IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 175 of 2013

BETWEEN : **SUSHIL CHAND** as a personal representative of the deceased **SHIVNEEL CHAND** of Tavarau, Ba, Farmer and I am suing on my behalf and as Trustee for my wife, Sneh Lata and two sons Ronish Chand and Prashant Chand who are beneficiaries under the Compensation of Relative Act.

PLAINTIFF

AND : **HANDYHARD MARKETING (FIJI LTD** a company duly registered under the Companies and having its registered office on 2 Nasoki Street, Lautoka.

1ST DEFENDANT

AND : **AVINESH NAIDU** of Korovuto, Nadi, Driver.

2ND DEFENDANT

RULING

INTRODUCTION

[1]. Before me is a summons filed by AK Lawyers on 27 November 2013 seeking the following Orders:

a) that leave be granted to appeal the decision or Order of His Lordship Justice Weeratne made in the High Court of Fiji at Lautoka on 07 November, 2013.
b) that time for filing of the appeal be extended if required.
c) that further proceedings in the High Court and the Judgment of 07 November, 2013 be stayed pending the hearing and determination of this application and the appeal upon grant of leave.
d) that time for filing and service of this application be abridged.

[2]. The application is supported by an affidavit sworn by a Mahendra Bhai Patel on 27 November 2013 (see further below). The story behind the plaintiff's substantive claim is rather sad. Sushil Chand wishes to file a claim as personal representative of his deceased son, the late Shivneel Chand. Shivneel died in a motor vehicle accident on 16 April 2008. He was 7 years old. Shivneel was mowed down by motor vehicle registration number FB 410 which was driven and under the control of one Avinesh Naidu (2nd defendant). The vehicle was then owned by Handyhard Marketing (Fiji) Limited (1st defendant) and was then insured by Sun Insurance Company Limited. Sushil Chand was in the United States of America burying his mother who had just died. He rushed back to Fiji on learning of the accident. Shivneel however died the day after Sushil arrived back from the US.

DECISION OF MR. JUSTICE WEERATNE

[3]. As stated in the summons, the decision in question of Mr. Justice Weeratne was handed down on 7 November 2013. Weeratne J had ordered:

> [69] In the circumstances I am of the view that;
>
> a. Mr. Narayan should discontinue to act as Counsel for Defendants, Handyhand Marketing (Fiji) Ltd and Sun Insurance Company Ltd;
> b. A. K. Lawyers should discontinue to act in this matter any further as solicitors on record for Handyhand Marketing (Fiji) Ltd and Sun Insurance Company Ltd .
>
> **DECISION**
>
> [70] Accordingly, I make orders that;
>
> a. Mr. Ashneel Kumar Narayan to discontinue acting as Counsel for Defendants, Handyhand Marketing(Fiji) Ltd and Sun Insurance Company Ltd;
> b. Messrs A. K. Lawyers to discontinue acting as Solicitor for the Defendants, Handyhand Marketing (Fiji) Ltd and Sun Insurance Company Ltd;
> c. Defendants are directed to take steps for the appointment of new solicitors.

BACKGROUD TO DECISION

[4]. The background to Weeratne J's decision might be stated shortly. On 19 September 2013, Qoro Legal, acting on behalf of the plaintiff, had filed an inter-parte Notice of Motion seeking an Order that Sushil Chand be granted leave to institute proceedings out of time against the defendants.

[5]. The matter was first called on 30 September 2013 in Weeratne J's court. Mr. AK Narayan (Jr) happened to be in Weeratne J's Court on that day on some matters totally unrelated to this case. No counsel from the firm of Qoro Legal was in attendance on the said date. A clerk of Qoro Legal however was present in the court gallery.

[6]. Upon this matter being called out in court, Qoro Legal's clerk handed over to Mr. AK Narayan (Jr) a piece of paper containing written instructions. I gather that the piece of paper containing the instructions was the only thing given to Mr. Narayan.

[7]. Pursuant to the limited instructions on the paper, Mr. Narayan sought two weeks to serve the application on the defendants. The court obliged and then adjourned the case to 14 October 2013 for mention.

