

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

No. 004 of 2015

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

DORSAMI NAIDU

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Counsel for the Applicant: Ms V. Prasad

Respondent: In Person

Date of Hearing: 8th February 2017

Date of Judgment: 15th February 2017

RULING ON VALIDITY OF CHARGE AGAINST RESPONDENT

1. The Issue

[1] This is a Ruling to clarify whether an allegation against a legal practitioner filed, not as the result of a complaint from a member of the public, but by the Chief Registrar of his own volition, should proceed to a final defended hearing. The legal practitioner had acted for five siblings in the preparation of a Deed that replaced the original trustee (with his consent) with two of his siblings. The legal practitioner then instituted legal proceedings to give effect to the terms of the Deed whereby the sole trustee was formally replaced by the two new trustees. The Applicant alleges that this is professional misconduct arising out of a conflict of interest in so instituting the legal proceedings. The Respondent legal practitioner alleges that there was no conflict of interest and, hence, no need for a final hearing as all the parties had agreed to the course of action.

2. The Count

[2] On 25th September 2015, an Application was filed by the Chief Registrar setting out nine allegations of professional misconduct against the Respondent. The

matter was first called on 21st October 2015, before the previous Commissioner, Justice P.K. Madigan, and adjourned whilst the Respondent legal practitioner sought further and better particulars from the Chief Registrar. The Respondent filed submissions in support of having the matter struck out and, whilst that was pending, the parties discussed various matters resulting in Counts 4 and 5 being withdrawn on 6th June 2016. The parties also sought by consent that a Ruling be stayed until after the outcome of the appeal to the Court of Appeal by the Chief Registrar in relation to the Commission's judgment in *Chief Registrar v Narayan* (Unreported, ILSC Case No. 009 of 2013; Paclii: [2014] FJILSC 6, <<http://www.paclii.org/fj/cases/FJILSC/2014/6.html>>). Eventually, as the issues narrowed, the parties agreed to proceed in obtaining a Ruling, written submissions were filed by Counsel for the Applicant, as well as a formal application filed by the Respondent to have the matter struck out. The matter was eventually heard before me on 8th February 2017. **At the commencement of the hearing, Counts 1, 3, 6 and 7 were withdrawn and discontinued and Orders made to that effect. I note that no such formal Orders were made previously on 6th June 2015 in relation to Counts 4 and 5 being withdrawn and discontinued and I shall make formal Orders to that effect at the end of this judgment.**

[3] This has then left me to rule upon the validity of Count 2. It states as follows:

Count 2

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

PARTICULARS

Dorsami Naidu, a Legal Practitioner being the sole proprietor of Pillai, Naidu & Associates, having acted for Rajesh Kumar Sami Pillay, Parwati, Ranga Nandan Sami Pillay, Michael Scott and Permal Sami Pillay for the preparation of the Deed of Appointment of Trustee dated 15 June 2005 and having had prepared the Deed of Appointment of Trustee dated 15 June 2005; thereafter instituted High Court Civil Action No. HBC 12 of 2006 (Lautoka) against Rajesh Kumar Sami Pillay on behalf of Parawati and Ranga Nandan Sami Pillay, the purpose of the litigation being the execution of the terms of Deed of Appointment of Trustee dated 15 June 2013, 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 2009.

3. Background

[4] The details that I will now summarise as to the background in this matter I have gleaned from reading the 125 pages of documents annexed to the original *Application* filed by the Applicant with the Commission on 25th September 2015. I apologise to any person I may inadvertently offend in setting out this short family history including the spelling of their names as some names have been given a number of different spellings in the various documents.

[5] On 27th November 1990, Krishna Sami Pillay died in Lautoka Hospital. He had had three partners (two wives by formal marriage and one partner whereby he had lived with her in a long term de facto relationship).

(„Death Certificate of Krishna Sami Pillay“, *Application*, filed 25th September 2016, doc.7, p.27; and „Statement of Michael Scott dated 15 April 2015“, doc.5, pp.20-24.)

[6] Krishna Sami Pillay’s first partner was by formal marriage. She died in 1961. As I have understood the documents, they had three children, two sons and a daughter:

(1) Michael Scott (a son born 13th January 1952, and I stand to be corrected, but from what I can glean from the documents, he was formerly known as Ponsami Pillay);

(2) Permal Sami Pillay (a son born 19th September 1953); and

(3) Pavathi Goundar (a daughter whose exact details were not provided in the documentation filed by the Chief Registrar with this *Application*, although I note a witness statement completed by her on 15th April 2015 stated that she was then 62 years of age and she is also referred to in most documents as “Parwati”).

