IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

Application No. 012 of 2015 and
No. 015 of 2015

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

SURUJ SHARMA

First Respondent

AND:

PATEL SHARMA LAWYERS

Second Respondent

Coram: Dr. T.V. Hickie, Commissioner

Counsel for the Applicant: Mr. A. Chand
Counsel for the Respondent: Mr. D. Sharma and Mr. N. Lajendra

Dates of Hearing (14 days):
- December 2016 Sittings - 5th and 6th December 2016;
- June 2017 Sittings - 5th, 6th, 7th, 8th, 9th June 2017;
- September 2017 Sittings - 18th, 19th, 20th, 21st, 22nd September 2017;
- April 2018 Sittings - 25th April 2018 (Clarification Hearing on written submissions);
- June 2018 Sittings - 13th June 2018 (Supplementary Clarification Hearing).

Mentions once hearing commenced:
- February 2018 Sittings - 5th February 2018 (Mention and Orders);
- 23rd April 2018 (Mention and Orders); and
- June 2018 Sittings - 4th June 2018 (Mention and Orders).

Dates of Written Submissions:
- Applicant (8th January 2018)
- Respondent (31st January 2018)
- Applicant in Reply (20th February 2018)
- Respondent's Synopsis (25th April 2018)
- Applicant in Reply (4th May 2018)
- Respondent's Supplementary Submissions (4th June 2018)

Date of Judgment: 20th September 2018

JUDGMENT

Table of Contents

Preface

[1] The following judgment provides a very good example as to the importance of having an Independent Legal Services Commission in Fiji. Evidence was taken over three Sittings commencing in December 2016 and concluding in September 2017, with a transcript totalling over 1500 pages. There were 86 Exhibits tendered (including copies of two files from the High Court, one of which was of some 526 pages comprising an entire court transcript, exhibits and numerous unpaginated documents). Counsel for the Applicant Chief Registrar filed two sets of written submissions totalling 57 pages with 506 paragraphs. Counsel for the Respondent filed one set of written submissions of 48 pages comprising 114 paragraphs with numerous sub-paragraphs. In addition, oral submissions were made by each Counsel at a clarification hearing on 25th April 2018, followed by 98 paragraphs of supplementary submissions filed by Counsel for the Respondent and then submissions in reply by Counsel for the Applicant. This, in turn, required a supplementary clarification hearing to be held on 13th June 2018.

[2] In light of the above, for well-meaning members from the legal profession to have sat as a Disciplinary Committee and heard this matter in addition to their already busy professional lives (as previously would have been the case) and then produce a written decision resolving the multiple issues of law and fact raised whilst doing

justice to all involved, would have been an unenviable task. In that regard, I acknowledge the time and effort spent in such adjudications previously by Disciplinary Committees. (See, for example, ***In Re A Barrister and Solicitor*** [1999] 45 FLR 59; PacLII: [1999] FJLawRp 11, <http://www.paclii.org/fj/cases/FJLawRp/1999/11.html>.) Unsurprisingly, common law jurisdictions in England, Wales, Australia and New Zealand, have moved (like Fiji) from self-regulation to establishing an independent tribunal, in one form or another, when considering allegations of professional misconduct.

[3] It is my hope that by the Commission allocating the time and resources necessary to hear such matters, while 'acting fairly' as required by section 114 of the *Legal Practitioners Act 2009,* it will instil confidence in both the public and profession as to importance of the work of the Commission in protecting the public whilst also upholding the standards required to be a member of the Bar of Fiji.

[4] One other matter that I need to mention, before I commence, is to clarify my capitalising of the noun 'Will' when referring to (as defined by the ***Concise Australian Legal Dictionary***, 5thedn, LexisNexis, Chatswood, 2015, p.666) *'a written declaration providing for disposition of property to take effect on the maker's death'*. That publication has defined the word 'will' as non-capitalised. Similarly, the ***Concise Oxford Dictionary of Current English*** (J.B. Sykes (ed.), 6th edn, 9th impression, Oxford University Press, Oxford, 1979, at p.1334) has also defined the word 'will' as non-capitalised. I have decided, however, that due to the length of this judgment and so as to avoid any confusion, particularly for the non-legal reader, to capitalise the noun 'will' when referring to a testamentary disposition.

1. Introduction

> *"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless."*
>
> Charles Dickens, *Bleak House*, Chapter 1, 'In Chancery', first published as 20 monthly instalments from March 1852, then as a complete novel by Bradbury and Evans, London, 1853; reprinted as an e-book by Project Gutenberg, 1 August 2007 [eBook #1023], updated 21 February 2012, <http://www.gutenberg.org/files/1023/1023-h/1023-h.htm#c37>.)

[5] Chancery Lane, London, sometime in the first half of the nineteenth century, 'implacable November weather' with 'fog everywhere' and the fictional suit of *Jarndyce and Jarndyce* drones on in the Court of Chancery. Dickens claimed, in the 'Preface' to *Bleak House, 'that everything set forth in these pages concerning the Court of Chancery is substantially true, and within the truth'*, noting:

> *'At the present moment (August, 1853) there is a suit before the court which was commenced nearly twenty years ago, in which from thirty to forty counsel have been known to appear at one time, in which costs have been incurred to the amount of seventy thousand pounds, which is A FRIENDLY SUIT, and which is (I am assured) no nearer to its termination now than when it was begun. There is another well-known suit in Chancery, not yet decided, which was commenced before the close of the last century and in which more than double the amount of seventy thousand pounds has been swallowed up in costs. If I wanted other authorities for Jarndyce and Jarndyce, I could rain them on these pages …'*

[6] Fast-forward 165 years to Victoria Parade, Suva, September 2018 on a tropical spring day in the South Pacific (beautiful and dry in the morning with the hint of a thunderstorm for the afternoon), and four offences in relation to a lawyer's alleged conduct arising from a dispute over an estate are listed for judgment in the Independent Legal Services Commission. Allegations have also surfaced during

the hearing as to the conduct of some other lawyers. While the century, place and weather may have changed and the angst and alleged costs incurred might not be on the same scale as took place in Dickens' fictional novel (the latter involving generations of lawyers until the whole of the estate had *'been absorbed in costs'* and thus the suit lapsed), aspects of the present matter, arguably, also do not reflect well upon the profession. In short, following the death of the testator in a motor vehicle accident, much of his estate was then, allegedly, dissipated in a protracted dispute, initially surrounding a grant of letters of administration when a Will could not be found and then, when a Will was found, challenging its validity. What role the Respondent and his firm played in this sad state of affairs, if any, is now for me to determine. A bitter family dispute, that perhaps could have been settled if a spirit of goodwill had prevailed, has not assisted matters (something to which I will return near the end of my judgment). Finally, the case is another warning to legal practitioners and their staff for whom they have responsibility, of the need to maintain file notes and, in particular, to confirm all contentious matters in writing to clients as well as to fellow practitioners.

[7] In summary, this judgment is concerned with four major issues:

(1) What is the responsibility of a legal practitioner to a beneficiary of a Will that has been drafted by the practitioner's law firm but where, allegedly on the testator's instructions, a copy is not made nor is the sole original left in the safe custody of the firm's Wills Register? In such a scenario, what is the responsibility of a legal practitioner to keep a record of the Will?

(2) If, following the testator's death, the Will cannot be found, is it a breach of duty by a legal practitioner towards the beneficiary of the missing Will and/or professional misconduct to then act solely on behalf of the widow in taking out a grant of Letters of Administration knowing that under the lost Will the testator left his estate not to his widow but to his mother as the sole beneficiary?

(3) Further, having initially advised both the widow and the intended beneficiary under the lost Will on the making of a joint application for a grant of Letters of Administration, is it professional misconduct (once the intended beneficiary under the lost Will has allegedly withdrawn the joint instructions) for the lawyer to later act only for the widow in making an application for a sole grant of Letters of Administration which, although in accordance with the priority set out in the applicable legislation, is arguably to the beneficiary's detriment?

(4) In taking out a grant of Letters of Administration knowing that under the lost Will the testator left his estate not to his widow but to his mother as the sole beneficiary, what then is the responsibility of the legal practitioner for any costs incurred when subsequently the Will is found and proceedings take place in the High Court to have the grant of Letters of Administration revoked and the Will declared valid?

[8] The judgment also raises two important issues of evidence and procedure:

(1) What inferences, if any, should be drawn from the absence of a witness one would have expected to be called to give evidence on an issue?

(2) What is the burden of proof to be applied in disciplinary proceedings where there are allegations as to what a reasonably competent practitioner would have done?

[9] Due to the nature of the matter, this will be a lengthy judgment. It has involved two complainants (a mother-in-law and a widow who were previously opposed to each other in two sets of proceedings in the High Court), each making separate allegations against the Respondent. It has required me to make findings on a number of separate issues across the four counts. Fortunately, the preliminary analysis that I have had to undertake before embarking on Counts 1 and 2, followed by the further lengthy analysis and findings in relation to those counts, has assisted me when considering Count 3 without the need to consider all the evidence anew. The findings that I have made in relation to Counts 1, 2 and 3, has then allowed me, together with submissions and a consideration of the relevant evidence from the transcript, to make relatively succinct findings in relation to Count 4.

2. The Counts

(1) The four counts

[10] The First Respondent faces three counts of professional misconduct and one count of unsatisfactory professional conduct as follows:

'Count 1 (as amended)

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

PARTICULARS

SURUJ PRASAD SHARMA, *a legal practitioner and principal of law firm named and styled as "Patel Sharma Lawyers" had acted against the interests of Maya Wati Prakash by acting for Pranita Devi, wife of deceased Salen Prakash Maharaj in taking out Letters of Administration for Pranita Devi for the Estate of Salen Prakash Maharaj, when earlier on his employee, Dipka Mala had prepared a Will for Salen Prakash Maharaj dated 22nd December 2006 under which Maya Wati Prakash, mother of the deceased, Salen Prakash Maharaj was the beneficiary, which conduct was contrary to section 82(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct.*

Count 2

Unsatisfactory Professional Conduct: Contrary to Section 81 of the Legal Practitioners Decree 2009.

PARTICULARS

SURUJ PRASAD SHARMA*, a Legal Practitioner and principal of law firm named and styled as "Patel Sharma Lawyers" between 22nd December 2006 and 23rd January 2010 failed to keep proper record of the Will of Salen Prakash Maharaj dated 22nd December 2006 which was prepared by the said law firm, which conduct was contrary to section 81 of the Legal Practitioners Decree 2009 and was an act of unsatisfactory professional conduct.*

Count 3

Professional Misconduct: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009.

PARTICULARS

SURUJ PRASAD SHARMA*, a Legal Practitioner and principal of law firm named and styled as "Patel Sharma Lawyers" between 25th November 2008 and 11th October 2013 failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006 which was prepared by Patel Sharma Lawyers, thereafter, proceeded on instructions of one Pranita Devi and obtained grant of Letters of Administration in the Estate of Salen Prakash, to the said Pranita Devi to the detriment of Maya Wati Prakash who was the sole beneficiary pursuant to the Will of Salen Prakash Maharaj, as the said Maya Wati Prakash was subjected to unnecessary cost for initiating High Court Action No. HPP 3 of 2010, which conduct was contrary to section 82(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct.'*

Count 4

Professional Misconduct: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009.

PARTICULARS

SURUJ PRASAD SHARMA*, a Legal Practitioner and principal of law firm*

named and styled as "Patel Sharma Lawyers" between 25th November 2008 and 11th October 2013 failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006 which was prepared by Patel Sharma Lawyers, thereafter, proceeded on instructions of Pranita Devi and obtained grant of Letters of Administration in the Estate of Salen Prakash to the said Pranita Devi, which grant subsequently was revoked by the Suva High Court and as a result caused the said Pranita Devi unnecessary costs, which conduct was contrary to section 82(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct.'

(2) The hearing

[11] Due to the need to take evidence from witnesses for the Applicant who were residing overseas and, also, to accommodate overseas absences of the Respondent's Counsel and the Respondent legal practitioner, the taking of evidence in this matter began in the December 2016 Sittings, continued for a week in the June 2017 Sittings and then for a further week in the September 2017 Sittings. After 12 hearing days, with evidence taken from numerous witnesses and some 86 exhibits tendered, Counsel for the parties requested time to file their respective written submissions and a timetable was so ordered. This was followed by a mention on 5th February 2018 where Counsel for the Applicant sought (and was given) 14 days to file any submissions in reply.

[12] Once I had the opportunity to consider the written submissions of both parties, I found that I needed to clarify the position of each Counsel in relation to the four counts as well as some of the exhibits. The matter was then relisted in the Call Over of the April 2018 Sittings, wherein I provided Counsel with a general outline of my concerns, followed by a day's hearing on 25th April 2018, at the end of which Leading Counsel for the Respondent tendered what he termed *'a written synopsis'* clarifying their position. Counsel for the Applicant was then given time to file a short synopsis in 'response' and the parties were advised that judgment would be on notice.

(3) A new second conflict being alleged?

[13] After reading the short synopsis filed by Counsel for the Applicant Chief Registrar on 4th May 2018 in response to the 'written synopsis' of Counsel for the Respondent, it appeared that **a new second conflict of interest was now being alleged**, as set out at paras [2] and [5] of those submissions as follows:

'2. The Applicant's case in alleging conflict of interest is based on the following issues:

...

- *The Respondent then proceeded **to obtain instructions from both** MWP and PD and provided advise [sic] that an application for Letters of Administration would be made jointly.*
- *That thereafter, the Respondent **proceeded with sole instructions** from PD and made an application for LA on behalf of PD only.*

...

*5. The Applicant submits that the Respondent should not have acted for PD [Pranita Devi] in extracting LA [Letters of Administration] on her behalf after ... him [the Respondent] **having advised both** MWP [Maya Wati Prakash] and PD first and thereafter only proceeding to act solely for PD.'*
[My emphasis]

[14] Further, Counsel for the Applicant Chief Registrar had cited in his previous written submissions the judgment of the Supreme Court of Fiji in ***Chaudhry v Chief Registrar*** (Unreported, Supreme Court of Fiji, Civil Petition No. CBV0001 of 2015, Gates P, Marsoof and Keith JJA, 20 April 2016; PacLII: [2016] FJSC 3, <http://www.paclii.org/fj/cases/FJSC/2016/3.html>) and, in particular, the four categories of conflict set out by Marsoof JA, without Counsel specifying which categories actually applied to the present matter. **Counsel had now submitted in his synopsis response that the second and third categories of conflict applied being -**

'(b) Conflicts between the interests of two or more clients the practitioner is currently representing;
(c) Conflicts between the client's interests and those of third parties to whom the practitioner owes obligations'.
[My emphasis]

[15] Whilst the third category had been canvassed at the clarification hearing on 25th April 2018, it appeared (and I stood to be corrected) that, although it was raised in the evidence and, in passing, at the clarification hearing on 25th April 2018, **this was the first time that the second category was being specifically alleged in detail by Counsel for the Applicant as part of his case**, noting that:

(1) it had not been set out in the particulars set out for Counts 1 and 3;

(2) it was not set out in the prosecution case statement of 18th November 2016;

(3) it had not been canvassed by Counsel for the Applicant in the previous written submissions of 8th January and 20th February 2018.

[16] Therefore, I arranged for each Counsel to be contacted by the Commission's Secretary to check on their availability during the June 2018 Sittings so as to relist the matter and allow each Counsel to clarify their position as to:

(1) Whether this second issue of conflict, as was now being alleged, should be allowed to form part of the case against the Respondent and in relation to which Counts (noting that it had been alleged in the evidence of some witnesses though it was disputed by others)?

(2) Whether such a conflict had been shown in light of the judgment of the Fiji Court of Appeal in ***R.C Manubhai & Co. Ltd v Herbert Construction Company (Fiji) Ltd*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU0002 of 2010 (29 May 2014); PacLII: [2014] FJCA 175, <http://www.paclii.org/fj/cases/FJCA/2014/175.html>), inclining to agree with the judicial proposition reflected in Lord Millett's judgment in ***Prince Jefri Bolkiah v KPMG*** [1998] UKHL 52; [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215; BAILII: <http://www.bailii.org/uk/cases/UKHL/1998/52.html>?

[17] After Counsel for the Respondent advised that he would be in New Zealand for the first week of the June 2018 Sittings of the Commission, a timetable was set for the filing of written submissions, the matter relisted in the Call Over of the June 2018 Sittings and a date allocated for oral submissions, if so needed, after I had read Counsel's respective supplementary written submissions. A supplementary clarification hearing then took place on 13th June 2018. At that hearing, Counsel for the Applicant conceded that it was too late to amend the particulars in Counts 1 and 3. The parties were then advised that judgment would be on notice. This then is my judgment.

3. Proceedings against the Second Respondent, Patel Sharma Lawyers dismissed

(1) No mention of Second Respondent in submissions

[18] As a preliminary matter, I noted that the *'Closing Submissions'* filed by Counsel for the Applicant Chief Registrar on 8th January 2018 named only the legal practitioner, **Mr. Suruj Shrama,** as the Respondent. Further, the submissions analysing the four counts commenced at para [487] with the words, *'The charges against the Respondent were as follows'* and there was no mention of the law firm Patel Sharma Lawyers (formerly known as Patel Sharma and Associates) as also being a Respondent in the proceedings although the firm had been listed as the second

Respondent as there was in the initial application.

[19] I further noted that the Closing Submissions filed by R. Patel Lawyers as Counsel for the Respondent legal Practitioner commenced (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018 at page 3, para [3]):

> *'It is noted at the outset that the Chief Registrar has dropped the Law Firm as a Practitioner and only specifies the Practitioner in his submissions. It is therefore assumed that the Law Firm Patel Sharma & Associates is no longer a part of the Chief Registrar's complaint. The Commission is respectfully invited to carefully consider the particulars of the charge in each count. In all the counts the Practitioner has been charged and not the law firm. In the Submissions of the CR, it is noted that the law firm has even been dropped/left out. Therefore, it is clear that there are no charges against the law firm and the CR is not pursuing the law firm in Application No 12 and 15 of 2015.'*

[20] Counsel for the Chief Registrar did not answer the above submission in his *'Applicant's Submissions in Reply'*, dated 20th February 2018. Instead, the submissions referred, both in their title page and throughout, to only the legal practitioner, **SURUJ SHARMA,** as the sole Respondent.

[21] I then raised the above issue at the clarification hearing on 25th April 2018 and Counsel for the Applicant Chief Registrar confirmed that the Applicant was no longer proceeding against the Second Respondent, that is, the law firm, Patel Sharma Lawyers.

(2) Dismiss proceedings against Second Respondent

[22] **Accordingly, in light of the above concession by Counsel for the Applicant Chief Registrar, I formally dismiss the proceedings against the Second Respondent, Patel Sharma Lawyers.**

4. A chronology of the dispute and the two complaints lodged with the Chief Registrar

[23] I have set out below a chronology of this dispute and the two complaints lodged with the Chief Registrar. Matters that I have indicated as disputed will be resolved later in the judgment.

(1) 22nd December 2006 - Will drafted and executed

[24] It is undisputed that on 22nd December 2006, Salen Prakash Maharaj and his mother,

Maya Wati Prakash, asked Dipka Mala, a law clerk in the firm of Patel Sharma Lawyers, to have Wills drawn for each of them. Both Wills were signed on that date and witnessed by Dipka Mala and Merewai Doughty, another law clerk then in the firm of Patel Sharma Lawyers. (Doc.AD1, 'Last Will and Testament of Salen Prakash Maharaj', dated 22nd December 2006, *Agreed Bundle of Documents,* 2nd December 2016, pp.1-3, marked as **Exhibit "1"**.)

[25] **It is disputed as to how many original Wills were executed on 22nd December 2006 and whether Salen Prakash Maharaj instructed the law firm for only one original Will to be made for him.**

[26] It is undisputed that after Salen's Will was executed on 22nd December 2006, an original Will was handed to Salen Prakash Maharaj and that Salen Prakash Maharaj took that Will away with him.

[27] **It is disputed, however, as to whether a second copy of Salen's Will was left with the firm to be in the safe custody of the firm's "Wills Register".**

(2) Death of Salen Prakash Maharaj and joint instructions for Letters of Administration

[28] On 24th November 2008, Salen Prakash Maharaj was killed in a car accident.

[29] It is undisputed that on 25th November 2008, the day after Salen's death, one of Salen's sisters, Subhasni Singh, made a telephone call to the Respondent's law firm of Patel Sharma Lawyers, looking for a copy of Salen's Will and spoke with Dipka Mala. **It is disputed, however, as to whether or not Dipka Mala advised Subhasni Singh during that said telephone call that there was an electronic copy of Salen's unsigned Will held on the law firm's computer.**

[30] **It is also disputed as to whether there was a subsequent telephone call on 9th December 2008, between Subhasni Singh and Dipka Mala, whereby Subhasni Singh advised that the family was still looking for a copy of Salen's Will and again mention was made by Dipka Mala to Subhasni that there was an electronic copy of Salen's unsigned Will held on the law firm's computer.**

[31] **It is further disputed as to whether a meeting took place on the 12th December**

2008 at the Respondent's law firm, between Salen's mother, Maya Wati Prakash, Subhasni Singh, Dipka Mala and the Respondent and also whether an electronic copy of Salen's unsigned Will held on the law firm's computer was shown to Maya and Subhasni on that date. In addition, it is also disputed whether Pranita Devi, the widow of Salen Prakash Maharaj, attended on that date.

[32] It is undisputed that on 15th December 2008, Maya Wati Prakash attended the law firm of Patel Sharma Lawyers together with Subhasni Singh and Pranita Devi, the widow of Salen Prakash Maharaj. It is also undisputed that a private conference was then held involving Pranita Devi, Maya Wati Prakash, Mr. Suruj Sharma and Dipka Mala whereby Pranita Devi and Maya Wati Prakash gave joint instructions authorising the law firm to prepare a joint application for a grant of Letters of Administration under their respective names in relation to the Estate of Salen Prakash Maharaj. ('Instructions given jointly by Pranita Devi and Maya Wati Prakash to Patel Sharma Lawyers to act to obtain Letters of Administration', 15th December 2008, *Agreed Bundle*, Doc.No.2, page 4, marked as **Exhibit "2"**.) It is further undisputed that Subhasni Singh was not present throughout the entire conference and, instead, came "in and out" so to speak, as she relayed what was occurring in the conference to others who waited outside. **It is disputed, however, whether an electronic copy of Salen's unsigned Will held on the law firm's computer was shown to Maya and Pranita in that conference.**

[33] **It is also disputed as to whether that same afternoon, 15th December 2008, the joint instructions, authorising the law firm to prepare a joint application for a grant of Letters of Administration, were unilaterally withdrawn by Maya Wati Prakash.**

(3) Sole instructions by widow for Letters of Administration

[34] It is undisputed that on 6th January 2009, Pranita Devi attended the law firm of Patel Sharma Lawyers with her uncle, Jayawant Pratap and that Pranita Devi gave instructions, as the widow of Salen Prakash Maharaj, authorising the law firm to prepare an application for a grant of Letters of Administration under her sole name. ('Instructions given by Pranita Devi to Patel Sharma lawyers to apply for Letters of Administration', 6th December 2008, *Agreed Bundle*, Doc.AD3, page 5, marked as

Exhibit "3".) It is also undisputed that an advertisement was prepared by Patel Sharma Lawyers and was published on behalf of Pranita Devi as the sole Administratrix of the Estate of Salen. ('Complaint by Pranita Devi to Chief Registrar against Suruj Sharma and Willy Hiuare', 14th November 2013, *Agreed Bundle*, Doc.AD20, pp. 76-84, annexing copy of advertisement with handwritten notation 'Fiji Sun 6/1/09', page 82, marked as **Exhibit "20"**). I do note, however, that although it is undisputed that on 6th January 2009 instructions were signed by Pranita Devi to prepare an application for a grant of Letters of Administration under her sole name, an advertisement appeared in the *Fiji Sun* on that same date inserted by '*PATEL SHARMA LAWYERS*' as '*SOLICITORS FOR THE ADMINISTRATRIX'* as follows:

> *'**IN THE ESTATE of SALEN PRAKASH MAHARAJ*** … Deceased. Intestate,
>
> ***NOTICE*** *is hereby given that after expiration of twenty one days (21) an application will be made to the High Court of Fiji at Suva for grant of Letters of Administration in the Estate of SALEN PRAKASH MAHARAJ … Intestate who died on the 24th of November, 2008 …*
>
> ***AND FURTHER NOTICE*** *is hereby given requiring creditors and other persons having claims in respect of the said estate to send particulars of their claims to the undersigned Solicitors within 21 days from the date of publication of this notice.*
>
> ***AND ALL PERSONS*** *indebted to the said estate are required to pay their debts to the said Solicitors by the aforesaid date after which an Administratrix may convey or distribute the assets having regard only to the claims of which particulars are received.*
>
> ***DATED*** *at Suva this 6th day of January, 2009.*
>
> *PATEL SHARMA LAWYERS*
> *BARRISTERS & SOLICITORS*
> *…*
> *(SOLICITORS FOR THE ADMINISTRATRIX)*
>
> (See 'Affidavit of Pranita Devi sworn on 28th January 2009', 'Annexure "E"', '*Fiji Sun*, Tuesday, January 6, 2009' p.17, part of 'Exhibit 6', 'List of Exhibits', '*High Court File for Civil Action No. HPP 003 of 2010', Prakash v Devi*, marked as **Exhibit "47" -** the 'List of Exhibits' appears in the file as an unnumbered an unpaginated document; see also an undated copy attached to Exhibit 20.)

[35] Obviously, it was impossible to take signed instructions and have an advertisement published in the *Fiji Sun* on the same date. I note, however, that no submissions

have been made by Counsel for either party in relation to this impossibility and its relevance or otherwise as to any of the four counts before me. Hence, it is not an issue for me to resolve in this judgment.

[36] It is undisputed that on 27th January 2009, Ms. Prem Narayan, Barrister and Solicitor, arranged for a letter of the same date to be delivered by hand to the law firm of Patel Sharma Lawyers advising as follows:

> *'Dear Sir*
>
> *Re:* ***Our Client: Subhasni Lata Singh***
> *Your Client: Administratix of the Estate of Shalen [sic] Prakash Maharaj*
>
> ***We act on instructions of Subhasni Lata Singh****.*
>
> *Our client has referred the Notice in Estate of Shalen [sic] Prakash Maharaj dated 6 January 2009 to our office to lodge a claim in equity against the Estate.*
>
> *We understand from our client that the Deceased is the registered proprietor of the property comprised in Certificate of Title No.31224 being Lot 11 on DP8112. Our client has made contributions in the purchase of the said property from Dalip Singh. Further she has paid for the erection of the dwelling house on the said property.*
>
> *Her total contribution amounts to $62,000.00. She has made this contribution on the belief and trust that she would be granted an interest in the property.*
>
> ***She hereby lodges her claim in the sum of $62,000.00 against the Estate.***
>
> *Kindly forward payment.*
>
> *Yours sincerely*
> *Prem Narayan (Ms.)*
> *Solicitor'*
> [My emphasis in bold]
>
> (Doc.AD4, 'Letter from Prem Narayan to Patel Sharma Lawyers registering claim on Estate in the sum of $62,0000 on behalf of Subhasni Singh', 27th January 2009, *Agreed Bundle*, page 6, marked **Exhibit "4"**.)

[37] A day later, on 28th January 2009, Pranita Devi swore an affidavit (in support of an application for a grant of Letters of Administration by the High Court of Fiji at Suva) as *'the intended Administratrix in the Estate of SALEN PRAKASH MAHARAJ',* his *'lawful wife*' and *'the only person entitled to a share in the Estate*

of the said Deceased'. She also swore in that affidavit at para 4:

> *'THAT I did advertise and call for Creditors to lodge any claims against the estate on 6th January 2009 in the "Fiji Sun" but* ***to date I have not received any claims*** *or objections to the grant of Letters of Administration to me ...'*
> [My emphasis]
>
> (See 'Affidavit of Pranita Devi sworn on 28th January 2009', 'Exhibit 6', 'List of Exhibits', '*High Court File for Civil Action No. HPP 003 of 2010', Prakash v Devi*, part of **Exhibit "47"**, unnumbered and unpaginated.)

[38] Why reference was not made in the above Affidavit of Pranita Devi to the claim of Subhasni Singh that had been made and received on the previous day, 27th January 2009, is unclear. I note that no submissions have been made by Counsel for either party in relation to the said affidavit and its relevance or otherwise as to any of the four counts before me. Hence, it is not an issue for me to resolve in this judgment.

[39] It is undisputed that on 16th February 2009, Letters of Administration were granted to Pranita Devi as the widow of Salen Prakash Maharaj. ('Letters of Administration issued in Estate of Salen Prakash Maharaj, No. 48371', Doc.AD5, *Agreed Bundle*, pp. 7-8, marked as **Exhibit "5"**.)

[40] On 26th February 2009, Prem Narayan, arranged for a second letter to be sent to the law firm of Patel Sharma Lawyers pressing the claim of Subhasni Singh. (Doc.44, 'Affidavit of Maya Wati Prakash dated 5th March 2009', in '*High Court of Fiji at Suva file, Civil Jurisdiction, HBC No. 81 of 2009'*, marked as **Exhibit "44",** pp. 131-150, **annexure MWP9,** p. 149.)

[41] The letter of 26th February 2009 (Exhibit 44) also raised an allegation that Pranita Devi had, by the use of force and threats, repossessed a motor vehicle that had been in the possession of Ratnesh [sic] Prasad, Salen's brother-in-law, who was married to Ireen Lata Prasad. It is unclear whether Raknesh Prasad had some form of claim to that vehicle. I note that he was not called to give evidence in these proceedings and no submissions were made by Counsel for either party in relation to that claim and its relevance or otherwise as to any of the four counts before me. I will, however, return to it when considering what inferences, if any, can be drawn from the failure to call Raknesh Prasad in relation to Count 3.

(4) Claim by Maya Wati Prakash for a grant of joint Letters of Administration

[42] It is undisputed that on 6th March 2009, **Prem Narayan, Barrister and Solicitor, acting (not on behalf of Subhasni Singh and/or Raknesh Prasad) but on behalf of Maya Wati Prakash (their mother and mother-in-law respectively)**, filed an application in the High Court at Suva, Civil Action No. 81 of 2009 (returnable on 10th March 2009), seeking a number of orders against Pranita Devi (and others) in dealing with the property in the name of Salen Prakash Maharaj at Koronivia, in particular, that the Letters of Administration be recalled and **a fresh grant of Letters of Administration be issued to Maya Wati Prakash and Pranita Devi**. (See 'Application filed by Maya Wati Prakash through Prem Narayan in High Court Action No. 81/2009 seeking interim injunctive relief', Doc.AD6, *Agreed Bundle*, pp. 9-20, marked as **Exhibit "6"**.)

[43] When I asked both Counsel at the clarification hearing on 25th April 2018 for a summary of their understanding as to what occurred in relation to the above application, the oral submissions of Counsel for the Respondent were that after 6th March 2009, Prem Narayan, acting on behalf of Maya Wati Prakash, called the Respondent and a settlement meeting was held between the parties on 28th March 2009 at the offices of Patel Sharma Lawyers. The Respondent did not act for either party at that meeting. Instead, the Respondent simply hosted the meeting, Prem Narayan acted on behalf of Maya Wati Prakash and Jayawant Pratap, Pranita Devi's uncle, acted as the spokesperson for his niece. A settlement was not reached. At some stage following that failed attempt at settlement, the firm of Kohli and Singh commenced acting for the widow, Pranita Devi. Eventually, an Order 25 rule 9 notice under the High Court Rules was issued for the plaintiff to show cause why the matter should not be struck out and at the return date of that show cause notice the matter was discontinued. The oral submission of Counsel for the Applicant Chief Registrar (although explaining that he did not having a copy of the exhibit with him at the clarification hearing on 25th April 2018) was that from memory, *"yes, the action was not pursued"*.

[44] Following the clarification hearing on 25th April 2018, I perused the entire High Court file in relation to Civil Action No. 81 of 2009 (tendered as Exhibit 44 in the present proceedings). It is important (as shall be seen later) that I set out a summary of what occurred, which is as follows:

(1) Initially, on 6th March 2009, an ex-parte application in Civil Action No. 81 of 2009 came before me when I was sitting as a Puisne Judge of the High Court at Suva. Ms. Prem Narayan appeared and I made an Order that the application was to be made "inter partes" and to be returnable on 10th March 2009 before Inoke J;

(2) On 10th March 2009, it was then adjourned until 12th March 2009 before Inoke J so that the plaintiff could effect service upon the defendant;

(3) On 12th March 2009, Prem Narayan appeared for the plaintiff, Maya Wati Prakash, Mr. Suruj Sharma appeared for the 1st Defendant, Pranita Devi and an indecipherable name (perhaps Siurra?) appeared for the 2nd Defendant, Dalip Singh. There was no appearance for the either the 3rd and 4th Defendants. The judge's notes of Inoke J have recorded the following:

> *'**Sharma appearance for purpose of resolution of this matter**.*
> *Agn to 6/4/09.*
> *D2 oppose application.*
> *Want ... to file Affdvt. in Response*
> ***Pltf confirms D1 instructions**.*
> *Adjn to 6/4/09 @ 10.00 am.'*
> [My emphasis]

(4) On 6th April 2009, the parties appeared before Inoke J with Prem Narayan appearing for the Plaintiff, Maya Wati Prakash, **Mr. Raman Singh for the 1st Defendant, Pranita Devi** and Ms. Fifita appeared on behalf of Young and Associates for the 2nd Defendant, Dalip Singh. The judge's notes have recorded that Ms. Narayan advised the Court that *'matter not settled'* and a timetable was then ordered for the filing of documents and the matter adjourned until 8th May 2009 for mention, which did not occur;

(5) There was then a mention on 23rd June 2009 before Inoke J with Prem Narayan appearing for the Plaintiff, Maya Wati Prakash, Mr. K. Vilibau(?) appeared on behalf of one of the Defendants and the judge noted:

> *'No appearance by K&S*
> *No compliance because 10/4*
> *Adjourn to 7 July 09 @ 9.30am for mention*
> *Registry to send NOAH to Kohli & Singh.'*

(6) It is unclear as to what took place on 7th July 2009 and if any further orders were made apart from the case being vacated to 19th November 2009 and then to 9th December 2009. It was then further vacated to 20th April 2010;

(7) A Notice of Change of Solicitors was filed on 15th June 2010, by HM Lawyers, (Mr. Willy Hiuare) as the new solicitor acting for the 1st Defendant, Pranita Devi

(in place of Kohli and Singh);

(8) The case was further vacated until 2nd July 2010, following which, no further action took place until the beginning of 2012, when on 6th January 2012, Prem Narayan filed a 'Notice of Intention to Proceed';

(9) On 23rd May 2012, **the Chief Registrar received an undated letter from Irene (Ireen) Prasad** stating in part (see Doc.9, p. 10, Exhibit 44):

> *'Case Number: HBC812009 Maya Wati Prakash vs. Pranita Devi Maharaj*
>
> *On behalf of my mother, Maya Wati Prakash, I, Irene Prasad hereby request the High Court to consider my mother's case and set a hearing date as soon as possible.*
> *...*
> *This case has been on-going since 2009. For over three years, our family has gone through a lot of hardship and **I am hereby requesting for this matter to be looked into and advise me of the progress**.'*
> [My emphasis]

(10) On 12th June 2012, the file was placed before Justice Kotigalage who directed that it be listed for mention on 3rd July 2012 at 9.30am, with Prem Narayan Lawyers, HM Lawyers and AG's Chambers all being served by hand on 19th June 2012 with such notification;

(11) On an unknown day in July 2012 (the day on the file cover has been obscured in the photocopying, in all likelihood, however, it was 3rd July 2012), the notation is:

> *'Before J. Kotigalage: no appearance for 2nd, 3rd & 4th defendants. Plaintiffs [sic] counsel states HBC 3/2010 in another court when **the outcome of this case will be dependant upon the decision of that case, and seeks 6 months time**. However I am inclined to grant 6 months time. 1st defendants [sic] counsel has no objection. No date is allocated if parties are interested, directed to file a motion and get this case mentioned.'*
> [My emphasis]

(12) On 12th February 2015, a "show cause" notice was issued by the High Court Registry pursuant to Order 25 rule 9 and Order 3 rule 5 of the High Court Rules and the matter listed on 3rd March 2015 *'to show cause why it should not be struck out for want of prosecution or an abuse of the process of the court'*;

(13) On 3rd March 2015, the matter was called before the Acting Master in the High Court at Suva when Ms Tikoisuva appeared on behalf of Prem Narayan for the Plaintiff, Maya Wati Prakash and Ms. T. Sharma from AG's Chambers appeared for the 3rd and 4th Defendants, the Registrar of Titles and the Attorney-General respectively. The Acting Master's notes record the following:

'Ct: All parties have been served.
MTikoisuva – No obj to having this matter struck out.
MSharma T – No objections either
Ct: I note D1 has been served & failed 2 appear
Having heard counsel this morning I decide 2 ***strike out this action & dismiss it accordingly****.'*
[My emphasis]

(5) Inferences from Application filed on 6th March 2009 by Maya Wati Prakash for joint Letters of Administration (Civil Action No. 81 of 2009)

[45] At the clarification hearing on 25th April 2018, I asked Counsel what inferences, if any, could I draw from the above application. The oral submission of Counsel for the Applicant Chief Registrar was that he had no submission to make and *"for the purposes of inferences, we leave it to the Commission"*. Counsel for the Respondent said that he had *"some very firm submissions on this"*. The oral submissions of Counsel for the Respondent were, in summary, as follows:

(1) *"Clearly as at the 6th March 2009, Maya Wati Prakash was represented by an independent solicitor";*

(2) *"The intention of Maya Wati Prakash and her solicitor were very evident from the court papers",* that is, by issuing such proceedings *"they also have the belief that there was no signed Will in existence and they were quite content to go for a grant of Letters of Administration"* in relation to the Estate of Salen Prakash Maharaj;

(3) ***"The only thing that Maya Wati wanted was that she wanted to be a joint administratrix";***

(4) Under the law, Pranita Devi, as the widow was the first person *"whose got first bite to apply for LA"* (so to speak), that is, who had to apply for a grant of Letters of Administration and *"I'm not sure how Prem Narayan was going to argue the matter";*

(5) If Maya Wati Prakash opposed the application of the widow, Pranita Devi, being granted Letters of Administration that was clearly advertised, then **Prem Narayan, acting on Maya's behalf*, "could have applied for a caveat against the grant of LA"***. Instead, Prem Narayan sent a letter on 27th January 2009, on behalf of Subhasni Singh, to the Respondent, making a claim upon the Estate in the sum of $62,000;

(6) *"This court case, which was started by Prem Narayan and Maya Wati Prakash, lingered on in the court system so that the intention never changed until the*

original, the executed Will, was found". It was only then that Prem Narayan filed a new action (to have the Letters of Administration revoked, the Will of Salen Prakash Maharaj dated 22nd December 2006 declared valid and probate be granted in favour of Maya Wati Prakash);

(7) It is clear from the pleadings filed in the 2009 action that –

(i) Maya Wati Prakash had **based her claim as a creditor** on the estate; and

(ii) Maya Wati Prakash was also saying that she was the beneficiary of the deceased's estate but, as Counsel for the Respondent noted, he was *"not really sure"* as to the legal basis of that claim. **Indeed, the point being raised was that Maya Wati Prakash could only base her claim as a creditor because section 6(1)(a) of the *Succession, Probate and Administration Act*** was amended in 2004 by section 3 of the *Succession, Probate and Administration (Amendment) Act*, whereby it stated, that '*section 6(1) of the principal Act is amended … by repealing paragraph (a) and substituting the following …* ***"(a) if the intestate leaves a wife or husband, without issue, the surviving wife or husband shall take the whole of the estate absolutely"***. [My emphasis] Therefore, in this case, where Salen died without issue, Pranita Devi, as the surviving spouse would get the entire estate;

(8) *"If Pranita Devi as a surviving spouse consented to a joined administratrix because she might have needed some help then the court would in fact grant a joined administratrix";*

(9) *"But if Pranita Devi didn't consent to it, then the law would say, 'well she is the surviving spouse, she is lawfully entitled to a grant of LA, what are you doing in the LA?', so I think it needed consent and I think that's where Ms Narayan got, came unstuck because … the law would require Pranita to consent and at that point in time Pranita was not inclined to consent to anything".*

[46] Counsel for the Applicant Chief Registrar advised that he had no submissions to make in response to the above.

[47] Having had the time to carefully consider, post-25th April 2018, the above submissions of Counsel for the Respondent legal practitioner, I agree with those oral submissions.

[48] I also note that in paragraph 26 of her affidavit sworn on 5th March 2009, filed in support of her application in Civil Action No. 81 of 2009, **Maya Wati Prakash**

stated:

> *'I have been explained by my solicitors* ***the application for probate*** *in the Deceased's estate* ***by the First Defendant*** *and* *am shocked that she [the widow] has claimed that she is the only beneficiary.* ***I am advised by my solicitors which I advise that I verily believe to be true that as the mother of the Deceased, I am a beneficiary of the Deceased's estate*** *as I was dependent on the Deceased since my husband died. The Deceased provided for all my everyday expenses. The First Defendant intends to deprive me of my legal interest under the Deceased's estate.'*
> [My emphasis]

[49] **I am not sure as to how Maya Wati Prakash was making the above claim as:**

(1) Clearly, there was no application that had been made previously on behalf of the widow, Pranita Devi, for a grant of **probate**, as there was no Will. Rather, I note, that what had occurred was that on 16th February 2009, there had been a grant by the High Court of Letters of Administration for Pranita Devi as the widow to administer the estate;

(2) I also note that **the claim of Maya Wati Prakash in Civil Action No. 81 of 2009 was based, not upon Maya Wati Prakash having been previously named as the sole beneficiary under the missing Will** (in fact, there is no mention of the missing Will), **instead, the claim, was arguing fraud by the previous vendor of the property at Koronivia**;

(3) Perhaps, there was also a potential claim by Maya Wati Prakash as a dependant, pursuant to section 3(1) of the *Inheritance (Family Provision) Act 2004*, however, this was not mentioned in the Statement of Claim;

(4) I am also unaware of any separate claim being pursued by Prem Narayan on behalf of Maya Wati Prakash between 2009 and when the Will was found on 23rd January 2010, pursuant to section 3(1) of the *Inheritance (Family Provision) Act 2004*;

(5) Indeed, adding to the confusion, is a letter that was mentioned in paragraph 25 of Maya's affidavit sworn on 5th March 2009, filed in support of her application in Civil Action No. 81 of 2009, and annexed and marked "MWP9" that was sent by Prem Narayan **not on behalf of Maya Wati Prakash but Subhasni Singh** dated 26th February 2009 (to which I have previously briefly referred above), which stated:

> *'**We act on behalf of Subhasni Lata Singh**. **Our client had lodged a claim against the Estate** of Shalen [sic] Prakash Maharaj **addressed to your office on 27 January 2009**.*

To date we have not received any response from your office or the intended Administratrix Pranita Devi.

We are aware that probate was issued on 16 February 2009 in favour of Pranita Devi. ***We are now in the process of instituting a claim against the Administratrix for the sum outstanding****.*

We are informed by our client that your client had taken possession of the motor vehicle registration number LT 3579 from Ratnesh [sic] Prasad who was the Deceased's brother-in-law by means of force and threats. At present your client is yet to distribute the assets of the estate to the beneficiaries of the estate.

Given the conduct of your client in repossessing the motor vehicle, our client will be moving the court for the assets of the Deceased's estate to be frozen until the outstanding debts are paid.'
[My emphasis]

[50] It is clear that in relation to the above:

(1) **The claim was being made on behalf of Subhasni Singh** not Maya Wati Prakash;

(2) There was no mention of any potential claim being pursued by Prem Narayan on behalf of Maya Wati Prakash pursuant to the *Inheritance (Family Provision) Act 2004;*

(3) **There was no objection being raised as to a conflict of interest of the Respondent acting for Pranita Devi in making the application for a grant of Letters of Administration** – something to which I will return later in this judgment.

(6) Will found, proceedings issued to have it declared valid and Letters of Administration revoked (Civil Action No. HPP 003 of 2010)

[51] On 23rd January 2010, the Will of Salen Prakash Maharaj dated 22nd December 2006, was found. (Doc.63, 'Agreed Facts', p. 1, 'Minutes of the Pre-Trial Conference', signed 22nd September 2011, '*File High Court Suva, Civil Action No. HPP 003 of 2010', Prakash v Devi*, Exhibit 47, p. 420.)

[52] Following the discovery of the Will, a Writ was then filed on 6th February 2010 in the High Court of Fiji at Suva, Probate Jurisdiction (**High Court Civil Action No. HPP 003 of 2010**) by Prem Narayan, on behalf of Maya Wati Prakash (the testator's mother) seeking (amongst various orders) that **the Letters of Administration granted on 16th February 2009 be revoked, the court pronounce the Will of**

Salen Prakash Maharaj dated 22nd December 2006 valid and probate be granted in favour of Maya Wati Prakash. ('Writ issued by Maya Wati Prakash' against Pranita Devi in Action No. 3/2010', Doc.AD7, *Agreed Bundle*, pp. 21-27, marked as **Exhibit "7"**.)

(7) Complaint by Maya Wati Prakash (mother and beneficiary) followed by mediation

[53] On 11th March 2010, the Legal Practitioners Unit within the office of the Chief Registrar received a 'Complaint Form' signed and dated on that same date by Maya Wati Prakash. (Doc.AD8, 'Complaint by Maya Wati Prakash to Chief Registrar', *Agreed Bundle*, pp. 28-31, marked as **Exhibit "8"**.) In completing the form, where asked to specify the nature of the complaint, it has been written:

> *'FRAUD ➔ Suruj was holding the original will submitted to him by Salen Prakash Maharaj (deceased)*
> *he was saying that he does not have any will but actually he was keeping it'*
>
> [My emphasis]

[54] On 24th June 2010, a mediation conference was conducted through the office of the Chief Registrar between Maya Wati Prakash and Suruj Sharma. **It is disputed as to whether the matter settled at that mediation conference.** Unfortunately, the person who acted as the mediator, Ms. Akanisi, did not give evidence before this Commission, something to which I will be returning when considering Count 3.

(8) Will declared valid and Letters of Administration revoked No. HPP 003 of 2010

[55] On 29th and 30th October 2012, a hearing took place before Justice S.N. Balapatabendi in the High Court at Suva in relation to High Court Civil Action No. HPP 003 of 2010 between Maya Wati Prakash and Pranita Devi (Exhibit 47.)

[56] **On 11th October 2013, Justice Balapatabendi ruled in favour of Maya Wati Prakash pronouncing that the Will of Salen Prakash Maharaj dated 22nd December 2006 to be valid** and that the grant of the Letters of Administration granted to Pranita Devi (the widow) on 16th February 2009 was to be revoked forthwith. ('High Court Judgment and Reasons for Decision of His Lordship the Honourable S.N. Balapatabendi in Matter No. HPP 03/2010 (11/10/2015), *Prakash v Devi* [2013] FJHC 528', *Agreed Bundle*, Doc.AD19, pp. 62-75, marked as **Exhibit "19"**; see also ***Prakash v Devi***, Unreported, High Court of Fiji at Suva, Civil Action No. HPP 03 of 2010, 11 October 2013; PacLII: [2009] FJHC 43,

<http://www.paclii.org/fj/cases/FJHC/2013/528.html>.)

(9) Complaint by Pranita Devi (widow)

[57] On 14th November 2013, Pranita Devi completed a complaint form that was received by the Chief Registrar's Legal Practitioners Unit on that same date, making complaints against both Mr. Suruj Sharma of Patel Sharma Lawyers and Mr. Willy Hiuare of HM Lawyers (Exhibit 20).

(10) Proceedings issued in Commission

[58] On 16th July 2014, the Chief Registrar filed an Application with the Commission setting out two allegations of Professional Misconduct against the legal practitioner. The Application was made returnable on 30th July 2014 when **the Application was withdrawn** (Doc. "AD25", *Agreed Bundle*, marked as **Exhibit "25"**).

[59] On 14th October 2015, **the Chief Registrar filed a new Application setting out three allegations** (two of Professional Misconduct and one of Unsatisfactory Professional Misconduct) naming the legal practitioner, Suruj Sharma as the First Respondent and the law firm, Patel Sharma Lawyers, as the Second Respondent. **These have become Counts 1, 2 and 3 in the present proceedings.**

[60] On 13th November 2015, while the new application was pending, the Chief Registrar filed a further allegation of Professional Misconduct against the First Respondent. On 16th November 2015, the previous Commissioner, Justice P.K. Madigan, consolidated **this further allegation so as to become Count 4 in the present proceedings**.

[61] On 10th February 2016, the Respondent filed and served an Interlocutory Application seeking Orders for a permanent stay/dismissal of the four Counts, a ruling for which was handed down by me on 21st September 2016, wherein the application was refused. (See ***Chief Registrar v Suruj Sharma*** (Unreported, ILSC, Application Nos. 012 and 015 of 2015, Commissioner Hickie, 21 September 2016; PacLII: [2016] FJILSC 5, <http://www.paclii.org/fj/cases/FJILSC/2016/5.html>.)

[62] On 21st November 2016, the Chief Registrar filed an application amending Count 1. On 1st of December 2016, the Chief Registrar filed a Further Amended

Application further amending Count 1.

[63] The hearing of this application then commenced on 5th December 2016. Evidence continued to be taken in the June and September 2017 Sittings. Written submissions were then filed in January and February 2018, followed by a clarification hearing on 25th April 2018 and a supplementary clarification hearing on 13th June 2018.

5. The law on inferences where a witness is not called

[64] Before I commence analysing each of the four counts, I need to explain how I have decided to deal with what inference, if any, I should draw where a witness has not been called in the present proceedings.

(i) The rule in Jones v Dunkel

[65] I note that Counsel for the Respondent have touched on this issue in their joint *'Written Synopsis in Response to Commissioner's Directions'* dated 24th April 2018, tendered at the clarification hearing on 25th April 2018, in relation to the absence of any evidence from Ms. Akanisi who chaired the mediation held on 24th June 2010 between Maya Wati Prakash and the Respondent. According to Counsel for the Respondent, the failure to obtain a statement and/or call Ms. Akanisi in evidence would allow the Commission to draw an inference as they have explained at para [88]:

> *'... It is respectfully submitted this is a fitting case in which the principle developed in* ***Jones v Dunkel (1959) 101 CLR 298*** *comes in operation. From the Prosecution conduct, there is a strong inference that the uncalled evidence would not have assisted it.'*
> [Underlining my emphasis]

[66] Interestingly, *Jones v Dunkel,* which is a judgment of the High Court of Australia, allows a limited inference to be drawn (compared say, with the United States of America where an unfavourable inference may be drawn), as discussed by Heydon J in the High Court of Australia in ***Australian Securities and Investments Commission v Hellicar and Ors*** [2012] HCA 17; AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2012/17.html>, where he explained at [232]:

> *'... two consequences can flow from the unexplained failure of a party to call a witness whom that party would be expected to call. One is that the trier of fact may infer that the evidence of the absent witness would not assist the case of that party. The other is that the trier of fact may draw an inference unfavourable to that party with greater confidence.* ***But Jones v Dunkel does***

not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party *(HML v The Queen [2008] HCA 16; (2008) 235 CLR 334 at 437-438 [302]- [303]; [2008] HCA 16; Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; (2011) 243 CLR 361 at 385 [64]; [2011] HCA 11).* ***The position in the United States is different*** *(Wigmore, Evidence in Trials at Common Law, Chadbourn rev (1979), vol 2 at 192 [285]). In turn,* ***that has evidently led to the imposition of stricter preconditions*** *than those which exist under Jones v Dunkel.' Thus McCormick says (Strong (ed), McCormick on Evidence, 5th ed (1999) at 407 264. See also Stier, "Revisiting the Missing Witness Inference – Quieting the Loud Voice from the Empty Chair", (1985) 44 Maryland Law Review 137):*

> *"The cases fall into two groups. In the first, an adverse inference may be drawn against a party for failure to produce a witness reasonably assumed to be favorably disposed to the party. In the second, the inference may be drawn against a party who has exclusive control over a material witness but fails to produce him or her, without regard to any possible favorable disposition of the witness toward the party. Cases in the second group are increasingly less frequent due to the growth of discovery and other disclosure requirements."'*

[67] I note that in Canada, the inference to be drawn can go so far as to be an adverse inference, similar to that in the USA. That is, *'an implied admission that the evidence of the absent witness would be contrary to the party's case or at least would not support it'* as discussed by J. Sopinka, S. N. Lederman and A. W. Bryant in ***The Law of Evidence in Canada*** (2nd ed. 1999), at p. 297, para. 6.321, cited, in turn, by the Supreme Court of Canada in ***R v Jolivet*** [2000] 1 SCR 751; CanLII: 2000 SCC 29, <https://www.canlii.org/en/ca/scc/doc/2000/2000scc29/2000scc29.html?resultIndex=>, where Binnie J, in delivering the unanimous judgment of the Court, explained at paras [24]-[28]:

> *'24. The "adverse inference" principle is derived from ordinary logic and experience, and is not intended to punish a party who exercises its right not to call the witness by imposing an "adverse inference" which a trial judge in possession of the explanation for the decision considers to be wholly unjustified.*
>
> *25.* ***The general rule developed in civil cases respecting adverse inferences from failure to tender a witness goes back at least to Blatch v. Archer*** *(1774), 1 Cowp. 63, 98 E.R. 969, where, at p. 65, Lord Mansfield stated:*
>
> > *It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.*
>
> *26. The principle applies in criminal cases, but with due regard to the division of responsibilities between the Crown and the defence, as*

explained below. It is subject to many conditions. The party against whom the adverse inference is sought may, for example, give a satisfactory explanation for the failure to call the witness as explained in R. v. Rooke (1988), 40 C.C.C. (3d) 484 (B.C.C.A.), at p. 513, quoting Wigmore on Evidence (Chadbourn rev. 1979), vol. 2, at para. 290:

> *In any event, the party affected by the inference may of course* ***explain*** *it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for nonproduction. [Italics in original [for bold]; underlining added.]*

27. ***The party in question may have no special access to the potential witness. On the other hand, the "missing proof" may lie in the "peculiar power" of the party against whom the adverse inference is sought to be drawn****: Graves v. United States, 150 U.S. 118 (1893), at p. 121. In the latter case there is a stronger basis for an adverse inference.*

28. ***One must also be precise about the exact nature of the "adverse inference" sought to be drawn****. In J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 297, para. 6.321, it is pointed out that* ***the failure to call evidence may****, depending on the circumstances,* ***amount "to an implied admission that the evidence*** *of the absent witness* ***would be contrary to the party's case, or at least would not support it****" (emphasis added), as stated in the civil case of Murray v. Saskatoon, [1952] 2 D.L.R. 499 (Sask. C.A.), at p. 506. The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony.* ***Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse****: United States v. Hines, 470 F 2d 225 (3rd Cir. 1972), at p. 230, certiorari denied, 410 U.S. 968 96 (1973); and the Australian cases of Duke Group Ltd. (in Liquidation) v. Pilmer & Ors, [1998] A.S.O.U. 6529 (QL), and O'Donnell v. Reichard, [1975] V.R. 916 (S.C.), at p. 929.'*
[Bold my emphasis]

[68] As for the statement cited in *Jolivet* of Lord Mansfield from ***Blatch v Archer*** [1774] 1 Cowp 63 at p. 65; 98 ER 969 at p. 970 (CommonLII: <http://www.commonlii.org/int/cases/EngR/1774/2.pdf>), I note that *Blatch v*

Archer was an appeal in a civil action against the Sheriff of Essex for an escape of a person (Moody) who had been previously arrested for a judgment debt. The defendant tried to argue on appeal that the arrest was not lawful as it was not performed personally by the bailiff, who was still some thirty rods away (approximately 150 metres) when the actual arrest occurred of Moody and, further, that the person who performed the arrest (the bailiff's son) did not have the warrant with him when he arrested Moody. There was also an objection raised that the warrant was not produced at court to prove its validity. On that last issue, it was noted that the sheriff's agent who was called and could have proved that the warrant was valid, *'immediately, upon hearing his name, ran out of Court to avoid being examined'*. The Court was satisfied, however, that the warrant was valid. As for the arrest, the Court noted that the jury was satisfied that the bailiff had been near enough at hand for the arrest to have been lawful. Thus, there was no need to call the son. As such, Lord Mansfield said, apart from reciting the legal maxim set out above (and which has been cited in numerous cases over the years), **also added,** '***But I think it would have been very improper to have called the son; for in fact it is an action against his father the bailiff, though nominally against the sheriff.'*** [My emphasis]

[69] I note that in some jurisdictions, legislation allows a court to draw adverse inferences in criminal proceedings as the effect of '*an accused's failure to mention facts when questioned or charged' or when a defendant decides not to give evidence* (see, for example, sections 34-37 of the *Criminal Justice and Public Order Act* (1994) (UK) or section 89A *Evidence Act 1995* (NSW)), overcoming, of course, the problems of ***Woolmington v DPP*** [1935] AC 462; BAILII: UKHL 1, <http://www.bailii.org/uk/cases/UKHL/1935/1.html>, where Viscount Sankey LC (with whom the rest of the House of Lords agreed) made his famous speech that:

> *'... Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception ... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained ...'*

[70] On that point, as Alexandra Felix and Tom Orpin-Massey explained in an article published in 2017 in the ***New Law Journal*** (UK): *'Adverse inferences were brought*

in by statute in the criminal courts and developed through the common law in the civil courts.' (See 'Coming soon? Adverse inferences', *New Law Journal*, LexisNexis, London, 14 July 2017, <https://www.newlawjournal.co.uk/content/coming-soon-adverse-inferences>.) Felix and Orpin-Massey were looking at the development of the law of adverse inferences and their use in disciplinary tribunals (an issue that I shall come to shortly). Whilst noting the legislation introduced in the United Kingdom for criminal proceedings (that I have cited above), they also cited the development of the common law in civil proceedings and, in particular, the principles set out by Lord Justice Brooke (with whom Lord Justice Aldous and Lord Justice Roch agreed) in ***Wisniewski (A Minor) v Central Manchester Health Authority*** [1998] PIQR P323; [1998] EWCA Civ 596 (1 April 1998); BAILII: <http://www.bailii.org/ew/cases/EWCA/Civ/1998/596.html>, as follows:

> *'(1) In certain circumstances* ***a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give*** *on an issue in an action.*
> *(2) If a court is willing to draw* ***such inferences they may go to strengthen the evidence adduced on that issue by the other party*** *or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
> *(3)* ***There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference****: in other words, there must be a case to answer on that issue.*
> *(4)* ***If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn****. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.'*
> [My emphasis]

[71] In ***Wisniewski***, I note that Justice Brooke LJ, in discussing *'the need for the party who seeks to rely on an adverse inference to adduce proof on the matter in issue'* cited, in turn, the Supreme Court of Victoria in ***O'Donnell v Reichard*** [1975] VR 916 *'where Gillard J conducted a review of earlier English and Australian cases'* and *'summed up the state of the authorities in these terms at p 921':*

> *'Looking at the authorities from Blatch v Archer (1774) 1 Cowp 63 right up to Earle v Eastbourne District Community Hospital [1974] VR 722, it may be accepted that* ***the effect of a party failing to call a witness who would be expected to be available*** *to such party to give evidence for such party and who in the circumstances would have a close knowledge of the facts on a particular issue,* ***would be to increase the weight of the proofs given on such issue by the other party and to reduce the value of the proofs on such issue given by the party failing to call the witness****.'*
> [My emphasis]

[72] On this issue, Brooke LJ in *Wisniewski* also noted the discussions in ***Chapman v Copeland*** (1966) 110 SJ 569 and ***Hughes v Liverpool City Council*** (Lexis transcript, 11th March 1988, CA), where a court might be willing to draw an inference even though a plaintiff had been able to adduce very little evidence to support their claim. Balanced against that, Brooke LJ noted at p.340 the judgment of Lord Lowry in the House of Lords in ***R v IRC ex parte T C Coombs v IRC*** [1991] 2 AC 283 at 300 where His Lordship said:

> *'In our legal system generally,* ***the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence****. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if* ***the silent party's failure*** *to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.'*
> [My emphasis]

[73] I further note that the above quote was cited with approval by Lord Sumption in the United Kingdom Supreme Court in ***Prest v Petrodel Resources Ltd & Ors*** [2013] UKSC 34 (12 June 2013); BAILII: <*http://www.bailii.org/uk/cases/UKSC/2013/34.html*>, as he explained at paras [44]-[45]:

> *'44. In British Railways Board v Herrington [1972] AC 877, 930-931, Lord Diplock, dealing with the liability of a railway undertaking for injury suffered by trespassers on the line, said:*
>
> > *"The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold. A court may take judicial notice that railway lines are regularly patrolled by linesmen and Bangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see. Anyone of common sense would realise the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of the persons who patrolled the line there is nothing to rebut the inference that they did not*

> *lack the common sense to realise the danger. A court is accordingly entitled to infer from the inaction of the appellants that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence."*
>
> ***The courts have tended to recoil from some of the fiercer parts of this statement, which appear to convert open-ended speculation into findings of fact.*** *There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it.* ***For my part I would adopt,*** *with a modification which I shall come to,* ***the more balanced view expressed by Lord Lowry*** *with the support of the rest of the committee in R v Inland Revenue Commissioners, Ex p TC Coombs & Co [1991] 2 AC 283, 300 …*
>
> Cf. *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, 340.
>
> *45. The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features.'*
> [My emphasis]

[74] As Justice Morgan recently observed in ***Ramsay v Love*** [2015] EWHC 65 (Ch) (20 January 2015); BAILII: <*http://www.bailii.org/ew/cases/EWHC/Ch/2015/65.html*>, on drawing adverse inferences:

> *'14. There is no doubt as to the principle. It was recently invoked by the Supreme Court in Prest v Prest [2013] 2 AC 415 at [44] per Lord Sumption.*
>
> *15. It will be noted that Lord Lowry in R v IRC ex parte T. C. Coombs & Co referred to the court's response to* ***"a party" not giving evidence*** *whereas Brooke LJ in Wisniewski referred to the court's response to* ***"a witness" not being called*** *by a party.'*
> [My emphasis]

[75] I note the point being made by Morgan J in *Ramsay* was that *Coombs* was a case where one party declined to give evidence, whereas in *Wisniewski* it was a witness who was not called. In ***Ramsay,*** the dispute was between a personal guarantee on a lease of premises used for a restaurant and a small hotel, signed by a chef, Mr. Gordon Ramsay, with the then freehold owner of premises, Northam, whose interest was later acquired by Mr. Gary Love. The issues was whether Mr. Ramsay's father-in-law, Mr. Hutcheson (who had been at one time the Chief

Executive Officer of Mr. Ramsay's company), had *'authority to act on behalf of Mr Ramsay in relation to the giving of a guarantee by Mr Ramsay*'. Neither Mr. Hutcheson, nor his son, Adam, *'who was closely involved in the negotiations which led to the grant of the lease'* were called. As Morgan J noted at paras [19]-[20]:

> *'19. On the material before me, I consider that* ***it is unlikely that the Hutchesons would have been prepared to give evidence voluntarily at this trial****. One reason for thinking that is that Mr Ramsay reported Mr Hutcheson to the police for alleged criminal behaviour and Mr Ramsay has been interviewed by the police on more than one occasion in relation to that report. Mr Ramsay understands that the resulting police investigation is continuing. It would not be surprising if the Hutchesons did not wish to have their conduct investigated at a civil trial in advance of a decision being made as to a possible criminal prosecution. Further, Mr Seitler submitted that the Hutchesons were "admitted perjurers" and any evidence they might give would be unreliable. Not having heard the Hutchesons, I am not in a position to make any findings as to their reliability. I can speculate however in this way. It is entirely possible that if the Hutchesons came to give evidence that I would have been cautious before I accepted their evidence, in view of the allegation of previous perjury and in view of the fact that they are* ***not disinterested witnesses****. If I were to feel cautious about their evidence, that would not mean that I would automatically accept all and any evidence from Mr Ramsay to the contrary.* ***In such a case, it would still be necessary for me to consider his evidence and assess it in the light of any contemporaneous documents and the inherent probabilities of the case.***
>
> *20. My overall conclusion on the submission, that* ***I should draw an adverse inference against Mr Love by reason of the fact that he has not called either of the Hutchesons as a witness, is that any potentially detrimental effect on Mr Love's case by reason of the Hutchesons not being called as witnesses is significantly reduced but possibly not wholly eliminated.'***
> *[My emphasis]*

[76] In undertaking this review, one final case that I have found relevant is the judgment of Glass JA in ***Payne v Parker*** [1976] 1 NSWLR 191, who, in turn, after undertaking a review of 'various sources' in relation to the law on inferences (including *Blatch v Archer*, '*Wigmore on Evidence*, 3rd ed., *vol II, pars. 285-289, pp. 162-175 ([where] there is a discussion of the underlying doctrine with illustrations from United Kingdom, Canadian and United States decided cases'*, as well considering *Jones v Dunkel* and other cases from the High Court of Australia, the New South Wales Court of Appeal and the Supreme Court of Victoria), summarised nine propositions to be drawn on inferences, with proposition number (6) being the conditions to be met for the principle to apply when a witness is not called, as His Honour explained at 201(F):

> *'Whether the principle can or should be applied depends upon whether the conditions for its operation exist. These conditions are three in number: (a) the missing witness* ***would be expected to be called by one party*** *rather than the other, (b) his evidence* ***would elucidate a particular matte****r, (c) his* ***absence is unexplained****.'*
> [My emphasis]

[77] Glass JA then explained the three conditions in further detail as propositions (7)-(9) at 201G:

> *(7)* ***The first condition*** ***is also described as existing where it would be natural for one party to produce the witness****:* Wigmore*, par. 286 ...;*
> *(8) According to* Wigmore*, par. 285,* ***the second condition*** ***is fulfilled where the party or his opponent claims that the facts would thereby be elucidated****. Under other formulations, the condition is made out when the witness is presumably able to put a true complexion on the facts: Jones v. Dunkel ... I would think it insufficient to meet the requirements of principle that one party merely claims that the missing witness has knowledge, or that, upon the evidence, he may have knowledge.* ***Unless, upon the evidence, the tribunal of fact is entitled to conclude that he probably would have knowledge, there would seem to be no basis for any adverse deduction from the failure to call him****.*
> *(9)* ***The third condition*** ***is satisfied if no explanation is offered for the absence of the witness, or the tribunal thinks that the explanation given is unsatisfactory****. The explanation tendered may be that the witness is ill, overseas, dead or refuses to waive his privilege:* Wigmore*, par. 286.'*
> [My emphasis]

[78] As for a situation where there is argument as to which party should have called a witness, Glass JA noted at 201(G)-203(A): *'... the accessibility of the witness' evidence to the parties, his relationship to them and the nature of the cases respectively advanced by them are all material factors bearing upon the ultimate questions: Which party would be expected to call the witness? To which party is his absence adverse?'*

(ii) Inferences in disciplinary proceedings where a witness is not called

[79] **So how does the above discussion affect disciplinary proceedings before the Commission and the drawing of inferences where a witness, who might be expected to do so, is not called to give evidence?**

[80] As a starting point it is important to note that section 114 of the *Legal Practitioners Act 2009* states that '*The Commission is* ***not bound by formal rules of evidence'****.* It also states, however, that *'****the commission must act fairly*** *in relation to the proceeding'.* [My emphasis]

[81] The issue, as to what inferences might be drawn in disciplinary proceedings not bound by the rules of evidence, was discussed in some detail in ***Legal Practitioners Complaints Committee and Trowell*** [2009] WASAT 42 (13 March 2009); AustLII: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASAT/2009/42.html>. The proceedings involved a charge of *unprofessional conduct* brought by the Legal Practitioners Complaints Committee (similar to the Legal Practitioners Unit within the Office of the Chief Registrar in Fiji) before the State Administrative Tribunal of Western Australia. The background to the charge was as the Tribunal explained at paras [27]-[34]:

> *'27. In March 2005, Ms Schapelle Corby, an Australian citizen from Queensland, was on trial in the District Court of Bali on a charge of importing a prohibited drug ...*
>
> *...*
>
> *31. On 27 May 2005, Ms Corby was found guilty by the District Court in Bali and sentenced to 20 years imprisonment ...*
>
> *...*
>
> *34 On 31 May 2005, the practitioner, without any prior communication with Ms Corby or the Bali legal team, prepared and issued a press release which related to Ms Corby's situation and her appeal. This is the first of the alleged eight disclosures of Ms Corby's confidential information and/or making unauthorised statements to the media ...'*

[82] In a nutshell, the statements were critical of the Indonesian judicial system including allegations of *'a proposal by a third party ...to attempt to procure money from the Australian government to bribe the Balinese judiciary'*. As the 'Summary of the Tribunal's decision' notes at [2]:

> *'The Legal Practitioners Complaints Committee brought a charge of unprofessional conduct against Mr Trowell on the basis that at the time he made the statements to the media, Ms Corby was his client or his prospective client and, in doing so,* ***he disclosed confidential information and made statements to the media without her informed consent****.'*
> [My emphasis]

[83] Part of the argument raised by Counsel appearing on behalf of the Respondent barrister was whether Ms Corby was his client and the failure by the LPCC to call certain witnesses including Ms Corby *'as to fact or as to a complaint'*. In particular, as the Tribunal noted at [67], Counsel for the Respondent barrister *'sought to draw inferences against aspects of the LPCC's case by reason of its failure to call several witnesses, particularly Ms Corby and the practitioner's alleged junior'* as well as

'some short reference made to the failure to call … members of the Bali legal team, specifically in relation to their meeting with the practitioner on 3 June 2005'.

[84] The Tribunal noted at para [68] *'The principles governing the operation of the "rule" in Jones v Dunkel'* and then discussed the applicability of the rule at [69]-[70] in relation to the *'LPCC's failure to call witnesses'* generally:

> *'69. We have taken into consideration and applied such of these principles as are relevant to the present circumstances, but with this qualification. It is to be borne in mind that this is not an ordinary civil action but rather it constitutes professional disciplinary proceedings brought by the governing body against a legal practitioner before a tribunal subject to its own statutory procedures. These include that* ***it is not bound by the rules of evidence or the practices of courts but is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms*** *(s 32 SAT Act). We have so proceeded and in this respect were prepared to accept explanations from both parties as to why Ms Corby's evidence might or might not have been available, without direct evidence in support.*
>
> *70. We mention we have also had regard to the decision in* ***Kalaf*** *[****New South Wales Bar Association v Kalaf*** *(unreported, Supreme Court of NSW, Court of Appeal, 12 October 1987; BC 8801429)], cited in another section of the practitioner's closing submissions.* ***The majority in the circumstances of that case were not prepared to make a finding that the practitioner before them had lied about the matter, in the absence of the Association (being the governing body and regulator) calling an available witness who had knowledge of the matter.*** *In their view, although this aspect of the case did not turn upon the issue of onus,* ***it was the Association, as the party carrying the burden of proof on this issue, rather than the practitioner, who was required to call the witness if it sought such a serious finding****. Samuels JA [who was in the minority] who alone addressed the rule in* ***Jones v Dunkel*** *held it was the practitioner who would be expected to call the witness and drew an adverse inference from his failure to do so.'*
>
> [My emphasis]

[85] As to the 'Failure to call Ms Corby' specifically and whether an 'inference against the LPCC should be drawn', after having noted that*'… counsel for the LPCC, suggested that it would be unrealistic to suppose that Ms Corby would want to participate in a case involving criticism of the Indonesian legal system',* that Ms Corby was in an Indonesian prison and the various difficulties that might be involved in taking evidence and *'whether Ms Corby would have any recollection of the specifics of her conversation with the practitioner'*, the Tribunal then set out at [87]-[89] the following:

*'87. In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter. It is not enough to conclude that a witness may have knowledge**.*

*88. There is a stronger basis for our decision. Under the **Jones v Dunkel** rule, the significance to be attributed to the fact that a witness does not give evidence depends in the end upon **whether**, in the circumstances, **it is to be inferred that the reason why the witness was not called was because the party expected to call the witness feared to do so**. The party may not be sufficiently aware of what the witness will say to warrant that inference. The party may simply not know what the witness will say. In this respect we can say with much greater confidence that, to the extent that the LPCC may be regarded as the party expected to call Ms Corby, we do not believe, having regard to all of the circumstances, that it did not call Ms Corby because it feared to do so.*

*89. The rule in **Jones v Dunkel** can operate against a party who bears the burden of proof (the LPCC) or against a party who does not bear the onus (the practitioner). Although the LPCC has not argued that the practitioner ought to have called Ms Corby, the practitioner has in his closing submissions sought to defend his decision not to do so. It is said that 'this is not a case where the "evidentiary onus" was on the respondent, to rebut any inference that Ms Corby was his client …*

90 To the extent it impacts on this issue, we are not convinced that submission is correct … It was clearly open to him to have sought corroboration of his evidence from Ms Corby. She was equally available (if at all) to both parties. Unlike the LPCC, the practitioner had a pre-existing relationship with her, although perhaps one soured by his last (the eighth) media interview in which the practitioner accused her legal team in Bali of seeking money to bribe the appeal judges. For the reasons we have outlined she may not have been able or willing to assist the practitioner. But that is a different question.'

91. For these reasons we do not draw an inference adverse to the case of the LPCC by reason of its failure to call Ms Corby.'
[My emphasis]

[86] The Tribunal also considered a submission on behalf of the Respondent practitioner that they should draw an adverse inference from the failure of the LPCC to call Mr. Laskaris who had attended a meeting between the practitioner and Ms. Corby:

'92. …There is no evidence or explanation to suggest he was not available to either party to give evidence. It appears he was interviewed by the LPCC and a transcript of the interview provided to the practitioner. Neither party sought to tender that document. He was also summonsed by the LPCC, but was not called upon.

*93. In his closing oral closing submissions, Mr Hall [for the LPCC] put as the first reason for not calling Mr Laskaris that it had not previously been suggested that he ought be called. It might perhaps operate to strengthen the inference otherwise drawn against a party that at an early stage of the proceedings, that party is put on notice that it is expected to call a witness or provide a proper explanation for the failure to do so and that the inference will be sought if it does not. **But***

we do not think that there is anything in the principles governing the Jones v Dunkel rule that a party must be put on such notice.

…

*96. We are mindful that in **Kalaf** dealing specifically with this type of issue as between the regulator and a practitioner, the majority took the view that **the obligation was on the regulator**. However, that majority decision was made where there was **a serious accusation of dishonesty** advanced by the regulator against the practitioner before the court. That is not the case before us.*

…

97. We have been troubled by the second explanation given by Mr Hall (Mr Laskaris was not a person who could provide an accurate account of events) in the absence of any evidence or elaboration. However, we are not prepared to regard the LPCC's failure to call Mr Laskaris as attributed to its fear that it would not advance the LPCC's case. We rather think the inference to be drawn from the fact that neither party wished to call Mr Laskaris or tender the transcript, is that his evidence was not entirely helpful to either.

98. In the circumstances we are not prepared to draw the inference sought from the LPCC's failure to call Mr Laskaris.'

[My emphasis]

(iii) What inferences should be drawn on the absence of a witness before the Commission?

[87] **Returning to the present case, what inferences, if any, should I draw from a witness not being called or a document not being produced in proceedings before the Commission?** Having reviewed the various authorities, I will be applying the rule in *Jones v Dunkel* subject to the following:

(1) It will be according to the three conditions set out by Glass JA in *Payne v Parker* being satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other';*

(ii) the missing witness' *'evidence would elucidate a particular matter;*

(iii) the missing witness' *'absence is unexplained';*

(2) **The inferences to then be drawn can be**, as discussed by Heydon J in the High Court of Australia set out above in *Australian Securities and Investments Commission v Hellicar & Ors* -

(i) *'the evidence of the absent witness would not assist the case of that party'; and*

(ii) *'that the trier of fact may draw an inference unfavourable to that party with greater confidence';*

(iii) *'But Jones v Dunkel does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party';*

(3) Balanced against that, I will be applying reasoning similar to that set out in *Legal Practitioners Complaints Committee and Trowell* set out above, that is, I will take into consideration and apply *'such of these principles as are relevant to the present circumstances, but with this qualification. It is to be borne in mind that this is not an ordinary civil action but rather it constitutes professional disciplinary proceedings brought by the governing body against a legal practitioner before a tribunal subject to its own statutory procedures'* including, as per section 114 of the *Legal Practitioners Act 2009*, that '*The Commission is not bound by formal rules of evidence … and the Commission must act fairly in relation to the proceeding'.*

6. The burden of proof to be applied

[88] One final issue that I need to explain, before I commence examining each of the four counts in detail, is the burden of proof that I shall be applying.

(i) The civil standard varied according to the gravity of the act to be proved

[89] I note that in ***Chief Registrar v Kapadia***, (Unreported, ILSC, Case No. 016 of 2015, 21 September 2016; PacLII: [2016] FJILSC 8, <http://www.paclii.org/fj/cases/FJILSC/2016/8.html>, I discussed in some detail the burden of proof in proceedings before the Commission. In particular, I explained at [115]-[116]:

> *'115 ... In **Chief Registrar v Sheik Hussein Shah** (2010)(Unreported, ILSC Case No.024 of 2010, 30 September 2010) (PacLII: [2010] FJILSC 24, <http://www.paclii.org/fj/cases/FJILSC/2010/24.html>),*
> *Commissioner Connors, after reviewing the standard that has been applied to disciplinary proceedings in various common law jurisdictions, concluded at [11] that the burden of proof to be applied by the Independent Legal Services Commission in Fiji was to be as follows:*
>
> > *'...**the appropriate standard of proof to be applied is the civil standard varied according to the gravity of the act to be proved**, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong.'*
>
> *[116] Accordingly, I have adopted the same standard as set out by Commissioner Connors in **Sheik Hussein Shah** (2010), and to which Justice Madigan referred to in both **Haroon Ali Shah** (2012) (citing **A Solicitor v Law Society of Hong Kong**) and **Marawai and Chaudhry**(2012) as **'the preponderance of probabilities'**, (the latter judgment being affirmed by the Supreme Court earlier this year). Madigan J also applied this standard in **Narayan** (2014).'*
> *[My emphasis]*

(ii) The tests in Bolam and Midland Bank - what the reasonably competent practitioner would do having regard to the standards normally adopted in their profession

[90] In addition, in *Kapadia*, I noted at [91]-[92] the **the tests** set out in ***Bolam v Friern Hospital Management Committee*** [1957] 1 WLR 583; [1957] 2 All ER 118 and ***Midland Bank Trust Ltd v Hett Stubbs and Kemp*** [1979] Ch 384. In the latter (as I noted at [93]) Oliver J in the Chancery Division stated at 402(H)-403(A-B):

> *'Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practicing a highly skilled and exacting profession, but I think that* ***the court must beware of imposing upon solicitors—or upon professional men in other spheres—duties which go beyond the scope of what they are requested and undertake to do****. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test.* ***The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession****, and cases such as Duchess of Argyll v. Beuselinck[1972] 2 Lloyd's Rep. 172; Griffiths v. Evans [1953] 1 W.L.R. 1424 and Hall v. Meyrick[1957] 2 Q.B. 455 demonstrate that* ***the duty is directly related to the confines of the retainer****.* [My emphasis]

(iii) The test applied in Shah

[91] Also, in *Kapadia*, I concluded at [118], subpara (15):

> *'Finally, in relation to the burden of proof, I have noted the statements of Dixon J in both* ***Briginshaw*** *and* ***Wright*** *as well as that of Lord Denning in* ***Blyth****. That is, '****the nature and gravity of an issue*** ***necessarily determines the manner of attaining reasonable satisfaction*** ***of the truth of the issue'*** *and '****In proportion as the offence is grave, so ought the proof to be clear****.' I am of the view that this was encapsulated by Commissioner Connors in his judgment in* ***Shah*** *(2010), that is, '****the civil standard varied according to the gravity of the act to be proved'****. I am also of the view that a similar standard (described as 'the preponderance of probabilities') was applied by Justice Madigan in* ***Shah*** *(2010) (citing* ***A Solicitor v Law Society of Hong Kong****),* ***Marawai and Chaudhry*** *(the latter affirmed by the Supreme Court) and in* ***Narayan****.'*

(iv) Conclusion

[92] Therefore, the '*standard of proof that has been applied to disciplinary proceedings'* (and to which I will be applying to the four counts in this matter) is thus: *'the civil standard [that is, the balance of probabilities] varied according to the gravity of the act to be proved'*. In addition, I have noted **the tests** set out in *Bolam* (supra) and *Midland Bank Trust Ltd* (supra). In particular, the test set out Oliver J in *Midland Bank Trust Ltd*, that is, *'The test is what the reasonably competent*

practitioner would do having regard to the standards normally adopted in his profession', and 'that the duty is directly related to the confines of the retainer'.

[93] I note that I raised the above with Counsel at the clarification hearing on 25th April 2018 and they agreed with what I have set out above as that which I should be applying in this matter.

7. Count 1

[94] Of the four counts, Count 1 is the most complex. In reaching a decision as to whether the charge is made out, I have divided it into 16 parts as follows:

(1) The allegation;

(2) The submissions on the alleged conflict;

(3) When did the alleged conflict arise?

(4) Was there a duty to the beneficiary?

(5) No application to protect the intended beneficiary;

(6) Conflict not raised by Prem Narayan;

(7) Section 6A *Wills Act* and possible conflict;

(8) Other potential claims;

(9) Distribution of Estate;

(10) Other proceedings involving the Estate;

(11) Section 18 *Wills Act* not raised;

(12) The joint application for Letters of Administration and the alleged withdrawal of instructions;

(13) The sole application for Letters of Administration on behalf of the widow;

(14) Analysis of Count 1;

(15) Addition to Count 1 – the new conflict;

(16) Overall conclusion on Count 1.

(1) The allegation

[95] Count 1 alleges that the Respondent has committed an act of *'Professional Misconduct: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009',* which states:

'Professional Misconduct

82.—(1) For the purposes of this Decree, "professional misconduct"

includes –

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

[96] The particulars accompanying Count 1, in summary, state:

> ***'SURUJ PRASAD SHARMA*** *... acted against the interests of Maya Wati Prakash by acting for Pranita Devi ... in taking out Letters of Administration ... for the Estate of Salen Prakash Maharaj, when earlier ... Dipka Mala had prepared a Will for Salen Prakash Maharaj dated 22nd December 2006 under which Maya Wati Prakash ... was the beneficiary'.*

[97] Counsel for the Applicant Chief Registrar in his *'Prosecution Case Statement'* filed on 18th November 2016 (following my ruling of 21st September 2016 dismissing the Respondent's strike-out application), stated the following in relation to Count 1 at paras [3]-[4]:

> *'3. Count one alleges that a Will dated 22nd December, 2006 of Salen Prakash Maharaj was prepared in the Respondent's firm by Ms. Dipka Mala. Ms. Maya Wati, complainant in Application 12 of 2015 was the beneficiary under the Will dated 22nd of December 2006.* ***The Respondent's firm later acted for Pranita Devi****, wife of Salen Prakash Maharaj and complainant in Application 15 of 2015, in taking out letters of administration.*
> *The Applicant submits that Respondent as the principal of the firm is liable for the act of his employees.*
> *4. The Applicant also relies on Section 111(3)(c) of the Legal Practitioners Decree 2009. It stipulates that the Registrar could commence proceedings before the Commission against the legal practitioner or one or more partners of the law firm in case of an allegation of professional misconduct or unsatisfactory professional conduct of an employee of a legal practitioner or law firm.'*
> [My emphasis]

(2) The submissions on the alleged conflict

[98] The written submissions of Counsel for the Applicant Chief Registrar filed following the defended hearing of this matter, stated the following in relation to Count 1 ('*Closing Submissions',* 8th January 2018, at paras [488]-[491]):

> *'488. In relation to Count 1, the Applicant submits that the charge is made out as the Respondent's law firm had prepared the Will of SPM wherein the sole beneficiary was the testator's mother, MWP. Upon the death of SPM,* ***the estate's interest would only be protected if the estate is distributed as per the Testator's last Will and Testament****. The*

Testator's last Will and Testament shows his intention of how he or she wants the Estate to be administered.

489. In the current situation, the Respondent in his evidence stated that he had knowledge of a Will of SPM being made at his law firm and although disputed by other witnesses, the Respondent stated that they had an electronic copy of the Will. By his own evidence, that ***there was an unsigned copy of the Will, the Respondent had knowledge of the deceased's intention of how he wanted his estate to be administered****. Having the said knowledge,* ***the Respondent went ahead and acted against that interest by acting for the widow and extracting LA on her behalf****. This action of the Respondent was* ***against the interest of the estate as well as against MWP's interest whom the Respondent owed a duty.***

490. In the case of ***Chaudhry v Chief Registrar*** *[2016] FJSC 3; CBV0001.2015 (20 April 2016), the Supreme Court at paragraph 42 of its judgment stated:*

> *"It is not easy to define the phrase "conflict of interest", and I shall not attempt to do so in this judgment. In a general sense, a conflict is a struggle between opposing forces, but when referring to a legal practitioner's conflict of interest, it may be articulated negatively, as a prohibition to participating in such clashes of opposing interests. Four major types of conflicts of interest may be identified in the context of a legal practice:*
> *(a) Conflicts between the practitioner's personal interests and the interests of the client;*
> *(b) Conflicts between the interests of two or more clients the practitioner is currently representing;*
> *(c) Conflicts between the client's interests and those of third parties to whom the practitioner owes obligations; and*
> *(d) Conflicts between the practitioner's duties to the present client and his continuing duties to a former client."*

491. It is respectfully submitted that the Respondent ***owed a duty to MWP and by acting against her interest acted in a conflicting situation****.'*
[My emphasis]

[99] Counsel for the Respondent specifically noted in their written submissions that *'the Chief Registrar refers to conflict of interest in paragraphs 489 and 490 of his submissions'* and responded *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, pp. 27-28, at paras [47]-[51]) as follows:

(1) *Chaudhry* is not relevant, indeed, it was where the legal practitioner '*faced an allegation under* ***s. 82(1)(b)*** *of the Legal Practitioners Decree 2009'* (not a fit and proper person to engage in legal practice) where he *'had acted against the interests of his former client in the same matter';*

(2) '*the alleged conflict was non-existent'* in the present matter;

(3) There *'were pressing matters which required the estate to be administered as quickly as possible. Letters of Administration was the only solution';*

(4) The Respondent *'by taking out the Letters of Administration [had] not in any way defeated the rights of MWP in respect of her claim'* and '*interest in the Koronivia property';*

(5) '*there was already a Caveat over the Title [to the Koronivia property] which would have precluded PD to have taken any action towards sale of the property to defeat the rights of MWP'.*

[100] Counsel for the Respondent then submitted *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 28, paras [52]-[53]) that to show there was a conflict, it would have to be proven:

(1) **That the Will executed on 22nd December 2006 still existed** (or a signed version of it) *'in which everything was given to MWP' – '(in fact there was evidence that it couldn't be located)';* and

(2) *'**There had not been any subsequent Will made to nullify the Will made on 22 December 2006'**.*

[101] Counsel for the Respondent further submitted *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 29, paras [55]-[60) that:

(1) *'taking out Letters of Administration would not be acting in conflict but in actual fact **adhering to the law** which is in the absence of a Will'* is what was required;

(2) ***'any other lawyer … would have taken an identical action';***

(3) Is the factual basis of what occurred a conflict as alleged by the Chief Registrar, that is, where *'by virtue of making a Will in which MWP was the sole beneficiary and then proceeding to taking out Letters of Administration placed the Practitioner in a conflict of interest situation'?*

(4) The '*allegation fails to appreciate the reality',* that is, as no signed Will was in existence *'unless Letters of Administration'* had been *'taken out the administration affairs of the estate could not commence'.*

[102] Counsel for the Respondent then turned to one of the questions that I raised in my ruling of 21st September 2016 in *Chief Registrar v Sharma* (supra), at para [47], subpara (2)), that is, '***Once the widow returned alone** (without the testator's mother) … on 6th January 2009, seeking to give instructions … to act on the widow's behalf to obtain a grant of Letters of Administration, **should the First Respondent not have referred the widow to another law firm?'*** Counsel for the Respondent

answered *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 30, at paras [62]-[67]) thus:

> *'62. Again, the question is why should the Practitioner not have acted? Was the signed Will found by then? - No.*
> *63. Then* ***what circumstances places the Practitioner in a conflict? As it was at that stage, there was no signed Will*** *which made MWP a/the beneficiary of the Estate of SP.*
> *64. What could be the interest of MWP that could possibly make the Practitioner act to MWP's detriment? She was holding* ***no*** *interest at the time Letters of Administration was taken out as the signed will was not in the equation.*
> *65. Taking out Letters of Administration was the only legal way to progress estate matters. This [is] exactly what was done by the Practitioner. Also, any other Practitioner would have done exactly the same as at that point.*
> *66. Then on what basis the conflict arises? With respect any argument that there existed a conflict for the Practitioner and the firm to take out Letters of Administration is* ***based on speculation that a signed [Will] would be found in the future and that it was the last Will that was made by SP.***
> *67. The point must be made that SP on his own volition decided to take his signed Will with him and as at 15th December 2008 or 6th January 2009 the Practitioner did not have possession of a signed Will and had no knowledge about the whereabouts of a signed Will.* ***At that point a reasonable and prudent solicitor would be guided by his clients as to whether a signed Will had been found****. If a signed Will could not be located anywhere then a reasonable and prudent solicitor would have every right to believe that even though a Will may have been made by the Testator that will was either lost or destroyed. That solicitor would then act on such instructions going forward.'*
> [My emphasis]

[103] Counsel for the Applicant Chief Registrar replied to the above submissions ('*Applicant's Submissions in reply'*, 20th February 2018, page 2, at paras [7]-[8]) that:

> *'7. The Applicant relies on his submissions filed on 8th January 2008 and in particular to paragraphs 490 and 491. The Applicant submits that the practitioner ought* ***not*** *to have pursued the application for Letters of Administration when he was fully aware that his firm had been engaged in the preparation of* ***the deceased's Will*** ***under which the sole beneficiary was MWP*** *whereas* ***LA was issued to Pranita Devi which was against the interests of the Estate of SPM****.*
> *8. The evidence of MWP is clear and has not been refuted on the issue that she was informed by the Respondent that PD would get the property because she was the widow of SPM and that* ***she was further informed by the Respondent that he would only represent PD****. Hence, she hired the services of Ms. Narayan.'*
> [My emphasis]

[104] At the clarification hearing held on 25th April 2018, I asked Counsel for the Applicant Chief Registrar to explain paras [488]-[491] of his '*Closing Submissions'* dated 8th January 2018, cited earlier above, that is:

(1) Upon what basis was he submitting '*that the charge is made out'?*

(2) What was the estate's interest?

(3) What responsibility did the Respondent have either contractually as the retainer was finished on 22nd December 2006 or as a duty of care?

[105] The oral submissions made by Counsel for the Applicant Chief Registrar were:

(1) The Applicant relies upon the judgment of the High Court of Australia in ***Badenach v Calvert*** (2016) 90 ALJR 610; [2016] HCA 18 (11 May 2016); AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2016/18.html>, (a copy of which I had previously provided to Counsel for each party at the Call Over on 23rd April 2018), that is, it was the intention of the testator that his mother, Maya Wati Prakash, be the sole beneficiary. After Salen's death, when Maya returned to the Respondent's law firm, Maya was advised by the staff that there was no Will and there was no mention of an electronic copy of the Will;

(2) The estate's interest was that Maya would be the beneficiary;

(3) The duty of care was to Maya as the beneficiary.

[106] The oral submissions in response by Counsel for the Respondent were:

(1) The retainer on 22nd December 2006 was to Salen Prakash Maharaj. The scope of the retainer that was given to Dipka Mala was that there was to be one copy of the Will giving everything to Maya Wati Prakash. It was a validly drawn and executed Will. There were no irregularities;

(2) When Salen Prakash Maharaj took his Will with him on 22nd December 2006 that was the end of his retainer with the law firm, Patel Sharma Lawyers;

(3) To understand the duty of care, one has to look at what was **the scope** of the retainer. In terms of tortious liability, Justice Gageler's judgment in *Badenach* (supra) makes it clear. His Honour cites ***Hill v Van Erp*** (1997) 188 CLR 159; (1997) 142 ALR 687; (1997) 71 ALJR 487; [1997] HCA 9 (18 March 1997); AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1997/9.html>, where the negligence of the solicitor was the failure to ensure that the Will was

properly executed. It was a limited duty of care to the actions of the solicitor. By contrast, in the present case, we have an application for a grant of Letters of Administration. **The duty of care, however, did not extend at all beyond Salen's instructions**. It would have been a "*Donoghue v Stevenson* duty of care scenario" in relation to Salen's Will only if the solicitor (or his firm) in drawing the Will had negligently carried that out. (See ***Donoghue v Stevenson*** (1932) AC 562; BAILII: [1932] UKHL 100, <http://www.bailii.org/uk/cases/UKHL/1932/100.html>.) There was a contractual duty to prepare a Will. **If it had been carried out negligently, then a *Hill v Van Erp* (supra) situation would have arisen. This did not occur, the Will was validly drawn and executed**;

(4) There was later, a change in circumstances. **By the time Maya Wati Prakash came back to the Respondent's firm, that was a second retainer.** Maya Wati Prakash sought to apply for a joint grant of Letters of Administration because the signed will could not be located. This was a new retainer.

[107] Counsel for the Applicant Chief Registrar did not seek to make oral submissions in reply to the above and stood by his written submissions.

(3) When did the alleged conflict arise?

[108] After having read the previous written submissions filed by Counsel for the Applicant Chief Registrar, I was not clear whether his position was that the conflict arose when Maya Wati Prakash was allegedly advised by the Respondent (on some unknown date) that he would only represent the widow, Pranita Devi, **after** the parties had previously signed joint instructions to make an application to the High Court for a grant of joint Letters of Administration **or** whether the conflict was present even when the Respondent agreed to make a joint application on 15th December 2009.

[109] Thus, I asked Counsel for the Applicant Chief Registrar at the clarification hearing on 25th April 2018 to clarify:

(1) When was Maya Wati Prakash allegedly advised by the Respondent (on some unknown date) that he would only represent the widow, Pranita Devi?

(2) Whether this alleged advice (by the Respondent to Maya Wati Prakash) was ever put to Dipka Mala and/or Suruj Sharma during cross-examination by Counsel for the Applicant Chief Registrar?

(3) **If Maya Wati Prakash was allegedly advised by the Respondent** (on some unknown date) **after the parties had previously signed joint instructions**, that he would only represent the widow, Pranita Devi, **was this when the alleged conflict arose**, or whether the conflict was present even when the Respondent agreed to make a joint application on 15th December 2009?

