

**IN THE INDEPENDENT  
LEGAL SERVICES COMMISSION**

No. 002 of 2015

BETWEEN:

**CHIEF REGISTRAR**

Applicant

AND:

**HARI RAM**

Respondent

**Coram:** Dr T.V. Hickie, Commissioner

**Counsel for the Applicant:** Ms V. Prasad

**Counsel for the Respondent:** Mr D. Sharma (with the Respondent Mr H. Ram)

**Dates of Hearing:** 20<sup>th</sup> April 2016, 28<sup>th</sup> November 2016 and 3<sup>rd</sup> February 2017

**Dates of Written Submissions:**

11<sup>th</sup> May 2016 (Applicant)

25<sup>th</sup> May 2016 (Respondent)

1<sup>st</sup> June 2016 (Applicant in Reply)

**Date of Judgment:** 6<sup>th</sup> February 2017

**JUDGMENT**

**1. The Counts**

[1] This is a case where a legal practitioner and his law firm acted as the common solicitor on a sale and purchase agreement in 2010 between a vendor landlord and a purchaser tenant in relation to a Crown Lease. The validity of the agreement was conditional upon the transfer being approved by the Director of Lands which was not granted. Later, the landlord lodged various complaints against the legal practitioner for acting on behalf of the tenant in three sets of subsequent legal proceedings between them.

[2] The case should be a warning to all legal practitioners as to:

(1) The potential problems that can arise in such matters (even with the best of intentions of all parties and where the subsequent legal proceedings are, arguably, unrelated to the original sale and purchase agreement); and

(2) Whether the practice of agreeing to act as a common solicitor has, perhaps,

reached its “use-by date” so to speak – something to which I will return to at the end of my judgment.

## **2. The Counts**

- [3] On 28<sup>th</sup> August 2015, an Application was filed by the Chief Registrar setting out six allegations of ‘Professional Misconduct’ against the Respondent.
- [4] The matter was first called on 11<sup>th</sup> September 2015, before the previous Commissioner, Justice P.K. Madigan.
- [5] On 14<sup>th</sup> October 2015, an Amended Application was filed by the Chief Registrar setting out six allegations of ‘Professional Misconduct’ against the Respondent (returnable on 29<sup>th</sup> October 2015) as follows:

### ***‘Count 1***

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

#### ***PARTICULARS***

***Hari Ram, a Legal Practitioner being the sole proprietor of Rams Law, having been retained sometime in or about the year 2010, failed to make full and frank disclosure, with regard to the issues that arise when acting for both parties to a transaction, to Sheik Shafiyul Haque (vendor) and Abid Hussain (purchaser) before acting for both of them for the sale and transfer of Crown Lease No 9749, which is a failure to obtain informed consent from Sheik Shafiyul Haque (vendor) and Abid Hussain (purchaser) to act for both of them in the same transaction, which conduct is a breach of Rule 1.2 of the Rules of Professional Conduct and Practice of 2009 and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.’***

### ***‘Count 2***

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

#### ***PARTICULARS***

***Hari Ram, a Legal Practitioner being the sole proprietor of Rams Law, having been retained, sometime in or about the year 2010, by both Sheik Shafiyul Haque (vendor) and Abid Hussain (purchaser) for the sale and transfer of Crown Lease No 9749; thereafter, acted on behalf of Abid Hussain against Sheik Shafiyul Haque in Magistrates’ Court Civil Action No. 122 of 2012 at Nadi, after a dispute arose between Sheik Shafiyul Haque and Abid Hussain stemming out from the transaction for the sale and transfer of Crown Lease No 9749 and that dispute being the subject matter of Magistrates’ Court Civil Action No. 122 of 2012 at Nadi, which conduct amounts to acting in conflict of***

*interests and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'*

**'Count 3**

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

**PARTICULARS**

*Hari Ram, a Legal Practitioner being the sole proprietor of Rams Law, having been retained, sometime in or about the year 2010, by both Sheik Shafiyul Haque (vendor) and Abid Hussain (purchaser) for the sale and transfer of Crown Lease No 9749; thereafter, acted on behalf of Abid Hussain against Sheik Shafiyul Haque in High Court Civil Action No. HBC 166 of 2013 at Lautoka, after a dispute arose between Sheik Shafiyul Haque and Abid Hussain stemming out from the transaction for the sale and transfer of Crown Lease No 9749 and that dispute being the subject matter of High Court Civil Action No. HBC 166 of 2013 at Lautoka, which conduct amounts to acting in conflict of interests and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'*

**'Count 4**

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

**PARTICULARS**

*Hari Ram, a Legal Practitioner being the sole proprietor of Rams Law, having been retained, sometime in or about the year 2010, by both Sheik Shafiyul Haque (vendor) and Abid Hussain (purchaser) for the sale and transfer of Crown Lease No 9749; thereafter, instructed a legal practitioner from Rams Law, namely Ms Barbara Kristine Angco Doton (named as Ms B Totam in the judgment in Agricultural Tribunal), to act on behalf of Abid Hussain against Sheik Shafiyul Haque in Agricultural Tribunal Action Reference No WD05 of 2012 at Lautoka, after a dispute arose between Sheik Shafiyul Haque and Abid Hussain stemming out from the transaction for the sale and transfer of Crown Lease No 9749 and that dispute being the subject matter of Agricultural Tribunal Action Reference No WD05 of 2012 at Lautoka, which conduct amounts to acting in conflict of interests and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'*

**'Count 5**

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

**PARTICULARS**

*Hari Ram, a Legal Practitioner being the sole proprietor of Rams Law, having been retained, sometime in or about the year 2010,, by both Sheik Shafiyul Haque (vendor) and Abid Hussain (purchaser) for the sale and transfer of Crown Lease No 9749; thereafter, having had drawn up and/or prepared the*

*Sale and Purchase Agreement, Mortgage, Irrevocable Power of Authority and Instrument of Transfer, witnessed the signatures of both Sheik Shafiyul Haque (vendor) and Abid Hussain on those instruments and/or legal documents in exercise of his title of Commissioner for Oaths, which conduct amounts to acting in conflict of interests and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'*

**'Count 6**

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

**PARTICULARS**

*Hari Ram, a Legal Practitioner being the sole proprietor of Rams Law, having had drawn up and/or prepared the Sale and Purchase Agreement, Mortgage, Irrevocable Power of Authority and Instrument of Transfer, failed to read and explain the contents of the aforementioned instruments and/or legal documents to Sheik Shafiyul Haque (vendor) prior to witnessing the signature of Sheik Shafiyul Haque (vendor) on those instruments and/or legal documents in exercise of his title of Commissioner for Oaths, which conduct is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'*

- [6] Count 6 was later amended to read as follows:

**'Count 6**

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

**PARTICULARS**

*Hari Ram, a Legal Practitioner being the sole proprietor of Rams Law, having had drawn up and/or prepared the Irrevocable Power of Attorney and Instrument of Transfer, failed to read and explain the contents of the aforementioned instruments and/or legal documents to Sheik Shafiyul Haque (vendor) prior to witnessing the signature of Sheik Shafiyul Haque (vendor) on those instruments and/or legal documents in exercise of his title of Commissioner for Oaths, which conduct is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.'*

- [7] Having been appointed as the new Commissioner from 22<sup>nd</sup> January 2016, I arranged for a call over of this matter to take place on 10<sup>th</sup> February 2016, following which the matter was set down for hearing on 6<sup>th</sup>-7<sup>th</sup> June 2016, and listed for a pre-hearing mention on 24<sup>th</sup> March 2016.
- [8] On 24<sup>th</sup> March 2016, as the parties agreed that the matter could be heard and finalised in one day, the hearing dates of 6<sup>th</sup>-7<sup>th</sup> June 2016 were vacated and a new hearing date was allocated for 20<sup>th</sup> April 2016, together with Orders in

relation to filing a *Statement of Agreed Facts* and an *Agreed Bundle of Documents* that were each filed on 30<sup>th</sup> March 2016.

[9] On 20<sup>th</sup> April 2016, the matter proceeded to hearing, following which, Orders were made for the parties to file and serve written submissions.

[10] Once I had the opportunity to consider the transcript, together with my handwritten notes, as well as the written submissions of both parties, I found that I had some difficulty understanding the position of Counsel for the Applicant in relation to the various counts, particularly in light of the evidence, noting that the Applicant carried the persuasive burden of proof. Therefore, I had the matter re-listed on 28<sup>th</sup> November 2016, (at the beginning of the November/December 2016 Sittings of the Commission) wherein I sought to clarify what I understood to be the position of Counsel for each party in relation to each of the counts, following which, the parties were advised that judgment would be on notice. As I was in the process of completing my judgment, however, it became clear that there were three further issues which I needed to bring to the attention of the parties and to give them the opportunity to address me. Hence, I relisted the matter at the beginning of these Sittings (last Friday, 3<sup>rd</sup> February 2017) to allow them to do so. This then is my judgment following that clarification.

## **2. The Essential Facts**

[11] In summary, the Respondent legal practitioner and his law firm acted as the common solicitor on a sale and purchase agreement in 2010 between the vendor landlord and the purchaser tenant in relation to a Crown Lease. It appears from what I can ascertain from the short set of agreed facts and gleaned from the *Agreed Bundle of Documents* (a clear detailed chronology never having been provided through the evidence of the complainant) that the following occurred:

- (1) Sometime in 2010, the vendor landlord reached a verbal agreement to sell his Crown Lease No.9749 to the purchaser tenant who had been a tenant on the property from about 2006. The agreed purchase price was for \$50,000;
- (2) The Respondent legal practitioner, having acted in previous matters for the vendor landlord's uncle as well as for the purchaser tenant, was approached and agreed to act as the common solicitor for both the landlord vendor and the

tenant purchaser in relation to the sale of the Crown Lease. A sale and purchase agreement was executed between the parties on 21<sup>st</sup> October 2010, such that the validity of the agreement was conditional upon the transfer being approved by the Director of Lands. Although it was unclear from the complainant's evidence, it would appear that approval was sought from the Director of Lands but it was never given as there was a moratorium at that time in granting such approvals for which the complainant alleged that the Respondent legal practitioner should have been aware;

(4) On 4<sup>th</sup> January 2011, an Irrevocable Power of Attorney in favour of the vendor's uncle (in relation to the said Crown Lease No.9749) was registered at the Registrar of Titles;

(5) On 27<sup>th</sup> February 2012, the said Irrevocable Power of Attorney was revoked (the legality of such revocation may be uncertain but this is not a matter before this Commission);

(6) On 6<sup>th</sup> March 2012, the vendor landlord wrote to the Divisional Surveyor Western seeking the Divisional Surveyor's assistance in evicting the tenant, complaining that the tenant had damaged the land with '*no cane on the land*' and it was '*an eye sore*' and '*requesting your office to value all damages caused of which I will out forward a claim towards Mr. Abid Hussain*'. The complainant was, in effect, purporting to cancel the transfer of the said property to the purchaser tenant;

(7) On 15<sup>th</sup> May 2012, the landlord instituted proceedings in the Nadi Magistrates Court (Civil Action No.122 of 2012) seeking mesne profits and damages against the defendant tenant for soil extraction from 2008 as well as an Order for vacant possession. The plaintiff landlord was represented by Koyas Chambers and the defendant tenant was represented by the Respondent legal practitioner;

(8) On 28<sup>th</sup> May 2012, proceedings were commenced by the tenant in the Agricultural Tribunal (Ref.No. W/D05 of 2012) seeking a declaration of tenancy which was dismissed. The tenant was represented by the Respondent legal practitioner, Mr Ram. The landlord was represented by Koyas Chambers;

(9) On 10<sup>th</sup> September 2013, proceedings were commenced in the High Court at Lautoka by the landlord seeking an Order for vacant possession (in effect evicting the tenant) which was granted by the Acting Master. (See *Haque v Hussain*, unreported, High Court of Fiji at Lautoka, Civil Action No. 166 of

2013, A/g Master Ajmeer, 22 January 2014) (Paclii: [2014] FJHC 21, <<http://www.paclii.org/fj/cases/FJHC/2014/21.html>>).

(10) The Defendant then sought leave to appeal to a Judge of the High Court from the Order of the Acting Master as well as a stay. The Defendant's application was dismissed on 6<sup>th</sup> February 2015. (See *Hague [sic] v Hussain*, unreported, High Court of Fiji at Lautoka, Civil Action No. 166 of 2013, Lal S. Abeygunaratne J, 6 February 2015) (Paclii: [2015] FJHC 74, <<http://www.paclii.org/fj/cases/FJHC/2015/74.html>> (NB: Incorrectly listed on Paclii as *Hague v Hussain* and, instead, should read *Haque v Hussain*).

[12] Meanwhile, on 12<sup>th</sup> July 2012, with proceedings pending in both the Nadi Magistrates Court and the Agricultural Tribunal, the vendor landlord completed a written complaint form (received by the Chief Registrar's Legal Practitioners Unit on 17<sup>th</sup> July 2012) alleging (in summary) as follows:

- (1) That he (the complainant vendor landlord) had agreed to sell his Crown Lease No.9749 to the purchaser (Abid Hussain);
- (2) That Mr Ram acted as the parties' common solicitor;
- (3) That Mr Ram was and is the solicitor for the purchaser;
- (4) That *'the transaction failed due to [a] moratorium over all agricultural lease[s] [of] which Mr Ram failed to advise me [as the vendor] at the date of signing of [the] Agreement and transfer documents'*;
- (5) *'I filed an action to evict Abid Hussain. Mr Ram is defending the matter and has also file[d] an application for Tenancy at the Agricultural Tribunal which is misleading and/or [a] wrong application in order to delay my case at Nadi Magistrates Court'.*

(*'Compliant form dated 12 July 2012', Agreed Bundle of Documents, 30<sup>th</sup> March 2016, Doc.No.1, pp.1-5*)

[13] On 21<sup>st</sup> September 2012 and 13<sup>th</sup> August 2013, further written complaints were made by the vendor landlord to the Applicant Chief Registrar against the Respondent.

