IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0018 of 2023
[In the Independent Legal Service Commission at Suva Case No. ILSC 003 of 2021]

BETWEEN	**:**	**CHIEF REGISTRAR**
		Appellant
AND	**:**	**DARSHIK NAIR & SHOMAL KANT**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Dobson, JA** **Heath, JA**
Counsel	**:**	**Mr. A. Chand and Ms. L. Malani for Appellant**
	:	**Ms. S. Kant, Mr. D. Nair and Mr. V. Anand for Respondent**
Date of Hearing	**:**	**10 July 2025**
Date of Judgment	**:**	**12 September 2025**

JUDGMENT

Prematilaka, RJA

[1] In June, 2020 a complaint had been received by the Legal Practitioners Unit (LPU) from two former clients of Sairav Law, a law firm. Admittedly, the 02nd respondent was the principal and the 01st respondent was a partner of the firm at the relevant time. 01st and 02nd respondents are husband and wife. A section 106 notice (coupled with section 105 notice) dated 25 January 2021 under Legal Practitioners Act 2009 ('LPA'), had been sent to the respondents seeking a copy of the bill of costs for the legal work carried out for the said clients, Mr. Sachindra Prakash Singh and Ms. Artila Devi who were the complainants and their responses to be submitted to the LPU within 14 days. Admittedly, the respondents failed to comply. Thereafter, a section 108 notice under the

LPA dated 15 February 2021 had been served on the respondents granting them further 14 days to comply with section 106 (and 105) notices failing which, they were warned, that they would be liable to be dealt with for professional misconduct under section 108(2). All notices had been dispatched by hand delivery on the respective days and admittedly received by the respondents on the same days. Accordingly, in terms of section 108 notice the responses and submission of documents as requested consequent to section 106 and 105 notices were finally due on or before 02 March 2021. The respondents admittedly did not respond or provide the document/s requested by that date to the LPU.

[2] As a result, the Chief Registrar ('CR') initiated proceedings against respondents before the Independent Legal Service Commission ('ILSC) on 23 March 2021 on the following charges:

> *'**COUNT 1***
>
> ***PROFESSIONAL MISCONDUCT**; Contrary to section 82(1)(a) of the Legal Practitioners Decree of 2009.*
>
> ***PARTICULARS***
>
> *DARSHIK NAIR, legal practitioner, being the partner of **SAIRAV LAW**, failed to respond to matters contained in a complaint lodged by one SUCHINDRA PRAKASH SINGH and ATILA DEVI dated 17th June 2020, as required by the Chief Registrar by a notice dated 25th January 2021 pursuant to section 106 of the Legal Practitioners Decree 2009 and thereafter failed to respond to a subsequent reminder notice dated 15th February 2021 issued by the Chief Registrar pursuant to section 108(1) of the Legal Practitioners Decree 2009, which conduct is a breach of section 108(2) of the Legal Practitioners Decree 2009 and is an act of professional misconduct.*
>
> ***COUNT 2***
>
> ***PROFESSIONAL MISCONDUCT**; Contrary to section 82(1)(a) of the Legal Practitioners Decree of 2009.*
>
> ***PARTICULARS***
>
> *SHOMAL KANT, legal practitioner, being the partner of **SAIRAV LAW**, failed to respond to matters contained in a complaint lodged by one SUCHINDRA PRAKASH SINGH and ATILA DEVI dated 17th June 2020, as required by the Chief Registrar by a notice dated 25th January 2021 pursuant to section 106 of the Legal Practitioners Decree 2009 and thereafter failed to respond to a subsequent reminder notice dated 15th February 2021 issued by the Chief Registrar pursuant to section 108(1) of the Legal Practitioners Decree 2009, which conduct is a breach*

of section 108(2) of the Legal Practitioners Decree 2009 and is an act of professional misconduct.'

[3] Thus, Mr. Darshik Nair ("the first respondent") was charged with 01 count of professional misconduct pursuant to section 82 (1) (a) of the LPA while Ms. Shomal Kant ("the second respondent") was also charged with one count of professional misconduct pursuant to section 82 (1) (a) of the LPA.

[4] This matter was heard before the then ILSC Commissioner ('Commissioner'), Justice Gihan Kulatunga on 13 September 2022 and the Judgment was subsequently pronounced on 05 January 2023. The Commissioner discharged both respondents from the proceedings after making *inter alia* the following conclusion:

> *" [24] In the afore circumstances on the one hand the explanation furnished is reasonable and on the other hand as there is tacit extension of time, I am of the view that the Respondent Practitioners cannot be held liable to the charges of professional misconduct based on the alleged failure to respond. In these circumstances, I am unable to conclude that there was a failure to respond as contemplated by Section 108 (2) of the LPA. Accordingly, this Commission is of the view that the Applicant has failed to satisfy this Commission of the ingredients of and prove both allegations as charged and accordingly hold that the Applicant has failed to prove the allegations preferred against both Respondents separately."*

[5] In summary, the appellant's appeal against the discharge of the respondents contain the following grounds of appeal alleging that the commissioner erred in law and fact as follow:

I. ***Ground 1***:

By discharging the respondents from the proceedings and failing to consider that the respondents did not provide a reasonable explanation for failure to respond within the stipulated time to a Notice dated 15 February 2021 issued pursuant to Section 108(2).

II. ***Ground 2***:

By relying on the aspect of intention as an element of professional misconduct pursuant to Section 108 of the Legal Practitioners Act.

III. ***Ground 3***:

In determining that the email from the LPU dated 23 March 2021 was an extension granted to the respondents when in fact Section 108 does not empower the appellant or the Legal Practitioners Unit to grant any extension.

IV. ***Ground 4***:

By erroneously discussing the evidence of Avneel Chand when in fact Avneel Chand never gave evidence before the Commission in the proceedings before it.

[6] I think the 01st to 03rd grounds of appeal could be considered together while nothing significant turns on the 04th ground of appeal. There are obviously some errors in the judgment on names and dates.

Introduction

[7] The legal profession today is marked by increasing corporatization, competition and internationalization…. there can be a tendency in such an environment to lose sight of the core values in which our profession is rooted. Private practitioners are frequently assessed on the basis of their billable hours; they are forced to compete with one another more intensely than ever before; and they must handle increasing pressures from clients. …. that law is an honorable profession and a calling. It is a necessary consequence of this that the ethical and moral standards to which lawyers are held must never be compromised. It is also a reminder that the core of those ethical standards is universal and timeless, even if the way the rules are organized and expressed have changed to keep in touch with the trends affecting the legal sector today[1].

[8] Ultimately, ethical practice is about character and character is rooted in man's innermost sense of rectitude (his principles) unobscured, unaffected and uncompromised by any personal interest. Just as the flower grows from the seed, so does right action emerge from the inner core of being[2].

[1] See Forward by Sundaresh Menon, Chief Justice of Singapore (20 September 2016) to the book **Legal Profession (Professional Conduct) Rules 2015, A Commentary** by Jeffrey Pinsler SC

[2] See Preface by Jeffrey Pinsler SC (20 September 2016) to his book **Legal Profession (Professional Conduct) Rules 2015, A Commentary**

The statutory scheme of the LPA.

[9] In Fiji, the LPA *inter alia* has introduced a framework of ethical responsibilities and accountability and sought to elevate and elaborate professional standards. It has presented a new sphere of regulation of the management of law practice. The LPA has homogenised the tenets of ethics infrastructure. The LPA deals with all supervisory and administrative powers on legal education, admission of legal practitioners, issuing practising certificates, ensuring professional standards and other matters. The Board of Legal Education, Chief Justice, Chief Registrar ('CR'), Independent Legal Services Commission ('ILSC') and the Independent Legal Commissioner ('Commissioner') are central to the exercise of these powers and general administration of the LPA. No other body in Fiji (for example Fiji Law Society) could exercise concurrently, separately, partially or fully such authority and power within or outside the LPA. Thus, Fiji has a fully codified statutory regime covering all aspects of the legal profession. This is important to keep in mind in interpreting provisions in the LPA.

[10] Therefore, the only mechanism to uphold professional standards of legal practitioners who are deemed to be officers of the court[3] and legal firms in Fiji, is regulated by Part 9 of the LPA where the CR and the Commissioner play pivotal roles independent of each other. The disciplinary proceedings[4] before the Commissioner are initiated by the CR under Part 9. Under Part 9, there are two grounds on which CR may commence disciplinary proceedings in the ILSC against a legal practitioner, a law firm or any employee or agent of a legal practitioner or law firm[5]. The two grounds are professional misconduct and unsatisfactory professional conduct by any legal practitioner a law firm or any employee or agent of a legal practitioner or law firm [6]. A law firm means a legal practice carried out by a partnership of legal practitioners or by a sole practitioner whether with or without any other legal practitioners as associates or employees[7].

[11] Any person or entity may make a complaint to the CR regarding any alleged professional misconduct or unsatisfactory professional conduct by any legal

[3] Section 51 of LPA
[4] Section 2 of LPA
[5] Section 111(1) of LPA
[6] Section 111(1) of LPA
[7] Section 2 of LPA

practitioner or law firm or any employee or agent of any practitioner or any law firm[8]. However, even without a complaint the CR may investigate the conduct of any legal practitioner or law firm or any employee or agent of any practitioner or any law firm if the CR has reason to believe that the conduct may amount to professional misconduct or unsatisfactory professional conduct[9]. If such conduct has been referred to him by a judicial officer, the CR must investigate the same for any professional misconduct and unsatisfactory professional conduct[10].

[12] Upon receipt of any complaint or commencement of an investigation, the CR should refer the substance of the complaint or investigation to a legal practitioner, law firm, any employee or agent of any practitioner or any law firm as the case may be[11]. The CR may also require from the legal practitioner or the law firm - on such complaint or commencement of an investigation - to furnish to him within a specified time a sufficient and satisfactory explanation[12]. The legal practitioner or the law firm shall provide such explanation to the CR within the time specified[13]. The Registrar also may require by notice any legal practitioner or a law firm the production of books, papers, files, securities, other documents or any other record or copies thereof within the time specified in the notice relevant to such complaint or investigation[14].

[13] Therefore, it is not difficult to see that the above provisions are there to ensure an objective consideration of any complaint against a legal practitioner or the law firm or employees or agents upon gathering all the necessary material, particularly the explanation of the legal practitioner or the law firm including any documents. These provisions would also ensure that natural justice is adhered to in the matter of such a complaint or investigation by affording the legal practitioner or the law firm or employees or agents an opportunity to present their version or narrative of events surrounding the complaint or the subject matter of investigation.

[14] Thus, it is the duty of every legal practitioner or the law firm or employees or agents to treat the notices under section 104, 105 and 106 served on them by the CR with the

[8] Section 99(1) of LPA
[9] Section 100(1) of LPA
[10] Section 100(2) of LPA
[11] Section 104 of LPA
[12] Section 105(1) of LPA
[13] Section 105(2) of LPA
[14] Section 106 of LPA

seriousness they deserve and respond accordingly. They are not to be treated lightly, for the CR would be significantly handicapped without the response of the legal practitioner or the law firm or employees or agents to consider the complaint or carry out his investigation impartially, a duty he owes to the public as a public functionary under the LPA. Such failures on the part of a legal practitioner or the law firm or employees or agents would also hamper the CR's statutory duty of undertaking an investigation which may result in summarily dismissing the complaint or making efforts to facilitate the resolution of the matter in question including *via* mediation or even referring the complaint to a Master or a High Court judge for taxation and assessment of costs or fees as the case may be[15]. The complainants who are the recipients of professional legal services as members of the public from legal practitioners or the law firms or employees or agents too have no other legal person or statutory body in Fiji to submit their grievances to arising from or in connection with such services.