[110] The oral submissions of Counsel for the Applicant Chief Registrar were:

(1) His recording of the evidence of Maya Wati Prakash was that she had said that the Respondent had informed her that he would only represent the widow;

(2) He could not recall whether he had put this allegation to Dipka Mala and/or Suruj Sharma;

(3) **The conflict arose sometime in January 2009 after the Respondent agreed on 6th January 2009 to act solely for the widow in taking out a grant of Letters of Administration.**

[111] The oral submissions in response by Counsel for the Respondent were:

(1) **It is factually incorrect that Maya Wati Prakash had been informed by the Respondent that he would only represent the widow**. What the Respondent had advised the parties when they came back on 15th December 2008 was that there was no signed Will and the parties agreed to apply for Letters of Administration in joint names;

(2) The allegation that the Respondent had informed Maya Wati Prakash that he would only represent the widow was not put to Dipka Mala and/or Suruj Sharma;

(3) The facts are clear that Pranita Devi and Maya Wati Prakash gave joint instructions on 15th December 2008. **This was the second retainer**.

[112] The oral submissions of Counsel for the Applicant Chief Registrar in reply were:

(1) His notes were that Maya Wati Prakash had said that the Respondent had informed her that he would only represent the widow;

(2) He could not confirm whether he had put this allegation to Dipka Mala and/or Suruj Sharma.

(3) The conflict arose when the Respondent agreed as from 6th January 2009 to act solely for the widow in taking out a grant for Letters of Administration.

[113] I note that the evidence-in-chief of Maya Wati Prakash on 5th December 2016 on this issue was as follows:

"Mr. Chand:	*Now, Ms. Prakash you had said that somebody had called and informed you about an advertisement in the newspaper and then you daughter had actually explained about that. Now what happened next after you became aware of that advertisement?*
Interpreter:	***Then we came back to Suruj Sharma's office then we asked him why everything was under the name of the daughter-in-law and he told us that/ he told me that it was under her name because she was the widow.***
Mr. Chand:	*Now, Ms Prakash would you be able to say/state the date you went to Mr. Sharma's office?*
Interpreter:	***I don't remember.***
Mr. Chand:	*Would you be able to remember the year at least?*
Interpreter:	***Don't remember.***
Mr. Chand:	*Now, what happened after Mr. Sharma told you that ... What else was discussed during this meeting apart from the fact that she was a widow and that's the reason the advertisement was in her name, what else was discussed apart from that?*
Interpreter:	***And then I came and asked Mr. Sharma to take my case but he said "I can't take your case now; I will only take*** *might be* ***your daughter-in-law's case".***
Mr. Chand:	*Now, did Mr. Sharma give any reason as to why he won't act for you?*
Interpreter:	***He said he could only take one person's case and that's the daughter-in-law's.***
Mr. Chand:	*Now Ms. Prakash, what happened thereafter?*
Interpreter:	*After that I hired another lawyer Mr. Prem Narayan.*
Ms Maya Wati:	*Ms Prem Narayan*
Interpreter:	*Ms Prem Narayan, my apologies"*
	[My emphasis]

[114] I also note that in cross-examination, it was put by Counsel for the Respondent to Maya Wati Prakash a version of events (that was later to be the evidence of Dipka Mala and to a lesser extent Suruj Sharma), that is, that Maya Wati Prakash returned on 15th December 2008 and uplifted the documents and that was the end of her instructions to Patel Sharma Lawyers. **Maya Wati Prakash's evidence in response was that she denied this occurred and then said that *"I don't remember"*, even though her signature was next to the documents that were allegedly uplifted, as the following excerpt from the transcript reveals**:

"Mr. Sharma:	*Is it not correct that you had a change of heart later in the day, and you came back and picked up the original document which*

	were to be used to apply for Letters of Administration from the firm of Patel Sharma?
Interpreter:	***No I did not come back***.
Mr. Sharma:	*Okay, well my instructions are that you did, that you changed your mind and you came back to Patel Sharma and picked up the documents and that's why if you look at the middle of the document, your signature appears again and it says – uplifted the following documents.*
Commissioner:	*You might just show her interpreter, in the middle on the particulars and brief under that box.*
…	
Interpreter:	***I don't remember***.
Commissioner:	*So, you don't remember if you ever came back and got, I presume here the birth certificate, marriage certificate, I can't read the other certificate*
Interpreter:	*Death certificate.*
Commissioner:	*Death Certificate, yeah,* ***you can't remember this****?*
Ms. Maya Wati:	***Na***.
Interpreter:	***No she doesn't****."*
	[My emphasis]

[115] It was also put in cross-examination to Maya Wati Prakash that by the time she alleged that she came back to Patel Sharma (after the advertisement appeared in January 2009) she was already instructing Prem Narayan, to which her response was as follows:

"Interpreter:	*I did not meet Prem Narayan, when the Letters of Administration came out. I went to Mr Suruj Sharma and he told me that he will not take my case and will only take Pranita's case.*
Interpreter:	*and then after that then I had gone to Prem Narayan.*
Commissioner:	*And who was the one … who did you go with, Rosie or you went by yourself?*
Interpreter:	*To Prem Narayan* ***I went with Ireen***.
Commissioner:	*Okay."*
	[My emphasis]

[116] Dipka Mala's evidence was also that Maya Wati Prakash returned on 15th December 2008 with another person (other than her daughter Subhasni) and uplifted the documents from Dipka Mala. It was also the evidence of Suruj Sharma that as he had been so informed by Dipka Mala that the documents had been uplifted, he considered the matter at an end on 15th December 2008.

[117] **I note that it was never put by Counsel for the Applicant to Dipka Mala that her recollection of what occurred on 15th December 2008 was incorrect** and that, instead, Maya Wati Prakash had returned to the office of Patel Sharma

Lawyers after the advertisement had appeared in January 2009 (notifying about the application for a grant of Letters of Administration) and that Maya Wati Prakash had then been informed by Suruj Sharma with words to the effect of *"I cannot take your case now; I will only take your daughter-in-law's case"* and that *"He said he could only take one person's case and that is the daughter-in-law's".*

[118] **Similarly, I note that it was also never put by Counsel for the Applicant to the Respondent that his recollection was incorrect** and that Maya Wati Prakash had returned to the office of Patel Sharma Lawyers not on the afternoon of 15th December 2008 but, allegedly, after the advertisement had appeared in January 2009 notifying about the application for a grant of Letters of Administration and that Maya Wati Prakash had been informed by the Respondent that he could not take her case and would that he would only represent the widow, Pranita Devi.

[119] **On the question of conflict of interest, on 25th April 2008 Counsel for the Respondent made oral submissions that there were three retainers** (which was also set out in the joint written synopsis of the Respondent's Counsel tendered at the end of the clarification hearing on 25th April 2018 at paras [28]-[40]), as follows:

> *'28.* ***The first retainer ended on 22nd December 2006****. The client in that retainer was SPM.*
> *29.* ***The second retainer arose on 15th December 2008*** *when both PD and MWP jointly instructed the Firm to apply for LA. The clients in that retainer were MWP and PD. The scope of that retainer was to apply for LA in the joint names of MWP and PD.*
> *30. The second retainer came to an end when MWP on 15th December 2008 came back and collected her original documents as her daughter had arranged for her to get independent legal advice.*
> *...*
> *32.* ***The third retainer arose on 6th January 2009*** *when PD solely instructed the Firm to apply for LA.*
> *...*
> *34. This retainer came to end when the LA was granted and the original LA was provided to PD.*
> *35. The LA was issued by the High Court on 16 February 2009 ...*
> *36. In evidence it was confirmed by PD that soon after the LA was issued by the High Court and the original uplifted by the Respondent's firm from High Court Registry, she was advised by the Respondent's firm to come and collect the original Grant of LA from the Respondent's office. PD confirmed in evidence collecting the original Grant upon payment of $700.00 as legal fees.*
> *37. PD further confirmed in evidence that she did not seek any advice from Respondent on how the distribution of assets are to be carried out or any general matters in relation to administration of Estate of SPM. PD*

further confirmed that since no advice was sought by her the Respondent did not provide her any further legal services.

38. ***Therefore, the third retainer which was to take out LA for the Estate of SPM came to an end when it was granted by the High Court on 16 February 2009*** *and the original Grant was provided to the Administratrix of the Estate (PD) as granted by the High Court.*

39. *The Respondent was asked to convene a mediation to discuss settlement between the two parties which he did on 28th March 2009 but there was no agreement reached between the parties.* ***This was not a retainer in any sense since the Respondent was not asked to undertake any legal work or provide legal advice****. The Respondent gave very clear evidence that when the mediation meeting was held in his office, he was not acting for any party. MWP was represented by PN and PD was accompanied by her adviser and uncle Mr Jaywant [sic] Pratap. All the witnesses – MWP, PN, and PD had in their evidence stated the same concerning the role played by the Respondent in as far as this mediation meeting was concerned.*

40. *The Firm and the Respondent had no further involvement.'*
[My emphasis]

[120] Leading Counsel for the Respondent also cited, in support of his oral submissions, the judgment of Justice Gageler in *Badenach* (supra) and **the importance of the scope of each retainer**.

[121] The oral submissions of Counsel for the Applicant Chief Registrar in reply on 25th April 2018 were:

(1) The Respondent should have refrained from applying for the grant of Letters of Administration as he was already tainted; and

(2) Professional misconduct should not be limited – it includes any form of conflict of interest.

[122] **I will return and make findings in relation to the evidence of Maya Wati Prakash and whether the alleged advice that the Respondent gave Maya Wati Prakash sometime in January 2009 ever occurred. First, however, the issue needs to be addressed as to whether the Respondent owed a duty of care to the beneficiary, Maya Wati Prakash.**

(4) Was there a duty to the beneficiary?

[123] As I considered the evidence, together with the written submissions filed, prior to relisting it for a clarification hearing on 25th April 2018, I wondered to myself:

(1) **Whether this was a matter where the Commission was the appropriate forum?** That is, **was this really a matter about professional misconduct or instead about alleged negligence** with the remedy being that the beneficiary should have been filing an action in the High Court proving negligence and seeking damages?

(2) Should the lawyer or lawyers involved have considered the implications of there being in existence an unsigned copy of a Will and thus, arguably, evidence of the testator's intention pursuant 6A of the *Wills Act*? I noted, however, that this had not formed part of the case of Counsel for the Applicant either in the particulars in Count 1, the prosecution case statement or as part of his two sets of closing written submissions;

(3) What is the law of negligence in relation to when a duty is owed to a beneficiary?

(4) Further, there is also the question of causation. That is, even if there was a duty owed, what damage was suffered and what was the cause of that damage?

(i) The appropriate forum?

[124] When I raised the question of forum at the clarification hearing on 25th April 2018, the oral submission of Counsel for the Applicant Chief Registrar was that the *Legal Practitioners Act 2009* does not say that a complainant has to have exhausted all other avenues before seeking a remedy before the Commission.

[125] Leading Counsel for the Respondent's oral submissions in response were that:

(1) Maya Wati Prakash went and saw the Legal Practitioners Unit on 10th March 2009. Any tortious claim was still alive at that time;

(2) A mediation was held in June 2010 and then four years passed and nothing occurred until two charges were laid and withdrawn in 2014 and then the present proceedings were commenced before the Commission in late 2015;

(3) Arguably, six years passed and there is an argument as to who should have advised the complainant as to her remedies (other than the Respondent).

[126] On the issue of forum, I agree with the oral submission of Counsel for the Applicant Chief Registrar. That is, the *Legal Practitioners Act 2009* does not say that a complainant has to have exhausted all other avenues before seeking a remedy before the Commission. I also agree, however, with one of the oral submissions of Counsel for the Respondent, that is, there is an argument as to who should have advised the

complainant as to her remedies (other than the Respondent). It is, however, not an issue for me to resolve in this judgment. Hence, I have decided to put it to one side.

(ii) The law of negligence when a duty is owed to a beneficiary

[127] In relation to the issue as to **whether there was a duty owed to the beneficiary by the Respondent in his firm having drafted Salen's will**, I am mindful of the development of negligence law in this area in such cases as ***Hawkins v Clayton*** (1988) 164 CLR 539; [1988] HCA 15 (8 April 1988); AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1988/15.html>; *Hill v Van Erp* (supra); and, more recently, *Badenach* (supra).

[128] In *Hawkins*, a remedy was allowed against the testator's solicitor where a Will was left in the safe custody of a law firm, who then failed to advise the executor of the death of the testator for some six years causing loss to the Estate (including deterioration of the property, unpaid rent and a penalty for late lodgement of a return for death duty). In *Van Erp*, a remedy was also allowed against the testator's solicitor to an intended but disappointed beneficiary where there was a failure by the solicitor to ensure that the spouse of the beneficiary did not witness the execution of the Will and thus made the disposition null and void. I note that a similar conclusion was reached 17 years earlier by Sir Robert Megarry V-C in ***Ross v Caunters*** [1980] Ch 297. As David Baker highlighted in an article published in the *Adelaide Law Review* in 2000, *'Decisions of the High Court of Australia and the House of Lords have now established the existence of a duty of care binding the solicitor in this situation, and the conclusion of a decision in another jurisdiction [the New Zealand Court of Appeal in Gartside] has been the same'*, citing *Van Erp*, ***White* v *Jones*** [I995] 1 2 AC 207 (BAILII: <http://www.bailii.org/uk/cases/UKHL/1995/5.html>) and ***Gartside* v *Sheffield, Young & Ellis*** [1983] 1 NZLR 37 (NZLII: <http://www.nzlii.org/nz/cases/NZCA/1983/37.html>). (See David Baker, 'Solicitors; Liability for failure of an *Inter Vivos* gift', (2000) 22 *Adelaide Law Review*, pp. 51-62; AustLII: <http://www.austlii.edu.au/au/journals/AdelLawRw/2000/3.pdf>.) Brennan CJ in *Van Erp* also noted apart from the New Zealand Court of Appeal applying *Ross v*

Caunters in *Gartside, 'in Canada and the United States the tendency has been to allow damages to an intended beneficiary deprived of a bequest by negligence in the preparation or execution of a will'.*

[129] Thus, as Dr Reid Mortensen explained, when discussing 'Solicitors' Will-Making Duties'' in the *Melbourne University Law Review* in 2002, in light of the judgments in *Hawkins* and *Van Erp*:

> *'There are a number of duties that arise only when the solicitor has been retained to hold the client's will in safe custody, and which arise on the client's death.*
> *... the duties arising under any retainer depend on the circumstances. The* ***custodial duties will arise when*** *the client asks that the solicitors hold the will in their safe-custody facility, and the solicitors agree to do so.'*
> [My emphasis]
>
> (See Mortensen, Reid --- 'Solicitors' Will-Making Duties'' [2002] *MelbULawRw* 4; (2002) 26(1) *Melbourne University Law Review* 60; AustLII: <http://classic.austlii.edu.au/au/journals/MelbULawRw/2002/4.html>.)

[130] In the abstract to his article, Reid explained that '*solicitors' will-making duties … spring from a clearer articulation of the solicitor's professional role as caretaker of clients' testamentary intentions'*. He was also critical of the decision in *Queensland Art Gallery Board of Trustees v Henderson Trout (a firm)* [2000] QCA 93 (Unreported, No. 1132 of 1998, Pincus and Thomas JJA and Byrne J, 24 March 2000) (delivered *ex tempore*) '*where duties to one who merely hoped to be a beneficiary were recognised'* by the Queensland Court of Appeal. That judgment, however, was before the decision of the High Court of Australia in *Badenach*.

[131] In *Badenach*, the High Court of Australia unanimously refused a remedy against the testator's solicitor where, although the testator bequeathed that his stepson be the sole beneficiary of his estate, a successful claim was brought by the testator's daughter from a previous relationship and the beneficiary then unsuccessfully argued that the testator's solicitor had failed to advise the testator of possible steps to avoid exposing the testator's estate to a claim under the *Testator's Family Maintenance Act* 1912 (Tas).

[132] I note that the majority judgment in *Badenach* (French CJ, Kiefel and Keane JJ) concluded at [42]-[49]:

> *'42.* ***Whatever be the position with respect to the duty which was owed to the client [the testator], it could not be one which extended to the respondent [the beneficiary]*** *by analogy with Hill v Van Erp.*
>
> *43. The duty recognised in Hill v Van Erp arose in circumstances where the interests of the testatrix and the intended beneficiary were aligned and where final testamentary instructions had been given to the solicitor. The solicitor's obligation was limited and well defined.*
>
> *44. This case might, at least on a first impression, be thought to bear some similarity to Hill v Van Erp. The client's initial instructions disclosed an intention that the respondent receive the client's property interests under his will. The respondent has the status of an intended beneficiary. But there the similarity ends.*
>
> *45.* ***The duty for which the respondent contends is not the same as the more limited duty which was recognised in Hill v Van Erp, to give effect to a testamentary intention.*** *It is one, more generally, to give advice as to the client's property interests and future estate.*
>
> *46. The duty for which the respondent contends cannot be said to be owed to the respondent as an intended beneficiary. That is apparent from the nature of the advices and the point at which they should have been given. The advices which the respondent says should have been given in discharge of that duty would have rendered it unnecessary for the client to name the respondent as a beneficiary in his will.*
>
> *47. The interests of the client and the respondent as parties to the proposed inter vivos transactions are not the same as those of a testator and intended beneficiary with respect to the execution of final testamentary intentions.* ***The advices and warnings which the solicitor would need to give about such transactions would reflect that their interests are not coincident.*** *For instance, at any point prior to completion of the creation of the joint tenancies or the gift,* ***the client could change his mind despite any promise having been made to the respondent****. This is not a circumstance which could arise where a solicitor was merely carrying into effect a testator's intentions as stated in his or her final will.*
>
> *48.* ***Nor could there be any question of the solicitor advising the respondent about all the matters relevant to his interests****, such as the risk inherent in a joint tenancy of predeceasing the client. The solicitor's duty is one protective of the client and his interests alone.*
>
> *49. So understood, the duty owed by the solicitor to the client is not different from that to which Brennan CJ referred in Hill v Van Erp.* ***It is the duty generally understood to be owed by a solicitor solely to his or her client.*** *Hill v Van Erp recognised circumstances in which the duty of care to a third party could and did arise. The circumstances which supported the existence of that duty of care are not present in this case.'*
> [My emphasis]

[133] Also in *Badenach*, Gageler J stated at [59] and [62]:

> *'[59] The solicitor's duty of care is instead limited to a person whom the testator actually intends to benefit from the will and is confined to*

*requiring the solicitor to take reasonable care to benefit that person in the manner and to the extent identified in the testator's instructions. **The testator's instructions are critical**. The existence of those instructions compels the solicitor to act for the benefit of the intended beneficiary to the extent necessary to give effect to them.*

...

*[62] Unless there is some further factor affecting the relationship of the parties, however, a solicitor retained to prepare a will can have no duty to a person whom the testator intends to benefit other than to act in the manner and to the extent identified in the testator's instructions. That is because, **outside the scope of the testator's instructions: there can be no requirement for the solicitor to act for the benefit of the person**; there can be no damage to the person if the solicitor fails to act for that person's benefit; there can be no relevant vulnerability on the part of the person to the action or inaction of the solicitor; and there can be no necessary coincidence between the person's interests and those of the client. **Where the testator's instructions stop, so does the solicitor's duty of care to the intended beneficiary**.'*
[My emphasis]

[134] Thus, my question to both Counsel at the clarification hearing on 25th April 2018, was whether they had any oral submissions to make as to the applicability or not of *Badenach* (and the duty of care owed to a beneficiary) to the present proceedings? In particular, I highlighted the above three factors noted by Justice Gageler in *Badenach*, that is:

(1) '*The testator's instructions are critical'* (at [59]);

(2) '*outside the scope of the testator's instructions: there can be no requirement for the solicitor to act for the benefit of the person'* (at [62]); and

(3) '*Where the testator's instructions stop, so does the solicitor's duty of care to the intended beneficiary'* (at [62]).

[135] The oral submissions of Counsel for the Respondent were:

(1) In relation to the '*testator's instructions'*, the **full scope of the retainer** was set out in the instructions that Salen gave to Dipka Mala, that is -

(i) One Will;

(ii) No mention about a wife or anyone else; and

(iii) He was taking his Will with him;

(2) As for having to act for the benefit of the beneficiary, Counsel submitted -

*"The contractual duty to the testator as a client is to simply obey the instructions given by the testator. Any relationship or to an intended beneficiary, is to actually carry out the instructions of the testator ... if he says 'I want you to make a valid Will giving everything to mum' ... That's all the law firm was supposed to do. **The only time that duty of care to an***

intended beneficiary becomes actionable, is … If the Will for some reason, the instructions are not carried out properly. So, the Will is invalid, it's negated, it's null and void."
[My emphasis]

(3) Where the testator's instructions stopped was as soon as the solicitor had carried out the testator's instructions, that was the end of the retainer and that was when the duty stopped.

[136] In addition, Counsel for the Respondent submitted:

(1) As the testator gave no instructions as to there being a wife, there was no requirement to provide advice to him as to the effect of section 3 and a potential claim by the widow pursuant to the *Inheritance (Family Provision) Act 2004*;

(2) Further, once Salen took his will with him on 22nd December 2006 then that was the end of the retainer.

[137] Counsel for the Applicant Chief Registrar indicated that he did not wish to make oral submissions addressing each of the three issues highlighted from the judgment of Gageler J. Rather, Counsel sought to address the issue more generally, making the oral submission that there was a conflict when the testator passed away and the Respondent acted thereafter for the widow, Pranita Devi, against the beneficiary.

[138] On the issue of **whether there was a duty owed to the beneficiary by the Respondent in his firm having drafted Salen's will**, I agree with the oral submissions of Leading Counsel for the Respondent, in accordance with the view expressed by the High Court of Australia in *Badenach.* That is, the testator's instructions are critical. In the present case no custodial duties had arisen as the testator took his sole original Will with him and thus no executed copy was left in the custody of the law firm.

(iii) Causation

[139] I then raised at the clarification hearing on 25th April 2018, the question of **causation**. That is, apart from the cases of *Hawkins*, *Van Erp* and *Badenach* each highlighting that the testator's instructions are critical and the issue of whether custodial duties have arisen, **there is also the question of causation, that is, even if there was a duty of care to the beneficiary, what damage was suffered and what was the cause of that damage?**

[140] The oral submissions of Counsel for the Respondent were, in summary, as follows:

(1) If the law firm had drafted the Will negligently and, as a result, the beneficiary "lost out" (so to speak) on her claim to the estate, then the beneficiary would have a claim in negligence against the solicitor as this was not a properly drafted Will;

(2) Here, however, the Will was valid. The testator validly gave his estate to Maya Wati Prakash, as the beneficiary under his Will, so there is no claim in negligence;

(3) There was already a registered caveat over the property at Koronivia and the widow, Pranita Devi, never took steps to remove Maya Wati Prakash as the beneficiary from living on the property;

(4) Maya Wati Prakash had a claim for $62,000.00 as a creditor on the estate that was made by Prem Narayan on 27th January 2009 on behalf of Subhasni Singh. Prem Narayan, however, did not pursue that claim. How can the Respondent then be liable for Prem Narayan's non-action?

(5) Once the Will was found on 23rd January 2010, Prem Narayan gave the Will to Nehla Baswaiya of Munro Leys, rather than depositing the Will with the Chief Registrar of the High Court '*within 30 days'* as required by section 18 of the *Wills Act;*

(6) Further, instead of depositing the Will with the Chief Registrar of the High Court and allowing the Chief Registrar to then relist the grant of Letters of Administration, Prem Narayan instituted a court action wherein legal fees incurred of $1410, for which the Court awarded costs fixed summarily in the sum of $1,500.00. Prem Narayan, however, did not pursue costs;

(7) As for the widow, Pranita Devi, in the absence of the Will, she was entitled to a grant of Letters of Administration as per the law. She was responsible for administering the estate properly, that is, to pay debts or satisfy creditors, however, this she did not do; and

(8) When the Will was found and Prem Narayan sought to have the grant revoked, Pranita Devi was still entitled to a claim upon the estate pursuant to the *Inheritance (Family Provision) Act 2004*.

[141] Counsel for the Applicant Chief Registrar indicated that he did not wish to make any oral submissions on this issue. In his 'Respondent's Response', however, subsequently filed on 4th May 2018 (in reply to the Respondent's written synopsis), Counsel for the Applicant Chief Registrar noted at para [1]: *'The Applicant submits*

that the matter before the Commission does not involve an allegation of misconduct in relation to the making of the Will.' **Instead, Counsel noted that the Applicant's case is *'alleging conflict of interest',*** something to which I will return.

[142] In relation to the present proceedings, I note that:

(1) The Testator's instructions were only one Will was to be executed and he would take that one Will with him, which he did;

(2) **The Testator assumed responsibility for the custodial duties of his Will, not the law firm of Patel Sharma Lawyers**;

[143] On the issue of **causation, the cause of the Will going missing must rest with the Testator** who, if the evidence of Pranita Devi is to be believed, seems to have not even advised his wife that he had made a Will and, of those family members who knew that he had secretly made a Will allegedly behind his wife's back (being his mother, Maya Wati Prakash and his sister, Subhasni Singh), they were not told where it was located – though Maya's evidence was that it was at one time on a bookshelf in the family home at Koronivia. Obviously, such evidence is also limited by the fact, that I have not heard evidence from either Ireen Prasad (Salen's other sister) or Hemant Kumar Singh (Salen's brother-in-law). How any potential claimant in a negligence action could prove causation against the Respondent and his law firm in such circumstances is not for me to resolve.

(iv) A duty of care and section 6A of the Wills Act

[144] **As I considered whether a duty of care was owed to the beneficiary, the only question that may have arisen for the Respondent (which I could see on these facts), was whether there was a duty upon him to have advised the beneficiary (Maya) as at 12th December 2008 as to a possible action pursuant to section 6A of the *Wills Act*? If so, why was there such a duty?**

[145] In relation to the applicability or not of section 6A of the *Wills Act*, I note that section 5 of the *Wills (Amendment) Act 2004* (PacLII: <http://www.paclii.org/fj/legis/num_act/wa2004171/>) amended the *Wills Act* (Cap. 59) by the insertion of section 6A as follows:

'Section 6A inserted

> ***5****. The principle Act is amended by inserting after section 6 the following section-*
>
> *"Court may declare a document to be a will*
>
> ***6A.****-(1)* ***A document purporting to embody the testamentary intentions of a deceased person****, even though it has not been executed in accordance with the formal requirements under section 6, constitutes a will of the deceased person if the Court is satisfied that the deceased person intended the document to constitute his or her will.*
> *(2) The Court may, in forming its view, have regard, in addition to the document, to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence, whether admissible before or after the commencement of this section, of statements made by the deceased person.*
> *(3) A party that seeks a declaration under this section has the onus of proof.".'*
> [My emphasis]

[146] This issue was raised previously in my interlocutory ruling of 21st September 2016 at para [24] as follows:

> *'... The Respondent further advised that if the parties could not find the original signed Will, then, in law,* ***the only option available was to commence litigation in the High Court*** *on that premise (presumably arguing that a copy of the draft unsigned Will downloaded from the Respondent firm's computer was evidence of the Testator's intention)* ***or to apply for Letters of Administration****. The parties were advised to go home and discuss how they wished to proceed.'*
> [My emphasis]

[147] As it had not been raised in the submissions of either Counsel, I asked both at the clarification hearing on 25th April 2018 **whether section 6A of the *Wills Act* was relevant to the present matter?**

[148] According to the oral submissions of Counsel for the Respondent:

(1) Section 6A would not be applicable where there was only a computer printout of an unsigned Will;

(2) Instead, the section would be applicable in a scenario such as where, instead of two signatories, only one has signed to witness the Will and the testator had also clearly signed the document, or where *"the testator signed but neither of the two witnesses have signed, but the testator has put his or her stamp on the ... signature of the document"*;

(3) A court would want tangible evidence where you could verify the testator's signature "Not something that could be just basically drafted overnight";

(4) Section 6 sets out how a Will is to be executed and section 6A says *'a document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements under section 6'*, can be considered '*if the Court is satisfied that the deceased person intended the document to constitute his or her will'*. Those words are grammatically quite important because what it does say is that **it is executed in some form**, but it is in accordance with 6A. In the present case, it was not even executed. It was just an unsigned computer printout;

(5) It was never raised in evidence that there was a duty upon Mr. Suruj Sharma to raise section 6A with the widow and the beneficiary at the meeting on 15th December 2008, as *"it just doesn't get there",* as *'A document purporting to embody the testamentary intentions of a deceased person'* which a Court could so declare pursuant to section 6A;

(6) Also, *"a computer document can be created overnight ... It can be touched up, it can be modified. So, the fact of the matter is a prudent, reasonable solicitor would not even go there, unless they have got something which they can actually take to the Court. And, this is why we saying that 6A doesn't even arise in this case"*;

(7) The professional position taken by the Respondent was that they could not have gone to the High Court and argued intention pursuant to section 6A because an unsigned computer print out *"just doesn't get there"* and thus under the law, the only other option was to make an application by the widow for a grant of Letters of Administration.

[149] Counsel for the Applicant Chief Registrar indicated that he did not wish to make any oral submissions in relation to the relevance or not of section 6A of the *Wills Act.*

[150] I also note that in *Badenach*, according to French CJ, Kiefel and Keane JJ at [5]: *'There was no evidence touching upon the question of what the client might have done had he been apprised of the possibility that a claim under the TFM Act might be made against his estate'*. **Similarly, in the present case, according to the evidence of Dipka Mala, the firm did not even know that there was a wife in 2006 when the Will was executed, let alone a widow until the conference with Maya and Subhasni on 12th December 2008.** Indeed, when the existence of a

widow was mentioned on 12th December 2008, the evidence of both Dipka Mala and Suruj Sharma was that Maya and Subhasni were advised that they had to go and get the widow to attend the firm with them as, under the law, the widow was the person who had to apply for Letters of Administration. Should Maya Wati Prakash have also been apprised on 12th December 2008 of section 6A or when she returned with Pranita Devi on 15th December 2008 and thus each party needed to obtain independent legal advice on to how to proceed? **Counsel for the Applicant Chief Registrar did not raise this as an issue in his two sets of written submissions, his oral submissions on 25th April 2018 or in his written Synopsis Reply of 4th May 2018.**

[151] **On the issue of whether section 6A of the *Wills Act* was relevant to the present matter**, **I tend to agree with the oral submissions of Leading Counsel for the Respondent**. That is, it was never the case of Counsel for the Applicant that there was a duty upon the Respondent to have raised section 6A with Maya as the beneficiary under the missing Will either at the conference on 12th December 2008 solely with her and Subhasni and/or at the conference on 15th December 2008 with Maya and Pranita. **Further, there is great doubt that an unsigned computer print out would have been considered by a Court who would have wanted, instead, tangible evidence, that is, a document executed in some form**. I do note that the only other option was to have made an application for a grant of Letters of Administration, which occurred.

[152] As, however, section 6A was not part of the case of Counsel for the Applicant Chief Registrar, it is not an issue for me to resolve in this judgment. Hence, I have decided to put it to one side.

(5) No application to protect intended beneficiary

[153] I also note that, apart from the initial proceedings being issued in 2009 by Prem Narayan on behalf of Maya Wati Prakash (which were eventually not pursued), **there was no separate application made for a caveat to protect the interest of Maya Wati Prakash when the application for a grant of Letters of Administration was made in February 2009. Was this a matter for the Respondent or Prem Narayan?**

[154] When I raised this at the clarification hearing on 25th April 2018, the oral submissions of Counsel for the Respondent were, in summary, as follows:

(1) The Respondent applied on behalf of the widow, Pranita Devi, for a grant of Letters of Administration;

(2) Prem Narayan could have applied for a caveat on behalf of Maya Wati Prakash, but she did not so;

(3) The Respondent had already lodged a caveat in 2007 on behalf of Maya Wati Prakash that had been agreed to by the testator over the property in Koronivia. Thus, the testator was acknowledging Maya's claim. Prem Narayan should have applied to the Registrar to have the interest of Maya in the property in Koronivia vested by a caveat as per the *Succession, Probate and Administration Act.*

[155] Counsel for the Applicant Chief Registrar indicated that he did not wish to make any oral submissions on this issue.

[156] On a preliminary view, there is force in the submission of Counsel for the Respondent that Prem Narayan should have applied to the Registrar to have the interest of Maya in the property in Koronivia vested by a caveat as per the *Succession, Probate and Administration Act.* As, however, the question of protecting the interest of Maya by a caveat as per the *Succession, Probate and Administration Act* was not part of the case of Counsel for the Applicant Chief Registrar, it is not an issue for me to resolve in this judgment. Hence, I have decided to put it to one side.

(6) Conflict not raised by Prem Narayan

[157] I note that Prem Narayan, in her letter of 27th January 2009 to Patel Sharma Lawyers, **did not question the right of Patel Sharma Lawyers to apply for Letters of Administration on behalf of the deceased's widow**.

[158] When I raised this at the clarification hearing on 25th April 2018, Counsel for the Respondent submitted that not only did **Prem Narayan in her letter of 27th January 2009 not raise the issue of a potential conflict**, rather, Prem Narayan raised, on behalf of Subhasni Singh, (not Maya) a claim on the estate of $62,000.

[159] Counsel for the Applicant Chief Registrar, however, took a different view. His oral submissions were that Prem Narayan's letter of 27th January 2009 was significant as it was evidence that Subhasni Singh had given instructions of a claim upon the estate and thus **there was a conflict for the Respondent in continuing to act, even if Prem Narayan had not raised it**. Therefore, according to Counsel for the Applicant Chief Registrar, the Respondent should have made a "judgement call" when he received that letter and decided that he should not continue to act rather than relying upon an objection to be raised by Prem Narayan.

[160] Counsel for the Respondent's oral submissions in reply were, in summary, as follows:

(1) The conflict of interest was also not raised at the conference held in Mr. Sharma's office on 28th March 2009 and Subhasni Singh was not present at the meeting (for whom the claim upon the estate had been made as per the letter from Prem Narayan of 27th January 2009);

(2) The option was there for Prem Narayan to lodge on behalf of Maya Wati Prakash a caveat against the grant of Letters of Administration;

(3) In fact, **Maya Wati Prakash was quite happy for the application for the grant of Letters of Administration, she had just wanted it to be a joint application**;

(4) The instructions given by the widow to the Respondent on 6th January 2009 to make an application for the grant of Letters of Administration for the widow was the third retainer;

(5) As for section 6A of the *Wills Act*, the parties had accepted by early 2009 that the Will executed on 22nd December 2006 was not around. How could the Respondent be sure that the Will executed on 22nd December 2006 was Salen's only Will?

(6) As paragraph [62] of Justice Gageler's judgment in *Badenach* makes clear '*a solicitor retained to prepare a will can have no duty to a person whom the testator intends to benefit other than to act in the manner and to the extent identified in the testator's instructions'*. That is, **the scope of the duty to Maya was limited to make sure that the Will executed on 22nd December 2006 was valid.**

[161] **It is clear that Prem Narayan in her letters of 27th January and 26th February 2009 never raised the issue of conflict generally**. In particular, Prem Narayan

never raised the issue of section 6A(1) of the *Wills Act 2004* and that Patel Sharma Lawyers may have had a conflict acting on the instructions of the deceased's widow, Pranita Devi, when Patel Sharma Lawyers were also holding an unsigned document in their computer records *'purporting to embody the* ***testamentary intentions****'* of Salen. That is, even though the unsigned document in the computer records of Patel Sharma Lawyers had *'not been executed in accordance with the formal requirements under section 6'*, Prem Narayan did not raise as to whether it could be argued before a Court that the unsigned document in the computer records of Patel Sharma Lawyers *'constitutes'* a Will of Salen if a Court was to be *'satisfied that the deceased person intended the document to constitute his Will'* (as per the exception set out in section 6A(1) of the *Wills Act 2004*).

[162] I can only conclude note that Prem Narayan, in her letters of 27th January 2009 and 26th February 2009 to Patel Sharma Lawyers did not raise the issue of conflict either generally or specifically in relation to a potential conflict pursuant to section 6A(1) of the *Wills Act 2004* because she did not see any such conflict.

(7) Other potential claims

[163] **I raised with Counsel appearing for each party at the clarification hearing on 25th April 2018, whether there were any other potential claims that were relevant (in particular, the *Inheritance (Family Provision) Act 2004),* and how did this reconcile with the proceedings before the Commission and the argument of the Chief Registrar that the intention of the testator is paramount?**

[164] According to the oral submissions of Counsel for the Respondent:

(1) There was a claim for the damage to Salen's mini-van that seems to have been dealt with by Pranita Devi;

(2) There was a third party personal injury claim that was being made through Daniel Singh, lawyer;

(3) There was the transfer of Salen's vehicle permit to Hemant, the husband of Subhasni Singh;

(4) In law, the widow having been granted the Letters of Administration had to account for what she had done;

(5) **The widow also had a residual claim**. She could have asked for part of the estate as a counter-claim in the High Court proceedings issued on behalf of Maya Wati Prakash seeking to have the grant revoked, the Will declared valid and probate granted. **No such counter-claim was filed**.

[165] Counsel for the Applicant Chief Registrar indicated that he did not wish to make any oral submissions on this issue.

[166] **In my view, it remains unclear as to what advice, if any, and by whom, was given to either Pranita Devi, as the widow and/or, Maya Wati Prakash, as the intended beneficiary under the Will (as well as the surviving parent), as to**:
(1) Potential claims they may have had upon the Estate in accordance with section 6 of the *Succession, Probate and Administration Act* once the grant of Letters of Administration was made on 16th February 2016;
(2) Potential claims they may have pursuant to sections 4 and 10 of the *Compensation to Relatives Act;*
(3) **Potential claims that may have been made had upon the Estate once the Will had been declared valid on 11th October 2013.** I note, for example, that Pranita Devi, in her evidence before the Commission, claimed that she had been married to Salen for over 10 years and they had worked together in the Suva Markets. Surely, she was not to be left destitute? Was she made aware of a potential claim pursuant to the *Inheritance (Family Provision) Act 2004*? For example, in ***Wati v Chand*** (Unreported, High Court of Fiji, Probate Jurisdiction, Civil Action No. HPP No. 0011 of 2004s, Pathik J, 8 July 2005; PacLII: [2005] FJHC 172, <http://www.paclii.org/fj/cases/FJHC/2005/172.html>), His Lordship in providing for a widow (by consent pending the finalisation of a challenge to the Will's validity) cited the judgment of the **Privy Council** in ***Dillon v Public Trustee of New Zealand & Others*** [1941] A.C. at 295 (BAILII: [1941] UKPC 11, <http://www.bailii.org/uk/cases/UKPC/1941/1941_11.html>), in relation to section 33 of the *Family Provision Act 1908* of New Zealand (a somewhat similar provision to **section 3(7)** of the *Inheritance (Family Provision) Act 2004* in Fiji), wherein it was held at page 303-304:

> *'The manifest purpose of the Family Protection Act, however, is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the*

> *distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do. The court, in considering how its discretion should be exercised, and how far it is just and necessary to modify the provisions of the will, will pay regard to the circumstances in which the testator's will is drawn as it is, and the interests of the respective members of the family, but,* ***if the Court comes to the conclusion that no adequate provision has been made in the will****, such as is called for by s. 33, then the jurisdiction of the court to alter the distribution of the estate in favour of the applicant (widow, widower, or children, as the case may be) cannot be doubted.* [My emphasis]

[167] As this was not part of the case of Counsel for the Applicant Chief Registrar, it is not an issue for me to resolve in this judgment. Hence, I have decided to put it to one side.

(8) Distribution of Estate

[168] As I understood the evidence, the Respondent simply assisted the widow in obtaining the grant for Letters of Administration so that the widow could administer the Estate. Further, following the meeting on 28th March 2009, the Respondent ceased any involvement in the matter. At the clarification hearing on 25th April 2018, I asked both Counsel to confirm that this was their understanding of the evidence, that is, **that the Respondent was not involved in the distribution of the Estate.**

[169] Counsel for the Applicant noted that there was some evidence from Pranita Devi concerning the transfer of permits in which the Respondent allegedly assisted her. Counsel for the Respondent submitted that the Respondent was not involved after the meeting on 28th March 2009.

[170] I note that according to the written submissions of Counsel for the Applicant the evidence of the Respondent on this point was ('*Closing Submissions',* 8th January 2018, at [474]): *'That his firm's engagement ended after LA granted and they would have done some letters for the Bank as is norm and that she paid'*. I agree with that summary.

[171] **I also note that Counsel for the Applicant never put to the Respondent the claim of Pranita Devi that the Respondent was involved in the transfer of permits after the grant of the Letters of Administration on 16th February**

2009. In addition, I note that there was no documentary evidence tendered to support such a claim made by Pranita Devi.

[172] **Indeed, the only documentary evidence tendered before me of the Respondent's further involvement after the grant of the Letters of administration was in Exhibit 44 (the High Court file of Civil Action No.81 of 2009 filed on 6th March 2009 by Prem Narayan on behalf of Maya Wati Prakash summarised near the beginning of this judgment) where, in the *'Judges's Notes'* of Inoke J, it was recorded that Mr. Suruj Sharma's sole appearance was on 12th March 2009 *'for [the] purpose of resolution of this matter'* and that, Prem Narayan for the *'Pltf confirms D1 instructions'* and the matter was *'Adjn to 6/4/09 @ 10.00 am'*.** I note the application sought a number of orders including interim injunctive relief against Pranita Devi (and others) in dealing with the property in the name of Salen Prakash Maharaj at Koronivia, that the Letters of Administration be recalled and **a fresh grant of Letters of Administration be issued to Maya Wati Prakash and Pranita Devi**.

[173] **I also note that on 6th April 2009, it was recorded in the Judges' Notes that Prem Narayan appeared for the Plaintiff, Maya Wati Prakash and Mr. Raman Singh appeared for the 1st Defendant, Pranita Devi**. I further note that after the failed settlement meeting hosted by the Respondent on 28th March 2009, between Maya Wati Prakash and Pranita Devi, (where Prem Narayan spoke for Maya Wati Prakash and Jayawant Pratap spoke for Pranita Devi), the latter then sought the assistance of the law firm of Kohli and Singh, hence the appearance by Mr Raman Singh before Inoke J on 6th April 2009.

[174] **It is clear that:**

(1) The Respondent simply assisted the widow in obtaining the grant for Letters of Administration so that the widow could administer the Estate and that his sole appearance on 12th March 2009 in response to the application filed on behalf of Maya Wati Prakash was *'for [the] purpose of resolution of this matter'* and that, Prem Narayan, who appeared for the plaintiff, confirmed that was the case to the Court;

(2) Following the meeting on 28th March 2009, the Respondent ceased any involvement in the matter.

(3) In any event, as the distribution of the estate was not part of the case of Counsel for the Applicant Chief Registrar in relation to any of the four Counts, it is not an issue for me to resolve further in this judgment. Hence, I have decided to put it to one side.

(9) Other proceedings involving the Estate

[175] I was aware that there were some separate proceedings involving a joint application of Maya Wati Prakash and Pranita Devi where, on 17th October 2014, a year AFTER the Will was pronounced valid, Master Rajasinghe granted an application to re-instate an action which was struck out previously due to noncompliance with an unless order. (See ***Wati and Devi v Chand & Ors*** (Unreported, High Court Civil Action No. HBC334 of 2011, 17 October 2014; PacLII: [2014] FJHC 748, <http://www.paclii.org/fj/cases/FJHC/2014/748.html>.) I was unaware, however, as to either the outcome or relevance of those proceedings to the proceedings before this Commission.

[176] Therefore, at the clarification hearing on 25th April 2018, I asked both Counsel to confirm their understanding of the above joint application of Maya Wati Prakash and Pranita Devi on 17th October 2014, and whether it was relevant to the present proceedings before this Commission?

[177] Counsel for the Respondent advised that it was his understanding in relation to the above joint application of Maya Wati Prakash and Pranita Devi, in summary, as follows:

(1) After Justice S.N. Balapatabendi in the High Court at Suva on 11th October 2013, ruled in favour of Maya Wati Prakash, pronouncing that the Will of Salen Prakash Maharaj dated 22nd December 2006 valid and that the Letters of Administration granted to Pranita Devi on 16th February 2009 be revoked forthwith (see **Exhibit "19"**; see also *Prakash v Devi*, (supra)), two things happened –

(i) Pranita Devi refused to comply with the Orders of the Court. Thus, further action was taken to transfer the permits (in relation to the taxi and minivan);

(ii) In addition, Maya Wati Prakash and Pranita Devi jointly pursued the third party claim and were required to show cause as to why the application should not

be struck out. When Salen died in the minivan accident, there was a third party claim against the insurer. Pranita Devi had an action as the Administratrix of the Estate of Salen to which Maya Wati Prakash was joined as the Executrix of the Estate. The other vehicle involved in the accident in which Salen died was a government vehicle and eventually the third party claim was settled. There was some legal issue involving the personal injury claim and compensation pursuant to the *Compensation to Relatives Act*, however, Counsel could not advise further.

[178] Counsel for the Applicant submitted that it was unclear what had occurred.

[179] As this was not part of the case of Counsel for the Applicant Chief Registrar, it is not an issue for me to resolve in this judgment. Hence, I have decided to put it to one side.

(10) Section 18 Wills Act not raised

[180] I note (as previously mentioned above) that whilst Counsel for the Respondent raised the behaviour of Prem Narayan in arranging for depositing of the Will with Nehla Baswaiya of Munro Leys (after it was found on 23rd January 2010) and NOT depositing the Will with the Court, as required by section 18 of the *Wills Act*, this was not raised by Counsel for the Applicant in either of his two sets of written submissions.

[181] Section 18 of the *Wills Act* states:

'Failure to produce will

> ***18.*** *Any person who, having in his possession or under his control any will or codicil of a deceased person or* ***any paper or writing purporting to be such a will*** *or codicil, fails or neglects to produce and deposit the same with the Court, or, where there is reason to believe that the deceased person's estate is a small estate, with Chief Registrar of the High Court within 30 days of learning of the death of the deceased person, commits an offence and is liable on conviction to a fine of $1,000.'*
> [My emphasis]

[182] I raised this issue with Counsel for the Applicant at the clarification hearing on 25th April 2018. I also invited Counsel for the Respondent to comment if he so wished.

[183] According to the oral submissions of Counsel for the Applicant, section 18 of the *Wills Act* is a separate issue and thus he had no submissions to make in relation to it and was prepared to leave it to the Commission to make comment.

[184] Counsel for the Respondent made two oral submissions, in summary, as follows:

(1) This reflects on the conduct of Prem Narayan and the unnecessary legal expenses incurred when section 18 of the *Wills Act* is clear. That is, upon the finding of the Will on 23rd January 2010, the Will should have been lodged with the '*Chief Registrar of the High Court within 30 days'.* The Chief Registrar could then have written to the Administratrix asking for return of the Letters of Administration now that the Will had been found, so that the onus was on the Administratrix to accept that it was a valid Will or did she wish to have the matter listed in the High Court. Prem Narayan did not comply with the 30 days requirement and, instead, issued Civil Action No. HPP 3 of 2010. Prem Narayan should have complied with the legislation and deposited the Will with the Chief Registrar;

(2) **Prem Narayan incurred legal expenses that were unnecessary if the right protocol had been followed.**

[185] Counsel for the Applicant did not seek to respond to those oral submissions.

[186] Again, as this was not part of the case of Counsel for the Applicant Chief Registrar, it is not an issue for me to resolve in this judgment. Hence, I have decided to put it to one side.

(11) The joint application for Letters of Administration and the alleged "withdrawal" of instructions

[187] In relation to the proposed **joint** application for the Letters of Administration, it is not disputed that on 15th December 2008, Pranita Devi, the widow of Salen Prakash Maharaj and Maya Wati Prakash, the mother of Salen Prakash Maharaj, attended the law firm of Patel Sharma Lawyers and, as the original Will of Salen Prakash Maharaj could not be found, gave joint instructions authorising Patel Sharma Lawyers to prepare an application for Letters of Administration under their joint names (Exhibit 2). It is disputed, however, what occurred after that meeting where joint instructions were given.

[188] According to Counsel for the Applicant Chief Registrar, which he clarified in his oral submissions at the hearing on 25th April 2018, the position of the Applicant is thus:

(1) There was no conflict when the parties instructed on 15th December 2008 to make a joint application to the High Court for a grant of joint Letters of Administration to both Pranita Devi as the widow as well as to Maya Wati Prakash holding an equitable interest in the Estate;

(2) **The conflict arose when the Respondent (sometime in January 2009), allegedly advised Maya Wati Prakash that the Respondent would only represent the widow, Pranita Devi.**

(12) Whether the Respondent allegedly advised Maya Wati Prakash that the Respondent would only represent the widow, Pranita Devi.

[189] **I will now make findings as to whether the above advice (allegedly given by the Respondent to Maya Wati Prakash in January 2009) ever occurred.**

(i) Evidence of Dipka Mala

[190] Despite the widow, Pranita Devi, and the mother, Maya Wati Prakash, instructing Patel Sharma Lawyers on 15th December 2008, in what Dipka Mala described as *"**a cordial meeting between the parties"*** to *"prepare LA under the joint names Pranita Devi and Maya Wati"***,** this was not, however, the end of the matter. That same afternoon, according to Dipka Mala, Maya Wati Prakash returned to Patel Sharma Lawyers as Dipka Mala explained in her evidence:

"Ms. Mala:	***And then later in the afternoon, Maya came back to our office with one another lady.***
Commissioner:	*Hold on, with another lady?*
Ms. Mala:	*Yes.*
Commissioner:	*You don't know who?*
Ms. Mala:	*No.*
Commissioner:	*Yes?*
Ms. Mala:	***And then she advised that her daughter has seen another solicitor, has spoken something with another solicitor.***
Commissioner:	*Yes?*
Ms. Mala:	***And Maya wanted to uplift copies of her documents that she had left behind earlier in the morning.***
Commissioner:	*Yes?*

Ms. Mala: *So the documents were released to her …"*
[My emphasis]

[191] Dipka Mala in her evidence was then taken to Exhibit 2 where she identified her handwriting and signature and also that of Maya Wati Prakash where "***she signed uplifting the documents"*** that is, *"…* ***Maya Wati was going to uplift the documents and go and see the same solicitor that the daughter had seen"*** and Maya "***did mention it was Subhasni****"*.

[192] As for the reason for the change of lawyers, Dipka Mala's evidence was as follows:

"Mr. Sharma: *Okay, and she says that she wants to consult another solicitor,* ***did she tell you why she wanted to consult another solicitor, Ms. Mala****?*
Ms. Mala: ***No she did not say that Sir, she did not****.*

Mr. Sharma: *And she, you said* ***she didn't tell you who the other solicitor that she was consulting****?*
Ms. Mala: ***We were not aware.***

Mr. Sharma: ***Now she uplifted the very documents you were to use to apply for LA, what did the firm do then?***
Ms. Mala: ***Because it was her documents and it was the client's request she requested that documents be uplifted by her, so we released the documents to her.***

…
Commissioner: *That's what I am asking, when she has come back to collect them, is that, does she see Mr. Sharma or just you?*
Ms. Mala: *Just me.*
…
Commissioner: *Do you and Mr. Sharma then have a discussion like 'the documents are gone, what are you going to do now'?*
Ms. Mala: ***Because we had no documents we closed the file.***

Commissioner: *You closed the file,* ***what about Pranita Devi, where does she sit****?*
Ms. Mala: ***Because they were residing in the same house so****.*

Commissioner: ***You thought it's a matter for them?***
Ms. Mala: ***Yes.***

Commissioner: *And the file was closed?*
Ms. Mala: ***Yes because prior to this day, we did not know Pranita****."*
[My emphasis]

(ii) The evidence of Maya Wati Prakash

[193] By way of contrast, **Maya Wati Prakash's evidence was that she did not return and withdraw the joint instructions on 15th December 2008**.

According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Maya Wati Prakash on this issue ('*Closing Submissions',* 8th January 2018, at [22]-[26]), was that after 15th December 2008:

> *'22. Her children informed her about* ***an advertisement which was published in the Fiji Times which stated that all the property would belong to PD****.*
> *23. She said that when the Respondent had asked to sign on the document, he informed her that she would receive 50% of SPM's estate and she was content with this arrangement.*
> *24.* ***She went back to the Respondent's firm to enquire about LA that was taken out under PD's name****. The Respondent informed her that PD would get the property because she was the widow of SPM.*
> *25. She then asked the Respondent to take her case. Respondent informed her that he could only take PD's case.*
> *26.* ***She then hired the services of Ms. Prem Narayan (PN)****. She informed Ms. Narayan that LA was taken out under PD's name and that she wanted her share.'*
> [My emphasis]

[194] Also, according to the written submissions of Counsel for the Applicant Chief Registrar, the evidence of Maya Wati Prakash, under cross-examination, on this issue was, in summary, as follows ('*Closing Submissions',* 8th January 2018, at [61]-[67]):

> *'61.* ***She confirmed that she did not withdraw the documents*** *as stated AD2 [Exhibit 2].*
> *62. She stated that when LA was granted to PD she went to the respondent. He informed her that he will not be able to take her case and will only take PD's case. After that she went to PN with her daughter Irene.*
> *63.* ***She gave instructions to PN after LA was granted.*** *[i.e. after 14th February 2009]*
> *64. She was cross-examined on a letter from PN to Respondent dated 27th January 2009 AD4 page 6 and regarding the purchase of their house to which she replied that she came for the case against the Respondent and she is not aware about anything else.*
> *65. She stated that PN lodged a claim once the will was found.*
> *66. She informed Commission that she agrees with the 3rd paragraph of Exhibit 59 statement of PN that she gave instructions on the 26th of January 2009 however she cannot recall the time.*
> *67. Commissioner referred witness to AD 2 at page 4.* ***She confirmed her signature and confirmed that she did not uplift the documents as stated at page 4 of AD2****.'*
> [My emphasis]

[195] Further, according to the written submissions of Counsel for the Applicant Chief Registrar, the evidence of Maya Wati Prakash in re-examination on this issue was, in summary, as follows ('*Closing Submissions',* 8th January 2018, at [95]-[96]):

'95. She informed the Commission that her sister had informed her that LA had been granted to PD.

96. ***She cannot recall the exact date she had instructed PN****.'*
[My emphasis]

[196] I agree generally with the above as a summary of the evidence of Maya Wati Prakash on this issue.

(iii) The evidence of Subhasni Singh

[197] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Subhasni Singh on the issue of the Letters of Administration ('*Closing Submissions',* 8th January 2018, at [127]-[129]), and the joint instructions given on 15th December 2008, was:

'127. She stated that her mum discussed with her as to what had transpired inside [Mr. Sharma's office] and told her that the properties of the Estate of SPM would be divided with 75% shares going to Pranita Devi (PD) and 25% to MWP.

129. ***That MWP was not happy*** *that she was* ***getting only 25%*** *and* ***she was advised by her cousin brother Viren [sic] to hire another solicitor****.*

130. That ***in 2009, MWP instructed Ms. Prem Narayan*** *and that she did not accompany her mum to Prem Narayan's office.'*
[My emphasis]

[198] I agree generally with the above as a summary of the evidence-in-chief of Subhasni Singh on this issue.

[199] I note that the evidence of Subhasni Singh under cross-examination before this Commission on 6th June 2017 as to when Prem Narayan was instructed was:

"Mr. Sharma:	***Do you remember when Prem Narayan got involved*** *in the estate of Salen Prakash as your mum's solicitor?*
Ms Singh:	*When did we hire her?*
Mr. Sharma:	*Yes.*
Ms Singh:	*That was* ***late December 2008****.*
Mr. Sharma:	*Okay,* ***so late December 2008, yeah****?*
Ms Singh:	***Yes****."*

[My emphasis]

[200] **Subhasni Singh was not asked any questions in re-examination as to when Prem Narayan was instructed.**

(iv) The evidence of Pranita Devi

[201] According to the written submissions of Counsel for the Applicant Chief Registrar,

the evidence-in-chief of Pranita Devi in relation to when she first instructed by the Respondent to make a sole application for a grant of Letters of Administration was, in summary, as follows: ('*Closing Submissions',* 8th January 2018, at [268]-[274]):

> *'268. She stated that after her husband's death,* ***she went to the Respondent's office along with her uncle Jaywant [sic] Pratap*** *but she could not recall the exact date to have LA obtained as SPM owned many things.*
> *269.* ***She stated that the Respondent told them that he was acting for MWP and he didn't give any response****. That* ***her uncle*** *requested the Respondent that since he was related why didn't he act for PD and the Respondent agreed.*
> ...
> *271. She confirmed that she gave instructions to the Respondent and he took her address and father's name and the reason for her visit. She paid $700 as fees to Mr. Sharma not at that time but after LA was granted to her.*
> *272. On 16th February 2009, LA was granted.*
> *273. She stated that she could not recall the number of times she paid a visit to the Respondent's law firm before LA was granted but went a number of times with her uncle Jaywant [sic].*
> *274. She also stated that she went once to the Respondent's office with MWP, Subhasni and her husband before LA was granted. She stated that this this could have been after SPM's 13 day death ritual.'*
> [My emphasis]

[202] Counsel for the Applicant Chief Registrar, has then summarised the cross-examination of Pranita Devi in relation to when she first instructed the Respondent to make a sole application for a grant of Letters of Administration as follows: ('*Closing Submissions',* 8th January 2018, at [307]-[310], and [326]-[335]):

> '*326. She confirmed that she agreed for LA to be granted jointly to her and her mother in law as she wanted to share the property with her mother-in-law.*
> *327. She stated that she did not know that MWP returned on the same day and uplifted the documents and that she did not know that MWP was not comfortable with the arrangement.*
> *328. She stated that when she left her in laws place, she had taken with her all of SPM's documents and that she checked his documents but there was no Will. Although she could not recall the exact date she took all her things from her in laws place and left for her parents place for good but she stated it could have been probably sometime on 26 or 27 December.*
> *329. She stated that at the time she left her in-laws place, she had no issues with MWP but only with Subhasni.*
> *330. She stated that* ***on 6th January 2009****, she went back to the Respondent's law firm* ***accompanied by her uncle****. She stated that* ***it was her uncle, Jaywant [sic] Pratap's decision to visit the Respondent's law firm and discuss about the probate matters*** *as her in-laws would not give her any share and* ***her uncle*** *thought that Subhasni is educated and she might take steps which might lead to PD not getting anything.*

331. *On 6th January 2009, **her uncle** asked Respondent if LA could be extracted under PD's name and the Respondent stated that he was acting for MWP. She stated that **Mr. Sharma agreed to withdraw from MWP and act for PD in extracting LA**.*
332. *She stated that she had told **her uncle** about joint instructions and that **her uncle told her to apply solely**.*
333. *She stated that she was not told by the Respondent or anyone from his firm that MWP had uplifted the documents. She also stated that as at 6 January 2009, she was neither aware of SPM's Will nor had she seen it anywhere.'*
[My emphasis]

[203] Counsel for the Applicant Chief Registrar, has then summarised the re-examination of Pranita Devi in relation to when she first instructed the Respondent to make a sole application for a grant of Letters of Administration was, in summary, as follows: ('*Closing Submissions',* 8th January 2018, at [338]):

> *'She was shown Exhibit 3 and asked why she changed from joint instructions to sole and she replied that her uncle told her that since she was no longer staying with her in-laws, she should take out LA solely. **She stated that the Respondent was already acting for MWP but upon her uncle's request, he was willing to act for her**. She also stated that he checked for any existing Will but there was no Will found and so he proceeded with LA.'*
> [My emphasis]

[204] I agree generally with the above as a summary of the evidence of Pranita Devi on this issue.

(v) The evidence of Prem Narayan

[205] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Prem Lata Narayan in relation to when she was first instructed by Maya Wati Prakash was, in summary, as follows: ('*Closing Submissions',* 8th January 2018, at [181]-[184]):

> *'181. She stated she could not recall the exact date but **sometime in December 2008 or early January 2009 she received instructions** from MWP. MWP told her that her son had recently passed away.*
> *182. MWP also told her that she had gone to see the Respondent as he was his solicitor. **She advised MWP that if there was no Will, then LA would have to be applied and property would go to wife and children**. MWP had brought documents in relation to property in Koronivia where she was residing.*
> *183. According to her re-collection, **she believed that both daughters of MWP had accompanied her** when instructions were given.*
> *183. She stated that her daughter, **Rosie had wanted to put a claim on the estate and so she had acted on instructions from Rosie**. She sent a*

letter to the Respondent's office who had advertised the Estate notice in the newspaper.'
[My emphasis]

[206] Counsel for the Applicant Chief Registrar, has then summarised the cross-examination of Prem Lata Narayan (by Counsel for the Respondent) in relation to when she was first instructed by Maya Wati Prakash as follows: ('*Closing Submissions',* 8th January 2018, at [203]-[205] and [217]-[224]):

> *'203.* ***She stated that there were no file notes or emails in file*** *as this was a case where she did not email MWP as MWP would come to her office or make a call. Calls made were stated in the Bill of Costs. Calls mostly were superfluous and would be in terms of things already provided such as next court dates.*
> *204. She also stated that her server crashed in first week of January 2015 and she had no backup. She also did not print out her emails. The backup was on the package she had which had crashed.*
> *205. She stated that she was aware of the Rules for law firms to keep records of file notes and she stated that she was complying with that rule but just did not print emails and the system crashed. She stated that* ***most email correspondence was with Subhasni and not MWP****.*
> *...*
> *217. She stated that* ***the information that she had was that MWP and PD were going to jointly apply for probate*** *and that on Christmas day, PD left the house and that then* ***they were told by the Respondent's firm that the firm would only act for PD****.*
> *218. She stated that* ***in January 2010, Irene [sic] told her that she was going through boxes looking for documents for Subhashni [sic] in Caubati****. She then stated that she believed that Will was found in the Koronivia property as stated in the pleading.*
> *219.* ***She stated that she did not take any notes/statement from Irene in writing of how the Will was found.***
> *220. She stated that she made enquiries with them on how often they searched for documents, where were the boxes, did anyone had access to the boxes and was there anything else with the envelope.* ***She stated that she did not ask to see the envelope*** *but she was told that the envelope had a lot of marks. MWP was out of the country so she spoke to her over telephone.*
> *221. MWP instructed her to start proceedings as she had taken advice from other practitioners as well. At all times MWP used to take second opinion.*
> *222. She was referred to Exh 47 and in particular to page 156 (second last paragraph) and she again mentioned that* ***Irene bought the Will to her office and that she did not meet Subhasni****, She stated that maybe the Will was discovered by Subhasni.*
> *223. She was then referred to page 157 of the same exhibit which stated that* ***Subhasni handed over the Will to her****. She then stated that it has been a long time ago and she cannot remember.*
> *224.* ***She stated that she cannot now remember*** *but if the transcript says Subhasni then she must have come to give her her [sic]. She explained*

that she had mentioned Irene in her earlier evidence as she was the one who used to come to her office all the time.'
[My emphasis]

[207] Counsel for the Respondent *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 11, subpara [xii][g]), have summarised the evidence of Prem Lata Narayan in relation to when she was first instructed by Maya Wati Prakash as follows:

> *'[g]. PLN couldn't say when exactly she first saw MWP but* ***it was late December 2008 or early January 2009****. She only agreed to take MWP on as a client after a few meetings and her first action was to write a letter on 27th January 2009 seeking to register SS's claim of $62,000.00 against SP's Estate.'*
> [My emphasis]

[208] I agree generally with the above as summaries of the evidence given by Prem Narayan on this issue.

(vi) The evidence of Suruj Sharma

[209] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Suruj Sharma in relation to the joint application for a grant of Letters of Administration was, in summary, as follows: ('*Closing Submissions',* 8th January 2018, at [457]-[461]):

> *'457. Both parties stated they wanted to apply under joint names and <u>he told them that if joint application is made, High Court registry may not accept</u>. They did not inform them what their internal family arrangement was and they wanted LA so as to move things along.*
> *458. Instructions taken for joint application on the same day.*
> *459. He was told by Dipka that MWP had taken her documents although he did not see her uplifting those documents. Dipka told him that MWP told her that she was going to see another lawyer arranged by her daughter, Subhasni. By that time, the documents were already uplifted.*
> *460. The instruction of joint application was put away in a dip. Joint instructions put in a manila file folder. Pending file with instruction sheet and put in a tray/dip with pending file. He stated that they would describe it as pending instructions and not an active file.*
> *461. There was no action taken on that pending file.'*
> [My emphasis]

[210] I agree generally with the above as a summary of the evidence of Suruj Sharma on this issue.

[211] I note that **<u>it was never put by Counsel for the Chief Registrar in his cross-</u>**

examination of Suruj Sharma that:

(1) the uplifting of the documents from his firm never took place;

(2) the uplifting of the documents from his firm occurred on another date other than 15th December 2008; **or**

(3) Suruj Sharma gave advice on some unknown date to Maya Wati Prakash that Suruj Sharma would only be acting for Pranita Devi in making an application for a grant of Letters of Administration.

[212] **At the clarification hearing on 25th April 2018, Counsel for the Respondent also noted (apart from the above), that Maya Wati Prakash's signature appears on the instruction sheet of 15th December 2008 next to the words, *'uplifted the following docs'*. There is no other date on the instruction sheet.**

[213] As for what occurred in the first meeting on 15th December 2008, **it was noted by Counsel for the Applicant Chief Registrar at the clarification hearing on 25th April 2018, the discrepancy in the evidence previously given between Subhasni Singh and Maya Wati Prakash**, whereby Subhasni Singh had claimed that the Respondent had suggested a 75/25 split (between Pranita Devi and Maya Wati Prakash) which caused Maya Wati Prakash to seek alternative advice (as suggested by an uncle Virend), compared with the evidence of Maya Wati Prakash who had claimed that the Respondent had suggested a 50/50 split. Counsel for the Applicant Chief Registrar suggested that it was a matter for the Commission to determine.

[214] The oral submissions of Counsel for the Respondent on this issue were:

(1) Maya Wati Prakash appears to have confused the meeting held on 28th March 2009 with that of 15th December 2008;

(2) The evidence of Dipka Mala and Suruj Sharma was that **there was no discussion held on 15th December 2008 as to a percentage of split of the estate** between Pranita Devi and Maya Wati Prakash.

[215] I have also noted that the evidence of **Pranita Devi made no reference to any such discussion** having taken place on 15th December 2008 **as to a percentage of split of the estate.**

[216] Counsel for the Respondent also submitted at the clarification hearing on 25th April

2018, that **Prem Narayan's evidence was that Maya Wati Prakash met her in late December 2008** – which logically followed from Maya Wati Prakash no longer being represented by the Respondent after 15th December 2008. Counsel for the Applicant did not seek to respond to this submission.

[217] **It was also my understating that Counsel for the Applicant Chief Registrar conceded at the clarification hearing on 25th April 2018, that it was never put by him to Suruj Sharma or Dipka Mala that:**

(1) the uplifting of the documents by Maya Wati Prakash from the firm of Patel Sharma Lawyers never took place on 15th December 2008; or

(2) Suruj Sharma gave advice on some unknown date to Maya Wati Prakash that Suruj Sharma would only be acting for Pranita Devi in making an application for a grant of Letters of Administration.

(vii) No evidence called from Irene Lata Prasad, Maya's second daughter

[218] **Although there was mention in the evidence given before this Commission by Maya Wati Prakash, Subhasni Singh and Prem Narayan of the younger daughter, Ireen Lata Prasad, being involved from December 2008 in the issues surrounding her brother's estate, she was not called in the present proceedings.**

[219] Balanced against that, I do note, however, that just as Counsel for the Respondent was commencing his cross-examination of Subhasni Singh on 6th June 2017, it is recorded in the transcript that Ms. Singh said: *"I do remember my 39 year old sister [Ireen] got mini stroke at the moment. It's not very easy for me to remember everything at the moment (crying)."* After a short adjournment, Counsel for the Applicant tendered a medical certificate not for Ireen Lata Prasad but for Carol Sheenal Singh, Maya's granddaughter (who is also the daughter of Subhasni Singh), who was to give evidence in the June 2017 Sittings but, due to illness, the taking of her evidence was delayed until the September 2017 Sittings. **There was, however, no mention by Counsel for the Applicant of any medical problem with Ireen Lata Prasad and/or the tendering of any medical certificate explaining her absence**.

[220] **I also note that, previously, on 6th December 2016, when I mentioned that I was concerned that *"Rosie [Subhasni] has not been sitting in the back of the court I hope"* listening to Maya give her evidence, I was informed by Counsel for the Applicant that the person who had been present in the back of the Commission's hearing room was, in fact, Ireen. Presumably, the strategic decision not to call Ireen was made by Counsel for the Applicant before Ireen may have fallen ill.**

[221] **I further note that during the evidence-in-chief of Subhasni Singh on 5th June 2017**, there was a dispute as to whether Subhasni had seen the receipt for $20,000 from Prem Narayan and Subhasni's evidence was that *"This original was with my sister, in Fiji, she was keeping there"*. **I then asked, *"Is the sister being called?"* to which Counsel for the Applicant simply replied *"No"*. There was no additional mention as to her unavailability due to illness.** I then asked for the name of the sister for the record and Subhasni replied and spelt it out as follows: *"I-R-E-E-N, Lata- L-A-T-A, and her married name Prasad, P-R-A-K-A-S-H"*.

[222] **As noted above, there was mention in the evidence of Maya Wati Prakash, Subhasni Singh and Pranita Devi, of Maya's younger daughter, Ireen Lata Prasad, being involved in the issues concerning Salen's estate. I have noted, in particular, the following:**

(1) It was Pranita Devi's evidence that '*that after final 13 days ritual, Subhasni, **Ireen**, MWP and PD discussed about SPM's properties';*

(2) It was Ireen, who attended with Maya Wati Prakash the meetings with Prem Narayan in 2008-2009;

(3) It was Ireen who attended with Maya Wati Prakash the settlement discussions between Maya Wati Prakash and Pranita Devi at the offices of Patel Sharma Lawyers on 28th March 2009;

(4) It was to Ireen with whom Maya Wati Prakash went to live in mid-2009 when Maya moved to Ireen's home at Caubati;

(5) It was allegedly Ireen who arranged for the "clean up" at Koronivia and the documents being "boxed" and transported to Ireen's home at Caubati;

(6) It was in Ireen's home at Caubati that Salen's Will was found by Subhasni Singh on 23rd January 2010;

(7) It was Ireen who wrote an undated letter to the Chief Registrar received on 23rd May 2012 seeking a hearing date in BHC81 of 2009 (see Doc.9, p. 10, Exhibit 44) between '*Maya Wati Prakash vs. Pranita Devi Maharaj';*

(8) According to the evidence in the High Court proceedings between Maya Wati Prakash and Pranita Devi, both Ireen and Subhasni were each to receive 25% of Maya's estate pursuant to Maya's will (Doc.21, p. 49, Exhibit 47, p.163). If Salen left his entire estate to his mother, then obviously this increased the value of Maya's estate;

(9) I have also noted that Ireen's husband, Raknesh Prasad, also had an interest in the Salen's estate as Maya Wati Prakash made clear in her affidavit sworn on 5th March 2009 in support of her summons (High Court at Suva, Civil Action No. 87 of 2009) to have the grant of Letters of Administration recalled and a fresh grant issued to Maya Wati Prakash and Pranita Devi, when she stated at para [25]: *'The Deceased was the registered owner of the motor vehicle taxi LT 3579 (taxi). The taxi was* ***always in the possession of my son-in-law Raknesh Prasad*** *since its purchase*.' [My emphasis] An allegation was then made that the taxi had been re-possessed by a bailiff on behalf of Pranita Devi. The claim was also made in the letter from Prem Narayan sent on behalf of Subhasni Singh to Patel Sharma Lawyers dated 26th February 2009 (a copy of which was annexed to the affidavit of Maya Wati Prakash as "MWP9") stating: '*We are informed by our client that your client had taken possession of the motor vehicle registration number LT 3579 from Ratnesh [sic] Prasad who was the Deceased's brother-in-law …'* (See Doc.131, Exhibit 44, pp. 134 and 149.) I also note that in the evidence given by Carol Sheenal Singh in the present proceedings, she stated that her uncle, Raknesh Prasad, had probably been printed Exhibit 8. This was also confirmed by Counsel for the Applicant Chief Registrar in his summary of her evidence ('*Closing Submissions',* 8th January 2018, at para [247]);

(10) In her statement of claim dated 6th March 2009 in Civil Action No. 81 of 2009 prepared by Prem Narayan, it was stated at para [9] that *'… the Plaintiff commenced part payments of the purchase price'* on the Koronivia property *'to … the law firm GP Lala & Associates trust account through her daughter and agent'.* It was also stated at para 11 that *'****The Plaintiff's daughter made payments*** *towards the purchase price for the Plaintiff as the Plaintiff and her husband had decided to have* ***her [the daughter] and her husband to settle on the property***'. [My emphasis] When this was put to Subhasni Singh in cross-examination on 6th June 2017 that

she was the daughter referred to in the statement of claim, Subhasni claimed total ignorance of having ever seen the statement of claim and had never discussed it with Prem Narayan. Counsel for the Respondent then put to Subhasni that Maya in her evidence *"claimed total ignorance about the claim and said that she left it to the daughter"* and *"... it seems now Ms. Singh that neither you are aware, or your mother was aware the contents of the claim*." Counsel for the Applicant then objected to this cross-examination of Subhasni Singh noting Subhasni's denials and also that Maya was never asked in cross-examination as to which daughter to whom she had been referring in the claim. **The transcript then records that I then asked Counsel for the Applicant** (**after he raised his objection) whether Ireen was going to be called and Counsel for the Applicant simply responded *"No"* with no further explanation. I then responded: *"Matter for you, Mr Chand"*. I do note, however, that it is then recorded in the transcript that Subhasni Singh then volunteered, *"she's [Irene] got a minor stroke now, she can't talk. She can't walk";***

(11) The evidence of Prem Narayan (as summarised by Counsel for the Applicant in his '*Closing Submissions',* 8th January 2018), was, at [183]) that *'**she believed that both daughters** of MWP had accompanied her when instructions were given'* and, at [197], *'She stated that **Irene [sic] used to come to her office** to make payments but she understood from MWP that Subhasni used to pay.'*

[223] **In my view, Ireen needed to be called. Applying the test set out in *Jones v Dunkel,* subject to the conditions that I have set out above, in relation to the absence of Ireen Lata Prasad (formerly known as Prakash), I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* are satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Ireen would be expected to be called by the Applicant Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, Ireen's evidence **would be able to elucidate in relation to how and when the instructions were given to Prem Narayan**;

(iii) the missing witness' *'absence is unexplained'* – Ireen's absence from the proceedings before this Commission is unexplained;

(2) The inferences to then be drawn can be -

(i) *'the evidence of the absent witness would not assist the case of that party'; and*
(ii) *'that the trier of fact may draw an inference unfavourable to that party with greater confidence';*
(iii) *'But Jones v Dunkel* <u>*does not enable the trier of fact to infer that the evidence*</u> *of the absent witness* <u>*would have been positively adverse to that party*</u>*';*
(3) I have noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

[224] **Having considered the above, I can only conclude that <u>Ireen Lata Prasad</u> (formerly known as Prakash) was not called by Counsel for the Applicant Chief Registrar as Ireen's evidence <u>would not have assisted the case of the Applicant Chief Registrar</u> in relation to how and when the instructions were given to Prem Narayan.**

(viii) No evidence called from 'cousin brother Virend'

[225] **I note that while there was mention by Subhasni Singh in her evidence of '*cousin brother Virend'* advising Maya to instruct another lawyer (other than Patel Sharma Lawyers) on the issue of the Letters of Administration, '*cousin brother Virend'* <u>was not called in the present proceedings before this Commission</u>.**

[226] To be clear, Counsel for the Applicant Chief Registrar summarised in his closing submissions that I have cited above, in relation to the <u>evidence-in-chief of Subhasni Singh</u> on the issue of the Letters of Administration ('*Closing Submissions',* 8th January 2018, at [128]), *'**<u>That MWP was not happy</u>** that she was **<u>getting only 25%</u>** and **<u>she was advised by her cousin brother Viren</u> [sic] to hire another solicitor**.'* By contrast, I have also noted above that Maya Wati Prakash's evidence-in-chief on the issue of the Letters of Administration, was that on 15th December 2008 in relation to the conference with Mr. Suruj Sharma (as Counsel for the Applicant Chief Registrar has summarised in his '*Closing Submissions',* 8th January 2018, at [23]): '*<u>he [Suruj Sharma] informed her that she would receive 50% of SPM's estate</u> and she was content with this arrangement'.* **I have further noted above, that the**

'*cousin brother Virend'* of Maya Wati Prakash was not called by Counsel for the Applicant Chief Registrar to verify who was correct in their recollection, either Maya Wati Prakash, or Subhasni Singh, or neither of them.

[227] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of '<u>*cousin brother Virend*</u>', a relative of Maya Wati Prakash, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* <u>not</u> satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Virend <u>would be expected to be called</u> (if his evidence was relevant) <u>by the Applicant Chief Registrar</u> rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, **Virend's evidence <u>would NOT, in my view, elucidate</u> in relation to how and when the instructions were given to Prem Narayan**, other than, perhaps, some hearsay evidence that may have been conveyed to him either by Maya Wati Prakash. As the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter. <u>It is not enough to conclude that a witness may have knowledge</u>**';*

(iii) the missing witness' *'absence is unexplained'* – <u>Virend's absence</u> from the proceedings before this Commission <u>is unexplained</u>, however, his evidence on this particular issue <u>would probably be irrelevant</u>;

(2) Accordingly, no inference will be drawn in relation to the absence of evidence from '<u>*cousin brother Virend*</u>' as to how and when the instructions were given to Prem Narayan;

(3) I have also noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

(ix) No evidence called from Jayawant Pratap, the uncle of Pranita Devi

[228] **I note that while there was mention by Pranita Devi in her evidence of her uncle, Jayawant Pratap, <u>he was not called in the present proceedings before</u>**

this Commission.

[229] **I note that the mention in the evidence of Pranita Devi as to the involvement of her uncle, Jayawant Pratap, as follows:**

(1) As Counsel for the Applicant Chief Registrar has noted ('*Closing Submissions',* 8th January 2018, at [268]-[269], [273]. [330]-[331]), in her, Pranita Devi claimed –

(i) '*after her husband's death,* ***she went to the Respondent's office along with her uncle Jaywant [sic] Pratap*** *but she could not recall the exact date to have LA obtained as SPM owned many things'*

(ii) When the Respondent had said '***that he was acting for MWP … her uncle*** *requested the Respondent that since he was related why didn't he act for PD and the Respondent agreed';*

(iii) *'she could not recall the number of times she paid a visit to the Respondent's law firm before LA was granted but went a number of times with her uncle Jaywant [sic]';*

(iv) *'on 6th January 2009, she went back to the Respondent's law firm* ***accompanied by her uncle****. She stated that* ***it was her uncle, Jaywant [sic] Pratap's decision to visit the Respondent's law firm and discuss about the probate matters*** *as her in-laws would not give her any share and her uncle thought that Subhasni is educated and she might take steps which might lead to PD not getting anything';*

(v) '*she had told* ***her uncle*** *about joint instructions and that her uncle told her to apply solely';*

(vi) *'she was not told by the Respondent or anyone from his firm that MWP had uplifted the documents … . as at 6 January 2009, she was neither aware of SPM's Will nor had she seen it anywhere.'*

[230] Counsel for the Applicant Chief Registrar, has then summarised the evidence in re-examination of Pranita Devi in relation to when she first instructed the Respondent to make a sole application for a grant of Letters of Administration was, in summary, as follows: ('*Closing Submissions',* 8th January 2018, at [338]):

> *'She was shown Exhibit 3 and asked why she changed from joint instructions to sole and she replied that her uncle told her that since she was no longer staying with her in-laws, she should take out LA solely.* ***She stated that the Respondent was already acting for MWP but upon her uncle's request, he was willing to act for her****. She also stated that he checked for any existing Will but there was no Will found and so he proceeded with LA.'*

[My emphasis]

[231] Applying the rule in *Jones v Dunkel* subject to the conditions that I have set out above, **I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* <u>are satisfied</u> -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Jayawant Pratap, the uncle of Pranita Devi, <u>would be expected to be called by the Applicant Chief Registrar</u> rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, Jayawant Pratap's evidence <u>would elucidate</u> in relation to how and when the instructions were given to the Respondent on 6th January 2009;

(iii) the missing witness' *'absence is unexplained'* – Jayawant Pratap's <u>absence</u> from the proceedings before this Commission <u>is unexplained</u>;

(2) The inferences to then be drawn can be -

(i) *'the evidence of the absent witness would not assist the case of that party'; and*

(ii) *'that the trier of fact may draw an inference unfavourable to that party with greater confidence';*

(iii) *'But Jones v Dunkel <u>does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party</u>';*

(3) I have noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

[232] **I can only conclude, therefore, that in relation to the proceedings before this Commission, <u>Jayawant Pratap, the uncle of Pranita Devi, was not called as his evidence would not have assisted the case of the Applicant Chief Registrar</u> in relation to how and when the instructions were given on 6th January 2009 to Patel Sharma Lawyers.**

(x) Analysis and findings on evidence

[233] **If Patel Sharma Lawyers continued to be instructed as from 15th December 2008 and the instructions had not also been withdrawn by Maya on that same date (as claimed by Maya in her evidence), then, in my view, <u>it makes no sense</u>**

(even noting that it was around the commencement of the legal vacation) **that Patel Sharma Lawyers would do no work on the joint application when the parties had stressed the urgency of the matter and later simply have published a notice in the *Fiji Sun* on 6th January 2009 that they were acting solely for Pranita Devi.**

[234] **Instead, I find that it makes logical sense, as per the evidence of Dipka Mala and Suruj Sharma, that the file was closed as from 15th December 2008 as the joint instructions had been withdrawn unilaterally by Maya and then, on 6th January 2009, when Pranita Devi attended the law firm of Patel Sharma Lawyers, she gave new instructions authorising the law firm to prepare an application for a grant of Letters of Administration under her sole name** (see **Exhibit 3**).

[235] **I find the evidence of Maya Wati Prakash on this issue to be unreliable, noting:**

(1) Apart from noting that Exhibit 47 contains a copy of the same advertisement which was published in the *Fiji Sun* on 6th January 2009 (not the *Fiji Times*), **it was incorrect of Maya Wati Prakash to claim in her evidence that the advertisement '*stated that all the property would belong to PD'***. Instead, a reading of the advertisement makes clear that it was a notice that an application '*that after expiration of twenty one days (21) an application will be made to the High Court of Fiji at Suva for grant of Letters of Administration in the Estate of SALEN PRAKASH MAHARAJ ... Intestate who died on the 24th of November, 2008'* and *'creditors and other persons having claims'* were to send particulars to Patel Sharma Lawyers as Solicitors for the Administratrix (Exhibit 20);

(2) The evidence of Maya Wati Prakash was that on 15th December 2008 in relation to the conference with Mr. Sharma (as Counsel for the Applicant Chief Registrar has noted): '*he informed her that she would receive 50% of SPM's estate and she was content with this arrangement'*. By way of contrast, the evidence of Subhasni Singh (as even Counsel for the Applicant Chief Registrar has noted), was: '*her mum discussed with her as to what had transpired inside [Mr. Sharma's office] and told her that ... the Estate of SPM would be divided with 75% shares going to Pranita Devi (PD) and 25% to MWP',* and *'That MWP was not happy that she was getting only 25% and* ***she was advised by her cousin brother Viren [sic] to hire another solicitor'.*** I note that the '*cousin brother Virend'* of Maya Wati Prakash was not

called by Counsel for the Applicant Chief Registrar to verify who was correct in their recollection, either Maya Wati Prakash, Subhasni Singh, or neither of them. **So whom is Counsel for the Applicant Chief Registrar asking me to believe? I am none the wiser. Indeed, when I asked this at the clarification hearing on 25th April 2018, the oral submission of Counsel for the Applicant Chief Registrar was that it is a matter for the Commission to decide;**

(3) According to the summary as set out in the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at [24]), of the evidence of Maya Wati Prakash was that *'She went back to the Respondent's firm to enquire about LA that was taken out under PD's name'*. **That would put the date after 16th February 2009 when the Letters of Administration were granted.** Further, according to the summary of the evidence of Maya Wati Prakash as set out in the written submissions of Counsel for the Applicant Chief Registrar, (at [24]-[25]), '*The Respondent informed her that PD would get the property because she was the widow of SPM. She then asked the Respondent to take her case. Respondent informed her that he could only take PD's case.'* **How does this evidence reconcile with the conference on 15th December 2008 where it is documented that Maya Wati Prakash signed joint instructions to apply for a joint grant of Letters of Administration, unless, of course, Maya Wati Prakash had also withdrawn instructions later that day on 15th December 2008?** It also becomes more bizarre when one considers Pranita Devi's evidence wherein she alleges that the Respondent said the exact opposite to Pranita on 6th January 2009 when the Respondent allegedly advised Pranita that he was only acting for Maya Wati Prakash;

(4) I further note that on the complaint form completed by Maya Wati Prakash lodged with the Legal Practitioners Unit on 11th March 2010 [Exhibit 8], where it asks, *'Date of* ***last contact with practitioner****/s/law firm'*, there has been inserted a handwritten answer: *'****December – 2007****'*. [My emphasis] Whilst I note that in her evidence before the Commission, Maya Wati Prakash confirmed that she only signed the form and as to who wrote the first three pages, she advised *"It's Rosie I'm sure"*, that is, her daughter, Subhasni Singh (called "Rosie"). I also note, as Counsel for the Applicant Chief Registrar set out in his written submissions summarising the evidence of Carol Sheenal Singh, Maya's granddaughter and the daughter of Subhasni Singh, ('*Closing Submissions',* 8th January 2018, at para [243]) (to which I agree): *'She was shown Exhibit 8 and in particular page 31 and*

she confirmed that the contents were told by her grandmother and she typed it. *She stated that she did not add on anything.'* [My emphasis] I can only note that whoever wrote *'**December – 2007**',* even if it was an error and should have been December 2008, **the date fits closer to the evidence of Dipka Mala than when Maya claimed in her evidence** before the Commission (as I have noted above) that *'**She went back to the Respondent's firm to enquire about LA that was taken out under PD's name'***, that would put the date after 16th February 2009 when the Letters of Administration were granted.

[236] **I find the evidence of Subhasni Singh on this issue to be unreliable,** noting that the evidence-in-chief of Subhasni Singh was (as summarised by Counsel for the Applicant in his written submissions at [130]), '*That **in 2009, MWP instructed Ms. Prem Narayan** and that she did not accompany her mum to Prem Narayan's office'.* **Under cross-examination, however, she said that Prem Narayan was hired in late December 2008**.

[237] **I find the evidence of Prem Narayan to be unreliable, noting:**

(1) Even though Prem Narayan is both a practising lawyer and operating her own firm, **her evidence was, surprisingly, based not upon any documentation, but her memory. Indeed, Prem Narayan admitted in cross-examination that there were no file notes or emails her in file**;

(2) Indeed, even Counsel for the Applicant Chief Registrar noted in his written submissions of Prem Narayan's evidence, that '*PLN couldn't say when exactly she first saw MWP but **it was late December 2008 or early January 2009';***

(3) Prem Narayan's recollection was (as, summarised by Counsel for the Applicant Chief Registrar), that '***the information that she had was that MWP and PD were going to jointly apply for probate** and that on Christmas day, PD left the house and that then **they were told by the Respondent's firm that the firm would only act for PD'***. This raises questions as to the accuracy of her instructions –

(i) How could it be said that Maya Wati Prakash and Pranita Devi '***were going to jointly apply for probate'*** when there was no will? **This does not make any sense.** Surely, for Ms. Narayan, this should have been a "red flag" warning (so to speak) to tread carefully and that perhaps "the information" that she was receiving (by whom we were not told, but presumably Maya Wati Prakash and/or Subhasni Singh and perhaps Ireen Lata Prasad) may have been suspect;

(ii) "The information" should also have raised another "red flag" for Ms. Narayan when she claimed '*that then* ***they were told by the Respondent's firm that the firm would only act for PD'.*** Surely, if the parties had signed joint instructions, why would the Respondent's firm now allegedly '***only act for PD'?*** Did Ms. Narayan ever ask "the information" as to **what occurred after '*MWP and PD were going to jointly apply for probate'* on 15th December and when was the date when** "the information" went and saw Patel Sharma Lawyers and were advised '***that the firm would only act for PD'?***

(4) Prem Narayan claimed that most of her contact in this matter was with Subhasni Singh – even though Subhasni's evidence was that '*she did not accompany her mum to Prem Narayan's office';*

(5) **Prem Narayan's eviden**ce (as noted by Counsel for the Applicant Chief Registrar, in his '*Closing Submissions',* 8th January 2018, at [218]), was that ***'in January 2010, Irene [sic] told her that she was going through boxes looking for documents for Subhashni [sic] in Caubati'*** **when Ireen found the will**. Prem Narayan then had to be reminded of Subhasni Singh's evidence given previously before the High Court on 29th October 2012 (doc.21, p.44, Exhibit 47, p.157) wherein Subhasni stated that after she found the Will, ***'I handed it [the will] over to her' [Prem Narayan].*** As Counsel for the Chief Registrar has noted, in his '*Closing Submissions',* 8th January 2018, at [233], Prem Narayan ***'****then stated that it has been a long time ago and she cannot remember'.* [My emphasis]

[238] **I find the evidence of Pranita Devi to be unreliable, noting:**

(1) Pranita Devi claimed '***that the Respondent told them that he was acting for MWP'*** and then *'her uncle requested the Respondent that since he was related why didn't he act for PD and the Respondent agreed'.* As with the claim of Maya Wati Prakash, that the Respondent allegedly told Maya Wati Prakash that the Respondent was acting for Pranita Devi, we now had Pranita Devi claiming that the Respondent told Pranita that the Respondent was acting for Maya Wati Prakash. Again, **it just does not make any sense**. Surely, if Pranita Devi and Maya Wati Prakash had signed joint instructions on 15th December 2008, why would the Respondent now allegedly be telling Pranita Devi on 6th January 2009 that '***he was acting for MWP'*** solely?

(2) Pranita Devi's evidence that when her uncle then reminded the Respondent that *"he was related"* such that the Respondent immediately agreed to cease acting for

Maya Wati Prakash and start acting for Pranita Devi, I find to be preposterous in the extreme. **Further, I note that Counsel for the Applicant Chief Registrar never put to either Dipka Mala or Suruj Sharma that this is what allegedly occurred;**

(3) I further note that while there was mention by Pranita Devi of her uncle, Jayawant Pratap, being present at the conference on 6th January 2009 when the alleged (what I can only term 'bizarre') conversation took place between the uncle and the Respondent (wherein the Respondent was reminded that "he was family" and so the Respondent immediately ceased to act for Maya Wati Prakash and agreed to act solely for Pranita Devi), **Jayawant Pratap was not called in the present proceedings before this Commission**. **I can only conclude, therefore, (as per my analysis above) that Jayawant Pratap was not called as his evidence would not have supported the bizarre claim of Pranita Devi nor assisted the case of the Applicant Chief Registrar**.

[239] **Clearly, at some stage, the documents must have been uplifted by Maya Wati Prakash from Patel Sharma Lawyers, however, in their evidence neither Maya Wati Prakash nor Subhasni Singh gave another date (as an alternative date to 15th December 2008) when the documents were uplifted**. **In addition, it was never put by Counsel for the Applicant Chief Registrar to either Dipka Mala and/or Suruj Sharma that the uplifting of the documents never occurred or occurred on another date other than 15th December 2008**.

(xi) Overall findings on the joint application for Letters of Administration and the alleged withdrawal of instructions

[240] **My findings as to whether the joint application for Letters of Administration in relation to the Estate of Salen Prakash Maharaj was withdrawn by Maya on 15th December 2008, or, alternatively, that the Respondent (sometime in January 2009) allegedly advised Maya Wati Prakash that the Respondent would only represent the widow, Pranita Devi, are:**

(1) Ireen Lata Prasad was not called in evidence, so I can only presume (for the reasons outlined above) that her evidence would not have assisted the case of the Applicant Chief Registrar;

(2) Although a person referred to as "Cousin brother Virend" was not called in evidence, I have come to the view (for the reasons outlined above) that his

evidence would not elucidate as to how and when instructions were given to Prem Narayan and therefore no inference will be drawn as to the absence of his evidence;

(3) Jayawant Pratap, an uncle of Pranita Devi, was not called in evidence, so I can only presume (for the reasons outlined above) that his evidence would not have assisted the case of the Applicant Chief Registrar;

(4) The evidence of Maya Wati Prakash as to how and when the initial joint instructions to Patel Sharma Lawyers for the preparation of a joint application for an application for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj were withdrawn and as to how, when and where, Prem Narayan was instructed, is unreliable;

(4) The evidence of Subhasni Singh as to how and when the initial joint instructions to Patel Sharma Lawyers for the preparation of a joint application for an application for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj were withdrawn and as to how, when and where, Prem Narayan was instructed, is unreliable;

(5) The evidence of Prem Narayan as to how, when and where, she was instructed by to act on behalf of Maya Wati Prakash in relation to the Estate of Salen Prakash Maharaj, is unreliable;

(6) The evidence of Pranita Devi as to how, when and where, she instructed the Respondent to act solely on behalf in relation to obtaining a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj, is unreliable;

(7) I am able to make findings as to how, when and where, the instructions for a joint application for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj were withdrawn and a new application on behalf of the widow was made, based upon the evidence of Dipka Mala who I have found to be the most reliable witness in these proceedings, as well as the evidence, in part, of Mr. Suruj Sharma (noting that he did not meet Maya Wati Prakash on the second occasion when she returned in the afternoon of 15th December 2008 and only heard of this through Dipka Mala) as follows -

(i) On the afternoon of 15th December 2008, Maya Wati Prakash attended the offices of Patel Sharma Lawyers for the second occasion on that day and spoke with Dipka Mala;

(ii) In attendance with Maya on this second occasion on 15th December 2008, was a woman not recognised by Dipka Mala, hence it could not have been Subhasni Singh and may well have been Maya's second daughter Ireen Lata Prasad, however, I cannot make a positive finding without Dipka Mala having been shown a photograph of Ireen Lata Prasad and/or Ireen Lata Prasad have been called to give evidence, neither of which has occurred;

(iii) Maya Wati Prakash advised Dipka Mala that her daughter had seen another solicitor and Maya Wati Prakash wanted to uplift copies of her documents that she had left behind earlier in the morning;

(iv) I accept that as it was not made clear to Dipka Mala that only Maya Wati Prakash was instructing the new solicitor and not jointly with Pranita Devi and because Maya Wati Prakash and Pranita Devi had attended together earlier that day and were also residing in the same house, Dipka Mala released all the documents to Maya Wati Prakash.