(*'Mr. Shiek Shafiyul Haque's letter to the Acting Chief Registrar dated 21 September 2012', and 'Mr. Shiek Shafiyul Haque's letter to the Acting Chief Registrar dated 13 August 2013', Agreed Bundle of Documents, 30<sup>th</sup> March 2016, Doc.No.6, pp.13-14 and Doc.No.7, pp.15-17*)

- [14] The complainant vendor landlord also provided to staff of the Legal Practitioners Unit of the Applicant Chief Registrar's Office, two witness statements dated 9<sup>th</sup> May 2014 and 19<sup>th</sup> March 2015. ('Statement of Mr. Shiek Shafiyul Haque dated 9 May 2014', and 'Supplementary Statement of Mr. Shiek Shafiyul Haque dated 19 March 2015', *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.8, pp.18-25 and Doc.No.9, pp.26-27)
- [15] **Significantly, each of the above five documents was written in English**, that is, the three written complainants dated 12<sup>th</sup> July and 21<sup>st</sup> September 2012, and 13<sup>th</sup> August 2013, as well as the two witness statements of 9<sup>th</sup> May 2014 and 19<sup>th</sup> March 2015. In addition, not one of the five documents contained a translation certificate or notation that they had been translated from English into another language. The issue of the complainant's understanding of English is a matter to which I will later return in my judgment.

### **3. The Applicant's Case: The evidence of Sheik Shafiyul HAQUE**

#### *(1) Evidence-in-Chief of Sheik Shafiyul Haque*

- [16] In the proceedings before this Commission, the only witness called by the Applicant was the complainant, Sheik Shafiyul Haque. He gave evidence with the assistance of a Hindustani interpreter. I have set out in the following paragraphs [16] to [36] a summary of his evidence.
- [17] According to Sheik Haque, he had an uncle, who had mentioned to him that Abid HUSSAIN, who had come from Labassa, was looking for somewhere to live. As Sheik Haque had a vacant farmhouse in Nadi, he met with Abid Hussain and agreed to allow Abid Hussain to temporarily stay at the farmhouse paying rent of \$300 per month. Abid Hussain stayed at the house until 2015.
- [18] Meanwhile, in 2010, Abid Hussain approached Sheik Haque to buy the property and a sale and purchase agreement was prepared. As to how this came about, Sheik Haque's evidence-in-chief was as follows:

*"Ms. V Prasad: Now who prepared this sales and purchase agreement?  
Witness: Mr. Ram's law office.*



Ms. V Prasad: **And how did you come across Mr. Ram's office.**  
 Witness: **Through my uncle. [Mohammed Haroon Rashid]**

Ms. V Prasad: *Now do you recall the first time you went to Mr. Ram's office?*  
 Witness: *Yes sir.*

Ms. V Prasad: *Would you recall the exact date?*  
 Witness: *No, I can't recall the exact date sir.*

Ms. V Prasad: *And would you recall what happened when you first went to Mr. Ram's office?*  
 Witness: *Yes sir.*

Ms. V Prasad: *Can you tell the Commission what happened?*  
 Witness: **When I went to Mr. Ram's office the documents were ready. My uncle was there and Mr. Abid was there and Mr. Ram was also there sir. Then I was told to sign the documents.**

Ms. V Prasad: *When you say documents, which documents are you referring to?*  
 Witness: *Sales [sic] and purchase agreement sir.*

Ms. V Prasad: **Can you clarify to this Commission who instructed Mr. Ram to prepare the sales and purchase agreement?**  
 Witness: **Actually I don't know sir. I can't recall sir whether it was my uncle or Mr. Abid.**

Ms. V Prasad: **Now before signing the sales and purchase agreement was the content of the agreement explained to you?**  
 Witness: **No, it was not explained to me.**

Ms. V Prasad: *And what happened after you signed the agreement?*  
 Witness: *After that I left.*

Ms. V Prasad: *Do you recall the purchase price of that property that you agreed to sell to Mr. Abid Hussain?*  
 Witness: *The property was sold at \$90,000 dollars but the document was prepared for \$50,000 dollars sir."*

[19] **In relation to whether he had read or had explained to him the contents of the signing of the sale and purchase agreement and associated documents,** Sheik Haque's evidence-in-chief was as follows:

"Ms. V Prasad: *Now Mr. Haque, just a clarification when the sales and purchase agreement was signed at Mr. Ram's office was a copy of that agreement given to you?*  
 Witness: *No, I wasn't given a copy of the agreement.*

Ms. V Prasad: *Did you request Mr. Ram to give you a copy of the sales and purchase agreement?*

Witness: *Sir, I personally went to request for the copy of the agreement and also I wrote the letter requesting for the copy of the agreement and also my lawyer wrote a letter requesting for the copy of the agreement.*

Ms. V Prasad: *And did you receive any copy of the agreement after requesting for it?*

Witness: *Till date I haven't received any copy of the agreement.*

Ms. V Prasad: *Was that the only document prepared by Mr. Ram's office Mr. Haque?*

Witness: *That day I signed plenty papers.*

Ms. V Prasad: *Do you also recall signing on the power of attorney?*

Witness: *Yes, I also signed the power of attorney on the same day.*

Ms. V Prasad: *And whom did you appoint as the power of attorney?*

Witness: *My uncle Mohammed Haroon Rashid.*

Ms. V Prasad: ***Now on the same day when you were told to sign the sales and purchase agreement were you given the opportunity to seek independent legal advice?***

Witness: ***No sir.***

Ms. V Prasad: *Now Mr. Haque I'll refer you to page 447 of the agreed bundle of documents. Mr. Haque do you see a signature on that page?*

Witness: *Yes sir.*

Ms. V Prasad: *Can you point out to your signature and can you show it to the Commission as well?*

Witness: *Yes.*

Ms. V Prasad: *Mr. Haque do you recall signing this document at Mr. Ram's office?*

Witness: *Sir, I went to sign documents on that day to Mr. Ram's office but **I can't recall which documents I signed but this is my signature.***

Ms. V Prasad: ***Did you read the contents of this document when you signed before you signed did you read the contents?***

Witness: ***No sir, I didn't read the documents.***

Ms. V Prasad: ***And were you explained the contents of the documents before you signed?***

Witness: ***No sir, I was not explained.***

Ms. V Prasad: Now Mr. Haque can you turn to the next page, page 448, can you see your signature on that document?

Witness: Yes sir.

Ms. V Prasad: Can you point out to your signature and show it to the Commission as well?

Witness: Yes.

Ms. V Prasad: **Mr. Haque before signing these documents did you read the contents of the letter?**

Witness: **No sir.**

Ms. V Prasad: **And were you explained the contents of the letter?**

Witness: **No sir.**

Ms. V Prasad: Mr. Haque can you tell us what is your level of education?

Witness: Form 3 sir.”

## **(2) Cross-examination of Sheik Shafiyul Haque**

### **(i) His command of the English language**

[20] The cross-examination of Sheik Shafiyul Haque commenced dealing with his understanding of the English language, as follows:

- (1) Mr. Haque confirmed that he has been operating a business by the name of Auto Bond (“but my children are looking after that business”) involving the “purchase [of] secondhand vehicle and tyres from Japan and used parts”;
- (2) He stated that he can read and write in English “a little bit”;
- (3) He was shown a letter written in English dated 13<sup>th</sup> August 2013 signed by him addressed to the Acting Chief Registrar registering a complaint against the Respondent. He explained that the letter was not prepared by him, rather it was drafted by one of his friends, Rameshwar Dutt, who “read and explained to me” before it was sent (‘Mr. Sheik Shafiyul Haque’s letter to the Acting Chief Registrar dated 13 August 2013’, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.7, pp.15-17);
- (4) He was then shown another letter written in English dated 21<sup>st</sup> September 2012 signed by him addressed to the Acting Chief Registrar registering a complaint against the Respondent. He explained that this was also prepared by Rameshwar Dutt “who prepared explained to me” (‘Mr. Sheik Shafiyul Haque’s letter to the Acting Chief Registrar dated 21 September 2012’, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.7, pp.13-14);
- (5) Mr Haque confirmed that he understood the contents of both of the abovementioned letters before signing them;

(6) When questioned as to why both of the abovementioned letters were in English, the complainant replied “I understand but a little bit”;

(7) He was shown an Affidavit sworn by him on 14<sup>th</sup> May 2012 and filed in the Magistrates Court at Nadi (Civil Action No.122 of 2012) that was in English. He stated that this was prepared by his lawyer who “read it out and explained to me” (‘Affidavit in Support of Sheik Shafiyul Haque sworn on 14 May 2012’, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.23, pp.57-97);

(8) He confirmed that it was his signature on the last page of the said affidavit and that he had signed the document before Ms. Meresani Vanua, a Barrister and Solicitor and Commissioner of Oaths, which “**she explained to me in English**” (See *Agreed Bundle of Documents*, Doc.No.23, page 62);

(9) He was shown an Affidavit sworn by him on 9<sup>th</sup> September 2013 containing 43 paragraphs and filed in the High Court at Lautoka (Civil Action No.166 of 2013) that was also in English. He confirmed that this was also witnessed by Ms. Vanua and was also **explained to him in the English language** (‘Affidavit in Support’ of Sheik Shafiyul Haque sworn on 9 September 2013 annexed to the ‘Affidavit of service of Veremo Tuileva sworn on 17 September 2013’, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.44, page 296);

[21] In re-examination, the following brief evidence was given by Shiek Haque on the issues as to his understanding of English:

*“Ms. V Prasad: Now I’ll take you to page 292 of the document. [Agreed Bundle of Documents, page 292 - ‘Affidavit in Support’ of Sheik Shafiyul Haque sworn on 9 September 2013.] This document was referred to you during cross-examination and you stated that your lawyer had explained this document to you. Can you tell us in which language did your lawyer explain this document to you?”*

*Witness: **In English sir, both in English and in Hindi.***

*Ms. V Prasad: And who explained it to you in Hindi?*

*Witness: Clerk sir.*

*Ms. V Prasad: No further questions My Lord.”*

(ii) *Preparation of documentation associated with the sale of the property*

[22] In relation to the preparation of the various documentation associated with the sale of the property, Shiek Haque’s evidence under cross-examination, was as

follows:

- (1) He had agreed to sell his crown lease for \$50,000 to Abid Hussain;
- (2) Part of the deal between his uncle, Haroon Rashid Ali, and Abid Hussain, was that Sheik Haque would grant Abid Hussain a mortgage back to secure the purchase price so that Abid Hussain could pay the purchase back to Sheik Haque by way of installments;
- (3) Sheik Haque's uncle, Haroon Rashid Ali, was dealing with the sale of the land with Abid Hussain;
- (4) His attention was directed to his Affidavit sworn on 14<sup>th</sup> May 2012 and filed in the Magistrates Court at Nadi, that had been drafted by his lawyers, Koya and Company, (not Rams Law), and which stated at paragraph 23 –

*'That on or about 22<sup>nd</sup> November 2010, my uncle requested me to attend Rams Law at Nadi to sign documents in order to complete the transactions. **I signed the following documents:-***

- 1. Power of Attorney*
- 2. An Application for Consent to Transfer*
- 3. **Sale and Purchase Agreement wherein I agreed to sell the said farm land in the sum of \$50,000.00***
- 4. Transfer documents' [My emphasis]*

- (5) In relation to the above paragraph 23 of his Affidavit, the following exchange took place between Counsel for the Respondent and Sheik Haque:

*"Mr. D Sharma: Now Mr. Sheik, when you say 'I signed the following Documents' and there it's set out 'Power of Attorney', 'An Application for Consent to Transfer', 'Sale and Purchase Agreement wherein I agreed to sell the said land farm land in the sum of \$50,000 dollars', 'Transfer documents', would it not indicate to an independent person that you clearly understand what documents you are signing?*

*Witness: Sir on the day I signed the documents there were plenty documents to be signed.*

*Mr. D Sharma: In this affidavit Mr. Sheik do you at any stage make the allegation that you did not understand the documents?*

*Witness: No sir, my lawyer has prepared the documents.*

*Mr. D Sharma: In the three Court cases that you fought, you fought I think one in the Magistrates Court, one in the High Court and one in the Agricultural Tribunal, did you ever plead that you did not understand any of the transfer documents that you have signed?*

*Witness: From the beginning my statement is that sir I only signed the document.*

Mr. D Sharma: *And you are telling this Commission that you simply did not even read any of the documents you signed?*

Witness: ***No sir, I'm not saying that all the documents were read put to me and I understood.***

Mr. D Sharma: ***So you understood the documents you signed, correct?***

Witness: ***Yes sir, the affidavit which is in front of me.***

Mr. D Sharma: *And the only thing you are saying you didn't understand was the documents prepared by Mr. Ram correct?*

Witness: *At that time I wasn't, **nothing was explained to me** what is written in the document sir.*

...