[15] Where the legal practitioner or the law firm fails to comply with any notice under sections 105 and 106 of LPA, the CR may notify the legal practitioner or the law firm that if the failure continues for another 14 days from the date of receipt, the legal practitioner or the law firm will be liable to be dealt with for professional misconduct[16] thus adequately warning the legal practitioner or the law firm of consequences of continuous failure. Thus, despite section 108 notice if the failure continues for another 14 days, such failure shall be deemed to be professional misconduct, unless the legal practitioner or the law firm furnishes a reasonable explanation for such failure[17]. In any proceedings before the ILSC the notice/communication/requirement from the CR with which the legal practitioner or the law firm has failed to comply together with proof of service of such notice/communication/requirement and any annexures accompanying such notice shall be *prima facie* evidence of the truth of the matters contained therein[18].

What are 'Unsatisfactory professional conduct' & 'Professional misconduct'

[16] 'Unsatisfactory professional conduct' includes conduct of a legal practitioner or a law firm or an employee or agent of a legal practitioner or a law firm, occurring in

[15] Section 109 of LPA
[16] Section 108(1) of LPA
[17] Section 108(2) of LPA
[18] Section 108(2) of LPA

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[19]. 'Professional misconduct' includes ‘unsatisfactory professional conduct' if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; or conduct 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[20]. The LPA also sets down other situations treated as ‘unsatisfactory professional conduct' and 'professional misconduct'.

[17] Some of the other instances of the conduct (of a legal practitioner or a law firm) becoming capable of being considered as ‘unsatisfactory professional conduct' and 'professional misconduct' are conduct consisting of a contravention of the LPA, the regulations and rules made under the LPA, or the Rules of Professional Conduct[21], charging of excessive legal costs or fees in connection with the practice of law, charging legal costs or fees for work not carried out by the legal practitioner or legal practice or for incomplete work [section 83(1)(c)] and conduct of a legal practitioner or law firm in failing to comply with any orders or directions of the CR or the ILSC under the LPA[22][section 83(1)(g)]. 'Professional misconduct' includes malpractice, and 'unsatisfactory professional conduct' includes unprofessional practice or conduct[23]. When failure to comply with section 108 notice coupled with section 105 or 106 occurs, such failure is also deemed to be professional misconduct[24]. However, the instances referred to by the LPA as unsatisfactory professional conduct and professional misconduct are by no means exhaustive. They only include conduct that amount to or are capable of being unsatisfactory professional conduct and professional misconduct.

[18] Legal practitioners and law firms must keep in mind that orders the Commissioner may make consequent to a finding of professional misconduct or unsatisfactory professional

[19] Section 81 of LPA
[20] Section 82 of LPA
[21] Rules of Professional Conduct and Practice are at the Schedule [made section 129(8) of LPA] to the LPA.
[22] Section 83(1) of LPA
[23] Section 83(2) of LPA
[24] Section 108(2) of LPA

conduct in terms of the powers under section 121 aim to achieve not only punitive, but also deterrent effects[25]. An order reprimanding a legal practitioner or a partner of the law firm is one of the orders among those in section 121(1) (a) to (r) that could be made by the Commissioner upon a finding of professional misconduct or unsatisfactory professional conduct and the ILSC must publicise any order so made in any way it thinks appropriate unless it withholds such publication on exceptional circumstances[26]. However, even upon a finding of professional misconduct or unsatisfactory professional conduct the Commissioner could still refrain from imposing a sanction.

[19] For example, in **Chief Registrar v Qetaki** the Commissioner found both counts of professional misconduct to have been proven by the practitioner's plea of guilty but as the level of seriousness of the misconduct was low, no sanction was imposed and the practitioner's name was not entered in the Discipline Register[27].The Supreme Court opined that the practitioner was qualified to hold office as a Judge of the Court of Appeal in terms of section 105(2)(b) of the Constitution because he was not sanctioned for professional misconduct[28].

[20] Further, any transgressions with the provisions under Part 9 of LPA on professional standards, legal practitioners and law firms would be measured against the standards of the reasonably competent practitioner[29] and not by the standards of an average person in society. However, in assessing the standards to be reasonably expected of a legal practitioner and law firm, the factual background is important and the issue in any given case is whether the court views the standards applied and skills discharged are consistent with the legal profession's presumed responsibilities and obligations[30] and in terms of competence (*i.e.* knowledge, skills and attributes), diligence, professionalism, the interests of administration of justice and the legal profession etc. expected of a reasonably competent practitioner or legal firm.

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[25] See **Law Society of Singapore v Ravindra Samuel** [1999] 1 SLR (R) 266 at [11] - [12].
[26] Section 126 of LPA
[27] Judgment on Sanctions [2017] FJILSC 9 (18 April 2017)
[28] In the Matter of a reference by Cabinet for an opinion from the Supreme Court concerning the interpretation and application of Sections 105(2) (b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji [2024] FJSC 20; Miscellaneous Action 0001 of 2024 (28 June 2024)
[29] See **Law Society of Singapore v K Jayakumar Naidu** [2012] 4 SLR (R) 1232 at [79].
[30] Per V K Rajah JC (as his Honor then was) in **Lie Hendri Rusli v Wong Tan & Molly Lim** [2004] 4 SLR (R) 594 at [42], [44]

[21] It appears that at least part of complaint made against the respondents relate to the fees charged in connection with a case handed over to them or to their law firm by the complainants. Therefore, proceedings could have been instituted against the respondents under section 83(1)(c) and 83(1)(g) for 'unsatisfactory professional conduct' or 'professional misconduct' by the CR if he chose to do so independent of section 82(1)(a) of the LPA.

[22] Thus, the statutory scheme of Part 9 is such that once a failure to comply with section 108 notice occurs (which means that a failure to comply with section 105 or 106 has already occurred), by operation of law it is deemed to be professional misconduct and when the failure escalates to the level of a professional misconduct by operation of law, once proceedings are instituted the CR has no power to determine or adjudicate upon that 'deemed' professional misconduct. That jurisdiction is vested in the Commissioner[31]. However, the CR could still consider the substantive complaint with a view to taking any of the steps in terms of section 109. Therefore, any belated response to section 105 or 106 notice by the practitioner or a law firm after the lapse of time granted by section 105 or 106 notice and also the expiry of further statutorily prescribed period of 14 days thereafter, would still be considered in relation to the substantive complaint.

[23] Although the CR may still have a discretion to extend the time given under section 105 or 106 notice provided the request is made before the expiry of the period in those notices, he has no such discretion to extend time (14 days) stipulated by section 108 (1) of the LPA[32]. His discretion under section 108(1) is whether or not to notify the practitioner or the law firm with a warning that if the failure to comply with section 105 or 106 notices continue for 14 days, the practitioner or the law firm will be liable to be dealt with for professional misconduct. We are made to understand that as a matter of practice, the CR does always send section 108 notice before institution of proceedings. This, I think is the correct approach.

[24] In this case, section 105/106 notices in the first instance brought to the attention of the respondents section 108. Due to the respondents' failure to respond, section 108(1)

[31] See sections 109(1) (c) and 121(1) of the LPA.
[32] See also **Singh v Chief Registrar** (CA) at footnote 45.

notices that followed clearly drew the attention of the respondents to section 108(2) by cautioning them of the consequences of continuous failure and therefore, there was no need or legislative requirement on the part of CR to have further communications with the respondents or seek further explanations from them as to the failure to comply with notices before section 108(2) is activated (in fact section 108(2) becomes applicable by operation of law) and taking legal steps as permitted by PLA.

[25] However, if a response is received before proceedings are instituted before the ILSC, even although belatedly, the CR should consider such response to decide whether proceedings should still be instituted under section 109(1)(c) and/or section 111 for professional misconduct or unsatisfactory professional conduct as the case may be. Such responses received before proceedings are instituted may include explanations for non-compliance with section 105, 106 and 108 notices and the CR's role extends to considering whether any such explanation is sufficient to excuse the failure to respond to notices under these provisions. I think this is the purposive, contextual and logical interpretation that could be given to the intended meaning of the phrases *'..will be **liable to be dealt with** for professional misconduct'* in section 108(1) and *'... such failure **shall be deemed to be** professional misconduct, unless the legal practitioner of law form furnishes a reasonable explanation for failure'* in section 108(2). In the case of the respondents, the response to the substantive complaint reached the LPU two days after the institution of proceedings and 23 days after the expiry of 14 days granted by section 108(1).

[26] The statutory arrangement of section 108(2) makes it clear that whether the legal practitioner or the law firm has a reasonable explanation for the failure has to be decided at the proceedings before by the ILSC *i.e.* by the Commissioner and not by the CR. Where no reasonable excuse has been provided before proceedings are instituted, it is for the Commissioner to decide whether the explanation is reasonable enough to displace the presumption of professional misconduct or it would only be a matter going to mitigation.

[27] If the legislature had intended otherwise, it would have said in unequivocal terms that upon such failure [meaning the total failure to respond within the time granted by section 105 or 106 and further period of 14 days under section 108(1)], the CR shall further notify the legal practitioner or the law firm to show cause as to why they are not

liable to be dealt with at proceedings before the ILSC for professional misconduct. Any other construction of section 108 by reading into section 108 any additional elements would have the effect of weakening the statutory regime for maintaining professional standards in Fiji and make the statutory mechanism intended by legislature in the LPA dysfunctional. Such a scenario would also lead to loss of public confidence in the system of administration of justice of which legal practitioners and law firms are integral parts along with the litigants whose ability to obtain expedient remedies for grievances against legal practitioners and law firms is a *sine qua non* for the judicial system to sustain that public confidence.

[28] However, it must be borne in mind that it is not only a failure to comply with a direction under section 108(1) that may make legal practitioners and legal firms liable to be dealt with for professional misconduct. Independent of section 108, any failure to adhere to requests by CR under section 105 and 106 for an explanation and documents is capable of being unsatisfactory professional conduct or professional misconduct as a separate contravention of the LPA under section 83(1)(a). As a result, legal practitioners or legal firms that do not comply with section 105, 106 and 108 potentially expose themselves to multiple allegations of unsatisfactory professional conduct or professional misconduct under sections 109(1)(c) and or 111 before ILSC in terms of sections 81, 82 or 83 read with sections 105, 106 and 108 as the case may be. Therefore, no legal practitioner or legal firm should disregard section 105 and 106 notices and wait until section 108 notice is served to respond, for section 108 (1) notification is discretionary but always advisable at least as a best practice.

[29] Ethical codes, practices and standards must be religiously observed and adhered to, as an unequivocal affirmation of and testament to the legal profession's undivided commitment to probity, competence and diligence in the practice of the law. However, it must also be stressed that a rigid and formalistic adherence to the codes of practice without a proper appreciation of their spirit, purport and intent may from time to time lead to ethical blindness. The legal profession must constantly and vigilantly guard itself against such lapses if it is to inspire and sustain public confidence[33].

[33] **Law Society of Singapore v Tan Phuay Khiang** [2007] 3 SLR (R) 477 at [120].

[30] Too often, lawyers who are charged with a disciplinary offence seek to rely on an inappropriate and self-serving interpretation of the rule which they are alleged to have breached. Ethical principles emphasise that such an approach is improper and unbecoming. The rules which govern ethical conduct (whether formulated in legislation, codes or practice directions) are merely aspects of fundamental and underlying values which are integral to the practice of law and the administration of justice. The principles import a deeper ethical dimension which should lie at the core of every lawyer's conscience[34].