(13) The sole application for Letters of Administration on behalf of the widow

[241] I now turn to the written submission of Counsel for the Applicant Chief Registrar in his reply in relation to Count 1 ('*Applicant's Submissions in reply'*, 20th February 2018, page 2, at para [8]) that: *The evidence of MWP is clear and has not been refuted on the issue that she was informed by the Respondent that PD would get the property because she was the widow of SPM and that* ***she was further informed by the Respondent that he would only represent PD****. Hence, she hired the services of Ms. Narayan.'*

[242] I have found above that the evidence of Maya Wati Prakash in relation to what occurred on the 15th December 2008 is unreliable and have preferred instead the evidence of Dipka Mala. It is clear that on 15th December 2008, the firm of Patel Sharma Lawyers took **joint** instructions from Pranita Devi and Maya Wati Prakash to apply for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj. I accept that later that same day, Maya Wati Prakash returned to the offices of Patel Sharma Lawyers, uplifted the documents and proceeded elsewhere. Accordingly, Dipka Mala, presuming that Maya Wati Prakash and Pranita Devi were still acting together, closed the firm's pending file.

[243] **Why then did the Respondent then make a sole application on behalf of Pranita Devi, as the widow, to be granted Letters of Administration, which I note was granted on 16th February 2009, in relation to the Estate of Salen Prakash Maharaj (Exhibit 5)?**

(i) The evidence of Maya Wati Prakash

[244] I have set out above, when discussing the joint application and the circumstances of the withdrawal of those instructions unilaterally by Maya Wati Prakash on 15th December 2008, that Maya's evidence was that she did not return and withdraw instructions on 15th December 2008 (I have found, however, that she did) and it was only after she had heard that an advertisement had been published in the *Fiji Times* (Exhibit 47, however, contains a copy of an advertisement was published in the *Fiji Sun*) that Letters of Administration were to be applied in favour of Pranita Devi that she returned to the offices of Patel Sharma Lawyers and was advised that Suruj Sharma was acting solely for Pranita Devi, following which she instructed another lawyer.

[245] I also note that the above evidence of Maya is in contrast with her complaint form lodged on 11th March 2010 with the Legal Practitioners Unit within the Office of the Chief Registrar signed and dated on that same date by Maya Wati Prakash (Exhibit 8). In completing the form, when asked '**Date of last contact with practitioner**/s/**Law Firm'**, Maya Wati Prakash answered ***'December 2007'***. Even if this was an error and was meant to be December 2008 (instead of December 2007), the date of December 2008 was **BEFORE not after** the advertisement had been published in the *Fiji Sun* (Exhibit 47) on **6th January 2009**.

(ii) The evidence of Subhasni Singh

[246] As noted above, when discussing the joint instructions given on 15th December 2008, according to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Subhasni Singh on the issue of the Letters of Administration ('*Closing Submissions',* 8th January 2018, at [132]) was: '*That in 2009, MWP instructed Ms. Prem Narayan and that she [Subhasni] did not accompany her mum to Prem Narayan's office.'*

[247] I agree generally with the above as a summary of the evidence of Subhasni Singh on this issue and also noting that her evidence-in-chief was that *"my sister [Ireen] must have accompanied her"*. It is also in direct contrast with the evidence of her mother, Maya Wati Prakash, who, according to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018 at [131]), stated: *'According to her [Maya's] re-collection, she believed that* ***both daughters*** *of MWP had* ***accompanied her*** *when instructions were given [to Prem Narayan].'* [My emphasis]

(iii) The evidence of Pranita Devi

[248] According to the written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions',* 31st January 2018, page 13, subparas [xii]-[xiv]), the evidence of Pranita Devi in relation to the LA was:

> '*[xii]. She said that she wanted to share the Estate with MWP but PLN objected and there was no settlement between the parties.*
> *[xiii]. She admitted she gave instructions to PSA [Patel Sharma Associates] to take out Letters of Administration. She became the Administratrix of the Estate.*
> *[xiv]. The monies owned to the Bank were paid off and with the balance she purchased two new mini vans in her own name.'*

[249] I agree generally with the above as a summary of the evidence of Pranita Devi on this issue.

(iv) The evidence of Dipka Mala

[250] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Dipka Mala in relation to the sole application of a grant of Letters of Administration was, in summary, as follows: ('*Closing Submissions',* 8th January 2018, at [422]-[426]):

> *'422. On 6th of January 2009, PD came to the office with her uncle, Jaywant [sic] Pratap and advised them that she wanted to proceed with the LA application under her name only.*
> *423. Respondent was present in the office on that day.*
> *424. PD informed them that she did not have any problem with MWP but wanted to apply LA as she was entitled under law.*
> *425.* ***She stated that Respondent had advised PD that in the case will is found then LA would be revoked.***
> *426. She stated that she did not take any notes.'*
> [My emphasis]

[251] I agree generally with the above as a summary of the evidence of Dipka Mala on

this issue. **I also note that Dipka Mala was asked no questions in cross-examination by Counsel for the Applicant in relation to the sole application made by Patel Sharma Lawyers on behalf of Pranita Devi for a grant of Letters of Administration of the Estate of Salen Prakash Maharaj.**

(v) The evidence of Suruj Sharma

[252] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Suruj Sharma in relation to the sole application of a grant of Letters of Administration was, in summary, as follows: ('*Closing Submissions',* 8th January 2018, at [462]-[474]):

> *'462. On 6 January 2009, PD and her uncle Jaywant [sic] Pratap visit the firm. They were both aware of the 15 December 2008 meeting although Mr. Jaywant [sic] Pratap was not there on 15 December 2008. My advice was that in the absence of a signed Will, LA was the option. Both were aware of that. He made it known to them that MWP had uplifted documents. That they were of the opinion that adviced [sic] given on 15 December 2008 did not change.*
>
> *463. He stated that he was not in a situation of conflict because advice given to search for signed Will. On 24 November 2008 and 9 December 2008, they were informed about unsigned Will. Attempt made to have it signed. On 12 December 2008, once again the person entitled to grant of LA was advised to look for signed Will.* ***He stated that he was acting for the estate of SPM and in law PD was entitled to estate****. As for joint application, he stated that it was not his advice but their discussion.*
>
> *464. He also stated that even at joint instruction stage,* ***client was still estate of SPM*** *and only difference that legal applicant would be PD and in law it did not alter the entitlement. He stated that no conflict as parties acknowledged that the person entitled was PD and MWP also acknowledges that her right does not kick in until a signed Will is found.*
>
> *465. That on 15 December 2008, parties accepted that no executed Will as they could not locate the Will under which MWP is the sole beneficiary.*
>
> *466. He stated that as at 15 December 2008, as per Dipka's information, he was aware that MWP instructed another lawyer.*
>
> *467.* ***He stated that when PD came with sole instructions****, he did not refer her to a third lawyer because they were acting for the Estate of SPM and the nature of rights and entitlement did not change irrespective where PD went, there would be a LA in any way.* ***As a matter of law, the entitlement remained with PD.***
>
> *468. He stated that to tackle the ethical issue of his firm preparing the Will and then taking out LA, he stated that there is a need to look at core facts and not in isolation and that only one copy was made and taken away. From 24 November 2008 to 6 January 2009, there was no signed Will and advice given to the person entitled in law was PD.* ***Client which is the Estate of SPM remained the same and MWP was separately represented****.*
>
> *469. He stated that on 6 January 2009, he had nothing to expect (caveat etc) although as a matter of law he knew that caveat could be lodged.*

470. That when MWp [sic] came on 15 December and uplifted documents, she wasn't the client but nominated as the joint application. This situation remained until 6 January 2009.

471. That MWP was represented by PN and if Will was found, caveat could have been lodged.

472. That on 6 February 2009, LA was granted and advertisement lodged on 6 January 2009. Claim by PN on behalf of Subhasni was received although Subhasni never discussed about her claim when she first came to meet.

473. He stated that he did not act for any parties in High Court Action No. 81/2009.

*474. **That his firm's engagement ended after LA granted** and they would have done some letters for the Bank as is norm and that she paid $750. The file was with them until 28 March 2009 and released later.'*
[My emphasis]

[253] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at [485]-[486]), the evidence of Suruj Sharma in <u>cross-examination</u> in relation to the sole application of a grant of Letters of Administration was:

'485. That he acted for PD in extracting LA when Will was previously made by the firm due to the factual background that MWP and Subhasni given a computer printout of Will and to look for signed Will. MWP and PD were aware of unsigned Will.

486. He stated that he did not decline to act for PD as he did not see any conflict and he did not feel he had any confidential information from MWP.'

[254] According to the written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, pp. 15-16, subparas [xv]-[xvii]), the evidence of Suruj Sharma in relation to the sole application of a grant of Letters of Administration was:

'[xv]. The Practitioner confirmed that his Firm was initially jointly instructed by MWP and PD to take out Letters of Administration but MWP then withdrew her instructions and had sought legal advice elsewhere.

*[xvi]. On the issue of conflict **the Practitioner did not see any conflict of interest as the signed Will was not found at the time his Firm was instructed to take out Letters of Administration**. The Practitioner confirmed that both MWP and PD wanted to urgently administer the Estate of SP in December 2008.*

*[xvii]. <u>The Practitioner had also previously taken steps to protect MWP by lodging a caveat against the Koronivia 9property [sic] on behalf of MWP</u>. **At no stage from the time of SP's death to the time the High Court revoked the Grant of Letters of Administration did PD attempt to remove the caveat or evict MWP**. MWP's main concern was the home in Koronivia. <u>MWP did not suffer any</u>*

detriment or prejudice at all as she was never evicted from her house and eventually she sold this house. Her right or title to the Koronivia property were never challenged by PD.'
[My emphasis]

[255] I agree generally with the above as summaries of the evidence of Suruj Sharma on this issue.

[256] **I note that Counsel for the Applicant never put to Suruj Sharma in cross-examination the evidence given by Pranita Devi (as summarised by Counsel for the Applicant set out above), that is:**

(1) *'On 6th January 2009, her uncle asked Respondent if LA could be extracted under PD's name and the Respondent stated that he was acting for MWP. She stated that Mr. Sharma agreed to withdraw from MWP and act for PD in extracting LA'* – as I have already discussed above, apart from Maya saying that the Respondent told Maya that he was acting for Pranita and, by contrast, Pranita saying that the Respondent told her that he was acting for Maya and then changed his mind once he was reminded by Pranita's uncle that the Respondent "was family", I have found this aspect of Pranita's evidence to be a preposterous allegation and contrary to the reliable evidence of both Dipka Mala and Suruj Sharma that on 15th December 2008 Maya uplifted all of the documents;

(2) *'She stated that she was not told by the Respondent or anyone from his firm that MWP had uplifted the documents'* – apart from this not being put to either Dipka Mala and/or Suruj Sharma in cross-examination, Dipka Mala was under the misunderstanding (as I have already discussed above) that when Maya withdrew the documents on 15th December 2008 it was on behalf of both Maya and Pranita as Dipka Mala's evidence was that earlier that day the joint conference "*was a cordial meeting between the parties, … they gave the instructions, nobody had objections to each other";*

(3) *'She also stated that as at 6 January 2009, she was neither aware of SPM's Will nor had she seen it anywhere'* – this is contrary to the evidence of both Dipka Mala and Suruj Sharma that on 15th December 2008, Pranita Devi was shown a computer print out of the unsigned Will.

(vi) No evidence called from Jayawant Pratap, the uncle of Pranita Devi

[257] **I note that there was mention in the evidence of Pranita Devi, Dipka Mala and Suruj Sharma that Jayawant Pratap, Pranita Devi's uncle, was in attendance at the meeting in the offices at Patel Sharma Lawyers on 6th January 2009. He was, however, not called in the present proceedings before this Commission.**

[258] I have previously set out above in detail the evidence of Pranita Devi as to the involvement of her uncle, Jayawant Pratap, in being the instigator of the sole application for a grant of Letters of Administration and, in particular, his alleged role at the meeting on 6th January 2009, as Counsel for the Applicant Chief Registrar has summarised in his '*Closing Submissions'* of 8th January 2018, at [268]-[269], [273], [330]-[331] and [338].

[259] Applying the rule in *Jones v Dunkel* subject to the conditions that I have set out above in relation to the absence of Jayawant Pratap, **I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* are satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Jayawant Pratap, the uncle of Pranita Devi, would be expected to be called by the Applicant Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, Jayawant Pratap's evidence would elucidate in relation to how and when the instructions were given to the Respondent on 6th January 2009;

(iii) the missing witness' *'absence is unexplained'* – Jayawant Pratap's absence from the proceedings before this Commission is unexplained;

(2) The inferences to then be drawn can be -

(i) *'the evidence of the absent witness would not assist the case of that party'; and*

(ii) *'that the trier of fact may draw an inference unfavourable to that party with greater confidence';*

(iii) *'But Jones v Dunkel does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party';*

(3) I have noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

[260] **I can only conclude, therefore, that in relation to the proceedings before this Commission, Jayawant Pratap, the uncle of Pranita Devi, was not called as his evidence would not have assisted the case of the Applicant Chief Registrar in relation to the sole application made by Patel Sharma Lawyers on behalf of Pranita Devi for a grant of Letters of Administration in the Estate of Salen Prakash Maharaj.**

(vii) Overall findings on the sole application for Letters of Administration on behalf of the widow

[261] **My findings in relation to why the Respondent made the sole application on behalf of Pranita Devi for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj are:**

(1) The evidence of Pranita Devi as to how and when the instructions to Patel Sharma Lawyers for the preparation of a sole application for an application for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj were given by Pranita Devi is unreliable;

(2) Jayawant Pratap, the uncle of Pranita Devi, was not called in evidence, so I can only presume that his evidence would not have assisted the case of the Applicant Chief Registrar as to how and when the separate instructions to Patel Sharma Lawyers for the preparation of an application for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj were given by Pranita Devi;

(3) Although I have not heard from Jayawant Pratap, I am able to make findings based upon the evidence of Dipka Mala and Mr. Suruj Sharma as to how, when and where, instructions were given by Pranita Devi to Patel Sharma Lawyers for the preparation of a sole application for an application for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj as follows -

(i) On 6th January 2009, Pranita Devi attended the offices of Patel Sharma Lawyers with her uncle, Jayawant Pratap and they spoke with Suruj Sharma in the presence of Dipka Mala;

(ii) The Respondent had advised Pranita Devi that in the case a Will was found then the grant of Letters of Administration would be revoked.

(iii) Pranita Devi gave signed instructions to the firm to proceed with a sole application on her behalf as the widow of Salen Prakash Maharaj for an

application for a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj.

(14) Analysis of Count 1

(i) Findings

[262] In reaching a conclusion in relation to Count 1, it is important to analyse what occurred after 15th December 2008.

[263] On 6th January 2009, Pranita Devi attended with her uncle the offices of Patel Sharma Lawyers and signed instructions, as the widow of Salen Prakash Maharaj, to apply for a grant of Letters of Administration in the Estate of Salen Prakash Maharaj (Exhibit 3). In accordance with those instructions, the Respondent placed an advertisement in the *Fiji Sun* (see Exhibit 47 with the specific date of 6th January 2009). As I have noted near the beginning of this judgment, obviously, it was impossible to take signed instructions and have an advertisement published in the *Fiji Sun* on the same date. As no submissions have been made by Counsel for either party, however, in relation to this impossibility and its relevance or otherwise as to any of the four counts before me, it is not for me to resolve.

[264] On 27th January 2009, Prem Narayan acting on behalf of Subhasni Singh arranged for a letter of demand to be delivered by hand to Patel Sharma Lawyers claiming $62,000 against the Estate of Salen Prakash Maharaj. **I note that Prem Narayan did not raise in that letter that Patel Sharma Lawyers had a conflict of interest in acting on behalf of the widow of Salen Prakash Maharaj, in seeking to apply for a grant of Letters of Administration in the Estate of Salen Prakash Maharaj.**

[265] **Further, in her letter of 27th January 2009 to Patel Sharma Lawyers, Prem Narayan never made a separate claim on behalf of Maya Wati Prakash, or set out such a claim in a separate letter. That is, Prem Narayan never put Patel Sharma Lawyers on notice that, on behalf of Maya Wati Prakash, she was:**

(1) **Alleging that Patel Sharma Lawyers had a conflict of interest in acting on behalf of the widow of Salen Prakash Maharaj, in seeking to apply for a grant of Letters of Administration in the Estate of Salen Prakash Maharaj;**

(2) Making a claim against the Estate on behalf of Maya Wati Prakash; or

(3) Putting Patel Sharma on notice that the application for a grant of letters of administration would be challenged and a caveat would be lodged 'against any application for probate administration' (pursuant to section 46(1) of the *Succession, Probate and Administration Act*; or

(4) Putting Patel Sharma on notice that a separate application would be made to the High Court on the basis that the unsigned Will held in the computer of Patel Sharma Lawyers (of which Subhasni and Maya Wati Prakash had been aware since 25th November 2008 and given a copy on 12th December 2008) was arguably evidence (pursuant to **section 6A of the *Wills Act)*** of '***the testamentary intentions'*** of Salen Prakash Maharaj **that Maya Wati Prakash be the sole beneficiary**. That is, '*even though it has not been executed in accordance with the formal requirements under section 6'* of the *Wills Act*, it *'constitutes a Will of the deceased'* such that a Court would be *'satisfied that the deceased person intended the document to constitute his ... will'.* As Master Amaratunga observed in ***Lata v Sharma*** (Unreported, Civil Action 15 of 2007, 7 October 2011; PacLII: [2011] FJHC 633, <http://www.paclii.org/fj/cases/FJHC/2011/633.html>) at [11]:

> *'So, from this insertion of section 6A, it is clear that from 2004 the law relating to Wills have changed significantly and what is paramount is not the formalities that are contained in the Section 6 of the Wills Act, but **the intention of the deceased**.'*
> [My emphasis]

[266] In relation to the possibility of an application pursuant to section 6A of the *Wills Act*, I have, however, noted the oral submissions of Counsel for the Respondent made at the clarification hearing on 25th April 2018 (set out earlier above), casting great doubt that any such application would be entertained by the High Court based upon a computer print out of an unsigned will. In the absence of submissions to the contrary, I tend to agree with those submissions.

[267] As for what inference, if any, I am supposed to draw from the letter of Prem Narayan of 27th January 2009, Counsel for the Respondent submitted at the clarification hearing on 25th April 2018, as follows:

(1) An inference can be drawn that Maya Wati Prakash was being represented by an independent legal practitioner, Prem Narayan, in her professional capacity, as a litigator;

(2) Maya Wati Prakash was not being represented by the Respondent after 15th December 2008;

(3) Prem Narayan's evidence was that she met Maya Wati Prakash in late December 2008.

[268] Counsel for the Applicant did not seek to respond to the above submissions.

[269] I agree with most of the above submissions of Counsel for the Respondent except that I note that the written submissions of both Counsel have summarised the evidence of Prem Narayan being that she could not recall the exact date when she first received instructions from Maya Wati Prakash but it was sometime in late December 2008 or early January 2009. **I have, however, already made a finding above that the evidence of Prem Narayan as to how, when and where, she was instructed by to act on behalf of Maya Wati Prakash in relation to the Estate of Salen Prakash Maharaj, is unreliable.**

[270] On 16th February 2009, Letters of Administration were granted to Pranita Devi as the widow of Salen Prakash Maharaj (Exhibit 5).

[271] As Counsel for the Respondent submitted at the clarification hearing on 25th April 2018, there is a logical sequence to what was required of Pranita Devi once the grant of Letters of Administration was granted to her. She had to comply with the law. Counsel for the Applicant did not seek to respond to the submission. I agree with this submission of Counsel for the Respondent.

[272] On 26th February 2009, Prem Narayan again acting on behalf of Subhasni Singh sent a second letter of demand to Patel Sharma Lawyers claiming $62,000 against the Estate of Salen Prakash Maharaj but, **thereafter, took that claim no further**. **As with the previous letter of demand of 27th January 2009, the letter of 26th February 2009 did not raise with Patel Sharma Lawyers that they had an alleged conflict of interest in acting on behalf of the widow of Salen Prakash Maharaj, in seeking to apply for a grant of Letters of Administration in the Estate of Salen Prakash Maharaj** (Exhibit 44, p.120).

[273] On 6th March 2009, **Prem Narayan filed an application in the High Court on behalf of Maya Wati Prakash, seeking** (amongst a number of orders) that the Letters of Administration be recalled and a **fresh grant be issued to Maya Wati**

Prakash and Pranita Devi (Exhibit 6). **Prem Narayan never proceeded with this claim.**

[274] On 28th March 2009, an attempt at settlement between Pranita Devi and Maya Wati Prakash was held at the offices of Patel Sharma Lawyers with Jayawant Pratap, the uncle of Pranita Devi talking on her behalf and Prem Narayan, acting on behalf of Maya Wati Prakash, with the Respondent only being a passive facilitator of the meeting. After that meeting, the Respondent was not involved. Pranita Devi was then represented by the firm of Kohli and Singh and later by Willy Hiuare.

(ii) What of the above conduct of the Respondent was professional misconduct?

[275] **What then of the above history of the conduct of the Respondent and his firm was professional misconduct?** As I understood the written submissions of Counsel for the Applicant Chief Registrar ('*Applicant's Submissions in reply'*, 20th February 2018, page 2, at para [7]), '*the practitioner ought not to have pursued the application for Letters of Administration'* on behalf of the widow, Pranita Devi, *'when ... his firm had been [previously] engaged in the preparation of the deceased's Will under which the sole beneficiary was MWP'* as the Letters of Administration issued to Pranita Devi *'was against the interests of the Estate of SPM'.*

[276] In my view, it was not enough to simply infer conflict. Instead, **Counsel for the Applicant Chief Registrar needed to:**

(1) establish as to how there arose a duty to Maya as the beneficiary under a signed but missing Will; and

(2) only then could he proceed to allege why the Respondent was then in conflict with that duty by acting for the widow in accordance with the law; and

(3) thus, although acting in accordance with the law, the Respondent had committed an act of professional misconduct.

[277] **The problem also, in my view, with the written submissions of Counsel for the Applicant Chief Registrar alleging conflict was that it first needed to be resolved who was the client?** If Salen, as the testator, had left his Will in the

custody of the firm of Patel Sharma Lawyers, then upon his death the firm would be under a legal duty to notify the Executor of his Estate named in that Will (being Maya Wati Prakash) and, if so instructed by her, obtain a grant of probate (with such costs associated in obtaining that grant to be paid from the Estate) and then Maya Wati Prakash, as the Executor, would have then been responsible for the distribution of the Estate in accordance with Salen's Will. That is, after paying Salen's debts, to distribute the balance of the Estate to herself as the sole beneficiary named in Salen's Will.

[278] **But who was the client where the Will was not left in the firm's custody?** Where Salen, as the testator, did not leave his Will in the custody of the firm of Patel Sharma Lawyers, then Salen was simply a previous client and **the legal duty of Patel Sharma Lawyers was at an end on 22nd December 2006 so long as the Will had been correctly drafted and executed on that date.**

[279] Upon Salen's death on 24th November 2008, either the family had to locate his Will and Maya, as the named Executor in the Will, had to instruct a lawyer to assist in making an application for a grant of probate, or, instead, as actually occurred, when the family could not locate Salen's signed Last Will and Testament (and thus there was no formally named executor), according to the law, an application then had to be made to the High Court for a grant of Letters of Administration. **But who was to make that application?**

(iii) Section 7(a) of the Succession, Probate and Administration Act

[280] **Thus, I asked both Counsel at the hearing on 25th April 2018, to clarify:**

(1) When the Will could not be found what had to be done?

(2) Did not section 7(a) of the *Succession, Probate and Administration Act* come into play requiring for the application for a grant of Letters of Administration of the Estate to be made by the *'wife of the deceased'*, Pranita Devi?

[281] According to the oral submissions of Counsel for the Respondent:

(1) The parties had been given the opportunity to look for the Will;

(2) When the Will could not be found, section 7(a) of the *Succession, Probate and Administration Act* required the widow to apply for a grant of Letters of Administration.

[282] The oral submission of Counsel for the Applicant Chief Registrar in response was that someone had to apply for a grant of Letters of Administration, however, the Respondent should not have done so on behalf of the widow.

[283] The oral submission of Counsel for the Respondent in reply was that nothing had changed even when the Will was found on 23rd January 2010.

[284] **I note that the law in Fiji as at 6th January 2009 was that if there was no Will found of a deceased person, then an application to the High Court for a grant of Letters of Administration had to be in accordance with the strict order of priority set out in section 7 of the *Succession, Probate and Administration Act* (Cap. 60)** (PacLII: <http://www.paclii.org/fj/legis/consol_act/spaaa376/>) as amended by the *Succession, Probate and Administration (Amendment) Act 2004* (PacLII: <http://www.paclii.org/fj/legis/consol_act/spaaa376/>).

[285] I note also that the Act was recently amended in March 2018 to cover de facto relationships (see Act No. 6 of 2018, the *Succession, Probate and Administration (Amendment) Act 2018*, assented on 16th March 2018, <http://www.parliament.gov.fj/wp-content/uploads/2018/03/Act-6-Succession-Probate-and-Administration-Amendment.pdf>). Although this may or may not have been an issue considering the limited evidence before the Commission as to the living arrangements between Salen and the second Pranita in 2006, however, as that was an issue that was not applicable as at 24th November 2008, I will put it to one side.

[286] Instead, **the relevant order as to who could apply for Letters of Administration from the applicable legislation in 2008 was as follows**:

'PART IV-GRANTS OF LETTERS OF ADMINISTRATION

Persons entitled to grant

> ***7.*** *The* ***court may grant administration of the estate of a person dying intestate to the following*** *persons (separately or conjointly) being not less than 21 years of age-*
> *(a) the husband or* ***wife*** *of the deceased;* ***or***
> *(b)* ***if there is no*** *husband or* ***wife****, to one or more of the next of kin in order of priority of entitlement under this Act in the distribution of the estate of the deceased; or*
> *(c) any other person, whether a creditor or not, if there is no person entitled to a grant under paragraphs (a) and (b) resident within the jurisdiction and fit to be so entrusted, or if the person entitled as aforesaid fails, when duly cited, to appear and apply for administration.'*

[287] **Put simply, as at the time on Salen's death on 24th November 2008, section 7(a) of the *Succession, Probate and Administration Act* required the grant of the Letters of Administration of the Estate to be by the *'wife of the deceased',* Pranita Devi.** I also note:

(1) The priority of the widow (pursuant to section 7(a) of the *Succession, Probate and Administration Act*) **was the law as at 15th December 2008**, when, as the Respondent noted in his evidence, he explained to Pranita and Maya that a joint application by the widow and the mother of the deceased may be rejected by the High Court;

(2) **It continued to be the law** when the practitioner was again approached, but this time solely by the widow, on 6th January 2009 (Exhibit 3) to act; and

(3) **It was still the law,** when the grant of Letters of Administration was made on 16th February 2009 (Exhibit 5).

[288] **Thus, if the will of Salen could not be found by his relatives, then what else was the Respondent legal practitioner supposed to do when he was approached by the widow, Pranita Devi, to assist her on 6th January 2009?**

[289] As I understood the written submissions of Counsel for the Applicant Chief Registrar (which he confirmed in his oral submissions at the clarification hearing on 25th April 2018), **the Respondent should have referred the widow to another practitioner to do exactly the same task as the Respondent was being asked to do**, that is, to make an application for a grant of Letters of Administration on behalf of the widow.

[290] **As I read the written submissions of Counsel for the Applicant Chief Registrar, I came to the view, that he had failed to explain how the**

Respondent, by applying for Letters of Administration on behalf of the widow, Pranita Devi, (which was in strict accordance with section 7 of the *Succession, Probate and Administration Act),* <u>was in conflict</u> with his duty to Maya Wati Prakash (as the beneficiary listed under Salen's signed but missing will). Further, it was also unclear to me how this was an act of professional misconduct.

[291] Hence, I asked both Counsel to clarify their positions on this issue at the hearing on 25th April 2018.

[292] <u>The oral submissions of Counsel for the Respondent</u> were, in summary:

(1) The legal basis of the limited duty of care owed by the Respondent was to ensure that a valid Will was drawn and executed;

(2) Once the testator took the Will home with him, the Respondent no longer owed a duty of care;

(3) The judgment in *Badenach* makes clear that there was no duty of care owed to the beneficiary;

(4) What crystallised on 15th December 2008 was that the Respondent advised that as no signed Will was located there would have to be an application for a grant of Letters of Administration.

[293] <u>Counsel for the Applicant Chief Registrar's oral submissions in response</u> were, in summary:

(1) Paragraph 59 of Gageler J's judgment in *Badenach* makes clear:

> '*The solicitor's duty of care is instead limited to a person whom the testator actually intends to benefit from the will and is confined to requiring the solicitor to take reasonable care to benefit that person in the manner and to the extent identified in the testator's instructions. The testator's instructions are critical. The existence of those instructions compels the solicitor to act for the benefit of the intended beneficiary to the extent necessary to give effect to them.'*

(2) Thus, the Respondent was duty bound to give effect to the testator's intention, that is, for Maya Wati Prakash to be the beneficiary of the estate;

(3) Warning bells should have rung and the Respondent should have referred the widow to another solicitor;

(4) The factual scenario in the present case is quite different to *Hill v Van Erp.*

[294] Counsel for the Respondent's oral submissions in reply were:

(1) *Badenach* is "on all fours*"* so to speak with the present case where the scope was limited to the circumstances of the retainer;

(2) In the present case, the Respondent's firm was instructed to draft a valid Will. It was signed and executed. The duty cannot be extended beyond those limited instructions. If the testator had left the Will in the firm's Wills Register that would have been a duty extending to the beneficiary but the testator did not do so.

[295] I note that Counsel for the Respondent expanded on this issue in their joint written synopsis tendered on 25th April 2018, wherein they stated at para [26]:

> *'The fact that the retainer ended when the Will was taken away is yet again seen in the judicial exposition of the duty of care in like circumstances in Badenach by Gageler J at [69] where his Honour said:*
>
> > *"…The problem is at an anterior stage in the analysis. It stems from the absence of a fact necessary to establish a duty of care of the requisite scope and to give rise to the existence of damage: an expansion in the scope of the Testator's instructions – a new or enlarged retainer."'*

[296] In my view, the Applicant Chief Registrar has failed to establish as to how the Respondent owed to Maya as the beneficiary under the signed but missing Will of Salen a duty of care.

(iv) Chaudhry v Chief Registrar – of little relevance?

[297] On the issue of conflict of interest, as noted above, Counsel for the Applicant Chief Registrar raised in his initial written submissions in relation to Count 1 ('*Closing Submissions',* 8th January 2018, at paras [489]-[491]) that ***'there was an unsigned copy of the Will, the Respondent had knowledge of the deceased's intention of how he wanted his estate to be administered*** *…* ***the Respondent went ahead and acted against that interest by acting for the widow and extracting LA on her behalf****'*. Counsel then cited *Chaudhry v Chief Registrar* (supra) in support of this submission and the four categories of conflict set out by Marsoof JA (without specifying which of the four actually applied to the present case) and then concluded at [491] *'the Respondent* ***owed a duty to MWP and by acting against her interest acted in a conflicting situation****'*.

[298] In his Synopsis Reply of 4th May 2018, Counsel for the Applicant Chief Registrar has again cited the decision of the Supreme Court in *Chaudhry v Chief Registrar*

'wherein the Court articulated the four categories of conflict of interest'. **On this occasion, however, Counsel has submitted at para [4] *'that the Respondent's conduct falls within the second and third category [sic] and hence amounts to him being in a conflicting situation'*** and then cited those two categories being:

> *'(b)* ***Conflicts between the interests of two or more clients*** *the practitioner is currently representing;*
> *(c)* ***Conflicts between the client's interests and those of third parties*** *to whom the practitioner owes obligations'.*
> [My emphasis]

[299] I note that in *Chaudhry,* the legal practitioner faced an allegation under section 82(1)(b) of the *Legal Practitioners Act 2009,* which states:

> *'Professional Misconduct*
> *82.—(1) For the purposes of this Decree, "professional misconduct" includes –*
> *...*
> *(b) conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice, or that the law firm is not fit and proper to operate as a law firm.'*

[300] Thus, the prohibited conduct pursuant to section 82(1)(b) is '*conduct ... that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'*. **The conduct in *Chaudhry* that was alleged to be prohibited conduct was that the legal practitioner acted as Counsel on behalf of a defendant in a criminal matter where the legal practitioner *'was [also] the victim*** *of a charge of giving false information to a public servant'* contrary to 209(1) of the *Crimes Decree 2009,* (the details of which were then set out as nine *'particulars of the offence appended to the charge')*. As Marsoof JA (with whom Gates P and Keith JA agreed) noted:

> *'45. The question in this case is whether the Commissioner was justified in finding that RC was not a fit and proper person to engage in legal practice ...*
> *46.* ***The false information adverted to in the charge was the allegation of rape and sexual abuse made by MB against RC****, which allegation constituted the subject matter of her statement to the police made on 13th June 2011. This allegation was withdrawn by MB in her affidavit of 4th July 2011, and* ***it was after the withdrawal of the said allegation that resulted in MB being charged for giving false information to a public officer.***

47. It is in this backdrop that RC appearance on behalf of MB in the Magistrates Court on 15th September 2011 has to be viewed. On that date, RC not only appeared for MB, but also advanced submissions in mitigation after tendering to court written submissions that were presumably prepared by RC. It is significant that the said written submissions also contained an allegation that MB was coerced by certain prominent public officials into making the complaint against RC. ***It is unthinkable that a legal practitioner would represent a person who had made and subsequently withdrawn a very serious allegation against him,*** *in proceedings where such person is charged for the offence of giving false information to a public officer, and* ***there can be no doubt that in so appearing, RC acted imprudently and in conflict of interest****, particularly where, as rightly observed by the Commissioner in paragraph 40 of his Judgment dated 12th September 2011, "only she and he know whether there is any truth in the allegation."*

48. On 29th September 2011, RC once again appeared for MB, and on this occasion for the purpose of having her guilty plea vacated and a new plea entered on the basis that his client has now realised that coercion was a defence. ***In my view this was the height of temerity, and demonstrated that RC was actuated by his own self-interest as against the interest of his client MB.*** *I have no difficulty in agreeing with the finding of the Commissioner in paragraph [40] of his judgment, that RC in the predicament he had placed himself by appearing for MB on two dates in proceedings in which she is charged with the offence of giving false information to a public officer accusing RC of rape and sexual abuse, could "never fulfil his duty either to the Court or to the client in respect of proceedings predicated on that allegation."'*
[My emphasis]

[301] Once the full setting in *Chaudhry* is understood, **I agree with the submission of Counsel for the Respondent** (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, p.27, at [48]), **that *'the Chaudhary [sic] case cannot assist the CR in the current case'*** where one is arguing duty of care and/or a conflict of interest because the Respondent acted for the widow in making an application for a grant of Letters of Administration against the alleged interest of the beneficiary under a missing Will.

[302] Counsel for the Applicant Chief Registrar then submitted at para [5] in his Synopsis Response of 4th May 2018:

> *'The Applicant submits that the Respondent should not have acted for PD in extracting LA on her behalf after his firm had made the Will* ***and*** *him having advised both MWP and PD first and thereafter only proceeding to act solely for PD.'*
> [My emphasis]

[303] I noted that Counsel for the Applicant Chief Registrar had now added in his Synopsis Response of 4th May 2018 a second category of conflict of interest, that is, '***and*** *him* *having advised both MWP and PD first'*. I also noted that this had never been particularised in this Count or in Count 3, both of which charged the Respondent with professional misconduct in relation to his conduct towards Maya Wati Prakash.

[304] Although this allegation had been raised in the evidence of Maya Wati Prakash, it was never part of any of the four counts. Also, it was never put by Counsel for the Applicant Chief Registrar in his cross-examination of either Dipka Mala and/or Suruj Sharma. While I could deal with that in my judgment, the problem, as I saw it, was that because Counsel for the Applicant Chief Registrar had only mentioned it in passing at the clarification hearing on 25th April 2018 and had not articulated it in specific detail until his subsequent written Synopsis Reply of 4th May 2018 (in what was supposed to be the final written submission before judgment), Counsel for the Respondent had not had the opportunity to respond to such a specific submission.

[305] **Therefore, I decided to relist the matter in the June 2018 Sittings of the Commission to give both Counsel the opportunity to file supplementary submissions followed by a short hearing to clarify their submissions on this issue**. I note that Counsel for the Applicant conceded at that supplementary clarification hearing which took place on 13th June 2018, that it was too late to now seek to amend the particulars to Counts 1 and 3. I will return to that as a separate issue near the conclusion of my findings in relation to this count. In the meantime, I intend to continue with my judgment and my analysis of Count 1, as I understood matters, prior to the Synopsis Response of Counsel for the Applicant Chief Registrar being filed on 4th May 2018.

(v) The alleged conflict of interest

[306] **Apart from *Chaudhry*, (and my providing to both Counsel at the Call Over on 23rd April 2018, a copy of the judgment in *Badenach*), I note that Counsel for the Applicant Chief Registrar has not cited any applicable case law and/or legislation which may assist me in finding that:**

(1) **a duty was owed by the Respondent to Maya Wati Prakash as the beneficiary of a signed but missing Will;** and

(2) By taking out Letters of Administration in accordance with the prevailing legislation, the Respondent legal practitioner was '*acting against her interest';* and

(3) Therefore, the Respondent '*acted in a conflicting situation'.*

[307] Instead of citing any applicable case law and/or legislation, (apart from *Chaudhry*), Counsel for the Applicant Chief Registrar has set out in his Synopsis Response of 4th May 2018, his summary of the conflict at para [2] as follows:

> *'The Applicant's case in alleging conflict of interest is based on the following issues:*
>
> - *The Respondent's staff within the firm in which he is a partner prepared the Will of SPM. Under the said Will, the sole beneficiary was MWP.*
> - *By virtue of the firm's involvement in preparing a Will for SPM and according to the evidence of Dipka Mala, the Respondent was aware of the contents of the Will.*
> - *The Respondent then proceeded to obtain instructions from both MWP and PD and provided advise [sic] that an application for Letters of Administration would be made jointly.*
> - *That thereafter, the Respondent proceeded with sole instructions from PD and made an application for LA on behalf of PD only.'*

[308] **Unfortunately, in my view, the above summary ignores as to why '*the Respondent proceeded with sole instructions from PD',* that is, as I have clearly found, Maya Wati Prakash withdrew the instructions on 15th December 2008 and at that stage the Respondent closed his pending file. I agree with the submissions of Counsel for the Respondent, that when the widow approached the Respondent on 6th January 2009 to act on her behalf simply to obtain a grant of Letters of Administration, this was a new retainer. In my view, Counsel for the Applicant Chief Registrar has still not explained, where was the conflict.**

(vi) Other relevant case law on conflict of interest

[309] I also note at the clarification hearing on 25th April 2018, Counsel for the Respondent raised, in relation to conflict of interest, a judgment of Justice Young sitting as a single judge in the Family Court of Australia at Melbourne in ***Grieves & Tully*** [2011] FamCA 617 (24 August 2011); AustLII: <http://www.austlii.edu.au/cgi-

bin/viewdoc/au/cases/cth/FamCA/2011/617.html>. As His Honour, Justice Young noted at para [71], the legal principles were discussed by the Full Court of the Family Court of Australia in ***McGillivray v Mitchell*** [1998] FamCA 96 (15 July 1998); (1998) FLC 92-818; AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCA/1998/96.html>, where '*The Full Court stated at 85,304 that':*

> *"It is our opinion that if a family law litigant has a genuine concern about a former legal adviser acting against him or her in later family law litigation,* ***the litigant must take the point at least in correspondence with the other side at the earliest possible opportunity ... Furthermore a failure to take the point initially must also cast doubt on the bona fides of any later complaint concerning the existence of confidential information in the practitioner in question****, and on the bona fides of any alleged apprehension regarding the possible mis-use of such confidential information".'*
> *[My emphasis]*

[310] In *Grieves & Tully,* Young J also cited at para [72] the judgment of Justice Brereton from the Supreme Court of New South Wales in ***Kallinicos v Hunt*** [2005] NSWSC 1181; (2005) 64 NSWLR 561; AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2005/1181.html>, where, in discussing the three grounds for the granting of an injunction to restrain a solicitor form acting against a former client, Brereton J (at para [76]; p. 582) *'summarised the authorities'* thus:

> *'a. During the subsistence of a retainer, where the court's intervention to restrain a solicitor from acting for another is sought by an existing client of the solicitor, the foundation of the court's jurisdiction is the fiduciary obligation of a solicitor, and the inescapable conflict of duty which is inherent in the situation of acting for clients with competing interests (Prince Jefri Bolkiah [v KPMG [1998] UKHL 52; [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215; BAILII: <http://www.bailii.org/uk/cases/UKHL/1998/52.html>]);*
>
> *b.* ***Once the retainer is at an end, however, the court's jurisdiction is not based on any conflict of duty or interest, but on the protection of the confidences of the former client*** *(unless there is no real risk of disclosure) (Prince Jefri Bolkiah).*
>
> *c.* ***After termination of the retainer, there is no continuing (equitable or contractual) duty of loyalty to provide a basis for the court's intervention, such duty having come to an end with the retainer*** *(Prince Jefri Bolkiah; Belan v Casey; PhotoCure ASA; British American Tobacco Australia Services Ltd; Asia Pacific Telecommunications Ltd; contra Spincode Pty Ltd; McVeigh; Sent).*
>
> *d.* ***However, the court always has inherent jurisdiction to restrain solicitors from acting in a particular case****, as an incident of its*

inherent jurisdiction over its officers and to control its process ***in aid of the administration of justice*** *(Everingham v Ontario; Black v Taylor; Grimwade v Meagher; Newman v Phillips Fox; Mitchell v Pattern Holdings; Spincode Pty Ltd; Holborow; Williamson v Nilant; Bowen v Stott; Law Society v Holt). Prince Jefri Bolkiah does not address this jurisdiction at all. Belan v Casey and British American Tobacco Australia Services Ltd are not to be read as supposing that Prince Jefri Bolkiah excludes it. Asia Pacific Telecommunications Ltd appears to acknowledge its continued existence.*

e. ***The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice*** *(Everingham v Ontario; Black v Taylor; Grimwade v Meagher; Holborow; Bowen v Stott; Asia Pacific Telecommunications Ltd).*

f. *The jurisdiction is to be regarded as exceptional and is to be exercised with caution (Black v Taylor; Grimwade v Meagher; Bowen v Stott).*

g. ***Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause*** *(Black v Taylor; Grimwade v Meagher; Williamson v Nilant; Bowen v Stott).*

h. *The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief (Black v Taylor; Bowen v Stott).'*
[My emphasis]

[311] Thus, in *Grieves & Tully*, Young J concluded at para [74]:

> *'In accordance with Kallinicos* ***the timing of the application is one of a number of considerations to be taken into account*** *in applying the inherent jurisdiction test of whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice, including the appearance of justice, requires that a practitioner be restrained from acting in a particular matter,* ***and delay will usually be, but is not necessarily, fatal to an application****, dependent on all the circumstances of the case.'*
> [My emphasis]

[312] **I note that none of the issues on conflict discussed in *Grieves & Tully, McGillivray v Mitchell, Prince Jefri Bolkiah* and/or *Kallinicos,* were mentioned by Counsel for the Applicant in his written submissions filed on 8th January and 20th February 2018.**

[313] **Indeed, as I have already noted above:**

(1) Prem Narayan, in her letters of 27th January and 26th February 2009, never raised the issue of conflict;

(2) This did not form part of the application filed by Prem Narayan filed on 6th March 2009 in the High Court on behalf of Maya Wati Prakash, seeking (amongst a number of orders) that the Letters of Administration be recalled and **a fresh grant be issued to Maya Wati Prakash and Pranita Devi** (Exhibit 6), that is, a grant of **joint Letters of Administration**;

(3) Even though the issue of conflict was later raised separately by the Applicant Chief Registrar and not by Prem Narayan and/or Maya Wati Prakash, surely the view of expressed by the Full Court of the Family Court of Australia in *McGillivray v Mitchell* (supra) is perhaps relevant. That is, that '*a failure to take the point initially must also cast doubt on the bona fides of any later complaint concerning the existence of confidential information in the practitioner in question'.*

(vii) Respondent's submissions on conflict of interest

[314] The written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, pp. 17-18, paras [30]-[33]), have specifically addressed the claim as to **a conflict of interest**. It is important that I set out those submissions in full as follows:

> *'30. At paragraph 10 of the [Prosecution Case] Statement [dated 21st November 2016] the Chief Registrar submitted that just because the Practitioner was aware that there might be a Will somewhere he failed to maintain a reasonable standard of competence and diligence because that knowledge was enough indication for the Practitioner to tread with caution and not partake in the application for the Letters of Administration as there was a high possibility of that grant being revoked on the occasion the Will was found.*
>
> *31. The Chief Registrar's position is to infer a conflict of interest on the basis that the Practitioners Firm had prepared a Will for SP and thus should not have acted for PD to take out Letters of Administration. Now that all relevant evidence is before the Commission we would urge the Commission to consider all relevant facts and circumstances to determine whether there was a conflict of interest in this matter. The facts and evidence is analysed later in these submissions.*
>
> *32. In taking the position that he did on conflict the Chief Registrar overlooked the statutory protection afforded under the **Succession Probate and Administration Act Cap 60** where a Court is given the power to determine any issues arising with respect to administration of an Estate and includes the statutory protection afforded to a person to whom Letters of Administration is granted but subsequently the said Letters are revoked because a signed Will is found:*

"Court may settle all questions arising in administration

***41**.-(1) The court may make such order with reference to any question arising in respect of any will or administration, or with reference to the distribution or application of any real or personal estate which an executor or administrator may have in hand, or as to the residue of the estate, as the circumstances of the case may require.*
(2) Such order shall bind all persons whether sui juris or not.
(3) No final order for distribution shall be made except upon notice to all the parties interested, or as the court may direct.
Payments made before revocation to be valid
***42**.-(1) Where any probate or **administration is revoked** or rescinded, **all payments bona fide made to the executor or administrator before the revocation or rescission shall be a legal discharge to the person making the same**.*
*(2) An executor or administrator who has acted under any revoked or rescinded probate or administration may retain and reimburse himself, or shall be entitled to be reimbursed, **in respect of all payments bona fide made by him before revocation or rescission, in the same manner as if such revocation or rescission had not taken place.***
Payments, etc., to be valid notwithstanding defect
***43**. All persons making or permitting to be made any payment or transfer bona fide upon any probate or administration granted under the authority of this Act shall be indemnified and protected in so doing, notwithstanding any defect or circumstances whatsoever affecting the validity of such probate or administration not then known to such person."*

33. What this shows is that a person who has acted in administration of an Estate under Letters of Administration is protected provided that the said person has acted bona fide in fulfilling his or her duties as the Administrator or Administratrix.'

[315] I have already set out earlier in this judgment, Counsel for the Applicant Chief Registrar's response in his written submissions in reply ('*Applicant's Submissions in reply'*, 20th February 2018, page 2, at paras [7]-[8]), in relation to 'Conflict of Interest', wherein he has stated that *'The Applicant relies on his submissions filed on 8th January 2008 and in particular to paragraphs 490 and 491.'*

[316] **In my view, the written submissions of Counsel for the Applicant Chief Registrar on 8th January and 20th February 2018 have failed to respond to the submission raised by Counsel for the Respondent, that is, '*the statutory protection afforded under the Succession Probate and Administration Act Cap 60'*.**

[317] This brings me to section 7(a) of the *Succession, Probate and Administration Act*. **I do not understand how it can be said to be a conflict of interest in following the law, as set out in section 7(a) of the *Succession, Probate and Administration Act*, that is, that the first person who is to apply for a grant of Letters of Administration must be the widow**. Further, if a Will is later found, the Court is given the power to '*settle all questions arising'* out of that administration and, as Counsel for the Respondent has noted, the legislation includes '*the statutory protection afforded to a person to whom Letters of Administration is granted but subsequently the said Letters are revoked because a signed Will is found'.*

[318] **I must admit, that I am none the wiser as to the stance of Counsel for the Applicant Chief Registrar on this point**. Surely, the legislation must apply and the person who had to make the application for a grant of Letters of Administration pursuant to section 7(a) of the *Succession, Probate and Administration Act* had to be the widow, Pranita Devi? **As I have understood Counsel for the Applicant Chief Registrar, he is not disputing that the widow had to apply under the law, however, the Respondent should not have assisted her in making the application even though this was the law as, according to Counsel for the Applicant Chief Registrar, the Respondent was in a conflict situation.**

[319] This brings me to **section 6(1)(a)(i) and (ii) of the *Succession, Probate and Administration Act* that sets out how an estate is to be distributed. Again, as I have understood Counsel for the Applicant Chief Registrar, his submission is not that the law should not have been applied and the estate distributed as set out above, rather the Respondent should not have assisted the widow in making the application for a grant of Letters of Administration.**

(viii) Should the Respondent, knowing his firm held an unsigned Will on the firm's computer, have refused to act seeking Letters of Administration?

[320] **The written submissions of Counsel for the Applicant Chief Registrar have not raised section 6A of the *Wills Act*, that is, where a '*Court may declare a document to be a Will'*.** I have noted above that Counsel for the Applicant Chief Registrar has not suggested that the Respondent, despite having no retainer (as the testator had taken his Will with him on 22nd December 2006), should have advised

the parties on 15th December 2008 as to the possibility of this option and suggested they each seek independent legal advice on the unsigned Will.

[321] On this issue, I note the oral submissions that I have set out above made by Counsel for the Respondent at the clarification hearing on 25th April 2018, that a court would be most reluctant to accept an unsigned computer print out as satisfying section 6A.

[322] **Even if Counsel for the Applicant Chief Registrar had raised this issue, there was no certainty at that time in late 2008 and early 2009 that the unsigned document on the computer of Patel Sharma lawyers was, in fact, the Last Will and Testament of Salen Prakash Maharaj. Indeed, there was a plausible argument that, in light of the history of Salen's alleged deceit of his mother (that I have set out briefly below), a court, rather than declaring the unsigned computer copy to be Salen's intention, may have been inclined instead to the view that either Salen may have destroyed the Will or perhaps had created a later Will that for some reason had not been found.** On the other hand, as Salen had a debt to his mother perhaps the unsigned document from 2006 was his most recent intention before his death, though the counter argument is that he had already agreed for a caveat to be placed over his property. **It is speculative to say the least, as to what a court may or may not have declared**.

[323] **Indeed, if some of the documents that have been filed in these proceedings are an indication, perhaps all was not well in the relationship between the testator, Salen Prakash Maharaj and his mother, Maya Wati Prakash**. In that regard, I note that on 16th August 2000, Satya Prakash (Salen's father) and Maya Wati (his mother), appointed their son, Salen, to hold their *'Power of Attorney'* (**Exhibit "37"**, at page 26). **I also note that in the Statement of Claim** that forms part of Exhibit 6 (that is, the application filed in the High Court at Suva on 6th March 2009, by Prem Narayan on behalf of Maya Wati Prakash against Pranita Devi and others restraining them dealing with the property in the name of Salen Prakash Maharaj at Koronivia and that the Letters of Administration be recalled and a fresh grant be issued to Maya Wati Prakash and Pranita Devi), it is alleged that:

(1) The property at Koronivia was supposed to be purchased between Maya Wati Prakash and her son, Salen;

(2) Maya's daughter (not named), made the payments for Maya and in return Maya and her then living husband decided to allow the daughter and her husband to settle on the property (presumably the daughter was Subhasni though Subhasni, denied knowledge of the claim);

(3) Salen did not make any payments towards the purchase price;

(4) Maya's daughter (again, not named) had fully paid the purchase price by 2003;

(5) Upon payment of the purchase price the vendor was supposed to transfer the property to Maya and Salen, however, in November 2003, the vendor only executed a transfer transferring the property to Salen;

(6) In June 2007, Salen informed Maya that the property was in his name only;

(7) **Maya and Salen then saw Patel Sharma & Associates and were advised that the property could not be transferred for five years and instead a caveat was lodged over the property to protect Maya's interest**;

(9) Maya claimed that '*as a result of the Deceased's [Salen's] and the Second Defendant's [the vendor's] actions the Plaintiff [Maya] has suffered loss and continues to suffer …*'

[324] I further note that Maya Wati Prakash made a similar claim in an affidavit sworn on 26th October 2012, as part of the proceedings in the High Court between Maya Wati Prakash and Pranita Devi, whereby **Maya Wati Prakash as her evidence-in-chief** (**Exhibit "18")** swore that in 2007, '*I found out that Salen had transferred a property to himself that was to be transferred to both of us pursuant to an agreement'***,** that an appointment with Patel Sharma & Associates where she stated that **she was advised that the property could not be transferred within five years** and hence it was agreed to lodge a caveat over the property to protect her interest. Indeed, in her cross-examination on 29th October 2012 in the High Court proceedings, it was put to Maya Wati Prakash (Doc.21, p.27, Exhibit 47, p.140), *"Maya Wati, **your son stole this property from you**, is that correct? Is that what you are saying?",* to which she replied, ***"Yes"***.

[325] On that claim, I note that in the letter of 29th April 2010 from Patel Sharma Lawyers to the Chief Registrar (**Exhibit** "**10"**), with the reference 'SPS/dm/8314' (that I assume indicates Suruj Prasad Sharma as the author and that it was typed by Dipka Mala), it is stated in the 'Chronology' as follows:

'(ii) 25th June 2007 - *Salen Prakash Maharaj and his mother Maya Wati Prakash approached our office with the view to attending to transfer of Certificate of Title No. 31224. They were attended to by Ms. Dipka Mala.*

Our office advised them that there would be stamp duty implications on the transfer and 2% reimbursement of stamp duty would be applicable. The property was bought on 28th December 2003, and as it was within 5 years the 2% stamp duty was applicable and payable.

They were also advised that a Valuation Report would also be needed and that there would be legal costs payable on transfer.

*The appropriate transfer documents were prepared, but **not** executed as a result of the stamp duty implications and other disbursements as advised.*

Maya Wati Prakash then requested that her interest in the property be protected in the meantime …
As a result, they were advised in the circumstances, that a Caveat ought to be lodged to protect her interest and this was done with the consent of her son …'

[326] **In my view, the above is another example of Maya Wati Prakash misunderstanding or misinterpreting what occurred either as a result of her memory and/or language difficulties or selective hearing/understanding.** That is, it was because of '*the stamp duty implications and other disbursements as advised*' **NOT** because Maya was advised by Patel Sharma Lawyers that the property could not be transferred within five years. **It is also surprising that a legal practitioner would include such an inaccuracy (without at least first checking it with a fellow practitioner before including it in a Statement of Claim)**, as occurred with the claim filed on 6th March 2009 by Prem Narayan on behalf of Maya Wati Prakash. Further, three years later, **Maya Wati Prakash in her affidavit sworn on 26th October 2012** (that was her evidence-in-chief as part of the proceedings in the High Court between Maya Wati Prakash and Pranita Devi) **included the same inaccurate claim**.

[327] **In my view, the Applicant Chief Registrar has failed to establish as to why the Respondent, knowing that his firm held an unsigned copy of Salen's Will on**

the firm's computer (whereby Salen's mother had been named as the sole beneficiary), should have refused to act for the widow in seeking Letters of Administration.

(ix) Other relevant legislation

[328] Apart from section 7 of the *Succession, Probate and Administration Act* (Cap. 60) as amended by the *Succession, Probate and Administration (Amendment) Act 2004* that I have set out above, I have also noted that the following may also be relevant and applicable to the present matter:

(1) Section 6 of the *Succession, Probate and Administration Act* (Cap. 60) as amended by the *Succession, Probate and Administration (Amendment) Act 2004;*

(2) Section 6A of the *Wills Act* (Cap. 59) as amended by section 5 the *Wills (Amendment) Act 2004*;

(3) Sections 4 and 10 of the *Compensation to Relatives Act* (Cap. 29);

(4) *Inheritance (Family Provision) Act 2004*.

[329] Thus, I asked Counsel to clarify the relevance, or not, of the above legislation at the hearing on 25th April 2018. I have already set out above the submissions in relation to section 6A of the *Wills Act.*

[330] In relation to section 6 of the *Succession, Probate and Administration Act,* I note that it sets out how an estate is to be distributed as follows:

> *'Succession to property on intestacy*
>
> ***6.**-(1) Subject to the provisions of Part2,* ***the administrator on intestacy*** *... shall hold the property as to which a person dies intestate on or after the date of commencement of this Act on trust to distribute the same as follows:*
> *(a**) if the intestate leaves a wife** ... **without issue**, **the surviving wife** ... shall take the whole of the estate absolutely;'*
> *...*
> *(f)* ***if the intestate leaves no issue, but one parent*** *only then, subject to the interests of a surviving wife ..., the surviving ... mother shall take the residuary estate of the intestate absolutely'.*
> [My emphasis]

[331] Counsel for the Respondent was of the view that as a result of the 2004 amendments, it meant that (pursuant to section 6) the widow would take the estate absolutely.

[332] In relation to sections 4 and 10 of the *Compensation to Relatives Act* (Cap. 29), (PacLII: <http://www.paclii.org/fj/legis/consol_act/ctra288/>), I note they state:

'Action to be for benefit of family

***4**. Every such action shall be for the benefit of the **wife**, husband, **parent** and child of the person whose death has been so caused.'*

And:

'Action may in certain cases be brought by persons beneficially interested

***10**.-(1) Where in any of the cases provided for by this Act it happens that there is no executor or administrator of the deceased person, **or** that there being such executor or administrator **no action as hereinbefore mentioned is within six months after the death of the deceased** person as herein mentioned brought by and in the name of his executor or administrator, then such action may be brought by and in the name or names of all or of any of the persons, if more than one, for whose benefit such action would have been if it had been brought by and in the name of the executor or administrator.*
(2) Every action so brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it were brought by and in the name of the executor or administrator.'
[My emphasis]

[333] In ***Balekaba v Jagdish*** [2013] FJHC 547; HBC 111.2012 (16 August 2013), Tuilevuka J, had to consider where a son had died in a motor vehicle accident, whether a writ filed by a father *'suing as "next of kin"' of his intestate deceased child is valid ... because the father in question did not have letters of administration at filing time'*. His Lordship came to the view that *'the writ is an irregularity but is curable by amendment'*. **In relation to the present matter, it is unclear what claim Maya Wati Prakash made, if any, pursuant to the *Compensation to Relatives Act*.**

[334] It is noted, however, that according to the written submissions of Counsel for the Applicant Chief Registrar cited above, the evidence of Pranita Devi during cross-examination raised the issue of a payment from Dominion Insurance that had insured Salen's van for $50,000 ('*Closing Submissions'*, 8th January 2018, at [320]):

*'... She also stated that **four days after her husband's demise**, Subhasni and Hemant took her to one Justice of Peace, Mr. Ramesh Prasad and wrote two letters; one stating that PD would transfer LM permit to Hemant Kumar Singh and second letter stating that **Dominion Insurance money was to be returned to MWP as SPM had borrowed $50,000 and PD had to return that. She signed both those letters before JP**.'*
[My emphasis]

[335] It is also noted that the Respondent was not involved in any such claims and that the further evidence of Pranita Devi during cross-examination was that Subhasni would not allow Pranita near the van and also that Dominion Insurance had declined a claim *"because Salen had used the wrong route".*

(15) Conclusion on Count 1

(i) The burden of proof

[336] I have set out above, the burden of proof in proceedings before the Commission and what I discussed in *Kapadia* (supra) as the appropriate standard, that is, *'adopting the same standard as set out by Commissioner Connors in Sheik Hussein Shah (2010)', 'the civil standard varied according to the gravity of the act to be proved'* and to which Justice Madigan as Commissioner referred to in both *Haroon Ali Shah* (2012) and *Marawai and Chaudhry* (2012) as *'the preponderance of probabilities'*, noting that the latter judgment was affirmed by the Supreme Court in 2016. I also note that Justice Madigan also applied this same standard in *Narayan* (2014).

[337] Therefore, the '*standard of proof*' that I will be applying to Count 1 is thus: *'the civil standard [that is, the balance of probabilities] varied according to the gravity of the act to be proved'*.

[338] In addition, I have noted **the tests** set out in *Bolam* (supra) and *Midland Bank Trust Ltd* (supra). In particular, the test set out Oliver J in *Midland Bank Trust Ltd*, that is, *'The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession', and 'that the duty is directly related to the confines of the retainer'*.

[339] Taking the above as my guide, I note that **the Applicant has to prove upon the balance of probabilities** that the Respondent has committed an act of *'Professional Misconduct: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009'*, that is, the '*conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'* with such conduct '*varied according to the gravity of the act to be proved'*. **In particular**, **by** '***taking out Letters of Administration*** *... for the Estate of Salen Prakash Maharaj'* **when**

earlier '*Dipka Mala [from **his firm] had prepared a Will** for Salen Prakash Maharaj dated 22nd December 2006 **under which Maya Wati Prakash … was the beneficiary**',* **the Respondent's conduct was** *'**a substantial or consistent failure** to reach or maintain a reasonable standard of competence and diligence'* having regard to *'what the reasonably competent practitioner would do'* and that the Respondent's *'duty is directly related to the confines of the retainer'*.

(ii) Conclusion

[340] In my view, **the Applicant has failed to satisfy the persuasive burden upon him**, that is, to prove upon the balance of probabilities the allegation in Count 1, because:

(1) **The Applicant has failed to prove that there was a duty of care owed by the Respondent to the beneficiary of the Will, Maya Wati Prakash**;

(2) Even if there was a duty of care owed by the Respondent to the beneficiary, the Applicant has failed to prove that by the Respondent taking out Letters of Administration on behalf of the widow, Pranita Devi, the Respondent breached the duty of care that he owed to the beneficiary;

(3) Even if there was a duty of care owed by the Respondent to the beneficiary and the Respondent, by taking out Letters of Administration on behalf of the widow, had breached that a duty of care, **the Applicant has failed to prove how this was professional misconduct**, having regard to *'what the reasonably competent practitioner would do'* and that the Respondent's *'duty is directly related to the confines of the retainer'* which was to **simply for his firm to prepare and execute a valid will but to not retain custody of it.**

[341] **In the alternative**, accepting for argument's sake the submission of Counsel for the Applicant that this is not about duty of care, rather it is about conflict of interest, I find that the Applicant has failed to satisfy the persuasive burden upon him, that is, to prove upon the balance of probabilities the allegation in Count 1, because:

(1) The Applicant has failed to prove that there was a conflict in the Respondent's firm having drafted a Will for the testator whereby the beneficiary of the Will was not his widow but his mother and later, when the Will could not be found, acting for the widow in obtaining a grant of Letters of Administration when she was the person required by law to make such an application;

(2) Even if there was a conflict, the Applicant has failed to prove that this was

professional misconduct.

(16) Addition to Count 1 – the new conflict of interest

(i) Advising both the widow and beneficiary and then acting solely for the widow

[342] Before dismissing Count 1, I note that I now have to deal with a separate issue of a new conflict that was raised by Counsel for the Applicant Chief Registrar in his Synopsis Response of 4th May 2018, that is, '*the Respondent should not have acted for PD in extracting LA on her behalf after … him having advised both MWP and PD first and thereafter only proceeding to act solely for PD'.*

[343] As I have noted above, this alleged conflict was neither particularised in this Count nor in Count 3, both of which have charged the Respondent with professional misconduct in relation to his conduct towards Maya Wati Prakash. Therefore, I decided to relist the matter to hear from both Counsel on:

(1) whether permission should be given to amend the particulars; and

(2) whether it was a conflict for the Respondent to have acted for the widow, Pranita Devi, in obtaining for her a grant of letters of administration after the Respondent having previously advised both the widow, Pranita Devi and Maya Wait Prakash on 15th December 2008 '*and then only proceeding to act solely for PD'* as from 6th January 2009.

[344] As I understood this new allegation of a conflict of interest, Counsel for the Applicant Chief Registrar in his Synopsis Response of 4th May 2018, was focusing on the second category set out by Marsoof, JA in in *Chaudhry*, that is, *'(b) Conflicts between the interests of two or more clients the practitioner is currently representing'.* I note that this second category did not form the basis of the conflict of interest alleged in *Chaudhry*. I also note, however, that Marsoof JA in in *Chaudhry*, after setting out the four general categories of conflict, then explained at [43]-[44] as follows:

> '*43. A legal practitioner owes ethical duties to his clients, to court and to the general public. The duties he owes to clients include duties of loyalty, diligence and confidentiality. Loyalty itself is said to encompass duties of zeal, integrity and independence. The obligation to avoid conflicts is an important aspect of loyalty.*
>
> *44. A legal practitioner owes fiduciary duties to his client. As Millet LJ put it in Bristol and West Building Society v Mothew [1996] EWCA Civ 533; [1996] 4 All ER 698, [1998] Ch 1at page 18:-*

> *"... A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work Fiduciary Obligations (1977), p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."(Emphasis added)'*
>
> [My emphasis is the underlining which Marsoof JA had in italics)

(ii) The legal principles on conflict

[345] I note that at the clarification hearing on 25th April 2018, Counsel for the Respondent tendered on the issue of conflict, the judgment of Young J in *Grieves & Tully,* citing in turn the judgment of Brereton J in *Kallinicos* both of which I have cited above. I have also noted above that none of the issues on conflict discussed in *Grieves & Tully, McGillivray v Mitchell, Prince Jefri Bolkiah* and/or *Kallinicos*, were even mentioned by Counsel for the Respondent in his written submissions filed on 8th January and 20th February 2018. I also note that they were not raised at the clarification hearing on 25th April 2018 or in his Synopsis Reply of 4th May 2018. Whilst some of these cases were concerned with when a court should intervene to restrain a legal practitioner from appearing further in legal proceedings, some of the principles enunciated are relevant to the present matter.

[346] In particular, I have noted the judgment of Lord Millett in the House of Lords in *Prince Jefri Bolkiah* (with whom Lords Browne-Wilkinson, Hope of Craighead, Clyde and Hutton agreed). Although the case concerned a firm of accountants, it was conceded that the following five principles were applicable in relation to professional conflicts as Lord Millett highlighted:

(1) '***The Law' –*** '***Rakusen v. Ellis, Munday and Clarke*** *[1912] 1 Ch. 831 … is authority for two propositions:*

(i) that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and

(ii) that the solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client';

(2) '***The basis of the jurisdiction' –***

(i) ***'****In Rakusen's case the Court of Appeal founded the jurisdiction on the right of the former client to the protection of his confidential information ... I would affirm this as the basis of the court's jurisdiction to intervene on behalf of a former client';*

(ii) '*It is otherwise* ***where the court's intervention is sought by an existing client*** *... A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation';*

(iii) *'****Where the court's intervention is sought by a former client****, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none.* ***The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer.*** *Thereafter the solicitor has no obligation to defend and advance the interests of his former client.* ***The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence';***

(iv) ***'The extent of the solicitor's duty'*** *– ' Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it ...';*

(v) ***'Degree of risk'*** *– 'It follows that in the case of a former client there is no basis for granting relief if there is no risk of the disclosure or misuse of confidential information.*

[347] Lord Millett in *Prince Jefri Bolkiah*, after noting that in the United States there is *'an absolute rule ... which precludes a solicitor or his firm altogether from acting for a client with an interest adverse to that of the former client in the same or a*

connected matter', explained *'the basis of the court's jurisdiction to intervene on behalf of a former client'* in the United Kingdom. **The test being, *'the possession of relevant confidential information … within the expression "the same or a connected matter".'* Thus, '*the Court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information'.*** [My emphasis] Lord Millett also highlighted the burden upon a plaintiff who sought to claim conflict as the basis to restrain their former lawyer from acting in a matter for another client as follows:

> *'Accordingly, it is incumbent on a plaintiff … to establish (i) that the solicitor is in possession of **information which is confidential to him** and to the disclosure of which he has not consented and (ii) that **the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own**. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters ... **Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case**. In this respect also we ought not in my opinion to follow the jurisprudence of the United States.'*
> *[My emphasis]*

[348] Lord Millett then noted that the test for disqualification *'has been the subject of criticism both in this country and overseas, particularly in relation to solicitors, and a more stringent test has frequently been advocated'* and he regarded such criticisms 'as well founded'. **The test he concluded that he would apply** was:

> *'I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that **the risk must be a real one**, and not merely fanciful or theoretical. But it need not be substantial ...*
>
> *In my view **no solicitor should**, without the consent of his former client, **accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential** to the former client **may come into the possession of a party with an adverse interest**.'*
> [My emphasis]

[349] **I note that *Prince Jefri Bolkiah* has been applied in two previous decisions of this Commission and on each occasion the Commission found no conflict** as follows:

(1) ***Chief Registrar v Shah*** [2010] FJILSC 24 (30 September 2010) where Commissioner Connors dismissed one of 14 counts on the basis at [43] *'there is no evidence that any confidential information was used*';

(2) ***Chief Registrar v Narayan*** [2014] FJILSC 6; Case No. 009 of 2013 (2 October 2014) where in relation to two transactions at [19] '*by acting for both the vendor and the purchaser of a Crown Lease in 1994, and then in year 2000 acting for the Vendor on a mortgagee sale when the purchaser as Mortgagor defaulted on his mortgage the Registrar, while not alleging it to be so in the particulars of the complaint, is in effect alleging that this conduct by the practitioner in his professional capacity is conduct to the prejudice of the purchaser complainant arising from a conflict of interest.'* Justice Madigan dismissed one count of professional misconduct. I note that decision was at one stage on appeal and I am not certain as whether that appeal has been pursued or withdrawn.

(iii) Application of principles from Prince Jefri Bolkiah in Fiji

[350] I note that *Prince Jefri Bolkiah* has also been considered more recently by the Fiji Court of Appeal in ***RC Manubhai & Co. Ltd v Herbert Construction Company (Fiji) Ltd*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU0002 of 2010 (29 May 2014); PacLII: [2014] FJCA 175, <http://www.paclii.org/fj/cases/FJCA/2014/175.html>). This was an appeal from the High Court where a lawyer was restrained from acting (See ***RC Manubhai & Co Ltd v Herbert Construction Company (Fiji) Ltd*** [2009] FJHC 219; HBC75.2009L (7 October 2009)). The appeal was allowed by the Fiji Court of Appeal ordering that a lawyer was '*entitled to act as Solicitor and Barrister for the respective Plaintiffs in the three actions',* however, the Court also ordered that the lawyer *'shall not divulge or disclose to any person including the Plaintiffs/Appellants without the consent of the Respondent company's confidential or privileged information (if any) acquired by him pertaining to the Statements of Claim of the Plaintiffs in the aforesaid actions'.* Importantly (and relevant to the present matter) was the judgment of Almeida Guneratne JA (with whom Chandra and Malalgoda JJA agreed) wherein he stated at [47]:

> *'I have already expressed my views on the approach adapted by the House of Lords in the* ***Prince Jefri Bolkiah*** *decision (supra). If that decision is constrained in perspective* ***the test emerging there is the test of "No real (although it need not be substantial) risk of disclosure."'***
> [My emphasis]

[351] Then, at [113]-[114] Almeida Guneratne JA highlighted the following from Lord Millett's judgment in *Prince Jefri Bolkiah* and added his endorsement as follows:

'[113] … as counsel for the Appellants pointed out, in Bolkiah's case it was stated thus:

> *"where the Court's intervention is sought by a former client, however, the position is entirely different.* ***The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none****. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interest of his former client.* ***The only duty to the former client relationship is a continuing duty to preserve the confidentiality on information imparted during its substance****."*

[114] I am inclined to agree with the judicial thinking reflected in the said proposition.'
[My emphasis]

[352] Before I apply '*the judicial thinking'* from *Prince Jefri Bolkiah* as endorsed by the Fiji Court of Appeal in *RC Manubhai v Herbert*, I acknowledge that some common law jurisdictions have taken a different view on conflict, notably Australia and Canada. In the Victorian Court of Appeal in ***Spincode Pty Ltd v Look Software Pty Ltd & Ors*** [2001] VSCA 248; PacLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2001/248.html>, 21 December 2001. In *Spincode*, Brooking JA, after asking *'When may a solicitor change sides?', then undertook* a comprehensive review of the common law in various jurisdictions and concluded:

> *'How, then, do matters stand? I think it must be accepted that* ***Australian law has diverged from that of England and that the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client*** *…'*
> [My emphasis]

[353] Brooking JA noted that a similar view was taken by the Ontario Court of Appeal in ***Re Regina and Speid*** (1983) 43 O.R. (2d) 596 at 600; CanLII: 1983 CanLII 1704 (ON CA), <https://www.canlii.org/en/on/onca/doc/1983/1983canlii1704/1983canlii1704.html>, where it was said by Dubin JA (in delivering the judgment of the Court) at para [15]:

> *'… A client has every right to be confident that the solicitor retained will not subsequently take an adversarial position against the client with respect to the same subject-matter that he was retained on. That fiduciary duty, as I have noted, is not terminated when the services rendered have been completed'.*

[354] The other two justices in *Spincode* (Orimston and Cherbov JJA), whilst acknowledging Brooking JA's arguments, did not deem it necessary to decide that side issue in an urgent appeal concerning a company winding up, though as Cherbov JA noted at para [63]:

> *'It is not necessary to decide for the purposes of this appeal whether there is an absolute obligation on solicitors not to act against their former clients in the same or substantially the same proceeding, although, if I may say so with respect, the learned judgment of Brooking, J.A. makes a compelling case for such a view'.*

[355] I also note that recently in the New South Wales Supreme Court, Ball J in ***Técnicas Reunidas SA v Andrew*** [2018] NSWSC 645; AustLII: 14 May 2018, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2018/645.html>, stated at para [39]:

> *'**There is some debate about whether, in certain circumstances, the duty of loyalty continues following termination of the retainer.** The issue was discussed in detail by Beach J in Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd (2014) 228 FCR 252; [2014] FCA 1065, who preferred what his Honour described as the narrow view of the ratio of Earl of Cholmondeley v Lord Clinton [1815] EngR 511; (1815) 19 Ves Jun 261; 34 ER 515 at 520, namely, "that a solicitor acting for Party A in a matter, who ceases to act for Party A and then acts for Party B in the same matter, where such a retainer has been terminated by the act of the solicitor, will be enjoined" (at [45]). **However, other statements of the principle, including the one made by Brereton J in Kallinicos, suggest that there is no room for the continuing operation of the duty of loyalty after termination of the retainer; and no exception is suggested in the case where the retainer is terminated by the solicitor**: at [76]; see also Cleveland Investments Global Ltd v Evans [2010] NSWSC 567 at [3] per Ward J.'*
> [My emphasis]

[356] So although in both Australia and Canada there has been some support for the view that the operation of the duty of loyalty continues after the termination of the retainer, **it is clear that the view of the House of Lords in *Prince Jefri Bolkiah*, was adopted by the Fiji Court of Appeal in *RC Manubhai v Herbert*, prevails in Fiji**. Adopting the view of the House of Lords (in preference to other common law jurisdictions) is also in line with the reasoning set out by the Fiji Court of Appeal in ***Goundar v Minister for Health*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU0075.2006S (9 July 2008); PacLII: [2008] FJCA 40, <http://www.paclii.org/fj/cases/FJCA/2008/40.html>, wherein the Court at para [30] **endorsed the view of the Fiji Court of Appeal**, from some 13 years earlier,

in ***Suresh Charan v Shah*** (1995) 421 FLR 65; PacLII: [1995] FJCA 3, <http://www.paclii.org/fj/cases/FJCA/1995/3.html>, that is:

> *'In Fiji the Court of Appeal in* ***Suresh Charan v Shah*** *...* ***further held that for the orderly development of the law in Fiji it was generally helpful to follow the decisions of the English courts unless there were strong reasons for not doing so*** *...'.*

(iv) Application to the present case

[357] Applying the view of the House of Lords in *Prince Jefri Bolkiah*, adopted by the Fiji Court of Appeal in *RC Manubhai v Herbert* to the present case, (that is, the ***'duty to preserve the confidentiality'*** of information which forms the basis of a professional conflict)**,** I note as follows:

(1) I have already found that the second retainer began and ended on 15th December 2018. Hence, **the fiduciary duty of the Respondent to Maya Wati Prakash**, in relation to making a joint application for a grant of letters of administration of the Estate of Salen Prakash Maharaj, **began and ended on 15th December 2018**;

(2) Therefore, in my view, **the present case does** not concern an alleged breach of a fiduciary duty to an existing client, **but whether in relation to a former client there is a conflict in acting in *'the same or a connected matter'*. That is, whether there is** *'the possession of relevant confidential information ... within the expression "the same or a connected matter".*

(3) Thus, **the test** to be applied is, as set out by Lord Millett in in *Prince Jefri Bolkiah*, that is, '***no solicitor should****, without the consent of his former client,* ***accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential*** *to the former client* ***may come into the possession of a party with an adverse interest'***;

(4) **The onus is thus on the Applicant** (as it would be if these were proceedings seeking to restrain a lawyer form acting in *"the same or a connected matter"*) **to prove on the balance of probabilities that there was confidential information that needed to be protected;**

[358] I also note that in the present matter:

(1) The interest of the beneficiary under the missing Will for a claim over the property at Koronivia was already protected by a caveat lodged in 2007;

(2) The Respondent was only assisting the widow to apply for a grant of letters of administration to administer the estate;

(3) The Respondent was not involved in assisting the widow in the distribution of the estate;

(4) The Respondent hosted a settlement meeting between the widow and the beneficiary under the missing Will in March 2009, at which the evidence is clear that Respondent did not act for either party;

(5) The widow still had a potential claim against the estate pursuant to the *Inheritance (Family Provision) Act 2004;*

(6) The Respondent **did <u>not</u> initially act solely for the benefit of Maya Wati Prakash**. Rather, <u>it was joint instructions</u> that he received on 15th December 2008 from both Pranita Devi and Maya Wati Prakash;

(7) The Respondent's **<u>instructions to act were then discharged not by the Respondent</u> but by Maya Wati Prakash** <u>that same afternoon, on 15th December 2008</u>. That is, he was '***in the situation of a solicitor discharged by the client'***;

(8) The Respondent **did <u>not</u> acquire "some personal knowledge" (or what might be termed "confidential information") from Maya Wati Prakash** when taking joint instructions on 15th December 2008 which he then used against Maya Wati Prakash when taking out the application for a grant of Letters of Administration on behalf of Pranita Devi as from 6th January 2009, **such that it could <u>not</u> be said that he *'had committed a gross breach of professional confidence'***.

(v) Whether what is now being alleged should be allowed to form part of the case against the First Respondent?

[359] Counsel for the Respondent took the opportunity to filed *'Further Submissions on the issue of Conflict'* dated 4th June 2018, raising objection to this new category of conflict being considered as part of the Applicant's case. Counsel for the Applicant was not able to file written submissions, however, he was given the opportunity to make oral submissions at the supplementary clarification hearing on 13th June 2018.

[360] **At the supplementary clarification hearing on 13th June 2018, I asked directly of Counsel for the Applicant Chief Registrar to explain whether I was correct in what I saw was a second category of conflict and, if so, whether he was seeking to amend Count 1 and/or Count 3?**

[361] After discussion, Counsel for the Applicant Chief Registrar conceded that it was too late to now amend the particulars in Counts 1 and 3 and he would stand by the

two counts in their present form. Counsel for the Respondent agreed and thanked Counsel for the Applicant Chief Registrar being prepared to make this concession.

(vi) Conclusion

[362] **In view of the concession by Counsel for the Applicant, my conclusion on the further alleged conflict is:**

(1) ***Whether what is now being alleged should be allowed to form part of the case against the First Respondent?***

(i) I have noted the concession by Counsel for the Applicant that it is <u>too late to seek to amend</u> Counts 1 and 3;

(ii) Accordingly, Counts 1 and 3 <u>stand in their present form</u>;

(2) ***What is the alleged confidential information that needs to be protected?***

In my view, the Applicant has failed to prove on the balance of probabilities that:

(i) there was confidential information that needed to be protected;

(ii) the Respondent breached that protection by acting on behalf of the widow in applying for a grant of letters of administration; and

(iii) by breaching the protection the Respondent committed an act of professional misconduct.

(17) Overall conclusion on Count 1

[363] In summary, I have found:

(1) **The Applicant has failed to prove that there was <u>a duty of care owed</u> by the Respondent to the beneficiary of the Will, Maya Wati Prakash**;

(2) **<u>In the alternative</u>, the Applicant has failed to prove that there was <u>a conflict</u> in the Respondent's firm having drafted a will for the testator whereby the beneficiary of the Will was not his widow but his mother and later, when the will could not be found, acting for the widow in obtaining a grant of Letters of Administration when she was the person required by law to make such an application;**

(3) **<u>In the further alternative</u>, the late allegation that there was <u>a second conflict</u> (that the Respondent having advised both the widow and beneficiary on 15th December 2008 in relation to a joint application for a grant of letters of administration was then in a conflict in acting solely for the widow as from 6th January 2009 in obtaining a grant of Letters of Administration), <u>has been</u>**

conceded by Counsel for the Applicant that it does not from part of the Applicant's case in relation to Counts 1 and/or 3. In any event, in my view, even if it a late amendment had been allowed to Count 1, there has been no evidence placed before the Commission that Maya Wati Prakash provided confidential information to the Respondent which needed to be protected and that the Respondent breached that confidentiality.

[364] **Accordingly, as I have found that the Applicant has failed to prove upon the balance of probabilities the allegation in Count 1, it is dismissed**.

8. Count 2

[365] In reaching a decision as to whether Count 2 is made out, that is, whether there was a failure to keep a proper record of the Will and thus committed an act of '*Unsatisfactory Professional Conduct'*, I have divided my analysis into six parts as follows:

(1) The allegation;

(2) How many wills were drafted and executed?

(3) Storage of the Will of Salen Prakash Maharaj;

(4) Lack of definition of what is a 'proper record';

(5) The evidence of Mr. Willy Hiuare;

(6) Conclusion on Count 2.

(1) The allegation

[366] Count 2 alleges that the Respondent has committed an act of '*Unsatisfactory Professional Conduct: Contrary to Section 81 of the Legal Practitioners Decree 2009'* which states:

> *'Unsatisfactory Professional Conduct*
>
> *81. For the purposes of this Decree, "unsatisfactory professional conduct"* ***includes conduct of a legal practitioner****, a law firm or an employee or agent of a legal practitioner or law firm, occurring in connection with the practice of law* ***that falls short of the standards of competence and diligence*** *that a* ***member of the public is entitled to expect*** *of a reasonably competent or professional legal practitioner or law firm.'*
> [My emphasis]

[367] The particulars accompanying Count 2, in summary, state:

'SURUJ PRASAD SHARMA *... between 22nd December 2006 and 23rd January 2010* ***failed to keep proper record of the Will*** *of Salen Prakash Maharaj dated 22nd December 2006 ...'*

(2) How many Wills were drafted and executed?

[368] On 22nd December 2006, Salen Prakash Maharaj and his mother, Maya Wati Prakash, each had a Will prepared for them by the law firm of Patel Sharma Lawyers. Both Wills were also executed on the same date. The Wills were drawn by Dipka Mala and witnessed by Dipka Mala and Merewai Doughty, employees in the firm of Patel Sharma Lawyers (Exhibit 1.) **It is disputed as to how many original Wills were drafted and executed on 22nd December 2006**.

(i) The affidavit of Maya Wati Prakash sworn on 26th October 2012

[369] On 26th October 2012, as part of the above proceedings in the High Court at Suva between Maya Wati Prakash and Pranita Devi, Maya Wati Prakash swore an affidavit as her evidence-in-chief (**Exhibit "18" before this Commission.**) In her said affidavit, Maya Wati Prakash recounted:

(1) On 22nd December 2006, when Salen's Will was made, '*My daughter Rosie [also known as Subhasni] had made an appointment with the solicitor for me and Salen to see the solicitor';*

(2) Maya then went with her son, Salen Prakash Maharaj, to the firm of Patel Sharma and Associates on 22nd December 2006 to have Wills prepared where they met a young lady and *'Salen told her that we came to have the Will for me and him done'* and this was done by the young lady *'in front of us on the computer. And [she] printed the documents';*

(3) Maya Wati Prakash then stated at paras [10]-[11] of her affidavit as follows:

> *'10. By that time my daughter Rosie arrived [at] the solicitors officers [sic]. She had a look at the documents. And then I signed the Will in front of this lady who I now know as Mala. At the time I signed the will, my daughter Rosie and son Salen was there. This lady, who I thought to be a lawyer,* ***Mala was there and another woman staff was there****. This other woman appeared to be Fijian. After I signed the paper, then the other two ladies signed after me. I believe there were* ***2 copies as they kept one copy and gave me one copy*** *...*
>
> *11. After I signed then* ***Salen also signed his Will*** ***in front of the two ladies****. He signed first and the other two ladies signed as witnesses. She then* ***gave Salen's signed Will to him*** *...'*
>
> [My emphasis]

[370] I note that in the above affidavit, in relation to Salen, there was the mention of a

Will, that is, in the singular. There was **no such statement** (as there was in relation to Maya's Will) **of there being TWO copies of Salen's Will** that is, a statement, such as, '*I believe there were **2 copies as they kept one copy and gave him one copy**'*.

(ii) The statement by Maya Wati Prakash of 29th September 2015 taken by "Jitendra" of the LPU

[371] On 29th September 2015, **Maya Wati Prakash made a statement that was written in English and translated in Hindustani by "Jitendra" (with no surname) from the Legal Practitioners Unit** within the Office of the Chief Registrar, wherein Maya Wati Prakash stated on pp. 2-3 ("AD28", *Agreed Bundle,* pp. 115-118, marked as **Exhibit "28**", at pp. 116-117) as follows:

> *'After preparing the Will was read back to us and explained by Ms Mala. I and my son agreed what all was written on those **two wills**. The clerk Ms Mala then took those **two Wills** for the lawyer to sign. After signing those **two Wills** by the lawyer **both the original Wills were handed over to my son Salen Prakash Maharaj**. The Wills were not registered and it was only signed by the lawyer.'*
> [My emphasis]

[372] I note that in the above statement there was no mention of there being FOUR Wills (that is, two originals and two copies of the Wills of Salen Prakash Maharaj and Maya Wati Prakash).

[373] Further, **the claim by Maya in her statement of 29th September 2015**, that after the Wills were drafted, '*The clerk Ms Mala then took those two Wills for the lawyer to sign'* and that *'The Wills were not registered and it was only signed by the lawyer'* **is clearly incorrect**:

(1) On 22nd December 2006, Maya Wati Prakash was present when the clerk, Merewai Doughty and the Law Clerk, Dipka Mala, witnessed the Wills (Exhibit 1). There is no evidence that Maya Wati Prakash met any lawyer from the law firm of Patel Sharma Lawyers that day. Indeed, in relation to Mr. Suruj Sharma, it is undisputed that he was overseas on that day as verified by the stamp in his passport, which was tendered and marked as **Exhibit 76**;

(2) Maya Wati Prakash presumably saw Salen's Will again (or a copy of it) after Maya arrived back in Fiji, at some stage after Salen's Will had been found by Maya's daughter, Subhasni, on 23rd January 2010. This was, obviously, prior to

Maya's statement of 29th September 2015 that she made before "Jitendra" of the LPU, wherein Maya claimed that a lawyer signed the Will. On Salen's Will, it is clearly stated that it was witnessed by Merewai Doughty, 'clerk' and Dipka Mala, 'Law Clerk' (See Exhibit 1);

(3) Maya Wati Prakash must also have been aware that this was the case following the judgment of 11th October 2013 (which was handed down nearly two years prior to her making her claim in her statement with "Jitendra" on 29th September 2015) **wherein Balapatabendi J set out in his judgment at para [5] the full text of Salen's Will including clearly stating that it had been witnessed by Merewai Doughty, Clerk and Dipka Mala, Law Clerk**. (See Exhibit 19 in these present proceedings.) Despite what Mala said in her witness statement of 29th September 2015, it is clear that a lawyer did not witness Salen's Will.

[374] In addition, if the statement by Maya Wati Prakash that *'The Wills were not registered'* was meant to be an inference that something untoward had occurred, this is also not correct. There was no requirement in 2006 for Wills to be registered and there is still no such requirement in 2018.

[375] Maya Wati Prakash then concluded her witness statement of the 29th September 2015, which had been written out for her by "Jitendra" from the Legal Practitioners Unit, with the claim on page 4 (Exhibit 28, page 118):

> *'Then sometimes in January 2010 my daughter Subhasni Lata Singh discovered **both the Wills** which was kept in the box of documents while she was looking for her lands title. Then **the two original Wills** were handed over to my lawyer Prem Lata Narayan who was representing me in my case in the Court.'*
> [My emphasis]

(iii) The evidence of Maya Wati Prakash given before the Commission on 5th and 6th December 2016

[376] The evidence of Maya Wati Prakash before this Commission on 5th December 2016 was that her son kept both Wills. Also, she said, in both her examination-in-chief and cross-examination, that she signed on two pages.

[377] Adding to the confusion, was this segment of evidence (from the re-examination of Maya Wati Prakash by Counsel for the Applicant on 6th December 2016), as follows:

"Mr. Chand:	*Now witness, **you had said in your evidence yesterday** that on the day the Will was signed, that is **on the 22nd December 2006** at Patel Sharma Lawyers, Patel Sharma Associates rather, back then **you had signed on two pages**?*
Interpreter:	*Yes.*
Mr. Chand:	*Now, what were those two pages?*
Interpreter:	*It was **the Will made of 2 pages**.*
Mr. Chand:	***Was it one Will of 2 pages or two different Wills**?*
Interpreter:	***It was one Will made of 2 pages**."*
	[My emphasis]

[378] I note that such evidence by Maya Wati Prakash, however, is contrary to her earlier affidavit that she had sworn on 26th October 2012, (as her evidence-in-chief in the proceedings *Prakash v Devi* in the High Court at Suva, Civil Action No.3 of 2010), cited above as Exhibit 18 in these present proceedings. In that affidavit, Maya Wati Prakash had stated at para [10], '*I believe there were **2 copies** as they kept one copy and gave me one copy …'.* [My emphasis] It is also different to the evidence that Maya Wati Prakash gave under cross-examination in the High Court in *Prakash v Devi* on 29th October 2012 (Doc.21, p.9, Exhibit 47, p.122). When it was put to Maya that "*it was Rosie that made the contents of the will"*, Maya replied, *"There was not one will. **There were 3 or 4 wills**."* Further, when it was put to Maya that Salen's Will was forged, she replied (Doc.21, p.21, Exhibit 47, p.134), *"It has Shalen's [sic] signature. Other people's signature. **He made 3 or 4 wills***." [My emphasis] I note though, in re-examination in the High Court, when it was put to her (Doc.21, p.35, Exhibit 47, p.148), *"You did **2 wills** at Patel Sharma",* she replied **"Yes"**.

[379] The "two pages" became an important issue of the cross-examination of Maya Wati Prakash on 5th December 2016. According to the written submissions of Counsel for the Applicant *('Closing Submissions'*, 8th January 2018, at para [42]): *'She [Maya Wati Prakash] confirmed she signed on 2 pages on her will and her son also signed on 2 pages on his will.'* This, however, is only part of what Maya said in cross-examination in relation to the "two pages".

[380] First, it was clarified in cross-examination by Counsel for the Respondent as to what Maya meant when she was referring to "two pages":

"Mr. Sharma: *Okay,* ***so you agree that you are not talking about four originals being signed; you are only talking about two originals****?*
Interpreter: *Translating in Hindi language.*
Mr. Sharma: *So in that, the explanation is what?*
Interpreter: *Initially said,* ***two pages were signed by me and then two by my son****."*
[My emphasis]

[381] Second, Maya was then taken by Counsel for the Respondent to document "SD6" at page 19 in the '*Supplementary Bundle of Documents'*, that is, the bundle of documents that were not agreed between Counsel prior to the hearing before the Commission. Counsel for the Respondent asked Maya as to whether the document at SD6, which was titled *'Authority'*, was one of the two pages (apart from the Will) that both Salen and she signed on 22nd December 2006. Further, Maya was asked to confirm that the document was an undertaking given by Salen for the clearing of all outstanding utilities in relation to the sale of a property at Lokia that had just been completed and that she was one of the two signatures that had witnessed Salen's signature. She confirmed that this was the case as the following extract of this aspect of her cross-examination reveals:

"Mr. Sharma: ***… Ms. Prakash do you see your signature on this document?*** *[*"SD6"*]*
Interpreter: ***It is at the bottom of the page towards the right.***

…

Mr. Sharma: ***So on the 22nd of December 2006, Ms. Prakash you did sign two pages didn't you? This was one of the pages you signed?***
Interpreter: *No this is the different document ...*
Interpreter: *That we signed.*
…
Interpreter: *Further said, one for selling the land and the house were different document.*
…
Mr. Sharma: *You look at the date of this document.*
…
Mr. Sharma: *Alright. What is the date on the document?*
Ms. Maya Wati: *22*
Interpreter: *22*

Mr. Sharma: *Alright.*
Commissioner: ***22 of December 2006, do you agree with that?***
Interpreter: ***If it's written then it must be the true thing because I do not remember.***
…
Mr. Sharma: *… And* ***you have already confirmed that, that is your signature at the bottom?***
Interpreter: ***Yes.***

Mr. Sharma: *And do you also confirm* ***that is <u>your son's signature</u>****, Salen Prakash's signature at the top?*
Interpreter: ***<u>Yes</u>****.*

Mr. Sharma: *And do you see, under the word "witness" there is another signature there?*

Mr. Sharma: ***Do you remember who witnessed your signature*** *on this document?*
Interpreter: *At that time* ***<u>Mala</u>*** *dealt with us.*

Mr. Sharma: *Now interpreter can you just read and explain to Ms. Prakash what this document is?*

...
Mr. Sharma: ***So now you understand what this was for Mrs. Prakash?***
Interpreter: ***Yes, about selling the house.***

Mr. Sharma: *Right. <u>Your son was giving an undertaking</u> that at the time you'll move out of the house then all the electricity, water rates, telephone bills and city rates, <u>utilities will be all paid up to date</u>.*

Mr. Sharma: *Right, at the time as at 22nd December 2006, were you still in the Lokia property?*
Interpreter: *I do not remember exactly what time it was sold, and then we came from there.*

Mr. Sharma: *Do you remember where you were staying on the 22nd of December 2006?*
Maya Wati: *Koronivia.*
Interpreter: *Koronivia.*
...
Interpreter: ***We had sold the house and we had come over to the Koronivia House.***

Mr. Sharma: *Okay, now My Lord if there's no objections to the fact that she has now identified the authority as her signature and the contents were read out to her then we can have it marked as exhibit ...*
Commissioner: *I think we are up to 38."*
[My emphasis]

[382] There followed, however, an initial objection by Counsel for the Applicant, to "SD6" being tendered, with Counsel for the Applicant claiming it did not look like Maya Wati Prakash's signature on the document. When it was pointed out to Counsel that the witness had just identified her signature twice on that same document, Counsel retracted his objection and SD6 was accepted into evidence and marked as **Exhibit "38"**.