Mr. D Sharma: *You understand that the scope of your instructions Mr. Sheik was that you were selling your land to Abid Hussain for \$50,000 dollars correct.*

Witness: *My land was to be sold for \$90,000 only documents prepared was for \$50,000 dollars sir.*

Mr. D Sharma: ***But in your affidavit which I have just shown you, you stated that I had agreed to sell the land for \$50,000 dollars.***

Witness: *That's the sale and purchase agreement for \$50,000 dollars sir.*

Commissioner: *Yes paragraph 23 point 3, says sale and purchase agreement wherein I agree to sell the said farm land in the sum of \$50,000 dollars and **Mr. Sharma just asked you those were your instructions were they?***

Witness: ***Yes sir.***

Mr. D Sharma: *Now My Lord can I take Mr. Sheik to page 347 [of the Agreed Bundle, Transfer for \$50,000.00], **Mr. Sheik have a look at the document, isn't that exactly what your instructions were?***

Witness: ***Yes sir.***

Mr. D Sharma: ***And you have signed there haven't you?***

Witness: ***Yes sir.***

Mr. D Sharma: *And, in spite of the fact you say you never read the documents, as a businessman wouldn't you be curious to see what was the price on the transfer before you signed this document?*

Witness: *Sir I knew that they are making a transfer of \$50,000 dollars I was told by my uncle.*

Mr. D Sharma: ***But you accept that, that is in fact a transfer for \$50,000 dollars isn't it.***

*Witness: Yes sir because the paper is made.”*

*(iii) Instructions to act*

[23] In relation to his specific instructions to Rams Law, Shiek Haque was taken to a document titled ‘Instructions to Act’ dated 21<sup>st</sup> October 2010 (‘Instructions to act dated 21<sup>st</sup> October 2010’, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.20, page 447). His evidence under cross-examination in relation to this document was as follows:

*“Mr. D Sharma: ... now Mr. Sheik you have seen all the documents that have been signed and effected by Mr. Ram’s office would you agree that whatever you signed off as your instructions were exactly what Mr. Ram did.*

*Witness: No sir, I didn’t say, my uncle did.*

*Mr. D Sharma: But you have seen let me take you to the four instructions that are there. First, it says ‘to attend to transfer of Crown Lease 9749 Lot 2 with cane contract 2147 Meiguniyah Sector consideration \$50,000 dollars to be paid for in installments \$1,500 dollars per month to my attorney Mohammed Haroon Rashid’?*

*Witness: [No response]*

*Commissioner: Let’s just check that one. You agree with that sir?*

*Witness: Yes.*

*Mr. D Sharma: Number 2 to prepare a mortgage for \$50,000 dollars with interest payable to the said Mohammed Rashid by monthly payments of \$1,500 dollars?*

*Witness: [No response]*

*Commissioner: You agree with that sir?*

*Witness: Yes sir.*

*Mr. D Sharma: The third one, ‘Attend to lands and obtain the consents’?*

*Witness: [No response]*

*Commissioner: You agree with that sir?*

*Witness: Yes sir.*

*Mr. D Sharma: And Mr. Sheik just to show you that, that’s not really a trick question your property is a crown lease isn’t it?*

*Witness: Yes.*

*Mr. D Sharma: And before you can sell the crown lease you need to have obtained consent from the director of lands.*

*Witness: Yes, it was my lawyer’s job sir.*

Mr. D Sharma: *And the last one My Lord is 'To prepare power of attorney from myself to Mohammed Haroon Rashid', that's correct as well?*

Witness: *Yes sir.*

Mr. D Sharma: *And you have already confirmed to the Commission that's your signature at the bottom correct?*

Witness: *Yes.*

Mr. D Sharma: *Would you then now concur with me that whatever is set out there was actually within the instructions that were given to Mr. Ram?*

Witness: *Sir these instructions were given by my uncle and not by myself.*

Mr. D Sharma: *If you needed any clarification you were on good talking terms with your uncle weren't you so you got to clarify any issues with your uncle?*

Witness: *We are still in good contacts.*

Mr. D Sharma: *I mean you would trust your uncle that's why you made him your power of attorney correct?*

Witness: *Yes sir, I trusted him. He was there when I signed all the papers without reading I just signed the papers sir.*

Commissioner: *I just need to ask something on that. You said without reading you just signed the documents. Can you have a look at the left hand side of the page [447]. See that it says 'Witness after Interpretation'? Do you see that? It says 'Witness after Interpretation', you agree?*

Witness: *Yes sir.*

Commissioner: *So someone interpreted all this to you?*

Witness: *No one explained to me sir I only signed the papers.*

...

Commissioner: *Are you saying that no one interpreted this to you?*

Witness: *Yes sir.*

Mr. D Sharma: *Mr. Sheik that is the signature of the gentleman, a senior law clerk, by the name of Mr. Naicker. Was he present in the room when your uncle, you, Mr. Ram and Abid were signing documents?*

Witness: *That law clerk was not present, only myself, Mr. Abid, my uncle and Mr. Ram.*

Mr. D Sharma: *Do you know this Mr. Naicker?*

Witness: *No sir."*

(iv) Instructions to act for the vendor and purchaser



[24] In relation to his instructions to Rams Law to act for both the vendor and purchaser, Sheik Haque was taken to a document titled 'Instructions to Act for The Vendor(s) and Purchaser(s)' dated 21<sup>st</sup> October 2010. (See 'Instructions to act for the Vendor and Purchaser dated 21<sup>st</sup> October 2010', *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.21, page 448). His evidence under cross-examination in relation to this document was as follows:

*“Mr. D Sharma: My Lord can I take Mr. Sheik to next page, page 448. Mr. Sheik I want you to read page 448 again just go through the document, you tell me whether you understand what that document means once you read it. In particular can I take you to part which says “Others”. Do you agree it says ‘All costs’, first number (1) is ‘All costs to be paid by the Purchaser”. **Would you agree that in this transaction you did not have to pay any costs at all to Mr. Ram?***

*Witness: **No sir, I wasn't asked to pay anything.***

*Mr. D Sharma: So you did not incur any legal fees as far as Mr. Ram was concerned correct?*

*Witness: No sir, I was not told.*

*Mr. D Sharma: Well apart from not being told, the words are quite clear, as in ‘all costs to be paid by the purchaser’ and the purchaser was Abid Hussain?*

*Witness: **Sir, that's what I'm telling from the beginning that I only signed the papers.***

*Mr. D Sharma: You see Mr. Sheik that's what I'm getting at, people just don't sign documents. **Even you are able to read this document**, and it is entirely up to the Commissioner how he looks at your evidence, but **what I'm trying to get from you is that you understood this document?***

*Witness: **Sir, that's true, I could understand but nothing was read to me.***

*Commissioner: I could understand but ...*

*Witness: **But I was not, when the time was there for signing, no one explained to me, I only signed.***

*Mr. D Sharma: While you are in the room you say you are signing, were you under duress to sign or did you have the voluntary ability to sign these documents?*

*Witness: I signed myself.*

*Commissioner: That wasn't the question. Mr. Sharma is asking **were you under duress was anyone threatening you to sign the documents?***

*Witness: No sir.*

*Commissioner: So no one was threatening - you weren't under duress, you voluntary just signed the documents?*

*Witness: Yes sir.*

*Mr. D Sharma: And if I can read under the definition of 'Others', the second point (2) which says 'Advised that the vendor has the right to seek legal opinion before execution of transfer doc[ument].' You understand what that means?*

*Witness: It is only over here I come to know that I was to take legal advice but **over there at that time I was not explained.***

*Mr. D Sharma: Mr. Sheik would it be fair to say that since you were not paying Mr. Ram any legal fees **you could have obtained a second legal opinion and paid your own lawyers for legal advice if you wanted any clarification on the documents?***

*Witness: I was not told sir.*

*Mr. D Sharma: Did you ask Mr. Ram's office to say that I would like to take the document away and get independent legal advice?*

*Witness: No sir.*

*Commissioner: Just on that I just want to clarify something. So if you weren't paying, who was paying Mr. Ram's fees - I mean there's legal work being done - who did you think was paying the fees?*

*Witness: The buyer.*

*Mr. D Sharma: Can I ask you to read the last paragraph, the typed paragraph, in this particular document and tell the Commission whether you understand what that means?*

*Witness: Sir I understand the paragraph now but at that time nothing was explained to me.*

*Mr. D Sharma: Now Mr. Sheik there is a distinction. You pinned your hopes on the facts that you're saying nothing was explained to you but would you confirm to the Commission that **you could on your own read the document and understand it yourself.***

*Commissioner: I think you better clarify that as a question rather than a statement.*

*Mr. D Sharma: Forget about the fact that you were not given advice about the document, but **you could read the document and understand the document couldn't you?***

*Witness: **Sir I could but I wasn't given a chance to read the papers in front of me. I can't recall them.***

*Mr. D Sharma: You accept that your signature at the bottom though?*

*Witness: Yes it's my signature sir.*

*Mr. D Sharma: And my instructions are that **it was Mr. Naicker the law clerk** who witnessed both the signatures yours and Abid's signature. **You still deny that Naicker was not present when your signature was witnessed?***

*Witness: **Yes sir.***

(v) *Alleged confidential or privileged information given by the Complainant to the Respondent*

[25] In relation to any alleged confidential or privileged information given by Shiek Haque to the Respondent, Shiek Haque's evidence under cross-examination in relation to this issue was as follows:

*"Mr. D Sharma: Is there any confidential or privileged information that you gave to Mr. Ram during your stint when he was a common solicitor for the sale and purchase of the land?*

*Witness: I didn't deal much with Mr. Ram sir my uncle did.*

*Mr. D Sharma: **In the three litigation matters the Magistrate Court, the Agricultural Tribunal and the High Court did Mr. Ram's firm use any confidential or privileged information that may have been given to him by you to your detriment?***

*Witness: [No answer]*

*Commissioner: Say it again Mr. Sharma.*

*Mr. D Sharma: **During the three Court cases one in the Magistrate Court one in the Agricultural Tribunal and one in the High Court (I know you agreed about the appeal in the High Court), but can you tell the Commission whether any privileged or confidential information that you had parted to Mr. Ram was used to your detriment by Mr. Ram in these cases?***

*Witness: **I can't recall.***

[26] In re-examination, the evidence given by Sheik Haque on this issue was as follows:

*"Ms. V Prasad: **Mr. Haque when Mr. Ram was acting for Abid in the three Court matters did you at any point feel that your case would be affected?***

*Witness: Yes sir.*

*Ms. V Prasad: And why do you say that?*  
*Witness: He was our common solicitor sir.*

*Ms. V Prasad: When you say he was your common solicitor what all did Mr. Ram do as a common solicitor for you and Mr. Hussain?*

*Witness: He prepared the sales and purchase agreement.”*

#### **4. The Respondent’s case: The evidence of Mr RAM**

##### *(1) Evidence-in-Chief of Mr Ram*

[27] The evidence of Mr Hari Ram, the Respondent legal practitioner, was, in summary, as follows:

(1) Mr Ram had known Haroon Rashid “*for at least about 15 years*” and Abid Hussain “*through golf days also for good 10 years plus*”. The two of them came to see him in his office and “*I had then referred them to our clerk Naicker, Janardhan Naicker ... for the purpose of working out how much cost that would be*”.

(2) “***Subsequently I met all three of them and after my meeting with the complainant, Abid and Haroon, all three once they have confirmed the cost, they then met with Naicker***”;

(3) After the cost agreement was signed, Mr Naicker prepared the instructions to act (see documents 447 and 448) and Mr Ram confirmed when specifically asked in relation to document 448 who prepared that document replied: “***The contents are written by Naicker***”;

(4) As for the agreement to act for both parties his evidence was -

***“Yes, well they both wanted us to act. We discussed that issues at length. Our concern here was the nature of the Power of Attorney. It is not every day that we make an Irrevocable Power of Attorney. So I had to go through in detail and explain why it is different what is different about an irrevocable one and so that required great attention ... So I had to explain, discuss what we would need to do as common solicitors and because I didn’t act for Sheik at all before, I have never met him before, so we had to explain to him the everyday practice that we have that if we are acting ... for both the parties then we give them the right to seek independent legal advice.”***

(5) The party who signed the costs agreement was Abid as the purchaser but due to an arrangement between Sheik (the vendor) and Sheik’s uncle, Mohammed Haroon Rashid, “*whose name was on the title on the crown lease, but because he had explained to us that he purchased that property he paid most of the*

money, the money was supposed [to be paid by the purchaser each month was] to be given back to him and not to Sheik”.

