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

Civil Action No. 214 of 2012

BETWEEN : **COSTERFIELD LIMITED** as trustee for the Costerfield Unit Trust a duly incorporated limited liability company having its registered office at Level 4, Plaza 1, FNPF Boulevard, 33 Ellery Street, Suva.

PLAINTIFF

AND : **DENARAU INTERNATIONAL LTD** a duly incorporated limited liability company, having its registered office at C/- Munro Leys, level 3, Pacific House, Butt Street, P.O. Box 149, Suva, Fiji.

FIRST DEFENDANT

AND : **DENARAU INVESTMENTS PTY LTD** a duly incorporated limited liability company, having its registered office at C/- Munro Leys, level 3, Pacific House, Butt Street, P.O. Box 149, Suva, Fiji.

SECOND DEFENDANT

RULING

INTRODUCTION

1. James D. Caitlin is an Australian Solicitor. He has always practiced in Australia. On 04 October 2012, a Writ of Summons and Statement of Claim was issued by the High Court of Lautoka. At the end of the pleadings and prayers in the Statement of Claim, the name *James D.Catlin* appears in typed print (but not signed). Immediately below *James D. Catlin*'s typed name, the ink handwritten signature of one *R. Kumar* appears above a small dotted line. Underneath the dotted line, the words: *"Faiz Khan Lawyers, Solicitors for the Plaintiff"* appear in typed print.

James D.Catlin

signature of R.Kumar

.....
Faiz Khan Lawyers
Solicitors for the Plaintiffs

TEMPORARY ADMISSION CERTIFICATE ("TAC")

2. It appears that James D. Caitlin had a TAC issued to him by the Chief Justice, the Honourable Mr. Anthony Gates. At the time the Writ of Summons and the Statement of Claim in this case were filed, that TAC was already issued.

3. The TAC issued to Mr. Catlin reads as follows:

> Upon reading the petition filed herein, the petition for temporary admission of **JAMES DOUGLAS CATLIN**, is granted restricted to appearance in the following cause or matter namely:-
>
> a) **Civil Action No. HBC 184 of 2009** in the High Court of Fiji – Trevor Rogan and Helen Rogan as trustee for the Bulla Trust (Plaintiff) Denarau International Limited, Hilton International Co and Strategic Nominees Limited (Defendants); and
>
> b) **Winding Up Application HBE 19 of 2010** in the High Court of Fiji – Rob v Overseas Pty Ltd (Applicant) Denarau International Limited (Respondent).
>
> Signed
>
> .....
>
> A.H.C.T. Gates
>
> Chief Justice

4. TACs are issued at the discretion of the Chief Justice to barristers and solicitors of other jurisdictions, on their application. The effect of the TAC is to admit the barrister or solicitor concerned to practice in Fiji, but only for the purpose of any specific cause or matter.

5. Section 39 of the Legal Practitioner's Decree 2009 provides as follows:

> *Temporary admission*
>
> 39.—(1) A person admitted to practice as a legal practitioner, barrister or solicitor in another jurisdiction may apply by petition supported by affidavit to the Chief Justice to be admitted to practice as a legal practitioner for the purpose of any specific cause or matter.
>
> (2) Public notice of the application shall not be required nor shall the applicant be required to appear upon the consideration by the Chief Justice of the application.
>
> (3) The Chief Justice, upon considering the application and any written submissions received may—
>
> *(a)* refuse the application;
>
> *(b)* grant the application subject to such conditions, if any, as he or she may think fit (which conditions may limit the duration of the admission);
>
> *(c)* adjourn the application to allow the applicant and objectors, if any, to be heard in person; or
>
> *(d)* require such further information as he or she may think fit before considering the application further.
>
> (4) The Registrar shall forthwith communicate the decision of the Chief Justice to the applicant and the objectors, if any.

(5) Any applicant dissatisfied with the decision of the Chief Justice may require the Registrar to list the application for hearing and may appear in person in support of the application.