(„Statement of Michael Scott dated 15 April 2015“, *Application*, filed 25th September 2016, doc.5, pp.20-24; „Statement of Permal Sami Pillay dated 15 April 2015“, doc.15, pp.120-121; and „Statement of Parvathi dated 15 April 2015“, doc.18, pp.128-129.)

[7] Michael Scott has lived in Canada since 1987. He was the originator of the initial complaint against the Respondent legal practitioner concerning the fact that one of the properties of Michael Scott’s father’s had been transferred without his consent. The Respondent legal practitioner had lodged a caveat specifically to guard against such a situation eventuating. I will come back to

the “caveat complaint” shortly.

(„Statement of Michael Scott dated 15 April 2015“, *Application*, filed 25th September 2016, doc.5, pp.20-24.)

- [8] Krishna Sami Pillay’s second partner was named Govindamma. They lived together in a de facto relationship for approximately 13 years. They had three children: Daya Wati, Ram Sami and Sara Wati.

(„Death Certificate of Krishna Sami Pillay“, *Application*, filed 25th September 2016, doc.7, p.27.)

- [9] Krishna Sami Pillay’s third partner was named Muniamma (Naidu) and they married on 13th January 1973. They had four children:

(1) **Rajesh** Kumar Sami Pillay (a son born on 27th October 1973);

(2) Dawandren Mani Pillay (a daughter born on 20th January 1978);

(3) **Ranga** Nadan Sami Pillay (a son born on 31st July 1979).

(4) Yashoda Mani Pillay (a daughter born on 8th March 1983);

(Annexures B, C, D and E to „Duplicate Court file – Parwati & Ranga Nadan Sami Pillay v Rajesh Kumar Sami Pillay, High Court Civil Action No. HBC 12 of 2006“, *Application*, filed 25th September 2016, doc.14, pp.90-97.)

- [10] Upon his death, Krishna Sami Pillay, had two properties, one being 14 acres of farming land and the other being a housing block of approximately 1.4 acres of native title.

- [11] By his „Last Will and Testament“ dated **5th March 1990**, Krishna Sami Pillay appointed Ral Sundram and Permal Sami Pillay (one of his sons by his first wife) to be the Executors and Trustees of his Estate. He made provision for the education of three younger children from his marriage to his third partner, Muniamma Naidu: Ranga Nadan Pillay, Dewa Mani Pillay, and Yasodamani Pillay. Thereafter, his estate was to be divided amongst his four sons Michael Scott (formerly known as Ponsami Pillay), Permal Sami Pillay, Rajesh Kumar Pillay and Ranga Nadan Pillay.

- [12] Just over a month later, by his „Last Will and Testament“ dated **26th April 1990**, Krishna Sami Pillay appointed Muniamma Naidu to be the Executor and Trustee of his Estate. In that Will, he made provision for the education of his four children from his marriage to his third wife, Muniamma Naidu:

Ranganadan Pillay, Kumar Sami Pillay, Dewandrin Mani Pillay, and Yasoda Pillay. He also granted a life tenancy to his third wife, Muniamma Naidu, and thereafter the residue of his Estate to his two sons from his marriage to Muniamma Naidu: Ranganadan Pillay and (Rajesh) Kumar Sami Pillay in equal shares.

- [13] On 4th June 1991, probate was granted in the Estate of Krishna Sami Pillay to Muniamma Naidu also known as Muniamma.

(Certificate of Probate, Supreme Court of Fiji, Probate Jurisdiction, Annexure “A” to „Duplicate Court file – Parwati & Ranga Nadan Sami Pillay v Rajesh Kumar Sami Pillay, High Court Civil Action No. HBC 12 of 2006, *Application*, filed 25th September 2016, doc.14, pp.87.)

- [14] On 18th March 1998, Muniamma Naidu, Krishna Sami Pillay’s third wife, died intestate (that is, without leaving a Will).

(„Certificate of Death”, Muniamma, Annexure F to „Duplicate Court file – Parwati & ranga Nadan Sami Pillay v Rajesh Kumar Sami Pillay, High Court Civil Action No. HBC 12 of 2006, *Application*, filed 25th September 2016, doc.14, pp.99.)