[31] It has been said[35] that the rules of ethics (including practice directions and rulings):

> *'…should not be perceived as an external and inconvenient imposition of values on the legal profession but rather as an embodiment of the moral compass and aspirations of the profession. It must also be recognised that ethical rules only delineate minimal standards and duties which solicitors must observe. There is much left unsaid that must be implicitly understood and observed with intelligent flexibility.'*

[32] Going back to the chronological order of events set out at paragraph [1], after 02 March 2021 when the statutory period of 14 days under section 108 notice for the response and documents requested lapsed, the 01st respondent sent an email at 2.34 pm on 22 March 2021 (20 days later) admittedly on behalf of both respondents to the Legal Practitioners Unit (LPU) – not to the CR- referring to section 108 notice dated 15 February 2021. He has said in the email that he noticed that the 'letter' they had written to the LPU was still in their office and their staff had forgotten to take it to the LPU. He asked whether his staff could bring that letter to the LPU the following day *i.e*. 23 March. The LPU replied at 6.36 am on 23 March to say that he could deliver the response to the LPU office. However, the response bundle eventually reached the LPU only on 25 March 2021 (23 days after the lapse of time granted by section 108 notice).

[33] In the meantime, the CR has instituted proceedings against both respondents at the ILSC on 23 March 2021 with a charge sheet, notices sent under section 106 and 108 and all other relevant documents. The CR's application invoking the jurisdiction of the ILSC had been filed at 9.59 am on 23 March. It appears from the allegation sheet

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[34] Professor Jeffrey Pinsler SC, LLD, LLM, LLB and Barrister (Middle Temple) at page 34 (04.004) on his book **Legal Profession (Professional Conduct) Rules 2015 A Commentary** (2016)

[35] **Wong Keng Leong Rayney v Law Society of Singapore** [2006] 4 SLR (R) 934 at [84] and [85].

containing charges that the CR had signed it on 22 March 2021 and the prosecution case statement signed by counsel for the CR too had been signed on 22 March 2021. The written witness statement of Alpna Dharshika Kumar, a court officer attached to the LPU who has confirmed that no correspondence had been received from the respondents till the date of her statement, had been made on 17 March 2021 while the other written witness statement of Tevita Cagina, a messenger with the LPU who had hand delivered section 106 and 108 notices on the respondents had been made on 16 March 2021.

[34] Therefore, it appears that the CR had already decided and made preparations to file the application at the ILSC before the 01st respondent's email on 22 March 2021 and he had every reason to do so as the respondents failed to respond to section 106 and 108 notices well after the lapse of time. Section 108 notice had been issued about a week after the lapse of time given in section 106 notice. Thus, altogether, the respondents had about 35 days to respond until the expiry of section 108 notice from the time beginning to run under the section 106 notice. The CR made allegations before ILSC after about 20 days since the lapse of 14 days given in section 108 notice. In the circumstances, I do not think that there was any sinister motive on the part of the CR or LPU to hurry the filing of charges against the respondents knowing that they have promised to serve the response on 23 March 2021. It seems that the reply email by one Melvin Kumar of LPU at 6.36 am on 23 March 2021 had no connection with the filing of allegations by the CR at 9.59 am on the same day. In any event, no such proposition has been canvassed with Alpna Dharshika Kumar when she gave evidence before the Commissioner.

[35] The evidence of Alpna Dharshika Kumar in support of the charges was uneventful and she was not cross-examined by the respondents. The process to file charges has commenced when Dharshika Kumar brought to the notice of the LPU legal officer that the LPU had not received any response from the respondents. She also confirmed that they received the hand delivered respondents' response on 25 March 2021 at 1.20 pm. It was not disputed by the counsel for the appellant that the bundle of documents received on 25 March 2021 had a letter signed by the 01st respondent on 22 February 2021. This bundle of documents are not before this court. By 22 February 2021, 14 days from 25 January 2021 (section 106 notice) had already lapsed but within section 108

notice period of 14 days. By 25 March 2021 the 14 days given by section 108 notice dated 15 February 2021 (i.e. 02 March 2021) had also lapsed.

[36] The 01st respondent admitted his fault without attempting any explanation in not responding to section 106 notice on 25 January 2021. The CR did not make a separate allegation or prefer a separate charge based on that failure. However, with regard to the section 108 notice, he took up the position that as the lawyer in carriage of the file relating to the complainant, he prepared the bill of costs, shown it to the 02nd respondent and handed over the bundle of documents on 22 February 2021 (still within the 14 days given in section 108 notice) to one Shivam Prasad (who had been described in different ways) to be delivered to the LPU. The 01st respondent had described Shivam Prasad as one of his unpaid office staff or bailiff who acted as a senior litigation officer too (see the respondent's letter to the CR dated 20 April 2021). Shivam Prasad was supposedly using the respondents' office and resources free of charge but carried out the delivery of their documents without a fee while running his own business. The Commissioner has once described him as a delivery boy in the judgment. The 01st respondent as partner and the 02nd respondent as the principal of their law firm had allowed this arrangement when paragraph 7.6(2) of the Rule of Professional Conduct and Practice made under section 129(8) of the LPA specifically prohibits legal practitioners sharing, occupying or using jointly and contemporaneously any office with any company or persons not being practitioners unless the CR otherwise approves.

[37] The 01st respondent admitted that he did not check with Shivam Prasad as to whether he had actually delivered the buddle of documents to the LPU before 02 March 2021 or thereafter because he was under that impression until 22 March. However, around 22 March 2021, the 01st respondent found the office complaint folder on his table with no acknowledgement from the LPU of the receipt of their response. Did the respondents pay due regard to the notices sent by the LPU on this matter? In my view, the respondents may not have acted intentionally or deliberately in their failures, but they have clearly fallen below the required standard of diligence expected of a reasonable practitioner faced with these circumstances.

[38] After consulting the 02nd respondent, when the 01st respondent checked with Shivam Prasad whether he had delivered the documents to the LPU, the latter had said that he

forgot to do so. Then, immediately the 01st respondent having got down the 02nd respondents to the office sent the email jointly to the LPU on 22 March 2021 at 2.34 pm and indicated that the response could be delivered on the following day. For the second time, the 01st respondent trusted Shivam Prasad who earlier defaulted in delivering the documents to the LPU to deliver them once again on 23 March 2021. Shivam Prasad carried out the delivery only on 25 March 2021 because 'he was busy' with other work. Again, there is no evidence on record to ascertain whether the 01st respondent (or the 02nd respondent) had checked with Shivam Prasad whether he had delivered the response in the afternoon on 23 March 2021 as expected. Should both respondents not have taken more care and shown more diligence at least on the second occasion to ensure the delivery of their response at least to be in compliance with their own email? Not that it mattered as the process to institute charges was already on foot by 22 March 2021 as I explained above but it would have shown signs of genuineness of the explanations by the respondents for non-compliance. Further, it would have at least shown that the respondents were taking the notices seriously and not adopting a lackadaisical attitude towards their legal obligations.

[39] According to Shivam Prasad he was employed at the respondents' law firm but running his own business from the respondents' office premises. He confirmed that he received a bundle of documents from the 01st respondent to be delivered to LPU on 22 February 2021 but did not deliver due to his workload. The 01st respondent inquired about the delivery around 22 March 2021. He was again asked to deliver the same set of documents to the LPU on 23 March 2021 and he did deliver them on 24 March 2021 which is not factually correct. He has said that he delivered the bundle on 24 March even in his statutory statement. I am surprised that the respondents too had repeated the delivery date as 24 March in the letter addressed to the CR on 20 April 2021. The bundle of documents reached the LPU admittedly only on 25 March 2021.

[40] The 02nd respondent is said to have been in and out of the office of their law firm due to some medical issues after her admission to and discharge from the hospital on 27 November 2020. According to the medical certificate she had received further medical treatments for 03 months since then although the respondents had said in their representations dated 20 April 2021 to the CR during the inquiry that the said condition continued for 06 months. Before the Commissioner, she has spoken little by way of an

explanation about section 106 notice though there was no contest that it was delivered to both respondents. According to her evidence, she had asked the 01st respondent to prepare a reply to section 108 notice and then around 22 February 2021 she had a look at it and approved it for service. When she checked with the 01st respondent, she was told that it had been given to Shivam Prasad for delivery. On 22 March 2021, the 01st respondent inquired from her whether Shivam Prasad had given her any acknowledgement from LPU and she said 'no'. Then, she rushed to the office and Shivam Prasad also came there. It was revealed that Shivam Prasad had not delivered it and he had no receipt for delivery. On the morning of 23 March, the 01st respondent had arranged the reply to be delivered through Shivam Prasad to be effected in the same afternoon and the 02nd respondent knew of this arrangement. Yet, it was eventually delivered to the LPU on 25 March 2021. She admitted that it was their responsibility to ensure that everything was done as required despite employing other employees. She particularly accepted her responsibility as the principal of the law firm to have the response delivered to the LPU. The respondents have failed to say anything at all as to why they still did not submit a response to section 106 notice in their letter addressed to the CR on 20 April 2021asking him to withdraw charges.

[41] Towards the end of the proceedings after the evidence has been led, the 01st respondent had informed the Commissioner that the substantive matter of the complaint was already settled. Terms of Settlement had been filed and he just had to pay the complainants by refunding the fees paid to them in some instalments. He had further asserted that therefore the only issue was his delay in filing the bill of costs as requested by section 106 notice. The Commissioner accepted the 01st respondent's word and said that he would take that fact into account in his judgment which he did. Earlier, during his evidence, the 01st respondent had informed the Commissioner that the substantive matter was under mediation.

[42] Apparently, the 01st respondent may not have told the truth or told him the half-truth or even misled the Commissioner regarding the settlement of the substantive matter giving the impression that for all purposes the substantive matter was at an end. Upon the conclusion of the hearing, this court asked counsel for both parties to file any supplementary written submissions which they have done. The counsel for the appellant has said in his supplementary submissions that the LPU referred the substantive matter

to the Fiji Mediation Centre where terms of settlement was entered into and where the 01st respondent agreed to pay $500 per month until the full payment of $3747 is paid in full. If fulfilled, the total payment must have been paid by now. However, upon the LPU making inquiries from the complainants, they had informed that the 01st respondent never settled his dues as undertaken. This has been revealed by an exchange of emails between the LPU and one of the complainants, Ms. Artila Devi who has said as recent as on 14 July 2025 that the 01st respondent never settled his dues. She has challenged him to produce proof of his payments, if any and produced several emails from 2022 where she had raised the issue of the 01st respondent's default. We have not received any rebuttal of this position from the 01st respondent who too has filed supplementary written submissions. The appellant's counsel has further stated that even on the day of hearing of the appeal, the 01st respondent informed them that he had fully complied with the terms of settlement arrived at the mediation. The 02nd respondent did not contradict the 01st respondent but seemingly concurred with him on his representations to this court on the settlement being finally finished and completed.

[43] I cannot simply determine where the truth lies. Nor am I required to do so in these proceedings. Whether the 01st respondent said the same thing to this court during the hearing of the appeal could be gathered by the audio recording of the appeal hearing. However, if what Ms. Artila Devi has said is true (without passing any judgment on it) then it is a matter that would go beyond the default of the terms of settlement and extend to misleading and making deliberately false representations to the Commissioner and to this court (if that be the case). This may amount to unsatisfactory professional conduct or professional misconduct and the CR should take action accordingly under the LPA. Paragraph 3.1 of the Rules of Professional Conduct and Practice states that a practitioner shall not knowingly deceive or mislead the court.