[383] Counsel for the Applicant dealt with the issue of Exhibit 38 and the querying of Maya's signature in re-examination the following day, 6th December 2016, when, after taking Maya Wati Prakash to the signature she had previously identified as

hers at Exhibit 2, (signed on 15th December 2008, as the joint instructions authorising the law firm to prepare an application for Letters of Administration under the joint names of Pranita Devi and Maya Wati Prakash), Counsel for the Applicant, then took Maya Wati Prakash to Exhibit 38 (document "SD6", page 19, signed on 22nd December 2006, whereby the undertaking given by Salen to clearing all outstanding utilities in relation to the sale of a property at Lokia was witnessed by two signatures) and asked:

"Mr. Chand:	*Now witness, if you look at now document SD6 at page 19, Supplementary Document 6 at page 19 [Exhibit 38]. Now could you explain why the and could you state which one is your signature at page 19?*
Interpreter:	***It doesn't look like my signature**. And my son's father's name is written incorrectly. It's not Ram Gopal.*
...	
Mr. Chand:	*Now witness could you clarify as in your evidence you had said that you had signed on document 19, document at page 19 of Supplementary Document, and today you're saying it's not your signature. Could you then confirm why...*
Commissioner:	*'It doesn't look like my signature', is what she said today.*
Mr. Chand:	*Yes, it doesn't look like your signature, but yesterday you had said it was your signature. Now which version is correct, Ms Prakash?*
Interpreter:	***The thing I'm saying today is true; it doesn't look like my signature**."* [My emphasis]

[384] I note that the signature of Maya Wati Prakash in the Authority signed on 22nd December 2006 (Exhibit 38), looks somewhat similar to the signature in the Trust Account 'Payment Voucher and Authority' dated 19th December 2006 (document "SD7", *Supplementary Bundle*, that was identified by Dipka Mala as signed by Maya and Salen on 22nd December 2006, and marked as **Exhibit "69", page 20**). I further note, however, that the signature of Maya in Exhibits 38 and 39 is different to what appears to be initials(?) (or, perhaps, as to what can best be described as an "indecipherable squiggles") on a document dated 19th December 2006 but, apparently also signed on 22nd December 2006 (document "SD8", *Supplementary Bundle*, marked as **Exhibit "71", at pp. 22-23**). I further note that there is a shortened form of Maya Wati Prakash's signature that is written simply as *"M Wati"* in the *'Power of Attorney'* executed on 16th August 2000 whereby Satya Prakash and Maya Wati (with no inclusion in her surname of "Prakash") appointed their son, Salen as their attorney (document "SD9", *Supplementary Bundle*, marked as **Exhibit 37, at page 26**). Also, **in the copy of the *'Sale and Purchase***

***Agreement'* dated 30th November 1998** between Dalip Singh (Vendor) and Maya Wati and Salen Prakash Maharaj (Purchaser), there is a shortened form of Maya Wati's signature as *"M Wati"* and also **a signature of Salen Prakash Maharaj that looks very different to that of his Last Will and Testament executed on 22nd December 2006** in Exhibit 1, page 2. Further, the two signatures of Maya Wati Prakash in the 'Instructions to Act' (document "AD2", *Agreed Bundle*, marked as **Exhibit 2**) look different to the signatures on the various authorities signed on 22nd December 2006. It may well have been that Salen was also signing some documents on behalf of his mother as her appointed 'Power of Attorney'. I am not going to resolve these issues. I do not need to do so. It is not the basis of any of the four counts before this Commission.

[385] If Counsel for the Applicant wished to raise further argument in relation to this issue (and how it was relevant to the four counts) then he needed to explain its relevance and produce, for example, if not a handwriting expert, then at least a number of official documents with Maya's signature and then to ask Maya to explain if there had been differences in her signature over the years. Further, I am not intending to make any findings regarding Maya's signature (nor have I been asked to do so in the written submissions of either Counsel) that will be crucial to my decision in relation to any or all of the four counts.

[386] **I found the evidence of Maya Wati Prakash unreliable on the issue as to how many Wills were executed for the following reasons**:

(1) In his judgment of 11th October 2013, Balapatabendi J, noted that *'**The Plaintiff in her evidence testified**... One Ms Mala of Patel Sharma Lawyers after obtaining all necessary details from both of them **prepared two wills'***. **There is no mention of there being a finding of four original wills. I do note, however, that Maya's evidence,** when it was put to her that "*it was Rosie that made the contents of the will"*, was *"There was not one will.* ***There were 3 or 4 wills"*** (Exhibit 47, p.122) **and that Salen *"made 3 or 4 wills"*** (Exhibit 47, p.134). Further, **in re-examination when she was asked *"You did 2 wills at Patel Sharma",* she replied *"Yes"*** (Exhibit 47, p.122)**;**

(2) In her witness statement made just under three years later, on 29th September 2015 and taken by "Jitendra" of the LPU, **there is mention of there being TWO Wills, one for her son and one for her**. **There is no mention of there being four**

original Wills;

(3) In her evidence given before this Commission on 5th December 2016, whilst saying that she signed two pages, she never directly confirmed that there were FOUR originals Wills (two for her son and two for her) prepared by the staff of Patel Sharma Lawyers;

(4) In her further evidence given before this Commission on the following day, 6th December 2016, she clearly stated in answers to specific questions in re-examination from Counsel for the Applicant Chief Registrar that she had signed on two pages and as to whether "*Was it one Will of 2 pages or two different Wills",* she replied that **"*It was one Will made of 2 pages*";**

(5) **It is quite clear when one examines the '*Last Will and Testament executed by* [the] *Deceased'*, Exhibit 1, it is of TWO signed pages.**

(iv) The evidence of Dipka Mala

[387] Apart from Maya Wati Prakash, the only other person who was called to give evidence before the Commission who was also present on 22nd December 2006 when Salen's Will was drafted and executed, was **Dipka Mala**, from the firm of Patel Sharma Lawyers.

[388] Even if I had found that the evidence of Maya Wati Prakash had satisfied the evidential burden upon the Applicant of there being TWO original Wills of Salen Prakash Maharaj (which I have not) so as to shift the burden to the Respondent on this issue, Counsel for the Respondent, in my view, satisfied that evidential burden (and thus shifted the onus back to the Applicant) through the evidence of Dipka Mala whose evidence I found far more plausible than that of Maya Wati Prakash as I shall now summarise.

[389] **What was not explored by Counsel for the Applicant Chief Registrar in the questions that he asked of Maya Wati Prakash in either her examination-in-chief or in re-examination (after it had been put to Maya by Counsel for the Respondent in cross-examination), was the context in how the Wills of Maya and Salen came to be made on 22nd December 2006.**

[390] **By contrast, Counsel for the Respondent, in his questioning of Dipka Mala, developed the context in how the Wills came to be made. Dipka Mala's**

evidence I found to be both reliable and revealing.

[391] **According to Dipka Mala, on 22nd December 2006, Maya Wati Prakash and Salen Prakash Maharaj attended upon Patel Sharma Lawyers to finalise the sale of a property at Lot 7 on DP 5754 known as "Lokia" in Rewa, Viti Levu.** That is, Salen signed an 'Authority' whereby he undertook to the purchasers to clear all outstanding utilities in relation to the sale of a property and his signed authority was witnessed at the same time by Dipka Mala and Maya Wati Prakash.

[392] In her evidence, Dipka Mala was referred to Exhibit 38, that is, the 'Authority' being an undertaking given by Salen to Inoke Kana and Levani Gonevou (as the purchasers) clear all outstanding utilities in relation to the sale of a property known as "Lokia". Dipka Mala confirmed her signature on the left hand side on the authority and stated that Maya Wati Prakash's signature was on the right hand side, as Dipka Mala explained:

> *"Since the settlement of the sale CT 24097 had taken place and they were on the verge of collecting the settlement proceeds, this authority was signed to ensure that they would arrange giving of vacant posession and payment and clearance of all utilities upon settlement prior to vacating the property."*

[393] According to Dipka Mala, once the authority was completed, Salen was handed a cheque as the balance of the settlement proceeds from the sale of the Lokia property. In that regard, Ms. Mala was taken to Exhibit 69 ("SD7" at page 20 in the '*Supplementary Bundle'*), a 'Trust Account Payment Voucher and Authority' from the firm of Patel Sharma & Associates that she identified and explained as follows:

"Mr. Sharma:	*Can you tell us, first of all what is this payment voucher and authority, what does it relate to?*
...	
Ms. Mala:	*This payment voucher related to payment of the balance settlement proceeds in respect of the sale of property.*
Mr. Sharma:	*And who's writing/handwriting is on that/ who's handwriting has been used to prepare the authority?*
Ms. Mala:	***It's my handwriting Sir.***
...	
Commissioner:	*All those and the particulars of payment, is that you?*
Ms. Mala:	*Particulars of payment except the cheque number right on.*
Mr. Sharma:	*Now this particular authority was prepared on the 19th December 2006 but* ***Mr. Salen and his mother came on the 22nd. Is it correct?***
Ms. Mala:	***Yes.***

Mr. Sharma:	*When did Salen and his mother sign the document?*
Ms. Mala:	***They signed it on the 22nd of December 2006**.*
Mr. Sharma	*Can you tell the Commission why this payment authority was prepared on the 19th of December 2006?*
Ms. Mala:	*Yes, it was prepared on the 19th December 2006 because settlement took place on the 18th and Mr. Sharma was to leave the country I think on the 20th December, so we had to get the authority signed off and the cheques prepared.*
…	
Mr. Sharma:	*But **you confirm that these people came to your office on the 22nd to pick it up, is it correct**?*
Ms. Mala:	***Yes**.*
…	
Mr. Sharma:	*And when Mr. Prakash and Mrs. Maya Wati come to the office on the 22nd they sign and collect the cheque, is that how it works?*
Ms. Mala:	*They sign and collected the cheques. The difference between the dates is because we had written for the cheques to clear off in the meantime.*
Mr. Sharma:	*Okay, right. But I just want to be very clear, my/as to when they came and collect the cheque?*
Ms. Mala:	***They came and collected it on the 22nd of December 2006**.*
Mr. Sharma:	***So, they collected on the 22nd when the things were cleared, that's what you are saying to me?***
Ms. Mala:	***Yes**."*
	[My emphasis]

[394] In relation to the above, I note that when "SD7" was being tendered as two separate pages and exhibits as follows:

(1) "SD7" Page 20 became Exhibit 69, that is, the payment voucher authority that Dipka Mala alleged were signed by Salen and Maya on 22nd December 2006 and the cheque received by Salen on that same date;

(2) "SD7" Page 21 became **Exhibit "70"**, that is, the *'Trust Account Cheque of $62,000.00 payable to Salen Prakash Maharaj and an unsigned authority'* that were prepared on the 19th of December 2006 but the cheque was not handed to Salen until he had signed the authority in Exhibit 69 on 22nd December 2006, that Dipka Mala alleged was witnessed by Mala and her.

[395] Dipka Mala then went on to identify document Exhibit 71 ("SD8", '*Supplementary Bundle',* at pp. 22-23) as the Trust Account authorities for *'the payment of commission to the agent',* to '*Joe Rarasea on the 19th of December for $5000.00',* which could not be released until the authority had been signed by Salen Prakash which also occurred on 22nd December 2006.

[396] Dipka Mala's evidence was that the following then occurred:

> *"I recall that after these payment vouchers were executed and payments collected ...* ***Maya Wati Prakash and Salen had left my table and gone to our reception area where they had some private discussions*** *and later came back and requested if I could help them prepare a Will for both of them"*. [My emphasis]

[397] According to Dipka Mala, Maya Wati Prakash had *"brought along with her a draft copy of the Will which she had asked me to go through the document and check whether it was in order", "she had told me that it was prepared by Subhasni"* who *"she told me it was her daughter"*.

[398] I note that when it had been previously put to Maya Wati Prakash during cross-examination that she had brought a document with her, Maya's initial response was: *"No, I have not seen it. My son dealt with everything."* Counsel for the Respondent then suggested to Maya that *"when you came to the Law firm of Patel Sharma on 22nd of December 2006 and met with the Law clerk Dipka Mala, you had this particular document to say that this is the kind of draft Will you had given to her to say this is what my intention is was"*. After this suggestion was repeated and when there was no answer, I sought to clarify what was being asked explaining to Maya *"What he is saying is, he has got instructions that someone had said when you came in 2006, this is the document you gave. What do you say about that?"* Maya's response was: "*Yes, the son dealt with everything, I did not take anything"*, followed by "*I don't know whether he took it or did not take it"*. When I sought to clarify if what Maya was saying was that the son had brought a document, she replied: *"He may have bought it, I do not remember."* Counsel for the Respondent then asked of me: *"Can we in that respect sir mark it for identification because then Mala will come to give evidence on that document sir?"* The document ("SD2", '*Supplementary Bundle'*, pp. 4-5) was then marked for identification as **MFI "1"**.

[399] In her evidence-in-chief, Dipka Mala identified the document that had been previously marked as MFI "1" as *"this was the document that she [Maya] brought along on the 22nd of December".* (It was later marked as **Exhibit "77"**.) She then explained why she recognised the document as follows:

> *"Mr. Sharma:* *Now, firstly* ***there are some handwritten mark-ups on this document****, who can you tell/can you know who marked it up?*
> *Ms. Mala:* ***I marked this document Sir.***
> *...*

Ms. Mala:	***That's my handwriting I had marked the documents***.
…	
Mr. Sharma:	*Now in this particular document, it's upon Salen and Subhasni as the proposed trustee, executor and executrix of the Will and the benefit is to be given to Subhasni, Ireen and Salen with some residual benefit to Sheenal and Kelvin the grandchildren?*
Ms. Mala:	*Yes.*
Mr. Sharma:	*Did she want the Will to be made this way? What was her instructions to you?*
Ms. Mala:	*Yes, her instructions were for us to prepare Will to this effect provided it was in order and I had told her that we can't use this format.*
Commissioner:	*We can't?*
Ms. Mala:	*Use this particular format because it was not correct.*
Commissioner:	*We can't use this particular format because it?*
Ms. Mala:	*was not correct. The contents of which was not right. The contents weren't right.*
Mr. Sharma:	*And you will see over the page the terms are Maya Wati said/ is refered to as the testator, you have, that's your handwriting to testatrix, is that correct?*
Ms. Mala:	*Yes Sir.*
Mr. Sharma:	*And witnesses are Justice of the Peace.*
Ms. Mala:	*Yes.*
Mr. Sharma:	*And she is being refered to as a man, isnt it? That he…*
Ms. Mala:	*Yes.*
Mr. Sharma:	*So you have informed her. Who typed the date 10th November 2006, did Subhashni type the date? Were you instructed?*
Ms. Mala:	*It was in the document when I received it.*
Commissioner:	*So, the date on the 10th of November 2006, was on the document?*
Ms. Mala:	*On the document itself.*
Mr. Sharma:	*So, after you had discussed with Ms. Maya Wati Prakash, what she wanted to be amended, did you then make a Will for her?*
Ms. Mala:	*Yes, then I had/once I gone through the document and I had told her that this was not the format that we prepare Wills and then she had requested if we could help her and prepare a will each for both of them, herself and the son."* [My emphasis]

[400] Then, according to Dipka Mala, *"The discussions took place between the mother and the son as regards to preparation of the Will ... I got the Will prepared and <u>when they were about to leave the office only Subhasni called into our office</u>".*

[401] Although document MFI "1" (which later became marked as Exhibit 77) had been put by Counsel for the Respondent to Maya Wati Prakash and Maya denied

knowledge of it, **I note that after the document was identified by Dipka Mala in her evidence-in-chief as having been produced by Maya on 22nd December 2006, it was never put to Dipka Mala in cross-examination by Counsel for the Applicant Chief Registrar that her recollection of the document being brought by Maya Wati Prakash was incorrect**.

[402] In relation to the preparation of the Will of Maya Wati Prakash, Dipka Mala's evidence was that *"once I [had] gone through the document and I had told her [Maya] that this was not the format that we prepare wills and then she had requested if we could help her and prepare a Will each for both of them, herself and the son"*. In relation to Salen's Will, Dipka Mala explained that this was from instructions that Salen gave her and that *"after taking the instructions I typed the Will"*.

[403] As for the option of leaving a copy of each Will in the firm's "Wills Register", Dipka Mala's evidence was clear that she gave Salen and Maya the option *"to keep a copy in our Wills Register"* which "*they opted not to do so, **they wanted only one Will to be prepared**"*, that is, *"... **one Will to be prepared for each of them which was to be taken away by Salen after execution on that same day**"*.

[404] According Dipka Mala, the procedure in the law firm of Patel Sharma Lawyers was that "*… we don't photocopy wills. The wills that we retain on our Wills Register is a[n] original Will."* As for the procedure where a client did not want the firm to keep a signed Will in the firm's Wills Register, her evidence was as follows:

> *"Mr. Sharma:* *So if the testator or testatrix do not want you or the firm to keep a signed doc/Will in the registry. What record would you have that there was a Will made be the firm?*
> *Ms. Mala:* ***We would have a/the electronic version of the Will on the computer.***
>
> *Mr. Sharma:* *And in the electronic* ***,you mean in the computer there is a directory of all the Wills*** *that you…*
> *Ms. Mala:* ***The directory of all the Wills that we have prepared****."*
> [My emphasis]

[405] In relation to the Wills of Salen Prakash Maharaj and Maya Wati Prakash dated 22nd December 2006, after their execution, Dipka Mala explained that the following occurred:

(1) "*After the Wills were signed … I had gone and put them in separate envelopes and handed over them to Salen Prakash Maharaj";*

(2) The two envelopes were A4 size and blank as was the firm's usual procedure;
(3) **An unsigned copy of each Will was stored in the firm's computer for which the firm had a backup copy with secure access to the directory.**

[406] Dipka Mala in her evidence also explained that no fees were charged as the preparation of the Wills was done on a pro bono basis as, she explained that, "*There are times where we do that for clients upon their request, this is just to build customer relations and for clients who can't afford to pay legal fees."*

[407] By contrast, in his judgment of 11th October 2013, Balapatabendi J, stated that in the proceedings in the High Court at Suva, *'**The Plaintiff** [Maya Wati Prakash] **in her evidence testified** … that **her son paid** for preparation of both wills although she is unable to recall the amount paid to Lawyers.'* [My emphasis]

[408] Maya Wati Prakash also repeated the claim in her evidence before this Commission that, **whilst she never saw her son actually pay the money over to the law firm, *'he showed me the receipt'***.

[409] I note that according to the evidence before this Commission of **Subhasni Singh,** the daughter of Maya Wati Prakash, after the Wills of Salen and Maya were made, that is, on 22nd December 2006, her brother had mentioned during dinner that same evening that he paid fees for the preparation of the Wills although he did not state a specific amount.

[410] On this issue, the Applicant attempted to satisfy the evidential burden upon him through the evidence of Maya Wati Prakash, who said that she saw a receipt, together with the hearsay evidence of Subhasni Singh who said that her brother told her later the same evening that he paid fees for the preparation of the Wills. Even though section 114 of the *Legal Practitioners Act 2009* states that '*The Commission is not bound by formal rules of evidence … **the commission must act fairly** in relation to the proceeding',* such that I can admit the hearsay evidence of Subhasni Singh, the weight that I shall give it is another matter entirely. The best that can be said of such evidence is that the brother told Subhasni that evening that he paid fees for the preparation of the Wills, it does not follow, however, that this is evidence that he actually paid any fees.

[411] Indeed, on the receipt issue, I also note that **no documentation was tendered by Counsel for the Applicant of any receipt** to support the claim that Salen Prakash Maharaj paid for the preparation of the said Wills. Further, even if the receipt had been lost after so many years, I note that there was no evidence placed before the Commission of any attempt made by investigators of the Applicant to find the relevant receipt book/s of the Respondent firm from December 2006 and/or a notice from the Applicant requiring production of such a document (together with any reply from the law firm) in accordance with section 106 of the *Legal Practitioners Act 2009* which states:

> *'Registrar may require production of documents etc*
>
> *106. The Registrar may require by notice in writing to a legal practitioner or a law firm, the production by the legal practitioner or the law firm to the Registrar, at a time specified in that notice, of books, papers, files, securities, other documents or any other record of any type whatsoever, or copies thereof which are in the custody, possession or control of the legal practitioner or law firm and which may be relevant to or relate to the complaint under section 99 or the investigation under section 100.'*

[412] In addition, there was no request by Counsel for the Applicant for the issuing of a subpoena upon the law firm and/or an application for the Commission to require the Respondent legal practitioner and/or an employee of the firm to attend and '*produce documents touching the matter in question'* pursuant to section 116 of the *Legal Practitioners Act 2009* which states:

> *'Witness to attend*
>
> *116.—(1) The Commission may by notice in writing signed by the Commissioner or any authorised employee of the Commission require to appear before it any person (including any complainant and the legal practitioner or partner of a law firm in respect of whose conduct any matter has been referred to it) who may, in its opinion, be able to give evidence or produce documents touching the matter in question, or whom any party to the reference may desire to call as a witness.'*

[413] At the clarification hearing on 25th April 2018, I asked Counsel for both parties what inferences could I draw from the evidence as to the main purpose of the visit to Patel Sharma Lawyers on 22nd December 2006, that is, was it the settlement of the Lokia property or the drafting of Wills for Salen and Maya?

[414] The oral submission of Counsel for the Respondent was that there was a logical

inference that the main purpose of the visit on 22nd December 2006 was the settlement of the Lokia property. The oral submission of Counsel for the Applicant Chief Registrar was that it was a matter for the Commission to decide.

[415] **I also note, that it was never put to Dipka Mala in cross-examination by Counsel for the Applicant that the main purpose of the visit on 22nd December 2006 was the drafting and execution of the Wills rather than the settlement of the Lokia property**.

[416] **In my view, <u>Dipka Mala's evidence is to be preferred to that of Maya Wati Prakash</u>. Dipka Mala's evidence makes logical sense. I find that the main purpose of the visit to the firm by Salen and Maya on 22nd December 2006 had been to finalise the transfer from the sale of the property at Lokia and that the preparation of the wills was an impromptu request made of Dipka Mala <u>AFTER</u> the main purpose of the visit had been completed.**

[417] **<u>Dipka Mala's evidence was also logical as to why no fees were charged for the preparation of the Wills</u>. It makes sense that as the firm had already earned its fees (paid by the purchasers Inoke Kana and Levani Gonevou or their bank) from the sale and transfer of the property Lot 7 on DP 5754 known as "Lokia" in Rewa, Viti Levu, as the preparation of the wills was a relatively minor impromptu request, Dipka Mala exercised her discretion and charged no fees as a gesture of goodwill.**

[418] **That the main purpose of the visit on 22nd December 2006 had been to finalise the sale of the property is also supported by the documentary evidence.** In that regard, apart from Exhibits 38, 69 and 70 discussed above, to which Dipka Mala was referred and explained in her evidence, I also note that there is further documentary evidence in the '*Supplementary Bundle',* listed as document "SD5" (*'File notes for Inoke Kana'*, **Exhibit "80"**) which has the following: *'File No: 7200', 'Client: Inoke Kana', 'Subject/Matter: Re: Purchase of Property'* and for which there is a final entry: ***'22/12/06 Matter settle*d'** with initials. As I have already noted above, Inoke Kana together with Levani Gonevou were the purchasers in 2006 of Lot 7 on DP 5754 known as "Lokia" in Rewa, Viti Levu, from Salen and Maya.

[419] **I also found Dipka Mala's evidence to be clear and logical**. In particular, Dipka Mala's identification of the document marked as MFI 1 (Exhibit 77) is revealing. She identified MFI 1 as *"the document that she [Maya] brought along on the 22nd of December",* and that she had explained to Maya that as the document contained a number of errors it could not just be copied (some examples of the errors were highlighted in questions of Dipka Mala by Counsel for the Respondent in evidence-in-chief). Whether these were all amended in the final Will is not clear as a copy of Maya's Will was not tendered in the present proceedings before this Commission. Dipka Mala was also clear that Salen's Will was drafted from instructions that Salen gave to Dipka Mala.

[420] Surely, many of the basic errors in the document marked as MFI 1 (Exhibit 77) would not be part of something drafted by an experienced law clerk? Also, the date on the document, being "10th November 2006", indicates that it was something that Maya Wati Prakash had been discussing with someone for at least 42 days prior to the attendance by Maya and Salen at Patel Sharma Lawyers on the 22nd December 2006. Further, Patel Sharma Lawyers must have retained the draft (that became Exhibit 77) from what Maya provided to Dipka Mala, or from where else was Counsel for the Applicant suggesting that the document originated? **I note that Counsel for the Applicant Chief Registrar never suggested to Dipka Mala an alternative explanation to which she could either agree or refute.**

[421] Dipka Mala's evidence was in contrast to the evidence of Maya Wati Prakash who denied any knowledge of MFI 1 (Exhibit 77) and suggested (as noted above) *"He [Salen] may have brought it, I do not remember."* **It can only be inferred that Maya's memory on this issue is unreliable.**

[422] I should also mention that I am mindful that although the Wills of Salen and Maya were prepared on a *pro bono* basis, the same degree of care was required as if they were fee-paying clients for the same service. As McCallum J explained in ***Moss v Eagleston*** [2014] NSWSC 6 (4 March 2014) (AustLII: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2014/6.html>), involving a claim of professional negligence against a solicitor in drafting a statement of claim on a pro bono basis where, it was submitted in the statement of

issues whether a lower standard of care applied, Her Honour rejected the argument outright stating at [81]:

> *'If it was intended to maintain the original contention (set out in the statement of issues) that there is no duty of care, or a lower standard of care, in the case of services provided on a pro bono basis,* ***that proposition must be rejected****, in my view. The degree of care and skill required in the performance of a professional task cannot logically be informed by the extent of remuneration which the lawyer agrees to accept for the task.* ***The task is the same in any case****. No lawyer is obliged to undertake work on a pro bono basis, but* ***those who choose to do so must in my view be held to the same standard of care as those who request payment for their services****.'*
> [My emphasis]

[423] **Dipka Mala's evidence was also clear that:**

(1) only one Will was prepared and executed as per the instructions of Salen Prakash Maharaj; and

(2) Salen Prakash Maharaj took his sole original Will with him (as well as that of Maya Wati Prakash).

(v) The letter of 23rd December 2013 from Patel Sharma Lawyers to the Acting Chief Registrar

[424] **The only query that I have in relation to Dipka Mala's evidence is that it does not accord with a statement made in a letter dated 23rd December 2013 from Patel Sharma Lawyers to the Acting Chief Registrar** (Document "AD23", *Agreed Bundle*, pp. 89-102, **Exhibit "23"**) wherein at page 12 of the letter (page 100, Exhibit 23), para [8], it is stated:

> *'Upon enquiry made by* ***Ms. Subhashni*** *[sic] on* ***25th November 2008*** *and thereafter by her mother,* ***Maya Wati Prakash*** *and* ***Pranita Devi****, they were advised that* ***Messrs. Patel Sharma Lawyers*** *did* ***not*** *have a* ***signed*** *copy of the Will in the "Wills Register" of 3 volumes although there was an entry in the office computer showing existence of a Will in the name of Shalen [sic] Prakash Maharaj.*
>
> *This Will was made on the same date as the Will of* ***Maya Wati Prakash****, also shown in the computer entry and confirmed from the* ***"Register of Wills"*** *containing a signed copy of the* ***Will of Maya Wati Prakash****.'*
> [Underlining my emphasis]

[425] Thus, the above statement apart from confirming '*an entry in the office computer [of Patel Sharma Lawyers] showing existence of a Will*' for Salen, also claims a computer entry for the Will of Maya Wati made on the same date but further that Patel Sharma Lawyers maintained a signed copy of the Will of Maya Wati Prakash in their "Register of Wills". I do note, however, that earlier in the same letter (at

p.3) specifically discussing the entry for '25th November 2008, there is no such statement in relation to Maya's Will also being maintained in the firm's "Register of Wills". Instead, it confirmed in part that:

> *'The telephone was put on hold while a quick search was done for the Will from the **3** volumes of "Wills Register" maintained by this office. However, a signed copy of the Will could **not** be found but the office computer did show the existence of a Will made on **22nd December 2006**. This was communicated to **Subhashni** [sic].'*

[426] I also note that **nearly three years and 8 months prior** to the above letter of 23rd December 2013 (Exhibit 23), a **letter dated 29th April 2010** from Patel Sharma Lawyers to the Chief Registrar (Document "AD10", *Agreed Bundle*, pp. 33-42, marked as **Exhibit 10**) with the reference 'SPS/dm/8314 (presumably indicating Suruj Prasad Sharma as the author and typed by Dipka Mala), **contains no such statement** (as appeared in the later letter of 23rd December 2013) that a signed copy of the Will of Maya Wati Prakash was in the "Register of Wills" maintained by Patel Sharma Lawyers.

[427] **Interestingly, I further note that no challenge was made by Counsel for the Applicant to Dipka Mala and/or Suruj Sharma asking them to compare and then explain their respective oral evidence with the correspondence from Patel Sharma Lawyers to the Chief Registrar marked as Exhibit 23 (the letter of 23rd December 2013 containing the statement as to the alleged existence of a signed copy of Maya's Will in the firm's "Will's Register").** Instead, Mr. Suruj Sharma was asked in cross-examination by Counsel for the Applicant Chief Registrar, as to why '*there was no mention of the unsigned Will being shown to MWP and Subhasni'* in Exhibit 10 (the letter of 29th April 2010) – an issue that I shall deal with later in this judgment. **Surely, if Counsel for the Applicant Chief Registrar wished to challenge the accuracy of either Dipka Mala's evidence and/or that of Mr Suruj Sharma's, as to the storage of Maya Wati Prakash's Will, then Counsel needed to show them the inconsistency between their oral evidence and Exhibit 23 and ask them to explain. Counsel for the Applicant did not do so.**

[428] **I also note that neither Dipka Mala nor Suruj Sharma were challenged by Counsel for the Applicant Chief Registrar in cross-examination as to the inconsistency of the statement in the later letter dated 23rd December 2013** (as

to the existence of a signed copy of the Will of Maya Wati Prakash in the firm's "Will's Register") with the earlier letter of 29th April 2010 (where no such claim was made), together with the later oral evidence of Dipka Mala given before the Commission on 21st September 2017 (where she was firm that there was only one signed Will for Maya as well as Salen and Salen took the two Wills with him). Instead, as Counsel for the Respondent noted in their written submissions at para [38]: ***'Mala's evidence was unchallenged by the Prosecution.'*** **I agree with that submission.**

[429] Further, I note that a letter dated 24th October 2015 (document "AD33", '*Agreed Bundle'* (at pp. 140-149) and marked as **Exhibit "33"**) signed by Mr. Devanesh Sharma of R. Patel Lawyers (the Leading Counsel appearing in this matter) was sent to the Chief Registrar advising *'that we are instructed by Lajendra Law and the Legal practitioner to take over the defence … in the above application and we have today filed and served our Notice of Change of Solicitors'.* That letter, consisting of 10 pages, makes no mention of an admission by Leading Counsel, on behalf of his client, of a signed copy of the Will of Maya Wati Prakash being kept in the Will's Register of Patel Sharma Lawyers. **Rather, it clearly states at para [5], subparas [ii]-[iv], page 141, Leading Counsel's instructions as to how the Wills were drawn up and that 'there is no file record of the Wills' (of either Salen and/or Maya Wati Prakash) as they were to given Salen**:

> *'[ii] Both Salen Prakash Maharaj and Maya Wati had Wills drawn up by the Firm's Clerk Dipka Mala. They executed the Wills in the presence of Ms Dipka Mala and Ms Merewaia Doughty [two clerks of the firm].*
> *[iii]* ***There is no file record of the Wills*** *since this was an additional service provided by Ms Mala at no cost to the two persons who had been conveyancing clients of the firm.*
> *[v]* ***The Wills once executed were given to Salen Prakash Maharaj i****n the presence of the Maya Wati. So, Salen Prakash Maharaj's Will was in his possession from 22nd December 2006.'*
> [My emphasis in bold]

[430] **I accept the above, not as evidence from Mr. Devanesh Sharma, but as evidence of the instructions that he had been given by his client, Mr. Suruj Sharma, as part of a submission to the Chief Registrar on 24th October 2015 seeking withdrawal of the four counts prior to filing a strike-out application with the Commission on the basis of abuse of process. I note that the letter was copied to the Commission.**

[431] Finally, I note that, as with the receipt issue, there was no evidence placed before the Commission of any attempt made by investigators of the Applicant to find the Will of Maya Wati Prakash in the Will's Register of the Respondent's firm from 22nd December 2006 and/or a notice from the Applicant requiring production of such a document (together with any reply from the law firm) in accordance with section 106 of the *Legal Practitioners Act 2009.*

[432] In addition, there was no request by Counsel for the Applicant for the issuing of a subpoena upon the law firm and/or an application for the Commission to require the Respondent legal practitioner and/or an employee of the firm to attend and '*produce documents touching the matter in question'* pursuant to section 106 of the *Legal Practitioners Act 2009*. That is, to produce a list of Wills kept in the firm's Wills Register either by relevant date sequence (that is, Wills stored in December 2006) and/or alphabetical order (that is, Wills stored under the surnames of "Wati" and "Prakash". Alternatively, there was no application by Counsel for the Applicant during the hearing of this matter, that the Commission (together with Counsel) hold a view at the offices of Patel Sharma Lawyers to inspect the firm's "Wills Register" and specifically to be shown what is held either by relevant date sequence and/or alphabetical order.

[433] **In light of the above, I raised this issue at the clarification hearing on 25th April 2018 asking Counsel for each party to comment.**

[434] According to the oral submissions of Counsel for the Respondent, the confusion may have been due to the fact that Maya Wati Prakash made a subsequent Will with Patel Sharma Lawyers. Counsel for the Applicant had no oral submission to make and said it was a matter for the Commission.

[435] I note that the Affidavit of Maya Wati Prakash sworn on 26th October 2012, filed as her evidence-in-chief in the High Court proceedings (Exhibit 18), stated at para [18] that following Salen's death:

> *'After about a month, I then went to Patel Sharma and Associates too [sic] change my Will as Salen was no longer alive. The Will was prepared by Mala. I signed in front of her and another woman.'*

[436] I also note that the evidence of the Respondent, given in cross-examination before the Commission as to the existence of the second Will prepared by Patel Sharma Lawyers for Maya Wati Prakash, was as follows:

> *"Mr. Chand:* *... now Mr. Sharma* ***was there a Will of Maya Wati Prakash, a signed will of Maya Wati Prakash kept with the law firm that was executed on the 22nd of December 2006****?*
>
> *Mr. S. Sharma:* ***No****. There was a Will kept in our wills register, that was a Will that she made subsequent to the death of Salen Prakash Maharaj when* ***she had come in sometime in December to make a Will and she had requested a copy to be put on a Wills Register that was kept****.*
>
> *Commissioner:* *When was the December 2008 or?*
> *Mr. S. Sharma:* *2008, as best I recall there was a.*
>
> *Commissioner:* *The other one was her previous Will and that was Salen had…*
> *Mr. S. Sharma:* *Had taken away Sir.*
>
> *Mr. Chand:* *Just, witness if you could, if you could repeat you answer, there was a subsequent Will that was kept by the law firm?*
> *Mr. S. Sharma:* ***There was a Will I am aware that was made after the death of Salen Prakash Maharaj and at that time it was Maya Wati request if we could keep a copy on our wills register****.*
>
> *Mr. Chand:* *And was that Will made by your law firm?*
> *Mr. S. Sharma:* *Yes.*
>
> *Mr. Chand:* *Would you be able to say* ***the date that this Will was made****, the Will that was made after Salen Prakash Maharaj's death?*
> *Mr. S. Sharma:* *It was, I got to know of that subsequently but* ***it was made before, sometime before 15th of December.***
>
> *Mr. Chand:* *15th December 2008?*
> *Mr. S. Sharma:* *2008."*
> [My emphasis]

[437] **Having considered the matter further, I accept that the unattributed statement in the letter dated 23rd December 2013 as to the existence of a signed copy of Maya's Will in the "Will's Register" of Patel Sharma lawyers was a factual error in the 14 page response from Patel Sharma Lawyers to the Acting Chief Registrar (which may have been caused by the existence of a later second Will of Maya's executed sometime after Salen's death on 24th November 2008 and before the 15th December 2008) and that it does not detract from the oral evidence given by Dipka Mala before this Commission.**

(vi) Salen's reason for taking the Wills with him on 22nd December 2006

[438] As to Salen's reason for taking the Wills with him on 22nd December 2006, this can

be only speculative. Perhaps, he did not want a copy of his Will kept with the firm due to the contents of his Will, that is, he was leaving his Estate to his mother and not his wife and there was also the fact that, apart from his wife, there was another woman residing in the household with whom he was having some form of a relationship. In any event, it is not my role to resolve such speculation.

[439] It is enough for me at this stage to make findings as to how many Wills were prepared and executed on 22nd December 2006 and taken by Salen Prakash Maharaj and whether a second original was left with the Respondent law firm. This I will now do.

(vii) Findings on the preparation of the Wills of Salen Prakash Maharaj and Maya Wati Prakash

[440] The position of Counsel for the Applicant Chief Registrar on this issue was clarified at the hearing on 25th April 2018, wherein Counsel for the Chief Registrar explained in his oral submission that *"what instructions we held from the complainant was somewhat different from the evidence [that] was before the Commission"* and that it was a matter for the Commission to interpret the evidence.

[441] The oral submission of Counsel for the Respondent legal practitioner was that the evidence was clear:

(1) *"there was one Will made on 22nd December 2006 by Salen Prakash Maharaj";*

(2) *"there was another Will made by Maya Wati Prakash on the same date and subsequently after Salen's death, Maya Wati Prakash then made a new Will";*

(3) The evidence of Maya Wati Prakash was that there was one Will of two pages *"And the Will has been exhibited and it's quite obvious it is two pages";*

(4) *"the Wills were taken away in the presence of Dipka Mala and Maya Wati Prakash".*

[442] **My findings in relation to the preparation of the Wills of Salen Prakash Maharaj and Maya Wati Prakash are:**

(1) On 22nd December 2006, Salen Prakash Maharaj and Maya Wati Prakash attended the Offices of Patel Sharma Lawyers for the purpose of finalising the sale of a property at Lokia (Nausori) for which Salen signed an 'Authority' to clear all outstanding utilities in relation to the sale of a property and that

signed authority was witnessed at the same time by Dipka Mala. I note that it is disputed whether Maya Wati Prakash also witnessed that authority. I do not need to resolve that issue. **I accept, however, that the once the authority was completed by Salen on 22nd December 2006, Dipka Mala then handed a cheque to Salen as the balance of the settlement proceeds;**

(2) After the sale of the property had been finalised on 22nd December 2006, Salen Prakash Maharaj and Maya Wati Prakash, who were still at the Offices of Patel Sharma Lawyers on that date, then asked Dipka Mala of Patel Sharma Lawyers if Dipka Mala could prepare a Will for Maya Wati Prakash and a Will for Salen Prakash Maharaj;

(3) The Will for Maya Wati Prakash was based upon a draft that Maya had brought with her and she handed to Dipka Mala, which Dipka Mala amended accordingly as she typed the original Will;

(4) The Will for Salen Prakash Maharaj was based upon oral instructions given by Salen to Dipka Mala;

(5) Dipka Mala prepared only ONE Will for Salen Prakash Maharaj and ONE Will Maya Wati Prakash (and not a second original for either);

(6) The preparation of the said Wills by Dipka Mala of Salen Prakash Maharaj was done on a pro bono basis;

(7) The said '*Last Will and Testament of Salen Prakash Maharaj'* prepared by Dipka Mala consisted of TWO signed pages and a backsheet;

(8) The said Will of Salen Prakash Maharaj was executed by him on 22nd December 2006 and witnessed by Merewai Doughty, Clerk, and Dipka Mala, Law Clerk, of Patel Sharma Lawyers, following which, Salen Prakash Maharaj then took that sole original Will with him and did not leave it with the said law firm;

(9) The said Will of Maya Wati Prakash was executed by her on 22nd December 2006 and witnessed by Merewai Doughty and Dipka Mala of Patel Sharma Lawyers, following which, Salen Prakash Maharaj then took that sole original Will with him and Maya Wati Prakash and did not leave it with the said law firm.

(3) Findings on whether a record of the Will of Salen Prakash Maharaj was maintained by Patel Sharma Lawyers after it was executed

(i) Counsel for the Applicant's 'Further Written Submissions' dated 6th June 2016

[443] Counsel for the Applicant in his 'Further Written Submissions' dated 6th June 2016, opposing the strike out applications of the Respondent (for which I delivered a ruling on 21st September 2016 refusing the application) argued at paras [11]-[12]:

> '*11. … the consumer public or clients of a law firm have some expectations from their solicitors … due to the very nature of the fiduciary relationship that a client and solicitor have. It is further submitted that despite the fact that there is no statutory requirement for law firms to keep original Wills of clients and records, a prudent practitioner* ***ought to keep original Wills*** *made by the law firm as well as proper record of the same as to safeguard the client's interest as well as the law firm's interest.*
> *12. It is unfortunate that the Respondents have submitted that since the law does not require them to maintain a record or keep Wills, they thus have no responsibility.* ***Any client would expect that a competent and diligent legal practitioner would keep proper records that they could rely on****.'*
> [My emphasis]

(ii) My Ruling of 21st September 2016

[444] I also noted in my ruling of 21st September 2016 that neither the Respondent legal practitioner nor Ms Dipka Mala, (the clerk in the Second Respondent's firm who prepared the Wills for both Mr. Salen Prakash Maharaj and his mother, Maya Wati Prakash), had been called to give evidence in the previous High Court proceedings in the matter of *Prakash v Devi.*

[445] **In my ruling, I further noted in relation to this count at para [42]:**

> ***'… there are two issues that need to be fully ventilated at a hearing arising from this Count:***
> *(1) Whether 'Subsequently to the Deceased's death on 24 November 2008, the Plaintiff and her family members … were informed by the law firm that the Deceased had not made any will'?*
> *(2) Whether such conduct in not making a second original of the Will in 2006 'falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner* ***or law firm****'?*

[446] On the issue as to whether a proper record of the said Will of Salen Prakash Maharaj was maintained by Patel Sharma Lawyers, I note that the case of Counsel for the Applicant shifted from his oral submissions made during the hearing of the interlocutory application on 22nd April 2016 (and in his subsequent written submissions filed as part of that application), to what I understood became the position of Counsel for the Applicant when he filed his prosecution case statement on 18th November 2016.

[447] On this issue, it is important that I cite from my ruling in wherein at paragraphs [18]-[21], I stated as follows:

> *'[18] The core of the argument of Counsel for the Applicant is that if there was a Will prepared by the Respondent's law firm, then, as a competent and diligent legal practitioner or law firm, **they should have kept a copy of the Will** - as Counsel for the Applicant submitted at the hearing on 22nd April 2016: "How long does it take to make a copy of the same and keep it?" "Further, if it was not registered, they could have made two originals and kept one."*
>
> *[19] As I understood Counsel for the Applicant's argument, "**every practitioner must keep duplicate copies of every document they make**". That is:*
>
> > *"It's a matter of competence and diligence, a competent and diligent legal practitioner would do that because it is fundamental obligation of the practitioner that the work he or she carries out keeps proper minutes, keeps the documents that they have prepared, keeps proper records of the same so that in future if there is any issues arising from the document that has been prepared from issues arising from the work that they have done."*
>
> *[20] ... **In 2006, however, as Counsel for the Applicant conceded, there was no such requirement.***
>
> *[21] Leading Counsel for the Respondents noted in reply at the hearing on 22nd April 2016, that **there was no rule or law or requirement in 2006 to say that there was supposed to be two originals made of a Will by a practitioner**, indeed, he emphasised that some clients "are very selective and say 'this is my private document I don't want anyone else to'" have a copy ... It was not an offence, however, in 2006, nor was there a Practice Direction to say that you needed to make two originals of the Will.'*
>
> [My emphasis]

(iii) The 'Prosecution Case Statement' dated 18th November 2016

[448] Counsel for the Applicant Chief Registrar in his *'Prosecution Case Statement'* filed on 18th November 2016, stated the following in relation to Count 2 at para [7]:

> *'To prove this count, the Applicant would rely on case laws which states that **legal practitioners should keep proper records of work they have done for their clients**. In the present case the Respondent had failed to keep proper record of Salen Prakash Maharaj's Will. As a legal practitioner, the Respondent should be vigilant in order to maintain proper records. The Respondent failed to do this as such his actions amount to unsatisfactory professional conduct.'*
>
> [My emphasis]

(iv) Analysis

[449] According to Counsel for the Applicant Chief Registrar in his written *'Closing Submissions'* of 8th January 2018 at para [492]:

*'In relation to Count 2, ... The Applicant is not alleging that the Respondent did not keep a copy of the Will or did not keep one of the originals but **what the Applicant is alleging that there was no proper record kept** by the firm to conclusively say that SPM's Will was made by the firm.'*
[My emphasis]

[450] Counsel for the Respondent *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, pp.37-38, para [96]) have replied:

*'... the Complainants were never told that the Firm had not made any Will for the Deceased. **They were told that the Firm did not hold a signed Will for the Deceased and the only record that they had was an unsigned version of the Will kept on the Firm's computer hard drive**. This fact could have easily been verified by PLN who acted for MWP before she initiated the court cases on MWP's behalf where she pleaded without any verification from the Firm that the Firm had informed MWP that it had not made any Will for the Deceased. The same information was given to the Solicitor acting for PD, WH when he came for a meeting with the Practitioner on 15th May 2010 that an electronic version of SP's Will was on the Firm[']s computer but that SP taken the original signed Will with him ...'*
[My emphasis]

[451] Counsel for the Applicant Chief Registrar in his further written closing submissions in reply ('*Applicant's Submissions in reply'*, 20th February 2018, page 2, at para [9]), in relation to 'Custody and Record of Will', has responded that:

*'The **allegation by the Applicant is based on the evidence of MWP and other witnesses** who testified that the law firm had completely denied the existence of a Will. The Applicant relies upon paragraph 492 of its submissions filed on 8th January 2018. It is on this basis that the allegations arose against the practitioner.'*
[My emphasis]

[452] Paragraph 492 of the '*Closing Submissions'* of Counsel for the Applicant Chief Registrar filed on 8th January 2018, states:

*'... it is respectfully submitted that the Respondent's firm did not keep any record of the Will of SPM as **apart from Dipka, all other witnesses denied having knowledge of the electronic copy of the Will**. All witnesses stated that they were never told about or shown the electronic copy of the Will. **They all stated that they were told that there is no Will**. Hence, it is respectfully submitted that **Dipka Mala's evidence is clearly contradicted by more than one witness and as such the charge is made out** in that the law firm did not keep a proper record of the Will ... **Evidence of MWP, Subhasni and Ms. Narayan was that Dipka had said that there was no Will** made by the firm. Even Ms. Narayan stated that she was told by MWP that Dipka said no Will was made by the firm.'*
[My emphasis]

[453] The above submission, unfortunately, contains some misunderstandings of the evidence relied upon by Counsel for the Applicant in relation to 'Custody and Record of Will'. Further, just because *'Dipka Mala's evidence is clearly contradicted by more than one witness'* it does not necessarily follow, as Counsel for the Applicant has submitted, that *'as such the charge is made out',* as I shall now explain.

(v) The evidence of Maya Wati Prakash

[454] In relation to Maya Wati Prakash, as I have noted above, on 11th March 2010, the Legal Practitioners Unit within the Office of the Chief Registrar received a 'Complaint Form' signed and dated on that same date by Maya Wati Prakash (Exhibit 8). In completing the form, when asked 'Date of last contact with practitioner/s/Law Firm', Maya Wati Prakash answered *'December 2007'*. When asked to specify the nature of her complaint she wrote:

> *'FRAUD ➔ Suruj was holding the original will submitted to him by Salen Prakash Maharaj (deceased)*
> *he was saying that he does not have any will but actually he was keeping it'*

[455] Further, when asked for 'Particulars of a complaint', it is written on the form, *'see attached page'*. The attached page was typed and stated, in part, as follows:

> *'**My daughter Subhasni had said that a Will was executed by Salen and at the law office of Patel Sharma & Associates**. Salen died in an accident on 24th November 2007. **On 1st, 2nd and 3rd December 2008 I together with my than [sic] daughter in law Pranita and daughter Subhasni visited the solicitors office**. We did not meet the solicitor despite appointments being made with the solicitor. We were attended by Dipka who informed us that Salen had not made Will through their office.*
>
> *The clerk asked the solicitor while we were there but the solicitor did not meet with us ...'*
> [My emphasis in bold]

[456] It is clear that the above allegations are incorrect as follows:

(1) To say that '*Salen died in an accident on 24th November 2007'*, is incorrect. He died in 2008. I accept, however, that this may have been a simple typographical error. I also accept that the 'Date of last contact with practitioner/s/Law Firm', may have an error and it should have been written on the form as *'December 2008'* rather than *'December 2007'*;

(2) **I have seen no evidence, however, to support an allegation of fraud and to have made such a claim against any person, let alone a legal practitioner, without any supporting evidence was simply outrageous**;

(3) I have seen no evidence to support an allegation that Mr. Suruj Sharma *'was holding the original Will submitted to him by Salen Prakash Maharaj'.* Indeed, I have already made a finding above that only one Will was drafted and executed on 22nd December 2006 of Salen Prakash Maharaj and which Salen Prakash Maharaj then took with him on that date and did not leave it with the law firm;

(4) To make the allegation that *'My daughter Subhasni had said that a Will was executed by Salen and at the law office of Patel Sharma & Associates',* makes no sense, particularly as it was Maya Wati Prakash and not Subhasni Singh who was present when Salen's Will was drafted and executed on 22nd December 2006;

(5) **To say that '*On 1st, 2nd and 3rd December 2008 I* together with my than [sic] daughter in law Pranita and daughter Subhasni *visited the solicitors office'*, was a complete fabrication** –

(i) Neither Subhasni nor Pranita gave evidence before the Commission of having attended the law offices of Patel Sharma & Lawyers on 1st, 2nd and 3rd December 2008;

(ii) The documented evidence is of an attendance by Maya, Subhasni and Pranita on 15th December 2008 where Maya and Pranita gave instructions for an application to be filed seeking Letters of Administration;

(iii) The evidence of Dipka Mala (supported, as shall be seen, by the evidence of Mr. Suruj Sharma) is that there were attendances on 12th December 2008 by Maya and Subhasni and then on 15th December 2008 with Maya, Subhasni and Pranita;

(iv) Indeed, as I have already noted above, **Maya Wati Prakash, after much questioning and then clarification by me, finally conceded that there were two meetings at the offices of Patel Sharma Lawyers**. On the first occasion, Subhasni and Maya attended and met Mr. Suruj Sharma for the first time where Mr. Sharma referred to there being *"no signed Will"*. This was followed by a subsequent (documented) meeting on 15th December 2008 at the offices of Patel Sharma Lawyers where Subhasni and Maya and, on this occasion, Pranita as the widow, also attended, so that the grant of Letters of Administration could be discussed and where instructions were signed by both Maya and Pranita to proceed with Letters of Administration.

[457] Whilst I accept that the date of Salen's death and the date of last contact with the legal practitioner may have been simple errors, **I find the evidence of Maya Wati Prakash on the larger issue of the alleged storage of the Will by the Respondent firm to be utterly unreliable.**

[458] Further, to underline the unreliability of the evidence of Maya Wati Prakash in relation to the storage of the Will of Salen, she was claiming in her written complaint to the Chief Registrar on 11th March 2010 that '*Suruj was holding the original will'* when, as Counsel for the Respondent have highlighted in their written submissions *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 10, sub-para [ix]), the truth was otherwise:

> *'It must be noted that* ***the compliant [sic] that MWP had made was that the Practitioner was holding onto the signed Will*** *when in fact as at 10th [sic] March 2010 MWP was clearly aware that* ***the signed Will had been found at her own daughter's house in Caubati on or around 23rd January 2010.*** *This allegation made to the Chief Registrar had* ***absolutely no merit****.'*
> [My emphasis]

[459] Indeed, to emphasise my finding as to the unreliability of the evidence of Maya Wati Prakash in relation to the storage of the Will of Salen, I note that on 6th March 2009, a year before Maya lodged her 'Complaint Form' dated 11th March 2010 with the Chief Registrar's Legal Practitioners Unit, Maya Wati Prakash filed an application in the High Court at Suva, Civil Action No. 81 of 2009 (returnable on 10th March 2009), through Prem Narayan, Barrister & Solicitor, seeking interim injunctive relief against Pranita Devi (and others) in dealing with the property in the name of Salen at Koronivia, Nausori. In the Statement of Claim filed with the Writ of Summons as part of that application (Exhibit 7, page 15) it was pleaded at para [25]:

> *'Subsequent to the Deceased funeral rites, and* ***sometimes between 10 and 23 December 2008****, the Plaintiff [Maya Wati Prakash] and the First Defendant [Pranita Devi]* ***instructed the law firm of Patel Sharma and Associate****s for grant of probate.'*
> [My emphasis]

[460] In her affidavit in support of the above application sworn on 5th March 2009, (that was not included as part of Exhibit 7 in the present proceedings before the Commission, but was later tendered as part of Exhibit 44, being a copy of the whole of the 'High Court file for Action No. 81 of 2009'), Maya Wati Prakash stated at para [21]:

> *'**Between 10 and 23 December 2008**, the First Defendant and I **sought legal advice from Patel Sharma and Associates** (now known as Patel Sharma Lawyers) **on obtaining grant of probate** and both the First Defendant and I executed documents at their office ...'*
> [My emphasis]

[461] How a person can in March 2009 instruct their solicitor to plead in a statement of claim supported by a sworn affidavit in support that the attendances were '***Between 10 and 23 December 2008'*** and then, just on a year later, in March 2010, complete a complaint form filed with the Chief Registrar's Legal Practitioners Unit that the attendances were '***On 1st, 2nd and 3rd December 2008'***, is simply, in my view, of only two explanations. Either her evidence is **utterly unreliable (perhaps due to her age and/or memory) or she has fabricated, in the sense as defined by the *Concise Oxford Dictionary of Current English* (supra) at p.370, that is, 'invent (story)'. A third option is that there were other forces involved in the complaint form, as I shall now explain**.

[462] I note that the complaint form that was lodged with the LPU on 11th March 2010, contained four pages, three pages of handwritten answers to a set of standard questions and a fourth page that was a typed single page with the handwritten notation *"complaint attachment".* In her evidence before this Commission, **Maya Wati Prakash confirmed that she only signed the form** and **as to who actually wrote the answers on the first three pages, she advised, *"It's Rosie I'm sure"*, that is, her daughter, Subhasni Singh (called "Rosie")**. I also note that **Carol Sheenal Singh**, Maya's granddaughter and the daughter of Subhasni Singh, confirmed that she had typed the single page *attachment* as Counsel for the Applicant Chief Registrar set out in his written submissions summarising her evidence ('*Closing Submissions',* 8th January 2018, at para [243]) (to which I agree):

> *'She [Carol Sheenal Singh] was shown Exhibit 8 and in particular page 31 and **she confirmed that the contents were told by her grandmother and she typed it**. She stated that she did not add on anything.'*
> [My emphasis]

[463] The complaint form raises a number of larger issues:

(1) Maya arrived back in Fiji from the USA on 10th March 2010. The complaint form was lodged with the Legal Practitioners Unit within the Office of the Chief Registrar the next day, 11th March 2010. **How could Subhasni Singh have completed the complaint form** (as claimed by Maya) if Subhasni was at that time

residing in Australia where she was studying? There was no evidence that Subhasni had previously posted it from Australia to Maya;

(2) Carol Sheenal Singh, Subhasni's daughter, when asked by Counsel for the Applicant if she could recognise the handwriting on the form (Exhibit 8) replied: *"No, I cannot recognize the writing"*. **Surely a daughter would recognise her own mother's handwriting?**

(3) Carol Sheenal Singh confirmed that she typed, on her laptop, the single page fourth page attached to the complaint form under instructions from Maya speaking Hindustani which Carol then translated including looking on the internet for the appropriate English equivalent of legal terms and then *"saved it in a USB and probably, I gave it to my Uncle"*, to print it. When asked her uncle's full name she advised: *"R-A-K-N-E-S-H Prasad".* Carol was at that time 11 years of age.

[464] Although her evidence was not directly relevant to the four counts, I must say in passing, however, that **I found the evidence of Carol Sheenal Singh, somewhat argumentative, if not incredulous, in parts**. Remembering that Maya's evidence was that she did not know how to read (and hence why Prem Narayan had to read out to Maya the judgment of Balapatabendi J in *Prakash v Devi*), to then have her granddaughter Carol give evidence that <u>in 2010, when she was just 11 years of age in primary school</u>, she simply took down on a piece of paper what Maya had told her in Hindustani and then, for the more difficult words, she looked up equivalent words in English on the internet, allegedly completing it all in 20 minutes, beggars belief. A precocious child is how she might have wished to portray herself to the Commission, believable, however, is another matter entirely, as the following excerpts from her cross-examination by Counsel for the Respondent illustrate:

> *"Mr. Sharma:* *Now, Ms. Singh, you are a intelligent lady at Uni, at 11 years old,* ***what did you understand by the word, '<u>Negligence</u>'?***
>
> *Ms. Singh:* ***Uh…***
>
> *Mr. Sharma:* *First word on that document. Whose word was it?*
>
> *Ms. Singh:* *I will tell you that, my grandmother, you know her age, right? She doesn't know all these hard-English words and even now, whenever we type any document, I just go on net and type the synonyms for those words. So, she did tell me the words in Hindi, I went on internet and I clicked those words that I understand at Class 7 at that age and I found the synonyms of those words and I typed it here."*
>
> …
>
> *Commissioner:* *Sorry, so, you are saying she says in Hindustani some word about that's like 'negligence' then you go and find it?*

Ms. Singh: *She didn't really say 'negligence', but there can be another word in Hindi for 'negligence'.*

Commissioner: *There are about 5 or 6 people in the room, who could tell me that. I don't know, I mean I don't speak Hindi, so …*
Ms. Singh: *Yes. Yes, she told me in Hindi.*

Commissioner: ***What did she tell you in Hindi?*** *Or you don't remember?*
Ms. Singh: ***I can't really recall, but that's what I typed and that's what she told me****…*

Commissioner: *No, I understand. I am just saying to get a word like 'negligence', what word do you think she used in Hindi, or you don't know, you can't recall? I am pretty sure, it's a long time, if you can't recall, I don't want you making things up. Alright? If you can't recall, you can't recall.*
Ms. Singh: *Yes, I don't recall.*
…
Mr. Sharma: *… how long did it take you to find all the English words on the computer and internet and then come up with this particular document?*
Ms. Singh: ***Actually, when I was in class 7*** *…*
Mr. Sharma: *Yes.*
Ms. Singh: ***I can say that I was a bright student*** *so, and becoming a lawyer, was one of my dreams, so, yes, I, I can tell you that I knew some legal term words and some, I searched it from the internet, just for their synonyms, it doesn't take long. So, I can say 20 minutes.*

Mr. Sharma: *Right. So, '****negligence'****, '****failure to act on instructions'****?*
Ms. Singh: *Yes, 'negligence' and 'failure' are all those common words,* ***a class 7 student can know those words****, I can believe, yes.*

Mr. Sharma: *And,* ***'setting aside the Grant of Letters of Administration'****?*
Ms. Singh: *Yes. All those things that you can say that are legal terms and I should not be knowing at that age, I can tell you that those words, she [Maya] took it out from a document or something, but as far as…*

Commissioner: *Sorry? She…*
Ms. Singh: *She [Maya] might have referred to the document to take those out, words out. But,* ***whatever she was trying to tell me in Hindi, I understood in English, I just typed****."*
[My emphasis]

[465] Whether there had been prior coaching of Carol by other family members in relation to the evidence she gave to the Commission, I cannot determine, particularly when I have not heard from Hemant Singh (her father and Subhasni's husband), Ireen Lata Prasad (her aunt) and Raknesh Prasad (her uncle), so this issue could be asked of each of them. Whether her mother, Subhashni Singh, had any part to play, again, I cannot determine, as, unfortunately, Subhasni gave her evidence in the June 2017 Sittings and Carol's evidence was delayed, because of illness, until the September

2017 Sittings, so this also could not be asked of Subhasni who by then had returned to Australia.

[466] Interestingly, as Counsel for the Applicant Chief Registrar noted in his written submissions summarising the evidence of Subhasni Singh in relation to the complaint form issue (a summary to which I agree), ('*Closing Submissions',* 8th January 2018, at para [158]):

> *'She stated that she had no hand in lodging the complaint with the CR's office and that* ***she never discussed with mum*** *on the issue of lodging complaint …'* [My emphasis]

[467] So in relation to the complaint form we have the following evidence:

(1) **Maya Wati Prakash confirmed she only signed the form** and **the author of** the handwritten answers on **the first three pages was, *"It's Rosie I'm sure"***, that is, her daughter, Subhasni Singh;

(2) **Subhasni Singh denied any involvement** stating that she had '*no hand in lodging the complaint'* and *'never discussed'* it with Maya;

(3) **Carol Sheenal Singh could not say whose handwriting was on the first three pages** (and, thus, **did not identify it as Subhasni's, who is her mother**) but, Carol also confirmed that she typed, on her laptop, the single page fourth page attached to the complaint form, under instructions from Maya speaking Hindustani, which Carol, although was only then 11 years of age, was able to translate Maya's spoken Hindustani into English in 20 minutes by finding English synonyms on the internet including legal terms such as *'negligence', 'failure to act on instructions', and 'setting aside the Grant of Letters of Administration',* because Carol, already at 11, had dreams of becoming a lawyer and *"knew some legal term words … from the internet";*

(4) Although Carol's mother and father were in Australia on 11th March 2010, Carol was residing in Fiji with her aunt Ireen and her uncle, Raknesh Prasad. Carol's evidence was that when Maya returned to Fiji on 10th March 2010, Maya shared a room with Carol at Ireen's house and Carol completed the typed form (it was unclear when) either that night or the next day.

[468] **If Maya was incorrect and Subhasni did not complete the handwritten pages of the complaint form, together with doubts as to whether the then 11 year old**

Carol typed the fourth additional page, again, it raises questions as to the extent of Ireen's involvement in this matter and her unexplained absence from giving evidence.

(vi) The evidence of Subhasni Singh

[469] I note that both Maya Wati Prakash and Pranita Devi gave evidence through an interpreter, though Pranita indicated that she understood English but preferred to speak Hindustani. **Why I mention their English language skills is because at the time of Salen's death the "spokesperson" (so to speak) for his relatives, was Salen's sister, Subhasni Singh, who gave her evidence in English**:

(1) It was Subhasni who telephoned the firm on 25th November 2008, the day after Salen's death and spoke with Dipka Mala. Indeed, it was made clear during the cross-examination of Maya Wati Prakash that Maya agreed that Subhasni had telephoned the firm the day after Salen's death and spoke with Dipka Mala. Maya relied upon the hearsay of what Subhasni had told her were *'her discussions with Mala'* and that *'they [the firm] said the Will was not made there';*

(2) It was Subhasni who allegedly telephoned the firm again on 9th December 2008, and again spoke with Dipka Mala;

(3) It was Subhasni who allegedly attended the firm on 12th December 2008 with her mother, Maya Wati Prakash and spoke with Dipka Mala and the First Respondent, Mr. Suruj Sharma. **Hence, it is important to examine the evidence of Subhasni.**

[470] According to the written closing submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at paras [101]-[105], [151]-[153], [160]-161]), **the evidence-in-chief of Subhasni Singh in relation to the storage and location of Salen's Will by Patel Sharma Lawyers** was, in summary, as follows:

> *'101. That after her brother past [sic] away and after the rituals, the family had a discussion and decided that they had to sort out her brother's business. During the discussion, the mother mentioned about the brother's Will.*
>
> *102. Sometime in December 2008 she visited the law firm along with her mother, MWP, her husband and her sister-in-law, Pranita Devi. They met with Dipka Mala as she had made a prior appointment.*
>
> *103. MWP mentioned to Dipka that her son had made a Will and they did not know its whereabouts and asked for a copy of the Will as they wanted to take it to LTA.*

104. *Ms. Mala mentioned that SPM had not instructed the law firm to prepare the Will and that only MWP did. MWP replied that they both made a Will at the law firm and asked Dipka to look for a copy because she could not locate the Will and she also did not know where he kept it.*
105. *That they left with the intention that Dipka would look for the Will. They were all stressed out.'*
[My emphasis]

[471] The evidence-in-chief of Subhasni Singh then referred to telephone calls made, as the written closing submissions of Counsel for the Applicant Chief Registrar have noted ('*Closing Submissions',* 8th January 2018, at paras [106]-[107]), that is, *'after the first meeting she made some calls to the law firm from her office although she could not recall the number of calls she made but stated that it could have been around 10 to 15 calls'*. It was '*during those calls she would ask Dipka if she found a Will and Dipka would reply that she was still looking for it'* and *'she then asked Dipka for any other option and Dipka gave an appointment for them to visit the firm sometime in December 2008'.*

[472] Even though it was somewhat unclear from the above whether Subhasni Singh was referring to telephone calls made before or after the initial telephone call on 25th November 2008, or both, **what was discussed in those telephone calls then became a subject of cross-examination by Counsel for the Respondent of Subhasni Singh** when she was taken to Exhibit 23 (the response dated 23rd December 2013 of Patel Sharma Lawyers to the Acting Chief Registrar), as Counsel for the Applicant Chief Registrar has summarised in his written submissions, as follows ('*Closing Submissions',* 8th January 2018, at paras [151]-[153]):

'151. She was referred to Exhibit 23 and in particular to page 91 and the entry of 25th November 2008 was referred to her. ***She agreed with the entries of 25th November 2008 which amongst another things stated that it was communicated to Subhasni that a signed copy of the Will could not be found but the office computer did show existence of a Will made on 22nd December 2006****.*
152. As for 12th December 2008 entry, she stated that Dipka did not give them a copy of the computer print out of the Will. She also stated that she only remembered briefly meeting with Mr. Sharma and that further discussion about the Will was done by the Respondent, her mum and sister-in-law. She mentioned that at the first meeting he sister-in-law was also present.
153. She confirmed that on the day she was sent to wait outside, her mother had relayed to her later that day that joint instructions were given to the Respondent.'

[My emphasis]

[473] Unfortunately, the written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions'*, 31st January 2018) have summarised the evidence of Maya and Subhasni together. Doing my best to split those submissions, my understanding of the submissions summarising the evidence of Subhasni in relation to the storage of the Salen's Will by Patel Sharma lawyers was (page 9, para [24], subparas [ii]-[iii], [v]-[vii])), as follows:

> *'[ii]. SP took the signed Will with him.*
> *[iii]. When SP died neither MWP nor SS made any effort to look for SP's Will at home.*
> *[v]. **SS in her evidence said that she didn't look for the Will and assumed that PD took it with her**.'*
> *[vi]. **SS contradicted herself on the issue whether [Dipka] Mala had said that the Firm had an electronic record of a Will** but no signed copy. Initially she said Mala hadn't said this but subsequently she was not sure and said Mala may have said it …*
> *[vii]. The allegation made that neither Mala nor the Practitioner had said that they hadn't made any Will for SP was dented under cross examination to the point that both MWP and SS couldn't really remember what Mala or the Practitioner had said. Mala was very clear in her evidence that she told SS that they had a record of the electronic copy of the Will but not a signed Will and she said she advised SS to look for SP's Will at home.'*
> [My emphasis]

[474] Noting that each of the above summaries submitted respectively by each Counsel differ slightly in their interpretation as to what was said by Subhasni Singh in her evidence on the issue of the telephone conversation with Dipka Mala on 25th November 2008, I think it best if I quote directly from the transcript of her evidence in cross-examination as recorded by the Commission:

> *"Mr. Sharma:* *You first, indicated that you didn't look for the Will because you presumed that Pranita had taken the Will?*
> *Ms. Singh:* *Yeah, we thought. Yup.*
>
> *Mr. Sharma:* *Right. And, is it correct that you rang up Patel Sharma?*
> *Ms. Singh:* *Mhh.*
>
> *Mr. Sharma:* ***The first time you rang up was, from what I can gather from my instructions are about the 25th of November?***
> *Ms. Singh:* *Could be, I can't remember that.* ***Yeah, I did call.***
>
> *Mr. Sharma:* *Yeah?*
> *Ms. Singh:* *Mhh.*

Mr. Sharma: *Right, let me just get the documents so I can, you can also look at the document.*
Ms. Singh: *Okay.*

Mr. Sharma: *This is AD, um AD 23, [Exhibit 23] and can I get you to look at page, starting from page 91, I think.*
...
Mr. Sharma: *Page 91.*
Ms. Singh: *Thank you.*

Mr. Sharma: *Ms. Singh, in this ah this particular matter*
Ms. Singh: *Mhh.*

Mr. Sharma: *My instructions are that you received, you - that the law firm of Patel Sharma received - a call from you?*
Ms. Singh: *Mhh.*

Mr. Sharma: *Subhasni Lata Singh?*
Ms. Singh: *Mhh.*

Mr. Sharma: *In the morning by this office?*
Ms. Singh: *Mhh.*

Mr. Sharma: *The call was received and attended by Dipka Mala?*
Ms. Singh: *Mhh.*

Mr. Sharma: *And, 'Subhashni advised that her brother Salen Maharaj had passed away'*
Ms. Singh: ***Yup****.*

Mr. Sharma: *And the portion, 'also inquired Will left behind'*
Ms. Singh: *Yeah.*

Mr. Sharma: *Up till that point any issues?*
Ms. Singh: *No.*

Mr. Sharma: ***You quite happy that a correct reflection of what happened?***
Ms. Singh: ***Yes.***

Mr. Sharma: *And, then it say 'the telephone was put on hold while the quick search was done for the Will'*
Ms. Singh: *Mhh.*

Mr. Sharma: *'From the 3 volumes of Will Register made by the office'*
Ms. Singh: *Mhh.*

Mr. Sharma: *'However, a signed copy of the Will could not be found,* ***but the office computer did show an existence of a Will made on 22nd December 2006'. And, 'this was communicated to Subhasni'****. Do you understand?*
Ms. Singh: *So, ah*

Mr. Sharma: *What that says?*
Ms. Singh: *The exist, the Will was exist there, so*

Mr. Sharma: *It says*
Ms. Singh: *Aha.*

Mr. Sharma: *They looked in their volumes*
Ms. Singh: *Yeah.*

Mr. Sharma: *Because you had informed them*
Ms. Singh: *Yeah.*

Mr. Sharma: *Formally Salen had died.*
Ms. Singh: *Mhh.*

Mr. Sharma: *They tried to find a signed Will.*
Ms. Singh: *Yup.*

Mr. Sharma: *And, but they couldn't find it, but* ***the only thing they had was just a computer record, which is an unsigned Will****.*
Ms. Singh: ***Okay****.*

Mr. Sharma: *Right?*
Ms. Singh: *But, that was only one*

Mr. Sharma: *This is a*
Ms. Singh: *Particular phone call.*

Mr. Sharma: *Right?*
Ms. Singh: *But we gave them enough time to look for it.*

Mr. Sharma: *Yes?*
Ms. Singh: *I did.*

Commissioner: ***I, I, I just want you to listen to the question.***
Ms. Singh: ***Yeah.***

Commissioner: ***Mr. Sharma's putting to you.***
Ms. Singh: ***Yeah.***

Mr. Sharma: ***Would that be a fair recollection of what actually had transpired?***
Ms. Singh: ***Yeah, could have been****.*

Mr. Sharma: ***Could have been, right****?*
Ms. Singh: ***Yeah****.*
[My emphasis]

[475] I also note, however, that the evidence given by Subhasni Singh in re-examination on this issue, as summarised by Counsel for the Applicant Chief Registrar in his written submissions ('*Closing Submissions',* 8th January 2018, at paras [160]-161]) was as follows:

> *'160. As for the* ***25th November 2008*** *entry (Exhibit 23), she stated that Dipka could not find any Will on computer and that Dipka had mentioned that there was no Will made.* ***She further stated that she could not recall if Dipka told her that there was an unsigned copy on the computer.***
> *161. She further stated that according to her knowledge she met the Respondent only once.'*

[My emphasis]

[476] I think it best if I again quote directly from the transcript of Subhasni's evidence given <u>in re-examination on this issue as recorded by the Commission</u>, as follows:

"Mr. Chand:	*Now Ms Singh I'll take you now to the response of Mr. Suruj Sharma and that is the agreed bundle the bigger bundle*
Ms Singh:	*Uh…huh*
Mr. Chand:	*That would be page 33*
Commissioner:	*Is it AD10?*
Mr. Chand:	*33 ahh AD10 yes Commissioner Sir, AD10 page 33.*
Mr. Chand:	*Now if you see at page 33 that was the response from Mr Suruj Sharma to the complaint that was lodged with the Chief Registrar's office?*
Ms Singh:	*Uh…huh*
Mr. Chand:	*If I may take you to page 34 and onwards*
Ms Singh:	*Uh…huh*
Mr. Chand:	*And in particular to page 35 please and the entry that begins with 25th November 2008*
Ms Singh:	*Uh…huh*
Mr. Chand:	***Now 25th November 2008 you confirmed that** a telephone call was received from you sorry **you made a phone call?***
Ms Singh:	***<u>Yes.</u>***
Mr. Chand:	*To the office of Patel Sharma Lawyers and **the call was received and attended by Dipka Mala?***
Ms Singh:	***<u>Yes.</u>***
Mr. Chand:	*Okay, now if you go on to the second paragraph*
Ms Singh:	*Uh..huh*
Mr. Chand:	*Which begins with 'the telephone was put on hold while a quick search was done on the Will*
Ms Singh:	*Uh…huh*
Mr. Chand:	*ahhh and it says that ''a signed copy of the Will could not be found **but the computer did show existence of the Will**'*
Ms Singh:	*uh…huh*
Mr. Chand:	*And **that information was <u>relayed to you on 25th November 2008</u>?***
Ms Singh:	***That's not true, she never called.***
Commissioner:	*Sorry?*
Ms Singh:	*That is not true.*
Commissioner:	*Because didn't you tell me earlier just, I just want to clarify that*
Mr. Chand:	*Yes.*
Commissioner:	***Were you confused earlier?***

Ms Singh: ***Yes, but she didn't told me*** *that there is no signed Will there.* ***She said there was no Will done.***

Commissioner: *So, just so I am clear,* ***she said there was no Will done?***
Ms Singh: ***Yes.***

Mr. Chand: *And who is this she that told you the Will was not done?*
Ms Singh: *Dipka Mala.*
...
Mr. Chand: *Now Ms Singh in your evidence-in-chief you had said*
Ms Singh: *Uh…huh*

Mr. Chand: *That was not relayed to you and that* ***Dipka Mala had told you that no Will was done?***
Ms Singh: *uh…huh*

Mr. Chand: *However* ***under cross-examination you confirmed that Dipka Mala had actually told you that there was a copy on the computer*** *but it showed you ahhh…. what you call this,* ***the computer did show the existence of a Will*** ***and you said that she has that is what was relayed to you by Dipka Mala in cross examination****. And* ***now you're saying that No, that conversation was not****, not what was the conversation between you and Dipka Mala but* ***rather it was that there was no Will done.*** *So which version is correct?*
Ms Singh: ***She was keep telling me that your brother didn't do a Will at the time.***

Commissioner: *No, that's not what Mr. Chand is asking you. I understand this is late in the day but Mr. Chand is just clarifying* ***originally in your evidence-in-chief you said to Mr. Chand no you were not told that there was an unsigned copy of the Will in the computer?***
Ms Singh: ***Yeah****.*

Commissioner: ***When Mr. Sharma asked you earlier this afternoon [in cross-examination] you said yes this was relayed to you there was an unsigned copy****. And now you're saying it wasn't relayed to you and Mr. Chand is asking you a moment ago and what he is asking you now,* ***what's correct?***
Ms Singh: *Because I did make numerous calls to that office.*

Mr. Chand: *No, Ms Singh that's not my question.*
Ms Singh: *uh…huh*

Mr. Chand: *The calls are not disputed.*
Ms Singh: *yeah*

Mr. Chand: *What is disputed here is* ***what was your conversation with Ms Dipka Mala upon your enquiries about the Will.***
Ms Singh: *About the brother's Will?*

Mr. Chand: *Yes.*
Ms Singh: *My brother did the Will there.*

Mr. Chand: *So what was the telephone conversation or* ***what was the response from Dipka Mala when you enquired about the Will****?*

Ms Singh: *She said she is gonna look for the Will in her system, she did a quick search and said that she could not find any signed Will of the brother, yes. Sorry I was a bit confused.*

Commissioner: ***So did she [say] there was an unsigned copy of the Will on the computer?***

Mr. Chand: *Yes, did she say that there was a copy on the computer but it was an unsigned copy on the computer. Did she relay that to you on the 25th November 2008?*

Ms Singh: ***No, no, no, no she always say there was no Will in that system*** *she cannot locate the Will in her system, she has to look for it or search for it,* ***I don't know. I can't recall.***

Commissioner: *Okay, just you understand what you're saying?*

Ms Singh: *Yup.*

Commissioner: *Everyone agrees, you agree?*

Ms Singh: *Yup.*

Commissioner: *There it was said there was no signed copy of the Will in their records, okay?*

Ms Singh: *Okay.*

Commissioner: *What we just want to clarify is and I've just got two different things from you*

Ms Singh: *uh…huh*

Commissioner: *is, however,* ***she did say that there was an unsigned copy on the computer, is that correct?***

Ms Singh: ***I can't recall that*** *but all the time I recall she was keep telling me there was no Will done by your brother.*
[My emphasis]

[477] Counsel for the Applicant then took Subhasni Singh to the entry in Exhibit 10 of 9th December 2008. Her evidence was as follows:

"Mr. Chand: *Now witness I will take you to then ahh…to the 9th December 2008. You confirmed that you had called on 9th December 2008?*

Ms Singh: *uh…huh,* ***9th December I can't remember the date but I did make some call****.*

Mr. Chand: *Okay, now if you look at page 36 and on top the…again the very first paragraph which begins with 'Ms Mala reiterate to Subhasni'*

Ms Singh: *uh…huh*

Mr. Chand: *'in relation to the computer record of the Will'.*

Ms Singh: *uh…huh*

Mr. Chand: *and then 'the family should continue to check to see if they could locate any signed Will' which you undertook to do. Now* ***do you confirm that on this day*** *like you say you can't remember the date*

Ms Singh: *uh…huh*

Mr. Chand: *but* ***during one of these conversations you were told that there was a computer record of the Will*** *and the family should continue to check to see they could locate any signed Will.* ***Was this relayed by Dipka Mala to you?***

Ms Singh: ***I think so she said that****, that we need to check if there is anything at home. It is very hard to remember everything on that back at that time.*

Mr. Chand: *Now you said that she said to check if there was anything at home but what about*
Ms Singh: *Yes*

Mr. Chand: ***The computer record of the Will. Did she say tell you about that*** *there was*
Ms Singh: ***No.***

Mr. Chand: ***a computer record*** *of the Will?*
Ms Singh: ***No, nothing about that****.*

Mr. Chand: ***What was your response, no?***
Ms Singh: ***No.***

Commissioner: *As I said, he is just trying to clarify for me as well and I don't want you saying 'yes', if you can't recall, you can't recall, just that there's been different answers.*
Ms Singh: ***Yeah, I can't recall****.*

Mr. Chand: *So umm*
Commissioner: *Just that you,* ***I'm just going to note there, you've got 'No' and then you've said 'I can't recall'*** *Mr. Chand.*
Ms Singh: ***Yeah****."*
[My emphasis]

[478] Counsel for the Applicant then took Subhasni Singh to the entry in Exhibit 10 of 12th December 2008. Her evidence was as follows:

"Mr. Chand: *Now I move ahhh I take you to 12th December 2008 entry*
Ms Singh: *Uh…huh*

Mr Chand: *And, okay ahhh sorry. Now just in relation to your meetings with Mr. Suruj Sharma*
Ms Singh: *Ah…huh*

Mr. Chand: ***Would you be able to say how many times you met Mr. Suruj Sharma****, you met Mr. Suruj Sharma?*
Ms Singh: ***I think only once.***

Mr. Chand: *And okay, sorry now on the issue of….okay, you said you met only once. Now would you be able to say* ***what was the discussion when you met with Mr. Sharma on this one occasion, single on this only occasion?***
Ms Singh: *I think he told mum that just because there is no signed Will or something and then Letter of Administration done or something on that.*

Commissioner: *I think he told mum in your presence?*
Ms Singh: ***Yes****.*

…
Ms Singh: *and just* ***because there is no signed Will****, there will be Letters of Administration done and that's it, it was a very small conversation.*

...

Mr Chand:	*And on this particular day you accompanied by anyone when you met with Mr. Sharma?*
Ms Singh:	***Yes mum and Pranita***
Commissioner:	*So it's just you and your mum …*
Ms Singh:	***No, Pranita I said my sister-in-law.***
Commissioner:	***Pranita, your sister-in-law?***
Ms Singh:	***Yes.***
Mr. Chand:	*And **was there anything else discussed in this only meeting with Mr. Sharma**, your only meeting with Mr. Sharma?*
Ms Singh:	***No**.*
Mr. Chand:	*Okay. Now would you be able to say when your mother informed you about the umm about the advice or about her rather about her agreeing to give joint instructions along with Ms Pranita Devi, when did she inform you that she was giving joint instructions to Mrs[sic] Suruj Sharma?*
Ms Singh:	*Regarding the Letter of Administration or something?*
Mr. Chand:	*Yes, regarding the Letter of Administration, joint instructions to extract the Letters of Administration?*
Ms Singh:	***I think it was on the same day when we were going back home and she said they came up with 75% to Pranita Devi and 25% to mum**."* [My emphasis]

[479] I should note at this point that it only became clear after the June 2017 Sittings of the Commission (after Subhasni Singh had completed her evidence) that Exhibits 10 and 23 in the Agreed Bundle were mistakenly the same. Counsel for the Applicant brought it to my attention on 20th September 2017, during the September 2017 Sittings, that a mistake had been made in the photocopying of the Agreed Bundle and **Exhibit 10 should be replaced with a copy of the first letter dated 29th April 2010 of 10 pages from Patel Sharma Lawyers to the Chief Registrar,** while Exhibit 23 should remain as is, that is, the second letter dated 23rd December 2013 of 14 pages from Patel Sharma Lawyers to the Acting Chief Registrar. Both Counsel were of the view that there was nothing arising out of that administrative error and it did not affect the questioning of Subhasni Singh in re-examination as she was still being asked questions in relation to the entries in the letter of dated 23rd December 2013 from Patel Sharma Lawyers to the Acting Chief Registrar. Apart from noting that administrative clarification (in which I agree with both Counsel that it has not affected the questioning of Subhasni Singh in re-examination on the evidence), **I am concerned as to the reliability of the evidence given by Subhasni Singh on the issue as to whether or not she was informed as to the**

existence of an unsigned copy on Salen's Will being on the computer system of Patel Sharma Lawyers. In addition, I note that Subhasni Singh's claim that '*according to her knowledge she met the Respondent only once'* is incorrect for reasons that I will discuss later below.

[480] There was also the claim (as I have noted above) by Dipka Mala in her evidence (upon which she was never challenged by Counsel for the Applicant) that Subhasni Singh had made a strange request in a telephone conversation on 9th December that "***because there was a[n] electronic version on the computer she was aware of, then she inquired if we could execute that version****"*. I note that this was mentioned in a letter of the 29th April 2010 (Exhibit 10) in the letter from Patel Sharma Lawyers to the Chief Registrar and again in a letter of 23rd December 2013 (Exhibit 23) in a further letter from Patel Sharma Lawyers to the Chief Registar. Counsel for the Respondent also put this to Subhasni Singh in cross-examination taking her to Exhibit 23 page 36 as follows:

"Mr. Sharma: *Okay. And then, she then, if you read what she says after she said, 'Subhasni further enquired if the said Will, as existed in the computer'.*
Ms. Singh: *Mhh.*

Mr. Sharma: *'Unsigned Will could be executed and she was advised by Mala that this could not be done as Salen had already passed away'.*
Ms. Singh: *No. I understand.*

Mr. Sharma: *Do you understand what she's actually getting there?*
Ms. Singh: *Yes, I haven't done, I haven't said that to her. No.*

Mr. Sharma: *Did you at any stage?*
Commissioner: *You haven't said that?*
Ms. Singh: *No.*

Commissioner: *Or you don't recall?*
Ms. Singh: *No, I don't, I haven't said that to her.*

Commissioner: *Okay.*
Ms. Singh: *Yeah.*

Mr. Sharma: *I mean that's a firm answer that you did say.*
Ms. Singh: *Yeah.*
Commissioner: *Yes.*

Mr. Sharma: *Do you understand what Mala was actually getting at?*
Ms. Singh: *I don't get you, can you?*
Mr. Sharma: *Right, could it be, I mean there can be 2 meanings to this*
Ms. Singh: *Yeah. Okay.*

Mr. Sharma: *You know, Ms. Singh*

Ms. Singh: *Yup.*

Mr. Sharma: *It could be a, not a very innocent remark 'Can we sign this Will and then admitted as a Will'. That's one version. The other is that 'Can we get the computer record and use it to get you know to use this as a legitimate document for his Will'?*

Ms. Singh: *I will never ask for someone to sign and use it as a Will, no, I will never say that.*

Mr. Sharma: *Right. I mean you understand the Will is*

Ms. Singh: *Yes.*

Mr. Sharma: *Signed by a testator?*

Ms. Singh: *Yes.*

Mr. Sharma: *Isn't it?*

Ms. Singh: *Yes.*

Mr. Sharma: *But, Ms. Singh, these are my instructions and Ms. Mala will also come and give evidence*

Ms. Singh: *Yup.*

Mr. Sharma: *On the defence.*

Ms. Singh: *Yup.*

Mr. Sharma: *Of fact, okay?*

Ms. Singh: *Yes.*

Mr. Sharma: *So you dispute that part eh?*

Ms. Singh: *Yup."*

[481] Hence, we had two witnesses with opposed versions as to whether the question was asked by Subhasni Singh as to whether the unsigned Will could be executed. It is also unclear that, even if the question had been asked whether it may have been entirely innocent. In reaching a finding on this allegation, I note that:

(1) there are two interpretations that could be made of this alleged question (as Counsel for the Respondent also noted when putting the alleged conversation to Subhasni Singh in cross-examination), one being (to quote Counsel), *'not a very innocent remark',* that is, *'Can we sign this Will and then admitted as a Will'* and the other being entirely innocent, that is, *'Can we get the computer record and use it as a legitimate document for his Will',* that is, as proof of Salen's intention?

(2) No contemporaneous file note of the alleged conversation was produced by Counsel for the Respondent, identified by Dipka Mala and then tendered in evidence to support her claim;

(3) Balanced against that, I have also noted earlier above the written submission of Counsel for the Respondent that, *'Mala's evidence was unchallenged by the*

Prosecution.' In particular, I note, Counsel for the Applicant never challenged Dipka Mala with Subhasni's denial and why it should be preferred;

(4) I am not sure that the allegation goes to the heart of any of the Counts; and

(5) Neither Counsel has relied upon it as the basis of arguing for or against whether one or more Counts have been established.

[482] **Accordingly, in view of the above, I will not be making any finding as to whether or not Subhasni Singh made such a request in a telephone conversation on 9th December to use the unsigned Will on the computer of Patel Sharma Lawyers and will put that aspect of the evidence to one side.**

(vii) The evidence of Pranita Devi

[483] As I have noted above, the problem with the evidence of the widow, Pranita Devi, given before the Commission on 21st September 2017, is that it is directly contradicted by the contents of her earlier letter dated 23rd January 2014 sent to the Acting Chief Registrar, in particular, where she stated in her letter that the day after her husband's death '*When my husband still in mortuary my sister in law **Subashni** [sic] enquired at Patel Sharma Lawyers and **was told of the unsigned Will**'.* Further, she mentions that Mr. Suruj Sharma *'knew there was a Will of my husband in their computer system'.* She also acknowledges that *'the unsigned Will of Salen popped up from just a day after my husband's death and still in the mortuary'.* That Subhasni Singh relayed the above to Maya Wati Prakash (and it would seem also Pranita Devi) also contradicts the evidence of both Maya Wati Prakash and Subhasni Singh.

(viii) The evidence of Prem Narayan

[484] In relation to Ms. Narayan, I have already noted above that I agree with the written submissions of Counsel for the Respondent, that is, *'Her evidence showed that she had no file notes and her records were non-existent'.* **Further, there is no evidence of Ms. Narayan having a direct conversation with any person from the firm of the Second Respondent, Patel Sharma Lawyers. Instead, her evidence was hearsay based upon what Maya Wati Prakash told her, whose evidence I have found to be unreliable on this issue.**

(ix) The evidence of Dipka Mala

[485] Dipka Mala explained in her evidence that Subhasni Singh was told of the electronic copy of the unsigned Will in the telephone conversations that she had with her on 25th November and 9th December 2008. She also stated that at the meeting on 12th December 2008 both Subhasni Singh and Maya Wati Prakash were told of the electronic copy of the unsigned Will and that a copy of it was given to them at that meeting. She further stated that a copy was also shown to Pranita Devi at the meeting on 15th December 2008.

(x) The evidence of Suruj Sharma

[486] **Despite the submission of Counsel for the Applicant, that '*apart from Dipka, all other witnesses denied having knowledge of the electronic copy of the Will'*, this is not correct. Dipka Mala was not alone in her evidence. The Respondent, Mr. Suruj Sharma, also gave evidence.**

[487] It is important that I quote from the actual transcript typed by the Commission's staff from the Commission's taped recording of the evidence. I note that in his evidence-in-chief, Mr. Suruj Sharma had said of the meeting on 12th December 2008 between Maya Wati Prakash, Subhasni Singh, Dipka Mala and himself as follows:

> *"Mr. S. Sharma:* *They were aware that there was a Will made in my office previously. And **Mala had printed off a copy of the Will as it existed into our computer system and that copy was given to them and I went through that copy**, and I recall that because I was personally not aware of that Will and that was the first time I actually got to see that/the existence of that Will in our computer system and I gave them a copy and I said that 'look you need to go and find the signed copy' because it wasn't a document that was/ a signed document was not left with our office. 'You need to go and find the signed copy it should be with your/Salen's the son's stuff' and then they asked me the question, 'What happens if we don't find it?' Then I said that look at that stage obviously in terms of the law I explained to them that the rules of intestacy would kick in and the estate would go to the widow and **it is at that stage we were informed that there was a widow and when asked they said 'the widow is still at home'**.*
>
> *Commissioner:* *Sorry?*
> *Mr. S. Sharma:* *'The widow is at home'.*
>
> *Commissioner:* *So, you asked where is the widow?*
> *Mr. S. Sharma:* ***'Where's the widow?'***
>
> *Commissioner:* *Hold on, and you were advised she's at home?*
> *Mr. S. Sharma:* *She's at home, and may it be heard also **that this was a first time I had met Maya Wati Prakash**.*

Commissioner: *Okay, hold on and have you met Subhasni before?*
Mr. S. Sharma: *No, **I had never met Subhasni before**.*

Commissioner: *Yes.*
Mr. S. Sharma: *And they said 'yes thank you again' it was again a very amicable discussion with them and under difficult circumstances so when I cast my mind back I am trying to relive the emotions of the family at that time and they said to me that 'look what we will do is we will go back home, we will have our own family discussions' and I said 'look take your time, there is no no no need for any rush, whenever you guys are ready you know, you can come back and we will take you to the next level' **but I stressed to them the importance of trying to look for and find the signed will** and that you know after that they both left."*
[My emphasis]

[488] In relation to the meeting on 15th December 2008, Suruj Sharma's evidence-in-chief was, in summary:

(1) Maya Wati Prakash, Subhasni Singh and Pranita Devi **attended with another gentlemen who remained outside in the reception area**;

(2) Suruj Sharma's recollection was that Subhasni was present in the meeting;

(3) They explained that "*they had had family discussions and … they wanted to actually pursue the matter further quickly … move on with the administration of the estate of Salen Prakash Maharaj"* as "*there were … minivan and taxi permits which needed to be transferred"* and *"monies owed to the bank, some debts"* and *"a potential claim, a third-party claim because Salen had died in a accident";*

(4) This was the first time that Suruj Sharma had met Pranita Devi so "*I actually took them back to the meeting that I had had with Maya Wati and Subhasni few days earlier, the 12th meeting, and **I explained to Pranita that look you know these people had come here 3 days ago and I had seen them and I had given them, my office had given them, a copy of the Will as it existed in our computer** and I had explained to them that they needed to find the signed copy of the Will and if a signed copy could be found they would need to discuss it";*

(5) As the three of them had come together to see him, Suruj Sharma *"had formed a clear opinion that they had discussed this amongst themselves and that's why the three of them had come";*

(6) He explained *"**what we did was we again showed a copy of the unsigned Will"*** and that Pranita's reaction to this "*Pranita didn't look surprised or anything, I again formed the opinion that she was aware of that by virtue of the previous discussions, you know I formed the opinion that they had discussed it";*

(7) As for the legal options, his evidence was that he explained "*that in the absence of a signed Will, the estate and in terms of the entitlement law, the estate … will go to Pranita Devi and at that stage the feedback that I got from both Maya Wati ... was that we had discussed this and we will divide up the estate in terms of our own family arrangement and but we would like the Letter of Administration application to proceed";*

(8) Further, *"at that point again I formed the clear view that the parties acknowledged what was in the unsigned Will, Maya Wati, in particular, knew that those rights going forth in the absence of the signed Will not remain in place … until the signed Will is found and equally Pranita Devi knew that her rights under the Letters of Administration, was based on the fact that there was no signed Will and … both parties then said that 'look what we would want to do is we would like to apply in joint names'";*

(9) Suruj Sharma's evidence was then that *"again I recall saying this, 'I said look we will take the instructions and I know from practice that even though you make a joint application sometimes the High Court Registry won't entertain that. They would actually return the document and say no, the person entitled to apply is the person who can apply. That you know, I know from my years of practice …'";*

(10) Despite the warning that "*the practice and procedure in terms of the law is it actually spells out who the person entitled to application is … we explained to them that 'yes, we will abide by your wishes' and I could sense it that the mother wanted to have a hand in it"* which he said "*she wanted to be involved for reasons of their own, their family reasons and I could understand that, you are dealing with the widow. They were living together they probably wanted to be involved in it but I again explained to them, the person entitled to apply as matter of law is Pranita Devi".*

[489] **Suruj Sharma was asked no specific questions in <u>cross-examination</u> as to what occurred in the meetings on 12th and 15th December 2008**. Instead, as I have noted above, all that was put to Suruj Sharma in cross-examination **on the issue of the electronic copy of the Will**, was, as noted by Counsel for the Applicant's written submissions at para [482], that is, *'he [Suruj Sharma] was referred to Exhibit 10 [the letter to the Chief Registrar of 29th April 2010] and asked why there was no mention of the unsigned Will being shown to MWP [Maya] and Subhasni and he replied that they were replying to [a] complaint as per [the] complaint form*

and did not omit it for any reason.' I think it is important that I quote from the actual transcript typed by the Commission's staff from the Commission's recording of the Respondent's evidence. After taking the Respondent to page 5 of the letter dated 29th April 2010 from Patel Sharma Lawyers to the Chief Registrar (Exhibit 10, page 37), Counsel for the Applicant asked a number of question of the Respondent, commencing with having him read out the second entry for 9th December 2008 as follows:

"Commissioner: *You want him to read that? So, Mr. Chand you want him to read that?*

Mr. Chand: *Yes.*

Commissioner: *Can you just read that Mr.*

Mr. S. Sharma: *Yes Sir.*

Commissioner: *You got it on page 37, the second paragraph, 'Subhasni further enquired'?*

Mr. S. Sharma: *'Subhasni further enquired if the said Will (as existed in the computer) (unsigned) could be executed. She was advised by Ms. Mala that that could not be done as Salen Prakash Maharaj had already passed away'.*

Mr. Chand: *Yes, now Mr. Sharma was there any file note kept for the conversation of this particular day?*

...