[8]. On 14 October 2013, Mr. Sovau of Qoro Legal appeared for the plaintiff. Mr. AK Narayan (Jr), who now obviously has since the last occasion, being instructed by the defendants, appeared for them (defendants).

[9]. Weeratne J took issue with Mr Narayan (Jr)'s appearance for the defendants when he had earlier appeared for the plaintiff at first call, albeit on limited instructions from Qoro Legal and despite Mr. Narayan's argument that he had

appeared "from the gallery" on the last occasion. Although Qoro Legal had no objections to AK Lawyers representing the defendants, Weeratne J was of the view that Mr. Narayan was conflicted. Below is an extract of Weeratne J's decision.

MATTERS FOR DETERMINATION

[31] (a) Can Mr Ashneel Kumar Narayan of Counsel having marked his appearance on the case record formally as counsel for the plaintiff instructed by Qoro Legal, now appear as counsel for the defendant, as the counsel instructed by the firm AK Lawyers;

(b) Given the structure and the relationship between Mr Ashneel Kumar Narayan of counsel and the firm AK Lawyers, can AK Lawyers continue to act as the solicitors on record for the defendants;

(c) If either of the two matters referred to above in (a) and (b), is allowed, give rise to any or any potential conflict of interest situation by Mr Narayan and AK Lawyers now appearing for the defendants in this matter.

[32] **THE LAW APPLICABLE**

Primarily, I will consider the Rules which govern this particular area of law pursuant to the provisions under the Legal Practitioners Decree 2009, Chapter 1 which stipulates:

1.1 A practitioner shall not abuse the relationship of **confidence** and **trust** with a client;
1.2 A party shall not act for more than one party in the same matter **without the prior consent of all parties**;
1.3 On becoming aware of a conflict of interest between clients a practitioner shall forthwith;

- (a) advise all clients involved in the matter of the situation;
- (b) continue acting for all clients only with the consent of all clients and only if no actual conflict has occurred;
- (c) decline to act further for any party where so acting would **disadvantage** any one or more of the clients.

[33] Secondly, with a more descriptive and a broader sense, I will now consider the view adopted by the courts on this point.

[34] The first aspect to be mentioned about the phrase **"conflict of interest"** in conjunction with examining the authorities on conflict of interest, there are seem to be more of cases not about "*conflict of interest*" but rather about "*conflict of duty*".

[35] The underlying principle is that, in accepting a retainer to act for a client, a legal practitioner owes a **duty** to act in the **best interest of his client** and to make available to the client all of his expertise and knowledge.

[36] If a practitioner concurrently acts for another client who has interests adverse to the first client and conflict arises the practitioner must necessarily sacrifice the interest of the one client to the other or vice versa or perhaps by failing to act at all on a particular issue might sacrifice the interests of both clients. Whichever way it goes the practitioner fails to perform to the full, the duties which he owes to the two clients.

[37] **In Archer v Howell (No 2)** (1992) 10 WAR 33, 49 Rowland J as a member of the full court of the Supreme Court of Western Australia said:

"*Whenever a practitioner acts for two persons whose interests may not be identical there is a* ***prospect*** *that there will be a conflict."*

[38] The current edition of **Riley Solicitors Manual** quotes as follows:

"[7015] professional consequences of client-client conflicts;

A lawyer who accepts a retainer from a client that is ***inconsistent*** *with his or her* ***duty*** *to a current client may be found guilty of misconduct, although this is unlikely to merit striking off unless the conflict in question unearths other unethical conduct."*

[39] At 7025.5 Riley also quotes from two decisions which are adopted as follows:

(a) Wilson JA in a Canadian case of **Davey v Wooley**, Homes, Dale & Dingwell (1982) 35 OR 92d) 599 at 602;

"*The underlying premise.....is that, human nature being what it is, the solicitor* ***cannot give his exclusive, undivided attention*** *to the interests of his client if he is torn between .....his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith."*

(b) Davies JA in **Alexander (t/a Minter Ellison) v Perpetual Trustees WA Ltd**[2001] NSW CA 240 at [125]:

"*A conflict of interest is an insidious thing. Aspects of a duty of care, which ought to be seen clearly and distinctly, are seen in a* ***hazy light when a solicitor seeks to reconcile the interests of two clients who each have interests which differ from those of the other.*** *Over many years, in judgments which I have written or in which I have joined, the point has been made that* ***solicitors should never allow themselves to have a conflict of interest.*** *Those judgments appear to have had no impact. Too many solicitors continue to act for two or more clients who have conflicting interests.* ***Year after year, cases come before the courts because a solicitor, in such a position, has failed to fulfill his duty to one or more of his or her clients."***

[40] Riley also quotes from Windeyer J in **Lowry v Alexander**[2000] NSWSC 66] and the English Court of Appeal in **Hilton v Barker Booth & Eastwood** (a firm) [2005] UKHL 8; [2005] 1 All ER 651. [at 34].

"The cases themselves illustrate the practical consequences that arise in conflict situation where the ***practitioner's every act*** *may potentially be for the* ***benefit*** *of one client and to the* ***detriment*** *of another".*

[41] Scrutton LJ in **Moddy v Cox** [1917] 2 Ch at 91 said:

"*It may be that a solicitor who tries to act for both parties puts himself in a position that* ***he must be liable to one or the other whatever he does****....[It] would be his fault for mixing himself with the transaction in which he has two entirely inconsistent interests".*

[42] In **Blackwell v Barroile Pty Ltd**(1994) 51 FCR 347; 123 ALR81, Federal Court, it was reflected that the principle behind the law in this area is that ***'NO MAN CAN SERVE TWO MASTERS".***

[43] In Blackwell it was also held that a firm is in no better position than a sole practitioner if it purports to act for separate clients whose interests are in contention.

[44] The concept of reliance upon "*Chinese Walls*" was discussed also in ***BLACKWELL.*** Simply "*Chinese Walls*" involve the firm taking steps to ensure that different lawyers

within the firm act for each client and that the legal staff acting for the respective clients do not come into contact with confidential information given to the firm by that client for whom their section of the firm is not acting, and that the integrity of the client's information in terms of their right to confidentiality is not comprised.
[45] The concern of the courts over the adequacy of *'Chinese walls'* to protect client information was expressed by Newnes M in **Zalfen v Gates**[2006] WASC 296 (21 December 2006) at [76] – [79]:

> *"There is, I think, also a strong body of authority to the effect that in circumstances where there is a real risk of disclosure it will rarely be the case that a 'Chinese wall' will be sufficient justification for allowing a firm to act: see, for example,* ***D & J Constructions Pty Ltd v Head*** *(supra), Effem Foods Pty Ltd v Trade Consultants ltd (1989) 15 IPR 45,* ***David Lee & Co (Lincoln) Ltd v Coward Chance****(a firm) [1991] Ch 259, Re a firm of Solicitors [1992] QB 959."*

[46] In **D & J Constructions Pty Ltd v Head** (supra), Bryson J (at 122 – 123) said that the Court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership, by accepting undertakings or imposing injunctions as to, among other things, communications among partners and their employees. His Honour noted that among the difficulties involved in attempting to contain information in that way:

> *"[e]nforcement by the court will be extremely difficult and it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control".*

[47] Similarly, in **David Lee & Co (Lincoln) Ltd v Coward Chance** (a firm) (supra), Browne Wilkinson VC said (at 674):

> *"When one has sensitive information in a firm or in any other group of people, there is the element of seepage of that information through casual chatter and discussion, the letting slip of some information which is not thought to be relevant but may make the link in a chain of causation or reasoning."*

[48] Historically courts have quite correctly shown grave concern in regards to the standards of the profession and how that reflects upon the public in terms of reputation of legal practitioners as officers of the court, on the issue of situations bordering or situations of conflict of interests.