(6) When asked, “... who is your client? Who was going to pay all the legal fees?”, Mr Ram replied:

*“It was very clear from, they had already decided between the two, that only Abid would pay. So it was clear between themselves because these people have done transactions before, so when it comes to smaller residential type of properties usually the purchaser pays, and so they had known that convention in Fiji from before.”*

**(7) After these initial discussions had taken place, the parties went to Mr Naicker’s room where instructions were prepared by Mr Naicker using the firm’s standard instruction sheets** (as set out in docs 447 and 448). The handwriting on those documents is Mr Naicker’s, the signatures of the parties is also on those documents, and those signatures have been witnessed by the signature of Mr Naicker. Mr Ram explained that this was the usual procedure and when asked was this his actual recollection of what occurred or was he recounting what was the usual procedure, he explained as follows:

*“Commissioner: Okay I understand that’s what the procedure is in the office. I realise it’s a number of years ago. Do you recall what actually happened here or you were just saying about what normally the procedure would be?”*

*Mr Ram: I have gone through my file notes and it’s based on that. It’s not all coming from my recollection but based on the notes that we have because our office’s practice of keeping notes.*

*Commissioner: So you’ve reviewed ... your file notes as to what took place?*

*Mr Ram: Yes.”*

**(2) Evidence-in-Chief of Mr Naicker**

[28] Thus, the evidence of Mr Naicker, the Respondent’s law clerk, proved crucial to the case before me. Therefore, I have set much of it out in full:

*“Mr. D Sharma: Can I take you to document number 447 in the agreed bundle of documents?”*

*Witness: Yes.*

*Mr. D Sharma: Have you seen this document before Mr. Naicker?*

*Witness: Yes sir.*

*Mr. D Sharma: Is this a document that you prepared?*

*Witness: Yes I prepared it.*

*Mr. D Sharma: Can you tell us how did you prepare this document?*

*Witness: Well I had instructions from the vendor.*

*Mr. D Sharma: And who was the vendor?*

*Witness: Sheik Haque.*

*Mr. D Sharma: Did you talk to Mr. Sheik?*

*Witness: Yes, I did talk to him. He gave instructions all by himself.*

*Mr. D Sharma: And is that your handwriting that you've written down instructions?*

*Witness: Yes sir that's my handwriting.*

*Mr. D Sharma: And did Sheik sign in front of you?*

*Witness: Yes he did sign in front of me.*

*Mr. D Sharma: And now whose signature is that which says 'witness after interpretation'?*

*Witness: That's my signature.*

*Mr. D Sharma: Mr. Naicker how did you explain this document to Mr. Sheik, was he in the same room with you?*

*Witness: Yes, he was with me in my room and I had mentioned to him regarding his legal rights and all that and if he wanted us to represent him and he had agreed to that and he said okay he agreed us to represent him as a common solicitor.*

*Mr. D Sharma: And Mr. Sheik had said that he doesn't even know whose signature that was. Did he sign in your presence?*

*Witness: He did sign in my presence, yes.*

*Mr. D Sharma: And where did he sign, was it signed in Rams Law?*

*Witness: Yes, in the office, in my office at Rams Law.*

*Mr. D Sharma: Now can you turn to document number 448, once again can you confirm to the Commission is this a document that you prepared?*

*Witness: Yes sir, I had prepared this one.*

*Mr. D Sharma: And what is this document what does it say?*

*Witness: It basically speaks of the vendor and the purchase authority to act for both of them as a common solicitor.*

*Mr. D Sharma: And was it explained to Mr. Sheik what the terms and conditions of this document were?*

*Witness: Yes, each of the conditions was very clearly explained to him.*

*Mr. D Sharma: Was it explained to him that no cost was to be paid by him all legal cost were to be paid by Abid Hussain?*

*Witness: Yes sir, I did tell him.*

*Mr. D Sharma: Was he given an option to obtain independent legal advice?*

*Witness: Yes, I had told him to take legal opinion from any other independent lawyers which he wanted to go and have it read out and explained to him.*

*Commissioner: And why did you tell him that?*

*Witness: Because we were acting as a common solicitor, so I had told him that he has got all the right to take his document and have it explained by other lawyers if he so wishes.*

*Commissioner: And that's your usual practice when you acting for common solicitor?*

*Witness: Yes sir.*

*Mr. D Sharma: And you have both the gentlemen signed in your presence?*

*Witness: Both signed in my presence.*

*Mr. D Sharma: Did Mr. Sheik at any time say to you that "I don't know what I'm signing" or "I don't understand the document"?*

*Witness: No, he didn't say.*

*Mr. D Sharma: And where was this document signed Mr. Naicker?*

*Witness: It was signed in my office at Rams Law.*

*Mr. D Sharma: Were both the two gentlemen present at the same time?*

*Witness: Yes sir, both were present.*

*Mr. D Sharma: The third document I want you to look at is the sale and purchase agreement that was signed in this matter. Can I take you to page it starts at page 246 and goes up to 254. Now Mr. Naicker is that the sale and purchase agreement that your office put together for Sheik Haque and Abid Hussain?*

*Witness: Yes sir.*

*Mr. D Sharma: And who drafted the sale and purchase agreement?*

*Witness: I did sir.*

*Mr. D Sharma: Who gives you the instructions to draft these documents?*

*Witness: Well, in this matter, it was the instructions were given by the vendor and then I did the draft and gave both to the vendor and the purchaser to look at.*

Mr. D Sharma: Now before they signed the document were they allowed to read the document?

Witness: Yes, I gave them a copy each a draft copy for them to go through and do any changes if they wish and a copy was given to both of them beforehand.

Mr. D Sharma: *And the purpose of that was to see if they wanted any changes is that correct?*

Witness: *Yes sir.*

Mr. D Sharma: *And were they happy with the terms and conditions of the sale and purchase agreement?*

Witness: *Yes, they were happy.*

Mr. D Sharma: ***Did they sign voluntarily in your presence?***

Witness: ***They did after they had perused the document and they found it correct and I went through the document again before both of them and they said it is okay, it's in order, then both of them signed before me.***

Mr. D Sharma: *Where was this document signed Mr. Naicker?*

Witness: *Once again this document was signed in my office.*

Mr. D Sharma: *Were both the gentlemen present at the same time?*

Witness: *Both were present at the same time.*

Mr. D Sharma: ***Did Mr. Sheik show any signs that he didn't understand English?***

Witness: ***No, according to what I gather is when the copy was given to him, he went through and when I asked him have you gone through he said 'yes', so but apart from that I had gone through the document and explained to him so he understood as well so what I assume is he's gone through the document and he understood the contents.***

Mr. D Sharma: *And I see Mr. Naicker that this is one of those unusual documents where you actually are very specific as to what language you explain the documents here. If you look at page 254A ... you say that you explained it to him in the English/Hindi language?*

Witness: *Yes.*

Mr. D Sharma: *What do you mean by that?*

Witness: ***I had gone through the agreement in English he understood then I tried to tell him in Hindi, convert that to Hindi, and tell him. So I use both languages to explain the contents of this agreement.***

Mr. D Sharma: *And for Mr. Abid you just explained to him in the Hindi language is that correct?*

Witness: *Yes sir.*



*Mr. D Sharma: And according to you because any of these documents was Sheik not aware of what he was signing from your perspective?*

*Witness: No, I feel he was fully aware of what he was signing.*

*Mr. D Sharma: He knew what he was selling?*

*Witness: Exactly sir.*

*Mr. D Sharma: And those are the three documents that you witnessed in this matter correct?*

*Witness: Yes sir.*

*(2) Cross-examination of Mr Naicker*

[29] The cross-examination of Mr Naicker was extremely short:

*“Ms. V Prasad: Mr. Naicker I just have one question for clarification, you mentioned that a draft of the sales and purchase agreement was given to the vendor and the purchaser is that correct?”*

*Witness: Yes.*

*Ms. V Prasad: When you give a copy of the draft to a vendor and purchaser do you make file notes of that?*

*Witness: We don't make file note of that. We give a copy to them they peruse and once that's confirmed then only we do the final copy.*

*Ms. V Prasad: No further questions, My Lord.”*

**5. The relisting and clarification of submissions on 28 November 2016**

[30] When I had the matter relisted on 28<sup>th</sup> November 2016, I sought clarification from Counsel for the respective parties on the following issues that I have summarised below.

***(1) Count 1 - The complainant's understanding of English and should it matter?***

[31] I had come to the view that Count 1 of the case really came down to whose evidence I accepted as to what had occurred – either the evidence of the complainant (who said that he had little command of English and that no documents had been explained to him either in English and/or Hindustani) or the evidence of Mr Naicker, the Respondent's law clerk (whose evidence was that he had explained the documents to the complainant in both English and Hindustani).

[32] When I relisted the matter on 28<sup>th</sup> November 2016 for clarification, the following exchanges took place in relation to Count 1:

*“Commissioner: ... Ms. Prasad do you or do you not concede or whatever that this fellow actually understands English quite well or what’s your view? Because I mean and I was trying to find out, what you are actually saying about his understanding of English?”*

*Ms. V Prasad: Actually My Lord when we had a witness conference I was informed that he doesn’t understand English and he doesn’t know how to read. And then he came [to court].*

*Commissioner: Now having seen the evidence, I’m not talking about what happened in your [examination]. Now having seen him, particularly under cross-examination by Mr. Sharma, we went through lots of documents. What do you concede or you don’t concede or what are you going to say?*

*Ms. V Prasad: **Yes My Lord. I understand that he knows how to read and he also knows how to speak in English. But when giving evidence he was maintaining his stand that the documents were not explained to him.***

*Commissioner: Okay. So that’s what I’m saying. Your point is this. Even though there’s an [argument] he was saying he didn’t understand English.*

*Ms. V Prasad: Yes My Lord.*

*Commissioner: **It’s clear that he does.***

*Ms. V Prasad: **He does.***

*Commissioner: But you’re saying, ‘Well Mr. Sharma, even if I concede to you on that point, the problem you’ve got is he should have been like anyone else who speaks English. He should have still had all explained to him like any other client.’ Is that what you saying?*

*Ms. V Prasad: That’s correct My Lord.*

*Commissioner: Whereas you’re saying ...*

*Mr. D Sharma: **And our answer to that Sir was this. That we had called a second witness called Janardhan Naicker, the law clerk, who had sat with them throughout the whole transaction and explained each and every clause and he has said that in his evidence.***

*Commissioner: I was going to come to that ... When he didn’t actually before acting for both of them get their informed consent is the argument of Ms. Prasad. Put the English issue to one side. She’s saying, ‘Even if he did have a fair command of English, it wasn’t informed consent*

*because it wasn't said to him.' You're saying 'It was said to him because Mr. Naicker did it and Mr. Naicker was sufficient. Mr. Ram didn't have to do it.' Is that what you saying to me now?*

*Mr. D Sharma: That's one part of it. **Because Mr. Ram was not even present at the time of the signing. The documents were actually witnessed and clarified by Mr. Janardhan Naicker the senior Court clerk Sir.***

*Commissioner: That's what I'm saying. So that's why I was just going through their argument - "he understood English but it doesn't matter, he still needed an explanation." **You're saying "Yes, we agree he does understand English but he did get someone to explain it to him. It wasn't the solicitor it was the law clerk Mr. Naicker."** Is there any argument to say Ms. Prasad, it should have been the solicitor or the law clerk suffices? Or you don't accept that Mr. Naicker did explain it?*

*Ms. V Prasad: We don't accept that My Lord.*

*Commissioner: **But if I found that Mr. Naicker did explain.***

*Ms. V Prasad: That goes down to the credibility of the ...*

*Commissioner: No... no ... I understand. That's what I'm saying. **But it didn't have to be the solicitor doing it?***

*Ms. V Prasad: Yes My Lord.*

*Commissioner: **You're saying, you're satisfied, if I find Mr. Naicker did actually explain it then that count will fail.***

*Ms. V Prasad: Yes My Lord.*

*Commissioner: Just on that Mr. Sharma ... **Are you saying he translated this in Hindi or Hindi and English or what did he actually do?***

*Mr. D Sharma: **Well according to Mr. Naicker's evidence Sir it was both in Hindi and English.***

*Commissioner: That's what I thought.*

*Mr. D Sharma: **And they were both there. And the other issue what I had taken up was that if you don't understand English then how come you signed all these extensive affidavits and letters.***

[33] Thus, although Counsel for the Applicant conceded that the complainant knew how to read and speak in English, the complainant's evidence was that his informed consent was not obtained to act for both the vendor and purchaser on the sale and that such conduct according to Count 1 was a breach of Rule 1.2 of the Rules of Professional Conduct and Practice of 2009. By contrast, Counsel

for the Respondent legal practitioner submitted that not only did the complainant understand English and thus the agreement, the evidence of Mr Naicker, the Respondent's law clerk, was that the agreement was explained to the complainant in both English and Hindi by Mr Naicker.

[34] In relation to the complainant's understanding of English, I accept the concession of Counsel for the Applicant. That is, "*he knows how to read and he also knows how to speak in English*".

[35] It is also noted that the three written complaints dated 12<sup>th</sup> July and 21st September 2012, and 13<sup>th</sup> August 2013, signed by the complainant and lodged with the Applicant, were written in English. There is no notation or certificate upon either of those three documents accompanying the complainant's signature to verify that before each letter of complaint had been signed that it had been translated by another party into the Hindustani language for the benefit of the complainant. (See 'Complaint form dated 12 July 2014', *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.1, pp.1-5).

[36] In addition, the two witness statements of 9<sup>th</sup> May 2014 and 19<sup>th</sup> March 2015, prepared by staff of the Legal Practitioners Unit (the body bringing this complaint on behalf of the Chief Registrar) contained no notation or certificate accompanying the complainant's signature to verify that before each statement had been signed that it had been translated by another party into the Hindustani language for the benefit of the complainant.

[37] Indeed, I note that even the 'Authority' signed by the complainant on 25<sup>th</sup> May 2012 '*to release all my documents ... to my solicitors Messrs Koyas*' has no translation certificate on it. Presumably, Mr Koya was of the view that the complainant knew how to speak and read English.

[38] As for the requirement that even if the complainant could read and speak English, the documents should have been explained to him or at least he should have been asked did he understand the effect of the documents, I accept the submission of Counsel for the Respondent: "*And our answer to that Sir was*

*this. That we had called a second witness called Janardhan Naicker, the law clerk, who had sat with them throughout the whole transaction and explained each and every clause and he has said that in his evidence.”*

[39] **Counsel for the Applicant has submitted that it is a matter of credibility. I agree.** It is whether I accept the evidence of the complainant (who portrayed himself in the hearing before the Commission as a person who could not understand English), or whether I accept the evidence of Mr Naicker that with abundant caution (because it was a common solicitor matter) the documents were explained in both English and Hindustani.