[44] In **Law Society of Singapore v Suresh Kumar Suppiah**[36], Suresh Kumar was charged with having failed to honour an undertaking given to his client. The court reiterated the principle in ***Ravindra Samuel*** that a solicitor may be struck off the roll even if he did not act dishonestly but if he *'is shown to have fallen below the required standards of integrity, probity and trustworthiness'*. Therefore, legal practitioners must realize the seriousness' of their undertakings to the clients.

[36] [2007] 3 SLR (R) 477 at [120]

Legal aspects arising from the impugned judgment.

[45] By that as it may, I shall now examine some of the concepts involved in section 108(2) of the LPA. Deeming one action or thing to be treated as if it were another is a tempting technique for a legislative drafter, often allowing economy and brevity by attracting, rather than having to replicate, lengthy sets of provisions[37]. Lord Justice Henderson said:[38]

> *'In support of his submissions on the correct approach to the interpretation of statutory deeming provisions, Mr Ewart referred us to the well-known statement by Peter Gibson J, sitting in this court with Balcombe and Simon Brown LJJ, in Marshall (Inspector of Taxes) v Kerr [1993] STC 360 at 366:*
>
> > *"For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction.* ***I further bear in mind that because one must trust as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so****.'*
>
> *This statement of principle has been cited with approval in many subsequent cases, including DV3 RS Ltd Partnership v Revenue and Customs Commissioners [2013] EWCA Civ 907, [2013] STC 2150, at [13] and [14] per Lewison LJ, with whom Gloster and Maurice Kay LJJ agreed. Lewison LJ added, at [15], that the fact that deeming provisions are involved 'does not displace the ordinary principles of statutory interpretation'."*

[46] The relevant dicta are mainly collected in a summary by Lord Walker in **DCC Holdings (UK) Ltd v Revenue and Customs Comrs** [2011] WLR 44, paras 37-39, collected from **Inland Revenue Comrs v Metrolands (Property Finance) Ltd** [1981] 1 WLR 637, **Marshall v Kerr** [1995] 1 AC 148; 67 TC 56 and **Jenks v Dickinson** [1997] STC 853. They include the following guidance, which has remained consistent over many years:

> *(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.*

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[37] **CRAIES ON INTERPRETATION** Twelfth Edition (2020) at page 516 (8.2.21)

[38] See **Barclaya Wealth Trustees (Jersey) Limited v Revenue and Customs Commissioners** [2017] EWCA Civ 1512; [2018] 1 W.L.R. 2312

(2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

(3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.

(4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.

(5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in East End Dwellings Co Ltd v Finsbury Borough Council [1952] AC 109, at 133; 'The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."'

(Emphasis mine)

[47] Lord Asquith also said:[39]

> *'If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from accompanied it.*

[48] Where the legislature says that 'something should be deemed to have been done' which in truth has not been done, it creates a legal fiction and in that case, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and **full effect must be given to the statutory fiction and it should be carried to its logical conclusion**[40] (emphasis mine). When a statute like s.108 says "unless explanation furnished," the practitioner must persuade the tribunal on balance of probabilities that the explanation is reasonable. This is a reverse burden which is

[39] **East End Dwellings Co Ltd v Finsbury Borough Council** [1952] AC 109, at 132-133
[40] **N S BINDRA'S Interpretation of Statutes** 12th Edition at page 268

more than producing some evidence (evidentiary burden); it is the persuasive burden[41]. Justice Gihan Kulatunga himself as the Commissioner later said:[42]

> *'27. On the evaluation of the evidence in its totality, the facts of due service of notices and the failure to respond within the stipulated time are proved. That being so the deeming provision of section 108(2) of the LPA comes into operation and now it is deemed that the Respondent did in fact commit Professional misconduct as alleged. Explanation of the Respondent is improbable and untrue. The only irresistible inference is that the Respondent did deliberately disregard the Notices and did not respond to the said Notices. Even if he was negligent, he is culpable. Any oversight or negligence is no excuse and such lapse will per se be attributed to the Practitioner and it was the Practitioner's duty and obligation to follow up and ensure that a response was duly sent to the LPU. (emphasis added)*
>
> *28. A legal practitioner is required to maintain a minimum standard of the due diligence and competence. For whatever reason, if he fails to maintain a minimum standard of diligence and competence, he violates the ethical rules which legal practitioners are required to abide by and is liable for professional misconduct as alleged.'*

[49] Applying those principles, I am of the view that the deeming provision in section 108 (2) should be given its natural and literal meaning. Even if one applies the mischief and purposive interpretation the result will be the same. The result of reading the section, as it is, is neither unjust, nor absurd nor abnormal. On the contrary if any additional elements such as fault elements (for example *bone fides*, *mala fides*, intentional, wilful or deliberate wrongdoing etc.), are to be read into the deeming provision in section 108(2) or additional duties are cast on the CR under section 108(2) (such as requiring the practitioners or legal firms to show cause why their failure should not be treated as professional misconduct), such an interpretation will negate the legislative intention given the policy of Part 9 of LPA and the purposes of maintaining professional standards in Fiji. In addition, the legislature has created a fiction by the deeming provision to achieve an intended result and for a clear purpose and the courts must give full effect to that and not dilute it in any way in that any real, imaginary or inevitable hardships therein must not deter courts from doing so.

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[41] See **Briginshaw v Briginshaw** (1938) 60 CLR 336 (High Court of Australia); **Bhandari v Advocates Committee** [1956] AC 806 (Privy Council – Kenya); **Australian Securities & Investments Commission v Hellicar** (2012) 247 CLR 345; **Campbell v Hamlet** [2005] UKPC 19

[42] **Chief Registrar v Prasad** [2023] FJILSC 9 (21 March 2023)

Errors of law

[50] Firstly, the Commissioner while correctly setting out the burden of proof and standard of proof on the respondents, has not applied the same tests to the facts of the case and said that he was satisfied that the respondents had discharged their reverse burden regarding 'a reasonable explanation' on a balance of probability. Secondly, the Commissioner was wrong to import the view that 'misconduct' usually implies an act done wilfully with a wrong intention and conveys the idea of intentional wrongdoing to professional misconduct as defined under Part 9 of the LPA, particularly under section 108(2). This is an error of law. In fact the Commissioner has treated some form of fault element as an ingredient of the charges. Yet, he later admitted in ***Prasad*** (see footnote 42) referring to **Re A (Barrister and Solicitor of Auckland):**[43]

> *'14. This, in my view, will not apply to misconduct resulting from the failure to respond in view of the deeming clause of section 108(2). If there be no explanation then the consequence namely, the failure to respond will ipso facto be deemed to be professional misconduct. If there be a reasonable explanation then the reverse process is set in motion and the deemed or the presumed fact can be rebutted and, if so the nature of the conduct will determine if it is professional misconduct. However, in view of section 108(2) of the LPA, lackadaisical disregard or negligence to respond will amount to professional misconduct if such practitioner fails to maintain the minimum standards of diligence and competence expected of a legal practitioner.'*

[51] Most relevantly, the Fiji Supreme Court said[44] as follows:

> *1. There is a further complaint by the petitioner which may conveniently and briefly be addressed here. It is the suggestion that the Court of Appeal[45] wrongly categorised section 108(2) as a strict liability provision. The complaint is not a sound one. Whilst in one paragraph of its judgment, that Court did say that section 108(2) imposed strict liability, that paragraph is not to be read in isolation. In the immediately preceding paragraph, the Court expressly referred to the defence of reasonable excuse. Viewed in its proper context, all that the Court of Appeal was saying when it referred to strict liability was that failure to comply with a section 105 notice was, subject to the defence of reasonable explanation, deemed to be professional misconduct. The Court was not suggesting that no defence was available.*

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[43] HC Auckland AP 59-SW01, (10 December 2001) at 50 where it was said *"Both in law and in ordinary speech the term 'misconduct' usually implies an act done wilfully with a wrong intention, and conveys the idea of intentional wrongdoing. The term implies fault beyond the error of judgment; a wrongful intention, and not a mere error of judgment; ... Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences."*

[44] **Singh v Chief Registrar** [2019] FJSC 8; CBV0002.2018 (26 April 2019)

[45] **Singh v Chief Registrar** [2018] FJCA 22; ABU0058.2013 (8 March 2018)

[52] The Commissioner has not guided himself at all by the two binding decisions of the Court of Appeal and the Supreme Court in interpreting section 108(2) leading to an error of law and thus the impugned judgment is *per incuriam* to that extent. In ***Singh*** (see footnote 38) Mr. Singh was charged by the CR under section 83(1)(g) of failing to respond to section 104 and 105 notices thus committing an act of professional misconduct in terms of section 108(2) of LPA. Singh's defense was that due to his ill-health he could not comply with the said notices. The Commissioner on the facts available did not find that Mr. Singh had produced a satisfactory explanation for the default and found him guilty of professional misconduct. Stock, J in the Supreme Court dealt with sections 83(1), 105(1) and 108 and said:

> *[20] ..... since section 108(2) deems failure to comply with a section 105 (or section 106) requirement to be, of itself, professional misconduct, absent a reasonable explanation for the failure. There was no need to resort to section 83(1).*
>
> *[22] I would only add that even if section 83(1) were applicable, the point taken is in any event without merit for, read in context and purposively, a section 105 notice is plainly a direction. That much is evident from the fact that section 105 talks in terms of a requirement to furnish an explanation and section 108 of the need to comply with that requirement.*

[53] The Court of Appeal in ***Singh*** (see footnote 45) made the following pertinent points none of which were criticized by the Supreme Court:

> *'[28] When a practitioner fails to respond to the notice directing and requiring a satisfactory written explanation to the substance of the complaint against the practitioner, within the time specified by the Chief Registrar in the notice, section 108(1) gives the Chief Registrar a discretion to notify the practitioner that if the failure continues for a period of fourteen days from the date of such notification, (that is, the second notification), to the practitioner, such failure shall be deemed to be professional misconduct, unless the practitioner furnishes a reasonable explanation for such failure. The reference here to date of notification, must be interpreted to mean the date of the receipt of such notice by the practitioner. Thus, if the Chief Registrar chooses to exercise the discretion given to him under section 108(2), another fourteen days will automatically be added to the original number of days given under section 105(1), to respond to the original complaint made against him.*
>
> *[29] Section 108(1) is in effect a provision which gives discretion to the Chief Registrar to warn the practitioner and put him on notice of the impending possibility, that his failure to provide a satisfactory written explanation to*

the main complaint, would render him liable to be dealt with for professional misconduct.

[31] If even during the extended period of fourteen days given under section 108(1) the practitioner fails to provide a satisfactory written explanation to the Chief Registrar, then, at the end of that extended fourteen-day period, such failure shall be deemed to be professional misconduct unless the practitioner furnishes a reasonable explanation for such failure. The word 'such' refers to the explanation required in respect of the original complaint made against him and notified to him by the Chief Registrar under section 105(1). Thus, professional misconduct is, by operation of law, established by the failure to comply with the notice of the Chief Registrar, and the provisions of section 108(2) will be engaged.

[32] Section 108(2) which is required to be considered in this case, is a mandatory provision, and imposes strict liability, through a deeming provision. Therefore, liability attaches by operation of law, and the offence is considered to have been committed ipso facto, upon the failure of the practitioner to respond within the extended period given under section 108((2).'

[54] Thus, it is very clear from the decisions of the Court of Appeal and the Supreme Court in ***Singh*****,** that the liability for professional misconduct under section 108(2) is a strict statutory liability subject only to the defense of reasonable explanation. No derogation of that position is permissible and should be attempted. Therefore, reading different shades of fault elements into section 108(2) is also an error of law on the part of the Commissioner.

