complainant Reema Gokal and witness Pratima Gokal by skype be refused'*, is granted**.

[237] **Therefore, the two witnesses who are presently in India, being the Complainant, Reema Gokal and witness, Pratima Gokal, will have to come to Fiji and appear before this Commission to give evidence in person at the final hearing and not via "Skype" or some other form of video conferencing**. **Should the complainant, Reema Gokal and/or the witness, Pratima Gokal, not appear, at the next listed hearing, the hearing will proceed in her/their absence.**

6. Respondent legal practitioner's Application for a permanent stay

[238] I now turn to the Respondent legal practitioner's Application for a permanent stay.

(1) Delay

(i) Affidavit and submissions of Respondent's legal practitioner

[239] According to the affidavit of the Respondent legal practitioner sworn on 29th November 2017 in support of the cross-motion (paragraphs [42]-[43]):

> *'42. Since the filing of the application it has been riddled with delays. These delays are the result of the Chief Registrar's failure to investigate this matter. The Chief Registrar had this same complaint since 2012[.]*
>
> *43. As a result of not having the files in this matter (which incidentally belong to Jamnadas & Associates) and the lengthy delays, the complained events being in 2008 I have been severely prejudiced. I have no documents to rely on. The Chief Registrar refuses to give me any information I request and in time my memory and that of my witnesses are failing us.'*

[240] In her written submissions dated 5th December 2017 in support of her cross-

motion that the application for an adjournment be refused or if the applicant is unable to proceed to hearing on 1st December 2017, that the application be dismissed or, in the alternative, that it be permanently stayed, the Respondent legal practitioner has cited the following criminal and civil cases (principally on the issue of delay):

(1) ***R v Askov*** [1990] 2 SCR 1199;

(2) ***Barker v Wingo, Warden*** [1972] USSC 144; 407 US 514;

(3) ***Seru v State*** [2003] FJCA 26; AAU0041.99S & AAU0042.99S (30 May 2003);

(4) ***R v Morin*** [1992] 1 SCR 771; (1992) 71 CCC (3d) 1 (citing in **[R. v.] Smith** (1989) 52 CCC (3d) 97);

(5) ***Martin v Tauanga District Court*** [1995] 2 NZLR 419;

(6) ***Mohammed Sharif Sahim v The State*** (Misc. Action No. 17 of 2007, 25 March 2008);

(7) ***Abdul Ahmed Ali, Uma Dutt & Roshni Devi v The State*** (Appeal No. AAU0075 of 2007, 14 April 2008);

(8) ***Mohammed Riaz Shameem v The State*** [2007] FJCA 19; AAU0096.2005 (23 March2007);

(9) ***Eckle v Germany*** [1982] ECHR 4; (1992) 5 EHRR 1;

(10) ***Howarth v United Kingdom*** (2001) 31 EHRR 861);

(11) ***Zimmerman and Steiner v Switzerland*** (1984) 6 EHRR 17;

(12) ***Porter v Magill*** [2002] 2 AC 357;

(13) ***UJL, GMR and AKP v United Kingdom*** [2001] 33 EHRR 225;

(14) ***Dhansukh Bhika, Gulabdas Bhika, Manoj Bhika, Jitendra Pratap, Sahsi Rudra Singh and Suliasi Sorovakatini v The State*** (Criminal Misc. Case No: HAM 085 of 2008, 18 August 2008);

(15) ***State v Malakai Tuiloa*** (Cr. Misc. Case No. HAM 10/07; Criminal Case No. HAC3/07, 2/3 June 2008);

(16) ***R v Cavanagh*** [1972] 2 All ER 704;

(17) ***R v Shaw*** [1972] 1 WLR 679;

(18) ***R v Leung Chi-Sing*** CrApp 37/92;

(19) ***Chief Registrar v Naveed Nadeem Sahu Khan*** [2013] FJILSC 25;

(20) ***Chief Registrar v Devanesh Prakash Sharma and R Patel Lawyers*** [2013] FJILSC.

(ii) Discussion of law on delay

[241] I note that in the above list of cases, the Respondent legal practitioner has cited a number of criminal judgments on delay. In that regard, (whilst acknowledging that matters before the Commission are not criminal proceedings), I also note the ruling of Winter J in ***Rabuka v State*** (Unreported, Criminal Miscellaneous Case No. HAM 76 of 2006, 9 November 2006; PacLII: [2006] FJHC 166, <http://www.paclii.org/fj/cases/FJHC/2006/166.html>) which is not included in the above list.

[242] In *Rabuka*, there was an application that the charges be *'dismissed or permanently stayed as they are an abuse of process'.* The application was made upon a number of bases including that there had been undue delay between the commission of the offences and the laying of the charges. Further, in the Information, there was a failure to provide full particulars or the provision of them late and also a failure to provide full disclosure or the provision of it late. Winter J, in noting *'the difference in Fiji between pre-charge and post-charge delay applications',* cited the judgment of the Fiji Court of Appeal in ***Seru v State*** (Unreported, Fiji Court of Appeal, Criminal Appeal Nos. AAU0041 of 2009S and AAU0042 of 2009S, 30 May 2003, Eichelbaum, Gallen and Smeillie JJA); PacLII: [2003] FJCA 26, <http://www.paclii.org/fj/cases/FJCA/2003/26.html>. In *Seru*, the offending was alleged to have occurred in September 1992, the charges were laid in November 1994, the committal to the High Court did not take place until April 1997 and a trial was finally held between July and September 1999. The Court of Appeal noted that in matters involving allegations of historical sexual abuse offences in New Zealand, *'in many such instances applications to stay on grounds of breach of the fair trial right have been dismissed, notwithstanding delays of an order which, if occurring after the charge, undoubtedly would have led to the case being stayed'.* An appeal was, however, allowed in *Seru* (even after conviction), on the basis that *'the delay which occurred between charge and trial was unreasonable'* and was in breach of section 29(3) of the *1997 Constitution* that *'every person*

charged with an offence has the right to have the case determined within a reasonable time'.

[243] In the present case, I am not convinced that the delay in the hearing of this matter lay at the feet of the Applicant. If I am incorrect, I note Winter J in *Rabuka* also cited ***Attorney-General's Reference (No 2 of 2001)*** [2004] 2 AC 72; [2004] 2 WLR 1; BAILII: [2003] UKHL 68, <http://www.bailii.org/uk/cases/UKHL/2003/68.html>, where (according to Winter J at para [34]) Lord Bingham of Cornhill *'while acknowledging the "powerful argument" that if a public authority causes or permits unreasonable delay to occur then a stay might be appropriate nonetheless **rejected stay as the only remedy**'*. As Winter J observed: *'In a country such as Fiji with limited Criminal Justice resources and scarce hearing time his Lordship[']s reasons with respect seem relevant'.*

[244] In that regard, Winter J also cited (at paras [37]-[42]) the judgment of the Privy Council in ***Boolell v The State (Mauritus)*** [2006] UKPC 46, 16 October 2006; BAILII: <http://www.bailii.org/uk/cases/UKPC/2006/46.html>) (later reported [2012] 1 WLR 3718), in particular where at [32] in *Boolell*, (cited by Winter J in *Rabuka* at para [42]), the Board concluded:

> *'Their Lordships accordingly consider that the following propositions should be regarded as correct in the law of Mauritius:*
>
> > *(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.*
> >
> > *(ii) An appropriate remedy should be afforded for such breach, but **the hearing should not be stayed** or a conviction quashed **on account of delay alone**, **unless** (a) the hearing was unfair or (b) **it was unfair to try the defendant at all**.'*
> >
> > [My emphasis]

[245] Also in *Boolell,* the Privy Council went on to cite the Scottish devolution case of ***Dyer v Watson*** [2002] UKPC D1; [2004] 1 AC 379 at 403-3; BAILII: <http://www.bailii.org/uk/cases/UKPC/2002/D1.html>, where, as the Board in *Boolell* noted at para [33] *'Lord Bingham of Cornhill set out a series of propositions material to determining the reasonableness of the time*

taken to complete the hearing of a criminal case, in terms which their Lordships would adopt as relevant to cases such as the present'. Those propositions from Lord Bingham in *Dyer* are as follows:

> *'52.* ***In any case in which it is said that the reasonable time requirement … has been or will be violated, the first step is to consider the period of time which has elapsed.*** *Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further ... The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed ...*
>
> *53.* ***The court has identified three areas as calling for particular inquiry.*** *The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.*
>
> *54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system* ***it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges****,* ***changing legal advisers, absenting himself, exploiting procedural technicalities, and so on****.* ***A defendant cannot properly complain of delay of which he is the author****. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.*
>
> *55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. ... But nothing in the convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business.* ***It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case.*** *… Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business.* ***There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit … to show that he has acted "with all due diligence and expedition."*** *But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement,* ***time runs from the date when the defendant is charged****, the passage of any*

> *considerable period of time before charge may call for greater than normal expedition thereafter.'*
> [My emphasis]

[246] In *Boolell,* the Privy Council noted that the matter had begun in 1991 when the accused had made three statements under caution, an Information was then not laid until the end of 1992 and the trial which was fixed to commence in October 1993, did not commence until March 1994. *'There then followed the first of a series of moves by the appellant described by the Supreme Court as devices which constituted an abuse of the proceedings'* followed by '*a long series of adjournments before evidence was first taken on 9 May 1996'.* As there were problems as to how the initial plea in relation to one of the two counts was recorded, the prosecution decided in January 1998 to enter a "*nolle prosequi"* and a new charge was filed which *'ended with the appellant's conviction and sentence on 24 March 2003'.* After reviewing this long history, the Privy Council concluded:

> *'35. In their Lordships' opinion it is undeniable that the delay in completing the trial was caused to a considerable extent by the actions of the appellant ... he deliberately made numerous attempts to exploit and abuse the legal system, making inappropriate use of his legal knowledge and experience ... It is objected on the appellant's behalf that some at least of the applications were justifiably made, even if they were rejected. But this is not a sufficient answer.* ***If a defendant makes a large number of applications which hold up the completion of a trial, even if all were made in good faith and based on sufficient grounds to be justifiable, he cannot properly complain that there was unreasonable delay****, provided that there was has been due expedition on the part of the prosecution and the court.*
>
> *36. It is plain, however, from the propositions set out by Lord Bingham of Cornhill in* **Dyer v Watson** *... that it is necessary to consider an amalgam of factors before reaching a conclusion on the reasonableness of the time taken to complete a trial.* ***The defendant's contribution to the delay may be an important factor, but before dismissing his complaint of delay as a breach of his constitutional rights the appellate tribunal is obliged to look at the whole picture****.*
>
> *37. ... much more could have been done to hasten matters between the commencement of the second trial in March 1998 and its completion in March 2003 ... however reprehensible the conduct of the appellant, the trial was not completed within a reasonable time and that there was in that respect a breach of section 10(1) of the Constitution.*

…

38. *The Board must therefore determine* ***the remedy which is to be afforded to the appellant****. In the light of its finding that the trial was not unfair, the Board does not consider that the conviction should be set aside. On the other hand, their Lordships would not regard it as acceptable that the prison sentence imposed by the Intermediate Court should be put into operation some 15 years after the commission of the offence unless the public interest affirmatively required a custodial sentence, even at this stage. This is not such a case, and their Lordships will set aside the prison sentence and substitute for it a fine …'*
[My emphasis]

[247] Whilst again acknowledging that matters before the Commission are not criminal proceedings, I also cite the following excerpt from the ***Victorian Criminal Proceedings Manual*** published by the Judicial College of Victoria, Melbourne, Australia, 2009 to 2014 (last updated 14 August 2017), Chapter 15 'Abuse of Process and Stays, at section 15.3.1 on 'Delays and incurable forensic disadvantage' (<http://www.judicialcollege.vic.edu.au/eManuals/VCPM/27781.htm>), where it states:

'3. Delay is measured both in the time taken to institute proceedings and in continuing proceedings that have been commenced (R v Clarkson [1987] VR 962).