Commissioner: *So, it's the 9th of December 2008 and you are saying certain things that took place there. There is a couple of paragraphs and Mr. Chand is now asking was there a file note kept of that?*

Mr. S. Sharma: *First of all, <u>that phone call wasn't made to me</u>, you know. What I can say though is* ***we have in our office a register that records all incoming and outgoing calls*** *so that there would certainly be a entry in our register of incoming call from Subhasni…*

Mr. Chand: *Now the…*

Mr. S. Sharma: *As far as the file note are concerned* ***whether they were made or not I can't recall now*** *but* ***<u>I do know that the file</u>****, the subject file in relation to estate of Salen Prakash Maharaj* ***was handed over to Kohli and Singh in 2009. So, whatever would have been on that file would be in that file****.*

Commissioner: *That's what, I was going to ask you something about that…*

Mr. S. Sharma: *Yes.*

Commissioner: *Is, because some firms take the view, others would take out personal notes rather that just send documents, what's your procedure?*

Mr. S. Sharma: ***Our procedure is the file goes, locks [stock] and barrels*** *Sir…*

Commissioner: *Right.*

Mr. S. Sharma: *It is important that an incoming Solicitor…*

Commissioner: *Yes.*

Mr. S. Sharma: *Has access to what has happened, you know* ***our procedure is we don't tamper with the file****. We extract our core documents which is the instruction sheets and so forth…*

Commissioner: *So* ***what do you extract, you take out****?*
Mr. S. Sharma: *The instruction sheet,*

Commissioner: *Yes.*
Mr. S. Sharma: *Retainers and stuff but those* ***documents that are internal to the company****…*

Commissioner: *Yes.*
Mr. S. Sharma: *Depending on the nature of the matter we would keep the core documents such as the pleadings you know…*

Commissioner: *Yes.*
Mr. S. Sharma: *The main one ones that we have actually done, other than that the file just goes in that form and we hand it of course,* ***we don't extract, pull off minutes and stuff like that. It remains on the file.***
Commissioner: *Okay.*

Mr. Chand: *Now* ***doesn't the law firm make a duplicate file*** *before it hands it over to the incoming Solicitors or the new Solicitors of the client?*
Mr. S. Sharma: *Look my answer to that Mr. Chand is this,* ***I have been in practice for 36 years, never ever have I made a duplicate file and I don't believe any lawyer in this country does that.***

Commissioner: *So, just on this because this is the 9th of December 2008. My understanding of the evidence earlier, correct me if I am wrong, at this time had any file been opened or what was going on?*
Mr. S. Sharma: *No, this was just a phone call.*

Commissioner: *That's what I thought, so apart from you said you got a register you keep a note when people have called. You never spoke with…*
Mr. S. Sharma: *No, I didn't.*

Commissioner: ***Mala spoke to Subhasni****.*
Mr. S. Sharma: ***That is correct Sir****.*

Commissioner: *Then,* ***would it be a file note or there wouldn't be a file note****?*
Mr. S. Sharma: ***I don't know Sir. I couldn't say.***
Commissioner: *Okay.*

Mr. Chand: *Now Sir it could be true since in the absence of a file note, sorry I withdraw that.* ***I put to you Mr. Sharma that on this day there was nothing about an unsigned Will by Ms. Dipka Mala to Subhasni over the phone on the 9th of December 2008****?*
Mr. S. Sharma: *I am not sure if I could answer that but all I can say…*

Mr. Chand: ***As per your response, you had said it in your response.***
Mr. S. Sharma: ***My response is based on the advice given to me by Ms. Mala****.*

Commissioner: *So, all I could hear just so* ***we are not bound by the rules of evidence.***
Mr. S. Sharma: *Yes.*

Commissioner: *But, **that's what Mala told you?***
Mr. S. Sharma: ***Yes.***

Commissioner: *And what ….. you don't know what was actually said obviously?*
Mr. S. Sharma: *No, obviously but **what I said Mala/ Ms. Mala told me and that's correctly put in there**."*
[My emphasis]

[490] Counsel for the Applicant then asked a number of questions of the Respondent, specifically in relation to the entry for the meeting on 12th December 2008 (Exhibit 10, page 37) as follows:

"Mr. Chand: *Now if I may take you to that 12th of December 2008, the entry there on the same page (Exhibit 10, p.37). Now **in your evidence you had said on this day also an unsigned copy of the Will was handed over to Maya Wati and Subhasni, do you confirm that?***
Mr. S. Sharma: ***Yes, it was**.*

Mr. Chand: *Now, is there any reason **why there is no mention of that in this/in your response to the complaint to the Chief Registrar?***
Mr. S. Sharma: *I think my answer to that Mr. Chand is, **if you look at that complaint that was actually made** which is at page…*

…
Mr. S. Sharma: *if you look at the complaint on page 29 you have got 3 proper boxes ticked in and we have got…*

Commissioner: *It's AD8 [Exhibit 8, pp.28-31], page 29, yes?*
Mr. S. Sharma: *And **you have got a brief summary of fraud and then you have got a attached document, a typed document page 31**, now what we were trying to do, here we were, what we were trying to do in this reply is to give the factual perspective you know a factual perspective in a condensed form against which these allegations needed to be looked at **so we didn't jump into the allegations and say yes we accept this, we deny this and what not**. We didn't do that, we wanted to give a layout a chronological summary of the key factors. Now **in doing that there maybe matters that are not in there but none of them had been omitted for any reasons other than to give an honest account of what our records in terms of what our position was in relation to these issue**s. So, these are you know these are chronological matters, they were not solved they were not even in the complaint but we nevertheless tried to capture and give the office of Chief Registrar an essence of the factual perspective and that was the intent behind that.*

Commissioner: *Just on that, on that thing on page 31. What about where it says 'On the 1st, 2nd and 3rd of December [2008] I together with my daughter in law Pranita … visit the office'?*
Mr. Chand: *Which page?*
Commissioner: *Page 31 the attached to the complaint, you know we were trying to work out with the grand daughter who typed this?*
Mr. S. Sharma: *Yes Sir.*

Commissioner: *Things like that were not the basis of the complaint was that alleging fraud on your behalf?*
Mr. S. Sharma: *Yes, that is correct.*

Commissioner *Right and say* ***even that aspect, which is totally incorrect from what I understand, is that incorrect that on the 1st, 2nd and 3rd December that they visited the office****?*
Mr. S. Sharma: *That is* ***simply not correct*** *Sir,* ***they never visited the office on those days.***

Commissioner: *So, just on that, so I understand, you understand what Mr. Chand is saying?*
Mr. S. Sharma: *Yes.*

Commissioner: ***You have not mentioned here about an unsigned copy being given on the 12th of December.*** *The thrust of what you are telling me is you were mainly answering this complaint about fraud?*
Mr. S. Sharma: *Yes.*

Commissioner: ***You were not going into every little detail?***
Mr. S. Sharma: *That is correct Sir.*

Commissioner: *Such as the 1st, 2nd and 3rd December, which is incorrect, you did not put in your big response here.* ***You didn't deal with that, incorrect that's what you are telling me. Is that****?*
Mr. S. Sharma: *Yes, Sir we do say at page 40 [Exhibit 10], you know regarding allegation 2…*

Commissioner: *Yes.*
Mr. S. Sharma: *We do say there that those are the additional summary and then* ***we say that Subhasni daughter of the complainant was aware on the 9th December of the existence of****…*

Commissioner: *Okay, that's all I am just understanding what's your answer in there,* ***just one of the examples for me to see there were things like that you didn't answer****.*
Mr. S. Sharma: *We volunteered a whole lot of summary, facts, we put the complaint in a proper…*

Commissioner: *Right.*
Mr. S. Sharma: *factual perspective Sir.*

Commissioner: *Right, just let me make a note. Yes Mr. Chand?*
Mr. Chand: *Now, if I may take you/sorry, still on the 12th of December 2008.* ***Mr. Sharma, I put to you that on this particular/on the 12th of December 2008 there was/there were no unsigned copy of the Will of Salen Prakash Maharaj printed and shown to Maya Wati Prakash and Subhasni Lata Singh.***
Mr. S. Sharma: ***That is not correct, it was****."*
[My emphasis]

[491] Counsel for the Applicant then asked a question of the Respondent, specifically in relation to the entry for the meeting on 15th December 2008 (Exhibit 10, pp.37-38) and the response was as follows:

"Mr. Chand: *Now if I may move on to the 15th of December 2008 and again Mr. Sharma as per my* ***instruction I put to you that the unsigned copy of the Will of Shalen Prakash Maharaj was not shown to Pranita Devi, Subhasni Singh or Maya Wati Prakash on the 15th of December 2008 when they visited the Law Firm?***

Mr. S. Sharma: *The answer is* ***that's not correct Mr. Chand*** *and we say that look* ***as far as Maya Wati Prakash and Subhasni is concerned they were given a unsigned copy of that record. Another copy was shown to, because Pranita that was her first visit to the office on the 15th and another copy was shown.***

[My emphasis]

(xi) No evidence called from Hemant Kumar Singh, the husband of Subhasni Singh

[492] **On the issue of the storage of the Will of Salen Prakash Maharaj by Patel Sharma Lawyers, I note that the husband of Subhasni Singh, Hemant Kumar Singh, was not called in the present proceedings before this Commission, despite his being mentioned in the evidence of Subhasni Singh and Pranita Devi as having been in attendance with them and Maya Wati Prakash in 15th December 2008, at the Offices of Patel Sharma Lawyers, when the joint instructions were given to obtain a joint grant of Letters of Administration.** I have noted that he was referred to in the evidence of Pranita Devi in the proceedings in the High Court at Suva in *Prakash v Devi* on 30th October 2012 (Doc.21 p. 65, Exhibit 47, p. 179) as follows:

"MR HIUARE: *Why did you people go to LTA?*

MS DEVI: *For the permit for minibus.*

MR HIUARE: *What happened there?*

MS DEVI: *Subhasni Singh and Hemant Kumar Singh told me to go to the counter.*

MR HIUARE: ***Who is Hemant Kumar Singh?***

MS DEVI: ***Subhasni Singh's husband****. Hemant Kumar Singh is the husband of Subhasni."*

[My emphasis]

[493] **Although he was mentioned on a number of other occasions in the proceedings in the High Court, he did not give evidence in those proceedings. In relation to the proceedings before this Commission and the issue of who was in attendance at the Offices of Patel Sharma Lawyers on 15th December 2008 at the Offices of Patel Sharma Lawyers, I note that:**

(1) Hemant Kumar Singh was not mentioned in the evidence of Maya as being in attendance;

(2) Dipka Mala, in her evidence, said that on 15th December 2008, *"there were some other people sitting outside";* and

(3) Suruj Sharma said that on 15th December 2008, *"there was another gentleman who wasn't, was accompanying them but he wasn't in the office".*

[494] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of Hemant Kumar Singh, the husband of Subhasni Singh, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* <u>not</u> satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Hemant <u>would be expected to be called</u> (if his evidence was relevant) by <u>the Applicant Chief Registrar</u> rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, **Hemant's evidence <u>would NOT, in my view, elucidate in relation to how and when the instructions were given</u>** and what was said by Suruj Sharma to Pranita Devi and Maya Wati Prakash on 15th December 2008, other than, perhaps, some hearsay evidence that may have been conveyed to him either by Maya Wati Prakash and/or his wife, Subhasni Singh (who, according to Dipka Mala was present for some of the discussion). As the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter. <u>It is not enough to conclude that a witness may have knowledge</u>**';*

(iii) the missing witness' *'absence is unexplained'* – <u>Hemant's absence</u> from the proceedings before this Commission <u>is unexplained</u>, however, his evidence on this particular issue <u>would probably be irrelevant</u>;

(2) Accordingly, no inference will be drawn in relation to the absence of evidence from Hemant Kumar Singh as to how and when the instructions were given and what Suruj Sharma said to Pranita Devi and Maya Wati Prakash on 15th December 2008;

(3) I have also noted when considering to draw no inference, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not*

bound by formal rules of evidence … and the Commission must act fairly in relation to the proceeding'.

(xii) No evidence called from Jayawant Pratap, an uncle of Pranita Devi

[495] **I also note that <u>Jayawant Pratap, an uncle of Pranita Devi,</u> <u>was not called in the present proceedings before this Commission,</u> despite his having given evidence in the proceedings before Balapatabendi J in the High Court at Suva in *Prakash v Devi* (supra), as to storage of the Will of Salen Prakash Maharaj by Patel Sharma Lawyers.**

[496] I note that His Lordship explained in his judgment at para [19]: *'Mr. Jayawant Pratap in his evidence testified … he helped the Defendant [Pranita Devi] as she was his sister's daughter'.* In his evidence before the High Court *Jayawant Pratap* claimed to have shared a bowl of grog on a Saturday with the Respondent whilst '*there was a clerk by the name of Mala and she was looking and there is no Will or anything … They checked the computer too and … there was no copy of the Will in the file too.'* His Lordship also cited in his judgment at para [19] the following from Jayawant Pratap's evidence-in-chief:

'Mr. Hiuare:	*Where were you that time when they were inside the office? Were you outside the office or sitting together on the table?*
Mr Pratap:	*I was Sharma's office. The first time only Pranita and myself, Mala Pranita and Rosie and Suruj Sharma.*
Mr. Hiuare:	*What did you specifically discussed?*
Mr Pratap:	*Discussion was made between both parties. Suruj Sharma said there is no children so the properties will not all go to Pranita. We will be giving 35% and 65% to mother in law. At least she can get something out of it. After some time they found a Will there. I get shock. Any paper has to be signed by him he always come and contact me. How come there is a Will there which I do not know and Pranita does not know.'*

[497] I note the above excerpt is taken from page 85 of the transcript of the High Court proceedings on 30th October 2012 that forms part of Exhibit 47 in the proceedings before this Commission (see Doc.21, p. 65, Exhibit 47, p. 199). I also note the following from Mr. Pratap's evidence as set out in the transcript of those proceedings (Doc.21, pp. 87-88, Exhibit 47, p. 201-202) when he was asked in cross-examination the following:

"MS NARAYAN: *You also said in your evidence that when Maya and Pranita went to see Suruj Sharma you were there at the table.*

MR PRATAP: *Yes.*

MS NARAYAN: *Now this was in December 200….*

MR PRATAP: *I do not know the exact date I did not write it down. After the death.*

MS NARAYAN: *Pranita, Mrs Prakash her daughter Rosie and the husband were there. Next you said the settlement clause.* ***Did Mrs Prakash said Pranita signed something in the lawyer's office****?*

MR PRATAP: ***That time, no****.*

…

MS NARAYAN: *I put it to you Mr Pratap that you are lying.* ***You were not there in Mr Sharma's office when Pranita, Mrs Prakash, Rosie and Hemant went there in 2008****? Do you agree with me?*

MR PRATAP: ***No, I do not agree with you****.*

MS NARAYAN: *I put it to you Mr Pratap that you were not there sitting with the clerk at all.*

MR PRATAP: *Suruj Sharma and the clerk were there.*

MS NARAYAN: *I put it to you* ***on the 1st occasion that Pranita went into Mr Sharma's office with the sister in law and mother in law you were not there****. Do you agree with me?*

MR PRATAP: ***No****.'*
[My emphasis]

[498] In re-examination, Mr. Pratap confirmed his claim that he was there at Patel Sharma's office at the first meeting (as His Lordship noted when an objection was taken) *"He was referring to the 1st day"* (which, if correct, would have placed him as present at the meeting on 15th December 2008).

[499] I note that the evidence that Jayawant Pratap gave before the High Court (as to what allegedly occurred at the first meeting in December 2008) was that Pranita did not sign a document at that meeting, **is clearly wrong and at odds with Exhibit 2 tendered in the current proceedings before this Commission**. **That is, the *'Instructions*** *given jointly by Pranita Devi and Maya Wati Prakash to Patel Sharma Lawyers to act to obtain Letters of Administration'*, **were signed by both Pranita Devi and Maya Wati Prakash on 15th December 2008.**

[500] In addition, as I have noted above, whilst the evidence of Dipka Mala was that other people were in attendance at the Offices of Patel Sharma Lawyers on 15th December 2008, however, they waited outside and were not present during the conference with Mr. Suruj Sharma and Dipka Mala, involving Maya Wati Prakash and Pranita Devi, other than Subhasni Singh - who was sometimes in attendance during the conference going back and forth to those outside. Mr. Suruj Sharma also did not mention Jayawant Pratap being present. **I further note that there was no mention in the evidence of Maya Wati Prakash, Subhasni Singh, or even Pranita Devi, of Jayawant Pratap being present in the meeting or even being present outside in the waiting room.**

[501] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of Jayawant Pratap, the uncle of Pranita Devi, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* not satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Jayawant Pratap would be expected to be called (if his evidence was relevant) by the Applicant Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, **Jayawant Pratap's evidence would NOT, in my view, elucidate in relation to how and when the instructions were given** and what was said by Suruj Sharma to Pranita Devi and Maya Wati Prakash on 15th December 2008, other than, perhaps, some hearsay evidence that may have been conveyed to him at sometime later by Pranita. Again, as the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter. It is not enough to conclude that a witness may have knowledge**'*;

(iii) the missing witness' *'absence is unexplained'* – Jayawant Pratap's absence from the proceedings before this Commission is unexplained, however, his evidence on this particular issue would probably be irrelevant;

(2) Accordingly, no inference will be drawn in relation to the absence of evidence from Jayawant Pratap as to how and when the instructions were

given and what was said by Suruj Sharma to Pranita Devi and Maya Wati Prakash on 15th December 2008.

(3) I have also noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

(xiii) No evidence called from Premila Devi, the clerk assisting Dipka Mala

[502] I note that there was mention by Dipka Mala in her evidence of a Ms. Premila Devi, who worked at Patel Sharma Lawyers in 2008. According to Dipka Mala, whilst Dipka Mala was on the telephone to Subhasni Singh on 25th November 2008, Dipka Mala instructed Premila Devi "to check through the *Wills register"* and when "*she confirmed to me that the Will wasn't there"*, Dipka Mala then said that *"while still being on the phone call"*, "*I checked through my computer records and confirmed to Subhashni that there existed an electronic version"* and *"That if a Will would have been prepared as it was shown in the computer records but not in a Wills register she was to take necessary steps to look for the Will in her brother's own personal belongings ... which she had agreed to do."*

[503] I note that **Counsel for the Applicant Chief Registrar did not cross-examine Dipka Mala on this issue**, that is, her alleged discussion with Premila Devi on 25th November 2008. **I also note that Premila Devi was not called in the present proceedings before this Commission**.

[504] As to whether Premila Devi, could have provided any assistance on this issue, it is my view, that without more as to her involvement, it is doubtful whether she could have assisted noting:

(1) She only looked through the Wills Register;

(2) There was no suggestion that she also checked the computer records;

(3) The evidence of Dipka Mala was that after Premila Devi had checked through the Wills Register and when "*she confirmed to me that the Will wasn't there"*, **it was Dipka Mala, not Premila Devi, who then** *"while still being on the phone call"*, "***checked through my computer records and confirmed to Subhashni that there existed an electronic version****";*

(4) The chances of someone who may have had, at best, one small involvement in this matter in late 2008, then recalling some nine years later as to what may or may not have been said in a telephone call in which she was not one of the two persons involved, must be extremely questionable.

[505] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of this Premila Devi giving evidence on the issue of the storage of Salen's Will on the computer records of Patel Sharma Lawyers and the discussion between Dipka Mala and Subhasni Singh on that issue on 25th November 2008, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* are not satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Premila Devi would be expected to be called (if her evidence was relevant) by the Respondent rather than the Applicant Chief Registrar;

(ii) the missing witness' *'evidence would elucidate a particular matter'* – for the reasons outlined above, **Premila Devi's evidence would NOT, in my view, elucidate on the issue of the storage of Salen's Will on the computer records of Patel Sharma Lawyers and the discussion between Dipka Mala and Subhasni Singh on that issue on 25th November 2008, other than, perhaps, some hearsay evidence that may have been conveyed to her by Dipka Mala during that time**. Again, as the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter. It is not enough to conclude that a witness may have knowledge**'*;

(iii) the missing witness' *'absence is unexplained'* – Premila Devi's absence from the proceedings before this Commission is unexplained, however, her evidence on this particular issue would probably be irrelevant;

(2) Accordingly, no inference will be drawn in relation to the absence of evidence from Premila Devi on the issue of the storage of Salen's Will on the computer records of Patel Sharma Lawyers and the discussion between Dipka Mala and Subhasni Singh on that issue on 25th November 2008.

(3) I have also noted when considering to draw no inference, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding*

... subject to its own statutory procedures' including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

(xiv) Findings on the storage of a record of the Will of Salen Prakash Maharaj by Patel Sharma Lawyers

[506] **My findings in relation to the storage of a record of the Will of Salen Prakash Maharaj by Patel Sharma Lawyers are:**

(1) On 25th November 2008, Subhasni Singh (also known as "Rosie") telephoned the Offices of Patel Sharma Lawyers and spoke with Dipka Mala seeking a copy of the Will of Salen Prakash Maharaj;

(2) For the reasons outlined above, I accept the evidence of Dipka Mala that Subhasni Singh was advised by Dipka Mala during the said telephone conversation on 25th November 2008 that "*there existed an electronic version*" that is, "*that I could see on the computer records* …" and further "*That if a Will would have been prepared as it was shown in the computer records but not in a Wills Register she was to take necessary steps to look for the Will in her brother's own personal belongings which she had agreed";

(3) I note that there was mention of Premila Devi, a clerk, being present on 25th November 2008 at the Offices of Patel Sharma Lawyers, however, according to the evidence of Dipka Mala, **Premila Devi only checked through the Wills Register** and when "*she confirmed to me that the Will wasn't there",* **it was Dipka Mala, not Premila Devi, who then** "***checked through my computer records and confirmed to Subhashni that there existed an electronic version***". **Premila Devi's evidence would not, in my view, elucidate in relation to the storage of the electronic copy of the Will of Salen Prakash Maharaj by Patel Sharma Lawyers, other than, perhaps, some hearsay evidence that may have been conveyed to her by Dipka Mala after the telephone call;**

(4) On or about 9th December 2008, Subhasni Singh telephoned the Offices of Patel Sharma Lawyers and spoke again with Dipka Mala seeking a copy of the Will of Salen Prakash Maharaj and also an appointment was arranged for 12th December 2008;

(5) For the reasons outlined above, I prefer the evidence of Dipka Mala that Subhasni Singh was advised by Dipka Mala during that said telephone

conversation on or about 9th December 2008 that <u>there was again mention of there being an unsigned Will in the firm's computer</u>;

(6) On or about 12th December 2008, Subhasni Singh attended the Offices of Patel Sharma Lawyers with Maya Wati Prakash and they spoke first with Dipka Mala and then saw Mr. Suruj Sharma in the presence of Dipka Mala in relation to the Will of Salen Prakash Maharaj;

(7) For the reasons outlined above, <u>I prefer the evidence of Dipka Mala</u> (corroborated by Mr. Suruj Sharma) to that of Subhasni Singh and Maya Wati Prakash, that is, *"A[n] electronic copy was printed and shown to them"* of the Will and *"given to them"* by Mala, that is, it was handed over to one of them "*when they were with Mr. Sharma"* in his office at which Dipka Mala was also present;

(8) Further, <u>I also accept the evidence of Dipka Mala</u> that the firm did not even know that Salen had a wife in 2006, let alone a widow in 2008, until 12th December 2008, so that when the widow was mentioned in the conference on 12th December 2008, Maya and Subhasni were advised that they had to get her to attend with them as under the law the widow was the person who had to apply for a grant of Letters of Administration;

(9) On 15th December 2008, Maya Wati Prakash and Pranita Devi attended the Offices of Patel Sharma Lawyers with Subhasni Singh and Maya and Pranita spoke with Dipka Mala and Mr. Suruj Sharma in relation to the Will of Salen Prakash Maharaj, with Subhasni Singh moving between inside and outside of the office where the conference was held;

(10) For the reasons outlined above, <u>I prefer the evidence of Dipka Mala and Mr. Suruj Sharma</u> to that of Maya Wati Prakash and Pranita Devi, that is, that Maya and Pranita were shown an unsigned copy of the Will and they gave instructions for a joint application for a grant of Letters of Administration;

(11) I also <u>accept the evidence of Dipka Mala</u> <u>(that was corroborated in part by Mr. Suruj Sharma</u>) that at the conference on 15th December 2008 (in which Dipka Mala was also in attendance) with Mr. Suruj Sharma, that the persons in attendance in Mr. Sharma's office were Maya Wati Prakash and Pranita Devi and occasionally Subhasni Singh and that whilst other people were in attendance at the Offices of Patel Sharma Lawyers on that date, however, they waited outside and were <u>not</u> present during the conference in Mr. Sharma's office;

(12) I note that there was mention of Hemant Kumar Singh, the husband of Subhasni Singh, also being in attendance on 15th December 2008 at the Offices of Patel Sharma Lawyers, however, as he was not present in the actual room when Mr Suruj Sharma gave advice to Pranita Devi and Maya Wati Prakash, Hemant Kumar Singh's evidence would not, in my view, elucidate in relation to how and when the instructions were given and what was said by Mr. Suruj Sharma to Pranita Devi and Maya Wati Prakash on 15th December 2008, other than, perhaps, some hearsay evidence that may have been conveyed to him either by Maya Wati Prakash and/or his wife, Subhasni Singh (who, according to Dipka Mala was present for some of the discussion);

(13) I also note that although there was mention of Jayawant Pratap, an uncle of Pranita Devi, having given evidence in the proceedings before Balapatabendi J in the High Court at Suva in *Prakash v Devi* that he was in attendance at the first meeting at the Offices of Patel Sharma Lawyers (that is, on 15th December 2008), he did not give evidence before this Commission. I further note that as he was not present in the actual room when Mr. Suruj Sharma gave advice to Pranita Devi and Maya Wati Prakash, Jayawant Pratap's evidence would NOT, in my view, elucidate in relation to how and when the instructions were given and what was said by Suruj Sharma to Pranita Devi and Maya Wati Prakash on 15th December 2008, other than, perhaps, some hearsay evidence that may have been conveyed to him at sometime later by Pranita Devi.

(4) Lack of definition of what is a failure to keep a 'proper record' in relation to the drafting and execution of a Will.

[507] I turn now to the question of what is a failure to keep a 'proper record' in relation to the drafting of a Will?

(i) The procedure at Patel Sharma Lawyers in 2006

[508] The evidence of Dipka Mala was that the procedure in the law firm of Patel Sharma Lawyers was that *"while taking the instructions"*, a client would be given options as to *"the number of copies they require"* and whether or not they *"they opted to register the Will with the High Court Registry"* (requiring a further two copies). In cases where a client opted not to register their Will, they would also be given "*an option to keep Wills in our Wills Register".* In that situation, there

would be *"Two original copies. One released to the client and one in the Wills Register".* If, however, a client wished to take their Will with them, then that was the client's prerogative. Her evidence in that regard was as follows:

"Mr. Sharma:	*And was it a common occurrence that a client may to say to you that 'No, I don't want the other two options. I'll take my Will with me'?*
Ms. Mala:	*It was on a case by case basis…*
Commissioner:	*Sorry, it was?*
Ms. Mala:	*It was on a case by case basis and there were at times that the customers/ the clients who called in wanted to take away the Wills because of the confidential nature of the contents of their Will which was best known to them.*
Mr. Sharma:	*So if the testator or testatrix do not want you or the firm to keep a signed doc/Will in the registry. What record would you have that there was a Will made be the firm?*
Ms. Mala:	***We would have a/the electronic version of the Will on the computer***.
Mr. Sharma:	*And in the electronic, you mean in the computer there is a directory of all the Wills that you …*
Ms. Mala:	***The directory of all the Wills that we have prepared****."* [My emphasis]

(ii) No Practice Direction in 2006

[509] I note, Counsel for the Applicant conceded at the strike out hearing in April 2016, **that there was no Practice Direction in 2006 setting out certain requirements in relation to the registration of Wills**.

[510] Indeed, as co-counsel for the Respondent highlighted at the clarification hearing on 25th April 2018 (for which I thank him for bringing this to my attention), *'Practice Direction No. 2 of 2012 - Wills and Non Contentious Probates Registry Practice'* issued on 14th December 2012 by His Lordship, Chief Justice A.H.C.T. Gates, sets out how to '**achieve registration'** of a Will with the High Court Civil Registry, with registration still remaining optional. That is, **it does not make it mandatory that a copy of a Will must be lodged with the High Court Registry**. Rather, should a client wish to exercise the option of registration then the Practice Direction sets out how this is to be achieved. (See PacLII*: http://www.paclii.org/fj/directions/prac_directions/pdn2o2012wancprp739/ - ww.paclii.org/fj/directions/prac_directions/pn1o2011wocicp607/>*.]

(iii) No expert evidence called of a senior practitioner

[511] Hence, **the onus was upon the Applicant to set out what was expected to be a "proper record" as at 22nd December 2006 in relation to the drafting and execution of a Will**. In that regard, I note:

(1) No expert evidence was called by Counsel for the Applicant. That is, no senior practitioner gave evidence as to what had been the practice in Fiji in 2006 where a client had made clear that they did not wish for a copy of a Will to be kept by the law firm after it had been executed;

(2) It was not put by Counsel for the Applicant in his cross-examination of either Mr. Suruj Sharma and/or Dipka Mala as to **what was expected to be a "proper record" in 2006 in relation to relation to the drafting and execution of a Will;**

(3) Further, if the law firm was bound by their client's instructions, that is, if the client did not want to leave a copy of his executed Will to be retained by the law firm, then what "proper record" of the Will was supposed to be maintained by the law firm in such circumstances?

(iv) Definition of a "proper record"

[512] In light of the above, I asked Counsel for the Applicant Chief Registrar at the clarification hearing held on 25th April 2018 to define what was a "proper record". According to the oral submission of Counsel for the Applicant Chief Registrar, the evidence of the complainants was that when they made their enquiries with the law firm and they were informed that there was no Will made by the law firm. Hence, there was no proper record maintained by the law firm Patel Sharma Lawyers.

[513] The oral submission of Counsel for the Respondent in reply was that **the evidence of Subhasni Singh**, under cross-examination, was that she was taken by Counsel for the Respondent to the letter dated 23rd December 2013 sent from the Respondent's law firm to the Acting Chief Registrar (Exhibit 23), and, in particular, page 3 of that letter (page 91 of the *Agreed Bundle*) where **she agreed with that entry which states: '*that it was communicated to Subhasni that a signed copy of the Will could not be found but the office computer did show existence of a Will made on 22nd December 2006'***. [My emphasis]

[514] On this issue, as I have set out above, I note that Counsel for the Applicant Chief Registrar in his written submissions ('*Closing Submissions'*, 8th January 2018, at

para [151), summarised the following in relation to the cross-examination of Subhasni Singh on this issue:

> *'151. She was referred to Exhibit 23 and in particular to page 91 and the entry of 25th November 2008 was referred to her.* ***She agreed with the entries of 25th November 2008 which amongst another things stated that it was communicated to Subhasni*** *[sic] that a signed copy of the Will could not be found but* ***the office computer did show existence of a Will made on 22nd December 2006****.'*
> [My emphasis]

[515] I have also set out above, however, that Counsel for the Applicant Chief Registrar, whilst noting that Subhasni Singh did concede in cross-examination that she agreed with the entries of 25th November 2008, also noted that **Subhasni's evidence in re-examination was** (as per Counsel for the Applicant Chief Registrar's written submissions ('*Closing Submissions'*, 8th January 2018, at para [160)) that, *'She further stated that* ***she could not recall*** *if Dipka told her that there was an unsigned copy on the computer.'* [My emphasis]

[516] For completeness, I note that I have previously set out above an excerpt from the transcript of the evidence of Subhasni Singh under cross-examination on 6th June 2017 wherein she conceded that it ***'could have been'*** **that Dipka Mala advised Subhasni Singh on 25th November 2008 that** ***'the office computer did show an existence of a Will made on 22nd December 2006'.*** I further note that in re-examination, Subhasni Singh then stated, ***"I can't recall"***.

[517] I have also noted the written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions'*, 31st January 2018), (page 9, para [24], subparas [vi]-[vii])), wherein Counsel have submitted that **Subhasni Singh *'contradicted herself on the issue*** *... Initially she said Mala hadn't said this but subsequently she was not sure and said Mala may have said it ...'* and *'the allegation made that neither Mala nor the Practitioner had said that they hadn't made any Will for SP was dented under cross examination to the point that both MWP and SS couldn't really remember what Mala or the Practitioner had said.'* [My emphasis] **The submissions of Counsel for the Respondent have then gone further and noted, by contrast, *'[Dipka] Mala was very clear in her evidence that she told SS [Subhasni Singh] that they had a record of the electronic copy of***

the Will but not a signed Will and she said she advised SS to look for SP's Will at home'. [My emphasis]

[518] **I agree with the above submission by Counsel for the Respondent. In my view, whilst Subhasni Singh wavered on this issue, Dipka Mala was very clear.**

(v) Was a computer record maintained by Patel Sharma Lawyers?

[519] In relation to the computer record of Salen's Will allegedly maintained by Patel Sharma Lawyers, I note:

(1) According to the evidence of Dipka Mala, a computer record of the Will of Salen Prakash Maharaj was kept safely on the firm's computer of which Subhasni Singh was first advised in a telephone conversation on 25th November 2008;

(2) Subhasni Singh in cross-examination on 6th June 2017 conceded that it ***'could have been'*** that Dipka Mala so advised her on 25th November 2008 and then in re-examination Subhasni said, ***"I can't recall"***;

(3) The evidence of Dipka Mala that she advised Subhasni Singh on 25th November 2008 as to existence of the computer record of Salen's Will was not challenged by Counsel for the Applicant during his cross-examination of Dipka Mala. I do note, however, that Counsel for the Applicant did challenge Dipka Mala that Subhasni Singh was not so advised of the computer record in a telephone conversation on 9th December 2008. I also note that Counsel for the Applicant put to Dipka Mala that unsigned copies of Salen's Will were not printed and shown to those who attended the meetings at Patel Sharma Lawyers on 12th and 15th December 2008.

(5) Findings as to whether there was a failure to a keep a 'proper record'

(i) Two questions arising from my Ruling of 21st September 2016 on this issue

[520] I note that in my Ruling of 21st September 2016, two questions arose from this issue:

(1) Whether *'subsequently to the Deceased's death on 24 November 2008, the Plaintiff [Maya Wati Prakash] and her family members … were informed by the law firm that the Deceased had not made any Will"*?

(2) Whether such conduct in not making a second original of the Will in 2006 *'falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner or law firm"*?

(ii) Submissions

[522] I note that Counsel for the Respondent have argued *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, pp. 16-17, paras [27]-[29]) in relation to the Prosecution Case Statement that:

> *'27. At paragraph 7 of the Statement* ***the Chief Registrar said*** *that in relation to the charge relating to keeping a record of the Will* ***he would****: [i].* ***Rely on case laws which state that legal practitioners should keep proper record of work they have done for their clients****;*
> *28. It is submitted that the Chief Registrar has not relied on any case laws and neither did he call any evidence from an expert on record keeping to establish what was the standard of record keeping required from a legal practitioner at the material time when the Will was made on 22nd December 2006.*
> *29. In this respect* ***the Chief Registrar has failed to establish what was the standard of competence and diligence*** *the legal practitioner was required to meet.'*
> *[My emphasis]*

[523] Counsel for the Applicant Chief Registrar's response in his written submissions in reply ('*Applicant's Submissions in reply'*, 20th February 2018), has not specifically addressed the submission of Counsel for the Respondent that he has failed to cite any case law in support. Instead, Counsel for the Applicant Chief Registrar has replied in his submissions at para [9]:

> *'The allegation by the Applicant is based on the evidence of MWP and other witnesses who testified that the law firm had completely denied the existence of a Will. The Applicant relies upon paragraph 492 of its submissions filed on 8th January 2018. It is on this basis that the allegations arose against the practitioner.'* [My emphasis]

[524] **In relation to the above submission of Counsel for the Respondent, I note:**

(1) I have already explained above as to why I reject the above submission of Counsel for the Applicant Chief Registrar in relation to the evidence of Maya Wati Prakash, whom I have found to be unreliable;

(2) Similarly, I have also found above the '*other witnesses who testified that the law firm had completely denied the existence of a Will',* to be also unreliable;

(3) **Further, I have also explained above why I reject the submission in paragraph 492 of the submissions filed by Counsel for the Applicant on 8th January 2018**, that is, *The Applicant is not alleging that the Respondent did not keep a copy of the Will or did not keep one of the originals but* ***what the Applicant is alleging that there was no proper record kept*** *by the firm to conclusively say that SPM's Will was made by the firm'.* **Indeed, Counsel for the Applicant Chief**

Registrar has not cited any case law and/or any expert evidence as to what is a proper record to be maintained by a law firm when a Will is drafted and executed and, in circumstances where the testator's clear instructions are that they do not want an original copy to be maintained by the law firm.

(iii) Findings in answering those two questions

[525] As I have accepted the evidence of Dipka Mala that Subhasni Singh was informed on 25th November 2008 of the existence of the computer record and, further, that Maya Wati Prakash and Subhasni Singh were shown a printout of the computer record on 12th December 2008 and that Maya Wati Prakash, Subhasni Singh and Pranita Devi were also shown a printout of the computer record on 15th December 2008, my findings in relation to the above two questions are as follows:

(1) Maya Wati Prakash and her family members were informed by the law firm of Patel Sharma Lawyers that an unsigned electronic copy of the Will of Salen Prakash Maharaj was stored on the firm's computer;

(2) Maya Wati Prakash and her family members were NOT informed by the law firm of Patel Sharma Lawyers that Salen Prakash Maharaj had not made any Will with the firm;

(3) Patel Sharma Lawyers were bound by the instructions of their client, Salen Prakash Maharaj, such that it could not be said that such conduct in not making a second original Will in 2006 *'falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner or law firm';*

(4) If there was any doubt as to whether the conduct in not making a second original Will in 2006 was unsatisfactory professional conduct, it is noted that '*Practice Direction No 2 of 2012 - Wills and Non Contentious Probates Registry Practice'* which requires for registration that'*… two originals of the deceased's "Will" are to be filed at the Registry together with the original Birth Certificate of the Testator'* and a completed Form No. W1, was not issued until 14th December 2012 by His Lordship, Chief Justice A.H.C.T. Gates, six years after the Will of Salen Prakash Maharaj was executed on 22nd December 2006 AND, further, that registration is still only optional and not compulsory.

(6) Exhibits "15A", "15B" and "15C"

[526] I now need to turn to Exhibits "15A", "15B" and "15C" to resolve what is a proper record in such circumstances as occurred in the present case.

[527] **I note that <u>an unsigned copy of the Will</u> of Salen Prakash Maharaj <u>was produced and tendered before the Commission</u> and marked as Exhibits "15A", "15B" and "15C". It was <u>alleged that the unsigned copy of the Will marked as Exhibits "15A", "15B" and "15C" had been attached to Exhibit 15, that is, a letter dated 20th May 2010 from Patel Sharma Lawyers to Mr. Willy Hiuare</u>.**

(i) Whether shown to Willy Hiuare on 15th May 2010?

[528] Whether or not a computer record of the unsigned Will allegedly held by Patel Sharma Lawyers was shown to Mr. Willy Hiuare on 15th May 2010 became an issue for discussion during the hearing near the end of the day's proceedings on 21st September 2017, immediately after Counsel for the Applicant had put to Dipka Mala in cross-examination concerning that meeting on 15th May 2010 the following:

> *"Mr. Chand:* *And now finally Ms. Mala you had said that you confirm that there was a meeting that was held at law firm at the law firm of Patel Sharma & Lawyers ahh whereby Mr. Hiuare was present?*
> *Ms. Mala:* *Yes Sir I can confirm that.*
>
> *Mr. Chand:* *And you confirm that this meeting was in relation to the Will of Salen Prakash Maharaj?*
> *Ms. Mala:* *Yes Sir.*
>
> *Mr. Chand:* *Now you had also said in your evidence that there was a/that **you also showed him the unsigned electronic**…*
> *Ms. Mala:* ***<u>Yes, the electronic version of the Will</u>**.*
>
> *Mr. Chand:* *Now I suggest to you that that was not ahh that the electronic copy of the Will was not shown to Mr. Hiuare at this meeting?*
> *Ms. Mala:* *That's not correct Sir because **when he produced to me the signed copy of the Will I printed off a electronic version and showed it to him just to reconfirm that that was the version** that was later that was/that was being executed. Just to match the details of that."*
> [My emphasis]

[529] After the above cross-examination, I asked Ms. Mala to please wait outside the Commission's hearing room for a moment whilst I raised an issue with Counsel. I then asked both Counsel as to why an unsigned copy of the Will was not in evidence before the Commission in the *Agreed Bundle* particularly if it was Ms. Mala who drafted the Will? I also wondered if Counsel for the Applicant had now raised with

Ms. Mala that the electronic copy of the Will was not shown to Mr. Hiuare, whether Counsel for the Respondent intended taking Dipka Mala to an unsigned copy of it and, further, if this was only now being raised in re-examination how would that be fair to Counsel for the Applicant and surely we would need to recall Mr. Hiuare? Counsel for the Applicant felt it was a matter for submissions whilst Counsel for the Respondent noted that "*the production of the document only will show the document exists"* and, at that stage, indicated that he was prepared to leave it and not tender a copy through Dipka Mala in re-examination. The hearing was then adjourned for the day.

[530] At the beginning of the hearing the following day on 22nd September 2017, the Commission was informed by Counsel for the Respondent that a copy of the unsigned Will had, in fact, been filed previously with the Commission in the supplementary application that had been filed by the Chief Registrar on 13th November 2015 (containing a further allegation of Professional Misconduct against the Respondent) that had then been consolidated by the previous Commissioner so as to become Count 4 in the present proceedings. In particular, '*in the documents relied upon'* in that supplementary application, at pp.17-72 was document 6, *'Response to Section 104 Notice letter received from Suruj Sharma of Patel Sharma Lawyers dated 23/12/2013 and received on 27/12/2013'*. That was a letter from Patel Sharma Lawyers to the Chief Registrar of 14 pages with 13 annexures. At Annexure 11 (pp. 69-71 of *'the documents relied upon'*), was a copy of a letter dated 20th May 2010 from Patel Sharma Lawyers to Mr. Willy Hiuare of HM Lawyers with four attachments including an unsigned copy of the Will of Salen Prakash Maharaj together with a backsheet from the firm of Patel Sharma Lawyers. It was unclear, however, as to why the various 13 annexures were interspersed throughout the letter and not in the order as one set of annexures at the end of the letter as set out by Patel Sharma Lawyers. A short adjournment was then granted whilst Counsel for the Applicant checked the original letter dated 23rd December 2013 from Patel Sharma Lawyers (including the 13 annexures) that had been received by the Chief Registrar on 27th December 2013.

(ii) Annexure 11 to letter dated 23rd December 2013 from Patel Sharma Lawyers to the Chief Registrar

[531] After the short adjournment, it was then explained that each Counsel had checked their respective documents and **although the unsigned Will had been included as part of Annexure 11 submitted by Patel Sharma Lawyers in their letter dated 23rd December 2013 to the Chief Registrar (responding to the Section 104 Notice in relation to the complaint of Pranita Devi), unfortunately, only the letter dated 23rd December 2013 and none of the 13 annexures had been included as part of document AD23 in the *Agreed Bundle of Documents* that had been filed in the present proceedings with the Commission and marked as Exhibit 23**. While some of those annexures were then separately included in the *Agreed Bundle* as individual documents, this did not include the unsigned Will from Annexure 11 as it had been disputed. After this clarification, Counsel for the Applicant had no objection to the unsigned Will being added to the Agreed Bundle as **Exhibits "15A", "15B" and "15C"** on the basis that Mr. Hiuare could then be recalled to confirm or deny as to whether or not the unsigned Will was included when he received the letter on 20th May 2010.

[532] As shall be seen, although Mr. Hiuare gave evidence that he did not receive the unsigned Will attached to the letter dated 20th May 2010, he also gave evidence that *'he could not re-call'* as to whether or not at the meeting at Patel Sharma Lawyers on 15th May 2010, he was shown a copy of the Will held by Patel Sharma Lawyers. **Importantly, however, after this evidence was given by Mr. Hiuare, there was no suggestion then made by Counsel for the Applicant to Mr. Suruj Sharma during cross-examination that the unsigned Will that comprised Exhibits "15A", "15B" and "15C" was a recent creation. In my view, this is a critical issue for the following reasons:**

(1) **If the Respondent was able to produce an unsigned copy of the Will from the firm's computer records that was tendered in evidence at the hearing before the Commission as Exhibits "15A", "15B" and "15C" with no suggestion that it was a recent creation (whether or not it was allegedly shown to Mr. Hiuare on 15th May 2010 and/or attached to the letter of 20th May 2010), then surely it logically follows that this document must have existed at the time when Subhasni Singh first telephoned the law firm on 25th November 2008, the day after Salen's death and asked about the existence of a Will?**

(2) **If the document existed on 25th November 2008, then surely it also logically follows that when Subhasni Singh spoke by telephone on 25th November 2008**

with Dipka Mala (whose evidence I have accepted above), Dipka Mala would have told Subhasni Singh of the existence of an unsigned copy of the Will on the firm's computer and to check at home for the signed original of the Will?

(3) **If the above is correct, then surely it follows that:**

(i) **when Subhasni Singh spoke by telephone on 9th December 2008 with Dipka Mala (whose evidence I have also accepted above), that Dipka Mala again confirmed to Subhasni Singh as to the existence of an unsigned copy of the Will on the firm's computer and asked her to check again at home for the signed original of the Will;**

(ii) **A copy of the document would have been produced at the meeting on 12th December 2008** (between Subhasni Singh, Maya Wati Prakash, Dipka Mala and Suruj Sharma), so that Subhasni Singh and Maya Wati Prakash could sight the unsigned copy; and

(iii) **A copy of the document would have been produced again produced at the further meeting on 15th December 2008** (between Pranita Devi, Subhasni Singh, Maya Wati Prakash, Dipka Mala and Suruj Sharma), so that Pranita Devi could sight the unsigned copy.

[533] **Apart from no suggestion being put by Counsel for the Applicant to Mr. Suruj Sharma (who continued to give evidence after Mr. Hiuare had been recalled) that the document that formed Exhibits "15A", "15B" and "15C" was a recent creation, Counsel for the Applicant also did not seek to have Dipka Mala recalled who was the person who had created the Will (and who had given evidence before Mr. Hiuare), so that Counsel for the Applicant could put the suggestion to her that the unsigned copy of the Will was a recent creation. The problem for Counsel for the Applicant was that he had laid no basis to be able to make such a suggestion that the document allegedly placed before Willy Hiuare on 15th May 2010 and/or included as Annexure 11 in the letter of 23rd December 2013 was a recent creation. That is, there was no meta-data or other documentary or expert evidence before the Commission to refute Dipka Mala's evidence that:**

(1) the document had been created and stored on the firm's computer system on 22nd December 2006;

(2) the document stored on the firm's computer system had been opened on 25th November 2008;

(3) the document stored on the firm's computer system had been opened and printed on 12th and 15th December 2008.

[534] I have also noted above that **Counsel for the Applicant did not challenge Dipka Mala as to the contents of the telephone conversation with Subhasni Singh on 25th November 2008.** By contrast, I note that Subhasni Singh was challenged by Counsel for the Respondent resulting in Subhasni conceding that it ***"could have been"*** that Dipka Mala so advised her on 25th November 2008, even if Subhasni then soon afterwards changed her mind in re-examination to ***"I can't recall"***.

[535] Instead, Counsel for the Applicant challenged Dipka Mala (based solely on the unreliable evidence of Subhasni Singh) as to the contents of the later telephone conversation on the 9th of December 2008 and also challenged her as to what occurred in the meeting on 12th December 2008 (based on the unreliable evidence of Maya Wati Prakash and Subhasni Singh) and in the meeting on 15th December 2008 (based on the unreliable evidence of Maya Wati Prakash and Pranita Devi) as follows:

"Mr. Chand:	*Now, going back to the telephone conversation on the 9th of December 2008, I put to you that there was/that* ***you have not disclosed to Ms. Subhasni Singh that there was a electronic copy of the Will*** *in your records?*
Ms. Mala:	*No that's not correct Sir, I remember, vaguely remember that…*
Commissioner:	*Slowly, you remember what?*
Ms. Mala:	*That* ***it was the second phone call that I had received and on both the days I had advised her****.*
Commissioner:	*On both the days, you advised her what, what did you advise?*
Ms. Mala:	***That the electronic version existed in our system and that she has to look for the Will at her/with her brother's belongings****.*
…	
Mr. Chand:	*I further put to you that on 12th December 2008* ***there was no electronic copy of the Will printed and shown*** *to the/to Maya Wati Prakash and Subhasni Singh?*
Ms. Mala:	***That is again not correct, we had printed and shown them the copy****.*
Mr. Chand:	*And I further put to you that* ***there was no mention of a electronic copy on the computer/electronic copy of the Will of Shalen Prakash Maharaj on the computer*** *on the 12th of December 2008.*
Ms. Mala:	***There was a mention, we had advised, we had printed a copy on that particular day while they were seated in Mr. Sharma's office.***
…	
Mr. Chand:	*On 15th December ahh now Ms. Mala I put to you that there was electronic copy shown to Ms. Pranita,* ***electronic copy of the/of***

a unsigned Will of Salen Prakash Maharaj was <u>not shown</u> to Pranita Devi *on this day?*

Ms. Mala: ***No it was shown, I can confirm that Sir.***

Mr. Chand: *And I further put to you that there was* ***<u>no discussion</u> about the unsigned Will / copy of the Will*** *of Salen Prakash Maharaj on the/* ***on your computer system****/ there was no information such relayed to Pranita on this day 15th December 2008, there is no discussion about the unsigned electronic copy of the Will of Shalen Prakash Maharaj?*

Ms. Mala: ***The discussions took place in relation to the Will because the initial discussions that took place with Subhasni on the/ Subhasni and the mother on the 12th, the electronic version was printed and given to them and a further printout was shown to Pranita on the 15th in the presence of Subhasni and Maya.***
[My emphasis]

(iii) Finding on Exhibits "15A", "15B" and "15C"

[536] **I find that:**

(1) <u>there was no evidence was placed before me to doubt the validity of a document having been printed from the computer records of Patel Sharma Lawyers</u> that was tendered in evidence at the hearing before the Commission and <u>marked as Exhibits "15A", "15B" and "15C"</u> being the unsigned copy of the Will of Salen Prakash Maharaj created by Dipka Mala on 22nd December 2006;

(2) Accordingly, <u>I find that this document must have existed in the computer system of Patel Sharma Lawyers at the time when Subhasni Singh first telephoned the said law firm on 25th November 2008.</u>

(7) Mr Willy Hiuare and the meeting on 15th May 2010

[537] **I have specifically put to one side when making the above findings, the evidence of Mr. Willy Hiuare who commenced acting for Pranita Devi from on or about 7th May 2010, that is, <u>AFTER</u> the period when the Applicant claims that the Respondent did not keep a proper record, that is, '*between 22nd December 2006 and <u>23rd January 2010</u>*'.**

(i) The evidence of Willy Hiuare

[538] I will now deal with the evidence of Mr. Willy Hiuare as to **<u>whether an unsigned Will held by Patel Sharma Lawyers was produced to him at a meeting he had with Patel Sharma Lawyers on 15th May 2010 as it also has implications as to whether or not there was a proper record kept by Patel Sharma Lawyers</u>**. I

also note that there was, what I would term, a secondary dispute. That is, whether or not a copy of the unsigned Will was then attached to a letter sent by Patel Sharma Lawyers to Willy Hiuare on 20th May 2010, following their meeting on 15th May 2010.

[539] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at paras [346], [348], [352] and [358]-[359]), the evidence-in-chief of Willy Hiuare in relation to a meeting held on 15th May 2010 at the firm of Patel Sharma Lawyers involving the Willy Hiuare, Dipka Mala and the Respondent, was, in summary, as follows:

> *'340. He stated that PD came with instructions in October 2010.*
>
> *...*
>
> *346.* ***He was shown Exhibit 14 [the letter he sent on 15th May 2010 to Patel Sharma lawyers following the meeting that took place earlier that day] and he confirmed that he had a meeting with Mr. Sharma and Dipka Mala and he stated that they helped him at the meeting. Dipka confirmed that it was her signature and confirmed Ms. Doughty's and SPM's signature. He stated that he then knew that it was a proper Will****.*
>
> *...*
>
> *348. He stated that he took notes when he had a meeting with the Respondent and Dipka Mala as well as when he discussed with PD but* ***he did not keep those notes as they were kept in an exercise book and he no longer had the said exercise book****.*
>
> *...*
>
> *352. He was referred to Exhibit 15 [the letter sent from Patel Sharma Lawyers dated 20th May 2010] and he confirmed that he had the instruction sheet and had interviewed Dipka.*
>
> *...*
>
> ***358.*** *He stated that* ***he was not aware of any unsigned Will or electronic Will.***
>
> *359. He stated that he took the copy of the Will that PD gave to him to the Respondent and* ***he was told by the Respondent and Dipka that that copy was found in their archives****.'*
>
> [My emphasis]

[540] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at paras [361]-[364] and [373]-[374]), the evidence of Willy Hiuare in cross-examination on this issue was, in summary, as follows:

> *'361. He was referred to Exhibit 15 [a copy of a letter dated 7th May 2010 from HM Lawyers to Patel Sharma & Associates enclosing a copy of the signed Will of Salen Prakash Maharaj] and he clarified that he received instructions from PD on 12 May 2010 and not 2011 and confirmed it as a typing error [on notes supplied by his office].*

362. He was shown Exhibit 11 [a second copy of a letter dated 7th May 2010 from HM Lawyers to Patel Sharma & Associates with Patel Sharma & Associates acknowledging receipt] and he further confirmed that he received instructions from PD on 7 May 2010 and not 12 May 2010.

*363. He stated that there might have been no retainer executed and also stated that **he did not keep proper records for this file**.*

364. He stated that on the day instructions were given by PD, he was given a Will but he did not enquire where she got it from and that from his re-collection PD went to Kohli & Singh Lawyers to bring a file.'
[My emphasis]

[541] The written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [366]-[368]), have summarised the evidence of Willy Hiuare in re-examination on this issue as follows:

*'366. **He stated that he did not ask PD when and how she got a copy of Will from the Respondent's firm.***

*367. He stated that **when he received the file from Kohli & Singh Lawyers**, **he only received the Statement of Claim and Statement of Defense [sic] and not any correspondences**.*

368. He stated that when PD came to give instructions, she gave him a copy of the Will saying that it is from the Respondent's firm and he confirmed that it did not mean or signify that she uplifted the Will from the Respondent's firm.
[My emphasis]

[542] The written submissions of Counsel for the Respondent summarised Willy Hiuare's evidence on this issue as follows *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 14, para [25], subparas [ii]-[v]):

*'[ii]. **WH confirmed that he had met with the Practitioner and Mala on 15th May 2010 and Mala had confirmed to him that the signatures on the Will were authentic and that it was not a forgery**.*

[iii]. WH confirmed that the Practitioner and Mala were co-operative and provided him with documents he required and also informed him that they would be willing to give evidence in Court.'
[My emphasis]

[543] I agree generally with the above provided by both Counsel as summaries of the evidence given by Willy Hiuare on this issue. I note that he gave further evidence on this issue when he was recalled two days later, on 22nd September 2018, to which I will turn shortly.

(ii) The evidence of Dipka Mala

[544] By way of contrast with the evidence of Willy Hiuare, there was the evidence of

Dipka Mala. I note that according to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions'*, 8th January 2018, at paras [433]-[437]), the evidence-in-chief of Dipka Mala as to **the meeting with Willy Hiuare on 15th May 2010** was as follows:

> *'433. They had a meeting with Willy Hiuare (WH) and prior to the meeting they exchanged couple of letters and they came to know that SPM's will was found by MWP as the will was attached to one of the letters.*
> *434. She stated that she saw a copy of the will.*
> *435. There was a meeting arranged on the 15th of May 2010. She recalls this date as it was in the letters. WH had arranged this meeting. She was present with the Respondent. She said that WH wanted to confirm whether the will was made in their office and wanted to verify the signatures. **She showed WH a copy of the unsigned will and compared it with the copy of the will**. **Both were same and they confirmed the will**. She stated that WH wanted to verify the signatures as his client had alleged forgery. **She confirmed the signature on the will**.*
> *436. They had discussion on how the will came to be made. She said that WH was making notes on a writing pad.*
> *437. They informed WH about the LA. After the meeting had concluded WH was pleased. The instruction was also provided to him. WH told them he would subpoena them by way of letter. He later wrote to them that he had spoken with PN and would not call them to give evidence.'*
> [My emphasis]

[545] I agree generally with the above as a summary of the evidence of Dipka Mala on this issue.

[546] **In my view, as Willy Hiuare had recently taken over acting for Pranita Devi on or about 7th May 2010, then as a matter of logic and common sense he would have been arranging at that time for a meeting to be held with Patel Sharma Lawyers (as the firm who had allegedly made the Will on 22nd December 2006 that had been discovered on 23rd January 2010), so as to confirm the Will's validity or otherwise, before deciding how to proceed.**

[547] **Also, in my view, it is a matter of logic and common sense that Willy Hiuare** would have:

(1) **brought with him** to the meeting with Patel Sharma Lawyers **a copy of signed the Will**;

(2) **sought to compare** the copy of the signed Will in his possession **with whatever record was held by the Respondent's firm**;

(3) **sought to confirm that the signatures of the witnesses on the signed Will**

were valid and not forgeries; and

(4) **brought with him a <u>notebook</u>** to record what was discussed at the meeting.

[548] **<u>I note that the above also accords with the evidence of Dipka Mala</u>. I further note that when Dipka Mala was challenged under cross-examination by Counsel for the Applicant as to her evidence on this issue, <u>a different scenario was not suggested to her as to what occurred on 15th May 2010</u>. Instead, it was a simple challenge that was met with a denial that was, in my view, logical in its response, as follows**.

> *"Mr. Chand:* *Now I suggest to you that that was not ahh that **<u>the electronic copy of the Will was not shown to Mr. Hiuare</u>** at this meeting?*
>
> *Ms. Mala:* *That's not correct Sir because when he produced to me the signed copy of the Will **I printed off a electronic version and showed it to him just to reconfirm that that was the version that was later that was/that was being executed**. Just **<u>to match the details</u>** of that."*
>
> [My emphasis]

(iii) The evidence of Suruj Sharma

[549] In addition to the evidence of Dipka Mala, there was also the evidence of Suruj Sharma who, in his <u>evidence-in-chief</u>, as summarised in the written submissions of Counsel for the Applicant Chief Registrar (which summary I accept as a fair record), stated that ('*Closing Submissions'*, 8th January 2018, at para [478]):

> *'... At the meeting, WH showed them a signed Will and **<u>an electronic version was placed in front of him</u>** and <u>he looked at content</u> and asked Mala some questions in relation to identifying the signatures ...'.* [My emphasis]

[550] I agree generally with the above as a summary of the evidence of Suruj Sharma on this issue. I also note that **Suruj Sharma was neither challenged under cross-examination by Counsel for the Applicant on his evidence as to what occurred on 15th May 2010, nor was a different scenario suggested to him**.

(iv) Analysis

[551] By contrast with the evidence of Dipka Mala and Suruj Sharma, I found the evidence of Willy Hiuare to be unreliable noting:

(1) <u>He admitted that he took notes in an exercise book</u> at the meeting on 15th May 2010 but then disclosed that **"<u>*I did not keep those notes*</u>"** and (as Counsel for the Applicant has noted in his summary of Mr. Hiuare's evidence) Mr. Hiuare said '***<u>he no longer had the said exercise book</u>***';

(2) He gave three different versions (and was twice shown to be incorrect) as to when he commenced acting for Pranita Devi. Initially, he that it was October 2010, then changed this to 12th May 2010 and then to 7th May 2010;

(3) He stated that the Will that he had shown the Respondent and Dipka Mala on 15th May 2010 had been given to him from **Pranita Devi who had informed him that she had been given it from Patel Sharma Lawyers,** as I understood the following exchange with Counsel for the Applicant –

"Mr. Chand:	*Now Mr. Hiuare I put to you that on the day Ms. Devi gave you instructions on around 7th May 2010, she did not have a copy of the Will of Salen Prakash Maharaj with her?*
Mr. Hiuare:	*No, she has a copy she gave me the copy that is why when I receive it I go to enquire to Suruj Maharaj [sic] about it.*
Mr. Chand:	*Now, did you ask Ms. Devi how come she received a copy of the Will of Salen?*
Mr. Hiuare:	***She receive it from Suruj Sharma Lawyers**. They gave it to him. **They gave it to her that's what she said**.*
Mr. Chand:	*How come she get in touch with them and receive a copy?*
Mr. Hiuare:	*I did not enquire further into how she inquired but **she just said she got it from the law firm and that's the issue**."* [My emphasis]

If the above claim was correct, then -

(i) Why did Mr. Hiuare feel the need to attach a copy of the Will to the letter that he sent on 7th May 2010 to Patel Sharma Lawyers (Exhibit 11) stating *'Enclosed is a copy for your records'*?

(i) This claim was also despite the fact that Patel Sharma Lawyers had ceased to act for Pranita Devi a year earlier in February/March 2009 and that **Kohli and Singh who were acting for Pranita Devi until early May 2010 had asked Prem Narayan in a letter dated 5th March 2010** (**Exhibit "67"**) **for a copy of the Will** dated 22nd December 2006 to be provided to them as it had been mentioned in the Statement of Claim that had been recently served upon them that had been filed on 6th February 2010 in the High Court of Fiji at Suva seeking to have the grant of Letters of Administration revoked and the Will dated 22nd December 2006 to be declared valid. When this was pointed out to Mr. Hiuare, he claimed, *"I only received the pleadings the writ and the statement of defence"* from Kohli and Singh. Again, however, he produced no file note to support that claim;

(iii) Why did Mr. Hiuare, then change his evidence soon afterwards? Indeed, I note that when I pressed Mr. Hiuare to clarify whether his client actually told him that she had been given the Will from Patel Sharma Lawyers or simply the firm was the

source of the Will, his evidence changed, as follows -

> *"Commissioner:* *But **you are saying to me now all she could say is 'this Will is from Suruj Sharma Lawyers'**. <u>That doesn't mean does it that she went and got and picked the Will up from Suruj Sharma Lawyer's does it</u>?*
> *Mr. Hiuare:* ***Yes**.*
>
> *Commissioner:* *Do you agree on that?*
> *Mr. Hiuare:* *I agree on that."*

(4) He claimed in his evidence on 20th September 2017 that *"I was not aware of the unsigned"* Will or electronic copy and that *"I remember very well that they/they said they found/they found the same copy in their archives later … but Patel Sharma did not give me a copy "* and further that *"I did not ask for the one in the archives"*. When he was recalled two days later on 22nd September 2017, he said ***"I can't <u>re-call</u>"* as to whether he was shown an electronic copy of the Will** held by Patel Sharma Lawyers at his meeting with Suruj Sharma and Dipka Mala on 15th May 2010.

[552] Although no contemporaneous file notes were produced by either Dipka Mala and/or Suruj Sharma as to what occurred during the meeting held on 15th May 2010 with Willy Hiuare, balanced against that I note that the firm had no current file in 2010 for Pranita Devi as the firm had ceased to act for her in February/March 2009 and Mr Suruj Sharma's previous evidence was that the firm's policy was not to extract file notes but only relevant legal documents when transferring a file to another firm, so it may go some way to explaining as to why no contemporaneous file notes may have been made (or produced). On the other hand, <u>there was still the complaint pending against the Respondent and his firm</u> by Maya Wati Prakash that had been lodged with the Chief Registrar in March 2010. In that regard, **I note that in a letter dated 29th April 2010 from Patel Sharma Lawyers to the Chief Registrar responding to the complaint by Maya Wati Prakash ("AD10" in the *Agreed Bundle*, pp. 33-42, marked as Exhibit 10**), **<u>there was specific mention of an entry for 9th December 2008 (pp. 36-37), of an unsigned copy of the Will being held on the Firm's computer</u>**. Surely, if the Respondent made such a claim in writing to the Chief Registrar as early as 29th April 2010, then the firm would have held a computer record of the Will to support such a claim at that time. **<u>Most importantly, the claim was being made 17 days BEFORE the meeting with Willy Hiuare on 15th May 2010</u>. It provides further support as to why it is**

logical that the unsigned copy of the Will produced from the firm's archives would have been shown to Mr. Hiuare at the meeting on 15th May 2010.

(v) Findings on meeting held on 15th May 2010

[553] **In relation to the meeting held on 15th May 2010 between Willy Hiuare, Dipka Mala and Suruj Sharma, my findings are –**

(1) There was a meeting held on 15th May 2010 between Willy Hiuare, Dipka Mala and Suruj Sharma at the offices of the law firm of Patel Sharma Lawyers;

(2) Willy Hiuare brought with him to the said meeting a copy of the signed Will that had been allegedly found on 23rd January 2010 so that he could -

(i) seek to confirm that the signatures of the witnesses on the Will were valid and not forgeries; and

(ii) seek to compare it with whatever record was held by the Respondent's firm;

(3) I accept the evidence of Dipka Mala that Willy Hiuare was making notes on a writing pad during the said meeting;

(4) I note that whilst Willy Hiuare agreed that he did take notes during the said meeting and that he recorded those notes in an exercise book, he claimed that he no longer had the exercise book;

(5) While Willy Hiuare claimed in his evidence on 20th September 2017 that *"I was not aware of the unsigned"* Will or electronic copy, when he was recalled two days later on 22nd September 2017, he said *"I can't re-call"* as to whether he was shown an electronic copy of the Will;

(6) I also note that whilst Counsel for the Applicant Chief Registrar put to Dipka Mala that an unsigned electronic copy of the Will was not shown to Will Hiuare during the said meeting on 15th May 2010, Counsel for the Applicant never put to her a different scenario as to what allegedly occurred during the said meeting on 15th May 2010, that is, as to how Mr. Hiuare came to form the view that it was a valid Will, that is, by simply having Dipka Mala confirm her signature rather than also making a comparison of the Will in his possession with the unsigned computer record of the Will held by the law firm;

(7) As to how a quick comparison of signatures would satisfy a legal practitioner that the Will was valid without a comparison also being made between the contents of each Will (that is, comparing the copy of the signed

Will in Willy Hiuare's possession with the unsigned electronic copy held by Patel Sharma Lawyers) was never explained. In my view, this did not make sense, particularly when –

(i) Willy Hiuare's evidence was (as Counsel for the Applicant noted in his written submissions) '*he was told by the Respondent and Dipka that that copy was found in their archives*';

(ii) The allegation of Pranita Devi was that her husband's signature was a forgery (on the basis of the contents of the Will, that is, she was not named as a beneficiary) and thus, in such circumstances, surely a simple comparison of signatures would not have sufficed and the contents of the unsigned Will (as to whether or not it confirmed that she was not named as a beneficiary) also became of utmost importance;

(8) I further note that Counsel for the Applicant Chief Registrar never put to Suruj Sharma that his evidence was not correct as to what occurred during the said meeting on 15th May 2010, nor was a different scenario suggested to him as to what occurred during the said meeting on 15th May 2010;

(9) In having to accept the evidence of Dipka Mala and Suruj Sharma or that of Willy Hiuare (who was shown to be in error as to when he commenced acting for Pranita Devi giving three different versions, no longer had his exercise book in which he had taken contemporaneous notes during the meeting on 15th May 2010 and when, in giving evidence on 20th September 2017 said that *"I was not aware of the unsigned"* Will or electronic copy during the meeting on 15th May 2010 and then, on 22nd September 2017, said *"I can't re-call"* if during the said meeting he was shown a copy of the Will), I prefer the evidence of Dipka Mala and Suruj Sharma. That is, I find that at the said meeting on 15th May 2010, Willy Hiuare was shown a copy of the unsigned Will and he compared it with the copy of the signed Will that he had brought with him and that, in addition, Dipka Mala confirmed to Willy Hiuare that it was her true signature on the said copy of the signed Will.

(8) Letter dated 20th May 2010 from Patel Sharma Lawyers to HM Lawyers

[554] In relation to **the letter dated 20th May 2010**, I note that:

(1) **I never sighted the original letter from Patel Sharma Lawyers** sent to HM Lawyers and **noted on it as "received 20/5/10 Time: 12.50pm"** by Willy Hiuare's clerk, Venina Mozeinakede, (as per the written notation on Exhibit 15) **and**

whether or not any document/s was/were attached to it;

(2) **Venina Mozeinakede was not called in evidence**;

(3) **I never sighted from the Respondent's records a copy of the letter dated 20th May 2010 sent to Mr. Hiuare together with the alleged attachments**. I do note, however, as I have already discussed above, that a copy of the letter dated 20th May 2010 together with the alleged attachments, was provided by the Respondent to the Chief Registrar in a letter dated 23rd December 2013 as Annexure 11;

(4) A copy of the letter dated 23rd December 2013 sent by the Respondent to the Chief Registrar together with 13 Annexures (including Annexure 11) was included in the supplementary application bundle filed by the Chief Registrar with the Commission on 13th November 2015 that was then amalgamated to become Count 4 in the present proceedings. **Annexure 11 (at pages 65-71 of the supplementary application bundle)** was the letter dated 20th May from Patel Sharma Lawyers to Mr. Willy Hiuare of HM lawyers marked *'Received [indecipherable signature] 20/5/10 Time: 12.50 pm'* (page 65) **together with the following three documents attached -**

(i) *'Instructions to act'* dated 6th January 2009 from Pranita Devi to Patel Sharma Lawyers to apply for a grant of Letters of Administration (page 66);

(ii) *'Instructions to act'* dated 15th December 2008 given jointly by Pranita Devi and Maya Wati Prakash to Patel Sharma Lawyers to apply for a joint grant of Letters of Administration (page 67);

(iii) **The unsigned Last Will and Testament of Salen Prakash Maharaj together with backsheet (pages 68-70)**;

(5) After it had been clarified at the hearing before the Commission on 22nd September 2017 that Annexure 11 (the letter dated 20th May from Patel Sharma Lawyers to Mr. Willy Hiuare of HM lawyers **together with the three documents attached INCLDUING** the unsigned Will)**, HAD BEEN SENT part of Exhibit 23, that is, the letter from Patel Sharma Lawyers to the Chief Registrar of 23rd December 2013, I note that Counsel for the Applicant -**

(i) did NOT then take the Respondent to Exhibit 23, that is, the letter from Patel Sharma Lawyers sent to the Chief Registrar on 23rd December 2013 and, in particular Annexure 11 (the letter from Patel Sharma Lawyers to Willy Hiuare dated 20th May 2010) and suggest to the Respondent that the fourth attachment, that is, the unsigned Will, was a post-dated inclusion (whether done innocently or otherwise) and had not been one of the attachments

received by Willy Hiuare on 20th May 2010. I note, however, as Counsel for the Applicant had laid no basis to make such a suggestion, he could not so;

(ii) Instead, the best that Counsel for the Applicant could have done (based on the evidence of Willy Hiuare) would have been to take the Respondent to Exhibit 15 (the letter sent to Willy Hiuare on 20th May 2010) and suggest that the unsigned Will included as Exhibits 15A, 15B and 15C, was not one of the three attachments in the letter. Counsel for the Applicant, however, did not do so;

(6) Similarly, Counsel for the Applicant did not seek to have Dipka Mala recalled and put to her the above, that is, that -

(i) the third attachment to Annexure 11, that is, the unsigned Will, attached to the letter sent to the Chief Registrar on 23rd December 2013, was a post-dated inclusion (whether done innocently or otherwise); and/or

(ii) it was not one of the three attachments included with the letter sent to Willy Hiuare on 20th May 2010.

(i) The evidence of Willy Hiuare

[555] I note that when the issue arose at the end of the cross-examination of Dipka Mala as to whether one of the attachments to the letter sent by Patel Sharma Lawyers to Willy Hiuare on 20th May 2010 was a copy of the unsigned Will, it was agreed that Willy Hiuare be recalled so that both Counsel could ask questions of him in relation to it. According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions'*, 8th January 2018, at paras [371]-[374]), **the evidence of Willy Hiuare when he was recalled on 22nd September 2018** was as follows:

> *'**Mr. Hiuare's further evidence** on Exhibit 15 [a letter sent and received on 20th May 2010 from Patel Sharma Lawyers] (this evidence was given after he had completed his evidence but was re-called on this particular issue)*
>
> *371. He stated that he received the first attachment but did not receive the unsigned Will. [Exhibit 15A, 15B and 15C]*
>
> *372. He stated that he saw the unsigned Will for the first time that day. [22nd September 2017]*
>
> ***Mr. Hiuare's cross examination***
>
> *373. He stated that he showed to Dipka and the Respondent the copy of the Will that PD gave to him and they told him that they had a copy. **He never asked for their copy**.*
>
> *374. He also stated that **he could not re-call if he was shown their copy** at the meeting.'*
>
> [underlining my emphasis]

[556] I agree generally with the above as a summary of the evidence of Willy Hiuare on this issue.

[557] I also note that when Willy Hiuare was recalled in relation to the specific issue as to whether the electronic copy of the unsigned Will, he confirmed that he did not actually open the letter from Patel Sharma Lawyers dated 20th May 2010. Instead, the letter had been opened by his clerk, Venina Mozeinakede (as per the handwritten notation on Exhibit 15) and placed on the firm's file. Mr Hiuare, however, did not actually see this occur. He was then asked:

> *"Mr. Sharma: Is there a possibility that when Venina received the documents that she didn't give you the full set of documents?*
> *Mr. Hiuare: I don't know sir.*
>
> *Mr. Sharma: Don't know?*
> *Mr. Hiuare: I don't know sir."*

[558] Counsel for the Applicant sought to clarify in cross-examination:

> *"Mr. Chand: ... now Mr. Hiuare would you be able to recall or confirm that, confirm* ***how many attachments or the number of pages of attachments that you sent with this letter****?*
> *Mr. Hiuare:* ***I could not recollect sir****.*
> *Mr. Chand: Okay.*
>
> *Commissioner: I could not recollect?*
> *Mr. Hiuare: I could not recollect.*
> [My emphasis]

(ii) No evidence called from Venina Mozeinakede

[559] As I have noted above, **Venina Mozeinakede was not called in evidence**. In my view, it is doubtful, however, whether Venina Mozeinakede could have provided any assistance on this issue, noting:

(1) She only opened the letter, made a handwritten notation of receipt and (according to Willy Hiuare) placed the letter on the firm's file;

(2) The chances of someone who may have had, at best, one small involvement in this matter in 2010, then recalling some seven years later as to what may or may not have been attached to a letter must be extremely doubtful.

[560] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of Venina Mozeinakede giving evidence on the issue of what was annexed to letter dated 20th May 2010, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* are <u>not</u> satisfied-

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Venina Mozeinakede <u>would be expected to be called</u> (if her evidence was relevant) by the Applicant Chief Registrar;

(ii) the missing witness' *'evidence would elucidate a particular matter'* – for the reasons outlined above, **Venina Mozeinakede's evidence <u>would NOT, in my view, elucidate</u> on the issue**. Again, as the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter. <u>It is not enough to conclude that a witness may have knowledge</u>***';

(iii) the missing witness' *'absence is unexplained'* – Venina Mozeinakede's <u>absence from the proceedings before this Commission is unexplained</u>, however, her evidence on this particular issue <u>would probably be irrelevant</u>;

(2) Accordingly, <u>no inference will be drawn</u> in relation to the absence of evidence from Venina Mozeinakede on the issue of what was annexed to the letter dated 20th May 2010 from Patel Sharma Lawyers to HM Lawyers.

(3) I have also noted when considering to draw no inference, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding … subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence … and the Commission must act fairly in relation to the proceeding'.*

(iii) Mr Hiuare's letter dated 19th December 2013 to the Chief Registrar

[561] When Mr. Hiuare was recalled to give further evidence before the Commission on 22md September 2017, Counsel for the Applicant sought to clarify in cross-examination whether what had now been disputed as attached to the letter of 20th May 2010, had been produced at the meeting on 15th May 2010 and, in that regard, took Mr. Hiuare a letter dated 19th December 2013 which Mr. Hiuare had sent to the Acting Chief Registrar (**AD "22"** in the *Agreed Bundle,* pp.86-88, marked as **Exhibit "22"**) as follows:

> *"Mr. Chand:* *… Now, maybe I will ask that question, you have said in the second paragraph [p.87] the line/**the quote says that 'they found the Will in their archives'**, right this is your response and **you have said that 'Both said they found the Will in their archives'**. Now, then it goes on but would you be able to elaborate **what you meant when you have said that they have 'both found the Will in their archives'**?*

Mr. Hiuare: *When I went there I show them the Will that Pranita Devi gave it to me and they say 'yes, we have a copy'.*

Commissioner: *So,* ***the logical thing then Mr. Hiuare*** *what do you think the logical thing is to follow from there* ***'We have a copy', 'Can you show me a copy', isn't that logical?***

Mr. Hiuare: ***Yes****.*

Commissioner: *Did you ask that?*

Mr. Hiuare: *I did not ask like 'where is your copy' and all that.*

Commissioner: *You sure you didn't ask that?*

Mr. Hiuare: *I…*

Commissioner: *Or you can't remember, I don't, it's been a number of years. I don't want you making it up.*

Mr. Hiuare: *Yes, sir all purposely I could remember is that when they confirm it then I say okay this is the true Will. That is all I am after,* ***I never ask anything like, 'oh where is the copy that you said is here in your computer or your archives there'****. All I am just after is to confirm the signature that is the meeting sir.*

Commissioner: *And just so I am clear so* ***you are saying to me neither Mala nor Mr. Sharma produce an unsigned Will to you to and you didn't compare?***

Mr. Hiuare: ***No****.*

Commissioner: *You didn't do any of that?*

Mr. Hiuare: *Not at all,* ***all I am after is this copy of signed Will that's all****.*

Commissioner: *Right, didn't you think if you are a solicitor there and there is an argument your client saying this is a forgery and they are telling you about signatures but as you said both said they found the Will in their archives,* ***wouldn't you be saying 'well now for me to go back and confirm with my client, can I see a copy of the Will that you have got in your archives'?***

Mr. Hiuare: ***Sir, I did not ask that sir****. All I am just trusted is to confirm the signature that's all and this is the valid Will that is why I have the meeting that is only the purpose to sit in the office, just to confirm the two signature that's all.*

Commissioner: *Okay.*

Mr. Sharma: *Can I just ask sir, wouldn't it just a follow up question to that?*

Commissioner: *Yes.*

Mr. Sharma: *Mr. Hiuare, if we, the combined instructions are that a Will was produced from the archives that's why you talk about the Will the usage of the Will. Archives is quiet specific isn't it?* ***My instructions are that a Will was produced from the archives so that you could have a look*** *not so much because of the signature but* ***to see whether the terms were the same****.*

Mr. Hiuare: ***No Sir****.*

Mr. Sharma: *You don't recall that at all?*

Mr. Hiuare: ***I can't recall*** *all I am after is just the Will that I brought.*

Mr. Sharma: *I would have been nice if you would have fully kept notes from that meeting eh?*
Mr. Hiuare: *Yeah.*

Mr. Sharma: *And produced it to the Commission today so that we could all see what you saw, what you noted.*
Mr. Hiuare: *Yeah."*
[My emphasis]

[562] It is important that I record what Mr. Hiuare actually wrote in his letter dated 19th December 2013 to the Acting Chief Registrar (Exhibit 22) on the issue of the Will in the archives of Patel Sharma Lawyers, as follows:

> *'On the 15th May, 2010 I had [a] meeting with Mr. Suruj Sharma and Ms Mala at their office. In that meeting Ms Mala did not deny the signature … **Both said they found the will in their archives** …'*
> [My emphasis]

[563] As I have already noted above, **there was no evidence led by Counsel for the Applicant challenging the validity of the document that was allegedly printed and produced to Willy Hiuare on 15th May 2010** (after this matter had begun to be investigated by the LPU from March 2010 and referred to in the letter dated 29th April 2010 from Patel Sharma Lawyers to the Chief Registrar) and tendered and marked in these proceedings as Exhibit 15A, 15B and 15C.

[564] **Importantly, after Willy Hiuare had been recalled on 22nd September 2017, there was no similar request made by Counsel for the Applicant to have Dipka Mala recalled so that he could put to her that the document marked as Exhibit 15A, 15B and 15C was a recent creation and not in existence on 15th May 2010 when the meeting took place with Willy Hiuare. In addition, Counsel for the Applicant also did not put that suggestion to Suruj Sharma (who gave most of his evidence after Willy Hiuare). In my view, Counsel for the Applicant could not make this suggestion as he had laid no basis to do so. Indeed, as I have already noted above, no documentary evidence was tendered by Counsel for the Applicant Chief Registrar of meta-data and/or no evidence was led from an expert engaged and/or an investigator employed by the LPU, as to the viability or otherwise of being able to obtain meta-data from the computer system of Patel Sharma Lawyers and/or the computer of Dipka Mala to show dates when the unsigned Will of Salen Prakash Maharaj was accessed and printed from the firm's computer system.**

(v) Conclusion

[565] **As I found that <u>Willy Hiuare had sighted an unsigned copy of the Will at the meeting held on 15th May 2010</u>, I do not need to spend more time in an already lengthy judgment analysing the various items of correspondence on 7th, 15th and 20th May 2010 between Willy Hiuare and Patel Sharma Lawyers and making findings in relation to the letter dated 20th May 2010 sent by the Respondent's firm to Willy Hiuare and whether or not an unsigned copy of the Will was attached to that letter. <u>It is clear to me (as I have already found above) that such a document was shown to Willy Hiuare at the meeting held on 15th May 2010 from the Respondent's records</u>.**

(9) Despite the firm allegedly not keeping a 'proper record' of Salen's Will, Maya returned to the firm to have a new Will drawn for herself

[566] One final issue in relation to Count 2, that does not make any sense to me, was a statement made by Maya Wati Prakash in her affidavit sworn on 26th October 2012 (Exhibit 18), filed as part of her evidence-in-chief in the proceedings in the High Court, when she stated at para [18]:

> *'After about a month, I then went to Patel Sharma and Associates too [sic] change my Will as Salen was no longer alive. The Will was prepared by Mala. I signed in front of her and another woman.'*

[567] Her further evidence-in-chief in the proceedings in the High Court on this issue was as follows (Doc.21, 'Transcript', p.8, Exhibit 47, p.121):

> *"MS NARAYAN: Now after Shalen [sic] passed way, did you change your will?*
>
> *MRS PRAKASH: Yes.*
>
> *MS NARAYAN: And who did you get your will changed with?*
>
> *MRS PRAKASH: Suruj Sharma."*

[568] The oral submission made by Prem Narayan in the High Court proceedings when she then sought to be permitted by His Lordship to show a copy of Maya's second Will to her, was that ***"The purpose is really to show that she went back to the same solicitor to change her Will"***. It is unclear what was inferred by Prem Narayan in making this statement and/or the action in seeking to be permitted to show Maya a copy of her second Will. I note that Prem Narayan did not refer to it in her closing

submissions in those proceedings. (See Doc.24, 'Submissions for the Plaintiff', Exhibit 47, pp.242-248.)

[569] In relation to the present proceedings before the Commission, as I have noted above, the affidavit of Maya Wati Prakash sworn on 26th October 2012 was tendered as Exhibit 18. I note, however, that no questions were asked of Maya in relation to the making of the second Will when Maya gave her evidence before the Commission in December 2016. Also, despite the making of the second Will in December 2008 being referred to in Exhibit 18, this fact not raised as part of the closing submissions of either Counsel. It is clear, however, that when Maya returned to Patel Sharma Lawyers sometime in December 2008 and had a new Will made for her by Dipka Mala, **this occurred in the same period in which Maya later alleged that the same firm, including Dipka Mala, had denied there was a Will made there by her son**. Indeed, in the same affidavit (Exhibit 18) where Maya refers at para [18] to the making of the second Will, she also states earlier at para [16] to having attended the offices of Patel Sharma Lawyers in relation *'to have Salen's Will as I knew that the Will was with the lawyer's office',* however, *'[Dipka] Mala then said that there was no Will.* ***I was already distraught by the loss of my son. I kept telling my daughters that Salen had made a Will'***. Then at para [17], she states, *'Later we made numerous calls to the office seeking the Will from Patel Sharma and Associates,* ***I gave up hope****.'* [My emphasis]

[570] **For a person who says that *'I gave up hope'* because the law firm who made her son's Will denied upon his death that there was a Will, to then go back to the same law firm in the month after the son's death and ask them to draft a new Will for herself does not, in my view, make any sense. As, however, neither Counsel have asked me to draw any inferences in relation to Maya having Dipka Mala make a second Will for her in December 2008, I will not do so.** I do note, however, that:

(1) No complaint was made by Maya Wati Prakash to the Chief Registrar (in relation to the Respondent allegedly not keeping a proper record of Salen's Will) until 11th March 2010, over 15 months after Salen's death which had occurred on 24th November 2008;

(2) On 15th December 2008, Maya Wati Prakash instructed the Respondent to act for her and Pranita Devi in making a joint application to obtain a grant of Letters of Administration and Maya only withdrew such instructions later that day following

family advice to which the Commission has not been made privy;

(3) Despite Prem Narayan being engaged presumably on behalf of Maya Wati Prakash and Subhasni Singh as from late December 2008, she never raised with Patel Sharma Lawyers any alleged failure on the part of their firm in keeping a proper record of Salen's Will, that is -

(i) There was no mention of it in the letter from Prem Narayan to Patel Sharma Lawyers of 27th January 2009 - instead the letter raised Subhasni Singh's claim of $62,000 upon Salen's Estate; and

(ii) There was no mention of it in the subsequent letter from Prem Narayan to Patel Sharma Lawyers of 26th February 2009;

(4) In the Statement of Claim dated 6th March 2009 prepared by Prem Narayan on behalf of Maya Wati Prakash and filed in the High Court at Suva as Civil Action No. 81 of 2009, **the Respondent and/or Patel Sharma Lawyers were not named as one of the four defendants**. In her affidavit in support, sworn on 5th March 2009, **there was no mention of an alleged failure** on the part of Patel Sharma Lawyers to keep a proper record of Salen's Will. Indeed, **the only mention of any alleged failure on the part of the Respondent and/or Patel Sharma Lawyers was in relation to the transfer of the property at Koronivia into the joint names of Salen and Maya** and that a caveat had been lodged to protect Maya's interest rather than proceeding with the transfer (without Maya explaining that this was due to stamp duty implications);

(5) There is **no evidence of Prem Narayan raising with the Respondent at the settlement meeting he hosted on 28th March 2009 any alleged failure** on the part of his firm in keeping a proper record of Salen's Will;

(6) It was **only after the Will was found in January 2010 that it was first raised in the Statement of Claim of an alleged failure** on the part of Patel Sharma Lawyers to keep a proper record of Salen's Will.

(10) Conclusion on Count 2

(i) The burden of proof

[571] I have set out above, the burden of proof in proceedings before the Commission and what I discussed in *Kapadia* (supra) as the appropriate standard, that is, *'adopting the same standard as set out by Commissioner Connors in Sheik Hussein Shah (2010)', 'the civil standard varied according to the gravity of the act to be proved'* and to which Justice Madigan as Commissioner referred to in both *Haroon*

Ali Shah (2012) and *Marawai and Chaudhry* (2012) as *'the preponderance of probabilities'*, noting that the latter judgment was affirmed by the Supreme Court in 2016. I also note that Justice Madigan also applied this same standard in *Narayan* (2014).

[572] Therefore, the '*standard of proof*' that I will be applying to Count 2 is thus: *'the civil standard [that is, the balance of probabilities] varied according to the gravity of the act to be proved'*.

[573] In addition, I have noted **the tests** set out in *Bolam* (supra) and *Midland Bank Trust Ltd* (supra). In particular, the test set out Oliver J in *Midland Bank Trust Ltd*, that is, *'The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession', and 'that the duty is directly related to the confines of the retainer'*.

[574] Taking the above as my guide, I note that **the Applicant has to prove upon the balance of probabilities** that the Respondent has committed an act of '*Unsatisfactory Professional Conduct: Contrary to Section 81 of the Legal Practitioners Decree 2009'*, that is, the '*conduct ... falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner or law firm'* with such conduct '*varied according to the gravity of the act to be proved'*. **In particular**, **the Respondent *'failed to keep proper record of the Will*** *of Salen Prakash Maharaj dated 22nd December 2006 ...'* and that the **Respondent's conduct** ***'falls short of the standards of competence and diligence*** *that a member of the public is entitled to expect* ***of a reasonably competent or professional legal practitioner*** *or law firm'* having regard to *'what the reasonably competent practitioner would do'* and that the Respondent's *'duty is directly related to the confines of the retainer'*.

(ii) Overall findings

[575] In my view, **the Applicant has failed to satisfy the persuasive burden upon him**, that is, to prove upon the balance of probabilities the allegation in Count 2, **because**: (1) The Applicant has failed to prove that on 22nd December 2006 the Respondent's staff at Patel Sharma Lawyers retained a second signed copy of the Will of Salen Prakash Maharaj. **Instead, it is clear that:**

(i) In accordance with the instructions of Salen Prakash Maharaj, that is, the retainer, only one Will was drafted for Salen; and

(ii) After this single Will was executed and witnessed on 22nd December 2006, Salen Prakash Maharaj then took that sole original Will with him and did not leave a copy to be retained by the law firm of Patel Sharma Lawyers in their custody as part of their "Wills Register";

(2) **I am also satisfied that the Applicant has failed to prove what is the standard for maintaining a "proper record" expected of a law firm in such circumstances and, even if the Applicant has set out correctly what is the standard, the Applicant has failed to prove that the Respondent failed to meet that standard as:**

(i) **There was no requirement in 2006 for a Will to be registered**; and

(ii) **In accordance with the instructions of Salen Prakash Maharaj, that is, the retainer, only one Will was drafted for Salen and not a second copy and Salen took that sole original Will with him;**

(3) I am satisfied that **the Respondent has complied with the test as set out by Oliver J in *Midland Bank Trust Ltd*,** that is, '***the duty is directly related to the confines of the retainer'*. I am satisfied that the retainer was to draft a Will and have it executed but no more.** Not only was there no request for the firm to keep a copy of the Will in their safe custody, when Salen Prakash Maharaj was given that option, he declined the offer and took his sole original Will with him, not wishing a copy to be made and left with the firm. Put simply, **the Respondent met the duty set out in the specific confines of the retainer, that is, to draft and have a Will executed but NOT for a copy to be retained by the law firm**;

(4) I am also satisfied that, despite the specific confines of the retainer, the firm of Patel Sharma Lawyers kept an unsigned copy of the Will of Salen Prakash Maharaj drafted on 22nd December 2006 stored in the electronic computer records of their firm. **I am satisfied that this was more than they were required to do under the duty set out in the specific confines of the retainer**;

(5) **By the firm of Patel Sharma Lawyers storing in their computer system an electronic record of an unsigned copy of the Will** of Salen Prakash Maharaj drafted on 22nd December 2006, which, in my view, **was more than the firm was required to do under the duty set out in the specific confines of the retainer**, **the Applicant has failed to prove how this was unsatisfactory professional conduct**, that is, '*conduct of a legal practitioner, a law firm or an employee ... that*

falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner or law firm';

(6) **Alternatively, if one held that despite the confines of the retainer, the firm of Patel Sharma Lawyers were required to keep at least a proper electronic record of Salen's Will, I note that:**

(i) As early as 25th November 2008, the day after Salen's death, Subhasni Singh was advised in a telephone conversation with Dipka Mala as to the existence of an electronic copy of the unsigned Will in the computer records of Patel Sharma Lawyers;

(ii) On 9th December 2009, Subhasni Singh was again advised in a telephone conversation with Dipka Mala as to the existence of an electronic copy of the unsigned Will in the computer records of Patel Sharma Lawyers;

(iii) On 12th December 2009, Maya Wati Prakash and Subhasni Singh attended the law firm of Patel Sharma Lawyers and were shown by Suruj Sharma and Dipka Mala a printed copy of Salen's unsigned Will held as an electronic record in the computer system of Patel Sharma Lawyers;

(iv) On 15th December 2009, Maya Wati Prakash and Pranita Devi attended (with Subhasni Singh) the law firm of Patel Sharma Lawyers and Maya Wati Prakash and Pranita Devi were shown in conference with Suruj Sharma and Dipka Mala a printed copy of Salen's unsigned Will held as an electronic record in the computer system of Patel Sharma Lawyers;

(v) On 29th April 2010, the existence of an electronic copy of the unsigned Will held in the computer records of Patel Sharma Lawyers <u>was referred to in writing</u> in a letter from the Respondent to the Chief Registrar;

(vi) On 15th May 2010, some three and a half months after the Will had been found on 23rd January 2010, **there was a meeting held at the offices of the law firm of Patel Sharma Lawyers between Willy Hiuare, Dipka Mala and Suruj Sharma where Willy Hiuare was shown a downloaded copy of the unsigned Will held in the computer records of Patel Sharma Lawyers AND <u>compared it with a copy of the signed Will that had been found on 23rd January 2010 and the contents of both were found to be the same</u>. In addition, Dipka Mala identified for Mr. Hiuare her signature on the signed copy;**

(vii) <u>An unsigned copy</u> of the Will from the computer records of Patel Sharma Lawyers <u>was produced</u> as part of Annexure 11 (a letter dated 20th May 2010 to

Willy Hiuare) attached to a letter dated 23rd December 2013 sent by Patel Sharma Lawyers to the Chief Registrar. Despite the unreliable evidence of Willy Hiuare denying receipt of it, there was no suggestion by Counsel for the Applicant put to either the Respondent and/or Dipka Mala that the unsigned Will was a post-dated inclusion and/or that the unsigned Will was a recent creation and had not been one of the attachments included with the original letter sent by Patel Sharma Lawyers to Willy Hiuare on 20th May 2010;

(viii) The Respondent produced as Exhibits 15A, 15B and 15C, a copy of the unsigned Will form the firm's computer records and there was no meta-data and/or expert evidence produced by Counsel for the Applicant to cast doubt as to its genuineness, when it was created and when it has been accessed and printed;

(7) Hence, the Applicant has failed to prove that the Respondent has not maintained a proper record.