[40] I note that Counsel for the Applicant agreed with my proposition that “*if I find Mr. Naicker did actually explain it then that count will fail*”. The problem also is that the Applicant carries not just an evidential burden but the ultimate persuasive burden. To satisfy the evidential burden, Counsel for the Applicant has produced the evidence of the complainant (who, in Counsel’s own words, “can read and understand English”) but who maintains, in any event, that no documents were explained to him.

[41] There were many gaps in the complainant’s evidence and in the case of the Applicant generally, such as:

(1) **The complainant’s claim that his lawyer failed to ever provide a copy of the sales and purchase agreement to him** even after “*my lawyer wrote a letter requesting for the copy of the agreement*” and that “*Till date I haven’t received any copy of the agreement*”. In the *Agreed Bundle of Documents*, there is set out his lawyer’s letter to Rams Law dated 25<sup>th</sup> May 2012 and Mr Hari Ram’s letter in reply to Koyas dated 1<sup>st</sup> June 2012 which states:

*‘The Original Crown Lease No. 9749 is enclosed.*

***All other original documents that you have referred in your letter that were prepared by our office were lodged with the Director of Lands. A copy of all these documents have also been taken by Mr. Haroon Rashid.*** [My emphasis]

So the original documents, other than the Crown Lease (which was provided to the complainant’s lawyer) were no longer with the Respondent by 25<sup>th</sup> May

2012. Copies were, however, provided to Mr Mohammed Haroon Rashid, the complainant's uncle, who also had an Irrevocable Power of Attorney for the complainant signed on 10<sup>th</sup> December 2010 and that was registered on 4<sup>th</sup> January 2011.

(See 'Koyas letter to Ram's [sic] Law dated 25 May 2012' and and 'Mr. Shiek Shafiyul Haque's letter to the Acting Chief Registrar dated 13 August 2013', *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.18, p.44 and Doc.No.20, p.46.)

(2) **The complainant's evidence in cross-examination conceding that his Affidavit of 9 September 2013 containing 43 paragraphs and filed in the High Court at Lautoka, was explained in English.** Then, in re-examination, he said that it was explained in both English and in Hindi. Whilst one could accept that this may have been a minor memory lapse, the documentation in the *Agreed Bundle of Documents* shows that the affidavit was witnessed by Meresani Vanua, a Barrister and Solicitor and Commissioner of Oaths, and clearly sets out that it was **explained to him in the English language** . There is no mention that it was explained in both English and Hindi as he subsequently claimed.

(See 'Affidavit in Support of Sheik Shafiyul Haque sworn on 9 September 2013 before Mereseini Belinda Vanua', pp.292-296, attached to 'Affidavit of Service of Veremo Tuilevu sworn on 17 September 2013', *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.43, pp.289-333.)

(3) **In an earlier Affidavit sworn by the complainant on 14 May 2012 and filed in the Magistrates Court at Nadi (containing 40 paragraphs and some 34 pages of annexures),** that was also witnessed by Meresani Vanua, it is clearly set out that the contents **were explained to the complainant in the English language.** **Ms Vanua was not called by the Applicant to support the complainant's evidence that she explained it in both English and Hindi.**

(See 'Affidavit in Support of Sheik Shafiyul Haque sworn on 14 May 2012' before Mereseini Belinda Vanua, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.43, pp.57-97.)

(4) **The complainant's letter of 4<sup>th</sup> May 2012 to the Divisional Surveyor**

**Western requesting and investigation and the eviction of the purchaser, Abid Hussain, is written in English and contains no statement that it was interpreted to him or that it was explained in both English and Hindi before it was signed.**

(See ‘Mr. Sheik Shafiyul Haque’s letter to the Divisional Surveyor Western dated 4 May 2012’, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.12, p.35.)

**(5) The complainant’s ‘Authority’ dated 25<sup>th</sup> May 2012 attached to the letter of 25<sup>th</sup> May 2012 from Koyas to Rams Law (authorising the transfer of Sheik Haque’s documents in respect of Crown Lease No.9749 from Rams law to Messrs Koyas), is written in English and contains no statement that it was interpreted to him or that it was explained in both English and Hindi before it was signed.**

(See ‘Mr. Sheik Shafiyul Haque Authority dated 25 May 2012’, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.19, p.45.)

**(6) The complainant’s witness statement dated 9<sup>th</sup> May 2014, recorded at Nadi by “Jitendra” of the Legal Practitioners Unit within the Office of the Chief Register contains no statement that it was interpreted to the complainant or that it was explained to him in both English and Hindi before it was signed by the complainant.** Indeed, at the bottom of every second page of the complainant’s seven page witness statement of 9<sup>th</sup> May 2014, it is stated:

*I declare that the above statement was read back to **Shiek Shafiyul Haque** [handwritten] in the **English** [handwritten] language and that he appeared to fully understand and approved of it before signing this statement before me:*

*[signature]  
Interpreter’*

(See ‘Statement of Mr. Sheik Shafiyul Haque dated 9 May 2014’, *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.8, pp.18-25.)

**(7) The complainant’s witness statement dated 19<sup>th</sup> March 2015, recorded at Nadi by Binesh Naidu of the Legal Practitioners Unit within the Office of the Chief Register contains no statement that it was interpreted to him or**

**that it was explained in both English and Hindi before it was signed.**

Indeed, it contains the following statement:

*'The statement consisting of pages each signed by me, is true to the best of my knowledge and belief. I make it knowing that if it is tendered in evidence, I shall be liable to prosecution if I have willfully stated in it anything which I know to be false or do not believe to be true.'*

(See 'Supplementary Statement of Mr. Sheik Shafiyul Haque dated 19 March 2015', *Agreed Bundle of Documents*, 30<sup>th</sup> March 2016, Doc.No.9, pp.26-27.)

**(8) Neither "Jitendra" nor Binesh Naidu was called by the Applicant to support the complainant's evidence that his witness statement was explained in both English and Hindustani. Therefore, I can only presume that before the complainant signed the witness statement he did not need to have it interpreted to him in Hindustani. I also note in passing, that whilst Counsel for the Applicant submitted that there should have been file notes kept by Mr Naicker as to what was explained to the complainant, no such file notes were produced on behalf of the Applicant for either "Jitendra" and/or Binesh Naidu of the Legal Practitioners Unit within the Office of the Chief Register, as to what was or was not interpreted to the complainant and in what language or languages (such as in both English and Hindustani), before the complainant's witness statement was signed on 9<sup>th</sup> May 2014 and 19<sup>th</sup> March 2015 respectively.**

**(9) The complainant's inconsistencies as to the purchase price on the sale.** His evidence-in-chief was that it was that "*The property was sold at \$90,000 dollars but the document was prepared for \$50,000 dollars*". Then in cross-examination he said that he had agreed to sell his Crown Lease for \$50,000 and then argued that the sale was for \$90,000 but the documents prepared was for \$50,000. He was then taken to his **affidavit sworn on 14 May 2012 and filed in the Magistrates Court at Nadi**, that was prepared by Koyas Lawyers (not Rams) **wherein it clearly states at paragraph 23, point 3: 'Sale and purchase agreement wherein I agree to sell the said farm land in the sum of \$50,000 dollars'** and confirmed that those were his instructions. Also, when the complainant's uncle, Mr Mohammed Haroon Rashid, was cross-examined by Counsel for the Applicant on this point, he clearly replied, without hesitation, as



follows:

“*Ms. V Prasad: Do you agree that the purchase price of the said land was \$50,000 dollars?*  
*Witness: Yes.*”

**(10) It is significant that the complainant’s denials were never formerly put to the complainant’s uncle in cross-examination by Counsel for the Applicant, that is, that:**

**(i) the instructions to Rams Law were never interpreted to the complainant;**

**(ii) Mr Naicker was not present when the various documentation was signed by the complainant; and**

**(iii) the complainant never met or even knew Mr Naicker.**

Rather, what was put to the uncle was that he could not really confirm “*whether Mr. Ram had actually explained the contents of the documents*”. **There was no mention of Mr Naicker by Counsel for the Applicant.** It was agreed *that “there was some discussion going regarding the explanation”* by Mr Ram, but then there were no follow up questions put by Counsel for the Applicant to the uncle regarding Mr Naicker. To be fair, when I asked the uncle further questions in relation to the meeting on 10<sup>th</sup> May 2012, he said “I can’t remember.” **Thus, the Applicant’s case in relation to Count One relies solely upon the evidence of the complainant.**

[42] By contrast, the Respondent has more than met the evidential burden to rebut the evidence of the complainant through the evidence of both Mr Ram and Mr Naicker combined with the various documentation.

[43] Even putting the evidence of Mr Ram to one side (as he was not the person who claimed to have explained the documentation to the complainant, rather it was Mr Naicker), **it comes down to me then deciding whether to accept the evidence of the complainant or that of Mr Naicker. I prefer the evidence of Mr Naicker** who explained: “*Sir I’ve been working in the law firm for the last 43 years and for the last 23 years I’ve been doing conveyancing and prior to that I was engaged in the litigation work side*”. **Mr Naicker clearly understood the issues and the responsibility of a firm acting as a common solicitor and, as he explained in his evidence, providing the option for the**

**vendor to obtain independent legal advice and the need for this to be explained to him.**

[44] **In my view, Mr Naicker gave clear and concise evidence.** Despite the suggestion from Counsel for the Applicant that there should have been file notes as to what was explained, clearly, the parties had already provided signed instructions. Further, I agree with Mr Naicker. If the vendor was given “*a draft of the sales and purchase agreement*” to peruse and make any amendments, then why would a practitioner create further file notes when the practitioner already had a signed document from the vendor, in effect giving his consent?

[45] **In my view, the Applicant has failed to satisfy the persuasive burden upon him, that is, to prove upon the balance of probabilities the allegation in Count 1. Thus, it must fail.**

***(2) Clarification of conflict in relation to Counts 2, 3 and 4***

[46] In relation to Counts 2, 3 and 4, the allegation supporting each count was that the Respondent legal practitioner acted for the purchaser in three subsequent legal proceedings - in the Magistrates’ Court at Nadi, in the High Court at Lautoka and in the Agricultural Tribunal – and by not obtaining the consent of the parties to continue to act or, when he was aware of the conflict, ceasing to act. It was alleged that this was a breach of *Rule 1.3 of the Rules of Professional Conduct*, which states:

*‘Rule 1.3 of the Rules of Professional Conduct states:  
1.3 On becoming aware of a conflict of interest between the clients a practitioner shall forthwith  
(a) Advise all clients involved in the matter of the situation  
(b) Continuing acting only with the consent of all clients  
(c) And decline to act further where so acting would disadvantage’*

[47] The argument of Counsel for the Applicant was that once one of the parties had issued legal proceedings, then the legal practitioner should have withdrawn and not acted for either party. By contrast, Counsel for the Respondent asked where was the conflict because there was no confidential information that the lawyer had gained when acting as the common solicitor for both parties that would disadvantage the vendor in the subsequent legal proceedings. Indeed, as Counsel for the Respondent submitted:

*“... I had asked the complainant to say, ‘can you explain to me what in your mind is the conflict?’ He always said one thing. He said ‘because I incurred High Court charges for he was trying to evict me from the land’. And that was for his understanding what the conflict was. Then I had gone on to say Sir that in all three matters there were independent solicitors acting for the complainant. There was no evidence of any confidential information had been retained by Mr. Rams’ office.”*

[48] Thus, **the argument of Counsel for the Respondent was that the complainant had never crystallised as to where was a conflict other than pointing to the costs incurred in the various legal proceedings between the landlord and tenant.** Counsel for the Respondent noted that by then the complainant landlord had engaged another legal practitioner to act for him against the tenant, as I clarified in the following exchange between the bench and Counsel for the parties when I had the matter relisted on 28<sup>th</sup> November 2016:

*“Commissioner: ... So what I’m asking you again on Count 2? **You’re saying Count 2 is found simply because there were Magistrates Court proceedings?**”*

*Ms. V Prasad: **Yes My Lord.***

*Commissioner: That’s the basis?*

*Ms. V Prasad: That’s the basis.*

*Commissioner: Mr. Sharma is saying there has to be more than that. There had to be some confidential information or something further to actually make that count out. And there was nothing further which came out when he [the complainant] was cross-examined up hill and down dale about it and nothing came out. Is that about right Mr. Sharma?*

*Mr. D Sharma: That’s right. And if you look at Rule 1.3 the key words there Sir is that: “**On becoming aware of a conflict of interest between clients a practitioner shall forthwith, advice all clients of the conflict of interest**”.*

*Commissioner: Right.*

*Mr. D Sharma: But by the time this thing happened My Lord, the bottom line was he had taken his files and gone to another lawyer. So it’s not like Mr. Ram was saying ....*

*Commissioner: That was to Mr. Koya?*

*Mr. D Sharma: That’s right. And so the litigation at all stages of the litigation he had already collected his file. He had gone to another lawyer. And so there was, it’s not like Mr. Ram was acting for both parties.*

Commissioner: *I understand but he - the cross-examination of him kept coming back Mr. Sharma – he is saying ‘well of course it’s a conflict because he used to act for both of us’. **And your point was what was the conflict? It can’t just be because he acted for both of us in a sale. There had to be something further that he was using on behalf of his client against you in the Magistrates Court proceedings. Is that the nub of what you are saying?***

Mr. D Sharma: *That’s right Sir.*

Commissioner: *And you agree that’s the nub of the argument?*

Ms. V Prasad: *Yes My Lord.*

Commissioner: *So if I find Ms. Prasad that it can’t be just that there was a Magistrates Court proceedings, there had to be something further such as confidential information. If I find there wasn’t what happens to the charge then?*

Ms. V Prasad: *My Lord I believe it would fail Sir.*

Commissioner: *Okay. So I have to find you agree there was some confidential information?*

Ms. V Prasad: *Yes Sir.”*

[49] Despite repeated attempts by Counsel for the Respondent to elicit from the complainant in cross-examination, together with my intervention, as well as questions by Counsel for the Applicant in re-examination, it was never articulated by the complainant as to what was the *conflict of interest to substantiate the charge that there was a breach of Rule 1.3 of the Rules of Professional Conduct*, other than the complainant repeatedly answering that the Respondent had previously been the parties common solicitor.

