IN THE HIGH COURT OF FIJI
AT SUVA

ACTION NO: HBC 195 OF 2012

THE STATE **-v-** **CITIZENS' CONSTITUTIONAL FORUM LIMITED and AKUILA YABAKI**

Respondents

EX PARTE **:** **THE ATTORNEY-GENERAL OF FIJI**

Applicant

Mr S Sharma with Ms R Mani and Ms M Devi for the Applicant
Mr N Williams SC with Mr J Apted and Mr J Cati for the Respondents

JUDGMENT

[1] On 16 July 2012 the Attorney-General (the Applicant) sought leave ex parte to apply for an order of committal against the Citizens' Constitutional Forum Limited and Akuila Yabaki (the Respondents). The application was made under Order 52 of the High Court Rules 1988 which in part replicates Order 52 of the now repealed Rules of the Supreme Court 1965 (UK).

[2] Under Order 52 Rule 2 (2) the ex parte application for leave must be accompanied by a statement setting out (1) the nature and description of the applicant; (2) the names, description and addresses of the persons sought to be committed; and (3) the grounds on which their committal is sought. The application must also be supported by an affidavit verifying the facts relied on in the statement.

[3] The notice filed on 16 July 2012 on behalf of the Applicant, apart from identifying the Applicant and the Respondents, alleged that the words:

> *"(a) "The Law Society Charity (LSC) in its report, "Fiji: The Rule of Law Lost" provides a stark and extremely worrying summary as to the state of law and justice in Fiji";*
>
> *(b) "The report highlights a number of fundamental failings of the current judiciary and legal structure in Fiji, particularly in relation to the independence of the judiciary";*
>
> *(c) "That the independence of the judiciary cannot be relied on."*

were published by the Respondents to scandalize the Court and the judiciary of Fiji in that they were a scurrilous attack on the members of the judiciary thereby lowering or posing a real risk of lowering and undermining the authority of the judiciary and the Court.

[4] The necessary affidavits in support verifying the facts relied on were sworn on 16 July 2012 by Christopher Thomas Pryde and Aiyaz Sayed-Khaiyum and on 17 July 2012 by Ajay Singh.

[5] On 17 July 2012 leave was granted ex parte to the Applicant. On the same day a Notice of Motion was filed seeking an order of committal against the Respondents for the publication of the words in the First Respondent's newsletter "*Tutaka*" Volume 6 Issue 1 for April 2012.

[6] On 27 July 2012 directions were given for the filing of affidavit material by the parties. Counsel appeared on behalf of the Respondents and the

proceedings were listed for mention on 5 October 2012 for the purpose of taking a plea. An answering affidavit sworn by Akuila Yabaki on 6 September 2012 was filed on behalf of the Respondents. A reply affidavit by Aiyaz Sayed-Khaiyum sworn on 28 September 2012 was subsequently filed on behalf of the Applicant.

[7] On 5 October 2012 Counsel for the Respondents informed the Court that the Respondents were pleading not guilty. This plea was formally recorded by the Court. The proceedings were listed for further mention on 18 October 2012.

[8] On 18 October 2012 Counsel for the Respondents sought and was granted leave to file further affidavit material. A supplementary affidavit by Akuila Yabaki sworn on 26 October 2012 was filed on behalf of the Respondents. A further reply affidavit by Aiyaz Sayed-Khaiyum sworn on 1 November 2012 was filed on behalf of the Applicant.

[9] The hearing of the substantive application for an order of committal against the Respondents was set down for 30 November 2012. On 19 November 2012 the Respondents filed a Notice of Motion seeking an order from the Court that I recuse myself from the further hearing of the application and that the case be re-assigned to another judge of the Court.

[10] The grounds of the application specified in the Motion were (1) the petition of William Marshall, (2) comments made by me in the interlocutory hearing on 18 October 2012 and (3) a reasonable apprehension or real risk of bias.

[11] The application for recusal was supported by affidavits sworn on 7 November 2012 by Akuila Yabaki and by Esther Deborah Immanuel also sworn on 7 November 2012. The Notice of Motion was made returnable on the same day as the hearing of the substantive application. On that day Counsel for the Applicant informed the Court that the Applicant did not intend to file affidavit material in relation to the recusal application.

[12] The Applicant filed on 12 November 2012 written submissions on the substantive application and handed up on 30 November 2012 written submissions on the recusal application. The Respondents filed written submissions on the substantive application on 26 November and on their recusal application on 28 November 2012.

[13] When the applications were called on 30 November 2012, the parties indicated their agreement that both applications should be heard on that day. It was agreed that both Counsel would present oral submissions on the recusal application first. Then Counsel would start again and present their submissions on the substantive committal application. The proceedings were completed on that day.

[14] It is, of course, necessary first to consider and determine the Respondents' recusal application. The affidavit sworn by the Second Respondent (Akuila Yabaki) in support of the recusal application deposes to facts that cover a range of matters. There are references to the "*petition of William Marshall*", "*Law and Justice Report April 2009 – 2010"*, "*events of 6 October 2011", "CCF letter to myself", "18 October 2012 interlocutory proceedings*" and "*CCF's concerns*."

[15] The affidavit sworn by Esther Deborah Immanuel deposes to facts that relate to the interlocutory court proceedings on 18 October 2012.

[16] In their written submissions filed in relation to the recusal application the Respondents state that they are relying on two separate grounds for their application. The first ground is stated as being the document written by William Marshall which makes reference to myself thereby giving rise to a personal interest in the proceedings.

[17] The second ground relied upon by the Respondents relates to comments made by myself in court on 18 October 2012 which, it is alleged, when considered with the conversation between the Second Respondent and myself during the course of a chance meeting in October 2011 may give

rise in the mind of a reasonable observer to an appearance of animosity towards the Respondents.