In –**Ex parte Macaulay**(1930) 30 SR NSW 193 of 193-4 Street CJ Comments:

> *"Unless the court insists on a high standard of conduct on the part of solicitors – unless the court punishes severely any lapse from the proper standard – the* ***public will never be properly safe-guarded and the profession will never retain the respect which it ought to have in the community."***

[49] In **Harvey v The Law Society of New South Wales** (1975) 49 ALJR 362 at 364: the court of Appeal commented:

> *"The court's duty is to ensure that those standards of the profession are fully maintained particularly in relation to the proper relationship of the practitioner with practitioner, practitioner with the court and practitioner with the member of the public who find need to use the services of the profession."*

[50] The view adopted, clearly, by courts is that as officers of the court, who are duty bound to hold the supreme esteem of the legal profession, practitioners should always take every precaution not to put themselves in situations which are seemingly a conflict of interest situation, irrespective of the question of access to confidential information or otherwise.
[51] I also wish to examine briefly, the view taken by courts, on the issue, with regards to concurrent conflict situation in solicitors representative of both insured and insurer, as this has relevance to this particular matter to be decided before me.
[52] Insurance policies ordinarily give the insurer a right of subrogation, that is, to stand in the shoes of the insured for the purpose of legal proceedings relating to the insured's liability.
[53] In **Mercantile Mutual Insurance (NSW Workers Compensation) Ltd v Murray** (2004) 13 ANZ Ins (as 61 – 612 at (50) Mason P said:

> *"The proceedings remain in the name of the insured, even though the insurer appoints the lawyer. Though the insurer-appointed lawyers most judges agree, becomes the lawyer for the insured, this does not necessarily deny a concurrent lawyer-client relationship with the insurer. That insurers regularly appoint solicitors to act for the insured representatives as implicit acceptance that in most cases there is coincidence between the interests of insured and insurer."*

ANALYSIS OF THE FACTS OF THE MATTER TO BE DECIDED IN THE CONTEXT OF THE APPLICABLE LAW.

PRIMARY FACTORS:

[54] (i) It is evident that Mr Narayan was formally retained to appear as counsel for plaintiff by Qoro Legal on the 30 September. Accordingly Mr Narayan's appearance has been formally marked on the case record for the plaintiff.
(ii) Mr Narayan had no knowledge of the confidential information, let alone was not able to address court with regards to the type of matter before court, or the nature of the matter, as he admittingly appeared before this court without a piece of paper, confined to the instruction sheet from Qoro Legal.
(iii) Mr Narayan made application to court on the 30 September 2013 seeking 14 days to serve notices on the defendants.
(iv) Mr Narayan submits that he now wishes to continue acting as counsel for the defendants instructed by AK Lawyers who have filed their appointment of solicitors for the defendants, of which firm he is an Associate.

[55] Clearly at the time Mr Narayan accepted instructions from Qoro Legal on 30 September 2013, by accepting the instruction sheet to appear for the plaintiff, the ethical and contractual obligation of Mr Narayan commenced towards the plaintiff.
[56] The consistent view of the courts, affirms the cardinal principal of the solicitor-client relationship which commences the moment a litigant steps in to a solicitors firm. Qoro Legal obviously bore that obligation to the plaintiff as their appointed solicitors, who in turn retained the services of Mr Narayan as counsel to appear for the plaintiff, thus, passing on that ethical and contractual obligation to Mr Narayan and Mr Narayan accepting that obligation.
[57] I dismiss Mr Narayan's submission in response to the courts query, that a counsel could appear on behalf of a litigant without a proper appointment of solicitors filed in the registry prior to the appearance.
[58] I do not wish to go into detailed analysis on this point, given that, at present, it is not the matter before me to be decided, as AK Lawyers have now filed Notice of Appointment as solicitors for the defendants.