[50] Whilst the situation may not be ideal, the problem in substantiating the allegation in Count Two is that the Applicant carries not just an evidential burden but the ultimate persuasive burden. To satisfy the evidential burden, Counsel for the Applicant has simply produced the evidence of the complainant (that the Respondent legal practitioner acted for the purchaser in the subsequent legal proceedings). By contrast, the Respondent does not deny that he did so but says, the Applicant has to show what was the *conflict of interest to substantiate the charge and thus satisfy the ultimate persuasive burden, that there was a breach of Rule 1.3 of the Rules of Professional Conduct*, which the Applicant has failed to do. I agree.

[51] In support of this view, I note that no evidence was placed before this Commission that any objection was ever taken by the lawyers acting for the complainant vendor in any of the three separate set of legal proceedings as to the Respondent legal practitioner continuing to act for the purchaser, a point which Counsel for the Respondent made to great effect:

*“Mr. D Sharma: Now when this claim was filed in the Magistrate Court it’s an agreed fact that subsequently after this claim was filed in July a defence was filed by Rams Law for Abid Hussain. You understand what I’m saying?”*

*Witness: Yes sir.*

...

*Mr. D Sharma: I just have some fundamental questions to ask you about this. Now you know, **you knew that Rams Law had filed this defence correct, you clearly were aware of that, right?***

*Witness: Yes my lawyer told me.*

*Mr. D Sharma: So you had Faiyaz Koya acting for you, Rams Law has now filed a defence for Abid Hussain.*

*Commissioner: So Koyas are acting for you, Rams Law are acting for Abid.*

*Mr. D Sharma: At any stage during this period when this action was current Mr. Sheik did you or your lawyers ever seek to recuse Rams Law from acting in this matter? Maybe I need to explain what ‘recuse’ means.*

*Commissioner: I think you might just say “object”. **Did you or your lawyers ever object to say ‘there is Mr. Ram and he’s acting on behalf of the other side he shouldn’t be doing that’. Did you ever raise that objection or did you mention this to Mr. Koya or to the Court?***

*Witness: **Not in Magistrate Court sir but in High Court.***

*Mr. D Sharma: So at no stage in the Magistrates Court did you raise or you issued any application to object to Mr. Ram acting, correct?*

*Witness: **My lawyer knows sir.***

*Mr. D Sharma: **Is there any documents in the disclosures which shows that an application was made to recuse Rams Law in the High Court?***

*Commissioner:* **“Recuse” you might again say “object”. Is there any document sir that you’re aware of that you are saying that it was an objection in the High Court where an application was made where you instructed Mr. Koya to object to Mr. Ram acting in the High Court? Are you aware of any document or application?**

*Witness:* **No idea sir.**

*Commissioner:* **Coming back to what Mr. Sharma was asking, so it’s clear for me and it’s also for Ms. Prasad and Mr. Sharma, you’re saying there is something in the High Court . Did you say to Mr. Koya I want you to object to Mr. Ram?**

*Witness:* **I don’t know sir.**

*Commissioner:* **You don’t know?**

*Witness:* **I got no idea.**

*Commissioner:* **Sorry, just so I’m clear sir, and I don’t want to confuse you, did you ever say to Mr. Koya ‘There is Mr. Ram acting on the other side and I object to him acting. I want you to get up in Court and object to him acting’?**

*Witness:* **No sir.**

*Mr. D Sharma:* **And Mr. Sheik isn’t it not a fact that not the Magistrates Court, not the Agricultural Tribunal not the High Court, at no stage ...**

*Commissioner:* **Hold on, let’s just do, because we have done two, I think we better do the third, we have done the High Court and the Magistrates Court.**

*Mr. D Sharma:* **In the Agricultural Tribunal, no such objection was taken either was it?**

*Witness:* **I have no idea sir.**

*Commissioner:* **Okay I better be clear again. We are in the Agricultural Tribunal, is it Mr. Koya again?**

*Witness:* **Yes.**

*Commissioner:* **Did you say to Mr. Koya ‘there is Mr. Ram I object to him being acting on the other side I want you to bring an application before the Tribunal to say he shouldn’t be acting on the other side’?**

*Witness:* **No.**

*Mr. D Sharma:* **Were you quite happy that you were represented by Koya and Company and they were representing your interest to the best of their ability?**

*Witness:* **Yes sir.**

Mr. D Sharma: *And would you agree that Koyas did a pretty good job for you in the matters in the Magistrate Court, Agricultural Tribunal and the High Court?*

Witness: *Yes sir he did a good job it was in my favour.*

Mr. D Sharma: *And in fact Mr. Sheik is it not true that you got an eviction order in the end.*

Witness: *Yes sir.*

Mr. D Sharma: *And is it not true that the application to the Agricultural Tribunal was knocked out as well by Mr. Koya.*

Witness: *It was struck out sir.*

Mr. D Sharma: ***Did you feel any prejudice at all whilst going through these three cases that Mr. Ram was on the other side?***

Witness: ***Yes sir.***

Mr. D Sharma: ***And what was the prejudice?***

Witness: ***Because Mr. Ram was our common solicitor.***

Commissioner: *Just so I'm clear sir so I can understand. The three of these matters you were successful in, Mr. Sharma is just asking you, did you feel any prejudice and you said 'yes' and he asked you 'what?' and you said 'Mr. Ram was our former solicitor'. **Okay, the question then is, you are going to have to explain what you mean what was the prejudice - just because you are saying he was the former solicitor on what basis do you feel there was prejudice, that's what I need to know?***

Witness: *He was the lawyer for us before sir.*

Commissioner: *Yes.*

Witness: *When the order was given for eviction then appeal was filed. There were other things filed sir.*

Commissioner: *Just so I'm clear 'when the order for eviction and appeal was filed' and, I'm just trying to be fair to you sir to just try to understand what your complaint is. **Right you are saying Mr. Ram he shouldn't be there on the other side and we are just trying to work out what you're saying and the question was being asked by Mr. Sharma. This is your opportunity to explain to me what were you saying was the prejudice that you felt?***

Witness: ***They were his common solicitor before.***

Commissioner: *Yes, I understand that. I'm just trying to take it one step further to the question going back to Mr. Sharma was asking, **what was the prejudice you are saying? What did you feel?** Yes, you are saying he was the common solicitor and **I'm asking what followed from that?** You're saying that something you were successful in*

*your three claims what was I understand you are saying he'd been the solicitor acting previously what was the prejudice you felt? Is there something you want to point to?*

*Witness: When eviction order was given appeal was filed.*

*Commissioner: I understand, just so I'm clear. You are just saying he was the solicitor who acted on the matter previously **he just shouldn't have acted. You are not pin pointing me to some specific issues you want to raise** because this is your opportunity. You are making a complaint here before the Commission. **This is your opportunity to explain to me independently, whatever you want to say, you felt was the prejudice against you.***

*Witness: I felt bad that I was wasting my money on appeal filed and leave filed and for other things I kept on paying.*

*Mr. D Sharma: But the fees and all that you incurred were paid to your own lawyers wasn't it Koya and Company?*

*Witness: Yes sir.*

*Mr. D Sharma: But would it be fair to say, like his Lordship asked, your common complaint is that he was a common solicitor in the sale of the land correct?*

*Witness: Yes sir.*

[52] **Interestingly, Mr Koya, whose firm acted for the complainant landlord in the three separate sets of legal proceedings against the tenant, was never called by Counsel for the Applicant (or a witness statement provided from him) in these present proceedings to support Counts 2, 3 and/or 4, that there was an alleged 'a conflict of interest between the clients' and thus the Respondent should have ceased to act in each of the three sets of legal proceedings.** I appreciate (and can take Judicial Notice of the fact) that Mr Faiyaz Koya is now an elected member of parliament and a Minister in the present government, however, what has been raised by the Applicant are serious matters and I would expect that, even for a busy Minister, a time could have been arranged by the Applicant to have obtained a witness statement from him and, if necessary, an appropriate hearing date arranged to take his evidence.

[53] Further, it was only as I was writing this judgment that I noted that **a copy of the judgment of the High Court proceedings in Lautoka which Counsel for the Applicant had annexed to her written submissions, was not the**



**judgment in *Haque v Hussain* of 22<sup>nd</sup> January 2014 from the original High Court proceedings before Acting Master Ajmeer (in which Mr Koya represented the plaintiff and Ms Naidu from Rams Law represented the defendant), but the judgment in *Hague [sic] v Hussain* of 6<sup>th</sup> February 2015 (in which neither Mr Koya appeared in person for the plaintiff nor Mr Ram appeared in person for the defendant). *Hague [sic] v Hussain* was the defendant's appeal from the proceedings before the Acting Master to a single judge of the High Court at Lautoka, wherein Abeygunaratne J dismissed the application for leave to appeal and a stay. As the judgment of Abeygunaratne J makes clear, **in that leave and stay application, the appearances were by Ms Laisani Tabuakuro from Koyas on behalf of the plaintiff and Ms Barbara Doton from Rams Law on behalf of the defendant.****

[54] Arguably then, in the present application before me, Count 3 is incorrectly drafted such that it should have particularised (as has been particularised in Count 4) that Mr Ram instructed a legal practitioner from Rams Law, first Ms Naidu to seek an adjournment of the plaintiff's application before the Acting Master and then Ms Barbara Doton, to appear on the defendant's application for leave to appeal and a grant of a stay.

[55] **Further, I note that Ms Tabuakuro from Koyas** (who appeared on behalf of the plaintiff responding to the defendant's leave and stay application before Abeygunaratne J) **was not called by called by Counsel for the Applicant (or a witness statement provided from her) in these present proceedings before the Commission to support Count 3**, that is, that there was an alleged '*conflict of interest between the clients*' and thus the Respondent should have ceased to act in the defendant's leave and stay application before Abeygunaratne J in the High Court at Lautoka.

[56] **In any event, whether the Applicant is arguing a conflict of interest relying upon the fact that Ms Naidu was recorded as appearing '*for Messrs Rams Law for the Defendant*' seeking an adjournment in response to the plaintiff's initial application before the Acting Master, and/or upon Ms Dutton from Rams Law later appearing in support of the defendant's leave and stay application before Abeygunaratne J, neither Mr Koya who appeared on**

behalf of the plaintiff before the Acting Master, nor Ms Tabuakuro who appeared before Abeygunaratne J, were called by Counsel for the Applicant in these present proceedings before this Commission to support Count 3.

[57] **Further, I am unaware of any proceedings begun by the Applicant against either Ms Naidu** (for appearing before the Acting Master, as the judgment notes, *‘for the limited purpose of making an application for adjournment’* which *‘she later withdrew ... when the Court refused her application’*) **or against Ms Doton** (for appearing on behalf of the Defendant arguing his leave and stay application). **If, according to the Applicant, both Mr Ram and his firm were “conflicted out” so to speak in appearing, did this alleged conflict not also apply to both Ms Naidu and Ms Doton who presumably were working as lawyers for the firm of Rams Law?**

[58] I have carefully read the judgments of the Acting Master and Abeygunaratne J from the High Court proceedings in Lautoka. **In neither judgment is there any mention of an alleged conflict having been raised in argument in relation to Rams Law appearing on behalf of the defendant tenant. I can only presume, therefore, that it was a non-issue.** That is, that it was never raised as an issue by the Counsel who appeared for the landlord before either the Acting Master (Mr Koya) and/or before Abeygunaratne J (Ms Tabuakuro). **If it was, where are there witness statements to that effect?**

[59] I also note that the plaintiff was awarded costs in both sets of proceedings before the High Court in Lautoka. The Acting Master summarily assessed costs in favour of the plaintiff in the sum of \$750.00. Similarly, Abeygunaratne J, also summarily assessed costs in favour of the plaintiff in the sum of \$750.00. **Further, in neither judgment is there any mention of an application for indemnity costs.**

[60] Why I have mentioned the question of indemnity costs is that Counsel for the Applicant in her written submissions before this Commission has argued (at paragraph 8) that once the Respondent became aware about the soil excavation issue **‘instead of mutually settling the matter, the Respondent continued the**

eviction proceedings when ***he was well aware that the transaction became illegal*** [my emphasis] because, pursuant to section 13(1) of the *Crown Lands Act* Cap 132, the land was a protected lease and thus required the prior written consent of the Director of Lands before it could be transferred.