[18] The document prepared by William Marshall (Mr Marshall) has become known by a number of names, one of which is the *"Marshall Petition*." Reference is made by the First Respondent in his affidavit sworn on 6 September 2012 to Mr Marshall at paragraph 97 and to the petition itself in his supplementary affidavit sworn on 26 October 2012.

[19] It is common ground that Mr Marshall was appointed as a resident justice of appeal on a contract for two years. He was not a citizen of Fiji and had previously practised in Hong Kong. His appointment and his contract expired on 15 July 2012. The Marshall petition was published shortly after his appointment had come to an end and after he had left Fiji. The petition itself is a lengthy document which has been reproduced in four bulky volumes annexed to the supplementary affidavit of the Second Respondent sworn on 26 October 2012.

[20] In his oral submissions Counsel for the Respondents indicated that in so far as the Marshall petition was being relied upon in support of the recusal application, that reliance was limited to paragraph 3.56 on page 16 of the Respondents' written submissions on the substantive application. That paragraph states:

> *"Annexure AY 34 to the Supplementary Affidavit of Mr Yabaki filed on 26 October 2012 is a document written by Mr William Marshall, a former Resident Justice of Appeal. The document is relevant not to show the truth of the diverse allegations it makes, but to show that a resident justice of appeal felt that the exercise of his functions had been interfered with, and that he had made the nature of his complaints known. They include assertions that fellow appeal judges were apparently concerned about their security of tenure if they concurred with his judgments towards the end of his period in office."*

[21] In my view, however, it is possible to reach a different conclusion about the genesis of the Marshall petition. It is clear from the petition that Mr

Marshall wanted to continue in Fiji as a resident justice of appeal. At paragraph 99 he states that *"I heard nothing, so on the Tuesday after Easter (10 April 2012) I said to Anthony Gates CJ at morning tea that I needed to discuss my re-appointment."* Then at paragraph 100 Mr Marshall says that *"I considered the possibility of a six month extension and saw Madam Justice Shameem a few days later."* In my view these comments suggest that whatever concerns Mr Marshall may have had about judicial independence in Fiji he was still prepared to serve in the judiciary and was anxious to secure a renewal of his contract to do so.

[22] In paragraph 100 Mr Marshall goes on to state that by mid April 2012 he realized that he would have to leave the judiciary. What he meant, of course, was that he realized that his contract would not be renewed.

[23] In my view it is more than a co- incidence that in paragraph 3.56 the Respondents claim that it was at about that time that Marshall asserts that his fellow judges were concerned about their tenure. Their alleged concern about tenure suddenly emerges at the same time as he becomes aware that his contract is not going to be renewed, but apparently not before this point in time. Neither the petition nor the Respondents made any reference to the obvious reasons for Mr Marshall's contract not being renewed.

[24] There are two questions that come to mind when one is considering the Marshall petition. The first is why did Mr Marshall not resign his appointment during the course of his contract if the independence of the judiciary had been so compromised. His portrayal of himself as a man of principle is inconsistent with his admitted efforts to secure a renewal of his contract as late as mid April 2012. The second question which one is tempted to ask is whether Mr Marshall would have wasted so much of his judicial time putting the document together if his contract had been renewed for a further two years or even if he had been given a six month extension?

[25] It is not surprising that Counsel for the Respondents during the course of his submissions acknowledged that the Marshall petition was a document that could be described as *"self-serving."*

[26] The facts relating to the second ground relied upon by the Respondents commence with a publication which the Second Respondent describes as the First Respondent's first Law and Justice Report published in about May 2010. It is claimed by the Second Respondent that I raised this publication with him on 6 October 2011. The Second Respondent is mistaken on that matter. Until it appeared as an annexure to his affidavit sworn on 7 November 2012, I had not seen that document. The document to which I made reference when the Second Respondent and I spoke on 6 October 2011 was a document that appeared on the internet with the title *"Citizens' Constitutional Forum Submission for Universal Periodic Review – Fiji"* which is dated 28 November 2009. In paragraph 16 of that document there is an assertion that since 10 April 2009 *"there has been substantial interference with the legal and justice system including _ _ _ the appointment of former military lawyers to the judiciary compromising its independence _ _ _".* As a footnote on that page it is stated that *"High Court Judge William Calanchini and Chief Registrar Ana Rokomokoti were both former military lawyers."* That could only be a reference to my appointment as a civilian legal practitioner to the Republic of Fiji Military Forces between October 2002 and December 2003 with the title Staff Officer Legal.

[27] Apart from what the Second Respondent has deposed to in paragraph 9 of his affidavit sworn on 7 November 2012, it was also pointed out to him during the course of that brief conversation that I had been appointed Permanent Arbitrator in December 2003 a position that I held till June 2008 and that I was then appointed Acting Chief Tribunal of the Employment Relations Tribunal in August 2008. The Second Respondent ought to have known that prior to my appointment in June 2009 as a Judge of the High Court, I had handed down a number of awards in the Arbitration Tribunal and in the Employment Tribunal that were decisions against the Government of the day – see: **Fiji Public Service**

Association –v- Public Service Commission Awards 52 – 57 of 2005 delivered 19 October 2005 and **Viti National Union of Taukei Workers –v- Public Service Commission** Dispute No.8 of 2008 delivered March 2009. Both these decisions are available on PACLII (Fiji Cases).

[28] As the Second Respondent has stated in paragraph 10 of the same affidavit, I did not respond to his subsequent letter and in my judgment it can reasonably be concluded that that was the end of the matter.