…

14. While most accused are not eager to face an early trial, a court may consider ***<u>whether the accused has taken any action to alert the prosecution to his or her objections to an unreasonable delay</u>****. Such conduct is evidence that the accused may be prejudiced if the delay continues (Jago v District Court of NSW (1989) 168 CLR 23).*

15. It is only in extreme cases that it will be appropriate to order a permanent stay on the basis of unreasonable delay. A permanent stay is equivalent to a certificate of indemnity and ***granting this too readily may undermine public confidence in the courts****. A stay may be appropriate where the trial judge is unable to protect the accused against the unfair consequences of the delay and that any conviction would bring the administration of justice into disrepute (Jago v District Court of NSW (1989) 168 CLR 23; R v Clarkson [1987] VR 962; R v Edwards (2009) 83 ALJR 717).'*
[My emphasis]

[248] In relation to the above propositions, I note as follows:

(1) '*the time taken to institute proceedings'* - I note that the first document

enclosed with the Application filed with the Commission on 30th September 2015 is an *'Email of complaint against Renee Lal received from Ravi Gokal with attachments dated 25/09/2013'*. There are a further 41 other documents which, on their face, reveal an investigation and no particular delay to which my attention has been drawn by the Respondent legal practitioner;

(2) '*time taken ... in continuing proceedings that have been commenced'* - I have already found above that it has not been *'fault'* on the part of the Chief Registrar that was the cause of the earlier adjournments;

(3) '*whether the accused has taken any action to alert the prosecution to his or her objections to an unreasonable delay'* – the Respondent legal practitioner has filed two affidavits. Her first affidavit sworn on 29th November 2016, contains 54 paragraphs with 25 annexures. It is a weighty document, which, on my rough estimate, is approximately 570mm thick. The Respondent legal practitioner's second affidavit sworn on December 2016 contains 19 paragraphs. Despite these two substantial documents, **I have not seen one example**, to which my attention has been drawn by the Respondent legal practitioner in either of her written submissions, **<u>of any action taken by her to alert the Chief Registrar to her objections to an unreasonable delay</u>**;

(4) '*the trial judge is unable to protect the accused against the unfair consequences of the delay and that any conviction would bring the administration of justice into disrepute'* – I have not been convinced that there has been unfair delay. Hence, I have also not been convinced that should the respondent legal practitioner be found guilty of any or all of the eight counts alleged against her that this would bring the administration of justice into disrepute.

[249] Counsel for the Chief Registrar in their '*Written Submissions'* in reply, filed on 7th December 2017, have relied upon my ruling in *Suruj Sharma*, in particular, paragraph [77] on the issue of delay. See ***Chief Registrar v Suruj Sharma*** (**Unreported**, Application No. 012 of 2015 and No. 015 of 2015, 21 September 2016; PacLII: [2016] FJILSC 5, <http://www.paclii.org/fj/cases/FJILSC/2016/5.html>.)

[250] In my view, (as I also found in *Suruj Sharma*), this is <u>not</u> the type of case where '*an action which is so long delayed that the defendant cannot be expected to assemble a case and make effective use of the right to be heard'*. As I noted in *Suruj Sharma* at para [77], the Fiji Court of Appeal stated in ***Pratap v Christian Mission Fellowship*** (Unreported, Fiji Court of Appeal, Barker, Henry and Scott JJA; Paclli: [2006] JCA 41, <*http://www.paclii.org/fj/cases/FJCA/2006/41.html*>*)* set out at para [23] the applicable test in civil proceedings as follows:

> *'**The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution** has been considered by this court on several occasions. Most recently, in <u>Abdul Kadeer Kuddus Hussein v. Pacific Forum Line</u> IABU 0024/2000 – FCA B/V 03/382) the court, readopted the principles expounded in <u>Birkett v. James</u> <u>[1978] AC 297</u>; [1977] 2 All ER 801 and explained that:*
>
> > *"**The power should be exercised only where the court is satisfied** either (i) that **the default has <u>been intentional and contumelious</u>**, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii) (a) that **there has been <u>inordinate and inexcusable delay</u> on the part of the Plaintiff or his lawyers**, **<u>and</u>** (b) that **such delay would give rise to <u>a substantial risk that it is not possible to have a fair trial</u>** of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."*
> >
> > [My emphasis]

[251] At the hearing on 7th February 2018, Mr. Bale who appeared as Counsel for the Respondent legal practitioner referred to para [7.3] of the written submissions of the Respondent legal practitioner dated 5th December 2017, on the issue of delay, that is:

> *'By the time the charge was laid the Respondent did not have any documents or information in her custody and control and the file belonged to Jamnadas & Associates. In **Chief Registrar v Naveed Nadeem Sahu Khan** [2013] FJILSC 25 a complaint was made against the Respondent Practitioner. At the time of the complaint, he he did not have the file as he had sold the practice to another practitioner, including all files and goodwill. The Practitioner in the matter argued that the delay in the Chief Registrar in bringing the proceedings effectively deprived him of his Defence. The Commission said that had the application been made in a timeously and not three years after the even[t], the Respondent would have been in a far better position to explain his failure, if indeed he could. The Commission*

was of the view that it was an abuse of process to make the application so late.'

[252] I note that ***Chief Registrar v Naveed Nadeem Sahu Khan*** (**Unreported**, ILSC, Case No. 15 of 2013, 22 August 2013, Justice P.K. Madigan, Commissioner; PacLII: <http://www.paclii.org/fj/cases/FJILSC/2013/25.html>), was a case dealing with an allegation of a failure to respond to the Chief Registrar. It can be distinguished on its facts and is far different to the present case.

[253] In *Naveed Nadeem Sahu Khan,* a letter was sent by the Chief Registrar to the practitioner on 11th August 2010. A reminder letter was sent on 21st September 2010. It was only after nearly three years, that the Chief Registrar brought an *'allegation of professional conduct as a consequence of that omission ... on 8th of July 2013',* alleging professional misconduct for a failure to respond. On the first return date of the matter, Justice Madigan refused the application proceeding as he explained:

'3. The Respondent on first call asked for time to search his files to see if he could find more information which might enable him to counter the allegation.

*4. On the 14th of August 2013 he told this Commission that as the matter is as old as 2010 <u>he cannot possibly remember why he would not have replied</u> **and in any event he is no longer in practice**, he having sold his practice, including all his files and goodwill to another practitioner. This transfer was effected on 7th of August 2012.*

*5. **It is a Defence to this allegation to furnish a "reasonable explanation for such failure" but the delay in making the application against the Respondent has effectively deprived him of this Defence.** Had the application been made timeously and not three years after the event, the Respondent would have been in a far better position to explain his failure, if indeed he could. This Commission is of the view that it is an abuse of process to make the application so late.*

6. It is impossible to say what time frame would be would be appropriate in making an application for failure to respond because each case will turn on its own peculiar circumstances, but to make an application after three years in respect of a practitioner no longer in practice and without access to his files or other records is unfair.

*7. In the premises, the application to commence proceedings against the Respondent is **refused**.'*

[254] Hence, there was just under a three-year delay between the Chief Registrar sending a letter, a reminder and then commencing proceedings for a failure to respond by which time the practitioner was no longer in practice – **far different from the present matter where there are allegations surrounding the whereabouts of $254,000**. In addition, one of the counts in the present matter (Count 7) alleges a failure to respond. The allegation is that the Respondent legal practitioner failed to respond to a letter from the Chief Registrar dated 7th August 2015 and to a subsequent reminder notice dated 17th August 2015. The application was then filed by the Chief Registrar with the Commission on 30th September 2015 and made returnable on 22nd October 2015. **That is, there was a period of 45 days (or one month and 14 days) between the failure to respond to the reminder and the end date of the Chief Registrar filing the application with the Commission in the present proceedings. Far different than the period of 1022 days (or 2 years, 9 months and 18 days) between the failure to respond to the reminder and the end date of filing the application with the Commission that occurred in *Naveed Nadeem Sahu Khan*.**

(iii) Finding – on delay

[255] In relation to the issue of delay, I have already found above (when considering whether there has been previous '*"fault" on the part of the party seeking the adjournment'),* that **I have not been convinced that the delay in the hearing of this matter lies principally at the feet of the Chief Registrar**. Indeed, the Respondent legal practitioner never filed a Summons seeking further and better particulars. Instead, the Respondent legal practitioner sought further adjournments as she sought to obtain certain documentation to show that she was not a trustee of the trust account of Jamnadas & Associates. **Further, when given the opportunity to do so, the Respondent legal practitioner never complied with a timetable to file a Summons seeking further and better particulars.**

[256] Despite the many adjournments granted at the request of the Respondent legal practitioner as she sought to obtain documentation to show that she was not a trustee of the trust account of Jamnadas & Associates, it has not

provided an answer to the eight allegations. Indeed, as I have set out above, **in six of the eight counts, whether or not the Respondent legal practitioner was a trustee of the trust account of Jamnadas & Associates is irrelevant to the allegations**. By way of an example, whether or not the Respondent legal practitioner was a trustee of the trust account of Jamnadas & Associates, is irrelevant to the allegation that the Respondent legal practitioner failed to respond to a notice sent by the Chief Registrar pursuant to sections 105 and 106 of the *Legal Practitioners Act 2009* and thereafter the Respondent legal practitioner failed to respond to a reminder notice sent by the Chief Registrar pursuant to section 108 of the *Legal Practitioners Act 2009.*

[257] As for Counts 3 and 8, as I have already noted above, Counsel for the Chief Registrar has made an oral application to amend Counts 3 and 8 so as to delete the reference to the Respondent legal practitioner being a trustee and to simply allege in the particulars that the Respondent legal practitioner *'authorized the payment voucher for the release of $254,000'* (Count 3) and *'authorized the withdrawal of $254,000 held in the trust account of Jamnadas & Associates'* (Count 8).