[61] According to the '***Civil Trials Bench Book***' published by the Judicial Commission of New South Wales on the subject of 'Costs', and, in particular, 'indemnity costs', it is noted as follows:

***'Indemnity costs are an important case management tool, in that their availability promotes the making of settlement offers, and has the effect of limiting the litigation of cases where there are no reasonable prospects of success'. The following are the most common occasions when such costs are ordered, but it should be noted that the categories are not closed: Colgate-Palmolive Pty Ltd v Cussons [(1993) 46 FCR 225] at 257.***

1. *Hopeless cases ...*
2. *Abuse of process ...*
3. *Unreasonable conduct or "relevant delinquency" in the proceedings ...*
4. *Fraud and misconduct ...*
5. *Offers of compromise and Calderbank letters ...'*

[My emphasis]

(See '***Civil Trials Bench Book***', 'Costs', paragraph [8-0140] 'Indemnity costs', <<https://www.judcom.nsw.gov.au/publications/benchbks/civil/costs.html#p8-0140>>).

[62] Further, I also note that a very good review as to the '*principles governing the award of indemnity costs*' and '*specific instances supporting or denying the award of indemnity costs*' in other common law jurisdictions as well as in Fiji, was set out by Scutt J in ***Prasad v Divisional Engineer Northern (No 2)*** (Unreported, High Court of Fiji at Suva, Judicial Review No. HBJ 03 of 2007, 25 September 2008) (Paclii: [2008] FJHC 234, <<http://www.paclii.org/fj/cases/FJHC/2008/234.html>>).

[63] **In my view, that neither a senior member of the profession in Mr Koya nor an experienced civil lawyer such as Ms Tabuakuro, sought indemnity costs in the High Court proceedings, is significant.** Perhaps, in the present case before, Counsel for the Respondent in his written submissions (at paragraph 13, sub-paragraph [ix]) has answered why, when he noted that:

*'It is not clear what Learned Counsel is alluding to when she says at paragraph 8 that the Respondent continued his eviction proceedings when he was well aware that the transaction had become illegal due to section 13(1) of the Crown Lands Act. With respect the eviction proceedings were commenced by the Complainant and not the Respondent. Having read the judgment annexed by Learned Counsel for the Chief Registrar the relevant passages in the judgment are paragraphs 27 to 29. It must be noted that the Purchaser in the matter before the Commission had gone into possession as a Tenant well before any Sale and Purchase Agreement was signed. He was a tenant at least two years prior to the execution of a Sale and Purchase Agreement. The Respondent did not act for the Complainant when the tenancy was created by the Complainant. What the judgment stands for is that without consent of the Director of Lands a dealing is void ab initio. At no stage did anyone claim or assert that the Sale and Purchase Agreement had been consented to by the Director of Lands. In fact the Sale and Purchase Agreement was conditional upon the consent of the Director of Lands. The case had nothing to do with the sale of the land but the license [to] occupy the land and the Court held that the Purchaser had entered the land with license but remains in occupation without a licence. Once the High Court gave its decision the Respondent did not take this case any further so it is difficult to see how the allegation that the Respondent continued the eviction has any merit.' [My emphasis]*

[64] I should mention that having now become aware as I was writing this judgment as to the incorrect drafting of Count 3 such that Counsel for the Applicant was not relying upon the judgment in the High Court proceedings before the Acting Master but the judgment arising from the defendant's application for leave to appeal and a stay before Abeygunaratne J in which Ms Tabuakuro and Ms Dutton appeared for the respective parties (and not Mr Koya and Mr Ram - something that was not been raised either during the hearing or in the parties written and later oral submissions), I had this matter relisted on 3<sup>rd</sup> February 2017, at the beginning of the February 2017 Sittings of the Commission, before handing down judgment to clarify three issues:

(1) I wished to make the parties aware that Ms Tabuakuro had previously been my instructing solicitor in a long fraud trial in Fiji that had concluded during the first half of 2015, following which, we have remained friends. Counsel for both parties had no objection in my continuing to preside in the matter and in handing down my judgment. Indeed, I noted to Counsel, that even though I was aware that Ms Tabuakuro was in Sydney last weekend to attend the Sydney Rugby 7s, I have, of course, made a point of not being in direct contact with her prior to this judgment being handed down once I became aware of this issue;

(2) I also noted that there had originally been two Counsel appearing for the Applicant in this complaint before the Commission, Ms Prasad assisted by Mr Aminiasi Turuva, who had both signed the agreed facts dated 30<sup>th</sup> March 2016 filed in these proceedings. I needed to raise the issue that I had become aware that Mr Turuva had left the employ of the Applicant before the hearing on 20<sup>th</sup> April 2016 and had subsequently become employed by K Law (the name now of the former firm of Mr Koya) of which Ms Tabuakuro had been a partner. I was unaware of whether Ms Tabuakuro was now still part of that firm and/or whether Mr Turuva was also still working for that firm. Counsel for the Applicant then confirmed these facts. Again, Counsel for both parties had no objection in my continuing to preside in the matter and in handing down my judgment.

(3) I further noted that it was my understanding that the *Narayan* case (whereby it was alleged that a practitioner had acted as common solicitor and later acted for one party against the other, had been dismissed by Justice Madigan who found no conflict of interest) was on appeal. (See *Chief Registrar v Narayan*, unreported, ILSC Case No.009 of 2013, 2 October 2014; Paclii: [2014] FJILSC 5, <<http://www.paclii.org/fj/cases/FJILSC/2014/6.html>>). I asked the parties whether or not the *Narayan* case (although it had not been cited to me in submissions), was relevant for when I was considering my judgment in the present case. Counsel for both parties indicated that it was not relevant.

[65] Apart from the allegation in Count 3 that there was a conflict of interest in the Respondent legal practitioner appearing on behalf of the defendant in the High Court proceedings, Count 2 refers to an alleged conflict of interest in the Respondent legal practitioner appearing on behalf of the defendant purchaser in proceedings in Nadi Magistrates Court, whilst Count 4 refers to an alleged conflict of interest in the Respondent legal practitioner appearing on behalf of the defendant in proceedings in the Agricultural Tribunal. **There was no specific reference by Counsel for the Applicant in her written submissions to the proceedings in the Nadi Magistrates Court.** She has, however, argued in her written submissions in relation to the Agricultural Tribunal proceedings (at paragraph 5) that:

*‘Upon entering into the sales and purchase agreement, the purchaser, Mr Abid Hussain started to excavate soil from the said land. The complainant went to the Respondent and informed him about the same but*

*no action was taken. The Respondent also admitted in his cross-examination that the complainant had advised him about the soil excavation. Despite being informed he continued to act for the purchaser in the Agricultural Tribunal. An application was made in the Agricultural Tribunal at Lautoka for declaration of Tenancy. This application was subsequently struck out on the 14<sup>th</sup> of August 2014.’ [My emphasis]*

[66] Counsel for the Respondent in his written submissions replied (at paragraph 13, sub-paragraph [x]) that:

*‘The Complainant went to see the Respondent about the soil excavation issue once but the Respondent informed him that he would arrange for a meeting of all parties. After agreeing to the meeting the Complainant failed to turn up. There was nothing confidential about the soil excavation issue, the Complainant had pleaded this as a cause of action in his pleadings. In fact the Purchaser has never denied extracting soil from the land and agreed to indemnify the Complainant [page 72 of the Agreed Bundle of Documents].’ [My emphasis]*

[67] Counsel for the Applicant in her written submissions has also suggested (at paragraph 8) that the Notice for Re-Entry was at the behest of the Lands Department and the Respondent took no action to protect the complainant’s interest:

*‘Furthermore, the Applicant submits that the Land[s] Department visited the said land for inspection for the purpose of granting their consent which was lodged by the Respondent’s office. Instead of granting consent, they issued Notice for re-entry proceedings. The complainant went to the Respondent’s office but no action was taken. The complainant then engaged a new legal Practitioner to safeguard his interest over the said land and to comply with the re-entry proceeding notice issued by the Land[s] Department. He managed to obtain consent from the Department to evict Abid Hussain.’ [My emphasis]*

[68] Counsel for the Respondent in his written submissions has suggested on this issue (at paragraph 13, sub-paragraph [viii]) that:

*‘At paragraph 8 of the Chief Registrar’s submissions, Learned Counsel submits that the Director of Lands had issued Notice of Re-Entry and the Respondent failed to take any action on the Notice of Re-Entry. This was an erroneous summary of the facts because there was no evidence before the Commission that the Complainant had actually gone to the Respondents [sic] Office to give instructions on this issue ... It is obvious that the Respondent was directly dealing with the Divisional Surveyor and the allegation that he had instructed the Respondent to deal with the Notice of Re-Entry has no substance of truth.’ [My emphasis]*

[69] For the record, I set out here the transcript of the complainant's evidence-in-chief on this issue:

*Ms. V Prasad: And what happened after the sales and purchase agreement was signed?*

*Witness: After signing the documents went to lands department for lodgment but at the same time Abid Hussain started digging the land and selling the soil sir.*

*Ms. V Prasad: What did you do when you found out that he was digging the land and selling the soil?*

*Witness: I told Mr. Ram personally in his office then Lands Department came to check.*

*Ms. V Prasad: And what happened after they came and checked the land?*

*Witness: The Lands Department they stopped the work to be done and I also had a Court order stopping him not to take the soil from that land.*

*Ms. V Prasad: Now when you say you received the Court order which Court are you referring to?*

*Witness: From Nadi Magistrate Court sir.*

*Ms. V Prasad: Who represented you in that matter?*

*Witness: Mr. Faiyaz Koya represented me in that matter.*

*Ms. V Prasad: And who represented Mr. Abid Hussain?*

*Witness: Mr. Abid Hussain was represented by Mr. Ram.*

*Ms. V Prasad: Now when you received the Court order what happened after that?*

*Witness: Then I went to Lands Department sir seeking their assistance.*

*Ms. V Prasad: And what happened after that?*

*Witness: Then they told me to evict Mr. Abid Hussain from the land.*

*Ms. V Prasad: And what did you do after they told you that?*

*Witness: Then I had a case filed in Nadi Magistrate Court sir."*

[70] It is unclear from the complainant's evidence as to the exact sequence of events in this matter, It is clear, however, after the sales and purchase agreement was signed, the purchaser started digging the land and selling the soil for which the plaintiff was not receiving any royalties nor was he receiving any rent (as the mortgage back was first to repay the plaintiff's uncle who had a sizeable interest in the land even though it was in the name of the plaintiff). **The plaintiff then took it upon himself to directly contact the Lands Department who then**

became aware of the soil excavation issue being undertaken without their prior consent following which the complainant issued proceedings in the Nadi Magistrates Court concerning the soil extraction. It had nothing to do with the sale and purchase agreement. Indeed, as the Respondent legal practitioner (Mr Ram) stated in his evidence-in-chief, there was a consent order filed:

*“Witness: This Magistrates Court action was about a claim for damages for soil extraction.*

...

*Witness: I went through the claim and checked that it had no conflict of interest. It had nothing to do with our instructions.*

*Mr. D Sharma: Okay now you held the belief that there was no conflict of interest in you acting for Abid?*

*Witness: Yes.*

*Mr. D Sharma: Abid was an existing client is that correct?*

*Witness: That is so.*

*Mr. D Sharma: And you confirm to the Commission that your firm did file a defence and counter claim in this matter and acted for Abid that's the fact isn't it?*

*Witness: Yes.*

*Mr. D Sharma: I asked this question of Mr. Sheik [the complainant] as well - At anytime during the proceedings in the Magistrates Court, Mr. Koya is acting on the other side, was there any application made by Mr. Koya or Mr. Sheik to ask you to be recused on the grounds of conflict of interest?*

*Witness: Never, in fact there was a consent order made in regards to soil extraction and both Mr. Koya and I discussed and it was agreed so they approved everything.*

*Commissioner: So Mr. Koya never raised with you any potential conflict of interest?*

*Witness: No.”*

[71] Thus the allegation of Counsel for the Applicant as to an alleged conflict of interest as set out in Counts 2, 3 and 4, required me to closely examine what the three sets of legal proceedings between the landlord and the tenant involved and whether, as alleged, that there was a conflict of interest in the Respondent representing the tenant such to be in breach of *Rule 1.3 of the Rules of*



- [72] My understanding of the three sets of proceedings, in summary, is as follows:
- (1) **In the proceedings in the Nadi Magistrates Court commenced in 2012**, the landlord '*claimed monetary relief for mesne profit from January 2008 and Damages for soil extraction*' and an Order to stop excavating the land, which was settled by way of a consent order between the parties on 21<sup>st</sup> May 2012. The landlord also sought an Order for the tenant to vacate the land and that application which was dismissed on 1<sup>st</sup> August 2013 for want of jurisdiction;
  - (2) **In the proceedings in the High Court at Lautoka commenced in 2013**, the landlord obtained an Order on 22<sup>nd</sup> January 2014 before the Acting Master to evict the tenant, and from which the tenant then made an application for leave to appeal and a stay before a single Judge of the High Court that was dismissed on 6<sup>th</sup> February 2015;
  - (3) **In the proceedings in the Agricultural Tribunal commenced in 2012**, the tenant sought a Declaration of Tenancy arguing that his occupation and cultivation of the land from January 2009 entitled him to the declaration of a valid lease, and that was dismissed on 14<sup>th</sup> August 2014.
- [73] The allegation as to an alleged conflict of interest has also required me to carefully read again the three relevant Counts – that is, Counts 2, 3 and 4. In summary, each of those three counts allege;
- (1) **Count 2:** Having been retained, sometime in or about the year 2010, by both the vendor and purchaser for the sale and transfer of Crown Lease No 9749, thereafter, the Respondent acted on behalf of the purchaser against the vendor in Nadi Magistrates' Court, after a dispute arose stemming out from the transaction for the sale and transfer of Crown Lease No 9749 and that dispute and conduct amounts to acting in a conflict of interest and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009;
  - (2) **Count 3:** Having been retained, sometime in or about the year 2010, by both the vendor and purchaser for the sale and transfer of Crown Lease No 9749, thereafter, the Respondent acted on behalf of the purchaser against the vendor in the High Court at Lautoka, after a dispute arose stemming out from the transaction for the sale and transfer of Crown Lease No 9749 and that

dispute and conduct amounts to acting in a conflict of interest and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009;

(3) **Count 4:** Having been retained, sometime in or about the year 2010, by both the vendor and purchaser for the sale and transfer of Crown Lease No 9749, thereafter, the Respondent instructed a legal practitioner from Rams Law, namely Ms Barbara Kristine Angco Doton, to act on behalf of the purchaser against the vendor in Agricultural Tribunal at Lautoka, after a dispute arose stemming out from the transaction for the sale and transfer of Crown Lease No 9749 and that dispute and conduct amounts to acting in a conflict of interest and is an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners Decree of 2009.