(6) Any person admitted pursuant to this Section shall only be entitled to appear or act—

(a) in the cause or matter for the purpose of which that person is admitted; and

(b) if instructed by, and if when appearing in any Court in the conduct of the cause or matter, appearing together with a practitioner admitted to practice in the Fiji Islands.

(7) Any person granted admission pursuant to this Section for a period of less than three months shall not—

(a) be required to take out a practising certificate;

(b) be required to take out professional indemnity insurance in the Fiji Islands pursuant to Part 10 of this Decree; or

(c) be subject to educational requirements set out in Part 2 of this Decree; but shall otherwise be subject to the provisions of this Decree.

(8) Any person admitted pursuant to this Section shall be included in a special Roll for temporary admission.

Exemptions

40. The Chief Justice may, on sufficient grounds, and upon conditions, if any, exempt any person from complying with the formalities set out in this Part and may enlarge or abridge any period of time referred to in this Part or any rules made pursuant to it.

BREACH OF THE CONDITION OF THE PRACTICING CERTIFICATE

6. In this case before me, the TAC granted by Gates CJ to Mr. Catlin, in effect, admitted Mr. Catlin to practice in Fiji, but only in relation to the two specific matters mentioned therein. These two matters are Civil Action No. HBC 184 of 2009 and Winding Up Application HBE 19 of 2010. The said TAC does not admit Mr. Catlin to practice in any other case.

7. The case now before me is not one for which Mr. Catlin's TAC applies. However, on 30 January 2013, Mr. Catlin did appear before me on this matter.

WHAT HAPPENED IN COURT ON 30 JANUARY 2013?

8. On the said date, I did inquire with Mr. Catlin in Court as to whether or not he had a valid Practicing Certificate to appear on the case. He replied in the affirmative. Mr. Catlin then undertook to furnish his TAC to Court later as he did not then have the document with him. I saw no reason to doubt him and gave him the benefit - so I proceeded to hear him and the other counsel on arguments on the application that was before me on the said day.

CAITLIN APOLOGISES

9. On 20 February 2013, a letter was received from Mr. Catlin (addressed directly to me) stating as follows:

> I refer to your Orders made in this matter that my practicing certificate be filed with the registry.
> Hopefully two documents have been filed namely the:
>
> a. Certificate of the Board of Legal Education;
> b. Limited Practicing Certificate
>
> I had been led to believe by our Fiji Solicitors (a different firm to Faiz Khan) that I had a general admission to practice but have now been informed that only a temporary practicing certificate for a claim similar to the current claim with Mr. Trevor Rogan as plaintiff had been issued.
> I was not aware of this when I addressed you and it was not my intention to mislead the court. I will apologise in person when my certificate is in order and am thus enabled to appear again.

ISSUE

10. The question before me now is - whether or not the fact that the name *"James D. Caitlin"* appears in typed print at the end of the Statement of Claim - offends the terms of his TAC and breaches sections 52 and 53 of the Legal Practitioners Act? If the answer to that is "yes", whether or not the Writ of Summons and Statement of Claim are therefore null and void *ab initio* and must be struck out.

DEFENDANT'S SUBMISSIONS

11. According to the defendant's counsel, Mr. Catlin breached the conditions of his TAC not only when he appeared before me on 30 January 2013 in this matter to argue an application before me – but also by the very fact that his typed name (though he did not sign) is endorsed at the end of the Statement of Claim. He argues that the Writ of Summons and Statement of Claim are therefore *void ab initio* and cannot be cured and must accordingly be struck out because of non-compliance with sections 52(c) and 53 of the Legal Practitioners Decree 2009.

CASE LAW

12. At common law, the position is that a solicitor who acts for a client without a Practicing Certificate cannot recover costs, the proceedings themselves are not void. Sir W. Page Wood V.C. in **Sparling –v- Brereton** (1866) L.R. 2 Eq 64 is often cited as authority for that proposition (at page 67 as follows):-

> "The cases at common law seem to show that although great difficulties are thrown in the way of any recovery of his costs by a solicitor who acts for a client without being duly qualified the proceedings themselves are not void.