[258] **There is an argument, that, rather than to continually seek adjournments, to "prove" that she was not a trustee, the Respondent legal practitioner could simply have argued this issue at trial. In fact, now having had the time to read all the material filed, as I have noted above and mentioned to the Respondent legal practitioner on 5th February 2018 and to Mr. Bale at the hearing on 7th February 2017, I wonder whether the trusteeship issue is somewhat of a red herring? Mr. Bale did not convince me otherwise. The major issue here is not whether or not the Respondent legal practitioner was a trustee but the whereabouts of $254,000 and whether this was due to the failure of the Respondent legal practitioner to disburse that sum to the complainant (as well as some associated allegations) including that the Respondent legal practitioner directed the funds to be transferred to New Zealand.**

(2) Abuse of Process

(i) Affidavit and submissions of the Respondent legal practitioner

[259] According to the affidavit of the Respondent legal practitioner sworn on 29th November 2017 in support of the cross-motion, she has stated in relation to abuse of process (paras [44]-[48]):

> *'44. It is an abuse of process for the Chief Registrar to refuse to provide me with particulars and expect me to carry out the role of his investigator. And by not answering my correspondences it is tantamount to further abuse. The Chief Registrar has not complied with the Pre-Trial Conference at the Legal Practitioners Unit. In fact the way that the prosecution is being conducted is malicious in the circumstance.*
>
> *45. These proceedings are deceptive on the Commission. The investigations by the Fiji Police, Prime Minister's Office and FRCS has not been placed before the Commission. The fact that all these investigations amounted to nothing and more importantly that the Complainant keeps withdrawing her complaints shows that the complaint is fictitious or constitute a mere sham.*
>
> *46. The Commission's proceedings are not being fairly or honestly used but is employed for sum ulterior or improper purpose or in an improper way. The Chief Registrar has not been fair in providing information knowing full well that I do not have the file in relation to this matter. It is improper for the Chief Registrar to persist with an application where there is no evidence to support it's applications.*
>
> *47. Furthermore it is wrong for the Chief Registrar to proceed with matters which are manifestly groundless or without foundation or which serve no useful purpose. The Chief Registrar has made an application which did not have the basic investigation carried out. Furthermore the fact that this identical complaint has been investigated by 3 other government authorities should be taken into account. If 3 government authorities particularly the Fiji Police found that the complaint was without foundation then the Chief Registrar must take notice of this.*
>
> *48. I have been investigated so many times on exactly the same facts by separate and unrelated government authorities. As a result since 2012 I have been responding to complaints, being interviewed, had searches and seizures carried out on me and my homes and office. This has happened multiple times and has become vexatious and oppressive in the circumstance.'*

[260] According to the submissions of the Respondent legal practitioner dated 5th December 2017 (at paragraphs [8.2]-[8.3]) in relation to abuse of process:

> *'8.2 First and foremost, it is an abuse of process to issue proceedings and not prosecute them diligently.* ***In this matter the Applicant has brought proceedings and has not been able [to] have it heard in two years since filing.*** *And now when the matter is set*

for hearing the Applicant is not ready and able to prosecute the matter with due dispatch.

8.3 Furthermore, given that this complaint has been investigated by the Police, the Prime Ministers Office and FRCS, ***the making of the same complaint to various bodies is tantamount to abuse of process****. The Applicant knowing this should have ascertained the extent of each investigation to avoid abuse is in now occurring. This Court is being used by the Complainant for an ulterior purpose having not succeeded in all her similar complaints.*

8.4 It is also an abuse of process for the complainant to have had this complaint tried on social media.'

[My emphasis]

[261] In her written submissions of 5th December 2017, the Respondent legal practitioner has cited in support of her cross-motion that the application be permanently stayed on the basis of abuse of process, ***Chief Registrar v Iqbal Khan*** (Unreported, ILSC, Action Nos. 009 and 010 of 2009, 21 June 2010; PacLII: [2010] FJILSC 14, <http://www.paclii.org/fj/cases/FJILSC/2010/14.html>) where Commissioner Connors cited (at para [14]) the High Court of Australia in ***Jeffery & Katauskas Pty Limited and SST Consulting Ply Ltd & Ors*** [20091 HCA 43 which, in turn, at para [27] cited ***Cocker v Tempest*** (1841) 7 M & W 502 at 503-504 and then Jacob, 'The Inherent Jurisdiction of the Court', (1970) 23 *Current Legal Problems* 23 at 43, stating that:

> *'... certain categories of conduct attracting the intervention of the courts emerged in the 19th and 20th centuries and included:*
>
> *"(a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;*
> *(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;*
> *(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;*
> *(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression."'*

(ii) Submissions of Chief Registrar

[262] Counsel for the Chief Registrar in their '*Written Submissions'* in reply, filed on 7th December 2017, have relied upon my ruling in *Suruj Sharma*, in particular, where I discussed (at paras [71]-[75]):

(1) ***Walton v Gardiner*** (1993) 177 CLR 378; 112 ALR 289; (Austlii: (1993) HCA 77, <http://www.austlii.edu.au/au/cases/cth/HCA/1993/77.html>) – where the High Court of Australia discussed abuse of process in the context of a disciplinary tribunal; and

(2) ***Prescott v Legal Professional Disciplinary Tribunal*** (Unreported, Supreme Court of South Australia, 30 September 2009, Layton J) (Austlii: [2009] SASC 309, <http://www.austlii.edu.au/au/cases/sa/SASC/2009/309.html>) – on the question of delay.

(iii) Discussion

[263] As I explained in *Suruj Sharma* at para [72] (in part):

> *'In Walton v Gardiner, the High Court of Australia confirmed ... 'staying disciplinary proceedings, against the relevant respondent, in the Medical Tribunal' of NSW for an abuse of process. As the majority judgment of Mason CJ, Deane and Dawson JJ observed at [26]:*
>
> > *'In its application to the Tribunal, the concept of abuse of process requires some adjustment to reflect the fact* ***that the jurisdiction of the Tribunal****, which is not a court in the strict sense,* ***is essentially protective - i.e. protective of the public - in character****. Nonetheless, the legal principles and the decided cases bearing upon the circumstances which will give rise to the inherent power of a superior court to stay its proceedings on the grounds of abuse of process provide guidance ... In particular, in a context where the disciplinary power of the Tribunal extends both to the making of an order permanently removing a medical practitioner from the Register with consequent loss of entitlement to practise and to the imposition of a fine of up to $25,000 ...* ***there is plainly an analogy between the concept of abuse of a court's process in relation to criminal proceedings and the concept of abuse of the Tribunal's process in relation to disciplinary proceedings*** *... The question whether disciplinary proceedings in the Tribunal should be stayed ... should be determined by reference to a weighing process similar to the kind appropriate in the case of criminal proceedings but adapted to take account of the differences between the two kinds of proceedings. In particular,* ***in deciding whether a permanent stay of disciplinary proceedings in the Tribunal should be ordered, consideration will necessarily be given to the protective character of such proceedings and to the importance of protecting the public from incompetence and professional misconduct*** *on the part of medical practitioners.'*
> > [My emphasis]

[264] As I also explained in *Suruj Sharma* at para [73]:

> *'Prescott v Legal Professional Disciplinary Tribunal, was a single judge decision of the Supreme Court of South Australia, involving an 'Application for judicial review of proceedings before the Legal Practitioners Disciplinary Tribunal' as Layton J explained at [3]:*
>
> > *'The orders sought by the plaintiff are based on* ***allegations which are said to amount to an abuse of process or breach of natural justice*** *if the first defendant, the Legal Practitioners Disciplinary Tribunal ("Legal Practitioners Tribunal"), proceeds to hear the complaint against him. The allegations include the following.* ***The length of delay*** *in the bringing of charges against him, in combination with the relatively minor nature of the charges being pursued, and* ***the long period of time already taken*** *for the Legal Practitioners Tribunal hearing. Further, that through no fault of the plaintiff, the Legal Practitioners Tribunal is now* ***seeking to re-hear the complaint*** *with yet further delay and causing additional stress.'*
> >
> > [My emphasis]

[265] Layton J in ***Prescott*** cited, in turn, at paras [72-[73] from the judgment of the Full Court of the Supreme Court of South Australia in ***James v Medical Board of South Australia*** [2006] SASC 267; (2006) 95 SASR 445 wherein Layton J noted '*some commentary, albeit in obiter, that the Legal Practitioners Tribunal does have the power to order a stay'* and that Anderson J (with whom Bleby and Gray JJ agreed) *'relied upon Forbes, Disciplinary Tribunals (2nd ed), where the author states (at para [147]): ...*

> *"The courts of law have inherent power to see that their processes are not abused. One application of the "abuse of process" doctrine is an order dismissing or permanently staying an action which is so long delayed that the defendant cannot be expected to assemble a case and make effective use of the right to be heard ...* ***The courts have extended the principle to prevent abuse of disciplinary proceedings and Tribunals may apply it themselves."'***
>
> [My emphasis]

(iv) Finding – on length of delay

[266] As I have noted on a number of occasions throughout this ruling, **I am of the view that the delay in this matter** being heard since it was first called for mention on 22nd October 2015, **has not been at the request of the Counsel for the Chief Registrar**. It was the Respondent legal practitioner who often sought the adjournments as she sought documents to show she was not a trustee of the trust account of Jamnadas & Associates.