[576] **Accordingly, as I have found that the Applicant has failed to prove upon the balance of probabilities the allegation in Count 2, it is dismissed.**

9. Count 3

[577] In reaching a decision as to whether Count 3 is made out, I have divided it into seven parts as follows:

(1) The allegation;

(2) The missing Will taken by Salen Prakash Maharaj and stored by him;

(3) The claim by Subhasni, the proceedings instituted by Maya and the attempt at settlement;

(4) The mediation between Maya Wati Prakash and Suruj Sharma on 24th June 2010;

(5) High Court Civil Action No. 81 of 2009 on behalf of Maya Wati Prakash;

(6) High Court Civil Action No. HPP 003 of 2010 on behalf of Maya Wati Prakash seeking revocation of the grant of Letters of Administration, the Will of 22nd December 2006 be declared valid and probate granted;

(7) Conclusion on Count 3.

(1) The allegation

[578] Count 3 alleges that the Respondent has committed an act of *'Professional Misconduct: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009',*

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

[579] The particulars accompanying Count 3, in summary, state:

> ***'SURUJ PRASAD SHARMA** ... between 25th November 2008 and 11th October 2013 **failed to exercise due care and diligence in locating the Will** of Salen Prakash Maharaj dated 22nd December 2006 ... thereafter, **proceeded on instructions of one Pranita Devi and obtained grant of Letters of Administration** ... to the detriment of Maya Wati Prakash who was the sole beneficiary pursuant to the Will ... **as** ... **Maya Wati Prakash was subjected to unnecessary cost for initiating High Court Action No. HPP 3 of 2010 ...'***

[580] Thus, the particulars of the '*unsatisfactory professional conduct',* that is, '***a substantial or consistent failure** to reach or maintain a reasonable standard of competence and diligence',* comprised:

(1) The Respondent '*failed to exercise due care and diligence in locating the Will';* and

(2) The Respondent '*proceeded on instructions of one Pranita Devi and obtained grant of Letters of Administration ... to the detriment of Maya Wati Prakash who was the sole beneficiary pursuant to the Will ... **as Maya Wati Prakash was subjected to unnecessary cost for initiating High Court Action'***.

(2) The Respondent 'failed to exercise due care and diligence in locating the Will'

[581] I have set out above in my findings in relation to Counts 1 and 2, that the Will of Salen Prakash Maharaj was executed by him on 22nd December 2006 and witnessed by Dipka Mala and Merewai Doughty of Patel Sharma Lawyers, following which Salen Prakash Maharaj then took that sole original Will with him and did not leave it with the said law firm. **How it can then be alleged that the Respondent '*failed to exercise due care and diligence in locating the Will*' when it was no longer in the custody of the Respondent's firm after Salen left the law firm on 22nd December 2006, does not make any sense. Also, it is undisputed that advice was given to Subhasni Singh by Patel Sharma Lawyers that the family should search for the said Will amongst Salen's records. The evidence is that Salen's family failed to do so.**

[582] **I note that I have also found above, that an electronic copy of Salen's unsigned Will was maintained by Patel Sharma Lawyers in their computer system which was more than required of the law firm in light of the terms of the retainer between the testator, Salen Prakash Maharaj and Patel Sharma Lawyers. Indeed, as I have previously noted in relation to Count 1, at the clarification hearing on 25th April 2018, Counsel for the Applicant Chief Registrar indicated that he did not wish to make any oral submissions in relation to the relevance or not of section 6A of the *Wills Act.* Counsel for the Applicant had also not raised it in either of his two sets written submissions filed and served prior to that hearing. I have also noted in Count 1, that I tend to agree with the oral submissions made by Counsel for the Respondent at the clarification hearing on 25th April 2018, that is, that an electronic copy of the unsigned Will maintained by Patel Sharma Lawyers in their computer system was not a basis for making an application to the High Court to have that unsigned document declared as '*a will of the deceased*'.**

[583] **Therefore, if Salen's Will that had been executed by him on 22nd December 2006 had not be found by his family, nor had they located any other Will executed by him together with the fact Counsel for the Applicant Chief Registrar has not submitted that Patel Sharma Lawyers should have advised Maya Wati Prakash as to the implications of section 6A of the *Wills Act* and/or obtained instructions from her to make such an application (relying upon the unsigned electronic copy held in Patel Sharma's computer system), then I fail to see what other alternative there was than for to apply for a grant of Letters of Administration? For completeness, however, I will now set out the evidence as to what efforts were made in locating Salen's Will that had been executed by him on 22nd December 2006.**

(i) The evidence of Maya Wati Prakash

[584] On 26th October 2012, just over three years and 11 months after Salen's death, an affidavit was sworn by Maya Wati Prakash as her evidence-in-chief in legal proceedings in the High Court at Suva (Civil Action No. 03 of 2010) between Maya Wati Prakash and Pranita Devi, wherein Maya Wati Prakash was seeking to have the Will dated 22nd December 2006 declared valid and the grant of Letters of Administration revoked (Exhibit 18 in these proceedings). At paras [16]-[17],

Maya stated:

> *'16. Subsequent to Salen's funeral, I together with the Defendant, Rosie and Hemant (Rosie's husband) came to the lawyer's office. We wanted to have Salen's Will as I knew that the Will was with the lawyer's office. Pranita and I spoke with Mala seeking Salen's Will. Mala then said there was no will. I was already distraught by the loss of my son.* ***I kept telling my daughters that Salen had made a will****.*
> *17. Later we made numerous calls to the office seeking the Will from Patel Sharma and Associates, I gave up hope.'*
> [My emphasis]

[585] **As to why Maya Wati Prakash needed to tell Rosie (Subhasni) that Salen had made a Will when Maya had said earlier in her affidavit that Subhasni had been there when the Will was made on 22 December 2006, does not make sense. This was even stranger when one recalls that, according to the evidence of Dipka Mala, Maya Wati Prakash had produced on 22nd December 2006 the draft of a Will that Maya said had been given to Maya by Subhasni for the firm to follow in drafting Maya's Will. Even stranger still, was that it was Subhasni's evidence that she glanced through the Will before they (Maya, Salen and Subhasni) left the Office of Patel Sharma Lawyers on 22nd December 2006 and, further, that Salen had told Subhasni over dinner that same evening that he had paid fees for the Will to be drafted that afternoon. Hence, Subhasni knew that Salen had a Will drafted and executed on 22nd December 2006 and, therefore, Subhasni did not need to be told of that by Maya after Salen's death on 24th November 2008 as to the existence of the Will.**

[586] Adding to the confusion is that Maya Wati Prakash stated in a complaint dated 10th March 2010 received by the Legal Practitioners Unit on 11th March 2010 (some two years and 7 months before Maya swore the above affidavit on 26th October 2012) that (Exhibit 8, p.31): *'My* ***daughter Subhasni had said*** *that a Will was executed by Salen and at the law office of Patel Sharma & Associates.'* [My emphasis] **Apart from being contrary to what was later sworn by Maya in her affidavit, as to why Subhasni needed to say to Maya that Salen had made a Will when Maya had been there when Salen's Will (as well as her own) was made on 22 December 2006 does not make sense.**

[587] In his judgment of 11th October 2013, in *Prakash v Devi*, wherein Justice Balapatabendi in the High Court at Suva pronounced that the Will of Salen Prakash

Maharaj dated 22nd December 2006 was valid, His Lordship stated at para [9] that the Plaintiff (Maya Wati Prakash), in her evidence before him, testified:

> *'... that her son Salen Prakash Maharaj died of an accident on 24 November 2008 and upon his death* ***she and her daughter in law (the Defendant) went to Patel Sharma Lawyers*** *to find about the will and* ***they were told by Ms Mala that there was no will*** *of Salen Prakash Maharaj ...* [My emphasis]

[588] Interestingly, the judgment goes from Salen's death on 24th November 2008 to a later visit to Patel Sharma Lawyers on an unspecified date with no mention of any alleged telephone calls to Patel Sharma Lawyers. I have now had the opportunity of reading the entire transcript from those proceedings (Doc.21, Exhibit 47) and, clearly, the focus was not on any alleged telephone calls. Perhaps, **this was because of the way the evidence-in-chief was taken, with the focus being on the alleged making of the Will in 2006, Salen's death on 24th November 2008 and then to visiting Patel Sharma's office** on an unspecified after the 13 days of funeral rites (Doc.21, p. 42, Exhibit 47, p. 155). Similarly, **the evidence given in cross-examination went from the alleged making of the Will, Salen's death and then attending Patel Sharma's office** (Doc.21, pp. 54-55, Exhibit 47, pp. 168-169) with brief mentions of telephone calls but no specific dates. **It should also be noted that neither Dipka Mala, nor Mr. Suruj Sharma, were called to give evidence in those proceedings.**

[589] I also note that **in the affidavit of Maya Wati Prakash sworn on 26th October 2012 as part of her evidence-in-chief in those proceedings**, there was **no mention of** her complaint to the Chief Registrar of 11th March 2010 that the Respondent was holding the Will and **the written response from Patel Sharma Lawyers of the 29th April 2010 to the Chief Registrar which confirmed the existence of an unsigned copy of the Will on the firm's computer**.

[590] **As to why the written response from Patel Sharma Lawyers of the 29th April 2010 to the Chief Registrar confirming the existence of an unsigned copy of the Will on the firm's computer, was not mentioned in the affidavit of Maya Wati Prakash sworn on 26th October 2012, nearly two and a half years later is a mystery**, unless:

(1) it was never conveyed by the office of the Chief Registrar to Maya Wati Prakash; or

(2) **it did not fit with the instructions of Maya Wati Prakash** that it was not the fault of Maya Wati Prakash and her family as to why the Will was not located for nearly 14 months between 25th November 2008 and 23rd January 2010, and it was far easier to simply blame the Respondent and his firm; or

(3) Alternatively, Maya Wati Prakash never told Prem Narayan as to this important item of evidence, which, together with Dipka Mala's evidence confirming her signature, supported as genuine the Will discovered on 23rd January 2010.

[591] Four years after her swearing her above affidavit on 26th October 2012 (and then giving evidence on 29th October 2012 in *Prakash v Devi* in the High Court at Suva), Maya Wati Prakash, in her evidence before this Commission on 5th December 2016, was asked in cross-examination when did she start looking for Salen's Will after his death and she replied, "*I was in a lot of tension that time, I do not remember but it was after 13 days."*

[592] Counsel for the Respondent then explored this issue further including asking about an alleged telephone call between Subhasni (Rosie) Singh and Dipka Mala on 25th November 2006, one day after the death of Salen, as follows:

"Mr. Sharma:	*... Now is it not true Mrs. Prakash that* ***one day after Salen's death, your daughter Subhasni was already looking for the Will****?*
Interpreter:	*I do not know whether she was looking for it.*
Mr. Sharma:	***Were you aware that Subhasni had rung Dipka Mala at Patel Sharma to ask whether a Will, the signed will was held by the firm?***
Interpreter:	***Yes, she called****.*
…	
Commissioner:	*So were you aware of it?*
Mr Sharma:	*Yes that's what*
Commissioner:	*You were aware that she called?*
Interpreter:	***I know there was a Will made so I asked my daughter to call****.*
Mr. Sharma:	*Okay, so your previous answer was that, I was under too much tension and all, I didn't do anything until after the 13 days is not correct,* ***the very next day you were looking around for a Will, weren't you?***
Interpreter:	***I don't remember****.*

…

Mr. Sharma:	*And now do you, did Subhasni tell you what her discussions with Mala were?*
Interpreter:	*She said that she asked for a Will and they said the Will was not made there.*

Mr. Sharma: *And you confirm that this is hearsay from your daughter Subhasni telling you, that your daughter is telling you this?*
Commissioner: *… Mr. Sharma is saying that* ***you never spoke to***
Mr. Sharma: *Mala*
Commissioner: ***Mala or Patel Sharma****?*
Interpreter: ***No****.*

Commissioner: ***You got Rosie to call Mala and this is what Rosie told you Mala told her?***
Interpreter: ***Yes.***

Mr. Sharma: *Now my instructions are Mrs. Prakash, and I will bring a witness to confirm this, is this that when Subhasni rang Mala, Mala didn't say a Will was not made here.* ***Mala said that a signed Will is not kept in the Patel Sharma Wills register****?*
Interpreter: *No,* ***she said that the Will was not made****."*
[My emphasis]

[593] In relation to Maya Wati Prakash's evidence, after initially claiming that Pranita Devi was also at the first meeting, Maya, after further questioning on this issue, **then changed her evidence**, such that I had then asked her confirm for me that Pranita Devi was not at the first meeting and that she was then brought along to the second meeting:

"Commissioner: *… We just need to clarify,* ***was there a meeting first with just your daughter and yourself with Mr. Sharma****, who says 'I need a Will to take out a probate.* ***If there is no Will, you need to bring the widow to take out letters of administration****' and that is when you brought her the second time?*
Interpreter: ***Yes.***

…

Commissioner: *And at* ***the second meeting is when you brought the widow along as well****?*
Interpreter: ***Yes****."*
[My emphasis]

[594] **Maya Wati Prakash also conceded that, at the first meeting on 12th December 2008 with Mr. Suruj Sharma, he had advised that a signed copy of the Will had to be found. Such evidence I note was recorded with some difficulty during the interpretation (and concluded with a mobile ringing), however, I note that there was no objection by Counsel for the Applicant (who also understands Hindustani) to the following clarification by Counsel for the Respondent:**

"Mr. Sharma: *Now my instructions are Mrs. Prakash that when* ***Mr. Sharma advised you that a signed copy of the Will had to be found*** *because Mr. Salen Prakash could have made any other Wills*

during the interim period and ***we needed the last signed copy of his Will to apply for file probate****. That was the advice that was given to you and Subhasni and the meeting on the 12th December 2008?*

Interpreter: ***Yes but there was … he took out probate without a signed copy.***

Mr. Sharma: *Can you interpret it a bit more carefully,* ***she said 'yes, but there was no signed will.' That's what she said****. And then she said, 'he took out'*

Interpreter: *She took out Probate without it.*

Mr. Sharma: *Yes. I think the first part is so important.*

Commissioner: *'****Yes, but there was no signed Will',*** *then 'took out'?*
Interpreter: *Probate*
Mr. Sharma: *'they still took out letters of'*
Commissioner: *I understand its 'letters of administration' but she did say 'probate'."*
[My emphasis]

[595] I agree with Counsel for the Respondent when he asked me to note the importance of the correct interpretation in the above evidence given by Maya Wati Prakash in cross-examination on 5th December 2016, that is, her response was: ***"yes, but there was no signed will.*** *He took out probate."*

[596] **Maya Wati Prakash also explained how and why it was at the second meeting that Pranita Devi, as the widow, attended** so that the grant of Letters of Administration could be discussed and joint instructions given by both Maya and Pranita, as follows:

"Mr. Sharma: ***Mrs. Prakash following from the meeting on the 12th, you came back again with the widow on the 15th of December. You, Subhasni, Pranita all came to the office?***
Ms. Maya Wati: ***Right.***
Interpreter: ***Right.***

Mr. Sharma: *And is it true that on that day you people all got together discussed it and agreed initially to take out letters of administration in the name of yourself and Pranita Devi?*
Interpreter: *Yes that's what Suruj Sharma had said.*
Interpreter: *That both of us will get 50% each and to take out Letters of Administration.*

Mr. Sharma: *And you remember at this meeting you were discussing, when you first met, you were discussing how you wanted to distribute the estate between yourself and Pranita?*
Interpreter: *We just wanted it to be half and half for both.*

Mr. Sharma: *Now as a consequence of this,* ***would you agree that you then, instructions were given to Mr. Sharma's firm to take out letters of Administration****?*
Interpreter: ***Yes****."*

[My emphasis]

(ii) The evidence of Subhasni Singh

[597] The evidence-in-chief given by Subhasni Singh (also known as "Rosie") before the Commission on 5th June 2017, in relation to the making of Salen's Will was, as summarised by Counsel for the Applicant Chief Registrar in his written submissions ('*Closing Submissions'*, 8th January 2018, at para [99]), that:

> *'... on 22nd December 2016 [sic - 2006] when the Will of her mother and deceased brother was made by Patel Sharma & Associates, her involvement was only in relation to making an appointment with the firm and thereafter stopping over at the law firm and checking on her brother and mother.* ***She denied reading the Will. She also made no mention that she was present when Maya and Salen signed their respective Wills as alleged by Maya*** *in her evidence'.*
> [My emphasis]

[598] The inconsistency in Subhasni's evidence between what she had previously said in the High Court proceedings in 2012 and what she later said in her evidence-in-chief before the Commission on 5th June 2017 raises questions as to her credibility as the following excerpts from her cross-examination on 6th June 2017 reveal:

"Mr. Sharma:	*You said that um, you, your mother and your brother had discussed the making of an appointment to make a Will, and you rang around a couple law firms to check?*
Ms. Singh:	*Yeah.*
Mr. Sharma:	*Is that correct?*
Ms. Singh:	*Yup.*
...	
Mr. Sharma:	*Mhh. And* ***did your mum and brother discuss with you the contents of the Will?***
Ms. Singh:	***No.***
Mr. Sharma:	*No?*
Ms. Singh:	***No.***
...	
Mr. Sharma:	*You see, my instructions are*
Ms. Singh:	*Mhh.*
Mr. Sharma:	*That Salen Prakash and Maya Wati*
Ms. Singh:	*Mhh.*
Mr. Sharma:	***Did not come to Patel Sharma for the purposes of making a Will but they came to collect the cheque for $62,000, being the sale from the Lokia property?***
Ms. Singh:	*on 22nd of*
Mr. Sharma:	*Of December, 2006?*

Ms. Singh: ***No****.*

…

Ms. Singh: ***They went to do a Will on that day****. I made an appointment for the Will on the same day.*
Mr. Sharma: *Mhh.*
Ms. Singh: *That was Dipka Mala advised about the stamp duty and other things as well.*

Mr. Sharma: *Well, she couldn't have advised them about the stamp duty because the sale [on the Lokia property] had already taken place.*
Ms. Singh: *That's for the Koronivia property.*

…

Mr. Sharma: *… were you told, that* ***they had picked up a cheque*** *of $22,000 from the Law firm of Patel Sharma?*
Ms. Singh: *$22,000?*

Mr. Sharma: *Ah, 62,000?*
Ms. Singh: ***No, I don't know about that****.*

Mr. Sharma: ***You had no idea?***
Ms. Singh: ***No****.*

Mr. Sharma: *You had no knowledge that the Lokia*
Ms. Singh: *No.*

Mr. Sharma: *Property had been sold?*
Ms. Singh: ***Lokia property was sold, I know that, but collecting cheque, I have no idea.*** *Is it clear? No.*

Mr. Sharma: *Yeah, Ms. Singh, before you raise your voice at me*
Commissioner: *Mr. Sharma …"*

[My Emphasis]

[599] I note that I then had to intervene and explain to the witness that Counsel for the Respondent had a duty to put his case to her. The cross-examination then continued as follows:

"Mr. Sharma: *Did you know that your mother*
Ms. Singh: *Mhh.*

Mr. Sharma: ***Maya Wati, actually already had a draft Will with her?***
Ms. Singh: ***No, I don't know****.*

Mr. Sharma: *In her possession when she went to see Patel Sharma on the 22nd of December 2006?*
Ms. Singh: *So that means they did went to do a Will on 22.*
Mr. Sharma: *I, I am coming to that.*

Commissioner: *No, no.* ***His question was, 'did you know she had a draft'***
Ms. Singh: ***No.***

Commissioner: ***'Will with her'?***
Ms. Singh: ***No.***

Mr. Sharma: ***So you had no idea?***

Ms. Singh: ***No.***

Mr. Sharma: *Right. And, did you know that at that date, on 22nd December.*
Ms. Singh: *Mhh.*

Mr. Sharma: *There was already a Conveyancing File opened at Patel Sharma*
Ms. Singh: *Mhh.*

Mr. Sharma: *For your mother.*
Ms. Singh: *Mhh.*

Mr. Sharma: *And for your brother.*
Ms. Singh: *Mhh.*

Mr. Sharma: *For the sale of the Lokia property?*
Ms. Singh: *Yup.*

Mr. Sharma: *And the caveat that had been registered against the Koronivia property?*
Ms. Singh: *Yup.*

Mr. Sharma: *Were you aware of they had 2 existing files there?*
Ms. Singh: ***No, I don't remember anything****.*

Mr. Sharma: ***You don't remember anything?***
Ms. Singh: ***No.****"*
[My emphasis]

[600] As for her knowledge as to what occurred during the appointment of Maya Wati Prakash and Salen Prakash Maharaj at Patel Sharma Lawyers on 22nd December 2006, Subhasni's evidence in cross-examination was as follows:

"Mr. Sharma: *Yes, where you with them at the time?*
Ms. Singh: *No.*

Mr. Sharma: *Right, you were not there?*
Ms. Singh: *No.*

Mr. Sharma: ***So, you wouldn't have any idea as to what was discussed between mum, Salen and the person who made the Will for them?***
Ms. Singh: ***No, no idea****.*

Mr. Sharma: *Right. And,* ***did they take any advice from you about the Will?***
Ms. Singh: ***No.***

Mr. Sharma: ***Nothing at all?***
Ms. Singh: ***No****. I was at work.*

Mr. Sharma: *You were at work?*
Ms. Singh: *Yes.*

Mr. Sharma: *So, they've now made their Wills, as they,* ***you have no idea what actually happened at the office at the time?***
Ms. Singh: ***No.***

Mr. Sharma: *Right. Okay.*
Ms. Singh: *And do remember we got a original Will here*

Mr. Sharma: *Mhh.*
Ms. Singh: *Which says 22nd of December, my brother did the Will on that day.*

Mr. Sharma: *It's never been disputed Ms. Singh, but you'll see what I am coming to?*
Ms. Singh: *Yeah.*

Mr. Sharma: ***You remember giving evidence in Court, in the High Court.***
Ms. Singh: *Mhh.*

Mr. Sharma: ***Now, today you've just said that you had no idea, never went there, didn't know what the Will was.***
Ms. Singh: ***I only hopped in**, in the office, while on my official run, but **I had no idea what they were discussing there**. Just to see if my brother and my mum was there. **But I didn't read or do anything on that**. I didn't drive them there, I didn't take them there.*

Mr. Sharma: *Right.*
Ms. Singh: *During the daytime I only hopped in to see if they were okay there.*

Mr. Sharma: *Okay, so when you, just explain a bit more on that. You hopped in to see whether they were okay?*
Ms. Singh: *Yes.*

Mr. Sharma: ***And why?***
Ms. Singh: ***And that's it. Is it an offence to hop in to see your family?***
[My emphasis]

[601] It was shortly after this exchange that Subhasni was taken to Exhibit 47 and her previous evidence in the High Court proceedings where, as Counsel for the Applicant Chief Registrar has noted in his written submissions ('*Closing Submissions'*, 8th January 2018, at para [144]): *'After she [Subhasni] was shown pages 165 and 166 of Exhibit 47, she stated that* ***she may have glanced through the Will**.'* [My emphasis]

[602] Exhibit 47 is a copy of the file from High Court proceedings in *Prakash v Devi* (Civil Action No. 3 of 2010). Document 21 in Exhibit 47 is the transcript of the hearing from that took place on 29th-30th October 2012 and pages 165 and 166 is part of the evidence that Subhasni gave under cross-examination on 29th October 2012 as follows:

"MR HIUARE: *When you came to Patel Sharma **you looked at the document is that correct?***

MRS SINGH: *When did I come to the Patel Sharma. You be more specific? On which day?*

MR HIUARE: ***On 22nd December***.

MRS SINGH: *Right.*

MR HIUARE: ***Did you look through the document?***

MRS SINGH: *I have mentioned a couple of more times that* ***I hopped in***. ***I just glanced through it***.

MR HIUARE: *Glanced what do you mean?*

MRS SINGH: ***I just looked through it I say it looks all right***. ***I have no interest to go through it*** *because I am not a legal person. There is no need because* ***I am not a beneficiary*** *on that to know."*
[My emphasis]

[603] This then became an issue in re-examination in the proceedings before the Commission as follows:

"Mr. Chand: *And if you could state that was on 22nd December 2006 when the Will of Salen Prakash Maharaj was made, what was your involvement on that day?*
Ms Singh: *What was my involvement on that day?*

Mr. Chand: *Yes?*
Ms Singh: *As I said previously* ***I hopped in.***

Mr. Chand: *Sorry?*
Ms Singh: ***I just hopped in to see them***.

Mr. Chand: *Yes?*
Ms Singh: *And* ***might be a glance*** *on the Will* ***but I can't recall.***

Commissioner: *I hopped into to see them and?*
Ms Singh: *Yes and* ***might be a glance through that*** *but* ***I can't recall exactly****."*
[My emphasis]

[604] By way of contrast with Subhasni Singh's evidence, I note that her mother, Maya Wati Prakash, swore an affidavit on 26th October 2012 (as part of her evidence-in-chief in the proceedings before the High Court against Pranita Devi – Exhibit 18 in the proceedings before the Commission) whereby Maya stated at para [4] that an *'**appointment was made between 12-30 to 1-00pm so that my daughter Rosie who is the most educated in the family could be present as well'*** and at para [10] that, after the Wills had been prepared and printed, *'**By that time my daughter Rosie arrived** ... **She had a look at the documents**. **And then I signed the Will**'* and at para [11], ***'after I signed then Salen also signed his Will'***. **Maya Wati Prakash also gave evidence** before the High Court on 29th October 2012 (Doc.21, High

Court Transcript, p. 4, Exhibit 47, p. 117) **that Subhasni (Rosie) was present <u>before</u> Salen signed his Will**, as follows:

> *"MS NARAYAN: And after she prepared you will then what happened. Did Shalen [sic] make a will?*
>
> *MRS PRAKASH: Yes my will was made and Shalen made his will.*
> *...*
>
> *MS NARAYAN:* ***Did Rosie come <u>before he signed</u> the will?***
>
> *MRS PRAKASH:* ***<u>Yes</u>.***
>
> *MS NARAYAN:* ***Did Rosie <u>explain the will to you</u>?***
>
> *MRS PRAKASH:* ***<u>Yes, she just read and explains.</u>***
> [My emphasis]

[605] **Notwithstanding what Subhasni Singh said before the High Court on 29th October 2012 that "*I hopped in"* and *"I just <u>glanced</u> through it",* <u>it was, in my view, fanciful of her to similarly suggest in her evidence before this Commission on 5th-6th June 2017 that she did not read the Wills of her mother and her brother</u> and instead that "*I just hopped in to see them"* and it "*might be a glance … but I can't recall".* In that regard I note**:

(1) Dipka Mala was clear in her evidence before the Commission (even if it was hearsay) that **Maya Wati Prakash told her that it was Subhasni who had given Maya a draft Will** as the basis to ask the law firm to make a Will for Maya (Exhibit 77);

(2) As set out above, **Maya Wati Prakash was clear** in both her affidavit sworn on 26th October 2012 and in her oral evidence before the High Court on 29th October 2012 **that Subhasni (Rosie) was present <u>before</u> Salen signed his Will and, indeed, according to Maya, Subhasni read and explained the Will**. Balanced against that, I note that Dipka Mala mentioned in her evidence before the Commission that *"... I got the will prepared and w<u>hen they were about to leave</u> the office then only <u>Subhasni called into our office</u>*". She did not get asked either in examination-in-chief or in cross-examination as to whether she could recall as to whether Subhasni read the Wills in front of her either before or after they were executed;

(3) Despite what Subhasni said in evidence before the High Court that she did not need to go through her brother's Will as "*I am not a beneficiary"*, **surely there was an incentive for her to at least glance through it (either before of after they had**

been executed) as, although her brother was leaving his entire Estate to his mother, **Subhasni knew (according to the draft in Exhibit 77), that it was intended for Subhasni to be a beneficiary under her mother's Will and at that time (despite the tragedy that later eventuated) it would have been presumed that Maya would have predeceased her son, Salen**. Indeed, this became a point of cross-examination in the High Court proceedings when Subhasni had to agree that she was to receive a 25% under her mother's Will, with a further 25% going to Ireen and the remaining 50% to Salen (Doc.21, 'Transcript of the High Court for Maya Wati Prakash -v- Pranita Devi HPP 003 of 2010', pp.48-49, Exhibit 47, pp.162-163). I also note that Subhasni and her brother, Salen, were appointed as Executors and Trustees of their mother's Will that was executed on the same date, 22nd December 2006, as Salen's Will (Doc.46, 'Evidence in Chief of Maya Wati Prakash', Exhibit 47, pp.291-303, Annexure "A");

(3) **It was Subhasni who later instructed Prem Narayan, Barrister and Solicitor** (as per the letter dated 27th January 2009 from Prem Narayan to Patel Sharma Lawyers) **to make a claim on behalf of Subhasni for $62,000 against the Estate of Salen Prakash Maharaj** for alleged '*contributions in the purchase of the said property from Dalip Singh'* at Koronivia which occurred in 2006 (prior to the Will being executed on 22nd December 2006) and also that Subhasni had allegedly later *'paid for the erection of the dwelling house on the said property'* (see Exhibit 4). This claim was reiterated as per the subsequent letter dated 26th February 2009 from Prem Narayan to Patel Sharma Lawyers and mentioned in paragraph 25 of the affidavit of Maya Wati Prakash sworn on 5th March 2009, filed in support of her application in Civil Action No. 81 of 2009 and annexed and marked "MWP9" to that affidavit (Exhibit 44, p.120).

[606] **It should also be noted that during the giving of her evidence on 29th October 2012 in the High Court proceedings, Subhasni Singh claimed that Pranita Devi knew at the time, that is, on 22nd December 2006, that Salen was going to make a Will that day.** According to Subhasni's evidence, there was a family discussion with Salen the night before at which there was present *"me, my mom, **my sister in law** and my husband. All the people living in the house"* (see Doc.21, 'Transcript', p. 46, Exhibit 47, p.160). [My emphasis] When it was put to Subhasni under cross-examination in the High Court proceedings that Pranita was not there, Subhasni arguably obfuscated, which I note is only my impression from a reading of the

transcript tendered in the proceedings before this Commission (Doc.21, 'Transcript', p.47, Exhibit 47, p.161) and not having been present at that hearing, as follows:

> *"MR HIUARE:* *Where was Pranita all the time you people were discussing?*
>
> *MRS SINGH:* *Pranita was inside the house. It was at night so definitely no one goes out of the house.* ***She was also in the family discussion because we eat and stay together in the same house****.*
>
> *MR HIUARE:* *Is it correct to say that Pranita was not there?*
>
> *MRS SINGH:* *No I did say that* ***Pranita was there****. Because when we do family discussion every member of the family has to be there. But when we actually went to do the will Pranita went to the market because my brother was running a business. Somebody has to go to the market. They cannot stop the business. That is between husband and wife. They decide who to go and what not. I was working so I left home at 6.30 a.m. I do not know what they discuss. I was in the office. I do not know what they discussed so who came to the lawyer is up to them between husband and wife.*
>
> *MR HIUARE:* *I put it to you that there was no meeting the previous night.*
>
> *MRS SINGH:* *No we cannot do any appointment from home because we did not have any land line that time. Law firms are closed at night so we cannot make appointments. We only discussed. We cannot make appointments."*
> [My emphasis]

[607] **It should further be noted that Pranita Devi claimed, both during the giving of her evidence before the High Court** (Doc.21, 'Transcript', p. 67, Exhibit 47, p.181) **as well as when giving evidence before this Commission, that she did not know of the existence of the Will until it was discovered by Subhasni Singh in 2010.**

[608] According to the written submissions of Counsel for the Respondent (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 9, sub-paras [vi]-[vii]) in relation to **Subhasni's evidence on the issue as to the storage of Salen's Will**:

> *'[vi]. SS [Subhasni Singh] contradicted herself on the issue whether [Dipka] Mala had said that the Firm had an electronic record of a Will but no signed copy. Initially she said Mala hadn't said this but subsequently she was not sure and said Mala may have said it …*
>
> *[vii]. … under cross examination …* ***both MWP [Maya Wati Prakash] and SS [Subhasni Singh] couldn't really remember what Mala or the Practitioner had said****.'*

[My emphasis]

[609] I agree with the above as a summary of the evidence of Subhasni Singh on this issue.

[610] **Turning to the second part of Subhasni Singh's evidence** before this Commission as to what occurred in the immediate aftermath of Salen's death on 24th November 2008, **there was no mention in Subhasni's evidence-in-chief of any telephone calls made to the firm the day after Salen's death, that is, 25th November 2008. Such evidence was contrary, however, to the evidence of her mother, Maya Wati Prakash. There was mention by Subhasni of calls that she made to arrange a visit to the firm but she could not recall the actual date/s.** I accept that there must have been telephone calls to have made the appointment at least for 12th December 2008 (if not also for 15th December 2008) and when Subhasni made an appointment with whoever answered the telephone at the firm of Patel Sharma Lawyers, **Subhasni must have explained as to why the family wanted an appointment to see Mr. Suruj Sharma**.

[611] The issue of telephone calls and what occurred on 25th November as well as the attendances at the office of Patel Sharma Lawyers was explored in the cross-examination of Subhasni, as noted by Counsel for the Applicant Chief Registrar in his written submissions ('*Closing Submissions'*, 8th January 2018, at paras [151]-[155]), in summary, as follows:

> *151. She was referred to Exhibit 23 and in particular to page 91 and the entry of 25th November 2008 was referred to her.* ***She agreed with the entries of 25th November 2008 which amongst another things stated that it was communicated to Subhasni [sic] that a signed copy of the Will could not be found but the office computer did show existence of a Will made on 22nd December 2006****.*
>
> *152. As for 12th December 2008 entry, she stated that Dipka did not give them a copy of the computer print out of the Will. She also stated that she only remembered briefly meeting with Mr. Sharma and that further discussion about the Will was done by the Respondent, her mum* ***and sister-in-law****. She mentioned that* ***at the first meeting he[r] sister-in-law was also present.***
>
> *153.* ***She confirmed that on the day she was sent to wait outside****,* ***her mother had relayed to her later that day that joint instructions were given to the Respondent****.*
>
> *154. She was shown Exhibit 2 and she confirmed that she had never seen that document and confirmed that Arvin Singh and Anil Kumar are her cousins.*

155. *She agreed that there was a break in the family after 28th December 2008.'*
[My emphasis]

[612] I agree generally with the above as a summary of the evidence given by Subhasni Singh when cross-examined on this issue.

[613] **It is significant, as Counsel for the Chief Registrar has noted in his summary, that Subhasni agreed during cross-examination with the entry of 25th November 2008 in Exhibit 23, page 91, that is, '*that it was communicated to Subhasni that a signed copy of the Will could not be found but the office computer did show existence of a Will made on 22nd December 2006*'**. Exhibit 23 was a letter dated 23rd December 2013 from Patel Sharma Lawyers to the Acting Chief Registrar responding to a letter dated 11th December 2013 attaching a complaint from Pranita Devi. The letter included a chronology and the entry at page 2 of that letter (Exhibit 23, page 91) set out what had allegedly occurred on 25th November 2008.

[614] The above written submissions of Counsel for the Applicant Chief Registrar summarising Subhasni's evidence, note that **Subhasni agreed that the first meeting after Salen's death, took place on 12th December 2008**. **I also note that the document of 15th December 2008 (Exhibit 2) was identified by Maya Wati Prakash and Pranita Devi** as signed joint instructions to make a joint application for a grant of Letters of Administration. Subhasni Singh also confirmed that at the meeting when the document was signed, she was sent to wait outside and her mother had relayed to her later that day that joint instructions were given to the Respondent. **Therefore, on one view, this is support that there were two meetings in December 2008 at the law firm of Patel Sharma Lawyers, the first on 12th December and the second on 15th December 2008**.

[615] **The problem with Subhasni's evidence as to the alleged attendance of Pranita Devi at both meetings, is that this was contradicted NOT ONLY by Subhasni's mother, Maya Wati Prakash, (as cited above) BUT ALSO by Pranita Devi.**

[616] **Apart from the issues as to Maya Wati Prakash saying that Subhasni had given her the draft Will which she produced to Dipka Mala on 22nd**

December 2006 and Subhasni denying it, as well as the conflicting evidence as to whether or not Subhasni read the Wills on 22nd December 2006, there was also another aspect of the evidence of Subhasni Singh before this Commission on 5th June 2017 that I found troubling, as I shall now explain.

[617] **During her evidence-in-chief, Subhasni was asked about the caveat over the property at Koronivia. Her evidence was as follows:**

> *"Mr. Chand:* *Would you be able to say which solicitor put the caveat on that property or which solicitor was hired to?*
> *Ms Singh:* *Patel Sharma & Associates.*
>
> *Mr. Chand:* *Now would you be able to say* ***why a caveat was put on the Koronivia property****?*
> *Ms Singh:* ***My brother has some, his personal issues****.*
>
> *Commissioner:* *My brother had?*
> *Ms Singh:* ***Some personal issues with a girl or something****, there was a little bit of marriage breaking up or something,* ***they were not in a good terms so there was a caveat done on that property****.*
>
> *Mr Chand:* *Were you involved in the giving of the instructions to or did you accompany your brother in giving of the instructions to Patel Sharma & Associates for lodging a caveat on the Koronivia property?*
> *Ms Singh:* ***I don't remember very well on that*** *but* ***I know Dipka Mala served them****.*
> *...*
>
> *Mr. Chand:* *How do you know that Dipka Mala served them?*
> *Ms Singh:* *Because Dipka Mala used to all the time served my brother and my mum.*
> [My emphasis]

[618] **As I have already noted above in relation to Count 1, the caveat was lodged over the property at Koronivia not because Salen's "*personal issues with a girl or something*" or that his marriage was "*breaking up or something*" as claimed by Subhasni. Instead, it was because Salen had used the Power of Attorney from his parents to transfer the property at Koronivia into his sole name rather than into the joint names of his mother, Maya Wati Prakash and him (as what was supposed to have occurred). When he confessed this to his mother in 2007, it was agreed that a caveat would be lodged over the property at Koronivia to protect his mother's interest.**

[619] Remembering that on 27th January 2009, Prem Narayan sent to the Respondent on behalf of Subhasni Singh a claim of $62,000 upon the estate of Salen and further, that Prem Narayan repeated this claim in a subsequent letter dated 26th February 2009, which was then mentioned in paragraph 25 of the affidavit of Maya Wati Prakash sworn on 5th March 2009, filed in support of her application in Civil Action No. 81 of 2009, and annexed and marked "MWP9" to that affidavit (Exhibit 44, p.120), **for Subhasni Singh to then feign ignorance in relation to why the caveat had been lodged over the property at Koronivia only some 18 months before in June 2007, I reject as fanciful**.

[620] In my view:

(1) For Subhasni Singh to say in evidence that in relation to the caveat being lodged over the property at Koronivia, "***I know Dipka Mala served them"*** when Maya and Salen attended Patel Sharma Lawyers in 2007 for this to be done, may suggest that Subhasni may well have known more than she was revealing to the Commission;

(2) **Subhasni Singh had more than a passing ignorance or disinterest in the caveat**, as paragraphs 11 and 12 of Maya's affidavit sworn on 5th March 2009 (filed in support of her application in Civil Action No. 81 of 2009 marked as Exhibit 44 in these proceedings) made clear –

> *'11. During the period 2000-2006, I was not in Fiji …*
> *12. Whilst I was away …* ***my daughter Subhasni continued making payment towards the purchase price****. Further,* ***my daughter began constructing a dwelling house on the property****.* ***My husband and I intended to have our daughter Subhasni and her husband settle on the property****. Subhasni completed the construction of the dwelling house in 2000 and had been residing at the house to-date.'*
> [My emphasis]

(3) Subhasni Singh was living at the property at Koronivia with more than just her husband, her mother, Maya Wati Prakash, her sister-in-law, Pranita Devi and her brother, Salen, who she said had "***some personal issues with a girl or something"***. As the evidence of Pranita Devi made clear, **Salen was living at the same property with another woman, also by the name of Pranita, whilst his mother, Maya Wati Prakash and his wife, Pranita Devi, shared a separate bedroom**. This was, obviously, more than just "***some personal issues with a girl or something"*** as claimed by Subhasni.

[621] The tensions in the household at the time Salen made his Will on 22nd December 2006 must have been palpable with his mother, his wife and his lover all residing in the same property and his sister and her husband in an adjacent flat and, according to Subhasni's evidence in the High Court cited above, "***we eat and stay together in the same house"***. **As to why Subhasni Singh downplayed this, as well as her involvement in the family dynamics, is not for me to resolve. It does, however, raise further issues, perhaps, <u>as to Subhasni's credibility</u>**. Indeed, even when Subhasni agreed, during cross-examination by Counsel for the Respondent in the present proceedings, that two Pranitas were living with Salen, Subhasni then, in my view, feigned ignorance as to the specific details, as the following excerpt from the transcript of her evidence illustrates:

"Mr. Sharma: *Around 22nd December 2006*
Ms. Singh: *Mhh.*

Mr. Sharma: *Was Salen having a few problems in his marriage?*
Ms. Singh: *Yes.*

Mr. Sharma: *He was, eh?*
Ms. Singh: *Yes.*

Mr. Sharma: *Can you tell us what was the problem?*
Ms. Singh: *Is it relevant to tell all those?*

Mr. Sharma: *It is Ms. Singh. I believe you're a witness of fact. I just expect you to just tell the truth.*
Commissioner: *Just tell me the truth, I just got to know what's happened.*
Ms. Singh: *He had issues with his wife, with his marriage, so he had a girl which he got involved with.*

Mr. Sharma: *And, what's the name of this other girl, also Pranita?*
Ms. Singh: *Coincidently yes, yes.*
...
Mr. Sharma: *... we just need to get to the bottom of this that Salen had some issues in the marriage. Was, <u>**which Pranita was staying at your house**</u>, at the time?*
Ms. Singh: ***<u>Both were there</u>.***

Mr. Sharma: *In Koronivia. Both of them was there?*
Ms. Singh: *Both of them. You know very well about my family. Well done.*

Mr. Sharma: *Yes, Ms. Singh, we've done our research about your family.*
Ms. Singh: *Good.*

Mr. Sharma: *Okay, so, the, Pranita 1 and Pranita 2 staying in the house?*
Ms. Singh: *Well, I don't know 1 or 2, but <u>**both Pranitas were there**</u>.*

Mr. Sharma: ***Both Pranitas, right?***
Ms. Singh: ***<u>Yes</u>.***

Mr. Sharma: ***And they were staying with Salen?***

Ms. Singh: ***In the house?***

Mr. Sharma: *Mhh.*
Ms. Singh: *Yeah.* ***Could be****, ah* ***I used to go to work, when I arrived in the afternoon, both were there****. So, that's what I know.* ***I used to have my own flat.***

Mr. Sharma: *Right.*
Ms. Singh: *But, both were there."*
[My emphasis]

[622] **Two points arise from the above evidence:**

(1) It may explain Subhasni Singh's telephone call to Patel Sharma Lawyers on 25th November 2008, the day after Salen's death, looking for Salen's Will, when one may have thought, as the Respondent said in his evidence, that this may have become something to consider after the morning period, that is, the usual 13 days of rituals according to the Hindu religion. **That is, Pranita Devi, as Salen's widow, did not know about the making of the Will on 22nd December 2006 as it had been made when Salen was residing with the two Pranitas**. If this is correct, then it also undermines Subhasni's claim that Pranita Devi was present at a family meeting on 21st December 2006 when the Wills were discussed and further that Subhasni discussed with her brother over dinner on the evening of 22nd December that he paid fees for the making of the Wills. Surely, Pranita Devi must have been present at that family dinner if, as Subhasni said in the High Court proceedings, "*we eat and stay together in the same house"*?

(2) It may also explain why only Subhasni Singh and Maya Wati Prakash attended Patel Sharma Lawyers on 12th December 2012, when, according to the evidence of both Dipka Mala and Suruj Sharma, after they (Dipka Mala and Suruj Sharma) found out that there was a widow, Suruj Sharma advised Subhasni Singh and Maya Wati Prakash that the widow would also have to attend the firm with them.

(iii) The evidence of Pranita Devi

[623] **The evidence of the widow, Pranita Devi, in relation to the visits to the Respondent's office with Subhasni**, according to Counsel for the Applicant Chief Registrar in his written submissions ('*Closing Submissions'*, 8th January 2018, at paras [274]-[277]), was, in summary:

> *'274. She also stated that* ***she went once to the Respondent's office with MWP, Subhasni and her husband before LA was granted****. She stated that this could have been after SPM's 13 day death ritual.*

274. She stated that MWP wanted to take out probate and to get it in both their names so they could share the property.

275. She stated that she was not aware that her in-laws were discussing with a lawyer on the distribution of the property.

*276. She was referred to Exhibit 2 and she confirmed her signature and date. She stated that on 15th December 2008, they talked about probate and her mother-in-law also asked the Respondent if there was nay [sic] Will of SPM but **at no time were they advised of a Will. MWP's Will was there but not SPM's**.'*

[My emphasis]

[624] Counsel for the Respondent have similarly noted in their written submissions (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 21, para [xi]), Pranita Devi's evidence in relation to the visits to the Respondent's office with Subhasni was, in summary:

> *'She [Pranita] said that she was never told by the Practitioner or his Firm that SP had made a Will. She denied that she was shown a copy of the unsigned Will when she went to meet the Practitioner on 15th December 2009 [sic].'*

[625] Whilst I agree with the above summaries of Counsel as to the evidence given by Pranita Devi, **the problem with her evidence is that <u>in a letter dated 23rd January 2014 that Pranita Devi sent to the Acting Chief Registrar</u>** (that was received on the same date by the Chief Registrar's Legal Practitioners Unit), **<u>Pranita Devi stated</u>** at para [5], page 1 (see "AD24", *Agreed Bundle of Documents*, pp.103-106, marked as **Exhibit "24", at page 103)**:

'2. He [Suruj Sharma] knew <u>there was a Will of my husband in their computer system</u>, however, search made by his office revealed there was no Will as a result they prepare Letters of Administration for me

...

*4. The question is where does **<u>the unsigned Will</u>** of Salen **popped up from just <u>a day after my husband's death</u>** and still in the mortuary?*

*5. <u>When my husband still in mortuary</u> **my sister in law Subashni [sic] enquired at Patel Sharma Lawyers <u>and was told of the unsigned Will</u>**.'*

[My emphasis]

[626] According to Counsel for the Respondent in their written submissions (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 21, paras [40]-[41]):

'40. For PD to then maintain under oath that she was never aware of an unsigned Will completely <u>destroys any credibility as to her denial of knowledge about an unsigned Will</u>.

*41. Furthermore **this corroborates what Mala had always stated that the***

> ***Firm <u>never denied that they made a Will for SP</u> but <u>what they said was that they didn't hold a signed Will</u> in their records**, consistent with SP's instructions.'*
> [My emphasis]

[627] I agree with the above submission. The letter dated 23rd January 2014 from Pranita Devi to the Acting Chief Registrar <u>reveals perhaps an unfortunate misunderstanding that she held</u> as to **the difference between what was held on the computer system as just an unsigned Will** (of which she knew Subhasni and then Maya and herself had been informed) **and an executed Will** - **<u>which is not to say that Salen never made a Will, rather what the firm of Patel Sharma Lawyers held was unsigned Will in their computer records</u>.**

[628] Pranita Devi's denial also does not make sense when her own Counsel, Mr. Willy Hiuare put the following to Maya Wati Prakash on 29th October 2012 in the proceedings in the High Court as follows (Doc.21, 'Transcript', pp.19-20, Exhibit 47, pp.132):

> *"MR HIUARE:* ***<u>When</u>** did you inform Pranita Devi about this will?*
>
> *MRS PRAKASH: After Shalen [sic] passed away."*
> [My emphasis]

And then (at p.133):

> *"MR HIUARE: "I put it to you that **this will was not prepared by Patel Sharma**, is that correct?*
>
> *MRS PRAKASH: It was made there."*
> [My emphasis]

[629] **Mr. Hiuare, however, never followed up his above questions with the obvious question, *"I put it to you Mrs. Prakash that there was no Will".*** This was a point that Counsel for the Respondent put to Pranita Devi in the proceedings before the Commission, as follows:

> *"Mr. Sharma: Okay, just need to bring this to your attention that she was asked that question, Maya Wati was asked the question that whether she brought, discussed the Will with you. Can I take you to page 132 of exhibit 47?*
> *Mr. Sharma: And you see the unusual thing is that **you are denying all these knowledge about Will but it was your own lawyer who asked that question**.*
> ....
> *Mr. Sharma: Yeah. Can I take you to the question that Mr. Hiuare asked your, asks Ms. Maya Wati Prakash [in] cross-examination, 'when did you inform Pranita Devi'?*
> ...

Mr. Sharma: *'About the Will'?*

...

Mr. Sharma: *Halfway down.*

...

Mr. Sharma: *Mr. Hiuare asks that question and Mrs., **Ms. Prakash [says] 'after Shalen passed away'.***

Ms. Devi: *Hmm. (Talking in Hindi)*

Translator: ***It's a lie my Lord**. I have taken a oath my Lord, I will not lie.*

...

Translator: *If there was a Will my Lord, then **after the 13 days final rituals, she was discussing about the property**.*

...

Commissioner: *Okay. ... **so did you then say to Mr. Hiuare at all, that's not correct?***

...

Translator: ***Yes, yes, I told him My Lord**.*

Commissioner: *When?*

Translator: *Yes, My Lord, I did ask him when the trial was going on, I met him outside the Court room, **and I asked him 'Why did you ask this question because there was no Will?'. And my uncle was with me.***

...

Mr. Sharma: *You, ah, see Ms., Ms. Devi, Mr. Hiuare has got a presumption, alright. He is asking where, **when** did you inform about Pranita Devi about the Will? **He's not saying whether you informed, he says when?** That means **he knew that you knew about the Will.***

Translator: *I do not know. It was not discussed with me My Lord. And **Maya Wati had never told me about this Will. Never**.*

...

Commissioner: *So, you told Mr. Hiuare you'd never seen the copy of the Will?*

Translator: *I have never seen Salen's Will, my Lord. If there was a Will, I would have never claimed."*

[My emphasis]

(iv) The evidence of Prem Narayan

[630] Counsel for the Applicant Chief Registrar also relies upon the evidence of Prem Narayan, Barrister and Solicitor. The written submissions of Counsel for the Applicant Chief Registrar summarised Prem Narayan's evidence in her examination-in-chief as to the instructions that she received from Maya in relation to Salen's death and the location of his will (*Closing Submissions'*, 8th January 2018, at paras [181]-[184]) as follows:

> '*181. She stated she could not recall the exact date but sometime in December 2008 or early January 2009 she received instructions from MWP. MWP told her that her son had recently passed away.*
>
> *182. MWP also told her that she had gone to see the Respondent as he was his [Salen's] solicitor. She [Prem Narayan] advised MWP that if there was no Will, then LA would have to be applied and property would go to wife and children. MWP had brought documents in relation to property in Koronivia where she was residing.*

183. *According to her re-collection, she believed that **both daughters of MWP had accompanied her** when instructions were given.*
184. *She stated that her daughter, Rosie had wanted to put a claim on the estate and so she had acted on instructions from Rosie. She sent a letter to the Respondent's office who had advertised the Estate notice in the newspaper.'*
[My emphasis]

[631] Counsel for the Applicant Chief Registrar then summarised Prem Narayan's evidence in her cross-examination as to the instructions that she received from Maya in relation to Salen's death and the location of his will (*Closing Submissions'*, 8th January 2018, at para [207]) as follows:

> *'She also stated that she could not recall when MWP first came as she did not keep a file note.'*

[632] According to the written submissions of Counsel for the Respondent (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 11, at sub-para [xi]), Prem Narayan's *'evidence showed that she had no file notes and her records were non-existent.'* [My emphasis].

[633] I agree generally with both of the above as summaries of the evidence of Prem Narayan as to the instructions that she received from Maya in relation to Salen's death and the location of his will.

[634] Of particular concern, at this stage, however, as the written submissions of Counsel for the Respondent have noted (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 11, at sub-para [xi], (b)), is that Prem Narayan *'**admitted that she made no effort whatsoever to contact or discuss the matter with the Practitioner** or his Office **before pleading in the Statement of Claim**'* filed with the High Court at Suva in *Prakash v Devi,* '*and [in] other places such as her statement'* before this Commission, **that the Respondent's Firm had told Maya Wati Prakash *'that they had not made a will'***. In that regard, I note that **it was pleaded by Prem Narayan in the Statement of Claim**, filed on behalf of Maya Wati Prakash in Maya's legal proceedings against Pranita Devi ("AD7", *Agreed Bundle of Documents*, pp.21-77, tendered as Exhibit 7**, at page 22), as follows**:

> '*7. Subsequent to the Deceased's death on 24 November 2008, the Plaintiff and her family members had approached the law firm of Patel Sharma & Associates enquiring about the Deceased's will and* ***were informed by the law firm that the Deceased had not made any will****.'*
> [My emphasis]

[635] **The problem with the above pleading,** according to Counsel for the Respondent in their written submissions filed with the Commission (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 12, at sub-para [q]), is that **Prem Narayan in her subsequent written submissions** dated 23rd August 2013 that were filed in the High Court in *Prakash v Devi, **'admitted that SP had taken away the Will**'*. In fact, what Ms. Narayan stated in her written submissions of 23rd August 2013 in *Prakash v Devi* was as follows (Doc.24, 'Submissions for the Plaintiff', 23rd August 2013, Exhibit 47, p.248, at para [4.02]) was:

> *'The evidence of PW1 was clear in relation to the execution of the Will. It was witnessed by 2 witnesses from that office after the Deceased had signed.* ***The Will was then given to the Deceased****.'*
> [My emphasis]

[636] **I agree that, although it was not actually stated by Prem Narayan in her written submissions filed with the High Court that '*The Will was then given to the Deceased'*, the inference can be drawn from the above submission that after '*The Will was then given to the Deceased'*, the deceased then took the Will away with him and did not leave it with the firm**.

(v) The evidence of Willy Hiuare

[637] As for Mr. Willy Hiuare, who had represented Pranita Devi in the High Court in *Prakash v Devi*, his evidence is only relevant as from 7th May 2010, when Pranita Devi first instructed him. His evidence as to why he pursued the proceedings in the High Court to a final hearing when he had been informed at least two years beforehand (on 15th May 2010) by Dipka Mala and Suruj Sharma that the Will of Salen Prakash Maharaj executed on 22nd December 2006 and found on 23rd January 2010 was a valid Will, I will return to later in this Count when discussing the alleged '*unnecessary cost [for Maya Wati Prakash in] initiating High Court Action No. HPP 3 of 2010'*.

(vi) The evidence of Dipka Mala

[638] Having found the evidence of Maya Wati Prakash, Subhasni Singh and Pranita Devi

to be unreliable and that Prem Narayan's (apart from being unreliable) to have been based on *no file notes* and *no records* (I note in passing that Prem Narayan was even confused in her evidence before the Commission as to who found Salen's Will), I now turn to the evidence of Dipka Mala.

[639] According to Dipka Mala's evidence-in-chief, following the death of Salen Prakash Maharaj on 24th November 2008, the immediate contact between Salen's family and the firm of Patel Sharma Lawyers was between Maya Wati Prakash's daughter, Subhasni Singh and Dipka Mala, on 25th November 2008, in summary, as follows:
(1) '*I had received a call from Subhasni advising me that the brother had passed away a date prior';*
(2) "*firstly she [Subhasni] advised that the brother had passed away and* ***the main purpose of her calling was/she wanted to enquire whether there was a signed Will in our office*** *that the brother had prepared a Will';*
(3) While Dipka Mala was on the telephone to Subhasni, another member of staff, Ms. Premila Devi, checked the firm's' Wills Register and "*confirmed to me that the Will wasn't there",* then Dipka Mala *"****checked through my computer records and confirmed to Subhasni that there existed an electronic version*****"**, that is, "***I roughly recall telling her that the electronic version was on the, that I could see, on the computer records";***
(4) Further, Dipka Mala then told Subhasni *"That if a Will would have been prepared as it was shown in the computer records but not in a Wills Register* ***she was to take necessary steps to look for the Will in her brother's own personal belongings"*** and that this *"****she*** *[Subhasni]* ***had agreed to do";***
(5) Subhasni then advised, "***she was going to contact me after the 13 days Hindu rituals****."*

[640] The next contact, according to Dipka Mala in her evidence-in-chief, was a telephone call between Subhasni Singh and her on or about 9th December 2008, in summary, as follows:
(1) Dipka Mala recalled the telephone call as it was after the 13 days rituals;
(2) As for the contents of the conversation Dipka Mala said that she vaguely recalled that ***"it was again in respect of the Will",*** that Subhasni *"****had advised that she had searched*** *through her records and she was not able to locate it and* ***she wanted to know whether we had managed to locate any other copy*** *in our office";*

(3) Dipka Mala said that Subhasni *"kept maintaining because the Wills weren't there, she was going to go back and check again, that was what we had asked her to go and do again"* that is check *"her brother's records";*

(4) Dipka Mala, also claimed that Subhasni had made a strange request in the telephone conversation on 9th December 2008, in that *"... she [Subhasni] inquired whether,* ***because there was a[n] electronic version on the computer she was aware of, then she inquired if we could execute that version*** *which I had told her no it wasn't possible because by then Salen had passed away."*

[641] As for any direct contact that Dipka Mala or the firm had with Maya Wati Prakash at that time, that is, between 25th November and prior to 12th December 2008, Dipka Mala's evidence was *"We did not have any communication with Maya Wati Prakash."*

[642] According to Dipka Mala, the next contact was when Maya Wati Prakash and Maya's daughter, Subhasni Singh, attended the firm on 12th December 2008, when the following occurred:

(1) "*They had called into the office and to advise our office that had still not located the Will, and they wanted to briefly see Mr. Sharma",* which they did *"to check what their options were in that case there was/the signed Will was not located by them";*

(2) ***"A[n] electronic copy was printed and shown to them"*** **of the will and** ***"given to them"*** **by Mala, that is,** ***"in their presence*****", it was handed over to one of them.**

[643] As for the meeting with Mr. Suruj Sharma on 12th December 2008, Dipka Mala's recollection, in summary, was as follows:

(1) "***They were given the copy [of the will] when they were with Mr. Sharma"*** **in his Office at which Dipka Mala was also present;**

(2) Dipka Mala had gone to her computer and printed out a copy of the Will and then come and brought it into Mr. Sharma's office and given it to one of them, of which she could not recall;

(3) *"In the best of my recollection, Mr. Sharma had advised them that in the absence of the signed Will, the option would be legally to go with the LA, that would be applied to the widow",* however, the widow was not present and, as Dipka Mala noted, *"****We never met the widow … we were not even sure he [Salen] was***

married". That was when ***"Maya had told that the son was married and the widow was at home, they did not bring along the widow with them"***.

[644] On the issue of the intention in Salen's Will and the option of now having to get the widow to apply for Letters of Administration, Dipka Mala's evidence was as follows:

"Commissioner:	*... They have come to see you, they were looking for the Will, you had printed out his and even though it's unsigned, it shows arguably the intention of Salen was to leave everything to his mother not to the widow right?*
Ms. Mala:	*Yes Sir.*
Commissioner:	*When you have printed it out, you have taken it to Mr. Sharma's office, did she, I will come to Subhasni in a minute,* ***did she, the mother, Maya Wati, say anything about 'that was my son's intention'?***
Ms. Mala:	***No she did not****.*
Commissioner:	*She didn't.* ***Did Subhasni say anything about what was there in that intention****?*
Ms. Mala:	***No she did not****.*
...	
Mr. Sharma:	***What was the reaction of Maya Wati Prakash*** *when that advice was given that in the absence of a signed Will LA will have to apply and the widow has to apply for that?*
Ms. Mala:	***She was happy for the LA to be applied by the widow****.*
Commissioner:	*Just on that, and* ***did they ask Mr. Sharma****, '****the LA applies to the widow, are we going to get a cut of this estate?****' Did they ask, 'Are we going to get something out of this'?*
Ms. Mala:	*Not on that particular day.*
Mr. Sharma:	*These two persons have come to the office, and you said that they were interested in how the estate is going to administered, did they inform you in the presence of Mr. Sharma, why they were, wanted to know the estate/was there any anxiety about that?*
Ms. Mala:	***They were in a rush to get the LA administered, the estate administered.***
...	
Mr. Sharma:	*Did they discuss why they were/wanted it to be administered quickly?*
Ms. Mala:	***They had some discussions with us because they, vaguely recall they had some permits*** *and…*
Commissioner:	*There were some permits?*
Ms. Mala:	***Motor Vehicle permits that they needed to be renewed and some bank debts that they were going to take care of, so the estate had to be administered.***
Mr. Sharma:	*So these were issues of concern for them, is that correct?*
Ms. Mala:	*Yes.*

Mr. Sharma: *Okay now you have, Mr. Sharma said that the widow is the one who is gonna have to apply for LA, that advice is given, what happens in that meeting now? The four of you are there, what happens?*

Ms. Mala: ***After the advice was given, they had agreed to go back and hold some family discussions and return to our office with the widow.***

Mr. Sharma: *And after this meeting, did they come back to the office?*

Ms. Mala: *Yes, they returned on or about 15th of December."*
[My emphasis]

[645] Dipka Mala's evidence in relation to **the conference held on 15th December 2008**, was, in summary, as follows:

(1) Those who attended were *"**Maya Wati, Subhasni and Pranita"*** and ***" there were some other people who were seated outside the office"***;

(2) The conference took place in "*Mr. Sharma's office"* in Dipka Mala's presence;

(3) As for what was actually discussed, Dipka Mala explained - *"... the Will still had not been located by Maya Wati Prakash or Subhasni or even the widow ... and then Mr. Sharma had again advised them that in case the Will wasn't there the LA was, the wife was, and ... the mother was happy for the widow again to apply for LA"* and also "***At that stage, the mother wanted to be joined";***

(4) "*Mr. Sharma had told them that the widow was to apply but **it was the client's instructions that they wanted Maya Wati Prakash to be joined".***

[646] As Counsel for the Respondent noted, there had to be some basis for a joint application and asked Dipka Mala to explain, which she did, as follows:

"Mr. Sharma: *... in order to be joined as a joint applicant you need to have something reason for it. Did they discuss any reason with you and Mr. Sharma why Maya wanted to be a party, a joined administratrixes?*

Ms. Mala: ***I think she indirectly, she had said that she had some equitable interest.***

...

Mr. Sharma: ***And did Pranita Devi also agree that Maya should be joined as a joined administratrix?***

Ms. Mala: ***Yes, it was jointly agreed by Pranita and Maya because they had a good relationship between a mother-in-law and a daughter-in-law.***

Commissioner: *That you observed or they said that or how or what basis are you telling me that?*

Ms. Mala: ***They were happy. Pranita had confirmed that she wanted Maya to be joined as one of the applicants.***

Commissioner: *And how did Subhasni react to this?*

Ms. Mala: ***Subhasni at that particular time was not there in that room, she had moved out****. She was in and out of the room.*

Commissioner: *Oh she was coming in and out to…*
Ms. Mala: *Yes, because there were some people seated outside.*

Commissioner: *… She was going in and out?*
Ms. Mala: *Yes.*

Commissioner: *Talking to people outside?*
Ms. Mala: *Yes.*
…
Commissioner: *So she wasn't there at this stage or she was there or you don't remember?*
Ms. Mala: ***I am not sure, I don't remember****.*
…
Mr. Sharma: *Now Maya has indicated that she has some interest to the estate of Salen Prakash Maharaj, did/was there any discussions as to what type of interest she had, what type of share she might have had in the estate, did they discuss it at that time?*
Ms. Mala: *Not with us,* ***it was mutual discussions between them, we didn't know the contents of the discussions****.*

Mr. Sharma: ***You are telling the Commission that they had agreed between themselves how to distribute the estate, is that right?***
Ms. Mala: ***Yes.***

Mr. Sharma: *And as a consequence of these discussions was instructions signed to take out joined LA?*
Ms. Mala: ***Yes instructions were given, taken by both of them jointly****.*
[My emphasis]

[647] Counsel for the Respondent then took Dipka Mala to Exhibit 2 (the *'Instructions to Act'* dated 15th December 2008) and asked her to explain it:

(1) Dipka Mala acknowledged as having seen the document and was the author, it being her handwriting;

(2) This was the instructions to *'prepare LA under the joint names Pranita Devi & Maya Wati';*

(3) The two other people mentioned in the document under the heading *'Particulars in Brief*', as *'Arvind Singh and Anil Kumar', "They were the Sureties";*

(4) As for the signatures at the bottom of the page, Dipka Mala stated that *"I confirm those are the signatures of Maya Wati and Pranita Devi"* and *"I witnessed it"* as the Clerk.

[648] After confirming that an electronic unsigned copy of Salen's Will was "***shown to Pranita Devi as well on the 15th"*** **by Mr. Suruj Sharma and "*Pranita had read through the document",*** Dipka Mala's evidence was:

"Commissioner:	***What was her reaction*** *when she read the document, do you remember her reaction?*
Ms. Mala:	***She did not say anything to us.***
Commissioner:	*Do you know if Mr. Sharma said .. 'this is what Salen was going to give everything to his mother' or nothing was said?*
Ms. Mala:	*No,* ***Mr. Sharma did clarify that on the/if the Will was located the contents of the Will did read that everything would be given/testate would be to the mother. She will be the ultimate beneficiary.***
Commissioner:	*Right and did anyone react to that?*
Ms. Mala:	*No, because at that particular time the Will wasn't located/still located and they were at our office solely for the purpose of…*
Commissioner:	*So?*
Ms. Mala:	***They were there at our office to get the LA application executed.***
Mr. Sharma:	*I think Ms. Mala, the purpose His Lordship is driving at, here is a document, I know that Maya Wati is sitting there, Pranita Devi is there but* ***the documents now relay to Pranita Devi that her husband had left everything to his mother in a Will and what His Lordship is saying is ascertaining is that, did you see the reaction from Ms. Pranita Devi when she found out that the husband had two years prior given everything to the mum, was there any reaction at all, did she say anything at all?***
Ms. Mala:	***It wasn't said, but I can't recall.***
Mr. Sharma:	*Okay and just wanted to clarify that the printed document is there, you know it's unsigned document, it's on the table.* ***Do you know what happened to the document at that/when the meeting ended? Did anyone take the document?***
Ms. Mala:	*That particular document because after this meeting, the instructions were taken,* ***the ahh printed version was put on our file.***
Mr. Sharma:	*Okay ...*
Commissioner:	*So the printed version was then put on your file?*
Ms. Mala:	*Yes.*
Mr. Sharma:	***And then you had the instructions sheet signed, is it correct?***
Ms. Mala:	***Yes."***

[My emphasis]

[649] According to Dipka Mala it "***was a cordial meeting between the parties, … they gave the instructions, nobody had objections to each other"*** and *"then once after the instructions were taken,* ***the documents were received by our office****, then they had left".* [My emphasis]

[650] The cross-examination of Dipka Mala was brief, as summarised in the written closing submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions'*, 8th January 2018, page 2) at para [447]:

> *'1. She stated that she was present on the mediation day.*
> *2. She stated that there was only one client file for SPM. The same conveyancing file was for the will.*
> *3. She was referred to AD1 at page 2. She said that she doesn't remember why she didn't put the interpretation in Hindustani language.*
> *4. She stated that as per their record no fee was charged for the will.'*

[651] I agree generally with the above as a summary of the cross-examination of Dipka Mala, though I note that Counsel for the Applicant Chief Registrar in cross-examination asked questions specifically:

(1) Clarifying the telephone call between Subhasni Singh and Dipka Mala on 9th December 2008 wherein Dipka Mala confirmed that it was disclosed to Subhasni Singh that an electronic copy of Salen's Will was in the firm's computer records;

(2) As I have noted above, challenging her as to what occurred in the meeting on 12th December 2008 (presumably based upon, without actually directly saying so, on the unreliable evidence of Maya Wati Prakash and Subhasni Singh) and in the meeting on 15th December 2008 (presumably based upon, without actually directly saying so, on the unreliable evidence of Maya Wati Prakash and Pranita Devi);

(3) That her evidence was based not on file notes but her recollection.

[652] Although Dipka Mala was giving evidence in September 2017, she did mention in her evidence, *"But I remember maybe there must have been some notes over the/in the computer at that time"*. I also note that the original complaint in this matter was received by the Respondent from the Chief Registrar in April 2010 and, arguably, (even if it may have initially settled at mediation in June 2010), it has been ongoing ever since. Therefore, it was not as though Dipka Mala was suddenly being asked for the first time when giving evidence in the Commission in September 2017 to recall what occurred in December 2006 and in November/December 2008 respectively. Instead, clearly she has had to recall, sometimes in specific detail, facts in relation to this matter as early as April 2010 so as to assist in responding to the initial request from the Chief Registrar and she had also been present at some important meetings, as follows:

(1) The first letter from the Chief Registrar to the Respondent was dated 8th April 2010, attaching the complaint of Maya Wati Prakash (**Exhibit "9**");
(2) The response from the Respondent to the Chief Registrar dated 29th April 2010 with the reference 'SPS/dm/8314' (presumably Suruj Prasad Sharma with Dipka Mala's input) was 10 pages (Exhibit 10);
(3) The letter from Willy Hiuare was dated 7th May 2010 follow by a meeting with Willy Hiuare held on 15th May 2010 – at which Dipka Mala was present;
(4) The mediation was held on 24th June 2010 – at which Dipka Mala was present and allegedly took notes (**Exhibit "73"**);
(5) The second letter from the Chief Registrar to the Respondent was dated 11th December 2013, attaching the complaint of Pranita Devi (**Exhibit "21"**);
(6) The response from the Respondent to the Chief Registrar dated 23rd December 2013 was 14 pages (Exhibit 23) (presumably with Dipka Mala's input);
(7) On 16th July 2014, the Chief Registrar filed an Application with the Commission setting out two allegations of Professional Misconduct against the Respondent that was made returnable on 30th July 2014 when the Application was withdrawn (Exhibit 25);
(8) On 14th October 2015, a new Application was filed by the Chief Registrar with the Commission setting out two of Professional Misconduct and one of Unsatisfactory Professional Misconduct against the Respondent and his law firm;
(9) On 13th November 2015, a supplementary application was filed by the Chief Registrar with the Commission setting out a further allegation of Professional Misconduct against the Respondent;
(10) On 10th February 2016, the Respondent filed and served an Interlocutory Application together with an affidavit in support (presumably with Dipka Mala's input) seeking Orders for a permanent stay/dismissal of the four Counts. A hearing took place in April 2016 and a ruling was handed down on 21st September 2016. The substantive hearing then began in December 2016 and continued in June 2017 and September 2017.

[653] As an example of how I found that Dipka Mala's evidence closely coincides with the facts, was her evidence-in-chief in relation to a telephone call between Subhasni Singh and her on or about 9th December 2008, which she recalled as it was after the 13 days rituals. In that regard, I note that Maya Wati Prakash in evidence-in-chief in the High Court, when asked about the rituals, advised as follows (Doc.21,

'Transcript', p.7, Exhibit 47, p.120):

> *"MS NARAYAN: When Shalen [sic] passed away his funeral was held straight away or after a couple of days?*
>
> *MRS PRAKASH: After two days.*
>
> *MS NARAYAN: And then how old [sic] does a funeral rite take in the Indian custom?*
>
> *MRS PRAKASH: 13 days."*

[654] Even though there are other aspects of the evidence of Maya Wati Prakash that are unreliable, if Salen passed away on 24th November 2008 and his funeral was held *'after two days'*, that is, on or about 26th November 2008 and the 13 days of funeral rites began from the day he was buried, then it would have concluded on 8th December 2008, making 9th December 2008 after the 13 days rituals.

[655] **Not only did I find Dipka Mala (apart from Suruj Sharma) the most reliable witness who gave evidence, I also note that, despite the lengthy evidence that she gave in her examination-in-chief, her cross-examination by Counsel for the Applicant was surprisingly brief.** Indeed, as Counsel for the Respondent succinctly noted in their written submissions (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 21, at para [38]): ***'Mala's evidence was unchallenged by the Prosecution.'*** **I have indicated above that I agree with that submission in relation to Dipka Mala's evidence as to the preparation of Salen's will. I also agree with that submission in relation Dipka Mala's evidence as to the storage of his Will. I further agree with that submission in relation to Dipka Mala's evidence as to what occurred on 12th and 15th December 2008.**

(vii) The evidence of Mr. Suruj Sharma

[656] The final witness who could speak on the location of the Will was the Respondent legal practitioner, Mr. Suruj Sharma. According to the written closing submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions'*, 8th January 2018 at paras [452]-[461]), the evidence-in-chief of the Respondent in relation to the storage of an electronic copy of the Will by his law firm was, in summary, was as follows:

> *'452. He stated that he was not in Fiji on 22nd December 2006 but rather in Malaysia.*

453. *That he first got involved in the estate of SPM on 12 December 2008.*
454. *On 12 December 2008, he re-called MWP and Subhasni had called into the office and seen by Dipka and towards end of meeting with Dipka, they came to see him briefly. Dipka briefed him first of the background. He probably told them not the right time to talk. They wanted to talk about estate of SPM in terms of a Will made by his office previously.* ***Dipka had printed a copy from their system and their copy was given to them and they were told to find a signed one as signed one not with their office****. They asked him what would happen if they don't find it. He told them laws of intestacy would kick in and estate would go to widow and at that stage they said that the widow is there and he asked them where she was and they responded that she was at home. That he met both of them for the first time. They told him that they would go and have a family discussion.*
455. *They returned on 15 December 2008. MWP, Subhasni, PD and a gentleman came. They met Dipka first and she brought them to his office. He asked if they found a Will and they replied that they did not find it, had family discussion referring to three of them (PD, MWP & Subhasni) and that they wanted to pursue the matter urgently as they wanted to move on with administration of estate.*
456. *They also explained about permits (mini van& taxi), money owed to bank and a potential third party claim as SPM had died in an accident.* ***He took PD through the first meeting with Subhasni and MWP and that his office had given a copy of the Will and they needed to find a signed copy of the Will****. Legal options were explained.* ***<u>They again showed the copy to all three</u>****. He advised them that in the absence of a signed Will, the estate would go to PD. The impression he got was that they wanted to proceed with LA.*
457. *Both parties stated they wanted to apply under joint names and he told them that if joint application is made, High Court registry may not accept. They did not inform them what their internal family arrangement was and they wanted LA so as to move things along.*
458. *Instructions taken for joint application on the same day.*
459. *He was told by Dipka that MWP had taken her documents although he did not see her uplifting those documents. Dipka told him that MWP told her that she was going to see another lawyer arranged by her daughter, Subhasni. By that time, the documents were already uplifted.*
460. *The instruction of joint application was put away in a dip. Joint instructions put in a manila file folder. Pending file with instruction sheet and put in a tray/dip with pending file. He stated that they would describe it as pending instructions and not an active file.*
461. *There was no action taken on that pending file.'*
[My emphasis]

[657] As for <u>cross-examination</u> on this issue, the summary in the written closing submissions of Counsel for the Applicant Chief Registrar at para [482] was:

> *'He was referred to Exhibit 10 [the letter dated 29th April 2010 from Patel Sharma Lawyers to the Chief Registrar responding to the complaint by Maya Wati Prakash] and* ***asked why there was no mention of the unsigned Will being shown to MWP and Subhasni*** *[on 12th December 2008] and he replied*

that <u>they were replying to complaint as per complaint form</u> and did not omit it for any reason.' [My emphasis]

[658] I agree generally with the above as a summary of the cross-examination of Suruj Sharma on this issue. I note, however, that while it is correct that in the letter of 29th April 2010 '*there was no mention of the unsigned Will being shown to MWP and Subhasni'* on 12th December 2008, **I also note that <u>there was a specific mention in the same letter of an EARLIER entry on 9th December 2008 (at pp.4-5, Exhibit 10, pp.36-37), that is, three days prior to 12th December 2008 entry, of Subhasni Singh being advised by Dipka Mala an unsigned copy of the Will on the Firm's computer</u>**, as follows:

> *'Ms. Mala of this office received a further call from Subhasni following up on the Estate and what could be done. <u>She was advised that **our computer system showed that a Will was created and modified on 22nd December 2006** in the name of **Salen Prakash Maharaj**</u> but we were unable to locate any signed Will or any further records in relation to that Will ...*
> *...*
> ***<u>Subhasni</u>** <u>further enquired if the said Will (as existed in the Computer)(unsigned) could be executed</u> and she was advised by **Ms. Mala** that that could **not** be done as **Salen Prakash Maharaj** had already passed away.'*
> [Underlining my emphasis]

[659] I further note that **as <u>Exhibit 10 is dated 29th April 2010</u>** and the entry within it for 9th December 2008 recording that Subhasni Singh was advised by Dipka Mala '*that our computer system showed that a Will was created and modified on 22nd December 2006',* **it clearly shows that <u>the mention of there being an unsigned Will in the Firm's computer system as at 9th December 2008 was not some recent invention</u> created as a defence to the current proceedings before this Commission that were first commenced on 16th July 2014, withdrawn and then recommend in 14th October 2014**. Indeed, I note that **the letter of 29th April 2010 was <u>created BEFORE the meeting with Willy Hiuare on 15th May 2010. It was also created BEFORE</u> (and thus it cannot be inferred that it was written to accommodate) <u>some of the contrary evidence appearing in later documents</u>**, such as:

(1) Maya Wati Prakash's affidavit of her evidence-in-chief sworn on 26th October 2012 (Exhibit 18);

(2) The judgment of Justice S.N. Balapatabendi of 11th October 2013, in the High Court at Suva, in *Prakash v Devi* (Exhibit 19);

(3) Pranita Devi's letter of complaint to the Chief Registrar dated 23rd January 2014 (**Exhibit "24"**); and

(4) Maya Wati Prakash's statement that was written out (in English and translated in Hindustani) by "Jitendra" on 29th September 2015 (Exhibit 28).

[660] According to Counsel for the Respondent in their written submissions *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 15, sub-paras [xii]-[xv]), the evidence of the Respondent legal practitioner in relation to the storage of an electronic copy of Salen's unsigned Will was, in summary, was as follows:

> *'[xii] The Practitioner only met MWP, SS and PD after SP's death in November 2008. The first meeting took place around 12th December 2008.*
> *[xiii]. The Practitioner* ***denied that he ever informed MWP, SS or PD that his Firm did not make a Will for SP****.*
> *[xiv]. The Practitioner in fact* ***gave evidence that a copy of the electronic version of SP's Will was shown to the parties when they met with him and Mala****.*
> *[xv]. The Practitioner confirmed that his Firm was initially jointly instructed by MWP and PD to take out Letters of Administration but MWP then withdrew her instructions and had sought legal advice elsewhere.'*
> [My emphasis]

[661] I agree generally with the above as a summary of the evidence of Suruj Sharma in relation to the storage and producing of an electronic copy of the unsigned Will. I also note that the Respondent confirmed, near the beginning of his evidence-in-chief that, *"prior to coming here* ***I did look at the relevant documents and to refresh my memory*** *and based on that my first involvement was on the 12th of December 2008"*. [My emphasis] Hence, his recollections in his evidence before the Commission, as with Dipka Mala, were not based solely on memory, which, unfortunately, seemed to have been the case for all other witnesses.

[662] I note that I have previously made extensive findings in relation to Count 2 that a proper record was maintained by Patel Sharma Lawyers in relation to the storing of an electronic unsigned copy of Salen's Will and that it was printed and shown to Maya, Subhasni and Pranita in December 2008. I have also found that it was shown to Willy Hiuare at the meeting on 15th May 2010 so he could compare the unsigned copy stored electronically on the computer system of Patel Sharma Lawyers with a

copy of the signed original that he brought with him to that meeting. The Applicant, however, has relied upon the evidence of Maya Wati Prakash, Subhasni Singh and Pranita Devi to satisfy the evidential burden upon him that the Respondent '***failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006***' with the inference being (without actually being particularised), that is, in the records of the Respondent's firm.

[663] Even if I had found that the evidence of Maya Wati Prakash, Subhasni Singh and Pranita Devi had satisfied the evidential burden upon the Applicant (which I have not) so as to shift the burden to the Respondent on this issue, Counsel for the Respondent, in my view, satisfied that evidential burden (and thus shifted the onus back to the Applicant) through the evidence of Dipka Mala and Suruj Sharma. What I have set out above in relation to this aspect of Count 3 only confirms my view (which I have previously found in relation to Counts 1 and 2) as to the unreliability of the evidence of Maya Wati Prakash, Subhasni Singh and Pranita Devi on the storage of the Will at the Respondent's firm.

[664] The alternative argument of the Applicant, as I understood it, was that the Respondent should have waited before making the application for a grant of Letters of Administration. This then shifted the focus of the evidence to the storage of Salen's Will by him after 22nd December 2006.

(3) The Will taken by Salen Prakash Maharaj on 22nd December 2006 and stored by him

[665] According to Justice S.N. Balapatabendi in his judgment handed down in the High Court at Suva on 11th October 2013 (when he ruled in favour of Maya Wati Prakash pronouncing that the Will of Salen Prakash Maharaj dated 22nd December 2006 was valid and that the Letters of Administration granted to Pranita Devi on 16th February 2009 be revoked), it was an agreed fact that '*On 23 January 2010, A Will was discovered executed by the Deceased.'* (See "AD19", *Agreed Bundle*, pp. 62-75, tendered as Exhibit "19"); see also *Prakash v Devi*, (supra).)

[666] I have found that it is clear Salen took his Will with him when he left the offices of Patel Sharma Lawyers on 22nd December 2006. According to the evidence of Dipka Mala, Salen's Will was placed alone in a blank envelope (as was the Will of Maya Wati Prakash that was also placed alone in a separate blank envelope)

and given to each of them by Dipka Mala. It was also Dipka Mala's recollection was that as Salen and Maya left the office of Patel Sharma Lawyers on 22nd December 2006, Salen *"had both envelopes with him".* This was confirmed by Maya Wati Prakash in her evidence before the Commission on 5th December 2006, when she recalled that: *"Mine was given to me and my son's was given to him but I gave mine to my son".* As to what occurred after they left, it was put to Maya Wati Prakash in cross-examination before the Commission on 5th December 2006, *"But is it not correct that you knew that Salen has taken his Will home?"* to which she replied: *"Yes he took it home but I was not here so I did not know where he had placed it".* **That response was then clarified by Maya confirming that she was present in Fiji on 22nd December 2006 when Salen's Will was made and that, *"Yes, he took it home."***

[667] **If Salen's Will was discovered on 23rd January 2010, then where was it stored during the three intervening years from 22nd December 2006?**

(i) The evidence of Maya Wati Prakash

[668] According to Maya Wati Prakash in her evidence-in-chief given before the Commission on 5th December 2006: ***"The son kept both [Wills] I was not residing here."*** When Maya was asked further in her evidence-in-chief by Counsel for the Applicant Chief Registrar in relation to the storage of Salen's Will, her evidence was:

"Mr. Chand:	*Now prior to your son's death* ***were you ever aware where he kept the Will****?*
Interpreter:	***No, I did not know****.*
Mr. Chand:	*Would you be able to say if anyone else in the family was aware of where he kept his Will?*
Interpreter:	*After his death,* ***I did ask my daughter in law and my son's where he kept his Will but they said that they did not know****.*
Mr. Chand:	*I think the witness said that,* ***I had asked my daughter/daughters and daughter in law and they said they were not aware****.*
Commissioner:	***daughter and daughter in law****?*
Mr. Chand:	***Yes****."*
	[My emphasis]

[669] As for why Maya would be asking her daughter-in-law, Pranita Devi, as to the whereabouts of the Will does not make sense, particularly when Pranita was not present when the Wills of Salen and Maya were made on 22nd December 2006.

Indeed, according to Pranita's evidence she was not even aware as to the existence of a Will until it was discovered on 23rd January 2010. On the other hand, I have also noted Subhasni's claim in her evidence before the High Court (Doc.21, 'Transcript' p. 46, Exhibit 47, p.160) that Pranita was part of the "family" discussions the night before the Wills of Salen and Maya were made on 22nd December 2006.

[670] I also note that the evidence of Maya before this Commission on 5th December 2016 was that when Salen's Will was found, "*I was not there, I was in America",* however, in cross-examination she conceded (as I have also noted above):

> *Mr. Sharma:* *Okay, but you knew when the Will was taken home in 2006 isn't that correct?*
> *Interpreter:* ***Yes he took it home**."*
> [My emphasis]

[671] As for the storage of the Will, according to the written submissions of Counsel for the Applicant Chief Registrar, the evidence of Maya Wati Prakash on this issue during cross-examination before the Commission was: ('*Closing Submissions',* 8th January 2018, at [43]-[44] and [67]-[70]):

> *'43. She informed the Commission that on the 22nd December 2006 she spoke SPM about the will. At that they were living in Koronivia in a 4 bedroom house. PD was also staying with them. Her daughter and son-in-law were living in a separate flat.*
> *44. The will was found in a bookshelf. The bookshelf was in their house in Koronivia. All the documents from the bookshelf were brought to her younger daughter's house in Caubati. She was not aware that the will was kept in the bookshelf.*
> *...*
> *68. She confirmed that will was found 1 year later. She said **her children had packed all the documents from the bookshelf in Koronivia and had taken it to Irene's house in Caubati**. Rosie found the Will when she was looking for her title in in documents which was brought from Koronivia.*
> *70. She reiterated that **Subhashni [sic] had found the original will in Caubati** while she was looking for her documents.'*
> [My emphasis]

[672] According to the written submissions of Counsel for the Respondent, the evidence of both Maya and Subhasni on this issue (as previously cited in part above) can be summarised as follows *('Practitioner's Closing and Responding Submissions',* 31st January 2018, page 9, para 24, sub-paras [iii]-[iv] and [viii]):

*[iii]. When SP died **neither MWP nor SS made any effort** to look for SP's Will at home.*

*[iv]. MWP's evidence was that SP kept his documents on top of a drawer/cabinet but **she didn't make any effort to look for any Will**.*

...

*[viii]. MWP and SS conceded that SP's signed Will was found at their home. Even on this issue their evidence was contradictory and ambivalent. **They really couldn't satisfactorily explain why the Will had not been found earlier**.'*

[My emphasis]

[673] I agree generally with the above as summaries of the evidence of Maya Wati Prakash on this issue.

[674] I have also noted the following from the transcript of the evidence of Maya Wati Prakash given under cross-examination before this Commission on 5th December 2016, in summary, as follows:

(1) On 22nd December 2006, *"... when we made the Will we were living at Koronivia"* and living in the house at Koronivia, was Salen, his wife (Pranita) and Maya Wati Prakash and *"The daughter and son-in-law used to stay but in a separate flat";*

(2) The house had four bedrooms;

(3) Legal documents like the Power of Attorney and title to the property were kept at that house "*with my son",* however, as to where Salen was keeping his documents Maya said *"I did not know because I did not used to stay here".* Maya did confirm, however, when asked again, "***But you said your son was keeping the documents in the house right?",*** Maya answered ***"Yes";***

(4) As for where in the house Salen was keeping his Will, Maya replied: "***No I don't know anything but <u>when the Will was found it was found on the bookshelf"</u>***;

(5) When Maya was asked further about the bookshelf, she advised, "*The bookshelf was in the old house but when the daughter went overseas, then **all her documents were bought to** ... **to my younger daughter's house in Caubati".*** When Maya was cross-examined, "*So you knew the original Will was on the bookshelf, correct?",* she replied, *"I did not know, if I had known why would I have done a case and hired a lawyer?"*

(6) I then intervened and sought to clarify what Maya was saying and so I asked her, *"**Was the Will on the bookshelf in Koronivia**? Was the Will on the bookshelf*

elsewhere?", to which Maya replied directly to me, *"**Koronivia"*** and this was also confirmed by the interpreter that Maya's reply was: ***"In Koronivia"***. I then asked Maya again, so that there was no confusion, "*Yeah, **so sitting on the bookshelf in Koronivia***?", to which Maya replied directly to me in English, ***"Yes"***;

(7) As for how the Will then got transferred from on the bookshelf located somewhere in the house at Koronivia to being kept in the "*younger daughter's house in Caubati"*, Maya's evidence was that at some stage in 2010 everything was packed up to be moved and the Will was taken off the bookshelf from the house at Koronivia and moved to Caubati. As at that time, Maya was residing back in the USA, Maya could not say who packed up the house saying, "*I will have to ask my children"* and, without specific reference to Salen's Will, said that, *"The children who took the stuffs, they told me that they had taken everything from the bookshelf and bought it to Caubati".*

(8) When she was asked, *"Then who was looking after the [Koronivia] house afterwards?",* she replied, *"The house was closed";*

(9) As for the time period **when the documents were packed from the bookshelf in Koronivia and taken to Caubati**, Maya confirmed that this occurred "*somewhere around 2010";*

(10) When Maya was asked,*"**So from the time of Salen's death in 2008, 24th November until 2010, you are saying that this particular document was sitting in a good bookshelf in Koronivia***?", she replied, "***Yes***, *all the bookshelf was kept there as my daughter had gone to Brisbane to study";*

(11) As for who was residing in the house at Koronivia after Salen's death on 24th November 2008, Maya replied, *"Myself, my daughter-in-law, my daughter and my son-in-law";*

(12) As for **where was the bookshelf kept in the house at Koronivia**, Maya advised, *"**In the sitting room of the daughter**"* and, when asked whether she could confirm that the bookshelf was still there at the time of Salen's death, she replied: "***It was there.**"*

[675] **If Maya Wati Prakash was correct and Salen's Will was still at Koronivia in January 2010, then how was it discovered by Subhasni Singh on 19th or 23rd January 2010 at Ireen's house at Caubati?**

(ii) The evidence of Subhasni Singh

[676] According to Balapatabendi J in his judgment in *Prakash v Devi* at para [9], **Maya** testified before him *'that **her daughter has discovered the will** sometime in January 2010 of Salen Prakash Maharaj while searching for some papers'*. As for **Subhasni Singh**, Balapatabendi J noted at [12] that *'She also **stated that she discovered the will of Salen** after about an year when she was in Fiji for a holiday while searching some documents'*. Further, as Balapatabendi J noted at [13]:

> *'... The following question were asked on behalf of the Defendant to ascertain in the witness's interest and discovery of the will.*
>
> *"Mr Hiuare: Mrs Singh because of this after 1 year were looking for the will?*
> *Mrs Singh: I was not looking for the will. I was looking for my other documents there. **I found the will** and I gave it back to the solicitor. If I was looking for the will I would not go back to Australia I will be still searching for the will here."'*
> [My emphasis]

[677] According to the written submissions of Counsel for the Applicant Chief Registrar, Subhasni Singh's evidence-in chief before the Commission in relation to the storage of the Will by Salen was, in summary, as follows ('*Closing Submissions',* 8th January 2018, at [113] and [115-126]):

> *'113. In relation to the Koronivia Road property, she stated that when her brother moved in, she had to build another flat for herself. The Koronivia property was owned by her brother SPM and prior to that her mother was the owner. SPM was the Power of Attorney holder and he had the Koronivia property transferred in his name although she did not know when it was done.*
>
> ...
>
> *115. After one year, in late January (19 or 23 January 2010), **she found the original Will of SPM at her sister's home in a box in Caubati**. She was in fact sorting out all her papers and books which her sister collected from the Koronivia property which were contained in two boxes.*
> *116. She stated that when **she went to Australia in July 2009**, she left the house with all her books and everything there. **Her sister cleared the Koronivia house** as they were putting a caretaker to stay and so **she took all the books and papers to her place in Caubati**.*
> *117. That in January 2010, she was in Fiji as her mother in law was very sick. Her sister requested her if she could come and sort out all the things which were in the carton.*
> *118. She went and found few cartons and her sister told her that **the cartons contained things that she had packed from her brother's as well as her side of the property**.*

119. *That whilst sorting out, **she found an envelope and opened it to find her deceased brother's Will**. She did not pay much attention if the envelope had anything written on it.*
120. *She confirmed that the boxes contained her school books, university books, school results and her brother's vehicle papers.*
121. *She stated that **the boxes might have been packed by her sister or some laborers [sic] that she hired**.*
122. *She confirmed that AD1 was the Will that she found in the envelope and that it was original Will and she identified it as original as she believed the sealed stamp was there although she could not remember if it was on the Will.*
123. *She also confirmed that **she was told by her sister [Ireen] that the cartons contained stuff from the Koronivia property** and that **her sister did not know from where specifically she got the Will from as the documents in <u>the boxes were from both flats</u>** [at Koronivia].*
124. *She stated that in July 2009, she went to Australia to study and prior to that **she was staying in her Koronivia property from November 2008 to July 2009**. She mentioned that <u>her sister must have cleaned up the Koronivia property sometime after July 2009 but she could not recall the exact date</u>.*
125. *That after finding the Will, she called her mum who was in US and informed her about the Will being found and MWP told her to take the Will to her solicitor, Ms. Prem Narayan (PN).*
126. *That she called PN and told her about the Will and PN asked her to bring it over and that she would put it in safe custody. She then went and delivered the Will to PN although she could not recall the actual date. She was asked by PN to put some notes and thereafter she left the note and Will with her and PN advised her that she would consult her mother.'*

    [My emphasis]

[678] The written submissions of Counsel for the Applicant Chief Registrar have summarised the <u>cross-examination</u> of Subhasni on this issue as follows ('*Closing Submissions',* 8th January 2018, at [136] and [146]-[153]):

*'136. She also confirmed that **PD [Pranita Devi] left in December 2008 and possession of the Koronivia property was in her [Subhasni's] and her mum's hands**. She stated that she stayed there until July 2009 when she left for Australia to pursue her studies along with her husband and that <u>her mum stayed there alone for a while until she asked her sister to take mum to her home in Caubati</u> although she could not recall when her mum started living in Caubati.*

...