13. Erle J in **Holgate v Slight** 21 L.J 21 L.J. (Q.B.) 74 (cited by Sir W. Page Wood V.C), said:

> "It seems to me, therefore, that an attorney, though uncertificated, may do acts in his capacity of attorney, but that the result will be that he will, in such case, lose his fees."

14. One reason why the common law takes that view is to avoid the mischief which prejudices an innocent litigant and innocent third parties who are caught in such a situation. Sir w. Page Wood V.C explains this in **Sparling**:

> It would be most mischievous indeed, if persons without any power of informing themselves on the subject should be held liable for the consequences of any irregularity in the qualification of their solicitor. As against third parties the acts of such a person acting as solicitor are valid and binding upon the client on whose behalf they are done. A client who might ascertain by inquiry that his Solicitor was on the roll, would have no means of finding out if his certificate was taken out and stamped at the proper time. I do not, therefore, think myself justified in interfering, because, at the time when the appearance which it is sought to vacate was entered, the Solicitor had no certificate.

The learned Vice—Chancellor concluded –

> "I should be injuring both plaintiffs and defendants if I were to hold that the absence of a certificate had the effect of invalidating all proceedings taken in the suit".

15. In the Malaysian High Court case of **Takun Bin Ladas vs Alliance Bank Malaysia Berhad & Others - BKI-24NCvC-10/2-2014**, the court reiterates the same position (underlining mine):

> It is noteworthy that even in cases where the practicing certificate of an advocate is not valid, the courts will not penalize an innocent litigant. In ***Bank Bumiputra Malaysia Bhd v. Mohd Ibrahim Salleh & Ors*** [2000] 2 CLA 501 Abdul Malik Ishak J (as he then was) held on the authority of ***Richards v. Bostock*** **[1914] 31 TLR 70** that proceedings were not invalidated merely because of the failure of an advocate to obtain a proper practicing certificate. Ian Chin J in ***Borneo Housing Mortgage Finance Berhad v. Voo Kee Chang & Anor*** [1994] 1 LNS 18 echoed a similar view following the old case of ***Sparling v.***

Brereton [1899] LR 2 Eq 6. Therefore, all the issues pertaining to partnership law that were addressed by the appellant are irrelevant.

16. The Supreme Court of Uganda in **Syed Huq v the Islamic University in Kampala** (Supreme Court Civil Appeal No. 47 of 1995) [1997] UGSC 3, Wambuzi C.J, citing the above passage of Sir W. Page Wood VC in **Sparling**, said (underlining mine) expressed the view that to deem as illegal documents prepared by an advocate without a practicing certificate could amount to a *"denial of justice to an innocent litigant"*:

> The above statement appears still to be the law in England. See paragraphs 57 and 353 of Halsbury's Laws of England, 4th edition at pages 38 and 266 respectively. See ***Richards vs. Bostock*** (1914) 31 T.L.R. 70. In ***Richards vs. Bostock*** (1914) 31 L.T.R. reported at page 43, Vol. 43, English And Empire Digest during the trial it appeared that the plaintiff's Solicitor held a Country certificate only, although his address on the writ was given as "Lombard Stree, E.C., "the judge though, holding that the Solicitor, was committing an offence, declined to dismiss the action, but ordered the case to stand over so that the plaintiff, might be able to consult another Solicitor".
>
> Mr. Justice Tinyinondi followed the reasoning of Page Wood, V.C., at page 8 of his ruling in High Court Election Petition No. 19 of 1996 (***Jesse Gulyetonda vs. Henry Muganwa Kajura and two others***. (Unreported) although he struck out the petition on other grounds.
>
> Solicitors in England draft and sign pleadings in much the same way advocates do so in this Country. The authorities I have just referred to are not binding on me, but I find the reasons therein sound and I would adopt the same reasoning.
>
> I think that deeming as illegal documents prepared by an advocate without practising certificate amounts to a denial of justice to an innocent litigant who innocently engages the services of such an advocate. A litigant would hardly inquire from an advocate if the particular advocate has a valid certificate. This is the business of the Courts and the Law Council. To say that litigants who engage advocates without practising certificate do so at their peril is harsh because the majority of our people would not know which advocate i.e. not entitled to practice. (my emphasis)
>
> We have not in this appeal benefitted from arguments of advocates as regards the Court of Appeal decision in ***Bakunda Darlington vs. Dr. Kinyatta Stanley & F. Ntaho*** (C.A. Civil Appeal No. 27 of 1996 (unreported). In that case the trial judge struck out an election petition on the technical ground that the petition was supported by an incompetent affidavit since the affidavit had been sworn before a Commissioner for Oaths who did not have a valid practicing certificate as an advocate. The Court of Appeal relied on cases decided by this Court for the view that any pleadings signed by an advocate without a valid Practicing Certificate are invalid: These cases are ***Olwora vs. Uganda Central Co—operative Union Ltd.*** — Civil Appeal No. 25 of 1992 (unreported) and Kabogere Coffee Factory Vs. Hajji Twahibu Kegongo — Supreme Court Civil Application No. 10 of *1993* (unreported). I think that these two cases are distinguishable. The Court of Appeal further relied on the Makula International vs. Cardinal Nsubuga (1982) H.C.B. 11 for the

