IN THE COURT OF APPEAL FIJI ISLANDS
APPLICATION FOR LEAVE TO APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0027 OF2008
(High Court Civil Action No. HBM105 of 2007)

BETWEEN: **ANGENETTE MELANIA HEFFERNAN**

Appellant

AND: **THE HON.JUSTICE JOHN EDWARD BYRNE**

1ST Respondent

THE HON.JUSTICE ANTHONY HAROLD CUMBERLAND GATES

2nd Respondent

THE HON.AIYAZ SAYED KHAIYUM

3rd Respondent

Coram: Hickie, JA

Hearing: Friday, 23 May 2008, Suva

Counsel: D. Naidu for the Appellant
R. Prakash for the 1st Respondent
C.B. Young for the 2nd Respondent
A.K. Nayaran for the 3rd Respondent
A. Tavo as Observer for the Fiji Law Society

Date of Judgment: Thursday, 29 May 2008, Suva

DECISION

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[1] This was an Application filed on 9 May 2008 for a Stay as well as Leave to Appeal from an interlocutory decision of Pathik J made on 24 October 2007 in which an Application for Recusal was dismissed for want of prosecution and the Appellant's lawyer on the record, Mr Dorsami Naidu, Esquire, Solicitor, was ordered to pay the costs personally of the failed application.

[2] The amounts ordered by Justice Pathik to be paid by Mr Naidu were as follows:
(a) Pay Mr R. Prakash, Solicitor, for the First Respondent $2,500.00 within 10 days;
(b) Pay Mr C.B. Young, Solicitor, for the Second Respondent the sum of $3,500.00 within 10 days;
(c) Pay Mr. A.K. Narayan, Solicitor, for the Third Respondent the sum of $3,500.00 within 10 days.

[3] When the Court of Appeal Registry brought the matter before me on Thursday afternoon, 15 May 2008, I arranged (due to the urgency of the Motion as claimed in the Affidavit filed in support by the Appellant's "legal" representative about which I will have further to say later in this judgment) for it to be set down as a hearing of at least the Stay Application on an inter-partes basis on Friday week, 23 May 2008, (and if time permitted the Application for Leave to Appeal from the dismissal of the recusal application). I then spent a major part of the weekend of the 17-18 May 2008 reading the entire contents of the Court file in the proceedings which had been before Pathik J in the High Court wherein the Appellant had been seeking Constitutional Redress (of which the refusal of a recusal application had formed part). I was at a loss to understand how such proceedings had come to be filed in the High Court when, in reality, it was an attempt, in my view, to circumvent the earlier Orders of Byrne J made on 30 July 2007 sitting as a single Judge of Appeal in the Court of Appeal (staying in turn the final hearing of the initial proceedings before Singh J in the High Court until certain issues had been decided by the Full Court of Appeal).

[4] Thus, the Application in the High Court for Constitutional Redress before Pathik J was, on its face, clearly an abuse of process. As such, not only was I astounded as to how competent and experienced counsel ever allowed this case to commence before Pathik J in the High Court. I could not understand why they were not pursuing their case before Byrne J to the Full Court of Appeal so that eventually the final hearing before Singh J could take place. In addition, I was very concerned at the potential conflicts of interest which, on my reading of the file, must now surely

have existed between the Appellant and her various legal advisers. In particular, I was alarmed at why the Appellant would be seeking a Stay as well as Leave to Appeal the inevitable costs orders (which had followed from the failed interlocutory recusal application before Pathik J of 24 October 2008) for which costs had been ordered not against her but against her Solicitor? In addition, no attempt had been made at payment since then by her Solicitor to satisfy those Orders.

[5] What I found even more astounding was that the Appellant (obviously on legal advice) has commenced hopeless and duplicated applications in the High Court (rather than pursuing the appeal proceeding from Byrne J to the Full Court of Appeal). I was extremely concerned that the Application for recusal had been made before Pathik J in October 2008 when it was clear that it would inevitably fail (particularly in light of the reasoned judgment given previously by Byrne J on 30 July 2007 as to the presumption of legality of post-December 2006 appointments). As it turned out, Mr Naidu did not even bother to appear and argue the recusal application on 24 October 2008 before Justice Pathik, instructing instead an agent to just attend and take judgment. As one would expect in such circumstances, the application was dismissed for want of prosecution and indemnity costs orders were made against Mr Naidu personally.

[6] Unsurprisingly, the substantive Application for Constitutional Redress before Pathik J was inevitably "struck out" on 11 April 2008 together with the Appellant being lumbered with significant mounting legal costs. It was of concern whether the costs implications of that failed Constitutional Redress application had been clearly explained to the Appellant at the time she gave instructions to commence such ill-conceived proceedings? Further, had it been explained to her by her legal advisers that this was a clear abuse of legal process which would inevitably fail and, in such a case, she would be ordered to pay indemnity costs (though the Court could make costs orders personally against those advising her, as had happened with the earlier failed recusal application before Justice Pathik on 24 October 2008). Upon reflection, I wondered whether Ms Heffernan had been manipulated by some of those advising her such that the applications now being brought were not so much

for her "personal protection", perhaps as they had been back in January 2007, but had now been overtaken by a far greater agenda of her advisers?

[7] Upon coming to Chambers the following Monday morning, 19 May 2008, I immediately requested a list of all files to be prepared for me in relation to the Appellant and her various associated matters. My understanding is that in amongst a number of proceedings, the major orders in the matters are these:

(a) **File HBC 37 of 2007 in High Court *before Singh J*–** 20 April 2007 - Interlocutory injunction **Granted to Appellant**

(b) **Civil Appeal No. ABU0034 of 2007 in Court of Appeal *before Byrne J*** – 5 June 2007 - Stay High Court final hearing – **Granted to Respondents** pending ruling by Full Court of Appeal

(c) Civil Appeal No. ABU0034 of 2007 **in Court of Appeal *before Ward J*** – 28 June 2007 – Application for President of Court to intervene in proceedings before Byrne J – **Refused to Appellant**

(d) Civil Appeal No. ABU0034 of 2007 **in Court of Appeal *before Byrne J*** – 30 July 2007 – Application for Byrne J to refer his Orders of 4 June 2007 as well as question of costs to Supreme Court – **Refused to Appellant** (Costs still to be argued)

(e) **File HBC 37 of 2007 in High Court *before Pathik J*** – 24 October 2007 – Application for Recusal - **Refused to Appellant**

(f) File HBC 37 of 2007 **in High Court *before Pathik J*** – 11 April 2008 – Application for Constitutional Redress - **Refused to Appellant**

[8] To my amazement, I was then to discover that there was now a **third** Application pending in the High Court, **Civil Action No. HBM 18 of 2008**. This was a new

Application for Constitutional Redress before Goundar J in the High Court against the Interlocutory Orders of Pathik J which had been made previously also in the High Court on 24 October 2007 in relation to the failed recusal application. In addition, there was a further Application before Goundar J for a Stay or Interlocutory Injunction against the final Orders of Pathik J of 11 April 2008 as well as an interlocutory Recusal Application before Goundar J seeking that he recuse himself.

[9] Alarm bells began ringing for me when I read that it was the Appellant alone who had originally given an undertaking to the Court in her Affidavit sworn on 31 January 2007, to pay any damages as a result of any Orders granted to her from her ex-parte motion (with her home mentioned as collateral). Although those proceedings were now temporarily in abeyance, her home, in my view, was clearly at risk from the various ongoing proceedings. Conversely, I pondered, what damage would be suffered by her Counsel of choice, Dr Cameron, safely residing in Western Australia? And, even more disturbing, "to round out the picture", so to speak, was that her Solicitor on the Record, Mr Naidu, **wanted to appeal in her name the personal costs orders made against him personally** by Justice Pathik of 24 October 2007. Those costs orders had clearly flowed from the fact that the Application for Recusal was dismissed for want of prosecution by Mr Naidu. If the costs orders were to be amended on Appeal, who else, other than the client (or perhaps the Counsel advising) could be liable for such costs?

[10] Having now obtained a much clearer picture of the legal and potential costs minefield which the Appellant and her legal advisers were now creating for themselves, I immediately arranged for a letter to be sent by facsimile transmission on Monday, 19 May 2008, to the legal representatives for the Appellant inviting them to be given the opportunity to consider filing further affidavits with the Court by 2.00 pm, Thursday, 22 May 2008 (noting that the matter was listed for hearing at 9.00 am, Friday, 23 May 2008) as follows:

(a) Ms Heffernan as the Appellant;

(b) The Chairperson of the Pacific Centre for Public Integrity Limited as Ms Heffernan's employer;

(c) Mr Dorsami Naidu as the Solicitor on the record; and

(d) Dr John Cameron as Counsel upon whose advice such recusal application was allegedly made.

The letter also highlighted issues which the above four parties needed to consider addressing, such as, who was actually funding the proceedings, who was taking responsibility as to liability for the mounting legal costs and perhaps the Appellant (as well as her legal representatives) needed independent legal advice and representation on 23 May 2008 as there were potential conflicts of interest which the Court would like to have clarified.

[11] I also requested on Tuesday, 20 May 2008, that a letter be sent that day by facsimile transmission to the President of the Fiji Law Society inviting the Law Society to send a representative to attend as an observer the proceedings on 23 May 2008, noting that the Judge hearing the matter was concerned as to the amount of costs for which the Appellant could now be liable (as well as to who was ultimately going to meet such costs).

[12] On Wednesday, 21 May 2008, **three** facsimile transmissions were received from Mr Dorsami Naidu as the legal representative for the Appellant as follows:

(a) Requesting an adjournment of 14 days so as to instruct another Counsel (as Dr Cameron was not allowed into the country and they had written to the Director of Immigration that morning requesting that Dr Cameron be so allowed);

(b) That they had overlooked that Ms Heffernan was to be present for the purposes of cross-examination and she is presently in New Zealand, hence the application for the adjournment.

(c) Seeking the name of the Judge who would be dealing with the matter as it was Mr Naidu's intention to file an Application for Recusal on the ground of "apprehended bias".

[13] The only reply I directed was to respond to Mr Naidu's first letter as follows (with copies to Counsel representing the three Respondents as well as the President of the Fiji Law Society):

"1. The matter will not be adjourned.

2. The Court has simply ***provided you with the opportunity to consider filing with the Court (as well as serving on the other parties to the matter) by 2.00 p.m., Thursday, 22 May 2008, Affidavits from*** *the following:*
(a) Ms Heffernan as the Appellant;
(b) The Chairperson of the Pacific Centre for Public Integrity Limited as Ms Heffernan's employer;
(c) Mr Dorsami Naidu as the Solicitor on the record; and
(d) Dr John Cameron as Counsel upon whose advice such recusal application was allegedly made. As mentioned in my original letter, the Court is prepared to accept a copy of such Affidavit from Dr Cameron subject to a signed undertaking from Mr Naidu that the original of Dr Cameron's Affidavit will be filed in the Court of Appeal Registry within 21 days thereafter.

3. The Court will not be hearing further evidence from a party unless an Affidavit has been filed by 2.00 p.m. on Thursday, 22 May 2008. If no Affidavits have been filed, then the Court will simply hear submissions from the legal representatives for the various parties on what has been filed previously in the proceedings.

4. In relation to the alleged difficulty which Mr Naidu is allegedly having obtaining legal representation, the Court notes that there were nearly some 350 members of the Society listed in its most recent Annual Report. The Court does not accept that a competent practitioner cannot be found to appear on Mr Naidu's behalf on Friday, 23 May 2008.