146. ***That SPM, his wife, Subhashni [sic] and her mother** (whenever she used to visit Fiji) **were staying in the Koronivia property**.*
147. *<u>That SPM had issues with his wife, Pranita Devi and got involved with a girl whose name was also Pranita and that</u> **both Pranita's [sic] were living together at the Koronivia property**.*
148. *That she did not know where SPM kept his documents or where he used to keep his official documents. <u>SPM's flat had two bedrooms</u>.*

149. *She stated that **they did not make an effort to look for the Will as after the accident**, they were disturbed and people were paying visits. She also said that she does not know if anyone else looked for the Will.*
150. *She said that **they thought her sister-in-law [Pranita Devi] might have taken the Will as she left home and packed her things so they thought she may have taken the Will**.'*
[My emphasis]

[679] Unfortunately, (as previously noted above) the written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions'*, 31st January 2018) have summarised the evidence of Maya and Subhasni together. Doing my best to split those submissions, my understanding of the submissions of Counsel for the Respondent summarising the evidence of Subhasni in relation to the storage of the Salen's Will was (page 9, para [24], sub-paras [iii]-[v] and [viii]), as follows:

*'[iii]. When SP died **neither MWP nor SS made any effort** to look for SP's Will at home.*

...

*[v]. SS in her evidence said that **she didn't look for the Will and assumed that PD took it with her**.*

...

*[viii]. MWP and SS conceded that SP's signed Will was found at their home. Even on this issue their evidence was contradictory and ambivalent. **They really couldn't satisfactorily explain why the Will had not been found earlier**.'*
[My emphasis]

[680] I agree generally with the above summaries of each Counsel as to the evidence that Subhasni Singh gave on this issue, though I note that Subhasni's evidence was not that '*her sister-in-law [Pranita Devi] might have taken the Will',* rather it was it was that "*my sister-in-law **must** have taken it"* w**hich she then clarified** as follows:

"Mr. Sharma: *... Did you or your mother make any effort to look for the Will?*
Ms. Singh: *No, I didn't.*

Mr. Sharma: *You didn't?*
Ms. Singh: *No.*
...
Commissioner: *Did you make the effort? You said no?*
Ms. Singh: *No, I didn't.*

Mr. Sharma: *Okay, and to the best of your knowledge*
Ms. Singh: *Mhh.*

Mr. Sharma: *Do you know if anyone else looked for the Will?*
Ms. Singh: *I don't know*

Mr Sharma: *You have no?*
Ms Singh: *No*

Mr Sharma: *Right.*
Ms Singh: *We thought that* ~~*t*~~ ***my sister-in-law must have taken it*** *because she left the house after my brother died.*

…
Commissioner: *Let's just take that slowly because Mr. Sharma was asking you to the best of your knowledge* ***if you know anyone else***
Ms. Singh: *No.*

Commissioner: ***Looked for the Will?*** *You said that?*
Ms. Singh: ***No, I didn't****.*

Commissioner: *'I didn't know'?*
Ms. Singh: *Yes.*

Commissioner: *And then you are saying?*
Ms. Singh: ***We thought that might be my sister in-law must have taken that's why we didn't look for it****.*

…
Mr. Sharma: ***And, but at this stage Ms. Singh***
Ms. Singh: *Mhh.*

Mr. Sharma: ***Your sister in-law, Pranita****.*
Ms. Singh: *Mhh.*

Mr. Sharma: ***Devi, the lawful wife of Salen was still staying at home, wasn't she? Was in your house?***
Ms. Singh: *No, she left on 28th of December, according to you. I don't remember the date but you mentioned this that she left on 28th of December.*

Mr. Sharma: *Yes, yes.*
Ms. Singh: *Even I can't remember that.*

Mr. Sharma: *Right,* ***but he [Salen] died on the 24th of November?***
Ms. Singh: *Yes.*

Mr. Sharma: ***2008?***
Ms. Singh: ***Yes.***

Mr. Sharma: *So all this time, up until 28th of December, you are thinking that she*
Ms. Singh: *Yes.*

Mr. Sharma: *Might have taken the Will. But she left the home.*
Ms. Singh: *She left on 28th of December, so* ***we thought she must have taken it****.*

…
Mr. Sharma: ***Would you agree though***
Ms. Singh: *Mhh.*

Mr. Sharma: ***That she didn't take the Will?***
Ms. Singh: ***Well she didn't because it was there in the house****.*

Mr. Sharma: ***It was in the house eh?***
Ms. Singh: ***Yes.****"*

[My emphasis]

[681] **The evidence-in-chief of Subhasni** that "*my sister-in-law must have taken it"*, which she then clarified to *"we thought that might be my sister in-law must have taken that's why we didn't look for it",* **as an explanation as to why no search was undertaken for over a month did not make sense as the sister-in-law was still residing with Salen's family in Koronivia between 25th November 2008, when Subhasni was advised by Dipka Mala to undertake a search and when the sister-in-law left the house on or about 28th December 2008**. I also note that if, according to Maya Wati Prakash, Salen's Will was on a bookshelf in the home at Koronivia *"**in the sitting room of the daughter**",* then **this could only have been in Subhasni's adjoining flat**. Subhasni's evidence, however, was the opposite:

"Mr. Sharma: *Okay. Now, in Salen's flat.*
Ms. Singh: *Mhh.*

Mr. Sharma: *Were you aware where he kept his documents?*
Ms. Singh: *No, not at all, because, his wife was there. So, no, not me.*

Mr. Sharma: *Right. Okay, his wife was there you said?*
Ms. Singh: *Yes.*

Mr. Sharma: *But you visited the flat you knew the lay-out?*
Ms. Singh: *Yeah.*

Mr. Sharma: *And do you see you might have water bills, you might have taxi permits or things, did you ever see any documents lying around in Salen's house, where it was kept?*
Ms. Singh: *What you mean?*

Mr. Sharma: *I, **I asked this question because your mother has described***
Ms. Singh: *Mhh.*

Mr. Sharma: ***Where the documents were kept, some of the documents.***
Ms. Singh: *Yup.*

Mr. Sharma: ***I just want to know from you whether you knew** about the*
Ms. Singh: ***No.***

Mr. Sharma: ***Where he kept any official documents?***
Ms. Singh: ***No, I don't know**.*

Mr. Sharma: *Right. **You had no idea eh?***
Ms. Singh: ***No**."*
[My emphasis]

[682] Subhasni then accepted that Salen's Will must have been initially in the home at Koronivia as follows:

"Mr. Sharma: *Do you now accept in hindsight now*
Ms. Singh: *Hmm*

Mr. Sharma: *That the Will was actually at your home?*
Ms. Singh: *Yeah,* ***it was found at home, yeah, in Koronivia****.*

Mr. Sharma: *Right. Because, in initially I presumed it wasn't Koronivia?*
Ms. Singh: *Yes, it was in Koronivia.*

Mr. Sharma: *And then that was where Salen was staying, right?*
Ms. Singh: *Yes.*

Mr. Sharma: ***And then it got packed and taken to Caubati?***
Ms. Singh: ***Yes. My sister tried to clear the house and then yeah."***
Mr. Sharma: *Okay."*
[My emphasis]

[683] Subhasni's evidence then became somewhat unreliable even as to the date when Salen's Will was found as follows:

"Mr. Sharma: *And Ms Singh, you found this Will on the 23rd of January 2010, correct?*
Ms Singh: *In January 2010 yes, but I don't remember the date, yes.*

Mr Sharma: *And once you found the original Will*
Ms Singh: *uh..huh*

Mr. Sharma: *You said in your evidence yesterday*
Ms Singh: *uh..huh*

Mr. Sharma: *That you rang your mother?*
Ms Singh: *Yes.*

Mr. Sharma: *In America?*
Ms Singh: *Yes.*

Mr. Sharma: *And had a conversation with her?*
Ms Singh: *Yes.*

Mr. Sharma: *And she told you to take the Will to Prem Narayan?*
Ms Singh: *Yes.*

Mr. Sharma: ***And you then took the Will to Ms Narayan?***
Ms Singh: ***Yes****.*
…
Mr. Sharma: *When you found the Will you rang your mother the same day?*
Ms Singh: *Yes, I think so, I called her same day.*

Mr. Sharma: *Now surely you can remember*
Ms Singh: *Yes*

Mr. Sharma: *That after your mum told you to take the Will to Prem Narayan*
Ms Singh: *yes*

Mr. Sharma: *You would have taken the Will when,* ***how long did it take you to go to Prem Narayan's office?***
Ms Singh: *Sunday the office are closed*

Mr. Sharma: *Right*
Ms Singh: *So I can't take it on Sunday.*

Mr. Sharma: *Yeah.*
Ms Singh: ***So I think I took it the next day****.*

Mr. Sharma: *Right, okay.*
Ms Singh: ***But I don't remember the date when I found the Will.***
…
Commissioner: *But her evidence has been consistent Mr. Sharma that she has said a number of times that it was the Sunday*
Mr. Sharma: *uh…huh*

Commissioner: ***It was the next day what she thinks was Monday****.*
Ms Singh: ***Yeah****.*

Mr. Sharma: ***It's just that she pleaded everywhere and anywhere that she found it on 23rd of January***
Commissioner: *I understand ...*
…
Commissioner: *But I understood your evidence*
Ms Singh: *Yeah*

Commissioner: *You can't recall the date* ***but you thought it was Sunday, office closed, Monday, you think the next day you took it?***
Ms Singh: ***Even I don't know if it was a Saturday or Sunday but it was in the weekend, I found it.***
…
Commissioner: *But it was then a following day*
Ms Singh: *And due to timing…*

Commissioner: ***So it would have been the Monday is what she is saying.***
Mr. Sharma: ***Okay****."*
[My emphasis]

[684] The problem with the above evidence that Subhasni Singh gave before the Commission on 6th June 2017 is that it was different to the specific evidence that she gave in the High Court before Justice Balapatapendi in October 2012, as Counsel for the Respondent clearly put to her and then I asked her to clarify this for me, as follows:

"Mr. Sharma: ***Do you remember in that you said in the evidence before Justice Balapatapendi?***
Ms Singh: *uh….huh*

Mr. Sharma: ***You gave evidence when you were been cross-examined by Mr Hiuare and he asked you when did you basically where were you on and you said I returned to Brisbane on the 24th of January?***
Ms Singh: *That could be wrong I am not saying that I was 100% right on that.* ***That could be wrong or that could be right****.*

Mr. Sharma; ***That was under oath?***
Ms Singh: ***Well I can't take every date on the case.***
...
Commissioner: ***Just, just listen to me carefully.***
Ms Singh: ***Yeah****.*

Commissioner: *Okay and I realise you've been upset and I realise it's a period of time*
Ms Singh: *uh…huh*
...
Commissioner: ***There was evidence you gave in the High Court, it wasn't that 'I could', you weren't 'or may or may not be',*** *you pretty*
Ms Singh: *Maybe*

Commissioner: *Hold on.*
Ms Singh: *Yup*

Commissioner: ***You were pretty clear in the High Court it was the 24th.***
Ms Singh: ***Yeah****.*
...
Commissioner: *You understand normally I think maybe your memory might have been better in 2013 and in 2017 I don't know,* ***but you understand what you said in 2013?***
Ms Singh: *Yeah.*

Commissioner: *What are you saying to me today?*
Ms Singh: *Well, my view* ***when I came for that court hearing I must have looked at my passport date****, the stamp on the passport and then I gave to her that* ***I must have gone back on that date****.*
...
Mr. Sharma: *Ms Singh the reason why I've asked you this question and I will now spell it out for you*
Ms Singh: *uh…huh*

Mr. Sharma: ***You said in the previous court case you found the Will on the 23rd of January 2010***
Ms Singh: *uh…huh*

Mr. Sharma: *In the High Court evidence at … page 157, Ms Narayan your own Counsel asked you about*
...
Mr. Sharma: *It would be shown on page 157, right you got that?*
Ms Singh: *Yup.*

Mr. Sharma: *Ms Narayan asked you, 'After you discovered the Will and handed it to your mother's solicitor you left for further studies?' and* ***you said (Ms S Singh) 'Yes. I was back in Brisbane on 24th January' 2010 basically****?*
Ms Singh: ***Yeah****.*

Mr. Sharma: *The point I was making is that* ***you keep on saying the Sunday the law firm is closed****?*
Ms Singh: *Yeah.*

Mr. Sharma: ***You discovered the Will on the 23rd of January*** *which according*
Ms Singh: *No, that's what I said,* ***it could be a week before that****.*

Commissioner: *Hold on.*
Ms Singh: *I did it one Sunday but I don't know when the 24th of…I did when*
…
Commissioner: *… **I thought you were saying <u>it could have been the Saturday or Sunday?</u>***
Ms Singh: ***<u>Yes</u>.***

Commissioner: ***But now what you're saying could have been a week before?***
Ms Singh: ***Yes, I don't remember the date**, it was on 2010 or 24th. I don't remember the date.*

Commissioner: *<u>All she's being consistent about</u> to be fair to her Mr. Sharma is that <u>it's been a weekend</u>.*
Ms Singh: ***<u>Yes</u>.***
…

Mr. Sharma: *But Ms Narayan when she gave her statement Ms Singh*
Ms Singh: *uh…huh*
…
Mr. Sharma: ***She said that the Will was handed to her on the <u>19th February 2010</u>***
Ms Singh: *19th of February 2010?*

Mr. Sharma: *Yes.*
Ms Singh: ***<u>No</u>.***
…
Ms Singh: *<u>That's not correct</u>.*

Mr. Sharma: *Have a look at Ms Narayan's statement.*
Ms Singh: *Yeah .*

Mr. Sharma: *It's the supplementary bundle of documents, the last document, page 91.*
…
Mr. Sharma: *It's SD21.*
…
Mr. Sharma: *Page 91. [**Exhibit "59"**]*
…
Mr. Sharma: *First paragraph Sir, first paragraph on page 91. The first line*
Ms Singh: *uh….huh*

Mr. Sharma: *'**On 19 February 2010, I received the original will from one of Mrs Prakash's daughters** (I cannot recall who it was).'*
Ms Singh: *uh….huh*
…
Ms Singh: ***Would have been 19th of January**, she must have put the wrong mark.*
…
Commissioner: *On that, that's incorrect is what you're saying?*
Ms Singh: ***<u>That's incorrect</u>.***

Commissioner: *It cannot be?*
Ms Singh: *No, I was not here in Fiji on that day.*

Mr. Sharma: *You were not in here on the 19th of February?*
Ms Singh: *No, no, my uni stuff was on that time*
[My emphasis]

[685] I can take judicial notice of the fact that the calendar for January and February 2010 reveals that:

(1) **The weekends in January 2010 were** –

(i) 2nd and 3rd;

(ii) 9th and 10th;

(iii) 16th and 17th;

(iv) 23rd and 24th;and

(v) 30th and 31st;

(2) **The Mondays in January 2010 were** –

(i) 4th;

(ii) 11th;

(iii) 18th; and

(iv) 25th;

(3) **The 19th January 2010 was a Tuesday**;

(4) **The 19th February 2010 was a Frida**y.

[686] **Clearly, the evidence of Subhasni Singh is unreliable as to the day and date when Salen's Will was found.** If it was found on a weekend, then that had to have occurred on either Saturday, 16th or Sunday, 17th January 2010, or on the following Saturday, 23rd January 2010, as her evidence before the High Court (which she said she gave after having previously referred to her passport) was that "*I was back in Brisbane on 24th January"* 2010. If, however, as she said, Prem Narayan's office was closed, then she must have found the Will on either 16th or 17th January 2010 and then took it to Prem Narayan's office when it was a weekday. Perhaps that was then on Tuesday, 19th January 2010?

[687] Adding to the confusion is that on 16th February 2010, Prem Narayan filed in the High Court at Suva a Writ of Summons on behalf of Maya Wati Prakash, which became Civil Action No HPP. 003 of 2010 (Exhibit 4), **wherein the annexed Statement of Claim dated 15th February 2010 pleaded at para [4]:**

> *'On **23rd January 2010**, the Plaintiff's daughter while searching for her personal documents at the Plaintiff's residence **at Lot 11, Koronivia Road, Koronivia, Nausori discovered a sealed envelope**, the contents of which, was the original will of Salen Prakash Maharaj bearing the date 22 day of December 2006'.*
> [My emphasis]

[688] Adding further to the confusion, is that only just over three weeks later, in a complaint dated 11th March 2010 received by the Legal Practitioners Unit on 11th March 2010, **Maya Wati Prakash stated** in the attachment to the complaint: *'On **19th January 2010** my daughter was searching for my title documents when she found an envelope. **It contained the Last Will** of Salen Prakash prepared by Patel Sharma & Associates.'* [My emphasis]

[689] I also note that the Affidavit of Maya Wati Prakash sworn on 26th October 2012 (Exhibit 18), filed as her evidence-in-chief in the High Court proceedings, stated at paras 21-22:

> *'21. Subsequently, all the rooms in the house were cleared and books, items and documents of Salen and Rosie were kept in boxes for storage. Rosie used to stay in the part of the house for a long period of time. Rosie and her husband left for Australia some months after Salen's death.*
>
> *22. Sometimes on **23 January 2010**, my daughter Rosie discovered the Will in the box of documents. She gave the original document to my now solicitors.'*
>
> *[My emphasis]*

[690] I note that there was no mention in the above affidavit of the boxes being transported from Koronivia to Ireen's house at Caubati before 23rd January 2010.

(iii) The evidence of Pranita Devi

[691] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in chief of Pranita Devi before the Commission on the issue as to the storage of Salen's Will was as follows ('*Closing Submissions',* 8th January 2018, at [265] and [270]-[280]):

> *'265.* ***She stated that she was not aware of any Will of her husband.***
>
> *...*
>
> *279. After 25th December 2008, she stated that she had a fight with MWP. She went there with her uncle to get her stuff and to inform them that she was alone and had no children and since mother-in-law had US citizenship so she wanted to return to her parents place as she was alone. Although Subhasni and her husband were there but she felt lonely.*
>
> *280. When they reached there, MWP, Subhasni and Hemant were there. She spoke to her mother-in-law about going to her mother's place. **Subhasni came and started fighting**. They did not want to give her stuff and she stated that all the things in the house were built by her husband and her. **Two bags were left there**.'*

[My emphasis]

[692] Further, according to the written submissions of Counsel for the Applicant Chief Registrar, the evidence of Pranita Devi under cross-examination was, in summary, as follows ('*Closing Submissions',* 8th January 2018, at [294]-[295], [297], [320]-[321], [328]-[329]):

> *'294. She confirmed that SPM made a Will on 22nd December 2006 but she did not know about the Will as* ***he never told her about a Will*** *and that* ***that is why she was confused as to why the Respondent never told her that a Will was made****.*
>
> *295. She confirmed that she was staying with SPM in Koronivia as at 22 December 2006 but* ***he never told her or discussed with her about the Will****.*
>
> *...*
>
> *297. She stated that as at 2006, they had been married for 10 years and that SPM was good and he would share with her everything.*
>
> *...*
>
> *320. She stated that after final 13 days ritual, Subhasni, Irene, MWP and PD discussed about SPM's properties. She also stated that* ***four days after her husband's demise, Subhasni and Hemant took her to one Justice of Peace, Mr. Ramesh Prasad and wrote two letters; one stating that PD would transfer LM permit to Hemant Kumar Singh and second letter stating that Dominion Insurance money was to be returned to MWP as SPM had borrowed $50,000 and PD had to return that. She signed both those letters before JP****.*
>
> *321. She stated that she was not aware of the telephone calls made by Subhasni to the Respondent's firm.'*
>
> *...*
>
> *328. She stated that* ***when she left her in-laws place****,* ***she had taken with her all of SPM's documents and that she checked his documents but there was no Will****. Although she could not recall the exact date she took all her things from her in laws place and left for her parents' place for good but she stated it could have been probably sometime on 26 or 27 December.*
>
> *329. She stated that at the time she left her in-laws place,* ***she had no issues with MWP but only with Subhasni****.'*
>
> [My emphasis]

[693] The written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions',* 31st January 2018), have summarised the evidence of Pranita Devi on the issue of the storage of the Will as follows:

> *'[xv]. When the signed Will was found* ***she refused to believe that SP had made a Will****. Her position was that if he made a Will then he would have discussed it with her.* ***Under cross examination she had to admit that SP had brought another Pranita home and was living with that other Pranita whilst PD was living in the same room as MWP****. In her letter to the Chief Registrar* ***PD also admitted at page 78 of the Agreed***

Bundle of Documents that SS was aware of the unsigned Will held by Patel Sharma & Associates from the time when SP had died and was in the mortuary.'
[My emphasis]

[694] I agree generally with the above summaries of each Counsel as to the evidence that Pranita Devi gave on this issue. I also note, however, that **Pranita Devi explained that one of the reasons why she thought that the Will was forged** (apart from allegedly not knowing of its existence until 2010) **was that <u>the location as to where the Will was allegedly found changed from Koronivia to Caubati</u>**. Indeed, during her evidence, Pranita Devi became somewhat agitated on this point and I had to intervene and ask her to slow down as follows:

"Commissioner:	*Just, just slow down because I am not going to get all that down. Can you just interpret what she just said?*
Translator:	*My Lord, I want to clarify this, that once the Will was found, **<u>Subhasni told me that it was found on the Koronivia House</u>**, and <u>later she changed that it was found in Caubati House</u>.*
Translator:	*The Koro, **Koronivia House was occupied by the tenants**.*
Translator:	*I don't know how they found the Will after one year.*
Translator:	*And they bought it to me that this is the Will.*
Mr. Sharma:	*Okay. And, Koronivia was rented. Who was living in the Caubati house?*
Translator:	*Koronivia house was rented Sir.*
Translator:	*And, Caubati house was occupied by Maya Wati's…*
Translator:	*Youngest daughter."*
	[My emphasis]

(iv) No evidence called from Hemant Kumar Singh, the husband of Subhasni Singh

[695] **I note that there was mention in the evidence of Maya Wati Prakash, Subhasni Singh and Pranita Devi of <u>Hemant Kumar Singh</u>, <u>the husband of Subhasni Singh</u>, <u>living with Subhasni in the flat adjacent to the house (where Maya, Salen, Pranita and the second Pranita were residing) in the property at Koronivia as at 22nd December 2006 when Salen's Will was made. Hemant Singh, however, was not called in evidence before this Commission.</u>** I have also noted above that although he was referred to in the 2012 proceedings in the High Court between Maya Wati Prakash and Pranita Devi, Hemant did not give evidence in those proceedings.

[696] I further note that, according to the evidence which Subhasni Singh gave before the High Court on 29th October 2012, her husband, came with her back to Fiji in early

2010 to visit his mother who *"was a bit sick"* and, after taking the mother-in-law to hospital, Subhasni then went to her sister's house to find some personal documents during which she also found Salen's Will *"in between those papers"* (Doc.21, pp. 43-44, Exhibit 47, pp. 156-157).

[697] It is unclear whether Hemant Kumar Singh had any knowledge as to where Salen stored his Will as from 22nd December 2006. I have noted that Hemant Kumar Singh moved with his wife, Subhasni Singh, to Australia in mid-2009 so Subhasni could pursue a higher degree in accounting. It is also unclear whether Hemant Kumar Singh was present on 19th or 23rd January 2010 when his wife, Subhasni Singh, found Salen's Will in Ireen's house at Caubati.

[698] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of Hemant Kumar Singh giving evidence on the issue of the storage of the will by Salen and attempts made by Salen's family to find it after Salen's death, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* are <u>not</u> satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – <u>Hemant would be expected to be called</u> (if his evidence was relevant) <u>by the Applicant Chief Registrar</u> rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, **Hemant's evidence <u>would NOT, in my view, elucidate</u> on the issue of the storage of the will by Salen and attempts made by Salen's family to find it after Salen's death**, **other than, perhaps, some hearsay evidence that may have been conveyed to him by his wife, Subhasni Singh**, **though I note that Subhasni's evidence was vague and that, in any event Subhasni and Hemant moved to Australia in mid-2009.** Again, as the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter**. <u>**It is not enough to conclude that a witness may have knowledge**</u>*';

(iii) the missing witness' *'absence is unexplained'* – <u>Hemant's absence</u> from the proceedings before this Commission <u>is unexplained</u>, however, his evidence on this particular issue would <u>probably be irrelevant</u>;

(2) Accordingly, no inference will be drawn in relation to the absence of evidence from Hemant Kumar Singh on the issue of the storage of the will by Salen and attempts made by his family to find it after Salen's death;

(3) I have also noted when considering to draw no inference, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding … subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence … and the Commission must act fairly in relation to the proceeding'.*

(v) No evidence called from the second "Pranita", the alleged lover of Salen

[699] **I note that there was mention in the evidence of Pranita Devi of another woman, also residing in the house at Koronivia and indeed, sharing a room with Salen, whilst Salen's wife, Pranita Devi and Salen's mother, Maya Wati Prakash, shared another room.** This person was referred to in evidence before this Commission as "Pranita" with no other details, apart from her surname that I have decided to anonymise noting the allegations that she was only 15 years of age.

[700] Pranita Devi gave evidence before this Commission that this second "Pranita" was living with Salen, after they *"had eloped",* the police were involved and, as her family did not want her back, according to Pranita Devi, *"I told them [the police] not to have him charged, because she is an under aged girl, and I will take her home, with me."* Also according to Pranita Devi, however, *"<u>One week, she stayed at my place. Afterwards, the police came and took her away</u>."* She also made mention that *"the police wanted to proceed with the case"* and *"Salen was charged with abduction"* but *"Salen won the case".*

[701] On such claims, Pranita Devi was taken by Counsel for the Respondent to her previous evidence that she gave before the High Court on 30th October 2012 (Doc.21, High Court Transcript, p. 75, Exhibit 47, p. 190) wherein it was put to her as follows:

> *"MS NARAYAN: So when you say you had a very happy marriage, it was not very happy was it?*
>
> *MS DEVI: I was very happy with my husband although **he was living together with Pranita [anonymised by me]**. We were basically going everywhere together."*
>
> *[My emphasis]*

[702] It was then put to Pranita Devi by Counsel for the Respondent in the present proceedings, "*You don't say in that statement, that they are only together only for one week, do they?",* to which she replied, *"Prem Narayan do not ask me a question directly, My Lord".* I note, however, that Pranita Devi was cross-examined by Prem Narayan in the High Court proceedings in *Prakash v Devi* (Doc.21, pp. 75-76, Exhibit 47, pp. 189-190) that Salen and the second Pranita were residing in a de facto relationship *"from 2006-2007"*.

[703] As to when this second "Pranita" ceased living with Salen at Koronivia, the evidence is unclear. I note, however, that although this second "Pranita", was not called in evidence in the High Court, she was, however, referred to in the judgment of Balapatabendi J when, in analysing the evidence of Pranita Devi, His Lordship stated at [16]:

> *'She [Pranita Devi] under cross examination* ***admitted that the deceased [Salen] from year 2006 – 2007 period was having defacto relationship with one Ms Pranita*** *[anonymised by me], a girl of 15 year old, in the same house. She stated that she used to sleep with the Plaintiff [Maya Wati Prakash] as the deceased was also living in the house with one Ms. Pranita [anonymised by me].'*
> [My emphasis]

[704] There was further evidence before the Commission on this issue, however, it is not of relevance to the present proceedings before this Commission. Indeed, when I asked Counsel for the Respondent as to the relevance of the second Pranita during the clarification hearing on 25th April 2018, he responded: *"Sir,* ***it's a question about she's saying that Salen Prakash Maharaj trusted and discussed everything with her [Pranita Devi]", "He obviously, he didn't."***

[705] As to whether the second "Pranita" ceased living with Salen at Koronivia in 2007 or later, it is doubtful, without more details, as to whether she knew about his Will and thus could have assisted as to where his Will was initially stored as from 22nd December 2006 and/or (depending upon when she ceased living with him) what efforts were made by Salen's family to search for his Will after his death on 24th November 2008.

[706] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of this second Pranita giving**

evidence on the issue of the storage of the Will by Salen and attempts made by Salen's family to find it after Salen's death, I have come to the view that:

(1) The three conditions set out by Glass JA in *Payne v Parker* are <u>not</u> satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – <u>the second Pranita would be expected to be called</u> (if her evidence was relevant) by the Applicant Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, **the second Pranita's evidence <u>would NOT, in my view, elucidate</u> on the issue of the storage of the will by Salen as from 22nd December 2006 until mid-2007 (when she presumably stopped living with Salen)**, **other than, perhaps, some hearsay evidence that may have been conveyed to her by Salen during that time.** Again, as the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter<u>. It is not enough to conclude that a witness may have knowledge</u>**'*;

(iii) the missing witness' *'absence is unexplained'* – <u>the second Pranita's absence</u> from the proceedings before this Commission <u>is unexplained</u>, however, her evidence on this particular issue <u>would probably be irrelevant</u>;

(2) Accordingly, no inference will be drawn in relation to the absence of evidence from the second Pranita on the issue of the storage of the will by Salen;

(3) I have also noted when considering to draw no inference, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding … subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence … and the Commission must act fairly in relation to the proceeding'.*

(vi) No evidence called from Ireen Lata Prasad, Maya's second daughter

[707] I have previously noted in relation to Count 1, that there was mention in the evidence of Maya Wati Prakash, Subhasni Singh and Pranita Devi, of <u>Maya's younger daughter, Ireen Lata Prasad</u>, being involved in the issues concerning Salen's estate. **On the issue of the storage of the Will by Salen as from 22nd**

December 2006 until it was found by Subhasni Singh on 23rd January 2010, I have noted, in particular, Ireen's involvement as follows:

(1) It was Pranita Devi's evidence that '*that after final 13 days ritual, Subhasni, **Ireen**, MWP and PD discussed about SPM's properties';*

(2) It was Ireen, who attended with Maya Wati Prakash the meetings with Prem Narayan in 2008-2009;

(3) It was Ireen who attended with Maya Wati Prakash the settlement discussions between Maya and Pranita at the offices of Patel Sharma Lawyers on 28th March 2009;

(4) It was Ireen with whom Maya Wati Prakash went to live in mid-2009 at Caubati;

(5) It was allegedly Ireen who arranged for the "clean up" at Koronivia and the documents being "boxed" and transported to Ireen's home in Caubati;

(6) It was at Ireen's home in Caubati that Salen's will was found by Subhasni on 23rd January 2010.

[708] In the proceedings before Balapatabendi J in the High Court at Suva in *Prakash v Devi*, Ireen Lata Prasad was not called in evidence (see Exhibit 47). I also note that Ireen Lata Prasad was not called in the present proceedings before this Commission even though, as I have previously noted in relation to Count 1, **on 6th December 2016**, when I mentioned that I was concerned that *"Rosie [Subhasni] has not been sitting in the back of the court I hope"* listening to Maya give her evidence, **I was informed by Counsel for the Applicant that the person who had been present was, in fact, Ireen**. Presumably, a strategic decision had already been made by Counsel in December 2016 not to call Ireen.

[709] I have previously noted in relation to Count 1, that six months later, whilst there was mention by Subhasni Singh on **6th June 2017**, that *"I do remember my 39 year old sister got mini stroke at the moment",* there was no mention of any medical problem with Ireen Prasad by Counsel for the Applicant who had at that time tendered a medical certificate for Carol Sheenal Prasad, Maya's granddaughter, who then gave evidence on 18th September 2017 (during the September 2017 Sittings).

[710] I have also previously noted in relation to Count 1, that during the evidence-in-chief of Subhasni Singh on 5th June 2016, there was a dispute as to whether Subhasni had

seen the receipt for $20,000 from Prem Narayan and Subhasni's evidence was that *"This original was with my sister, in Fiji, she was keeping there"*. **I then asked, *"Is the sister being called?"* to which Counsel for the Applicant simply replied *"No"*. I asked the same question the following day on 6th June 2016 during the cross-examination of Subhasni Singh and again all the Counsel for the Applicant replied was *"No"*. <u>There was no additional mention as to her unavailability due to illness</u>. Indeed, as I have noted above, presumably, a strategic decision had already been made by Counsel in December 2016 not to call Ireen.**

[711] **Applying the test set out in *Jones v Dunkel*, subject to the conditions that I have set out above, in relation to the absence of Ireen Lata Prasad (formerly known as Prakash) giving evidence on the issue of the storage of the will by Salen as from 22nd December 2006 until it was found by Subhasni on 23rd January 2010 in Ireen's home, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* <u>are satisfied</u> -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – <u>Ireen would be expected to be called by the Applicant</u> Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – **for the reasons outlined above, <u>Ireen's evidence would elucidate</u> at least on the issue of who arranged for the "clean up" at Koronivia and the documents being "boxed" and transported to Ireen's home in Caubati in mid-2009 and what checks or searches, if any, were made by her, as well as other members of her family, in relation to locating Salen's will in 2008-2009 until it was found by Subhasni on 23rd January 2010 in Ireen's home**;

(iii) the missing witness' *'absence is unexplained'* – <u>Ireen's absence</u> from the proceedings before this Commission <u>is unexplained</u>;

(2) The inferences to then be drawn might be -

(i) *'the evidence of the absent witness would not assist the case of that party'; and*

(ii) *'that the trier of fact <u>may</u> draw an inference unfavourable to that party with greater confidence';*

(iii) *'But Jones v Dunkel <u>does not enable the trier of fact to infer that the evidence</u> of the absent witness <u>would have been positively adverse to that party</u>';*

(3) I have also noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

[712] **Having considered the above, the inference that I shall be drawing is that Ireen Lata Prasad (formerly known as Prakash) was not called by Counsel for the Applicant Chief Registrar as Ireen's evidence would not have assisted the case of the Applicant Chief Registrar on the issue of the storage of the will by Salen as from 22nd December 2006 and the attempt to find it, until it was found by Subhasni on 23rd January 2010 in Ireen's home.**

(vii) No evidence called from Raknesh Prasad, the husband of Ireen Lata Prasad

[713] **On the issue of the storage of the Will by Salen and attempts made by his family to find it after his death, I note that Raknesh Prasad, the husband of Ireen Lata Prasad, was not called in the proceedings before this Commission, despite his being mentioned in the letter of 26th February 2009 from Prem Narayan to Patel Sharma Lawyers with a claim over a motor vehicle.**

[714] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of Raknesh Prasad, the husband of Ireen Lata Prasad, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* not satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Raknesh Prasad would be expected to be called (if his evidence was relevant) by the Applicant Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – apart from perhaps explaining the vehicle dispute, **Raknesh Prasad's evidence would NOT, in my view, elucidate in relation to the storage of the Will by Salen and attempts made by his family to find it after his death** and other than, perhaps, some hearsay evidence that may have been conveyed to him either by his wife, Ireen Lata Prasad, his sister-in-law, Subhasni Singh and/or his mother-in-law, Maya Wati Prakash. As the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones***

v Dunkel *to operate,* ***the evidence of the missing witness must be such as would have elucidated a matter. <u>It is not enough to conclude that a witness may have knowledge</u>****';*

(iii) the missing witness' *'absence is unexplained'* – <u>Raknesh's Prasad's absence</u> from the proceedings before this Commission <u>is unexplained</u>, however, his evidence on this particular issue <u>would probably be irrelevant</u>;

(2) Accordingly, no inference will be drawn in relation to the absence of evidence from Raknesh Prasad on the storage of the Will by Salen and attempts made by Salen's family to find it after Salen's death;

(3) I have also noted when considering to draw no inference, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding … subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence … and the Commission must act fairly in relation to the proceeding'.*

(viii) Findings in relation to <u>the storage of the Will of Salen Prakash Maharaj by him</u> as from 22nd December 2006

[715] **My findings in relation to <u>the storage of the Will of Salen Prakash Maharaj by him</u> as from 22nd December 2006 are:**

(1) On 22nd December 2006, Salen Prakash Maharaj finalised the sale of a property at Lokia, Rewa, to Inoke Kana and Levani Gonevou, however, as from late November 2006, Salen Prakash Maharaj was residing at Koronivia comprised in Certificate of Title No. 31224 being Lot 11, Koronivia Road, Koronivia, Nausori, on DP8112 that had been purchased from Dalip Singh;

(2) The said land at Koronivia had constructed upon it a house with an adjacent flat;

(3) Residing in the house at Koronivia as at 22nd December 2006 were Salen Prakash Maharaj, his mother, Maya Wati Prakash, his wife, Pranita Devi and another woman, also by the name of "Pranita";

(4) Although there are allegations that as at 22nd December 2006, Salen was having a relationship with this second "Pranita", despite her allegedly being under the age of consent and that allegedly there was involvement by the police, these are not matters for the Commission and, as such, it would be inappropriate for me to make any findings in relation to that issue;

(5) Residing in the adjacent flat at Koronivia as at 22nd December 2006 were Salen's sister, Subhasni Singh and Subhasni's husband, Hemant Kumar Singh;

(6) Hemant Kumar Singh was not called in evidence, however, for the reasons that I have set out above, no inference will be drawn in relation to his absence from giving evidence before the Commission on this issue;

(7) As at July 2009, Subhasni Singh and her husband, Hemant Kumar Singh, went to reside in Australia where Subhasni was studying;

(8) Also, around mid-2009, rather than Maya Wati Prakash residing in the house at Koronivia on her own, Maya agreed to go and live with Maya's second daughter, Ireen Lata Prasad, in a property at Caubati;

(9) Sometime in mid-2009, the contents in the house at Koronivia may have been "packed up" by Ireen Lata Prasad, or by labourers under instructions from Ireen, and the contents may have been taken to Ireen's property at Caubati. I cannot make definite findings in that regard noting the evidence from both Maya Wati Prakash and Subhasni Singh was somewhat vague on this point, the hearsay evidence of Pranita Devi is that Subhasni told her that the Will was found in the house at Koronivia and I have not heard evidence from Ireen Lata Prasad;

(10) As for Ireen Lata Prasad not being called in evidence, for the reasons that I have set out above, an inference will be drawn that her evidence would not have assisted the case of the Applicant Chief Registrar as to the storage of the Will by Salen as from 22nd December 2006 and also, following Salen's death on 24th November 2008, the efforts by members of Salen's family to locate Salen's Will;

(11) The evidence of Maya Wati Prakash and Subhasni Singh was also unclear as to how, when and where, the Will of Salen was stored as from 22nd December 2006;

(12) Also, I have not heard from a person known as the second "Pranita", though for the reasons that I have outlined above, I doubt whether her evidence would have assisted the Commission on the issue to the storage of the Will of Salen Prakash Maharaj as from 22nd December 2006 and/or from after his death on 24th November 2008 and, therefore, no inference will be drawn in relation to her absence from giving evidence;

(13) In the circumstances, the best that can be said as to how, when and where, the Will of Salen was stored from 22nd December 2006 is as follows -

(i) After the Will of Salen Prakash Maharaj was executed on 22nd December 2006, it <u>may</u> have been initially stored by him in a bookshelf in the property at Koronivia;

(ii) According to the Statement of Claim filed on behalf of Maya Wati Prakash in 2010 at para [4] -

> *'On 23rd January 2010, the Plaintiff's daughter while searching for her personal documents at the Plaintiff's residence <u>at Lot 11, Koronivia Road, Koronivia, Nausori discovered a sealed envelope</u>, the contents of which, was* ***the original will of Salen Prakash Maharaj bearing the date 22 day of December 2006****';*
> [My emphasis]

(iii) I note that the above statement is contrary to the evidence of Subhasni Singh that she found the Will in the home of her sister, Ireen Lata Prasad, at Caubati, though it accords with the hearsay evidence of Pranita Devi as to what Subhasni allegedly told her as to the location of the Will;

(iv) The judgment of Balapatabendi J in the High Court of Suva delivered on 11th October 2013, noted at para [20] that the agreed facts filed stated, *'The Last Will of the Deceased was recovered on 23 January 2010'* (<u>without naming a location</u>) and, further, at para [37], Balapatabendi J pronounced the Will dated 22 December 2006 as valid but, apart from noting Maya and Subhasni's evidence that Subhasni found the Will, His Lordship made no findings as to the place of location when the Will was found;

(v) on an unknown date after 22nd December 2006, the said Will of Salen Prakash Maharaj <u>may</u> have been taken by a person or persons unknown and stored in a box in the home of Ireen Lata Prasad at Caubati;

(vi) as to what attempts, if any, were made by members of Salen's family to find the Will of Salen Prakash Maharaj as from his death on 24th November 2008 until it was found on 23rd January 2010, <u>there is no evidence before the Commission that any search was ever undertaken</u>;

(vii) the evidence of Subhasni that "*my sister-in-law must have taken it"* when, in December 2008, "*she left the house after my brother died",* is rejected as, apart from noting that there is no other evidence to support this claim, Subhasni's evidence before both the High Court and this Commission was that the Will was found by Subhasni in January 2010 in the home of her sister,

Ireen Lata Prasad, at Caubati and not in the possession of her sister-in-law, Pranita Devi.

[716] I find, therefore, that Applicant has failed to satisfy the burden upon him as to how the Respondent '***failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006****'* either at his law firm or through requests of Salen's family, before making an application for a grant of Letters of Administration on behalf of the widow, Pranita Devi.

[717] I now turn to the second element of the particulars for Count 3 wherein it is alleged that the Respondent '*proceeded on instructions of one Pranita Devi and obtained grant of Letters of Administration … to the detriment of Maya Wati Prakash who was the sole beneficiary pursuant to the Will …* ***as Maya Wati Prakash was subjected to unnecessary cost for initiating High Court Action'.***

(4) The first set of proceedings instituted by Maya making a claim of $62,000 upon the Estate of Salen Prakash Maharaj

[718] After 6th January 2009, when the Respondent advertised that he was acting on behalf of Pranita Devi to proceed with an application seeking a grant of Letters of Administration in relation to the Estate of Salen Prakash Maharaj, a letter was hand delivered on 27th January 2009 to Patel Sharma Lawyers from Prem Narayan, Barrister and Solicitor, advising that *'****we act on instructions of Subhasni Lata Singh****'* and lodging ***'****a claim in equity against the Estate'* in the sum of $62,0000 (see Exhibit 4). I note that Prem Narayan repeated this claim in a subsequent letter dated 26th February 2009, which was then mentioned in paragraph 25 of the affidavit of Maya Wati Prakash sworn on 5th March 2009, filed in support of Maya's application in Civil Action No. 81 of 2009, and annexed and marked "MWP9" to that affidavit (Exhibit 44, p.120). As I have noted above, the letter of 26th February 2009 also raised an allegation that Pranita Devi had, by the use of force and threats, repossessed a motor vehicle that had been in the possession of Ratnesh [sic] Prasad, Salen's brother-in-law, who was married to Ireen Lata Prasad, and that Raknesh had some form of claim to that vehicle.

[719] On 6th March 2009, an application was filed by Prem Narayan, Barrister and Solicitor, **not on behalf of Subhasni Singh (or Raknesh Prasad) but Maya Wati**

Prakash seeking various orders including an interim injunction, that the Letters of Administration be recalled and a fresh grant be issued to Maya Wati Prakash and Pranita Devi (see Exhibit 6). An attempt at settlement was then held on 28th March 2009 between Pranita Devi and Maya Wati Prakash hosted at the offices of Patel Sharma Lawyers.

(i) The evidence of Maya Wati Prakash

[720] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Maya Wati Prakash in relation to the attempt at settlement between Pranita Devi and Maya at the meeting on 28th March 2009 ('*Closing Submissions',* 8th January 2018, at [27]-[28]), was, in summary:

> *'27. **MWP and PN went to the Respondent's office sometime in 2009. PD, Irene and PD's parents accompanied them.***
> *28. The Respondent and PN had a conversation regarding LA. PD said that she was willing to give MWP 1/4 of the estate and the rest would belong to her. PD also said once MWP dies all the property would belong to PD.'*
> [My emphasis]

[721] I agree generally with the above as a summary of the evidence given by Maya Wati Prakash on this issue.

(ii) The evidence of Subhasni Singh

[722] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at paras [111]-[114]), the evidence-in-chief of Subhasni Singh in relation to her claim and/or the attempt at settlement between Pranita Devi and Maya Wati Prakash was, in summary, as follows:

> *'111. That in 2009, MWP instructed Ms. Prem Narayan and that **she did not accompany her mum to Prem Narayan's office**.*
> *112. She was shown the letter dated 27 January 2009 (AD4) [Exhibit 4] and she stated that Ms. Prem Narayan informed her that LA would be issued to PD and she advised them that if they had invested in the deceased's properties, then they could lodge their claims. She then instructed Prem Narayan.*
> *113. In relation to the Koronivia Road property, she stated that when her brother moved in, she had to build another flat for herself. The Koronivia property was owned by her brother SPM and prior to that her mother was the owner. SPM was the Power of Attorney holder and he had the Koronivia property transferred in his name although she did not know when it was done.*

114. In regards to the instructions she gave to Ms. Prem Narayan, she did not follow up as she was in Australia but she thought that Ms. Narayan had corresponded with the other party.'
[My emphasis]

[723] Counsel for the Applicant Chief Registrar, has then summarised the cross-examination of Subhasni Singh in relation to her claim and/or the attempt at settlement between Pranita Devi and Maya Wati Prakash was, in summary, as follows ('*Closing Submissions',* 8th January 2018, at [134]-[139]):

*'134. She stated that **PN may have been instructed in late December 2008** and confirmed that PN lodged claim on her behalf as well.*
135. She stated that the $75,000 to $90,000 that she mentioned in her evidence in chief was from the proceeds of sale of Lokia property.
136. She also confirmed that PD left in December 2008 and possession of the Koronivia property was in her and her mum's hands. She stated that she stayed there until July 2009 when she left for Australia to pursue her studies along with her husband and that her mum stayed there alone for a while until she asked her sister to take mum to her home in Caubati although she could not recall when her mum started living in Caubati.
...
138. She was referred to AD 4 [Exhibit 4]. She confirmed that she did not enter into any cost agreement with PN and that she did sign something. She confirmed that she provided PN with documents such as receipts for material, labour cost and other things she bought.
*139. She confirmed that she was briefed by PN on her claim and that **she had instructed PN to write the letter** (AD 4).'*
[My emphasis]

[724] I agree generally with the above as a summary of the evidence given by Subhasni Singh on this issue. I note that there were no questions asked in re-examination of Subhasni Singh by Counsel for the Applicant Chief Registrar in relation to her claim of $62,000 and/or the attempt at settlement between Pranita Devi and Maya Wati Prakash.

[725] **The evidence of Subhasni Singh on this issue I found to be unreliable for the following reasons**:

(1) On the one hand, Subhasni said that she did not accompany her mother to instructing Prem Narayan and was unclear as to when this occurred;

(2) On the other hand, on some unknown date, Subhasni instructed Prem Narayan to send the letter of 27th January 2009 to Patel Sharma Lawyers making a claim of $62,000 upon the Estate of Salen (Exhibit 6). I note that Prem Narayan sent a subsequent letter dated 26th February 2009 (Exhibit 44, p. 120) pressing this

claim, which was presumably sent on instructions from Subhasni. So, at some stage, Subhasni must have given instructions to Prem Narayan;

(3) As shall be seen, according to Prem Narayan, when instructions were initially given to her, both of Maya's daughters had accompanied her to the appointment, that is, Subhasni and Ireen.

[726] **All that I can conclude is that Subhasni Singh must have been giving some instructions to Prem Narayan but details are vague and, as Prem Narayan kept no specific dates and details, Subhasni's evidence remains unreliable**.

(iii) The evidence of Pranita Devi

[727] During her examination-in-chief by Counsel for the Applicant Chief Registrar, Pranita Devi was not asked any questions in relation to the attempt at settlement between Maya Wati Prakash and herself on 28th March 2009. Questions were, however, asked on this issue by Counsel for the Respondent in his cross-examination of her. Counsel for the Applicant Chief Registrar in his written submissions ('*Closing Submissions'*, 8th January 2018, has summarised that evidence at paras [308]-[310] and [334]-[335]), as follows:

> *'308. She stated the meeting of 28th March 2009 and that the outcome of the meeting was for MWP to receive 65% shares and PD to receive 35% but **PN did not agree to this proposition although she and MWP agreed to it**. **Her uncle had informed her to agree as Will was now found and she might receive nothing**.*
> *309. She agreed that Jaywant [sic] Pratap was her advisor.*
> *310. She also agreed that after 28 March 2009 to 2010, Mr. Raman Pratap Singh acted for her and thereafter Mr. Hiuare.'*
> …
> *334. She stated that she could not remember if 28th March 2009 was the last time she o [sic] met the Respondent after MWP had filed the High Court action although she confirmed that she agreed to settle for 35% of shares as she thought it was fair distribution.*
> *335. She agreed that **after action filed by MWP, she hired Kohli & Singh** although she did not state the exact date.'*
> [My emphasis]

[728] The evidence of Pranita Devi in re-examination on this issue, according to Counsel for the Applicant Chief Registrar in his written submissions ('*Closing Submissions'*, 8th January 2018, at paras [336]-[337]), was, in summary:

> *'336. She stated that **she did not see the Respondent after LA granted**.*
> *337. As for the 28th March 2009 meeting, she stated she could not recall the date but she confirmed having a meeting at the Respondent's firm to get*

things sorted out as MWp [sic] had filed an action in court and she had the taxi and van permits transferred to her name.
[My emphasis]

[729] According to the written submissions of Counsel for the Respondent, the evidence of Pranita Devi was *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 13, sub-para [xii]): '*She said that she wanted to share the Estate with MWP but PLN objected and there was no settlement between the parties.'*

[730] I agree generally with the above as summaries of the evidence given by Pranita Devi on this issue. I am not sure whether it adds anything to the case apart from confirmation that the Respondent did not act for Pranita Devi after the application for Letters of Administration was granted.

(iv) The evidence of Prem Narayan

[731] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Prem Narayan in relation to Subhasni Singh's claim and/or the attempt at settlement between Pranita Devi and Maya Wati Prakash on 28th March 2009 ('*Closing Submissions',* 8th January 2018, at [183]-[191]) was:

> *'183. According to her re-collection, she believed that* ***both daughters*** *of MWP* ***had accompanied her when instructions were given***.
> *184. She stated that her daughter, Rosie had wanted to put a claim on the estate and so she had acted on instructions from Rosie. She sent a letter to the Respondent's office who had advertised the Estate notice in the newspaper.*
> *185. She was informed by MWP that on the first occasion when MWP had visited the Respondent's office, she was informed that there was no Will and that the firm had not prepared the Will.*
> *186. She stated that before she could claim on the grounds of equity, she was told by MWP that she and her son had made a Will. She told MWP, if there was a Will, it would have to be there, otherwise LA would apply.*
> *187.* ***She received instructions to attend to a meeting at the Respondent's office as the property she was residing in had been purchased by her money and she wanted to claim in equity***.
> *188. MWP provided her Sale and Purchase agreement where she was a party but transfer was not done in her name but only in her son's name. She [Maya] then lodged caveat on her property.*
> *189. That she took action in court for fraud against estate as son's name was on transfer as well as on Sale and Purchase agreement. In 2009 she had applied for injunction. Dalip Singh was one of the defendants.*
> *190. She stated that High Court Action No. 81/09 (Exhibit 44) was called in March and adjourned. Dalip Singh past [sic] away and there were numerous adjournments. There were no judges due to the constitutional issue and* ***eventually MWP did not want her to pursue this matter***.

Further, this matter was also not continued as another case had been filed for revocation of LA and MWP's matter had been solved by 2014.

191. ***She stated that in 2008 [sic], a meeting took place at the Respondent's office which was more so like a mediation to resolve certain issues on property****. Unfortunately the meeting was not successful.'*
[My Emphasis]

[732] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence of Prem Narayan under cross-examination relation to Subhasni's claim and/or the attempt at settlement between Pranita Devi and Maya Wati Prakash ('*Closing Submissions',* 8th January 2018, at [213], [216]-[217], [221]) was:

'213. She stated that her meeting with the Respondent was on splitting estate and that if the firm had made a Will then he should have stated so.

...

216. She confirmed that she wrote a letter on claim of Subhasni and that it was the only action she took as ***Subhasni did not provide any documents, time lapsed and so she did not pursue****.*

217. She stated that the information that she had was that MWP and PD were going to jointly apply for probate and that on Christmas day, PD left the house and that then they were told by the Respondent's firm that the firm would only act for PD.

...

221. MWP instructed her to start proceedings as she had taken advice from other practitioners as well. At all times MWP used to take second opinion.'
[My emphasis]

[733] According to the written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions',* 31st January 2018, page 11, sub-para [xi], [a]-[g]), the evidence of Prem Narayan in relation to Subhasni Singh's claim, the proceedings issued by Maya Wati Prakash and/or the attempt at settlement between Pranita Devi and Maya Wati Prakash was:

'[xi]. ... Her evidence showed that ***she had no file notes and her records were non-existent****. What was also apparent from her evidence was that:*

[a]. She sent a letter for SS to claim $62,000.00 as a creditor of SP's Estate claiming that she made contributions to the Koronivia property but ***she admitted that SS did not provide an evidence to support this claim****. SS contradicted PLN and said she had supplied all invoices and receipts but she didn't produce any such evidence.*

[b]. ***PLN admitted that she made no effort whatsoever to contact or discuss the matter with the Practitioner or his Office before pleading*** *in the Statement of Claim and other places such as her statement* ***that the Firm had told MWP that they had not made a wil****l.*

[c]. PLN admitted that she didn't obtain a single order in the 2009 case and eventually agreed to have the claim struck out. She said she didn't seek to lodge a caveat against the Grant of LA because there was no Will and LA was the appropriate in the circumstances.

[d]. PLN admitted that the Firm had taken steps to protect MWP's interest in the Koronivia property by registering a caveat against the title to the property.

[e]. PLN agreed that she also gave the advice that in the absence of a Will the only way forward was issuance of LA and that the beneficiary was the widow.

[f]. PLN admitted that in the 2009 court case her client was trying to protect her interest in the Koronivia property and that is why she wanted to be a Joint Administratrix along with PD.

[g]. PLN ***couldn't say when exactly she first saw MWP but it was late December 2008 or early January 2009.*** *She only agreed to take MWP on as a client after a few meetings and her first action was to write a letter on 27th January 2009 seeking to register SS's claim of $62,000.00 against SP's Estate.'*
[My emphasis]

[734] I agree generally with the above as summaries of the evidence given by Prem Narayan on this issue.

[735] There were no questions in re-examination of Prem Narayan by Counsel for the Applicant Chief Registrar in relation to the attempt at settlement between Pranita Devi and Maya Wati Prakash.

(v) The evidence of Dipka Mala

[736] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Dipka Mala in relation to the attempt at settlement between Pranita Devi and Maya Wati Prakash ('*Closing Submissions',* 8th January 2018, at [427]-[431]) was:

'427. After LA was granted there was a meeting with PN, MWP, PD, her uncle Jaywant [sic] Pratap and Respondent. The meeting was called to resolve the shares. The meeting was held at their office.

428. After LA was granted, PN filed litigation. The meeting was conducted after litigation was filed by PN. The meeting was held at Patel & Sharma office.

429. She stated that she cannot recall the exact share but larger share was going to MWP.

430. She stated that that ***the Respondent was only listening. They were not acting on behalf of PD****.* ***PD's uncle was talking on her behalf****. There was no agreement at the conclusion of the meeting.*

*431. **After the meeting their firm did not act for either of the parties in litigation**.'*
[My emphasis]

[737] I agree generally with the above as a summary of the evidence given by Dipka Mala on this issue.

[738] There were no questions in cross-examination of Dipka Mala by Counsel for the Applicant Chief Registrar in relation to the attempt at settlement between Pranita Devi and Maya Wati Prakash. Hence, there was also no re-examination on this issue.

(vi) The evidence of Suruj Sharma

[739] According to the written submissions of Counsel for the Applicant Chief Registrar the evidence-in-chief of Suruj Sharma to the attempt at settlement between Pranita Devi and Maya Wati Prakash ('*Closing Submissions',* 8th January 2018, at [472]-[476]) was, in summary:

'472. That on 6 February 2009, LA was granted and advertisement lodged on 6 January 2009. Claim by PN on behalf of Subhasni was received although Subhasni never discussed about her claim when she first came to meet.
473. He stated that he did not act for any parties in High Court Action No. 81/2009.
*474. **That his firm's engagement ended after LA granted and they would have done some letters for the Bank as is norm and that she paid $750**. The file was with them until 28 March 2009 and released later.*
*475. He stated that **the meeting of 28th March 2009 was a discussion between Jaywant [sic] Pratap and PN** and he was like a passive facilitator of the meeting. He could not remember who arranged the meeting. The outcome was that percentages were discussed. According to his re-collection it was 75/25 or 65/35 but he could not re-call who was for the bigger share. He informed them that one of the orders MWP was seeking under the Writ action was to be treated as joint applicant which was the background of the discussion.*
476. He stated that after 28 March 2009, they had discussions and without prejudice meetings and advised PD and her uncle that they could not be part of this.'
[My emphasis]

[740] As for the cross-examination of Suruj Sharma in relation to the attempt at settlement between Pranita Devi and Maya Wati Prakash, Counsel for the Applicant Chief Registrar has summarised ('*Closing Submissions',* 8th January 2018, at [483]): '*He stated that he acceded to the 28 March 2009 meeting as it was a request by both*

parties for resolution.'

[741] According to the written submissions of Counsel for the Respondent *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 16, sub-para [xviii]), the evidence of Suruj Sharma in relation to the attempt at settlement between Pranita Devi and Maya Wati Prakash was:

> *'After facilitating a meeting to see if the parties could settle the matter the Practitioner did not represent either the Estate of SP or either party in the ensuing litigation.'*

[742] I agree generally with the above as summaries of the evidence given by Suruj Sharma on this issue.

(vii) No evidence called from Ireen Lata Prasad

[743] I note that **while there was mention by Maya Wati Prakash of the younger daughter, Ireen Lata Prasad, attending the meeting on 28th March 2009**, she was not called in the proceedings before this Commission. **I also note, however, that the alleged attendance by Ireen at that meeting was not mentioned by any of the other persons who were in attendance at that meeting and gave evidence before the Commission, that is, Prem Narayan, Pranita Devi, Dipka Mala or Suruj Sharma.**

[744] **Applying the test set out in *Jones v Dunkel*, subject to the conditions that I have set out above, in relation to the absence of Ireen Lata Prasad (formerly known as Prakash) giving evidence on the issue of whether she attended the meeting on 28th March 2009, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* are satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Ireen would be expected to be called by the Applicant Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – **for the reasons outlined above, Ireen's evidence would elucidate whether or not she attended and, if so, what was discussed**;

(iii) the missing witness' *'absence is unexplained'* – Ireen's absence from the proceedings before this Commission is unexplained;

(2) The inferences to then be drawn might be -

(i) *'the evidence of the absent witness would not assist the case of that party'; and*
(ii) *'that the trier of fact may draw an inference unfavourable to that party with greater confidence';*
(iii) *'But Jones v Dunkel does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party';*
(3) I have also noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

[745] I can only conclude, therefore, that either Ireen Lata Prasad was not called as her evidence would not have assisted the case of the Applicant Chief Registrar **or** the evidence of Maya Wati Prakash on this issue is unreliable.

[746] Noting that four other persons who attended that meeting did not mention Ireen being in attendance, (and one of those four being Dipka Mala, who, in my view, was the most reliable person to have given evidence before the Commission), **I have come to the view that the evidence of Maya Wati Prakash on this issue, as with so many other issues in these proceedings, is unreliable and, as such, the inference to be drawn is that Ireen Lata Prasad was not called as her evidence on this issue would not have assisted the case of the Applicant Chief Registrar.**

(viii) No evidence called from Jaywant Pratap, the uncle of Pranita Devi

[747] I note that while there was mention of Jayawant Pratap, the uncle of Pranita Devi, having attended the meeting on 28th March 2009, he was not called in the proceedings before this Commission.

[748] **In regard to Jayawant Pratap, the claim by Subhasni Singh upon Salen's estate and the attempt at settlement between Pranita Devi and Maya Wati Prakash, I note that**:
(1) I have previously noted that Jayawant Pratap gave evidence before the High Court in *Prakash v Devi* (see Doc.21, pp. 83-91, Exhibit 47, pp. 196-205);
(2) I have also previously noted that Jayawant Pratap was named on the instruction sheet signed by Pranita Devi on 6th January 2009 at Patel Sharma Lawyers for the

firm to make an application on her behalf to obtain a grant of Letters of Administration on her behalf (see Exhibit 3), where it is presumed he was one of the two sureties, the other being a person by the name of "Dilip". This would also accord with the evidence of Dipka Mala in relation to Exhibit 2 (the joint *'Instructions to Act'* dated 15th December 2008) and that the box was where the names of the two sureties was inserted;

(3) I have further previously noted that Counsel for the Applicant Chief Registrar in his summary of the evidence in re-examination of Pranita Devi in relation to when she first instructed the Respondent to make a sole application for a grant of Letters of Administration noted: ('*Closing Submissions',* 8th January 2018, at [338]): *'She was shown Exhibit 3 and asked why she changed from joint instructions to sole and* ***she replied that her uncle told her*** *that since she was no longer staying with her in-laws, she should take out LA solely';* [My emphasis]

(4) Pranita Devi in her evidence confirmed that her uncle Jayawant Pratap was at the meeting on 28th March 2009 as her advisor and his advice was that she should agree to the proposed settlement, however, according to Pranita, the proposed settlement was opposed by Prem Narayan.

[749] Applying the rule in *Jones v Dunkel* subject to the conditions that I have set out above, **I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* are satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Jayawant Pratap, the uncle of Pranita Devi, would be expected to be called by the Applicant Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – for the reasons outlined above, Jayawant Pratap's evidence would elucidate in relation to how and when the instructions were given to the Respondent on 6th January 2009, the claim by Subhasni Singh upon Salen's estate and the attempt at settlement between Pranita Devi and Maya Wati Prakash;

(iii) the missing witness' *'absence is unexplained'* – Jayawant Pratap's absence from the proceedings before this Commission is unexplained;

(2) The inferences to then be drawn can be -

(i) *'the evidence of the absent witness would not assist the case of that party'; and*

(ii) *'that the trier of fact may draw an inference unfavourable to that party with greater confidence';*

(iii) *'But Jones v Dunkel does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party';*

(3) I have noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

[750] **I can only conclude, therefore, that in relation to the proceedings before this Commission, Jayawant Pratap, the uncle of Pranita Devi, was not called as his evidence would not have assisted the case of the Applicant Chief Registrar in relation to how and when the instructions were given to Prem Narayan.**

(ix) No evidence called from Raknesh Prasad, the husband of Ireen Lata Prasad

[751] **On the issue as to how and when the instructions were given to Prem Narayan, I note that Raknesh Prasad, the husband of Ireen Lata Prasad, was not called in the proceedings before this Commission, despite his being mentioned in the letter of 26th February 2009 from Prem Narayan to Patel Sharma Lawyers.**

[752] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of Raknesh Prasad, the husband of Ireen Lata Prasad, I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* not satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – Raknesh Prasad would be expected to be called (if his evidence was relevant) by the Applicant Chief Registrar rather than the Respondent;

(ii) the missing witness' *'evidence would elucidate a particular matter* – apart from perhaps explaining the vehicle dispute, **Raknesh Prasad's evidence would NOT, in my view, elucidate in relation to how and when the instructions were given to Prem Narayan** and other than, perhaps, some hearsay evidence that may have been conveyed to him either by his wife, Ireen Lata Prasad, his mother-in-law, Maya Wati Prakash and/or by his sister-in-law, Subhasni Singh. As the State Administrative Tribunal of Western Australia noted in disciplinary proceedings in *Trowell* (supra), at [87] '*In order for the rule in **Jones v Dunkel** to operate, **the***

evidence of the missing witness must be such as would have elucidated a matter. It is not enough to conclude that a witness may have knowledge*';*

(iii) the missing witness' *'absence is unexplained'* – Raknesh's Prasad's absence from the proceedings before this Commission is unexplained, however, his evidence on this particular issue would probably be irrelevant;

(2) Accordingly, no inference will be drawn in relation to the absence of evidence from Raknesh Prasad as to how and when the instructions were given to Prem Narayan;

(3) I have also noted when considering to draw no inference, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding … subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence … and the Commission must act fairly in relation to the proceeding'.*

(x) Findings

[753] **My findings in relation to the claim for $62,000 made by Subhasni Singh in the letters sent by Prem Narayan of 27th January and 26th February 2009, as well as the attempt at settlement between Pranita Devi and Maya Wati Prakash on 28th March 2009 are:**

(1) The evidence of Subhasni Singh as to how and when instructions were given by her to Prem Narayan to make a claim in relation to the Estate of Salen Prakash Maharaj is unreliable for the reasons outlined above. I make no findings, however, as to whether there was any basis for Subhasni Singh in making such a claim upon the Estate of Salen Prakash Maharaj;

(2) Similarly, the evidence of Prem Narayan as to how and when Subhasni Singh gave instructions to Prem Narayan for a claim in relation to the Estate of Salen Prakash Maharaj is unreliable for the reasons outlined above;

(3) Jayawant Pratap, the uncle of Pranita Devi, was not called in evidence, so, for the reasons that I have set out above, I can only draw an inference that his evidence would not have assisted the case of the Applicant Chief Registrar;

(4) As for the recollection of Maya Wati Prakash was that her younger daughter, Ireen Lata Prasad, attended the meeting on 28th March 2009, apart from Ireen not being called in the proceedings before this Commission, I have come to the view, for the reasons outlined above, that Ireen Lata Prasad

did not attend the meeting on 28th March 2009 and that the evidence of Maya Wati Prakash on this issue is unreliable;

(5) Raknesh Prasad, the husband of Ireen Lata Prasad, was not called in evidence, however, apart from his being mentioned in a letter of 26th February 2009 from Prem Narayan as having some claim upon a vehicle, there is no other evidence before me to convince me that he would have been in a position to elucidate as to when and how Prem Narayan was instructed and so no inference will be drawn from his absence;

(6) I am able to make findings based upon the evidence of Dipka Mala and Mr. Suruj Sharma (and to a lesser extent Pranita Devi) as to the claim made by Subhasni Singh upon the Estate of Salen Prakash Maharaj and the proceedings issued on 6th March 2009 on behalf of Maya Wati Prakash as follows -

(i) On 27th January 2009, Prem Narayan made a claim on behalf of Subhasni Singh upon the Estate of Salen Prakash Maharaj, however, other than by a "follow up" letter sent on 26th February 2009 pressing the claim, the basis of this claim was never substantiated nor pursued;

(ii) The letter of 26th February 2009 also raised an allegation that Pranita Devi had, by the use of force and threats, repossessed a motor vehicle that had been in the possession of Raknesh Prasad, Salen's brother-in-law, who was married to Ireen Lata Prasad and that Raknesh had some form of claim to that vehicle, however, it is unclear how and when Prem Narayan was instructed on that issue and how it was eventually resolved;

(iii) On 6th March 2009, Prem Narayan filed an application on behalf of Maya Wati Prakash seeking that the Letters of Administration be recalled and a fresh grant be issued to Maya Wati Prakash and Pranita Devi, however, it is unclear upon what basis that claim was issued and, I note, it was not pursued and eventually was allowed to be struck out by consent on 3rd March 2015;

(iv) On 28th March 2009, a meeting was held at the offices of Patel Sharma Lawyers between Maya Wati Prakash and Pranita Devi and I accept the evidence of Dipka Mala and the Respondent that there was a discussion between Jayawant Pratap (an uncle of Pranita Devi), talking on behalf of his niece and Prem Narayan, acting on behalf of Maya Wati Prakash and that

the Respondent <u>was only listening</u> and <u>was like a passive facilitator of the meeting</u>;

(v) I can see <u>no basis upon which the Respondent was responsible for any unnecessary costs incurred in relation to the claim by Subhasni Singh</u> upon Estate of Salen Prakash Maharaj that was not pursued;

(vi) I can see <u>no basis upon which the Respondent was responsible for any unnecessary costs incurred in relation to the claim by Maya Wati Prakash to be a joint administratrix</u> of the Estate of Salen Prakash Maharaj that was eventually not pursued;

(vii) Indeed, I note that the Respondent attempted to assist the parties by hosting a meeting at his law firm for the parties to discuss a possible settlement, however, a settlement did not eventuate.

(5) The mediation between Maya Wati Prakash and Suruj Sharma in relation to the complaint lodged on 11th March 2010 with the Chief Registrar

[754] <u>On 24th June 2010</u>, a mediation was conducted through the office of the Chief Registrar between Maya Wati Prakash and Suruj Sharma in relation to the complaint that Maya Wati Prakash had lodged on 11th March 2010 with the Legal Practitioners Unit (LPU) within the office of the Chief Registrar (Exhibit 8). That complaint was twofold:

(1) As noted above, in completing the complaint form that she lodged with the LPU, Maya Wati Prakash had alleged *'Fraud'*, the details of which were that '*Suruj [Sharma] was holding the original will submitted to him by Salen Prakash Maharaj (deceased)'* and that *'**<u>he was saying that he does not have</u>** any will **<u>but actually he was keeping it</u>'*. [My emphasis] Thus, it was alleged that the Respondent had been holding Salen's original Will, even though in an attachment to the complaint it was clearly stated that the Will had been found elsewhere in January 2010 some two months prior to the lodging of the complaint;

(2) It was also alleged that there had been *'negligence and [a] failure to follow instructions'* in the Respondent's firm not transferring the property (at Koronivia) into the joint names of Salen and Maya and, instead, advising that the transfer could not take place for five years and in the meantime lodging a caveat.

[755] **It is disputed whether the matter settled at mediation**. Even though the Respondent tendered a contemporaneous file cover (**Exhibit "72"**) together with

file notes (Exhibit 73) allegedly made by Dipka Mala at the mediation on 24th June 2010 to the effect that the matter settled, there was never a document signed between Maya Wati Prakash and the Respondent at the end of the mediation confirming that it had settled, nor was a letter later sent by the mediator and/or the then Acting Chief Registrar to the parties confirming either that the complaint had or had not settled at the mediation.

(i) Chief Registrar proceeds with further complaint and investigation

[756] **Whether or not the complaint lodged by Maya Wati Prakash with the Chief Registrar on 11th March 2010 had settled at mediation on 24th June 2010, this was not the end of the matter. The Chief Registrar later conducted a fuller investigation into other aspects of the Respondent's alleged conduct in relation to the Will of Salen Prakash Maharaj - no doubt arising from comments made in the judgment of Balapatabendi J in *Prakash v Devi* handed down on 11th October 2013 (Exhibit 19), as well as the complaint dated 15th November 2013 from Pranita Devi (Exhibit 21) lodged with the Legal Practitioners Unit a month after the handing down of the judgment in *Prakash v Devi.***

[757] Counsel for the Respondent raised in their written submissions allegations as to how the investigations were conducted into this matter as follows *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, pp. 44-45, para [111], sub-paras [vi] and [viii]-[ix]):

> *'v. This is also a case where the investigations were not carried out in a fair and impartial manner.* ***The initial allegation that MWP made in March 2010 was that the Practitioner was holding onto SP's Will when in fact the truth was that the Will was found in the possession of MWP's home in January 2010. This was in effect a false allegation made by MWP****.*
>
> *…*
>
> *viii. Furthermore, in total denial of fairness to the Practitioner none of the subsequent allegations in the MWP allegations were ever put to the Practitioner by the CR before he was charged some four years later. After the charges were dropped new charges were again brought another 14 months later. No explanation was given or evidence led by the CR to explain the reason for dropping the initial charges or the delay between the filing of these charges.*
>
> *ix. New charges were laid on behalf of PD who had also complained after the judgment was received in HPP No. 3 of 2010. No effort was ever made to analyse whether the comments made by his Lordship Justice*

Balapatabendi were correct and more importantly whether the Practitioner had been given a chance to give evidence.'
[My emphasis]

(ii) Relevance of the mediation to the four counts?

[758] **This became a focus of oral submissions at the clarification hearing on 25th April 2018, when I asked of both Counsel whether the mediation was relevant to the four counts laid against the Respondent.**

[759] Counsel for the Respondent made the following oral submissions:

(1) There is a clear record that the complaint was before the mediator at which it was settled;

(2) The concern is that **although the matter was settled it has been resurrected twice which should raise as an estoppel** particularly in light of section 109(1) of the *Legal Practitioners Act 2009,* which states –

*'109.—(1) Upon receipt of such complaint under section 99, … the Registrar **may** after undertaking such investigations as it sees fit—*
(a) summarily dismiss the complaint under section 110 of this Decree;
*(b) make such efforts as it sees fit to facilitate the resolution of the matter in question, including **mediation**; or*
*(c) **commence disciplinary proceedings** before the Commission for determination by the Commission, in accordance with the provisions of this Decree.'*
[My emphasis]

(3) This is particularly relevant as it meant that if the complainant wished to continue with the complaint herself, even after it had settled at mediation, she would be doing so pursuant to section 111(2) of the *Legal Practitioners Act 2009* and **open to having an award of costs made against her** if unsuccessful;

(4) Apart from the issue of raising an allegation on the same facts, it is difficult to follow that one of the Counts against the Respondent is alleging that he failed to keep a proper record of the Will when the complainant knew when she lodged the complaint in March 2009 that the Respondent was keeping the Will was not correct.

[760] Counsel for the Applicant Chief Registrar responded that the mediation was not relevant to the four counts as there were other issues raised in relation to Maya Wati Prakash and the estate of Salen, as well as separate allegations raised by Pranita Devi.

[761] Counsel for the Respondent in reply submitted:

(1) Section 104 of the *Legal Practitioners Act 2009* states:

'Practitioner or law firm to be informed

*104. Upon receipt of a complaint under section 99 or commencement of an investigation under section 100, the Registrar **shall** refer the substance of the complaint or the investigation—*

*(a) in the case of complaint or investigation against a legal practitioner—**to the legal practitioner**;*

(b) in the case of complaint or investigation against a law firm—to all the partners of the law firm; or

(c) in the case of complaint or investigation against any employee or agent of a legal practitioner or law firm—to the legal practitioner or the one or more partners of the law firm.'

[My emphasis]

(2) The complaint of Maya Wati Prakash was referred to the Respondent, a mediation was held and the matter settled. **None of the other allegations of Maya Wati Prakash that are the subject of the counts were sent to the Respondent despite section 104** stating that '*the Registrar **shall** refer the substance of the complaint … to the legal practitioner'.*

[762] Counsel for the Applicant Chief Registrar responded that this was dealt with as a preliminary issue in the ruling of 21st September 2016.

(iii) The judgment of Balapatabendi J in Prakash v Devi of 11th October 2013

[763] **Clearly, there was a gap of some three years, 3 months and 18 days, between the mediation held on 24th June 2010 and the handing down of the judgment on 11th October 2013 by Justice Balapatabendi when His Lordship ruled in favour of Maya Wati Prakash pronouncing the Will of Salen Prakash Maharaj dated 22nd December 2006 valid** and that the Letters of Administration granted to Pranita Devi (the widow) on 16th February 2009 be revoked forthwith (Exhibit 19; and *Prakash v Devi* (supra)).

[764] In his judgment in *Prakash v Devi*, Balapatabendi J noted at [36]:

'I note that the parties in this case are in this predicament due to the inadvertence of the solicitors acted in the preparation of the will. When all the parties visited after the death of Salen Prakash Maharaj, they were categorically informed that there was no will. The same solicitor subsequently acted for the Defendant and took steps to take out Letter of Administration in favour of the Defendant. When the will was discovered

and submitted to the solicitor, he contacted the Defendant and informed that there is a will and thereby the Letter of Administration is in issue. The solicitors are duty bound be maintain proper records and registers for the wills prepared by them on behalf of their clients. <u>It appears that there was no such accurate system registration and recording of wills in the law firm. It also appears that the will is not registered. Wills (Amendment) Act requires the registration of will to avoid the circumstances similar to this case</u>. It is further observed that the existence or the non existence of a will to a complete 3rd party, by the solicitors after the death is also a matter of concern of the court. ***In my view, the conduct of the solicitor acted for parties initially in preparation of the will and Letter of Administration is unacceptable and unsatisfactory****.'*
[My emphasis]

(iv) The complaint of Pranita Devi of 15th November 2013

[765] On 15th November 2013, **<u>just over a month after the above judgment</u>**, the Legal Practitioners Unit received **<u>a complaint from Pranita Devi</u>** against both the Respondent and Mr. Willy Hiuare of HM lawyers (Exhibit 20). On 11th December 2013, a copy of the complaint was sent to the Respondent who was advised that *'The Chief Registrar's office has instituted investigations on the said complaint under section 100 of the Legal Practitioners Decree 2009'* (*Agreed Bundle*, Doc.AD21, p. 85, marked as Exhibit 21). The Respondent was given 21 days to respond and his firm did so on 23 December 2013 (with a copy sent to Pranita Devi), marked as received by the Legal Practitioners Unit on 27th December 2013 (Exhibit 23), setting out in 14 pages a detailed chronology of the matter with 13 annexures.

[766] I note that Pranita Devi responded in writing to the Acting Chief Registrar in a letter dated 23rd January 2014 (Exhibit 24).

[767] I also note that a similar letter was sent on 16th December 2013 to Mr. Willy Hiuare of HM Lawyers who responded on 19th December 2013, received by the Legal Practitioners Unit on 8th January 2014 (*Agreed Bundle*, Doc.AD22, pp. 86-88, marked as Exhibit 22).

[768] <u>On 16th July 2014</u>, (just over nine months after the judgment of Balapatabendi J was handed down on 11th October 2013), <u>the Chief Registrar filed an Application with the Commission setting out two allegations of Professional Misconduct against the Respondent.</u> This was made returnable on 30th July 2014 when the Application was withdrawn (Exhibit 25).

[769] Just under 15 months later, on 14th October 2015, a new Application was filed by the Chief Registrar setting out three allegations (two of Professional Misconduct and one of Unsatisfactory Professional Misconduct) against the Respondent and his law firm. On 13th November 2015, while the new application was pending, the Chief Registrar filed a further allegation of Professional Misconduct against the Respondent which, on 16th November 2015, the previous Commissioner, Justice P.K. Madigan, consolidated with the present proceedings so as to become Count 4.

(v) Conclusions as to the relevance of the outcome of the mediation

[770] My conclusions as to the relevance of the outcome of the mediation are thus:

(1) **Counsel for the Applicant Chief Registrar was correct in part in the oral submission that he made at the clarification hearing on 25th April 2018 when he stated that the mediation was previously dealt with in my ruling of 21st September 2016 as to why the entire matter needed to proceed to a final hearing.** I agree that it does not automatically follow that just because I heard evidence in relation to the mediation at the final hrearing that I need to make a findings in relation to it if they are irrelevant in assisting me in deciding whether Count 3 has been proven (and/or Counts 1, 2 and 4 for that matter);

(2) To be clear, I listed the mediation as one of 12 reasons **as to why there needed to be a full hearing** before the Commission in relation to the conduct of the Respondent and his firm **for the ENTIRE matter** and thus the strike-out application was refused. **Lest there still remains any confusion in relation to interlocutory applications generally before the Commission (and why most will be refused), I note what was said by Justice Madigan in *Chief Registrar v Adish Kumar Narayan*** [2014] FJILSC 6; Case No 009 of 2013; (PacLII: <http://www.paclii.org/fj/cases/FJILSC/2014/6.html>) at para [4]:

> *'... 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'.

Therefore, such an application, raising the conduct of how an investigation was undertaken and/or proceedings instituted, will usually be refused unless it is directly relevant as the basis of a preliminary strike out application such as for abuse of process. (See, for example, ***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 permanently stayed new proceedings brought before a medical tribunal against three psychiatrists arising out of a Royal Commission that took place after the medical tribunal had previously stayed earlier proceedings against one of the psychiatrists and the New South Wales Court of Appeal had ordered a permanent stay of proceedings against the other two; ***James v Medical Board of South Australia*** (2006) 95 SASR 445; AustLII: [2006] SASC 267, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2006/267.html>, where, in refusing an application for a permanent stay, the Full Court of the Supreme Court of South Australia instead confirmed the power of a medical tribunal to hear such argument as to an abuse of process and to stay proceedings before it should it see fit; and ***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>), where, in refusing an application for a permanent stay, a single justice of the Supreme Court of South Australia concluded at [126]: '*Even if a proper foundation had been made out and there was arguably a prima facie case on the merits, I would have exercised my discretion to refuse to grant the relief sought. The proper body to hear an application for a stay of proceedings on the grounds sought by the plaintiff is the Legal Practitioners Tribunal itself.')* In that regard, in relation to proceedings before this Commission, I note the successful strike out application in ***Chief Registrar v Naidu*** (Unreported, ILSC, Case No. 004 of 2015, Commissioner Hickie, 5 February 2017; PacLII: <http://www.paclii.org/fj/cases/FJILSC/2017/2.html>), compared with the unsuccessful strike out application in the present matter (*Chief Registrar v Suruj Sharma* (supra)), as well as in ***Sen v Chief Registrar*** (Unreported, ILSC, Case No.

010 of 2015, Commissioner Hickie, 14 February 2018; PacLII: [2018] FJILSC 1, <http://www.paclii.org/fj/cases/FJILSC/2018/1.html>) and ***Chief Registrar v Lal*** (Unreported, ILSC, Case No. 008 of 2015, Commissioner Hickie, 14 February 2018; PacLII: [2018] FJILSC 2, <http://www.paclii.org/fj/cases/FJILSC/2018/2.html>). **Those decisions must now be read in light of the Court of Appeal's recent judgment in *Chief Registrar v Devanesh Prakash Sharma*** (Unreported, Civil Appeal No. ABU 0076 of 2016, 1 June 2018, Basnayake, Lecamwasam and Almeida Guneratne JJA; PacLII: [2018] FJCA 53, <http://www.paclii.org/fj/cases/FJCA/2018/53.html>, **where (although the Commission has been advised that it is now under appeal to the Supreme Court) Almeida Guneratne JA (with whom Basnayake and Lecamwasam JJA agreed) explained** at paras [44] and [49]-[50]:

> *'[44] Section 121 of the LPD [Legal Practitioners Decree 2009] spells out the powers of the Commission on hearing. The provisions contained therein **do not confer an express power to grant a permanent stay** of the proceedings whether before or completing the hearing.*
>
> *...*
>
> *[49] Consequently, it is imperative that, Courts and Tribunals must identify the **distinction between abuse of process and procedural flaws** in the Conduct of Proceedings.*
>
> *[50] In the result, the application of the Respondents for a permanent stay and to strike out all the charges was misconceived and/or ill – founded, in as much as, the initial charges filed by the Appellant were not "frivolous, vexatious or in bad faith although **the Respondents might have been justified if they had sought an interim stay** in regard to the said additional 3 charges of the Commissioner in that regard and consequently the Commissioner had granted the same.'*
> [My emphasis in bold]

(3) In my Ruling of 21st September 2016, dismissing the Respondent's strike-out application, I noted at para [55] that Counsel for the Applicant had stated in his 'Written Submissions Opposing Application for Dismissal' dated 21st April 2016 at para [19], that *'the fundamental issue is not whether mediation minutes were kept or not but whether the complaint was resol[v]ed or not.'* [My emphasis] I then stated at para [58]: '… ***Clearly, whether or not there was a settlement between the First Complainant and the Respondent needs to be fully ventilated at a hearing'.*** Having now heard the entire four Counts, including evidence from some of the parties who attended the mediation, I have come to the view that **the outcome of the mediation (whether it not it settled the original complaint of Maya Wati Prakash) is not relevant in assisting me to decide whether or not the Applicant**

has proved his case in relation to Count 3, nor for that matter Count 1 or Counts 3 and/or 4, the latter two also alleging conduct that occurred after the mediation that was held in June 2010;

(4) **A final hearing before the Commission is not the appropriate forum to again raise the conduct of how an investigation was undertaken and/or proceedings instituted that has been the subject of a previous interlocutory application for a permanent stay or dismissal that has been refused, unless it is directly relevant as to why evidence should not be admitted and/or the basis of a submission as to why the Applicant has failed to prove its case;**

(5) Experienced Counsel who have been appearing on behalf of the Respondent in the present matter before me, are no doubt aware that there are other forums if one wishes to argue an unlawful investigation and/or malicious prosecution and seek damages. Whether a Court would be prepared to entertain such an application when proceedings before the Commission are not punitive but for protection of the public, is another matter entirely;

(6) **Even if the mediation had settled the initial two complaints of Maya Wati Prakash, it did not mean that the Chief Registrar was barred from a fuller investigation of the ENTIRE matter – as would be expected in light of the judgment of Balapatabendi J handed down on 11th October 2013 and the complaint by Pranita Devi of 15th November 2013**;

(7) The submission by Counsel for the Respondent **that section 111(2) of the *Legal Practitioners Act 2009* allows a complainant to be open to having an award of costs** made against them if unsuccessful, **is not correct according to the previous Commissioner, Justice Madigan, in *Vimotaad's Investment (Fiji) Ltd v Koya*** (Unreported, ILSC, Action No. 005 of 2012, 12 October 2012; PacLII: [2012] FJILSC 5, <http://www.paclii.org/fj/cases/FJILSC/2012/5.html>). Section 111(2) states:

> *'Any complainant **whose complaint has been summarily dismissed by the Registrar** under section 110(1), may commence 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 directly to the Commission in accordance with this Decree and containing one or more allegations of professional misconduct or unsatisfactory professional conduct.'*

Section 111(2) has to be read in conjunction with section 124(1) of the *Legal Practitioners Act 2009*, which states:

> *'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.'*
> [My emphasis]

I do not need to decide this issue, however, I do note that in *Vimotaad's Investment (Fiji) Ltd (supra),* which involved a legal practitioner as the self-represented complainant in a costs dispute with another practitioner, Justice Madigan, in dismissing the application, stated at paras [6]-[7]:

> *'6. By the terms of section 124 of the Legal Practitioners Decree 2009 the Commission has the right to award costs against any practitioners or law firm "as it thinks fit". As wide as that power may be, the Commission is of the view that it clearly envisages the award of costs against a party or parties it has investigated on an application by the Chief Registrar and* ***does not extend to parties or counsel for parties bringing frivolous applications before the Commission***.
> *7. This application by Vimotaad is frivolous and vexatious and is dismissed forthwith. It may be that the Decree may need to be amended to provide for the award of costs in a situation such as this, but* ***at the moment there being no power to do so****, the Commission does not make any order for costs.'*
> [My emphasis]

(6) High Court Civil Action No. HPP 003 of 2010 on behalf of Maya Wati Prakash – revocation of LA and probate of Will of 22nd December 2006

[771] As a result of the Will of Salen that had been executed on 22nd December 2006 being found on 23rd January 2010, a Writ was issued by Prem Narayan, on 6th February 2010, on behalf of Maya Wati Prakash, filed in the High Court of Fiji at Suva, Probate Jurisdiction (High Court Civil Action No. HPP 003 of 2010), between Maya Wati Prakash as the Plaintiff and Pranita Devi as the Defendant, seeking that the Letters of Administration granted on 16th February 2009 be revoked and the court declare probate of the Will of Salen Prakash Maharaj dated 22nd December 2006 (Exhibit 7).

(i) The evidence of Prem Narayan

[772] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [192]-[201]), the evidence-in-chief of Prem Narayan in relation to the High Court proceedings issued in 2010 on behalf of Maya Wati Prakash was, in summary, as follows:

'192. She also stated that MWP had informed her that Will was found by daughter but didn't say where but her daughter said that she found the Will when she was searching for other documents.

193. That when Will was found, instructions from MWP was to file for revocation as she was the Trustee under the will.

*194. She stated that **she believed that MWP's younger daughter, Irene [sic] had handed over the Will to her**.*

195. She was referred to page 522 -523 of Exhibit 47 and in particular to the Statement of Defense [sic] which stated that the signature of the deceased was forged. She said that she had to find out with forensic companies and costing involved as client would have to pay for it. According to her re-collection, she had asked MWP and her children to get hold of documents containing Salen's signature.

196. She confirmed the following in terms of the invoices:

- *Invoice No. 350 (Exh 50) was for work done after trial and also believed after judgment was delivered in relation to communicating with solicitor Daniel Singh and for committal proceedings as cost was not paid by the defendant [Pranita Devi].*
- *Invoice No. 351 (Exh 51) separate Estate matter for an application of probate, writing letters to banks in which deceased had accounts, letters to LTA as deceased had taxi and mini-van permits, letters to dominion Insurance and for removal of caveat that was lodged by MWP.*
- *Invoice No. 363 (Exh 52) was for summons for stay filed by defendant [Pranita Devi] and also for leave to appeal.*
- *Invoice No. 389 (Exh 53) was in relation to the Koronivia property for distress of rent as MWP had given it out on rent and the tenant was not paying rent*
- *Invoice No. 390 (Exh 54) transfer of property after probate issued to MWP*
- *Invoice No. 392 (Exh 55) must be in relation to application for leave to appeal out of time.*

197. She stated that <u>Irene used to come to her office to make payments but she understood from MWP that Subhasni used to pay</u>.

198. She confirmed that the total fees paid for all matters would have been approximately $48,000 and later confirmed that <u>total amount of fees paid for all matters was $49,062.45</u>

199. She confirmed that all outstanding fees was paid in 2016. She also confirmed that <u>she exercised lien over the original title of the Koronivia property which was handed over to her by MWP</u>.

200. She confirmed that MWP was travelling but she did not call MWP to come in the country until the case was called for hearing. She also stated that Subhasni was called only for trial.

201. She also confirmed that bailiff was sent to recover vehicle as vehicle was in a situation where certain things were removed and that PD made the bailiff run around as she did not easily surrender the vehicle.'
[My emphasis]

[773] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [189]-[190]), <u>the evidence of</u>

Prem Narayan in cross-examination in relation to the High Court proceedings issued in 2010 on behalf of Maya Wati Prakash was, in summary, as follows:

> *'203. She stated **that there were no file notes or emails in file** as this was a case where she did not email MWP as MWP would come to her office or make a call. Calls made were stated in the Bill of Costs. Calls mostly were superfluous and would be in terms of things already provided such as next court dates.*
>
> *204. She also stated that her server crashed in first week of January 2015 and she had no backup. She also did not print out her emails. The backup was on the package she had which had crashed.*
>
> *205. She stated that she was aware of the Rules for law firms to keep records of file notes and she stated that she was complying with that rule but just did not print emails and the system crashed. She stated that most email correspondence was with Subhasni and not MWP.*
>
> *206. She stated that she was called by MWP over the weekend and told that her daughter found the Will.*
>
> *...*
>
> *215. She stated that **she did not join the Respondent as a party since the Will was admitted to and so there was no need to call him**.*
>
> *…*
>
> *218. She stated that in January 2010, **Irene told her** that she was going through boxes looking for documents for Subhashni [sic] in Caubati. She then stated that **she believed that Will was found in the Koronivia property** as stated in the pleading.*
>
> *219. She stated that **she did not take any notes/statement from Irene in writing of how the Will was found**.*
>
> *220. She stated that she made enquiries with them on how often they searched for documents, where were the boxes, did anyone had access to the boxes and was there anything else with the envelope. She stated that she did not ask to see the envelope but she was told that the envelope had a lot of marks. MWP was out of the country so she spoke to her over telephone.*
>
> *221. MWP instructed her to start proceedings as she had taken advice from other practitioners as well. At all times MWP used to take second opinion.*
>
> *222. She was referred to Exh 47 and in particular to page 156 (second last paragraph) and she again mentioned that Irene bought the Will to her office and that she did not meet Subhasni, **She stated that maybe the Will was discovered by Subhasni**.*
>
> *223. She was then referred to page 157 of the same exhibit which stated that **Subhasni handed over the Will to her**. She then stated that it has been a long time ago and she cannot remember.*
>
> *224. She stated that she cannot now remember but if the transcript says Subhasni then she must have come to give her her [sic]. She explained that **she had mentioned Irene in her earlier evidence as she was the one who used to come to her office all the time**.*
>
> *225. She stated that when she got the Will and before she commenced action **she did not write to PD to come and inspect the original** Will, **she also did not verify the original Will with the Respondent or with the two witnesses because she had MWP's Will with her which was prepared by the Respondent's law firm and had the same witnesses**.*

226. *She stated that she understood that for revocation of LA she was required to file a Writ after she did her research. She stated that she looked at the time frame, Will being discovered at a much later stage and so* ***she thought litigation was needed****.*

...