- [15] On 26th January 1999, **Rajesh** Kumar Sami Pillay obtained a grant of Letters of Administration of Muniamma’s estate.

- [16] Also, Muniamma had left unadministered upon her death the whole of the estate of her late husband, Krishna Sami Pillay. It was not until 16th July 2010, some 12 years after her death, that **Ranga** Nadan Swami Pillay (also known as Ranganadan Pillay) applied to be the Administrator of the Estate of Krishna Sami Pillay. On 1st November 2010, *Letters of Administration de bonis with Will* were granted to **Ranga** Nadan Swami Pillay also known as Ranganadan Pillay. That is, as the assets remained in the Estate of Krishna Sami Pillay following the death of Muniamma (who had previously been granted probate of his Estate), a second administrator was appointed to distribute the assets of Krishna Sami Pillay’s estate now that Muniamma was deceased.

(„Duplicate Court file – Parwati & Ranga Nadan Sami Pillay v Rajesh Kumar Sami Pillay, High Court Civil Action No. HBC 12 of 2006”, *Application*, filed 25th September 2016, doc.14, „Letters of Administration de bonis with Will”, p.79.)

- [17] Meanwhile, some five years previously, on 15th June 2005, a **Deed of**

Appointment of Trustee was made in relation to the Estate of Muniamma Naidu whereby Parwati (Goundar) and **Ranga** Nadan Sami Pillay (a son) **replaced Rajesh** Kumar Sami Pillay **as trustees of the Estate of Muniamma**.

The Deed was between:

- (1) **Rajesh** Kumar Sami Pillay (as Administrator of the Estate of Muniamma);
- (2) **Parwati** (Goundar) and **Ranga** Nadan Sami Pillay; and
- (3) **Michael Scott, Permal** Sami Pillay (the two sons of Krishna Sami Pillay by his first wife) and **Rajesh** Kumar Pillay **and Ranga** Nadan Sami Pillay (the two sons of Krishna Sami Pillay by his third wife, Muniamma Naidu).

(„Deed of Appointment of Trustee dated 15 June 2005“, *Application*, filed 25th September 2016, doc.9, pp.30-32.)

[18] The above Deed of Appointment of Trustee stated in the recitals that:

*„... **the said Administrator, Trustees and beneficiaries have mutually agreed** and have appointed the said PARAWATI and RANGA NADAN SAMI PILLAY as the trustees ... „*

[My emphasis]

[19] **On 23rd January 2006, an Originating Summons was filed in the High Court at Lautoka** returnable on 24th February 2006 **seeking that Rajesh Kumar Sami Pillay „beremoved as Administrator“ and the plaintiffs, Parwati and Ranga Nadan Sami Pillay, „be appointed to continue as Administrators“.** **Those proceedings later became the basis of Count 2** being laid against the Respondent legal practitioner in the present disciplinary proceedings before this Commission. That is, it is alleged that the Respondent legal practitioner, by instituting such proceedings against the original trustee, was allegedly in a conflict of interest.

(„Duplicate Court file – Parwati & Ranga Nadan Sami Pillay v Rajesh Kumar Sami Pillay, High Court Civil Action No. HBC 12 of 2006“, *Application*, filed 25th September 2016, doc.14, „Originating Summons“, pp.74-76.)

[20] Meanwhile, approximately four and half years later, **on 12th July 2010, a caveat** was lodged by the Respondent legal practitioner, on behalf of **Permal Sami Pillay** (a son of Krishna Sami Pillay by his first wife), **in relation to a cane farm that was part of the Estate of Krishna Sami Pillay.**

[21] **On 18th April 2011,** pursuant to *Letters of Administration de bonis with Will*, a

Native Title Lease that had formed part of the Estate of Krishna Sami Pillay (on which Muniamma, his third wife, had been given a life tenancy pursuant to his Will dated 26th April 1990), **was now transferred to Ranga Nadan** (also know as Ranganadan) Sami Pillay **and (Rajesh)** Kumar Pillay (the two sons of Krishna Sami Pillay by his third wife, Muniamma Naidu).