[29] The affidavit of Esther Deborah Immanuel purports to set out the contents of proceedings on 18 October 2012. On that day Counsel appearing for the Respondents made an application to call oral evidence at the hearing of the substantive application. Having considered the reasons for the application and the nature of the evidence, it appeared to me that the Respondents were seeking to take advantage of the proceedings in order to further an unrelated agenda. Furthermore, in my view, the Respondents had hoped to advance their position through the undoubted media attention that accompanies the attendance of witnesses giving oral evidence in court proceedings.

[30] My comments could not reasonably be construed as otherwise than as a strong indication that the parties would not be permitted to stray from the issue raised by the substantive application. The application to call oral evidence was refused. The Respondents were given reasonable time to file supplementary affidavit material which they did. The comments that have been selected by the deponent in that affidavit have been taken out of context. They were made in the context of an application that was inconsistent with the procedure that is usually applied in proceedings commenced under Order 52 in Fiji. Order 52 Rule 5 (4) allows only a respondent to give oral evidence if he wishes to do so. Otherwise evidence is adduced by affidavit.

[31] The applicants base their recusal application on the basis that I have a personal interest in the proceedings as a result of the Marshall petition and that objectively it can be said that there is animosity towards the

Respondents. The Respondents are in effect invoking their common law right to natural justice in the form of an unbiased judge.

[32] The leading authority in Fiji on the issue of bias is **Koya –v- The State** (unreported Supreme Court decision CAV 2 of 1997 delivered 26 March 1998). In that decision the Supreme Court discussed two tests that have been developed by the courts to determine whether a judge should disqualify himself on account of bias. The first test is known as the reasonable apprehension of bias test that was applied by the High Court of Australia in **Livesey –v- New South Wales Bar Association** (1983) 151 CLR 288 and confirmed in **Webb –v- The Queen** (1994) 181 C.L.R. 41. Under this test a judge should disqualify himself from adjudicating a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in the case. The other test is referred to as the real danger of bias test which had been adopted by the House of Lords in **R –v- Gough** [1987] AC 646. Although there is some support in the authorities for the proposition that there is not a great deal of difference between the two tests, if it is necessary to identify which test I consider this Court should apply, I consider that the decision in **R –v- Gough** (supra) should be followed in this jurisdiction. That test was preferred by Fatiaki J (as he then was) in **Citizens' Constitutional Forum –v- The President** [2001] 2 FLR 127. This preference for the test adopted in **R –v- Gough** (supra) is re-inforced by section 22 of the High Court Act Cap 13.

[33] The real danger of bias test was explained by Lord Goff in **R –v- Gough** (supra) at 670 in this way:

> *"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the*

test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or having unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him _ _ _."

[34] The test was subsequently slightly adjusted by the House of Lords in **Porter –v- Magill** [2002] 2 WLR 37 at pages 83 – 84. As a result the approach to be taken is that the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, that the tribunal was biased.

[35] In my judgment this approach is to be preferred to either a purely subjective test or the reasonable apprehension of bias test. A purely subjective test considers the concerns of a particular litigant and would as a result allow any litigant to successfully challenge any judge assigned to a case whenever that litigant perceived that the judge might be prejudiced.

[36] The reasonable apprehension of bias test raises an issue relating to the knowledge to be imputed to the hypothetical member of the public. What kind and what depth of knowledge is to be imputed to the hypothetical member of the public? Does the imputation of such knowledge mean that the hypothetical person with that imputed knowledge is no longer an average or typical adult? The artificial nature of this exercise surely leads to a wide variance in its application by courts. (See: The Australian Judiciary – Enid Campbell and H P Lee, Cambridge University Press 2001 at pages 133 – 136).

[37] Consistent with the decision in **Porter –v- Magill** (supra) the Court of Appeal in **Patel and Mau –v- Fiji Independent Commission Against**

Corruption (unreported criminal appeal AAU 39 and 40 of 2011 delivered 12 September 2011) adopted a two stage enquiry. The first stage involved establishing the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "*bias*" ball in the air. The second stage is to determine whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case. This involves an objective determination in the sense that it requires an enquiry as to how others would view the judge's position.

[38] The two grounds relied upon by the Respondents must be considered in the light of the test that has been discussed above and was adopted by the Court of Appeal in **Patel and Mau** (supra).

[39] The first ground is the claim that I have a personal interest in the present proceedings. The present proceedings are brought under Order 52 of the High Court Rules. The Respondents' publication is said to have used words that constitute criminal contempt scandalizing the Court. The gist of the words used is that the independence of the judiciary cannot be relied on. It is apparent, of course, that as a judge and hence a member of the judiciary I have an interest in the proceedings as do all the judges of the Court as members of the judiciary. In proceedings where the nature of the contempt is criminal contempt scandalizing the court it is inevitable that the judge to whom the application is assigned will have an interest, which may be described as personal, in the proceedings. The contents of the Marshall petition do not in my judgment enhance the degree to which my interest may be more personal than any other member of the judiciary. After all the principal thrust of the Marshall petition is the independence or lack thereof of the judiciary. That I may have been the subject of disparaging comments in the Marshall petition does not, in my judgment render my interest in the present proceedings sufficiently personal to warrant my recusal.

[40] There is also the view expressed by Fatiaki J (as he then was) in **Citizen's Constitutional Forum –v- The President** (supra) that applicants such as the Respondents should not be allowed to easily have a judge changed based on public vilification of the judge. Although the vilification of the judge in that decision was published by the applicants, I see no reason why that principle should not apply when the vilification has been published by a third party. In cases such as the present, the Respondents right to a fair hearing based on the principles of natural justice are safeguarded by the procedural requirements that are prescribed by Order 52 and by the common law.

[41] In my judgment and for the reasons stated the allegation of personal interest constituting bias has not been established.