[74] **As noted earlier, despite repeated requests during the hearing, the complainant never clearly articulated, in my view, the alleged conflict of interest - other than repeatedly stating that the Respondent legal practitioner had previously acted as the common solicitor between the purchaser and vendor. I am still at a loss to understand the alleged professional misconduct. It is clear that the landlord felt aggrieved as to how the tenant was using the land – that is, not to plant and cultivate sugar cane but to extract soil and sell it. Hence, the landlord’s claim in the Nadi Magistrates Court for mesne profits and damages as well as his writing separately to the Lands Department seeking their assistance to evict the tenant (and thus frustrate the sale and transfer of the lease) which he eventually achieved.**

[75] Apart from the fact that it may have been preferable (and perhaps wiser) for the Respondent not to have got involved once the vendor landlord wished to evict the tenant, there is, however, no evidence before me as to an actual conflict of interest. It could not be simply that the Respondent had acted as the common solicitor. Surely, there had to be more for the bringing of these proceedings? Was there something that placed the Respondent in a conflict of interest? That is, was there something that the Respondent could use when acting on behalf of the tenant in the three sets of proceedings to the disadvantage of the landlord and of which the Respondent came to know when

he was acting as the common solicitor? **There has been no such information of a confidential nature to which my attention has been drawn during the present proceedings before this Commission.**

[76] **In my view, the dispute in the Nadi Magistrates Court was brought by the landlord seeking a claim for mesne profits, damages, an injunction to stop excavation which was settled by way of consent orders, as well as an application seeking an Order to evict the tenant which was dismissed for want of jurisdiction. The dispute in the High Court at Lautoka was brought by the landlord seeking to evict the tenant and the landlord was successful. The dispute in the Agricultural Tribunal was brought by the tenant seeking to obtain a declaration as to a valid tenancy and in which he was unsuccessful. Despite what is alleged in Counts 2, 3 and 4, none of those three proceedings was related to a dispute that ‘arose stemming out from the transaction for the sale and transfer of Crown Lease No 9749’. In fact, there have been no proceedings of which I am aware, whereby the purchaser sought to seek specific performance of the sale and purchase agreement.**

[77] **In light of the above, the Applicant has failed to satisfy the persuasive burden, that is, upon the balance of probabilities, to prove the allegations in Counts 2, 3 and 4. Thus, each of these three Counts must fail.**

### ***(3) Clarification of Count 5***

[78] **Count 5 alleged** that having had drawn up and/or prepared the Sale and Purchase Agreement, Mortgage, Irrevocable Power of Authority and Instrument of Transfer, **the Respondent legal practitioner witnessed the signatures of both the vendor) and purchaser.** It was my understanding that there was no evidence to support this allegation. In her written submissions, Counsel for the Applicant agreed. She also conceded (at page 9, point 3) *‘that there is no rule which stops a Legal Practitioner to prepare documents as per count 5 and witness the same except for affidavits as stated in order 42, rule 6 of the High Court 1988’.*

[79] The Respondent replied in written submissions dated 24<sup>th</sup> May 2016: *‘With the*

*greatest respect it is submitted that the Chief Registrar's office needs to learn basis [sic] law before laying charges. This Count 5 is a clear abuse of process.'*

[80] Despite the above submission, and whether or not it was, as alleged, 'a clear abuse of process', I have not relied upon it. **Indeed, in relation to the Respondent's case, I have relied solely upon the written submissions filed on behalf of the Respondent by his Counsel, Mr Sharma.** In that regard, I note that Mr Sharma did not specifically address Count 5 in his written submissions believing, as he submitted to me when the matter as relisted on 28<sup>th</sup> November 2016, that "Count 5 was dropped actually". Hence, why I only asked of Counsel for the Applicant at the relisting on 28<sup>th</sup> November 2016, in relation to Count 5, for her to clarify her position, as it was still unclear to me as to whether she was withdrawing the charge or wanted me to find that there was no evidence to support the Count and thus dismiss it. Indeed, even when the matter was relisted on 28<sup>th</sup> November 2016, the following exchange took place in relation to Count 5:

*Commissioner: ... Count 5 was witnessing the signatures.*

*Ms. V Prasad: Yes My Lord.*

*Commissioner: And you're saying that was a conflict?*

*Ms. V Prasad: Yes My Lord. But ... we have conceded that there was no evidence brought up during the hearing in relation to count 5.*

*Commissioner: So, that's what I'm saying. So are you withdrawing that count or your saying that I can find to have it dismissed?*

*Ms. V Prasad: Yes My Lord.*

*Commissioner: So there was no evidence to support that count is that what you are saying?*

*Ms. V Prasad: Yes My Lord."*

[81] To even satisfy the evidential burden upon her and thus requiring a response, Counsel for the Applicant had to produce some evidence. The Applicant has simply failed to do so. **Therefore, the Applicant has also failed to satisfy the persuasive burden upon him, that is, to prove the allegation in Count 5 upon the balance of probabilities. Thus, this Count must fail.**

**(4) Clarification of Count 6**

[82] **Count 6 alleged that the Respondent legal practitioner having had drawn up and/or prepared the Irrevocable Power of Attorney and Instrument of Transfer, failed to read and explain the contents to the complainant vendor prior to witnessing the complainant's signature. My confusion was that the evidence was that the Respondent legal practitioner's clerk, Mr Naicker, and not the legal practitioner himself, had witnessed the documents. In any event, the argument of Counsel for the Applicant was that the document was not explained prior to requesting that the complainant sign the document.**

[83] When I relisted the matter on 28<sup>th</sup> November 2016, the following exchange took place in relation to Count 6:

*Commissioner: So the charge here is fail to read and explain the contents of the documents prior to witnessing the signature. What are you saying now Ms. Prasad?*

*Ms. V Prasad: My Lord, we were actually relying on the evidence of the complainant.*

*Commissioner: Yes. He was saying nothing was explained to him.*

*Ms. V Prasad: Yes. Nothing was explained by the Respondent.*

*Commissioner: Okay. And that's the last part. So nothing was explained. What are you saying Mr. Sharma?*

*Mr. D Sharma: Our evidence was very clear that first of all he [the complainant] hung his head on the fact that 'I don't understand English'. We proved to the Commission that actually he can understand and read and write English. Secondly, we got an independent witness and that was Mr. Naicker who was there at the time who actually then explained the documents. And in fact you look at the cross-examination of the transcript, you'll see that Ms. Prasad did not really take Mr. Naicker on at all in that matter. Because Mr. Naicker stood his ground and said 'no I explained the documents'.*

*Commissioner: So you're saying it was explained. It didn't have to be Mr. Ram, it was enough if I find Mr. Naicker.*

*Mr. D Sharma: That's right. And there was just not only him and Mr. Naicker. There was other parties there who were sitting and discussing.*

*Commissioner: Yes. There were other people. Ms. Prasad do you concede, rather if I find as I did earlier, if I say the same as the earlier count? If I find I agree with the*

*evidence of Mr. Naicker, that he did explain, then this count would fail? Is that what you saying or do you concede that or not?*

*Ms. V Prasad:* *Yes My Lord.*

- [84] As I have already found in relation to Count 1, I also repeat my findings in relation to Count 6, that is, in my view, Mr Naicker gave clear and concise evidence. **Further, I agree with Counsel for the Respondent. Mr Naicker was unshaken in his evidence.**
- [85] I note that Counsel for the Applicant has conceded that “*if I find I agree with the evidence of Mr. Naicker, that he did explain, then this count would fail*”. The problem here, as with Count One, is that the Applicant carries not just an evidential burden but also the ultimate persuasive burden. To satisfy the evidential burden, Counsel for the Applicant has produced the evidence of the complainant (who, in Counsel’s own words, “can read and understand English”) but who, in any event, maintains that no documents were explained to him. By contrast, the Respondent has more than met the evidential burden through the evidence of Mr Naicker. **In deciding whether to accept the evidence of the complainant or that of Mr Naicker, again I prefer the evidence of Mr Naicker.**
- [86] **Therefore, the Applicant has failed to satisfy the persuasive burden upon him, that is, upon the balance of probabilities, to prove the allegation in Count 6. Thus, it must fail.**

## **6. The burden of proof**

- [87] In relation to the burden of proof carried by the Applicant in these proceedings, I note that in *Chief Registrar v Cevalawa* [2011] FJILSC 6 (5 December 2011), (Unreported, ILSC Case No. 014 of 2011)(Paclii: [2011] FJILSC 10, <<http://www.paclii.org/fj/cases/FJILSC/2011/6.html> >), Commissioner Connors stated at [32]-[33]:

*[32] In A Solicitor and The Law Society of Hong Kong [[2008] HKCFA 15; [2008] 2 HKLRD 576; (2008) 11 HKCFAR 117; FACV 24/2007 (13 March 2008) HKLII <<http://www.hklii.hk/eng/hk/cases/hkcfa/2008/15.html>>] the Chief Justice at paragraph 116 said*

***"In my view, the standard of proof for disciplinary proceedings in Honk Kong is a preponderance of probability under the Re H approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable if is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability, if that is properly appreciated and applied in a fair-minded manner, it will provide appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time protecting their members from unjust condemnation."***

[33] *I am therefore of the opinion that the appropriate standard of proof to be applied is the civil standard varied according to the gravity of the fact to be proved, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong.*  
[Underlining my emphasis]

[88] I agree with the approach of Commissioner Connors. Indeed, I have recently discussed at some length in *Chief Registrar v Kapadia* (Unreported, ILSC Case No.016 of 2015, 21<sup>st</sup> September 2016)(Paclii: [2016] FJILSC 8, <<http://www.paclii.org/fj/cases/FJILSC/2016/8.html>>), at paragraphs [102] to [117], a similar approach to ‘*the burden of proof in proceedings before the Commission*’.

[89] In the present case, the Respondent has faced six allegations of ‘professional misconduct’. It is the more serious form of charge that a legal practitioner can face. As I noted in *Kapadia* at [117], ‘*the onus is still upon the Applicant to prove the charge to the civil standard, that is, upon the balance of probabilities, according to the gravity of the act to be proved*’.

[90] For the reasons that I have detailed in this judgment, I find that the Applicant has failed to prove any of the six counts to the civil standard, that is, upon the balance of probabilities ‘according to the gravity of the act to be proved’.

Accordingly, each of the six counts is dismissed.

## **7. Practitioners should proceed with caution**

[91] Before leaving this case, I think that it is important to make a short comment. Although I have dismissed each of the six counts, this case is a reminder to

practitioners as to the problems that can arise when acting as a common solicitor. I am also conscious of the role of the Commission plays in protecting the public.

[92] I can understand in an earlier era, when there were far fewer legal practitioners in Fiji than there are today, how the practice developed of acting as a common solicitor for both parties in a commercial transaction. Nowadays, however, when there are three universities producing law graduates within Fiji, not to mention those who are obtaining legal qualifications overseas and either returning to Fiji or emigrating here, it is not as though solicitors are in “short supply” so to speak. A practitioner would be wise when approached to act as a common solicitor to make it a condition of them so acting that the parties agree that one of them, (such as the purchaser who usually pays all of the costs of engaging the common solicitor), also pays the costs of the other party (the vendor) in obtaining independent legal advice.

### **ORDERS**

[93] The formal Orders of the Commission are:

1. In the Application filed before the Commission in Case No. 002 of 2015, *Chief Registrar v Hari Ram*, Count 1 is dismissed.
2. In the Application filed before the Commission in Case No. 002 of 2015, *Chief Registrar v Hari Ram*, Count 2 is dismissed.
3. In the Application filed before the Commission in Case No. 002 of 2015, *Chief Registrar v Hari Ram*, Count 3 is dismissed.
4. In the Application filed before the Commission in Case No. 002 of 2015, *Chief Registrar v Hari Ram*, Count 4 is dismissed.
5. In the Application filed before the Commission in Case No. 002 of 2015, *Chief Registrar v Hari Ram*, Count 5 is dismissed.



6. In the Application filed before the Commission in Case No. 002 of 2015,  
*Chief Registrar v Hari Ram*, Count 6 is dismissed.

Dated this 6th day of February 2017.

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Dr. Thomas V. Hickie  
COMMISSIONER