(„Duplicate Court file – Parwati & Ranga Nadan Sami Pillay v Rajesh Kumar Sami Pillay, High Court Civil Action No. HBC 12 of 2006“, *Application*, filed 25th September 2016, doc.14, „Transfer of native Title Lease“, p.116)

[22] Just over two years later, **on 19th July 2013**, the Respondent legal practitioner wrote to Messrs Babu Singh & Associates noting that:

(1) The Respondent legal practitioner acted on behalf of Permal Sami Pillay, one of the beneficiaries of the Estate of Krishna Sami Pillay;

(2) The Respondent legal practitioner had lodged a caveat on 12th July 2010 over one of the properties from the Estate of Krishna Sami Pillay;

(3) Despite the caveat having been lodged, the property was later transferred in favour of two other beneficiaries without Permal Sami Pillay’s consent;

(4) **Permal Sami Pillay had now lodged a complaint with the Chief Registrar against the Respondent legal practitioner for not enforcing the caveat;**

(5) Therefore, the Respondent legal practitioner sought a response as to „*whether consent of our client as beneficiary was obtained*“.

[22] Also on 19th July 2013, the Respondent legal practitioner wrote to the High Court of Fiji, Probate Office, seeking „*informatiøn on what circumstances the Probate ... was granted and whether our client PERMAL SAMI PILLAY had executed withdrawal of the caveat filed by him*“.

[23] On 2nd August 2013, the High Court Probate Office replied to the Respondent legal practitioner in relation to the „*Estate of Krishna Sami Pillay – L/A DBN Will 50190*“ that:

(1) „*The above application number 50910 was filed on 19th July 2010 and was granted on 01st November 2010*“;

(2) „*There was a Caveat number 21/10 dated 12th July 2010, filed on 13th July 2010*“;

(3) „***Probate number 26805 was already granted on 04th June 1991 where no***

Caveat was registered at that time”;

(4) „Letters of Administration [de Bonis with] Will number 50910 was granted to one of the beneficiaries namely Rananadan Pillay on Will dated 26th April 1990.“

[24] This means that:

(1) **Probate had been granted on 4th June 1991 in relation to the Estate of Krishna Sami Pillay on the second and last Will of Krishna Sami Pillay dated 26th April 1990**, whereby Muniamma Naidu was appointed the Executor and Trustee of his Estate;

(2) After Muniamma’s death on 18th March 1998, nothing further happened until **Ranga** Nadan Sami Pillay (one of the two sons of Krishna Sami Pillay by his third wife, Muniamma) applied on 16th July 2010 (as noted earlier) to be the Administrator of the Estate of Krishna Sami Pillay and on 1st November 2010 *Letters of Administration de Bonis non with Will* was granted.

[25] How this matter then came to be the subject of a complaint before the Chief Registrar was that **Michael Scott** (formerly known as Ponsami Pillay), **one of the children of Krishna Sami Pillay by his first wife, lodged on 24th June 2013, the initial complaint against Respondent legal practitioner to the Chief Registrar as to how the property (the cane farm from the Estate of Krishna Sami Pillay) had been transferred if a caveat had been correctly lodged by the Respondent legal practitioner.** The answer as to how probate was granted when a caveat had been lodged was explained in a letter dated 9th August 2013 sent by the Respondent legal practitioner in response to a request from the Chief Registrar. **As Mr Scott resides in Canada, his brother, Permal Sami Pillay, continued with the complaint from Fiji. Various issues arising from that complaint then formed the basis of some of the Counts originally filed in the Commission against the Respondent legal practitioner. Those Counts have subsequently been withdrawn.**

[26] The Chief Registrar, however, has continued proceedings before this Commission against the Respondent legal practitioner **alleging an issue of conflict of interest arising out of the administration of the Estate not of Krishna Sami Pillay but the Estate of Muniamma Naidu.** An allegation of a

conflict of interest has then formed the basis of Count 2 for which the Respondent legal practitioner has been charged under section 82(1)(a) of the *Legal Practitioners Decree 2009*.

[27] Section 82(1)(a) of the *Legal Practitioners Decree 2009* states:

'Professional Misconduct

82.—(1) For the purposes of this Decree, 'professional misconduct' includes –

(a) unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. [My emphasis]

[28] In short, the argument is quite simple. Having prepared on behalf of five siblings, a Deed of Appointment of Trustee of the Estate of Muniamma Naidu, dated 15th June 2005 (whereby one of those five siblings, Rajesh, was replaced as the sole trustee of the Estate of Muniamma Naidu, by two of the other four siblings, Parwati and Ranga Nandan), the Respondent legal practitioner should not have then instituted legal proceedings to give effect to that Deed as it was against the interests of Rajesh. Therefore, it is alleged that such conduct (of replacing the original sole trustee, Rajesh, with the two later trustees, Parwati and Ranga Nandan), amounted to a conflict as it was acting against the interests of the original trustee, Rajesh.