[42] The second ground may be disposed of briefly. The Respondents base their attacks on my appointment as a judge on the fact that I was engaged by the Republic of Fiji Military Forces between October 2002 and December 2003. Their publications in 2009 classified my appointment as a military judge and hence lacking impartiality and independence. They now seek to rely on those attacks as a basis for seeking my recusal on the grounds that they fear that I may demonstrate animosity towards them, or, as Fatiaki J (as then was) said in **Citizens Constitutional Forum –v- The President** (supra), that I might retaliate. My response to that suggestion is the same as was made by Fatiaki J (as he then was) in that earlier decision. The Respondents cannot rely on their earlier public attacks on a judge as a basis for seeking his recusal in subsequent proceedings. Otherwise it would be open to any litigant to publicly attack any member of the judiciary so as to ensure that none of them could be assigned proceedings in which the litigant was a party. As Fatiaki J (as he then was) said at page 140 (supra):

> *"_ _ _ the applicant's fear is more a reflection of its own subjective perception rather than an objective assessment by an informed observer based on relevant and admissible evidence asking himself the question "is there a real danger that the judge is biased." _ _ _*

> *It may not be commonly understood, that, besides being human, judges are, by training and experience, quite capable of exercising a high degree of personal and emotional detachment from the cases that they are called upon to determine. The second equally important reason is that if a litigant could be permitted through the launching of a public vilification campaign against a judge to then successfully claim that the judge is thereby reasonably likely to be biased against him, then no judge would be secure. No litigant ought to be allowed so easily to change his tribunal."*

[43] I would apply those observations to the Respondents' earlier publications. The brief conversation in October 2011 objectively considered should be regarded as no more than an explanation being sought and given. The comments in court on 18 October 2012 objectively regarded were no more than a stern warning that the Respondents were to limit themselves to the issues raised in the application for their committal.

[44] As a result it is my considered view that the allegation relating to a perception of animosity has not been established. The application for recusal is refused.

[45] Turning now to the substantive application for an order of committal against the Respondents. The relevant background facts, which appear not to be in dispute, may be stated briefly. Between 13 – 18 November 2011 a Mr Nigel Dodds, the Chairman of Law Society Charity made a private visit to Fiji. The Law Society Charity was established by the Law Society of England and Wales and promotes law and justice issues with particular emphasis on legal education and human rights. The Law Society Charity decided to take advantage of the private visit by its Chair to evaluate *"the position there* " and *" to publish a report."* The visit was restricted to interviewing selected persons on the main island of Viti Levu.

[46] Those who were interviewed by Mr Dodds are identified in general but not by name in the Report dated 12 January 2012 that was subsequently published after the visit and which is copied as annexure A to the affidavit sworn on 16 July 2012 by Aiyaz Sayed-Khaiyum. Those who were not

approached by Mr Dodds for interview or comments are listed in paragraph 4 of the same affidavit. On page 11 of the Report in paragraph 15 there are ten conclusions. Following publication of the Report there appeared on page 8 of the First Respondent's newsletter "*Tutaka*" published in April 2012 an item with the heading *"Fiji: The Rule of Law Lost."* The sub-heading described the item as an "*analysis of the Law Society Charity Report 2012."* A copy of the publication including the item on page 8, is attached to the same affidavit as annexure B. The item was apparently written by a Mr Jonathan Turner. The words the subject matter of the application appear in the item on page 8 of annexure B.

[47] Committal is sought against the First Respondent as proprietor and publisher of "*Tutaka*" the quarterly newsletter of the First Respondent. Committal is sought against the Second Respondent as editor of the newsletter "*Tutaka*."

[48] The Attorney-General is the applicant and has commenced these proceedings under Order 52 of the High Court Rules on the basis that the alleged contempt in this case falls under Order 52 Rule 1 (2) (b) as contempt of court committed otherwise than in connection with any proceedings. No challenge has been made to the propriety of the proceedings being launched by the Attorney-General. There is authority for the proposition that such proceedings should usually be commenced by the Attorney-General. See: **In the Matter of Charles Gordon** (unreported civil appeal No. 49 of 1975 delivered 16 March 1976), **Attorney-General –v- Times Newspaper Ltd** [1974] AC 273 and **In the Matter of Mahendra Pal Chaudhry** (1988) 44 FLR 39.

[49] The Respondents are alleged to have committed what is termed a criminal contempt in the form of scandalizing the court otherwise than in connection with any proceedings. It is not disputed that Order 52 is the correct procedure for bringing such an application for an alleged contempt which, if established, is a criminal contempt. See the authorities referred to in **The State –v- Fiji Times Ltd and Others ex parte the Attorney-General** (unreported HBC 343 of 2011 delivered 1 October 2012).

[50] The applicant alleges that the words printed and published by the Respondents scandalize the Court and the judiciary in Fiji on the basis that they (a) are a scurrilous attack on the judiciary and (b) lower the authority of the judiciary and the Court. The underlying principle upon which this jurisdiction is exercised was stated in clear terms by Lord Diplock in his speech in **Attorney-General –v- Times Newspaper Ltd** (supra) at page 307:

> *"In any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another."*

[51] Contempt proceedings are concerned with the maintenance of public confidence in the courts of law (and the judiciary) established and maintained by the state for the administration of justice. The ability of the judiciary and courts of law to effectively administer justice is dependent on, amongst other things, the authority of those courts and the judiciary. That in turn depends on whether they (the courts and the judiciary) command the confidence of citizens to administer justice without fear or favour. The mischief that is targeted by contempt proceedings such as the present is the risk to the administration of justice by lowering the authority and the reputation of the courts and the judiciary by questioning their independence and hence their impartiality.