5. In relation to Dr Cameron, the Court awaits his Affidavit. If filed as requested, then arrangements can then be made on Friday for video conferencing to deal with any travel restrictions. As with Mr Naidu, Dr Cameron may also need to consider his position in relation to any potential conflict of interest between himself and the client as well as with Mr Naidu and whether he needs to instruct Counsel to appear for him on Friday. That is a matter for him. The Court presumes that you will be forwarding a copy of this letter to both Ms Heffernan and Dr Cameron.

Yours faithfully,
RAVENDRA KUMUD
for ***REGISTRAR – COURT OF APPEAL"***

[14] On 21 May 2008, I asked the Officer-in-Charge of the Civil Registry of the High

Court at Suva to ascertain the current status of the three bills of costs and disbursements which were to be submitted for taxation before the Master as per the final costs orders made by Pathik J on 11 April 2008 in relation to the matter (of which the recusal application before me had formed part). After the Officer-in-Charge of the Civil Registry of the High Court at Suva requested two of the parties to file amended bills of costs in taxable form in accordance with the Rules (which they did on 22 May 2008), I was advised by the Officer-in-Charge on that same date that all three were now in order to go before the Master for taxation on 10 June 2008. The costs being claimed prior to taxation should give room for pause for the Appellant and her legal representatives. They are as follows for the entire Application for Constitutional Redress before Pathik J (including the Recusal Application):

(a) $27,967.50 for the First Respondent;
(b) $69,012.50 for the Second Respondent; and
(c) $33,225.25 for the Third Respondent.
Total = <u>$130,205.25</u>

[15] Of the $130,205.25 claimed, my understanding is that, subject to taxation, Ms Heffernan will be liable for such costs less $10,000 (of which I had the application before me asking to stay payment against Mr Dorsami Naidu personally as the Solicitor on the Record) and less the costs of the stay and leave proceedings which had been dismissed on 19 February 2008 before Pathik J (the costs of which had again been ordered personally against Mr Dorsami Naidu).

[16] As at 2.00pm, Thursday, 22 May 2008, no Affidavits were filed with the Court of Appeal Registry. The Registry did receive that afternoon, however, the following:

(a) A letter dated 22 May 2008 from the Appellant;
(b) A letter dated 22 May 2008n from Dr John Cameron;
(c) A request on behalf of Dorsami Naidu & Associates to file a Notice of Motion returnable at 9.00am, on Friday, 23 May 2008, before the single Judge of Appeal

hearing the matter making an Application for recusal of the Honourable Judge on the ground of apprehended/actual/perceived bias against Dorsami Naidu as per the Court's letter dated 19 May 2008.

[17] I gave leave in Chambers for the Notice of Motion to be filed returnable before me at 9.00am, on Friday, 23 May 2008, on condition that it was served upon the other parties (or sent to each of them by way of facsimile transmission) by 4.00 pm that afternoon. I also arranged for the Court of Appeal Registry to send to each of the parties by way of facsimile transmission (as well as a hand delivery to the Offices of Pillai Naidu & Associates in Nadi), copies of the letters received from the Appellant and Dr Cameron as well as the Notice of Motion for Recusal.

[18] It is important that I set out in part the letters received from the Appellant and Dr Cameron with certain sections emphasised in bold.

[19] According to Ms Heffernan:

> *"I am presently in Wellington and unable to return to Fiji at this time.*
>
> ***I am not a party to Mr Naidu's appeal** against the costs order made against him personally **and have not instructed him to appeal against the dismissal of my application for recusal.**"*

[20] According to Dr Cameron:

> *"As I understand it, the appeal is against a costs order made against Mr Naidu personally when, **following a misunderstanding, he failed to appear** at the hearing of an application for the recusal of the Honourable Davendra Pathik ... It **would appear that the application was dismissed for want of prosecution and Mr Naidu ordered to pay the costs thrown away** ...*
>
> *While I was briefed in the matter, and provided advice, I was at the time of the hearing, as at present, prevented from entering Fiji and appearing as counsel. **How upon appeal I could be ordered to pay costs thrown away in such circumstances is not immediately obvious.** How I could be ordered by the Court of Appeal to pay costs on the substantive application, which has not been subject to appeal, is even more opaque. **I have not been instructed by Mr Naidu in the present appeal, and have no professional interest in the matter** ...*
>
> ***Ms Heffernan**, who is presently in New Zealand, is unable to return to Fiji,*

did not authorise Mr Naidu to lodge any appeal on her behalf ... she has no sufficient connexion with the issues in the costs appeal ...".

Opening the Court

[21] The matter then commenced before me at 9.00am, on Friday, 23 May 2008. After the announcement of appearances, including by Ms A. Tavo who was attending as the invited observer from the Fiji Law Society, I noted that the Court had apparently received a telephone request the previous afternoon from an alleged representative from the Human Rights Commission seeking to be present. I noted that although the matter was listed as "Court in Chambers", I was of the view that, unless there was any objection, the Court should be open to the public. As there was no objection raised, I directed the Court Officer that the Court be opened to members of the public, including representatives from the media, as well as other interested observers, and they all be invited to come inside if they so wished. At that point, a number of persons filled the Court room.

Documentation recently received by the Court

[22] I then noted that the Court had recently received letters from the Appellant dated 22 May 2008 and, her Counsel, Dr John Cameron dated 21 May 2008, as well as a Notice of Motion for Recusal filed by the Appellant's Solicitors for which I had granted leave for short service until that morning.

Application for Adjournment

[23] Before I could commence dealing with the Application for Recusal, Mr Naidu made an oral Application from the Bar Table seeking an adjournment of the proceedings for 14 days.

[24] My concern, which I expressed in Court, was that if the letters from Ms Heffernan and Dr Cameron were to be accepted by the Court, then Mr Naidu clearly did not have any instructions to be pursuing <u>any</u> of the four applications which he currently had before the Court of Appeal: namely an oral application for an adjournment, a an Application for Recusal, Application for a Stay and an Application seeking Leave to Appeal to the Full Court of Appeal. Also, I was interested as to the views of

Counsel before me as to what weight the Court should give to the letters it had received from Ms Heffernan as the Appellant and Dr Cameron as her Counsel noting that Affidavits had not been filed by either of them?

[25] In summary, Mr Naidu made the following submissions in support of his oral application for an adjournment:

(a) That this was a quite a complex case and that he had only been put on notice when the letter from the Court had been faxed to his office on Monday afternoon, 19 May 2008 (which he had only read the following day due to pressures of work).

(b) That he had not been able in the past three days to obtain a Counsel willing to appear at such short notice and who was sufficiently knowledgeable about this case.

(c) That the other parties concerned, that is, the Appellant and Dr Cameron of Counsel, were presently overseas and that he had only received yesterday copies of the letters from them (as sent by the Court of Appeal Registry) which had changed the whole complexion of the Appeal and clearly showed that he needed the services of Counsel to consider the questions of conflict of interest and file a relevant Affidavit in Court.

(d) That the letter from Ms Heffernan wherein she claimed that she was not part of the Appeal was not Mr Naidu's understanding as her Solicitor and although he had not verbally spoken to her, he had had a chat with her on the internet.

(g) That he had never instructed Dr Cameron in this Appeal. There were, however, matters of which Dr Cameron was aware (as the Counsel for Ms Heffernan from which this action had originally initiated) that would be brought out once Mr Naidu had obtained the appropriate legal advice.

(h)That the recusal submission and legal opinion made before Justice Pathik was prepared on behalf of Ms Heffernan by Dr Cameron, hence his part in the case.

(i)That certain documents needed to be filed with the Court which he had been unable to do so due to time constraints.

(j) That it was a discretion of the Court to allow an adjournment and he cited in support two cases (without providing copies to the Court or other Counsel for the three Respondents in attendance): ***Goldenwest Enterprises Limited v Timoci Pautogo*** a decision of the Fiji Court of Appeal on 3 March 2008 (Civil Appeal

No.ABU0038/2005, Byrne and Scutt JJA) at page 10, paragraph 37; and ***Sookdeo v Ali and Ali***, [2001] TTCA 12 (Court of Appeal, Trinidad and Tobago, 18 May 2001), (2001) *TT Appeal Reports*, pg 2.

(k) That there would be no prejudice to the Respondents.

(l) That by refusing to grant an adjournment, Mr Naidu would be deprived of a fair hearing and there would be a serious miscarriage of justice.

(m) That there had been no fault on his part, apart from the client, in seeking the adjournment.

(n) That he had written to the Court on Wednesday, 21 May 2008 seeking an adjournment with copies to Counsel for the three Respondents.

(o) That he was seeking an adjournment for 14 days.

[26] Mr Prakash on behalf of the First Respondent submitted in summary as follows:

(a) Whose appeal was this? It was not Mr Naidu's Appeal. The documents filed clearly stated that the Appellant was Ms Heffernan, the affidavit filed in support said that it was filed on Ms Heffernan's behalf, everything pointed to it being Ms Heffernan's appeal.

(b) The Order made by Justice Pathik of 11 April 2008 would seem to support the view that Ms Heffernan should not have been allowed to file any application (including these proceedings before the Court of Appeal) until the costs order made by Pathik J on 11 April 2008 (as a result of the "struck out" constitutional redress case before him) had been determined and paid. It was a very wide order.

(c) That the letter dated 22 May 2008 from Ms Heffernan to the Court made it very clear that she did not wish to be part of the Appeal. Upon what basis would the Court then be agreeing to adjourn the Appeal? The problem for Mr Naidu was simply this: this was NOT his appeal. It was Ms Heffernan's and she had clearly written to the Court that she did not wish to be part of it.

(d) That whichever way it was looked at, Mr Naidu was "tied in" by the Costs Order made personally against him by Justice Pathik on 24 October 2007, and he could not get out of it by proceeding with this Appeal. There was, however, a special way if he had wanted to appeal the costs order made against him personally by Justice Pathik and that was by, under the Rules, applying to the Court for him to be joined

as a party and then taking leave of the Court to appeal. It would then become Mr Naidu's appeal and then he could go to the Court of Appeal and say: "Please set aside that order of Justice Pathik which made an Order for costs personally against me". Unfortunately, this procedure had not been followed.

(g) All that was before the Court was Ms Heffernan's Appeal. Mr Naidu could not say "this is my appeal". If, however, he said it was Ms Heffernan's appeal, then, on one view, she could not file such an Appeal until she had satisfied the costs orders made by Justice Pathik on 11 April 2008, or appealed those Orders.

(h) As for the letter written by Ms Heffernan to the Court, much weight had to be paid to it. Even if Mr Naidu was to come back on an Affidavit in response to counter the weight of the contents of that letter, regardless of what he said, (even if it was that "she is saying something that is not true"), her position is still this, that she has not appealed. So, if she has not appealed then what were all the parties doing before the Court of Appeal? The Appeal should be summarily dismissed. It was not even on foot properly. It was so irregular. Mr Naidu should stop wasting everybody's time and it should stop there.

(i) It did not matter how many adjournments Mr Naidu was granted, it did not matter how many documents he was to file, it did not matter which Counsel he engaged, when he came back before the Court of Appeal the issue would still be the same and he cannot get out of it because there is no appeal by Mr Naidu. The only appeal on the documents filed was Ms Heffernan's which, on one view, could not have been properly put before the court (due to the earlier orders of Pathik J of 11 April 2008), irrespective of her letter.