Errors of fact

[55] Another erroneous conclusion arrived at by the Commissioner is to say that the email response by one Melvin Kumar of ILP at 6.36 am on 23 March 2021 in reply to the respondents' email at 2.34 pm on 22 March 2021 that they could deliver the response to the LPU office somehow amounts to a tacit extension of time for the respondents to forward their response to section 108 (and 106) notice. In my view, by no reasonable stretch of imagination could such an inference be possible. Firstly, the respondents have not requested an extension of time granted by section 108 notice. Secondly, the CR had no power under section 108 to allow such an extension of time beyond prescribed 14 days. Thirdly, the respondents' email was not addressed to the CR. Fourthly, even if the respondents naively thought that Melvin Kumar had granted them an extension of time, it was on their own undertaking only till 23 March but the delivery of the response

reached the LPU only on 25 March 2025. Fifthly, even assuming (only for the sake of argument) that the CR could grant an extension of time under section 108(1), he could not have done it after the lapse of 14 days given in section 108 notice as by 02 March 2021 the 14 days had lapsed; such request for extension should have been made within the 14 days. All that Melvin Kumar did was to acknowledge the respondents' email and said that they could deliver the response (no time period mentioned). How can there be an open-ended extension of time?

[56] The appellant's counsel clarified Melvin Kumar's email saying that the LPU would never refuse any response to their notices whether they are within time or not, because the CR needs the version of the practitioner or the law firm in order to effectively consider the complaint and carry out his statutory duty under section 109 of the LPA. If not, it would be an *ex parte* inquiry and a decision only based on the complainant's narrative may not be fair to the practitioner or the law firm.

[57] The Commissioner has admitted that:

> *'[19] ……..No doubt, it is the responsibility of the Practitioner to ensure the timely delivery of the response to the LPU. The oversight or negligence of the Clerk of the Respondents is no excuse and such lapse will per se be attributed to the Practitioner. It was the Practitioner's duty and obligation to follow up and ensure the due delivery of such response.'*

02nd respondent's liability

[58] In order to consider the liability of the 02nd respondent who is admittedly the principal of the law firm of which the 01st respondent is the other partner, it is also not inappropriate to have some understanding of the statutory duties of a partner or the principal of a law firm[46] coupled with the principal's broader operational role in general law firm management norms. However, I must hasten to add that the 02nd respondent's liability in this instance relating to the failure to comply with section 108 notice does not arise from or depend on her position as the principal of the firm. In that respect, the 02nd respondent's responsibility is based on her own conduct. Part 9 of the LPA on Professional Standards and other statutes referred to below do not distinguish between

[46] See for example Financial Transactions Reporting Act 2004 (FTRA), Partnership Act 1910 and Trust Accounts Act 1996 (TAA)

legal practitioners and law firms or principals. All principals are partners and practitioners. Law firm means a legal practice carried out by a partnership of legal practitioners or by a sole practitioner with or without any other legal practitioners as associates or employees[47]. Nevertheless, under Chapter 8 – Client Care - of Rules of Professional Conduct and Practice made under section 129(8) of the LPA, a principal must:

- *Implement at the outset of a client matter:*
    - *Identification of who is handling and overseeing the case;*
    - *The basis for fees and, where possible, an estimate of costs;*
    - *The firm's internal complaint-handling procedure and the option to escalate unresolved complaints to the Fiji Law Society.*
- *Keep clients informed—both at the start and during the case—about:*
    - *Issues involved, required steps, and expected timeline;*
    - *Progress updates, and explanations for any unreasonable delays.*

[59] Generally speaking, failure to comply with relevant statutes and meet the professional standards/norms consistently (such as wilful neglect) can constitute professional misconduct—including charging excessive fees, non-compliance with laws or rules, or lacking competence and diligence—and may result in disciplinary action against sole practitioners and partners or the principal of a law firm.

[60] I shall now examine the 02nd respondent's case. The Commissioner had discharged the 02nd respondent mainly on the basis of her medical issues on account of which she was said to be not actively involved in the day-to-day activities and running of the law firm. However, her evidence at the inquiry reveals that while she may not have been attending the law firm as regularly as she used to do ('*in and out of office*') due to her medical condition, it is certainly not as if she was totally detached from its work or incapacitated particularly with regard to the section 106 and 108 notices. She ought to have been aware of section 106 notice and was aware of section 108 notice because one of the staff members informed her about it and she then she asked the 01st respondent to prepare a response. In fact, both respondents admitted before the Commissioner having received *all* the notices sent by the CR. Yet, the 02nd respondent has not even attempted to explain the failure to respond to section 106. She instructed the 01st respondent to

[47] Section 2 of LPA

prepare a response as the complainant was the 01st respondent's client. After the 01st respondent settled the response, the 02nd respondent being the principal approved the response for service on 22 February 2021. According to her evidence, *'...He showed me the response. And asked if anything else needed to be added. I thought it was fine and I approved it for service'*. The 02nd respondent inquired from the 01st respondent (but never from Shivam Prasad) whether it had been delivered to the LPU and was told that the documents were given to Shivam Prasad. Then, upon the discovery on 22 March 2021 of possible non-delivery of the response, the 01st respondent promptly contacted the 02nd respondent and inquired of any acknowledgment given by Shivam Prasad. She came to the office and the three of them finally recovered the undelivered response and the two respondents collectively wrote the email to the LPU at 2.34 pm on the same day inquiring whether the response could be dropped off on the following day. On 23 March the 01st respondent told the 02nd respondent that charges had been filed but the bundle of documents eventually reached the LPU only on 25 March 2021. All communications with the LPU since that email were done jointly by the two respondents.

[61] Thus, the unmistakable picture that emerges from the totality of the evidence is that though the 02nd respondent claimed not to have been coming to the office regularly, at least in handling the matter relating to section 108 notice, she was fully informed and involved in it from inception. She claims to have initiated the preparation of the response through the 01st respondent. Irrespective of being the principal at the law firm, the 02nd respondent as a practitioner should however have taken more than a casual interest in seeing that the bundle of documents was in fact delivered to the LPU before 02 March 2021. She in the clearest terms possible admitted the dereliction of her duty (as the principal) in this regard in evidence and did not take up the position that it was her medical condition that actually prevented her from complying with section 108 notice. Why did she wait for the 01st respondent to find that out accidentally on 22 March? The 02nd respondent did not even think it fit to check either with the 01st respondent or Shivam Prasad until 22 March whether the response she approved had in fact been delivered.

[62] Therefore, on her own evidence the 02nd respondent's medical condition taken at its best alone could and should not have been treated as a reasonable excuse for the non-

compliance by the Commissioner, for the failure to comply with section 108 of the LPU was not the result of her medical condition but the result of the lackadaisical approach and attitude coupled with gross negligence towards section 108 notice and the weight of her statutory obligations under the LPA, first and foremost as a practitioner and also as the principal of the law firm. In fact, she in her evidence accepted her responsibility for not having seen to it that the response to CR's notices was delivered to the LPU in a timely manner. In my view, in the totality of circumstances, the 02nd respondent's conduct falls far below the expected standards of a practitioner, whether or not as a partner or principal of a law firm. In ***Singh*** against the clear defence of much stronger medical reasons for the similar default than in this case, it was not considered a reasonable explanation by the Commissioner whose decision was affirmed by the Court of Appeal and the Supreme Court. Sudden illness or medical incapacity, natural disaster affecting office operation are examples of reasonable excuses; not carelessness, indifference, negligence etc.

[63] As Keith J said:[48]

> *'[1] The legal profession is highly regulated in Fiji, as it is in most parts of the world. That is not surprising. Legal practitioners are expected to demonstrate high standards of integrity and professionalism at all times, and it is important for those standards to be monitored and seen to be maintained. That is why Part 9 of the Legal Practitioners Decree ("the Decree") is devoted to the topic of professional standards'*

01st respondent's liability

[64] As for the 01st respondent, his explanation is in my view even weaker. He has done nothing at all to check whether the bundle of documents had in fact been delivered to the LPU around 22 February 2021 knowing very well that they were on the final extension of 14 days after not complying with section 106 notice particularly if the 02nd respondent was not attending office regularly. If he was serious about the issue facing both of them, rather than relying on a third party, he could have delivered the response to the LPU before 02 March 2021. It appears, that their law firm and the LPU were situated not very far from each other in terms of the distance.

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[48] **Chief Registrar v Khan** [2016] FJSC 14; CBV0011.2014 (22 April 2016)

[65] Delays are tolerable only if they are reasonably explicable and not due to default or neglect. Mere forgetfulness or pressure of work is not a reasonable excuse; nor reckless disregard for statutory directions. Even section 108 notice on 15 February 2021 does not seem to have alerted both respondents that they have simply disregarded section 106 notice already and therefore they must ensure that the response said to have been prepared on 22 February 2021 must be delivered before time would finally run out on 02 March 2021. Even the email written by the respondents on 22 March 2021only speaks to a 'letter' – not a bundle of documents- and which was supposed to be dropped off at the LPU office 'last month'. This is the first ever communication by them to the LPU on this matter and the email has not said that the 'letter' (in response to the substantive allegation) was expected to be delivered on 22 February 2021.

[66] If merely handing over to a third party for delivery without at least following it up with the courier of the actual handing over of such explanation and documents sought by the CR under section 105, 106 and 108 responding to an allegation or complaint by a client, is to be accepted as a reasonable explanation to rebut the 'deemed' professional misconduct, I think it would wide open floodgates for abuse and weaken the whole mechanism of maintaining professional standards under Part 9 of the LPA. Such a situation would dent the spirit of the LPA and defeat the intended objectives of the LPA by the legislature.

[67] It is also clear that the 01st respondent's representation on 18 November 2022 that the substantive matter had been fully settled effectively putting an end to the dispute, has had a significant influence on the outcome reached in the judgment and the Commissioner has obviously considered that fact in coming to his decision. The Commissioner said during the proceedings that he would consider it and in fact stated so in the judgment as follows:

> *'[16] During the course of this inquiry, the Commission was informed that the substantive matter too had been finalized and sorted out between the virtual Complainant and the Respondents. This was confirmed by the Counsel appearing on behalf of the Chief Registrar on 22nd November 2022.'*

[68] There were no proceedings of the inquiry on 22 November 2022. The date referred to by the Commissioner must be 18 November 2022. The 01st respondent had informed

the Commissioner that 'last week' the parties signed the terms of settlement and he had to only refund the money. He has claimed that the status of the substantive matter is that the dispute between the parties was settled. On that day, the counsel for the appellant had confirmed the entering into the settlement. The fact that terms of settlement have been entered into seems to be not in dispute. What Ms. Artila Devi has said on 14 July 2025 is that the 01st respondent never settled his dues presumably as per the settlement reached voluntarily between the parties.

[69] For the above errors of law and fact, I think the Commissioner's judgment cannot stand on both respondents. I have considered the Supreme Court decision in **Chandra v The Chief Registrar**[49] but in my view, the impugned decision of the Commissioner is outside the generous ambit within which reasonable disagreement is possible (the test applied by Keith, J) due to the errors of law and other factual errors coupled with taking some irrelevant considerations into account or being influenced by them in coming to the decision. I have already dealt with these instances and need no repetition.