[52] The nature of the jurisdiction was clarified in **Mahendra Pal Chaudhry –v- Attorney-General of Fiji** (1999) 45 FLR 87. At page 92 the Court of Appeal (Casey, Barker and Thompson JJA) said:

> *"This summary indicates that the common law offence of contempt scandalizing the Court involves attacks upon the integrity or impartiality of judges or Courts, the mischief aimed at being a real risk of undermining public confidence in the administration of justice which must be established beyond reasonable doubt."*

[53] It appears not to be disputed that the words complained of were published in the First Respondent's newsletter "*Tutaka*" as alleged by the Applicant. That is a factual issue that has been established beyond reasonable doubt. It is also not disputed that the Second Respondent is the editor of the First Respondent's newsletter. Whether the published words rendered the Respondents liable for contempt scandalizing the Court depends upon whether the Court forms the view that the publication overstepped what has been described as *"the fine line between the tolerable and the intolerable"* (The Australian Judiciary (supra) at page 183). In determining whether that line has been crossed it is appropriate to consider the publication, the readership of the publication and the nature of the jurisdiction in which the words were published.

[54] "*Tutaka*" is the quarterly newsletter published by the First Respondent with the Second Respondent as its editor. It was first published in its current form in October 2007. It is claimed by the Second Respondent that it has a limited circulation with about 2000 copies of each issue being printed. There is evidence before the Court that the relevant issue of "*Tutaka"* is also available in hard copy form in the library at the University of the South Pacific. The Applicant deposed in paragraph 11 of his affidavit sworn on 28 September 2012 that *"past issues of Tutaka*" have been published on line on the First Respondent's official website.

[55] The Respondent submitted that in a case such as the present where the words appear in a specialized publication that has a limited readership, those words are unlikely to create a real risk of undermining public confidence in the administration of justice. However, I am not satisfied that in this case the newsletter fits the description of a specialized publication nor am I satisfied that the newsletter was either read by or available to only a few. It is, after all, a newsletter published by the Citizens' Constitutional Forum (emphasis added). In my judgment the newsletter's level of publication and circulation was sufficient for the Court to enquire whether the publication crossed the fine line between the tolerable and intolerable.

[56] Furthermore, there are occasions when a relatively narrow distribution of the publication may be sufficient to support contempt proceedings. In **Ex parte Attorney-General; R Goodwin** (1970) 91 WN (NSW) 29, the New South Wales Court of Appeal at page 32 observed:

> *"Then the claim that the area of publication was insufficient to support the Attorney-General's application is unacceptable. In **Re Wiseman** [1969] NZLR 55 and in **R –v- Collins** [1954] VLR 46 the material constituting the contempt appeared only in affidavits and a notice of motion filed in court, and in the one case the New Zealand Court of Appeal and the other Sholl J found the publisher guilty of contempt and in each case a sentence of imprisonment was imposed. In the present case the publication was made to a substantial number of District Court Registrars and such an area of publication is clearly sufficient to support contempt proceedings."*

[57] In the case of **Goodwin** (supra) the Respondent had sent letters to thirteen Registrars of District Courts in New South Wales repeating an allegation that a District Court Judge had made a malicious and unwarranted attack on his character and, in so doing, was activated by an ulterior motive. The Respondent requested the Registrars to publicly display a copy of an earlier letter addressed to the Attorney-General that contained the same allegation. There was no evidence that any of the Registrars displayed copies of the letter as requested by the Respondent. The Court of Appeal of New South Wales convicted the Respondent for contempt in scandalizing the Court in publishing the letter with its enclosure and imposed a fine of $2000.00. The Court indicated that when determining the appropriate penalty it had taken into account, amongst other things, the limited area of publication. I have no doubt that the scope of publication in the present case is clearly sufficient to support contempt proceedings.

[58] To add weight to that conclusion, I need look no further than the affidavit material that sets out in detail the history and activities of the First Respondent.

[59] The Second Respondent in his affidavit sworn on 6 September 2012 has set out in considerable detail the history of the First Respondent, the nature of its work and its contribution to constitutional discourse in Fiji. The First Respondent is a company limited by guarantee and became registered under the Companies Act Cap 247 in about July 2003. It is described as a non-governmental organization. It had its origins following the 1987 coup. It adopted its present name in 1991 and was initially registered under the Charitable Trust Act Cap 67.

[60] In my view the First Respondent's undoubted acquired reputation as a respected organization indicates that its newsletter is influential and regarded as a serious and reliable publication. The notoriety and reputation of the First Respondent and its newsletter lends credence to the allegations in the words that were published in the newsletter. As a result I am re-enforced in my conclusion in this case that the publication supports contempt proceedings.

[61] In an application such as the present a further factor to be considered is the nature of the jurisdiction. In **Ahnee and Others –v- Director of Public Prosecutions** [1999] 2 WLR 1305 the Privy Council considered the issue of contempt scandalising the court which arose in Mauritius and observed at page 1313:

> *"Their Lordships have already concluded the offence of scandalising the court exists in principle to protect the administration of justice. _ _ _. But it is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater _ _ _. Moreover it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice."*

[62] The Judicial Committee considered that the recent constitutional history of Mauritius together with other matters meant that the administration of

justice was more vulnerable than in the United Kingdom. It was as a result of this vulnerability on a small island state that the need for the offence of scandalising the court was greater.

[63] In my view not only the recent constitutional history of Fiji but its constitutional history since independence in 1970 has meant that at various times the administration of justice has been more vulnerable than in the United Kingdom. It is also the case that the need for the offence of scandalising the court in Fiji as a developing Island state (albeit of more than 300 islands) is greater than in a developed state such as the United Kingdom.

[64] The mischief that is targeted by commencing proceedings seeking committal for contempt scandalising the Court is the real risk that the publication will undermine public confidence in the administration. If that is established, then the publication becomes intolerable.