[27] Mr Young on behalf of the Second Respondent submitted in summary as follows:

(a) Whilst Mr Naidu was correct putting forward the proposition that an adjournment is normally granted for the sake of justice and fairness to the party concerned, however, fairness and justice was not something that operates in a vacuum. What normally happens is that a party seeking an adjournment has got to come before the Court and provide it with the circumstances as to why an adjournment should be granted.

(b) There were no good grounds for an adjournment for this very simple reason –

the issue of conflict of interest was always staring at Mr Naidu right from the beginning, as early as 24 October 2007, when Justice Pathik had given a ruling in awarding costs against Mr Naidu personally. Despite this, Mr Naidu took the next step to ask for Leave to Appeal and appear in his own right and this was on 19 February 2008 and that was refused by Justice Pathik. So the circumstances add up. Mr Naidu knew that there was a conflict of interest as of 24 October 2007. Come 19 February 2008 when he applied again, he took a bold step of representing himself. After leave was refused on 19 February 2008, he then comes before this Court on 23 May 2008 (three months later) and says: "There has to be some kind of conflict of interest because Ms Heffernan is saying 'that I do not wish to appeal' and I have Dr Cameron I thought acting in the matter who is saying he has no interest in this appeal. I need to have separate legal advice." That particular decision and particular thinking should have been put into motion "way back" (some seven months ago) after Justice Pathik's Orders of 24 October 2007. It was the submission of the Second Respondent that it was now too late for Mr Naidu to come before the Court of Appeal and say: "By the way, because of all these things that are against me and the possible conflict of interest as to whom I am supposed to act for, that I need an adjournment." It was too late for him. He should have known about it. Any legal practitioner should have known that he could have been in a situation to decide between the interest of defending of himself and the interest of his client. He cannot look after both and certainly everyone knows, to quote the old maxim: "he is a fool who has himself as a client". He could not use that now as a basis of an adjournment.

(d) The last matter for the Court to consider in its assessment as to whether to grant an adjournment, was the Affidavit of Abdul Islam, sworn on 1 May 2008, which was the only document filed in the proceedings before the Court of Appeal. It probably added to the issue of conflict of interest. If one looked at paragraphs 14, 16 and 20 therein, there was no question of fact that this Appeal had been set down by the Appellant, Ms Heffernan. At the same time, the Second Respondent accepted the fact that Mr Naidu had the right to file his own appeal because there was a costs order made against him personally. The problem for Mr Naidu was this: in the Affidavit from Mr Islam, his own employee (and this is a document which

originated from Mr Naidu's own office), he said that this was an Application for Leave to be granted to the Appellant and not to Mr Naidu. So it goes against the total grain of the correspondence which had been put before this Court from the Appellant and her Counsel. At the very least, the Court was obliged to take judicial notice of those letters until such time as something was brought before the Court by Mr Naidu to the contrary.

(e) This then was the position of the Second Respondent: that an adjournment should not be granted and that the Court should then deal with the application for recusal, the application for stay and the application for leave to Appeal.

[28] Mr Narayan on behalf of the Third Respondent submitted:

(a) The position of the Third Respondent in relation to Mr Naidu's application for an adjournment, was exactly the same as that of the First and Second Respondents. It was very clear from the time when the Orders were first made against Mr Naidu on 24 October 2007 that there was likely to be a conflict of interest.

(b) Mr Naidu was not in an enviable position as follows:

(i) The Court had asked pertinent questions. The Court must have foreshadowed that something was likely to come forward as has been the case with the letters it had now received from Ms Heffernan and Dr Cameron. Initially, when Counsel for the Third Respondent saw the letter dated 19 May 2008 from the Court of Appeal Registry, he was taken aback because obviously the Court was expressing serious concerns here about the issue of costs and about the nature of the stay and leave applications which had been filed before it.

(ii) In addition, Counsel for each of the Respondents had an "inkling" that something was amiss here because of the way the Affidavit of Mr Islam was filed in support of the Applications for a Stay and Leave to Appeal.

(iii) Even the Application heard on 19 February 2008 before his Lordship, Justice Pathik, filed by the Appellant under Rule 26(3), was limited to the Costs Order made against Mr Naidu personally. It did not affect Ms Heffernan. There was no Appeal in relation to the Order by Justice Pathik made on the 24 October 2007 to refuse to recuse himself. In the Ruling made by Justice Pathik on 19 February 2008, he made it very clear that there was not an application by Ms Heffernan for a

general leave to appeal. All counsel when they appeared before Justice Pathik on that date proceeded on that basis, that is, that the appeal was just in relation to the personal costs order made against Mr Naidu. It would now appear to be the case that Ms Heffernan obviously did not even instruct Mr Naidu to appeal or attempt to appeal the recusal matter at that stage.

(c) In reading the letter dated 22 May 2008 from Ms Heffernan to the Court, paragraph three of it says that she is not a party to Mr Naidu's appeal against the costs order made against him personally and that she has not instructed him to appeal against any dismissal of her application of recusal by Justice Pathik (as decided on 24 October 2007). Obviously, it is clear then that even the previous application before Justice Pathik on 20 February 2008 was without the Appellant's instructions. Mr Naidu, at that time, knew that he had no instructions because that letter speaks for itself very clearly.

(d) Another matter which should be of some concern to the Court when considering whether to exercise its discretion to grant an adjournment was on the first page of the letter dated 21 May 2008 from Dr Cameron to the Court, the very last sentence of which said: *"I have not been instructed by Mr Naidu in the present appeal and have no professional interest in the matter."* That seems to be a little bit at odds with what Mr Naidu was no suggesting to the Court and also from the Affidavit of Mr Islam filed with the Court. Indeed, Mr Islam's Affidavit created the impression that Dr Cameron was going to have the charge of the Appeal as Counsel but, obviously, it was quite clear from a reading of Dr Cameron's letter that he had not even been approached. So the Affidavit from paragraph 8 onwards of Mr Islam's dealing with the fact that Dr Cameron was admitted to practice in this country and that he was presumably the "Counsel of choice" for the Appeal (which we have now found out was not Ms Heffernan's but Mr Naidu's) raises serious questions. Compounding the problem was this: Dr Cameron, as the alleged "Counsel of choice", had no idea about the Appeal. That was a pertinent matter that the Court would need to take into account when considering the exercise of its discretion as to whether to accede to Mr Naidu's request for an adjournment.

(e) There was no need to cite any authority for the fact a Court can determine the credibility of Affidavit evidence, even in the absence of cross-examination, when

documents before it clearly disprove what was being asserted. This was a case where it was clear from what Dr Cameron had said in his letter to the Court that it did not bear out what was being suggested to the Court both in the Affidavit of Mr Islam and also from the address of Mr Naidu.

(f) The Third Respondent also concurred with what Mr Prakash had submitted on behalf of the First Respondent and that was, that Mr Naidu may need to go back and seek legal advice to reconsider how he could properly bring an appeal before this Court on the order for costs made against him personally by Justice Pathik on 24 October 2007.

(g) That there can be nothing clearer than the letter dated 21 May 2008 from Ms Heffernan to the Court. As such, the Third Respondent opposed the application for any adjournment.

[29] Mr Naidu, in response, directed his argument to the submissions from Counsel for the three Respondents that Ms Heffernan had nothing to do with this appeal. In that regard, Mr Naidu referred the Court to an Affidavit sworn by Ms Heffernan on 7 November 2007 which Mr Naidu submitted clearly explained that she was a party to it and that she urged the Court to grant the orders sought. The Court had to intervene at that point and suggest to Mr Naidu that the problem with that the submission was that the Affidavit of Ms Heffernan of 7 November 2007, to which he had referred, was in support of an Application already dealt with by Justice Pathik on 19 February 2008 which she had lost. It was noted that in that matter costs were again ordered against Mr Naidu personally to be agreed or taxed. It was unclear at this stage whether they formed part of the $130,000 in costs presently waiting to be taxed by the Master in the High Court (to cover the entirety of the Constitutional Redress proceedings brought by Ms Heffernan before Justice Pathik which had failed completely including the recusal, stay and leave applications). Mr Naidu submitted that was why he was seeking an adjournment "to have this matter sorted out and we were only informed yesterday and we need to resolve this issue and I cannot resolve it without consulting her".

[30] The Court then took a short adjournment to consider Mr Naidu's Application and

submissions in support as well as the various submissions made by Counsel appearing for the Respondents in opposing it.

[31] After resuming my position on the Bench, I gave my decision with a short outline of reasons which I noted would be contained in my later written judgment. These are:

(a) As I explained in open Court, in considering the various submissions made, I kept being confronted on each occasion with the first point made by Mr Prakash, Counsel for the First Respondent: "Whose appeal is this?"

(b) I also noted that there was no Affidavit filed before the Court other than from Abdul Islam, Mr Naidu's Law Clerk.

(c) I further noted that while I had no Affidavit from the Appellant I had a letter from her dated 22 May 2008 addressed to the Court. The question was what weight should I give such a letter? In considering that issue, I noted that Mr Naidu did not dispute in Court that the letter was genuine and that it had come from the Appellant, even though he might have disputed the contents of what she was saying.

(d) I was struck, however, by the submission also made by Mr Prakash for the First Respondent, who noted that the Appellant had clearly written to the Court saying that she did not wish to be part of these proceedings. That is, here was the Appellant on the Court record saying that she did not wish to proceed.

(e) As each of the Counsel for the Respondents had submitted, if Mr Naidu wished to commence separate proceedings that was a matter for him. They all agreed he had that right, unfortunately, for him, he had chosen the wrong way to do it.

(f) In the end, the Court was left before it with proceedings where the Appellant had clearly indicated to the Court that she did not wish to proceed. In reaching my decision, this was the nub of the issue. Accordingly, Mr Naidu's application for an adjournment was refused.

Withdrawal of all Applications

[32] After giving my decision on the adjournment application, I then invited Mr Naidu to address me on the recusal application. Mr Naidu then advised the Court: *"In light of the letters of Dr Cameron and Ms Heffernan I have no further instructions in the matter. I wish to withdraw the applications before your Lordship."*

Costs

[33] In the extraordinary circumstances which had now unfolded, the Court then invited Mr Naidu to address it on the question of costs. Mr Naidu submitted that costs should be as agreed or taxed and that this should be normal party to party costs which follow the event rather than on an indemnity basis.

[34] The Court then invited Counsel for each of the three Respondents to address on the question of costs.

[35] Mr Prakash on behalf of the First Respondent submitted that he was seeking costs on an indemnity basis of **$2,500.00** as he was a Suva based practitioner whereas he noted that Counsel for the Second and Third Respondents would inevitably have higher costs coming from other locations. If costs were to be awarded against Mr Naidu personally, then he should be given an opportunity to respond.

[36] Mr Young on behalf of the Second Respondent submitted on the question of costs, that, regrettably, these should be awarded against Mr Naidu personally as, when withdrawing his application, he said, to paraphrase: "I'm withdrawing it in view of what Ms Heffernan has said." Thus the fault must be laid at Mr Naidu's door. Mr Young also noted that he had come from Lautoka. He had spent significant time in preparation to argue the Applications for Stay and Leave ($2,500) as well as further time ($1,000) to prepare for the late Recusal application making a total of $3,500 for preparation, plus the cost of attending Court for a day ($3,000) and then $500 for "out of pocket expenses" including travelling, making an overall total of **$7,000.00.**

[37] Mr Narayan on behalf of the Third Respondent submitted that he too, regrettably, felt that the costs should be awarded against Mr Naidu personally on an indemnity basis. He noted that he was seeking costs of $4,000 for preparation, $4,000 for appearance at Court for one day, and disbursements for travelling and incidentals of $500 - $600, a total of **$8,600.00**.