[70] I understand that the three decision cited by Keith, J highlight restraint in appellate review of judicial discretion by special tribunals; interference only if plainly wrong which means that appellate courts should accord a healthy respect to the tribunal's fact-finding and evaluative function even if it might have reached a different conclusion; mere disagreement does not justify interference. The common through-line is that appellate interference is justified only where legal errors occur or decisions clearly fall outside a reasonable ambit. Exceptions largely hinge on presence of such thresholds - plainly wrong outcome, error of law, or truly exceptional circumstances. The House held in ***AH (Sudan)*** that the Asylum & Immigration Tribunal's (AIT) wrong legal test justified appellate interference. If a tribunal has committed a legal error, it must be corrected - ***Hutton and ors.***[50]

[71] Where the Commissioner makes a reasonable finding about an explanation under section 108 of the LPA, courts will generally defer to that evaluative judgment. However, deference is not absolute; nor does it mean abdication. As Keith J said in

[49] [2025] FJSC 4; CBV0018.2024 (30 April 2025)
[50] **Bellenden (formerly Satterthwaite) v Satterthwaite** [1948] 1 All ER 343 at page 345; **AH (Sudan) v The Home Secretary** [2007] UKHL 49; [2008] 1 AC 678 at para 30 and **The Criminal Injuries Compensation Authority v Hutton and ors** [2016] EWCA (Civ) 1305 at para 57

Chandra that this is not to say that the appellate courts should always defer to the views of the Commissioner, but it does mean that the Commissioner's view deserves respect. However, the courts will intervene if the Commissioner commits a legal error, applies the wrong test, fails to give adequate reasons, takes into account irrelevant considerations, or reaches a conclusion that a reasonable decision-maker could not have reached. Again, as Keith J said in ***Chandra*** that if the Commissioner exercised the discretion in a way which was not reasonably open to it, then the courts would intervene. In my view, upon an objective and holistic review of all the material and the impugned judgment and the reasons thereof, it was not reasonably open to the Commissioner to arrive at the conclusion he eventually reached given the errors of law and fact. Therefore, this court's intervention in this appeal is warranted with regard to both respondents.

[72] The Court of Appeal has entertained appeals relating to disciplinary decisions, which confirms that ILSC rulings are not immune from judicial correction where the legal/procedural thresholds for intervention are met. Misconstruction of section 108 (legal error), for example treating an explanation as "reasonable" without applying the statutory chronology or ignoring the 14-day procedural notice scheme or failing to apply the statutory 14-day notice mechanics is only one such instance.

[73] The next question is what orders this court may make other than allowing the appeal. Although, LPA is silent on the nature of orders this court can make, I think directing proceedings to be held *de novo* before the current Commissioner (Justice Gihan Kulatunga is no longer serving in Fiji) on the same charges is possible. It may also be possible to direct the current Commissioner to deliver a judgment *de novo* on the material already available without a new inquiry. However, I would opt for the third course of action in that given my discussion above on their liability for breach of section 108, I find the respondents guilty of professional misconduct in terms of section 108 (as I do not consider their explanations to be reasonable and they have failed to discharge the reverse burden of proving the reasonableness of the explanation on a balance of probability), on the material available on record but I would not propose to impose any of the penalties set out in section 121 of the LPA, partly because I did not have the benefit of seeing the deportment and demeanour of them at the inquiry. In

addition, I am persuaded not to impose a penalty on the respondents due to the reasons stated at paragraph [74].

[74] I am also not inclined to follow either of the first two courses of action, for *inter alia* the appellant admitted that the LPU did receive the respondents' explanation and bill of costs, belatedly though, on 25 March 2021 regarding the substantive complaint. It has proceeded to mediation and terms of settlement have been apparently entered. The 01st respondent says that he has fulfilled the terms of the settlement fully whereas Ms. Artila Devi says that the 01st respondent made no payment to date.

[75] This is a matter that should receive the attention of the CR urgently and ascertain what the true position is. If the 01st respondent has told the truth the matter ends there. However, if what Ms. Artila Devi says is true, then the CR should consider whether the 01st respondent has made false and/or misleading misrepresentations or misrepresented or underrepresented facts relating to the conclusion of the substantive matter to the Commissioner with a view to gain an undue advantage and to this court (if that be the case) and if so, whether it may warrant appropriate action under the LPA including fresh disciplinary proceedings. In fact, the 02nd respondent who appeared at the hearing seemed to concur with what the 01st respondent said regarding the settlement. Therefore, the CR's inquiry should also include the 02nd respondent as well. This inquiry should also verify whether the 01st respondent has breached the terms of settlement entered into with the complainants to return their fees and if so, take steps accordingly in terms of the LPA.

[76] I am also not inclined to order costs in all the circumstances of this case and appeal.

[77] Bringing this discussion to a conclusion, I may quote the following guiding principles in the conduct of legal practitioners and law firms at all times. Lord Macmillan made the following distinction between mere business and a profession:

> *The difference between a trade and a profession is that the trader frankly carries on his business primarily for the sake of pecuniary profit while the members of a profession profess an art, their skill in which they no doubt place at the public service for remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest rewards in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake,*

and in the contribution which, by reason of his attainments, he can make to the promotion of the general welfare.[51]

[78] In **Wong Keng Leong Rayney v Law Society of Singapore**[52], V K Rajah J said of the legal infrastructure governing professional conduct as follows:

> *"Unstinting compliance with all ethical rules and practices is in the enlightened self-interest of the profession. Without such observance and effective enforcement of ethical rules, the glue that binds and distinguishes advocates and solicitors as professionals as opposed to merely self-serving businessmen will soon dissolve. A solicitor is most certainly not merely a businessmen or client proxy. He is an officer of the court charged with the unique responsibility of upholding the legal system and the quality of justice."*

[79] That said, before parting with the judgment, I must clarify one important matter as to the scope of the appellate proceedings before this court. The issue in this appeal is not whether the CR acted illegally or unlawfully in filing charges before ILSC against the respondents in that their explanation was not considered before the charges were laid. The issue in this appeal is whether the Commissioner's decision to discharge the respondent's after full inquiry was right or wrong based on what he considered to be a reasonable explanation for non-compliance with section 108 notice. Anyway, understandably the counsel were not even heard in any meaningful manner on the former issue.

[80] In my view, if a practitioner or a law firm were to challenge the decision to frame charges by the CR against them before ILSC, it should be by way of judicial review. In other words, if a decision properly made in terms of section 108(2) to institute proceedings is to be challenged, it must be done by way of an application for judicial review on legally available grounds in the High Court and not by way of a collateral attack in an appeal against the judgment of the Commissioner after acquiescence in the inquiry. At least, any objection to jurisdiction of the CR to institute proceedings or the Commissioner hearing the matter should be raised in the first instance. In an appeal against the decision of the Commissioner after inquiry, this court cannot quash the CR's decision to file charges before ILSC. If the appeal is against the High Court decision on a judicial review application, then this court is competent to do so.

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[51] Hugh P MacMillan, "Law and History" speech in Edinburgh (October 1934) reproduced in High P MacMillan, Law and Other Things (1937) at p 127.

[52] **Wong Keng Leong Rayney v Law Society of Singapore** [2006] 4 SLR(R) 934 at [84]

[81] However, the fact of the matter is that the explanation reached the CR only on 25 March 2021 and proceedings were instituted on 23 March 2021. The respondents acquiesced in the Commissioner's jurisdiction and proceeded to inquiry. Thus, there was no explanation before the CR to consider before the charges were filed. However, on an application by the respondents as permitted by the Commissioner, the CR indeed considered the respondents' written explanation dated 20 April 2021 for the delay during the proceedings but decided not to accept it and continued with the proceedings before the Commissioner. The CR has also considered the respondents' explanation and bill of costs regarding the substantive complaint and referred the matter for mediation. I have explained this aspect in detail before. Thus, the concern expressed by the respondents that their explanation was not considered before the CR lodged charges with ILSC was not an issue for determination by the Commissioner and in any event it would have been beyond his statutory powers to do so. However, for example if the CR files charges before the statutory period of 14 days in section 108 expires, then that may be taken up as a jurisdictional defect in the proceedings before the Commissioner as well as this court. Neither is the said concern a matter for this court to consider in this appeal. Understandably, it was not raised by the respondents in this appeal except as a discussion between the Bench and the appellant's counsel. Thus, this issue is only of academic interest as far as this appeal is concerned.

[82] At the risk of being treated as obiter, but for the avoidance of any doubt on my part, I may proceed to say a few things based on legal jurisprudence in the area of administrative law as the respondents' concern touches upon the right to be heard which is not unqualified (for example in cases of violation of motor traffic laws and rules on roads). This is because I would flag this issue whether right to be heard should be given by the Chief Registrar in respect of the failure to comply with section 105 or 106 notice and in any event even after section 108(1) notice is served and after expiry of the further 14 days under section 108(1) before charges are preferred for professional misconduct. Currently, there is no such requirement under the LPA and I have discussed this before. In fact in ***Singh v Chief Registrar*** [CA] the Court of Appeal held that the word 'such' in section 108(1) refers to the explanation required in respect of the original complaint made against him and not to an explanation for the failure to comply with section 105/106/108 notices. This position was not controverted by the Supreme Court in ***Singh v Chief Registrar*** [SC]. However, this may be a matter for any future deliberations in

the Supreme Court if it were to arise in an appropriate appeal. Hence, the following paragraphs taken from the classic text by H.W.R. WADE & C.F. FORSYTH on **ADMINISTRATIVE LAW** ELEVENTH EDITION on the right to be heard.

[83] **Ridge v. Baldwin** [1964] AC 40 reinstated the right to a fair hearing as 'a rule of universal application'. Basically the principle is confined by no frontiers. However, on the other hand it must be a flexible principle. The judges, anxious as always to preserve some freedom of manoeuvre, emphasise that *'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter'*.[53] Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case. *'In the application of the concept of fair play there must be real flexibility'*.[54] There must also have been some real prejudice to the complainant: there is no such thing as merely technical infringement of natural justice.[55]

[84] A decision to prosecute or bring legal proceedings,[56] or to carry out a search,[57] damaging though it may be to the accused, does not entitle him to be consulted or shown the evidence in advance. In order to preserve flexibility the courts frequently quote general statements such as the following:[58]

> *'The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.'*

Dobson, JA

[85] I agree with the judgment of Prematilaka RJA as to outcome, and the orders proposed.

[86] I specifically concur with the acceptance of the adequacy of the steps taken in laying the disciplinary charges in this case, as analysed in [23] and [24] of the judgment. I respectfully disagree with the observation in [80] to the effect that any challenge to the lawfulness of the process for laying disciplinary charges would necessarily have to be

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[53] **R v. Gaming Board for Great Britian ex p Benaim and Khaida** [1970] 2 QB 417 at 439 (Lord Denning MR).
[54] **Re Pergamon Press Ltd** [1971] Ch 388 at 403 (Sachs LJ).
[55] **George v. Secretary of State for the Environment** (1979) 77 LGR 689.
[56] **Wiseman v. Borneman** [1971] AC 297 at 308 (Lord Reid); Nicol v. A-G of Victoria [1982] VR 353.
[57] **R v. Leicester Crown Court ex p Director of Public Prosecutions** [1987] 1 WLR 1371.
[58] **Russell v. Duke of Norfolk** [1949] 1 All ER 109 at 118 (Tucker LJ).

raised by way of application for judicial review and contemplate a range of circumstances where such a challenge could be mounted as an aspect of a defence to such charges.

Heath, JA

Introduction

[87] This is an appeal by the Chief Registrar from a decision made by the Independent Legal Service Commissioner, Mr Justice Gihan Kulatunga (the Commissioner), on 5 January 2023. By that decision,[59] the Commissioner dismissed charges brought under s 108 of the Legal Practitioners Act 2009 (the Act) against two practitioners for failing to comply (without reasonable explanation) with notices previously issued by the Chief Registrar under s 106 of the Act.[60] The agreed pre-charge facts are accurately summarised in Prematilaka RJA's comprehensive judgment,[61] which I have had the advantage of reading in draft.

