IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

NO. 009/2009
NO. 010/2009

BETWEEN: **CHIEF REGISGTRAR** ***Applicant***

A N D: **IQBAL KHAN**
IQBAL KHAN & ASSOCIATES ***Respondent***

Applicant: **Ms V. Lidise**
Respondent: **Mr S. D Sahu Khan for Mr Iqbal Khan**

Date of Hearing: **21 June 2010**
Date of Ruling: **21 June 2010**

EXTEMPORE RULING
ON NOTICE OF MOTION TO DISQUALIFY FOR BIAS

1. By Notice of Motion filed on the 17th of June 2010 the Respondent seeks the following orders:

i. *"That the Commissioner Mr John Connors to be disqualified or he himself recuses from hearing complaints referenced No 009/09 and 010/09.*
ii. *That another Commissioner be appointed to hear the complaints against the Respondent."*

2. The Respondent seeks to rely on his affidavit sworn on the 16th of June 2010.

3. On the 11th December 2009 the Respondent made an oral application to the Commission seeking the same orders.

4. That application was supported by written submissions which are annexed to the Respondent's affidavit of the 16th June 2010 and are again relied on.

5. On the 3rd February 2010 the Commission delivered a ruling dismissing the application of the 11th December 2009.

6. The substance of the Respondent's applications are that he commenced proceedings against me and against my wife (then Resident Magistrate Lisa Gowing) in 2005/2006 and subsequentlyl discontinued those proceedings.

7. No appeal has been lodged with respect to the ruling of 3rd February 2010.

8. The Respondent also relies of the ruling of the Commission of the 28th April 2010 vacating allocated hearing dates upon payment of costs; no appeal has been lodged with respect to that ruling.

9. All other matters relied on by the Respondent are matters integral to the rulings already delivered.

10. The Respondent attests that he has come upon further relevant information as a result of an inspection of his personal file at the office of the Fiji Law Society.

11. There is nothing to suggest in the evidence placed before the Commission that any of the material now relied on came into existence after the ruling of 3rd February 2010 apart from that contained in the ruling of the 28th April 2010. None is there any evidence that it would be unreasonable for the material to have been obtained and placed before the Commission in the earlier application.

12. In any event the letter of the 25th April 2006 written by me to the President of the Fiji Law Society, which the Respondent seeks to rely on, was a complaint about the Fiji Law Society.

13. In the interest of completeness I set forth the President's reply of the 3rd of May 2006

"Thank you for your letter of 25 April, 2006. I am aware that Mr Iqbal Khan has commenced proceedings against yourself and your wife. I understand your disappointment about what you perceive to a lack of support from the Law Society with regard to the raft of law suits that you and Ms Gowing have had to

face from a Lautoka lawyer. Regrettably the reality is that we are not able to offer practical assistance at this time.

I appreciate your frank views. I also concede that the Law Society has not adequately dealt with matters it is charged under statute with addressing, including lawyer discipline. For your information I have "inherited" at least 80 complaints from my predecessors. Other problem areas include commenting on draft bills, member services, mentoring of younger practitioners and so on.

As you may know, the Law Society is staffed by an administrator, an accounts clerk and a messenger. Our staffing situation is likely to worsen with the imminent departure of the most efficient Secretary we have had in a long time. It would not surprise me that she is leaving because she is burnt out. The part time Council of the Law Society is comprised of fulltime practitioners. As President I accept full responsibility for any shortcomings of the Council and the Society.

At the moment 5 disciplinary committees are sitting and at different stages of hearing. I have found from experience that unfortunately the committee system has not been working as effectively as it should. These cases are taking far too long to dispose of.

I take your point that Continuing Legal Education (CLE) is a core function of the Law Society. However under section 4 of the Legal Practitioners Act it is the Board of Legal Education (BLE) that is responsible for the provision of CLE's. I have time and again urged the Board which is chaired by the former Chief Justice, Sir Timoci Tuivaga to take more proactive steps to administer this program. We have done all within our means to support the BLE.

Unfortunately the Law Society suffers huge constrains in resources which have a real impact on its ability to deliver. Over the last several years we have received very little or next to nothing at all from lawyers trust accounts as envisaged by the Trust Accounts Act. We are working with AusAid to explore the possibility of donor support in building institutional capacity.

I am sorry that at you consider the Law Society's forthcoming conference to be a facade for the benefit of the international community. I respectfully disagree. Under the leadership of Nehla Basawaiya the conference committee has worked hard to assemble an interesting list of speakers. Despite repeated requests to practitioners, there was little response to our invitation to have greater local input in the convention.

Presently the files pertaining to the practitioner that you mentioned are under review and the Society expects to deal with this matter more decisively in the near future."