[38] Mr Naidu was given the opportunity to respond whereupon he submitted that he should be given the opportunity to file a document as to who was to pay the costs.

[39] The Court then adjourned with judgment on notice.

[40] In considering the question of costs, I could have easily just awarded them summarily in Court. To be fair, however, to all parties, I needed to consider the following:

(a) Whether they should be on an indemnity basis;

(b) Whether they should be against Mr Naidu personally, against Ms Heffernan as the Appellant on the record, or shared equally between them, and what part, if any, did Dr Cameron, as Counsel, have to play in what can only be described as a complete waste of the time of the Court and for Counsel for the Respondents.

[41] In deciding upon the question of costs, I needed to consider what had been filed with the Court as well as reflect upon what had taken place in Court on 23 May 2008. I was also mindful that costs orders had already been made personally against Mr Naidu for the recusal application as ordered by Justice Pathik on 24 October 2007 in the amount of $9,500, as well as for the failed stay and leave applications as ordered by Justice Pathik on 19 February 2008 (with the latter to be taxed).

[42] The first issue to be dealt with, even before the recusal application, was upon what basis had Mr Naidu brought the Applications for Stay and Leave to Appeal when, if the letters to the Court from Dr Cameron and Ms Heffernan of the 21 and 22 May 2008 respectively, were to be accepted, then clearly Mr Naidu had done so not on the advice of Dr Cameron nor on the instructions of Ms Heffernan.

[43] Without a doubt, this case will be cited to future law students as everything NOT to do in conducting litigation. Recently, the New South Wales Court of Appeal had to consider in ***Lemoto v Able Technical Pty Ltd & 2 Ors*** [2005] NSWCA 153, whether a costs order could be made against a Solicitor personally pursuant to the provisions

of that State's *Legal Profession Act*. McColl JA, who delivered the main judgment of the Court, noted at paragraph 95:

> *"The days when the suit of* Jarndyce v Jarndyce *wound its apocryphal way through the pages of Dickens'* Bleak House *are long gone – if they ever were."*

Unfortunately, it would seem, such is not the case as matters presently stand in some parts of the Fiji Islands. The "Heffernan cases", if not stopped, either by the parties themselves or by the Court's intervention, may soon come to replace the fiction of *Jarndyce v Jarndyce* of English literature, with the stark reality of indemnity costs orders making Ms Heffernan and/or her legal advisers impecunious, if not bankrupt, as well as leaving those who have had to defend her various ill-conceived applications with no prospect of ever recouping the substantial costs they have incurred.

[44] In considering the "Notice of Motion for Stay of Execution", all that I had filed before me in support was an Affidavit sworn on 1 May 2008 from Mr ABDUL ISLAM, Legal Executive with the law firm of Pillai, Naidu & Associates of Nadi. As mentioned above, I also had separate letters from the Appellant and her Counsel each distancing themselves from the Applications for Stay and Leave to Appeal. The client had clearly advised the Court that she was not a party to the costs appeal of Mr Naidu and that she had not instructed him to Appeal against the dismissal of the recusal application. Dr Cameron, as the named Counsel by both Mr Islam and Mr Naidu, similarly, had clearly written to the Court (in amongst an angry and abusive diatribe for which he should obviously get some help) that he was not instructed in the appeal and had no professional interest in it. In addition, he clearly had understood that the costs order made by Justice Pathik on 24 October 2007 was made for want of prosecution and costs thrown away.

[45] In relation to Mr Islam's Affidavit, being the only evidence before me in support of the Application for the Stay and Leave to Appeal, I have undertaken a careful analysis of it and make the following observations:

(a) At paragraph 1, Mr Islam states that he is a "Legal Executive", whatever that

means. He does not state, however, that he is a qualified lawyer, nor does he state that he has been admitted to practice as a legal practitioner in the Fiji Islands, nor that he holds a valid practising certificate from the Fiji Law Society. I can only presume, therefore, that he is not a lawyer.

(b) Also at paragraph 1, Mr Islam states that Pillai, Naidu & Associates "have been retained by the Appellant in connection with the matter herein", but provides no details as to the basis of that retainer. It also clearly conflicts with the letter dated 22 May 2008 received by the Court from the Appellant.

(c) Of particular concern is that Mr Islam, despite not being a qualified practitioner, further states (also at paragraph 1):

> *"I have had and have the conduct of the proceeding on behalf of the Appellant and I am duly authorized to make this Affidavit on her behalf";*

Again, this clearly conflicts with the letter dated 22 May 2008 received by the Court from the Appellant.

(d) Of further concern is that Mr Islam, despite not being a qualified practitioner, then attempts to depose (at paragraph 2) as to what has occurred in the proceedings

> *"through my own knowledge, partly through information supplied to me by Mr. Dorsami Naidu ... and partly from information derived by me from an examination of the office file";*

(e) Mr Islam then provides in four paragraphs conflicting details as follows –

> *"3. That the Appellant has* ***instructed our legal firm to file application for recusal*** *of His Lordship Justice Mr D. Pathik from the action* ***which was listed on 24th October, 2007"*** and
>
> *4. The application for recusal of Mr Justice D. Pathik* ***was the result of argument made on the 5th October, 2007*** *by Mr [sic] Jone Madraiwiwi at a directions hearing* ***whereupon we were requested to make formal application for recusal*** *...*
>
> *6. INFACT the recusal application was argued on 5th October, 2007 and the date on which the formal application for recusal was listed I understand to be the date for ruling by the Court.*
>
> *7. BASED on the above facts we instructed Messrs Diven Prasad Lawyers* ***to obtain the ruling on the recusal application****, and a hearing on the Respondent's application.*

The problem with this chronology is that it is incorrect as the following reveals:

(i) An oral application was made on 5 October 2007 before Pathik J by Ratu Joni Madraiwiwi who was advised to make a formal motion (as per paragraph 4),

which the Appellant did (on 12 October 2007) and, as Mr Islam has also noted in paragraph 3, "***was listed on 24th October, 2007***";

(ii) Clearly, the motion for recusal was set for hearing on 24 October 2007 but, incredibly, Diven Prasad Lawyers were not briefed to argue the motion and one can only presume they were instructed just to rely upon the motion and affidavit in support filed and then "***to obtain the ruling on the recusal application***" from Pathik J;

(iii) The problem also with Mr Islam's recollection that the recusal application "***was the result of argument made on the 5th October, 2007*** *by Mr [sic] Joni Madraiwiwi at a directions hearing*" is that that the Court's own record reveals that this was just not simply the case. It was not some "spur of the moment" decision following an argument between Justice Pathik and Ratu Joni Madraiwiwi on 5 October 2008. It is clear from correspondence on the Court file that such an application was already being contemplated by the Appellant's legal advisers prior to Ratu Madraiwiwi's appearance on 5 October 2008. When the oral application for recusal was made by Ratu Madraiwiwi on 5 October 2008, Justice Pathik simply requested it be formalised by way of motion and affidavit in support. This is what occurred on 12 October 2008 and the hearing of it was set for 24 October 2008.

(f) Mr Islam then states that (at paragraph 8):

> *"Pillai Naidu & Associates and my principal Mr Dorsami Naidu are Solicitors on record ... but* ***Dr. John Lewis Cameron who has expertise in this area of law is the Appellant's choice of legal Counsel*** *but has not been able to be present due to the Immigration Department not allowing him entry into Fiji."*

No details are provided as to whether either the firm and/or Dr Cameron advised the Appellant as to the possibility of costs being awarded against her, nor are there any details as to what agreement, if any, was reached as to who would pay such costs if the recusal application failed and costs were awarded against Ms Heffernan. In addition, it is now quite clear from Dr Cameron's letter dated 21 May 2008 that he was not instructed in the appeal and had no professional interest in it.

(g) Mr Islam then states (at paragraoh 9) "*That Dr John Lewis Cameron has agreed to represent the Appellant on a pro bono basis and has appeared for the Appellant earlier*" and that "*the Appellant had applied for a visa*" to allow him to do so with a

letter of support dated 2 November 2008 from the President of the Fiji Law Society. What is not clarified is:

(i) The actual basis of the "pro bono" agreement and whether this was a case of "all care but no responsibility" such that if the case failed the Appellant would be liable for the legal costs awarded against her; and

(ii) Whether the Law Society at the time of writing the letter was aware of the judgments of Byrne J of 30 July 2007 and Pathik J of 24 October 2007 both of which were not only highly critical of the recusal applications made before them but had requested that a copy of their respective judgments be forwarded to the Fiji Law Society. That Justice Byrne's reasoned and detailed judgment by a senior member of the bench of the Fiji Islands (having served for some 18 years previously) was not heeded by the Appellant and her legal advisers is simply astounding. Compounding that behaviour is both the sheer arrogance and stupidity of how they dealt with his judgment. It should be remembered that Justice Byrne was sitting as a single judge of the Court of Appeal from an interlocutory judgment of Singh J. Mention was made in the submissions before him by the Appellant that Justice Byrne should disqualify himself. Judgment was delivered on 30 July 2008 wherein, amongst other matters, he refused to do so and provided detailed reasons. The Appellant and her legal advisers, rather than appealing his judgment, if they felt he was wrong at law, simply commenced new proceedings in the High Court (a court of lower jurisdiction) seeking Constitutional Redress.

(h) Mr Islam shows the problem of his lack of training as a lawyer in handling this file when he suggests (at paragraph 12): *"That if the appeal is not successful, the Respondents would be compensated through their judgment."* This statement conveniently does not mention:

(i) That costs normally follow the event and a successful party is normally not denied the fruits of their judgment because an appeal has been lodged;

(ii) That such a statement does not take into account the costs of the three Respondents in defending the unsuccessful appeal, and it had not been clarified as to who would be liable for such costs (the Appellant or his principal, Mr Naidu personally);

(iii) That the Application for Constitutional Redress ultimately failed completely before Pathik J on 11 April 2008 with costs being awarded against the Appellant to pay all three Respondents;

(iv) That in this regard Justice Pathik made an Order on 11 April 2008 that the Applicant (Ms Heffernan) pay costs of the proceedings on an indemnity basis to be taxed by the Master and **"that unless the Applicant pays the taxed costs in time she be not allowed to make any further application or institute any proceedings herein in Court".**

(v) That they were **not** acting on instructions in making the applications for Stay and Leave before the Court of Appeal. Indeed, it is now clear from the Appellant's letter dated 22 May 2008 to the Court, that she considered herself not only *"not a party to Mr Naidu's appeal against the costs order made against him personally"* but that she had *"not instructed him to appeal against the dismissal of my application for recusal"';*

(j) Despite not being a qualified practitioner, Mr Islam then states (at paragraph 13): "That the *grounds of appeal filed herein are substantive and show arguable legal issues."* How he can make such a statement when not only is he not qualified to do so but when this goes against two separate judgments by the longest serving senior judges in the Fiji Islands beggars belief.

(k) Compounding such nonsense is Mr Islam's next statement (at paragraph 14) that "our application to the Honourable Court is genuine and is on merit". Again, how his principal has allowed an unqualified person to make a statement of such legal significance is beyond me. How could he assess the legal merits? Indeed, as Dr Cameron has clearly understood in his letter dated 21 May 2008 to the Court, the issue is "that the application was dismissed for want of prosecution and Mr Naidu ordered to pay the costs thrown away".