[88] While I agree with much of what Prematilaka RJA has written, I have come to a different conclusion, both as to the elements of a charge under s 108 and the outcome of the appeal. Without intending to traverse the same ground unnecessarily, I write separately to explain why I have reached different conclusions. My judgment is intended to be read as a separate expression of my own views. I intend no disrespect by not engaging with all aspects of the judgment given by Prematilaka RJA.

The scheme and purpose of s 108 of the Act

[89] The s 108 charges were brought on 23 March 2021, in respect of an alleged failure on the part of Mr Nair and Ms Kant respectively to respond to matters contained in a complaint lodged by former clients. On 25 January 2021, the Chief Registrar had issued a notice under s 106 of the Act to which the practitioners (despite a reminder notice issued on 15 February 2021 under s 108(1) of the Act) did not respond within the stipulated time. The notices under both ss 106 and 108 were directed to each lawyer separately, rather than to their law firm; s 108(1) refers disjunctively to the

[59] **Chief Registrar v Nair** [2023] FJILSC 1.
[60] The charges are set out at **para 2** above.
[61] See **para 1 above.**

"practitioner" (on the one hand) and the "law firm" (on the other). The term "law firm" is defined by s 2(1) of the Act as a "legal practice" carried out by a partnership of legal practitioners or by a sole practitioner, whether with or without any other legal practitioners as associates or employees.

[90] On that basis, the two principals, as partners of the relevant firm, Sairav Law, were the persons against whom the charges were brought. In those circumstances, my analysis proceeds on the basis that the charges must be determined by reference to the individual culpability of each of the partners separately, rather than their roles as partners of the firm.

[91] In full, s 108 provides:

> *Failure to provide explanation or production of documents etc*
>
> **108**.-(1) Where any legal practitioner or law firm fails to comply with any notice issued under section 105 or section 106, the Registrar may notify the legal practitioner or law firm in writing that if such failure continues for a period of fourteen days from the date of receipt of such notice, the legal practitioner or law firm will be liable to be dealt with for professional misconduct.
>
> (2) *If such failure referred to in subsection (1) continues for a period of fourteen days from the date of such notification to the practitioner, such failure shall be deemed to be professional misconduct, unless the legal practitioner or law firm furnishes a reasonable explanation for such failure*. In any proceedings before the Commission, the tendering of a communication or requirement from the Registrar with which the legal practitioner or law firm has failed to comply, together with proof of service of such communication or requirement, shall be prima facie evidence of the truth of the matters contained in such communication and any enclosures or annexures accompanying such communication.
>
> (Emphasis added)

[92] My judgment is based on two propositions arising out of the wording of s 108:

(a) First, s 108(1) allows the Chief Registrar to bring a charge immediately after the period of 14 days specified in s 108(1) has expired.

(b) Second, if the practitioner fails to comply with the (in this case) s 106 notice within the additional period of 14 days allowed by the s 108 notice, he or she is

"deemed" to be guilty of professional misconduct, unless a "reasonable explanation for such failure" is given.

[93] Section 108 is contained within Part 9 of the Act, headed "Professional Standards". Two types of conduct are defined as justifying disciplinary action. They are "unsatisfactory professional conduct" and "professional misconduct". Sections 81 and 82 provide:

> *81. For the purposes of this [Act], 'unsatisfactory professional conduct' includes conduct of a legal practitioner or a law firm or an employee or agent of a legal practitioner or a 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.*
>
> *82.-(1) For the purposes of this [Act], '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; or*
> >
> > *(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.*
>
> *(2) For the purpose of finding that a legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the matters that would be considered if the practitioner were an application for admission or for the grant or renewal of practising certificate, including those matters contained in section 44 (a) to (j) of this [Act].*

[94] Section 83 of the Act identifies conduct capable of constituting unsatisfactory professional conduct or professional misconduct. Without attempting to limit the scope of ss 81 and 82, s 83(1)(a) defines any "conduct consisting of a contravention of [the] Act" as either "unsatisfactory professional conduct" or "professional misconduct". Section 83(2) states:

> *83. ...*

> *(2) "Professional misconduct" includes malpractice, and "unsatisfactory professional conduct" includes unprofessional practice or conduct.*

[95] Section 108(2) deems any failure to comply with a s 106 notice within the extended time provided by the Chief Registrar under s 108(1) to be "professional misconduct, unless the legal practitioner or law firm furnishes a reasonable explanation for such failure". The effect of that deeming provision is to equate non-compliance with the notice as "professional misconduct" irrespective of the degree of culpability.[62]

[96] I have not overlooked the fact that a Commissioner may impose one or more of a broad range of sanctions if a disciplinary offence were found proved, whether unsatisfactory professional conduct or professional misconduct.[63] My concern is that the labelling of a person of low culpability as one who has been guilty of "professional misconduct" is, itself, a significant finding. The practitioner will bear the stigma of that finding, irrespective of what penalty might be imposed.

[97] During the course of argument on the appeal, I raised the possibility that the Chief Registrar ought to have inquired as to whether there was a reasonable explanation before deciding whether to lay a charge. In supplementary post-hearing submissions filed on behalf of the Chief Registrar, counsel submitted that "the Chief Registrar does not have a *duty* under the law to ask the legal practitioner for an explanation for failing to comply with a Section 108 notice … [however], the Chief Registrar may choose to seek an explanation at their discretion" (original emphasis). Counsel added that "the Chief Registrar can refer the matter directly to the Independent Legal Services Commission … without the requirement to first request an explanation". With respect to Prematilaka RJA's contrary view, if there were an obligation on the Chief Registrar to inquire into whether there was or was not a reasonable explanation a practitioner's remedy for breach of that requirement would not be something solely justiciable through judicial review proceedings.[64] If the Chief Registrar proceeded on an erroneous legal basis, a question of law (which I now develop) arises for the purpose of an appeal.

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[62] See para 102 below.
[63] Legal Practitioners Act 2009, s 121.
[64] See para 80 above.

[98] Although this point does not appear to have been argued or determined in prior cases in this Court or the Supreme Court,[65] I am not persuaded that failure to comply with a relevant notice without any inquiry as to a "reasonable explanation" is sufficient to enable the Chief Registrar to lay a charge under s 108. In my view, the disciplinary offence is created by the composite phrase: "such failure shall be deemed to be professional misconduct, unless the legal practitioner or law firm furnishes a reasonable explanation for such failure". On that interpretation, the deeming provision does not come into play until the appropriate decision-maker (the Chief Registrar in the first instance and the Commissioner, if a charge were laid) is satisfied that there is no reasonable explanation for the failure to comply with the relevant notice. A prosecutorial decision cannot responsibly be made until the practitioner has been given the opportunity to explain, and the reasonableness of the explanation has been considered by the Chief Registrar.

[99] This is not an arid point. It is the difference between putting an onus on the person alleging professional misconduct to establish all elements of the disciplinary charge, rather than treating the "reasonable explanation" element as an affirmative defence that the practitioner carries the burden of establishing.

[100] In my view, it seems incongruous for a person to be charged and to be forced to establish the "reasonable explanation" element at a hearing before the Commissioner in circumstances where the Chief Registrar has not considered that question before laying a charge. If a reasonable explanation were given to the Chief Registrar, there would be no need to trouble the Commissioner with a charge, or to put the practitioner to the unnecessary stress and expense involved in defending a charge.

[101] The position in Fiji can usefully be compared to that in New Zealand.[66] Section 147 of the Lawyers and Conveyancers Act 2006 (NZ) empowers an investigator or standards

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[65] In both *Singh v Chief Registrar* [2018] FJCA 22 at paras 32, 37 and 62, the Court of Appeal considered that a disciplinary offence against s 108(2) was one of "strict liability". The Supreme Court subsequently (*Singh v Chief Registrar* [2019] FJSC 8 at para 23) qualified that view saying that, viewed "in its proper context, all that the Court of Appeal was saying when it referred to strict liability was that failure to comply with a s 105 notice was, subject to the defence of reasonable explanation, deemed to be professional misconduct". The question whether the "reasonable explanation" element was part of the charge or a defence was not argued or determined in either the Court of Appeal or the Supreme Court.

[66] The disciplinary process in New Zealand was helpfully summarised by the Supreme Court in *Re A Reference By Cabinet for an opinion from the Supreme Court on matters concerning the interpretation and application of*

committee to require a lawyer to furnish a wide range of information. That requirement is viewed in the context of the fundamental obligations of lawyers under s 4 of that Act, which includes "the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand".[67] The practitioner's obligation to comply is reinforced by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which are made under the New Zealand Act.[68] Non-compliance does not necessarily result in a finding of misconduct.[69] If referred to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, the conduct of which complaint is made can be the subject of a finding of unsatisfactory conduct rather than misconduct.

[102] The rationale for the New Zealand approach is the same as that in Fiji. In *Holdaway v Auckland Standards Committee 4*, the High Court of New Zealand considered an appeal from a decision of the Tribunal finding a lawyer guilty of misconduct as a result of "repeatedly [failing] to comply with reasonable statutory information requests … made by the Auckland Standards Committee 4".[70] The Court found that the lawyer's conduct was "disgraceful", thereby amounting to "misconduct".[71] Becroft J explained the rationale for that conclusion as follows:[72]

> *"A failure to comply with any professional obligation threatens to undermine the integrity of that profession. That is because a purpose of those obligations is to secure public trust in the profession. This is particularly true in relation to obligations that arise as part of a disciplinary process. The ability of a regulator to effectively investigate complaints made about a practitioner secures public trust in the profession. A request to provide information to the Standards Committee serves that very purpose. Where a practitioner does not comply with such request, the regulator cannot effectively determine whether wrongdoing has occurred. In essence, non-compliance with information requests strikes at the heart of the profession's integrity. If the public cannot trust that the regulator will effectively investigate complaints, the profession falls into disrepute."*

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sections 105(2)(b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji [2024] FJSC 3 at paras 57–59.

[67] Lawyers and Conveyancers Act 2006 (NZ), s 4(a).

[68] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (NZ) rules 8.2(d), 10.14 and 10.14.1.

[69] In New Zealand, the term "misconduct" rather than "professional misconduct" is used because there are some circumstances in which personal misconduct (namely, conduct not connected with the provision of legal services) might be found to exist. In that context, both professional and personal misconduct may give rise to misconduct charges that could result in a practitioner being struck off the roll. Generally, see *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, a decision of the Full Court of the High Court.

[70] *Holdaway v Auckland Standards Committee 4* [2024] NZHC 3544.

[71] Ibid, at para [131].

[72] Ibid, at para [132], applied most recently in *Auckland Standards Committee 1 v Kwon* [2024] NZLCDT 44, at para [54].

[103] A finding that a s 108(1) charge has been proved equates the practitioner's conduct to that of persistent failure to reach or maintain a reasonable standard of competence and diligence or justify a finding that he or she is not a fit and proper person to engage in legal practice. The Supreme Court has touched on this potential anomaly, albeit in a different context. In a Constitutional reference from Cabinet, the Supreme Court was not prepared to rely on a plea of guilty to professional misconduct in circumstances where the Commissioner ought to have considered whether such a finding was justified.[73] The point was important because of the consequence of a prior "professional misconduct" finding on eligibility for judicial office. I acknowledge that the Supreme Court was dealing with a provision of the Trust Accounts Act 1996 which provides that a contravention is "capable" but not "deemed" to amount to professional misconduct. It does, however, bear on (by analogy) problematic features of a deeming provision of the type contained in s 108(2).