ABUSE OF PROCESS

14. The High Court of Australia in *Jeffery & Katauskas Pty Limited and SST Consulting Pty Ltd & Ors* [2009] HCA 43 said at paragraph 27:

"An early statement of the power of any court to prevent abuse of its processes is found in an 1841 case, Cocker v Tempest(1841) 7 M & W 502 at 503-504: "The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice."

That statement foreshadowed the contemporary approach in the United Kingdom and Australia which takes no narrow view of what can constitute "Abuse of Process". Never the less certain categories of conduct attracting the intervention of courts emerged in the 19th and 20th centuries and included:

"(a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

(b) proceedings where the process of the court is not being fairly or honestly used but it employed for some ulterior or improper purpose or in an improper way;

(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression."

15. The court went on at paragraph 28 to say:

"The term "abuse of process", as used in Australia today, is not limited by the categories mentioned above or those which constitute the tort. It has been said repeatedly in the judgments of this Court that the categories of abuse of process are not closed. In Walton v Gardiner ((1993) 177 CLR 378 at 393) the majority adopted the observation in Hunter v Chief Constable of the West Midlands Police ([1982] AC 529 T 536) that courts have an inherent power to prevent misuse of their procedures in a way which, although not inconsistent with the literal application of procedural rules of court, would nevertheless be "manifestly unfair to a party to litigation... or would otherwise bring the administration of justice into disrepute among right-thinking people." This does not mean that abuse of process is a term at large or without meaning. Nor does it mean that any conduct of a

party or non-party in relation to judicial proceedings is an abuse of process if it can be characterized as in some sense unfair to a party. It is clear, however, that abuse of process extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment".- Batistatos (2006) 226 CLR 256 at 267.

16. At paragraph 56 the court went on to consider the general principles applicable to abuse of process and said :

"In Hunter v Chief Constable of the West Midlands Police Lord Diplock said that the court had inherent power "to prevent misuse of its procedure in a way which, although not inconsisted with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people." That statement has been approved in this Court by Mason CJ, Deane and Dawson JJ as stating the law "correctly". They also said that abuse of process arises in "all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness." They quoted certain statements by Richardson J pointing to two aspects of the public interest. One was that the "public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly". The second aspect of the public interest lay "in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice." Abuse of process "extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment." There is a "general principle empowering a court to dismiss or stay proceedings which are ... an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case." A stay or dismissal prevents abuse of process: "the counterpart of a court's power to prevent its processes being abused is its power to protect the integrity of those processes once set in motion."

17. In paragraph 57 the court went on and said :

"The power of a court to deal with abuse of its process is one aspect of its more general power to control its own process. The exercise of the power to deal with abuse of process "is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands." Further, the power to control abuse of process by granting a permanent stay "should be seen as a power which is exercisable if the administration of justice so demands, and not one the exercise of which depends on any nice distinction between notions of unfairness or injustice, on the one hand, and abuse of process, on the other hand."

18. And finally at paragraph 58 the court said :
"Words like "unfair", "unjust", "oppressive", "seriously and unfairly burdensome, prejudicial or damaging", "productive of serious and unjustified trouble and harassment" and "bring the administration of justice into disrepute among right-thinking people" are not words of exact meaning. Nor are the words "abuse of process" themselves. That notion is not "very precise". Hence it is not surprising that, as Lord Diplock said, "the circumstances in which abuse of process can arise are very varied". What amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues".

19. The New South Wales Court of Appeal in *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 considered abuse of process and said in paragraph 80:

"A decision to stay or dismiss proceedings on the basis that they are an abuse of process involves the exercise of discretion in the sense that "although there are some clear categories, 'the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse'". Accordingly "as with discretionary decisions, properly so called, appellate review of its exercise looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration, Batistatos."

ANSHUN ESTOPPEL

20. The principle commonly referred to as *Anshun* estoppel, established in *Henderson v Henderson* (1843) 3 Hare 100, involves an extended doctrine of res judicata. It operates *"not only [in respect of] points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".- Port of Melbourne Authority v Anshun 147 CLR 589.*

21. In *Port of Melbourne Authority v Anshun Pty Ltd* at page 602 the court confirmed that the test is one of reasonableness.

22. The court in *Habib* said in paragraph 82:

"Thus Anshun estoppel introduces "an evaluative element based upon what a litigant could reasonably have been expected to do in earlier proceedings"; it is "allied to, but not co-extensive with, res judicata and issue estoppels".

23. In *Anshun* the High Court of Australia said at paragraph 38

"It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment."

24. Clearly if the Respondent is successful in his Notice of Motion filed on the 16th June 2010 there will be a ruling in conflict with the ruling of this Commission of the 3rd February 2010.

25. I find, therefore that the Notice of Motion is an abuse of process and is accordingly dismissed.

ORDER

The Notice of Motion is dismissed.

INDEPENDENT LEGAL SERVICES COMMISSION SEAL

JOHN CONNORS
COMMISSIONER

21 JUNE 2010