(l) Further astounding statements in the Affidavit from Mr Islam as an unqualified person include: (at paragraph 15) "There are serious questions which require this Honourable's Courts [sic] attention", (at paragraph 16) "That there is a breach of natural justice as the Honourable Court has refused the Appellant and my Principal a right to be heard" and (at paragraph 17) "That I have made an application for Leave to Appeal and Stay of Execution in the High Court which was refused."

Despite Justice Pathik allowing the Appellant and Mr Naidu to be heard through their representative Mr Diven Prasad who appeared on 24 October 2008, what is apparent from these statements is that Mr Islam as an unqualified person has truly had the carriage of the matter which would perhaps go some way to explain some of its problems which I will shortly address, but it also must be a matter of concern for both the Attorney-General and the Law Society as, if it is correct as to what he has deposed, then it raises questions as to whether he has breached the *Legal Practitioners Act* 1997. It is unclear in the correspondence from Ms Heffernan and Dr Cameron whether they were aware that they had been giving and taking instructions from an unqualified person.

(m) Mr Islam seems to believe (at paragraph 18) that the basis for a Stay is simply because two of the other parties are seeking their rightful payment of legal costs. It shows a clear lack of understanding as to why a stay would be considered – not just because the other side wanted payment of their costs of $9,500,00 outstanding now for some seven months. Indeed, as Dr Cameron (the Counsel to whom both Mr Islam and Mr Naidu have referred to as the person directing the proceedings) acknowledged in his letter dated 21 May 2008 to the Court: "It would appear that the application was dismissed for want of prosecution and Mr Naidu ordered to pay the costs thrown away."

(n) Mr Islam the concludes asking the Court (at paragraph 19) "that in the interest of justice to grant the orders sought" whereas he fails to grasp as a non-lawyer that in the interests of justice the Court needs to be given cogent reasons to consider granting a Stay and to be sure not only as to the merit of the Application for Leave but also who is going to pay for the proceedings if they fail?

[46] It is important that in completing my judgment that I reiterate that the Court provided to each of the parties who might be held liable for the costs of the Applications for a Stay and Leave to Appeal, the opportunity to consider filing Affidavits. It is unclear whether the Chairperson of the Pacific Centre for Public Integrity Limited as Ms Heffernan's employer was provided with the opportunity through Mr Naidu to file an Affidavit. It is clear, however, that Ms Heffernan and Dr Cameron did not wish to take that opportunity, preferring instead to forward letters

to the Court denying their involvement in the present proceedings. This leaves Mr Dorsami Naidu as the Solicitor on the record as the only person who pursued the four applications which came before me on 23 May 2008: Adjournment, Recusal, Stay and Leave to Appeal.

[47] The reason as to why I refused the adjournment is sufficiently set out above. It was Mr Naidu who should have come to Court on 23 May 2008 prepared to argue the substantive applications. Indeed, it was his application supported by the Affidavit of his law clerk wherein he sought that the matter be dealt with urgently by the Court. That is why the Court advised all parties by facsimile transmission on 16 May 2008 that the hearing of the Application for the Stay would proceed on 23 May 2008 (and that Counsel were also advised to be prepared to argue the application for leave to appeal).

[48] That Mr Naidu did not take heed of that letter of 16 May 2008 from the Court, nor the letter sent subsequently on 19 May 2008 providing him with the opportunity to consider filing further affidavit material, was a matter for him. That he devoted his limited time to preparing and filing a recusal application, rather than being prepared to come to Court to argue the substantive applications for Stay and Leave to Appeal (having already done so before Pathik J three months earlier on 19 February 2008) is just unacceptable.

[49] Granted that the letters from Ms Heffernan and Dr Cameron placed Mr Naidu "squarely in the frame" so to speak. As Counsel for the Second and Third Respondents submitted to the Court, Mr Naidu must have known for quite some time that this was always going to the case. Otherwise, why did he not file in the Court of Appeal an Affidavit from Ms Heffernan in support of her applications for a Stay and Leave to Appeal as he did earlier in the High Court on 7 November 2007 in support of the applications for a stay and leave which were heard before Pathik J on 19 February 2008? Also, that Mr Naidu chose not to file his own Affidavit but instead to rely upon that from his law clerk, which I have had the unpleasant duty of having to criticise as set out above in this judgment (and to which Counsel for the

Respondents have directed me in their respective submissions to reveal the sham that it is), leaves Mr Naidu totally exposed personally (rather than his client) to indemnity costs orders.

[50] In relation to the withdrawn recusal application, there was no reason as to why I should have had to consider recusing myself. What has happened by the Court inviting the Appellant and her legal representatives to file affidavits is that their respective positions have been clarified through two letters to the Court from the Appellant and her Counsel in relation to the stay and leave applications from which the separate recusal application (filed by Mr Naidu again without instructions) has emerged. Clearly, Ms Heffernan and Dr Cameron wished to have no part in these proceedings. Far from creating any "apprehended/actual/perceived bias", the letter I directed to be sent from the Court on 19 May 2008 achieved its aim. Justice has indeed been achieved by allowing two parties who are not in the country and who claim (with no evidence to the contrary submitted by Mr Naidu) to have clearly not been part of the decision to make the applications before this Court, to have had the opportunity to say so, albeit not on Affidavit. The Application for Recusal was clearly misguided and, unsurprisingly, withdrawn mid-morning.

[51] Turning to the Motions for a Stay and Application for Leave to Appeal, there was one Affidavit in support filed sworn on 1 May 2008 from Mr Abdul Islam, Legal Executive, with the law firm of Pillai, Naidu & Associates of Nadi. For the reasons, I have detailed in this judgment, the Affidavit was of no support. Indeed, as mentioned above, I will be asking for a copy of this judgment to be forwarded formally to the Attorney-General and the Fiji Law Society to consider what action, if any, they should be taking in relation to the matters deposed to in the Affidavit by Mr Islam.

[52] This leaves Mr Naidu without any support from the Appellant or Counsel in taking these proceedings before me and leaves him relying upon an Affidavit which I will be referring to elsewhere. It is farcical that an experienced practitioner who was seeking to appeal personal costs orders would not put himself on Affidavit. By

getting his law clerk to do so, only resonates what Justice Pathik said in his judgment on 24 October 2007 when he noted, at paragraphs 22-23:

> *"I will award costs against the solicitor personally Mr. Dorsami Naidu of Pillai, Naidu & Associates whose brief it is and who has signed all necessary documents, for ill-advising the applicant to make such frivolous application knowing that he has no leg to stand on. He did not have the audacity to appear before me in person or send Ratu Joni who appeared before me earlier on and did not have the courtesy of informing the court that for some good reason he is unable to attend rather than his counsel saying when asked 'he is in the West'.*
> ***If all counsel involved in this case think that by this kind of behaviour before the Court they will cripple the Court system they should think twice before they dig their own grave."***

In short, the problem for Mr Naidu is that clearly, he must have been aware, that not only was there no merit to either application but they were doomed to failure and, unsurprisingly, also withdrawn mid-morning. .

[53] In considering how best to deal with the question of costs, I note that if argument had proceeded concerning the recusal, stay and leave applications, this may well have included argument as to why no affidavits of service had been filed with the Court, as well as to whether Mr Naidu should have waited in filing such applications with the Court of Appeal until after the costs orders of Pathik J of 11 April 2008 had been satisfied. I do not need to decide that point. I concede that there is some substance to Mr Naidu's argument that his client is "not so shackled". His problem is, as far as I am aware (and Mr Naidu produced nothing before the Court of Appeal to the contrary), no appeal has been lodged against the Orders made by Pathik J of 11 April 2008 and, therefore, as they presently stand, there is force in the argument as pointed out by Counsel for the First Respondent. That is, the Appeal could not have been properly put before this Court due to the earlier orders of Pathik J of 11 April 2008, in particular order (e):

> ***"That unless the Applicant [Ms Heffernan] pays the taxed costs in full in time she be not allowed to make any further application ort institute any proceedings herein in Court."***

[54] Therefore, the only point I can find in Mr Naidu's favour is that by withdrawing his

three applications he spared all involved the time and expense of what inevitably would have been a second and perhaps a third day in Court. In reaching a conclusion concerning the behaviour of Mr Naidu in these proceedings, I am mindful of what the Court of Appeal for Botswana said in ***Lerumo Mogobe Legal Practitioners v Fencing Center (Pty) Ltd*** [2000] 1 B.L.R. 128; [2000] BWCA 10, as per Steyn JA at pages 14-15 (with whom Amissah P and Lord Weir JA agreed):

> *"This court must not be seen to encourage parties to appeal only against costs orders, save when they are clearly wrong. Secondly, and more importantly, [the]* ***appellant's conduct as an officer of the court was most reprehensible and deserving of censure****. The court in demonstrating its disaffection concerning such conduct, should not be confined to expressions of disapproval only but also, in proper cases, by way of appropriate orders as to costs. For these reasons we propose to order that the costs of appeal should also be paid on an attorney and own client scale [that is, indemnity costs].*
>
> ***Clearly the professional behaviour of the appellant is deserving of censure****. We believe that his conduct in this case is a matter which requires an investigation by his peers.* ***As officers of the court and servants of justice the legal profession needs to guard jealously the standards of honesty of those who practice our profession.*** *As the Law Society of Botswana is the guardian of the proper professional conduct of its members, and in view of the findings made and the opinions expressed by the Judge a quo and ourselves concerning Mr. Mogobe's unprofessional behaviour, we refer this matter to the Law Society for its investigation and such action as it deems appropriate."*

[55] Similarly, I can find no reason not to condemn Mr Naidu's behaviour in the strongest possible terms. To commence such a frivolous and vexatious application to the Court of Appeal warrants an indemnity costs order. To do so, however, without evidence that the Solicitor was acting on the instructions of his client, (and indeed, in circumstances where she has written to the Court saying that she is not a party to the appeal and has not instructed him to do so), must mean that he is liable personally as the Solicitor on the record for such costs. It also means that I would not be doing my duty to the profession as well as the general public in this country if I did not refer the matter to the Fiji Law Society for its own investigation. I will also be forwarding a copy of this judgment to Ms Tavo who attended on behalf of the Law Society as an Observer at the hearing on 23 May 2008. It is now a matter for the Society to consider.

[56] Before leaving this judgment, I must raise six important issues.

1. Vexatious Litigant

[57] First, I am mindful that, as a Judge, I have a responsibility to protect parties from vexatious litigants (and, if necessary, as this case has clearly demonstrated, their legal advisers). The "Heffernan" cases have all the hallmarks of vexatious litigation. Indeed, recently in another leave application, where I was sitting as a single Judge of the Court of Appeal, I had to consider this issue (see ***William Rosa Jnr v Chief Executive Officer for Justice and Commissioner of Prisons***, Hickie JA, 1 May 2008, Civil Appeal No. HBM 34 of 2004).