view that a Court cannot condone illegality. The Olwara case and Kabogere case did not in fact specifically determine the issue I am discussing now.

.....

.....

I think that the Court would be guilty of condonation of illegality if it allowed an advocate who does not possess valid practicing certificate to recover his costs through Court.

I think, therefore, that documents drawn by an advocate without a practicing certificate should not be regarded as illegal and invalid simply because the advocate had no valid practicing certificate when he drew or signed such documents.

In my opinion Article 126(2) (e) of the Constitution would be infringed if a Pleading is declared invalid because it was signed by an advocate who does not possess a valid practicing certificate.

17. **Tsekooko, J.S.C**, sitting also in the above case emphasizes that the intention of the legislature regulating the practice and conduct of solicitors is *"to punish an errant advocate"* by *"denying him remuneration or having him prosecuted"* and not to *"penalize an innocent litigant"*.

The above provisions do not declare invalid pleadings **signed** by an advocate who has no practising certificate. And by Section 63(1)

> "Any person other than an advocate who shall either directly or indirectly act as an advocate or agent for suitors, or as such sue out any summons or other process, or commence, carry on or defend any suit or other proceedings, in any court, unless authorized so to do by any law, shall be guilty of an offence.

Section 63(1) does not declare illegal any summons or other process issued in contravention of the Section.

By Section 68

> "No costs shall be recoverable in any suit, proceeding Or matter by any person in respect of anything done, the doing of which constitutes an offence under the provisions of this Act, whether or not any prosecution has been instituted in respect of such offence".

Here an advocate who contravenes the provisions of the Advocates' Act is prevented from recovering his costs.

It appears to me that the provisions of the Advocates' Act do not render in valid pleadings drawn or prepared by an advocate who has no valid practising certificate by the fact that he had no practising certificate.

The intention of the legislature appears to be aimed at punishing the errant advocate by denying him remuneration or having him prosecuted. I find nothing in the Provisions I have referred to which penalize an innocent litigant. That is why the Court would deny audience to an advocate without a practising certificate but should allow a litigant the opportunity to conduct his case or engage another advocate.

I am buttressed in this conclusion by the English decision of **Sparling vs. Brereton** (1866) L.R. 2 Eq 64. In that case a plaintiff instituted a case. A.B. a Solicitor for the defendant

entered appearance and filed other subsequent pleadings. Thereafter there was a Chamber "application on the part of the plaintiff that appearance entered in this cause, and all subsequent proceedings by A.B., might be set aside, on the ground that at the time when the appearance was entered the said A.B. had not taken out an annual certificate entitling him to practise as Solicitor of (the Court)". Because I find this decision of considerable persuasive value, I shall set out its facts in some detail.

The name of A.B. appeared in the 'Law list" for *1865,* and between the 15th of November and the 16th of December 1865, he bespoke his annual certificate at the Law Institute for practising as an Attorney and. Solicitor.