4. The Submissions

(1) The Respondent's submissions in support of his Application for Count 2 to be dismissed

[29] The Respondent legal practitioner's submissions, in summary, were as follows:

(1) For there to be a conflict of interest there has to be a fiduciary relationship using confidential or privileged information adverse to the interests of the party;

(2) In the present case, there was a Deed agreed to by all parties on 15th June 2005 (page 31 of *Application*). The terms of the Deed were then put into effect by the Originating Summons filed in the High Court at Lautoka (page 67 of *Application*) which states why the defendant (Rajesh) was being replaced as

trustee. The trustee who was to be replaced by two other trustees was notified (as per the Affidavit of Service on pages 49-50 of the *Application*). He was served with the Originating Summons including the Affidavit of Parwati and Ranga Nadan Sami Pillay set out the reasons for the new trustees and Rajesh chose not to appear or have someone appear on his behalf in the High Court at Lautoka when the Order was made on 24th February 2006 (page 46 of *Application*). He had no complaint. Indeed, in his Affidavit sworn on 8th September 2016, he confirms this to be the case;

(3) There was also no complaint by Michael Scott. His complaint was the unrelated matter about how he was not notified that a property was to be transferred when the Respondent legal practitioner was to have placed a caveat on the property.

(2) The Applicant's submissions in response

[30] Counsel for the Applicant submitted in response that:

- (1) She confirmed that she had received the affidavit of Mr Rajesh Pillay;
 - (2) She confirmed that she had received the statement of Michael Scott in relation to the withdrawal of the caveat issue;
 - (3) She was submitting, however, that this was still a complaint as to a conflict of interest and there is a public interest in pursuing the matter;
 - (4) The Chief Registrar has powers pursuant to section 100 of the *Legal Practitioners Decree 2009* to investigate even without a complaint having been lodged with him and this is what he has done here;
 - (5) Rajesh should be called and cross-examined as to the contents of his affidavit. In addition, the Applicant wants to call Michael Scott and the three other siblings as to the details of how the Respondent legal practitioner has acted for them and then instituted proceedings in the High Court to have Rajesh removed as a trustee. Hence, she submits, the matter should go to a defended hearing;
 - (6) She had cited in her written submissions (at paragraph 11) *Law Society v Nguyen* [2009] NSWADT 199, and specifically in her oral submissions noted paragraphs 76 and 77 therein
(see Austlii: <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2009/199.html>).
- I note that paragraph 76 stated:

*'76 xxxviii. In the view of the Tribunal, the duty of loyalty of the Respondent to her client, the mother, forms part of her obligation to avoid [a] conflict of interest. **The Tribunal regards the avoidance of acting against the interests of a client as a basic professional duty of a solicitor.** The client is entitled to expect that having had a solicitor act for him or her in a matter[,] that that same solicitor will not thereafter appear and act against the client, nor on behalf of an opponent with a contrary interest.'*

(7) She noted Rule 1.3 of the *Rules of Professional Conduct and Practice* which states:

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.**'*
[My emphasis]

(8) She stated that the alleged conflict here was that the Respondent legal practitioner had acted for all five parties and prepared a Deed of Appointment of Trustees and then later initiated High Court proceedings against one of the trustees, Rajesh Pillay, to have him removed as a trustee. Thus, the interest of Mr Pillay was not protected. He had been one of the trustees and a former client and the Respondent legal practitioner had then acted against his interest.

(9) She also questioned why there was the need to liaise with the witness, Rajesh, in order to confirm that there was a conflict, before issuing the current proceedings before the Commission. **In fact, when earlier questioned by me, as noted above, she had confirmed “our investigating officer wasn't able to locate Mr Pillay”.** Hence, why the Chief Registrar had issued the proceedings without first obtaining a complaint from Mr Pillay or clarifying with him what occurred.