[59] Mr Narayan submits that in his experience as a legal practitioner, the common practice of legal practitioners in Fiji is that appearances can be marked by counsel randomly for both parties on the premise that there is no conflict of interest, in doing so.
[60] If that be the current practice amongst the legal practitioners in this country, I am bemused by said practice, as such practice would be, in my view be contrary to the view taken by the English and Australian supreme courts over the years, as it would be clearly contrary to the ethical and contractual obligations of solicitors, at the risk of damaging the reputation of the legal practitioners.
[61] Litigants are lay people, illiterate in many instances. It is clearly the ordinary litigant that forms a perception of the legal practitioner, whom they retain, in a commercial world, for a consideration, to act on their behalf to endevour to protect their interest to the optimum, against the interests of their opponent.
[62] It is certainly a floodgate the legal profession will attempt to open up if such practice is to continue, which will leave a bad taste in the mouths of the ordinarily litigant, when they come to realize their solicitor who represented them the previous day in court, in most cases for a commercial consideration, is now appearing for their opponent.
[63] I am of the view that the court of law is by no means a "theater" or a stage for other dramatic impromptu performances where counsel robed in their wigs and gowns can appear from the "gallery", with next to no knowledge about a litigant and on the matter, marking their appearance on the case record, and then swap their appearances around conveniently to appear for the opponent on the basis of there been no access by the practitioner for any confidential information up to that point in time.
[64] I am of the view that such conduct of a legal practitioner will be in breach of the contractual and the ethical obligations of a legal practitioner, at any level, which has to be viewed from a broader perspective of general law rather than been confined to the narrower rules which govern the area.
[65] Mr Narayan submits that he subsequently obtained consent of the plaintiff counsel to act for the defendants. I am of the view that this is not an issue which can be dealt by way of striking agreements with opposing counsel, as an afterthought.

CONTRIBUTORY FACTORS:

[66] I note the following contributory factors which I have also considered in arriving at my decision.
[67] The very nature of the substantive matter:
This is a matter where the plaintiff, the father of a deceased, is seeking an order for an extension of time to file Writ of Summons against the defendants for personal injuries arising out of a motor vehicle accident which occurred on or around 16 April 2008. Plaintiff's son died as a result of the injuries on 19 April 2008.

i. In his affidavit of 19 September 2013, in support of the Notice of Motion, the plaintiff in paragraph 9 pleads:

> *"Sometimes on or about March 2010, I met with my new landlord, Saha Deo. In our conversation, Mr Deo asked me how many children I have. I said three but the youngest died. He asked me how he died. I said he died from injuries suffered in an accident on or about 16 April 2008. Mr Deo then asked me what I have done about it. I said nothing. He then asked me whether I have sought legal advice from a lawyer. I said no because I did not know what to do and what rights do I have".*

ii. Clearly the plaintiff appears to be an average common member of the public with no knowledge of his legal rights;
iii. Mr Narayan sought 2 weeks to serve the Notice on the Defendants on his appearance for the plaintiff on 30 September 2013;
iv. On the 14 October 2013 whilst now appearing for the defendants,(Insured) Mr Narayan alleged late Service of the Notice on the defendants by the plaintiff, i.e. on 9 October 2013, which has resulted in the insurer having retained AK Lawyers on the previous Friday 11 September 2013, at 4.25pm;
v. Even without the access to any confidential information, as submitted by Mr Narayan, the mere submission in itself, on the issue of late Notice by the plaintiff on the defendants, for whom he previously appeared for, in my view, constitutes conflict of interest in the conduct of Mr Narayan (as per **Hilton v Barker Booth & Eastwood**).

[68] **Nexus between Mr. Narayan and A. K. Lawyers**

i. Mr. Narayan submits he is an Associate for A. K. Lawyers. As per Mr. Narayan's submission there appears to be two partners as well as another Associate apart from himself;
ii. In his written submission Mr. Narayan states that A. K. Lawyers is a firm which is on the panel of solicitors for Sun Insurance Company Limited, the Defendant insurer in the matter;
iii. Endorsing the concept of reliance upon "Chinese Walls" as discussed in **BLACKWELL**, and the concern over the adequacy of these as discussed in **Zalfer v Gates** (referred in my paragraphs 44, 45), I am of the view that A. K. Lawyers bear the same onus to discharge as much as Mr. Narayan himself;
iv. This situation also can be distinguished from the establishment if large national and international firm where it raises the possibility of the one firm (perhaps in a different jurisdiction) dealing with competing interest. This could be a potential problem for practitioners in country towns where one or two firms might have to deal with legal problems of the whole town. This is clearly not such a case.