By (English Statutes) 23 & 24 Vict 127, S. 22, every certificate issued between the 15th of November and 16th of December in any year shall bear date and take effect for a11 purposes from the 16th of November provided it be stamped before the 16th of December. If not stamped before the 16th December, it shall take effect, as regards the qualification to practise on the day on which it is stamped. All certificates continue in force until 13th November next following and the "Law List" shall, until the contrary be made to appear, be evidence in all the Courts that the persons named therein as Attorneys & C., holding such certificates. A.B. did not get his certificate stamped until the 30th of December 1865. The appearance which was now sought to be set aside was entered by him on the 7th of December 1865. The application to set the appearance aside was taken out on the 22nd of January 1866.

Sir W. Page Wood, V.C., made his ruling in the following words (at page 67) —

> "The cases at common law seem to show that although great difficulties are thrown in the way of any recovery of his costs by a Solicitor who acts for a client without being duly qualified, the proceedings themselves are not void. It would be most mischievous, indeed, if persons, without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualification of their Solicitor. As against third parties the acts of such a person acting as a Solicitor are valid and binding upon the client on whose behalf they are done. A client who might ascertain by inquiry that his Solicitor was on the roll, would have no means of finding out if his certificate was taken out and stamped at the proper time. I do not, therefore, think myself justified in interfering, because, at the time when the appearance which it is sought to vacate was entered, the Solicitor had no certificate. The result of the authorities is thus stated by Erle, J., in Holgate vs. Slight 21 L.J. (Q.B.) 74 :— "It seems to me, therefore, that an attorney, though uncertificated, may do acts in his capacity of attorney, but that the result will be that be will, in such case, lose his fees."

The learned Vice—Chancellor concluded —

> "I should be injuring both plaintiffs and defendants if I were to hold that the absence of a certificate bad the effect of invalidating all proceedings taken in the suit".

The above statement appears still 5 be the law in England. See paragraphs 57 and 353 of Halsbury's Laws of England, 4th edition at pages 38 and 266 respectively. See Richards vs. Boatock (1914) 31 T.L.R. 70. In Richards vs. Botock (1914) 31 L.T.R. reported at page 43, Vol. 43, English And Empire Digest during the trial it appeared that the plaintiff's Solicitor held a Country certificate Only, although his address on the writ was given as

"Lombard Stree, E.C., "the judge though, holding that the Solicitor, was committing an offence, declined to dismiss the action, but ordered the case to stand over so that the plaintiff, might be able to consult another Solicitor".

18. In **Re Wallis** (1914) 98 Tasmanian Law Reports, an English Solicitor who held a Master of Arts of the University of Cambridge and had been admitted as a solicitor of the Supreme Court in England in 1896 and practised there until he left England, in 1904, for New Zealand and then to Tasmania, and who had not practised since he left England, was applying to be admitted without examination as a practitioner of the Supreme Court of Tasmania. The Law Society had objected to the application on the ground that, under section 16, only a solicitor admitted and entitled to practice in England may be admitted in Tasmania without examination. Since the applicant has not taken out the annual certificate required by the English Solicitors Act since he left England, he is therefore not entitled to practise in Tasmania.

19. The applicant, citing **Sparling v. Brereton** (supra), argued that the annual certificate is not a qualification to practise but is merely a method of taxation analogous to a trade-license. Nicholls CJ opined thus:

.... Possession of the annual certificate is not a qualification, and any solicitor can obtain it on paying a fee, if there is nothing to his discredit in the records of the Law Society.

THE LEGAL PRACTITIONER'S DECREE – FIJI

20. Section 52 of the Legal Practitioners Decree 2009 states as follows:

Practising Without a Certificate

52 – (1) A person shall not, unless that person is the holder of a current practicing certificate –

(a) practice or act as a legal practitioner of the Fiji Islands or as Notary Public;

(b) pretend to be entitled to practice as a legal practitioner of the Fiji Islands or as a Notary Public; or

(c) draw or prepare any instrument relating to any real or personal estate or property or any legal proceeding or grant of probate or letters of administration, whether as agent for any person or otherwise, unless he or she proves that the act was not done for or in expectation of fee, gain or reward either direct or indirect.