(3) *The Respondent's submissions in reply*

[31] For completeness, I also note that there is also a discussion in *Nguyen* (to which my attention was not specifically drawn by Counsel for the Applicant in the oral submissions) as to the law in Australia, placing an obligation upon a legal practitioner to avoid a conflict of interest even where it is not a

„*confidential/privilege information situation*“. I further note that the Respondent legal practitioner in his written submissions, „*Respondents [sic] Response to Applicants [sic] Submissions filed on 20/1/2017*“, dated 1st February 2017, has submitted (page 1) that *Nguyen* was a case of „*actual conflict*“ and not „*perceived conflict*“ but also explaining (at page 2) that in the present case before me, „*the Respondent is not acting contrary to the interest[s] of the parties*“.

[32] As for the Respondent legal practitioner’s oral submissions in 8th February 2017, he initially took me to the four witness statements prepared by an investigative officer for the Applicant as follows:

(1) He first took me to the statement of Michael Scott dated 15th April 2015 recorded by Binesh Naidu of the Legal Practitioners Unit within the Office of the Chief Registrar, wherein Michael Scott has stated at page 3 (page 22 of the Application filed with the Commission on 25th September 2015) as to the change in trustee that occurred replacing Rajesh Kumar Sami Pillay with Parwati and Ranga Nadan Sami Pillay:

„Mr Rajesh Kumar Sami Pillay was also present and he also consent to this transfer of trustee. Later[,] we also instructed Mr Dorsami Naidu to be removed as Administrator through High Court Action (12/2006L)“.
[My emphasis]

(2) He then took me to the statement of Permal Sami Pillay dated 15th April 2015 recorded by Binesh Naidu of the Legal Practitioners Unit within the Office of the Chief Registrar, wherein Permal Sami Pillay has stated at page 2 (page 123 of the Application filed with the Commission on 25th September 2015) as to the change in trustee:

„He[,] Rajesh[,] informed all our family members that he can’t look after this land and wishes to withdraw from the trustee and the deed, made on 26/1/99. We all brothers went to the office of Mr Dorsami Naidu and changed the Administrator from Rajesh Kumar Sami Pillay to Parwati and Ranga Nadan Sami Pillay. This was done in High Court Lautoka ... Civil Action No 012 of 2006L dated 14th March, 2006.
[My emphasis]

(3) Next, he took me to the statement of Ranga Nadan Sami Pillay dated 15th April 2015 recorded by Binesh Naidu of the Legal Practitioners Unit within the Office of the Chief Registrar, wherein Ranga Nadan Sami Pillay has stated at

page 1 (page 126 of the *Application* filed with the Commission on 25th September 2015) as to the change in trustee:

„... I can easily recall after the death of my mother, Muniamma, I was 18yrs old and I recall my elder brother Rajesh Kumar Sami Pillay together with Michael Scott made a Deed of Appointment of Trustee to be Rajesh Kumar. In the year 2005 my brother Rajesh did not work in the farm and the family members decided to change the trustee. On 15th June 2005, a new Deed of Appointment of Trustee was made whereby my elder sister Parwati and myself was appointed to look after the property which was under Estate of Muniamma.”
[My emphasis]

(4) Finally, he took me to the statement of Parvathi (Goundar) dated 15th April 2015 recorded by Binesh Naidu of the Legal Practitioners Unit within the Office of the Chief Registrar, wherein Parvathi has stated at page 1 (page 128 of the *Application* filed with the Commission on 25th September 2015) that:

„I am the eldest daughter of Krishna Swamy Pillay. In the year 1990 my father Krishna Swamy Pallay [sic] died and probate was for my younger brother Rakesh [sic] Kumar Sami Pillay. In the year 2005 my brother told my family members that [as] he cant [sic] look after the property it should be given to someone else. On the 15th day of June [we] went to the office of Dorsami Naidu to change the Administrator of my fathers [sic] property. All my brothers told lawyer Dorsami that myself and my younger brother Ranga Nadan Sami Pillay. The lawyer did told [sic] us that we will look after this property.”
[My emphasis]

[34] The Respondent legal practitioner then submitted:

- (1) By instituting the proceedings in the High Court at Lautoka, all that the Respondent legal practitioner was doing was giving effect to the Deed of Appointment (of change in Trustees) dated 15th June 2005 as signed by all the five parties including Rajesh Kumar Sami Pillay that Parwati (Goindar) and Ranga Nadan Sami Pillay be appointed as the trustees (as set out on page 30 of the *Application* filed with the Commission on 25th September 2015);
- (2) The citing of *Law Society v Nguyen* and specifically paragraph 76 was not relevant as this was not a conflicting interest;
- (3) The Chief Registrar was duty bound to have put the complaint to me regarding acting when there was an alleged conflict, however, no such letter was sent to the Respondent legal practitioner asking him to explain. Instead, the

Applicant has gone ahead and filed without speaking with the Respondent legal practitioner or the person (Rajesh) who was replaced as trustee.