[267] **Further, I am of the view that this matter is <u>not</u> '*so long delayed that the Respondent legal practitioner cannot be expected to assemble a case and make effective use of the right to be heard'*.**

(v) Finding – on submission 'this complaint has been investigated by the Police, the Prime Ministers Office and FRCS'

[268] **I have not seen one example** to which my attention has been drawn by the Respondent legal practitioner in her two affidavits and two sets of submissions **<u>of an investigation having been undertaken AND FINALISED</u> by the Police, the Prime Minister's Office and/or Fiji Revenue and Customs Service (FRCS).** I have seen, however, the following annexures to the affidavit of the Respondent legal practitioner sworn on 29th November 2017:

(1) Letter dated 30th March 2015 from the Office of the Prime Minister to Ms Lal seeking her 'assistance in reimbursing [to the complainant, Ms Reema Gokal] her share of money of her property which you sold' (Annexure RDSL 20);

(2) Letter dated 17th May 2015 to the Office of the Prime Minister from Ms Reema Gokal saying *'I wish to withdraw a complaint that I have made to your high office in regards to Ms Renee Lal as the matter has been amicably sorted out between the parties.'* (Annexures RDSL 20 and RDSL 22);

(3) Letter dated 17th May 2015 to the Chief Registrar from Ms Reema Gokal saying *'I wish to withdraw a complaint that I have made to your high office in regards to Ms Renee Lal as the matter has been amicably sorted out between the parties.'* (Annexure RDSL 22);

(4) Royal Fiji Police, Statement Form – handwritten statement of Reema Gokal dated 17th May 2015 that [a Blog] is publishing stories written by her brother, Ravi Gokal, against Renee Lal and that *'I have settled my matters on my behalf and my family with Renee Lal and we signed a Deed where neither party could disclose any information and now* that [a Blog] *is causing problems as I am being sued for making statements that I am making this complaint'*. She then goes on to make allegations against Dilip Jamnadas.

[269] At the appearance on 1st December 2017, Counsel for the Chief Registrar provided a copy of a letter clearly incorrectly dated 10th November **2016** (as it says that is in response to a letter dated 1st November 2017) that appears to have been hand delivered to the Chief Registrar on 13th November 2017 and then to the Legal Practitioners Unit on 17th November 2017, from Abhay Nand (SP) [Superintendent], the Criminal Investigation Department of the Fiji Police Force. I note the following excerpt:

> *'Re: Clarification concerning activities of Lal Patel Bale Lawyers during 2013 and 2014*
>
> *Reference is made to your letter dated* ***1st November 2017****, pertinent to the above subject matter.*
>
> *Please be informed that an investigation was initiated against Ms Renee Lal in 2015 and on 5 October 2015, during the course, a search was conducted at the office of Jamnadas & Associates at level 6 FNPF Place on Victoria Parade and the following documents were uplifted. … [22 documents are then listed]*
>
> *All the documents uplifted are copies as the originals were not located during the search. A copy of the search warrant and search list also enclosed for your reference.*
>
> *Please note that all these documents are to be treated as confidential as* ***the matter is still under investigation****.'*
> [My emphasis]

[270] Whilst Counsel for the Chief Registrar explained that the above letter was in response to a letter sent on 1st November 2017 from the Legal Practitioners Unit to the police in relation to a separate investigation, **I note the above letter states that investigation is still ongoing** into the activities of the legal firm Lal Patel Bale Lawyers **during the years 2013 and 2014**, which just so happens to be **the same period particularised in Counts 4, 5 and 6 in the present matter before this Commission**. Whether the material is relevant or not, can only be decided at a final hearing. I do note, however, that Counsel for the Chief Registrar is seeking leave to file and serve those disclosures provided by the Fiji Police Force with their letter dated 10th November **2016.**

[271] I also note that included in the list of documents included with the original

application filed with the Commission on 30th September 2015 in the present matter, are the following:

(1) A statement dated 20th May 2015 and signed by the complainant Reema Gokal. This is only three days after she signed letters to the Office of the Prime Minister and to the Chief Registrar saying *'I wish to withdraw a complaint that I have made to your high office in regards to Ms Renee Lal as the matter has been amicably sorted out between the parties';*

(2) An email dated 29th June 2015 from Reema Gokal to Ms Elizabeth Krishna in the Office of the Prime Minister complaining that *'... the LPU is a very weak department. They are not doing anything to Renee';*

(3) An email dated 10th July 2015 from Reema Gokal to Mr Avneel Chand confirming the complaint against the Respondent legal practitioner.

[272] **How the three alleged stances of the complainant are to be explained (that is, the initial complaint, withdrawal, and then further complaint), are matters for a final hearing. Presumably, Counsel for the Chief Registrar is satisfied that the complaint is genuine and it can be explained as to why there was a signed withdrawal on 17th May 2015 and then a detailed statement of complaint signed only three days later on 20th May 2015. In addition, <u>the public interest requires transparency</u>. <u>Indeed, only by holding a full hearing can the complainant explain</u> her initial witness statement, her letter of withdrawal and then her subsequent witness statement <u>and be cross-examined</u>.**

(vi) Finding on submission -'it is an abuse of process for the complainant to have had this complaint tried on social media'

[273] I note that the Respondent legal practitioner has annexed to her affidavit sworn on 29th November 2017, copies of a complaint that she has made to the police on 1st September 2015, as well as an unsigned statement from her daughter, a statement from the practice manager of the Respondent legal practitioner's firm and another member of staff. The complaints are to do with allegations of harassment, threats and abuse by Reema Gokal via social media. <u>These are matters for the police not the Commission.</u>

[274] In relation to social media, having read the affidavit of the Respondent legal practitioner sworn on 29th November 2017 and her annexures containing various downloaded copies from social media, **I note that the abuse was not only directed at the Respondent legal practitioner. Indeed, there was abuse targeted at the Chief Registrar, the principal Counsel appearing on behalf of the Chief Registrar in this matter and the Legal Practitioners Unit generally**, with wild accusations that I shall not dignify by repeating them in this ruling. I do note, however, that this abuse also included photographs targeting the principal Counsel appearing on behalf of the Chief Registrar.

[275] I can only presume that the joint Counsel appearing on behalf of the Chief Registrar are satisfied that the complaints on social media have not come from the complainant and instead, as the complainant said in her police statement of 17th May 2015, that the website, [a Blog], is publishing stories written by the complainant's brother, Ravi Gokal, against Renee Lal and that the complainant has no complaint against Renee Lal. If that is the case, and Counsel are so satisfied, then <u>how does that statement of 17th May 2015 reconcile with the statement the complainant makes three days on 20th May 2015 making allegations against the Respondent legal practitioner?</u> These are all matters for a final hearing.

[276] **Further, if during a final hearing, it is shown that the above social media material has come from the complainant then this may form the basis of an appropriate application by either party.**

[277] I also note that the social media material that I have read annexed to the affidavit of the Respondent legal practitioner of 29th November 2017, was from 2014 and the first half of 2015. There was no material from October 2015 or following to which my attention has been drawn where it has been alleged such has been made by the complainant commenting on the present proceedings before the Commission. **Should however, such material appears at a final hearing, again, it would be a matter for applications**

to be made by either party seeking appropriate Orders or perhaps an Order made by the Commission of its own volition.

(3) Right to a fair trial – refusal of disclosure and delay

[278] According to the affidavit of the Respondent legal practitioner sworn on 29th November 2017 in support of the cross-motion (paragraphs [49]-[54]) in relation to a right to a fair trial:

> *'49. I have a fundamental right to a fair trial. Regrettably it is not possible in this matter. I have no files or records. Memories of witnesses are failing. One witness who was the accountant at Jamnadas & Associates are the material time has migrated (Roslin Bi) and I do not have any contact with her.*
>
> *50. The staff of Jamnadas & Associates who remain working there are afraid to give evidence in this matter for fear of losing their jobs.*
>
> *51. The complainant is refusing to come to give evidence before the Commission. She is making an excuse when as a visitor she must have a return ticket to Fiji. She wants to give evidence by Skype. But given the facts of this case, her credibility is being challenged by me.* ***For this she needs to give oral evidence in Fiji before the Commission so that we can see her demeanour when she answers questions. She also needs to be in Fiji so that if she perjures herself there can be recourse against her****. The Complaint is notorious for being able to write many untruths on paper without facing up to it by hiding in India.*
>
> *52. The Complainant is known to run scams online by asking people for money. I annex hereto and mark with the letters* ***"RDSL 23"*** *with a copy of online messages of people warning other people about the Complainant asking / scamming for money.*
>
> *53. From India the complainant caused to be published articles on* [a Blog]. *I have already been tried by social media. I annex hereto and mark with the letters* ***"RDSL 24"*** *with a copy of the complaints made by the complainant to* [a Blog]. *Interestingly when I confronted the complaint with the articles as being released by her, she denied it and gave me a statement to that effect. I annex hereto and mark with the letters* ***"RDSL 25***
>
> *54. .... Given that the Chief Registrar has not produced the Complainant the application should not be allowed to proceed and should be struck out. Alternatively the application should be permanently stayed for delay, abuse of process and the inability for me to have a fair trial.'*

[279] On the issue of a right to a fair trial, the Respondent legal practitioner in her 'Submissions' dated 5th December 2017 (at paragraphs [9.1]-[9.7]) has argued as follows:

> *'9.1 The Respondent has a Constitutional right to fair trial.*

9.2 *Section 14(2)(b) states:*
<u>*Every person charged with an offence*</u> *has the right to be informed in legible writing, in a language he or she understands, of the nature and reason for the charge.*

9.3 *Section 14(2)(e)*
<u>*Every person charged with an offence*</u> *has the right to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence.*

9.4 *Section 14(2)(g)*
<u>*Every person charged with an offence*</u> *has the right to have the trial begin and conclude without unreasonable delay*

9.5 *The Respondent has been seeking particulars since the inception of the charges. In response the Chief Registrar has advised the Respondent in writing that the Applicant will endeavor to call witnesses to testify and the Respondent would have an opportunity to cross-examine them on facts as well as on the documents.*

9.6 *What this means is that the Applicant is refusing to give the Respondent information in advance of the evidence on which the Applicant intends to rely. Furthermore the Respondent does not / cannot have reasonable access to that evidence since the Applicant is refusing to give the information in advance to the Respondent. This is a flagrant disregard for the Respondent's Constitutional right to a fair trial.*

9.7 *Furthermore the Respondent's Constitutional right to have a trial without undue delay has also been affected. The facts of this matter related to events of 2008. Charges were laid in 2015. Trial was scheduled on 28th November, 2017 almost nine years later. This delay has significant effect on the Respondents Constitutional right to fair trial.'*
[My emphasis]

[280] In relation to the Constitutional arguments, the Respondent legal practitioner seems to be under the misapprehension that the provisions of the Constitution of the Republic of Fiji in relation to "offences" apply to "charges of misconduct" before the Commission. This is incorrect as set out above and explained by the Court of Appeal in *Amrit Sen v Chief Registrar* (supra) in 2016 and confirmed by the Supreme Court in *Sen* (supra) in 2017.