(2) A person who fails to comply with a provision of this Section shall be guilty of an offence and shall be liable to a fine not exceeding $5,000 and for a second or subsequent offence, to imprisonment for any period not exceeding one year in addition to or in substitution for such fine.

(3) This section shall not apply to –

(a) any public officer who draws or prepares instruments in the performance of such office or performs any powers, functions and duties which he or she is empowered to perform under the provisions of any Decree; or
(b) any person who merely types or engrosses any instrument or process.
(4) No person who breaches any of the provisions of subsection (1) of this Section shall be entitled to recover any fee, reward or disbursement arising out of or relating to any act or proceeding in breach of that subsection.

21. Section 53 of the Decree provides as follows:

Acting as agent for unqualified persons

53 – Save with the consent of the Registrar, no practitioner shall knowingly act as agent for any person not the holder of a current practicing certificate in the performance of any act which may only be lawfully performed by the holder of a current practicing certificate, nor shall that practitioner allow his or her name to be made use of by any person other than the holder of a current practicing certificate in respect of the performance of such an act. A practitioner who contravenes this Section shall be guilty of professional misconduct.

22. I observe that section 52(2) of the Legal Practitioners Decree (Fiji) seems consistent with the position at common law. It seems to suggest that a person without a current practicing certificate may draw or prepare an instrument relating to any real or personal estate or property or any legal proceeding or grant of probate or letters of administration, whether as agent for any person or otherwise without any expectation of fee, gain or reward either direct or indirect.

23. Sections 52 and 53 of the Legal Practitioners Decree 2009 merely create the disciplinary offence of engaging in any of the legal work mentioned therein without a valid Practicing Certificate or acting as agent for any solicitor without such a valid Practicing Certificate.

24. There is nothing in the Decree that says that any document prepared by a practitioner who does not have a valid Practicing Certificate is an illegal document and therefore void. Obviously, the intention of the Decree is to punish the errant advocate by denying him remuneration or having him prosecuted. In the absence of any express provision in the Decree which renders illegal any document prepared by an errant solicitor, I am loath to read that provision into the Decree for fear of the potential grave mischief it

might cause in denying justice to an innocent litigant and to innocent third parties.

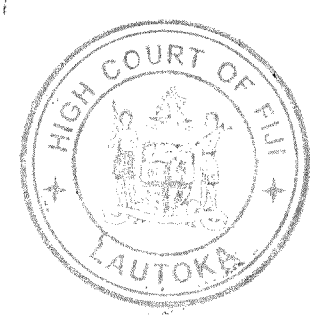
COMMENT

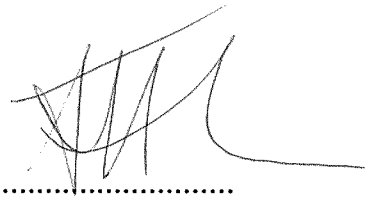
25. Ideally, any solicitor from another jurisdiction with a TAC to practice in Fiji should, as a matter of common courtesy, either before, or, at first appearance, furnish the court either the original or a Certified True Copy of their TAC. This should have been clear to Mr. Caitlin. I regret my decision to give Mr. Catlin the benefit of the doubt at first appearance. Mr. Catlin should also be reminded that, as I am sure is the case in the jurisdiction he comes from, that writing directly to a judge is most inappropriate. Instead, he should have communicated through the office of the Deputy Registrar. Furthermore, Mr. Catlin's explanation in his letter of apology that **"I had been led to believe by our Fiji Solicitors that I had a general admission to practice"** and **"I was not aware of this when I addressed you and it was not my intention to mislead the court"** is ludicrous – coming from a lawyer.

26. At the end of the day, I must remain guarded of the interests of his clients in this matter as the cases cited above would urge me to do.

ORDERS

27. I dismiss the application of the defendants to strike out the writ of summons and statement of claim for reasons I state above. Costs to the plaintiff which I summarily assess at $1,000-00 (one thousand dollars only). Case adjourned to **Wednesday 26 November 2014** for mention.





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Anare Tuilevuka

JUDGE

Lautoka High Court

13 November 2014.