[35] It is important that I set out here most of what Rajesh has deposed in his affidavit:

(i) He was the Administrator of the Estate but *„due to my inability to perform my duties as Administrator I consented to step down“*;

(ii) *„Parwati and Ranga ... were appointed in my place and this was with the consent of all the beneficiaries“*;

(iii) *„... we authorized the same solicitor Mr Dorsami Naidu who prepared the Deed of appointment of new Trustees to file the necessary application in the Lautoka high court to regularize our agreement as per the deed“*;

(iv) *„I have no complaint against Dorsami Naidu ... in regards to his acting for all the parties as the contents of the Deed dated 15th June 2006 nor the Orders obtained by him in Lautoka High Court Civil Action Number HBC 12 of 2006L was done with the knowledge and consent of all parties.*

[My emphasis]

[36] It is also important that I cite here an excerpt from the witness statement dated 16th April 2015 of Binsh Prakash Naidu, the investigating officer from the Applicant’s Legal Practitioners Unit as to why a statement was obtained by four of the five siblings on 15th April 2015, but not from Rajesh:

„I was instructed to record the statement of Rajesh Kumar Sami Pillay who stays at Valley Road Sigatoka were [sic] his wife is a School teacher at Bay Mana Junior Secondary School. I proceeded towards that location with our Judicial vehicle but could not make it and due to heavy rain and road condition and it was also getting dark. Later I compiled the file and forwarded back to A/Senior legal officer Vinay Sharma with all my facts and finding[s] as per instruction given to me to comply.“

[My emphasis]

(„Statement of LPU Investigator Binesh Prakash Naidu“, *Application*, filed 25th September 2016, doc.19, p.130.)

[37] It is of concern to this Commission that:

(1) The Applicant's staff, before filing the present Application with the Commission, had never spoken to Rajesh the person about whom the alleged conflict of interest in Count 2 is based;

(2) The reason that the Applicant's staff never spoke to Rajesh was not, as submitted by Counsel for the Applicant, that "our investigating officer wasn't able to locate Mr Pillay". Rather, the investigating officer was to have obtained a statement on 15th April 2015 from Rajesh (as he did that day with the other four siblings), however, as he proceeded towards Sigatoka „*our Judicial vehicle ... could not make it ... due to heavy rain and road condition and it was also getting dark*“. The investigating officer then compiled a report. There is no other documentary evidence annexed to the Application as to any other attempt made to obtain a statement from Rajesh by the staff of the Legal Practitioners Unit.

(3) It is clear from the excerpts set out above of the statements taken by the Applicant's investigator from the four other parties to the Deed that there was an agreement by the five siblings including Rajesh, to replace Rajesh with two others siblings, Parwati and Ranga.

(4) Further, a close reading of the Deed, as well as the four statements and Rajesh's affidavit, reveal that it was arguably in Rajesh's interest (as one of the beneficiaries of the Estate) that he be replaced to save the Native Title lease from being terminated (as he not only had failed to cultivate the land but was also in arrears of rent to the then Native Land Trust Board who had issued a Notice to Vacate due to such arrears).

[38] Most of the four statements are clear that Rajesh was present when they decided to replace him as the sole trustee with two other siblings (Parwati and Ranga). Even though in Ranga's statement he goes on to say that „*I was told it was to be High Court matter*“ which has then been crossed-out and initialed, followed by the statement „*to my knowledge I never been to high court Lautoka in relation to this matter*“; I am satisfied that such proceedings took place, with the knowledge of Ranga to approve the Deed to which he had previously consented (even if he did not actually attend the High Court proceedings), as he had the Respondent legal practitioner appear on his behalf as is clearly set out in the Court Order

dated 24th February 2006 and sealed on 14th March 2006 (page 46 of *Application*).