[65] With the real risk test it is not necessary for the Applicant to establish that the Respondents intended to commit the offence of contempt scandalising the court. Once it has been established that the publication itself was intentional, the only element that remains to be determined is whether the publication constitutes or represents a real risk of undermining public confidence in the administration of justice. There is no requirement to establish an additional element of mens rea (**Ahnee –v- Director of Public Prosecutions** (supra) and **Chaudhry –v- Attorney-General of Fiji** (supra)). In this case, the court is required to determine whether the words in the publication have the effect of undermining public confidence in and the authority of the judiciary thereby undermining public confidence in the administration of justice. The test to be applied was discussed by the Court of Appeal in **Parmanandan –v- Attorney-General** (1972) 18 FLR 90. At page 96 the Court of Appeal stated that the words complained of must be construed objectively as a whole. The test is what any fair minded and reasonable man would understand from the words as they appeared in the publication.

[66] I am satisfied that a fair minded and reasonable person reading the item on page 8 of the newsletter "*Tutaka*" would understand the words in the context of the published article to mean that the independence (used in its ordinary non technical meaning) of the judiciary in Fiji "*cannot be relied on*." They are the actual words used and in my judgment that is the meaning that would be given by a fair minded and reasonable person to all the words that are the subject matter of the present proceeding. As Northrop J observed in **Viner –v- Australian Building Construction Employees' and Builders Labourers Federation and Another** [1982] 2 I.R. 177 at page 185:

> *"In any event it is for the court to construe the statement made having regard to the understanding of the ordinary man. The words are not to be construed in any technical way but in a practical sense having regard to the reality of the situation in which they were published."*

[67] During the course of his submissions Counsel for the Respondents submitted that the correspondence from the Director of Public Prosecutions (Mr Pryde) to the Second Respondent annexed to the affidavit of Christopher Thomas Pryde sworn on 16 July 2012 as annexures B and E does not make reference to a claim that the item on page 8 or the words in particular constituted contempt of court. The first letter is dated 23 May 2012. It is correct that the words *"contempt of court"* are not used in that letter. The second letter is dated 31 May 2012 and does contain in paragraph 8 the writer's concern that the contents of the item may amount to a contempt of court.

[68] In his affidavit sworn on 6 September 2012 at paragraph 148 the Second Respondent stated that he declined to retract the article because he did not believe it was contemptuous. It is apparent that the Second Respondent was aware that one of the reasons for the request to retract the article was the allegation that it was in contempt. Whatever the Second Respondent's opinion may have been is also not relevant to the question of liability for publication. There was certainly no evidence that

the Second Respondent had sought qualified legal advice prior to publication.

[69] A further submission by Counsel for the Respondents was to the effect that the words referred to the institutional independence of the courts and not with the impartiality of the judiciary. However the following words that appear in the newsletter refer specifically to the judiciary:

> *"The report highlights a number of fundamental failings of the current judiciary and legal structure in Fiji, particularly in relation to the independence of the judiciary."*

[70] It is my view that the words "*the independence of the judiciary*" were a reference to the independence of the judiciary in a non-technical sense. When read with the latter assertion that *"the independence of the judiciary cannot be relied on"* I have no doubt that a fair minded and reasonable person would conclude that the words were referring to the independence of the judges who when considered collectively are the judiciary and that what could not be relied on was the ability or capacity of any of the judges to reach a decision without being influenced by external or personal considerations.

[71] Furthermore, I do not agree that the use of the words *"independence of the judiciary"* as distinct from the *"impartiality of the judiciary"* takes away the contemptuous nature of the words used. In the Shorter Oxford English Dictionary one of the meanings of the word "*independent*" is stated as being *"not influenced or biased by the opinion of others; thinking or acting for oneself."* It also has the meaning of "*not subject to external control or rule*." The word "*impartial*" is defined as meaning "*not favouring one more than another, unprejudiced, unbiased, fair just, equitable*." In a practical sense giving them their ordinary meanings the words independence and impartiality are likely to give to a fair minded and reasonable person the impression of an overlapping or even interchangeable meaning.

[72] Even if a fair minded and reasonable person concluded that the two words each had a distinct meaning, they are nevertheless not mutually exclusive. As the learned authors of The Australian Judiciary (supra) noted at page 49:

> *"Public perception of judicial impartiality, which is the essence of judicial independence, is promoted when the judiciary is seen to be separate from the other branches of government."*

[73] If a more technical understanding of the two words is to be imputed to a fair minded and reasonable person, then there must also be imputed the connection between the two. It is my view that judicial impartiality is linked to and largely dependent upon judicial independence. Judicial impartiality cannot exist without judicial independence. To say that the independence of the judiciary cannot be relied on is to say that judicial impartiality cannot be relied on. The ability to be impartial ultimately depends on the presence of independence. In the absence of judicial independence the judiciary will surrender its impartiality to pressure from external sources.

[74] The Supreme Court of Canada has taken a similar approach to the concept of judicial independence. In **The Queen –v- Beauregard** (1986) 30 D.L.R. (4th) 481 Dickson CJC in expressing the opinion of the majority stated at page 491:

> *"_ _ _ the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere with the way in which a judge conducts his or her case and makes his or her decision."*

[75] In my view these comments refer to a state of mind or attitude in the actual exercise of the judicial function and are as a result concerned with judicial impartiality. As Dickson CJC accepted, in the same decision, the principle of judicial independence has in more recent times become a far broader principle. It now also has a collective or institutional aspect in

that it connotes a status or relationship to others, particularly to the Executive branch of government, that is based on objective conditions or guarantees. In other words the principle of judicial independence has two components. One is the traditional concept of impartiality on the part of individual judges. The other is the institutional relationship of the judiciary to other institutions. One matter that is clear is that Dickson CJC in **Beauregard** (supra) did not consider judicial impartiality as a separate and distinct concept falling outside of the principle of judicial independence.