228. *She stated initially that she told Mr. Hiuare not to call Dipka and later retracted and said that she did not tell him whom not to call but that* ***she would not be calling Dipka as she did not see any reason to call as the Will was agreed to****.*
229. *She confirmed in her evidence that she did not write to Mr. Sharma's office to verify pleadings and she did not feel that what was contained at page 522 of exhibit 47 and in particular at paragraphs 6 and 7 was an attack on the Respondent's law firm* ***because she relied on her client*** *and she stated that if she does not believe in her client, then there is no need to take a brief.*
230. *She stated in her evidence that she did not present the Will to High Court within 30 days of it being found as she had instead made an application for revocation.*
231. *She confirmed that as per exhibit 46, on 2nd September 2010, she deposited the original Will with Nehla Baswaiya for safe keeping and that she had informed her client about this arrangement.*
232. *She confirmed she had lien over the Title.*
233. *She also stated that the money from Dominion Insurance was not received by her.*
234. ***She also stated that she would not be able to say how much funds were received on behalf of estate****.*
235. *She stated that according to her re-collection, the sum received from Dominion Finance was paid to PD.*
236. *She confirmed that she was paid by Sherani for lien over the Title.*
237. *She also stated that MWP got hold of taxi permits in the course of her instructions.*
238. ***She did not have an explanation as to why she did not ask for indemnity costs in the High Court matter****.*
239. *She confirmed that she just made a one liner submission on cost and confirmed that the cost awarded by the judge was $1500. She stated that cost was not paid so leave to committal was drafted but not pursued.*
240. *She stated that it* ***did not occur to her to put Mr. Hiuare on notice that her client was coming from US and daughter from Australia and that she would be seeking costs****.*
241. *She stated that she discussed with client on cost but she didn't get receipts.'*
[My emphasis]

[774] As already noted on a number of occasions in this judgment, according to the written submissions of Counsel for the Respondent, Prem Narayan's *'evidence showed that she had no file notes and her records were non-existent'.* In relation specifically to the High Court proceedings issued in 2010, the written submissions of Counsel for the Respondent summarised Prem Narayan's evidence as follows

('Practitioner's Closing and Responding Submissions', 31st January 2018, page 11, sub-para [xi][h]-[o] and [q]-[t]):

> *'[xi]. ...*
>
> *[h]. **When the Will was found PLN did not write to the Firm, PD or to the High Court Registry but instead she drafted and filed a Writ**. She made allegations against the Practitioner without giving him any chance to discuss or refute the allegations.*
>
> *[i]. In the Writ PLN admitted that she did not plead a claim for costs.*
>
> *[j]. PLN said she had nothing to do with the complaint to the CR against the Practitioner and claimed to be related to him. The evidence showed that she had a major hand and even raised the issue of the complaint to the High Court Judge.*
>
> *[k]. **PLN made no attempt to seek costs in the High Court matter. She didn't put WH on notice about seeking costs on an indemnity basis when they met.***
>
> *[l]. PLN's Invoices were in an appalling condition and she couldn't provide any records to verify the items on her invoice.*
>
> *[m]. PLN admitted that she had talked to WH and had told him not call Mala to give evidence, **She felt that Mala or the Practitioner's evidence was unnecessary because the Will had been admitted.***
>
> *[n]. PLN criticised the Firm in her submissions at paragraph 3.13 and these submissions were adopted by the Judge to vilify the Practitioner. The judgment was used as a basis to lay the charges against the Practitioner and his Firm.*
>
> *[o]. **PLN admitted that it never occurred to her to seek a judgment on admissions once the PTC had agreed that the Will had been made and duly signed**.*
>
> *...*
>
> *[q]. PLN had nothing to say when it was shown to her that it was not mandatory to register Wills under section 17 of the Wills Amendment Act 2004.*
>
> *[r]. PLN admitted that she had taken a lien over MWP's home property in order to get paid her fees.*
>
> *[s]. **PLN admitted that the compliant [sic] made by MWP that the Practitioner was keeping the Will was a false complaint**.*
>
> *[t]. PLN said she didn't keep any records about Wills on her client files but she registers the Will and keeps a signed Copy of a Register. In this respect PLN was unable to show any records at all about the Will she drafted.'*
> *[My emphasis]*

[775] I agree generally with the above submitted by each Counsel as summaries of the evidence given by Prem Narayan in relation to the High Court proceedings issued in 2010 on behalf of Maya Wati Prakash.

(ii) The evidence of Maya Wati Prakash

[776] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [36]), the evidence-in-chief of Maya Wati Prakash in relation to the High Court proceedings was:

> *'She further informed the Commission that she won the High Court case which PN had filed. She paid $65,000 fees to PN and she took loan to pay this amount. She also informed the Commission that she [sic] the receipts of the amount being paid to PN.'*

[777] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [36]), the evidence of Maya Wati Prakash under cross-examination in relation to the High Court proceedings was:

> *'77. She agreed that Subhashni [sic] gave the original will to PN.*
> *78. She said that Subhashni and PN used to take [sic] to her about the pleadings.*
> *...*
> *80. She informed the Commission that she did not read the fee invoice and had just paid the amount of $65,000. Her family and her daughter had assisted her in paying the bill cost to PN. She stated that she had to sell her Koronivia house as PN held the title so that she could pay the fees.*
> *...*
> *81. **She stated that she had informed PN that Dipka had signed on SPM's will as a witness**.'*
> [My emphasis]

[778] I agree generally with the above as a summary of the evidence of Maya Wati Prakash in relation to the High Court proceedings issued in 2010 on her behalf by Prem Narayan.

(iii) The evidence of Subhasni Singh

[779] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at paras [129]-[132]), the evidence-in-chief of Subhasni Singh in relation to the High Court proceedings was, in summary:

> *'129. She mentioned that they suffered **a loss of approximately $200,000 which included the fee paid to PN**, airfare for her and her mum (mum's airfare from US to Fiji and back and her airfare from Australia to Fiji and back), taxi fare from Caubati to PN's office. She did not provide the documentation as she felt it was not needed.*

130. *She mentioned that after LA was granted to PD in 2009, the properties of the deceased were as follows:*
    - *Between $75,000 - $90,000 Cash in bank as the deceased had just sold property*
    - *Taxi permit with vehicle*
    - *Mini bus with permit*
    - *House at Koronivia*
    - *Insurance claim (mini bus got accident and Dominion Finance paid $30,000*

275. *She stated that **she does not know who received the sum of $30,000 but she did remember it went to Prem Narayan's trust account** and that after her mum won the case in 2013, PD only gave back the permit without the vehicle and some cash.*
276. *She also stated that **she had to pay PN's fees when mum could not pay** and that she may have paid $25,000 in total as PN's fees.'*
[My emphasis]

[780] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at paras [133]-[143]), the evidence of Subhasni Singh under cross-examination in relation to the High Court proceedings was:

*'133. She stated that **she was not asked to send a schedule of breakdown of $200,000** but she was asked to give a statement and that she provided some bank statements. She also confirmed that the visits that she and her mum made to PN's office was at PN's request as she would email her or communicate with her sister, Irene and relay that they were required to come over, sometimes on very short notice*

134. *She stated that PN may have been instructed in late December 2008 and confirmed that PN lodged claim on her behalf as well.*
135. *She stated that the $75,000 to $90,000 that she mentioned in her evidence in chief was from the proceeds of sale of Lokia property.*
136. *She also confirmed that PD left in December 2008 and possession of the Koronivia property was in her and her mum's hands. She stated that she stayed there until July 2009 when she left for Australia to pursue her studies along with her husband and that her mum stayed there alone for a while until she asked her sister to take mum to her home in Caubati although she could not recall when her mum started living in Caubati.*
137. *She stated that when her mum won the case, she sold the property and **although she had invested in that property** she did not know for how much it was sold and **she did not take any money from mum**.*
138. *She was referred to AD 4. She confirmed that she did not enter into any cost agreement with PN and that she did sign something. She confirmed that she provided PN with documents such as receipts for material, labour cost and other things she bought.*
139. *She confirmed that she was briefed by PN on her claim and that she had instructed PN to write the letter (AD 4).*
140. *As for the Dominion Insurance claim, she stated the payout was in the sum of $30,000 and they were given a cheque of that amount in December 2008 and that it was deposited in a trust account but she was*

not sure whether it was deposited in Patel Sharma or PN's trust account.

141. She confirmed that she contributed towards PN's fees. She stated that PN asked her mum, MWP to make ***payment for $20,000 since she was holding on to MWP's title to the Koronivia property*** *and that she would release once they made payments. She stated she did not know how PN got the title of the Koronivia property.*

142. ***In relation to the personal injury claim*** *(Daniel Singh Lawyers instructed for this matter) as SPM died of injuries sustained in a motor vehicle accident,* ***she stated that she did not know how much her mum received****.*

143. She stated that ***they were not happy of the fees charged****.'*
[My emphasis]

[781] I agree generally with the above as a summary of the evidence of Subhasni Singh in relation to the High Court proceedings issued in 2010 by Prem Narayan on behalf of Maya Wati Prakash.

[782] The written submissions of Counsel for the Respondent did not specifically address the evidence of Maya Wati Prakash and Subhasni Singh in relation to the High Court proceedings *(see 'Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 9, para [24], sub-paras [i]-[ix]).

(iv) The evidence of Willy Hiuare

[783] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [339]-[344], [346]-[347], [349]-[357] and [360]), the evidence-in-chief of Willy Hiuare in relation to representing Pranita Devi in defending the High Court proceedings issued in 2010 by Prem Narayan on behalf of Maya Wati Prakash) was, in summary, as follows:

'339. He stated that he had a bit of experience with Mr. G.P. Lala in estate matters perhaps one at the least.

340. He stated that PD came to his office and that she got a Will in her hand from Patel & Sharma and Kohli & Singh and he stated that by that time Statement of Claim had been filed by Ms. Narayan as well as a Statement of Defense [sic].

341. He stated that ***PD pled forgery and fraud*** *and discussed with him about the Will and that the only evidence she had was the signature on his passport* ***and no evidence on fraud****.*

342. He stated that he told her that evidence is not enough and for fraud she needs expert witness and the option for her to solve it outside court by discussing with her mother-in-law but she told her that her in laws did not want her to be part of anything.

343. He stated that all these instructions/discussion with PD was done orally with no retainer.

344. *He stated that he met Ms. Narayan outside court and discussed if this matter could be settled but she was very difficult.*

…

346. ***He was shown Exhibit 14 [the letter he sent on 15th May 2010 to Patel Sharma lawyers follwing [sic] the meeting that took place that day] … Dipka confirmed that it was her signature and confirmed Ms. Doughty's and SPM's signature. <u>He stated that he then knew that it was a proper Will</u>.***

347. *He stated that he discussed with PD that it is a true Will and that if she proceeds, then need for an expert witness. <u>He stated that PD told her [sic] that since she is not the beneficiary she is disputing the Will</u>.*

…

349. *He stated that he told PD that the case is very weak or get overseas expert or settle.*

350. *He stated that when he had a meeting with PN, she told him that she would call Dipka Mala and the Respondent so he was of the opinion they would be called.*

…

352. *He was referred to Exhibit 16 [the letter he sent to Patel Sharma Layers on 12th October 2012] and **asked on what basis he was referring to the Will as forged and he replied that PD persisted that the Will was forged**.*

353. *He stated that he did not obtain expert witness as PD had no money.*

354. *He stated that he was in a difficult situation as his client PD did not have expert evidence but <u>relied on her husband's signature on passport and he said he advised her that it was a default [sic] case</u>.*

355. *He stated that he asked PD to withdraw her instructions but he stated that she told him that she cannot hire another lawyer and **he stated that he didn't think that he had an ethical responsibility of withdrawing**.*

356. *<u>He admitted that **he had an ethical duty to withdraw** as counsel</u>.*

357. *He agreed that copy of passport was not an agreed document and was also not tendered in through the witness.*

…

360. *He stated that he was not aware that PD was administering the estate and had taxi and mini van permits and he only came to know about it during trial.'*
[My emphasis]

[784] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [363]-[365]), <u>the evidence of Willy Hiuare in cross-examination</u> was, in summary, as follows:

*'363. He stated that there might have been no retainer executed and also stated that **<u>he did not keep proper records for this file</u>**.*

364. *He stated that on the day instructions were given by PD, he was given a Will but he did not enquire where she got it from and that from his re-collection PD went to Kohli & Singh Lawyers to bring a file.*

365. *He stated that she paid him a total of $1050 as fees.'*
[My emphasis]

[785] The written submissions of Counsel for the Applicant Chief Registrar ('*Closing*

Submissions', 8th January 2018, at para [367] and [369]-[370]), have summarised the evidence of Willy Hiuare in re-examination on this issue as follows:

> *'367. He stated that* ***when he received the file from Kohli & Singh Lawyers, he only received the Statement of Claim and Statement of Defense [sic] and not any correspondences****.*
>
> *...*
>
> *369. He stated that PD started paying fee after one year had lapsed.*
>
> *370. He stated that she must have paid a total fee of $1400 out of which approximately $200 could have been filing fees. He did not issue Bill of Costs as he treated her as a casual client.'*
>
> [My emphasis]

[786] The written submissions of Counsel for the Respondent have summarised Willy Hiuare's evidence on this issue as follows *('Practitioner's Closing and Responding Submissions',* 31st January 2018, page 14, para [25], sub-paras [ii]-[v]):

> *'[ii]. **WH confirmed that he had met with the Practitioner and Mala on 15th May 2010 and Mala had confirmed to him that the signatures on the Will were authentic and that it was not a forgery**.*
>
> *[iii]. WH confirmed that the Practitioner and Mala were co-operative and provided him with documents he required and also informed him that they would be willing to give evidence in Court.*
>
> *[iv]. WH gave evidence that **he advised PD that the case was hopeless but he said that PD insisted on running the defence of forgery**.*
>
> *[v]. WH said that after he had discussed the matter with PLN they agreed not to call the Practitioner and Mala to give evidence in Civil case HPP No. 3 of 2010.'*
>
> [My emphasis]

[787] I agree generally with the above as summaries of the evidence of Willy Hiuare in relation to the High Court proceedings issued in 2010 by Prem Narayan on behalf of Maya Wati Prakash.

(v) The evidence of Pranita Devi

[788] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [282]-[292]), the evidence-in-chief of Pranita Devi in relation to defending the High Court proceedings issued in 2010 by Prem Narayan on behalf of Maya Wati Prakash) was, in summary, as follows:

> *'282. She stated that after LA was granted, she received the following:*
>
> - *LM permit only without vehicle*
> - *Taxi permit with vehicle*
> - *Cash held in BSP Bank in the sum of $11,000 (she stated that there was $60,000 in the bank account but after deduction of loan, she*

received $11,000). The mini van that was involved in the accident was under Bill of Sale and the Bill of Sale amount was deducted.

- *$7,000 cash held in ANZ Bank*

283. She could not recall the exact dates when the above properties were transferred to her. She stated that she bought another van from the cash that she received and also took loan for the purchase of the van.

284. The Koronivia property was not transferred in her name and there was caveat place on the Title.

285. The Respondent had assisted her in transferring the properties.

286. She stated that she did not benefit from what she received as she was paying loan of $1321 monthly, base fees and maintenance of vehicle

287. She stated she had the properties under her name for close to 5 years. The last vehicle was taken away from her on 14th September 2014.

288. She confirmed she was a party to proceedings in the High Court and that she lost that case. She stated that Raikaci Lawyers were instructed by her to appeal the matter.

289. She stated that WH did not inform her first of the outcome of the High Court matter but she first learnt of the outcome from her husband's sister-in-law. When she met with Mr. Hiaure [sic] and asked why he had not informed her of the outcome, he told her that he did not have her contact number to which she replied that she had given her contact to his clerk.

290. WH told her that she might have to appeal the case but he would not pursue the appeal.

291. Decision of the Court of Appeal was that appeal was filed out of time by 58 days and hence dismissed.

*292. **She stated that if there was a Will, then the Respondent should have told her before. LA would not have been granted to her. Today she found herself to be nowhere.**'*
[My emphasis]

[789] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at paras [298]-[307], [309]-[310]), the evidence of Pranita Devi under cross-examination in relation to defending the High Court proceedings issued in 2010 by Prem Narayan on behalf of Maya Wati Prakash) was, in summary, as follows:

*'298. She stated that she was never told by her lawyer as to why she lost the High Court case and that she had not read the judgment but directly given it to Raikaci Law and Ms. Raikaci read and explained to her about the judgment and told her that **her lawyer [Mr. Hiuare] erred as he agreed to the Will**. She told Ms. Raikaci that she gave three documents containing signature of SPM.*

*299. She stated that **she had instructed WH that the Will was fake and forged since at the time when LA was filed, there was no Will**.*

300. She also stated that from the beginning, WH agreed with her that the Will was forged and he told her that if she wanted to prove the fake Will, she would have to get experts which would cost her $15,000. She did not go ahead with hiring expert but stated that case went on.

*301. She confirmed that **WH had informed her over the telephone that he took the Will to the Respondent's office** but that he never informed her that it was confirmed there that it was a true Will. **WH never told that the Will was tue. [sic]***

302. She stated that it was a Saturday when she got a call from the Respondent's office that Will had been found by Subhasni and she and her uncle went to the Respondent's office as her uncle was related to Mr. Sharma.

303. Mr. Sharma explained that Will had been found and properties would go back to them.

*304. **She was shown Exhibit 12 [letter dated 7th May 2010 from HM Lawyers to Patel Sharma Lawyers] and she confirmed that the Will was shown to her and that her view was that it was not her husband's signature on the Will**.*

305. She stated that she and her lawyer sat together and read the Will and she understood.

306. She also stated that her lawyer did not tell her the implications of the Will being found and that she was not told that LA would be revoked and she stated that that was the reason the case was still going on.

*307. She confirmed that **the Respondent acted for her in 2009 and 2010** and that as at March 2010 Mr. Raman Singh was dealing with her matter. She did not know the date when the Respondent last acted for her but transferring of permits etc were done by the Respondent.*

...

309. She agreed that Jaywant [sic] Pratap was her advisor.

*310. She also agreed that **after 28 March 2009 to 2010, Mr. Raman Pratap Singh acted for her and thereafter Mr. Hiuare**.'*

[My emphasis]

[790] According to the written submissions of Counsel for the Respondent, the evidence of Pranita Devi on this issue was, in summary, as follows *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 13, sub-paras [xi]-[xvi]):

'[xii]. She said that she wanted to share the Estate with MWP but PLN objected and there was no settlement between the parties.

[xiii]. She admitted she gave instructions to PSA to take out Letters of Administration. She became the Administratrix of the Estate.

[xiv]. The monies owned to the Bank were paid off and with the balance she purchased two new mini vans in her own name.

*[xv]. When the signed Will was found she refused to believe that SP had made a Will. Her position was that if he made a Will then he would have discussed it with her. Under cross examination she had to admit that SP had brought another Pranita home and was living with that other Pranita whilst PD was living in the same room as MWP. **In her letter to the Chief Registrar PD also admitted at page 78 of the Agreed Bundle of Documents that SS was aware of the unsigned Will held by Patel Sharma & Associates from the time when SP had died and was in the mortuary**.*

[xvi]. PD made a deliberate decision not to hand over the Estate to MWP when the signed Will was found and even though it had been confirmed to her Solicitor by Mala that the signatures were

> *authentic she still persisted in instructing WH to pursue a defence of forgery.* ***She had no evidence to prove that the signature in the Will was a forgery****.'*
> [My emphasis]

[791] According to the written submissions of Counsel for the Applicant Chief Registrar ('*Closing Submissions',* 8th January 2018, at para [336]), the evidence of Pranita Devi in re-examination dealt with defending the earlier High Court proceedings issued in 2009 by Prem Narayan on behalf of Maya Wati Prakash and that Pranita Devi *'stated that she did not see the Respondent after LA granted',* apart from hosting a meeting between the parties held at the Respondent's firm in March 2009.

[792] I agree generally with the above as summaries of the evidence of Pranita Devi in relation to the High Court proceedings issued in 2010 by Prem Narayan on behalf of Maya Wati Prakash, though I note that the evidence of Pranita Devi was that she never gave Mr. Hiuare instructions for the Will dated 22nd December 2006 to be an agreed document and she did not know about that until she went at saw Ms. Raikaci of Ravono and Raikaci Law who read and explained to the High Court judgment to her.

(vi) The evidence of Dipka Mala

[793] According to the written submissions of Counsel for the Applicant Chief Registrar, the evidence-in-chief of Dipka Mala in relation to the High Court proceedings issued in 2010 by Prem Narayan on behalf of Maya Wati Prakash was ('*Closing Submissions',* 8th January 2018, at para [437]) was that *'... WH told them he would subpoena them by way of letter. He later wrote to them that he had spoken with PN and would not call them to give evidence.'*

[794] I agree generally with the above summary and note that Dipka Mala was not cross-examined on this issue.

(vii) The evidence of Suruj Sharma

[795] The written submissions of Counsel for the Respondent, have summarised the evidence of Suruj Sharma in relation to the High Court proceedings issued in 2010 by Prem Narayan on behalf of Maya Wati Prakash *('Practitioner's Closing and Responding Submissions',* 31st January 2018, page 16, sub-para [xix]) as (to which

I generally agree):

> *'The Practitioner co-operated with WH and was willing at all times to give evidence in Court about SP's Will but WH and PLN decided not to call him or Mala to give evidence.'*

(viii) No evidence called from Mr. Raman Pratap Singh

[796] I note that Mr. Raman Pratap Singh of the firm of Kohli & Singh, who acted for Pranita Devi from late March 2009 or early April 2009 until 2010, was not called in the proceedings before this Commission.

[797] I also note that on 6th February 2010 (after the Will had been found on 23rd January 2010), Prem Narayan commenced proceedings on behalf of Maya Wati Prakash seeking that the Letters of Administration granted on 16th February 2009 be revoked, the court declare valid the Will of Salen Prakash Maharaj dated 22nd December 2006 and probate be granted in favour of Maya Wati Prakash. I further note that Willy Hiuare took over acting for Pranita Devi from on or about 7th May 2010 and claimed in his evidence that when he took over the matter a Statement of Defence had already been filed pleading forgery and fraud. In that regard, I have examined the *'Statement of Defence'* filed on 28th April 2010 (Doc.89, Exhibit 47, pp. 483-485) and note at paragraph 4 it is stated *'that the alleged will dated 22nd December 2006 is forged'* and again at paragraph 7 it is stated that *'the Defendant says that the signature of the deceased's name on the Will is a forgery'*. The particulars then state:

> *'The deceased was 33 years of age at the time of his death. He was a fit and healthy person. He was close to the Defendant and always discussed all matters relating to the property and other matters pertaining to the family with the Defendant[.] He did not mention that he had made a Will at any time. By comparing the signature of the deceased in other documents it is evident that the signature of the deceased in the Will is forged.'*

[798] **Despite the above particulars claiming that Salen was close to his wife, Pranita Devi, '*and always discussed all matters relating to the property*' with her, I wonder whether Mr. Singh was ever made aware by his client as to the existence of the second Pranita living with Salen at the time when his Will was made on 22nd December 2006. I also note that there is no evidence before the Commission that Mr. Singh ever contacted Patel Sharma Lawyers and spoke with the Respondent and/or Dipka Mala prior to filing a Statement of Defence in HPP No.003 of 2010. Further, it is unclear what work was performed by**

Mr. Singh from late March or early April 2009 in relation to the 2009 proceedings (Civil Action No. 81 of 2009) and then between February and May 2010 in relation to HPP No.003 of 2010 (apart from drafting and filing a Statement of Defence) when Willy Hiuare took over the matter.

[799] In my view, Mr. Raman Pratap Singh is a person who might have been expected to have been called in the present proceedings before the Commission but he was not and no explanation given for his absence which was strange particularly when Prem Narayan was called by Counsel for the Applicant and Willy Hiuare was called by Counsel for the Respondent. Balanced against that, apart from his acting for Pranita Devi from late March or early April 2009 until Mr. Hiuare became involved on or about 7th May 2010, there has been no evidence to which my attention has been drawn that Mr. Singh might have been able to assist the Commission, **that is, that he would be able to *'elucidate a particular matter'* in relation to the conduct of the Respondent.** Indeed, I note that, **according to the evidence of Mr. Hiuare, when he took over the matter from Mr. Singh, all that he received from the firm of Kohli and Singh was a Statement of Claim and a Statement of Defence and not any correspondence. Even though I am concerned upon what basis Mr. Singh filed on behalf of Pranita Devi a Statement of Defence pleading fraud, in my view, without detailed file notes, the chances of Mr. Raman Pratap Singh's recollections assisting the Commission in relation to the conduct of the Respondent and what took place from late March or early April 2009 until Mr. Hiuare became involved in this matter in May 2010 are speculative at best.**

[800] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of Mr. Raman Pratap Singh from giving evidence as to what occurred in this** matter from late March 2009 until Mr. Hiuare became involved in May 2010, **I have come to the view that:**

(1) The three conditions set out by Glass JA in *Payne v Parker* are not satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – there is no material before me as to why Mr. Raman Pratap Singh would be expected to be called (if his evidence was relevant) '*by one party rather than the other*'. **Indeed, it was open to either party to call him**;

(ii) the missing witness' *'evidence would elucidate a particular matter'* – for the reasons outlined above, **the evidence of Mr. Raman Pratap Singh would NOT, in my view, elucidate in relation to what took place in this matter from March 2009 until Mr. Hiuare became involved in May 2010 relevant to the conduct of the Respondent**. As the State Administrative Tribunal of Western Australia noted in the disciplinary proceedings in *Trowell* (supra) at [87], '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter. It is not enough to conclude that a witness may have knowledge**';*

(iii) the missing witness' *'absence is unexplained'* – the absence of **Mr. Raman Pratap Singh** from the proceedings before this Commission is unexplained, however, **his evidence in relation to what took place in this matter from March 2009 until Mr. Hiuare became involved in May 2010 would probably not assist**;

(2) Accordingly, no inference will be drawn, in relation to the case of either party, from the absence of evidence by Mr. Raman Pratap Singh in relation to what took place in this matter from March 2009 until Mr. Hiuare commenced representing Pranita Devi from May 2010;

(3) I have also noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

(ix) No evidence called from Ms. Raikaci

[801] I note that Ms. Raikaci of the firm of Ravono & Raikaci Law, who acted for Pranita Devi in relation to the appeal after the judgment was handed down in *Prakash v Devi* in October 2013, was not called in the proceedings before this Commission. I am unaware of what evidence, if any, Ms. Raikaci could have given to assist in this matter other than, according to the hearsay evidence given by Pranita Devi, that she never gave Mr. Hiuare instructions that the Will being admitted as an agreed document and she did not know about that until she went at saw Ms. Raikaci who read and explained to the judgment to her.

[802] **Applying the test set out in *Jones v Dunkel* (subject to the conditions that I have set out above), in relation to the absence of Ms. Raikaci from giving**

evidence as to <u>what occurred in this matter relevant to the appeal</u>, I have come to the view that:

(1) The three conditions set out by Glass JA in *Payne v Parker* are <u>not</u> satisfied -

(i) *'the missing witness would be expected to be called by one party rather than the other'* – there is no material before me as to why Ms. Raikaci would be expected to be called (if her evidence was relevant) '*by one party rather than the other*'. **Indeed, <u>it was open to either party to call her</u>**;

(ii) the missing witness' *'evidence would elucidate a particular matter'* – for the reasons outlined above, **the evidence of Ms. Raikaci <u>would NOT, in my view, elucidate in relation to</u> what took place in this matter in relation to the High Court proceedings HPP 3 of 2010**. As the State Administrative Tribunal of Western Australia noted in the disciplinary proceedings in *Trowell* (supra) at [87], '*In order for the rule in **Jones v Dunkel** to operate, **the evidence of the missing witness must be such as would have elucidated a matter. <u>It is not enough to conclude that a witness may have knowledge</u>**';

(iii) the missing witness' *'absence is unexplained'* – <u>the absence</u> of Ms. Raikaci from the proceedings before this Commission <u>is unexplained</u>, however, **her evidence in relation to what took place in this matter in relation to the High Court proceedings HPP 3 of 2010 <u>would probably not assist</u>**;

(2) Accordingly, <u>no inference will be drawn,</u> in relation to the case of either party, from the absence of evidence by Ms. Raikaci;

(3) I have also noted when considering what inference, if any, to be drawn, '*that this is not an ordinary civil action but rather it constitutes professional disciplinary proceeding ... subject to its own statutory procedures'* including that '*the Commission is not bound by formal rules of evidence ... and the Commission must act fairly in relation to the proceeding'.*

(x) Findings in relation to the alleged 'unnecessary cost for initiating High Court Action No. HPP 3 of 2010'

[803] **My <u>findings</u> in relation to the alleged '*unnecessary cost for initiating High Court Action No. HPP 3 of 2010'* relevant to Count 3 are:**

(1) After the Will of Salen Prakash Maharaj had been found on 23rd January 2010, Prem Narayan, <u>prior to instituting proceedings</u> in the High Court -

(i) never contacted Patel Sharma Lawyers and spoke with Dipka Mala and/or Mr. Suruj Sharma to have them confirm the validity of the Will;

(ii) never lodged the Will with the High Court so that the Court's Probate Division could write to Pranita Devi as the Administratrix and recall the grant of Letters of Administration;

(2) Prem Narayan, rather than lodging the Will with the High Court, gave the Will to Nehla Baswaiya of Munro Leys for safekeeping and instituted proceedings in the High Court in HPP 3 of 2010;

(3) <u>After instituting proceedings</u> in the High Court in HPP 3 of 2010, Prem Narayan –

(i) never sought judgment on the admissions once the Pre-Trial Conference Minutes had agreed that the Will had been made and duly signed;

(ii) never called Dipka Mala and/or Mr. Suruj Sharma as witnesses in the High Court in HPP 3 of 2010 to give evidence as to the validity of the Will;

(iii) never sought indemnity costs;

(4) Mr. Willy Hiuare of HM lawyers commenced acting in this matter on or about 7th May 2010 and, as I have already found above in relation to Count 2, on 15th May 2010, Willy Hiuare attended the offices of Patel Sharma Lawyers and the following occurred -

(i) Mr. Hiuare spoke with Dipka Mala and Mr. Suruj Sharma;

(ii) Mr. Hiuare showed to Dipka Mala and Mr. Suruj Sharma a copy of the signed Will allegedly found on 23rd January 2010;

(iii) the signed Will allegedly found on 23rd January 2010 was then compared with the unsigned copy of the Will held on the computer records of Patel Sharma Lawyers and the details in both were found to be the same;

(iv) Dipka Mala also confirmed to Mr. Hiuare that it was her signature on the signed the copy of the Will allegedly found on 23rd January 2010;

(v) Dipka Mala and Mr. Suruj Sharma offered to Mr. Hiuare to give evidence in the High Court proceedings HPP 3 of 2010;

(5) Once Dipka Mala and Mr. Suruj Sharma had confirmed to Mr. Hiuare on 15th May 2010 that the Will was valid, then defending the proceedings in HPP 3 of 2010 was doomed to fail as there was –

(i) <u>no basis to raise the defence of fraud</u>;

(ii) no basis to continue to defend the High Court proceedings generally other than filing a possible cross-claim pursuant to the *Inheritance (Family Provision) Act 2004* or issuing separate proceedings to that effect;

(5) In light of the above findings, I can see no basis as to how the Respondent is responsible for the alleged *'unnecessary cost for initiating High Court Action No. HPP 3 of 2010'.*

(7) Conclusion on Count 3

(i) Submissions

[804] In his *'Prosecution Case Statement'* filed on 18th November 2016 prior to the final hearing of this matter, Counsel for the Applicant Chief Registrar stated in relation to Count 3 at para [8]:

> *'Count 3 alleges that the Respondent **failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj** dated 22nd December 2006 which was prepared by Patel Sharma Lawyers, thereafter, proceeded on instructions of Pranita Devi **and obtained grant of Letters of Administration** in the Estate of Salend [sic] Prakash to the said Pranita Devi **as such Maya Wati Prakash who was the sole beneficiary to the Will of Salend [sic] Prakash had to institute civil proceedings** before the High Court.'*
> [My emphasis]

[805] The written submissions of Counsel for the Applicant Chief Registrar filed after the hearing of this matter, have stated the following in relation to Count 3 *('Closing Submissions'*, 8th January 2018, at [493]-[494]):

> *'493. In regards to Count 3, it is respectfully submitted, that **the Respondent should not have proceeded with the application for LA** as he ought to have remained neutral after knowing that his firm had prepared a Will for the deceased and the terms of the said Will, if found, would be in conflict with the grant of LA to the widow. The Respondent should have foreseen the conflict and refrained from pursing the LA grant. **The practitioner by pursuing with the LA application and a true Will being found later put himself in a conflicting situation.** MWP upon finding the Will had to seek legal advice which definitely came at a cost. The action no. HPP 3/10 was initiated as a result of the LA being granted and for the same to be revoked.*
>
> *494. It is respectfully submitted that **Ms. Narayan as a practitioner did what according to her knowledge and expertise was correct**. MWP had been put in this situation as LA had been granted for the Estate of SPM. Had LA not been extracted, MWP would never have to incur additional cost and suffering in setting aside the grant of LA. Hence, it is submitted that **MWP was subjected to unnecessary cost as a result of the actions of the Respondent in extracting LA**. According to PN, she submitted a Schedule of Invoices (Exhibit 61) and according to her **the cost that***

***MWP had to bear in total was $1,440**. However, it is submitted that this cost does not include the pain and suffering that MWP had to go through. Further, the amount $1,440 does not include the cost of appeal as the other party had appealed and MWP had to defend the appeal. She would not have to defend the appeal or for that matter bear cost of HPP 3/10 had LA not been granted to PD.'*
[My emphasis]

[806] Counsel for the Respondent have argued *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 18, paras [30]-[33]) in relation to the Prosecution Case Statement that:

> *'30. At paragraph 10 of the Statement the Chief Registrar submitted that just because the Practitioner was aware that there might be a Will somewhere he failed to maintain a reasonable standard of competence and diligence because that knowledge was enough indication for the Practitioner to tread with caution and not partake in the application for the Letters of Administration as there was a high possibility of that grant being revoked on the occasion the Will was found.*
> *31. The Chief Registrar's position is to infer a conflict of interest on the basis that the Practitioners Firm had prepared a Will for SP and thus should not have acted for PD to take out Letters of Administration. Now that all relevant evidence is before the Commission we would urge the Commission to consider all relevant facts and circumstances to determine whether there was a conflict of interest in this matter. The facts and evidence is analysed later in these submissions.*
> *32. In taking the position that he did on conflict the Chief Registrar overlooked the statutory protection afforded under the **Succession Probate and Administration Act Cap 60** where a Court is given the power to determine any issues arising with respect to administration of an Estate and includes the statutory protection afforded to a person to whom Letters of Administration is granted but subsequently the said Letters are revoked because a signed Will is found [at ss.41-43]*
>
> *...*
>
> *33. What this shows is that a person who has acted in administration of an Estate under Letters of Administration is protected provided that the said person has acted bona fide in fulfilling his or her duties as the Administrator or Administratrix.'*
> [Underlining my emphasis]

[807] Counsel for the Respondent have then quoted *('Practitioner's Closing and Responding Submissions'*, 31st January 2018, page 22, para [44]) paragraph 47 of my Interlocutory Judgment of 21st September 2016 wherein I asked:

> *'[47]... **there are two issues that need to be fully ventilated at a hearing arising from this Count:***
> *(1) **Whether the First Respondent, having been aware that his firm had prepared the Will of Salen Prakash Maharaj** dated*

*22nd December 2006 and seen an unsigned copy on the Second Respondent's computer in 2008 (wherein the testator's mother, Maya Wati Prakash, had been named as the sole beneficiary), **was then in an ethical conflict in proceeding on the instructions of the widow**, Pranita Devi, and obtaining a grant of Letters of Administration in the Estate of Salend Prakash Maharaj, to the benefit of Pranita Devi and **to the detriment of Maya Wati Prakash**?*
*(2) **Once the widow returned alone** (without the testator's mother) to the office of the Second Practitioner on 6th January 2009, seeking to give instructions for the First Practitioner to act on the widow's behalf to obtain a grant of Letters of Administration, **should the First Practitioner not have referred the widow to another law firm?***
[My emphasis]

[808] Counsel for the Respondent have then made some 27 points including the following (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, pp. 26-27, sub-paras [xxv]-[xxvii]):

> *'[xxv]. When MWP withdrew her instructions and PD gave sole instructions on 6th January 2009 to Patel Sharma apply for Letters of Administration the Practitioner did not see a conflict of interest arising as **both parties had accepted that a signed Will had not been found and in the absence of a signed Will the Estate was to be administered as an intestacy**. This fact has not been disputed in that as at 6th January 2009 no signed Will had been found. As Solicitors acting for SP's Estate the decision on whether to apply for Letters of Administration did not depend on the said Firm making a Will for SP but depended on the fact whether a signed Will had been found on which Letters of Probate could be granted.*
>
> *[xxvi]. Once the matter went into litigation and the parties couldn't settle the Practitioner withdrew from acting as Solicitors for SP's Estate and did not act for either MWP or PD in the litigation or in any Estate matter. The Practitioner by doing so left the room open for either party to call him or his employee Mala as a witness or seek discovery from his Firm.*
>
> *[xxvii]. **At the time the Practitioner withdrew from acting for SP's Estate in March 2009 no distribution had taken place**. Both parties had their rights intact and both were represented by independent solicitors. Neither party had suffered detriment because **MWP could still have pursued her right as a creditor or even challenged the Grant of letters of Administration** and on the other hand PD had taken an oath as an Administratrix and was bound in law to properly administer the Estate and to also deal with the rights of all creditors.'*
> [My emphasis]

[809] Later in their submissions, Counsel for the Respondent made the following points

on 'Unnecessary Costs and Expenses' alleged in Count 3 (*'Practitioner's Closing and Responding Submissions'*, 31st January 2018, pp. 38-39, para [97]) as follows:

> *'97. For **Count 3 it is alleged that b**etween 25th November 2008 to 11th October 2013 the Practitioner failed to exercise due care and diligence in locating the Will of SP dated 22nd December 2006 and by taking out letters of LA for PD, MWP **was subjected to unnecessary costs for initiating Court Action No. HPP 3 of 2010.** However:*
>
> - *The Will was always at MWP's home and it was she and SS who failed to exercise due care and diligence in not locating the Will until 23rd January 2010.*
> - *The Firm's position was made known to MWP from 25th November 2008 and confirmed as at 12th December 2008 that a Will had been made by SP but the Firm did not hold a signed copy of SP's Will.*
> - *Mala and the Practitioner were deliberately shut out from giving evidence in HPP No. 3 of 2010 which would have alerted the High Court to the fact that the Firm had advised MWP that a Will had been made but it did not hold a signed original of the Will.*
> - *MWP would not have incurred any costs if she had acted with diligence and found the Will at her home much earlier than 23rd January 2010.*
> - *MWP may not have incurred any litigation costs at all if PLN had tried to resolve the matter without the need to resort to litigation;*
> - *All the "unnecessary cost" and "expenses" could have been easily avoided had PLN followed the correct procedure by lodging the Will with the High Court and letting the Probate Division of the High Court write to PD as the Administratrix in respect of recall of grant rather than embarking prematurely and erroneously by way of court action.*
> - *MWP would not have incurred unnecessary costs for initiating HPP 3 of 2010 if PLN had pleaded for and led evidence seeking indemnity costs;*
> - *The Court awarded MWP costs of $1500.00 in Civil Action No. HPP 3 of 2010 which was more than adequate to compensate her for the costs she incurred from PLN in that case.*
> - *The charge that MWP incurred unnecessary costs in initiating Civil Action No. HPP 3 of 2010 therefore fails.'*
>
> [My emphasis]

[810] In addition, I note that Counsel for the Respondent have also submitted in relation to the Prosecution Case Statement and Count 4, some of which is relevant in so far as the submissions also apply to Maya Wati Prakash and Count 3 ('*Practitioner's Closing and Responding Submissions'* dated 31st January 2018, page 18, paras [98]-[99]), in particular:

> *'98. ...*
>
> - ***Neither PD nor MWP disclosed to the Commission how much***

they collected as compensation from the motor vehicle accident claim relating to SP's death. *At the end of the day this compliant was all about money. Both MWP and PD had fully agreed with the legal advice to obtain Letters of Administration but when they fell out with each other and incurred legal fees which they have incurred by virtue of their own actions they have decided to blame the Practitioner. If MWP had looked for SP's Will diligently at her home in Koronivia there would not have been a need to apply for Letters of Administration …*

99. The key complaint of both Complainants was that they were put to unnecessary expenses and costs due to the alleged actions of the Practitioner and his Firm. In this respect MWP's costs for Civil Action No HPP 3 of 2010 as shown by PLN's documents amounted to around $1,400.00. ***The Court had awarded MWP $1500.00 in costs*** *and this would have compensated her fully for her costs but neither she nor her lawyers have made any effort to pursue recovery of these costs. Any other costs incurred by MWP had nothing to do with Civil Action No. HPP No. 3 of 2010 and that is a matter she has to pursue with PLN. Evidence has shown that* ***PLN rushed into litigation*** ***to propound the Will in any event and did not pursue other alternative avenues such as requesting the Chief Registrar's Office to ask for the surrender of the Grant of Letters of Administration once the signed Will was located at MWP's home in January 2010****. Evidence has also shown that PLN refused to give the title to MWP's property unless she got paid her fees. It is illegal for a Solicitor to take security over a client's property to secure payment of legal fees.'*
[My emphasis]

[811] Counsel for the Applicant Chief Registrar in his written submissions in reply ('*Applicant's Submissions in reply'*, 20th February 2018, at para [10]), has responded:

> *'It is respectfully submitted that* ***the unnecessary costs and expenses would not have been accrued by either MWP or PD had Letters of Administration not been pursued by the Respondent****. The Respondent should not have hurried with pursuing the grant of LA when he was well aware that his firm had prepared the Will. Further, he should have refrained from acting for PD alone in the given circumstances.'*
> [My emphasis]

(ii) The burden of proof

[812] I have set out above, the burden of proof in proceedings before the Commission and what I discussed in *Kapadia* (supra) as the appropriate standard, that is, *'adopting the same standard as set out by Commissioner Connors in Sheik Hussein Shah (2010)', 'the civil standard varied according to the gravity of the act to be proved'* and to which Justice Madigan as Commissioner referred to in both *Haroon Ali Shah* (2012) and *Marawai and Chaudhry* (2012) as *'the preponderance of*

probabilities', noting that the latter judgment was affirmed by the Supreme Court in 2016. I also note that Justice Madigan also applied this same standard in *Narayan* (2014).

[813] Therefore, the '*standard of proof'* that I will be applying to Count 3 is thus: *'the civil standard [that is, the balance of probabilities] varied according to the gravity of the act to be proved'*.

[814] In addition, I have noted **the tests** set out in *Bolam* (supra) and *Midland Bank Trust Ltd* (supra). In particular, the test set out Oliver J in *Midland Bank Trust Ltd*, that is, *'The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession', and 'that the duty is directly related to the confines of the retainer'*.

[815] Taking the above as my guide, I note that **the Applicant has to prove upon the balance of probabilities** that the Respondent has committed an act of *'Professional Misconduct: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009',* that is, the '*conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'* with such conduct '*varied according to the gravity of the act to be proved'.* **In particular**, **the Respondent *'failed to exercise due care and diligence in locating the Will';*** and then '***proceeded on [the] instructions of Pranita Devi [the widow]*** *and obtained [a] grant of Letters of Administration',* that was '***to the detriment of Maya*** *Wati Prakash who was* ***the sole beneficiary*** *pursuant to the Will ... **as** ... **Maya** ... **was subjected to unnecessary cost for initiating High Court Action No. HPP 3 of 2010'*. **Thus, the Applicant has to prove that such conduct was** ***'a substantial or consistent failure*** *to reach or maintain a reasonable standard of competence and diligence'* having regard to *'what the reasonably competent practitioner would do'* and that the Respondent's *'duty is directly related to the confines of the retainer';*

(ii) Conclusion

[816] In my view **the Applicant has failed to satisfy the persuasive burden upon him**, that is, to prove upon the balance of probabilities the allegation in Count 3, **because**: (1) **The Applicant has failed to prove that it was the Respondent and/or his**

firm who '*failed to exercise due care and diligence in locating the Will'* as –

(i) I have already found in relation to Count 2 that the Applicant has failed to prove that the Respondent's staff at Patel Sharma Lawyers retained a second signed copy of the Will of Salen Prakash Maharaj on 22nd December 2006. Instead, it is clear that in accordance with the instructions of Salen Prakash Maharaj, that is, the retainer, only one Will was drafted for Salen, which, after this single Will was executed and witnessed on 22nd December 2006, Salen Prakash Maharaj then took that sole original Will with him and did not leave a copy to be retained by the law firm of Patel Sharma Lawyers in their custody as part of their "Wills Register";

(ii) Either Salen had hidden his Will or someone else had misplaced Salen's Will;

(iii) It was, however, not the Respondent and/or his firm who misplaced the Will as it was never in their possession once Salen Prakash Maharaj took that sole original Will with him on 22nd December 2006;

(iv) **How it can then be alleged that the Respondent and/or his firm '*failed to exercise due care and diligence in locating the Will'* when the will was not in their possession once it was handed to Salen on 22nd December 2006 does not make sense;**

(v) Surely, the responsibility for locating the Will was with the members of Salen's family?

(vi) What attempts, if any, were made by members of Salen's family to find the Will of Salen Prakash Maharaj as from his death on 24th November 2008 until it was found on 23rd January 2010, is unclear, however, it appears from the evidence of both Maya Wati Prakash and Subhasni Singh, that no search was ever undertaken by members of Salen's family. In that regard, I note, that I have not had the benefit of hearing evidence from either Salen's sister, Ireen Lata Prasad and/or Salen's brother-in-law, Raknesh Prasad, in whose home at Caubati the Will was allegedly found on 23rd January 2010. I have also not had the benefit of hearing evidence from Subhasni's husband, Hemant Kumar Singh, who was residing in the family home at Koronivia as from 22nd December 2006 (when the Will was executed and then stored by Salen) until Hemant went to Australia with Subhasni in mid-2009. I note that Hemant returned to Fiji in January 2010 with Subashni Singh during which time Subhasni found the Will before she and Hemant then returned to Australia on 24th January 2010;

(2) The Applicant has failed to prove that there was a conflict when the Respondent '*proceeded on [the] instructions of Pranita Devi and obtained [a]*

***grant of Letters of Administration'*,** in that –

(i) Someone had to apply for Letters of Administration and, at law, that person had to be the widow in accordance the strict order of priority set out in section 7 of the *Succession, Probate and Administration Act;*

(ii) The Respondent only assisted the widow in obtaining a grant of Letters of Administration, he did not assist in the distribution of the estate, which still had to follow;

(iii) Maya Wati Prakash could still have made a claim against the Estate and, indeed, her claim against the property at Koronivia was already protected by her caveat lodged previously in June 2007 prior to Salen's death;

(iv) Counsel for the Applicant Chief Registrar has provided neither expert evidence nor case law to support the allegation that in such circumstances there was a duty owed by the Respondent to Maya Wati Prakash as the beneficiary under Salen's missing Will;

(v) If there was a duty owed by the Respondent to Maya Wati Prakash as the beneficiary, Counsel for the Applicant Chief Registrar has provided neither expert evidence nor case law to support the allegation that this was a breach of any duty owed by the Respondent to the beneficiary of a missing Will, in particular, '*what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession';*

(vi) Further, as Justice Gageler in *Badenach* observed, '***the duty is directly related to the confines of the retainer****',* which, as I have noted above, was to Salen and that was **to draft and execute a will but no more**;

(vii) By contrast, the confines of the retainer signed by Pranita Devi on 6th January 2009 was to arrange for a grant of Letters of Administration, which the Respondent did, but no more;

(4) The Applicant Chief Registrar has failed to prove that the Respondent bears any responsibility for the detriment claimed in the particulars, that is, '***Maya Wati Prakash was subjected to unnecessary cost for initiating High Court Action No. HPP 3 of 2010'***. Indeed, I find:

(i) The Respondent assisted beyond the confines of his limited retainer with Pranita Devi (to obtain a grant of Letters of Administration which occurred on 16th February 2009), by appearing on 12th March 2009, in response to High Court Civil Action No. 81 of 2009 instituted by Prem Narayan on behalf of Maya Wati Prakash, and as the Judge's notes of Inoke J have recorded *'**Sharma appearance for purpose of***

resolution of this matter' and the matter was adjourned to 6th April 2009 when Mr. Raman Pratap Singh appeared on behalf of Pranita Devi. In the meantime, the Respondent again assisted beyond the confines of his limited retainer with Pranita Devi by arranging a "round table meeting" on 28th March 2009 between Maya Wati Prakash and Pranita Devi, with Maya Wati Prakash being represented by Prem Narayan and Pranita Devi by her uncle Jayawant Pratap, following which, when there was no settlement, the Respondent ceased any involvement and Maya Wati Prakash continued to be represented by Ms. Prem Narayan and Pranita Devi was then represented initially by Mr. Raman Pratap Singh (who appeared on 6th April 2009) and then from May 2010 Pranita Devi was represented by Mr. Willy Hiuare in relation to High Court Civil Action No. 81 of 2009;

(ii) The Respondent bears no responsibility that Civil Action No. 81 of 2009 did not settle at the round table meeting on 28th March 2009;

(iii) The alleged '*unnecessary cost for initiating High Court Action No. HPP 3 of 2010'* filed by Prem Narayan on behalf of Maya Wati Prakash, after the Will had been found on 23rd January 2010, seeking to have grant of the Letters of Administration revoked and the Will pronounced valid, is something for which the Respondent bears no responsibility;

(iv) That **Ms. Prem Narayan**, after the Will had been found on 23rd January 2010, **never contacted Patel Sharma Lawyers and spoke with Dipka Mala and/or Mr. Suruj Sharma** to have them confirm the validity of the Will, prior to instituting proceedings in the High Court in HPP 3 of 2010**,** is something for which the Respondent bears no responsibility;

(v) That **Ms. Prem Narayan**, **never lodged the Will with the High Court** so that the Court's Probate Division could write to Pranita Devi as the Administratrix and recall the grant of Letters of Administration, **prior to instituting proceedings** in the High Court in HPP 3 of 2010**,** is something for which the Respondent bears no responsibility;

(vi) That **Ms. Prem Narayan, gave the Will to Nehla Baswaiya of Munro Leys for safe keeping and instituted proceedings** in the High Court in HPP 3 of 2010, rather than first lodging the Will with the High Court so that the Court's Probate Division could write to Pranita Devi as the Administratrix and recall the grant of Letters of Administration, is something for which the Respondent bears no responsibility;

(vii) That **Ms. Prem Narayan never contacted the Respondent** once the Will had

been found on 23rd January 2010 **to confirm its validity nor to arrange a round table meeting between the parties** at which the Respondent and Dipka Mala would be also present to confirm the validity of the Will and thus try and resolve a settlement, but, instead initiated legal proceedings, with the resultant legal costs incurred, is something for which the Respondent bears no responsibility;

(viii) That **Ms. Prem Narayan never sought judgment on the admissions** once the Pre-Trial Conference Minutes had agreed that the Will had been made and duly signed is something for which the Respondent bears no responsibility;

(ix) That **Ms. Prem Narayan never called Dipka Mala and/or Mr. Suruj Sharma as witnesses** in the High Court in HPP 3 of 2010 is something for which the Respondent bears no responsibility;

(x) That **Ms. Prem Narayan never sought indemnity costs** is something for which the Respondent bears no responsibility;

(xi) That **the sum which Ms. Prem Narayan charged Maya Wati Prakash** for various advices given and professional work undertaken associated with the Will of Salen Prakash Maharaj is something for which the Respondent bears no responsibility**;**

(xii) That **Mr. Willy Hiuare having met with the Respondent and Dipka Mala on 15th May 2010** and had it confirmed to him that the Will found on 23rd January 2010 was a valid Will, thereafter **continued to defend the proceedings** in the High Court with the resultant legal costs incurred, is something for which the Respondent bears no responsibility;

(xiii) That **Mr. Willy Hiuare conducted a fraud defence** in the High Court based upon (as the trial judge found) '*the mere suggestion to witnesses that the signature in the will is not similar to the signature of deceased',* with the resultant legal costs incurred, is something for which the Respondent bears no responsibility;

(xiv) That **Mr. Willy Hiuare defended the claim of Maya Wati Prakash** on the basis that the Will was a fraud **rather than issuing a possible cross-claim pursuant to the *Inheritance (Family Provision) Act 2004*** or issuing separate proceedings to that effect, is something for which the Respondent bears no responsibility.

[817] **Accordingly, as I have found that the Applicant has failed to prove upon the balance of probabilities the allegation in Count 3, it is dismissed.**

10. Count 4

[818] In reaching a decision as to whether Count 4 is made out, I have divided it into four parts, as follows:

(1) The allegation;

(2) The 'Prosecution Case Statement' dated 18th November 2016;

(3) The submissions;

(4) Conclusion on Count 4.

(1) The allegation

[819] Count 4 alleges that the Respondent has committed an act of *'Professional Misconduct: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009',* that is, *'unsatisfactory professional conduct of a legal practitioner, a law firm or an employee ... **if the conduct involves a substantial or consistent failure** to reach or maintain a reasonable standard of competence and diligence'.* [My emphasis]

[820] The particulars accompanying Count 4, in summary, state:

> *'**SURUJ PRASAD SHARMA** ... between 25th November 2008 and 11th October 2013 failed to exercise due care and diligence in locating the Will of Salen Prakash Maharaj dated 22nd December 2006 ..., thereafter, proceeded on instructions of Pranita Devi and obtained grant of Letters of Administration ... which grant subsequently was revoked by the Suva High Court and as a result caused the said Pranita Devi unnecessary costs ...'*

(2) The 'Prosecution Case Statement' dated 18th November 2016

[821] Counsel for the Applicant Chief Registrar in his *'Prosecution Case Statement'* filed on 18th November 2016, stated the following in relation to Count 4 at paras [9]-[10]:

> *'9. ... alleges that the Respondent failed to exercise due care and diligence in locating the Will of Salend [sic] Prakash. He acted for Pranita Devi in obtaining letters of administration which was subsequently revoked by Suva High Court. The Respondent should have taken due care and diligence as he had knowledge that his firm had created a Will and therefore, should have refrained from acting for Pranita Devi in obtaining grant of Letters of Administration. **By not doing so, he put himself in a conflicting situation**.*
>
> *10. The Respondent **acting for Pranita** after being aware that there might be a Will somewhere as per their computer records is a substantial failure to reach or maintain a reasonable standard of competence and diligence. The computer records of the firm was enough indication for the Respondent to tread with caution and not to partake in the application for Letters of Administration **as there was if not every but***

***high possibility of that grant being revoked on the occasion the Will is found**.'*
[My emphasis]

(3) The submissions

(i) Counsel for the Applicant's '*Closing Submissions' dated 8th January 2018*

[822] The written submissions of Counsel for the Applicant Chief Registrar filed after the hearing of this matter, have stated the following in relation to Count 4 *('Closing Submissions'*, 8th January 2018, at [495]):

> *'In relation to Count 4, once again the Applicant submits that **PD would not have gone through all the pain and suffering** in having to go through the proceedings in the matter HPP 3/10 and the consequent appeal if in the first place, the Respondent would have refrained from pursuing with the LA action when he knew or ought to have known that in the event the Will that was made by his firm was found, **PD would be left with nothing**. Whilst it is noted that PD benefitted from the permits for a while during the period the LA was granted to her, her own evidence also showed the difficulties that she faced outweighed the benefit she received from the permits. As such, it is submitted that she did not indeed benefit from the LA granted to her but was rather put in a more difficult situation.'*
> [My emphasis]

(ii) Counsel for the Respondent's '*Practitioner's Closing and Responding Submissions' dated 31st January 2018*

[823] Counsel for the Respondent have responded ('*Practitioner's Closing and Responding Submissions'* dated 31st January 2018, page 18, paras [98]-[99]) in relation to the Prosecution Case Statement that:

> *'98. For Count 4 it is alleged that PD incurred unnecessary costs because the Practitioner and his Firm failed to exercise due care and diligence in locating SP's Will dated 22nd December 2006 from the period 25th November 2008 to 11th October 2013.*
>
> - ***Evidence has clearly shown that the original Will was not in the Offices of the Firm but taken by SP** and kept by him so no amount of diligence or care would have located the said Will in the Offices of the Practitioner. **It is an undisputed fact that the signed Original Will was taken by SP**.*
> - *On the issue of incurring unnecessary expenses **PD did not spend any of her own money but simply spent monies belonging to SP's Estate**.*
> - *Furthermore, any legal fees she incurred in defending Civil Action No HPP 3 of 2010 was entirely of her own making because **she along with her Counsel WH knew or ought to have known from 15th May 2010 that SP's Will was not a forgery** because **Mala had already confirmed to WH that the signatures on the Will found at MWP's house in January 2010 were genuine and authentic**. She chose to pursue forgery as a defence whilst knowing she had no evidence to support such a defence and more*

so she would have known that the said defence had no merit.

- *It must also be noted that PD signed an Oath as an Administratrix that she would administer SP's Estate according to law. In this respect, she profited from the Estate by seeking to transfer the permits to herself without settling the debts of the creditors. In law, it is clear that if a signed Will is located after Letters of Administration are granted then that Grant can be recalled or revoked.* ***The law protects an Administratrix who has administered the Estate truthfully and incurred genuine expenses****. Till to date PD has never accounted for how she used the funds in SP's Estate.* ***She even refused to consent to the revocation of the Letters of Administration and refused to transfer the permits back once the Court Order had been made.***
- ***Neither PD nor MWP disclosed to the Commission how much they collected as compensation from the motor vehicle accident claim relating to SP's death****. At the end of the day this compliant was all about money. Both MWP and PD had fully agreed with the legal advice to obtain Letters of Administration but when they fell out with each other and incurred legal fees which they have incurred by virtue of their own actions they have decided to blame the Practitioner. If MWP had looked for SP's Will diligently at her home in Koronivia there would not have been a need to apply for Letters of Administration.* ***If PD had complied diligently with her duties as an Administratrix and complied with the law rather than pursue a bogus defence of forgery she would not have incurred any costs either*** *...*
- *This count therefore fails ...*

  [My emphasis]

(iii) Counsel for the Applicant's *'Applicant's Submissions in reply' dated 20th February 2018*

[824] Counsel for the Applicant Chief Registrar's reply ('*Applicant's Submissions in reply'*, 20th February 2018, at para [10]) is the same that I have discussed above in relation to Count 3, that is:

> *'... the unnecessary costs and expenses* ***would not have been accrued by either MWP or PD had Letters of Administration not been pursued by the Respondent****. The Respondent should not have hurried with pursuing the grant of LA when he was well aware that his firm had prepared the Will. Further, he should have refrained from acting for PD alone in the given circumstances.'*
> [My emphasis]

[825] For the reasons that I have already set out above in relation to Counts 1, 2 and 3 and the findings that I have made in relation to each of those three counts, I do not accept this submission from Counsel for the Applicant Chief Registrar. Therefore, I do not intend to restate in an already lengthy judgment the evidence that I have already

canvassed in relation to Counts 1, 2 and 3, my findings, analysis and conclusion reached respectively in dismissing each of those counts. Accordingly, I agree with the submissions of Counsel for the Respondent in so far as they apply to Pranita Devi and Count 4.

(iv) The evidence of Willy Hiuare

[826] **Although I am mindful that my focus in this judgment is to assess the conduct of the Respondent and his staff, I cannot reach a conclusion in relation to Count 4, however, without considering the evidence (where relevant) given by Pranita Devi's legal representative, Mr. Willy Hiuare.** In that regard, I note that when Willy Hiuare took over this matter as from 7th May 2010, a defence had already been filed pleading forgery and fraud. On what there was to support such a defence, Willy Hiuare's evidence was as follows:

> *"Mr. Sharma:* *When she said to you that I want to file this case on fraud and forgery **what was the evidence she had**?*
> *Mr. Hiuare:* ***She does not have**, only a signature of the husband that was on the passport, that's the only thing she has. She said 'Mr. Hiuare this is the signature here, you have to concede with the signature on the Will'.*
>
> *Mr. Sharma:* *Okay, that is the only evidence she had?*
> *Mr. Hiuare:* *That is the only evidence.*
>
> *Mr. Sharma:* *And on the issue of fraud what was the issue of fraud?*
> *Mr. Hiuare:* ***The issue fraud here is no evidence**.*
>
> *Mr. Sharma:* *No evidence?*
> *Mr. Hiuare:* ***No evidence at all**."*
> [My emphasis]

[827] After the meeting on 15th May 2010 between Willy Hiuare, Suruj Sharma and Dipka Mala, Willy Hiuare's evidence was that he was satisfied that the document dated 22nd December 2006 was a valid Will, however, when he relayed this to his client, Pranita Devi, she was not satisfied because she was not named as a beneficiary in the Will, as he explained:

> *"Mr. Hiuare:* *Every time she come to my office, **I remind her every time that 'this will you gave me is a will from Patel Sharma office is a valid will'.***
>
> *Mr. Sharma:* *Okay, Valid will?*
> *Mr. Hiuare:* ***Valid will**.*
>
> *Mr. Sharma:* *You now know it's a valid will.*
> *Mr. Hiuare:* *Hmm.*

Mr. Sharma:	*You have informed Ms. Devi what were your instructions at that point in time?*
Mr. Hiuare:	*My instruction at that point in time,* ***Pranita Devi say 'no because the beneficiary is not me, I am still disputing it'****.*
Mr. Sharma:	*The beneficiary?*
Mr. Hiuare:	*She said that ...*
Mr. Sharma:	*Beneficiary?*
...	
Mr. Hiuare:	*The beneficiary is not her.*
...	
Mr. Sharma:	*And so, you have advised her, given her legal advice, did she follow your legal advice?*
Mr. Hiuare:	*She is a difficult client. She is a very difficult client. I advise her if you are disputing the Fraud we have to hire an expert witness and you have to get some money for that and I she says 'Sir I am a poor, I am a widow I can't pay anything'.*
Mr. Sharma:	*And you said that her main objection was that why was she not a beneficiary in the will?*
Mr, Hiuare:	***That is the issue that she says she's not happy with the Will****.*
Mr. Sharma:	*She is not happy with the Will?*
Mr. Hiuare:	***She is not happy with the Will****.* [My emphasis]

[828] As to how the Will was going to be challenged without evidence from Dipka Mala denying her signature on the Will that had been found in January 2010 or that the firm ever drafted such a Will (supported, in part, from Suruj Sharma disputing that his firm was ever engaged to prepare such a Will), Willy Hiuare's evidence, as to his discussions with his client, Pranita Devi, was as follows:

"Mr. Sharma:	*Okay, did she [Pranita Devi] then ask you to say that 'no I want you to subpoena Mr. Sharma and Ms. Dipka Mala to come to Court to give evidence'?*
Mr. Hiuare:	*She did not ask me to subpoena Dipka or Suruj Sharma at all.*
Mr. Sharma:	*She didn't?*
Mr. Hiuare:	*She didn't.*
Mr. Sharma:	*Okay, did you ever advise her that at any stage 'if I bring these two witnesses you will lose the case'?*
Mr. Hiuare:	***I told her that if these two witnesses come to Court it would not help you as well, still weaker case****."* [My emphasis]

[829] The evidence then became somewhat confusing as to whether or not Willy Hiuare intended to subpoena Dipka Mala on behalf of the defendant or rely upon Prem Narayan, acting for the plaintiff (who had never spoken to Dipka Mala and/or Suruj Sharma in relation to this matter since the meeting hosted at the offices of Patel

Sharma Lawyers on 28th March 2009, **BEFORE** the Will had been found). Willy Hiuare's explanation in his evidence was as follows:

"Mr. Sharma: *AD 16, Page 56. [Exhibit 16] Mr. Hiuare have a look at this letter, that's your letter?*
Mr. Hiuare: *Yes.*

Mr. Sharma: *Letter dated 12th October 2012?*
Mr. Hiuare: *Yes.*

Mr. Sharma: *And here you say, 'kindly be advised that we will subpoena Dipka Mala' …*
Mr. Hiuare: *Yes.*

Mr. Sharma: *'To justify in Court in regards to the Forged will dated 22nd February 2006 since she is one of the witnesses and her signature appears in the said will. The hearing is set for 29th and 30th of October in the Suva High Court'. So,* ***you were telling Mr. Sharma's office that you will Subpoena Dipka Mala?***
Mr. Hiuare: ***Yes****.*
…

Mr. Sharma: *Mr. Hiuare did you said you were going to issue a subpoena,* ***did you issue a subpoena*** *for the hearing dates on the 29th and 30th of October 2012?*
Mr. Hiuare: ***I relied upon from Prem Narayan so I did not subpoena****.*

Mr. Sharma: *But your advice Mr. Hiuare to Mr. Sharma is that you will issue the Subpoena?*
Mr. Hiuare: *Yes.*

Mr. Sharma: *Did you change your mind?*
Mr. Hiuare: *No.*

Mr. Sharma: *Okay so you are thinking that Ms. Narayan is now going to subpoena?*
Mr. Hiuare: *Ms. Narayan will subpoena Suruj Sharma and Dipka.*
…
Commissioner: *… I am just not understanding. You have sent this letter on the 12th of October 2012. Quiet clearly in paragraph 2 you have called it a 'forged Will' which means that* ***you are going to have to deal with Ms. Mala and put to her that this is a forged Will that is what you are going to have to do aren't you?***
Mr. Hiuare: ***Yes.***

Commissioner: ***So, you will have to subpoena her, wouldn't you?***
Mr. Hiuare: ***Yes.***

Commissioner: ***And you didn't?***
Mr. Hiuare: ***We didn't.***
…
Commissioner: *You are just going to rely on the passport is that?*
Mr. Hiuare: *Passport signature.*
…
Mr. Sharma: *Okay, Mr. Hiuare if the reliance was only going to be on the passport and the Will, what questions would you ask Ms. Mala in court. Right, she has been subpoenaed to give evidence…*

Mr. Hiuare: *Mmm. Just to repeat,* ***I will ask her whether based on the meetings that I have with her that's all****.*

Mr. Sharma: *And* ***you knew what answer she was going to give?***
Mr. Hiuare: ***Yes, she signed there****.*

Mr. Sharma: ***The Will was at Patel Sharma?***
Mr. Hiuare: ***Patel Sharma.***

Mr. Sharma: ***Salen signed the will?***
Mr. Hiuare: ***Salen signed the will.***

Mr. Sharma: ***Mala had witnessed the Will, do you agree to that?***
Mr. Hiuare: ***Yes.***

Mr. Sharma: *So, how was that going to be useful to your case?*
Mr. Hiuare: ***It will weaken my case****.*

Mr. Sharma: *It will weaken the matter?*
Mr. Hiuare: *Yes.*
...
Mr. Sharma: *But* ***in the end neither you nor Ms. Narayan subpoenaed anyone from Patel Sharma won't you agree with that?***
Mr. Hiuare: ***Yes, Yes.****"*
[My emphasis]

[830] Counsel for the Respondent then turned his attention to the Pre-Trial Minutes and the agreed facts and **Willy Hiuare being asked to explain how he was running a defence of forgery when the Will was an agreed fact**. His evidence was as follows:

"Mr. Sharma: *Mr. Hiuare you have seen the pre-trial agreed/minutes of the pre-trial conference?*
Mr. Hiuare: *Yes.*

Mr. Sharma: *You confirm that's the true copy of the Pre-trial conference?*
Mr. Hiuare: *Yes.*

Mr. Sharma: *And there was, this was held on 20th of April 2011?*
Mr. Hiuare: *Yes.*

Mr. Sharma: *At the office of Prem Narayan?*
Mr. Hiuare: *Yes.*

Mr. Sharma: *And you were both present at the office, correct?*
Mr. Hiuare: *Yes.*
...
Mr. Sharma: *Right, over the Will* ***it says 'on 23rd January a Will was discovered executed by the deceased'****, that's an agreed fact isn't it?*
Mr. Hiuare: ***That was an agreed fact****.*
Commissioner: ***Sorry?***
Mr. Hiuare: ***It was an agreed fact.***

Mr. Sharma: *Now if you are running a defence of forgery* ***how could that have become an agreed fact?***
Mr. Hiuare: *I discussed with my client, Pranita Devi, Devi said 'yes, the will was discovered'.*

Mr. Sharma: ***Right and executed by the deceased****.*
Mr. Hiuare: ***Executed****.*
[My emphasis]

[831] Counsel for the Respondent then asked about the agreed documents and **Willy Hiuare was asked to explain how he was running a defence of forgery when the Will was an agreed document**. His evidence was as follows:

"Mr. Sharma: *You also then agreed to two documents, one is the Letters of Administration … The other one you agreed to is that* ***it's an agreed document that the will dated 22nd December 2006 executed by the deceased and witnessed by two witnesses. If it's an agreed document, it's going in without challenge isn't it****?*
Mr. Hiuare: ***Yes.***

Mr. Sharma: ***You are not challenging the admissibility or the veracity of the document?***
Mr. Hiuare: ***I am only challenging*** *based on the evidence by the letters,* ***the signatures but I am not challenging the veracity of the document****.*

Commissioner: *So, just say that for me, so that I hear that clearly,* ***I am not challenging?***
Mr. Hiuare: ***The veracity of the document****.*

Commissioner: *'****I am not challenging the veracity of the document'. So what are you challenging?***
Mr. Sharma: *What are you, veracity means that you accept that it's a true will.*
Mr. Hiuare: ***Yes****.*

Mr. Sharma: *Then what exactly was your client challenging?*
Mr. Hiuare: ***My client she said that this the true Will but she is still challenging because her name is not in the beneficiaries****.*

…
Mr. Sharma: *So, that's the real challenge?*
Mr. Hiuare: *Yeah.*

Mr. Sharma: *That she was left out as a beneficiary?*
Mr. Hiuare: *Yes.*
…
Mr. Sharma: *Okay, if she was left out as a beneficiary was it proper to challenge on the grounds of fraud and forgery?*
Mr. Hiuare: *That is what is there but the fact that she did not have any (inaudible) on my advice so very difficult for her to prove it.*

…
Commissioner: *Yes, it is important what you are asking. Just so, I understood,* ***you are challenging this you are saying you are not challenging the veracity of the will in fact what the whole challenge is about is that she was left out as a beneficiary of the will right****, that's correct* ***but what Mr. Sharma is asking you is that that's not a***

basis because she is being left out of her beneficiary to then to say that this is a forged will*?*

Mr. Hiuare: *Hmm.*

Commissioner: ***Do you agree? So, I am just not actually sure, what you are actually running in the High Court?***

Mr. Hiuare: *My difficult question is that she did not have an expert witness to prove it but she just say that based on the signature you just proceed with the forgery allegation,* ***that is my difficult position at that time****.*

…

Mr. Hiuare: ***She would just rely on the signature of the husband as appeared on the passport.***

Commissioner: *Yes, but* ***how is that going to help you challenge when you have just agreed you are not challenging the veracity of the document?***

Mr. Hiuare: ***That is the difficult situation I was in****."*

[My emphasis]

[832] Counsel for the Respondent then asked **Willy Hiuare to explain the ethical position as to how he was running a defence of forgery when** it was not part of the trial issues and **he knew that the Will was not a forgery but the widow was dissatisfied because she was not a beneficiary**. His evidence was as follows:

"Mr. Sharma: *Mr. Hiuare, was your instructions by any chance that she was aggrieved because she was not a beneficiary?*

Mr. Hiuare: ***Yes****.*

Mr. Sharma: *So, she was going to try somehow to knock the Will out?*

Mr. Hiuare: *She was trying.*

Mr. Sharma: *Right, and what she chooses was 'let's just challenge the signature on the Will'.*

Mr. Hiuare: ***That is the only thing that she relies upon that****.*

Mr. Sharma: *So,* ***because she has been left out as a beneficiary she was finding some way to knock out the Will*** *then she becomes the sole beneficiary, is that correct?*

Mr. Hiuare: ***Yes, Yes.***

Mr. Sharma: ***Did you advise her that this was actually unethical?***

Mr. Hiuare: *I advised her this is quite difficult case you can't put up the case with that, even the signature.*

Mr. Sharma: *And* ***do you accept if you look at the minutes the issue of fraud or forgery is not mentioned as one of the trial issues****. Just have a look at the four issues.*

…

Commissioner: *If you look at page 396 [Exhibit 47] Mr. Hiuare there are four issues for trial there.*

Mr. Hiuare: *Yes.*

Commissioner: *Just have a look at them.*
Mr. Hiuare: *Yes Four issues.*

Commissioner: *He has read that Mr. Sharma.*
Mr. Sharma: *Yes, would you agree that* ***the issue of forgery and fraud are not raised as trial issues?***
Mr. Hiuare: ***It was not raised*** *in the trial, it is the issues* ***but it was raised in the cross-examination in the trial****.*

...
Commissioner: *So, just let him get this clear.* ***You are telling me today it was your view this was valid Will?***
Mr. Hiuare: ***Yes.***

Commissioner: *Your client has shown you a passport signature of her former husband, deceased husband and says 'I want you to challenge this'?*
Mr. Hiuare: *Based on that.*

Commissioner: ***You said*** *you 'you will have to get an overseas expert, it's not going to happen, I have gone to Mr. Sharma's office, I have met Mr. Sharma, I have met Mala,* ***I am convinced, and I put notes on my exercise book that this is a valid Will****'?*
Mr. Hiuare: ***Yes.***

Commissioner: ***Surely you as an officer of the High Court of Fiji have an ethical responsibility here****, you understand what I am talking about?*
Mr. Hiuare: ***I understand, yes sir.***

Commissioner: *Sure, you were in a bit of ethical dilemma here at this stage weren't you?*
Mr. Hiuare: *Yes.*

Commissioner: ***Did you talk to any other senior practitioner in Fiji about this?***
Mr. Hiuare: *I did not talk to any/I did not discuss it.*

Commissioner: *You understand the problem?*
Mr. Hiuare: *Yes Sir.*

Commissioner: ***So, you are running something that****, you may disagree with me,* ***you knew it was going to be hopeless?***
Mr. Hiuare: ***Yes.***

Commissioner: *And your client, after being hopeless, got costs awarded against her, you knew that?*
Mr. Hiuare: ***I told her on the cost****, I told her the case all that, we don't have any good case based on this evidence here.*

Commissioner: ***So, didn't you have a ethical responsibility about withdrawing?***
Mr. Hiuare: *I did not think of the ethical reason, I did not.* ***It really did not come to my mind at that time Sir****.*
[My emphasis]

[833] Apart from conducting a defence based on fraud and forgery, there was **the widow's accountability from her previous administration of the Estate,** for which Mr. Hiuare seemed oblivious, as he explained in his evidence, as follows:

"Mr. Sharma: *Now, at the time you are preparing for this trial* ***did she provide to you Mr. Hiuare an account of the estate that she had administered to date?***
Mr. Hiuare: ***No Sir.***

Mr. Sharma: *You know what I am saying?*
Mr. Hiuare: *Yes.*

Mr. Sharma: ***That she has been the administratrix from 16th of February 2009****?*
Nr. Hiuare: ***Yes.***

Mr. Sharma: *Did she give you a followed data of what she has been doing, how she was spending the money?*
Mr. Hiuare: ***I was shocked at the Court House that she has some money in the estate.***

Mr. Sharma: *You were shocked that she has some money?*
Mr. Hiuare: *Because all along she said she was poor, 'I did not have any money'.*

Mr. Sharma: *Okay.*
Mr. Hiuare: ***But from there I realised she has some money and the estate****.*

Mr. Sharma: *Okay, she was telling you she has no money?*
Mr. Hiuare: ***She has no money****.*

Mr. Sharma: *But you discovered that* ***she had already received some money as the administratrix?***
Mr. Hiuare: ***Yes****.*

Mr. Sharma: *Okay, and* ***did she give you what is called an account of administration*** *to say that 'this is all the assets of the estate, this is the monies I have received, this is how I have applied the money, this is how have dealt with the assets', anything like that?*
Mr. Hiuare: ***No Sir.***

Mr. Sharma: *Nothing.*
Mr. Hiuare: ***Nothing****."*
[My emphasis]

[834] When Mr. Hiuare continued giving evidence before the Commission on 22nd September 2017, Counsel for the Respondent went through with Mr. Hiuare a quick summary of his evidence from the previous afternoon and then clarified with Mr. Hiuare as to why he continued to act for Pranita Devi beyond May 2010 *"knowing that you are now giving her this advice that in your opinion your advice it's a valid will"?* Mr. Hiuare's evidence was as follows*:*

"Mr. Sharma: *Did you advise her to surrender the estate or to settle the matter?*

Mr. Hiuare: *To settle the matter.*

Commissioner: *So, that's yes?*
Mr. Hiuare: *Yes.*

Mr. Sharma: *And **one of the things about surrender is if it's a valid will isn't it that you consent to the revocation of grant at that poin**t, wont you agree with me?*
Mr. Hiuare: ***Yes**.*

Mr. Sharma: *Even though Ms. Pranita Devi is telling you that she is poor lady and she can't afford any other solicitor, after you had taken view on the Will **did you consider it prudent and as matter of ethics and your responsibility to withdraw acting as her solicitor?***
Mr. Hiuare: ***Yes, I did raise it with her that I can't continue.***

Mr. Sharma: *Right.*
Mr. Hiuare: ***She kept on pressurising me**, 'brother just continue with it the signature, the hand writing signature is gonna be the issue'.*

Mr. Sharma: *And the reason why I asked you that question Mr. Hiuare is because **you are giving a professional advice and she is not accepting it**?*
Mr. Hiuare: ***She is very hard**.*

Mr. Sharma: *Right?*
Commissioner: *Sorry, what is your answer?*
Mr. Hiuare: ***She is very difficult client, she can't accept it.***

Mr. Sharma: *And at that point, once as lawyer, **if the client refuses to accept your professional advice what do you think you should have done?***
Mr. Hiuare: *I told her she should, **I should withdraw from the case**.*

Mr. Sharma: *Right.*
Mr. Hiuare: *But she kept on coming back and say 'brother just continue with it'.*

Mr. Sharma: *Okay, now Mr. Hiuare **do you accept that against the background of Pranita Devi running a defence of forgery in the High Court this was inconsistent with your professional ethics and your duties as a officer of the Court because to run forgery you had no evidence, would you agree with that?***
Mr. Hiuare: ***Yes**."*
[My emphasis]

(v) The evidence of Pranita Devi

[835] I note that Pranita Devi in her evidence (which she gave before Mr. Hiuare) differed with much of what Mr. Hiuare later alleged in his evidence (as set out above), though she did confirm in cross-examination that she had presented three samples of Salen's handwriting which Willy Hiuare said that he would present in Court and then did not do so and that it was her instructions to Mr. Hiuare that the Will was

forged, as follows:

> *"Translator:* *Mr. Willie had told me that I have shown the three … signature documents that I had given to him, and then he had assured me that we'll win the case.*
>
> *Mr. Sharma:* *Did Mr. Hiuare tell you that the Will was a fake Will?*
> *Translator:* ***I had told Mr. Willie that the Will was a fake Will*** *because when the Letters of Administration was filed, there was no Will. It was only found after one year.*
> *Translator:* *Then after that one year that Will was found, I informed my Counsel that it was a forged Will.*
> *Translator:* ***I said it's a fake Will because of the Signature of Mr. Shalen Prakash Maharaj.*** *He was only educated till class 2, and I could tell by the writing that it did not belong to him.*
> …
> *Mr. Sharma:* *… Ms. Devi,* ***can you confirm to the Commission that it was your instructions, that the Will was forged?***
> *Translator:* ***Yes, My Lord****."*
> [My emphasis]

[836] Pranita Devi also alleged that:

(1) She was not told as to the outcome of the meeting with Suruj Sharma and Dipka Mala on 15th May 2010;

(2) In particular, she was not informed that *"it was confirmed in that meeting, that it was not a forgery, it was in fact a copy of the true Will";*

(3) She asked Mr. Hiuare to call Mr. Sharma and Ms. Mala to give evidence in the High Court proceedings, however, *"he never explained to me why they should not come to court and give evidence"*. She then changed her evidence and said that *"he advised me if he calls them we will lose our case"* but then he never explained to her why this would be so;

(4) She claimed that after the Will had been found, she was never given the option of returning the grant of the Letters of Administration and *"that you could voluntarily hand over the Administration of the Estate to Maya Wati Prakash*";

(5) She wanted to settle the matter and so informed Mr. Hiuare *"but then he never informed me on the status of it"*;

(6) Mr. Hiuare never raised with her that under the *Family Inheritance Act* in Fiji, as the lawful wife of Salen Prakash Maharaj and a dependent on him, she could have asked for a portion of his Estate.

(vi) Conclusion on the evidence of Willy Hiuare

[837] There is much more from the transcript of the evidence of Mr. Hiuare that I have not quoted which raises questions as to his conduct in this matter. **Confining**

myself, however, to the conduct of the Respondent, I am at a loss to understand how the Respondent could be responsible in any way for the strategic decisions taken by Mr. Hiuare allegedly acting upon the instructions of Pranita Devi, resulting in a High Court judgment against Pranita Devi, including an award of costs, (apart from whatever costs that she may have incurred personally) and no claim being made on her behalf under the *Family Inheritance Act*.

(4) Conclusion on Count 4

(i) Burden of proof

[838] I have set out above, the burden of proof in proceedings before the Commission and what I discussed in *Kapadia* (supra) as the appropriate standard, that is, *'adopting the same standard as set out by Commissioner Connors in Sheik Hussein Shah (2010)', 'the civil standard varied according to the gravity of the act to be proved'* and to which Justice Madigan as Commissioner referred to in both *Haroon Ali Shah* (2012) and *Marawai and Chaudhry* (2012) as *'the preponderance of probabilities'*, noting that the latter judgment was affirmed by the Supreme Court in 2016. I also note that Justice Madigan also applied this same standard in *Narayan* (2014).

[839] Therefore, the '*standard of proof'* that I will be applying to Count 4 is thus: *'the civil standard [that is, the balance of probabilities] varied according to the gravity of the act to be proved'*.

[840] In addition, I have noted **the tests** set out in *Bolam* (supra) and *Midland Bank Trust Ltd* (supra). In particular, the test set out Oliver J in *Midland Bank Trust Ltd*, that is, *'The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession', and 'that the duty is directly related to the confines of the retainer'*.

[841] Taking the above as my guide, I note that **the Applicant has to prove upon the balance of probabilities** that the Respondent has committed an act of *'Professional Misconduct: Contrary to Section 82(1)(a) of the Legal Practitioners Decree 2009',* that is, the '*conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'* with such conduct '*varied according to the gravity of the act to be proved'.* **In particular**, **the Respondent**

'*failed to exercise due care and diligence in locating the Will';* and then '***proceeded on [the] instructions of Pranita Devi [the widow]*** *and obtained [a] grant of Letters of Administration',* that '*subsequently was revoked by the Suva High Court and as a result caused the said Pranita Devi unnecessary costs'.* **Thus, the Applicant has to prove that such conduct was *'a substantial or consistent failure*** *to reach or maintain a reasonable standard of competence and diligence'* having regard to *'what the reasonably competent practitioner would do'* and that the Respondent's *'duty is directly related to the confines of the retainer'.*

(ii) Conclusion

[842] In my view the Applicant has failed to satisfy the persuasive burden upon him, that is, to prove upon the balance of probabilities the allegation in Count 4, for similar reasons (in part) as I have set out above as to why the Applicant has failed to satisfy the persuasive burden upon him in relation to Count 3, that is, because:

(1) **The Applicant has failed to prove that it was the Respondent and/or his firm who '*failed to exercise due care and diligence in locating the Will'*** as –

(i) I have already found in relation to Count 2 that Applicant has failed to prove that the Respondent's staff at Patel Sharma Lawyers retained a second signed copy of the Will of Salen Prakash Maharaj. Instead, it is clear that in accordance with the instructions of Salen Prakash Maharaj, that is, the retainer, only one Will was drafted for Salen, which, after this single Will was executed and witnessed on 22nd December 2006, Salen Prakash Maharaj then took that sole original Will with him and did not leave a copy to be retained by the law firm of Patel Sharma Lawyers in their custody as part of their "Wills Register";

(ii) It is unclear as to whether Salen Prakash Maharaj had hidden his Will or someone else had hidden or misplaced Salen's Will;

(iii) It was, however, not the Respondent and/or his firm who misplaced Salen's Will as it was never in their possession once Salen Prakash Maharaj took that sole original Will with him on 22nd December 2006;

(iv) How it can then be alleged that the Respondent and/or his firm '*failed to exercise due care and diligence in locating the Will'* when the Will was not in their possession once it was handed to Salen on 22nd December 2006 does not make sense;

(v) Surely, the responsibility for locating the Will was with the members of Salen's family?

(vi) **As to what attempts, if any, were made by members of Salen's family to search for the Will of Salen Prakash Maharaj as from after his death on 24th November 2008 until the Will was found on 23rd January 2010, there is no evidence before the Commission that any search was ever undertaken by members of Salen's family**. In that regard, I note, that I have not had the benefit of hearing evidence from either Salen's sister, Ireen Lata Prasad, in whose home the Will was allegedly found or from Salen's brother-in-law, Hemant, who was residing in the family home at Koronivia from 22nd December 2006 and mid-2009;

(2) The Applicant has failed to prove how it was *'a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'* **when the Respondent '*proceeded on [the] instructions of Pranita Devi and obtained [a] grant of Letters of Administration'*,** in that –

(i) Someone had to apply for Letters of Administration and, at law, that person had to be the widow in accordance the strict order of priority as set out in section 7 of the *Succession, Probate and Administration Act;*

(ii) The confines of the retainer signed by Pranita Devi on 6th January 2009 was to arrange for a grant of Letters of Administration, which the Respondent did, but no more;

(iii) There is no evidence, that once the Letters of Administration were granted, the Respondent assisted Pranita Devi in the management and/or distribution of the estate;

(4) The Applicant has failed to prove that the Respondent bears any responsibility for the detriment claimed in the particulars, that is, that the Respondent '***proceeded on [the] instructions of Pranita Devi [the widow]*** *and obtained [a] grant of Letters of Administration',* that '*subsequently was revoked by the Suva High Court and as a result caused the said Pranita Devi unnecessary costs'.* **Rather, in my view, the responsibility for the detriment alleged does not lie at the feet of the Respondent and/or his law firm**. Indeed, I note that:

(i) The Respondent assisted beyond the confines of his retainer with Pranita Devi by arranging a "round table meeting" on 28th March 2009 between Maya Wati Prakash and Pranita Devi, with Maya Wati Prakash being represented by Prem Narayan and Pranita Devi by her uncle Jayawant Pratap, following which, when there was no settlement, the legal proceedings continued for which Maya Wati Prakash was represented by Ms. Prem Narayan and Pranita Devi was represented by Mr. Raman Pratap Singh and then from May 2010 by Mr. Willy Hiuare;

(ii) The Respondent bears no responsibility that the matter did not settle at the round table meeting on 28th March 2009;

(iii) That **Mr. Willy Hiuare having met with the Respondent and Dipka Mala on 15th May 2010** and had it confirmed to him that the Will found on 23rd January 2010 was a valid Will, thereafter **continued to defend the proceedings** in the High Court with the resultant legal costs incurred, is something for which the Respondent bears no responsibility;

(iv) That **Mr. Willy Hiuare conducted a fraud defence** in the High Court **with no expert evidence of handwriting and no documents** produced in support, but was based upon (as the trial judge found) '*the mere suggestion to witnesses that the signature in the will is not similar to the signature of deceased'*, with the resultant legal costs incurred, is something for which the Respondent bears no responsibility;

(v) That **Mr. Willy Hiuare defended the claim of Maya Wati Prakash** on the basis that the Will was a fraud **rather than issuing a possible cross-claim pursuant to the *Inheritance (Family Provision) Act 2004*** or issuing separate proceedings to that effect, is something for which the Respondent bears no responsibility.

[843] **Accordingly, as I have found that the Applicant has failed to prove upon the balance of probabilities the allegation in Count 4, it is dismissed.**

11. Findings against other practitioners

[844] I note that Counsel for the Respondent have made a number of submissions in relation to the alleged conduct of both Prem Narayan and Willy Hiuare. Although both Prem Narayan and Willy Hiuare were required to appear and give evidence in the present proceedings, I am mindful that each has appeared as a witness and not as a respondent. In addition, as I have noted above, the *'Statement of Defence'* filed on 28th April 2010 (Exhibit 47) was drafted by Raman Pratap Singh, however, as he was not called by either party to give evidence, it is unclear upon what basis that Mr. Singh pleaded forgery and fraud. Further, I have also noted above, that Counsel for the Respondent raised the behaviour of Prem Narayan in arranging for depositing of the Will with Nehla Baswaiya of Munro Leys (after it was found on 23rd January 2010) and not depositing the Will with the Court, as required by section 18 of the *Wills Act*.

[845] Despite the above concerns, this judgment is not the place for me to make findings of professional misconduct and/or unprofessional misconduct against any legal practitioner other than the Respondent. To be clear, the conduct of each legal practitioner in Fiji is a matter for the Chief Registrar to consider and to decide whether to investigate. If an investigation proceeds, then, depending upon the outcome of those investigations, it is for the Chief Registrar to decide whether to file an application with the Commission. If an application is filed, then it is for the Commission to hold a hearing into the alleged conduct of a legal practitioner. Therefore, I will not be making findings of professional misconduct and/or unprofessional misconduct against a legal practitioner without:

(1) having before me either an application having been filed either by the Chief Registrar as required under section 111(1) of the *Legal Practitioners Act 2009,* or, alternatively, by a member of the public under section 111(2) *'whose complaint has been summarily dismissed by the Registrar'*; and

(2) holding a hearing at which the legal practitioner will be provided with an opportunity to be heard as required under section 114 of the *Legal Practitioners Act 2009.*

12. A tangled web of self-interest

[846] As I listened to the evidence in this matter, two quotes came to mind, time and again. The first, from Sir Walter Scott: ***"Oh, what a tangled web we weave, when first we practice to deceive."*** (Sir Walter Scott, *Marmion: A Tale of Flodden Field,* edited by Henry Morley, transcribed from the 1888 Cassell & Company edition, London, by Sandra Laythorpe and David Price, 'Canto Sixth, The Battle, XVII', <http://www.gutenberg.org/files/4010/4010-h/4010-h.htm>.) The second, from a former Australian Prime Minister, Paul Keating (1991-96): ***"In the race of life, always back self-interest; at least you know it's trying."*** (As quoted by Tony Wright, 'Fickle fate: Labor keeping an eye out for goddess Fortuna', *Sydney Morning Herald*, 10 June 2013, <https://www.smh.com.au/politics/federal/fickle-fate-labor-keeping-an-eye-out-for-goddess-fortuna-20130609-2ny82.html>, quoting the philosophy Keating learnt from Jack Lang, NSW Labor Premier 1925-27, 1930-32.)

[847] Assessing who may have deceived whom in this tangled web of self-interest, are largely matters not for me to decide. Apart from noting that the judgment of

Balapatabendi J in *Prakash v Devi* of 11th October 2013 declared the Will to be valid (which was already known to Mr. Hiuare as from 15th May 2010 when the Respondent and Dipka Mala confirmed this to Mr. Hiuare in person), issues surrounding whether the Will was stored in Koronivia or Caubati, when and if the location of the Will was moved, where the Will was found in January 2010 and by whom, are all matters not for me to adjudicate. I have done my best to concentrate on assessing the four counts before this Commission in relation to the alleged conduct of the Respondent and the staff of his law firm.

[848] As for the anguish incurred in this sorrowful episode following the death of Salen on 24th November 2008 and the subsequent legal proceedings that ensued and resulting costs incurred, I have come to **the firm view**, that **fault does not lie at the feet of the Respondent and/or his staff**.

[849] **As to whether private legal actions might lie elsewhere and against whom, it is not appropriate for me to comment**. They are matters for some of Salen's relatives to consider and, where relevant, to each obtain their own independent legal advice.

[850] **Similarly, it is also not appropriate for me to comment as to whether or not a new investigation should be undertaken into the conduct of other lawyers who were involved in this matter. As I have noted above, that is something for the Chief Registrar and his staff to consider.**

13. Perhaps time for a family discussion?

[851] To the relatives of Salen Prakash Maharaj, I can only express my sympathy to each of you, having lost a son, husband, brother, uncle and brother-in-law. Hopefully, after having read this judgment, the family members of Salen Prakash Maharaj might consider a moment of reflection as they approach the 10th anniversary of his death and resolve, with the help of constructive legal advice, a fair settlement of any matters that may remain outstanding amongst you.

14. For the profession

[852] Near the end of the clarification hearing on 25th April 2018, when Counsel were concluding answering various questions raised by me in relation to their written submissions, a clarification was brought to my attention in relation to '*Practice Direction No 2 of 2012 - Wills and Non Contentious Probates Registry Practice'*

issued on 14th December 2012 by His Lordship, Chief Justice A.H.C.T. Gates, which requires that *'... two originals of the deceased's "Will" are to be filed at the Registry together with the original Birth Certificate of the Testator'* and a completed Form No. W1. (See PacLII*:* *<http://www.paclii.org/fj/directions/prac_directions/pdn2o2012wancprp739/>*.)

[853] The submission was (and to which I agree) that *Practice Direction No 2 of 2012* still has to be read in conjunction with section 17 of the *Wills Act,* which states:

> *'Deposit and registration of wills*
>
> ***17.**-(1) Any person **may** deposit his or her will in the Court for registration.*
> *(2) Any document so deposited shall be registered in the prescribed manner.' [My emphasis]*

[854] This means that any testator still has the option as to whether or not to have their Will registered. If they agree to do so, then *Practice Direction No 2 of 2012* has set out how this is to be done. If, however, the testator declines to do so, then that is their prerogative.

[855] As I understood the final submission from the Leading Counsel for the Respondent, it would seem then, that perhaps this judgment is timely in clarifying for the legal profession generally in Fiji the responsibility of practitioners in such matters. I have done my best to bring clarity rather than confusion to the issues raised. **In my view, it will depend upon the specifics of the retainer**. If one or both parties do not agree with my view, then I hope that I have laid a foundation for a group of collective minds, greater than my solitary thoughts, to ponder the issues.

15. Thanks to Counsel

[856] Before closing, I wish to record my thanks to Counsel who have appeared before me in this lengthy matter for their important submissions and contributions. In addition, the manner in which they dealt with witnesses and the decorum that they displayed to each other was a fine example of what it means to be a member of the Bar.

16. Thanks to my staff

[857] Finally, I must also record my thanks to my staff. They have, once again, with diligence and good humour, worked on many evenings and weekends listening to the recordings of the evidence stored mostly on a frustratingly antiquated system,

to provide me with the transcripts and then corrected the proofs of the drafts that have become this judgment. I could not have completed it without their tremendous support.

ORDERS

[858] The formal Orders of the Commission are:

1. In the Application filed before the Commission in Case No. 0012 of 2015 and No.015 of 2015, *Chief Registrar v Suruj Sharma (First Respondent) and Patel Sharma Lawyers (Second Respondent),* as Counsel for the Chief Registrar has confirmed that he is proceeding only against *Suruj Sharma (First Respondent),* the four counts against *Patel Sharma Lawyers (Second Respondent)* are dismissed accordingly.

2. In the Application filed before the Commission in Case No. 0012 of 2015 and No.015 of 2015, *Chief Registrar v Suruj Sharma,* Count 1 is dismissed.

3. In the Application filed before the Commission in Case No. 0012 of 2015 and No.015 of 2015, *Chief Registrar v Suruj Sharma,* Count 2 is dismissed.

4. In the Application filed before the Commission in Case No. 0012 of 2015 and No.015 of 2015, *Chief Registrar v Suruj Sharma,* Count 3 is dismissed.

5. In the Application filed before the Commission in Case No. 0012 of 2015 and No.015 of 2015, *Chief Registrar v Suruj Sharma,* Count 4 is dismissed.

I will now hear the parties in relation to costs.

Dated this 20th day of September 2018.

SEAL

Dr. Thomas V. Hickie
COMMISSIONER