[281] Therefore, in light of the judgment of the Supreme Court in *Sen*, affirming the view of the Court of Appeal, that '***charges of misconduct do not fall within the purview of … the Constitution',*** the Respondent legal practitioner's submissions as to the applicability of sections 14(2)(b), 14(2)(e) and 14(2)(g) to the present matter are incorrect.

[282] Instead, as noted and discussed in detail earlier above, what is applicable is the *Legal Practitioners Act* 2009. In particular, section 114 states *'…* ***the Commission must act fairly in relation to the proceeding****.'* [My emphasis]

[283] Obviously, the Chief Registrar is still required to provide sufficient particulars in relation to any offence so a Respondent can understand the case against them. As I explained in *Vosarogo* at para [67]:

> *'… the Applicant in filing an Application before this Commission must:*
> *(1) allege either "unsatisfactory professional conduct" and/or "professional misconduct" involving a breach of a section/s of the Legal Practitioners Decree 2009; and*
> *(2) also provide sufficient particulars of the alleged conduct to substantiate the alleged breach such that the Respondent legal practitioner is aware of the case that they have to meet and for the Commission to conduct a hearing into each allegation particularised in the application'.*

(4) Analysing the Respondent legal practitioner's "Right to a fair trial" submissions

[284] I will now analyse each of the above three submissions of the Respondent legal practitioner.

(i) 'The Respondent legal practitioner has been seeking particulars since the inception of the charges'

[285] I have already dealt with this issue already on a number of occasions throughout this ruling, in summary, as follows:

(1) **In my view, Counts 1, 2, 4, 5, 6 and 7, provide '*sufficient particulars*** *of the alleged conduct to substantiate the alleged breach such that the Respondent legal practitioner is aware of the case that they have to meet';*

(2) **I also note that the Respondent legal practitioner has not previously filed an application seeking an Order for further and better particulars or for the matter to be struck out as occurred in *Vosarogo;***

(3) **Further, when a timetable was ordered to allow for such an application, the Respondent legal practitioner failed to file the necessary Summons**;

(4) **I have agreed, however, that Counts 3 and 8 require clarification**

<u>and the provision of further particulars together with a short prosecution case statement</u> outlining a summary of the evidence and the legal basis upon which the Application is brought in relation to these two Counts.

(ii) 'the Applicant is refusing to give the Respondent legal practitioner information in advance of the evidence on which the Applicant intends to rely'

[286] Counsel for the Applicant has filed and served an application containing some 225 pages of documents. He has also filed and served on 23rd March 2016 an 'Additional Disclosure' of a witness statement of Mr. Dilip Jamnadas the principal of the firm of Jamnadas & Associates. He has also made application to file and serve additional disclosures that have recently been provided by the police and for which I will make a separate ruling below. Hence, I reject the submission by the Respondent legal practitioner that the Applicant is refusing to give information of the evidence upon which the Applicant intends to rely;

(iii) '*the Respondent legal practitioner's Constitutional right to have a trial without undue delay has also been affected'*

[287] As has already been noted above, according to the Court of Appeal in *Sen* (and affirmed by the Supreme Court), sections 14(1) and (2) of the Constitution deal with "offences" not "charges of misconduct" before the Commission. Thus, '*charges of misconduct do not fall within the purview of ... the Constitution'.* Therefore, section 14(2)(g) which states that *'Every person charged with an offence has the right ... to have the trial begin and conclude without unreasonable delay*', does not apply to "charges of misconduct" before the Commission.

[288] **I do note, however, that section 15(3) says that: '*... every party to a civil dispute has the right to have the case determined within a reasonable time'*.** What is a reasonable time is surely "fact specific" and thus must be determined on a case-by-case basis.

[289] **<u>In the present case, as I have already outlined above, I have not been</u>**

convinced that there has been unfair delay on the part of the Chief Registrar either in '*the time taken to institute proceedings',* or in the '*time taken ... in continuing proceedings that have been commenced',* which, in my view, have been delayed at the request of the Respondent legal practitioner seeking to show that she was not a trustee.

[290] **Further, as I have also noted above, in considering '*whether the accused has taken any action to alert the prosecution to his or her objections to an unreasonable delay',* I have not seen one example to which my attention has been drawn by the Respondent legal practitioner in her two affidavits and either of her written submissions of any action taken by her to alert the Chief Registrar to her objections to an unreasonable delay.**

(5) ***10th Ruling*** *– Application be dismissed or permanently stayed -* ***Granted***

[291] **Accordingly, my 10th Ruling is that the Respondent legal practitioner's cross-motion seeking Orders, *'If the Applicant is unable to proceed to hearing on 1st December, 2017 that the application be dismissed; OR IN THE ALTERNATIVE that the action be permanently stayed'*, is REFUSED.**

7. The Chief Registrar's Application for leave to file and serve additional disclosures

[292] In Counsel for the Chief Registrar's Notice of Motion filed on 1st December 2017, an Order was sought *'That the Applicant be granted leave to file with the Commission and serve on the Respondent additional disclosures*'. I will now deal with that request. The Applicant is seeking to file:

(1) Material provided by the Fiji Police Force annexed to a letter dated 10th November 2016 [sic] received by the Chief Registrar on 13th November 2017;

(2) Two witness statements of staff from the firm of Jamnadas & Associates, being Shammi Lata and Niumai Wati Seduadua.

(1) The Applicant's submissions as to the need for further disclosures

[293] The affidavit in support of the motion was sworn on 1st December 2017 by Melvin Nitish Kumar, Acting Court Officer, Legal Practitioners Unit within Office of the Chief Registrar. In support of the application to be granted leave to file and serve additional disclosures, Mr Kumar has stated at paragraphs [8] and [10]:

> *'8. THAT I am informed that the Applicant intends to file additional disclosures.* ***The documents which the Applicant intends to disclose at this stage were not in possession of the Legal Practitioner's Unit until the 17th of November, 2017*** *when the Legal Practitioners Unit received a correspondence from the Fiji Police Force dated 10th November 2016. The said letter from the Fiji Police Force was a response to our letter dated 1st November 2017. Our letter of 1st November 2017 was in relation to another matter. Annexed herewith and marked as* ***"MNK1"*** *is a copy of our letter to the Fiji Police Force dated 1st November 2017, the delivery document confirming the receipt of our letter on even date and the response of the Fiji Police Force dated 10th November 2016.*
>
> *...*
>
> *10. THAT I am further informed that* ***the disclosures are required as they are relevant to the charges laid against the Respondent****.'*
>
> [My emphasis]

[294] The joint submissions of Counsel for the Chief Registrar *('Written Submissions'*, 5th December 2017, paras [19]-[21], page 6), have paraphrased the above from the affidavit of Mr. Kumar sworn on 1st December 2017, arguing the need to file and serve further disclosures is as follows:

> *'19. The Applicant submits that the additional disclosures were not in its possession or custody until the 17th of November 2017 when the Legal Practitioners Unit received a correspondence from the Fiji Police Force dated 10th November 2017.*
>
> *20. The said letter from the Fiji Police Force was a response to the Applicant's letter dated 1st November 2017. The Applicant's letter dated 1st November 2017 was in relation to another complaint against the Respondent.*
>
> *21. The Applicant submits that the Respondent will not be prejudiced if leave is granted to file and serve additional disclosures.'*

[295] In support of their joint submissions, Counsel for the Chief Registrar have cited ***Sakiusa Tuisolia v Fiji Independent Commission against Corruption*** (Unreported, High Court at Suva, Miscellaneous Jurisdiction, Criminal

Miscellaneous Case No. HAM 122 of 2009, 1 April 2010, Goundar J; PacLII: [2010] FJHC 100, <http://www.paclii.org/fj/cases/FJHC/2010/100.html>), where Justice Goundar stated the following in relation to disclosure (at paragraphs [31], [32], [34] and [36]):

> *'[31] While I accept that disclosures should be made available to the defence well before the commencement of a trial, there is no hard and fast rule restricting disclosure of evidence at any stage before or during a trial. As Lawton LJ in* ***Reg v. Hennessey (Timothy)*** *(1978) 68 Cr. App. R 419 at p.426 said the courts must:*
>
> > *"keep in mind that those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence."*
>
> *[32] The obligation to disclose is a continuing duty of the prosecution developed by common law.*
>
> *...*
>
> *[34] Fairness also requires that the rules of natural justice must be observed. As Lord Taylor of Gosforth CJ observed in* ***R v. Keane*** *[1994] 1 W.L.R. 746, 730G, the great principle is that of open justice. It would be contrary to that principle for the prosecution to withhold from the accused material which might undermine their case against him or which assist his defence.*
>
> *...*
>
> *[36] In my view,* ***the additional disclosures, albeit late, is entirely consistent with the duty of the prosecution to disclose evidence to ensure a fair trial for the applicant****. Continuing disclosures is almost a norm in fraud cases. This is because fraud prosecution involves voluminous amount of documents. It is in the interests of justice that all material documents are made available to an accused to ensure a fair trial is held.* ***The primary principle is that the applicant has the disclosures to prepare a defence****. Looking at the conduct of the prosecution in view of their disclosure obligations to the applicant, the prosecution complied with rules of fairness and open justice by disclosing the additional evidence.* ***The fact is that the applicant has the disclosures. These circumstances do not show any manipulation of court process on behalf of the prosecution.****'*
> [My emphasis]

(2) The objections of the Respondent legal practitioner on granting the Applicant leave to file and serve additional disclosures

[296] The Respondent legal practitioner says that her right to a fair trial has been breached by Counsel for the Chief Registrar seeking to file and serve further

disclosures (as well as to amend Counts 3 and 8 which I shall deal with separately). The Respondent legal practitioner in her 'Submissions' dated 5th December 2017 (at paragraphs [9.8]-[9.9]) has argued as follows:

> *'9.8 In further breach of Section 14(2)(e) [of the Constitution] the Applicant without having provided the evidence under the current charges is not seeking to amend the charges and provide further disclosure to the Respondent.*
>
> *9.9 The application is opposed as* ***the Applicant is already in breach of the Respondents right to fair trial by failing to provide evidence in advance on which it intends to rely o****n. By amending the charges and* <u>*providing further disclosures does not cure this breach*</u>*. And the application to amend the charges and application* <u>*to provide further disclosure suggests that the Applicant is in breach of the Respondent's Constitutional righ*</u>*t.'*
> [My emphasis]

[297] I presume that there is a typographical error in paragraph [9.8] above and that it should read: '*the Applicant without having provided the evidence under the current charges is* <u>***now***</u> *seeking to amend the charges and provide further disclosure to the Respondent'*.