[104] In the absence of an ability for the Commissioner to reduce any penalty for failure to comply with a relevant notice from professional misconduct to unsatisfactory conduct, it is appropriate to put some obligation on the Chief Registrar to seek an explanation before deciding whether to lay a charge. In this case, it would have been a simple task for the Chief Registrar (or his delegate) to send an email asking for a more detailed explanation as to the reasons for failure to comply before a charge was laid. Such a response could be sought within a short period of time. Given the purpose of the legislation, a period of one working day would, in my view, suffice. In practical terms, within a period of one day, the Chief Registrar would have one further document to consider before deciding whether to lay a charge.

[105] The need to undertake that task within such a short time does not undermine the statutory purpose of promoting public confidence in the legal profession. While I accept (for the reasons given by Prematilka RJA) that the Commissioner has no power to extend the time for compliance with a s 108(1) notice, the additional communication that I propose is not an extension of time. It is a request for an explanation from the relevant practitioner for his or her failure to comply, for the sole purpose of enabling the Chief Registrar to reach a considered view on whether a charge of failure to comply

[73] *Re A Reference By Cabinet for an opinion from the Supreme Court on matters concerning the interpretation and application of sections 105(2)(b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji* [2024] FJSC 3, at paras 68-71.

with the relevant notice without reasonable explanation should be proffered. Any response from the practitioner can only go to the second (reasonable explanation) limb of s 108(2).

[106] For those reasons, I consider that s 108 should be interpreted as creating a disciplinary charge, the elements of which are composite in nature, so that the Chief Registrar must have sufficient evidence to establish that there has been a failure to comply with a relevant notice without reasonable explanation before laying a charge. If the Chief Registrar forms the view that the explanation is unreasonable, a charge may be laid. It will then be for the Commissioner to decide whether the explanation was reasonable. If it were reasonable, the charge would be dismissed.

[107] My conclusion does not (and is not intended to) undermine anything that Prematilaka RJA has written about the importance of membership of the legal profession. That is apparent from the extract from *Holdaway,*[74] to which I have referred. All of what has been said is supported by what has been called the "indicia" of a profession, helpfully summarised by Lord Templeman, in giving the principal opinion in the House of Lords in *Guiness plc v Saunders*.[75] His Lordship described the indicia as follows: "an organisation which controls entry and membership, provides educational and training qualifications, insists on a standard of work and behaviour, imposes disciplinary sanctions for misconduct and, above all, acknowledges and enforces a duty to the public over and above the duty common to all of obeying the law".[76] That construct reinforces the Resident Justice of Appeal's emphasis on the duty of every legal practitioner to treat notices given under ss 104, 105 and 106 of the Act with "the seriousness they deserve and [to] respond accordingly".[77]

Approach to appeals from the Commissioner

[108] In *Chandra v The Chief Registrar*,[78] the Supreme Court made it clear that an appeal from the Commissioner was not a rehearing by the appellate court. Keith J (with whom Temo P and Gates J agreed) pointed out that its true scope was one of deciding whether

[74] *Holdaway v Auckland Standards Committee 4* [2024] NZHC 3544, at para [132], set out at **para 108 above**.
[75] *Guiness plc v Saunders* [1990] 1 All ER 652 (HL).
[76] Ibid, at 658.
[77] See para 14 above.
[78] *Chandra v The Chief Registrar* [2025] FJSC 4.

the decision exceeds the "generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong". Only in those circumstances is the appellate court entitled to interfere.[79] In undertaking that assessment, the appellate court must give proper weight to the advantage that the Commissioner had in hearing and seeing witnesses give evidence before him.

[109] Keith J added that an appellate court must not overlook the fact that the Commissioner exercises specialist functions. When appointed to the office, he or she must be "familiar with the nature of the legal system and legal practice in Fiji". During his or her tenure, the Commissioner determines all cases brought to the Commissioner and, in doing so, acquires considerable experience in determining the appropriate sanction in disciplinary proceedings. As the Judge noted, colloquially, "he or she gets a 'feel' for what the appropriate sanction in a particular kind of case should be".[80] It follows that an appellate court should be slow to reverse a decision made by the Commissioner. In Keith J's words, "decisions of specialist bodies should not be readily overturned".

[110] In my view, that approach should be adopted on the present appeal as the reasoning holds good to an appellate assessment of whether a "reasonable explanation" has been given for the purposes of s 108(2) of the Act. The question whether we should interfere with the dismissal of both charges turns on whether the Commissioner's decision was either an error of law or plainly wrong, in the sense described by Keith J.

Analysis

(a) The Commissioner's decision

[111] The Commissioner heard evidence on oath from three witnesses: Mr Nair, Ms Kant and Mr Shivam Prasad, the clerk who had been given the tasks of delivering responses to the notices to the Chief Registrar. Having heard and seen the witnesses, the Commissioner made the following findings in his judgment.[81]

> *19. The cause of the delay as explained is due to certain health issues of [Ms Kant's], covid situation and the oversight of the delivery boy. This*

[79] Ibid, at para 21, citing *Bellenden v Satterthwaite* [1948] 1 All ER 343 (CA) at 345 (per Asquith LJ).
[80] Ibid, at para 22.
[81] *Chief Registrar v Nair* [2023] FJILSC 1, at paras 19-23.

explanation furnished to this Commission is consistent with the email received by the [Legal Practitioners Unit]. In these circumstances it is certainly more probable than not [Mr Nair and Ms Kant] have certainly made an attempt to respond but due the said circumstances it had not reached [Legal Practitioners Unit] on the due and expected date. No doubt, it is the responsibility of [a practitioner] to ensure the timely delivery of the response to the [Legal Practitioners Unit]. The oversight or negligence of the Clerk of [Mr Nair and Ms Kant] is no excuse and such lapse will per se be attributed to the Practitioner. It was the Practitioner's duty and obligation to follow up and ensure the due delivery of such response."

20. *By virtue of the presumption in section 108 (2) the failure within the stipulated time to respond will be deemed to be professional misconduct. In view of this deeming provision with the failure to make a timely response it shall be presumed that the ... practitioners have committed professional misconduct. However, section 108 contains a reverse onus by which if the practitioner furnishes a reasonable explanation for such failure the presumed fact can be rebutted. In the present application the respondents provide an explanation as for ..., [Ms Kant] was not actively involved in the day-to-day activities and running of the law firm. ... [Mr Nair] admits that he was in charge and was attending to the day-to-day affairs of the law firm, including accepting notices received by them.*

21. *The reason for [Ms Kant] to be away from the affairs of the law firm have been due to her ill-health which is supported by the medical certificate dated 25th March, 2021. The fact that [Ms Kant] was not attending to the day-to-day activities is also stated in the letter dated 20th April, 2021 written to the Chief Registrar. The fact of she been admitted to hospital for a gynaecological procedure on 27th November, 2020 and the continuing health issues which lasted for about 6 months had been explained in that letter. This was led in evidence and the said letter along with annexures was produced as exhibit R2. This evidence remains unchallenged.*

22. *[Mr Nair] admits that he was handling single handedly the day-to-day affairs of the law firm. In these circumstances, in the first instance [Ms Kant] has furnished an explanation which explains reasonable grounds for her inability to make a timely response. Secondly, [Mr Nair] provides an explanation namely the oversight of his office delivery boy. No doubt by the 22nd March, 2021 the stipulated time had expired. As such the presumption in section 108 (2) comes into operation and it shall be deemed upon the proof of such failure that the Respondent Practitioner did commit professional misconduct as alleged. Now the explanation comes into place. There is a reasonable explanation then the presumed fact can be rebutted.*

23. *As mentioned above [Mr Nair and Ms Kant] have on the 22nd March, 2021 promptly by email communicated the lapse on their part to make a timely response and informed of their desire to respond and provide the necessary documents. This preceded and was prior to the filling of this application. This conduct clearly establishes the bona fide intention of [Mr Nair and Ms Kant] to respond to the notices. No doubt there was a delay. However, on the 23rd March in response to the said email informed that, their response may be delivered to the office. These circumstances and evidence will clearly establish two facts. Firstly, promptly explaining the delay. Secondly, and the fact of time being sought or an extension requested for by [Mr Nair and Ms Kant] and though not stated directly in that form the [Legal Practitioners Unit] too had agreed to accept a delayed delivery of the response. To my mind this amounts to the granting of extension of time and [Mr Nair and Ms Kant] have within 2 days there of on the 25th of March 2021 handed over the response to the [Legal Practitioners Unit] which is admitted and common ground.*

(Original emphasis)

(b) The charge against Mr Nair

[112] From what I have already said, I consider that the Commissioner erred in law in (a) applying a test that created a substantive reverse onus on the practitioners to establish a "reasonable explanation" defence, (b) in holding that the Chief Registrar had power to extend the time for compliance with a s 108 notice and (c) in suggesting there was some element of intention inherent in the charge.

[113] I agree with Prematilaka RJA that no reliance can be placed on the alleged extension of time that was provided on the morning of the day on which the charges were proffered. I am not prepared to go behind the earlier decision of this Court in which it was held that there was no power for the Registrar to extend time for the s 108(1) notice itself.[82]

[114] So far as Mr Nair is concerned, the Commissioner concluded that "the explanation furnished is reasonable and on the other hand as there is tacit extension of time" he (and also Ms Kant) could not be found liable for professional misconduct.[83] I am not persuaded that the Commissioner would necessarily have reached the same conclusion

[82] *Singh v Chief Registrar* [2018] FJCA 22; ABU0058.2013 (8 March 2018)
[83] *Chief Registrar v Nair* [2023] FJILSC 1, at para 24.

if he had not held that a "tacit extension of time" had been given by the Chief Registrar. In those circumstances, I consider that the charge against Mr Nair, as the person primarily responsible for providing the information requested to the Chief Registrar, should be remitted to the present Commissioner for reconsideration on a *de novo* basis.

(c) The charge against Ms Kant

[115] The findings made by the Commissioner demonstrate that Ms Kant was not responsible for replying to the relevant notice. As between themselves, Mr Nair and Ms Kant had agreed that the former had responsibility for undertaking this task. Indeed, Mr Nair frankly acknowledged that agreement in his evidence.

[116] In absolving Ms Kant from the charge brought against her, the Commissioner relied both on the allocation of responsibility among the partners in a two-person firm, and the serious health issues that Ms Kant had faced at a time proximate to the requests. These are findings to which the Commissioner was entitled to come on the evidence before him. It is not for an appellate court to second-guess findings such as those.[84] For those reasons, I would dismiss the appeal, so far as Ms Kant is concerned.

Conclusion

[117] For those reasons, had the majority not taken a different view, I would have:

(a) Allowed the Chief Registrar's appeal in respect of Mr Nair and remitted the charge for rehearing before the present Commissioner on a *de novo* basis.

(b) Dismissed the appeal against the Commissioner's decision that the charge against Ms Kant was not proved.

[84] See *Chandra v The Chief Registrar* [2025] FJSC 4, at paras 21 and 22, discussed at **paras 108 and 109 above.**

Orders of the Court (by majority):

1. *Appeal allowed.*
2. *The respondents are found guilty of professional misconduct but no sanction is imposed.*
3. *The Chief Registrar is directed to investigate as expeditiously as possible the matters specified in paragraph [42], [43], [74] and [75] above.*
4. *Parties to bear their own costs.*

The Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

The Hon. Mr. Justice Robert Dobson
JUSTICE OF APPEAL

The Hon. Mr. Justice Paul Heath
JUSTICE OF APPEAL

Solicitors:

Legal Practitioners Unit for the Appellant
Sairav Law for the Respondent