[39] **I agree with the Respondent legal practitioner. There is no point in allowing the Applicant to continue and have a final defended hearing in relation to Count 2. There was no conflict of interest for Rule 1.3 of the Rules of Professional Conduct and Practice to apply.** Indeed, the Count does not make sense. It states that the Respondent legal practitioner having acted for the five siblings including Rajesh in the preparation of a Deed of Appointment of Trustee dated 15th June 2005, „*thereafter, instituted High Court Civil Action No. HBC 12 of 2006 (Lautoka) against Rajesh ... on behalf of Parawait and Ranga ... the purpose of the litigation being the execution of the terms of Deed of Appointment of Trustee*“. **Thus, my reading of the Count is that it agrees with the submission of the Respondent legal practitioner: the proceedings were to put into effect the terms of the Deed (also signed by Rajesh), that Parwati and Ranga be appointed as the new trustees.**

[40] If, however, I am incorrect and there was a conflict of interest, the Respondent legal practitioner had advised all five parties involved and had their consent for him to prepare a Deed. He then filed an Originating Summons to put the contents of that Deed into effect. That is, to obtain an Order that Parwati and Ranga be appointed as the new trustees. This has been stated clearly, in my view, by the four other siblings as confirmed in their witness statements prepared by the Applicant's own investigator. **Therefore, Count 2 is misconceived. It must fail.** Also, even if Counsel for the Applicant were allowed to proceed with Count 2 she would have to make application to amend it as, at present, it incorrectly states the Deed was dated 15th June 2013 rather than 15th June 2005.

[41] If this were a case in the High Court, I would now be considering making an Order as to costs and, perhaps, indemnity costs as this was arguably a hopeless case and an abuse of process such that the trustee Rajesh should have been interviewed prior to any application being filed with the Commission. **Counsel for the Applicant says that a hearing should still take place so that she can cross-examine Rajesh as to the contents of his affidavit.** She has placed no

evidence before me as to why I should go behind Rajesh's affidavit. Indeed, Rajesh's affidavit, in my view, complements the four statements previously taken by the Applicant's investigator as to what occurred in 2005. **Further, I am still at a loss as to what was the alleged conflict. As I have already noted above, the legal proceedings, in my view, just put into effect the contents of the Deed signed by the five siblings on 15th June 2005, including signed by the original trustee, Rajesh.**

[42] Section 124 of the *Legal Practitioners Decree 2009* limits any award that the Commission may order in relation to costs and expenses to those against a respondent legal practitioner. Section 124(2) clearly states: „***The Commission shall not make any order for payment of costs and expenses against the Registrar or the Attorney-General.***“ [My emphasis]

[43] The Respondent legal practitioner having read my recent judgment in *Chief Registrar v Vosarogo* (Unreported, ILSC Application No. 002 of 2016, 6 February 2017) as to when the Commission might entertain a “Mosely type Order” (see *R v Mosely* (1992) 28 NSWLR 735; (1992) 65 A Crim R 452), mentioned that if he was successful in having this Count struck out, the Commission might consider reimbursement of costs for his travelling from Nadi (apart presumably from any costs paid for those who appeared on his behalf at previous mentions prior to the hearing of this Interlocutory Application). As I said in *Vosarogo*, I would need first a formal application from the Respondent including setting out the legal costs and disbursements involved and for both parties to address me as to whether I have the powers to grant such an Order together with the appropriateness of doing so. At this time, I have no such application before me and I cannot make an Order for costs. **I will, however, be making Orders not only that Count 2 be struck out but (in view of what has occurred in this Application), making a further Order that if the Applicant wishes to bring any subsequent action based upon Count 2, it must be with leave of the Commission satisfying that there is both a factual and legal basis as to what is alleged to have occurred.**

ORDERS

[42] The formal Orders of the Commission are:

1. In the Application filed before the Commission in Case No. 004 of 2015, *Chief Registrar v Dorsami Naidu*, Count 2 is struck out.
2. If the Applicant wishes to bring any subsequent action based upon Count 2 in Case No. 004 of 2015, *Chief Registrar v Dorsami Naidu*, it must be with leave of the Commission.
3. In the Application filed before the Commission in Case No. 004 of 2015, *Chief Registrar v Dorsami Naidu*, Count 4 is withdrawn and discontinued.
4. In the Application filed before the Commission in Case No. 004 of 2015, *Chief Registrar v Dorsami Naidu*, Count 5 is withdrawn and discontinued.

Dated this 15th Day of February 2017

Dr. Thomas V. Hickie
COMMISSIONER