[298] The Respondent legal practitioner's second set of written submissions filed on 7th February 2018, in response to the application by Counsel for the Chief Registrar to be granted leave to file and serve the additional disclosures, has cited ***State v Jamuna Prasad*** [1995] 41 FLR 223; PacLII: [1995] FJLawR 33, <http://www.paclii.org/fj/cases/FJLawRp/1995/33.html>, where Justice Pain in the High Court considered and interpreted section 11 of the Constitution in relation to "offences" (now section 14(2)(e)).

(3) Discussion

[299] In relation to the application of the Chief Registrar '*That the Applicant be granted leave to file with the Commission and serve on the Respondent additional disclosures',* **I note that this matter contains serious allegations as to the whereabouts of $254,000**.

[300] Apart from what Counsel for the Chief Registrar have cited in their joint submissions from ***Sakiusa,*** I am of the view that paragraphs [33] and [35] are also relevant, where Goundar J said:

'[33] The common law rules of disclosure and which were adopted in this country in the case of ***State v. Jamuna Prasad*** *[1995] 41 FLR 223, owe their origin to the elementary right of every accused person to a fair trial. If an accused person is to have a fair trial he must have adequate notice of the case which is to be made against him';*

and

'[35] In the present case, it is not alleged that the prosecution has withheld material evidence from the defence. ***What is contended by the applicant is that the service of additional disclosures following the setting of a trial date constitutes rogue conduct*** *on behalf of the prosecution.'*
[My emphasis]

[301] As His Lordship made clear in *Sakiusa,* it is not 'rogue conduct' for the '*service of additional disclosures following the setting of a trial date'.* Further, '*The obligation to disclose is a continuing duty of the prosecution developed by common law.'*

[302] Whilst appreciating that these are disciplinary not criminal proceedings, I note that in *Sakiusa,* 'the offences were alleged to have been committed between 21 October 2004 and 31 April 2006' and the first appearance was in the Magistrates' Court on 11th February 2008. The matter was eventually transferred to the High Court. On 9th September 2009, the case was set for trial on 25th November 2009. On 13th November 2009, the prosecution filed a notice of additional evidence and on 25th November 2009, additional documents were filed. On 27th January 2010, a document was filed after an issue arose about an unavailable witness during the hearing of an application for stay.

[303] As Goundar J noted, the arguments for each side in *Sakiusa* were:

'[16] ... the applicant submits that the disclosure of evidence made at various stages of proceedings before the commencement of the scheduled trial in November 2009 amounted to rogue conduct on behalf of the prosecution. The applicant further submits that the late disclosure of evidence was done to force the defence to seek an adjournment and to vacate the trial so that the charges could be left hanging on the applicant.

> *[17] Counsel for the prosecution submits that the late disclosure on its own is not in bad faith.'*

[304] **In *Sakiusa,* the applicant argued that the late disclosure supported a case for abuse of process, which Goundar J rejected and, instead, ordered an adjournment.**

[305] As I have already noted above, in light of the judgment of the Supreme Court in *Sen*, affirming the view of the Court of Appeal, '*charges of misconduct do not fall within the purview of ... the Constitution'.* **Hence, the Respondent legal practitioner's submission, that the Applicant is in breach of section 14(2)(e) in seeking to file further disclosure, is incorrect.**

[306] Although section 14 of the *Constitution* does not apply to charges of misconduct to be heard before this Commission, I do accept (as has been noted earlier in this ruling), that **<u>common law principles of fairness do apply (a requirement similarly set out in section 114 of the *Legal Practitioners Act* 2009, that the Commission act fairly).</u>**

[307] In the present case, I have not been shown fault on the part of the Chief Registrar by delay in seeking to disclose such material. The letter from the police containing the material was only received by the Chief Registrar's office on 13th November 2017. As for the additional two witness statements of staff from the legal firm of Jamnadas & Associates, as Goundar J stated in *Tuisolia* ***<u>'an appropriate remedy to address the prejudice [from late disclosure] is to grant an adjournment'</u>*. Similarly, I will be so ordering in the present case.**

[308] I note at the hearing in 7th February 2018, Counsel for the Chief Registrar, advised that the two-page letter from the police received by the Chief Registrar's office on 13th November 2017 together with the 51 pages of annexures are relevant to Counts 1 and 8. Similarly, so are the two witness statements of staff from the firm of Jamnadas & Associates, being Shammi Lata and Niumai Wati Seduadua.

*(4) **<u>11th Ruling</u>** - leave to file and serve additional disclosures – **Granted but adjournment also granted***

[309] **Accordingly, I will allow the application by the Chief Registrar. Thus, <u>my 11th ruling, is that the application</u>, *'That the Applicant be granted leave to file with the Commission and serve on the Respondent additional disclosures', <u>is granted</u>.* I will, however, be adding two conditions to that Order in that:**

(1) Leave will be limited to the 51 pages of disclosures supplied by the police with their letter to the Chief Registrar dated 10th November 2016 received by the Chief Registrar's office on 13th November 2017 **and to the two witness statements of staff from the legal firm of Jamnadas & Associates, Shammi Lata and Niumai Wati Seduadua and**

(2) An adjournment is granted to give the Respondent legal practitioner sufficient time to consider the additional disclosures.

[310] **In addition, I will also be ordering that Counsel for the Chief Registrar file a prosecution case statement outlining a summary of the evidence in the recent disclosures supplied by the police and their relevance to Counts 1 and 8.**

<u>8. The Chief Registrar's Application for leave to amend Counts 3 and 8</u>

[311] In Counsel for the Chief Registrar's Notice of Motion filed on 1st December 2017, an Order was sought *'That the Applicant be granted leave to amend Counts 3 and 8'*. I will now deal with that request.

(1) The Applicant's submissions as to the need to amend Counts 3 and 8

[312] According to the joint submissions of Counsel for the Chief Registrar *('Written Submissions'*, 5th December 2017, paragraphs [15]-[18], page 5), the reasons as to why they should be granted leave to amend Counts 3 and 8 are as follows:

> *'1. The Applicant submits that upon the completion of the witness conference on the 24th of November 2017, Counsel for the Applicant was in a position to ascertain that the Respondent*

may not have been the trustee of the Trust Account of Jamnadas & Associates in 2007.

2. *On the 28th of November 2017, Counsel for the Applicant made oral application to amend counts 3 and 8 to reflect the above.*
3. *The Applicant submits that **the Respondent will not be prejudiced if leave is granted to amend counts 3 and 8**.'*

[My emphasis]

[313] In support, the joint submissions of Counsel for the Chief Registrar have cited ***Sakiusa Tuisolia v Fiji Independent Commission against Corruption*** (supra) at paragraphs [41]-[42] as follows:

> *[41] After the Information is filed, the prosecution has the power to amend it with the leave of the court. The power to amend is provided by section 274(9) of the Criminal Procedure Code. It includes substitution or addition of new offences. Section 274(9) reads:*
>
> > *"The Court may, upon application by the prosecution, grant leave to amend an information, whether by way of substitution or addition of charges or otherwise."*
>
> *[42] **If a late amendment to the Information is allowed, and there is a risk of the accused being prejudiced by the late amendment, then an appropriate remedy to address the prejudice is to grant an adjournment**, as provided by section 274(10) of the Criminal Procedure Code:*
>
> > *"In deciding whether or not to grant leave, the Court may consider whether such amendment might embarrass the accused in his defence and whether such embarrassment might be appropriately mitigated by way of adjournment of trial."'*
>
> [My emphasis]

(2) The objections of the Respondent legal practitioner to amend Counts 3 and 8

[314] I have previously noted above in relation to the right to a fair trial issue, the Respondent legal practitioner says that this has been breached by Counsel for the Chief Registrar seeking to file and serve further disclosures as well as to amend Counts 3 and 8. I have also previously cited the Respondent legal practitioner's 'Submissions' dated 5th December 2017 (at paragraphs [9.8]-[9.9]) where she has argued a '*further breach of Section 14(2)(e)'* of the *Constitution by 'the Applicant ... seeking to amend the charges'* and that *'By amending the charges ... does not cure this breach. And the application to amend the charges ... suggests that the Applicant is in breach of the Respondent's Constitutional right.'*

[315] The second affidavit of the Respondent legal practitioner that was sworn and filed on 11th December 2017 concentrates solely on the issue of prejudice that the Respondent legal practitioner says that she will suffer should leave be granted to amend the particulars of Counts 3 and 8.

[316] The Respondent legal practitioner's second set of written submissions filed on 7th February 2018, in response to the application by Counsel for the Chief Registrar to be granted leave amend Counts 3 and 8 cites *Chief Registrar v Devanesh Prakash Sharma and R Patel Lawyers* (supra). I have already discussed at length earlier in this ruling as to why, in my view, the present case is different to what occurred in *Devanesh Sharma*. I have also noted that the ruling in *Devanesh Sharma* has been appealed.

(3) Discussion

[317] Again, as I have already noted above, in light of the judgment of the Supreme Court in *Sen*, affirming the view of the Court of Appeal, '*charges of misconduct do not fall within the purview of ... the Constitution'*. **Hence, the Respondent legal practitioner's submission, that the Applicant is in breach of section 14(2)(e) in seeking to amend Counts 3 and 8 and to provide further disclosure, is incorrect.**

[318] Again, I note, that although section 14 of the *Constitution* does not apply to charges of misconduct to be heard before this Commission, I do accept (as has been noted earlier in this ruling), that **common law principles of fairness do apply** **(a requirement similarly set out in section 114 of the *Legal Practitioners Act* 2009, that the Commission act fairly). Indeed,** as the High Court of Australia observed in *Walton v Gardiner* (supra), '*there is plainly an analogy between the concept of abuse of a court's process in relation to criminal proceedings and the concept of abuse of the Tribunal's process in relation to disciplinary proceedings'*. Further, as Commissioner Connors stated in ***Chief Registrar v Mishra*** (Unreported, ILSC, Action No. 002 of 2010, 6 December 2010; PacLII: [2010] FJILSC 31, <http://www.paclii.org/fj/cases/FJILSC/2010/31.html>) at para [27]:

> *'The Commission is by virtue of section 114 of the Legal Practitioners Decree obliged to act fairly in its proceedings whilst having flexibility in the reception of evidence and not being bound by the rules of evidence.* ***The dominant procedural requirement is that the Commission act fairly to all parties*** *before it ...'*
> [My emphasis]

[319] **In relation to the application of the Chief Registrar '*That the Applicant be granted leave to amend Counts 3 and 8'*, this arises from the decision of Counsel for the Chief Registrar not to pursue the trusteeship issue. Instead, the Chief Registrar has decided to simply allege in the particulars that the conduct of the Respondent legal practitioner was in authorizing what occurred**. That is, that the Respondent *'authorized in the Jamnadas & Associates Trust Account payment voucher for the release of $254,000 to ANZ when she failed to obtain the consent and authority ... to release the sum'* (Count 3) and *'authorized the withdrawal of $254,000 held in the trust account of Jamnadas & Associates and utilized the said sum for her own benefit'* (Count 8). **Thus, the substantive allegations remain as they were before the amendments. Whether or not the Respondent legal practitioner was a trustee is not the conduct that is the basis of the alleged professional misconduct**. The Applicant Chief Registrar was always going to have to prove the allegation that the Respondent legal practitioner **authorized** the payment voucher for the release of $254,000 to ANZ **without the consent and authority of the client** (Count 3) and **authorized** the withdrawal of $254,000 and **utilized the sum for her own benefit** (Count 8).