[58] In ***Rosa***, I cited at paragraph 34 a more recent decision of the Hong Kong Court of Final Appeal in ***Ng Yat Chi v Max Share Ltd & Another*** (2005) 8 HKCFAR 1 wherein Ribeiro PJ explained (at page 24, paragraph 48 F):

> *"The vexatious litigant* ***typically acts in person and characteristically refuses to accept the unfavourable result of the litigation, obstinately trying to re-open the matter without any viable legal basis****. Such conduct can become obsessive with* ***the litigant not shrinking from making wild allegations against the Court, or against the other side's legal representatives or targeting well-known public personalities thought to be in some way blameworthy****. Numerous actions may be commenced and numerous applications issued within each action."*

[59] The only difference in the "Heffernan" cases is that she has not been acting "in person" but, unfortunately, on the advice of her legal advisers, with all or most of it apparently undertaken on a "pro bono" basis. Far from being a noble service, with which one normally comes to associate the words "pro bono", it may well be that such a service will cost Ms Heffernan her home and perhaps lead her to bankruptcy.

[60] In ***Rosa***, I also cited at paragraph 35 of my judgment, Ribeiro PJ's noting in ***Chi v Max Share Ltd*** "that the problem [of vexatious litigants] had been highlighted in the courts of England and Wales in recent years" and his citation of the following examples:

"(a) (at page 24, paragraph 49 I) Lord Bingham of Cornhill CJ in **AG v. Barker** [2000] 1 FLR 759 that the effect of the vexatious litigant was *"to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant;* ***and that it involves an abuse of the process of the court"***;

(b) (at page 25, paragraph 59 A-B) Lord Justice Brooke's "description" in ***Bhamjee v Forsdick (No 1)*** [2003] EWCA Civ 799 of **the "litigant who will not take no for an answer"** as striking "a chord which is all too familiar";

(c) (at page 26, paragraph 53 C) Lord Justice Brooke's further comments in ***Bhamjee v Forsdick (No 1)*** as to the **financial costs caused** by vexatious litigants not only to respondents but **to the court system itself** (such as accommodation and the time of both judicial and administrative staff);

(d) and finally (at page 25, paragraph 51J), Lord Phillips of Worth Matravers in ***Bhamjee v. Forsdick and Others (No. 2)*** [2004] 1 WLR 88 that:

> *"vexatious litigants are often without the means to pay any costs orders against them, and the parties in whose favour such costs orders are made are disinclined to throw good money after bad by making them bankrupt,* ***particularly as the vexatious conduct may spill over into bankruptcy proceedings themselves."***

[61] In ***Rosa***, I further noted at paragraph 37 that Ribeiro PJ in ***Chi v Max Share Ltd*** had suggested (at page 28, paragraph 61 G) :

> *using a "Grepe v Loam Order" whereby the English Court of Appeal in* ***Grepe v Loam*** *[1888] LR 37 ChD 168 ordered that a group of vexatious litigants be required to obtain leave to issue any fresh application "and if notice of such application be given without such leave being obtained", then the proposed respondents "shall not be required to appear ... and it shall be dismissed without being heard".*

[62] In addition, as discussed in ***Rosa***, at paragraph 41, Ribeiro PJ in ***Chi v Max Share Ltd*** had suggested (at page 29, paragraph 66 I-J): "that it was important to consider making what he termed an 'an extended *Grepe v Loam order*', to cover not only existing proceedings but the issuing of fresh actions".

[63] The decision of the Hong Kong Court of Final Appeal in ***Ng Yat Chi v Max Share Ltd & Another*** and, in particular, the excerpts from the judgment of Ribeiro PJ

which I have cited in ***Rosa***, as well as partly above, are measures that might have to be considered in relation to the "Heffernan" cases.

[64] I must place on the record my concern that, even with Mr Naidu's withdrawal of all proceedings he had filed before me in the Court of Appeal, there would still appear to be pending an Application for Constitutional Redress before Justice Gounder as well as an appeal from the Orders of Justice Byrne of 30 July 2007 to the Full Court of Appeal. As the Appellant and her Counsel sensibly had nothing to do with the matters before me, I do not have a basis to consider, as I did in ***Rosa,*** whether the Appellant should be declared a vexatious litigant and for which she would need the opportunity to address the Court considering any such Order.

[65] As a Judge of this Court, I have a responsibility, however, to stop any abuse of the Court process as well as to protect other members of the community from such actions. Clearly, by the Appellant bringing two additional applications in the High Court seeking Constitutional Redress rather than appealing to the Full Court of Appeal the Orders of His Lordship, Byrne J, sitting as a single Judge of Appeal, is an abuse of the Court process and must be stopped. Therefore, I will be forwarding a copy of this judgment (as well as my judgment in ***Rosa)*** to the Attorney-General as well as Justices Byrne and Goundar for consideration. As such, the Appellant and Dr Cameron are put on notice, that whereas they wisely advised the Court that they were not part of the matters I have just heard, they could well each find themselves liable for indemnity costs order depending upon the outcome of those other matters. In addition, Ms Heffernan may also find herself being declared a vexatious litigant (even for her own protection as well as the various Respondents to her actions).

2. Unanswered questions

[66] Second, as mentioned earlier in this judgment, I directed the Court of Appeal Registry to send a letter on 19 May 2008, to the Appellant's Solicitor providing the following persons with the opportunity to consider filing an Affidavit with the Court:

(a) Ms Heffernan as the Appellant;

(b) The Chairperson of the Pacific Centre for Public Integrity Limited as Ms

Heffernan's employer;

(c) Mr Dorsami Naidu as the Solicitor on the record; and

(d) Dr John Cameron as Counsel upon whose advice such applications were allegedly made.

[67] Due to so much misinformation which seems to be "the norm" at present in the Fiji Islands (and then relayed abroad), it is important that I place on the public record in this judgment that not only was the opportunity provided not taken up (and that is a matter for each of the four persons), it does raise larger costs questions for the Courts which still have to hear Ms Heffernan's various pending matters as well as any future applications made by Ms Heffernan on the advice of her present legal representatives.

[68] Mr Dorsami Naidu relied upon the Affidavit of his Law Clerk. It is a matter for others to read it and decide whether its contents are relevant to other disciplinary issues.

[69] In relation to the invitation to Ms Heffernan, many of the questions which remain unanswered are as follows:

(a) Details concerning the arrangements, if any, between Ms Heffernan and her employer, the Pacific Centre for Public Integrity Limited as to the liability for Ms Heffernan's legal costs should she be unsuccessful in her various applications before the Courts?

(b) Does Ms Heffernan understand that she commenced the various applications before Singh J, Byrne J, Ward P, Pathik J and Goundar J in her own right or as an employee of the Centre?

(c) Ms Heffernan has mentioned in her Affidavit of 12 September 2007 that the Centre is **supported by funding from donor agencies such as AusAid and NZAid.** Have the various donor agencies which provide such funding to the Centre been advised of Ms Heffernan's various legal proceedings? If so, have they been approached to provide funding for any of the outstanding legal costs awarded against her to date? If so, what has been their response?

(d) Is Ms Heffernan aware that her ultimate application for Constitutional Redress before Pathik J failed completely and that costs were awarded against her personally and on an indemnity basis for all three Respondents, which at this stage, until they are taxed, stand in excess of $130,000 (less the costs previously ordered to be paid personally by Mr Naidu on 24 October 2007 and 19 February 2008?)

[70] As mentioned, I wonder whether AusAid and NZAid, and whoever else has been funding Ms Heffernan and her various activities, are aware of these matters? I will be forwarding to AusAid and NZAid a copy of this judgment.

[71] In relation to the invitation to the Chairperson of the Pacific Centre for Public Integrity Limited as Ms Heffernan's employer, many of the questions which remain unanswered are as follows:

(a) What is their understanding as to the arrangements, if any, between the Centre and Ms Heffernan as her employer, concerning the liability for Ms Heffernan's legal costs should she be unsuccessful in her various applications before the Courts (as she has now been before Pathik J on the Constitutional Redress application)?

(b) Does the Centre understand that Ms Heffernan commenced the various applications before Singh J, Byrne J, Ward P, Pathik J and Goundar J in her own right or as an employee of the Centre?

(c) Ms Heffernan has mentioned in her Affidavit of 12 September 2007 that the Centre is supported by funding from donor agencies such as AusAid and NZAid. Have the various donor agencies which provide funding to the Centre been advised of Ms Heffernan's various legal proceedings? If so, have they been approached to provide funding for any of the outstanding legal costs awarded against her to date? If so, what has been their response?

(e) Is the Centre aware that Ms Heffernan's ultimate application for Constitutional Redress before Pathik J failed completely and that costs were awarded against her personally and on an indemnity basis for all three Respondents, which at this stage, until they are taxed, stand in excess of $130,000 (less the costs previously ordered to be paid personally by Mr Naidu on 24 October 2007 and 19 February 2008?) Does the Centre have sufficient assets or an insurance policy to cover such legal costs?

[72] In relation to the invitation to Ms Heffernan's "Counsel of choice", Dr John Lewis Cameron, many of the questions which remain unanswered are as follows:

(a) Whether Dr Cameron is required to take out professional indemnity insurance in Fiji pursuant to Part X of Legal Practitioners Act 1997? If so, has he taken out such insurance, with whom and what is the amount of cover?

(b) It is noted that at paragraphs 48-49 in the Affidavit of Ms Heffernan sworn on 12 September 2007, she deposed that:

> *"48. On Tuesday 26 June 2007, the Director of Immigration arranged a media conference at which he claimed that Dr Cameron was refused entry because he had breached the terms of past visitors' permits by appearing in court without a work permit ...*
> *49. I am advised by Dr Cameron and do believe that the claim is without foundation and that he will shortly issue proceedings to clear his name."*

It is now some eight months since Ms Heffernan deposed to the above. Presumably Dr Cameron has commenced such litigation. At what stage have such proceedings reached? Does Dr Cameron expect to have his personal proceedings finalised soon, such that, if successful, he would be in a position to take over the carriage of the matter as the Solicitor on record for Ms Heffernan and on a pro bono basis?

(c) When was Dr Cameron first instructed to act on Ms Heffernan's behalf in her various matters before the Courts of the Fiji Islands? According to annexure "AMH 1" of the Affidavit of Angenette Melania Heffernan sworn on 12 September 2007, an Originating Summons was filed in the High Court of Fiji at Lautoka (HBC 25 of 2007) on 31 January 2007 by Pillai Naidu & Associates in Nadi (with city agents named as S.B. Patel & Associates of Lautoka). Subsequently, this was heard before Justice Singh in the High Court of Fiji at Suva on 28 March 2007 and became Civil Action No: HBC 37 of 2007 with a Ruling on the Application for an Interlocutory Injunction being delivered by His Lordship on 20 April 2007. Dr Cameron and Ms T. Draunidalo are listed in the judgment as having appeared before Justice Singh.

(d) Who has paid for Dr Cameron's various flights to and from the Fiji Islands since he started acting on Ms Heffernan's behalf as although he might be acting for Ms Heffernan on a pro bono basis it is unclear who is covering the cost of his

disbursements? Is the agreement directly between Dr Cameron and Ms Heffernan or through Pillai Naidu & Associates of Nadi?

(e) Upon what basis has Dr Cameron been acting on Ms Heffernan's behalf since June 2007 when he was denied entry to the Fiji Islands? Is there a formal signed retainer and costs agreement between Dr Cameron and Ms Heffernan or are there separate agreements between Dr Cameron and Ms Heffernan, Dr Cameron and Pillai Naidu & Associates, and Ms Heffernan and Pillai Naidu & Associates?

(f) If Dr Cameron has been acting for Ms Heffernan "on a pro bono basis", and there is no written agreement as such, then what is his understanding as to the terms of such retainer?