[76] In Fiji the independence of the judiciary, including its impartiality can be gauged by the substance of the judgments and decisions of the individual judges of the Court. To assist in that process since 2008 all proceedings in all the courts of Fiji are open to the public. Decisions and reasons for judgments are published and are available on the internet. Judgments are subject to public scrutiny, comment and criticism both domestically and internationally. Judgments by single judges are subject to appeal to enable errors to be corrected. In my view these are all bench marks that assist a fair minded and reasonable person to understand that the judiciary acts independently.

[77] However, I am satisfied that the words published in "*Tutaka*" and thus understood by a fair minded and reasonable reader do represent a real risk of undermining that public confidence in the administration of justice. The words have the effect of raising doubts in the minds of the public that their disputes will not be resolved by impartial and independent judges. As a result the authority and integrity of the judiciary in Fiji is undermined. I am satisfied that the offence of contempt scandalising the court has been established against the First Respondent, the Citizens' Constitutional Forum.

[78] I shall now consider the issue of legal responsibility of the Second Respondent, Akuila Yabaki. In his affidavit sworn on 6 September 2012 the Second Respondent admits that he is the editor of the newsletter and

that he personally approves every article for publication in the newsletter (paragraph 38).

[79] It appeared not to be in dispute that at common law liability attaches to an editor for material appearing in a publication which the court holds to be contempt scandalising the court. In his affidavit the Second Respondent does not put forward any factual basis for avoiding liability as editor. His affidavit is more concerned with the issue of whether the words in the item were contemptuous. The affidavit is concerned almost entirely with the Second Respondent's views, opinions and perceptions in respect of the issues raised by the application. However, he is the Respondent and the affidavit is almost entirely subjective when it comes to considering the issue of whether the words constitute contempt scandalising the court. The issue is not whether Akuila Yabaki as the Second Respondent considered the words to be contemptuous. The issue is whether a fair minded and reasonable person would consider that the words undermined or risked undermining public confidence in the administration of justice. Only very rarely would one expect the subjective views of a contemnor and the objective answer to be the same. They are certainly not in this case.

[80] The Respondents raise the issue of defences. Having concluded that the words are contemptuous, the question is whether there is any defence available to the Respondents and if so has such a defence been made out?

[81] The answer to the first question is to be found in the decision of the Court of Appeal in **Chaudhry –v- Attorney-General of Fiji** (1999) 45 FLR 87 at page 91:

> *"We accept that in respect of such attacks a defence is available of honest and fair comment on the basis of facts truly stated and of justification or truth."*

[82] The issue then to be determined is whether either the defence of honest and fair comment or justification is available to the Respondents in the present case. I have already indicated that, in my judgment, the

allegation that the independence of the judiciary cannot be relied on constitutes contempt scandalising the court on the basis that there is a real risk that those words undermine public confidence in the administration of justice. The words allege that the judiciary as a whole cannot be relied upon to act with the impartiality required of judicial office. It follows that the reason for this is because members of the judiciary when adjudicating will on occasions defer to an outside influence in the form of the executive. As a result, it is claimed, the public cannot rely on any particular decision being free of improper motives or considerations.

[83] It appeared not to be disputed that the onus or responsibility for raising these defences fell on the Respondents. In that regard, when considering the Respondents' submissions on these issues, I do not agree that it is necessary to consider constitutional history of Fiji or legislation passed since independence in 1970. The Report which the newsletter purported to summarise was a report published by the Law Society Charity on an "*evaluation of the position there.*" In my judgment that can only mean an evaluation as to the present position in Fiji. It follows that the present position must be taken to be that which exists and has existed since April 2009 following the abrogation of the 1997 Constitution. Similarly, any reference to judgments or decisions handed down by the judiciary should be limited to the period after April 2009.

[84] It is also important to note that the contemptuous words that appeared in the item on page 8 of the Respondents' newsletter purported to be an analysis of the Law Society Charity Report. That section of the Law Society Charity Report which deals with the Judiciary can be found in paragraphs 13.1 to 13.6. As already noted, the report was based on limited and selective consultation and, in my view, cannot be said to be balanced or fair. Under those circumstances that part of the report that deals with the Judiciary and the conclusions reached by Mr Dodds cannot be said to amount to fair comment. Consequently the repetition of those conclusions in the article that purports to be an analysis of the Law Society Charity Report cannot be said to be fair comment.

[85] In my view the reference to various provisions in various decrees introduced since 2009 are not relevant to the present proceedings which are concerned with allegations published in an article that purports to be an analysis of the Law Society Charity Report. The conclusions in the Report concerning the judiciary were based on that part of the Report that discusses the judiciary. To the extent that there is implied criticism to the appointment of judges by way of contract for fixed but renewable terms, it must be noted that section 137 (4) of the 1997 Constitution permitted the appointment of puisne judges of the High Court for fixed terms of not less than four and not more than seven years. It has also become the practice in some Australian jurisdictions to appoint acting judges for fixed terms with the possibility of further extensions (See The Australian Judiciary (supra) at pages 86 – 87). To the extent that the usual guarantees in relation to tenure and remuneration are included in a decree rather than enshrined in a constitution, I would say that the position is the same as in other countries where there is no written constitution.

[86] It is my view that any provision in any piece of legislation, whether it be an Act, a Proclamation or a Decree, that purports to oust the Court's jurisdiction with respect to a particular matter, has nothing to do with the independence of the judiciary but is rather a matter of interpretation. Courts in both the United Kingdom and Australia have developed approaches to such provisions with a view to restricting their effect (See: The Australian Judiciary (supra) at pages 205 – 206). Similar provisions can be found in long standing pieces of legislation such as section 7 of the Native Lands Act Cap 133.