[320] **I am at a loss to understand how this proposed amendment prejudices the defence of the Respondent legal practitioner.** The Respondent legal practitioner was always going to have to prepare her defence knowing that these were the allegations in relation to Counts 3 and 8. For the Respondent to now say that '*I will have to carry out my own investigations ... to prepare a new defence',* is a matter for her. If it is proven that the legal practitioner authorised the payment voucher without consent and authority and/or authorised the withdrawal of $254,000 and utilized the sum for her own benefit, **whether or not she was a trustee is "a red herring"**, as I have

already noted on a number of occasions above.

[321] In ***Rabuka v State - Ruling*** (Unreported, Criminal Miscellaneous Case No. HAM 76 of 2006, 9 November 2006; PacLII: [2006] FJHC 165, <http://www.paclii.org/fj/cases/FJHC/2006/165.html>) when there was an application for an adjournment involving (amongst other issues) 'the question of the late amendment of the date frame in the first count', Justice Winter noted in his ruling at paras [8]-[9]:

> *'[8] 'Learned Counsel complains that this late amendment will prejudice the defence as they will turn their minds to a consideration of over a 17-day time frame and make appropriate enquiries and take appropriate instructions about the possibility of any available defences.*
>
> *[9] In my view, **the question of the date** of the time frame **while perhaps going to the defence is not an essential ingredient of the charge'**.*
>
> [My emphasis]

(4) ***12th Ruling*** *- leave to amend Counts 3 and 8 -* ***Granted***

[322] In the present case, I have not been convinced that the Commission would be acting unfairly in allowing the two amendments sought by the Chief Registrar to Counts 3 and 8. As I have noted above in relation to disclosure and the words of Goundar J in *Tuisolia,* similarly apply here. That is, an appropriate remedy to address any perceived prejudice is to grant an adjournment. **Accordingly, my 12th Ruling is that I allow the two amendments sought by the Chief Registrar to Counts 3 and 8.**

[323] I will, however, also be ordering an adjournment. Further, I will be ordering in relation to Counts 3 and 8, (as noted much earlier in this ruling), that the Chief Registrar provide further particulars together with a short prosecution case statement outlining a summary of the evidence and the legal basis upon which the Application is brought in relation to these two Counts.

9. Clarification as to the duty owed and the nature of proceedings before the Commission

[324] At this point, I think it appropriate for me to clarify two misunderstandings that have arisen during the present proceedings. The first concerns the issue

of a fair hearing that was raised by the Respondent legal practitioner. There appears to be a misunderstanding on this issue as to whom is the duty owed. The second misunderstanding is in relation to the nature of proceedings before the Commission.

[325] On the issue as to whom is the duty owed, as the then Chief Justice of the Supreme Court of Victoria, Justice Marilyn Warren, noted in a speech that she gave in 2011: *'It is well-established that <u>the prosecutor owes his or her duty to the court</u> and not the public at large or the accused',* citing ***Cannon v Tahche*** (2002) 5 VR 317; [2002] VSCA 84 (AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2002/84.html>) and *'the discussion on the role and responsibility of a prosecutor in* ***Richardson v The Queen*** *(1974) 131 CLR 116 and* ***The Queen v Apostilides*** *(1984) 154 CLR 563'*. (See 'The Duty Owed to the Court: The Overarching Purpose of Dispute Resolution in Australia', A speech delivered by the Hon. Marilyn Warren AC, at the Bar Association of Queensland Annual Conference, Gold Coast, 6 March 2011, p.12, <http://www5.austlii.edu.au/au/journals/VicJSchol/2011/7.pdf>.)

[326] In *Canon,* the Victorian Court of Appeal stated at paras [57]-[58]:

> *[57] The prosecutor's "duty of disclosure" has been the subject of much debate in appellate courts over the years. But, as it seems to us, authority suggests that, whatever the nature and extent of the "duty",* ***<u>it is a duty owed to the court</u> and not a duty, enforceable at law at the instance of the accused****. This, we think, is made apparent when the so- called "duty" is described (correctly in our view) <u>as a discretionary responsibility</u> exercisable according to the circumstances as the prosecutor perceives them to be. The responsibility is, thus, dependent for its content upon what the prosecutor perceives, in the light of the facts known to him or her, that fairness in the trial process requires ...*
>
> *[58]* ***The prosecutor's obligation to act fairly****, with due regard to the interests of the accused, has been variously described as a "duty", an "obligation", a "responsibility", or "a function". But the history of its development demonstrates that,* ***however it is described, <u>the "duty" is owed to the court and not to the public at large or the accused</u>****. It is a significant aspect of the administration of criminal justice and the court's capacity to ensure the accused's right to a fair trial.'*

[My emphasis]

[327] Again, as I have noted on a number of occasions during this ruling, whilst proceedings before the Commission are not criminal, Counsel for the Chief Registrar still carries a similar duty, that is, to the Commission. The Commission, in turn, as stated by Commissioner Connors in *Mishra* (supra), is guided '*by virtue of section 114 of the Legal Practitioners Decree'*, that is, *'The dominant procedural requirement is that* ***the Commission act fairly to all parties before it****'*.

[328] This then brings me to my second point as to the nature of proceedings before the Commission. As I expressed in *Suruj Sharma* (supra) at para [80]:

> *'It is also important to reiterate what was said by Justice Madigan in* ***Chief Registrar v Adish Kumar Narayan*** *[2014] FJILSC 6; Case No.009.2013 (2 October 2014), (Paclli:* <http://www.paclii.org/fj/cases/FJILSC/2014/6.html>), in relation to interlocutory applications at paragraphs [4]-[5]:
>
> > *'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.'*
> [My emphasis]

[329] Hopefully, as a result of the rulings in *Adish Kumar Narayan* (2014), *Suruj Sharma* (2016), *Amrit Sen* (2018), as well as this present ruling, being disseminated throughout the profession (as well as listed on both PacLII and the Commission's soon to be "live" website), it will come to be better understood, as Justice Madigan emphasized in *Adish Kumar Narayan*, that '*hearings before the Commission are hearings by way of an enquiry and not adversarial trials'* and that *'it will only be in exceptional circumstances that interlocutory applications and no case applications will be entertained'*.

[330] In addition, members of the profession need to also be aware of the judgment in *Amrit Sen v Chief Registrar (Supra),* handed down by the Court of Appeal in November 2016 and confirmed by the Supreme Court in October 2017, that '*charges of misconduct'* before the Commission are not the same as "offences" and thus *'**do not fall within the purview of …** [the offence provisions] **of the Constitution**.'* **As the Court of Appeal made the point in *Amrit Sen, '<u>professional misconduct', … is not an offence</u>. These are rules made for the purpose of maintaining dignity of professional bodies'.***

<u>10. The affidavit of Tevita Cagina be struck out</u>

[331] I now turn to the final application, that of the Respondent legal practitioner seeking an order: *'**<u>THAT</u>** the Affidavit of Tevita Cagina sworn on 24th November, 2017 and filed on 24th November, 2017 be struck out from the record of ILSC APPLICATION No.8 of 2015'*.

(1) Affidavit and submissions of legal practitioner

[332] In her affidavit sworn on 29th November 2017, the Respondent legal practitioner has stated:

'24. I have read the affidavit of Tevita Cagina sworn on 24th November, 2017 and filed on 24th November, 2015 at 4.15 pm. I deny the suggestion by the deponent that I was evading service. At no time prior to the attempt at service on 23rd November, 2017 was I aware of the application. Therefore I could not be evading service. It is totally wrong for the deponent to make such a statement and his affidavit should be expunged from the record. If anything it is a self-serving affidavit to deflect from the issue at hand. The Chief Registrar is making an application at the last minute and the service of the application even if received is short service. Furthermore the attempt to serve Lal Patel Bale Lawyers further shows that the Chief Registrar's office's total disregard for the rules of service. In this action I have always appeared in person. Therefore the rules of personal service apply. I take issue with the affidavit of Tevita Cagina and ask that it be struck out.'

[333] In her written submissions of 5th December 2017 (paras [3.27]-[3.29]), the Respondent legal practitioner has stated:

'3.27 Order 41. r. 6 High Court Rules 1988 states that:
The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

3.28 The Affidavit of Tevita Cagina ("Cagina") sworn on 24th November, 2017 and filed on 24th November, 2017 states at paragraph 12 that:
I believe Ms Lal and the law firm are evading service.

3.29 Cagina is reaching a conclusion in his affidavit that is not supported by the facts. Furthermore his facts are rebutted in "RDSL" affidavit. Accordingly the contents of the affidavit are scandalous and oppressive and the affidavit must be struck out.'
[My emphasis]

(2) No submissions of Applicant

[334] I note that the three affidavits of Mr. Kumar, as well as the two sets of written submissions of Counsel for the Chief Registrar, do not address the affidavit of Tevita Cagina. I note, however, that when I raised with Counsel for the Chief Registrar at the appearance on 1st December 2017, as to the inappropriateness of paragraph 12 of the affidavit of Tevita Cagina, Counsel responded, *"point noted"*. He also noted my point when I raised it again during a general discussion at the hearing on 7th February 2018 as to the affidavits filed in this matter.

(3) Finding

[335] **I agree with the Respondent legal practitioner that the statement at**

paragraph [12] is not a fact but a conclusion. I do not understand why such a statement has been included in the affidavit.