(g) Has Dr Cameron ever advised Ms Heffernan as to the possibility of her losing her various applications before the courts in the Fiji Islands, that costs orders against the unsuccessful litigant normally follow the event, that there is the potential of indemnity costs orders being awarded against her and that she should seek independent counsel's advice concerning her liability for such costs?

(h) Is Dr Cameron aware that Ms Heffernan's ultimate application for Constitutional Redress before Pathik J failed completely and that costs were awarded against her for all three Respondents (which at this stage, until they are taxed, stand in excess of $130,000 less the amounts awarded personally against her Solicitor, Mr Naidu?)

(i) In that regard, does Dr Cameron agree to such costs orders being altered to being awarded against him personally and, if so, would this be covered by his professional indemnity insurance?

(j) If an award for costs personally against Dr Cameron was not going to be covered by the terms of his personal indemnity insurance does Dr Cameron have sufficient assets to cover such an award of costs?

(k) Does Dr Cameron consider that Ms Heffernan needs to obtain independent legal advice concerning such costs orders and whether she has an action against her various legal representatives who have advised her, namely Mr Dorsami Naidu and/or Dr John Cameron?

(l) What are the contact details for Dr Cameron so that they are correct on the court record as well as correct for service should the Court decide that he should be personally liable for costs. In that regard, the Court notes as follows:

(i) **Fiji Law Society Registration**

"John Lewis Cameron
Unit 8, 17 Emerald Terrace
West Perth W.A. 6005
AUSTRALIA
E-Mail: jcameron@francisburt.com.au
Phone: 9481 1550
Fax: 9486 1774"

(ii) **Western Australian Bar Association Membership**

"Francis Burt Chambers
Allendale Square
77 St George's Terrace
Perth, WA, 6000
AUSTRALIA
E-Mail: drjohn@bigpond.net.au
Phone: (08) 9481 1550
Fax: (08) 9486 1774"

(iii) **Francis Burt Chambers**

The Court also notes that whilst listed as a tenant of the above Chambers by the WA Bar Association, Dr Cameron is not listed as an actual member of those Chambers on the Chambers' website. Is it to be presumed that Dr Cameron actually practises from Unit 8, 17 Emerald Terrace, West Perth W.A., 6005, AUSTRALIA, and the address of Francis Burt Chambers, 77 St George's Terrace, Perth, WA, 6000, AUSTRALIA, is where he is purely a "door tenant"?

The letter dated 21 May 2008 which the Court received from Dr Cameron declined (as is his right) to answer most of these questions. The Court does note, however, that he has listed his contact details as follows:

"Francis Burt Chambers
Allendale Square
77 St George's Terrace
Perth, WA, 6000
AUSTRALIA
P.O. Box 745
WEST PERTH, WA 6872
Tel: (08) 9481 1550
E-Mail: jlcameron@iinet.net.au"

[73] Although Ms Heffernan and Dr Cameron, (as well as presumably the Chairperson of the Pacific Centre for Public Integrity Limited as Ms Heffernan's employer), have each exercised their right not to clarify many of the unanswered questions concerning Ms Heffernan's Application for Constitutional Redress heard before Justice Pathik (part of which was the Recusal Application which was the subject of the Applications for a Stay and Leave to Appeal before me), it must be of concern to those who are Respondents to Ms Heffernan's various other actions that there remain many unanswered questions as to:

(a) Who is directing the litigation;

(b) Who is going to take responsibility for the payment of the costs of the other parties if her applications fail and costs are awarded against her; and

(c) Should not the Fiji Law Society be suggesting that Ms Heffernan immediately seek independent legal advice as to her liability for such legal costs as well as possible negligence actions against her legal advisers?

[74] In my reading of the many files which involve the "Heffernan" cases, I came across her original Affidavit in file HBC No. 37 of 2007 sworn on at Nadi on 31 January 2007, which commenced, what I can only describe as, an avalanche of legal stupidity. In it, Ms Heffernan mentions, at paragraph 25, that she has a husband and young children. Further, at paragraphs 27-28, she deposes in relation to her financial circumstances as follows:

> *"**My assets are** – real property at 5 Sterling Place, Lami, valued at $150,000.00 ... A motor vehicle valued at $7,000.00 ... Furniture and personal effects valued at $20,000 .... **My liabilities are** – a Mortgage over the said real property with ANZ in the sum of $72,000.00 ... Visa Card debt in the sum of $5,000.00 ..."*

[75] **If nothing is done, at least by raising these questions, I have tried to make Ms Heffernan and her husband aware (even at this late hour), of the serious prospect of them losing their home and the need for the Law Society to arrange for them to get urgent independent legal advice. It has also put her legal advisers on notice as to the potential implications for claims on their professional indemnity insurance by Ms Heffernan (of which they now have a duty to advise their insurers). In addition, the Respondents to Ms Heffernan's various actions can at least now be in**

a position to put the Courts on notice that what is occurring is surely the height of legal lunacy and, if not withdrawn or struck out, then some security for costs must be forthcoming.

3. Behaviour of Some Senior Members of the Profession

[76] Third, I note that during his appearance before me, I had to stop and warn Mr Naidu when he attempted to make, what I perceived, were denigrating remarks about Justice Pathik. I pointed out to him that Justice Davendra Pathik is the longest serving member of the legal profession in the Fiji Islands, a remarkable individual who has given his adult life to the law, including 35 years service to the judiciary and, in turn, to the people of this wonderful country.

[77] Mr Naidu's questionable remarks follow in the footsteps of what can only be described as the most disgraceful submissions I have ever read a practitioner submit to a Court (as were made by Dr Cameron on 19 June 2007 to Justice Byrne in the Court of Appeal and upon which Justice Byrne ruled on 30 July 2007) which then formed the basis of the subsequent Constitutional Redress Application heard before Justice Pathik. To make such outlandish statements without any foundation about members of the Judiciary is totally unacceptable and would normally be dealt with severely by the profession's governing body. It does not bode well, however, for the legal profession in this country if this is the standard of accepted behaviour from senior members of the profession presumably supported by the Law Society as, when Justices Byrne and Pathik forwarded their respective judgments to the Law Society, and I stand to be corrected, no action was taken against either Dr Cameron or Mr Naidu.

[78] It is interesting then that in the *2007 Annual Report of the Fiji Law Society*, the then President, Mr Devanesh P. Sharma, said at page 4, paragraph 12:

> *"One thing that I would like to encourage is showing of respect for the senior members of the profession. When I started my legal practice we had this unwritten code of showing utmost respect for senior members of the legal profession. Young members would offer their seats in Court to Senior Counsel and even ask that their cases be stood down whilst a Senior Counsel was in Court. We would address senior members with respect and*

> *in most cases that respect was accorded back to us. I would dearly love to see this practice being fully revived. Our profession is steeped in tradition and dignity and we should not lose sight of this fact."*

[79] I can only concur. To quote from distant memories of my schoolboy Latin: "facta non verba" ("deeds not words"). How can senior members of the profession expect respect when younger members observe what is presently taking place in the Courts? Long after the present troubles have passed, the long term effects for the profession of which each and everyone one of us has contributed to on a daily basis will remain. It is trite to say but "you reap what you sow".

4. An Independent bar

[80] Fourth, in the *2007 Annual Report of the Fiji Law Society*, the President suggested at page 4, paragraph 7, in his Report as to the need to 'Set up a Bar Association'. I also note that there is information about this on the Society's website. In light of what has been happening in this and other cases, perhaps it is time to further develop this idea.

[81] A strong and independent Bar based permanently in the Fiji Islands, would not have allowed the "Heffernan" cases to continue, in particular, after reading Justice Byrne's judgment of 30 July 2007. For a start, Counsel would have been strongly disciplined by the senior members of the Bar in light of Justice Byrne's comments and a "please explain" may well have halted the behaviour of those advising Ms Heffernan or at least made them provide her with independent legal advice. In addition, Counsel once removed from the fray of the "day to day clients", may well have provided, to use a hackneyed phrase, "wise counsel". The motto of the NSW Bar Association, of which I was a member before coming to the Fiji Islands, is: "Servants of all yet of none". Food for thought.

5. Opening the Courts

[82] Fifth, at the commencement of the proceedings before me on 23 May 2008, I asked Counsel appearing before me, that whilst I noted that the matter had been listed as is usually the case of "Chambers in Court", did any of them object to my "opening

the Courts" to the public? There were no objections.

[83] I wish to go on the record that this will now be the usual practice for matters listed before me. Whilst I can understand that in the past, with a small judiciary and profession, listing most matters in Chambers prior to hearing was the usual practice, I am of the view that it has definitely reached its "use by date". I appreciate that there are at present a limited number of court rooms and that this may eventuate in late morning and, perhaps, at times, afternoon sittings, but this is the norm in many other common law jurisdictions and provides "open" justice rather than closed chamber hearings whereby we have the unsightly spectacle of the battle of one lawyer's "spin" over another's for the nightly television and radio news or banner headlines for the newspapers the next day. As any lawyer worth their salt knows, it is the argument in the court of law at the end of the day which counts, not the play to the gallery in the court of public opinion. Hence, it is preferable that the courts are open to the media to form their own views as to what has taken place rather than what has been "doctored" and sometimes "sensationalised" for them.

[84] With that said, I believe that the media have a vital role to play in any vibrant system of justice and I will be doing my best to provide to members of the media with copies of all of my judgments. I am sure that there will be times where I might vehemently disagree with them, but I can only agree with the words of Lord Denning who in ***Reg v Commissioner of Police of the Metropolis; Ex parte Blackburn (No.2)*** (1968) 2 QB 150 at 155, when a judgment of the Court of Appeal had received a stinging commentary in the press and there was a question whether it was contempt, said:

> "*It is the right of every man [and woman], in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not.* ***All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy.*** *We must rely on our conduct itself to be its own vindication.*

> ***Exposed as we are to the winds of criticism, nothing** which is said by this person or that, nothing which is written by this pen or that, **will deter us from doing what we believe is right.**"*

[85] I should also mention that if the Courts are to be open, however, the names of Judges should not normally be listed particularly in leave applications prior to the commencement of proceedings. Mr Naidu expressed concern to me at the commencement of these proceedings that apparently my name had been kept from him by the Court of Appeal Registry. I replied that I was of the view that this was as it should be as it puts a brake on "judge shopping". Indeed, in the jurisdiction from which I have recently come, in leave to appeal applications before the High Court of Australia, one does not know which two judges will hear the leave application until they literally file on to the Bench. A similarly practice occurs in varying ways before the Supreme Court of New South Wales, and even in final hearings before the District and Local Magistrates' Court. Surely, in any transparent system of justice this is how it should be rather than "feigned adjournments" in the hope of a more favourable judge on a different day?

6. Allegations of Bias

[86] The sixth and final matter I need to menton is that allegations of bias against me were raised and then withdrawn by Mr Naidu. I also note that a number of scurrilous accusations were previously made by Dr Cameron in his submissions of 19 June 2007 against Justice Byrne.

[87] As we know, such allegations whilst making great headlines in the print media are long on hype but short on facts. Courts, if they are to be places of justice, must rely on facts not hype. Perhaps a very good example for members of the media as well as the general public as to the gap in reality between the rumours they are being fed and the actual truth is contained in an Affidavit sworn by Ms Angenette Heffernan at Nadi on 31 January 2007. This was the original Affidavit which commenced these long and bizarre proceedings. Annexure "AH 2" to that Affidavit contains a number of alleged newspaper articles which are clearly not the originals nor properly sourced by their web address citation (if they have been downloaded from the

internet as would seem to be the case). In any event, the Appellant and another person are mentioned in a number of articles to be in hiding as being "pro-democracy activists" (*Fijilive*, Saturday January 27, 2007), who were being sought to be questioned for "alleged incitement" which is an offence. An indirect quote in that same article perhaps sums up the misguided nature of the "Heffernan" cases over the past 16 months when it was said:

> *"... **the two are making themselves feel like martyrs which they are not.** If they think they are doing this for a good cause than [sic] they are wrong ..."*

The other person named in the article with Ms Heffernan was a "vocal businesswoman **Laisa Digitaki**".