[69] In the circumstances I am of the view that;

a. Mr. Narayan should discontinue to act as Counsel for Defendants, Handyhand Marketing (Fiji) Ltd and Sun Insurance Company Ltd;
b. A. K. Lawyers should discontinue to act in this matter any further as solicitors on record for Handyhand Marketing (Fiji) Ltd and Sun Insurance Company Ltd.

GIST OF APPELLANT'S CASE

[10]. In his affidavit, Mahendra Bhai Patel deposes that AK Lawyers retains the instructions of Sun Insurance Company Limited, the compulsory third party vehicle insurer of the defendants, pursuant to its rights of subrogation. Sun had instructed AK Lawyers upon being served with a copy of the application. The decision of Weeratne J in finding that the firm of AK Lawyers is conflicted is wrong in law. At no time whatsoever, was the firm of AK Lawyers or any of the solicitors therein ever privy to any confidential information pertaining to the

THE LAW

[13]. The decision of Weeratne J was an interlocutory decision.Section 12(2)(f) of the Court of Appeal Act provides that no appeal shall lie without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge of the High Court. Whether or not a decision or judgement is final or interlocutory, the law appears to be now settled in Fiji (see **Goundar v Minister for Health** [2008] FJCA 40 ; ABU0075.2006S (9 July 2008). Without revisiting that position, suffice it to say at this point that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. Otherwise, it would be encouraging appeals (see **Hubball v Everitt and Sons (Limited)**[1900] 16 TLR 168; **Kelton Investments Ltd & Orsv CAAF**[1995] FJCA 15).

[14]. In **Kelton** (supra), the Fiji Court of Appeal observed as follows:

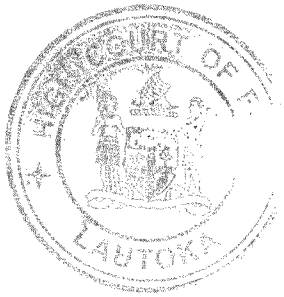
> Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example Ashmore v Corp of Lloyd's [1992] 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords.
> The following extracts taken from pages 3 and 4 of the written submissions made by the Applicants' Counsel are also pertinent:
>
> *'.....*
> *5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in Niemann v. Electronic Industries Ltd (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (Decor Corp v. Dart Industries[1991] FCA 655; 104 ALR 621 at 623 lines 29-31).*
> *5.3 Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in Exparte Bucknell[1936] HCA 67; (1936) 56 CLR 221 at 224).*
> *5.4 There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. The appellant contends the Order of 10 May 1995 determines substantive rights.*
> *5.5 Even "if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation" (per Murphy J in the Niemann case at page 441). The appellant contends the order of 10 May 1995 determines substantive rights.*
> *5.6 In Darrel Lea v. Union Assurance (169) VR 401 at 409 the Full Court of the Supreme Court of Victoria said:*
> *"We think it is plain from the terms of the judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result."'*

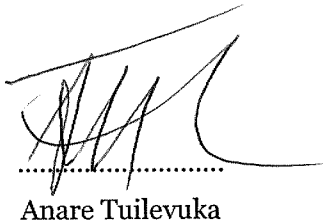
[15]. Taking my cue from the above, I start by saying that the decision of Weeratne J does indeed have a bearing on the legal profession and legal practice in Fiji. But

it has potential to cause greater impact particularly in the way that it can affect a litigant's right to legal representation and to retain counsel of one's choice. I am satisfied that the greater interests of justice will be served if an opportunity to appeal out of time is granted in this case in order that the issues might be properly thrashed out. I do not think that the plaintiff will be greatly prejudiced as his application to file proceedings out of time is still on foot.

ORDERS

[16]. Leave granted to appeal the decision of Mr. Justice Weeratne dated 07 November 2013. No Order as to costs.





Anare Tuilevuka
JUDGE
26 September 2014