*(4) **13th Ruling** – cross-motion strikeout affidavit – **Granted in part***

[336] **Accordingly, my 13th Ruling is that paragraph [12] in the Affidavit of Tevita Cagina sworn on 24th November 2017 and filed on 24th November 2017, be struck from the record.**

11. The affidavits filed in the matter

[337] Following on from the above ruling, I cannot conclude this ruling without making some brief comments on the affidavits filed by both parties. Indeed, I mentioned to the parties near the conclusion of the hearing on 7th February 2018 that I would be doing so.

[338] As I have noted at the beginning of this ruling, there have been seven affidavits filed in relation to the three applications that I have been asked to consider. This ruling is already lengthy and I do not propose to waste time and space dealing with the problems in each of the affidavits, paragraph by paragraph. I will, however, make three quick points.

[339] First, I have had to consider in this ruling, three affidavits of Mr. Kumar filed on behalf of the Chief Registrar. Generally, such affidavits filed in support of, or opposing, an interlocutory application, should concentrate on the facts, the sources of such facts and, where appropriate, annex supporting documentation.

[340] Second, I make the above same points to the Respondent legal practitioner in relation to her two affidavits. In particular, having read the affidavit of the Respondent legal practitioner sworn on 29th November 2017 and the annexures thereto, including statements to the police together with downloaded copies of "posts" from social media without any explanation or referencing, (presumably to illustrate the alleged "identity theft" by the complainant posing as the Respondent legal practitioner), **I am not so sure that all of this needed to be placed before me.** For example, "**Annexure**

19" contains (apart from police statements) a bundle of voluminous copies of downloaded social media "chat" including a photograph of a penis with the offering *'and you can get this as much as you want'*, the relevance of which to the present case I am still none the wiser. In addition, the alleged suffering of an illness by the Respondent legal practitioner (of which I am sorry to hear), together with the acrimonious ending of the Respondent legal practitioner's employment with Jamnadas & Associates and other associated issues, are matters, <u>where relevant</u>, for trial.

[341] Third, I have mentioned in this ruling that there is a witness statement signed by Mr. Jamnadas that has been filed by the Applicant and presumably is to be relied upon at a final hearing. I have already highlighted that parts of it are potentially problematic. This is something for Counsel for the Chief Registrar to consider. <u>Similarly, I expect that any further witness statements that are filed concentrate on facts and avoid being argumentative, speculative and/or the drawing of conclusions</u>.

[342] Whilst the Commission is not bound by the rules of evidence nor strictly by a formal set of rules of procedure, *'the Commission is expected to act fairly'* (as per s.114 of the *Legal Practitioners Act 2009*) and **<u>Counsel are expected to be aware of their professional requirements as members of the Bar</u>**. A re-reading of the judgments of Justice Gates in *Prasad* and Sir Moti Tikaram in *Ah Koy* might be a good starting point before drafting the next contentious affidavit. In addition, Counsel are reminded of **Rule 3.5 of the '*Rules of Professional Conduct and Practice'*** which states: *'A practitioner shall not on behalf of a client attack a person's reputation without good cause.'* A reading of the judgment of the High Court of Australia in ***Clyne v New South Wales Bar Association*** (1960) 104 CLR 186; AustLII: [1960] HCA 40, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1960/40.html>, is also recommended, where in discussing the ethical standards expected of a legal practitioner (and the ultimate penalty of being struck from the Roll of legal practitioners that can be imposed where that is breached), the joint judgment of the Court said (at pp. 201-202; para [23]-[24]):

> *'... a member of the Bar enjoys great privileges ... Cases will constantly arise in which it is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the courts. But, from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused ...'.*

12. Costs

[343] As I have also noted above, the Applicant sought as one of the Orders in the first Notice of Motion that 'Costs be costs in the cause'. I note that counsel for both parties agreed to this proposed order when I asked them to address me after I concluded the reading of my ruling last evening, 13th February 2018. Accordingly, I defer the question of costs associated with this ruling until after the final hearing of the substantive application field by the Chief Registrar.

13. My staff

[344] Finally, I must place on the public record my sincere thanks to the staff of the Commission, without whom, the timely delivery of this ruling would not have been possible. They have worked on many evenings and weekends listening to the recordings of each appearance in this matter (bar one), stored mostly on a frustratingly antiquated system, from which they have, with patience and good humour, provided the transcripts and chronology, undertaken research and corrected the proofs of the drafts that became this ruling. It is their dedication that has provided the music, allowing this passing, fortunate, conductor to highlight some of the notes. Working with them has reminded me of a review by Neil McCormick published in *The Telegraph (UK)* on 19th October 2013 of Morgan Neville's uplifting documentary *'20 Feet From Stardom',* when McCormick wrote:

'Loosely framed as a history of how successive generations of young, black, predominantly female, church-raised American gospel singers brought soul and vitality to a stilted pop format, it is, essentially, a plucky underdog story, a feelgood celebration of incredibly talented people whose huge contributions to our general wellbeing have gone unnoticed and, in many cases, largely unrewarded.'

(Neil McCormick, '20 Feet From Stardom: the secret life of the backing singer', *The Telegraph (UK)*, 19 October 2013, <http://www.telegraph.co.uk/culture/music/rockandpopfeatures/10389065/20-Feet-From-Stardom-the-secret-life-of-the-backing-singer.html>)

ORDERS

[345] In the hearing before the Commission in Case No. 004 of 2015, *Chief Registrar v Lal*, of the two Notices of Motion filed by the Applicant as well as one oral application made by Counsel for the Chief Registrar on 1st December 2017 and of the Cross-Motion filed by the Respondent legal practitioner, as well as two objections raised by the Respondent and the oral application made by her Counsel on her behalf on 7th February 2018, the formal Orders of the Commission are:

1. That the objection of the Respondent legal practitioner to answers given by Counsel for Chief Registrar on 1st December 2017 being considered as part of the evidence in the application as to whether or not to vacate the hearing, is allowed in part.
2. That the objection of the Respondent legal practitioner as to the affidavit Melvin Nitish Kumar sworn on 22nd November 2017 and filed on 23rd November 2017 being allowed into evidence, is refused.
3. That the oral application of Counsel for the Respondent legal practitioner made on 7th February 2018 that Mr. Avneel Chand withdraw in appearing as Counsel for the Chief Registrar at the hearing of the three interlocutory applications, is refused.
4. That the application of the Chief Registrar for the hearing dates allocated from the 28th November 2017 to 1st December 2017 be vacated, is granted.

5. That the oral application made on 1st December 2017, by Counsel for the Chief Registrar to amend Order 1 sought in the Notice of Motion filed on 23rd November 2017, such that if the vacation of the hearing is granted that the entire proceedings be adjourned rather than part-heard, leave is granted to so amend;
6. The Amended Order 1 sought by the Chief Registrar is granted, that is, the entire proceedings are adjourned to a date to be allocated by the Commission.
7. That the cross-application of the Respondent legal practitioner, that an adjournment be refused of the said hearing allocated from the 28th November 2017 to 1st December 2017, is refused.
8. That the cross-application of the Respondent legal practitioner that the Applicant produce the Complainant, Reema Yogeshrai Gokal and that Case No. 004 of 2015, *Chief Registrar v Lal,* proceed to hearing on 1st December 2017, is refused.
9. That the application of the Chief Registrar that the evidence of Reema Yogeshrai Gokal and Pratima Yogesh Rai Gokal be heard in the next Sittings of the Commission, is granted, subject to a date to be allocated by the Commission.
10. That the cross-application of the Respondent legal practitioner that the taking of evidence of Reema Yogeshrai Gokal and Pratima Yogesh Rai Gokal by way of Skype be refused, is granted.
11. That the taking of evidence of Reema Yogeshrai Gokal and Pratima Yogesh Rai Gokal, is to be given in person in the Commission's hearing room in Suva, Fiji, on a date to be allocated by the Commission.
12. That an affidavit sworn by the Chief Registrar or a member of his staff, is to be filed and served by 9.00am on 15th February 2018 confirming that they have spoken with Reema Yogeshrai Gokal who has advised that she will be in Fiji (either alone or together with Pratima Yogesh Rai Gokal) for a hearing during the June 2018 Sittings of the Commission (that is, 4th to 14th June 2018).

13. That an affidavit sworn by the Chief Registrar or a member of his staff, is to be filed and served by 12 noon on 28th February 2018 confirming that a ticket has been booked with details to enable Reema Yogeshrai Gokal and, if necessary, Pratima Yogesh Rai Gokal to travel from India to Fiji to be present for a hearing during the June 2018 Sittings of the Commission (that is, 4th to 14th June 2018).
14. That the application of the Chief Registrar to be granted leave to file and serve additional disclosures, is granted, with such leave being limited to:

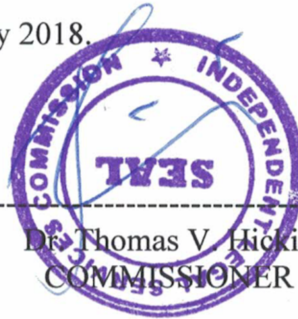
    (1) the disclosures supplied by the police with their letter to the Chief Registrar incorrectly dated 10th November 2016 (received by the Chief Registrar on 13th November 2017), conditional upon, the Applicant Chief Registrar filing and serving within 7 days (or a member of his staff), that is, by 12 noon on 21st February 2018, a prosecution case statement outlining a summary of the evidence in the said disclosures supplied by the police, and the relevance of such disclosures to Counts 1 and 8; and

    (2) the witness statements of Shammi Lata and Niumai Wati Seduadua.
15. That the application of the Chief Registrar to be granted leave to amend the particulars in Counts 3 and 8, is granted, conditional upon, the Applicant filing and serving within 7 days the amended particulars in Counts 3 and 8, that is by 12 noon on 21st February 2018, together with a short prosecution case statement outlining a summary of the evidence and the legal basis upon which the Application is brought in relation to these two Counts.
16. That paragraph [12] of the Affidavit of Tevita Cagina sworn on 24th November 2017 and filed on 24th November 2017, is struck out.
17. That the cross-application of the Respondent legal practitioner for the action in Case No. 004 of 2015 to be permanently stayed, is refused.

18. The determination of costs associated with this ruling is deferred until after the final hearing of the substantive application filed by the Chief Registrar.

19. The matter is adjourned until 9.00am on 15th February 2018, to confirm a date for the final hearing of the substantive Application filed by the Applicant.

Dated this day 14th February 2018.



Dr. Thomas V. Hickie
COMMISSIONER