[88] If ever this puts paid to the exaggeration and misinformation which has been coming out of Ms Heffernan and Dr Cameron for the past 16 months then this is surely it. Ms Heffernan's "comrade to the cause", Laisa Digitaki, **is the same person who was recently successful in her appeal before Justice Byrne and myself sitting in the Court of Appeal where we ruled in her favour** allowing an appeal and a retrial thereby overturning a judgment against her by the Mobil Oil company **for a sum with interest of just under $400,000**. (See ***Laisa Digitaki v Mobil Oil Australia Limited***, Unreported, Full Court of Appeal, Civil Appeal No. ABU 0100 of 2006, 2 May 2008, Byrne and Hickie JJA). If Justice Byrne was, as alleged in Dr Cameron's disgraceful submissions of 19 June 2007, "a military appointee who might be inclined to ... deliver a favourable decision", then how could we ever have found in Ms Digitaki's favour? Surely, there were 400,000 reasons presented on a platter to us to find against her? Instead, could one suggest that there are now 400,000 reasons for the media and general public to question the credibility of Ms Heffernan's Counsel of choice, Dr Cameron?

[89] It also puts paid to the mischievous advice which Ms Heffernan was also previously given by her various legal advisers as she sets out in her Affidavit of 31 January 2007 at paragraph 22:

> *"My lawyer met with her colleagues at about 3.30pm yesterday in Suva and they resolved that these proceedings be filed in Lautoka instead of Suva. Apart from the circumstances already deposed,* ***my lawyers also opined that***

> ***this matter may not get a fair hearing in Suva*** *where the purported Acting Chief Justice has a discretion with regard to the allocation of Judges for matters filed after his purported appointment."*

[90] If this is correct, this is just disgraceful legal advice. As it so happened, an ex-parte motion came before Justice G. Phillips at 4.50 p.m. on 31 January 2007 in the High Court at Lautoka with Ms T. Draunidalo appearing on behalf of Ms Heffernan. Justice Phillips transferred the matter (being a Constitutional application) to the High Court Registry, Suva, pursuant to Order 4 Rule 1 (4) of the High Court Rules. Thereafter, the Acting Chief Justice simply directed that the case go before the next civil judge available in Suva, who was Justice Jiten Singh, a pre-December 2006 appointment.

[91] What occurred also puts paid to the outlandish claims in Ms Heffernan's Affidavit (presumably on the advice of her lawyer, Ms T. Draunidalo, and perhaps others). In addition, obviously, Ms Heffernan was never made aware by her legal advisers of the judgment of the present Acting Chief Justice, Gates J, in ***Iftakhar Khan v President of the Fiji Islands*** [2002] NZAR 393. I would refer it to Ms Heffernan as she may find it enlightening reading on "judge shopping".

[92] I might also add that over the past three months during my time working in the High Court at Suva and Court of Appeal I have never met the interim Prime Minister, I have never met the Attorney-General or any other member of the interim government. The only person I have met is His Excellency, the President, who warmly welcomed me to the Fiji Islands and thanked me for coming. Since being sworn in on 3 March 2008, I have never been told how to deal with a case. It is my understanding that files are allocated at random by the Registry taking into account constitutional matters which are first discussed briefly with the Acting Chief Justice so that potential conflicts of interest are avoided. In addition, an "after hours" Duty Judge system on a rotating basis has recently been implemented by the Acting Chief Justice for Suva, Lautoka and Labasa to again stop allegations of "judge shopping" and "firm favouritism".

[93] Hopefully, after Ms Heffernan has read the entirety of this judgment, she may reflect as to how she became entangled in this legal and costs minefield. Perhaps, when she commenced her initial proceeding in Lautoka in January 2007, which was subsequently transferred to Suva, she may have held certain fears (real or imagined, exacerbated or not, by well-meaning friends and family). No doubt, however, she genuinely accepted the legal advice which she was given as to "the protection" she needed. Her initial success in obtaining interlocutory Orders in her favour from Justice Singh on 20 April 2007 may have only wrongly served to have strengthened her in that belief.

[94] Justice Byrne's subsequent detailed and reasoned judgment of 30 July 2007, however, should have made her and her legal advisers "stop and take stock" as any experienced practitioner would do. This was the second most experienced judge in the country, telling Ms Heffernan that a case based on rumour, innuendo and unsubstantiated media reports would not normally stand up in a superior court of law or a final hearing and that is without dealing with the problems of the notice provisions and the consideration of weight to be given to such hearsay evidence as outlined in Sections 4 and 6 of the *Evidence Act*. (See ***Digitaki v Mobil***, supra).

[95] The costs of the proceedings before Byrne J in June and July 2007 still have to be determined. Also, the matter still has to proceed to the Full Court of Appeal for determination and once a ruling has been made then the case referred back to Singh J for a final hearing. No doubt, depending upon the outcome, that case would well be appealed to the Court of Appeal and, perhaps, the Supreme Court. The Constitutional Redress application before Pathik J questioned what took place before Byrne J in June and July 2007 resulting in his reasoned and detailed judgment of 30 July 2007. The initial Affidavit filed in support of that Constitutional Redress application before Pathik J was sworn at Suva on 12 September 2007 and showed all the hallmarks of a client who had been "swept up" in the agenda of others. What events happening in the Judiciary had to do with Ms Heffernan's alleged personal protection is beyond me. As Justice Pathik noted at paragraph 28 of his judgment of 11 April 2008:

> *"The applicant has not been deprived of access to a fair, independent and impartial court under section 29(2) of the Constitution."*

[96] Apart from Ms Heffernan attempting to canvass issues already dealt with before Byrne J (such as 'judges and judicial immunity'), as Justice Pathik summarised at paragraphs 46-47 of his judgment, commencing further proceedings in the High Court rather than taking it on appeal (either to the Full Court of Appeal from the ruling of Byrne J or to the Supreme Court from the ruling of Ward P), was an abuse of process:

> *"The applicant applied to the President of the Court of Appeal [Ward P] to set aside the various orders of the 1st Respondent which she is complaining of.*
> *As counsel said the President refused to interfere with the 1st Respondent's orders. Instead of pursuing an appeal to the Supreme Court either by obtaining the leave of the Court of Appeal or if not the Supreme Court, of the Court of Appeal President's decision on 28 June 2007, the applicant seeks a constitutional redress* ***to avoid*** *(as Lord Diplock put it) [in* ***Harrikisoon v Attorney General of Trinidad and Tobago*** *[1980] AC 265 at 269]* ***"the necessity of applying in the normal way for the judicial remedy …"*** *The President of the Court of Appeal did not dispute the authority of the 1st Respondent [Byrne J] as a Judge."*

And this is without considering issues in relation to "relevance" as well as "locus standi". Unsurprisingly, the proceedings before Pathik J were "struck out" as an abuse of process leaving Ms Heffernan with an exposure of over $100,000.

[97] Alarm bells should have been ringing in the ears of Ms Heffernan's legal advisers. Instead, despite the judgments of Byrne J, Ward P and now Pathik J, of following ***"the necessity [of] applying in the normal way for the judicial remedy"***, Ms Heffernan has NOT appealed Pathik J's judgment to the Court of Appeal. Rather, she has commenced a further amended Constitutional Redress application which has been filed in the High Court (presumably on the obstinate advice and/or blind stupidity of her legal representatives whose homes are not on the line), that rather than accepting the reasoned judgments of Byrne J and Pathik J in relation to the legality of post-December 2006 appointments, she should only have cases heard by judges appointed pre-December 2006 who are mostly in the High Court. The file was allocated to Goundar J, but he being a post-December 2006 appointment, the

inevitable interlocutory application seeking his recusal has also been filed. It is in reality, a duplication of all that has taken place previously and will presumably suffer the same fate of her previous applications before Byrne J, Ward P and Pathik J.

[98] If Ms Heffernan's lawyers are sincere as to the nightmare in legal costs and probable financial ruin which she must now be surely facing, then she must be advised to withdraw all applications as best she can. If she still feels aggrieved or "unsafe" (as to what I am actually not certain), then she can proceed with the Appeal to the Full Court of Appeal against the Orders of Byrne J of 30 July 2007, after which she can then again take stock of both her legal and financial position. Taking personal proceedings against members of the judiciary by questioning their appointments in some misconceived notion that by doing so one is achieving personal protection as well as a "strike for liberty", is definitely flawed legal advice. For those suffering such delusions, the Courts are definitely not the correct forum.

[99] I realise that this has been a long judgment for what might have seemed to some to be a simple costs question. Should costs be paid on a party to party or indemnity basis? Further, should such costs be paid by the client, her Counsel or the Solicitor on the record? It was only as I began to analyse these issues, that it became obvious that the cause of the costs in this case was symptomatic of a much larger and much more complex malaise perhaps affecting part of the profession in this country. I hope that in spending the time I have upon it that I have "aired" some of the issues which need discussion in the profession, the media and the wider community.

[100] In closing, I want to make it clear to all, that I was appointed as a judge of the High Court and Court of Appeal by His Excellency, the President. I intend to remain true to my oath given to the President on behalf of each of you, the people of the Fiji Islands, to dispense justice without fear or favour for the duration of my term.

Orders

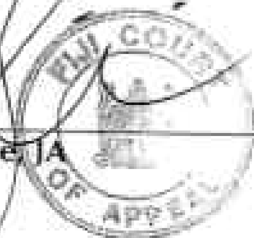
[101] The Court Orders:

1. That the Application for an adjournment is refused.

2. That in light of Mr Dorsami Naidu, the Appellant's Solicitor on the record, withdrawing the remaining three applications (recusal, stay and leave to appeal), he is ordered to pay costs on an indemnity basis of all four applications, that is the oral application for an Adjournment as well as the Notice of Motion for a Stay of Execution of proceedings, the Notice of Motion for Leave to Appeal and the Notice of Motion for Recusal which were withdrawn on the day of hearing.

3. That the indemnity costs to be paid by Mr Dorsami Naidu, the Appellant's Solicitor on the record, are as follows:
   (a) Pay Mr R. Prakash, Solicitor for the First Respondent, $2,500.00 within 10 days;
   (b) Pay Mr C.B. Young, Solicitor for the Second Respondent, the sum of $7,500.00 within 10 days;
   (c) Pay Mr. A.K. Narayan, Solicitor for the Third Respondent, the sum of 8,600.00 within 10 days.

4. That the titles of the First and Second Respondents as listed in these proceedings be amended to read:
   (a) The Honourable Justice John Edward Byrne, First Respondent:
   (b) The Honourable Justice Anthony Harold Cumberland Gates, Second Respondent.



Hickie JA

Solicitors:
Pillai Naidu & Associates, Nadi, for the Appellant
Mishra Prakash & Associates, Suva, for the First Respondent
Young & Associates, Lautoka, for the Second Respondent
Attorney Generals Chambers, Suva, for the Third Respondent
Fiji Law Society, Suva, as an Observer