[87] It is accepted that under the separation of powers doctrine the judiciary does not involve itself in legislating when delivering judgments or decisions. It plays no part in the drafting of provisions that either purport to oust the jurisdiction of the courts or purports to affect pending litigation. In my judgment, the independence and impartiality of the judiciary is not affected by its obligation to interpret and apply these provisions any more than it is by its obligation to interpret and apply any other statutory or legislative provision.

[88] It was submitted by Counsel for the Respondents during the course of his oral submissions that the Respondents cannot be found to be in contempt when other organisations have produced publications with similar content. The decision to commence contempt proceedings against a particular party under Order 52 is a matter for the Attorney-General. Certainly the Law Society Charity had no control over the extent, if any, to which its report or any analysis of it would be published. The decision to publish the offending material rested entirely with the Respondents and once publication actually occurred then contempt by publication has been committed. In my view the fact that others may have published similar material on the same subject matter does not exonerate the Respondents and does not render the contemptuous words fair comment.

[89] In his oral submissions Counsel for the Respondents submitted that the Respondents rely in a limited way on the Marshall petition in so far as it relates to the defence of justification. It is only necessary for me to say that if the assertions in paragraphs 23 – 24, 143 and 167 (which were identified by Counsel) are to be relied upon as being true then the petition should have been verified by affidavit sworn by Mr Marshall. The mere fact that Mr Marshall says that a certain event occurred does not necessarily make it true or confirm that it happened in the manner described.

[90] A mere assertion by Mr Marshall made during the course of a telephone conversation with the Second Respondent that the contents of the petition are to the best of his knowledge true is not good enough. That assertion adds little or no weight to the probative value of the contents of the petition which can best be described as marginal.

[91] In paragraph 167 of the Marshall petition, a paragraph to which express reference was made by Counsel for the Respondents, there is a reference to the appeal of **Vergnet –v- Commissioner of Inland Revenue**. As the petition is being relied upon by the Respondents in support of their

defence of justification I am compelled to make some comments in respect of this matter.

[92] In paragraph 166 of the Marshall petition it is claimed that:

> *"Since the executive wanted the case dealt with quickly _ _ _."*

[93] I am able to indicate that it was not the executive that had approached the Court of Appeal. It was the legal practitioners acting for Vergnet who had in passing mentioned the matter to me personally. I was approached by a member of that firm in the street enquiring as to when the judgment would be delivered. To my knowledge the Commissioner of Inland Revenue has not at any stage communicated with the Registry or with any judge as to the progress of the appeal.

[94] It was only after those enquiries had been made that I approached Marshall JA (as he then was) and discussed options available to the Court since he had not been able to draft a decision prior to the departure of Inoke JA. The appeal had been heard in May 2011.

[95] When I became aware that Mr Marshall's contract would not be renewed I wrote to him concerning the appeal by minute dated 3 May 2012 as follows (omitting formal parts):

> *"Further to our discussion earlier this week on the above appeal and to your subsequent letter dated 3 May 2012 addressed to Khan JA I wish to clarify the purpose of my raising the issue of the appeal judgment.*
>
> *My concern was prompted by a judgment dated 5 April 2012 (in this appeal) which I had received late last week. It was from Inoke J. I attach the judgment for your information. I understand that you had already received a draft judgment from Inoke J some time ago. I do not know whether the latter is the same as the former.*
>
> *In any event, as Inoke J has left the bench, the only way to avoid a re-hearing of the appeal is to take advantage of section 19 of the Court of Appeal Act. For*

that purpose two things would need to happen. The parties must consent and Khan JA would need to be a willing participant.

The sole purpose of my raising the matter with you was to determine whether you would agree with that proposal and if so whether you could proceed under section 19 before you went on leave.

I am attempting to avoid re-hearing of appeals as the work load of the Court is substantial.

In the event that the parties do not consent, in the event that Khan JA cannot assist or in the event that a judgment cannot be settled and delivered before you go on leave, then a re-hearing will be inevitable."

[96] By minute also dated 3 May 2012 Mr Marshall replied (omitting formal parts):

"Thank you for your clarifications.

I am correct in my email to Khan JA in comprehending your intentions which are reasonable and proper.

In asking Khan JA I believe I have made it clear that I myself will give priority to this plan if section 19 consent is given. It had to be made clear to Khan JA,;" If it were done, it were best be done quickly."

[97] It is as a result of this obvious misrepresentation of the facts in the Marshall petition that I am reluctant to place any reliance on any assertion made in that petition which Counsel for the Respondents acknowledged to be "*self-serving*."

[98] For the reasons stated above I have concluded that neither the defence of fair comment nor justification is available to the Respondents for the use of the contemptuous words that appeared in their newsletter and which purported to be a summary of the Report of the Law Society Charity.

[99] To the claim that the words go no further than mere criticism I am prepared to rely on the remarks of the Supreme Court of India in **In Re Arundhati Roy** [2002] 3 SCC 343 at 352 to the effect that:

> *"_ _ _ any criticism of the judicial institution couched in language that apparently appears to be mere criticism, but ultimately results in undermining the dignity of the courts cannot be permitted when found having crossed the limits and has to be punished."*

[100] Furthermore, in my view the decision of the Court of Appeal in **Vijay Parmanandam –v- The Attorney-General** (supra) is authority for the conclusion that when the words go deeper than mere criticism they cannot be regarded as having been made in good faith nor can they constitute fair comment.

[101] I have no hesitation in finding that the words that "*the independence of the judiciary cannot be relied on"* when considered objectively by a fair minded and reasonable person means that there is a real risk of not having his dispute determined by an independent and hence impartial member of the judiciary. In my view such a conclusion clearly risks undermining the public's confidence in the administration of justice. This is a serious contempt that is intolerable and has *"crossed the limits."*

[102] The application will be listed on a date to be fixed for mitigation.

_____

W D CALANCHINI
JUDGE

3 May 2013
At Suva